

BOSTWICK & JASSY LLP

GARY L. BOSTWICK, Cal. Bar No. 79000

gbostwick@bostwickjassy.com

JEAN-PAUL JASSY, Cal. Bar No. 205513

jpjassy@bostwickjassy.com

KEVIN L. VICK, Cal. Bar No. 220738

kvick@bostwickjassy.com

12400 Wilshire Boulevard, Suite 400

Los Angeles, California 90025

Telephone: 310-979-6059

Facsimile: 310-314-8401

CENTER FOR CONSTITUTIONAL RIGHTS

Maria LaHood

mlahood@ccrjustice.org

666 Broadway, 7th Floor

New York, NY 10012

Telephone: (212) 614-6430

Facsimile: (212) 614-6499

Attorneys for Defendant FEDERATION
INTERNATIONAL DES DROITS DE
L'HOMME

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MORDECHAI Y. ORIAN, et al.

Plaintiffs,

v.

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

Defendants.

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

**NOTICE OF MOTION AND SPECIAL
MOTION TO STRIKE COMPLAINT
PURSUANT TO CAL. CODE OF CIVIL
PROCEDURE § 425.16 AND
MEMORANDUM OF POINTS;
AUTHORITIES IN SUPPORT
THEREOF DEFENDANT
FEDERATION INTERNATIONALE
DES DROITS DE L'HOMME'S; AND
DECLARATION OF ANTOINE
BERNARD IN SUPPORT THEREOF**

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

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

TO PLAINTIFF AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 28, 2011 at 1:30 p.m., or as soon thereafter as counsel may be heard, in Courtroom 790 of the above-entitled Court, the Honorable Philip S. Gutierrez, presiding, located at 255 East Temple Street, Los Angeles, California 90012, Defendant FEDERATION INTERNATIONALE DES DROITS DE L'HOMME ("FIDH" or "Defendant") will and hereby does move the Court for an order striking the Complaint of plaintiffs pursuant to California Code of Civil Procedure § 425.16.

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

Grounds for the Motion are that the Complaint is subject to § 425.16(e) in that the matters complained of are matters of public concern and plaintiffs cannot establish, by admissible evidence, a probability that they will prevail. This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Antoine Bernard, all papers, pleadings, records and files in this case, all matters of which judicial notice may be taken, and such other evidence and/or argument as may be presented to the Court at the hearing on this Motion.

Dated: October 17, 2011

BOSTWICK & JASSY LLP and
CENTER FOR CONSTITUTIONAL
RIGHTS

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

Attorneys for Defendant FEDERATION
INTERNATIONALE DES DROITS DE
L'HOMME

TABLE OF CONTENTS

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

I. CALIFORNIA’S ANTI-SLAPP STATUTE APPLIES TO PLAINTIFFS’ CLAIMS AGAINST FIDH 1

 A. California’s Anti-SLAPP Statute, C.C.P. § 425.16, Applies In Federal Diversity Cases 1

 B. The Anti-SLAPP Statute Is Construed Broadly 1

 C. Plaintiffs’ Claims Fall Within Sections 425.16(e)(1), (e)(2) and (e)(4) 3

 1. The Alleged Statements Fall Within Section 425.16(e)(4)..... 3

 2. The Alleged Statements Also Fall Within Sections 425.16(e)(1) And (2) 4

II. PLAINTIFFS’ CLAIMS SHOULD BE STRICKEN BECAUSE PLAINTIFFS CANNOT DEMONSTRATE A PROBABILITY OF SUCCESS 5

 A. FIDH Did Not Republish Any Material Relating To Plaintiffs In 2010 And The Claims for Relief Should Be Stricken On That Ground. 6

 B. Even The Conclusory Allegation Of Publication Shows That The Publication Alleged Was An Absolutely Privileged Communication 7

 C. The Tortious Interference Claim And The Declaratory Relief Claim Must Also Be Stricken As They Are Mere Attempts To Plead Around First Amendment Limitations That Render The Defamation Claim Baseless..... 9

