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.: 3 Judge: Irving Oral Hearing Requested

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG ON THE ISSUE OF FALSITY, AND MOTION TO STRIKE THEIR AFFIRMATVE DEFENSE THAT THEIR STATEMENTS WERE NOT "SUBSTANTIALLY FALSE"

Pursuant to D.C. Superior Court Rules of Civil Procedure 56 and 12-I(a), Plaintiff Michael E. Mann, Ph.D. respectfully moves for partial summary judgment on the grounds that no genuine issue of material fact exists as to the falsity element of his defamation claim, and that plaintiff is entitled to judgment as a matter of law. Plaintiff also moves to strike defendants The Competitive Enterprise Institute's and Rand Simberg's affirmative defense that their statements were not "substantially false." In support of this motion, Plaintiff submits a Memorandum of Points and Authorities, a Statement of Undisputed Material Facts, a Declaration with exhibits attached thereto; and a Proposed Order.

WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff's motion for partial summary judgment as to falsity and to strike the affirmative defense that the statements were not "substantially false."

Rule 12-I(a) Certification

The undersigned counsel certifies that he conferred with defense counsel and was unable to reach an agreement on this motion.

Dated: January 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, a copy of the foregoing Plaintiff's motion for partial summary judgment and to strike the affirmative defenses of truth and substantial truth was served via electronic filing or first-class mail on the following:

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE COMPETITIVE ENERPRISE INSTITUTE AND RAND SIMBERG ON THE ISSUE OF FALSITY, AND MOTION TO STRIKE THEIR AFFIRMATVE DEFENSE THAT THEIR STATEMENTS WERE NOT "SUBSTANTIALLY FALSE"

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Pursuant to Rules 12 and 56 of the Rules of the D.C. Superior Court, plaintiff Michael E. Mann, Ph.D. respectfully files this motion seeking partial summary judgment on the issue of truth, and the entry of an order finding that the defamatory statements of defendants Competitive Enterprise Institute (CEI) and Rand Simberg are false. Dr. Mann further seeks an order striking their affirmative defense that claims that their statements are "not substantially false." This relief is appropriate because the facts on these issues are not genuinely disputed by admissible evidence.

I. INTRODUCTION

In their article published July 15, 2012, CEI and Mr. Simberg accused Dr. Mann of engaging in "hockey stick deceptions." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1264 (D.C. 2016), as amended December 13, 2018. They stated that he had engaged in "data manipulation to keep the blade on his famous hockey stick graph." *Id.* at 1224. They stated that he was "the posterboy of the corrupt and disgraced climate science echo chamber." *Id.* at 1263. They alleged that his employer, Pennsylvania State University, had hidden his "academic and scientific misconduct." *Id.* at 1264. And they compared him to the convicted pedophile Jerry Sandusky, claiming that instead of molesting children, he "molested and tortured data in the service of politicized science." *Id.*

The Court of Appeals has reviewed these "noxious" allegations. *Id.* at 1243. It held that these statements accused Dr. Mann "of engaging in specific acts of academic and scientific misconduct in the manipulation of data." *Id.* It held that these accusations "implied that Dr. Mann's manipulation of data was seriously deviant for a scientist." *Id.* It held that these accusations conveyed the defamatory message that Dr. Mann "had engaged in 'data manipulation' that was fraudulent…," *id.* at 1249, n. 46, and that he engaged in wrongdoing by

"molesting" and "torturing" data. *Id.* at 1248. And it held that their use of the term "corrupt" in conjunction with their accusations of deception, misconduct, and data manipulation, along with their demand for a further investigation, implied that there were "sinister hidden misdeeds" he had committed. *Id.* at 1244.

The court found further that these allegations of deception and misconduct "have been proved false by four separate investigations," *id.* at 1245, noting that the defendants had not even argued that their allegations were true, *id.* at 1244, and further noting that defendants "do not counter any of these reports with other investigations…that reach a contrary conclusion about Dr. Mann's integrity." *Id.* at 1253. On the issue of the defendants' actual malice, the court held that Dr. Mann had made a sufficient showing that these statements were made with actual malice: knowing falsity or with reckless disregard of the truth. *Id.* at 1262.

Discovery is now closed. It is clear that there is no genuine dispute on the issue of falsity. The falsity of defendants' statements is confirmed not only by the investigations noted by the Court of Appeals, but by the numerous scientific studies and reviews addressing Dr. Mann's research, as well as the testimony of Dr. Mann's expert witnesses.[1] And notably, Dr. Mann's proof of falsity is further confirmed by the opinions of *defendants' own witnesses,* who have stated: (1) that the hockey stick is ***not*** **deceptive** (*See* Statement of Undisputed Material Facts

[1] These expert witnesses, John P. Holdren, Raymond S. Bradley, John R. Mashey, Gerald North, Naomi Oreskes, Peter C. Frumhoff, and John P. Abraham, have submitted expert reports in connection with this case. Dr. John Holdren of Harvard University was formerly President Obama's top Science Advisor. Dr. Raymond Bradley is a co-author of MBH98 and MBH99. Dr. John Mashey is a leading expert on disinformation in the climate change field who has written extensively about climate change issues. Dr. Gerald North of Texas A&M University chaired the NRC panel which reviewed MBH98 and MBH99. Dr. Naomi Oreskes of Harvard University published an analysis of the climate change controversy in *Merchants of Doubt*. Dr. Peter Frumhoff is the Director of Science and Policy and Chief Climate Scientist at the Union of Concerned Scientists. Dr. John Abraham, of the University of St. Thomas, is an expert on thermodynamics and a leading climate change researcher who reviewed each of the eight academic and governmental investigations into the climategate emails.

("SOMF") ¶ 75); (2) that Dr. Mann did ***not*** engage in fraud or misconduct, "**not even close"** (SOMF ¶ 77); and (3) that Dr. Mann "***published diligently***" (SOMF ¶ 82).

In sharp contrast to Dr. Mann's proof of falsity, defendants have failed to produce any admissible evidence that their allegations are true. Not one defense witness has testified that the defendants' allegations are true. They also fail to counter any of the investigative reports with an investigation of their own as the Court of Appeals indicated would be necessary on their part. *CEI,* 150 A.3d at 1253. In their affirmative defenses, CEI and Mr. Simberg do not even assert that their statements were true. All they say on this issue is that their statements were not "substantially false." SOMF ¶ 151.

Pursuant to Rule 56, a party may move for summary judgment on a "part of each claim or defense." Summary judgment should be granted "if there is no genuine dispute as to any material fact." Pursuant to Rule 12, the court may strike any "insufficient defense" from a pleading. Given that there is no genuine dispute that the CEI and Simberg statements about Dr. Mann are false, he is entitled to partial summary judgment on the issue of falsity, and their "no substantial falsity" defense should be stricken.

II. STATEMENT OF FACTS

A. DR. MANN AND THE HOCKEY STICK RESEARCH

Michael E. Mann is a climatologist and geophysicist. He is a Distinguished Professor of Meteorology at the Pennsylvania State University and the director of its Earth System Science Center. He holds a B.A. in applied mathematics and physics from the University of California and a Ph.D. in physics from Yale University. He has published over 200 peer-reviewed articles in his technical field. He has received numerous awards and honors. In 2007, the Intergovernmental Panel on Climate Change (IPCC) presented him, along with all other

scientists who had contributed substantially to the preparation of IPCC reports, with a certificate noting their contributions to the award of the Nobel Peace Prize to IPCC and Al Gore. Dr. Mann is a Fellow of the American Meteorological Society and a member of the National Academy of Sciences.

In 1998 and 1999 Dr. Mann, along with Raymond S. Bradley and Malcolm K. Hughes, published two papers demonstrating that global warming was occurring at an alarming rate. Their papers disclosed substantial data and analysis that disproved the arguments of climate change skeptics and deniers that the 20th century temperature rises were due to the cyclical nature of the earth's temperatures. In particular, they disproved that temperatures during the Medieval era were higher than today. Thus, they established that the rise in temperatures over the latter half of the 20th Century were outside the range of natural variability and evidenced anthropogenic global warming.

These papers are known as MBH98 and MBH99. MBH98 was published in *Nature*; MBH99 was published in *Geophysical Research Letters.* As the Court of Appeals observed, the "1998 study used a technique to reconstruct temperatures from time periods before the widespread use of thermometers…by using 'proxy indicators'" such as tree rings, lake and ocean sediment, ice cores, and corals. *CEI,* 150 A.3d at 1221. The court further observed that these proxy data "showed that global mean annual temperatures have been rising since the early twentieth century, with a marked increase in the last fifty years. The papers concluded that this rise in temperature was 'likely unprecedented in at least the past millennium' and correlated with higher concentrations of carbon dioxide in the atmosphere emitted by the combustion of fossil fuels." *Id*. at 1221-22.

