APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-CV-101

COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG, APPELLANTS,

v.

MICHAEL E. MANN, APPELLEE,

NO. 14-CV-126

NATIONAL REVIEW, INC., APPELLANT,

v.

MICHAEL E. MANN, APPELLEE.

Appeals from the Superior Court of the District of Columbia (CAB-8263-12)

(Hon. Natalia M. Combs Greene, Trial Judge)
(Hon. Frederick H. Weisberg, Trial Judge)

(Argued November 25, 2014 Decided December 22, 2016)
(Amended December 13, 2018)*

* * *

* This appeal was decided by an opinion issued on December 22, 2016, 150 A.3d 1213. This amended opinion adds a new footnote 39 and revises former footnote 45 (now 46).

Before BECKWITH and EASTERLY, *Associate Judges*, and RUIZ, *Senior Judge*.

RUIZ, *Senior Judge*: These appeals present us with legal issues of first impression concerning the special motion to dismiss created by the District of Columbia's Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act, D.C. Code §§ 16-5501 to -5505 (2012 Repl.): whether denial of a special motion to dismiss is immediately appealable and the standard applicable in considering the merits of an Anti-SLAPP special motion to dismiss.

Appellee Michael E. Mann is a well-known climate scientist whose research in studying the "paleoclimate," or ancient climate, has featured prominently in the politically charged debate about climate change. Dr. Mann filed an action for defamation and intentional infliction of emotional distress against Competitive Enterprise Institute (CEI), Rand Simberg, National Review, Inc. (National Review), and Mark Steyn based on articles written by Mr. Simberg, Mr. Steyn, and National Review's editor Rich Lowry that appeared on the websites of CEI and National Review. Dr. Mann's complaint claimed that the articles which criticized Dr. Mann's conclusions about global warming and accused him of deception and academic and scientific misconduct contained false statements that injured his reputation and standing in the scientific and academic communities of which he is a part.

Defendants argued that Dr. Mann's lawsuit infringes on their First Amendment right of free speech and moved for dismissal under the Anti-SLAPP Act and, alternatively, under Superior Court Rule 12

(b)(6). The trial court ruled that Dr. Mann's claims were "likely to succeed on the merits" — the standard established in the Anti-SLAPP Act to defeat a motion to dismiss — and denied appellants' motions to dismiss and their subsequent motions to reconsider. Appellants — CEI, National Review and Mr. Simberg — sought interlocutory review in this court of the trial court's denial of their motions to dismiss.[1]

As a preliminary matter, we hold that we have jurisdiction under the collateral order doctrine to hear appellants' interlocutory appeals of the trial court's denial of their special motions to dismiss filed under the Anti-SLAPP Act. We further hold that the Anti-SLAPP Act's "likely to succeed" standard for overcoming a properly filed special motion to dismiss requires that the plaintiff present evidence — not simply allegations — and that the evidence must be legally sufficient to permit a jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor. Having conducted an independent review of the evidence to ensure that it surmounts the constitutionally required threshold, we conclude that Dr. Mann has presented evidence sufficient to defeat the special motions to dismiss as to some of his claims.[2] Accordingly, we

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[1] Defendant Steyn did not appeal the trial court's denial of his motions to dismiss the complaint.

[2] Because we hold that the showing required to defeat an Anti-SLAPP special motion to dismiss is more demanding than is required to overcome a Rule 12 (b)(6) motion to dismiss, Dr. Mann's successful response to appellants' AntiSLAPP special motions to dismiss necessarily also defeats appellants' Rule 12 (b)(6) motions to dismiss.

affirm in part, reverse in part, and remand the case to the trial court for further proceedings.

I. Statement of the Case

A. Factual Background

The facts presented in the complaint and subsequent pleadings filed with the court are as follows. Dr. Mann is a graduate of the University of California at Berkeley (B.S. Physics and Applied Math) and Yale University (M.S. Physics; Ph.D. Geology and Geophysics), and has held faculty positions at the University of Massachusetts's Department of Geosciences and the University of Virginia's Department of Environmental Sciences. He is a Distinguished Professor of Meteorology and the Director of the Earth System Science Center at Pennsylvania State University (Penn State).[3] Dr. Mann is considered an authority on climate change science, and has been recognized with honors and awards for his work identifying global warming and its cause.

In 1998 and 1999, Dr. Mann and two colleagues[4] co-authored two scientific papers, the first of which was

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[3] According to the CV currently on Penn State's website, Dr. Mann's title is Distinguished Professor of Atmospheric Science. Michael E. Mann, *Curriculum Vitae* at 2, PENNSYLVANIA STATE UNIVERSITY DEPARTMENT OF METEOROLOGY, http://www.meteo.psu.edu/holocene/public_html/Mann/about/cv.php (last visited Aug. 31, 2016).

[4] The co-authors were Raymond S. Bradley and Malcolm K. Hughes. Dr. Raymond S. Bradley is the Principal Investigator, Distinguished Professor of Geosciences, and Director of Climate Systems Research Center at the Northeast Climate Science

published in the international scientific journal *Nature* and the second of which was published in *Geophysical Research Letters*, that reported the results from a statistical study of the Earth's temperatures over several centuries. Their 1998 study used a technique to reconstruct temperatures from time periods before the widespread use of thermometers in the 1960s by using "proxy indicators" (described by Dr. Mann as "growth rings of ancient trees and corals, sediment cores from ocean and lake bottoms, ice cores from glaciers, and cave sediment cores"). The 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.

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 90% of

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Center at the University of Massachusetts. He received a B.S. degree from the University of Southampton, United Kingdom, and M.S. and Ph.D. degrees from the University of Colorado at Boulder. Raymond Bradley, Ne. Climate Sci. Ctr., https://necsc.umass.edu/people/raymond-bradley (last visited Aug. 31, 2016). Dr. Malcolm Hughes is Regents' Professor of Dendrochronology with the Laboratory of Tree-Ring Research at the University of Arizona. He received B.S. and Ph.D. degrees from Durham University, United Kingdom. Malcolm Hughes, UNIV. OF ARIZ. SCI. LAB. OF TREE-RING RESEARCH, http://ltrr.arizona.edu/people/hughes (last visited Aug. 31, 2016).

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."[5] The hockey stick graph became the foundation for the conclusion that the sharp increase in temperature starting in the twentieth century was anthropogenic, or caused by concentrations of CO_2 in the atmosphere generated by human activity initiated by the industrial age. The hockey stick graph also 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.

In 2001, the Intergovernmental Panel on Climate Change (IPCC),[6] in its Third Assessment Report,

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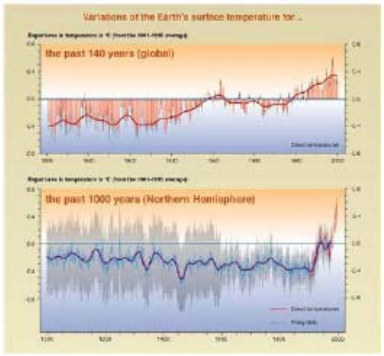
[5] The hockey stick graph appears as follows:



Intergovernmental Panel on Climate Change, Climate Change 2001—IPCC Third Assessment Report (2001), http://www.ipcc.ch/ipccreports/tar/slides/05.16.htm.

[6] The IPCC is an international scientific body created under the auspices of the United Nations Environment Program and

summarized the study and data that led to the hockey stick graph and featured several of the studies that replicated its data. In 2003 and 2005, mining consultant Stephen McIntyre and Professor Ross McKitrick[7] published articles claiming to demonstrate that the hockey stick graph was the result of bad data and flawed statistical analysis. That same year, in a study commissioned by two U.S. Congressmen, Professor Edward Wegman[8] concluded that Dr. Mann's statistical methodology was flawed. That same year, the National Research Council of the National Academies of Science, in a study commissioned by the U.S. House of Representatives, raised questions about the reliability of temperature reconstructions prior to 1600, but agreed substantively with the conclusions represented by the hockey stick graph. Follow-up, peer-reviewed studies published in the literature have independently validated conclusions illustrated by the hockey stick graph.

In November 2009, thousands of emails from the Climate Research Unit (CRU) of the University of East Anglia in the United Kingdom — some between Dr. Mann and CRU climate scientists — were somehow obtained and anonymously published on the

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the World Meteorological Organization. *IPCC Factsheet: What is the IPCC?* 1 (2013), http://www.ipcc.ch/news_and_events/docs/factsheets/FS_what_ipcc.pdf (last visited Aug. 3, 2016). The IPCC was awarded the 2007 Nobel Peace Prize for its work on climate change, jointly with Al Gore. Dr. Mann was a lead author of the IPCC's 2001 Third Assessment Report.

[7] Professor of Economics, University of Guelph, Ontario.

[8] Professor of Statistics, George Mason University, Virginia.

Internet, shortly before the U.N. Global Climate Change Conference was to begin in Copenhagen in December 2009. In a controversy dubbed "Climategate," some of these emails were cited as proof that climate scientists, including Dr. Mann, falsified or manipulated their data, in collusion with government officials, to produce the hockey stick result. The emails led to public questioning of the validity of the research leading to the hockey stick graph and to calls for evaluation of the soundness of its statistical analysis and the conduct of the scientists involved in the research, including, specifically, Dr. Mann.

Following 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. The inquiries that considered the science largely validated the methodology underlying the hockey stick graph. None of the investigations found any evidence of fraud, falsification, manipulation, or misconduct on the part

of Dr. Mann.[9] These reports were published in 2010 and 2011.

On July 13, 2012, Mr. Simberg authored an article entitled "The Other Scandal in Unhappy Valley," which was published on OpenMarket.org, an online blog of CEI. Comparing "Climategate" with the then-front-page news of the Penn State sexual abuse scandal involving Jerry Sandusky that had been revealed in the Freeh Report,[10] Mr. Simberg wrote:

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[9] The investigations considered the Climategate emails. For example, one of the most cited emails, from the director of the CRU to Dr. Mann and two other climate scientists, stated, "I've just completed [Dr. Mann's] *Nature* trick of adding in the real temps to each series for the last 20 years (i.e., from 1981 onwards) and from 1961 for Keith's to hide the decline." The University of East Anglia investigation concluded that the reference to the "trick" used in Dr. Mann's paper for the science journal *Nature* was a colloquialism used by the scientists to describe a specific and legitimate statistical technique used to interpret the data and to exclude certain non-relevant data. Philip Jones, the head of the UEA Climate Research Unit and author of the email, explained that "trick" did not refer to a deception, but rather to "the 'best way of doing or dealing with something,'" namely, the exclusion of proxy temperature data for a period in which thermometer readings were available (i.e., "the decline"). The UEA investigation concluded that the emails used "slang, jargon, and acronyms," and were "extreme modes of expression" but "no[t] indicative of actual behavior that is extreme, exceptional or unprofessional."

[10] Former FBI Director Louis Freeh conducted a review which severely criticized Penn State's investigation of sexual abuse complaints made against Penn State football coach Jerry Sandusky.

> So it turns out that Penn State has covered up wrongdoing by one of its employees to avoid bad publicity.
>
> But I'm not talking about the appalling behavior uncovered this week by the Freeh report. No, I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in service of politicized science that could have dire consequences for the nation and planet. . . .[11]
>
> [M]any . . . luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon

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11 CEI subsequently deleted from its website the comment comparing Dr. Mann to Jerry Sandusky, characterizing it as "inappropriate." Rand Simberg, *The Other Scandal in Unhappy Valley*, COMPETITIVE ENTER. INST. (July 13, 2012), https://cei.org/blog/other-scandal-unhappy-valley.

> for those determined to reduce human carbon emissions by any means necessary. . . .
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality. . . .
>
> Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing in millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being whitewashed investigated. We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?
>
> It's time for a fresh, truly independent investigation.

(strike-through in original).

On July 15, 2012, Mr. Steyn authored an article titled "Football and Hockey," which appeared on National Review's online blog "The Corner." In his article, Mr. Steyn quoted from Mr. Simberg's July 13 article:

> I'm referring to another cover up and whitewash that occurred [at Penn State] two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's

> time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in service of politicized science that could have dire consequences for the nation and planet.

Mr. Steyn then added:

> 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, the very ringmaster of the tree-ring circus. And, when the East Anglia emails came out, Penn State felt obliged to "investigate" Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same [one] who investigated Mann. And, as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.
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> If an institution is prepared to cover up systematic statutory rape of minors, what won't it cover up? Whether or not he's "the Jerry Sandusky of climate change", [sic] he remains the Michael Mann of climate change, in part because his "investigation" by a deeply corrupt administration was a joke.

Dr. Mann's counsel wrote to appellants requesting an apology and retraction of the statements, and threatening litigation if the articles were not removed from their respective websites. The letter stated that the allegations of data manipulation and misconduct were false, and pointed to the investigations that had concluded Dr. Mann had not engaged in wrongdoing or manipulated data in a deceptive manner. No apology was forthcoming, nor were the posted statements withdrawn. Instead, on August 22, 2012, Mr. Lowry wrote an editorial on *National Review*'s website titled "Get Lost" that referred to "Michael Mann of Climategate infamy," characterized his threatened litigation as "a nuisance lawsuit," and included a link to National Review's lawyer's response rejecting Dr. Mann's counsel's request for a retraction. Mr. Lowry explained that "[i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." The editorial concluded: "[Dr. Mann is] going to go to great trouble and expense to embark on a losing cause that will expose more of his methods and maneuverings to the world. In short, he risks making an ass of himself. But that hasn't stopped him before." The underlying lawsuit followed.

B. Trial Court Proceedings

Dr. Mann filed his initial complaint on October 22, 2012, alleging libel and intentional infliction of emotional distress based on appellants' statements accusing him of improperly manipulating data to reach a preordained conclusion, deception, fraud, and misconduct. Appellants filed special motions to dismiss the complaint pursuant to the D.C. Anti-SLAPP Act and motions to dismiss for failure to state

a claim under Superior Court Rule 12 (b)(6). Dr. Mann opposed the motions. On July 19, 2013, Judge Natalia Combs Greene denied the motions. She determined that the subject of appellants' challenged statements brought them within the ambit of the Anti-SLAPP Act, but that Dr. Mann had made the required showing under the Act to defeat the special motions to dismiss. First, the trial court interpreted the "likely to succeed" standard in the Act as substantively similar to the standard for prevailing on a motion for summary judgment or motion for judgment as a matter of law. Second, the trial court concluded that Dr. Mann met this burden by making a prima facie showing that appellants' statements were defamatory and not sheltered by the fair comment privilege, and by providing sufficient evidence for the court to find that "discovery may uncover" that appellants acted with actual malice. Third, the trial court determined that Dr. Mann also made the requisite showing of malicious and outrageous conduct to support his claim of intentional infliction of emotional distress. Finally, the trial court determined that the complaint stated a claim, and thus survived a Rule 12 (b) (6) evaluation.

Appellants asked the trial court to vacate the denials of their motions to dismiss and, after the trial court denied this request, appellants moved for certification of the trial court's orders for interlocutory appeal. The trial court denied the motions for certification. Appellants then appealed to this court, which issued an order to show cause as to why the appeals should not be dismissed for lack of jurisdiction as having been taken from non-appealable orders. On December 19, 2013, these appeals were dismissed as

moot because Dr. Mann filed an amended complaint on June 28, 2013.

The amended complaint is substantially the same as the original complaint, with the addition of one count of libel based on the comment comparing Dr. Mann to Jerry Sandusky, which, in the original complaint, supported only the intentional infliction of emotional distress claim. Appellants renewed their motions to dismiss, and Dr. Mann opposed them. On January 22, 2014, Judge Frederick Weisberg denied the motions, reasoning that Judge Combs Greene's order denying the original motions to dismiss was the law of the case, and adding an analysis of the new defamation count. Appellants again filed motions seeking vacatur of the denial of their motions to dismiss and certification for interlocutory appeal, which were, again, denied by the trial court.

Appellants filed notices of appeal to this court, and Dr. Mann moved to dismiss the appeals on the ground that they seek review of non-final orders that are not immediately appealable, or, in the alternative, to expedite the appeal. The court ordered appellants to show cause as to why the court has jurisdiction to hear these interlocutory appeals. Appellants filed a response, as did Dr. Mann. The court ultimately reserved the jurisdiction question, expedited the appeal, and ordered the parties to file briefs addressing the court's jurisdiction as well as the merits. The District of Columbia and non-appealing defendant Mr. Steyn filed a brief as amicus curiae in favor of the court's jurisdiction to hear the

interlocutory order on appeal.[12] Several organizations filed briefs as amici curiae in support of appellants. We now address all issues.

II. SLAPP Actions and the D.C. Anti-SLAPP Act

A "SLAPP" (strategic lawsuit against public participation) is an action "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893, at 1 (Nov. 18, 2010) (hereinafter Report on Bill 18-893). Thus, the goal of a SLAPP "is not to win the lawsuit but to punish the opponent and intimidate them into silence." *Id.* at 4 (citing George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3, 9–11 (1989)). Enacted in 2012, the D.C. Anti-SLAPP Act was designed to protect targets of such meritless lawsuits by creating "substantive rights with regard to a defendant's ability to fend off" a SLAPP. Report on Bill 18-893, at 1. The rights created by the Act comprise a special motion to dismiss a complaint, D.C. Code § 16-5502, and a special motion to quash discovery orders, requests for information, or subpoenas for personal identifying information in suspected SLAPPs, D.C. Code § 16-5503. This court has interpreted and applied the Anti-SLAPP Act with respect to the provisions concerning the special motion to quash a subpoena, *see Doe v. Burke* (*Burke I*), 91

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[12] Mr. Steyn also urged the court to act expeditiously as Dr. Mann's claims against Mr. Steyn, and Mr. Steyn's counterclaim, have been put on hold in the trial court pending resolution of this appeal.

A.3d 1031 (D.C. 2014), and the award of attorney's fees in connection with such a motion, *see Doe v. Burke* (*Burke II*), 133 A.3d 569 (D.C. 2016). This is the first case presented on appeal that raises the proper interpretation and application of the Act's special motion to dismiss.

Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by "mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502 (b). Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff,[13] who must "demonstrate[] that the claim is likely to succeed on the merits." *Id.* If the plaintiff cannot meet that burden, the motion to dismiss must be granted, and the litigation is brought to a speedy end. *Id.* In this case, the parties agree that appellants made the requisite prima facie showing that the Act applies because the lawsuit is based on articles that appeared on CEI's and National Review's websites that concern the debate over the existence and causes of global warming. *See* D.C. Code § 16-5501 (1) (defining "[a]ct in furtherance of the right of advocacy on issues of public interest" to include "[a]ny written or oral statement made . . . [i]n a place open to the public or a public forum in connection with an issue of public

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[13] The nonmoving party could also be the defendant in the original action, who has filed a counterclaim, and is responding to a special motion to dismiss filed by the counterclaim defendant. For the sake of clarity, we refer to the nonmoving party and plaintiff interchangeably.

interest . . . ."); D.C. Code § 16-5501 (3) ("'Issue of public interest' means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place."). What is contested in this appeal is whether Dr. Mann met his burden of demonstrating that he is "likely to succeed on the merits" of his claims for defamation and intentional infliction of emotional distress. If he has, appellants' special motions to dismiss were properly denied, and the litigation continues. If he has not, the motions should have been granted, and the litigation would be terminated. But we must decide first whether this court has jurisdiction to decide that question at this stage of the litigation.

III. Jurisdiction

Denial of a special motion to dismiss filed under the Anti-SLAPP Act does not end the litigation and is not a final order. To the contrary, it signals that the litigation will continue.[14] Nor is it one of the types of interlocutory orders specified by statute over which this court has jurisdiction. *See* D.C. Code § 11-721 (a)(2)–(3) (2012 Repl.). The denial of a motion to dismiss filed under Rule 12 (b)(6) is not usually immediately appealable. *See McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1135 (D.C. 2010). Thus, we must decide, in the first instance, whether the denial of a special motion to dismiss filed pursuant to D.C. Code § 165502 belongs to that "small class" of non-final orders that may be appealed under the collateral order doctrine established by the Supreme Court in *Cohen v.*

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[14] The grant of a special motion to dismiss, on the other hand, is appealable as a final order. *See* D.C. Code § 11-721 (a)(1).

Beneficial Industrial Loan Corp., because it is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541, 546 (1949).

The test for application of the collateral order doctrine is "stringent." *McNair Builders*, 3 A.3d at 1136 (quoting *Will v. Hallock*, 546 U.S. 345, 349–50 (2006)). For an order to qualify for interlocutory review under the doctrine, "(1) it must conclusively determine a disputed question of law, (2) it must resolve an important issue that is separate from the merits of the case, and (3) it must be effectively unreviewable on appeal from a final judgment." *Id.* at 1135–36 (quoting, and overruling on other grounds, *Finkelstein*, *Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 339–40 (D.C. 2001)). "Effective" unreviewability encompasses the notion that the matter at stake concerns an issue of "substantial public interest." *Id.* at 1137. We conclude that these criteria are met where a special motion to dismiss filed under the Anti-SLAPP Act is denied as they are in the case of denial of a special motion to quash filed under the Act. *See Burke I*, 91 A.3d at 1038 ("[The] determination that an order is appealable under [these criteria] is 'not directed at the individual case, but to the entire category to which a claim belongs.'") (quoting *McNair Builders*, 3 A.3d at 1140 n.9)).[15]

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[15] *Burke I* held that denial of a special motion to quash a subpoena to discover the identity of unidentified defendant(s) filed under the Anti-SLAPP Act is appealable on an interlocutory

A. Conclusivity

First, a trial court's order denying a special motion to dismiss under the Anti-SLAPP Act "conclusively determine[s] a disputed question of law," *McNair Builders*, 3 A.3d at 1135: whether the movant is entitled to dismissal under the Act. In analyzing whether the denial of a special motion to quash under the Act is immediately appealable, the *Burke I* court concluded that the "conclusivity element" of the collateral order doctrine is "satisfied when a trial court has determined the movant is ineligible for protection under the [Anti-SLAPP] statute." 91 A.3d at 1038 (quoting *Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir. 2010)).[16] Here, appellants have received some measure of protection under the Act by having their motions to dismiss evaluated under the special provisions of the Act created to deter SLAPPs. The application of the Act does not mean, however, that there is no "disputed question of law" for purposes of the collateral order doctrine. There remains the specific disputed legal question of whether the movant is entitled to the Act's ultimate protection: mandatory dismissal of the lawsuit at an early point in the litigation. That is an issue a trial court conclusively determines when it rules on a special motion to dismiss. Therefore, denial of a special motion to

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basis, 91 A.3d at 1036–40; it reserved the "related but separate question" of the appealability of an order denying a special motion to dismiss filed under the Act. *Id*. at 1036 n.6.

[16] In *Burke I*, the special motion to quash was denied after the trial court determined that the movant failed to make a prima facie case that the lawsuit arose out of protected acts and that the plaintiff was likely to succeed on the merits. 91 A.3d at 1035. This court reversed on both counts. *Id.* at 1045.

dismiss satisfies the "conclusivity element" of the collateral order doctrine.

B. Separability

Second, a trial court's order denying a special motion to dismiss "resolve[s] an important issue that is separate from the merits of the case." *McNair Builders*, 3 A.3d at 1135. The issue in the case of a special motion to dismiss, once the threshold prima facie case has been met by the movant, is whether the movant has a statutory right to be free of the burdens of defending the litigation. Resolution of both issues — whether the claim arises from acts protected by the Act and whether the movant is entitled to dismissal — will involve some of the same facts relevant to the merits of the claim. That commonality, however, does not necessarily preclude interlocutory review of the denial of an Anti-SLAPP special motion to dismiss.

An analogy to qualified immunity is apt. "[I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell v. Forsyth*, 472 U.S. 511, 527–28 (1985). The special motion to dismiss created by the Anti-SLAPP Act "explicitly protects the right not to stand trial" in a SLAPP, which is intended as a "weapon to chill or silence speech." *Burke I*, 91 A.3d at 1033, 1039; *see* Report on Bill 18-893, at 4 (referring to "other jurisdictions, which have similarly extended absolute or qualified immunity for individuals engaging in protected actions"). This statutory right is analogous to qualified immunity for official conduct

in that its application depends on the court's resolution of whether the acts complained of entitle the defendant not to stand trial "under certain circumstances." *Mitchell*, 472 U.S. at 525. In this case we interpret the statutory standard ("likely to succeed on the merits") for determining special motions under the Act and, as discussed *infra*, conclude that the court must decide, as a matter of law, whether the plaintiff has produced (usually without the benefit of discovery) sufficient evidence to prevail on the claim. In other words, the circumstance under which the Anti-SLAPP Act creates immunity from trial is a meritless SLAPP. As we stated in *Burke I*, this "resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed." 91 A.3d at 1039 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)).[17]

We readily acknowledge that this inquiry is not completely separable from the merits, but it need not be where it serves a different purpose. *See Henry v. Lake Charles Am. Press*, 566 F.3d 164, 175 (5th Cir. 2009) (noting that purpose of Anti-SLAPP special motions is "distinct from [the purpose] of the underlying suit"). As the Supreme Court has recognized, "although sometimes practically intertwined with the merits, a claim of immunity

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[17] *Burke I* also explained that denial of a special motion to quash on the ground that the defendant was not entitled to protection under the Act is separable because whether "speech qualifies for protection under the statute is a separate question from whether [appellants] may be held liable for defamation." *Burke I*, 91 A.3d at 1038. As discussed *supra*, appellants' speech in this case was deemed to be covered by the Act.

nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (*i.e.*, in the absence of qualified immunity)." *Johnson v. United States*, 515 U.S. 304, 314 (1995). As is the case with qualified immunity, the issue that the court must resolve in deciding a special motion to dismiss under the Anti-SLAPP Act is whether the defendant is entitled to immunity from trial, a question of law that involves the evaluation of the complained-of conduct against established legal standards. *Cf. Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (holding that court's denial of qualified immunity separate and immediately appealable because it "necessarily determined that certain conduct attributed to [defendant] (which was controverted) constituted a violation of clearly established law").[18] Consequently, even though a court's determination involves consideration of evidence produced in support of the merits, in view of the purpose of the D.C. Anti-SLAPP Act to provide immunity from suit, a court's denial of a special motion to dismiss resolves an issue of law at the threshold of litigation — whether the defendant is entitled to immunity from trial — that is sufficiently separate from the ultimate question on the merits of the case decided at trial — whether the defendant is liable. *See Henry*, 566 F.3d at 175 (noting that Anti-SLAPP motion is "separate[] from the merits of the claim itself" because its purpose is to determine "'whether

[18] *See id.* (contrasting *Johnson*, where what was "at issue in the sufficiency determination was nothing more than whether the evidence could support a finding that certain conduct occurred").

the defendant is being forced to defend a meritless claim,' not to determine whether the defendant actually committed the relevant tort" (quoting *Batzel*, 333 F.3d at 1025)).[19]

C. Unreviewability

Third, a trial court's denial of a special motion to dismiss is "effectively unreviewable on appeal from a final judgment." *McNair Builders*, 3 A.3d at 1135 (quoting *Finkelstein*, *Thompson* & *Loughram*, 774 A.2d at 339–40). Denial of immunity from trial is the quintessential unreviewable order because the core of immunity from suit "is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Id.* at 1137 (quoting *Mitchell*, 472 U.S. at 525). The D.C. Anti-SLAPP Act provides not only immunity from having to stand trial but also protection from "expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish" by "toll[ing] discovery while the special motion to dismiss is pending." Report on Bill 18-893, at 4. Consequently, the denial of a special motion to dismiss filed under the Act — a denial of the immunity from suit and pretrial burdens afforded by the statute — is the type of unreviewable order that falls squarely within the collateral order doctrine. *Accord Henry*, 566 F.3d at 178 (holding that denial of Anti-SLAPP motion to dismiss satisfies the third requirement of the collateral order doctrine because its purpose is to

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[19] *But see Ernst v. Carrigan*, 814 F.3d 116, 119–22 (2d Cir. 2016) (holding that even if Vermont Anti-SLAPP statute provides immunity from trial, consideration of special motion to dismiss takes into account fact-based determinations and is thus not "completely separate from the merits").

"provide[] a right not to stand trial"); *see also Behrens*, 516 U.S. at 308 (noting that the scope of protection afforded by qualified immunity, which includes the right to not stand trial and to avoid the burdens of pretrial matters, such as discovery, made denial of immunity claim immediately appealable).

D. Substantial Public Interest

Finally, and of particular importance in conducting a *Cohen* analysis, we conclude that because the denial of a special motion to dismiss implicates a "substantial public interest," it would be effectively unreviewable on appeal from a final judgment. *McNair Builders*, 3 A.3d at 1136. The purpose of the special motion to dismiss is to protect a "particular value of a high order" — the right to free speech guaranteed by the First Amendment — by shielding defendants from meritless litigation that might chill advocacy on issues of public interest. *Will*, 546 U.S. at 352 (citing cases involving separation of powers, states' dignitary interests under the Eleventh Amendment, and double jeopardy bar of the Fifth Amendment); *cf. McNair Builders*, 3 A.3d at 1141 (holding that contractor's asserted immunity under judicial proceedings privilege did not implicate a substantial public interest warranting interlocutory review). The legislative history of the Anti-SLAPP Act confirms that the legislature thought the denial of the Act's protection merited immediate appellate review. The original Anti-SLAPP bill presented to the Council of the District of Columbia included a provision for the interlocutory appeal of the denial of a special motion to dismiss or quash. This provision was excluded from the final version of the bill following this court's decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *vacated*, 30 A.3d 783 (D.C. 2011) (Mem.)., which held

that a similar provision affecting the jurisdiction of the court is beyond the scope of the Council's authority. Report on Bill 18-893, at 7. The Council's evident intent and preference to include an interlocutory review provision — regardless of whether it had the authority to do so — is a significant indicator of its belief that "some particular value of a high order," *Will*, 546 U.S. at 352, is at issue that should be addressed by the court on appeal without waiting for completion of the litigation. *See Henry*, 566 F.3d at 181 (concluding that where statute "embodies a legislative determination that parties should be immune from certain abusive tort claims that have the purpose or effect of imperiling First Amendment rights, 'there is little room for the judiciary to gainsay its "importance"'" (quoting *Digital Equip. v. Desktop Direct*, 511 U.S. 863, 879 (1994))); *cf. Englert v. MacDonnell*, 551 F.3d 1099, 1105–06 (9th Cir. 2009) (holding that denial of special motion to strike under Oregon's anti-SLAPP statute was not immediately appealable where Oregon statute did not provide for immediate appellate review of such order).

We conclude that denial of Anti-SLAPP special motions to dismiss meet the requirements of conclusivity, separability, and effective unreviewability established in *Cohen*, as further refined in *Will*, and is immediately appealable to this court. We come to this conclusion in light of the District of Columbia AntiSLAPP Act's purpose to create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures, a right that would be lost if a special motion to dismiss is denied and the case proceeds to discovery and trial; our interpretation of the Act as requiring a judicial

determination applying established principles of law in deciding a special motion to dismiss; and, most especially, the public interest in safeguarding important First Amendment rights in an expeditious manner as shown by the Council's evident desire to make denials of such motions, which must be filed and decided in the early stage of litigation, immediately appealable. *See Henry*, 566 F.3d at 176–78 (noting that a ruling on a special motion to dismiss under the Louisiana Anti-SLAPP statute meets every prong of the collateral order doctrine because the statute provides a right not to stand trial and bear the costs of defending a meritless defamation claim that can chill important First Amendment rights by gauging plaintiff's probability of success); *Batzel*, 333 F.3d at 1025–26 (holding that denial of special motion to dismiss under California Anti-SLAPP Act met *Cohen* standards because it created a substantive immunity from suit and provided for immediate right of appeal).

As we have determined that we have jurisdiction, we have two further questions to address: (1) what is meant by the Act's language requiring the plaintiff to "demonstrate[] that the claim is likely to succeed on the merits," and (2) whether Dr. Mann has met this standard in the present case.

IV. The Anti-SLAPP Act's "Likely to Succeed on the Merits" Standard for Special Motions to Dismiss

The Anti-SLAPP Act's special motion to dismiss creates a burden-shifting procedure that is triggered by the party seeking to invoke the special protections

afforded by the Act. *See* D.C. Code § 16-5502.[20] The moving party (usually the defendant)[21] files a special motion to dismiss within forty-five days after service of the complaint. *Id.* § 16-5502 (a). Filing of the motion stays discovery, unless the court grants a limited exception for discovery targeted to defeating the motion. *Id.* § 16-5502 (c). If the moving party

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[20] D.C. Code § 16-5502 provides in its entirety:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.
>
> (c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.
>
> (2) when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.
>
> (d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

[21] See *supra* note 13.

makes a "prima facie showing" that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest," the burden shifts to the party opposing the motion to "demonstrate[] that the claim is likely to succeed on the merits." *Id.* § 16-5502 (b) & (d). The court is required to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing." *Id.* § 16-5502 (d). If the plaintiff's opposition fails to meet the statutory standard, the Act requires the trial court to dismiss the complaint, with prejudice. *Id.* § 16-5502 (b) & (d). If the opposition is successful, the motion to dismiss is denied, *id.*, and the litigation proceeds in the normal course.

For the reasons that follow, we conclude that in considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion. This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial.

We review questions of statutory interpretation de novo. *Burke I*, 91 A.3d at 1040.[22] Our analysis begins

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[22] *Burke I* held that the special motion to dismiss filed in that case should have been granted because the plaintiff's claim was unlikely to succeed. The court did not need to dwell on the precise

with the language of the statute, *see District of Columbia v. Place*, 892 A.2d 1108, 1111 (D.C. 2006), which requires that to prevail in opposing a special motion to dismiss, the opponent must "demonstrate[] that the claim is likely to succeed on the merits." D.C. Code § 16-5502 (b). As neither the phrase nor any of its components is defined in the statute, we look to "the language of the statute by itself to see if the language is plain and admits of no more than one meaning." *Rodriguez v. District of Columbia*, 124 A.3d 134, 146 (D.C. 2015) (quoting *Dobyns v. United States*, 30 A.3d 155, 159 (D.C. 2011)). Although we can be confident that "on the merits" refers to success on the substance of the claim,[23] the meaning of the requirement that the opponent "demonstrate[] that the claim is likely to succeed" is more elusive. Use of the word "demonstrate"[24] indicates that once the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim. This interpretation is supported

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interpretation of the "likely to succeed" standard in light of its conclusion that the record contained no evidence that the defendant acted with the requisite malice. 91 A.3d at 1045.

[23] "Merits" is defined as "[t]he elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure." BLACK'S LAW DICTIONARY (10th ed. 2014).

[24] The relevant dictionary definitions of "demonstrate" are: "to show clearly and deliberately; manifest," and "to show to be true by reasoning or adducing evidence." THE AMERICAN HERITAGE DICTIONARY (5th ed. 2015).

by another provision in the Act, § 16-5502 (c), that stays discovery upon the filing of a special motion to dismiss "until the motion has been disposed of," unless it "appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome." If evidence were not required to successfully oppose a special motion to dismiss under § 16-5502 (b), there would be no need for a provision allowing targeted discovery for that purpose.[25] Moreover, unless something more than argument based on the allegations in the complaint is required, the special motion to dismiss created by the Act would be redundant in light of the general availability, in all civil proceedings regardless of the nature of the claim, of motions to dismiss under Rule 12 (b)(6).

But what does it mean that the evidence must demonstrate that the claim is "likely to succeed"? In common parlance, the term "likely" connotes a predictive quality, and its dictionary definition is "probable."[26] The phrase conveys an assessment of the

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[25] *See Tippett v. Daly*, 10 A.3d 1123, 1127 (D.C. 2010) (en banc) (referring to interpretation of statutory language as a "holistic endeavor" (quoting *Wash. Gas Light Co. v. Pub. Serv. Comm'n*, 982 A.2d 691, 716 (D.C. 2009))).

[26] "Likely" is defined as "[a]pparently true or real; probable. . . . Showing a strong tendency; reasonably expected (likely to snow)." BLACK'S LAW DICTIONARY, *supra* note 23. Rather unhelpfully, "probable," in turn, is defined in Black's as "[l]ikely to exist, be true, happen." *Id*. *See* THE AMERICAN HERITAGE DICTIONARY, *supra* note 24 (defining "likely" as "1. Possessing or displaying the qualities or characteristics that make something probable . . . 2. Within the realm of credibility;

claimant's chance of success, but does not inherently provide the exact measure by which such an assessment is to be made. It could be argued that "likely to succeed" is different from and a lesser standard than "more likely than not to succeed," the phrase routinely used to mean a preponderance of the evidence, and that if the legislature had in mind a preponderance of the evidence standard, it would have used that well-known term of art. *See Haley v. United States*, 799 A.2d 1201, 1209 n.6 (D.C. 2002) ("The preponderance of the evidence standard requires proof that something more likely than not exists or occurred."). On the other hand, it seems counterintuitive to say that a claim is "likely to succeed" if it has a less than 50% chance of prevailing. In short, the statutory language's dictionary meaning, even if good enough for common parlance, leaves us in doubt as to its proper interpretation in the Anti-SLAPP Act.

Appellants argue that we should look to a similar phrase, "a likelihood of success on the merits," that is used to evaluate requests for temporary stays and preliminary injunctions. In that context, "a likelihood of success" has been defined to mean a "substantial likelihood" though not a "mathematical probability," *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 162 (D.C. 2013) (quoting *In re Estate of Reilly*, 933 A.3d 830, 837 (D.C. 2007)), and does not express a fixed

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plausible . . . 3. Apparently appropriate or suitable . . . 4. Apt to achieve success or yield a desired outcome").

measurement,[27] as it is part of a multi-factor test where a stronger showing on some factors can compensate for a weaker showing on others.[28] The phrase "a likelihood of success" is similar (though not identical) on its face to the phrase "likely to succeed," and in both the preliminary injunction context and under the Anti-SLAPP Act, the judicial role involves prediction of ultimate success on the merits. The two terms should not automatically be equated, however, because of the different purpose and impact of the court's ruling in the two contexts. In granting a request for preliminary injunction, the court grants temporary relief to a movant who makes some showing of likelihood of success that is weighed, along with other factors such as irreparable harm, to preserve the status quo pending the final outcome of litigation. *See Nken*, 556 U.S. at 434 (noting that preliminary injunctions and stays similarly concern whether court

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[27] It has been suggested that, in the federal courts, "a likelihood of success" in the preliminary injunction context is to be contrasted with a chance of success that is only a "mere possibility" or "better than negligible," but without requiring a showing of success "more likely than not." *Citigroup Glob. Mkts. v. VCG Special Opportunities Master Fund*, 598 F.3d 30, 37 & n.7 (2d Cir. 2010) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009))).

[28] *See Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) ("The likelihood of success on the merits that a movant for injunctive relief must demonstrate varies with the quality and quantum of harm that it will suffer from the denial of an injunction. 'Where it appears that a lack of a showing of irreparable [harm] exists . . . the party seeking a preliminary injunction has a burden of convincing with a reasonable certainty that it must succeed . . . .'" (quoting *Dino de Laurentiis Cinematografica v. D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966))).

order "may allow or disallow anticipated action before the legality of that action has been conclusively determined"). Under the Anti-SLAPP Act, on the other hand, the result of the court's ruling in favor of the moving party means complete and final victory for that party by bringing the litigation to an end, avoiding a resolution by trial. Because it is a variable standard that is used for a different purpose, "a likelihood of success," the term used in deciding requests for preliminary injunctions and stays, does not determine the proper interpretation of the "likely to succeed" standard for deciding special motions to dismiss under the Anti-SLAPP Act.

Lacking a statutory definition, clear dictionary definition, or application as a term of art that reasonably can be borrowed from another legal context, the AntiSLAPP Act's "likely to succeed on the merits" leaves us with "textual uncertainty." *Cass v. District of Columbia*, 829 A.2d 480, 486 (D.C. 2003). Our task, therefore, is to interpret the ambiguous term in a manner "that makes sense of the statute as a whole" by reference to legislative history and other aids to construction, such as applicable canons of statutory interpretation. *District of Columbia v. Reid*, 104 A.3d 859, 868 (D.C. 2014) (quoting *Cass*, 829 A.2d at 482).

We begin with what the legislature said it was trying to accomplish: to deter SLAPPs by "extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court." Report on Bill 18-893, at 4. The special motion to dismiss is a mechanism by which a SLAPP defendant can "expeditiously and economically

dispense of litigation" to alleviate the burdens and cost of defending against a suit that is filed, not to succeed, but to "prevent or punish" the defendant's speech or advocacy. *Id.* To this end, a special motion to dismiss must be filed and decided in the early stage of litigation. D.C. Code § 16-5502 (a). If the trial court determines that the plaintiff has not met the statutory burden, the special motion to dismiss must be granted "with prejudice." *Id*. § 16-5502 (b) & (d). In short, the special motion to dismiss provision authorizes final disposition of a claim in a truncated proceeding, usually without the benefit of discovery, *id*. § 16-5502 (c), to avoid the toll that meritless litigation imposes on a defendant who has made a prima facie showing that the claim arises from advocacy on issues of public interest.

The dispositive nature of a court's grant of a special motion to dismiss after the claimant has been required to proffer evidence, but without a full opportunity to engage in discovery and before trial, is critical to our interpretation of the "likely to succeed" standard. An interpretation that puts the court in the position of making credibility determinations and weighing the evidence to determine whether a case should proceed to trial raises serious constitutional concerns because it encroaches on the role of the jury.[29] In view of this

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[29] *See Davis v. Cox*, 351 P.3d 862, 873–74 (Wash. 2015) (en banc) (declaring that Washington state's Anti-SLAPP special motion to dismiss, WASH. REV. CODE § 4.24.525 (2010), violates the state's constitutional guarantee to a jury trial because it required trial court to weigh the evidence and make factual determination whether there was "clear and convincing evidence [of] a probability of prevailing on the claim"); *Opinion of the*

concern, we apply the canon of constitutional avoidance, "an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). This canon leads us to interpret the phrase "likely to succeed on the merits," undefined in the D.C. AntiSLAPP statute, in a manner that does not supplant the role of the fact-finder, lest the statute be rendered unconstitutional.[30] We, therefore, conclude that to remove doubt that the

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Justices (*SLAPP Suit Procedure*), 641 A.2d 1012, 1015 (N.H. 1994) (declaring that proposed Anti-SLAPP legislation would violate right to trial by jury guaranteed by state constitution because it would require court to "weigh the pleadings and affidavits on both sides and adjudicate a factual dispute" in determining whether claimant has shown "a probability of prevailing on the merits"); *Unity Health Care, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 549 (D. Minn. 2015) (concluding that Minnesota AntiSLAPP provision requiring that party opposing dismissal must persuade judge by clear and convincing evidence that defendant is not immune from liability violates Seventh Amendment right to jury trial because it requires judge to weigh evidence and make credibility determination), *interlocutory appeal docketed*, No. 15-2489 (8th Cir. July 10, 2015).

[30] *See Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 53 (1995) (interpreting standard for judging California's Anti-SLAPP motion to dismiss to avoid violating the state constitutional right to jury trial); *cf. Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 232–33 (Minn. 2014) (concluding that it was not possible to use constitutional avoidance canon to interpret statute to avoid constitutional defect where statutory language "unambiguously require[s] the responding party to produce evidence and the district court to make a finding on whether 'the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability'" (quoting Minn. Stat. § 554.02 (2014)).

Anti-SLAPP statute respects the right to a jury trial, the standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that the claimant could not prevail *as a matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury. *Cf. Mixon v. Wash. Metro. Area Transit Auth.*, 959 A.2d 55, 58 (D.C. 2008) (explaining that summary judgment does not violate right to jury trial because it results in dismissal only if no reasonable jury could find for the claimant based on the undisputed facts).

The standards against which the court must assess the legal sufficiency of the evidence are the substantive evidentiary standards that apply to the underlying claim and related defenses and privileges. As we discuss in the next section, in addition to the elements required to make out a claim for defamation under the law of the District of Columbia, there is a well-developed body of case law, originating with the Supreme Court, that establishes different levels of fault and proof that are designed to protect First Amendment rights. One example is the requirement to prove actual malice by clear and convincing evidence when the claimant is a public official or, as in this case, a limited public figure with respect to the issue that is the subject of speech claimed to be defamatory. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254–55 (1986) (holding that in evaluating motion for summary judgment under Rule 56, as in evaluating motion for directed verdict under Rule 50 (a), in a case requiring proof of actual malice by clear and convincing evidence, "the judge must view the evidence presented through the prism of the

substantive evidentiary burden"). The precise question the court must ask, therefore, is whether a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented.[31]

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[31] Colorado, which was specifically cited in the Committee Report, applies a similar standard. See Report on Bill 18-893 at 2 n.4. In *Protect Our Mountain Env't, Inc. v. Dist. Court*, 677 P.2d 1361 (Colo. 1984), the Colorado Supreme Court crafted a means to protect the First Amendment right to petition of a defendant sued for abuse of process, while also protecting "those truly aggrieved by abuse of these processes to vindicate their own legal rights." *Id*. at 1369. The court permits the parties to present "all material pertinent to the motion" and then considers a motion to dismiss "as one for summary judgment." *Id.* In resolving the motion, the court applies a "heightened standard" intended to protect petitioning activity by requiring a showing that

> (1) the . . . claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id.

Other states have adopted similar approaches. California's Anti-SLAPP statute, which requires a showing "that there is a probability that the plaintiff will prevail on the claim," CAL. CIV. PROC. CODE § 425.16 (b)(1) (West 2015), has been interpreted as requiring the plaintiff to "state and substantiate a legally sufficient claim," by "demonstrat[ing]" that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Rusheen v. Cohen*, 128

We acknowledge that our functional interpretation of the statutory language is not evident from the face of the statute alone. As we have explained, the interpretation we adopt is made possible by the ambiguity of the statutory language and rendered necessary to avoid doubt about the constitutionality of § 16-5502 (b). This interpretation comports with the legislative aim of building special protections for a defendant who makes a prima facie case that the claim arises from advocacy on issues of public interest. A comparison of the procedures usually available in civil litigation makes clear that the complement of provisions of the Anti-SLAPP Act impose requirements and burdens on the claimant that significantly advantage the defendant. As we have noted, the filing of a special motion to dismiss stays the claimant's right to seek discovery "until the motion has been disposed of," with a limited exception that favors the defendant. D.C. Code § 16-5502 (c). The Act also places the initial burden on the claimant to present legally sufficient evidence substantiating the

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P.3d 713, 718 (Cal. 2006) (alterations in original omitted) (quoting *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002)). *See also Yount v. Handshoe*, 171 So.3d 381, 387 n.4 (La. Ct. App. 2015) (commenting that Louisiana and California's Anti-SLAPP statutes match "word for word"); *John v. Douglas Cty. Sch. Dist.*, 219 P.3d 1276, 1281 (Nev. 2009)) (stating that under Nevada's statute requiring "clear and convincing evidence [of] a probability of prevailing on the claim," plaintiff must show genuine issue of material fact); OR. REV. STAT. § 31.150 (2010) (providing that if defendant makes prima facie showing speech is protected by statute, "the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case").

merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection. *Id.* § 16-5502 (b). This is a reversal of the allocation of burdens for dismissal of a complaint under Superior Court Rule of Civil Procedure 12 (b)(6), which requires the moving party to show that the complaint's allegations, even if proven, would not state a claim as a matter of law; and for summary judgment under Superior Court Rule of Civil Procedure 56, which requires the moving party to wait until discovery has been completed and then shoulder the initial burden of showing that there are no material facts genuinely in dispute and that the movant is entitled to judgment as a matter of law on the undisputed facts.

