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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF ALAMEDA

21 G. WILLIAM HUNTER,
22 Plaintiff,

23 v.

24 DEREK FISHER, *et al.*,
25 Defendant.

Case No. RG13679736

**DEFENDANT NBPA'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ANTI-SLAPP MOTION AND
REQUEST FOR ATTORNEY FEES**

Date: August 27, 2013
Time: 3:45 p.m.
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Judge: The Hon. Frank Roesch
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1 **I. INTRODUCTION**

2 *"If someone wants to point a gun at my head, I'll point it right back at him."*

3 - Billy Hunter, October 14, 2011

4 Billy Hunter seeks to punish the National Basketball Players Association (the "Union" or
5 "NBPA") and others who participated in an outside investigation, prompted by a government
6 subpoena, which led to his termination. The subpoena was issued by a U.S. Attorney's Office in
7 conjunction with the U.S. Department of Labor and called for Union financial and business
8 records. It issued soon after the media widely reported Hunter's questionable business tactics,
9 self-dealing, and rampant nepotism while serving as the Union's Executive Director.¹

10 In response to the government subpoena, the Union retained the Paul Weiss law firm to
11 investigate the allegations and respond to the subpoena. Paul Weiss investigated for nine months,
12 interviewed three dozen witnesses (including Hunter), reviewed thousands of documents, and
13 publicly issued its 229-page Report with several hundred pages of exhibits. The Report
14 concluded that Hunter acted inconsistently with his fiduciary duties, improperly obtained the
15 Union's agreement to pay him \$1.3 million for allegedly-unused vacation time without
16 documentation (and without securing independent advice on any Union obligation to make the
17 payment), and spent Union funds on personal items, including legal fees and travel expenses.
18 The Report also detailed Hunter's failure to ensure the Union had independent advice in its 2010
19 contract negotiation with him, which resulted in an alleged \$13 million dollar contract in his
20 favor, and his repeated knowing failure to obtain required approval for his 2010 contract in
21 violation of the Union's By-Laws. In light of this information, the Union justly terminated
22 Hunter's employment following a 24-0 vote by the Board of Player Representatives and a 9-0
23 vote by the Executive Committee.

24
25
26 ¹ See e.g., "NBPA Family Matters," [www.sports.yahoo.com/news/nba--nbpa-family-matters-hunter-](http://www.sports.yahoo.com/news/nba--nbpa-family-matters-hunter-union.html)
27 [union.html](http://www.sports.yahoo.com/news/nba--nbpa-family-matters-hunter-union.html), Apr. 25, 2012 ("Four of Billy Hunter's family members – including daughter Alexis and son
28 Todd – have profited from jobs awarded them in law firms, financial management institutions and NBPA
staff positions. Over the past five years, Billy Hunter received more than \$13.3 million in total
compensation. During that same timeframe he oversaw the distribution of more than \$3.9 million to four
members of his family and their related corporate entities.").

1 Hunter now attacks Union President Derek Fisher's *encouragement* of the Paul Weiss
2 investigation, Fisher's *participation* in the investigation (expressly alleging that Fisher's
3 *statements to investigators* were false), and his statements to the public concerning Hunter's
4 termination. Hunter even attacks Fisher's business manager, Jamie Wior, for allegedly *drafting*
5 *Fisher's "public statements"*, for "*encouraging him*" to "*publicly [speak]*" on behalf of the
6 Union and disseminating messages to the players" and for "orchestrating a press campaign" that
7 "compelled the Executive Committee to form a Special Committee charged with supervising an
8 internal investigation". Compl., ¶¶ 4, 84. Hunter additionally alleges that Wior devised a
9 strategy that allowed Fisher to "*drive the Union's use of the internal investigation as a pretext*
10 *for terminating Hunter*". *Id.* at ¶ 85.

11 Hunter's claims against the Union are premised on his allegations that the Report
12 "absolved Hunter of all serious allegations" and that he was not allowed to review the statements
13 of witnesses interviewed, question the drafters, or attend the presentation of the Report to the
14 Board of Player Representatives. *Id.* at ¶ 87. In addition, Hunter attacks members of the Union's
15 Executive Committee for alleged statements encouraging his own decision to terminate the
16 Union's employment of his family members discussed in the Report (contending that the
17 statements implied that those terminations "would resolve the issues between Hunter and the
18 Union"), contending that the Committee members then refused to discuss his employment and
19 "[i]nstead, Fisher and the NBPA moved to summarily terminate his employment". *Id.* at ¶¶ 93-
20 94. Hunter goes on to attack the Union's decision to adopt the Report's finding that the 2010
21 contract was not properly approved. *Id.* at ¶¶ 96, 97. His allegations clearly admit that his
22 termination was premised upon the internal investigation and the Report which followed it. *See*
23 *id.* at ¶ 85 (citing the "Union's use of the internal investigation as a pretext for terminating
24 Hunter").