"The 1999 paper included a graph depicting global temperatures in the Northern Hemisphere for a millennium, from approximately 1050 through 2000. The graphical pattern is roughly horizontal for ninety percent of the temperature axis — reflecting a slight, long-term cooling period between 1050 and 1900 — followed by a sharp increase in temperature in the twentieth century. Because of its shape resembling the long shaft and shorter diagonal blade of a hockey stick, this graph became known as the 'hockey stick.'" *Id.* at 1222.

Given the potential for error from using very old proxy data, the authors were careful to note the uncertainties in their conclusions, as reflected in the title of MBH99: "*Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations."* SOMF ¶ 5 at Exhibit C. Despite these cautionary words, as the Court of Appeals stated, the hockey stick graph "became a rallying point, and a target, in the subsequent debate over the existence and cause of global warming and what, if anything, should be done about it."[2] *CEI*, 150 A.3d at 1221-22. As a result, MBH98 and 99 have been subjected to rigorous scrutiny by scientists, statisticians, physicists, and mathematicians. Since these studies were released, their data, analysis, and conclusions have been reviewed—and validated and replicated—in numerous peer-reviewed publications. These follow-on studies used different proxy data and different statistical methods, and all reached the same conclusion that global warming was occurring. And notably, all of the temperature graphs displayed in these studies resembled a hockey stick. SOMF ¶ 65 at ¶ 9 ¶¶ 51-60.

[2] S*ee also*, National Research Council. 2006. *Surface Temperature Reconstructions for the Last 2,000 Years*. Washington, DC: The National Academies Press. https://doi.org/10.17226/11676 (NRC2006) (noting the "research received wide attention, in part because it was illustrated with a simple graphic, the so-called hockey stick curve, that many interpreted as definitive evidence of anthropogenic causes of recent climate change.")

B. THE DEFENDANTS

There are two defamatory articles at issue in this case, and four responsible defendants. Rand Simberg and the Competitive Enterprise Institute ("CEI") published their article entitled *The Other Scandal in Unhappy Valley* on July 13, 2012. *CEI*, 150 A.3d at 1262-64. Two days later, Mark Steyn and the National Review published their article entitled *Football and Hockey*, on July 15, 2012. *Id.* at 1264.

The Competitive Enterprise Institute describes itself as a "think-tank," and has championed the cause of denying the scientific consensus that climate change research is valid, and that environmental regulations are therefore appropriate. CEI prides itself on its influence in this area and notes on its website that Al Gore has "lamented" that it has "tremendous effect."[3] [4] Myron Ebell, CEI's Director of its Center for Energy and Environment, led former President Trump's Environmental Transition Team in 2016. He claims on his resume that he is "enemy #1 to the current climate change community" (SOMF ¶ 19), and CEI has repeated this claim on its website.[5]

Rand Simberg is a writer for CEI's "Open Market" website. He is a fervent climate change skeptic with a particular distaste for Dr. Mann, calling him "corrupt" (*CEI*, 150 A.3d at 1263), "on the take" (SOMF ¶ 25), and a "liar" and a "charlatan[]" (SOMF ¶ 25). He has advocated that Dr. Mann should lose his job (SOMF ¶ 25) as well as his funding (SOMF ¶ 25).

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[3] http://web.archive.org/web/20120729144615/http://cei.org/about-cei

[4] At the time of CEI's defamatory article, it had just lost a challenge to the EPA's greenhouse gas "endangerment finding." EPA had investigated and rejected CEI's claims of scientific misconduct and had concluded that, "a considerable body of scientific evidence [supports]. . . that motor-vehicle emissions contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.'" *See Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 115 (D.C. Cir. 2012) *citing* EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009).

[5] http://web.archive.org/web/20120729144615/http://cei.org/about-cei

Mr. Simberg also publishes his own website, Transterrestial Musings, where he advocates against pandemic public safety restrictions, endorsing articles that "people should not wear masks" (SOMF ¶ 26), and that "lockdowns kill people" (SOMF ¶ 26). He also promotes conspiracy theories, including "birtherism," the allegation that former President Obama was born in Kenya (SOMF ¶ 26). In this regard, as respected journalist James Fallows wrote in the *Atlantic* in the wake of all of the investigations into Dr. Mann's conduct: "If you hear people talking in environmental debates about "climategate" and "Mann's misconduct," recognize that what you're hearing is just like 'Obama was born in Kenya.' These people are either passively uninformed or knowingly beyond the reach of fact." SOMF ¶ 29. And in Mr. Simberg's case, he believes that he can knowingly engage in false attacks against public figures such as Dr. Mann because, in his view, "all's fair in love war and political campaigns," and that "people are entitled to say what they want about public figures." SOMF ¶ 27.

Until a falling out related to this litigation, Mark Steyn wrote for the National Review Online, a widely read conservative news and opinion website. Mr. Steyn was National Review's most prized writer, its "All Star" (SOMF ¶ 30) and its "Happy Warrior" (SOMF ¶ 30). He was widely admired for his controversial and acerbic views, and paid more than anyone else at the publication, including the editor and the publisher. (SOMF ¶ 31). Mr. Steyn is currently a guest host for the Rush Limbaugh Show, and has been criticized for his homophobic and anti-Muslim views.[6] He also writes frequent articles excoriating and insulting Dr. Mann: "Doctor Fraudpants" (SOMF ¶ 33), "a worthless piece of garbage" (SOMF ¶ 33), "an insecure litigious dweeb" (SOMF ¶ 33), "a serial liar" (SOMF ¶ 33), "a super-villain" (SOMF ¶ 33), "a sleazy

[6] https://www.mediamatters.org/national-review/hour-1-fill-steyn-compares-torture-memo-controversy-miss-californiagay-marriage and https://www.mediamatters.org/fox-friends/right-wing-media-respond-fort-hood-shooting-attacking-american-muslims

charlatan" (SOMF ¶ 33), and "the Oscar Wilde of climate science with his fellow scientists as his rent boys." (SOMF ¶ 33).

C. THE DEFAMATIONS

The defamations in this case arise from the defendants' long-held views that global warming is a hoax and that Dr. Mann is the "poster boy" of "corrupt and disgraced" climate change scientists. *CEI*, 150 A.3d at 1263-64. Defendants' attacks were fueled by the 2009 hacking of emails from the Climate Research Unit at the University of East Anglia. This episode, referred to as "climategate," included emails written by the director of the Climate Research Unit, Phil Jones. One referred to "Mike's Nature trick," another used the term "hide the decline." Defendants also disbelieved the extensive academic and governmental investigations that addressed and explained the context of these allegedly incriminating emails and that cleared the researchers, including Dr. Mann, of any suggestion of fraud or misconduct. According to the defendants, these investigations were "whitewashes" and "cover-ups."

Defendants' invective smoldered after the release of the "Closeout Memorandum" issued by the Inspector General (IG) of the National Science Foundation.[7] (SOMF ¶¶ 135-139). But their fuse was lit with the July 12, 2012, Report by former FBI Director, Louis Freeh, alleging that Dr. Mann's employer, Penn State, had been negligent in investigating misconduct by Jerry Sandusky. *See CEI*, 150 A.3d at 1221-25.

A day later, on July 13, 2012, Mr. Simberg wrote his article entitled *The Other Scandal in Unhappy Valley* and sent it for review to Marc Scribner, his editor at CEI. Mr. Scribner made a number of edits to the article and published it on CEI's Open Market website. The article

[7] The IG Report thoroughly investigated Dr. Mann's conduct and found no evidence of fraud or deception—based in part on an interview with defense expert witness Judith Curry, who stated (five times) that Dr. Mann did not engage in misconduct). SOMF ¶¶ 74, 135-139.

invoked swift condemnation from a variety of organizations, including the Columbia Review of Journalism.[8] It was also condemned by CEI readers,[9] as well as by a number of Mr. Simberg's blogging companions, who warned him that he could be found liable for defamation—to which Mr. Simberg promptly responded, as noted above, that "all's fair in love war and political campaigns." SOMF ¶ 27.

In prior court proceedings, the defendants attempted to justify the Simberg article on the ground that it merely expressed their "opinions" and constituted appropriate commentary on the climate change debate. These arguments were decisively rejected by Judge Combs Greene, Judge Weisberg, and, later, by a unanimous D.C. Court of Appeals, sitting en banc. In its decision, the Court of Appeals held that these statements were not protected opinion or commentary. It also rejected defendants' claims that Dr. Mann had not made a sufficient showing of actual malice in view of all of the governmental and academic investigations clearing the researchers and Dr. Mann, as well as their deep opposition to their side of the global warming debate and their animus towards Dr. Mann. In evaluating the evidence submitted, the Court of Appeals pointed to the multiple academic and governmental investigation reports,[10] which concluded that the scientists' correspondence in the 1,075 CRU emails did not reveal research or scientific misconduct and noted that "appellants do not counter any of these reports with other investigations into the CRU emails that reach a contrary conclusion about Dr. Mann's integrity." *CEI,* 150 A.3d at 1253.

