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: Status Hearing, Oct. 11, 2013, 9:30 a.m.

DEFENDANTS MARK STEYN AND NATIONAL REVIEW, INC.'S COMBINED MEMORANDUM IN SUPPORT OF SPECIAL MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT UNDER D.C. ANTI-SLAPP ACT, MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT UNDER D.C. SUPER. CT. CIV. R. 12(B)(6), AND MOTION FOR RECONSIDERATION OF COURT'S JULY 19, 2013 ORDER

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Defendants National Review, Inc. ("National Review") and Mark Steyn submit this Combined Memorandum of Points and Authorities in support of their Special Motion to Dismiss Plaintiff's Amended Complaint under the D.C. Anti-SLAPP Act, their Motion to Dismiss under D.C. Super. Ct. Civ. R. Rule 12(b)(6), and their Motion for Reconsideration of this Court's July 19, 2013 Order, which denied their prior motions to dismiss.

This Court denied Defendants' Motions to Dismiss Counts I through VI of what is now Plaintiff's Amended Complaint in its order dated July 19, 2013. Plaintiff thus move only to dismiss for the first time the one additional count (Count VII) in the Amended Complaint, which claims that Defendants' Jerry Sandusky-related commentary was defamatory. However, because the legal conclusions in Court's July 19, 2013 Order were premised upon a fundamental misconception of fact – incorrectly attributing to National Review and Mark Steyn the conduct of their co-defendants – National Review and Steyn respectfully request reconsideration of the Order denying their Special Motion to Dismiss Counts I through VI of the (now Amended) Complaint. Defendants also request reconsideration of their Motions to Dismiss Plaintiff's claim of intentional infliction of emotional distress, which were not addressed in the Court's July 19 Order and raised arguments different from those raised by co-defendants.[1]

[1] For purposes of preservation of the record with respect to the Amended Complaint, Defendants renew and repeat their arguments in support of dismissal of Counts I through VI of the Amended Complaint and incorporate their prior Memorandum in Support of their Special Motion to Dismiss and Rule 12(b)(6) Motion to Dismiss (and Reply) as Points and Authorities in support of the current motion. *See* 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, Inc. and Mark Steyn (filed Dec. 14, 2012) (the "Memorandum"); *see also* Reply 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, Inc. and Mark Steyn (filed Feb. 1, 2013) (the "Reply"). Defendants recognize, however, that the Court has already ruled against them on those arguments, and therefore includes in this Memorandum only arguments directed at their Motion for Reconsideration.

With respect to the new Count VII, Defendants have previously addressed the claim that the Jerry Sandusky-related "metaphor" defamed Plaintiff Michael Mann. *See* Memorandum at 27-28; *see also* Reply at 10. Plaintiff responded to Defendant's briefing of the issue on the pending Motions to Dismiss by conceding that he was not seeking relief for defamation based on the Sandusky comparison. *See* Pl.'s Opp. to National Review/Steyn Special Motion to Dismiss ("Pl.'s Opp.") at 50 ("Unfortunately, Defendants fail to acknowledge that Dr. Mann is not bringing a defamation claim on the basis of the Sandusky comparison – that is a different claim, an intentional infliction of emotional distress."). Because Plaintiff now seeks the relief that he once disclaimed, Defendants specifically address that defamation count here.

Especially in context, the commentary at issue in Count VII is not defamatory or capable of being proved true or false, but is merely rhetorical hyperbole and pure opinion protected by the First Amendment. Plaintiff infers a particular meaning from the Sandusky comparison – that the Sandusky comparison accuses him of odious criminal behavior and an abuse of the public trust. That construction is one to which the Plaintiff is now bound. *See, e.g., U.S. Steel, LLC v. Tieco*, *Inc.*, 261 F.3d 1275, 1293 (11th Cir. 2001). But as this Court already observed, National Review "explicitly disclaimed criminal offense" by Mann. *See* July 19, 2013 Order at 16.

