SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D.,	
Plaintiff,	Case No. 2012 CA 008263 B Calendar No.: 10 Judge: Natalia Combs Greene Next event: 9/27/2013 Status Conference
v.	
NATIONAL REVIEW, INC., *et al.,*	
Defendants.	

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

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

I. DEFENDANTS' MOTION TO RECONSIDER SHOULD BE DENIED

In its well-reasoned Order dated July 19, 2013 (the "Order"), this Court denied the CEI Defendants'[1] motions to dismiss pursuant to the D.C. Anti-Slapp Act and Rule 12(b)(6). Nevertheless, in an attempt to re-litigate the issues previously (and correctly) decided, the CEI

[1] "CEI Defendants" refers to defendants Rand Simberg and the Competitive Enterprise Institute.

Defendants argue that the Court "misapplied" First Amendment law and "misconstrued" the statements that they made.

Procedurally, defendants' motion is improper. Substantively, the motion is flawed—and continues to reflect defendants' failure to grasp the serious nature of their accusations against Dr. Mann.

A. Standard on Motion for Reconsideration

As noted by the D.C. Court of Appeals, "[a] motion for reconsideration, by that designation, is unknown to the Superior Court's Civil Rules." *Fleming v. District of Columbia* , 633 A.2d 846, 848 (D.C. 1993). Instead, that term has been used loosely to describe two different kinds of post-judgment motions. *Id.* The first such motion, brought pursuant to Rule 59(e) of the Superior Court Rules of Civil Procedure, is designated a Motion to Alter or Amend the Judgment.[2] *Id.* The second is a motion for relief from judgment pursuant to Rule 60(b) of the Superior Court Rules of Civil Procedure.[3] *Id.* Significantly, "[t]he nature of a motion is determined by the relief sought, not by its label or caption." *Wallace v. Warehouse Emp. Union #730*, 482 A.2d 801, 804 (D.C. 1984). Thus, "where a movant is seeking relief from the original order on the basis of an error of law, and not citing new or changed circumstances, the motion is properly made pursuant to Rule 59(e)." *D.D. v. M.T* ., 550 A.2d 37, 42 (D.C. 1988).

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[2] Superior Court Rule of Civil Procedure 59(e) provides:

(e) Motion to alter or amend a judgment

A motion to alter or amend a judgment shall be served not later than 10 days after entry of the judgment.

[3] Superior Court Rule of Civil Procedure 60(b) provides, in pertinent part:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of the judgment. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

In their Motion for Reconsideration, the CEI Defendants fail to specify the Superior Court Rule of Civil Procedure under which they seek relief. Notably, the motion does not contain a single new factual or legal assertion that was not before the Court before, nor does it set forth any "new or additional circumstances" that were not previously considered. As such, the motion should be treated as one brought pursuant to Superior Court Rule of Civil Procedure 59(e).

Importantly, Rule 59(e) motions are "committed to the broad discretion of the trial judge" and reconsideration is an extraordinary remedy that should be used sparingly. *District No. 1 – Pacific Coast Dist. v. Travelers Cas. & Sur. Co.,* 782 A.2d 269, 278 (D.C. 2001). A Rule 59(e) motion to reconsider is not "an opportunity to reargue facts and theories upon which a court has already ruled. The motion must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions." *Amoco Prod. Co. v. Fry*, 908 F. Supp. 991, 993 (D.D.C. 1995).[4] Indeed, a trial court may "grant a motion to reconsider only if the moving party can present new facts or clear errors of law that compel a change in the court's prior ruling." *Id.* (internal citations and quotations omitted). Motions to alter or amend under Rule 59(e) are disfavored "and relief from judgment is granted only when the moving party establishes extraordinary circumstances.'" *Montgomery v. Gotbaum*, 10-cv-1223 (RLW), 2013 U.S. Dist. LEXIS 35944, at *4 (D.D.C. March 15, 2013) (quoting *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001)) (internal citations omitted). Given that the CEI Defendants are simply rearguing facts and issues previously decided, the motion may be denied on procedural grounds alone.

[4] Rule 59(e) is identical to Federal Rule of Civil Procedure 59(e). Accordingly, citations to federal caselaw interpreting the federal rule are instructive in this case.

