SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Natalia Combs Greene Next event: Motion Hearing February 19, 2013

REPLY BRIEF IN SUPPORT OF DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S MOTIONS TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT AND TO RULE 12(b)(6)

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ABBREVIATIONS

CEI	Defendant Competitive Enterprise Institute
CEI Defendants	Defendants Competitive Enterprise Institute and Rand Simberg
CRU	East Anglia University's Climatic Research Unit
EPA	Environmental Protection Agency
Ex.	CEI Defendants' Exhibits (numbered items are exhibits to the CEI Defendants' Anti-SLAPP Motion, and lettered items are exhibits to this filing)
ICCER	Independent Climate Change E-mails Review
IPCC	Intergovernmental Panel on Climate Change
P. Ex.	Exhibits to the Plaintiffs' Response to CEI's Motions
SAP	The University of East Anglia's Scientific Assessment Panel
SLAPP	Strategic Lawsuit Against Public Participation

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Michael E. Mann gets the First Amendment's protection of free speech precisely backwards. Mann claims the right to characterize individuals and groups who disagree with him as being engaged in "pure scientific fraud,"[1] as publishing "bogus" research,[2] as "hired assassin[s],"[3] as "deniers,"[4] as "shills for the fossil fuel industry,"[5] as "deeply unethical,"[6] and as perpetuators of a "crime against humanity."[7] But faced with criticism of his own views, he claims that a government agency has decided the matter once and for all in his favor, that any dissent is therefore false and defamatory, and that CEI is "estopped" from arguing otherwise. The First Amendment, of course, rejects that premise in favor of the "bedrock . . . principle . . . that citizens have a right to voice dissent from government policies." *Tobey v. Jones*, --- F.3d ---, 2013 WL 286226, at *8 (4th Cir. Jan. 25, 2013) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). That principle is not only central to our

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[1] Environmental Protection Agency, 3 *EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act* (2010) (quoting email from Michael Mann to Andy Revkin, reporter, N.Y. Times (Feb. 8, 2005)) ("The McIntyre and McKitrick paper is pure scientific fraud."), Ex. A, at 73. (Lettered exhibits are those attached to this reply; numbered exhibits are those attached to the CEI Defendants' Anti-SLAPP Motion; and "P. Exs." are those attached to the Plaintiffs' Response in Opposition.)

[2] Michael E. Mann, *The Hockey Stick and the Climate Wars* 141 (2012).

[3] Interview by James Coomarasamy with Michael Mann and Marc Morano, on BBC World Service Newshour (Nov. 30, 2012), https://soundcloud.com/ameliaf/newshour-moran-mann-climatewar. On his Facebook page, Mann describes this as an "interview on attacks on #climate scientists by industry hired guns like Marc Morano." Michael Mann, Facebook Post (Dec. 2, 2012), http://www.facebook.com/MichaelMannScientist/posts/457448474312117.

[4] *E.g.*, *A Climate Scientist Fights Back: Penn State professor discusses his new book on the climate wars*, Green Light (March 21, 2012), Ex. 1, at 2.

[5] Rick Piltz, Michael Mann Interview: Denialists are waging "asymmetric warfare" against climate science, Climate Science Watch (Mar. 10, 2010), Ex. 35.

[6] Adam Forrest, "*We Need to Adapt . . . Changes are Coming no Matter What": Michael Mann, the US scientist caught up in the 'Climategate' controversy, on why a new sense of urgency is needed*, The Big Issue (April 3, 2012), Ex. 3, at 1.

[7] Ex. 3, at 1; Paul Dechene, *I Won, We Lost*, Planets Magazine (July 26, 2012), Ex. 4, at 4.

system of government, but also to the scientific process, which depends on those willing to challenge prevailing wisdom in the never-ending search for enlightenment. A government report, or even a stack of them, does not and cannot mean, as Mann asserts, that a matter of scientific dispute and public debate has been conclusively "put to rest." Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition ("Opp.") at 28. That Mann considers this debate illegitimate and an obstacle to implementing the public policies that he favors does not undermine that conclusion—quite the opposite.

It is telling that Mann does not mention or address his repeated statements that this lawsuit's purpose is to harass and silence his ideological opponents—statements that are proof positive of a classic SLAPP suit. *See* Memorandum of Points and Authorities in Support of Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act ("CEI Defendants' Anti-SLAPP Motion"), at 2-3, 23-26. He does not deny that he launched this litigation to intimidate "groups seeking to discredit the case for concern over climate change," with the intent to "silence" them.[8] That is the precise kind of abuse of legal process that the D.C. Anti-SLAPP Act was enacted to curtail or, barring that, punish.[9]

Mann's suit should be dismissed at this stage because the statements he challenges are protected expressions of opinion as a matter of law. The principal defect in Mann's reasoning is that he ignores context. In the context of the Blog Post, it is apparent that the statements Mann challenges are expressions of opinion critical of his research, not accusations of unlawful conduct.

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[8] Michael Mann, Facebook Post (Oct. 23, 2012), Ex. 9; Michael Mann, Facebook Post (May 16, 2012), Ex. 10.

[9] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report, Report on Bill 18-893, "Anti-SLAPP Act of 2010" ("Report on Bill 18-893"), Ex. 8, at 1.

And in the context of the heated global warming debate, the statements of which Mann complains are actually quite temperate. Any doubt on that score may be allayed by consulting Mann's routine use of far harsher language (including *express* accusations of "scientific fraud" and "bogus" research) directed at CEI and other "deniers." In this context, name calling is the norm.

Because Mann ignores context, he proffers an interpretation of the Blog Post that could be shared by no reasonable reader. If, as Mann contends, the Blog Post were asserting that he committed criminal fraud or made up data, why would it link to criticisms of his *scientific methodology*? Why would it link to investigation reports that it describes as "declar[ing] him innocent of any wrongdoing" and that Mann claims "exonerate" him? And why would it conclude by calling for "a fresh, truly independent investigation" of Mann's research, rather than simply demand that he be fired? The only reasonable reading is that the Blog Post is a critical commentary on Penn State's "whitewash[ed]" investigation of Mann.

It is therefore protected under the First Amendment as a supportable interpretation of underlying facts and under District of Columbia law as a fair comment. Mann's response to this point is to assert that the usual legal standard in such cases—whether "*no reasonable person could find* that the [defendant's] characterizations were supportable interpretations" of true underlying facts, *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1,8, 22 F.3d 310, 317 (D.C. Cir. 1994) ("*Moldea II*")—applies only to "evaluations of a literary work," Opp. at 49. That is false. *See, e.g., Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597-600 (D.C. 2000) (newspaper columnist's statements regarding company's hostility to organized labor protected as supportable interpretation).

Mann's emotional distress claim fares no better, given that he fails to engage, or even mention, the Supreme Court's precedent governing application of the First Amendment to such claims. This omission, however, is understandable, given that the statement Mann challenges "could

not reasonably have been interpreted as stating actual facts about the public figure involved" and so is not actionable. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

But even if that claim were not dismissed on the merits, it would have to be dismissed under Rule 12(b)(6) for failure to state a claim, because Mann identifies no allegation in his Complaint that supports the required element of actual malice. His libel claims fail on the same ground.

Finally, Mann's request for attorneys' fees and costs lacks any merit, as it simply repeats several of the more overheated charges from elsewhere in his brief. While plainly frivolous on the merits, it does serve as a timely reminder of Mann's admitted aim in this litigation: to silence his critics through the abuse of legal process and risk of liability. The Court should not allow itself to be used to facilitate Mann's attempt to muzzle opposing points of view on an important issue of intense public interest. Instead, it should carry out the purpose of the D.C. Anti-SLAPP Act and the First Amendment by dismissing his claims against the CEI Defendants.

ARGUMENT

I. Rather than "Exonerate" Him, the Reports that Mann Cites Actually Raise Questions Regarding His Scientific Methodology, Supporting the Blog Post's Point

Although the CEI Defendants will not burden the Court with detailed discussion of every error, misstatement, or omission in Mann's factual recitation—these factual disputes are not directly relevant to the issues before the Court at this stage—three points do require response. First, it is simply not the case that Mann's work has been subject to no serious and legitimate criticism in the peer-reviewed literature and elsewhere. Second, Mann's claim that any of the investigations into the Climategate scandal delved into the science or truly "exonerated" him are false. And third, Mann's focus on the proceedings regarding EPA's denial of petitions to reconsider its Greenhouse Gas Endangerment Finding is a red herring, because neither EPA nor the D.C. Circuit issued decisions on any issue even arguably implicated by this litigation. Given this background, the CEI

Defendants' statements are a supportable interpretation of the facts, fair comment on Mann's controversial research methodologies, and therefore a protected expression of opinion.

A. Mann's Work Has Been Met With Controversy and Criticism

Mann's recitation of the factual background confirms one of the CEI Defendants' central points: that Mann's research, while central to the case for man-made global warming, is controversial and has been the target of much criticism over the years. As he concedes, his "hockey stick" research, from the time of its initial publication, has been subject to vigorous debate in scientific, policy, and political circles. Opp. at 11-16. He also concedes that the disclosure of the Climategate emails intensified this debate, with numerous policymakers raising questions about reconstructions of the global temperature record and numerous institutions pressured into conducting investigations of conduct within the field. Opp. at 16-28. Mann may believe that these debates and concerns over his and others' research methodologies are unfounded or counterproductive, but the fact that these things took place demonstrates that many others disagree.

And they had reason to do so. For example, in response to the CEI Defendants' discussion of McIntyre and McKitrick's criticisms of Mann's work, Mann states that "*every* peer-reviewed study that has examined McIntyre and McKitrick's claims has found them to be inaccurate." Opp. at 15 (emphasis added). That is false, as even a single example demonstrates: In a 2011 paper published in the *Annals of Applied Statistics* (a peer-reviewed journal), Blakely McShane (Northwestern University) and Abraham Wyner (University of Pennsylvania) confirmed McIntyre and McKitrick's claims that Mann's statistical methods assume the hockey-stick result and that his temperature proxy data perform worse at temperature estimation than "fake" data run through similar methodologies. Their conclusion: "the long flat handle of the hockey stick is best

understood to be a feature of regression and less a reflection of our knowledge of the truth."[10] "Climate scientists," they say, "have greatly underestimated the uncertainty of proxy-based reconstructions and hence have been overconfident in their models."[11]

And that is far from the only scholarly criticism of Mann's statistical methodology. Mann cites a 2006 report by the National Academies of Science's National Research Council as confirming his work, while omitting its criticisms that "[l]ess confidence can be placed in large-scale surface temperature reconstructions for the period from A.D. 900 to 1600" and that "[v]ery little confidence can be assigned to statements concerning the hemispheric mean or global mean surface temperature prior to about A.D. 900 . . . ."[12] And while Mann attempts to cast doubt on Edward Wegman's critical report to Congress on Mann's statistical methodology, he does not challenge its conclusions (some of which he conceded in congressional testimony). *See* Opp. at 16. Indeed, McShane and Wyner echo Wegman's criticisms of the poor use of advanced statistical methods in climate science and repeat Wegman's lament "that there are very few mainstream statisticians working on climate reconstructions."[13] In fact, they identify Wegman's work as the only published "collaboration with university-level, professional statisticians" on temperature reconstructions prior to their own.[14]

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[10] Blakeley B. McShane and Abraham J. Wyner, *A Statistical Analysis of Multiple Temperature Proxies: Are Reconstructions of Surface Temperatures Over the Last 1000 Years Reliable?*, 5 Annals of Applied Statistics, no. 1, 2011, Ex. B, at 39.
[11] *Id.* at 40.
[12] National Research Council of The National Academies, *Surface Temperature Reconstructions for the Last 2,000 Years* 3 (2006), http://www.uoguelph.ca/~rmckitri/research/NRCreport.pdf.
[13] Blakeley B. McShane and Abraham J. Wyner, Ex. B, at 6.
[14] *Id.* at 39.