In addition to these substantive burdens, there are financial levies to deter a SLAPP plaintiff. The Act authorizes the trial court to award costs and fees — including attorney's fees — to a moving party who prevails "in whole or in part" on a special motion to dismiss. D.C. Code § 16-5504 (a). We have held that under the parallel provision for special motions to quash under D.C. Code § 16-5503, the successful movant is presumptively entitled to an award of fees unless special circumstances make a fee award unjust. *See Burke II*, 133 A.3d at 571. The Act is much less generous to a plaintiff who successfully defends against a special motion to dismiss, allowing the award of costs and fees "only if the court finds that [the] motion . . . is frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504 (b). In sum, the special motion to dismiss not only provides substantial advantages to the defendant over and above those usually available in civil litigation, but

also imposes procedural and financial burdens on the plaintiff.

Our interpretation of the requirements and standard applicable to special motions to dismiss ensures that the Anti-SLAPP Act provision is not redundant relative to the rules of civil procedure. A defendant may still file a motion to dismiss a complaint at the onset of litigation under Rule 12, based solely on deficiencies in the pleadings. *See* Super. Ct. Civ. R. 12 (a) (requiring that motion for failure to state a claim must be filed within 20 days of service of complaint). The Anti-SLAPP Act gives the defendant the option to up the ante early in the litigation, by filing a special motion to dismiss that will require the plaintiff to put his evidentiary cards on the table and makes the plaintiff liable for the defendant's costs and fees if the motion succeeds. D.C. Code § 16-5502 (a) (requiring that special motion to dismiss be filed within forty-five days of service of the complaint); *id.* § 16-5504 (a) (providing for costs and fees). Even if the AntiSLAPP special motion to dismiss is unsuccessful, the defendant preserves the ability to move for summary judgment under Rule 56 later in the litigation, after discovery has been completed, or for a directed verdict under Rule 50 after the presentation of evidence at trial.[32]

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[32] The D.C. Circuit has described the Anti-SLAPP Act's "likely to succeed" standard as "an additional hurdle a plaintiff must jump over to get to trial," and opined (without elaboration) that the standard "is different from and more difficult" than for summary judgment under Federal Rule 56. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015). For the reasons we note in the text, we agree with *Abbas* that the

special motion to dismiss is different from summary judgment in that it imposes the burden on plaintiffs and requires the court to consider the legal sufficiency of the evidence presented before discovery is completed. As concerns the standard to be employed by the court in deciding whether to grant the motion, however, the question is substantively the same: whether the evidence suffices to permit a jury to find for the plaintiff.

Abbas also stated that the special motion to dismiss created by D.C. Code § 16-5502 does not apply in federal court because it answers the same question as the Federal Rules of Civil Procedure — when a court must dismiss a case before trial — in a different way. *Id*. at 1336. Implicit in *Abbas* is that the special motion to dismiss is only procedural in nature rendering it inapplicable in federal court sitting in diversity. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938); *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1104 (D.C. Cir. 2012) (applying *Erie* doctrine to District of Columbia). Other federal appellate courts have come to a different conclusion and applied similar state Anti-SLAPP procedures. *See, e.g.*, *Liberty Synergistics, Inc. v. Microflo Ltd.*, 718 F.3d 138, 143–44 (2d Cir. 2013) (applying California Anti-SLAPP statute's "probability" standard); *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010) (same); *Godin*, 629 F.3d at 89 (applying Maine Anti-SLAPP statute's special motion to dismiss because it is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right") (quoting *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring)); *Henry*, 566 F.3d at 16869 (applying Louisiana Anti-SLAPP statute's "nominally-procedural" special motion to dismiss "probability" standard). *But cf. Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1361–62 (11th Cir. 2014) (declining to apply Georgia Anti-SLAPP statute's verification requirement because it was procedural and conflicted with Federal Rules of Civil Procedure, which do not require verification).

The applicability of the Anti-SLAPP statute in federal court is not for this court to determine. *Abbas* recognized that at the time, this court "has never interpreted the D.C. Anti-SLAPP Act's likelihood of success standard to simply mirror the standards

Finally, our interpretation of the standard applicable to special motions to dismiss as providing an early judicial evaluation of the legal sufficiency of the plaintiff's evidence strikes the right balance between the interests of the parties. Consistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation. But by deferring to the jury's reasonable decision-making, the constitutional right of a plaintiff who has presented evidence that could persuade a jury to find in her favor is respected. It bears remembering that the fact that a defendant can make a threshold showing that the claim arises from activities "in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502 (a), does not mean that the defendant is immunized from liability for common law claims. *See Duracraft Corp. v. Holmes Prods. Corp*., 691 N.E.2d 935, 943 & n.19 (Mass. 1998) (construing Anti-SLAPP statute to avoid unconstitutionality and noting that "[b]y protecting one party's exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the adverse party's exercise of

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imposed by" Federal Rule 56. 783 F.3d at 1135. We do so now. This court's interpretation of the standard applicable to the special motion to dismiss under District of Columbia law will no doubt factor into future analysis of the dicta in *Abbas* concerning the applicability of the Anti-SLAPP Act in litigation brought in federal courts. *See Abbas*, 783 F.3d at 1339–1341 (dismissing complaint with prejudice under Rule 12 (b)(6) for failure to state a claim).

its right to petition, even when it is not engaged in sham petitioning"). Rather, heightened legal and proof requirements apply when First Amendment rights of the defendant are implicated, but it is possible to meet these requirements by strong evidence in support of the claim. The immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards. Thus, the special motion to dismiss in the Anti-SLAPP Act must be interpreted as a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial; it is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act. *See, e.g.*, *Sandholm v. Kuecker*, 962 N.E.2d 418, 429–30 (Ill. 2012) (noting that Illinois statute is aimed solely at "meritless, retaliatory SLAPPs" and "was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute").

To sum up, it is not the court's role, at the preliminary stage of ruling on a special motion to dismiss, to decide the merits of the case but to test the legal sufficiency of the evidence to support the claims. We now turn to a discussion of the operative constitutional and legal substantive and proof requirements that apply to the underlying claims and to an analysis of the legal sufficiency of Dr. Mann's proffered evidence applying those requirements.

V. Judicial Review for Legal Sufficiency

A court's review for legal sufficiency is a particularly weighty endeavor when First Amendment rights are implicated. The court must "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Fla.*, 328 U.S. 331, 335 (1946)). The court must consider whether a properly instructed jury could find for the plaintiff "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). This is a question of law, measured against constitutional standards, that does not involve the court in making credibility determinations or weighing the evidence. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685, 690 (1989) (considering findings of fact made by jury along with undisputed evidence in concluding evidence was legally sufficient to prove actual malice); *see id.* at 697–700 (Scalia, J., concurring) (referring to appellate court's "independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it reasonably could have made"). With these principles in mind, we turn to a de novo review of the record to determine whether the evidence produced by Dr. Mann could support, with the clarity required by

First Amendment principles, a jury verdict in his favor.

A. Defamation

To succeed on a claim for defamation, 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];[33] 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." *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005) (quoting *Crowley v. N. Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n.2 (D.C. 1997)). Appellants contend that the trial court erred in denying their special motions to dismiss because Dr. Mann did not sufficiently substantiate his defamation claim on the first three elements. As to Mr. Lowry's editorial, we agree; but as to some of the other statements on which Dr. Mann bases his complaint, we disagree. We conclude that Dr. Mann hurdled the Anti-SLAPP statute's threshold showing of likelihood of success on the merits because the evidence he has presented is legally sufficient to support findings by the fact-finder that statements in Mr. Simberg's and Mr. Steyn's articles were defamatory, were published by appellants to a third

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[33] As discussed *infra*, the level of fault — from negligence to actual malice — depends on whether the plaintiff is a public official or, if a private individual, is deemed a public figure with respect to the subject matter of the statement alleged to be defamatory.

party without privilege, and were made with actual malice.

1. False and Defamatory Statements

A statement is defamatory "if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000) (alteration in original) (quoting *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984)). The statement "must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256 (D.C. 2012) (quoting *Howard Univ.*, 484 A.2d at 989).

The important societal interest in vigorous debate over matters of public concern protected by the First Amendment has led to the development of constitutional standards for evaluating statements before liability may be imposed under state defamation laws. Because the First Amendment protects speech as an expression of the fundamental right to freedom of thought, constitutionally speaking, "there is no such thing as a false idea." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)). Expressions of pure opinion, as embodiments of ideas, are generally entitled to constitutional protection. *See id.* (noting that "opinion" and "ideas" are equated). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339–40. Therefore, under the First Amendment a statement is not actionable "if it is plain

that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." *Guilford Transp. Indus.*, 760 A.2d at 597 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

Although ideas and opinions are constitutionally protected, the First Amendment does not, however, "create a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich*, 497 U.S. at 18. "[S]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Guilford Transp. Indus.*, 760 A.2d at 597. Whether a defamatory statement of opinion is actionable often depends on the context of the statement in question. *See id.* "If, for example, an average reader would likely understand that particular words, in the context of an entire article, were not meant to imply factual data but, rather, were intended merely to disagree strongly with the views of the [plaintiff], those words would be protected despite their factual content." *Sigal Const. Corp. v. Stanbury*, 586 A.2d 1204, 1211 (D.C. 1991). Thus, statements that constitute "imaginative expression" and "rhetorical hyperbole" are not actionable because they "cannot reasonably be interpreted as stating actual facts about an individual." *Guilford Transp. Indus.*, 706 A.2d at 596–97 (quoting *Milkovich,* 497 U.S. at 20). Such statements are "used not to implicate underlying acts but 'merely in a "loose, figurative sense"' to demonstrate strong disagreement" with another's ideas. *Sigal*, 586 A.2d at 1210 (quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307

(N.Y. 1977)). On the other hand, a statement is actionable if viewed in context it "was capable of bearing a defamatory meaning and . . . contained or implied provably false statements of fact." *Guilford Transp. Indus.*, 760 A.2d at 597.

Appellants contend that all the statements on which Dr. Mann bases his defamation claims are protected under the First Amendment because they expressed appellant's opinions about climate change, a matter of widespread public concern that "must be resolved through the process of free and open debate, not through costly litigation." There is no dispute that the statements that Dr. Mann claims defamed him were made in the context of a broad disagreement between the parties about the existence and cause of global warming, a disagreement that reached a high level of intensity and rhetoric. Public discussion about whether there is a warming climate and, if so, its cause, involves scientific questions and policy prescriptions of general public interest. The First Amendment protects those engaged in a debate of such public concern in the expression of their ideas on the subject, even with pointed language, free of the chilling effect of potential civil liability. As a matter of constitutional principle, when the issue is whether liability may be imposed for speech expressing scientific or policy views, the question is not who is right; the First Amendment protects the expression of all ideas, good and bad.

But not all the statements cited in the complaint are necessarily cloaked by the First Amendment simply because the articles in which they appeared related to a matter of public concern. As we have discussed, the law distinguishes between statements expressing

ideas and false statements of fact. To the extent statements in appellants' articles take issue with the soundness of Dr. Mann's methodology and conclusions — i.e., with ideas in a scientific or political debate — they are protected by the First Amendment. But defamatory statements that are personal attacks on an individual's honesty and integrity and assert or imply as fact that Dr. Mann engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable. The Second Circuit's observation in *Buckley v. Littell* with respect to defamatory statements about a journalist made in the course of political debate is equally apt to defamatory statements about a scientist made in the course of scientific and policy debate:

> In short, whatever might be said of a person's political views, any journalist, commentator or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. . . . [I]t is "crucial" to such a person's career that he or she not be so treated. 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.

539 F.2d 882, 896–97 (2d Cir. 1976).

Tarnishing the personal integrity and reputation of a scientist important to one side may be a tactic to gain advantage in a no-holds-barred debate over global warming. That the challenged statements were made as part of such debate provides important context and

requires careful parsing in light of constitutional standards. But if the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger policy debate.

We apply these principles to the statements in the articles cited in the complaint, in the order in which they appeared. The articles, as they appeared on CEI and National Review's websites, are appended to this opinion.

Mr. Simberg's July 13, 2012 article on CEI's OpenMarket.org.[34]

Mr. Simberg's article does not specifically criticize Dr. Mann's statistical techniques, except by calling him the "poster boy of the corrupt and disgraced climate science echo chamber."[35] The article's focus is on Dr. Mann personally, alleging that he has engaged

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[34] Rand Simberg, *The Other Scandal in Unhappy Valley*, COMPETITIVE ENTER. INST. (July 13, 2012), https://cei.org/blog/other-scandal-unhappy-valley.

[35] Mr. Simberg's article quotes from a linked article written by Steven McIntyre, which in turn quotes the CRU email that referred to "Mike's Nature trick" and reviews data charts that, according to McIntyre, reveal the "trick." Other links in Mr. Simberg's article are to Mr. Simberg's earlier posts: "The Death of the Hockey Stick?" published online on May 17, 2012, in which Mr. Simberg criticized the methodology and statistical analysis that led to the hockey stick graph by citing the work of other researchers, but without accusing Dr. Mann of personal wrongdoing; and "Climategate: When Scientists Become Politicians," dated November 23, 2009, in which Mr. Simberg commented that climate scientists had subverted proper scientific process by molding data to fit their preconceived ideas about a warming global climate, but without accusing Dr. Mann, personally, of misconduct.

in "wrongdoing," "deceptions," "data manipulation," and "academic and scientific misconduct." The article calls Dr. Mann "the Jerry Sandusky of climate science," comparing Dr. Mann's "molest[ing] and tortur[ing] data in the service of politicized science" to Sandusky's "molesting children." The article also describes Dr. Mann as being, "like Joe Paterno," a "rock star" at Penn State, who attracted millions of dollars to the University, and, like Bernie Madoff "at the height of his financial career," "a sacred funding cash cow."

A jury could find that the article accuses Dr. Mann of engaging in specific acts of academic and scientific misconduct in the manipulation of data, and thus conveys a defamatory meaning, because "to constitute a libel it is enough that the defamatory utterance imputes any misconduct whatever in the conduct of [plaintiff's] calling." *Guilford Transp. Indus.*, 760 A.2d at 600 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 569, cmt. (e)); *see Tavoulareas v. Piro*, 817 F.2d 762, 780 (D.C. Cir. 1987) (en banc) (holding that statement that "a father set up his son in business" accuses father of nepotism and is defamatory because it, "might 'tend[] to injure [him] in his trade, profession or community standing, or lower him in the estimation of the community'" (quoting *Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966))). Moreover, a jury could find that by calling Dr. Mann "the [Jerry] Sandusky of climate science," the article implied that Dr. Mann's manipulation of data was seriously

deviant for a scientist. These noxious comparisons,[36] a jury could find, would demean Dr. Mann's scientific reputation and lower his standing in the community by making him appear similarly "odious, infamous, or ridiculous." *Rosen*, 41 A.3d at 1256; *see also Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1091 (D.C. Cir. 2007) (*Jankovic I*) (holding that statement was capable of defamatory meaning because it suggested Serbian businessman was an ally of the Milosevic regime for which, as in the case of the apartheid regime in South Africa, Americans have an "intense antipathy" (quoting *South. Air Transp., Inc., v. ABC, Inc.*, 877 F.2d 1010, 1015 (D.C. Cir. 1989))).

Appellants contend that Mr. Simberg's article is more reasonably understood as a criticism of the hockey stick graph and the research that underlies it. This seems to be a forced interpretation — and one that a jury could easily reject — because the article does not comment on the specifics of Dr. Mann's methodology at all. Nor does the article purport to reveal previously unknown facts about Dr. Mann's methodology, which was apparent from his published work and numerous articles commenting on the hockey stick graph and its findings. In a different context, the article's use of the phrase "corrupt and disgraced climate science," could, as appellants argue,

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[36] These were well-known figures in the public eye. Jerry Sandusky is a notorious convicted child sexual abuser and former assistant football coach at Penn State who was making front-page news at the time. Joe Paterno was the once revered long-term head football coach at Penn State during the time of Sandusky's depredations. Bernie Madoff is a convicted criminal who swindled billions of dollars from thousands of investors and charities through a massive Ponzi scheme.

be interpreted as criticism of flawed scientific methodology. But when the phrase is used in conjunction with assertions that Dr. Mann engaged in "deception[]," "misconduct," and "data manipulation," and the article concludes that he should be further investigated, the cumulative import is that there are sinister, hidden misdeeds he has committed. These are pointed accusations of personal wrongdoing by Dr. Mann, not simply critiques of methodology of his well-known published scientific research. *Cf. Milkovich*, 497 U.S. at 21 ("This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that the petitioner committed the crime of perjury."). We conclude that Mr. Simberg's article is capable of conveying a defamatory meaning.

Appellants do not argue that Mr. Simberg's article, if capable of conveying a defamatory meaning, is not actionable because the statements that Dr. Mann engaged in deception and misconduct are true. Their argument is that the statements are not verifiably false because they are simply Mr. Simberg's opinion. *See Oparaugo*, 884 A.2d at 76 (noting that defamation requires that statement be both defamatory and false). To be clear, the Supreme Court has rejected "an additional separate constitutional protection for 'opinion'" as such, deeming that the dual constitutional requirements of falsity and fault, as well as a searching appellate judicial review, suffice "to ensure the freedom of expression guaranteed by the First Amendment." *Milkovich*, 497 U.S. at 20–21. The reason a pure statement of opinion is not actionable is that, not being factual, it cannot be proved to be false. *See id.* at 20. It is also clear,

however, that "the First Amendment gives no protection to an assertion 'sufficiently factual to be susceptible of being proved true or false' *even if* the assertion is expressed by implication in 'a statement of opinion.'" *Jankovic v. Int'l Crisis Grp.* (*Jankovic II*), 593 F.3d 22, 27 (D.C. Cir. 2010) (quoting *Milkovich*, 497 U.S. at 20, 21). We, therefore, turn to a close reading of Mr. Simberg's article to determine whether it asserts or implies a defamatory provable *fact*. *See Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994) (*Moldea I*) (noting this is "a question of law for the court to determine as a threshold matter").

Mr. Simberg's article contains two principal defamatory assertions about Dr. Mann. The first is that Dr. Mann has been "shown" to have behaved in a "deceptive" and "most unscientific manner" because he "molested and tortured data in the service of politicized science" as was "revealed" in the leaked CRU emails. This is followed by a related defamatory assertion, that Dr. Mann engaged in "academic and scientific misconduct" that Penn State's investigation exonerating Dr. Mann of these charges failed to uncover because Penn State was biased and its investigation was a "whitewash."[37]

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[37] The full concluding paragraphs in Mr. Simberg's article state:

> Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being ~~whitewashed~~ investigated. We saw what the university administration was willing to do to cover up heinous

We note that in the article Mr. Simberg does not employ language normally used to convey an opinion, such as "in my view," or "in my opinion," or "I think."[38] The article's assertions about Dr. Mann's deception and misconduct are stated objectively, as having been "shown" and "revealed" by the CRU emails. Thus, Mr. Simberg's article can fairly be read as making defamatory factual assertions outright. Mr. Simberg would not have concluded the article with the prescription that a "fresh, truly independent investigation" is necessary, unless he supposed that "ordinary, reasonable readers could read the [article] as implying," *Jankovic II*, 593 F.3d at 25, that Dr. Mann was guilty of misconduct that had to be ferreted out. An opinion may be subject to further discussion or debate, but a "truly independent *investigation*" is necessary to uncover facts that, impliedly, are there to be found. Moreover, Mr. Simberg cites the CRU emails as proof of Dr. Mann's deception and academic and scientific misconduct. The assertion that the CRU emails showed or revealed that Dr. Mann engaged in

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> crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?
>
> It's time for a fresh, truly independent investigation.

[38] This is not to suggest that use of such words would automatically insulate the ensuing statements from liability. "In my opinion, Jones is a liar" is actionable if the statement is false and the speaker acted with the requisite degree of fault. *See Milkovich*, 497 U.S. at 18–19, 20. But the absence of such language is one indication of how the article would come across to the reader.

deception and academic and scientific misconduct is not simply a matter of opinion: not only is it capable of being proved true or false, but the evidence of record is that it actually has been proved to be false by four separate investigations.

Appellants attempt to find shelter in post-*Milkovich* appellate decisions recognizing that "a statement of opinion that is based upon *true* facts that are revealed to readers . . . [is] generally . . . not actionable so long as the opinion does not otherwise imply unstated defamatory facts." *Moldea I*, 15 F.3d at 1144. The theory is that when a writer discloses the facts upon which a statement is based, the reader will understand that the statement reflects the writer's view, based on an interpretation of the facts disclosed, such that the reader remains "free to draw his or her own conclusion based upon those facts." *Id.* at 1145. This argument is unavailing here. First, as we have discussed, a jury could reasonably interpret Mr. Simberg's article as asserting as *fact* that the CRU emails "show[]" that Dr. Mann engaged in deceptive data manipulation and academic and scientific misconduct. In this regard, this case is markedly different from *Rosen*, where we noted that because no specific misconduct was mentioned in the allegedly defamatory statement, "no one hearing the general characterizations . . . could have discerned particular behaviors that were concrete enough to reveal 'objectively verifiable' falsehoods," and that the statements "exuded merely subjective evaluation — essentially a 'statement of opinion' without an 'explicit

or implicit factual foundation.'" 41 A.3d at 1259 (footnote omitted).[39]

Second, to claim this form of protection from liability, the facts on which the purported opinion is based must be accurate and complete. *See Milkovich*, 497 U.S. at 18–19 ("[E]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect, or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").[40] Mr. Simberg's article does not assemble facts that prove Dr. Mann's alleged deception and misconduct, but primarily criticizes two entities, Penn State and the National Science

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[39] *See also Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013) (holding that statements that an employee was investigated for "serious misconduct," "gross misconduct and integrity violations," and "ethical violations" — which were unspecified — "reflected one person's subjective view of the underlying conduct and were not verifiable as true or false"). In this case the statements accusing Dr. Mann of "fraud," "deception," and "academic" and "scientific" misconduct specifically referred to the CRU emails and were therefore verifiable.

[40] In *Jankovic II* the court summarily dismissed the publisher's argument that the defamatory statement was protected as opinion because it was offered as the writer's interpretation of a fact that was disclosed in the report, noting that this protection applies only where opinion is "based on true facts, accurately disclosed." 593 F.3d at 28. Because an inaccurate fact (that one of the plaintiff's companies was on a frozen assets list because it provided support to the Milosevic regime) was cited as the basis of the report's purported opinion that the plaintiff supported the regime in exchange for favorable treatment of his businesses, the defamatory statement was not protected as opinion. *Id*.

Foundation, that investigated those charges and concluded they are unfounded. The target of the article is Dr. Mann; the criticism of these two investigations is a means to that end. Mr. Simberg's attack on the investigations begins with a mocking reference to Dr. Mann's "exoneration" by Penn State. It points to the University's vested financial interest in Dr. Mann and what Mr. Simberg characterizes as the University's resulting "whitewash" in its investigation of the accusations leveled against Dr. Mann, comparing it to Penn State's previous investigation in the Sandusky case.[41] The article also refers to the report of the National Science Foundation,[42] and acknowledges that the NSF investigation confirmed Penn State's conclusion that Dr. Mann had not engaged in misconduct. Mr. Simberg questions the independent corroboration of the NSF report, however, because, as he emphasizes, "more importantly," the NSF "relied on the integrity of [Penn State] to provide them with all

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[41] The Penn State report on the investigation of Dr. Mann is embedded as a link in Mr. Simberg's article, as is the Freeh Report, which criticized inadequacies in Penn State's investigation of Sandusky (not Dr. Mann).

[42] The article does not include a link to the NSF Report itself but to a secondary source that describes its substantive observations and conclusions. Mr. Simberg's article inaccurately refers to the report as having been produced by "NAS" instead of "NSF." The National Academy of Sciences, a private nonprofit organization, is a different entity than the National Science Foundation, an independent government funding agency. *See* National Academy of Sciences, http://www.nasonline.org/ (last visited Oct. 5, 2016); National Science Foundation, https://www.nsf.gov/ (last visited Oct. 5, 2016).

relevant material." In other words, the NSF investigation and report should not be trusted because they were tainted by reliance on Penn State's biased and inadequate work.

In this, Mr. Simberg's article was inaccurate. 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."[43] Moreover, the article was incomplete because it failed to mention two other parallel investigations of the CRU emails, conducted in the United Kingdom, that came to the same conclusion as Penn State and NSF. In short, Mr. Simberg's assertions that the CRU emails revealed deception and academic and scientific misconduct on the part of Dr. Mann that Penn State covered up and NSF failed to uncover, are not protected as opinion based on accurate, complete facts, because the article gave a skewed and incomplete picture of the facts a reader would need to come to his

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[43] Appellants CEI and Mr. Simberg impliedly concede that the description of the NSF investigation in the article is inaccurate, acknowledging in their reply brief that the NSF interviewed Dr. Mann's critics. But, as noted in the text and in the NSF report itself, that is not all that NSF did in conducting its own separate investigation, after reviewing the Penn State report.

or her own conclusions on the matter. *See Moldea I*, 15 F.3d at 1144.

Even allowing for the use of hyperbole in the public discussion about global warming, we conclude that the statements in Mr. Simberg's article that Dr. Mann acted dishonestly, engaged in misconduct, and compared him to notorious persons, are capable of conveying a defamatory meaning with the requisite constitutional certainty and included statements of fact that can be proven to be true or false.

Mr. Steyn's July 15, 2012 article on National Review*'s "The Corner"*[44]

National Review argues that Mr. Steyn's statement that "Michael Mann was the man behind the fraudulent climate-change 'hockey stick' graph" could be, and therefore should be, interpreted as expressing vigorous disagreement with the idea represented by the hockey stick graph and as criticism of the methodology that Dr. Mann used in gathering the data that led to the graph. As such, National Review contends that the statement is not actionable because it does not possess the clarity of defamatory meaning required by the Constitution. *See Greenbelt Coop. Publ'g Ass'n v. Bressler*, 398 U.S. 6, 13–14 (1970) (noting that the word "blackmail," when used to describe a real estate developer's negotiating position, was not defamatory as "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole" to express that the developer

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[44] Mark Steyn, *Football and Hockey*, NATIONAL REVIEW (July 15, 2012), http://www.nationalreview.com/corner/309442/football-and-hockey-mark-steyn.

was being unreasonable where the description of the negotiations was "accurate and full"). At oral argument, counsel for National Review explained that "fraudulent" was intended to mean (or could reasonably be interpreted as meaning) that Dr. Mann's research is not reliable because he "cherry-picked" the data on which he relied and compared "apples to oranges" in producing the hockey stick graph, by first relying on temperature data derived from proxy sources (such as tree rings) and, after a certain date, using actual measured temperatures. We agree that if the use of "fraudulent" in this one sentence were the only arguably defamatory statement in Mr. Steyn's article, we would have to conclude that it is insufficient as a matter of law, as such an ambiguous statement may not be presumed to necessarily convey a defamatory meaning. In such a case, the First Amendment tips the judicial balance in favor of speech. *See Bose*, 466 U.S. at 505.

Statements are not to be viewed in isolation but in context, however. *See Guilford Transp. Indus.*, 760 A.2d at 597. Mr. Steyn's article continued the theme of personal attack and innuendo against Dr. Mann commenced in Mr. Simberg's article. It begins by quoting three sentences from Mr. Simberg's article that refer to "hockey-stick deceptions" by "molest[ing] and tortur[ing] data," and the comparison of Dr. Mann to Sandusky. Mr. Steyn first appears to retreat from the comparison to Sandusky, saying that he is "[n]ot sure" that he would have extended the metaphor "all the way into the locker-room showers," but then adds that Mr. Simberg "has a point." *See Olinger v. Am. Savs. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969) ("The law affords no protection to those who couch

their libel in the form of . . . repetition . . . repetition of a defamatory statement is a publication in itself.") (citation omitted). Referring to the investigation of Dr. Mann by a "deeply corrupt [Penn State University] administration," Mr. Steyn elaborates that "as with Sandusky and Paterno" Penn State University "declined to find one of its star names guilty of any wrongdoing." The clincher in Mr. Steyn's article: "If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?" The implication that serious misconduct has been covered up is inescapable.

Appellants would have us conclude that the comparisons of Dr. Mann to notorious individuals are merely exaggerated — if crass — depictions of a policy opponent. There is an important distinction, however, between generic labels with derogatory connotations and comparisons to specific individuals from which defamatory factual allegations can be inferred. Thus, in *Buckley*, the Second Circuit dismissed defamation claims that were based on statements in a book that described William F. Buckley, Jr.,[45] as "fascist," "fellow traveler," and "radical right," because even if the labels were insulting and derogatory, they could not be proven to be false statements of fact due to "the tremendous imprecision of the meaning and usage of these terms in the realm of political debate." 539 F.2d at 893. The same book also described Buckley as having lied about and libeled several people who could take him to court "if they wanted to and could afford

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[45] Mr. Buckley was a well-known and influential conservative author and commentator, and the founder of *National Review*. *Buckley*, 539 F.2d at 885–86.

it," and compared Buckley to another journalist, identified by name, "who lied day after day in his column." *Id*. at 895. These statements, the court held, were actionable because they "make a factual assertion relating to Buckley's journalistic integrity." *Id*. at 895–96. The comparison to a known liar, the court noted, "as it appears on its face states that Buckley was engaging in libelous journalism" and, as it was proven to be false, was "constitutionally as well as tortiously defamatory." *Id*. at 896.

The statements in Mr. Steyn's article are similarly factual and specific in their attack on Dr. Mann's scientific integrity. As with Mr. Simberg's article, Mr. Steyn's is not about the merits of the science of global warming, but about Dr. Mann's "deceptions" and "wrongdoing." Like Mr. Simberg, Mr. Steyn compares Dr. Mann's alleged wrongdoing — "molesting" and "torturing" data to achieve a deceptive but desired result that will court funding for Penn State — to that of Sandusky, which suggests that their characters are similarly base. ("Whether or not he's 'the Jerry Sandusky of climate change,' he remains the Michael Mann of climate change.") The accusation is bolstered by referring to the University's investigation as a "cover-up" of Dr. Mann's "wrongdoing" in order to protect someone who was a "star name" at Penn State like Sandusky and Paterno. Because the allegations impugned Dr. Mann's scientific integrity and likened him to notorious individuals connected to Penn State in whom the University had (according to Mr. Steyn) a similar financial interest to protect, the statements are not merely fanciful or extreme, purely for rhetorical effect. As in *Buckley*, they deliver an indictment of reprehensible conduct against Dr. Mann

that a reader could take to be an assertion of a true fact.[46] These injurious allegations about Dr. Mann's

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[46] We reject appellants' argument that "the correct measure of the challenged statements' verifiability as a matter of law is whether *no reasonable person could find* that the review's characterizations were supportable interpretations" of the work being criticized. *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) (*Moldea II*) (modifying *Moldea I*). As *Moldea II* explained, the standard depends on the genre of the work, and the stricter standard applied there "takes into account the fact that the challenged statements appeared in the context of a book review, and were solely evaluations of a literary work." *Id.* In the case of an "ordinary libel," the standard is "whether a reasonable jury *could find* that the challenged statements were false." *Id.* The issue comes down to the "verifiability" of the defamatory statements. *Id.*

In *Guilford* we applied the stricter standard, concluding that an op-ed column in a trade newspaper commenting on a labor management dispute is "indistinguishable in principle" from the review of an artistic work at issue in *Moldea II*, after noting it is a genre "in which readers expect to find spirited critiques of [works] that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." 760 A.2d at 603 (quoting *Moldea II*, 22 F.3d at 311). The statements in this case were "garden-variety" libels because they were levelled against the professional character of a person — not simply critiques of a work — and made factual assertions, based on the CRU emails, that Dr. Mann had engaged in "data manipulation" that was fraudulent and constituted scientific and academic misconduct. *See Moldea II*, 22 F.3d at 315 (referring to *Milkovich*, which involved a newspaper article accusing a coach of perjuring himself at a hearing, as a case of ordinary libel, 497 U.S. at 21); *cf. Guilford*, 760 A.2d at 599–600 (holding statements not actionable where op-ed article implied that plaintiffs were "hostile" and "antagonistic" to labor, which were not "susceptible of objective proof," and made no express allegation of "unlawful conduct").

character and his conduct as a scientist are capable of being verified or discredited. If they are proven to be false, the statements breach the zone of protected speech. *See Buckley*, 539 F.2d at 895–96.

Mr. Lowry's August 22, 2012 editorial for National Review[47]

We come to a different conclusion with respect to the third in the series of articles that Dr. Mann claims defamed him, Mr. Lowry's editorial for *National Review*. In the editorial, Mr. Lowry is responding to Dr. Mann's threatened lawsuit after *National Review* rejected the request for an apology and retraction. The editorial refers and links to Mr. Steyn's article, characterizing it as "mild" and "f[a]ll[ing] considerably short of" Mr. Simberg's article; Mr. Lowry does not repeat Mr. Steyn's statements except to say that Mr. Steyn referred to the hockey stick graph as "fraudulent." The editorial does not disavow Mr. Steyn's use of the word "fraudulent" but puts a gloss on it, explaining that "[i]n common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." In sum, Mr. Lowry's editorial does not repeat or endorse the factual assertions that Dr. Mann engaged in deception and misconduct that we have found to be actionable in Mr. Simberg's and Mr. Steyn's articles.

Mr. Lowry's editorial ridicules Dr. Mann, repeatedly calling him "poor Michael," describing his letter as "laughably threatening" and "pathetically

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[47] Rich Lowry, *Get Lost*, NATIONAL REVIEW (August 22, 2012), http://www.national review.com/blogs/314680.

lame chest-thumping," and saying that if he proceeds with a lawsuit Dr. Mann "risks making an ass of himself." The editorial mocks the threatened lawsuit and even welcomes it, as a way of "teach[ing] [Dr. Mann] a thing or two about how the law and how free debate works in a free country." These statements, however belittling of Dr. Mann, are not statements of fact, but of Mr. Lowry's opinion of Dr. Mann and his threatened lawsuit. Even though the ultimate success or failure of Dr. Mann's lawsuit will eventually be a provable fact, it was not so at the time the editorial was written — it still is not so — and Mr. Lowry's opinions on the matter are protected speech. Mr. Lowry's editorial is clearly an attempt to distance Mr. Steyn's article that appeared on *National Review*'s website from Mr. Simberg's that appeared on CEI's, and to express to *National Review*'s readers that it is confident of the success of the vigorous defense that it intended to mount in response to Dr. Mann's threatened lawsuit. Because Mr. Lowry's editorial for *National Review* does not repeat or endorse the actionable defamatory statements in Mr. Simberg's and Mr. Steyn's articles or contain defamatory assertions of fact that were provably false at the time they were made, the editorial is an expression of opinion protected by the First Amendment.[48]

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[48] As the allegedly defamatory statements were included in the complaint and Mr. Lowry's editorial was appended to the complaint, the claims based on these statements could have been dismissed, for failure to state a claim, under Superior Court Civil Rule 12 (b)(6). *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 312–13 (D.C. 2006) (noting that newspaper article appended

We emphasize that in conducting a review of the legal sufficiency of the evidence "it is the role of the court to determine whether the challenged statement[s] [are] 'capable of bearing a particular meaning' and whether 'that meaning is defamatory.'" *Tavoulareas*, 817 F.2d at 779 (quoting RESTATEMENT (SECOND) OF TORTS § 614 (1)). "The jury's proper function, in turn, is to determine whether a statement, held by the court to be capable of a defamatory meaning, was in fact attributed such a meaning by its readers." *Id.* at 780. As we conclude that Dr. Mann has demonstrated that Mr. Simberg's and Mr. Steyn's articles are capable of conveying a defamatory meaning and contain statements of fact that can be proven to be true or false, we continue to evaluate the legal sufficiency of the evidence with respect to the other elements of defamation.

2. Publication

"[A] cause of action for defamation requires proof of publication of the defamatory statement to a third party." *Oparaugo*, 884 A.2d at 73. Dr. Mann presented documentation showing that Mr. Simberg's article appeared on the website of CEI and Mr. Steyn's on the website of *National Review*. Notably, CEI and

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to complaint could be considered in ruling on Rule 12 (b)(6) motion, which presented issue of law whether use of word "informer' was capable of conveying defamatory meaning). The additional evidence presented by Dr. Mann in opposition to the special motion to dismiss was unnecessary to test the legal sufficiency of the statements; its relevance went primarily to the issue of actual malice, discussed *infra*.

Mr. Simberg do not dispute that Mr. Simberg's blog post on CEI's website constituted publication.[49]

National Review takes a different position. It argues that it cannot be held liable for any of the statements made by Mr. Simberg or Mr. Steyn that appeared on its website. According to National Review, it is shielded from liability by the Communications Decency Act of 1996 ("CDA"), because its website is a "provider . . . of an interactive computer service"[50] that may not be "treated as the publisher or speaker of any information provided by another information content provider."[51] 47 U.S.C. § 230 (c)(1). Under the CDA "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" § 230 (c)(1). 47 U.S.C. § 230 (e)(3). This argument was not raised in the trial court and is not properly before us.

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[49] As we have concluded that the defamation claims based on Mr. Lowry's editorial are not actionable, we do not address CEI's argument (presented for the first time on appeal) that hyperlinking Mr. Lowry's editorial on the CEI website does not suffice to satisfy the element of publication.

[50] The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230 (f)(2).

[51] The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230 (f)(3).

See Akassy v. William Penn Apartments Ltd. P'ship, 891 A.2d 291, 304 n.11 (D.C. 2006) ("Generally, issues not raised in the trial court will not be considered on appeal."). Moreover, it is not a pure question of law that we may decide on appeal without an adequate trial court record. As National Review notes in its brief, the availability of § 230 immunity under the CDA involves a three-part test that inquires into the nature of the website and the involvement of the website provider with the content of the statement, including the relationship with its author. *See Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (stating that § 230 mandates dismissal of action if defendant is a "provider or user of an interactive computer service," statement on which liability is based is "provided by another content provider," and liability is based on publishing or speaking the statement); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (noting that "[a] website operator can be both a service provider and a content provider" under the CDA: immune as a "service provider" if it "passively displays content that is created entirely by third parties," but a "content provider" and thus not immune if it displays content that "it creates itself, or is 'responsible, in whole or in part for' creating"). These are questions that have not been developed or considered in the trial court, and that Dr. Mann has not had an opportunity to address.

On the record before us, Dr. Mann met his burden of demonstrating that a jury could find that Mr. Simberg's and Mr. Steyn's articles were published to a third party.

3. Actual Malice

An essential safeguard of First Amendment rights is the "breathing space" for uninhibited expression, *NAACP v. Button*, 371 U.S. 415, 433 (1963), afforded by the heightened showing of fault — actual malice — that must be proved in defamation cases that rely on statements made about public figures concerning matters of public concern,[52] *see N.Y. Times Co.*, 376 U.S. at 279–80 (imposing heightened standard to defamation action brought by a state official); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion), 164 (Warren, C.J., concurring), 170 (Black, J., concurring in part and dissenting in part), 172–73 (Brennan, J., concurring in part and dissenting in part) (extending the actual malice standard to public figures). Moreover, to prevail, the plaintiff in such a lawsuit bears a higher burden of proof than the preponderance of the evidence standard usually applicable in civil cases; the plaintiff must persuade the fact-finder that the defendant acted with actual malice in publishing the defamatory statements by clear and convincing evidence. *See N.Y. Times Co.*, 376 U.S. at 285–86 (referring to the "convincing clarity which the constitutional standard demands").

A plaintiff may prove actual malice by showing that the defendant either (1) had "subjective knowledge of the statement's falsity," or (2) acted with "reckless disregard for whether or not the statement was false."

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[52] The parties agree, as do we, that Dr. Mann is a limited public figure with respect to statements about global warming because he has assumed a role in "the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345.

Burke I, 91 A.3d at 1044. The "subjective" measure of the actual malice test requires the plaintiff to prove that the defendant actually knew that the statement was false. *See N.Y. Times Co.*, 376 U.S. at 280. The "reckless disregard" measure requires a showing higher than mere negligence; the plaintiff must prove that "the defendant in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."). The plaintiff may show that the defendant had such serious doubts about the truth of the statement inferentially, by proof that the defendant had a "high degree of awareness of [the statement's] probable falsity." *Harte-Hanks Commc'ns*, *Inc.*, 491 U.S. at 688 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). A showing of reckless disregard is not automatically defeated by the defendant's testimony that he believed the statements were true when published; the fact-finder must consider assertions of good faith in view of all the circumstances. *St. Amant*, 390 U.S. at 732 ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."). Thus, in considering the evidentiary sufficiency of the plaintiff's response to a special motion to dismiss filed under D.C. Code § 16-5502 (b), the question for the court is whether the

evidence suffices to permit a reasonable jury to find actual malice with convincing clarity.[53]

There is a hefty volume of evidence in the record. Appellants' special motions to dismiss were accompanied by various investigatory reports cited in Dr. Mann's complaint and several articles by third parties that criticize the investigations underlying the reports. In his response, Dr. Mann also submitted extensive documentation from eight separate inquiries that either found no evidence supporting allegations that he engaged in fraud or misconduct or concluded that the methodology used to generate the data that resulted in the hockey stick graph is valid and that the data were not fabricated or wrongly manipulated.

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[53] In this case, the trial court characterized the evidence of actual malice as "slight" and as not amounting to a showing by clear and convincing evidence, but stated that it was "sufficient to find that further discovery may uncover evidence of 'actual malice.'" We are not constrained by the trial court's conclusion in this regard, as the sufficiency of the evidence to support a finding of actual malice is a question of law that we review de novo. *See Harte-Hanks Commc'ns*, *Inc.*, 491 U.S. at 685. We note, however, that if the trial court considers that the evidence presented in opposition to a special motion to dismiss is not sufficient to go to a jury, the court must grant the motion to dismiss as the opponent has the burden to demonstrate a sufficient evidentiary basis for his claim. *See* D.C. Code § 16-5502 (b). The court is not at liberty to dispense with this statutory burden. The Anti-SLAPP Act authorizes the court to permit targeted discovery for the purpose of responding to a special motion to dismiss. Granting a request for such discovery was the proper way to proceed, if it "appear[ed] likely that targeted discovery [would] enable the plaintiff" to shoulder his evidentiary burden to overcome the special motion to dismiss *and* would not be "unduly burdensome" to the defendants. *Id.* § 16-5502 (c)(2).

Not all the evidence before the court was relevant to the question of whether appellants acted with the requisite malice in accusing Dr. Mann of engaging in deceptive behavior and misconduct. We set aside the reports and articles that deal with the validity of the hockey stick graph representation of global warming and its underlying scientific methodology. The University of East Anglia, the U.S. Environmental Protection Agency, and the U.S. Department of Commerce issued reports that concluded that the CRU emails did not compromise the validity of the science underlying the hockey stick graph. As we have explained, the expression of scientific and policy opinions in the debate over global warming that the hockey stick illustrates is speech protected by the First Amendment. Much as Dr. Mann's pride in his work may be wounded by criticisms of the hockey stick graph, appellants are entitled to their opinions on the subject and to express them without risk of incurring liability for defamation. The proper place for the discussion is the scientific community and the public sphere of policy prescriptions.

The reports that are relevant to the defamation claims are those that concern appellants' statements that Dr. Mann engaged in "dishonesty," "fraud," and "misconduct." The University of East Anglia Independent Climate Change Emails Review, Penn State University, the United Kingdom House of Commons, and the Office of the Inspector General of the U.S. National Science Foundation, all conducted investigations and issued reports that concluded that the scientists' correspondence in the 1,075 CRU emails that were reviewed did not reveal research or scientific misconduct. 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.

The issue for the court at this juncture is to determine whether the conclusions reached by these various investigations, when considered in view of all the evidence before the court, permit a jury to find, by clear and convincing evidence, that appellants either knew their accusations of misconduct were false or made those accusations with reckless disregard for their truth.

We begin our examination by noting that the results of the investigations that Dr. Mann says exonerate him of wrongdoing were made public; appellants do not claim they were unaware of them when they made the challenged statements. In assessing whether these reports provided appellants with "obvious reasons to doubt the veracity," *St. Amant*, 390 U.S at 732, of their subsequent statements that Dr. Mann engaged in misconduct, we consider (as would a jury) the source of the reports, the thoroughness of the investigations, and the conclusions reached. As the reports are extensive, we summarize the relevant portions in this opinion.

We are struck by the number, extent, and specificity of the investigations, and by the composition of the investigatory bodies. We believe that a jury would conclude that they may not be dismissed out of hand. Although we do not comment on the weight to be given to the various investigations and reports, which is a question for the jury, what is evident from our review is that they were conducted by credentialed academics

and professionals.[54] The investigations considered, and expressly rejected, the claim that the CRU emails substantiated charges of misconduct, fraud, and

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[54] The first Penn State investigation, into allegations of research misconduct, was directed Henry C. Foley, Ph.D, Vice President for Research and Dean of the Graduate School; Alan W. Scaroni, Ph.D., Associate Dean for Graduate Education and Research, College of Earth and Mineral Sciences; and Ms. Candice A. Yekel, M.S., CIM, Director of the Office for Research Protections and Research Integrity Officer. A second Penn State investigation, into compliance with accepted academic practices, was conducted by Sarah M. Assmann, Waller Professor, Department of Biology; Welford Castleman, Evan Pugh Professor and Eberly Distinguished Chair in Science, Department of Chemistry and Department of Physics; Mary Jane Irwin, Evan Pugh Professor, Department of Computer Science and Electrical Engineering; Nina G. Jablonski, Department Head and Professor, Department of Anthropology; Fred W. Vondracek, Professor, Department of Human Development and Family Studies; with Candice Yekel, Director of the Office for Research Protections. The National Science Foundation's investigation was conducted by its Office of Inspector General. The University of East Anglia's Independent Climate Change E-mails Review was led by Sir Muir Russell, a former professor and Vice Chancellor for the University of Glasgow, and current chair of the Judicial Appointments Board for Scotland. He was assisted by Professor Geoffrey Boulton, Regius Professor Emeritus of Geology and former Vice Principal of the University of Edinburgh; Professor Peter Clarke, Professor of Physics at the University of Edinburgh; Mr. David Eyton, Head of Research & Technology at British Petroleum; and Professor James Norton, an independent policy advisor from the U.K. Parliament's Office of Science & Technology. The United Kingdom's investigation was conducted by the House of Commons' Science and Technology Committee, comprised of fourteen members of the House of Commons from the Labour Party, the Conservative Party, the Liberal Democrats Party, and an independent.

deception. The investigations posed their questions in slightly different ways and conducted their analyses in accordance with their own procedures and standards, a mark of the cumulative strength of the conclusion each reached unanimously and without equivocation: that the CRU emails did not support the conclusion that the scientists engaged in fabricating or deceptively manipulating data, or in scientific misconduct, fraud or dishonesty in their reporting and presentation of research results.