B. The Court Correctly Applied First Amendment Precedent.

According to the defendants, the Court's order "gives short shrift to First Amendment values and is therefore inconsistent with governing precedent." CEI Defendants' Memorandum of Points and Authorities ("CEI Mem.") at 8. To the contrary, the Court properly applied the law, properly recognized that the "opinion defense" is not a license to libel, and properly construed the defamatory and reprehensible nature of the defendants' statements.

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

The CEI Defendants assert that the Court applied the wrong standard in determining whether a statement is constitutionally protected opinion. They argue that the Court was mistaken when it stated that "the First Amendment only protects a statement 'that is purely opinion and not one that stems from facts.'" CEI Mem. at 9 (citing Order at 14). But the defendants ignore the fact that the Court's decision rested properly and soundly on the recognition that a statement is not protected by the "opinion defense" if it states or implies a verifiable fact. *See* July 19 Order denying the CEI Defendants' Motion to Dismiss (the "Order") at 13 ("opinions are actionable 'if they imply a provably false fact or rely upon stated facts that are provably false'") (quoting *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000)); *see also, Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) ("*Moldea II*"). This has been black letter law since the Supreme Court's decision in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990), and this law was correctly applied by this Court. Here, the Court reviewed the defendants' various accusations against Dr. Mann—corruption, data manipulation, academic misconduct, scientific misconduct, etc.—and correctly found that these were accusations that could be proven true or false—and thus not protected.

As for the CEI Defendants' continued reliance on the already rejected opinion defense, there can be no question that these statements are objectively verifiable and not statements of opinion. *Weyrich v. New Republic*, *Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001). CEI cannot assert, in good faith at least, that they were "expressing a subjective view, an interpretation, a theory, conjecture, surmise, or hyperbole, rather than claiming to be in possession of objectively verifiable facts." *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995), *aff'd*, 80 F.3d 555 (D.C. Cir. 1996) (citations omitted). And to the extent that CEI chooses to cling to this defense, the Court has properly recognized that the statements at issue contain verifiably false statements of fact:

> Considering the numerous articles that characterize Plaintiff's work as fraudulent, combined with the assertions of fraud and data manipulation, the CEI Defendants have essentially made conclusions based on facts. Further, the assertions of fraud "rely upon facts that are provably false" particularly in light of the fact that Plaintiff has been investigated by several bodies (including the EPA) and determined that Plaintiff's research and conclusions are sound and not based on misleading information.

Order at 15.

In an effort to avoid the fact that the Court properly understood that their statements asserted provably false facts, the CEI Defendants make the remarkably tortured argument that the "facts" at issue in this defamation case do not involve whether Dr. Mann engaged in data manipulation, scientific misconduct or corruption—but rather that the "facts" at issue are the emails from the University of East Anglia. CEI Mem. at 10. CEI then proceeds to argue that because no one disputes the content of the emails, they are "true facts," not provably false, and therefore not defamatory. This is simply absurd. The verifiably false "facts" at issue in this case are not the emails. The verifiably false facts in this case are the allegations that Dr. Mann engaged in data manipulation, scientific misconduct or fraud. *See* Order at 15. And because these facts can be (and already have been) objectively disproven, CEI's opinion defense is meritless. *Id.* at 17. *See also Weyrich,* 235 F.3d at 624 (the key inquiry is whether a statement is capable of verification).

2. Defendants' Statements Did Not Simply Question Dr. Mann's Intellect

The CEI Defendants also argue that the Court misconstrued their statements because, according to them, all they had done was to question Dr. Mann's intellect. CEI Mem. at 8. This is also absurd. CEI and Rand Simberg did far more than question Dr. Mann's intellect. They accused him of scientific and academic misconduct, among other things. As the Court has noted on this very point, the CEI Defendants did not merely express an opinion regarding the soundness of Dr. Mann's scientific ideas, but rather made "aspersions of verifiable facts that plaintiff is a fraud." Order at 17. As we have continued to point out, and as the defendants have continued to ignore, they defamed Dr. Mann not because they questioned his scientific research, but because they accused him of "data manipulation," "academic and scientific misconduct," and being "the posterboy of the corrupt and disgraced climate science echo chamber." Compl. ¶¶ 48, 84. These statements hardly questioned Dr. Mann's intellect; they are accusations of fraud and dishonesty.

