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 Calendar No.: 3 Judge: Fredrick H. Weisberg Next event: None

COUNTER-DEFENDANT MICHAEL MANN'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS THE COUNTERCLAIMS OF COUNTER-PLAINTIFF MARK STEYN

Pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.* (the "Anti-SLAPP Act") and Superior Court Civil Rule 12(b)(6), Counter-Defendant Michael E. Mann, Ph.D. ("Mann"), by and through his attorneys, hereby submits this memorandum of law in support of his motion to dismiss the counterclaims of Counter-Plaintiff Mark Steyn ("Steyn").

PRELIMINARY STATEMENT

Dr. Mann brought this lawsuit based upon certain defamatory statements made by Mark Steyn and the National Review, the Competitive Enterprise Institute, and Rand Simberg. Steyn and his co-defendants moved to dismiss Mann's lawsuit pursuant to both the Anti-SLAPP Act as well as Rule 12(b)(6)—arguing that the statements at issue were constitutionally protected opinion and had not been made with actual malice. According to Steyn and his co-defendants, Mann could not demonstrate that he was 'likely to prevail on the merits" of the matter. However, and critical for the merits of this motion, this Court disagrees. It has already ruled—

on three separate occasions—that Mann is likely to prevail against Steyn and his co-defendants. Undeterred, Steyn has now filed his Amended Answer and Counterclaims to the Amended Complaint ("Counterclaims").[1] The Counterclaims purport to seek $30 million in damages and attorneys' fees incurred as a result of having to defend this lawsuit.

In his first counterclaim, Steyn alleges that Mann "has engaged in a pattern of abusive litigation designed to chill freedom of speech and to stifle legitimate criticism of [Mann's] work." (Counterclaims ¶ 130). In an effort to paint Mann as an overly litigious individual whose purpose is to stifle dissent, Steyn riddles his counterclaims with irrelevant accusations related to Mann's actions with respect to completely separate lawsuits to which Steyn is not a party and from which Steyn can claim no legally cognizable injury. (*Id.* at ¶¶ 130-132). Steyn then alleges that the lawsuit currently before this Court was brought not to protect Mann's legal rights, but rather "was designed to have and has had the effect of inhibiting legitimate debate on the issues and public policy surrounding the theories expounded by [Mann] and others and of restricting the free flow of ideas concerning the merits of those theories." (*Id.* at ¶ 134). Steyn complains that this lawsuit improperly "targeted Defendant Steyn" and has "damaged Defendant Steyn by interfering with his right to express opinions on controversial matters and causing him to expend time, money and effort in having to respond to this lawsuit." (*Id.* at ¶¶ 136, 138). In his second counterclaim, Steyn alleges that Mann has "wrongfully interfered" with Steyn's "constitutionally protected rights of free speech and public expression and his engagement and use of the courts as an instrument of the government to carry out that wrongful interference

[1] The Court denied defendants motions to dismiss the amended complaint on January 22, 2014. Pursuant to Superior Court Civil Rule 12(a)(4)(A), Steyn's answer was due on February 10, 2014. Steyn did not file his initial Answer and Counterclaims until February 20, 2014. He amended his untimely Answer and Counterclaims on March 12, 2014, adding a third cause of action.

violates the First Amendment and constitutes a constitutional tort." (*Id.* at ¶ 142). In his third counterclaim, Steyn alleges that Dr. Mann has "wrongfully and abusively interfer[ed] with Defendant Steyn's constitutionally protected rights of free speech and public expression and misus[ed] the processes of the Court," and that such actions "constitute a form of abusive litigation akin to malicious prosecution, abuse of process, litigation designed to suppress competition, and so on . . ." (*Id.* at ¶ 144, 146).

