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
Judge Alfred S. Irving
Status Hearing:
ORAL HEARING REQUESTED

DEFENDANT MARK STEYN'S
RULE 56 MOTION FOR SUMMARY JUDGMENT

Pursuant to Superior Court Civil Rule 56, Defendant Mark Steyn moves the Court for summary judgment dismissing the complaint as against him on the ground that there exists no genuine dispute as to any material fact and Defendant Steyn is entitled to judgment as a matter of law. Accompanying this motion is a Memorandum of Points and Authorities in Support, a Statement pursuant to Superior Court Rule 56 Civil Rule 56(b)(2)(A) of Undisputed Facts, a Declaration from counsel attaching copies of exhibits, and a Proposed Order.

RULE 12-I Certification

Pursuant to Superior Court Civil Rule 12-I, counsel for Steyn (Daniel J. Kornstein) conferred with counsel for Plaintiff (John B. Williams) via telephone on January 18, 2021 for approximately ten minutes to ascertain whether Plaintiff would consent to the relief sought by this motion. Plaintiff declined.

Dated: January 22, 2021

Oral Hearing Requested

EMERY CELLI BRINCKERHOFF
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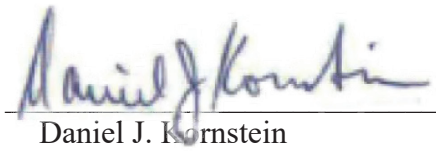
By: 
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Alfred S. Irving, Jr.

DEFENDANT STEYN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SUMMARY JUDGMENT

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TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

CASES PAGE(S)

PAGE(S)

PAGE(S)

STATUTES AND OTHER AUTHORITIES

Michael Mann's ill-conceived and baseless eight-year-old libel suit against cultural commentator Mark Steyn has gone on long enough. Discovery, now over, has shown that this suit is not about defamation. Nor is it, as this Court has ruled, about "climate change" or "science," Oct. 22, 2019 Order at 1-2. "The Court is particularly careful and mindful not to step into the substance or merit of the policy debate on global warming. . . . The broader question of global warming is never before this Court. . . . Plaintiff is not *the* scientist representing the entirety of the science behind global warming." *Id.* at 6-7 (italics in original).

Rather, as the Court has also found:

> The main idea of Defendant [Steyn]'s article is the inadequate and ineffective investigations conducted by Pennsylvania State University into their employees, including Jerry Sandusky and Plaintiff [Michael E Mann].

Id. That is not defamatory: It has been thoroughly adjudicated – and Mann's mentor, the corrupt Penn State president who tightly controlled both the Sandusky and Mann "investigations," has exhausted his appeals and is heading to jail. ¶ 8. (All references to "¶" are to corresponding paragraphs of Steyn's accompanying Statement of Undisputed Facts.) The eight years since Mann filed suit have only confirmed the essential truth of Steyn's characterization of Penn State. However embarrassing that might be for a prominent beneficiary of that regime, he cannot seek to have Steyn found liable for Penn State's guilt: that is a legal nonsense.

Like discovery, this case itself should end now too.

"Because of the compelling First Amendment interest at stake," courts "regard summary judgment as a useful method of disposing of constitutional libel actions where appropriate." *Nader v. de Toledano*, 408 A.2d 31, 44 (D.C. 1979). "The threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs." *Meyers v. Plan Takoma, Inc.,* 472 A.2d 44, 50 (D.C. 1983).

Summary judgment dismissing Mann's libel claim against Steyn should be granted for any one of four independent reasons: Steyn's blog: (1) was true; (2) lacked "actual malice"; (3) was protected as part of a polemic about an important public issue; and (4) caused Mann no damage. On that last point, while Mann claims he was defamed by Steyn's linking him with the Sandusky case, in his just-published book *The New Climate War,* Mann thanks one of the convicted criminals in the Sandusky case. ¶ 185.

Steyn is entitled to summary judgment as a matter of law based on the following undisputed facts.

FOOTBALL AND HOCKEY

In July 2012 Steyn wrote a post titled "Football and Hockey" on National Review's online blog "The Corner." ¶ 1. The post was published three days after an independent investigation, commissioned by the Penn State Board of Trustees and led by former federal judge and FBI director Louis Freeh, publicly criticized in harsh terms Penn State's failure to respond to and report football coach Jerry Sandusky's sexual abuse of children. ¶ 7. Less than a month earlier (June 22, 2012), Sandusky had been convicted of 45 counts of child sexual abuse. ¶ 8. Steyn's post asked what Penn State's decades-long protection of a star of its football program might say about its 2010 "investigation" of another of its stars, Michael Mann. ¶ 2.

The very title of Steyn's piece, "Football and Hockey," makes clear the parallel he is drawing between the cover-ups in the Athletics Department ("Football") and in the Science Department (Mann's once famous global-warming "Hockey" stick). ¶ 4. As this Court stated in an earlier ruling, "Defendant [Steyn] used the [Freeh] investigation to support his viewpoint that the institution is corrupt and prepared to cover up the alleged wrongdoing of its 'stars.'" Oct. 22, 2019 Order at 4. Mann, the Court added, is "not the main target" of the article; Penn State is. *Id.*

No genuine dispute exists about the core facts concerning the Freeh Report, Mann's Hockey Stick, Steyn's post and its subject: Penn State's failed investigation of Mann. Discovery has also yielded crucial insight into Mann's dark and improper motives for choosing this battle in what he himself calls "the climate wars."

THE FREEH REPORT FAULTS PENN STATE'S INADEQUATE FOOTBALL INVESTIGATION FOR AVOIDING BAD PUBLICITY

The July 2012 Freeh Report stressed that "[f]our of the most powerful people" at Penn State, including President Graham Spanier, "concealed facts" about Sandusky's misconduct from the "university Community," ¶ 9, and that the Board of Trustees was "complacent," "did not perform its oversight duties," and "failed to inquire reasonably and to demand detailed information from Spanier" in whose "abilities" the Board had "overconfidence," *id*.

"[A]voidance of the consequences of bad publicity [was] the most significant, but not the only cause" for this failure. ¶ 10. Freeh's investigation also "reveal[ed] weaknesses of the University's culture, governance, administration, compliance policies and procedures." ¶ 11. The Report emphasized "the need for the leaders of" Penn State "to govern in ways that reflect the ethics and values of those entities." ¶ 12. The Report also criticized the extent to which leadership at Penn State acted to elude public scrutiny. According to the Report, "the lack of emphasis on values and ethics-based action created an environment in which Spanier [and other Penn State leaders] were able to make decisions to avoid the consequences of bad publicity." ¶ 13. The Freeh Report is explicit that the specific enabling of Sandusky's appalling crimes arose from the more general "culture" of the university under the Spanier regime. ¶ 11.

The day the Report was released, Defendant Rand Simberg published a post that drew a parallel between Penn State's failed investigation of Sandusky and its investigation of another of the University's stars, Climate Science Professor Michael Mann.

MANN'S HOCKEY STICK WAR

The Penn State investigation that both Simberg and Steyn wrote about emerged from the public controversy over Mann's work on what came to be known as the "Hockey Stick" graph. Mann has long been a lightning rod for criticism. ¶¶ 66-83. In 1998 and 1999, Mann and two colleagues published articles containing a graph that, they claimed, supported sharply increasing worldwide temperatures since 1850. The graph looked like a hockey stick, with a long flat shaft representing temperatures from the year 1000 to 1850, followed by a sharp upward blade showing a rise. ¶ 15.

Because of its vivid visual impact, the graph became much used by those proposing that governments take action to deal with what they saw as the threat of man-made global warming. The Hockey Stick graph created a "media frenzy," turned into a "political football," ¶ 67, and 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." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1222 (D.C. 2016), *as amended* (Dec. 13, 2018) ("*CEI*").