B. Not One of the Reports Heeded CEI's Call for an Inquiry into the Science

And that is why CEI and other critics of the "consensus" position on global warming had hoped that the revelations of the Climategate scandal would lead to a critical review of the methodology of the science, particularly the temperature reconstructions underlying the hockey-stick diagram. As Mann concedes, CEI and others repeatedly called for such an investigation, but he points to absolutely nothing to support his assertion that these "calls were heeded." Opp. at 19. Instead, as Mann himself recounts, these investigations focused on such things as whether the scientists who were implicated had made up data. Opp. at 20-28. None, however, addressed concerns that the complicated statistical models contrived by Mann and others were biased or that their output (e.g., the hockey stick figure) had been oversold—which was the Blog Post's entire point.

To be clear, that criticism is true of *every single one* of the reports cited by Mann. The University of East Anglia's Scientific Assessment Panel ("SAP") conceded that "[t]he potential for misleading results arising from selection bias is very great in this area,"[15] but specifically declined to investigate that issue, leading to a rebuke by Members of the British Parliament.[16] The Independent Climate Change E-mails Review ("ICCER") specifically declined to make any "statement regarding the correctness of any of these analyses in representing global temperature trends" or to "address any possible deficiencies of the method" employed by University of East Anglia researchers and

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[15] University of East Anglia, *Report of the International Panel Set Up by the University of East Anglia to Examine the Research of the Climate Research Unit* (2010), Ex. 24, at 3.
[16] James Randerson, *Oxburgh: UEA vice-chancellor was wrong to tell MPs he would investigate climate research*, The Guardian (Sept. 8, 2010), Ex. 26.

Mann.[17] The House of Commons Science and Technology Committee lamented that it lacked the time to look into the science: "If there had been more time available before the end of this Parliament we would have preferred to carry out a wider inquiry into the science of global warming itself."[18] It specifically stated, "this was not an inquiry into global warming."[19] Similarly, the British Government response to the House of Commons report stated that "[i]t was not our purpose to examine, nor did we seek evidence on, the science produced by CRU."[20] Penn State's investigation disclaimed any intention of wading into a "bona fide scientific disagreement or debate."[21] Rather than defend the science of long-term temperature reconstructions, EPA's decision to deny reconsideration of its Greenhouse Gas Endangerment Finding (discussed further below) disclaimed any substantial reliance on that research.[22] The Department of Commerce's inquiry was limited to investigating any misconduct by National Oceanic and Atmospheric Administration ("NOAA") personnel and "did not assess the validity or reliability of NOAA's or any other entity's climate science work."[23]

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[17] Sir Muir Russel, et al., *The Independent Climate Change E-mails Review* (July 2010), Ex. 18, at 49.
[18] House of Commons Science and Technology Committee, *The disclosure of climate data from the Climatic Research Unit at the University of East Anglia* (2010), P. Ex. 7, at 9.
[19] *Id.*
[20] Secretary of State for Energy and Climate Change, *Government Response to the House of Commons Science and Technology Committee 8th Report of Session 2009-10: The disclosure of climate data from the Climate Research Unit at the University of East Anglia* (2010), P. Ex. 8, at ¶31.
[21] Inquiry Committee for the Case of Dr. Michael E. Mann, *RA-10 Inquiry Report: Concerning the Allegations of Research Misconduct Against Dr. Michael E. Mann, Department of Meteorology, College of Earth and Mineral Sciences, the Pennsylvania State University* (Feb. 3, 2010), Ex. 22, at 2.
[22] EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556, 49,571/3 (Aug. 13, 2010), P. Ex. 11.
[23] Letter from Todd. J. Zinser to Senator James M. Inhofe (Feb. 18, 2011), P. Ex. 12, at 2.

Finally, the National Science Foundation ("NSF") inquiry, which was undertaken only because the agency found Penn State's inquiry to be insufficient, actually acknowledged "concerns . . . about the quality of the statistical analysis techniques that were used in [Mann's] research" and "concern about how extensively [Mann's] research had influenced debate in the overall research field."[24] But it declined to conduct any analysis of Mann's work, on the basis that it was irrelevant to the object of its investigation: the existence of "research misconduct" as defined in its regulations as "plagiarism, fabrication, and falsification."[25]

In sum, far from CEI's calls for a scientific inquiry being heeded, *not one* of the "investigations" actually *investigated* the methodology of the science.

C. Not One of the Reports "Exonerated" Mann

And as for Mann's supposed "exoneration," only two of the investigations—those conducted by Penn State and NSF—actually focused on Mann's conduct. Penn State's investigation relied almost entirely on evidence provided by Mann[26] and declined to even speak with any experts critical of Mann's work.[27] While NSF did additionally speak with several critics in its inquiry into possible "data fabrication or falsification"—an accusation not raised in the Blog Post—it did not conduct a full investigation of Mann's data practices (e.g., a forensic investigation or an attempt to recreate Mann's datasets) because it determined that "no direct evidence has been presented that

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[24] National Science Foundation Office of Inspector General Office of Investigations, *Closeout Memorandum Case Number: A09120086*, Ex. 23, at 3.
[25] *Id.* at 2-3.
[26] Office of the Vice President for Research at Penn State, *Investigation of climate scientist at Penn State complete* (June 4, 2010) (listing evidentiary sources), Ex. 6, att. G, at 6.
[27] National Science Foundation Office of Inspector General Office of Investigations, Ex. 23, at 2.

indicates the Subject fabricated the raw data he used for his research or falsified his results."[28] Mann was not "exonerated" following an investigation into the facts; rather, it would be more accurate to say that the inquiries into his conduct were dropped at a preliminary stage.

In fact, the very investigations that Mann cites as "exoneration," Opp. at 28, actually raise questions concerning his research and conduct. As the NSF report explained, the "publicly released emails . . . contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors," including Mann.[29] That same report, as described above, raised "concerns" regarding Mann's statistical methods and influence on the field. The ICCER report recognized that there are "multiple sources of uncertainty in respect of proxy temperature reconstructions," such as those by Mann, and that these "are the subject of an ongoing and open scientific debate" as to their correctness.[30] Similarly, the SAP report actually identified the potential for bias in the statistical models used for long-term temperature reconstructions and specifically found that some research groups engaged in paleoclimate reconstruction had employed "inappropriate statistical tools with the potential for producing misleading results."[31] The bodies that issued these reports apparently disagree with Mann's bluster that "there is simply no legitimate support for any different conclusion" on the issues raised by the Climategate emails. Opp. at 18.

D. EPA's Reconsideration Proceeding Addressed No Issue Relevant to This Litigation

Finally, Mann makes much of EPA's reconsideration decision. Opp. at 22-25. To begin with, the CEI Defendants are honestly puzzled by Mann's strange accusation that their choice not to

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[28] *Id.* at 3.
[29] *Id.* at 2-3.
[30] Sir Muir Russel, et al., Ex. 18, at 57.
[31] University of East Anglia, Ex. 24, at 2-3.

discuss an irrelevant administrative proceeding (more on that below) could be construed as "a deliberate attempt to hide information from this Court," Opp. at 24, when that proceeding was prominently disclosed in Mann's Complaint. *See* Compl. ¶22 (stating that CEI filed a petition for reconsideration of EPA's Endangerment Finding).

In any case, there is nothing for the CEI Defendants to hide. On December 15, 2009, EPA issued a finding that "six greenhouse gases taken in combination . . . contribute to the greenhouse gas air pollution that endangers public health and welfare under [Clean Air Act] section 202(a)."[32] After the period for public comment on this Endangerment Finding had closed, the Climategate scandal struck, raising questions regarding some of the scientific research underlying EPA's decision. CEI, joining with two other nonprofit public policy groups, filed a petition for reconsideration of the Endangerment Finding on February 12, 2010, arguing that it was based on "scientifically flawed studies," among them Mann's "hockey stick" research.[33] On August 13, 2010, EPA denied all ten of the petitions for reconsideration that had been filed.[34]

Rather than embrace and defend Mann's research, EPA instead denied that it had relied on it in deciding to issue the Endangerment Finding:

> Petitioners argue that if the current warming is not "unprecedented," our ability to attribute the current warming to greenhouse gases is undermined, and that EPA has not provided "compelling" evidence that the current temperatures are unusual compared to the last 1,000 years. Petitioners misstate EPA's conclusions and overstate the role of this line of evidence. EPA has not claimed that current

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[32] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496/1 (Dec. 15, 2009).

[33] *In re Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, Petition for Reconsideration of the Nongovernmental International Panel on Climate Change, the Science and Environmental Policy Project, and the Competitive Enterprise Institute (Feb. 12, 2010), P. Ex. 26, at 1.

[34] EPA's Denial of the Petitions to Reconsider, 75 Fed. Reg. at 49,557/1, P. Ex. 11.