III. CONCLUSION 11

TABLE OF AUTHORITIES

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

Federal Cases

Carafano v. Metrosplash.com Inc., 207 F.Supp.2d 1055 (C.D. Cal. 2002)9

Carafano v. Metrosplash.com Inc., 339 F.3d 1119 (9th Cir. 2003)9

Christakis v. Mark Burnett Productions, 2009 WL 1248947, 5 (C.D.Cal., 2009)10

eCash Technologies, Inc. v. Guagliardo, 127 F.Supp.2d 1069 (C.D. Cal. 2000)5

Films of Distinction, Inc. v. Allegro Film Productions, Inc.,
12 F.Supp.2d 1068 (C.D.Cal.,1998)10

Franchise Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd.,
542 F.2d 1076 (9th Cir. 1976)7

Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2010)4

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)9,10

Mindys Cosmetics Inc. v. Dakar, 611 F.3d 590 (9th Cir. 2010)4

Spacecon Specialty Contractors, LLC v. Bensinger,
--- F.Supp.2d ---, 2011 WL 819700 (D. Col. Mar. 2, 2011)3

Thomas v. Fry’s Electronics, Inc., 400 F.3d 1206 (9th Cir. 2005)1

United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.,
190 F.3d 963 (9th Cir. 1999)1

State Cases

Blatty v. New York Times Co., 42 Cal.3d 1033, 232 Cal.Rptr. 542 (1986)10

Briggs v. Eden Council, 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999)1

Cabesuela v. Browning-Ferris Industries of California, Inc.,
68 Cal.App.4th 101, 80 Cal.Rptr.2d 60 (1998)8,9

City of Cotati v. Cashman, 29 Cal. 4th 69, 78, 124 Cal. Rptr. 2d 519 (2002)2

1 *ComputerXpress, Inc. v. Jackson,*
 2 93 Cal. App. 4th 993, 113 Cal.Rptr.2d 625 (2001)4
 3 *Cote v. Henderson,* 218 Cal.App.3d 796, 267 Cal.Rptr. 274 (1990)8
 4 *Damon v. Ocean Hills Journalism Club,*
 5 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205, 212 (2000)3
 6 *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman,*
 7 47 Cal. App. 4th 777, 54 Cal.Rptr.2d 830 (1996)4
 8 *Equilon Enters. v. Consumer Cause, Inc.,*
 9 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002)2,5
 10 *Hunsucker v. Sunnyvale Hilton Inn,*
 11 23 Cal.App.4th 1498, 28 Cal.Rptr.2d 722 (1994)8
 12 *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.,*
 13 37 Cal. App. 4th 855, 44 Cal.Rptr.2d 46 (1995)4
 14 *Navellier v. Sletten,* 29 Cal. 4th 82, 124 Cal. Rptr.2d 530 (2002)2
 15 *Nygård, Inc. v. Uusi-Kerttula,*
 16 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210, 220 (2008)3
 17 *Ramona Unified Sch. Dist. v. Tsiknas,*
 18 135 Cal. App. 4th 510, 37 Cal.Rptr.3d 381 (2005)5
 19 *Silberg v. Anderson,* 50 Cal.3d 205, 266 Cal.Rptr. 638 (1990)7
 20 *Sipple v. Foundation for Nat’l Progress,*
 21 71 Cal. App. 4th 226, 83 Cal.Rptr.2d 677 (1999)4
 22 *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,*
 23 17 Cal.4th 553, 71 Cal.Rptr.2d 731 (1986)10
 24 *Varian Med. Sys., Inc. v. Delfino,* 35 Cal. 4th 180, 25 Cal. Rptr. 3d 298 (2005)1
 25 *Williams v. Taylor,* 129 Cal.App.3d 745, 181 Cal.Rptr. 423 (1982)4,8
 26