The Penn State investigation report looked into "research misconduct" such as "manipulating data, destroying records and colluding to hamper the progress of scientific discourse"[55] the National Science Foundation considered "allegations of research misconduct" the University of East Anglia investigated "whether data had been manipulated or suppressed" the U.K. House of Commons considered whether the scientists had "deliberately misrepresented the data." These reports expressly disclaimed that their purpose or conclusions were concerned with the validity of the underlying

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[55] Penn State conducted two separate investigations by two different investigatory bodies. The first was into research misconduct; after the first investigation found no research misconduct, the second took a broader view and considered whether Dr. Mann had "engaged in, or participated in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities."

statistical methodology, or its representation in the hockey stick graph.[56]

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[56] For example, the report commissioned by the University of East Anglia states: "The Review examines the honesty, rigour and openness with which the CRU scientists have acted. It is important to note that we offer no opinion on the validity of their scientific work. Such an outcome could only come through the normal processes of scientific debate and not from the examination of e-mails or from a series of interviews about conduct."

From the Penn State report: "[R]esearch misconduct does not include disputes regarding honest error or honest differences in interpretations or judgments of data, and is not intended to resolve bona fide scientific disagreement or debate." "We are aware that some may seek to use the debate over Dr. Mann's research conduct and that of his colleagues as a proxy for the larger and more substantive debate over the science of anthropogenic global warming and its societal (political and economic) ramifications. We have kept the two debates separate by only considering Dr. Mann's conduct."

From the report of the U.K. House of Commons, Science and Technology Committee: "The complaints and accusations made against CRU in relation to the scientific process come under two broad headings. The first is transparency . . . . The second is honesty: that CRU has deliberately misrepresented the data, in order to produce results that fit its preconceived views about the anthropogenic warming of the climate." "If there had been more time available before the end of this Parliament we would have preferred to carry out a wider inquiry into the science of global warming itself."

From the report of the National Science Foundation, Office of Inspector General: "Although [Dr. Mann's] data is still available and still the focus of significant critical examination, no direct evidence has been presented that indicates the Subject fabricated the raw data he used for his research or falsified his results. . . . Such scientific debate is ongoing but does not, in itself, constitute evidence of research misconduct."

Appellants offer several reasons why the reports do not supply sufficient evidence for the jury to find that they acted with actual malice.

1. *Appellants' Honest Belief*

Appellants contend that because the challenged statements reflect their subjective and honest belief in the truth of their statements, actual malice cannot be proven. This argument, however, presupposes what the jury will find on the facts of this case. The issue for the court is whether, taking into account the substantive conclusions of investigatory bodies constituted to look into the very evidence — the CRU emails — that appellants' statements claimed as factual proof of Dr. Mann's deception and misconduct, a jury could find, by clear and convincing evidence, that appellants acted with "actual malice." This is a determination the jury could reach by finding either that appellants knew their defamatory statements were false, or that appellants acted with reckless disregard for the truth of their statements. It is for the jury to determine the credibility of appellants' protestations of honest belief in the truth of their statements, and to decide whether such a belief, assuming it was held, was maintained in reckless disregard of its probable falsity.[57]

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[57] Appellants have made representations in their briefs about their subjective belief, but there is no evidence in the record (beyond the articles that are the subject of the defamation action) in the form of affidavits or depositions attesting to the personal beliefs of Mr. Simberg, Mr. Steyn, or the responsible personnel at CEI and National Review, and how they came to have such beliefs in light of the reports that had been issued before the statements were made.

2. *Unreliability of Reports*

As Mr. Simberg and Mr. Steyn make clear in their articles, they dismiss the Penn State investigation as biased, conducted by insiders with a vested interest in upholding Dr. Mann's reputation as a leading climate scientist. The articles describe the Penn State investigation as a "cover-up" and a "whitewash," and argue they have a good basis for believing so in light of Penn State's shoddy investigation of Jerry Sandusky, in which he was cleared in the face of multiple allegations of sexually abusing children for which he was subsequently charged and convicted. Even if appellants' skepticism of the Penn State report were to be credited by a jury as a valid reason for not taking its conclusions seriously, that leaves three other reports, from separate investigatory bodies in academia and government, on both sides of the Atlantic, that also found no wrongdoing.[58]

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[58] Of particular relevance to appellants' criticism of the Penn State investigation is the report of the National Science Foundation, an independent federal agency that funded Dr. Mann's scientific research, and therefore had a responsibility to monitor and ensure compliance with required standards. As the NSF report states, it examined "de novo" each of three allegations of misconduct leveled against Dr. Mann that were dismissed by the Penn State report. As part of that review, NSF "reviewed the emails and concluded that nothing contained in them evidenced research misconduct." The NSF found that Penn State had adequately addressed those three allegations. However, the NSF found the Penn State investigation deficient concerning the allegation concerning data fabrication or falsification because the University had not interviewed experts critical of Dr. Mann's research. The NSF Office of Inspector General then undertook its own independent investigation of this

Appellants argue that the investigatory reports could not be relied upon by a jury because the investigations Dr. Mann claims exonerate him of misconduct "take no ultimate position," but only indicate that there was "no evidence" of fraud. This is a quibble about wording that does not call into question the import of the investigations' conclusions. An investigatory body can report only on what it has found; a determination that there is "no evidence" of fraud is an ultimate conclusion that investigation has not turned up any evidence of misconduct.

Appellants also contend that the investigatory reports cannot be relied upon to find that they purposely avoided the truth because the investigations do not, in fact, "exonerate" Dr. Mann. They point to the report of the University of East Anglia, which states that the hockey stick graph that was submitted for inclusion in the 1999 WMO Report and IPCC Third Assessment Report was "misleading." The UEA report does use the word "misleading." As that report makes clear, however, what it meant is not that the statistical procedures used to generate the hockey stick graph — which involved reconstructions of temperature through the use of proxies (such as tree

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allegation, broadened it beyond data falsification, and interviewed Dr. Mann, his critics, and disciplinary experts. After concluding its independent investigation, the NSF found "no evidence" that data had been fabricated or falsified or that Dr. Mann had engaged in any other types of research misconduct. The NSF closed its investigation "with no further action." Thus, even if appellants initially had reason to be skeptical of Penn State's motivations and thoroughness, a jury could find that the independent, de novo investigation by the NSF corroborated the Penn State findings, as did the investigations conducted by the University of East Anglia and the U.K. House of Commons.

rings) or splicing data from different sources — are themselves misleading, but that an explanation of those procedures should have been included in the graph itself or in immediately accompanying text. It is not an indictment of the deceptive use of data, but a comment on how the graph could and should have been presented to be more transparent to the readers of the WMO and IPCC Reports. With respect to the allegations of misconduct it investigated, the report of the University of East Anglia is unequivocal in its conclusion:

> Climate science is a matter of such global importance, that the highest standards of honesty, rigour and openness are needed in its conduct. On the specific allegations made against the behaviour of CRU scientists, we find that their rigour and honesty as scientists are not in doubt.[59]

Appellants argue that the investigations of the University of East Anglia and the U.K. House of Commons also cannot be said to have exonerated Dr. Mann because they were primarily focused on the conduct of the scientists in the U.K., at the University of East Anglia's Climate Research Unit. The CRU emails at the core of those investigations, however, contained exchanges between these scientists, specifically, the CRU's head, Philip Jones, and Dr. Mann or referred to Dr. Mann. See *supra* note 9. The National Science Foundation Report was specifically focused on Dr. Mann and similarly

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59 The report did criticize the CRU scientists for their "unhelpfulness" in responding to FOIA requests and for deleting emails that may be requested.

concluded that there was "no specific evidence that [Dr. Mann] falsified or fabricated any data and no evidence that his actions amounted to research misconduct." The Penn State investigations also were specifically directed at Dr. Mann's conduct.

3. *Subjectivity of Reports*

Appellants contend that the investigations' conclusions need not have alerted them to the probable falsity of their beliefs because the reports reflected no more than subjective and standardless opinions on the manner in which Dr. Mann and the other scientists conducted their work. A jury could well think otherwise. Each of the reports cites to specific standards for assessing the allegations of misconduct. The Penn State investigation refers to the University's Research Administration Policy No. 10; the National Science Foundation Office of Inspector General conducted a de novo review of the CRU emails and relevant documents against NSF Research Misconduct Regulation, 45 C.F.R. § 689.1 (plagiarism, fabrication, falsification), and other requirements applicable to federal awardees under federal statutes, such as the False Claims Act, 18 U.S.C. § 287, and False Statements Act, 18 U.S.C. § 1001; and the U.K. House of Commons investigation specifically inquired into charges of "dishonesty" and falsification of data for the purpose of exaggerating global warming arising out of the scientists' use of the phrases "trick" and "hide the decline" in the most-quoted CRU email referring to Dr. Mann's statistical technique; the University of East Anglia's investigation set out its analytic parameters for assessing the "honesty, rigour and openness" of the CRU scientists' handling of data as follows:

> In making its analysis and conclusions, the Team [of investigators] will test the relevant work against pertinent standards at the time it was done, recognizing that such standards will have changed. It will also test them against current best practice, particularly statements of the ethics and norms such as those produced by the UK Government Office for Science and by the US National Academy of Sciences. These identify principles relating to rigour, respect and responsibility in scientific ethics and to integrity, accessibility and stewardship in relation to research data.

The fact that the standards applied to charges of scientific and research misconduct are primarily professional or ethical, not criminal, and that their application requires the exercise of judgment does not mean that they lack substantive content, real-life consequences, or make them incapable of verification.[60] These standards do not suffer from the defect we identified in *Rosen*, that "no threshold showing of falsity is possible" where there were no standards of "a particular kind identifiable in writing," and thus the challenged statement was "too subjective, too amorphous, [and] too susceptible of multiple

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[60] *See Jankovic II*, 593 F.3d at 28 (noting that a proposition is "verifiable in the practical sense that our legal system is ready to make decisions on the basis of how such issues are resolved — decisions profoundly affecting people's lives"). As an example, the conduct of lawyers is evaluated against professional and ethical standards, and civil liability and disciplinary sanctions can be imposed based on findings that those standards have been violated.

interpretations." 44 A.3d at 1255, 1260 (noting statement's reference to unspecified "standards [the employer] expected of its employees").

As the preceding discussion demonstrates, appellants' objections to the reports can fairly be characterized as arguments that could be made to a jury as to why the reports' conclusions should not be credited or given much weight. We do not judge whether appellants' arguments will persuade a jury. Our task now is not to anticipate whether the jury will decide in favor of appellants or Dr. Mann, but to assess whether, on the evidence of record in connection with the special motion to dismiss, a jury *could* find for Dr. Mann.

We reviewed a comparable constellation of facts in *Nader v. de Toledano*, the first case considered by this court following the Supreme Court's adoption of the actual malice standard for defamation actions by public figures. 408 A.2d 31 (D.C. 1979). The case involved Ralph Nader, the well-known consumer advocate, who sued a journalist who wrote a newspaper column criticizing Nader, saying that it had been "demonstrate[d] conclusively that Nader falsified and distorted evidence" during hearings before a Senate subcommittee. *Id.* at 37–38. In support of this assertion, the column referred to a Senate Report, issued after an extensive investigation, that rejected the thrust of Nader's testimony as unsubstantiated. *Id.* at 37. The Report also stated, however, that the testimony had been presented "in good faith based on the information available" to Nader at the time. *Id.* On appeal of the trial court's grant of summary judgment to the journalist, the court reversed and remanded the case for trial. The court

dismissed the argument that a finding of malice would be impermissible because the journalist asserted that he "honestly believed in the truth of his statement when he published it," concluding that the Report's "explicit, unambiguous finding" that Nader had acted in good faith afforded "a sufficient evidentiary basis from which a reasonable inference" could be drawn that the statement that Nader "falsified and distorted evidence" had been made with actual malice. *Id*. at 53.

We come to the same conclusion as in *Nader*. In the case before us now, not one but four separate investigations were undertaken by different bodies following accusations, based on the CRU emails, that Dr. Mann had engaged in deceptive practices and scientific and academic misconduct. Each investigation unanimously concluded that there was no misconduct. Reports of those investigations were published and were known to appellants prior to Mr. Simberg's and Mr. Steyn's articles continuing to accuse Dr. Mann of misconduct based on the emails that were the subject of the investigations. Applying the reasoning in *Nader* to the evidence now of record in this case, we conclude that a jury could find that appellants' defamatory statements were made with actual malice.[61]

There is, in this case, another factor that a jury could take into account in evaluating appellants' state of mind in publishing the statements accusing Dr. Mann of misconduct and deception. As the articles

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[61] Our legal conclusion is based on the evidence that has been presented at this juncture, in connection with the special motion to dismiss. Once discovery is completed, the legal conclusion that the evidence is sufficient to go to trial could change.

that form the basis of Dr. Mann's complaint make clear, appellants and Mr. Steyn are deeply invested in one side of the global warming debate that is opposed to the view supported by Dr. Mann's research. Although animus against Dr. Mann and his research is by itself insufficient to support a finding of actual malice where First Amendment rights are implicated, bias providing a motive to defame by making a false statement may be a relevant consideration in evaluating other evidence to determine whether a statement was made with reckless disregard for its truth. *See Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 664–65, 667–68, 689 n.36 (stating that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry," and noting that jury could have found actual malice on the basis, *inter alia*, that publisher was biased against plaintiff and in a "bitter rivalry" with another newspaper that would be impugned by discrediting the plaintiff); *see also Payne v. Clark*, 25 A.3d 918, 925 (D.C. 2011) (distinguishing between common law malice, for which "ill will" or bad faith is sufficient, and "actual malice" required by the First Amendment). In evaluating the evidence in this case, for example, the jury could consider that appellants' zeal in advancing their cause against the hockey stick graph's depiction of a warming global climate led them to accuse Dr. Mann, one of its most prominent proponents, of deception and misconduct in producing the graph with reckless disregard of their knowledge that several investigations had discredited those accusations. *See Tavoulareas*, 817 F.2d at 796 (noting that evidence of ill will or bad motive, if probative of a "willingness to

publish *unsupported* allegations," may be suggestive of actual malice).

Just as this court's decision in *Nader* provides a useful comparison with the facts of this case, the D.C. Circuit's recent opinion in *Jankovic v. Int'l Crisis Grp.* (*Jankovic III)*, 822 F.3d 576 (D.C. Cir. 2016), provides a useful contrast. After deciding in two previous appeals, during the twelve-year course of litigation, that a report stating that a Serbian businessman had supported the Milosevic regime in exchange for favorable treatment for his businesses was capable of conveying a defamatory meaning, see *supra* at 60, and that the statement was actionable because it was not purely an opinion but asserted a false fact as justification, see *supra* note 39, the court addressed the element of actual malice. The court evaluated the evidence to determine whether it would allow a jury to find, by clear and convincing evidence, that the International Crisis Group's (ICG) publication of the statement was made with actual malice. Concluding that the evidence was insufficient as a matter of law, the court noted the following facts: ICG considered that the writer of the report was an able analyst and expert on the Balkans; the writer had conducted research of published reports and Serbian press accounts, and had interviewed a number of confidential sources in government, business, and NATO embassies, before writing the report; and the report was reviewed and edited by the writer's supervisor, the head of research, and ultimately approved by ICG's president. *Id*. at 591–92.

The court stressed that because the plaintiff had not produced evidence that the writer had reason to doubt his research and sources, his failure to investigate

further or question his sources did not show actual malice or a reckless disregard for the truth. "[I]t is only when a plaintiff offers evidence that 'a defendant has reason to doubt the veracity of its source' does its 'utter failure to examine evidence within easy reach or to make obvious contacts in an effort to confirm a story' demonstrate reckless disregard." *Id*. at 590 (quoting *McFarlane v. Sheridan Square Press, Inc*., 91 F.3d 1501, 1510 (D.C. Cir. 1996)). "Absent such evidence . . . [the writer's] extensive background research and reporting on the Balkans, his understanding of the Serbian press, and his good faith belief that the frozen assets list implied more than it actually did, belies actual malice." *Id*. at 597. In sum, the court concluded, what was missing was evidence that the publisher had "serious doubt" or had "a high degree of awareness" of the statement's probable falsity, and thereby "acted with reckless disregard" for the truth of the defamatory statement. *Id*.

What was present in *Jankovic III* that lent support to the claim of good faith belief is missing here. Unlike in *Jankovic III*, where the court noted that ICG had relied on an able analyst who had researched, reviewed and edited the report prior to publication, in this case there is, at this point, no similar evidence that Mr. Simberg, Mr. Steyn, CEI, or National Review conducted research or investigation that provided support for their defamatory statements that Dr. Mann engaged in deception and misconduct. The only support cited in the articles are the CRU emails, with primary reliance on the language in one email that referred to "Mike's *Nature* trick." But what the court noted was missing in *Jankovic III* to support a finding of actual malice is present here: evidence that

there was reason to doubt the emails as a reliable source for the belief that Dr. Mann had engaged in misconduct. That evidence has been presented in the form of reports from four separate investigations that debunked the notion that the emails and, specifically the reference to Dr. Mann's "trick," revealed deception in the presentation of data and scientific misconduct.

On the current record, where the notion that the emails support that Dr. Mann has engaged in misconduct has been so definitively discredited, a reasonable jury could, if it so chooses, doubt the veracity of appellants' claimed honest belief in that very notion. A jury could find, by clear and convincing evidence, that appellants "in fact entertained serious doubts" or had a "high degree of awareness" that the accusations that Dr. Mann engaged in scientific misconduct, fraud, and deception, were false, and, as a result, acted "with reckless disregard" for the statements' truth when they were published. *Nader*, 408 A.2d at 41, 50–53.

B. Intentional Infliction of Emotional Distress

The complaint's claim for intentional infliction of emotional distress was based on the statement that compared Dr. Mann to Jerry Sandusky.[62] To establish a prima facie case of intentional infliction of emotional distress, a plaintiff must show "(1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v.*

[62] "Dr. Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire consequences for the nation and planet."

District of Columbia, 9 A.3d 484, 493–94 (D.C. 2010) (quoting *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003)). 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.* at 494 (quoting *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 (D.C. 1991)). As a constitutional matter, a public figure "may not recover for the tort of intentional infliction of emotional distress by reason of publication[] . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine, Inc.*, 485 U.S. at 56.

Our conclusion that the evidence presented suffices to permit a jury to find the constitutional requirement of actual malice also satisfies the mens rea element of the tort of intentional infliction of emotional distress. Arguably, appellants' statement comparing Dr. Mann to a convicted child sexual abuser could be considered to be not simply a serious departure from journalistic standards, but also "outrageous" and "extreme in degree," particularly where there was no legitimate need or urgency that might excuse it. *Cf. Minch v. District of Columbia*, 952 A.2d 929, 941 (D.C. 2008) (noting the pressure on police officers who publicly and prematurely identified a student as suspect in one murder as they confronted murder of a second student at undergraduate campus). We need not decide whether the statement permits a finding that appellants' conduct was "extreme and outrageous," because we conclude that Dr. Mann has not demonstrated that he is likely to succeed in proving that he suffered the severe emotional distress required

to prevail on a claim for intentional infliction of emotional distress.

The complaint alleges that as a result of the defamatory statements "besmirching Dr. Mann's reputation and comparing him to a convicted child molester," Dr. Mann has suffered "extreme emotional distress," "mental anguish," and "personal humiliation." From the statement itself, a jury could infer that the comparison to Sandusky was particularly hurtful. Dr. Mann's requests for an apology and retraction, and his undertaking this litigation, would allow a jury to infer that he was so deeply aggrieved that he deemed it necessary to restore his public reputation. Dr. Mann has presented no evidence, however, that his understandable consternation met the high bar of "severe emotional distress," which requires a showing beyond mere "mental anguish and stress" and must be "of so acute a nature that harmful physical consequences are likely to result." *Armstrong v. Thompson*, 80 A.3d 177, 189–90 (D.C. 2013) (quoting *Futrell*, 816 A.2d at 808); *see also Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 81 (D.C. 2011) (en banc) (noting that claim of negligent infliction of emotional distress requires showing of emotional distress that is "acute, enduring or life-altering"). We, therefore, conclude that, on the record before us, the evidence is insufficient to support a finding that Dr. Mann suffered "severe" emotional distress. *See id.* at 182, 189 (noting that plaintiff's "strong distress" resulting from false statements to prospective employer that plaintiff was under investigation "for suspected violations of both a criminal and administrative nature" that led to rescission of employment offer was insufficient to

show "severe emotional distress"). As Dr. Mann has not produced or proffered evidence that he is likely to succeed in proving that he suffered severe emotional distress, appellants' special motions to dismiss the claim of intentional infliction of emotional distress should have been granted.

* * *

Concluding that we have jurisdiction pursuant to the collateral order doctrine to hear appellants' interlocutory appeal of the trial court's denial of their special motions to dismiss under the District's Anti-SLAPP Act, we hold that the Act's "likely to succeed on the merits" standard for overcoming a special motion to dismiss filed under D.C. Code § 16-5502 (b) requires that the plaintiff present an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor. Dr. Mann has supplied sufficient evidence for a reasonable jury to find, by a preponderance of the evidence, that statements in the articles written by Mr. Simberg and Mr. Steyn were false, defamatory, and published by appellants to third parties, and, by clear and convincing evidence, that appellants did so with actual malice. We, therefore, affirm the trial court's denial of the special motions to dismiss the defamation claims based on those articles and remand the case for additional proceedings in the trial court with respect to these claims. *Id*. We reverse the trial court's denial of the special motions to dismiss with respect to Dr. Mann's defamation claims based on Mr. Lowry's editorial and the claim for intentional infliction of emotional distress. On remand, the court shall dismiss these claims with prejudice. *Id*. § 16-5502 (d).

So ordered.

APPENDIX

The Other Scandal In Unhappy Valley[63]

by Rand Simberg on July 13, 2012

in Global Warming, Transparency

So it turns out that Penn State has covered up wrongdoing by one of its employees to avoid bad publicity.

But I'm not talking about the appalling behavior uncovered this week by the Freeh report. No, I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

To review, when the emails and computer models were leaked from the Climate Research Unit at the University of East Anglia two and a half years ago, many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed had been engaging in data manipulation to keep the blade on his famous hockey-

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[63] The underlining in the articles in the Appendix indicate a hyperlink.

stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary.

As a result, in November of 2009, the university issued a press release that it was going to undertake its own investigation, independently of one that had been launched by the National Academy of Sciences (NAS) in response to a demand from Congressman Sherwood Boehlert (R- N.Y.). In July of the next year, the panel set up to investigate declared him innocent of any wrongdoing:

> Penn State Professor Michael Mann has been cleared of any wrongdoing, according to a report of the investigation that was released today (July 1). Mann was under investigation for allegations of research impropriety that surfaced last year after thousands of stolen e-mails were published online. The e-mails were obtained from computer servers at the Climatic Research Unit of the University of East Anglia in England, one of the main repositories of information about climate change.
>
> The panel of leading scholars from various research fields, **all tenured professors at Penn State**, began its work on March 4 to look at whether Mann had "engaged in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting or reporting research or other scholarly activities."

My emphasis.

Despite the fact that it was completely internal to Penn State, and they didn't bother to interview anyone

except Mann himself, and seemingly ignored the contents of the emails, the warm mongers declared him exonerated (and the biggest victim in the history of the world). But many in the skeptic community called it a whitewash:

> This is not surprising that Mann's own university circled the wagons and narrowed the focus of its own investigation to declare him ethical.
>
> The fact that the investigation cited Mann's 'level of success in proposing research and obtaining funding' as some sort of proof that he was meeting the 'highest standards', tells you that Mann is considered a sacred funding cash cow. At the height of his financial career, similar sentiments could have been said about Bernie Madoff.
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.

Richard Lindzen of MIT weighed in as well:

> "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally," Lindzen said in an e-mail from France.

But their criticism was ignored, particularly after the release of the NAS report, which was also purported to exonerate him. But in rereading the NAS "exoneration," some words stand out now. First, he was criticized for his statistical techniques (which was the basis of the criticism that resulted in his unscientific behavior). But more importantly:

> The OIG also independently reviewed Mann's emails and PSU's inquiry into whether or not Mann deleted emails as requested by Phil Jones in the "Climategate" emails (aka Allegation 2). The OIG concluded after reviewing the published CRU emails and **the additional information provided by PSU** that "nothing in [the emails] evidenced research misconduct within the definition of the NSF Research Misconduct Regulation." Furthermore, the OIG accepted the conclusions of the PSU inquiry regarding whether Mann deleted emails and agreed with PSU's conclusion that Mann had not.

Again, my emphasis. In other words, the NAS investigation relied on the integrity of the university to provide them with all relevant material, and was thus not truly independent. We now know in hindsight that it could not do so. Beyond that, there are still relevant emails that we haven't seen, two years later, because the University of Virginia continues to stonewall on a FOIA request, and it's heading to the Supreme Court of the Commonwealth of Virginia.

Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing in millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being whitewashed investigated. We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we

now know, they would do any less to hide academic and scientific misconduct, with so much at stake?

It's time for a fresh, truly independent investigation.

NATIONAL REVIEW

Football and Hockey

By Mark Steyn — July 15, 2012

In the wake of Louis Freeh's report on Penn State's complicity in serial rape, Rand Simberg writes of Unhappy Valley's other scandal:

> I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

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, the very ringmaster of the tree-ring circus. And, when the East Anglia emails came out, Penn State felt obliged to "investigate" Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same cove who investigated Mann. And, as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.

If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?

Whether or not he's "the Jerry Sandusky of climate change", he remains the Michael Mann of climate change, in part because his "investigation" by a deeply corrupt administration was a joke.

NATIONAL REVIEW

Get Lost

My response to Michael Mann.

By Rich Lowry — August 22, 2012

So, as you might have heard, Michael Mann of Climategate infamy is threatening to sue us.

Mann is upset — very, very upset — with this Mark Steyn Corner post, which had the temerity to call Mann's hockey stick "fraudulent." The Steyn post was mild compared with other things that have been said about the notorious hockey stick, and, in fact, it fell considerably short of an item about Mann published elsewhere that Steyn quoted in his post.

So why threaten to sue us? I rather suspect it is because the Steyn post was savagely witty and stung poor Michael.

Possessing not an ounce of Steyn's wit or eloquence, poor Michael didn't try to engage him in a debate. He sent a laughably threatening letter and proceeded to write pathetically lame chest-thumping posts on his Facebook page. (Is it too much to ask that world-renowned climate scientists spend less time on Facebook?)

All of this is transparent nonsense, as our letter of response outlines.

In common polemical usage, "fraudulent" doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us.

Usually, you don't welcome a nuisance lawsuit, because it's a nuisance. It consumes time. It costs

money. But this is a different matter in light of one word: discovery.

If Mann sues us, the materials we will need to mount a full defense will be extremely wide-ranging. So if he files a complaint, we will be doing more than fighting a nuisance lawsuit; we will be embarking on a journalistic project of great interest to us and our readers.

And this is where you come in. If Mann goes through with it, we're probably going to call on you to help fund our legal fight and our investigation of Mann through discovery. If it gets that far, we may eventually even want to hire a dedicated reporter to comb through the materials and regularly post stories on Mann.

My advice to poor Michael is to go away and bother someone else. If he doesn't have the good sense to do that, we look forward to teaching him a thing or two about the law and about how free debate works in a free country.

He's going to go to great trouble and expense to embark on a losing cause that will expose more of his methods and maneuverings to the world. In short, he risks making an ass of himself. But that hasn't stopped him before.

— *Rich Lowry is the editor of* NATIONAL REVIEW.

APPENDIX B

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., *et al*., Defendants.	Case No. 2012 CA 008263 B Judge Frederick H. Weisberg

ORDER

This matter is before the court on the separate special motions of defendants Mark Steyn and National Review, Inc. ("National Review")[1] and of

[1] When these motions were filed, defendants Steyn and National Review were represented by the same counsel. That law firm has recently withdrawn as counsel for both defendants. Mr. Steyn is currently representing himself, and new counsel has entered its appearance for National Review. On January 21, 2014, Mr. Steyn filed his own Motion to Vacate Judge Combs Greene's July 19, 2013, order, stating his intention to file a new motion to dismiss the amended complaint. Because the court is denying the pending defense motions to dismiss with respect to all seven Counts of the amended complaint, it is unnecessary to wait for still another similar motion from Mr. Steyn.

defendants Competitive Enterprise Institute and Rand Simberg ("CEI") to dismiss the amended complaint pursuant to the District of Columbia Anti-SLAPP Act, defendants' separate Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted, and defendants' motion for a stay of discovery pending the court's decision on the Anti-SLAPP special motions. On December 19, 2013, the District of Columbia Court of Appeals dismissed as moot defendants' interlocutory appeal of the orders dismissing plaintiff's original complaint, which were entered on July 19, 2013, after plaintiff had filed his amended complaint on July 10, 2013. Defendants have now renewed their special motions to dismiss and their Rule 12(b)(6) motions to dismiss, this time directed against plaintiff's amended complaint, which is almost identical to the original complaint except for the addition of one new claim for relief.[2]

Under the D.C. Anti-SLAPP Act, a defamation defendant may file a special motion to dismiss any claim arising from an "act in furtherance of the right of advocacy," which shall be granted unless the claim is "likely to succeed on the merits." D.C. Code § 16-5502(a)–(b). Columnists and organizations

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[2] Defendants have focused their motions to dismiss on the new Count VII in plaintiff's amended complaint, and they have addressed Counts I–VI primarily through their motions for reconsideration. Judge Combs Greene denied the motions for reconsideration on August 30, 2013 (National Review defendants) and September 20, 2013 (CEI defendants). In the interest of judicial efficiency, the court is treating the motions to dismiss as if they sought dismissal of all seven Counts of the amended complaint.

writing on issues of public interest, such as defendants, are engaged in acts "in furtherance of the right of advocacy." D.C. Code § 16-5501. Therefore, the court must grant the motions unless plaintiff is "likely to succeed on the merits."[3]

The only substantive difference between the original complaint and the amended complaint is the addition of Count VII, alleging libel *per se* against all defendants. The court (Combs Greene, J.) denied defendants' previous special motions to dismiss on the ground that plaintiff had shown a likelihood of success on the merits. To the extent that the current motions are addressed to the six claims that were pled in plaintiff's original complaint (*see* note 2, *supra*) – and regardless of whether the rulings embodied in the non-final orders of July 19, 2013, should be treated as "law of the case" – the court agrees with Judge Combs Greene that plaintiff has shown a sufficient likelihood of success on Counts I through VI of the amended complaint to survive defendants' special motions to dismiss and, *a fortiorari*, defendants' Rule 12 (b)(6) motions to dismiss for failure to state a claim upon which relief can be granted.[4]

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[3] D.C. Code § 28-5502(d) enjoins the court to hold "an expedited hearing" on a special Anti-SLAPP motion to dismiss. However, Judge Combs Greene already held such a hearing on the original Anti-SLAPP motions in this case. Given the delay that has attended the convoluted procedural history of those motions and defendants' appeal, it is in the interests of the parties and the court to dispose of these nearly identical motions on the papers.

[4] The defendants point out that the July 19 orders contain factual errors, including attributing to the National Review defendants actions taken by the CEI defendants, and vice versa.

Opinions and rhetorical hyperbole are protected speech under the First Amendment. Arguably, several of defendants' statements fall into these protected categories. Some of defendants' statements, however, contain what could reasonably be understood as assertions of fact. Accusing a scientist of conducting his research fraudulently, manipulating his data to achieve a predetermined or political outcome, or purposefully distorting the scientific truth are factual allegations. They go to the heart of scientific integrity. They can be proven true or false. If false, they are defamatory. If made with actual malice, they are actionable. Viewing the allegations of the amended complaint in the light most favorable to the plaintiff, a reasonable finder of fact is likely to find in favor of the plaintiff on each of Counts I–VI, including the Intentional Infliction of Emotional Distress alleged in Count VI as to both sets of defendants.[5]

In Count VII, plaintiff alleges that CEI published, and National Review republished, the following defamatory statement: "Mann could be said to be the

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Even correcting for those errors, the court's legal analysis would not change and the result would have been the same, as Judge Combs Greene herself made clear in her orders denying defendants' motions for reconsideration.

[5] Although Judge Combs Greene did not specifically address Intentional Infliction of Emotional Distress when she denied the National Review defendants' motion to dismiss, this court concludes that, even as applied solely to the alleged conduct of the National Review defendants, the claim survives the instant motions to dismiss for the reasons stated by Judge Combs Greene in her original order denying the CEI defendants' motions to dismiss and in her order denying the National Review defendants' motion for reconsideration.

Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." The allegedly defamatory aspect of this sentence is the statement that plaintiff "molested and tortured data," not the rhetorically hyperbolic comparison to convicted child molester Jerry Sandusky.[6] To "molest" means "to annoy, disturb, or persecute esp. with hostile intent or injurious effect." Webster's New Collegiate Dictionary 741 (1977). To "torture" means "to twist or wrench out of shape"; and to "distor[t] or overrefin[e] a meaning or an argument." *Id*. at 1233. The statement "he has molested and tortured data" could easily be interpreted to mean that the plaintiff distorted, manipulated, or misrepresented his data. Certainly the statement is capable of a defamatory meaning, which means the questions of whether it was false and made with "actual malice" are questions of fact for the jury.[7] A reasonable reader, both within and outside the scientific community, would understand that a scientist who molests or tortures his data is acting far outside the bounds of any acceptable scientific method. In context, it would not be unreasonable for a reader

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[6] Accusing plaintiff of working "in the service of politicized science" is arguably a protected statement of opinion, but accusing a scientist of "molest[ing] and tortur[ing] data" is an assertion of fact.

[7] For purposes of this order, the court assumes that plaintiff is at least a "limited-purpose public figure" and that all defendants are media defendants acting "in furtherance of the right of advocacy." *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337, 345 (1974); *Moss v. Stockard*, 580 A.2d 1011, 1030–31(D.C. 1990).

to interpret the comment, and the republication in National Review, as an allegation that Dr. Mann had committed scientific fraud, which Penn State University then covered up, just as some had accused the University of covering up the Sandusky scandal. For many of the reasons discussed in Judge Combs Greene's July 19 orders, to state as a fact that a scientist dishonestly molests or tortures data to serve a political agenda would have a strong likelihood of damaging his reputation within his profession, which is the very essence of defamation. *See Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 313 (D.C. 2006)). Viewing the alleged facts in the light most favorable to plaintiff, as the court must on a motion to dismiss, a reasonable jury is likely to find the statement that Dr. Mann "molested and tortured data" was false, was published with knowledge of its falsity or reckless disregard of whether it was false or not, and is actionable as a matter of law irrespective of special harm. *See Payne*, 25 A.3d at 924; *Guilford Transp. Ind., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000); *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964)); *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979). Accordingly, the special motion of defendants CEI and Simberg to dismiss Count VII must be denied, as must their motion to dismiss Count VII for failure to state a claim.

Turning to the special motion of defendants National Review and Steyn to dismiss Count VII, when Mr. Steyn republished Mr. Simberg's words, he stopped short of wholeheartedly endorsing the

offensive Sandusky metaphor.[8] Nevertheless, Mr. Steyn did not disavow the assertion of fact that Dr. Mann had "molested and tortured data," and he added insult to injury by describing Dr. Mann as "the man behind the fraudulent climate-change 'hockey-stick' graph." Am. Compl. ¶ 28. In context, calling Dr. Mann's work "fraudulent" is itself defamatory and parallels Mr. Simberg's claim that Dr. Mann "molested and tortured data." Viewing the facts in the light most favorable to plaintiff, a reasonable jury is likely to find in favor of the plaintiff on Count VII against the National Review defendants, and their special motion of those defendants to dismiss Count VII as well as their Rule 12(b)(6) motion to dismiss will also be denied.[9]

For the foregoing reasons, it is this 22nd day of January, 2014,

ORDERED that the Special Motion of defendants Mark Steyn and National Review, Inc. to Dismiss Plaintiff's Amended Complaint Under D.C. Anti-SLAPP Act and their Motion to Dismiss Plaintiff's Amended Complaint Under D.C. Super. Ct. Civ. R. 12(b)(6) be, and they hereby are, denied; and it is further

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[8] In paragraph 28 of his amended complaint, plaintiff quotes Mr. Steyn as follows: "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."

[9] Because the court is denying both special motions to dismiss, defendants' motion for a protective order staying discovery pursuant to D.C. Code § 16-5502(c)(1) is moot. If defendants attempt another interlocutory appeal, the court will rule on any accompanying motion for a further stay.

ORDERED that the Special Motion of defendants Competitive Enterprise Institute and Rand Simberg to Dismiss Plaintiff's Amended Complaint Pursuant to the D.C. Anti-SLAPP Act and their Motion to Dismiss Pursuant to Rule 12(b)(6) be, and they hereby are, denied; and it is further

ORDERED that defendants' Motion for a Protective Order Enforcing Stay of Discovery Proceedings be, and it hereby is, denied as moot; and the automatic discovery stay imposed by D.C. Code § 16-5502(c)(1) is hereby lifted; and it is further

ORDERED that defendant Steyn's Motion to Vacate Order of July 19, 2013 be, and hereby is, denied.

s/ Judge Frederick H. Weisberg
Judge Frederick H. Weisberg

Copies to:

All parties listed in Case File Xpress

Mark Steyn
P.O. Box 30
Woodsville, NH 03785

APPENDIX C

IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	)	Case No. 2012 CA 008263 B Judge Natalia M. Combs Greene Calendar Ten

ORDER

This matter is before the Court on Defendants Competitive Enterprise Institute and Rand Simberg's (the "CE Defendants") Motion for Reconsideration (the "Motion") and Opposition thereto. Upon consideration, the Motion is denied.[1]

[1] The memorandum of points and authorities (as well as the caption of the Motion) includes arguments in support of the CE Defendants' Motion for Reconsideration as well as the Special Motion to Dismiss Plaintiff's Amended Complaint pursuant to the District of Columbia's Anti-SLAPP Act and the Motion to Dismiss Plaintiff's Amended Complaint pursuant to D.C. Super. Ct. R. 12(b)(6). The Civil Rules do not permit parties to combine different motions. Accordingly, this Order only addresses the Motion for Reconsideration, specifically the CE Defendants'

Standard

"A motion for reconsideration, by that designation, is unknown to the Superior Court's Civil Rules. The term has been used loosely to describe two different kinds of motions . . . brought pursuant to" Rule 59 (e) and Rule 60 (b). *Kibunja v. Alturas, LLC*, 856 A.2d 1120, 1128 n.8 (D.C. 2004). Motions under either rule are committed to the broad discretion of the trial judge. *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 810 (D.C. 1984). Rule 60 (b) provides that "the Court may relieve a party or a party's legal representative from . . . an order for the following reasons. . . (1) mistake, inadvertence, surprise, or excusable neglect . . .; or (6) any other reason justifying relief from the operation of the judgment." Rule 59 (e) provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." This time period cannot be extended and is jurisdictional. *Circle Liquors, Inc. v. Cohen*, 670 A.2d 381 (D.C. 1996). A timely motion asserting that the Court committed an error of law is normally treated under Rule 59 (e). *In re Tyree*, 493 A.2d 314, 317 n.15 (D.C. 1985).

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C.

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arguments that the Court gave "short shrift to First Amendment values..." The case has (now) been transferred to Judge Weisberg who presides over one of the two Civil I calendars and therefore the remainder of the issues raised by the Motion may be considered by Judge Weisberg.

2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; 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." *Payne*, 25 A.3d at 924.

The Court notes that upon review, the record was unclear regarding which Defendants induced the EPA to investigate Plaintiff and the length of time that the CE Defendants had engaged in harsh criticism of Plaintiff. Nonetheless, the Court finds that the confusion of facts does not amount to a material mistake nor does it change the Court's analysis because the Court's ruling was not based on these facts. The Court incorporates its earlier ruling and reiterates it herein.

The Court finds that there is sufficient evidence in the record to demonstrate that Plaintiff is likely to succeed on the merits. Further, the Court is in agreement with and adopts the arguments advanced by Plaintiff in the Opposition. Upon review of its decision, the Motion for Reconsideration and Opposition, the Court finds no reason to change its ruling. Accordingly, it is this 20th day of September 20 hereby,

ORDERED, that the Motion is **DENIED**.
SO ORDERED.

s/ Natalia M. Combs Greene
Natalia M. Combs Greene
(Signed in Chambers)

Copies to:
The Honorable Frederick H. Weisberg
Parties

APPENDIX D

IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	)	Case No. 2012 CA 008263 B Judge Natalia M. Combs Greene Calendar Ten

ORDER

This matter is before the Court on Defendants Mark Steyn and National Review, Inc.'s (the "NR Defendants") Motion for Reconsideration of July 19, 2013 Order (the "Motion") and the Opposition thereto. Upon consideration, the Motion is denied.[1]

[1] The memorandum of points and authorities includes arguments in support of the NR Defendant's Motion for Reconsideration as well as the Special Motion to Dismiss Plaintiff's Amended Complaint pursuant to the District of Columbia's Anti-SLAPP Act and the Motion to Dismiss Plaintiff's Amended Complaint pursuant to D.C. Super. Ct. R. 12(b)(6). The Court is unsure whether the NR Defendants intended to combine three motions. Nonetheless, the Civil Rules do not permit parties to combine different motions. Accordingly, this Order only

Standard

"A motion for reconsideration, by that designation, is unknown to the Superior Court's Civil Rules. The term has been used loosely to describe two different kinds of motions . . . brought pursuant to" Rule 59 (e) and Rule 60 (b). *Kibunja v. Alturas, LLC*, 856 A.2d 1120, 1128 n.8 (D.C. 2004). Motions under either rule are committed to the broad discretion of the trial judge. *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 810 (D.C. 1984). Rule 60 (b) provides that "the Court may relieve a party or a party's legal representative from . . . an order for the following reasons. . . (1) mistake, inadvertence, surprise, or excusable neglect . . .; or (6) any other reason justifying relief from the operation of the judgment." Rule 59 (e) provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." This time period cannot be extended and is jurisdictional. *Circle Liquors, Inc. v. Cohen*, 670 A.2d 381 (D.C. 1996). A timely motion asserting that the Court committed an error of law is normally treated under Rule 59 (e). *In re Tyree*, 493 A.2d 314, 317 n.15 (D.C. 1985).

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addresses the Motion for Reconsideration, specifically the NR Defendants' arguments that relate to material mistakes of fact and that the Court's did not specifically address Plaintiff's claim of Intentional Infliction of Emotional Distress. The case has (now) been transferred to Judge Weisberg presiding in Civil I. Thus, the Court will forward to Judge Weisberg the entire Motion for his consideration of the part of the Motion that address the Motion to Dismiss pursuant to the Anti-SLAPP Act. The parties may want to consider refilling that motion separately on Judge Weisberg's calendar. The Court will provide Judge Weisberg with all of the exhibits previously provided to this Court.

Special Motion to Dismiss Pursuant to Anti-SLAPP ACT

Defamation

The NR Defendants argue that the Court's ruling as to the defamation claim was significantly affected by its mistaken belief that the NR Defendants induced the Environmental Protection Agency (the "EPA") to investigate Plaintiff as well as the Court's belief that the NR Defendants had for years criticized Plaintiff's.[2] [3] The NR Defendants argue that the correction of the Court's mistaken premise should affect its conclusion that Plaintiff met his initial burden of showing actual malice. The NR Defendants also argue that the Court should err on the side of nonactionability because "where the question of truth or falsity is a close one, a court should err on the side of nonactionability." (quoting *Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 8, 22 F.3d 310, 317 (1994)).[4]

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[2] The NR Defendants allege that it was actually the CEI Defendants who criticized Plaintiff for years and caused the EPA to investigate Plaintiff.

[3] The NR Defendants argue that *National Review* is an "opinion magazine and website" that does not involve itself in governments and agency proceedings.

[4] The decision to err on the side of nonactionability is permissive and not mandatory. Also, to give this statement more context and provide a better understanding, the *Moldea* case quotes from *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988). The *Liberty Lobby Inc.* court stated "where no reasonable jury could find by a fair preponderance of the evidence that the statement complained of is false, summary judgment for the defendant should be granted." *Id.* In this case, however the Court finds that a reasonable jury could find by a

Plaintiff counters that the Court's Order was well-reasoned, thus the Motion should be denied. Plaintiff argues that the factual misstatements are inconsequential to the Court's conclusion. Plaintiff argues that the NR Defendants do not allege any "new or additional circumstances" that were not previously before the Court, thus the Court should deny the Motion on procedural grounds. Plaintiff argues that the Court's ruling was based on the NR Defendants' knowledge of several the "investigations and exonerations "of Plaintiff and not the NR Defendants' petition to the EPA or the NR Defendants' criticism of Plaintiff over several years. Plaintiff also argues that the NR Defendants have harshly criticized Plaintiff for several years prior to the Sandusky comment and called for investigations of Plaintiff.[5]

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following

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fair preponderance of the evidence that the statement is false. In addition, while the standards are very similar, this matter is before the Court on the Special Motion to Dismiss pursuant to the Anti-SLAPP Act.

[5] In his Opposition Plaintiff references five instances in which the NR Defendants criticized Plaintiff, however the Court does not (for purposes of this Motion) consider this evidence because it was not previously before the Court. Plaintiff has not provided the Court with any authority, and the Court had found none, which would permit the Court to consider the information Plaintiff now posits.

elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; 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." *Payne*, 25 A.3d at 924.

The Court notes that upon review, the record was unclear regarding which Defendants induced the EPA to investigate Plaintiff and the length of time that the NR Defendants had engaged in harsh criticism of Plaintiff. Nonetheless, the Court finds that the confusion of facts does not amounts to a material mistake nor does it change the Court's analysis because the Court's ruling was not based on these facts. The Court incorporates its earlier ruling and reiterates the following.

The Court finds that there is sufficient evidence in the record to demonstrate that Plaintiff is likely to succeed on the merits. As the Court stated in its previous Order, the NR Defendants' reference to Plaintiff "as the man behind the fraudulent climate change 'hockey stick' graph" was essentially an allegation of fraud by Plaintiff. Plaintiff is a member of the scholarly academy and it is obvious that allegations of fraud could lead to the demise of his profession and tarnish his character and standing in the community.

