SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Pennsylvania State University Department of Meteorology University Park, PA 16802, Plaintiff, v. NATIONAL REVIEW, INC. , 215 Lexington Avenue New York, NY 10016, - and - COMPETITIVE ENTERPRISE INSTITUTE, - and - RAND SIMBERG, - and - MARK STEYN, c/o National Review, Inc., 215 Lexington Avenue New York, NY 10016, Defendants.	Case No. 2012 CA 8263 Judge Natalia M. Combs Greene Next Scheduled Event: Initial Status Conference Jan. 25, 2013

MEMORANDUM IN SUPPORT OF SPECIAL MOTION 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

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Defendants National Review, Inc. and Mark Steyn (collectively, "National Review") respectfully submit this Memorandum of Points and Authorities in support of their Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act, D.C. Code §16-5501 *et seq.*, and Motion to Dismiss Pursuant to D.C. Super. Ct. Civ. R. 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff Michael Mann – by his own account, a world-renowned climate scientist, *see* Compl. ¶¶ 13-17 – has filed this suit to squelch public criticism of his ideas. Plaintiff is no stranger to the rough-and-tumble public debate over climate science and policy, branding critics of his scientific research "climate change deniers" (Compl. ¶¶ 19, 20) – a pejorative term that compares global warming skeptics to "Holocaust deniers." Yet Professor Mann apparently cannot stomach the dish that he so often serves – he seeks, by this action, to insulate his scientific theories from similar hyperbole in the robust public debate over global warming. Under his erroneous view of the law, columnists, journalists and other participants in the discussion of critical public issues would be liable for damages for the "vehement, caustic, and sometimes unpleasantly sharp attacks" that often characterize that debate. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988). Plaintiff's claims are entirely inconsistent with "our national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Particularly in the context of the quest for scientific knowledge, "the remedy to be applied" for speech deemed offensive to the listener "is more speech, not enforced silence." *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

In light of these core First Amendment principles, the District of Columbia has adopted the Anti-SLAPP Act of 2010, *see* D.C. Code § 16-5501 *et seq*. (attached at Tab A), to enhance "a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate

aimed to punish or prevent the expression of opposing points of view." Report on Bill 18-893, "Anti-SLAPP Act of 2010," D.C. Council, Committee on Public Safety and the Judiciary (Nov. 18, 2010) (attached at Tab B). The statute provides that where defendants make 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," a special motion to dismiss must be granted unless plaintiff meets his burden of demonstrating "that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b).

Here, defendants easily satisfy their *prima facie* burden under the anti-SLAPP statute. Professor Mann is, by his own characterization, a public figure, "well known for his work regarding global warming," and highly decorated in the scientific community. *See* Compl. ¶¶ 14-15. That defendants' commentary discussed Professor Mann is enough to satisfy their burden of demonstrating speech on an issue of public interest. *See* D.C. Code § 16-5501 (defining "issue of public interest" to include "an issue related to . . . a public figure . . . ."). Moreover, the subject matter of the speech at issue – Mann's highly publicized scientific research regarding climate change and the subsequent controversy surrounding it – relates to issues of significant public interest. *Id.* ("issue of public interest" also includes "an issue related to "environmental, economic or community well being . . . ."). This is plainly the sort of suit to which the anti-SLAPP statute applies.

Dismissal is required here, since Mann is unlikely to succeed on the merits. Mann's claims against National Review and Steyn seek impermissible relief from protected speech. Much of the speech identified in the Complaint – such as defendant Steyn's statement that Mann "is the very ringmaster of the tree-ring circus," Compl. ¶ 60, or Mann's suggestion that National Review has deemed his research "intellectually bogus," *id.* ¶ 84 – is plainly hyperbolic opinion commentary, which, by its very nature, cannot be proved factually false. *See, e.g.*, *Hustler*, 485

U.S. at 56. This commentary cannot form the basis of a libel claim, as it is absolutely protected under the First Amendment. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.").

In a similar vein, Mann claims that, by describing his much-maligned "hockey stick" research as "fraudulent," Steyn and National Review "falsely imput[e] to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense." *See, e.g.*, Compl. ¶ 60. But to the extent the commentary at issue related to plaintiff Mann at all, it involved criticism of his *ideas*, not aspersions directed at his *character*. Criticism of plaintiff's scientific *theories* is fair commentary on an issue of public importance. *See, e.g.*, *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994); *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996). Especially when considering the context in which it arose – commentary appearing on an online blog often given to such colorful and pointed opinions – defendants' speech is clearly the sort of rhetorical hyperbole protected by the First Amendment. *See, e.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14-15 (1970) (public claims of "blackmail" not actionable when they arise in a context that makes clear they are not to be taken literally).

Finally, plaintiff reserves much of his outrage for National Review's republication of commentary that facetiously labeled Mann as the "Jerry Sandusky of climate science," *see* Compl. ¶ 26, and argued that Penn State University similarly mishandled investigations of complaints of misconduct against its high-profile employees, Sandusky and Mann. Even as originally published by co-defendants Rand Simberg and Competitive Enterprise Institute ("CEI"), the commentary at issue expressly disclaimed any literal comparison of Mann to Sandusky, the convicted sex offender formerly employed as a football coach by Penn State University. *See id.* ("except instead of molesting children, he has molested and tortured data . . . ."). And in republishing it in *National Review Online* blog post that questioned Penn

State's investigation of allegations of misconduct against Professor Mann, defendant Steyn made clear that he disagreed with Mr. Simberg's "metaphor," expressing doubts that he would "have extended [it] all the way into the locker room showers with quite the zeal Mr. Simberg does . . . ." Compl., Ex. B, at 1. Defendants have little doubt that Professor Mann did not enjoy being compared in loose way to Jerry Sandusky, but the First Amendment jealously guards such metaphorical flourish. *See, e.g.*, *Hustler*, 485 U.S. at 56. Because Mann cannot demonstrate that he is likely to succeed on the merits of his claims, the District's Anti-SLAPP Act requires dismissal of his claims.

For much the same reasons, plaintiff's lawsuit should also be dismissed pursuant to Superior Court Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The First Amendment stands as an impediment to plaintiff's lawsuit with or without the expedited procedures of the Anti-SLAPP Act. Moreover, Professor Mann has failed to adequately plead facts demonstrating "actual malice," which requires public figures, such as Mann, to demonstrate that defendants acted with knowledge of the falsity of their statements or reckless disregard for their truth. After the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), adopted by the D.C. Court of Appeals in *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011), Mann must do more than simply parrot the legal "actual malice" standard in his Complaint. He must instead plead sufficient *facts* to demonstrate that he can satisfy this difficult legal standard at trial, which he has failed to do. *See, e.g., Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377-78 (4th Cir. 2012). Under the circumstances of the case, he cannot plead – and certainly is not likely to prove – actual malice.

At bottom, this is a case brought by a disgruntled scientist who wishes to litigate a contentious scientific battle not suitable for judicial resolution, but properly belonging in the arena of public debate. *See Underwager*, 22 F.3d at 736. If the First Amendment means

anything, it must prevent a scientist who frequently engages in the very hyperbolic polemics for which he seeks recovery here – *see generally, e.g.,* M. Mann, *The Hockey Stick and the Climate Wars: Dispatches From the Front Lines* at 249 (Columbia University Press 2012) ("Will we hold those who have funded or otherwise participated in the fraudulent denial of climate change similarly accountable – those individuals and groups that both made and took corporate payoffs for knowingly lying about the threat climate change posed to humanity . . . ?") – from seeking money damages for sharp public criticism of his scientific theories. Michael Mann has plenty of avenues to answer his critics in this important debate, but this Court is not one of them. His Complaint should be dismissed.

FACTUAL BACKGROUND

I. PROFESSOR MICHAEL MANN AND GLOBAL WARMING RESEARCH CONTROVERSY

A. Mann Has Thrust Himself into the Ongoing Debate Over Global Warming .

Plaintiff is a professor of meteorology at The Pennsylvania State University ("Penn State"), one of the largest publicly-funded universities in the U.S. *See* Compl. ¶¶ 2, 7, 13; *see also* Declaration of Shannen Coffin ("Coffin Decl."), Exs. 1-2 (attached at Tab C).[1] He also serves as director of the Earth System Science Center at Penn State. Coffin Decl., Ex. 2 (Mann *curriculum vitae*).

[1] As noted in the attached Declaration of Shannen W. Coffin, the documents attached to this Motion to Dismiss are either explicitly referenced in the Complaint or incorporated by hyperlink in the defendants' commentary attached to the Complaint and the subject of this dispute. The Court may consider information referenced in the Complaint and exhibits to the Complaint without converting a motion to dismiss to a motion for summary judgment. *See, e.g., Pisciotta v. Shearson Lehman Bros.*, 629 A.2d 520, 525 n.10 (D.C. 1993). The Court may also take judicial notice of media articles and information available on the Internet. *See, e.g., Washington Post v. Robinson*, 290 U.S. App. D.C. 116, 125, 935 F.2d 282, 291 (1991) (notice of article); *Wilson v. Cox*, 828 F. Supp. 2d 20, 25 n.1 (D.D.C. 2011) (judicial notice of website appropriate). The documents that are hyperlinked in the blog posts identified in the Complaint are collected at Exhibits 2, 6-7, 9 and 11-20 to the Coffin Declaration.

