

Joshua Koltun (Bar No. 173040)
 One Sansome Street
 Suite 3500, No. 500
 San Francisco, California 94104
 Telephone: 415.680.3410
 Facsimile: 866.462.5959
 joshua@koltunattorney.com

Attorney for Doe Defendants

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SAN FRANCISCO

WINELAND-THOMSON ADVENTURES,
 INC. d/b/a THOMSON SAFARIS, a
 Massachusetts corporation,

Plaintiff,

v.

DOES 1 through 10, inclusive,.

Defendants.

Case No. CGC-13-528871

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF DOE
 DEFENDANT'S DEMURRER**

Date: June 17, 2013
 Time: 9:30 a.m.
 Dept.: Dept. 302
 Judge: Hon. Marla J. Miller

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Summary

Thomson Safaris is a Massachusetts company that runs safaris on land that its affiliate company controls in Tanzania. Doe Defendants¹ created a Website that brings to the public's attention ongoing litigation in Tanzania in which the rights to that land are disputed by local Maasai villagers. The villagers contend that Thomson Safari's affiliate's predecessor procured rights to their ancestral land by fraud, and that the villagers' rights to continue to graze and water their livestock on the land have been established by adverse possession. The villagers allege that Thomson and its affiliate have driven them from the land by force, burning their homes and beating villagers whom Thomson accuses of "trespassing," denying them access to the land where they have traditionally grazed and watered their livestock, and, as a result, threatening to impoverish the villagers. These allegations have been the subject of ongoing investigation as well by a committee of the United Nations High Commissioner for Human Rights ("UNHCHR").

Thomson has sued Defendants for defamation and tortious interference with prospective economic advantage. A complaint for defamation or other injurious falsehood is subject to a heightened pleading standard: Plaintiff must specify precisely which words it contends are false. In ruling on demurrers to such complaints, the Court must take judicial notice of the full context of the challenged statements. The "gist and sting" of the statements must be false; it is not enough to simply show some minor error of fact.

The Complaint fails to state a claim.

The statements that the Complaint specifically places at issue are largely repetitions of the allegations of the Litigation and UNHCHR investigation, which are specifically referenced on the Website. As such, Defendants have an absolute privilege to report on the allegations under the "fair report" privilege Civil Code section 47(d). The "fair report" privilege applies even if the allegations were false and Defendants knew them to be false.

Moreover, the First Amendment protects statements of opinion; a statement can only be actionable if it is fairly understood as an assertion of provably false fact. A conclusion or hypothesis

¹ Defendants appear anonymously through counsel so as not to waive the right to speak anonymously under the First Amendment. The term "Defendants" will be used, following the terminology in the Complaint, without making any factual assertion or disclosure.

1 premised on certain underlying facts cannot be actionable unless the premises are themselves provably
2 false statements of fact.

3 Here, the Website contains a number of detailed factual accounts that support the allegations in
4 the Litigation and UNHCHR investigation. The Complaint does not specifically address that these
5 underlying accounts or specifically state that anything in these accounts is false. Rather it makes
6 conclusory allegations of falsity. The Complaint is fatally vague as to whether Plaintiff is asserting
7 that the underlying factual accounts are false, or is only disputing the overall conclusions or
8 characterizations on the Website. For example, the Website gives numerous accounts of individual
9 Maasai whose cows have been detained “illegally.” It is unclear whether the Complaint is alleging
10 that these incidents never occurred, or is simply disputing the characterization of the detention as
11 “illegal.” The characterization is constitutionally protected opinion.

12 Similarly, if the context of a statement shows that the speaker is not claiming actual
13 knowledge of certain facts, but rather is speculating based on certain disclosed facts, the statement is
14 opinion. Thus, for example, in context the Website does not assert any direct knowledge that
15 Thomson Safaris has bribed police. Rather the Website states that it surmises that such bribes must
16 have been paid from the fact that the police and local government are working so closely with
17 Thomson to arrest “trespassing” villagers. Such speculation is constitutionally protected opinion.

