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)

REPLY 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. INTRODUCTION

Defendants, at the outset, wish to summarize their positions on the currently pending motions. First, there is no basis to remand this case to the Superior Court. The removal statute clearly and unambiguously provides that the alleged residency of a fictitiously named defendant must be disregarded for purposes of determining diversity. Second, although Sherrod consumes over 20 pages trying to justify why she filed in D.C., the undisputed facts and the equities demonstrate that this case belongs in California. Sherrod has lived and worked in Georgia for her entire life. Breitbart and O'Connor live and work in California; and the blog post that is the subject of her claims was published on the Internet from California. None of the private or public interest factors favor Washington D.C., and thus the Court has unquestionable discretion to send this matter to California. Finally, no matter where this case proceeds, it must end at the pleading stage because the views expressed in the blog post are constitutionally-protected, non-actionable opinions of Sherrod's own words.

II. PRELIMINARY STATEMENT

Last summer, when the nation met Shirley Sherrod, there was something imprudent about her but also something candid – a person who spoke her mind in front of a rolling video camera about the complicated subject of race relations not appreciating that because she was a high-ranking federal official her words would resonate very differently outside of the Douglas, Georgia ballroom where she addressed an African-American audience at an NAACP awards dinner. After Defendants publicized her speech as indicating to them the existence of a double standard in the way race can be publicly discussed in this country, she continued to talk with almost alarming frankness, admitting on national television that her comments were newsworthy because of the ongoing feud between the NAACP and the Tea Party. *See* Memorandum in

Support of Motion to Dismiss ("Mem.") at 26. Sherrod was believable because she seemed to say it like she saw it.

But now, in the hands of her lawyers, she has become just another plaintiff. Sherrod today denies what she earlier openly acknowledged about the context of Breitbart's post, protesting in her papers that she "had nothing to do with the controversy" between the NAACP and the Tea Party over allegations of racism. She tries to dismiss as "extraneous" the factual setting that is central to this Court's task on a Rule 12(b)(6) motion to determine as a matter of law whether Breitbart's post contains any verifiable, provably-false statements of fact. Sherrod the plain speaker has been replaced by Sherrod the plaintiff, who resorts to histrionics with phrases such as "truly mind-boggling," "preposterous," "ridiculous" and "def[ying] credibility" to describe anyone who dares to disagree with her orthodoxy that she does not see the world through a prism of race, and instead is an agent of racial healing. Opposition to Motion to Dismiss ("Opp.") at 39, 42; Opposition to Anti-SLAPP Motion at 3 n.2. Finally, Sherrod repeatedly states as fact that Defendants "knowingly" omitted and edited out portions of her speech in order to make it misleading. Opp. 5. Sherrod is wrong to insinuate that Defendants possessed a video of her entire speech at the time of publication, but more important than her error is her willingness to lead the Court astray about matters of which she cannot possibly have any direct knowledge.

When all the intentionally confusing legal maneuvers of Sherrod's brief are recognized for what they are, this Court is left with a clear, straightforward task. The Defendants seek dismissal on the ground that their statements about Sherrod constitute opinion, which is constitutionally protected and not actionable under the libel laws. The Court has not been asked at this time to dismiss the complaint for lack of defamatory meaning or on the basis of

substantial truth. Nor have Defendants raised at this juncture the "actual malice" fault standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, which require a public official to prove, by clear and convincing evidence, that a defendant published a false statement while "entertain[ing] serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The complaint should be dismissed under Rule 12(b)(6) because, whether one agrees with him or not, Breitbart is entitled to his opinion. He disclosed two video clips supporting his subjective view that the NAACP speech was evidence of a top federal official showing that she sized up individuals according to their race. Sherrod's public statements in the two clips and the reaction of the NAACP audience were disturbing and discriminatory at their most basic level to Defendants because she grouped and defined people by race while her listeners nodded and approved. The rest of her remarks do not dispel, and in fact confirm, that she remained deeply race conscious while in her USDA position.

Sherrod's argument that characterizing her speech as "racist" is not protected opinion requires the existence of a single, "true" meaning to her words. But her claim that Breitbart's subjective evaluations of her "racism" are actionable because they are "verifiable" fails because, taken in context, and where Breitbart has disclosed the factual predicate for his views as required by D.C. Circuit authority, there is absolutely no basis for finding such statements provably "false" under the libel laws. Sherrod argues that the "the full truth" was not disclosed to readers, Opp. 40, because the rest of the speech was not posted online and yet she *herself* describes in her brief the "moral of her story" as the lesson that "race should not play a role in helping those in need." Opp. 41. That lesson, however, is *exactly* what was revealed in the embedded video in the Breitbart post when she says in her own words:

> 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.

To emphasize the point, Breitbart writes in his post, "Eventually, her basic humanity informs that this white man is poor and needs help." Complaint, Ex. 1. How, given her own admission in her brief, Sherrod can claim that the clip does not capture the gist of her speech is what is "truly mind-boggling." *See* Opp. 42.

With no valid legal theory to support her claim, Sherrod resorts to emotion arguing that she must have a viable cause of action given the "national uproar" her remarks created when Breitbart published them. Opp. 5. But while statements of opinion are often more provocative and cause more debate and discomfort than statements of fact, "[o]n the facts before us, we cannot react to that pain by punishing the speaker. As a Nation, we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (affirming dismissal of tort claims brought by father of deceased soldier against picketers who disrupted his son's funeral).

III. ARGUMENT

A. Sherrod cannot show any provably-false statements of fact because the Defendants' characterizations of her speech as "racist" are the essence of protected opinion.

