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Protection of the Public against Litigious Suits ("PPALS"): Using 1993 Federal Rule 11 to Turn SLAPPs Around

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CASENOTE

Protection of the Public Against Litigious Suits ("PPALS"): [1] Using 1993 Federal Rule 11 to Turn SLAPPs Around

I. INTRODUCTION

There is a chill in the ire of petitioning activity[2] in states including New Mexico, portending a cold, snowy blanket of unconstitutional silence threatening to settle over participatory voices in the Land of Enchantment. Those who, like New Mexico's SouthWest Organizing Project (SWOP), wish to brave these elements and speak out on the issues of the day, unfortunately better bundle up—for the forecast is that, absent a call to procedural arms, the First Amendment climate is about to take a turn for the worse.[3]

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1. The acronym describes methods, particularly sanctions under Rule 11, available to be utilized against SLAPPs. SLAPP is an acronym for Strategic Lawsuit Against Public Participation and was coined by George Pring and Penelope Canan. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3 (1996).

2. While the First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," U.S. CONST. amend. I, the scope of petitioning for redress of grievances has been stretched far beyond its express language. PRING & CANAN, *supra* note 1, at 16. Justice Holmes interpreted the petition clause as a mandate that ideas survive competition in global rialto as the ultimate test of their power. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Petitioning activity has since been exulted to that of a most precious of liberties, Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967), as well as an international human right. Article 21 (1) of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. 1/77/7, at 3 (1948).

Petitioning activity thus encompasses and protects not only complaining, debating, demonstrating and lobbying, but also, as pertains to this note, litigation–a fundamental petitioning tool to redress grievances. PRING & CANAN, *supra* note 1, at 17. In the labor/antitrust context, the court in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) reinforced the notion that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Id.* at 741. However, as will be discussed shortly, the right is not without qualification.

3. Although it may already be too late, either a disclaimer or at least a bit of foreboding language is appropriate here. This will not be, nay, it cannot be, a note typical of the genre. Due to the nature of the topic and the commentary, including applicable judicial opinions, a traditional casenote "treatment" would be wholly ineffective not only to argue the issue effectively, but also to appropriately influence the intended audience. As such, the passion

The phenomenon producing this climatic shift comes from the revival of a tool used throughout American socio-jurisprudential history to achieve oppositional silence in any of a number of social issues. It is the SLAPP—the Strategic Lawsuit Against Public Participation. Briefly put, SLAPP filers take constitutionally protected petitioning activity out of the public forum and force it into the courtroom, where the chilling expense of litigation effectively freezes the often shallow-pocketed SLAPP target into silence. The SLAPP filer focuses on use of the judicial *process*, as opposed to any anticipated judicial *product*, to silence the opponent.[4] Unfortunately,

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is preserved within and throughout the legal analysis–including that of academicians in the field, that of lawmakers, and that of the author. For those who prefer a more traditional treatment, the author offers no apologies whatsoever: the author will brook no disrespect to passion.

4. This activity is included in those constituting the "sham" exception to the near-absolute protection of petitioning afforded by the Constitution's First Amendment. When exposed, the suit falls squarely within that proscribed by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991), and dismissal is imminent. The *Omni* court, with relative surgical precision, drew the fine line of distinction between protected and unprotected petitioning activity when it takes place inside the courtroom. However, the *Omni* doctrine's test for dismissal was not drawn to such clarity with the first stroke. What follows is a brief overview of the court's journey to *Omni*.

While petitioning activity was to receive considerable protection, *see supra* note 2, it was not to be without qualification. McDonald v. Smith, 472 U.S. 479, 483 (1985) (in an action for libel); *Bill Johnson's*, 461 U.S. at 743 (qualified right in actions other than defamation); PRING & CANAN, *supra* note 1, at 19. The court's reluctance to recognize an absolute privilege for petitioning activity such that would propel the protection above those freedoms of speech and press, *id.* at 23, forced the court to find the point at which first amendment protection would be inappropriate. In 1983, the *Bill Johnson's* court removed from the first amendment right to petition a suit that is "a 'mere sham' filed for harassment purposes." *Bill Johnson's*, 461 U.S. at 741. The court noted that the NLRB, below, also recognized that "going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer." *Id.* (quoting Peddie Buildings, 203 N.L.R.B. 265, 272 (1973)). Even though the *Bill Johnson's* court clearly saw the suit as a weapon to "get even" with an employee "and to chill the waitresses' federal rights with a coercive lawsuit[,]" the court allowed the case to go forward merely to unwind an extrajudicial dismissal order that appeared to usurp the court's function. PRING & CANAN, *supra* note 1, at 20–21.

In 1975, the *McDonald* court attempted to apply the "actual malice" standard established in *Times v. Sullivan*, 376 U.S. 254 (1964). *See McDonald*, 472 U.S. 480 (1975). Pring and Canan describe the result of the application of this test to SLAPPs as the court's final slide into the "fact quagmire" that SLAPP targets seek so dearly to avoid. Here, the defamee must be proven to be a "public figure," and the target's conduct must be proven to have fallen below a standard of care higher than that of "negligence." PRING & CANAN, *supra* note 1, at 22–23. Oddly, it would be the prior *Noerr-Pennington* line of 1960s antitrust cases that would allow the court to reach, in the 1991 *Omni* decision, a process/product distinction that would allow the court to clearly delineate between petitioning activity protected by the first amendment and litigation that is being used as a weapon. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), long-haul trucking companies and major railroads waged a "no holds barred" fight for favorable legislation. Tactics included unethical business

ultimate, even timely, dismissal, as will be shown, is wholly inadequate because the damage has already been done—the filer's goal has been more than effectively accomplished.

Legislative, judicial and procedural legions are rallying against the upswing in SLAPPs.[5] While this note deals briefly with the panoply of PPALS, the note's focus is on sanctions under state procedural rules based on Federal Rule of Civil Procedure (FRCP) 11. The note argues that state adoption of a sanctions rule based on the current version of FRCP 11, when coupled with appropriately calculated sanctions, can effectively deter SLAPPs[6] while protecting access for novel claims. New Mexico's SWOP will serve to maintain this focus throughout the note.

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conduct on both sides, deception, falsification of references and distortion of public sources of information. *Id.* at 140. The court stated that while such conduct was certainly unethical, *id.*, in that both parties deliberately deceived the public and public officials, *id.* at 145, such conduct did not constitute a violation of the Sherman Act and was protected petitioning activity. *Id.* While *Noerr* protected petitioning activity that is "done for an illegal purpose or with the intent to violate the law," PRING & CANAN, *supra* note 1, at 24, the court drew short at an absolute privilege and alluded to the sham exception: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Noerr*, 365 U.S. at 144.

