B237804

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

MIKE MALIN,
Plaintiff and Respondent,

v.

MARTIN D. SINGER et al.,
Defendants and Appellants.

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

APPELLANTS' OPENING BRIEF

HORVITZ & LEVY LLP
JEREMY B. ROSEN (BAR NO. 192473)
FELIX SHAFIR (BAR NO. 207372)
WESLEY T. SHIH (BAR NO. 233531)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157

ATTORNEYS FOR DEFENDANTS AND APPELLANTS
LAVELY & SINGER, MARTIN D. SINGER,
AND ANDREW B. BRETTLER

COPY

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION P	Court of Appeal Case Number: B237804
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)* Wesley T. Shih Bar No.: 233531 Horvitz & Levy LLP 15760 Ventura Boulevard, 18th Floor Encino, California 91436-3000 TELEPHONE NO. (818) 995-0800 FAX NO. *(Optional)* (818) 995-3157 E-MAIL ADDRESS *(Optional)* wshih@horvitzlevy.com ATTORNEY FOR *(Name)*: Lavely & Singer, Martin D. Singer, and Andrew Brettler	Superior Court Case Number: BC466547 *FOR COURT USE ONLY* COURT OF APPEAL - SECOND DIST. FILED FEB 14 2012 JOSEPH A. LANE Clerk D. SANDERS Deputy Clerk
APPELLANT/PETITIONER MIKE MALIN RESPONDENT / REAL PARTY IN INTEREST MARTIN D. SINGER, ET AL.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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Date: February 10, 2012

WESLEY T. SHIH ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF APPELLANT OR ATTORNEY)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Miscellaneous

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

MIKE MALIN,
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INTRODUCTION

This is an appeal from the denial of an anti-SLAPP motion. 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 settlement demand letter on behalf of their client, co-defendant Shereene Arazm, to Malin. Arazm and Malin are business partners in a restaurant group that Malin manages. Arazm discovered that Malin had been embezzling and mismanaging the restaurant group's funds and assets for personal gain, with losses exceeding $1 million. Arazm retained the Lavely & Singer defendants to protect her interests. On Arazm's behalf,

Singer sent Malin a demand letter in anticipation of litigation between Arazm and Malin over Malin's misconduct.

The demand letter requested a full forensic accounting and the return of the misappropriated funds. The letter attached a draft complaint (which would be filed if the parties did not reach a settlement) and detailed the numerous ways in which Malin had misappropriated restaurant group assets, including creating separate ledgers to hide the money, opening off-shore accounts to hold the money, and engaging in insurance fraud. Malin's wrongful conduct also included diverting restaurant group assets to his sexual partners, one of whom happens to be a former judge. The letter identified the judge and included his photograph but the draft complaint (and the actual complaint filed after settlement talks failed) did not identify any of the sexual partners by name.

Malin abruptly ended settlement discussions (after falsely saying he wanted time to negotiate in good faith over the parties' dispute) and filed this lawsuit against the Lavely & Singer defendants, Arazm, and Arazm's husband, Oren Koules, alleging claims for extortion based upon the demand letter, civil rights violations based upon alleged prelitigation wiretapping and e-mail hacking, and infliction of emotional distress based upon the same allegations. Defendants filed an anti-SLAPP motion. The trial court denied the motion on the sole basis that Malin's claims fell within the "illegal as a matter of law" exception to the anti-SLAPP statute. The court concluded this exception applied because: (1) it was somehow wrong for the Lavely & Singer defendants to point out the improper payments made by Malin to his sexual partners and to

show that defendants knew the identity of at least one of the sexual partners who received the restaurant group's money for Malin's sole personal gain; and (2) the complaint alleged defendants' involvement in illegal wiretapping and e-mail hacking.

The trial court's decision was erroneous because the anti-SLAPP motion should have been granted. The anti-SLAPP statute applies to all of Malin's claims because they each seek to impose liability on the Lavely & Singer defendants for their prelitigation communications with and investigations of Malin. For the "illegal as a matter of law" exception to apply and bar application of the anti-SLAPP statute, a plaintiff must conclusively establish with admissible evidence that defendants engaged in conduct that is illegal as a matter of law. As to his extortion claim, Malin failed to conclusively prove that the demand letter was outside the broad range of absolutely privileged prelitigation communications. As to his civil rights claim, Malin was required to conclusively establish as a matter of law that the Lavely & Singer defendants actually hacked his e-mails and/or wiretapped his telephones. But Malin presented *no* evidence of either. Indeed, undisputed evidence confirms that the Lavely & Singer defendants did not hack Malin's e-mail accounts or wiretap his telephones.

Finally, Malin cannot show a probability of prevailing on any of his claims because Malin failed to produce admissible evidence to make a prima facie case for each element of each of his claims. In any event, all of the conduct challenged by the complaint is absolutely protected by the litigation privilege and the *Noerr-Pennington* doctrine.

Indeed, the purpose of the litigation privilege "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213 (*Silberg*).) " '[A]n attorney is often confronted with clashing obligations imposed by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.' . . . The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys not be deterred from pursuing legal remedies because of a fear of personal liability. To decide otherwise 'would inject undesirable self-protective reservations into the attorney's counselling role,' and prevent counsel from devoting their entire energies to their clients' interests." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 647.) Here, exposing the Lavely & Singer defendants to potential liability for sending a prelitigation demand letter that threatens litigation — a common practice engaged in by numerous attorneys throughout the United States (see *Sussman v. Bank of Israel* (2d. Cir. 1995) 56 F.3d 450, 459) — would have an improper chilling effect on the practice of law in California as all lawyers will be worried about whether they will be held personally liable for pursuing the zealous advocacy necessary to protect their clients' interests.

Accordingly, the trial court's decision denying the anti-SLAPP motion should be reversed.

STATEMENT OF THE CASE

A. Arazm, Malin, and Moore are partners in a restaurant group that Malin and Moore manage.

Arazm, Malin, and Lonnie Moore are business partners in a restaurant group that owns and operates the well-known Geisha House restaurant and other establishments. (1 AA 58; 2 AA 225.)[1] Restaurants, clubs, and other establishments owned by the group have been featured in television and film productions. (See 1 AA 58.)

As part of their business relationship, Malin and Moore have responsibility for and day-to-day control over the operation and management of the restaurant group and its various establishments. (See 1 AA 58; 2 AA 225.)

B. Third parties inform Arazm that Malin and Moore are embezzling and mismanaging restaurant group funds and resources.

Arazm learned from multiple sources that Malin and Moore were improperly taking assets of the restaurant group for their personal benefit. (1 AA 191; 2 AA 225.) In late May or early June 2011, Arazm confronted Moore about the embezzlement and

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[1] The following record abbreviations are used in this brief: RT (Reporter's Transcript), AA (Appellants' Appendix), and RJN (Request for Judicial Notice).

demanded that Moore and Malin repay the money or face a lawsuit. (2 AA 225.) Moore responded that if she could substantiate her allegations, Arazm should sue him and Malin. (*Ibid.*)

Shortly after her meeting with Moore, an anonymous whistleblower—believed to be a current or former employee of Malin and Moore—contacted Arazm and supplied her with, among other things, e-mails taken from the restaurant group's e-mail server, evidencing: (i) details of Malin and Moore's elaborate schemes to embezzle restaurant group funds and improperly use assets for their personal benefit and the benefit of third parties; (ii) their establishment of an off-the-books ledger, which Malin and Moore used to track the monies they had embezzled; (iii) Malin and Moore's multiple exclusivity deals with various distributors whereby Malin and Moore earned kickbacks not included in official company records; (iv) their commission of insurance fraud; and (v) Malin's use of company funds and assets to facilitate his sexual encounters and to benefit his sexual partners. (See 2 AA 225-227.)

C. Arazm retains the Lavely & Singer defendants. Singer sends a demand letter to Malin seeking prelitigation resolution of Arazm's grievance.

Arazm retained the Lavely & Singer defendants to protect her interests. (1 AA 61; see 1 AA 55.) Attempting to resolve Arazm's claims without formal litigation, Singer sent a prelitigation settlement demand letter to Malin, attached to which was a draft complaint that had not yet been filed. (1 AA 55-56, 61.) The

demand letter identified Lavely & Singer as Arazm's counsel and stated that Arazm intended to sue Malin and Moore for embezzling and stealing over $1 million from Arazm. (1 AA 61-62.) The letter and draft complaint alleged that Malin and Moore had created a special account to track their stolen funds and had taken steps to hide their ill-gotten assets from creditors and tax authorities by depositing them in offshore accounts. (1 AA 61, 70.) The letter and draft complaint also alleged that Malin planned to transfer his ownership of the Geisha House to another partner to further hide his assets. (1 AA 61, 73-74.) Finally, the letter and draft complaint alleged that Malin had used restaurant group assets to pay his sexual partners. (1 AA 62; 66, 74; see 1 AA 99-100.) The letter identified one of those sexual partners, a former judge, and also enclosed a photograph of that individual to show that Arazm knew to whom Malin was diverting company assets. (3 AA 448-449.)