Early motions practice plays a critical role in defamation cases because libel suits "pose a threat to freedom of the press even if a defendant ultimately prevails." *Mar-Jac Poultry, Inc. v. Katz*, 2011 WL 1140447, *6 (D.D.C. March 30, 2011). As a result, the D.C. Circuit has instructed district courts to "apply close judicial scrutiny and properly dispose of defamation cases against the news media through summary procedures when and as soon as possible." *Id.* (*citing Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996)). *See also Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir.

1966) ("In the First Amendment area, summary procedures are … essential. For the stake here, if harassment succeeds, is free debate. … The threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."). Because of the importance of and the frequency with which courts decide motions to dismiss and motions for summary judgment in libel cases, the questions presented at each stage of litigation have been clearly delineated through decades of jurisprudence.

On a motion to dismiss under Rule 12(b)(6), courts are most frequently asked to determine whether the statements at issue constitute non-actionable opinion and whether they are capable of a defamatory meaning. *See Weyrich v. New Republic*, 235 F.3d 617, 623-34 (D.C. Cir. 2001) (observing at the Rule 12 stage that the court's task was to decide "whether the disputed article … contain[ed] express or implied verifiably false statements of fact" and whether those statements were "reasonably capable of defamatory meaning."). Both of these inquiries are questions of law for the court. *Id.* at 623. In contrast, on a Rule 56 motion for summary judgment, courts in a public official or public figure defamation case generally determine whether the statements are substantially false and whether sufficient evidence of actual malice exists to submit the case to the jury. *See*, *e.g.*, *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1295-96 (D.C. Cir. 1988) (granting summary judgment for defendants on grounds of substantial truth and lack of actual malice). Other questions of law not presented in a motion to dismiss may be resolved at summary judgment as well.

Sherrod conflates the defenses of opinion, lack of defamatory meaning, and substantial truth in an effort to confuse the issues and hopes that the Court will allow her to take a deficient complaint past a motion to dismiss. But contrary to Sherrod's assertions, the Defendants have not raised for purposes of this motion whether the statements are capable of a defamatory

meaning, *see* Opp. 38-39, or whether they are substantially true. *See* Opp. 33. Rather, they have focused on one question only: whether Breitbart's subjective evaluation that Sherrod's speech was "racist" is protected as opinion under the First Amendment. On that issue Defendants prevail, and each of the allegedly defamatory statements must be dismissed as non-actionable.

1. The inquiry into opinion is analytically separate from any inquiry into lack of defamatory meaning.

While defamatory meaning and opinion are issues that are typically raised on a motion to dismiss, they are distinct inquiries. Under D.C. law, a statement is defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Weyrich*, 235 F.3d at 627 (citations omitted). But even if a statement "has been found capable of defamatory meaning[,] [a] defendant may escape liability if the defamatory meaning is established … as constitutionally protected expression." *White v. Fraternal Order of Police*, 909 F.2d 512, 523 (D.C. Cir. 1990). *See also Mar-Jac Poultry*, 2011 WL 1140447, *14 (finding that even if broadcast tying plaintiff to terrorist groups "could be found defamatory," the court must still determine "whether the [b]roadcast was nonetheless protected by the First Amendment" as opinion).

It is not unusual for a court to dismiss a statement that is otherwise defamatory because it is opinion. For example, in *Moldea v. New York Times*, 22 F.3d 310 (D.C. Cir. 1994) (*Moldea II*), the D.C. Circuit determined that several defamatory statements about the plaintiff, an investigative journalist, were capable of a defamatory meaning, but then held that those same statements were constitutionally protected as opinion. *Moldea II*, 22 F.3d at 320. Indeed, the court found that even when an opinion is written "with an aim to damage [the plaintiff's] reputation," finding the statement actionable would "unacceptably interfer[e] with free speech." *Id.* Sherrod is incorrect in stating that Defendants have raised lack of defamatory meaning over

the six allegedly actionable statements. Opp. 38-39. This Court is only called upon to answer whether each of the statements is non-actionable opinion. Mem. 29-42.

2. Sherrod errs in ignoring the central role context plays in the opinion analysis.

Sherrod focuses on the verifiability of statements as the single lynchpin of the opinion analysis, Opp. 28-32, but fails to acknowledge that courts are also required to consider the context in which the statements were published when determining whether they are actionable. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Moldea II*, 22 F.3d 310. If the context is one in which a reader expects to be presented with statements of opinion, defendants "must be given some leeway to offer 'rational interpretation'" of the facts. *Moldea II*, 22 F.3d at 313. In such cases, the "correct measure" of whether a statement is verifiably false is whether "*no reasonable person could find* that the [defendant's] characterizations were supportable interpretations" of true underlying facts disclosed to the reader. *Id.* at 317 (emphasis in original). Any statements that fail to satisfy this stringent test are protected opinion. Sherrod is therefore incorrect that in a Rule 12 opinion analysis all underlying facts are presumed to be false. Opp. 38-39. *See Copeland-Jackson v. Oslin*, 555 F. Supp. 2d 213, 217 (D.D.C. 2008) (dismissing libel action under Rule 12(b)(6) because plaintiff failed to "demonstrate by a preponderance of the evidence that the statements … were false"). Such a rule would make absolutely no sense because it would mean that an opinion defense could never prevail on a motion to dismiss.

a. This Court is required to consider the context and genre in which the statements were made when deciding whether they are protected opinion.

Despite decades of case law and the Supreme Court's attempts to bring clarity, the law of opinion has always been fraught with confusion. "When you read the [opinion] cases, they are a mess," D.C. Circuit Judge Edwards observed from the bench during the oral argument in the *en banc* rehearing before the D.C. Circuit in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).