The Court clearly recognizes that some members involved in the climate-change discussions and debates employ harsh words. The NR Defendants are

reputed to use this manner of speech; however there is a line between rhetorical hyperbole and defamation. In this case, the evidence before the Court demonstrates that something more than mere rhetorical hyperbole is, at least at this stage present. Accusations of fraud, especially where such accusations are made frequently through the continuous usage of words such as "whitewashed," "intellectually bogus," "ringmaster of the tree-ring circus" and "cover-up" amount to more than rhetorical hyperbole. In addition, whether the NR Defendants induced the EPA to investigate Plaintiff is not critical to this analysis because it is not disputed that the NR Defendants knew that the EPA and several reputable bodies had investigated Plaintiff and concluded that his work was sound. The evidence before the Court indicates the likelihood that "actual malice" is present in the NR Defendants' conduct.

Intentional Infliction of Emotional Distress ("IIED")

The NR Defendants argue that the Court did not in its ruling explicitly address Plaintiff's claim for Intentional Infliction of Emotional Distress ("IIED"). The NR Defendants argue that the Plaintiff cannot allege and prove the common law elements of a claim for IIED because the NR Defendants' disclaimer of the Simberg's Sandusky comment prevents the NR Defendants' commentary from reaching the level of "outrageousness." The NR Defendants argue that their reference to Simberg's article was not "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" in light of the "reprehensible speech" that the Supreme Court has

found to be protected speech. The NR Defendants' argue that Plaintiff has not provided any physical evidence of emotional distress.

Plaintiff argues that the Court's failure to provide an analysis for its ruling on the IIED claim is inconsequential, because the Court provided an analysis in its Omnibus Order to the CEI Defendants. Plaintiff alleges that the statement "Jerry Sandusky of Climate Science" is obviously extreme and outrageous because it would arouse the indignation of any average community member and "lead him to exclaim 'Outrageous!'" (quoting *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 162 (D.C. 2013). Plaintiff argues that a comparison of a person to a convicted pedophile is not "colorful" or "caustic." Plaintiff argues that the NR Defendants' co-signed the CEI Defendants' accusations of Plaintiff's fraudulent conduct. Plaintiff argues that "if the NR Defendants intended to distance themselves from the Sandusky comparison, why do they continue to publish it on their website?" Plaintiff also argues that his burden is only to show that the alleged emotional distress was serious enough that "harmful consequences might be not unlikely to result." (quoting *Ortberg*, 64 A.3d at 164.

Similar to the legal standard for defamation, a public figure may only "recover for intentional infliction of emotional distress by showing that there was a false statement of fact, which was made with actual malice". *Foretich v. CBS, Inc.*, 619 A.2d at 59 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). The public figure must prove "actual malice"

by clear and convincing evidence." *Id*.[6] The Supreme Court has been clear that the constitutional protections given to defendants that are charged with defamation of a public figure are extended to other civil actions alleging emotional harm. *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004).

The Court finds that Plaintiff's claim for IIED is similar to that for defamation. There is sufficient evidence before the Court to indicate "actual malice." The NR Defendants have frequently accused Plaintiff of academic fraud regardless of their awareness that Plaintiff has been investigated by several bodies and his work found to be proper. The NR Defendant's persistence despite the findings of the investigative bodies could be likened to a witch hunt. In fact, Plaintiff had nothing to do with the Sandusky case yet the NR Defendants seized upon that criminal act by a

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[6] The Order does not discuss the elements of IIED because the issue was whether Plaintiff could prove actual malice and not whether Plaintiff could prove the general elements of an IIED claim. The elements of an IIED claim are "(1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v. District of Columbia*, 9 A.3d 484, 494 (D.C. 2010) (citing *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003). 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." *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 (D.C. 1991). Mental anguish and stress "do not rise to the level of severe emotional distress." *Futrell*, 816 A.2d at 808. The defendant's actions must be the proximate cause of "plaintiff's emotional upset of so acute a nature that harmful physical consequences are likely to result." *Id*. The Court notes that this claim was addressed in its Omnibus Order.

pedophile and did more, this Court finds, than simply comment on another article.

The Court agrees with the arguments advanced by Plaintiff. To place Plaintiff's name in the same sentence with Sandusky (a convicted pedophile) is clearly outrageous. The NR Defendants argue that they rejected Simberg's Sandusky comparison (in the *Football and Hockey* article). This argument, however begs the question. The article attempts to reject the Sandusky comparison by stating: "I'm not sure I would have extended that metaphor all the way to the locker-room showers with quite the zeal Mr. Simberg does". A few lines later, in that same article, the author cosigns the Sandusky reference by stating: "...whether or not he's the 'Jerry Sandusky of climate change.'" Seemingly rejecting the metaphor then reiterating it is not a clear rejection as the NR Defendants argue. The NR Defendants said Simberg "has a point" which could be interpreted to mean that the NR Defendants agree that Plaintiff "molested and tortured data."

In addition, the element requires only that Plaintiff to show "harmful physical consequences are likely to result" and not that they did occur. Accordingly, it is this 30th day of August 2013 hereby;

ORDERED, that the Motion is **DENIED**.

SO ORDERED.

s/ Natalia M. Combs Greene
Natalia M. Combs Greene
(Signed in Chambers)

Copies to:
The Honorable Frederick H. Weisberg
Parties

APPENDIX E

IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	)))))))	Case No. 2012 CA 008263 B Judge Natalia M. Combs Greene Calendar Ten

ORDER

This matter is before the Court on Defendants' National Review and Mark Steyn's Special Motion to Dismiss Pursuant to the District of Columbia's Anti-SLAPP Act, the Opposition and Reply, and Defendants' National Review and Mark Steyn's Motion to Dismiss pursuant to Rule 12(b)(6) and the Opposition thereto. Upon careful review of the pleadings and consideration of the arguments advanced at a hearing on the matter, and for the reasons set forth herein, the Motions are denied.

Background

Plaintiff, Michael Mann, is a Professor of meteorology at The Pennsylvania State University

("Penn State"). Plaintiff also serves as Director of the Earth System Science Center at Penn State. Plaintiff is well known for his research on global warming and his co-authorship of the 'Hockey Stick Graph,' which "purports to identify long-term trends in global temperatures based . . . on theoretical models involving temperature proxies, such as the analysis of tree growth rings."[1] (Def's Mtn. at 6.) Plaintiff has authored numerous peer-reviewed papers and published two books. In 2001, Plaintiff served as "lead author" for a chapter of the United Nations' International Panel on Climate Change ("IPCC") Third Scientific Assessment Report.[2] *Id.* In 2002, Plaintiff "was named as one of the fifty leading visionaries in science and technology by Scientific American, and has received numerous awards for his research." *Id*[3].

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[1] "The 'Hockey Stick Graph' – named for its iconic shape resembling a hockey stick – attempts to represent estimates of the world's temperatures between 1000 and 2000 A.D., based (in large part) on the observed growth in various tree rings throughout the world. The 'Hockey Stick Graph' illustrates the authors' theory of gradual decline in temperatures from 1000 A.D. until about 1900 A.D., followed by a sharp increase in the late 20th century." (Def.'s Mot. 6.)

[2] The data Plaintiff used in the creation of the 'Hockey Stick Graph' was referenced in the Report.

[3] In his Complaint, Plaintiff alleges that he and his colleagues, as a result of their research, were awarded the Nobel Peace Prize as a result of their research. Defendants claim that the Nobel Peace Prize award, referenced in the Complaint, states that the award was given jointly to Vice President Al Gore and the IPCC. *Id.* at 7.

In 2009 approximately one thousand emails were apparently "misappropriated from a server at the University of East Anglia's Climate Research Unit ("CRU")." *Id.* at 8. These emails included correspondence between Plaintiff and CRU scientists, in which the CRU was cast in a negative light. *Id.* One particular email, written by Phil Jones (a CRU scientist) stated: "I've just completed Mike's Nature *trick* of adding in the real temps to each series for the last 20 years (*i.e.* from 1981 onwards) [and] from 1961 for Keith's to *hide the decline*." *Id.* As a result of these emails coming to light, the University of East Anglia began an investigation into the "'honesty, rigor, and openness with which the CRU scientists have acted." *Id.* The investigators concluded that the "'rigor and honesty of the CRU scientists was not in doubt," but that Jones' email referencing Plaintiff's "'Nature *trick*" was "'misleading'." *Id.* at 9.

In 2010, Penn State tasked its Investigatory Committee, "appointed by University administrators and comprised entirely of Penn State faculty members," to investigate Plaintiff in connection with the CRU emails. *Id.* at 10. Plaintiff was cleared of three of the four substantive charges against him. The decision by the investigative group was apparently based on an interview with Plaintiff. Defendants claim that the Committee failed to interview any scientist who had previously been critical of Plaintiff's work. Penn State investigated the last charge (which involved Plaintiff's research and an allegation that it might "deviate from accepted research norms) through an interview with Professor Richard Lindzen of MIT, a critic of Plaintiff's work, who later "expressed dismay with

the scope of the investigation and the Committee's analysis of the East Anglia emails." *Id.* at 11.

Also in 2010, the United States Environmental Protection Agency (the "EPA") investigated Plaintiff as a result of constant pressure from Defendant The National Review, Defendant Steyn (collectively the "NR Defendants") and others. (Pl. Mtn at 22.) The EPA concluded there was "no evidence of scientific misconduct." *Id.* A subsequent investigation of Plaintiff's work was conducted, by the National Science Foundation (the "NSF"), which found that "Penn State did not adequately review the allegation in its inquiry, especially in light of its failure to interview critics of [Plaintiff's] work." (Def. Mtn. at 11.)

In 2012, attention was again brought to Penn State's investigation of Plaintiff, when Penn State released the results of an unrelated investigation conducted by FBI Director Louis Freeh. That investigation concerned allegations of sexual abuse by Jerry Sandusky, a Penn State assistant football coach. *Id.* at 12. Freeh's report stated there had been a "failure by university officials to properly investigate known allegations of misconduct when they arose." *Id.* The report further stated that Penn State should "undertake a thorough and honest review of its culture," which placed "the avoidance of the consequences of bad publicity above virtually every other value." *Id.*

A few days after Freeh's report was released, Defendant, the National Review ("an influential magazine and website" that offers "conservative news, commentary and opinion,") published, on its

website, a piece by Defendant Steyn, entitled "*Football and Hockey*". The piece was published by the *National Review Online*, in a section called "*The Corner.*" *Id*. at 13. Defendant Steyn's blog post contained an excerpt and link to Defendant Simberg's earlier internet post for Defendant Competitive Enterprise Institute's website OpenMarket.org, entitled "*The Other Scandal in Unhappy Valley*." *Id*. Defendant Simberg's blog post compared the Sandusky scandal, and Penn State's failure to properly handle the matter with the Penn State's investigation into Plaintiff's work.[4] *Id*. Defendant Steyn's article endorsed Defendant Simberg's commentary, however Defendant Steyn indicated he was "not sure [he] would have extended the metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does". Defendant Steyn nevertheless agreed that Defendant Simberg "had a point." *Id*. Defendant Steyn also stated: "Michael Mann was the man behind the fraudulent climate-change hockey stick graph, the very ringmaster of the tree-ring circus." *Id*. at 14. Defendant Steyn concluded the piece by enumerating the similarities between Penn State's investigation into allegations of misconduct by both Sandusky and Plaintiff, and "questioned the university's similar handling of the two matters." *Id*.

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[4] Defendant Simberg compared Plaintiff to Sandusky by this statement: "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." *Id*. at 13.

Eight days after Defendant Steyn's article was posted on the *National Review Online* website, Plaintiff demanded a retraction and that an apology be issued for the accusations of "academic fraud." *Id.* The *National Review* responded by letter, and *via* an online post by Editor Rich Lowry, which explained that the term 'fraudulent' was used in Defendant Steyn's article to mean "intellectually bogus and wrong," and did not carry the connotation of "criminal fraud". *Id.*

On October 22, 2012, this action was filed in which Plaintiff alleges libel and intentional infliction of emotional distress against Defendants National Review and Defendant Steyn, along with co-Defendants Competitive Enterprise Institute and Simberg (the "CEI Defendants"). Plaintiff's suit is based primarily upon the NR Defendants' and the CEI Defendants' following statements: (1) Defendant Simberg's statement published in Openmarket.org that Plaintiff had engaged in "data manipulation" and "scientific misconduct" and the was the "poster-boy of the corrupt and disgraced climate science echo chamber;" (2) Defendant Steyn's statement in the National Review Online that Plaintiff "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus;" and (3) Mr. Lowry's statement in *National Review Online* that indicated Plaintiff's work is "intellectually bogus."

Discussion

The NR Defendants' Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP Act

Anti-SLAPP Act

As an umbrella statement, the NR Defendants argue that their comments are protected by the First Amendment thus Plaintiff may not recover.[5] The NR Defendants argue that the Anti-SLAPP Act applies because Plaintiff's lawsuit stems from statements that were made on an Internet site (a public forum that discusses issues of public interest). Further these Defendants argue that Plaintiff's suit is based on an issue of public interest because climate change and global warming are issues involving environmental and community well being. The NR Defendants also argue that Plaintiff's claims involve an issue of public interest because Plaintiff is a public figure as he is "well-known for his work regarding global warming and the 'Hockey Stick Graph'."

Plaintiff counters that the Anti-SLAPP Act was not meant to protect against this type of lawsuit. Plaintiff argues that: "Anti-SLAPP suits are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so." Plaintiff asserts that the Anti-SLAPP Act was enacted to give courts a chance to look into the merits of a claim in order to prevent large

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[5] Plaintiff asserts that Defendants' statements are not constitutionally protected because they are capable of verification as objective evidence could be assessed to determine whether Plaintiff deliberately altered his data.

corporations (or those who are economically superior) from commencing meritless litigation to stifle the participation of less well financed individuals in the litigation process. Plaintiff further argues that his intent in bringing this suit does not comport with the reasons for the Anti-SLAPP Act.[6] It appears that while Plaintiff argues the Motion should be denied in this case on this basis; it also appears that Plaintiff does not seriously challenge the applicability of the Anti-SLAPP Act because it arises from an act in furtherance of the right of advocacy on issue of public interest."[7] D.C. Code § 16-5501 defines "an act in furtherance of the right of advocacy on issues of public interest" as " any written or oral statement made . . . (ii) in a place open to the public or a public forum in connection with an issue of public interest." That section also defines an issue of public interest, *inter alia*, as "an issue related to . . . environmental . . . well-being."

The D.C. Code §16-5502 provides:

> (a) A party may file a special motion to dismiss to any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

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[6] The Court does not fully appreciate Plaintiff's argument in this regard as Plaintiff has not brought the Special Motion and is not a large corporation.

[7] Recently, Judge Walton of the United States District Court for the District of Columbia issued a decision and discussed the standard or burden Plaintiff faces once the Court finds the Anti-SLAPP applies. *Boley v. Atlantic Monthly Group,* C.A. No 13-89 (RBW)(D.D.C. June 25, 2013)

> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.
>
> (c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.
>
> (2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.
>
> (d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

The Anti-SLAPP Act was adopted in the District of Columbia in 2010. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012). The Anti-SLAPP Act protects speech regarding the public interest such as qualifications for public office. *Id.* The Anti-SLAPP Act gives "absolute or qualified

immunity to individuals engaged in protected actions." *Id.* Where the proponent of a motion brought pursuant to the Anti-SLAPP Act "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." *Id.* *See also*, *3M Co. v. Boulter*, 842 F. Supp.2d 85 93 (D.D.C. 2012).

An extensive discussion as to whether the Anti-SLAPP Act applies in this case is not necessary for the reasons stated *supra*.[8] The NR Defendants' comments were made with respect to climate issues, which are environment issues, thus an issue of public interest. In addition, the comments were made in publications (blogs, columns and articles) that were published to the public (available on online websites) thus the comments fit under the definition of an act in furtherance of the right of advocacy. Thus, the Court finds application of the Anti-SLAPP Act appropriate because the case involves issues of climate change, clearly a topic of public interest.

Standard/Burden

The NR Defendants argue that the Anti-SLAPP Act's word use of "likely" rather than "probability" poses a higher burden than that of "probability" (found in the corresponding California Statute) because likely means "having a high probability of occurring or being true." Merriam-Webster Online

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[8] Plaintiff's real argument appears to be that the Motion should be denied.

Dictionary. The NR Defendants translate this to mean that Plaintiff must prove the falsity of all the challenged statements rather than the "mere possibility."

Plaintiff counters that the relevant legal standard is the same as that to be applied in deciding a motion summary judgment, not a standard requiring the high burden the NR Defendants argue should be applied. Plaintiff argues that the D.C. Anti-SLAPP Act is fashioned after the corresponding California statute (a statute which requires that there is "a probability that the plaintiff will prevail on the claim.") Plaintiff also argues that the sole distinction between the D.C. Anti-SLAPP Act and the California statute is that the former requires the plaintiff to demonstrate that he is "likely" to succeed on the merits while the latter requires that the plaintiff establish that there is a "probability" that he will prevail on the claim. Plaintiff argues that there is no difference in the meaning of "likely" and "probability."

Blacks Law Dictionary defines the "likelihood of success on the merits test" in the context of a preliminary injunction as requiring the litigant to "show a reasonable probability of success in the litigation or appeal." BLACKS LAW DICTIONARY (9th ed. 2009). The California statute requires the plaintiff to show a "probability of prevailing on the claim by making a *prima facie* showing of facts that would, if proved, support a judgment in the plaintiff's favor." *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (Cal. Dist. Ct. App. 2004). The probability standard is similar to that used to determine a "motion for directed verdict, or summary

judgment." Although the Court may not weigh the evidence, as noted *supra,* the Plaintiff must provide sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint). *Id.*

The District of Columbia Anti SLAPP Act does not provide a definition of the standard and there has not been a decision on this issue from our Court of Appeals. *See* note 4. *supra*. The legislative history of the Anti-SLAPP Act, an almost identical act to the California act, indicates that the California act served as the model for the District of Columbia's Anti-SLAPP Act. The Court disagrees with the argument that there is such a high burden as advanced by the NR Defendants. The standard "likely to succeed on the merits" or likelihood of success on the merits, is a high burden but not as high as suggested by the NR Defendants. As noted, the standard of the likelihood to succeed on the merits, in the context of a preliminary injunction, is proof by a preponderance of the evidence. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003).

The Court is in agreement with the decision issued by Judge Walton on this issue and finds the case law from California (upon which the D. C. Anti-SLAPP Act is modeled) instructive. In California, as Judge Walton noted; "...a Plaintiff seeking to show a probability of prevailing on a claim in response to an anti-SLAPP motion must satisfy a standard comparable to that used on a motion for judgment as a matter of law" *See Boley v. Atlantic Monthly Group, supra.* (quoting *Price v. Stossel*, 620 F. 3d 992, 1000 (9th Cir. 2010)). Thus, the Court finds, Plaintiff must

present a sufficient legal basis for his claims and if he fails to do so, the motion should be granted.

Defamation

The NR Defendants move the Court to dismiss the case because Plaintiff will be unable to make a *prima facie* case for libel. The NR Defendants argue that Plaintiff cannot prove "actual malice" as required where a plaintiff is a public figure. The NR Defendants also argue that Plaintiff must prove the falsity of all the statements at issue.

Plaintiff counters that, to succeed on a defamation claim, he must prove "actual malice" by a showing that "the defendant in fact entertained serious doubts" as to the truth of the publication or acted with a high degree of awareness of its probable falsity. Plaintiff argues that the statements made by the NR Defendants are not only false, but defamatory *per se*,[9] and that the NR Defendants made these statements with knowledge of their falsity or reckless disregard for their truth. Plaintiff claims whether he engaged in fraud is verifiable by either analyzing the

[9] This Order does not discuss defamation *per se* because in his Opposition, Plaintiff only makes this reference in passing and does not support the statement with any substantive argument.

elements of fraud[10] or considering the objective investigations conducted regarding his research.[11]

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; 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." *Payne*, 25 A.3d at 924.

The Court of Appeals has stated that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement

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[10] Plaintiff claims that the Court may consider evidence as to whether Plaintiff made any knowing and material misrepresentations in his research with intent to deceive, and then arrive at a conclusion as to whether he committed fraud.

[11] Plaintiff claims that there were six investigations into whether he committed fraud. Those most notable were done by the EPA and the National Science Foundation (NSF).

was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id.*

The NR Defendants move the Court to dismiss Plaintiff's case because the alleged defamatory remarks are opinion thus Plaintiff cannot prove them as false. NR Defendants argue that issues of science are opinion because "[s]cientific truth is elusive." NR Defendants argue that, the considerations of the language and context[12] of the posts ("*Get Lost*" and "*Football Hockey*") suggests that the NR Defendants were making fun of Plaintiff rather than accusing him of fraud.[13] NR Defendants claim that the article "Get Lost" which referred to Plaintiff's work as "intellectually bogus" is not offensive nor does it impugn "academic corruption, fraud and deceit" as Plaintiff argues. Finally, the NR Defendants argue that Plaintiff's work and theories are not provably false because they are propositions based on data

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[12] NR Defendants argue that the readers of Defendant Steyn's column knew to "expect strongly-worded, and often caustic, opinions in places."

[13] The NR Defendants assert that the use of the interrogatory style in the statement "if an institution is prepared to cover up systematic rape of minors, what won't it cover up?" is further evidence that the statement was an opinion (one especially meant to raise questions about Penn State's investigation of its "star" employees).

that is not properly verifiable (data from years where accurate measures were not taken or recorded).

Plaintiff counters that the statements at issue are not opinion. Plaintiff argues that taken in context Defendants' statements are actionable opinion because defamatory statements can still appear in publications that often express opinion.

Prior to the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), statements that were considered to be opinion were generally treated as non-defamatory. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Under *Milkovich*, opinions are actionable "if they imply a provably false fact or rely upon stated facts that are provably false." *Id.* at 597. If the proponent of the statement, however is "expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.2d 1222, 1227 (7th Cir. 1993). In determining whether the statement is an opinion, the context of the statement should be considered. *Id.* (quoting *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994).

The First Amendment protects opinions however the statement must be one that is purely opinion and not one that stems from facts. The Court disagrees with the NR Defendants' contention that the statement "perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions," can only clearly be viewed as an opinion.

The Court certainly recognizes that (within the confines of the law) the NR Defendants may employ harsh language, as appears to be the norm in the climate debate environment, however the Court finds this statement goes beyond harsh debate or "rhetorical hyperbole". Rather the statement questions facts –it does not simply invite readers to "ask questions". In addition, the accusation that Plaintiff has acted in a "most unscientific manner . . . in data manipulation to keep a blade on his famous hockey-stick graph," relies on the interpretation of facts (the emails).

The Court recognizes that the blogs and publications by the NR Defendants at issue in this case may employ these words because it appears to have become what some may describe as the norm (in global warming criticism), and because the tone set by the use of harsh and contentious statements is in line with what some may argue is the reputation developed by the NR Defendants; having legitimacy and is fair argument. The question becomes, and it is difficult in this case, is whether the line (as recognized by the law) has been crossed. Defendants argue that the accusation that Plaintiff's work is fraudulent may not *necessarily* be taken as based in fact because the writers for the publication are tasked with and posed to view work critically and interpose (brutally) honest commentary. In this case, however, the evidence before the Court, at this stage, demonstrates something more and different that honest or even brutally honest commentary, and creases that line of reasoning.

Fraud is defined as: "(1) A deception deliberately practiced in order to secure unfair or unlawful gain;

(2) a piece of trickery; a trick; (3)(a) one that defrauds; cheat; (b) one who assumes a false pose; an imposter." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 722 (3rd ed. 1996). Fraudulent is defined as: "(1) Engaging in fraud; deceitful; (2) characterized by, constituting, or gained by fraud: fraudulent business practices." *Id*. Given the dictionary definition as well as the common readers' thought about the use of these words (fraud and fraudulent) the Court finds that these statement taken in context must be viewed as more than honest commentary—particularly when investigations have found otherwise. Considering the numerous articles that characterize Plaintiff's work as fraudulent, combined with the assertions of fraud and data manipulation, the NR Defendants have essentially made conclusions based on facts. Further, the assertions of fraud "rely upon facts that are provably false" particularly in light of the fact that Plaintiff has been investigated by several bodies (including the EPA) and determined that Plaintiff's research and conclusions are sound and not based on misleading information.

In addition, the NR Defendants' attempt to minimize the seriousness of their reference to Plaintiff as a fraud by claiming that this reference may be compared to the statement "intellectually bankrupt" to "intellectually bogus" is not credible. It is obvious that "intellectually bankrupt" refers to a lack of sense or intellect but the same may not be said for "intellectually bogus." The definition of "bogus" in the Merriam-Webster online dictionary, *inter alia*, is "not genuine . . . sham." BOGUS, MERRIAM-WEBSTER: ONLINE DICTIONARY

AND THESAURUS, http://www.merriam-webster.com/dictionary/bogus. In Plaintiff's line of work, such an accusation is serious. To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud (taken in the context and knowing that Plaintiff's work has been investigated and substantiated on numerous occasions). The Court must, at this stage, find the evidence indicates that the NR Defendants' statements are not pure opinion but statements based on provably false facts.[14]

The NR Defendants move the Court to find that the statements at issue are rhetorical hyperbole, which the Supreme Court protects because public debate need not "suffer for lack of imaginative expression which has been traditionally added much to the discourse of the Nation." The NR Defendants argue that the statements are witty and obviously exaggerations, thus not actionable. The NR Defendants also argue that the statements criticized Plaintiff's work as fraudulent (though they explicitly disclaimed criminal offense) and not Plaintiff himself and defamation cannot be upheld where the criticism is of the person's ideas and not of the person himself.

Plaintiff claims that there is nothing rhetorical about the NR Defendants' accusations of fraud, and that the statements do not qualify as rhetorical hyperbole. Plaintiff points to statements made by readers of Defendants' publications in an attempt to paint Defendants' statements as defamatory.[15]

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[14] The Court does view this as a very close case.

[15] Some of these statements are "NR flatly stated that Mann had written a fraudulent paper" and "even if the NRO is an

Plaintiff notes other publications that have published statements about how Plaintiff was defamed.

In *Milkovich*, the Supreme Court found that statements that are not made from actual facts are protected to prevent public debate from a deprivation of "imaginative expression" or "rhetorical hyperbole"[16] that has "traditionally added much to the discourse of this Nation." *Milkovich*, 497 A.2d at 2. *See also*, *Wilner*, 760 A.2d at 589. Rhetorical hyperbole is not actionable in defamation because it cannot be interpreted as factual assertions. *Wilner*, 760 A.2d at 597. To determine whether a statement is rhetorical hyperbole, *i.e.* a statement that is verifiable, courts must look to the context of the statement. *Weyrich v. New Republic, Inc.* 235 F.3d 617, 624 (D.D.C. 2001).

An analysis of this argument is similar to or the same as what is applied to evaluate the NR Defendants' contention that their statements were opinion. Language such as "intellectually bogus" and "ringmaster of the tree-ring circus" in the context of the publications' reputation and columns certainly appear as exaggeration and not an accusation of fraud. On the other hand, when one takes into account all of the statements and accusations made over the years, the constant requests for

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opinion magazine, it is not permitted to make false statements and present them as facts especially when they damage another person's reputation.

[16] Rhetorical hyperbole refers to exaggerations used as a rhetorical device. Rhetorical hyperbole is often a figure of speech that is used to evoke strong feelings or create a strong impression but not intended to be taken literally.

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 statements 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.

The NR Defendants argue that their statements are protected by the "Fair Comment" privilege which protects opinions based on facts that are well known to readers. Plaintiff counters that the "Supportable Interpretation" and "Fair Comment" privileges do not apply. Plaintiff contends that Supportable Interpretation privilege only applies if the challenged statements are evaluations of a literary work, such as when a reviewer offers commentary that is tied to the work being reviewed. When a writer launches a personal attack on a person's character, reputation, or competence then the Supportable Interpretation standard does not apply. Plaintiff claims that the NR Defendants' statements were a personal attack on Plaintiff's conduct and that NR Defendants' comments are not opinions but rather misstatements

of fact and therefore the Fair Comment privilege does not apply.

When the media defames a private individual, the law in the District of Columbia is that the standard of care is negligence unless a common law privilege applies. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87 (D.C. 1980). The District of Columbia has several common law privileges, one of which is the fair comment privilege. *Id.* The law in the District of Columbia provides the media the privilege of "fair comment on matters of public interest." *Id.* at 88. The privilege only applies to opinion and not misstatements of fact.[17] *Id.* (finding that the Evening Star Newspaper could not employ the fair comment privilege because it printed false facts regarding the existence of a quarrel).

To be in a position to take advantage of this privilege a defendant must "clear[] two major hurdles to qualify for the fair report privilege." *Id.* at 89. A defendant must show that the publication was "fair and accurate" and that the "publication properly attributed the statement to the official source." *Id.* In this case, the accusations of fraud are statements

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[17] The rationale for this is found in *De Savitsch v. Patterson*, 159 F.2d 15, 17 (D.C. Cir. 1946) in which the court said "to state accurately what a man has done, and then to say that in your opinion such conduct was disgraceful or dishonorable, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well founded or not. Misdescriptions of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the reader no opportunity for judging himself for (sic) the character of the conduct condemned, nothing but a false picture being presented for judgment."

that are provably false. Whether Plaintiff's work is fraudulent is certainly a matter of public interest, however several reputable bodies have investigated Plaintiff's work (even if the Court does not consider the investigation conducted by Penn State as one of these bodies[18]) and Plaintiff's work has been found to be sound. Having been investigated by almost one dozen bodies due to accusations of fraud, and none of those investigations having found Plaintiff's work to be fraudulent, it must be concluded that the accusations are provably false. Reference to Plaintiff, as a fraud is a misstatement of fact. The NR Defendants' reference to Plaintiff as "the man behind the fraudulent climate-change 'hockey-stick' graph" is arguably a misstatement of fact (the evidence indicates otherwise as Plaintiff's work has been found to be sound). Thus, the Court finds, at this stage the fair comment privilege does not apply to the NR Defendants.

Actual Malice

The NR Defendants argue that Plaintiff cannot prove "actual malice" because his work has been questioned frequently. The NR Defendants argue that just because some investigative bodies have accepted Plaintiff's work as proper does not mean that Plaintiff's work is not still questioned by others. Finally, the NR Defendants argue that there is sufficient evidence that indicate Plaintiff's work was "intellectually bogus" thus Plaintiff would be unable to prove that the NR Defendants were aware of the

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[18] Here the Court notes the NR Defendants' argument that the various investigations have not been thorough, fair or complete.

falsity of their comments or that the NR Defendants entertained serious doubts about the truth of their statements.

Plaintiff counters that the NR Defendants' statements were made with the knowledge of their falsity or reckless disregard for their truth.

"Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (citing the Supreme Court in *New York Times Co.*, 376 U.S. at 279–80, which held that "the Constitution limits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.") The plaintiff must prove "actual malice" by "clear and convincing evidence." *Id.* at 924. There must also be sufficient evidence that indicates that the defendant had serious doubts regarding the truth of the published statement. *Id.* (explaining that a publication made where there are serious doubts is an indication of reckless disregard for truth or falsity thus demonstrates "actual malice"). The *New York Times Co.* rule was extended to include libel actions by public figures. *Nader*, 408 A.2d at 40 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) which defined a public figure as "[one] who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are classed as public figures.")

Plaintiff does not seriously challenge the assertion that he is a public figure and the Court finds that given his work and notoriety the characterization as a public figure (albeit limited) is appropriate. As a public figure, Plaintiff may only succeed in a suit for libel if he can prove "actual malice" because, as a public figure, he has opened himself to criticism and differing opinions. At this stage, the evidence is slight as to whether there was actual malice. There is however sufficient evidence to demonstrate some malice or the knowledge that the statements were false or made with reckless disregard as to whether the statements were false. Plaintiff has been investigated several times and his work has been found to be accurate. In fact, some of these investigations have been due to the accusations made by the NR Defendants. It follows that if anyone should be aware of the accuracy (or findings that the work of Plaintiff is sound), it would be the NR Defendants. Thus, it is fair to say that the NR Defendants continue to criticize Plaintiff due to a reckless disregard for truth. Criticism of Plaintiff's work may be fair and he and his work may be put to the test. Where, however the NR Defendants consistently claim that Plaintiff's work is inaccurate (despite being proven as accurate) then there is a strong probability that the NR Defendants disregarded the falsity of their statements and did so with reckless disregard.

The record demonstrates that the NR Defendants have criticized Plaintiff harshly for years; some might say, the name calling, accusations and jeering have

amounted to a witch hunt,[19] particularly because the NR Defendants appear to take any opportunity to question Plaintiff's integrity and the accuracy of his work despite the numerous findings that Plaintiff's work is sound. At this stage, the evidence before the Court does not amount to a showing of clear and convincing as to "actual malice," however there is sufficient evidence to find that further discovery may uncover evidence of "actual malice." It is therefore premature to make a determination as to whether the NR Defendants did not act with "actual malice."

NR Defendants Motion to Dismiss Pursuant to Rule 12(b)(6)

Standard

Rule 12 vests the Court with the authority to dismiss an action when it "fails to state a claim upon which relief can be granted." Super. Ct. Civ. R. 12(b)(6). Pursuant to this Rule, "[d]ismissal is warranted only if, construing the complaint in the light most favorable to the non-moving party and assuming the factual allegations to be true for purposes of the motion, 'it appears, beyond doubt, that the plaintiff can prove no facts which would support the claim.'" *Leonard v. Dist. of Columbia*, 794 A.2d 618, 629 (D.C. 2002) (quoting *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997)). The determination of whether dismissal is proper must be made on the face of the pleadings

[19] The Court does not, by this Order endorse or make any finding regarding this characterization of the type of dialogue engaged in by the NR Defendants.

alone. *See Telecommunications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985).

A plaintiff is required to plead enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007). In order to survive a motion to dismiss, a plaintiff's complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.*, 127 S.Ct. at 1964–65. "When the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 1966.

Defamation

The NR Defendants argue that the First Amendment bars Plaintiff's recovery because the NR Defendants' statements are protected speech. Further that the facts as pled by Plaintiff are insufficient to make malice plausible because Plaintiff's work and theories are questionable.

Plaintiff counters that his claims should survive a 12(b)(6) because he has pled facts that demonstrate that the NR Defendants knew fraud was nonexistent, or deliberately ignored evidence that their accusations of fraud, misconduct or data manipulation were false. Plaintiff claims that multiple government and academic institutions have exonerated him and that the NR Defendants were aware of this. Plaintiff asserts that the Motions are frivolous and "nothing more than a cynical ploy to evade liability" and "delay proceedings."

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). Plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; 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." *Payne*, 25 A.3d at 924.

The Court of Appeals has held that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from the mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id.*

Given the Court's discussion and decision *supra,* on the Special Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act, the Court will not repeat that discussion here. The Court finds the Motion to Dismiss pursuant to Rule 12(b(6) must be denied for the same reasons as stated *supra*. Accordingly, it is this 19th day of July 2013 hereby,

ORDERED that the Motions are **DENIED**. It is further,

ORDERED that the **STAY IS LIFTED**. It is further,

ORDERED that the parties shall appear for a status hearing on September 27, 2013 at 9:00 a.m.

SO ORDERED.

s/ Natalia M. Combs Greene
Natalia M. Combs Greene
(Signed in Chambers)

Copies to:

Parties

APPENDIX F

IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	)))))))	Case No. 2012 CA 008263 B Judge Natalia M. Combs Greene Calendar Ten

OMNIBUS ORDER

This matter is before the Court on Defendants' Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to the District of Columbia's Anti-SLAPP Act, the Opposition and Reply, and Defendants' Competitive Enterprise Institute and Rand Simberg's Motion to Dismiss pursuant to Rule 12(b)(6) and the Opposition thereto. Upon careful review of the pleadings and consideration of the arguments advanced at a hearing on the matter, and for the reasons set forth herein, the Motions are denied.

Background

Plaintiff, Michael Mann, is a Professor of meteorology at The Pennsylvania State University ("Penn State"). Plaintiff also serves as Director of the Earth System Science Center at Penn State. Plaintiff is well known for his research on global warming and his co-authorship of the 'Hockey Stick Graph,' which "purports to identify long-term trends in global temperatures based . . . on theoretical models involving temperature proxies, such as the analysis of tree growth rings."[1] (Def's Mtn. at 6.) Plaintiff has authored numerous peer-reviewed papers and published two books. In 2001, Plaintiff served as "lead author" for a chapter of the United Nations' International Panel on Climate Change ("IPCC") Third Scientific Assessment Report.[2] *Id.* In 2002, Plaintiff "was named as one of the fifty leading visionaries in science and technology by Scientific American, and has received numerous awards for his research." *Id.*[3]

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[1] "The 'Hockey Stick Graph' – named for its iconic shape resembling a hockey stick – attempts to represent estimates of the world's temperatures between 1000 and 2000 A.D., based (in large part) on the observed growth in various tree rings throughout the world. The 'Hockey Stick Graph' illustrates the authors' theory of gradual decline in temperatures from 1000 A.D. until about 1900 A.D., followed by a sharp increase in the late 20th century." (Def.'s Mot. 6.)

[2] The data Plaintiff used in the creation of the 'Hockey Stick Graph' was referenced in the Report.

[3] In his Complaint, Plaintiff alleges that he and his colleagues, as a result of their research, were awarded the Nobel Peace Prize as a result of their research. Defendants claim that the Nobel Peace Prize award, referenced in the Complaint, states that the

In 2009 approximately one thousand emails were apparently "misappropriated from a server at the University of East Anglia's Climate Research Unit ("CRU")." *Id.* at 8. These emails included correspondence between Plaintiff and CRU scientists, in which the CRU was cast in a negative light. *Id.* One particular email, written by Phil Jones (a CRU scientist) stated: "I've just completed Mike's Nature *trick* of adding in the real temps to each series for the last 20 years (*i.e.* from 1981 onwards) [and] from 1961 for Keith's to *hide the decline*." *Id.* As a result of these emails coming to light, the University of East Anglia began an investigation into the "honesty, rigor, and openness with which the CRU scientists have acted." *Id.* The investigators concluded that the "'rigor and honesty of the CRU scientists was not in doubt," but that Jones' email referencing Plaintiff's "'Nature *trick*" was "'misleading'." *Id.* at 9.

In 2010, Penn State tasked its Investigatory Committee, "appointed by University administrators and comprised entirely of Penn State faculty members," to investigate Plaintiff in connection with the CRU emails. *Id.* at 10. Plaintiff was cleared of three of the four substantive charges against him. The decision by the investigative group was apparently based on an interview with Plaintiff. Defendants claim that the Committee failed to interview any scientist who had previously been critical of Plaintiff's work. Penn State investigated the last charge (which involved Plaintiff's research and an allegation that it might "deviate from accepted research norms) through

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award was given jointly to Vice President Al Gore and the IPCC. *Id.* at 7.

an interview with Professor Richard Lindzen of MIT, a critic of Plaintiff's work, who later "expressed dismay with the scope of the investigation and the Committee's analysis of the East Anglia emails." *Id.* at 11.

Also in 2010, the United States Environmental Protection Agency (the "EPA") investigated Plaintiff as a result of constant pressure from the CEI Defendants and others. (Pl. Mtn at 22.) The EPA concluded there was "no evidence of scientific misconduct." *Id.* A subsequent investigation of Plaintiff's work was conducted, by the National Science Foundation (the "NSF"), which found that "Penn State did not adequately review the allegation in its inquiry, especially in light of its failure to interview critics of [Plaintiff's] work." (Def. Mtn. at 11.)

In 2012, attention was again brought to Penn State's investigation of Plaintiff, when Penn State released the results of an unrelated investigation conducted by FBI Director Louis Freeh. That investigation concerned allegations of sexual abuse by Jerry Sandusky, a Penn State assistant football coach. *Id.* at 12. Freeh's report stated there had been a "failure by university officials to properly investigate known allegations of misconduct when they arose." *Id.* The report further stated that Penn State should "undertake a thorough and honest review of its culture," which placed "the avoidance of the consequences of bad publicity above virtually every other value." *Id.*

A few days after Freeh's report was released, Defendant, the National Review ("an influential

magazine and website" that offers "conservative news, commentary and opinion,") published, on its website, a piece by Defendant Steyn, entitled "*Football and Hockey*". The piece was published by the National *Review Online*, in a section called "*The Corner*." *Id*. at 13. Defendant Steyn's blog post contained an excerpt and link to Defendant Simberg's earlier internet post for Defendant Competitive Enterprise Institute's website OpenMarket.org, entitled "*The Other Scandal in Unhappy Valley*." *Id*. Defendant Simberg's blog post compared the Sandusky scandal, and Penn State's failure to properly handle the matter with the Penn State's investigation into Plaintiff's work.[4] *Id*. Defendant Steyn's article endorsed Defendant Simberg's commentary, however Steyn indicated he was "not sure [he] would have extended the metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does". Steyn nevertheless agreed that Defendant Simberg "had a point." *Id*. Defendant Steyn also stated: "Michael Mann was the man behind the fraudulent climate-change hockey stick graph, the very ringmaster of the tree-ring circus." *Id*. at 14. Defendant Steyn concluded the piece by enumerating the similarities between Penn State's investigation into allegations of misconduct by both Sandusky and Plaintiff, and "questioned the university's similar handling of the two matters." *Id*.

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[4] Defendant Simberg compared Plaintiff to Sandusky by this statement: "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." *Id*. at 13.

Eight days after Defendant Steyn's article was posted on the *National Review Online* website, Plaintiff demanded a retraction and that an apology be issued for the accusations of "academic fraud." *Id.* The *National Review* responded by letter, and *via* an online post by Editor Rich Lowry, which explained that the term 'fraudulent' was used in Defendant Steyn's article to mean "intellectually bogus and wrong," and did not carry the connotation of "criminal fraud". *Id.*

On October 22, 2012, this action was filed in which Plaintiff alleges libel and intentional infliction of emotional distress against Defendants National Review and Steyn (the "NR Defendants"), along with co-Defendants Competitive Enterprise Institute and Simberg (the "CEI Defendants"). Plaintiff's suit is based primarily upon the NR Defendants' and the CEI Defendants' following statements: (1) Defendant Simberg's statement published in Openmarket.org that Plaintiff had engaged in "data manipulation" and "scientific misconduct" and the "posterboy of the corrupt and disgraced climate science echo chamber;" (2) Defendant Steyn's statement in the National Review Online that Plaintiff "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus;" and (3) Mr. Lowry's statement in *National Review Online* that indicated Plaintiff's work is "intellectually bogus."

Discussion

Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP ACT

Anti-SLAPP Act

The CEI Defendants argue that their commentary on Plaintiff's global warming research and the investigations of said research is protected by the Anti-SLAPP Act because the commentary was an "act in furtherance of the right of advocacy on issues of public interest." The CEI Defendants assert that because the statute applies, Plaintiff's claim must be dismissed without further action unless Plaintiff is able to carry the heavy burden imposed on him by the Anti-SLAPP Act (to successfully demonstrate that his claims are "likely to succeed on the merits.")[5] The CEI Defendants argue that the standard "likely to succeed on the merits" requires Plaintiff to prove that the statements complained of are: (1) Defamatory; (2) capable of being proven true or false; (3) concern Plaintiff; (4) false; and (5) made with the requisite degree of intent or fault. The CEI Defendants also argue that Plaintiff's status, as a public figure, requires proof of "actual malice" by clear and convincing evidence.

Plaintiff counters that the Anti-SLAPP Act was not meant to protect against this type of lawsuit. Plaintiff argues that: "Anti-SLAPP suits are generally

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[5] Recently, Judge Walton of the United States District Court for the District of Columbia issued a decision and discussed the standard or burden Plaintiff faces once the Court finds the Anti-SLAPP applies. *Boley v. Atlantic Monthly Group,* C.A. No 13-89 (RBW)(D.D.C. June 25, 2013)

meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so." Plaintiff asserts that the Anti-SLAPP Act was enacted to give courts a chance to look into the merits of a claim in order to prevent large corporations (or those who are economically superior) from commencing meritless litigation to stifle the participation of less well financed individuals in the litigation process. Plaintiff further argues that his intent in bringing this suit does not comport with the reasons for the Anti-SLAPP Act. It appears that while Plaintiff argues the Motion should be denied in this case on this basis; it also appears that Plaintiff does not seriously challenge the applicability of the Anti-SLAPP Act because it arises from an act in furtherance of the right of advocacy on issue of public interest."[6] D.C. Code § 16-5501 defines "an act in furtherance of the right of advocacy on issues of public interest" as " any written or oral statement made . . . (ii) in a place open to the public or a public forum in connection with an issue of public interest." That section also defines an issue of public interest, *inter alia*, as "an issue related to . . . environmental . . . well-being."

The D.C. Code §16-5502 provides:

> (a) A party may file a special motion to dismiss to any claim arising from an act in furtherance of the right of advocacy on issues

[6] The Court does not fully appreciate Plaintiff's argument in this regard as Plaintiff does not bring the Special Motion and is not a large corporation.

> of public interest within 45 days after service of the claim.
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> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.
>
> (c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.
>
> (2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.
>
> (d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

The Anti-SLAPP Act was adopted in the District of Columbia in 2010. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012). The Anti-SLAPP Act protects speech regarding the public interest such

as qualifications for public office. *Id*. The Anti-SLAPP Act gives "absolute or qualified immunity to individuals engaged in protected actions." *Id*. Where the proponent of a motion brought pursuant to the Anti-SLAPP Act "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." *Id*. *See also*, *3M Co. v. Boulter*, 842 F.Supp.2d 85 93 (D.D.C. 2012).

An extensive discussion as to whether the Anti-SLAPP Act applies in this case is not necessary for the reasons stated *supra.*[7] The CEI Defendants' comments were made with respect to climate issues, which are environment issues, thus an issue of public interest. In addition, the comments were made in publications (blogs, columns and articles) that were published to the public (available on online websites) thus the comments fit under the definition of an act in furtherance of the right of advocacy. Thus, the Court finds application of the Anti-SLAPP Act appropriate because the case involves issues of climate change, clearly a topic of public interest.

Standard/Burden

The CEI Defendants argue that the standard "likely to succeed on the merits" is a heavy burden and that Plaintiff is unable to meet that burden. The CEI Defendants argue that because other states do not employ the same standard ("*likely* to succeed on the

[7] Plaintiff's real argument appears to be that the Motion should be denied.

merits") the District of Columbia intended its version of the Anti-SLAPP Act to be more strict. The CEI Defendants also argue that the Merriam-Webster Dictionary definition defines "likely" as "having a high probability of occurring or being true," and "very probable." The standard of likelihood to succeed on the merits, in the context of a preliminary injunction is proof by a preponderance of the evidence. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003); *see also*, *District of Columbia*, 670 A.2d 354, 366 (D.C. 1996) (stating that "likely to succeed on the merits" indicates the *possibility* that the plaintiff will prevail at trial).