The specific legal theories upon which Steyn bases his counterclaims are unclear. Mann is unaware of any "constitutional tort" against a private party for the wrongful interference with the right to free speech.[2] The Counterclaims should be dismissed on this basis alone. Nonetheless, given Steyn's allegations (albeit conclusory ones) that Mann has engaged in a "pattern of abusive litigation," has initiated this lawsuit for an improper motive, and that Steyn has been damaged by the initiation of this lawsuit, Mann will assume for purposes of this motion that Steyn has attempted to plead counterclaims sounding in the torts of abuse of process and malicious prosecution. In any event, these counterclaims fail as a matter of law, and should be dismissed. First, any claim for abuse of process fails because the only process Mann has used is the filing of this lawsuit, and Steyn cannot establish any threat to coerce some collateral advantage. Similarly, any claim for malicious prosecution fails because there is no underlying suit that has terminated in Steyn's favor. Further, given the Court's rulings, it is evident that Mann filed this lawsuit with probable cause, and in any event Steyn has not suffered the requisite

[2] As a general matter, the individual liberties guaranteed by the United States Constitution protect against actions by government officials but not against actions by private persons or entities. Because of this, civil-rights lawsuits seeking to vindicate federal constitutional rights (including First Amendment rights) are limited to those situations where there is "state action" or where a private person or entity acts "under color of state law," situations which are clearly not present here.

special injury necessary to maintain his action. Simply put, Mann's lawsuit is meritorious, and Steyn's contrived counterclaims should be dismissed with prejudice.

Finally, this Court should award Mann his costs and attorneys' fees in responding to Steyn's counterclaims as provided in the Anti-SLAPP Act. Steyn's counterclaims lack any merit whatsoever, and his assertion of these claims in the face of this Court's previous rulings is yet another manifestation of his disdain for this Court and its processes. Shortly before this Court denied the defendants' motions to dismiss the amended complaint, Steyn filed a motion to vacate the Court's July 19 orders—which was nothing other than an extended diatribe against this Court, accusing it of "improper", "grotesque", and "zombie-like" behavior. *See* Mot. to Vacate Order, dated January 21, 2014 at ¶ 8, 10, 12. This conduct should not be sanctioned, and attorneys' fees should be awarded.

ARGUMENT

I. Steyn's Counterclaims Are Subject To An Anti-SLAPP Motion As Well As A Motion To Dismiss For Failure To State A Claim.

The Counterclaims should be dismissed with prejudice pursuant to both the Anti-SLAPP Act Rule 12(b)(6). Steyn is unable, as a matter of law, to state a claim under Rule 12(b)(6), let alone meet the Anti-SLAPP Act's heavier burden of demonstrating that the claims are likely to succeed on the merits.

Pursuant to the Anti-SLAPP Act:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes a *prima facie* showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is

> likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502. The Anti-SLAPP Act further provides for a stay of discovery, an expedited hearing on the special motion to dismiss and for issuance of a ruling as soon as practicable after the hearing. *Id.* If the motion to dismiss is granted, the complaint shall be dismissed with prejudice. Defendants that are successful in filing such a motion are entitled to costs and attorney fees. D.C. Code § 16-5502(d).

Accordingly, in order for the Anti-SLAPP Act to apply to Steyn's counterclaims, Mann is only required to make a *prima facie* showing that Steyn's counterclaims arise "from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The Anti-SLAPP Act further defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include: "Any written or oral statement made: (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" (D.C. Code § 16-5501(1)(A)(i)); or "Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." (D.C. Code § 16-5501(1)(B)). The actions challenged in the Counterclaims meet both of these definitions.

First, the gravamen of the counterclaims is Steyn's ire over Mann's defamation complaint, and Mann's filing of this lawsuit plainly constitutes "an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. D.C. Code § 16-5501(1)(A)(i); *see also Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 735 (Cal. 2003) (stating that "every Court of Appeal that has addressed the question has

concluded that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute").[3] Therefore, Mann has met the threshold requirement for his special motion to dismiss.

