

1 James A. Otto, SBN: 144432
LAW OFFICE OF JAMES A. OTTO
2 19536 San Jose Street
Northridge, California 91326
3 Telephone: (818) 366-8432
Facsimile: (818) 368-7757
4

5 ELKIN GAMBOA & ASHKINADZE LLP
Regina Ashkinadze, Esq. (SBN: 256908)
Jessica Gamboa, Esq. (SBN: 285773)
6 144 N. GLENDALE AVE., SUITE 333
GLENDALE, CA 91206
7 TELEPHONE: (323) 372-1202
TELEFAX: (323) 372-1216
8

9 Attorneys for Defendant,
NICHOLAS BEHUNIN

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN FRANCISCO**

12 CHARLES R. SCHWAB, an individual,
13 Plaintiff,

14 vs.

15 LEONARD STEINER, an individual;
STEINER & LIBO, P.C., a California
16 professional corporation; NICHOLAS
BEHUNIN, an individual; DOES 1-10,
17 inclusive,

18 Defendants.
19
20

Case No. CGC-14-542436

**DEFENDANT NICHOLAS BEHUNIN'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SPECIAL MOTION TO STRIKE
STRATEGIC LAWSUIT AGAINST
PUBLIC PARTICIPATION**

[Filed concurrently with Request for Judicial
Notice]

Date: February 5, 2015
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Ernest H. Goldsmith
Reservation Number 121614-01

21
22 **TO THE HONORABLE COURT, ALL PARTIES AND THEIR ATTORNEYS OF**
23 **RECORD:**

24 Defendant Nicholas Behunin respectfully submits the following Memorandum of Points
25 and Authorities in support of his Special Motion to Strike Strategic Lawsuit Against Public
26 Participation.
27
28

TABLE OF CONTENTS

1

2 I. INTRODUCTION 7

3 II. STATEMENT OF FACTS 7

4 III. ARGUMENT 8

5 A. California’s Anti-SLAPP Law Protects Fundamental

6 Constitutional Speech And Is To Be Construed Broadly 8

7 B. Code of Civil Procedure Section 425.16 Requires The Court To

8 Utilize A Two-Step Process To Determine Whether To Strike

9 The Offending Pleading 8

10 C. Plaintiff’s Complaint Arises Out Of Behunin’s Exercise Of

11 Constitutionally-Protected Speech, And Concerns A Matter Of

12 Public Interest 9

13 1. The Website at issue in this case is a public forum 10

14 2. The statements contained on the Website are a matter of public interest 10

15 D. Plaintiff Cannot Establish A Probability Of Prevailing On His Libel Claim 14

16 1. Plaintiff, who is a public figure, has failed to plead, and cannot

17 make a clear and convincing showing with admissible evidence,

18 that Behunin acted with actual malice in publishing the allegedly false

19 statements, and therefore, such statements are privileged 14

20 i. Schwab’s ties to the Suharto family; Charles Schwab’s

21 and Michael Schwab’s business deals with Tommy Suharto 18

22 ii. Charles and Helen Schwab Foundation used to indirectly

23 fund investment deals with the Suharto family 19

24 iii. Schwab being an anchor investor in land deals with

25 the Suharto family 19

26 2. All of the allegedly offending statements are true, and truth

27 is a complete defense to libel actions 20

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. The offending statements are not provably false factual assertions,
and therefore are not defamatory as a matter of law 21

IV. DEFENDANT IS ENTITLED TO ATTORNEY’S FEES AND COSTS 22

V. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Ampex Corp. v. Cargle (2005) 128 Cal.App.4th 1569 19

Anderson v. Liberty Lobby (1986) 477 U.S. 242..... 18

Antonovich v. Superior Court (1991) 234 Cal.App.3d 1041 19

Averill v. Superior Court (1996) 42 Cal.App.4th 1170 13

Barrett v. Rosenthal (2006) 40 Cal.4th 33..... 12

Bindrim v. Mitchell (1979) 92 Cal.App.3d 61 18

Braun v. Chronicle Publishing (1997), 52 Cal.App.4th 1036 11

Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106..... 10, 16

Campanelli v. Regents of Univ. of Calif. (1996) 44 Cal.App.4th 572 23

Campanelli v. Regents of University of California (1996) 44 Cal.App.4th 572..... 24

