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CASE NO. A120260

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 2

TERRY MCMILLAN,
Plaintiff, Respondent and Cross-Appellant,

v.

JONATHAN PLUMMER,
Defendant, Appellant and Cross-Respondent,

and

DOLORES S. SARGENT,
Defendant and Respondent.

Appeal From the judgment of the Superior Court of the State of California
For the County of Contra Costa
The Honorable Barbara Zuniga
Case Number C 07-00601

TERRY McMILLAN'S COMBINED RESPONDENT BRIEF AND CROSS-APPELLANT'S OPENING BRIEF

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INTRODUCTION

Dolores Sargent and Jonathan Plummer have filed separate Motions to Strike before the Hon. Barbara Zuniga, Judge of the Superior Court, the Complaint of Plaintiff Terry McMillan under Code of Civil Procedure Section 425.16 [*hereinafter* "anti-SLAPP motion"]. As fully detailed, both Motion to Strike are procedurally defective and substantively meritless, and therefore the lower Court's order (R ___), that grants all of Sargent motion under the anti-SLAPP motion, and all of Plummer's anti-SLAPP motion (except as to the First and Fourth Causes of Action) with fees and costs, should be reversed.

STATEMENT OF FACTS

Terry McMillan and Jonathan Plummer were married on September 5, 1998 in Hawaii. Prior to the marriage, in August 1998, the parties entered into a prenuptial agreement. The Complaint alleges Jonathan Plummer, gay at the time of the marriage, married solely to get United States citizenship, and during the course of the marriage, had affairs with men, embezzled money and stole artwork.

On January 20, 2005, McMillan filed for divorce and Plummer, admitting he was gay at the time of the marriage, then sought an annulment. His lawyer, Dolores Sargent, the Complaint states, filed factual claims that she knew were totally dishonest, claiming the prenuptial was involved even though Plummer had separate counsel. The Complaint alleges Plummer brutalized McMillan and her son in the media (Allegations 16 to 18).

On October 4, 2005, the Prenuptial Agreement was held valid and enforceable. A settlement agreement and exchange of releases followed, and a Restraining Order was issued against Plummer.

The Complaint and the Amended Complaint allege Plummer violated the Restraining Order, claims the defendants were guilty of extortion, intentionally inflicted emotional distress on McMillan, violated her privacy, placed her in a false light, abused process and seeks to declare the release signed by McMillan in the matrimonial benefit (   ) for the benefit of Plummer and Sargent to be null and void. The Declarations in Opposition to the Anti-Slapp Motion support the allegations of the Amended Complaint and the Declaration in Opposition allegedly supports the Anti-SLAPP motion..

ARGUMENT

I. Standard of Review

An Appellate Court independently reviews the trial court's order granting or denying a special motion to strike Flatley v. Maruo (2006), 39 Cal. 4th 209; Soukup v. Law Offices of Herbert Hafif (2006), 39 Cal. 4th 260, 278. It includes whether the anti-SLAPP statute applies to the challenged claim. The Court applies its independent judgment to determine whether plaintiff's causes of action arose from acts by defendant in furtherance of defendant's right o petition or free speech in connection with a public issue. Assuming these two conditions are satisfied, the Appellate Court must then independently determine, from its review of the record as a whole, whether plaintiff has established a reasonable probability he would prevail on his claims. Thomas v. Quintero (2005), 126 Cal. App. 4th 635, 645. This Court, in its *de nova* review, accepts plaintiff's allegations as true and does not weigh credibility nor compare the weight of the evidence.

II. Ms. Sargent's and Mr. Plummer's Anti-SLAPP Motion Should Be Dismissed Because It Is Directed At A Superseded Pleading

Ms. Sargent and Mr. Plummer filed their anti-SLAPP motion prematurely, in stark violation of an Order of the lower Court, causing the motion to be void on its face, and void because directed at Ms. McMillan's superseded Complaint (which, *inter alia*, refers to extortion) rather than at Ms. McMillan's timely intervening Amended Complaint (which, *inter alia,* sets forth a cause of action for extortion).

On June 26, 2007 the parties agreed and the lower Court ordered that "Defendants shall delay filing of their SLAPP Motions until the later of (i) the date the Court decides Plaintiff's Motion to Seal and for a Protective Order or (ii) August 8, 2007." (McMillan Request for Judicial Notice, dated Sept. 6, 2007 ("McMillan Request"), Ex. M). This Court decided Plaintiff's Motion to Seal and for a Protective Order on July 25, 2007, (Plummer Request for Judicial Notice, dated Aug. 2, 2007 ("McMillan Request"), Ex. 13), and therefore the Order obligated Ms. Sargent to "delay filing of [her] SLAPP Motion until . . . August 8, 2007." On August 1, 2007, we, as a matter of courtesy, advised defendants we would file an amended pleading that had been already prepared. We told them if they needed additional time, after they saw the amended pleading, we would agree to it. We were going to file on August 3rd. The following day, August 2nd, defendants, in violation of the Court order, raced to the Courthouse and filed an Anti-SLAPP

motion at the first pleading. The day after, August 3, 2007, we filed the amended pleading. Had McMillan not made a courtesy contact on August 1, 2007, this issue would never have arisen and we would be litigating the Amended Complaint.

Settled law states that in all instances, and for all purposes, "[a]n amended complaint supersedes the original. . . . The original complaint is dropped out of the case and ceases to have any effect as a pleading, or as a basis for a judgment." Bassett v. Lakeside Inn, Inc., 140 Cal. App. 4th 863 (2006) (internal citations and punctuation omitted). Thus, where, as here, a defendant directs a motion at a superseded complaint, the motion is void. See Optinrealbig.com, LLC v. Ironport Systems, Inc., No. C 04-1687, 2004 U.S. Dist. Lexis 15375, at *4, 13 (N.D. Cal. July 28, 2004) (denying anti-SLAPP motion directed at superseded complaint, explaining "a plaintiff's ability to amend a complaint as of right trumps a defendant's anti-SLAPP Motion, even where the filing of the amended complaint may circumvent the SLAPP statute"); Perry v. Atkinson, 195 Cal. App. 3d 14 (1987) (voiding court's grant of defendant's summary adjudication motion directed at superseded complaint).

The lower Court relied on Sylmar Conditioning v. Pueblo Contracting Services, 2004, 122 Cal. App. 4th 1049, which has a totally different fact pattern, bearning no relationship to the cases we cited below or to the facts of this case. In fact, the reasoning and logic of the Sylmar case supports McMillan's position. Sylmar punished the bad faith actor. Sylmar's Third Cause of Action in its counterclaim drew a SLAPP motion. Three days before the SLAPP motion an amended complaint was filed by Sylmar. The original cause of action was dismissed. Sylmar then filed an amended cause of action. When a SLAPP motion was filed against it, Sylmar voluntarily withdrew the new amended pleading and took an appeal from the original dismissal and contested attorneys' fees. Sylmar lost because the court beieved the SLAPP statute was undercut if the recipient of a SLAPP motion could see his adversary's papers and then redraw his pleading; the court believed Sylmar was acting in bad faith. Sylmar had learned had to amend its complaint after reading the anti-SLAPP motion.

Here, it was the opposite of Sylmar. McMillan told her adversaries she was going to file an Amended Pleading before Sargent and Plummer were legally able to file their SLAPP motion – McMillan was following a Court order.

Ms. Sargent's and Mr. Plummer's premature filing of their anti-SLAPP motion immediately after receiving notice of Ms. McMillan's intent to amend her Complaint was bad faith, exactly the kind of practice Sylmar was directed at. Furthermore, the anti-SLAPP motion

was filed in direct violation of the lower Court's Order and was not directed at Ms. McMillan's operative Amended Complaint. As a result the lower court did not consider the new causes of action and issues raised in the new pleading. Thus, this Court should deem the motion procedurally defective and reverse the granting of any portion of the anti-SLAPP motion.