Mann can also make a *prima facie* showing under the Anti-SLAPP Act because Steyn is undoubtedly a public figure. The Anti-SLAPP Act defines an "issue of public interest" to include "an issue related to health or safety; environmental, economic, or community well-being" or "a public figure". D.C. Code § 16-5501(3). There can be no question that Steyn should be deemed a public figure under the Anti-SLAPP Act. Steyn's Counterclaims essentially concede the point, providing this Court with a litany of his public activities:

> - Steyn says that he is a self-described "popular writer and columnist on matters of public interest."
>
> - Steyn says that he is the author of two "international bestselling books."
>
> - Steyn says that he has been "published over the years by the leading newspapers and magazines throughout the English-speaking world, including *The Wall Street Journal*, *The Times* of London, *The National Post* of Canada, *The Australian*, *The Irish Times*, *The Jerusalem Post*, *The Spectator*, *Maclean's*, and *The Atlantic Monthly*."
>
> - Steyn says that he is a "human rights activist whose efforts on behalf of freedom of speech have been recognized by the Canadian Committee for World Press Freedom, by the Danish Free Press Society, and by the repeal in 2013 of Canada's Section 13 censorship law."

See Counterclaims at ¶ 128.

As Mann has met his burden of establishing the applicability of the Anti-SLAPP Act to Steyn's claims, the burden shifts to Steyn to establish that his "claim is likely to succeed on the

[3] California's Anti-SLAPP Act, as with D.C.'s, provides that the protected activity includes, *inter alia*, "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Cal. Civ. Proc. Code § 425.16(e).

merits." *See* D.C. Code § 16-5502(b). If Steyn fails to meets that burden his counterclaims must be dismissed with prejudice. *Id.* As set forth in detail below, Steyn is unlikely to succeed on the merits of an abuse of process claim, because he cannot show that the filing of this lawsuit amounts to the use of process to obtain an improper end. The only judicial process Mann has engaged in related to Steyn is his assertion of defamation and intentional infliction of emotional distress claims.[4] Given that this Court has found on three separate occasions that Mann is likely to succeed on the merits of those claims, Steyn cannot remotely show that Mann filed this lawsuit for an end not contemplated by law. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 54, 58 (1993) (there is no abuse of "administrative and judicial processes" where litigation does not show "a pattern of baseless, repetitive claims," but instead, litigants have pursued "objectively reasonable claims."). Similarly, Steyn is unlikely to succeed on a malicious prosecution claim because he cannot establish an essential element – termination of a lawsuit in Steyn's favor.

II. Steyn Cannot State A Claim For Abuse Of Process, Let Alone Demonstrate That He Is Likely To Succeed On The Merits Of An Abuse Of Process Claim.

Steyn's counterclaim for abuse of process fails as a matter of law because he cannot show that Mann used the legal process to accomplish an improper or unrelated end outside of the relief sought in this action. An abuse of process is the use of the legal system to "accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do."

[4] Steyn's allegations regarding (1) Mann's pending lawsuit against Dr. Tim Ball (Counterclaims at ¶ 130), (2) litigation between Kenneth Cuccinelli and the University of Virginia (*id.* at 132), and (3) Mann's efforts to ensure his likeness is not misappropriated by Minnesotans for Global Warming (*id.* at ¶ 131) are beside the point. Steyn has no standing to sue for abuse of process based upon lawsuits in which he is not even a party. *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1104 (D.C. 2005) (a litigant "cannot rest his claim to relief on the legal rights or interests of third parties") (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

Bown v. Hamilton, 601 A.2d 1074, 1079 (D.C. 1992); *see also, Whelan v. Abell*, 953 F.2d 663, 670 (D.C. Cir. 1992) (describing abuse of process as "a perversion of the judicial process and achievement of some end not anticipated in the regular prosecution of the charge"); *Scott v. District of Columbia*, 101 F.3d 748, 744 (D.D.C. 1997) ("The essence of the tort of abuse of process is the use of the legal system 'to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do."); *Nader v. Democratic Nat'l Comm.*, 555 F.Supp. 2d 137, 161 (D.D.C. 2008) ("The *sine qua non* of an abuse of process claim . . . is that a defendant has used process to compel a party to do a collateral thing that they would not otherwise do."). Importantly, a regular and legitimate use of process does not constitute abuse of process even if it is done with an ulterior motive. *See Geier v. Jordan*, 107 A.2d 440, 441 (D.C. 1954). Further, the District of Columbia courts have interpreted the doctrine of abuse of process very narrowly to avoid the chilling effect it might otherwise have on the filing and prosecution of claims. *Bown*, 601 A.2d at 1080.

