Case No. 12-Civ-6052-JPO

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SHELDON ADELSON,
PLAINTIFF,

V.

DAVID HARRIS, MARC STANLEY, AND
NATIONAL JEWISH DEMOCRATIC COUNCIL
DEFENDANTS.

BRIEF FOR AMICUS CURIAE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Other

INTRODUCTION AND OVERVIEW

In passing the Anti-SLAPP Act of 2010, codified at D.C. Code 16-5501, *et seq.*, (the "Act"), the Council of the District of Columbia joined the majority of states in crafting a legislative response to the threat to speech rights from "SLAPPs": strategic lawsuits against public participation. SLAPPs are typically civil actions that arise out of individuals' communications to government bodies or to the public on an issue of public concern. SLAPPs can be particularly insidious; as noted in the Committee Report following a review of the use of SLAPPs, such suits "are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893 at 1 (Nov. 18, 2010) ("Comm. Rep.") (attached as Addendum). Through the imposition of costs and the related burdens of defending a lawsuit, the Council concluded, "*litigation itself* is the plaintiff's weapon of choice" in SLAPPs, wielded to chill the speech of those who would otherwise speak out on a matter of public interest. *Id*. at 4.

To combat this problem, the Council stated its intention to follow the legislatures of the numerous states that have extended "absolute or qualified immunity to individuals engaged in protected actions." *Id.* The Council's stated purpose in the Act was to "ensure a defendant is not subject to . . . expensive and time consuming discovery," so that "District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id.* To accomplish that policy goal, the Council provided a qualified immunity right in the Act. A defendant invoking the Act's protections is entitled to immunity from suit if the claim

arises from an act in furtherance of the right of advocacy on issues of public interest and the claim is not likely to succeed on the merits. *See* D.C. Code § 16-5502(b).

Amicus the District of Columbia Government submits this brief to respond to two dangerous contentions of plaintiff Mr. Adelson that this Court, if after its choice of law analysis decides to apply District of Columbia law, would need to confront. First, plaintiff's facial constitutional challenge to the Act under the Seventh Amendment should be soundly rejected. Nothing in the Act's immunity-creating provisions requires the trial judge to make factual findings that the law requires a jury to make. Second, if the Court determines that choice of law principles point towards District of Columbia law, then under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, the District's Anti-SLAPP statute applies in this federal diversity action because the statute implements substantive rights for those who have engaged in constitutionally protected speech and as a result have been subjected to a meritless lawsuit. If the Court were to hold otherwise, it would unjustifiably undermine the substantive policy choice of the District's legislative branch.

ARGUMENT

I. The Act Does Not Violate The Seventh Amendment.

Because the Act does not require the judge to usurp the role of the jury to decide a special motion to dismiss, it does not violate the Seventh Amendment, and there is certainly no basis to sustain a facial challenge to the Act.

As an initial matter, it is well-established that in cases where "a serious doubt of constitutionality is raised, it is a cardinal principle that [a] Court will first ascertain whether a construction of the statute is fairly possibly by which the question may be avoided." *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996) (upholding Rhode Island's anti-SLAPP

law against a Seventh Amendment challenge) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Here, there is no serious question of facial invalidity. Under the Seventh Amendment, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The courts that have been faced with a Seventh Amendment challenge to a state anti-SLAPP statute have each found that the immunity-granting procedures of the statute in question did not require judges to take any actions in deciding anti-SLAPP motions which are properly the province of the jury. See *Nexus v. Swift*, 785 N.W.2d 771, 782 (Minn. 2010) (stating that the "ultimate determinations of fact are not required by the clear-and-convincing standard" set forth in the Minnesota anti-SLAPP statute, and the statute thus did not violate the Seventh Amendment); *Lee v. Pennington*, 830 So.2d 1037, 1043 (La. App. 2002) (the purpose of the Louisiana statute is to act as a "screen for meritless suits, which is a question of law for a court to determine at every state of a legal proceeding." . . . A plaintiff is only required to show a 'probability of success' of his claim before a jury (i.e. the merits) based upon the elements of the tort claim he alleges," and thus the statute "does not bar anyone with a valid claim from pursuing his case through the judicial process."); *Louisiana Crisis Assistance Center v. Marzano-Lesenevich*, 827 F.Supp.2d 668, 679 n.7 (E.D. La. 2011), *vacated on other grounds*, No. 11-2102, 2012 WL 2717075 (E.D. La. July 9, 2012) (noting that the Louisiana anti-SLAPP statute "has not been interpreted in such a way that Seventh Amendment concerns exist."); *Marich v. QRZ Media, Inc*., 73 Cal. App.4th 299, 306 n.2, 86 Cal. Rptr.2d 406, 411 n.2 (Cal. Ct. App. 1999) ("This procedure does not deny the constitutional right to a jury trial because the court *does not weigh the evidence* in ruling upon the motion; instead, it simply determines whether a prima facie case has been made which

warrants the lawsuit going forward.") (emphasis added); *Dixon v. Superior Court*, 30 Cal. App.4th 733, 746 36 Cal. Rptr.2d 687, 697 (Cal. Ct. App. 1994) ("SRS also contends the statute unconstitutionally deprives it of the right to trial by jury by requiring the court to weigh the evidence in ruling on the motion to strike. But the court *does not weigh the evidence* in ruling on the motion; instead, it accepts as true all evidence favorable to the plaintiff.").

