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INTERNATIONAL DES DROITS DE
12 **L'HOMME**

13
14 UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA
16

17 MORDECHAI Y. ORIAN, et al.

18 Plaintiffs,

19 v.

20 FEDERATION INTERNATIONAL
DES DROITS DE L'HOMME,
21 corporate form unknown, EURO-
MEDITERRANEAN HUMAN
22 RIGHTS NETWORK, corporate form
unknown, SIDIKI KABA, an
23 individual, ABDELAZIZ BENNANI,
an individual, and KAV LAOVED, an
24 Israeli Corporation, form unknown,

25 Defendants.

Case No. 11-cv-06904-PSG (FFMx)

**DEFENDANT FEDERATION
INTERNATIONAL DES DROITS DE
L'HOMME'S MOTION TO DISMISS
UNDER RULE 12(b) FOR LACK OF
JURISDICTION, INSUFFICIENT
SERVICE OF PROCESS, AND
FAILURE TO STATE A CLAIM;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; AND DECLARATION OF
CLEMENCE BECTARTE IN SUPPORT
THEREOF**

Date: November 28, 2011
Time: 1:30 p.m.
Judge: Hon. Philip S. Gutierrez

1 TO PLAINTIFF AND HIS COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on November 28, 2011 at 1:30 p.m., or as soon
3 thereafter as counsel may be heard, in Courtroom 790 of the above-entitled Court, the
4 Honorable Philip S. Gutierrez, presiding, located at 255 East Temple Street, Los
5 Angeles, California 90012, Defendant FEDERATION INTERNATIONALE DES
6 DROITS DE L'HOMME ("FIDH" or "Defendant") will and hereby does move the
7 Court for an order dismissing the Complaint and each claim for relief contained
8 therein, filed by plaintiffs ("Plaintiffs") under Federal Rules of Civil Procedure,
9 Rule 12(b)(6).

10 This Motion is made following a conference of counsel pursuant to Local Rule
11 7-3, which took place on October 12, 2011.

12 The Motion is made on the following grounds:

- 13 (1) the defendant is not subject to the personal jurisdiction of this court
14 pursuant to Fed. R. Civ. Proc. 12(b)(2);
- 15 (2) the Complaint should be dismissed for insufficient service of process
16 pursuant to FRCP Rule 12(b)(5);
- 17 (3) the Complaint fails to state a claim upon which relief can be granted
18 pursuant to Fed. R. Civ. Proc. 12(b)(6).

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1 This Motion is based on this Notice, the attached Memorandum of Points and
2 Authorities, the Declaration of Clémence Bectarte and Exhibits A & B thereof, on all
3 papers, pleadings, records and files in this case, on all matters of which judicial notice
4 may be taken, and on such other evidence and/or argument as may be presented to the
5 Court at the hearing on this Motion.

6
7 Dated: October 17, 2011

8 BOSTWICK & JASSY LLP AND
9 CENTER FOR CONSTITUTIONAL
10 RIGHTS

11 By: /S/ - Gary L. Bostwick
12 GARY L. BOSTWICK

13 Attorneys for Defendant
14 FEDERATION INTERNATIONALE DES
15 DROITS DE L'HOMME
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21 23 Cal.App.4th 1498, 28 Cal.Rptr.2d 722 (1994)11

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17 PROSSER & KEETON, Torts (5th ed. 1984) § 113, pp. 797–798 9

18 WRIGHT & MILLER, 4A Federal Practice & Procedure § 1073.1 (2009) 7

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I. INTRODUCTION**

4 The allegations of this Complaint are so conclusory that they must be
5 discounted. They simply do not satisfy the standards required by both the Ninth
6 Circuit and the United States Supreme Court in matters alleging conduct protected by
7 the First Amendment. The Complaint here claims that the speech of the
8 FEDERATION INTERNATIONALE DES DROITS DE L'HOMME ("FIDH" or
9 "Defendant") has damaged plaintiffs. Speech is protected by the First Amendment.