3. The Court Did Not Misapprehend What the CEI Defendants Published

In an effort to distance themselves from National Review and Mark Steyn, CEI also argues that the Court's Order relies on the incorrect premise that they published two statements actually made (at least initially) by their co-defendants: (1) the statement that Dr. Mann was "the man behind the fraudulent climate-change hockey stick graph, the very ringmaster of the tree-ring circus;" and (2) the statement that Dr. Mann's research was "intellectually bogus."

With respect to the statement describing the hockey stick graph as fraudulent and Dr. Mann as the ringmaster of the tree-ring circus, the CEI Defendants are correct that they did not make those specific statements. However, it does not then follow that they are then somehow absolved from liability. Clearly, the Court did not base its decision solely on the fraudulent hockey stick reference. Rather, it considered all of the statements, including those made by the CEI Defendants, and rightly noted that each of these statements was actionable because of the

factually disprovable statements including CEI's allegations of academic and scientific misconduct. The CEI Defendants' argument in this regard is nothing but a straw man—whether or not the CEI Defendants used the word "fraudulent" or the phrase "tree-ring circus" is hardly dispositive. The CEI Defendants accused Dr. Mann of academic and scientific misconduct, data manipulation, and corruption—accusations that, as this Court has correctly recognized, are tantamount to fraud. Order at 17.

With respect to the "intellectually bogus" statement, there is no legitimate question that the CEI Defendants are liable that statement. This is because they republished it after it was initially published by NRO. *See* Pl.'s Opp'n to Defs.' Motion to Dismiss at 55-56. CEI hyper-linked to Mr. Lowry's post, explicitly noted that Mr. Lowry's comments "expertly summed up the matter," and recommended to its readers that they read Mr. Lowry's post. This renders CEI liable as a republisher. Nor is there any question that the characterization of Dr. Mann's research as bogus is defamatory. As the Court stated:

> In Plaintiff's line of work, such an accusation [that Plaintiff's work is bogus] is serious. To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud (taken in the context and knowing that Plaintiff's work has been investigated and substantiated on numerous occasions). The Court must, at this stage, find the evidence indicates that the CEI Defendants' statements are not pure opinion but statements based on provably false facts.

Order at 16-17.

II. COUNT VII OF THE AMENDED COMPLAINT SHOULD NOT BE DISMISSED

On June 28, 2013, after oral argument on the CEI Defendants' original motions to dismiss, Dr. Mann moved this Court to amend his complaint to add an additional defamation count based upon defendants' statement that Dr. Mann was "the Jerry Sandusky of climate science." As set forth in Dr. Mann's motion to amend, this statement constitutes defamation of Dr. Mann because it asserts a false and defamatory fact about Dr. Mann (*i.e.,* that Dr. Mann

committed heinous crimes and violated the public trust). In their latest motions to dismiss, the CEI Defendants argue that the Sandusky comparison is not defamatory because it is a "statement of opinion phrased in hyperbolic language and therefore constitutionally protected speech" and because the Amended Complaint "fails to plausibly allege that the CEI Defendants acted with actual malice." CEI Mem. at 2. As with his other claims for defamation, Dr. Mann is likely to succeed on the merits of this Sandusky claim as well.

A. The Sandusky Comparison is Not Protected Opinion or Rhetorical Hyperbole.

1. Readers Understood the Sandusky Comparison as an Accusation of Criminal Behavior.

In an effort to avoid the implications of the Sandusky comparison, the CEI Defendants argue "that even the most careless reader" would have perceived the comparison as "no more than rhetorical hyperbole." CEI Mem. at 6. This argument misses the mark, and by a wide margin. Dr. Mann does not contend that any reader would literally believe that he was a child molester; rather, he contends that one who read the Sandusky comparison in such close proximity to the accusations of data manipulation, academic and scientific misconduct, and corruption—would understand that the CEI Defendants were accusing Dr. Mann of criminal behavior and a breach of the public trust.[5] Am. Compl. ¶ 103. After all, there was a reason that the CEI Defendants compared Dr. Mann to Jerry Sandusky—and not someone else. That reason is evident: Jerry Sandusky is an odious and despicable figure who violated the law by sexually abusing young boys. And Sandusky further violated the public trust by soliciting funds from the

