Joshua Koltun (Bar No. 173040)
Attorney
101 California Street
Suite 2450, No. 500
San Francisco, California 94111
Telephone: 415.680.3410
Facsimile: 866.462.5959
joshua@koltunattorney.com

Attorney for Defendants
Doe/Klim and Doe/Skywalker

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE

ART OF LIVING FOUNDATION, a California corporation, Plaintiff, v. DOES 1-10, inclusive, Defendants.	Case No.: CV 10-5022 LHK HRL **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Date: May 12, 2011 Time: 1:30 am Judge: Hon. Lucy H. Koh Courtroom: 4 Filed Herewith: Reply Memo. in Support of Special Motion to Strike Koltun Decl. 2nd Request for Judicial Notice

TABLE OF CONTENTS

Cases

Joshua Koltun ATTORNEY

INTRODUCTION

Plaintiff's jurisdictional argument is entirely dependent on its argument that the defamatory statements are "of and concerning" American chapter of AOL. Since, as explained in section III, that is not the case, this Court has no jurisdiction. Contrary to Plaintiff's repeated contention, this Court should consider the ***actual*** context of the Statements on this Motion to Dismiss. Thus all of Plaintiff's contentions as a matter of law concerning "of and concerning," constitutionally protected "opinion," actual malice and the Free Exercise privilege are addressed herein, including those contentions Plaintiff reserved for the Motion to Strike.

I. If Plaintiff Cannot Show that the Statements are "Of and Concerning" the Art of Living Foundation of the United States, Plaintiff Cannot Show that This Court has Jurisdiction

Plaintiff cites *Calder v Jones* and its progeny for the proposition that it is reasonable for the Court to exercise jurisdiction where the defendants knew that the brunt of the harm from the article would be felt in California. *Id.*, 465 U.S. 783, 789 (1984); Opp.MTD at 6:5-7. But that principle does nothing to assist Plaintiff. Jurisdiction in *Calder* depended upon the fact that the allegedly defamatory article "concerned the California activities of a California resident." *Id.*, 465 U.S. at 788. In none of Plaintiff's cases was there any dispute as to whether the statements at issue referred to the plaintiff, who resided in the forum state. Indeed, two of Plaintiff's cases specifically distinguish the situation in *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir 1978) in which the statements did not target the California branch of the Church. *See Gordy v. Daily News, L.P.* 95 F.3d 829, 834 (9th Cir. 1996); *Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060, 1067 (D. Haw. 2000).

This case presents *precisely* the question that was at issue in *Adams* –whether the allegedly defamatory statements were referring to plaintiff, the *California chapter* of a large international organization – as opposed to that organization or movement generally, or its leader. Plaintiff attempts to distinguish *Adams* on the grounds that it predates *Calder*, but *Adams* was applying an "effects" test, just as the Supreme Court later did in *Calder*. *Adams*, 584 F.2d at 897-98. Plaintiff further attempts to distinguish *Adams* by making a number of claims that the "Blogs" refer to Plaintiff, a California organization. Opp.MTD at 7:6-8, 8:10-17. But the fact that the Blogs in their entirety may refer to Plaintiff in various isolated places is not the relevant question under *Calder*. The question is whether

the allegedly defamatory Statements at issue concerned Plaintiff. If they did, then harm was at least arguably suffered in California. If, however, as argued below in section II, the Statements were not of and concerning Plaintiff, then the "effects" test cannot be met.[1]

Moreover, quite apart from the harmful "effects" test, where the publication takes place on the internet, purposeful availment is not satisfied by merely creating a web-site accessible by residents of the forum state. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997). There has to be "'something more' [than a passive web-site] to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). Thus, it is not enough that a substantial number of readers may have been in California, unless it can be shown that the statements were purposefully directed at California readers.[2]

Plaintiff argues that Klim and Skywalker availed themselves of the forum state by entering terms of service with Google and Automattic that provided for California venue and choice of law. Opp.MTD at 7:10-15. But the cited terms are simply a contractual waiver of the right to challenge

---

[1] Indeed, even in cases where "of and concerning" is not an issue, the *Calder* test is not met where the allegedly defamatory article does not focus on activities in the forum state. *See, e.g. Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (collecting similar authorities).