Bruce W. Sanford, LIBEL & PRIVACY § 5.1 (Aspen 2010). In *Ollman*, the court determined that statements labeling the plaintiff college professor a "political activist" who was an "outspoken proponent" of Marxism with an "avow[ed] desire to use the classroom" to indoctrinate his students were constitutionally-protected expressions of opinion. 750 F.2d at 971-72. The majority opinion of Judge Starr brought some degree of clarity to the "uncharted seas" of opinion jurisprudence, *id.* at 977, by setting forth a four-part inquiry to determine whether statements are expressions of fact or protected opinion. The *Ollman* test called for an examination of:

1) "the common usage or meaning of the specific language of the challenged statement itself" to determine "whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous";

2) the statement's "verifiability," meaning whether the statement is "capable of being objectively characterized as true or false";

3) the "full context of the statement" to determine whether "unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content"; and

4) the "broader context or setting in which the statement appears," meaning whether the particular "type[] of writing h[as] … social conventions which signal to the reader the likelihood of a statement's being either fact or opinion."

Id. at 979. The fourth factor in particular examined the "broader social context into which the statement fits," with Judge Starr noting that "[s]ome types of writing … by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Id.* at 983. The importance of context could not be understated because "it is one thing to be assailed as a corrupt public official by a soapbox orator and quite another to be labeled corrupt in a research monograph detailing the causes and cures of corruption in public service." *Id.* Judge Bork also emphasized the need to consider context in opinion analysis because when statements are made in the arena of "controversy and politics" such as in the op-ed pages, the reader is

automatically "alert" that "what he reads does not even purport to be … balanced, objective, and fair-minded." *Id.* at 1010 (Bork, J., concurring). As he wrote, "Those who step into areas of public dispute … must be willing to bear criticism, disparagement, and even wounding assessments … [T]he law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate." *Id.* at 993.

Six years after the D.C. Circuit's decision in *Ollman*, the Supreme Court echoed the work of Judge Starr and Judge Bork in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In *Milkovich*, the high court addressed a charge that the plaintiff while under oath at a judicial hearing "lied" – a word classically found in libel jurisprudence to be either a statement of fact or a statement of opinion depending on context. The opinion by Chief Justice Rehnquist – much like the opinions in *Ollman* – dismissed any "artificial dichotomy between opinion and fact." *Id.* at 19. But in calling for courts to examine the "general tenor" of the work to determine if a reader would understand statements as assertions of objective fact, *id.* at 21, the Chief Justice adopted the approach in *Ollman* and then shaped it based on the facts of the case to find the assertion that the plaintiff "lied" under oath actionable.

This Circuit applied *Milkovich* four years later in the New York Times' successful defense of the libel suit brought by author Dan Moldea. *See* Mem. 35. In *Moldea v. New York Times*, 15 F.3d 1137, 1141 (D.C. Cir. 1994) (*Moldea I*), the D.C. Circuit initially found actionable two passages supporting the newspaper's assessment that Moldea was a "sloppy" journalist: the questioning of his assertion that Joe Namath "guaranteed" a Super Bowl victory "shortly after a sinister meeting in a bar with a member of the opposition" and the criticism of Moldea for the "reviv[al] of the discredited notion" that an owner of the L.A. Rams "who had a penchant for gambling[] met foul play when he drowned in Florida." The court further thought it

"important to make clear that … our analysis of this case is not altered by the fact that the challenged statements appeared in a 'book review' rather than in a hard news story." *Id.* at 1146.

But on rehearing, the D.C. Circuit reversed its earlier holding on these two passages for "fail[ing] to take sufficient account" of the context in which the statements appeared. *Moldea II*, 22 F.3d at 311. It recognized that *Milkovich* was decided "against the backdrop of th[e] settled principle" that different genres of writing have a different influences on the average reader, and that it had "erred in assuming that *Milkovich* abandoned the principle of looking to the context in which [the statement] appears." *Id.* at 314-15. Instead of "disavow[ing] the importance of context," the Supreme Court "simply discounted it in the circumstances of that case." *Id.* at 314. Applying the correct standard, the court dismissed the case in its entirety.

The D.C. federal courts since *Moldea II* have consistently held that, "[i]n deciding whether a reasonable factfinder could conclude that a statement expressed or implied a verifiably false fact about" a plaintiff, "the court must consider the statement in context." *Weyrich*, 235 F.3d at 624. In *Weyrich*, the appellate court reversed summary judgment in favor of political consultant Paul Weyrich based on an article in The New Republic that he suffered from "bouts of pessimism and paranoia." *Id.* The court held that "the First Amendment demands that [it] place these references in their proper context," and because The New Republic was "well[] understood" to be a "magazine of political commentary" the statement was found to be "neither verifiable nor d[id] it imply specific defamatory facts" about the plaintiff. *See also Matusevich v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (granting summary judgment to defendant because "if the statements" that plaintiff espoused "racialist views" were "read in context … a reader would reasonably be alerted to the statements' function as opinion and not as an assertion of fact").

This Court has continued post-*Milkovich* to apply the *Ollman* factors, which explicitly

take into account the context in which the statements are published. *See Q Int'l Courier v. Seagraves*, 1999 U.S. Dist. LEXIS 23355, *17 (D.D.C. Feb. 26, 1999) (finding in dismissing allegedly defamatory statements on opinion grounds that "the *Milkovich* holding does not discount the four factor test established in *Ollman* for distinguishing between utterances of fact and opinion"); *Matusevich*, 877 F. Supp. at 5 (*citing Ollman*). Sherrod completely ignores *Ollman*, and she might as well have ignored *Moldea II* given that her attempt to distinguish it by limiting it to situations in which a reader "expects a critique," Opp. 40 n.32, all but defines exactly what Breitbart provides his audience. *Ollman* and *Moldea II* require examination of context in every case, and in this instance there can be no question that the context, as in *Weyrich*, is a publication known for sharp political commentary and opinion in which readers "expect a critique." Breitbart is a well-known "combatant in a battle of ideas" and someone who is "very much a provocative force,"[1] characteristics that inform the content of his websites.

b. Where context requires, a court must find statements non-actionable as opinion when they spring from underlying facts disclosed to the readers.

