SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E MANN, PhD 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, NW Washington, DC 20036, - and - RAND SIMBERG c/o Competitive Enterprise Institute 1899 L Street, NW Washington, DC 20036, - and - MARK STEYN, Box 30 Woodsville, NH 03785 Defendants.	)	Case No 2012 CA 008263 B Calendar No.: 3 Judge: Frederick H. Weisberg Next event: None

DEFENDANT STEYN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS

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> "No one, rich or poor is entitled to abuse the judicial process."[1]

Defendant Mark Steyn's three counterclaims aim to make plaintiff Michael Mann accountable for his abuse of the judicial

[1] Tripati v. Beaman, 878 F.2d 351, 353 (10th Cir. 1989).

process. They are designed to protect one of the highest values in our society: freedom of expression, for Steyn and for all of us. Those counterclaims seek to defend the jewel in the crown of our civil liberties. They state valid claims and should not be dismissed. If successful, they will make plaintiff liable for his serial efforts to stifle and avoid criticism of his work on a highly controversial issue of intense public interest -- the extent of supposed man-made global warming and how to deal with it.

Mann's motion fails to address the essence of any of Steyn's vital counterclaims and mischaracterizes what has been alleged. He erects and then tries to knock down strawman claims that Steyn has not made or asserted. Two thirds of Mann's brief, for example, is spent arguing that Steyn has not sufficiently alleged claims for abuse of process and malicious prosecution, even though Steyn asserts no such claims. Mann devotes the rest of his brief to turning the D.C. Anti-SLAPP statute upside down. Rather than inhibit public participation or the right of advocacy on issues of public interest, Steyn's counterclaims do precisely the opposite -- they challenge Mann's attempts to gag his critics; their purpose is to protect public participation and advocacy.

The motion to dismiss should be denied. Freedom of speech, the glory of our vibrant way of life, should have its day in court.

Summary of Argument

Mann's motion should be denied because:

1. Steyn's first counterclaim is an implied right of action under the D.C. Anti-SLAPP law. Steyn is a member of the class the statute was meant to benefit, there is no indication that the statute was not meant to create such a right of action, and a remedy for Steyn is consistent with the purposes and public policy considerations underpinning the statute.

2. Steyn's second counterclaim, for constitutional tort, is appropriate because Mann's lawsuit infringing on Steyn's First Amendment rights qualifies as state action under the Fourteenth Amendment, and the lawsuit by its very existence creates a chilling effect on free speech.

3. Steyn's third counterclaim, for abusive litigation, is an appropriate use of the common law to remedy tortious use of the court system. It does not impinge on Mann's right of access to the courts, which Mann's abusive conduct has rendered unprotected.

4. Mann's attempt to invoke the D.C. Anti-SLAPP law is misguided because Steyn's counterclaims, unlike Mann's claims, seek only to redress inappropriate litigation -- they make no attempt to interfere with Mann's right of advocacy.

Governing Standards on this Motion

The standards on a motion to dismiss are familiar. The Court relied on them in denying defendants' motions to dismiss the complaint. Pursuant to Rule 12(b)(6), "dismissal is warranted only if, construing the complaint [or counterclaim] in

the light most favorable to the non-moving party and assuming the factual allegations to be true for the purposes of the motion, 'it appears, beyond doubt, that the plaintiff [or counterclaim plaintiff] can prove no facts which would support the claim.'"[2] The Court must "take the facts as alleged in the Complaint as true" and dismiss "only where it is clear that the plaintiff [or counterclaim plaintiff] cannot prove facts in support of his claim which would entitle him to relief."[3] Deciding whether dismissal is proper must be made on the face of the pleading alone.[4] Applying these controlling criteria to the counterclaims, the Court should deny plaintiff's motion to dismiss, just as it previously denied defendants' motions to dismiss.