10 The Ninth Circuit has held "that in any case . . . where a plaintiff seeks
11 damages or injunctive relief, or both, for conduct which is prima facie protected by
12 the First Amendment, the danger that the mere pendency of the action will chill the
13 exercise of First Amendment rights requires more specific allegations than would
14 otherwise be required." *Franchise Realty Interstate Corp. v. San Francisco Local Jt.*
15 *Exec. Bd.*, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (emphasis added) (citing, e.g.,
16 *Time, Inc. v. Hill*, 1967, 385 U.S. 374, 387-91, 87 S.Ct. 534, 17 L.Ed.2d 456; *New*
17 *York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 267-83, 84 S.Ct. 710, 11 L.Ed.2d
18 686; *N.A.A.C. P. v. Button*, 1963, 371 U.S. 415, 431-33, 83 S.Ct. 328, 9 L.Ed.2d 405.

19 The Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.
20 1937, 1949 -1950, 173 L.Ed.2d 868 (2009) goes ever further to condemn the sort of
21 pleading found in this Complaint:

22 To survive a motion to dismiss, a complaint must contain sufficient
23 factual matter, accepted as true, to "state a claim to relief that is
24 plausible on its face." A claim has facial plausibility when the plaintiff
25 pleads factual content that allows the court to draw the reasonable
26 inference that the defendant is liable for the misconduct alleged.

27 *Id.* (citations omitted). *Iqbal* makes clear that "where the well-pleaded facts
28 do not permit the court to infer more than the mere possibility of

1 misconduct, the complaint has alleged -- but it has not “show[n]” -- “that
2 the pleader is entitled to relief.” *Id.* at 556 U.S. at ___, 129 S.Ct. 1937 at
3 1950 (quoting Fed. Rule Civ. Proc. 8(a)(2)).

4 The allegations of the Complaint in this case are conclusory allegations,
5 parroting mere conclusions of law that cannot be seriously accepted as factual
6 allegations. The factual allegations, such as they are, are insufficient to “permit the
7 court to infer more than the mere possibility” of the grounds for jurisdiction or
8 anything more than “the mere possibility of misconduct.” The Complaint should be
9 dismissed on all of the following grounds, including lack of personal jurisdiction and
10 failure to state a claim for any claim for relief.

11 **II. STATEMENT OF RELEVANT FACTS**

12 The Complaint was filed on August 22, 2010. It alleges that: several acts
13 occurred in years past, almost all of which were more than a year prior to the filing of
14 the Complaint; FIDH is headquartered in Paris and that plaintiffs are residents of or
15 incorporated in California (Complaint, ¶¶ 1-3); a grand jury indicted Plaintiff Orian in
16 September 2010 for the 2003 activities of Plaintiff Global Horizons, Inc., a company
17 that he was President of and which imports agricultural labor; and that the criminal
18 case against him is still pending. Complaint, ¶ 1. The Complaint further alleges that:
19 in 2005, FIDH published material regarding events in 1996 concerning Chinese
20 employees of the Global Manpower Company who were owed back pay and beaten
21 and deported from Israel at the behest of director Plaintiff Orian (Complaint, ¶ 10);
22 “‘Global (Israel)’ only imported Chinese workers in 1992...[and] was not even in
23 business in Israel in 1996;” (Complaint, ¶ 12); and in 2006, FIDH made changes to
24 the publication, consisting of changing “Global Manpower” to “Gl**al Man**wer”,
25 and changing “Matti Orian” to “Motti O.” (Complaint, ¶ 17). The Complaint further
26 alleges that after Orian was arrested in 2010 on charges stemming from 2003, the
27 unredacted material regarding events in 1996 was republished and submitted by the
28 U.S. Attorney to the District Court in which Orian’s criminal case is pending.

1 (Complaint, ¶ 19). Factual allegations relating to what was republished, where it was
2 republished and how it was republished are stunningly absent from the Complaint.

3 **III. LEGAL STANDARD ON DEFENDANTS' MOTIONS TO DISMISS**

4 On a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2),
5 “the plaintiff bears the burden of demonstrating that the court has jurisdiction over
6 the defendant.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).
7 To meet that burden, the plaintiff must make “a prima facie showing of jurisdictional
8 facts to withstand the motion to dismiss.” *Id.* The plaintiff must establish (1) that the
9 forum’s operative long-arm statute permits jurisdiction over the defendant, and (2)
10 that the exercise of jurisdiction over the defendant does not violate due process of
11 law. *See Id.* “[M]ere conclusory allegations” regarding jurisdiction do not satisfy a
12 plaintiff’s burden of making a prima facie showing of jurisdictional facts. *Wenz v.*
13 *Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). Moreover, courts do “not
14 assume the truth of allegations in a pleading which are contradicted by affidavit.”
15 *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1284 (9th Cir.
16 1977).