The importance of context is crucial to the inquiry into whether a statement is actionable because, as stated above, it changes the "correct measure" of the statement's verifiability. *Moldea II*, 22 F.3d at 317. A statement that is made in a context where a reader expects the author to make interpretive statements is non-actionable opinion if the defendant "show[s] that it offered true facts in support of its judgment that served to support its statement of opinion." *Moldea II*, 22 F.3d at 312.

In *Moldea II*, 22 F.3d at 312-13, the court found that the defendant's assertion that the plaintiff had engaged in "sloppy journalism" was supported throughout the review by facts that were principally true or by other supported statements of opinion and thus was non-actionable.

[1] Roger Aronoff, Andrew Breitbart's Righteous Indignation: Exclusive Interview, Canada Free Press, May 5, 2011, available at http://www.canadafreepress.com/index.php/article/36189.

The plaintiff failed to meet his burden under the "supportable interpretation" test even though the court was "troubled" by the "sinister meeting" passage. *Id.* at 319. But the court said it was "constrained to conclude" that the passage was "simply one of the 'interpretations'" offered in support of the reviewer's accusation of "sloppy journalism" in the book. *Id.* at 318. Thus, not every single basis for an opinion had to be accurate, the court ruled, only one or more of them.

In the years since *Moldea II*, courts have continued to apply the "supportable interpretation" test when the context of the allegedly defamatory statements demonstrates that defendants should be afforded additional "leeway" under the First Amendment. *Id.* at 313. In *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996), the D.C. Circuit affirmed a grant of summary judgment to a sportswriter who in a college basketball preview stated that the plaintiff, a coach, "usually finds a way to screw things up." The court found that the article in which the allegedly defamatory statement appeared was "critical commentary" to which the "supportable interpretation" standard must be applied. *Id.* at 557. The court then determined that the facts provided to the reader about the coach's win-loss record were "open to different interpretations by reasonable persons," and that the plaintiff had thus failed to prove that "no reasonable person could find that the characterization … [w]as supported by the facts." *Id.* at 557.

Similarly, in *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580 (D.C. 2000), the D.C. Court of Appeals, in affirming on other grounds, credited a trial court's dismissal of a plaintiff's defamation claim based on a trade publication column which purportedly implied that the plaintiff had violated the Railway Labor Act. In granting summary judgment to the defendant, Judge Huvelle had found that the reader "would understand" that the allegedly defamatory statement was "supported opinion" that represented the author's "interpretation of the facts presented." *Id.* at 591. Thus, since the reader was "free to draw his or her own conclusions," the

allegedly defamatory implication was not actionable because it was protected opinion. *Id.*

3. Statements that Sherrod's NAACP speech was racist and discriminatory are protected as opinion because they are supported by reference to her own words.

Applying the analytical framework of *Ollman* and *Moldea II* to the specific factual context of the Breitbart post and the months-long war of words between the NAACP and the Tea Party over allegations of "racism" in their ranks, *see* Mem. 16-28, it is evident that the complaint is not actionable and must be dismissed. Sherrod would direct the Court to a truncated opinion inquiry into whether it is "verifiable" that she gave a racist speech. Opp. 28. Because she wrongly believes that her words (and the concept of "racism") are only susceptible to a single understanding, she argues that it *is* an objective fact that she did *not* give such a speech. Opp. 28. Not only is the endlessly arguable subject of the Breitbart post far removed from the world of objective fact – racism, like love, "sloppy journalism," and "bouts of pessimism and paranoia," is in the eye of the beholder – Sherrod would apply the wrong test to the opinion inquiry. This Court instead must look to whether "no reasonable person could find" that Breitbart's "characterizations [of Sherrod] were supportable interpretations" of the facts disclosed in the two video clips. *Moldea II*, 22 F.3d at 317.

Almost all of the precedent Sherrod cites relating to the actionability of the words "racist" or "racism" are defamatory meaning cases, not opinion cases. *See* Opp. 30 (*citing Afro-American Publ'g v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) (affirming judgment for plaintiff because "readers would understand a defamatory meaning" in a column which "signif[ied] that plaintiff is a bigot, racially prejudiced, and scornful of the Negro race"); *Chonic v. Wayne Cty. Cmty. Coll.*, 973 F.2d 1271, 1276 (6th Cir. 1992) (affirming jury verdict for plaintiff where the "defamatory potential of the statement found to be libelous" was "obvious")); Opp. 31 (*citing Schermerhorn v. Rosenberg*, 426 N.Y.S.2d 274, 284-85 (N.Y. App. Div. 1980) (upholding

submission of defamatory meaning to jury where legislator's reputation could be "seriously damaged" by reasonably defamatory statement in headline); *MacElree v. Philadelphia Newspapers*, 674 A.2d 1050, 1052, 1055 (Pa. 1996) (reversing trial court's dismissal of defamation claim because allegations that plaintiff was "a racist" engaged in "racially motivated hatred" was "capable of defamatory meaning as a matter of law")); Opp. 39 (*citing Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir. 2000) (finding no First Amendment violation in employment suit where statement that plaintiff was a "racist" was defamatory)).

