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 CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS NATIONAL REVIEW, INC. AND MARK STEYN'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 Consolidated Memorandum of Points and Authorities in Opposition to Defendants National Review, Inc. and Mark Steyn'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 NRO Defendants'[1] motions to dismiss pursuant to the D.C. Anti-Slapp Act and Rule 12(b)(6). The defendants now argue that the Court's opinion should be reconsidered because of several (rather minor) factual misstatements, and because it did not include a section specifically dealing with

[1] "NRO Defendants" refers to defendants Mark Steyn and National Review, Inc.

their arguments regarding the emotional distress claim (despite the fact that virtually identical arguments were rejected in the accompanying Omnibus Order).

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 NRO 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 NRO 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. Dr. Mann Has Demonstrated a Likelihood of Success on the Merits of the Emotional Distress Claim

The NRO Defendants argue that the Court erred by failing to set forth its reasoning when it denied their motion to dismiss the emotional distress claim. *See* NRO Defendants' Memorandum of Points and Authorities ("NRO Mem.") at 18. While the Court did not address the NRO Defendants' arguments in the written opinion that was specifically relevant to them, it did reject those arguments in the Omnibus Order. No different result should apply with respect to the NRO Defendants.

As this Court correctly noted in its Omnibus Order: "The elements of a claim for IIED [are]: (1) extreme and outrageous conduct on the part of the defendant, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.'" Omnibus Order at 22 n.18 (citations omitted). Moreover, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* (citations omitted).

As set forth in Dr. Mann's brief in opposition to the NRO Defendants' initial motions to dismiss, the statement that Dr. Mann was the "Jerry Sandusky of climate science" is unquestionably extreme and outrageous. Pl.'s Opp'n to Defs.' Motion to Dismiss at 55-56. Here, "the recitation of the facts to an average member of the community would arouse his resentment against [the NRO Defendants], and lead him to exclaim, 'Outrageous!'" *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 162 (D.C. 2013) (citing Restatement, § 46 comment d). Defendants' attempt to minimize their Sandusky comparison as "lusty and imaginative," "colorful," and mere "caustic bombast" is hardly persuasive. Comparing someone to a convicted pedophile is far beyond "colorful" or even "caustic." It is outrageous and it is reprehensible. The NRO Defendants also have not addressed the fact that their co-defendant CEI removed the

Sandusky comparison from its website, and acknowledged that it was "inappropriate." It is doubtful that CEI would have removed the Sandusky comparison, or labeled it as "inappropriate," were it merely "colorful or "caustic." CEI removed the comparison because it crossed the line, and as discussed later in this brief, NRO's own readers agreed. *See infra* at 11-12.

The NRO Defendants then advance the rather disingenuous argument that they cannot be held liable for the Sandusky comparison because they "labeled it a 'metaphor,'" "questioned its propriety," and "specifically declined to join in Simberg's comparison." NRO Mem. at 12. According to the NRO Defendants, the statement that they may not have "extended that [Sandusky] metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does" somehow constitutes a rejection of the Sandusky comment. And then they point out that, after this supposed "rejection" of the Sandusky metaphor, they proceeded to talk about Penn State's whitewash of Jerry Sandusky. From this collage of the facts, they go on to argue that their comments could hardly be considered outrageous, since all they were doing, in their view, is to reject the Sandusky metaphor and to focus on the Penn State investigation.

This is all revisionist history. The publication at issue did not segue directly from the Sandusky "disclaimer" to the Penn State whitewash. The NRO Defendants forget to mention that they only disclaimed Mr. Simberg's zeal, not the comparison itself. They also fail to mention that immediately after they said that the metaphor perhaps should not be so zealously extended into the locker room, they stated that Mr. Simberg "had a point" in his Sandusky comparison. And the "point" was not the Penn State whitewash. Here is the sentence directly following the statement that Mr. Simberg "had a point": "Michael Mann was the man behind the

fraudulent climate-change 'hockey stick' graph. The very ringmaster of the tree-ring circus."[5] In context, it is clear that the NRO Defendants were actually endorsing the Sandusky comparison. And in context, it is clear that the "point" of the Sandusky comparison had to do with Dr. Mann's alleged fraud, not the Penn State investigation. One matter must be raised: if the NRO Defendants intended to distance themselves from the Sandusky comparison, why do they continue to publish it on their website? CEI removed the Sandusky comment, and NRO could have done the same.