The answer for the District's Act is the same. The Act's "likely to succeed on the merits" standard is very similar to the "probability" standard in Cal. Civ. Proc. Code § 425.16(b)(1). Guidance from the California courts under its state constitutional right to jury trial, while not specifically reaching the Seventh Amendment question, is instructive because the District's Act was modeled in substantial part on California's Anti-SLAPP Act. *See* Comm. Rep. at 3. Just as the California courts have rejected the constitutional right-to-jury challenge to California's statute, there is no Seventh Amendment violation here—and plainly no facial violation—because the Act does not require a trial judge to weigh credibility of factual evidence. If in the extraordinary case a trial judge applying the Act was confronted with two competing items of evidence and could only grant a motion under the Act by weighing their credibility, the trial judge could address any Seventh Amendment concerns in the court's application of the Act in such a case by applying avoidance principles. But that issue is simply not presented here in this facial challenge, where the parties' competing submissions are focused on legal issues, such as whether the Complaint is foreclosed by the legal privileges that attach to reporting of a judicial proceeding, or fall within the "fair comment" privilege. *See* Defendants' Sept. 21, 2012 Memorandum at 30–42.

Plaintiff's submission ignores all this and relies on a passage from the United States District Court for the District of Columbia's memorandum order in *3M*, in which the Court

indicated its view that the Federal Rules must be read to "trump[] any state Anti–SLAPP law that requires a trial judge to resolve disputed factual issues and decide a case on the merits prior to trial, because "[a]n essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *3M Co. v. Boulter*, No. 11-CV-1527, 2012 WL 5245458, *1 (D.D.C. Oct. 24, 2012) (citing *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958)). Neither that passage in *3M* nor the *Byrd* decision remotely render the Act in violation of the Seventh Amendment, for two main reasons. First, *Byrd*'s holding does not apply here. In that case, the Supreme Court held inapplicable in diversity actions a state law expressly assigning to the trial judge the task of deciding a specific question of fact necessary for determining whether an immunity existed—there, whether a defendant qualified as an "owner," and as such was immune from personal injury claims made outside the worker's compensation regime. 356 U.S. at 527. The Act does no such thing; the immunity under the Act turns on whether the movant has shown a "likelihood of success" on the merits, which may well entail, depending on the particulars of a case, a pure question of law or mixed question of law and fact, quite separate from a final merits determination. In assessing similar determinations for purposes of reviewing decisions disposing of motions for preliminary injunctions, federal courts have readily found such determinations to be "primarily on questions of law." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 614 (D.C. Cir. 1992); *UBS Financial Services, Inc. v. West Virginia Univ. Hospitals, Inc.*, 660 F.3d 643, 648 (2d Cir. 2011). And second, to the extent that *Byrd* did have any application here—which for the reasons outlined it does not—this Court, contrary to the approach suggested in *3M*, would be obligated to engage in avoidance

construction to implement this validly enacted statute. *Accord Godin v. Schencks*, 629 F.3d 79, 90 n.18 (1st Cir. 2010) (noting concern that Maine Anti-SLAPP Act "to the extent it might be read to allow, contrary to [Fed. R. Civ. P.] 56, a judge to resolve a disputed material issue of fact, would then preclude a party from exercising its Seventh Amendment rights to trial by jury on disputed issues of material fact," and declining to reach the issue, concluding that the statute is "a relatively young statute, not much construed by the state courts, and there is no reason to think the state courts would construe [it] so as to be incompatible with the Seventh Amendment.").

Plaintiff's facial challenge to the Act for these reasons fails as a matter of law.

II. The Act Applies In Federal Diversity Actions.

"Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Com/Tech Commc'n Techs., Inc. v. Wireless Data Sys., Inc.*, 163 F.3d 149, 150 (2d. Cir. 1998) (quoting *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427 (1996). The Supreme Court has set forth a two-step test for determining whether a law is substantive or procedural for *Erie* purposes. The first step asks whether there is an applicable federal rule or statute, the "scope" of which is "sufficiently broad to control the issue before the Court." *Burke v. Air Serv. Int'l*, 685 F.3d 1102, 1107–108 (D.C. Cir. 2012) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980)). If there is, the Federal Rule or statute governs, state law notwithstanding, '*unless* it exceeds statutory authorization or Congress's rulemaking power.'" *Shady Grove*, 130 S. Ct. at 1437. The analysis thus must account for the Rules Enabling Act's command that the Federal Rules of Civil Procedure (and the Federal Rules of Evidence) "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). If the federal rule, properly construed, and the state rules at issue "can exist side by side, . . . each controlling its own intended sphere of coverage without conflict," then a court must proceed to

the second step of the test. *Burke*, 685 F.3d at 1108 (quoting *Walker*, 446 U.S. at 752). Under the second step, the federal court must apply the relevant District of Columbia or state law if "the failure to enforce state law would disserve the so-called twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* (internal quotation marks omitted). Applying that governing Supreme Court test, the Act's protections apply in federal court diversity actions, as we now show.

A. The Act and the Federal Rules Of Civil Procedure can operate side by side in federal court without conflict.

i. Under governing precedent, a federal court sitting in diversity is bound to apply an otherwise applicable state rule unless there is an unavoidable, direct collision between a federal rule and a state rule.