Professor Mann has been a central figure in the worldwide debate over the causes of global warming and climate change. As the Complaint asserts, Mann is "well known for his work regarding global warming and the so-called 'Hockey Stick Graph.'" Compl. ¶ 15. Plaintiff's theories and research on global warming – which purport to identify long-term trends in global temperatures based, in large measure, on theoretical models involving temperature proxies, such as the analysis of tree growth rings – have been published widely by academic journals and news media outlets. *Id.* ¶ 14. Plaintiff has written numerous peer-reviewed papers and published two books, including his recent account of his involvement in the rancorous public debates on climate science, *The Hockey Stick and the Climate Wars: Dispatches From the Front Lines*, Columbia University Press (2012). *See* Coffin Decl., Ex. 2.

The Complaint alleges that Professor Mann has attracted broad international acclaim for his work on climate science, including acting as a "lead author" for a chapter of the United Nations' International Panel on Climate Change ("IPCC") Third Scientific Assessment Report, published in 2001. Compl. ¶ 14. In 2002, plaintiff was named as one of the fifty leading visionaries in science and technology by *Scientific American*, and he has received numerous other awards for his research. *Id.*

Plaintiff is known largely as a co-author of the "Hockey Stick Graph," an illustration that first appeared in a 1998 research paper for the scientific journal, *Nature*, purporting to show a dramatic and historic increase in global temperatures in the late 20th century. *See* Compl. ¶¶ 15-16. The graph – named for its iconic shape resembling a hockey stick – purported to represent modeling estimates of worldwide temperatures between 1000 and 2000 A.D., based, in large part, on the observed growth in various tree rings throughout the world. The graph illustrates the authors' theory of a gradual decline in temperatures from 1000 A.D. until about 1900 A.D., followed by a sharp increase in the late 20th century. *Id.* ¶ 16. Mann and his co-authors

concluded "the recent 20th century rise in global temperature is likely unprecedented," and is linked to the simultaneous rise in carbon dioxide in the atmosphere caused by the burning of fossil fuels in the 20th century. *Id.* ¶ 15. The graph received international attention when a simplified version was featured on the front cover of the World Meteorological Organization's 1999 Statement of Status of Global Climate ("1999 WMO Report"). *See* Coffin Decl., Ex. 5, at 28-29. The data represented in the graph were also referenced in the IPCC's 2001 Third Assessment Report. *Id.*

Professor Mann claims that, "[a]s a result of this research, [he] and his colleagues were awarded the Nobel Peace Prize." Compl. ¶ 2. *See also id.* ¶ 17 ("In 2007, Dr. Mann shared the Nobel Peace Prize with other IPCC authors for their work in climate change, including the development of the Hockey Stick Graph."); Coffin Decl., Ex. 2 (same). In fact, as the 2007 Nobel Peace Prize award referenced in the Complaint itself demonstrates, Dr. Mann was not awarded the Nobel Prize; rather the 2007 award was jointly given to former Vice President Al Gore and the IPCC "for their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change." *See* Coffin Decl., Ex. 3. Since Mann's public claims of being a "Nobel prize recipient" (Compl. ¶ 5) surfaced, the IPCC has released a public statement clarifying that the Nobel Peace Prize "was awarded to the IPCC as an organization, and not to any individual associated with the IPCC. Thus, it is incorrect to refer to any IPCC official, or scientist who worked on IPCC reports, as a Nobel laureate or Nobel Prize winner." *See* Coffin Decl., Ex. 4, at 1.

B. The Disclosure of the East Anglia Emails Stokes Debate Over Climate Science and Questions about Michael Mann's Scientific "Trick."

Professor Mann's penchant for puffery aside, there is little question that his work thrust him into the center of international debate and controversy. In November 2009, approximately 1000 emails were misappropriated from a server at the University of East Anglia's Climate Research Unit ("CRU") in Great Britain and published on the Internet. Compl. ¶ 19. The emails, which included correspondence between CRU scientists and Professor Mann about their climate research, "fuelled challenges to the work of CRU, to the reliability of climate science generally, and to the conclusions of [IPCC]." Coffin Decl., Ex. 5, at 10.[2] Although a number of the emails cast the CRU in a negative light, one in particular, a November 16, 1999 email from CRU scientist Phil Jones, sparked heated international criticism of Michael Mann and his Hockey Stick Graph. Jones wrote to Professor Mann and two other scientists: "I've just completed Mike's 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*." *Id.* at 32 (emphasis added). The "Mike" in Jones' email is plaintiff Michael Mann.

The disclosure of the "trick" email and other CRU emails led to a number of investigations of the CRU in Great Britain and of Mann in the United States. Compl. ¶ 21. The University of East Anglia conducted its own investigation of the emails and published its results in *The Independent Climate Change Emails Review* (the "East Anglia Report"). *See* Coffin Decl., Ex. 5. That report examined the "honesty, rigor, and openness with which the CRU scientists have acted," but offered "no opinion on the validity of their scientific work." *Id.* at 10,

[2] Plaintiff cites to the investigations by the University of East Anglia that followed from the public disclosure of these emails at Paragraph 21 of his Complaint. The principal report of that investigation, *The Independent Climate Change Emails Review* (July 2010), is attached as Ex. 5 to the Coffin Declaration. Further explication of the allegations of plaintiff's Complaint discussed herein is derived, in part, from that report, which is incorporated by plaintiff's reference into the Complaint. See discussion, *supra* at 5 n.1.

¶ 8. Nor did it offer any opinion on Mann, who was not a part of CRU, but merely a collaborator with some of its scientists. *See generally* Coffin Decl., Ex. 5. The East Anglia Report generally found that the "rigour and honesty of the CRU scientists was not in doubt," *id.* at 11, ¶ 13, but did not completely exonerate those scientists. With respect to Jones' email referencing Professor Mann's "Nature trick," the report acknowledged the ambiguity of the term "trick," and that "opposing interpretations can be obtained from the same statement." *Id.* at 59, ¶ 24.[3] It found that Jones' use of the phrase "hide the decline" – a reference to the scientists' presentation of instrumental data spliced with tree ring proxy data to deemphasize declining proxy temperature data after 1960 – demonstrated the "misleading" nature of the Hockey Stick Graph as portrayed on the cover of the 1999 WMO Report:

> Finding: In relation to "hide the decline" we find that, given its subsequent iconic significance . . . the figure supplied for the WMO Report was **misleading** in not describing that one of the series was truncated post 1960 for the figure, and in not being clear on the fact that proxy and instrumental data were spliced together. We do not find that it is misleading to curtail reconstructions at some point *per se* (italics in original), or to splice data, but we believe that both of these procedures should have been made plain – ideally in the figure but certainly clearly described in either the caption or the text.

Id. at 59-60 (emphasis added).

The East Anglia Report also concluded that Jones and other CRU scientists encouraged others – including plaintiff – to delete emails to circumvent Freedom of Information Act requests in the U.K. and U.S. In a May 29, 2008 email, Jones urged Professor Mann to delete emails:

[3] For instance, a leading critic of Professor Mann's work, Stephen McIntyre, wrote to investigators that the "IPCC 'trick' was not a 'clever' mathematical method – it was merely the deletion of inconvenient data after 1960." Coffin Decl., Ex. 5, at 32. Jones disputed that characterization, stating that the email was written in "haste" and "was not intended to imply any deception, simply the 'best way of doing or dealing with something[.]'" *Id.* at 32-33.

"Can you delete any emails you may have had with Keith re AR4?" *Id.* at 92. Similarly, in a February 2, 2005 email to plaintiff, Jones declared: "The two MMs have been after the CRU station data for years. If they ever hear there is a Freedom of Information Act now in the UK, I think I'll delete the file rather than send to anyone." *Id.* These actions and others led investigators to conclude that CRU scientists often refused to share scientific data with other scientists. The report found that CRU scientists "may have gone out of their way to make life difficult on their critics" *Id.* at 33, and that "there has been a consistent pattern of failing to display the proper degree of openness." *Id.* at 11.

The East Anglia Report concluded that the role of science and modes of expression for scientists have changed in the Internet age. *Id.* at 15. Critiques of academic and scientific research in the "blogosphere" tend to be "more vociferous, more polarised," but are "a fact of life," that would be "foolish to challenge." *Id.* at 15, 42. The spillover of that debate from the pages of academic journals into more popular debate venues requires scientists to "communicate their work in ways the public can access and understand." *Id.* at 15.