III. This Case Presents Several Issues of First Impression. The Anti-SLAPP Statute Does Not Apply To The Amended Complaint

This case poses, among other things, the issue of what limitations can be placed on a lawyer and her client when they try to use the media to extort money from their adversary. IN his declaration, Mr. Fishkin, a Senior Bar Prosecutor and expert witness, dealt with this matter – a matter of great importance. Ms. Sargent and Mr. Plummer strategically seeks to use the anti-SLAPP statute to escape liability for their orchestrated campaign of false and malicious public attacks on Ms. McMillan's character and reputation during Ms. McMillan's divorce from her client Jonathan Plummer – not for the purpose for which the anti-SLAPP statute was intended, i.e., to prevent the chilling of desirable political or public speech. See Civ. Proc. Code §425.16(a). They attempt to immunize themselves for serious wrongdoing to Ms. McMillan by hiding behind the anti-SLAPP statute. But neither prong of the two-prong test required for an anti-SLAPP dismissal of the Complaint is satisfied in this case.

A. Ms. Sargent's and Mr. Plummer's Wrongful Conduct Is Not Constitutionally-Protected First Amendment Activity

Ms. Sargent and Mr. Plummer bears the burden of the first prong of the anti-SLAPP test, pursuant to which they must make a prima facie showing that the "principal thrust or gravamen" of their actions that gave rise to the instant lawsuit were taken in furtherance of their constitutional rights of petition or free speech in connection with a public issue. See Civ. Proc. Code §425.16(b)(1); Rothman v. Jackson, 49 Cal. App. 1134 (1996); Flatley v. Mauro, 39 Cal. 4th 299, 314 (2006). The anti-SLAPP statute identifies four categories of acts deemed to be "in furtherance of [Ms. Sargent's Constitutional] right of petition or free speech . . . in connection with a public issue." See Civ. Proc. Code §425.16(e). Ms. Sargent's and Mr. Plummer's wrongful conduct against Ms. McMillan falls well outside each of these four categories, and therefore they both fail to make the prima facie showing necessary to sustain their anti-SLAPP motion.

1. Ms. Sargent's and Mr. Plummer's Petitioning Activity Was Illegal Extortion and Is Not Protected First Amendment Activity

This issues, the center of plaintiff's complaint, was not considered because the Court refused to consider the amended pleading. Extortion and an orchestrated campaign of emotional

and physical harassment are both outside the Anti-SLAPP statute and the litigation privilege. Flatley v. Mauro, 39 Cal 4th 299, 317, 320; Novartis Vaccines and Diagnostics Inc. v. Stop Huntington Animal Cruelty (2006), 143 Cal App 4th 1284, 1296, 1297. As the affidavit of McMillan's publisher states, security had to be provided at all of Ms. McMillan's book events because of her fear of being physically harmed.

As Ms. Sargent acknowledged in papers below (R ____), the basis of the Complaint is Ms. Sargent's misconduct during the divorce proceeding between Mr. Plummer and Ms. McMillan, namely Ms. Sargent's and Mr. Plummer's "setting forth 'false facts' . . . [and] placing claims in legal papers and pleadings to 'extort' money" from Ms. McMillan, and Ms. Sargent's subsequent recourse outside the courtroom to the media to further disseminate those 'false facts' and advance her extortionate efforts. (Sargent Decl. ¶ 12). Extortion is illegal, see Penal Code §§518 et seq., and it is hornbook law that illegal activity is not constitutionally-protected and cannot serve as the predicate for an anti-SLAPP claim. See Flatley, supra., 39 Cal. 4th at 325, 333 (defendant's speech or petitioning activity that constitutes extortion is illegal as matter of law and therefore precludes defendant's use of anti-SLAPP statute to strike plaintiff's action).

Ms. Sargent contends that she disclosed Ms. McMillan's confidential communications as part of a legitimate litigation strategy and not for purposes of extortion. Rothman v. Jackson, 49 Cal App. 1134 (1996). Because "the evidence conclusively establishes[] that [Ms. Sargent's] assertedly protected speech or petition activity was illegal as a matter of law." Id. at 311, 320. Her motion must be denied.

In attempting to extract a favorable divorce settlement from Ms. McMillan by threatening to and carrying forward with instigating and leveraging damaging publicity about her, Ms. Sargent and her client clearly engaged in acts of civil extortion. "Extortion is the obtaining of property from another, with his consent, . . . [which consent] may be induced by a threat . . . to impute to him . . . any disgrace." Penal Code §§518, 519(3). Ms. Sargent's and her client's actions and communications evidence her threats that unless Ms. McMillan agreed to void her binding premarital agreement and deliver a substantial divorce settlement to Mr. Plummer, Ms. Sargent would funnel to the media, through the court system and through on- and off-the-record press interviews, documents and information falsely labeling Ms. McMillan as a virulent homophobe. (See Fishkin Decl. ¶ 5).

The Court chose to totally disregard the affidavit of Jerome Fishkin, who for ten years was senior bar prosecutor of disciplinary proceedings, and had testified as an expert witness in 61

cases. set forth the applicable legal principles and the facts leaving no doubt that Ms. Sargent's conduct was extortion and a breach of her obligations as a lawyer.

From the inception of the divorce action Ms. Sargent aggressively courted the media, plainly because she realized that heavy press attention was essential for her extortion campaign to succeed, and prompted by her clear knowledge that media coverage of the divorce would trouble Ms. McMillan, who was actively resisting all publicity. Thus, for example, Ms. Sargent and Mr. Plummer flatly refused to adjudicate the divorce before a private judge as Ms. McMillan had requested (and offered to pay for). (See Hersh Declaration, dated Sept. 5, 2007 ("Hersh Decl."), ¶¶ 4-7, 10). Ms. Sargent also refused to seal the divorce court proceedings. (See id. at ¶8). Ms. Sargent and Mr. Plummer changed Ms. McMillan's name on Mr. Plummer's responsive court filings to "Terry McMillan," dropping the less attention-grabbing name "Terry Plummer" that Ms. McMillan had until then successfully been using on her own filings in an attempt to dodge the media. (See McMillan Request Exs. F & G, McMillan Decl. ¶ 30.) Ms. Sargent discussed the contentious divorce with nationally-recognized columnists Phillip Matier and Andrew Ross of the San Francisco Chronicle and in an appearance on "Good Morning America," at a time when it was widely known and reported that Ms. McMillan was refusing all press requests for comment regarding the divorce action and Mr. Plummer's conduct prompting that action. (See McMillan Decl. ¶¶33, 44; DeSanti Decl. ¶¶6-7, 9; Tisdel Decl. ¶¶ 3, 5-7, 9). Ms. Sargent never claimed that her client had authorized her conduct.

Pushing the divorce case into the public eye laid the groundwork for the extortion campaign, which Ms. Sargent put into full effect by introducing into Mr. Plummer's public court filings copies of Ms. McMillan's confidential telephone messages and letters, in an effort to make Ms. McMillan out to be an ignorant and hate-filled homophobe. (See Plummer Request Ex. 3, 6; McMillan Request Ex. H; McMillan Decl. ¶¶ 38-40, Ex. G). Never did Ms. McMillan extend her disparagement of Mr. Plummer to a castigation of all homosexuals or homosexuality, however, contrary to the impression that Ms. Sargent created with their release of these communications. (McMillan Decl. ¶¶ 50-51).

