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 Calendar No.: 10 Judge: Natalia Combs Greene Next event: 1/25/2013 Initial Scheduling Conference

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT AND MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

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Plaintiff Michael E. Mann, Ph.D. ("Dr. Mann") respectfully submits this Consolidated Memorandum of Points and Authorities in Opposition to Defendants Rand Simberg and the Competitive Enterprise Institute's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(a) and Motion to Dismiss Pursuant to Rule 12(b)(6).

I. INTRODUCTION

Defendants[1] assert that this case involves a scientific battle that is not suitable for judicial resolution.[2] They are mistaken. The issues in this case are simple, straight forward, and certainly capable of an effective judicial resolution. This is not a referendum on global warming, or climate change, or even the accuracy of Dr. Mann's conclusions. This is a defamation case, no more and no less: did Defendants defame Dr. Mann when they accused him of fraud? As in any defamation case, the issues are limited: were the defendant's statements true or false; did the defendant make a defamatory allegation of fact concerning the plaintiff; and did the defendant act with the requisite degree of fault? Those are the essential questions in this case as well—and they do not involve the scientific battle over global warming.

Here, there is no question that the assertions were false, and Defendants do not even attempt to argue that their statements about Dr. Mann were true. They have accused him of "academic and scientific misconduct," "data manipulation," "molesting and torturing data," and "corruption and disgrace"—all the while gloating in a disgraceful comparison to Jerry Sandusky,

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[1] "Defendants" refers to all defendants in this matter; "CEI Defendants" refers to defendants Rand Simberg and the Competitive Enterprise Institute and "NRO Defendants" refers to defendants Mark Steyn and the National Review.

[2] *See, e.g.,* Memorandum of Points and Authorities in Support of Special Mission to Dismiss Pursuant to D.C. Anti-SLAPP Act and Motion to Dismiss Pursuant to D.C. Super. Ct. Civ. R. 12(b)(6) of Defendants National Review and Mark Steyn ("NRO Mem.") at 1; 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 Anti-SLAPP Mem.") at 4 (stating that this case "is about the First Amendment's application to controversies of science.")

a convicted child molester who worked at the same institution that employs Dr. Mann. And they made these statements knowing that Dr. Mann's research has been reviewed repeatedly and replicated by other scientists, and that Dr. Mann has been repeatedly exonerated: no fraud; no misconduct; no molestation; no corruption.

Remarkably, Defendants choose not to inform this Court that one of the principal and most thorough inquiries in this regard, the 2010 investigation by the U.S. Environmental Protection Agency, was the result of a petition filed by Defendant CEI. The CEI Defendants now take the position that their defamatory statements of 2012 were simply requesting an "investigation" and or "raising questions about Penn State's handling of investigations."[3] Yet, at the same time, they fail to disclose that their 2010 request to the EPA for such an "investigation" resulted in the determination that their fraud allegations were a "myth." Similarly, they do not inform the Court that they appealed that EPA decision to the United States Court of Appeals for the District of Columbia Circuit, which upheld the EPA's exhaustive determination that no fraud had been committed and that there was no basis for any allegations of "falsification" or "manipulation" of data. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 124-125 (D.C. Cir. 2012).[4] (As a legal matter, given CEI's vigorous participation in the administrative and judicial proceeding involving these same allegations, they are collaterally estopped from asserting in this proceeding that Dr. Mann committed fraud or manipulated the data.) Nor do Defendants inform this Court—or their readers for that matter—of the many other

[3] *See* CEI Anti-SLAPP Mem. at 51-53; NRO Mem. at 24.

[4] In fact, in their framing of the issues for review by the D.C. Circuit, CEI asked the court to decide "[w]hether EPA's Endangerment Finding violates the Clean Air Act and the Administrative Procedure Act, as well as the USCA Data Quality Act and applicable agency guidelines, because it arbitrarily relied on third-party research which it accepted uncritically despite mounting evidence that this research *was based on incomplete, erroneous, and deliberately manipulated data. See* Nonbinding Statement of Issues and Statement on Deferred Appendix of Competitive Enterprise Institute, et al., April 15, 2010, attached hereto as Exhibit 36.

inquiries by various organizations within the United Kingdom and the United States that reached the same conclusion.[5]

Rather than defending the falsity of their words, because they cannot, Defendants attempt to hide behind the "opinion defense''—the last bastion of the apprehended liar. They now say that their words are "protected speech" because they are "pure opinion and hyperbole" and cannot be construed, by any reasonable reader, to be assertions of fact.[6] Not so, and the U.S. Supreme Court has been clear on this opinion defense. Whether the defamatory statement appears in a news story, a newspaper column, an editorial, or Defendants' "blogs," the opinion defense does not apply if the statement is capable of objective verification, *i.e.,* if the statement can be proven true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990).[7] Here, this is an easy question. Numerous academic institutions and government agencies have already successfully undertaken the task of attempting to verify precisely the same fraud allegations (and have rejected them). And query: if Defendants (at least CEI) did not believe that the fraud allegations could be objectively verified, why did they call upon the EPA for that very

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[5] *See, e.g.*, United States Department of Commerce, Office of Inspector General, Detailed Results of Inquiry Responding to May 26, 2010, Request from Senator Inhofe, attached hereto as an enclosure to Exhibit 12; House of Commons Science and Technology Committee, "The disclosure of climate data from the Climatic Research Unit at the University of East Anglia," (March 24, 2010), available at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/387i.pdf, attached hereto as Exhibit 7, ("House of Commons Report").; Government Response to the House of Commons Science and Technology Committee 8th Report of Session 2009-10: The disclosure of climate data from the Climatic Research Unit at the University of East Anglia Presented to Parliament by the Secretary of State for Energy and Climate Change by Command of Her Majesty (September 2010), available at: http://www.decc.gov.uk/assets/decc/consultations/570-gov-response-commons-science-tech-8th.pdf, attached hereto as Exhibit 8, ("Government Response to House of Commons Report").. While the Defendants do address some of the inquiries into these issues, including those undertaken by Pennsylvania State University, the National Science Foundation, and the University of East Anglia, they obfuscate and misrepresent the findings of those panels, in an effort to suggest (erroneously) that those inquiries did not exonerate Dr. Mann of fraud or misconduct. *See* CEI Anti-SLAPP Mem. at 14-17; NRO Mem. at 8-11. All of the aforementioned inquiries are attached hereto as Exhibits 5 through 13.

[6] *See* CEI Anti-SLAPP Mem. at 4.; NRO Mem. at 22.

[7] As discussed *infra,* p. 29, n. 59, the CEI Defendants cannot have it both ways. They cannot hold themselves out as a scholarly think-tank that publishes "original scholarly studies" by "adjunct scholars" such as Defendants Simberg, while at the same time seek refuge behind the "opinion defense" when they make knowingly false statements of fact.

investigation in 2010? As Defendants well know, their fraud allegations, like all fraud allegations, are clearly capable of judicial resolution. Fraud is an issue that this Court, like all courts, are routinely asked to resolve.

Defendants also make the lame assertion that they really did not intend to accuse Dr. Mann of fraud. They now claim that they were just having some "hurly burly," good ol' boy, name-calling fun; and that, in any event, their readers (or at least their reasonable readers) did not construe their statements to be factual assertions of fraud. These arguments are not only factually unsupported, they are flatly contradicted by the evidence. Defendants' own subsequent statements make it clear that they intended to—and did—accuse Dr. Mann of fraud. In response to Dr. Mann's request for a retraction, Defendant NRO published another article (adopted by CEI) in which they said that they did not mean to accuse Dr. Mann of fraud in the "criminal" sense.[8] We do not know exactly what that means, but whether they meant to accuse Dr. Mann of fraud in the "criminal sense," or fraud in the "civil sense," is meaningless in this case. Both allegations are defamatory *per se*. NRO then (in the statement adopted by CEI) went on to state that its real purpose in publishing this article was to call Dr. Mann's research "bogus," which is another distinction without a difference: "bogus" being a synonym for fraud.[9]

Certainly Defendants' "reasonable" readers did not have any difficulty understanding that the statements at issue in this case constituted specific allegations of fraud against Dr. Mann. Last month, NRO wrote an article asking for donations to help defray their legal costs in this case (a rather ironic request, given that NRO had previously challenged Dr. Mann to file this

[8] *See* Rich Lowry, "Get Lost: My response to Michael Mann," nationalreviewonline.com (August 22, 2012), available at: http://www.nationalreview.com/articles/314680/get-lost-rich-lowry#. ("Get Lost: My Response to Michael Mann"), attached hereto as Exhibit 3.

[9] *See* Dictionary.com, (listing "fraudulent" as a synonym for "bogus"), available at: http://dictionary.reference.com/browse/bogus?s=t.

lawsuit). A sampling of these responses, as well as the responses of CEI's readers, demonstrate that Defendants' readers clearly understood the specific nature of their fraud allegations against Dr. Mann.[10] Similarly, commentators from the *Columbia Journalism Review*, the Union of Concerned Scientists, and *Discovery Magazine's* blog were "aghast" at Defendants' allegations against Dr. Mann, describing them as "deplorable, if not unlawful," "slimy," "disgusting," and "defamatory."[11]

Defendants' secondary challenge to the Complaint is that it should be dismissed because it does not adequately plead the requisite degree of fault: actual malice. Defendants say that in order to prevail on his defamation claim, Dr. Mann must establish that Defendants made their defamatory statements with knowledge that those statements were false or that they were made with a reckless disregard of their falsity. *See Thomas v. News World Communications*, 681 F.Supp. 55, 65 (D.D.C. 1988) (citing *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)). And they also say that all of Dr. Mann's allegations of actual malice are too conclusory, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and the case-law that decision has spawned in defamation cases. But in this regard, Defendants point only to some of the malice allegations in the specific causes of action of the Complaint; they conveniently ignore the underlying factual allegations leading to the claims of actual malice—and these are the specific factual allegations upon which the conclusions of malice are based. Defendants say nothing about how the

[10] The readers' responses are set forth on p. 54-55 of this brief, and all are included in Exhibit 35.
[11] *See* Curtis Brainard, "'I don't bluff': Michael Mann's lawyer says National Review must retract and apologize," *Columbia Journalism Review* (July 25, 2012), available at: http://www.cjr.org/the_observatory/michael_mann_national_review_m.php?page=2, attached hereto as Exhibit 14, (Brainard article"); Phil Plait, "Deniers, disgust, and defamation," *Discover,* (July 23, 2012), available at: http://blogs.discovermagazine.com/badastronomy/2012/07/23/deniers-disgust-and-defamation/, attached hereto as Exhibit 15, ("*Discover* article"); Michael Halpern, Union of Concerned Scientists, *Ecowatch*, (July 23, 2012), available at: http://ecowatch.org/2012/think-tank-climate-scientist/, attached hereto as Exhibit 16, ("*Ecowatch* article").

Complaint sets forth, in painstaking detail, the series of investigations and subsequent exonerations of Dr. Mann that "found that there was no evidence of any fraud, data falsification, or statistical manipulation or misconduct." *See* Compl. ¶ 24. They say nothing about the allegations that Defendants had read and were aware of the conclusions of these investigations. *Id.* They say nothing about the paragraph of the Complaint which describes that, after the litany of these reports and the falsity of their statements were specifically brought to their attention in pre-litigation correspondence, they failed to even attempt to deny the accuracy of the reports, or the falsity of their statements.[12] *See* Compl. ¶¶ 31-33.

For the purposes of Defendants' Rule 12(b)(6) motion, the Court must accept as true that Defendants had read those reports (as is required at the motion to dismiss stage), and that those reports exonerated Dr. Mann of fraud or misconduct of any kind, and that they knew about them, and that they have never (even given the opportunity) attempted to dispute them, or to dispute the falsity of their words. The bottom line is that the Complaint provides a formidable litany of the underlying facts known to and understood by Defendants. There is simply no way that anyone could have read those reports without developing an understanding that Dr. Mann's work was not a fraud. The evidence, as specifically pled in the Complaint, demonstrates overwhelmingly that Defendants knew that there was no fraud, and, at the very least, proves that Defendants acted with a reckless disregard for the truth or a "deliberate effort to avoid the truth." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 684-685 (1989); *see also, Schatz v. Republican State Leadership Committee*, 669 F.3d 50, 58 (1st Cir. 2012) (citations and internal quotations omitted)("[r]ecklessness amounting to actual malice may be found . . . where the

[12] *See* Letter from John B. Williams, Esq. to Jack Fowler (July 23, 2012) and Letter from John B. Williams, Esq. to Fred L. Smith, Jr. (August 21, 2012), attached hereto as Exhibit 17 ("Williams letter to Fowler") and Exhibit 18 ("Williams letter to Smith").

defendant deliberately ignores evidence that calls into question his published statements"). In and of itself, Defendants' purposeful avoidance of the very studies that have exonerated Dr. Mann demonstrates that they have no defense to the actual malice claim. *See Schatz*, 669 F.3d at 58 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In any event, at this stage of the proceedings, Dr. Mann has certainly shown that his actual malice claim far exceeds his burden to show that it is "plausible" that Defendants acted with actual malice, which is all that is required at this stage of the proceedings and under *Iqbal* and its progeny. This is a case in which CEI specifically stated that its accusations against Dr. Mann were "inappropriate," and then deleted them from their website. They know they acted improperly, and they know they defamed Dr. Mann. If this Complaint cannot withstand a motion to dismiss, no defamation complaint can.