Carver v. Bonds (2005) 135 Cal.App.4th 328 14

Chaker v. Mateo (2012) 209 Cal.App.4th 1138 22

Christian Research Institute v. Alnor (2007) 148 Cal.App.4th 71 17, 19

City Of Cotati v. Cashman (2002) 29 Cal.4th 69 11

Computerexpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993 12, 14

Cross v. Cooper (2011) 197 Cal.App.4th 357 13, 14

Curtis Publishing Co v. Butts (1967) 388 U.S. 130..... 18

Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468..... 12, 13

Dible v. Haight Ashbury Free Clinics (2009) 170 Cal.App.4th 843 12

Ellenberger v. Espinosa (1994) 30 Cal.App.4th 943..... 22

Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53..... 11

Fletcher v. San Jose Mercury News (1989) 216 Cal.App.3d 172 18, 24

Francis v. Dun & Bradstreet (1992) 3 Cal.App.4th 535 22

Gantry Const. Co. v. American Pipe & Const. Co. (1975) 49 Cal.App.3d 186 22

Gertz v. Robert Welch (1974) 418 U.S. 323..... 17, 18

1	<i>Gilbert v. Sykes</i> (2007) 147 Cal.App.4th 13.....	16, 22
2	<i>Gill v. Hughes</i> (1991) 227 Cal.App.3d 1299.....	22
3	<i>Glenn v. Gibson</i> (1946) 75 Cal.App.2d 649.....	22
4	<i>Greenbelt Cooperative Publishing Assn. v. Bresler</i> (1970) 398 U.S. 6.....	18
5	<i>Harte-Hanks Communications v. Connaughton</i> (1989) 491 U.S. 657.....	18, 19, 20
6	<i>Heuer v. Kee</i> (1936) 15 Cal.App.2d 710.....	22
7	<i>Jackson v. Paramount Pictures Corp.</i> (1998) 68 Cal.App.4th 10.....	19
8	<i>Jensen v. Hewlett-Packard Co.</i> (1993) 14 Cal.App.4th 958.....	23
9	<i>Lieberman v. KCOP Television, Inc.</i> (2003) 110 Cal.App.4th 156.....	13
10	<i>Macias v. Hartwell</i> (1997) 55 Cal. App. 4th 669.....	13
11	<i>McGarry v. University Of San Diego</i> (2007) 154 Cal.App.4th 97.....	12, 15, 17
12	<i>Miller v. Nestande</i> (1987) 192 Cal.App.3d 191.....	19
13	<i>Morrow v. Los Angeles Unified School Dist.</i> (2007) 149 Cal.App.4th 1424.....	15
14	<i>Moyer v. Amador Valley Joint Union High School District</i> (1990) Cal. App. 3d 720.....	23
15	<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82.....	10, 11
16	<i>New York Times Co. v. Sullivan</i> (1964) 376 U.S. 254.....	17, 18
17	<i>Nygard, Inc. v. Usi-Kerttula</i> (2008) 159 Cal.App.4th 1027.....	12, 13, 14, 16
18	<i>Okun v. Superior Court</i> (1981) 29 Cal.3d 442.....	23
19	<i>Overstock.com v. Gradient Analytics</i> (2007) 151 Cal.App.4th 688.....	17, 18, 19
20	<i>Reader' Digest Assn. v. Superior Court</i> (1984) 37 Cal.3d 244.....	17, 18
21	<i>Rivera v. First Databank, Inc.</i> (2010) 187 Cal.App.4th 709.....	13, 14
22	<i>Robertson v. Rodriguez</i> (1995) 36 Cal.App.4th 347.....	19
23	<i>Rohde v. Wolf</i> (2007) 154 Cal.App.4th 28.....	10
24	<i>Rubin v. Green</i> (1993) 4 Cal. 4th 1187.....	10
25	<i>Ruiz v. Harbor View Community Assn.</i> (2005) 134 Cal.App.4th 1456.....	15
26	<i>Schmidt v. Foundation Health</i> (1995) 35 Cal.App.4th 1702.....	22
27	<i>Seelig v. Infinity Broadcasting Corp.</i> (2002) 97 Cal.App.4th 798.....	23
28	<i>Sipple v. Foundation for Nat. Progress</i> (1999) 71 Cal.App.4th 226.....	17, 18, 24

1	<i>Stewart v. Rolling Stone LLC</i> (2010) 181 Cal.App.4th 664	13
2	<i>Swaffield v. Universal Ecsco Corp.</i> (1969) 271 Cal.App.2d 147	22
3	<i>Tague v. Citizens for Law & Order</i> (1977) 75 Cal.App.3d Supp. 16.....	18
4	<i>Terry v. Davis Community Church</i> (2005) 131 Cal.App.4th 1534.....	22
5	<i>Vogel v. Felice</i> (2005) 127 Cal.App.4th 1006.....	16, 18
6	<i>Weller v. American Broadcasting Cos.</i> (1991) 232 Cal.App.3d 991	23
7	<i>Wilbanks v. Wolk</i> (2004) 121 Cal.App.4th 883	13
8	<i>Wong v. Tai Jing, et al.</i> , (2010) 189 Cal.App.4th 1354.....	12
9	<i>World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.</i> (2009) 172 Cal.App.4th 1561.....	15
10	Statutes	
11	Cal. Civ. Code § 45	17
12	Cal. Code Civ. Proc. § 425.16.....	9, 10, 11, 12, 13, 15, 16
13	Cal. Code Civ. Proc. § 425.26.....	24
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a defamation case brought by a public figure – Charles Schwab. Plaintiff alleges
4 that Behunin created a publicly-accessible website that contains false statements concerning
5 Schwab’s business dealings. Plaintiff has alleged a single cause of action for libel against
6 Behunin. Plaintiff’s complaint is an attempt to abridge Behunin’s First Amendment rights to
7 engage the general public in a matter of public interest involving a public figure. Plaintiff cannot
8 make his *prima facie* case showing that the statements contained on Behunin’s alleged website are
9 defamatory. Plaintiff’s Complaint most illustratively demonstrates the purpose of the enactment of
10 Code of Civil Procedure section 425.16 and presents a quintessential SLAPP case that should be
11 stricken as a meritless suit filed primarily to chill Behunin’s free speech rights.

12 **II. STATEMENT OF FACTS**

13 On May 28, 2014, Behunin filed suit against Schwab for fraud involving a real estate deal.
14 (Behunin’s Complaint, attached as Exhibit “1” to Ashkinadze Decl.; Request for Judicial Notice
15 [“RJN”] ¶ 1.) Behunin’s complaint alleges that he was defrauded by Schwab, when Schwab cut
16 Behunin out of various business deals that they were working on together. (*Id.*)

17 On October 30, 2014, Schwab filed the instant complaint in retaliation to Behunin having
18 filed his May 28, 2014 lawsuit for fraud. Schwab’s complaint alleges that Behunin created a
19 publically-accessible website called “www.chuck-you.com” (the “Website”), wherein Behunin
20 attempted to defame Schwab by “falsely associating him with the misconduct committed by one
21 of the most brutal and corrupt dictators of the 20th century, former Indonesian President Suharto.”
22 (Schwab Complaint ¶ 1, attached as Exhibit “2” Ashkinadze Decl.; RJN ¶ 2.)

23 Schwab takes issue with the following types of statements on the “www.chuck-you.com”
24 website, which Schwab alleges are libelous: (1) “Looking to launder money overseas? Chuck can
25 help!”; (2) “Looking to profit from a brutal dictator? Ask Chuck.”; (3) Schwab is an
26 “international plunderer” and engaged in “exploitation abroad”; (4) Schwab entered into business
27 deals with members of the Suharto family, who are descendants of an infamous brutal dictator
28 (President Suharto), including Tommy Suharto who was convicted of murder and who was

1 accused of seizing land through force; and (5) that some of these business deals were indectly
2 funded by the Charles and Helen Schwab Foundation. (Schwab complaint ¶¶13-18, Exh. 2.)

3 Schwab’s complaint is meant to achieve nothing more than to chill Behunin’s right to
4 petition the courts, as it was clearly filed in retaliation for having been sued by Behunin in the
5 May 28, 2014 action against Charles Schwab. (See Cal. Code Civ. Proc. § 425.16 (e)(1) and (2).)

6 **III. ARGUMENT**

7 **A. California’s Anti-SLAPP Law Protects Fundamental Constitutional Speech**
8 **And Is To Be Construed Broadly**

9 “A cause of action against a person arising from any act of that person in furtherance of the
10 person’s right of petition or free speech under the United States or California Constitution in
11 connection with a public issue shall be subject to special motion to strike...unless the court
12 determines the plaintiff has established that there is a probability that the plaintiff” will “prevail on
13 the claim.” (Cal. Code Civ. Proc. § 425.16.) *Code of Civil Procedure*¹ (“CCP”), section 425.16,
14 enables a defendant to seek early dismissal of a cause of action by means of a special motion to
15 strike. Section 425.16 is “construed broadly, to protect the right of litigants to ‘the utmost
16 freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort
17 actions.’” (See CCP § 425.16, subd. (a); *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35; *Rubin v.*
18 *Green* (1993) 4 Cal. 4th 1187, 1194; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19
19 Cal. 4th 1106, 1119.)