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[8] http://web.archive.org/web/20120727005557/http:/www.cjr.org/the_observatory/michael_mann_national_review_m.php

[9] http://web.archive.org/web/20130208121139/http://www.openmarket.org/2012/07/13/the-other-scandal-in-unhappy-valley/#comments

[10] The Court of Appeals specifically reviewed and summarized in detail the findings of the University of East Anglia Independent Climate Change E-mails Review, Penn State University, the United Kingdom House of Commons, and the Office of the Inspector General of the U.S. National Science Foundation. *CEI,* 150 A.3d. at 1253 .

Discovery is now complete. Over 30 witnesses have been deposed and more than a million documents have been produced by Dr. Mann and his witnesses. Yet the defendants are still is unable to counter any of these reports with contrary evidence or investigations that reach a contrary conclusion about Dr. Mann's integrity. Nor do they have any expert testimony that their allegations against Dr. Mann are true.

D. DEFENDANTS' ALLEGATIONS AGAINST DR. MANN ARE FALSE: THEY HAVE HAD FULL AND OPEN DISCOVERY AND HAVE NO ADMISSIBLE EVIDENCE THAT THEIR STATEMENTS ARE TRUE

For years the defendants have vowed that, given the appropriate opportunity, they would prove "to the world" that the hockey stick was fraudulent, and that global warming was a hoax. CEI's Myron Ebell testified in this case that because he and his organization disbelieved the honesty of many of the climate researchers, they wanted to "get [them] into court," where the researchers would be "required to tell the truth." SOMF ¶ 46. In 2006, Mr. Ebell met up with one of the MBH co-authors, Raymond Bradley, and told him that he looked forward to "see[ing] [him] in court."[11] SOMF ¶ 47. In 2012, after the publication of the defamatory articles, Dr. Mann's attorney sent a letter to CEI requesting an apology and a retraction. SOMF ¶ 48. Upon receiving this letter, another CEI staffer described Mr. Ebell as "happy as a cat." SOMF ¶ 49.

National Review was also pleased when it received a similar letter from Dr. Mann's counsel. In an article entitled "*Get Lost,"* it described the letter as "laughably threatening," and stated that any lawsuit by Dr. Mann would provide it with "a journalistic project of great interest." *CEI*, 150 A.3d at 1264-65. It would hire a "dedicated reporter" to "comb through the [discovery] materials and regularly post stories on Mann," which it promised would "expose [Dr. Mann's] methods and maneuverings to the world." *Id.* The article concluded with its own

[11] Raymond S. Bradley, Global Warming and Political Intimidation: How Politicians Cracked Down on Scientists as the Earth Heated Up (Amherst: University of Massachusetts Press, 2011), p. 28.

threat: that should Dr. Mann proceed with a lawsuit, he risked "making an ass of himself." *Id.* Mark Steyn chimed in as well, promising to call upon "an array of witnesses [to] testify to the fraud necessary to create the hockey stick."[12]

In discovery, CEI has had its opportunity to examine the scientists under oath. National Review has had its opportunity to "comb through" the million pages they demanded both from Dr. Mann and from every one of Dr. Mann's witnesses. And, Mr. Steyn has had his opportunity to bring his array of witnesses into court.

But defendants have identified no proof their accusations are true. Defendants spent virtually no time questioning Dr. Mann on his "methods and maneuverings." They asked no questions about the allegedly suspicious "Nature trick" and "hide the decline" emails that launched many of the spurious fraud allegations. (These terms do not appear once in the transcript.) Rather, the deposition days were consumed with questions about statements that Dr. Mann made about other scientists—entirely irrelevant in this case.

1. DEFENDANTS' EXPERT WITNESSES

As for Mr. Steyn's "array of witnesses,"[13] defendants identified only two: Judith Curry and Abraham Wyner. Not surprisingly, both assiduously *avoided* addressing the allegations of fraud or misconduct. Dr. Curry told defense counsel "upfront" that she would "not…get involved in adjudicating scientific misconduct" in this case. SOMF ¶ 58. Dr. Wyner testified that he was "absolutely specifically" told by defense counsel not to opine on defendants' fraud allegations. SOMF ¶ 59.

[12] http://web.archive.org/web/20201030103744/https://www.steynonline.com/6333/michael-e-mann-liar-cheat-falsifier-and-fraud

[13] http://web.archive.org/web/20201030103744/https://www.steynonline.com/6333/michael-e-mann-liar-cheat-falsifier-and-fraud

Rather than addressing the issue of truth or falsity, defendants' experts were retained instead to offer opinions addressing the defendants' "state of mind"—specifically, whether it was "reasonable" for the defendants to have made their defamatory statements. These opinions are directed to whether the defendants acted with actual malice: knowing falsity or reckless disregard of the truth. Specifically, Dr. Curry's opinion is that it would be "reasonable" for the defendants to have concluded that Dr. Mann engaged in fraud,[14] and Dr. Wyner's opinion is that the defendants' statements "can reasonably be construed [by political commentators] as manipulative." SOMF ¶ 63.

But the law is clear that expert opinion regarding a defendant's state of mind is inadmissible. *See Charalambopoulos v. Grammer*, No. 3:14-cv-2424, 2017 WL 930819, at *12 (N.D.Tex. March 8, 2017); *Fisher v. Halliburton*, Nos. H–05–1731, H–06–1971, H–06–1168, 2009 WL 5216949, at *2 (S.D.Tex. Dec. 21, 2009); *Iacangelo v. Georgetown University*, 560 F.Supp.2d 53, 60 (D.D.C. 2008); *U.S. v. Libby*, 461 F.Supp.2d 3, 7 (D.D.C. 2006). Dr. Mann is moving in separate motions to exclude this evidence on the issue of malice.

In addition, as the motion to exclude Dr. Curry's testimony further asserts, her opinion is barred by other *Daubert* factors, which require that an expert's opinion be based on accurate facts and must be reliable—subject to peer review and accepted in the scientific community. *See*

[14] In explaining her expert opinion, Dr. Curry testified:
A: Okay, if 20 people are calling it a fraud and then the 21st person comes along and calls it a fraud, one might infer that what they're saying is consistent with other statements that people have made. It's a simple statement.
Q: Well, isn't it important to know in terms of evaluating the credibility of information, which you have made no attempt to evaluate here, the credibility of the person making the statement?
MR. WILSON:· Objection to the form.
THE WITNESS:· There's two approaches that you can take. One is to do a personal investigation of all the evidence for and against, which is beyond the interests or capabilities of most journalists. An alternative approach is to parrot what other people are saying or listen to your preferred expert. I mean, there are many different rationales for how people come to a judgment about these things, their personal judgment.
(SOMF ¶ 61) (emphasis added).

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993); *Motorola Inc. v. Murray*, 147 A.3d 751, 756 (D.C. 2016). The burden is on the proponent of the expert testimony to establish that it is based on accurate facts and that it is accepted in the scientific community. *Daubert,* 509 U.S. at 592 n. 10. But here, no such showing has or could be made. To the contrary, as Dr. Mann's motion to exclude demonstrates, Dr. Curry's opinions are factually incorrect and have been *rejected* in the scientific community.

In her report, Dr. Curry posits three reasons why it might have been "reasonable" for the defendants to have made their statements about Dr. Mann. According to Dr. Curry, Dr. Mann committed: (1) "image fraud" in connection with Dr. Mann's participation in a report of the Intergovernmental Panel on Climate Change in 2001, two years after the publication MBH98 and MBH99; (2) "cherry picking" in connection with the selection of the proxy data for the MBH98 and MBH99 research; and (3) "data falsification" in connection with a different peer-reviewed article Dr. Mann and his colleagues published in 2008, nine years after MBH98 and MBH99 were published.

As the attached declarations of Raymond Bradley and Thomas Karl state, Dr. Curry's factual allegations on each of these three points are incorrect. SOMF ¶ 65. Unlike Dr. Curry, Dr. Bradley and Dr. Karl have personal knowledge on these issues, having worked extensively with Dr. Mann on the publications at issue. SOMF ¶ 66. Moreover, Dr. Curry's opinions on these points have been rejected in the scientific community. SOMF ¶ 67. Dr. Curry ignores this fact, but it is addressed in the Bradley and Karl declarations. The truth is that Dr. Curry is an "extreme" outlier in the scientific community, and even her former colleagues at Georgia Tech

agree. SOMF ¶ 68. Her performance reviews noted that the colleagues were "troubled by the vision [she] has on climate science—definitely not mainstream and quite extreme."[15] *Id.*

Finally, it must be noted that instead of establishing that the defendants' allegations are true, the testimony of Dr. Curry and Dr. Wyner demonstrates that they are false. In her deposition, Dr. Curry confirmed that—prior to her retention in this case—she had specifically stated on her website that **Dr. Mann had not engaged in research misconduct—falsification or fabrication.** SOMF ¶ 73. And when interviewed by the National Science Foundation, Dr. Curry told the Inspector General (five times) that **Dr. Mann did not commit research misconduct.** SOMF ¶¶ 74 & 139. Dr. Wyner's testimony also refutes defendants' allegations. In his deposition he testified that, in his opinion, **the hockey stick was "not a deception."** SOMF ¶ 75.

