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.

DEFENDANT STEYN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF FALSITY, AND TO STRIKE STEYN'S AFFIRMATIVE DEFENSE OF TRUTH

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP
600 Fifth Avenue
New York, New York 10020
(212) 763-5000

and

CARLTON FIELDS P.A.
1025 Jefferson Street, NW
Suite 400 West
Washington, DC 20007-5028
(202) 965-8112

Attorneys for Defendant Mark Steyn

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES PAGE(S)

PAGE(S)

STATUTES AND OTHER AUTHORITIES

MANN'S MERITLESS BUT USEFUL MOTION

Rare is the motion that is at the same time both meritless and useful. Plaintiff Michael Mann's motion to strike, for example, is just meritless: it is seven years too late. But his motion for partial summary judgment is one of the rare ones. It is meritless in that it applies the wrong law to imaginary facts. It is useful, however, in demonstrating why Defendant Mark Steyn, not Mann, should prevail on summary judgment and end this case's eight-year-old damper on free expression on matters of public importance.

Mann's motion for partial summary judgment is the mirror image of Steyn's own already-filed motion for summary judgment on his defense of truth. Dkt. ED301J002143716. Steyn's motion explains why the challenged statements in his post are true. Mann's motion, in contrast, tries, but fails, to show they are false. Of those two dueling motions, only Steyn's should prevail. Mann's motion for summary judgment on falsity should be denied for the same reasons Steyn's motion for truth should be granted.

MANN'S MOTIONS SHOULD BE DENIED

Mann brings two motions (one, to strike the defense of truth, and the other, for summary judgment on falsity), both of which should be denied:

Mann's motion to strike Steyn's defense of truth is seven years too late. Steyn answered Mann's Amended Complaint on March 12, 2014, asserting as his Second Affirmative Defense that "[t]he statements at issue made by Defendant Steyn are true." Williams Decl. Ex. 59 (Steyn's Amended Answer and Counterclaims) ¶ 115. Superior Court Rule 12(f) requires a motion to strike to be filed "within 21 days" of the pleading it is addressed to, or on April 2, 2014. Mann filed his motion to strike on January 22, 2021. ED301J00214371

Mann's motion seeking partial summary judgment on falsity founders on indisputable facts. The three statements Mann sued Steyn about (Amended Complaint ¶ 28) are, insofar as they are capable of being verified, true. Aware of this insurmountable barrier of truth, Mann does not move against those three true statements. Mann attacks a straw man, confusing and conflating what Steyn wrote and what someone else—co-defendant Rand Simberg—wrote. He compounds this confusion by combining the straw man he builds with premature "inferences" drawn by the Court of Appeals when resolving an appeal to which Steyn was not party, and which preceded discovery. That discovery conclusively established the truth of Steyn's comments, which requires denying Mann's motion.

Mann now shifts ground; he does not base his motion on the text of what Steyn wrote. Instead, by some dark alchemy, he tries to transmute his claim into three new allegations that he imagines he has proven, when he has not.

FOOTBALL AND HOCKEY

Mann's motions ignore what this Court has ruled is the "main idea" of Steyn's post: "the inadequate and ineffective investigations conducted by Pennsylvania State University into their employees, including [convicted former football coach and child molester] Jerry Sandusky and Plaintiff [Mann]." Oct. 22, 2019 Order at 1-2. Steyn "used the investigations to support his viewpoint that the institution is corrupt and is prepared to cover up the alleged wrongdoing of its 'stars.'" *Id.* at 2. The 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.[1] Steyn's comments on

[1] All references to "¶" refer to Steyn's Statement of Undisputed Material Facts dated January 22, 2021, Dkt. ED301J002143834, filed in connection with his motion for summary judgment.

both Penn State and the Hockey stick were true.

Discovery has revealed grave deficiencies in Penn State's investigation of Mann. As more fully discussed in Steyn's motion for summary judgment, depositions of three University officials and emails among the lead investigators show that Penn State deliberately avoided a fair and full investigation of its "star" Mann.

Both phases of Penn State's investigation—the Inquiry Committee and the Investigatory Committee—flouted official Penn State policy requiring the charges against Mann to be investigated "thoroughly," ¶ 103, and were riddled with fundamental defects.

The Inquiry Phase Shortcomings. A recused faculty member with a close relationship to Mann participated actively in the Inquiry Committee process. ¶¶ 106-11. The Committee disregarded evidence that Mann encouraged colleagues to delete emails even though one of the charges asked whether Mann participated in any actions to "delete, conceal, or otherwise destroy emails." ¶¶ 105, 151-55. Before dismissing three of the four charges, Inquiry Committee members found evidence that Mann "compromised" and "breach[ed] [] ethical standards," ¶¶ 118-21, 127; expressed support for a "censure," ¶ 123; and stated discomfort with calling Mann "innocent" of the charges, ¶ 125.

The Committee's tune changed dramatically after Committee Member Henry Foley secretly provided a draft of the Committee's Report to former Penn State President Graham Spanier—the same ex-President now on his way to prison for his role in the Sandusky coverup—without notifying other Committee members. ¶¶ 8, 131. Spanier suggested numerous changes and "urge[d]" Foley to take into account the prospect of "international media attention" and "the firestorm of elected officials." ¶¶ 135-37. Foley promised to make Spanier's edits, and the draft ballooned from two-and-a-half to ten pages. ¶¶ 140-41. After Spanier and Foley's clandestine

back-and-forth, the Inquiry Committee, contradicting its prior statements, found "no credible evidence" that Mann committed the acts alleged and "no basis for further examination." ¶ 142. It referred only a fourth, opaque "catch-all" charge alleging violation of "accepted practices" to the Investigatory Committee for further review. ¶ 143.