20 **B. Code of Civil Procedure Section 425.16 Requires The Court To Utilize A Two-**
21 **Step Process To Determine Whether To Strike The Offending Pleading**

22 “Section 425.16 posits ... a two-step process for determining whether an action is a
23 SLAPP.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) “First, the court decides whether the
24 defendant has made a threshold showing that the challenged cause of action is one arising from
25 protected activity,” such as free speech or petition of the courts. (*Id.* at 88; *Braun v. Chronicle*
26 *Publishing* (1997), 52 Cal.App.4th 1036, 1042-1043.) “A defendant meets this burden by

27 _____
28 ¹ All further references are to the *Code of Civil Procedure*, unless otherwise noted.

1 demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in
2 section 425.16, subdivision (e)....” (*City Of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)
3 (Citations Omitted.) If the court finds that such a showing has been made, it must then determine
4 whether the plaintiff has “demonstrated a probability of prevailing on the claim.” (*Navellier*,
5 *supra*, 29 Cal.4th at 88.) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP
6 statute-i.e., that arises from protected speech or petitioning *and* lacks even minimal merit is a
7 SLAPP, subject to being stricken under the statute.” (*Id.* at 89.)

8 **C. Plaintiff’s Complaint Arises Out Of Behunin’s Exercise Of Constitutionally-**
9 **Protected Speech, And Concerns A Matter Of Public Interest**

10 A claim arises from “protected activity” if it arises from “(1) any written or oral statement
11 or writing made before a legislative, executive, or judicial proceeding, or any other official
12 proceeding authorized by law, (2) any written or oral statement or writing made in connection with
13 an issue under consideration or review by a legislative, executive, or judicial body, or any other
14 official proceeding authorized by law, (3) any written or oral statement or writing made in a place
15 open to the public or a public forum in connection with an issue of public interest, or (4) any other
16 conduct in furtherance of the exercise of the constitutional right of petition or the constitutional
17 right of free speech in connection with a public issue or an issue of public interest.” (CCP §
18 425.16, subd. (e).)

19 The critical inquiry under this prong is “whether the cause of action is *based on* the
20 defendant’s protected free speech or petitioning activity.” (*Navellier, supra*, 29 Cal.4th at 89; see
21 *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Equilon Enterprises v. Consumer Cause, Inc.*
22 (2002) 29 Cal.4th 53, 66.) In assessing this requirement, the court considers “the pleadings, and
23 supporting and opposing affidavits stating the facts upon which the liability or defense is based.”
24 (CCP § 425.16, subd. (b); see *City of Cotati, supra*, 29 Cal.4th at 79.) Accordingly, the “form” of
25 the action is not material; rather the activity alleged that “constitutes protected speech or
26 petitioning” is material to the court’s analysis of the application of section 425.16. (*Navellier*,
27 *supra*, 29 Cal.4th at 92-93.) The court’s preliminary inquiry “is to determine exactly what act of
28 the defendant is being challenged by plaintiff,” and in so doing, the court will look at the papers

1 filed, and admissible evidence, in opposition to the extent that they might give meaning to the
2 complaint. (*Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843, 849-850.)

3 **1. The Website at issue in this case is a public forum**

4 A public forum is traditionally defined as a place that is open to the public where
5 information is freely exchanged. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal. App. 4th
6 468, 475.) The Courts have liberally construed this definition when applying section 425.16. In
7 *Damon*, the Court stated that a newsletter, even one with a single viewpoint, was a public forum
8 under section 425.16 because it communicated messages about “public matters to a large and
9 interested community.” (*Id.* at 476.) It is well established that an internet website is “a place open
10 to the public or a public forum” pursuant to Section 425.16, subdivision (e)(3). (*McGarry v.*
11 *University Of San Diego* (2007) 154 Cal.App.4th 97, 110-111; *Wong v. Tai Jing, et al.*, (2010)
12 189 Cal.App.4th 1354, 1366; *Computerxpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1006-
13 1007; *Nygaard, Inc. v. Usi-Kerttula* (2008) 159 Cal.App.4th 1027, 1038-1039; *Barrett v. Rosenthal*
14 (2006) 40 Cal.4th 33, 41, fn. 3.)

15 Here, Schwab’s complaint concerns statements contained on a publicly-accessible website
16 on the internet called “www.chuck-you.com”. Specifically, the complaint alleges that, “[i]n an
17 effort to reach the broadest possible audience or the false and defamatory statements in the
18 Website, the Website included links to social media, including Facebook, Twitter, and LinkedIn.
19 The Website urged viewers to ‘Tell Chuck!’ – *i.e.*, of their disapproval of Schwab’s purported
20 conduct – by posting Twitter messages with the Twitter hashtag ‘chuckyou.’” (Schwab complaint
21 ¶ 20, Exh. 2.) The complaint alleges that the Website maintains an area where readers can post and
22 discuss issues of interest to the community concerning Schwab’s business practices. Even
23 Schwab’s own complaint recognizes that the Website at issue in this case is a “place open to the
24 public or a public forum.” (Schwab complaint ¶¶ 25, 30, Exh. 2.)

25 **2. The statements contained on the Website are a matter of public interest**

26 Whether or not the challenged publication occurred in a public forum is without
27 consequence in light of CCP section 425.16(e)(4), which includes conduct and/or communication
28 “made in furtherance of the exercise of the constitutional right of petition or the constitutional

1 right of free speech in connection with a public issue or an issue of public interest.” Section
2 425.16, subdivision (e)(4), sometimes referred to as a “catch-all” provision, identifies as protected
3 “any other conduct” in furtherance of the exercise of the rights of petition or free speech in
4 connection with an issue of public interest. (*Lieberman v. KCOP Television, Inc.* (2003) 110
5 Cal.App.4th 156, 164). Subdivision (e)(4) of section 425.16 includes purely private
6 communications that concern a public issue. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 897;
7 *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175.)

8 “Section 425.16 does not define ‘public interest’ or ‘public issue,’” because “those terms
9 are inherently amorphous and thus do not lend themselves to a precise, all-encompassing
10 definition.” (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371.) Accordingly, the definition of
11 “public interest” or “public issue” are broadly construed to include not only governmental matters,
12 but also private conduct that impacts a broad segment of society or a community in a manner
13 similar to that of a governmental entity. (*Id.* at 372-373; *Nygaard, supra*, 159 Cal.App.4th at 1039;
14 *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176 [private conversations are protected if
15 they concern public interest.]) “[M]atters of public interest... include activities that involve private
16 persons and entities, especially when a large, powerful private organization may impact the lives
17 of many individuals.” (*Macias v. Hartwell* (1997) 55 Cal. App. 4th 669, 674.)