Steyn's Counterclaims

Steyn's counterclaims are simple and straightforward, vindicate important public interests, and have a common thread. All grow out of plaintiff's use of this lawsuit and others to silence criticism of plaintiff himself. One counterclaim is based on statute, one on the Constitution, and one on the common

[2] Leonard v. District 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)). See also Mann's Jan. 18, 2013 Mem. in Opp. to National Review and Steyn's Motion to Dismiss, at 57-59.

[3] Cagliati v. District Hosp. Partners, LP, 933 A.2d 800, 807 (D.C. 2007).

[4] See Telecommunications of Key West, Inc. v. United States, 757 F.2d 1330, 1335, 244 U.S. App. D.C. 335, 340 (D.C. Cir. 1985).

law. They should be allowed to go forward.

Mann's suit here is part of a disturbing pattern. In addition to suing Steyn and his co-defendants here, Mann has brought suit in British Columbia against a retired professor whose criticism of Mann consisted of stating that Mann should be "in the state pen, not Penn State."[5] Mann has also threatened litigation over a parody video by "Minnesotans for Global Warming," claiming that "Professor Mann's likeness" is protected from parody and satire.[6] In addition, Mann, who is suing here over his professional reputation, ironically and hypocritically has used the courts to thwart discovery pertaining to his controversial research.[7]

[5] See Mann v. Ball et al, British Columbia VLC-S-S-111913 (2011) (exhibit attached).

[6] Cease and desist letter from Mann's attorney to Horner dated March 8, 2010.

[7] See Cuccinelli v. Rector and Visitors of the University of Virginia, 283 Va. 420, 722 S.E.2d 626 (2012) (suit by state attorney general seeking Mann's e-mails relating to the extent of alleged man-made global warming research; Mann did not consent to access); The American Tradition Institute v. The Rector and Visitors of the University of Virginia, Circuit Court of Prince William County, Virginia, Index No. CL-11-3236 (Mann intervened, contributing briefing and oral argument, to prevent any FOIA disclosure of his e-mails about the extent of supposed man-made global warming research).

Argument

I

SINCE A PRIVATE RIGHT OF ACTION CONSISTENT WITH THE D.C. ANTI-SLAPP LAW'S PUBLIC POLICY IS IMPLIED, STEYN'S FIRST COUNTERCLAIM UNDER THAT LAW IS VALID

Steyn's first counterclaim asserts an implied right of action under the D.C. Anti-SLAPP Act.[8] That statute provides a remedy to defendants who, like Steyn, have been wrongfully sued for "acts in furtherance of the right of advocacy on issues of public interest." This Court has already determined that the comments by Steyn that Mann's lawsuit challenges constitute such acts.[9] The statute not only provides for the dismissal of the offending lawsuit, but establishes a limited remedy in the form of costs and attorneys' fees incurred in having to respond. Steyn's first counterclaim goes beyond that remedy.

The Court's earlier ruling denying defendants' motion to dismiss under the Anti-SLAPP statute, now on appeal, is no impediment to Steyn's first counterclaim. The Court did not "find," as Mann claims in his moving papers, that Mann was likely to succeed. That motion was decided, and the Court's view of Mann's likelihood of success given, based only on pleadings and papers without benefit of a hearing. The Court made that ruling in the context of Rule 12(b)(6)'s standards requiring him to accept the factual allegations in Mann's pleading as true. The Court may conclude differently after discovery and once all the

[8] DC Code §§ 16-5501, et seq.

[9] Decision dated July 19, 2013 at 8-9.

evidence is before it on summary judgment or at trial. Indeed, Mann has himself argued that "Orders Denying Anti-SLAPP Motions Are Not Conclusive."[10] Mann there explained that defendants' Anti-SLAPP motions raise a "disputed question" about Mann's "ability to succeed on the merits [which] will recur throughout the lower court proceedings."[11]

Whether or not the counterclaim is sustainable must also be decided under Rule 12(b)(6) standards, which Steyn's first counterclaim satisfies. Those standards require this Court to accept Steyn's allegations as true and uphold his counterclaims where, as here, the facts as alleged would, if proven, support the cause of action. Inasmuch as the Court's ruling on the Anti-SLAPP motion is on appeal, any implications of that ruling for this counterclaim should in any event await the outcome of that appeal.