27 **Constitutional Provisions**

28 U.S. Constitution, Amendment I *passim*

1 **State Authorities**

2 Cal. Civ. Code § 47(b)7,8,9

3 Cal. Code Civ. Proc. § 340 (c)6

4 Cal. Code of Civil Procedure § 425.16*passim*

5 Cal. Code of Civil Procedure § 425.16(a) 1

6 Cal. Code of Civil Procedure § 425.16(b)(1) 1,2

7 Cal. Code of Civil Procedure § 425.16(e) 2

8 Cal. Code of Civil Procedure § 425.16(e)(1) 2,4

9 Cal. Code of Civil Procedure § 425.16(e)(2) 2,4

10 Cal. Code of Civil Procedure § 425.16(e)(4) 2,3

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

MEMORANDUM OF POINTS AND AUTHORITIES

I. CALIFORNIA’S ANTI-SLAPP STATUTE APPLIES TO PLAINTIFFS’ CLAIMS AGAINST FIDH

A. California’s Anti-SLAPP Statute, C.C.P. § 425.16, Applies In Federal Diversity Cases

The Ninth Circuit has made clear that California’s anti-SLAPP statute, C.C.P. § 425.16 (“Section 425.16”), applies in federal diversity cases with state law claims because the statute confers substantive rights that do not “directly collide” with the Federal Rules of Civil Procedure. *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-73 (9th Cir. 1999); *see also Thomas v. Fry’s Electronics, Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005) (reversing district court for failing to apply anti-SLAPP statute). Plaintiffs here allege that this Court has diversity jurisdiction and allege state law claims. *See, e.g.*, Complaint, ¶¶ 8, 25-29, 33-35.

B. The Anti-SLAPP Statute Is Construed Broadly

The anti-SLAPP statute was enacted to check “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech and petition[.]” C.C.P. § 425.16(a). In 1997, the Legislature amended Section 425.16(a) to ensure that it “shall be construed broadly.” The California Supreme Court has stressed that “the broad construction expressly called for in [Section 425.16(a)] is desirable from the standpoint of judicial efficiency,” and cautioned “that [a narrow construction] would serve Californians poorly.” *Briggs v. Eden Council*, 19 Cal. 4th 1106, 1121-22, 1125, 81 Cal. Rptr. 2d 471 (1999).

The anti-SLAPP statute creates a “two-step process for determining” whether a cause of action should be stricken under Section 425.16. *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192, 25 Cal. Rptr. 3d 298 (2005); C.C.P. § 425.16(b)(1). First, the court decides “whether the defendant has made a threshold showing that ...

1 the act or acts of which the plaintiff complains were taken ‘in furtherance of the
2 [defendant]’s right of petition or free speech ... in connection with a public issue.’”
3 *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507
4 (2002); C.C.P. § 425.16(b)(1). “[T]he critical point” in the first step is determining
5 “whether the plaintiff’s cause of action itself was *based on* an act in furtherance of
6 the defendant’s right of petition or free speech.” *City of Cotati v. Cashman*, 29 Cal.
7 4th 69, 78, 124 Cal. Rptr. 2d 519 (2002) (original emphasis). Under the first step of
8 the analysis, a defendant need only show that its alleged conduct “underlying the
9 plaintiff’s cause of action fits one of the categories spelled out in section 425.16,
10 subdivision (e).” *Navellier v. Sletten*, 29 Cal. 4th 82, 88, 124 Cal. Rptr.2d 530
11 (2002). Subdivision (e) of the anti-SLAPP statute covers many categories of speech
12 activities, including:

13 (1) any written or oral statement or writing made before a ... judicial
14 proceeding, or any other official proceeding authorized by law; (2) any
15 written or oral statement or writing made in connection with an issue
16 under consideration or review by a ... judicial body, or any other official
17 proceeding authorized by law; ... (4) or any other conduct in furtherance
18 of the exercise of the constitutional right of petition or the constitutional
19 right of free speech in connection with a public issue or an issue of
20 public interest.

21 C.C.P. § 425.16(e). Second, if the statute applies – i.e., if the defendant’s
22 alleged conduct falls within *any one* of the categories enumerated in Section
23 425.16(e) – then the burden shifts to the plaintiff to demonstrate a probability of
24 success on its claim, and if this burden cannot be satisfied, the claim must be stricken.
25 *Equilon Enters.*, 29 Cal. 4th at 67; *Navellier*, 29 Cal. 4th at 88; C.C.P. § 425.16(b)(1).