18 A statement or other conduct is made in connection with a public issue or an issue of
19 public interest “if the statement or conduct concerns a topic of widespread public interest and
20 contributes in some manner to a public discussion of the topic.” (*Rivera v. First Databank, Inc.*
21 (2010) 187 Cal.App.4th 709, 716; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677-
22 678.) An issue of “public interest” within the meaning of section 426.16(e)(3), and by virtue of
23 identical language in subdivision (e)(4), “is *any issue in which the public is interested*”, including
24 “private conduct that impacts a broad segment of society and/or that affects a community in a
25 manner similar to that of a governmental entity” (*Damon, supra*, at p. 479). (*Rivera, supra*, 187
26 Cal.App.4th at 716 (emphasis in original); *Cross, supra*, 197 Cal.App.4th at 379 [private
27 conversation regarding the location of a sex offender “a subject specifically and directly related to
28 an issue of compelling and widespread interest.”]; *Nygaard, supra*, 159 Cal.App.4th at 1042

1 [Newspaper article about the details of the work place made by a former employee is of public
2 interest to the 12,000 employees of defendant corporation.]; *Carver v. Bonds* (2005) 135
3 Cal.App.4th 328, 343-344 [newspaper article about medical practitioner involved issue of public
4 interest where information would assist others in choosing doctors]; *Computerxpress, Inc. v.*
5 *Jackson (supra)* 93 Cal.App.4th at 1007-1008 [criticism of products and management published
6 on the internet was of public interest to the 18,000 investors in a publicly traded corporation.] In
7 assessing the public interest, the court will construe the term broadly and consider whether the
8 issue is of concern to a substantial number of people and whether the challenged statements and
9 the public interest are closely related. (*Rivera, supra*, 187 Cal.App.4th at 716.)

10 Here, the statements allegedly published on the Website, a public forum, by Behunin
11 concerned the association between Schwab and the Suharto family. The alleged association
12 between Schwab and Suharto is a matter of public interest because (1) Schwab is a well-known
13 public figure, who runs a publicly-traded company that manages trillions of dollars in investments
14 for millions of clients, and who holds himself out to the public as a person with uncompromised
15 integrity and trust, commanding confidence of the public at large; (2) the Suharto family is well
16 known for the many atrocities committed by General Suharto over many decades of rule in
17 Indonesia, including exploitation and murder of countless Indonesians, as well as widespread
18 corruption. (Schwab company and asset management information, attached as Exhibit “3” to
19 Ashkinadze Decl.; Articles about the Suharto family, attached as Exhibits 35-36, 40-42, 57-59 to
20 Behunin Decl.; RJN ¶ 8-10.) The public issues discussed by Behunin on the Website focus
21 exclusively on the duplicitous nature of Schwab, where, on one hand, Schwab runs a respectable
22 company backed by his integrity, and on the other hand, Schwab is engaged in nefarious business
23 deals with brutal and infamous criminals. The comments emphasize Schwab’s cooperation,
24 funding, and participation in investments and real estate deals with members of the Suharto family
25 through shell companies and through Schwab’s own philanthropic Foundation.

26 Without doubt, Schwab’s participation in investments and business dealings with criminals
27 and exploitators on the scale of crimes committed by the Suharto family is a matter of interest to
28 the public – i.e. to the thousands of employees who work for Schwab’s company; to the thousands

1 of shareholders in the Charles Schwab Corporation; to the millions of investors who have invested
2 trillions of dollars with Schwab and his company, and who rely on Schwab's expertise in finance
3 and investment management; as well as to the United States government and other private and
4 public entities, in the context of the ongoing public debate and discussion over Schwab's financial
5 and business activities, including philanthropic activities, wherein such monies actually fund and
6 enable nefarious conduct by the surviving members of the Suharto family. (See, e.g., *Ruiz v.*
7 *Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468 [dispute over architectural
8 guidelines for community was of public interest to community's board members and owners of
9 523 lots]; *Damon, supra*, 85 Cal.App.4th at 479 [statements in election dispute related to
10 management of homeowners association concerned issues of public interest to over 3,000
11 members of the community].)

12 The business and investment activities of Schwab, vis-à-vis a known crime family on the
13 large scale contemplated by these deals implicates more than merely “a broad and amorphous
14 interest” unconnected to the specific dispute at issue. (See *World Financial Group, Inc. v. HBW*
15 *Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570, and cases discussed therein.)
16 Thus, the statements allegedly made by Behunin directly involve public interest issues, triggering
17 section 425.16 protection. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 110
18 [rejecting argument that even if termination of a university's football coach was of public interest,
19 the confidential reasons for the termination were not]; *Morrow v. Los Angeles Unified School Dist.*
20 (2007) 149 Cal.App.4th 1424, 1437 [rejecting argument that article's mention of principal's
21 retirement was a purely private matter because the fact directly concerned the school district's
22 solution to student violence, the topic of the article].)

23 While Schwab is an individual, the company that Schwab runs as Chairman of the Board
24 of Directors is a large private organization that affects the lives of millions of individual investors
25 and shareholders. (See Exh. 3; Charles Schwab biography, attached as Exhibit “4” to Ashkinadze
26 Decl.) The statements allegedly contained on the Website concern Schwab's business dealings.
27 The millions of investors whose assets are managed by Schwab and/or his company under his
28 guidance would be interested to know if their money is being invested into real estate funds and

1 ventures that benefit the Suharto family - a criminal organization. The donors who donate to the
2 Charles and Helen Schwab Foundation would be interested to know if their donations are being
3 funneled into real estate deals that benefit the Suharto family, jointly with Schwab. (Charles and
4 Helen Schwab Foundation information, attached as Exhibit “5” to Ashkinadze Decl.) Without
5 question, it is important to investors and to philanthropic donors to know how their money will be
6 invested, so that they can make educated decisions regarding their investments and donations.

7 **D. Plaintiff Cannot Establish A Probability Of Prevailing On His Libel Claim**

8 When a moving defendant makes the required first-step showing, the court must determine
9 whether the plaintiff has demonstrated a “probability” that he or she will prevail on his or her
10 claim. (CCP § 425.16, subd. (b)(1); *Oasis West, supra*, 51 Cal.4th at 820.) To satisfy the second
11 prong of the Section 425.16 test, a plaintiff must state and substantiate a legally sufficient claim
12 with admissible evidence. (CCP § 425.16.) Put another way, the plaintiff “must demonstrate that
13 the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts
14 to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (*Briggs v.*
15 *Eden Council For Hope And Opportunity (supra)* 19 Cal.4th at 1121; *Nygård, Inc. v. Uusi-*
16 *Kerttula (supra)* 159 Cal.App.4th at 1044.) A complaint is legally sufficient when it establishes all
17 of the essential elements of a cause of action. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017
18 [the complaint was insufficient as it failed to plead an essential element of the cause of action];
19 *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31 [the complaint was insufficient as it failed to plead
20 an essential element of the cause of action.]