A. Implied Private Right of Action

The Anti-SLAPP statute implicitly creates a private right of action. Specifically, it creates a private right not to be subject to vexatious and financially ruinous litigation designed to quash free speech concerning matters of public interest. A special motion for limited relief (legal fees and costs) under the statute is not the only avenue of redress. Nothing in the legislative history or any case law precludes a private right of action for broader relief (damages for chilled speech).

The inquiry for determining if the statute here implies a

[10] Pl's Dec. 3, 2013 Appeal Br. at 19.

[11] Id. at 19-20.

private right of action is satisfied:

> 1. Is the plaintiff "one of the class for whose especial benefit the statute was enacted" -- that is, does the statute create a . . . right in favor of the plaintiff?
>
> 2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> 3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?[12]

First, Steyn, like other cultural commentators who routinely advocate on issues of public interest, is "one of the class for whose especial benefit the statute was enacted." Second, the legislature both explicitly and implicitly intended to create such a remedy, for it expressly provides for the award of the costs of litigation and attorney fees. Third, since a remedy is provided for, it is consistent with the underlying purposes of the legislative scheme.

B. Public Policy Considerations

The existence of an implied right of action here is buttressed by public policy. Steyn's first counterclaim advances the public policy behind the Anti-SLAPP law. That policy promotes freedom of speech by protecting advocacy on issues of public interest, including the extent of alleged man-made global

[12] Cort v. Ash, 422 U.S. 66, 78 (1975); Kelly v. Parents United for District of Columbia Public Schools, 641 A.2d 159 (D.C. 1994) (applying Cort v. Ash standards in holding that private right of action exists under District's Nurse Assignment Act). The fourth factor in Cort is irrelevant here. Kelly, 641 A.2d at 163 n.10.

warming and what, if anything, to do about it.

Passage of the D.C. Anti-SLAPP law in 2012 is part of a recent growing widespread recognition of the pernicious problems associated with abusive litigation and the need to provide relief to victims.[13] The SPEECH Act, passed unanimously by both the Senate and the House of Representatives in 2010,[14] remedied the related problem of intimidating libel lawsuits in foreign jurisdictions to silence critics in the United States -- a phenomenon known as libel tourism. Congress explained:

> The freedom of speech and the press is enshrined in the first amendment to the Constitution, and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.
>
> . . . Some persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, . . .
>
> [I]n some instances the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work.[15]

These vital public policy concerns are no less implicated by Mann's lawsuit. Steyn should be permitted to proceed with his

[13] See American Bar Association Resolution, Aug. 6-7, 2012 ("RESOLVED, that the American Bar Association encourages federal, state, and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs.").

[14] 28 U.S.C. §§ 4101 et seq.

[15] H.R.2765 § 2, 111th Cong. (2010) (Reported in Senate).

first counterclaim under the authority of the D.C. Anti-SLAPP law.

II

SINCE MANN'S LAWSUIT IS STATE ACTION CHILLING SPEECH, STEYN STATES A CLAIM FOR CONSTITUTIONAL TORT

Mann's motion all but ignores Steyn's second counterclaim sounding in constitutional tort. That counterclaim, based on allegations of Mann's ill-conceived scheme to silence Steyn's fundamental free speech right to criticize Mann, is firmly rooted in the First and Fourteenth Amendments, the civil rights statute, 42 U.S.C. § 1983, and a long line of Supreme Court authority. This Court must accept those allegations as true for purposes of this motion. So accepted, they state a constitutional tort claim.

A. State Action

The sole argument Mann makes -- the bald assertion that his lawsuit does not meet the state action requirement for an unconstitutional violation of rights -- ignores decades of contrary authority.[16] Starting with the landmark Supreme Court decision in Shelley v. Kraemer,[17] courts have looked beyond the simple identity of the parties and focused on the essence of the conduct at issue. State action can be found when a court is

[16] Mann's only attempt to address the state-action issue is confined to a footnote on page 3 of his brief and is noteworthy for the lack of citation to any legal authority.