[5] In fact, the CEI Defendants original defamatory publication makes this allegation explicitly. *See* Exhibit 4, Rand Simberg, "*The Other Scandal in Unhappy Valley*," openmarket.org, (July 13, 2012) ("the emails revealed [that Dr. Mann] had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary").

public for his Second Mile charity which he then used as a vehicle to find even more victims. The clear implication of this comparison is that both Sandusky and Dr. Mann are guilty of soliciting public monies through misrepresentations—Sandusky through his Second Mile charity and Dr. Mann through his attempts to secure public funding for research.[6] The clear implication of the Sandusky comparison—in addition to an assertion of criminal behavior—is that Dr. Mann, like Jerry Sandusky, breached the public trust through misrepresentations designed to secure public funding.[7] This allegation is reprehensible and clearly defamatory—and CEI has itself labeled it as "inappropriate."

Further, the facts show that readers could easily understand that CEI was accusing Dr. Mann of criminal behavior and many commented as such:

- As for libeling Dr. Mann, you'd think our hirsute Canadian [Steyn] would be more careful in *calling Dr. Mann a criminal* and his science a fraud.

- Hey, I hate bogus climate doom-mongers as much as the next guy, but no, *faking data is nothing like what those kids suffered from Sandusky*. And exploiting their experiences to score points in the climate debate is something I hope NR would summarily reject.

- I would argue that the author is attempting to make the link for the Penn State scientist as someone as *odious as a pedophile*.

- *Attacking Penn State for their cover ups would have been valid. But the piece went further and crossed the line*. Steyn quoted Simberg's inappropriate "Mann could be said to be the Jerry Sandusky of climate science, …" in this article, and no amount of follow on "Not sure" or "Whether or not" backing up does not make it an appropriate quote for this forum.

[6] *See, e.g., White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) (Defamation by implication "stems not from what is literally stated, but from what is implied.").

[7] *See* Exhibit 4, "The Other Scandal in Unhappy Valley," (alleging Dr. Mann "had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary.")

See Exhibit 1 (comments to "*Football and Hockey*" post).[8] The record is clear as to how readers understood the Sandusky comparison.

2. The Sandusky Metaphor Was Not a Mere Epithet: The Cases Teach That an Epithet Accompanied by False Facts is Actionable

Unable to deny the clear defamatory meaning of their statements, the crux of the defendants' briefing rests on their assertion that their use of the Jerry Sandusky "metaphor" is nothing but the type of rhetorical hyperbole protected by the First Amendment. However, a review of each and every case they cite for this proposition flatly contradicts this position. While they may be correct that the use of an offensive metaphor—without more—may qualify for constitutional protection, the case law teaches that when that metaphor is accompanied by a false assertion of fact, the publication can no longer be considered an expressive opinion, and becomes actionable. In our context, the defendants did not simply state that Michael Mann was comparable to Jerry Sandusky; rather, they went on—at some length—to tell their readers why they thought that comparison was apt. They said that Dr. Mann had molested and tortured data; that Dr. Mann had engaged in data manipulation; that Dr. Mann had committed academic and scientific fraud; that Dr. Mann had behaved in an unscientific manner; and that Dr. Mann had been improperly investigated, "whitewashed," and benefitted from a "cover-up."

The specific factual allegations against Dr. Mann stand in marked contrast to the bulk of the cases cited by the defendants, in which the defamation claims were based upon loose epithets and conjectural name-calling, without reference to specific facts. To wit:

[8] Dr. Mann directs the Court to comments to Mr. Steyn's post, because soon after publishing Mr. Simberg's post CEI removed the Jerry Sandusky comparison after realizing it was "inappropriate." Accordingly, CEI's website does not—and one would not expect it to—contain reader comments regarding the Sandusky comparison. Therefore, the best evidence of readers' understanding of the meaning of the Sandusky comparison is found in comments to Mr. Steyn's blog post.

- In *Potts v. Dies*, 132 F.2d 734 (D.C. Cir. 1942), the plaintiff had been called a "Nazi Trojan Horse." The D.C. Circuit held that the metaphor was not actionable because it was "not a proposition of fact," and that the defendant "neither said nor implied anything false." 132 F.2d at 735.