Four years later, the court in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) pasted a veneer of absolutism on petitioning activity when it trounced both lower courts for not according proper weight to the *Noerr* holding that "anticompetitive purpose did not illegalize the [petitioning] conduct there involved." *Id.* at 669. The *Pennington* court reiterated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670; *see also* PRING & CANAN, *supra* note 1, at 25. This combination of decisions became the *Noerr-Pennington* doctrine—as close to an absolute right to petition as the court would allow.

Though still in the antitrust context, the first significant sham exception to *Noerr-Pennington* appeared seven years later in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) where the court found that by a "pattern of baseless, repetitive claims" petitioners sought "'to discourage and ultimately to prevent the respondents from invoking' the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*." *Id.* at 512–13; *see also* PRING & CANAN, *supra* note 1, at 25.

It would be the NAACP that would release the *Noerr-Pennington* doctrine from the throes of antitrust constraints. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 866 (1982), the court found, in a boycott, the same intention to influence governmental action, the same foreseeability and the same intention to inflict economic injury as in the prior antitrust cases. *Id.* at 914. The distinction lies in the absence of the desire to destroy legitimate competition. *Id.* The *Omni* court held that *Noerr-Pennington* applied to the nonviolent aspects of a boycott and that such activities were protected under the first amendment. *Id.* at 915.

5. In addition to Rule 11 sanctions, weapons against SLAPPs (or PPALS of present and future SLAPP targets) include anti-SLAPP legislation, countersuits, and early dismissal. These approaches will be discussed briefly in a later section of this note.

6. Or, if you will, one of the many PPALS that can be used to turn back a SLAPP.

SWOP, a not-for-profit dedicated to empowering communities of color, has been recognized for speaking out against social and economic injustice. As will be fully discussed in this note, SWOP is being sued for exercising its petitioning voice. The suit has been characterized as a SLAPP. SWOP, then, first serves to reveal the vulnerabilities of potential SLAPP targets residing in states like New Mexico that use a form of the original 1937 version of federal Rule 11. Second, SWOP serves as representative of all SLAPP targets that could benefit from a few loyal PPALS. Finally, SWOP functions as an effective guide through the interrelationships of petitioning activity, SLAPPs, and sanctions under Rule 11 as potentially one of the best PPALS SWOP, as well as all SLAPP targets, ever had.

This note first illuminates the disturbing trend with historical background of SLAPPs, and, in order to emphasize the need for PPALS, particularly the potent deterrent force of sanctions available under Rule 11, events giving rise to SWOP's SLAPP. The background section concludes by highlighting inherent weaknesses in the deterrent power of the predecessor versions of federal Rule 11 that continue to be the rule of procedure in many states. The note then discusses the current status of and various responses to SLAPPs, followed by an examination of the deterrent force under the current federal rule. The analysis compares weaknesses inherent in the deterrent capability of the predecessor versions and corresponding potential strengths offered by the rule as amended in 1993.

In its final main section, this note argues for sanctioning guidelines to be applied by judges in the SLAPP context based on state adoption of a form of the current version of federal Rule 11. In this section the note calls for judicial activism in not only entertaining an expanded definition of allowable sanctions under the Rule but also more aggressively applying the sanctions scheme to achieve chilling deterrence commensurate with the importance of protecting this most significant of Constitutional rights.

II. BACKGROUND

A. SLAPPs

1. Definition by Implication

On a purely empirical level, a lawsuit qualifies for the SLAPP label if it involves communications made to produce a desired governmental outcome and those communications resulted in a civil complaint or counterclaim filed against nongovernment individuals or organizations on a substantive issue of some public interest or social significance.[7] However,

7. PRING & CANAN, *supra* note 1, at 8–9.

a more compelling definitional picture emerges by observing the effects of SLAPPs not only on defendant "targets" but also on society as a whole when SLAPPs enjoy unequal protection under the law.[8] While virtually destined to fail in court,[9] SLAPPs succeed in silencing the community voice and jeopardizing representative democracy.[10] SLAPPs have an average duration of 40 months,[11] during which time the target is silenced from pursuing its cause by being forced to engage in defense of the suit.[12] In essence, the filer's suit SLAPPs robust social debate off the soapbox and into the jury box.[13]

Not only do SLAPPs silence people *for* speaking out, SLAPPs silence people *from* speaking out as well. Many former SLAPP targets vow to think twice about future activism.[14] In addition, bystanders, oftentimes friends, neighbors or colleagues, gaping at the SLAPP target twisting in the judicial wind, are likely to become similarly discharged as a democratic force.[15]

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8. Obviously, the injustice that is revealed when one merely peers through the lens of legalese cannot begin to do justice to a proper definition of SLAPPs. After observing a SLAPP in theater one must step outside the courtroom for a breadth of social implication in order to fully appreciate the definition of a SLAPP as much more than merely a jurisprudential frivolity. *See supra* note 3. As will be explained in subsequent sections of this note, Rule 11 attempts to prevent frivolous suits while protecting novel claims. When the Rule 11 balancing fulcrum is placed so as to favor protection, as will be shown to currently be the case in states, including New Mexico, that use a form of Rule 11 in, for the most part, its original form, both SLAPP filers and their attorneys enjoy insufficient deterrence.

9. PRING & CANAN, *supra* note 1, at 1 (due to finding that the case succumbs to the *Noerr-Pennington* "sham" exception); *see supra* note 3.

10. PRING & CANAN, *supra* note 1, at 2; Lafayette Morehouse, Inc. v. Chronicle Pub. Co., 44 Cal. Rptr. 2d 46 (Ct. App. 1995). "SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the [target's] exercise of First Amendment rights . . . ." *Id.* at 48.

11. Alexandra Dylan Lowe, *The Price of Speaking Out*, A.B.A. J., Sept. 1996, at 48, 50. The suit against SWOP was still pending after 41 months. Telephone Interview with Louis Head, staff member, SWOP (April 8, 1998).

12. Lowe, *supra* note 11, at 50.

13. PRING & CANAN, *supra* note 1, at 2.

14. *Id.* at 5 ("I won't circulate another petition, and my husband wants me to get out of [community issues]." "I don't want my name on anything.").

15. Lowe, *supra* note 11, at 49 (quoting Gordon v. Marrone, 590 N.Y.S.2d 649 (Sup. Ct. 1992)) ("People have disappeared into the woodwork."); PRING & CANAN, *supra* note 1, at 28–29. It is left for another to author a note dealing with the issue of whether SLAPPs are a more sinister form of prior restraint. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). BLACK'S defines prior restraint as "*any* scheme which gives public officials the power to deny use of a forum in advance of its actual expression." BLACK'S LAW DICTIONARY 1194 (6th ed. 1990) (emphasis added).