[17] 334 U.S. 1 (1948) (lawsuit to enforce racially restrictive covenant is state action).

necessarily called upon to play a role in what amounts to a deprivation of constitutional rights.[18]

Where -- as here -- a private lawsuit infringes on First Amendment rights, state action exists. In such a civil lawsuit between private parties, the Supreme Court has repeatedly held that "the application of state rules of law by the . . . state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[19] Exactly so here. Mann's lawsuit invokes the application of state, or in this case District of Columbia, law in a state or District of Columbia court "in a manner alleged to restrict First Amendment freedoms." That alone is enough for state action under a long line of Supreme Court authority.

B. Chilling Effect

The nature of Mann's suit makes its mere filing, without more, suffice for state action. The existence of the lawsuit by itself creates a chilling effect, not only on Steyn but on everyone else who might want to participate in the debate. Such a libel suit involving a controversial issue of public interest raises serious First Amendment issues. The cases finding private lawsuits to be state action rely heavily on New York Times Co. v.

[18] See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Merrell v. Renier, 2006 WL 3337368 (W.D. Wash. Nov. 16, 2006); Sabghir v. Eagle Trace Community Ass'n, Inc., 1997 WL 33635315 (S.D. Fla. Apr. 30, 1997); Board of Managers of Old Colony Village Condominium v. Preu, 80 Mass. App. Ct. 728, 956 N.E.2d 258 (App. Ct. of Mass. 2011).

[19] NAACP v. Claibourne Hardware Co., 458 U.S. 886, 916 n.51 (1982) (citing New York Times Co. v. Sullivan, supra); Cohen v. Cowles Media Co., supra, 501 U.S. at 668.

Sullivan,[20] which itself stressed the chilling effect and self-censorship caused by such suits. When a litigant like Mann misuses the judicial system as an instrument to silence critics and chill free speech, state action exists.

Public discourse on the important subject of the extent of alleged man-made global warming should not be chilled by the threat of tort damages for expressing criticism. Rather, such public debate should be encouraged. Uninhibited and robust public debate depends on a better informed citizenry that can receive and evaluate all sides of an issue. It is essential to self-government. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[21] That bedrock principle applies here when the courts are used by a public figure plaintiff like Mann to limit the stock of information and silence critics. The second counterclaim states a claim.

[20] 376 U.S. 254 (1964). See e.g., NAACP v. Claibourne Hardware Co., supra, 458 U.S. at 916 n.51 (citing Sullivan); Cohen v. Cowles Media Co., supra, 501 U.S. at 688 (citing Sullivan).

[21] First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). See also Citizens United v. Federal Election Commission, 558 U.S. 310, 341 (2010).

III

SINCE MANN'S ABUSIVE LITIGATION IS UNPROTECTED, STEYN STATES A CLAIM UNDER COMMON LAW

Mann's assumption that Steyn's third counterclaim sounds "in the torts of abuse of process and malicious prosecution"[22] is incorrect. Rather, as expressly and carefully set forth in the pleading itself, Steyn seeks through his third counterclaim redress at common law for Mann's attempts to suppress free speech and to restrain competition in the marketplace of ideas through his use of the courts to conduct "abusive litigation akin to malicious prosecution [and] abuse of process."[23] Mann's misconduct is remediable at tort and not protected simply because it involves the courts. Steyn has adequately alleged a right to common law relief.

A. Mann's Abuse Actionable

"[N]o one should be permitted to subject a fellow citizen to [litigation] for an improper purpose and without an honest belief that the accused may be found [liable]."[24] Mann's conduct, as alleged by Steyn, does exactly that. His pattern of intimidating behavior, waged against Steyn and others, shows Mann's use of lawsuits and the threat of lawsuits to chill the speech of those who would otherwise want to weigh in on a matter of public debate. Steyn's allegations, which must be deemed true on this

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[22] Pl.'s Br. at 3.