The few opinion cases Sherrod cites are easily distinguishable from this case where the Defendants have identified the precise factual predicate for their subjective assessments. In *O'Brien v. City of Saginaw*, 2011 WL 8143, *5 (E.D. Mich. Jan. 3, 2011), a complaint alleging that defendants had – out of the blue – accused the plaintiff of being a racist at a board meeting survived a motion to dismiss because the statement "implies" the existence of defamatory facts that were *not* disclosed. As the court said, "[A]t this stage of the case – before the parties have had an opportunity to develop the surrounding circumstances through discovery – it is impossible to say whether or not the allegedly defamatory statements can be proved false." *Id.* Those facts are nothing like the ones in this case, in which Breitbart disclosed the basis for his opinions of Sherrod in his post and the embedded videos, and thus where the factual context is fully developed. The *O'Brien* court furthermore made it clear, distinguishing *Milkovich*, that "one cannot prove a person is a racist or not a racist … with the same objective confidence that one can prove a person lied under oath." *Id*. The same conclusion is true of *Taylor*, 214 F.3d at 790, also cited by Sherrod, where a paralegal for the City of Gary, Indiana complained "in general terms" to the city attorney that her supervisor was "racist." The court found the statement was actionable because "a person who makes an *unsupported* defamatory statement

may be penalized without offending the first amendment." *Id.* at 793 (emphasis added).

Similarly, the D.C. Circuit's 1966 pre-*Ollman*, pre-*Moldea II* decision in *Jaffe* has never been cited by the Circuit as precedent on opinion, only on defamatory meaning, an issue not raised in this motion. The block quote from the decision, *see* Opp. 29-30, reveals that the court's inquiry was into defamatory meaning and that it did not undertake the separate opinion analysis this Court will do under the controlling authority of *Ollman* and *Moldea II*. Furthermore, the case was on appeal after trial, and the fact-finder had already determined that an anecdote used in the newspaper article that was the subject of the lawsuit – that the plaintiff had told the columnist a story showing that African-Americans living in the neighborhood near his store were of low intelligence – was not true. *Jaffe*, 366 F.2d at 653. Here, Sherrod's own words are the indisputable factual predicate for Defendants' statements of opinion.

Sherrod's clipped reference to a hypothetical in *Moldea II* requires correction. According to Sherrod, the D.C. Circuit held that "falsely characterizing a book as stating that 'African Americans make poor football coaches' amounts to 'libeling its author by portraying him as a racist.'" Opp. 30. This, in fact, is what the D.C. Circuit wrote in full:

> A critic's statement must be a rational assessment or account of something the reviewer can point to in the text, or omitted from the text, being critiqued. For instance, if the Times review stated that *Interference* was a terrible book because it asserted that African-Americans make poor football coaches, that reading would be 'unsupportable by reference to the written work,' because nothing in Moldea's book even hints at the notion. In such a case, the usual inquiries into libel would apply: a jury could determine that the review falsely characterized *Interference* thereby libeling its author by portraying him as a racist (assuming the other elements of the case could be proved).

22 F.3d at 315. In this hypothetical, the D.C. Circuit simply reiterates the controlling test that in the context of the genre of commentary if an expression of opinion is "unsupportable" by reference to underlying facts, then it could be the basis of a lawsuit. It does *not* stand for the

principle argued by Sherrod that statements attributing racism are de facto actionable.

Finally, Sherrod's reliance on *Puchalski v. Sch. Dist. of Springfield*, 161 F. Supp. 2d 395 (E.D. Pa. 2001), as precedent that statements about a person's alleged "racism" by their very nature go "beyond the realm of mere opinion," Opp. 31, also crumbles on inspection. She omits from her quotation of the footnote in the decision the reference to "authority that characterizing someone or something he has said as 'racist' is *not* alone actionable." *Id.* at 408 n.7 (emphasis added). The only reason the court placed the statements at issue "beyond" opinion is because a defendant was alleged to have attributed to a high-school football coach the uttering of a racial epithet – a wholly different situation from the facts here where there is *no* dispute over what Sherrod said and she merely claims that Breitbart's *characterization* of her remarks was not fair.

Though she identifies six statements in her pleadings, Sherrod's complaint boils down to essentially two bases for finding the Defendants' statements actionable: 1) the subjective evaluation of her speech as "racist" and "discriminatory" and 2) the assertion that she has "managed" her "federal duties" through the "prism of race" and discriminated against people "in her federally appointed position."

a. <u>"Racist" and "discriminatory"</u>

In statements 2, 4, 5 and 6, Breitbart expresses his belief that Sherrod's speech was evidence of "racist" and "discriminatory" behavior. These subjective assessments are supported by reference to an incontrovertible fact stated by Sherrod herself and disclosed in the video clips – that she initially withheld assistance to a white farmer for no other reason than his race. Sherrod argues at great length that no one could possibly think that she was racist or discriminatory because portions of the speech not included in the excerpts provided to Defendants show her – in her opinion – to be a racial healer, not a racial divider, due to the

support she eventually gave to the white farmer. Opp. 25. What Sherrod refuses to see is that the subjective conclusion the Defendants made regarding her behavior was not that she failed to do the right thing in the end.

In fact, the Breitbart post very clearly stated that she did ultimately help the white farmer, *see* Mem. 21 – a detail that her brief does not acknowledge. The concern they identified with her conduct was that she didn't do the right thing from the very beginning. And the reason she didn't was because of race. These irrefutable facts, fully disclosed to readers, provide more than the necessary predicate to shield Breitbart's "characterizations" as "supportable interpretations" of Sherrod's NAACP speech. Furthermore, in constantly quibbling that she did not "admit" to any discriminatory behavior, Opp. 4, 27, 28, 31-36, 39, 42, 43, she again chooses to wrestle with language that is inherently unverifiable. In the context of the disputatious culture of American politics, words such as "admit" or "concede" are classic examples of protected rhetorical hyperbole. *See*, *e.g.*, *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (finding that "even the most careless reader must have perceived" the word "blackmail" when used to describe the negotiating tactics of a public figure as "no more than rhetorical hyperbole" and a "vigorous epithet"); *Ollman*, 750 F.2d at 972 (holding that allegations of a professor's "avowed desire" to "use higher education for indoctrination" was non-actionable opinion).

b. "Managed" her "federal duties" through the "prism of race"/discriminates "<u>in her federally appointed position</u>"

In statements 1 and 3, the Defendants connect the race-conscious tutorial Sherrod gives her NAACP audience with her current federal employment. The second video clip, in which Sherrod recruits African-Americans to apply for government jobs that they have otherwise shunned, lays out a factual predicate for Breitbart's conclusion that race also frames her perspective on her USDA work. That she would claim such reasoning "defies credibility," Opp.

