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 Jennifer M. Anderson

DEFENDANT STEYN'S RULE 36(a)(6) MOTION
REGARDING THE SUFFICIENCY OF PLAINTIFF'S
RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSION

Pursuant to Superior Court Civil Rule declaration 36(a)(6), Defendant Mark Steyn moves this Court to determine the sufficiency of Plaintiff's responses and objections to Steyn's First Set of Requests for Admission, which were served on Plaintiff on April 30, 2020. Accompanying this motion is a Memorandum in Support, which sets forth Steyn's legal and factual basis for this motion, a Proposed Order, and a declaration attaching copies of the requests, the objections, and other exhibits.

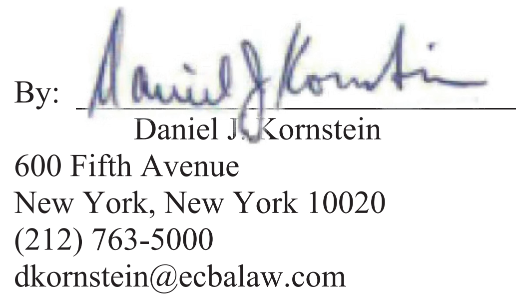
Rule 12-I Certification

Pursuant to Superior Court Civil Rule 12-I, counsel for Steyn (Daniel J. Kornstein and Marissa Benavides) conferred with counsel for Plaintiff (John B. Williams) via telephone on June 4, 2020 for approximately 15 minutes to ascertain whether Plaintiff would provide sufficient responses to Steyn's First Set of Requests for Admission. Plaintiff declined to consent to the relief sought, except for Requests for Admission 70 and 71. For those responses, the parties agreed that Plaintiff will admit, as he states in the CV he filed as an exhibit to his Court-

ordered supplemental responses to co-defendants' discovery requests regarding damages, that he was elected to the National Academy of Sciences in 2020.

Dated: July 14, 2020

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: 
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DEFENDANT STEYN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RULE 36(a)(6) MOTION REGARDING THE SUFFICIENCY OF PLAINTIFF'S RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSION

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DEFENDANT STEYN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RULE 36(a)(6) MOTION REGARDING THE SUFFICIENCY OF PLAINTIFF'S RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSION

Plaintiff Michael Mann refused to provide a single answer to Defendant Mark Steyn's timely and proper requests for admission. Rather than answer, Mann stonewalled by lodging baseless objections to every request. Steyn now asks the Court to order Mann to answer Steyn's requests.

MANN OBJECTS TO ALL OF STEYN'S REQUESTS FOR ADMISSION

On April 30, 2020, Steyn served on Mann requests for admission under Superior Court Civil Rule 36. A copy of those requests is annexed as Exhibit 1 to the accompanying declaration of Daniel J. Kornstein. Such service was three-and-a-half months before the August 17, 2020 deadline for completing fact discovery in this case. A copy of the Court's June 5, 2019 Scheduling Order is annexed as Exhibit 2 to the Kornstein declaration.

The Requests

Steyn's 71 requests for admission fall into three main categories:

1. Inflammatory and pejorative statements by Mann on Twitter about public figures from March 2012 to September 2019. For example, Request 1(d) asks Mann to admit that on July 22, 2012 he Tweeted "@RyanRadia, Oh you are with *CEI*, front group dedicated to dishonest smears & promotion of disinformation." Request 1(g) asks Mann to admit that on March 17, 2013 he Tweeted: "#JamesTaylorNotMusician of discredited #HeartlandInst & other hacks spin disinformation about new #ExtendedHockeyStick study #KochMachine." Request 1(r) asks Mann to admit that on January 7, 2018 he Tweeted: "To get a sense of just how awful a human being #TimBlair actually is, read this [website link] No surprise of course that only #RupertMurdoch would promote such a misogynistic ogre." And Request 1(s) asks Mann to admit that on January 7, 2018 he Tweeted "Tim Blair is ONE of the worst people in the world. But it is his employer, Rupert Murdoch—THE worst person in the world—who facilitates his indecent, bilious assaults on humanity. There's a special place down under for them both—they better hope there isn't a hell."