> warming is "unprecedented"; the Administrator's Endangerment Finding stated that "The second line of evidence arises from indirect, historical estimates of past climate changes that suggest that the changes in global surface temperature over the last several decades are unusual." EPA found the scientific evidence "supports" this conclusion, not that it compels it, as petitioners incorrectly assert. EPA clearly characterized the uncertainty in this line of the evidence, properly stating that there is significant uncertainty in the temperature record prior to 1600 A.D.[35]

EPA's notice mentions Mann once, in a footnote citation to a 2009 paper.[36]

As to Climategate, EPA does not claim to have conducted any independent investigation, but states only that it "has reviewed all of the CRU emails."[37] According to EPA, "[t]he core defect in petitioners' arguments [regarding Climategate] is that these arguments are not based on consideration of the body of scientific evidence" that the agency says underlies the Endangerment Finding.[38] For that reason, the agency decided that arguments based on the Climategate emails did not require it to reconsider the Endangerment Finding.[39]

EPA also published a "Myths vs. Facts" document on its website, quoted at length by Mann, concerning the denial of the petitions for reconsideration—essentially, a press release. The agency again stated that its investigation consisted of "carefully review[ing] the CRU emails" and that its findings on global warming were based on "multiple lines of evidence" besides those implicated by the Climategate scandal.[40]

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[35] *Id.* at 49,571/3 (citations omitted).
[36] *Id.* at 49,571/3 n.25.
[37] *Id.* at 49,581/1.
[38] *Id.* at 49,557/3. Although Mann omits it, the quoted sentence is actually the topic sentence of the first paragraph quoted by Mann. *See* Opp. at 23.
[39] *Id.* at 49,557/3.
[40] EPA, *Myths v. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, P. Ex. 25.

On June 26, 2012, the D.C. Circuit upheld EPA's decision to deny the petitions for reconsideration.[41] The agency, it explained, was due "an extreme degree of deference" on scientific questions.[42] The court reasoned that EPA had not acted in an arbitrary and capricious fashion because it had relied on the IPCC assessment, which in turn "relied on around 18,000 studies," such that any "inaccurate information" in the assessment "does not appear sufficient to undermine the substantial overall evidentiary support for the Endangerment Finding."[43] The decision does not mention Mann, the "hockey stick" diagram, proxy-based temperature reconstruction, paleoclimate, or really any subject that relates to this litigation.[44]

In sum, when EPA was faced with criticisms of Mann's research, EPA denied that it acted on the basis of that research, rather than defend it, and maintained that it had always recognized doubts about the reliability of paleoclimate reconstructions such as Mann's. The D.C. Circuit, in turn, upheld EPA's decision to deny reconsideration as not arbitrary and capricious because EPA had relied on so many studies other than those implicated by Climategate. As should be apparent, these events are, at most, of indirect relevance to the instant case.

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[41] *Coalition for Responsible Regulation v. EPA*, 401 U.S. App. D.C. 306, 684 F.3d 102 (D.C. Cir. 2012).
[42] *Id.* at 129.
[43] *Id.* at 125.
[44] The nonbinding statement of issues cited by Mann, Opp. at 2 & n.4 (citing P. Ex. 36), is actually from CEI's challenge to the Endangerment Finding, not its challenge to the EPA's denial of its petition to reconsider the Endangerment Finding. Because the Climategate emails were disclosed months after the close of comments on the Endangerment Finding, arguments regarding Climategate were procedurally barred from that challenge. *See, e.g., National Wildlife Federation v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised in comments before the agency are waived and this Court will not consider them."). In its issue statement in the reconsideration challenge, CEI did not ask the D.C. Circuit to adjudicate any matters at issue in this case but (in relevant question), "[w]hether EPA's treatment of the 'Climategate' documents and of other evidence which developed or came to light after its Endangerment decision is arbitrary, capricious, or otherwise contrary to law." *Competitive Enter. Inst. v. E.P.A.*, Nonbinding Statement of Issues 2 (Nov. 17, 2010), Ex. C.

II. Mann's Claims Fail Under the D.C. Anti-SLAPP Act Because Mann Cannot Show that They Are "Likely To Succeed on the Merits"

In response to the Defendants' Anti-SLAPP Motions, Mann has abandoned his complaints against several of the statements that he had previously alleged to be defamatory, presumably recognizing that those claims would fail as a matter of law. *Compare* Compl. ¶¶26, 28, 32 *with* Opp. at 41. Those claims that remain, however, are equally flawed, because the CEI Defendants' statements are expressions of protected opinion under the First Amendment and D.C. common law. Mann's claims should therefore be dismissed, with prejudice, at this stage of the litigation.

A. Mann Concedes that the D.C. Anti-SLAPP Act Applies to His Claims

"Dr. Mann does not dispute that the Anti-SLAPP statute applies here . . . ." Opp. at 37. That is the end of the matter.

Nonetheless, Mann insists that his lawsuit is "distinguishable from the type of action the District of Columbia had in mind when it enacted [the Act]." Opp. at 34. That claim is belied, first and foremost, by the Act's text. The Anti-SLAPP Act applies to "[a]ny written or oral statement made . . . (ii) In a place open to the public or a public forum in connection with an issue of public interest . . . ." D.C. Code § 16-5501(1)(A). "Issue of public interest" is, in turn, defined as "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code § 16-5501(3). Both the Blog Post and CEI's press release on Mann's legal threats were written statements accessible to the public, and they both concerned issues of environmental and economic well-being

related to a public figure, Mann.[45] Accordingly, the CEI Defendants' Anti-SLAPP Motion "shall be granted unless the responding party [i.e., Mann] demonstrates that the claim is likely to succeed on the merits . . . ." D.C. Code § 16-5502(b). Whether or not Mann's complaint was "well-pled," *see* Opp. at 34, is irrelevant under the text of the Act. *See* D.C. Code § 16-5502(b). If that were the standard, the core provision of the Act would be superfluous, because a complaint that is not well-pled is already subject to dismissal under Rule 12(b)(6).

Mann's argument that the Act should not apply to suits by a "lone individual" or should apply only to suits against individuals is contrary to the Act's text and purpose. To begin with, Mann overlooks that he has sued two individuals, Rand Simberg and Mark Steyn, seeking to hold them jointly and severally liable for money damages and costs "to the highest extent permitted by law." Compl. ¶¶11-12, 101. In any case, this interpretation of the Act, based on an unpublished federal court order's holding that predates the D.C. Act by nearly a decade and has not been followed by any court, Opp. at 35, would deny application of the Act to media and advocacy organizations, which are among the most likely to face SLAPP suits and require the Act's protection. *Cf. Klayman v. Segal*, 783 A.2d 607, 613 n.5 (D.C. 2001) ("Because prolonged litigation in defamation actions against media defendants may inhibit free speech . . . . summary procedures are essential."). Indeed, Mann ignores that the first dismissal under the Act was of a lawsuit by an individual against a corporation and its employee. Order, *Lehan v. Fox Television Stations, Inc.*, No. 2011 CA 004592 (D.C. Sup. Ct. Dec. 2, 2011) (King, J.); *see also Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36-

[45] *See* Mann, *The Hockey Stick and the Climate Wars*, at 253 ("I became a public figure . . . ."); Bill Blakemore, *'New McCarthyism' Described by Climate Scientist Michael Mann*, abcnews.com (July 8, 2012), Ex. 2, at 3 (Mann identifies himself as "a public figure in this debate" on global warming); Bill Blakemore, *Climate Denialists Worse than Tobacco CEOs Lying Under Oath, Says Mann*, abcnews.com (July 8, 2012) (Mann states that he has "actually learned to embrace the role"), Ex. 2, at 10.

40 (D.D.C. 2012) (dismissing defamation case against magazine and its employees under D.C. Anti-SLAPP Act). He also ignores the D.C. Council's view that the impact of SLAPP suits "is not limited to named defendants['] willingness to speak out, but prevents others from voicing concerns as well." Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report, Report on Bill 18-893, "Anti-SLAPP Act of 2010" ("Report on Bill 18-893"), Ex. 8, at 1 (describing the Act's "Background and Need"). In the D.C. Council's view, stopping lawsuits "aimed to punish or prevent the expression of opposing points of view," *id.*, at the earliest possible instant is a public good, the benefit of which accrues to all persons subject to the jurisdiction of this Court. Given the unusual (and unrebutted) fact that Mann has confirmed that his aim in this litigation is to silence opposing points of view on global warming, CEI Defendants' Anti-SLAPP Motion at 1-3, 23-26, it would be difficult to imagine a more appropriate case for dismissal under the Act.

Mann's contention that the CEI Defendants do not yet "show any signs of having their First Amendment rights 'muzzled'" also misses the mark. Opp. at 36. It is well recognized that defendants such as CEI and Simberg are fully entitled to seek the protection of anti-SLAPP statutes notwithstanding their ability to continue to exercise their First Amendment rights. *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 863 (1995) (plain language of statute applied to libel cases brought against a media outlet for reporting on issues of public concern); *Stern v. Doe*, 806 So. 2d 98, 100 (La. Ct. App. 2001) ("The purpose of [the Louisiana anti-SLAPP statute] is to review frivolous and meritless claims against the media at a very early stage in the legal proceedings."). To hold that the Act applies only when SLAPP defendants have in fact been silenced would defeat its purpose of blocking attempts to litigate parties into silence.

Finally, Mann understandably resists the daunting burden that the Act's language imposes on him. As Mann describes, the Act was modeled on California's anti-SLAPP statute, but instead of

requiring (as under California law) a "probability the plaintiff will succeed on the merits," it requires the plaintiff to show that he is "likely to succeed on the merits." Opp. at 37-38. Mann's assertion that "[t]his is a distinction without a difference," Opp. at 38, denies all credit to the D.C. Council's choice to depart from California's approach in this one, crucial respect. The legislative history shows that the D.C. Council studied the laws of the states and federal law in crafting the Act's text, and then substantially revised that text (including the provision at issue) based on comments by the American Civil Liberties Union ("ACLU") to better address what it recognized to be a substantial problem within the District. Report on Bill 18-893, Ex. 8, at 1, 8.

To that end, it chose a word, "likely," that the same dictionary relied upon by Mann defines as "having a high probability of occurring or being true" and "very probable."[46] Mann offers no explanation for why he quotes, instead, the definition of "likelihood," a different word that is not used in the statute. Opp. at 38. Based on the words the Council chose, it is quite clear that the Council did intend, contrary to Mann's contention, that a court applying the Act "determine whether it is more probable than not that plaintiff will prevail on the claim." Opp. at 38.

B. Mann Identifies No Provably False Statements of Fact Because the CEI Defendants' Characterization of His Research Is Protected Opinion

Mann focuses on the verifiability of statements as the lynchpin of the opinion analysis, Opp. at 43-46, but fails to acknowledge that courts are also required to consider the context in which the statements were published when determining whether they are actionable to begin with. *See Moldea II*, 306 U.S. App. D.C. at 5, 22 F.3d at 314. If the context is one in which a reader expects to be presented with statements of opinion, defendants "must be given some leeway to offer 'rational

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[46] *Likely*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/likely.

interpretation"' of the facts. *Id.* at 4, 22 F.3d at 313. In such cases, the "correct measure" of whether a statement is verifiably false is whether "*no reasonable person could find* that the [defendant's] characterizations were supportable interpretations" of true underlying facts disclosed to the reader. *Id.* at 8, 22 F.3d at 317 (emphasis in original). Any statements that fail to satisfy this stringent test are protected opinion. Mann's contention that this analysis applies only to "evaluations of a literary work" has been definitively rejected by, among others, the Court of Appeals, which has also rejected his argument that generalized claims can be subject to the verification necessary to establish a provable falsehood.

