Nos. 13-cv-1043, 13-cv-1044 (consolidated)

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Michael E. Mann, Ph.D.,

Plaintiff–Appellee,

v.

National Review, Inc.; Mark Steyn;
Competitive Enterprise Institute; Rand Simberg,

Defendants–Appellants.

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B
(The Honorable Natalia Combs Greene)

Appellants' Response to the Court's Order To Show Cause Regarding Application of the Collateral Order Doctrine

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Rule 28(a)(2) Disclosure

The parties in the trial and appellate proceedings, and their respective counsel, are:

> Plaintiff–Appellee Michael Mann, represented by John B. Williams, Catherine Rosato Reilly, and Peter J. Fontaine of Cozen O'Connor; and Bernard S. Grimm of Law Office of Bernard S. Grimm;
>
> Defendants–Appellants Competitive Enterprise Institute and Rand Simberg, represented by David B. Rivkin, Jr., Bruce Brown, Mark I. Bailen, and Andrew M. Grossman of BakerHostetler LLP; and
>
> Defendants–Appellants National Review and Mark Steyn, represented by Shannen W. Coffin, James Moorhead, and Thomas M. Contois of Steptoe & Johnson LLP.

Defendant–Appellant National Review Inc. discloses that its voting shares are owned by Constitutional Enterprises Corporation, a Delaware Corporation, and that it has no other parent corporation. Defendant–Appellant Competitive Enterprise Institute discloses that it has no parent corporation or subsidiaries and that no publicly held corporation owns more than 10 percent of its stock.

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Statutes

Penn State climate scientist and professor, author, and activist Michael Mann filed this defamation action against Competitive Enterprise and its adjunct fellow Rand Simberg ("CEI Defendants") and National Review, Inc. and its writer Mark Steyn ("National Review Defendants"). Dr. Mann alleges that Defendants defamed him and intentionally inflicted emotional distress in commentary criticizing his research and comparing Penn State's lax response to a public controversy regarding that research to its handling of allegations regarding Penn State assistant football coach Jerry Sandusky.

Defendants appeal the Superior Court's denial of their motion to dismiss Mann's Complaint under the D.C. Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.* Plaintiff has forcefully thrust himself into the heated political debate that he calls the "Climate Wars," frequently accusing his critics of the same sort of "fraud" that he claims is actionable when directed at him. Yet the court below held that Defendants' criticism of Mann's research was not protected by the First Amendment, reasoning, among other things that, "[t]o call [Mann's] work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud." Omnibus Order, *Mann v. Nat'l Review, Inc. et al.*, 2012 CA 008263 B (D.C. Sup. Ct. July 19, 2013), Att. F at 16.

This Court can and should consider Defendants' appeal, reverse the Superior Court's orders, and dismiss the complaint. The denial of a motion to dismiss under the D.C. Anti-SLAPP Act is immediately appealable under the "collateral order" doctrine of *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 546 (1949). The inevitable chilling effect of the Superior Court's mistaken decision—caused by exposing speakers to the risk of burdensome and expensive litigation for protected commentary—perfectly illustrates why the D.C. Council established an "immunity" from suit for speech on matters of public interest. Council

of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report on Bill 18-893, Att. A. at 4. The D.C. Anti-SLAPP Act guarantees a "substantive right[]" to defendants engaged in protected speech in order to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id*. As this Court has previously recognized, that right is a "public interest worthy of protection on interlocutory appeal" under the collateral order doctrine. *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1138 (D.C. 2010).

To give effect to the immunity established by the D.C. Council—which would be lost if Defendants are forced to litigate a meritless case aimed at chilling First Amendment-protected expression on a matter of intense public interest—the Court should adhere to its own precedent and follow the lead of the First, Second, Fifth, and Ninth Circuits in holding that denial of an anti-SLAPP motion is immediately appealable as a collateral order where, as here, legislators intend to provide speakers with substantive immunity from suit.

Background

A. The D.C. Anti-SLAPP Act

The D.C. Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed at preventing their engaging in constitutionally protected actions on matters of public interest." Att. A at 4.[1] The D.C. Council sought to "[f]ollow[] the lead of other jurisdictions," such as California, that have "extended absolute or qualified immunity to

[1] SLAPP stands for "strategic lawsuit against public participation." Att. A at 1.

individuals engaging in protected actions." *Id*.[2] This approach, it explained, was necessary to protect defendants from being forced to "dedicate a substantial[] amount of money, time, and legal resources" to defend suits intended as "punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." *Id*. at 1. In this way, the Act "ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id*. at 4.

The statute immunizes any "act in furtherance of the right of advocacy on issues of public interest," which it defines as a "written or oral statement" to a government entity or the public concerning such matters as "environmental, economic, or community well-being" and the affairs of "public figure[s]." D.C. Code § 16-5501(1), (3). It does so by creating "a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest." Att. A at 7. To effectuate the statute's immunity, a party need only file a special motion to dismiss "mak[ing] 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." § 16-5502(b). The mere filing of that motion, in turn, automatically stays all discovery proceedings, § 16-5502(c)(1), so as to "ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP." Att. A at 4. If the defendant has carried its minimal burden, "the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." § 16-5502(b). The Act mandates that dismissal "shall be with prejudice." § 16-5502(d).

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[2] Plaintiff Mann acknowledges that the "District of Columbia statute was modeled after the California statute." Pl.'s Opp. to National Review's Motion to Dismiss, 8-9 (D.C. Sup. Ct. filed July 18, 2013).