1 **C. Plaintiffs' Claims Fall Within Sections 425.16(e)(1), (e)(2) and (e)(4)**

2 **1. The Alleged Statements Fall Within Section 425.16(e)(4)**

3 Section 425.16(e)(4) protects statements “in connection with a public issue or
4 an issue of public interest.” C.C.P. § 425.16(e)(4). This phrase has been construed
5 broadly. “[A]n issue of public interest’ within the meaning of section 425.16 . . . is
6 *any issue in which the public is interested*. In other words, the issue need not be
7 ‘significant’ to be protected by the anti-SLAPP statute – it is enough that it is one in
8 which the public takes interest.” *Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th
9 1027, 1042, 72 Cal. Rptr. 3d 210, 220 (2008) (emphasis in original); *Damon v. Ocean*
10 *Hills Journalism Club*, 85 Cal. App. 4th 468, 479, 102 Cal. Rptr. 2d 205, 212 (2000)
11 (“the definition of ‘public interest’ within the meaning of [Section 425.16] has been
12 broadly construed”). Last year, the Ninth Circuit held that courts “must construe ...
13 ‘issue of public interest’ in Section 425.16(e)(4) broadly” to include any “topic of
14 widespread, public interest.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 906 (9th Cir.
15 2010) (finding public interest in greeting card poking fun at socialite Paris Hilton).

16 Consistent with the foregoing authorities, courts have found a wide variety of
17 matters to fall within the “public interest” under the anti-SLAPP statute, including
18 statements and alleged statements about harsh working conditions. In *Nygård*, a
19 former employee of plaintiffs gave an interview to a Finnish magazine about his work
20 experience at plaintiffs’ company. 159 Cal. App. 4th at 1032. The former employee
21 described how he supposedly “slaved ... without a break,” “had to ‘slave/drudge
22 almost without a break the whole time,” “work[ed] round the clock,” and that the
23 plaintiff employer “keeps an eye on his workers like a hawk,” and “didn’t want to
24 let his employees to even go and see a doctor’ when injured.” *Id.* (internal quotation
25 marks omitted). In holding that a matter of public interest under the anti-SLAPP
26 statute is “*any issue in which the public is interested*,” the Court of Appeal
27 emphasized that comments, such as the former employee’s in *Nygård*, are a matter of
28 public interest. *Id.* at 1042. Here, the purported statements underlying each cause of

1 action describe human trafficking and human rights abuses – *i.e.*, a far more serious
2 and egregious description of abysmal working conditions – and they, too, must
3 therefore relate to a matter of public interest. Complaint, ¶¶ 10, 26, 31, 34. *See* 18
4 U.S.C. § 1589 (outlawing human trafficking); *Spacecon Specialty Contractors, LLC*
5 *v. Bensinger*, --- F.Supp.2d ---, 2011 WL 819700 (D. Col. Mar. 2, 2011), *1, *6 (film
6 “clearly” involved a matter of “public concern” where it depicted company’s
7 “discriminatory and abusive treatment of Hispanic workers,” “hiring and abuse of
8 undocumented workers,” and “human trafficking”).

9 **2. The Alleged Statements Also Fall Within Sections 425.16(e)(1)**
10 **And (2)**

11 Section 425.16 applies to writings before or in connection with an issue under
12 consideration by a judicial body or other official proceeding. C.C.P. §§
13 425.16(e)(1), (e)(2). Complaints to a law enforcement body qualify as statements
14 before an “official proceeding.” *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th
15 993, 1008-1010, 113 Cal.Rptr.2d 625 (2001) (involving complaints to the Securities
16 and Exchange Commission). The protections of the anti-SLAPP statute also apply to
17 reports about past judicial proceedings, court records, and related statements made
18 outside the courtroom. *See Sipple v. Foundation for Nat’l Progress*, 71 Cal. App. 4th
19 226, 237-38, 83 Cal.Rptr.2d 677 (1999) (Section 425.16(e)(2) extends to statements
20 about past litigation, depositions, and related statements by court witnesses outside of
21 court); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784,
22 54 Cal.Rptr.2d 830 (1996) (“communications preparatory to or in anticipation of the
23 bringing of an action or other official proceeding are...entitled to the benefits of
24 section 425.16”); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal.
25 App. 4th 855, 863, 44 Cal.Rptr.2d 46 (1995) (statements in connection with
26 government hearings and related lawsuits also fall within section 425.16). Indeed, “a
27 communication concerning possible wrongdoing made to an official government
28 agency..., and which communication is designed to prompt action by that agency, is

1 as much a part of an ‘official proceeding’ as a communication made after an official
2 investigation has commenced.” *Williams v. Taylor*, 129 Cal. App. 3d 745, 753-754,
3 181 Cal.Rptr. 423 (1982); *see also Mindys Cosmetics Inc. v. Dakar*, 611 F.3d 590,
4 596 (9th Cir. 2010) (applying same standard in the context of C.C.P. § 425.16 and
5 citing *ComputerXpress*, 93 Cal. App. 4th at 1009).