The Investigation Phase Failures. The Investigatory Committee's inept "investigation" of this single charge compounded the Inquiry Committee's mistakes. It *interviewed* the recused faculty member as a witness, despite his conflict of interest. ¶ 111. The Committee ignored the only critic of Mann's work it interviewed, who expressed dismay about the Inquiry Committee's dismissal of the first three charges because Mann "explicitly stated" the basis for them in his emails. ¶¶ 162-63. No interviewee said that Mann engaged in a clearly acceptable practice (the basis of the charge), leading one Committee member to conclude Mann needed a "hand slap." ¶ 166. The Investigatory Committee nonetheless cleared Mann of the lone charge that survived the Inquiry Committee—not on the merits, but instead based on Mann's professional awards and history of winning grants. ¶¶ 165, 167-68. Mann's prestige, however, is no proxy for innocence. Former FBI Director Louis Freeh's conclusion, issued days before Steyn's post, that the "avoidance of bad publicity" undermined Penn State's investigation of Sandusky, ¶ 10, applies with equal force to its corrupted investigation of Mann.

MANN'S MORPHNG DEFAMATION THEORY

Shortly after Steyn published his post about Penn State, Mann saw an opportunity: "There is a possibility I can ruin National Review over this," he wrote two days later. ¶ 186. He filed this lawsuit three months later, telling friends, "My hope is that we can ruin this pathetic excuse of a human being [Steyn] through this lawsuit." ¶¶ 191-92.

Mann sued Steyn based on: (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) the statement that "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).

Unable to prove these statements false, Mann now tries to move the target. His motion ignores the text of Steyn's post and the three snippets of it he claimed were defamatory. He also ignores Steyn's testimony that his critique of the Hockey Stick was that it "does not prove what it purports to prove." Steyn SJ Ex. AA (Steyn Dep.) 52:16-17.[2] That is, the smoothing of the proxy and instrumental temperature record presents a stark but inaccurate picture of global temperatures over time, "obscure[ing] the fact that proxy data does not correlate with observed records." *Id.* 52:16-55:15.

Instead, Mann muddles Steyn and Simberg's posts to claim that they both stand for three "inferences" drawn by the Court of Appeals: (1) Mann "engaged in data manipulation that was fraudulent"; (2) he engaged in "deception and misconduct"; and (3) he committed "wrongdoing" by "molesting and torturing data." Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment ("Pl. Br."), Dkt. ED301J002143959, at 27.

These inferences warp the text of the Steyn post and depart from the subject of Mann's own claims. The words "data manipulation" and "misconduct" appear nowhere in Steyn's post. The words "wrongdoing" and "deception" are not among the three snippets Mann claims are

[2] All references to "Steyn SJ Ex." refer to Exhibits attached to the Declaration of Daniel J. Kornstein dated January 22, 2021, Dkt. ED301J002143787.

defamatory. Am. Compl. ¶ 28. Moreover, Steyn's use of the capacious term "wrongdoing" refers to Penn State's unwillingness to investigate its "stars," not Mann in particular, and "deception" is Simberg's phrase, not Steyn's. What is left is "molesting and torturing data," another of Simberg's statements, and "fraudulent," which Steyn uses to describe the Hockey Stick. But the Hockey Stick, a controversial image, is not capable of being defamed, and the Court of Appeals has already held that the word "fraudulent" is incapable of defamatory meaning. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1247 (D.C. 2016) ("*CEI*"). Mann's motion overreads Steyn's post to say more than it does and expands its reach beyond what even he has claimed is defamatory.

Mann's manipulations reveal his defamation case for what it is: not a defense against Steyn's statements, but yet another platform from which Mann can try to trumpet the validity of his own statistical modeling and stifle his critics. But the undisputed material facts demonstrate that Mann's graph is deceptive and misleading. The "truth" of Steyn's post, as shown by Defendants' experts Drs. Judith Curry and Abraham Wyner—whose opinions are supported by a substantial body of peer-reviewed literature and multiple Congressional reports—is that Mann's graph, as Steyn suggested, is not what it purports to be.

Mann does not dispute the deficiencies Curry and Wyner identify. His motion instead takes a disorganized, scattershot approach, cherry-picking his favorite parts of the record that have nothing to do with the truth of Steyn's post.

- Throughout his motion, Mann disregards this Court's admonition that "[t]he broader question of global warming is never before this Court. . . . Plaintiff is not *the* scientist representing the entirety of the science behind global warming." Oct. 22, 2019 Order at 6-7 (italics in original). He relies heavily on studies that "all reached the same conclusion that global warming was occurring," Pl. Br. at 5, 19-21, and seeks to discredit Dr. Curry on the grounds that her views on global warming do not accord with his, *id.* at 12-13. This Court has made clear that evidence focused on global warming is irrelevant to propriety of Penn State's investigation or the validity of the Hockey Stick graph.

- Mann's contention that Steyn relied on only one article when he published his post, Pl. Br. at 3, is false. Steyn identified more than twenty published articles and news media sources he relied on to support his critiques of the Hockey Stick graph. ¶¶ 211, 217-18. Regardless, the sources Mann relied on to support his post are irrelevant here because they bear on actual malice, not truth. Steyn has moved for summary judgment on actual malice, but Mann, tellingly, has not.