[23] Counterclaim ¶ 146 (emphasis added).

[24] W. Page Keeton, Prosser and Keeton on Torts § 119 at 871 (5th ed. 1984).

motion, are not, as Mann claims, irrelevant attempts to recover on the claims of others. Rather, they support and show Steyn's likelihood of success on a common-law claim to recover for Mann's abusive interference with Steyn's exercise of his constitutionally protected free speech and public expression rights.

Steyn alleges actionable conduct appropriately redressed at common law by Steyn, and presumably others, who have been damaged by Mann's efforts to muzzle their expression. Wrongful deprivation of that free expression right, particularly through the use of the tort system itself, that damages the deprived party in some fashion gives rise to a need for a remedy, even if that precise cause of action has not yet been specifically described by the courts. One of the great virtues of the common law is its ability to adapt. As the leading treatise on torts put it:

> There is no necessity whatever that a tort have a name. New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.[25]

[25] Id. at § 1, at 3-4. See also Yost v. Torok, 344 S.E.2d 414, 417 (Ga. 1986) ("The tort system can (and should) provide within its own structure the means for preventing its abuse").

So it is here -- regardless of whether Mann's conduct falls under a specifically named common law cause of action, this Court can and should provide redress for it.

Illustrating this adaptability, in 1986 the Supreme Court of Georgia recognized an "abusive litigation" tort meant to fill in some of the gaps between abuse of process and malicious prosecution.[26] In Yost v. Torok, after reviewing the elements of malicious abuse of process and malicious use of process, the Court expressed concern that the terms used to define and discuss those torts created "substantial uncertainty, to the extent that a plaintiff with a bona fide claim might have no effective means of relief," leading to "an injury without a remedy."[27]

To close this gap and resolve this uncertainty, Georgia's highest court recognized a broader "abusive litigation" tort that provided, in part, a remedy for litigants targeted by unjustified claims.[28] So, too, should this Court close any gaps in the common law and ensure that damaging misuses of the tort system, such as that allegedly perpetrated by Mann against Steyn here, do not go unremedied.

B. Mann's Abuse Not Protected

Mann's choice to carry out his alleged abuses through the judicial system does not protect him from liability. "[T]he

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[26] 344 S.E.2d 414 (Ga. 1986).

[27] Id. at 416.

[28] Id. at 417.

right of access to the courts is neither absolute nor unconditional, . . . and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious. . . . No one, rich or poor, is entitled to abuse the judicial process."[29] "Just as false statements are not immunized by the First Amendment right to freedom of speech . . . baseless litigation is not immunized by the First Amendment right to petition."[30] "First Amendment rights may not be used as the means or the pretext for achieving substantial evils" that the law prohibits.[31]

To be sure, this Court deemed Mann's complaint in this action sufficient to survive defendants' Anti-SLAPP motions, but this is not a final ruling on its merits (or lack thereof). After further proceedings, including discovery, Mann's lawsuit may (and likely will) be found baseless by this Court. In any event, whatever its supposed facial merits, Mann's lawsuit is in reality designed to stifle the expression of others, and, under these circumstances, that is enough to entitle Steyn to common

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[29] Tripati, supra, 878 F.2d at 353 (internal citations omitted). See also Butler v. Dep't of Justice, 492 F.3d 440, 445, 337 U.S. App. D.C. 141, 146 (D.C. Cir. 2007) (finding although "[l]itigants have a constitutional right of access to the courts . . . that right is neither absolute nor unconditional") (internal quotation omitted); Caldwell v. Obama, 2013 WL 6094237, at *11 (D.D.C. Nov. 20, 2013) (same).

[30] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983). See also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("the right of access to the . . . courts . . . is part of the right of petition protected by the First Amendment. Yet that does not necessarily give [petitioners] immunity from the antitrust laws").