[2] Contrary to Plaintiff's contentions, there is no competent evidence that 73% of the Wordpress Blog and 78% of the Blogspot Blog's viewers are located in the United States (let alone California). *See* Opp.MTS at 5:18-20. Plaintiff's expert's opinion was merely that "there is a significant population of individuals from the United States that visited these sites during the timeframe over which these statistics were gathered." Cohen Decl., ¶ 7. Moreover, this expert testimony does not show that this opinion rests on a scientifically reliable methodology admissible under FRE 702; *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). He testifies that he relied upon a third party free website that provides "free traffic metrics." Cohen Decl., ¶ 2. He does not purport to known what methodology that third party used, other than the third party's published claim that it "operates by the placement of 'toolbars' in Web browsers from which it collects information about searches undertaken by users." *Id.* How this universe of "users" is sampled he does not say (and does not know). Nevertheless he asserts in conclusory fashion that the third-party's methodology can be analyzed and tested. *Id.*¶ 3. The only basis for this conclusion is the assertion that he performed a single test in which he "examined ***statistics*** provided by [the third party] on the 'all.net' domain that I operate and ***have detailed knowledge of***, and found that ***select*** information provided by [the third party] was ***consistent*** with my personal knowledge and understanding of ***the use*** of the all.net Web site. *Id.*(emphasis added) What Dr. Cohen means by any of those terms is unclear. Dr. Cohen's opinion is essentially a black box sitting inside another black box. In any event, it is irrelevant as explained in the text above.

jurisdiction in any contractual dispute with Google and/or Automattic. There is no such waiver with respect to tort actions by third parties. Indeed, courts have held that even where the terms of a defendant's contractual relationship with Google create a revenue stream flowing to defendant, a plaintiff cannot invoke the terms of that contract relationship to assert jurisdiction over an out of state defendant. *Advice Co. v. Novak*, 2009 U.S. Dist. LEXIS 4641 (N.D. Cal. Jan. 23, 2009).[3]

The same analysis applies to the trade secret and copyright claims here. Where a trade secret is disclosed on the internet, the "purposeful availment" prong cannot be based on the premise the defendant "should have known" that the trade secret disclosure would have an impact on an industry in California. *Pavlovich v. Sup.Ct.*, 29 Cal. 4th 262, 278 (2002). Here, the alleged trade secret at issue is undisputedly one held by the AOL organization/movement *worldwide.* Indeed, the takedown notice to which Skywalker responded came from an AOL entity based in *India.* Decl.SW, ¶ 10 & Exh. F. There is no evidence, indeed, no plausible reason to believe, that Skywalker in posting the Manuals and BWSM was targeting California. Moreover, whatever Skywalker may have intended, jurisdiction cannot be asserted over either Klim or the other Doe defendants based on Skywalker's actions. One defendant cannot be haled into a court in the forum state because of the unilateral activities of another defendant. *Brainerd v. Governors of University of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989). Surely Plaintiff's absurd contention that Klim has indicated that he is thinking about writing a book, and Plaintiff "is informed and believes" that said (unwritten) book will be derived from Plaintiff's copyrighted materials, cannot provide a basis for jurisdiction. *See* Opp.MTQ at 22.[4]

---

[3] *Accord Nam Tai Electronics v. Titzer*, 93 Cal. App. 4th 1301, 1313 (2001) (person who posted anonymous comments on Yahoo! Website had not purposefully availed himself of California for purposes of third party defamation suit; terms of service only govern litigation between poster and Yahoo!); *Jewish Defense Org. v. Sup. Ct.*, 72 Cal. App. 4th 1045, 1062 (1999) (fact that defamation defendant used Internet service providers that maintain offices or databases in California held insufficient to constitute "purposeful availment."

[4] *America West Airlines v. GPA Group,* cited by Plaintiff, does not suggest that Plaintiff may embark on a fishing expedition to try to prove that this Court has jurisdiction over Defendants, in the absence of any reason to believe that they are likely to be successful. *Id.* 877 F.2d 793, 801 (9th Cir. 1989). This is particularly so since any requested discovery would impact the First Amendment rights of the Doe Defendants to speak anonymously. *See* Motion to Quash.

II. The "Totality of the Circumstances" Test Requires this Court to Take Into Account the Actual Context of the Statements, Not the Context Alleged (or Not) in the Complaint

Plaintiff concedes that the Court must consider the "totality of the circumstances" in determining whether the Statements are (i) "of and concerning" Plaintiff and (ii) constitutionally protected opinion, Opp.MTD at 9:25-27; 11:1-4. However, pervasive premise of Plaintiff's opposition to the 12(b)(6) motion is the proposition that (i) the motion violates the rule that the Court must "accept the complaint's allegations as true," (ii) that the Court "may not consider extrinsic evidence, except when established by judicial notice," and that Defendant's request for judicial notice was improper here. Opp. At 1:7-12. Plaintiff repeatedly insists, however, that the Court must accept whatever totality of circumstances Plaintiff has chosen to allege (or not allege) in the Complaint.[5]