18 ***Factual Background***

19 ***The “Stop Thomson Safaris” Website.*** Plaintiff, known as “Thomson Safaris,” is a tour
20 operator that arranges and conducts safaris and tours in Tanzania. Complaint, ¶ 4. Doe Defendant
21 created a website called “Stop Thomson Safaris” (“Website”). *Id.*, ¶ 5, 6. The Website brings to the
22 attention of the public ongoing litigation in Tanzania between Thomson Safari’s affiliated land-
23 holding company and local Maasai villagers. The villagers claim rights to the use the land for
24 traditional purposes such as grazing and watering their livestock, and complain that they have being
25 forcibly evicted and excluded so that Thomson Safari can run its safaris on the land. Request for
26 Judicial Notice, ¶ 1, Exhs. A-D.²

27 ² Doe requests judicial notice of the Website itself, not for the truth of any matters asserted therein, but simply as the
28 relevant context for the purportedly wrongful speech at issue. *See, e.g. Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1100,
1102 (N.D. Cal. 1999) (taking judicial notice of context of allegedly defamatory statements); *see also Knievel v. ESPN*,

1 The Website opens with a “Home” page that summarizes and links to other parts of the
 2 website. *Id.*, Exh. A. *Id.* The Home page is titled: “Boycott Thomson Safaris and Stop Them Land
 3 Grabbing from the Maasai People.” *Id.* The Home page notes that there is ongoing litigation in the
 4 Tanzanian courts (“Litigation”) concerning land use rights to “Sukenya Farm,” which has since 2006
 5 been “occupied by” Tanzania Conservation Ltd. (“TCL”). *Id.* TCL is owned by the same people who
 6 own Thomson Safari, a tourism company that runs its safaris on the land, having rebranded it as
 7 “Enashiva” a “private nature refuge.” *Id.* Thomson Safaris “bills themselves as an eco-friendly,
 8 sustainable, ethical and responsible company,” but the Website disputes this. *Id.* The Home page
 9 directs readers (by hyperlink) to the “History of the Sukenya Farm Conflict” page that goes into more
 10 detail about the Litigation. *Id.*, Exh. B. The Home page lists a number of bullet points summarizing
 11 allegations in the Litigation and elsewhere on the Website. The home page then has a section entitled
 12 “UN concerns over the human rights violations of Soitsambu villagers,” and contains a hyperlink to
 13 correspondence from the United Nations High Commissioner for Human Rights (UNHCHR) and the
 14 Tanzanian government, and quotes certain language from that correspondence (discussed further
 15 below). *Id.* The Home page then discusses a “Case Study: Young boys beaten and injured at Sukenya
 16 Farm by Thomson Safari guard, 30th May 2011.” *Id.* The Website also has a page (“Updates”) that is
 17 continually updated with specific reports of incidents and other matters concerning the dispute. *Id.*
 18 Exh. C.

19 ***The Sukenya Farm Litigation.*** As the Website notes, the Litigation is ongoing, the Court of
 20 Appeal having in May 2012 overturned a ruling of the High Court that the matter was *res judicata*.
 21 *Id.*, Exh. B (website) & ¶ 2, Exh. E (Court of Appeal opinion). The plaintiff in the case is the
 22 Soitsambu Village Council (“Village”), which is suing TCL, asserting that the villagers have rights in
 23 the disputed land on a number of grounds. *Id.*, Exh. F, Exh. I. The Village is suing to prevent TCL
 24 from changing the use of the land “from pastoralism and farming to conservation and tourism.” *Id.*,
 25 Exh. H. The Village alleges that after TCL took possession of the land it “burnt, damaged and
 26 removed [the villager’s] buildings, residences and other belonging and has expelled the [villagers,]

27 393 F.3d 1068, 1076-1077 (9th Cir. 2005)(defendant puts context of statements before court to show lack of defamatory
 28 meaning).

1 leaving the latter with very limited land for residence pastoralism.” *Id.*, Exh. F ¶ 21. The villagers
2 allege that they have

3 3. ... been in long and undisturbed use of [the] disputed land ... for grazing, farming and
4 putting temporary shelters (Bomas) for dry season grazing. The [villagers] also depend[] on
5 water coming from Pololeti River and Ilotimi spring and wells situated within the disputed
6 land for homes and cattle use.

7 ...
8 7. That, in 2006 [TCL] and its agents and employees unlawfully invaded the disputed land,
9 destroyed the Bomas and chased away villagers who were grazing cattle in the disputed land.
10 [TCL] also started to harass Soitsambu villagers by refusing them access to the disputed land
11 for grazing, farming and drinking water for their cattle. In addition to that [TCL] and its
12 agents frequently beat villagers who enter the disputed land, arrest and charge them with the
13 offence of trespass.

14 8. That, despite [the villagers’] complaints to various government authorities on the acts being
15 committed by [TCL, TCL] continues to harass and beat the ... villagers when they enter the
16 disputed land on allegation that the disputed land belong to [TCL].