6 Plaintiffs’ claims are based on FIDH’s alleged communication of the
7 purportedly defamatory remarks to the United States Attorney in Hawaii, which
8 supposedly prompted action by the government adverse to Plaintiffs. Complaint, ¶¶
9 19, 20. Thus, Plaintiffs’ claims fall under the anti-SLAPP statute for the independent
10 reason that they arise from statements to and before an official government agency.

11 **II. PLAINTIFFS’ CLAIMS SHOULD BE STRICKEN BECAUSE**
12 **PLAINTIFFS CANNOT DEMONSTRATE A PROBABILITY OF**
13 **SUCCESS**

14 Because FIDH satisfies the first step of Section 425.16’s test – i.e., that that
15 the purported speech at issue was in connection with a matter of public interest – the
16 burden shifts to Plaintiffs to demonstrate a probability of prevailing on their cause of
17 action for libel. *Equilon Enters.*, 29 Cal. 4th at 67; C.C.P. § 425.16(b)(1); *Ramona*
18 *Unified Sch. Dist. v. Tsiknas*, 135 Cal. App. 4th 510, 519, 37 Cal.Rptr.3d 381 (2005).
19 “In making this assessment, the court must consider both the legal sufficiency of and
20 evidentiary support for the pleaded claims, and must also examine whether there are
21 any constitutional or non-constitutional defenses to the pleaded claims and, if so,
22 whether there is evidence to negate those defenses.” *Id.*; *see also eCash*
23 *Technologies, Inc. v. Guagliardo*, 127 F.Supp.2d 1069, 1074-75 (C.D. Cal. 2000)
24 (under Section 425.16, a plaintiff must substantiate its claims and overcome any
25 affirmative defenses with admissible evidence). Plaintiffs cannot satisfy their burden
26 for multiple independent reasons, and their claims against FIDH should therefore be
27 stricken.

1 **A. FIDH Did Not Republish Any Material Relating To Plaintiffs In**
2 **2010 And The Claims for Relief Should Be Stricken On That Ground.**¹

3 FIDH did not republish any material related to plaintiffs in 2010. (*See*
4 Declaration of Antoine Bernard, ¶ 4 (hereinafter “Bernard Declaration”)). In 2006,
5 FIDH voluntarily undertook to make changes to an Internet posting relating to
6 plaintiffs, after the co-defendant Kav LaOred entered into a settlement with plaintiffs
7 in Israel. (Bernard Declaration, ¶ 3). It was not required to do so as it was not a party
8 to the litigation. (*Id.*) Since that date, FIDH has not changed the Internet posting or
9 published or republished any matter related to plaintiffs, either on the Internet or in
10 any other form or media. (Bernard Declaration, ¶ 4).

11 Those are the facts. Arrayed against them are nothing more than mere
12 conclusions alleged in the Complaint, vaguely stating that publication occurred and
13 that it was caused by FIDH. In fact, Plaintiffs’ exhibit C to the Complaint, a copy of
14 the pages that were allegedly republished and submitted to the District Court in
15 Hawaii by the U.S. Attorney, are undated (Complaint, ¶ 19; Complaint, Ex. C), but
16 the actual filing in Hawaii shows the date of publication as 2003. *See* Exhibit F to the
17 Declaration of Howard I. Langer in Support of Defendant Kav LaOved’s Motion to
18 Strike or, in the Alternative, to Dismiss Plaintiffs’ Complaint dated and filed in this
19 case on September 28, 2011, at HIL 378.

20 The Ninth Circuit has held
21 that in any case . . . where a plaintiff seeks damages or injunctive relief,
22 or both, for conduct which is prima facie protected by the First
23 Amendment, the danger that the mere pendency of the action will chill
24

25 1 The statute of limitations for a defamation claim in California is one year. Cal.
26 Code Civ. Proc. § 340 (c). The Complaint is file-stamped August 22, 2011. Every
27 allegation of publication other than those stated in a conclusory fashion in ¶¶ 19-20 occurred
28 earlier than one year before the filing of the Complaint. As such, no alleged publication in
the Complaint on any other occasion is actionable in California.