It should also be noted that this is not the type of lawsuit the Anti-SLAPP statute was intended to deter. As courts in the District of Columbia have made clear, the purpose of anti-SLAPP suits is to prevent large corporations from commencing meritless litigation to stifle the participation of less well financed individuals in the litigation process. *See Blumenthal v. Drudge*, No. Civ.A. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001). As a result, courts were given an early mandate to halt a baseless suit to ensure that innocent defendants would not be unnecessarily burdened by the discovery process. But here, not one of those factors apply. Unlike a traditional SLAPP suit, there is no economic bullying by Dr. Mann, who certainly is not a "large private interest[] [aiming] to deter common citizens from exercising their political or legal right[s]." *Id*. (citation omitted). To the contrary, Defendants in this case are a well-financed organization funded by large industries and private foundations and a nationally circulated news magazine, which (at least in the case of NRO) have already raised hundreds of

thousands of dollars as a result of their efforts to publicize this lawsuit, ostensibly to finance this litigation.[13] Nor has this suit had any effect whatsoever in stifling debate on this issue, and Defendants, particularly NRO, continue to take great delight in deriding Dr. Mann at every turn. They have publicly boasted that they are going to "kick" Dr. Mann's "legal heinie," and recently took out a full page advertisement in Penn State's student newspaper ridiculing Dr. Mann — simply to continue their malicious play. As for the anti-SLAPP objective of trying to avoid discovery, NRO and its co-defendant Mark Steyn wrote pre-litigation articles begging Dr. Mann to bring this lawsuit so they could obtain and publish his correspondence and research in the discovery process.[14]

We do not argue that the anti-SLAPP law is inapplicable in this circumstance. But this new statute should be interpreted judiciously and in light of its intended purpose, as set forth in *Blumenthal*. It certainly should not be given the overbearing interpretation suggested by Defendants. The showing at this stage is not the high burden that Defendants urge on this Court, but rather is akin to the summary judgment standard. Defendants argue that the Anti-SLAPP statute places a "heavy" and "unique" burden on Dr. Mann, one that is "perhaps the strictest burden of any jurisdiction." CEI Anti-SLAPP Mem. at 34; NRO Mem. at 20. But there is no support for this interpretation. The District of Columbia statute was modeled after the California

[13] *See* CEI Staff, "Climate Scientist Sues CEI", (October 26, 2012), available at: http://cei.org/news-releases/climate-scientist-sues-cei, attached hereto as Exhibit 19, ("Climate Scientist Sues CEI"); *See* "About Michael Mann's lawsuit vs. CEI and National Review", available at: https://members.cei.org/mann, attached hereto as Exhibit 20, ("CEI: 'About Michael Mann's lawsuit'"); *See* Jack Fowler, We Need Your Help (December 10, 2012), available at: http://www.nationalreview.com/articles/335221/we-need-your-help-jack-fowler, attached hereto as Exhibit 21, ("We Need Your Help"); *See* Jack Fowler, 'Mann' Up and Join Our Fight: The NR Legal-Defense Fund (December 18, 2012), available at: http://www.nationalreview.com/corner/335960/mann-and-join-our-fight-nr-legal-defense-fund-jack-fowler, attached hereto as Exhibit 22, ("Fowler: 'Mann' Up").

[14] *See* Exhibit 3, Get Lost: My response to Michael Mann; Mark Steyn, "Stick it Where the Global Warming Don't Shine," steynonline.com (August 22, 2012), available at: http://www.steynonline.com/5118/stick-it-where-the-global-warming-dont-shine, attached hereto as Exhibit 23, ("Steyn: 'Stick it'").

statute. The only semantic difference is that the District of Columbia statute requires a showing of a likelihood to succeed on the merits, whereas the California statute requires a probability of success. But there is no legal or dictionary difference between these two standards. And there is nothing in the District of Columbia legislative history suggesting a standard different from the California standard, which simply incorporates the summary judgment standard. As such, a fair interpretation of the statute makes clear that the Court should address the motion as one for summary judgment, as the California courts have done. As set forth below, Dr. Mann's Complaint easily clears this hurdle. In the alternative, should the Court believe that Dr. Mann requires additional evidence to support his claim, the Anti-SLAPP statute specifically provides for targeted discovery prior to any determination on the motion.[15] D.C. Code § 16-5502(c)(2).

II. FACTUAL BACKGROUND

Dr. Mann is a research scientist and academic known for his work regarding the paleoclimate – the study of the earth's past before instrument temperature records. A graduate of the University of California, Berkeley and Yale University, Dr. Mann is currently a Distinguished Professor of Meteorology at the Pennsylvania State University ("Penn State") and was previously a faculty member at the University of Virginia.

Contrary to Defendants' assertions, Dr. Mann did not thrust himself into the climate "wars," nor was he the aggressor in any ensuing "battle." CEI Anti-SLAPP Mem. at 1-3; NRO Mem. at 4-7. Rather, Dr. Mann became the target of climate change skeptics as a result of research he published in the late 1990's, research that was later disseminated by the United

[15] Targeted discovery is particularly warranted in a case where actual malice is at issue. *See, e.g.*, *Christian Research Institute v. Alnor*, 148 Cal.App.4th 71, 93, 55 Cal. Rptr. 3d , 619 (2007) ("If evidence from which actual malice may be proven is not readily available, the nonmoving party may, on noticed motion and for good cause, request discovery").

Nations Intergovernmental Panel on Climate Change ("IPCC"). Equally distorted is Defendants' characterization of this dispute as the product of Dr. Mann's supposed belief that Defendants, along with others who disagree with him, should not be able "to voice their opinions in [the] public debate" regarding "man-made global warming." CEI Anti-SLAPP Mem. at 5; *see also,* NRO Mem. at 1 (arguing that Dr. Mann filed this lawsuit to "squelch public criticism of his ideas"). By Defendants' telling, this lawsuit is an effort by Dr. Mann to stifle debate and to muzzle those who deny that global warming exists. These assertions are nothing more than a smokescreen designed to divert from the real issues in the case. They are nonsense and they are deceptively drafted. One example: the CEI Defendants assert in their brief that Dr. Mann was responsible for accusing a Member of Congress "of engaging in 'inquisitions' and using 'McCarthyist' tactics in the climate change debate." CEI Anti-SLAPP Mem. at 55. What the CEI Defendants fail to inform this Court is that those terms were introduced into this debate not by Dr. Mann, but by the National Academy of Sciences and the journal *Nature.*[16] The vitriol that Dr. Mann and other climate scientists face in the United States is sadly unique, so much so that foreign scientists have expressed concern about the "intimidation and about the state of America's climate debate,"[17] and the American Association for the Advancement of Science has issued a statement deploring the "extent and nature of personal attacks on climate scientists."[18]

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[16] *See* 255 members of the National Academy of Sciences, "Climate change and the integrity of science," *Science*, 328, (May 7, 2010): 689-690, available at: http://www.guardian.co.uk/environment/2010/may/06/climate-science-open-letter; "Science Subpoenaed," *Nature*, 465, (May 12, 2010) 135-136, available at: http://www.nature.com/nature/journal/v465/n7295/full/465135b.html.

[17] *See* Katherine Bagley, "America Is Only Nation Where Climate Scientists Face Organized Harassment", *InsideClimate News*, (September 10, 2012), available at: http://insideclimatenews.org/news/20120910/america-only-nation-where-climate-scientists-face-organized-harassment.

[18] Statement of the Board of Directors of the American Association for the Advancement of Science Regarding Personal Attacks on Climate Scientists, (June 28, 2011), available at: http://www.aaas.org/news/releases/2011/media/0629board_statement.pdf. The organization "vigorously oppose[d] attacks "that question [scientists] personal and professional integrity or threaten their safety based on displeasure with their scientific conclusions."

Dr. Mann did not bring this lawsuit because Defendants do not accept the fact that global warming exists, or because they are vocal, or because they have criticized and disagreed with his work. After all, Defendants and their ilk have criticized and disagreed with him for years; moreover, Dr. Mann works in the field of science, where criticism and disagreement are the norm. The reason for this lawsuit has nothing to do with "squelching" public debate, as Defendants allege. Dr. Mann brought this lawsuit because he was wrongfully accused of fraudulent conduct in his research and despicably compared to a child molester. Even before this lawsuit was filed, CEI itself acknowledged that some of these accusations were "inappropriate," and nowhere in over a hundred pages of briefing do any of Defendants assert that any of the challenged statements in this litigation were true. Defendants' accusations are indefensible, and Dr. Mann's purpose in this lawsuit is to defend his reputation.

A. The Hockey Stick Graph

While the defamation issue in this case does not hinge upon the history of climate science or the accuracy of Dr. Mann's scientific conclusions, a summary of the controversies that led to this lawsuit is important to place Defendants' accusations into context—and to belie any suggestion that any legitimate questions remain regarding Dr. Mann's integrity.

1. MBH98 And MBH99

In 1998, Dr. Mann co-authored a peer-reviewed paper in *Nature* on the "paleoclimate" (*i.e.* the study of ancient climate). The study applied new statistical techniques in an attempt to reconstruct temperatures over past centuries from "proxy" indicators—natural archives that record past climatic conditions—which had been gathered and analyzed by other researchers in

prior peer-reviewed studies.[19] These proxy indicators include the growth rings of ancient trees and corals, sediment cores from ocean and lake bottoms, ice cores from glaciers, and cave sedimentation cores. The 1998 *Nature* paper (hereinafter "MBH98"[20]) concluded that "Northern Hemisphere mean annual temperatures for three of the past eight years [1990-1998] are warmer than any other year since (at least) AD1400," and that rising carbon dioxide concentrations is the primary "forcing" cause.

In 1999, Dr. Mann co-authored a second peer-reviewed paper in *Geophysical Research Letters.*[21] MBH99 built upon MBH98 and concluded that the recent 20th century rise in global temperature is *likely* unprecedented in at least the past millennium, and correlates with a concomitant rise in atmospheric concentrations of carbon dioxide—primarily emitted by the combustion of fossil fuels. Included in MBH99 was a graph depicting this 20th century rise in global temperature. The graph came to be known as the "Hockey Stick," due to its iconic shape—the "shaft" reflecting a long-term cooling trend from the so-called "Medieval Warm Period" (broadly speaking from 1050 AD to 1450 AD) through the "Little Ice Age" (broadly speaking from 1550 AD to 1900 AD), and the "blade" reflecting a dramatic upward temperature swing during the 20th century that culminates in anomalous late 20th century warmth.

The key findings of MBH98 and MBH99—that Northern Hemispheric average temperatures for the most recent decades are probably the highest in at least 1000 years—

[19] "Global-scale Temperature Patterns and Climate Forcing Over the Past Six Centuries" ("MBH98"), *Nature*, Vol. 392 (6678), 779–787, (April 23, 1998), available at: http://www.geo.umass.edu/faculty/bradley/mann1998.pdf.

[20] MBH98 (and MBH99) were coauthored by Dr. Mann, Dr. Raymond Bradley of the University of Massachusetts, and Dr. Malcolm Hughes of the University of Arizona. Accordingly, the papers are commonly referred to as "MBH98" and "MBH99."

[21] Michael E. Mann, Raymond S. Bradley, and Malcolm K. Hughes, "Northern hemisphere temperatures during the past millennium: Inferences, uncertainties and limitations," ("MBH99"), *Geophysical Research Letters,* Vol. 26:6, 759-762 (March 15, 1999), available at: http://www.geo.umass.edu/faculty/bradley/mann1999.pdf

prompted a number of follow-up peer-reviewed studies. These studies not only replicated Dr. Mann's work using the same data and methods, but independently validated and extended his conclusions using other techniques, and using newer and more extensive datasets. Upwards of a dozen studies have been published in peer-reviewed journals replicating the findings of Dr. Mann and his research colleagues that recent hemispheric warmth is likely unprecedented as far back as the past millennium, using a variety of independent statistical techniques and/or types of proxy data and scientific information.[22]

Significantly, in 2005 the U.S. House of Representatives commissioned the National Research Council of the National Academies of Science—originally chartered by President Abraham Lincoln to "investigate, examine, experiment, and report upon any subject of science"[23]—to assess the state of scientific efforts to reconstruct surface temperatures for the Earth over approximately the last 2,000 years. The authors of the report, which included

[22] *See, e.g.*, Jones PD, Briffa KR, Barnett TP, Tett SFB (1998) "High-resolution palaeoclimatic records for the last millennium: Interpretation, integration and comparison with general circulation model control-run temperatures,"*Holocene* 8:455–47; Crowley TJ, Lowery TS (2000) "How warm was the Medieval Warm Period? A comment on 'Man-made versus natural climate change'," *Ambio* 39:51–54; Briffa, K.R., T.J. Osborn, F.H. Schweingruber, I.C. Harris, P.D. Jones, S.G. Shiyatov, and E.A. Vaganov (2001) "Low-frequency temperature variations from a northern tree ring density network," *Journal of Geophysical Research* 106(D3):2929-2941; Esper, J., E.R. Cook, and F.H. Schweingruber. 2002a. "Low-frequency signals in long tree-ring chronologies for reconstructing past temperature variability," *Science* 295:2250-2253; Moberg, A., D.M. Sonechkin, K. Holmgren, N.M. Datsenko, and W. Karlen. 2005b. "Highly variable Northern Hemisphere temperatures reconstructed from low- and high-resolution proxy data," *Nature* 433:613-617;.Oerlemans, J. 2005b. "Global Glacier Length Temperature Reconstruction," IGBP PAGES/World Data Center for Paleoclimatology. Data Contribution Series #2005-059. NOAA/NCDC Paleoclimatology Program, Boulder, CO.; Hegerl, G.C., T.J. Crowley, W.T. Hyde, and D.J. Frame (2006) "Climate sensitivity constrained by temperature reconstructions over the past seven centuries." *Nature* 440:1029-1032; D'Arrigo RD, Wilson R, Jacoby G (2006) "On the long-term context for 20th century warming." *J Geophys Res* 111: D03103; M. N. Juckes et al. (2007) "Millennial Temperature Reconstruction Intercomparison and Evaluation," *Climate of the Past*, 3: 591–609; Mann, ME, Zhihua Z., Hughes, MK, Bradley, RS, Miller, SK, Rutherford, S. and Fenbiao N. (2008) "Proxy-based reconstructions of hemispheric and global surface temperature variations over the past two millennia,"*Proceedings of the National Academy of Sciences* 105 (36) 13252-13257; D. S. Kaufman et al. (2009) "Recent Warming Reverses Long-Term Arctic Cooling," *Science* , 325: 1236; F. C. Ljungqvist (2010) "A New Reconstruction of Temperature Variability in the Extra-tropical Northern Hemisphere During the Last Two Millennia," *Geografi ska Annaler*, 92 A: 339–351.

[23] The National Academies, encompassing the National Academy of Science, National Academy of Engineering, Institute of Medicine, and National Research Council "are the nation's pre-eminent source of high-quality, objective advice on science, engineering and health matters." *See* http://www.nationalacademies.org/about/whatwedo/index.html

members of the National Academy and distinguished faculty of leading research universities and institutions with expertise in atmospheric science, climate, statistics and other relevant disciplines, concluded:

> The basic conclusion of Mann et al. (1998, 1999) . . . that the late 20th century warmth in the Northern Hemisphere was unprecedented during at least the last 1,000 years . . . has subsequently been supported by an array of evidence …Based on the analyses presented in the original papers by Mann et al. and this newer supporting evidence, the committee finds it plausible that the Northern Hemisphere was warmer during the last few decades of the 20th century than during any comparable period over the preceding millennium.[24]

2. IPCC's Third Assessment Report -- 2001

In 2001, the IPCC[25] published its Third Assessment Report, which prominently featured Dr. Mann and his colleagues' work from MBH98 and MBH99. The Third Assessment Report included the Hockey Stick graph. The report summarized Dr. Mann's work and the paleoclimate reconstruction work of other scientists, and the report included a graph demonstrating that several different reconstructions, not just those of Dr. Mann, showed modern warming to be unprecedented over the past millennium. The Third Assessment Report also concluded that carbon dioxide concentrations in the global atmosphere were at their highest levels in the past 420,000 years, principally due to fossil fuel combustion.

3. Criticism Of The Hockey Stick Graph

After the publication of the IPCC report in 2001, controversy over the Hockey Stick began to develop. Certain publications criticized the conclusions of Dr. Mann and his

[24] The National Academies, "Surface Temperature Reconstructions for the Last 2,000 Years: Report in Brief," (2006) available at: http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Surface_Temps_final.pdf, attached hereto as Exhibit 24.