25 It is difficult to imagine claims which fall more clearly within California's anti-SLAPP
26 law than those alleged here. All claims are premised on acts which fall under one or more of the
27 statutory anti-SLAPP arms:

- 28
- Statements or writings made before an official proceeding or regarding an

1 issue under review by an official proceeding (*e.g.*, statements made in the
2 course of the investigation; statements made to the press or players
3 regarding the investigation, use by the Union of the internal investigation
4 as a basis for terminating Hunter, etc.);

- 5 • Statements made in a public forum on a matter of public interest (*e.g.*,
6 statements made to the press by Fisher following Union elections and
7 Hunter's termination, etc.); and/or
- 8 • Conduct in furtherance of the exercise of the constitutional right of free
9 speech in connection with an issue of public interest (*e.g.*, statements
10 allegedly made to the press by Wior regarding "Hunter's stewardship of
11 the Union", efforts by the Union and Defendants to encourage the
12 investigation and participate in it, support for Hunter's long-overdue
13 termination based upon investigation's findings, alleged orchestration of a
14 press campaign, etc.).

15 As outlined below, because the conduct about which Hunter complains is clearly covered
16 by the anti-SLAPP statute, the burden shifts to Hunter to show that he can prevail on each claim.
17 Hunter cannot come close to meeting this burden and a fee award to the Union is mandatory.

18 **II. RELEVANT FACTUAL BACKGROUND**

19 **A. Following the Subpoena, Paul Weiss Investigates and the Union Participates** 20 **in the Investigation**

21 In 2011, NBA players raised questions about Hunter's self-dealing and other inappropriate
22 conduct. As the Paul Weiss Report later found, over the course of many years Hunter had created
23 an environment rife with nepotism, conflicts of interest, misuse of Union funds, and, importantly,
24 the suppression of criticism and questions by Union members. *See* Declaration of Lynne C.
25 Hermle ("Hermle Decl."), ¶ 2, Exh. A, pp. 5-6, 20-22.

26 On April 25, 2012, the U.S. Attorney's Office for the Southern District of New York
27 issued a subpoena to the Union calling for the production of financial and other business records.
28 This subpoena issued shortly after inquiries were made regarding Hunter's payout to himself—
from Union funds—of a million dollars in allegedly accrued unused vacation, the employment of
several close friends and relatives, and other facts suggesting breaches of fiduciary duty. In the
days before the government issued the subpoena, numerous media outlets reported Hunter's
nepotism, conflicts of interests, and possible misuse of Union funds. *Id.* at Exh. E. For example,
ESPN reported the efforts taken by Hunter to oust Fisher from his role as president of the Union

1 after Fisher sought a review of the Union's finances due to perceived nepotism that Hunter
2 provided to his family members throughout his tenure as Executive Director. *Id.* Similarly,
3 *Yahoo! Sports* reported that Hunter had considered using NBPA funds to invest in a failing bank
4 whose board of directors at the time included Hunter's son.² *Id.* The government's issuance of
5 the subpoena led to further media coverage and public scrutiny of the Union's practices and
6 Hunter's involvement in them.³ *Id.*

7 On April 26, 2012, the Union's Executive Committee formed a six-member Special
8 Committee which, as Hunter admits, was "charged with supervising an internal investigation"
9 into his conduct. Compl., ¶ 84. On April 27, 2012, the Special Committee retained the Paul
10 Weiss law firm to conduct the investigation and respond to the government's subpoena. Per the
11 Union's instruction, Paul Weiss was in direct communication with the U.S. Attorney's Office
12 throughout its investigation. Hermle Decl., Exh. A, p. 35. Paul Weiss first met with the
13 government on April 30, 2012, and thereafter produced nearly 29,000 pages of documents both to
14 the U.S. Attorney's Office and to the U.S. Department of Labor, which was assisting in the
15 investigation. *Id.*

16 As part of its investigation and response to the government's subpoena, Paul Weiss
17 interviewed Fisher, then and now the NBPA President, and more than three dozen Union
18 members, employees (including Hunter, for several days) and others about Hunter's conduct.
19 The investigation included an exhaustive review of tens of thousands of pages of financial records
20 and e-mails, and Paul Weiss retained the services of Deloitte Financial Advisory Services LLP to
21 assist with the accounting aspect of the investigation. At the investigation's conclusion, Paul
22 Weiss issued its 229-page Report with several hundred pages of exhibits, setting forth the
23 investigators' findings.

