

Donald J. Trump Is A Libel Bully But Also A Libel Loser

BY SUSAN E. SEAGER

Donald J. Trump is a libel bully. Like most bullies, he's also a loser, to borrow from Trump's vocabulary.

Trump and his companies have been involved in a mind-boggling 4,000 lawsuits over the last 30 years and sent countless threatening cease-and-desist letters to journalists and critics.¹

But the GOP presidential nominee and his companies have never won a single speech-related case filed in a public court.

This article examines seven speech-related cases brought by Trump and his companies, which include four dismissals on the merits, two voluntary withdrawals, and one lone victory in an arbitration won by default. Media defense lawyers would do well to remind Trump of his sorry record in speech-related cases filed in public courts when responding to bullying libel cease-and-desist letters.

Trump's lawsuits are worthy of a comedy routine, as when Trump sued HBO comedian Bill Maher for suckering Trump into sending his birth certificate to prove he was not the "spawn" of an orangutan, and Trump hit back with a \$5-million breach-of-contract lawsuit, only to withdraw it after the *Hollywood Reporter* ridiculed it. Can anyone say *Hustler v. Falwell*?²

Orangutans and joking aside, this examination of Trump's libel losses also provides a powerful illustration of why more states need to enact anti-SLAPP laws to discourage libel bullies like Trump from filing frivolous lawsuits to chill speech about matters of public concern and run up legal tabs for journalists and critics.

A. Trump Sues Architecture Critic

Trump filed his first and crankiest libel lawsuit in 1984 against the *Chicago Tribune* and the newspaper's Pulitzer Prize-winning architecture critic, Paul Gapp. Trump filed his libel lawsuit in the U.S. District Court in the Southern District of New York.³ Trump claimed he suffered \$500 million in damages.⁴

Gapp, who won the Pulitzer Prize for criticism in 1979, dared to publish a "Design" column in the *Sunday Tribune Magazine* on August 12, 1984 ridiculing Trump's proposal to build the tallest building in the world: a 150-story, nearly 2,000-foot tall skyscraper on a landfill at the southeast end of Manhattan.⁵

Gapp wrote that Trump's planned office tower was "one of the silliest things anyone could inflict on New York or any other city" and a kind of "Guinness Book of World Records architecture." Gapp's column said the "only remotely appealing aspect" of Trump's planned office tower was that it would "not be done in the Fence Post Style of the 1970s." The architect critic slammed

the already-built Trump Tower as a “skyscraper offering condos, office space and a kitschy shopping atrium of blinding flamboyance.” Gapp wrote that Trump’s claim that the 150-story skyscraper would architecturally balance the two World Trade Center towers on the opposite side of lower Manhattan was mere “eyewash.”⁶

Gapp also gave an interview to the *Wall Street Journal*, telling a reporter that Trump’s plan was “aesthetically lousy” and complaining that the central part of Chicago “has already been loused up by giant-ism.”

Trump filed a libel lawsuit in New York, claiming that Gapp’s criticisms in the *Tribune* and the *Journal* were false and defamatory.

Trump added an implication allegation, alleging that the *Tribune* artist’s conception of his planned building made the proposed skyscraper look like “an atrocious, ugly monstrosity” – injecting words that were never used by Gapp – and claimed that Gapp’s statements and the *Tribune* illustration “torpedoed his plans” to build the office tower.⁷

The *Tribune* and Gapp filed a Rule 12(b)(6) motion to dismiss on the grounds that Gapp’s statements and the artist’s rendering were protected opinions, and U.S. District Judge Edward Weinfeld agreed, granting the motion to dismiss.⁸

Judge Weinfeld gave Trump a lesson in the First Amendment and politics: “Men in public life ... must accept as an incident of their service harsh criticism, oftentimes unfair and unjustified – at times false and defamatory – and this is particularly so when their activities or performance may ... stir deep controversy” “*De gustibus non est disputandum*, there is no disputing about tastes.”⁹

Judge Weinfeld, then 84, reaffirmed the First Amendment rule that “[e]xpressions of one’s opinion of another, however unreasonable, or vituperative, since they cannot be subjected to the test of truth or falsity, cannot be held libelous and are entitled to absolute immunity from liability under the First Amendment.”¹⁰

Judge Weinfeld explained that opinions expressed in the form of “rhetorical hyperbole,” “rigorous epithets,” and “the most pejorative of terms” are protected from liability, so long as the opinions do not veer to into factual accusations, such as accusing someone of a crime, unethical conduct, or the lack of professional integrity in a manner that would be proved true or false.¹¹

Judge Weinfeld stated that “this court has no doubt that the statements contained in the *Tribune* article are expressions of opinion.”¹² The court held that the “Design” heading and title “architecture critic” informed the reader that the article “embodies commentary” and is “cast in subjective terms,” especially since calling a building “one of the silliest things” and not “appealing” are “highly personal and subjective” judgments.” While “many ... would disagree with Mr. Gapp’s view ... there is no way the Court could instruct a jury on the process of evaluating whether [a] statement is true” when it comes to such “aesthetic matters.”¹³

The court also rejected Trump's claim that the Tribune artist's rendering of the proposed tower was "false" because it allegedly misrepresented his architectural plan.

