UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY SHERROD, Plaintiff, v. ANDREW BREITBART, LARRY O'CONNOR, AND JOHN DOE, Defendants.	Case No. 1:11-cv-00477 (RJL)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULES 12(B)(3) AND (6) OR IN THE ALTERNATIVE, TRANSFER VENUE UNDER 28 U.S.C. §§ 1404(a) OR 1406(a) BY DEFENDANTS ANDREW BREITBART AND LARRY O'CONNOR

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I. PRELIMINARY STATEMENT

Plaintiff Shirley Sherrod has sued Andrew Breitbart, Larry O'Connor and "John Doe" over Breitbart's July 19, 2010 commentary on the website BigGovernment.com (the "Blog Post") that criticized Sherrod and based that criticism on two video clips of Sherrod's public, televised speech at the NAACP's Annual Freedom Fund Awards banquet on March 27, 2010. At the time that these events occurred, Sherrod was a public official. Breitbart is a well-known journalist and an outspoken conservative. He publishes news, works of original investigative journalism, commentary, "blogs" and works of opinion over the Internet via a number of websites he created and operates, including BigGovernment.com, which focuses on issues concerning government, politics and other matters of public concern. Larry O'Connor is the Editor-in-Chief of Breitbart.tv, a website operated by Breitbart that post videos, and contributes commentary pieces to other Breitbart websites.

Prior to addressing the Complaint's lack of merit under Rule 12(b)(6), this motion first focuses on the threshold matter of whether this case – between a Georgia resident and two California residents based on purported tortious conduct that was not committed in the District of Columbia – is properly venued in this Court. Sherrod neither resides nor works in the District of Columbia. The statements at the core of the dispute were published over the Internet from California, where all the present defendants work and reside, and where all of the relevant evidence is located. Sherrod was no more harmed by the defendants (if at all) in the District of Columbia than she was in any other corner of the nation. Her decision to sue Breitbart and O'Connor outside her home state of Georgia, in a court located more than 600 miles from the place of her residence, is entitled to no deference whatsoever, and all the other relevant factors

demonstrate that if this case is to proceed at all, it must either be re-filed in or transferred to the United States District Court for the Central District of California.

If the Court reaches the substantive part of this motion, dismissal is proper under Rule 12(b)(6) because the allegedly defamatory statements constitute protected expressions of opinion under constitutional libel law as well as the common-law doctrine of fair comment. Breitbart's Blog Post embedded actual video clips from Sherrod's speech that provide the truthful facts – her own words – upon which Breitbart's opinions were based.

For the reasons set forth below, the Court should grant the motion to dismiss under Rules 12(b)(3) and (6), Federal Rules of Civil Procedure.

II. PROCEDURAL SECTION – VENUE

A. Statement of Facts

Sherrod's Complaint, filed on February 11, 2011 in the Superior Court of the District of Columbia, asserts purported claims for defamation, false light, and intentional infliction of emotional distress against Defendants Breitbart, O'Connor, and an unidentified John Doe defendant. (Complaint ¶¶ 35, 36, 38.) Breitbart and O'Connor timely removed this action to this Court on March 4, 2011.

Sherrod alleges that the Defendants published allegedly defamatory comments on the websites BigGovernment.com, YouTube.com, and Twitter.com, which included an allegedly defamatory video. (Complaint ¶¶ 30, 31, 47-48, 59, 60.) Sherrod alleges that she suffered damage as a result of the allegedly defamatory video and allegedly defamatory comments, including reputational and career damage that purportedly led her to resign from her employment as the Georgia State Director of Rural Development for the United States Department of Agriculture ("USDA"). (Complaint ¶¶ 86-90.)

Sherrod alleges she is a citizen and resident of Georgia. (Complaint ¶ 9). She has lived and worked in Georgia her entire life. (Complaint ¶¶ 13-20.) Breitbart and O'Connor are both citizens and residents of California who currently live within the Central District of California. (Declaration of Andrew Breitbart ("Breitbart Dec.") ¶ 2; Declaration of Larry O'Connor ("O'Connor Dec.") ¶ 2.) Breitbart is the publisher of, and a contributor to, the news portals Breitbart.com, Breitbart.tv, BigGovernment.com, BigHollywood.com, BigJournalism.com, and BigPeace.com (collectively, the "Breitbart Websites"). (Breitbart Dec. ¶ 3.) O'Connor is Editor in Chief of Breitbart.tv and a contributor to other Breitbart Websites. (O'Connor Dec. ¶ 3.) Each of the Breitbart Websites is operated and maintained within California. (Breitbart Dec. ¶ 8.)

Breitbart Holdings, Inc. is the parent company. (Breitbart Dec. ¶ 4.) It is a California corporation. (Breitbart Dec. ¶ 5.) Breitbart.com, LLC, is a California limited liability company that operates the Breitbart Websites, with the exception of Breitbart.tv. (Breitbart Dec. ¶ 6.) Breitbart.tv, LLC is a Delaware limited liability company. (Breitbart Dec. ¶ 7.) The respective owners and operators of the Breitbart Websites have no offices or employees in Washington, D.C. (Breitbart Dec. ¶ 9.) Breitbart performs his duties as publisher of and contributor to the Breitbart Websites while physically located within California, typically from a computer or other web-enabled device that is also located within the state of California (or has a IP address, phone number, or other identifier that is registered within California). (Breitbart Dec. ¶ 12.) O'Connor performs his duties as Editor in Chief of Breitbart.tv and contributor to many of the Breitbart Websites typically from a computer or other web-enabled device that is also located within the state of California (or has a IP address, phone number, or other identifier that is registered within California). (O'Connor Dec. ¶ 4.)

O'Connor usually works out of his home in Los Angeles County, California, where he lives with his wife and four children, ages four to eleven, or at his office, located in Orange County, California. (O'Connor Dec. ¶ 5.) O'Connor and his wife, who works part time, are the primary caretakers for their children, two of which have special needs, and they home-school three of their four children. (O'Connor Dec. ¶ 6.) Breitbart also has four young children and would not be able to perform many of his duties as publisher of and contributor to the Breitbart Websites from Washington, D.C. (Breitbart Dec. ¶ 13.)

Neither Breitbart nor O'Connor have ever lived or worked in D.C. (Breitbart Dec. ¶ 14; O'Connor Dec. ¶ 7.) Likewise, neither Breitbart nor O'Connor regularly does or solicits business, engages in any other persistent court of conduct, or derives substantial revenue from goods used or consumed or services rendered in Georgia. (Breitbart Dec. ¶ 2; O'Connor Dec. ¶ 9.) Rather, both Breitbart and O'Connor are residents of California and are subject to service of process in the Central District of California. (Breitbart Dec. ¶ 2; O'Connor Dec. ¶ 2.)

B. Argument

1. Because venue is improper and/or inconvenient in this district, this action should be dismissed under 28 U.S.C. § 1406(a) or, in the alternative, transferred to the Central District Of California under 28 U.S.C. §§ 1406(A) or 1404(A).

Under Rule 12(b)(3) of the Federal Rules of Civil Procedure, which "instructs the court to dismiss or transfer a case if venue is improper or inconvenient in the plaintiff's chosen forum," a defendant may challenge the appropriateness of the plaintiff's chosen venue at the outset of a lawsuit. *Black v. City of Newark*, 535 F. Supp. 2d 163, 166 (D.D.C. 2008). For the reasons that follow, the Court should dismiss this action under 28 U.S.C. § 1406(a) or, in the alternative, transfer it to the United States District Court for the Central District of California under 28 U.S.C. §§ 1406(a) or 1404(a).

a. Venue is improper in this District.

This Court has diversity jurisdiction over this action. 28 U.S.C. § 1332(a). Under 28 U.S.C. § 1391(a), venue in a diversity action is proper only in:

> (1) A judicial district where any defendant resides, if all defendants reside in the same State;
>
> (2) A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) A judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Id.

None of these applies. Neither Breitbart nor O'Connor resides in this District (Breitbart Dec. ¶ 14; O'Connor Dec. ¶ 2), so venue is not proper under § 1391(a)(1). Sherrod, who has the burden of demonstrating that venue is proper in this District, *see Lamont v. Haig*, 590 F.2d 1124, 1136 (D.C. Cir. 1978), must therefore be trying to rely upon § 1391(a)(2) to establish venue. Indeed, in her Complaint, Sherrod states that "this case is properly brought in this Court because significant events giving rise to Mrs. Sherrod's complaint – and significant damage to Mrs. Sherrod's reputation – occurred within the District of Columbia." (Complaint ¶ 8). But that is simply, and demonstrably, not true.

Sherrod's conclusory statement that "significant events giving rise to her claims occurred within Washington, D.C." is not supported by the factual allegations of her own Complaint. Sherrod alleges that she is currently a citizen and resident of Georgia (Complaint ¶ 9), where she attended school and has lived and worked her entire life. (Complaint ¶¶ 13, 15, 16, 17, 18, 20). Sherrod does not allege that she intends to relocate or seek work in Washington, D.C., and in fact, has "vowed to remain in the South . . . ." (Complaint ¶ 14).

Although Sherrod formerly worked for the USDA, a federal agency,[1] *she does not allege that she ever worked within Washington, D.C.*[2] In fact, aside from her conclusory statement that significant events giving rise to her claims occurred within Washington, D.C., Sherrod alleges only the following, manifestly thin factual connections, between her claims and the District of Columbia: (1) she attended one orientation in Washington, D.C., after she accepted employment with the USDA (Complaint ¶ 23); (2) she was supervised by and reported directly to senior USDA officials who work at USDA's Washington, D.C. headquarters (Complaint ¶ 23); and (3) she received four phone calls that originated from the USDA's Washington, D.C. headquarters *after* the allegedly defamatory material was published. (Complaint ¶¶ 23, 72, 74-77). Notably, Sherrod does not allege that *any* Defendant undertook any tortious act within the District of Columbia.