24
25 ² The U.S. Attorney's Office recently indicted two principals of that outside investment advisor, Prim
26 Capital, because they forged a lucrative, multi-year non-terminable contract with the Union shortly before
27 Hunter's termination in 2013. Hermle Decl., Exh.F.

28 ³ See, e.g. "Billy Hunter Invested NBPA Money in Shaky Bank with Ties to Son, According to Report",
www.sbnation.com/nba/2012/4/20/2962514/derek-fisher-billy-hunter-nba-players-association, April 20,
2012; see also, "Federal Investigators Subpoena Union Documents,"
www.offthedribble.blogs.nytimes.com/2012/04/27/federal-investigators-subpoena-union-documents/,
April 27, 2012.

1
2 **B. The Report Concludes That Hunter Engaged in Improper Conduct That**
3 **Placed His Personal Interests Adverse to the Union's**

4 Paul Weiss concluded that Hunter took actions that were inconsistent with his fiduciary
5 obligations to the NBPA, displayed poor judgment, paid little attention to the appearance of
6 impropriety created by his conduct, and failed to properly manage conflicts of interest. Hermle
7 Decl., Exh. A, pp. 5-6. Paul Weiss also concluded that Hunter suppressed criticism which, if he
8 had allowed it to be expressed, might have led to the resolution of certain issues the Report
9 identified. *Id.* at pp. 20-22, 169-170.

10 On January 17, 2013, Paul Weiss released the Report to the Union's membership and to
11 the general public. *See* Compl., ¶ 86. On February 14, 2013, Hunter released his response and
12 posted it on his public website, stating he "was left with no choice but to communicate with the
13 public in a more direct manner . . ." Hermle Decl., ¶ 8, Exh. G.

14 **C. The Union Terminates Hunter's Employment Based on the Report's Findings**

15 On February 16, 2013, following the Report's public release, the NBPA Board of Player
16 Representatives voted 24-0 to terminate Hunter's employment. *See* Declaration of Derek Fisher
17 in Support of Defendants Fisher and Wior's Anti-Slapp Motions, ¶ 12. On February 17, 2013, the
18 Union's Executive Committee notified Hunter by letter of his termination. Compl., ¶ 96 & Exh.
19 E. Hunter concedes the connection between the investigation and his termination, alleging both
20 that the investigation was used "as a pretext for terminating" him and that "when the Report's
21 conclusions were presented to the players" prior to their voting on his termination, "Hunter was
22 not allowed to address the players" and "was denied any opportunity to respond to the Report's
23 threadbare insinuations." Compl., ¶ 92.

24 Each of the employment contracts between Hunter and the Union specified that Hunter
25 was employed at-will. *See* Compl., Exhs. A-C. For instance, Hunter's 2000 employment
26 contract expressly states that Hunter was an at-will employee who could be terminated by the
27 Executive Committee, by majority vote, at any time and without cause. *See id.* at Exh. B,

28 In June 2010, Hunter sought to negotiate another employment contract, using as leverage

1 the Union's upcoming 2011 collective bargaining negotiation with the National Basketball
2 Association. *Id.* at Exh. D. The contract was never approved as the Union's Constitution and By-
3 Laws require. It also contains at-will language. *Id.*

4 **III. CALIFORNIA'S ANTI-SLAPP STATUTE BARS HUNTER'S CLAIMS**

5 Each of Hunter's four causes of action against the Union is barred by Code of Civil
6 Procedure section 425.16 ("Section 425.16"), commonly referred to as the anti-SLAPP statute.
7 Section 425.16 subjects claims arising from acts in furtherance of constitutional rights of petition
8 or free speech to a special motion to strike (an "anti-SLAPP motion"), *see Blanchard v. DirecTV,*
9 *Inc.*, 123 Cal. App. 4th 903, 913 (2004), which is clearly applicable and requires dismissal of the
10 claims here.