Judge Weinfeld held that the sketch was not factual because it was described as an "artist's conception" and even if the drawing did imply that the planned 150-story tower was "an atrocious, ugly monstrosity," this is "precisely the same sort of individual, subjective aesthetic opinion" that is not capable of being subjected to "factual proof."¹⁴

The court also called out Trump's doublespeak to which the American public is now quite familiar.

Trump argued that the artist's illustration in the *Tribune* did not accurately depict "his proposal" for the building's specific "tapered" design, but "at the same time" Trump was "equally vehement in declaring that he has no plans and has not even engaged an architect." Judge Weinfeld said: "Plaintiff cannot have it both ways."¹⁵

Of course this was not painless victory for the *Chicago Tribune*; it spent \$60,000 in legal fees to win the motion to dismiss.¹⁶

New York's anti-SLAPP statute is limited to claims arising from the right to petition the government, and does not protect speech outside of government proceedings, so the Tribune and Gapp could not use the statute to dismiss the libel claim. If New York had a SLAPP statute that protected speech about matters of public concern, the *Tribune* and Gapp could have argued that they were being sued over speech about a matter of public concern and brought a quick motion to dismiss based on their absolute immunity for opinion and sought reimbursement of their \$60,000 in legal fees from Trump.¹⁷

B. Trump Sues Book Author for Saying He Is Not a Billionaire

Trump's next big libel lawsuit was filed in New Jersey state court more than 20 years later.

This time, Trump alleged a whopping \$5 billion in damages¹⁸ in his 2006 libel lawsuit against book author Timothy O'Brien and his book publishers, Time Warner Book Group, Inc. and Warner Books, Inc.¹⁹

Trump's lawsuit claimed that O'Brien's 2005 book, *TrumpNation, The Art of Being The Donald*, falsely reported that Trump was "only" worth between \$150 million to \$250 million, nowhere near the net worth claimed by Trump, which ranged from \$4 billion to \$5 billion to \$6 billion to \$9.5 billion.²⁰ Trump sued for libel, claiming he was really, really worth billions of dollars.

Once again, Mr. Trump saw his libel lawsuit tossed out of court, this time by New Jersey Superior Court Judge Michele M. Fox, who granted the defendants' motion for summary judgment based on no actual malice, which was affirmed by a New Jersey appellate court.²¹ "Nothing suggests that O'Brien was subjectively aware of the falsity of his source's figures or that he had actual doubts as to the information's accuracy," the New Jersey appellate court ruled.²²

The appellate court concluded that “there is no doubt that Trump is a public figure” and that he failed to meet his burden of proving the book’s statements about his net worth millions was false was published with actual malice.²³ “Nothing suggests that O’Brien was subjectively aware of the falsity of his source’s figures or that he had actual doubts as to the information’s accuracy,” the New Jersey appellate court ruled.²⁴

The court held that O’Brien, an experienced financial reporter and then the *Sunday Business* section editor at the *New York Times*, relied on three confidential sources who gave “remarkably similar” estimates of Trump’s actual net worth of between \$150 million to \$250 million.²⁵

Earlier in the litigation, a different trial court judge ordered O’Brien to produce the names of his confidential sources, but the New Jersey appellate court reversed, holding that the New Jersey’s qualified reporter’s privilege protected O’Brien’s right to keep the identities of his confidential sources.²⁶ O’Brien produced his notes from his interviews of those confidential sources in discovery, however.

The appellate court also rejected Trump’s argument that O’Brien published with knowing falsity because O’Brien rejected the financial information provided by Trump before the book was published.

The court found that “it is undisputable that Trump’s estimates of his own worth changed substantially over time and thus [Trump] failed to provide a reliable source” to O’Brien to rebut the confidential sources.²⁷

Trump and his accountant were their own worst enemies in their depositions. The accountant who prepared Trump’s 2004 Statement of Financial Condition admitted at his deposition that he never verified whether Trump had been honest in listing all his debts and liabilities for the accountant’s report, which Trump had provided to O’Brien for the book.²⁸

Trump was even more unreliable in his testimony about his net worth:

Q: Now Mr. Trump, have you always been completely truthful in your public statements about your net worth of properties?

A: I try.

Q: Have you ever been not truthful?

A: My net worth fluctuates, and it goes up and down with markets and with attitudes and feelings, even my own feelings but I try.

Q: Let me just understand that a little bit. Let’s talk about that for a second. You said that the net worth goes up and down based on your own feelings?

A: Yes²⁹

The court concluded that “Trump’s estimates of his own worth changed substantially over time and *thus failed to provide ... reliable*” evidence that proved O’Brien’s book false.³⁰ In other words, Trump ran to the court complaining that the book falsely debunked Trump’s claim of being a billionaire but utterly failed to provide any reliable evidence to prove falsity.