- Mann's claim that the hearsay Climategate investigations, inadmissible on summary judgment, Super.Ct. Rule 56 (c)(2), "exonerated" him is false. Several investigations did not focus on Mann at all, ¶¶ 84-101, and those that did noted several "misleading" aspects of the graph and flaws in Mann's statistical analysis. ¶¶ 28, 87, 98-100.

- Mann's reliance on his *seven* expert witnesses consists entirely of conclusory and unsupported claims that Steyn's statements are "false." Pl. Br. 24-25; Pl. SOMF ¶¶ 142-50. The absence of factual support for these legal conclusions stands in stark contrast to Defendants' experts, whose detailed analysis finds that several aspects of the Hockey Stick are "deceptive," "misleading," and consistent with scientific definitions of "fraud" and "falsification." *See infra* Section II.

- Mann's argument that Defendants' fact witnesses testified that "Mann's research was performed appropriately," Pl. Br. at 14-15, grossly distorts their testimony. Stephen McIntyre testified at length about the Hockey Stick's "major deficiencies in statistical terms." Steyn SJ Ex. GG (McIntyre Dep.) 95:6-7; *see generally id.* 50:11-127:4. Edward Wegman, consistent with the Congressional report he authored validating McIntyre and McKitrick's peer-reviewed criticisms of the graph, testified that the Hockey Stick's principal component methodology "preferentially choose[s] the so-called hockey stick shape." Steyn SJ Dep. Ex. NN (Wegman Dep.) 76:5-77:6. Roger Pielke wrote that the deletion of Briffa's post 1960 data to hide the decline was "a form of cherry-picking" and testified that the Hockey Stick authors "fudge[d]" data. Steyn SJ Ex. II (Pielke Dep.) 72:7-73:4, 76:22-77:7.[3]

In the end, Mann's machinations come to nothing: discovery has proven Steyn's statements true, not Mann's.[4]

---

[3] Pielke makes clear that his use of the term "fraud" in the testimony Plaintiff cites, Pl. Br. at 14-15, refers to "research misconduct"—which Steyn did not accuse Mann of, Steyn SJ Ex. II (Pielke Dep.) 67:10-20. Pielke distinguishes this use of "fraud," meaning "research misconduct," from the "colloquial" and "amorphous" term "scientific fraud" used by "blog commenters in the media." *Id.* 80:14-23.

[4] Having wasted eight years of the courts' time over a 270-word blog post, Plaintiff's arguments are so exhausted that he is reduced to phony complaints about Steyn's alleged racism and homophobia, neither of which is before this court. *Compare* Pl. Br. at 7, *with* Defendant Steyn's Response to Plaintiff's Statement of Undisputed Material Facts ¶ 32.

ARGUMENT

Both of Mann's inter-related motions—to strike Steyn's affirmative defense of truth and for summary judgment on his own claim of falsity—should be denied.

I. MANN'S MOTION TO STRIKE IS SEVEN YEARS TOO LATE

Plaintiff's motion to strike Steyn's truth defense need not long detain us or the Court. The motion is as untimely as a motion can be. Under D.C. Superior Court Rule 12(f), a motion to "strike from a pleading an insufficient defense" must be made "within 21 days after being served with pleading." Steyn served and filed his Amended Answer to Plaintiff's Amended Complaint on March 12, 2014, seven years ago. The motion should be denied at the threshold for that reason alone. *Sweeney v. Am. Registry of Pathology*, 287 F. Supp. 2d 1, 5-6 (D.D.C. 2003) (denying motion to strike affirmative defense as untimely "because it was not filed within 20 days of service of defendant's answer" under Federal Rule of Civil Procedure 12(f), whose language is identical to D.C. Rule 12(f)).

Defendants cite no authority from the District of Columbia to support their argument that the motion is timely. The out-of-state cases cited by Mann are distinguishable as well as not controlling. In *S.E.C. v. Sands,* 902 F. Supp. 1149, 1166 (C.D. Cal. 1995), the motion to strike an affirmative defense was, unlike here, timely filed within 21 days of service of answer and later denied without prejudice to refiling. Other cases relied on by Mann do not address timeliness at all. *See Mme. Pirie's, Inc. v. Keto Ventures, LLC,* 57 N.Y.S.3d 555, 557 (3d Dep't 2017); *Fijal v. Am. Exp. Isbrandtsen Lines, Inc.,* 514 N.Y.S.2d 6, 7 (1st Dep't 1987).

Courts "disfavor motions to strike" affirmative defenses. *Franco v. Nat'l Capital Revitalization Corp.,* 930 A.2d 160, 166 (D.C. 2007) (collecting cases). The movant "must shoulder a 'formidable burden,'" *U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 456

F. Supp. 2d 46, 53 (D.D.C. 2006) (quoting *Judicial Watch, Inc. v. U.S. Dep't of Com.*, 224 F.R.D. 261, 264 (D.D.C.2004)), and the court "will draw all reasonable inferences in the pleader's favor and resolve all doubts in favor of denying the motion to strike." *Nwachukwu v. Rooney,* 362 F. Supp. 2d 183, 190 (D.D.C. 2005). A motion to strike "will not be granted if the insufficiency of the evidence is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits." *Franco,* 930 A.2d at 166-67.

Apart from gross lateness, a motion to strike a truth defense makes no sense where, as here, Mann bears the burden of proving the opposite. *Beeton v. Dist. of Columbia,* 779 A.2d 918, 923 (D.C. 2001) ("A plaintiff bringing a defamation . . . must show [] that the defendant made a false and defamatory statement concerning the plaintiff." (first alteration in original) (citation and quotation marks omitted)). Whether or not Steyn asserts the defense of truth, Mann must prove falsity. And he cannot.