The NRO Defendants are also incorrect that the emotional distress claim should be dismissed because Dr. Mann did not allege any harmful physical consequences. Under District of Columbia law, there is no requirement to show resultant physical consequences from severe emotional distress. Rather, Dr. Mann need only show "emotional distress of so acute a nature that harmful physical consequences *might be not unlikely to result*." *Ortberg*, 64 A.3d at 164 (emphasis added) (citing *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007)). District of Columbia courts are clear: if the conduct is sufficiently extreme and outrageous, demonstrable physical consequences are not required. *See Homan v. Goyal*, 711 A.2d 812, 821 (D.C. 1988).

As discussed above, the gravamen of an emotional distress claim is that it be outrageous—and the Sandusky comparison is precisely that. And it is even more outrageous that NRO continues to publish this attack when their co-defendant stated publicly that it was "inappropriate." The NRO Defendants used—and continue to use—a national platform to compare Dr. Mann to a notorious serial child abuser. Their lame attempt to characterize the Sandusky comparison as "colorful," "lacking in taste," a "sophomoric jab, and "mudslinging"

[5] *See* Mark Steyn, "*Football and Hockey*," National Review, (July 15, 2012), attached hereto as Exhibit 1.

reflects a failure on their part to understand the seriousness of the comparison, and the manner in which most people view Jerry Sandusky. By any standard, NRO's conduct surpasses all bounds of decency. *See Murray v. Schlosser*, 574 A.2d 1339, 1341 (Conn. Super. 1990) (description of brides pictured in newspaper column as "dogs" permitted an action for IIED). All Dr. Mann need show at this point is that such a comparison was so outrageous that he suffered severe emotional distress that *might* have resulted in physical consequences.[6] He has clearly met that standard.

C. The Court's Order Does Not Rest on Any Material Factual Misstatements.

The NRO Defendants also argue that the Court's decision should be reconsidered because it mistakenly attributed some of the conduct of the CEI Defendants to that of the NRO Defendants. NRO Mem. at 14-15. Specifically, the NRO Defendants contend that the Court erred when it stated that the Environmental Protection Agency investigation resulted from a petition they filed. They also assert that the Court erred when it stated NRO had criticized Dr. Mann harshly for years. According to the NRO Defendants, it is CEI that has been critical of Dr. Mann, and not them. *Id.* at 15.

Two points must be made in response. First, the Court's order certainly did not hinge upon whether the NRO Defendants had petitioned the EPA, or whether the NRO Defendants had been critical of Dr. Mann. These facts were not the basis upon which the Court held that NRO's statements were defamatory and not protected by the opinion defense. Nor were they the basis of the Court's determinations regarding the actual malice issue. The Court rested that

[6] The NRO Defendants only ask the Court to reconsider the denial of dismissal of the IIED claim based upon the common law definition of the tort. Therefore, we only note here that the Court has already addressed, in Dr. Mann's favor, the question of whether the Sandusky comparison amounts to a false statement of fact made with actual malice. Omnibus Order at 22-23.

determination on defendants' knowledge of the litany of investigations and exonerations of Dr. Mann.

Second, even if these facts did have significance to the Court's decision, NRO cannot deny that it, like CEI, has called for investigations of Dr. Mann, and that it, like CEI, has been harshly critical of Dr. Mann for years. To the extent these facts were not in the record before, we put them in now. Beginning with the release of hacked emails from the University of East Anglia in 2009, the NRO Defendants have not only attacked Dr. Mann, they have called for investigations into his conduct:

- On November 25, 2009, Mark Steyn, writing on National Review's website, delighted in the fact that Dr. Mann was "ensnared" by the Climategate scandal, calling him a "warm-monger" and accusing him and others of "wide-spread data-raping."[7] Mr. Steyn further mused that "[i]t might be that 'climate change' is an *organized criminal conspiracy* to defraud the entire developed world."[8]

- On November 30, 2009, the National Review's headline regarding Dr. Mann stated: "*Let the Investigations Begin*."[9]