42, is consistent with her mistaken belief that there is but a single legitimate interpretation of her words. But it is not for her to decide which evaluations of her positions are valid under the First Amendment and which are not. The USDA, like most federal agencies, has programs in place to achieve more minority representation in its workforce. To some, that is admirable affirmative action; to others it is nothing but reverse discrimination. What makes Defendants' conclusions about Sherrod's statements protected opinion is that they have disclosed a supportable basis for linking her USDA duties to her admitted predisposition to see the world in racial terms and left it to their readers to judge for themselves whether they agree or disagree with that assessment.

Thus, the fact that Sherrod's ambiguous interactions with the white farmer took place before she assumed federal office does not break the connection Defendants saw between her USDA functions and their subjective evaluation of her discriminatory attitudes. Moreover, Sherrod's statement that her speech "expressly" indicates that her communications with the white farmer took place in 1987 is simply contrary to the record. Opp. 35. The speech "expressly" says no such thing. In hindsight, upon review of the entire speech, it is possible to see that she met the farmer many years ago while she was in the private sector, but while she mentions him by name over six times in her *brief*, not once *in her speech* does she do so. Her post-hoc effort to bring clarity to her own remarks is no more successful that her in-court attempt to obfuscate the subjective meaning of Breitbart's post.

4. The false light and intentional infliction claims do not survive.

If Sherrod's libel claim fails because the allegedly actionable statements are found to be protected opinion under the First Amendment, her claim for false light invasion of privacy must fail as well. *See Weyrich*, 235 F.3d at 627-28. While Sherrod may plead defamation and false light in the alternative, "the same First Amendment protections apply" even though false light "is

distinct from the tort of defamation." *Id*. at 627. *See also Moldea I*, 15 F.3d at 1151 (a plaintiff cannot plead false light simply to avoid "the strictures … associated with defamation").

Sherrod tries to save her false light claim by citing authority which suggests that a false light claim may survive if the underlying statements are dismissed for lack of defamatory meaning. *See* Opp. 44. But here again Sherrod fails to separate defamatory meaning, which is determined under state law, from opinion, which is protected as a matter of constitutional law. *See* Opp. 44. The D.C. Circuit is clear that where an allegedly defamatory statement is found to be non-actionable opinion, any related false light claim must be dismissed. *See Weyrich*, 235 F.3d at 627-28; *Moldea I*, 15 F.3d at 1151.

However, *even if* the defamation claim fails under state law rather than constitutional law, many jurisdictions – including the District of Columbia and California – have *still* refused to sustain false light and other tort claims including intentional infliction of emotional distress that are based on the same facts. *See*, *e.g.*, *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 317 (D.C. 2006) (where defamation claim fails for lack of defamatory meaning, claims for false light and intentional infliction of emotional distress fail as well); *Couch v. San Juan Unified School Dist.*, 33 Cal. App. 4th 1491 (1995) (claims for invasion of privacy and emotional distress based on the same factual allegations as a libel claim must be dismissed). Thus, if the statements at issue are found to be protected opinion – the only issue Defendants raise in this motion – or are dismissed on other grounds, the false light and intentional infliction claims fail as well.

B. All of the relevant factors demonstrate that this case belongs in California, not Washington, D.C.

This case does not belong in the District of Columbia. Sherrod is a lifelong *Georgia* resident. She *never* lived in or worked in the District of Columbia. Each of her pleaded claims arises from a speech Sherrod gave at a NAACP event held in *Georgia* and from subsequent

critical comments published in *California*. Defendants Breitbart and O'Connor both work and reside in *California*. Their statements about Sherrod were *not* aimed at residents of Washington, D.C.; they were published on a website, rendering them simultaneously and equally accessible to anyone, everywhere with Internet access. Defendants' remarks about Sherrod generated extensive *national* (not merely local D.C.) news coverage (CNN, Fox News, ABC), after which Sherrod claims she was forced to resign from the USDA while driving between cities located within *Georgia*. The fact that she was a federal employee and claims to have suffered damages in D.C. does not render this Court an appropriate forum. There are two proper forums for this case – Georgia (where she has not sued and cannot establish personal jurisdiction over Breitbart and O'Connor) and California (where jurisdiction and venue would not be subject to challenge).

Sherrod seeks to avoid California's well-developed anti-SLAPP laws, and accordingly overstates and misstates the applicable governing authorities that compel dismissal or transfer. First, she proclaims that removing a case to federal court itself constitutes a waiver of any subsequent venue challenge, citing *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663 (1953). Neither the federal venue statute (28 U.S.C. § 1391), nor the removal statute (28 U.S.C. § 1441(a)) contains any such "waiver" language. Indeed, Justice Learned Hand decades ago expressly rejected the view that a removing defendant waives venue defects in a decision that remains the law to this day in the Second Circuit:

> At times courts have indeed spoken as though removal to a federal court "waived" some defect of venue … When a defendant removes an action from a state court in which he has been sued, he consents to nothing and "waives" nothing; he is exercising a privilege unconditionally conferred by statute and, since the district court to which he must remove it is fixed by law, he has no choice, without which there can be no "waiver."