2. DEFENDANTS' FACT WITNESSES

Defendant's fact witnesses have also testified that Dr. Mann's research was performed appropriately. Roger Pielke, Jr. is a professor at the University of Colorado, Boulder, and has followed the hockey stick issue closely. Dr. Pielke has written numerous articles about this controversy and stated that there was nothing in the climategate reviews that "presented any evidence of fraud." SOMF ¶ 76. He also wrote that the ***allegations against Dr. Mann did not rise to the level of "fraud or misconduct, not even close***." SOMF ¶ 77. When CEI learned that Dr. Pielke, its own witness, had made these statements, CEI cancelled Dr. Pielke's deposition

[15] Nor does Dr. Curry present as an impartial expert witness. She blames Dr. Mann for her dismissal from Georgia Tech and has filed amicus briefs against him in the litigation before this Court. But the truth of the matter is that her wounds were self-inflicted and were due to her extreme views on climate science, views that were questioned by federal program funding managers and by others at "Tier 1 universities" who wanted to know how Georgia Tech could "tolerate [her] positions and her blogging." *See* SOMF ¶ 69.

forty minutes before its scheduled start. The deposition eventually took place later, at the request of Dr. Mann's counsel. SOMF ¶ 78.

Stephen McIntyre is a retired mining executive who has exhaustively reviewed and written on Dr. Mann's research, according to him, more than any other person. He also claims that no one has more knowledge than he about Dr. Mann's work. SOMF ¶ 79. Mr. McIntyre's work has been frequently cited by the defendants in this case as authoritative on the subject of the hockey stick, and Mr. McIntyre and his co-author, Ross McKitrick, an economist, received CEI's prestigious Julian Simon award for their hockey stick investigations. SOMF ¶ 80. Mr. McIntyre has never accused Dr. Mann of fraud or misconduct in any of his writings or in his interview with the National Science Foundation Inspector General. SOMF ¶ 81. To the contrary, Mr. McIntyre has publicly stated that Dr. Mann **"published diligently**." SOMF ¶ 82.Edward Wegman is another of defendants' fact witnesses. He is a statistician who was asked to analyze Dr. Mann's work. He testified to Congress that Dr. Mann used incorrect mathematical models, but never testified—or even suggested—that this was in any way fraudulent or corrupt, or constituted academic, scientific, or research misconduct. SOMF ¶ 85.

E. PLAINTIFF'S PROOF OF FALSITY

In sharp contrast to defendants' failure of proof, Dr. Mann has assembled overwhelming evidence that the defamatory statements were false. This includes: (1) the report of the National Research Council, of the National Academy of Sciences that conducted a review of Dr. Mann's research in 2006 at the request of the United States House of Representatives; (2) the body of extensive peer-reviewed, scientific studies reviewing, validating, and replicating the hockey stick; (3) the reports issued by academic and governmental organizations in 2010 and 2011 which found, as the Court of Appeals affirmed, that Defendants' allegations against Dr. Mann

were false; [16] and (4) the testimony of Dr. Mann's own array of expert witnesses in this case: Dr. Raymond Bradley, co-author of MBH98 and MBH99; Dr. John Mashey, a leading expert on disinformation in the climate change field who has written extensively about climate change issues; Dr. John Holdren of Harvard University, formerly President Obama's top Science Advisor; Dr. Gerald North of Texas A&M University, who chaired the NRC panel which reviewed MBH98 and MBH99; Dr. Naomi Oreskes of Harvard University, who published an analysis of the climate change controversy in *Merchants of Doubt*; Dr. Peter Frumhoff, Science Director of the Union of Concerned Scientists; and Dr. John Abraham, of the University of St. Thomas, an expert on thermodynamics and a leading climate change researcher who reviewed each of the eight academic and governmental investigations into the climategate emails. SOMF ¶ 86.

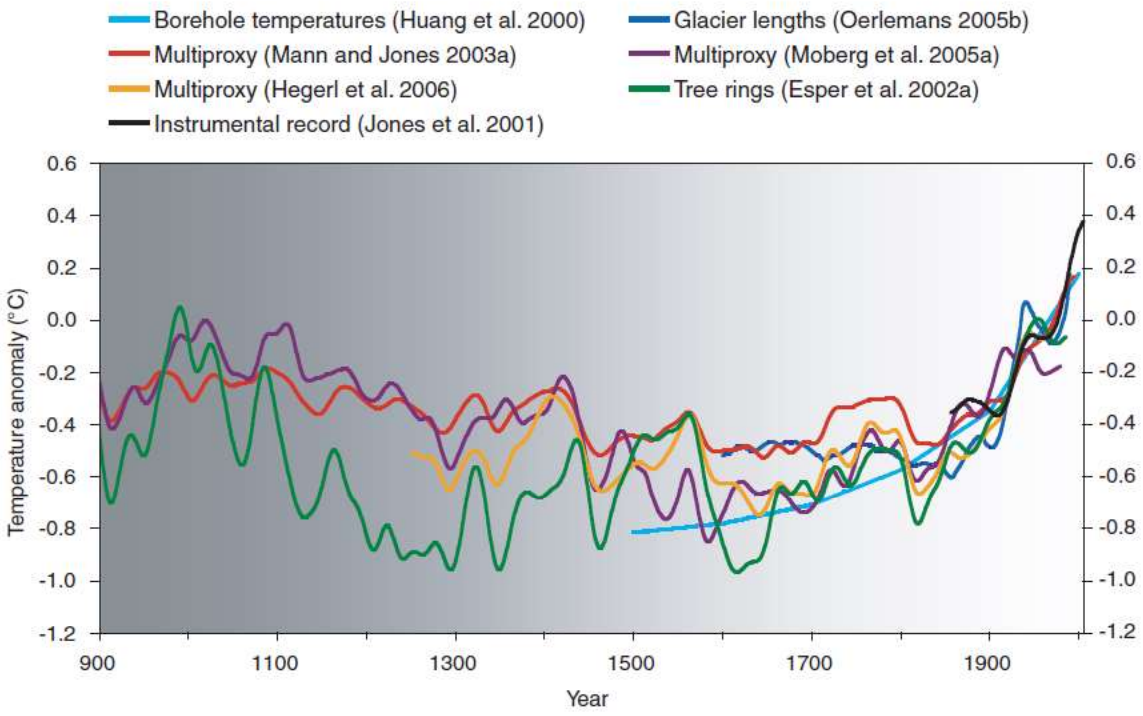
1. THE NATIONAL RESEARCH COUNCIL REPORT

In 2006, at the request of the United States House of Representatives, Committee on Science, the National Research Council of the National Academy of Science evaluated the methodology and conclusions of MBH98 and MBH99, and the overall state of knowledge

[16] These reports are: (a) "Report of the International Panel set up by the University of East Anglia to examine the research of the Climatic Research Unit," (April 12, 2010), by the University of East Anglia, Oxburgh Panel; (b) "The Independent Climate Change E-mails Review," (July 2010), by the University of East Anglia, Russell Panel; (c) "The disclosure of climate data from the Climatic Research Unit at the University of East Anglia," (March 24, 2010), by the UK House of Commons, Science and Technology Committee; (d) "Government Response to the House of Commons Science and Technology Committee 8th Report of Session 2009-10: The disclosure of climate data from the Climatic Research Unit at the University of East Anglia," (September 2010), by the Secretary of State for Energy and Climate Change by Command of Her Majesty; (e) "RA-10 Inquiry Report: Concerning the Allegations of Research Misconduct Against Dr. Michael Mann, Department of Meteorology, College of Earth and Mineral Sciences," by The Pennsylvania State University, (February 3, 2010); (f) "RA-10 Final Investigation Report Involving Dr. Michael Mann," (June 4, 2010), by The Pennsylvania State University; (g) "Letter and Detailed Results of Inquiry Responding to May 26, 2010, Request from Senator Inhofe," (February 18, 2011), by the Office of Inspector General, United States Department of Commerce; (h) "Closeout Memorandum, Case No. A09120086," by The Office of Inspector General, Office of Investigations, National Science Foundation; (i) "EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Final Rule, Fed. Reg. 75:156," (August 13, 2010), by the United States Environmental Protection Agency; (j) "EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volumes 1-3," by the United States Environmental Protection Agency.

concerning proxy data reconstruction of global and hemispheric temperature. SOMF ¶ 87. *See* National Research Council. 2006. *Surface Temperature Reconstructions for the Last 2,000 Years*. Washington, DC: The National Academies Press. https://doi.org/10.17226/11676 (NRC2006). The Chair of the Council was Dr. Jerry North, one of Dr. Mann's expert witnesses in this case. The NRC's review was prompted in part by "critic[isms] of the original papers [which] argued that the statistical methods were flawed, that the choice of data was biased, and that the data and procedures used were not shared so others could verify the work." NRC2006, Preface p. ix. SOMF ¶ 88. These criticisms included those of Stephen McIntyre, one of the defendants' witnesses in this case. SOMF ¶ 89.