The letter and draft complaint further 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 61, 104.)[2]

Certain portions of the attached draft complaint were left blank. (1 AA 66-67, 72-75.) For example, blanks standing in place

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[2] The draft complaint contained additional details of Arazm's allegations against Malin and Moore and included causes of action for conversion, breach of contract, and breach of fiduciary duty, in addition to the accounting claim mentioned in the demand letter. (See 1 AA 101-104.)

of content on Malin's use of misappropriated funds for his sexual escapades were found in paragraph 6, and the subsection labeled "[Sexual] Misconduct" (paragraphs 40-42). (1 AA 66-67, 74-75.) Those blanks corresponded to a description of the kinds of sexual encounters Malin participated in and the nicknames of his sexual partners in connection with the allegations that Malin improperly used restaurant group assets to pay for his sexual partners. (See 1 AA 99-100.) The draft complaint also had blanks in the subsections labeled "The 'Ledger' and Unauthorized Side Deals" and "General Mismanagement" (paragraphs 27, 30, and 34). (1 AA 72-73, emphasis omitted.) These blanks corresponded to the names of Malin's alleged co-conspirators who helped facilitate the embezzlement and other misconduct. (1 AA 95-97.)

The demand letter stated that, if the draft complaint were filed, its blanks would be replaced by the missing content—i.e., the details (but not names) of Malin's sexual partners who improperly received restaurant group assets and the names of Malin's co-conspirators. (1 AA 62.) The letter to Malin also explained why these blanks had been used: "Because Mr. *Moore* has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange [sexual] liaisons." (*Ibid.*, emphasis added.) The demand letter concluded by telling Malin that he "should govern [him]self accordingly." (*Ibid.*)

D. Malin abruptly breaks off settlement discussions and sues Arazm and the Lavely & Singer defendants for extortion. Arazm sues Malin for embezzlement.

On receiving the demand letter, Malin immediately contacted Singer and Arazm by facsimile and e-mail, indicating his desire to resolve Arazm's claims without litigation. (1 AA 56, 83.) Malin also requested that Arazm delay filing her lawsuit to give him time to raise the funds necessary for settlement. (*Ibid.*) Malin's controller, James McDonald, also contacted Arazm and Singer to arrange a meeting to discuss settlement. (1 AA 56, 86.) Singer and McDonald made arrangements for the meeting; McDonald stated he would return Singer's call to arrange for a time to meet, but McDonald never called. (1 AA 56-57.) Instead of hearing back from Malin or McDonald regarding the promised settlement meeting, Singer received a call from the media asking about Malin's lawsuit. (1 AA 57.)

Malin sued the Lavely & Singer defendants, their client Arazm, and Arazm's husband Oren Koules, asserting claims for extortion, civil rights violations, and intentional and negligent infliction of emotional distress. (1 AA 1, 57.)[3] Malin's complaint alleged that (1) the Lavely & Singer defendants, on behalf of Arazm and Koules, sent a letter to Malin that "threatened to file a lawsuit against" Malin, and that the lawsuit would allege that Malin had

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[3] Malin had also previously responded to threatened lawsuits against him by preemptively filing his own lawsuits against those who asserted claims against him. (1 AA 58.)

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'" (1 AA 3); (2) "Defendants AZARM [*sic*] and BRETTLER are listed as having received copies" of the letter; (*ibid.*); and (3) on information and belief, "over the past few weeks, an individual or individuals whose identity is currently unknown, acting on behalf of Defendants, and each of them, have hacked into [Malin's] private e-mails . . . and have also illegally eavesdropped and/or wiretapped [Malin's] telephones." (1 AA 3-4.)

In his declaration submitted in opposition to the anti-SLAPP motion, Malin speculates that the defendants must have been involved with the alleged wiretapping because a messenger used by the Lavely & Singer defendants supposedly once worked for Anthony Pellicano. (1 AA 157.)

The Lavely & Singer defendants, on behalf of Arazm, filed a complaint against Malin alleging the same wrongful conduct identified in the demand letter and draft complaint. (1 AA 88; RJN, exh. A.) The complaint filled in the blanks from the draft complaint and generally mirrors the draft complaint. (1 AA 88-107.) Arazm's lawsuit seeks the return of the money Malin and his co-defendants misappropriated from the restaurant group. (1 AA 106.)

E. The Lavely & Singer defendants and their client file an anti-SLAPP motion against Malin's complaint. The trial court denies the motion. This appeal follows.

The Lavely & Singer defendants, Arazm, and Koules brought an anti-SLAPP motion against Malin's complaint on the basis it seeks to impose liability for privileged prelitigation communications. (1 AA 34.) Malin argued that the anti-SLAPP statute did not apply to his claims because defendants' alleged conduct fell within the "illegal as a matter of law" exception to the anti-SLAPP statute articulated in *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*). (See 1 AA 137, 141, 147-152.)

The trial court denied the motion on the sole basis that defendants' conduct was subject to the illegal as a matter of law exception to the anti-SLAPP statute. (2 AA 416-417.)[4] In particular, the court determined that "the allegations of sexual misconduct contained in the demand letter in this case are very tangential to the causes of action in Defendants' complaint, which have to do with a business dispute and alleged misuse of company resources"; the "letter is best read as extortion as a matter of law [because] [i]t threatens to reveal the names of sexual partners"; and the letter "accuses or imputes to the Plaintiff some disgrace or crime or threatens to expose some secret affecting him for purposes of

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[4] In reaching its decision, the trial court ordered the demand letter filed under seal. (2 AA 415.)

obtaining money." (2 AA 416.)[5] Furthermore, the court determined that "on the cause of action alleging a wiretapping and computer hacking, under *Gerbosi v. Gaims*, allegations of this type of activity that is illegal as a matter of law are not covered by Code of Civil Procedure § 425.16." (2 AA 416.)

Defendants appealed. (2 AA 420.)

F. Malin moves to strike allegations from Arazm's complaint regarding Malin's misappropriation of restaurant group assets to fund his sexual escapades. The trial court denies Malin's motion because the allegations are relevant to Arazm's claims.

After this appeal was filed, Malin filed a demurrer and motion to strike against Arazm's embezzlement complaint. (See RJN, exhs. E, F.) In particular, Malin moved to strike all of the allegations referring to his misuse and misappropriation of company monies and resources to pay his sexual partners. (RJN, exh. F, p. 5.) Malin argued that these allegations were simply not relevant to the business dispute that was the main subject of Arazm's complaint against him. (RJN, exh. F, p. 4.)

The trial court denied both Malin's demurrer and motion to strike in their entirety. (RJN, exhs. K, L.) In particular, with respect to the allegations concerning Malin's sexual escapades, the

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[5] The same judge later found these identical allegations to be relevant to Arazm's complaint against Malin. (See RJN, exh. L, pp. 6-7; pp. 12-13, *post*.)

trial court found those allegations proper and relevant, explaining that Arazm "alleges that Mr. Malin engaged in these [sexual] 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." (RJN, exh. L, pp. 6-7.)

STATEMENT OF APPEALABILITY

Defendants timely appeal from an order denying an anti-SLAPP motion. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13); 2 AA 420.)

LEGAL ARGUMENT

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

A. The anti-SLAPP statute applies to claims arising from a defendant's acts in furtherance of the right of petition.

Code of Civil Procedure section 425.16, the anti-SLAPP statute, sets forth a two-step process for evaluating a special motion to strike. In step one, the defendant must make a prima facie showing that the plaintiff's claim arises from or was based on an act of the defendant in furtherance of the right of petition or the right of

free speech. (Code Civ. Proc., § 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*).) Once the defendant makes this showing, in the second step, the burden shifts to the plaintiff to establish a probability of prevailing on his claim. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, superseded by statute on another point of law as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 545-550.) If the plaintiff does not meet this burden, the defendant's motion must be granted. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

This court reviews an order denying an anti-SLAPP motion de novo. (*Flatley, supra,* 39 Cal.4th at p. 325.) Thus, " '[w]hether [ ]the anti-SLAPP statute] applies and whether the plaintiff has shown a probability of prevailing are both legal questions which [this court] review[s] independently on appeal.' " (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 961 (*Seltzer*).)

B. Malin's claims are based on the Lavely & Singer defendants' acts in furtherance of the right of petition.

1. The anti-SLAPP statute applies to Malin's extortion claim because it is based on the sending of a prelitigation demand letter.

The anti-SLAPP statute protects activities that " 'fit[] one of the categories spelled out in section 425.16, subdivision (e).' " (*Cotati, supra,* 29 Cal.4th at p. 78.) As relevant here, subdivision (e) protects: "(1) any written or oral statement or writing made before a

legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, [or]. . . (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

Under subdivision (e), "the filing . . . and prosecution of a civil action" is included as "any written or oral statement or writing made before a . . . judicial proceeding." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 (*Navellier*) ["The constitutional right of petition [protected by the anti-SLAPP statute] encompasses ' " 'the basic act of filing litigation' " ' "]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*) [same].) The statute also protects "communications preparatory to or in anticipation of the bringing of an action or other official proceeding" as a "written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." (*Briggs*, at p. 1115; Code Civ. Proc., § 425.16, subd. (e).) "[S]ection 425.16 . . . [is] construed broadly, to protect the right of litigants to the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions." (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055.)