In the seven-plus decades since *Erie*, the Supreme Court has consistently applied state law in diversity actions except where confronted with an unavoidable, direct conflict between the federal procedural rule and the state law in question. *See Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001); *Gasperini*, 518 U.S. at 439; *Walker*, 446 U.S. at 753; *Cohen v. Beneficial Life Indus. Loan Corp.*, 337 U.S. 441, 557 (1949); *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943). In the few exceptional cases where the Court *has* refused to apply the state law in question in a diversity action, it has in each instance explained how the related federal procedural rule could not be fairly interpreted to accommodate the state rule, and thus how that unavoidable, direct conflict required application of the federal rule. *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (because Federal Rule of Civil Procedure 4(d)(1) provided "with unmistakable clarity . . . that in-hand service is not required in federal courts," while the relevant state rule provided explicitly that service *must* be "by delivery in hand," a "clash [was] unavoidable" between the federal and state rules, and thus the federal rule controlled); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987) (two unavoidable conflicts between Federal Rule of Appellate Procedure 38

and the state law at issue precluded application of the state rule); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (because the application of the state law would "defeat [the] command" of the federal law, they could not exist in a diversity action "'side by side . . . each controlling its own sphere of coverage without conflict'" (quoting *Walker*, 446 U.S. at 752)).

Most recently, in *Shady Grove*, the Court reaffirmed that a truly unavoidable conflict will mean that an on-point federal rule controls, so long as the federal procedural rule does not exceed the Rules Enabling Act's ban on expanding or abridging substantive rights. In that federal diversity action, a state statute by its terms *precluded* plaintiffs seeking a statutory penalty from proceeding in a class action, but Federal Rule of Civil Procedure 23 provides that class actions "may be maintained" if the Rule's prerequisites are met. 130 S. Ct. at 1436 n.2. Because the state statutory rule, if it applied, would have stripped that explicit procedural right of class action from plaintiffs in federal court, the Court found a conflict, since "[b]y its terms, the [state] provision precludes a plaintiff from 'maintaining a class action seeking statutory penalties.'" *Id.* at 1439 (internal brackets omitted). *Shady Grove* explained the Court's numerous prior opinions *applying* state law in diversity actions this way: "[E]ach [of those cases] involved a Federal Rule that we concluded could fairly be read not to 'control the issue' addressed by the pertinent state law, thus avoiding a 'direct collision' between federal and state law." *Id.* at 1442 n.8 (quoting *Walker*, 446 U.S. at 749).

ii. The Act's immunity-granting procedures do not conflict with Rules 12 and 56.

The Act and the Federal Rules can operate in tandem and without conflict. Indeed, the three federal appellate courts to have examined whether the immunity-granting procedures of a state anti-SLAPP statute apply in federal diversity actions have uniformly held that they do. *Godin*, 629 F.3d at 92; *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 168–69 (5th Cir.

2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). The answer is the same for the Act here.

Rules 12 and 56 do not "attempt[ ] to answer the same question as" the Act, *Shady Grove*, 130 S. Ct. at 1437, because they are "addressed to different (but related) subject-matters." *Godin*, 629 F.3d at 88. The Act "on its face is not addressed to either of these procedures, which are general federal procedures governing all categories of cases." *Id.* Rather, it focuses on District-law "claims based on a defendant's petitioning activity." *Id.* The Act applies only to meritless claims challenging defendants' exercise of their constitutional speech rights, and for those claims it codifies a targeted, qualified immunity from suit.

a. The Act provides for a qualified immunity.

The Act provides an immunity from suit for claims that arise from conduct in furtherance of the right of advocacy on issues of public interest, where a plaintiff cannot show "that the claim is likely to succeed on the merits[.]" D.C. Code § 16-5502(b). As the federal appellate courts—as well as a number of state courts—have recognized, anti-SLAPP statutes may codify an implied substantive immunity by using a burden-shifting provision, combined with a provision calling for dismissal or striking of plaintiff's claim once the burden shifts back to the plaintiff. Courts have repeatedly recognized an implied immunity in anti-SLAPP statutes, even where the statute being analyzed does not use the word "immunity." *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *Henry*, 566 F.3d at 177; *Gaylord Ent. Co. v. Thompson*, 958 P.2d 128, 144 (Okla. 1998).

"*Erie* . . . requires, of course, that federal courts exercising diversity jurisdiction apply state substantive law in order that 'the outcome of the litigation in the federal court . . . be substantively the same . . . as it would be if tried in a state court.'" *Zakrzewska v. The New*

School, 598 F.Supp.2d 426, 435 n.54 (S.D.N.Y 2009) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109–10 (1945)) (internal citation omitted). The D.C. Court of Appeals has stated that "[w]hen interpreting a statute, the judicial task is to discern, and give effect to, the legislature's intent." *A.R. v. F.C.*, 33 A.3d 403, 405 (D.C. 2011). And in construing legislative intent, that court has emphasized that its reading of the statutory text must "effectuate the legislative purpose," as determined by both the text and "a reading of the legislative history or by an examination of the statute as a whole." *Carter v. State Farm Mut. Auto. Ins.*, 808 A.2d 466, 471 (D.C. 2002) (internal quotations omitted). *See also D.C. Appleseed Center for Law & Justice, Inc. v. District of Columbia Dep't of Ins., Securities, & Banking*, 54 A.3d 1188, 1214 (D.C. 2012) (even where statutory language "is sufficiently clear to demonstrate the Council's intent, 'in certain circumstances it is appropriate to look beyond even the plain and unambiguous language of a statute to understand the legislative intent.'") (quoting *District of Columbia v. Cato Inst.*, 829 A.2d 237, 240 (D.C. 2003))

Here, although the Act's language and structure is itself indicative of the intent to provide an immunity, the legislative purpose could not have been more clearly stated in the Council's unanimous Committee report. That report, which was never rebutted on this point at any stage of the legislative debate, explained that in the Act the Council was "*follow[ing] the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions.*" Comm. Rep. at 4 (emphasis added); *see also id.* at 1.