As initially proposed, the Anti-SLAPP Act expressly provided for immediate interlocutory appeal "from a court order denying a special motion to dismiss in whole or in part." The Committee on Public Safety and the Judiciary removed that provision due solely to the panel decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *rehearing en banc granted and opinion vacated*, 30 A.3d 783 (D.C. 2011), which the Committee understood to hold that "the Council is restricted from expanding the authority of [the] District's appellate court" to hear interlocutory appeals. Att. A at 7; *see Sherrod v. Breitbart*, -- U.S. App. D.C. --, 720 F.3d 932, 936 (2013). The Committee expressed its agreement with the dissenting opinion in *Stuart,* which it read to provide "a strong argument for why the Council should be permitted to legislate this issue." Att. A at 7. Nonetheless, it acknowledged that it was bound by *Stuart*. In removing the explicit interlocutory appeal provision, however, the Committee made clear that it still "agrees with and supports the purpose of this provision." *Id*.

B. Professor Mann Sues a Magazine, a Think Tank, and Their Associates for Their Criticism of His Research

On October 22, 2012, Dr. Mann filed this action for defamation and intentional infliction of emotional distress. Dr. Mann is one of the creators of the controversial "hockey stick" diagram often cited as evidence of manmade or catastrophic global warming. His "hockey stick" research has been called into question by critics who have challenged his statistical methods and data. Further controversy regarding Dr. Mann's research arose from the release of private emails involving Dr. Mann and his professional colleagues at the Climate Research Unit at the University of East Anglia—a highly publicized scandal known as "Climategate."

Dr. Mann's lawsuit claims that Defendants defamed and inflicted emotional distress on him in blog posts criticizing Penn State's failure to seriously investigate his work in the wake of the Climategate scandal. On July 13, 2012, the day after the release of an investigative report by former FBI Director Louis Freeh regarding Penn State University's handling of the sexual assault allegations against former assistant football coach Jerry Sandusky, Simberg authored a post on CEI's OpenMarket weblog entitled "The Other Scandal In Unhappy Valley." *See* Att. B. Dr. Mann contends that the post caused him emotional distress by stating that he "could be said to be the Jerry Sandusky of climate science" for the way that Penn State had similarly failed to adequately investigate Dr. Mann's research after the Climategate emails raised serious questions regarding his research. Dr. Mann also contends that he was defamed by the post's characterization of those emails as revealing "data manipulation," its questioning of whether Penn State, in light of the Sandusky scandal, "would do any less to hide academic and scientific misconduct," and its quotation of a climate-science commentator that Dr. Mann was "the posterboy of the corrupt and disgraced climate science echo chamber." Att. B.

On July 15, 2012, in a post entitled "Football and Hockey" published separately on National Review Online's weblog "The Corner," Steyn criticized institutional corruption at Penn State with respect to both its handling of the Jerry Sandusky affair and its cursory investigation of allegations of wrongdoing against Dr. Mann. *See* Att. C. Dr. Mann contends that Steyn's commentary caused him emotional distress in quoting Simberg's "Jerry Sandusky of climate science" statement. He further asserts that NR Defendants defamed him in its

description of him as "the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus."[3] Att. C.

After the publication of these statements, Dr. Mann demanded public retractions and apologies from both NRO and CEI. National Review's counsel responded in an August 22, 2012 letter denying that the commentary at issue was actionable. National Review's Editor Rich Lowry subsequently posted his own response to the threat of legal action in an August 22, 2012 post entitled "Get Lost," in which he suggested that Dr. Mann "go away and bother someone else." *See* Att. D. Dr. Mann alleges that Lowry's post further defamed him by explaining: "In common polemical usage, 'fraudulent' doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong." Dr. Mann also alleges that CEI and Simberg are liable for this same statement because CEI hyperlinked to Mr. Lowry's response.

C. The Superior Court Denies the Defendants' Special Motions To Dismiss Under the D.C. Anti-SLAPP Act

Both sets of Defendants timely moved to dismiss Dr. Mann's claims under the D.C. Anti-SLAPP Act and Rule 12(b)(6). As relevant to this appeal, Defendants argued that they met their *prima facie* Anti-SLAPP burden because Dr. Mann was a public figure and that the speech at issue related to issue of public importance. Dr. Mann conceded that the Act applied to the speech at issue and that Defendants had met their *prima facie* burden.

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[3] Dr. Mann's original complaint did not allege that the "Jerry Sandusky of climate science" statement was defamatory, only that it caused him emotional distress, and he explicitly disclaimed any intention of pursuing a defamation claim based on that statement in opposing Defendants' Anti-SLAPP motion. After oral argument on those motions, however, Dr. Mann reversed course and obtained leave to amend his complaint to assert a defamation count on the basis of that statement. Defendants subsequently moved to dismiss the Amended Complaint under the Anti-SLAPP Act and Rule 12(b)(6), and those motions remain pending before the Superior Court.