1. Mann Ignores the Central Role of Context

Mann is compelled to concede that "context has been a determinative factor for courts in the wake of *Milkovich*," but he errs in his contention that context matters only in "the necessarily subjective theater of artistic commentary and review." Opp. at 47. Contrary to Mann's contention, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990), while rejecting "an artificial dichotomy between 'opinion' and fact," did not undermine the central role of context in determining whether a statement is actionable. *See* Opp. at 46-47. The case law is clear that context matters in three respects: genre, subject matter, and the work as a whole. Any of these may be decisive.

Indeed, the *Milkovich* court described with approval the Court's earlier decision in *Greenbelt Cooperatuve Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970), which recognized the relevance of context in holding that a characterization of a developer's negotiating position as "blackmail" could not support a defamation claim. 497 U.S. at 16-17. The Court recognized that, "as a matter of constitutional law, the word 'blackmail' *in these circumstances* was not slander when spoken," *id.* (internal quotation marks omitted) (emphasis added), due to the context of the heated public debate over the developer's tactics and the statement's placement in an article that provided greater factual context. *Id.* at 17. The *Milkovich* court also cited with approval *Letter Carriers v. Austin*, 418 U.S. 264,

284-86 (1974), a case holding that use of the word "traitor" to describe a union "scab" was not actionable "in the context of this case," which was an article regarding a heated labor dispute published in a pro-union newsletter, because readers would have understood that word "to demonstrate the union's strong disagreement with the views of those workers who oppose unionization." 418 U.S. at 284. The Court recognized that "such exaggerated rhetoric was commonplace in labor disputes" and so was not actionable in that context. *Id.* at 286.

And were there any doubt on the continued relevance of context, the Supreme Court laid it to rest in its recent decision in *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011), which held a church's offensive message on picket signs at a soldier's funeral to be protected speech based on "the whole context of how and where it chose to say it."[47]

Moldea II confirmed that *Milkovich* was not intended, and should not be read, to "sweep away" the established "principle of looking to the context in which speech appears" that was at the heart of *Ollman v. Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970 (D.C. Cir. 1984) (en banc), and other cases. *See Moldea II*, 306 U.S. App. D.C. 1, 5-6, 22 F.2d at 314-15 (discussing *Ollman*). In *Moldea v. New York Times*, 304 U.S. App. D.C. 406, 414-18, 15 F.3d 1137, 1145-49 (D.C. Cir. 1994) ("*Moldea I*"), the D.C. Circuit initially found actionable two passages supporting the newspaper's assessment that Moldea was a "sloppy" journalist: the questioning of his assertion that Joe Namath "guaranteed" a Super Bowl victory "shortly after a sinister meeting in a bar with a member of the opposition" and the criticism of Moldea for the "reviv[al] of the discredited notion" that an owner of the L.A. Rams "who had a penchant for gambling[] met foul play when he drowned in Florida."

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[47] The Supreme Court's 2010 grant of certiorari in *Snyder*, 130 S. Ct. 1737 (2010), vacated the Fourth Circuit decision cited by Mann. *See* Opp. at 47 & n.87.

The court further thought it "important to make clear that . . . our analysis of this case is not altered by the fact that the challenged statements appeared in a 'book review' rather than in a hard news story." *Id.* at 414-15, 15 F.3d at 1145-46.

But on rehearing, the D.C. Circuit reversed its earlier holding on these two passages for "fail[ing] to take sufficient account" of the context in which the statements appeared. *Moldea II*, 306 U.S. App. D.C. at 2, 22 F.3d at 311. It recognized that *Milkovich* was decided "against the backdrop of th[e] settled principle" that different genres of writing have a different influences on the average reader, and that it had "erred in assuming that *Milkovich* abandoned the principle of looking to the context in which [the statement] appears." *Id.* at 5-6, 22 F.3d at 314-15. Instead of "disavow[ing] the importance of context," the Supreme Court "simply discounted it in the circumstances of that case." *Id.* at 5, 22 F.3d at 314 (internal quotation marks omitted). Applying the correct standard, the D.C. Circuit dismissed the case in its entirety.

And contrary to Mann's characterization of the case, Opp. at 47-48, *Weyrich v. New Republic, Inc.*, 344 U.S. App. D.C. 245, 235 F.3d 617 (D.C. Cir. 2001), similarly accepted the importance of context. Recognizing that *The New Republic* "is itself well-known to be a magazine of political commentary, a self-described 'Weekly Journal of Opinion,'" it held that a reference to the plaintiff's supposed "bouts . . . of paranoia" was not actionable because it was "[p]resented in such a loose manner, in such a well-understood context . . . ." As the court explained, although if "looking at these statements in isolation, a reasonable reader *might* interpret them to attribute a diagnosable and debilitating mental affliction to appellant . . . the First Amendment demands that we place these references in their proper context." *Id.* at 253, 235 F.3d at 625. Also contrary to Mann's description, the court did not hold that certain isolated words or statements regarding the plaintiff were actionable, *see* Opp. at 48, but allowed to proceed claims regarding "a number of [allegedly] false anecdotes, suggesting to the average reader that appellant is not only a political reactionary, but

emotionally volatile, perhaps even mentally unsound, and otherwise unfit for his profession." 344 U.S. App. D.C. at 255, 325 F.3d at 627. Unlike the "loose" characterizations of Weyrich the court held to be protected—references to "bouts of pessimism and paranoia," "habits of suspicion, pessimism, and antagonism," and the fact that other conservatives have acted "as nutty as Weyrich"—these anecdotes were "historical vignettes," some "utiliz[ing] quotations, some purportedly from appellant, to further reinforce the impression that the stories are in fact true." *Id.* at 254, 325 F.3d at 626. The difference was that these anecdotes were sufficiently detailed and specific to overcome any presumption that, based on their appearance in a political magazine, they were expressions of opinion. *Id.*

And Mann ignores entirely that the D.C. Court of Appeals has been especially sensitive to context. The Court of Appeals recognized in *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 582-83 (2000), that the context-sensitive approach of *Ollman* remains good law and that it applied to an op-ed column concerning a labor dispute. The plaintiffs, including a railroad company, claimed that the column falsely portrayed them as antagonistic to labor and implicitly accused them of violating federal labor statutes. *Id.* at 585. The court, however, found the challenged statements non-actionable, based on three contextual factors. First, it was "critical . . . that the allegedly defamatory utterances in this case appeared in an Op–Ed column in which Wilner [the defendant] was commenting on matters of substantial public concern." *Id.* at 597.

Second, the statements were "made in the context of a labor dispute," such that statements "which on their face resemble statements of fact, may, depending on the circumstances, be treated as statements of opinion not subject to an action for libel" because such disputes "normally involve considerable differences of opinion and vehement adherence to one side or the other." *Id.* at 597-98 (citation and internal quotation marks omitted). In that context, the Court held, even some "provably false" statements could not support a defamation claim:

> [W]e do not believe that those statements in the column which the plaintiffs have characterized as "provably false" are of the genre which would support a defamation case against the author of a column on the opinion page of a newspaper. The plaintiffs' focus has been on Wilner's allegation that Guilford [the main plaintiff] "bolted" from national wage and benefit negotiations. According to Professor Northrup, Guilford did not bolt; rather, it declined to "opt into" national "handling." Either way, Guilford negotiated locally and not nationally. Even assuming that Wilner's use of the verb "bolted" reflects lack of precision, and treats the plaintiffs with undeserved asperity, the challenged language surely pales in comparison to "blackmail," *Greenbelt Publ'g Ass'n*, 398 U.S. at 11-14, or "traitor" or "scab," *Austin*, 418 U.S. at 282-87. If we were to adopt a rule of law which sustains the plaintiffs' position on this issue, then authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight.

Id. at 598-99 (some citations and internal quotation marks omitted).

And third, the Court considered the work as a whole, particularly the column's acknowledgment that one deal that it criticized had been upheld by a federal agency. *Id.* at 599; *see also Klayman*, 783 A.2d at 616 ("[T]he publication must be considered as a whole . . . ."). Thus, "[a]ny reasonable reader of the column would understand that Guilford took certain actions, that Wilner was apparently unenthusiastic about those actions, and that the ICC [Interstate Commerce Commission] basically sustained them." 760 A.2d at 599. "This is not the stuff of which successful libel suits are made," the Court concluded. *Id.*

2. Taken in Context, the Challenged Statements Are Protected Opinion

Although acknowledging that context may be "determinative," Mann makes no attempt to apply the law to the facts of this case other than to state that it is not a "liability shield" in every instance. *See* Opp. at 47. But all three contextual factors of *Guilford*, which is binding on this Court, demonstrate that the challenged statements are protected expressions of opinion.

First is genre. Mann concedes that the Blog Post and Lowry's statement (which Mann contends CEI republished) "were published on websites that . . . often offer opinion commentary." Opp. at 47. *Moldea II*, *Weyrich*, and *Guilford* each recognize the significance of this contextual factor, with *Guilford* declaring it to be "critical." 760 A.2d at 597. Indeed, the Blog Post employs the kind

of "'strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere in the newspaper,'" that would tip off a reasonable reader that its contents are not "hard news" but expressions of non-verifiable opinion. 760 A.2d at 583 (quoting *Ollman*, 242 U.S. App. D.C. at 317, 750 F.2d at 986).

Second is the broader context of the public debate over global warming. Just as the Court of Appeals recognized regarding labor disputes, statements made in the context of the debate over global warming "normally involve considerable differences of opinion and vehement adherence to one side or the other." 760 A.2d at 598. In fact, Mann's recent book fairly well chronicles the heated debate over global warming, often describing it as a "war" or a "battle."[48] In this context, forceful, highly opinionated language and hyperbole are expected, from advocates on both sides. Mann uses precisely this type of language when he describes CEI as dishonest, accuses it of being an "industry front group," and characterizes its work as "fraudulent." *See* CEI Defendants' Anti-SLAPP Motion at 23-26. In such a heated context, the Court of Appeals held, statements "which on their face resemble statements of fact, may, depending on the circumstances, be treated as statements of opinion not subject to an action for libel." 760 A.2d at 597. Were the law otherwise, it would sweep up too much speech on matters of public interest, stifling free and open debate. *Id.*

The statements at issue here are not distinguishable from those at issue in *Guilford* in terms of their vehemence or general implication of disapproval. The article in *Guilford* stated that the plaintiffs had "ignited" a "bitter labor-management conflict," "bolted from traditional national wage and benefits negotiations," engaged in "chaotic legal fisticuffs," and employed questionable legal tactics later blessed by a federal agency "with a zealous pro-management bias." *Id.* at 584-85. Here,

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[48] *See, e.g.*, Mann, *The Hockey Stick and the Climate Wars*, at 233.