17 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the
18 claims asserted in the complaint. *See Pegasus Holdings v. Veterinary Centers of*
19 *America, Inc.*, 38 F.Supp.2d 1158, 1159-60 (C.D. Cal. 1998). “A complaint may be
20 dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal
21 theory or (2) insufficient facts under a cognizable legal claim.” *Robertson v. Dean*
22 *Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). Moreover, a complaint
23 must allege sufficient facts “to state a claim to relief that is *plausible* on its face,” and
24 the court must “draw on its judicial experience and common sense” in determining
25 whether a plausible claim is stated. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937,
26 1949-1950 (2009) (emphasis added). Finally, leave to amend should not be granted
27 where the complaint cannot be saved. *In re Silicon Graphics Inc. Sec. Litig.*, 183
28 F.3d 970, 991 (9th Cir. 1999).

1 **IV. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R.**
2 **CIV. PROC. 12(b)(2), 12(b)(5), and 12(b)(6).**

3 **A. The Complaint Should Be Dismissed Under FRCP Rule 12(b)(2) For**
4 **Lack Of Personal Jurisdiction.**

5 There is no basis for personal jurisdiction over FIDH. United States courts
6 consistently have interpreted the Fourteenth Amendment to the U.S. Constitution¹ as
7 placing fundamental limitations on when a court may assert personal jurisdiction over
8 a non-resident defendant. *See, e.g., International Shoe Co. v. Washington*, 326 U.S.
9 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Specifically, nonresident defendants must
10 “have certain minimum contacts with [the forum], such that the maintenance of the
11 suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.* at
12 316; *see also, Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006).
13 Moreover, “[w]hen a defendant moves to dismiss for lack of personal jurisdiction, the
14 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
15 defendant.” *Pebble Beach*, 453 F.3d at 1154.

16 Here, the Complaint alleges no personal contacts whatsoever by FIDH.
17 Plaintiffs have failed to meet their burden for showing there is any valid basis for
18 asserting personal jurisdiction over FIDH.

19 Plaintiffs’ allegations against FIDH are that it is a human rights organization
20 located in Paris, France (Complaint, ¶ 3) and the bald conclusion alleged that “[t]his
21 Court has personal jurisdiction over as [sic] Defendants have committed tortuous
22 [sic] acts within and without the State of California and in this District having an
23 injurious effect on the Plaintiffs in California.” (Complaint, ¶ 7). These allegations
24 are not sufficient to allege jurisdiction by this Court.

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26
27 ¹ The Due Process Clause of the 14th Amendment to the U.S. Constitution provides
28 that “[n]o State shall ... deprive any person of life, liberty, or property, without due process
of law.”

1 Plaintiffs' conclusory allegation that "defendants" committed acts causing
2 injury in California does not provide a valid basis for asserting personal jurisdiction
3 over FIDH. The Complaint does not state how publication of any material occurred,
4 whether it occurred in California, or whether the publication was on a web site. A
5 summary of all of the allegations in the complaint upon which jurisdiction is claimed
6 follows:

7 Paragraph 10: Allegation that FIDH published (without stating by what means
8 or where) information obtained from defendant Kav LaOved (without stating in what
9 form or how).

10 Paragraph 14: Allegation that FIDH had republished the defamatory material
11 via the Internet (without stating where or in what form it was available).

12 Paragraph 19: Allegation that Orian was arrested in September 2010 on
13 charges arising out of activities of co-plaintiff Global Horizons.

14 Paragraph 19: Allegations that FIDH republished the material (without stating
15 in what form, what media, how or where published).

16 Paragraph 20: Allegations that the material was made available to the
17 government (without stating in what form or how "made available", but evidently
18 referring back to ¶ 19 where it is alleged that the United States Attorney in Hawaii
19 made use of the material).

20 Paragraph 21: Conclusory allegations that the material was made available
21 widely throughout the world (without stating where, how, in what form or in what
22 medium).

