

May 2017

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## Recommended Citation

David J. Cook, *Toiling in Trump's Vineyard of Alternative Facts Lining Its Random Walk*, 10 DePaul J. for Soc. Just. (2017)  
Available at: <http://via.library.depaul.edu/jsj/vol10/iss2/7>

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## TOILING IN TRUMP'S VINEYARD OF ALTERNATIVE FACTS LINING ITS RANDOM WALK

David J. Cook, Esq.<sup>1</sup>

### Abstract

Donald Trump is sui generis. President Trump will go where no one has gone before. President Trump will upset every settled expectation. These are the reasons why now President Donald Trump won the presidency. He makes no bones about it. President Trump has challenged decades old policies and commitments including NATO, One China, the EU, and NAFTA, among many others. President Trump makes clear his distaste for the media. President Trump inserted "fake news" into the American lexicon. President Trump is going to build that \$25 billion wall along the United States and Mexican border. President Trump is going to start a trillion-dollar trade war with Mexico to compel Mexico to pay for the wall. Expect a big price increase for burritos, which use avocados imported from Mexico.

President Donald Trump became a public figure because he kick started the media into making him a public figure. As a truly self-made public figure and snaring the greatest prize in recorded history, President Donald Trump knows no bounds, which is the reason for this article.

This article argues that President Trump deigns to control his image and his message at nearly any cost. President Trump can succeed if he can tamp down the cacophony of shrieks and howls that shadow him. Threatening someone with a defamation suit succeeds in dialing down this rhetoric and throwing off the media and online stalkers. Additionally, this article demonstrates that opening the federal courts to defamations suits, and *Shady Grove* tossing anti-Slapp, topples *New York Times v. Sullivan*.

Like all articles that suggest a change of the law, overturn a decision, or rewrite the law legislation or regulation, the article is 100% speculative but predictive. Certainly, once in a very blue moon (or red), an article topples existing law. However, this article is different. Instead, this article reveals the law of President Trump's intended consequences. President Trump wants to expand the right to sue for defamation. What President Trump really wants is to dam the rising reservoir of rejection, ill will and repudiation that might crest his presidency. For instance, Alec Baldwin is on President's Trump's sue list. A viable right to sue gets the job done because few erstwhile defendants have the resources to defend themselves. Defamation cases, even against a public figure, rise from the grave when the anti-Slapp statutes are kicked to the courthouse curb. Is the banishment of anti-Slapp viable? Under the vaulted ceiling of *Shady Grove*, the answer lies in the ideological animus of the Republican and Hard Right Congress whose own ambitions likewise know no bounds.

America is about to take a new [Hard Right] turn. Just ask Alec Baldwin who said "Yes, this is real life . . . this is really happening . . . on January 20th, I, Donald J. Trump, will become the 45th president of the United States . . . and then two months later, Mike Pence will become the 46th." [From *Saturday Night Live*, January 14, 2017, opening skit].

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Vineyards have names and Biblical origins. [Matthew 20:1-16] The name of this Vineyard is *Shady Grove*.

### **The President Trump Wish List**

What does President Trump really want? The list includes erecting a wall on the border of Mexico, dissolving the Obama era sanctions imposed upon Russia, banning all Muslim immigrants by an Executive Order *Redux*, and tossing Obamacare. Although the list is endless and in progress, President Trump seeks the greater goal, which is to immunize him from any criticism, critique, rumor, innuendo or insult. President Trump pushes back from criticism, and verbally attacks all critics, including members of the new media (CNN – which he dubs a purveyor of "fake news"), Meryl Streep ("overrated"), and even the intelligence community for presenting rumors of illicit conduct (Nazi Germany). His weapon of mass humiliation is the 140-character Twitter feed that consumes all the media oxygen anywhere.

#### **What is #1 on President Trump's Wish List? Answer:**

"One of the things I'm going to do if I win... I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money," Trump said during a rally in Fort Worth, Texas.

