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January 14, 2011

Hon. Tani Cantil-Sakauye, Chief Justice,
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Overhill Farms, Inc. vs. Nativo Lopez, et al., California Court of Appeal No. G042984
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice and Associate Justices:

This letter is intended as an amicus letter under Rule 8.500 (g) in support of the petition for review in this case.

This letter is on behalf of our client, the California Labor Federation, AFL-CIO.

Interest of Amicus

The California Labor Federation, AFL-CIO, is the California state body chartered by the American Federation of Labor- Congress of Industrial Organizations ("AFL-CIO"). The Federation is a federation of affiliated labor organizations which represent in excess of two million workers in the state of California.

This petition for review concerns a 2 to 1 opinion by the Court of Appeal finding the use of the term "racist" in a press release, leaflets, flyers, and signs to be a sufficient showing of defamation to defeat an Anti-SLAPP motion. This expressive activity was engaged in by workers who were employed by the employer for a long period of time but who were terminated after their legality to work in this country was

put in issue. Understandably, the workers were devastated. Some engaged in the expressive activity complained of by the employer. The Federation and its affiliates are interested in this case because the affiliates and their members often engage in the use of handbills, leaflets, signs, etc. to protest various labor disputes; and, in so doing they often use inflammatory and colorful words which to the minds of some people are defamatory even though they are fully protected free speech. The majority opinion is of great concern to the Federation, its affiliates and their members for the reasons set forth below for why the Federation believes that review should be granted.

Reasons for Granting Review

This Court is urged to review this case under CRC Rule 8.500 (b) (1). The Court is urged to grant review of this case not just because the majority opinion is wrong - for the reasons set forth in the dissent of Justice Fybel and in the petition for review - but because the majority opinion is in conflict with other decisions concerning the term "racist" as a basis for defamation. In addition review is merited because if the majority opinion remains California law, the use of hyperbole and robust language will be increasingly vulnerable to a claim of defamation and to the types of tort alleged by the plaintiff. The ensuing combination of conflicting opinions and an apparent new willingness by the judiciary to curb hyperbole and robust language will needlessly burden the trial and appellate courts of California.

The conflict arises from the majority's holding that the expressive activities of the defendants (press release, signs, leaflets and flyers) contained under all the circumstances a provable false assertion of fact, viz. that the plaintiff Overhill engaged in large-scale terminations because of "racist"motives. The Seventh and Eighth Circuits have found quite some time ago that the "racist" epithet has lost so much meaning as to no longer be defamatory under any circumstances. In 1988 in Stevens v. Tillman (7th Cir. 1988) 855 F. 2d 394, 402, the Circuit found that the term is not outside the protection of the First Amendment because accusations of racism are no longer "obviously and materially harmful"; and that is so because the term "has been watered down by overuse" and has been "hurled about so indiscriminately that it is no more that a verbal slap in the face ....". In 1994 in Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union Local 655 (8th Cir. 1994) 39 F. 3d 191, 196, the Eighth Circuit said that calling an employer's actions "discriminatory" and "unfair to black employees" was not actionable defamation and was not a

falsification of facts but rather "loose language" part of "conventional give and take"in the public square.

The majority opinion still believes, however, that "[t]he term 'racist' is of course an exceptionally negative, insulting, and highly charged word - it is hard to imagine being called much worse". Slip Op. p. 15. Then, however, the majority acknowledges, as it must, the contrary authority from the Seventh and Eighth Circuits and asserts that the term is "also a word that lacks precise meaning, so that its application to a particular situation or individual is problematic; ...." Slip Op. p.15. As this amicus understands the two Circuits, they are saying the term has lost all meaning because of overuse. They are not saying that the term is "problematic" and could be defamatory depending on context. As the Seventh Circuit said, an accusation of racism is not "obviously and materially harmful" and is "no more than a verbal slap in the face". If that is true its use cannot satisfy the definition of defamation in Civil Code §45 because its use does not "expose any person to hatred, contempt, ridicule, or obloquy, or ... causes him to be shunned or avoided." No one takes the term literally or perhaps even seriously when used in any context.