Steyn has no legitimate abuse of process claim because he does not allege and cannot show that there was a perversion of the regular and contemplated judicial process. The typical case of abuse of process is some form of extortion, improperly using the process to put pressure on the party to compel some action. *Scott*, 101 F.3d at 755 (citing Restatement (Second) of Torts § 682 cmt. b (1977)). The mere initiation of litigation is *never* actionable as abuse of process "no matter what ulterior motive may have prompted it." *Bown*, 601 A.2d 1080; *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980). Steyn alleges that Mann filed this lawsuit in order to interfere with Steyn's right to free speech, "to chill freedom of speech and to stifle legitimate criticism of [Mann's] work," to inhibit "legitimate debate on the issues and public policy surrounding"

Mann's work and "to re-ignite [Mann's] dimming celebrity." (Counterclaim 130, 134). Steyn's conclusory allegations that Mann had an improper motive in bring this lawsuit are of no consequence. Although Steyn alleges that this lawsuit was filed to chill Steyn's free speech rights, he cannot seriously contest that it was also filed for a proper purpose – to protect Mann's right against defamation. Thus, Steyn cannot succeed on an abuse of process claim.

III. Steyn Cannot State A Claim For Malicious Prosecution Let Alone Demonstrate He Is Likely To Succeed On The Merits Of A Malicious Prosecution Claim.

In *Morowitz v. Marvel*, the D.C. Court of Appeals delineated the elements of a malicious prosecution action: a plaintiff "must plead and prove: (1) the underlying suit terminated in plaintiff's favor; (2) malice on the part of defendant; (3) lack of probable cause for the underlying suit; and (4) special injury occasioned by plaintiff as the result of the action." *Morowitz,* 423 A.2d at 198 (citing *Ammerman v. Newman*, 384 A.2d 637, 639 (D.C. 1978) (per curiam); *see also, Joeckel v. Disabled Am. Vets.*, 793 A.2d 1279, 1282 (D.C. 2002). Mann's filing of this lawsuit cannot give rise to a malicious prosecution claim.

First, Steyn simply cannot state a claim for malicious prosecution where he cannot allege the required element that the underlying suit terminated in his favor. *See Joeckel*, 793 A.2d at 1282. It has been universally held that an action for malicious prosecution will not lie either as an independent action or as a cross-claim in the same suit before such a final and favorable conclusion occurs. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, Malicious Prosecution – The Cause Of Action – Favorable Termination, § 6.13 (4th Ed. 1996) (and cases cited therein); *see also*, David J. Meiselman, *Attorney Malpractice Law and Procedure*, Malicious Prosecution § 20:1 (1980) (since there must be a termination of the underlying action, a counterclaim for malicious prosecution cannot exist). Not only has this suit not terminated in Steyn's favor, but Steyn has moved this Court on three separate occasions to dismiss Mann's

lawsuit. In each instance, this Court has found that Mann has shown he is likely to succeed on the merits and that this case shall move forward.

Second, Steyn cannot show that Mann filed this lawsuit without probable cause. It is settled District of Columbia law that "[l]ack of probable cause is an essential element of an action for malicious prosecution." *Ammerman,* 384 A.2d at 639. The United States Supreme Court has explained that "[p]robable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.'" *PRE,* 508 U.S. at 62-63 (alteration in original) (quoting *Hubbard v. Beatty & Hyde, Inc.,* 178 N.E.2d 485, 488 (Mass. 1961)); *see also Lyles v. Micenko,* 468 F. Supp. 2d 68, 76 (D.D.C. 2006) (quoting *Ammerman,* 384 A.2d at 639, and defining probable cause as "facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper"). Steyn's complaint does not even bother to allege that Mann lacked probable cause to pursue his defamation and intentional infliction of emotional distress claims. Further, given that this Court has already ruled that Mann is likely to succeed on the merits of his claim, Mann certainly had a "reasonable belief" that his claims would be held valid upon adjudication.