- In *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987), the plaintiff had been compared to Adolph Hitler. The Ninth Circuit held that the defamation claim was not actionable because there was no evidence that the remark was "understood to refer to facts." 817 F.2d at 509-510.

- In *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003), the plaintiff Rosa Parks claimed she had been defamed by some lyrics in a popular song. The Sixth Circuit held that the defamation claim was not actionable because the song "did not make any factual statements about her." 329 F.3d at 462.

- In *Dunn v. Gannett*, 833 F.2d 446 (3d Cir. 1987), the Third Circuit rejected a defamation claim involving an accusation that a mayor had referred to Hispanics as "pigs," noting that the defendant had not specifically accused the mayor of wrongdoing. 833 F.2d at 454.

- In *Rizzo v. Welcomat, Inc.*, 1986 WL 501528 (Pa.Com.Pl. 1986), another Hitler case, the Court of Common Pleas of Pennsylvania rejected a defamation claim brought by the former Mayor of Philadelphia because the Hitler statement did not involve a fact capable of being proven false. 1986 WL 501528 at *561.

- In *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983) (yet another Hitler case), *Williams v. Town of Greenburgh*, 535 F.3d 71 (2d Cir. 2008) ("Junior Mussolini" and "intimidation tactics"), and *Novecon Ltd. v. Bulgarian-American Enterprise Fund*, 190 F.3d 556 (D.C. Cir. 1999) (general allegations of "extortion" and selling the "Brooklyn Bridge"), the defamation claims appeared to be rejected because they were not accompanied by any specific false assertions of fact.

These cases stand in stark contrast to other cases (curiously) cited by defendants in which the defamation claims were upheld because they did involve specific false assertions of fact:

In *Buckley v. Littell*, 539 F.3d 882 (2d Cir. 1976), a defamation case brought by William F. Buckley, the founder and former publisher of the defendant in this case, the *National Review*, asserted that he had been defamed in three separate statements: (1) that he had been called a "fascist;" (2) that he had been called a "deceiver;" and (3) that he had been compared to an individual named Westbrook Pegler "who lied day after day." The Second Circuit rejected Mr.

Buckley's first two claims on the grounds that they could not be viewed as direct statements of fact, given the imprecision as to their meaning and usage. Yet Mr. Buckley's third asserted libelous statement, involving the comparison to Westbrook Pegler, was held to be actionable because the assertion that he had lied and libeled people was "an assertion of fact." 539 F.3d at 895-96. Further, the Second Circuit went on to say that the fact that the statements regarding Mr. Buckley were made in the context of a political attack did not entitle the statements to constitutional protection. *Id.* at 897 ("to call a journalist a libeler and to say that he is so in reference to a number of people is defamatory in the constitutional sense, even if said in the overall context of an attack otherwise directed at his political views").

In *Jordan v. Lewis*, 247 N.Y.S.2d 650 (N.Y. App. Div. 1964), a New York appellate court held that the comparison to "Hitler and Eichman" could not be held to be slanderous per se. But it held that two other statements were slanderous, including the allegation that the plaintiff had committed adultery and the statement that the plaintiff had cheated on his income taxes. 247 N.Y.S.2d at 652. The difference, of course, is that with respect to the latter two statements, the plaintiff had been accused of a specific crime, capable of being proven true or false.

The remaining case cited by the defendants is perhaps the most instructive with respect to the issues presented in the pending motion before this Court. In *Medifast v. Minkow*, No. 10–CV–382 JLS (BGS), 2011 WL 1157625 (S.D. Cal. March 29, 2011), the defendant had published an article comparing certain aspects of Medifast's business operations to those that had been used by the convicted financier Bernie Madoff. The comparisons included the defendant's compensation system and its use of small accounting firms. 2011 WL 1157625 at *12. Further, the context of the article was that of "a cautionary tale." *Id.* The plaintiff interpreted these comparisons as tantamount to the assertion that "it was running a Ponzi scheme—an illegal

criminal enterprise," and based its defamation claim on this alleged statement. The United States District Court for the Southern District of California rejected this purported interpretation of the defendant's actual statements, noting that all the article actually stated or implied was that people should be cautious of Medifast, and that "things at Medifast are not what they seem." *Id.*. These implications were held too inexact or subjective to "imply a provably false assertion of fact." But the court then went on to observe that if the defendant had stated or implied that "Medifast, like Bernie Madoff, is running a Ponzi scheme, one could hardly dispute that Defendants would be liable for defamation." *Id.* Similarly, if the defendants had simply said that Medifast ran its business like Bernie Madoff, the statement would also have been actionable. *Id.*