21 **1. Plaintiff, who is a public figure, has failed to plead, and cannot make a**
22 **clear and convincing showing with admissible evidence, that Behunin**
23 **acted with actual malice in publishing the allegedly false statements,**
24 **and therefore, such statements are privileged**

25 “Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other
26 fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or
27 obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in
28 his occupation.” (Cal. Civ. Code § 45.) It is black letter law that “[o]ne who publishes a false and

1 defamatory communication concerning a public official or public figure in regard to his conduct,
2 fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement
3 is false and that it defames the other person, or (b) acts in reckless disregard of these matters.”
4 (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 280.)

5 Persons who occupy positions of such persuasive power and influence are deemed public
6 figures, for all purposes. (*Gertz v. Robert Welch* (1974) 418 U.S. 323, 344; *Reader’ Digest Assn.*
7 *v. Superior Court* (1984) 37 Cal.3d 244, 253; *Sipple v. Foundation for Nat. Progress* (1999) 71
8 Cal.App.4th 226, 248 [nationally known political strategist was public figure]; *Ampex Corp. v.*
9 *Cargle*(2005) 128 Cal.App.4th 1569, 1578 [corporation that was subject of allegedly defamatory
10 Internet postings was a public figure; it was publicly traded and had inserted itself into the
11 controversy through press releases and letters made available on Internet]; *Christian Research*
12 *Institute v. Alnor* (2007) 148 Cal.App.4th 71, 81 [nonprofit organization and organization’s
13 president were public figures and thus had burden in defamation action of proving both that
14 challenged statement was false and that defendant acted with actual malice]; *Overstock.com v.*
15 *Gradient Analytics* (2007) 151 Cal.App.4th 688, 700 [online closeout retailer was public figure];
16 *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 115 [college coach was public
17 figure; plaintiff voluntarily entered public arena by pursuing that career and lost protection for his
18 reputation to extent that allegedly defamatory communications related to job performance].)

19 Here, it is undisputed that Schwab is a public figure. (RJN ¶¶ 3-6.) First, Schwab’s
20 complaint alleges that, “Plaintiff Charles R. Schwab is a well-known and widely respected
21 business leader and investor and is the Chairman and founder of the Charles Schwab Corporation,
22 a brokerage and banking company. For decades, Schwab has enjoyed a good reputation both
23 personally and professionally.” (Schwab complaint ¶ 2, Exh. 2.) Second, the Charles Schwab
24 Corporation referred to in the complaint is a publicly-traded company that services millions of
25 investors and manages trillions of dollars in investments. (Exh. 3; Charles Schwab Corporation
26 10-Q Report, attached as Exhibit 6 to Ashkinadze Decl.) This information is reiterated on Charles
27 Schwab Corporation’s website, and the company’s public filings with the Securities and Exchange
28 Commission. (Exh. 3, 6.) Schwab continues to be the Chairman of the Board of Directors of the

1 Charles Schwab Corporation. (Exh. 4.) Schwab’s name, image and likeness is well-recognized in
2 the media. (RJN ¶ 3-6.) Schwab is the spokesperson for the Charles Schwab Corporation, and
3 appears regularly in television commercials in which he holds himself out as an expert in
4 investment. (*Id.*) Undoubtedly, Schwab occupies a position of persuasive power and influence in
5 the media and in his field as a prominent expert in investment management. (RJN ¶ 3-7.)

6 The *New York Times* rule, applicable in actions by public figures, protects false statements
7 of fact as well as opinions where the same are made without actual malice - i.e., the privilege
8 exists unless the statements were made with knowledge of falsity or in reckless disregard of the
9 truth. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-281; *Gertz v. Robert Welch*
10 (1974) 418 U.S. 323, 332, 349; *Curtis Publishing Co v. Butts* (1967) 388 U.S. 130, 156; *Greenbelt*
11 *Cooperative Publishing Assn. v. Bresler* (1970) 398 U.S. 6, 10; *Harte-Hanks Communications v.*
12 *Connaughton* (1989) 491 U.S. 657, 666-667; *Belli v. Curtis Publishing Co.* (1972) 25 Cal.App.3d
13 384, 388; *Reader’s Digest Assn., supra*, 37 Cal.3d at 253; *Gallagher v. Connell* (2004) 123
14 Cal.App.4th 1260, 1272 [whether plaintiff is a public figure is question of law].)

15 In an action initiated by a public figure, or an action by a private person relating to
16 statements on a matter of public concern, the First Amendment requires that the plaintiff bear the
17 burden of proving falsity. (See *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1021.) The plaintiff
18 must prove, **with convincing clarity**, that the defendant published the matter with knowledge or
19 in reckless disregard of its falsity and its defamatory character. (See *New York Times, supra*, 376
20 U.S. at 285-286) (emphasis added). The constitutional requirement of showing the existence of
21 actual malice requires “clear and convincing evidence”. (*Overstock.com, supra*, 151 Cal. App. 4th
22 at 700; *Sipple v. Foundation for Nat. Progress, supra*, 71 Cal.App.4th at 247; *Reader’s Digest*
23 *Assn., supra*, 37 Cal.3d at 252; *Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 252-256 ; *Tague*
24 *v. Citizens for Law & Order* (1977) 75 Cal.App.3d Supp. 16, 25; *Bindrim v. Mitchell* (1979) 92
25 Cal.App.3d 61, 72; *Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172; *Antonovich v.*
26 *Superior Court* (1991) 234 Cal.App.3d 1041, 1049; *Robertson v. Rodriguez* (1995) 36
27 Cal.App.4th 347, 358; *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 33.)

28 “[T]he actual malice standard is not satisfied merely through a showing of ill will or

1 'malice' in the ordinary sense of the term. ... Actual malice ... requires at a minimum that the
2 statements were made with a reckless disregard for the truth. And although the concept of
3 'reckless disregard' cannot be fully encompassed in one infallible definition,—... we have made
4 clear that the defendant must have made the false publication with a 'high degree of awareness of
5 ... probable falsity,' ... or must have 'entertained serious doubts as to the truth of his
6 publication.'" (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657 667, quoting
7 *St. Amant v. Thompson* (1968) 390 U.S. 727.) **Actual malice focuses on the defendant's attitude**
8 **toward the truth or falsity of his statements rather than his attitude toward the plaintiff.**
9 (*Jackson v. Paramount Pictures Cory* (1998) 68 Cal.App.4th 10, 32.) The actual malice standard
10 applies to, and can be asserted by, nonmedia defendants with respect to matters of public concern.
11 (*Miller v. Nestande* (1987) 192 Cal.App.3d 191.)