11 **A. The Anti-SLAPP Protections Are Broadly Construed**

12 Section 425.16 encourages continued participation in matters of public significance and
13 disposal of lawsuits brought to impede the exercise of constitutional rights. *See Macias v.*
14 *Hartwell*, 55 Cal. App. 4th 669, 672 (1997); *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1055 (2006).
15 As required by the statute's terms, California courts construe Section 425.16 **broadly** to provide
16 expansive protection against invalid claims. *See* Section 425.16(a) ("it is in the public interest to
17 encourage continued participation in matters of public significance, and that this participation
18 should not be chilled though abuse of the judicial process. To this end, this section shall be
19 construed broadly."); *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1119
20 (1996); *see also Kashian v. Harriman*, 98 Cal. App. 4th 892, 908 (2002) (courts have adopted "a
21 fairly expansive view" of litigation-related conduct to which Section 425.16 applies).

22 **B. The Anti-SLAPP Process as Applied Here**

23 An anti-SLAPP motion is analyzed pursuant to a two-step process. The moving party first
24 makes a *prima facie* showing that the challenged cause of action "arises from" protected activity
25 by demonstrating that the conduct underlying the claim fits within one of Section 425.16's four
26 categories. *See* Section 425.16(b)(1); *Rusheen, supra*, 37 Cal. 4th at 1056; *Blanchard, supra*, 123
27 Cal. App. 4th at 917-18; *Equilon Enter., L.L.C. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 58
28 (2002). The categories are: (1) statements or writings made before an official proceeding

1 authorized by law; (2) statements or writings made in connection with an issue under
2 consideration or review by an official proceeding authorized by law; (3) statements or writings
3 made in a place open to the public or public forum in connection with an issue of public interest;
4 or (4) other conduct in furtherance of the exercise of the right of free speech in connection with a
5 public issue or issue of public interest.

6 Once the moving party makes this *prima facie* showing, the court *presumes* that the
7 purpose of the claims is to chill the exercise of protected rights. *See Equilon Enter.*, 29 Cal. 4th at
8 61. The nonmoving party must then demonstrate a probability of prevailing by demonstrating
9 that the claims are “both legally sufficient and supported by a sufficient *prima facie* showing of
10 facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”
11 *Rusheen*, 37 Cal. 4th at 1056 (citing *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821
12 (2002)). It is not enough for the nonmoving party to show that his claims could survive a motion
13 to dismiss; instead he must provide the court *with sufficient admissible evidence* to show that
14 there is a probability he will prevail. *See DuPont Merck Pharm. Co. v. Super. Ct.*, 78 Cal. App.
15 4th 562, 568 (2000). The court considers a defendant’s evidence to determine whether it defeats
16 a plaintiff’s case. *Traditional Cat Ass’n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004).

17 **C. Hunter’s Claims are Covered by the Anti-SLAPP Statute**

18 The conduct underlying each and every claim Hunter asserts⁴ falls within the anti-SLAPP
19 categories. Each is premised on conduct which occurred in connection with the Paul Weiss
20 investigation, the creation and presentation of the Report, the Union’s reliance on the conclusions
21 in the Report as a basis for Hunter’s termination, and statements made about these events.

22
23
24 ⁴ Hunter asserts fourteen causes of action: (1) breach of express contract against NBPA and Fisher; (2)
25 breach of express contract by repudiation against NBPA and Fisher; (3) breach of implied-in-fact contract
26 against NBPA and Fisher; (4) breach of covenant of good faith and fair dealing against NBPA and Fisher;
27 (5) inducing breach of contract against Fisher and Wior; (6) intentional interference with contractual
28 relations against Fisher and Wior; (7) intentional interference with prospective economic relations against
Fisher and Wior; (8) negligent interference with prospective economic relations against Fisher and Wior;
(9) intentional misrepresentation against Fisher; (10) intentional misrepresentation against Fisher; (11)
concealment against Fisher; (12) negligent misrepresentation against Fisher; (13) defamation per se
against Fisher; and (14) defamation per quad against Fisher. Only the first four causes of action are
asserted against the Union.

1 1. **The Events on Which the Claims are Generally Based Are Protected**
2 **by Sections 425.16(e)(1) and (2)**