The clear and guiding principle derived from all of these cases cited by the defense is as follows: A defendant is not liable in defamation for simply using an epithet, or comparing someone to a disgraced or notorious individual—no matter how offensive. However, when the defendant chooses to accompany that epithet or comparison with specific factual allegations that are capable of being proven true or false, then the line has been crossed, and the defendant can no longer hide behind the protection of "rhetorical hyperbole." And as this Court has already held, that is exactly what happened in this case:

> [W]hen 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. Defendant Simberg's article "*The Other Scandal in Unhappy Valley"* suggested that Penn State had covered up Plaintiff's alleged fraudulent conduct and misrepresentation of data. The content and context of the statement is not indicative of play and "imaginative expression" but rather aspersions of verifiable facts that Plaintiff is a fraud. At this stage, the Court must find that these statements are not simply rhetorical hyperbole.

Order at 17. Given all the allegations made against Dr. Mann, the Sandusky comparison is an "aspersion of a verifiable fact" that Dr. Mann is guilty of odious and criminal conduct and a

breach of the public trust. Defendants' opinion and rhetorical hyperbole defenses are without merit.

B. Dr. Mann Has Plausibly Pled Actual Malice—And Supported His Pleading With Specific Facts

The CEI Defendants also argue that Dr. Mann has failed to plausibly plead actual malice. A party acts with actual malice when it deliberately ignores evidence that calls into question its published statements or when it encounters persuasive evidence that contradicts the published statement. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989); *Schatz v. Repub. State Leadership Cmte.*, 669 F.3d 50, 58 (1st Cir. 2012); *Levesque v. Doocy*, 560 F.3d 82, 90 (1st Cir. 2009); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511 (D.C. Cir. 1996). Dr. Mann easily satisfies this standard.

This Court has already ruled that Dr. Mann has adequately pled actual malice with respect to Dr. Mann's claim for intentional infliction of emotional distress for the Jerry Sandusky comparison:

> The CEI Defendants have consistently accused Plaintiff of fraud and inaccurate theories, despite Plaintiff's work having been investigated several times and found to be proper. The CEI Defendants' persistence despite the EPA and other investigative bodies' conclusion that Plaintiff's work is accurate (or that there is no evidence of data manipulation) is equal to a blatant disregard for the falsity of their statements. Thus, given the evidence presented the Court finds that Plaintiff could prove "actual malice."

Order at 23. The inquiry is no different with respect to Dr. Mann's defamation claim.

Moreover, as with Dr. Mann's other defamation claims, the Amended Complaint specifically pleads facts demonstrating that the CEI Defendants knew, or at the very least deliberately ignored evidence, that Dr. Mann was not guilty of criminal conduct or conduct in breach of the public trust. As set forth in Dr. Mann's opposition to the CEI Defendants original motions to dismiss, the Amended Complaint details facts regarding the series of inquiries and

subsequent exonerations of Dr. Mann that "found that there was no evidence of any fraud, data falsification, or statistical manipulation or misconduct." *See* Am. Compl. ¶ 24. The Amended Complaint further alleges that Defendants read and were aware of the conclusions of these inquiries and exonerations. *Id.* The evidence already before this Court is more than sufficient to demonstrate that the CEI Defendants knew or deliberately avoided the fact that there was no criminal conduct or conduct in breach of the public trust. *See Harte-Hanks Commc'ns*, 491 U.S. at 685; *Schatz*, 669 F.3d at 58.

But there is more. In addition to the numerous investigations discussed by the Court, there is other proof of actual malice. This proof involves evidence of the defendants' motive behind their defamations. In this regard, it should be noted that actual malice can be proven through circumstantial evidence, *see Levesque*, 560 F.3d at 90 ("Because direct evidence of actual malice is rare, it may be proved through inference, and circumstantial evidence"), and one type of oft-used circumstantial evidence of malice is the defendant's motive to defame. *See Biro v. Condé Nast,* 11 Civ. 442 (JPO), 2013 U.S. Dist. LEXIS 108113, at *58-59 (S.D.N.Y. August 1, 2013) (one of the circumstances probative of actual malice is when "the defendant has a motive for defaming the plaintiff").