12 To make a *prima facie* showing of actual malice, a plaintiff cannot simply rely on their
13 own declaration that certain statements are false; especially in light of declarations or other
14 admissible evidence offered by the moving defendant setting forth the defendant's basis for the
15 allegedly defamatory statements. (*Ampex Corp., supra*, 128 Cal.App.4th at 1578; *Christian*
16 *Research Institute, supra* 148 Cal.App.4th at 81; *Overstock.com, supra*, 151 Cal.App.4th at 710
17 [plaintiff corporation established *prima facie* case that investment analysts published reports in
18 reckless disregard of truth; evidence showed that analyst published negative reports at behest of
19 short-selling clients in order to depress price of plaintiff's shares].)

20 Here, other than pleading conclusions that the statements made on the Website were made
21 with "actual malice", there are no factual allegations in the complaint to show the basis for this
22 conclusion. Schwab alleges that none of the offending statements are true, however, this allegation
23 alone is insufficient to withstand the burden of showing plaintiff's *prima facie* case sufficient to
24 withstand this Anti-SLAPP Motion. Plaintiff also alleges that Behunin allegedly created the
25 Website in order to gain an unfair advantage in the lawsuit first filed by Behunin against Schwab.
26 Again, even if this was true, this may establish ill will at best, which is insufficient to withstand
27 this Anti-SLAPP Motion pursuant to *Harte-Hanks Communications v. Connaughton* (1989) 491
28 U.S. 657. Schwab's complaint is insufficient as a matter of law on this basis alone.

1 Further, this court’s only focus must be Behunin’s attitude toward the statements he was
2 making, rather than his like or dislike, or even ill will, toward Schwab. (See *Jackson, supra*, 68
3 Cal.App.4th at 32.) In other words, Behunin’s motivation for making the statements is irrelevant,
4 instead, the court’s inquiry is as follows: when Behunin allegedly published the offending
5 statements, did Behunin know that they were false, or did Behunin entertain serious doubt as to
6 the truthfulness of the statements made.

7 There is no evidence that Behunin intentionally published any false statements, and
8 Behunin could not have entertained serious doubt about the truthfulness of the statements made
9 because there was a factual basis for the conclusions that were made, as follows:

10 i. **Schwab’s ties to the Suharto family; Charles Schwab’s and Michael**
11 **Schwab’s business deals with Tommy Suharto**

12 On July 2, 2010, Charles Schwab, Michael Schwab and Behunin entered into a business
13 deal with Panji Suharto to develop real estate in Indonesia. (Behunin Decl. ¶¶ 3-9, 12-18; Exh. 7-
14 17, attached to Behunin Decl.) Panji Suharto is the grandson of President Suharto. (Behunin Decl.
15 ¶¶ 12-13, 31-34.) In furtherance of the July 2, 2010 deal with Charles Schwab and Michael
16 Schwab, in September 2010, Panji Suharto in partnership with Charles Schwab and Michael
17 Schwab entered into a deal with Tommy Suharto’s company to construct and design a project in
18 Bali, Indonesia. (Behunin Decl. ¶¶ 12-18, 27-31, 36-38, 48-51; Exh. 7-8, 10, 11-12, 15-20, 26-27,
19 30-32, 35-39, 45-50, 54-57, attached to Behunin Decl.) Immediately prior to this deal, Tommy
20 Suharto’s company was sued by Bali residents for illegal seizure of many hectares of land.
21 (Behunin Decl. ¶ 52; Exh. 58, attached to Behunin Decl.) Tommy Suharto, who was convicted of
22 murder and sentenced to 15 years in prison, is the son of President Suharto. (Behunin Decl. ¶¶ 31,
23 37, 52-53; Exh. 56, 59, attached to Behunin Decl.) Numerous exposes have been published
24 concerning the corruption, human rights violations, and other atrocities committed by the former
25 President Suharto. (Behunin Decl. ¶¶ 34, 41; Exh. 40-42, 47, attached to Behunin Decl.)

26 On September 15, 2010, Michael Schwab sent an email that verifies the existence of the
27 business relationship between Charles Schwab and Suharto family members, stating, “**I am**
28 **actually in Indonesia as I write this working on our newly formed ASR-Indonesia regional**

1 **partnership with the Suharto family.”** (Behunin Decl. ¶ 30; Exh. 32-33, attached to Behunin
2 Decl.) Further, Behunin was instructed by Charles Schwab to go to Indonesia to develop the
3 relationship with the Suharto family and to push through Charles Schwab’s deals involving
4 Suharto family real estate and funding. Behunin’s trips to Indonesia and meetings with Suharto
5 family members on behalf of Charles Schwab and Michael Schwab are documented in
6 photographs, videos, and emails attached as exhibits herein. (Behunin Decl. ¶¶ 13, 31-33, 49, 51;
7 Exh. 17, 30, 32, 34, 37-39, 45-48, 53, 56, attached to Behunin Decl.)

8 ii. **Charles and Helen Schwab Foundation used to indirectly fund**
9 **investment deals with the Suharto family**

10 In June 2010, Michael Schwab and Behunin founded “Seathos, Inc”, a nonprofit company
11 that received a \$250,000 donation from the Charles and Helen Schwab Foundation. (Behunin
12 Decl. ¶¶ 10, 22-26; Exh. 11, 20-25, attached to Behunin Decl.) Charles Schwab and Michael
13 Schwab then used Seathos to sell an interest in their real estate investment fund in Indonesia to
14 Suharto family members; to gain access to real estate owned by the Suharto family; and to be
15 awarded contracts to develop the real estate owned by the Suharto family. (Behunin Decl. ¶¶ 11
16 19-35, 28, 30-33; Exh. 16, 18-25, 37-39.)

17 iii. **Schwab being an anchor investor in land deals with the Suharto family**

18 Charles Schwab and Michael Schwab created a real estate investment fund (the “Fund”).
19 (Behunin Decl. ¶¶ 14-15, 19-22, 33, 35-51; Exh. 12, 18-21, 39, 43-57, attached to Behunin Decl.)
20 The Fund’s purpose was in invest into development of Suharto-owned real estate using Schwab
21 and Suharto funds, among others. (*Ibid.*) The private placement documentation for the Fund states
22 that: “**Anchor investors are the Charles Schwab Family and Hashim Djojohadikusomo...**
23 [Suharto family confidante]” (emphasis added). (Behunin Decl. ¶¶ 31, 42-47; Exh. 35-36, 50-52,
24 53 attached to Behunin Decl.) The same information is stated on Michael Schwab’s Facebook
25 page, which contains a photograph depicting Michael Schwab, Charles Schwab, Panji Suharto,
26 and Hashim Djojohadikusumo [a Suharto family confidante], with a caption that states, “If anyone
27 is interested in investing in land in Indonesia, **this is the team and a few of our anchor**
28 **investors.** This place is blowing up, and we have it locked down!” (Behunin Decl. ¶ 46; Exh. 53,

1 attached to Behunin Decl.)