3 Investigations by government agencies are “official proceedings authorized by law”
4 within the meaning of Section 425.16(e)(1). *See Hansen v. Dep’t of Corr. & Rehab.*, 171 Cal.
5 App. 4th 1537, 1544 (2008). Here, the investigation, Report, and consequences of the Report—
6 including the termination—were made “in connection with” the government’s subpoena of, and
7 investigation into, Hunter’s practices. Certainly all statements made by the witnesses Paul Weiss
8 interviewed, including Fisher, were made in connection with the government’s subpoena and
9 investigation, an official proceeding authorized by law. *See* Section 425.16(e)(2); *see also Greka*
10 *Integrated, Inc. v. Lowrey*, 133 Cal. App. 4th 1572, 1579-80 (2006) (defendant’s response to
11 subpoena protected under anti-SLAPP statute); *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal.
12 4th 192, 203 (2006) (participation in hospital peer review protected by anti-SLAPP statute);
13 *Vergos v. McNeal*, 146 Cal. App. 4th 1387, 1399 (2007) (participation in university grievance
14 investigation of employee protected pursuant to anti-SLAPP statute). Accordingly, the
15 complained-of statements Fisher allegedly made to investigators, including those purportedly
16 impugning Hunter’s character and integrity, Compl., ¶ 90, and claiming that Hunter tried to bribe
17 Fisher, *id.* at ¶ 91, the resulting Report, *id.* at ¶ 92, Hunter’s participation or lack thereof in the
18 investigation, *id.*, and comments regarding it, including that the investigation “was used as a
19 pretext by Fisher and NBPA to terminate Hunter without cause,” *id.* at ¶¶ 7, 85, were made in
20 connection with an issue under consideration by an authorized official proceeding and constitute
21 protected activity under Section 425.16 (e)(1) and (2).

22 Hunter admits—correctly—that the negative press surrounding his tenure as Executive
23 Director was a contributing factor to the investigation, contending that “a flurry of press articles
24 suddenly appeared that presented Hunter’s stewardship of the Union in a negative light”, and that
25 (on information and belief) Fisher’s business manager Wior “orchestrated this press campaign
26 designed to undermine Hunter and muddy his reputation”. Compl., ¶ 85; *see also* Hermle Decl.,
27 Exh. A at pp. 1-3 (describing the role of media attention in the commencement of the Paul Weiss
28 investigation). He alleges that this “excessive negative attention...compelled the Executive

1 Committee to form a Special Committee charged with supervising an internal investigation.”⁵
2 Compl., ¶ 84.

3 Because Hunter admits, correctly, that his termination arose out of the Paul Weiss
4 investigation, the claims premised on the termination also fall within the anti-SLAPP protections.
5 *See id.*, ¶ 85. As discussed below, ultimate personnel actions, such as censures, demotions, and
6 terminations resulting from such investigations, fall squarely within the protection of the anti-
7 SLAPP statute. *See Nesson v. N. Inyo Cnty. Local Hosp. Dist.*, 204 Cal. App. 4th 65, 78-84
8 (2012) (hospital’s termination of physician’s agreement, prompted by peer review process, was
9 protected conduct under the anti-SLAPP statute); *Vergos, supra*, 146 Cal. App. 4th at 1397
10 (communicative conduct denying grievances protected by Section 425.16).

11 As discussed more specifically below with respect to his individual claims, Hunter
12 attempts to bolster his claims by relying on additional allegations of conduct protected by the
13 anti-SLAPP statute.

14 **2. Hunter’s Breach of Contract Claims Are Covered by the Second and**
15 **Fourth Categories of the Anti-SLAPP Statute**

16 The first through fourth causes of action are based upon Hunter’s theory that
17 encouragement of and participation by Fisher and the Union in the government-prompted
18 investigation led directly to his termination, which he alleges breached his 2010 proposed
19 employment contract (which he refers to as the “2010 Extension”). *See* Compl., ¶¶ 80-81, 84, 90-
20 92, 94-101, 106. This conduct is protected by the second and fourth categories of the anti-SLAPP
21 statute. As discussed above, the underlying conduct that Hunter alleges led to his termination was
22 either statements made by Wior to the press, causing the investigation, statements Fisher made to
23 the investigators as part of the investigation, or actions by the Union in reliance upon the
24 investigation, *e.g.*, terminating Hunter. *See id.* at ¶¶ 85, 90. Each of these is clearly covered by
25 one or more anti-SLAPP categories.

26 _____
27 ⁵ According to Hunter’s allegations, Fisher and Wior “orchestrated a series of actions that would
28 eventually lead to Hunter’s termination by the NBPA” by working to “commission an audit of the Union”,
followed by Fisher convening an Executive Committee conference call to discuss conducting of an audit.
Compl., ¶ 80.