1 the exercise of First Amendment rights requires more specific
2 allegations than would otherwise be required.

3 *Franchise Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd.*, 542 F.2d
4 1076, 1082-83 (9th Cir. 1976) (emphasis added). The only facts before the Court
5 show that FIDH did not publish any material in 2010 (Complaint ¶¶ 19-20). Thus,
6 the primary element of proof of a defamation claim – the fact of publication -- is
7 unsatisfied.²

8 **B. Even The Conclusory Allegation Of Publication Shows That The**
9 **Publication Alleged Was An Absolutely Privileged Communication.**

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

20 The Complaint at ¶ 19 alleges that FIDH “upon information and belief,
21 between September 3 and September 9, 2010, subsequent to ORIAN's “arrest on the
22 above-referenced charges” the material referred to earlier in the Complaint. It does
23 not allege how, in what form, via what media, or where the alleged publication
24 occurred. The Complaint also alleges that “the US Attorney used the defamatory
25

26
27 ² Defamation involves (a) a publication that is (b) false, (c) defamatory, and (d)
28 unprivileged, and that (e) has a natural tendency to injure or that causes special damage.
(C.C. 45, 46).

1 material in its submissions to the District Court in Hawaii upon which the Court
2 based its decision to keep ORIAN in pretrial detention.” (Complaint, ¶ 19).

3 Paragraph 20 of the Complaint alleges that the material was made available to
4 the government in Hawaii (without stating in what form or how it was “made
5 available,” but clearly referring back to ¶ 19 where it is alleged that the United States
6 Attorney in Hawaii made use of the material). This leaves the Court with but one
7 conclusion: each claim against FIDH is based on its purported communication to the
8 government.

9 Even though the Complaint does not make an allegation of fact about where
10 and how the 2010 publication occurred, assuming *arguendo* that the publication was
11 to the United States Attorney prosecuting a criminal matter related to the “material,”
12 the publication was absolutely privileged.

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

1 made in any legislative or judicial proceeding); *Cabesuela v. Browning-Ferris*
2 *Industries of California, Inc.*, 68 Cal.App.4th 101, 112, 80 Cal.Rptr.2d 60 (Cal.App.
3 6 Dist.,1998) (Civ. Code § Code 47 gives all persons the right to report crimes to the
4 police, the local prosecutor, or an appropriate regulatory agency without risk of
5 defamation liability, even if the report is made in bad faith).

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

11 **C. The Tortious Interference Claim And The Declaratory Relief Claim**
12 **Must Also Be Stricken As They Are Mere Attempts To Plead Around First**
13 **Amendment Limitations That Render The Defamation Claim Baseless.**

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

26 “First Amendment limitations are applicable to all claims whose gravamen is
27 the alleged injurious falsehood of a statement.” *Carafano v. Metrosplash.com Inc.*,
28 207 F.Supp.2d 1055, 1076 (C.D. Cal. 2002), *aff’d* 339 F.3d 1119 (9th Cir. 2003). A

1 plaintiff may not evade the limitations on defamation claims by restyling the claim as
2 something else. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108
3 S.Ct. 876, 99 L.Ed.2d 41 (1988) (protections apply to claim styled as intentional
4 infliction of emotional distress where gravamen of claim was false speech); *Blatty v.*
5 *New York Times Co.*, 42 Cal.3d 1033, 1042-43, 232 Cal.Rptr. 542 (1986) (“the
6 limitations that define the First Amendment’s zone of protection ... apply to all
7 claims whose gravamen is the alleged injurious falsehood of the statement”).

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

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

25 ///

26 ///

27 ///

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

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint, and each of its claims therein, should be stricken and attorneys' fees and costs should be awarded to defendant FIDH pursuant to Cal. Code Civ. Proc § 425.16.³

Dated: October 17, 2011

**BOSTWICK & JASSY LLP and
CENTER FOR CONSTITUTIONAL RIGHTS**

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

**Attorneys for Defendant FEDERATION
INTERNATIONAL DES DROITS DE
L'HOMME**

³ "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." § 425.16(c).