George Pring and Penelope Canan, SLAPP researchers with the University of Denver's Political Litigation Project,[16] are to be credited with unmasking those who wish to trade free speech for personal profit. They have sounded the alarm for the need to address this most urgent threat to the Constitutional right to petition.[17] Due in major part to their efforts, SLAPPs have gained recognition both broad and wide. Legislators and judges have begun to take up the call to constitutional arms, recognizing that SLAPPs need not only be deterred, but also chilled.[18] New York's Justice Nicholas Cobella, writing for the *Gordon* majority, could not have summarized SLAPPs more accurately: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[19]

2. *Development and Recognition*

Although SLAPPs faltered over at least one definitional stumbling block[20] and have only recently become the recipient of increasing recognition and intense scrutiny,[21] the definitive focus of a SLAPP has emerged as involving activity covered by the petition clause of the First Amendment.[22] It would not be intuitively incorrect, then, to surmise that the frequency of SLAPPs would vary with a corresponding degree of general political or social unrest.[23] The initial wave of SLAPPs, according to the results of a study performed by Pring and Canan's Political Litigation Project,[24] washed upon American shores, not surprisingly, with the birth of our nation.[25] Shortly thereafter, with a citizenry preoccupied with the building of a nation, SLAPPs, and the political and social unrest that incites them, abated.[26]

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16. PRING & CANAN, *supra* note 1, at 2.

17. *Id.* at 15–19.

18. Gordon v. Marrone, 590 N.Y.S.2d 649, 654 (Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994).

19. *Id.* at 656.

20. Nestle Food Co. v. Miller, 836 F. Supp. 69, 78 n.34 (D. R.I. 1993) (SLAPP is a suit "filed in retaliation for another's lawsuit").

21. PRING & CANAN, *supra* note 1, at 3.

22. *Id.*; *see supra* note 1; *Gordon*, 590 N.Y.S.2d at 656.

23. PRING & CANAN, *supra* note 1, at 3.

24. *Id.* at 2.

25. *Id.* at 3, 17, 227 n.24 (citing Harris v. Huntington, 2 Tyl. 129 (Vt. 1802)) (case dismissed when county justice of the peace sued five citizens for $5,000 for libel when they petitioned the state legislature not to reappoint him).

26. *Id.* at 3.

In the wake of an increasingly diverse society, SLAPPs reemerged over a century and a half later in a dizzyingly clever array of guises.[27] The legacy of the 1960s placed the citizen activist as a permanent fixture on the American landscape.[28] Numerous political,[29] religious,[30] social[31] and environmental[32] causes of subsequent decades brought with them not only their respective advocates but also those who wished, via SLAPPs, to sue those collective voices into silence.[33]

Current literature reveals that the citizen voice is again very much at risk. In typical SLAPP theater, real estate developers sue landowners

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27. *Id.* See, for example, *id.* at 2, 223 n.3 (citing McDonald v. Smith, 472 U.S. 479 (1985)) (writing a letter to the president of the United States opposing a political appointment); *id.* at 2, 224 n.8 (citing Lange v. Nature Conservancy, Inc., 601 P.2d 963 (1979)) (recommending county acquisition of open space); *id.* at 2, 224 n.11 (citing Perlman, *Alta Dena Sues Its Critics for $780,000,000*, SAN FRANCISCO CHRONICLE, June 22, 1985) (testifying before Congress or a state legislature); *id.* at 2, 224 n.12 (citing Streif v. Bovinette, 411 N.E.2d 341 (1980)) (reporting a violation of law to health authorities); *id.* at 2, 224 n.10 (citing North Star Legal Found. v. Honeywell Project, 355 N.W.2d 186 (Minn. Ct. App. 1984)) (demonstrating peacefully for or against government action); *id.* at 3, 224 n.15 (citing Chavez v. Citizens for a Fair Farm Labor Law, 148 Cal. Rptr. 278 (Ct. App. 1978)) (ballot issue campaigning).

28. *Id.* at 3.

29. *Id.* at 6, 227 n.32 (citing Hickox, *Critics of City Hall Slapped with Suits*, ORANGE COUNTY REGISTER, Apr. 7, 1995, at 1) (retirees spoke out against city pensions).

30. *Id.* at 227 n.43 (citing Cole v. Lehman, No. 85CV2187 (Dist. Ct. Adams County, Colo., filed Sept. 1985)). "Conservative religious parents complained to school authorities about a liberal grade school teacher in a suburb of Denver. The teacher won a $250,000 jury verdict for their 'defamation.'" *Id.* at 7.

31. *Id.* 227 n.35 (citing Central Transportation, Inc. v. Stephens, No. 1978-2083 & 1978-2475 (Ct. C.P., Cambria County, Pa.) (dismissed 1979). "Pennsylvania parents, alarmed over reports of unsafe school buses, voiced their concerns at a school board meeting. The bus company filed a $680,000 suit for 'libel' against 68 parents." *Id.* at 7.

32. *Id.* at 227 n.34 (citing Dixon v. Super. Ct., 36 Cal. Rptr. 2d 687 (Ct. App. 1994)).

> An anthropology professor fought to preserve an ancient Indian village found on his California State University campus, before the university buried it in apartment buildings and retail stores. He wrote letters to government officials protesting lack of compliance with California's Environmental Quality Act and was sued for $570,000 by the university's consulting firm for "negligent interference with contractual relations," "libel," "slander," and "trade libel."

Id. at 6.

33. *Id.* at 3. For a most illustrative example, testimony revealed practices of the Church of Scientology included its doctrine of "fair game," whereby litigation was employed "to bludgeon the opposition into submission, . . . [and] according to written policy, [the Church] will use any means legal or illegal to subvert and frustrate judicial process against them, and will willingly and knowingly abuse judicial process in order to attack perceived 'enemies.'" Church of Scientology of California v. Wollersheim, 49 Cal. Rptr. 2d 620, 627–28 (Ct. App. 1996).

who speak out against a proposed development.[34] In addition, Pring and Canan identified SLAPPs in areas as diverse as speaking out at school board meetings,[35] filing a complaint over shoddy home repairs,[36] and protesting license renewals.[37] Pring and Canan's research found the Sierra Club to be "the nation's leading SLAPP target."[38] Consistent with that finding, the suit in which SWOP is currently involved includes the Sierra Club as the first named defendant.[39] SWOP's suit is explicitly mentioned in Pring and Canan's book—the authors characterized the suit as a SLAPP because the Sierra Club published a book in which an article by SWOP founder Richard Moore and staff member Louis Head appears.[40]

B. SWOP GETS SLAPP'D

Founded in 1981, SWOP is a multi-racial, multi-issue, community-based non-profit organization based in Albuquerque, New Mexico.[41] SWOP's mission is to "empower the disenfranchised in the Southwest to realize racial and gender equality, and social and economic justice."[42] SWOP's efforts include calling for meaningful jobs, advocating for tax policies favoring local communities rather than multi-national corporations, assisting communities in their efforts to speak out against undesirable development, supporting immigration rights, and providing community education on issues critical to people of color.[43] SWOP

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34. PRING & CANAN, *supra* note 1, at 30–45; Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523 (N.D. Ill. 1990) (developer who planned to use thoroughfare as access to subdivision sued landowners who petitioned successfully to have thoroughfare abandoned as a road); *see also* Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 829 F. Supp. 420 (D.D.C. 1993); Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46, 51 (Ct. App. 1995).