Significantly, Ms. Sargent's filing of these messages and letters in the divorce action had nothing whatsoever to do with the three narrow issues raised by the parties in that case, namely (i) whether the premarital agreement that Ms. McMillan and Mr. Plummer had entered into was enforceable, (ii) whether Mr. Plummer had induced Ms. McMillan into marriage under fraudulent pretenses, and (iii) whether Mr. Plummer was entitled to any further royalties from Ms.

McMillan's novel and screenplay relating to their relationship, "How Stella Got Her Groove Back" [*hereinafter* "Stella"]. (McMillan Request Exs. G & H; Fishkin Decl. ¶¶6, 13, 14). Nor could Ms. McMillan's messages and letters plausibly have had any relevance to those limited issues – All of Ms. McMillan's communications were from 2005 and therefore intrinsically could shed no light either on the disputed circumstances surrounding the parties' premarital agreement and marriage in 1998, or on whatever legal principle Ms. Sargent believed entitled Mr. Plummer to set aside and renegotiate the royalty grant for "Stella" that he had received in the premarital agreement. Considering the utter uselessness and irrelevance of these inflammatory messages and letters to Mr. Plummer's arguments in the divorce action, it is beyond a doubt that Ms. Sargent filed these messages in the divorce action for the sole purpose of funneling the messages to the press.

Ms. Sargent's claim that these messages and letters were "directly related" to her April 2005 filing for "enforce[ement] of stay-away orders" against Ms. McMillan, (Sargent Mem. at 10; Sargent Decl. ¶ 8), or her June 2005 filing for a contempt order against Ms. McMillan, (see Sargent Decl. ¶ 10), is patently absurd because Ms. Sargent began releasing Ms. McMillan's confidential communications to the court on March 29, 2005, months before either of these two filings she references.

Ms. Sargent's extortion is laid bare in a letter that Ms. Sargent sent to Ms. McMillan's divorce attorney shortly before Ms. Sargent granted strategic interviews to Matier & Ross and "Good Morning America." In this letter Ms. Sargent writes that Mr. Plummer will settle his challenge of his premarital agreement in exchange for Ms. McMillan (i) buying him "a house" in a location "acceptable to him" that would provide him with "security as far as his living situation goes for the foreseeable future"; (ii) helping him "restart life debt free" by paying off all his credit card debt, and presumably also forgiving the hundreds of thousands of dollars he had stolen, borrowed or otherwise taken from her; and (iii) paying his tens of thousands of dollars of attorneys fees in the divorce action. (See McMillan Decl. Ex. E.)

Ms. Sargent continues that an earlier modest settlement offer by Ms. McMillan is unacceptable, whereas settlement on the far more massive terms Mr. Plummer counterproposes

> would end the ongoing acrimony and very public bitterness between the parties. We have undertaken efforts to keep the matter relatively private but I don't anticipate it may remain private of the entire litigation. It seem [sic] inevitable that someone will recognize Terry in the courtroom or hallway, *some clerk will see her name on a pleading, some reporter will go through the filings and see it, or, in some other way, the matter will get public attention.*

Id. (emphasis added). To drive the point home, Ms. Sargent reminds Ms. McMillan's divorce attorney that this anticipated "public attention" "could negatively impact the sales of Terry's new book" and thus harm Ms. McMillan's career and livelihood if settlement is not reached. Id.; Ms. Sargent's threats of adverse publicity in this letter are remarkably similar to the threats of adverse publicity found to constitute extortion as a matter of law in Flatley v. Mauro. Compare McMillan Decl. Ex. E, with Flatley, 39 Cal. 4th at 310, 332 (quoting attorney's statement that unless celebrity settled attorney's client's rape claim, allegation that celebrity is rapist would circulate "immediate[ly] to any place where [celebrity is] . . . performing everywhere in the world" and would "be publicized every place [celebrity] goes for the rest of his life," and holding that statement is extortionate). But cf. People v. Massengale, 261 Cal. App. 2d 758, 765 (1968) (extortionate threats "can be made by innuendo," and "[n]o precise or particular form of words is necessary") (citation and internal punctuation omitted); see also Fishkin Decl. ¶¶13, 14.

Ms. McMillan rejected Mr. Plummer's vast monetary demands, and shortly thereafter Ms. Sargent launched the interview portion of her extortion campaign against Ms. McMillan. Under the strain of the ensuing barrage of news stories and blog reports falsely identifying her as bigoted and intolerant, and induced by fears and threats of more bad press to come, Ms. McMillan capitulated and awarded Mr. Plummer a divorce settlement with terms far more generous than provided for in the couple's besieged-but-unassailable premarital agreement. (See McMillan Decl. ¶ 57; Plummer Request Ex. 2; McMillan Request Ex. J.)

In 2006 Mr. Plummer initiated a second, near-identical extortion campaign against Ms. McMillan, threatening that unless she made him a monetary offer "all those messages that you left me in the past, you know the public will hear it . . . and it will definitely put you back on the homophobic . . . stereotype again." Mr. Plummer emphasized to Ms. McMillan, "Hopefully you'll think about it and think about your reputation. . . . The media just loves to hear more dirt." (McMillan Decl. ¶ 61, Ex. H.) The lower Court rightly concluded that Mr. Plummer's statements constituted extortion of Ms. McMillan. See McMillan Request Ex. L; see generally Flatley, 39 Cal. 4th at 330, 332 (holding that statement from attorney, "We are positive the media worldwide will enjoy what they find," constitutes extortion). The clear similarities between Mr. Plummer's threat in 2006 to release Ms. McMillan's telephone messages to the press unless she "made [him] an offer," and Ms. Sargent and Mr. Plummer's threats and actions in 2005 to make Ms. McMillan's telephone messages and letters accessible to the press unless Ms. McMillan accepted Mr. Plummer's settlement offer, strongly evidences that the actions that this Court held to be

extortionate when performed by Mr. Plummer in 2006 were no less extortionate when conducted by Ms. Sargent in 2005.

Ms. Sargent did not have any right to threaten such a release to induce Ms. McMillan to pay Mr. Plummer a substantial amount of money. See People v. Hesslink, 167 Cal. App. 3d 781, 787 (1985) ("[E]ven if defendant had the right to arrest the victim, he was not at liberty to threaten to arrest her for the purpose of extorting money or property from her."). In making such threats to Ms. McMillan, therefore, Ms. Sargent committed extortion as a matter of law and her actions are not protected by the First Amendment. More significantly, Ms. McMillan's causes of action that are premised on those wrongful acts – namely her claims for intentional infliction of emotional distress, false light, public disclosure of private facts, extortion and abuse of process – cannot be dismissed on anti-SLAPP grounds.

2. Ms. Sargent's and Mr. Plummer's Release of Ms. McMillan's Confidential Telephone Messages And Letters Violated Ms. McMillan's Rights Because It Did Not Concern Any Issue Of Public Interest

Ms. Sargent's and Mr. Plummer's release of Ms. McMillan's telephone messages and letters directly to the press are not protected by the anti-SLAPP statute, both because they constitute extortion, see supra part II.A.1, and because these messages, which are purely personal, private communications between estranged spouses, do not address any issue of legitimate public interest. The fact that Ms. McMillan, an alleged public figure, was the subject of these communications does not establish that they concerned any issue of public interest. See Condit v. National Enquirer, Inc., 248 F. Supp. 2d 945, 954 (E.D. Cal. 2002) ("Even assuming *arguendo* that Plaintiff is a 'public figure' for First Amendment purposes, not all speech concerning her necessarily bears on a 'public issue' or an 'issue of public interest' for purposes of [the anti-SLAPP statute]."). To the contrary, where, as here, a party's speech is nothing more than "a mere effort to gather ammunition for another round of private controversy," that speech must be deemed not made in connection with the public interest, even if it concerns a public figure. Thomas v. Quintero, 126 Cal. App. 4th 635, 658-59 (2005) (citation and internal punctuation omitted).