Plaintiff is wrong. While it is true that "[g]enerally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion," the Court may consider "documents specifically referred to in a complaint, though not physically attached to the pleading, may be considered where authenticity is unquestioned," and may "take judicial notice of matters of public record." *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1100 (N.D.Cal. 1999). In *Nicosia*, the Complaint had set forth, out of context, the allegedly defamatory statements that had been made by Defendant on a number of different places on her website. *Id.* at 1096. Defendant presented the full context of those statements by means of a request for judicial notice, and the Court, after considering that context, determined that all of the statements at issue except two were constitutionally protected opinion. *Id.* at 1108. This "incorporation by reference" procedure is the correct method for the court to determine the "context in which [an allegedly defamatory] statement appeared," and is an exception to the general rules cited by Plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1077 (9th Cir. 2005).

Generally, Defendants are not asking this Court to examine the context of the Blogs – or the other matters of which they seek judicial notice – not for the truth of the statements therein but simply for the fact that such statements are made – because these statements are part of the ***actual*** context –

---

[5] Thus, for example, Plaintiff insists that Defendant's "of and concerning" argument must be rejected because it "conflicts with the allegations of the complaint, which allege that the statements are about Plaintiff." Opp.MTD at 10:13-15. Similarly, according to Plaintiff, this Court cannot consider Defendant's assertion that the context of the Statements is a heated debate, because "the Complaint does not allege that the Blogs offer heated debate. Rather, the complaint alleges that the Blogs offer a one-sided critique of Plaintiff, whereby Defendants defame Plaintiff ..." Opp.MTD at 12:11-13.

the "totality of the circumstances -- in which the purportedly defamatory statements were made There is no dispute as to the authenticity of the documents as to which Defendants seek judicial notice – indeed, on the Motion to Strike, Plaintiffs have submitted the ***complete*** context of the Blogs, and has sought to draw this Court's attention to particular postings in order to support its arguments concerning the meaning of the purportedly defamatory Statements. Rosenfeld Decl., Exhs. A-M. Defendant asks that the Court take judicial notice of all of the materials proffered by Plaintiffs for that purpose, for consideration on this Motion.

III. Plaintiff Cannot Show that the Allegedly Defamatory Statements at Issue are "Of and Concerning" Plaintiff – the AOL Foundation of the United States

Since Plaintiff's briefs tend to obfuscate on this issue, some basic facts concerning the identity of Plaintiff need to be emphasized. "The Art of Living ***Foundation*** ('AoL') is an ***international*** … organization based in Bangalore, ***India***." Complaint, ¶ 1. "AoL has regional centers in ***140 countries***." *Id.* "***Plaintiff*** is the ***United States chapter*** of AoL." *Id.* Thus, even though the corporate name of Plaintiff is "The Art of Living Foundation," neither the terms "AoL," "Art of Living" or even "Art of Living ***Foundation***" can be understood as referring exclusively to Plaintiff. Similarly, Plaintiff's own Bylaws make clear that the term "AoL" or "AoL Foundation" do not necessarily refer to plaintiff. See Request for Judicial Notice, ¶ 3 & Exh. C1 [rjn 058] (purpose of Plaintiff is, *inter alia* to "to provide funds, materials, volunteers, and/or other resources for international relief efforts through various organizations including the ***AOL Foundations worldwide***, the AOL International Organization,").

It is true, as Plaintiff contends, that a statement would also be "of and concerning" Plaintiff if it were "identified, expressly or by ***clear*** implication." *Blatty v. New York Times,* 42 Cal. 3d 1033, 1044 n.1 (1986); Opp.MTD at 9:23. But this does not help Plaintiff, for its own Complaint is an admission that the term "Art of Living," "Art of Living Foundation," or "AoL" does ***not*** either expressly, or by clear implication refer to Plaintiff, the AOL Foundation ***of the United States***, as opposed to the international organization, any of the other "AoL Foundations worldwide," or AoL as a

general movement.[6] To avoid any confusion, we will refer to the AoL Foundation of the United States, herein as "AOLFUS."