Criticisms of the Hockey Stick Abound. *See, e.g.,* A.W. Montford, *The Hockey Stick Illusion: Global Warming and the Corruption of Science* (2009); A.W. Montford, *"Hide the Decline,"* (2012); Mark Steyn, ed., *A Disgrace to the Profession* (2015) (collecting criticisms of Mann and the Hockey Stick by over one hundred respected scientists worldwide), and sources listed in ¶¶ 67-79. "Most scientists dismiss the Hockey Stick." ¶ 81. It has been called "fraudulent" or a "fraud" at least fifteen times by fellow scientists and others. ¶ 82.

By 2006, debate about the Hockey Stick reached such a fevered pitch that the U.S. House of Representatives formed a committee that determined that the Hockey Stick's findings were "somewhat obscure and incomplete" and found several "criticisms" of the graph "to be valid and

compelling." ¶ 25. *The Wall Street Journal* published an editorial titled "Hockey Stick Hokum" about the congressional committee's findings that "Mann's papers are plagued by basic statistical errors that call his conclusions into doubt." ¶¶ 71-72.

"Climategate." Such criticisms of the Hockey Stick multiplied and intensified in 2009 when embarrassing revelations in Mann's emails and those other climate researchers at the University of East Anglia's Climatic Research Unit came to light. In those emails, researchers said the Hockey Stick depended on "Mike's *Nature* trick"—combining actual temperature data with proxy datasets. ¶¶ 62, 64. The emails also discussed Mann's deleting post-1960 data from tree ring proxies that showed a decline in temperatures after 1960. ¶ 43. This was done, the emails stated, to "hide the decline" in the post-1960 data. ¶ 64. Mann admitted that public perception, not scientific precision, drove his deletion of the inconvenient data. ¶ 43(c). So embarrassing were these revelations that the episode soon took on the disparaging title "Climategate." ¶ 63. Another flood of scientific and media criticism ensued. ¶ 65.

Reacting to Climategate, Penn State purported to investigate Mann, but it was a sham. The Penn State investigation did not consider whether Mann had committed fraud or data manipulation regarding the Hockey Stick. Penn State's so-called investigation was so flawed, inadequate, and improper that it quickly prompted justified cries of a "whitewash" and "cover-up." *See infra* at 6-13, 18-19.

STEYN'S BLOG POST

Steyn's blog post was "prompted by," "based on," and "closely connected to" the Simberg article published two days earlier. Oct. 22, 2019 Order at 2, 5. The first paragraph "makes it clear" that Steyn's blog post is a "development" from Simberg's article. *Id.* at 2. The second paragraph is a 102-word, full paragraph quote from Simberg's article and "indicates the

following paragraphs are built upon that quote." *Id.* Of the 270 words in Steyn's post, more than a third (102) are a quotation from Simberg's article, on which Steyn comments. The third and fourth paragraphs also quote and comment on Simberg's article.

Steyn's post mainly concerns the faulty investigations by Penn State into their employees, including Sandusky and Mann. Steyn used the investigations to buttress his view that Penn State is corrupt and willing to cover up alleged wrongdoing of its "stars." *Id.* at 4.

Mann's claim against Steyn is based on three statements: (1) a quote from the Simberg article calling Mann "the Jerry Sandusky of climate change" who "molested and tortured data in the service of politicized science"; (2) Steyn's note he was "[n]ot 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"; and (3) "Michael Mann was the man behind the fraudulent climate-change 'hockey stick' graph, the very ringmaster of the tree-ring circus." Am. Compl. ¶ 28 (filed July 10, 2013).

Collectively, as this Court has recognized, these statements by Steyn asked the question whether Penn State whitewashed its investigation of Mann, as it had whitewashed its investigation of Sandusky.

PENN STATE'S WHITEWASHED INVESTIGATION OF MANN

Discovery has now answered Steyn's question about the propriety of Penn State's investigation of Mann. In late 2009, following release of the Climategate emails, Penn State drew up four charges against its prominent professor: (1) actions with the intent to suppress or falsify data, (2) actions, "directly or indirectly . . . with the intent to delete . . . emails," (3) misuse of privileged or confidential information, and (4) any actions that seriously deviated from accepted practices within the academic community. ¶¶ 102, 105.

To evaluate such charges, Penn State used a two-step procedure. First an Inquiry

Committee investigated and decided whether the charges should be referred to a second Investigatory Committee, which then decided if a violation has occurred.

Both stages of the Penn State process were hopelessly compromised, completely unreliable, and fell far short of minimum standards. The entire process was undercut by secret behind-the-scenes string-pulling by Penn State's president to avoid bad publicity. These failings directly echoed the faults in the Sandusky investigation. "Avoidance of bad publicity" was what the Freeh Report had called the "most significant" cause of the Sandusky cover-up. ¶ 10.

1. Inquiry Committee Improprieties.

From the start, Penn State failed to investigate the charges against Mann "thoroughly," as required by the governing Penn State policy. ¶ 103. The three-member Inquiry Committee, as a committee, interviewed only one witness—Mann—and accepted what he said at face value, no matter how implausible. Even though it is "important to gather information from all sides," ¶ 115, no critic of Mann or his work was interviewed by the Inquiry Committee, ¶¶ 116-17. Because the Inquiry Committee was acting as a gatekeeper or preliminary hearing to decide if any charges should be passed for further investigation, this function meant all Mann had to do was deny whatever he was accused of.

Participation by Recused Member. An original member of the Inquiry Committee, Dean William Easterling, recused himself on grounds of conflict of interest due to his close personal and professional relationship with Mann. ¶¶ 106-07. But even after recusing himself for bias, Easterling: (a) asked to continue receiving emails from the Committee, (b) still sent emails and provided information to the Committee, (c) "was "on the sidelines helping [Mann] out where he can," (d) was given a preliminary draft of the Inquiry Report for review and comment, and (e) testified as a witness at the Investigatory stage without mentioning or discussing his bias or his prior recusal for conflict of interest. ¶¶ 107-11.

"We Never Found [Mann] Innocent of Anything." Before preparing their report, the Committee members shared their dim views of Mann's behavior. Dean Henry Foley stated (i) we "cannot prove that he [Mann] is not guilty" of the first three charges, (ii) implied another Committee member thought Mann was guilty, and (iii) noted "evidence to suggest that he [Mann] indeed may have compromised these [ethical] principles." ¶¶ 118-21. Foley then wrote, "if we cannot find him not guilty [of the first three charges] then we must do an investigation," but then inconsistently contradicted himself by concluding that none of those three charges should be investigated. ¶¶ 122, 129.

Foley went on to say he favored a "censure" of Mann by the Committee on the fourth charge. ¶ 123. Another Committee member—Alan Scaroni—responded, saying: "I am uncomfortable applying the word 'innocent' in regard to any of the charges. My willingness to 'set aside' accusations 1-3 was not because I find him [Mann] innocent, rather because it is unlikely that a faculty committee will have access to the depth of information needed to make a definitive finding, one way or the other." ¶ 125. A third member of the Inquiry Committee—Candace Yekel—wrote that "we felt Mann did in fact breach the ethical standards" in the relevant policy. ¶ 127.

Foley testified the Committee "never found [Mann] innocent of anything." ¶ 128. They "could not find anything to prove [Mann's] innocence." *Id*. They did not "exonerate" Mann. *Id.*

First Draft. Nonetheless, Foley prepared a two-and-a-half-page draft of the Inquiry Committee's report, stating, despite his and the other Committee members' prior comments and reservations, "We found nothing to warrant an investigation [of the first three charges] and we will not pursue this further." ¶ 129. The fourth allegation, according to the draft, "should be remanded to a faculty investigative committee for deeper consideration." ¶ 130.

Secret Back-And-Forth with Spanier. Without telling other Committee members, Foley took the extraordinarily improper and unprecedented step of secretly emailing the draft to Penn State President Spanier (the same man who had protected Sandusky and had thwarted any attempts to expose him). ¶ 131. Spanier was not a member of the Inquiry Committee, supposedly had no role in its work, ¶ 133, and "did not look at any evidence because I was not involved in the investigation." ¶ 132. Yet Spanier replied to Foley, without copying the other Committee members, with ten specific written suggestions for changing the draft. ¶¶ 134-37.