Certainly Ms. Sargent has not established any legitimate public interest that her release of Ms. McMillan's confidential communications possibly served. It is clear from the face of these messages and letters that, contrary to Ms. Sargent's assertion, (see Sargent Mem. at 9, 15), and contrary to how she positioned these communications to the media, they did not concern any topic of broad applicability, such as homosexual behavior or homosexuality generally. See generally Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90, 111 (2004) ("[T]he focus of the anti-

SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it. . . . [Otherwise] nearly any [speech] could be sufficiently abstracted to fall within the anti-SLAPP statute.") (citation and internal punctuation omitted).

Indeed the messages and letters Ms. Sargent released presented Ms. McMillan's views on one particular gay man only – Mr. Plummer – and their disclosure was simply one part of an obvious "effort [by Ms. Sargent] to gather ammunition" for her extortion campaign against Ms. McMillan. Ms. Sargent's distortion and publicizing of Ms. McMillan's statements, carried out for the purpose of vilifying Ms. McMillan in the press, certainly involved no issue of public interest and therefore does not constitute protected conduct or speech under the anti-SLAPP statute as a matter of law.

3. The Litigation Privilege Does Not Protect Ms. Sargent's or Mr. Plummer's Extortionate Activity In The Divorce Proceeding.

Even assuming *arguendo* that Ms. Sargent's and Mr. Plummer's conduct in the divorce proceeding falls within the scope of the litigation privilege, Civ. Code §47(b)(2), Ms. Sargent's conduct does not automatically earn protection under the anti-SLAPP statute as a result. Rothman v. Jackson, 49 Cal. App. 4th App. 1134 (1996); See Flatley, 39 Cal. 4th at 320-25 (rejecting defendant's contention that that all speech protected by litigation privilege (including "illegal litigation-related activity") "is necessarily protected under the anti-SLAPP statute," and explaining that conflating litigation privilege with anti-SLAPP statute "is not consistent with the language or the purpose of the anti-SLAPP statute").

This issue is entirely academic, however, because in fact the litigation privilege does not apply to Ms. Sargent's or Mr. Plummer's conduct in the divorce proceeding, specifically her filing with the court in that action copies of Ms. McMillan's confidential communications to Mr. Plummer. The messages and letters she released were entirely extraneous to any issue in the case and therefore did not serve to advance Mr. Plummer's legal position in any way. Because the litigation privilege extends only to statements made in a judicial proceeding that "ha[ve] some reasonable relevancy to the subject matter of the action," Nguyen v. Proton Tech. Corp., 69 Cal. App. 4th 140, 147 (1999) (citation and internal punctuation omitted), the privilege does not protect Ms. Sargent's introduction of these completely irrelevant documents in the divorce action. Accord Rothman v. Jackson, 49 Cal. App. 4th 1134, 1148-49 (1996) (litigation privilege protects only communications that "advance a litigant's case" and "should not be extended to [communications that constitute] 'litigating in the press'").

For all the reasons stated above, therefore, the gratuitous and abusive acts by Ms. Sargent in the divorce proceeding are not Constitutionally-protected. Because Ms. Sargent and Mr. Plummer cannot make a prima facie showing that the Amended Complaint targets Constitutionally-protected activity, she fails to satisfy the first, threshold prong of an anti-SLAPP motion and her Motion to Strike the Amended Complaint must be denied as a matter of law.

B. Ms. McMillan Can Establish That She Will Prevail Against Mr. Plummer and Ms. Sargent On Each Of Her Claims In The Amended Complaint

In the unlikely event that this Court concludes that Ms. Sargent and Mr. Plummer has met her first prong burden under the anti-SLAPP statute, this Court still should reverse the lower Court's Order granting Ms. Sargent's Motion to Strike in its entirety because the facts in this case leave little doubt that Ms. McMillan easily can demonstrate that each of the causes of action in the Amended Complaint are "legally sufficient," show Constitutional violation and thus satisfy the "minimal merit" standard necessary for her to prevail. Mann, 120 Cal. App. 4th at 105.

The showing required for Ms. McMillan to defeat Ms. Sargent's and Mr. Plummer's anti-SLAPP motion is not onerous. As succinctly summarized in Mann v. Quality Old Time Service, Inc.:

> A plaintiff is not required to prove the specified claim to the trial court. . . . [T]he appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim. In deciding this question the court . . . may not weigh the credibility or comparative strength of competing evidence. Rather, the court considers whether the plaintiff has made a prima facie showing of facts based on competent admissible evidence that would, if proved, support a judgment in the plaintiff's favor. . . . The court also may consider the defendant's opposing evidence, but only to determine if it defeats the plaintiff's showing as a matter of law. . . . [O]nce a plaintiff shows a probability of prevailing *on any part of its claim*, the plaintiff has established that its cause of action has some merit and the entire cause of action stands.

120 Cal. App. 4th at 105-06 (citations and internal punctuation omitted, emphasis deleted and added). In other words, in assessing whether Ms. McMillan's causes of action possess "minimal merit," "it is the court's responsibility to accept as true the evidence favorable to [Ms. McMillan]" and to credit all admissible evidence that Ms. McMillan presents. Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 291 (2006) (citation and internal punctuation omitted). Additionally, for each of Ms. McMillan's claims that are premised on multiple legal and/or factual theories, she need only "show[] a probability of prevailing on any" one of those theories for the claim to stand. Mann, 120 Cal. App. 4th at 106. Further lightening Ms. McMillan's evidentiary burden still, Ms. Sargent is responsible for substantiating all affirmative defenses. See Premier

Med. Mgmt. Sys., Inc. v. California Ins. Guar. Ass'n, 136 Cal. App. 4th 464, 477 (2006) ("Although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.") (citation omitted), reh'g denied, 2006 Cal. App. Lexis 302 (Feb. 22, 2006).

1. All of Ms. McMillan's Constitutional Privacy-Based Claims Against Ms. Sargent and Mr. Plummer Are Meritorious

Ms. Sargent's conduct is not a claim that arises out of acts in furtherance of free speech because it is based on publication of personal information that has little or no connection to any issue of public interest. The conduct that gives rise to Ms. McMillan's intentional infliction of emotional distress, false light and public disclosure of private facts claims unquestionably is "extreme and outrageous" and "exceed[ed] all bounds of that usually tolerated in a civilized community," not least of which because Ms. Sargent performed those actions with the specific intent to humiliate, distress and extort Ms. McMillan. Delfino v. Agilent Techs., Inc., 145 Cal. App. 4th 790, 808-09 (2006). Consistent with Ms. Sargent's professed expertise, (see Sargent Decl. ¶ 1), she clearly knew that Ms. McMillan's telephone messages and letters were inflammatory, injurious and, most importantly, utterly irrelevant to Mr. Plummer's divorce case. Accordingly, it defies credibility for Ms. Sargent to claim that she filed those documents with the court for any reason other than to harm Ms. McMillan and advantage her client. See id. at 641 ("In almost every case in which the prior judgment was procured by the adverse party through perjured testimony or a false document, severe emotional distress would be a substantially certain result").

Predictably, Ms. Sargent's abusive conduct was highly effective. Because of Ms. Sargent's falsely branding her homophobic to the press and the public, Ms. McMillan suffered "a great deal of distress and . . . fear[ed] from [her] physical safety in [her] own home." (McMillan Request Ex. I).