Greenberg v. Giannini, 140 F.2d 550, 553 (2d Cir. 1944). *See also P.T. United Can. Co. v. Crown Cork & Seal Co*., 138 F.3d 65, 73 (2d Cir. 1998) (*quoting Greenberg*); *Tanzman v.*

Midwest Express Airlines, 916 F. Supp. 1013, 1018 (S.D. Cal. 1996) ("The statements by the *Polizzi* Court do not mention waiver and the case does not hold that waiver of a venue objection based on other federal venue statutes is necessarily implied from the mere act of removal.")

Under *Polizzi*, § 1441(a) rather than § 1391 governs district court venue on cases removed from state court, although some district courts have continued to analyze the issue under § 1391(a). *See*, *e.g.*, *Superior Precast, Inc. v. Safeco Ins. Co. of Am*., 71 F. Supp. 2d 438 (E.D. Pa. 1999) (applying § 1391 rather than § 1441 to motion to dismiss a case removed from state court for improper venue)*; Harrison v. L.P. Rock Corp*., 2000 WL 19257, *1 n.1 (E.D. Pa. Jan. 6, 2000) (same). In any event, the Court need not address the issue of dismissal under § 1391 because, as shown below, transfer is warranted under 28 U.S.C. §§ 1404 and 1406 even if § 1391 does not apply. *See P.T. United*, 138 F.3d at 72 (explaining that in a removed action, "a party may nonetheless request a discretionary transfer to a more convenient district court forum under the transfer provision" of § 1404). The cases cited by Sherrod reach the same conclusion.[2]

Second, Sherrod misstates the law governing Defendants' motion to transfer pursuant to §§ 1404 or 1406. Sherrod cites *Thayer v. Pryor Resources, Inc*., 196 F. Supp. 2d 21 (D.D.C. 2002) which, in turn, relies exclusively upon *Pain v. United Tech. Corp*., 637 F.2d 775, 784 (D.C. Cir. 1980), for the proposition that defendants have a "heavy burden of establishing that the plaintiff's choice of forum is inappropriate." But *Pain* does not analyze transfer under § 1404. Instead, it analyzed *dismissal* of an action arising out of a helicopter crash in Norway under the common law doctrine of *forum non conveniens*. Since the advent of the federal venue and transfer statutes, however, the common law doctrine of *forum non conveniens* only applies in

[2] *See Kotan v. Pizza Outlet, Inc.*, 400 F. Supp. 2d 44, 47 (D.D.C. 2005) (denying a motion to dismiss for improper venue on the grounds that § 1441 governs venue in a removed case, but transferring the action to the appropriate venue pursuant to § 1404(a)); *AIG Fin. Prods. Corp. v. Pub. Util. Dist. No. 1*, 675 F. Supp. 2d 354, 373 (S.D.N.Y. 2009) (same); *Encompass Advisors, Ltd. v. Unapen, Inc.*, 686 F. Supp. 2d 607, 621 (W.D.N.C. 2009) (same).

cases where the alternative forum is located abroad. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994). Moreover, courts have more discretion to transfer to another federal district under § 1404(a) than they have to dismiss on grounds of *forum non conveniens* (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981)), and Sherrod cites no authority (aside from *Thayer*) which holds that a defendant bears a "heavy burden" when seeking a transfer under § 1404.[3] Rather than applying Sherrod's outdated "heavy burden" *forum non conveniens* standard, this Court should "balance case-specific factors related to the public interest of justice and the private interests of the parties and witnesses." *Al-Ahmed v. Chertoff*, 564 F. Supp. 2d 16, 19 (D.D.C. 2008); *see also Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 29-30 (1988). These factors are discussed at length in Defendants' motion, need not be repeated here, and balance in favor of Defendants. As *Thayer* itself provides, this Court "has broad discretion to determine where the proper balance lies and whether a case should be transferred." 196 F. Supp. 2d at 31.

Third, Sherrod incorrectly contends that her "choice of a forum is 'a paramount consideration' in any determination of a transfer request" and claims that "residency is not an essential predicate to deference." Opp. 15 (*citing Thayer*, 196 F. Supp. 2d at 31). Again, this simply is not the law. The very next sentence in *Thayer* – which she incredibly omits – adds a critical, dispositive qualification: "The choice of forum is ordinarily afforded great deference, except when the plaintiff is a foreigner in that forum." *Id*. (*citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-256 (1981)). Thus, directly contrary to Sherrod's claims, residency *is* an essential predicate to the substantial deference she seeks. By choosing not to file in Georgia, Sherrod forfeited much of the "deference" she otherwise would have been entitled to claim.

[3] A few other cases in this District refer to this incorrect "heavy burden" standard, but each traces back to *Pain*. *See Malveaux v. Christian Bros. Servs*., 753 F. Supp. 2d 35, 40 (D.D.C. 2010); *Toledano v. O'Connor,* 501 F. Supp. 2d 127, 154 (D.D.C. 2007); *Southern Utah Wilderness Alliance v. Norton,* 315 F. Supp. 2d 82, 86 (D.D.C. 2004); *Shapiro, Lifschitz & Schram, P.C. v. Hazard,* 24 F. Supp. 2d 66, 71 (D.D.C.1998).

Barham v. UBS Fin. Servs., 496 F. Supp. 2d 174, 178-79 (D.D.C. 2007) (finding that a Maryland resident's choice of venue was afforded "substantially less deference" when they sued in D.C. even though the alleged discrimination occurred in D.C.); *Pyrocap Intern. Corp. v. Ford Motor Co*., 259 F. Supp. 2d 92, 96 (D.D.C. 2003) (explaining that plaintiff's choice of a foreign venue was not entitled to the same deference she would have received in her home forum even when the plaintiff claimed "substantial economic, business, and employment ties within the District.").

