SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Natalia Combs Greene Next event: Initial Scheduling Conference January 25, 2013

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

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In support of their Motion To Dismiss pursuant to Rule 12(b)(6), Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg (collectively "CEI Defendants") respectfully submit this Memorandum of Points and Authorities:

INTRODUCTION

Plaintiff Michael Mann, a climate scientist and activist for limits on greenhouse gas emissions, has filed this defamation lawsuit in an attempt to retaliate against his persistent critic, CEI, and its adjunct scholar Mr. Simberg for their criticism of his research and opposition to his political goals. The CEI Defendants are concurrently filing a Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a), that addresses Mann's improper attempts to engage the legal process to silence his critics.

As set forth in the Special Motion to Dismiss, the CEI Defendants believe that Mann's research is biased and unreliable, and Mr. Simberg's blog post (the "Blog Post") said so, citing analyses critical of Mann's statistical techniques and contradicting his "hockey stick" findings. They also believe that Penn State's investigation into Mann's research following the disclosure of emails suggesting research flaws and methodological overreaching by Mann was woefully inadequate, and the Blog Post said so, analogizing it to another instance in which the same university chose to bury its head in the sand rather than investigate potentially damaging truths—the Sandusky affair.

Given the language, context in the global warming debate, and lack of verifiability of the statements (i.e., whether a statement is even capable of being proven true or false), the portions of the Blog Post that Mann challenges are protected expressions of opinion and hyperbole, not assertions of fact—something that any reasonable reader would instantly recognize. For that reason and others, Mann cannot succeed on his claims, and the Special Motion to Dismiss should be granted. And because Mann's claims fail as a matter of law, dismissal under Rule 12(b)(6) is also proper.

Even if the challenged statements are found to be actionable—which they are not—Mann's claims should still be dismissed due to his failure to allege facts to support a finding by clear and convincing evidence that the CEI Defendants acted with actual malice, an essential element of every claim. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged," and the rule that libel plaintiffs must plausibly plead actual malice further implements that requirement. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (citing, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Yet Mann offers only legal conclusions—the CEI Defendants acted "maliciously," they wrote "with actual malice," etc.—bereft of any supporting allegations of fact showing that they knew their statements to be false or entertained serious doubt as to their truth. *Id.* at 667. At the same time, he concedes that the CEI Defendants reviewed the inquiries into Mann's own conduct, which is far more investigation than the law requires to defeat any claim of actual malice. Mann has therefore not set forth "sufficient factual matter . . . to state a claim for relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, at 678 (2009); *see also Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (adopting *Iqbal* standard), and thus failed to state any viable claim against the CEI Defendants.

Accordingly, yhe CEI Defendants respectfully request that the Court grant their Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, filed concurrently with this Motion, and for the reasons stated below, also grant this Motion to Dismiss pursuant to Rule 12(b)(6).

SUPPLEMENTAL FACTUAL BACKGROUND

A complete recitation of the background facts relevant to this case is set forth in the concurrently filed Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act. For the convenience of the Court and the Parties, the CEI Defendants will not repeat those facts in this Motion, but rather hereby respectfully incorporate them by reference.

In addition, the following factual allegations in the Complaint regarding whether the CEI Defendants acted with "actual malice" are relevant to the arguments raised in this Motion:

- "Recognizing that they cannot contest the science behind Dr. Mann's work, the defendants, contrary to known and clear fact, and intending to impose vicious injury, have nevertheless maliciously accused him of academic fraud . . . ." Compl. ¶4.

- "[D]efendants' have also maliciously attacked Dr. Mann's personal reputation with the knowingly false comparison to a child molester." Compl. ¶4.

- "The defendants' statements against Dr. Mann are false, malicious, and defamatory per se." Compl. ¶6.

- "All of the above investigations found that there was no evidence of any fraud, data falsification, statistical manipulation, or misconduct . . . . All were read by the Defendants." Compl. ¶24.

- "Dr. Mann advised NRI and CEI that their allegations of misconduct and data manipulation were false and were clearly made with the knowledge that they were false." Compl. ¶31.

- "Defendants knew or should have known the statements were false when made." Compl. ¶38.