Predictably, Mr. Plummer's abusive conduct was highly effective. The cumulative effect of Mr. Plummer's larceny and other financial wrongdoing, philandering, and many false statements branding her homophobic to the press and the public, was that Ms. McMillan "suffered severe emotional distress, [was] unable to sleep and fear[ed] for her life & physical safety." (McMillan Request Ex. E at 3, Ex. I; Tisdel Decl. ¶7). Mr. Plummer's more recent extortionate acts have continued to have this severe distressing effect. See id. Ex. K (stating Ms. McMillan "is afraid for her life and has already been threatened").] The effect of Mr. Plummer's false

disclosures was particularly grievous because until Mr. Plummer released the confidential telephone messages and letters that are core to Ms. McMillan's privacy claims, those communications – including their general "gist" – had remained between Ms. McMillan and Mr. Plummer alone, and never had been publicized or otherwise generally known.

The effect of Ms. Sargent's false disclosures was particularly grievous because until Ms. Sargent released the confidential telephone messages and letters that are core to Ms. McMillan's privacy claims, those communications – including their general "gist" – had remained between Ms. McMillan and Mr. Plummer alone, and never had been publicized or otherwise generally known. Additionally, notwithstanding the intense scrutiny Ms. McMillan and her marriage had received for years in the press, certainly Ms. McMillan never had been accused of homophobia or bigotry of any kind. Even a cursory review of the hundreds of news articles compiled by Ms. Sargent's media expert quickly proves this true. (See generally Gallagher Declaration). The unending vituperation that Ms. Sargent's false accusations now received in the worldwide media and on the Internet was unprecedented and, understandably, was devastating to Ms. McMillan personally and disastrous to her professionally. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511 (1991) (outrageous statements attributed verbatim to an individual may result in injury to reputation because manner of expression indicates negative personal trait).

Because Ms. Sargent knew or recklessly disregarded the fact that Ms. McMillan was not a homophobe, (McMillan Decl. ¶ 53), though her active distortion of Ms. McMillan's phone messages and letters falsely and transparently painted Ms. McMillan to be one, she acted with the "actual malice" necessary to support a claim for emotional distress and false light.

Ms. Sargent alleges that Ms. McMillan must prove "actual malice" under a "clear and convincing" evidentiary standard. (See Plummer Br. at 13 n.12). That is wrong. "Clear and convincing" is the standard for defamation claims, but it is not the standard for any privacy-based claim where defamation was not also alleged. Ms. McMillan has presented "clear and convincing" evidence of actual malice. See Christian Research Inst. v. Alnor, 148 Cal. App. 4th 71, 81 (2007) ("publishing a knowingly false statement or . . . entertain[ing] serious doubts as to its truth" demonstrates "actual malice"). Considering that Ms. Sargent was at least partly responsible for disseminating those communications and for creating the widespread misimpression that they conveyed Ms. McMillan's supposed intolerance for gay people generally and not merely her low regard for her philandering gay husband alone, for Ms. Sargent now to argue that she did not "know" the falsity or did not "seriously doubt" the truth of what she was

communicating is implausible, to say the least. Cf. Masson, 501 U.S. at 517 ("deliberate alteration of the words uttered by a plaintiff . . . [that] results in a material change in the meaning conveyed" "equate[s] with knowledge of falsity").

Indeed, this case presents abundant evidence that Ms. Sargent acted with "actual malice." See id. at 84 ("actual malice" may be proved by "inferences drawn from circumstantial evidence"). Relevant factors include: "[a] failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable or known to be biased against the plaintiff . . . . [and] an alleged motive to discredit the plaintiff." Id. at 84-85, 89 (citations and internal punctuation omitted). These factors are present here. More specifically, assuming *arguendo* that she was not knowingly mischaracterizing Ms. McMillan as a homophobe to the press and public, Ms. Sargent, knowing her client lied, took Mr. Plummer at his word and failed to investigate whether this slur was true before proceeding to mischaracterize Ms. McMillan. Her reliance on Mr. Plummer for this critical fact was highly ill-advised considering not only Mr. Plummer's obvious bias but also his history of deceit. Mr. Plummer has acknowledged his propensity for lying. (See McMillan Decl. Ex. B). Indeed, Ms. Sargent discerned Mr. Plummer's disinterest in telling a straight story from the ever-changing explanations he provided (and continues to provide) or she created as to why his heavily-negotiated premarital agreement was invalid. First Mr. Plummer stated under oath that he had signed his premarital agreement under duress because of his fears of deportation to the U.S. (See Plummer Request Ex. 3). Next he said that "he executed it without really understanding the terms." (Sargent Mem. at 5 n.3). Mr. Plummer's newest contradictory claims, made in the same filing, are that he signed the agreement "because [Ms. McMillan] made oral representations to [him] and [his] family members that she would assist [him] financially if the marriage dissolved," (Plummer Decl. ¶ 3), and "because [he] was more than 20 years younger than [Ms. McMillan] when they married, and because he has always maintained that the Prenuptial Agreement was unfair, . . . the contract was unconscionable and should be voided." (Plummer Mem. at 10). Even amid this array of rotating defenses what stands out is Mr. Plummer's about-face in alleging that "he has always maintained," and his attorney at the time also advised him, that the marital agreement was "unfair and one-sided," (Plummer Decl. ¶ 3), whereas he previously swore to this Court that he had not "really underst[ood] the terms" of that agreement. All of this contradictory interpretations were in papers prepared by Ms. Sargent.

In the underlying action Mr. Plummer surely felt "anger and hostility" when he considered how sharply his standard of living would be reduced if his premarital agreement was upheld.

Additionally, Mr. Plummer had both motive and intent to discredit Ms. McMillan, in furtherance of his extortion campaign.

Further examples of Mr. Plummer's duplicity abound. Compare, e.g., Mr. Plummer's repeated avowal that he was faithful to Ms. McMillan throughout their marriage, (Sargent Decl. Ex. 9), with his subsequent admissions that, in reality, he was having sex with men during at least the last two years of the marriage. (McMillan Decl. Exs. C & D). Additionally, Ms. Sargent had both motive and intent to discredit Ms. McMillan, in furtherance of her extortion campaign. See supra part II.A.1.

2. Ms. McMillan's Extortion and Abuse of Process Claims Are Meritorious

Ms. McMillan has set forth the legal and factual basis that compels a finding that Ms. Sargent committed extortion. Similarly, Ms. McMillan also has provided ample support through facts presented in this brief that by filing in the divorce action her irrelevant but injurious telephone messages and letters to Mr. Plummer, Ms. Sargent made "use of a legal process against [her] to accomplish a purpose for which [the process] is not designed." Drum v. Bleu, Fox & Assocs., 107 Cal. App. 4th 1009, 1019 (2003). Because Ms. Sargent had an "ulterior motive" for making these improper filings – i.e., her above-noted extortion campaign – Ms. Sargent committed the tort of abuse of process.

3. The Settlement Agreement Does Not Bar Ms. McMillan's Claims

The marital settlement contains a release of claims against Ms. Sargent that is unenforceable as a matter of law and therefore ineffective against the Amended Complaint. Most fundamentally, Ms. McMillan's release of Ms. Sargent is not supported by consideration of any kind. See Civ. Code §1550(4) (consideration "essential to the existence of a contract"), §1689(b) (contract subject to rescission for lack of consideration). Ms. McMillan did not receive, nor did Ms. Sargent give, anything of value, whether monetary or non-monetary, to induce Ms. McMillan to grant Ms. Sargent the release. See Civ. Code §§1605 et seq. Certainly Ms. Sargent had no claims to release against Ms. McMillan, which might have served as consideration. As Ms. Sargent concedes in her sworn Declaration, any alleged harassing communications she received from Ms. McMillan post-dated the release. (See Sargent Decl. ¶¶ 25-29). Further, any claim Ms. Sargent may have had for reimbursement of attorneys fees by Ms. McMillan under Family Code Section 2030(a)(1) or otherwise was wholly pendent to Mr. Plummer's divorce action and was independently extinguished by Mr. Plummer upon his settlement of that action. Further, Ms.