Mann complains of statements that his research is "intellectually bogus" and relies on "data manipulation" to reach certain conclusions, that he is the "posterboy" of a "corrupt and disgraced" field, and that claims against him have been dismissed in investigations by a public university whose willingness to pursue "academic and scientific misconduct" the CEI Defendants (and many others) doubt. Opp. at 41; Compl., Exs. A, C. There is no relevant distinction, and Mann does not suggest one. *See also infra* § II.B.3 (discussing related hyperbole inquiry).

Third is the question of how those statements are situated in the work as a whole. Just as the column at issue in *Guilford* reported that a federal agency had approved the plaintiff's actions, the Blog Post reports that Mann was "declared innocent of any wrongdoing" by Penn State and was also cleared by the NSF's investigation. The Blog Post does not call for Mann to be fired—a call that would naturally follow an accusation of fraud—but for the university to commission " a fresh, truly independent investigation" of his research. As in *Guilford*, any reasonable reader would understand that Mann took certain actions, that the CEI Defendants were unenthusiastic about those actions, and that Penn State and the NSF found Mann guilty of no wrongdoing. *See* 760 A.2d at 599. That "is not the stuff of which successful libel suits are made." *Id.*

3. Taken in Context, the Challenged Statements Are Rhetorical Hyperbole

Mann ignores the fact that the challenged statements are, in the context of the climate-change debate, clearly rhetorical hyperbole, phrased in colorful language, and not actionable assertions of fact. Indeed, the entirety of Mann's response consists of citations to comments left on CEI's website by unknown third parties and to statements by Mann's supporters and allies

professing *shock* that anyone would compare Penn State's handling of Mann to its handling of Jerry Sandusky.[49] *See* Opp. at 52-55.

Had Mann addressed the case law—this section of his brief discusses none and does not even attempt to apply the law to the facts of the case—he would know these citations are irrelevant:

> [T]he inquiry into whether a statement should be viewed as one of fact or one of opinion must be made from the perspective of *an 'ordinary reader'* of the statement. It is also clear that the determination of whether a statement is opinion or rhetorical hyperbole as opposed to a factual representation *is a question of law for the court.*

Mr. Chow of N.Y. v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985) (citation omitted) (emphasis added). Yet faced with a "question of law," Mann ignores the law entirely, choosing instead to focus on a carefully curated selection of unrepresentative comments and articles that support his interpretation of the challenged statements. If the law actually held that the proper standard is a battle of citations, the CEI Defendants would proffer their own list, and the Court could determine which list is longer. But because the law does not hold that, the CEI Defendants will instead address the governing precedents.

Under those precedents, when the literal or factual nature of a statement is challenged, the Court should play it down the middle. Thus, "[i]n determining whether a statement is fact or opinion, a court is, of course, trying to assess the average reader's view of the statement rather than that of either the most skeptical or most credulous reader." *Ollman*, 242 U.S. App. D.C. at 310 n.16, 750 F.2d at 979 n.16. "The court should not . . . indulge far-fetched interpretations of the challenged publication. The statements at issue should not be interpreted by extremes, but should be construed as the average or common mind would naturally understand them." *Guilford*, 760 A.2d

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[49] This is despite the fact that Mann drops his defamation claim regarding that statement in the same section of his brief. *See* Opp. at 52; Compl. ¶26 (listing challenged statements).

at 594-95 (internal quotation marks omitted). Once again, context is key. *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) (explaining that hyperbole "cannot be determined without consideration of context"); *Letter Carriers*, 418 U.S. at 286-87; *Greenbelt*, 398 U.S. at 14.

Hyperbolic rhetoric is not actionable because it "cannot reasonably [be] interpreted as stating actual facts . . . ." *Weyrich*, 344 U.S. App. D.C. at 252, 235 F.3d at 624 (internal quotation marks omitted). For example, when Mann asserts on a radio broadcast that one of his critics is a "hired assassin," no reasonable listener takes that statement to mean that the critic has, in fact, been hired to murder Mann or anyone else. *See* CEI Defendants' Anti-SLAPP Motion at 55 (analyzing other instances of Mann's hyperbole).

The language at issue here is similarly hyperbolic and would be recognized as such by any ordinary reader, who would be attuned to the heated rhetoric typically employed in the public debate over global warming. For example, Mr. Lowry's statement that Mann's work is "intellectually bogus" would not, to a reasonable reader, mean or imply criminal fraud any more than the statement the term "intellectually bankrupt" implies insolvency. A word like "bogus" is precisely the kind of word used to express outrage and disagreement, as opposed to stating cold, hard facts. On that basis, an Ohio court rejected the claim that use of the word "bogus" to describe legal claims implied fraud, finding instead that the word "suggests opinion." *Cooke v. United Dairy Farmers, Inc.*, No. 04AP-817, 2005 WL 736246, at *6 (Ohio Ct. App. Mar. 31, 2005).

And on that same basis, many courts have held that even use of the word "fraud" or "fraudulent" was, in context, only hyperbole, not an assertion of fact. *E.g., Coghlan v. Beck*, --- N.E.2d ---, 2013 WL 240421, at *11 (Ill. Ct. App. Jan. 22, 2013) (defendants' description of plaintiffs' enterprise as a "fraud machine" not actionable "in the overall context" of publication criticizing plaintiff); *Art of Living Found. v. Does*, No. 10-CV-05022, 2011 WL 2441898, at *7-8 (N.D. Cal. 2011) (defendants' statement that plaintiffs engaged in "fraud" and "obtained money from

participants on false, deceitful declarations" not actionable in the context of "obviously critical blogs . . . with heated discussion and criticism" of defendants and in the "specific context" of a heated Internet debate); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1104 (N.D. Cal. 1999) (defendant's statement that the plaintiff was a "self-serving fraud," a "criminal" and acted "illegally" not actionable due to the "controversial subject matter of the debate" and use of language "too loose and hyperbolic to be susceptible of being proved true or false"); *Beattie v. Fleet Nat. Bank*, 746 A.2d 717, 727 (R.I. 2000) (defendant's statement that plaintiff's appraisal was so misleading "as to be considered fraudulent" not actionable where context of deal indicated it "amounted to a hyperbolic . . . opinion"); *Phantom Touring, Inc. v. Affiliated Publ'n*, 953 F.2d 724, 729 (1st Cir. 1992) (newspaper's description of a theatrical production as "a rip-off, a fraud, a scandal, a snake-oil job" not actionable due to use of "hyperbolic" language admitting "numerous interpretations" that could not be verified); *600 W. 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d 930, 937 (N.Y. 1992) (defendant's statement that plaintiff's permit application was "as fraudulent as you can get and it smells of bribery and corruption" not actionable in the context of a heated debate among ordinary citizens who could not be supposed to be in possession of undisclosed facts); *Henry v. Halliburton*, 690 S.W.2d 775, 778 (Mo. 1985) (defendant's statement that insurance agent is "'a fraud and a twister'" did not suggest that agent committed specific crime where it was clear from the context that the defendant was expressing only his opinion and not alleging any "specific crime"); *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170, 172 (D.N.J. 1982) (defendants' description of plaintiffs' book as "the # 1 fraud ever perpetrated upon the gambling reader" not actionable where it was clear from the context that this was only the reviewer's opinion and not a suggestion that any specific "acts occurred which would be criminally punishable").

The other statements of which Mann complains are of a similar vein: strong but "imaginative expression," *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 32 (D.D.C. 1995), that

is meant to signal disagreement and disdain, not any accusation of criminal fraud. And it is precisely in that kind of context that courts have routinely held words bearing connotations of both fraud and disdain to be "mere hyperbole rather than falsifiable assertions of discreditable fact," when taken in that kind of context. *Dilworth*, 75 F.3d at 310 ("'scab,' 'traitor,' 'amoral,' 'scam,' 'fake,' 'phony,' 'a snake-oil job,' 'he's dealing with half a deck,' and 'lazy, stupid, crap-shooting, chicken-stealing idiot.'"). Mann offers no reason why the result here should be any different.

4. Mann's Assertion that the CEI Defendants' Statements Are Verifiable Ignores Binding Case Law

Mann asks the Court to pass judgment on the veracity of the exact kind of "general characterizations" that the Court of Appeals has held are not "concrete enough to reveal 'objectively verifiable' falsehoods" that could possibly be the subject of a defamation claim. *Rosen v. AIPAC, Inc.*, 41 A.3d 1250, 1259 (D.C. 2012) (footnote omitted); *see* Opp. at 43-46. In *Rosen*, the Court of Appeals held that an employer's statement to the *New York Times* that an employee had been dismissed for actions regarding the use of classified information that differed from "the standards that AIPAC expects and requires of its employees" was not actionable because the employer lacked any specific written standards. 41 A.2d at 1260. While it expected employees to adhere to such standards as obeying the law and following counsel's advice, that "was too subjective, too amorphous, too susceptible of multiple interpretations . . . to make any of them susceptible to proof of particular, articulable content." *Id.* Because "standards" was "a word of aggregation" at a "high[] level of generality" and "could have meant many things, none self-evident," any statement that the plaintiff had not followed those standards could not be "provably false" and therefore was not actionable. *Id.* at 1260-61.

Rosen, in turn, relied on and approved of two cases demarking the limits of verifiability. *Id.* at 1258-59. *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 856 (8th Cir. 2000), concerned press statements made by an employer regarding two insurance agents it had fired for lobbying. The

company had stated that the agents "engaged in 'disloyal and disruptive activity,'" had not understood the "'value of loyalty and keeping promises,'" had acted "'against the best interests of the insurance buying public,'" "'were in direct violation of their agreements,'" and had engaged in "'conduct unacceptable by any business standard.'" *Id.* at 853. As the Court of Appeals noted with approval, the *McClure* court concluded that these "remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of 'falsity' is possible in such circumstances." *Id.* (internal quotation marks omitted). Similarly, in *Gibson v. Boy Scouts of Am.*, 360 F. Supp. 2d 776, 781 (E.D. Va. 2005), the Boy Scouts published a statement that an individual was "unfit to be a Scoutmaster and in Scouts." As the Court of Appeals again noted with approval, the *Gibson* court held that the words were too general to "contain a provably false factual connotation" and so were "merely the expression of the speaker's opinion." *Id.*; *see Rosen*, 41 A.2d at 1259.