35. PRING & CANAN, *supra* note 1, at 7, 227 n.35 (citing Central Transportation, Inc. v. Stephens, No. 1978-2083 & 1978-2475 (Ct. C.P., Cambria County, Pa.) (dismissed 1979).

36. *Id.* at 7, 228 n.46 (citing Bass v. Rohr, No. 1103642 (Cir. Ct., Anne Arundel County, Md., Mar. 28, 1983), *aff'd* 471 A.2d 752 (1984)).

37. *Id.* at 119, 7, 227 n.40 (citing Ross Investment Corp. v. The Northeast Community Org., No. 80122 812/22500 (Super. Ct., Baltimore County, Md., dismissed per stipulation Mar. 27, 1984)).

38. *Id.* at 85.

39. SBP Corp. v. Sierra Club, No. 94-11903 (Dist. Ct El Paso County Tex. filed Nov. 2, 1994).

40. PRING & CANAN, *supra* note 1, at 87; *see* Richard Moore & Louis Head, *Building a Net That Works: SWOP*, *in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 191 (Robert D. Bullard ed., 1994).

41. VOCES UNIDAS (SWOP newsletter, Albuquerque, N.M.), May 1996, at 20.

42. *Id.*

43. SWOP publicity literature (1996).

encourages public participation through a variety of methods, including non-partisan voter registration drives.[44]

SWOP's image, then, is that of an activist organization that endorses, encourages, and engages in public participation in equitable causes. As such, SWOP also has the capacity to be viewed in its photographic negative as a developer's, polluter's or discriminator's worst nightmare.

In addition to the broad-based coalition-building activities noted above, SWOP also participates in many individual community efforts. One such effort involved assisting the citizens of Sunland Park, New Mexico—a Chicano-Mexicano community located at the junction of New Mexico, Texas and Mexico.[45] A community of predominately immigrant laborers,[46] Sunland Park also borders the Camino Real landfill.[47] Since its opening in 1987,[48] the landfill accepts residential waste from El Paso, Texas as well as waste from Mexican *maquiladoras*.[49]

Concerned about the environmental effects of the landfill on their community, Sunland Park residents formed the Concerned Citizens of Sunland Park (CCSP) in the late 1980s.[50] CCSP sought and received broad support from a variety of labor, religious and legal organizations.[51] CCSP also, in 1990, solicited assistance from SWOP.[52] SWOP, consistent with its mission, advised the group on strategies to attain greater voice for its concerns.[53] CCSP and its supporters were able to not only effectuate the closure of a medical waste incinerator operating on the Camino Real landfill site but also to obtain assurances from the New Mexico Environment Department (NMED) that groundwater contamination from the landfill would be monitored and maintained within regulatory limits.[54]

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44. *Id.*

45. Interview with Louis Head, SWOP staff member, in Albuquerque, N.M. (July 17, 1996).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* A *maquiladora*, or "twin-plant," is typically an American manufacturing facility located in Mexico in close proximity to the U.S.-Mexico border.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*; *In re.* Application of Nu-Mex Landfill, Inc. and Joab, Inc. for a Solid Waste Facility Permit for the Nu-Mex Landfill Facility, Decision and Order - Parts 1 and 2 (1991) (Part 1 covers the landfill and recycling facility, while Part 2 addresses the medical waste incinerator).

> At the prehearing conference, the following parties were permitted by the hearing officer to intervene in the hearing:
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> 1. Concerned Citizens of Sunland Park

SWOP's advisory and participatory activities with respect to "social, racial, and economic justice" are described in an article that is included in a 1994 Sierra Club publication.[55] Co-authored by SWOP founder Richard Moore and staff member Louis Head, the article describes SWOP's efforts to coalesce people of color into a unified whole.[56] According to Moore and Head, SWOP was instrumental in the formation of the Southwest Network for Environmental and Economic Justice (SNEEJ), an organization designed to unify and educate newly-formed activist groups such as CCSP, with an emphasis on empowerment within political decision-making processes.[57] In short, SNEEJ is dedicated to breathing powerful political voice into organizations composed of people of color.

In a section of their article subtitled *Shattering a Myth*, authors Moore and Head describe the genuine concern that minority groups share regarding social and environmental issues and, by way of supporting examples, defend the validity of those concerns.[58] The authors describe how communities of color are routinely exploited by groups that range from local governments to private waste disposal companies—referring to the situation at Sunland Park and the medical waste incinerator that was, prior to the time their article was published, located on the landfill site.[59] In their article, the authors characterize vulnerable locales such as Sunland Park as "endangered communities."[60]

Due in part to the Sierra Club's publication of Moore and Head's article, on November 2, 1994, SBP Corporation, its parent company Rubbish Removal, Inc. and Joab, Inc. (doing business as Nu-Mex Landfill), owners and operators of the Camino Real landfill, filed suit in El Paso, Texas District Court against the Sierra Club and various of its subsidiaries and chapters, SWOP, and contributing authors Richard Moore and Louis

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2. Southwest Research and Information Center.
3. Sunland Park Planning and Zoning Commission
4. Consulado General de Mexico
5. Catholic Diocese of Las Cruces
6. El Paso Inter-Religious Sponsoring Organization
7. Southwest Organizing Project
8. *Work on Waste U.S.A.*

Part 2 *id.* at 9.

55. Moore & Head, *supra* note 40, at 191.

56. *Id.* at 192. The authors characterize these groups as traditionally foreclosed from social justice. *Id.* at 194.

57. *Id.* at 192–93.

58. *Id.* at 195–97.

59. *Id.* at 198.

60. *Id.*

Head.[61] SBP sought actual, special and exemplary damages in excess of jurisdictional minimums, pre-and post-judgment interest, costs of suit as well as "other and further just relief."[62]

SBP's petition alleged that "plaintiffs have endured shame, embarrassment, humiliation, mental pain and anguish"[63] as a result of defendant's "conscious indifference to the rights and welfare of Plaintiffs";[64] that Moore and Head's article contains "libelous and slanderous statements";[65] that the heightened level of scrutiny of the landfill as required by the NMED and associated costs and expenses were proximately caused by *"demonstrations, unfounded complaints and the environmental activism of Defendants."*[66]

From the above claims, one might conclude, as did Pring and Canan, that SWOP is being sued because its environmental activism and public participation resulted in assurances from the NMED that the residents of Sunland Park would be neither breathing nor drinking unacceptable quantities of medical or landfill waste. If so, one would have to see this suit as a Strategic Lawsuit Against Public Participation and conclude nothing less than SWOP was SLAPP'd.