2. Mann's public and private accusations that other public figures have committed fraud. For example, Request 3 asks Mann to admit that on February 4, 2005, "you wrote in an email to Andy Revkin: '[t]he McIntyre and McKitrick paper is pure scientific fraud.'" Request 6 asks Mann to admit that "in a January 27, 2005 post to the website realclimate.org you wrote, "MM however, continue to promote false and specious claims.'" Request 8 asks Mann to admit that "in a January 27, 2005 post to the website realclimate.org you wrote, 'Sifting through a large number of false and misleading statements in this latest paper, there are two primary criticisms of MBH98 that they raise, both of which are demonstrably specious.'"

3. Public criticism by many members the scientific community that Mann's work is faulty, phony, and fraudulent, without being sued by Mann. For example, Request 20 asks Mann to admit that "in 2008 Dr. Michael R. Fox of the University of Idaho wrote to the United States Environmental Protection Agency that 'We now know that the hockey stick graph is fraudulent.'" Request 25 asks Mann to admit that "on October 15, 2004, Dr. Richard Muller of the University of California at Berkeley wrote in the MIT Technology Review that 'a phony hockey stick is more dangerous than a broken one.'" Request 35 asks Mann to admit that "at the 2012 Swiss Energy & Climate Summit in Bern, Switzerland, Dr. Fritz Vahrenholt of the University of Hamburg stated that 'Mann's stick was phony.'" Request 40 asks Mann to admit that "on September 21, 2008, Dr. Lubos Motl, formerly of Harvard University, wrote on his personal blog that the hockey stick graph paper is 'an example of scientific fraud.'" Request 45 asks Mann to admit that "on December 12, 2009, Dr. Zbigniew Jaworowski, former Chairman of the United Nations Scientific Committee on the Effects of Atomic Radiation, told the Polish daily newspaper Our Journal that the hockey stick graph researchers 'are guilty of brazen fraud.'" And Request 50 asks Mann to admit that "on October 6, 2010, Dr. Harold Lewis of the University of California at Santa Barbara, wrote in his resignation letter to the president of the American Physical Society that global warming studies represented 'the greatest and most successful pseudoscientific fraud I have seen in my long life as a physicist.'"

Mann's Meritless Objections

On June 1, 2020, Mann served on Steyn his objections to Steyn's requests. Mann objected to each of Steyn's 71 requests on grounds of untimeliness and, in some instances, relevance. Plaintiff did not answer a single request. A copy of Mann's objections is annexed as Exhibit 3 to the Kornstein declaration.

Mann misplaces his reliance on two faulty grounds for objecting. First, Mann incorrectly asserts that Steyn's requests for admission constitute "written discovery" and therefore are untimely under the Court's January 6, 2020 deadline for such "written discovery." Mann also wrongly asserts that most of Steyn's requests are "seeking information that is not relevant to any party's claim or defense in this case." He further claims that the identified scientific criticisms of his work are "irrelevant to any issue regarding factual truth" as they were "not made in any peer reviewed publications" and were not relied on by Steyn.

Counsel for Mann and Steyn conferred on June 4, 2020 to discuss Mann's objections, but could not resolve their differences except as to Requests 70 and 71 regarding Mann's 2020 election to the National Academy of Sciences.

Applicable Rule

The relevant rule here is Superior Court Civil Rule 36(a)(6). That rule states that the party serving requests for admission "may move to determine the sufficiency of an answer or objection [to those requests]. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served."

Applying Rule 36(a)(6) to this situation, the Court should find that none of Mann's objections are justified, and that Steyn is entitled to an admission or, at the least, an answer to each of his requests.

I. SINCE STEYN'S REQUESTS FOR ADMISSION ARE NOT "WRITTEN DISCOVERY," THEY ARE TIMELY

Mann's main objection—untimeliness—is not well taken. Steyn's Rule 36 requests for admission are not "written discovery" and therefore are not subject to the February 2, 2020

"written discovery" deadline in this case. The requests were served on April 30, 2020, three-and-a-half months before the August 17, 2020 cut-off for all "fact discovery," which controls here. (On July 7, 2020, the parties submitted a joint request to the Court to extend that deadline to November 23, 2020.) Steyn's requests for admissions are therefore timely.