- On December 1, 2009, Chris Horner (a senior fellow at CEI's Center for Energy and Environment), penned a piece for National Review ridiculing Dr. Mann for his explanation of certain of the stolen emails and concluding: "These guys really need to call for a *RealInvestigation* to get to the bottom of their actions, as the more they stumble around the worse they're making themselves look."[10]

- On January 13, 2010, National Review stated that Dr. Mann received stimulus funds to advance his "agenda-guided science" and asked, in light of the CRU e-mails: "In these crushing economic times, *is it too much to ask that university authorities, our political leaders, and the press jump on this case with a bit more rigor?*"[11]

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[7] Mark Steyn, "Global Frauding," National Review, (November 25, 2009), attached hereto as Exhibit 2.

[8] *Id.*

[9] Greg Pollowitz, "Let the Investigations Begin," National Review, (November 30, 2009), attached hereto as Exhibit 3.

[10] Chris Horner, "'Hockey Stick' Mann's Josh Steiner Moment," National Review, (December 1, 2009), attached hereto as Exhibit 4.

[11] Candace de Russy, "Your Stimulus Dollars Lavished on Climate-Alarmist Prof," National Review (January 14, 2010), attached hereto as Exhibit 11.

- On December 18, 2009, National Review stated that the CRU e-mails called "the most alarmist claims into question" and showed "collusion between several scientists to overstate the evidence for the argument, made by Penn State University's Michael Mann, that 'the 1990s are likely the warmest decade, and 1998 the warmest year, in at least a millennium.'"[12] National Review went on to attack the EPA's finding that global warming is a hazard to human health and warned: "There's a thin line separating comedy and tragedy; enforcement of the EPA finding would send the climate farce hurtling across it."[13]

Given the above, while it may be true that the NRO Defendants did not "petition or apply pressure to the EPA to investigate Dr. Mann," they certainly have called for investigations of Dr. Mann, and have done so for years. And with respect to the EPA, they specifically attacked this agency for its reliance on Dr. Mann's research. In sum, the attempt by NRO and Steyn to distance themselves from CEI and Simberg finds no traction.

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

The NRO Defendants assert that Count VII of the Amended Complaint is "easily dispatched" because, in their view, it is "beyond plain" that they were not literally claiming that Dr. Mann was a convicted child rapist "or anything of the sort." NRO Mem. at 9. They argue that "no reasonable reader" could interpret their Sandusky metaphor as stating actual defamatory facts about Dr. Mann, and then proceed to rehash their (already rejected) "contextual analysis" argument. Finally, they address the caselaw, with specific reference to CEI's lengthy discussion of the cases that involve epithets and name-calling. We will respond to each of these arguments in order.

First, it is irrelevant that NRO and Steyn may not have been "literally claiming" that Dr. Mann was a child rapist or anything of that "sort." By endorsing the Sandusky comparison, they

[12] National Review Editors, "The Tree-Ring Circus Continues," National Review, (December 18, 2009), attached hereto as Exhibit 5.

[13] *Id.*

were clearly ascribing criminal behavior to Dr. Mann, accusations that are reprehensible and defamatory *per se*. The reference to Jerry Sandusky was not adopted because NRO and Steyn were expressing an opinion about the Penn State investigation; it was chosen because of the despicable nature of Jerry Sandusky's criminal acts. Moreover, NRO's subsequent "clarification" of the comment, in Rich Lowry's "Get Lost" editorial, makes it clear they understood that a reasonable interpretation of the Sandusky reference was the accusation of criminal fraud. Simply put, publishers do not disclaim a particular interpretation of a comment if they do not believe such an interpretation would be drawn in the first instance.

Second, the claim that "no reasonable reader" could interpret the Sandusky metaphor as stating defamatory facts about Dr. Mann is sharply contradicted by the *actual comments* of NRO's own "reasonable readers." As we will show, these readers plainly understood the Sandusky comparison to ascribe criminal conduct to Dr. Mann.

Third, an analysis of the context of the Sandusky reference demonstrates that the intent and effect of the statement was to accuse Dr. Mann of criminal behavior. Among other contextual facts, Mark Steyn himself had previously suggested that Dr. Mann was a part of a "criminal conspiracy."