So too here. This is apparent from a review of the statements. CEI's statements that Mann "has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet" and "had been engaging in data manipulation" are not, as Mann claims, "plainly factual and verifiable."[50] *See* Opp. at 43. These are general terms subject to multiple meanings, some technical, some critical, many benign. *See* CEI Defendants' Anti-SLAPP Motion, at 41-3. They state nothing that is provably false; in other words, they state an opinion.

Mann's challenge to Lowry's statement that his work is "intellectually bogus" also fails. This statement—which CEI never made, in any case, *see infra* § II.C—is plainly the kind of "general

[50] Although Mann mentions this statement, Opp. at 43, he has abandoned any claim regarding it and no longer considers it to be among those statements he challenges in this litigation, Opp. at 41.

characterization[]" that the Court of Appeals held is not "concrete enough to reveal 'objectively verifiable' falsehoods" that could support a defamation claim. *Rosen*, 41 A.3d at 1259. So unspecific, it would not be viewed by an ordinary reader as making an assertion of fact.

The same is true of the statement that "Mann has become the posterboy of the corrupt and disgraced climate science echo chamber." To begin with, it is not clear to what verifiable facts this statement could refer, because it is a characterization of a field of research and its political supporters (the "corrupt and disgraced *climate science echo chamber*") and of how others view Mann within that field ("the *posterboy*"). Mann asserts that this "statement explicitly accuses Dr. Mann of corruption," as if using the words "Mann" and "corrupt" in the same sentence was itself unlawful, but the statement neither sets forth nor implies any particular facts. Opp. at 43.

Rinaldi v Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1307-08 (N.Y. 1977), actually cuts strongly against Mann, offering a sharp contrast to his hazy claims. *See* Opp. at 43-44. It upheld dismissal of a plaintiff judge's libel action regarding a book that had deemed him "probably corrupt," but initially found the statement actionable because it was "not used merely in a 'loose, figurative sense'" to demonstrate general disagreement. 366 N.E. at 1307. Instead, it was a conclusion based on the book's detailed accounts of "illustrative cases" before the judge—accounts that the judge, in his complaint, alleged to be materially false. *See id.* at 1303. For that reason, "[t]he ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions." *Id.* at 1307.[51] So while the plaintiff in *Rinaldi* pointed to factual statements so concrete that no reader could take the

[51] The court nonetheless affirmed dismissal of that claim because the plaintiff was unable to "set forth sufficient evidentiary facts to generate a triable issue of fact as to the falsity and actual maliciousness of the accusations of criminal conduct." 366 N.E.2d at 1307.

charge of corruption merely as an expression of opinion, Mann points only to a word, "corrupt," standing alone and unsupported by any detail—something that any reader would recognize as an epithet, not a factual conclusion.

Finally, Mann never explains how a question directed as criticism at Penn State's investigation of Mann actually states any fact regarding Mann. He merely asserts as much, Opp. at 45, missing the whole point of the question as challenging the university's motivations and diligence. But his interpretation is implausible: why, after all, would one who is asserting that Mann committed fraud call for "a fresh, truly independent investigation" in the very next sentence, rather than simply demand that he be fired? Instead, a reasonable reader would see that the surrounding text is critical of the university, not Mann, and questions Penn State's motives in both the Sandusky and Mann affairs. That reader would take it as restating the central premise of the Blog Post: that Penn State puts its own interests ahead of ferreting out inconvenient truths. Phrased as a question, it leads the reader to that conclusion.[52]

But even assuming Mann's tortured interpretation, "academic and scientific misconduct" is no more concrete than the statements held not actionable in *Rosen* (employee violated his employer's "standards"), *McClure* (employees acted "against the best interests of the insurance buying public" and had engaged in "conduct unacceptable by any business standard"), and *Gibson* (plaintiff was "unfit to be a Scoutmaster and in the Scouts"). Like those statements, it is simply "too subjective,

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[52] Mann's citation, Opp. at 51, of *Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 653-55 (D.C. Cir. 1966), regarding rhetorical questions is inapposite, because that case concerned defamatory meaning—i.e., whether a statement casts its subject into disrepute—and not opinion. *See id.* at 654 (considering whether the statements at issue "tend[ed] to bring the plaintiff into contempt, ridicule and disgrace in the community in which he operated his business").

too amorphous, too susceptible of multiple interpretations," 41 A.3d at 1260, to suggest any verifiable fact. Instead, what it suggests is opinion.

5. Mann Misstates the Law on the "Supportable Interpretation" Standard and "Fair Comment" Privilege

Mann's contention that only statements that are "evaluations of a literary work" may be protected as a "supportable interpretation" of facts, *see* Opp. at 49, has been rejected by, among others, the Court of Appeals. *Guildford*, 760 A.2d at 597 (discussing the application of the "supportable interpretation" standard in case challenging statements in an op-ed column regarding a labor dispute); *id.* at 601 (applying the standard because the article left the reader "free to draw his or her own conclusions regarding whether the plaintiffs acted wrongfully"); *see also Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1067-68 (9th Cir. 1998) ("Prime Time Live" report on alleged misconduct by judge); *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995) (book and television docudrama that impugned attorney's competence and performance in murder trial); *Washington v. Smith*, 317 U.S. App. D.C. 79, 81, 80 F.3d 555, 557 (D.C. Cir 1996) (magazine article impugning competence and performance of basketball coach); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. Ct. App. 1996) (statement by talk show host impugning competence and performance of sports orthopedist); *Fasi v. Gannett Co., Inc.*, 930 F. Supp. 1403, 1409-10 (D. Haw. 1995) (newspaper editorial that described mayor's actions as "legalized blackmail"). In fact, the CEI Defendants are aware of no case that has held that the "supportable interpretation" standard is limited to book reviews.

And Mann's assertion that *Milkovich*, and not *Moldea II*, "governs here" is nonsensical, because the two cases are not at all inconsistent. *See Moldea II*, 306 U.S. App. D.C. at 5-6, 22 F.3d at 314-15 (discussing *Milkovich*); *Guilford*, 760 A.2d at 597 (discussing *Milkovich* and *Moldea II*). *Moldea II* follows *Milkovich's* holding that "statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false," 306 U.S. App. D.C. at 4, 22 F.3d at 313,

and also recognizes that "a supportable interpretation . . . does not present a verifiable issue of fact that can be actionable in defamation," *id.*

As the Anti-SLAPP Motion describes in detail, the Blog Post links to a wealth of factual materials that provide a basis for its commentary, and each of the challenged statements, in turn, is commentary on those disclosed facts and other facts readily available to the public. *See* CEI Defendants' Anti-SLAPP Motion at 48-51. Rather than address this point, Mann asserts that all of the challenged statements are allegations of fraud and are therefore unsupported, because none of the linked or publicly available materials "sets forth a scintilla of evidence" that would support such an opinion. Opp. at 49. But he does not dispute, nor could he, that the Blog Post prominently links to and describes both the Penn State and NSF reports, stating that the former "declared him innocent of any wrongdoing" and that the latter did so as well, and links to other materials that are critical of Mann's research methodology.[53] *See* Ex. 6 and attachments. This is indistinguishable from *Guilford*, in which the challenged column was harshly critical of the plaintiffs' stance toward organized labor and described several of plaintiffs' run-ins with labor unions in critical language but also accurately "disclose[d] that the ICC ruled in Guilford's favor on some issues and that Guilford had engaged in contested litigation with the union and with Amtrak." 760 A.2d at 601. In this instance, as in *Guilford*, "the reader is therefore free to draw his or her own conclusions regarding whether the plaintiffs acted wrongfully." *Id.* And while that reader might perceive that the CEI Defendants are not sympathetic to Mann, "that surely does not render the column defamatory." *Id.*

[53] Mann's statement that some of the "disclosed facts . . . are authored by Mr. Simberg himself" is plainly false. *See* Opp. at 49. A person cannot "author[]" a fact, only report it. The two articles by Simberg linked in the Blog Post report facts from the scientific literature, news reports, the Climategate emails, and other sources. *See* Ex. 6, attachs. B, C. Notably, Mann makes no attempt to challenge the facts reported in those articles. *See* Opp. at 49-50.

Accordingly, Mann's burden is to show that each challenged "statement is 'so obviously false' that 'no reasonable person could find that [its] characterizations were supportable interpretations' of the underlying facts." *Washington*, 317 U.S. App. D.C. at 81, 80 F.3d at 557 (quoting *Moldea II*, 306 U.S. App. D.C. at 8, 22 F.3d at 317). Mann makes no attempt to do so. *See* Opp. at 48-50.

Mann's argument regarding application of the District of Columbia's "fair comment" privilege is incoherent. Mann argues that, even if the challenged statements were expressions of opinion, they would still not be protected by the privilege because "the law protects only opinions based on true facts, accurately disclosed." Opp. at 50 (internal quotation marks omitted). But after stating that, Mann points to no misstatement of facts or failure to disclose that would defeat application of the privilege, instead simply concluding that "Defendants' statements do not offer an opinion regarding Dr. Mann . . . ." Opp. at 51.

Indeed, the leading case cited by Mann supports application of the privilege. *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. 1965), makes clear that, "[s]o long as the comment is the speaker's actual opinion, based on fact, about a matter of public interest, the words are protected . . . ." On that basis, it dismissed claims regarding the statement that a gallery's show was "badly hung," recognizing that "opinions could differ on such matters." *Id.* In dismissing the lawsuit, it also rejected the argument "for opinion to be protected by the fair comment doctrine, the facts upon which it is based must be stated or referred to so that the reader might draw his own conclusions." *Id.* at 338. It is enough that "the facts are available to the public . . . ." *Id.* In this instance, the challenged statements were highly critical of Mann's research, a factual predicate that is

clearly available to the public.[54] But rather than leave readers to find Mann's research on their own, the Blog Post links to Mann's webpage and to a wealth of commentary on Mann's research and conduct. *See* Ex. 6 and attachments. Accordingly, the fair comment privilege applies here, providing an additional ground for dismissal of Mann's claims.

6. Mann Abandons His Emotional Distress Claim

Mann fails to address or even mention *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), which spells out the First Amendment's limitation of "a State's authority to protect its citizens from the intentional infliction of emotional distress." As described in the CEI Defendants' Anti-SLAPP Motion at 57-58, the plaintiff in that case, a well-known minister, claimed that the defendant, a pornographic magazine, had intentionally subjected him to emotional distress by publishing an article purporting to be an interview with him "in which he states that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 48. Because "that speech could not reasonably have been interpreted as stating actual facts about the public figure involved," the Supreme Court held that the First Amendment precluded liability, even for "speech that is patently offensive and is intended to inflict emotional injury." *Id.* at 50.