Plaintiff counters that the relevant legal standard is the same as that to be applied in deciding a motion summary judgment, not a standard requiring the high burden the CEI Defendants argue should be applied. Plaintiff argues that the D.C. Anti-SLAPP Act is fashioned after the corresponding California statute (a statute which requires that there is "a probability that the plaintiff will prevail on the claim.") Plaintiff also argues that the sole distinction between the D.C. Anti-SLAPP Act and the California statute is that the former requires the plaintiff to demonstrate that he is "likely" to succeed on the merits while the latter requires that the plaintiff establish that there is a "probability" that he will prevail on the claim. Plaintiff argues that there is no difference in the meaning of "likely" and "probability."

Blacks Law Dictionary defines the "likelihood of success on the merits test" in the context of a preliminary injunction as requiring the litigant to "show a reasonable probability of success in the litigation or appeal." BLACKS LAW DICTIONARY (9th ed.

2009). The California statute requires the plaintiff to show a "probability of prevailing on the claim by making a *prima facie* showing of facts that would, if proved, support a judgment in the plaintiff's favor." *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (Cal. Dist. Ct. App. 2004). The probability standard is similar to that used to determine a "motion for directed verdict, or summary judgment." Although the Court may not weigh the evidence, as noted *supra,* the Plaintiff must provide sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint). *Id*.

The District of Columbia Anti SLAPP Act does not provide a definition of the standard and there has not been a decision on this issue from our Court of Appeals. *See* note 4. *supra*. The legislative history of the Anti-SLAPP Act, an almost identical act to the California act, indicates that the California act served as the model for the District of Columbia's Anti-SLAPP Act. The Court finds the argument (as to the high burden) advanced by the CEI Defendants not well founded. The standard "likely to succeed on the merits" or likelihood of success on the merits, is a high burden but not as high as suggested by the CEI Defendants. As noted, the standard of the likelihood to succeed on the merits, in the context of a preliminary injunction, is proof by a preponderance of the evidence. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003).

The Court is in agreement with the decision issued by Judge Walton on this issue and finds the case law from California (upon which the D.C. Anti-SLAPP Act is modeled) instructive. In California, as Judge Walton noted; "...a Plaintiff seeking to show a

probability of prevailing on a claim in response to an anti-SLAPP motion must satisfy a standard comparable to that used on a motion for judgment as a matter of law". *See Boley v. Atlantic Monthly Group, supra* (quoting *Price v. Stossel*, 620 F. 3d 992, 1000 (9th Cir. 2010)). Thus, the Court finds, Plaintiff must present a sufficient legal basis for his claims and if he fails to do so, the motion should be granted.

Defamation

The CEI Defendants argue that Plaintiff will be unable to make a *prima facie* case for libel. The CEI Defendants argue that the First Amendment protects debate on issues of public concern of which scientific matters are included. Further, that Plaintiff will be unable to prove "actual malice" (as required where the plaintiff is a public figure) by clear and convincing evidence because the statements at issue are not assertions of fact. Finally the CEI Defendants argue that Plaintiff will be unable to prove that the CEI Defendants made the statements without care for the truth because there is evidence which suggests Plaintiff's work is not reliable.

Plaintiff counters that, to succeed on a defamation claim, he must prove "actual malice" by a showing that "the defendant in fact entertained serious doubts" as to the truth of the publication or acted with a high degree of awareness of its probable falsity. Plaintiff argues that the statements made by the CEI Defendants are not only false, but defamatory *per se*,[8]

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[8] This Order does not discuss defamation *per se* because in his Opposition, Plaintiff only makes this reference in passing and does not support the statement with any substantive argument.

and that the CEI Defendants made these statements with knowledge of their falsity or reckless disregard for their truth. Plaintiff claims whether he engaged in fraud is verifiable by either analyzing the elements of fraud[9] or considering the objective investigations conducted regarding his research.[10]

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; 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." *Payne*, 25 A.3d at 924.

The Court of Appeals has stated that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see*

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[9] Plaintiff claims that the Court may consider evidence as to whether Plaintiff made any knowing and material misrepresentations in his research with intent to deceive, and then arrive at a conclusion as to whether he committed fraud.

[10] Plaintiff claims that there were six investigations into whether he committed fraud. Those most notable were done by the EPA and the National Science Foundation (NSF).

also, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id*.

The CEI Defendants argue primarily that Plaintiff is unable to present a *prima facie* case of libel because the statements in question are not actionable, as any reasonable reader would believe that the statements consist of opinions on issues of intense public debate. The CEI Defendants ask that the Court consider: (1) specific language of the challenged statement; (2) the statements verifiability; (3) the full context of the statement; and (4) the broader context or setting in distinguishing their statements from assertions or implications of fact.[11] These Defendants argue that if the Court considers these four factors, the Court will conclude that the debate over global warming (in which CEI Defendants contend its statements are a part) is contentious and acrimonious (giving rise to commonplace highly opinionated language). The CEI Defendants argue that their statements are not exceptional, but just common statements made within the global warming arena. Finally, they contend that their statements are not actionable because they raise

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[11] The CEI Defendants argue that their statements were pure opinions

questions rather than make factual assertions that are capable of "being proved true or false" (specifically, that the CEI Defendants believe their statements invite readers to "ask questions" and arrive at their own conclusions).

Plaintiff counters that the statements at issue are not opinion(s). He argues that taken in context, the CEI Defendants' are actionable and not opinion because defamatory statements may appear in publications that often express opinion.

Prior to the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), statements that were considered to be opinion were generally treated as non-defamatory. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Under *Milkovich*, opinions are actionable "if they imply a provably false fact or rely upon stated facts that are provably false." *Id.* at 597. If the proponent of the statement, however is "expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.2d 1222, 1227 (7th Cir. 1993). In determining whether the statement is an opinion, the context of the statement should be considered. *Id.* (quoting *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994).

The First Amendment protects opinions however the statement must be one that is purely opinion and not one that stems from facts. The Court disagrees with the CEI Defendants' contention that the statement "perhaps it's time that we revisit the

Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions," can only clearly be viewed as an opinion. The Court certainly recognizes that (within the confines of the law) the CEI Defendants may employ harsh language, as appears to be the norm in the climate debate environment, however the Court finds this statement goes beyond harsh debate or "rhetorical hyperbole". Rather the statement questions facts –it does not simply invite readers to "ask questions". In addition, the accusation that Plaintiff has acted in a "most unscientific manner . . . in data manipulation to keep a blade on his famous hockey-stick graph," relies on the interpretation of facts (the emails).

The Court recognizes that the blogs and publications by the CEI Defendants at issue in this case may employ these words because it appears to have become what some may describe as the norm (in global warming criticism), and because the tone set by the use of harsh and contentious statements is in line with what some may argue is the reputation developed by the CEI Defendants; having legitimacy and is fair argument. The question becomes, and it is difficult in this case, is whether the line (as recognized by the law) has been crossed. Defendants argue that the accusation that Plaintiff's work is fraudulent may not *necessarily* be taken as based in fact because the writers for the publication are tasked with and posed to view work critically and interpose (brutally) honest commentary. In this case, however, the evidence before the Court, at this stage, demonstrates something more and different that honest or even brutally honest commentary, and creases that line of reasoning.

Fraud is defined as: "(1) A deception deliberately practiced in order to secure unfair or unlawful gain; (2) a piece of trickery; a trick; (3)(a) one that defrauds; cheat; (b) one who assumes a false pose; an imposter." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 722 (3rd ed. 1996). Fraudulent is defined as: "(1) Engaging in fraud; deceitful; (2) characterized by, constituting, or gained by fraud: fraudulent business practices." *Id.* Given the dictionary definition as well as the common readers' thought about the use of these words (fraud and fraudulent) the Court finds that these statement taken in context must be viewed as more than honest commentary—particularly when investigations have found otherwise. Considering the numerous articles that characterize Plaintiff's work as fraudulent, combined with the assertions of fraud and data manipulation, the CEI Defendants have essentially made conclusions based on facts. Further, the assertions of fraud "rely upon facts that are provably false" particularly in light of the fact that Plaintiff has been investigated by several bodies (including the EPA) and determined that Plaintiff's research and conclusions are sound and not based on misleading information.

In addition, the CEI Defendants' attempt to minimize the seriousness of their reference to Plaintiff as a fraud by claiming that this reference may be compared to the statement "intellectually bankrupt" to "intellectually bogus" is not credible. It is obvious that "intellectually bankrupt" refers to a lack of sense or intellect but the same may not be said for "intellectually bogus." The definition of "bogus" in the Merriam-Webster online dictionary, *inter alia*, is "not genuine . . . sham." BOGUS, MERRIAM-WEBSTER:

ONLINE DICTIONARY AND THESAURUS, http://www.merriam-webster.com/dictionary/bogus. In Plaintiff's line of work, such an accusation is serious. To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud (taken in the context and knowing that Plaintiff's work has been investigated and substantiated on numerous occasions). The Court must, at this stage, find the evidence indicates that the CEI Defendants' statements are not pure opinion but statements based on provably false facts.[12]

The CEI Defendants argue that their statements are rhetorical hyperbole, which are not actionable assertions of fact, and thus they are entitled to dismissal of the action. The CEI Defendants contend that any reasonable reader would interpret their statements as rhetorical hyperbole. Plaintiff counters there is nothing rhetorical about the CEI Defendants' accusations of fraud, and that the statements do not qualify as rhetorical hyperbole. Plaintiff points to statements made by readers of the CEI Defendants' publications as evidence that Defendants' statements are defamatory.[13] Plaintiff notes other publications

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[12] The Court does view this as a very close case.

[13] Some of these statements are "this is some of the most disgusting and amoral attempts to smear an honest and courageous scientist's reputation that I have ever seen," and "falsely screaming 'fraud' about one study done over a dozen years ago and ignoring the 11 other studies that confirm it reveals the accuser has no interests [sic] in the truth." At the hearing on the Motions, there was much discussion or critical reference made to the source of this particular comment and the character and worth of the commentator (questioning whether this comment should be taken with any legitimacy). The Court finds this issue

that have published statements about how Plaintiff was defamed.

In *Milkovich*, the Supreme Court found that statements that are not made from actual facts are protected to prevent public debate from a deprivation of "imaginative expression" or "rhetorical hyperbole"[14] that has "traditionally added much to the discourse of this Nation." *Milkovich*, 497 A.2d at 2. *See also*, *Wilner*, 760 A.2d at 589. Rhetorical hyperbole is not actionable in defamation because it cannot be interpreted as factual assertions. *Wilner*, 760 A.2d at 597. To determine whether a statement is rhetorical hyperbole, *i.e.* a statement that is verifiable, courts must look to the context of the statement. *Weyrich v. New Republic, Inc.* 235 F.3d 617, 624 (D.D.C. 2001).

An analysis of this argument is similar to or the same as what is applied to evaluate the CEI Defendants' contention that their statements were opinion. Language such as "intellectually bogus" "data manipulation" and "scientific misconduct" in the context of the publications' reputation and columns certainly appear as exaggeration and not an accusation of fraud. On the other hand, when one takes into account all of the statements and accusations made over the years, the constant requests for investigations of Plaintiff's work, the alleged defamatory statements appear less akin to

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unimportant for purposes of the questions decided herein and at this point in the litigation.

[14] Rhetorical hyperbole refers to exaggerations used as a rhetorical device. Rhetorical hyperbole is often a figure of speech that is used to evoke strong feelings or create a strong impression but not intended to be taken literally.

"rhetorical hyperbole" and more as factual assertions. Defendant Simberg's article "*The Other Scandal In Unhappy Valley*" suggested that Penn State had covered up Plaintiff's alleged fraudulent conduct and misrepresentations of data. The content and context of the statements 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.

Application of the Fair Comment Privilege

The CEI Defendants argue that their statements are protected by the "Fair Comment" privilege, which protects opinions based on facts that are well known to the readers. Plaintiff counters that the "Supportable Interpretation" and "Fair Comment" privileges do not apply. Plaintiff contends that Supportable Interpretation privilege only applies if the challenged statements are evaluations of a literary work, such as when a reviewer offers commentary that is tied to the work being reviewed. When a writer launches a personal attack on a person's character, reputation, or competence then the Supportable Interpretation privilege does not apply. Plaintiff claims that the CEI Defendants' statements were a personal attack on Plaintiff's conduct and that the CEI Defendants' comments are not opinions but rather misstatements of fact and therefore the Fair Comment privilege does not apply.

When the media defames a private individual, the law in the District of Columbia is that the standard of care is negligence unless a common law privilege applies. *Phillips v. Evening Star Newspaper Co.*, 424

A.2d 78, 87 (D.C. 1980). The District of Columbia has several common law privileges, one of which is the fair comment privilege. *Id*. The law in the District of Columbia provides the media the privilege of "fair comment on matters of public interest." *Id*. at 88. The privilege only applies to opinion and not misstatements of fact.[15] *Id*. (finding that the Evening Star Newspaper could not employ the Fair Comment privilege because it printed false facts regarding the existence of a quarrel).

To be in a position to take advantage of this privilege a defendant must "clear[] two major hurdles to qualify for the fair report privilege." *Id*. at 89. A defendant must show that the publication was "fair and accurate" and that the "publication properly attributed the statement to the official source." *Id*. In this case, the accusations of fraud are statements that are provably false. Whether Plaintiff's work is fraudulent is certainly a matter of public interest, however several reputable bodies have investigated Plaintiff's work (even if the Court does not consider the investigation conducted by Penn State as one of these

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[15] The rationale for this is found in *De Savitsch v. Patterson*, 159 F.2d 15, 17 (D.C. Cir. 1946) in which the court said "to state accurately what a man has done, and then to say that in your opinion such conduct was disgraceful or dishonorable, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well founded or not. Misdescriptions of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the reader no opportunity for judging himself for (sic) the character of the conduct condemned, nothing but a false picture being presented for judgment."

bodies[16]) and Plaintiff's work has been found to be sound. Having been investigated by almost one dozen bodies due to accusations of fraud, and none of those investigations having found Plaintiff's work to be fraudulent, it must be concluded that the accusations are provably false. Reference to Plaintiff, as a fraud is a misstatement of fact. Thus the CEI Defendants accusation of "data manipulation" could be a misstatement of the facts (the evidence indicates that Plaintiff's work is sound). Therefore, the Court finds the fair comment privilege is not available to the CEI Defendants in this case.

Actual Malice

The CEI Defendants argue that there is sufficient evidence to indicate that Plaintiff's work was "intellectually bogus" thus Plaintiff would be unable to prove that the CEI Defendants knew that their comments were false or that they entertained serious doubts about the truth of their statements. The CEI Defendants argue that Plaintiff will be unable to prove "actual malice" (as required where the plaintiff is a public figure) by clear and convincing evidence because the statements at issue are not assertions of fact (and even if they are, because Plaintiff's work is constantly questioned it follows that the CEI Defendants would not question the truth of their publications).

Plaintiff counters that the CEI Defendants' statements were made with the knowledge of their falsity or reckless disregard for their truth, thus

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[16] Here the Court notes Defendants' argument that the various investigations have not been thorough, fair or complete.

"actual malice" is evident. Plaintiff argues that his work has been proved accurate by several investigations, thus the CEI Defendants plainly disregarded the falsity of their statements.

"Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (citing the Supreme Court in *New York Times Co.*, 376 U.S. at 279-80, which held that "the Constitution limits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.") The plaintiff must prove "actual malice" by "clear and convincing evidence." *Id.* at 924. There must also be sufficient evidence that indicates that the defendant had serious doubts regarding the truth of the published statement. *Id.* (explaining that a publication made where there are serious doubts is an indication of reckless disregard for truth or falsity thus demonstrates "actual malice"). The *New York Times Co.* rule was extended to include libel actions by public figures. *Nader*, 408 A.2d at 40 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) which defined a public figure as "[one] who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are classed as public figures.")

Plaintiff does not seriously challenge the assertion that he is a public figure and the Court finds that given his work and notoriety the characterization as a public

figure (albeit arguably limited) is appropriate. As a public figure, Plaintiff may only succeed in a suit for libel if he can prove "actual malice" because, as a public figure, he has opened himself to criticism and differing opinions. At this stage, the evidence is slight as to whether there was actual malice. There is however sufficient evidence to demonstrate some malice or the knowledge that the statements were false or made with reckless disregard as to whether the statements were false. Plaintiff has been investigated several times and his work has been found to be accurate. In fact, some of these investigations have been due to the accusations made by the CEI Defendants. It follows that if anyone should be aware of the accuracy (or findings that the work of Plaintiff is sound), it would be the CEI Defendants. Thus, it is fair to say that the CEI Defendants continue to criticize Plaintiff due to a reckless disregard for truth. Criticism of Plaintiff's work may be fair and he and his work may be put to the test. Where, however the CEI Defendants consistently claim that Plaintiff's work is inaccurate (despite being proven as accurate) then there is a strong probability that the CEI Defendants disregarded the falsity of their statements and did so with reckless disregard.

The record demonstrates that the CEI Defendants have criticized Plaintiff harshly for years; some might say, the name calling, accusations and jeering have amounted to a witch hunt,[17] particularly because the

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[17] The Court does not, by this Order endorse or make any finding regarding this characterization of the type of dialogue engaged in by the CEI Defendants.

CEI Defendants appear to take any opportunity to question Plaintiff's integrity and the accuracy of his work despite the numerous findings that Plaintiff's work is sound. At this stage, the evidence before the Court does not amount to a showing of clear and convincing as to "actual malice," however there is sufficient evidence to find that further discovery may uncover evidence of "actual malice." It is therefore premature to make a determination as to whether the CEI Defendants did not act with "actual malice."

Intentional Infliction of Emotional Distress

The CEI Defendants argue that Plaintiff's claim for intentional infliction of emotional distress ("IIED") fails because the Supreme Court has made it clear that public figures may not recover for the tort of intentional infliction of emotional distress by reason of publications without showing (in addition) that the publication contains a false statement of fact which was made with "actual malice." Defendants contend that their statements are not actionable because they are pure opinion and hyperbole and are not false assertions of fact.

Plaintiff counters that his claim for IIED will succeed because the comment in which Plaintiff was likened or compared to "Jerry Sandusky" by the CEI Defendants was extreme and outrageous. Plaintiff also argues that his claim will survive because the comparison to Sandusky caused him to experience "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea."

Similar to the legal standard for defamation, a public figure may only "recover for intentional

infliction of emotional distress by showing that there was a false statement of fact, which was made with 'actual malice.'" *Foretich v. CBS, Inc.*, 619 A.2d at 59 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). The public figure must prove "actual malice" by clear and convincing evidence." *Id.*[18] The Supreme Court's ruling in this area is clear that the constitutional protections given to defendants that are charged with defamation of a public figure are extended to other civil actions alleging emotional harm. *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004).

The argument advanced in support of Plaintiff's claim for IIED is similar to the claim of defamation. There is sufficient evidence presented that is indicative of "actual malice." 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

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[18] The question here is whether can prove actual malice, not that the general elements of a claim for IIED. The elements of a claim for IIED: "(1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v. District of Columbia*, 9 A.3d 484, 494 (D.C. 2010) (citing *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003). 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." *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 (D.C. 1991). Mental anguish and stress "do not rise to the level of severe emotional distress." *Futrell*, 816 A.2d at 808. The defendant's actions must be the proximate cause of "plaintiff's emotional upset of so acute a nature that harmful physical consequences are likely to result." *Id.*

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."

Defendants' CEI and Simberg's Motion to Dismiss Pursuant to Rule 12(b)(6)

Standard

Rule 12 vests the Court with the authority to dismiss an action when it "fails to state a claim upon which relief can be granted." Super. Ct. Civ. R. 12(b)(6). Pursuant to this Rule, "[d]ismissal is warranted only if, construing the complaint in the light most favorable to the non-moving party and assuming the factual allegations to be true for purposes of the motion, 'it appears, beyond doubt, that the plaintiff can prove no facts which would support the claim.'" *Leonard v. Dist. of Columbia*, 794 A.2d 618, 629 (D.C. 2002) (quoting *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997)). The determination of whether dismissal is proper must be made on the face of the pleadings alone. *See Telecommunications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985).

A plaintiff is required to plead enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007). In order to survive a motion to dismiss, a plaintiff's complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*

Corp., 127 S.Ct. at 1964–65. "When the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id*. at 1966.

Defamation

The CEI Defendants argue that the Court should dismiss the claim because the challenged statements are constitutionally protected and subject to the "fair comment privilege." The CEI Defendants argue that Plaintiff's claim is insufficient to support allegations of "actual malice." The CEI Defendants further argue that Plaintiff has not pled factual content (only conclusory allegations) that are provably false.

Plaintiff counters that his claims should survive a 12(b)(6) because he has pled facts that demonstrate that the CEI Defendants knew fraud was nonexistent, or deliberately ignored evidence that their accusations of fraud, misconduct or data manipulation were false. Plaintiff claims that multiple government and academic institutions have exonerated him and that the CEI Defendants were aware of this. Plaintiff asserts that the Motions are frivolous and "nothing more than a cynical ploy to evade liability" and "delay proceedings."

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). Plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or

defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; 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." *Payne*, 25 A.3d at 924.

The Court of Appeals has held that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from the mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id*.

Given the Court's discussion and decision *supra,* on the Special Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act, the Court will not repeat that discussion here. The Court finds the Motion to Dismiss pursuant to Rule 12(b(6) must be denied for the same reasons as stated *supra.* Accordingly, it is this 19th day of July 2013 hereby,

ORDERED that the Motions are **DENIED**. It is further,

ORDERED that the **STAY IS LIFTED**. It is further,

ORDERED that the parties shall appear for a status hearing on September 27, 2013 at 9:00 a.m.

SO ORDERED.

s/ Natalia M. Combs Greene
Natalia M. Combs Greene
(Signed in Chambers)

Copies to:

Parties

APPENDIX G

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 14-CV-101 & 14-CV-126

COMPETITIVE ENTERPRISE INSTITUTE, *et al.*,

Appellants,

v.

MICHAEL E. MANN, Ph.D,,

Appellee.

CAB8263-12

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson, Beckwith, Easterly, and McLeese, Associate Judges.

ORDER

On consideration of appellants' petitions for rehearing *en banc*, and *amici curiae's* motions for leave to file the lodged briefs supporting appellants' petitions for rehearing *en banc*, and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED that *amici curiae's* motions for leave to file the lodged briefs supporting appellants' petitions

for rehearing *en banc* are granted, and the Clerk shall file the lodged briefs. It is

FURTHER ORDERED that appellants' petitions for rehearing *en banc* are denied.

PER CURIAM

Copies mailed to:

Honorable Frederick H. Weisberg

Civil Division
Quality Management Unit

*** * ***

APPENDIX H

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 14-CV-101 & 14-CV-126

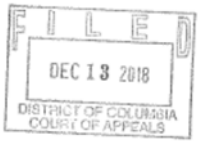
COMPETITIVE ENTERPRISE INSTITUTE, *et al.*,

Appellants,

v.

MICHAEL E. MANN, Ph.D,,

Appellee.



CAB8263-12

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson, Beckwith,* Easterly,* and McLeese, Associate Judges; and Ruiz,* Senior Judge

ORDER

On consideration of appellants' petitions for rehearing *en banc*, David M. Morrell, Esquire's, motion to withdraw as counsel for appellant National Review, Inc., *amici curiae's* motions for leave to file the lodged briefs supporting appellants' petitions for rehearing *en banc*, and appellee's response to the petition for rehearing or rehearing *en banc*, it is

ORDERED that David M. Morrell, Esquire's, motion to withdraw as counsel for appellant National

Review, Inc. is granted, and the Clerk shall withdraw his appearance. It is

FURTHER ORDERED that *amici curiae's* motions for leave to file the lodged briefs supporting appellants' petitions for rehearing or rehearing *en banc* are granted, and the Clerk shall file the lodged briefs. It is

FURTHER ORDERED by the merits division* that the petitions for rehearing are granted to the extent that this court's opinion issued on December 22, 2016, 150 A.3d 1213, is being amended to add a new footnote 39 and revise former footnote 45 (now 46). The amended opinion is attached to this order. It is

FURTHER ORDERED that the petitions for rehearing *en banc* are denied without prejudice to the filing of a new petition for rehearing *en banc* addressed to the amended opinion.

PER CURIAM

Copies mailed to:

Honorable Frederick H. Weisberg

Civil Division
Quality Management Unit

* * *

APPENDIX I

SUPERIOR COURT
OF THE DIVISION OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Pennsylvania State University Department of Meteorology University Park, PA 16802 Plaintiff, v. NATIONAL REVIEW, INC. 215 Lexington Avenue New York, NY 10016, - and - COMPETITIVE ENTERPRISE INSTITUTE 1899 L Street, N.W. Washington, D.C. 20036, - and - RAND SIMBERG c/o Competitive Enterprise Institute 1899 L. Street, N.W. Washington, D.C. 20036,	Case No. 2012 CA 008263 B Calendar No.: 10 Judge: Natalia Combs Greene JURY TRIAL DEMANDED

- and -	)
	)
MARK STEYN	)
c/o National Review, Inc.	)
215 Lexington Avenue	)
New York, NY 10016	)
	)
Defendants.	)
	)

AMENDED COMPLAINT

Plaintiff, Michael E. Mann, Ph.D., for his complaint against Defendants National Review Inc., Competitive Enterprise Institute, Rand Simberg and Mark Steyn alleges as follows:

INTRODUCTION

1. This is a defamation action brought by Michael E. Mann, Ph.D. against two publishers, the National Review Inc. and the Competitive Enterprise Institute, and two of their journalists, Rand Simberg and Mark Steyn, for their utterly false and defamatory statements against Dr. Mann—accusing him of academic fraud and comparing him to a convicted child molester, Jerry Sandusky, the disgraced former football coach at Pennsylvania State University.

2. Dr. Mann is a climate scientist whose research has focused on global warming. Along with other researchers, he was one of the first to document the steady rise in surface temperatures during the 20th Century and the steep increase in measured temperatures since the 1950s.

3. Nevertheless, the defendants, for business and other reasons, assert that global warming is a "hoax"

and have accused Dr. Mann of improperly manipulating the underlying data to reach his conclusions. In response to these accusations, academic institutions and governmental entities alike, including the U.S. Environmental Protection Agency and the National Science Foundation, have conducted investigations into Dr. Mann's work, and found the allegations of academic fraud to be baseless. Every such investigation—and every replication of Dr. Mann's work—has concluded that Dr. Mann's research and conclusions were properly conducted and fairly presented.

4. Recognizing that they cannot contest the science behind Dr. Mann's work, the defendants, contrary to known and clear fact, and intending to impose vicious injury, have nevertheless maliciously accused him of academic fraud, the most fundamental defamation that can be levied against a scientist and a professor. Unsatisfied with their lacerations of his professional reputation, defendants have also maliciously attacked Dr. Mann's personal reputation with the knowingly false comparison to a child molester.

5. It is one thing to engage in discussion about debatable topics. It is quite another to attempt to discredit consistently validated scientific research through the professional and personal defamation of a respected scientist. Responsible media reviews, including the Columbia Journalism Review, have described the defendants' attacks against Dr. Mann as "deplorable, if not unlawful." Responsible scientific publications, including Discover Magazine, have described these attacks as "slimy," "disgusting," and "defamatory." Even one of the defendants in this case,

the Competitive Enterprise Institute, has conceded that at least a portion of its statements were "inappropriate," but continues to republish its allegations of academic fraud.

6. The defendants' statements against Dr. Mann are false, malicious, and defamatory per se. They are so outrageous as to amount to the intentional infliction of emotional distress. Dr. Mann seeks judgment against each and all of the defendants as set forth in the claims below and the award of compensatory and punitive damages against all defendants, jointly and severally.

PARTIES

7. Dr. Mann is a faculty member in the Departments of Meteorology and Geosciences within the College of Earth and Mineral Sciences at Pennsylvania State University. Dr. Mann is a resident of Pennsylvania.

8. Defendant National Review, Inc. (hereinafter "NRI") is a corporation having its principal place of business at 215 Lexington Avenue, New York, NY, 10016. NRI maintains an office at 233 Pennsylvania Ave, S.E., Washington D.C. 20003. NRI publishes *National Review*, a bi-monthly print magazine, and *National Review Online*. Both publications tout themselves as "America's most widely read and influential magazine and website for Republican/conservative news, commentary and opinion." *National Review* and *National Review Online*, are widely read and circulated in the District of Columbia. Accordingly, NRI is transacting and doing business within the District of Columbia and is

subject to the jurisdiction of this Court pursuant to DC Code §13-422.

9. Defendant Competitive Enterprise Institute (hereinafter "CEI") is a 501 (c)(3) corporation having its principal place of business at 1899 L Street, N.W., Washington, DC 20036. CEI describes itself as a "non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty." CEI has been a tireless opponent of the mainstream climate change community. CEI publishes, among other things, OpenMarket.org. CEI's principal place of business is within the District of Columbia and as such it is transacting and doing business within the District of Columbia and subject to the jurisdiction of this Court pursuant to DC Code §13-422 and 13-423(a).

10. Defendant Rand Simberg, upon information and belief, is an adjunct scholar at CEI, a contributing editor to OpenMarket.org, and a resident of Idaho. Mr. Simberg's writings are widely read and circulated in the District of Columbia. Accordingly, Mr. Simberg is transacting and doing business within the District of Columbia and is subject to the jurisdiction of this Court pursuant to DC Code §13-423(a).

11. Defendant Mark Steyn, upon information and belief, is an author who among other things serves as a regular contributor to *National Review*. Mr. Steyn is a resident of Canada. Mr. Steyn's writings are widely read and circulated in the District of Columbia. Accordingly, Mr. Steyn is transacting and doing business within the District of Columbia and is subject to the jurisdiction of this Court pursuant to DC Code §13-423(a).

12. Venue in this Court is proper as the District of Columbia has personal jurisdiction over defendants.

STATEMENT OF FACTS

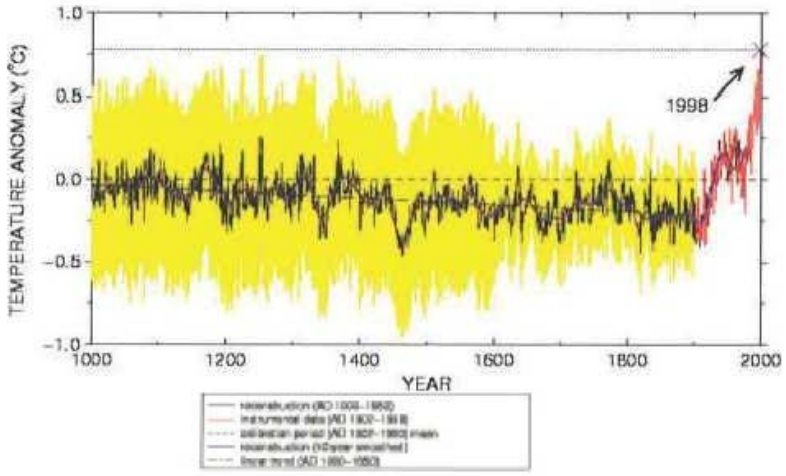
Dr. Mann and the "Hockey Stick" Graph

13. Dr. Mann received his undergraduate degrees in Physics and Applied Math from the University of California at Berkeley, an M.S. degree in Physics from Yale University, and a Ph.D. in Geology and Geophysics from Yale University. Dr. Mann's research focuses on the use of theoretical models and observational data to better understand our Earth's climate system. Prior to Dr. Mann's faculty appointment at Penn State, he was a faculty member within the University of Virginia's Department of Environmental Sciences and a faculty member within the University of Massachusetts's Department of Geosciences.

14. Dr. Mann was a lead author on the *Observed Climate Variability and Change* chapter of the Intergovernmental Panel on Climate Change (IPCC) Third Scientific Assessment Report in 2001 and was the organizing committee chair for the National Academy of Sciences *Frontiers of Science* in 2003. Dr. Mann has received numerous honors and awards including, in 2002, the National Oceanic and Atmospheric Administration's outstanding publication award and selection by *Scientific American* as one of the fifty leading visionaries in science and technology. In 2012, Dr. Mann was inducted as a Fellow of the American Geophysical Union and awarded the Hans Oeschger Medal of the European Geosciences Union.

15. Dr. Mann is well known for his work regarding global warming and the so-called "Hockey Stick Graph." In 1998 and 1999, together with Raymond S. Bradley and Malcolm K. Hughes, Dr. Mann published two research papers showing a steady rise in surface temperature during the 20th Century and a steep increase in measured temperatures since the 1950s (the "1998 Paper" and the "1999 Paper"). These papers concluded that the recent 20th century rise in global temperature is likely unprecedented in at least the past millennium, and that the temperature rise correlates with a concomitant rise in atmospheric concentrations of CO2—a gas whose heat- trapping properties have long been established—primarily emitted by the combustion of fossil fuels.

16. The 1999 Paper included the following graph depicting the 20th century rise in global temperature;



The graph came to be known as the "Hockey Stick," due to its iconic shape—the "shaft" reflecting a long-term cooling trend from the so-called "Medieval Warm Period" (from approximately 1050 AD to

1450 AD) through the "Little Ice Age" (approximately 1550 AD to 1900 AD), and the "blade" reflecting a dramatic upward temperature swing during the 20th century that culminates in anomalous late 20th century warmth.

17. The work of Dr. Mann and the IPCC has received considerable accolades within the scientific community. In 2007, the IPCC was awarded the Nobel Peace Prize for its work in climate change. The IPCC, in turn, has recognized Dr. Mann for his contribution to that award.

18. However, Dr. Mann's research and conclusions have been and continue to be attacked by certain individuals and organizations who do not accept the concept that the Earth is becoming warmer. This resistance has been characterized not by a serious challenge to the actual science underlying Dr. Mann's conclusions, but rather by invective and personal attacks against Dr. Mann and his integrity—often by those with economic interests and political agendas tied to maintaining the status quo and the current regulatory structure with respect to climate policy.

The Theft of Emails from CRU

19. In November 2009, thousands of emails were stolen from a computer server at the Climate Research Unit ("CRU") at the University of East Anglia in the United Kingdom. The CRU emails, some of which were exchanged between Dr. Mann and researchers at the CRU and other climate change research institutions, were posted anonymously on the World Wide Web shortly before the United Nation's Global Climate Change Conference in Copenhagen, Denmark in December 2009. A few of those emails were then

taken out of context, mischaracterized, and misrepresented by climate change deniers to falsely imply impropriety on the part of the scientists involved, including Dr. Mann.

20. The climate change deniers went on to claim that the CRU emails proved that global warming is a hoax perpetrated by scientists from across the globe and that these scientists were colluding with government officials to somehow reap financial benefits. In fact, and as discussed below, these emails reflected only the commonplace and legitimate give and take of academic debate and inquiry.

The Exoneration of Dr. Mann

21. Following the publication of the CRU emails, Penn State and the University of East Anglia (in four separate instances) 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 National Science Foundation) have conducted separate and independent investigations into the allegations of scientific misconduct against Dr. Mann and his colleagues. Every one of these investigations has reached the same conclusion: there is no basis to any of the allegations of scientific misconduct or manipulation of data.

22. Notably, in July 2010, CEI, a defendant in this case, and others, filed a request entitled *Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*. In response, the

Environmental Protection Agency published a summary of its findings, entitled "Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," which stated:

> **Myth**: The University of East Anglia's Climatic Research Unit (CRU) emails prove that temperature data and trends were manipulated.
>
> **Fact**: Not true. Petitioners say that emails disclosed from CRU provide evidence of a conspiracy to manipulate data. The media coverage after the emails were released was based on email statements quoted out of context and on unsubstantiated theories of conspiracy. The CRU emails do not show either that the science is flawed or that the scientific process has been compromised. *EPA carefully reviewed the CRU emails and found no indication of improper data manipulation or misrepresentation of results.*
>
> **Myth**: The jury is still out on climate change and CRU emails undermine the credibility of climate change science overall.
>
> **Fact**: Climate change is real and it is happening now. The U.S. Global Change Research Program, the National Academy of Sciences, and the Intergovernmental Panel on Climate Change (IPCC) have each independently concluded that warming of the climate system in recent decades is "unequivocal." This conclusion is not drawn from any one source of data but is based on multiple lines of evidence, including three

> worldwide temperature datasets showing nearly identical warming trends as well as numerous other independent indicators of global warming (e.g., rising sea levels, shrinking Arctic sea ice). Some people have "cherry-picked" a limited selection of CRU email statements to draw broad, unsubstantiated conclusions about the validity of all climate science.

U.S. Environmental Protection Agency, "Decision Document, Denial of Petitions for Reconsideration of Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act" (July 29, 2010). Available at http://epa.gov/climatechange/endangerment/petitions/decision.html.

23. In August 2011, the Inspector General of the National Science Foundation ("NSF"), an independent agency of the United States government tasked with promoting the progress of science in this country, reported on the outcome of its independent review of charges of misconduct against Dr. Mann. NSF concluded that:

> Although [Dr. Mann's] data is still available and still the focus of significant critical examination, no direct evidence has been presented that indicates [Dr. Mann] fabricated the raw data he used for his research or falsified his results. Much of the current debate focuses on the viability of the statistical procedures he employed, the statistics used to confirm the accuracy of the results, and the degree to which one specific set of data impacts the statistical results. These concerns are all appropriate for

> scientific debate and to assist the research community in directing future research efforts to improve understanding in this field of research. Such scientific debate is ongoing but does not, in itself, constitute evidence of research misconduct. Lacking any direct evidence of research misconduct, as defined under the NSF Research Misconduct Regulation, we are closing this investigation with no further action." .

Report available at http://www.nsf.gov/oig/search/A09120086.pdf

24. All of the above investigations found that there was no evidence of any fraud, data falsification, statistical manipulation, or misconduct of any kind by Dr. Mann. All of the above reports and publications were widely available and commented upon in the national and international media. All were read by the Defendants. To the extent there was ever any question regarding the propriety of Dr. Mann's research, it was laid to rest as a result of these investigations.

The Defamatory Statements

25. Nevertheless, despite the fact that CEI's claims of data manipulation were labeled a "myth" by the EPA in 2010, and despite the fact that NSF deemed the allegations of scientific misconduct "closed" in 2011, the climate-change deniers saw an opportunity to work themselves up once again in the wake of the publication of the results of an investigation at Penn State conducted by Louis Freeh (the former director of the Federal Bureau of Investigation) regarding the university's handling of the Jerry Sandusky child abuse scandal. Mr. Sandusky had been convicted of

molesting ten young boys. The Freeh Report concluded that senior officials at Penn State had shown "a total and consistent disregard" for the welfare of the children, had worked together to conceal Mr. Sandusky's assaults, and had done so out of fear of bad publicity for the university. For the climate change skeptics, the Sandusky scandal presented a new avenue to castigate Dr. Mann and impugn his reputation and integrity, evidently on the theory that a different investigative panel of the university had cleared Dr. Mann of misconduct.

26. On July 13, 2012, an article authored by Defendant Rand Simberg entitled "The Other Scandal In Unhappy Valley" appeared on OpenMarket.org, a publication of CEI. Purporting to comment upon Penn State's handling of the Sandusky scandal, Mr. Simberg hearkened his readers back to "another cover up and whitewash" that occurred at the university. Mr. Simberg and CEI stated as follows:

> perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. *Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.*

(Emphasis added). Mr. Simberg and CEI went on to state that after the leaking of the CRU emails,

> many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were

> Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed 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.
>
> * * * *
>
> *Mann has become the posterboy of the corrupt and disgraced* climate science echo chamber. No university whitewash investigation will change that simple reality.
>
> * * * *
>
> We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them.
>
> Should we suppose, in light of what we now know, they would do any less to hide *academic and scientific misconduct*, with so much at stake?

See Exhibit A (emphasis added).

27. After this publication was released, the editors of Openmarket.org removed the sentence stating that "Mann could be said to be the Jerry Sandusky of climate science . . .," stating that the sentence was "inappropriate."

28. On July 15, 2012, an article entitled "Football and Hockey" appeared on *National Review Online*. See Exhibit B. The article, authored by Defendant Mark Steyn, commented on and extensively quoted from Mr. Simberg's piece on Openmarket.org. Mr. Steyn and NRI reproduced the following quote:

> I'm referring to another cover up and whitewash that occurred [at Penn State] two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

Perhaps realizing the outrageousness of Mr. Simberg's comparison of Dr. Mann to a convicted child molester, Mr. Steyn conceded: "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." Mr. Steyn and NRI went on to state that "*Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus.*"

29. Mr. Steyn and NRI reproduced the defamatory statements of Mr. Simberg and CEI verbatim, even after CEI's acknowledgment that at least some of those statements were inappropriate. The full quote from Mr. Simberg and CEI remains visible on National Review Online, in spite of the fact that CEI had already removed the self-described "inappropriate" statements from OpenMarket.org.

30. In the wake of these attacks on Dr. Mann, a number of respectable and well-regarded journalists

chose to weigh in on the matter, describing these new attacks on Dr. Mann as deplorable, untruthful, and outrageous. The *Columbia Journalism Review*, perhaps the most highly regarded media authority, stated that Mr. Steyn's and NRI's accusations of "academic fraud" "dredg[ed] up a discredited charge" and ignored "almost half a dozen investigations [that had] affirmed the integrity of Mann's research." See Brainard, Curtis. (2012, July 25). 'I don't bluff': Michael Mann's lawyer says *National Review* must retract and apologize. *Columbia Journalism Review*. Retrieved from http://www.cir.org/theobservatory/michael_mann_national_review_m.php?page=2. The Columbia Journalism Review further commented that Dr. Mann has endured "witch hunts and death threats in order to defend his work" and that "the low to which Simberg and Steyn stooped is certainly deplorable, if not unlawful." *Id.* Similarly, the scientific publication Discover Magazine described the attacks as "slimy," "disgusting," and "defamatory." See Plait, Phil. (2012, July 23). Deniers, disgust, and defamation. *Discover Magazine.*, Retrieved from http://blogs.discovermagazine.com/badastronomy/2012/07/23/deniers-disgust-and-defamation/. Further, the Union of Concerned Scientists, through its program manager, Michael Halpern, stated that it was "aghast" at these attacks, describing them as "disgusting," "offensive," and a "defamation of character." See Halpern, Michael. (2012, July 23). Union of Concerned Scientists. *Ecowatch*. Retrieved from http://ecowatch.org/2012/think-tank-climate-scientist/.

The Refusal to Apologize or Retract the Statements

31. After the publication of the above statements, Dr. Mann demanded retractions and apologies from both NRI and CEI. Dr. Mann advised NRI and CEI that their allegations of misconduct and data manipulation were false and were clearly made with the knowledge that they were false. Dr. Mann further stated that it was well known that there have been numerous investigations into the issue of academic fraud in the wake of the disclosure of the CRU emails, and that every one of these investigations has concluded that there is no basis to these allegations and no evidence of any misconduct or data manipulation.

32. On August 22, NRI published a response from its editor Rich Lowry on *National Review Online* entitled "Get Lost." *See* Exhibit C. While NRI refused to apologize for or retract "Football and Hockey", Mr. Lowry did not deny the falsity of the defamatory statements, nor its knowledge of their falsity. Rather, Mr. Lowry's defense was that his publication had not intended to accuse Dr. Mann of fraud "in the criminal sense." Nevertheless, Mr. Lowry then proceeded to repeat the defamatory charges, stating that Dr. Mann's research was "intellectually bogus," another accusation which is actionable in and of itself. Semantics aside, the allegation that Dr. Mann's research was "intellectually bogus" is yet another allegation of academic fraud.

33. On August 24, 2012, CEI issued a press release entitled "*Penn State Climate Scientist Michael Mann Demands Apology from CEI: CEI Refuses to Retract*

Commentary." *See* Exhibit D. In its statement, CEI linked to and adopted Mr. Lowry's response.

COUNT I
(Libel per se against all defendants)

34. Each of the preceding paragraphs 1 through 33 hereby incorporated herein by reference.

35. The aforementioned written statements by the defendants accusing Dr. Mann of academic fraud are defamatory per se and tend to injure Dr. Mann in his profession because they falsely impute to Dr. Mann academic corruption, fraud, and deceit as well as the commission of a criminal offense, in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally.

36. The aforementioned statements proximately caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally.

37. By publishing the aforementioned statements, defendants knew they would be republished and read by the general public throughout the United States and elsewhere. The statements were in fact republished and read by members of the general public throughout the United States and elsewhere as a direct, natural, probable, and foreseeable consequence of their publications.

38. The aforementioned statements are false, and were false when made. Defendants knew or should have known the statements were false when made.

39. Defendants made the aforementioned statements with actual malice and wrongful and willful intent to injure Dr. Mann. The statements

were made with reckless disregard for their truth or falsity or with knowledge of their falsity and with wanton and willful disregard of the reputation and rights of Dr. Mann.

40. The aforementioned statements were made of and concerning Dr. Mann, and were so understood by those who read defendants' publications of them.

41. The aforementioned statements have been widely published throughout the United States and elsewhere.

42. Defendants knew or should have known that the statements were injurious to Dr. Mann's career and reputation.

43. As a proximate result of the aforementioned statements and their publications Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial but not less than the jurisdictional minimum of this Court. The full nature, extent and amount of these damages is currently unknown, but this Complaint will be amended at trial to insert said information if deemed necessary by the Court.

44. The aforementioned false and defamatory statements were made by the defendants with actual malice and either with knowledge of their falsity or in reckless disregard of the truth or falsity of the statements.

45. Defendants cooperated among themselves in publishing the false and defamatory statements by, among other acts, republishing and endorsing the defamations of their co-defendants. They are joint tortfeasors and as such jointly and severally liable to Dr. Mann for damages.

46. In making the defamatory statements, defendants acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit defendants. Defendants are liable to Dr. Mann for punitive damages in an amount in accordance with proof at trial.

COUNT II

(Libel per se against CEI and Rand Simberg)

47. Each of the preceding paragraphs 1 through 46 is hereby incorporated herein by reference.

48. Mr. Simberg's statements, published by CEI on Openmarket.org, that Dr. Mann had engaged in "data manipulation, "academic and scientific misconduct," and was "the posterboy of the corrupt and disgraced climate science echo chamber" are defamatory per se and tend to injure Dr. Mann in his profession because they falsely impute to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense, in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally.

49. The aforementioned statements proximately caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally.

50. By publishing the aforementioned statements, CEI and Simberg knew they would be republished and read by the general public throughout the United States and elsewhere. The statements were in fact republished and read by members of the general public throughout the United States and elsewhere as a direct, natural, probable, and foreseeable consequence of CEI's and Simberg's publication.

51. The aforementioned statements are false and were false when made. CEI and Simberg knew or should have known the statements were false when made.

52. CEI and Simberg made the aforementioned statements with actual malice and wrongful and willful intent to injure Dr. Mann. The statements were made with reckless disregard for their truth or falsity or with knowledge of their falsity and with wanton and willful disregard of the reputation and rights of Dr. Mann.

53. The aforementioned statements were made of and concerning Dr. Mann, and were so understood by those who read CETs and Simberg's publications of them.