II. MANN'S PARTIAL SUMMARY JUDGMENT ON FALISTY SHOULD BE DENIED: DISCOVERY HAS VERIFIED STEYN'S STATEMENTS

Mann's motion faces a higher bar than in the garden variety case, for the familiar standards for summary judgment are heightened in a libel case. The court's "summary judgment calculus" must take into account the "obligation to protect the right of citizens to free expression" because "'[t]he threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs.'" *Guilford Transp. Indus., Inc. v. Wilner,* 760 A.2d 580, 592 (D.C. 2000). *See also Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966) ("[T]he stake here, if harassment succeeds, is free debate. One of the purposes of the [*N.Y. Times v. Sullivan,* 376 U.S. 254 (1964)] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials,

is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights").

In this case, even on his own contorted terms, Mann's falsity motion fails to meet these summary judgment requirements for each of the three statements he attacks about (a) the fraudulent Hockey Stick; (b) Mann's deception and misconduct; and (c) his torture of data.

A. The Hockey Stick Is Fraudulent

Mann's claim that he was defamed by Steyn calling the Hockey Stick "fraudulent" does not bear scrutiny. As a threshold matter, the Court of Appeals has already concluded that "the use of 'fraudulent' . . . is insufficient as a matter of law" to establish a defamation claim because "such an ambiguous statement may not be presumed to necessarily convey a defamatory meaning." *CEI*, 150 A.3d at 1247. Accordingly, on its own, as Mann presents it, the statement that the Hockey Stick is fraudulent is immaterial.

Apart from whether "fraudulent" could by itself give rise to a defamation claim, however, Defendants' experts, Drs. Judith Curry and Abraham Wyner have conclusively demonstrated that Mann's use of data was "deceptive," "misleading," and consistent with scientific definitions of "fraud" and "falsification." Their conclusions support the finding that any inferences that Mann engaged in deception and misconduct or fraudulent data manipulation were true.

B. Mann Engaged in Deception and Misconduct

Equally baseless is the second of Mann's claims: that he has not engaged in deception and misconduct. Dr. Curry has identified three "deceptive and misleading" aspects of the Hockey Stick graph: image fraud, data cherry-picking, and data falsification. ¶¶ 35-36. She then describes Mann's years of stifling criticism and harassing scientists who criticize his work,

demonstrating his misconduct in violation of long-established norms of scientific discourse. Steyn SJ Ex. TT (Curry Report) at 28-39.

1. Mann's Hockey Stick "Deceptions"

Image Fraud: Curry opines that "Mann's efforts to conceal the so-called 'divergence problem' by deleting downward-trending post-1960 data and also by splicing earlier proxy data with later instrumental data is consistent with most standards of image fraud." *Id.* at 1.

This opinion addresses a version of the Hockey Stick graph published as Figure 2.21 in 2001 IPCC TAR, on which Mann served as a lead author. ¶ 18. The Figure omitted tree ring proxy data collected by climate scientist Keith Briffa that showed a decline in temperatures after 1960, a message inconsistent with the prized hockey stick shape. ¶¶ 37-40. The IPCC TAR did not disclose the deletion of this data. ¶ 41.

Curry shows what the graph would have looked like had Briffa's post-1960 data been included (bold on right, red line). This graph demonstrates how the blade of the Hockey Stick disappears when Briffa's post-1960 data is included.

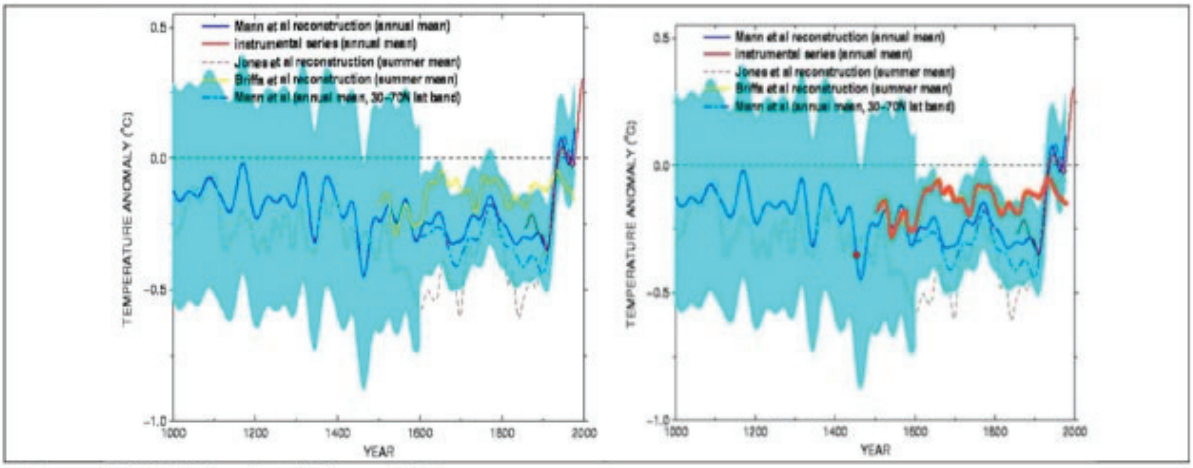


Figure 5. IPCC Zero Draft Figure 2.2.3a. *Comparison of millennial Northern Hemisphere (NH) temperature reconstructions from different investigators (Briffa et al, 1998; Jones et al, 1998; Mann et al, 1998;1999a)... All the series were filtered with a 40 year Gaussian filter.* ***Briffa reconstruction is in yellow (left – original); re-colored for emphasis on right.***

Steyn SJ Ex. TT (Curry Report) at 20.