- "Defendants made the aforementioned statements with actual malice and wrongful and willful intent to injure Dr. Mann." Compl. ¶39.

- The statements "were made by the defendants with actual malice and either with knowledge of their falsity or in reckless disregard of the truth or falsity of the statements." Compl. ¶44.

- "[D]efendants acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann . . . ." Compl. ¶46.

- "CEI and Simberg knew or should have known the statements were false when made." Compl. ¶51.

- "CEI and Simberg made the aforementioned statements with actual malice and wrongful and willful intent to injure Dr. Mann." Compl. ¶52.

- The statements "were made by CEI and Simberg with actual malice and either with knowledge of their falsity or in reckless disregard of the truth or falsity of the statements." Compl. ¶57.

- "CEI and Simberg acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann . . . ." Compl. ¶58.

- "CEI knew or should have known the statement [that Mann's research is 'intellectually bogus'] was false when made." Compl. ¶87.

- "CEI made the aforementioned statement with actual malice and wrongful and willful intent to injure Dr. Mann." Compl. ¶88.

- The statement "was made with actual malice, and either with knowledge of its falsity or in reckless disregard of the truth or falsity of the statement." Compl. ¶93.

- "CEI acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann . . . ." Compl. ¶94.

- "[T]he actions of defendants were made intentionally, maliciously, willfully and with the intent to injure Dr. Mann . . . ." Compl. ¶101.

These allegations provide the Complaint's only support for a finding of actual malice.

SUMMARY OF THE ARGUMENT

I. For the reasons explained in the CEI Defendants' Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, the challenged statements are plainly constitutionally protected expressions of pure opinion and hyperbole, as well as protected "fair comment" under D.C. law, and not actionable assertions of fact. Accordingly, Mann's claims regarding those statements fail as a matter of law.

II. Mann's Complaint fails to state a claim against the CEI defendants because its assertion that they acted with actual malice—an essential element of all his claims—is unsupported by any allegations of fact and is therefore not plausible. The Complaint's liberal use of the terms "malice" and "malicious" cannot overcome its failure to allege facts showing that the CEI

Defendants knew the statements at issue to be false or acted with reckless disregard as to their veracity. To the contrary, the Complaint specifically alleges that the Defendants reviewed the factual materials on which they commented in the challenged statements, and that is more than sufficient to defeat any claim of actual malice, as a matter of law. Accordingly, Mann's claims should be dismissed.

ARGUMENT

I. For the Reasons Set Forth in the CEI Defendants' Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, Mann Fails To State a Claim Because the Challenged Statements Are Pure Opinion, Hyperbole, and Fair Comment

As shown in the concurrently filed Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, Professor Mann fails to state a claim because none of the challenged statements contain provably false statements of fact and each is (a) a constitutionally protected expression of opinion, (b) constitutionally protected rhetorical hyperbole, and (c) a non-actionable fair comment on facts that are available to the public. The CEI Defendants hereby respectfully incorporate § II of the Argument of their Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act herein.

II. Mann Fails To State a Claim Because He Does Not Plausibly Allege that the CEI Defendants Acted with Actual Malice

A. Mann Is Required To Set Forth A Plausible Factual Basis for Each of the Elements of His Claims

For his claims to survive a motion to dismiss, Mann is required to "plead factual content" that plausibly suggests "the defendant is liable for the misconduct alleged." *Bertram v. WFI Stadium, Inc.*, 41 A.3d 1239, 1243 (D.C. 2012) (citation omitted); *see also Harnett v. Washington Harbour Condominium Unit Owners' Ass'n*, 54 A.3d 1165, 1171 (D.C. 2012).