McMillan executed the settlement agreement pursuant to Ms. Sargent's extensive acts of extortion, part II.A.1, and therefore under acute duress and against her will, which necessitates rescission of that release. See Civ. Code §§1689(b)(1).

"There is . . . no general rule as to the sufficiency of facts to produce duress." Lewis v. Fahn, 113 Cal. App. 2d 95, 99 (1952) (citation and internal punctuation omitted). "Generally speaking, duress may be said to exist whenever one, by the unlawful act of another, is induced to make a contract . . . under circumstances which deprive him of the exercise of free will. . . . [D]uress is to be tested, not by the nature of the threats, but rather the state of mind induced thereby in the victim." Id. at 97, 98, 99 (internal punctuation omitted). As established above, see supra at part II.A.1, and supported by extensive precedent, Ms. Sargent's extortion and other misconduct each provide the "unlawful act" required for duress. See, e.g., Philippine Exp. & Foreign Loan Guar. Corp. v. Chuidian, 218 Cal. App. 3d 1058, 1080 (1990) (duress may "exist when the person threatens [damaging] publicity before suit or when the lawsuit is not perceived to be brought in good faith"); see also Balcof v. Balcof, 141 Cal. App. 4th 1509, 1523 (2006) (duress "is shown where a party intentionally used threats or pressure to induce action or nonaction to the other party's detriment") (citation and internal punctuation omitted) , reh'g denied, 2006 Cal. App. Lexis 1412 (Sept. 7, 2006).

Ms. McMillan already has well established that Ms. Sargent's pressuring her with threats and abuse had "a cumulative and real effect on [her] mental state," and caused her to suffer extreme distress and an impaired state of mind. Balcof, 141 Cal. App. 4th at 1524; see supra parts II.A.1, II.B.1. Knowing that Ms. Sargent's efforts already had severely harmed her reputation and professional prospects, and that her campaign to sully her character otherwise would not stop, Ms. McMillan believed her only available option was to sign the settlement agreement and release that unfairly freed Ms. Sargent of liability for her misconduct. Based on this clear showing of duress, therefore, any attempt by Ms. Sargent to enforce the release should be refused. See generally Balling v. Finch, 203 Cal. App. 2d 413, 417, 419-20 (1962) (finding sufficient facts to support claim by attorney that his promissory note was not enforceable on grounds of duress, where attorney's "professional reputation is a tremendously important factor in the successful pursuit of his profession" and creditors induced note by threatening to create "embarrassing" publicity for attorney that would cause him "great harm").

4. The Litigation And Fair And True Report Privileges Against Ms. Sargent Do Not Bar Any Of Ms. McMillan's Claims

The litigation privilege does not apply to Ms. McMillan's confidential telephone messages and letters that Ms. Sargent made of record in the divorce proceeding, and that are the substantial basis for virtually all of the causes of action in the Amended Complaint, because those communications lacked the requisite "connection or logical relation to the [divorce] action," Silberg v. Anderson, 50 Cal. 3d 205, 212 (1990), and Ms. Sargent filed them for the sole purpose of "litigating [Mr. Plummer's] in the press." Rothman, 49 Cal. App. 4th at 1149 (internal punctuation omitted). Nor does the litigation privilege extend to any statements by Ms. Sargent "made outside of the courtroom to nonparties unconnected to the proceedings," and therefore does not immunize her statements to the press. Begier v. Strom, 46 Cal. App. 4th 877, 882 (1996) (wife's false report to police that husband was molesting their child not barred by litigation privilege).

No less flawed is Ms. Sargent's assertion that the "fair and true report" privilege provides her with a defense. See Civ. Code §47(d). To begin with, this privilege applies only to communications to the press and therefore is no safe harbor for Ms. Sargent's in-court statements. Ms. Sargent previously claimsed that a common law "truth and fair comment" privilege also applies to her conduct in this case. (See Sargent Decl. at 14 n.13). Whatever else the contours of that privilege, according to Ms. Sargent it applies only to "matters of public interest," and does not apply to comments made "for any ulterior motive of causing harm to the plaintiff." Id. at 14 n.13. Ms. McMillan's phone messages and letters were not "matters of public interest" and were revealed by Ms. Sargent expressly to "caus[e her] harm," and therefore any such common law privilege does not apply. See id. (protecting only "a communication to[] a public journal"). Further, this privilege applies only to a "fair and true report," which Ms. Sargent clearly did not make here. See supra parts I I.A.1, II.B.1. Additionally, on its face this privilege excludes statements that "[v]iolate[] Rule 5-120 of the State Bar Rules of Professional Conduct," as Ms. Sargent's do here. See id. Extrajudicial statements may "violate[] Rule 5-120" when they present "clearly inadmissible . . . evidence" or information the speaker knows was "false [and] deceptive." See Cal. Rules Prof'l Conduct, Rule 5-120, "Discussion." As established supra parts II.A.1, II.B.1, Ms. Sargent's release of Ms. McMillan's phone messages and letters to the press satisfies this criteria, thus denying her any right to claim this privilege.

Because all of Ms. McMillan's causes of action have more than "minimal merit" and because none of Ms. Sargent's purported defenses apply, Ms. McMillan has defeated Ms. Sargent's anti-SLAPP motion in its entirety as a matter of law.

IV. The Anti-SLAPP Statute Does Not Apply To The Facts Alleged in the Complaint Against Mr. Plummer.

Mr. Plummer strategically seeks to use the anti-SLAPP statute to escape liability for his grossly abusive conduct towards Ms. McMillan before, during and after their 2005 divorce, and not for the elevated purpose for which the anti-SLAPP statute was intended, i.e., to prevent the chilling of desirable political or public speech. See Civ. Proc. Code §425.16(a).

A. Mr. Plummer's Abusive Acts Are Not Petition Or Speech

The following is a very partial list of the vicious and cruel conduct Mr. Plummer inflicted upon Ms. McMillan from 1998 through 2006: Prior to their marriage, Mr. Plummer was aware that he was gay but because of his desire for U.S. citizenship and Ms. McMillan's luxe lifestyle, both of which he could obtain only by marrying Ms. McMillan, he did not inform her of this critical fact. At various points during their marriage Mr. Plummer stole upwards of $63,000 in cash, $10,000 of artwork, and other valuable property from Ms. McMillan; Mr. Plummer falsely induced Ms. McMillan to gift him additional money; Mr. Plummer prevailed upon Ms. McMillan to invest and loan to him another $300,000 for a pet grooming business, which shortly thereafter he looted of all its assets and strategically bankrupted. (McMillan Declaration in Support of Opposition to Motions to Strike, dated Sept. 6, 2007 ("McMillan Decl."), ¶¶ 8-10). During the final two years of their marriage Mr. Plummer took multiple gay lovers and covertly funded those affairs with money he beseeched from Ms. McMillan; as a result of those affairs Mr. Plummer exposed Ms. McMillan to a risk of HIV and other sexually transmitted diseases; during this same period Mr. Plummer maintained a collection of gay pornography into which he placed a nude photograph of Ms. McMillan's infant son. (*Id.* ¶¶ 16, 22, 36.)