[25] The IPCC is the leading international body for the assessment of climate change. It was established by the United Nations Environment Programme and the World Meteorological Organization in 1988 to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.

colleagues, and those who opposed the concept of climate change (often backed by fossil fuel interests) began to use these publications in an attempt to discredit Dr. Mann and his colleagues. While each of these studies has been thoroughly debunked and discredited within the scientific community, they continue to be (ostensibly) relied upon in the attacks against Dr. Mann—including by Defendants in their briefing in this case.

For example, in 2003, mining consultant Stephen McIntyre and University of Guelph Economics Professor Ross McKitrick published a paper in *Energy and Environment* purporting to demonstrate that the Hockey Stick Graph was an artifact of bad data.[26] A later article by the same authors in the journal *Geophysical Research Letters* suggested that the "hockey stick" shape was an artifact of a faulty statistical approach.[27] Subsequently, every peer-reviewed study that has examined McIntyre and McKitrick's claims has found them to be inaccurate.[28] Nonetheless, Defendants continue to point to McIntyre and McKitrick's work as evidence of "data errors" and faulty statistics underlying Dr. Mann's work. *See* CEI Anti-SLAPP Mem. at 9. But significantly, at no point have either McIntyre and McKitrick ever accused Dr. Mann of misconduct or fraud.

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[26] Stephen McIntyre and Ross McKitrick, "Corrections to the Mann et al. [1998] Proxy Database and Northern Hemisphere Average Temperature Series," *Energy and Environment*, 14 (2003): 751–771, available at: http://www.multi-science.co.uk/mcintyre-mckitrick.pdf

[27] Stephen McIntyre and Ross McKitrick, "Hockey Sticks, Principal Components, and Spurious Significance," *Geophysical Research Letters*, 32 (2005), available at: http://climateaudit.files.wordpress.com/2009/12/mcintyre-grl-2005.pdf

[28] *See, e.g.*, E.R. Wahl and C.M. Amman, "Robustness of the Mann, Bradley, Hughes Reconstruction of Surface Temperatures: Examinations of Criticisms Based on the Nature and Processing of Proxy Climate Evidence," *Climactic Change*, 85 (2007); 33-69, available at: http://www.cgd.ucar.edu/ccr/ammann/millennium/refs/Wahl_ClimChange2007.pdf; E.R. Wahl and C.M. Amman, "The Importance of the Geophysical Context in Statistical Evaluations of Climate Reconstruction Procedure," *Climactic Change*, 85 (2007); 71-88, available at: http://www.cgd.ucar.edu/ccr/ammann/millennium/refs/Ammann_ClimChange2007.pdf.

Similarly, in 2006, U.S. Congressmen Joe Barton and Ed Whitfield (both avowed climate change skeptics) requested Edward Wegman, a statistician from George Mason University, to investigate Dr. Mann's research. Dr. Wegman, like McIntyre and McKitrick, concluded that the statistical methodology underlying the Hockey Stick Graph was faulty.[29] Subsequently, George Mason conducted a formal investigation into charges of plagiarism and misconduct related to the Wegman Report.[30] While Dr. Wegman was not sanctioned for misconduct *per se*, he did receive a letter of reprimand due to plagiarism and his paper was retracted by its publisher, the journal *Computational Statistics and Data Analysis*.[31] It was revealed that Dr. Wegman was provided with a significant amount of material for use in drafting its report from members of Representative Barton's staff—further demonstrating that his report was neither impartial nor unbiased.[32] And again, it should be noted that nowhere did Dr. Wegman, even in his discredited report, ever suggest that Dr. Mann or his colleagues had engaged in any misconduct."[33]

B. Theft Of E-Mails From CRU

Unable to debunk Dr. Mann's research based upon a legitimate review of his work or upon contrary peer reviewed science, Defendants and other climate change skeptics pounced

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[29] As discussed in Section II(c) *infra*, the National Academy of Sciences, the National Science Foundation, the EPA, and others have all specifically considered and rejected any and all claims of "manipulation" or "adopting a particular statistical methodology to get a particular result.

[30] *See* Dan Vergano, "University investigating prominent climate science critic," *USA Today*, (Oct. 8, 2010), available at; http://content.usatoday.com/communities/sciencefair/post/2010/10/wegman-plagiarism-investigation-/1#.UOepghy2OhQ.

[31] *See* Dan Vergano, "Climate study gets pulled after charges of plagiarism," *USA Today*, (May 15, 2011), available at: http://usatoday30.usatoday.com/weather/climate/globalwarming/2011-05-15-climate-study-plagiarism-Wegman_n.htm.

[32] *See* John R. Mashey, "Strange Scholarship in the Wegman Report (SSWR): A Façade for the Climate Anti-Science PR Campaign", available at: http://deepclimate.org/2010/09/26/strange-scholarship-wegmanreport/.

[33] Edward J. Wegman, David W. Scott, Yasmin H. Said, Ad Hoc Committee Report on the 'Hockey Stick' Global Climate Reconstruction, Science and Public Policy Institute (2006) at 50, available at: http://scienceandpublicpolicy.org/images/stories/papers/reprint/ad_hoc_report.pdf.

upon the theft and publication of thousands of e-mails from the Climate Research Unit ("CRU") at the University of East Anglia in the United Kingdom. The CRU e-mails, some of which were exchanged between Dr. Mann and researchers at CRU, and as well as other climate change research institutions, were stolen via a "sophisticated and carefully orchestrated attack on the CRU's data files, carried out remotely via the internet."[34] The e-mails were then posted anonymously on the internet just a few weeks before the United Nation's Global Climate Change Conference in Copenhagen, Denmark in December 2009, which the Norfolk Constabulary concluded was "timed to undermine the conference and to hinder global agreement on measures to limit the extent of temperature increase.[35] A few of the more than one thousand CRU e-mails stolen from the University of East Anglia had been "cherry-picked" by climate change skeptics (as described by the EPA[36]), taken out of context, and misrepresented to falsely imply impropriety and academic fraud on the part of the scientists involved, including Dr. Mann. The skeptics claimed that the CRU e-mails proved that anthropogenic climate change was a hoax perpetrated by scientists from across the globe colluding with government officials to reap financial benefits. The CRU e-mails led to the controversy now derisively referred to as "Climategate."

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[34] *See* Norfolk Constabulary, "Police Close UEA Investigation", (July 18, 2012) available at: http://www.norfolk.police.uk/newsevents/newsstories/2012/july/ueadatabreachinvestigation.aspx . The Major Investigation Team at the Norfolk Constabulary (the police force for Norfolk County, England, the home of the University of East Anglia) concluded that the perpetrators used "methods common in unlawful internet activity to obstruct inquiries" and that there was no evidence "that anyone working at or associated with the University of East Anglia was involved in the crime."

[35] Norfolk Constabulary, "Operation Cabin – Closure of Investigation Report" (July 2012); available at: http://www.norfolk.police.uk/newsandevents/newsstories/2012/july/ueadatabreachinvestigation/idoc.ashx?docid=67ace43a-ed09-4bbb-a214-b0948d2c2992&version=-1 .

[36] U.S. Environmental Protection Agency, Myths vs. 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, available at: http://www.epa.gov/climatechange/endangerment/myths-facts.html, attached hereto as Exhibit 25, ("EPA's Myths vs. Facts").

The most quoted e-mail, and one highlighted by Defendants in their briefs, is a November 16, 1999 message from Phil Jones, the director of CRU, to Dr. Mann, Raymond Bradley, and Malcolm Hughes (all climate researchers) in which Jones writes: "I've just completed Mike's [referring to Dr. Mann] *Nature* trick of adding in the real temps to each series for the last 20 years (i.e., from 1981 onwards) and from 1961 for Keith's to hide the decline". Defendants, with no factual support, assert: (1) that the decline referenced by Professor Jones represents the "gulf between reconstructed temperature estimates (such as those made by Mann) and more recent instrumental temperature data;" (2) that the decline "undermines the case for recent global warming;" and (3) that "any attempt to hide [the decline] by use of a 'trick "appear[s] (to say the least) suspicious." CEI Anti-SLAPP Mem. at 12-13; *see also*, NRO Mem. at 35 (arguing that Professor Jones's e-mail raised "questions of possible misconduct"). Defendants omit the alternative (and correct) interpretation of this e-mail, which is that scientists often use the term "trick" to refer to a common statistical method to deal with data sets. This was a standard "trick" described openly in *Nature* and was hardly something that was secret or in any way nefarious. Further, the term "decline" does not refer to a decline in global temperatures, but rather a well-documented, and certainly unhidden, divergence in tree ring density proxies after 1960.[37] And there is simply no legitimate support for any different conclusion on these matters. As Defendants further forget to inform the Court, Professor Jones' e-mail was included in the material that was investigated and reviewed by each and every one of the academic and governmental entities that have considered the allegations of fraud and misconduct. As

[37] This well-documented "divergence" problem refers to an enigmatic decline in tree ring response to warming temperatures after 1960. This decline was discussed and addressed in various publications and was therefore not hidden, but rather simply not used to infer temperatures after 1960. *See* K.R. Briffa, F.H. Schweingruber, P.D. Jones, T.J. Osborn, S.G. Shiyatov, and E.A. Vaganov, "Reduced Sensitivity of Recent Tree-Growth to Temperature at High Northern Latitudes," *Nature*, 391 (1998): 678-682; R. D'Arrigo et al.., "On the 'Divergence Problem' in Northern Forests: A Review of the Tree-Ring Evidence and Possible Causes," *Global and Planetary Change*, 60 (2008): 289-305.

discussed below, every organization, including the D.C. Circuit Court of Appeals and the EPA in CEI's litigation with the EPA, has dismissed the skeptics' hysteria surrounding this and any other e-mail and found no evidence of nefarious conduct by Dr. Mann or his colleagues. *See, infra*, at p. 20-30.

C. Dr. Mann Is Exonerated

Following the publication of the CRU e-mails, and the subsequent baseless charge that these e-mails showed that global warming was a hoax, a number of climate change skeptics, including CEI, called for official inquiries into whether any of the researchers had committed fraud, or had improperly manipulated any data. Their calls were heeded—two universities and six governmental agencies independently investigated the allegations of fraud and misconduct. And every one of these investigations concluded that there was no basis to the allegations of fraudulent conduct, data manipulation, or the like. Moreover, most, if not all, of these reports constitutes a public record or report and will therefore be admissible. *Goldsberry v. United States*, 598 A.2d 376, 378 (D.C. 1991); Fed.R.Evid. 803(8).

1. University Of East Anglia

In April 2010, the University of East Anglia convened an international Scientific Assessment Panel, in consultation with the Royal Society of London for Improving Natural Knowledge,[38] and chaired by Professor Ron Oxburgh. The Report of the International Panel assessed the integrity of the research published by the CRU and found "no evidence of any

[38] The Royal Society, chartered in 1662 by King Charles II, is the oldest learned society for science in existence today and is the national Academy of science in the UK. Its fundamental purpose is to recognize, promote, and support excellence in science. *See* http://royalsociety.org/about-us/.

deliberate scientific malpractice in any of the work of the Climatic Research Unit".[39] Three months later, the University of East Anglia published the Independent Climate Change Email Review report, prepared under the oversight of Sir Muir Russell. The report examined whether manipulation or suppression of data occurred and concluded that "the scientists' rigor and honesty are not in doubt."[40]

In their brief, the CEI Defendants suggest that the University of East Anglia's investigation actually found that the hockey stick graph was "misleading" because it did not identify that certain data was "truncated" and that other proxy and instrumental temperature data had been spliced together. *See* CEI Anti-SLAPP Mem. at 16-17; NRO Mem. at 35. This allegation is yet another example of Defendants' attempts to obfuscate the evidence in this case. The "misleading" comment made in this report had absolutely nothing to do with Dr. Mann, or with any graph prepared by him. Rather, the report's comment was directed at an overly simplified and artistic depiction of the hockey stick that was reproduced on the frontispiece of the World Meteorological Organization's Statement on the Status of the Global Climate in 1999.[41] Dr. Mann did not create this depiction, and the attempt to suggest that this report suggested an effort by Dr. Mann to mislead is disingenuous.

2. The United Kingdom Parliament And The United Kingdom Department Of State

In March 2010, the United Kingdom's House of Commons Science and Technology Committee published a report finding that the skeptics' criticisms of the CRU were misplaced,

[39] Professor Ron Oxburgh FRS (Lord Oxburgh of Liverpool), *et al.*, "Report of the International Panel set up by the University of East Anglia to examine the research of the Climatic Research Unit," (April 12, 2010), available at: http://thehill.com/images/stories/blogs/crureport.pdf, attached hereto as Exhibit 5.

[40] Sir Muir Russell, et al., "The Independent Climate Change E-mails Review," (July 2010), available at: http://www.cce-review.org/pdf/FINAL%20REPORT.pdf, attached hereto as Exhibit 6.

[41] *Id.* at 59-60.

and that its actions "were in line with common practice in the climate science community." It also found that "there is no case to answer" with respect to accusations of dishonesty.[42] On the allegation of attempting to corrupt the peer-review process, the committee stated: "The evidence that we have seen does not suggest that Professor Jones was trying to subvert the peer review process. Academics should not be criticised for making informal comments on academic papers". The committee further found that:

> [I]nsofar as we have been able to consider accusations of dishonesty—for example, Professor Jones's alleged attempt to "hide the decline"—we consider that there is no case to answer. Within our limited inquiry and the evidence we took, the scientific reputation of Professor Jones and CRU remains intact. We have found no reason in this unfortunate episode to challenge the scientific consensus as expressed by Professor Beddington, that "global warming is happening [and] that it is induced by human activity.[43]

Further, in September 2010, in response to the House of Commons Science and Technology Committee report, the Secretary of State for Energy and Climate Change "agree[d] with and welcome[d], the overall assessment of the Science and Technology Committee" and, echoing the conclusions of the University of East Anglia, noted:

> the rigour and honesty of the scientists are not in doubt; that there is no evidence of bias in data selection; that there is no evidence of subversion of peer review and that allegations of misusing the Intergovernmental Panel in Climate Change (IPCC) process cannot be upheld. [44]

Accordingly, as far as expressly determined by the government of the United Kingdom, there is no truth to any allegation of data manipulation, misconduct or fraud.

3. Pennsylvania State University

In February, 2010, as a result of communications it received from alumni, politicians, and others, that accused Dr. Mann of "manipulating data, destroying records and colluding to hamper

[42] *See* Exhibit 7, House of Commons Science and Technology Committee report.
[43] *Id.* at 46.