Trump later complained about the dismissal of the lawsuit, displaying his misunderstanding of the law of public figure and actual malice. “Essentially, the judge just said, ‘Trump is too famous,’” he told the Atlantic magazine in 2013. “‘He’s so famous that you’re allowed to say anything you want about him.’”³¹ No wonder Trump wants to change libel law; he doesn’t understand it.

Trump later boasted to the *Washington Post* that he didn’t mind losing after five years of litigation. “I spent a couple of bucks on legal fees but they spent a whole lot more. I did it to make [O’Brien’s] life miserable, which I’m happy about.”³²

That, ladies and gentlemen, is a paradigm SLAPP lawsuit: good at harassing and draining the bank accounts of critics, but ultimately a loser in court. New Jersey does not have an anti-SLAPP statute.

C. Trump University Sues Former Student

In 2010, Trump switched gears and filed a libel suit on behalf of Trump University, his for-profit real estate “school.” Trump U filed a \$1-million libel lawsuit in 2010 in the U.S. District Court for the Southern District in San Diego against Tarla Makaeff, a former Trump U student, yoga instructor, and whistleblower.³³

Trump U filed its libel lawsuit against Makaeff after she filed a class-action lawsuit as the lead plaintiff against Trump U and Trump for alleged deceptive business practices. In her class-action lawsuit, she claimed she was tricked into raising her credit card limit, ostensibly to buy real estate, but then Trump U persuaded her to use her credit card to pay nearly \$35,000 to enroll in an “elite” Trump U class.³⁴

Trump U sued Makaeff for her pre-litigation statements about Trump U when she posted on internet message boards and wrote a letter to the Better Business Bureau and her bank requesting a \$5,100 refund for services charged by Trump U. Trump U claimed that she defamed the school by claiming in her letters that that Trump U and its affiliates engaged in “fraudulent business practices,” “deceptive business practices,” “grand larceny,” “predatory behavior,” “criminal” business practices, and used “trickery” and “fraud” to persuade her to open a new credit card, which she called “grand larceny” and “identity theft.”³⁵

Makaeff took advantage of California’s anti-SLAPP statute to file a special motion to strike Trump U’s libel counterclaim. The California statute allows defendants to bring quick motions to strike speech-related claims that target speech about a matter of public concern and are meritless because the plaintiff cannot show a probability of prevailing.³⁶

Makaeff argued that Trump U’s claim was subject to dismissal under the two-part test of the anti-SLAPP statute because: (1) the claim arose from her exercise of speech about a matter of public concern – Trump U’s deceptive business practices and her statements about consumer protection; and (2) Trump U could not show a “probability of prevailing” on the merits of the defamation claim because Trump U was a public figure lacking evidence that Makaeff published with actual malice.³⁷

U.S. District Judge Irma Gonzalez, who was initially assigned to the case, held that Trump U’s libel claim came under the protection of the anti-SLAPP statute because the claim arose from Makaeff’s statements about “consumer protection information,” which was a matter of public concern. But Judge Gonzalez denied Makaeff’s anti-SLAPP motion on the grounds that Trump U was not a public figure and had established a probability of prevailing on its libel claim under the negligence standard for private figures.³⁸

The Ninth Circuit Court of Appeals affirmed the lower court’s holding that Trump U’s libel claim came under the protection of the anti-SLAPP statute, but reversed the lower court’s holding that Trump U was a private figure, and held that the for-profit school is a limited purpose public figure due to its use of “aggressive advertising campaign” on the internet, newspapers, and radio, and sent the case back to the district court to decide if Trump U could prove actual malice.³⁹

On remand, the case was assigned to U.S. District Judge Gonzalo P. Curiel, who granted Makaeff’s anti-SLAPP motion and dismissed Trump’s \$1-million libel claim in 2014. The court held that Trump U could not meet his burden of showing a probability of prevailing because Makaeff believed the truth of her statements and Trump lacked evidence that Makaeff’s statements were made with actual malice.⁴⁰

The court also ordered Trump U to pay nearly \$800,000 for Makaeff’s attorney’s fees and costs.⁴¹ The legal fees order is on hold pending the outcome of the class action lawsuit.

Six years into her class-action lawsuit, which has still not gone to trial, Makaeff was shell-shocked how she had been “put through the wringer,” developed health problems, and was having a hard time finding work due to the high-profile nature of the case, and she was permitted by Judge Curiel to withdraw as lead plaintiff in 2016.⁴²

As for Judge Curiel, he has been subjected to repeated verbal attacks by Trump, who called the judge “a hater of Donald Trump” with “hostility toward me.” Trump incorrectly claimed that the Indiana-born Latino judge was “Spanish” and “Mexican” and contends that the judge is biased against Trump due to his campaign pledge to build a wall between the United States and Mexico. Trump never filed a recusal motion, and has hinted that he might bring a “civil” lawsuit against Curiel after the election.⁴³

D. Trump Sues Miss Pennsylvania

Trump’s corporate lawyer Michael Cohen recently cited the sole Trump & Co. defamation victory – a default judgment – to bully another reporter.