As lead author, Mann decided to omit the Briffa data without the input of his other lead authors. ¶ 42. Mann's own collaborators cautioned him against the deletion. IPCC TAR Coordinating Lead Author Chris Folland wrote to Mann that Briffa's data "contradicts the multiproxy curve and dilutes the message rather significantly." ¶ 43(a). Briffa himself urged Mann not to succumb to "pressure to present a nice tidy story" by "ignor[ing]" his post-1960 results. ¶ 43(b). Mann agreed with them on the merits but bemoaned the data's *political* impact: "[I]f we show Keith's series . . . skeptics [will] have a field day." ¶ 43(c). To prevent a "skeptics' field day," he chose to delete the data.

Curry explains that the deceptiveness of deleting the Briffa data in the IPCC TAR was enhanced by the graph's splicing of different datasets, a maneuver that "further disguis[ed] the decline" in Briffa's data. Steyn SJ Ex. TT at 21. Peer-reviewed literature has likewise denounced Mann's splicing of proxy and instrumental data. ¶ 30.

Applying the definition of image fraud in *Nature*, a "top" peer-reviewed journal, Steyn SJ Ex. EE (Bradley Dep.) 80:14-15, Curry concludes that these two data "manipulations"—deleting the post-1960 data and splicing datasets—"are consistent with most definitions of image fraud." ¶ 45. Dr. Curry's image fraud opinion establishes that the graph is fraudulent and deceptive.

Data Cherry-Picking: Curry opines that "[e]vidence shows that Mann engaged in selective data cherry picking to create the Hockey Stick." ¶ 36(b). Citing *Nature*, she defines cherry-picking as "select[ing] segments of evidence that seem to confirm a particular position while ignoring a significant portion of related cases or data that contradict the position." Steyn SJ Ex. TT (Curry Report) at 18. As for the Hockey Stick, she concludes that Mann's data cherry-picking "straddles" what *Nature* calls "the fine line between sloppy science and scientific misconduct." ¶ 54.

Curry demonstrates that the graph relies heavily on a single tree ring dataset, bristlecone pine trees, to produce the Hockey Stick shape. ¶ 46. Curry relies on a Congressional report that raises concerns about Mann's overreliance on bristlecone pines because they are not accurate temperature proxies. ¶ 50. Multiple peer-reviewed articles corroborate Dr. Curry's opinion that tree ring results "adverse" to the Hockey Stick's conclusions were "not reported" or even "misrepresent[ed]." ¶¶ 46-51. Mann himself proves the point. He *admitted* to Briffa in 2003 that he eliminated data that was inconsistent with the hockey stick shape. ¶ 52.

Data Falsification: Finally, Curry opines that Mann falsified data by publishing a proxy dataset known as the "Tiljander proxies" upside-down—inverting cold and warm temperatures—and "[c]ontinuing to misuse" the dataset after being notified of the error. ¶ 60. Mann's upside-down publication led to the repetition of this error in other peer-reviewed research, and Mann failed to issue a correction even after a coauthor of the Tiljander proxies called his publication a "scientific forgery." Steyn SJ Ex. TT (Curry Report) at 26.

Mann's Non-Rebuttal: Mann does not—and cannot—dispute the substance of any of Curry's conclusions. He does not dispute that Briffa's post-1960 data was adverse to the Hockey Stick's conclusions; that it was deleted from the graph; and that the Hockey Stick spliced proxy and instrumental data. Nor does he dispute that greater statistical weight was given to data confirming the Hockey Stick shape or that he continued to publish the Tiljander proxies upside-down after being notified of the error. These are the foundations of Dr. Curry's image fraud, cherry-picking, and data falsification opinions. Mann has no defense.

Rather than defend his statistical modeling, Mann runs away from it. The declarations of Drs. Bradley and Karl seek to distance Mann from the decisions that led to the graph's image fraud and data cherry-picking, but even on these grounds they fail. Bradley's claim that Mann

did not "select the source data" because he "ran the statistics," Williams Decl. ¶ 9, does not refute Curry's opinions, which focus on the Hockey Stick's splicing of different data sets, excising adverse data, and giving greater statistical weight to favorable data. Karl's declaration likewise proves nothing. Karl does not dispute that Mann *was involved* in the decision not to delete the Briffa data, *see Id*. ¶ 34, and other IPCC TAR lead authors contend that Mann made the decision to delete the data alone, ¶ 42. (Moreover, as discussed in Steyn's opposition to strike Dr. Curry's testimony, Dr. Karl's declaration should also be ignored because he was not disclosed until a year after the February 6, 2020 deadline in the Court's June 4, 2019 Scheduling Order.).

Mann's reliance on a former Georgia Tech colleague's stray remark that Curry has "extreme" views on climate change, Pl. Br. at 14, is more irrelevant distraction. This remark is neither probative, representative nor relevant. It is belied by Curry's forty years of experience as a highly regarded climate scientist, during which she has published 190 peer-reviewed articles and testified before Congress ten times. Steyn SJ Ex. TT (Curry Report) at 40-55. It is not even representative of the performance review in which it appears, which otherwise delivers positive comments about Curry's performance as Chair of Georgia Tech's Earth and Atmospheric Sciences Department, Williams Decl. ¶ 35, a position she held for twelve years, Steyn SJ Ex. TT (Curry Report) at 40. And more substantively, Mann's attack of Curry's role in "the broader question of global warming," is another attempt to fight over an issue that "is never before th[is] Court," Oct. 22, 2019 Order at 6.