"We're going to open up those libel laws so when *The New York Times* writes a hit piece, which is a total disgrace, or when the *Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected," he said.<sup>1</sup> "We're going to open up libel laws and we're going to have people sue you like you've never got sued before."<sup>2</sup>

#### **What is # 2 on President Trump's Wish List? Answer:**

"Well in England they have a system where you can actually sue if someone says something wrong," Trump said.<sup>3</sup> "Our press is allowed to say whatever they want and get away with it. And I think we should go to a system where if they do something wrong – I'm a big believer, tremendous believer of the freedom of the press, nobody believes it stronger than me – but if they make terrible, terrible mistakes and those mistakes are made on purpose to injure people, and I'm not just talking about me, I'm talking about anybody else, then yes, I think you should have the ability to sue them."<sup>4</sup>

### **The Beacon of *New York Times v. Sullivan***

The immediate response of the reader is that the First Amendment protects the freedom of speech. *New York Times v. Sullivan* renders any legal action against a public figure near

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<sup>1</sup> Dylan Bowers, *Donald Trump wants to 'open up' libel laws so he can sue press*, CNN, <http://money.cnn.com/2016/02/26/media/donald-trump-libel-laws/>.

<sup>2</sup> *Id.*

<sup>3</sup> Tom Kludt, *Donald Trump says he wants libel laws more like the UK's*, CNN (Oct. 24, 2016, 12:40 PM), <http://money.cnn.com/2016/10/24/media/donald-trump-sue-news-organizations/>.

<sup>4</sup> *Id.*

impossible. No matter the deep shift to the Hard Right with one or more appointments to the Supreme Court in the next four to eight years, the Supreme Court is unlikely to overturn or shrink *New York Times v. Sullivan*. This body of law, on the books, will remain unchanged, no matter who sits in the White House or on the Supreme Court.

This is the holding of *New York Times v. Sullivan*: "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'— that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>5</sup> While this burden of proof is near Sisyphean, what stops the public official from the filing a lawsuit whose allegations contour to this holding? The answer is found under anti-Slapp statutes that enable the defendant to dismiss the action at the outset and without the burden or expense of endless litigation. For example, under California's robust anti-Slapp law, the defendant can move to strike the complaint if the complaint is based on constitutionally protected activity. If so, the burden shifts to the plaintiff to demonstrate that the claim is viable, i.e., tenable.<sup>6</sup> Given the broad sweep of *New York Times v. Sullivan*, the plaintiff would have to make out its prima facie case within nearly 30 days of the filing of the lawsuit. Thirty days is a very short period to demonstrate the probable validity of a defamation case. Anti-Slapp motions rid the court of suits that seek to chill, if not suppress, the exercise of constitutional rights for fear of expensive, harrowing and ruinous civil litigation.<sup>7</sup> Chances are that the defendant wins, the complaint is dismissed, and the defendant collects significant attorney's fees, even if contingent upon the outcome of the case. Anti-Slapp litigation has no lack of takers given the mandatory fees awarded to the winning defendant.<sup>8</sup> Anti-Slapp's are state statutes that find their way into federal courts.<sup>9</sup>

The current landscape of a libel suit follows down the path of the anti-Slapp statute that enables the defendant to end the litigation at the outset by forcing the plaintiff to put on a tenable case.<sup>10</sup> Even if the defendant loses the anti-Slapp motion and faces the full frontal wrath of the angry plaintiff, the defendant enjoys the right of an immediate appeal.<sup>11</sup> An anti-Slapp appeal stalls

<sup>5</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

<sup>6</sup> Cal. Civ. Proc. Code § 425.16(b)(1) (West 2015).

<sup>7</sup> Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003) ("These are lawsuits that 'masquerade as ordinary lawsuits' but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.") (citation omitted). "The anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." (citation omitted).

<sup>8</sup> Cal. Civ. Proc. Code § 425.16(c) (West 2015); Ketchum v. Moses, 17 P.3d 735, 747–48 (Cal. 2001) (Mandatory fees due defendant and if collection is required of the fee judgment, the defendant wins "fees on fees").