1 This conduct is protected by the fourth anti-SLAPP category, conduct in furtherance of
2 the exercise of the right of free speech in connection with an issue of public interest. In *Tamkin v.*
3 *CBS Broadcasting Inc.*, 193 Cal. App. 4th 133 (2011), the court confirmed that an issue of public
4 interest is “any issue in which the public is interested.” Hunter’s performance in his high profile
5 role falls clearly within this definition; in fact, Hunter boasts about his public persona and the
6 impact that he had on NBA fans and global communities. Hunter claims to have aided people
7 affected by tsunamis in Bangladesh, earthquakes in Haiti, hurricanes in the United States, and the
8 HIV epidemic in Africa. *See* Compl., ¶ 40. Hunter also claims he was responsible for efficiently
9 negotiating collective bargaining agreements that allowed the global fan base to enjoy as many
10 basketball games as possible. *Id.* at ¶ 35. Moreover, throughout Hunter’s tenure he regularly
11 issued press statements, spoke at press conferences, made public appearances, and otherwise held
12 himself out publicly in a job of interest to the general public.⁶ *See* Hermle Decl., ¶ 6, Exh. E.
13 Hunter even created a public website for himself after Paul Weiss released the Report so that the
14 public could understand his “side of the story.”⁷ Clearly he has made every effort to make his
15 performance and involvement in the investigation public, confirming the application of the
16 statute. *Fontani v. Wells Fargo Invs., LLC* (2005) 129 Cal. App. 4th 719, 728 (“Statements that
17 fit the definition of a public issue or an issue of public interest under subdivision (e)(4) generally
18 fall into one of three categories. The first includes statements that “concern[] a person or entity
19 in the public eye.”); *see also ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1008 (2001)
20 (statements about executives and officers, even if critical or disparaging, concern matters of
21 public interest); *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1265 (C.D. Cal.
22 2001) (statements concerned matters of public interest because they were about a publicly traded
23 company and successes or failures of that company could impact investors as well as “market
24 sectors or the markets as a whole”). The slew of articles in major media concerning Hunter’s
25

26
27 ⁶ A Google search for the phrase, “Billy Hunter news conference” produced over 1.6 million results, and a
28 search for the phrase, “Billy Hunter public figure” produced over 30.4 million results, including Hunter’s
Wikipedia page.

⁷ *See* <http://gbillyhunter.blogspot.com/>.

1 potential wrongdoing, the Paul Weiss Report, and Hunter's termination amply confirms that this
2 is a matter of public interest. Hermle Decl., ¶ 6, Exh. E.

3 In addition, this conduct is protected by the second anti-SLAPP category, conduct in
4 connection with an issue under consideration or review by an official proceeding authorized by
5 law. Hunter's breach of contract claims are based on the termination of his employment, which,
6 as he admits, arose out Defendants' participation in the government-induced Paul Weiss
7 investigation. See Compl., ¶ 85. The Union's participation in the investigation is protected under
8 the second category of the anti-SLAPP statute because it constitutes participation in an official
9 proceeding authorized by law. See Section 425.16(e)(2). In fact, the Union, and Fisher as its
10 president, had criminal and civil law obligations to respond to the governmental subpoena and
11 investigation. See, e.g., FED. R. CIV. P. Rule 45(e) ("A party who fails to comply with an
12 otherwise valid subpoena without adequate excuse can be held in contempt and subjected to fines
13 or even imprisonment"); 29 U.S.C. § 431(a)(5)(H) (requiring unions to investigate and provide
14 detailed statements of discipline or removal of agents for breaches of trust). Thus, the Union, and
15 its president, had legal obligations to initiate and participate in the investigation. It follows that
16 the action taken as a direct result of that investigation – i.e., the termination of Hunter's
17 employment – constitutes conduct in furtherance thereof. Hunter readily admits he was
18 terminated as a direct result of the investigation. See Compl., ¶¶ 85, 96-99. In fact, an entire
19 section of Hunter's Complaint is entitled "**Defendants Use the Internal Investigation as a**
20 **Pretext for Terminating Billy Hunter.**" See *id.* at p. 19, line 17.