C. FRCP Rule 11 - The Toothless Tiger?

Judicial confusion in finding a Rule 11 violation, coupled with judicial reluctance to impose sanctions sufficient to deter, stem from the fact that the very same First Amendment right that protects SWOP's, as well as all citizens' right to speak out on matters of local interest also protects SBP Corp.'s and other plaintiffs' right of valid access to the courts.[67] Thus, "[d]rafting a sanctions provision that preserves the goals of redressing litigation abuse and encouraging fair access to the courts has proven to be a daunting task."[68] Federal Rule 11 continues to struggle, as it has from its inception, to strike the appropriate balance between deterring frivolous filings and providing a forum for novel claims.

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61. SBP Corp. v. Sierra Club, No. 94-11903 (Dist. Ct El Paso County, Tex.) (filed Nov. 2, 1994).

62. *Id.* at 14.

63. *Id.* at 12.

64. *Id.* at 13.

65. *Id.* at 5.

66. *Id.* at 7–8 (emphasis added).

67. Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983).

68. Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1071 (1994).

1. *FRCP Rule 11 (1937)*

Federal Rule 11, first enacted in 1938, carried no special significance.[69] Narrow in scope,[70] the rule required that the lawyer's signature merely certify that the lawyer had not only read the pleading but also held a good faith belief that there is "good ground to support it."[71] Enacted with the original body of Federal Rules[72] during a relatively harmonious period not only between bench and bar but also between civil parties,[73] the purpose of the rule was not so much to ensure factual or legal merit, but more to deter a strict subjective intent to abuse the federal judicial process.[74]

2. *FRCP Rule 11 (1983)*

With the outburst of civil litigation during the late 1970s, judges required more effective case management and sanctions seemed a useful tool.[75] However, the 1937 version of Rule 11 was not up to the task, precipitating the 1983 update.[76]

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69. *Id.* at 1074.

70. *Id.* at 1075.

71. The original version of Rule 11 required that:

> [e]very pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1938).

72. Keeling, *supra* note 68, at 1074; *see supra* text accompanying notes 20-23.

73. *Id.* at 1076.

74. *Id.* at 1075; FED. R. CIV. P. 11 (1938) at committee's notes.

75. Keeling, *supra* note 68, at 1076–77.

76. *Id.* A 1988 report from the Federal Judicial Center supports the claim that pre-1983 procedures inadequately deterred frivolous claims and defenses. THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 15 (1988).

The 1983 version of federal Rule 11[77] was enacted to increase Rule 11's deterrent effect[78] by reducing judicial reluctance to imposing sanctions,[79] applying the appropriate standard of attorney conduct and administering appropriate sanctions.[80] Judicial interpretation of the "good ground to support it" provision of the original version gave sway to the factual and legal elements of the 1983 amendments.[81] The amendments deleted provisions for striking sham pleadings and willfulness as a prerequisite for discipline.[82] Thus, the 1983 amendments attempted to broaden the scope of sanctionable actions, raise the standard of attorney behavior and encourage the application of sanctions as a deterrent tool.[83]

The 1983 amendments focused on the need for signing parties to perform a prefiling inquiry[84] into both facts and law that was "reasonable

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77. As amended, Rule 11 required that:

> [e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by an affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of the his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon such person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11 (1983).

78. *Id.* at advisory committee's notes; WILLGING, *supra* note 76, at 14.

79. Due to confusion in finding a violation. FED. R. CIV. P. 11 (1983) at advisory committee's notes.

80. *Id.*; *see* 2A JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 11.02[1.–1] at 11–22 (2d ed. 1996).

81. FED. R. CIV. P. 11 (1983) at advisory committee's notes.

82. *Id.*

83. *Id.*

84. *Id.*

under the circumstances,"[85] signaling a shift to an objective standard[86] which was quickly adopted within the federal circuits.[87] However, that signing parties were required to find the document well grounded in fact and law to the best of their "knowledge, information and belief" alluded to a subjective standard.[88] Nonetheless, the courts largely ignored this subjective interpretation.[89] One amendment that was not ignored, however, was the mandatory imposition of sanctions, which could include reasonable expenses and attorney's fees.[90] The objective standard, coupled with mandatory sanctions, evolved into a "potent tool of the Courts."[91]

The 1983 amendments, however, brought double-edged results—a more effective tool to deter frivolous litigation and an explosion of sanctions litigation.[92] The 1983 adjustments begat even more judicial confusion in both finding violations and imposing sanctions than did the 1937 version.[93] Exploiting judges' initial comfort with the Rule's objective standard and perceived potential as a deterrent force, parties became more likely to request sanctions, further lulling judges into more frequent, but less confident, application, further inviting parties to file sanctions motions, and so on.[94] In addition, the objective standard proved less precise than its predecessor,[95] which, coupled with the award of attorney's fees as an allowable sanction, had the effect of chilling the filing of marginal or novel claims.[96]

At the appellate level, judges applied a "hands off" abuse of discretion standard that encouraged ever-increasing sanctions awards and reinforced the chilling effect on colorable claims.[97] In sum, the 1983 amendments propelled judges into a sanctioning tailspin that tipped the balance inappropriately towards deterrence at the expense of free access.

3. *FRCP Rule 11 (1993)*

It would be merely a decade before federal Rule 11 would receive another adjustment designed to strike the elusive balance between the competing interests of deterrence of frivolous suits and free access for

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85. FED. R. CIV. P. 11 (1983).
86. Keeling, *supra* note 68, at 1078.
87. WILLGING, *supra* note 76, at 22.
88. Keeling, *supra* note 68, at 1078.
89. *Id.* at 1079.
90. FED. R. CIV. P. 11 (1983).
91. Gordon v. Marrone, 590 N.Y.S.2d 649, 653 (Sup. Ct. 1992).
92. Keeling, *supra* note 68, at 1077.
93. *Id.* at 1080–81. *See generally* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332 (1990).
94. Keeling, *supra* note 68, at 1080.
95. *Id.* at 1081.
96. *Id.* at 1083.
97. *Id.* at 1089 & n.105.

modifications of law and novel claims.[98] Consistent with this goal, the 1993

98. FED. R. CIV. P. 11:
(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
(1) How Initiated.
(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.
(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations

amendments broadened the scope of sanctionable activity while placing greater constraints on the imposition of sanctions.[99] To achieve its purpose with greater judicial certainty, the current rule requires federal district courts to give sanctions decisions heightened scrutiny.[100] To that end, section (c)(3) requires specific findings of fact, including a description of the conduct constituting the violation and the basis for imposing the sanction.[101]

III. DISCUSSION

A. Turning SLAPPs Around: PPALS

1. Non-Judicial PPALS

The legal community has begun to recognize and respond to the upswing in SLAPPs.[102] A variety of deterrent PPALS is emerging in the states.[103] Legislative approaches include anti-SLAPP statutes requiring a

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> in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
> (A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).
> (B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.
> (3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.
> (d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Id.