In this case, there is ample evidence that the defendants had a specific and direct motive to accuse Dr. Mann of being a fraud. Why? Because those aspersions furthered their political agenda of casting doubt on the entire concept of global warming and climate change.[9] In this case, the evidence will show that one of CEI's principal mandates is to oppose the science

[9] In fact, Mr. Simberg's original post was clear in sounding the alarm should the CEI Defendants and other skeptics fail to convince the public that global warming is a hoax. According to him, Dr. Mann had "molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." *See* Exhibit 1, Rand Simberg, "The Other Scandal in Unhappy Valley," openmarket.org, (July 13, 2012) .

behind global warming and the environmental efforts to address global warming.[10] CEI is funded in part by fossil fuel industry groups that face economic harm if the world's governments continue to attempt to curb greenhouse gases. CEI is also funded by a number of politically conservative individuals and organizations which oppose many (even any) regulatory initiatives, and particularly environmental initiatives. These groups know that if people thought that Dr. Mann and his colleagues were frauds, they would be more inclined to believe that global warming was a hoax.

And here the proof is in the pudding. After the release of the hacked emails in 2009, public opinion polls showed a sharp drop in the percentage of respondents who believed that global warming was "real." Moreover, after Dr. Mann and his colleagues began to be exonerated, these percentages started to rise again. What better way to further their political agenda than by convincing the public that the hockey stick is fraudulent and that Dr. Mann committed scientific and academic misconduct?[11] At trial, Dr. Mann will prove not only that the defendants maliciously and recklessly defamed him, but that they did so to further their own political agendas.

III. CONCLUSION

For all the foregoing reasons, and for the reasons sets forth in Dr. Mann's opposition to the CEI Defendants' initial motions to dismiss, these motions should be denied. Moreover,

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[10] *See* CEI's 2009 Form 990, at 2, available at: http://cei.org/sites/default/files/CEI%20FY2010%20990.pdf , attached hereto as Exhibit 2, (characterizing CEI's environmental policy as seeking "to analyze and promote property-based approaches to environmental protection as well as exploring methods of preserving both individual liberty and the environment.")

[11] A review of public opinion polls shows that the public's belief in global warming receded in 2009 and 2010, corresponding with the release of emails from the University of East Anglia and increasing publicity of so-called global warming skeptics. After the various investigations into Climategate concluded, the percentage Americans who believe that the world is warming began to grow. *See* Lydia Saad, "Americans' Concerns About Global Warming on the Rise", gallup.com (April 8, 2013), *available at*: http://www.gallup.com/poll/161645/americans-concerns-global-warming-rise.aspx, attached hereto as Exhibit 3.

given the procedural and substantive flaws in their motion for reconsideration, and the fact that this Court has already disposed of the issues raised in the defendants' motion to dismiss the Amended Complaint, these motions should be considered frivolous, and Dr. Mann should be awarded his fees and costs in responding to them.

DATED: August 12, 2013

Respectfully submitted,
COZEN O'CONNOR

/s/ John B. Williams
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August 2013, I caused a copy of the foregoing Opposition to Rand Simberg and the Competitive Enterprise Institute's 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 to be served via CaseFileXpress on the following:

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/s/ John B. Williams
John B. Williams

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., *et al.,* Defendants.	Case No 2012 CA 008263 B Calendar No.: 10 Judge: Natalia Combs Greene Next event: 9/27/2013 Status Conference

PROPOSED ORDER

Upon consideration of Defendants Rand Simberg and the Competitive Enterprise Institute's 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, and all responses thereto, it is hereby

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

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

FURTHER ORDERED, that the Motion to Reconsider is **DENIED**.

SO ORDERED.

Dated: _____, 2013

_____
Natalia M. Combs-Greene
(Associate Judge)

Copies by e-service to:
John B. Williams
Peter J. Fontaine
Catherine R. Reilly
David B. Rivkin
Bruce D. Brown
Mark I. Bailen
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Chris Moeser