A. "Not a Discovery Device"

The Court of Appeals has made clear that "Rule 36 is not a discovery device" and is not subject to the same rules of discovery that govern interrogatories and requests for the production of documents. *Dorsky Hodgson & Parts. Inc. v. Nat. Council of Sr. Citizens*, 766 A.2d 54, 57 (D.C. 2001) (quoting *Pickens v. Equitable Life Assurance Soc.*, 413 F.2d 1390, 1393 (5th Cir. 1969)).

Rather, a request for admission is a pre-trial tool designed to increase the efficiency of fact-finding at the trial stage. "Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." Fed. R. Civ. P. 36 Advisory Committee's note. *See also Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 803 (3d Cir. 1992) ("[R]equests for admission typically come late in discovery, or even after discovery has been completed and trial is imminent . . . That is what Rule 36 was intended to do—narrow the issues for trial, or even altogether obviate the need for trial"); *Pickens*, 413 F.2d at 1393 ("[Rule 36's] proper use is as a means of avoiding the necessity of proving issues which the requesting party will doubtless be able to prove").

Steyn's requests are calculated to reduce trial time and increase trial efficiency. By asking Mann to admit to the statements made on the internet or otherwise by him and others, we will not need to expend time discussing each of the more than seventy statements that are readily

identifiable and subject to admission, or time at trial to call witnesses to authenticate the statements. The requested admissions are the most efficient means to establish that the statements were in fact made.

B. Rule 16(b)(5)(A)(I)

The timing of Steyn's service of requests for admission is governed only by Superior Court Civil Rule 16(b)(5)(A)(I), which states, "No interrogatories, requests for admission, requests for production or inspection, or motions for physical or mental examinations may be served less than 30 days before the date set for the end of discovery" (emphasis added). The rule does not specify that the deadline refers to written discovery, and no order in this case states that requests for admission must be subject to the written discovery deadline or prohibits the service of requests for admission after a specific date.

C. Rule 37 Excludes Motions to Compel Admissions

The Superior Court Civil Rules themselves distinguish between requests for admission and regular discovery. Rule 37, which provides for motions to compel discovery, excludes Rule 36 requests for admissions from its list of permissible grounds on which to file a motion to compel. *See* Super. Ct. Civ. R. 37(a)(3)(B). Only Rule 36(a)(6) provides a mechanism for a motion to compel answers to requests for admission. If a party prevails on a Rule 36(a)(6) motion to compel, then that prevailing party can move under Rule 37 for fees and expenses. No provision of the Superior Court Civil Rules dictates that Rule 36 requests for admission constitute written discovery.

As a result, Mann has no basis to object to Steyn's requests for admission as untimely.

II. STEYN'S REQUESTS ARE RELEVANT

All of Steyn's requests are relevant to Steyn's defenses to Mann's allegations of libel.

A. Scientific Criticism of Mann and the Hockey Stick

Requests 10-71 are crucially relevant. These requests concern criticism by members the scientific community that described Mann's hockey stick graph as faulty, phony, and fraudulent—and Plaintiff's decision not to sue these critics. This criticism is relevant in a number of ways.

Lack of "Actual Malice." These requests help establish Steyn's lack of "actual malice" in publishing what he did. The repeated criticism of Mann's hockey stick in the public record establishes the widely known existence of sharp disagreement regarding the reliability of Mann's hockey stick graph and undermines Mann's argument that Steyn's similar statements were made with "actual malice."

Peer Review No Objection. Equally meritless is Mann's intellectually snobbish objection that the criticisms in Requests 10-71 did not appear in a peer reviewed publication. That is not a legitimate objection to responding to a request for admission, especially since Steyn is not contending that these critical remarks are undisputed truth. As journalist Roni Rabin recently reported in the *New York Times*, publishing in a peer reviewed journal does not necessarily assure accuracy or reliability, especially if the "peers" are friends or allies in a debate over public policy. *See*, *e.g.,* Roni Caryn Rabin, "*Two Retractions Hurt Credibility of Peer Review*," N.Y. Times, June 15, 2020, at 1, col. 6.