99. *Id.* at advisory committee's notes. These provisions were also designed to stem the tide of motions for sanctions awards. *Id.*

100. Keeling, *supra* note 68, at 1090.

101. Section (c)(3) requires that "[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." FED. R. CIV. P. 11(c)(3).

102. Due in no small part to the efforts of Pring and Canan's Political Litigation Project.

103. While this note concerns itself with state motions for sanctions based on adoption of a form of federal Rule 11, sanctioning guidelines and recommendations discussed in this note apply equally with respect to SLAPPs filed at both the state and federal level.

review of the merits of a suit that smacks of a SLAPP,[104] shifting and heightening burdens of proof of unprotected conduct,[105] staying discovery and shifting fees.[106] To date, at least nine states have passed legislation which allows defendants to file special motions to strike SLAPPs, grounding the target's acts in Constitutional immunity from prosecution for exercising First Amendment petition rights.[107] Pring and Canan also go so far as to provide model anti-SLAPP legislation.[108]

In addition, SLAPPs have received attention among both the bar and the popular media.[109] A recent issue of the *American Bar Association Journal* devoted its cover and lead article to SLAPPs.[110] The article documents the efforts of Nancy Hsu Fleming, a naturalized citizen, who was sued for speaking out over contaminated ground water from a neighboring landfill.[111] Although Fleming ultimately won dismissal of the suit,[112] the Fleming voice was silenced for four years.[113] Absent increased recognition of and action consistent with Justice Cobella's "gun to the head" level of concern,[114] yesterday's Nancy Hsu Flemings will

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104. Lowe, *supra* note 11, at 52. For example, the court in *Westfield Partners Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990), skeptical of the plaintiff's underlying purpose in filing the suit, felt that the suit could be characterized as a SLAPP and dismissed the complaint. *Id.* at 524–25.

105. Lowe, *supra* note 11, at 52.

106. *Id.*

107. *Id.* "California, Delaware, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, and Washington – have adopted modern, 'active' anti-SLAPP statutes . . . ." PRING & CANAN, *supra* note 1, at 189; *id.* at 198, 262 n.61 (CAL. CODE CIV. PROC. § 425.16 (1992)); *id.* at 195, 261 n.41 (DEL. CODE ANN. tit. 10, §§ 8136–38 (1992)); *id.* at 199, 263 n.72 (MASS. GEN. LAWS ch. 231, § 59H (1994)); *id.* at 200, 263 n.80 (MINN. STAT. §§ 554.01–05 (1994)); *id.* at 195, 261 n.42 (NEB. REV. STAT. §§ 25-21, 241–46 (1994)); *id.* at 193, 260 n.22 (NEV. REV. STAT. §§ 41.640–70 (1993)); *id.* at 195, 261 nn.30, 32, 35–38 (N.Y. CIV. RIGHTS LAW §§ 70-a(1)(a)–(c), 76-a(1)(a)–(b), 76-a(2) (1992), N.Y. C.P.L.R. 3211(g), 3212(h) (1993)); *id.* at 199, 263 n.72 (R.I. GEN. LAWS §§ 9-33-2, -3 (1995)); *id.* at 192, 260 n.13 (WASH. REV. CODE §§ 4.24.500–.520 (1989)).

108. PRING & CANAN, *supra* note 1, at 201–05.

109. *See* Mark A. Chertok, *Sanctions As A SLAPP Deterrent: How Effective Are They?* ALI-ABA Course of Study, C935 A.L.I.-A.B.A. 117 (1994); PRING & CANAN, *supra* note 1, at 224–27 nn.20–23. Note 20, *id.* at 224–25, cites "over 20 recently reported federal and state court opinions using the word "SLAPP". Note 21, *id.* at 225–26, cites over 30 professional and scholarly articles written on "SLAPPs." Note 22, *id.* at 226, cites numerous articles from periodicals ranging from *Playboy* to the *Wall Street Journal*. Note 23, *id.* at 226–27, cites coverage of SLAPPs on TV including *L.A. Law* as well as "more serious" coverage on a variety of news programs.

110. Lowe, *supra* note 11, at 48.

111. *Id.*

112. Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

113. Lowe, *supra* note 11, at 50.

114. *See supra* text accompanying notes 18–19.

increasingly become today's SWOPs. Given appropriate and reliable means, the bench can become one of a SLAPP target's most formidable PPALS. Fortunately, the judiciary, analogous to the Concerned Citizens of Sunland Park, is beginning to find its voice.

2. *PPALS on the Bench*

With increasing momentum, courts have begun to consider the alarming nature of SLAPPs[115] and the important policy issues they raise.[116] The court in *Gordon v. Marrone*[117] included in their opinion a virtual reiteration of Pring and Canan's most pertinent findings.[118] The court conferred judicial validation on the notion that the SLAPP filer succeeds in silencing a most deserving and legitimate participatory voice by forcing social debate into the courtroom and foisting the expenses of litigation on the target.[119] The court also recognized both the value to the filer in churning litigation and judicial reluctance to grant early dismissal.[120]

Appropriate judicial treatment of SLAPPs requires two major strategies: first, proper identification and expedient removal of SLAPPs once filed and second, deterrence sufficient to eliminate future filings.[121] Prompt dismissal hinges on shifting both attorneys' and judges' focus away from the elements of defendant's alleged tort[122] and in the direction

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115. Westfield Partners Ltd. v. Hogan, 740 F. Supp. 523, 524–25 (N.D. Ill. 1990).

116. Petrochem Insulation, Inc. v. Northern California and Northern Nevada Pipe Trades Council, 1992 WL 131162 at *12 (N.D. Cal. Ma. 19, 1992) (irrespective of the label, litigation costs and threats of damages could, and should not, chill public participation).

117. 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992).

118. *Id.*

119. *Id.*

> This case, like other SLAPPs, attempts to turn the petition clause on its head by using the right to petition to indirectly punish the prior exercise of the right to petition by others.
>
> The Court adheres to its finding in this case that this is a SLAPP suit by virtue of the lack of any evidence establishing a substantial legitimate purpose.

Id.

120. *Id.* "Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory." *Id.*

121. PRING & CANAN, *supra* note 1, at 143; Lowe, *supra* note 11, at 51. Admittedly, expedient dismissal of the suit, once established in such cases, wreaks significant deterrent havoc on a filer whose only goal is to churn litigation. Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992). This note, however, argues that this level of deterrence is wholly insufficient in the SLAPP context.