<sup>9</sup> Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839–40 (9th Cir. 2001). ("The anti-SLAPP statute was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation. Under the statute, a civil defendant may move to strike a cause of action based on an 'act in furtherance of [the] right to petition or free speech.' An 'act in furtherance' includes 'any ... oral statement ... made in a ... public forum in connection with an issue of public interest.'") (citation omitted). Not so everywhere. See Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393, 398–99 (2010) (holding that the FRCP might exclude non-conforming and conflicting remedies for a pre-trial judgment.) See also Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (rejecting anti-Slapp in a diversity action and holding that FRCP 12 & 56 are the standards for pre-trial judgments.)

<sup>10</sup> San Ramon Valley Fire Prot. Dist. v. Contra Costa Cty. Employees' Ret. Ass'n, 22 Cal. Rptr. 3d 724, 731–32 (Ct. App. 2004) ("Put slightly differently, '[t]he [anti-SLAPP] statute's definitional focus is ... [whether] the defendant's activity giving rise to his or her asserted liability ... constitutes protected speech or petitioning.'") (citation omitted).

<sup>11</sup> Cal. Civ. Proc. Code § 425.16(i).

the underlying litigation during the appeal that might span months or years, even though the underlying motion and appeals are without merit.<sup>12</sup>

### The Bubbling Brew of anti-Slapp and Defamation Cases

President Trump is no stranger to anti-Slapp nor defamation lawsuits. Former students of Trump University filed a class action suit that sought damages arising from deceptive business practices. In response, Trump University counterclaimed against the class action plaintiff for defamation based on the statements in her letters and Internet postings.<sup>13</sup> The counter defendant filed, but initially lost the anti-Slapp motion at the district court, but was reversed on appeal.<sup>14</sup> The Ninth Circuit held that Trump University became a limited public figure. The district court [Judge Gonzolo P. Curiel] finally granted the anti-Slapp motion and dismissed the defamation counterclaim.<sup>15</sup> This case provided President Trump's with a personal motivation to expand the libel laws and constrict the scope of *New York Times v. Sullivan*. Suffice to say, had the Ninth Circuit declined to find Trump University a limited public figure and that the counter-claim could continue to and through trial, the plaintiff's main case would have been irrevocably threatened. The plaintiff, now facing the facially viable counter-claim, would bear the risks of litigation financed by a vengeful billionaire and the burden of financing a million-dollar defense to the counter-claim.

In the face of the viable counterclaim, more than one counter-defendant would abandon the main case, lest risk financial ruin even if winning the counter-claim. The purpose of a defamation lawsuit is to deter an individual from access to the court, or other constitutionally protected rights. To illustrate, the Trump University saga is the paradigm of anti-Slapp. Thus, the anti-Slapp statute enables a plaintiff (the counter-defendant) to escape financial ruin and continue the case to a successful outcome, which included the \$25,000,000.00 settlement paid by President Trump.<sup>16</sup>

### Reviving the Libel Laws without Breaking a Sweat

How can President Trump snatch his defamation cases from the clutches of the *New York Times v. Sullivan*? Without overturning *New York Times v. Sullivan* through a Supreme Court reversal, or Constitutional amendment, Congress, controlled by the Hard Right, could enact legislation that offers original jurisdiction in the federal courts to the plaintiff for defamation cases, and bars the federal courts from the state anti-Slapp relief. *Shady Grove* justifies ouster of anti-Slapp because anti-Slapp summarily disposes an action in beyond the parameters of Federal Rules

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<sup>12</sup> *Hewlett-Packard Co. v. Oracle Corp.*, 191 Cal. Rptr. 3d 807, 809 (Ct. App. 2015). ("The trial court denied the motion as untimely. Oracle immediately appealed, bringing all further proceedings to a halt. In a pattern that has become all too familiar to the appellate courts of this state, the appeal, like the motion engendering it, is utterly without merit. The motion was late under any reasonable construction of the facts, and it was quite properly denied because it could not possibly achieve the purposes for which the anti-SLAPP statute was enacted.")

<sup>13</sup> *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 260 (9th Cir. 2013).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 266. (Whether Trump University was limited public figure and subject to anti-Slapp). *Makaeff v. Trump Univ., LLC*, 26 F. Supp. 3d 1002 (S.D. Cal. 2014) (motion granted and counter-claim for defamation stricken).