Rather, as to the (allegedly) key, operative facts Sherrod alleges that Breitbart: received an allegedly defamatory video from an unknown individual (Complaint ¶ 12); edited or participated in the editing of the allegedly defamatory video (Complaint ¶ 38); authored an allegedly defamatory blog post that contained the allegedly defamatory video and posted it on

[1] To the extent that Sherrod is arguing that venue is proper in Washington, D.C. because she was formerly employed by a federal agency, that argument fails. Tangential involvement of a federal agency is not sufficient to establish venue in Washington, D.C. *See, e.g., Aftab v. Gonzalez*, 597 F. Supp. 2d 76, 82 (D.D.C. 2009) ("When the only real connection the lawsuit has to the District of Columbia is that a federal agency headquartered here is charged with generally regulating and overseeing the [administrative] process, venue is not appropriate in the District of Columbia."); *Marks v. Torres*, 576 F. Supp. 2d 107, 111 (D.D.C. 2008); *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 68 (D.D.C. 2003) (stating that the plaintiff's choice of forum received less deference because there was a "lack of evidence that federal officials in Washington, D.C. played an active and significant role in the decision" that caused the alleged harm).

[2] Sherrod argues that she suffered damage to her reputation in Washington, D.C. and that she suffered damage to her career generally, but it is unclear whether Sherrod is arguing that she lost job opportunities within Washington, D.C. Such damage, even if alleged and provable, is insufficient to establish venue within Washington, D.C. *See, e.g., Manning v. Flannery*, Civ. No. 09-03190, 2010 U.S. Dist. LEXIS 1091 (E.D. Pa. Jan. 7, 2010) (finding that when the plaintiff alleged that he was unable to obtain new employment in the Eastern District of Pennsylvania as a result of torts that were committed in the Western District of Pennsylvania, venue was not proper in the Eastern District).

BigGovernment (Complaint ¶ 2); published an allegedly defamatory message on the website Twitter.com (Complaint ¶ 60); and has failed to remove the allegedly defamatory blog post from BigGovernment (Complaint ¶ 4). *None* of these occurred in Washington, D.C. and, in fact, ALL occurred (if at all) from California. The same holds true for O'Connor, who is alleged to have edited and published the video of Sherrod's speech. (Complaint ¶¶ 37-46.) Sherrod has not alleged, nor can she, that any of O'Connor's conduct regarding the publishing and purported editing of the speech occurred in Washington, D.C.

If Breitbart or O'Connor committed any tortious acts (which they categorically deny), they *could only have committed such acts within the Central District of California*, where Breitbart and O'Connor live, where the Breitbart Websites are maintained, and where Breitbart works as the publisher of and a contributor to the Breitbart Websites and O'Connor works for Breitbart.tv and as a contributor to other Breitbart Websites. *See, e.g., Elemary v. Phillip Holzman A.G.*, 533 F. Supp. 2d 144, 151 (D.D.C. 2008) ("[when] determining where venue will lie in a tort action, courts generally "look to 'where the allegedly tortious actions occurred . . .'") (internal citations omitted); *Abecassis v. Wyatt*, 669 F. Supp. 2d 130, 133 (D.D.C. 2009). Under both § 1391(a)(1) and § 1391(a)(2), venue is not proper within this district, and properly lies only within the Central District of California.

b. In the interest of justice, this action should be dismissed rather than transferred.

Since venue is not proper in Washington, D.C., § 1406(a) *requires* that this Court must either dismiss this action or, if it finds that it is in the "interest of justice," transfer it to a District where it could have been brought. Here, transfer is not in the "interest of justice" because this action was filed in a judicial district that was *obviously incorrect* and far less plausible than the proper judicial district, the Central District of California. *See, e.g., Noxell Corp. v. Firehouse*

No. 1 Bar-B-Que Restaurant, 760 F.2d 312 (D.C. Cir. 1985) (dismissing action for lack of venue where plaintiff chose District of Columbia forum "simply to suit its own purpose"); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1201 (4th Cir. 1993) (explaining that it is not in the "interest of justice" to transfer an action that was "obviously" or "deliberately" filed in the wrong court). In *Noxell, the plaintiff* was a Maryland corporation who sued a small California restaurant for trademark infringement in this District. 760 F.2d at 314. The only nexus between the plaintiff's claims and the District of Columbia was that a small amount of the product that allegedly infringed the plaintiff's trademark was sold within Washington, D.C. *Id*. The plaintiff alleged that venue was proper under § 1391(b)(2) because its "claim arose" within Washington, D.C. *Id.*

Relying upon *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979) – which held that when venue is based upon the "claim arose" language of 1391(b)(2),[3] venue must be interpreted with a view to the convenience of *defendants* – the D.C. Circuit dismissed the action, explaining that:

> Noxell has chosen the District of Columbia simply to suit its own convenience. The forum Noxell has selected is barely plausible in terms of the accessibility of relevant evidence; certainly the District of Columbia is a far less plausible choice from that vantage point than is the Northern District of California. While trial in the District of Columbia would serve plaintiffs' convenience, it would in no way serve the convenience of the defendants.

Id.

Here, like in *Noxell*, there are virtually no ties between the claims in this action and the District of Columbia, but correspondingly, there are *significant ties to California*. Although trial

[3] The language of 28 U.S.C. § 1391(b)(2), which governs venue in cases in which federal jurisdiction is based upon the presence of a federal question, is identical to the language of 28 U.S.C. § 1391(a)(2), which governs venue in cases in which federal jurisdiction is based upon diversity of citizenship.

in Washington, D.C. may suit Sherrod's convenience and the convenience of her counsel, it does not serve the convenience of the named defendants, who live and work over 3,000 miles away from the District of Columbia. Sherrod's choice of this venue was and is far less plausible or reasonable than the Central District of California. Accordingly, the Court should dismiss, rather than transfer, this action under § 1406(a).

2. If this Court determines that venue is improper, but does not dismiss, the action must be transferred to the United States District Court for the Central District Of California under § 1406(A).

If this Court agrees that venue is improper in the District of Columbia, but finds that it is in the interest of justice to transfer this action rather than to dismiss it, this case should be transferred to the Central District of California under the mandatory transfer requirements of § 1406(a), which provides that "the district court of a district in which is filed a case laying venue in the wrong division or district *shall* dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (emphasis added).

a. This action could have been brought in the United States District Court for the Central District of California.

In order to transfer a case to another district court under § 1406(a), *both* venue and personal jurisdiction must be present in the transferee district. *Packer v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 728 F. Supp. 8, 12 (D.D.C. 1989). Both Breitbart and O'Connor are residents of California and are subject to service of process in the Central District of California. (Breitbart Dec. ¶ 2; O'Connor Dec. ¶ 2.) Furthermore, under § 1391(a)(1), venue in a diversity action is proper in "a judicial district where any defendant resides, if all defendants reside in the same State," so venue is clearly proper in the Central District of California, where both Breitbart and O'Connor reside. Accordingly, this matter certainly "could have been brought" in the United States District Court for the Central District of California.

b. This case cannot be transferred to Georgia.

If this Court finds that venue is improper in the District of Columbia, but that transfer of this action is in the interest of justice, it must transfer this action to the United States District Court for the Central District of California because there is no other judicial district in which this action could have been brought.

Sherrod may argue that this action could conceivably be transferred to the Northern District of Georgia, based on the following: She is a citizen and resident of Albany, Georgia (*see* Complaint Caption), which is located within the Northern District of Georgia and she was forced to resign her employment in Georgia and purportedly has suffered emotional and physical distress in Georgia. (Complaint ¶¶ 86-90.)

However, this action could not have been brought in Georgia because Breitbart and O'Connor are *not* subject to personal jurisdiction in Georgia. *See, e.g.*, Ga. Code Ann. § 9-10-91(2) (providing that a Georgia court may exercise personal jurisdiction over a nonresident if he "commits a tortious act or omission within this state, *except as to a cause of action for defamation of character arising from the act*.") (emphasis added); *Worthy v. Eller*, 265 Ga. App. 487, 488 (Ga. Ct. App. 2004) (analyzing Ga. Code Ann. § 9-10-91(2) and finding that a Georgia court can only exercise personal jurisdiction over a defendant accused of defamation if he has sufficient other minimum contacts with Georgia separate and *apart from* the defamatory act of which the plaintiff complains); *see also* Ga. Code Ann. § 9-10-91(3) (providing that a Georgia court may exercise personal jurisdiction over a nonresident if he "commits a tortious injury in [Georgia] caused by an act or omission outside [Georgia] if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in [Georgia].").

Breitbart and O'Connor do not have sufficient minimum – or indeed *any* – contacts with Georgia separate and apart from the allegedly defamatory acts of which Sherrod complains. Neither Breitbart nor O'Connor regularly does or solicits business, engages in any other persistent court of conduct, or derives substantial revenue from goods used or consumed or services rendered in Georgia. (Breitbart Dec. ¶ 2; O'Connor Dec. ¶ 9.) A Georgia court could not, therefore, exercise personal jurisdiction over Breitbart or O'Connor, and this action could not have been brought in the Northern District of Georgia.

Thus, since the Central District of California is the *only* judicial district in which this action could properly have been originally filed, if this Court determines that transfer is in the interest of justice, the Court should transfer to the Central District of California.

3. If this Court finds that venue is proper in this District, this action should nonetheless be transferred to the United States District Court for the Central District of California in the interest of justice under § 1404(A).

Even if this Court finds that Sherrod has (somehow) satisfied the technical requirements of § 1391(a) to establish venue in this District, this action should nonetheless be transferred to the Central District of California for the convenience of the parties pursuant to the discretionary transfer provisions of § 1404(a), that provides that "for the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district . . . where it might have been brought." Section 1404(a) is "intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Little v. King*, Civ. No. 10-1216, 2011 WL 198152, 2011 U.S. Dist. LEXIS 5467 (D.D.C. Jan. 20, 2011) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)).

Like § 1406(a), an action may only be transferred under § 1404(a) to a district in which the case could have been originally filed. Because the case could have been originally filed in the Central District of California, the Court must now "balance case-specific factors related to the public interest of justice and the private interests of the parties and witnesses" to determine whether transfer to that District is in the "interest of justice." *Al-Ahmed v. Chertoff*, 564 F. Supp. 2d 16, 19 (D.D.C. 2008).