The D.C. Court of Appeals has held that the same standard prevailing in the federal district courts following the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), applies in this Court. *Potomac Development Corp. v. District of*

Columbia, 28 A.3d at 544 (citing *Iqbal* and "interpret[ing] Superior Court Rule 8(a) to include [the same] plausibility standard"). *Iqbal* clarified the proper standard for pleadings:

> [T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . . To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face . . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

556 U.S. at 678 (citations and quotation marks omitted). Thus, "factual allegations, even though assumed to be true, must still be enough to raise a right to relief above the speculative level," and "the Court need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint." *Parisi v. Sinclair*, 845 F.Supp.2d 215, 217-18 (D.D.C. 2012) (citations and quotation marks omitted). "Nor must the court accept legal conclusions cast in the form of factual allegations." *Id.*

The *Iqbal* Court, following the "two-pronged approach" of *Twombly*, began its analysis "by identifying the allegations in the complaint that are not entitled to the assumption of truth." 556 U.S. at 679-80. Only after "reject[ing]" allegations that "are conclusory and not entitled to be assumed true" did the *Iqbal* Court "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 681.

The plaintiff, Javaid Iqbal, had been detained by the federal government in the wake of 9/11 and sued a number of federal government officials for unconstitutionally discriminatory conditions of confinement on the basis of his race, religion, and national origin. *Id.* at 666. To prevail against particular defendants, Iqbal was required to show that they had *purposefully* implemented a policy of subjecting certain detainees to harsher conditions of confinement. *Id.* at 677 (quotation marks omitted). His complaint alleged all the elements of the claim: it stated that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin

and for no legitimate penological interest.'" *Id.* at 680 (quoting Iqbal's complaint). The Supreme Court, however, dismissed these allegations as "bare assertions" that "amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Id.* at 681(quotation marks omitted). Stripped of these conclusory allegations, the Court concluded that Iqbal's complaint lacked any allegations that, if proven true, would establish the officials' intent and therefore Iqbal's entitlement to relief. Accordingly, it dismissed his complaint.

B. Mann Fails To Allege that the CEI Defendants Acted with Actual Malice

Mann's libel and intentional infliction of emotional distress claims against the CEI Defendants should be dismissed because he does not plausibly allege that the CEI Defendants' statements were made with actual malice.

1. Actual Malice Is a Required Element of All of Mann's Claims

"To prevail in a defamation suit, Plaintiff must prove that the statements complained of are i) defamatory; ii) capable of being proven true or false; iii) 'of and concerning' the Plaintiff; iv) false; and v) made with the requisite degree of intent or fault." *Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995). Because Mann is a public figure[1] and the challenged statements relate to matters of public concern[2], he must prove that the CEI Defendants acted with "actual malice," that

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[1] *See, e.g.,* Michael E. Mann, The Hockey Stick and the Climate Wars 253 (2012) ("I became a public figure . . . .").

[2] Indeed, global warming is an issue of such intense public interest that other courts have offered it as a paradigmatic example of a matter of public concern. *E.g.*, *United States v. Strandlof*, 667 F.3d 1146, 1156 (10th Cir. 2012) (rejecting argument that upholding Stolen Valor Act against First Amendment challenge would lead down slippery slope allowing legislatures to criminalize, *inter alia*, "climate change criticism"), *vacated on other grounds*, 684 F.3d 962 (10th Cir. 2012); *One World One Family Now v. City of Key West*, 852 F. Supp. 1005, 1007 (S.D. Fl. 1994) (enjoining application of municipal regulation that would have prevented nonprofit from selling t-shirts bearing messages relating to global warming and other issues).

is, "with knowledge" that the statements were false or that they "entertained serious doubts as to the truth" of their publication. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (standard applies to public figure). And he must do so not by the preponderance-of-the-evidence standard that typically prevails in civil suits, but with "clear and convincing evidence," a requirement that exists specifically to provide "'an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander.'" *Tavoulareas v. Piro*, 260 U.S. App. D.C. 39, 53, 817 F.2d 762, 776 (D.C. Cir. 1987) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). Accordingly, Mann has the burden of pleading specific facts showing that the CEI Defendants acted with actual malice in publishing the allegedly defamatory statements.

The same requirements apply equally to Mann's claim for intentional infliction of emotional distress. "[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Finally, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991). The two are not at all the same:

> Actual malice, in the constitutional sense, differs dramatically from the pre-*New York Times* concept. The traditional common law definition of malice equated it with bad or corrupt motive, spite, ill will, general hostility, intention to injure, or hatred. However, publication with these motives alone does not satisfy the *New York Times* standard, and actual malice can never be inferred from the mere presence of such factors.