To show that AOLFUS is referred to by "clear implication," Plaintiff directs this Court to a number of references in "the Blogs" that Plaintiff contends are "references to Plaintiff [or] Plaintiff's website." Opp.MTD 7:6-7; Opp.MTS at 10:11-15. First, the mere fact that "the Blogs" refer to AOLFUS ***somewhere*** would not be relevant unless these references could be connected in some way to the defamatory Statements at issue. Second, the fact that "the Blogs refer to Plaintiff by name, i.e. the Art of Living Foundation" Opp.MTS at 10:12-13 proves absolutely nothing, since Plaintiff's own usage shows that the term "Art of Living Foundation" can be used to refer to the international organization. Complaint, ¶ 1; *see also* RJN Exh. Exh. C1 (referring to "Art of Living Foundations worldwide." Third, the "context" to which Plaintiff directs the Court shows the ***precise opposite*** of what Plaintiff seeks to show – in other words the cited references are themselves discussing AOL chapters or entities worldwide, not AOLFUS in particular.[7]

---

[6] Because of the "group libel" rule, it is not enough for Plaintiff to show that the term refers to a large group of which Plaintiff happens to be a member. *Barger v. Playboy Enterprises*, 564 F. Supp. 1151, 1153 (N.D.Caol 1983); *accord Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 350 (1940)("an attack upon a large group of persons … cannot have the quality of a libel unless there be a ***certainty*** as to the individuals accused. [Plaintiff] cannot by the use of [additional pleading allegations] make the language which is applicable to so large a group of persons be made specifically to refer to him.").

[7] Thus, for example, one poster uses the term "Art of Living Foundation" in the following context (much like the Complaint): "The Art ofLiving Foundation is one of the world's largest non-profit organizations led by the spiritual leader Sri Sri Ravi Shankar. The foundation is active ***in more than 140 countries*** and has reached out to hundreds of millions of people across the globe." Rosenfeld Decl., Exh. G, p10. Another reference is actually a diatribe on the murkiness of the term "Art of Living" and its lack of specificity as to what entity or entities to which it refers (!). Rosenfeld Decl., Exh. G, p.6. The author then goes on to argue that the murkiness of the term "Art of Living" relates to a generalized murkiness about the legality and structure of the international organization and its status as a legitimate NGO or nonprofit group. *Id.*

Similarly, the references to "Plaintiff's website" to which Plaintiff refers the Court tend to prove that the Blogs are NOT specifically referring to AOLFUS. The www.artofliving.org website to which Plaintiff refers (Rosenfeld Decl., ¶ 10 & Exh. H) is, on its face, a ***GLOBAL*** website, not one associated with AOLFUS. It has a "contacts" webpage with a drop-down menu which allows the user to select his "local center" from around the globe. 2d. RJN, ¶ 1 & Exh. A. Once the user has selected his national center, an icon appears in the top-left corner of the webpage, showing which relevant national center is referred to. *Id.* Many of the specific references to which Plaintiff directs this Court do not appear to relate to AOLFUS at all, but rather to AOL in the UK, South Africa (ZA), Indonesia (Bali), or India. Rosenfeld Exh. H, p. 2, 3, 8, 10 (note that http://www.artofliving.org/in-en/revolution-education is URL of *Indian* "regional center")

Plaintiff argues that the "of and concerning" issue must be resolved by a jury, not by the Court. Opp.MTD at 10:4-7. But that is only true if the Court finds that a reasonable juror could determine that any of the defamatory statements referred to AOLFUS by "clear implication." Thus, for example, in *Barger,* the Court reviewed the actual context of the statements at issue and dismissed the complaint. *Id.,* 564 F. Supp. at 1153-1155. Even though the article contained some references to the Oakland chapter of the Hell's Angels, the defamatory statements at issue were not so geographically limited and references to Hells Angel's "brides" could not be taken as specific references to particular women. *Id; accord Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1045 (C.D. Cal. 1998) (dismissing complaint against Distributor and Importer where, in context and considering "totality of the circumstances," none of the statements at issue were "of and concerning" them) *see also Yow v. Nat'l Enquirer, Inc.,* 550 F. Supp. 2d 1179, 1190 (E.D. Cal. 2008)(declining to dismiss Complaint where the language in the article "marginally satisfies" the "of and concerning" requirement).

Here, the meanings of words that are proposed by Plaintiff are simply not the ones that an ordinary reader would understand . *See Barger,* 564 F. Supp. at 1155 ("Plaintiff's cannot, however, plead libel by imputing an esoteric meaning to the term "bride" which has no reasonable basis in the article and is inaccessible to the ordinary reader.") Take Statement B, which reads:

> Here is the man who waved off female devotees reaped or beaten up by his devotees by telling them it was their fault or that they deserved it since 'Violence begets violence. Your karma."

Plaintiff apparently contends that the "man" in that statement is not only Shankar, but also "the Art of Living Foundation, and students and members of the organization." Patel Decl ¶ 3.