The private interest factors include: 1) the plaintiff's choice of forum; 2) the defendant's choice of forum; 3) where the claim arose; 4) the convenience of the parties; 5) the convenience of the witnesses; and 6) the ease of access to sources of proof. *New Hope Power Co. v. U.S. Army Corps of Engineers*, 724 F. Supp. 2d 90, 95 (D.D.C. 2010) (internal quotations and citations omitted); *Al-Ahmed*, 564 F. Supp. 2d at 19. The public interest factors include: 1) the local interest in making local decisions about local controversies; 2) the potential transferee court's familiarity with the applicable law; and 3) the congestion of the transferee court. *Id.*

All of these factors point to and support a transfer to California.

a. The private interest factors weigh strongly in favor of discretionary transfer to the United States District Court for the Central District of California.

The private interest factors weigh in favor of transfer because: (1) Sherrod's choice to sue in a foreign forum that has no meaningful ties to her claims or interest in the parties or the subject matter is not entitled to deference; (2) her claims arose outside of her chosen forum; and (3) the convenience of the Defendants and witnesses would be best served in the Central District of California.

Sherrod is now, and has been for her entire life, a citizen and resident of Georgia. (Complaint ¶ 9, 13, 15, 16, 17, 18, 20). Because she intentionally chose not to sue in her home

district, Sherrod's choice of forum is not entitled to significant deference. *See, e.g.*, *New Hope Power*, 724 F. Supp. 2d at 95 (finding that less deference for plaintiff's chosen forum is appropriate when the plaintiff has not chosen her own home forum); *Thayer/Patriocof Educ. Funding v. Pryor Resources, Inc*., 196 F. Supp. 2d 21, 31 (D.D.C. 2002) (plaintiff's chosen forum is "ordinarily afforded great deference, except where the plaintiff is a foreigner in that forum").

Sherrod's chosen venue should be afforded less deference because it "has no meaningful ties to the controversy and no particular interest in the parties or their subject matter." *Sheldon v. Nat'l R.R. Passenger Corp*., 355 F. Supp. 2d 174, 178 (D.D.C. 2005); *Gipson v. Wells Fargo & Co*., 563 F. Supp. 2d 149 (D.D.C. 2008). Sherrod's claims "arose" in California and the real ties (if any) between Sherrod's claims and the District of Columbia are insignificant. The ties between the parties – none of whom are Washington, D.C. residents – and the District of Columbia are tenuous at best. Sherrod does *not*, and could *not* in good faith, allege that *any* Defendant undertook *any* tortious act within the District of Columbia. Perhaps the most meaningful connection to the District of Columbia is that Sherrod's counsel is located here. However, the "location of counsel carries little, if any, weight in an analysis under § 1404(a)." *Reiffin v. Microsoft Corp*., 104 F. Supp. 2d 48, 52 n.7 (D.D.C. 2000).[4]

If Breitbart or O'Connor committed any tortious acts (which they categorically deny), *they could only have committed such acts within the Central District of California*, where Breitbart and O'Connor live, where the Breitbart Websites are maintained, and where Breitbart works as the publisher of and a contributor to the Breitbart Websites and O'Connor works for

[4] In fact, although there is no indication that Sherrod's counsel has any lengthy (or even any) prior relationship, KMR has represented Breitbart, in California, as his and his companies' lead outside counsel for many years.

Breitbart.tv and contributor to the Breitbart Websites. *See, e.g., Elemary v. Phillip Holzman A.G.*, 533 F. Supp. 2d 144, 151 (D.D.C. 2008) ("[when] determining where venue will lie in a tort action, courts generally "look to 'where the allegedly tortious actions occurred . . .'") (internal citations omitted); *Abecassis v. Wyatt*, 669 F. Supp. 2d 130, 133 (D.D.C. 2009). Sherrod's claims (if any), therefore, arose in the Central District of California, and not in this District.[5]

The Central District of California is plainly more favorable to the Defendants in terms of convenience. Every named defendant resides in the Central District of California. *See Noxell Corp.*, 760 F.2d at 317 (D.C. Cir. 1985) (finding that causing a California defendant to defend a lawsuit 3,000 miles from where his employees and records were located would exceed "inconvenience" and would in fact cause a hardship for the defendant, especially when the nexus between the District of Columbia and the plaintiff's claims was almost non-existent).

For O'Connor, litigating this matter in the District of Columbia is particularly burdensome and inconvenient. He is a primary caretaker for his four children, ages four to eleven, he and his wife home school three of the children, and he works out of his home to be available for caretaking responsibilities. (O'Connor Dec. ¶¶ 5-6.) Two of his children have special needs and they require additional attention and care. (O'Connor Dec. ¶ 6.) Compelling O'Connor to defend this matter in the District of Columbia would interfere with and disrupt these caretaking responsibilities.

[5] Indeed, transfer to the Central District of California would still be proper even if Sherrod had established that her claims arose in multiple venues, which she has not. In *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), the United States Supreme Court explained that when a "claim arose" in multiple venues, the case should proceed in the venue most favorable to the defendant – not the plaintiff – in terms of the availability of witnesses, the accessibility of relevant evidence, and general convenience. *Id*. at 178.

Further, if there is any evidence to support Sherrod's claims, it is likely to be found in the Central District of California, where Breitbart and O'Connor live, work, and maintain their personal and business records, and where the Breitbart Websites are maintained. *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d 149 (D.D.C. 2008) ("Even if modern technology such as e-mail, scanning, and efficient air travel has made the choice of venue based on the location of evidence less significant, the physical location is still relevant for the convenience determination.").

The balance of private interest factors thus strongly favors litigating this action in the Central District of California. In fact, *not a single private interest factor* weighs in favor of allowing this action to remain in the District of Columbia.

b. The public interest factors weigh in favor of discretionary transfer to the United States District Court for the Central District of California.

The public interest factors also weigh in favor of a transfer. Sherrod's claims are based upon state law and, as the above discussion of appropriateness of venue in the Central District of California demonstrates, to the extent that the laws of the District of Columbia and California conflict, California is the *only state* with sufficient ties to the conduct to warrant the application of its law to Sherrod's claims. As discussed below, California law should apply to the causes of action in the Complaint. Therefore, to the extent that the laws of the District of Columbia and California conflict, the Central District of California is likely to have more experience and familiarity with the law governing Sherrod's claims. *See, e.g., U.S. v. Hohri*, 482 U.S. 64, 74 n.6 (1987) ("Local federal district judges . . . are likely to be familiar with the applicable state law.").

Although the dockets of both this Court and the Central District of California are congested, this Court has not hesitated to transfer cases to the Central District of California when the circumstances warrant. *See, e.g., Reddy v. O'Connor*, 520 F. Supp. 2d 124 (D.D.C. 2007);

Airport Working Group of Orange City., Inc. v. U.S. Dep't of Defense, 226 F. Supp. 2d 227 (D.D.C. 2002).

Notably, *none* of the public interest factors weighs in favor of maintaining this action within this District. Since the private and public interest factors weigh overwhelmingly in favor of transferring this action to the Central District of California, if the case is not dismissed, the Court should transfer this action to the Central District of California under § 1404(a).

III. SUBSTANTIVE SECTION – MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

A. Statement of Facts

The words "racist" and "racism" that lie at the heart of Sherrod's Complaint are labels that were first applied in this case not to her or to her NAACP hosts. Rather, they were directed towards the Tea Party and long before the events underlying this matter first arose. As early as the spring of 2009, activists on the political left began to refer to the nascent Tea Party movement as "racist" in an effort to malign and marginalize an emerging political movement with which it disagreed politically.[6] It would not be the last time opponents of the Tea Party expressed their disapproval of the party or its supporters, such as Breitbart, using figurative, hyperbolic language. In the heat of the charge and counter-charge that defined this episode, Sherrod herself would tell a national network news audience that Breitbart was a "racist" and

[6] *See, e.g.*, Countdown with Keith Olbermann (April 16, 2009), available at http://www.youtube.com/watch?v=jAAHMDpk7Ik, a transcript of which is available at http://www.msnbc.msn.com/id/ 36645333/ns/msnbc_tv-countdown_with_keith_olbermann/ and attached as **Exhibit 1**. The Defendants respectfully request that this Court take judicial notice pursuant to Federal Rule of Evidence 201(b) of this and other factual information available in the public domain cited and described herein and attached to this Memorandum as Exhibits 1 through 16. *See e.g., Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of newspaper articles); *Washington Ass'n for Television and Children v. F.C.C.*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) taking judicial notice of a speech); *Hamilton v. Paulson*, 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008) (Walton, J.) (taking judicial notice of website).

that "he would like to get us stuck back in the times of slavery. That's where I think he'd like to see all black people end up again." During this interview, Sherrod also revealed her motivation in filing this lawsuit. She stated of Breitbart, "that's one person I'd like to get back at," and, when asked by the CNN anchor, "Would you like his site [BigGovernment.com] to be shut down?," Sherrod responded unequivocally, "That would be a great thing. Because I do not see how that advances us in this country."[7]

When these claims of Tea Party "racism" first surfaced, Breitbart, a prominent and outspoken conservative publisher and journalist, started a campaign to refute those accusations and take up the defense of the Tea Party cause.[8] He was well-known as a defender of the Tea Party by the time its supporters gathered in Washington, DC for a four-day rally in March 2010 to oppose passage of the health care bill.

On March 20, 2010, published reports began to appear claiming that attendees at a Tea Party rally on Capitol Hill protesting the Obama health-care reform package spat on lawmakers and yelled racial epithets at members of the Congressional Black Caucus.[9] In particular, members of the Congressional Black Caucus alleged that the "N-word" was hurled at them, not

[7] Transcript, CNN Newsroom (July 20, 2010), available at http://transcripts.cnn.com/ TRANSCRIPTS/1007/20/cnr.02.html, attached as **Exhibit 2**.