Hustler compels the same result here. Mann identifies no "actual fact" that can be discerned from the CEI Defendant's statement that "Mann could be said to be the Jerry Sandusky of climate science." *See* Opp. at 57-58. Nor could he: no "actual fact" regarding Mann is apparent, particularly given that the Blog Post expressly stated that Mann was not engaged in "molesting children." *See*

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[54] *Michael E. Mann: Research*, Penn State University Department of Meteorology, http://www.meteo.psu.edu/holocene/public_html/Mann/research/research.php.

Compl. ¶26. The CEI Defendants' comparison is not actionable because it is a statement of pure opinion and hyperbole, not a false or even verifiable assertion of fact.

In that light, the cases cited by Mann are irrelevant. Two do not involve expressive conduct at all and therefore do not implicate the protections of the First Amendment. *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007) (an arrest); *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 352-53 (1st Cir. 1988) (stalking and other harassment by photographers on a cruise ship). One predates *Hustler* by 18 years and raises no First Amendment issue. *Moore v. Greene*, 431 F.2d 584, 591 (9th Cir. 1970). And the last involved statements that plainly did state "actual facts." *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 212 (Ill. 1992). Specifically, the defendants, a radio station and its hosts, had broadcast that the plaintiff's wife, afflicted with neurofibromatosis, "was so hideous that no one would marry her except under duress" and that the plaintiff's "wife and five-year-old child," also afflicted with neurofibromatosis, "had deformed heads." *Id.* Nonetheless, the court's opinion does not address any First Amendment defense to the plaintiff's emotional distress claim.

Mann does not even attempt to establish that his emotional distress claim can survive the CEI Defendants' First Amendment defense. It must therefore be dismissed.

C. Mann Makes No Real Attempt to Distinguish Case Law Holding that a Hyperlink Is Not Republication

Mann's argument that CEI can be liable for *National Review* editor Rich Lowry's characterization of Mann's research as "intellectually bogus" fails to seriously address the consistent line of cases holding that a party cannot be liable for hyperlinking to allegedly defamatory statements

so long as it does not itself publish those statements.[55] *See* CEI Defendants' Anti-SLAPP Motion at 56-57.

To begin with, Mann provides no support for his contention that CEI's comment that Lowry "expertly summed up the matter" converted its hyperlink into republication. Opp. at 55-56. In *U.S. ex rel. Klein v. Omeros Corp.*, No. C09-1342-JCC, 2012 WL 4874031, at *10 (W.D. Wash. Oct. 15, 2012), the court recognized as black-letter law that, "[u]nder traditional principles of republication, a mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material." *Id.* (quoting *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012)). The key to a traditional republication, it explained, "is that it *presents the material*, *in its entirety*, before a new audience. A mere reference to a previously published article does not do that. While it may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory* contents of the article to that audience." *Id.* at *11 (quoting *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 916 (W.D. Ky. 2009)) (emphasis in original). This case is indistinguishable from *Klein*, in that CEI did not restate Lowry's allegedly defamatory statement. *See* Compl., Ex. D.

Second, Mann simply asserts, again without any support or even any reasoning, that cases concerning the effect of republication on the running of limitations periods are not relevant here. But the threshold inquiry in each instance is *whether a new publication occurred at all*, the same matter at issue here.[56] This is because, "under the single publication rule, the statement is considered

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[55] Although he uses the plural term "defamatory statements," Opp. at 55, Mann elsewhere clarifies that he claims only one statement to be defamatory: "intellectually bogus," Opp. at 41.

[56] Mann's Complaint alleges that CEI's hyperlink "adopted *and republished* Mr. Lowry's defamatory statement." Compl. ¶84 (emphasis added).

published and the statute of limitations runs as soon as the communication enters the stream of commerce." *Salyer*, 701 F. Supp. 2d at 915 (internal quotation marks omitted). Republication, however, is an exception to that rule: "Republishing material in a new edition, editing and republishing it, or placing it in a new form resets the statute of limitations." *Id.* at 914 (internal quotation marks omitted). Regardless, *Klein,* which did not involve the running of a limitations period, relied on the analysis of cases that do in support of its holding that a hyperlink, without the restatement of the link's allegedly defamatory contents, is not actionable. 2012 WL 4874031, at *11.

Third and finally, Mann presents no support for his argument that to "endorse" allegedly defamatory speech, without ever repeating it, is itself defamation. It is not, because an endorsement lacks the central element of a defamation claim: publication of "a false and defamatory statement concerning the plaintiff." *LeFande v. District of Columbia*, 864 F. Supp. 2d 44, 51 (D.D.C. 2012); *see also* Restatement (Second) of Torts § 558(a) (1977).

Lowry's characterization of Mann's research as "intellectually bogus" is an expression of pure opinion entitled to the First Amendment's strongest protections. But it is also a statement that CEI never made or republished and for which it therefore could not be liable.

D. Mann's Collateral Estoppel Argument Is A Red Herring Because Neither the EPA Nor D.C. Circuit Resolved Any Matter at Issue in This Litigation

Mann attempts to make an end-run around one of the key elements of libel: the question of truth or falsity of the challenged statements. He purports to "believe[] that Defendants will concede that their statements were false (especially in light of the fact that they have not argued to the contrary in their briefs)." Opp. at 41 n.78. But if not, he claims, "CEI will be collaterally estopped from asserting that its statements are true based upon its participation in the EPA proceedings and subsequent appeal to the District of Columbia Circuit." *Id.* Both of these contentions are false.

The CEI Defendants have never conceded that the challenged statements are false and at no time—neither now nor at the moment of publication—have believed them to be. Mann's assertion

that the CEI Defendants "have not argued to the contrary" in their prior briefs is irrelevant. *See* Opp. at 41 n.78. It is well established that a motion to dismiss "tests the legal sufficiency of a complaint." *Winston v. Clough*, 712 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting *Smith-Thompson v. District of Columbia,* 657 F. Supp. 2d 123, 129 (D.D.C. 2009). The CEI Defendants' briefs thus far have focused on the *legal issues* currently before this Court, and not (as Mann would apparently require) the *factual issues* that will be litigated if his claims are not dismissed at this stage.

Mann's argument, confined to a footnote, Opp. at 41 n.78, that CEI is collaterally estopped from asserting the truth of the challenged statements is equally mistaken. That footnote references the EPA litigation and sets forth the four-prong test for collateral estoppel. Without actually applying that test to the facts of this case, Mann simply asserts that "all of the necessary elements for collateral estoppel are present." *Id.*

As an initial matter, the values of the First Amendment make estoppel especially inappropriate here. The heavy burden that a libel plaintiff must bear—particularly in cases (like this one) involving a public figure and issues of public concern—provides the "breathing space" that is required for freedom of expression to survive. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). For that reason, it is "a constitutional requirement that the plaintiff bear the burden of showing falsity," even though that rule may result in the dismissal of some meritorious claims. *Phila. Newspapers, Inc. v. Hepps*, 475 US 767, 776 (1986). Mann seeks not only to stifle public debate through this lawsuit, but to do so while avoiding the traditional safeguards of free debate that apply to every other plaintiff in every other lawsuit implicating First Amendment freedoms.

On the merits, Mann's estoppel argument fails in at least three ways. Estoppel has four "foundational requirements": "(1) the issue [was] actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not

merely dictum." *Modiri v. 1342 Rest. Group, Inc.*, 904 A.2d 391, 395-96 (D.C. 2006) (quoting *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995)).

First, the truth or falsity of the CEI Defendants' statements was never "actually litigated," nor was any claim regarding Mann's research or conduct. As discussed in *supra* § I.D, CEI filed a petition to reconsider of EPA's Endangerment Finding in 2010, raising issues relating to the Climategate scandal, and the EPA denied it and other such petitions on the basis that the research implicated by Climategate was irrelevant to its Endangerment Finding because it had relied on so many other studies. 75 Fed. Reg. 49,556 (Aug. 13, 2010). The D.C. Circuit upheld that reasoning in *Coalition for Responsible Regulation v. EPA*, 401 U.S. App. D.C. 306, 684 F.3d 102 (D.C. Cir. 2012).

Mann argues that the D.C. Circuit's decision forecloses any consideration of the truth or falsity of statements made nearly two years after EPA's petition denial, because EPA's denial specifically disproves any "data manipulation" on his part. *See* Opp. at 41 n.78. But even if a general claim like "data manipulation" was the kind of thing that could be proven true or false, *see supra* § II.B.4, those proceedings did not "actually litigate" the issue or determine it "on the merits." *Compare Modiri*, 904 A.2d at 395-96; *Davis*, 663 A.2d at 501. EPA's notice mentions Mann only once, in a footnote citation to a 2009 paper. 75 Fed. Reg. at 49,571/3, P. Ex. 11. EPA does not claim that it conducted any independent investigation of Climategate, but only that it "has reviewed all of the CRU emails." *Id.* at 49,581/1. EPA's notice does not claim to have made any decision regarding Mann or his research. Instead, EPA determined that Climategate implicated only a small portion of the research on which its Endangerment Finding relied, such that it had no reason to reconsider the Endangerment Finding. *Id.* at 49,571/3.

Because the D.C. Circuit upheld EPA's reasoning, its decision has nothing to say about Mann's conduct or research. CEI and other petitioners challenged the EPA's denial of their petitions for reconsideration as "arbitrary, capricious, or otherwise contrary to law." *Competitive*

Enter. Inst. v. EPA, Nonbinding Statement of Issues (Nov. 17, 2010), Ex. C. The D.C. Circuit disagreed. *See Coalition for Responsible Regulation v. EPA*, 401 U.S. App. D.C. 306, 684 F.3d 102 (D.C. Cir. 2012). It reasoned that the agency had not acted in an arbitrary and capricious fashion when it had relied on the IPCC assessment, which in turn "relied on around 18,000 studies that were peer-reviewed." *Id.* at 329, 684 F.3d at 125. In the Court's view, as in EPA's, Mann's research and his conduct were irrelevant to the question before it: whether EPA had acted irrationally in denying the petitions for reconsideration. Accordingly, the D.C. Circuit's decision does not mention Mann, the "hockey stick" diagram, or any other subject that would bear on the truth or falsity of the CEI Defendants' statements.

In short, the parties did not actually litigate the question of "data manipulation" by Mann, and the court did not decide the issue. Collateral estoppel cannot apply where "it is not clear" that the issue a party seeks to preclude "was actually determined." *Bobby v. Bies*, 556 U.S. 825, 834 (2009). Here, it is clear that the issue was not determined at all. Moreover, the arbitrary and capricious standard applies in that case is nothing like the burden a libel plaintiff bears, as a constitutional requirement, to *prove* falsity. Even if the D.C. Circuit had ruled that EPA did not act irrationally by relying on Mann's research, that ruling would not have any estoppel effect here. *Patton v. Klein*, 746 A.2d 866, 871 (D.C. 1999) ("Collateral estoppel does not apply if the issues are not identical, even if the issues are similar."); *Hutchinson v. D.C. Office of Emp. Appeals*, 710 A.2d 227, 236 (D.C. 1998) (no estoppel "when the issues in the prior and current litigation are not identical").