C. Penn State's Investigation of Mann.

In 2010, Penn State conducted its own investigation of Professor Mann amid the controversy created by the disclosure of the CRU emails. *See* Compl. ¶ 21. The investigation was conducted by an "Investigatory Committee" appointed by University administrators and comprised entirely of Penn State faculty members. *See* Coffin Decl., Ex. 6. The Committee members cleared their colleague of three of four substantive charges against him with only a cursory inquiry. The Committee based its inquiry largely on its interview of Professor Mann himself and failed to interview any scientist who had been critical of Mann. It subsequently conducted a broader examination of a single charge that Mann's research deviated from accepted research norms. *Id.* at 6. As part of that investigation, the Committee interviewed one prominent

critic of Professor Mann, Massachusetts Institute of Technology Professor Richard Lindzen, who expressed dismay with the scope of the investigation and the Committee's analysis of the East Anglia emails. When told of the results of the cursory initial inquiry, Lindzen, a climatologist, remarked: "It's thoroughly amazing. I mean there are issues he explicitly stated in the emails. I'm wondering what's going on?" *Id.* at 13.

A subsequent investigation of plaintiff's work by the National Science Foundation ("NSF") (*see* Compl., ¶¶ 21, 23), found the Penn State investigation so lacking in supporting evidence that the NSF could not fully rely on the results of that investigation. *See* Coffin Decl., Ex 7, at 1-2. With respect to Penn State's cursory determination that plaintiff had not engaged in data falsification, as evidenced by the East Anglia emails, the NSF concluded that Penn State did not adequately review the allegation in its inquiry, especially in light of its failure to interview critics of plaintiff's work. *Id.* at 2. While the NSF found no "direct evidence of research misconduct" by Mann, its investigation found "several concerns raised about the quality of the statistical analysis techniques that were used in the Subject's research." *Id.* at 3.

II. DEFENDANTS' COMMENTARY ON THE PENN STATE SANDUSKY SCANDAL AND THE CURRENT CONTROVERSY

A. Defendants National Review and Mark Steyn Are Opinion Commentators.

Defendant National Review, founded by conservative intellectual icon William F. Buckley in 1955, is described as "America's most widely read and influential magazine and website" offering "conservative news, commentary and opinion." Compl. ¶ 8. National Review publishes its magazine bi-weekly, and also provides commentary through its website, *National Review Online* (www.nationalreview.com). A central feature of *National Review Online* is its main blog, *The Corner*, on which a wide variety of contributors provide commentary on the gamut of public policy, political, and cultural topics. Coffin Decl., Ex. 8. First published in

2002, *The Corner* is described on *National Review Online* as "a web-leading source of real-time conservative opinion." *Id.*

Defendant Mark Steyn is conservative columnist and commentator who writes a feature article for *National Review* magazine, writes feature commentary for *National Review Online*, and provides occasional and often more informal opinion commentary and analysis on *The Corner* on *National Review Online*. *See generally* Compl. ¶ 11.[4]

B. Defendant Steyn's Commentary on Penn State's Investigation of Mann

Renewed attention to Penn State's investigation of Professor Mann arose in the summer of 2012, when Penn State released the results of former FBI Director Louis Freeh's report on the university's handling of unrelated allegations of sexual abuse by a highly regarded former assistant football coach, Jerry Sandusky. Sandusky, the long-time defensive coordinator and a top aide to legendary head football coach Joe Paterno, was convicted of multiple counts of sexual misconduct with minors. *See* Coffin Decl., Ex. 9, Executive Summary and Findings of *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* (the "Freeh Report"), at 13. When the allegations against Sandusky became public, Penn State appointed Freeh as an independent investigator to probe the University's handling of the scandal. Freeh's report, released on July 12, 2012, found a "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims," and a failure by university officials to properly investigate known allegations of misconduct when they arose. *Id.* at 14.

[4] Defendant Mark Steyn is a citizen of Canada and a resident of New Hampshire. He denies that this Court may exercise personal jurisdiction over his internet commentary, since that commentary was not purposefully directed at the District of Columbia. *See, e.g., Calder v. Jones*, 465 U.S. 783 (1984). Nor is Mr. Steyn subject to general jurisdiction in the District of Columbia. Solely to expedite this litigation as a matter of administrative convenience, however, he voluntarily submits to personal jurisdiction in this Court for the limited purpose of litigating these claims.

Freeh concluded that, "in order to avoid the consequences of bad publicity, the most powerful leaders at the University. . . repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large." *Id.* at 16. The Freeh report urged Penn State "to undertake a thorough and honest review of its culture[,]" which placed "[t]he avoidance of the consequences of bad publicity" above virtually every other value. *Id.* at 16, 18.

A few days after the release of the Freeh report, defendant Mark Steyn wrote an opinion piece, entitled "Football and Hockey," published on *The Corner* on *National Review Online*, raising questions about Penn State's prior investigation of Mann in light of the results of the Freeh report. *See* Compl., Ex. B.; *see also* Coffin Decl., Ex. 10. Steyn's blog post opened by excerpting and linking to an earlier internet post written by defendant Rand Simberg for defendant CEI's website OpenMarket.org, entitled "The Other Scandal in Unhappy Valley." In that earlier piece, republished in part by Steyn and National Review, Simberg had compared the Sandusky scandal with "another cover up and whitewash that occurred [at Penn State] two years ago." *Id.* Simberg asked whether it was "time to revisit the Michael Mann affair" in light of the Freeh's finding of a corrupt culture of leadership at Penn State. Simberg then drew a comparison between Sandusky and Mann: "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." *Id.*

In republishing this commentary, Steyn distanced himself from Simberg's hyperbolic comparison of Sandusky and Mann: "Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does . . . ." Nevertheless, Steyn agreed that Simberg "has a point." Steyn continued: "Michael Mann was the man behind the fraudulent

climate-change 'hockey stick' graph, the very ringmaster of the tree-ring circus." *Id.* He noted similarities between Penn State's handlings of allegations of misconduct by Mann and Sandusky:

> [W]hen the East Anglia emails came out, Penn State felt obliged to 'investigate' Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same cove who investigated Mann. And as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.

Id. Steyn then closed his post by questioning Penn State's similar handling of the two matters:

> If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up? Whether or not he's the 'Jerry Sandusky of climate change,' he remains the Michael Mann of climate change, in part because his 'investigation' by a deeply corrupt administration was a joke.

Id.[5]

C. National Review Rejects Plaintiff's Demand for Retraction, and the Public Debate Over Climate Science Continues.

Eight days after "Football and Hockey" appeared on *The Corner*, Mann demanded a retraction and an apology from what he deemed accusations of "academic fraud." Compl., ¶ 31; *see* Coffin Decl., Ex. 19. National Review responded by letter on August 22, 2012 (*see* Coffin

[5] The factual underpinnings of Steyn's piece are fully set forth in the post and documents incorporated therein. Steyn's post hyperlinked to Simberg's article, which itself linked to the following documents available on the internet: (1) Rand Simberg, "The Death of the Hockey Stick?," May 17, 2012 (Coffin Decl., Ex. 11); (2) Rand Simberg, "Climategate: When Scientists Become Politicians," Nov. 23, 2009 (*Id.*, Ex. 12); (3) Steve McIntyre, "Mike Nature trick," www.climateaudit.org (*Id.*, Ex. 13); (4) Penn State's internal investigative report on plaintiff (*Id.*, Ex. 6); (5) the National Science Foundation Inspector General's Closeout Memorandum analyzing Penn State's investigation of plaintiff's research (*Id.*, Ex. 7); (6) Comments of Steve Milloy, publisher of Junkscience.com, on Penn State's investigative report on plaintiff's research (*Id.*, Ex. 14); (7) Joe Romm, "Much-vindicated Michael Mann and Hockey Stick get final exoneration from Penn State – time for some major media apologies and retractions," www.thinkprogress.org, July 1, 2010 (*Id.*, Ex. 15); (8) Marc Morano, Comment on Penn State investigation of plaintiff, www.climatedepot.com, July 2, 2010 (*Id.*, Ex. 16); (9) Mike Cronin, "Penn State University panel clears global-warming scholar," www.triblive.com, July 2, 2010 [*Id.*, Ex. 17]; and (10) "NSF confirms results of Penn State investigation, exonerates Michael Mann of research misconduct," www.scholarsandrogues.com (*Id.*, Ex. 18). All of these documents are incorporated by reference in the Complaint and the exhibits attached thereto.

Decl., Ex. 20), and in a *National Review Online* column by Editor Rich Lowry published on the same date. *See* Compl. ¶ 32 & Ex. C; Coffin Decl., Ex. 21. Lowry explained that Steyn's prior post did not assert that Mann committed actual fraud in the literal sense; instead, "[i]n common polemical usage, "fraudulent" doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." Coffin Decl., Ex. 21.

Plaintiff subsequently filed this suit on October 22, 2012, alleging libel and intentional infliction of emotional distress against defendants National Review and Mark Steyn, along with co-defendants CEI and Simberg. Mann's complaint asserts that defendants defamed him in their characterization of the Hockey Stick Graph as "fraudulent," or "intellectually bogus," and harmed his reputation and caused emotional harm by their alleged comparison of plaintiff Mann to Jerry Sandusky. *See generally* Compl. Counts I-VI.