54. The aforementioned statements have been widely published throughout the United States and elsewhere, including to all persons who subscribed to or read OpenMarket.Org.

55. CEI and Simberg knew or should have known that the statements were injurious to Dr. Mann's career and reputation.

56. As a proximate result of the aforementioned statements and their publications Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial but not less than the jurisdictional minimum of this Court. The full nature, extent and amount of these damages is currently unknown, but this Complaint will be amended at trial to insert said information if deemed necessary by the Court.

57. The aforementioned false and defamatory statements were made by CEI and Simberg with

actual malice and either with knowledge of their falsity or in reckless disregard of the truth or falsity of the statements.

58. In making the defamatory statements, CEI and Simberg acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit CEI and Simberg. Accordingly, CEI and Simberg are liable to Dr. Mann for punitive damages in an amount in accordance with proof at trial.

COUNT III

(Libel per se against NRI and Mark Steyn)

59. Each of the preceding paragraphs 1 through 58 is hereby incorporated herein by reference.

60. Mr. Steyn's statement, published by NRI on *National Review Online*, that Dr. Mann "was the man behind the fraudulent climate-change "hockey-stick" graph, the very ringmaster of the tree-ring circus" is defamatory per se and tends to injure Dr. Mann in his profession because it falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense, in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally.

61. The aforementioned statement proximately caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally.

62. By publishing the aforementioned statement, NRI and Steyn knew the statement would be republished and read by the general public throughout the United States and elsewhere. The statement was in fact republished and read by members of the general public throughout the United States and

elsewhere as a direct, natural, probable, and foreseeable consequence of NRI's and Steyn's publication.

63. The aforementioned statement is false, and was false when made. NRI and Steyn knew or should have known the statement was false when made.

64. NRI and Steyn made the aforementioned statement with actual malice and wrongful and willful intent to injure Dr. Mann. The statement was made with reckless disregard for its truth or falsity or with knowledge of its falsity and with wanton and willful disregard of the reputation and rights of Dr. Mann.

65. The aforementioned statement was made of and concerning Dr. Mann, and was so understood by those who read NRI's and Steyn's publication of it.

66. The aforementioned statement has been widely published throughout the United States and elsewhere, including to all persons who subscribed to or read *National Review Online*.

67. NRI and Steyn knew or should have known that the statement was injurious to Dr. Mann's career and reputation.

68. As a proximate result of the aforementioned statement and its publication. Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial but not less than the jurisdictional minimum of this Court. The full nature, extent and amount of these damages is currently unknown, but this Complaint will be amended at trial to insert said information if deemed necessary by the Court.

69. The aforementioned false and defamatory statement was made by NRI and Steyn with actual

malice, and either with knowledge of its falsity or in reckless disregard of the truth or falsity of the statement.

70. In making the defamatory statement, NRI and Steyn acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit NRI and Steyn. Accordingly, NRI and Steyn are liable to Dr. Mann for punitive damages in an amount in accordance with proof at trial.

COUNT IV
(Libel per se against NRI)

71. Each of the preceding paragraphs 1 through 70 is hereby incorporated herein by reference.

72. Mr. Lowry's statement, published by NRI on *National Review Online*, calling Dr. Mann's research "intellectually bogus" is defamatory per se and tends to injure Dr. Mann in his profession because it falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense, in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally.

73. The aforementioned statement proximately caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally.

74. By publishing the aforementioned statement on the Internet, NRI knew it would be republished and read by the general public throughout the United States and elsewhere, The statement was in fact republished and read by members of the general public throughout the United States and elsewhere as a

direct, natural, probable, and foreseeable consequence of NRI's publication.

75. The aforementioned statement is false, and was false when made. NRI knew or should have known the statement was false when made.

76. NRI made the aforementioned statement with actual malice and wrongful and willful intent to injure Dr. Mann. The statement was made with reckless disregard for its truth or falsity or with knowledge of its falsity and with wanton and willful disregard of the reputation and rights of Dr. Mann.

77. The aforementioned statement was made of and concerning Dr. Mann, and was so understood by those who read NRI's publications of it.

78. The aforementioned statement has been widely published throughout the United States and elsewhere, including to all persons who subscribed to or read *National Review Online*.

79. NRI knew or should have known that the statement was injurious to Dr. Mann's career and reputation.

80. As a proximate result of the aforementioned statement and its publication, Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial but not less than the jurisdictional minimum of this Court. The full nature, extent and amount of these damages is currently unknown, but this Complaint will be amended at trial to insert said information if deemed necessary by the Court.

81. The aforementioned false and defamatory statement was made by NRI with actual malice, and

either with knowledge of its falsity or in reckless disregard of the truth or falsity of the statement.

82. In making the defamatory statement, NRI acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit NRI. Accordingly, NRI is liable to Dr. Mann for punitive damages in an amount in accordance with proof at trial.

COUNT V
(Libel per se against CEI)

83. Each of the preceding paragraphs 1 through 82 is hereby incorporated herein by reference.

84. CEI's press release adopted and republished Mr. Lowry's defamatory statement calling Dr. Mann's research "intellectually bogus." The aforementioned statement is defamatory per se and tends to injure Dr. Mann in his profession because it falsely imputes to Dr. Mann academic corruption, fraud and deceit as well as the commission of a criminal offense, in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally.

85. The aforementioned statement proximately caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally.

86. By publishing the aforementioned statement on the Internet, CEI knew it would be republished and read by the general public throughout the United States and elsewhere. The statement was in fact republished and read by members of the general public throughout the United States and elsewhere as a

direct, natural, probable, and foreseeable consequence of CEI's publication.

87. The aforementioned statement is false, and was false when made. CEI knew or should have known the statement was false when made.

88. CEI made the aforementioned statement with actual malice and wrongful and willful intent to injure Dr. Mann. The statement was made with reckless disregard for its truth or falsity or with knowledge of its falsity and with wanton and willful disregard of the reputation and rights of Dr. Mann.

89. The aforementioned statement was made of and concerning Dr. Mann, and was so understood by those who read CEI's publications of them.

90. The aforementioned statement has been widely published throughout the United States and elsewhere.

91. CEI knew or should have known that the statement was injurious to Dr. Mann's career and reputation.

92. As a proximate result of the aforementioned statement and its publications Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial but not less than the jurisdictional minimum of this Court. The full nature, extent and amount of these damages is currently unknown, but this Complaint will be amended at trial to insert said information if deemed necessary by the Court.

93. The aforementioned false and defamatory statement was made with actual malice, and either with knowledge of its falsity or in reckless disregard of the truth or falsity of the statement.

94. In making the defamatory statement, CEI acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit CEI. Accordingly, CEI is liable to Dr. Mann for punitive damages in an amount in accordance with proof at trial.

COUNT VI
(Intentional infliction of emotional distress against all defendants)

95. Each of the preceding paragraphs 1 through 94 is hereby incorporated herein by reference.

96. CEI's and Simberg's statement, and NRI's and Steyn's republication thereof, that Dr. Mann "could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet" occurred intentionally with a desire to harm Dr. Mann.

97. The manner by which defendants sought to harm Dr. Mann, including the steps described herein, was extreme and outrageous.

98. As a result of the actions of defendants, including, inter alia, besmirching Dr. Mann's reputation and comparing him to a convicted child molester. Dr. Mann has experienced extreme emotional distress.

99. As a result of the actions of defendants, the character and reputation of Dr. Mann were harmed, his standing and reputation among the community were impaired, he suffered financially, and he suffered mental anguish and personal humiliation.

100. Defendants cooperated among themselves in the republication and endorsement of these statements. They are joint tortfeasors and as such are jointly and severally liable to Dr. Mann for damages.

101. As a direct and proximate result of the actions of defendants, Dr. Mann has been materially and substantially damaged. Furthermore, the actions of defendants were made intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit defendants. Accordingly, defendants are liable to Dr. Mann for punitive damages in an amount in accordance with proof at trial.

COUNT VII
(Libel per se against all defendants)

102. Each of the preceding paragraphs 1 through 101 is hereby incorporated herein by reference.

103. The defendants' statements that "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet," published by CEI and Mr. Simberg on Openmarket.org, and by NRI and Mr. Steyn on *National Review Online*, are defamatory per se and tend to injure Dr. Mann in his profession because they falsely impute to Dr. Mann the commission of a criminal offense and the violation of the public trust in a manner injurious to the reputation and esteem of Dr. Mann professionally, locally, nationally, and globally. Jerry Sandusky is widely and notoriously known as the former Pennsylvania State University football coach who founded and maintained a non-profit foundation, The

Second Mile, through the solicitation of public funds—ostensibly to provide care and guidance to adolescent boys, but in actuality to provide sexual opportunities to himself in order to molest those same boys. He has since been convicted of multiple counts of child molestation, and has been widely criticized for violating the public's trust. Mr. Sandusky is presently serving a life sentence in prison. The aforementioned statements proximately caused Dr. Mann damages in the form of injury to his reputation throughout the United States and internationally.

104. By publishing the aforementioned statements, defendants knew they would be republished and read by the general public throughout the United States and elsewhere. The statements were in fact republished and read by members of the general public throughout the United States and elsewhere as a direct, natural, probable, and foreseeable consequence of their publication.

105. The aforementioned statements are false and were false when made. Defendants knew or should have known the statements were false when made.

106. Defendants made the aforementioned statements with actual malice and wrongful and willful intent to injure Dr. Mann. The statements were made with reckless disregard for their truth or falsity or with knowledge of their falsity and with wanton and willful disregard of the reputation and rights of Dr. Mann.

107. The aforementioned statements were made of and concerning Dr. Mann, and were so understood by those who read defendants' publications of them.

108. The aforementioned statements have been widely published throughout the United States and elsewhere, including to all persons who subscribed to or read OpenMarket.Org. and *National Review Online*.

109. Defendants knew or should have known that the statements were injurious to Dr. Mann's career and reputation.

110. As a proximate result of the aforementioned statements and their publications Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial but not less than the jurisdictional minimum of this Court. The full nature, extent and amount of these damages is currently unknown, but this Complaint will be amended at trial to insert said information if deemed necessary by the Court.

111. The aforementioned false and defamatory statements were made by defendants with actual malice and either with knowledge of their falsity or in reckless disregard of the truth or falsity of the statements.

112. Defendants cooperated among themselves in publishing the false and defamatory statements by, among other acts, republishing and endorsing the defamations of their co-defendants. They are joint tortfeasors and as such jointly and severally liable to Dr. Mann for damages.

113. In making the defamatory statements, defendants acted intentionally, maliciously, willfully and with the intent to injure Dr. Mann, or to benefit themselves. Accordingly, defendants are liable to

Dr. Mann for punitive damages in an amount in accordance with proof at trial.

WHEREFORE, Plaintiff Michael Mann demands judgment, jointly and severally against Competitive Enterprise Institute, National Review, Inc., Rand Simberg and Mark Steyn for: (1) compensatory damages in an amount to be proven at trial; (2) punitive damages in an amount to be proven at trial; (3) all costs, interest, attorneys' fees, and disbursement to the highest extent permitted by law; and (4) such other and further relief as this Court may deem just and proper.

DATED: June 28, 2013

Respectfully submitted,
COZEN O'CONNOR

/s/ John B. Williams
JOHN B. WILLIAMS

* * *

Counsel for Plaintiff

EXHIBIT A

OpenMarket.org

The Other Scandal In Unhappy Valley

By Rand Simberg on July 13, 2012

So it turns out that Penn State has covered up wrongdoing by one of its employees to avoid bad publicity.

But I'm not talking about the appalling behavior uncovered this week by the Freeh report. No, I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since.

To review, when the emails and computer models were leaked from the Climate Research Unit at the University of East Anglia two and a half years ago, many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed 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.

As a result, in November of 2009, the university issued a press release that it was going to undertake its own investigation, independently of one that had been launched by the National Academy of Sciences

(NAS) in response to a demand from Congressman Sherwood Boehlert (R- N.Y.). In July of the next year, the panel set up to investigate declared him innocent of any wrongdoing:

> Penn State Professor Michael Mann has been cleared of any wrongdoing, according to a report of the investigation that was released today (July 1). Mann was under investigation for allegations of research impropriety that surfaced last year after thousands of stolen e-mails were published online. The e-mails were obtained from computer servers at the Climatic Research Unit of the University of East Anglia in England, one of the main repositories of information about climate change.
>
> The panel of leading scholars from various research fields, **all tenured professors at Penn State**, began its work on March 4 to look at whether Mann had "engaged in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting or reporting research or other scholarly activities."

My emphasis.

Despite the fact that it was completely internal to Penn State, and they didn't bother to interview anyone except Mann himself, and seemingly ignored the contents of the emails, the warm mongers declared him exonerated (and the biggest victim in the history of the world). But many in the skeptic community called it a whitewash:

> This is not surprising that Mann's own university circled the wagons and narrowed the focus of its own investigation to declare him ethical.
>
> The fact that the investigation cited Mann's 'level of success in proposing research and obtaining funding' as some sort of proof that he was meeting the 'highest standards', tells you that Mann is considered a sacred funding cash cow. At the height of his financial career, similar sentiments could have been said about Bernie Madoff.
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.

Richard Lindzen of MIT weighed in as well:

> "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally," Lindzen said in an e-mail from France.

But their criticism was ignored, particularly after the release of the NAS report, which was also purported to exonerate him. But in rereading the NAS "exoneration," some words stand out now. First, he was criticized for his statistical techniques (which was the basis of the criticism that resulted in his unscientific behavior). But more importantly:

> The OIG also independently reviewed Mann's emails and PSU's inquiry into whether or not Mann deleted emails as requested by Phil Jones in the "Climategate" emails (aka Allegation 2). The OIG concluded after reviewing the published CRU emails and **the additional information**

> **provided by PSU** that "nothing in [the emails] evidenced research misconduct within the definition of the NSF Research Misconduct Regulation." Furthermore, the OIG accepted the conclusions of the PSU inquiry regarding whether Mann deleted emails and agreed with PSU's conclusion that Mann had not.

Again, my emphasis. In other words, the NAS investigation relied on the integrity of the university to provide them with all relevant material, and was thus not truly independent. We now know in hindsight that it could not do so. Beyond that, there are still relevant emails that we haven't seen, two years later, because the University of Virginia continues to stonewall on a FOIA request, and it's heading to the Supreme Court of the Commonwealth of Virginia.

Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing in millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being ~~whitewashed~~ investigated. We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?

It's time for a fresh, truly independent investigation.

**** Two inappropriate sentences that originally appeared in this post have been removed by the editor.***

EXHIBIT B

National Review Online

The Corner

The one and only.

Football and Hockey

By Mark Steyn

July 15, 2012 6:22 P.M.

In the wake of Louis Freeh's report on Penn State's complicity in serial rape, Rand Simberg writes of Unhappy Valley's other scandal:

> I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

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, the very ringmaster of the tree-ring circus. And, when the East Anglia emails came out, Penn State felt obliged to "investigate" Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same cove who

investigated Mann. And, as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.

If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up? Whether or not he's "the Jerry Sandusky of climate change", he remains the Michael Mann of climate change, in part because his "investigation" by a deeply corrupt administration was a joke.

EXHIBIT C

National Review Online

Get Lost

By Rich Lowry

August 22, 2012 1:15 P.M.

So, as you might have heard, Michael Mann of Climategate infamy is threatening to sue us.

Mann is upset — very, very upset — with this Mark Steyn Corner post, which had the temerity to call Mann's hockey stick "fraudulent." The Steyn post was mild compared with other things that have been said about the notorious hockey stick, and, in fact, it fell considerably short of an item about Mann published elsewhere that Steyn quoted in his post.

So why threaten to sue us? I rather suspect it is because the Steyn post was savagely witty and stung poor Michael.

Possessing not an ounce of Steyn's wit or eloquence, poor Michael didn't try to engage him in a debate. He sent a laughably threatening letter and proceeded to write pathetically lame chest-thumping posts on his Facebook page. (Is it too much to ask that world-renowned climate scientists spend less time on Facebook?)

All of this is transparent nonsense, as our letter of response outlines.

In common polemical usage, "fraudulent" doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us.

Usually, you don't welcome a nuisance lawsuit, because it's a nuisance. It consumes time. It costs money. But this is a different matter in light of one word: discovery.

If Mann sues us, the materials we will need to mount a full defense will be extremely wide-ranging. So if he files a complaint, we will be doing more than fighting a nuisance lawsuit; we will be embarking on a journalistic project of great interest to us and our readers.

And this is where you come in. If Mann goes through with it, we're probably going to call on you to help fund our legal fight and our investigation of Mann through discovery. If it gets that far, we may eventually even want to hire a dedicated reporter to comb through the materials and regularly post stories on Mann.

My advice to poor Michael is to go away and bother someone else. If he doesn't have the good sense to do that, we look forward to teaching him a thing or two about the law and about how free debate works in a free country.

He's going to go to great trouble and expense to embark on a losing cause that will expose more of his methods and maneuverings to the world. In short, he risks making an ass of himself. But that hasn't stopped him before.

—Rich Lowry is the editor of NATIONAL REVIEW.

EXHIBIT D

COMPETITIVE ENTERPRISE INSTITUTE –

Free Markets and Limited Government

Penn State Climate Scientist Michael Mann Demands Apology From CEI

CEI Refuses to Retract Commentary

By Christine Hall

August 24, 2012

Washington, D.C., August 24, 2012 - The Competitive Enterprise Institute received a letter on August 21 from an attorney representing Penn State University Professor Michael E. Mann that demands that CEI retract and apologize for a post on CEI's blog, Openmarket.org, written by CEI adjunct scholar Rand Simberg. The letter also threatens that they "intend to pursue all appropriate legal remedies on behalf of Dr. Mann."

"The Other Scandal in Unhappy Valley," the July 13, 2012 blog post at issue, criticized Professor Mann, a climate scientist who is recent years has become a leading advocate in the public debate for global warming alarmism. Mann was the lead author of research that fabricated the infamous hockey stick temperature graph. The hockey stick was featured in the UN Intergovernmental Panel on Climate Change's Third Assessment Report (2001), but was dropped in its Fourth Assessment Report (2007). E-mails from and to Professor Mann featured prominently in what became known as the Climategate scandal.

In response to the letter from Mann's attorney, CEI offered the following statements.

Statement by CEI General Counsel Sam Kazman:

This week CEI received a letter from Michael Mann's attorney, John B. Williams of Cozen O'Connor, demanding that CEI fully retract and apologize for a July 13th OpenMarket blog post concerning Mann's work. Shortly after that post was published in mid-July, CEI removed two sentences that it regarded as inappropriate. However, we view the post as a valid commentary on Michael Mann's research. We reject the claim that this research was closely examined, let alone exonerated, by any of the proceedings listed in Mr. Williams's letter.

National Review, which earlier got a similar letter from Mann's attorney, has expertly summed up the matter in a response by the editor and the publication's attorney.

And regardless of how one views Mann's work, his threatened lawsuit is directly contrary to First Amendment law regarding public debate over controversial issues. Michael Mann may believe we face a global warming threat, but his actions represent an unfounded attempt to freeze discussion of his views.

In short, we're not retracting the piece, and we're not apologizing for it.

Statement by Myron Ebell, Director of CEI's Center for Energy and Environment:

Penn State Professor Michael Mann's lawyer claims that nine investigations of academic fraud have all exonerated Professor Mann. Most of these investigations did not examine Professor Mann's conduct or even mention him, and Penn State

University's investigation was typical of that institution's unfortunate tendencies.

The fact that Professor Mann's hockey stick research is still taken seriously in the public debate is an indication that people haven't read the Wegman Report to the House Energy and Commerce Committee, the National Research Council's report, or the analysis of Stephen McIntyre and Ross McKitrick.

Professor Mann's political advocacy is no more reliable than his scientific research. His recent book, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines*, repeats numerous factual errors, some of them about CEI.

* * *

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, NATIONAL REVIEW, INC., *et al.*, Defendants.	Case No 2012 CA 008263 B Calendar No.: 10 Judge: Natalia Combs Greene Next event: Unscheduled

PROPOSED ORDER

Upon consideration of Plaintiff's Motion to Amend Complaint, it is hereby

ORDERED, that the Motion to Amend is **GRANTED**, and

FURTHER ORDERED that the Amended Complaint is deemed filed as of the date of this Order.

SO ORDERED.

Dated: _____, 2013

_____
Natalia M. Combs-Greene
(Associate Judge)

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

APPENDIX J

Exhibit 6

The Other Scandal In Unhappy Valley

By Rand Simberg on July 13, 2012

So it turns out that Penn State has covered up wrongdoing by one of its employees to avoid bad publicity.

But I'm not talking about the appalling behavior uncovered this week by the Freeh report [a]. No, I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned [b] about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

To review, when the emails and computer models were leaked from the Climate Research Unit at the University of East Anglia two and a half years ago, many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner [c]. Among them were Michael Mann, Professor of Meteorology at Penn State

[d], whom the emails revealed had been engaging in data manipulation [e] 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.

As a result, in November of 2009, the university issued a press release [f] that it was going to undertake its own investigation, independently of one that had been launched by the National Academy of Sciences (NAS) in response to a demand from Congressman Sherwood Boehlert (R- N.Y.). In July of the next year, the panel set up to investigate declared him innocent of any wrongdoing [g]:

> Penn State Professor Michael Mann has been cleared of any wrongdoing, according to a report of the investigation that was released today (July 1). Mann was under investigation for allegations of research impropriety that surfaced last year after thousands of stolen e-mails were published online. The e-mails were obtained from computer servers at the Climatic Research Unit of the University of East Anglia in England, one of the main repositories of information about climate change.
>
> The panel of leading scholars from various research fields, **all tenured professors at Penn State**, began its work on March 4 to look at whether Mann had "engaged in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting or reporting research or other scholarly activities."

My emphasis.

Despite the fact that it was completely internal to Penn State, and they didn't bother to interview anyone except Mann himself [h], and seemingly ignored the contents of the emails, the warm mongers declared him exonerated [i] (and the biggest victim in the history of the world). But many in the skeptic community called it a whitewash [j]:

> This is not surprising that Mann's own university circled the wagons and narrowed the focus of its own investigation to declare him ethical.
>
> The fact that the investigation cited Mann's 'level of success in proposing research and obtaining funding' as some sort of proof that he was meeting the 'highest standards', tells you that Mann is considered a sacred funding cash cow. At the height of his financial career, similar sentiments could have been said about Bernie Madoff.
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.

Richard Lindzen of MIT weighed in [k] as well:

> "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally," Lindzen said in an e-mail from France.

But their criticism was ignored, particularly after the release of the NAS report, which was also purported to exonerate him [l]. But in rereading the NAS "exoneration," some words stand out now. First, he was criticized for his statistical techniques (which

was the basis of the criticism that resulted in his unscientific behavior). But more importantly:

> The OIG also independently reviewed Mann's emails and PSU's inquiry into whether or not Mann deleted emails as requested by Phil Jones in the "Climategate" emails (aka Allegation 2). The OIG concluded after reviewing the the published CRU emails and **the additional information provided by PSU** that "nothing in [the emails] evidenced research misconduct within the definition of the NSF Research Misconduct Regulation." Furthermore, the OIG accepted the conclusions of the PSU inquiry regarding whether Mann deleted emails and agreed with PSU's conclusion that Mann had not.

Again, my emphasis. In other words, the NAS investigation relied on the integrity of the university to provide them with all relevant material, and was thus not truly independent. We now know in hindsight that it could not do so. Beyond that, there are still relevant emails that we haven't seen, two years later, because the University of Virginia continues to stonewall on a FOIA request, and <u>it's heading to the Supreme Court of the Commonwealth of Virginia [m]</u>.

Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing in millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being whitewashed ~~investigated~~. We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather

than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?

It's time for a fresh, truly independent investigation.

Attachment A

Penn State Rocked by Investigation of Abuse Scandal

Posted By Nina Yablok On July 12, 2012 @ 12:54 pm

One of the nation's most respected college football programs, Penn State, was rocked this year by allegations against and the eventual conviction of former defensive coordinator Jerry Sandusky on multiple counts of sexual activity (including assault) with minors. In addition to Sandusky, two high-ranking university officials were charged with failing to report allegations of child abuse that were made against Sandusky – Timothy M. Curley, the university's athletic director, and Gary C. Schultz, the university's senior vice president of finance and business. Both are still awaiting trial.

In the wake of these charges, Penn State's Board of Trustees hired former FBI Director Louis Freeh's law firm (Freeh Sporkin & Sullivan LLP) to perform a "no one is above scrutiny" investigation of the issue. Freeh's report was issued, and made public, today and can be found here [1]:

The findings in the executive summary begin with this:

> The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders and Penn State for the safety and welfare of Sandusky's child victims. As the Grand Jury similarly noted in its presentment, there was no "attempt to investigate, to identify Victim 2, or to protect that child or any others from similar conduct except

> as related to preventing its re-occurrence on University property."

The report further states that in addition to Curley and Shultz who were charged, University President Graham Spanier and the legendary Coach Joe Paterno also failed to protect children from a sexual predator for over a decade:

> They exhibited a striking lack of empathy for Sandusky's victims by failing to inquire of the child who Sandusky assaulted in the Lasche Building in 2001. Further, *they exposed this child to additional harm by alerting Sandusky who was the only one who knew the child's identity*, of what McQueary saw in the shower on the night of February 9, 2001 [emphasis added].

Michael McQueary was a graduate assistant who in 2001 reported to Paterno that he saw Sandusky engaging in sexual activity with a boy in the coach's shower room. Sandusky was involved in a youth program that put him in contact with boys, and it was one of these boys whom McQueary saw. Paterno told McQueary that McQueary had done what he had to do by reporting it, and to leave the handling of the incident to him.

Paterno did report to his superiors, but from then on Penn State's reaction was a casebook example of cover-up. Curley told Sandusky not to clean up his act, not to get psychiatric help, not to turn himself in to authorities, but merely to "never bring youth into the showers."

Why not just tell him: "We'll rent you a motel room, but just keep your sexual assault of kids off university property?" In fact, Sandusky was taking boys to his

home basement, so losing "shower room" privileges didn't slow him down.

Why should we care about this incident? Tragically, children are sexually abused every day, and heaven knows it's not news for college sports to be a breeding ground for illegal activity. But it is rare to see the institutional decay so clearly and at such high levels as we do in this report.

Do we believe Penn State is the only school where a university president would allow heinous crimes to continue in order to avoid bad press? Is Penn State the aberration, or the school that got caught?

Certainly, in releasing the report, the Board of Trustees took a courageous step towards pouring some bleach on the mold. And the majority of youth sports programs and the adults who lead them take their duties as guides and role models seriously.

We should note this story because it hurts us all when we realize the emperor has no clothes. It doesn't matter if the scandal is an aberration or not — we should note it points out how close we all can be to moral failure. We should care because Penn State and the almost saintly [2] Joe Paterno were so high in the college sports stratosphere they were almost "too big to fail." And we should care when institutions are no longer accountable for their actions or mismanagement.

Hopefully the Freeh report will bring about some needed changes both at Penn State and in youth football as a whole. But whether it does or not, it's a fascinating and very candid look at an institutional cover-up.

Article printed from PJ Media: **http://pjmedia.com**

URL to article: **http:/ /pjmedia.com**

URLs in this post:

[1] here: **http://abcnews.go.com/Site/page/free-report-psu-16760826**

[2] saintly: **http://articles.orlandosentinel.com/2012-01-22/sports/os-diaz-joe-paternodeath-20120122_1_joe-paterno-jerry-sandusky-penn-state**

Attachment B

The Death of the Hockey Stick?

Posted By Rand Simberg On May 17, 2012 @ 12:00 am
In Environment, History, Media, Politics, Science, Science & Technology |

People who have been following the climate debate closely know that one of the most controversial and key elements of the controversy is the so-called "hockey stick" — a graph of supposed global temperature over the past centuries that ostensibly shows a dramatic increase in average temperature in the last century or so (the upward swoop of the graph at that point is the business end of the stick, with regard to the puck). It vaulted its inventor, Michael Mann of Penn State University, to climate stardom, with associated acclaim and government grants, when he first presented it in the late '90s. It was the visual basis of much of the hysteria in recent years, from Al Gore's Oscar-winning crockumentary [1] to bogus reports [2] from the UN's Intergovernmental Panel on Climate Change (IPCC).

Unfortunately for those promoting the theory (and the potentially economically catastrophic policy recommendations supposedly supported by it), recent events indicate that the last basis of scientific support for the hockey stick may be crumbling. But to understand this, a little background is necessary.

Ultimately, in addition to Mann's claim for the dramatic recent uptick (which we are supposed to presume was a result of the late industrial revolution and equally dramatic increase in carbon dioxide into the atmosphere as a result of the liberation of carbon from burning long-buried fossil fuels), Keith Briffa of

the Climate Research Unit (CRU) at the University of East Anglia in England controversially declared, based on Eurasian data, that the well-documented Medieval Warm Period (MWP), from around 950 to 1250 CE — the European Middle Ages — didn't actually exist.

This claim was important, if not essential, to Mann's thesis, because his initial formulation only went back to 1400, the beginning of the so-called Little Ice Age. Critics of the theory thus argued immediately upon its presentation that it shouldn't be surprising that the earth was warming now, given that we are still coming out of it, and that the medieval warming in the absence of late Carolingian SUVs and coal plants argued that the climate naturally cycled, with no need to invoke Demon Carbon. That is to say, to the degree that the hockey stick has a blade in the twentieth century, it would have another a millennium ago.

The theory has continued to take blows over the years since it was first presented. About a decade ago, a paper [1] was published by Willie Soon and Sallie Baliunis claiming that there was good evidence that both the (still extant) MWP and current warming were driven by solar activity rather than carbon emissions. But these initial attacks were beaten back by the climate mafia (as we now know from the leaked emails [3] between Mann and his partners in crime in East Anglia from two and a half years ago). The real damage came when a retired Canadian mining engineer, Steve McIntyre, and a professor at the University of Guelph, Ross McKitrick, started digging into Mann's methodology, and found flaws in both his statistical analysis and data interpretation, and

published a paper [4] describing them in Geophysical Research Letters in 2005. They showed that Mann's methodology would generate a hockey stick almost independently of the data input, by feeding it spectral noise [5]. Later, Internet satirist (and apparent statistician by day) Iowahawk provided a primer on how to create a hockey stick at home [6], using a standard spreadsheet program.

Defenders of the theory have long claimed that even if there are problems with Mann's method or data set, we have independent results from other research, such as that at the CRU, that confirm it. But this was a point of contention. In addition to the unscientific behavior in attempting to silence critics and keep them from publishing, we also know that the climate "scientists" had been withholding data that would help to resolve the controversy (more unscientific behavior, because it makes it difficult or impossible to replicate claimed results, and behavior that continues to the present da [7]y by the University of Virginia), even in the face of numerous Freedom of Information requests, on both sides of the Atlantic.

To no avail, McIntyre had been requesting data for years from Briffa, who had claimed to have independent Eurasian tree-ring analysis that confirmed Mann's results, from a data set called the Polar Urals (Mann's work was based on ancient California bristlecone pine trees). Unfortunately, paleoclimatologists had discovered that the Polar Urals data didn't actually support the disappearance of the MWP, so they were in search of another Eurasian data set that would, and they found one called Yamal, gathered and published in 2002 by two Russian scientists.

McIntyre had wanted to see it for years, and in 2008, utilizing a bylaw of the Royal Society, he enlisted their aid in forcing Briffa to finally start to release the data. Unfortunately, he still didn't get enough, at least initially, to make any sense of it. But he did notice that, first, it had sparse data for the twentieth century and second, that it, unlike the typical treatment of such data sets, was not supplemented by any regional data — Briffa was using it by itself. When McIntyre did such a supplementation himself using other data (reluctantly) provided by Briffa, the twentieth-century hockey-stick blade *completely disappeared*.

That was where things stood in 2009, just before the so-called Climate-gate email and model leak. After that, the CRU actually started to pull down data [8] that had been previously available for years. It was clear from the emails that Briffa had been telling one story publicly and another privately as to his reasons for not including the devastating data, but the tide finally turned last month, when the University of East Anglia was finally forced by the British Information Commissioner to at least tell McIntyre which data sets were used in its results. Let's let blogger "Bishop Hill" (aka Andrew Montford, who has written the book [9] on the subject) tell the rest of the story [10] (and read the whole thing for a detailed description of the deception):

> The list of 17 sites that was finally sent to McIntyre represented complete vindication. The presence of Yamal and Polar Urals had already been obvious from the Climategate emails, but the list showed that Briffa had also incorporated the Polar Urals update (which, as we saw above, did not have a hockey stick shape, and which Briffa claimed he had not looked at since 1995)

and the Khadtya River site, McIntyre's use of which the RealClimate authors had ridiculed.

Although the chronology itself was not yet available, the list of sites was sufficient for McIntyre to calculate the numbers himself, and the results were breathtaking. Firstly, the URALS regional chronology had vastly more data behind it than the Yamal-only figures presented in Briffa's paper

But what was worse, the regional chronology *did not have a hockey stick shape* — the twentieth century uptick that Briffa had got from the handful of trees in the Yamal-only series had completely disappeared.

Direct comparison of the chronology that Briffa chose to publish against the full chronology that he withheld makes the point clear:

It seems clear then that the URALS chronology Briffa prepared to go alongside the others he put together for the 2008 paper gave a message that did not comply with the message that he wanted to convey — one of unprecedented warmth at the end of the twentieth century. In essence the URALS regional chronology was suffering from the divergence problem — the widely noted failure of some tree ring series to pick up the recent warming seen in instrumental temperature records, which led to the infamous 'hide the decline' episode.

Remarkably, however, Briffa did allude to the divergence problem in his paper:

> These [regional chronologies] show no evidence of a recent breakdown in [the

> association between tree growth and temperature] as has been found at other high-latitude Northern Hemisphere locations.
>
> The reason for dropping the URALS chronology looks abundantly clear. It would not have supported this message.

His emphasis.

And new results are coming out almost by the day. Earlier this week, McIntyre reportedly received [11]new Yamal data, which continued to confirm that there is no blade to the stick

What does this all mean? First, let's state what it doesn't mean. It doesn't mean that we know that the planet isn't warming, and it doesn't mean that if it is, that we can be sure that it is not due to human activity.

But at a minimum it should be the final blow to the hockey stick, and perhaps to the very notion that bristlecone pines and larches are accurate thermometers. It should also be a final blow to the credibility of many of the leading lights of climate "science," but based on history, it probably won't be, at least among the political class. What it really should be is the beginning of the major housecleaning necessary if the field is to have any scientific credibility, but that may have to await a general reformation of academia itself. It would help, though, if we get a new government next year that cuts off funding to such charlatans, and the institutions that whitewash their unscientific behavior.

URL to article: **http://pjmedia.com/blog/the-death-of-the-hockey-stick/**

URLs in this post:

[1] crockumentary: **http://www.global-warming-and-the-climate.com/al-gore-documentary.htm**

[2] bogus reports: **http://www.guardian.co.uk /environment/ 2010/feb/02/climate-change-pachauri-un-glaciers**

[3] leaked emails: **http://pjmedia.com/blog/global-warminggate-the-science-is-unsettled/**

[4] a paper: **http://climateaudit.files.wordpress.com/2009/12/mcintyre-grl-2005.pdf**

[5] feeding it spectral noise: **http://www.uoguelph.ca/ %7Ermckitri/research/trc.html**

[6] primer on how to create a hockey stick at home: **http://iowahawk.typepad.com/iowahawk/2009/12/fables-of-the-reconstruction.html**

[7] continues to the present da: **http://campaign2012.washingtonexaminer.com/blogs/beltway-confidential/judge-adds-michael-%E2%80%98hockey-stick%E2%80%99-mann-uva-foia**

[8] started to pull down data: **http://wattsupwiththat.com/2009/12/14/whats-going-on-cru-takes-down-briffa-tree-ring-data-and-more/**

[9] the book: **http://www.amazon.com/The-Hockey-Stick-Illusion-Climategate/dp/1906768358**

[10] tell the rest of the story: **http://www.bishop-hill.net/blog/2012/5/9/the-yamal-deception.html**

[11] reportedly received: **http://wattsupwiththat.com/2012/05/15/mcintyre-gets-some-new-yamal-data-still-no-hockey-stick/**

Attachment C

Climategate: When Scientists Become Politicians

Posted By Rand Simberg On November 23, 2009 @ 12:44 am In Computers,Crime,Environment,Science & Technology,US News |

At the dawn of the modern age of science, a few hundred years ago, accounting for the motion of the planets was a mystery, but one driven by a flawed theory. It was thought, going back to the ancient Greeks and Plato, that the motions of the planets, being otherworldly and celestial objects, must be perfect and therefore circular. Unfortunately, actual observations were hard to reconcile with this notion. The ancient astronomers could have fudged the data to make it conform to the theory, but that would have been unscientific, so they fine-tuned the theory to try to make a better fit. Almost two millennia ago, Ptolemy [1] refined the concept of circles within circles, or epicycles, to try to develop a model that would explain the observed planetary motions. The theory reached its height half a millennium ago when Copernicus, with the insight that the earth orbited the sun, like the other planets, came close to modeling planetary motion by adding new epicycles, albeit with a different model for each planet. But it was a very complex system, and still wasn't quite close enough.

Kepler [2] resolved the issue by demonstrating that the best fit of the motion was not circles within circles, but rather simple ellipses. He came up with simple but powerful and explanatory laws that described the motion of the planets as a function of their distance

from the sun. Newton [3] in turn used this finding to validate his own universal theory of gravitation [4].

But it still wasn't quite good enough. For centuries, the innermost planet, Mercury [5], stubbornly refused to conform perfectly to Newton's laws, and many more modern astronomers postulated a hidden planet elsewhere in the solar system that might account for the discrepancies; they didn't abandon Newton's theory. However, despite years of trying, they could never determine its location or mass. But despite this frustration, they never yielded to the temptation of simply denying the planet's mercurial behavior — they continued to refine the theory, no matter how difficult.

About a century ago, another physicist, Albert Einstein, came up with a new theory of gravitation. A key part of it is that Newton's laws must be adjusted slightly to account for the near presence of large masses. By Einstein's new theory of general relativity, of which Newton's earlier theory was simply a special case for velocities much less than that of light and locations not adjacent to very large masses, Mercury's motion was perfectly explained by its close proximity to the sun.

Over thousands of years, at each step, the response of the scientists was to continually adjust and refine their theories to conform to the data, not the other way around. This is how science is done and how we developed the knowledge that has given us such tremendous and accelerating scientific and technological breakthroughs in the past century. It is occasionally reasonable to throw out a bad data point if it is in defiance of an otherwise satisfactory model

fit, as long as everyone knows that you've done so and the rationale, but a deliberate and unrevealed fudging of results in an attempt to make the real world fit one's preconceptions is beyond the scientific pale. Journal articles have been thrown out for it; PhD candidates have lost their degrees for it.

But such behavior, along with attempts to cover it up and dishonestly discredit critics, is exactly what was revealed in a leak of emails last Friday [6] from a research facility in eastern England. And it was not the behavior of previously unknown researchers on some arcane topic of little interest to anyone outside their own field. It was the behavior of leading luminaries in perhaps the greatest scientific issue and controversy of our age: Whether or not the planet is warming to a potentially dangerous degree as a result of humanity's influence. It is a subject on which billions — if not trillions — of dollars worth of future economic growth and costs hinge [7]. It was the basis for the massive "cap and trade" bill that passed the U.S. House of Representatives in the spring and seems stalled in the Senate. It is accordingly a subject on which a great deal of money is being spent on research to understand the problem. And when there is a great deal of research funding at stake, often funded by people less interested in truth than in power and political agendas, the temptation to come up with the "correct" answers can perhaps overcome scientific integrity.

It is hard (perhaps impossible) to know the motives of the people who would so betray the basic precepts of science. It is easy to postulate that they have political aims, and there are certainly many "watermelon" environmentalists (green on the outside, "red" on the

inside) who see the green movement as a new means to continue to push socialist and big-government agendas, after a momentary setback with the collapse of the Soviet Union two decades ago.

But scientists are human, with human failings. Thomas Kuhn noted half a century ago that science doesn't always follow the idealized model of the objective scientist seeking only truth; it is often driven by fashions and fads, peer pressure, and a lust for glory and respect by the other courtiers of the court that fund them. So we may never know whether this defense of a flawed theory arose from the sense of power that it might give them over the rest of our lives. Or perhaps it was due to simply an emotional attachment to a theory in which they had invested their careers. Either way, what they did was not science, and they should be drummed out of that profession. They can no longer be trusted.

Many in the climate change community have condemned what they call "skeptics," often to the point of declaring them de facto criminals and assigning them to the same category as Holocaust deniers [8]. They tell us that "the science is settled" and that we should shut up. But *every* scientist worthy of the name should be a skeptic. *Every* theory should be subject to challenge on a scientific basis. *Every* claim of a model's validity should be accompanied by the complete model and data set that supposedly validated it, so that it can be replicated. That is how science works. It is how it advances. And when the science is supposedly "settled" and they refuse to do so, it's not unreasonable to wonder why.

Well, now we know.

In fact, when scientists become politicians but continue to pretend to be doing science, *that* is the real crime. The theory being promoted by these men was being used to justify government actions that would result in greatly diminished future economic growth of the most powerful economy on earth (and the rest of the world as well). It would make it more difficult and less affordable to address any real problems that might be caused in the future by a change in climate, whether due to human activity or other causes. It could impoverish millions in the future, with little actual change in adverse climate effects. And when such a theory has the potential to do so much unjustified harm, and it has a fraudulent basis, who are the real criminals against humanity?

URLs in this post:

[1] Ptolemy: **http://en.wikipedia.org/wiki/Ptolemy**

[2] Kepler: **http://en.wikipedia.org/wiki/Johannes_Kepler**

[3] Newton: **http://en.wikipedia.org/wiki/Isaac_Newton**

[4] theory of gravitation: **http://en.wikipedia.org/wiki/Newton%27s_law_of_universal_gravitation**

[5] Mercury: **http://en.wikipedia.org/wiki/Vulcan_%28hypothetical_planet%29**

[6] what was revealed in a leak of emails last Friday: **http://pjmedia.com../../../../../blog/global-warminggate-what-does-it-mean/**

[7] hinge: **http://pjmedia.com../../../../../richardfernandez/2009/11/20/the-cru-hack/**

[8] assigning them to the same category as Holocaust deniers: **http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/02/09/no_cha**

Attachment D

Michael E. Mann

Professor of Meteorology
Joint Appointment with the Department of Geosciences
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http://www.thehockeystick.net

Education:

PhD -- Yale University

Research Specialties:

Atmospheric Business and Policy:
Atmospheric Dynamics:

Climate:

Earth-Atmosphere Interactions:
Oceanography:

Statistical Meteorology:

Biography:

Dr. Michael E. Mann received his undergraduate degrees in Physics and Applied Math from the University of California at Berkeley, an M.S. degree in

Physics from Yale University, and a Ph.D. in Geology & Geophysics from Yale University.

Dr. Mann was a Lead Author on the Observed Climate Variability and Change chapter of the Intergovernmental Panel on Climate Change (IPCC) Third Scientific Assessment Report in 2001 and was organizing committee chair for the National Academy of Sciences Frontiers of Science in 2003. He has received a number of honors and awards including NOAA's outstanding publication award in 2002 and selection by Scientific American as one of the fifty leading visionaries in science and technology in 2002. He contributed, with other IPCC authors, to the award of the 2007 Nobel Peace Prize. He was awarded the Hans Oeschger Medal of the European Geosciences Union in 2012. He is a Fellow of both the American Geophysical Union and the American Meteorological Society.

Dr. Mann is author of more than 150 peer-reviewed and edited publications, and has published two books including *Dire Predictions: Understanding Global Warming* in 2008 and *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines* in 2012. He is also a co-founder and avid contributor to the award-winning science website RealClimate.org.

Awards and Honors

2013 Inducted as a Fellow of the American Meteorological Society

2012 Awarded the Hans Oeschger Medal of the European Geosciences Union

2008 Inducted as a Fellow of the American Geophysical Union

2008 Profiled in *American Environmental Leaders From Colonial Times to the Present*

2008 Website "RealClimate.org" (co-founded by M. Mann) chosen as one of top 15 "green" websites by *Time Magazine* (April 2008)

2007 Contributed (with other IPCC report authors) to the award of the 2007 Nobel Peace Prize

2006 American Geophysical Union Editors' Citation for Excellence in Refereeing (for *'Geophysical Research letters'*)

2005 Website "RealClimate.org" (co-founded by M. Mann) chosen as one of top 25 "Science and Technology" websites by *Scientific American*

2005 John Russell Mather Paper award for 2005 by the Association of American Geographers [for article: Frauenfeld, O., Davis, R.E., and Mann, M.E., A Distinctly Interdecadal Signal of Pacific Ocean-Atmosphere Interaction, *Journal of Climate* 18, 1709-1718, 2005]

2002 Named by *Scientific American* as one of 50 leading visionaries in science and technology

2002 Outstanding Scientific Paper award for 2002 by NOAA Office of Oceanic and Atmospheric Research (OAR) [for article: Delworth, T.L., Mann, M.E., Observed and Simulated Multidecadal Variability in the Northern Hemisphere, *Climate Dynamics,* 16, 661-676, 2000]

2002 Article [Mann et al, "Global-scale temperature patterns and climate forcing over the past six centuries", *Nature,* 392, 779-787, 1998] selected for 'fast moving fronts' by Institute for Scientific Information (ISI)

2002 Selected as one of 10 'Mead Honored Faculty', University of Virginia

1998 Council of Graduate Schools' Distinguished Dissertation Award, nominated

1997 Phillip M. Orville Prize for outstanding dissertation in the earth sciences, Yale University

1996 Alexander Hollaender Distinguished Postdoctoral Fellowship (DOE)

1989 Josiah Willard Gibbs Prize for outstanding research and scholarship in Physics, Yale University

Research Interests

Current areas of research include reconstruction of past climate using climate paleoclimate ' 'proxy" data, and model/data comparisons aimed at understanding the long-term behavior of the climate system and its relationship with possible external (including anthropogenic) "forcings" of climate. Other areas of active research include simulation of climate using theoretical models, development of statistical methods for climate signal detection, and investigations of the response of geophysical and ecological systems to climate variability and climate change scenarios.

Teaching Interests

Ocean-Atmospheric Dynamics; Climatology; Paleoclimatology; Statistical and Time Series Methods

Selected Publications (of 150+ Total Peer-Reviewed/Edited)

Ning, L., Mann, M.E., Crane, R., Wagener, T., Najjar, R.G., Singh, R., Probabilistic Projections of Anthropogenic Climate Change Impacts on Precipitation for the Mid-Atlantic Region of the United States, *J. Climate,* 25, 5273-5291, 2012.