17 *Id.*, Exh. I. The Villagers submitted to the Court a list of villagers arrested for “trespass,” with the
18 date of the incident and the “bribe paid” to the police to obtain release for many of them. *Id.*, Exh. I
19 [Annex B]. The Village alleges that as a result of [TCL’s] acts, it is living “in destitute hardship and
20 untold sufferings.” *Id.*, Exh. G.

21 **UNHCHR Investigation.** As referenced on the Home page, UNHCHR has been investigating
22 the allegations in the Sukenya Farm land dispute for many years. In 2009, UNHCHR complained to
23 the Tanzanian government concerning its failure to provide requested information with regard to the
24 investigation, and has noted its concern

25 that the pastoralist Maasai community of Soitsambu village ... has forcibly been evicted from
26 Sukenya farm and therefore unilaterally dispossessed of the land it has traditionally occupied.
27 Moreover, the Soitsambu villagers are allegedly being denied access to vital sources of water
28 on the Sukenya Farm therefore threatening their survival and that of their livestock.

29 *Id.* ¶ 3, Exh. J. UNHCHR called for “interim measures” to be “put in place until the government
30 delivers its findings or the dispute is settled through national legal processes,” including that:

- 31 - Soitsambu villagers should be granted access to Sukenya Farm for the purpose of
32 grazing and watering their livestock
- 33 - Further commercial development ... should be suspended while the relevant legal
34 authorities deliberate over the disputed legal title to Sukenya Farm
- 35 - The government should undertake to ensure the physical security of the Soitsambu
36 villagers and investigate thoroughly all allegations of brutality and criminality by the
37 police and the security gurards of the company occupying the farm.

38 *Id.* In 2011, UNHCR requested the Tanzanian government provide information about “[m]easures [it]
39 has taken to investigate thoroughly all allegations of excessive use of force and crimes by the police

1 and the security guards of the company occupying the Farm.” *Id.*, Exh. K.

2 ***The Complaint’s Unspecific and Ambiguous Allegations of Falsity***

3 As explained below in section I, causes of action alleging injurious falsehood must set forth
4 the specific statements that are alleged to be false. Thus to understand why the Complaint fails to
5 state a claim, it is necessary to review the full context of the Website and to note which statements on
6 the Website the Complaint specifically alleges are false, and (equally significantly), which statements
7 the Complaint ***does not allege to be false***. The Complaint’s complete allegations concerning false
8 statements on the Website are contained in a few bullet points in Paragraph 8. We will consider each
9 of the bullet points in comparison to the actual statements on the Website.

10 ***“Illegal” Actions.*** The Complaint alleges that the website falsely accuses Thomson Safaris of
11 “[i]llegally confiscating property.” Complaint, ¶ 8. The Website, on its home page summary, states
12 that the “alleged abuses undertaken by Thomson Safaris staff ... include ... [i]llegal confiscation of
13 cows grazing the land.” RJN, Ex. A.

14 The Website provides a more specific account of an incident on April 2, 2012, in which
15 Thomson Safaris and police are alleged to have locked up 200 cows for 5 hours today. Young
16 men from Sukenya and Enadooshoke were told to pay a "fine" of Ths5,000 for the release of
17 each cow, but they refused. NGO's intervened and said the "fine" would be paid if the cows
18 were released. They eventually were but sources tell us that the community does not plan to
19 pay a bribe for the release of their own property. People from Sukenya and Mondorosi villages
20 are trying to find out how TS can bring tourists and prevent cows from grazing while the case
21 is in court. Both parties to the case should have access until the case is resolved
22 RJN, Exh. C. The Complaint does not specifically allege that any of the facts stated in this account
23 are false.

24 It is unclear whether the Complaint is denying that such cows have been confiscated or is
25 simply disputing the website’s characterization of such confiscations as illegal. The Website in
26 several places explains what it means by “illegal.” For example, in the paragraph above, the Website
27 expresses the view that “both parties to the case should have access until the case is resolved.” Thus
28 the website adopts the legal theory of the Village in the litigation, namely, that while rights to the land
are being disputed in court, Thomson and the police have no right to exclude them. The Website
quotes the UNHCHR position that “commercial development [ie for tourism] should be suspended
while the relevant legal authorities deliberate over the disputed legal title” RJN, Exh. A.

Thus the Website depicts a situation in which Thomson and the local police have one view of what is “illegal,” and the villagers have the opposite view:

Sukenya and Mondorosi villagers have been injured in confrontations with the company and police, and many have been jailed for “illegally” trespassing onto the farm. The villagers believe that the land is still rightfully theirs and the measures taken to exclude them from the farm are unlawful, unjust and they are damaging the overall welfare of the communities.”