Contrary to Mann's suggestions, Curry never claimed that the Hockey Stick is not fraudulent. *See* Pl. Br. at 14. In the National Science Foundation interview Mann cites to claim that she did, she called Mann's statistics "goofy" and found "shoddy science in his data

analysis." Pl. SOMF ¶ 139. The evidence for Mann's fraudulent and deceptive publication of the Hockey Stick has remained just as strong since then.

2. Mann's "Misconduct": Violation of Scientific Norms

Separate and apart from promulgating the deceptive Hockey Stick, Mann has also engaged in misconduct by coordinating colleagues to delete emails and attacking his peers in the climate change polemic.

Deleted Emails: On May 29, 2008, Phil Jones, a School of Environmental Sciences Professor at the University of East Anglia, instructed Mann to "delete any emails you had with Keith [Briffa] re AR4" and to "email Gene [Wahl, another climate scientist] and get him to do the same." ¶ 147. Mann replied to Jones, "I'll contact Gene about this asap," and promptly forwarded Jones' email to Wahl. ¶¶ 148-49. Wahl followed Mann's instruction and deleted the referenced emails. ¶ 150. Actions taken "directly or indirectly with the intent to delete . . . emails" was one of four "research misconduct" charges in the Penn State inquiry. ¶¶ 102, 105. Had it conducted a remotely responsible investigation, it would have concluded the evidence that Mann engaged in misconduct by coordinating colleagues to delete emails was clear in the record. ¶¶ 151-55.

Mann's Climate War: Curry details how Mann has been "instrumental in the downward spiral of the climate science discourse" by withholding data frdom scientists who are critical of his statistical modeling, stifling criticism within the IPCC, distorting the peer review process, and leveling relentless personal attacks against anyone who dares to disagree with him. Steyn SJ Ex. TT (Curry Report) at 34. These attacks are "misconduct" because they violate fundamental norms of scientific discourse. *Id.*

During the Penn State investigation, Dean Henry Foley found Mann's vitriolic "nasty" emails about his critics such misconduct 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.

Mann's own coauthor Raymond Bradley believes Mann has a "relish [for] battle" and "take no prisoners" approach that comes from his "conspiratorial world view." ¶¶ 174-75. For instance, Mann tried to organize a boycott of a peer-reviewed journal that criticized the Hockey Stick. Steyn SJ Ex. TT (Curry Report) at 33-34. He speaks against his critics in "nasty" and "angry" ways, pouring out "vitriol." ¶ 174. He has publicly called his critics' peer-reviewed work "pure scientific fraud" and "pure crap," ¶ 179, and leveled countless personal attacks against anyone who disagrees with him, including on his public Twitter account with over 150,000 followers: "professional liar/denier-for-hire"; "human filth"; "THE worst person in the world"; "doofus for a dad"; "tinfoil hat-wearing conspiracy theory monger"; "putz"; "fucking embarrassment of a human being." ¶¶ 176-77, 179. This is just the tip of the iceberg. ¶¶ 176-81.

Mann embraces what he calls the "Climate Wars." ¶ 183. This lawsuit is a part of Mann's unending battle. Mann is not a victim of the Hockey Stick polemic; he is its leading architect.

C. Mann Engaged in "Wrongdoing" by "Molesting and Torturing" Data

Not Steyn's Words: Simberg, not Steyn, wrote that Mann is "the Jerry Sandusky of climate change" who "molested and tortured" data. Steyn distanced himself from this language immediately after quoting it ("I'm not sure I would have extended that metaphor all the way into the locker room showers").

A Metaphor: We are dealing here with a figure of speech. Aristotle, in *The Rhetoric,* describes the metaphor as the joining of dissimilars to show their similarity. Here, the dissimilars

are a football coach who is in prison for being a pedophile and a college professor of climate science whose scientific work is being challenged. The similarity is that both were employees at Penn State investigated by that University for wrongdoing without result due to improper concern for adverse publicity. Their wrongdoing is not the similarity; neither Simberg nor Steyn has said Mann is a child molester, and no witness has said they thought that.

In terms of the metaphor, to call Mann "the Jerry Sandusky of climate change" is merely to say that Mann, like Sandusky, was the subject of a whitewash investigation by Penn State. That is the only reasonable interpretation, and that is how the phrase was understood by all. Likewise, to say Mann "tortured and molested" data is simply to turn the metaphor. Any other reading says more about the reader than the writer.

No Republication Liability on an Internet Blog: In this context, commenting on an Internet blog about another Internet comment about a limited public figure (Mann), the ordinary rule about liability for republishing a libel, cited by the Court of Appeals, *CEI*, 150 A.3d at 1248, should not be applied woodenly. The rule is rooted in the "quaint homespun logic that talebearers are as bad as talemakers." 1 R. Smolla, Law of Defamation § 4.87 (2d ed. 2001). This anachronistic rationale does not apply to an Internet blog post, where courts and society writ large are more sensitive to the important role of free and open expression in commenting on matters of public concern. *See Sandals Resorts Int'l Ltd. v. Google, Inc*., 86 A.D.3d 32, 43–44 (1st Dep't 2011) ("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."). Justice Cardozo's teaching that "rules applicable to stage coaches are archaic when applied to automobiles" well encapsulates the application of the "quaint" rule of republication to Steyn's blog post.