The NRC specifically evaluated these criticisms, investigated the hockey stick in depth, and considered a number of subsequent large-scale surface temperature reconstruction studies conducted by different research groups, each of which validated and replicated Dr. Mann and his colleagues' work. SOMF ¶ 90. Each used different methodologies and data, which the NRC depicted in a composite graph, reproduced below, which establishes regardless of the specific proxy and method used, 20th Century warming over the prior millennium is undeniable:



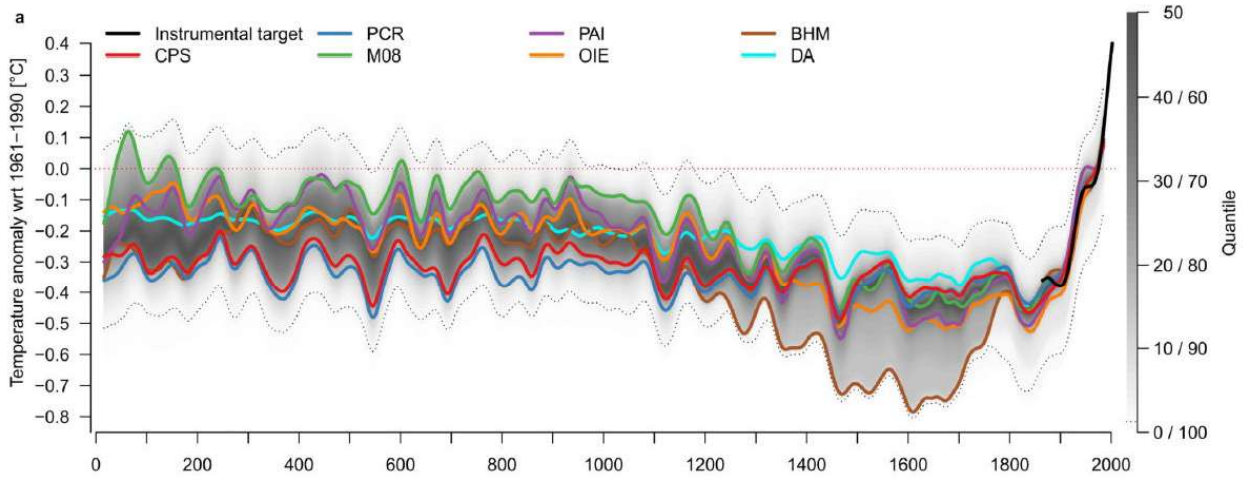
SOMF ¶ 90; *see* NRC2006, Figure S-1, p. 2.

The NRC found the "basic conclusion of Mann et al. (1998, 1999)…[had] subsequently been supported by an array of evidence that includes the additional large-scale surface temperature reconstructions and documentation," noting the studies of Cook et al. 2004, Moberg et al. 2005b, Rutherford et al. 2005, D'Arrigo et al. 2006, Osborn and Briffa 2006, Wahl and Ammann (in press at the time of the NRC report) (SOMF ¶ 93), and concluded as follows: "***the MBH authors accurately and honestly reported their underlying research and did not make claims that were stronger than the data could support.***" SOMF ¶ 94. Dr. North has addressed this report in this case and has also reviewed "the great deal of research in the area of global warming which has further confirmed the conclusions of the committee." SOMF ¶ 95. As Dr. North further states, "the MBH work has stood the test of time and should be considered a significant and pioneering contribution in the area of climate science." SOMF ¶ 96.

2. THE PEER REVIEWED STUDIES

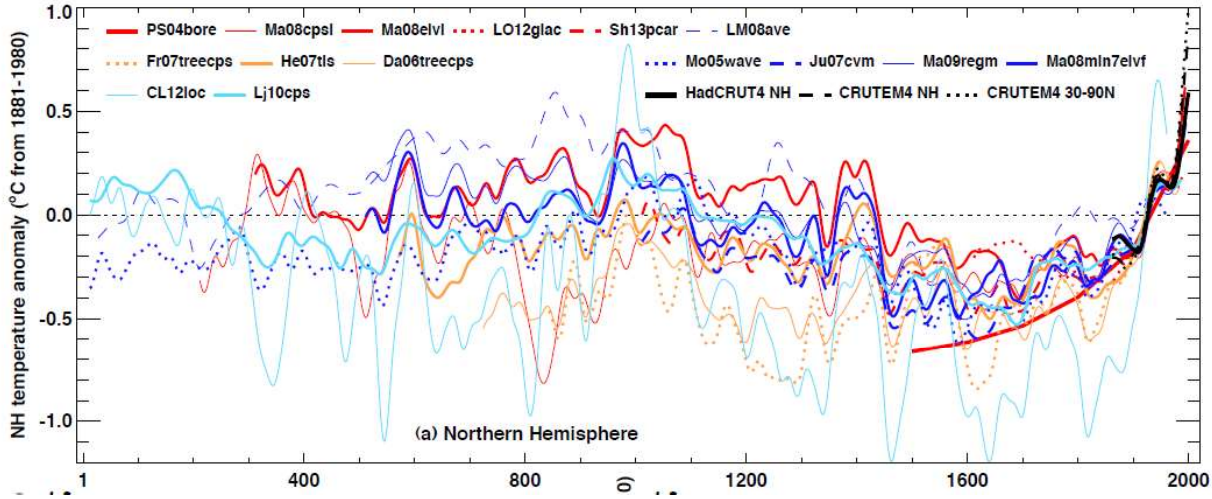
At the time NRC issued its report, six different peer-reviewed studies had confirmed the validity of the MBH research (cited above). Each used different methodologies and data from the MBH papers. Each reached the same conclusions as the MBH authors. Since that time, as Dr. North observed, dozens of subsequent paleoclimate reconstructions using a wide variety of proxy data and analytical methods have cited to, validated, and extended the work on the hockey stick. SOMF ¶ 111.

One of the most recent examples is a paleoclimate temperature reconstructions study performed by the European PAGES consortium, which used seven different statistical methods drawing from a global collection of temperature-sensitive paleoclimate records to reconstruct global temperature over the past 2,000 years. SOMF ¶ 118; *see* PAGES 2k Consortium, Neukom R, Barboza LA, et al. *Consistent multi-decadal variability in global temperature reconstructions and simulations over the Common Era. Nat Geosci*. 2019;12(8):643-649. doi:10.1038/s41561-019-0400-0. This study demonstrated remarkably synchronous temperature reconstructions and strongly reinforced the findings in a follow study, Mann et al. 2008, depicted below as the M08 data:



SOMF ¶ 120.

The most recent IPCC report, the Fifth Assessment Report published in 2013, featured the subsequent work Drs. Mann, Hughes, and Bradley, *Proxy-based reconstructions of hemispheric and global surface temperature variations over the past two millennia*, Michael E. Mann, Zhihua Zhang, Malcolm K. Hughes, Raymond S. Bradley, Sonya K. Miller, Scott Rutherford, Fenbiao Ni, Proceedings of the National Academy of Sciences Sep 2008, 105 (36) 13252-13257; DOI: 10.1073/pnas.0805721105 (Mann, et al. 2008). SOMF ¶ 116. Numerous other paleoclimate reconstructions which again show remarkable consistency in demonstrating the anomalous nature of 20th Century temperatures, as depicted in this composite hockey stick graph:



IPCC, 2013: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp., Figure 5.7(a).

A common measure of the contribution a scientific paper makes toward developing a scientific consensus is the number of citations it receives in the scholarly literature. MBH98 and MBH99 have been widely cited in the peer reviewed literature, according to Google Scholar. SOMF ¶ 112. At the present time, MBH98 has been cited by 2,470 scholarly works and publications;[17] and MBH99 has been cited by 2,410 scholarly works and publications.[18]

3. THE CLIMATEGATE INVESTIGATIONS

In the wake of the theft of the "climategate" emails, eight different academic and governmental panels conducted investigations into the conduct of the climate scientists, including Dr. Mann. The Court of Appeals confirmed: "[f]ollowing disclosure of the emails and the questions raised, Penn State, the University of East Anglia, and five governmental agencies — the U.K. House of Commons Science and Technology Committee, the U.K. Secretary of State for Energy and Climate Change, the Inspector General of the U.S. Department of Commerce, the U.S. Environmental Protection Agency, and the U.S. National Science Foundation — issued reports after conducting inquiries into the validity of the methodology and research underlying the hockey stick graph and investigating the allegations impugning the integrity of Dr. Mann's and other climate scientists' conduct." *CEI,* 150 A.3d at 1223.