RJN, Exh. B.³

Beating Children and Adults. The Complaint states that the Website has falsely accused it of “engaging in the beating of children and adults,” Complaint, ¶ 8. The Home page summary of “allegations” lists “[beatings of children and adults grazing cattle on or near the land,” which repeats the allegations in the Litigation (apart from specifying “children”). RJN, Exh. A, & Exh. I, ¶ 8. The Home page gives a detailed account of two boys aged 11 and 13 who were beaten on May 30, 2011, and the Updates page chronicles the details of beatings of specific villagers in May, 2009, and on August 17, 2012, and February 14 and 19, 2013. RJN, Exh. C. The Complaint does not specifically allege that any of the factual statements in these accounts are false.

Burning Bomas. The Complaint alleges that the Website falsely accuses Thomson of “[b]urning homes.” Complaint, ¶ 8. The Website’s Home page summary of allegations includes “[b]urnings of local peoples *bomas* (homes) built on the land,” which is simply repeating the allegations (quoted above) made by the villagers in the Litigation. RJN., Exh. A & I, ¶¶ 3, 7. It is not clear whether the Complaint is contending that the allegations of burning “bomas” is false, or disputing that the term “boma” includes “homes.” See RJN, Ex. F ([Comp]laint in Litigation)(“burnt, damaged and removed [the villager’s] buildings, residences”)

Refusal of Access to Water Sources. The Complaint alleges that the Website falsely accuses Thomson of “[r]efusing to allow local inhabitants access to water sources.” Complaint, ¶ 8. The Website, on its Home page summary of allegations, states that Thomson “[r]efus[es] to let locals access the Pololet River, traditionally the communities vital water source,” which again is a direct repetition of the allegations of the villagers in the Litigation, quoted above. RJN., Exh. A & I, ¶¶ 3, 7.

³ See also *Id.*, Exh. C (December 10, 2012) (“The ownership of the disputed land is subject to an ongoing High Court civil case and therefore both parties should have access to the land until the case is resolved.”); Exh. C (June 11, 2012); “[Thomson] are pressurizing the [District Commissioner] to stop grazing while the case is ongoing, whereas the fact that the case is unresolved means the community should have full access to the land.”).

The Website explains that “Thomson has made grazing and watering prohibited because the Ilotimi is only an hour far from Irmasiling and it is located in the disputed land,” and so “Maasai herdsmen must make a 14 hour trip that takes them through Kenya in order to access water.” Exh. B. The Complaint does not allege that these specific facts are false. Thus it is unclear whether Plaintiff is simply disagreeing that access was denied, on the theory that the 14 hour trip constitutes an alternative form of access to water sources.

Detention by Thomson Safaris and the Police. The Complaint states that the Website accuses Thomson Safaris of “[c]onfining and starving members of the local Tanzanian community.” Complaint, ¶ 8. The Website, on its home page summary of “allegations,” includes “extra-judicial detention of locals for trespass for days without food.” RJN, Exh. A. Specifically, the Website alleges that that in May 2009:

Mr Meitaya, a resident of one of Soitsambu’s sub-villages, was confronted near the disputed Sukenya Farm area by seven Thomson Safari security guards and two police officers. Upon questioning the boundaries of the disputed area, Mr Meitaya was beaten severely, detained and forcibly transferred to Loliondo police station.

In detention, Mr Meitaya was deprived of food and water for two days. Mr Meitaya spent a total of seven days in prison: four days prior to his case being heard by the magistrate, and a further three days after the hearing. He was eventually released on the condition that he pay the court Tsh 300 000 (approximately 230 USD). Unable to pay the full amount, Mr Meitaya was later re-imprisoned for a further 5 days, when he received assistance to pay a new fine of Tsh 800,000 (approximately 610 USD), failing which he would have faced 16 months in prison.

RJN, Exh. C; *see also* Exh. I, (Annex B) (Litigation exhibit listing Meitaya as one of the persons arrested and forced to pay a “bribe” to obtain his release). The Website also states that on June 11, 2012, “Two men from Mondorosi were recently detained by TS and brought to the police station where they were starved for two days and then charged with illegally cutting tree branches for their bomas.” *Id.* The Website also states that on July 29, 2012, “They detained five men last week and they went without food for over a day.” *Id.* The context shows that “they” is the police, since the account goes on to say that the District Commissioner has “re-arrested the same men.” *Id.* The Website followed the story of these five men over time, reporting, for example, on August 15, 2012, they were scheduled to appear at a court hearing but that the hearing was adjourned until November “so that Thomson Safaris can ‘gather more evidence.’ This is extremely ominous as we’ve already

1 heard that the District Commissioner intends to ‘make an example out of them.’” *Id.*

2 The Complaint does not specify that any of the factual statements in the foregoing accounts
3 concerning the treatment of detainees handed over to the police by Thomson Safaris are false. Thus it
4 would appear Plaintiff is merely complaining that it is unfair to blame Thomson for the mistreatment
5 received by villagers once Thomson hands them over to the police.