“Do you want to destroy your life?” Cohen asked a *Daily Beast* reporter last year. “It’s going to be my privilege to serve it to you on a silver platter like I did that idiot from Pennsylvania in Miss USA, because I think you are dumber than she is.” Cohen said. “Sheena Monnin, another one that wanted to defame Mr. Trump and ended up with a \$5 million judgment. That’s going to be nothing compared to what I do to you.... So I’m warning you, tread very fucking lightly, because what I’m going to do to you is going to be fucking disgusting. You understand me?”⁴⁴

Monnin, a former Miss Pennsylvania, tangled with Trump when she entered the 2012 Miss USA Pageant along with 50 other contestants, and was soon eliminated.⁴⁵

While waiting in the wings during the telecast, Monnin claims that another contestant confided that she had seen a list of the five finalists and the ultimate winner – Miss Rhode Island – and the outcome had been predetermined by pageant officials.⁴⁶

The next day, Monnin told her agent she was resigning from her post as 2012 Miss Pennsylvania and from the Miss Universe pageant because she believed the Miss USA pageant was “rigged” and because she did not agree with the pageant’s decision to allow transgendered contestants.

Monnin posted on her Facebook page about her resignation, saying she was quitting “an organization I consider to be fraudulent, lacking in morals, inconsistent and in many ways trashy.”⁴⁷ The next day, Monnin posted on her Facebook page the details about the reputed list, saying the “show must be rigged” and was “dishonest.”⁴⁸

Trump, who helps run the Miss USA pageant as an equity partner with the Miss Universe L.P. company, quickly escalated the dispute by appearing on *Good Morning America* to refute Monnin’s Facebook claims, saying she had “loser’s remorse” and that her allegations were “disgraceful.” Monnin responded by appearing on *The Today Show* to explain and repeat her allegations from her Facebook page.

Trump’s Miss Universe pageant filed a \$10-million claim against Monnin with JAMS, the private arbitration service mandated by Monnin’s Miss USA contract, asserting claims against Monnin for defamation, tortious interference with prospective economic advantage, and breach of contract.⁴⁹

Monnin said she got bad advice from her lawyer, who repeatedly told her that she was not required to attend the arbitration, only to tell Monnin later that he could not represent her because he was not admitted to practice law in New York.⁵⁰

With Monnin and her attorney absent from the arbitration proceeding, no one provided any evidence to rebut testimony that Miss USA supposedly suffered \$5 million in damages because the oil company BP, formerly known as British Petroleum, allegedly backed out of its reputed plan to provide a \$5-million sponsorship fee due to BP’s alleged concern about Monnin’s allegations.⁵¹

The JAMS arbitrator, retired U.S. Magistrate Judge Theodore H. Katz, held that Monnin’s statements were false, defamatory, and published “with actual malice,” and awarded the Miss

Universe company its full \$5 million defamation damages claim.⁵² The arbitrator dismissed the tortious interference and contract claims.

Monnin filed a motion in the U.S. District Court for the Southern District of New York to vacate the \$5-million defamation award, arguing that Monnin failed to receive proper notice of the arbitration, received ineffective counsel from her lawyer, the arbitrator exceeded his authority and exhibited “manifest disregard for the law” by finding liability without any evidence that BP cited Monnin’s comments as the reason for withdrawing its planned pageant sponsorship.⁵³

As Monnin pointed out, the arbitrator awarded the full \$5-million sponsorship fee award to Trump’s pageant company even though no one from BP testified at the arbitration. The arbitrator relied solely on hearsay testimony from a Miss USA pageant employee who testified that BP withdrew its \$5 million sponsorship fee.⁵⁴

Although this was not raised by Monnin, the arbitrator appeared to apply the negligence standard instead of the required actual malice standard when he cited the following evidence of Monnin’s actual malice: she made “malicious” statements as a “disgruntled contestant,” her “rigged” allegation was “highly improbable,” she “made no attempt to seek verification” of her claim with other sources, she failed to respond to discovery demands, failed to appear to argue the truth of her statements, and lost by default.⁵⁵

On July 2, 2013, U.S. District Judge J. Paul Oetken rejected all of Monnin’s challenges and affirmed the arbitrator’s \$5 million default judgment. While Judge Oetken expressed “[s]ympathy” that Monnin “is suffering from her poor choice of counsel” and agreed that her lawyer acted “unconscionably,” he declined to vacate the judgment because the arbitrator relied on evidence to support his decision and the “apparent inequity” of the default judgment was not enough for the federal court vacate the judgment under the very protective rules for arbitration awards.⁵⁶

Monnin later sued her former New Jersey lawyer for malpractice in Camden County (New Jersey) Superior Court in 2013,⁵⁷ and her father, Phillip Monnin, contends his daughter did not pay “a penny” of the \$5 million judgment when Trump’s attorney filed a notice of satisfaction of the full \$5 million *Miss Universe L.P. v. Monnin* arbitration award.⁵⁸

For Trump to boast about winning this arbitration claim is misleading. The arbitrator never heard any rebuttal to the factual allegations and legal theories made by Trump’s pageant company, the judgment was not subject to the full appellate review available to litigants in public courts, and Monnin’s attorney acted “unconscionably.”