Following their separation and while their divorce proceeding was ongoing, Mr. Plummer threatened Ms. McMillan with his fists and menaced her in her home; in the divorce proceeding Mr. Plummer conspired with his attorney Dolores Sargent to file a sham action against Ms. McMillan, and to make public, both in and out of court, irrelevant, misleading and inflammatory communications sent by Ms. McMillan, to attempt to generate adverse press coverage about her and thus extort a generous marital settlement from her. Following the couple's divorce Mr. Plummer continued to harass Ms. McMillan and, again using threats of adverse publicity, to

attempt to extort additional money from her. (McMillan Decl. ¶ 61, Ex. H). Mr. Plummer has admitted in sworn statements and to the press much of his wrongful conduct noted here. (*See, e.g.*, McMillan Decl. Exs. D, E, G). Other facts listed either have been conclusively established by judicial findings or by the factual record and are not disputed by Defendant. (See, e.g., McMillan Decl. ¶¶ 14, Ex. H; McMillan Request for Judicial Notice, dated September 6, 2007 ("McMillan Request") Exs. A, B, E, K, L.)

The great majority of these acts, upon which each of Ms. McMillan's causes of action are based, do not concern any speech or petition activity. Indeed the most injurious and significant of Mr. Plummer's misconduct, and accordingly the heart of Ms. McMillan's allegations – i.e., prior to their marriage Mr. Plummer's failure to disclose to Ms. McMillan that he was gay and was marrying her to establish U.S. citizenship, and during their marriage Mr. Plummer's grand theft larceny, plundering of Ms. McMillan's finances, and furtive philandering – obviously do not communicate or solicit anything in any way. See generally Jespersen v. Zubiate-Beauchamp, 114 Cal. App. 4th 624, 630-32 (2003) (failure to speak or petition does not "amount[] to constitutionally protected speech or petition"). Because the "principal thrust or gravamen" of the Amended Complaint is Mr. Plummer's extensive range of non-speech and non-petition abusive activity, and because Mr. Plummer undertook this activity wholly independent of any First Amendment right, Mr. Plummer's anti-SLAPP motion fails as a matter of law. See Martinez v. Metabolife Int'l, 113 Cal. App. 4th 181, 188 (2003) (where Amended Complaint is "based essentially on nonprotected activity" and "allegations referring to arguably protected activity are only incidental," Amended Complaint is not subject to anti-SLAPP statute). Novartis Vaccines and Diagnostics Inc. v. Stop Huntington Animal Cruelty USA Inc., 143 Cal App 4th 1284.

B. Mr. Plummer's Petitioning Activity, Like Ms. Sargent's, Was Illegal Extortion

Ms. McMillan rejected Mr. Plummer's vast monetary demands, and shortly thereafter Mr. Plummer launched the interview portion of his extortion campaign against Ms. McMillan. Under the strain of the ensuing barrage of news stories and blog reports falsely identifying her as bigoted and intolerant, and induced by fears and threats of more bad press to come, Ms. McMillan capitulated and awarded Mr. Plummer a divorce settlement with terms far more generous than provided for in the couple's besieged-but-unassailable premarital agreement. See [cite to TM Decl/cash + DS fees + car etc. + value of released claims. & TM Decl Exs./settlement & prenup]

Mr. Plummer conspired with Ms. Sargent in all of the acts alleged in ______________. In addition, in 2006 Mr. Plummer initiated a second, near-identical extortion campaign against

Ms. McMillan, threatening that unless she made him a monetary offer "all those messages that you left me in the past, you know the public will hear it . . . and it will definitely put you back on the homophobic . . . stereotype again." Mr. Plummer emphasized to Ms. McMillan, "Hopefully you'll think about it and think about your reputation. . . . The media just loves to hear more dirt." [Cite to Judicial Notice, TM Decl. & anything else] This Court rightly concluded that Mr. Plummer's statements constituted extortion of Ms. McMillan. See [cite to Judicial Notice]; see generally Flatley, 39 Cal. 4th at 330, 332 (holding that statement from attorney, "We are positive the media worldwide will enjoy what they find," constitutes extortion). The clear similarities between Mr. Plummer's threat in 2006 to release Ms. McMillan's telephone messages to the press unless she "made [him] an offer," and Ms. Sargent and Mr. Plummer's threats and actions in 2005 to make Ms. McMillan's telephone messages and letters accessible to the press unless Ms. McMillan accepted Mr. Plummer's settlement offer, strongly evidences that the actions that this Court held to be extortionate when performed by Mr. Plummer in 2006 were no less extortionate when conducted by Mr. Plummer in 2005.

Mr. Plummer did not have any right to threaten such a release to induce Ms. McMillan to pay him a substantial amount of money. In making such threats to Ms. McMillan, therefore, Mr. Plummer committed extortion as a matter of law and his actions are not protected by the First Amendment. More significantly, Ms. McMillan's claims that are premised on those wrongful acts – i.e., intentional infliction of emotional distress, false light, public disclosure of private facts, extortion and abuse of process – cannot be dismissed on anti-SLAPP grounds. For the same reason, Mr. Plummer's proven extortion of Ms. McMillan in 2006, cannot be dismissed under the anti-SLAPP statute.

C. The Litigation Privilege Does Not Protect Mr. Plummer's Extortionate Activity In The Divorce Proceeding

The litigation privilege does not apply to Mr. Plummer's conduct in the divorce proceeding, specifically his filing with the court in that action copies of Ms. McMillan's confidential communications to him. They are set forth in detail on ___________. The messages and letters he released were entirely extraneous to any issue in the case and therefore did not serve to advance Mr. Plummer's legal position in any way.

For all the reasons stated above, therefore, the gratuitous and abusive acts by Mr. Plummer before, during and after his marriage to Ms McMillan, including in the divorce proceeding, are not Constitutionally-protected. Because Mr. Plummer cannot make a prima facie showing that the

Complaint targets Constitutionally-protected activity, he fails to satisfy the first, threshold prong of an anti-SLAPP motion and his Motion to Strike the Amended Complaint must be denied as a matter of law.

D. Ms. McMillan Can Establish That She Will Prevail Against Plummer On Each Of Her Claims In The Amended Complaint

In the unlikely event that this Court concludes that Mr. Plummer has met his first prong burden under the anti-SLAPP statute, this Court still should deny Mr. Plummer's Motion to Strike because the facts in this case leave little doubt that Ms. McMillan easily can demonstrate that each of the causes of action in the Amended Complaint are "legally sufficient," Constitutionally deficient and thus satisfy the "minimal merit" standard necessary for her to prevail. Mann v. Quality Old Time Service, Inc., 120 Cal. App. 4th at 105. (See Part ____ of this brief).

Further lightening Ms. McMillan's evidentiary burden still, Mr. Plummer is responsible for substantiating all affirmative defenses. See Premier Med. Mgmt. Sys. v. California Ins. Guar. Ass'n, 136 Cal. App. 4th 464 (2006) ("Although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.") (citation omitted).

1. Ms. McMillan's Claim That Mr. Plummer Violated His Restraining Order Is Meritorious

Paragraph 14.1 of marital settlement agreement between Ms. McMillan and Mr. Plummer states, in part, that Mr. Plummer may not "contact, molest, harass, . . . threaten[,] . . . telephone, send any messages to, . . . or disturb the peace of the other." (McMillan Request Ex. J.) On March 24, 2006 Mr. Plummer phoned Ms. McMillan to extort her. Quite obviously Mr. Plummer has breached the restraint provision of the settlement agreement.