Concerns About Bad Publicity. Spanier recommended to Foley that the Inquiry Committee, to avoid adverse publicity, say "you found no further evidence" of wrongdoing. ¶ 135. Thoughts about bad publicity and Penn State's reputation dominated Spanier's reply. Spanier told him "we will be blasted if we say only what is here. The world is watching and we have to be brave enough to say what we really mean." ¶¶ 135-36. Spanier "urges" Foley to take into account "international media attention, the firestorm from elected officials, and the consequences to the reputation of the University and its leadership." ¶ 137.

Spanier knew that elevating publicity above all else was wrong. He repeatedly acknowledged at his deposition that concerns about bad publicity should play no role in an academic misconduct inquiry/investigation. Public relations, bad publicity, and media attention—conceded Spanier—should not "in any way" bear on the outcome. ¶ 138. But, as Freeh critiqued, inherent in the Penn State "culture" and a particular concern of Spanier was trying to "avoid" the "consequences of bad publicity." ¶¶ 11, 13.

Foley Does Spanier's Secret and Improper Bidding. "I will make sure we make many of your changes," Foley immediately wrote back to Spanier. ¶ 140. Based on "input from people, including Graham Spanier," the final report of the Inquiry Committee, written by Foley,

ballooned from two-and-a-half pages to ten pages and implemented Spanier's secret instructions. ¶ 141. The particular findings and decisions on the first three charges differ markedly from and are contrary to the earlier exchange of views among the Committee members. Foley himself thought Mann's Climategate emails were "nasty," "ad hominem," and "snarky." ¶ 144. Foley thought it "appropriate to call [Mann] out on it." *Id.* And Scaroni did not think Mann's answers had satisfied the Committee, nor had the Committee considered or determined whether Mann had manipulated data or acted fraudulently. ¶¶ 145-46.

Regardless, as to each of those three charges, the Inquiry Committee, exercising its gatekeeper role, strangely and mysteriously found in its final report "no substance to the allegation," "no credible evidence" that Mann committed the acts alleged, and "no basis for further examination." ¶ 142. The fourth charge, the vague catch-all charge about "accepted practices," was the only one the Inquiry Committee recommended should proceed to an Investigatory Committee. ¶ 143.

The "Deleted Emails" Charge. The single most glaring example of the Inquiry Committee's willful blindness is its mishandling of the second charge about whether Mann participated, "directly or indirectly," in any actions "with the intent to delete, conceal, or otherwise destroy emails." ¶ 155. That charge grew out of a May 29, 2008 email from fellow climate scientist Phil Jones to Mann, in which Jones wrote: "Mike, Can you delete any emails [in response to a Freedom of Information Act request] you may have had with Keith [Briffa] re AR4? Keith will do likewise. . . . Can you also email Gene [Wahl, another climate scientist] and get him to do the same?" ¶¶ 102, 105, 147.

Although Mann maintains he did not delete any emails, he damns himself by admitting he replied to Jones: "I'll contact Gene about this asap" and that he "forwarded Mr. Jones' email

to Gene Wahl without comment." ¶¶ 148-49. By so forwarding Jones' request, Mann thereby implicitly encouraged Wahl to delete emails, which Wahl in fact did. ¶ 150. Bizarrely, Mann did not volunteer, and the Committee did not ask, and therefore did not itself know, if Wahl had deleted any emails, and, what is more, did not care. ¶ 154.

Nor did the Committee find out—because Mann did not answer forthrightly—the crucially important fact that shortly after Mann forwarded the "delete any emails" message, and before Wahl had deleted anything, Mann and Wahl had a conversation about Jones' email in which Mann told Wahl that Jones' deletion request was in connection with criticism of climate research but failed to ask Wahl *not* to delete emails. ¶ 153. Yet the Inquiry Committee accepted Mann's ridiculous self-serving statement, "I did nothing wrong." ¶ 151.

The Committee's decision not to refer this serious charge for investigation is absurd and unsupportable. Despite the key word "indirectly" in the second charge—whether Mann ever "indirectly" acted "with the intent to delete, conceal, or otherwise destroy emails"—the Committee did not consider that charge as applying to Mann's obvious encouragement of a fellow scientist to delete emails. ¶ 155. But at least one member understood that "indirectly" meant to include a situation where Mann encouraged others to delete emails. *Id*. Instead, and in the teeth of the undisputed facts and Mann's own admission, the Committee covered up Mann's misconduct by burying it.

**"Cover Our A$$es."** Mann trivialized the fourth charge, the one moving on to the investigatory stage, as a "cover our a$$es" charge. ¶ 159. By that he meant "it allows Penn State to say that they fully investigated at least some aspect of the allegations, while allowing them to dismiss in short order the truly serious allegations." *Id.* Mann was right. Mann's use of dollar signs presumably refers to money he generates for Penn State through research grants.

Mann "Not Very Truthful." When Foley later read an email Mann had sent about a conversation he had with Foley about the Report, Foley found it "astonishing" and "not very truthful." ¶ 157. This lack of veracity on Mann's part raised a "question" in Foley's mind, and rightly so, about "Mann's truthfulness" during the Penn State inquiry. ¶ 158.

2. Investigatory Committee Improprieties.

Compounding the Inquiry Committee's abject failures were those of the Investigatory Committee. In addition to the Investigatory Committee's failure to ask recused Inquiry Committee member Easterling, who was now appearing as a witness, about his conflict of interest, the Investigatory Committee acted in an irregular fashion.

"I'm Wondering What Is Going On." The one critic of Mann interviewed by the Investigatory Committee was Richard Lindzen, an eminent climatologist from MIT, who did not understand how the Inquiry Committee could have dismissed the first three charges. ¶¶ 161-62. According to the Investigatory Committee Report, "When told that the first three allegations against Dr. Mann were dismissed at the inquiry stage, Dr. Lindzen's response was: 'It's thoroughly amazing. I mean these are issues he explicitly stated in the emails. I'm wondering what is going on?'" ¶ 162. The Committee didn't respond to Dr. Lindzen's comment. ¶ 163.

Lindzen believes Penn State was "obviously intent on finding nothing. . . . [T]here was something there. . . . [Mann's] most famous work was, in fact, incorrect and primitive." ¶ 164.

Not "Clearly Acceptable Practice." One member of the Committee wrote, regarding the fourth charge, that "No interviewee said that the type of actions [Mann] engaged in on that were clearly acceptable practice." That member, Sarah Assman, said, "I definitely do think we need the 'hand slap.'" ¶ 166.

Proxies Not Facts. Rather than its own investigation of facts regarding the fourth charge, the Committee used two proxies. As evidence of Mann's innocence, it considered (not tree rings

but) funding that Mann had received as well as honors and professional recognition. ¶ 165. The Committee's reliance on such proxies bothered the National Science Foundation. The NSF asked, dripping with skepticism, "How the committee determined that Dr. Mann's success in obtaining grants, publications, and awards, in and of itself, can serve as relevant for concluding that particular acts he committed did not seriously deviate from accepted practices." ¶¶ 167-68.

A Free Pass. The Committee found "no substance" to the remaining fourth charge, just as Mann had predicted in his "cover our a$$es email." ¶ 159. Such a conclusion only underscores the cumulative errors and shortcomings in the Penn State investigation.

The undisputed facts demonstrate that the so-called investigation was, from start to finish, riddled with irregularity and had no credibility. For Mann or anyone else to rely in good faith on the Penn State investigation as exoneration of Mann is, on examination, impossible.

MANN'S IMPROPER MOTIVE FOR SUING

Although Steyn's blog post is about Penn State, Mann makes little mention of that university in his Complaint. Instead, Mann sees this lawsuit as another battle in what he himself calls *The Hockey Stick and the Climate Wars* and *The New Climate War,* which is in truth Mann's years' long campaign to stop debate about an issue of profound public importance and to bar criticism of him or his Hockey Stick. His efforts in this vein take many forms.

For years, Mann has thrust himself into the role of both lead creator and primary defender of the "now notorious," "infamous," and "toxic" Hockey Stick, lashing out at the critics and trying to prevent publication of differing views.