Second, because the truth or falsity of the CEI Defendants' statements was never litigated, collateral estoppel fails because that question was not "determined by a valid, final judgment on the merits." And, third, because that determination was never made, it was certainly not essential to any judgment. Indeed, the EPA's and D.C. Circuit's precise reasoning was that determination of any such issue was completely irrelevant.

III. Mann's Claims Fail Under Rule 12(b)(6) Because Mann Did Not Plausibly Allege that the CEI Defendants Acted with Actual Malice

Mann's claims must be dismissed because he fails to plausibly allege facts that would establish that the CEI Defendants acted with actual malice. *See* Rule 12(b)(6) Motion at 9-15. Rather than confront this argument, Mann parrots back the legal standards and asserts that he satisfies them. This does not render plausible any claim that the CEI Defendants "must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of [their] publication." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (internal quotation marks and citations omitted). At the same time, Mann has abandoned any attempt to show actual malice in support of his emotional distress claim.

A. Mann's Libel Claims Should Be Dismissed Because He Fails To Plausibly Allege Actual Malice

The CEI Defendants' Rule 12(b)(6) Motion listed each and every factual allegation contained in Mann's Complaint that might be thought to support his legal allegation that the CEI Defendants acted with actual malice. Rule 12(b)(6) Motion at 3-4. It then proceeded to address each allegation. *Id.* at 10-14. As it showed, the bulk of those allegations are plainly conclusory and therefore must be discarded under the first step of *Iqbal* and *Twombly*. *Id.* at 11. The two that remained, while pleading facts, were not "enough to raise a right to relief above the speculative level" under *Iqbal* and *Twombly's* second step. *Parisi v. Sinclair*, 845 F. Supp. 2d 215, 217-18 (D.D.C. 2012).

Mann now abandons all of his allegations of actual malice but one: that the CEI Defendants read certain investigations that "found that there was no evidence of any fraud, data falsification,

statistical manipulation, or misconduct." *See* Opp. at 59-60 (citing Compl. ¶24).[57] Mann then concludes that the CEI Defendants must have acted with actual malice, because there is "simply no way anyone could read the litany of inquiries . . . without coming to the conclusion that Dr. Mann was not guilty of fraud, misconduct, or data manipulation." Opp. at 60.

That is wrong, in four respects. First, this is nothing more than a conclusory allegation that a statement was made "with knowledge that it was false." In every single case where actual malice is at issue, the plaintiff could simply state that some book or website contradicts the challenged statement and the defendant was surely aware of that book or website. Such an approach is incompatible with the Court of Appeal's admonition that, "in the First Amendment area, summary procedures are essential." *Klayman v. Segal*, 783 A.2d 607, 613 n.5 (D.C. 2001). It also falls far short of *Iqbal's* requirement that the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Second, none of the challenged statements accuse Mann of criminal misconduct, data falsification, or anything of the sort, but of conducting research that is biased or has been oversold. None of the reports cited in the Complaint addressed these issues, *see supra* § I.B, and so they are irrelevant as to whether the CEI Defendants acted with actual malice. The CEI Defendants, of course, had ample grounds to believe that Mann's science was shoddy, and there can therefore be no question that they acted without actual malice. *See, e.g., supra* § I.A (discussing concerns raised regarding Mann's research and statistical methodology); CEI Defendants' Anti-SLAPP Motion at 9-

[57] Because Mann defends only this one allegation as supporting actual malice, all of his claims necessarily fail if the Court finds that allegation to be insufficient.

12 (discussing criticisms of Mann's research); Blakeley B. McShane and Abraham J. Wyner, Ex. B (peer-reviewed article calling Mann's research into question).

Third, even accepting Mann's implausible interpretation of the challenged statements for the sake of argument, the supposedly exonerating reports that he cites do not contradict them. Mann himself acknowledges that the investigations only "found that there was no evidence" of fraud by Mann, not that he was determined to be innocent of it. Compl. ¶24; Opp. at 59. Accordingly, the reports do not show that the CEI Defendants' statements were made with the knowledge that they were false.

Fourth, Mann's allegation regarding the reports speaks, if at all, to falsity, not actual malice. Recognizing that distinction, the Supreme Court held that a plaintiff had failed to prove actual malice based on knowledge of falsity even where newspaper had a "reasonable doubt" as to falsity. *New York Times*, 367 U.S. at 286-87. Even if Mann could show that the challenged statements are false—which he cannot—he cannot show and does not plausibly allege that "the defendant[s] in fact entertained serious doubts as to the truth" of their publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Finally, Mann quibbles over the import of a single Sixth Circuit decision, *Cobb v. Time*, 278 F.3d 629 (6th Cir. 2002). *See* Opp. at 60 (claiming that Defendants "misleadingly" cite *Cobb*). *Cobb* speaks for itself. The Sixth Circuit reversed a finding of actual malice because the defendant magazine attempted to corroborate a story that ultimately turned out to be false. *See* 278 F.3d at 640. The court noted that the reporters had obtained information "from at least one independent source," and found that the record did not "support the conclusion that [the defendant] intentionally avoided learning the truth . . . ." *Id.* Here, the CEI Defendants went above and beyond what the law requires by performing an investigation, *see Harte-Hanks Commc'ns,* 491 U.S. at 688 (explaining that "failure to investigate" is itself "not sufficient to establish reckless disregard"), and they found

materials that "bristled with ambiguities," *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971), regarding Mann's research. *See* Rule 12(b)(6) Motion at 13-14. That, in turn, precludes as a matter of law any finding of actual malice. *Pape*, 401 U.S. at 290.

Because Mann "pleads facts that are merely consistent with a defendant's liability," his allegations "do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 678-79 (internal quotation marks omitted). His libel claims should be dismissed.

B. Mann Abandons His Emotional Distress Claim

The one allegation regarding actual malice that Mann continues to defend, Opp. at 59-60, provides no support to Mann's emotional distress claim, which must therefore be dismissed.

Mann's burden at this stage is to show that CEI made the challenged statement—"Mann could be said to be the Jerry Sandusky of climate science"—with actual malice. This is a requirement of the Supreme Court's decision in *Hustler*, which held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." 485 U.S. at 56.

Yet the one allegation regarding actual malice that Mann has not abandoned provides no indication of the truth or falsity of this comparison. That allegation states, in its entirety:

> All of the above investigations found that there was no evidence of any fraud, data falsification, statistical manipulation, or misconduct of any kind by Dr. Mann. All of the above reports and publications were widely available and commented upon in the national and international media. All were read by the Defendants. To the extent there was ever any question regarding the propriety of Dr. Mann's research, it was laid to rest as a result of these investigations.

Compl. ¶24. This, of course, says nothing about Jerry Sandusky or whether and how a comparison of Mann and Sandusky might be true or false, let alone whether the CEI Defendants knew such a comparison to be false. Because Mann has abandoned any attempt to show that the CEI

Defendants acted with actual malice when they published this statement, his emotional distress claim must be dismissed.

IV. Mann Is Not Entitled to Attorney's Fees and Costs

If the D.C. Anti-SLAPP Act awarded fees and costs for chutzpah, Mann would have a strong case. He began this case by filing a Complaint containing outright falsehoods regarding his status as a Nobel Laureate and seeking legal sanctions for the same kind of heated rhetoric in which he often traffics. While many suspected that this lawsuit was intended principally to harass and silence his critics, Mann stepped forward to confirm that this was so, telling the *Atlantic* that this case "is about saying 'enough is enough'" and harassing those who "want to attack this iconic graph." He posted a message for his Facebook followers describing this lawsuit as part of a "larger battle" against "groups seeking to discredit the case for concern over climate change," and expressing his hope that such groups will be "silenced." Ex. 9; Ex. 10. And after he saw that the CEI Defendants were monitoring his public Facebook page, in December he began systematically deleting public posts and comments relating to the subject matter of this litigation, including a comment published there for months stating that those who disagree with the theory of man-made global warming "are comparable to Jerry Sandusky." Ex. D. And now, in the same filing in which he abandons his emotional distress claim, *see supra* §§ II.B.6, III.B, and silently abandons his challenge to several statements mentioned in his Complaint, *see supra* § II, he seeks attorneys' fees and costs from the CEI Defendants, claiming that their attempt to take advantage of the D.C. Anti-SLAPP Act, *in a lawsuit that he concedes is subject to the Act*, is somehow illegitimate. Opp. at 61-62.

Unfortunately for Mann, chutzpah is not the governing standard. Mann's burden is to show that the CEI Defendants' motion "is frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504(b). It is plainly not, given that Mann concedes that the CEI Defendants have made a *prima facie* showing that the Act applies, Opp. at 37, and given that, in response to the CEI

Defendants' motion, Mann narrowed his claims. Mann's principal argument to the contrary is that he is not only right on the merits, but that the merit of his claims is "abundantly clear." Opp. at 61. The CEI Defendants respectfully disagree and believe that the law and facts are on their side on that point. *See supra* §§ I-III. As for Mann's assertion that the CEI Defendants "deliberately misled the Court, mischaracterized the facts underlying the lawsuits, and . . . simply ignored highly material facts," it is offensive and incorrect, but it is also of a piece with the remainder of his brief, which is long on rhetoric and short on legal argument and detail. The CEI Defendants are honestly puzzled by Mann's strange fixation on the EPA's decision to deny reconsideration of its Endangerment Finding, given that the agency did not purport to pass on any issue now raised in this litigation and given that, faced with challenges to Mann's research, the agency chose to throw it under the bus rather than to defend it. *See supra* §§ I.D, II.D.

Finally, there is nothing "cynical," Opp. at 62, about the CEI Defendants' attempt to defend themselves against Mann's attempt to silence his critics through abuse of legal process. The debate over global warming is vigorous, it accommodates many disparate views, and it is vitally important to the choices that our Nation will make in the years ahead. This lawsuit seeks to stifle that debate. The CEI Defendants seek to protect their own free speech rights and those of others—whether or not they agree or disagree with CEI—to speak freely on this issue without fear of being sued. Their belief that this kind of uninhibited debate is necessary to our system of self-government is not cynical but heartfelt. *Cf.* U.S. Const., amend. I.

CONCLUSION

For the reasons stated here, in the CEI Defendants' Anti-SLAPP Motion, and in the CEI Defendants' Rule 12(b)(6) Motion, the CEI Defendants respectfully request that the Court dismiss, with prejudice, all of Mann's claims against them.

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Respectfully submitted,

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