2. The Settlement Agreement Does Not Bar Ms. McMillan's Claims Against Plummer

The marital settlement contains a release of claims against Mr. Plummer that is unenforceable as a matter of law and therefore ineffective against the Amended Complaint. Ms. McMillan executed the settlement agreement pursuant to Mr. Plummer's extensive acts of extortion and other severe abuse, and therefore under acute duress and against her will, which necessitates rescission of that release. See Civ. Code §§1689(b)(1). The same facts that are set forth at _________ apply here. ______________

"There is . . . no general rule as to the sufficiency of facts to produce duress." Lewis v. Fahn, 113 Cal. App. 2d 95, 99 (1952) (citation and internal punctuation omitted). "Generally

speaking, duress may be said to exist whenever one, by the unlawful act of another, is induced to make a contract . . . under circumstances which deprive him of the exercise of free will. . . . [D]uress is to be tested, not by the nature of the threats, but rather the state of mind induced thereby in the victim." Id. at 97, 99 (1952). As established above, see supra at part ___, and supported by extensive precedent, Mr. Plummer's extortion and other misconduct each provide the "unlawful act" required for duress. See, e.g., Philippine Exp. & Foreign Loan Guar. Corp. v. Chuidian, 281 Cal. App. 3d 1058, 1080 (1990) (duress may "exist when the person threatens [damaging] publicity before suit or when the lawsuit is not perceived to be brought in good faith"); see also Balcof v. Balcof, 141 Cal. App. 4th 1509, 1523 (2006) (duress "is shown where a party intentionally used threats or pressure to induce action or nonaction to the other party's detriment") (citation and internal punctuation omitted).

Ms. McMillan has established that Mr. Plummer's pressuring her with threats and abuse, including threatened acts of violence, had "a cumulative and real affect on [her] mental state," and caused her to suffer extreme distress and an impaired state of mind. Balcof, 141 Cal. App. 4th at 1524. Knowing that Mr. Plummer's efforts already had severely harmed her reputation and professional prospects, and that his campaign to sully her character otherwise would not stop, Ms. McMillan believed her only available option was to sign the settlement agreement and release that unfairly freed Mr. Plummer of liability for his misconduct. Based on this clear showing of duress, therefore, any attempt by Mr. Plummer to enforce the release should be refused. See generally Balling v. Finch, 203 Cal. App. 2d 413, 417, 419-20 (1962) (finding sufficient facts to support claim by attorney that his promissory note was not enforceable on grounds of duress, where attorney's "professional reputation is a tremendously important factor in the successful pursuit of his profession" and creditors induced note by threatening to create "embarrassing" publicity for attorney that would cause him "great harm"). Of course the release at issue has no affect on Ms. McMillan's claims that accrued after October 4, 2005, including all claims based on Mr. Plummer's extortionate telephone message on [date], 2006.

3. The Litigation Privilege Does Not Bar Any Of Ms. McMillan's Claims Against Plummer

The same facts and law that are set forth at _______ apply to Mr. Plummer. The litigation privilege does not apply to Ms. McMillan's confidential telephone messages and letters that Mr. Plummer made of record in the divorce proceeding, and that are the substantial basis for virtually all of the causes of action in the Amended Complaint, because those communications lacked the

requisite "connection or logical relation to the [divorce] action," Silberg v. Anderson, 50 Cal. 3d 205, 212 (1990), and Mr. Plummer filed them for the sole purpose of "litigating [his claims] in the press." Rothman, 49 Cal. App. 4th at 1149 (internal punctuation omitted). Nor does the litigation privilege extend to any statements by Mr. Plummer "made outside of the courtroom to nonparties unconnected to the proceedings," and therefore does not immunize his statements to the press. Begier v. Strom, 46 Cal. App. 4th 877, 882 (1996) (wife's false report to police that husband was molesting their child not barred by litigation privilege). Lastly, the litigation privilege does not preclude any claims based on Mr. Plummer's wrongful non-speech conduct. See Kimmel v. Goland, 51 Cal. 3d 202, 212 (1990) ("[W]ithout exception, the [litigation] privilege has applied only to torts arising from statements or publications"); accord Jacob B. v. County of Shasta, 40 Cal. 4th 948, 956-57 (2007) (litigation privilege "protects only against *communicative* acts and not against *noncommunicative* acts") (emphasis in original).

Because all of Ms. McMillan's causes of action have more than "minimal merit" and because none of Mr. Plummer's purported defenses apply, Ms. McMillan has defeated Mr. Plummer's anti-SLAPP motion in its entirety as a matter of law.

V. Ms. McMillan Is Entitled To An Award Of Her Costs And Attorneys Fees Incurred In Opposing Mr. Sargent and Mr. Plummer's Frivolous Anti-SLAPP Motion

Ms. Sargent's and Mr. Plummer's anti-SLAPP motion, like their challenge to Ms. McMillan's ironclad premarital agreement, is a textbook example of a "frivolous" litigation tactic, in that it is "totally and completely without merit" and was brought "for the sole purpose of harassing" Ms. McMillan. Civ. Proc. Code §128.5 (definition of "frivolous"). Thus, Ms. McMillan hereby respectfully requests that this Court reverse the Order granting Ms. Sargent and Mr. Plummer SLAPP motion and attorney fees and costs and instead, reinstate Ms. McMillan's complaint and order, grant Ms. McMillan her costs and fees. Mr. Plummer and Ms. Sargent to pay the costs and reasonable attorneys fees she has incurred in defeating the motion. Civ. Proc. Code §425.16(c).

CONCLUSION

Based on the foregoing, the lower Court's order granting Ms. Sargent's motion in its entirety and granting Plummer's motion except with respect to the First and Fourth causes of action should be reversed. Ms. Sargent's and Mr. Plummer's Motion to Strike the Amended Complaint under the anti-SLAPP statute must be denied, and Mr. Plummer should be ordered to pay Ms. McMillan her costs and fees in opposing the Motion.

Dated: ____________________, 2008

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I. Public Disclosure of Ms. McMillan's Spousal Communications and Financial Records Threatens Her Compelling Rights and Compels an Order to Seal**Error! Bookmark nc**

A. Ms. McMillan's Compelling Rights Overcome the Public's Right to Unfettered Access to the Records in This Case, and Support Sealing Those Records**Error! Bookmark**

B. Defendants' Past Disclosures Evidence that Ms. McMillan's Rights Will Be Irreparably Prejudiced if Her Private, Confidential and Sensitive Records Are Not Sealed by This Court in This Action.......................**Error! Bookmark not defined.**

C. Ms. McMillan Seeks a Narrow Seal..............................**Error! Bookmark not defined.**

D. Sealing, or Redacting, Ms. McMillan's Spousal Communications, Financial Records and Divorce Settlement is the Least Restrictive Means to Protect Ms. McMillan's Overriding Interests...................................**Error! Bookmark not defined.**

II. Defendants' Threatened Public Disclosure of Ms. McMillan's Spousal Communications and Other Private, Confidential and Sensitive Information and Documents Will Prejudice Her Constitutional and Other Overriding Rights, and Therefore Compels a Protective Order against Defendants .**Error! Bookmark not defined.**

CONCLUSION 1

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PROOF OF SERVICE

McMillan v. Plummer, In the Court of Appeal of the State of California, First Appellate District, Division 2, Case No. A120260

The undersigned declares:

I am employed in the County of New York, State of New York. I am over the age of 18 and am not a party to the within action; my business address is c/o Davis & Gilbert LLP, 1740 Broadway, 21st Floor, New York, New York 10019.

On __________ ___, 2008, I served ____ on the following parties to this action as follows:

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(X) (By U.S. Mail) On the same date, at my said place of business, () the original (X) a true copy thereof enclosed in a sealed envelope, addressed as shown on the above service list was placed for collection and mailing following the usual business practice of my employer. I am readily familiar with my employer's business practice for collections and processing of correspondence for mailing with the U.S. Postal Service, and, pursuant to that practice, the correspondence would be deposited with the U.S. Postal Service, with postage thereon fully prepaid, on the same date at San Francisco, California.

Dated: ______________ _____, 2008

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

____
MARTIN GARBUS