Mann's "Confrontational" and Harassing Personality. Mann, said one of the Penn State committee members who looked into Mann's conduct, is "obsessed . . . more than is normal," "more than any other scholar," and in a "not healthy" way with people who criticize his

work. ¶ 174. With what Bradley, one of Mann's co-authors (and his listed expert witness here) calls a "confrontational" personality, a "conspiratorial world view," and an "amazingly arrogant," "take no prisoners" approach, ¶ 174-75, Mann has a history of weaponizing and lowering scientific and public policy debate about global warming by attacking—in print, by email, on the Internet, and in court —those who disagree with him.

There is often no legitimate purpose to his actions other than to harass, bankrupt, and ruin his many perceived enemies. In 2011 Mann sued the Canadian scientist Tim Ball in Vancouver. Eight years later, the case was dismissed by the Supreme Court of British Columbia for Mann's failure to prosecute. ¶ 182. By then, Defendant Ball's retirement savings were exhausted and his health was ruined—so, from Mann's point of view, mission accomplished. *Id.* Nevertheless, the Supreme Court ordered Mann to pay Ball's costs. *Id.*

With his "relish for the battle," Mann goes on the offensive in "nasty" and "angry" ways, pours out "vitriol" as acrid as anything said about him, and is partial to personal vendettas. ¶ 174.

Mann's "Nasty" Attacks on Critics. Mann has made abusive personal attacks on his critics unrelated to earnest scientific disagreement. His public Twitter account, where he boasts over 150,00 followers, is his preferred forum. There, he launches regular invectives against perceived detractors. He has claimed that "professional climate change deniers are basically just horrible human beings," ¶176(p), some of whom "represent an existential threat to humanity and must be treated that way," ¶ 176(q). He described Sydney *Daily Telegraph* columnist Tim Blair as "ONE of the worst people in the world" responsible for "indecent, bilious assaults on humanity." ¶ 176(s). Responding to a critical Tweet, he stated, "Your avatar is clearly not you. No actual dog could be this ignorant . . . ." ¶ 176(t). Mann also instigated others to attack his critics. ¶ 194-96.

Mann has tried to limit debate about the Hockey Stick. He is upset that those who disagree with him dare to use "newspaper op-eds, public debates, fake scientific articles, and any other means available" to advocate their point of view. ¶ 184. This self-appointed "gatekeeper" role of Mann in trying to control what could and could not get published about climate science is what Mann's co-author Bradley regarded as "arrogant." ¶ 175. It is what led Bradley to say: "I would like to disassociate myself from Michael Mann's view," adding "Vomit. Puke." *Id.*

Mann called the leading McIntyre & McKitrick articles, one of which was published in the same prestigious peer-reviewed journal as Mann's, "pure scientific fraud" and "pure crap." ¶ 179. On his Twitter account, Mann said: "McIntyre is a professional liar/denier-for-hire," and in an email referred to "that human filth we call McIntyre." *Id*.

As for other people who disagree with him, Mann is a name-caller: "putz," "a fucking embarrassment of a human being . . ." ¶ 177. For other examples of Mann's elevated notion of scientific debate, see ¶¶ 176-80.

Mann apparently does not agree with what his expert witness/co-author Bradley said: that science "does not advance through ad hominem attacks." ¶ 175.

During the Penn State investigation, Dean Foley found Mann's vitriolic, "nasty" emails about his critics so severe as to be "worthy of censure." ¶ ¶ 123, 144. "[T]hey were emails that you would not expect from people who are high minded and scientifically inclined." ¶ 144. This case is no different.

Mann Aims to "Tak[e] Down" and "Ruin" Defendants. Here, Mann's own unguarded statements show that this lawsuit is not about protecting Mann's reputation—which has long been tarnished with accusations of fraud and has suffered no damage as a result of Steyn's post—but instead about his attacking and hurting people Mann doesn't like and trying to stifle

debate about climate change in general and the Hockey Stick in particular. "[W]e are going after National Review," Mann wrote shortly after filing this lawsuit in 2012, because it is an "established outfit" with "much more to lose" than "bottom feeders like CEI." ¶ 186 Still, he added that "taking down CEI would be helpful." *Id.*

As for Steyn, Mann said: "My hope is that we can ruin this pathetic excuse for a human being through this lawsuit." ¶ 191. After filing suit, he wrote to a YouTube blogger: "Have you thought about doing something about Steyn? Viewers would benefit from learning just what an ugly human being he is." ¶ 194. To another media personality, Mann wrote: "just following up to see if you folks were going to do anything on Steyn. He could certainly use some attention (of the unflattering kind)." ¶ 195. In the 2013 Postscript to *The Hockey Stick and the Climate Wars,* Mann includes Steyn as one of "the individuals at the center of an ever well-oiled climate change denial machine." ¶ 193.

Rather than a good faith defense of his reputation, and in keeping with his war-like metaphors and his thirst for battle,[1] Mann saw this ill-conceived lawsuit as a means to assault those who disagree with him, to limit debate about a controversial subject of great public interest—climate change. He even told the press that he planned to use pretrial discovery for improper purposes. On the day he filed suit, Mann emailed a writer at the Huffington Post: "you might also drop the point (although don't quote me on it!) that 'discovery' . . . is a two-way

[1] Mann's 2021 book *The New Climate War* brims with bellicose phrases. He talks about the "the scientist as warrior," "battlefield," "forces being mobilized," "attack," "opening skirmish in a new climate war," "combat," "the various fronts on which this war is being waged," the "battle," "the final battle" and Mann's "battle plan," a "powerful arsenal," those who disagree with him as the "enemy," his becoming a "combatant in the climate wars," "he's seen the enemy up close, in battle" and "the various fronts on which this war is being waged." Mann admits, "I have colleagues who have expressed discomfort in framing our predicament as a war." ¶ 184. Reading so many militaristic phrases, one can be forgiven for viewing this lawsuit as a weapon.

street. Wouldn't it be interesting to get access to all of National Review and Competitive Enterprise Institute's email exchanges with other industry groups and advocates, Koch Brothers, etc. Just saying. But you didn't hear that from me." ¶ 190.

ARGUMENT

Summary judgment is now appropriate because Steyn's blog was true, lacked actual malice, was part of a public debate, and caused Mann no harm. *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1257 (D.C. 2012). Earlier decisions in this case (denying motions to dismiss at the trial level and on appeal) are no bar to summary judgment now, after extensive discovery. *PDK Labs v. Ashcroft,* 338 F. Supp. 2d 1, 6-7 (D.D.C. 2004); *CEI*, 150 A.3d at 1230.

I. STEYN'S STATEMENTS WERE TRUE: PENN STATE'S INVESTIGATION OF MANN WAS INADEQUATE AND THE HOCKEY STICK IS MISLEADING

Truth is an absolute defense to libel. *Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013). Mann's libel claim should be dismissed because Steyn's post, "'viewed in its entire context, merely conveys materially true facts from which a defamatory inference can be drawn." *Id.* at 184. A statement is not defamatory, even with "minor inaccuracies so long as the substance, the gist, the sting, of the libelous charge be justified." *Id*. Steyn's post meets this test.

Each of the three challenged statements—and any related inferences—are true. It is true that Mann is "the Jerry Sandusky of climate change" in the sense that, like Sandusky, Mann was a beneficiary of the corrupt and unethical administration that ran Penn State and protected its stars. Steyn's suggestion was correct that Simberg "had a point" when he argued Mann had "molested and tortured data" to achieve his "fraudulent" hockey stick. And it is true Mann was responsible for the "fraudulent climate-change 'hockey stick' graph." Broadly, these three statements—and any related inferences—concern two topics: the efficacy of Penn State's investigation and Mann's Hockey Stick.

Steyn's blog post poses a serious, disturbing, but legitimate question: "If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?" Steyn basically asks whether Penn State's cover-up of predatory sexual abuse in the athletic department suggests it might be willing to cover up misconduct in relation to the controversial Hockey Stick. A question, of course, cannot be defamatory. That could end the inquiry.[2] But to the extent that Steyn's blog is construed to imply an answer to his question, discovery has demonstrated comprehensively the shortcomings of Penn State's investigation and the connivance of the university's most senior figures, from its President down. The "substance, gist, [and] sting" of Steyn's post may be—to borrow a phrase—an inconvenient truth to Mann, but it is a truth nonetheless.