Irrespective of what this Court has already concluded about the other allegedly defamatory remarks in this case, the Sandusky comparison is simply not capable of defamatory meaning – especially the criminal meaning that Mann ascribes to the statements at issue. In the context of the oft-overheated debate over the politics and science of global warming – a debate in which Plaintiff Michael Mann enthusiastically participates – no reasonable reader could possibly conclude that Rand Simberg's rhetorical comparison of Dr. Mann to convicted sex offender Jerry Sandusky could be read literally to accuse Dr. Mann of criminal behavior. *See, e.g., Kreuzer v. George Washington Univ.*, 896 A.2d 238, 248 (D.C. 2006) (comment that plaintiff was

"inhaling" not actionable because reasonable reader would have determined no accusation of crime was intended); *Pring v. Penthouse, Inc*., 695 F.2d 438, 442-43 (10th Cir.1982) (suggestion that pageant contestant had committed sexual acts on stage at the Miss America Pageant was "pure fantasy" and could not support libel claim); *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); *Williams v. Town of Greenburgh*, 535 F.3d 71, 77 (2d Cir. 2008) ("comparing a disliked authority figure to a fascist leader [i.e., 'Junior Mussolini'] is an exceedingly common-arguably hackneyed-rhetorical device" that is protected by First Amendment); *Klahr v. Winterble*, 418 P. 2d 404 (Ariz. Ct. App. 1966). Count VII must be dismissed because it fails to take into account the context of the targeted speech, which demonstrates that the speech at issue is not defamatory.

Defendants also move for reconsideration of this Court's July 19, 2013 Order denying National Review's Motions to Dismiss. This Court's Order denying National Review's Motion to Dismiss was based on a fundamental mistake of fact, which apparently affected this Court's legal conclusions in several respects. The Court concluded that the public investigations of Michael Mann, especially the investigation conducted by the U.S. Environmental Protection Agency ("EPA"), were the "result of constant pressure from Defendant The National Review, Defendant Steyn . . . and others." But this factual conclusion finds no support in the record, and attributes to the National Review Defendants the conduct of co-defendant Competitive Enterprise Institute ("CEI"), which has been an active player in the public policy of global warming. National Review, by contrast, is simply an opinion magazine and website, and has not petitioned any governmental agency for any action in the global warming field. Because the Court's factual finding apparently impacted both its conclusion that the particular language at issue could be viewed as defamatory and its conclusion that Plaintiff had made a threshold

demonstration of actual malice, Defendants respectfully request that the Court reconsider its prior order as to the National Review Defendants.

This Court did not address Plaintiff's Intentional Infliction of Emotional Distress ("IIED") claim against the National Review Defendants, apparently denying the Motion to Dismiss that claim without comment. But unlike the CEI Defendants (as to which the Court did address the claims in a separate order addressing CEI's Motion to Dismiss), National Review *did challenge* the IIED claims as failing to state a common law claim of IIED. As National Review argued both in the pleadings and at oral argument, there is simply nothing outrageous – either as a matter of common law or as a matter of protected First Amendment speech – about Mark Steyn's republication and disclaiming of the Jerry Sandusky comparison originally printed on CEI's website by co-defendant Rand Simberg. *See* Reply at 7-11. Moreover, plaintiff has offered no evidence of actual emotional harm, let alone the sort of evidence necessary to prove such harm under District of Columbia law. *See id.* at 8 n.2; CEI Omnibus Order at 22 n.18.[2]

BACKGROUND

Because the prior briefs of the parties discuss the factual background of this case at length, Defendants will briefly recount only those allegations specifically relating to Count VII. Plaintiff Michael Mann alleges that Defendants defamed him in their publication (in the case of

[2] In correspondence with Defendants prior to the filing of this Motion, Plaintiff threatened to seek attorneys' fees under the D.C. Anti-SLAPP statute if this motion was filed. The extraordinary award of plaintiffs' attorneys' fees under the Anti-SLAPP statute is not warranted here. *See* D.C. Code § 16-5504(b). This motion is neither frivolous nor filed solely for purpose of unnecessary delay. As discussed below, the Motion to Dismiss Count VII presents serious – indeed, meritorious – arguments, and Plaintiffs are just as entitled to file this Motion to Dismiss as they were they were the original Motions to Dismiss. Had Plaintiff not previously disclaimed any intention of seeking to hold Defendants liable for defamation based on the Sandusky comparison, there would have been no need for this Motion, since Defendants previously addressed the Jerry Sandusky claim in their original motions to dismiss.