After reviewing all these reports, the Court of Appeals observed that none of these investigations found any evidence of fraud, falsification, manipulation or misconduct. *Id.* at

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[17] https://www.google.com/search?rlz=1C1GCEJ_enUS891US891&sxsrf=ALeKk01MoJK0TLOvxgbDrxgxBpNQNl_olA%3A1610764145281&ei=cU8CYP6AEOOO5wLzxqeoDQ&q=Global-scale+temperature+patterns+and+climate+forcing+over+the+past+six+centuries&oq=Global-scale+temperature+patterns+and+climate+forcing+over+the+past+six+centuries&gs_lcp=CgZwc3ktYWIQDFAAWABg6x1oAHABeACAAQCIAQCSAQCYAQCqAQdnd3Mtd2l6&sclient=psy-ab&ved=0ahUKEwi-_ceFtJ_uAhVjx1kKHXPjCdUQ4dUDCA0.

[18] https://scholar.google.com/scholar?rlz=1C1GCEJ_enUS891US891&sxsrf=ALeKk03rgc8bwOoUE54XvKtfrRHwTvJ2oQ:1610763800601&gs_lcp=CgZwc3ktYWIQDDIECAAQRzIECAAQRzIECAAQRzIECAAQR1CzIlizImDbQmgAcAR4AIABAIgBAJIBAJgBAaABAqABAaoBB2d3cy13aXrIAQTAAQE&um=1&ie=UTF-8&lr&cites=11253045204762962594.

1223. Further, allegations that Dr. Mann had engaged in deception and academic and scientific misconduct "[have] been proved to be false by four separate investigations." *Id.* at 1245. Regarding the defendants' assertions that the negative findings do not support a conclusion that their statements were, in fact, false, the Court of Appeals held: "a determination that there is 'no evidence' of fraud is an ultimate conclusion that investigation has not turned up any evidence of misconduct." *Id.* at 1256.

The Court of Appeals also addressed CEI's criticisms of the Penn State inquiry and its assertion that there had not yet been an independent investigation of Dr. Mann's research. It concluded: "In this, Mr. Simberg's article was inaccurate." *Id.* at 1246. It continued: "As the NSF Report clearly lays out, in addition to 'fully review[ing] all the reports and documentation the University provided,' NSF reviewed 'a substantial amount of publicly available documentation concerning both [Dr. Mann's] research and parallel research conducted by his collaborators and other scientists in that particular field of research.' The NSF also independently interviewed Dr. Mann, his 'critics, and disciplinary experts.'" *Id.* at 1246-47.

Dr. Mann's expert witness also address the climategate investigations. Dr. Holdren notes that the allegations against the climate scientists that led to these investigations were "bankrupt" and highlight the harassment that climate denialists inflict on climate change researchers. SOMF ¶ 127. As Dr. Frumhoff and Dr. Oreskes state, the reports of the investigations "vindicated the integrity" of the scientists in question, SOMF ¶ 128, and, in particular, "exonerated" Dr. Mann. SOMF ¶ 128. Dr. Abraham testifies that the investigations confirm the accuracy and validity of the hockey stick and concludes with the following observation: "In fact, the irony is that the unfounded complaints have given such intense scrutiny to Dr. Mann's work, that we now know, with great certainty, he was correct all along." SOMF ¶ 129.

Finally, Defendants have identified no evidence that the investigations into Dr. Mann's conduct were somehow unreliable, and they have failed to conduct their own investigation into the climategate emails as the Court of Appeals stated they should have in order to legitimately attack Dr. Mann's integrity. *CEI,* 150 A.3d at 1253. Their theory that these investigations—every one of them—was a "whitewash" and "cover-up" is just that: a theory grounded in nothing but their own confirmation bias –and without a shred of supporting evidence. They have spent a huge amount of time in this case trying to impeach the Penn State investigation. They have subpoenaed documents from the University and deposed all three of the members of the panel that conducted the inquiry, as well as former Penn State President, Graham Spanier. SOMF ¶ 130. Yet, discovery only confirmed that the Penn State investigation was thorough and complete. Henry Foley, the former Vice President for Research and Dean of Graduate Studies at Penn State, testified that in view of the public scrutiny of the issue, the committee was "keenly concerned that we try to do everything as carefully and as well as we possibly could." SOMF ¶ 131. He also testified that the committee came into the investigations with no preconceived notions and stated that he and Dr. Scaroni (a committee member) were initially skeptical of the validity of the hockey stick research until convinced otherwise. SOMF ¶ 132.

As Candice Yekel, Penn State's Research Integrity Officer testified:

> Q: What would you say to the people that say that Penn State's inquiry and investigation of Dr. Mann was a whitewash?
>
> A: I would say that is not true, and we took great care and effort to make sure we looked at these allegations…. The committee members…were some of our best. And so I would absolutely stand behind the report that it was thorough and complete.

> Q: What would you say to someone that alleges that Penn State's inquiry and investigation was a cover-up of wrongdoing?
>
> A: I would say that is not accurate. And to suggest such a thing, I would expect to have some evidence to even suggest such a thing.

See SOMF ¶ 134.

There is no such evidence. Nor is there evidence that any of the other investigations was a "whitewash" or a "cover-up." Defendants have made no attempt to impeach the NOAA investigation, or the EPA investigation (which, ironically, CEI requested), or any of the investigations carried out in the United Kingdom. Defendants did send a Freedom of Information Act request to the National Science Foundation, only to learn that both Judith Curry and Stephen McIntyre had been interviewed by NSF investigators, with neither accusing Dr. Mann of misconduct—and Dr. Curry explicitly stating that Dr. Mann did not engage in misconduct. SOMF ¶¶ 135-139.

4. DR. MANN'S WITNESSES

Dr. Mann's witnesses directly address the falsity of Defendants' allegations. Dr. Bradley, noting the extensive body of peer-reviewed articles validating Dr. Mann's research, states:

> This body of scientific reports is significant for multiple reasons. Each was conducted by qualified and independent, accredited scientists. In addition, each reaches essentially the same conclusion, reinforcing and supporting the conclusions reached by the others. Specifically, they each found that there is no basis to conclude that: a. the MBH authors had molested or tortured the data used in our studies; b. the MBH authors had engaged in data manipulation; c. the MBH authors had engaged in corrupt or disgraced science or that any of these investigations were a whitewash; d. anyone covered up or allowed to continue heinous crimes or that the MBH authors had engaged in academic and scientific misconduct; and e. the "hockey stick" graph was fraudulent.

SOMF ¶ 142.

Dr. Naomi Oreskes also rejects Defendants' allegations against Dr. Mann as "false and unjustified." SOMF ¶ 143. Dr. Peter Frumhoff similarly opines that the "statements made by National Review and the Competitive Enterprise Institute at issue in this case are false." SOMF ¶ 144. John Mashey states in his report that there is no research demonstrating that Dr. Mann's research is falsified or that his methods or conclusions were fraudulent or involved misconduct. SOMF ¶ 145. He also states that no researcher who has investigated Dr. Mann's work has suggested that his research was fraudulent or improper or constituted misconduct, including the defendants' own witnesses: Mr. McIntyre, Dr. Wyner, and Dr. Wegman. SOMF ¶ 146.

Dr. Mashey was the last expert witness to testify in this case and thus had an opportunity to review all of the defendants' expert reports, all of their deposition testimony, and all of their fact witness testimony (except for Dr. Wegman who was deposed two days later). SOMF ¶ 147. In reviewing this testimony, Dr. Mashey observed correctly that not one of defendants' witnesses made any allegation of fraud, or corruption, or scientific misconduct, or scientific misconduct, or research misconduct. SOMF ¶ 148. (Nor did Dr. Wegman in his subsequent deposition.) SOMF ¶ 148.

In sum, as Dr. Mashey states, the allegations of fraud and improper conduct are false. SOMF ¶ 149. And as Dr. Bradley states: "there is no factual basis for any of the statements" at issue in this litigation. SOMF ¶ 150.

III. PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED: THERE IS NO GENUINE DISPUTE THAT THE DEFENDANTS' ALLEGATIONS AGAINST DR. MANN ARE FALSE

D.C. Superior Court Rule 56 provides that "[a] party may move for summary judgment, identifying each claim or defense—*or the part of each claim* or defense—on which summary

judgment is sought."[19] (emphasis added). The Advisory Committee's Note to the 2010 amendments to Federal Rule of Civil Procedure 56 explains that this sentence was "added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, *or part of a claim* or defense." Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment (emphasis added).