E. Trump Sues Maher About Orangutan Joke

Trump has zero sense of humor. But, boy, can he file a hilarious lawsuit! He proved that much when he sued HBO *Real Time* cable television show host Maher for not making good on Maher’s *joke* that Maher would donate \$5 million to charity if the orange-haired and orange-tinged Trump could provide a birth certificate showing that Trump was not the “spawn of his mother having sex with an orangutan.”⁵⁹

At the time, Trump was exploring a run for the GOP presidential nomination and Maher made his donation joke as part of his political comedy shtick ridiculing Trump's "racist" and false "birther" claim that President Obama, our first African American president, was born in Kenya, not the United States, and Trump's offer to pay \$5 million to charity if Obama produced his birth certificate.⁶⁰

Trump's lawyer responded by sending Maher a copy of Trump's birth certificate, "demonstrating he is the son of Fred Trump, not an orangutan," and a "formal acceptance" letter directing Maher to divvy up his \$5 million donation among five charities.⁶¹

When Maher did not cut a donation check, Trump filed a \$5-million "breach of contract" lawsuit in Los Angeles Superior Court against Maher.⁶² Exhibit A of his lack of a sense of humor (literally it was Exhibit A): Trump attached a transcript of Maher's appearance on the *Tonight Show with Jay Leno* to prove Trump thought Maher's offer was serious, including Maher's offer to "donate to a charity of his choice Hair Club for Men, The Institute for Incurable Douche-bag-ery. Whatever charity!"⁶³

Trump thought it was important to state in his lawsuit that a 2011 *Newsweek* poll showed he would "enjoy the support of 41% of voters in a hypothetical race against President Obama."⁶⁴

Trump was roundly ridiculed by the *Hollywood Reporter* for filing such a frivolous lawsuit.⁶⁵

It was obvious to media lawyers that Maher could seek a quick dismissal under the U.S. Supreme Court decision *Hustler*, which held that statements about a public figure reasonably understood to be a caricature, parody, or satire – a joke – are not actionable under any theory of liability claiming a falsehood.⁶⁶

Maher also had a very good chance of winning an anti-SLAPP motion under California's anti-SLAPP statute. Although Trump's lawsuit against Maher was labeled a "breach of contract" lawsuit, Trump's lawsuit targeted Maher's speech about a matter of public concern – Maher's critique of Trump's "racist," anti-Obama birther campaign while Trump explored a presidential bid⁶⁷ As it turns out, Trump's birther campaign likely helped catapult Trump to the GOP presidential nomination three years later.

Shortly after filing his frivolous lawsuit against Maher, Trump quickly withdrew it, and his lawyer said he would refile an amended complaint.⁶⁸ He never did.

F. Trump Hotel Sues Bartender and Culinary Unions

By 2015, Trump was an actual GOP candidate for the presidential nomination and more aggressive in using lawsuits to chill negative speech about him. He was probably fed up with losing libel claims and being blocked by the First Amendment and became more creative trying to avoid the defamation label and his old foe, the First Amendment.

On October 5, 2015, Trump gave a campaign speech at the Treasure Island Hotel & Casino, a rival hotel. Outside the hotel, culinary workers and bartenders trying to organize a union at the Trump Hotel Las Vegas handed out flyers saying that Treasure Island Hotel & Casino employed unionized workers while Trump “refused to agree to a fair process for workers at his hotel to form a union.” The workers’ flyers asked “If Trump choses to stay at a union hotel, why can’t Trump Hotel workers choose to form a union.”

Trump sued the culinary and bartender labor unions that organized the protest in U.S. District Court in the District of Nevada, claiming the flyers hurt his hotel’s reputation by falsely implying that he had not stayed at his own hotel due to lesser quality. Instead of suing for libel, the companies sued the unions for violating Section 43(a) of the federal Lanham Act for alleged false advertising and for violating Nevada’s deceptive trade practices law. Trump sued in the name of his hotel companies, Trump Ruffin Commercial LLC and Trump Ruffin Tower I LLC.⁶⁹

There was just one problem with the Trump hotel lawsuit, according to Chief U.S. District Court Judge Gloria M. Navarro. To make out a case for false advertising, Trump’s hotel needed to allege that the workers’ allegedly false statements were “commercial speech,” that is, to propose a commercial transaction.

The court found that even if the workers’ statements were “intended to, and would have the tendency to cause harm to the reputation of Trump Hotel Las Vegas,” the workers’ statements did not qualify as commercial speech under the Lanham Act because they were not proposing a commercial transaction.

Judge Navarro dismissed the Lanham Act claim without prejudice on August 8, 2016, holding that Trump’s hotel companies failed to allege that the labor unions were engaged in commercial speech, and dismissed the state law claim due to lack of jurisdiction.⁷⁰ The Trump hotel companies chose not to file an amended complaint and voluntarily dismissed the lawsuit,⁷¹ and the court closed the case.