Fourth and finally, the caselaw proves our point on the art of epithets. While it is true that a bald epithet or hurled invective may be protected by the opinion defense, when that epithet or invective is accompanied by an accusation capable of being proven true or false, the opinion defense no longer applies.

A. The Intent and Effect of the Sandusky Comparison Was to Accuse Dr. Mann of Criminal Behavior and a Breach of the Public Trust

The reason the NRO Defendants compared Dr. Mann to Jerry Sandusky—and not someone else—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 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.[14] In this regard, NRO has been a constant critic of the public research funds received by Dr. Mann. Indeed, it has called for an investigation into the "piles of dough" he and other climate scientists secured through public grants.[15] NRO wrote an article listing each of Dr. Mann's funded proposals, and complaining that the funding was from the government's "teats" and on "the taxpayer dime."[16] To NRO's "reasonable readers," 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.[17]

Nor can the NRO Defendants evade the obvious criminal implication of the Sandusky comparison by their self-serving *post hoc* statements that they never meant to accuse Dr. Mann of "criminal fraud." After having received a demand for a retraction and apology from Dr. Mann's attorneys, Rich Lowry (National Review's editor) argued that in using the term "fraudulent," Mr. Steyn did not "mean honest-to-goodness criminal fraud."[18] Putting aside the

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[14] *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").

[15] *See* Ed Craig, "If Grant Money Determines Your Conclusions on Climate …", National Review, (December 2, 2009), attached hereto as Exhibit 10.

[16] *Id.*

[17] Rand Simberg, "The Other Scandal in Unhappy Valley," (July 23, 2012), attached hereto as Exhibit 8 (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.")

[18] Rich Lowry, "Get Lost", (August 22, 2012), National Review, attached hereto as Exhibit 6.

fact that this Court is not obliged to accept the NRO Defendants' explanations of what they meant, Mr. Lowry's explanation begs the question of why he felt the need to explicitly disclaim an allegation of criminal fraud. In their retraction letter, Dr. Mann's attorneys did not assert that Mr. Steyn had accused Dr. Mann of a crime.[19] So why then did Mr. Lowry deem it necessary to disclaim that allegation? The answer is evident: a logical reading of Mr. Steyn's blog post is that it accused Dr. Mann of a crime—and that Mr. Lowry understood that interpretation.

B. NRO's Readers Understood the Sandusky Comparison As An Accusation of Criminal Behavior

In an effort to avoid the implications of the Sandusky comparison, the NRO Defendants argue that "no reasonable reader" could interpret this comparison as an allegation of child molestation or any other odious criminal behavior. NRO Mem. at 2-3. To the contrary, NRO's "reasonable readers" could easily understand that NRO was accusing Dr. Mann of criminal behavior—particularly given the close proximity of the Sandusky comparison to the accusations of fraud, 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

[19] July 23, 2012 letter from John B. Williams, Esq. to Jack Fowler, attached hereto as Exhibit 7.

> "Whether or not" backing up does not make it an appropriate quote for this forum.[20]

The record is clear as to how readers understood the Sandusky comparison.

C. The Context of the Sandusky Comparison Make Clear that is not Hyperbolic

The NRO Defendants also restate the argument that a contextual analysis supports the conclusion that the Sandusky comparison is non-defamatory rhetorical hyperbole. NRO Mem. at 9. As a preliminary matter, the Court has already addressed and rejected the NRO Defendants' argument that context renders their statements rhetorical. Further, the context of Mr. Steyn's *Football and Hockey* post makes clear that the NRO Defendants were not merely calling Dr. Mann an offensive name, but rather were accusing him of fraud, criminal conduct, and an abuse of the public trust. The fact that the piece appeared in an opinion magazine and was written by a "well-known political opinion maker and satirist" is hardly dispositive. *See Moldea v. New York Times Co.,* 22 F.3d 310, 314 (D.C. Cir. 1994) ("*Moldea II*") (noting that "[a]lthough the statements at issue in *Milkovich* appeared in an 'opinion column' in a newspaper sports section, the Court found no relevance in this fact . . . apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns"); *see also Weyrich v. New Republic, Inc.*, 235 F.3d 617, 625 (D.C. Cir. 2001) (assertions in the *New Republic*, a well-known opinion magazine, that the subject of the article had "snapped," was becoming "more and more isolated," had surrounded himself with a "coterie of sycophants," was "apoplectic," and had "psychological problems" were actionable).