Since 2010, courts have repeatedly recognized that it is proper to move for summary judgment on a single element, or part of a claim.[20] *See, e.g., United States ex rel. Morsell v. Symantec Corporation*, No. 12-cv-800, 2020 WL 5651277, at *27 (D.D.C. March 30, 2020) (finding that the "[g]overnment is . . . only entitled to partial summary judgment on [the duty] element of its negligent misrepresentation claim, to the same extent it was entitled to summary judgment on the duty element of its breach claim."); *LUX EAP, LLC v. Bruner*, No. 17-cv-1359, 2018 WL 6016973, at *13 (C.D.Cal. July 31, 2018) (granting partial summary judgment as to the publication element of the counterclaim for defamation); *Hudak v. Clark,* No. 3:16-cv-288, 2018 WL 1785865, at *2 (M.D.Pa. April 13, 2018) (granting plaintiff's motion for partial summary judgment as to a single element, the absence of probable cause, of his claim for unlawful seizure/arrest); *Operation Technology, Inc. v. Cyme International T & D Inc.,* 14-cv-00999, 2016 WL 6246806, at *8 (C.D.Cal. March 31, 2016) ("grant[ing] summary judgment on the element of a Lanham Act false advertising claim that several communications were literally false statements of fact.").

[19] "This rule is identical to *Federal Rule of Civil Procedure 56*, as amended in 2010, except that 1) a reference to local district court rules is omitted from the language in subsection (b)(1) and 2) subsection (b)(2), which is unique to the Superior Court rule. . ." DC R RCP Rule 56, cmt. to 2017 Amendments.

[20] Plaintiff notes that despite being decided after 2010, the D.C. District Court in *Davis v. District of Columbia,* 2020 WL 6134670, at *6 n.8 (D.D.C. 2020) evidently did not consider the amendment.

"Regardless of whether a party seeks summary judgment on part of a claim or the entire claim, the same standard applies: The movant must establish through its pleadings that no genuine issue exists as to a material fact." *United States ex rel. Landis v. Tailwind Sports Corp.,* 234 F.Supp.3d 180, 191 (D.D.C. 2017); *Johnson v. Washington Gas Light Co.,* 109 A.3d 1118, 1120 (D.C. 2015) ("to prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.").

> Once the movant has made a sufficient evidentiary showing to support the motion, the opposing party's response must set forth specific facts showing that there is a genuine issue for trial. The movant is entitled to summary judgment if the opposing party fails to make a sufficient showing on an essential element of her claim with respect to which she has the burden of proof. However, in assessing whether there exists a genuine issue of material fact, the pleadings and probative evidentiary materials submitted on the motion must be viewed in the light most favorable to the non-moving party[.]

Johnson, 109 A.3d at 1120.

One element of Dr Mann's defamation claim is the necessity to show that the statements at issue are false.[21] The defamatory statements made in this case by Mr. Simberg and CEI include the allegation regarding "hockey stick deceptions," the allegation that Dr. Mann, "molested and tortured data" comparable to the conduct of Jerry Sandusky, the allegation that Dr. Mann engaged in data manipulation to keep the blade on the hockey stick, the allegation that Dr. Mann was corrupt, and the allegation that Dr. Mann committed "academic and scientific misconduct." As the Court of Appeals has held, these allegations convey the defamatory

[21] To succeed on a defamation claim, a plaintiff must prove: "(1) that the defendant made a ***false*** and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement [met the requisite standard]; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *See CEI*, 150 A.3d at 1240 (emphasis added).

messages that: (1) Dr. Mann "engaged in data manipulation that was fraudulent…," *id.* at 1249, n. 46; (2) Dr. Mann engaged in "deception and misconduct," *id.* at 1245, 1260; and (3) Dr. Mann committed "wrongdoing" by "molesting and torturing data." *Id.* at 1248.

There is no genuine issue that these statements are false. Dr. Mann's evidence of falsity, cited above, is overwhelming. In contrast, CEI and Mr. Simberg have identified no evidence that any of these allegations are true. They have no evidence that the Dr. Mann is corrupt, or engaged in deception, or misconduct, or manipulated data to obtain a pre-determined result. They have no evidence that Dr. Mann engaged in wrongdoing by molesting and torturing data. And even were the opinions of Dr. Curry and Dr. Wyner considered admissible on the issue of truth—and by their own admissions, they are not—neither will testify that the defamatory statements are true. To avoid summary judgment defendants must present admissible evidence establishing a genuine issue of material fact—here there is none.

IV. THE AFFIRMATIVE DEFENSES OF TRUTH AND SUBSTANTIAL TRUTH SHOULD BE STRICKEN

A court may strike an affirmative defense where, as here, it is clear that the defense is "irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense." *Malibu Media, LLC v. Parsons*, No. 12-1331, 2013 WL 12324463, at *2 (D.D.C. May 31, 2013); *Intex Recreation Corp. v. Team Worldwide Corp.,* 390 F.Supp.2d 21, 24 (D.D.C. 2005). Courts are often inclined to strike an affirmative defense where discovery has been completed and the sufficiency of the allegations can be determined on the merits. *See, e.g., Mme. Pirie's v Keto Ventures, LLC*, 57 N.Y.S.3d 555, 557 (3d Dep't June 15, 2017) (holding that the court "properly granted plaintiffs' motion for summary judgment dismissing defendants' affirmative defense and counterclaim for fraud" after discovery was completed.); *S.E.C. v. Sands*, 902 F.Supp. 1149, 1166 (C.D.Cal. 1995) (granting the SEC's

motion to strike the affirmative defense of unclean hands after discovery was completed and defendants had produced no evidence of unconstitutional actions by the SEC); *Fijal v. American Export Isbrandtsen Lines*, 514 N.Y.S.2d 6, 7 (1st Dep't 1987) (finding that the affirmative defense of contributory negligence was unsubstantiated and properly stricken after discovery and deposition proceedings had been completed.); *Schiavone Const. Co. v. Time, Inc.,* 619 F.Supp. 684, 700-01 (D.N.J. 1985) (holding that no disputed issue of fact existed as to plaintiffs' truth defense, striking the defense, and granting plaintiffs' motion for summary judgment on that element of their defamation claim).

As noted above, neither CEI nor Mr. Simberg asserts that their statements were true. They do assert, however, that their statements were not "substantially false," which we assume is the defense generally referred to as the "substantial truth" defense. *See* SOMF ¶ 151.

Substantial truth is a defense that permits the court to overlook minor inaccuracies and mistakes. But only minor inaccuracies and mistakes. As an affirmative defense, the burden is on the defendant, who is required to prove that the statements made were substantially true, and that any minor misstatements of fact or inaccuracies of expression were immaterial." *Lohrenz v. Donnelly*, 223 F.Supp.2d 25, 59 (D.D.C. 2002); *see also Restatement (Second) of Torts* § 581A, comment f (1977).

Accordingly, any error in the publication must be minor, and must be immaterial. But further, in considering whether the doctrine even applies, the court must focus on whether the conduct that the defendants assert is "substantially true" is the same—or different—than the conduct addressed in the publication. "It is . . . the truth or falsity of the particular charge that is to be determined." *Restatement (Second) of Torts* § 581A, comment f. In other words, "truth is no defense where the plaintiff 'is found to have engaged in some other substantially different

kind of misconduct even though it is equally or more reprehensible.'" *Schiavone*, 619 F.Supp. at 701 (citing *Restatement* § 581A, comment f.); *see also Kilian v. Doubleday & Co.,* 79 A.2d 657, 660 (Pa. 1951) ("if the accusation is one of particular misconduct, . . . it is not enough to show a different offense, even though it be a more serious one. . . . [A] charge of misconduct *of any specific kind* is not justified by proving plaintiff guilty of misconduct of a similar character.). For example, the fact of a conviction for a charge of petty larceny does not render the allegation that the defendant had a "mania for stealing" substantially true. *See Register Newspaper Co. v. Stone*, 102 S.W. 800 (Ky.App. 1907). Similarly, a conviction for "neglect of duty" does not justify a charge of "knowing indifference to inhumane treatment." *Kilian,* 79 A.2d at 559-60. And a statement that an individual was guilty of robbery is not substantially true where that person was only guilty of misdemeanor theft. *See Weber v. Fernandez,* No. 02-18-00275-CV, 2019 WL 1395796, at *12-13 (Tex.App.Fort Worth, March 28, 2019). The *Kilian* court provided another example: "If, for instance, one were to assert that A had embezzled $50 from the X Bank he would not support the truth of such allegation by testimony that A embezzled $100 from the Y Bank." 79 A.2d at 660.

In *Crane v. New York World Telegram Corp.,* 308 N.Y. 470, 475-76 (1955), the truth defense failed where a newspaper item stated that Plaintiff was "under indictment," when he had only been *accused* of indictable crimes. As the court noted, the defense was based entirely on the improper assumption that a jury could accept the broader meaning urged by defendants. *Id.* at 475. "It is one thing to say that a person has been accused by his colleagues and . . . has testified before a grand jury to criminal activities, and quite another thing to say that an indictment has been brought against him by a grand jury. The former charge may be a serious blot upon reputation, but the latter says, in a practical and amoral sense, much more, for it

announces that an actual criminal prosecution has been brought against him, that he must stand trial and may be found guilty and sentenced to a prison term." *Id.* at 475-76.