ARGUMENT

Defendants' combined motion seeks to dismiss plaintiff's claims both through the expedited procedures of the D.C. Anti-SLAPP Act and the more traditional standards of D.C. Super. Ct. Civ. R. 12(b)(6). Under either route, plaintiff's claims must be dismissed for the same reasons: Defendants' commentary is protected speech under the First Amendment, which precludes tort recovery of any kind relating to speech on issues of public interest.

I. PLAINTIFF'S CLAIM SHOULD BE DISMISSED PURSUANT TO THE EXPEDITED PROCEDURES OF THE D.C. ANTI-SLAPP ACT.

Professor Mann's claims – seeking monetary damages for defendants' public commentary regarding his highly publicized global warming research and the ensuing controversy surrounding it – present the very sort of "strategic lawsuit against public participation" targeted for early dismissal by the District of Columbia Anti-SLAPP Act of 2010 (the "Act"). *See* D.C. Code § 16-5501, *et seq*. The Anti-SLAPP Act permits litigants defending

claims "arising from an act in furtherance of the right of advocacy on issues of public interest" to file a "special motion to dismiss" prior to discovery in a proceeding. D.C. Code § 16-5502(a).[6] The Act creates a heavy burden for a plaintiff asserting tort claims, such as defamation or intentional infliction of emotional distress, based on defendants' speech. If defendants make 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, then the motion *shall be granted* unless the responding party demonstrates that the claim is *likely to succeed on the merits* . . . ." D.C. Code § 16-5502(b) (emphasis added).

The Anti-SLAPP Act was designed to provide expedited dismissal of lawsuits "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *See* Tab. B, D.C. Council Comm. on Pub. Safety and the Judiciary Rpt. on Bill 18-893, at 1 (Nov. 18, 2010). Following in the footsteps of dozens of states that have enacted similar statutes, *id.* at 2-3, the District of Columbia Council adopted its anti-SLAPP statute to prevent the "chilling effect" SLAPP lawsuits were having on public debate regarding issues of public interest:

> Such lawsuits . . . have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Id. at 1. The Act thus ensures that speakers "are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id.* at 4. The statute reinforced existing authority supporting the early dismissal of lawsuits that inhibit protected speech. *See,*

[6] The statute requires an "expedited hearing" on the special motion to dismiss, and generally directs the court to stay discovery until the special motion is decided. *See* D.C. Code § 16-5502(b), (d).

e.g., Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 592 (D.C. 2000) ("[i]n the First Amendment area, summary procedures are even more essential") (citation omitted).

A. Plaintiff's Lawsuit "Arises From an Act in Furtherance of the Right of Advocacy on Issues of Public Interest."

Defendants National Review and Mark Steyn easily satisfy their *prima facie* burden under the D.C. Anti-SLAPP Act. In order meet that burden, defendants need only demonstrate that plaintiff's lawsuit "arises from an act in furtherance of the right of advocacy on issues of public interest[.]" D.C. Code § 16-5502(b). Section 16-5501(1)(B) defines such an "act" to include any "expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest."

Here, Professor Mann's entire suit is predicated on statements made by Steyn and National Review on an internet site, *National Review Online*, which exists as a forum for public discussion of issues of public interest. *See* Compl. ¶ 4 (describing *National Review* and *National Review Online* as "widely read and circulated" publications). The Complaint itself asserts that the commentary at issue was "were widely published throughout the United States and elsewhere" and read by members of the public. Compl. ¶¶ 40-41. As such, plaintiff's claims clearly arise from "acts in furtherance of the right of advocacy." *See Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 37, 38 (D.D.C. 2012) (internal quotations and citations omitted) (applying D.C. anti-SLAPP law to internet blog post).[7]

[7] For the same reason, defendants' commentary also meets the statute's alternative definition of "act[s] in furtherance of the right of advocacy on issues of public interest," because it involves "written . . . statement[s] made . . . [i]n a place open to the public or a public forum in connection with an issue of public interest." D.C. Code §16-5501(1)(A)(ii). *See Farah*, 863 F. Supp. 2d at 38. Courts have "uniformly held or, deeming the proposition obvious, simply assumed that internet venues to which members of the public have relatively easy access constitute a 'public forum' or a place 'open to the public'" for purposes of an anti-SLAPP statute. *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090 (C.D. Cal. 2004) (interpreting California statute); s*ee also Du Charme v. Int'l Bhd. of Elec. Workers, Local 45*, 110 Cal. App. 4th 107 (2003).

Moreover, it cannot seriously be questioned that defendants' commentary addressed "an issue of public interest." D.C. Code § 16-5501(1)(B) "Issue of public interest" includes "an issue related to *health or safety, environmental, economic* or *community well-being*" or "*a public figure*." D.C. Code § 16-5501(3) (emphasis added). The blog posts, which discuss Professor Mann's research on climate change and global warming – and public investigations into alleged improprieties in connection with that research – address issues of "environmental" and "community well-being." *Id.* They also express the authors' opinion that the "politicized science" of climate change could have "dire economic consequences for the nation and planet." Coffin Decl., Ex. 10, at 2. By any measure, National Review's commentary addresses subject matters that are of significant "public interest" within the meaning of the statute.

The Act's "public interest" definition is met for the independent reason that Professor Mann is a "public figure." *See* D.C. Code § 16-5501(3). The court determines whether plaintiff is a public figure as a matter of law. *See Waldbaum v. Fairchild Publ'ns, Inc.*, 201 U.S. App. D.C. 301, 307, 627 F.2d 1287, 1293 n.12. (1980). The Complaint all but concedes plaintiff's public figure status, alleging that Professor Mann is "well known for his work regarding global warming and the so-called 'Hockey Stick Graph.'" Compl. ¶ 15. Plaintiff served as "lead author on the *Observed Climate Variability and Change* chapter" of the IPCC's Third Scientific Assessment Report in 2001, and was regaled as "one of the fifty leading visionaries in science and technology" by *Scientific American* in 2002. *Id.* ¶ 14. His work "has received considerable accolades within the scientific community," and has been the subject of heated debate in both scientific and political circles. *Id.* ¶¶ 17, 18. Plaintiff has written extensively in both scientific and popular fora, including a book about his travails on the "front lines" of the global warming "wars." *See* Coffin Decl., Ex. 2 (citing M. Mann, *The Hockey Stick and the Climate Wars: Dispatches From the Front Lines* (2012)); *see also* Ex. 20 at 2. Plaintiff even claims – though

quite erroneously – that the 2007 Nobel Peace Prize that was awarded to the IPCC was personally co-awarded to him along "with other IPCC authors for their work on climate change." Compl. ¶ 17.

Plaintiff thus qualifies as a public figure because he has thrust himself into the international debate about climate change. *See, e.g., Gertz*, 418 U.S. at 345 ("those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."); *McBride v. Merrell Dow & Pharm. Inc.*, 230 U.S. App. D.C. 403, 409, 717 F.2d 1460, 1466 (1983) (same). In similar circumstances, courts have held scientists at the center of public debates on important scientific and political issues to be public figures. *See, e.g., Ruber v. Food Chemical News, Inc.*, 925 F.2d 703, 706 (4th Cir. 1991) (scientist who injected himself into public debate over carcinogen in pesticide was public figure); *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 197 (8th Cir. 1966) (then-Judge Blackmun, holding Nobel laureate Linus Pauling was a public figure where he had "projected himself into the arena of public policy, public controversy, and 'pressing public concern'"). At a minimum, plaintiff is a "limited purpose public figure" because he has played a major role in a pre-existing public controversy and the alleged defamatory statements at issue here relate specifically to that controversy. *See Waldbaum*, 201 U.S. App. D.C. at 311-12, 627 F.2d at 1297-98; *see also Hatfill v. The New York Times Co.*, 532 F.3d 312, 324-25 (4th Cir. 2008) (scientist was limited purpose public figure as a result of frequent commentary on bioterrorism). Defendants' commentary discussed a public figure's involvement in an issue of public concern, and they have met their *prima facie* burden of demonstrating the applicability of the anti-SLAPP statute.

B. Plaintiff Cannot Satisfy the Heavy Burden that His Lawsuit Is Likely to Succeed on the Merits.

Because defendants have met their *prima facie* burden under the Anti-SLAPP Act, the burden shifts to Professor Mann, who must demonstrate that his claims are "*likely* to succeed on the merits." D.C. Code § 16-5502(b) (emphasis added). Given the nature of this inquiry, courts interpreting anti-SLAPP statutes have held a plaintiff cannot merely rely on the allegations in the Complaint, but "must provide the court with sufficient evidence to determine" whether plaintiff is likely to prevail. *See Traditional Cat Ass'n v. Gilbreath*, 13 Cal. Rptr. 3d 353, 357 (Cal. Ct. App. 2004) (citations and internal quotations omitted). A court "can also consider defendant's opposing evidence to determine whether it defeats a plaintiff's case as a matter of law." *Id.* Although the court should not weigh the credibility or strength of competing evidence, "it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002).