Defendants thus argued that Dr. Mann had not met his burden of demonstrating that he is likely to succeed on the merits of the case because the challenged statements are protected statements of opinion, phrased in the hyperbolic language typical of the public debate over global warming, which cannot be reasonably interpreted as stating facts about Dr. Mann. Defendants also argued that, in light of the widespread public criticism of his research and conduct, Dr. Mann could not possibly meet his burden under the First Amendment of demonstrating by clear and convincing evidence that the challenged statements had been made with actual malice, *i.e.*, knowledge of their falsity or reckless disregard for their truth. As to Dr. Mann's intentional infliction of emotional distress claim, Defendants argued that the statement was not outrageous and was constitutionally protected speech. Finally, the CEI Defendants argued that they cannot be held liable for libel on the basis of a hyperlink when they have not republished the challenged statements.

On July 19, 2013, the Superior Court (Judge Natalia Combs Greene) denied Defendants' motions to dismiss in two substantially similar orders, one per each set of Defendants. *See* Atts. E, F. The court found that the Anti-SLAPP Act properly applied to Dr. Mann's claims as arising from covered acts in furtherance of the right of advocacy on issues of public interest. Att. F at 8. But the statements, it held, were actionable because they "rel[y] on the interpretation of facts (the [Climategate] emails)," *id*. at 14, and because "[t]o call his [Dr. Mann's] work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud." *Id*. at 16. Although the court recognized that "[l]anguage such as 'intellectually bogus[,]' 'data manipulation[,]' and 'scientific misconduct' in the context of the publications' reputation and columns certainly appear [sic] as exaggeration and not an accusation of fraud," it nonetheless held that these statements were not rhetorical hyperbole

"when one takes into account all of the statements and accusations made over the years [and] the constant requests for investigations of Plaintiff's work." *Id.* at 17. The court similarly rejected (or declined to address) Defendants' other legal arguments.[4]

On August 13, 2013, the Superior Court extended the time for appeal of its July 19 orders to and including September 17. *See* Att. G. Subsequently, the case was transferred to Judge Frederick Weisberg. Both sets of defendants filed notices of appeal on September 17. This Court's order of October 18, 2013, consolidated the appeals and directed the Defendants to show cause why this Court has jurisdiction over their appeals.

Argument

I. Because the D.C. Anti-SLAPP Act Establishes an Immunity from Suit, the Collateral Order Doctrine Provides Jurisdiction for this Appeal

As every appellate court to have considered the issue has concluded, the denial of an anti-SLAPP motion is appealable under the collateral order doctrine where, as here, the legislature intended that the statute provide a substantive immunity from suit. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 147-151 (2d Cir. 2013); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 174 (5th Cir. 2009); *Godin v. Shencks*, 629 F.3d 79, 85 (1st Cir. 2010); *Schelling v. Lindell*, 942 A.2d 1226, 1230 (Me. 2008). There is no question from the text and legislative history of the

[4] In its orders, the Superior Court also confused the Plaintiff's allegations, misattributing in multiple respects the comments and actions alleged against the CEI Defendants to the National Review Defendants, and *vice versa*. In response to motions for reconsideration based on the court's fundamental factual misconceptions, the court conceded a "confusion of facts" as to who said what and who did what—*i.e.*, the very basis of Dr. Mann's claims—but concluded that it "does not amount[] to a material mistake" that altered its legal conclusions, and thus denied the motions. Order, *Mann v. National Review, Inc.*, No. 2012-CA-8263B (D.C. Sup. Ct. filed August 30, 2013).

D.C. Anti-SLAPP Act that the D.C. Council intended to confer upon anti-SLAPP defendants a "substantive right" in the nature of an "immunity" from suit. *See* Att. A at 4, 6. That legislative purpose controls the collateral order issue here, triggering jurisdiction for this appeal.

The decisions of other courts recognizing the appealability of the denial of an anti-SLAPP motion are consistent with the law of this Court. This Court has recognized that the immunity established by the D.C. Anti-SLAPP Act for speech on matters of public interest is precisely the kind of compelling public interest that merits immediate interlocutory review under the collateral order doctrine. Its decision in *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1138-39 (D.C. 2010), discussing Louisiana's anti-SLAPP statute, agreed with the Fifth Circuit that "the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning matters of public significance" is one "worthy of protection on interlocutory appeal" under the doctrine.

The D.C. Council sought to promote that very interest when it enacted the D.C. Anti-SLAPP Act to extend an "immunity to individuals engaging in protected actions" so as to "ensure that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Att. A. at 4. The D.C. Council repeatedly noted that the Anti-SLAPP Act "[c]reates a substantive right" to prompt dismissal of a lawsuit regarding an act in furtherance of a right of advocacy on issues of public interest. Att. A. at 6, 7. Consistent with the clear understanding of the legislature, interlocutory review is necessary to secure that right to be free from suit for protected speech and thereby to carry out the D.C. Council's intentions.

A. The D.C. Council Sought To Confer Immunity from Suit

Both the statutory text and the legislative history of the D.C. Anti-SLAPP Act conclusively demonstrate that it was "intended to provide a right not to be tried"—*i.e.*, a substantive right in the nature of an immunity from suit for protected speech—"as distinguished from a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a [trial] judge before a defendant is required to undergo the burden and expense of a trial." *Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009). That intent, in turn, triggers application of the collateral order doctrine.