2 Based on the foregoing, Behunin had a factual basis for the conclusions allegedly
3 published by him on the Website, and therefore Schwab has no admissible evidence of actual
4 malice, and cannot make a *prima facie* showing of libel as a matter of law. (See Exh. 7.)

5 2. **All of the allegedly offending statements are true, and truth is a**
6 **complete defense to libel actions**

7 Truth of the statements made is a complete defense against liability for defamation,
8 regardless of bad faith or malicious purpose. (See *Terry v. Davis Community Church* (2005) 131
9 Cal.App.4th 1534, 1553; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28 [as matter of law, before-
10 and-after photographs on website of defendant patient that were substantially accurate
11 representations of results of plastic surgery by plaintiff were not defamatory]; *Chaker v. Mateo*
12 (2012) 209 Cal.App.4th 1138, 1150 [mother’s statement that daughter’s ex-boyfriend was “a
13 criminal” was true and thus was not defamatory, even though conviction was later expunged]; *Gill*
14 *v. Hughes* (1991) 227 Cal.App.3d 1299, 1309; *Francis v. Dun & Bradstreet* (1992) 3 Cal.App.4th
15 535, 540; *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 953; *Schmidt v. Foundation Health*
16 (1995) 35 Cal.App.4th 1702, 1715.)

17 The defendant need not justify every word of the alleged defamatory matter; it is sufficient
18 if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.
19 (*Heuer v. Kee* (1936) 15 Cal.App.2d 710, 714; *Glenn v. Gibson* (1946) 75 Cal.App.2d 649, 658;
20 *Swaffield v. Universal Ecsco Corp.* (1969) 271 Cal.App.2d 147, 164; *Gantry Const. Co. v.*
21 *American Pipe & Const. Co.* (1975) 49 Cal.App.3d 186, 194.) “The concept that it is the gist or
22 sting of the alleged defamatory statements that must be false rather than the specific details of the
23 charge is deeply rooted in our common law.” (*Weller v. American Broadcasting Cos.* (1991) 232
24 Cal.App.3d 991, 1009, fn. 17; *Campanelli v. Regents of Univ. of Calif.* (1996) 44 Cal.App.4th 572,
25 581 [admission that plaintiff basketball coach engaged in tirades so bad that seven players were
26 thinking of quitting established truth of defendant’s assertion that players “were in trouble
27 psychologically”]; *Hughes v. Hughes* (2004) 122 Cal.App.4th 931, 936 [evidence of father’ past
28 activity was relevant and sufficient to establish truth of sons’ statement “Our Dad’ a pimp”].)

1 Based on the timeline and documents described above, which are all attached as exhibits
2 herein, the general gist of the statements published on the Website is true: (1) the Schwab family
3 does have business dealings with the Suharto family; (2) President Suharto did commit many
4 atrocities in Indonesia; (3) the Charles and Helen Schwab Foundation did donate money to
5 Seathos, which in turn, was a partner with various Suharto entities in real estate development
6 deals; and (4) Tommy Suharto was sued by Bali residents for illegal seizure of their land.
7 Accordingly, the gist of the published statements is true, which is a complete defense to
8 defamation claims, even if there is slight inaccuracy in the specific details.

9 **3. The offending statements are not provably false factual assertions, and**
10 **therefore are not defamatory as a matter of law**

11 To establish a defamation claim that will survive a First Amendment challenge, a plaintiff
12 must present admissible evidence of a statement of fact that is provably false. (*Seelig v. Infinity*
13 *Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809.) “Statements do not imply a provably false
14 factual assertion and thus cannot form the basis of a defamation action if they cannot ‘reasonably
15 [be] interpreted as stating actual facts’ about an individual.” (*Ibid.*) “Rhetorical hyperbole,”
16 “vigorous epithet[s]” and “lusty and imaginative expression[s] of... contempt” “will not support a
17 viable defamation claim.” (*Ibid.*) Further, a statement of opinion, even if objectively unjustified or
18 made in bad faith, is not actionable defamation unless “it implies the allegation of undisclosed
19 defamatory facts as the basis for the opinion.” (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 451-
20 452; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 971.) This determination can be
21 made by applying a “totality of circumstances test -- a review of the meaning of the language in
22 context and its susceptibility to being proved true or false.” (*Moyer v. Amador Valley Joint Union*
23 *High School District* (1990) Cal. App. 3d 720, 724.)

24 For each of the statements made by Behunin, this Court must consider “the nature and
25 meaning of the language used, including the verifiability of the statements, and the context in
26 which the statements appeared.” (*Moyer, supra*, Cal. App. 3d at 725.) Statements alluding to
27 Schwab as a money launderer, exploiter, plunderer, profiting from a dictator, and associating
28 with a criminal is an expression of subjective judgment by Behunin. It is impossible to prove

1 whether an individual is an exploitor, or plunderer, or associated with criminals, and the
2 statements do not contain any verifiable facts. These statements are nothing more than an
3 exaggerated expression describing Behunin’s disapproval of the way that he believes Schwab
4 conducts business. These statements cannot reasonably be understood to convey verifiable facts
5 about Schwab, and therefore are not defamatory. Any money laundering, exploitation, and
6 plundering is not verifiable because no specific factual basis is provided for these conclusions. It
7 would be impossible to determine what Behunin is referring to.

8 This Court should have no difficulty discerning that the statements allegedly made by
9 Behunin are not actionable as false statements of fact, but were instead broad subjective comments
10 reflecting Behunin’s personal opinions about Schwab and his conduct. (See *Fletcher v. San Jose*
11 *Mercury News* (1989) 216 Cal.App.3d 172, 190-191 [referring to “crooked politician”].) Plaintiff
12 cannot rely on such statements to support his defamation claim because he cannot make a *prima*
13 *facie* showing that the statements were of fact, and were false. In *Sipple v. Foundation for Nat.*
14 *Progress, supra*, 71 Cal.App.4th at 244, the Court held that to establish that a statement is false,
15 the defendant must generally show that the statement is more than slightly inaccurate. (*Campanelli*
16 *v. Regents of University of California* (1996) 44 Cal.App.4th 572, 581-582.) None of the allegedly
17 defamatory statements can be viewed as an assertion of fact. The statements are either hyperbole
18 or loose figurative expressions.