Once again, Trump’s attempt to escape the burdens of libel law and the First Amendment by pleading a non-libel claim failed.

G. Trump Sues to Make Clear He Is Not a Racist Mass Murderer

Not only does Trump lack a sense of humor, he doesn’t know from rhetorical hyperbole. We got the message loud and clear from Trump’s \$2.5 billion lawsuit against television network Univision Networks & Studios, Inc. and its programming chief Albert Ciurana.

In his 2015 lawsuit, Trump filed claims for breach of contract, intentional interference with contractual relationships, and defamation arising from the Spanish-language network’s decision to stop airing Trump’s beauty pageants after Trump stated during his presidential campaign announcement that Mexican immigrants were “rapists” and criminals.

Trump alleged that he was defamed to the tune of \$1 billion by Ciurana’s Instagram post of Trump’s photo side-by-side with a photo of accused Southern white supremacist mass murderer

Dylann Roof with the caption “Sin commentaries,” or “No comments.”⁷² Ciurana posted the Instagram photos shortly after Trump’s “rapists” and criminals statement, and later apologized.

Trump claimed that given the “target audience” of Ciurana’s post, “a reasonable person could understand Mr. Ciurana to be stating that Mr. Trump had committed heinous acts similar to Roof, and/or that Mr. Trump had incited others to commit similar heinous acts.”⁷³

Without an ounce of irony, Trump wanted to make it clear in his lawsuit that he is not a racist mass murderer: “This statement [the alleged implication of the Instagram post] is patently false,” Trump alleged, “because as Defendants well knew (*or should have known*) at the time (*and still*) Mr. Trump has never committed heinous acts similar to Roof’s and never incited Roof or anyone else to commit such heinous acts.”⁷⁴

Univision and Ciurana filed a motion to dismiss, arguing that the Instagram post was not a statement of fact, but a “visual satire” and an expression of a personal opinion by Ciurana, a Mexican immigrant himself, about Trump’s qualifications as a candidate for president, which is quintessential political speech protected by the First Amendment. The defendants chided Trump for not remembering that he lost his first defamation case against the *Chicago Tribune* for failing to understand the protection of opinion.

Univision and Ciurana also argued that the satirical post simply compared the two men’s similar frowns and hair, and that it would be a “stretch” and “far from plausible” that the post conveyed that both Roof and Trump “hold comparably racist views,” but even if that was the message, this message still would be protected opinion.⁷⁵ The breach of contract claim was frivolous, Univision argued, because Trump had already breached the contract by pushing away all the advertisers and viewers of the planned first-ever Spanish-language version of Trump’s beauty pageants with his offensive comments about Mexican immigrants who formed a large part of the Univision audience.

Shortly before oral argument on the motion to dismiss, Trump and co-plaintiff Miss Universe L.P., LLLP filed a notice of voluntary dismissal of their lawsuit with prejudice on Feb. 11, 2016, depriving us of what promised to be a very interesting oral argument. The parties announced a confidential settlement of the lawsuit but only mentioned the settlement of the contract claim,⁷⁶ so I count the dismissal of the defamation claim as another loss to Trump.

More Anti-SLAPP Statutes Are Needed

Trump has pledged to get revenge on the First Amendment. Trump has promised “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.”⁷⁷

Trump’s campaign pledge misrepresents and misunderstands libel law. The First Amendment already punishes “purposely . . . false articles” about powerful public figures like Trump and his companies. It’s called publishing with actual malice.⁷⁸ Trump has never been able to prove actual malice in a public trial court.

Trump’s speech-targeting lawsuits filed in public courts were doomed to failure because the First Amendment protects good-faith reporting about public figures (that is, published without actual malice) and immunizes subjective opinions and jokes, even if they are “negative” and “horrible,” as Trump complains.

Journalists and whistleblowers may have won dismissal of Trump’s libel lawsuits, but at significant cost of time, energy, and money.

State legislatures should enact more anti-SLAPP statutes allowing defendants to quickly dismiss meritless lawsuits targeting speech about matters of public concern.⁷⁹ Over two dozen states have enacted these statutes.⁸⁰ A federal anti-SLAPP law has been proposed. Many state statutes require plaintiffs like Trump to pay the prevailing defendant’s legal fees, as Trump University discovered in California when the court granted a former student’s anti-SLAPP motion dismissing the school’s flawed libel claim and ordered Trump University to pay nearly \$800,000 in attorney’s fees.⁸¹ A federal anti-SLAPP law has been proposed.

These anti-SLAPP laws, while not perfect, would help discourage frivolous libel lawsuits favored by Trump & Co. Instead of labeling frivolous, speech-targeting lawsuits “SLAPP suits,” perhaps we should call them “Trump Suits.”

Susan Seager is a First Amendment attorney who teaches media law to journalism students at the University of Southern California.