Prelitigation demand letters receive generous protection under the anti-SLAPP statute. For example, in *Blanchard v.*

DIRECTV (2004) 123 Cal.App.4th 903 (*Blanchard*), DIRECTV sent thousands of demand letters to individuals who allegedly were pirating their signal, demanding they cease using their devices and presenting opportunities for the recipients to settle the claims before DIRECTV filed suit seeking damages. (*Id.* at pp. 903, 909-910.) Many recipients of those demand letters sued DIRECTV, alleging the demand letters constituted extortion. (*Id.* at p. 909.) The court concluded that claims based on demand letters fell within the protection of the anti-SLAPP statute: "[P]laintiffs cannot successfully argue that their complaint does not arise from DIRECTV's constitutionally protected right to petition for redress of grievances. The entire lawsuit is premised on DIRECTV's demand letter, sent in advance of, or to avoid, litigation to vindicate its right not to have its programming pirated." (*Id.* at p. 918.)

The application of the anti-SLAPP statute to demand letters is unsurprising given the statute's broad application to prelitigation communications made in anticipation of litigation. *Rohde v. Wolf* (2007) 154 Cal.App.4th 28 (*Rohde*) is instructive. In *Rohde*, the defendant attorney represented a decedent's son in a dispute with the decedent's daughter over the sale and distribution of the decedent's assets. (*Id.* at p. 32.) The defendant left voicemail messages for the daughter's real estate agent, accusing the agent and daughter of conspiring to defraud the son in connection with a proposed sale of decedent's property. (*Id.* at p. 33.) The defendant later stated he would have filed a lawsuit to protect the son's interests. (*Ibid.*) The daughter eventually filed suit for defamation and slander. (*Id.* at p. 34.) The court held that prelitigation

communication is protected by the anti-SLAPP statute " 'when it relates to litigation that is contemplated in good faith and under serious consideration.' " (*Id.* at pp. 36, 38, quoting *Action Apartment Association, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.) Applying this standard, the court held the claims based on defendant's voicemails were protected by the anti-SLAPP statute because they were prelitigation statements concerning a dispute that was subject to the threat of litigation. (*Rohde*, at p. 36; see also *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1258-1259 [anti-SLAPP statute applies to prelitigation letter sent by employer to customers warning them not to do business with former employee who was allegedly improperly competing with employer].)

Indeed, this court has correctly noted that " 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], [and] such statements are equally entitled to the benefits of section 425.16.' [Citations.] 'Accordingly, although litigation may not have commenced, if a statement "concern[s] the subject of the dispute" and is made "in anticipation of litigation "contemplated in good faith and under serious consideration" ' [citation] then the statement may be petitioning activity protected by section 425.16.' " (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789-790 (*Bailey*) [Second. Dist., Div. Four]; see also *Rubin v. Green* (1993) 4 Cal.4th 1187, 1194 (*Rubin*) ["in light of this extensive history, it is late in the day to contend that communications with 'some relation' to an *anticipated* lawsuit are not within the privilege. . . . Numerous

decisions have applied the privilege to prelitigation communications"].)

Bailey demonstrates that the anti-SLAPP statute applies with full force to claims based on prelitigation communications that fall within the litigation privilege's scope. This confirms that the anti-SLAPP statute applies to Malin's extortion claim because the sending of demand letters is protected by the litigation privilege. (See *A.F. Brown Electrical Contractor, Inc. v. Rhino Electrical Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1126 [litigation privilege extends to "the sending of a prelitigation demand letter"]; *Rohde, supra,* 154 Cal.App.4th at p. 36 [noting that application of the litigation privilege is " 'not an issue in the case of a classic demand letter' "]; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1541 (*Kolar*) ["Included under [the litigation privilege's] protection are prelitigation demand letters"]; *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 259-268 (*Aronson*) [applying litigation privilege to sending of prelitigation demand letter].)[6]

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[6] Although the anti-SLAPP statute and the litigation privilege are not completely co-extensive, it is generally the case that where the litigation privilege applies, so too does the anti-SLAPP statute. (See *Flatley, supra,* 39 Cal.4th at pp. 322-325 [scope of the anti-SLAPP statute and litigation privilege are not "identical in every respect"—but the California Supreme Court and "Court of Appeal have looked to the litigation privilege as an aid in construing the scope of" the anti-SLAPP statute]; *Briggs, supra,* 19 Cal.4th at p. 1115 [" '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b), such statements are equally entitled to the benefits of section 425.16' "]; *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489; (continued...)

Here, as in *Blanchard* and *Rohde*, Malin's extortion claim is subject to the anti-SLAPP statute because it is based on prelitigation communication, specifically the demand letter Singer sent to Malin and the attached draft complaint. (1 AA 3.) The plain language of both documents demonstrate that they were written in contemplation of litigation. (See 1 AA 9-10, 12.) Furthermore, consistent with the letter's contents, Arazm filed suit shortly after Malin broke off settlement discussions, filing a complaint that was substantially similar to the draft complaint that had been attached to the demand letter. (See 1 AA 88; RJN, exh. A.) In short, Malin's extortion claim arises from core petitioning activity and is subject to the anti-SLAPP statute.

2. The anti-SLAPP statute applies to Malin's civil rights claim because it is based on prelitigation investigations.

The anti-SLAPP statute protects communicative conduct as well as communications. (See, e.g., *Rusheen, supra*, 37 Cal.4th at p. 1056 ["communicative conduct"]; *Kolar, supra*, 145 Cal.App.4th at p. 1537 ["conduct that relates to . . . litigation"]; Code. Civ. Proc., § 425.15, subd. (e).) In particular, the anti-SLAPP statute protects investigative activities conducted in support of potential or pending

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(...continued)
Gallanis-Politis v. Medina (2007) 152 Cal.App.4th 600, 617 (*Gallanis*); *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1288, fn. 23.)

litigation because such conduct is " 'in furtherance of the right of petition or free speech' " (*Gallanis, supra,* 152 Cal.App.4th at pp. 604, 610-611; accord *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1542 [anti-SLAPP statute protects prelitigation internal investigation and comments made during investigation]; *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1068-1071 (*Tichinin*) [prelitigation investigation of potential legal claim is petitioning activity protected by First Amendment].) Investigative activities are also protected acts under the litigation privilege for the same reason, further confirming that the anti-SLAPP statute applies to such activities. (See, e.g., *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302-1304 (*Wise*) [husband's investigation of wife, including unauthorized access to her prescription drug records was absolutely privileged]; *ante,* pp. 18-19 [explaining interplay between anti-SLAPP statute and litigation privilege].)

For example, in *Tichinin*, a city council member instructed an attorney to investigate a romantic affair between the city manager and the city attorney. (*Tichinin, supra,* 177 Cal.App.4th at pp. 1056-1057.) The attorney retained an investigator, who surveiled the manager at a conference. (*Id.* at p. 1057.) After confronting the attorney, the council publicly condemned him and requested his resignation from a council post. (*Id.* at pp. 1059-1060.) The attorney sued the city for unlawful retaliation. (*Id.* at pp. 1055, 1060.) The court analyzed whether "hiring a private investigator and investigating the rumored inappropriate relationship [ ] [was] protected" activity under the right of petition. (*Id.* at p. 1064.) The

court held "[g]iven the close functional relationship between the preliminary investigation of a potential claim and the subsequent assertion of that claim, we consider it obvious that restricting, enjoining, or penalizing prelitigation investigation could substantially interfere with and thus burden the effective exercise of one's right to petition . . . . For this reason, we consider it as proper and appropriate to protect prelitigation investigation as it is to protect *prelitigation letters that demand settlement or threaten legal action [,] discovery, and postlitigation settlement talks.*" (*Id.* at p. 1069, emphasis added.)

Here, Malin's civil rights claim based on invasions of privacy is subject to the anti-SLAPP statute because it is entirely dependent on allegations of prelitigation investigation of Malin's misdeeds, through alleged improper review of e-mails and telephone conversations. (1 AA 5.) The only admissible evidence demonstrates that Arazm received unsolicited e-mails and other information detailing Malin's embezzlement and other misconduct from an anonymous whistleblower. (1 AA 191; 2 AA 225-227.) The Lavely & Singer defendants had nothing to do with gathering the e-mails and did not engage in any wiretapping. (1 AA 192, 218.) Thus, Malin's cause of action, seeking to impose liability on the Lavely & Singer defendants for the information Arazm received before the lawsuit was filed is nothing more than an effort to impose liability on the Lavely & Singer defendants for prelitigation investigations which are protected by the anti-SLAPP statute.

3. The anti-SLAPP statute applies to Malin's claims for intentional and negligent infliction of emotional distress.

Malin also alleged claims for intentional and negligent infliction of emotional distress which simply incorporate by reference the facts on which the extortion and civil rights claims were based and then alleged that those acts caused Malin emotional distress. (1 AA 6-7.) As explained above, the extortion and civil rights claims are based on petitioning activity. (*Ante*, pp. 14-21.) Accordingly, where, as here, emotional distress claims are based on speech or petitioning activity they are also subject to the anti-SLAPP statute. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376-1380; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420; *Briggs, supra*, 19 Cal.4th at pp. 1111, 1115.)

4. At minimum, Malin's civil rights and emotional distress claims are mixed causes of action covered by the anti-SLAPP statute.

Consistent with the policy that the provisions of the anti-SLAPP statute are to be interpreted broadly, "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity." (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 (*Fox Searchlight*).) Therefore, " 'where a cause of action alleges both protected and unprotected activity, the cause

of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct.' " (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 (*Peregrine*).) Such a mixed cause of action is subject to a special motion to strike if "at least one of the underlying acts is protected conduct." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287.)