Nader v. de Toledano, 408 A.2d 31, 40 (D.C. 1979); *see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at 667 ("[T]he actual malice standard is not satisfied merely through a showing

of ill will or "malice" in the ordinary sense of the term.") Instead, the actual malice standard requires the plaintiff to show that "the defendant must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of his publication." *Id.* (quotation marks and citations omitted). Anything less falls short.

2. Mann Fails To Plead Facts that Would Establish that the CEI Defendants Acted With Actual Malice

Mann's Complaint fails to allege any facts that would establish actual malice on the part of the CEI Defendants. Because it does no more than "tender[] 'naked assertions' devoid of 'further factual enhancement,'" it is insufficient to state a claim against the CEI Defendants. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

Courts in post-*Iqbal* defamation cases have made clear that boilerplate assertions of actual malice are insufficient to withstand a motion to dismiss. In *Parisi v. Sinclair*, 845 F. Supp. 2d at 218-19, for example, the U.S. District Court for the District of Columbia dismissed libel and other claims against a book author, explaining—

> In their complaint, plaintiffs merely allege in a conclusory fashion that the "defamatory statements were made and published by defendants with knowledge of their falsity or with reckless disregard for their truth." Compl. ¶¶ 45, 58. The complaint contains no factual allegations, other than the plaintiffs' own assertions that the statements were false, *see id.* ¶ 44, suggesting that Sinclair either fabricated the story, that the story was so improbable that only a reckless person would have circulated the story, or that he acted wholly on an unverified anonymous telephone call. Indeed, . . . the cited passages of the book state that he took steps to verify the statements made in the phone call and relied on more than just the call itself.

Id. (citation omitted). Because the complaint failed to "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, the court dismissed the claims.

Similarly, in *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012), the U.S. Court of Appeals for the First Circuit affirmed dismissal of a defamation case where the complaint used only "actual-malice buzzwords," such as "that the RSLC had 'knowledge' that its statements were 'false' or had 'serious doubts' about their truth and a 'reckless disregard' for whether

they were false." These were "merely legal conclusions, which must be backed by well-pled facts," and are not facts in themselves. *Id.* The court in *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 377-78 (4th Cir. 2012), applied just about the same logic, affirming dismissal of a libel claim because the plaintiffs' bald assertion that the challenged "statements 'were known by [the defendants] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity' is entirely insufficient." *See also Hanks v. Wavy Broad., LLC*, No. 2:11CV439, 2012 WL 405065, at *12 (E.D. Va. Feb. 8, 2012) (similar).

Mann's Complaint is entirely insufficient, in identical fashion. It asserts actual malice, but it does so in the most conclusory manner possible. To begin with, every single allegation regarding malice but for two is plainly conclusory. The Complaint is replete with allegations that the Defendants "knew or should have known the statements were false when made." *See* Compl. ¶¶ 38, 51, 87. No less than six paragraphs make the bare assertion that the statements were made "with actual malice." *See* Compl. ¶¶ 39, 44, 52, 57, 88, 93. Three of those add the rote recitation of the standard for malice, *i.e.*, that the statements were made "either with knowledge of their falsity or in reckless disregard of the truth or falsity of the statements." *See* Compl. ¶¶ 44, 57, 93. These allegations, individually and collectively, fail to plead any "factual content" that plausibly suggests that the CEI Defendants acted with actual malice. *See Bertram*, 41 A.3d at 1243; *Harnett*, 54 A.3d at 1171. To the contrary, as in *Iqbal*, *Parisi*, *Schatz*, and *Mayfield*, they simply parrot back the legal standard, asserting that the Defendants acted with malice. The Court should not accept "legal conclusions cast in the form of factual allegations." *Parisi*, 845 F. Supp. 2d at 218 (quoting *Kowal*, 16 F.3d at 1276).

Mann's Complaint contains several allegations that, in addition to being conclusory, suggest or imply that the CEI Defendants acted with the intent to injure him. *See* Compl. ¶¶ 4, 6, 46, 58, 94, 101. The CEI Defendants did not, but such allegations are, in any case, entirely irrelevant to the

"actual malice" inquiry. *See supra* § II.B.1. And that the Blog Post's analogy between Mann and Jerry Sandusky may not be to every person's taste—the concern that led CEI to remove it[3]—does not prove actual malice, either. *Hustler Magazine*, 485 U.S. at 50 (declining "to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury").