<sup>16</sup> Karen Freifeld and Dan Levine, *Trump agrees to pay \$25 million to settle Trump University lawsuits*, REUTERS (Nov. 18, 2016, 6:35 P.M.), [www.reuters.com/article/us-trump-lawsuit-idUSKBN13D1UI](http://www.reuters.com/article/us-trump-lawsuit-idUSKBN13D1UI).

of Civil Procedure (FRCP) 12(b)(6) and FRCP 56.<sup>17</sup> To underpin this novel grant of original jurisdiction of the federal courts is that the alleged libel arose out of "interstate commerce", i.e., the use of the mails, internet, or radio or broadcast intended to reach an audience over state lines.<sup>18</sup> *Wickard v. Filburn* would readily support the reach of federal jurisdiction over libel cases given the pervasiveness of mass media, the internet and social media in every nook and cranny of America, i.e., the smart phone in everyone's back pocket.<sup>19</sup> The more practical justification in barring anti-Slapp is that the losing party can appeal an adverse ruling under state law.<sup>20</sup> In light of the right of appeal, the trial court is stayed from further proceedings that necessarily stall the progress of the action and therefore an undue burden on the trial and appellate courts.<sup>21</sup> Even without original jurisdiction in favor of a defamation plaintiff, the fact that Congress banishes anti-Slapp, courtesy of *Shady Grove*, offers a favorable forum to the defamation [and diversity] plaintiff.<sup>22</sup> Seeking to avoid anti-Slapp, the defamation plaintiff would file in the "anti-Slapp" free zone, i.e., district court, and not state court.

The fact that anti-Slapp no longer enables the defendant to defeat a defamation suit does not prohibit the defendant from filing a FRCP 12(b)(6) motion or FRCP 56 summary judgment.<sup>23</sup> Of course, nothing stops the defendant from seeking FRCP 11 sanctions or other relief (i.e., *Chambers v. Nasco etc.*). Should the defendant win the case, the defendant can pursue the plaintiff for malicious prosecution.

Federal law does not offer an anti-Slapp remedy but might borrow anti-Slapp from the state law where the district court sits.<sup>24</sup> Nobody can really claim that a defendant has a constitutional right to an early dismissal of a defamation claim based on the exercise of constitutionally protected rights, when in fact the FRCP 12(b)(6) and Rule 56 enables a party to exit the case if non-meritorious. In a civil action, the Constitution does not guarantee an attorney to a party. However, the major difference between the anti-Slapp remedies on one hand and FRCP 12(b)(6) and FRCP 56 on the other hand is that the defendant, prevailing in anti-Slapp, can recover mandatory

<sup>17</sup> *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) ("A federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act.") (citation omitted).

<sup>18</sup> "The federal courts have original jurisdiction, but not exclusive, of a claim for relief arising out of defamation if the communication arises from interstate commerce, use of the mails, wire, internet or any broadcast, cable or radio broadcast or print media intended to reach an audience in another state or foreign state. The Dismissal of any action shall be limited to the Federal Rules of Civil Procedures."

<sup>19</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942) (reach of Commerce Clause over local farming practices).

<sup>20</sup> *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) ("In the present case all three factors are met. First, the court's denial of Cremers's anti-SLAPP motion is conclusive as to whether the anti-SLAPP statute required dismissal of Batzel's suit. If an anti-SLAPP motion to strike is granted, the suit is dismissed and the prevailing defendant is entitled to recover his or her attorney's fees and costs. See § 425.16(c).")

<sup>21</sup> The right of an appeal by the losing party stalls the litigation, no matter the lack of merit in the underlying anti-Slapp motion or the appeal itself. Stalling the disposition of a meritless action keeps the litigation alive that is necessarily corrosive. Stalling the plaintiff from prosecuting a meritorious action benefits the defendant who delays the outcome of the action and likewise corrosive.

<sup>22</sup> Under Title 28, Congress could pass legislation that prohibits the district courts from entertaining an anti-Slapp motion and relegate the parties to their remedies under the FRCP.