Here, Malin's civil rights and emotional distress claims incorporate by reference all of the facts alleged for Malin's extortion claim. (1 AA 5-7.) Therefore, because those claims are largely dependent on the extortion allegations, and because the acts underlying the extortion claim were protected activity, Malin's civil rights and emotional distress claims are mixed causes of action. Given that the extortion allegations are not incidental to those claims, the anti-SLAPP statute applies.

C. Malin's claims do not fall within the narrow "illegal as a matter of law" exception to the anti-SLAPP statute.

1. To effectuate its purpose, the anti-SLAPP statute is construed broadly and any exception to it is construed narrowly.

The anti-SLAPP was "designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644, overruled on other grounds in *Equilon*

Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 68, fn. 5 (*Equilon*).) To effectuate this purpose, the statute provides that its provisions shall be construed broadly. (Code Civ. Proc., § 425.16, subd. (a); *Briggs, supra,* 19 Cal.4th at p. 1121; *Equilon* at p. 60, fn. 3.)

Any exceptions to the anti-SLAPP statute's regular operation must "be narrowly interpreted . . . lest it swallow the rule found in the anti-SLAPP statute." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319; see also *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1218, fn. 28; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1494; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 400.)

2. To invoke the "illegal as a matter of law" exception, a plaintiff must conclusively establish with admissible evidence that the defendant's alleged conduct is illegal as a matter of law.

In *Flatley, supra,* 39 Cal.4th at p. 299, the Supreme Court articulated a narrow exception to the anti-SLAPP statute. The so-called "illegal as a matter of law" exception holds that if "either the defendant concedes, or *the evidence conclusively establishes,* that the assertedly protected speech or petition activity was illegal as a matter of law," then claims based on such conduct are not subject to the anti-SLAPP statute. (*Id.* at p. 320, emphasis added.)

"Mere allegations that [a] defendant[] acted illegally, however, do not render the anti-SLAPP statute inapplicable." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245-1246; *Fox Searchlight, supra,* 89 Cal.App.4th at p. 305.) To be "conclusively establishe[d]," the illegal as a matter of law exception must be established "by uncontroverted and conclusive evidence." (*Flatley, supra,* 39 Cal.4th at p. 320; accord *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1188 (*Wallace*) ["the fact that a defendant's conduct was alleged to be illegal, or that there was some evidence to support a finding of illegality, does not preclude protection under the anti-SLAPP law. [Citations.] An exception exists only where 'the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence' "].)

Moreover—where, as here, a defendant does not concede it acted illegally—the *plaintiff* has the burden to establish that the conduct was illegal as a matter of law. (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 388 [plaintiff "satisfied her *burden* to conclusively establish that [defendant] committed attempted extortion (emphasis added)"]; accord, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 286-287 (*Soukup*) ["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. . . [¶] Once 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"]; *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 23 [" 'one who claims an exemption from a general statute has the burden of proving that he or she comes within the exemption' "]; *Seltzer, supra,* 182 Cal.App.4th 953, 964-965 [for "illegal as a matter of law" exception to apply, plaintiff must "demonstrate the absence of relevant factual disputes"]; *id.* p. 967 [refusing to apply *Flatley* exception because "there is a factual dispute in the record"].)

In denying the anti-SLAPP motion here, the trial court relied on *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 445-446 (*Gerbosi*) for the proposition that the illegal as a matter of law exception applies whenever the complaint simply alleges illegal conduct. (See 2 AA 416; *Gerbosi,* at p. 445.) As confirmed above, this holding is at odds with all other case law on the "illegal as a matter of law" exception, including the California Supreme Court's binding decisions in *Flatley* and *Soukup* requiring plaintiff to conclusively establish illegal conduct, and should therefore not be followed here. Indeed, "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)." (*Summit Bank v. Rogers* (2012) __ Cal.App.4th __ [142 Cal.Rptr.3d 40, 48] (*Summit*).)

3. The "illegal as a matter of law" exception must be strictly construed to protect a defendant's First Amendment right of petition.

The "illegal as a matter of law" exception applies only in "rare cases" and under "narrow circumstance[s]." (*Flatley*, *supra*, 39 Cal.4th at pp. 313-317, 320; see also, e.g., *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851 [violence]; *Paul For Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1363, 1365-1367 [money laundering]; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820 [arson], disapproved on another ground by *Equilon*, *supra*, 29 Cal.4th at p. 68, fn. 5.)

The "illegal as a matter of law" exception cannot apply to "criminalize" speech that is constitutionally protected. *Summit* is instructive. There, plaintiff argued that defendant's anti-SLAPP motion should be denied because defendant's speech supposedly violated a criminal statute, Financial Code section 1327, regarding speech that is derogatory to the solvency of a bank. (*Summit*, *supra*, __ Cal.App.4th __ [142 Cal.Rptr.3d at p. 48].) The court refused to apply the "illegal as a matter of law" exception because, "when analyzed under modern constitutional jurisprudence, the broad provisions of Financial Code section 1327, on their face, impermissibly sweep within their proscriptions speech that cannot be criminally punished." (*Id.* at p. 49.) In particular, the court noted that section 1327 was unconstitutionally vague and overbroad and therefore invalid on its face. (*Id.* at pp. 50-56.)

Indeed, criminal statutes, in general, must be narrowly construed. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 405 ["Because the

statute is penal, we adopt the narrowest construction of its penalty clause to which it is reasonably susceptible in the light of its legislative purpose"]; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312 ["It is indeed the case that '[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit' "].) This is particularly true where necessary to protect speech. (See *Schwartz v. Romnes* (2d Cir. 1974) 495 F.2d 844, 852 ["It is difficult to imagine a setting where a narrow interpretation would be more appropriate than when a criminal statute might otherwise impinge on First Amendment rights"].)

Accordingly, the Supreme Court emphasized in *Flatley* that, when a plaintiff contends that a defendant has engaged in criminal extortion, the "illegal as a matter of law" exception must be read narrowly precisely because of the important First Amendment interests in protecting speech: "We emphasize that our conclusion that Mauro's communications constituted criminal extortion as a matter of law are based on the specific and extreme circumstances of this case. . . . [O]ur opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion. '[A] person, generally speaking, has a perfect right to prosecute a lawsuit in good faith, or to provide information to the newspapers.' . . . In short, our discussion of what extortion as a matter of law is limited to the

specific facts of this case." (*Flatley, supra,* 39 Cal.4th at p. 332, fn. 16.)

4. Malin has not conclusively demonstrated that the demand letter amounted to extortion as a matter of law.

a. Demand letters are a vital part of litigation practice and are entitled to broad First Amendment protection.

Our legal system is founded upon zealous advocacy by lawyers for their clients. (See *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 248 [100 S.Ct. 1610, 1616, 64 L.Ed.2d 132]; *Silberg, supra,* 50 Cal.3d at p. 213-215; *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 747; *Sharpe v. Superior Court* (1983) 143 Cal.App.3d 469, 473, fn. 1.) Indeed, lawyers must have wide latitude 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; see also *People v. Kalnoki* (1992) 7 Cal.App.4th Supp. 8, 11-12.)

The safeguarding of zealous advocacy is so important that the litigation privilege immunizes communications and actions made even before a proceeding has commenced. (See *Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1492 ["[T]he purpose of the litigation privilege is to . . . encourage zealous advocacy"]; *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 320 [same].)

"[A] prelitigation statement is protected by the litigation privilege . . . when the statement is made in connection with a proposed litigation that is 'contemplated in good faith and under serious consideration.'" (*Aronson, supra*, 58 Cal.App.4th at p. 262; *Blanchard, supra*, 123 Cal.App.4th at p. 919.) Given the importance of safeguarding zealous advocacy, the test applied to determine if a prelitigation communication is protected is intentionally broad: "[I]f the statement is made with a good faith belief in a legally viable claim and in serious contemplation of litigation, then the statement is sufficiently connected to litigation and will be protected by the litigation privilege." (*Aronson*, at p. 266; see also *Blanchard*, at p. 919.) The test is expansive "not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned." (*Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 99.)

Demand letters are one of the most common and well-established forms of protected prelitigation communication. (*Rubin, supra*, 4 Cal.4th at pp. 1193-1194; *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 169 ["the [litigation] privilege has been broadly construed to apply to demand letters and prelitigation communications by an attorney"]; *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577 [It is "well established legal practice to communicate promptly with a potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action"]; *Larmour v. Campanale* (1979) 96 Cal.App.3d 566, 568 [same]; *Smith v. Hatch* (1969) 271 Cal.App.2d 39, 50 [holding prelitigation

letter protected by litigation privilege and stating such protection "is based on the desire of the law to protect attorneys in their primary function—the representation of a client"]; see also *McKay v. Retail Auto. S. L. Union No. 1067* (1940) 16 Cal.2d 311, 321, quoting *Vegelahn v. Guntner* (1896) 167 Mass. 92, 107 [" 'As a general rule, even if subject to some exceptions, 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' "].) Equally well established is the fact that "[o]ne legitimate purpose of a demand letter is to intimidate." (Subrin & Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe* (2004) 79 Notre Dame L.Rev. 1981, 2003 (hereafter Subrin & Main).)