23 The most fatal defect in the Complaint regarding jurisdiction is that it contains
24 no allegation that the "material" was published in California. Reading the Complaint
25 in its totality, no one can tell if it alleges that a hard copy of the "material" was
26 published, whether the "material" was broadcast, or whether it appeared on the
27 Internet. (The only allegation of how any material was published at any time is in
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1 ¶ 14 where a publication in 2006, not actionable in California due to the one-year
2 statute of limitations, was “discovered via the Internet.”)

3 Since the place and mode of the publication alleged in 2010 (¶ 19) is
4 conclusory and uncertain, the allegations of jurisdiction are without any merit
5 whatsoever. Even if one assumes publication on the Internet by stretching the
6 standards demanded by *Iqbal*, for purposes of argument alone, the allegation would
7 be insufficient to provide this Court with jurisdiction. *See Cybersell, Inc. v.*
8 *Cybersell, Inc.*, 130 F.3d 414, 418-419 (9th Cir. 1997). In *Telebyte, Inc. v. Kendaco*,
9 105 F. Supp. 2d 131 (E.D.N.Y. 2000), the District Court, applying a New York long-
10 arm statute found that “the mere existence of a web site accessible from New York is
11 insufficient to establish ‘solicitation’ [of business] for purposes of personal
12 jurisdiction.” *Id.* at 136. As the Second Circuit explained, courts in New York
13 addressing the question of jurisdiction over Internet defamation defendants “have
14 concluded that the posting of defamatory material on a website accessible in New
15 York does not, without more, constitute ‘transact[ing] business’ in New York for the
16 purposes of New York's long-arm statute.” *Best Van Lines, Inc. v. Walker*, 490 F.3d
17 239, 251 (2d Cir. 2007) (internal quotation marks omitted).

18 Personal jurisdiction is not proper here because FIDH lacks the requisite
19 “minimum contacts” with the state of California to satisfy the Due Process Clause,
20 Article II, Section 4. In response to the growth of the Internet over the past couple of
21 decades, a substantial body of jurisprudence has arisen relating to when the assertion
22 of personal jurisdiction over a defendant based upon its Internet website comports
23 with due process. This body of jurisprudence demonstrates why personal jurisdiction
24 over FIDH does not lie here.

25 First, the allegations of the Complaint do not allege how the “material” was
26 published to cause injury in California. Even it were inferred that the allegations
27 stated that the publication was on the web site of the FIDH (which they do not), the
28 mere fact that a website is accessible in a given forum is not sufficient to establish

1 jurisdiction over the defendant website operator in the forum. *See generally* WRIGHT
2 & MILLER, 4A Federal Practice & Procedure § 1073.1 (2009); *see also, Cybersell,*
3 *Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418-419 (9th Cir. 1997). Otherwise, a website's
4 mere existence on the Internet would subject the website operator to worldwide
5 jurisdiction. *See Cybersell*, 130 F.3d at 418-419. Accordingly, courts will only
6 exercise personal jurisdiction based on a defendant's website when that website has
7 certain characteristics that make jurisdiction reasonable under the circumstances.

8 Passive websites that simply provide information accessible for reading by
9 computer users in the forum state (and plaintiffs allege nowhere in the Complaint that
10 the "material" was accessible to Californians) do not give rise to personal
11 jurisdiction. *See, e.g., Cybersell*, 130 F.3d at 418; *Pebble Beach*, 453 F.3d at 1157-
12 1158; *Best Van Lines*, 490 F.3d at 251; *Zippo Manufacturing Co. v. Zippo Dot Com*,
13 952 F. Supp. 1119 (W.D. Pa. 1997) (first setting forth framework for analyzing
14 personal jurisdiction based on the characteristics of Internet websites).

15 Even an advertisement that could be read by someone in California
16 could not be the basis of jurisdiction. As the Ninth Circuit has explained, "No court
17 has ever held that an Internet advertisement alone is sufficient to subject a party to
18 jurisdiction in another state." *Panavision Int'l, L.P. v. Toebben*, 141 F.3d 1316, 1320
19 (9th Cir. 1998); *see also, Salu, Inc. v. Original Skin Store*, WL 3863434, *4 -5 (E.D.
20 Cal. Aug. 13, 2008) ("courts have held that personal jurisdiction is not appropriate
21 when a website is merely a passive, either as an advertisement or for informational
22 purposes"); *Barrett v. Catacombs Press*, 44 F.Supp.2d 717, 728 (E.D. Pa.1999)
23 (holding that "posting of messages to listserves and USENET discussion groups" is
24 "akin" to a passive website that will not support the exercise of personal jurisdiction).