Indeed, the most recent judicial opinion to have specifically considered the Council's intent in this regard, *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d. 29 (D.D.C. 2012) (Collyer, J.), appeal filed Jun. 11, 2012 (D.C. Cir. No. 12-7055), adopted precisely this

construction of the Act.[1] *Farah* held that the protections of the Act *do* apply in diversity actions, and emphasized that it "was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences." *Id.* at 36 n.10. In applying the Act's protections, *Farah* recognized that "the D.C. Anti-SLAPP Act intentionally follows 'the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions.'" *Id.* at 36 (quoting Comm. Rep. at 4). Accordingly, "to extend such immunity, the Act allows defendants to file a motion to dismiss any claim 'arising from an act in furtherance of the right of advocacy on issues of public interest.'" *Id.* (quoting D.C. Code § 16-5502(a)). That view is further reinforced by the structure and language the Council chose, drawn from peer jurisdictions' anti-SLAPP statutes. In particular, the statutory standard that it employed is very similar to the standard in the California statute that the Ninth Circuit repeatedly—and for over a decade at the time of the Council's deliberations—had for over a decade been recognized as having enacted an implied immunity from suit. *Compare Newsham*, 190 F.3d at 971, *with* D.C. Code §§ 16-5502(a)–(b). From all this, we submit that the D.C. Court of Appeals would find the Council's intent in the Act to enact an immunity to be clear.

b. The Act addresses a different question than Rules 12 or 56.

The threshold issue under the Act is whether the defendant invoking the Act has established an immunity from suit, based on both the demonstration that the claim arises out of

[1] *Farrah* is pending in the D.C. Circuit, as is the *Sherrod v. Breitbart* appeal about which we understand the parties have advised this Court. No argument date for *Farrah* has been set. When that appeal is decided, it may provide relevant insights on the D.C. Circuit's construction of both the Act and the *Erie* doctrine's application to it. Accordingly, if this Court in its choice of law analysis holds that the analysis points towards District law, the Court may wish to forebear on any final decision on the questions addressed in this brief until those appeals have been resolved.

constitutionally-protected speech activity and a lack of showing of likelihood on the merits. There is nothing in the text or scope of Rules 12 or 56 addressing this "question" for *Shady Grove* purposes. And, likewise, there is nothing in the Act that addresses the issues encompassed by Rules 12 or 56.

Rule 12(b)(6) allows a defendant to assert a "failure to state a claim upon which relief can be granted." The Act "provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis [than the federal rules]: that the claims in question rest on the defendant's protected petitioning conduct and that the plaintiff cannot meet the special" standard that the District has "created to protect such petitioning activity against lawsuits." *Godin*, 629 F.3d at 89.

The Act likewise provides mechanisms for relief for a defendant in a SLAPP case different in kind from that provided in the federal summary judgment rule. Rule 56(a) allows parties to move for summary judgment, and requires a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Act "serves the entirely distinct function," *Godin*, 629 F.3d at 89, of protecting those specific defendants that have been (a) targeted with litigation on the basis of their protected speech, (b) where the plaintiff has not shown a likelihood of success on the merits. *See* D.C. Code §§ 16-5502(a)–(b).

Just as with the state anti-SLAPP acts that have been held by federal appellate courts to apply in diversity actions, the Act does *not* "seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function." *Godin*, 629 F.3d at 88. As a practical matter, the Act and these federal rules can operate in tandem—both when a party's special motion to dismiss fails and when it succeeds.

If defendants invoking the Act's protections *fail* to convince the presiding judge that their statements are "in furtherance of the right of advocacy on issues of public interest," or if the court concludes that "the claim is likely to succeed on the merits," such a ruling would do nothing to interfere with the disposition of outstanding or subsequent motions filed by a defendant under Rule 12 or by either party under Rule 56. Indeed, in *3M Co. v. Boulter*, 842 F. Supp. 2d 85 (D.D.C 2012), *appeals filed*, Feb. 17, 2012 & Feb. 23, 2012 (D.C. Cir. No. 12-7012 & 12-7017), *appeals dismissed*, Nov. 27, 2012 & Jan. 4, 2013, the defendants' motion under the Act was denied, but their 12(b)(6) motion was granted as to every claim but one. 842 F. Supp. 2d at 113–20. Similarly, in *Farah*, the court granted dismissal under both Rule 12(b)(6) and the Act. 863 F. Supp. 2d. 29. While these two different motions may, if granted, both have the same effect in dismissing the claims in question, because of the fees and costs provisions associated with the anti-SLAPP motion (provisions long recognized as substantive for *Erie* purposes), the two dismissal standards neither turn on the same questions nor necessarily have the same consequences. *See, e.g.*, *Newsham*, 190 F.3d 963 (evaluating *grant* of Rule 12(b) motion to dismiss for lack of jurisdiction and *denial* of California anti-SLAPP act motion). Again, the Act and federal rules can operate in tandem, each in their own respective sphere.