Demand letters are a vital aspect of an attorney's zealous representation of his client to achieve the best legal result for a client, as more and more disputes are resolved without reaching trial. (See *Sussman, supra*, 56 F.3d at p. 459 ["prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace"]; Daniel Markovits, How (and How Not) to Do Legal Ethics (2010) 23 Geo. J. Legal Ethics 1041, 1064 [" 'it is both common and proper for lawyers to send demand letters to potential defendants, hoping that the threat will bring a desirable settlement but preparing for litigation if settlement is not possible' "]; Subrin & Main, *supra*, 79 Notre Dame L.Rev. at p. 2002 ["[I]t is increasingly common for lawyers to send demand letters"].) Moreover, "[t]oday a 'demand letter' is frequently much more elaborate than a pro forma demand for payment or a simple and inflated settlement

demand . . . . These letters read much like a closing argument to a judge or jury. The tone is determined by what the lawyer thinks will persuade the other parties to settle." (Subrin & Main, *supra*, at pp. 2002-2003.)

Accordingly, due to constitutional constraints, "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 . . . . [Courts must] avoid burdening the ability of potentially adverse parties to make legal representations in demand letters and other presuit communications sent in contemplation of possible litigation." (*Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 940-941 (*Sosa*).)

b. Singer's demand letter cannot constitute illegal extortion because it was based purely on the threat of litigation to redress legitimate grievances.

Penal Code section 518, in relevant part, defines extortion as: "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear." (See also Penal Code, § 523 [threatening letters].)

Even though "extortion" in the abstract is not entitled to First Amendment protection (see, e.g., *Planned Parenthood v. American Coalition of Life* (9th Cir. 2001) 244 F.3d 1007, 1015), the particular speech alleged to constitute extortion can be subject to First

Amendment protection on the basis of the speech in question. (See, e.g., *Melugin v. Hames* (9th Cir. 1994) 38 F.3d 1478, 1483 [rejecting argument that the word "threat" as defined in Alaska's extortion statute includes conduct protected by the First Amendment because, had Alaska courts "construed 'threat' in the present case as including *all* conduct proscribed by the extortion statute" then the statute "might be overbroad as applied to" plaintiff]; *State v. Pauling* (2003) 149 Wash.2d 381, 389-390 [69 P.3d 331, 335-336] [construing extortion statute narrowly to afford breathing space for protected speech].)

Indeed, the extortion statute, like any criminal statute, must be given a narrow construction that renders it free of any doubt as to its constitutionality. (See *Skilling v. United States* (2010) __U.S.__, __ [130 S.Ct. 2896, 2929-2931, 177 L.Ed.2d 619]; *Watts v. United States* (1969) 394 U.S. 705, 706-708 [89 S.Ct. 1399, 22 L.Ed.2d 664] [emphasizing that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind," explaining that "[w]hat is a threat must be distinguished from what is constitutionally protected speech," and indicating that the "kind of political hyperbole indulged in by petitioner" is protected speech]; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509; *People v. Schmitz* (1908) 7 Cal.App. 330, 367-368 [no extortion where party makes threat to do something it has right to do]; *Phillippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1080-1081 [noting huge difficulty in proving extortion where lawsuit is filed in good faith].)

Here, an interpretation of the extortion statute that criminalizes this demand letter runs afoul of the First Amendment because it would not afford precise guidelines for lawyers to follow.[7] The letter in this case, like many other demand letters, identifies the basis for the client's claims and explains that a lawsuit will follow if the parties do not resolve their disagreement. (1 AA 9-10.) This is absolutely protected speech because lawyers have an absolute right to threaten litigation if their prelitigation demands are not met.

We next explain that the trial court's conclusion that the "illegal as a matter of law" exception applies here is wrong for the additional reasons that Malin did not conclusively prove that the elements of extortion were met.

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[7] Such an interpretation also could not be squared with the California Constitution's free speech clause, which "is 'more definitive and inclusive than the First Amendment.'" (*Summit*, *supra*, __ Cal.App.4th __ [142 Cal.Rptr.3d at p. 51, fn. 7]; see also Cal. Const., art. I, § 2.)

c. Malin failed to establish conclusively that the Lavely & Singer defendants' conduct constituted a wrongful use of fear as a matter of law.

i. Any threats were directed at third parties, not Malin, and therefore do not constitute extortion against Malin.

To prove extortion, Malin must prove: "(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 (*Hesslink*)), and (3) the use of a writing. (*People v. Umana* (2006) 138 Cal.App.4th 623, 638-639 (*Umana*); see also *People v. Sales* (2004) 116 Cal.App.4th 741, 749.)

As relevant to this case, for "fear" to constitute extortion, there must be a threat "to accuse the individual threatened, or any relative of his, or member of his family, of any crime; or to expose, or to impute to him or them any deformity, disgrace or crime; or to expose any secret affecting him or them." (Penal Code § 519, subds. (2)-(4).)[8] The trial court found that the demand letter and draft

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[8] Malin argued in his opposition to the anti-SLAPP motion that extortion is present solely under subdivisions 2 to 4 of Penal Code section 519. (1 AA 142, 151.) Malin's complaint simply cites Penal Code section 519 subdivisions 2 and 3 and section 523 (applying section 519 to letters) as the legal basis for his extortion claim. (See 1 AA 4.) In deciding an anti-SLAPP motion, " 'the pleadings frame (continued...)

complaint improperly threatened Malin by accusing him of a disgrace or crime or threatening to expose a secret by purportedly threatening to "reveal the names of sexual partners, including a retired superior court judge." (2 AA 416.)

Even assuming the draft complaint would have revealed the names of Malin's sex partners (which as we explain below it did not), there is no legal basis for the court's conclusion that revealing the names of these third parties constituted a wrongful use of fear as to *Malin* as required to show extortion in this case. To the extent that the "threat" was directed at anyone, it was to the third parties who had sexual relationships with Malin and thus cannot constitute an improper threat against Malin. Furthermore, as the ample evidence in the record demonstrates, it was already a matter of public record that Malin had male sex partners, so no secret about him was possibly revealed here. (2 AA 227, 232, 234.)[9]

(...continued)
the issues to be decided.' " (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 236.)

[9] To the extent the trial court suggested that it was wrong for a complaint to publically state someone is gay, that likewise cannot form the basis for an extortion claim. (See, e.g., *Yonaty v. Mincolla* (N.Y.App.Div., May 31, 2012, 2012 N.Y. Slip Op. 04248) __ N.Y.S.2d __ [2012 WL 1948006 at p. *3] [holding that false allegations of homosexuality cannot constitute defamation per se because of changing societal norms].)

ii. To the extent that any threat was directed at Malin, the elements for wrongful use of fear are not met.

Generally, the wrongful use of fear element is inferred in situations involving repeated demands for money from a victim in exchange for not engaging in truly loathsome conduct with no legitimate purpose which would harm the victim. (See, e.g., *People v. Goldstein* (1948) 84 Cal.App.2d 581, 582-585 [police officer is guilty of extortion for repeatedly calling and visiting the victim to threaten her with arrest on a false charge of prostitution unless payments to him are made]; *People v. Peniston* (1966) 242 Cal.App.2d 719, 721 [defendant guilty of extortion for threatening to reveal nude photographs of a woman and her prior sexual relationship with defendant to her new husband and parents].)

Similarly, in *Flatley*, which involved an extortion claim based on a demand letter, the Supreme Court emphasized that—in addition to the demand letter—the lawyer: (1) threatened in subsequent phone calls that he would directly and personally publicize Flatley's alleged rape of his client to "worldwide" media; (2) publicize completely unrelated additional criminal activity having nothing to do with the lawyer's client or potential lawsuit (involving tax and immigration issues) by Flatley; and (3) pursue criminal charges against him unless Flatley paid an exorbitant settlement ($100 million). (*Flatley, supra,* 39 Cal.4th at pp. 330-332.) 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 held a 40 percent attorney's lien on the total recovery. (*Id.* at pp. 308, 331-332.)

Likewise, in *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 306-311 (*Cohen*), which also involved an extortion claim based on a demand letter, two attorneys retained on the same case became embroiled in a fee dispute when the case settled. Brown threatened to and later did file a complaint with the State Bar against Cohen for the purpose of obtaining advantage in the underlying action. (*Id.* at pp. 310-311, 317.) Cohen sued Brown for extortion, and Brown filed an anti-SLAPP motion. (*Id.* at p. 312.) In affirming the denial of this motion, the court held Brown's actions were extortion as a matter of law because undisputed evidence established that Brown presented a complaint to the State Bar he knew to be false in order to secure an advantage in the underlying litigation, threatened Cohen that the complaint would make Cohen's life "a living hell", and refused to negotiate the fee dispute in good faith. (*Id.* at pp. 317-318.)

In deciding the "illegal as a matter of law" exception applied here, the trial court agreed with Malin's subjective interpretation of the demand letter that the Lavely & Singer defendants threatened to reveal the names of Malin's sexual partners. (See 2 AA 416; RT 6-8.) But Malin's subjective opinion of the letter is simply irrelevant. (*Umana, supra,* 138 Cal.App.4th at p. 641 ["Because extortion is a specific intent crime . . . guilt depends upon the intent of the person who makes the threat and not the effect the threat has on the victim"]; *People v. Fox* (1958) 157 Cal.App.2d 426, 430 [same].)