25 Nor can jurisdiction over FIDH be asserted based on the "effects" test
26 set forth by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783, 104
27 S.Ct. 1482, 79 L.Ed.2d 804 (1984). In *Calder*, the Court held that a California court
28 could exercise personal jurisdiction over the defendant magazine publisher, because

1 the defendant knew that California would be the “focal” point of the injuries resulting
2 from its intentional conduct in publishing an allegedly libelous story about the
3 California activities of a California resident. *Id.* at 788-89. The Court emphasized
4 that the defendants’ intentional, and allegedly tortious, actions were “expressly
5 aimed” at California. *Id.*; *see also, Bancroft & Masters v. Augusta National*, 223
6 F.3d 1082, 1087 (9th Cir. 2000) (explaining that a foreign act with foreseeable effects
7 in the forum state does not by itself give rise to specific jurisdiction, because there
8 needs to be something more, and that something more is “express aiming” at the
9 forum state). “The mere allegations that the Plaintiff feels the effect of the
10 Defendant’s tortious conduct in the forum because the Plaintiff is located there is
11 insufficient to satisfy *Calder*. Unless [the forum state] is deliberately or knowingly
12 targeted by the tortfeasor, the fact that harm is felt in [the forum state] from conduct
13 occurring outside [the forum state] is never sufficient to satisfy due process.”
14 *Barrett*, 44 F. Supp. 2d at 731 (internal citations omitted). Thus, “jurisdiction will lie
15 only if the posting is intended to target or focus on internet users in the state where
16 the cause of action is filed.” *Seldon v. Direct Response Technologies, Inc.*, 2004 WL
17 691222 at * 4 (S.D.N.Y. 2004) (holding no targeting of allegedly libelous statements
18 on defendant’s website towards New York, and thus no jurisdiction).

19 None of the conclusory allegations state how “the material” was
20 published. But however it was published, the conclusory allegations do not set forth
21 a plausible claim and the Complaint should be dismissed.

22 **B. The Complaint Should Be Dismissed Under FRCP Rule 12(b)(5) for**
23 **Insufficient Service of Process.**

24 Plaintiffs have not properly served FIDH with the summons and
25 complaint, which were sent by registered mail to FIDH in France by Plaintiffs and
26 their attorney, not by the clerk of the court. *See Declaration of Clémence Bectarte*,
27 ¶¶ 3-5, and Exhibit A and Exhibit B attached thereto (copies of the mailing
28 envelopes). The Ninth Circuit has held that service on an entity in a foreign country

1 by international mail is insufficient unless it is sent by the clerk of the court (and
2 requires a signed receipt), or it is specifically directed by the district court in advance.
3 *Brockmeyer v. May*, 383 F.3d 798, 808-09 (9th Cir. 2004) (vacating judgment due to
4 ineffective service because complaint was sent by international mail by plaintiffs’
5 counsel). Rather than permitting Plaintiffs to cure service, however, FIDH requests
6 that the Court reach the other grounds for dismissal and strike the Complaint.²

7 **C. The Claim of Defamation Against FIDH Should Be Dismissed**
8 **Pursuant To FRCP Rule 12(b)(6) Because No Actionable Defamation Has Been**
9 **Alleged.**³

10 Plaintiffs’ claims against FIDH fail because the conclusory allegations do not
11 state the facts necessary to state a claim for defamation in California.

12 **1. No factual allegation of “publication” appears in the Complaint.**

13 It is axiomatic that for defamatory matter to be actionable, it must be
14 communicated, or “published,” intentionally or negligently, to “one other than the
15 person defamed.” *See* PROSSER & KEETON, Torts (5th ed. 1984) § 113, pp. 797–798.
16 *Cabesuela v. Browning-Ferris Industries of California, Inc.*, 68 Cal.App.4th 101,
17 112, 80 Cal.Rptr.2d 60 (1998). And an allegation of communicating or publishing
18 “requires more specific allegations than would otherwise be required.” *Franchise*
19 *Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd.*, 542 F.2d 1076, 1082-83
20 (9th Cir. 1976). The allegations of “publication” in ¶¶ 19-20 are not specific enough
21 to meet the test set by this Circuit.