[31] California Motor Transport Co., supra, 404 U.S. at 513.

law relief.

Abusive litigation is actionable or remediable in a variety of contexts. Although malicious prosecution and abuse of process causes of action are not at issue here, the existence of such causes of action shows that litigants cannot use the courts for malicious ends and escape liability for the damages they cause. But the landscape of remedies for abusive litigation stretches much further than those two traditional causes of action. The recent spate of Anti-SLAPP laws is one example. Another is in the antitrust context, when a "sham" litigation -- a baseless lawsuit in an attempt to directly interfere with its competitor's business relationships -- is not entitled to First Amendment protection.[32] Yet another is a civil lawsuit to retaliate against an employee for exercising certain rights under Federal labor law.[33]

Beyond specifying that certain litigation conduct is remediable at law, the courts have also exercised their power to combat misuse of the judicial system by limiting the rights of certain litigants to bring lawsuits absent certain conditions. This includes, among other tings, enjoining litigants who file repeated, frivolous lawsuits from filing new actions without leave of the court, enjoining litigants from filing lawsuits pro

[32] See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56-57 (1993); California Motor Transport, supra, 404 U.S. at 515; WAKA LLC v. DC Kickball, 517 F. Supp. 2d 245, 251 (D.C. Cir. 2007).

[33] See Bill Johnson's Restaurants, Inc., supra, 461 U.S. at 744; Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26, 31, 345 U.S. App. D.C. 102, 107 (D.C. Cir. 2001).

se without leave of the court, or denying requests from repeated frivolous litigants to proceed as indigents where that mechanism has in the past been abused.[34]

As in all the above contexts, here too Steyn seeks redress for Mann's practice of filing lawsuits to achieve an impermissible end -- indeed, one that strikes at Mann's victims' most fundamental rights -- the chilling of the free expression rights of Steyn and others. Such conduct is not protected.

C. Adequately Pleaded

Steyn adequately pleads the elements required to allege a right to relief in tort at common law. Specifically, he alleges that Mann has intentionally used litigation for an improper purpose to restrict the scope of Steyn's freedom of expression by using a lawsuit or the threat of a lawsuit to chill the exercise of that freedom of expression by Steyn and others who might want to contribute to the public debate.[35] Accepting these allegations as true, which this court must, Steyn has alleged the facts needed to support an abusive litigation claim.

The damages Steyn seeks are appropriate to such a claim. "Intangible, non-pecuniary damages ... can be recovered in

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[34] See, e.g., Butler v. Dep't of Justice, 492 F.3d 440, 445, 377 U.S. App. D.C. 141, 146 (D.C. Cir. 2007) (denying litigant's request to proceed in forma pauperis); Urban v. U.S., 768 F.2d 1497, 1500, 248 U.S. App. D.C. 64, 67 (D.C. Cir. 1985) (requiring litigant to receive leave of court before filing new claims); Caldwell v. Obama, 2013 WL 6094237, at *11 (D.D.C. Nov. 20, 2013) (same); Landrith v. Schmidt, 732 F.3d 1171, 1174 (10th Cir. 2013) (proposing injunction against litigant proceeding pro se without meeting certain conditions and obtaining leave of court).

[35] See Counterclaims ¶¶ 130-36, 144-47.

addition to the pecuniary losses" associated with litigation meant to intimidate, and "[p]unitive damages are also recoverable in a proper case."[36] Here, Mann's malicious behavior -- an intentional tort -- targeted at one of our society's most deeply-ingrained rights, cries out for redress to the fullest extent possible.

IV

SINCE STEYN'S COUNTERCLAIMS DO NOT INHIBIT MANN'S ADVOCACY, MANN'S RETALIATORY ANTI-SLAPP MOTION IS MERITLESS

Mann's lawsuit is not advocacy. It therefore does not even cross the statutory threshold. His misguided attempt to invoke the Anti-SLAPP law's provisions to discourage Steyn's counterclaims would defeat the very purpose of that law. That is so because Steyn's counterclaims -- unlike Mann's lawsuit -- do not seek to interfere with a right of advocacy. Since Mann's libel suit does not constitute "advocacy," Steyn need not show a likelihood of success on the merits to defeat Mann's motion.