Most tellingly, the Act provides that any "dismissal shall be with prejudice." D.C. Code § 16-5502(b). Thus, a plaintiff who is unable to demonstrate, at the very outset of litigation, that his "claim is likely to succeed on the merits," § 16-5502(b), forfeits that claim for all time—no matter what evidence he might later uncover or might have turned up in discovery and no matter even that simple amendment of the complaint might have corrected any deficiency in his case.[5] This is far more than a simple review of "the legal sufficiency of the evidence underlying the complaint" prior to trial; by operation of *res judicata*, it immunizes the defendant from any successive related claim. In this respect, the Act provides defendants a powerful "substantive right" to be free from suit where the plaintiff's initial showing has, for whatever reason, fallen short. Just as the D.C. Council intended, the Act does

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[5] In this respect, the D.C. statute differs from certain anti-SLAPP laws that have been held not to support a right to an interlocutory appeal under the collateral order doctrine. In *Englert*, for instance, the Ninth Circuit held that the Oregon statute did not support a collateral order appeal. But that statute merely created a "procedural defense to civil actions that can dismiss a case *without prejudice*." 551 F.3d at 1101 (emphasis added). Where a legislature does not give final effect to an anti-SLAPP dismissal, as with the Oregon statute, it is plain that the statute does not create the sort of immunity from suit created by the D.C. law.

more than alter court procedures; it provides SLAPP defendants with "substantive rights," foremost among them the right to be free from any SLAPP suit. *See* Att. A at 1, 4, 6, 7.

That approach is the only one equal to the evil identified by the Council. As the Committee on Public Safety and the Judiciary's report on the Act explains, "the goal of [anti-SLAPP] litigation is not to win the lawsuit but punish the opponent and intimidate them into silence." Att. A. at 4. In other words, "*litigation itself* is the plaintiff's weapon of choice." *Id*. (quoting testimony of Art Spitzer, Legal Director, ACLU-NCA). The remedy, as the Council saw it, was to "provide[] a defendant to a SLAPP with substantive rights to expeditiously and economically *dispense of litigation* aimed to prevent their engaging constitutionally protected actions on matters of public interest." *Id*. (emphasis added). And the way to do that was to establish an immunity from suit:

> Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.

Id.[6]

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[6] In connection with an order staying proceedings below, Judge Weisberg reasoned that, although (in his view) the Anti-SLAPP Act's right is "technically not an absolute or qualified immunity," it should be treated as "analogous to a claim of qualified immunity." Order Staying Case Pending the Decision on Defendants' Interlocutory Appeals, 2 n.2 (D.C. Sup. Ct. Oct. 2, 2013). Consistent with Judge Weisberg's characterization, the Second Circuit reasoned in *Liberty Synergistics* that this is a distinction without a difference. In *Liberty*, the court disagreed with the Ninth Circuit's view in *Batzel* that California's anti-SLAPP statute confers a "substantive immunity from suit." 718 F.3d at 148 n.9. Nonetheless, it agreed with the Ninth Circuit that the statute supports collateral order appeal because the right it establishes is in the "*nature* of immunity." *Id*. The "essence" of the California law, found to support a collateral order appeal in both *Batzel* and *Liberty Synergistics*, was to "protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression," and the denial of this right is sufficiently "final" to satisfy the collateral order standards. *Id.* (quotation marks omitted).

As with California's anti-SLAPP statute and other state statutes that have been found to support a collateral appeal on denial of a motion to dismiss, the statutory text and legislative history demonstrate that the Council "wanted to protect speakers from the trial itself rather than merely from liability." *Batzel*, 333 F.3d at 1025; *see also Liberty Synergistics*, 718 F.3d at 148 (anti-SLAPP rule "reflects a substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity."). The whole point of such an anti-SLAPP statute "is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." *Liberty Synergistics*, 718 F.3d at 147 (quotation marks omitted). The protections of the law are lost if defendants are "forced to litigate a case to conclusion before obtaining a definitive judgment through the appellate process." *Id.* (quotation marks omitted).

In resisting the collateral order appeal below, Dr. Mann focused exclusively on the fact that the D.C. City Council did not provide an explicit right to such an appeal in the statute's text. But this misses the forest for the trees. The touchstone of appealability under the collateral order doctrine is not whether a statute mechanically provides for such an appeal, but the legislature's intent to immunize speakers from the burden of trial. That is why courts look toward legislative history to determine whether a statute was intended to provide immunity from suit in cases applying the collateral order doctrine. *E.g., Batzel*, 333 F.3d at 1025 (surveying "the legislative history behind" California's anti-SLAPP statute). And that is why they also consider statutory language reflecting legislative intent regarding immunity. *E.g., Stein v. United States*, 532 A.2d 641, 644 (D.C. 1987) (recognizing right to immediate appeal where statute suggested immunity was intended, in the absence of an interlocutory appeal provision).

Indeed, courts have consistently *rejected* the contention that "a right to appeal must have been *expressly established* by the state legislature in order to create an immunity from suit" subject to collateral order appeal. *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1016 n.7 (9th Cir. 2013) (emphasis added); *see also Godin*, 629 F.3d at 85 (availability of appeal under state law "relevant, but not conclusive"); *Henry*, 566 F.3d at 178 n.1 (holding that denial of a motion under Louisiana's anti-SLAPP statute was immediately appealable under the collateral order doctrine even though that statute does not expressly authorize immediate appeal because it establishes a right not to stand trial); *Stein*, 532 A.2d at 644. Instead, an explicit provision for interlocutory appeal merely provides evidence of legislative intent to create a right to be free from the burdens of trial.