Congress has expressed a clear intent, through the Communications Decency Act ("CDA"), to "encourage the unfettered and unregulated development of free speech on the Internet." *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1162 (N.D. Cal. 2017) (citation and quotation marks omitted), *appeal filed* (No. 18-16700); *see* 47 U.S.C. § 230(a) ("[T]he Internet . . . ha[s] flourished, to the benefit of all Americans, with minimal government regulation."). 47 U.S.C. § 230(a)(4). The Act shields an Internet "user" from liability for sharing "information provided by another information content provider"—a "person [] that is responsible, in whole or in part, for the creation or development of information provided through the Internet." *Id.* §§ 230(c)(1), (f)(3). Steyn "used" the Internet to quote information provided by another "content provider" (Simberg). Holding Steyn liable for quoting another's comments about matters of public concern on an Internet blog thwarts the CDA's text and purpose.

Neutral Reportage: Steyn used what Simberg wrote on a controversial and important public issue as the launching pad for his own comments. It would be awkward for a commentator to comment on something without being able to quote what he is commenting on. How could he express his views on what Simberg said without saying what Simberg said? When bloggers or commentators are reporting and commenting on developments on a particular topic of public concern, they often give readers more and needed context by repeating what was previously published. Mann used the same explanation to justify his own republication of the statements at issue in the Postscript to a second edition of his book *The Hockey Stick and the Climate Wars,* where he commented on them. ¶¶ 198-99.

Mechanical reliance on the republication rule for Steyn's blog post, one of seven posts he published on various matters of public concern in the week he published "Football and Hockey," ¶ 6, would frustrate core functions of the First Amendment, especially on the Internet. In these

circumstances, a privilege akin to the neutral reporting privilege should apply. *Cf. Edwards v. Nat'l Audubon Soc'y, Inc.,* 556 F.2d 113 (2d Cir. 1977). The privilege is based on the "essential" principle "that the press be at liberty to report serious charges against public officials without excessive concern for the source." *In re United Press Int'l*, 106 B.R. 323, 329 (D.D.C. 1989).

To serve that principle, Judge James E. Boasberg of the U.S. District Court for the District of Columbia believes the doctrine should apply to "the accurate republication of any statement by or about a public figure as long as attribution to and identification of the source are made." James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455, 488 (1991). That is exactly what Steyn did here—he accurately republished Simberg's statement about Penn State and Mann and attributed it to Simberg. Steyn's skepticism about Simberg's Sandusky metaphor immediately after he quotes it satisfies the "neutrality" requirement imposed on the privilege by some courts, *see In re United Press Int'l*, 106 B.R. at 339, especially since he uses Simberg's post as a jumping off point to criticize Penn State, his "main target," Oct. 22, 2019 Order at 4. Regardless, Judge Boasberg rejects this "requirement of neutrality" because it "would harm those segments of the media most in need of first amendment protection, namely those with a particular slant or viewpoint." Boasberg, *supra*, at 480. Steyn, writing commentary on an Internet blog about a newsworthy matter of public concern, falls squarely within that category. His republication of Simberg's post should be protected by the neutral reportage privilege. If not, the law would run afoul of the First Amendment rules against viewpoint discrimination.

Colloquialism Not Capable of Verification: Separate and apart from the truth of Mann's misconduct, accusing him of torturing data is not even necessarily pejorative. The phrase "torturing data" is a widely used colloquialism in the statistics community that "does not refer to

facts." ¶ 183; Steyn SJ Ex. DD (Wyner Dep.) at 163:16-19. Far from being defamatory, the phrase lacks a "clear definition" and is instead a springboard for "discussion" about a particular work of statistics. Steyn SJ Ex. DD (Wyner Dep.) 164:5-8. It cannot be proven true or false.

Mann's Data Manipulations: If the Court nonetheless imputes Simberg's non-defamatory words to Steyn, discovery has revealed that Mann manipulated and distorted ("molested and tortured") data in several ways to create the Hockey Stick.

Three peer-reviewed studies by Stephen McIntyre and Ross McKitrick show that the graph is plagued by statistical "errors and defects" that undermine its conclusions. ¶ 22. One of these studies, published in *Geophysical Research Letters*—the same journal where Mann published MBH99—explained that the graph "carried out an unusual data transformation" whose "effect . . . is so strong" that the hockey stick shape "is nearly always generated from (trendless) red noise." ¶ 22(c). That is, no matter what data goes into Mann's statistical model, the Hockey Stick shape emerges. The MIT Technology Review agreed—the Hockey Stick's data normalization procedure "tends to emphasize any data that do have the hockey stick shape, and to suppress all that do not," making the graph "an artifact of poor mathematics." ¶ 32. Mann cannot deflect the blame to others here. As Bradley acknowledges, Mann "ran the statistics," Williams Decl. ¶ 9, despite the fact that he lacks a degree in statistics and failed to consult or work with statisticians to create the graph, ¶¶ 19-20.

Defendants' expert Dr. Abraham Wyner, Statistics Professor at the University of Pennsylvania, explores the graph's "considerable number" of "statistical missteps" in a comprehensive and thorough report. Williams Decl. Ex. 31 (Wyner Report) ¶¶ 9-10. In addition to validating McIntyre and McKitrick's findings, *id.* ¶¶ 62, 67, he finds that (a) temperature proxies relied on by Mann "do not predict temperature more accurately than a random series

generated independently of temperature," *id.* ¶ 37; (b) Mann used confidence intervals that "dramatically underestimate[] uncertainty," and "result from assumptions that are demonstrably false," *id.* ¶¶ 10-11, 34, 42; (c) Mann used a "non-standard" principal component analysis, *id.* ¶ 10; and (d) he has created "highly misleading" graphs that "exaggerate the blade of the hockey stick" by "grafting" together two sequences of data that do not belong on the same graph, *id.* ¶¶ 10, 86-87. Together, Wyner concludes these missteps can be "construed as manipulative." *Id.* ¶ 9.