Rabin's recent *New York Times* article exposed shortcomings in the peer review process regarding Covid-19 research and generally. Articles in peer-reviewed publications were withdrawn "after an outcry from researchers who saw obvious flaws." *Id.* "[T]he rush for

research on the coronavirus," like the rush for research on climate change, "overwhelmed the peer review process and opened the door to fraud." *Id.* According to the former editor of the *New England Journal of Medicine*, "If outside scientists detected problems that weren't identified by the peer reviewers," as happened with the hockey stick, "then the journals failed." "The studies should never have appeared." *Id.*

"But peer review was never intended," said an editor of another prestigious peer reviewed journal "to detect outright deceit" and anyone who thinks otherwise has "a fundamental misunderstanding of what peer review is." *Id.* "If you have an author who deliberately tries to mislead, it's surprisingly easy for them to do so." The peer review process is "opaque and fallible." "Critics have long worried that the safeguards are cracking." "But peer review fails more often than anyone admits," stated Dr. Ivan Oransky, co-founder of Retraction Watch, which tracks discredited research. *Id.*

In short, that a comment is published elsewhere than in a peer reviewed journal may go to its weight, not to its admissibility. Nowhere is that truer than here, where Steyn's contested statement was not made in a peer-reviewed journal. To the contrary, Steyn's statement was made in the popular on-line media, to a lay audience and should be judged by that standard—not the standard of Mann's academy.

<u>Damages</u>. Requests 10-71 also relate to whether or not Mann sustained damages. Mann alleges that Steyn's published criticism of the hockey stick graph specifically caused Mann reputational and financial damages, and the Court has recently underlined Mann's burden of proving causation. *See* Decision dated May 5, 2020 compelling Mann to produce discovery regarding damages: "causation traced back to defendant's wrongdoing" (at 2). If such damages occurred, any potential causes other than Steyn's article are relevant to determining the extent to

which damages can be attributed to Steyn. Commentator after commentator, and scientist after scientist, has criticized Mann's work as unreliable, misleading, and fraudulent. Yet Mann has not sought any financial remedy from any of the other public commentators or scientists identified in Steyn's requests who have made similar criticisms against Mann. These facts are relevant.

B. Nature and Context of the Public Debate

Requests 1-9 are relevant in a basic sense. By getting these admissions from Mann, we will be able to demonstrate the setting of the raucous public debate over the hockey stick graph and the role Mann has played in lowering the tone of that debate. Requests 1-9 seek admissions from Mann that he made many derogatory statements about people who disagree with or criticize him. Often Mann has accused his critics of the same things he has been accused of. He has been confrontational on-line and has taken a cut-and-slash approach to his critics in what he has dubbed a "war." *See* Michael Mann, *The Hockey Stick and the Climate Wars* (2012).

The polemical and inflammatory nature of public discourse on climate change and the hockey stick in particular is relevant, and the requested admissions help establish this ongoing setting for Steyn's comments, which would have been understood as part of that public argument. As Dr. Eugene Wahl testified on June 30, 2020, "scientists like bashing each other" and "science progresses even better by really even to the point of aggressive criticism." June 30, 2020 Dep. of Eugene Wahl at 24 (rough draft), annexed as Exhibit 4 to the Kornstein declaration. "The broader social context, too, is vital to a proper understanding of the disputed statements." *Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C. Cir. 2013).

Statements made in the medium of public opinion columns or on the internet, as is the case here, are entitled to more leeway because "[t]he reasonable reader . . . is fully aware that the statements found there are 'hard' news. . . . 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." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 582-83 (D.C. 2000). "The culture of internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a freewheeling, anything goes writing style." *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43-44, 925 N.Y.S.2d 407 (N.Y. App. Div. 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. 2d 287, 295 (E.D.N.Y. 2015).

C. Whether Steyn Relied on The Subject Statements Is Beside the Point

Insofar as Mann objects to the requests as irrelevant because Steyn did not rely on them, he is incorrect. First of all, Steyn's reliance has nothing to do with the purposes for which the admissions are sought. The purpose of these statements is to show the setting of the disputed statements in the context of the robust controversy about climate change.