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25 ² Defendant Sidiki Kaba, former President of FIDH, has not been served at all.

26 ³ Pursuant to Rule 12(b)(6), the factual allegations in the Complaint are accepted as
27 true, but “conclusory allegations of law and unwarranted inferences are not sufficient to
28 defeat a motion to dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).
Moreover, FIDH expressly reserve their right to challenge the Complaint’s factual
allegations later in the proceedings, if necessary.

1 The Court must discount all of the conclusory allegations in the Complaint
2 regarding publication. This conclusion of law then mandates dismissal of the claim
3 of defamation.

4 **2. No publication prior to August 22, 2010 is cognizable in California.**

5 The statute of limitations for a defamation claim in California is one year. Cal.
6 Code Civ. Proc. § 340 (c). The Complaint is file-stamped August 22, 2011. Every
7 allegation of publication other than those stated in a conclusory fashion in ¶¶ 19-20
8 occurred earlier than one year before the filing of the Complaint. As such, no alleged
9 publication in the Complaint on any other occasion is actionable in California.

10 **3. Publication to the government prosecuting an ongoing action is**
11 **privileged pursuant to Cal. Civ. Code § 47(b).**

12 As codified in Civil Code section 47, subdivision (b), a privileged publication
13 is one made “[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any
14 other official proceeding authorized by law, or (4) in the initiation or course of any
15 other proceeding authorized by law and reviewable” under various portions of the
16 Code of Civil Procedure. The California Supreme Court has established a four-part
17 test for the application of the litigation privilege: it “applies to any communication (1)
18 made in judicial or quasi-judicial proceedings; (2) by litigants or other participants
19 authorized by law; (3) to achieve the objects of the litigation; and (4) that have some
20 connection or logical relation to the action.” *Silberg v. Anderson*, 50 Cal.3d 205, 212,
21 266 Cal.Rptr. 638 (1990). The privilege is absolute. *Id.* at 215.

22 The Complaint at ¶ 19 alleges that FIDH “upon information and belief,
23 between September 3 and September 9, 2010, subsequent to ORIAN’s “arrest on the
24 above-referenced charges” republished the material referred to earlier in the
25 Complaint. It does not allege how, in what form, via what media, nor how or where.
26 The Complaint also alleges that “the US Attorney used the defamatory material in its
27 submissions to the District Court in Hawaii upon which the Court based its decision
28 to keep ORIAN in pretrial detention.”

1 Paragraph 20 of the Complaint states allegations that the material was made
2 available to the government in Hawaii (without stating in what form or how “made
3 available,” but clearly referring back to ¶ 19 where it is alleged that the United States
4 Attorney in Hawaii made use of the material). This leaves the Court with but one
5 conclusion: however conclusory the allegation of publication, the publication was
6 absolutely privileged. Even though the Complaint does not make an allegation of fact
7 about where and how the 2010 publication occurred, assuming arguendo that the
8 publication was to the United States Attorney prosecuting a criminal matter related to
9 the “material,” the publication was absolutely privileged.

10 The Complaint alleges that plaintiff Orian was arrested in September 2010 on
11 charges arising out of activities of co-plaintiff Global Horizons (Complaint, ¶ 19).
12 Anything published to the government by anyone relating to that would be a
13 communication made in a judicial proceeding or in any official proceeding
14 authorized by law, thereby bringing Civ. Code § 47(b) into effect. Multiple cases in
15 California hold that communications with the prosecution, police or other law
16 enforcement officials are absolutely privileged under these circumstances. *Williams*
17 *v. Taylor*, 129 Cal.App.3d 745, 753-54, 181 Cal.Rptr. 423 (1982) (communication
18 which concerns possible wrongdoing, which is made to official governmental agency
19 such as local police department, and which is designed to prompt action by that entity
20 is therefore absolutely privileged); *Cote v. Henderson*, 218 Cal.App.3d 796, 806, 267
21 Cal.Rptr. 274 (1990) (sexual battery victim was absolutely privileged in reporting to
22 police and district attorney acts which she complained alleged perpetrator committed
23 on her person); *Hunsucker v. Sunnyvale Hilton Inn*, 23 Cal.App.4th 1498, 1502-1503,
24 28 Cal.Rptr.2d 722 (1994) (reports made by citizens to police regarding potential
25 criminal activity fall within scope of absolute privilege attaching to publications
26 made in any legislative or judicial proceeding); *Cabesuela v. Browning-Ferris*
27 *Industries of California, Inc.*, 68 Cal.App.4th 101, 112, 80 Cal.Rptr.2d 60 (1998) (CC
28 Code 47 gives all persons the right to report crimes to the police, the local prosecutor,

1 or an appropriate regulatory agency without risk of defamation liability, even if the
2 report is made in bad faith).