Defendants Competitive Enterprise Institute and Rand Simberg) and republication (in the case of Defendants National Review and Mark Steyn) of Rand Simberg's internet commentary – originally appearing on CEI's website *openmarket.org* – that facetiously labeled Mann as the "Jerry Sandusky of climate science." *See* Am. Compl. ¶¶ 26-28. Even as originally published by Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg, however, 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. Simberg observed that Mann "could be said to be the Jerry Sandusky of climate science, *except instead of molesting children*, he has molested and tortured data in the service of politicized science. . . ." Am. Compl., Ex. A (emphasis added).

Defendant Mark Steyn republished a portion of Simberg's commentary on *National Review Online* on July 15, 2012, in a blog post that questioned Penn State's investigation of alleged misconduct by Professor Mann "in the wake of [former FBI Director] Louis Freeh's report on Penn State's complicity in serial rape" in its handling of the Jerry Sandusky affair. *See* Am. Compl., ¶ 28 & Ex. B. In republishing Simberg's Sandusky comparison, defendant Steyn explicitly labeled it a "metaphor" and immediately expressed doubts about the comparison: "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." Am. Compl., Ex. B.

Steyn went on to question whether Penn State's prior investigation of Michael Mann was reliable in light Director Freeh's indictment of the culture at the university, since, in both instances, "the college declined to find one of its star names guilty of any wrongdoing." *Id.* "If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?" *Id.* Steyn concluded by, once again, casting doubt on the Jerry Sandusky metaphor, but noting that the prior investigation of Mann is subject to criticism in light of Freeh's report: "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.*

Although Plaintiff's original Complaint addressed the Sandusky "metaphor" at length and characterized it as defamatory, *see* Compl. ¶¶ 25-29, Plaintiff explicitly disclaimed any intention of asserting a defamation claim on the basis of that comparison in opposing Defendants' Motions to Dismiss the original Complaint. *See* Pl.'s Opp. at 50 ("Unfortunately, Defendants fail to acknowledge that Dr. Mann is not bringing a defamation claim on the basis of the Sandusky comparison – that is a different claim, an intentional infliction of emotional distress."). After oral argument on the Motions to Dismiss, however, Plaintiff moved to amend the Complaint to add the Sandusky-related defamation claim, and this Court granted leave to amend. After granting leave to amend the complaint, the Court dismissed the counts of the original complaint (now counts I through VI of the Amended Complaint).

ARGUMENT

I. PLAINTIFF'S SANDUSKY-RELATED DEFAMATION CLAIM (COUNT VII) SHOULD BE DISMISSED.

Given Plaintiff's concession that D.C.'s Anti-SLAPP statute applies and that Defendants have met their *prima facie* burden under the Act, the burden shifts to Plaintiff to demonstrate that he is likely to succeed on the merits. *See* D.C. Code § 16-5502(b); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 39 (D.D.C. 2012).[3] Accordingly, the only issue before the Court is whether he is likely to succeed on his Sandusky-related defamation claim, which requires that he demonstrate the statements at issue were (1) defamatory, (2) capable of being proven true or false, (3) of and concerning plaintiff, and because Dr. Mann is admittedly a public figure, both (4) false, and (5) made with actual malice. *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 Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594-95 (D.C. 2000); *Blodgett v. The University Club,* 930 A.2d 210, 222 (D.C. 2007); *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*").

Here, Plaintiff's claim founders on the requirements that the statement at issue be defamatory and capable of being proved true or false. As this Court has recognized, Plaintiff must demonstrate that, in the particular context at issue in this case, a reasonable reader would interpret the Jerry Sandusky "metaphor" as stating actual defamatory facts about Dr. Mann. *See*

[3] Defendants preserve, for record purposes, their argument regarding the proper standard of review under the D.C. Anti-SLAPP statute's "likely to succeed on the merits" standard, *see* Memorandum at 20-21; *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21-22 (2008) (likelihood of irreparable injury in preliminary injunction inquiry requires more than simply a possibility of such injury). But even under the standard adopted by the Court in its July 19 Order, Plaintiff still bears the burden of demonstrating that his claims are *legally sufficient*, which he cannot meet here.