Moreover, Steyn does not need to establish that he relied on any specific article or statement when forming his opinion that Mann's work was unreliable and worthy of critique. Given the nearly twenty years of fierce debate about the graph, such criticism had pervaded the scientific discourse. Just as we may not be able to cite to a specific article that informs our opinion of whether there was a conspiracy to assassinate John F. Kennedy, we may have formed an opinion on that topic and the delivery of that opinion is not made with "actual malice" unless it is directly contrary to a known fact. With this in mind, in his Supplemental Responses to Plaintiff's First Set of Interrogatories to All Defendants (Exhibit 5 to the Kornstein declaration), Steyn responded to inquiries about documents he relied on as follows: "there was substantial media coverage of and commentary on the hockey stick graph and subsequent investigations

relating to it in and around the time of the statements at issue in this litigation, and it is overly burdensome to require identification of each such document that informed the statements. . . . Steyn further states that he is an avid reader of media on climate change and is generally aware of published scientific criticism of the hockey stick graph." Response 4(a). "Steyn also relied on his memory of scientific criticisms, media reports, and public discussion of the hockey stick graph that he had reviewed over the previous twelve years." Response 4(e).

Conclusion

Steyn's requests are timely, relevant, and appropriate. Each of Mann's objections is inadequate. The Court should grant Steyn's Rule 36(a)(6) Motion and require Mann to answer the requests for admission within 30 days or have Steyn's requests deemed admitted.

This is not the first time Mann has delayed, obfuscated, or refused to comply in the ordinary course of his discovery obligations in litigation he has filed. We see a pattern. Only a few months ago, in its May 5th ruling in this case, the Court had to compel Mann to supply basic information about his claimed damages, and then ordered Mann to reimburse CEI for the legal fees incurred in moving to compel.

Similarly, less than a year ago, the Supreme Court of British Columbia dismissed Mann's libel suit against Canadian scientist Tim Ball because of Mann's "inordinate," "inexcusable," and "unreasonable delay." *See* Decision dated Aug. 22, 2019 annexed as Exhibit 6 to the Kornstein declaration. The Canadian court also ruled that Mann would have to reimburse Ball for the "costs of the action" (that is, the legal fees Ball incurred). *Id.* So far as we are aware, Mann has not yet paid any of those "costs."

Mann's practice of stonewalling and delay imposes additional costs on Defendants and additional burdens on the Court. By granting Steyn's motion, the Court can let Mann know that his standard operating procedure is unacceptable.

Dated: July 14, 2020

Respectfully submitted,

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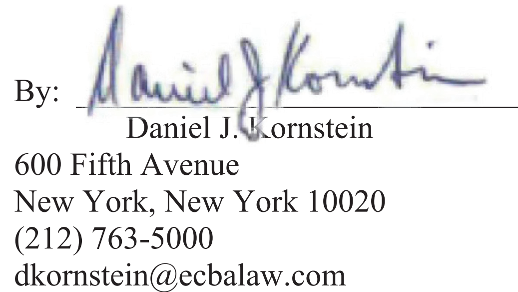

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2020, I served a true and correct copy of the foregoing Defendant Steyn's Rule 36(a)(6) Motion Regarding the Sufficiency of Plaintiff's Responses to Requests for Admission via email, pursuant to the agreement of counsel, on:

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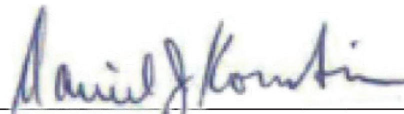

Daniel J. Kornstein

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 Jennifer M. Anderson

(Proposed) Order Granting Defendant Steyn's Rule 36(a)(6) Motion Regarding the Sufficiency of Plaintiff's Responses and Objections to Requests for Admission

Before the Court is Defendant Steyn's Rule 36(a)(6) Motion Regarding the Sufficiency of Plaintiff's Responses and Objections to Requests for Admission. Upon consideration of the Motion, any response thereto, and good cause having been shown, it is hereby

ORDERED that Plaintiff answer Defendant Steyn's requests for admission in full within 30 days of the entry of this Order or the requests will be deemed admitted.

SO ORDERED.

DATE: ________________

____
Judge Jennifer M. Anderson