[8] *See*, *e.g.*, Andrew Breitbart, *Big Hollywood Crew Joins Tea Party Protest*, BigGovernment.com(April 15, 2009), available at http://bighollywood.breitbart.com /abreitbart/2009/04/15/bill-hollywood-crew-joins-tea-party-protest/, attached as **Exhibit 3**; Andrew Breitbart, *Question Democratic Authority? Not!*, BigGovernment.com (April 19, 2009), available at http://bighollywood.breitbart.com/abreitbart/ 2009/04/19/question-democratic-authority-not/, attached as **Exhibit 4**.

[9] *See*, *e.g.*, Paul Kane, *'Tea Party' Protestors Accused of Spitting on Lawmaker, Using Slurs*, WASH. POST (Mar. 20, 2010), available at http://www.washingtonpost.com/wpdyn/content/article/2010/03/ 20/AR2010032002556.html, attached as **Exhibit 5**.

once, but 15 times.[10] On March 25, 2010, a Pulitzer-prize winning columnist published under the headline "Tea Party proves me right on racism" a syndicated opinion article stating that the Tea Party activists accused of harassing the congressman "would not have said they were racists. Racists never do."[11] On March 31, 2010, conservative Fox News host Bill O'Reilly made reference to "a number of commentators" who "have called the Tea Party people racists."[12]

Breitbart reacted to these serious accusations by publicly calling for proof. When weeks passed and no audio or visual confirmation of the supposed slurs had surfaced, Breitbart offered to make a $100,000 donation to the United Negro College Fund if anyone produced audio or video footage in support of the published accounts.[13] As part of his open challenge, Breitbart posited that the claims of racial slurs were being fabricated by the "left" and the "progressive media" as a tactic to marginalize growing support for the Tea Party movement in the months leading to the November 2010 mid-term elections. In fact, multiple videos, with audio, showed no evidence that the epithets were made.[14]

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[10] Angelo Henderson, *Rep. Andre Carson and Rep. John Lewis Called the N-Word 15 Times*, WCHB AM, available at http://wchbnewsdetroit.com/detroit/angelohenderson/rep-andre-carson-and-rep-john-lewis-called-the-n-word-15-times-rep-emanuel-cleaver-was-spat-on-by-anti-health-care-reform-protestor-what-does-these-times-remind-you-of/, attached as **Exhibit 6**.

[11] Leonard Pitts, Jr., *Commentary, Tea Party proves me right on racism*, MIAMI HERALD (March 25, 2010), available at http://www.mcclatchydc.com/2010/03/25/90975/commentary-tea-party-proves-me.html#ixzz1JbuhqPSf_), attached as **Exhibit 7**.

[12] Bill O'Reilly, The O'Reilly Factor, FOX NEWS (March 31, 2010), transcript available at http://www.foxnews.com/story/0,2933,590306,00.html, attached as **Exhibit 8**.

[13] *See, e.g.*, Andrew Breitbart, *Barack Obama's Helter Skelter, Insane Clown Posse, Alinsky Plans to Destroy America*, BigGovernment.com (April 2, 2010), available at http://biggovernment.com/abreitbart/ 2010/04/02/barack-obamas-helter-skelter-insane-clown-posse-alinsky-plans-to-deconstruct-america/, attached as **Exhibit 9**.

[14] *See, e.g.*, Andrew Breitbart, *No More Beer Summits: Tea Party 'N-Word' Incident Didn't Happen, and the Congressional Black Caucus Owes America an Apology* (April 26, 2010), available at http://biggovernment.com/abreitbart/2010/04/26/no-more-beer-summits-tea-party-n-word-incident-didnt-happen-and-the-congressional-black-caucus-owes-america-an-apology/, attached as **Exhibit 10**.

It was during this volatile period, on March 27, 2010, that Sherrod was honored by the NAACP at its 20th Annual Freedom Fund Banquet in Douglas, Georgia and gave the speech that, according to the Complaint, was seen by the Doe defendant when it was broadcast on local television. (Complaint ¶ 57.) Sherrod alleges that after watching the speech the Doe defendant contacted Breitbart in order to enlist his help in publicizing the contents of the speech. *Id*.

Over the course of the next three months, the Tea Party continued to confront accusations of racism, including from prominent members of the NAACP.[15] As the allegations of Tea Party racism continued throughout spring and into summer, tensions intensified between the Tea Party and the NAACP. During the first half of July 2010, the war of words over whether the claimed events of March 20, 2010 occurred reached a boiling point, and Breitbart and NAACP President Benjamin Jealous were at the forefront of the controversy.[16] During a July 13, 2010 interview with ABC News, NAACP President Jealous attempted to justify his organization's attack on the Tea Party by referring to the still unproven events of March 20:

> For more than a year we've watched as Tea Party members have called congressmen the N-word, have called congressmen the F-word. We see them carry racist signs and whenever it happens, the membership tries to shirk responsibility. If the Tea Party wants to be respected and wants to be part of the mainstream of this country, they have to take responsibility.[17]

At this very point in time – the week of July 10, 2010 – thousands of NAACP members gathered in Kansas City, Missouri for the NAACP's annual national convention. On the evening of July 13, 2010, the NAACP passed a special resolution that, according to a press release, asked

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[15] *See, e.g.*, Huma Khan, *NAACP vs. Tea Party: Racism Debate Heats Up as Sarah Palin Joins the Fray*, ABC NEWS (July 13, 2010), available at http://abcnews.go.com/Politics/naacp-tea-party-race-debate-heats-sarah-palin/story?id=11153935, attached as **Exhibit 11**.

[16] *Id.*

[17] *Id.*

the Tea Party to repudiate "racist" leaders within its ranks.[18] "[T]here is no place for racism . . . in their movement," Jealous said.[19] The Kansas City Star reported on July 12, 2010 that the resolution alleged that Tea Party activists engaged in "explicitly racist behavior" and used "racial" epithets, and several subsequent news reports contained similar statements from Jealous.[20] ABC News, for example, published on July 13, 2010 that Jealous accused the Tea Party of harboring "racist" and "ultra-nationalist" elements and of failing to dissociate itself from members who carry "racist" signs. "If the Tea Party wants to be respected," Jealous added, "they have to take responsibility."[21] But one Tea Party supporter told the network, "These ideas that Tea Party people are racist . . . that's a simple lie."[22] Former Republican vice presidential candidate Sarah Palin tweeted of the KC conventioneers: "[N]otify me asap when NAACP renders verdict: are liberty-loving, equality respecting patriots racist?"[23]

It was squarely in the context of this months-long and very loud public clash between Tea Party conservatives and the NAACP and its allies in Congress that Breitbart turned the rhetorical tables with his 1400-word, July 19, 2010 commentary (the "Blog Post") that is the subject of Sherrod's lawsuit. *See* Complaint, Ex. 1. In the first half of his commentary, Breitbart accuses the NAACP of demagoguery by demanding the repudiation of "racists" within the Tea Party. He

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[18] Press Release, NAACP Delegates Unanimously Pass Tea Party Amendment, NAACP (July 13, 2010), available at http://www.naacp.org/press/entry/naacp-delegates-unanimously-pass-tea-party-amendment/, attached as **Exhibit 12**.

[19] *Id.*

[20] Judy L. Thomas, *NAACP Considers Resolution Decrying Racist Elements in Tea-Party Movement*, K.C. STAR (July 12, 2010), attached as **Exhibit 13**.

[21] Huma Khan, *NAACP vs. Tea Party: Racism Debate Heats Up as Sarah Palin Joins the Fray*, ABC NEWS (July 13, 2010), available at http://abcnews.go.com/Politics/naacp-tea-party-race-debate-heats-sarah-palin/story?id=11153935, attached as **Exhibit 11**.

[22] *Id.*

[23] *Id.*

argues that the claims of the Congressional Black Caucus about the March 2010 rally in Washington, DC were nothing but a "racial" smear as it took to the airwaves to accuse the Tea Party of "racism." *Id*. He blames the Democratic Party for using charges of "racism" against the Tea Party movement as an expedient political strategy. *Id.* And he derides the mainstream media for falsely labeling the Tea Party as "racist" as well. *Id.* It has been, he says, a summer with "race and racism" taking "center stage" and the NAACP and the Congressional Black Caucus playing the "race card" as "their Stradivarius." *Id.*

It is over 800 words into the Blog Post that Breitbart first introduces Sherrod and her March 27, 2010 public appearance as an NAACP award recipient and USDA official. When he finally reaches the subject of Sherrod's speech, the figurative labels "racist" and "racism" were a well-used part of the rhetorical feud between the Tea Party and its opponents, as is evident not only from the context of the Blog Post but from the prior year of heated dialogue. Indeed, Breitbart begins his evaluation of Sherrod's words by noting that "by bringing up race, and demanding a zero tolerance of racism, the left, and the NAACP in particular, has opened itself up for scrutiny." (Complaint, Ex. 1). He then writes of Sherrod:

> In her meandering speech to what appears to be an all-black audience, this federally appointed executive bureaucrat lays out in stark detail, that her federal duties are managed through the prism of race and class distinctions.
>
> In the first video, Sherrod describes how she racially discriminates against a white farmer. She describes how she is torn over how much she will choose to help him. And, she admits that she doesn't do everything she can for him, because he is white. Eventually, her basic humanity informs that this white man is poor and needs help. But she decides that he should get help from "one of his own kind". She refers him to a white lawyer.
>
> Sherrod's racist tale is received by the NAACP audience with nodding approval and murmurs of recognition and agreement. Hardly the behavior of the group now holding itself up as the supreme judge of another groups' racial tolerance.