A. Penn State's Investigation of Mann Was Inadequate

The Penn State investigation drew criticism from others, before Steyn. In a separate report, the NSF found Penn State's investigation inadequate. Penn State, according to the NSF, "did not provide the supporting evidence and documentation necessary to concur with [its] conclusions" and "did not adequately review the allegation [of data falsification]." ¶ 167. The NSF was particularly "concerned that the University did not interview any of the experts critical of [Mann's] research." ¶¶ 167-68. Other academics and media outlets called the integrity of the Penn State investigation into question. ¶¶ 169-72.

A 2010 article in *The Atlantic* said "The Penn State Inquiry . . .would be difficult to parody. . . .[T]he case for the prosecution is never heard. Mann is asked if the allegations (well,

[2] In *Ollman v. Evans*, the D.C. Circuit considered whether an article that "expressly posed . . . questions" in the penultimate paragraph was capable of defamatory meaning. 750 F.2d 970, 987 (D.C. Cir. 1984). It concluded that the "[p]rominently displayed" questions "militate[] in favor of treating statements as opinion." *Id.* In much the same way, Steyn concludes his post by posing a question raised by Penn State's inadequate investigation of Sandusky, "weaken[ing] any inference that the author possesses knowledge of damaging, undisclosed facts." *Id.* at 983.

one of them) are true, and he says no. His record is swooned over. Verdict: case dismissed." ¶ 169. The article identified "a wave of criticism accusing the university panel of failing to interview key people, neglecting to conduct more than a cursory review of the allegations and structuring the inquiry so that the outcome—exoneration—was a foregone conclusion." ¶ 170. A 2010 *Fox News* article led with the headline: "Penn State probe into Mann's Wrongdoing a 'Total Whitewash.'" ¶ 171. The Pittsburgh Tribune said that Penn State "has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." In that same article, the Pittsburgh Tribune quoted scientist Richard Lindzen as calling the Penn State investigation a "whitewash." ¶ 172.

Penn State's investigation of Mann fell short of its own standards, was subject to the same shortcomings of the Sandusky investigation, and was described by other critics as a "whitewash." Steyn's criticisms of Penn State's investigation thus convey materially true facts and are substantially true as a matter of law.

B. The Hockey Stick Is Fraudulent

Steyn's characterization of Mann as the "man behind the fraudulent climate-change 'hockey-stick' graph" and the observation that Mann "molested and tortured data in service of politicized science" were also truthful. Numerous respected academics, a congressional report, many books, and the popular press have explained the multiple ways the data behind the Hockey Stick fails to support its conclusions and criticized it as a fraud. *See supra* at 5-6; *see* ¶¶ 19-83. The Hockey Stick is a statistical device, but Mann is not a statistician and did not work with statisticians to develop it. ¶¶ 19-20. Several "deceptive and misleading" aspects of the Hockey Stick are consistent with scientific definitions of fraud and data falsification. ¶ 35.

First, Mann manipulated data when he deleted Keith Briffa's post-1960 tree ring proxy

data from the version of the Hockey Stick published in Chapter 2 of the Intergovernmental Panel on Climate Change's (IPCC) Third Assessment Report (TAR). ¶ 35. Briffa's data showed a "cooling trend" after 1960 that was inconsistent with the Hockey Stick shape. ¶ 38. An initial draft of the IPCC TAR included Briffa's post-1960 data. ¶ 39. But Mann deleted Briffa's post-1960 data in the final draft, cutting off Briffa's dataset earlier than the others shown in the graph—thus "hiding the decline" in his data. *Id.* ¶¶ 40, 42-43.[3]

Mann colleague Chris Folland wrote to Mann and Briffa in 1999 that the post-1960 temperature decline in Briffa's data "contradicts" the Hockey Stick curve and "dilutes the message rather significantly." ¶ 43(a). Briffa agreed: "I know there is pressure to present a nice tidy story as regards 'apparent unprecedented warming in a thousand years or more in the proxy data' but in reality the situation is not quite so simple." ¶ 43(b) (Briffa). In response, Mann bemoaned the data's potential *political* impact, claiming that "if we show Keith's series," "skeptics" could "have an [sic] field day." ¶ 43(c). Mann followed his political instinct and ignored his colleagues' advice. He deleted the post-1960 Briffa data without explaining or even disclosing it in the Report. ¶¶ 41-42. This deletion "concealed" the divergence between tree ring temperature proxy data and the instrumental temperature record, "rais[ing] serious doubts about the reliability of paleoclimate temperature reconstructions using tree rings." ¶ 42.

Second, Mann spliced proxy data with actual temperature data without making it clear, "creat[ing] a strong but entirely misleading contrast," according to statisticians at the University

[3] Accusations that a scientist is guilty of "molesting and torturing data" have been used before. In 2004, an article in the MIT Technology Review talked about letting "science proceed unmolested." ¶ 32. And, in a much-quoted line, Nobel Prize-winner Ronald H. Coase (Economics 1991) wrote in his 1994 book *Essays on Economics and Economists*: "if you torture the data long enough, it will confess to anything." ¶ 83. At his deposition, Abraham Wyner explained that "torturing data" is a common colloquialism in the statistics world. *Id.*

of Pennsylvania and Northwestern University. ¶ 30. Mann's "splicing of proxy and instrumental data enhanced his concealment of the divergence problem," ¶ 45, and his "manipulations"—his deletion of the Briffa data and splicing proxy and instrumental data—"are consistent with most definitions of image fraud." *Id.* Academics have also found that Mann used an "improper [data] normalization procedure" that "tends to emphasize any data that do have the hockey stick shape, and suppress all data that do not." ¶¶ 32-33; *see also* ¶ 22. The National Academies of Sciences concluded "uncertainties of the published reconstructions have been underestimated." *Id.* ¶ 28.

Third, Mann "cherry-picked" proxy data that conformed to the Hockey Stick shape, giving greater weight to data that supported the shape and deemphasizing or excluding data that did not. In their 2005 *Geophysical Research Letters* paper, McIntyre and McKitrick found that Mann relied on a single dataset of bristlecone pine trees to reproduce temperatures during the "controversial" fifteenth century. ¶ 49. In a separate peer-reviewed paper, they found "a number of examples[] where results adverse to [Mann's] claims were not reported," including "calculations excluding bristlecone pines" and "results from calculations using archived Gaspé tree ring data." *Id.* The Wegman Report, commissioned by Congress, also criticized Mann's overreliance on bristlecone pine trees, which are "not a reliable temperature proxy for the last 150 years" because they reflect changes caused by CO_2 fertilization, not temperature. ¶ 50. In an email to Keith Briffa in 2003, Mann admitted that "[w]e actually eliminate records with negative correlations . . . ." ¶ 52. Mann's "data cherry-picking straddles the fine line between sloppy science and scientific conduct" that "contribute[s] to the perception of a 'fraudulent Hockey S[t]ick' among journalists, the public and scientists from other fields." ¶ 54.

Fourth, Mann published a 2008 version of the Hockey Stick with a temperature proxy dataset called the "Tiljander proxies" flipped upside-down. ¶¶ 55-56. This flip of the Tiljander

proxies was severely criticized by fellow scientists, including two co-authors of the 2003 paper presenting this data set. ¶ 59. One of the co-authors said, "Normally, this would be considered a scientific forgery, which has serious consequences. *Id*. Mann ultimately published the upside-down Tiljander proxies in multiple papers. ¶ 57. Although other authors who published the upside-down Tiljander proxies later issued corrigendums (corrections), Mann never did. ¶ 58. Mann's "continuing [] misuse [of] the incorrect version of the data after being notified of the issue is a clear example of data falsification." ¶ 60.

Together, these defects in the Hockey Stick led a lead author on the IPCC TAR to testify to Congress in 2011 that the graph "misrepresented the temperature record of the last 1,000 years." ¶ 61. Steyn's statements regarding the Hockey Stick, therefore, also convey materially true facts and are substantially true as a matter of law.