After *Iqbal* and *Twombly's* first step of discarding conclusory allegations, the Court is left with two allegations, neither of which supports Mann's claim that the CEI Defendants' acted with actual malice. The first alleges that "[d]efendants have also maliciously attacked Dr. Mann's personal reputation with the knowingly false comparison to a child molester." Compl. ¶4. Again, this allegation seems to confuse "malice," as used in common parlance, with "actual malice," the constitutional standard set forth in *New York Times* and its progeny. Regardless, the portion of the Blog Post to which Mann refers actually did not state or imply that Mann was a child molester. To the contrary, it states that he is not: "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 . . . ." Compl. ¶26 (emphasis added). This statement is a metaphor, a figure of speech used not to denote factual equivalence but only some kind of "likeness or analogy" that must be inferred from context. *Parks v. LaFace Records*, 329 F.3d 437, 454 (6th Cir. 2003) (quoting *Webster's Third New International Dictionary* 1420 (Phillip Babcock Gove, ed. 1976)). A metaphor, of course, cannot be "knowingly false," only apt or inapt, and so cannot make Mann's allegation of actual malice plausible. *Cf. Williams v. Town of Greenburgh*, 535 F.3d 71, 77 (2d Cir. 2008) (comparisons are protected opinion, not actionable assertions of fact).

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[3] Shortly after Simberg published the Blog Post, and well prior to any complaint or demand by Mann, CEI removed the sentence referring to Sandusky on the ground that its tone was "inappropriate" for the OpenMarket site. Compl. ¶27.

The second is Mann's allegation that certain "investigations found that there was no evidence of any fraud, data falsification, statistical manipulation, or misconduct" and that "[a]ll [of the investigation reports] were read by the Defendants." Compl ¶24. The assertion that the CEI Defendants read each of the nine separate reports mentioned, Compl. ¶21, is plainly conclusory. So too is the assertion that those reports' contents contradict any of the challenged statements made by the CEI Defendants. Compl. ¶¶24-25. Indeed, the Complaint fails to quote a single word or cite a single page from seven of those reports, and the brief excerpts of two that it does set forth do not actually contradict any of the CEI Defendants' challenged statements. *Compare* Compl. ¶¶22-23 *with* Compl. ¶26. As a result, this allegation amounts to no more than a conclusory assertion that a statement was made "with knowledge that it was false." If accepted as sufficient to state a plausible claim, this kind of allegation would nullify at the motion-to-dismiss stage the protection of the actual malice requirement, which exists specifically to provide "breathing space" so that protected speech is not discouraged. *Harte-Hanks Communications, Inc.*, 491 U.S. at 685-86. But under *Iqbal* and *Twombly*, a libel plaintiff must do more than simply state that the defendant was surely familiar with some book or article that contradicts the allegedly defamatory statement.

Beyond that, this allegation actually does not support any claim that the CEI Defendants *knew* the challenged statements to be false. Mann contends that the challenged statements were tantamount to accusations of fraud, e.g., Compl. ¶35, but he does not allege that the investigations found him innocent of fraud, only that they "found that there was no evidence" of it, Compl. ¶24—a point that the Blog Post expressly reports as to the Penn State and NSF investigations. Accordingly, even taking as true Mann's characterization of the investigations' findings and accepting Mann's implausible interpretation of the challenged statements, there is no conflict between them and therefore no awareness of probable falsity.

And even that fails to account for the CEI Defendants' strong criticisms of the investigations of Mann's research, which the Blog Post describes as a "cover up and whitewash," such that the CEI Defendants lacked the required "state of mind" for the challenged statements to be "knowingly false." *See New York Times*, 367 U.S. at 286-87 (no actual malice based on knowledge of falsity where newspaper had a "reasonable doubt" as to falsity). Just because an investigatory panel says that something is so—even if that panel is convened by the government or a public university—does not mean that private citizens have to accept it as the Gospel. Instead, there cannot be liability unless there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth" of their publication. *St. Amant v. Thompson*, 390 U.S. at 731. Given the CEI Defendants' strong views on inadequacy of the Penn State and NSF investigations, Mann's allegation that they read those reports does not suggest that they entertained any subjective doubt as to their criticism of Mann and his research that could be proven by the daunting test of clear and convincing evidence.