Indeed, the actual evidence demonstrates that the demand letter was not the type of rare and highly egregious letter that could satisfy the narrow definition of extortion. As an initial matter, the demand letter simply stated the factual bases of the anticipated lawsuit detailing the wide range of financial wrongdoing Malin engaged in, including using restaurant group assets to pay his sexual partners. (1 AA 9-10.) The letter also stated that Arazm only sought recovery of stolen monies, not an exorbitant sum in excess of her actual damages and asked for an accounting to determine the precise amount taken. (See *ibid.*) The demand letter did not threaten additional publicity and the Lavely & Singer defendants sought to negotiate a resolution of the dispute in good faith. (See 1 AA 9-10, 56-57.) And it was Malin, not the Lavely & Singer defendants, who abruptly withdrew from settlement discussions and filed a lawsuit after having asked for more time to negotiate. (1 AA 57.) It appears that Malin had no intention of negotiating, but simply wanted to be able to file his lawsuit first while Arazm waited to file her lawsuit so that the parties could engage in good faith negotiations. Finally, the Lavely & Singer defendants were simply advocating for their client and did not have the personal stake in the lawsuit as the lawyer in *Flatley* had.

The demand letter did describe Malin's various misdeeds, but had the letter not demonstrated a high level of knowledge regarding those misdeeds, then Malin may have dismissed Arazm's claims as baseless. (See 2 AA 225.) The inclusion of details in the demand letter—including the identity and a photograph of one of Malin's sex partners who benefited from misappropriated company resources—

served this same purpose. (See *ibid.*) Indeed, when Arazm initially confronted Moore about these allegations, Moore directed her to file a lawsuit if she had any proof of her allegations. (*Ibid.*)

Contrary to Malin's subjective interpretation, the presence of blanks in the draft complaint had no sinister or nefarious purpose. As explained by the plain language of the demand letter itself, the blanks in the draft complaint were present only because a copy of the complaint and a separate demand letter were being sent to *Moore.* (1 AA 10.) The blanks in the draft complaint had nothing to do with the actual names of Malin's sexual partners. The *only* real name the draft complaint would reveal in connection with sexual conduct was Malin's name along with the *aliases* Malin used for his sex partners. (1 AA 91, 99-100.) And the picture of one of Malin's sex partners—the retired judge—attached to the demand letter (3 AA 449) was not an exhibit to the draft complaint or the actual complaint filed shortly thereafter. (See 1 AA 64-80, 88-107.) Indeed, neither the draft complaint nor the actual complaint mentioned any of the actual names of Malin's sexual partners who improperly received restaurant group assets. (See 1 AA 62, 66, 74, 91, 99-100.)

While the real names of Malin's sex partners may arise during civil discovery conducted on Arazm's claims against Malin and may be used as evidence at trial, nothing about the filing of Arazm's complaint, in and of itself, violated any third-party privacy rights. In fact, many of the blanks in the draft complaint had nothing to do with Malin's sex life; these blanks were placeholders for the names of Malin's alleged co-conspirators who participated in

other aspects of Malin's various embezzlement schemes. (1 AA 72-73.)

If Malin had been embezzling funds from the restaurant group and spending it on family members (as opposed to sexual partners), the demand letter and draft complaint would have included similar details of the third parties who received those funds and how those funds were spent. In short, far from being a wrongful use of fear, the inclusion of details of Malin's misuse of monies for his sexual escapades was essential to the demand letter and draft complaint and did not fall outside the bounds of typical, prelitigation communications conveying a client's legal grievances. Indeed, the trial court reached this same conclusion in denying Malin's motion to strike allegations from *Arazm*'s complaint, finding the allegations of Malin's sexual escapades relevant and necessary to Arazm's allegations and claims for redress of financial misconduct and, on that ground, refused to strike the sex allegations from Arazm's complaint. (RJN, exh. L, pp. 6-7.)

At a minimum, there is at least a disputed question of fact whether the demand letter constituted a wrongful use of fear. Even in that situation, Malin's extortion claim cannot fall within the "illegal as a matter of law" exception because Malin would still have failed to establish conclusively, *as a matter of law*, this wrongful use of fear element of extortion. (See *Seltzer, supra,* 182 Cal.App.4th at pp. 964-965, 967; accord, *Summit, supra,* ___ Cal.App.4th __ [142 Cal.Rptr.3d at p. 49].)

d. Malin failed to establish conclusively that the Lavely & Singer defendants had the specific intent to extort.

Extortion is a specific intent crime, requiring proof of a specific intent of the person who makes the threat and not the effect the threat has on the victim. (*Hesslink, supra,* 167 Cal.App.3d at pp. 788-789; *People v. Torres* (1995) 33 Cal.App.4th 37, 50; *Umana, supra,* 138 Cal.App.4th at p. 641.) The specific intent requirement for extortion "ensures that [the statute's] application is sufficiently constrained to reach only nonprotected speech." (*United States v. Coss* (6th Cir. 2012) 677 F.3d 278, 290 [construing federal extortion statute]; see also *Village of Hoffman Est. v. Flipside, Hoffman Est.* (1982) 455 U.S. 489, 499 [102 S.Ct. 1186, 71 L.Ed.2d 362] ["the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"].)

In both *Flatley* and *Cohen,* the court found the defendant had the specific intent to commit extortion based on evidence of additional egregious conduct and communications following delivery of the demand letter, none of which are present here. (*Flatley, supra,* 39 Cal.4th at pp. 308, 330-332; *Cohen, supra,* 173

Cal.App.4th at pp. 310-312; *ante,* pp. 37-39 [describing critical differences between this case and *Flatley* and *Cohen*].)

Moreover, here, there is also the additional evidence presented by Singer of his specific intent. Singer explained in his declaration that his "purpose of sending Mr. Malin the prelitigation demand letter and draft lawsuit was to give Mr. Malin the opportunity to resolve [his] client's legal claims and repay the monies [Malin] embezzled from Ms. Arazm ***before*** Ms. Arazm filed her lawsuit against Mr. Malin and his co-conspirators." (1 AA 56.) Singer also stated that he tried to engage Malin and his associates in good faith settlement negotiations, but Malin pulled the plug on any negotiations. (1 AA 56-57.) Finally, Singer notes that the complaint he ultimately filed on behalf of Arazm contained the same allegations as in his demand letter and draft complaint. (1 AA 57.) In sum, Singer points out: "I have been practicing law for nearly 35 years, and have sent hundreds of similar prelitigation demand letters on behalf of my clients in efforts to avoid litigation and resolve disputes prior to the filing of any lawsuit. As an experienced practitioner, I am well-aware of the distinction between a prelitigation demand letter protected by the litigation privilege and an extortionate demand." (1 AA 56.) Malin never presented any evidence directly contradicting Singer's statements regarding his intent.

Indeed, in stark contrast to either *Flatley* or *Cohen*, all of the writings, communications, and conduct of the Lavely & Singer defendants was typical, protected prelitigation activity that does not contradict Singer's stated intent and does not establish the specific

intent to extort. (*Ante*, pp. 37-39.) In short, this conduct, in whole or in part, does not conclusively establish that the Lavely & Singer defendants had the specific intent to extort as a matter of law.[10] And again, at minimum, there is at least a factual dispute whether they had the requisite specific intent which means that the "illegal as a matter of law" exception cannot apply to Malin's extortion claim. (*Seltzer, supra,* 182 Cal.App.4th at pp. 964-965, 967; accord, *Summit, supra,* ___ Cal.App.4th __ [142 Cal.Rptr.3d at p. 48].)

5. Malin has not conclusively established that the Lavely & Singer defendants violated his civil rights as a matter of law.

a. Malin failed to meet his evidentiary burden under the "illegal as a matter of law" exception because he submitted no admissible evidence in support of his civil rights claim.

Malin alleges that "an individual or individuals whose identity is currently unknown, acting on behalf of Defendants, and each of them, and at said Defendants behest, have hacked into Plaintiff's private e-mails . . . and have also eavesdropped and/or wiretapped Plaintiff's phones." (1 AA 5.) As explained above,

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[10] There is no evidence or allegation that Brettler had any role in the supposed improper conduct. (See pp. 51-52, *post*.)

because the Lavely & Singer defendants did not concede these allegations, Malin had the burden to establish conclusively with admissible evidence that the Lavely & Singer defendants wiretapped his telephones and hacked his e-mail accounts in violation of Penal Code section 502, subdivisions (c)(1) and (c)(2), and 18 U.S.C.A. section 2510, et seq., respectively. (*Ante,* pp. 24-26.) Malin did not do so. Indeed, the trial court applied the "illegal as a matter of law" exception to this claim based solely on the activities *alleged* in Malin's complaint, relying on *Gerbosi* (2 AA 416-417), which we have previously explained wrongly concludes that the "illegal as a matter of law" exception applies whenever a complaint merely alleges illegal conduct (*ante*, p. 26).

The trial court could not base this conclusion on any evidence because the evidence Malin presented was not admissible. Malin submitted declarations from himself—in which Malin claimed his own research and observations of his phone lines and e-mail accounts revealed evidence of wiretapping and hacking—and declarations from a supposed computer security consultant who opined that an unknown individual had accessed Malin's e-mail accounts. (1 AA 156-157, 161-162.) Defendants objected to this so-called evidence on the grounds that they were speculative, hearsay, irrelevant, conclusory, without expertise, and/or without foundation. (2 AA 240-244, 252-256.) The trial court agreed and sustained most

of defendants' evidentiary objections to the statements potentially relevant to Malin's civil rights claim. (2 AA 416.)[11]

Therefore, following the court's exclusion of his purported evidence, Malin was left with nothing but the allegations in his complaint (1 AA 5) to support his civil rights claim. Thus, Malin failed to meet his burden under the "illegal as a matter of law" exception.

b. Even if credited, neither Malin's statements nor those of his purported security expert establish conclusively that the Lavely & Singer defendants violated Malin's privacy rights *as a matter of law.*

Malin stated in his declaration that he "hear[d] other people on the line, and hear[d] whispered conversations in the background" (1 AA 157) but failed to show how this could possibly constitute evidence of wiretapping generally, let alone wiretapping by the Lavely & Singer defendants. Malin also averred that the individual who delivered the demand letter to him for the Lavely & Singer defendants was a "known associate" of an individual convicted of

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[11] Rulings on evidentiary objections made in the context of an anti-SLAPP motion are reviewed for abuse of discretion. (See *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348; *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 630.)