Third, Steyn cannot show the requisite special injury. In the District of Columbia, "[t]he special injury required [for malicious prosecution] has been defined as arrest, seizure of property, or 'injury which would not necessarily result from suits to recover for like causes of action.' " *See Joeckel,* 793 A.2d at 1282 (citing *Mazanderan v. McGranery,* 490 A.2d 180, 182 (D.C. 1984)). District of Columbia courts have held that injuries to reputation, emotional distress, loss of income, and substantial expenses incurred in defending against a lawsuit do not qualify as "special injuries." *See id.; Tri-State Hosp. Supply Corp. v. United States,* No. 00-01463, 2007

WL 2007587, *7 (D.D.C. July 6, 2007) ("[I]ncurring substantial expense in defending against a lawsuit does not rise to the level of special injury."). In *Mazanderan*, the District of Columbia Court of Appeals held that allegations of indignity and humiliation, mental and physical distress and pain, loss of productive work time, damage to reputation, and expense did not rise to the level of "special injury" necessary to state an abuse-of-process claim. Thus, Steyn's allegations that this lawsuit has interfered with "his right to express opinions on controversial matters" and has caused him "to expend time, money and effort in having to respond to his lawsuit" cannot as a matter of law constitute special injury sufficient to satisfy the legal requirements.

IV. The Court Should Award Mann Attorneys' Fees and Costs

Section 4 of the Anti-SLAPP Act provides that the Court may award reasonable attorneys' fees and costs to a moving party who prevails, in whole or in part, on a motion to dismiss brought pursuant to the Anti-SLAPP Act. D.C. Code § 16-5504(a). The award of attorneys' fees and costs is especially warranted here because Steyn's counterclaims are plainly without merit and fly in the face of this Court's previous rulings on his motions to dismiss. Steyn's counterclaims amount to nothing more than a complaint against Mann for filing this lawsuit and unsubstantiated allegations that the purpose of Mann's lawsuit was to stifle Steyn's and other freedom of expression. By filing his counterclaims in the wake of multiple rulings by this Court that Mann's lawsuit against him is likely to succeed, not to mention the stream of invective that he has hurled at this Court, Steyn has shown a disregard for this Court and the governing law. The Court should grant Mann the costs and attorneys' fees incurred filing this motion.

CONCLUSION

Dr. Mann has established that the Anti-SLAPP Act applies to Steyn's Counterclaims and that Steyn is unable to demonstrate that he is likely to succeed on the merits. Dr. Mann has also demonstrated that the Counterclaims fail to state a claim as a matter of law. For the foregoing reasons, Dr. Mann respectfully requests that the Counterclaims be dismissed with prejudice and that the Court award him the costs and attorneys' fees incurred in filing this motion.

DATED: March 17, 2014

Respectfully submitted,

/s/ John B. Williams
John B. Williams (D.C. Bar No. 257667)
WILLIAMS LOPATTO PLLC
1776 K Street, NW Suite 800
Washington, D.C. 20006
Tel: (202) 296-1665
jbwilliams@williamslopatto.com

Peter J. Fontaine (D.C. Bar No. 435476)
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
Tel: (215) 665-2723
pfontaine@cozen.com

Catherine R. Reilly (D.C. Bar No. 1002308)
COZEN O'CONNOR
1627 I Street, NW, Suite 1100
Washington, D.C. 20006
Tel: (202) 912-4800
creilly@cozen.com

Bernard S. Grimm (D.C. Bar. No. 378171)
Law Office of Bernard S. Grimm
1627 I Street, NW, Suite 1100
Washington, D.C. 20006
bgrimm@grimmlawdc.com
Tel: (202) 912-4888

Counsel for Plaintiff / Counter-Defendant Michael E. Mann, Ph.D.