¹ A 2016 study by *USA TODAY* located over 4,000 lawsuits filed by or against Trump and his companies over three decades, an unprecedented number for a presidential nominee. *USA TODAY* located seven speech-related lawsuits or arbitrations filed by Trump and his companies. *USA TODAY Network: Dive into Donald Trump’s thousands of lawsuits*, *USA TODAY*, <http://usatoday.com/pages/interactives/trump-lawsuits/>, Nick Penzenstadler, *New USA TODAY interactive database shows Trump lawsuits surpass 4,000*, *USA TODAY* (July 7, 2016), <http://www.usatoday.com/story/news/politics/onpolitics/2016/07/07new-usa-today-interactive-database-shows-trump-lawsuits-surpass-4000/86809010/>. This article examines the seven speech-related lawsuits or arbitration proceedings brought by Trump and his companies discussed by *USA TODAY* and located in an independent search by the author.

² 485 U.S. 46, 56-57 (1988) (statements not reasonably understood as stating facts – in this instance a parody liquor-and-sex advertisement in *Hustler* magazine poking fun at the Rev. Jerry Falwell – are not actionable under any theory of liability based on an alleged “false” publication, even if the statements are “offensive” and “vulgar”).

³ *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434 (S.D.N.Y. 1985) (*Trump I*).

⁴ Nat Hentoff, *Citizen Trump*, *WASH. POST* (Oct. 19, 1985), <http://www.washingtonpost.com/archive/politics/1985/10/19/citizen-trump/88efc4ba-6c1e-4226-8924-4101-a60f5478/>

⁵ *Trump I*, 616 F. Supp. at 1434.

⁶ *Id.* at 1435.

⁷ *Id.*

⁸ *Id.* at 1436.

⁹ *Id.*

¹⁰ *Id.* at 1435 (citations and quotations omitted).

¹¹ *Id.*, citing *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) and *Greenbelt Pub. Assn v. Bresler*, 398 U.S. 6, 14 (1970). Although Judge Weinfeld’s decision in *Trump v. Chicago Tribune Co.* was issued in 1985, before the U.S. Supreme Court narrowed its protection for opinions in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), Judge Weinfeld’s decision was based on the protection for non-factual, hyperbolic opinions and remains good law.

¹² *Trump I*, 616 F. Supp. at 1436.

¹³ *Id.*

¹⁴ *Id.* at 1438.

¹⁵ *Id.*

¹⁶ Hentoff, *supra* note 4.

¹⁷ SLAPP suits are meritless lawsuits that target speech about a matter of public concern. SLAPP is an acronym for Strategic Litigation Against Public Participation. *See generally* Cal. Civ. Proc. Code § 425.16.

¹⁸ Paul Farhi, *What really gets under Trump’s skin? A reporter questioning his net worth*, WASH. POST (March 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3ee-e4c2-11e5-bofd-073d5930a7b7_story.html

¹⁹ *Trump v. O’Brien*, 29 A.3d 1090, 1092 (N.J. Super. Ct. App. Div. 2011) (*Trump II*).

²⁰ *Id.* at 1092-1093.

²¹ *Id.* at 1094-1095.

²² *Id.* at 1101.

²³ *Id.*

²⁴ *Id.* at 1101.

²⁵ *Id.* at 1092,1097.

²⁶ *Id.* at 1094, citing *Trump v. O’Brien*, 958 A.2d 85 (N.J. Super. Ct. App. Div. 2008) (*Trump III*) (defendants did not have to disclose confidential source identities).

²⁷ *Id.* at 1099-1100.

²⁸ *Id.* at 1099.

²⁹ *Id.*

³⁰ *Id.* (emphasis added).

³¹ Farhi, *supra* note 18.

³² *Id.*

³³ *Makaeff v. Trump University, LLC*, 715 F.3d 254, 260 (9th Cir. 2013) (*Makaeff I*).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Cal. Civ. Proc. Code § 425.16.

³⁷ *Id.* at 260-261, citing Cal. Civ. Proc. Code § 425.16.

³⁸ *Id.*

³⁹ *Id.* at 268, 271-272.

⁴⁰ *Makaeff v. Trump University, LLC*, No. 10-cv-00940, ECF No. 328 (S.D. Cal. June 17, 2014) (*Makaeff II*).

⁴¹ *Makaeff v. Trump University, LLC*, No. 10-cv-00940, ECF No. 331 (S.D. Cal. April 9, 2015) (*Makaeff III*) (awarding \$790,083.40 in fees and \$8,695.81 in costs).

