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 Calendar No. 10 Next event: Status Hearing September 27, 2013

Defendants Competitive Enterprise Institute and Rand Simberg's Memorandum of Points and Authorities in Support of Their Special Motion to Dismiss Plaintiff's Amended Complaint Pursuant to the D.C. Anti-SLAPP Act, Motion To Dismiss Pursuant to Rule 12(b)(6), and Motion To Reconsider

In support of their Special Motion To Dismiss Pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(a), Motion To Dismiss Pursuant to Superior Court Rule of Civil Procedure 12(b)(6), and Motion To Reconsider, Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg (collectively "CEI Defendants") respectfully submit this Memorandum of Points and Authorities.

I. The Amended Complaint's Additional Claim Should Be Dismissed

Plaintiff Michael Mann's Amended Complaint ("Am. Compl.") repeats the claims of his original Complaint, while adding an additional libel claim, Count VII, regarding the statement that he "could said to be the Jerry Sandusky of climate science." *See* Am. Compl. ¶¶102–13. Because the CEI Defendants addressed this claim in their briefing in support of their prior motions to dismiss, they hereby

renew and incorporate those arguments here.[1] *See* Memorandum in Support of CEI Defendants' Special Motion To Dismiss Pursuant to the D.C. Anti-SLAPP Act (filed Dec. 14, 2012) ("Anti-SLAPP Mot."); Memorandum in Support of CEI Defendants' Special Motion To Dismiss Pursuant to Rule 12(b)(6) (filed Dec. 14, 2012) ("Rule 12(b)(6) Mot."); Reply Brief in Support of CEI Defendants' Motions To Dismiss (filed Feb. 1, 2013) ("Reply Br."). In particular, the statement challenged by Count VII is not actionable as libel because it is a statement of opinion phrased in hyperbolic language and therefore constitutionally protected speech. *See* Anti-SLAPP Mot. at 40–41, 55–56; Reply Br. at 18–36. The Court's July 19 Order does not address this issue and is therefore not controlling on that point. In addition, Count VII fails to plausibly allege that the CEI Defendants acted with actual malice. *See* Rule 12(b)(6) Mot. at 5–15; Reply Br. at 43–47. Accordingly Mann cannot meet his burden to demonstrate that Count VII is "likely to succeed on the merits," Order (filed July 19, 2013) (quoting D.C. Code § 16-5502(b)), and it therefore must be dismissed with prejudice. D.C. Code § 16-5502(d).

Mann's fundamental error is that a metaphorical comparison is a quintessential statement of pure opinion and therefore protected by the First Amendment. A metaphorical comparison, such as here, denotes not factual

[1] To protect their procedural rights, the CEI Defendants also renew and incorporate their prior briefing's arguments for dismissal of Plaintiff's Counts I–VI, recognizing that the Court's rejection of their previous motions to dismiss in its July 19 Order governs the disposition of those arguments at this time, barring the Court's reconsideration of that Order.

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)). It cannot be true or false, only apt or inapt. *See Potts v. Dies*, 77 U.S. App. D.C. 92, 93, 132 F.2d 734, 735 (D.C. Cir. 1942) ("The 'Nazi Trojan Horse' metaphor, like most metaphors, is not a proposition of fact."). Even Judge Robinson's *Ollman* dissent, which forcefully rejected the majority's conclusion that the statements at issue there were non-actionable opinion, recognized as much: "metaphorical language is also allied to pure opinion. When context makes it apparent that a word is being used figuratively or imaginatively without any intention to rely on its literal meaning, the labels 'true' and 'false' are inapposite." *Ollman v. Evans*, 242 U.S. App. D.C. 301, 353, 750 F.2d 970, 1022 (D.C. Cir. 1984) (Robinson, C.J., dissenting) (footnote omitted). Accordingly, "these types of statements seem clearly to fall within the ambit of the constitutional opinion privilege." *Id.*