Sherrod repeatedly argues, without any citation to authority, that her choice of forum is entitled to deference as if it were her home forum because she could not obtain personal jurisdiction over Defendants in Georgia. Opp. 2, 15. This also is not the law. *See Brannen v. Nat'l R.R. Passenger Corp*., 403 F. Supp. 2d 89, 93 (D.D.C. 2005) (even though plaintiff could not have brought action in her home district because of lack of personal jurisdiction, the court refused to "defer to her choice of forum as if it were her home forum"). These cases establish that if California is the only proper venue, then Sherrod was required to file in California.

Moreover, because this District's connection to Sherrod and her claims is, at best, tenuous and incidental, her choice to sue here is entitled to even less deference.[4] *Deloach v. Phillip Morris Cos., Inc*., 132 F. Supp. 2d 22, 24-25 (D.D.C. 2000) ("Although a plaintiff's choice of forum is ordinarily accorded a significant degree of deference, numerous cases in the D.C. Circuit recognize that such a choice receives substantially less deference where the plaintiffs … neither reside in, nor have any substantial connection to, that forum."). It is not

[4] Throughout her opposition, Sherrod conflates the concepts of personal jurisdiction and venue, arguing that venue is proper in this District because Breitbart and O'Connor "intentionally and voluntarily inserted themselves into a controversy in the District of Columbia," and citing for support cases that analyze personal jurisdiction. *See*, *e.g.*, *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770 (1984); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). But it is well-settled that venue and personal jurisdiction are "separate and distinct," *Companhia Brasileira Carbureto de Calcio-CBCC v. Applied Industrial Materials Corp*. 698 F. Supp. 2d 109, 120 (D.D.C. 2010), and that "the laws relating to venue give added protection to defendants beyond those that are provided … personal jurisdiction." 14D Wright & Miller, Fed. Practice and Proc. § 3801 (2010).

enough that Sherrod, Breitbart, and O'Connor are among the more than six million people who travel to the District for business annually,[5] that Sherrod was a federal employee, or that readers inside the Beltway were able to access Defendants' websites from a computer. If, as Sherrod contends, these factors were sufficient, the welcome mat of this Court would extend to any defamation claim brought by any federal official or which generated national media coverage.[6]

Finally, Sherrod vastly overstates her position when she claims this Court should disregard the obvious inconvenience Defendants will encounter if they are forced to litigate 3,000 miles from where they work and raise their families. As support, Sherrod truncates the following quotation from *Int'l Painters & Allied Trades Indus. Pension Fund v. Tri-State Interiors, Inc*., 357 F. Supp. 2d 54, 57 (D.D.C. 2004) in a manner that entirely changes its meaning: "convenience of the parties is … insufficient to persuade [the] Court that a transfer is warranted." Sherrod's brief removes the word "itself" with ellipses. Thus, contrary to what is represented by Sherrod, *Int'l Painters* is among numerous other decisions that recognize that convenience of the parties is an important statutory factor that is entitled to substantial and even, at times, dispositive weight. *See*, *e.g.*, *Flynn v. Berich*, 603 F. Supp. 2d 49, 52 (D.D.C. 2009).

After improperly discounting the importance of convenience, Sherrod then declares that it weighs in her favor since, in her view, transfer to California would merely shift the inconvenience from Defendants to her and to third parties. In the cases she cites, however, the court declined to transfer an action where each litigant advocated for a *home* forum, rendering

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[5] *See* Washington, D.C. Corporate Convention Information, available at http://washington.org/planning/press-room/corporate-and-convention-info/research-and-statistics.

[6] *See*, *e.g.*, *Airport Working Group of Orange County, Inc. v. U.S. Dep't of Defense*, 226 F. Supp. 2d 227, 230 (D.D.C. 2002) ("[C]ourts must be especially cautious in allowing [cases] to remain in the District of Columbia."); *Trout Unlimited v. U.S. Dep't. of Agriculture*, 944 F. Supp. 13, 17 (D.D.C. 1996) (*citing Cameron v. Thornburgh*, 983 F.2d 253 (D.C. Cir. 1993) ("Courts in this circuit must examine challenges … venue carefully to guard against the danger that a plaintiff might manufacture venue in the District of Columbia … [b]y naming high government officials as defendants[.]")).

the competing venues "mutually inconvenient." *See*, *e.g.*, *Int'l Painters*, 357 F. Supp. at 57. Having chosen to litigate in a foreign forum, Sherrod cannot rely on these cases.

While it may arguably be less convenient for Sherrod to litigate in California than in D.C., transfer to California will completely eliminate any inconvenience to Defendants, thereby increasing the "net convenience" of the parties. As Sherrod herself notes, an increase in the "net convenience" favors Defendants. Opp. 14. Because the venue statute's purpose is "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial,"[7] this Court should give no weight to Sherrod's claim that transfer to California will shift the inconvenience to her.[8] Sherrod does not (and cannot) dispute that California would be an appropriate forum for transfer, and she has waived any right to argue that another jurisdiction would be a better forum. 28 U.S.C. § 1408(b); *Bonaccorsy v. Dist. of Columbia*, 685 F. Supp. 2d 18, 24 (D.D.C. 2010) ("As plaintiff has neither rebutted nor addressed [the defendant's] argument to the contrary, she has waived or conceded the issue.").

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in the Memorandum of Law in Support of the Motion to Dismiss, dismissal should be granted or in the alternative the case should be transferred to the United States District Court for the Central District of California.

[7] *Leroy v. Great Western United Corp*., 443 U.S. 173, 184 (1979) (emphasis in original).

[8] By the same logic, this Court also should give no weight to Sherrod's arguments that her witnesses could more easily travel to Washington from Georgia, and that evidence is more likely to be found in D.C. than in California. Some evidentiary or witness inconvenience will result no matter where the case proceeds. Because the convenience of the parties would be better served by transferring the action to California, these factors do not tip the balance in Sherrod's favor.

Respectfully submitted,

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