Here, the D.C. Council plainly indicated a desire to create a substantive immunity from suit. It concluded, however, that it lacked the authority to expressly authorize interlocutory appeal, as a result of a recent decision by this Court. Att. A at 7. In these circumstances, the absence of an explicit statutory interlocutory appeal cannot bear the talismanic significance that Dr. Mann would ascribe to it. Indeed, in cases where the Ninth Circuit has held that a state statute does not support a collateral order appeal, it did so because the legislature's choice indicated a legislative decision not to afford immunity to the anti-SLAPP defendant. Thus, in *Englert*, the Ninth Circuit reasoned that the Oregon legislature's refusal "to provide for an appeal from an order denying a special motion to strike . . . suggests that Oregon does not view such a remedy as necessary to protect the considerations underlying its anti-SLAPP statute." 551 F.3d at 1105. Similarly, in *Metabolic Research*, the court reasoned that the Nevada "legislature could have mirrored California's unequivocal language concerning an immediate right to appeal had it intended to furnish one." *Metabolic*

Research, Inc. v. Ferrell, 693 F.3d 795, 801 (9th Cir. 2012). Its affirmative decision not to do so demonstrated that it "did not intend for its anti-SLAPP law to function as an immunity from suit." *Id.* at 802.

The D.C. Council could not have made that same choice. Instead, it viewed its hands tied by this Court's decision in *Stuart v. Walker*, 6 A.3d 1215, 1217 (D.C. 2010), *rehearing en banc granted and opinion vacated*, 30 A.3d 783 (D.C. 2011), that the Council lacks authority to expand the jurisdiction of this Court to hear appeals of non-final orders of the Superior Court. But in removing the draft provision providing for such an immediate appeal, the Committee could not have been clearer that it "agrees with and supports the purpose" of the interlocutory review provision. Att. A. at 7. That legislative purpose controls here, triggering application of the collateral order doctrine.

B. Immediate Appeal Is Necessary To Preserve that Immunity by Protecting SLAPP Defendants Against Litigation Intended To Chill Rights of Free Expression

To qualify for immediate appellate review under the collateral order doctrine, a ruling denying a motion to dismiss must satisfy three conditions: "(1) it must conclusively determine a disputed question of law, (2) it must resolve an important issue that is separate from the merits of the case, and (3) it must be effectively unreviewable on appeal from a final judgment." *McNair*, 3 A.3d at 1135 (quotation marks omitted). Applying this standard, the Court has observed several times that "'the denial of a motion that asserts an immunity from being sued is the kind of ruling that is commonly found to meet the requirements of the collateral order doctrine and thus to be immediately appealable.'" *Id*. at 1136 (quoting *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C.

2001)). Denial of a special motion to dismiss under the D.C. Anti-SLAPP Act is precisely that kind of ruling.

1. Denial of an Anti-SLAPP Motion Conclusively Determines a Disputed Question of Law

The Superior Court, by denying Defendants' motions to dismiss, has conclusively determined the disputed legal issue of Defendants' claim of immunity from suit. As the Ninth Circuit explained in *Batzel*, denial of an anti-SLAPP motion "is conclusive as to whether the anti-SLAPP statute required dismissal" because "[i]f an anti-SLAPP motion to strike is granted, the suit is dismissed . . . . [Or] if the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation." 333 F.3d at 1025; *see also Henry*, 566 F.3d at 174 (identical reasoning); *Liberty Synergistics*, 718 F.3d at 147-48. More generally, this Court has held that an order denying application of a privilege or immunity, as here, conclusively determines a question of law. *McNair*, 3 A.3d at 1136; *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001); *United Methodist Church, Baltimore Annual Conference v. White*, 571 A.2d 790, 792 (D.C. 1990). Denial of an anti-SLAPP motion is no different.[7]

2. Defendants' Immunity from Suit Is Separate from the Merits

Defendants' immunity from suit is separate from the merits of the plaintiff's claims. "[T]he very nature of an immunity claim makes it collateral to and separable from the merits . . . ." *White*, 571 A.2d at 792. In particular, "[d]enial of an anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist,

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[7] The subsidiary issues disputed below are also questions of law. *See, e.g., Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 588 (D.C. 2000) (First Amendment); *Fisher v. Washington Post Co.*, 212 A.2d 335, 337-38 (D.C. 1965) (fair comment privilege).

without evaluating whether the plaintiff's claim will succeed." *Batzel*, 333 F.3d at 1025; *accord Henry*, 566 F.3d at 176 ("A court deciding an [anti-SLAPP] motion does not ask whether the plaintiff has proved her claim, but whether she has shown a sufficient probability of being able to prove her claim.").

3. Defendants' Immunity from the Burden of Litigation Is Entirely Unreviewable on Appeal from Final Judgment

Finally, Defendants' immunity from suit is effectively unreviewable if appellate review is deferred until there is a final judgment in the Superior Court. "Denial of immunity in its various forms has been considered the embodiment of a ruling that is unreviewable from a final judgment, 'for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.'" *McNair*, 3 A.3d at 1137 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)); *see also Finkelstein*, 774 A.2d at 341 ("the purported 'entitlement not to stand trial or face the other burdens of litigation' would be lost irretrievably").