122. Usually libel, business interference or conspiracy. PRING & CANAN, *supra* note 1, at 3.

of plaintiff's petition clause violation.[123] Once dismissed, then, strong deterrence is required to produce the chilling effect that is at once both desired and deserved.[124]

Recommended common law PPALS include "SLAPP-back" suits for abuse of process or malicious prosecution.[125] However, countersuits, while increasingly popular as the public awakens from the shock to the conscience that a SLAPP delivers, are usually not PPALS of choice for the typical SLAPP target who has succeeded in obtaining appropriate early dismissal of the suit, due to the target's constrained resources and decided preference for participation in societal processes via alternative means.[126]

State-level PPALS can also include sanctions under procedural rules modeled after FRCP 11.[127] The following section argues for judicious application of sanctions under state adoption of a procedural rule based on the 1993 amended federal Rule 11, as opposed to the predecessor versions.[128] Under the proposed sanctions scheme, judges can effectively prevent SLAPPs from ever reaching the courthouse steps, thus providing the desired deterrent effect.

B. Sanctions as a Deterrent Force

Currently, at least 12 states, including New Mexico, use the 1937 version as the foundation for their sanctions motion procedure.[129] New Mexico, of federal rule 11 for one, continues to express difficulty with the Rule's application and indicate its desire for adoption of a more useable

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123. *Id.* at 152. Identification of a SLAPP as a violation of the petition clause based on the *Noerr-Pennington* sham exception, *see supra* note 4, is outside the scope of this note. However, a thorough treatment of recommended procedures for dismissal of SLAPPs on petition clause grounds is offered in PRING AND CANAN, *supra* note 1, at 143–67. *See also* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991) (antitrust action); McDonald v. Smith, 472 U.S. 479 (1985) (libel); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (unfair labor practice); Westfield Partners, Ltd., v. Hogan, 740 F. Supp. 523 (N.D. Ill. 1990) (four counts, including conspiracy and slander); Gordon v. Marrone, 616 N.Y.S.2d 98 (App. Div. 1994) (suit to annul tax assessment).

124. A motion for sanctions must be filed separately from a motion for dismissal. FED. R. CIV. P. 11(c)(1)(A).

125. Lowe, *supra* note 11, at 53; *see* Leonardini v. Shell Oil Co., 254 Cal. Rptr. 883 (Ct. App. 1989) (action for malicious prosecution brought in response to action for injunctive and declaratory relief).

126. PRING & CANAN, *supra* note 1, at 11; interview with Louis Head, *supra* note 45.

127. Lowe, *supra* note 11, at 53.

128. It would not be inappropriate to hope that the argument presented here will find support among states currently using a form of the 1983 amended federal Rule 11 as well.

129. Keeling, *supra* note 68, at 1073 n.25 (ALA. R. CIV. P. 11; IND. TRIAL R. 11(A); ME. R. CIV. P. 11; MD. R. CIV. P. 1-311(a)–(c); MASS. R. CIV. P. 11(a); MISS. R. CIV. P. 11; N.H. SUPER. CT. R. 15; N.M. R. CIV. P. 1-011; OHIO R. CIV. P. 11; R.I. R. CIV. P. 1023; S.C. R. CIV. P. 11).

rule.[130] In sum, the version's subjective standard coupled with discretionary sanctions provides, albeit consistent with the Rule's intent, little, if any, capability for deterrence in the context of a suit filed in violation of the petition clause. The Rule fiercely protects access to the courts at the expense of deterring none but the willful abuser of the judicial process.

1. *FRCP Rule 11*

While judges remain shouldered with the burden of locating the balance within each case, federal Rule 11 now allows judges to more effectively reach an appropriate balance. The 1993 amendments broadened the domain of sanctionable activity, offered a clearer set of guidelines with which to find such activity, and specified a wider range of requirements necessary to uphold the order.[131] In sum, there are three issues with which both federal courts and states using a form of the 1993 amended version of federal Rule 11 continue to struggle: (1) the definition and identification of "frivolous" suits,[132] (2) the related standard of conduct[133] of which SLAPPs are part and parcel, and (3) the striking of a justicable balance between deterrence of litigation abuse and occurrence of an accessible court system.[134]

Within the context of SLAPPs, the paths to identification and removal are clearly marked.[135] Adequate procedural tools are both available to safeguard an accessible system and capable of effectively deterring SLAPP filers. While now more able to hold violating parties and/or their attorneys in the tongs of Rule 11, it remains for judges to wield the hammer of appropriate sanctions to forge searing judicial mettle into chilling constitutional deterrence.

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130. The New Mexico Court of Appeals recognized potential "difficulties encountered by federal courts in interpreting Federal Rule 11 prior to the 1983 amendment [in order] to alert our supreme court should it wish to reexamine our own Rule 11." Cherryhomes v. Vogel, 804 P.2d 420, 422 (N.M. Ct. App. 1990). For now, New Mexico has been fortunate in that its appellate courts have not had to wrestle with sanctions motions in any more serious a contest than the misconduct presented in *Rivera v. Brazos Lodge Corp.*, 808 P.2d 955 (N.M. 1991), "another episode in the seemingly endless saga of the Tierra Amarilla Land Grant." *Id.* at 957.

131. *See supra* text accompanying notes 98–101. On a significantly related issue, the court in *Gordon v. Marrone*, 616 N.Y.S.2d 98 (App. Div. 1994) ruled that an award of sanctions to redress abuse does not impermissibly infringe upon the First Amendment right of access to the courts. *Id.* at 102 ("Any effect [enforcement of the sanctions rule] may have on substantive rights, . . . , is merely incidental and not prohibited (cf., *Business Guides v. Chromatic Communications Enter., Inc.*, . . . 111 S. Ct. 922, 933-34 . . .)").

132. Keeling, *supra* note 68, at 1070.

133. *Id.* at 1132.

134. *Id.* at 1071.

135. *See supra* note 123.

2. *SLAPP Sanctioning Schemes and Sanctions Sufficient to Deter*

While the procedural balance is now more appropriately struck with federal Rule 11 as amended in 1993,[136] the Rule's intent and effect can easily be undermined if sanctions are not calculated and awarded commensurate with the depth and breadth of deterrence required. Current sanctions schemes remain skewed in favor of protection of access at the expense of protection of First Amendment rights.[137] The 1993 amended version of federal Rule 11 limits awards of monetary sanctions against represented litigants.[138] Under most state sanctions schemes, regardless of the standard of conduct, an award to another party of expenses and fees is the largest sanction that a court might impose.[139]

For a typical SLAPP filer, a cost/fee sanction can be seen as merely a business cost,[140] particularly if the suit is recognized as a SLAPP and dismissed appropriately early.[141] In such cases, any deterrent effect is completely lost.[142] Only with the imposition of sanctions in excess of fees can the proper deterrent effect be realized.[143] While this sanctions scheme should arguably be reserved for subjective bad faith violations,[144] intentional abusers of the judicial process should expect judges to find

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136. FED. R. CIV. P. 11 at advisory committee's notes.