[44] Exhibit 8, Government Response to House of Commons Report.

the progress of scientific discourse," Pennsylvania State University launched an inquiry into whether Dr. Mann had committed research misconduct. Penn State subsequently released an Inquiry Report finding that "there exists no credible evidence that Dr. Mann had or has ever engaged in, or participated in, directly or indirectly, any actions with an intent to suppress or to falsify data."[45] Moreover, given the severity of the charges, the inquiry committee decided to empanel an investigatory committee to further consider these allegations against Dr. Mann. In June, 2010, after having reviewed "all available evidence," the university published its Final Investigation Report, confirming that "there was no substance to the allegations against [Dr. Mann]."[46]

4. United States Environmental Protection Agency

In February 2010, Defendant CEI, along with nine other coordinated Petitions for Reconsideration filed by various states, corporations, industry groups, and "free market" think tanks, petitioned the EPA to reconsider its Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act. A central argument by the petitioners was their contention that Dr. Mann and other scientists had distorted, concealed, and manipulated certain temperature data, which fundamentally called into question EPA's endangerment finding. In their petition, CEI stated that Dr. Mann's proxy data which was included in IPCC's assessment report "was artfully truncated" so as to give the "false impression that the tree ring data agree with reported late 20th Century surface temperature data, when in fact

[45] *See* 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, (February 3, 2010), available at: http://www.research.psu.edu/orp/documents/Findings_Mann_Inquiry.pdf, attached hereto as Exhibit 9.

[46] See RA-10 Final Investigation Report Involving Dr. Michael E. Mann, (June 4, 2010), at 1, 19, available at: http://live.psu.edu/pdf/Final_Investigation_Report.pdf, attached hereto as Exhibit 10.

they did not."[47] CEI went on to explicitly accuse Dr. Mann of "artful deceit" and "deliberate" "deception," even attaching an exhibit to their petition titled "An Explanation of How Michael Mann Hid the Decline."[48] In response, the EPA thoroughly investigated each and every e-mail and found that there was no evidence of data manipulation or fraud.[49]

After considering CEI's petition, the United States Environmental Protection Agency concluded that:

> As EPA's review and analysis shows, the petitioners routinely take these private e-mail communications out of context and assert they are ''smoking gun'' evidence of wrongdoing and scientific manipulation of data. EPA's careful examination of the e-mails and their context shows that the petitioners' claims are exaggerated, are often contradicted by other evidence, and are not a material or reliable basis to question the validity and credibility of the body of science underlying the Administrator's Endangerment Finding or the Administrator's decision process articulated in the Findings themselves Petitioners' assumptions and subjective assertions regarding what the e-mails purport to show about the state of climate change science are clearly inadequate pieces of evidence to challenge the voluminous and well documented body of science that is the technical foundation of the Administrator's Endangerment Finding.
>
> Inquiries from the UK House of Commons, Science and Technology Committee, the University of East Anglia, Oxburgh Panel, the Pennsylvania State University, and the University of East Anglia, Russell Panel, all entirely independent from EPA, have examined the issues and many of the same allegations brought forward by the petitioners as a result of the disclosure of the private CRU e-mails. These inquiries are now complete. Their conclusions are in line with EPA's review and analysis of these same CRU e-mails. The inquiries have found no evidence of scientific misconduct or intentional data manipulation on the part of the climate researchers associated with the CRU e-mails.

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[47] See Petition for Reconsideration of the International Nongovernmental Panel in Climate Change, the Science and Environmental Policy Project, and the Competitive Enterprise Institute, Endangerment and Cause (February 12, 2010), at 6, 7, available at: http://cei.org/sites/default/files/1-Joint%20Petition%20for%20Reconsideration,%202-12-10.pdf, attached hereto as Exhibit 26, ("CEI Petition for Reconsideration").

[48] *See id.* at 6, 7, and 12, and Exhibit 26, p. 12.

[49] *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Volume 1: Climate Science and Data Issues Raised by Petitioners, attached hereto as Exhibit 11(a).*

> [P]etitioners have routinely misunderstood or mischaracterized the scientific issues, drawn faulty scientific conclusions, resorted to hyperbole, impugned the ethics of climate scientists in general, characterized actions as "falsification" and "manipulation" with no basis or support, and placed an inordinate reliance on blogs, news stories, and literature that is often neither peer reviewed nor accurately summarized in their petitions. Petitioners often "cherry-pick" language that creates the suggestion or appearance of impropriety, without looking deeper into the issues or providing corroborating evidence that improper action actually occurred.[50]

Remarkably, and in what can only be characterized as a deliberate attempt to hide information from this Court, Defendants do not even bother to disclose the existence of the EPA inquiry, and in particular the fact that this inquiry was requested by CEI. In any event, EPA categorically rejected the fraud allegations against Dr. Mann as a "myth":

> **Myth**: The University of East Anglia's Climatic Research Unit (CRU) emails prove that temperature data and trends were manipulated.
>
> **Fact**: Not true. Petitioners say that emails disclosed from CRU provide evidence of a conspiracy to manipulate data. The media coverage after the emails were released was based on email statements quoted out of context and on unsubstantiated theories of conspiracy. The CRU emails do not show either that the science is flawed or that the scientific process has been compromised. EPA carefully reviewed the CRU emails and found no indication of improper data manipulation or misrepresentation of results.
>
> **Myth**: The jury is still out on climate change and CRU emails undermine the credibility of climate change science overall.
>
> **Fact**: Climate change is real and it is happening now. The U.S. Global Change Research Program, the National Academy of Sciences, and the Intergovernmental Panel on Climate Change (IPCC) have each independently concluded that warming of the climate system in recent decades is "unequivocal." This conclusion is not drawn from any one source of data but is based on multiple lines of evidence, including three worldwide temperature datasets showing nearly identical warming trends as well as numerous other independent indicators of global warming (e.g., rising sea levels, shrinking Arctic sea ice). Some people have "cherry-picked" a limited selection of CRU email statements to draw broad, unsubstantiated conclusions about the validity of all climate science.[51]

[50] EPA's Denial of the Petititons To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, Fed. Reg. 75:156 (August 13, 2010) p. 49556-49594, codified at 40 C.F.R. Chapter 1, attached hereto as Exhibit 11.

[51] Exhibit 25, EPA's Myths vs. Facts

Further, on June 2012, the United States Circuit Court of Appeals for the District of Columbia Circuit affirmed the EPA's "Endangerment Finding" and the denial of ten petitions for reconsideration of that finding filed by, among others, CEI. The court noted:

> Petitioners maintain that EPA erred by denying all ten petitions for reconsideration of the Endangerment Finding. Those petitions asserted that internal e-mails and documents released from the University of East Anglia's Climate Research Unit (CRU)—a contributor to one of the global temperature records and to the IPCC's assessment report—undermined the scientific evidence supporting the Endangerment Finding by calling into question whether the IPCC scientists adhered to "best science practices." 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 ("Reconsideration Denial"), 75 Fed. Reg. 49,556, 49,556–57 (Aug. 13, 2010).
>
> **********
>
> On August 13, 2010, EPA issued a denial of the petitions for reconsideration accompanied by a 360-page response to petitions (RTP). *Id.* at 49,556. It determined that the petitions did not provide substantial support for the argument that the Endangerment Finding should be revised. According to EPA, the petitioners' claims based on the CRU documents were exaggerated, contradicted by other evidence, and not a material or reliable basis for questioning the credibility of the body of science at issue; two of the factual inaccuracies alleged in the petitions were in fact mistakes, but both were "tangential and minor" and did not change the key IPCC conclusions; and the new scientific studies raised by some petitions were either already considered by EPA, misinterpreted or misrepresented by petitioners, or put forth without acknowledging other new studies. *Id.* at 49,557–58.
>
> **********
>
> State Petitioners have not provided substantial support for their argument that the Endangerment Finding should be revised.

Coalition for Responsible Regulation Inc., 684 F.3d at 124-125.

Again, Defendants do not even bother to mention the EPA's review in their brief, or the D.C. Circuit Opinion, determinations they had specifically requested.

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5. United States Department Of Commerce

In February 2011, after a request from Senator James Inhofe, the Inspector General of the Department of Commerce conducted an independent review of the e-mails stolen from CRU.[52] The review was precipitated by the testimony of Dr. Jane Lubchenco, Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator, at a hearing before the House Select Committee on Global Warming. Specifically, Dr. Lubchenco testified that:

> The [CRU] emails really do nothing to undermine the very strong scientific consensus and the independent scientific analyses of thousands of scientists around the world that tell us that the earth is warming and that the warming is largely a result of human activities.[53]

In the course of its inquiry, the department examined all of the CRU e-mails, including the November 16, 1999 e-mail referenced above in which Professor Jones used the words "trick" and "hide the decline."[54] The department found "no evidence" of inappropriate manipulation of data.[55]

6. National Science Foundation

Most recently, all of these same allegations were reviewed, once again, by the Inspector General of the National Science Foundation ("NSF"). The NSF is an independent federal agency established to, among other things, "promote the progress of science," and "advance the national health, prosperity, and welfare." *See* National Science Foundation Act of 1950, Pub. L. No. 81-507, 81st Congress (1950). The NSF is the only federal agency "dedicated to the support of

[52] *See* Letter from Todd J. Zinser to The Honorable James M. Inhofe (February 18, 2011), available at: http://www.oig.doc.gov/Pages/Response-to-Sen.-James-Inhofe's-Request-to-OIG-to-Examine-Issues-Related-to-Internet-Posting-of-Email-Exchanges-Taken-from-.aspx, attached hereto as Exhibit 12 ("Zinser Letter to Inhofe").

[53] *Id.* at 1.

[54] Detailed Results of Inquiry Responding to May 26, 2010, Request from Senator Inhofe, at 2-3, attached hereto as Enclosure to Exhibit 12, Zinser Letter to Inhofe.

[55] *Id.*at 11-12.

fundamental research and education in all scientific and engineering disciplines"[56], and is essentially the final arbiter of scientific research in the United States. The NSF's Inspector General is further tasked with investigating fraud and other violations of laws and regulations. *See* 45 C.F.R. §§ 689.1-689.10 (2011).

In 2011, the NSF, after having been notified by Penn State of its own investigation, and presumably sensitive to the hue and cry of certain skeptics regarding Penn State's failure to interview experts critical of Dr. Mann's research, decided to initiate another investigation into the allegations related to research misconduct.[57] In so doing, NSF performed its own independent review of all of the allegations and all of the evidence, and concluded the following:

> As a part of our investigation, we again fully reviewed all the reports and documentation the University provided to us, as well as a substantial amount of publically available documentation concerning both the Subject's research and parallel research conducted by his collaborators and other scientists in that particular field of research. As noted above, no specific allegation or evidence of data fabrication or falsification was made to the University; rather, the University developed its allegation of data falsification based on a reading of publicly released emails, many of which contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors. As part of our investigation, we attempted to determine if data fabrication or falsification may have occurred and interviewed the subject, critics, and disciplinary experts in coming to our conclusions.

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[56] *See* "National Science Foundation History", available at: http://www.nsf.gov/about/history/.

[57] *See* National Science Foundation, Office of Inspector General, Office of Investigations, "Closeout Memorandum, Case No. A09120086," available at: http://www.nsf.gov/oig/search/A09120086.pdf, attached hereto as Exhibit 13 ("NSF Closeout Memorandum"). Defendants try to downplay the obvious significance of the National Science Foundation's findings by claiming that NSF did not review all of the data and that NSF only considered "whether Mann . . . had engaged in plagiarism, fabrication, or falsification." CEI Anti-SLAPP Mem. at 15. With respect to the first statement, they are simply wrong. *See* NSF Closeout Memorandum at 2-3. With respect to the second statement, we do not really understand their point. NSF concluded that "[t]here is no specific evidence that [Dr. Mann] falsified or fabricated any data and no evidence that his actions amount to research misconduct." *Id.* at 3. Fabrication is further defined as "making up data or results and recording or reporting them"; "falsification' is defined as "manipulating research materials, equipment, or processes, or changing or omitting data or results such that research is not accurately represented in the research record." 45 C.F.R. § 689.1(b)-(c). Accordingly, any suggestion that the NSF did not exonerate Dr. Mann of fraud is wholly without support.

> Although the Subject's data is still available and still the focus of significant critical examination, no direct evidence has been presented that indicates the Subject fabricated the raw data he used for his research or falsified his results. Much of the current debate focuses on the viability of the statistical procedures he employed, the statistics used to confirm the accuracy of the results, and the degree to which one specific set of data impacts the statistical results. These concerns are all appropriate for scientific debate and to assist the research community in directing future research efforts to improve understanding in this field of research. Such scientific debate is ongoing but does not, in itself, constitute evidence of research misconduct. Lacking any direct evidence of research misconduct, as defined under the NSF Research Misconduct Regulation, we are closing this investigation with no further action. [58]

This NSF inquiry was intended to, and did, close the book on the question of whether Dr. Mann and his colleagues had engaged in data manipulation, research misconduct, or fraud. NSF's exoneration of Dr. Mann was widely reported in the national press, and Defendants acknowledge that they were aware of its conclusions.[59]

D. Defendants' Attacks On Dr. Mann

While this entire fraud matter was (or should have been) put to rest by in the inquiries described above, Defendants saw another opportunity to dredge up their tired and outdated attacks against Dr. Mann in the wake of the wholly unrelated publication of the results of an investigation at Penn State conducted by Louis Freeh (the former director of the Federal Bureau of Investigation) regarding the university's handling of the Jerry Sandusky child abuse scandal. Mr. Sandusky had been convicted of molesting ten young boys. The Freeh Report concluded that senior officials at Penn State had shown "a total and consistent disregard" for the welfare of the children, had worked together to conceal Mr. Sandusky's assaults, and had done so out of

[58] NSF Closeout Memorandum at 3.

[59] *See, e.g.*, Douglas Fisher and The Daily Climate, Federal Investigators Clear Climate Scientist, Again (August 23, 2011), *Scientific American*, available at: http://www.scientificamerican.com/article.cfm?id=federal-investigators-clear-climate-scientist-michael-mann, attached hereto as Exhibit 27; Associated Press, National Science Foundation Investigation Clears Climate Change Researcher (August 24, 2011), *FoxNews*, available at: http://www.foxnews.com/scitech/2011/08/24/national-science-foundation-clears-climate-change-researcher/#ixzz2H53yISXF, attached hereto as Exhibit 28.

fear of bad publicity for the university. For the climate change skeptics, the Sandusky scandal presented a new avenue to castigate Dr. Mann and impugn his reputation and integrity. Based upon the supposed link that a different investigative panel of the university had cleared Mr. Sandusky of misconduct, Defendants baldly assert that the university also must have worked to conceal improper and fraudulent conduct on the part of Dr. Mann. While this comparison strains credulity, this was Defendants' new "news peg".