6 ***Bribery/Corruption.*** The Complaint states that the website falsely accuses Thomson Safaris
7 staff of “Bribing police and other government officials.” The Website on its home page summary
8 states that Thomson Safaris staff “brib[e] local police and district officials to ensure they will
9 intimidate the community on Thomson’s behalf.” RJN, Exh. A. The full context of the Website
10 shows that it is not claiming to have direct knowledge of bribery or corruption, but is simply
11 surmising from the way in which the police work hand-in-glove with Thomson security, and from the
12 failure of authorities to respond to complaints about same, that the police have been influenced by
13 bribes and/or by other undue influence.

14 For example, the Website’s home page quotes directly from the UNHCHR letter requesting
15 the Tanzanian government to “ensure the physical security of the Soitsambu illagers and investigate
16 thoroughly all allegations of brutality and criminality by the police and [Thomson Safari] security
17 guards,” and goes on to state that

18 The owners of Thomson Safaris, Rick Thomson and Judi Wineland, have been told by both
19 NGO’s and the communities themselves about the violence and human rights violations being
20 carried out on behalf of the company. They have always denied this possibility and claimed
21 there is no proof of beatings taking place. When victims try to report abuses to the police they
22 are turned away. Often the police join in with TS guards in intimidating and arresting local
23 people. **Transparency International** marks Tanzania’s public sector 3/10 on their corruption
24 index (10 being very clean). Police in Tanzania are notorious for taking bribes.

25 *Id.*, Exh. A (hyperlinking to the Transparency International report, *Id.*, ¶ 6, Exh. P). Similarly the
26 Website complains that “Thomson continue to abuse their position as a wealthy foreign investor with
27 disproportionate influence over local police and the District Commissioner. Please boycott Thomson
28 Safaris until abuses like this are permanently halted.” Exh. C (Dec. 10, 2012).⁴ As discussed above,

⁴ The Website on its home page summary also states that Thomson Safaris “brib[es] leaders of the poorest clan to stoke divisions in the resistance to the company and maintain control of the land. RJN, Exh. A. The Complaint does not allege that this summary is false. It also describes Wineland and Thomson as “promising dispensaries and more classrooms as a reward” to obtain the cooperation of a clan, which “refused” the offer. Exh. C (June 11, 2012).

the Website is replete with accounts of the local District Commissioner and police working hand in hand to detain those villagers accused of the offense of trespass, which accounts the Complaint does not specifically allege to be false.

I. A Complaint Alleging Injurious Falsehood Must Specify the Statements Alleged to be False, and the Court Must Take Judicial Notice of the Full Context of the Statements That Were In Fact Made To Evaluate Whether Plaintiff Has Stated A Claim

A demurrer must be sustained if the complaint does not state facts sufficient to state a cause of action. C.C.P. § 430.10. The court must accept as true “all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1040 (1986). The court also considers facts which may be judicially noticed, and when the allegations of the complaint contradict or are inconsistent with such facts, the court must accept the judicially noticed facts and reject the inconsistent allegations. *Id.*, C.C.P. § 430.30(a).

A complaint must meet a heightened standard of clarity and specificity when plaintiff’s claims arise from an alleged injurious falsehood. “[T]he words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.” *Gilbert v. Sykes*, 147 Cal. App.4th 13, 31 (2007). Vague or conclusory allegations concerning the falsity of statements are insufficient. *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1421 (2001).⁵ Moreover, it is not enough for plaintiff to show literal or technical falsity – the statement is actionable only if the “the substance, the gist, the sting of the libelous charge” is false. *Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 262 (1984); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1404 (1999).⁶

As discussed above, the Complaint paraphrases various statements on the Website that are themselves paraphrases of the allegations in the litigation and more detailed factual accounts given elsewhere on the Website, and in a conclusory fashion claims these paraphrases are “false.”

⁵ Heightened specificity is required not only by California law but by the First Amendment. *Barger v. Playboy Enterprises*, 564 F. Supp. 1151, 1154 (N.D. Cal. 1983); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1121-1122 (N.D. Cal. 1984).