To be sure, a *successful* special motion to dismiss a claim under the Act may obviate the need for a court to entertain further dismissal motions. But this does not amount to a conflict with Rules 12 and 56, any more than those rules conflict with each other. The Act simply provides an additional, independent basis upon which a court may dispose of a claim prior to trial. *See Godin*, 629 F.3d at 89 (Maine anti-SLAPP law "provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis [than Rule 12(b)(6)]"). Indeed as a practical matter, and as experience thus far under the Act shows, it can reasonably be expected

that defendants will regularly invoke both bases for dismissal and district courts will entertain both without the analysis under the Act displacing or necessarily becoming co-extensive with the analysis under Rule 12(b)(6). They are different motions, designed for some common and some different purposes, evaluated under different standards, and with a different range of attendant consequences where the motion is granted.

The Act's protections touch on procedural issues, which they must since they are targeted at the evil the Council sought to address—the abuse of the court system to silence speech on topics of public interest. This does not constitute a conflict with the Federal Rules nor with *Erie* principles. Just like the Maine law held applicable by the First Circuit, the Act (i) "shifts the burden to plaintiff to defeat the special motion"; (ii) "determines the scope of plaintiff's burden"; and (iii) "allows courts to award attorney's fees and costs to a defendant that successfully brings a special motion to dismiss." *Godin*, 629 F.3d at 89 & n.15.

The partial parallels between the Act's provisions "and Rules 12 and 56 as mechanisms to efficiently dispose of meritless claims before trial occurs do not resolve the issue" of whether the Act may be applied under *Erie*. *Godin*, 629 F.3d at 89 n.16 (citing *Shady Grove*, 130 S. Ct. at 1441 n.7 (in turn relying on *Semtek*, 531 U.S. at 504)); *see also Newsham*, 190 F.3d at 972 ("This commonality of purpose, however, does not constitute a direct collision—there is no indication that Rules 8, 12 and 56 were intended to occupy the field with respect to pre-trial procedures aimed at weeding out meritless claims."). The fact that Rules 12 and 56 and the Act each provide pathways to a common possible result, the claim being resolved in a defendant's favor, does not present a "conflict" any more than the application in diversity of state law provisions touching on procedural matters, which the Supreme Court has long approved. *Cohen* applied a state law requiring the plaintiff class to post security as a prerequisite to bringing an

action—notwithstanding that Federal Rule 23 addressed the same topic. 337 U.S. at 556–57. *Walker* applied state law to determine when an action commences, notwithstanding that Federal Rule 3 defined when an action is "commenced." 446 U.S. at 753. And *Gasperini* applied the state standard of judicial review to be applied to challenges to the size of a jury's damages award, notwithstanding Federal Rule 59's command that new trials may be granted "'for any of the reasons for which new trials have heretofore been granted . . . in the courts of the United States.'" 518 U.S. at 433.

Likewise, there is no conflict here in the relevant sense. A conflict that requires a federal court to disregard state law in a diversity action is, instead, a conflict that directly prevents the federal court from obeying two commands at once. Thus, for example, *Hanna* explained that the clash was "unavoidable" between Rule 4(d)(1)'s command that "in-hand service is not required in federal courts" and the state rule's requirement that service *must* be by delivery in hand." 380 U.S. at 470. In *Stewart*, the federal statute for transfer requests required "an individualized, case-by-case consideration of convenience and fairness" and could not exist in a diversity action "'side by side" with the state law's "*categorical* policy disfavoring forum-selection clauses," 487 U.S. at 29–31 (emphasis added and internal quotation marks omitted), the application of which would "defeat [the] command" of the federal law, *id.* at 31. In *Burlington Northern*, the Court similarly stressed that a federal appellate court, if both Federal Rule of Appellate Procedure 38 and the state law applied, would be faced with a situation where it would be forced to either exceed its authority under Rule 38 or to violate the mandatory state-law obligation; as a practical matter, the two laws could not operate "side by side." 480 U.S. at 7–8. Similarly, in *Shady Grove*, the Court confronted a situation where a judge, faced with plaintiffs demanding state statutory penalties and seeking class certification, must either refuse to apply Rule 23's express

"may maintain" language or certify a class in violation of state law. 130 S. Ct. at 1442. Again, there was no practical way for the trial judge to apply both laws "side by side." *Id.* at 1442. Here, as discussed above, there is a straightforward way for trial courts to do so.

c. Under any viable reading of *Shady Grove*, the Act does not answer the same question as Rules 12 or 56 or conflict with either of those rules.