That interpretation is not only unreasonable, it is dependent on the erroneous premise that anything that reflects badly on a plaintiff must be "of and concerning" plaintiff. Thus Plaintiff contends that "statements that refer generally to Plaintiff's teachers also refer to Plaintiff by reasonable implication, where Plaintiff's teachers are part of Plaintiff's organization." OppMTD at 10:18-20: Assuming for the moment, that Plaintiff could show that the "teachers" at issue were teachers at AOLFUS (which it cannot), the premise wrong. "Statements which refer to individual members of an organization do not implicate the organization." *Jankovic v. Int'l Crisis Group,* 494

F.3d 1080, 1089 (D.C. Cir. 2007); *Provisional Government of Republic of New Afrika v. American Broadcasting Co.*, 609 F. Supp. 104, 108 (D.D.C. 1985). Thus for example, where members of a Scientology organization were accused of breaking into the courthouse and stealing a filing fee, the court ruled that "[a]ccusing members of any religious organization of criminal activity is hardly likely to reflect well on the religion's official organs, but the fact that the CSC's reputation in the community may have been diminished by virtue of Flynn's charges against an anonymous individual or individuals does not vest in CSC a right to sue for libel." *Church of Scientology v. Flynn*, 578 F. Supp. 266, 268 (D. Mass. 1984)(dismissing complaint).[8]

It follows *a fortiori* that statements concerning Shankar, who is concededly not an employee, director or officer of AOLFUS, (Dhall Decl., ¶ 16) are not "of and concerning" AOLFUS. It may well be that the "primary purpose of Plaintiff is to spread Shankar's teachings in the United States," Opp.MTD at 10:17-19, but even if it were true that statements defaming Shankar have the effect of causing a pecuniary loss to AOLFUS, that would not convert statements about Shankar into statements about AOLFUS *Kirch v. Liberty Media Corp*., 449 F.3d 388, 398 (2d Cir. 2006) ("A false disparaging statement about IBM, for example, would not, we think, ordinarily be a defamatory statement "of and concerning" all of IBM's suppliers, employees and dealers, however much they may be injured as a result); *Jankovic*, 494 F.3d at 1089 ("matters that might reflect poorly upon an individual are not necessarily 'concerning' that person.)(internal citation omitted); *see also Adams*, 584 F.2d at 896 (statements defaming L. Ron Hubbard are not "of and concerning" California Church).

IV. The "Totality of the Circumstances" Shows that the Statements are Constitutionally Protected Opinion

Plaintiffs concede that in order to be defamatory, a statement must be reasonably

[8] In a different case involving the same defendant, the "of and concerning" requirement was met. *Church of Scientology of California v. Flynn*, 744 F.2d 694, 697 (9th Cir. 1984). The case does not help Plaintiff, because relevant context there was very different from the context here. There, the defendant was an attorney ***was involved in litigation against the Church of Scientology of California,*** and whose allegedly defamatory statement referred to "an enormous organization" that he had "been ***litigating with***," and the statement at issue was made to an audience in Los Angeles made up of people who were seeking refunds from the Church of Scientology of California. *Id.*, 744 F.2d at 695, 697.

understandable as stating or implying a false factual assertion, and that to determine that the Court must examine "the totality of the circumstances," namely a) the statement's broad context, b) the statement's specific context, and c) whether the statement is susceptible of being proven true or false. Opp.MTD at 11:1-7.[9]

A. The Broad and Specific Context Shows That the Statements Are Opinion

With respect to the specific context, Plaintiff does not discuss the context surrounding the Statements, and cites only to its own out-of-context citations in the Complaint. Opp.MTD at13:3. But the Court must consider this immediate context. Thus, for example, the immediate context surrounding statement K makes it perfectly clear that "aolwhistleblower" was not literally asserting that Shankar has a disease, but rather suggesting that his followers are deluded in believing that he will win the Nobel Peace Prize. *See* MTD at 15-16.

With respect to the broad context, the relevant question is whether the allegedly defamatory comments occurred within an "adversarial" context in which readers would normally expect hyperbole or invective. *Ferlauto v. Hamsher,* 74 Cal.App.4th 1394, 1401 (1999). This is not limited to particular for a such as radio talk shows. *Ferlauto,* for example, involved a book, as did *Partington v. Bugliosi,* 56 F.3d 1147 (1995); *see also Nicosia,*72 F.Supp.2d at 1102 (fact that defendant ultimately hoped to publish postings as a book did not alter the fundamentally adversarial tenor of her internet articles). The question is whether the context is one "in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Campanelli v. Regents of the Univ. of Cal.,* 44 Cal. App. 4th 572, 579 (1996)(citation omitted).