Two Congressional Reports verify Dr. Wyner's statistical critiques and those in the peer-reviewed literature. *First*, the National Research Council Report that Mann claims proves the falsity of Steyn's post, Pl. Br. at 17-18, does anything but. It agrees with Wyner, McIntyre, and McKitrick that "Mann et. al used a type of principle component analysis that tends to bias the shape of the reconstructions" and that "uncertainties of the published reconstructions have been underestimated." ¶ 28. *Second*, the Wegman Report validated McIntyre and McKitrick's criticisms and found MBH98 and MBH99 to be "obscure and incomplete." ¶ 25.

Mann's Empty Response: As with Curry, Mann mounts no defense to Wyner's analysis. Instead, he grossly mischaracterizes Wyner's deposition testimony. Wyner testified that he "didn't . . . form an opinion on deception." Steyn SJ Ex. DD (Wyner Dep.) 194:18-19. Wyner did not, as Plaintiff claims, testify that the hockey Stick is "not a deception." Pl. Br. at14. His report and deposition testimony are clear: the Hockey Stick is "very misleading" and "manipulative." Steyn SJ Ex. DD (Wyner Dep.) 194:18-19; Williams Decl. Ex. 31 (Wyner Report) ¶¶ 9, 32, 94-95.

The peer-reviewed studies Mann contends prove Steyn's statements false do not assess the validity of data manipulation, deception, or misconduct in connection with *the Hockey Stick*.

Rather, the studies he cites are entirely about the evidence for global warming. *See* Pl. Br. at 20 ("[O]ther paleoclimate reconstructions [] again show remarkable consistency in demonstrating the anomalous nature of 20th Century temperatures."); *id.* at 19 ("This study demonstrated remarkably synchronous temperature reconstructions."). These studies are irrelevant. The science of global warming is not at issue here. As Dr. Wyner explains, "a bad process can sometimes have good outcomes and vice versa." Williams Decl. Ex. 31 (Wyner Report) ¶ 93. No matter how strong the evidence is for global warming, Mann cannot salvage his bad process.

CONCLUSION

We have shown here, and in Steyn's affirmative motion for summary judgment, that the three allegedly defamatory statements in paragraph 28 of the Amended Complaint are true. We have demonstrated that the three new "statements" Mann has concocted and tried to attribute to Steyn are also true.

Mann's motion should in all respects be denied.

Dated: March 3, 2021

Respectfully submitted,

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP

By: _____
Daniel J. Kornstein

600 Fifth Avenue
New York, New York 10020
(212) 763-5000
dkornstein@ecbalaw.com

and

CARLTON FIELDS, P.A.
Scott Abeles
1025 Jefferson Street, NW
Suite 400 West
Washington, DC 20007-5028
(202) 965-8112
sabeles@carltonfields.com

Attorneys for Defendant Mark Steyn

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, I served a copy of the foregoing upon the following and by email at the addresses listed below:

John B. Williams, Esq.
WILLIAMS LOPATTO PLLC
1629 K Street, NW, Suite 300
Washington, D.C. 20006
Email: jbwilliams@williamslopatto.com
Telephone: (202) 296-1665

Peter J. Fontaine, Esq.
Chad E. Kurtz, Esq.
COZEN O'CONNOR P.C.
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Email: pfontaine@cozen.com
Email: ckurtz@cozen.com
Telephone: (215) 665-2723

Ty Cobb, Esq.
Ty Cobb, PLLC
3913 49th Street, NW
Washington, DC 20016
Email: Gbhshof@gmail.com
Telephone: (202) 957-7881

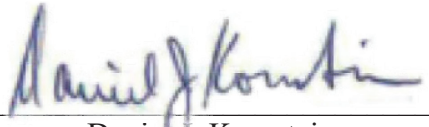
Counsel for Plaintiff Michael Mann

Andrew Grossman, Esq.
Mark I. Bailen, Esq.
David B. Rivkin, Jr., Esq.
BAKER HOSTETLER
Washington Square, Suite 1100
1050 Connecticut Avenue
Telephone: (202) 861-1500
Email: agrossman@bakerlaw.com

Counsel for Defendants Competitive Enterprise Institute and Rand Simberg

Michael A. Carvin, Esq.
Anthony J. Dick, Esq.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3900
Email: macarvin@jonesday.com
Email: ajdick@jonesday.com

Counsel for Defendant National Review, Inc.



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 Plaintiff's Motion for Partial Summary Judgment on the Issue of Falsity and to Strike Steyn's Defenses of Truth and Substantial Truth, and all responses thereto, it is hereby

ORDERED that the Motion is **DENIED**.

SO ORDERED.

Dated: _____, 2021

_____
Hon. Alfred S. Irving, Jr.

Copies by e-service to:

John B. Williams, Esq.
Ty Cobb, Esq.
Peter J. Fontaine, Esq.
Chad E. Kurtz, Esq.
Michael A. Carvin, Esq.
Anthony J. Dick, Esq.
Mark I. Bailen, Esq.
Andrew Grossman, Esq.