Indeed, courts have consistently recognized that metaphorical comparisons like the one at issue here are protected statements of opinion and not actionable as libel. *E.g.*, *Williams v. Town of Greenburgh*, 535 F.3d 71, 77 (2d Cir. 2008) (condemning a public official as a "Junior Mussolini" was protected speech and citing cases); *Novecon Ltd. v. Bulgarian-Am. Enter. Fund*, 338 U.S. App. D.C. 67, 190 F.3d 556, 567, 569 n.6 (D.C. Cir. 1999) (defendant's "metaphor" that plaintiff's project proposal was a "veritable Brooklyn Bridge of misrepresentations" "reflected the defendant's assessment of [plaintiff's] contract offer, obviously subject to many

debatable interpretations," and so was not actionable); *Dunn v. Ganett N.Y. Newspapers, Inc.*, 833 F.32d 446, 454 (3d Cir. 1987) (comparison to Hitler and Castro "in the context of public debate, is protected speech"); *Koch v. Goldway*, 817 F.2d 507, 508, 509, 510 (9th Cir. 1987) (comparison to Nazi war criminal "not actionable" despite status as a "vicious slur," due to context of "a heated political debate, where certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters"); *Buckley v. Littell*, 539 F.2d 882, 893–94 (2d Cir. 1976) ("[T]he use of 'fascist,' 'fellow traveler' and 'radical right' as political labels . . . cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate . . . . The use of these terms in the present context is in short within the realm of protected opinion and idea under *Gertz*."); *Medifast, Inc. v. Minkow*, No. 10-382, 2011 WL 1157625, at *12 (S.D. Cal. Mar. 29, 2011) (comparison to disgraced financier and fraudster Bernard Madoff was not "provably false"); *Bryant v. Cox Enters., Inc.*, 715 S.E.2d 458, 469 (Ga. Ct. App. 2011) ("conjectural" comparison to "convicted child serial killer" "cannot form the basis of a defamation action" where "no reasonable person would believe [it] presented facts"); *Jordan v. Lewis*, 247 N.Y.S.2d 650, 651 (N.Y. App. Div. 1964) ("While 'Hitler' and 'Eichman' are words of disapprobation, their use does not specify violation of any Penal Statutes. And the characterization of the plaintiff as a 'criminal' has been held not to be slander *per se*."); *Yeager v. Local Union 20*, 453 N.E.2d 666, 667, 669 (Ohio 1983) (description of plaintiff as a

"Little Hitler," as operating "a Nazi concentration camp," and as using "Gestapo" tactics "is capable of different meanings; is mere hyperbole or rhetoric, and is an expression of opinion, not fact; and is protected"); *Rizzo v. Welcomat, Inc.*, 1986 WL 501528, 14 Phila. Co. Rptr. 557, 562 (Pa. Com. Pl., Phila. Cnty. Sept. 17, 1986) ("The comparison[s] between Hitler and Rizzo . . . are not the most flattering to Mr. Rizzo, [but] in the context of the entire article they are not, merely because of a reference to Hitler, accusing him of condoning or practicing genocide or other atrocities.") (internal quotation marks omitted). The cases involving Nazi comparisons are particularly apt in the context of the debate over climate change, given that Mann and his supporters regularly compare their opponents to Holocaust deniers and perpetuators of a "crime against humanity." *See* Anti-SLAPP Mot. at 1.

Even Mann concedes that the metaphorical comparison here cannot be read in any literal sense, *i.e.*, as an accusation that Mann has undertaken anything like the same conduct as Jerry Sandusky. Am. Compl. ¶103. Instead, the Sandusky metaphor and words like "tortured" and "molested" are precisely the kind of "loose, figurative or hyperbolic language which would preclude an impression that the author was seriously maintaining a provable fact." *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 283, 909 F.2d 512, 522 (D.C. Cir. 1990) (quotation marks omitted); *Bryant*, 715 S.E.2d at 469 (comparison to "convicted child serial killer" "cannot form the basis of a defamation action" because "no reasonable person would believe [it] presented facts" (quotation marks omitted)). Indeed, scientists routinely use identical language to express opinions critical of other scientists'

assumptions and methodology. *See* Anti-SLAPP Mot. at 41–42 & n. 101. The challenged statement cannot and should not be taken as an accusation of criminal fraud, but as stating the opinion that, in certain relevant respects, Penn State's treatment of Mann parallels its treatment of Sandusky.