---

[9] In some circumstances a statement couched as an "opinion" may nevertheless be reasonably understood as implying a provably false factual assertion, in which case it is not constitutionally protected. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 17-19 (1990). Like many courts post-*Milkovich*, we have used the term "opinion" as shorthand for "constitutionally protected opinion," on other words, statements that are not reasonably understood as implying a provably false assertion of fact. *See, e.g. Rodriguez v. Panayiotou,* 314 F.3d 979, 986 (9th Cir. 2002)("the issue of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court to decide"); *Gallagher v. Connell,* 123 Cal. App. 4th 1260, 1270 (2004)("The essential difference between a statement of fact and a statement of opinion is that a statement of fact implies a provably false factual assertion while a statement of opinion does not.")

In *Nicosia* this Court determined that the parties were engaging in a "heated debate," insofar as the comments took place in the context of a freewheeling and spirited discussion on the internet, in which posters were responding to one another in an ongoing fashion. *Id.* at 1101, 1106. That is certainly the case here. Moreover, this Court should "take judicial notice" that "[i]n religious matters … often the keenest disputes and the most lively intolerance exists among persons of the same general religious belief, who, however, are in disagreement as to what that faith requires in particular matters." *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir.1993).

B. The Concept of "Libel Per Se" is of No Relevance to the Opinion Inquiry

Plaintiffs accuse Defendants of "fabricating rules of construction" to show that the Statements are opinion. Opp.MTD at 13:23-26. Defendants do not argue for "rules of construction," i.e. that particular words or phrases must be construed to have particular meanings, irrespective of context. On the contrary, the "totality of the circumstances" test is a requirement that words always be considered in their context.

Plaintiff, however, appears to suggest its own rules of construction, namely that certain words or phrases necessarily render a statement defamatory. Thus Plaintiff insists that "an allegation that the plaintiff is guilty of a crime is an assertion of fact that is defamatory on its face," and that "statements accusing business of financial improprieties are assertions of fact that are defamatory per se OppMTD at 14:2-4, 14-16.

Plaintiff contention stems from a misunderstanding of the import of the distinction between libel "per se" and libel "per quod. The concept of "libel per se" does not mean that certain references (ie. to crime or financial wrongdoing) are magic words that render a statement defamatory without regard to context. Libel "per se" or "on its face" is merely a common law pleading requirement codified at Civil Code § 45a. A libel "per se" is one in which the defamatory meaning is clear "without the necessity of explanatory matter." The only impact is that if the libel is not "per se" (referred to at common law as "libel per quod") plaintiff has the additional burden of pleading and proving "that he has suffered special damage as a proximate result thereof." *Id.*

The ***statutory*** per-se/per quod distinction does not relieve the Court of the ***constitutional*** requirement that it must first determine, based on the totality of the circumstances, ***whether*** a given

statement is an assertion of fact, or instead, constitutionally protected opinion. Only then does the court apply the "per se"/ "per quod" distinction. *See, e.g. Rodriguez*, 314 F.3d at 983.[10] Thus the word "blackmail" was determined by the Supreme Court to be opinion in one context, even though in other contexts that term would be taken literally as an assertion of the commission of a crime. *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *Nicosia*, 72 F.Supp.2d at 1102 ("Gerald Nicosia killed Jan Kerouac" was not literal accusation of murder).

C. Statements that Involve Subjective Judgments are Not Susceptible of Being Proven True or False; and When the Author Outlines the Facts Upon Which He Relies for a Conclusion, the Conclusion is Necessarily Subjective

Plaintiff contends that "statements alleging physical and mental abuse are not protected 'evaluative opinions' when they are not couched as opinions and are not based on accurate third party information simultaneously disclosed to the public (e.g. a video showing the alleged abuse." Opp.MTS at 15:4-7. Plaintiff's contention is based on several erroneous legal premises.

Plaintiff apparently misunderstands the third prong of the "totality of the circumstances test, namely, whether a statement is "susceptible of being proved true or false." This rule protects statements that involve subjective value judgments, or what some call "evaluative" statements. As one case relied upon by Plaintiff explains:

> The essential difference between a statement of fact and a statement of opinion is that a statement of fact implies a provably false factual assertion while a statement of opinion does not. For example, the Daily Breeze article quotes the petition for conservatorship as stating Gallagher is " 'extremely rude' " when Petone's friends come to visit. This statement is not defamatory because it does not make a factual assertion capable of being proven true or false. Whether someone is "extremely rude" is a subjective judgment of the person making the statement.

Gallagher v. Connell, 123 Cal. App. 4th 1260, 1270 (2004); *Partington*, 56 F.3d at 1159 ("comments that are in the nature of personal assessments or criticisms [are] subjective evaluations [protected by the First Amendment] because they are not susceptible of being verified as true or false.")

