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 June 19, 2013

DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S RESPONSE TO PLAINTIFF'S NOTICE OF RECENTLY DECIDED AUTHORITY

Contrary to the claims of Plaintiff Michael Mann, *Payne v. District of Columbia*, Case No. 2012 CA 6163B (May 28, 2013) ("Payne Order"), provides no support for his opposition to the CEI Defendants' Motion To Dismiss Pursuant to the D.C. Anti-SLAPP Act ("Anti-SLAPP Motion").

First, as shown in the Anti-SLAPP Motion, Mann's claims all fail as a matter of law because the statements he challenges are expressions of pure opinion protected by the First Amendment. Anti-SLAPP Motion at 37-52. There is no dispute that claims that fail as a matter of law must be dismissed under the Act, which Mann concedes calls for the application of "the summary judgment standard." Plaintiff's Opposition To CEI Defendants' Motion To Dismiss ("Opp.") at 37. Accordingly, no matter Mann's burden of persuasion at this stage of proceedings, the CEI Defendants are entitled to dismissal of his claims.

Second, as the Court itself noted in its June 14 Order, *Payne* is "not binding on this Court and does not set any precedent that this Court is bound to follow." Order Granting Plaintiff's Motion for Leave To File Notice Of Recently Decided Authority, *Mann v. National Review*, Case No. 2012 CA 008263B (June 14, 2013). Moreover, *Payne* is unconvincing to the extent that it departs from the burden on respondents specified by the D.C. Council. As *Payne* explains, the D.C. Council

did generally "follow[] the lead of other jurisdictions" in enacting the D.C. Anti-SLAPP Act. Payne Order at 4. But it specifically departed from other jurisdictions, including California, when it chose to require dismissal "'unless the responding party demonstrates that the claim is *likely* to succeed on the merits.'" Payne Order at 4 (quoting D.C. Code § 16-5502(b)) (emphasis added). By contrast, California requires the respondent to make only a showing of "*probability* of success on the merits." *Id.* at 4 (quoting Cal. Civ. Proc. Code § 425.16(b)(1)) (emphasis added). As shown in the CEI Defendants' briefing, the language used in the D.C. Act sets a higher burden for the respondent than California law. Anti-SLAPP Motion at 34-35; CEI Defendants' Reply at 17-18. The reasoning of *Payne* improperly disregards the D.C. Council's deliberate choice, given its familiarity with the California statute, to adopt an approach more protective of free speech rights. *Cf. McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983) (remedial statutes construed liberally to effectuate their purposes). In that respect, *Payne* is in error—although it was a harmless one, as the anti-SLAPP motion was nonetheless granted. *See* Payne Order at 1, 20.

Third, in applying the D.C. Anti-SLAPP Act to a former employee's claims against the District of Columbia, *Payne* rejects Mann's argument that, although the Act applies in this case, the CEI Defendants do not merit the Act's protections because Mann is a "lone individual" and because CEI is a corporation. *See* Opp. at 36. The Act's text makes no such distinctions, nor would they be appropriate to achieve its intended purpose of defeating attempts to muzzle speech on matters of public interest. *See* CEI Defendants' Reply at 15-17.

In sum, whether or not the Court accepts *Payne*'s mistaken construction of the D.C. Anti-SLAPP Act's burden on respondents, the CEI Defendants are entitled to dismissal of Mann's claims against them.

Dated: June 17, 2013

Respectfully submitted,

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