<sup>23</sup> The court can dispose of the action under Fed. R. Civ. P. 16(c)(2)

<sup>24</sup> After *Shady Grove*, the Circuits are split whether anti-Slapp applies in federal courts in a diversity action. "In short, unlike the D.C. Anti-SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal. Under *Shady Grove*, therefore, we may not apply the D.C. Anti-SLAPP Act's special motion to dismiss provision." *Supra* note 14, at 1334.

attorney's fees and costs, but on the other hand, absent anti-Slapp, the defendant is relegated to FRCP 12(b)(6) and FRCP 56, and bears his or her own costs and attorney's fees.<sup>25</sup> Getting to the bottom of this problem is access to competent counsel whose fees are borne by the plaintiff by winning the anti-Slapp motion. Access to the courts is access to contingency fee counsel who would accept an anti-Slapp engagement. Anti-Slapp fees enable the defendant to exit the litigation that "chills" the defendant's constitutional rights that are precisely the outcome of the Trump University litigation.<sup>26</sup> Had Congress [riding on the wings of *Shady Grove*] precluded the district court from invoking anti-Slapp potentially under the rubric of *Shady Grove, Makaeff v. Trump Univ* might have turned out very differently.

### Attorneys Fees Awarded Under Anti-Slapp Protect The Defendant's Constitutional rights

Removing anti-Slapp and the fee entitlement from the reach of the defendant in federal courts obligates the defendant to cycle through the paces of civil litigation, i.e., an answer, disclosures under FRCP, status and setting conferences, law and motion practice, pretrial and trial. Litigation is very expensive by any standard, and absent liability insurance, the defendant would face a daunting financial burden.<sup>27</sup> Absent malicious prosecution or a FRCP Rule 11 award, the victorious defendant is unable to recover attorney's fees or damages. Even if the victor, the defendant might emerge dead broke from the endless litigation. In the face of near financial destruction in the defense of a defamation lawsuit, many defendants would settle by entering a "do not denigrate order" or in the future use enormous caution in any public statement.

President Trump wants to change the libel laws that would enable public officials, if not others, to sue the media for "[p]urposely negative and horrible and false articles" or for "[t]errible, terrible mistakes and those mistakes are made on purpose to injure people."<sup>28</sup> A wholesale change

<sup>25</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.")

<sup>26</sup> *Makaeff*, *supra* note 11. (Motion granted and counter-claim for defamation stricken.)

<sup>27</sup> A comprehensive general policy of insurance might offer the costs of defense for a defamation lawsuit, but not necessarily the damages if arising from an intentional act, which of course depends upon the language of the policy. *State Farm Gen. Ins. Co. v. Mintarsih*, 95 Cal. Rptr. 3d 845, 852-53 (Cal. Ct. App. 2009). ("Liability policies typically promise that the insurer will defend the insured in an action seeking damages for a covered claim. Thus, an insurer's duty to defend claims for which there is at least potential coverage under the policy is contractual. The contractual duty to defend extends to all claims at least potentially covered under the policy, but no further. An insurer has no contractual duty to defend claims for which there is no potential coverage, but a duty to defend such claims is *implied in law* if there is at least potential coverage for, and therefore a duty to defend, another claim in the action. In such a "mixed" action, an insurer has a duty to defend the action in its entirety to ensure that the defense of claims that are at least potentially covered will be both meaningful and immediate. (Citations omitted)."

<sup>28</sup> "I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money," Mr. Trump said. "We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected." *Can Trump Change Libel Laws?*, NEW YORK TIMES, [nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html](http://nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html), ( March 30, 2017). "I'm a big believer, [a] tremendous believer of the freedom of the press. Nobody believes it stronger than me but if they make terrible, terrible mistakes and those mistakes are made on purpose to injure people... Over here they don't have to apologize. They can say anything they want about you or me and there doesn't have to be any apology." *Trump Announces The First Amendment Gives Too Much Protection*, BIPARTISAN REPORT, [bipartisanreport.com/.../trump-announces-the-first-amendment-gives-too-much-prote..](http://bipartisanreport.com/.../trump-announces-the-first-amendment-gives-too-much-prote..) (Dec 27, 2016).

of libel law is a tall order and probably inaccessible given the impossibility of a Constitutional amendment, or overturning a sacrosanct case. However, deactivating anti-Slapp under the mantle of *Shady Grove* in the federal courts that have original jurisdiction in defamation cases, or in a diversity action, reinvigorates the libel suits that quash dissent and criticism given the financial burden of a protracted defense.