---

[10] Actually there are some differences between libel per se and slander per se -- there is technically no such thing as "defamation per se -- but they are not important for present purposes. *See* Cal. Civ. Code § 46. In either event the important point is that the Court ***first*** has to determine whether the statement at issue can be reasonably interpreted as implying a verifiable assertion that the plaintiff committed a crime. *Compare Rodriguez*, 314 F.3d at 983 (statement reasonably interpreted as accusing plaintiff of public indecency was slander per se) with *Greenbelt* 398 U.S. at 13 ("blackmail" was not slander)

Certain sorts of statements thus are generally understood as subjective or "evaluative," unless there is some particular context that would show otherwise. In *Campanelli*, where the allegedly defamatory statement was a parent's conclusion that "someone or something is making his son sick, the general public would not reasonably expect the parent to be making an observation which could be proven true or false in a medical sense." *Id.*, 44 Cal. App. 4th at 580. The question whether the parent's opinion was "was empirically sound or medically justified" was thus not one that plaintiff could present to a jury. *Id., see also id.* at 581 ("psychological damage," etc.)

There is no ***requirement*** that, in order to be deemed subjective, the speaker disclose the underlying basis for his opinion, let alone that this information be "third party" information. Many statements are self-evidently subjective, at least in the absence of further context rendering them factual. *See, e.g. Nicosia,* 72 F.Supp.2d at 1106 ("Manipulation, however, refers to subjective motivations and personality traits, which are not provable as true or false").

On the other hand, where the context ***does*** disclose the facts "available to [the author], thus ***making it clear*** that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Partington*, 56 F.3d at 1156-1157 (emphasis added). Such statements, even though they "at first blush appear to be factual[,] are protected by the First Amendment. *Standing Comm. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995).

> As one Court explained these two analytically separate principles, some statements are ***either*** too vague to be falsifiable ***or*** sure to be understood as merely a label for the labeler's underlying assertions; and in the latter case the issue dissolves into whether those assertions are defamatory. If you say simply that a person is a "rat," you are not saying something definite enough to allow a jury to determine whether what you are saying is true or false. If you say he is a rat because . . . , whether you are defaming him depends on what you say in the because clause.

Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir. 1996)(emphasis added).

Where the basis of defendant's conclusion is set forth within the broader context of the article, it is plaintiff's burden to show that the underlying statements are false. This is true no matter how unreasonable the conclusion drawn by the defendant. Thus in *Standing Committee v. Yagman*, Yagman's statement that the judge was "anti-Semitic" was based on the (exceedingly thin) premise

that the Judge had sanctioned three Jewish lawyers. Since plaintiff had not disputed that the three lawyers in question were Jewish and had been sanctioned by the judge, the statement was not defamatory. *Id.*, 55 F.3d at 1438.

V. This Court Cannot Adjudicate the Validity of Statements Concerning Religious Matters

Plaintiff contends that the Free Exercise Clause is inapplicable to this case, because the "complaint … states that Plaintiff is not a religious organization, but rather a non-denominational educational and charitable organization that teaches courses in breathing yoga, and mediation." Opp.MTD at 16:7-9. Plaintiff provides no citation for this "denial," and the assertion that an organization is "nondenominational" Complaint, ¶ 23 does not negate that it may have religious or spiritual content. The allegations of the Complaint must be read in conjunction with the "secret" Manuals and Principles to which it refers and which are incorporated therein by reference, Complaint, ¶ 39-41; Dhall Decl., Exhs. A-D; *see Knievel*, 393 F.3d at 1077. Together, the Complaint and these incorporated documents indicate that AoL and Plaintiff are dedicated to propagating the teachings of their Guru Shankar, a prodigy in the study of Vedic (i.e. sacred Hindu) literature/science, who is regarded as a "hol[y]" man and an enlightened master, whose "mind, body and emotional achievements are a foundational component of Plaintiff's Art of Living course" and whose teachings are sacred, divine transmissions within a tradition that contains those of other great teachers such as Buddha, Jesus, and Krishna, and whose Yogic breathing techniques work through the mysterious grace and presence of the Guru. Complaint, ¶¶ 16, 30; Dhall Decl., Exh. Exh. B, p. 4; 9; Exh. D, p. 2, 3. Plaintiff cannot evade the religious aspect of AoL by labeling its "teachings" a trade secret.