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- ⁴² *Makaeff v. Trump University, LLC*, No. 10-cv-00940 , ECF No. 472 (S.D. Cal. March 21, 2016) (*Makaeff IV*).
- ⁴³ Maureen Groppe, *What Trump has said about Judge Curiel*, INDYSTAR (June 11, 2016), <http://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/>
- ⁴⁴ *Trump Lawyer Bragged: I 'Destroyed' a Beauty Queen's Life*, DAILY BEAST (July 31, 2015), <http://thedailybeast.com/articles/2015/07/31d/trump-lawyer-bragged-i-destroyed-a-beauty-queen-s-life.html>.
- ⁴⁵ *Miss Universe L.P., LLLP v. Monnin*, 952 F.Supp.2d 591, 594 (S.D.N.Y. 2013) (*Monnin I*).
- ⁴⁶ *Id.* at 594-95.
- ⁴⁷ *Id.* at 595.
- ⁴⁸ *Id.* at 596.
- ⁴⁹ *Id.* at 597.
- ⁵⁰ *Id.* at 603-606.
- ⁵¹ *Id.* at 598.
- ⁵² *Id.* at 598.
- ⁵³ *Id.* at 600-610. *See also Miss Universe L.P., LLLP v. Monnin*, No. 12-cv-09174, ECF No. 17 (S.D.N.Y Feb. 5, 2013).
- ⁵⁴ *Miss Universe L.P., LLLP v. Monnin*, No. 12-cv-09174, ECF No. 17 (S.D.N.Y Feb. 5, 2013).
- ⁵⁵ *Miss Universe L.P., LLLP v. Monnin*, No. 12-cv-09174, ECF No. 1 (S.D.N.Y Dec. 17, 2012).
- ⁵⁶ *Monnin I*, 952 F.Supp.2d at 610.
- ⁵⁷ *Monnin v. Klineburger & Nussy*, No. L-4505-13 (Nov. 4, 2013 N.J. Super. Ct., Camden Cty); *see also* Joshua Alston, *Pageant Queen Blames NJ Firm For \$5M Miss Universe Win*, LAW360 (Nov. 8, 2013), <http://www.law360.com/articles/487678/pageant-queen-blames-nj-firm-for-5m-miss-universe-win>
- ⁵⁸ Nick Penzenstadler, *Trump, Bill Maher and Miss Pennsylvania: The 'I'll sue you' effect*, USA TODAY (July 11, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/2016/07/11/trump-bill-maher-and-miss-pennsylvania-ll-sue-you-effect/85877342/>; *see also Miss Universe L.P., LLLP v. Monnin*, No. 1:12-cv-09174, ECF No. 27 (S.D.N.Y Aug. 15, 2014).
- ⁵⁹ *Trump v. Maher*, No. BC 499537 (Los Angeles Super. Ct. Feb. 4, 2013), http://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/Trump_Maher.pdf.
- ⁶⁰ *Id.*
- ⁶¹ *Id.*
- ⁶² *Id.*
- ⁶³ *Id.* at Exhibit A.
- ⁶⁴ *Id.*
- ⁶⁵ Eriq Gardner, *Why Donald Trump is Likely to Lose a Lawsuit Against Bill Maher (Analysis)*, HOLLYWOOD REPORTER (Feb. 3, 2013), <http://hollywoodreporter.com/thr-esq-why-donald-trump-is-lose-417806>.
- ⁶⁶ *Hustler*, 485 U.S. at 56-57.
- ⁶⁷ *See* Cal. Civ. Code § 425.16(e)(4) (allowing defendant to bring anti-SLAPP motion to dismiss “a claim” arising from speech “in connection with a public issue or an issue of public interest”).

⁶⁸ Eriq Gardner, *Donald Trump Withdraws Bill Maher Lawsuit*, HOLLYWOOD REPORTER (April 3, 2013), <http://hollywoodreporter.com/thr-esq-donald-trump-withdraws-bill-maher-432675>.

⁶⁹ *Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226*, No. 15-cv-01984, ECF No. 1 (D. Nev.).

⁷⁰ *Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226*, No. 15-cv-01984, 2016 WL 4208437 (D. Nev. Aug. 8, 2016).

⁷¹ *Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226*, No. 15-cv-01984, ECF No. 21. (D. Nev. Aug. 17, 2016).

⁷² *Miss Universe L.P., LLLP v. Univision Networks & Studios, Inc.*, No. 15-cv-05377, ECF No. 22 (S.D.N.Y. Nov. 6, 2015).

⁷³ *Id.*

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Miss Universe L.P., LLLP v. Univision Networks & Studios, Inc.*, No. 15-cv-05377, ECF No. 25 (S.D.N.Y. Dec. 4, 2015).

⁷⁶ Nick Niedzwiadek, *Donald Trump, Univision Settle Lawsuit over Miss Universe Pageant*, WALL STREET JOURNAL (Feb. 11, 2016), <http://www.wsj.com/articles/donald-trump-univision-settle-lawsuit-over-miss-universe-pagaent-1455220440>; see also joint statement, <http://corporate.univision.com/2016/02/donald-j-trump-and-univision-reach-settlement/>

⁷⁷ Trump declared the following at his Feb. 26, 2016 campaign rally in Fort Worth, Texas: “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. 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.” Hadas Gold, *Donald Trump: We’re going to ‘open up’ libel laws*, POLITICO (Feb. 26, 2016), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>

⁷⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public official must prove actual malice to win libel case); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 346 (1974) (same for public figure).

⁷⁹ *E.g.*, Cal. Civ. Code § 425.16.

⁸⁰ State-by-state guide, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists/state-state-guide>

⁸¹ *Makaeff III*, relying on Cal. Civ. Proc. Code § 425.16(c)(1) (“a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorney’s fees and costs”) (emphasis added).