19 **IV. DEFENDANT IS ENTITLED TO ATTORNEY’S FEES AND COSTS.**

20 Section 425.26, subd. (c) provides that in any action in which a defendant brings a
21 successful Anti-SLAPP Motion, that a prevailing defendant is entitled to recover attorney’s fees
22 and costs as compensation for the expense of responding to a baseless suit. (*Robertson v.*
23 *Rodrigues* (1995) 36 Cal.App.4th 347, 362.) Therefore, an award of attorneys’ fees to a prevailing
24 defendant is mandatory and not discretionary. (See CCP § 425.26(c).) The declarations of James
25 A. Otto and Regina Ashkinadze, filed concurrently herewith, detail the attorneys’ fees and costs
26 incurred by Behunin in responding to plaintiff’s frivolous complaint.

27 **V. CONCLUSION**


28

1 For the foregoing reasons, Defendant Nicholas Behunin respectfully requests that this
2 Court grant this special motion to strike the complaint of Charles R. Schwab. Further, Defendant
3 Nicholas Behunin requests that this Court award him attorneys' fees in the sum of \$64,800.00, and
4 his costs in the amount of \$90, to be recovered from plaintiff Charles Schwab jointly and severally
5 with plaintiff's counsel of record Robert R. Moore, Esq. of Allen Matkins Leck Gamble Mallory
6 & Natsis LLP in having to bring this Special Motion to Strike.

7
8 DATED: December 16, 2014

9 RESPECTFULLY SUBMITTED,

10 ELKIN GAMBOA & ASHKINADZE LLP

11
12
13
14 By: 
15 REGINA ASHKINADZE
16 Attorneys for Defendant NICHOLAS BEHUNIN

17
18
19
20
21
22
23
24
25
26
27
28

1 James A. Otto, SBN: 144432
LAW OFFICE OF JAMES A. OTTO
2 19536 San Jose Street
Northridge, California 91326
3 Telephone: (818) 366-8432
Facsimile: (818) 368-7757
4

5 ELKIN GAMBOA & ASHKINADZE LLP
Regina Ashkinadze, Esq. (SBN: 256908)
Jessica Gamboa, Esq. (SBN: 285773)
6 144 N. GLENDALE AVE., SUITE 333
GLENDALE, CA 91206
7 TELEPHONE: (323) 372-1202
TELEFAX: (323) 372-1216
8

9 Attorneys for Defendant,
NICHOLAS BEHUNIN

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN FRANCISCO**

12 CHARLES R. SCHWAB, an individual,
13 Plaintiff,

14 vs.

15 LEONARD STEINER, an individual;
STEINER & LIBO, P.C., a California
16 professional corporation; NICHOLAS
BEHUNIN, an individual; DOES 1-10,
17 inclusive,

18 Defendants.
19
20
21
22
23
24

Case No. CGC-14-542436

**DEFENDANT NICHOLAS BEHUNIN'S
NOTICE OF SPECIAL MOTION AND
SPECIAL MOTION TO STRIKE
STRATEGIC LAWSUIT AGAINST
PUBLIC PARTICIPATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF NICHOLAS
BEHUNIN AND EXHIBITS IN SUPPORT
THEREOF; DECLARATION OF REGINA
ASHKINADZE AND EXHIBITS IN
SUPPORT THEREOF; DECLARATION
OF JAMES A. OTTO IN SUPPORT OF
THE FEE REQUEST**

[Filed concurrently with Request for Judicial
Notice]

Date: February 5, 2015
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Ernest H. Goldsmith
Reservation Number 121614-01

25
26 **TO THE HONORABLE COURT, ALL PARTIES AND THEIR ATTORNEYS OF**
27 **RECORD:**
28

1 **PLEASE TAKE NOTICE THAT** on February 5, 2015, at 9:30 a.m., in Department 302
2 of the San Francisco Superior Court, located at 400 McAllister Street, San Francisco, California,
3 Defendant Nicholas Behunin (“Behunin” or “Defendant”) will and hereby does specially move for
4 an order, pursuant to *Code of Civil Procedure* section 425.16, striking the Complaint as to all
5 cause(s) of action against Defendant Nicholas Behunin.

6 The crux of the issues subject to this Special Motion to Strike is that the entirety of the
7 allegations set forth in Charles R. Schwab’s (hereafter “plaintiff” or “Schwab”) complaint state
8 that Behunin purportedly created a website, accessible to the general public on the worldwide web,
9 which contains allegedly false statements concerning plaintiff, a public figure. Plaintiff alleges a
10 single cause of action for “Libel.”

11 This Special Motion to Strike is made on the ground that the wrongful conduct alleged by
12 plaintiff arises out of Behunin’s exercise of free speech by way of discussions of matters of public
13 interest in a public place about a public figure (Cal. Code Civ. Proc. §425.16, subd. (e)(3) &
14 (e)(4)), and on the ground that the sole purpose behind plaintiff’s complaint in this matter is to
15 inhibit Behunin’s ability to engage in petitioning activity protected by the United States and
16 California Constitutions related to the filing of a civil complaint by Behunin on May 28, 2014,
17 with the Los Angeles Superior Court, case number BC546925, styled *Behunin v. Charles Schwab,*
18 *et al.* (Cal. Code Civ. Proc. § 425.16, subdivision (e)(1) & (2).) As established by the admissible
19 evidence filed by Behunin in support of this Motion, the statements contained on the website
20 allegedly created by Behunin concerning plaintiff are either not defamatory, or Behunin had a
21 factual basis to make the statements, such that plaintiff cannot show with admissible evidence that
22 Behunin acted with actual malice as a matter of law.

23 This Motion is made on additional grounds that there is no probability that plaintiff will
24 prevail on his complaint because: (1) the complaint is not legally sufficient; and (2) plaintiff has
25 NO admissible evidence to suggest, infer or support an argument that Behunin published any
26 statements that are false or libelous concerning plaintiff, or acted with actual malice.

27 PLEASE TAKE FURTHER NOTICE that Behunin, through his counsel of record, seeks
28 to recover his attorneys’ fees and costs from plaintiff Charles Schwab jointly and severally with

1 plaintiff's counsel of record Robert R. Moore, Esq. of Allen Matkins Leck Gamble Mallory &
2 Natsis LLP in having to bring this Special Motion to Strike, in the amount of \$64,800.00 for
3 attorney's fees, and in the amount of \$90 for costs.

4 This Motion is based upon this notice, the attached Memorandum of Points and
5 Authorities, and declarations of James A. Otto, Regina Ashkinadze, and Nicholas Behunin, the
6 Defendant's Request For Judicial Notice, the papers, pleadings, and any other documents in the
7 Court's file for the matter, and any such further evidence and argument as may be elicited during
8 the hearing on this Motion.

9

10 DATED: December 16, 2014

11

ELKIN GAMBOA & ASHKINADZE LLP

12

13

14

15

By: 
REGINA ASHKINADZE
Attorneys for Defendant NICHOLAS BEHUNIN

16

17

18

19

20

21

22

23

24

25

26

27

28