137. There are, in addition to this author, others who seek to again readjust the balancing point. The Attorney Accountability Act of 1995, H.R. 988, passed the House by a 232 to 193 vote on March 7, 1995 and was placed on the Senate Legislative Calendar on March 15 of that year. The bill would reinstate mandatory sanctions, remove the safe harbor provision and require an award of reasonable expenses and attorney's fees to the prevailing party on a motion for sanctions, delete section (d), thus making sanctions applicable to discovery, and reverse the language of section (c)(2) from limiting sanctions to affirming that:

> [a] sanction imposed for a violation of this rule shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of an order to pay to the other party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.

H.R. 988, 104th Cong. (1995) (no proposed changes to subparagraphs (A) and (B)). While the proposed amendment would allow an award to a SLAPP target of direct expenses as well as attorney's fees, this note argues that this award is wholly insufficient to produce the desired deterrent effect.

138. FED. R. CIV. P. 11 at advisory committee's notes; Keeling, *supra* note 68, at 1092.

139. FED. R. CIV. P. 11 at advisory committee's notes; Keeling, *supra* note 68, at 1143.

140. Keeling, *supra* note 68, at 1144.

141. *See supra* text note 123; PRING & CANAN, *supra* note 1, at 3.

142. Keeling, *supra* note 68, at 1154.

143. *Id.*

144. *Id.*

evidence of subjective bad faith sufficient to impose sanctions in excess of fees.[145] SLAPP filers, once discovered,[146] could not unreasonably expect to fall into this category. This sanctions scheme thus may ease some of the difficulty caused by the subjective/objective dichotomy, and, while not producing a perfect balance between deterrence and access, at least tipping these particular scales more appropriately in favor of encouraging PPALS rather than SLAPPs, consistent with the intent of the Rule.

Specifically within the SLAPP context, imposing sanctions in excess of costs and fees can produce an appropriate level of deterrence while preserving access.[147] While allowing any excess award to a SLAPP target may be both an honorable social goal as well as a victory to the target,[148] federal sanctions in excess of fees must currently be paid into court coffers.[149] While the deterrent effect might be enhanced if the award is returned to the target,[150] the typical SLAPP target, SWOP included, is unlikely to pursue any allowable excess.[151] SWOP's, not unlike most SLAPP targets', mission leans decisively towards exercising First Amendment rights and away from becoming practiced in the high art of sanctions recovery litigation.[152] Independent of forum and recipient, awards in excess of fees and costs must nonetheless be levied in order to deter filing a suit. Such suits too often succeed in, not only violating petitioning rights protected by the First Amendment, but also silencing future participatory voices as well.

Judges, traditionally disinclined to impose sanctions in excess of fees and costs,[153] should draw their blueprint of sanctions to a scale broader than merely those costs directly incurred by the named parties. For instance, the SLAPP filer's costs include not only the direct fees and expenses of litigation, but also, in some instances, the "costs" of goods and

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145. *Id.* at 1155.

146. Once a suit is identified as a SLAPP, it is likely that the court found a petition clause violation in that the suit fell into the sham exception of the *Noerr-Pennington* doctrine—where the filer seeks victory not via the end product of winning the suit but rather by using the judicial process as a weapon against the target. *See* PRING & CANAN, *supra* note 1, at 3, 154; text *supra* notes 4, 119, 123.

147. Section (c)(2) of federal Rule 11 states that a sanction shall be limited only by "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. CIV. P. 11(c)(2).

148. In addition to early dismissal of the suit.

149. FED. R. CIV. P. 11(c)(2).

150. Chertok, *supra* note 109, at 139.

151. *Id.*

152. Interview with Louis Head, *supra* note 45. However, there is no restriction on a state that wishes to adopt a rule that authorizes a court to be more generous in its award to the target.

153. Chertok, *supra* note 109, at 146.

services not delivered to "customers" during the preparation, initiation, and churning of the litigation. Similarly, the SLAPP target's "customers" must bear the burden of unavailable goods or services while the target frets and fights to preserve the freedom of free speech. In addition, judges should consider "costs" to potential clients of counsel to all parties who are denied access to otherwise valid legal services. Finally, "costs" to the court should be included and can be defined as the value of valid suits not heard while the SLAPP was devouring scarce judicial resources.

Admittedly, calculations under this sanctions scheme could require extensive evidentiary hearings that would be counterproductive to the goal of expediency. Nonetheless, a rule that would allow judges to calculate sanctions up to a maximum percentage of the filer's net worth[154] could effectively encompass all relevant "costs," achieve justice for the target, and send the appropriate message of deterrence to those similarly situated, consistent with the intent of Rule 11.[155] It now remains for judges to recognize the scope of the harm, realize that appropriate deterrent tools are available, and revitalize the right to freely petition within American society.

IV. CONCLUSION

While not a recent phenomenon, SLAPPs are gaining popularity as a procedure to silence opposition in a variety of social and political contexts. Due to the combination of the disguised nature of the typical SLAPP and judicial reluctance to both grant early dismissal and impose sanctions commensurate with truly effective deterrence, SLAPP filers currently enjoy a lack of restraint inconsistent with the federal Rule 11 manifesto—to preserve petitioning activity that seeks a valid judicial outcome and to prevent that same activity when its design is to use the judicial process as a weapon. Because SLAPPs also represent a potentially pervasive violation of a constitutionally protected activity, heavy-handed deterrence is appropriate and sanctions should be applied liberally when a violation is found.

Notwithstanding the fact that the current version of federal Rule 11 is available to impose sanctions in excess of fees, many states still use a modified form of the original rule, which affords SLAPP filers the benefit of a subjective standard. These states should consider adoption of a form of the 1993 amended version of federal Rule 11 in order to benefit both from its deterrent intent balanced with the preservation of access to judicial mechanisms.

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154. A percentage that would survive classification as "deterrence" and not "punishment."

155. FED. R. CIV. P. 11 at advisory committee's notes.

Given the nature of a SLAPP and the First Amendment violation it embraces, allowable sanctions under Rule 11 should be viewed broadly to deter SLAPPs and return robust social and political debate to its rightful eminence in the global rialto of public participation. Free speech is too valuable, too precious a right to allow it to be anything less than free. While difficult to place a dollar value on such injustice, attorneys and filers should be placed on notice that a SLAPP suit is cut from precious constitutional cloth.

With a more aggressive sanctioning tool available, judges, in turn, can become less pensive about wielding it to impose appropriate sanctions. Judicial sanctions schemes should include an expanded definition of allowable "costs" to turn back the tide of SLAPPs. Such costs should include the value of goods and services withheld from the filer's and the target's, as well as their attorneys', customer bases, in addition to resources both consumed by the judiciary and lost to the attorneys while managing the litigation. A percentage of the filer's net worth can be used to avoid unnecessary evidentiary hearings and achieve chilling deterrence. With this approach, sanctions can become one of the most effective PPALS in the deterrent arsenal against SLAPPs. The constitutional value of the public participant's right to petition, the private value to the SLAPP filer of that participant's silence, and the societal value of an accessible court system demand no less.

J. Reid Mowrer