Steinman, B.A., Abbott, M.B., Mann, M.E., Stansell, N.D., Finney, B.P, 1500 year quantitative reconstruction of winter precipitation in the Pacific Northwest, *Proc. Nat. Acad. Sci.,* 109, 11619-11623, 2012.

Mann, M.E., Fuentes, J.D., Rutherford, S., Underestimation of Volcanic Cooling in Tree-Ring Based Reconstructions of Hemispheric Temperatures, *Nature Geoscience,* 5, 202-205, 2012.

Kemp, A.C., Horton, B.P., Donnelly, J.P., Mann, M.E., Vermeer, M., Rahmstorf, S., Climate related sea-level variations over the past two millennia, *Proc. Natl. Acad. Sci.* 108, 11017-11022, 2011.

Mann, M.E., Zhang, Z., Rutherford, S., Bradley, R.S., Hughes, M.K., Shindell, D., Ammann, C., Faluvegi, G., Ni, F., Global Signatures and Dynamical Origins of the Little Ice Age and Medieval Climate Anomaly, *Science* 326, 1256-1260, 2009.

Mann, M.E., Woodruff, J.D., Donnelly, J.P., Zhang, Z., Atlantic hurricanes and climate over the past 1,500 years, *Nature* 460, 880-883, 2009.

Fan, F., Mann, M.E., Ammann, C.M., Understanding Changes in the Asian Summer Monsoon over the Past Millennium: Insights From a Long-Term Coupled Model Simulation, *J. Climate* 22, 1736-1748, 2009.

Mann, M.E., Defining Dangerous Anthropogenic Interference, *Proc. Natl. Acad. Sci.* 106, 4065-4066, 2009.

Steig, E.J., Schneider, D.P. Rutherford, S.D., Mann, M.E., Comiso, J.C., Shindell, D.T., Warming of the Antarctic ice sheet surface since the 1957

International Geophysical Year, *Nature* 1457, 459-463, 2009.

Mann, M.E., Zhang, Z., Hughes, M.K., Bradley, R.S., Miller, S.K., Rutherford, S., Proxy-Based Reconstructions of Hemispheric and Global Surface Temperature Variations over the Past Two Millennia, *Proc. Natl. Acad. Sci.,* 105, 13252-13257, 2008.

Mann, M.E., Smoothing of Climate Time Series Revisited, *Geophys. Res. Lett.,* 35, L16708, doi:10.1029/2008GL034716, 2008.

Mann, M.E., Sabbatelli, T.A., Neu, U., Evidence for a Modest Undercount Bias in Early Historical Atlantic Tropical Cyclone Counts, *Geophys. Res. Lett.,* 34, L22707, doi:10.1029/2007GL031781, 2007.

Mann, M.E., Rutherford, S., Wahl, E., Ammann, C., Robustness of Proxy-Based Climate Field Reconstruction Methods, *J. Geophys. Res.,* 112, D12109, doi: 10.1029/2006JD008272, 2007.

Mann, M.E., Emanuel, K.A., Atlantic Hurricane Trends linked to Climate Change, *Eos,* 87, 24, p 233, 238, 241, 2006.

Mann, M.E., Cane, M.A., Zebiak, S.E., Clement, A., Volcanic and Solar Forcing of the Tropical Pacific Over the Past 1000 Years, *Journal of Climate,* **18,** 447-456, 2005.

Jones, P.D., Mann, M.E., Climate Over Past Millennia, *Reviews of Geophysics,* **42**, RG2002, doi:10.1029/2003RG000143, 2004.

Adams, J.B., Mann, M.E., Ammann, C.M., Proxy evidence for an El Niño-like Response to Volcanic Forcing, *Nature,* **426,** 274-278, 2003.

Mann, M.E., The Value of Multiple Proxies (invited 'perspective' article), *Science,* **297,** 1481-1482, 2002.

Shindell, D.T., Schmidt, G.A., Mann, M.E., Rind, D., Waple, A., Solar forcing of regional climate change during the Maunder Minimum, *Science,* **294,** 2149-2152, 2001.

Delworth, T.L., Mann, M.E., Observed and Simulated Multidecadal Variability in the Northern Hemisphere, *Climate Dynamics,* **16,** 661-676, 2000.

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Mann, M.E., Park, J., Oscillatory Spatiotemporal Signal Detection in Climate Studies: A Multiple-Taper Spectral Domain Approach, *Advances in Geophysics,* **41,** 1-131, 1999.

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Mann, M.E., Bradley, R.S., and Hughes, M.K, Global-Scale Temperature Patterns and Climate Forcing Over the Past Six Centuries, *Nature,* **392,** 779-787, 1998.

Mann, M.E., Park, J., Greenhouse Warming and Changes in the Seasonal Cycle of Temperature: Model Versus Observations, *Geophysical Research Letters,* **23,** 1111-1114, 1996.

Mann, M.E., Park, J., Bradley, R.S., Global Interdecadal and Century-Scale Climate Oscillations During the Past Five Centuries, *Nature,* **378,** 266-270, 1995.

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Attachment E

Climate Audit [http://climateaudit.org/]

Mike's Nature trick

So far one of the most circulated e-mails from the CRU hack is the following from **Phil Jones** to the original hockey stick authors—**Michael Mann, Raymond Bradley,** and **Malcolm Hughes**.

From: Phil Jones

To: ray bradley, mann@xxxxx.xxx,
mhughes@xxxx.xxx
Subject: Diagram for WMO Statement
Date: Tue, 16 Nov 1999 13:31:15 +0000
Cc: k.briffa@xxx.xx.xx,t.osborn@xxxx.xxx

Dear Ray, Mike and Malcolm,

Once Tim's got a diagram here we'll send that either later today or first thing tomorrow.

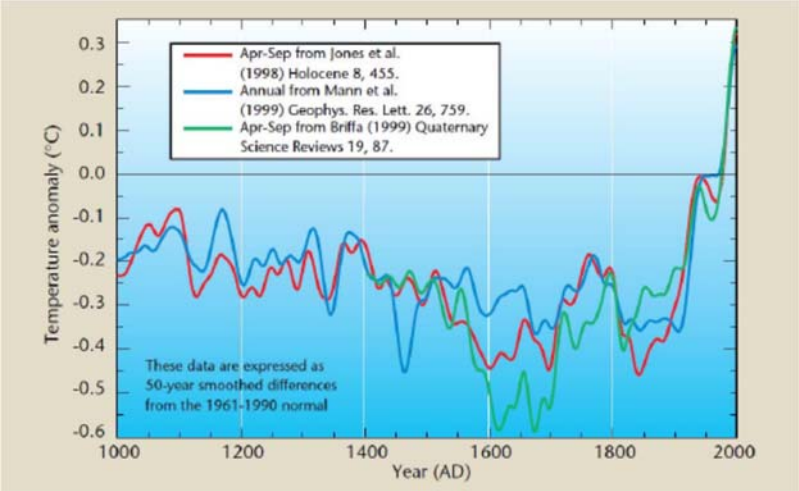
I've just completed Mike's Nature trick of adding in the real temps to each series for the last 20 years (ie from 1981 onwards) amd from 1961 for Keith's to hide the decline. Mike's series got the annual land and marine values while the other two got April-Sept for NH land N of 20N. The latter two are real for 1999, while the estimate for 1999 for NH combined is +0.44C wrt 61-90. The Global estimate for 1999 with data through Oct is +0.35C cf. 0.57 for 1998.

Thanks for the comments, Ray.

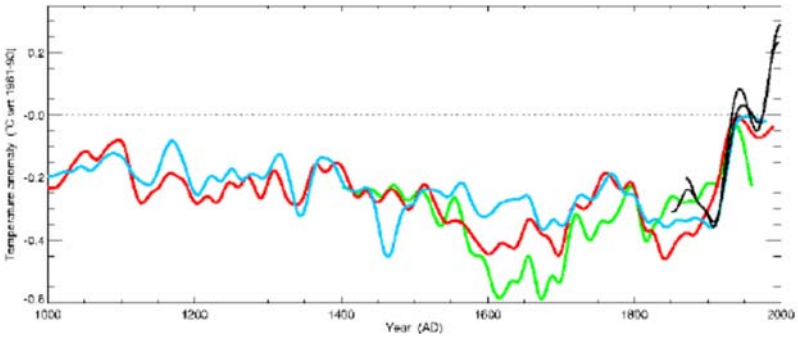
Prof. Phil Jones
Climatic Research Unit Telephone +44 (0) xxxxx
School of Environmental Sciences Fax
+44 (0) xxxx

University of East Anglia
Norwich Email p.jones@xxxx.xxx
NR4 7TJ
UK

The e-mail is about **WMO statement on the status of the global climate in 1999** [http://www.wmo.ch/pages/prog/wcp/wcdmp/statement/wmo913.pdf/ -report, or more specifically, about its cover image.



[**Update November 24:** Jones' ~~confession~~ **Nov 24 Update** [http://www.uea.ac.uk/mac/comm/media/press/2009/nov/hom



I think the graph speaks for itself, see especially "Keith's series" (green).] [**Update Steve May 5, 2010** – Jones' graphic shown here appears to be identical to the version shown in Briffa et al JGR 2001].

Back in December 2004 **John Finn** asked about "the divergence" in **Myth vs Fact Regarding the "Hockey Stick"** [http://www.realclimate.org/index.php/archives/2004/12/myths-vs-fact-regarding-the-hockey-stick/#comment-345]
-thread of RealClimate.org.

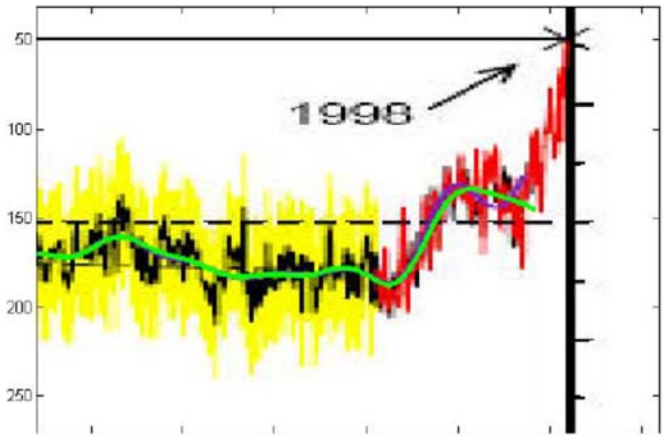
> Whatever the reason for the divergence, it would seem to suggest that the practice of grafting the thermometer record onto a proxy temperature record—as I believe was done in the case of the 'hockey stick'—is dubious to say the least.

Mike's response speaks for itself.

> No researchers in this field have ever, to our knowledge, "grafted the thermometer record onto" any reconstruction. It is somewhat disappointing to find this specious claim (which we usually find originating from industry-funded climate disinformation websites) appearing in this forum.

But there is an interesting twist here: grafting the thermometer onto a reconstruction is not actually the original "Mike's Nature trick"! Mann did not fully graft the thermometer on a reconstruction, but he stopped the smoothed series in their end years. The trick is more sophisticated, and was uncovered by UC over here [http://www.climateaudit.org /?p=1553#comment-340175] .

When smoothing these time series, the Team had a problem: actual reconstructions "diverge" from the instrumental series in the last part of 20th century. For instance, in the original hockey stick (ending 1980) the last 30–40 years of data points slightly downwards. In order to smooth those time series one needs to "pad" the series beyond the end time, and no matter what method one uses, this leads to a smoothed graph pointing downwards in the end whereas the smoothed instrumental series is pointing upwards—a divergence. So Mann's solution was to use the instrumental record for padding, which changes the smoothed series to point upwards as clearly seen in UC's figure (violet original, green without "Mike's Nature trick").

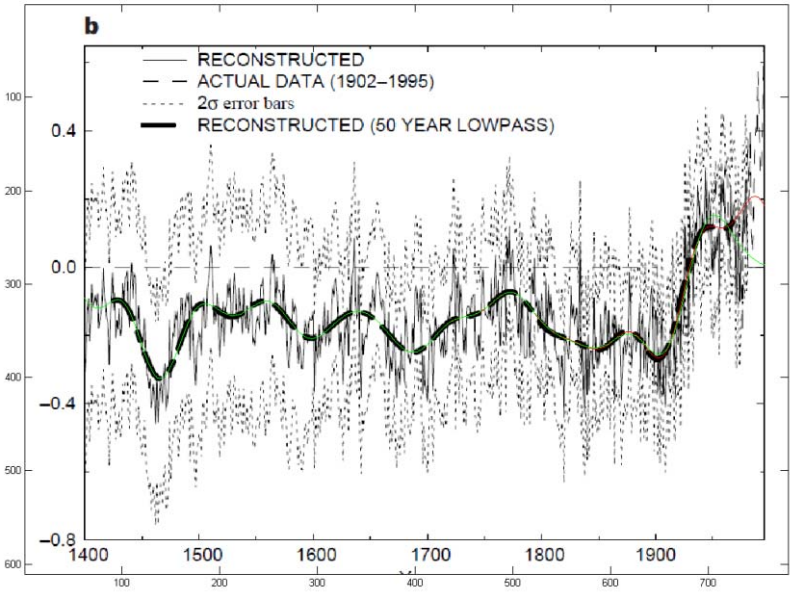


TGIF-magazine has already **asked** [http://www.investigatemagazine.com/australia/latestissue.pdf] [Update Nov 23 2012: WayBackMachine [http://web.archive.org/web/20091124185735/http://www.investigatemagazine.com/australia/latestissue.pdf]] Jones about the e-mail, and he denied misleading anyone but did remember grafting.

> "No, that's completely wrong. In the sense that they're talking about two different things here. They're talking about the instrumental data which is unaltered—but they're talking about proxy data going further back in time, a thousand years, and it's just about how you add on the last few years, because when you get proxy data you sample things like tree rings and ice cores, and they don't always have the last few years. So one way is to add on the instrumental data for the last few years."
>
> Jones told TGIF he had no idea what me meant by using the words "hide the decline".
>
> "That was an email from ten years ago. Can you remember the exact context of what you wrote ten years ago?"

Maybe it helps Dr. Jones's recollection of the exact context, if he inspects UC's figure carefully. We here at CA are more than pleased to be able to help such nice persons in these matters.

Update April 1, 2010: UC has created a **timeline for the trick** [http://signals.auditblogs.com/2010/02/26/the-trick-timeline/]



[http://climateaudit.files.wordpress.com/2009/11/mbh98trick.png]

Attachment F

Penn State Rocked by Investigation of Abuse Scandal

Posted By Nina Yablok On July 12, 2012 @ 12:54 pm In Uncategorized |

One of the nation's most respected college football programs, Penn State, was rocked this year by allegations against and the eventual conviction of former defensive coordinator Jerry Sandusky on multiple counts of sexual activity (including assault) with minors. In addition to Sandusky, two high-ranking university officials were charged with failing to report allegations of child abuse that were made against Sandusky — Timothy M. Curley, the university's athletic director, and Gary C. Schultz, the university's senior vice president of finance and business. Both are still awaiting trial.

In the wake of these charges, Penn State's Board of Trustees hired former FBI Director Louis Freeh's law firm (Freeh Sporkin & Sullivan LLP) to perform a "no one is above scrutiny" investigation of the issue. Freeh's report was issued, and made public, today and can be found here [1]:

The findings in the executive summary begin with this:

> The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders and Penn State for the safety and welfare of Sandusky's child victims. As the Grand Jury similarly noted in its presentment, there was no "attempt to investigate, to identify Victim 2, or to protect that

> child or any others from similar conduct except as related to preventing its re-occurrence on University property."

The report further states that in addition to Curley and Shultz who were charged, University President Graham Spanier and the legendary Coach Joe Paterno also failed to protect children from a sexual predator for over a decade:

> They exhibited a striking lack of empathy for Sandusky's victims by failing to inquire of the child who Sandusky assaulted in the Lasche Building in 2001. Further, *they exposed this child to additional harm by alerting Sandusky who was the only one who knew the child's identity*, of what McQueary saw in the shower on the night of February 9, 2001 [emphasis added].

Michael McQueary was a graduate assistant who in 2001 reported to Paterno that he saw Sandusky engaging in sexual activity with a boy in the coach's shower room. Sandusky was involved in a youth program that put him in contact with boys, and it was one of these boys whom McQueary saw. Paterno told McQueary that McQueary had done what he had to do by reporting it, and to leave the handling of the incident to him.

Paterno did report to his superiors, but from then on Penn State's reaction was a casebook example of cover-up. Curley told Sandusky not to clean up his act, not to get psychiatric help, not to turn himself in to authorities, but merely to "never bring youth into the showers."

Why not just tell him: "We'll rent you a motel room, but just keep your sexual assault of kids off university

property?" In fact, Sandusky was taking boys to his home basement, so losing "shower room" privileges didn't slow him down.

Why should we care about this incident? Tragically, children are sexually abused every day, and heaven knows it's not news for college sports to be a breeding ground for illegal activity. But it is rare to see the institutional decay so clearly and at such high levels as we do in this report.

Do we believe Penn State is the only school where a university president would allow heinous crimes to continue in order to avoid bad press? Is Penn State the aberration, or the school that got caught?

Certainly, in releasing the report, the Board of Trustees took a courageous step towards pouring some bleach on the mold. And the majority of youth sports programs and the adults who lead them take their duties as guides and role models seriously.

We should note this story because it hurts us all when we realize the emperor has no clothes. It doesn't matter if the scandal is an aberration or not — we should note it points out how close we all can be to moral failure. We should care because Penn State and the almost saintly [2] Joe Paterno were so high in the college sports stratosphere they were almost "too big to fail." And we should care when institutions are no longer accountable for their actions or mismanagement.

Hopefully the Freeh report will bring about some needed changes both at Penn State and in youth football as a whole. But whether it does or not, it's a fascinating and very candid look at an institutional cover-up.

URLs in this post:

[1] here: **http://abcnews.go.com/Site/page/free-report-psu-16760826**

[2] saintly: **http://articles.orlandosentinel.com/2012-01-22/sports/os-diaz-joe-paterno-death-20120122_1_joe-paterno-jerry-sandusky-penn-state**

Attachment G

office of the vice president for
RESEARCH AT PENN STATE

Investigation of climate scientist at Penn State complete

University Park, Pa. — A panel of leading scholars has cleared a well-known Penn State climate scientist of research misconduct, following a four-month internal investigation by the University.

Penn State Professor Michael Mann has been cleared of any wrongdoing, according to a report of the investigation that was released (July 1). Mann was under investigation for allegations of research impropriety that surfaced last year after thousands of stolen e-mails published online. The e-mails were obtained from computer servers at the Climatic Research Unit of the University of East Anglia in England, one of the main repositories of information about climate change.

The panel of leading scholars from various research fields, all tenured professors at Penn State, began its work on March 4 to look at whether Mann had "engaged in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting or reporting research or other scholarly activities." Mann is one of the leading researchers studying climate change.

A full report on the findings of the committee can be viewed at:

RA-10 Final Investigation Report and Decision, RE: Professor Michael E. Mann

i. Letter from Henry C. Foley, Vice President for Research, Penn State to Graham B. Spanier, President, Penn State

ii. Letter from Henry C. Foley, Vice President for Research, Penn State to Michael E. Mann, Professor of Meteorology, Penn State

iii. Letter from Henry C. Foley, Vice President for Research, Penn State to James Kroll, Head Administrative Investigations, Office of the Inspector General, The National Science Foundation

RA-10 Final Investigation Report Involving Dr. Michael E. Mann
The Pennsylvania State University
June 4, 2010

Composition of the Investigatory Committee:

Sarah M. Assmann, Waller Professor
Department of Biology

Welford Castleman, Evan Pugh Professor and Eberly Distinguished Chair in Science
Department of Chemistry and Department of Physics

Mary Jane Irwin, Evan Pugh Professor
Department of Computer Science and Electrical Engineering

Nina G. Jablonski, Department Head and Professor
Department of Anthropology

Fred W. Vondracek, Professor
Department of Human Development and Family Studies

Research Integrity Officer:

Candice Yekel, Director of the Office for Research Protections

Background of the alleged misconduct as described in the RA10 Inquiry Report:

On and about November 22, 2009, The Pennsylvania State University began to receive numerous communications (emails, phone calls and letters) accusing Dr. Michael E. Mann of having engaged in acts, beginning in approximately 1998, that included manipulating data, destroying records and colluding to hamper the progress of scientific discourse around the issue of anthropogenic global

warming. These accusations were based on perceptions of the content of the emails stolen from a server at the Climatic Research Unit of the University of East Anglia in Great Britain as widely reported.

Given the sheer volume of the communications to Penn State, the similarity of their content and the variety of sources, which included University alumni, federal and state politicians, and others, many of whom had had no relationship with Penn State, Dr. Eva J. Pell, then Senior Vice President for Research and Dean of the Graduate School, was asked to examine the matter. The reason for having Dr. Pell examine the matter was that the accusations, when placed in an academic context, could be construed as allegations of *research misconduct,* which would constitute a violation of Penn State policy.

Under The Pennsylvania State University's policy, Research Administration Policy No. 10, (hereafter referred to as RA-10), *Research Misconduct* is defined as:

(1) fabrication, falsification, plagiarism or other practices that seriously deviate from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities;

(2) callous disregard for requirements that ensure the protection of researchers, human participants, or the public; or for ensuring the welfare of laboratory animals;

(3) failure to disclose significant financial and business interest as defined by Penn State Policy RA20, *Individual Conflict of Interest;*

(4) failure to comply with other applicable legal requirements governing research or other scholarly activities.

RA-10 further provides that "research misconduct does not include disputes regarding honest error or honest differences in interpretations or judgments of data, and is not intended to resolve bona fide scientific disagreement or debate."

On November 24, 2009, two days after receipt of the allegations, Dr. Pell initiated the process articulated in RA-10 by scheduling a meeting with the Dean of the College of Earth and Mineral Sciences (Dr. William Easterling), the Associate Dean for Graduate Education and Research of the College of Earth and Mineral Sciences (Dr. Alan Scaroni), the Director of the Office for Research Protections (Ms. Candice Yekel), and the Head of the Department of Meteorology (Dr. William Brune).

At this meeting, all were informed of the situation and of the decision to initiate an inquiry under RA-10. Dr. Pell then discussed the responsibilities that each individual would have according to the policy. Dean Easterling recused himself from the inquiry due to a conflict of interest. As the next administrator in the line of management for the college, Dr. Scaroni was asked to take on Dean Easterling's function in the ensuing inquiry.

The Inquiry Committee assigned to conduct the inquiry into the matter consisted of Dr. Eva J. Pell, Senior Vice President for Research, Ms. Candice Yekel, Director of the Office for Research Protections, and Dr. Alan Scaroni, Associate Dean for Graduate Education and Research of the College of Earth and

Mineral Sciences. Dr. William Brune, Head of the Department of Meteorology, was to serve in a consulting capacity for the Inquiry Committee. Dr. Henry C. Foley, then Dean of the College of Information Sciences and Technology, was added to the Inquiry Committee in an ex-officio role for the duration of 2009, since he had been named to succeed Dr. Pell as the next Vice President for Research, beginning January 1, 2010.

At the time of initiation of the inquiry, no formal allegations accusing Dr. Mann of research misconduct had been submitted to any University official. Therefore, the emails and other communications were reviewed by Dr. Pell, and from these she synthesized the following four formal allegations. To be clear, these were not allegations that Dr. Pell put forth but rather her best effort to reduce to reviewable allegations the many different accusations that were received from parties outside of the University. The four synthesized allegations were as follows:

1. Did you engage in, or participate in, directly or indirectly, any actions with the intent to suppress or falsify data?

2. Did you engage in, or participate in, directly or indirectly, any actions with the intent to delete, conceal or otherwise destroy emails, information and/or data, related to AR4, as suggested by Phil Jones?

3. Did you engage in, or participate in, directly or indirectly, any misuse of privileged or confidential information available to you in your capacity as an academic scholar?

4. Did you engage in, or participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research, or other scholarly activities?

On November 29, 2009, Dr. Pell and Dr. Foley met with Dr. Mann to inform him personally that he had been accused of research misconduct and that an inquiry under RA-10 would take place. On November 30, 2009, a letter was delivered by Dr. Pell to Dr. Mann to notify him of these allegations and Dr. Pell's decision to conduct an inquiry under RA-10. The inquiry phase of RA-10 was thereby formally initiated on November 30, 2009.

From November 30 to December 14, 2009, staff in the Office for Research Protections culled through the 1073 files that contained emails or email strings that were purloined from a server at the University of East Anglia. A subset of the files containing emails or email strings was reviewed. This subset of files included emails that were sent by Dr. Mann, were sent to Dr. Mann, were copied to Dr. Mann, or discussed Dr. Mann (but were neither addressed nor copied to him). In summary, the following were found:

- 206 files that contained emails or email strings that contained message/text from Dr. Mann somewhere in the chain;
- 91 files that contained emails or emails strings that were received by Dr. Mann, but in which he did not participate; and
- 79 files that contained emails or email strings that dealt with Dr. Mann, his work

or publications but that he neither authored nor was listed as copied.

From among these 376 files, the Inquiry Committee focused on 47 files that contained emails or email strings that were deemed relevant. On December 17, 2009, the Inquiry Committee (Pell, Scaroni, Yekel), Dr. Brune and Dr. Foley met to review the emails, the RA-10 inquiry process, and their respective activities. It was agreed that these individuals would meet again in early January and that they would use the time until that meeting to review the relevant information, including the above mentioned e-mails, journal articles, OP-ED columns, newspaper and magazine articles, the National Academy of Sciences report entitled "Surface Temperature Reconstructions for the Last 2,000 Years," ISBN: 0-309-66144-7 and various blogs on the internet.

On January 4, 2010, Dr. Foley, in his capacity as the new Vice President for Research and Dean of the Graduate School, became the convener of the Inquiry Committee as Dr. Pell had left the University to become the Under-Secretary of Science for the Smithsonian Institution. On January 8, 2010, Dr. Foley convened the Inquiry Committee to discuss their thoughts on the evidence presented in the emails and other publically available materials. At this meeting, it was decided that each Inquiry Committee member would send to Dr. Foley specific questions to be used by the Inquiry Committee during the interview of Dr. Mann. During the interview, Dr. Foley would moderate the interview and ask each of the initial questions with follow-up

questions coming from the other Inquiry Committee members.

On January 12, 2010, the Inquiry Committee (Foley, Yekel, Scaroni) and Dr. Brune met with Dr. Mann. Dr. Mann was asked to address the four allegations leveled against him and to provide answers to the fifteen additional questions that the Inquiry Committee had compiled. In an interview lasting nearly two hours, Dr. Mann addressed each of the questions and follow-up questions. A recording was made of the interview and was later transcribed. The Inquiry Committee members asked occasional follow-up questions. Dr. Mann answered each question carefully:

- He explained the content and meaning of the emails about which the Inquiry Committee inquired;
- He stated that he had never falsified any data, nor had he had ever manipulated data to serve a given predetermined outcome;
- He stated that he never used inappropriate influence in reviewing papers by other scientists who disagreed with the conclusions of his science;
- He stated that he never deleted emails at the behest of any other scientist, specifically including Dr. Phil Jones, and that he never withheld data with the intention of obstructing science; and
- He stated that he never engaged in activities or behaviors that were inconsistent with accepted academic practices.

On January 15, 2010, Dr. Foley conveyed via email on behalf of the Inquiry Committee an additional request to Dr. Mann. Dr. Mann was asked to produce all emails related to the fourth IPCC report ("AR4"), the same emails that Dr. Phil Jones had suggested that he delete. On January 18, 2010, Dr. Mann provided a zip-archive of these emails and an explanation of their content. In addition, Dr. Mann provided a ten page supplemental written response to the matters discussed during his interview.

On January 22, 2010, the Inquiry Committee and Dr. Brune met again to review the evidence, including but not limited to Dr. Mann's answers to the Inquiry Committee's questions, both in the interview and in his subsequent submissions. Dr. Foley reviewed the relevant points of his conversation with Dr. Gerald North, a professor at Texas A&M University and the first author of the NAS 2006 report that included Dr. Mann's research on paleoclimatology. Dr. Foley also relayed the sentiment and view of Dr. Donald Kennedy of Stanford University and the former editor of Science Magazine about the controversy currently swirling around Dr. Mann and some of his colleagues. Both were very supportive of Dr. Mann and of the credibility of his science. Dr. Brune gave his opinions and suggestions for next steps of the process, and then was dismissed from further discussion pursuant to RA-10 policy role which was consult to the rest of the Inquiry Committee members.

On January 26, 2010, Dr. Foley convened the Inquiry Committee, along with University counsel, Mr. Wendell Courtney, Esq., in case issues of procedure arose.

After a careful review of all written material, and information obtained from the purloined emails, the interview of Dr. Mann, the supplemental materials provided by Dr. Mann and all the information from other sources, the Inquiry Committee found as follows with respect to each allegation:

Allegation 1: "Did you engage in, or participate in, directly or indirectly, any actions with the intent to suppress or falsify data? "

> **Decision 1:** The Inquiry Committee determined there was no substance to this allegation and further investigation of this allegation was not warranted.

Allegation 2: "Did you engage in, or participate in, directly or indirectly, any actions with the intent to delete, conceal or otherwise destroy emails, information and/or data, related to AR4, as suggested by Phil Jones?"

> **Decision 2:** The Inquiry Committee determined there was no substance to this allegation and further investigation of this allegation was not warranted.

Allegation 3: "Did you engage in, or participate in, directly or indirectly, any misuse of privileged or confidential information available to you in your capacity as an academic scholar?"

> **Decision 3:** The Inquiry Committee determined there was no substance to this allegation and further investigation of this allegation was not warranted.

Allegation 4: "Did you engage in, or participate in, directly or indirectly, any actions that seriously

deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities?"

> **Decision 4:** The Inquiry Committee determined that "given that information emerged in the form of the emails purloined from CRU in November 2009, which have raised questions in the public's mind about Dr. Mann's conduct of his research activity, given that this may be undermining confidence in his findings as a scientist, and given that it may be undermining public trust in science in general and climate science specifically, an Investigatory Committee of faculty peers from diverse fields should be constituted under RA-10 to further consider this allegation."

An Investigatory Committee of faculty members with impeccable credentials was appointed and asked to present its findings and recommendations to Dr. Henry C. Foley within 120 days of being charged.

The charge to the RA-10 Investigatory Committee:

The Investigatory Committee was charged by Dr. Henry C. Foley, Vice President for Research, on March 4, 2010, as follows:

The Investigatory Committee's charge is to determine whether or not Dr. Michael Mann engaged in, or participated in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities.

Sources of support for the related research or publications:

Dr. Mann's research has been sponsored by many different agencies including the National Science Foundation, the Department of Energy and the National Oceanic and Atmosphere Administration.

Documents available to the Investigatory Committee:

- 376 files containing emails stolen from the Climate Research Unit (CRU) of the University of East Anglia and originally reviewed by the Inquiry Committee
- Documents collected by the Inquiry Committee
- Documents provided by Dr. Mann at both the Inquiry and Investigation phases
- Penn State University's RA-10 Inquiry Report
- House of Commons Report HC387-I, March 31, 2010
- National Academy of Science letter titled, "Climate Change and the Integrity of Science" that was published in Science magazine on May 7, 2010
- Information on the peer review process for the National Science Foundation (NSF)
- Department of Energy's Guide to Financial Assistance
- Information on National Oceanic and Atmospheric Administration's peer review process
- Information regarding the percentage of NSF proposals funded
- Dr. Michael Mann's *curriculum vitae*

Interview process:

The interviews were audio-taped and verbatim transcripts were prepared. All interviewed individuals were provided an opportunity to review the transcripts of their interviews for accuracy. The transcripts will be maintained in the Office for Research Protections as part of the official record. Statements or information relevant to the Investigatory Committee's findings are noted in the paragraphs below. The Investigatory Committee interviewed the following individuals:

April 12, 2010: Dr. William Easterling, Dean, College of Earth and Mineral Sciences, The Pennsylvania State University

April 14, 2010: Dr. Michael Mann, Professor, Department of Meteorology, The Pennsylvania State University

April 20, 2010: Dr. William Curry, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution

April 20, 2010: Dr. Jerry McManus, Professor, Department of Earth and Environmental Sciences, Columbia University

May 5, 2010: Dr. Richard Lindzen, Alfred P. Sloan Professor, Department of Earth, Atmospheric and Planetary Sciences, Massachusetts Institute of Technology

Summary of Investigatory Committee's Interview with Dr. Michael E. Mann, Professor, Department of Meteorology, Penn State University – April 14, 2010

On April 14, 2010, the RA-10 Investigatory Committee (Assmann, Castleman, Irwin, Jablonski, and Vondracek) and Candice Yekel interviewed Dr. Michael Mann. In advance of the interview, the Investigatory Committee prepared several questions focusing on whether Dr. Mann "engaged in, or participated in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for preparing, conducting, or reporting research or other scholarly activities." In addition to the prepared questions, Investigatory Committee members asked a number of follow-up questions. Dr. Mann answered the questions in a detailed manner.

The first question was "Would you please tell us what you consider in your field to be accepted, standard practice with regard to sharing data?" A follow-up question asked how Dr. Mann had dealt with requests for data that were addressed to him during the period covered by the stolen emails. Dr. Mann offered a brief historical perspective on the issue of sharing data in his field, concluding with the observation that data are made generally available (e.g., in the NOAA public database) after those scientists who obtained the data have had a chance to be the first to publish findings based on the data. He noted that sometimes data are made available on a collegial basis to specific scientists before those who collected the data have published their initial findings. Typically, this involves a request to not release the data to others until the data are made publically available by the scientists who obtained the data. Dr. Mann concluded his answer by stating that he has always worked with data obtained by

other scientists, and that when such data were not already in the public domain, he made them available as soon as he was permitted to do so by those who initially obtained the data.

Dr. Mann drew a distinction between actual data and intermediate data that are produced as part of the analytic procedures employed. He indicated that while such intermediate data may occasionally be shared with colleagues, it is not standard practice to publish or make generally available this intermediate data (to which he and others refer to as "dirty laundry" in one of the purloined emails). Finally, he indicated that someone who wanted to reproduce his work would be able to independently reproduce this intermediate data and that, in fact, other researchers had done this.

The Investigatory Committee next inquired how he constructed his source codes and what he considered to be accepted practice in his field for publishing source codes. Dr. Mann indicated that in his field of study, in contrast with some other fields such as economics, publishing the source code was never standard practice until his work and that of his colleagues came under public scrutiny, resulting in public pressure to do so. He indicated that he initially was reluctant to publish his source codes because the National Science Foundation had determined that source codes were the intellectual property of the investigator. Also, he developed his source codes using a programming language (FORTRAN 77) that was not likely to produce identical results when run on a computer system different from the one on which it was developed (e.g., different processor makes/models, different operating

systems, different compilers, different compiler optimizations). Dr. Mann reported that since around 2000, he has been using a more accessible programming style (MATLAB), and since then he has made all source codes available to the research community.

The next question was "Do you believe that the perceived hostility and perceived ulterior motives of some critics of global climate science influenced your actions with regard to the peer review process, particularly in relation to the papers discussed in the stolen emails?" Dr. Mann responded by affirming his belief in the importance of the peer review process as a means of ensuring that scientifically sound papers are published, and not as a means of preventing the publication of papers that are contrary to one's views. He elaborated by stating that some of the emails regarding this issue dealt with his concern (shared by other scientists, the publisher, and some members of the editorial board of the journal in question) that the legitimacy of the peer review process had been subverted.

Next, Dr. Mann was asked "Did you ever, without first getting express permission from the original authors, forward to a third party an in-press or submitted manuscript on which you were not a co-author?" In response to this question, Dr. Mann first responded by saying that to the best of his knowledge he had not done so. He then clarified that he may have forwarded such a manuscript to a specific, close colleague, in the belief that permission to do so had been implicit, based on his close collegial relationships with the paper's authors. An illustrative case of such a circumstance would have

been the manuscript by Wahl and Ammann, which Dr. Mann forwarded to Dr. Briffa. In response to a follow-up question, Dr. Mann asserted that such judgments about implied consent are quite typical in his field, but they are made only as long as it is understood that such sharing would take place only among trusted colleagues who would maintain the confidentiality of the manuscript.

The next question for Dr. Mann was posed as follows: "What is your reply to the email statements of Dr. McIntyre (a) that he had been referred to an incorrect version of your data at your FTP site (b) that this incorrect version was posted prior to his request and was not formulated expressly for him and (c) that to date, no source code or other evidence has been provided to fully demonstrate that the incorrect version, now deleted, did not infect some of Mann's and Rutherford's other work?" Dr. Mann responded by stating that neither he, nor many of his colleagues, put much reliability in the various accusations that Dr. McIntyre has made, and that, moreover, there is "no merit whatsoever to Mr. McIntyre's claims here." Specifically, Dr. Mann repeated that all data, as well as the source codes requested by Dr. McIntyre, were in fact made available to him. All data were listed on Dr. Mann's FTP site in 2000, and the source codes were made available to Dr. McIntyre about a year after his request was made, in spite of the fact that the National Science Foundation had ruled that scientists were not required to do so. The issue of an "incorrect version" of the data came about because Dr. McIntyre had requested the data (which were already available on the FTP site) in spreadsheet format, and

Dr. Rutherford, early on, had unintentionally sent an incorrectly formatted spreadsheet.

In response to a couple of follow-up questions, Dr. Mann stressed that the stolen emails represent part of a larger context of active communication among scientists, and that he remains on friendly terms with scientists with whom he has had ongoing, and sometimes heated, disagreements about scientific matters. He also commented that he and other scientists fear that the stolen emails will have a chilling effect on the way scientists communicate with each other, partly because members of the public may not appreciate the lingo or jargon (e.g., "dirty laundry" or "trick") that scientists often use when communicating with each other about their science.

At the conclusion of the interview, Dr. Mann indicated that he would be very happy to provide additional information if the Investigatory Committee felt that this would be helpful.

Summary of Investigatory Committee Interview with Dr. William Easterling, Dean, College of Earth and Mineral Sciences, Penn State University – April 12, 2010

On April 12, 2010, the RA-10 Investigatory Committee (Assmann, Castleman, Irwin, Jablonski, and Vondracek) and Candice Yekel interviewed Dr. William Easterling, Dean of the College of Earth and Mineral Sciences, Penn State University. The Investigatory Committee had a number of prepared questions, starting with a request to learn how Dr. Easterling knew Dr. Mann. Dr. Easterling reported that he had known Dr. Mann for about six or seven

years prior to his appointment at Penn State in 2008. In response to a question about when and how he had become aware of the allegations against Dr. Mann, Dr. Easterling reported that it was the week before Thanksgiving 2009, when he started receiving emails suggesting a connection between the stolen East Anglia emails and Dr. Mann's work.

The next question for Dr. Easterling was posed as follows: "In your judgment, are accepted and ethical research practices in scientific fields related to global climate change significantly different from such practices in other fields of scientific inquiry?" Dr. Easterling's response to that question was "Absolutely not!" In a follow-up question, Dr. Easterling was asked whether he saw any difference between certain kinds of experimental scientific fields and observational ones like paleoclimatology. He responded by stating that much of what we know about climate change is the result of a combination of observation and numerical modeling, making the classic idea of falsification of a hypothesis, which may be applicable to a laboratory science, of limited applicability in the study of climate change. Thus, even though there are a number of highly sophisticated, physically sound models that are used to analyze and predict various features of the earth's climate system, human judgments are invariably involved, and a certain amount of subjectivity is introduced.

Another follow-up question inquired about the likely number of different statistical models that might be applicable to Dr. Mann's work. Dr. Easterling indicated that Dr. Mann and his colleagues were primarily interested in looking at

historical data (which tend to be "noisy"), using a relatively small number of statistical models, such as principal components analysis, which has a long tradition in various sciences.

The next question addressed to Dr. Easterling was whether, in his judgment, Dr. Mann's work was very aggressive, very conservative, or somewhere in the middle in how it portrayed global warming. Dr. Easterling responded by stating that Dr. Mann's early work showed a more dramatic upturn in warming, but that his more recent work has led to the conclusion that the change has been slightly less dramatic. Moreover, Dr. Easterling added that Dr. Mann's findings have been replicated by independent teams of researchers.

Dr. Easterling was asked whether he knew of any other investigations related to the stolen emails other than the University of East Anglia and Penn State University, and he responded that he was unaware of any others.

The Investigatory Committee then questioned Dr. Easterling about various scientists in the field of climate science who might be interviewed by the Investigatory Committee regarding their views of what constitutes accepted and ethical practice with regard to the conduct of research in the field. The Investigatory Committee wanted a choice of scientists who had disagreed with Dr. Mann's findings as well as others who had agreed but who had not collaborated with Dr. Mann or his collaborators.

At the conclusion of the interview, Dr. Easterling offered to be available to the Investigatory

Committee if the Investigatory Committee members thought that this would be helpful.

Summary of Investigatory Committee Interview with Dr. William Curry, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution – April 20, 2010

On April 20, 2010, the RA-10 Investigatory Committee (Assmann, Castleman, Irwin, Jablonski, and Vondracek) and Candice Yekel interviewed Dr. William Curry, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution. The Investigatory Committee had four prepared questions, but Investigatory Committee members were free to ask additional questions as well as follow-up questions as they saw fit.

The first question addressed to Dr. Curry was: "Would you please tell us what you consider in your field to be accepted standard practice with regard to sharing data and unpublished manuscripts?" With regard to sharing data, Dr. Curry indicated that standard practice is that once a publication occurs, the pertinent data are shared via some electronic repository. He stated that not all researchers actually comply with this practice, and that there may be special arrangements with the funding agency, or the journal that publishes the research, that specify when data need to be made available to other researchers. In Dr. Curry's case, for example, the National Science Foundation allows a two-year window during which he has exclusive rights to his data. After that period he must make it available to others.

On the issue of sharing unpublished manuscripts, Dr. Curry stated that if the manuscript was accompanied by a request to keep it confidential, he would not share it with anyone; if it was not accompanied by an explicit request for confidentiality, he might talk about it with colleagues but would not usually forward it.

Next, Dr. Curry was asked: "Would you please briefly explain how codes are developed in the process of evaluating data in your field, e.g., are these codes significantly different from published software packages? Then please tell us what you consider in your field to be accepted standard practice with regard to sharing codes." Dr. Curry reported that in his area, most codes are fairly basic and researchers use software packages to construct them. He also reported that he was not aware of any public archive for such codes, but that he was fairly certain that if he asked another researcher to share such codes, he would most likely get them. He added that overall compliance with requests to share codes would probably be equal to the rate of compliance with requests for sharing data.

Next, Dr. Curry was asked to respond to the following: "How do the processes of data acquisition, analysis and interpretation in paleoclimatology affect practices of data sharing in the field? Are any of these processes unique to paleoclimatology?" Dr. Curry asked for clarification and was told that the question referred to whether the laborious and expensive way in which most data are collected in paleoclimatology had an effect on data sharing. He then responded that requests for raw data would be the exception rather than the rule, because

transforming the raw data into usable information is labor intensive and difficult. Nevertheless, because of NSF requirements, he would release all data after two years. He added that some scientists, however, do seek to maintain proprietary access to their data even after two years.

Finally, Dr. Curry was asked whether he wanted to share anything else with the Investigatory Committee. In his concluding comments to the Investigatory Committee, Dr. Curry noted that in the last ten years things have changed rather rapidly with regard to sharing data and information. He reported that he has become more aware of how he would be affected if people started asking him step-by-step details of his work, and that while he has always been diligent about documenting his work, ten years ago he would not have been able to document every single step in his analytical work. Thus, "accepted practices" are not fixed and are always evolving.

Summary of Investigatory Committee Interview with Professor Jerry McManus, Professor, Department of Earth and Environmental Sciences, Columbia University – April 20, 2010

On April 20, 2010, the RA-10 Investigatory Committee (Assmann, Castleman, Irwin, Jablonski, and Vondracek) and Candice Yekel interviewed Dr. Jerry McManus, Professor, Department of Earth and Environmental Sciences, Columbia University. The Investigatory Committee had four prepared questions, but Investigatory Committee members were free to

ask additional questions as well as follow-up questions as they saw fit.

To start the interview, Dr. McManus was asked to respond to the following question: "Would you please tell us what you consider in your field to be accepted standard practice with regard to sharing data [and] ... with regard to sharing unpublished manuscripts?" Dr. McManus responded by first drawing a distinction between published and unpublished data, noting, however, that there is a range of standard practices with regard to both. Nevertheless, the mode of behavior regarding unpublished data is to share "in a fairly limited fashion with individuals or groups who make specific requests and typically who are known to the researcher." Regarding published data, Dr. McManus indicated that standard practice is to make such data available through any of a broad range of means, including providing access to electronic repositories and institutional archives.

Regarding the sharing of unpublished manuscripts, Dr. McManus indicated that there is a broad range of typical and accepted behaviors, with such manuscripts commonly shared with a limited number of colleagues. In a follow-up question, it was inquired whether it may be considered standard practice to share an unpublished manuscript with others without getting express permission to do so from the author. Dr. McManus responded by saying "no" to such sharing as standard practice, but allowing that there is not necessarily only one acceptable practice, as permission may be given implicitly or explicitly. Without specific encouragement for wider distribution, however, it is generally understood,

according to Dr. McManus, that unpublished papers are not intended for third-party distribution.

The next question was stated as follows: "Would you please briefly explain how codes are developed in the process of evaluating data in your field (e.g., are these codes significantly different from published software packages)? Then please tell us what you consider in your field to be accepted, standard practice with regard to sharing codes." Dr. McManus indicated that most, but not all, details of such methods are usually reported when research is published, and that some of these details may be shared in a "somewhat ad hoc basis." Generally, however, the tendency is to "try to provide the conditions by which any research can be replicated...."Dr. McManus agreed that generally, codes are treated the same way as any other method.

Summary of Investigatory Committee Interview with Dr. Richard Lindzen, Alfred P. Sloan Professor, Department of Earth, Atmospheric, and Planetary Sciences, Massachusetts Institute of Technology – May 5, 2010

On May 5 2010, the RA-10 Investigatory Committee (Assmann, Irwin, Jablonski, Vondracek; Dr. Castleman was not available) and Candice Yekel interviewed Dr. Richard Lindzen, Professor, Department of Earth, Atmospheric, and Planetary Sciences, Massachusetts Institute of Technology. The Investigatory Committee had four prepared questions, but Investigatory Committee members were free to ask additional questions as well as follow-up questions as they saw fit.

Before the Investigatory Committee's questioning began, Dr. Lindzen was given some general background information regarding the process of inquiry and investigation into allegations concerning Dr. Mann, with a focus on the particular allegation that is the subject of the current review by the Investigatory Committee. Dr. Lindzen then requested, and was provided with, a brief summary of the three allegations previously reviewed. When told that the first three allegations against Dr. Mann were dismissed at the inquiry stage of the RA-10 process, Dr. Lindzen's response was: "It's thoroughly amazing. I mean these are issues that he explicitly stated in the emails. I'm wondering what's going on?"