CEI has asserted two different "substantial truth" defenses: the first attempts to justify the "hockey stick deceptions" allegation. The second attempts to justify the allegation of "academic and scientific misconduct." Each is discussed below.

A. "Hockey Stick Deceptions"

In their article, the CEI defendants alleged that Dr. Mann had engaged in "hockey stick deceptions" by molesting and torturing data, and by engaging in data manipulation to keep the blade on the hockey stick. SOMF ¶ 152. As the Court of Appeals stated, these were statements that accused Dr. Mann of "*specific acts* of academic and scientific misconduct *in the manipulation of data,"* of deception "*in producing the graph,*" and of deception "*in the presentation of data*." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1243, 1259, 1260 (D.C. 2016) (emphasis added). As such, the court held clearly that the actionable allegations of "misconduct" and "deception" involved Dr. Mann's data practices that led to the production and presentation of the hockey stick graph.

However, the CEI defendants want to shift the focus away from their allegations of Dr. Mann's deceptive data practices (which they cannot defend) and accuse him instead of a completely different type of alleged "deception." In their Second Supplemental Response to Interrogatory 14, defendants now say that the conduct that constituted "hockey stick deceptions" refers not to Dr. Mann's data practices, but instead to a variety of conduct that occurred *years after* his research was completed and published. *See* SOMF ¶ 155. The newly alleged hockey stick deceptions include, for example, statements that Dr. Mann made to the Penn State investigative committee in 2010—ten years after the hockey stick was published. SOMF ¶ 156.

The other allegations also allege conduct that occurred many years later, including allegations that were investigated—and rejected. SOMF ¶ 157.

CEI's counsel has tried to justify its new position that the term "hockey stick deceptions" means something other than what Mr. Simberg wrote. According to counsel, "Mr. Simberg did not, nor did he intend to, limit the basis for the deceptions concerning the 'hockey stick' to just the research and publication of the MBH articles in 1998 and 1999." *See* SOMF ¶ 158.

This statement is demonstrably false. In his deposition Mr. Simberg did, in fact, "limit the basis for the deceptions." And he did so by explicitly limiting that basis to the creation of the hockey stick.

> Q: Okay. Tell me what the hockey stick deceptions were?
>
> A: The hockey stick deceptions were—well the hockey stick itself was a graph…[and] the deception was the means by which they generated the curve by the use of, you know, selective – selection of proxy—
>
> Q: And-
>
> A: --among other things.
>
> Q: Well, what else—you mentioned the selection of proxy data before, and we've been through that. Tell me what the other deceptions were other than the selection of the particular proxy data they used.
>
> A: Well, that basically was it.

SOMF ¶ 159.

> And continuing:
>
> Q: Were there any other hockey stick deceptions?
>
> A: No. But. again, those seem sufficient to me.
>
> Q: I understand.
>
> A: And I think there were other deceptions. Not hockey stick deceptions.

SOMF ¶ 160.

It cannot be clearer. The Simberg article criticized Dr. Mann for torturing and molesting data and engaging in "data manipulations" in developing the hockey stick. The Court of Appeals correctly interpreted those statements as allegations of deceptions in "the manipulation of data," in the "presentation of data, and in "producing the graph." Mr. Simberg himself confirmed that the term "hockey stick deceptions" meant "the means by which they generated the curve." SOMF ¶ 162. The Simberg article had nothing to do with Dr. Mann's conduct before the investigative committee ten years later, or with any conduct other than his hockey stick research. SOMF ¶¶ 163 and 164. Defendants' new theory that the term "hockey stick deceptions" refers instead to any conduct *other* than Dr. Mann's conduct in producing the graph, or as Mr. Simberg clearly identified, the "means" by which he "generated the curve" is baseless. *Id.* Defendants are asserting an entirely different type of conduct here, and the substantial truth defense does not apply.

B. "Academic and Scientific Misconduct"

The Simberg article accused Dr. Mann of academic and scientific misconduct. SOMF ¶ 165. Just prior to the paragraph in which this statement appears, the article addresses the NSF Research Misconduct Regulations. SOMF ¶ 165. The article criticizes the NSF investigation and its finding, repeated in the Simberg article, that "nothing in [the emails] evidenced *research misconduct within the definition of the NSF Research Misconduct Regulation*." SOMF ¶ 165. The article then links directly to another article which identifies what acts constitute research misconduct, and they include *falsification, fabrication, and plagiarism.*[22] SOMF ¶ 165.

[22] https://scholarsandrogues.com/2011/08/27/nsf-psu-mann-exonerated/

There is no question that Mr. Simberg understood that the phrase "research misconduct" he described in the article included falsification and fabrication.

> Q: All right. Let's talk about the academic and scientific misconduct that you're referring to on the part of Dr. Mann. You said earlier that he had engaged in unscientific conduct, right?
>
> A: Yes
>
> Q: (after objections) That's scientific misconduct, isn't it?
>
> A: I'm not sure if they're exactly the same thing. . . .[T]here's a specific definition…the National Science Foundation has for research misconduct.
>
> Q: All right. And what is that?
>
> A: It's—specifically it's—basically three things. I think its falsification, fabrication or plagiarism.

SOMF ¶ 166.

The CEI defendants concede in this case that Dr. Mann did not engage in research misconduct. Mr. Simberg stated in his deposition that Dr. Mann did not engage in data fabrication and further that he did not think he engaged in data falsification. SOMF ¶ 167. But they are now attempting to invoke the "substantial truth" defense to allege that misconduct means something other than misconduct. According to their Second Supplemental Responses to Interrogatories 10 and 11, defendants now say that their use of the term "academic and scientific misconduct" was intended to mean that Dr. Mann did not act with "academic integrity," and they go on to allege that Dr. Mann's conduct violated the Penn State Standards for Professional Ethics (referred to as AD47). *See* SOMF ¶ 168.

This is absurd. AD47 is an ethical standard, specifying that professors should strive for the highest standards in data gathering and data presentation. SOMF ¶ 169. AD47 is not a misconduct standard—misconduct," by definition, is addressed in the Research Misconduct

Standards—which defendants concede Dr. Mann did not violate. SOMF ¶ 170. CEI's article was not one that accused Dr. Mann of an ethical violation. SOMF ¶ 171. It accused him of serious wrongdoing, corruption, and data manipulation in order to reach a predetermined conclusion. SOMF ¶ 171. It specifically addressed the Research Misconduct Regulations and linked to an article defining Research Misconduct to include falsification and fabrication. SOMF ¶¶ 171 and 172. Those allegations entail far more than an ethical violation—they are accusations of fraud and falsification. SOMF ¶ 173. And this is precisely how the Court of Appeals interpreted the articles, noting that they made factual assertions that Dr. Mann "*had engaged in specific acts of academic and scientific misconduct* ***in the manipulation of data.****" CEI,* 150 A.3d at 1243. (emphasis added). SOMF ¶ 173. It was the "data manipulation" that was allegedly fraudulent and "constituted scientific and academic misconduct." *Id.* at 1249, n. 46.

Ethical violations are substantially different than academic and scientific misconduct and the substantial truth defense does not apply for this reason alone. Moreover, the conduct that supposedly violated the Penn State ethical standards was conduct that occurred well after the hockey stick was produced and published. This supposedly unethical conduct has nothing to do with Dr. Mann's alleged "manipulation of data" that the Court of Appeals has already held constitutes the conduct alleged to constitute misconduct.

Accordingly, the substantial truth defense does not apply for two separate and independent reasons. First, the allegation of misconduct is a substantially more significant offense than the allegation of an ethical violation. Second, these new ethical allegations involve conduct that is substantially different from the allegations of manipulative data practices that led to the presentation of the hockey stick graph.

Finally, it should be noted, once again, that defendants have no proof on this issue. They have no proof of any type of academic or scientific misconduct—even if that term could now be speciously considered an ethical violation. As an affirmative defense, it is CEI's burden to establish that Dr. Mann engaged in a violation of AD47, which, given its rather aspirational and ambiguous guidelines, would require them to produce expert testimony regarding both the standard of care, as well as the breach of that standard. *See, e.g., Webster v. Claremont Yoga,* 236 Cal. Rptr. 3d 802, 806 (2018) (expert testimony necessary to establish standard of care and a breach thereof). But defendants have no such proof. As noted above, both Dr. Curry and Dr. Wyner testified that they were not accusing Dr. Mann of misconduct—any type of misconduct.

V. CONCLUSION

For the foregoing reasons, Dr. Mann respectfully requests that the Court grant its motion for partial summary judgment on the issue of falsity and to strike the affirmative defense of substantial truth.

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Respectfully submitted,

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