Here, the Court has already considered the context of the *Football and Hockey* post. To be sure, the Court did recognize that if one were to consider the National Review's reputation

[20] *See* Exhibit 1, reader comments "Football and Hockey."

alone, the comments referring to the "tree-ring circus" could appear only as an exaggeration. However, the inquiry does not end there. Considering all of the accusations against Dr. Mann's integrity, including the NRO Defendants' allegations of fraud, the statements appear "less akin to 'rhetorical hyperbole' and more as factual assertions." Order at 17. As the Court correctly concluded, the context of the NRO Defendants statements is not mere rough and tumble name calling, but "rather aspersions of verifiable facts that [Dr. Mann] is a fraud." *Id.* at 17-18. Further, in looking at the context of the post as a whole, it is clear that the Sandusky comparison is meant to accuse Dr. Mann of similarly reprehensible criminal conduct.

D. The Sandusky Comparison 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 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:

- 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 *Klahr v. Winterble*, 418 P.2d 404 (Ariz. Ct. App. 1966), the Arizona Court of Appeals rejected a defamation claim involving an editorial which compared the plaintiff to Stalin, Hitler, and Mussolini because “caustic criticism” by “analogy, metaphor, invective and ridicule” is non-libelous when it is not accompanied by charges or insinuations of criminal or grossly immoral conduct. 418 P.2d at 416.

- In *Pring v. Penthouse, Inc.*, 695 F.2d 438 (10th Cir. 1982), the Tenth Circuit dismissed a defamation case brought by a Miss America pageant contestant where it was clear that the publication at issue was “obviously a complete fantasy.” 695 F.2d at 443.

- In *Kreuzer v. George Washington Univ.*, 896 A.2d 238 (D.C. 2006), the D.C. Court of Appeals dismissed a professor’s defamation claim involving a statement by the university president that the plaintiff was “inhaling” because it was obvious that the statement did not state actual facts or mean that the plaintiff was actually smoking marijuana. 896 A.2d at 248.

- 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." *See, e.g. Smith v. McMullen*, 589 F.Supp. 642, 645 (S.D. Tex. 1984) (description of plaintiff as "despicable human being" when viewed in context of the statement as a whole was capable of defamatory meaning). 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. NR Defendant's publication of Defendant Steyn's article quotes from Defendant Simberg's article *The Other Scandal in Unhappy Valley.* Defendant Steyn then writes: 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. Michael Mann was the man behind the fraudulent climate change "hockey-stick" graph" *National Review Online, Football and Hockey*, by Mark Steyn (July 15, 2012). 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 were not simply rhetorical hyperbole.

Order at 17-18. 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.

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

The NRO 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."

Omnibus 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 NRO 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 NRO 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 NRO 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. In this case, the evidence will show that the NRO Defendants have opposed the science behind global warming and the environmental efforts to address global warming at every turn.[21] The NRO Defendants 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."[22] Moreover, after Dr. Mann and his colleagues began to be

[21] Since 2007, National Review has hosted a blog on its website called "Planet Gore" to "track the news, data, and misinformation that feed the global-warming/climate-change debate. The blog additionally serves as a resource for accurate information about fossil fuels, alternative energy, environmental activism, the climate-change political process, and Al Gore's carbon footprint." *See* http://www.nationalreview.com/taxonomy/term/17/about.

[22] 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 of Americans who believe that the world is warming began to grow. *See* Lydia Saad, "Americans' Concerns About Global

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? 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 NRO Defendants' initial motions to dismiss, these motions should be denied. Moreover, 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.

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 9.

DATED: August 12, 2013

Respectfully submitted,
COZEN O'CONNOR

/s/ John B. Williams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August 2013, I caused a copy of the foregoing Consolidated Memorandum of Points and Authorities in Opposition to National Review, Inc. and Mark Steyn'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
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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 National Review, Inc. and Mark Steyn'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:
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