On that basis, the First, Second, Fifth, and Ninth Circuits have specifically held that orders denying motions to dismiss under anti-SLAPP statutes meant to confer immunity from litigation are effectively unreviewable on appeal from a final judgment. *Godin*, 629 F.3d at 85; *Henry*, 566 F.3d at 177-78 ("Perhaps the embodiment of unreviewability, then, is immunity from suit . . . ."); *Batzel*, 333 F.3d at 1025. As the Ninth Circuit explained, "[i]f the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression." *Id.* at 1025; *see also Liberty Synergistics*, 718

F.3d at 149 ("the policy interest at stake is one of substantial importance that cannot be effectively vindicated after final judgment"). Similarly, the Supreme Court of Maine held that refusal to allow interlocutory review of an order denying an anti-SLAPP motion "would impose additional litigation costs on defendants, the very harm the statute seeks to avoid, and would result in a loss of defendants' substantial rights." *Schelling v. Lindell*, 942 A.2d 1226, 1230 (Me. 2008). Defendants here face the same potential injuries, with no remedy save collateral order review.

Recognizing as much, this Court has already identified the enforcement of "a statute that 'aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights'" as a "public interest worthy of protection on interlocutory appeal." *McNair*, 3 A.3d at 1138 (quoting *Henry*, 566 F.3d at 180). It explained:

> In *Henry*, the [Fifth Circuit] considered Louisiana's anti-SLAPP ("strategic lawsuits against public participation") statute, which was designed to bring an early end to meritless claims "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances," noting that in enacting the statute, the Louisiana legislature had "declare[d] that it is in the public interest to encourage continued participation in matters of public significance . . . ."

Id. (quoting *Henry*, 566 F.3d at 180).[8] The dispositive factor, the Court explained, was that the Louisiana statute promoted a "public policy" of the "high order": "the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances

[8] Just as with the D.C. Anti-SLAPP Act, "[i]n order to succeed in dismissing a complaint under the Louisiana statute, the defendant must first make a *prima facie* showing that . . . 'a cause of action against him arises from an act by him in furtherance of the exercise of his right of petition or free speech . . . .'" *McNair*, 3 A.3d at 1138 n.5 (quoting statute) (quotation marks omitted).

concerning 'matters of public significance.'" *Id*. at 1138-39 (quoting *Henry*, 566 F.3d at 180). For that reason, interlocutory review was warranted.

That reasoning is entirely consistent with the Court's application of the collateral order doctrine to other First Amendment privileges and immunities. The Court has "held that an order denying a claim of immunity from suit under the First Amendment satisfies the collateral order doctrine and is thus immediately appealable." *District of Columbia v. Pizzulli*, 917 A.2d 620, 624 (quotation marks omitted). "In defamation actions," it has "agreed with other courts which likewise have held that the denial of a motion to dismiss based on a claim of absolute privilege under the common law is immediately appealable as a collateral order." *Id*. (quotation marks omitted). And in a series of cases, it has exercised interlocutory review over orders denying motions that claimed immunity under the First Amendment's Free Exercise Clause. *White*, 571 A.2d at 792-93; *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419, 425-26 (D.C. 1996); *Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002). In fact, the only instance where the Court has denied interlocutory appeal of a rejected claim of immunity was in *McNair*, on the basis that denying immediate review regarding judicial proceeding immunity did not "imperil a substantial public interest"—a conclusion that it specifically juxtaposed with the availability of collateral order review regarding immunity under an anti-SLAPP statute. 3 A.3d at 1138-39.

For the reasons explained in *McNair*, there can be no question that denying immediate review imperils the substantial public interest that the D.C. Council sought to promote: "ensur[ing] that District residents are not intimidated or prevented, because of abusive

lawsuits, from engaging in political or public policy debates." Att. A at 4. That interest cannot be served in the absence of collateral order review.

II. *Newmyer* Is Not Governing Law and Is, in Any Case, Unpersuasive

The Court should not give any weight to its "terse, unpublished order" in *Newmyer v. Sidwell Friends School*, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished order); s*ee Sherrod v. Breitbart*, -- U.S. App. D.C. --, 720 F.3d 932, 936 (2013) (characterizing order). That order's bare conclusion that collateral order review was unavailable for an order denying a motion under the D.C. Anti-SLAPP Act is non-precedential[9]; lacks any legal reasoning; and, as described above, misapplies this Court's precedents to the extent it is read to apply to apply generally to orders denying anti-SLAPP motions on the merits.

But the order is susceptible to a narrower reading. The Superior Court in that case denied an anti-SLAPP motion on two separate grounds: that it was filed outside of the statutory deadline and that it was frivolous in substance. The former holding, which is an adequate and independent ground for the denial, is a factual conclusion and therefore not subject to collateral order review. *McNair*, 3 A.3d at 1136 (disputed issue must be "an issue of law"). Dismissal of the appeal on that basis was a straightforward application of the Court's precedents, meriting no more than an unpublished order. Read in that fashion, the *Newmyer* order is entirely inapplicable to this case, because it does not address the availability of collateral order review of denial of an anti-SLAPP motion on the merits.[10]

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[9] *O'Rourke v. District of Columbia Police and Firefighters' Retirement and Relief Bd.*, 46 A.3d 378, 383 n.9 (D.C. 2012) (unpublished opinion "is not binding precedent").

