

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

**MICHAEL E. MANN, Ph.D.,**  
**Plaintiff,**

v.

**NATIONAL REVIEW, INC., et al.,**  
**Defendants.**

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**2012 CA 008263 B**  
**Judge Jennifer M. Anderson**  
**Civil I, Calendar 3**  
**Status Hearing: June 22, 2020**

**ORDER GRANTING IN PART DEFENDANTS COMPETITIVE ENTERPRISE  
INSTITUTE’S AND RAND SIMBERG’S MOTION TO COMPEL DISCOVERY**

The matter before the Court is Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Compel Discovery filed on February 21, 2020, and Plaintiff's Opposition filed on March 16, 2020.

Defendants request the Court to compel discovery (interrogatories and document production) from Plaintiff for information relating to his alleged injury and damages, and information relating to the causation of his alleged reputational injury and damages. In his Opposition, Plaintiff argues that Defendant's requested information is irrelevant because the article at issue is defamatory *per se*; once liability is established, he is entitled to presumed general damages; thus, he is not required to submit evidence of actual damages or compensatory damages<sup>1</sup> (Pl.'s Opp'n. at 9). Causation is also presumed, (*id.* at 13), which implies he is not required to submit evidence of causation either. The Court disagrees with Plaintiff.

Plaintiff alleged proximate cause, the amount of damages to be determined, and the nature and extent of the damages in his Amended Complaint, thereby placing them directly at issue. (*See*

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<sup>1</sup> Actual damages and compensatory damages are interchangeable. *See Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876) (“compensatory damages and actual damages mean the same thing”); *Amiri v. Government of the Dist. of Columbia*, 2000 U.S. Dist. LEXIS 7263, \*3 (May 16, 2000) (“actual damages also termed compensatory damages ...”).

Amend. Compl. ¶ 56, 92, 110, “as the proximate result of Defendants' statements and publication, Plaintiff has suffered and continues to suffer damages in an amount to be determined at trial; the full nature, extent, and amount of these damages will be added at trial”). A defendant is entitled to the discovery that is directly based on or relevant to the complaint. *See United States v. All Assets Held at Bank Julius Baer & Co.*, 309 F.R.D. 1, 15 (D.D.C. 2015) (concluding the government is entitled to the discovery that is based directly on the amended complaint); *see also Nuskey v. Lambright*, 251 F.R.D. 3, 11 (D.D.C. 2008) (permitting discovery to the extent it is relevant to the allegations in her complaint). The information relating to the damages and causation, as alleged in the Amended Complaint, is relevant and Defendants are entitled to receive it.

Despite claiming presumed general damages in his Opposition and using it as a basis to reject Defendants' discovery requests (*see* Defs.' Mot. Ex. 2 “given that the defamations, in this case, are *per se*, damages are presumed”), Plaintiff is, in fact, seeking compensatory damages that require proof. At the end of the Amended Complaint, Plaintiff “demands judgment against Defendants for compensatory damage in an amount to be proven at trial.” (Amend. Compl. at 25.) In each paragraph that alleges damages, Plaintiff states “as a proximate result of the aforementioned statements, Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial” (Amend. Compl. ¶ 56, 92, 110), which is a clear call for compensatory damage because it includes causation and a determinable amount. Plaintiff must undertake the required burden of proof associated with compensatory damages and submit evidence which for Defendants are then entitled to challenge.

Recovering compensatory damage requires the plaintiff to prove the (1) 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. *See Amiri v. Government of the Dist. of*

*Columbia*, 2000 U.S. Dist. LEXIS 7263, \*3 (May 16, 2000) (compensatory damage is the amount awarded to the plaintiff to compensate for a proven actual injury or loss); *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876) (compensatory damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less). None of these elements can be presumed without proof and counterproof. Plaintiff has the right to prove these elements to receive the compensatory damages he seeks, and his opponents equally have the right to challenge that proof.

The presumption of general damages in a libel *per se* case can only get a plaintiff so far as having an actionable case without pleading any special harm that is normally required in a tort case. *See Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 312-313 (D.C. 2006) (concluding a plaintiff bringing a defamation action must show either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm). Whether an alleged libel is actionable is distinct from the issue of damages. Actionable means a defendant's conduct is the subject of legal action, and the harm is remediable by an action at law or equity; it does not get to how much damage award a plaintiff is entitled to receive.