Id. The next section of the Blog Post contains an embedded video excerpt from Sherrod's NAACP speech showing the audience reaction referenced in the post. Sherrod makes the following statements which Breitbart characterizes as "video evidence of racism," *id.*, coming from a federal appointee and NAACP award recipient:

> *The first time I was faced with having to help a white farmer save his farm, he — he took a long time talking, but he was trying to show me he was superior to me. I know what he was doing. But he had come to me for help. What he didn't know while he was taking all that time trying to show me he was superior to me, was I was trying to decide just how much help I was going to give him.*
>
> *I was struggling with the fact that so many black people have lost their farmland, and here I was faced with having to help a white person save their land. So, I didn't give him the full force of what I could do. I did enough so that when he—I—I assumed the Department of Agriculture had sent him to me, either that or the—or the Georgia Department of Agriculture. And he needed to go back and report that I did try to help him.*
>
> *So I took him to a white lawyer that we had—that had . . . attended some of the training that we had provided, because Chapter 12 bankruptcy had just been enacted for the family farmer. So I figured if I take him to one of them that his own kind would take care of him.*
>
> *That's when it was revealed to me that, ya'll, it's about poor versus those who have, and not so much about white—it is about white and black, but it's not—you know, it opened my eyes, because I took him to one of his own . . .*

Id. (transcription of video).

The video is preceded by text slides containing the statement, "On March 27, 2010, while speaking at the NAACP Freedom Fund Banquet … Ms. Sherrod admits that in her federally appointed position, overseeing over a billion dollars … She discriminates against people due to their race." Complaint ¶¶ 34-36. At that portion of the speech when Sherrod states, "What he didn't know while he was taking all that time trying to show me he was superior to me, was I

was trying to decide just how much help I was going to give him," there are again noticeable sounds of laughter come from the NAACP audience listening to Sherrod's speech.

At the conclusion of the first video excerpt of Sherrod's speech, the video contains a televised exchange between NAACP Senior Vice President Hilary Shelton and Fox anchor Geraldo Rivera from a July 17, 2010 interview – broadcast just days after the NAACP unanimously passed its resolution in Kansas City in which Rivera asks Shelton, "Do you renounce, in the ways you ask the Tea Parities to renounce, racists within your ranks?" Shelton responds, "Yes, we do. We repudiate racists within our ranks." Beneath the video of the two men is a banner headline that reads, "Tea Party Rallies & Signs Labeled as Racist By NAACP." The video then replays the segment of the Sherrod speech in which she states, "I was struggling with the fact that so many black people have lost their farmland, and here I was faced with having to help a white person save their land. So, I didn't give him the full force of what I could do."

The next portion of the Blog Post discusses a second video clip from Ms. Sherrod's speech in which she tells her NAACP audience, "*There are jobs at USDA, and many times there are no people of color to fill those jobs because we shy away from agriculture . . . And you've heard of a lot of layoffs. Have you heard of anybody in the federal government losing their job? That's all that I need to say, okay?"* (Complaint, Ex. 1) (transcription of video). As expressed in the Blog Post, this part of the speech shows a high-ranking federal official who "nearly begs black men and women into taking government jobs at USDA – because they won't get fired." *Id*. Sherrod's articulated sense of entitlement is the "bigger problem." *Id.* Breitbart criticizes the Democratic Party, the NAACP, and the media for manufacturing a "racial schism" and for prodding at "the racial hornet's nest" while more important issues are ignored. *Id.* After the

publication of his commentary on the BigGovernment.com website, Breitbart sent a quip to his readers on Twitter in the short, pithy style of that playful online platform, asking rhetorically, "Will Eric Holder's DOJ hold accountable fed appointee Shirley Sherrod for admitting practicing racial discrimination?" (*Id.* ¶ 60.)

A full transcript of Sherrod's speech is attached as Exhibit 14 with the excerpted segments from the Breitbart commentary highlighted.[24] As is evident from comparing the full text with the transcripts of the video excerpts, the clips published on BigGovernment.com were taken directly and verbatim from the speech. Not one word was omitted, added, or re-ordered from the excerpted portions. Some of the ensuing television news reporting of the story on July 19, 2010, was accompanied by video that had been truncated to exclude Sherrod's final, redemptive remarks that were included in the BigGovernment.com posts, such as 1) the language in the post that ultimately Sherrod's "basic humanity informs her that this white man is poor and needs help" and 2) Sherrod's own statement in the embedded video that "That's when it was revealed to me that, y'all, it's about poor versus those who have, and not so much about white – it is about white and black, but it's not – you know, it opened my eyes, because I took him to one of his own." Rather, some of the subsequent reports included only the statements that she had decided not to assist the white farmer because of his race. (Complaint ¶ 70.) There is no allegation that either Breitbart or O'Connor participated in the editorial process of any other news organization in how to present the story or the video.

[24] In Paragraphs 41 through 43 of her Complaint, Sherrod references a video of the full speech available on YouTube. **Exhibit 14** is a transcript of that speech that has been posted on the website AmericanRhetoric.com and verified for accuracy by counsel. Because the full text of the speech is referenced and cited in the Complaint, the transcript of the speech is properly before the Court on this motion to dismiss.

Sherrod's March 27, 2010 speech, in which she repeatedly refers to her position within USDA, contains passages that irrefutably demonstrate that in her federal role she is conscious of promoting the interests of African-Americans based on their race:

- *One of things in the position I'm in . . . that really hurt . . . one of the programs we had with some of the most money in it, you know, it's with business and industry. And I sit up their and I'm signing off on six million, three million, two million but who is it going to? Not one so far. And when I got a report on where we are with it, we're approaching 80 million dollars since October 1st. But not one dime to a black business not one, you know.*

- *In Rural Development, there are 129 employees and guess how many of them are people of color? Anybody want to take a guess that's in Georgia? There are 129 in my agency. How many? It's more than two. Little more than 12. There are less than 20 of us. We have six area offices in the State and subarea offices and when I look at who's coming up the line in the agency, there are not many of us, because we think 'agriculture' is a bad word. We think it's working in the fields. Some of the best paying jobs you ever want to have, okay?*

- *You know, I was helping a family here recently: 515 acres of land, never had a drop of debt on it since the grandfather bought it years ago, and he died in 1974. And two cousins up in the North, guess what they decided? They tried to force a sale of every acre of it. And they wanted that. One of their aunts spent all of her life on the land. She was 93 years old when she died. And she died after those "For Sale" signs went up out there on that farm – [the] auction sign went up on the farm. She was in the hospital. The next month she was dead. That was January she was dead by October. But we kept working at it. And we found some honest lawyers they were white. I wish I could say that about all lawyers, especially black lawyers, but they will nickel and dime you to death. I don't have sorry I don't have two dozen pennies for most lawyers. But anyway that land has been saved, you know. But they were trying to force a sale of all of it. They'll eventually get 62 acres of the 515. And guess what? They have a white man already lined up to buy it.*

On the evening of July 19, 2010, the USDA demanded and received Sherrod's resignation. (Complaint ¶ 77.) Approximately three hours after she was forced to leave her

federal job, the NAACP issued its own statement condemning Sherrod's perceived racism and the audience reaction to her speech, stating: "The reaction from many in the audience is disturbing. We will be looking into the behavior of NAACP representatives at this local event and take any appropriate action."[25]

On July 20, 2010, Sherrod appeared live on CNN and began to speak about the events of the prior day.[26] During her first of many televised interviews following her forced resignation, Sherrod expressed outrage over the fact that, in her view, the NAACP condemned her and that the Obama administration forced her resignation before they ever heard her side of the story.[27] Sherrod further explained that senior USDA officials harassed her while she was driving home the previous afternoon and made her pull to the side of the road to resign, saying that news of her speech was going to be on Glenn Beck's Fox News program and they needed her gone before Beck went on the air.[28] Sherrod also made this other, rather prescient, statement: "[The NAACP] is the reason why this happened. They got into a fight with the Tea Party, and all of this came out as a result of that."[29]

On July 21, 2010, after the NAACP posted the longer video of Sherrod's speech, BigGovernment.com made – at the very top of the Blog Post and on YouTube.com – the following addition to the text of the Breitbart commentary:

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[25] NAACP Statement on the Resignation of Shirley Sherrod, NAACP Statement (July 19, 2010), available at http://www.naacp.org/press/entry/naacp-statement-on-the-resignation-of-shirley-sherrod1/, attached as **Exhibit 15**.

[26] Transcript, CNN Newsroom (July 20, 2010), available at http://transcripts.cnn.com/TRANSCRIPTS/ 1007/20/cnr.03.html, attached as **Exhibit 2**.

[27] *Id.*

[28] *Id.*

[29] *Id.*

> Correction: While Ms. Sherrod made the remarks captured in the first video featured in this post while she held a federally appointed position, the story she tells refers to actions she took before she held that federal position.

(Complaint, Exhibit 1.)

According to numerous published reports the government offered Sherrod her job back.[30] She declined to return to work at the USDA and instead, on February 11, 2011, filed this lawsuit claiming defamation, false light, and intentional infliction of emotional distress. She identifies six statements as allegedly actionable:[31]

Statement #1: "Mrs. Sherrod admits that in her federally appointed position, overseeing over a billion dollars …. She discriminates against people due to their race."

Statement #2: The clip shows "video evidence of racism coming from a federal appointee and NAACP award recipient."

Statement #3: "[T]his federally appointed executive bureaucrat lays out in stark detail, that her federal duties are managed through the prism of race and class distinctions."

Statement #4: "In the first video, Sherrod describes how she racially discriminates against a white farmer."

Statement #5: Her speech is a "racist tale."

Statement #6: "Will Eric Holder's DOJ hold accountable fed appointee Shirley Sherrod for admitting practicing racial discrimination?"

Along with her Complaint, Sherrod issued a press release through counsel in which she describes the environment last year between the NAACP and the Tea Party as one of "overheated political debate." (Complaint, Ex. 2.) She states that she expects "intense media

[30] *See, e.g.*, Jake Tapper and Huma Kahn, *White House Apologizes to Shirley Sherrod, Ag Secretary Offers Her New Job*, ABC News (July 21, 2010), available at http://abcnews.go.com /Politics/shirley-sherrod-shell-back-usda-secretary-tom-vilsack/story?id=11215446, attached as **Exhibit 16**.

[31] *See* Complaint ¶ 94.

interest" in the case she has filed against Breitbart and O'Connor but denies that the lawsuit is about "politics or race . . . Right versus Left, the NAACP, or the Tea Party."