Malin has not challenged any of these rulings via cross-appeal. As a result, he has waived any challenge to them. (See *Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.)

wiretapping (*ibid*), but again failed to show how this constituted evidence that his phones had been wiretapped or that such conduct was committed by defendants.

Malin also stated that he had "seen evidence that [his] computer has been hacked. Attached . . . is a copy of what is obviously an errant broadcast e-mail . . . . The monitoring of [the restaurant group's] computer(s) from" that same e-mail address "was not authorized. Ms. Arazm had both access and ability to plant or initiate this hacking" (1 AA 156-157.) Such vague generalities, even if properly introduced as admissible evidence, do not establish that any of the defendants in this case, and certainly not the Lavely & Singer defendants in particular, committed hacking as a matter of law.

Moreover, the Lavely & Singer defendants and their client (Arazm) submitted counter-declarations in response to Malin's submissions. In these declarations, the Lavely & Singer defendants and their client specifically denied any direct or indirect involvement with illegally accessing Malin's e-mail accounts or telephone conversations. (1 AA 192, 218; 2 AA 227.)[12] For example, Arazm explained in detail: (i) how she had authorization to access restaurant group e-mails because she was a partner in the group; and (ii) how she had received internal communications from an unidentified, third-party whistleblower. (2 AA 226.) In short, because of these counter-declarations, even if Malin's evidentiary

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[12] Arazm's husband, Koules, and the messenger, Barresi, also submitted declarations denying any wrongdoing. (1 AA 215; 2 AA 220.)

submissions had not been excluded, at best, there is a factual dispute whether the Lavely & Singer defendants violated Malin's privacy rights. This factual dispute forecloses application of the "illegal as a matter of law" exception to Malin's civil rights claim because the illegality of the alleged conduct must be established conclusively "by uncontroverted and conclusive evidence." (*Flatley, supra,* 39 Cal.4th at p. 320; see also *Seltzer, supra,* 182 Cal.App.4th at pp. 964-965, 967.)[13]

II. MALIN DID NOT MAKE A PRIMA FACIE SHOWING THAT HE CAN PREVAIL ON THE MERITS OF ANY OF HIS CLAIMS.

A. A plaintiff has the burden of demonstrating that he has a probability of prevailing on his claims.

Where the anti-SLAPP statute applies, the plaintiff bears the burden of establishing "a 'probability' of prevailing on" the merits of his claims. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906 (*Kashian*).) 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,

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[13] Malin's emotional distress claims simply incorporate the allegations from the extortion and civil rights claims. (See 1 AA 6.) For the reasons set forth above, the "illegal as a matter of law" exception cannot apply to those claims either.

398 (*Traditional*).) A plaintiff " '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 (*Christian Research*).)

Furthermore, a plaintiff must show how admissible evidence substantiates *every* element of *each* of his claims. (See *Balzaga v. Fox News Network, LLC* (2004) 173 Cal.App.4th 1325, 1336-1337; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236-1239; *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 670; *Wallace, supra,* 196 Cal.App.4th 1169 at p. 1206.) "The plaintiff's showing of facts must consist of evidence that would be admissible *at trial.*" (*Hall, supra,* 153 Cal.App.4th at p. 1346, emphasis added.)

A plaintiff cannot show that he has a probability of prevailing where an affirmative defense would bar his claims. (See *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 477-479 (*Premier*); *Peregrine, supra,* 133 Cal.App.4th at p. 676 & fn. 11; *Traditional, supra,* 118 Cal.App.4th at pp. 398-399.)

We next explain that Malin failed to meet his burden to show admissible evidence substantiating every element of each of his claims, and, in any event that all of his claims are barred by the absolute affirmative defenses of the litigation privilege and *Noerr-Pennington* doctrine.

B. Malin did not meet his burden to show how admissible evidence substantiates any of his claims against the Lavely & Singer defendants.

Extortion claim. As explained above, Malin's extortion claim fails as a matter of law because the demand letter is not evidence of extortion. (*Ante,* pp. 29-44.)

Civil rights claim. As explained above, Malin's civil rights claim fails as a matter of law because Malin produced no admissible evidence showing that any of the Lavely & Singer defendants hacked into his private e-mails, eavesdropped or wiretapped his telephones, or asked or caused any third party to do so. (*Ante,* pp. 44-48.)

Emotional distress claims. To prevail on his claim for intentional infliction of emotional distress, Malin must show " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) [his] suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct....' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903; *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 86; see also *Cole v. Fair Oaks Fire Protection District* (1987) 43 Cal.3d 148, 155.)

Malin could not prevail on this claim because he did not adduce any evidence demonstrating that the Lavely & Singer

defendants' conduct was extreme and outrageous. Malin's claim for emotional distress relies solely on the allegations of the complaint, which are insufficient. (*Christian Research, supra,* 148 Cal.App.4th at p. 80.) Moreover, Malin has not produced any evidence showing that he suffered *any* emotional distress, let alone the required "severe emotional distress." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004 (*Potter*); *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) In his declaration, Malin never even suggests he suffered any emotional distress. (See 1 AA 156-158.)

Malin also asserts a claim for negligent infliction of emotional distress. However, "there is no independent tort of negligent infliction of emotional distress." (*Potter, supra,* 6 Cal.4th at p. 984.) Instead, to recover under this claim, Malin must show the traditional elements of a negligence cause of action: duty, breach of duty, causation, and damages. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) However, in neither his complaint nor his opposition to the anti-SLAPP motion does Malin attempt to articulate the duty the Lavely & Singer defendants owed and failed to satisfy.

But even assuming Malin is able to show a requisite duty, Malin must still show how he suffered "emotional distress that is serious." (*Potter, supra,* 6 Cal.4th at p. 989, fn 12.) Malin has not demonstrated he suffered any emotional distress, much less serious emotional distress.

All claims against Andrew Brettler. Malin's sole allegation against Brettler relates to the extortion claim and asserts that Brettler was "listed as having received copies of the July 25,

2011 [demand] letter, and [is] *presumptively assumed* to have knowledge of its contents and approved same prior to transmission to" Malin. (1 AA 3.) Malin's complaint contains no other allegations about Brettler. (See 1 AA 1-7.) To survive the second step of the anti-SLAPP analysis, neither a "presumptive assumption" nor the allegations of the complaint are enough. (*Christian Research, supra*, 148 Cal.App.4th at p. 80.) Malin was required to produce admissible evidence establishing Brettler's liability. Malin produced none. Indeed, aside from the single allegation in the complaint, Malin never mentioned Brettler in any subsequent briefing. Accordingly, Malin cannot prevail on his claims against Brettler.

In sum, the anti-SLAPP motion is framed by the existing pleadings, including Malin's complaint. (See *Schoendorf, supra,* 97 Cal.App.4th at p. 236.) Given Malin's failure to produce admissible evidence to support the liability theories set forth in his complaint, the anti-SLAPP motion should be granted.

C. In any event, all of Malin's claims are barred by the litigation privilege.

The litigation privilege—Civil Code section 47, subdivision (b)—immunizes litigants from liability for all claims (other than those for malicious prosecution) that arise from communications or communicative conduct with some relation to judicial and quasi-judicial proceedings. (See *Rusheen, supra,* 37 Cal.4th at pp. 1057-1058; *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1140, fn. 8;

Gallanis, *supra*, 152 Cal.App.4th at pp. 615-617; *Navellier*, *supra*, 106 Cal.App.4th at p. 770; *Kashian*, *supra*, 98 Cal.App.4th at pp. 912-913, 915-916.) "[T]he key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Rusheen*, at p. 1058.) "Although originally applied only to defamation actions, the privilege has been extended to *any* communication, not just a publication, having 'some relation' to a judicial proceeding." (*Kashian*, at p. 913; *Rubin*, *supra*, 4 Cal.4th at pp. 1193-1194.) Application of the privilege does not depend on the defendant's "motives, morals, ethics or intent." (*Silberg*, *supra*, 50 Cal.3d at p. 220; *Kashian*, at p. 913.) The "privilege [also] extends to noncommunicative acts that are necessarily related to the communicative conduct." (*Rusheen*, at p. 1065; *Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 503 [same] (*Ramalingam*).)

The purpose of the privilege "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Silberg*, *supra*, 50 Cal.3d at p. 213.) Since "the evils inherent in permitting derivative tort actions based" on activities protected by the privilege are "far more destructive to the administration of justice than an occasional 'unfair' result," courts disallow all such actions other than ones for malicious prosecution. (*Ibid.*) As a result, the litigation privilege even bars tort actions based on a litigant's criminal conduct (see *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960; *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1300), applying

whether the protected activity is "fraudulent, perjurious, unethical, or even illegal" (*Kashian, supra,* 98 Cal.App.4th at p. 920). "Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian,* at p. 913; *Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529.)