Even if this Court perceives ambiguity as to whether Federal Rules 12 and 56 permit the Act's application, precedent requires this Court to read the rules and the Act to avoid conflict because a fair reading of them allows it to do so. Section II.A, the portion of Justice Scalia's *Shady Grove* opinion that garnered five Justices' votes, echoes the *Erie* line of decisions that it built on, and instructs federal courts to "read an ambiguous Federal Rule to avoid substantial variations [in outcomes] between state and federal litigation." 130 S. Ct. at 1441 n.7 (quoting *Semtek*, 531 U.S. at 504). The concurrence by Justice Stevens (who provided the fifth vote) in *Shady Grove* is to the same effect. *See id.* at 1451 n.5 (Stevens, J., concurring). Echoing prior Supreme Court majority opinions, the concurrence further requires that "federal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,'" *id.* at 1449 (quoting *Gasperini*, 518 U.S. at 427 n.7), and that "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result," by a viable "saving construction" to ensure no violation of the Enabling Act's mandate that federal rules "shall not" alter "*any* substantive right." *Id.* at 1452 (citing *Semtek*, 531 U.S. at 503).

There is some question as to how properly to read *Shady Grove.* In an unpublished decision, the Second Circuit has, in evaluating an alleged conflict with a federal rule, applied the standard from *Shady Grove*'s Section II.A. *See Retained Realty, Inc. v. McCabe*, 376 Fed. Appx.

52, 55–56 & n.1 (2d Cir. 2010). The First Circuit in *Godin* applied the standard from both Section II.A and the concurring opinion in construing Rules 12 and 56. 629 F.3d at 86–87. The Tenth Circuit has, in contrast, applied only the standard from Justice Stevens' concurrence to both the conflict analysis and the Rules Enabling Act analysis. *See Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983–84 (10th Cir. 2010). The U.S. District Court for the District of Columbia has applied Section II.A in evaluating whether a federal rule controls a conflict issue, and Justice Stevens' concurrence on the Rules Enabling Act question. *See Driscoll v. George Washington Univ.*, No. 12-0690, 2012 WL 3900716, at *6 (D.D.C. Sept. 10, 2012) (Huvelle, J.).

This Court, however, need not resolve for purposes of *Marks v. United States*, 430 U.S. 188, 193 (1977), the precise scope of *Shady Grove*'s precedential meaning or the significance of the differences between Section II.A and Justice Stevens' concurring opinion. This Court need not decide *those* questions in *this* case, because the result is the same under any viable application of *Shady Grove*. For the reasons set out above, Rules 12 and 56, read in a straightforward way, do not "attempt[ ] to answer the same question as" the Act, and thus there is no conflict under even the stricter standard for state law application laid out in Section II.A of *Shady Grove*. And under that same standard, to the extent this Court finds any ambiguity on the issue, it "should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation.'" *Id.* at 1441 n.7 (quoting *Semtek*, 531 U.S. at 504). That directive points to a conclusion of no conflict here because, if this Court were to hold that the federal rules forbid application of the Act, the Act's protections, including its speech-rights-focused immunity, burden-shifting, and cost- and fee-related protections, would be available in

the District of Columbia in *Superior* Court, but not available whatsoever in federal district court, a variation that is surely "substantial." *Id.*

d. The district court's analysis in *3M* is unpersuasive.

Finally, this Court if it reaches the *Erie* question should reject both the conclusion and the analysis of the United States District Court for the District of Columbia in *3M*, the only case on which Plaintiff relies in his *Erie* claims. To conclude that Rules 12 and 56 conflict with application of the Act in diversity matters, the court in *3M* relied principally on: (i) the Supreme Court's decisions in *Burlington Northern* and *Shady Grove*; (ii) Advisory Committee Notes to the 1946 Amendments to the Federal Rules of Civil Procedure; (iii) several decisions from the 1940s and 1950s of this Court and other circuits applying Rules 12 and 56; and (iv) the Ninth Circuit's decision in *Metabolife Int'l Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001). *See 3M*, 842 F. Supp. 2d at 96–112. None of those authorities supports, let alone compels, the conclusion reached by the court in that case.

First, as discussed above, Supreme Court precedent permits a federal court sitting in diversity to refuse to apply the state law only where there is a true conflict between the state law and a federal law or procedural rule. Thus, for example, *Burlington Northern* posited a situation where a federal appellate court would deem a penalty to be warranted, but that a penalty of 10% of the judgment would be unjustified. 480 U.S. at 7–8. In such a situation, were both Federal Rule of Appellate Procedure 38 and the state law to apply, the appellate court would be forced to either exceed its authority under Rule 38 or to violate the mandatory state-law obligation; as a practical matter, the two laws could not operate "side by side." *Id.* at 7. Similarly, in *Shady Grove*, as discussed above, there was no practical way for the trial judge to apply Federal Rule

23 and the state law "side by side." 130 S. Ct. at 1441–42. Here, there is no such unavoidable clash in application of the Act.

Second, the historical materials and mid-20th Century decisions relied on by the *3M* court likewise do not support its conclusion that Rules 12 and 56 are intended to "occupy the field" of weeding out meritless claims. *See 3M*, 842 F. Supp. 2d at 109 (citing, *e.g.*, *Callaway v. Hamilton Nat'l Bank of Wash.*, 195 F.2d 556 (D.C. Cir. 1952); *Farrall v. D.C. Amateur Athletic Union*, 153 F.2d 647 (D.C. Cir. 1946); *Nat'l War Labor Bd. v. Montgomery Ward & Co.*, 144 F.2d 528 (D.C. Cir. 1944); *Gallup v. Caldwell*, 120 F.2d 90 (3d Cir. 1941); *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302 (8th Cir. 1940); Fed. R. Civ. P. 12(d) advisory committee's notes). The *3M* decision characterized—unjustifiably in our view—the Advisory Committee's notes as "clearly explain[ing] that Rule 12(d) links Rule 12 with Rule 56 to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint." *3M*, 842 F. Supp. 2d at 98. This is not a persuasive reading of the notes, nor of the cases it applied, or those cited cases decided shortly after the 1946 amendments.