On July 13, 2012, an article authored by Defendant Rand Simberg entitled "The Other Scandal In Unhappy Valley" appeared on OpenMarket.org, a publication of CEI.[60] Purporting to comment upon Penn State's handling of the Sandusky scandal, Mr. Simberg hearkened his readers back to "another cover up and whitewash" that occurred at the university. Mr. Simberg and CEI stated as follows:

> perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.[61]

[60] Defendant CEI describes itself as "non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty" and touts itself as being "at the forefront of the political and scientific debate over global warming." CEI Anti-SLAPP Mem. at 10. CEI has a history of demonizing and attempting to discredit scientists with whom it disagrees, particularly those scientists who have asserted a link between human conduct and the environment. For example, CEI hosts the website RachelWasWrong.org, whose sole purpose is to cast aspersions on the late Rachel Carson, Presidential Medal of Freedom recipient, marine biologist and conservationist who authored the groundbreaking book *Silent Spring*, which documented the deleterious effects of DDT on the environment. *See* http://www.RachelWasWrong.org. Historically funded by fossil-fuel interests such as the Koch Brothers Industries and ExxonMobil, CEI has a track record of disseminating misinformation in attempting to convince the public that global warming is uncertain. For example, in 2006 CEI launched an advertising campaign promoting carbon dioxide and arguing that global warming is not a concern. Citing *Science* magazine, CEI stated that carbon dioxide "is essential to life" and that the world's glaciers were "growing, not melting." *Science's* editors complained of this use of their research stating that the advertisement "misrepresents the conclusions of the two cited *Science* papers." *See* FactCheck.org, "Scientist to CEI: You Used My Research to 'Confuse and Mislead," (May 26, 2006), available at: http://www.factcheck.org/misleading-ads/scientist_to_cei_you_used_my_research.html

[61] Rand Simberg, "The Other Scandal in Unhappy Valley," (July 23, 2012), available at: http://www.openmarket.org/2012/07/13/the-other-scandal-in-unhappy-valley/, attached hereto as Exhibit 1. The amended version is attached hereto as Exhibit 1(a).

Mr. Simberg and CEI went on to state that after the leaking of the CRU e-mails,

> many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary.
>
> **********
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.
>
> **********
>
> We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?

Id.

After this publication was released, the editors of Openmarket.org removed the sentence stating that "Mann could be said to be the Jerry Sandusky of climate science . . .," stating that the sentence was "inappropriate." *See* Exhibit 1(a).

On July 15, 2012, an article entitled "Football and Hockey" appeared on National Review Online.[62] The article, authored by Defendant Mark Steyn, commented on and extensively quoted from Mr. Simberg's piece on Openmarket.org. Mr. Steyn and NRO reproduced the following quote:

[62] The *National Review* touts itself as an iconic and venerable conservative opinion leader. *See* NRO Mem. at 11. While that may have been true at one time, in recent years the publication has appeared to change course. So much so that Christopher T. Buckley, the son of the magazine's founder, publicly disavowed and resigned from the magazine after receiving a "tsunami" of "hate mail" in the wake of his endorsement of Barack Obama for President, including an attack from an editor at the magazine deeming his support of Mr. Obama as "cretinous." Buckley was disappointed that his act of voicing a "reasoned argument for the opposition should result in acrimony and disavowal" and that he had been effectively "fatwahed . . . by the conservative movement." *See* Christopher T. Buckley, Buckley Bows Out of National Review, *The Daily Beast* (October 14, 2008), available at http://www.thedailybeast.com/articles/2008/10/14/sorry-dad-i-was-fired.html, Exhibit 29.

> I'm referring to another cover up and whitewash that occurred [at Penn State] two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.[63]

Perhaps realizing the outrageousness of Mr. Simberg's comparison of Dr. Mann to a convicted child molester, Mr. Steyn conceded: "Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point." *Id.* Mr. Steyn and NRO went on to state that "Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." *Id.*

Mr. Steyn and NRO also reproduced verbatim the defamatory statements of Mr. Simberg and CEI, even after CEI's acknowledgment that they were inappropriate, and continue to stand by them. The full quote from Mr. Simberg and CEI remains visible on National Review Online.

After the publication of the above statements, Dr. Mann demanded retractions and apologies from both NRO and CEI.[64] Dr. Mann advised NRO and CEI that their allegations of misconduct and data manipulation were false and were clearly made with the knowledge that they were false. Dr. Mann further stated that it was well known that there have been numerous investigations into the issue of academic fraud in the wake of the disclosure of the CRU e-mails, and that every one of these investigations has concluded that there is no basis to these allegations and no evidence of any misconduct or data manipulation.

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[63] Mark Steyn, "Football and Hockey," (July 15, 2012), available at: http://www.nationalreview.com/corner/309442/football-and-hockey-mark-steyn#, attached hereto as Exhibit 2.

[64] *See* Exhibit 17, Williams letter to Fowler, and Exhibit 18, Williams letter to Smith.

On August 22, NRO published a response from its editor Rich Lowry[65] on National Review Online entitled "Get Lost."[66] NRO refused to apologize for or retract "Football and Hockey," but tellingly did not deny the falsity of the defamatory statements, nor their knowledge of their falsity. Rather, Mr. Lowry's defense was that:

> [i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us. *Id.*

As noted above, whether criminal fraud or civil fraud, the accusations against Dr. Mann are both defamatory *per se*. And semantics aside, the allegation that Dr. Mann's research was "intellectually bogus" is yet another allegation of academic fraud.[67] CEI then again republished Mr. Lowry's comments by linking to and adopting Mr. Lowry's response and noting that NRO "expertly summed up the matter in a response by the editor."[68]

Defendants did not stop there. Their words and actions since Dr. Mann's demand for a retraction and the filing of this lawsuit evidence an undisguised glee at the prospect of further humiliating Dr. Mann and in battling him in the court of law. In an initial effort to use this controversy to drum up funds, Mr. Lowry told his readers that if Dr. Mann filed a lawsuit, he and NRO:

> will be doing more than fighting a nuisance lawsuit; we will be embarking on a journalistic project of great interest to us and our readers . . . we may eventually

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[65] Mr. Lowry is no stranger to offensive commentary, having been roundly criticized in 2002 for having entertained the idea of "nuking" Mecca in retalation for a terrorist attack on the United States. *See* http://old.nationalreview.com/thecorner/2002_03_03_corner-archive.shtml.

[66] *See* Get Lost: My response to Michael Mann, Exhibit 3.

[67] *See* Dictionary.com, (listing "fraudulent" as a synonym for "bogus"), available at: http://dictionary.reference.com/browse/bogus?s=t..

[68] *See* Christine Hall, Penn State Climate Scientist Michael Mann Demands Apology From CEI (August 24, 2012), available at: http://cei.org/news-releases/penn-state-climate-scientist-michael-mann-demands-apology-cei, attached hereto as Exhibit 4.

> even want to hire a dedicated reporter to comb through the materials and regularly post stories on Mann. My advice to poor Michael is to go away and bother someone else. If he doesn't have the good sense to do that, we look forward to teaching him a thing or two about the law and about how free debate works in a free country. He's going to go to great trouble and expense to embark on a losing cause that will expose more of his methods and maneuverings to the world. In short, he risks making an ass of himself. But that hasn't stopped him before.[69]

Mark Steyn, in cheering on his co-defendants' call to arms, told his own readers that he would "bet Michael Mann had never heard of [him] when he blew his gasket, and [he would] wager his high-priced counsel never bothered doing two minutes of Googling. If they had, they'd have known that once they start this thing they'd better be prepared to go the distance."[70] Defendants' continued derision of Dr. Mann reached its zenith when the NRO editors took out a full page advertisement in Penn State's student newspaper mocking Dr. Mann for his statements regarding the 2007 Nobel Peace Prize awarded to the IPCC.[71] Defendants' taunts have only grown more intense in the wake of the filing of this lawsuit—threatening to "kick Professor Mann's legal heinie,"[72] and to "stick Dr. Mann's hockey stick where the global warming don't shine"[73]—rather emphatically putting the lie to Defendants' assertions that Dr. Mann's lawsuit is a threat to their First Amendment rights.

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[69] Get Lost: My response to Michael Mann, Exhibit 3.

[70] Exhibit 23, Steyn: "Stick it"

[71] *See* Exhibit 30. Specifically, Defendants deride Dr. Mann for "falsely" claiming to be a Nobel Prize recipient. Dr. Mann contributed to the Intergovernmental Panel on Climate Change ("IPCC"). The IPCC was subsequently awarded the Nobel Peace Prize for 2007. After the receipt of that award the IPCC sent certificates to scientists who had contributing substantially to the report congratulating them for "contributing to the award of the Nobel Peace Prize for 2007 to the IPCC." A number of those scientists, including Dr. Mann, understood from this commendation that it was appropriate to state that they either "shared" or were a "co-recipient" of the award.

[72] *See* Exhibit 20, CEI: About Michael Mann's lawsuit; Exhibit 21, We Need Your Help; Exhibit 22, Fowler: "Mann Up.

[73] Mark Steyn, "Nobel Laureate Steyn Takes on *National Review*, (December 11, 2012), available at: http://www.nationalreview.com/corner/335320/nobel-laureate-steyn-takes-national-review-mark-steyn#.

III. ARGUMENT

A. Dr. Mann's Lawsuit Should Not Be Dismissed Pursuant To The District Of Columbia's Anti-SLAPP Statute

1. This Is Not The Type Of Lawsuit The Anti-SLAPP Statute Was Meant To Protect Against

In a transparent attempt to couch themselves as the defenders of the First Amendment, the CEI Defendants boldly assert that this lawsuit "is precisely the kind of attempt to chill speech on issues of public concern that the D.C. Council intended to target when it passed the anti-SLAPP Act." CEI Anti-SLAPP Mem. at 30. Defendants further argue that Dr. Mann, in filing this lawsuit, does not seek to redress a legally cognizable wrong, but rather simply to "muzzle opposing points of view." *Id.* Casting themselves as the champions of free debate on matters of public concern, Defendants represent to this Court that they have brought their motion to combat the "evil" that SLAPP suits represent. Defendants' characterization of this lawsuit and its supposed similarity to a classic SLAPP suit could not be more off the mark.

Dr. Mann's Complaint is specific, well-pled, and replete with actionable facts—all compiled before discovery has even begun. This case is therefore entirely distinguishable from the type of action the District of Columbia had in mind when it enacted the D.C. Anti-SLAPP Act. As the D.C. District Court has described them, " "SLAPP suits are often brought for 'purely political purposes' in order to obtain 'an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff.'" *Blumenthal*, 2001 WL 587860, at *3.

> [O]ne of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished… Thus, while SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common

> citizens from exercising their political or legal right or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs.

Id. (alterations in original)(citation omitted)

The District of Columbia Council's Committee Report regarding the Anti-SLAPP Act supports this view of SLAPPs. In commenting on the reasoning underlying the adoption of the D.C. Anti-SLAPP Act, the Committee Report points to certain previous SLAPP suits in the District of Columbia.[74] As its primary example, the Report focuses on "the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer." Committee Report at 3. According to the Report, "[w]hen the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they 'conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of … signs and gave statements and interviews to various media." *Id.* The Committee noted that "[s]uch activism … was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend." *Id.* The Committee concluded: "Though the actions of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation." *Id.* at 3-4.

This view of SLAPP suits as described in the Committee Report is exactly in line with the justification offered by the court in *Blumenthal*—and completely different from the case Dr. Mann has brought. Much like this case, the Court in *Blumenthal* reasoned that the suit "[bore] little resemblance" to a SLAPP action and concluded that it could not "characterize the suit as

[74] *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report, November 18, 2010, ("Committee Report") at 3, attached hereto as Exhibit 31.

meritless … or conclude at this stage that plaintiffs have not been injured in their reputations or that 'winning is not [their] primary motivation', so far as it appears, they have brought this suit to 'vindicate a legally cognizable right.'" *Blumenthal*, 2001 WL 587860, at *4 (second alteration in original). Unlike a traditional SLAPP suit, there is no economic bullying here, and Dr. Mann is certainly not a "large private interest[] [aiming] to deter common citizens from exercising their political or legal right[s]." Id. at *3. To the contrary, Dr. Mann is a lone individual who is meritoriously seeking legal recourse for damage to his reputation after Defendants published false and misleading statements of fact about him to a national audience. Nor do Defendants show any signs of having their First Amendment rights "muzzled," as their persistent post-litigation articles evidence.[75] In fact, both NRO and CEI have used this lawsuit as an opportunity to line their coffers, ostensibly to cover legal costs. As noted, NRO has issued pleas to its readers asking them to "[p]lease help National Review in its fight to kick Professor Mann's legal heinie," noting that the publication will "do whatever [it has] to do to find . . . Professor Mann thoroughly defeated, as he so richly deserves to be," and boasting of raising over $100,000 from 900 readers in one week "to counter Michael Mann, the non-Nobel Peace Prize-winning Penn State warming warrior."[76]

2. Relevant Legal Standards

In bringing a Special Motion to Dismiss under the D.C. Anti-SLAPP statute, the movant has the initial burden of making a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The statute further defines an "issue of public interest" to include an issue related to a "public

[75] Attached as Exhibit 34 is a sampling of Defendants' statements regarding Dr. Mann subsequent to his demands for a retraction and apology.

[76] *See* Exhibit 20, CEI: About Michael Mann's lawsuit (soliciting donations based upon the filing of this lawsuit); Exhibit 21, We Need Your Help; Exhibit 22, Fowler: "Mann Up.

figure". D.C. Code § 16-5501(3). Dr. Mann does not dispute that the Anti-SLAPP statute applies here, as the Complaint "arises from an act in furtherance of the right of advocacy on issues of public interest." Assuming Defendants have met their burden under the statute, the burden then shifts to Dr. Mann to establish that his "claim is likely to succeed on the merits." *See* D.C. Code § 16-5502(b). If Dr. Mann meets that burden – which he easily can – Defendants' motion "shall be denied." *Id.*

D.C. Courts have yet to consider the standard by which to judge whether a plaintiff has shown its claims are "likely to succeed on the merits." A sound interpretation of the statute, adopted in California (and which served as the model for the D.C. statute) is that the showing at this stage is not the high burden that Defendants urge on this Court, but rather is akin to the summary judgment standard. After all, the Anti-SLAPP statute was passed to protect against discovery necessitated by lawsuits that were ultimately found to be meritless. The purpose was to provide the court with an early look at the merits of the case, in order to spare the defendants the expense of discovery if the case was not well-founded. The law simply changes the timing on which a motion for summary disposition can be heard—it does not change the substantive law in a defamation case. As such, if it appears at this early stage that the case can survive a motion for summary judgment by raising a triable issue, the case may proceed.

This view is squarely based on jurisprudence from the California courts, and as noted, the D.C. statute was modeled after the California statute. *See Farah v. Esquire Mag., Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012) ("The D.C. Anti-SLAPP Act intentionally follows 'the lead of other jurisdictions.'") (citing Rep. of the D.C. Comm. on Public Safety and the Judiciary on Bill 18-893 (Nov. 19, 2010) at 4). There is nothing in the D.C. legislative history suggesting a standard different from the California standard, which simply incorporates the summary

judgment standard. Pursuant to California law, once a defendant has established that the anti-SLAPP statute applies, in order to avoid dismissal the plaintiff must establish "that there is a probability that the plaintiff will prevail on the claim." Cal. CCP. § 425.16 (2013). The sole difference between the California statute and the D.C. statute is that California uses the term "probability the plaintiff will succeed on the merits," whereas D.C. uses the term "likely to succeed on the merits." This is a distinction without a difference. The dictionary defines "probability" as "likelihood".[77] And it also defines "likelihood" as "probability." Accordingly, the standard is the same and this Court can easily look to California law in order to establish Dr. Mann's burden.