21 Where the link between the anti-SLAPP protections and the discipline or termination is
22 clear, the termination is protected activity. In *Nesson, supra*, 204 Cal. App. 4th at 78-84, the
23 employer hospital suspended and then terminated the plaintiff. The plaintiff sued for breach of
24 contract, breach of the covenant of good faith and fair dealing, and other claims, alleging that the
25 termination breached his contract. The hospital filed an anti-SLAPP motion, arguing that it
26 terminated the contract following a peer review process, which, although conducted by private
27 parties, was required by law and thus protected by Section 425.16(e)(1). The trial court granted
28 the motion and the court of appeal affirmed. The court of appeal noted that although the plaintiff

1 argued that his contract claims “are based on the termination of his Agreement and not” the peer
2 review proceedings, the anti-SLAPP provision applied. It found that because “the Hospital’s
3 action in terminating the Agreement was ‘inextricably intertwined’ with” the peer review process,
4 the contract and covenant claims were barred: “this court must look to the essence of the
5 contested conduct in order to determine if the suit arises from protected activity...the fundamental
6 premise of Nesson’s claims is the Hospital could not terminate him based on a summary
7 suspension. The first prong of analysis under the anti-SLAPP statute focuses on the acts on
8 which liability is based, not the gestalt of the cause of action.” *Id.* at 83 (quotation marks and
9 citation omitted). Here, where Hunter makes clear that he was terminated as a direct result of the
10 anti-SLAPP protected investigation, *see* Compl., ¶¶ 85, 96-99, Hunter’s first four causes of action
11 “arise from” protected activity under the anti-SLAPP statute.

12 **D. Hunter Cannot Meet His Burden of Establishing A Probability of Success on**
13 **his Breach of Contract Claims Against the Union**

14 Hunter must show that his claims are “both legally sufficient and supported by a sufficient
15 *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the
16 plaintiff is credited.” *Jarrow Formulas Inc. v LaMarche*, 31 Cal. 4th 728, 744 (2003); *see also*
17 Section 425.16(b)(1). In determining whether he has demonstrated the requisite probability, the
18 court must “consider the pleadings, and supporting and opposing affidavits stating the facts upon
19 which the liability or defense is based.” Section 425.16(b)(2). The statute contemplates analysis
20 of the substantive merits of the claims, as well as available defenses, including the statute of
21 limitations. *See Traditional Cat*, 118 Cal. App. 4th at 398. Hunter’s breach of contract claims
22 (First through Fourth causes of action) fail for several independent reasons.

23 **1. Incorporation of Demurrer Arguments**

24 The Union incorporates herein by reference each of its arguments in its accompanying
25 demurrers as to Hunter’s First through Fourth causes of action. In addition, Hunter’s Third Claim
26 for Relief fails for the following independent reason:
27
28

1 2. **Hunter's Breach of Implied Contract Claim Fails Because the Union**
2 **Had Good Cause**

3 Regarding Hunter's Third Claim for Relief for breach of implied contract, the Union
4 undisputedly had good cause to terminate his employment.

5 On an implied contract claim, good cause for termination is satisfied by a "reasoned
6 conclusion . . . supported by substantial evidence gathered through an adequate investigation that
7 includes notice of the claimed misconduct, and a chance for the employee to respond." *Cotran v.*
8 *Rollins Hudig Hall Int'l*, 17 Cal. 4th 93, 108 (1998). When such an investigation has occurred,
9 employers who fire employees for misconduct are not required to prove that the alleged
10 misconduct **actually occurred**. *Id.* at 107, 109; *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256,
11 262 (1998). Rather, the employer must show only that it **reasonably believed** that the alleged
12 misconduct took place. *Id.*

13 Here, the Union, through Paul Weiss, conducted an exhaustive investigation which
14 included an opportunity for Hunter to provide his views – indeed, Paul Weiss interviewed Hunter
15 at length as part of its investigation. Hermle Decl., Exh. A, p. 46. Paul Weiss concluded, among
16 other things, that Hunter acted inconsistently with his fiduciary duties to the Union, knowingly
17 failed to disclose that his \$3 million per year contract was never properly approved, improperly
18 obtained the Union's agreement to pay him \$1.3 million for accrued but allegedly-unused
19 vacation time without documentation and without securing independent advice for the Union on
20 its obligation to make the payment, failed to disclose personal relationships with candidates for
21 employment and parties contracting with the Union, and spent Union funds on personal items
22 such as luxury gifts and personal legal fees. The Report also detailed Hunter's failure to follow
23 the proper procedure for approving his own contract in 2010, and found that he failed to ensure
24 that the Union had independent representation in the negotiation of his 2010 contract, which
25 resulted in an alleged \$13 million dollar contract in his favor.⁸ The Paul Weiss investigators

26 ⁸ Courts will not permit breach of contract claims when the contract is the product of undue influence and
27 overreaching by one party. *See* Cal. Civil Code §§ 1550, 1567, 1575. Whenever "the relations between
28 contracting parties appear to be of such a character as to render it certain that they do not deal on terms of
 equality, but that either on the one side, from superior knowledge of the matter derived from a fiduciary
 relation, or from overmastering influence, or on the other, from weakness, dependence or trust justifiably

1 reached these conclusions after reviewing tens of thousands of documents and interviewing over
2 three dozen witnesses. The U.S. Attorney's Office and the U.S. Department of Labor also
3 participated in the investigation, upon which the Union relied to determine that Hunter's
4 employment should be terminated. *See* Hermle Decl., Exh. C.