As an initial matter, neither the notes themselves nor a single case cited by the *3M* court uses the term "exclusive" in this context; that is solely the court's gloss. Nor does the text of Rules 12 or 56 use that term or its substantive equivalent.

Further, the 1946 Advisory Committee notes simply indicate what has today become black-letter law—that motions filed under the Federal Rules that seek judgment based on the evidence, whether they are styled as "speaking motions" or they otherwise attach factual averments such as affidavits that go to the merits of the allegations, should generally be treated as motions for summary judgment. It is by now an "unobjectionable proposition that when a

complaint adequately states a claim, it may not be dismissed" under Rule 12 "based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or fail to prove his claim to the satisfaction of the factfinder." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). This proposition is accurate, but does nothing to support the *3M* opinion's extrapolation from it.

Similarly, the cases cited in *3M* do not speak at all to the question of when courts may dismiss cases upon motions based on state-created substantive immunity rules. None of the 1946 advisory committee language or early cases construing the 1946 amendments cited in *3M* discussed statute-based immunities implementing substantive rights, and none says *anything* to negate via the Federal Rules the application of a state-created right that is narrowly targeted to constitutionally-protected activities. And, indeed, that is not surprising, as Congress spoke to *that* question separately and well before the 1946 amendments, enacting in 1934 the command in the Rules Enabling Act, applicable ever since, that "the Rules 'shall not abridge, enlarge, or modify any substantive right.'" *Semtek*, 531 U.S. at 503 (quoting 28 U.S.C. § 2072(b)).

Third, and contrary to the *3M* court's intimation, Ninth Circuit precedent does not support its conclusion. *Metabolife* does *not* stand for the proposition, ascribed to it by *3M*, that "Rules 12 and 56 are so broad as to cover or answer the same question as the California statute." 842 F. Supp. 2d at 109 n.19. Rather, the Ninth Circuit has *repeatedly* held, including before and after *Metabolife*, that California's substantive immunity squarely applies in federal court. *See Newsham*, 190 F.3d at 970–73; *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n.2 (9th Cir. 2009); *Thomas v. Fry's Electronics, Inc.*, 400 F.3d 1206, 1207 (9th Cir. 2005); *Batzel*, 333 F.3d at 1025–26. Indeed, *Metabolife expressly* left intact *Newsham*'s holding, and addressed only the California anti-SLAPP statute's discovery-stay provision, which it declined to apply because in

its view the "discovery-limiting aspects of" the California act "collide with the discovery-allowing aspects of Rule 56." *Metabolife*, 264 F.3d at 845–46. *Metabolife* held that discovery was appropriate on an issue as to which the relevant "information is in the defendants' exclusive control, and may be highly probative," *id.* at 847, a holding not particularly relevant to the question of whether the Act applies in the first place. More apposite Ninth Circuit precedent, in particular *Newsham*, instead *supports* the conclusion that the Act applies.

iii. The Act's discovery-stay provision does not conflict with Rule 56(d).

In addition, Plaintiff's contention that the Act conflicts with Rule 56(d) is incorrect. It again bears noting that whether the discovery provisions conflict with Rule 56(d) has no immediate relevance to whether the immunity-granting provisions of the Act apply in federal court in the first place. *See Metabolife*, 264 F.3d at 845–46 (applying the immunity-granting provisions of the California anti-SLAPP law, but declining to apply the discovery-stay provision). In any event, Rule 56(d) does not mandate that a court grant discovery to every party opposing a motion for summary judgment; instead the movant must submit an affidavit stating that the "material sought is germane to the defense, and that it is neither cumulative nor speculative," and the Court then evaluates the representation. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994); *see also Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012).[2] It is *not* inconsistent with Rule 56 to grant a non-moving party the benefit of discovery only after he has made sufficient representations to justify the grant. *See Godin*, 629 F.3d at 90 ("The Maine statute, in imposing on the opponent of the motion the burden of justifying discovery, is consistent with the allocation of burdens under Rule 56(d)"); *USANA*

[2] After the 2010 Amendments to the Federal Rules, the provision can now be found in Rule 56(d). Fed. R. Civ. P. 56(d); Advisory Committee's Note, 2010 Amendments. *Metabolife* and *Paddington* construed the earlier Rule 56(f).

Health Sci., Inc. v. Minkow, 2008 WL 619287, at *2 (D. Utah Mar. 4, 2008) ("the [California] anti-SLAPP law does not conflict with the Federal Rules of Civil Procedure because '[b]oth statutes confer discretion on the trial court to permit discovery in the face of a dispositive motion, in the appropriate case and upon a proper showing.'" (quoting *New.Net Inc. v. Lavasoft*, 356 F.Supp.2d 1090, 1101 (C.D.Cal.2004)); *Bible and Gospel Trust v. Twinam*, 2008 WL 5245644, *1 (D. Vt. Dec. 12, 2008) (resolving discovery request under the Vermont anti-SLAPP Act).