The denouement is that free speech is quashed because the hapless defendant is unable to engage counsel to defend the suit filed in federal court and lacks virtually no recourse to recover fees from the plaintiff. Few would speak up, if met with a lawsuit that no counsel would defend, and prosecuted by a plaintiff freed of the strainer of anti-Slapp and attorney's fees due the successful defendant. Nearly all media organizations have the ample resources to defend themselves from virtually any claim of defamation out of their pocket or are adequately insured, but nonetheless hampered, delayed and dragged into endless litigation without the benefit of an early dismissal and the fee shifting under anti-Slapp.

Is original federal jurisdiction, without anti-Slapp a credible legislative elixir quenching President Trump's thirst to expand access to the court in order in prosecuted libel suits against the media, bloggers, social media pundits, and print journalists? Given the malleable Hard Right Congress who supports nearly all reforms proposed by President Trump and the clarion call of "I'm talking about anybody else, then yes, I think you should have the ability to sue them," nothing stops them from channeling libel litigation into the federal courts, sans anti-Slapp riding on the back of *Shady Grove*.<sup>29</sup> Anti-Slapp offers legal representation to the defendant because the attorney can seek payment from the plaintiff should the attorney succeed in dismissing the suit.<sup>30</sup>

Is this really possible or a pipedream? *Shady Grove* implicitly shows anti-Slapp the door of the federal court. This outcome is no different that the Congress, and President Trump, repealing Obamacare and probably enacting REINS (HR 26) that enables Congress to roll back regulations promulgated under the executive branch if exceeding a \$100 million-dollar impact and even easier given *Shady Grove's* blessings. This article does not suggest overturning *New York Times v. Sullivan* but demonstrates that President's Trump might side step it altogether with a little help from *Shady Grove*. Clearly absent anti-Slapp, chances are that the \$25,000,000 settlement of *Makaeff* might never seen the light of day.<sup>31</sup>

President Trump is the living epitome of the Random Walk theory. "In an efficient market, stock returns follow what is known as a 'random walk,' meaning that investors cannot use past stock price movement to predict the next day's stock price movement."<sup>32</sup> Like stock prices under the Random Walk theory, President Trump leaps off the pages of history and repudiates all prior precedent and tradition. President Trump lands on the plains of the unknown and unpredictable.<sup>33</sup> President Trump makes no bones that he wants to appear unpredictable and surprise the public. President Trump rumbles down Frost's Road not taken and navigates up Conrad's Congo River, and embodies infinite entropy [expansion of energy which becomes disorderly, random, diffuse,

<sup>29</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (hereinafter "Shady Grove")

<sup>30</sup> See, e.g., Cal. Civ. Proc. Code § 425.16(c) that guaranties fees due the attorney for the defendant if succeeding in getting the case dismissed.

<sup>31</sup> Pundits might take issue with this state and assert that Trump settled the case given the risks, involvement with the case, and unseemly spectacle of a sitting president who is defending himself of fraud charges in a public case.

<sup>32</sup> *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 81 (S.D.N.Y. 2015).

<sup>33</sup> *Full text of Trump's executive order on 7-nation ban, refugee suspension*, CNN, <http://www.cnn.com/2017/01/28/politics/text-of-trump-executive-order-nation-ban-refugees/>.



and deteriorates]. Embracing President Trump for who he is, as opposed the 230 years of settled presidential expectations, the hypothetical of this article is viable, credible and follows in the footprints of President Andrew Jackson who said, "[w]ell, John Marshall has made his decision—now let him enforce it," as when he was faced with enforcement under *Worcester v. Georgia*.<sup>34</sup>