Wilner, 760 A.2d at 596-97. But where, as here, "it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* at 597 (internal quotation and citation omitted); *see also Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256 (D.C. 2012).

Plaintiff asserts that, by comparing him to Jerry Sandusky, Defendants "falsely impute to Dr. Mann the commission of a criminal offense and the violation of the public trust." Am. Compl. ¶ 103. In his other defamation claims, Dr. Mann asserts that the alleged statements accused him of a wide (albeit vague) range of dishonest conduct, including criminal wrongdoing, but also non-criminal misconduct in his research (which he labeled "academic fraud"). *See, e.g.,* Am. Compl. ¶¶ 60, 72. Thus, the Sandusky-related defamation count differs from the other counts in that Plaintiff ascribes to the statement at issue *only* a criminal connotation.[4]

Against that background, the defamation claim is easily dispatched, for it is beyond plain that Defendants Mark Steyn and National Review are not literally claiming that Dr. Mann is a convicted child rapist – or ascribing to him any criminal conduct of the sort. Steyn himself describes Simberg's Sandusky comparison as a "metaphor" – a common rhetorical device used to make a non-literal comparison. Courts have consistently held that "a reader of criticism expects rhetorical hyperbole and vivid metaphor, so the use of lively language is understood as hyperbole and metaphor, not as fact." *Saenz v. Playboy Enterprises, Inc.*, 653 F. Supp. 552, 567 (N.D. Ill. 1987), *aff'd,* 841 F.2d 1309 (7th Cir. 1988).

This Court has recognized the importance of context in the First Amendment defamation inquiry. *See* Order at 13; Memorandum at 22-30; Reply at 13-17. "Context serves as a constant

[4] In defamation cases, once a plaintiff ascribes a particular meaning to an allegedly defamatory phrase, he is bound to that meaning. *See, e.g., U.S. Steel,* 261 F.3d at 1293.

reminder that a statement may not be isolated and then pronounced defamatory, or deemed capable of defamatory meaning." *Klayman v. Segal*, 783 A.2d 607, 614 (D.C. 2001). Context is thus a "critical legal concept for determining whether, as a matter of law, a statement is reasonably capable or susceptible of defamatory meaning." *Id.*

Here, this contextual analysis supports the conclusion that Defendants' commentary is non-defamatory rhetorical hyperbole at every turn. First, the greater social context of the debate – an overheated public discussion of both the politics and science of global warming – suggests that a reasonable reader would not take particular sophomoric jabs as literal allegations of criminality. *See, e.g., Greenbelt*, 398 U.S. at 13 (context of "heated" public debate on controversial issues supported holding that "blackmail" charge was not defamatory); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974) ("intemperate, abusing or insulting language" is "common parlance in labor disputes"). Indeed, as Defendants explained at oral argument on the Motions to Dismiss, Dr. Mann himself frequently engages in similar mudslinging in defending both his research and his policy prescriptions that he claims flow from that research. *See* Declaration of Shannen Coffin, Ex. 1 (demonstrative exhibit of Mann's prior statements used at prior oral argument); *see also* Reply at 15; CEI's Mot. to Dismiss at 39.

Second, the commentary at issue appeared on websites that are well-known destinations for political commentary and opinion. *See* Memorandum at 25-26. Dr. Mann himself concedes that "Defendant's statements were published on websites that, to be sure, often offer opinion commentary." Pl.'s Opp. at 46. National Review is touted as a leading conservative opinion journal. *See* Am. Compl. ¶ 8 (National Review and *National Review Online* "tout themselves as 'America's most widely read and influential magazine and website for Republican/conservative news, commentary and opinion'"). Readers of publications like *National Review Online* thus

"expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere . . . ." *Ollman v. Evans*, 242 U.S. App. D.C. 301, 317, 750 F.2d 970, 986 (1984). Colorful statements found in opinion publications are simply less likely to be defamatory, since those publications necessarily signal to the readers they contain non-verifiable opinion. *See Weyrich v. The New Republic, Inc.*, 344 U.S. App. D.C. 245, 252, 235 F.3d 617, 624 (2001); *Wilner*, 760 A.2d at 583 (statements made in context of op-ed in trade newspaper not defamatory).[5]

Similarly, Mark Steyn himself is a "regular contributor to *National Review*," Am. Compl. ¶ 11, whose writings are "widely read." *Id.* Mr. Steyn's commentary must therefore be read in light of his role as a well-known political opinion maker and satirist. "[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." *Ollman*, 242 U.S. App. D.C. at 315, 750 F.2d at 984 (internal quotation marks and citation omitted); *see id.* at 321, 750 F.2d at 990 ("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").