B. Argument

Each of the statements reflecting Breitbart's belief that Sherrod's conduct was "racist" or revealed signs of "racial discrimination" must be dismissed as a non-actionable expression of opinion based on truthful disclosed facts. The video excerpt of the NAACP speech published on BigGovernment.com is representative of the whole. It recounts that Sherrod initially declined to offer professional assistance to a white farmer on account of his race but then experienced a change of heart and obtained a new lawyer for him when she realized that poor people deserve help regardless of the color of their skin. In her Complaint, Sherrod states that her full speech stressed that "poverty, not race, must be the critical factor for helping those in need." (Complaint ¶ 43.) That is *exactly* what the excerpt and the Blog Post show her to profess. Thus, judged by Sherrod's own articulation of the message *she* intended to convey, the clip captured the gist of the speech.

But from the truthful facts laid out in the excerpt, Breitbart drew a contrary conclusion about the meaning of what was said, as Americans with different beliefs and formative experiences often do when the topic is the endlessly arguable subject of race relations. In Sherrod's admissions and the audience reactions, he saw evidence that she had evaluated and initially declined to help an individual because of his race, even if she eventually had a change of heart. Breitbart thus took her – and the NAACP – to task for, in his view, casually condoning a double-standard when the civil rights organization had been repeatedly attacking the Tea Party as "racist." But just as the NAACP's rhetoric about Tea Party racism was not objective and verifiable assertions of fact capable of being proven true or false, so is Breitbart's rebuke of the

NAACP and Sherrod. The Blog Post contains subjective, non-verifiable opinion protected by the Constitution. The claims based on these statements must be dismissed.

1. A defamation action may properly be dismissed under Rule 12(b)(6).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. ___ (2009) (*quoting Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). Rule 12(b)(6) of the Federal Rules of Civil Procedure is an appropriate mechanism for raising the question of whether the plaintiff has stated a claim for defamation, including of whether the alleged defamatory statement is constitutionally protected as non-actionable opinion. *See Weyrich v. New Republic*, 235 F.3d 617, 623 (D.D.C. 2001); *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1120 (C.D. Cal. 1998).

2. The tone and context of the challenged statements signal that they are expressions of opinion based on the true facts disclosed by Sherrod herself and protected as fair comment.

Statements of opinion are only actionable "if they imply a provably false fact, or rely upon stated facts that are provably false." *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) (*Moldea II*). Thus, statements of opinion that "do not contain a provably false factual connotation" are fully protected. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *see also Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1067 (9th Cir. 1988) ("[A]n opinion based on an implication arising from disclosed facts is not actionable when the disclosed facts themselves are not actionable."). Similarly, opinions that are based on truthful facts disclosed to the reader are non-actionable. *See Liberty Lobby v. Dow Jones*, 838 F.2d 1278, 1300 (D.C. Cir. 1988) ("While the stated facts underlying an opinion may support a libel action if they themselves are false and defamatory, an opinion itself never can."). Nor is an opinion actionable if it cannot be

"objectively verif[ied] as false," *Milkovich*, 497 U.S. at 18-19, or if it cannot "reasonably be interpreted as stating actual facts" about an individual. *Id.* at 20. As long as the author puts forth a "supportable interpretation" of the disclosed facts, the statement is not actionable. *Moldea II*, 22 F.3d at 315 ("The proper analysis would make commentary actionable only when the interpretations are unsupportable by reference" to the underlying disclosed facts.).

Similarly, the common law doctrine of fair comment "applies where the reader is aware of the factual foundation for a comment, and therefore can judge independently whether the comment is reasonable." *Lane v. Random House*, 985 F. Supp. 141, 150 (D.D.C. 1995) (Lamberth, J.) (dismissing defamation claim under fair comment privilege where publisher labeled plaintiff "guilty of misleading the American public" in promotional materials accompanying book that criticized plaintiff's research). "[T]he fair comment privilege can be invoked even if the underlying facts are included with the comment." *Id.* at 151 (*citing Fisher v. Washington Post*, 212 A.2d 335, 338 (D.C. 1965) (dismissing defamation claim under fair comment privilege where art critic described artwork in plaintiff's art gallery in negative light).

Furthermore, rhetorical language that is "loose, figurative [and] hyperbolic" tends to negate the impression that a statement contains an assertion of verifiable fact. *Milkovich*, 497 U.S. at 21; *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) ("The language is colorful, figurative rhetoric that reasonable minds would not take to be factual."). As the Supreme Court has said, "to use loose language or undefined slogans that are part of the give-and-take in our economic and political controversies – like "unfair" or "fascist" – is not to falsify facts." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). Nor can raising rhetorical questions, no matter how inflammatory or controversial – be defamatory because a question is not a statement of fact. *See Chapin v. Knight-Ridder, Inc.*,

993 F.2d 1087, 1098 (4th Cir. 1993) (finding that a rhetorical question could not be reasonably read to imply assertion of false fact where it "simply provoke[d] public scrutiny of the plaintiffs' activities"); *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005) (holding that a clearly exaggerated rhetorical question does not constitute actionable defamation).

Whether a challenged statement is non-actionable opinion is a question of law for the court. *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994) ("*Moldea I*"); *see also Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 264 (2001). In making this threshold determination, the court must analyze the allegedly defamatory statement within the broader context of the defendant's speech as a whole and the specific context of the author's words. *See Partington v. Bugliosi*, 56 F.3d 1147, 1152 (9th Cir. 1995) (establishing a three-part analysis in which the court looks to both the broader context and specific context of the defendant's speech); *Moldea II*, 22 F.3d at 314 (reversing *Moldea I* because the court had "erred in assuming that *Milkovich* abandoned the principle of looking to the context in which speech appears"); *Weyrich v. New Republic*, 235 F.3d 617, 625 (D.D.C. 2001) ("[T]he First Amendment demands that we place these references in their proper context").

Speech must be analyzed in context because "the general tenor of the entire work [may] negate[] the impression that the defendant was asserting an objective fact." *Partington*, 56 F.3d at 1153. That is particularly true in the realm of political discourse, where the protections for opinion "provide[] assurance that the public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20 (quotations omitted).

For example, in *Thomas v. New World Commc'ns*, 681 F. Supp. 55, 63 (D.D.C. 1988), the court looked to "both the immediate, linguistic context and the overarching social and

political setting" of comments made by *The Washington Times* editorial page alleging that a political message expressed by plaintiff was "gibberish," "garbage" and "trash" in determining that they constituted non-actionable opinion. The court found that "the editorials at issue reflect[ed] the fact that *The Washington Times* has adopted a political position contrary to the plaintiffs'," and that "the newspaper's espousal of its position, and of its opposition to plaintiffs', partakes of a longstanding tradition of vigorous social and political criticism in the press" where such statements were considered "exaggerated epithet[s], not factual allegation[s.]" *Id.* at 63-64.

The broad context here is similarly illuminating. As set forth in the Blog Post, Sherrod's own July 20 statement that she blamed the NAACP for picking a fight with the Tea Party, and the various articles attached to this Memorandum and to Sherrod's Complaint, the Blog Post was published in the midst of a fierce and at times furious rhetorical battle between the Tea Party and the NAACP. As Breitbart stated in the post well before turning to the Sherrod speech:

> For the past week, Americans who consider themselves aligned with the Tea Party movement have suffered the indignity of being falsely labeled racist by the NAACP and their pro-bono publicity managers, the main stream media. The constant calls to "repudiate the racists from your ranks" have not only been insulting, but have also served to force a false standard upon America's fastest-growing and most vibrant political movement that no other group could ever live up to nor would ever be asked to live up to.

In addition, the format of the BigGovernment.com website further put readers on notice that they were receiving Breitbart's commentary and views concerning his ongoing disagreement with the NAACP. *See Cochran v. NYP Holdings, Inc*., 58 F. Supp. 2d 1113, 1123 (C.D. Cal. 1998) (finding that an editorial piece could not reasonably be understood as anything other than opinion); *Weller v. American Broadcasting Companies, Inc.*, 232 Cal. App. 3d 991 (1991) (explaining that speech that is "not of the type of apparently objective and neutral reporting … almost certain to be understood as factual" is generally opinion speech); *Ollman v. Evans*, 750

F.2d 970, 984 (D.C. Cir. 1984) (recognizing that courts have "considered the influence that … well-established genres of writing will have on the average reader"). The style of this particular article simply does not resemble the look and feel of a traditional news story reporting objective fact.

The specific context and language in the Blog Post also loudly and defiantly announces that Breitbart's speech constitutes non-actionable opinion. He deemed the Congressional Black Caucus as going "from camera hogs to ostriches in the snap of a finger" and playing the "race card" as "their Stradivarius." He described the NAACP as "playing with fire" and stirring the "racial hornet's nest" and the health care reform bill as "the toxic health care bill that the majority of Americans did not want." Democrats, he wrote, are "government expansionists" who are "brazen in [their] desire to transform America into a European-model welfare state with a healthy dose of socialism."

"Racist" and "racism" in this context are reciprocal rhetoric and undoubtedly in the views of some Americans, justifiable "sauce for the [NAACP] gander" – but they are not factual.

3. The terms "racist" and "racism" are pervasive and non-actionable opinions in today's heated political dialogue over the country's future.

Well-established constitutional and common law demonstrate that the accusation of being a "racist" is not verifiable in this context and therefore non-actionable as a matter of law. For example, in *Edelman v. Croonquist*, 2010 U.S. Dist. LEXIS 43399, at *14-17 (D.N.J. May 4, 2010), a court recently found that statements made by a stand-up comedian who had labeled her mother-in-law and sister-in-law "racist" in her act were "opinion rather than fact" because the comedian had "explain[ed] her opinion … vis-à-vis her interactions with them." Similarly, in *Smith v. School District of Phila.*, 112 F. Supp. 2d 417 (E.D. Pa. 2000), a court found a statement in school board resolution alleging that the plaintiff had made "racist" statements non-actionable

opinion. In doing so, it "acknowledge[d] that a statement that plaintiff is 'racist[]'… would be unflattering, annoying and embarrassing," but that "such a statement does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric." *Id.*

This authority reflects the modern interpretation of the term "racist," which has been stripped of its objective defamatory meaning over time. In *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988), the Seventh Circuit, in holding that a defendant's accusations that a high school principal made "very racist statements" was protected opinion, described how the word "racist" has lost its derogatory connotation:

> Accusations of "racism" no longer are "obviously and naturally harmful[.]" The word has been watered down by overuse, becoming common coin in political discourse. … That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. … In daily life "racist" is hurled about so indiscriminately that it is no more than a verbal slap in the face … It is not actionable unless it implies the existence of undisclosed, defamatory facts[.]