It is worthy of note that in a defamation case, the general damages that can be presumed are limited to reputational injury because it is the reputational harm that is subtle, indirect, and impossible to trace. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 765 (1985) (White, J., concurring) (defining general damages as reputational injury and special injury as pecuniary loss and emotional distress). Even if the plaintiff is seeking general damages only (which is not the case here), the defendant still has the right to show there was, in fact, no reputational injury at all; if that is the case, the plaintiff is only entitled to nominal damages. *See id.* (concluding in the event of no reputational injury the prevailing rule was that nominal damages

were to be awarded for any defamatory publication actionable *per se* to serve a vindicatory function).

Furthermore, to obtain punitive damages as Plaintiff wishes here, Plaintiff must establish he has suffered compensable harm as a prerequisite to the recovery of additional punitive damages. *Linn v. United Plant Guard Workers of Am.*, Local 114, 383 U.S. 53, 66 (1966); *see Intercity Maint. Co. v. Local 254, Serv. Employees Int'l Union AFL-CIO*, 241 F.3d 82, 90 (1st Cir. 2001) (“no punitive damages may be awarded absent evidence of actual damages.”). Establishing compensable harm requires proving the elements set forth above.

Accordingly, the Court will allow the requested discovery with some limitations. Defendants seek to compare the “before and after” of Plaintiff’s income and reputation by asking for information from 2005 to the present. Given that the article was published in July of 2012, it is reasonable to go back in time five years to 2007 to establish a base point for Plaintiff’s income and reputation and to the present to determine the loss of income or reputation, if any, that resulted from its publication.

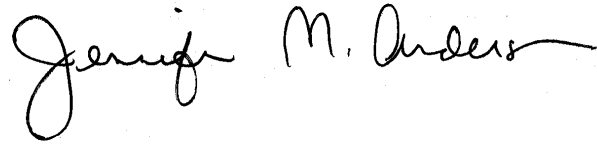
The Court notes that the document production requests in the second set are narrower than the first set; specifically, Defendants asks only for the documents relating to Plaintiff’s professional activities and earnings. ( Mot. at 4.) That seems to be a more reasonable starting point. Accordingly, it is this 5<sup>th</sup> day of May, 2020 hereby

**ORDERED** that Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Compel Discovery is **GRANTED IN PART**; it is further

**ORDERED** that discovery responses are limited to the period of 2007 to the present; it is further

**ORDERED** that Plaintiff produce all responsive documents to Requests 1-3, 7-8, and Requests 10-11 in CEI Defendants' Second Set of Requests for Production. It is further

**ORDERED** that Plaintiff provide the information requested in Interrogatories 2-4 in CEI Defendants' First Set of Interrogatories and Interrogatories 22-23, 25, 26, 29, and 31 in CEI Defendants' Second Set of Interrogatories.



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Judge Jennifer M. Anderson  
*Signed in Chambers*

**Copies to:**

John B. Williams, Esq.  
Ty Cobb, Esq.  
Peter J. Fontaine, Esq.  
**Counsel for Plaintiff**  
*Via CaseFileXpress*

Andrew Grossman, Esq.  
Mark I. Bailen, Esq.  
David B. Rivkin, Jr., Esq.  
William O'Reilly, Esq.  
**Counsel for Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg**  
*Via CaseFileXpress*

Anthony J. Dick, Esq.  
Michael A. Carvin, Esq.  
Thomas M. Contois, Esq.  
James B. Moorhead, Esq.  
Molly Bruder-Fox, Esq.  
Christopher Moeser, Esq.  
Shannen W. Coffin, Esq.  
**Counsel for Defendant National Review, Inc. ("NRI")**  
*Via CaseFileXpress*

Clifton S. Elgarten, Esq.  
Mark Thomson, Esq.  
Daniel J. Kornstein, Esq.  
Mark Platt, Esq.  
Michael J. Songer, Esq.  
**Counsel for Defendant Mark Steyn**  
*Via CaseFileXpress*