The majority opinion says that the two Circuits were speaking only generally, and the majority then finds defamation in context, blaming the petitioners for not having given a fuller context in their expressive activities which might have saved these poor workers from a defamation claim. In so proceeding the majority overlooks the fact that the use of the accusation of racism is always going to have some context. The majority opinion thereby invites lower courts to parse the facts or context of any given case to see if a term that has lost all meaning can still be given defamatory meaning by "context". If the accusation "racist" has lost all meaning - no one takes it literally - then it should not make any difference whether all the facts surrounding the press release, flyers, etc. were disclosed or not. Viewed through the eyes of the public, this term is understood as "imaginative expression" or "rhetorical hyperbole". As such, it is constitutionally protected. Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 20.

The Court is asked to review this case because more is at stake than just the use of "racism" as a basis for defamation. The majority's potential direction to trial courts to evaluate the context of "racism" opens a door long shut by the U.S. Supreme Court's opinion in Old Dominion Branch No. 496, Nat. Assn. of Letter Carriers v. Austin (1974) 418 U.S. 264. Certainly, Jack London's famous definition of a

"scab"[1] might be characterized by some (to use the majority opinion's words) as "exceptionally negative, insulting and highly charged" in the context of a labor dispute. Such language is constitutionally protected, however. It is not appropriate for California courts now to examine rough language, especially words that have lost meaning, to see if some "context" will furnish a basis for defamation, whether to defeat an anti-SLAPP motion or in any other context.

For these reasons, the California Labor Federation, AFL-CIO, believes review is merited under CRC Rule 8.500 (b) (1).

Thank you.

Very truly yours,

LAW OFFICES OF
CARROLL & SCULLY, INC.

Donald C. Carroll

DCC:kes
ope-3-afl-cio
cc: Mr. Art Pulaski

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[1] "The Scab

"After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab.*

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class."

CERTIFICATE OF SERVICE
(C.C.P. Section 1013A and 2015.5)

I, Karen Scannell, declare that I am a citizen of the United States, over 18 years of age, and not a party to the within action. My business address is 300 Montgomery Street, Suite 735, San Francisco, California 94104.

Upon this day, I served the following document(s):

An amicus letter in support of the petition for review of Overhill Farms, Inc. vs. Nativo Lopez, et al., California Court of Appeal No. G042984

on the following party(s) by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Law Offices of Carroll & Scully, Inc. for the collection and processing of correspondence for mailing with the United States Postal Service. I deposited each such envelope, with first class postage thereon fully prepared, in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I personally delivered the above document(s) to the office of the addressee on the date shown herein.

(C) By Messenger Service: I am readily familiar with the practice of the Law Offices of Carroll & Scully, Inc. for messenger delivery, and I delivered each such envelope to a courier employed by SILVER BULLET EXPRESS COURIER, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.

(D) By Overnight/Mail Courier: By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and

processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would, in the ordinary course of business, be delivered to an authorized courier or driver business, be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

(E) By Facsimile: I served such document(s) via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following facsimile numbers:

TYPE OF SERVICE	ADDRESSEE	PARTY
(A)	Carol A. Sobel Law Office of Carol A. Sobel 429 Santa Monica Blvd., Ste. 550 Santa Monica, CA 90401-3439	Attys. for Petitioners, Defendants and Appellants
(A)	Mark Payne Chris Weaver Rutan & Tucker 611 Anton Blvd., 14th Floor Costa Mesa, CA 92626-1931	Attys. for Plaintiff and Respondent
(A)	The Hon. Robert Moss Orange County Superior Court 700 Civic Center Drive West Santa Ana, CA 92701	
(A)	Clerk, California Court of Appeal Fourth Appellate District, Division Three 601 W. Santa Ana Blvd. Santa Ana, CA 92701	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 14, 2011 at San Francisco, California.

Karen Scannell

Karen Scannell