⁶ It is an element of defamation that the statements at issue be unprivileged; thus if it appears that the statements were privileged, the Complaint must specifically plead such facts as would negate the privilege. *Harnish v. Smith*, 138 Cal.App.2d. 307, 311 (1956); *see also Salma v. Capon*, 161 Cal. App. 4th 1275, 1290 (2008) (privileged statements cannot give rise to intentional interference with prospective economic advantage or for any other tort except malicious prosecution).

1 Complaint, ¶ 8. Because the Complaint fails to specify which facts, if any, it is alleging are false in
 2 the underlying factual accounts, it is impossible to tell whether the Complaint is simply raising
 3 various minor factual quibbles or actually disputing the substance of the factual accounts.

4 Insofar as the statements at issue are simply reports of the allegations in the Litigation, they are
 5 privileged, as explained in section II, even if they are false. Moreover, as discussed in the section III,
 6 it is impossible to tell whether the Complaint is merely disagreeing with the conclusions expressed on
 7 the Website, which are constitutionally protected opinion, or actually disputing the truth of the
 8 underlying factual accounts upon which those conclusions are based.

9 ***II. The Website's Report of the Allegations in the Litigation and UNHCHR***
 10 ***Investigation are Absolutely Privileged under Civil Code section 47(d)***

11 Civil Code § 47(d) provides that “a fair and true report in, or a communication to, a public
 12 journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything
 13 said in the course thereof,” is privileged.⁷ This privilege is “absolute.” *Sipple v. Found. for Nat.*
 14 *Progress*, 71 Cal. App.4th 226, 240 (1999). Even when publisher of an accurate report of a statement
 15 from a privileged proceeding knows the statement to be false, the report’s protection cannot be
 16 “penetrated by a finding of malice.” *McClatchy Newspapers v. Superior Court*, 189 Cal. App.3d 961,
 17 974 (1987). The scope of the privilege is construed broadly. *Braun v. Chronicle Publ'g Co.*, 52 Cal.
 18 App. 4th 1036, 1049-51 (1997); *Howard v. Oakland Tribune*, 199 Cal. App. 3d 1124, 1128 (1988).

19 The meaning of a 'fair and true report' is well established ... a media defendant does not have
 20 to justify every word of the alleged defamatory material that is published ...[but only to]
 21 ensur[e] that the 'gist or sting' of the report--its very substance--is accurately conveyed.
 Moreover, this responsibility carries with it a certain amount of literary license.

22 *McClatchy*, at 189 Cal.App.3d at 975-976 (citations omitted); accord *Sipple*, 71 Cal. App.4th at 242.

23 The accusations on the Website about which Plaintiff complains are simply repetitions of the
 24 allegations in the Litigation and the UNHCHR investigation – that the Villagers were chased off the

25 ⁷ The Website is a public journal. It is addressed to the general public and contains periodic news updates concerning the
 26 subject matter to which it is addressed. In an analogous decision, the California Reporter’s Shield has been deemed to
 27 cover websites that provide ongoing reports on “news.” *O’Grady v. Superior Court*, 139 Cal.App.4th 1423, 1458-60,
 28 (2006). The Court rejected the proposition that the legislature should be deemed to have limited itself to media that did
 not exist at the time the reporter’s privilege was first enacted. *Id.* The Court also interpreted the term “periodical
 publications” to include those that are updated irregularly, as opposed to those that come out at regular intervals. *Id.* at
 1461-65.

disputed land, have been subjected to beatings, the burnings of their homes, the denial of grazing rights and customary access to water for their livestock, and that as a result, the people are suffering. The Website has reported the “gist and sting” of these allegations accurately, and that report is absolutely privileged.

III. The Allegedly Defamatory Statements Are Constitutionally Protected Opinion

A. The Court Must Consider the “Totality of the Circumstances” to Determine Whether A Statement is an Actionable Assertion of Provably False Fact or Constitutionally Protected Opinion

It has long been the law of California that a statement is not defamatory merely because it is hostile or offensive to the plaintiff. *Western Broadcast Co. v. Times Co.*, 14 Cal. App.2d 120, 124 (1936). A statement that only recites the author's argument or conclusions is not defamatory. *Id.* The First Amendment compels this rule, for “there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S., 323, 339-340 (1974).

In distinguishing “fact” from “opinion,” courts require a statement to convey a “provably false factual assertion.” *Moyer v. Amador Valley J. Union High School Dist.* 225 Cal. App.3d 720, 724 (1990). Whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide in the first instance, and only goes to the jury if the court rules that it is reasonably capable of being understood as an assertion of fact. *Franklin v. Dynamic Details, Inc.*, 116 Cal. App.4th 375, 385 (2004); *Yorty v. Chandler*, 13 Cal.App.3d 467, 475 (1970).