To the extent that Steyn's critique of Mann is read more broadly—and there is no reason to expand it beyond the Penn State inquiry—discovery has provided further evidence of Mann's misconduct ranging from his duplicitous claim to be a Nobel Laureate, ¶ 178, to his repeated, savage attacks on other academics that violate the norms of his profession. ¶¶ 176-81.

II. STEYN PUBLISHED WITHOUT ACTUAL MALICE

In any event, Steyn acted without "actual malice," which also justifies summary judgment in his favor. Steyn testified he believed his statements were true when he made them and they were based on good faith research. Steyn's position on the Hockey Stick has been consistent in his published writing for two decades and across the world. Since the dawn of this century, Steyn has maintained the fraudulence of the graph in London's *Sunday Telegraph*, *The Australian*, *The National Post* of Canada, *Maclean's* (the Canadian equivalent of *Time*) and other publications around the British Commonwealth and in the United States. ¶ 207.

To defeat summary judgment, then, Mann—a limited public figure, *CEI*, 150 A.3d at 1252 n.52, suing about controversial speech of public importance—has a doubly high bar. First, Mann must establish Steyn wrote with "actual malice," *i.e*. he (1) had "subjective knowledge of the statement's falsity," or (2) acted with "reckless disregard for whether or not the statement was false." *Doe v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014). And, second, Mann must show Steyn's "actual malice" by "clear and convincing" evidence. *Id.*; *Beeton v. Dist. of Columbia*, 779 A.2d 918 (D.C. 2001). Mann fails both prongs.

Mann cannot prove, let alone with the required convincing clarity, that Steyn doubted the truth of the statements at issue. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The test is not whether a reasonably prudent man would have published or would have investigated further. The inquiry depends on the defendant's subjective state of mind. Mann must, but cannot, prove that Steyn "entertained serious doubts" as to the truth of the challenged statements, that he had a degree of awareness of their falsity. *Id.* To the contrary: as the global publications listed above demonstrate, Steyn had no "reckless disregard" for the falsity of his statements—he had been researching and making them consistently for over ten years.

The undisputed facts of Steyn's subjective state of mind show that: (a) he sincerely and in good faith believed (and still believes) his statements to be true and had a reasonable basis for so believing; (b) Steyn's criticisms of Penn State's investigation are rooted in credible sources and borne out by pretrial discovery; (b) Steyn's critique of the Hockey Stick is based on credible sources; and (d) other so-called investigations do not "exonerate" Mann.

A. Steyn Believed with a Good Faith Basis His Statements Were True

Steyn's "testimony that he published the statement in good faith" is highly relevant. *St Amant*, 390 U.S. at 731. Steyn is the only reliable evidentiary source for his state of mind at the

time of publication. His deposition testimony is essential to understanding his reasonable basis for believing the truth of his statements.

At his deposition, Steyn testified at length about the reasonable grounds on which he viewed the Hockey Stick as fraudulent. *See* ¶¶ 217-29. He described the incongruity of Mann trying to reconcile two types of data into one graph, as the Hockey Stick purports to do. ¶ 224. Steyn sincerely believes that Mann's graph is "an attempt to simplify a very sophisticated, complex nuanced subject," ¶ 225, that "obscure[s] the fact that the proxy data does not correlate with the observed records." *Id.* "The Hockey Stick is fraudulent because it does not prove what it purports to prove." ¶ 226. Yet Penn State nonetheless concealed "what was going on with Mr. Mann [and] the Hockey Stick coverup" in preparing its investigatory report on Mann. ¶ 212. Steyn reasonably believes this concealment, coupled with Penn State's failure to conduct an adequate investigation of the Sandusky affair, evidences an endemic culture of corruption. ¶ 215.

B. Steyn's Criticisms of Penn State Are Rooted in Credible Sources

An avid consumer of political news media, Steyn closely followed Penn State's investigations of Mann and Sandusky. In publishing the blog post, he relied on his recollection of popular media coverage of the failures of Penn State's investigations. Steyn recalled reviewing an article by the Chronicle of Higher Education that "saw parallels between Penn State, Penn State's coverup of Sandusky and Penn State's coverup for Mann. . . . In both cases the priorities for Graham Spanier and Penn State were brand protection." ¶ 213.

Steyn also personally reviewed the Sandusky indictment, ¶ 209, and the Freeh report. *Id*. "When you read . . . the Freeh document . . . [t]hey were fully in the tank to protect the Penn State Football Department as Spanier was fully in the tank to protect the Penn State Science Department." ¶ 214.

Steyn makes a reasonable and genuine inference that a university that failed to properly investigate a sex abuse scandal could also be capable of failing to investigate a scientifically inaccurate graph. A little over six months before "Football and Hockey," in November 2011, Steyn had published a blistering column about a Penn State faculty member, Mike McQueary, who walked into the locker room and witnessed Sandusky sodomizing a ten-year-old boy, excoriating the "Penn State protection racket" that shielded University officials from consequences in the Sandusky affair. ¶ 216. That evil act was compounded by those of Spanier & Co. as they moved into "brand protection" mode. Steyn's language—"the Penn State protection racket"—makes clear that Steyn, like Freeh, understood that this particular problem arose from the general culture of Penn State—or what Mann in his latest appreciation of Spanier calls the "supportive environment." Mann, *The New Climate War* 270. As the very headline of Steyn's column puts it: "Penn State's *Institutional* Wickedness." ¶ 216 (emphasis added).

The Freeh report—the impetus for Simberg's article—concluded, among other shocking failures, "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims." ¶ 9. Steyn based his critique of Penn State's investigations of Sandusky and Mann in "The Corner" on this foundation.

Steyn closely followed Penn State's investigations of Mann and Sandusky and had a deep knowledge of credible sources criticizing both, girding his statements in a reasonable and genuine belief that Penn State's failure to adequately investigate sexual misconduct raises the possibility that it could be capable of the same with regard to popular scientific graph. Discovery in this case has borne out the correctness of Steyn's conclusions. *See supra* at 6-13.

C. Steyn's Criticisms of the Hockey Stick Were Based on Credible Sources

Mann is not the "main target" of Steyn's blog post. Penn State was. Oct, 22, 2019 Order

at 4. This alone should be dispositive. *See Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 319 (1984) ("[t]he editorial giving rise to this appeal when viewed 'within the four corners thereof' and as ordinary people would understand it simply is not directed toward the plaintiff. Instead it criticizes" the admissions policies of the University of North Carolina; libel action by plaintiff dismissed). To the extent Steyn's post could be construed as a critique of Mann and his Hockey Stick, such criticisms are well supported. *See supra* at 19-22.

As Steyn testified, climate scientists have levied a litany of criticisms against the Hockey Stick. "[American physicist] Harold Lewis called it 'the greatest pseudoscientific fraud of my lifetime.' . . . [Nobel Laureate] Ivar Giaver said it was the emperor's new clothes of science, [] Rob Watson, a Scottish climate scientist described it . . . as a 'crock of sh*t,' [and] Jonathan Jones at Oxford University called it obvious drivel." ¶ 227. In the immediate years before publishing his post, Steyn also read academic critiques by "McIntyre and McKitrick and Keith Briffa and Judith Curry." ¶ 228 (published academic critiques of the Hockey Stick methodology Steyn reviewed). "When you start looking at what some of these other scientists say it becomes very hard not to conclude that these are not honest mistakes [in the Hockey Stick Graph], but are in fact intentional." ¶ 229.

These and other criticisms of the Hockey Stick were widely covered in popular media. ¶¶ 66-82. Steyn's blog post is rooted in these credible critiques. He closely followed the vociferous public and scientific debate about the Hockey Stick, so much so that in 2015 he published a 320-page book synthesizing scientific critiques of the graph by many pundits and scientists. At the height of the Climategate scandal, Steyn "was checking in on new developments every day." ¶ 219. When media coverage was "less dramatic," Steyn "check[ed] the various climate change websites . . . three or four times a week." ¶ 220. His media

consumption canvassed esteemed journals and periodicals, such as the *MIT Technology Review* and *The Atlantic*, *see* ¶ 221, and popular climate blogs by journalists and climate researchers, including "the most read climate website in the world," ¶ 222. Steyn also purchased and "read . . . in full" articles about climate science from a range of peer-reviewed scientific journals. ¶ 223.