Given the context here—the spirited public debate over global warming and, in particular, Mann's research—"even the most careless reader must have perceived that the [comparison] was no more than rhetorical hyperbole" meant to express criticism, primarily of Penn State and to a lesser extent of Mann. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). To hold otherwise would cause public debate to "suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

The statement that Mann challenges communicates "a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000). The CEI Defendants' opinion, which they stated plainly and repeatedly in the Blog Post, is that Penn State puts its own parochial interests ahead of diligently investigating accusations regarding prominent members of its faculty, as shown in the cases of Jerry Sandusky and Michael Mann. That view is not defamatory; it is not verifiable; and, above all, it is not actionable as libel. On that basis, Count VII should be dismissed.

II. The Court Should Reconsider Its Order Denying the CEI Defendants' Motions To Dismiss and Should Dismiss Plaintiff's Other Claims

In *Moldea v. New York Times Co.*, 304 U.S. App. D.C. 406, 15 F.3d 1137 (D.C. Cir. 1994) ("*Moldea I*"), a panel of the D.C. Circuit held that a book review's complaint that its subject was marred by "too much sloppy journalism" was actionable as libel, reversing the decision of the court below. That panel subsequently reversed itself, in a thoughtful opinion by Judge Harry Edwards, on the ground that its initial effort had "failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 2, 22 F.3d 310, 311 (D.C. Cir. 1994) ("*Moldea II*"). "To allow a plaintiff to base a lawsuit on claims of mischief, without some indication that the review's interpretations are unsupportable, would wreak havoc on the law of defamation," Judge Edwards concluded. *Id.* at 320. Because there "simply is no viable way to distinguish between reviews written by those who honestly believe a book is bad, and those prompted solely by mischievous intent," any lesser rule would lead to courts "unacceptably interfering with free speech" *Id.*

A. The Order Misapplies Binding Precedent on the Scope of the First Amendment's Protection for Statements of Opinion

This circumstances of this case echo *Moldea*. The Court's July 19 Order denying the CEI Defendants' motions to dismiss ("Order") holds that, even in the context of a heated public debate over global warming, in general, and Plaintiff's

research, in particular, "[t]o call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud" and therefore is actionable. Order at 16. This standard gives short shrift to First Amendment values and is therefore inconsistent with governing precedent. *See generally Guilford*, 760 A.2d at 598–99 ("Even assuming that Wilner's use of the verb 'bolted' reflects lack of precision, and treats the plaintiffs with undeserved asperity, the challenged language surely pales in comparison to 'blackmail,' or 'traitor' or 'scab'" (citations omitted)); *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1258 (D.C. 2012) (approving of case that held non-actionable statements that former employees had engaged in "'disloyal and disruptive activity,' that they had not understood the 'value of loyalty and keeping promises,' that they had acted 'against the best interests of the insurance buying public,' that they 'were in direct violation of their agreements,' and that they had engaged in 'conduct unacceptable by any business standard.'").

Questioning a person's "intellect" is in the heartland of protected speech. *E.g., Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) (discussing the epithets "he's dealing with half a deck," "stupid," and "idiot," and citing cases); *Greene v. Barber*, 310 F.3d 889, 895–96 (6th Cir. 2002) (characterization of police officer as "stupid" was constitutionally protected opinion); *Stepien v. Franklin*, 528 N.E.2d 1324, 1326–28 (Ohio Ct. App. 1988) (radio host's repeated description of a public figure as "stupid," "dumb," "buffoon," "nincompoop," "scum," "a cancer," "an obscenity," "gutless liar," "egomaniac," "suicidal," and "lunatic" was constitutionally

protected speech). So is questioning a person's "reasoning." *Guilford*, 760 A.2d at 597 (a "theory" or "conjecture" is protected speech); *Ony, Inc. v. Cornerstone Therapeutics, Inc.*, --- F.3d ---, 2013 WL 3198153, at *5 (2d Cir. June 6, 2013) (discussing and citing cases regarding criticism of scientific reasoning).

The basic problem is that the Order misapprehends the scope of the First Amendment's protection for statements of opinion. It is manifestly not the case that the First Amendment only protects a statement "that is purely opinion and not one that stems from facts." Order at 14. To the contrary, the proper test is stated in *Guilford*, 760 A.2d at 596, and is recited in the Order: "opinions are actionable 'if they imply a provably false fact or rely upon stated facts that are provably false." Order at 13 (quoting *Guilford*, 760 A.2d at 597) (emphasis added). Thus, "an interpretation, a theory, conjecture, or surmise . . . is not actionable," Order at 13 (quoting *Guilford*, 760 A.2d at 597 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993))), even though every single one of those things is premised on and implies facts. The proper inquiry is whether those underlying facts are provably false.