Under California law, "[t]o demonstrate a probability of prevailing on the merits" the plaintiff must show that the "evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment." *Hall v. Time Warner, Inc.*, 153 Cal.App.4th 1337, 1346, 63 Cal. Rptr. 3d 798, 804-805 (2007) (internal citations and quotations omitted); *see also*, *Taus v. Loftus.*, 40 Cal. 4th 683, 714, 54 Cal. Rptr. 3d 775, 799 (2007) ("past cases interpreting [the anti-SLAPP statute] establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities"). In fact, California courts, in describing California's anti-SLAPP act's probability standard have, deemed it a determination of whether the plaintiff can establish a "likelihood of success on the merits"—words identical to the

[77] *See* "likelihood" *Merriam Webster.com* 2013 (defining likelihood as "probability"). (January 9, 2013), available at: http://www.merriam-webster.com/dictionary/likelihood; "probability" *Merriam Webster.com* 2013 (listing "likelihood" as a synonym for probability). (January 9, 2013), available at: http://www.merriam-webster.com/dictionary/probability.

wording in the D.C. statute. *Mann v. Quality Old Time Service., Inc.*, 120 Cal.App.4th 90, 105, 15 Cal. Rptr. 3d 215, 222 (2004); *see also Aber v. Comstock*, Case No. A134701, 2012 WL 6621695, at *11 (Cal.App. 1 Dist. Dec. 18, 2012) (noting that plaintiff had to "show a likelihood of success on his claims" in responding to a SLAPP motion); *Chodos v. Cole*, 210 Cal. App.4th 692, 706, 148 Cal.Rptr.3d 451, 461 (2012) (describing the second prong of California's anti-SLAPP statute as "likelihood of success on the merits"); *Wong v. Jing,* 189 Cal.App.4th 1354, 1368, 117 Cal. Rptr. 3d 747, 760 (2010) (describing plaintiff's burden under California's anti-SLAPP statute as a requirement "[t]o show a likelihood of success").

Nonetheless, Defendants argue that Dr. Mann's burden is "daunting," "unique among Anti-SLAPP statutes," and "heavier" than other anti-SLAPP jurisdictions. *See* CEI Anti-SLAPP Mem. at 34-35; NRO Mem. at 20. In support of their argument and in a pointed effort to avoid the summary judgment standard that has been established in other anti-SLAPP jurisdictions, Defendants point to one dictionary definition of the term "likely" for the proposition that this term connotes a higher burden than "probability." *See, e.g.* NRO Mem. at 20. This standard finds no support in the law, and is clearly at odds with the law set forth in other jurisdictions which have enacted Anti-SLAPP statutes. This overly stringent standard—on a motion to dismiss, would unduly restrict any plaintiff's right to assert a defamation case involving a matter of public interest.

3. Dr. Mann Is Likely To Prevail On The Merits Of His Defamation Claims

To succeed on his defamation claims, Dr. Mann must demonstrate that: (1) Defendants made false and defamatory statements about Dr. Mann; (2) Defendants published those statements without privilege to at least one third party; (3) Defendants' possess the requisite fault in publishing those statements; and (4) either the statements were actionable as a matter of law

(i.e., were defamatory *per se*, which is the case here), or that their publication caused Dr. Mann special damages. *See Williams v. District of Columbia*, 9 A.3d 484, 91 (D.C. 2010); *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001). There is no dispute that a statement that tends to injure the plaintiff in his profession by indicating that he lacks knowledge, skill, honesty, character, and integrity constitutes defamation *per se*, and is actionable as a matter of law. *See Ingber v. Ross*, 479 A.2d 1256, 1268 (D.C. 1984) ("Defendants' statements were slander *per se* because they imputed to Plaintiff "a lack of knowledge and skill in dentistry and a lack of honesty, character and integrity which tended to injure [plaintiff's] reputation in the community and were calculated to cause harm to [plaintiff's] reputation") (citations omitted). Defendants do not even contest the fact that their statements are defamatory *per se*.

Assuming that Dr. Mann is a public figure, then to prevail on his defamation claim, he must also establish that Defendants made the defamatory statements with actual malice – *i.e.* with knowledge that they were false or with reckless disregard as to their truth. *See Thomas*, 681 F.Supp. at 65 (citing *New York Times v. Sullivan*, 376 U.S. at 280). Actual malice is established if it is shown that "the defendant in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness of . . . . its probable falsity." *See Oao Alfa Bank v. Center for Public Integrity*, 387 F.Supp.2d 20 (D.D.C. 2005) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731)).

In making an early assessment of Dr. Mann's likelihood of prevailing on the merits, there is only one possible conclusion that this Court can reach: Dr. Mann will prevail, as the

statements at issue are false and defamatory *per se* and Defendants made those statements with knowledge of their falsity or reckless disregard for their truth.[78]

Dr. Mann has brought suit for defamation *per se* based on the following four individual statements:

- Defendant Simberg's statement, published by CEI on Openmarket.org, that Dr. Mann had engaged in "data manipulation," "academic and scientific misconduct," and was "the posterboy of the corrupt and disgraced climate science echo chamber." Compl. ¶ 48.

- Defendant Steyn's statement, published by NRO on *National Review Online*, that Dr. Mann "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." Compl. ¶ 60.

- Mr. Lowry's statement, published by NRO on *National Review Online*, calling Dr. Mann's research "intellectually bogus." Compl. ¶ 72.

- Defendant CEI's press release, adopting and republishing the above statement by Mr. Lowry calling Dr. Mann's research "intellectually bogus."

[78] Dr. Mann believes 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). However, to the extent that they change their position, CEI will be collaterally estopped from asserting that its statements are true based upon its participation in the EPA proceedings and the subsequent appeal to the District of Columbia Circuit. CEI took advantage of a full and fair opportunity to make its arguments that the so-called "climategate" e-mails evidenced data manipulation. Having failed to persuade either the EPA or the D.C. Circuit of their position, CEI is now estopped from arguing that its statements about Dr. Mann are true. "Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *United States v. Mendoza*, 464 U.S. 154,(1984) (citing *Montana v. United States*, 440 U.S. 147,(1979)) (noting that the Court has broadened the scope of the collateral estoppel doctrine by abandoning the mutuality of parties requirement and allowing for "offensive" use of collateral estoppel—that is, the use of the doctrine by a plaintiff seeking to foreclose a defendant from relitigating an issue the defendant previously lost against another plaintiff). "Collateral estoppel, like the related doctrine of res judicata, serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *Id.* (quoting *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). Collateral estoppel may be applied when (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. *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995) (quoting *Washington Med. Ctr. v. Holle*, 573 A.2d 1269, 1283 (D.C. 1990)). Further, collateral estoppel applies to the result of an administrative proceeding. *Franco v. District of Columbia,* 3 A.3d 300, 303-04 (D.C. 2010) (citations omitted). Here, all of the necessary elements for collateral estoppel are present based upon CEI's litigation with the EPA, a proceeding in which CEI had a full and fair opportunity to argue its central contention that the so-called "climategate" e-mails demonstrated fraudulent activity and data manipulation. Having failed in that litigation, principles of collateral estoppel preclude CEI from re-litigating the truth of its defamatory statements.

Each of these allegations accuses Dr. Mann of fraud and dishonesty and each is false. Again, Defendants make no claim that the statements at issue are not false. Nor could they. Rather, they hang their hats on the arguments that "much of the speech identified in the Complaint . . . is plainly hyperbolic opinion commentary" and that Dr. Mann has failed to plead actual malice with sufficient specificity.

a. Defendants' Statements About Dr. Mann Are Not Constitutionally Protected Opinion

As a threshold matter, the Supreme Court has eschewed any "artificial dichotomy between 'opinion' and fact." *Milkovich,* 497 U.S. at 19. Thus, "the Supreme Court's decision in *Milkovich* made clear that the First Amendment gives no protection to an assertion sufficiently factual to be susceptible of being proved true or false." *Jankovic v. International Crisis Group*, 593 F.3d 22, 27 (D.C. Cir. 2010) (citations omitted); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). As the D.C. Circuit further explained in *Jankovic*, "there is no wholesale exemption from liability in defamation for statements of 'opinion.' Instead, statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. 1994) ("*Moldea II*"). The key inquiry is whether a statement is capable of verification. *Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001). "In other words, even with a *per se* opinion, the question is whether the person has made an assertion that can reasonably be understood as implying provable facts." *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990). Accordingly, Defendants cannot defeat Dr. Mann's claims with their asserted opinion defense, absent a showing that "it is *clear* [they] are expressing a subjective view, an interpretation, a theory, conjecture, surmise, or hyperbole, rather than claiming to being in possession of objectively verifiable facts." *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C.

1995), *aff'd*, 80 F.3d 555 (D.C. Cir. 1996) (citations omitted); *see also*, *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995) (All authors, even those of generally subjective pieces like book reviews, "must attempt to avoid creating the impression that they are asserting objective facts rather than merely stating subjective opinions"). Here, the statements at issue contain verifiably false statements of fact.

(1) Defendants Statements Are Verifiable

The statement that Dr. Mann "has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and the planet" is plainly factual and verifiable. It does not, as Defendants' contend, merely repeat a supposed "longstanding criticism" that Dr. Mann's work is "based on flawed assumptions and statistical methods." Similarly, the statement that Dr. Mann "had been engaging in data manipulation" can be proven false. It does not, as Defendants' contend, merely argue that Dr. Mann "adopted a particular statistical methodology that led to a particular result." Thus, objective evidence could be assessed to determine whether Dr. Mann deliberately altered his data in order to fit his political agenda, by among other things, ignoring data that does not lead to a preordained result and/or manufacturing data out of whole cloth.

Equally verifiable is the statement that Dr. Mann has become the posterboy of the corrupt and disgraced climate science. The statement explicitly accuses Dr. Mann of corruption. "[T]o falsely state that [plaintiff] is incompetent and corrupt . . . is to hold him up to disgrace and contempt . . . [and is] defamatory." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 1305 (N.Y. 1977) (finding that defendants' statements that a judge was "corrupt" would lead the "ordinary and average reader" to "understand the use of these words . . . as meaning that plaintiff had committed illegal and unethical actions" and that such statements

are not constitutionally protected as opinion). It does not simply "reflect the low esteem in which skeptics hold Mann and his work." CEI Anti-SLAPP Mot. at 43.

Similarly verifiable are the allegations that Dr. Mann engaged in academic and scientific misconduct and fraud and that his research is intellectually bogus.[79] Fraud has five essential elements: "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation." *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977). Whether Dr. Mann engaged in fraud is verifiable, and is a matter that this Court and others routinely address and regarding which factual findings are made every day. Defendants know this. They know that six separate entities have considered and made objective findings as to whether Dr. Mann and his colleagues engaged in misconduct or fraud. CEI called for an investigation into Dr. Mann's conduct in November 2010[80], and has gone so far to request and receive an investigation by the EPA.[81] Nonetheless, the CEI Defendants have the temerity to represent to this Court that their call for an investigation "was to no avail" (CEI Anti-SLAPP Mem. at 18), a bold assertion to make in light of the investigations by the EPA and the NSF. In and of itself, this conduct shows that Defendants know that their fraud allegations are objectively verifiable (and false).

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[79] Defendants' semantic parsing aside, bogus is a synonym for fraud and therefore this allegation is verifiable in much the same way as the explicit fraud allegations. *See* Dictionary.com, (listing "fraudulent" as a synonym for "bogus"), available at: http://dictionary.reference.com/browse/bogus?s=t.

[80] *See* Christine Hall, "Climategate Scandal One Year Later, May Questions Remain," (November 18, 2010), available at: http://cei.org/news-releases/climategate-scandal-one-year-later-many-questions-remain, attached hereto as Exhibit 32. In that release, Myron Ebell, the Director of CEI's Center on Energy and Environment Policy, called for a "thorough audit" of "the data and methodologies underlying the major scientific claims underlying global warming alarmism."

[81] CEI has also championed the Virginia Attorney General Ken Cuccinelli's efforts to obtain Dr. Mann's e-mail correspondence defending those efforts as "simply . . . following the letter of a statute authorizing investigation of possible fraud." *See* Christopher C. Horner, Cuccinelli is Following the Law; Mann Up, UVa (May 23, 2010), available at: http://cei.org/op-eds-and-articles/cuccinelli-following-law-mann-uva, attached hereto as Exhibit 33. Certainly if Mr. Cuccinelli, can investigate Dr. Mann for fraud, this Court can verify allegations of fraud.

Defendants' accusations of fraud in this case are strikingly similar to the accusations deemed factual (and therefore not constitutionally protected) by the Supreme Court in *Milkovich*. In that case, the defendant accused the plaintiff of lying during a hearing before the Ohio High School Athletic Association. *Milkovich,* 110 S. Ct. at 2697. The Court noted that "[t]he dispositive question" was "whether a reasonable fact finder could conclude that the statements in [defendant's] column imply an assertion that [plaintiff] perjured himself in a judicial proceeding." *Id.* at 2707.[82] The Court concluded "a determination whether [plaintiff] lied in this instance can be made on a core of objective evidence." *Id.* Likewise, a determination of whether Dr. Mann committed fraud in relation to his development of the hockey-stick graph can be made on a core of objective evidence. This Court, like any other fact finder litigating a case involving criminal or civil fraud, can hear and consider evidence as to whether Dr. Mann made any knowing and material misrepresentations in his research with the intent to deceive.

As to the allegations of "misconduct," Defendants cannot argue their way around this statement by claiming that it merely expresses an opinion about Penn State and not Dr. Mann. While the statement may include a criticism of Penn State, it clearly states that Dr. Mann, and not Penn State, is guilty of academic and scientific misconduct. There can be no question that objective evidence could be assessed to show whether Dr. Mann engaged in academic and scientific misconduct. In fact, this is the very same factual inquiry that the EPA, the NSF, the Commerce Department, the United Kingdom government, and Penn State engaged in when those entities independently investigated whether Dr. Mann had engaged in "research misconduct."[83]

[82] Perjury, like fraud, has readily identifiable elements: (1) an oath; (2) before a competent person or tribunal; (3) a false statement; (4) of material fact; and (5) knowledge of falsity. *See In re White*, 11 A.3d 1226, 1273 (2011) (citations omitted).

[83] *See* Exhibits 5 through 13.