Taking one side of a debate is not actual malice. Mann must show that Steyn engaged in "purposeful avoidance of the truth." That Steyn found credible critiques on one side of the Hockey Stick debate more persuasive is not enough for a reasonable juror to conclude, by clear and convincing evidence, that Steyn purposefully avoided the truth of his statements. *See id.*

D. Mann Has Not Been "Exonerated"

Mann's principal argument for actual malice rests on quicksand. As a shield from criticism, Mann mistakenly relies on investigations that he asserts did not find that he personally committed wrongdoing. And even the existence of reports that do make favorable findings about Mann's research are not the defamation license that Mann claims they are. The Climategate investigations do not create a genuine dispute of material fact that Steyn published with reckless disregard to his statements' falsity.

The investigations did not focus on Mann. Steyn did not disregard the Climategate investigations. To the contrary, he avidly read several investigations from the United Kingdom. ¶ 208. Those investigations did not "exonerate" Mann; they either addressed matters wholly unrelated to Mann or concluded that Mann's methods were best left for open and ongoing scientific debate. ¶¶ 84-101. Mann himself testified that "not every single one of those inquiries looked specifically at the details . . . of the hockey stick studies." ¶ 101.

Of those that did consider the Hockey Stick, several investigations noted "misleading" aspects of the graph and raised concerns about its statistical analysis. ¶ 100 (Russell Report:

Hockey Stick graph published in World Meteorological Organization report was "misleading in two regards. It did not make clear that in one case the post 1960 data was excluded, and it was not explicit on the fact that proxy aspects of the graph's presentation and its statistical analysis."); ¶ 28 (National Academies of Sciences: "As part of their statistical methods, Mann et al. used a type of principal component analysis that tends to bias the shape of reconstructions."); ¶ 87 (NSF: "There are several concerns raised about the quality of the statistical analysis techniques that were used in [Mann's] research."); ¶ 98 (Oxburgh Panel: "[I]t is very surprising that research in an area that depends so heavily on statistical methods has not been carried out in close collaboration with professional statisticians.").

Mann claims "exoneration" by multiple U.K. and U.S. reports that do not even mention him, but his only real "exoneration" was by Penn State—at the improper, unethical direction of Graham Spanier, a man who has no more or less credibility than any other convicted criminal.

III. STEYN'S POST WAS NOT DEFAMATORY, AS IT WAS PART OF A VIGOROUS DEBATE ABOUT MATTERS OF PUBLIC CONCERN

"Much as Dr. Mann's pride in his work may be wounded by criticisms of the hockey stick graph, [defendants] are entitled to their opinion on the subject and to express them without incurring liability for defamation." *CEI*, 150 A.3d at 1253. While the appellate court went on to conclude—before discovery—that Steyn's blog post was not protected opinion, it did so without considering the broader social context of the post. *Id.* at 1247-49. This context is critical to understanding whether or not "Football and Hockey" is defamatory.

The question of whether a given statement protected opinion, or not, requires the consideration of the "totality of the circumstances." *Ollman v. Evans*, 750 F. 2d 970, 997 (D.C. Cir. 1984). These circumstances include (1) the common usage or meaning of the words; (2) whether it is based on objectively verifiable facts; (3) the context of the words within the

statement; and (4) the context of the statement within the broader social setting or debate. To this list, the Supreme Court in *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), added that an opinion could be defamatory if based on undisclosed defamatory facts.

In this case, there is ample support for each of the initial factors the appellate court has already considered: (1) Steyn's language denoted he was expressing an opinion ("he has a point"); (2) was not suggesting verifiable facts (the "tree ring circus"); and (3) Mann's criticized snippets are best understood as subordinated to, what this Court recognized is the piece's "main idea"—an opinionated critique of "the inadequate and ineffective investigations conducted by Pennsylvania State University." Oct. 22, 2019 Order at 1-2. And, given that the post gave an opinion based on the just-released Freeh Report and the hotly debated Hockey Stick, it rested on disclosed, not undisclosed, facts.

But the most significant factor that weighs in the totality of the circumstances is the factor that the appellate court did not consider: the setting of the blog withing the broader social context of the both the polemic surrounding the Hockey Stick and the public questioning of Penn State, in the wake of the Freeh Report. Although "[s]tatements are not to be viewed in isolation but in context," *CEI*, 150 A. 3d at 1248, "'[c]ontext' includes not only the immediate context of the disputed statements, but also the type of publication, the genre of writing, and the publication's history of similar works," *Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C. Cir. 2013). The context of Steyn's post thus also includes the "context" of the blog itself because "the *settings* of the speech in question make[] their . . . nature apparent." *Id.* (emphasis in original). Courts should also examine "the broader social context into which the statement fits." *Ollman*, 750 F. 2d at 983. This examination militates against defamation.

The setting of Steyn's statements—a polemical, online blog on a subject of fierce public

debate—makes plain that the blog post is expressing opinion on a matter of public concern.

A. Steyn's Post Appeared in an Opinion Magazine

Steyn's post concerned a matter of public importance and appeared in the online blog of an opinion magazine. This context weighs heavily in favor of finding that his post is protected opinion. The "'fundamental importance of the free flow of ideas and opinions on matters of public interest and concern'" has been "vigorously upheld in the District of Columbia." *Abbas v. Foreign Policy Grp*., *LLC*, 975 F. Supp. 2d 1, 17 (D.D.C. 2013) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)). The right to free expression "is surely at its zenith when it is exercised in an Op-Ed column on a subject of general interest." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Reading an opinion column, "[t]he reasonable reader . . . is fully aware that the statements found there are not 'hard' news." *Id.* at 582 (alteration in original). "Readers expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered fair or balanced elsewhere in the newspaper . . . This broad understanding of the traditional function of a[n] [opinion] column . . . will therefore predispose the average reader to regard what is found there to be opinion." *Id.* at 583. National Review is 'a magazine of conservative *opinion.*' ¶ 5. Steyn published his post in "The Corner," National Review's online-only blog for brisk, polemical, and instantaneous takes on the news of the day. "The traditional function of a column like [Steyn's] will therefore predispose the average reader to regard what is found there to be opinion." *Id*.

B. Steyn's Post Appeared on a Blog

The culture of Internet communications is distinct from print media such as newspapers and magazines. *Sandals Resorts Int'l Ltd. v. Google, Inc*., 86 A.D.3d 32, 43–44 (1st Dep't 2011). Courts "have consistently protected statements in online forums as statements of opinion rather than fact." *Bellavia Blatt & Crosset P.C. v. Kel & Partners*, 151 F. Supp. 3d 287, 295 (E.D.N.Y.

2015); Robert D. Sack, Sack on Defamation § 4:3:1(D) ("[S]ome courts have recognized that Internet-borne communications, in the form of blogs . . . are frequently used as vehicles for hyperbolic public opinion.").

"The Corner" is National Review's online-only blog for daily drive-by takes on breaking news. "Football and Hockey" is typical; it flowed immediately from the release of the Freeh Report. It was also one of *seven* posts Steyn published on the blog in the one-week span between July 10 and 17, 2012. ¶ 6. In these posts, Steyn covered an array of issues of public importance in polemical, pungent, and provocative fashion. *Id.* "From the earliest days of the Republic, individuals have published and circulated short, frequently sharp and biting writings on issues of social and political interest." *Ollman*, 750 F.2d at 986. "Football and Hockey" was "plainly part and parcel of this tradition of social and political criticism." *Id.*

C. Steyn's Post Appeared Amid a Vigorous Debate

Steyn's blog post concerned Penn State's investigations and climate change. Both were matters of intense public interest and the Hockey Stick had been a matter of ongoing public debate for almost twenty years.