Plaintiff contends that, even if it were a religious organization, the Free Exercise Clause has no applicability here. Plaintiff is mistaken. It is true that Courts may adjudicate civil torts involving religious organizations, but this is subject to an important constitutional limitation. Courts may only adjudicate questions that can be fully resolved solely on neutral, secular principles; if the adjudication would entangle the court in religious matters, the court must abstain. *Jones v. Wolf*, 443 U.S. 595, 603 (1979); *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1250 (9th Cir. 1999)(Court may resolve trademark dispute between rival Sufi groups on "neutral, secular principles," but cannot adjudicate the validity of religious statements, such as whether the Master's religious

authority had been transmitted to others).[11]

To be sure, there may be some overlap between this Free Exercise principle and general Free Speech principles. The court in *Dilworth* determined term that the term "crank" is protected opinion, because "judges are not well equipped to resolve academic [i.e. scholarly] controversies," and thus the term is inherently incapable of being proven true or false. *Id.*, 75 F.3d at 310. By the same token, judges are not well equipped to determine whether a religious organization is a "cult," whether its Guru is a "charlatan" (Statement N); whether the teachings are "brainwash[ing]" (Statement I) or whether "psychic threats [are] made … yes, even by the precious master himself." (Statement L).

They are not only ill-equipped to do so, they are expressly forbidden to do so by the Free Exercise clause.[12] It is the very essence of the Free Exercise of Religion that a person is free to "disparage," "attack" or "tarnish" the "services" and/or teachings" of a religious organization, or to "mislead" others about such teachings or to discourage others from "registering for Plaintiff's [religious] courses." Complaint, ¶¶ 65, 95, 109, 110, 116-19. Contrary to Plaintiff's assertions, Defendants do not need to prove that they are motivated by their own theology or that Defendants "are an organized church or religion." Opp.MTD at 17:10. The Religion Clauses … protect adherents of all religions, as well as those who believe in no religion at all." *McCreary County v. ACLU*, 545 US 844, 884 (2005). The operative issue is whether the adjudication of the allegedly defamatory statements would entangle the court in matters of religion or spirituality.

To be sure, many cases involving Free Exercise or Establishment privileges have involved the disciplining or termination of ministers or faculty/administrators in religious schools. But these cases turn at least in part on the principle that the Courts will not entangle themselves in matters involving internal church governance and discipline, matters that are themselves intertwined with issues of the

---

[11] *Conley v. Roman Catholic Archbishop* is not to the contrary. *See id.*, 85 Cal.App.4th 1126, 1130 (citing *Jones v. Wolf*). The court there determined that the risk of government entanglement in matters or religion was outweighed by the state's compelling interest in preventing child abuse. *Id.*, 85 Cal. App. 4th 1126, 1132 (2000).

[12] *Church of Scientology v. Flynn* is not to the contrary. That case involved an accusation that the Church of Scientology had attempted to murder the defendant by tampering with his aircraft. The Court could safely resolve the issues there without entangling itself in matters concerning the Church's teachings or internal functioning. *Id.*, 744 F.2d at 698.

church's faith and teachings. "Neutral principles" is not a one-way street. The courts have ruled that a church is permitted to accuse one of its priests or teachers of sexual abuse or financial impropriety – because the question of whether a person is qualified for the ministry or other church office is uniquely religious.[13] By the same token then, if an apostate defects from the church, and urges others to do the same, based on identical accusations, i.e. that persons within the church are not worthy of the offices they hold, those accusations must be privileged as well.

Conclusion

For the reasons stated above, the Complaint should be dismissed. Plaintiff requests that any dismissal be without prejudice, so that it can amend the Complaint to make new allegations of actual malice. Opp.MTS at 20:1-7 *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873 (2009), relied upon by Plaintiff, however, merely stands for the proposition that where Plaintiff in its opposition to the Motion to Strike shows that there is a basis for alleging actual malice, the Complaint may be amended to conform to proof. Where, however, Plaintiff's opposition to the motio n to dismiss and the motion to strike are themselves premised on erroneous theories as to what constitutes actual malice, the dismissal should be with prejudice. *Nicosia,* 72 F. Supp. 2d at 1109, 1111; *See* ReplyMTS at 14-15. As this is the case here, the Complaint should be dismissed with prejudice.

Dated: April 6, 2011

_____\s_____
Joshua Koltun
Attorney for Defendants Klim and Skywalker

[13] *Cha v. Korean Presbyterian Church*, 262 Va. 604, 609, 615 (Va. 2001) (court would violate Free Exercise clause if it adjudicated defamation claim involving accusation of financial impropriety, because "the court would be compelled to consider the church's doctrine and beliefs because such matters would undoubtedly affect the plaintiff's fitness to perform pastoral duties"); *State ex rel. Gaydos v. Blaeuer*, 81 S.W.3d 186, 196-197 (Mo. Ct. App. 2002)(" questions of truth, falsity, malice and the various privileges that exist often take on a different hue when examined in the light of religious precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church").