Specifically, Penn State, after receiving numerous communications "accusing [Dr. Mann] of having engaged in acts . . . that included manipulating data, destroying records and colluding to hamper the progress of scientific discourse around the issue of anthropogenic global warming", reviewed "all available evidence"[84] and "determined that there was no substance to the allegations against [Dr. Mann]."[85] Similarly, the National Science Foundation noted that "[t]o recommend a finding of research misconduct, the preponderance of the evidence must show that with culpable intent [Dr. Mann] committed an act that meets the definition of research misconduct" and concluded that "no direct evidence has been presented that indicates [Dr. Mann] fabricated the raw data he used for his research or falsified his result."[86] These investigations clearly belie Defendants' specious argument that their accusations of "data manipulation," and "academic and scientific misconduct" are not "objectively capable of proof or disproof." CEI Anti-SLAPP Mem. at 46.

(2) The Context Of Defendants' Statements Does Not Render Them Non-Actionable Opinion

Perhaps realizing the verifiability of their statements, Defendants focus predominantly on the "context" of their statements and spend less than half a page of their brief arguing that their defamatory statements are "not objectively capable of proof or disproof." CEI Anti-SLAPP Mem. at 37-46. While it is true that *Milkovich* did not abandon the principle of looking to the context in which the speech appears, *Moldea II*, 22 F.3d at 314, "an article's political 'context' does not indiscriminately immunize every statement contained therein." *Weyrich*, 235 F.3d at 626. Further, *Milkovich* specifically eschewed the multifactor tests that several lower courts had

[84] Penn State's review included interviewing seven witnesses, including Dr. Mann, and reviewing scores of documents and e-mails. *See* Exhibit 10 at 6-7.

[85] *Id.* at 1, 19.

[86] Exhibit 13, NSF Closeout Memorandum at 3

utilized to categorize speech (and that Defendants rely upon in their briefs). *Snyder v. Phelps*, 580 F.3d 206, 218-219 (4th Cir. 2009).[87] As for those cases in which context has been a determinative factor for courts in the wake of *Milkovich*, they are limited to arenas where non-verifiable opinions are the norm—such as book reviews. *See, e.g. Moldea II*, 22 F.3d at 315. For example, in *Phantom Touring, Inc.*, after noting that "the connotation of deliberate deception is sufficiently factual to be proved true or false," the court held that the context of the statement—a theater review—"rendered the language not reasonably interpreted as stating 'actual facts.'" *Phantom Touring v. Affiliated Publications,* 953 F.2d 724, 729 (1st Cir. 1992).

Here, the context of Defendants' statements (to the extent they are relevant), is a far cry from the necessarily subjective theater of artistic commentary and review. Defendants' statements were published on websites that, to be sure, often offer opinion commentary. But the fact that the statements appeared in a publication that often expresses opinions is hardly a liability shield. *See Moldea II,* 22 F.3d at 314 (noting that [a]lthough the statements at issue in *Milkovich* appeared in an 'opinion column' in a newspaper sports section, the Court found no relevance in this fact . . . apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns"). The D. C. Circuit's decision in *Weyrich* is instructive in this regard. In *Weyrich,* the defamatory statements appeared in *The New Republic*. *The New Republic*, much like *The National Review*, is a well-known source of political commentary, and describes itself as a "Weekly Journal of Opinion." *Weyrich*, 235 F.3d

[87] The court in *Snyder* considered whether the following signs displayed at the funeral for a Marine killed in Iraq and held that the following statements were not verifiable, and were thus constitutionally protected opinion: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags". *Snyder* at 39-40. Because the statements were "purely subjective opinion", the court concluded that "a reasonable reader" would not interpret the signs as including verifiable facts about plaintiff or his son. *Id.* at 40-41. In contrast to the statements in *Snyder*, there can be no question that Defendants' fraud accusations are verifiable and could be—and were—interpreted by reasonable readers as such.

at 625. Although most of the article at issue in *Weyrich* contained hyperbolic commentary, the D.C. Circuit still found actionable factual assertions in the article, including that the subject of the article had "snapped," was becoming "more and more isolated," had surrounded himself with a "coterie of sycophants," was "apoplectic," and had "psychological problems." *Id.* While these statements may have appeared in an opinion piece, because they were objectively verifiable, as are the statements at issue here, they did not constitute protected speech.

(3) The "Supportable Interpretation" And "Fair Comment" Privileges Do Not Apply

Finally, the suggestion that Defendants' statements are protected because they are "protected opinions based on truthful facts" and offer "fair comment" is absurd. CEI Anti-SLAPP Mot. at 51. First, relying upon the D.C. Circuit's opinion in *Moldea II,* Defendants argue that their statements regarding Dr. Mann are non-actionable because they have put forth a "supportable interpretation" of the facts. Second, Defendants posit that because their statements are opinion based upon truthful facts disclosed to the reader, those statements qualify as "fair comment" on a matter of public concern. These arguments, like all of Defendants' opinion arguments, must fail.

The supportable interpretation protects non-verifiable statements of opinion where the plaintiff cannot "show that the statement is 'so obviously false that 'no reasonable person could find that the review's characterizations were supportable interpretations' of the underlying facts." *Washington v. Smith*, 80 F.3d 555, 557 (D.C. Cir. 1996) (citing *Moldea II*, 22 F.3d at 315, 317). Similarly, the fair comment privilege provides "legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Milkovich,* 497 U.S. at 13 (citations omitted).

As to their supportable interpretation argument, *Moldea II* expressly stated that the "supportable interpretation" framework applies only if "the challenged statements [are] evaluations of a literary work," such as "when a reviewer offers commentary that is tied to the work being reviewed." *Moldea II*, 22 F.3d at 313. When "a writer launches a personal attack" on a person's "character, reputation, or competence," however, the "supportable interpretation" standard does not apply. *Id.* at 315 ("supportable interpretation" standard would not apply if book reviewer said a book was "badly written … because its author was a drug dealer"); *id.* ("The statements at issue in the instant case are assessments of a book, rather than direct assaults on [the author's] character, reputation, or competence as a journalist."). *Milkovich*—not *Moldea II*—thus governs here because Defendants "launch[ed] a personal attack" on Dr. Mann and his conduct, not the quality of any "literary work." *Id.* (explaining that *Milkovich* governs "garden-variety libel," even when it appears in "the medium of a book review").

Moreover, not a single one of the purportedly disclosed facts supports Defendants' allegations of fraud or misconduct. *See* CEI Exhibits 6(a)-(m). In fact, many of the supposedly disclosed facts are: (1) authored by Mr. Simberg himself (CEI Exhibits 6(b), 6(c)); (2) related solely to Penn State's investigation of Mr. Sandusky (CEI Exhibit 6(a)); (3) provide mere biographical information regarding Dr. Mann (CEI Exhibit 6(d)); and/or (4) pre-date the NSF's exoneration of Dr. Mann. Not a one sets forth a scintilla of evidence that would support the opinion that Dr. Mann is guilty of research misconduct or fraud. Thus, Defendants' assertion that the "Blog Post links to a wealth of factual materials that provide basis for its commentary" and that "[e]ach of the challenged statements, in turn, is commentary on those disclosed facts" is simply without merit. CEI Anti-SLAPP Mem. at 48. Moreover, Defendants' claim that their statements include "factual materials . . . fully and prominently disclosed in the article," *id.* at 49,

is a distortion. As with this Court, Defendants do not tell their readers about the EPA's investigation and Defendants' commentary on those investigations that they do disclose deliberately misleads their readers. Accordingly, Defendants' readers certainly are not permitted "to draw their own conclusions." *Id.*

With respect to their fair comment argument, Defendants fail to appreciate that fair comment applies only to opinions, not misstatements of fact. *See Fisher v. Wash. Post Co.,* 212 A.2d 335, 337 (D.C. 1965). For the reasons stated above, Defendants' statements are verifiable facts, not opinions. But even if Defendants' statements were opinions, the law "protects only opinions based on true facts, accurately disclosed." *Jankovic*, 593 F.3d at 28. As the Supreme Court has made clear, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 19. The fair comment privilege does not protect statements that are false, or that are based on misstatements of fact. S*ee Fisher* 212 A.2d at 337 (D.C. 1965) (the fair comment privilege "goes only to opinions expressed by the writer and does not extend to misstatements of fact"); *see also Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980) ("[The fair comment] privilege, however, has been restricted to extend protection only to opinion, not misstatements of fact."); *Jankovic*, 593 F.3d at 29 ("a conclusion based on a misstatement of fact is not protected by the [fair comment] privilege"). Fair comments are not actionable in defamation "because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts . . . ." *Moldea v. New York Times Co. ("Moldea I")*, 15 F.3d 1137, 1144 (D.C. Cir. 1994). Here,

Defendants' statements do not offer an opinion regarding Dr. Mann, they assert as a factual matter that Dr. Mann is guilty of academic misconduct and fraud.

(4) Defendants' Assertion That Their Statements Merely Raise Questions Does Not Shield Defendants From Liability

Defendants also claim that their statements are not actionable because they "raise questions, rather than making factual assertions." CEI Anti-SLAPP Mem. at 51. But the D.C. Circuit rejected this argument long ago: "Where readers would understand a defamatory meaning, liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation, or even question." *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1965). In Defendants' telling, the crux of Defendant Simberg's initial post was really directed at Penn State's investigation of Dr. Mann, and not Dr. Mann himself. While Mr. Simberg's post may end with a question mark, there is nothing rhetorical about its accusations regarding Dr. Mann. Although it is arguable whether Defendants were even raising questions about Penn State's investigation – a difficult argument to make considering that investigation is characterized as a "cover up and white wash" – it is clear that Defendants are not raising questions about Dr. Mann, but rather bluntly accusing him of misconduct and fraud.

Defendants do not question whether Dr. Mann engaged in "data manipulation," they directly posit that the CRU e-mails "revealed [he] had been engaging in data manipulation." Nor do they question whether Dr. Mann had engaged in "academic and scientific misconduct." Rather they base their entire call for a "fresh, truly independent investigation" of Dr. Mann upon the premise that Penn State "covered up and whitewashed" its prior investigation in order to "hide academic and scientific misconduct" on the part of Dr. Mann.

b. Defendants' Statements Do Not Qualify As "Rhetorical Hyperbole"

Nor can the CEI Defendants skirt liability by arguing that their statements are nothing more than rhetorical hyperbole. In defamation law, the phrase "rhetorical hyperbole" encompasses a variety of communications, including epithets, insults, and name-calling, which are protected against civil liability. Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 2.4.7 (4th ed. 2012). The statements at issue here are not mere name-calling, they are accusations of fraudulent conduct and dishonesty.

As a preliminary matter, in an effort to shoehorn their statements into the definition of rhetorical hyperbole, the CEI Defendants assert that their statements are hyperbolic because "no reasonable person could conclude that Mann has been accused of committing acts remotely similar to those of Sandusky—the comparison between the two men's deeds is metaphorical, not literal." CEI Anti-SLAPP Mem. at 55; NRO Mem. at 28. Unfortunately, Defendants fail to acknowledge that Dr. Mann is not bringing a defamation claim on the basis of the Sandusky comparison—that is a different claim, an intentional infliction of emotional distress. Rather, Dr. Mann's defamation claims are based upon defendants' allegations of "fraud," "academic and scientific misconduct," "data manipulation," "molesting and torturing data," and "corruption and disgrace." Accordingly, whether a reasonable reader would have taken the Sandusky comparison as literal or metaphorical is beside the point.

More important, Defendants' assertion that the explicit allegations of fraud and misconduct "are also obviously likewise rhetorical hyperbole" does not withstand scrutiny. The CEI Defendants' lies are written as statements of fact, not statements of opinion, and they were

meant to be, and were, taken literally.[88] Nonetheless, they argue that "a reasonable reader would not think that Mann was being accused of fraud in any literal criminal sense." CEI Anti-SLAPP Mem. at 56; NRO Mem. at 28. But Defendants' offer no support for their assertions about what their readers might think, and any assertion in that regard is sharply contradicted by the evidence discovered to date. Commentators on OpenMarket.org (the CEI blog on which Mr. Simberg originally published his defamatory statements) immediately responded to Defendants' allegations. More recently, last month, NRO wrote an article to its readers pleading for donations to fund its defense. A sampling of CEI's and NRO' readers' responses is set forth below, and all are included in Exhibit 35. These responses make clear that Defendants' readers did not have any trouble understanding the fact that they had specifically accused Dr. Mann of research fraud:

> From CEI's readers:
>
> - This is one of the most disgusting and amoral attempts to smear an honest and courageous scientist's reputation that I have ever seen. Dr. Mann has been cleared of any sort of wrongdoing whatsoever by 6 different investigations and his detractors have been shown to be complete liars.
>
> - Falsely screaming "fraud" about one study done over a dozen years ago and ignoring the 11 other studies that confirm it reveals the accuser has no interests [sic] in the truth.
>
> - Admit that Michael Mann isn't guilty of any kind of fraud . . . [i]f you can't do that much, or if you're going to tell me that virtually all scientists are in on a global conspiracy to conceal the truth, without any evidence of such conspiracy, then you don't deserve any kind of respect.
> -

[88] The cases cited by Defendants in support of their rhetorical hyperbole argument are inapposite. For example, in *Greenbelt Coop. Publishing Assoc. v. Bresler*, 613 F.3d 995 (10th Cir. 2010), the Supreme Court found a newspapers' statements calling plaintiff's proposal "blackmail" hyperbolic where the record was devoid of evidence that anyone believed plaintiff had been charged with a crime, and where plaintiff's proposal was accurately and fully described in each article, along with the accurate statement that some people had referred to the proposal as blackmail at a town meeting); *see also*, *Jenkins v. Snyder*, 2001 WL 755818, at *5 (E.D. Va. Feb. 2, 2001) (finding statement that groundskeepers were "trying to kill the players with their crappy field" hyperbolic).

From NRO's readers:

- NR flatly stated that Mann had written a fraudulent paper. That is slander and for a scientist is pretty much the worst thing someone can be accused of. . . . not one scientific organization has supported the idea that Mann's paper or graph were fraudulent . . . There have been numerous investigations of Mann and the Climategate emails, and not one of them has concluded that Mann did anything that was in any way fraudulent.

- [E]ven if NRO is an opinion magazine, it is not permitted to make false statements and present them as facts especially when they damage another person's reputation. NRO didn't imply that "Mann was a fraud in their opinion." They presented that particular statement as a fact ("Mann who was behind the fraudulent paper…").

- NR clearly [sic] says he published something that was fraudulent. Mann (and almost every other scientist who knows anything about this issue) do not think it was fraudulent. It is up to a court to decide whether accusing someone, a scientists, in particular, of fraud, when there is no supporting evidence of fraud, is libel or not.

- NRO published "Michael Mann was the man behind the fraudulent climate-change hockey stick graph". They did this despite knowing fully well that numerous investigations had found no fraud. The weak defense that NRO is now offering is that when they said "fraudulent", they didn't really mean it and were using "rhetorical hyperbole".