The cases cited by Plaintiff do not support a contrary conclusion. *Metabolife*, the case on which Plaintiff primarily relies, declined to apply the California anti-SLAPP law's discovery provisions and allowed the non-moving party to discover "information . . . in the defendants' exclusive control," which it found "may be highly probative to Metabolife's burden of showing falsity." 264 F.3d at 846–47; *see also Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1194 (W.D. Wash 2010) (construing *Metabolife* as holding that the discovery-limiting provisions were only "inapplicable to the extent that the Federal Rules of Civil Procedure entitle a party to discover information essential to its defense."). Indeed, in subsequent cases, the Ninth Circuit has recognized that "[u]nder California law, discovery is automatically stayed when a defendant files an anti-SLAPP motion, unless the opposing party can demonstrate good cause." *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010). The Act, therefore, does not create a standard that is inconsistent with Rule 56(d)—if the non-moving party makes an adequate showing that the discovery it seeks is essential for its opposition to the motion, the Court will grant limited discovery. Cases relied on by Plaintiff are entirely consistent with this view. *See Rebel Communications, LLC v. Virgin Valley Water Dist.*, No. 2:10-CV-0513-LRH-PAL, 2011 WL 3841340 (D. Nev. Aug. 25, 2011) (granting plaintiff discovery, after sufficient showing was

made, limited to information necessary to oppose defendant's anti-SLAPP motion); *Nixon v. Haag*, No. 1:08-CV-00648-LJM-JMS, 2009 WL 2026343, *5 (S.D. Ind. July 7, 2009) (same).

The question of whether to grant discovery to a non-movant opposing a motion for dispositive relief is by its terms a fact-specific inquiry—it sometimes will yield a ruling that discovery is warranted and sometimes will not—and the District takes no position on whether the facts of *this* case warrant limited discovery for the plaintiff. *See, e.g.*, *Godin*, 629 F.3d at 90–91 (holding that the discovery provisions of the Maine anti-SLAPP statute allows discovery "upon good cause shown" and may be applied under *Shady Grove*).

In addition, *presumptively* requiring discovery by a plaintiff responding to a Special Motion to Dismiss under the Act would undermine the protective purposes for which the Council passed the Act. The Council recognized, consistent with many courts' observations, that the provision creating a presumptive tolling of discovery upon the filing of a Special Motion to Dismiss was an important protection, designed "[t]o ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish." Comm. Rep. at 4.

iv. The Act does not conflict with Rule 41(b).

Further, and contrary to Plaintiff's argument, and to the unfounded conclusion of the court in *3M*, 842 F. Supp.2d at 104–105, the Act's provision that dismissal under Section 16-5502 shall be with prejudice does not conflict with Federal Rule of Civil Procedure 41(b). Rule 41(b) says, in relevant part, that "[u]nless the dismissal order states otherwise, a dismissal under this subdivision . . . and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." As has been long-recognized, the Rule simply sets forth a default rule of construction of

otherwise ambiguous language in dismissal orders; contrary to the *3M* court's understanding, it does not by its terms independently confer discretion on district courts. *See* 27A Tracy Bateman Farrell, *et al.*, *Federal Procedure, Lawyers Ed.* § 62:557 (Mar. 2012); *see also Sack v. Low*, 478 F.2d 360, 364 (2d Cir. 1973). Because there is no discretion separately provided to federal district judges in Rule 41(b), there is none that could be taken away by the Act to furnish the basis of any purported conflict.

B. Application of the Act in federal court serves *Erie*'s twin aims.

Because the Federal Rules and the Act can "exist side by side, . . . each controlling its own intended sphere of coverage without conflict," the second step of the governing test is triggered, and the Act must be applied in this diversity action if its application will serve *Erie*'s twin aims. *Burke*, 685 F.3d at 1108 (quoting *Walker*, 446 U.S. at 752). It will.

Application of the Act's protections in federal court will serve these two related aims, which are (i) avoiding inequitable administration of the laws and (ii) discouraging forum-shopping. *See Hanna*, 380 U.S. at 468; *Burke*, 685 F.3d at 1109.

First, it would be inequitable to allow the use of a defense to parties subjected to a SLAPP in Superior Court, but deny them the use of that defense in *federal* court. This is especially so since the plaintiff largely chooses the forum. *See Godin*, 629 F.3d at 91–92; *see also Hanna*, 380 U.S. at 467.

Second, and relatedly, if plaintiffs are subject to the heightened burden of proof set forth in the Act if they file their case in local court, but can avoid being subject to those standards if they file in federal court, that result will promote *precisely* the type of forum-shopping *Erie* was designed to avoid. *See, e.g.*, *Newsham*, 190 F.3d at 973. Indeed, such forum-shopping has *already* occurred in the District as a result of *3M*. *See Dean v. NBC*, Order at 2 (D.C. Sup. Ct.

June 25, 2012) (copy in Addendum at 30–36) ("Plaintiffs [alleging defamation against a journalist and other parties] wish to discontinue this case and pursue the same matter in Federal Court because [of the *3M* decision]"). The twin-aims analysis thus confirms that the Act's protections apply in federal diversity actions.

CONCLUSION

If this Court decides that the governing choice of law analysis points towards District of Columbia law, it should reject Plaintiff's facial challenge to the Act and should hold that the Act applies in federal diversity actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 22, 2013, electronic copies of the final version of this brief were served on all registered parties through the Court's ECF system.

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