By requiring plaintiff to demonstrate that he is "likely" to succeed on the merits, the D.C. Act imposes a heavier burden on defamation plaintiffs than other anti-SLAPP jurisdictions. *Compare* D.C. Code § 16-5502(b) *with* Cal. Civ. Proc. Code § 425.16(b)(3) (requiring plaintiff to demonstrate "a *probability* that he or she will prevail on the claim") (emphasis added); *Browne v. McCain*, 611 F. Supp. 2d 1062, 1069 (E.D. Cal. 2009) (California plaintiff need only demonstrate a legally sufficient claim and a "mere possibility" of success). "Likely" means "having a high probability of occurring or being true." *See Merriam-Webster Dictionary* (online ed. 2011, available at http://www.merriam-webster.com/dictionary/likely); *see also Clark v.*

Moler, 418 A.2d 1039, 1043 (D.C. 1980) (describing "likely to succeed" as "strong" showing that is something more than simply demonstrating a meritorious defense).[8]

Professor Mann cannot meet his burden here. To prevail in a libel claim, plaintiff must prove that the statements identified in the Complaint are: (1) defamatory, (2) capable of being proven true or false, (3) of and concerning plaintiff, (4) false, and (5) made with the requisite degree of fault. *See Coles v. Wash. Free Weekly*, 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd*, 319 U.S. App. D.C. 215, 88 F.3d 1278 (1996); *see also Blodgett v. The University Club*, 930 A.2d 210, 222 (D.C. 2007). Because Professor Mann is unquestionably a public figure – and because the speech at issue relates to issues of public concern – he bears the burden of proving the falsity of all of the challenged statements made by the defendants. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *Moldea v. New York Times Co.*, 304 U.S. App. D.C. 406, 411, 15 F.3d 1137, 1142 (1994) ("*Moldea I*"), *modified on reh'g*, 306 U.S. App. D.C. 1, 22 F.3d 310 (1994) ("*Moldea II*"); *Wilner*, 760 A.2d at 595.

Where, as here, allegations touch contentious issues of public concern, the Court should closely scrutinize the Complaint to ensure that debate on public issues remains "uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."). "The sort of robust political debate encouraged by the First Amendment" is "bound to produce speech that is critical of those . . . public figures who are intimately involved in the resolution of important public questions . . . ." *Hustler*, 485 U.S. at 51 (citations omitted). District of Columbia courts have long recognized that early dismissal of

[8] Given the Act's remedial protections for First Amendment rights, it also "should be construed liberally in order to effectuate the purposes for which it was enacted." *McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983); *see also Hutchison Bros. Excavation Co. v. Dist. of Columbia*, 278 A.2d 318, 321 (D.C. 1971) ("a court should give a liberal interpretation to protective provisions while narrowly interpreting exceptions from such provisions").

actions that inhibit this sort of protected speech is "essential." *Wilner*, 760 A.2d at 592, quoting *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 35, 365 F.2d 965, 968 (1966).

1. In Both Content and Context, Defendants' Commentary Is Pure Opinion and Does Not Assert Provably False Statements of Fact.

Plaintiff's claims fail here for the basic reason that the alleged defamatory remarks at issue are pure opinion, not capable of being proved false. The First Amendment absolutely protects statements of opinion where those statements "cannot reasonably [be] interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (citation omitted); *Weyrich v. The New Republic, Inc.*, 344 U.S. App. D.C. 245, 252, 235 F.3d 617, 624 (2001).

This principle applies with particular force in the context of a debate regarding scientific theories and ideas, since the very notion of "[s]cientific truth is elusive." *Underwager*, 22 F.3d 735; *see also Gertz*, 418 U.S. 339. As a general matter, then, "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Underwager*, 22 F.3d at 736. "More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path toward superior understanding of the world around us." *Id.* *See also Ezrailson v. Rohrich*, 65 S.W.3d 373, 382 (Tex. Ct. App. 2001) ("Scientists continuously call into question and test hypotheses and theories; this questioning advances knowledge."); *Beckman v. Dunn*, 419 A.2d 583 (Pa. Super. Ct. 1980) ("criticism of academic performance . . . necessarily includes subjective elements that render statements of the kind complained of here, akin to opinion").

Plaintiff asserts that National Review's publication of "Football and Hockey" and the subsequent "Get Lost" column by Editor Rich Lowry would be understood by readers to assert that Professor Mann committed academic and/or criminal fraud. Compl. ¶ 35. Plaintiff's characterization of the commentary cannot bear even the slightest of scrutiny. In determining

whether language constitutes an actionable statement of fact or protected opinion or hyperbole, this Court must examine the content and context of the article or publication in which the statement was used. *See Moldea II*, 306 U.S. App. D.C. at 4, 22 F.3d at 313; *Weyrich*, 344 U.S. App. D.C. at 252, 235 F.3d at 624. That inquiry requires the court to examine the context in which the statement appeared, the specific language used, and the extent to which the language is verifiable. *See Ollman v. Evans*, 242 U.S. App. D.C. 301, 310, 750 F.2d 970, 979 (1984) (en banc); *Moldea II*, 306 U.S. App. D.C. at 4, 22 F.3d at 313. This determination is a question of law for the Court. *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 248 (D.C. 2006) ("[W]hether a statement is capable of defamatory meaning is a question of law for the court to determine.") (quotations and citations omitted); *see also Klayman v. Segal*, 783 A.2d 607, 612-13 (D.C. 2001). Here, in both content and context, the commentary at issue is protected speech.

First, with respect to "Football and Hockey," the language used by Mr. Steyn signals to a reasonable reader that Steyn is not literally alleging criminal activity or "academic fraud" against Professor Mann – or making any provably false assertions of *fact*. *See Wilner*, 760 A.2d at 597. Instead, the post merely raises questions regarding the recent events at Penn State and, to the extent it addresses Mann at all, pokes fun at his scientific theories and Penn State's investigation of his involvement in the East Anglia affair. In reprinting Rand Simberg's colorful comparison of Mann to Sandusky, Steyn cast doubt on the analogy and explicitly highlights to the reader the non-literal sense in which it was employed: "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." Compl., Ex. B, at 1. (emphasis added). Steyn's description of Mann as "the very ringmaster of the tree-ring circus" smacks of exaggeration – a mere witticism. It is difficult to imagine what provable fact – particularly, what *defamatory* fact – a reader might derive from such a statement. In short, the column's "loose," "imaginative" and "polemical" language clearly signals to readers

that it contains the author's opinion and does not seek to convey provably false facts. *See Wilner*, 760 A.2d at 597; *Weyrich*, 344 U.S. App. D.C. at 252, 235 F.3d at 624; *Ollman*, 242 U.S. App. D.C. at 318, 750 F.2d at 987 (noting Op-Ed column was written "to spark a more appropriate debate within academia").

The central point of the Steyn post was to raise questions about Penn State's handling of investigations regarding its "star" employees: "If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?" Compl., Ex. B, at 2. Steyn's use of this interrogatory style further "militates in favor of treating statements as opinion." *Ollman*, 242 U.S. App. D.C. at 318, 750 F.2d at 987; *see also Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 729-730 (1st Cir. 1992) (question posed by columnist "was posed rhetorically" and "reasonably could be understood only as [the author's] personal conclusion"). Courts have repeatedly emphasized that use of interrogatory language necessarily invites readers to draw their own conclusions about an ambiguous subject. *See, e.g., Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993) ("inquiry itself, however embarrassing or unpleasant . . . is not an accusation").

Second, the subsequent internet column, "Get Lost," in which Rich Lowry responds to Professor Mann's threat of lawsuit, contains nothing remotely resembling a provably false factual assertion. In Count V of the Complaint, plaintiff asserts that Lowry calls Professor Mann's research "intellectually bogus," and he claims that this statement is defamatory in that it "falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense." Compl. ¶ 84. But plaintiff is simply stretching to take offense. His characterization of Lowry's comments is flatly refuted by the content of the column, attached as Ex. C to the Complaint, which explains that, "[i]n common polemical usage," Mark Steyn's previous use of the term "'fraudulent' *doesn't mean honest-to-goodness criminal fraud*. It means

intellectually bogus and wrong." Compl., Ex. C, at 1 (emphasis added). Fairly read, the column doesn't label Mann's research anything at all, it merely explains that the prior Steyn post and *explicitly disclaims* any suggestion that Steyn had accused Mann of criminal fraud.

At worst, what remains is a "polemic[al]" suggestion that Mann's *research* and *ideas* are "intellectually bogus and wrong," a claim that cannot serve as a basis for defamation. *See, e.g., Dilworth*, 75 F.3d at 311 ("where one scholar calls another a 'crank' for having taken a position that the first scholar considers patently wrongheaded, the second does not have a remedy in defamation"). In this scientific debate, there is little provable fact, only theory – a proposition to which even Mann must assent. *See* Compl.¶ 15 (Mann's papers concluded that "recent 20th century rise in global temperature is *likely* unprecedented in at least the past millennium") (emphasis added). A science as embryonic as climatology continues to evolve, to be debated and researched. Mann's research relates to estimates of temperatures that occurred hundreds or thousands of years ago, long before accurate measures were taken or records kept. By its very nature, it cannot be proved definitively that his theories – or even harsh critiques of those theories – are false. *See, e.g., Underwager*, 22 F.3d at 736; *Klein v. Victor*, 903 F. Supp. 1327, 1334 (E.D. Mo. 1995) ("What one social scientist considers to be pseudo-scientific another could consider legitimate, but, in the context used here, neither can be tested or proven.").