Similarly, outside observers of Defendants' accusations had no trouble understanding the accusatory nature of their allegations. Immediately after Defendants' initial salvo against Dr. Mann last summer, commentators from a number of highly regarded publications and organizations wrote that they were "aghast" at Defendants' allegations regarding Dr. Mann—describing them as "deplorable, if not unlawful," "slimy," "disgusting," and "defamatory." For example, the *Columbia Journalism Review*, perhaps the most highly regarded media authority, stated that Mr. Steyn's and NRO's accusations of "academic fraud" "dredg[ed] up a discredited charge" and ignored "almost half a dozen investigations [that had] affirmed the integrity of Mann's research."[89] The *Columbia Journalism Review* further commented that Dr. Mann has

[89] *See* Exhibit 14, Brainard article.

endured "witch hunts and death threats in order to defend his work" and that "the low to which Simberg and Steyn stooped is certainly deplorable, if not unlawful." *Id.* Similarly, a blog hosted by the scientific publication *Discover Magazine* described the attacks as "slimy," "disgusting," and "defamatory."[90] Further, the Union of Concerned Scientists, through its program manager, Michael Halpern, stated that it was "aghast" at these attacks, describing them as "disgusting," "offensive," and a "defamation of character."[91]

c. CEI Is Liable For Republishing National Review's Comments

CEI's argument that it cannot be held liable for republishing the *National Review's* defamatory statements is equally without merit. "The common law of libel has long held that one who republishes a defamatory statement "adopts" it as his own, and is liable in equal measure to the original defamer." *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988) (citations omitted). Further, the District of Columbia Court of Appeals has noted that "each publication of a defamatory statement, including each republication, is a separate tort; each republisher is responsible for the effects of his republication." *Ingber,* 479 A.2d at 1269 (quoting R. Sack, Libel, Slander and Related Problems, supra, at 86).

CEI's efforts to blunt the plain effect of this general principle by claiming that they only provided a hyperlink to Mr. Lowry's statement and thus did not republish it is without merit. First, CEI did not simply hyperlink to Mr. Lowry's statement. Rather, CEI explicitly noted that Mr. Lowry's comments "expertly summed up the matter" and thereby recommended to its readers that they read Mr. Lowry's post. Accordingly, Defendants reliance on cases where the republication solely "tells the new audience where the defamatory material can be found" is

[90] *See* Exhibit 15, *Discover* article.

[91] *See* Exhibit 16, *Ecowatch* article.

unavailing. *U.S. ex rel. Klein v. Omeros Corp.*, --- F.Supp.2d ---, 2012 WL 4874031, at *11 (W. D. Wash. Oct. 15, 2012); *see also*, *Goforth v. Avemco Life Ins. Co.*, 368 F.2d 25, 29 n.7 (4th Cir. 1965) (reference was limited to the words "recent correspondence to you" and did not attach that correspondence or otherwise directly link the reader to the correspondence).

Second, the doctrine of republication and many of the cases that the CEI Defendants cite address only the question of whether the statute of limitation has run, an issue not relevant here. *See, e.g., In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) (holding that a mere reference to an article, without more, does not reset the statute of limitations); *Salyer v. Southern Poverty Law Ctr., Inc.*, 701 F.Supp. 2d 912, 918 (W.D.Ky. 2009) (holding that solely referencing and hyperlinking to an article does not republish the article for purposes of the statute of limitations); *Churchill v. State*, 378 N.J. Super. 471, 478, 876 A.2d 311, 316 (2005) (holding that "the Internet publication of a document, where that document remains unchanged after its original posting, is subject to a one-year statute of limitations that runs from the date of publication of the alleged libel or slander"); *Shepard v. TheHuffingtonPost.com, Inc.*, Civ. No. 12-1513, 2012 WL 5584615, at *2 (D. Minn. Nov. 15, 2012) (holding that "the statute of limitations begins to accrue on the first date of publication where subsequent republications have the same content as the original publication"); *Sundance Image Technology, Inc. v. Cone Editions Press, Ltd.*, No. 02 CV 2258 JM, 2007 WL 935703, at * 8 (S.D. Cal. Mar. 7, 2007) (finding insufficient evidence that alleged defamatory statements were republished within the applicable statute of limitations). None of the cases cited by Defendants support the proposition that an individual cannot be held liable for defamation when he endorses another publication by reference or hyperlink, as CEI has done in this case.

4. Dr. Mann Is Likely To Succeed On The Merits Of His Intentional Infliction Of Emotional Distress Claim

"'To succeed on the claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.'" *Minch v. District of Columbia*, 952 A.2d 929, 940 (D.C. 2008) (quoting *District of Columbia v. Thompson*, 570 A.2d 277, 289-90 (D.C. 1990)).

To meet the first element, a plaintiff must show that the alleged conduct is "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kotsch v. District of Columbia*, 924 A.2d 1040, 1045-46 (D.C. 2007) (quoting Restatement (Second) of Torts § 46, cmt. D (1965)). Defendants' false statement that Dr. Mann was the "Jerry Sandusky of climate science" is unquestionably extreme and outrageous—and the public response to the comparison and the fact that the CEI Defendants promptly retracted those statements provide compelling evidence of the outrageousness of the comparison. And certainly, the comparison of Dr. Mann to a convicted child molester is far more offensive than the conduct at issue in many other emotional distress cases. *See, e.g. Muratore v. M/S Scotia Prince,* 845 F.2d 347, 349-50, 352-53 (1st Cir. 1988) (court found extreme and outrageous conduct where photographer repeatedly took plaintiff's picture over her objection, doctored her photos with a gorilla face and displayed them to other passengers and made offensive comments to plaintiff); *Moore v. Green*, 431 F.2d 584, 591 (9th Cir. 1970) (question of whether five letters sent by attorney to former client containing "barrage of offensive and insulting remarks" were outrageous was "properly for the jury"); *Kolegas v. Heftel Broadcasting Corp*., 607 N.E.2d 201, 212 (Ill. 1992) (radio host's statements that plaintiff's family was hideous and deformed were extreme and outrageous giving rise to claim for emotional distress).

Dr. Mann also easily satisfies the second and third elements of his intentional infliction of emotional distress claim. The Complaint asserts that Dr. Mann has suffered extreme emotional distress for many months as a result of Defendants' statements, an assertion that is more than just plausible under the circumstances of the Sandusky matter. The types of emotional distress required for an intentional infliction of emotional distress claim, are often far less. *See* Restatement 2d Torts § 46 (1965) (the types of emotional distress required for an intentional infliction of emotional distress claim include "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea"). Finally, there is no question that the publishing of Defendants' statements was the actual and proximate cause of Dr. Mann's emotional distress. Accordingly, Dr. Mann can establish a likelihood of prevailing on his intentional infliction of emotional distress claim.

B. Dr. Mann's Lawsuit Should Not Be Dismissed Pursuant to Rule 12(b)(6)

In addition to their motion to dismiss pursuant to the Anti-SLAPP statute, the CEI Defendants bring a separate motion to dismiss pursuant to Rule 12(b)(6). By this motion, the CEI Defendants regurgitate their argument that the statements in question are protected expressions of opinion and hyperbole and present the new argument that Dr. Mann failed to allege facts sufficient to prove actual malice.[92] First, for all the reasons set forth above, the defamatory statements set forth in Dr. Mann's complaint are verifiable, and are not protected as opinion, rhetorical hyperbole or supportable interpretation. Second, the CEI Defendants cannot reasonably challenge Dr. Mann's Complaint because it specifically pleads actual malice—and far beyond the "plausible" standard.

[92] *See* Memorandum of Points and Authorities in Support of Defendants Competitive Enterprise Institute and Rand Simberg's Motion to Dismiss Pursuant Rule 12(b)(6) ("CEI 12(b)(6) Mem.") at 1-2.

1. Relevant Legal Standards

Defendants argue that Dr. Mann's complaint is deficient under the Supreme Court's rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Iqbal*for failing to plausibly allege that the CEI Defendants acted with actual malice. *See* CEI 12(b)(6) Mem. at 7. *Twombly* requires a plaintiff to allege facts in the complaint sufficient for a court to find it plausible that the plaintiff is entitled to relief. 550 U.S. at 556. *Iqbal* affirms this standard, holding that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and *then* determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679 (emphasis added). Accordingly, to overcome the CEI Defendants' Motions to Dismiss pursuant to Rule 12(b)(6), Dr. Mann's Complaint need only plead facts sufficient to show that a finding of actual malice is plausible. A party acts with actual malice when it deliberately ignores evidence that calls into question its published statements or when it encounters persuasive evidence that contradicts the published statement. *Harte-Hanks Communications*, 491 U.S. at 685; *Schatz*, 669 F.3d at 58; *Levesque v. Doocy*, 560 F.3d 82, 90 (1st Cir. 2009); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511 (D.D.C. 1996).

2. Dr. Mann Sufficiently Pled Facts Supporting A Plausible Finding That Defendants Acted With Actual Malice

Dr. Mann easily satisfies this standard, as he specifically pleads facts demonstrating that Defendants knew that no fraud existed, or at the very least deliberately ignored evidence that their accusations of fraud, misconduct, or data manipulation were false. The Complaint details facts regarding the series of inquiries and subsequent exonerations of Dr. Mann that "found that there was no evidence of any fraud, data falsification, or statistical manipulation or misconduct." *See* Compl. ¶ 24. The Complaint further alleges that Defendants read and were aware of the

conclusions of these inquiries and exonerations.[93] *Id.* Therefore, not only is it "plausible" that the CEI Defendants deliberately ignored evidence that called into question the truth of their statements, but the evidence already before this Court unequivocally demonstrates that the CEI Defendants knew there was no fraud or recklessly disregarded the evidence that there was no fraud, and deliberately avoided the fact that there was no fraud. *See Harte-Hanks Communications*, 491 U.S. at 685; *Schatz*, 669 F.3d at 58. There is simply no way anyone could have read the litany of inquiries regarding Dr. Mann—some of which were requested by Defendants themselves—without coming to the conclusion that Dr. Mann was not guilty of fraud, misconduct, or data manipulation. *See* CEI 12(b)(6) Mem. at 1 (arguing that they need not accept the reports "as the Gospel"). Rather, Defendants simply ignore all of Dr. Mann's factual allegations detailing that every governmental and academic institution had exonerated Dr. Mann of fraud, that Defendants had read and were aware of those exonerations, that Defendants nevertheless proceeded to accuse Dr. Mann of the very conduct of which he had been exonerated, and that, even given the opportunity, Defendants never retracted their statements or said that their statements were not false. Accordingly, there can be no question that Dr. Mann has pled a plausible claim of actual malice.

Finally, the Court should also reject Defendants' contention that their supposed investigation (by simply reading the reports that exonerated Dr. Mann) precludes a finding of malice. (*See* CEI 12(b)(6) Mem. at 14-15.) Defendants misleadingly cite *Cobb v. Time, Inc.* for the proposition that such an alleged investigation "defeats a claim of actual malice." (*See* CEI 12(b)(6) Mem. at 14.) That is an incorrect reading of the case. *Cobb* simply holds that the failure to investigate the accuracy of a statement does not alone constitute actual malice. *Cobb v.*

[93] Without any legal or factual support, the CEI Defendants argue that that allegation is "plainly conclusory." (*See* CEI 12(b)(6) Mem., at 12.) That is simply not so. That a person or entity read a document is unquestionably a factual statement, and one that can be proven true or false.

Time, Inc, 278 F.3d 629, 637 (6th Cir. 2002). *Cobb* in no way states that an investigation negates a finding of malice. That case is in any event irrelevant, because Dr. Mann contends that Defendants acted with actual malice not because they failed to investigate but rather because, having read the numerous reports clearing Dr. Mann of charges of academic fraud, they still accused him of engaging in that very same conduct.

C. Defendants' Motion Is Frivolous And Dr. Mann Should Be Awarded Attorneys' Fees And Costs

Section 5 of the D.C. Anti-SLAPP Act provides that the Court may award reasonable attorneys' fees and costs to the responding party who prevails on a Special Motion to Dismiss if the Court deems that motion "is frivolous or is solely intended to cause delay." D.C. Code § 16-5504. Such is the case here. As set forth above, it is abundantly clear that Defendants' statements were false, that Defendants' published those statements knowing that they were false, and that those statements are defamatory *per se*. Dr. Mann has been exonerated of fraud and misconduct no less than eight separate times, and Defendants knew Dr. Mann had been exonerated. Nonetheless they continue to publish their vicious libelous statements about Dr. Mann and have the temerity to cloak their lies in the protection of the First Amendment.

Further, attorneys' fees and costs are especially warranted in a case such as this where Defendants have deliberately misled the Court, mischaracterized the facts underlying the lawsuit, and, in particular, simply ignored highly material facts. In an effort to deflect the Court's attention from the plain import of their words, Defendants disingenuously argue—in the face of a litany of independent investigations—that the jury is still out on whether Dr. Mann committed fraud. Contrary to the CEI Defendants' assertions, their call for an independent investigation of Dr. Mann was heeded time and time again, and their allegations of fraud and misconduct were debunked time and time again. Adding to the frivolous nature of this motion, the CEI Defendants never disclose to the Court that they were the ones who requested the EPA

investigation, as well as the appeal to the D.C. Circuit. They never acknowledge the findings of the other investigations. To the extent they even address some of the investigations, they twist and misrepresent the findings of those panels. And they repeatedly ignore the factual allegations of the Complaint upon which the allegations of malice are based. Their transparent attempt to deflect this Court's attention from these facts is nothing more than a cynical ploy to both evade liability and to continue their attack on Dr. Mann. This motion is frivolous and was brought to delay these proceedings. The Court should grant Dr. Mann his costs and attorneys' fees in responding to this motion.

IV. CONCLUSION

The Motions filed by the CEI Defendants should be denied, and Dr. Mann should be awarded his costs and fees in responding to it.

DATED: January 18, 2013

Respectfully submitted,
COZEN O'CONNOR

/s/ John B. Williams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January 2013, I caused a copy of the foregoing Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act and Motion to Dismiss Pursuant to Rule 12(b)(6) to be served via CaseFileXpress on the following:

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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 Calendar No.: 10 Judge: Natalia Combs Greene Next event: 1/25/2013 Initial Scheduling Conference

PROPOSED ORDER

Upon consideration of Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act and Motion to Dismiss Pursuant to Rule 12(b)(6), and all responses thereto, it is hereby

ORDERED, that the Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act is **DENIED**, and

FURTHER ORDERED, that the Motion to Dismiss Pursuant to Rule 12(b)(6) is **DENIED**, and

FURTHER ORDERED, that Plaintiff's request for attorney's fees and related costs and expenses for litigation costs incurred in connection with Defendants' Motion to Dismiss Pursuant to the D.C. Code § 16-5504 is hereby **GRANTED** in an amount to be determined. Plaintiff shall file a separate motion detailing the costs claimed pursuant to this paragraph.

SO ORDERED.

Dated: _____, 2013

_____
Natalia M. Combs-Greene
(Associate Judge)

Copies by e-service to:
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