5 Although there is no doubt that Hunter **actually engaged** in misconduct, the Report
6 undisputedly establishes the basis for the Union's **reasonable belief** that Hunter engaged in
7 misconduct, which is all that is required. *See Cotran*, 17 Cal. 4th at 100 ("there must be a balance
8 between the employer's interest in operating its business efficiently and profitably and the
9 employee's interest in continued employment. Care must be exercised so as not to interfere with
10 the employer's legitimate exercise of managerial discretion . . . An employer must have wide
11 latitude in making independent, good faith judgments about high-ranking employees without the
12 threat of a jury second-guessing its business judgment."). Hunter's breach of implied contract
13 claim fails as a matter of law.

14 **IV. REQUEST FOR ATTORNEYS' FEES**

15 An award of reasonable attorney's fees and costs to a defendant who prevails on a Section
16 425.16 motion to strike is "mandatory." Section 425.16(c); *Ketchum v. Moses*, 24 Cal. 4th 1122,
17 1131 (2001). The prevailing party may seek fees with the special motion, by subsequent motion,
18 or by a cost memorandum at the conclusion of the litigation. *Am. Humane Ass'n v. Los Angeles*

19
20 reposed, unfair advantage in a transaction is rendered probable . . . the transaction is presumed void."
21 *Barnard v. Gantz*, 140 N.Y. 249, 256-57 (1893); *see also In re Estate of LoGuidice*, 186 A.D.2d 659, 659-
22 60 (N.Y.A.D. 1992)(where nephew was sophisticated commercial actor, he had the support of his
23 fiancée's legal knowledge, and the other contracting party had insufficient education and was partially
dependent on him, the lease transaction was both unconscionable and void as the product of undue
influence).

24 Moreover, when one contracting party (i) holds a position requiring the trust of the other; (ii) is aware of
25 his relative advantages in legal savvy, and commercial experience; and (iii) chooses to exploit these
26 advantages, rather than instruct that other party to seek out truly independent consultation, the resulting
agreement will be void for unconscionability. *See, e.g., 520 East 7ndst Street Comm. Corp. v. 520 East 7nd*
Owners Corp., 691 F. Supp. 728, 738 (S.D.N.Y. 1988) ("At the time Mr. Lapidus executed the
[unconscionable] contingency agreement, he stood in a fiduciary capacity vis-à-vis the Cooperative.").
27 Moreover, "it will be a rare case where an unconscionable agreement may be [subsequently] ratified by the
28 client." *King v. Fox*, 7 N.Y.3d 181, 191 (N.Y. 2006) (noting that "ratification induced by misconduct
would be invalid").

1 *Times Commc'ns*, 92 Cal. App. 4th 1095, 1103 (2001); *Doe v. Luster*, 145 Cal. App. 4th 139,
2 144, n.4 (2006).

3 Hunter's lawsuit is designed to chill Defendants' rights to free speech, and he cannot
4 prevail on any of his fourteen causes of action. Defendant NBPA asks the Court to find that it is
5 entitled to reasonable fees and costs and that it may submit the amount incurred upon the Court's
6 finding and order dismissing the action.

7 **V. CONCLUSION**

8 It is the duty of every citizen to cooperate in the investigation of crime and to provide
9 information to investigators, and defendants cannot be liable for "fulfill[ing] this duty." *Hagberg*
10 *v. Ca. Fed. Bank FSB*, 32 Cal. 4th 350, 373 (2004). Defendants were exercising their first
11 amendment right to free speech regarding their concerns with Hunter's improper business tactics.
12 Defendants' concerns were substantiated by the U.S. Attorney's Office, the U.S. Department of
13 Labor, and the independent investigation Paul Weiss conducted. Based on the totality of
14 evidence, the Union terminated Hunter's employment. In doing so, the Union was protecting its
15 interests and the interests of its members. Hunter has nonetheless chosen to file the instant
16 lawsuit, seeking to chill Defendants' rights to free speech. Hunter's claims must be dismissed, as
17 the conduct alleged in support thereof is expressly protected by the anti-SLAPP statute.

18 Dated: July 1, 2013

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