The "broader social context [] is [also] vital to a proper understanding of the disputed statements." *Farah*, 736 F.3d at 535; *accord Jacobus v. Trump*, 51 N.Y.S.3d 330, 337 (Sup. Ct. N.Y. Cnty. 2017). Steyn's post appeared during a raucous polemic, established in part by Mann's own diatribes. Mann published his book *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines* in 2012, just months before Steyn's blog post. The book describes "slick, bare-knuckled ways" that critics cast doubt on his work. Mann is not a victim in this polemic; he is one of its bare-knuckled architects. Steyn's blog post was one of countless entries in this strident, years-long debate, characterized by routinely sharp insults and personal attacks from both camps.

IV. MANN CAN SHOW NO HARM CAUSED BY STEYN'S STATEMENTS

The lack of damages attributable to Steyn's statements is the hollow core of this case. Mann is "seeking compensatory damages . . .[and] must prove (1) the existence of an actual injury, (2) causation traced back to the defendant's wrongdoing, and (3) the amount that is precisely commensurate with the injury suffered." May 5, 2020 Decision at 2; *accord Robertson v. McCloskey*, 680 F. Supp. 414, 415 (D.D.C. 1988). ("[S]pecific evidence demonstrating financial harm resulting from libel is required"). Mann has done, and can do, none of this.

No Injury. Mann has produced no credible evidence that he has been harmed by Steyn's blog. On the contrary, his economic and professional positions have improved. ¶¶ 230-31. Mann has not provided any evidence of a decline in income or other form of pecuniary harm.

Nor has Mann offered any evidence of reputational harm. Just the opposite. In addition to his 2013 promotion to Distinguished Professor, Mann received numerous accolades in the months and years after the Steyn Post. *Id.* He continues to be regarded as a prominent climate change scientist. ¶ 230.

Mann cannot name a single colleague who believed the content of the Steyn Post. ¶ 201. Mann was so unconcerned that the Steyn Post would harm his reputation that he himself republished Steyn's comments several times, in various media, to perhaps hundreds of thousands of people. ¶¶ 198-200. No evidence exists that the Steyn Post did any harm to Mann's reputation.

No Causation. Mann cannot show that his alleged economic harm was a "natural and proximate consequence of the alleged inaccuracies contained in the article, and not the result of other causes." *Schoen v. Washington Post*, 246 F.2d 670, 672 (D.C. Cir. 1957). Insofar as Mann relies on any before-and-after analysis—for example, that he received less grant funding after the publication of Steyn's post than before—he is speculating and overlooking causation. Mann

admits that (1) "[t]here is no way for me to determine . . . how many of the denied funding grants . . . were denied as a direct result of defendants' statements"; (2) he "ha[s] no information about who read [the Steyn Post]"; and (3) he "can't prove any one specific grant was impacted." ¶ 232. The Steyn Post played no role in the denials of Mann's grant proposals, which were based solely on their scientific merit. ¶ 233.

Were one to take seriously Mann's simplistic "before-and-after" analysis, one would, ironically, have to conclude that Steyn's article helped Mann's career and reputation. Since Steyn's article appeared in July 2012, Mann's income has steadily risen and he received a number of professional awards. ¶¶ 230-31.

No Presumed Damages. Inasmuch as Mann lacks clear and convincing proof of actual malice, no presumed damages are allowed. "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Gertz v. Robert WeIch Inc.*, 418 U.S. 323, 349 (1974). And even if actual malice were shown, which it has not been, the overwhelming weight of authority from many U.S. jurisdictions bars presumed damages in all defamation cases.[4]

[4] *See, e.g.*, *Bierman v. Weier*, 826 N.W.2d 436, 447 (Iowa 2013) (holding that plaintiff must prove a "demonstrable injury" to prevail against a media defendant and "plaintiffs no longer benefit from presumed fault or damages"); *Smith v. Durden*, 276 P.3d 943, 948–49 (N.M. 2012) (barring presumed damages in all defamation actions and holding that "actual injury to reputation must be shown as part of a plaintiff's prima facie case in order to establish liability"); *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752, 756 (1998) (prohibiting presumed damages in all defamation cases because "the better and more consistent rule . . . is to require plaintiffs to prove reputational injury in all cases"); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 313 (Mo. 1993) ("[P]laintiffs . . . must prove actual damages in all cases."); *Gobin v. Globe Pub. Co.*, 649 P.2d 1239, 1242 (Kan. 1982) ("Damages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel."); *Pate v. Serv. Merch. Co. Inc.*, 959 S.W.2d 569, 574 (Tenn. App. 1996) (finding Tennessee Supreme Court had held that "damages must be shown in all defamation cases"); *Metromedia, Inc. v. Hillman*, 400 A.2d 1117,1123 (Md. 1979) (reviewing Gertz and state

No Nominal Damages. Absent any actual harm, nominal damages do not justify allowing Mann's case to proceed to trial. Steyn's Post is one entry in an enormous, decades-long controversy about the Hockey Stick. It made no charges against Mann that had not been made countless times in a wide variety of publications. The potential, if any, for nominal damages is far outweighed by the significant future costs, time, and effort of this lawsuit that has now been going on for more than eight years.

CONCLUSION

This lawsuit should be dismissed as against Defendant Steyn. His blog post was substantially true and without "actual malice." It was protected commentary on a matter of public importance without harm to Mann. Any one of these grounds would by itself justify summary judgment in Steyn's favor. Together, they make an overwhelming case for ending this baseless libel action now, before it takes up more time, effort, and money, and continues to dissuade other commentators from speaking out without fear of being sued.

As a public figure, Mann has ample remedy without suing for libel and thereby trying to stifle or curtail discussion of an important public issue, discussion essential to self-government. He should be trying his case in the court of public opinion, not in a taxpayer-funded court of law. "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of

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common law and finding that for "pleading to be sufficient[, it] must show a basis for believing that the plaintiff has sustained actual injury"); *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 363 (Wash. App. 1997) (a "defamation plaintiff can recover damages only if he or she proves harm factually caused by the defendant's wrongful conduct"); *see also* Dan B. Dobbs et al., 3 *The Law of Torts* § 574, at 336 (2nd ed. 2011) ("The presumed damages rule may be headed for extinction. Commentators have attacked it and some states have abandoned it even when the Constitution does not require them to do so.")

effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Given Mann's celebrity and taste for the spotlight, his remedy lies in telling his story to the public. He has often done so in the past eight years, including in a Postscript to his book in which he repeats the allegedly defamatory remarks and describes this litigation.

In dealing with this case, and this motion for summary judgment in particular, we should bear in mind Justice Alito's admonition that:

> Climate change has staked a place at the very center of this Nation's public discourse. Politicians, journalists, academics, and ordinary Americans discuss and debate various aspects of climate change daily—its causes, extent, urgency, consequences, and the appropriate policies for addressing it. The core purpose of the constitutional protection of freedom of expression is to ensure that all opinions on such issues have a chance to be heard and considered.

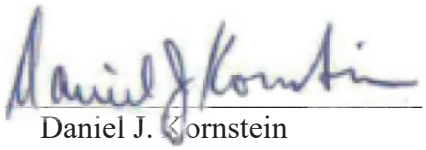
Nat'l Review, Inc. v. Mann, 140 S.Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari). Libel suits like this one have a baleful chilling effect on public discourse and lead to self-censorship of topics of public importance.

Steyn's summary judgment motion should be granted.

Dated: January 22, 2021

Respectfully submitted,

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP

By: 
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I hereby certify that on January 22, 2021, I served a copy of the foregoing upon the following and by email and mail at the addresses listed below:

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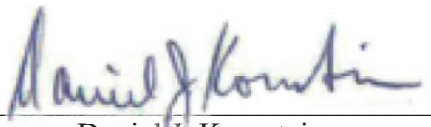

Daniel J. Kornstein

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 Alfred S. Irving, Jr. Status Hearing: June 22, 2020

PROPOSED ORDER

Upon consideration of Defendant Steyn's Motion for Summary Judgment dismissing the Complaint as against him, and all responses thereto, it is hereby

ORDERED that the Motion is **GRANTED**.

SO ORDERED.

Dated: _____, 2021

_____
Hon. Alfred S. Irving, Jr.

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