Mann's attempt to enlist the Anti-SLAPP law as a weapon to silence Steyn's criticisms is perverse. It is contrary to the fundamental salutary purpose of that statute. It wrongfully seeks the imposition of costs and attorneys' fees against Steyn in retaliation for his asserting and defending his constitutional right to speak out on a matter of great public interest.

Nor is this the first time Mann has attempted to misuse the Anti-SLAPP law in a manner foreign to its intended purpose. Mann

[36] W. Page Keeton, Prosser and Keeton on Torts, supra, § 120 at 896 (5th ed. 1984).

earlier sought to invoke it against all the defendants both in his opposition to their Anti-SLAPP and Rule 12(b)(6) motions to dismiss and their motions for reconsideration. Mann apparently believes Steyn should be penalized not only for having the temerity to challenge Mann's views on this vital public interest issue, but also for standing up for his right to do so.

Anti-SLAPP laws are intended to stem the growing misuse of the legal system by wealthy, powerful interests who bring abusive lawsuits against individuals or community organizations that speak out against them.[37]

> Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. . . . The goal of the litigation is not to win the lawsuit but to punish the opponent[s] and intimidate them into silence.[38]

The stated purpose of the Anti-SLAPP law perfectly describes the use to which Steyn asks the Court to put it in his first counterclaim. It is diametrically opposed to Mann's misuse of the law.

Mann is attempting to staunch criticism of his theories concerning the extent of alleged man-made global warming by filing intimidating litigation. Steyn, on the other hand, does nothing to silence Mann, chill his speech, or prevent him from

[37] See George W. Pring and Penelope Canan, SLAPPS: Getting Sued for Speaking Out (1996).

[38] Report on Bill 18-893, the "Anti-SLAPP Act of 2012," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010) at 1 & 4.

criticizing Steyn if he chooses. Steyn's goal is to have a voice in the public debate on this important public interest issue. That worthy goal should not be subject to sanction by Mann's misguided attempt to have the Court punish Steyn with costs and attorneys' fees by an upside down application of the Anti-SLAPP law.

Conclusion

Mann's motion to dismiss the counterclaims should be denied. Each of those counterclaims states a valid claim. On this 12(b)(6) motion, Steyn's allegations are presumed to be true and must be interpreted in the light most favorable to him. At this pre-discovery stage of the litigation, it is impossible to say "beyond doubt" that Steyn "can prove no facts which would support" the counterclaims.[39] For all we and the Court know, discovery will reveal documents and deposition testimony fully backing up and supplying details supporting Steyn's allegations of Mann's abusive litigation.

"[F]reedom to think as you will and to speak as you think are means indispensable to the discovery of political truth. . . . [P]ublic discussion is a political duty."[40] That basic right, one of the glories and boasts of a free society, hangs in the balance on this motion.

As recently as March 22, 2014, Michelle Obama, the First

[39] Leonard v. District 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)).

[40] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

Lady, told an audience in Beijing that freedom of speech, particularly on the Internet and in the news media, provided the foundation of a vibrant society. She spoke of the value for people hearing "all sides of every argument." "Time and again," she said, "we have seen that countries are stronger and more prosperous when the voices and opinions of all their citizens can be heard." "[W]hen it comes to expressing yourself freely," she said, "and having open access to information -- we believe those are universal rights that are the birthright of every person on the planet."[41]

Steyn's counterclaims protect that birthright. He should have a chance to conduct discovery to find out more of the facts about those counterclaims. His counterclaims should not be dismissed.

Dated: April 1, 2014

Oral Hearing Requested

Respectfully submitted,

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[41] Jane Perez, "In Beijing Talk, Michelle Obama Extols Free Speech," N.Y. Times, Mar. 23, 2014, at 4.

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