The Efficient Market Hypothesis predicts the Post Trump Future. This future takes everyone down the Trump path that might leave in the slipstream some parties who are ousted from their settled perch.<sup>35</sup> The Efficient Market Hypothesis states that the price of a security in an open market represents the total sum of all information, whether real or imagined.<sup>36</sup> The word "imagined," post Trump, means Alternative Facts or as branded by the media, falsehoods or outright lies. President Trump eschews precedent. He rejects convention. He absorbs all what others tell him without a strainer. President Trump is the total sum of all knowledge whether real or imagined, no different from a share of stock in a public market. Here is his claim that three to five million illegal aliens voted for Secretary Clinton, which is a rumor spread by conspiracy provocateurs that President Trump espouses as [alternative] fact and justifies a putative criminal investigation. Clearly, the claim that millions of undocumented aliens (or other disqualified individuals) voted is an alternative fact (i.e., falsehood), but embraced by President Trump to delegitimize the fact that Clinton won nearly 3,000,000 more votes, yet losing the Electoral votes.<sup>37</sup>

### Here is the Conclusion:

The burial of *New York Times v. Sullivan*, in the *Shady Grove* quashes dissent and stifles free expression for fear of the retaliatory defamation lawsuit. The defamation counter-claim in *Makaeff* bore no economic value, other than to terrorize the lead plaintiff into abandoning a potential \$25 million-dollar recovery and righteous case. While anti-Slapp might prosper in the state courts, anti-Slapp's internment in the federal court licenses public figures to oust criticism, investigative journalism or even blogs, well founded or otherwise, that exposes the alternative facts. How realistic is this threat? The answer is found in the cauldron of alternative facts at the hands of foreign states, Hard Right fanatics, hate groups, conspiracy provocateurs, or even the public officials and their cadres. Taking a recent example, a foreign state, or its agents could flood the media with alternative facts that favor one U.S. candidate over another or push an extremist position. Alternative facts fuel this rumor machine. They are voluminous, well written, deceptive clear, logical, and time consuming to refute given their facile logic. To avoid any pejorative tint,

<sup>34</sup> *Cobell v. Norton*, 283 F. Supp. 2d 66, 73 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004) ("When they realized that the executive branch had no intention of honoring the decision of the Court, the Cherokee nation reluctantly entered into the Treaty of New Echota in 1835"). See also *Worcester v. Georgia*, 31 U.S. 515 (1832) (holding that that federal government, and not the states, has jurisdiction over the Native Americans)

<sup>35</sup> Abortion rights, immigration, and Obamacare advocates are at the top of the list.

<sup>36</sup> *Carpenters*, 310 F.R.D. at 77–78 ("[t]here are three general forms of the efficient capital markets hypothesis: First is the weak form, which asserts simply that the current share price in an efficient market reflects all information about past share prices. If the weak form of the hypothesis accurately describes a market, it is impossible to predict future prices using only past prices. Second, the semi-strong form, which asserts that a share price in an efficient market reflects all public information concerning the security (including but not limited to past share prices). Third, the strong form, which asserts that all relevant information, public and private, is reflected in the price of securities in an efficient market. The strong form has been widely discredited").

<sup>37</sup> About 200,000 votes in key precincts in some blue states turned them into red that handed the winning Electoral votes to Trump. The Electoral College appointed the supreme role to the states in electing the president, and not the actual voter. However, the optics of the Clinton's 3 million vote plurality over Trump's lesser tally made Trump a president of his base and not the United States of America.

alternative facts lack a basis in reality but sound plausible. The irate opposition points out the alternative facts that would draw a defamation action by the irate politician, or others.

No doubt, sooner than later, *New York Times v. Sullivan* would and should flame the defamation lawsuit, but only after cycling through the regular civil process that could cost six figures in a heartbeat and no hope of recompense. Faced with the risk of enormous non-recoverable expense arising from a defamation action, the critics might think twice before exposing alternative facts. Sans anti-Slapp, the newly revived weapon of censorship is the defamation lawsuit that bleeds the defendant dry, guaranteed by *Shady Grove* and converted into legislative fiat courtesy of the Hard Right and the Triumph of Alternative Facts in the age of Trump.