3 The only reasonable inference to draw from the conclusory allegations of the
4 Complaint is that “the material” was communicated to the U.S. Attorney in Hawaii or
5 someone else in the United States government. That being the case, the
6 communication was absolutely privileged by Cal. Civ. Code § 47(b) and the claims
7 must be dismissed.

8 **D. The Tortious Interference Claim And The Declaratory Relief Claim**
9 **Must Also Be Dismissed Under FRCP Rule 12(b)(6) As They Are Mere Attempts**
10 **To Plead Around First Amendment Limitations That Render The Defamation**
11 **Claim Baseless.**

12 Plaintiffs have plead two claims for relief beyond the claim for defamation.
13 They must be dismissed because they are based entirely upon the defamation claim
14 for relief; they are what are called parasitic claims, seeking life by attempting to plead
15 around common law and First Amendment defenses relating to defamation. The law
16 is clear that whenever the gravamen of additional claims is nothing more than an
17 alleged injurious falsehood upon which the defamation claim is based, those
18 additional claims must be dismissed. Here, the language of the Complaint clearly
19 expresses that Claims Two and Three are nothing more than a repetition of the harm
20 supposedly caused by the injurious falsehood. (Claim Two: “Defendants’ willful and
21 malicious defamatory statements about the Plaintiff constitute libel per se.” ¶ 31)
22 (Claim Three: “By reason of the foregoing [incorporated allegations], Defendants
23 have tortiously interfered” ¶ 34).

24 “First Amendment limitations are applicable to all claims whose gravamen is
25 the alleged injurious falsehood of a statement.” *Carafano v. Metrosplash.com Inc.*,
26 207 F.Supp.2d 1055, 1076 (C.D. Cal. 2002), *aff’d* 339 F.3d 1119 (9th Cir. 2003). A
27 plaintiff may not evade the limitations on defamation claims by restyling the claim as
28 something else. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108

1 S.Ct. 876, 99 L.Ed.2d 41 (1988) (protections apply to claim styled as intentional
2 infliction of emotional distress where gravamen of claim was false speech); *Blatty v.*
3 *New York Times Co.*, 42 Cal.3d 1033, 1042-43, 232 Cal.Rptr. 542 (1986) (“the
4 limitations that define the First Amendment’s zone of protection ... apply to all
5 claims whose gravamen is the alleged injurious falsehood of the statement”).

6 “[C]onstitutional protection does not depend on the label given the stated cause
7 of action.” *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042, 232 Cal.Rptr. 542
8 (1986). [T]he limitations that define the First Amendment's zone of protection ...
9 apply to all claims whose gravamen is the alleged injurious falsehood of a statement.”
10 *Id.*; see also, *Christakis v. Mark Burnett Productions*, 2009 WL 1248947, 5 (C.D.
11 Cal. 2009) “Under California law, First Amendment limitations are applicable to all
12 claims, of whatever label, whose gravamen is the alleged injurious falsehood of a
13 statement.” *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 563, 71
14 Cal.Rptr.2d 731 (1986) (reaffirming rule preventing “creative pleading” from
15 “rendering nugatory the First Amendment limitations placed on litigation against
16 speech”); see also, *Films of Distinction, Inc. v. Allegro Film Productions, Inc.*, 12
17 F.Supp.2d 1068, 1082 (C.D. Cal. 1998).

18 The cases and principles set forth above call for the dismissal of any claim for relief
19 that is based entirely upon the same operative facts of publication that render the
20 concurrent claim for defamation non-actionable. As shown above, the defamation
21 claim must be dismissed; it follows that the other two parasitic claims must also be
22 dismissed.

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V. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint, and each of its claims therein, should be dismissed with prejudice as to defendant FIDH.

Dated: October 17, 2011

BOSTWICK & JASSY LLP AND
CENTER FOR CONSTITUTIONAL
RIGHTS

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