Indeed, the term "racist" is not the only charged insult that has been subject to the same "leveling forces" of time and overuse. *Id.* As another court observed, "Americans have been hurling epithets at each other for generations. From charging 'Copperhead' during the Civil War, we have come down to 'Racist,' 'Pig,' 'Fascist,' 'Red,' 'Pinko,' 'Nigger Lover,' 'Uncle Tom' and such." *Raible v. Newsweek*, 341 F. Supp. 804 (W.D. Pa. 1972) (holding that statement that plaintiff was "racially prejudiced" was not actionable).

Many of these offensive terms no longer carry any objective defamatory weight under libel law. *See Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) (finding the term "fascist" a "political label" that could not be proven false "because of the tremendous imprecision of the meaning and usage of the[] term[] in the realm of political debate."); *see also Fikes v. Furst*, 133 N.M. 146, 154-55 (2002) ("anti-Semite"); *Hunter v. New York City*, 22 Media L. Rep. (BNA)

1189 (N.Y. Sup. Ct. 1993) ("new night-riders of the KKK"); *Kimura v. Santa Cruz Superior Court*, 19 Media L. Rep. (BNA) 1777 (Cal Ct. App. 1991) ("bigot"); *Brower v. New Republic*, 7 Media L. Rep. (BNA) 1605 (N.Y. Sup. Ct. 1981) ("Stalinist").

4. Each of the statements relating to Sherrod's alleged "racism" or "discrimination" in the Blog Post is constitutionally-protected opinion.

Under the D.C. Circuit's controlling authority in *Moldea II*, an author's subjective viewpoint is protected as opinion when it is a "supportable interpretation" based on truthful disclosed facts. 22 F.3d at 315. Thus, in *Moldea II*, the characterization in a New York Times book review that Dan Moldea's history of the National Football League contained "too much sloppy journalism to trust the bulk of th[e] book's 512 pages," *id.* at 312, was non-actionable opinion because the evaluation that Moldea was a "sloppy" journalist was buttressed in the review by reference to examples of mistakes in Moldea's reporting, including one that the court was "troubled by" and would not recognize as correct.[32] *Id.* at 318.

Breitbart disclosed the basis on which he drew his conclusions about Sherrod. Sherrod's real quibble is not with the *amount* of the speech shown on the website but with what Breitbart *makes* of her story. The truthful disclosed facts displayed in the video clip on BigGovernment.com include Sherrod's own words in describing her epiphany over the fate of the destitute white farmer: "it *is* about white and black" (emphasis added). Some might see in Sherrod's speech a tale of racial healing while others might take away a tale of racial division. Breitbart's latter reading is a "supportable interpretation" based on the video evidence. Thus all of his statements about Sherrod's conduct in treating the white farmer differently when she first

[32] *Moldea* thus makes clear that not all of the factual bases supporting an opinion have to be accurate. It is legally sufficient that the opinion is supported by some bases that "are true, are supported opinion [or] are reasonable interpretations." *Moldea II*, 22 F.3d 318.

encounters him as an example of "racist" and "discriminatory" behavior are protected opinion. Each is addressed below.[33]

a. Statement #2: "The clip shows 'video evidence of racism coming from a federal appointee and NAACP award recipient.'"

Statement #5: "Her speech is a 'racist tale.'"

Breitbart's commentary that the clip shows "video evidence of racism" and that Sherrod's speech is a "racist tale" are protected expressions of opinion and the type of epithets and name calling that are non-actionable. *See Stevens*, 855 F.2d at 402 (statement that school principal made "very racist statements" non-actionable as an epithet and protected opinion); *Raible v. Newsweek*, 341 F. Supp. 804 (W.D. Pa. 1972) (calling plaintiff "racially prejudiced" not actionable).

Furthermore, both statements are supportable interpretations based on facts disclosed to the reader that Sherrod does not claim are false. *See Moldea II*, 22 F.3d at 313, 315. Sherrod admits in the video clip: "I was struggling with the fact that so many black people have lost their farmland, and here I was faced with having to help a white person saving their land. *So, I didn't*

[33] Plaintiffs' defamation claim fails in total and should be dismissed in its entirety, the Court separately evaluating and dismissing each allegedly defamatory statement. *Jankovich v. Int'l Crisis Group*, 494 F.3d 1080, 1092 (D.C. Cir. 2007) (evaluating each of three allegedly defamatory passages separately and dismissing two as a matter of law); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 628 (D.C. Cir. 2001) (admonishing the court on remand to "distinguish those anecdotes that are both verifiably false and reasonably capable of defamatory meaning from those that are not"); *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 112, 151 (D.D.C. 2009) (evaluating two allegedly defamatory statements separately); *Cusano v. Klein*, 264 F.3d 936, 943 (9th Cir. 2001) (explaining the district court's holding that two of four allegedly defamatory statements were non-defamatory as a matter of law); *Dodds*, 145 F.3d at 1058 (affirming dismissal of some, but not all, allegedly defamatory statements).

give him the full force of what I could do." (emphasis added).[34] Based on these disclosed facts – words that Sherrod herself said, Breitbart justifiably formed the view that her statements constituted "evidence of racism" and she told a "racist tale." Because Breitbart's opinions were supported by disclosed facts, they are not actionable.

b. Statement #3: *"[T]his federally appointed executive bureaucrat lays out in stark detail, that her federal duties are managed through the prism of race and class distinctions."*

Statement #4: *"In the first video, Sherrod describes how she racially discriminates against a white farmer."*

Statement #6: *"Will Eric Holder's DOJ hold accountable fed appointee Shirley Sherrod for admitting practicing racial discrimination?"*

Sherrod's own words from her speech provide the factual predicate for Breitbart's opinion in Statements #3 and #4. For example, Sherrod told the audience of NAACP members that "it's about poor versus those who have, and not so much about white – it is about white and black." When recounting the story about when a white farmer came to her for help, Sherrod stated that "I was trying to decide just how much help I was going to give him. I was struggling with the fact that so many black people have lost their farmland, and here I was faced with having to help a white person save their land."

Thus, Breitbart's comment that Sherrod views the world today "through the prism of race and class distinctions" is justifiably supported by the statements in her speech. Significantly,

[34] The facts in the second statement that Sherrod was a "federal appointee" and an "NAACP award recipient" are indisputably true. As the text at the beginning of the video clearly states, Sherrod was appointed as Georgia Director of Rural Development of the USDA on July 25, 2009. *See also* Complaint ¶ 20. As such, it is true that she is a "federal appointee." And Sherrod was "presented with the NAACP's award in recognition of her lifetime of service" at the banquet at which she made her speech. *Id.* Thus, it is also true that she was an "NAACP award recipient."

Sherrod gave her speech while serving as a federally-appointed government employee. She never offered a disclaimer that her worldview does not impact decisions made in her federal capacity. Indeed, the entire video clip was about race and class distinctions and how they have shaped Sherrod into the person that she is. When Sherrod invites her audience to apply for USDA jobs from which they cannot be fired, she evidences her continuing and contemporary determination to advance the interests of African-Americans at the economic expense of people of other races. However problematic her invitation may be from the standpoint of public employment practices, it certainly provides a clear, truthful basis for the view that as a USDA official "she discriminates against people due to their race."

Statement #4 is similarly non-actionable because it is a reasonable opinion drawn from the true facts that Sherrod disclosed during her speech. Sherrod admitted that she did not give a farmer "the full force of what [she] could do" because of his race. Breitbart's conclusion that Sherrod had "racially discriminate[d]" against a white farmer is justifiable on this basis alone. "Discrimination" is defined as "to make a difference in treatment or favor on a basis other than individual merit." http://www.merriam-webster.com/dictionary/discriminate.

Finally, Statement #6 is not actionable because it cannot be "objectively verif[ied] as false." *Milkovich*, 479 U.S. at 18-19. Nor does it rely on provably false facts. *See Moldea II*, 22 F.3d at 313. As with the fourth statement, Breitbart's comment that Sherrod "admitt[ed] practicing racial discrimination" is justified as she admitted that did not give a white farmer "the full force of what I could do" because he was white. The remainder of the text of Statement #6 is phrased as a rhetorical question, which is "an opinion rather, rather than an assertion, … that the First Amendment protects." *Troy Group*, 364 F. Supp. 2d at 1156; *see also Chapin,* 993 F.2d at 1098 (rhetorical question could not be reasonably read to imply assertion of false).

c. Statement # 1: *"Mrs. Sherrod admits that in her federally appointed position, overseeing over a billion dollars . . . She discriminates against people due to their race."*

Sherrod creates Statement #1 by combining two of the *five* introductory headline slides (the "Five Headlines") spliced into the first video clip of the Blog Post. Taken together, the Five Headlines introduce Breitbart's commentary on the remarks Sherrod actually made during her speech.

In defining Statement #1 as an actionable libel, however, the Complaint omits any reference to the first three headline slides and attempts to change the context and alter the meaning of the Five Headlines. Specifically, by not including slide three – which qualifies the next two slides and makes clear Breitbart is describing what is on the video – Statement No. 1 erroneously suggests that Breitbart made a general statement about Sherrod's discrimination rather than a statement commenting on the content of her speech to the NAACP. Read together in proper context with slide three and the remainder of the Blog Post, the last two headline slides only announce Breitbart's evaluative opinion of Sherrod's *speech.*[35]

Sherrod claims Statement #1 is actionable because she actually was recounting events that had taken place more than 20 years earlier, not at a time when she was a federal appointee. Sherrod does *not* allege that Breitbart took her words out of context, nor does she even allege

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[35] Slide One: "On July 25, 2009 Agriculture Secretary Tom Vilsack appointed Shirley Sherrod as Georgia Director of Rural Development." (Complaint ¶ 32).