Finally, the contextual analysis requires that the publication be "considered as a whole, in the sense it would be understood by the readers to whom it was addressed." *Klayman*, 783 A.2d at 614 (internal quotations and citation omitted). Here, that context – and the particular words used by Defendants – plainly demonstrates that the Sandusky comparison was not a literal allegation of criminality, but merely a comparison to illustrate how Penn State gave preferential treatment to its "star names." Am. Compl., Ex. B.

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[5] As discussed below in support of the Motion for Reconsideration, however, National Review is not in the business of petitioning the government for any particular governmental decisions, and thus had no role whatsoever in challenging the EPA's endangerment finding on carbon dioxide and the subsequent D.C. Circuit proceedings. *See* Exs. 26 & 36 to Plaintiffs' Opp. (showing CEI, but not National Review, was party to EPA proceeding and D.C. Circuit appeal).

Rand Simberg's original 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'").

As this Court notes in its Order, "rhetorical hyperbole refers to exaggerations used as a rhetorical device . . . used to evoke strong feelings or create a strong impression but not intended to be taken literally." Order at 17 n.16. If ever there were a case for rhetorical hyperbole, the Sandusky "metaphor" is it. Whatever might be said about the propriety of Mr. Simberg's choice of words, the Sandusky comparison is, on its face, so outlandish that an objective reader could not possibly understand Simberg to allege that Mann engaged in similar criminal acts. *See, e.g., Greenbelt*, 398 U.S. at 14 ("No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [plaintiff] with the commission of a criminal offense."); *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (dismissing defamation claim based on talk show host's labeling anti-abortion activist an "accomplice to murder" of abortion doctor); *Pring*, 695 F.2d at 442-43 (suggestion that pageant contestant had committed sexual acts on stage at the Miss America Pageant was "pure fantasy" and could not support libel claim); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50 (1988) (ad parody of well-known minister losing virginity to his mother in an outhouse "could not reasonably have been interpreted as stating actual facts about the public figure involved").

As the CEI Defendants argued, "such comparisons—even arguably more offensive ones, such as to Mussolini's Italy, Nazi Germany, and Adolph Hitler—are consistently held to be

protected opinion." CEI Defendants' Special Mot. to Dismiss at 40-41 (citing *Williams*, 535 F.3d at 77 (holding that a statement condemning a public official as a "Junior Mussolini" was protected speech and citing cases) (citing cases)); *Buckley v. Littell*, 539 F.2d 882, 893 (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*."). Indeed, in one such case, *Klahr v. Winterble*, a court of appeals affirmed the dismissal of defamation claims based on a metaphorical comparison of plaintiff to Stalin, Hitler and Mussolini, reasoning that "[i]f the laws of libel are this stringent a censor, then figurative and colorful speech will never be the badge of editorial writers." 418 P.2d at 413, 414.[6] Rand Simberg's choice of metaphors may be lacking in taste, but it is fiercely protected speech under the First Amendment.

In republishing that 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." Am. Compl., Ex. B. Accordingly, Steyn explicitly declined to join in Simberg's comparison, leaving open the

[6] Plaintiff argues that the *implication* of the Sandusky metaphor is that Mann himself has committed criminal acts and abused the public trust. *See* Am. Compl. ¶ 103. But the D.C. Court of Appeals has urged caution in finding "defamation by implication." *Wilner*, 760 A.2d at 596. "Defamation by implication, an area of law 'fraught with subtle complexities,' requires careful exegesis to ensure that imagined slights do not become the basis for costly litigation." *Id.* (citation omitted); *see also Potts v. Dies*, 77 U.S. App. D.C. 92, 93, 132 F.2d 734, 735 (1942) (holding characterization of magazine as "Nazi Trojan Horse" was a metaphor used to criticize magazine, not a proposition of fact in context of public debate).

question of "whether or not" the metaphor is apt.[7] 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) (harsh description of plaintiffs as "garbage," "bums," or "pitiable lunatics" absolutely protected).