[10] In addition, because the appellant in *Newmyer* never argued that the D.C. Anti-SLAPP Act established any kind of immunity, it can be assumed that the panel did not reach out to decide that issue. *See* Counter-Defendant/Appellant Arthur G. Newmyer's Response in Opposition to

But that precise issue is under active consideration by the Court in *Doe v. Burke*, No. 13-CV-83. Having received briefing by the parties on the issue of its appellate jurisdiction and scheduled that issue for oral argument, the Court canceled the argument and directed the parties to proceed to brief the merits of the case. Order, *Doe v. Burke*, No. 13-CV-83 (D.C. filed Sept. 6, 2013). This indicates that, at the least, the *Burke* panel does not intend to follow the reading of *Newmyer* as barring immediate appeal of orders denying anti-SLAPP motions on the merits. Accordingly, the Court's reasoning in *Burke* may well be dispositive of the issue raised in its Show-Cause Order here. Dismissal of this appeal prior to the Court's decision in *Burke* therefore risks an inequitable result that undermines the D.C. Council's central purpose of protecting core political speech against the chilling effect of litigation.

Conclusion

"The threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs." *Guilford*, 760 A.2d at 592 (quotation marks omitted). The D.C. Counsel sought to eliminate that potential. To give effect to the immunity established by the D.C. Anti-SLAPP Act, the Court should apply the collateral order doctrine and reach the merits of this appeal.

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 7, 2013, I caused a copy of the foregoing Response to be served by first-class mail, postage prepaid, upon:

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Attachment A

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004 2010 NOV 19 PM 12:33

OFFICE OF THE SECRETARY

TO: All Councilmembers

FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary

DATE: November 18, 2010

SUBJECT: Report on Bill 18-893, "Anti-SLAPP Act of 2010"

The Committee on Public Safety and the Judiciary, to which Bill 18-893, the "Anti-SLAPP Act of 2010" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation -- or SLAPPs -- have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

In what is considered the seminal article regarding SLAPPs, University of Denver College of Law Professor George W. Pring described what was then (1989), considered to be a growing litigation "phenomenon":

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

These lawsuits, Pring noted, are typically an effort to stop a citizen from exercising their political rights, or to punish them for having already done so. To further identify the problem, and be able to draw possible solutions, Pring engaged in a nationwide study of SLAPPs with University of Denver sociology Professor Penelope Canan.

Pring and Canan's study established the base criteria of a SLAPP as: (1) a civil complaint or counterclaim (for monetary damages and/or injunction); (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official or electorate; and (4) on an issue of some public interest or concern.[2] The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of the defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract.[3]

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1122&context=envlaw (last visited Nov. 17, 2010).

[2] *Id.* at 7-8.

[3] *Id.* at 8-9.

[4] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The three-prong test develop by the court requires:

> When [ ] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the

growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

This issue has also recently been taken up by the federal government, with the introduction of the H.R. 4363, the Citizen Participation Act of 2009. This legislation would provide certain procedural protections for any act in furtherance of the constitutional right of petition or free speech, and specifically incorporate a special motion to dismiss for SLAPPs.[6]

SLAPPs in the District of Columbia:

Like the number of jurisdictions that have sensed the need to address SLAPPs legislatively, the District of Columbia is no stranger to SLAPPs. The American Civil Liberties Union of the Nation's Capital (ACLU), in written testimony provided to the Committee (attached), described two cases in which the ACLU was directly involved, as counsel for defendants, in such suits against District residents.[7]

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions

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plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

[5] California Anti-SLAPP Project (CASP) website, Other states: Statutes and cases, *available at* http://www.casp.net/statutes/menstate.html (last visited Nov. 11, 2010).

[6] http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&|/home/LegislativeData.php|

[7] *Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary*, Sept. 17, 2010, at 2-3 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

[8] *Id.* at 2 (quoting from lawsuit in *Father Flanagan's Boys Home v. District of Columbia et al.*, Civil Action No. 01-1732 (D.D.C)).

of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

What has been repeated by many who have studied this issue, from Pring on, is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony "[*I*]*itigation itself* is the plaintiff's weapon of choice."[9]

District Anti-SLAPP Act:

In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia. As introduced, this measure closely mirrored the federal legislation introduced the previous year. Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest.

Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court. To ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish, the legislation tolls discovery while the special motion to dismiss is pending. Further, in recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants -- in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out -- the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Bill 18-893 ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates. To prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act, the Committee urges the Council to adopt Bill 18-893.

II. LEGISLATIVE CHRONOLOGY

June 29, 2010 — Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

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[9] *Id.* at 3.

July 9, 2010	Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register.*
August 13, 2010	Notice of a Public Hearing is published in the *District of Columbia Register.*
September 17, 2010	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.
November 18, 2010	The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

The Executive provided no witness to testify on Bill 18-893 at the September 17, 2010 hearing. The Office of the Attorney General provided a letter subsequent to the hearing stating the need to review the legislation further.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-893 on Friday, September 17, 2010. The testimony summarized below is from that hearing. A copy of submitted testimony is attached to this report.

Robert Vinson Brannum, President, D.C. Federation of Civic Associations, Inc., testified in support of Bill 18-893.

Ellen Opper-Weiner, Public Witness, testified in support of Bill 18-893. Ms. Opper-Weiner recounted her own experience in SLAPP litigation, and suggested several amendments to strengthen the legislation.

Dorothy Brizill, Public Witness, testified in support of Bill 18-893. Ms. Brizill recounted her own experience in SLAPP litigation. She stated that the legislation is the next step in advancing free speech in the District of Columbia.

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-

893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

Although no Executive witness presented testimony, Attorney General for the District of Columbia, Peter Nickles, expressed concern that certain provisions of the bill might implicate the Home Rule Act prohibition against enacting any act with respect to any provision of Title 11 of the D.C. Official Code. A copy of his letter is attached to this report.