The Investigatory Committee members did not respond to Dr. Lindzen's statement. Instead, Dr. Lindzen's attention was directed to the fourth allegation, and it was explained to him that this is the allegation which the Investigatory Committee is charged to address. Dr. Lindzen was then asked the first question formulated by the Investigatory Committee: "Would you please tell us what you consider in your field to be accepted, standard practice with regard to sharing data, and the second part of the question is would you tell us what you consider in your field to be accepted, standard practice with regard to sharing unpublished manuscripts?"

Dr. Lindzen responded by stating that "with respect to sharing data, the general practice is to have it available." With respect to unpublished manuscripts, he indicated that "those are generally not made available unless the author wishes to." In response to a number of follow-up questions, Dr.

Lindzen indicated that if an unpublished manuscript is sent to a scientist by the author, it would be common practice to ask for permission before sharing it with others; if it was sent by someone else it would be common practice to ask if they had permission to share the paper. According to Dr. Lindzen, a scientist might conclude that there is implicit permission to disseminate an unpublished paper only when the author made it clear that the results may be disseminated.

The next question inquired whether, in Dr. Lindzen's view, climatologists normally make their codes (used in the analysis of data) available for other people to download. Dr. Lindzen responded by stating that "it depends." He elaborated, saying that if the codes are very standard, it is unnecessary to share them, but if it's an unusual analysis it would be his practice to make the codes available to anyone who wishes to check them. In a follow-up question, Dr. Lindzen was asked whether he would have issues with people running into compatibility issues or compilation issues. He responded by saying that even if people "screw it up" or if you have reservations about sharing codes, "if somebody asks you how did you get this, you really should let them know."

The next questions presented to Dr. Lindzen were as follows: "How do the processes of data acquisition, analysis, and interpretation in paleoclimatology affect practices of data sharing in the field? Are any of these processes unique to paleoclimatology?" Dr. Lindzen indicated that he did not think that these processes are unique to paleoclimatology, and that since most of the data are acquired using public

funds, there is no basis for investigators being proprietary with their data. In response to a follow-up question, Dr. Lindzen acknowledged that prior to publication, scientists may have a variety of reasons to keep things confidential, but after publication "there's an obligation to explain exactly how you got them, especially if they're controversial."

Standard of proof used by the Investigatory Committee:

Preponderance of the evidence (happen more likely than not or 51% certainty). All committee votes are unanimous unless otherwise indicated.

Level of intent considered by the Investigatory Committee:

The Investigatory Committee considered various levels of intent in order of increasing severity from *careless,* to *reckless,* to *knowingly,* to *intentional.* These terms are defined as follows:

- *careless* - a reasonable person would not have known better or honest error – this is not considered research misconduct.
- *reckless* - a reasonable person should have known better.
- *knowingly* - a reasonable person knew better but did it anyway.
- *intentional (purposeful)* - a reasonable person knew better but did it anyway with the intent to deceive.

The level of intent regarding the specific allegation will be addressed below.

Summary of Investigation:

The Investigatory Committee investigated the following potential acts of misconduct:

"Did Dr. Michael Mann engage in, or participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities?"

The Investigatory Committee was given access to 376 files that contained emails stolen from the Climate Research Unit (CRU) of the University of East Anglia. These emails were either sent by Dr. Mann, sent to Dr. Mann, copied to Dr. Mann, or discussed Dr. Mann (but were neither addressed nor copied to him). The Investigatory Committee also reviewed the documents collected by the Inquiry Committee, as well as the Inquiry Committee's findings and report. In addition, the Investigatory Committee reviewed a number of documents provided by Dr. Mann in response to requests from both the Inquiry and Investigatory Committees. A number of public documents were also made available to the Investigatory Committee, including a number of editorials, both pro and con Dr. Mann, an open letter from 255 members of the National Academy of Sciences, published in *Science* magazine, May 7, 2010, and the full text of the British House of Commons' Science and Technology Committee report on "The disclosure of climate data from the Climatic Research Unit at the University of East Anglia," which was published on March 31, 2010.

In the course of the investigation, the Investigatory Committee interviewed Dr. Michael Mann, as well as

his immediate supervisor, Dr. William Easterling, Dean of the College of Earth and Mineral Sciences at the Pennsylvania State University. Dean Easterling and Dr. David Verardo, National Science Foundation Program Director for Paleo Perspectives on Climate Change, agreed to suggest names of eminent scientists who might agree to be interviewed by the Investigatory Committee in its efforts to establish the range of "accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities." As previously described, the Investigatory Committee contacted, and subsequently interviewed, three eminent scientists from the field of climate research: Dr. William Curry, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution; Dr. Richard Lindzen, Alfred P. Sloan Professor, Department of Earth, Atmospheric, and Planetary Sciences, Massachusetts Institute of Technology; and Dr. Jerry McManus, Professor, Department of Earth and Environmental Sciences, Columbia University.

Based on the documentary evidence and on information obtained from the various interviews, the Investigatory Committee first considered the question of whether Dr. Mann had seriously deviated from accepted practice in *proposing* his research activities. First, the Investigatory Committee reviewed Dr. Mann's activities that involved proposals to obtain funding for the conduct of his research. Since 1998, Dr. Mann received funding for his research mainly from two sources: The National Science Foundation (NSF) and the National Oceanic and Atmospheric Administration (NOAA). Both of

these agencies have an exceedingly rigorous and highly competitive merit review process that represents an almost insurmountable barrier to anyone who proposes research that does not meet the highest prevailing standards, both in terms of scientific/technical quality and ethical considerations.

NOAA and NSF research grant proposals are both evaluated through similarly rigorous and transparent merit review (peer review) processes. To illustrate, we describe the NSF review process, which has two stages. In Stage I, proposals are sent out to several external experts for merit review (mail review) based on the two NSF review criteria established by the National Science Foundation Board -- Intellectual Merit and Broader Impacts. In Stage 2, the proposal and its external expert reviews (mail reviews) are taken to a 8-15 person external expert panel and evaluated over a several day period (panel review). Panel review members are not the same persons as the mail review members. In Stage I, the external reviewers only see individual proposals and rate them on a 5-point scale in descending order from Excellent, Very Good, Good, Fair, and Poor. In Stage 2, the entire panel (except those members who have a conflict of interest with the proposal) see all the proposals in the competition (usually about 140 proposals in the NSF program to which Dr. Mann has typically submitted his proposals) and rate them based on the same two NSF criteria on the same rating scale, but at this stage they evaluate the proposals in comparison with all the other proposals that were submitted. All reviews are then taken under advisement by the director of the particular NSF program to which the proposal was submitted,

who then recommends whether a project should be funded. The program director is guided by the expert reviews, but may also take programmatic balance and other NSF criteria into account before making a final recommendation. The rate of funding varies by program, but rarely exceeds 25 percent.

The results achieved by Dr. Mann in the period 1999–2010, despite these stringent requirements, speak for themselves: He served as principal investigator or co-principal investigator on five NOAA-funded and four NSF-funded research projects. During the same period, Dr. Mann also served as co-investigator of five additional NSF- and NOAA-funded research projects, as well as on projects funded by the Department of Energy (DOE), the United States Agency for International Development (USAID), and the Office of Naval Research (ONR). This level of success in proposing research, and obtaining funding to conduct it, clearly places Dr. Mann among the most respected scientists in his field. Such success would not have been possible had he not met or exceeded the highest standards of his profession for proposing research.

The second part of the Investigatory Committee's charge was to investigate whether Dr. Mann had engaged in any actions that seriously deviated from accepted practices within the academic community for *conducting* research or other scholarly activities. One focus of the committee's investigation centered on whether Dr. Mann had deviated from accepted practice with regard to sharing data and source codes with other investigators. First, the Investigatory Committee established that Dr. Mann has generally used data collected by others, a common practice in

paleoclimatology research. Raw data used in Dr. Mann's field of paleoclimatology are laboriously collected by researchers who obtain core drillings from the ocean floor, from coral formations, from polar ice or from glaciers, or who collect tree rings that provide climate information from the past millennium and beyond. Other raw data are retrieved from thousands of weather stations around the globe. Almost all of the raw data used in paleoclimatology are made publicly available, typically after the originators of the data have had an initial opportunity to evaluate the data and publish their findings. In some cases, small sub-sets of data may be protected by commercial agreements; in other cases some data may have been released to close colleagues before the originators had time to consummate their prerogative to have a limited period (usually about two years) of exclusivity; in still other cases there may be legal constraints (imposed by some countries) that prohibit the public sharing of some climate data. The Investigatory Committee established that Dr. Mann, in all of his published studies, precisely identified the source(s) of his raw data and, whenever possible, made the data and or links to the data available to other researchers. These actions were entirely in line with accepted practices for sharing data in his field of research.

With regard to sharing source codes used to analyze these raw climate data and the intermediate calculations produced by these codes (referred to as "dirty laundry" by Dr. Mann in one of the stolen emails) with other researchers, there appears to be a range of accepted practices. Moreover, there is evidence that these practices have evolved during the

last decade toward increased sharing of source codes and intermediate data via authors' web sites or web links associated with published scientific journal articles. Thus, while it was not considered standard practice ten years ago to make such information publicly available, most researchers in paleoclimatology are today prepared to share such information, in part to avoid unwarranted suspicion of improprieties in their treatment of the raw data. Dr. Mann's actual practices with regard to making source codes and intermediate data readily available reflect, in all respects, evolving practices within his field. Dr. Mann acknowledged that early in his career he was reluctant to publish his source codes because the National Science Foundation had determined that source codes were the intellectual property of the investigator. Moreover, because he developed his source codes using a specific programming language (FORTRAN 77), these codes were not likely to compile and run on computer systems different from the ones on which they were developed (e.g., different processor makes/models, different operating systems, different compilers, different compiler optimizations). Since then, however, he has used a more accessible method for developing his source codes (MATLAB) and he has made all source codes, as well as intermediate data, available to the research community, thereby meeting and exceeding standard practices in his field. Moreover, most of his research methodology involves the use of Principal Components Analysis, a well-established mathematical procedure that is widely used in climate research and in many other fields of science. Thus, the Investigatory Committee

concluded that the manner in which Dr. Mann used and shared source codes has been well within the range of accepted practices in his field.

The issue of whether Dr. Mann had engaged in any actions that seriously deviated from accepted practices within the academic community for *conducting* research or other scholarly activities was examined by the Investigatory Committee via a number of additional means. When a scientist's research findings are well outside the range of findings published by other scientists examining the same or similar phenomena, legitimate questions may be raised about whether the science is based on accepted practices or whether questionable methods might have been used. Most questions about Dr. Mann's findings have been focused on his early published work that showed the "hockey stick" pattern of climate change. In fact, research published since then by Dr. Mann and by independent researchers has shown patterns similar to those first described by Dr. Mann, although Dr. Mann's more recent work has shown slightly less dramatic changes than those reported originally. In some cases, other researchers (e.g., Wahl & Ammann, 2007) have been able to replicate Dr. Mann's findings, using the publicly available data and algorithms. The convergence of findings by different teams of researchers, using different data sets, lends further credence to the fact that Dr. Mann's conduct of his research has followed acceptable practice within his field. Further support for this conclusion may be found in the observation that almost all of Dr. Mann's work was accomplished jointly with other scientists. The checks and balances inherent in such a scientific

team approach further diminishes chances that anything unethical or inappropriate occurred in the conduct of the research.

A particularly telling indicator of a scientist's standing within the research community is the recognition that is bestowed by other scientists. Judged by that indicator, Dr. Mann's work, from the beginning of his career, has been recognized as outstanding. For example, he received the Phillip M. Orville Prize for outstanding dissertation in the earth sciences at Yale University in 1997. In 2002, he received an award from the Institute for Scientific Information for a scientific paper (published with co-authors) that appeared in the prestigious journal *Nature;* also in 2002, he co-authored a paper that won the Outstanding Scientific Paper Award from the NOAA Office of Oceanic and Atmospheric Research, and *Scientific American* named him as one of 50 leading visionaries in science and technology. In 2005, Dr. Mann co-authored a paper in the *Journal of Climate* that won the John Russell Mather Paper award from the Association of American Geographers, and in the same year, the website "RealClimate.org" (co-founded by Dr. Mann) was chosen as one of the top 25 "Science and Technology" websites by *Scientific American.* In 2006, Dr. Mann was recognized with the American Geophysical Union Editors' Citation for Excellence in Refereeing (i.e., reviewing manuscripts for *Geophysical Research Letters*). All of these awards and recognitions, as well as others not specifically cited here, serve as evidence that his scientific work, especially the conduct of his research, has from the beginning of his career been judged to be outstanding by a broad spectrum of

scientists. Had Dr. Mann's conduct of his research been outside the range of accepted practices, it would have been impossible for him to receive so many awards and recognitions, which typically involve intense scrutiny from scientists who may or may not agree with his scientific conclusions.

The third area of investigation was to address whether Dr. Mann had engaged in any actions that seriously deviated from accepted practices within the academic community for *reporting* research or other scholarly activities. Dr. Mann's record of publication in peer reviewed scientific journals offers compelling evidence that his scientific work is highly regarded by his peers, thus offering de facto evidence of his adherence to established standards and practices regarding the reporting of research. To date, Dr. Mann is the lead author of 39 scientific publications and he is listed as co-author on an additional 55 publications. The majority of these publications appeared in the most highly respected scientific journals, i.e., journals that have the most rigorous editorial and peer reviews in the field. In practical terms, this means that literally dozens of the most highly qualified scientists in the world scrutinized and examined every detail of the scientific work done by Dr. Mann and his colleagues and judged it to meet the high standards necessary for publication. Moreover, Dr. Mann's work on the Third Assessment Report (2001) of the *Intergovernmental Panel on Climate Change* received recognition (along with several hundred other scientists) by being awarded the 2007 Nobel Peace Prize. Clearly, Dr. Mann's reporting of his research has been successful and judged to be outstanding by his peers. This would

have been impossible had his activities in reporting his work been outside of accepted practices in his field.

One issue raised by some who read the stolen emails was whether Dr. Mann distributed privileged information to others to gain some advantage for his interpretation of climate change. The privileged information in question consisted of unpublished manuscripts that were sent to him by colleagues in his field. The Investigatory Committee determined that none of the manuscripts were accompanied by an explicit request to not share them with others. Dr. Mann believed that, on the basis of his collegial relationship with the manuscripts' authors, he implicitly had permission to share them with close colleagues. Moreover, in each case, Dr. Mann explicitly urged the recipients of the unpublished manuscripts to first check with the authors if they intended to use the manuscripts in any way. Although the Investigatory Committee determined that Dr. Mann had acted in good faith with respect to sharing the unpublished manuscripts in question, the Investigatory Committee also found that among the experts interviewed by the Investigatory Committee there was a range of opinion regarding the appropriateness of Dr. Mann's actions. Opinions ranged from one expert who contended that it is never acceptable to share an unpublished manuscript without first obtaining explicit permission from the author(s) to do so, to another expert who felt that, when working with close colleagues, it is sometimes acceptable to do so by assuming that implicit permission had been granted. The Investigatory Committee considers Dr. Mann's actions in sharing

unpublished manuscripts with third parties, without first having received express consent from the authors of such manuscripts, to be careless and inappropriate. While sharing an unpublished manuscript on the basis of the author's implied consent may be an acceptable practice in the judgment of some individuals, the Investigatory Committee believes the best practice in this regard is to obtain express consent from the author before sharing an unpublished manuscript with third parties.

The Investigatory Committee would like to note that Dr. Mann, after being questioned by the Investigatory Committee about this issue, requested and received confirmation that his assumption of implied consent was correct from the author of one of the papers in question. This "after the fact" communication was not considered by the Investigatory Committee in reaching its decision.

Conclusion of the Investigatory Committee as to whether research misconduct occurred:

The Investigatory Committee, after careful review of all available evidence, determined that there is no substance to the allegation against Dr. Michael E. Mann, Professor, Department of Meteorology, The Pennsylvania State University.

More specifically, the Investigatory Committee determined that Dr. Michael E. Mann did not engage in, nor did he participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research, or other scholarly activities.

The decision of the Investigatory Committee was unanimous.

Attachment H

NEWS: Milloy Comments On Penn State Scandal And Investigation Of Michael Mann

February 2, 2010

The following statement is from Steve Milloy, publisher of JunkScience.com an author of *Green Hell: How Environmentalists Plan to Control Your Life and What You Can Do to Stop Them*

Here's our early take on today's Penn State report <http://www.research.psu.edu/orp> on its Michael Mann investigation:

1. The review apparently extended little further than the Climategate e-mails themselves, an interview with Mann, materials submitted by Mann and whatever e-mails and comments floated in over the transom. Not thorough at all.

2. Comically, the report explains at length how the use of the word "trick" can mean a "clever device." The report ignores that it was a "trick... to hide the decline." There is no mention of "hide the decline" in the report.

3. The report concludes there is no evidence to indicate that Mann intended to delete e-mails. But this is contradicted by the plain language and circumstances surrounding Mann's e-mail exchange with Phil Jones—See page 9 of Climategate & Penn State: The Case for an Independent Investigation <http://www.commonwealthfoundation.org/docLib/20100111_PB2202Climategate.pdf>

4. The report dismisses the accusation that Mann conspired to silence skeptics by stating, "one finds enormous confusion has been caused by interpretations of the e-mails and their content."

Maybe there wouldn't be so much "confusion" if PSU actually did a thorough investigation rather than just relying on the word of Michael Mann.

5. Although PSU is continuing the investigation, its reason is not to investigate Mann so much as it is to exonerate climate alarmism. On page 9 of the report, it says that "questions in the public's mind about Dr. Mann's conduct... may be undermining confidence in his findings as a scientist... and public trust in science in general and climate science specifically."

There needs to be a thorough and independent investigation of Climategate. PSU's report is a primer for a whitewash," concluded Milloy.

-30-

Attachment I

Much-vindicated Michael Mann and Hockey Stick get final exoneration from Penn State — time for some major media apologies and retractions

By **Joe Romm** on Jul 1, 2010 at 3:28 pm

"An Investigatory Committee of faculty members with impeccable credentials" has unanimously "determined that Dr. Michael E. Mann did not engage in, nor did he participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research, or other scholarly activities."

PANEL STICKS UP FOR AN INNOCENT MANN

His work "clearly places Dr. Mann among the most respected scientists in his field.... Dr. Mann's work, from the beginning of his career, has been recognized as outstanding."

Few if any American climate scientists have been as falsely accused — and thoroughly vindicated — over both their academic practices and scientific results as Dr. Michael Mann.

Today, Penn State issued its final and complete exoneration (click here) of Dr. Michael Mann in the matter of his scientific practices "for proposing, conducting, or reporting research," primarily related to the famous — and thoroughly vindicated — Hockey Stick. We can be more confident than ever that the "Earth is hotter now than in the past 2,000 years" (a post which discusses the *PNAS* study that is the source of the above graph).

And this "Investigatory Committee of faculty members with impeccable credentials" not only exonerated him unanimously, they did so even though one of the scientists they interviewed in the course of their work was the much debunked, shameless defamer of climatologists, Richard Lindzen!

A number of major media outlets owe Mann an apology and retraction:

- Newsweek staff who play fast and loose with the facts
- CBS libels Michael Mann
- Defamatory WSJ piece by Jeffrey Ball and Keith Johnson

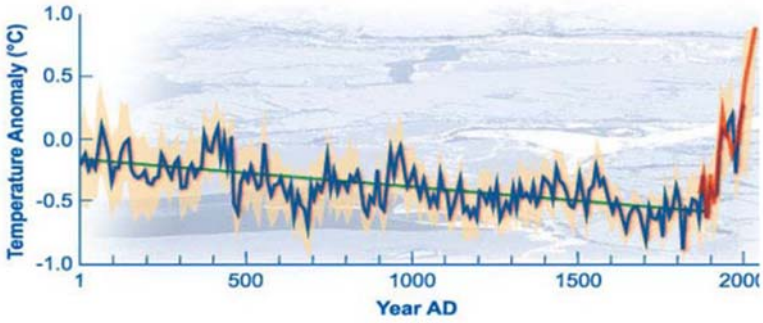
If the disinformer-friendly *Sunday Times* can retract and apologize for its shameful and bogus Amazon story smearing the IPCC, surely *Newsweek*, *CBS*, and the *WSJ* can.

UPDATE: The *WashPost* has a flawed story on the exoneration that typifies how the media has blown the coverage of the stolen emails, discussed at the end.

Let's back up and start with Mann's scientific work — that's what the anti-science crowd has been trying to undermine all these years. If Mann were an astrophysicist publishing papers on black holes, none of this would've happened. The disinformers have been desperate to prove that recent human-caused warming is not unusual and is not indicative of an important and dangerous trend — but it is. As climatologist and one-time darling of the contrarians Ken Caldeira said last year, "To talk about global cooling at the end of the hottest decade the planet has experienced in many thousands of years is ridiculous."

The key point about Mann's "Hockey Stick" work is that it was repeatedly attacked and utterly vindicated long before we saw any of the trumped up charges around the stolen emails:

- The Hockey Stick was affirmed in a major review by the uber-prestigious National Academy of Scientists (in media-speak, the highest scientific "court" in the land) — see NAS Report and here. The news story in the journal *Nature* (subs. req'd) on the NAS panel was headlined: "**Academy affirms hockey-stick graph**"!
- The Hockey Stick has been replicated and strengthened by numerous independent studies. My favorite is from *Science* last year "" see Human-caused Arctic warming overtakes 2,000 years of natural cooling, "seminal" study finds (the source of the figure below).
- And then we have Penn State's first review of Mann, which concluded: "After careful consideration of all the evidence and relevant materials, the inquiry committee finding is that there exists no credible evidence that Dr. Mann had or has ever engaged in, or participated in, directly or indirectly, any actions with an intent to suppress or to falsify data. While a perception has been created in the weeks after the CRU emails were made public that Dr. Mann has engaged in the suppression or falsification of data, there is no credible evidence that he ever did so, and certainly not while at Penn State."



That first Penn State review also found "no substance" to these allegations:

- "Did you engage in, or participate in, directly or indirectly, any actions with the intent to suppress or falsify data? "
- "Did you engage in, or participate in, directly or indirectly, any actions with the intent to delete, conceal or otherwise destroy emails, information and/or data, related to AR4, as suggested by Phil Jones?"

But that first review did remand to a second panel the following question:

> "Did Dr. Michael Mann engage in, or participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities?"

On that charge, the "Investigatory Committee of faculty members with impeccable credentials" concluded:

> The Investigatory Committee, after careful review of all available evidence, determined that

> there is no substance to the allegation against Dr. Michael E. Mann, Professor, Department of Meteorology, The Pennsylvania State University.
>
> More specifically, the Investigatory Committee determined that Dr. Michael E. Mann did not engage in, nor did he participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research, or other scholarly activities.
>
> The decision of the Investigatory Committee was unanimous.

Here are some other key excerpts from the report, which should be required reading for any reporter who has ever written about Mann or the Hockey Stick:

> This level of success in proposing research, and obtaining funding to conduct it, **clearly places Dr. Mann among the most respected scientists in his field**. Such success would not have been possible had he not met or exceeded the highest standards of his profession for proposing research….
>
> **The Investigatory Committee established that Dr. Mann, in all of his published studies, precisely identified the source(s) of his raw data and, whenever possible, made the data and or links to the data available to other researchers. These actions were entirely in line with accepted practices for sharing data in his field of research….**
>
> **Thus, the Investigatory Committee concluded that the manner in which Dr. Mann used and shared source codes has**

been well within the range of accepted practices in his field.

Mann is clearly owed an apology from Dr. Judith Curry, a bit player in all this who has parroted the false charges against Mann by McIntyre and his ilk in her *Discover* interview, among other places.

Here's more from the committee:

> Most questions about Dr. Mann's findings have been focused on his early published work that showed the "hockey stick" pattern of climate change. In fact, research published since then by Dr. Mann and by independent researchers has shown patterns similar to those first described by Dr. Mann.... In some cases, other researchers (e.g., Wahl & Ammann, 2007) have been able to replicate Dr. Mann's findings, using the publicly available data and algorithms. The convergence of findings by different teams of researchers, using different data sets, lends further credence to **the fact that Dr. Mann's conduct of his research has followed acceptable practice within his field**. Further support for this conclusion may be found in the observation that almost all of Dr. Mann's work was accomplished jointly with other scientists. The checks and balances inherent in such a scientific team approach further diminishes chances that anything unethical or inappropriate occurred in the conduct of the research.
>
> A particularly telling indicator of a scientist's standing within the research community is the recognition that is bestowed by other scientists. Judged by that indicator, **Dr. Mann's work,**

from the beginning of his career, has been recognized as outstanding. For example, he received the Phillip M. Orville Prize for outstanding dissertation in the earth sciences at Yale University in 1997. In 2002, he received an award from the Institute for Scientific Information for a scientific paper (published with co-authors) that appeared in the prestigious journal *Nature*; also in 2002, he co-authored a paper that won the Outstanding Scientific Paper Award from the NOAA Office of Oceanic and Atmospheric Research, and Scientific American named him as one of 50 leading visionaries in science and technology. In 2005, Dr. Mann co-authored a paper in the *Journal of Climate* that won the John Russell Mather Paper award from the Association of American Geographers, and in the same year, the website "RealClimate.org" (co-founded by Dr. Mann) was chosen as one of the top 25 "Science and Technology" websites by Scientific American. In 2006, Dr. Mann was recognized with the American Geophysical Union Editors' Citation for Excellence in Refereeing (i.e., reviewing manuscripts for *Geophysical Research Letters*). All of these awards and recognitions, as well as others not specifically cited here, serve as evidence that his scientific work, especially the conduct of his research, has from the beginning of his career been judged to be outstanding by a broad spectrum of scientists. Had Dr. Mann's conduct of his research been outside the range of accepted practices, it would have been impossible for him to receive so many awards and recognitions, which typically involve intense

> scrutiny from scientists who may or may not agree with his scientific conclusions.

My guess is that you didn't know Mann's work had been so highly recognized. The media certainly never writes about this because it doesn't fit their disinformer-driven storyline that somehow his work is not first rate.

In fact, it is those who attack him whose work is far, far from first rate. Hmm. That might even the a good subject for an academic paper (see New study reaffirms broad scientific understanding of climate change, questions media's reliance on tiny group of less-credibile scientists for "balance").

> Dr. Mann's record of publication in peer reviewed scientific journals offers compelling evidence that his scientific work is highly regarded by his peers, thus offering de facto evidence of his adherence to established standards and practices regarding the reporting of research. To date, Dr. Mann is the lead author of 39 scientific publications and he is listed as co-author on an additional 55 publications. The majority of these publications appeared in the most highly respected scientific journals, i.e., journals that have the most rigorous editorial and peer reviews in the field. In practical terms, **this means that literally dozens of the most highly qualified scientists in the world scrutinized and examined every detail of the scientific work done by Dr. Mann and his colleagues and judged it to meet the high standards necessary for publication.** Moreover, Dr. Mann's work on the Third Assessment Report

> (2001) of the Intergovernmental Panel on Climate Change received recognition (along with several hundred other scientists) by being awarded the 2007 Nobel Peace Prize.
>
> Clearly, Dr. Mann's reporting of his research has been successful and judged to be outstanding by his peers. This would have been impossible had his activities in reporting his work been outside of accepted practices in his field.

So Mann isn't merely a competent researcher. He is one of the leading climate scientists in this country, which of course is precisely why the anti-science crowd has gone after him, much as they have with other leading climate scientists, including Hansen and Santer.

And that's one more reason why the major media outlets who smeared and defamed him owe him an apology and a retraction.

The Investigatory Committee does have one obvious mistake in it, though. In its effort to bend over backwards to appear fair and balanced in examining the baseless charges against Mann:

> The Investigatory Committee contacted, and subsequently interviewed, three eminent scientists from the field of climate research: Dr. William Curry, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution; Dr. Richard Lindzen, Alfred P. Sloan Professor, Department of Earth, Atmospheric, and Planetary Sciences, Massachusetts Institute of Technology; and Dr. Jerry McManus, Professor, Department of Earth

> and Environmental Sciences, Columbia University.

Lindzen may have been 'eminent' a long, long time ago, but his big climate theory has been largely debunked — see Science: "Clouds Appear to Be Big, Bad Player in Global Warming,"an amplifying feedback (sorry Lindzen and fellow disinformers). For quite some time he has been doing little but spreading disinformation — see Re-discredited climate denialists in denial. He's even started publishing nonsense that has led to unusually strong debunkings by his colleagues:

- Lindzen debunked again: New scientific study finds his paper downplaying dangers of human-caused warming is "seriously in error": ***Kevin Trenberth: The flaws in Lindzen-Choi paper "have all the appearance of the authors having contrived to get the answer they got."***

Lindzen tries to stick the knife into Mann:

> Before the Investigatory Committee's questioning began, Dr. Lindzen was given some general background information regarding the process of inquiry and investigation into allegations concerning Dr. Mann, with a focus on the particular allegation that is the subject of the current review by the Investigatory Committee. Dr. Lindzen then requested, and was provided with, a brief summary of the three allegations previously reviewed. **When told that the first three allegations against Dr. Mann were dismissed at the inquiry stage of the RA-10 process, Dr. Lindzen's response was: "It's**

> **thoroughly amazing. I mean these are issues that he explicitly stated in the emails. I'm wondering what's going on?**"
>
> The Investigatory Committee members did not respond to Dr. Lindzen's statement. Instead, Dr. Lindzen's attention was directed to the fourth allegation, and it was explained to him that this is the allegation which the Investigatory Committee is charged to address.

It isn't thoroughly amazing that Lindzen wants to retry Mann for charges he was completely exonerated on. What's amazing is that the committee would even talk to Lindzen on a matter like this. Lindzen simply lacks credibility on climate science, and he has a penchant for going after the reputation of the top climate scientists in the country. At the Heartland conference of climate-change disinformers last year, Lindzen went from disinformation to defamation as he smeared the reputation of one of the greatest living climate scientists, Wallace Broecker (see "Shame on Richard Lindzen, MIT's uber-hypocritical anti-scientific scientist"). And this year he slandered his one-time friend Kerry Emanuel, who asserted that Lindzen's charge in *Boston Globe* is "pure fabrication."

The bottom line is that every major independent investigation has exonerated Mann and his work — and his fellow climate scientists:

- Climatic Research Unit scientists cleared (again)
- House of Commons exonerates Phil Jones: Based on their inquiry and evidence, "the scientific reputation of Professor Jones and CRU remains intact. We have found no

> reason … to challenge the scientific consensus … that 'global warming is happening [and] that it is induced by human activity'."

Let me give the final word to Mann from 2008 on the key scientific issue:

> **You can go back nearly 2,000 years and the conclusion still holds-the current warmth is anomalous. The burst of warming over the past one to two decades takes us out of the envelope of natural variability.**

UPDATE: The *WashPost* story, "Penn State clears Mann in Climate-gate probe" absurdly quotes one of the top anti-scientist disinformers in the country, Myron Ebell, for balance. Seriously, mainstream media, after all the false charges, can't you just run a straight exoneration story without publishing yet another baseless defamatory smear by the paid disinformation specialists? And it's time to drop the blame-the-victim moniker "Climate-gate" (see "Rename The Scandal Formerly Known As Climategate").

The Project on Climate Science release is here.

Climate Science Watch interviewed Michael Mann on the Penn State Final Report and the "concerted, well- organized, and very well-funded campaign to attack climate scientists – not just the science but the scientists themselves," as he puts it. Mann clears up the most recent misrepresentation about his work:

> CSW: You were quoted recently with reference to the so-called 'hockey stick' graph from the temperature record study that you published in the late 1990s that is still a b[a]te noire of skeptics, contrarians, and deniers; sometimes they try to

talk about it as if there were not a whole body of paleoclimate literature and subsequent work. You apparently made a comment to the effect that you were skeptical about how much of an icon that particular graph had become. Some of the deniers have jumped on that and said, "Aha! Michael Mann is walking back his conclusions about the temperature record." What should people make of what you said, what is the appropriate way to take your comment?

MM: Yeah, this is all too predictable. This is what the climate change denial machine has been doing for years. What they'll do is they'll quote a statement out of context. In this case it was a statement I did in the course of an interview for the BBC. Then it'll be turned into a news article in a fringe media outlet, in this case the Telegraph – which, in my view, has engaged in the sloppiest and most slanted coverage of climate change now for years. So it's no surprise to me that the Telegraph would again publish a very misleading, slanted piece that took what I actually said out of context.

All that I said in that interview was that it was somewhat misplaced for the hockey stick to be made the central icon of the climate change debate, for the obvious reasons: It isn't that there's just one study. In fact, there are more than a dozen studies now that come to the same conclusion as our original work. That's beside the point though, because paleoclimatic reconstructions are really just one line of evidence among multiple lines of evidence that indicate the Earth is warming, that the climate is changing in

a way that is consistent with that warming, and that it can only be explained by the human influence on climate.

So, to pretend, as deniers like to do, that all of our understanding of human caused climate change rests on the so-called hockey stick is disingenuous, to say the least. I was simply pointing out in my interview just how disingenuous that argument is. Of course, it was twisted and contorted in the way that we now have come to expect: To imply that I was saying something other than I was actually saying. **It's really quite sad**.

Here's an old cartoon and a new roundup of headlines:

Climate Scientist Cleared of Altering Data – NYT

Mann Cleared in Final Inquiry by Penn State – NYT

2nd Penn State review clears climate scientist – Associated Press

Climategate Continues to Crumble – Time

Investigation clears 'climate-gate' researcher of wrongdoing – The Hill

An End to Climategate? Penn State Clears Michael Mann – CBSNews.com

Penn State clears Michael Mann again; legal battle continues in Virginia – Nature

'Climategate' scientist cleared a 2nd time – UPI

Penn State Clears Climate Scientist Mann of Climategate Wrongdoing – ENS

Climategate's death rattle – Discover Magazine

Climategate Scientist Cleared in Inquiry, Again – Scientific American

Climate scientist Mann gets final exoneration from Penn State – Grist

Climategate Scientist Michael E. Mann Exonerated – Huffington Post

Penn State panel clears climatologist Michael Mann in e-mail case – Philly Inquirer

Climate scientist cleared by Penn State panel – Washington Examiner

University panel clears Mann – Daily Collegian

Penn State University panel clears global-warming scholar – Pittsburgh Tribune Review

Penn State Probe Clears Mann Of Wrongdoing – State College News

Michael Mann exonerated yet yet again – Science blog

Attachment J

CLIMATE DEPOT

Penn State investigation cited Mann's 'level of success in proposing research and obtaining funding' as some sort of proof that he was meeting the 'highest standards'

Climate Depot's Morano: 'At the height of his financial career, similar sentiments could have been said about Bernie Madoff'

By Marc Morano – Climate Depot

Climate Depot's Executive Editor Marc Morano on Penn State's inquiry into Michael Mann:

'This is not surprising that Mann's own university circled the wagons and narrowed the focus of its own investigation to declare him ethical.

'The fact that the investigation cited Mann's 'level of success in proposing research and obtaining funding' as some sort of proof that he was meeting the 'highest standards', tells you that Mann is considered a sacred funding cash cow. At the height of his financial career, similar sentiments could have been said about Bernie Madoff.

Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.'

Flashback Dec. 2009: Penn State's announcement of its investigation 'is so complimentary to Mann, it almost reads like the press release of the verdict, published prematurely'

MIT's Richard Lindzen on Mann: 'Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally'

Physicist Lubos Motl: 'Penn State officially joins Michael Mann's scam...remembered as a black day in its history' (Mann email: mann@meteo@psu.edu) -- Mann 'cleared' of research misconduct even though explicit proofs of his misconduct are available to the whole world'

Climate Depot's FactSheet on Mann's Various 'Hockey Stick' Creations

Filed under: ipcc, science, michael mann, cru, climate depot

Attachment K

TRIBLIVE | State

Penn State University panel clears global-warming scholar

By Mike Cronin

Published: Friday, July 2, 2010

A Penn State University panel of scientists on Thursday exonerated one of the school's researchers of accusations that his work on climate change violated the university's research misconduct policy.

After a four-month investigation, five university professors unanimously cleared professor Michael Mann, a climate scientist and one of several hundred researchers sharing the 2007 Nobel Peace Prize for their work with the United Nations' Intergovernmental Panel on Climate Change.

The Penn State investigators concluded in a report released yesterday that "Mann did not engage in, nor did he participate in, directly or indirectly , any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research, or other scholarly activities."

"I am pleased that the last phase of Penn State's investigation has now been concluded, and that n has cleared me of any wrongdoing ," Mann wrote in an e-mail. "These latest findings should finally put to rest the baseless allegations against me and my research."

Mann's work was chronicled in the 2006 documentary "An Inconvenient Truth," about former

Vice President Al Gore's public campaign on global warming.

The film showed a graph Mann created, commonly called the "hockey stick" because of its shape, that depicts global temperatures skyrocketing during the past century . It appeared in the U.N. panel's 2001 report. Global-warming skeptics criticized the graph and Mann's research methods.

The National Academy of Sciences investigated Mann's work and in 2006 found ii valid, though it questioned some conclusions by Mann and other researchers , including that the 1990s were the warmest decade of the past 1,000 years.

A controversy erupted in November when a hacker published e-mails obtained from computer servers at the Climatic Research Unit of the University of East Anglia in England and published them on the Internet.

The e-mails contained at least 10 years of communication among climate-change researchers, including Mann.

In one e-mail, Phil Jones, former director of the Climatic Research Unit, who resigned after the e-mails became public, asked Mann to delete e-mails he wrote to another scientist. Mann said he did not comply and did not delete any e-mails.

Penn State chose to investigate because the e-mail incident "raised questions in the public's mind about Dr. Mann's conduct of his research activity," and those questions could undermine confidence in Mann, science and climate science.

Supporters and critics of Mann's work responded swiftly to the Penn State decision.

"It's about time," said Francesca Grifo, director of the Union of Concerned Scientists scientific integrity program, speaking from Washington.

"Now, let this man get back to work," Grifo said. "When is this witch hunt going to stop• A lot of this type of research is funded by taxpayer dollars. I'd rather have my taxpayer dollars spent on research than utter nonsense."

But Richard S. Lindzen, a Massachusetts Institute of Technology professor of meteorology who disagrees with Mann's work, called the school's investigation a "whitewash." Lindzen was interviewed by the Penn State panel during its investigation.

"Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally," Lindzen said in an e-mail from France.

School officials in February dismissed other allegations against Mann that questioned whether he suppressed or falsified data, deleted or concealed e-mails, or misused privileged or confidential information.

Virginia Attorney General Kenneth T. Cuccinelli II served University of Virginia Rector John 0. Wynne on April 23 with a civil investigative demand for documents related to grants Mann obtained during his time as an assistant professor at the school. Mann worked at the university from 1999 until 2005, when he joined Penn State's faculty.

"We will address any arguments that the University of Virginia has posed when we file our court brief on July 13," said Cuccinelli's spokesman, Brian Gottstein, in an e-mail. "We do not intend to address issues outside of the courtroom."

Attachment L

NSF confirms results of Penn State investigation, exonerates Michael Mann of research misconduct

By Brian Angliss on August 27, 2011

First in a series

As a result of the illegal publication of CRU climate emails, the Pennsylvania State University (PSU) conducted an inquiry and investigation into allegations of research misconduct by Professor Michael Mann. The University exonerated Mann of all four allegations in July 2010, but the National Science Foundation Office of Inspector General (OIG) reviews such investigations for completeness and correctness. On August 15, 2011, the OIG released the results of their own review, agreeing with all of the conclusions of the PSU investigation and subsequently acquitting Mann of all the allegations of research misconduct made against him.

PSU published the results of an their internal investigation into alleged research misconduct by climatologist Michael Mann on July 1, 2010. As S&R reported, the university's conclusions were that Mann did not falsify data over the course of his research, that he did not destroy any emails in possible breach of the Freedom of Information Act, that he did not misuse his position or abuse confidentiality agreements, and that he did not deviate from accepted practices of conduct for his field.

As required by law, PSU reported their results to the OIG for independent review. The OIG's review was

completed and closed on August 15, 2011, with the OIG writing:

> Finding no research misconduct or other matter raised by the various regulations and laws discussed above, this case is closed.

The conclusion – that Mann is acquitted of research misconduct – is obviously significant. But the details in the OIG closeout memo are important because of what they show about the original PSU investigation. Specifically, the OIG closeout memo shows that the critics who labeled the PSU investigation a "whitewash" were wrong.

When the OIG received the inquiry and investigation reports from PSU, the reviewed the reports and a significant amount of additional documentation that PSU provided upon request. Based on the OIG's review, they "were satisfied that the University adequately addressed its Allegations 3 and 4 (misusing privileged information and serious deviation from accepted practices)." The OIG also concluded that neither of these issues rose to the level of research misconduct as defined by the NSF Research Misconduct Regulation, 45 CFR §689.

The OIG also independently reviewed Mann's emails and PSU's inquiry into whether or not Mann deleted emails as requested by Phil Jones in the "Climategate" emails (aka Allegation 2). The OIG concluded after reviewing the the published CRU emails and the additional information provided by PSU that "nothing in [the emails] evidenced research misconduct within the definition of the NSF Research Misconduct Regulation." Furthermore, the OIG accepted the conclusions of the PSU inquiry regarding

whether Mann deleted emails and agreed with PSU's conclusion that Mann had not.

The OIG did conclude that PSU didn't meet the NSF's standard for investigating the charge of data falsification because PSU "didn't interview any of the experts critical of [Mann's] research to determine if they had any information that might support the allegation." As a result, the OIG conducted their own independent investigation, reviewing both PSU's documentation, publicly available documents written about Mann and his co-researchers, and "interviewed the subject, critics, and disciplinary experts" in reaching their conclusions. The details of what publicly available documents were reviewed and whom among Mann's critics were interviewed is not mentioned in the closeout memo.

The OIG concluded as a result of their additional investigation that:

1. [Mann] did not directly receive NSF research funding as a Principal Investigator until late 2001 or 2002.
2. [Mann's] data is documented and available to researchers.
3. There are several concerns raised about the quality of the statistical analysis techniques that were used in [Mann's] research.
4. There is no specific evidence that [Mann] falsified or fabricated any data and no evidence that his actions amounted to research misconduct.

5. There was concern about how extensively [Mann's] research had influenced the debate in the overall research field.

Point 1 essentially means that Mann's work prior to 2001 or 2002 was not subject to NSF review, but that the NSF appears to have reviewed it regardless. Point 2 is significant because one of the allegations of Mann's critics is that he refused to make his data available – even though the illegally published CRU emails make it clear that Mann had made his data publicly available. Point 5 is an observation on which the OIG offered no additional comment or analysis and is a subject of additional research by S&R.

Point 3 is significant because Mann has been criticized for ~~truncating tree ring data where it diverges from the historical temperature data in his original papers of~~ [This issue has nothing to do with Mann, but rather Keith Briffa who generated the data in question. We apologize for the confusion] using sub-standard statistical techniques. However, the OIG addresses this point specifically, writing that there is a lot of debate about "the viability of the statistical procedures [Mann] employed, the statistics used to confirm the accuracy of the results, and the degree to which one specific set of data impacts the statistical results." But, the OIG says, "these concerns are all appropriate for scientific debate" and that "such scientific debate… does not, in itself, constitute evidence of research misconduct."

Point 4 is the key conclusion – there is "no specific evidence that [Mann] falsified or fabricated any data" as some of his more vocal critics have contended. The OIG reached this conclusion after interviewing Mann's

critics, after reviewing the CRU emails, and after reviewing other "publically available documentation concerning both [Mann's] research and parallel research conducted by his collaborators and other scientists…." Furthermore, the OIG didn't just limit their investigation to data fabrication as the PSU investigation did – the OIG did a full research misconduct investigation according to the NSF Research Misconduct Regulation. According to this regulation, research misconduct is defined as

> fabrication, falsification, or plagiarism in proposing or performing research funded by NSF, reviewing research proposals submitted to NSF, or in reporting research results funded by NSF.

The regulation further define fabrication as "making up data or results" and falsification as "manipulating… or changing or omitting data or results" to lead to false conclusions. Mann's critics have claimed that Mann manipulated the data he used in his papers, but the OIG specifically ruled that this was not the case. After all, the regulation states that "research misconduct does not include honest error or differences of opinion."

Ultimately the OIG's review and supplemental investigation agreed on all counts with the PSU inquiry and investigation – Mann did not falsify data, he did not destroy any emails, he did not misuse any privileged information, and he did not deviate from accepted scientific processes.

Other sites reporting on the OIG's exoneration of Mann:

Joe Romm of ClimateProgress broke the story

Bloomberg
Climate Science Watch
Douglas Fischer at The Daily Climate
Richard Littlemore at DeSmogBlog
James Fallows of The Atlantic
Hank Campbell at Science 2.0
The Policy Lass
Eli at Rabbett Run
Centre Daily Times
Greg Laden at Science Blogs
Scott Mandia
the Unitarian-Universalist United Nations Office
Barry Bickmore
Andy Revkin at dotEarth
TPM Muckraker
The Summit County Voice
Bad Astronomy

Attachment M

The Blackboard
Where Climate Talk Gets Hot!

Court Ruling on Mann/ATI case.

17 April, 2012 (08:42) – politics **Written by:** lucia

The Washington Post reports on a ruling in the continuing and seemingly perpetual UVA/Mann/ATI legal battle.

> …at the end of four hours of argument, the judge did not grant ATI's immediate request for 12,000 withheld e-mails written while Mann was a professor at U.Va., and did not rule that the school had waived its right to withhold the e-mails by providing them to Mann last fall. Instead, Sheridan acknowledged that however he rules, the case is headed to the Virginia Supreme Court to resolve several key FOIA issues the case raises:

and

> …
>
> It wasn't the way either side expected the day to go. They both wanted the judge to rule on ATI's demand for civil discovery, and ATI's argument that U.Va. providing the e-mails to Mann made them open to the public. But both sides were satisfied that the judge was handling the case carefully and managing it with an eye toward its ultimate resolution in the state Supreme Court

I know lots of you are rooting for one side or the other to win. Looks like whoever wins, the battle will have to be fought in higher courts.

Written by lucia

Comments

George Tobin (Comment #94378)

April 17th, 2012 at 10:47 am

In addition to the issues presented, the judge probably wants to try to avoid coming up with a standard that requires an individual review of each of the 12,000 emails.

Also, I am not sure what "proprietary" means for purposes of applying the statute cited by UVA. For example, I think presumptive co-authors discussing pre-publication issues and exchanging data can claim that protection but what about after publication or if they decide not to publish? Is the protection forever? Is relevance and materiality also a function of time?

I think somebody's gonna have to split the baby in at least two pieces. The more granular the decision by the trial judge, the less likely the high court will arrive at a blanket yes or no.

Anyway, Michael Mann and his sure-to-be-partisan-and-snarky email comments about the politics (internal and otherwise) of climate change just seems so five minutes ago, doesn't it?

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