While expressing doubts about the propriety of the metaphor, Steyn explains fully his point in republishing it. He does not assert that Dr. Mann is a depraved criminal on par with Sandusky, but simply that there might be reason to doubt the results of Penn State's investigation of him in light of Director Freeh's conclusions about corruption in the Penn State administration. The "point" that Steyn took from Simberg's original post was simply that Penn State's prior investigation of Michael Mann in the aftermath of the "Climategate" affair should be met with skepticism after the Freeh report highlighted institutional corruption at Penn State.

In sum, the particular statements challenged by Plaintiff as defamatory are plainly protected rhetorical hyperbole. Courts have 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 v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *see also Wilner*, 760 A.2d at 596-97 ("'imaginative expression' and 'rhetorical hyperbole' are not actionable in defamation because they 'cannot reasonably be interpreted as stating actual facts about an individual'"). No reasonable person could conclude that Steyn (or Simberg, for that matter) has labeled Mann a convicted child molester or accused him of any similar criminal conduct. *See Horsley*, 292 F.3d at 702 ("no reasonable viewer would have concluded that [talk show host] was

[7] The use of such "interrogatory" language and questions as rhetorical devices "militates in favor of treating statements as opinion." *Ollman*, 242 U.S. App. D.C. at 318, 750 F.2d at 987; *see also Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995).

literally contending that [pro-life activist] could be charged with a felony in connection with [abortionist's] death").

Finally, Plaintiff's renewed reliance on the Sandusky metaphor as a basis for a defamation claim emphasizes his failure to demonstrate actual malice – that Defendants published the metaphor with *knowledge* of its falsity or in *reckless disregard* of its truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); Memorandum at 33-36; Reply at 20-27. Because the metaphor is incapable of being proved true or false, Plaintiff also cannot meet his burden of showing he is "likely" to demonstrate actual malice concerning the Sandusky-related claim. *See* D.C. Code § 16-5502(b). Count VII must be dismissed.[8]

II. THE COURT'S ORDER DENYING NATIONAL REVIEW'S MOTION TO DISMISS IS BASED ON MATERIAL MISTAKES OF FACT.

As this Court noted repeatedly in its Order, the question of whether Plaintiff has met his Anti-SLAPP burden of demonstrating that he is likely to succeed on the merits of his defamation claims against National Review and Mark Steyn presents a "very close case." Order at 16 n.14; *see also id.* at 14 ("The questions becomes, and it is difficult in this case, is whether the line (as recognized by the law) has been crossed."). But the Court's consideration of that "close" question was significantly affected by a mistaken understanding of the relevant facts of the case. Accordingly, National Review and Mark Steyn respectfully request that the Court reconsider its defamation holdings against them.[9]

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[8] Without repeating the analysis, Plaintiff's Complaint also fails under the standards of D.C. Super. Ct. R. Civ. P. 12(b)(6). The Complaint fails to state a claim for defamation because the Jerry Sandusky comparison is, on its face, simply not a defamatory statement of fact accusing Michael Mann of criminal behavior, but obviously rhetorical hyperbole, and plaintiff has failed to allege actual malice. *See* Memorandum at 37-39.

[9] This court has inherent authority to reconsider its interlocutory rulings prior of entry of final judgment. *See Williams v. Vel Rey Properties, Inc.*, 699 A.2d 416, 419 (D.C. 1997). And even

The factual misunderstanding at issue lies in attributing the alleged conduct of co-defendant CEI to National Review and Mark Steyn. In setting out the factual allegations of the dispute, the Court states that "in 2010, the United States Environmental Protection Agency (the 'EPA') investigated Plaintiff as a result of constant pressure from Defendant The National Review, Defendant Steyn . . . and others." Order at 3. The Court further reasoned that "Plaintiff has been investigated several times and his work has been found to be accurate. In fact, some of these investigations have been due to the accusations made by the NR Defendants." *Id.* at 21. Similarly, the Court reasoned that "[t]he record demonstrates that the NR Defendants have criticized Plaintiff harshly for years." *Id.*