In determining whether a statement is one of fact or opinion, the Courts apply a “totality of the circumstances” test. *Franklin*, at 116 Cal. App.4th at 385; *Baker v. L.A. Herald Examiner*, 42 Cal. 3d 254, 260 (1986); *Moyer*, 225 Cal.App.3d at 725. Under this test, the Court must first consider the language of the statement itself. *Baker*, 42 Cal.3d at 260. The Court must also look beyond the immediate language of the statement and consider the full context of the statement as well. *Id.* at 261. This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. *Id.* (citing *Gregory v. McDonnell Douglas*, 17 Cal.3d 596, 602-603(1976)). “[The]

1 publication in question must be considered in its entirety; [it] may not be divided into segments and
2 each portion treated as a separate unit.” *Baker*, 42 Cal.3d at 261 (internal citations omitted).

3 The Court should also consider the larger factual context in which the statement was made.
4 For example, “[w]here potentially defamatory statements are published in a public debate, a heated
5 labor dispute, or in another setting in which the audience may anticipate efforts by the parties to
6 persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which
7 generally might be considered as statements of fact may well assume the character of statements of
8 opinion.” *Gregory*, 17 Cal.3d at 601. In *Carr v. Warden*, 159 Cal.App.3d 1166 (1984), former
9 members of a city planning commission claimed that they had been defamed by an environmental
10 advocate’s statement in a local newspaper that “I think someone is being bought on the Planning
11 Commission, otherwise, how could you explain a 3-3 vote at one meeting on an issue and then at the
12 very next meeting, a 6-1 vote?” *Id.* at 1168 (emphasis added). The Court held the statement to be
13 protected; characterizing it as the “kind of expression of opinion . . . typically generated in the heat of
14 a political controversy.” *Id.* at 1170.

15 ***B. Opinions Based on Facts that are Disclosed to the Reader Are Not***
16 ***Actionable, No Matter How Unreasonable the Opinion May Be***

17 Where a conclusion is predicated on disclosed facts, the speaker can only be held liable if
18 those underlying facts are themselves false and defamatory. *Franklin*, 116 Cal. App.4th at 387;
19 *Standing Committee v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *see* Rest. of Torts (2d), § 566 (b)
20 & (c) (“A simple expression of opinion based on disclosed or assumed nondefamatory facts is not
21 itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion
22 may be or how derogatory it is”); *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 99
23 (3d Cir. 1988) (“Even outrageous statements of opinion are protected”).

24 For example, in *Carr v. Warden*, the statement that the planning commission had been
25 “bought” was deemed opinion in part because Warden disclosed the facts on which his opinion was
26 based -- i.e., that the change in vote was too dramatic to point to any other conclusion. *Id.*, 159
27 Cal.App.3d 1166, 1170 (1984). Such a statement is not actionable, because the readers are free to
28

1 decide for themselves whether the opinion is warranted.⁸ In other words, where it appears that the
 2 speaker is speculating as to what the facts might be, the statement is not an assertion of fact but rather
 3 opinion. *Baker v. L.A. Herald Examiner*, 42 Cal. 3d 254, 263 (1986); *Gregory*, 17 Cal.3d at 603. Even
 4 a provably false statement is not actionable if “it is plain that the speaker is expressing a subjective
 5 view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of
 6 objectively verifiable facts.” *Riley v. Harr*, 292 F.3d 282, 290-91 (1st Cir.2002) (citing *Partington v.*
 7 *Bugliosi*, 56 F.3d 1147, 1156-57, (9th Cir. 1995).

8 A related principle is that when “there could easily be a number of varying rational
 9 interpretations,” about “disputed events” an author writing about such “inherently ambiguous” matters
 10 may “fairly describe[] the general events involved and offer[] his personal perspective about some of
 11 [the] ambiguities and disputed facts” without subjecting himself to a lawsuit. *Riley*, 292 F.3d at 290-
 12 91. Otherwise, authors would never venture beyond “dry, colorless descriptions of facts, bereft of
 13 analysis or insight,” and the threat of defamation lawsuits would discourage “expressions of opinion
 14 by commentators, experts in a field, figures closely involved in a public controversy, or others whose
 15 perspectives might be of interest to the public.” *Id.*, (citing *Partington*, 56 F.3d at 1154).⁹