Indeed, the reports themselves defeat any allegation that the CEI Defendants acted with actual malice. In *Pape*, the Supreme Court rejected a libel challenge to a reporter's description of police brutality discussed in a Civil Rights Commission report where the reporter declined to mention that the report had only repeated the allegations of a legal complaint. *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). Because the context of the Commission report, taken as a whole, suggested that the brutality had occurred as described, "omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities," such that adopting one of those interpretations over others precluded any finding of actual malice. *Id.* Here, too, the reports at issue "bristled with ambiguities" regarding Mann's research. For example, the National Science Foundation's investigation, which Mann specifically cites as contradicting the challenged statements, Compl. ¶9, states that the Climategate emails

"contained language that reasonably caused individuals, not party to the communications, to suspect some impropriety on the part of the authors," including Mann, and expressly raised "concerns . . . about the quality of the statistical analysis techniques that were used in [Mann's] research."[4] In this way, the NSF report provides support for the CEI Defendant's criticisms of Mann and his research, precluding any finding of actual malice.

Moreover, substantial investigation, such as Mann concedes the CEI Defendants undertook in reading various investigatory reports, Compl. ¶24, is far more than the law requires. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at 688 (explaining that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."). And as in *Parisi*, Mann's Complaint reflects that the CEI Defendants undertook additional research to support and verify their claims. *Parisi*, 845 F.Supp.2d at 217-18 ("[T]he cited passages of the book state that he [the defendant] took steps to verify the statements made in the phone call and relied on more than just the call itself."). This is evident in the Blog Post's hyperlinks to background materials, including the Penn State report and detailed coverage of the NSF report, as well as to materials critical of Mann's assumptions, methodology, and conclusions. Such diligence defeats a claim of actual malice. *See, e.g., Cobb v. Time*, 278 F.3d 629, 640 (2002) (no actual malice where magazine attempted to corroborate story that proved to be false).

Once Mann's Complaint is stripped of conclusory recitations of fault, as required by *Iqbal* and *Twombly*, the skeletal framework that remains does not support his assertion that there is clear

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[4] Office of the Inspector General, National Science Foundation, Closeout Memorandum, Case No. A09120086 (Aug. 15, 2011), at 2-3, Ex. 1. Because this report is referenced in the Complaint, Compl. ¶¶21, 23, 25, the Court may consider it at this stage. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010).

and convincing evidence that the CEI Defendants acted with actual malice, as required by *New York Times Co. v. Sullivan* and its progeny. Accordingly, Mann has failed to "plausibly suggest an entitlement relief," *Iqbal*, 556 U.S. at 681, and his claims against the CEI Defendants should be dismissed.

CONCLUSION

As explained in the CEI Defendants' Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, as incorporated herein, Professor Mann's claims challenge expressions of pure opinion and hyperbole that are protected under both the First Amendment and D.C. law. Accordingly, those claims fail as a matter of law.

Moreover, the Complaint fails to plead specific facts showing that the CEI Defendants acted with actual malice in publishing the challenged statements, an essential element of every claim. Its allegations in support of actual malice are entirely conclusory and do not show that the CEI Defendants knew their statements to be false or entertained serious doubt as to their truth. Indeed, the Complaint concedes that the CEI Defendants undertook greater investigation than the First Amendment requires, and it references official reports (also cited in the Blog Post) that support the challenged statements. These things defeat any claim of actual malice.

For the foregoing reasons, the CEI Defendants respectfully request that the Court dismiss the Complaint's claims against Defendants Competitive Enterprise Institute and Rand Simberg with prejudice.[5]

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[5] Pursuant to Rule 54(d)(2)(B), prevailing defendants also are entitled to move for an award of "the costs of litigation, including reasonable attorney fees," within fourteen days after the entry of judgment. The CEI Defendants hereby reserve their right to seek such an award.

Dated: December 14, 2012

Respectfully submitted,

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