There is no evidence in the record to support *any* of these factual statements. National Review did not petition or apply pressure to the EPA to investigate Dr. Mann. The investigations of Dr. Mann were not in any way "due to the accusations made by the NR Defendants." And there is no record evidence that National Review has criticized Michael Mann harshly for years. Instead, what the record demonstrates is that *defendant CEI*, which is not affiliated with National Review, has been a dogged public critic of global warming alarmism and Dr. Mann in particular. It was *CEI*, not National Review, that petitioned the EPA to reconsider its carbon dioxide endangerment finding based on the East Anglia "Climategate" emails.

For his part, Plaintiff does not claim that National Review had anything to do with the proceedings before the EPA. Instead, Plaintiff contends that "the 2010 investigation by the U.S. Environmental Protection Agency [] was the result of a petition filed by Defendant CEI." Opp. to National Review's Special Mot. to Dismiss at 2; *see id.* at 3 ("if defendants (*at least CEI*) did not believe that the fraud allegations could be objectively verified, why did they call upon the

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with respect to final orders, this Court has authority to correct a mistake of fact or law. *See* D.C. Super. Ct. R. Civ. P. 60(b).

EPA for that very investigation in 2010?") (emphasis added); *id.* at 22 ("In February 2010, Defendants CEI, along with nine other coordinated Petitions for Reconsideration filed by various states, corporations, industry groups, and "free market" think tanks, petitioned the EPA to reconsider its Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202 of the Clean Air Act."). Plaintiff attached to his Opposition to the Motion to Dismiss *CEI's* petition for reconsideration to the EPA, *id.*, Ex. 26, which did not involve National Review or Mark Steyn.

In short, Defendants National Review and Mark Steyn had nothing to do with CEI's efforts calling the EPA to investigate Michael Mann. It did not petition the EPA, Penn State or any investigative body to review Mann's scholarship or conduct. National Review is simply an opinion magazine and website. While it might express opinions on these subjects, it does not participate in government agency proceedings, and there is no evidence that any investigative body acted as a result of pressure from the National Review Defendants.

The Court's misunderstanding in this regard appeared to affect its reasoning at several critical points. In discussing the question of whether National Review's statements could be viewed as defamatory, this Court reasoned:

> Language such as "intellectually bogus" and "ringmaster of the tree-ring circus" in the context of the publications' reputation and columns certainly appear as exaggeration and not an accusation of fraud. On the other hand, *when one takes into account all of the statements and accusations made over the years*, *the constant requests for investigations of Plaintiff's work*, the alleged defamatory statements appear less akin to "rhetorical hyperbole" and more as factual assertions.

Order at 17 (emphasis added). Again, in discussing actual malice, this Court reasoned that "[a]t this stage the evidence is slight as to whether there was actual malice." *Id.* at 21. Nevertheless, the Court concluded that there is "sufficient evidence to demonstrate some malice or knowledge

that the statements were false or made with reckless disregard as to whether the statements were false." *Id.*. In particular,

> Plaintiff has been investigated several times and his work has been found to be accurate. In fact, *some of these investigations have been due to the accusations made by the NR Defendants*. *It follows that if anyone should be aware of the accuracy (or findings that the work of Plaintiff is sound), it would be the NR Defendants*. Thus, it is fair to say that the NR Defendants continue to criticize Plaintiff due to a reckless disregard for truth.

Id. at 21 (emphasis added).

In both instances, the Court drew critical legal conclusions from an erroneous premise – that National Review and Mark Steyn played some role in pressuring public officials to investigate Plaintiff Michael Mann. While CEI might have, National Review did not. The Court's conclusions with respect to whether National Review's commentary is defamatory and whether Plaintiff has met his initial burden of demonstrating actual malice should be reconsidered in light of this mistaken premise of the Court's analysis.