Third, reinforcing their *content*, both Steyn's post and Lowry's column appeared in *a context* where the reasonable reader would clearly understand that the authors' statements are purely opinion, and not actionable factual assertions. *See, e.g., Moldea II*, 306 U.S. App. D.C. at 4, 22 F.3d at 313. Both posts appeared on *National Review Online*, which plaintiff alleges in the complaint is website for "conservative news, commentary and opinion." Compl. ¶ 4; *see Weyrich*, 344 U.S. App. D.C. at 253, 235 F.3d at 625 (recognizing *The New Republic* "is itself well-known to be a magazine of political commentary, a self-described 'Weekly Journal of

Opinion'"). Readers of Steyn's piece on *The Corner* could click on a link called "About This Blog," to learn that *The Corner* describes itself "as a web-leading source of real-time conservative opinion" from the serious to the silly – a "home for Volcano-Lancing news, congressional handicapping, arguments about American exceptionalism and updates on the Islamification of Europe." *See* Coffin Decl., Ex. 8, at 1-2.

Readers expect strongly-worded, and often caustic, opinions in places, like the Op-Ed pages of newspapers and internet blogs, where political commentary can be found. *See Wilner*, 760 A.2d at 582-83. From "the earliest days of the Republic," opinion columnists, like Steyn, have stimulated debate and persuaded readers on public issues through the use of "sharp and biting" writings. *Ollman*, 242 U.S. App. D.C. at 317, 750 F.3d at 986. Readers of publications like *National Review Online* "expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere . . . ." *Id.*, 242 U.S. App. D.C. at 315, 317, 750 F.3d at 984, 986 ("[I]t is well understood that editorial writers and commentators frequently resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction.") (quotation marks omitted); *Wilner*, 760 A.2d at 583 (citing *Ollman*). In such instances, the very "settings of the speech in question makes their hyperbolic nature apparent." *Moldea II*, 306 U.S. App. D.C. at 5, 22 F.3d at 314.

This is especially true given the inflammatory nature of the debate over the topic addressed in the Steyn blog post: Penn State's investigation of Mann in light of highly publicized allegations of misconduct. *See, e.g., Lewis v. McTavish*, 673 F. Supp. 608, 610 (D.D.C. 1987) (noting court should examine "broader social context" of statements).[9] Mann's role in the East

[9] "Football and Hockey" appeared three days after the Freeh Report was released, documenting allegations that Penn State – one of the county's largest public colleges – covered up child abuse accusations against Jerry Sandusky to protect the University's football program and its legendary coach, Joe Paterno. *E.g.*, Coffin Decl., Ex 9. The Sandusky scandal was the type of public

Anglia emails, which became the subject of numerous investigations by government organizations and universities throughout the world, sparked a fierce public debate about the science of global warming – a debate that the East Anglia Report called "vociferous" and "polarised." *See* Coffin Decl., Ex. 5, at 42. As that report notes, the "blogosphere" allows "an opportunity for unmoderated comment to stand alongside peer reviewed publications; for presentations or lectures at learned conferences to be challenged without inhibition; and for highly personalized critiques of individuals and their work to be promulgated without hindrance." *Id.* at 15. This reality "is a fact of life," the report concluded, "and it would be foolish to challenge its existence." *Id.*

Professor Mann's own rhetoric – with talk of "climate change deniers," *see* Compl. ¶¶ 19-20, and his "dispatches from the front lines" of the "climate wars," *see* Coffin Decl., Ex. 2 – indicates that he fully understands the use of polemics in the public debate over global warming. He cannot now claim that such hyperbolic rhetoric is fair only when it churns from his own keyboard.

2. The Sandusky "Metaphor" and Description of the Hockey Stick Graph as "Fraudulent" Are Protected Rhetorical Hyperbole.

Against this backdrop, the particular statements challenged by plaintiff as defamatory are plainly protected rhetorical hyperbole. The Supreme Court has repeatedly recognized immunity for such hyperbolic statements, observing that this protection "provides assurance that public debate will not suffer for lack of . . . 'imaginative expression' . . . which has traditionally added much to the discourse of the Nation." *Milkovich*, 497 U.S. at 20; *see also Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt*, 398 U.S. at 14-15; *Dilworth*, 75 F.3d at 309 ("rhetorical hyperbole" is "a well-recognized category of, as it were, privileged defamation").

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controversy that invited "caustic" criticism. *See Hustler*, 485 U.S. at 51 (noting "[s]uch criticism, inevitably, will not always be reasoned or moderate").

The Sandusky "Metaphor." Especially appearing in the context of a publication where readers expect strong and colorful opinions, Rand Simberg's comparison of Mann to Sandusky – which, by its own terms, disclaims any literal comparison of the two – is clearly understood by readers as a "lusty and imaginative" expression of hyperbole. *See Letter Carriers*, 418 U.S. at 285-86 (union's description of "scab" as a "traitor to his God, his country, his family and his class" was "merely rhetorical hyperbole"); *Weyrich*, 344 U.S. App. D.C. at 253, 235 F.3d at 625 (holding that article's description of plaintiff's behavior as exhibiting "paranoia" "is rhetorical sophistry, not a verifiably false attribution in fact of a 'debilitating mental condition'").

In republishing the comparison, Steyn explicitly labeled it a "metaphor," questioned its propriety, and then completed the rhetorical point: "Whether or not he's the 'Jerry Sandusky of climate change', he remains the Michael Mann of climate change, in part because his 'investigation' by a deeply corrupt administration was a joke." Coffin Decl., Ex. 10, at 2. In this context, reasonable readers of *The Corner* would understand the Sandusky analogy – or what was left of it after Steyn's piece – was used in a "metaphorical, exaggerated or even fantastic sense. . . ." *Thomas v. News World Commc'ns*, 681 F. Supp. 55, 63-64 (D.D.C. 1988) (holding harsh description of plaintiffs as "garbage," "bums," or "pitiable lunatics" was absolutely protected by First Amendment). Just as no reasonable person would assume that Professor Mann is engaged in a real shooting "war" when they read the title of his book, no reasonable person could conclude that Steyn (or Simberg, for that matter) labeled Mann a convicted child molester.

The "Fraudulent" Hockey Stick Graph. Defendants' description of the Hockey Stick Graph as "fraudulent" is similarly rhetorical hyperbole. Read in context, Steyn's column cannot reasonably be construed to accuse plaintiff of academic fraud or a criminal act. Indeed, the only place the words "academic fraud" or "criminal offense" appear is in the plaintiff's Complaint. *See Wilner*, 760 A.2d at 601 ("Nothing in law or common sense supports saddling a libel

defendant with civil liability for a defamatory implication nowhere to be found in the published article itself."). In his piece, Lowry expressly disclaims any suggestion that plaintiff committed any criminal act. *See* Compl., Ex. C.

Notably, Steyn's column does not label Mann himself as "fraudulent," but only his research, *i.e.*, the "fraudulent climate change 'hockey-stick' graph." Compl., Ex. B, at 1. Steyn's characterization expressed his opinion that the graph itself is "fraudulent," in the sense that it fails to prove what Mann suggests it proves – that temperatures in the late 1990s were the warmest on record in over a millennium. The column is not an assault on Mann's character, but on his body of scientific work. But defamation does not lie where it is "not the character but *the ideas* of [a] scholar are attacked." *Dilworth*, 75 F.3d at 310 (emphasis added); *see also Sinclair v. Tubesocktedd*, 596 F. Supp. 2d 128, 133 (D.D.C. 2009) (finding no defamation in internet claims that plaintiff was "spreading lies" because claims were "less an attack on [plaintiff's] general character and instead a dispute with the accuracy of a specific statement made by him").

Again, that Steyn is not charging fraud in the literal sense, but in a more popular, non-legalistic sense, is clear from the surrounding context. *See Weyrich*, 235 F.3d at 620 (article's suggestion that plaintiff suffered from "paranoia" was "a popular, not clinical term, to embellish the author's view of [plaintiff's] political zealotry and intemperate nature"). The next phrase in the same sentence, "the very ringmaster of the tree-ring circus," clearly signals to readers that Steyn was writing in a "loose, figurative" sense. *See, e.g., Thomas*, 681 F. Supp. at 64; *Ollman*, 242 U.S. App. D.C. at 321, 750 F.3d at 990 (holding column questioning professor's academic reputation was protected speech; "But here we deal with statements by well-known, nationally syndicated columnists on the Op-Ed Page of a newspaper, the well-recognized home of opinion and comment."). As in *Kreuzer*, where D.C. Court of Appeals held that an assertion that plaintiff was "inhaling," was simply pejorative hyperbole, any reasonable reader coming across Steyn's

writing here "would have been able to tell that no actual accusation of crime was intended." 896 A.2d at 248.