Slide Two: "USDA Rural Development spends over $1.2 Billion in the State of Georgia each year." (Complaint ¶ 33).

Slide Three: "On March 27, 2010, *while speaking at the NAACP Freedom Banquet* …" (Complaint ¶ 34) (emphasis added).

Slide Four: "Mrs. Sherrod admits that in her federally appointed position, overseeing over a billion dollars . . ." (Complaint ¶ 35).

Slide Five: "She discriminates against people due to their race." (Complaint ¶ 36).

that the purported falsity of Statement #1 is demonstrated by the "full video." Indeed, nowhere does she allege that watching her entire speech would inform the viewer that she discriminated against this white farmer *before* joining the USDA.[36] Moreover, Sherrod's invitation to her audience to apply for USDA jobs from which they cannot be fired evidences her continuing determination to advance the interests of African-Americans at the economic expense of people of other races and provides a clear, truthful basis for the view that as a USDA official "she discriminates against people due to their race."

The Five Headlines characterize and announce what the viewer is about to see on the video clip. In fact, the very first line of text in the Blog Post is: "*Context is everything. In this piece you will see video evidence of racism coming from a federal appointee and NAACP award recipient . . .*" Thus, when read in the context of the other statements in the Blog Post, the Five Headlines are part of a series of comments and evaluative opinions made by Breitbart *about the video.*

The Five Headlines, like newspaper headlines that must be read in conjunction with the entire article, must be viewed together with the entire video clip. *See, e.g., Locricchio v. Evening News Ass'n*, 438 Mich. 84, 131 (1991) ("the headlines in the series, while arguably inflammatory, do not convey false implications apart from the context of the reported facts"); *Cooper v. Miami Herald Pub. Co.,* 159 Fla. 296, 301 (1947) ("the article should be read and construed in connection with the display of headline"); *De Luca v. New York News, Inc.*, 109 Misc. 2d 341, 351 (N.Y. Sup. Ct. 1981) ("The term no-show [in the headline], as used in the

[36] The closest the Complaint comes is in paragraph 67, where it repeats the following quote from the *published* video clip: "Chapter 12 bankruptcy had just been enacted for the family farm." Incredulously, the Complaint then alleges that, upon hearing this utterly vague and confusing statement, Breitbart should have jumped on his computer to conduct a "web search," for the enactment date of Chapter 12 of the federal Bankruptcy laws, which in turn would have suggested that she was referring to events that occurred in 1986.

context of this article, is … an expression of opinion."); *Lane*, 985 F. Supp. at 150-51 (evaluating opinion expressed in advertisement for book by looking to, among other things, the statements made in the book).

Breitbart's publication of the Five Headlines is no different than a television reporter describing video footage as part of a news story. While the video itself may be factual, the reporter's description of that video is subjective and interpretive. In such instances, where, as here, "an opinion is based upon facts already disclosed in [a video], the expression of the opinion implies nothing other than the speaker's subjective interpretation of the facts . . . [and] . . . *is actionable only if it implies . . . undisclosed defamatory facts as the basis for the opinion.*" *Friendship Empowerment And Economic Development v. WALB-TV*, 2006 U.S. Dist. LEXIS 27785 (D. Ga. 2006) (emphasis added) (citations omitted); *see also Kegel v. Brown & Williamson Tobacco Corp*., Civ. No. 3:06-CV-00093-LRH-VPC, 2009 U.S. Dist. LEXIS 18386 (D. Nev. Mar. 10, 2009) (finding that when an employer provided surveillance video of an allegedly injured employee performing strenuous physical tasks to its insurance carrier with the description that it was "great video," the employer's speech was non-actionable opinion); *PETA v. Bobby Berosini, Ltd*., 111 Nev. 615, 625 (1995)(finding that Dr. Jane Goodall's statements that a video demonstrated the defendant was cruel to animals was non-actionable opinion because "all viewers of that video are free to express their opinion on the question of whether they think [the defendant] was being cruel to those animals, and no one can be successfully sued for expressing such an evaluative opinion – even if it is 'wrong'"). This is particularly true when, as here, the viewer can watch the video themselves and form their own opinion. *See Kegel*, 2009 U.S. Dist. LEXIS 18386 at *50 (noting that statements based on a video were not

defamatory since an insurance adjuster viewing them "was able to view the videotape and make her own, independent assessment of plaintiff's behavior").

"When a speaker outlines the factual predicate for his conclusion, his statement is protected." *Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002) (*quoting Partington*, *supra* at 1156). That is exactly what Breitbart did. He identified the video as the factual predicate multiple times in the Blog Post, as well as in Headline 3 ("On March 27, 2010, while speaking at the NAACP Freedom Banquet"), both of which are purposefully omitted from the Complaint. His conclusions about the video expressed in Statement #1 are therefore protected and not actionable.[37]

5. Plaintiff's false light and intentional infliction of emotional distress claims fail to the same extent as the defamation claim.

Whether the Court applies California or District of Columbia law, Sherrod's claims for false light invasion of privacy and intentional infliction of emotional distress as to the five statements discussed above necessarily fail.[38] In California, courts "have largely collapsed false

[37] The fact that Breitbart published a clarification regarding this statement (*see* Complaint ¶ 69) does not affect this analysis, which is based on opinion. *Moldea II* recognizes that not every single basis for the opinion must be truthful. As all of the alleged defamatory statements are non-actionable opinion as a matter of law, the Court will not need to consider how Sherrod could overcome the daunting standard she would have to prove under *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny to prove, with clear and convincing evidence, that Breitbart and O'Connor published a substantially-false assertion of fact with actual malice; *i.e.*, that they "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

[38] If the Court were to perform a choice-of-law analysis, District of Columbia law requires the Court to apply a blend of the Restatement (Second) Conflict of Laws' "government interests" and the "most significant relationship" tests. *See, e.g., Parnigoni v. St. Columba's Nursery Sch.*, 681 F. Supp. 2d 1, 11-12 (D.D.C. 2010). The "most significant relationship" test requires consideration of: 1) "the place where the injury occurred;" 2) "the place where the conduct causing the injury occurred;" 3) "the domicil[e], residence, nationality, place of incorporation and place of business of the parties;" and 4) "the place where the relationship, if any, between the parties is centered." *Id.* at 11-12. The "government interests" test requires an evaluation of the governmental policies underlying the applicable laws and determination of which

light causes of action into libel." *Cort v. St. Paul Fire & Marine Ins. Co., Inc*., 311 F.3d 979, 987 (9th Cir. 2002); *M.G. v. Time Warner, Inc*., 89 Cal. App. 4th 623 (2002). "When an invasion of privacy claim rests on the same allegations as a claim for defamation, the former cannot be maintained as a separate claim if the latter fails as a matter of law." *Alszeh v. Home Box Office*, 67 Cal. App. 4th 1456 (1998). Likewise, under California law, an intentional infliction of emotional distress claim fails where, like here, a defamation claim fails. *Couch v. San Juan Unified Sch. Dist*., 33 Cal. App. 4th 1491 (1995) ("When claims for invasion of privacy and emotional distress are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed."); *see also Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244 (1984); *Blatty v. N.Y. Times Co*., 42 Cal. 3d 1033, 1042 (1986). The intentional infliction of emotional distress claim also fails under California's Uniform Single Publication Act, Cal. Civ. Code § 3425.3; *Long v. Walt Disney Co*., 116 Cal. App. 4th 868, 871-73 (2004).

District of Columbia law also bars claims for false light or intentional infliction of emotional distress where the court determines that there is no defamation as a matter of law. *See Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 317 (D.C. 2006) (trial court did not err in dismissing claims for false light and intentional infliction of emotional distress where defamation claim failed). Where, as here, the statements at issue are substantially true or protected opinion, a false light claim cannot stand. *White v. Fraternal Order of Police*, 909 F.2d

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jurisdiction's policy would be most advanced by having its law applied to the facts of the case. *Hercules & Co. v. Shama Restaurant Corp.*, 566 A.2d 31, 41 (D.C. 1989). As set forth in Section II above, California is the state where the conduct that allegedly caused Sherrod's injury occurred, the state where the defendants live and work, and the only state with a significant relationship to these torts. Accordingly, the Court should apply California law if it finds that a conflict exists in the laws of the two jurisdictions.

512, 518 (D.C. Cir. 1990) (for defamation and false light claims, "truth or assertion of opinion are defenses in both causes of action.").[39]

Accordingly, Sherrod has not stated a claim upon which relief may be granted for the six statements referenced in Section III(B)(4) above, and the Court should dismiss all causes of action based on those statements.

[39] Sherrod fares no better under Georgia law. False light invasion of privacy claims based on statements that are defamatory are subsumed into the defamation claim. *See Bollea v. World Championship Wrestling*, 610 S.E.2d 92, 96 n.1 (Ga. App. 2005) ("In order to survive as a separate cause of action, a false light claim must allege a non-defamatory statement. If the statements alleged are defamatory, the claim would be for defamation only, not false light invasion of privacy."). Similarly, intentional infliction of emotional distress claims cannot survive under Georgia law where, like here, the claim is based on defamatory statements and the defamation claim is dismissed. *See Lewis v. Meredith Corp.*, 667 S.E.2d 716 (2008) (where intentional infliction of emotional distress arises from defamation and defamation claim is dismissed, emotional distress claim should also be dismissed); *Nix v. Cox Enterp., Inc.*, 545 S.E.2d 319, 321 (Ga. App. 2001), *rev'd on other grounds*, 560 S.E.2d 650 (Ga. 2002) (when only act complained of is act of publishing, proper claim is for defamation, not intentional infliction of emotional distress).

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted,

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