Even resting on this erroneous foundation, this Court recognized that the question of whether National Review's speech was provably true of false – or was simply rhetorical hyperbole, as Defendants contend – was a "very close" one. Order at 16 n.14. Defendants respectfully submit that the balance tips in their favor when properly considered in light of the evidence before the Court, for the reasons already argued to the Court. *See* Memorandum at 27-31; Reply at 11-20.[10] "When the question of truth or falsity is a close one, a court should err on

[10] The Court's Order also mistakenly attributes one of CEI's allegedly defamatory statements to the National Review Defendants. National Review and Mark Steyn did not publish or republish CEI's statement that Plaintiff acted in a "most unscientific manner . . . engaging in data manipulation to keep a blade on his famous hockey-stick graph," which the Court cites in its Order as evidence of the factual verifiability of Defendants' statements. Order at 14. Plaintiff's opposition to National Review Defendants' Motions to Dismiss argued that only two statements by the National Defendants were defamatory: 1) Mark Steyn's statement that Mann "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree

the side of nonactionability." *Moldea II*, 306 U.S. App. D.C. at 8, 22 F.3d at 317. Similarly, where the Court held that Plaintiff had not demonstrated a sufficient basis for actual malice based on the record as the Court understood it, that record is even more lacking when considered in light of a proper understanding of that evidence. *See* Reply at 20-27. Plaintiff's defamation claims should be dismissed.

III. THIS COURT SHOULD RECONSIDER DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

Although it addressed Plaintiffs' IIED claims against the CEI Defendants, the Court did not explicitly address the IIED claims against the National Review Defendants. In denying CEI's Motion to Dismiss Plaintiff's IIED claim, the Court noted that CEI did not challenge the Complaint based on the common law definition of intentional infliction of emotional distress. *See* CEI Omnibus Order at 22 n. 18. It thus denied CEI's Motions to Dismiss only on the grounds that Plaintiff might be able to prove actual malice with respect to his claim of intentional infliction. The Court did not decide whether CEI's statements fit the common law definition of the tort of intentional infliction of emotional distress.

National Review and Mark Steyn *did* challenge Plaintiff's IIED claim against them for failure to allege (and prove) even the common law standards of the tort of intentional infliction. *See* Reply at 7-11. National Review argued that Mark Steyn's republication and explicit disclaimer of Rand Simberg's Sandusky "metaphor" could not meet the common law definition of "outrageousness." *Id.* at 8-9. Whatever one might think of *CEI's* original publication of that comparison, the "metaphor" as reprinted and criticized by National Review and Mark Steyn was not "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

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ring-circus"; and 2) National Review Editor Rich Lowry's statement explaining that "fraudulent" meant "intellectually bogus and wrong." *See* Pls.' Opp. at 41.

atrocious and utterly intolerable in a civilized community." *Id.* This is especially true when considered against the reprehensible speech that the Supreme Court has found to be afforded "special protection" against claims of intentional infliction of emotional distress. *See id.* at 9-10 (citing *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011); *Hustler*, 485 U.S. at 56). In short, as against both common law and constitutional standards, Plaintiff's intentional infliction claim comes up short.

Plaintiff has also failed to produce any evidence of emotional distress. *See* Reply at 8 n.2. As this Court properly notes in its CEI Omnibus Order (at 22-23 n.18), plaintiff must suffer something much greater than mere emotional upset and stress. Instead, "defendant's actions must be the proximate cause of 'plaintiff's emotional upset of so acute a nature that harmful physical consequences are likely to result.'" *Id.* But plaintiff has not alleged – let alone offered evidence to prove – any physical consequences of his alleged emotional distress. This Court concluded that Plaintiff alleged that he experienced "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." *Id.* at 22. But Plaintiff alleges nothing of the sort. The language in question was simply a quote from a treatise by which Plaintiff argues (erroneously, under D.C. law) "[t]he types of emotional distress required for an intentional infliction of emotional distress claim." *See* Pl.'s Opp. at 56. He has offered no evidence – or even any allegations – that he suffered emotional distress of the kind that supports an IIED claim.

The Court's denial of Defendants' Motion to Dismiss this claim should be reconsidered, and the claim should be dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in Defendants' Motions to Dismiss the original Complaint, Count VII of the Amended Complaint should be dismissed with prejudice, and the Court should reconsider and dismiss the remaining Counts of the Complaint (Counts I-VI).

Dated: July 24, 2013

Respectfully submitted,

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