This court has explained, "A party resisting the assertion of the litigation privilege, however, must do more than simply 'assert[] that litigation to which the statement is related is without merit, and therefore the proponent of the litigation could not in good faith have believed it had a legally viable claim. To adopt such an interpretation would virtually eradicate the litigation privilege for all but the most clearly meritorious claims.'" (*Bailey, supra,* 197 Cal.App.4th at p. 790 [Second Dist., Div. Four].)

Here, all of Malin's claims are barred by the litigation privilege. As explained above, Malin's claims for extortion, civil rights violations, and infliction of emotional distress are based on the prelitigation settlement demand letter Singer sent to Malin; the draft complaint attached to the letter; and the related investigative and communicative acts. (*Ante,* pp. 14-21.) The Lavely & Singer defendants' communicative acts—including the demand letter and the draft complaint—are protected by the litigation privilege. (See *ante,* pp. 17-18 [explaining that litigation privilege absolutely protects prelitigation demand letters].)

The privilege also applies to Malin's claims insofar as they involve the Lavely & Singer defendants' communicative acts, such as prelitigation investigation, since such acts were necessarily related to the demand letter and the draft complaint. (See

Ramalingam, supra, 151 Cal.App.4th at p. 503; *Rusheen, supra,* 37 Cal.4th at p. 1056; *Kolar, supra,* 145 Cal.App.4th at p. 1537.) Communicative acts necessarily related to communications receive protection under the litigation privilege because "[t]o accomplish the purpose of judicial or quasi-judicial proceedings, it is obvious that the parties or persons interested must confer and must marshal their evidence for presentation." (*Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 487, 490-491.) In other words, without protecting the communicative acts necessarily underlying the protected communications, the protected communications would lose much of, if not all of, their effectiveness as aspects of the right to petition. (See, e.g., *Gootee v. Lightner* (1990) 224 Cal.App.3d 587, 593 [psychologist's investigation on which testimony was based]; *Wang v. Heck* (2012) 203 Cal.App.4th 677, 686-687 [physician's investigation on which report was based]; *Wise, supra,* 83 Cal.App.4th at pp. 1302-1304 [husband's investigation into spouse's prescription records].)[14]

Thus, Malin has no probability of prevailing on any his claims.

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[14] The litigation privilege would not apply to the civil rights claims had Malin actually shown the Lavely & Singer defendants engaged in illegal wiretapping and email hacking, but there is no evidence that they did so. Allowing Malin to escape the application of the litigation privilege simply because he alleged illegal acts would improperly deprive defendants of the vital protections of the litigation privilege.

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

"The *Noerr-Pennington* doctrine" is a rule that immunizes defendants from claims that seek to hold them liable for activities protected by the First Amendment's petition clause and is named for the United States Supreme Court's decisions in *Eastern Rail. Pres. Conf. v. Noerr Motor Frgt., Inc.* (1961) 365 U.S. 127 [81 S.Ct. 523, 5 L.Ed.2d 464] and *United Mine Workers of America v. Pennington* (1965) 381 U.S. 687 [85 S.Ct. 1585, 14 L.Ed.2d 626]. (See *Tichinin, supra,* 177 Cal.App.4th at pp. 1064-1065; *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 486, fn 7.) Under the *Noerr-Pennington* doctrine, " '[t]hose who petition the government are generally immune from . . . liability.' " (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21 (*Ludwig*).) The doctrine bars "virtually all civil liability" for a defendant's exercise of its right of petition. (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 964-965; *Premier, supra,* 136 Cal.App.4th at p. 478.) This immunity "applies to virtually any tort." (*Ludwig,* at p. 21, fn. 17.)

In particular, the *Noerr-Pennington* doctrine immunizes defendants from claims whose gravamen is petitioning conduct undertaken during or in anticipation of court proceedings. (See *Premier, supra,* 136 Cal.App.4th at pp. 478-479.) The doctrine affords "broader" protection than the litigation privilege, applying to all "conduct in exercise of the right to petition . . . ." (*Ibid*; see also *Ludwig, supra,* 37 Cal.App.4th at p. 23, fn. 22 ["*Noerr Pennington* applies to all facets of the exercise of the right of petition"].)

Sosa, supra, 437 F.3d at pp. 925-927, is instructive. There, DIRECTV was sued under RICO by individuals who had received demand letters sent by DIRECTV accusing them of receiving DIRECTV's signal illegally and demanding they pay money to DIRECTV or face litigation. (*Ibid.*) The Ninth Circuit concluded that the *Noerr-Pennington* doctrine barred the lawsuit challenging the prelitigation demand letters because the lawsuit interfered with DIRECTV's right of petition. (*Id.* at pp. 936-942; see also *Theme Promotions v. News America Marketing FSI* (9th Cir. 2008) 546 F.3d 991, 1006-1008 [*Noerr-Pennington* doctrine bars lawsuit over prelitigation demand letters].)

In addition, " 'it would be absurd to hold that [*Noerr–Pennington*] does not protect those acts reasonably and normally attendant upon effective litigation . . . .' As noted, prelitigation investigation is a typical feature of effective litigation." (*Tichinin, supra,* 177 Cal.App.4th at p. 1069.)

Here, the doctrine bars Malin's claims against the Lavely & Singer defendants because, as we explained above (see *ante,* pp. 14-21), Malin's claims are based on the Lavely & Singer defendants' prelitigation petitioning activities (sending the demand letter and prelitigation investigation).[15]

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[15] The Lavely & Singer defendants did not argue that the *Noerr-Pennington* doctrine barred Malin's claims in their anti-SLAPP motion. However, whether the *Noerr-Pennington* doctrine applies is a question of law (*Andrx Pharmaceuticals, Inc. v. Elan Corp., PLC* (11th Cir. 2005) 421 F.3d 1227, 1232), and this court may therefore consider the issue for the first time on appeal (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287-1288).

III. THE LAVELY & SINGER DEFENDANTS ARE ENTITLED TO ATTORNEY'S FEES.

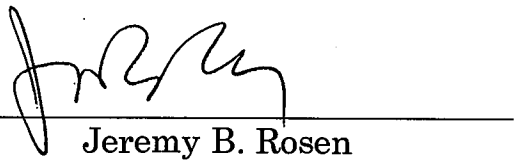
A defendant who prevails on an anti-SLAPP motion, in whole or in part, is statutorily entitled to attorney's fees and costs, including those incurred in an appeal reversing the denial of an anti-SLAPP motion. (Code Civ. Proc., § 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) This court should direct the trial court to award the Lavely & Singer defendants the fees and costs they incurred below and on appeal.

CONCLUSION

For the foregoing reasons, this court should reverse the trial court's denial of the Lavely & Singer defendants' anti-SLAPP motion, direct the trial court to enter an order granting the motion, direct the court to enter judgment for the Lavely & Singer defendants, and direct the trial court to award the Lavely & Singer defendants the fees and costs they incurred below and on appeal.

July 5, 2012

HORVITZ & LEVY LLP
JEREMY B. ROSEN
FELIX SHAFIR
WESLEY T. SHIH

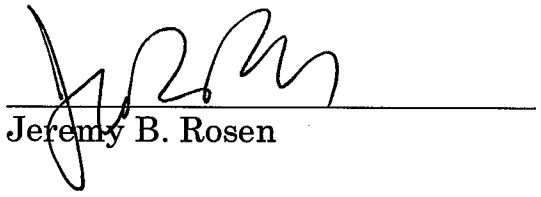
By: 
Jeremy B. Rosen

Attorneys for Defendants and Appellants
LAVELY & SINGER, MARTIN D. SINGER, and ANDREW B. BRETTLER

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

The text of this brief consists of 13,957 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: July 5, 2012



Jeremy B. Rosen

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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.

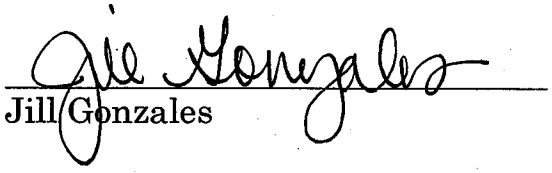
On July 5, 2012, I served true copies of the following document(s) described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action as follows:

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 July 5, 2012, at Encino, California.



Jill Gonzales

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Counsel / Individual Served	Party Represented
Barry P. King LAW OFFICES OF BARRY P. KING 9255 Sunset Boulevard, Suite 920 Los Angeles, California 90069 (310) 277-0420 • Fax: (310) 277-0490	Attorneys for Plaintiff and Respondent **MIKE MALIN**
Mark Goldowitz Paul Clifford Ryan Metheny CALIFORNIA ANTI-SLAPP PROJECT 2903 Sacramento Street Berkeley, California 94702 (510) 486-9123 • Fax: (510) 486-9708	Attorneys for Defendants and Appellants **SHEREEN ARAZM aka SHEREENE ARAZM and OREN KOULES**
Hon. Mary M. Strobel Los Angeles Superior Court Central District 111 North Hill Street, Dept. 32 Los Angeles, CA 90012 (213) 974-5639	[Case No. BC466547]
Clerk California Supreme Court 350 McAllister Street San Francisco, CA 94102-3600	Electronic Copy (CRC, Rule 8.212(c)(2)(A)(i) or (ii)) Website Address: http://www.courtinfo.ca.gov/courts/courtsofappeal/appbriefs.cfm