Courts have frequently found more pointed invective to be protected hyperbole, even where it might be read, in a more literal sense, to suggest criminal or unethical conduct by the plaintiff. In *Greenbelt*, for instance, the Supreme Court held a newspaper's publication of an allegation that a developer was engaged in "blackmail" was simply a colorful description of his negotiating posture with a city. 398 U.S. at 14. In *Letter* Carriers, the Court held that description of replacement workers as "'traitor[s]' cannot be construed as representations of fact." 418 U.S. at 284. The U.S. Court of Appeals for the Seventh Circuit has summed up the various cases:

> Among the terms or epithets that have been held . . . to be incapable of defaming because they are mere hyperbole rather than falsifiable assertions of discreditable fact are "scab," "traitor," "amoral," "scam," "fake," "phony," "a snake oil job," "he's dealing with a half deck," and "lazy stupid, crap-shooting, chicken-stealing idiot."

Dilworth, 75 F.3d at 310 (concluding that labeling engineer "crank" was non-actionable challenge to the validity of his mathematical ideas).

Allegations of "lying" and "fraud" have fared no better where, as here, the context makes clear that the claims are simply rhetorical. In *Faltas v. The State*, for instance, the court denied recovery against a newspaper for publishing letters to the editor that suggested plaintiff, a physician and professor at a state medical school, had "lie[d] to suit her agenda" and "present[ed] lies as truth" in a column presenting her "meta-analysis of homosexual behavior." 928 F. Supp. 637, 640-642 (D.S.C. 1996), *aff'd*, 155 F.3d 557 (4th Cir. 1998). "[A]t worst, Riley's letter can be interpreted that plaintiff manipulated or ignored statistics. When it comes to 'imaginative expression' and 'rhetorical hyperbole,' few terms have enjoyed so frequent an association in the common culture as the terms 'lie' and 'statistic.'" *Id.* at 649.

Similarly, in *Phantom Touring,* the U.S. Court of Appeals for the First Circuit found no defamation in published articles suggesting a musical-comedy version of "The Phantom of the Opera" was a "rip-off, a fraud, a scandal, snake-oil job" and deliberately deceived the public. *Phantom Touring*, 953 F.2d at 728 ("Not only is this commentary figurative and hyperbolic, but we also can imagine no objective evidence to disprove it."). And a publisher's critique of a book on gambling techniques as "the # 1 fraud ever perpetrated upon the gambling reader" was similarly held to be protected hyperbole. *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170, 171 (D. N.J. 1982); *see also Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 727 (R.I. 2000) (mortgage broker's assessment of an appraisal as "fraudulent" held to be a non-actionable "vigorous epithet").

Plaintiff's complaint must meet the same fate. In the heated debate over the science of global warming and plaintiff's role in controversies surrounding it, strong language and pointed criticism are to be expected. Nothing in the language used by Mark Steyn and National Review can reasonably be read to accuse Professor Mann of anything more than intellectually suspect science. Such debate is not only protected, it also is laudable and cannot serve as the basis of a tort claim in this Court.

3. Defendants' Commentary Is Protected by the Fair Comment Privilege.

Defendants' commentary is also protected by the "fair comment" privilege, which protects opinions based on disclosed facts or those that are well known to the readers. *See Moldea I*, 304 U.S. App. D.C. at 413-14, 15 F.3d at 1144-45. The fair comment privilege applies to protect commentary from liability where "the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and [where] the reader is free to draw his or her own conclusions based upon those facts . . . ." *Id.*; *see also Chapin*, 993 F.2d at 1093 (when "the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider

the term anything but the opinion of the author drawn from the circumstances related"); *Partington*, 56 F.3d at 1156-57.

Here, Steyn asserted an opinion based on facts clearly identifiable from his commentary. The separate Simberg and Steyn internet posts cited in the Complaint contain hyperlinks to at least ten additional documents that lay out the details of the Sandusky child abuse scandal and the controversy over plaintiff's scientific research.[10] *See* Coffin Decl., Exs. 2, 5-7, 11-20. These documents include: (1) investigative reports from universities and research organizations that examine the East Anglia emails controversy (*see, e.g.*, Coffin Decl., Exs. 5-7); (2) critical analysis of plaintiff's research methods by other scientists and commentators who found plaintiff's methods led to distorted results (*see, e.g., id*., Exs. 5, 11, 13, 17); and (3) opinion pieces defending plaintiff's research, as well as more critical opinion pieces that fault the conclusions of the investigations of plaintiff's work (*see, e.g., id.*, Exs. 11-18).

As these sources make clear, defendants supplied relevant facts in exhaustive detail, allowing readers to evaluate the authors' opinions and reach their own conclusions. *See Moldea I*, 304 U.S. App. D.C. at 413-14, 15 F.3d at 1144-45. For example, Steyn sharply questioned whether Penn State's investigation of plaintiff's research can be trusted in light of the Freeh Report's conclusions about the University's corrupt culture, including Freeh's criticism of a Penn State leadership that "discouraged discussion and dissent." Coffin Decl., Ex. 9, at 16. In doing so, he offered readers the opportunity to review facts in those reports, such as, *inter alia*, (1) findings that the Hockey Stick Graph was misleading as presented in the WMO Report (*see*

[10] This court may consider hyperlinks when the subject matter of the Complaint is an electronic article that contains hyperlinks. *See Jankovic v. Int'l Crisis Grp.*, 389 U.S. App. D.C. 170, 174, 593 F.3d 22, 26, (2010); *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 702 (D. Md. 2000) (dismissing defamation complaint based on facts provided in hyperlinks), *aff'd*, 11 F. App'x 99 (4th Cir. 2001); *see also Insyst, Ltd. v. Applied Materials, Inc.*, 88 Cal. Rptr. 3d 808 (Cal. Ct. App. 2009) (taking judicial notice of hyperlinked documents).

Coffin Decl., Ex. 5, at 59-60), (2) the leaked emails that East Anglia investigators acknowledged could be interpreted different ways (*id.* at 59-60; *see also* Ex. 7, at 2-3), (3) the criticism of plaintiff's work by other climate scientists, and (4) the Freeh report itself. *See* Coffin Decl., Exs. 5, 9, 11, 13, 17. The links to the underlying source documents – including the investigative reports and even an opinion column from a liberal group that defended plaintiff – are all provided. *See e. g., Phantom Touring*, 935 F.2d at 730 (noting author disclosed underlying facts and that "not everyone shared his artistic judgment" about theater production). "Football and Hockey," then, is nothing more than "supported opinions" that "represent the writer's interpretation" of the facts presented. *Moldea I*, 304 U.S. App. D.C. at 413-14, 15 F.3d at 1144-45. As such, the column is protected by the fair comment privilege.

4. Plaintiff Is Unlikely to Succeed in Demonstrating Actual Malice by Clear and Convincing Evidence.

Professor Mann is also unlikely to succeed in meeting his burden of demonstrating fault. In cases involving a public figure, like Professor Mann, and issues of public concern, a defamation plaintiff must demonstrate that the challenged statements were made with "actual malice." *New York Times*, 376 U.S. at 279-80; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *Hepps*, 475 U.S. at 777. This burden does not mean, as it does under the common law, simple ill will, but requires much more. *Keogh*, 125 U.S. App. D.C. at 34, 365 F.2d at 967. As a public figure, Professor Mann must demonstrate facts suggesting that National Review and Steyn published their commentary with *knowledge* of its falsity or reckless disregard of its truth. *New York Times*, 376 U.S. at 279-80; *Curtis Publ'g*, 388 U.S. at 155; *Hepps*, 475 U.S. at 777. That is, plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added); *see also Garrison*, 379 U.S. at 74 (actual malice includes "only those false statements made with the high degree of awareness of their probable falsity");

Beeton v. District of Columbia, 779 A.2d 918, 924 (D.C. 2001). Plaintiff must present *clear and convincing evidence* of actual malice to meet his burden of proving fault. *See Beeton*, 779 A.2d at 924.

Here, Professor Mann is unlikely to meet his burden of demonstrating actual malice by clear and convincing evidence. This is true even if the court construes Defendants' commentary to accuse Mann, as he suggests, of "academic fraud." Plaintiff's research and methodology have been the subject of a fierce international debate – with entire websites (*see, e.g.*, www.climateaudit.org; www.wattsupwiththat.com) and books (*see, e.g.*, A. Montford, *The Hockey Stick Illusion: Climategate and the Corruption of Science* (Independent Minds 2010)) devoted to demonstrating the falsity of plaintiff's Hockey Stick Graph.[11] Several of the exhibits attached to the Complaint and hyperlinked in the Simberg and Steyn posts at issue in this case recount this debate. *See, e.g.*, Coffin Decl., Ex. 11 (Simberg, "The Death of the Hockey Stick?"); Ex. 13 (McIntyre, "Mike's Nature Trick").