Thus, "[t]he dispositive question" in *Milkovich* was whether "the statements in the [challenged newspaper] column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." 497 U.S. at 21 (1990). The answer was yes, because a reasonable reader would understand that the columnist's opinion was premised on the provably false factual assertion of perjury. *Id.* Similarly, the court in *Moldea* inquired whether the challenged book review was not "a rational

assessment or account of something the reviewer can point to in the text, or omitted from the text, being critiqued." *Moldea II*, 22 F.3d at 315. The answer was no, because the reviewer's "interpretation" was not premised on provably false facts but on true facts regarding the book's contents and omissions. *Id*. at 315, 317–18.

As regards Michael Mann and his research, the Blog Post sets forth the CEI Defendants' opinion, and that opinion (as the Court itself recognized) "relies on the interpretations of facts (the emails)." Order at 14. The required inquiry, then, is whether those underlying facts are provably false. They are not, because all parties agree that they are true. The Plaintiff does not maintain that he did not send the emails attributed to him, that their contents have been falsely reported, or that the "Mike" referred to in a number of the emails is not him. To the contrary, he concedes that all of these things are true facts. Am. Compl. ¶19; Plaintiff's Opposition to the CEI Defendants' Motions To Dismiss, at 16–19 (describing the emails). Instead, what he challenges is the CEI Defendants' interpretation of those true facts. But, because the facts underlying that interpretation (i.e., the emails) are true, the CEI Defendants' interpretation of them is constitutionally protected speech. The challenged statements do not, as required to be actionable as libel, "imply a provably false fact, or rely upon stated facts that are provably false." *Guilford*, 760 A.2d at 597 (quoting *Moldea II*, 22 F.3d at 313) (emphasis added). Instead, they imply and rely upon what everyone agrees are true facts regarding the email messages disclosed in the Climategate affair. They are therefore not actionable.

B. The Order Misapprehends What the CEI Defendants Actually Published

The Order relies on the incorrect premise that the CEI Defendants published two statements (of the three challenged by the Plaintiff, see Order at 5) that were, in fact, only published by *National Review*: (1) "the man behind the fraudulent climate-change 'hockey stick' graph, the very ringmaster of the tree-ring circus" and (2) "intellectually bogus." As to the first, the Plaintiff does not contend that the CEI Defendants published it. *See* Am. Compl. at Count III. As to the second, CEI (but not Simberg, *see* Am. Compl. at Count V) linked to the webpage that contains it, but did not repeat the alleged libel. A link is not publication. *See* Anti-SLAPP Mot. at 56–57; Reply Br. at 37–39. To be perfectly clear, the Plaintiff does not claim that the CEI Defendants published statements describing Mann as a "fraud" or his work as "fraudulent."

Accordingly, the Order's reliance on, for example, dictionary definitions of the words "fraud" and "fraudulent" as evidence for how "common readers" might view the use of those words has no possible relevance to anything that the CEI Defendants actually published. *See* Order at 15. The same is true regarding the term "bogus." *See* Order at 15–16. Whether or not *National Review*'s use of these terms was actionable, the CEI Defendants cannot be held liable for statements they did not publish. *See Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (stating requirement "that the defendant published the statement"). Due to the great significance that the Order attaches to the use of these terms, this factual error also requires reconsideration.

* * *

In his *Moldea II* opinion, Judge Edwards acknowledged and was sympathetic to "the frustrations that have prompted Mr. Moldea's long legal battle" against those he believed had slighted him in print. 22 F.3d at 320. But he also recognized that his earlier opinion allowing Moldea's claims to proceed was "misguided," because it was insufficiently attentive to the concerns of the First Amendment. On that same basis, the CEI Defendants respectfully request that the Court reconsider its Order.

CONCLUSION

For the foregoing reasons, the Court should reconsider its Order, and the Amended Complaint should be dismissed with prejudice.

Dated: July 24, 2013

Respectfully submitted,

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