18 ⁸ *Accord Dunn v. Gannett Newsp*, 833 F.2d 446, 453-54 (1987)(newspaper suggested that the town's mayor had embezzled
 19 funds but set forth the facts upon which it based its opinion-- e.g., the government discovered funds were missing and the
 20 mayor ordered employees not to talk to the press -- the statement was not actionable); *Brian v. Richardson*, 87 N.Y.2d 46,
 21 53 (1995)(defendant advocating investigation on the basis of rumor not an assertion of fact); *Kotlikoff v. Community News*,
 89 N.J. 62, 72 (N.J. 1982)(use of terms “coverup” and “conspiracy” not an assertion of fact where speaker complained
 about official’s refusal to reveal the names of delinquent taxpayers); see also *ComputerXpress v. Jackson*, 93 Cal.App.4th
 993, 1012(2001)(comments re motives and ethics of stock promoters deemed opinion).

22 ⁹ Where the facts supporting an author’s conclusion or hypotheses are disclosed, the statement is constitutionally protected
 23 opinion, but it is not a prerequisite to such protection that the underlying facts be disclosed. *Baker*, 42 Cal.3d at 267 n.7.
 24 For example, the context of statement may indicate to readers that the speaker to be making an assertion of fact. *Id.* Certain
 sorts of assertions are not susceptible of being proven true or false, and thus cannot be understood as assertions of fact.
 25 *James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 13 (1993); *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th
 1027, 1050 (2008). For example, to attempt to discern the motives of a person is an inherently speculative enterprise, not
 26 susceptible to being proven true or false. *Gregory*, 17 Cal. 3d at 603-04 (statements that “impute... motives of personal
 gain and political ambition” are opinion). Similarly, whether a person would characterize himself as having a
 “relationship” with another person is inherently subjective and incapable of being proven true or false. *Carver v. Bonds*,
 135 Cal. App. 4th 328, 348 (2005). For the same reason, “an expression of subjective judgment by the speaker” is not
 27 actionable. *Moyer*, 225 Cal.App.3d at 725; *accord Nicosia v. De Rooy*, 72 F.Supp. 2d 1093, 1107 (N.D. Cal. 1999)
 (“exploitative business relationship” deemed an inherently subjective evaluative judgment).

1
2 **C. Here, the Complaint Fails to Show That the Website Contains False**
3 **Assertions of Fact as Opposed to Protected Opinions**

4 The Complaint fails to allege with the requisite specificity that the Website contains any
5 assertions of provably false fact. The Complaint's conclusory allegations of falsity may mean nothing
6 more than that Plaintiff disagrees with Defendant's constitutionally protected opinions.

7 For example, Defendant characterizes the confiscation of cows by Thomson as "illegal." RJN,
8 Exh. A. Defendant's underling legal theory – that while ownership and land use rights are in
9 litigation, the party in possession has no right to confiscate "trespassing" cows —may or may not be
10 correct as a matter of Tanzanian law. But whether or not it is correct, the theory is simply a
11 conclusion of law, not an assertion of fact. *Riley*, 292 F.3d at 290-91; *Partington*, 56 F.3d at 1156-
12 57, (9th Cir. 1995). So long as the underlying facts supporting the conclusion are not themselves false
13 statements of fact, the conclusion derived therefrom is protected opinion. This is true no matter how
14 unreasonable the conclusion may be. Rest. of Torts (2d), § 566 (b) & (c); *Nanavati*, 857 F.2d at 99.

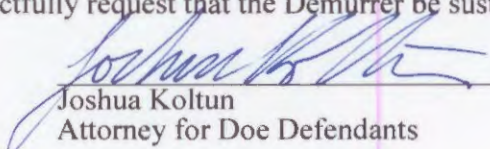
15 By the same token, where the Website speculates and surmises that the local police must have
16 been paid bribes in order to work so closely to arrest and prosecute "trespassers" on Thomson land,
17 that speculation is opinion. This speculation is exactly analogous to that which the court held to be
18 protected opinion in *Carr v. Warden, supra*. There, as here, the statements were made in the heat of a
19 controversy, and the context of the statement made clear that the accusation of "someone ... being
20 bought" was simply speculation based on what the speaker believed was otherwise inexplicable and
21 inexcusable behavior. *Id.* 159 Cal.App.3d at 1168, 1170.

22 The Complaint does not specifically allege that any of the underlying factual evidence cited by
23 the Website is false. In the absence of such specific allegations, the Complaint's conclusory
24 allegations concerning falsity are insufficient to state a claim.

25 **Conclusion**

26 For the reasons stated, Defendants respectfully request that the Demurrer be sustained.

27 Dated May 17, 2013

28 
Joshua Koltun
Attorney for Doe Defendants