Against this background, the Complaint seems to suggest that defendants must have known that Steyn's commentary about Mann was false because plaintiff had been "cleared" by a number of investigations. But the mere fact that some investigative bodies determined, based on their review (and in Penn State's case, a cursory review), that Mann's research was sound does not mean that the question is fairly removed from any public debate. The NSF Inspector General, for instance, cast serious doubt on the thoroughness and reliability of Penn State's Mann investigation. *See* Coffin Decl., Ex. 7, at 1-2. Other respected publications raised similar questions, with a senior editor for *The Atlantic* concluding that the Penn State investigation "would be difficult to parody" because "the case for the prosecution is never heard. Mann is

[11] Defendants do not attach as an exhibit any of the readily available, but lengthy books cited in this memorandum, but can provide them to the Court at its request.

asked if the allegations (well, one of them) are true, and says no. His record is swooned over. Verdict: case dismissed, with apologies that Mann has been put to such trouble." *See Clive Crook*, "Climategate and the Big Green Lie," *The Atlantic* (July 14, 2010) (available at http://www.theatlantic.com/politics/archive/2010/07/climategate-and-the-big-green-lie/59709/). Indeed, in "exonerating" Mann, the Penn State committee relied, in part, on its conclusion that plaintiff is well regarded in the scientific community, citing in support the fact that "Dr. Mann's work on the Third Assessment Report (2001) of the Intergovernmental Panel on Climate Change received recognition (along with several hundred other scientists) by being awarded the 2007 Nobel Peace Prize." Coffin Decl, Ex. 6 at 18. But as already noted, Mann was not awarded the Nobel Peace Prize – it went instead to the IPCC, and no individual contributor to that Committee can claim that his "work" received the award. *See* Coffin Decl., Ex. 4. In short, plenty of doubt remains after Penn State "cleared" its star researcher.

Moreover, many of the same reports cited by Mann suggest that his conduct, along with that of CRU scientists and other colleagues, gave rise to legitimate questions of possible misconduct. The East Anglia Report, for instance, finds that Professor Jones' email, suggesting that "Mike's Nature trick" would "hide the decline" in temperatures shown by more recent proxy tree ring data, was fairly subject to "different interpretations," and cited as evidence Steven McIntyre's submission that the "'trick' was not a 'clever' mathematical method – it was merely the deletion of inconvenient data after 1960." Coffin Decl., Ex. 5 at 32. The report ultimately concluded, in light of Professor Jones "hide the decline" email, that the version of Mann's Hockey Stick graph that appeared on the 1999 WMO Report was "misleading." *Id.* at 13, 60. The report also faulted the CRU scientists involved for deleting relevant emails and encouraging others to do so in order to avoid public disclosure of their methods to critics. *Id.* at 33, 92.

Similarly, the NSF Inspector General report, discussed in detail in the Complaint, ¶ 23, concluded that the many of the leaked East Anglia emails "contained language which reasonably caused individuals, not subject to the communications, to suspect some impropriety on the part of the authors." Coffin Decl., Ex. 7, at 2-3. That the NSF ultimately concluded that its research standards were not breached does not mean that the questions of impropriety are no longer subject to fair debate. In fact, the NSF also concluded that there were several legitimate "concerns raised about the quality of the statistical analysis techniques that were used in the Subject's research." *Id.* at 3. Those statistical techniques have been the subject of significant public criticism by skeptics such as Stephen McIntyre. *See, e.g.,* Coffin Decl., Ex. 13.

Thus, without even considering sources beyond the documents incorporated by reference in the Complaint or linked in the Steyn and Simberg blog posts, there is significant evidence to support a good faith belief that Professor Mann's research is "intellectually bogus" and that Mann engaged in some improper conduct in his research. Professor Mann is thus unlikely to satisfy his burden of demonstrating by clear and convincing evidence that defendants knew of the falsity of their statements or entertained serious doubts about their truth. Failing in his burden of proving fault, plaintiff's claims must be dismissed.

5. Plaintiff Is Unlikely to Succeed on His Claim for Intentional Infliction of Emotional Distress.

Plaintiff's intentional infliction claim fails for same reasons as his libel claim. Because plaintiff is a public figure and the speech at issue relates to an issue of public concern, his intentional infliction of emotional distress claim is subject to the same defenses and privileges as the libel allegations. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (affirming dismissal of intentional infliction claim; noting even offensive speech on issue of public concern is "entitled to special protection under the First Amendment"); *Hustler*, 485 U.S. at 52-53; *Washington v. Smith*, 893 F. Supp. 60, 64-65 (D.D.C. 1995). Plaintiff cannot do an "end run" around the

heightened First Amendment standards on defamation claims by alleging a related tort. *Smith*, 893 F. Supp. at 64-65; *Moldea II*, 306 U.S. App. D.C. at 10, 22 F.3d at 319. Consequently, to prevail, plaintiff must prove "*both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler*, 485 U.S. at 52. Because, as explained above, the speech at issue is not capable of being proved true or false (see discussion, *supra*, at 22-32) and plaintiff cannot demonstrate actual malice by clear and convincing evidence (see discussion, *supra*, at 33-36), his intentional infliction claim based on the Sandusky "metaphor" should be dismissed. *Id.*; D.C. Code § 16-5502(a).

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE IT DOES NOT ALLEGE THAT DEFENDANTS ACTED WITH FAULT.

Defendants' motion to dismiss under D.C. Super. Ct. Civ. R. 12(b)(6) rests on the same First Amendment grounds as its special motion to dismiss. Even assuming the plaintiff's allegations as true, and taking into account all of the documents incorporated by reference into the Complaint and its exhibits, the First Amendment forecloses plaintiff's recovery for the protected speech targeted by the Complaint. See cases cited, *supra,* n.1; *see also Chamberlain v. Am. Honda Fin. Corp*., 931 A.2d 1018, 1025 (D.C. 2007) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim."). Thus, for all of the reasons stated above, plaintiff's claims must be dismissed for failure to state a claim under Rule 12(b)(6).

Plaintiff's complaint is especially deficient in its failure to allege facts to demonstrate defendants acted with actual malice. A complaint should be dismissed pursuant to Rule 12(b)(6) if it does not allege facts sufficient "enough to raise a right to relief above the speculative level." *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 555 (2007). This demanding federal pleading standard has been adopted by the D.C. Court of Appeals. *See Potomac Dev. Corp.*, 28 A.3d at

543 (construing Rule 8(a) "consistent with Federal Rule 8(a) as interpreted by the Supreme Court of the United States"). Under the *Iqbal/Twombly* pleading standard, a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Rather, the well-pleaded factual allegations must have "facial plausibility" by including "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Separate and apart from the question of whether plaintiff is *likely* to prevail on the merits, his claim must be dismissed because he has not adequately pled facts that, if proved true, would demonstrate actual malice by defendants. As noted, this requires public figure libel plaintiffs to demonstrate that defendants made their statements "with the high degree of awareness of their probable falsity." *Garrison*, 379 U.S. at 74.

Here, plaintiff's Complaint merely recites the legal "actual malice" standard, asserting in several places that defendants' statements were "made with reckless disregard for their truth or falsity or with knowledge of their falsity. . . ." *See* Compl. ¶ 39; *see also id.* ¶¶ 38, 51-52, 63-64, 75-76. Simply parroting the legal standard in the Complaint is insufficient as a matter of law to plead actual malice. *See Twombly*, 550 U.S. at 555 (rejecting "labels and conclusions"). As *Iqbal* holds, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Accordingly, several courts applying *Iqbal* in libel actions have dismissed complaints relying on similar boilerplate. *See, e.g., Mayfield*, 674 F.3d at 378 (holding allegations were "conclusory"); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 57-58 (1st Cir. 2012) (noting complaint failed to allege knowing falsity where alleged defamatory statements were "not out of line with" news accounts of dispute); *Parisi v. Sinclair*, 845 F. Supp. 2d 215, 218-19 (D.D.C. 2012) (dismissing case for failure to plead sufficient facts to support actual malice).

Nor, for the reasons explained above, could plaintiff demonstrate facts necessary to establish actual malice. The very documents on which Professor Mann relies to suggest that he was "cleared" of any wrongdoing by numerous investigations raise as many questions about his science and methods as they answer. See discussion, *supra*, at 33-36. Nothing alleged in the Complaint, then, permits a reasonable inference to support plaintiff's bald assertions of actual malice. In these circumstances, as in other high profile debates, "[t]he public interest in 'uninhibited, robust and wide-open' debate on public issues is best served by allowing free competition between proponents of conflicting accounts," not by stifling those views. *Groden v. Random House, Inc.*, 1994 WL 455555, No. 94 Civ. 1074, at *9 (S.D.N.Y. Aug. 23, 1994), *aff'd*, 61 F.3d 1045 (2d Cir. 1995).

Conclusion

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: December 14, 2012

Respectfully submitted,

/s/ Shannen W. Coffin
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