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

The attached November 16, 2010 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-893. This legislation requires no additional funds or staff.

VIII. SECTION-BY-SECTION ANALYSIS

Several of the changes to the Committee Print from Bill 18-893 as introduced stem from the recommendations of the American Civil Liberties Union of the Nation's Capital (ACLU). For a more thorough explanation of these changes, see the September 17, 2010 testimony of the ACLU attached to this report.

Section 1	States the short title of Bill 18-893.
Section 2	Incorporates definitions to be used throughout the act.
Section 3	Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

Subsection (a) Creates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (b) Provides that, upon a prima facie showing that the activity at issue in the litigation falls under the type of activity protected by this act, the court shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits.

Subsection (c) Tolls discovery proceedings upon the filing of a special motion to dismiss under this act. As introduced the legislation permitted an exemption to this for good cause shown. The Committee Print has tightened this language in this provision so that the court may permit specified discovery if it is assured that such discovery would not be burdensome to the defendant.

Subsection (d) Requires the court to hold an expedited hearing on a special motion to dismiss filed under this act.

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

Section 4 Creates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special

[10] *See* Stuart v. Walker, 09-CV-900 (DC Ct of App 2010) at 4-5.

motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 — Provides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

Section 6 — Provides exemptions to this act for certain claims.

Section 7 — Adopts the Fiscal Impact Statement.

Section 8 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On November 18, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-893, the "Anti-SLAPP Act of 2010." The meeting was called to order at 1:50 p.m., and Bill 18-893 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Cheh, and Evans present; Councilmembers Bowser absent), Chairman Mendelson moved the print, along with a written amendment to repeal section 3(e) of the circulated draft print, with leave for staff to make technical changes. After an opportunity for discussion, the vote on the print was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). Chairman Mendelson then moved the report, with leave for staff to make technical and editorial changes. After an opportunity for discussion, the vote on the report was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). The meeting adjourned at 2:15 p.m.

X. ATTACHMENTS

1. Bill 18-893 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement
4. Committee Print for Bill 18-893.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum

To: Members of the Council

From: Cynthia Brock-Smith, Secretary to the Council

Date: July 7, 2010

Subject: (Correction)
Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, June 29, 2010. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Anti-SLAPP Act of 2010", B18-0893

INTRODUCED BY: Councilmembers Cheh and Mendelson

CO-SPONSORED BY: Councilmember M. Brown

The Chairman is referring this legislation to the Committee on Public Safety and the Judiciary.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Phil Mendelson

Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmembers Mary M. Cheh and Phil Mendelson introduced the following bill, which was referred to the Committee on _____.

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation (SLAPPs), to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this Act, the term:

(1) "Act in furtherance of the right of free speech" means:

(A) 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;

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

(2) "Issue of public interest" means an issue related to health or safety; environmental, economic or community well-being; the District government; a public figure; or a good, product or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(3) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(4) "Government entity" means the Government of the District of Columbia and its branches, subdivisions, and departments.

Sec. 3. Special Motion to Dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of free speech within 45 days after service of the claim.

(b) A party filing a special motion to dismiss under this section must make a prima facie showing that the claim at issue arises from an act in furtherance of the right of free speech. If the moving party makes such a showing, the responding party may demonstrate that the claim is likely to succeed on the merits.

(c) Upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until notice of entry of an order disposing of the motion, except that the court, for good cause shown, may order that specified discovery be conducted.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

(e) The defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in whole or in part.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with an action arising from an act in furtherance of the right of free speech may make a special motion to quash the discovery order, request, or subpoena.

(b) The person bringing a special motion to quash under this section must make a prima facie showing that the underlying claim arises from an act in furtherance of the right of free speech. If the person makes such a showing, the claimant in the underlying action may demonstrate that the underlying claim is likely to succeed on the merits.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

(a) This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest.

(b) This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Testimony of the
American Civil Liberties Union
of the Nation's Capital

by

Arthur B. Spitzer
Legal Director

before the

Committee on Public Safety and the Judiciary
of the
Council of the District of Columbia

on

Bill 18-893, the
"Anti-SLAPP Act of 2010"

September 17, 2010

The ACLU of the Nation's Capital appreciates this opportunity to testify on Bill 18-893. We support the purpose and the general approach of this bill, but we believe it requires some significant polishing in order to achieve its commendable goals.

Background

In a seminal study about twenty years ago, two professors at the University of Denver identified a widespread pattern of abusive lawsuits filed by one side of a political or public policy dispute—usually the side with deeper pockets and ready access to counsel—to punish or prevent the expression of opposing points of view. They dubbed these "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). They pinpointed several criteria that identify a SLAPP:

— The actions complained of "involve communicating with government officials, bodies, or the electorate, or encouraging others to do so." *Id.* at 150.

— The defendants are "involved in speaking out for or against some issue under consideration by some level of government or the voters." *Id.*

— The legal claims filed against the speakers tend to fall into predictable categories such as defamation, interference with prospective economic advantage, invasion of privacy, and conspiracy. *Id.* at 150-51.

— The lawsuit often names "John or Jane Doe defendants." *Id.* at 151. "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'" *Id.*

The authors "conservatively estimate[d] that ... tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat." *Id.* at xi. Finding that "the legal system is not effective in controlling SLAPPs," *id.*, they proposed the adoption of anti-SLAPP statutes to address the problem. *Id.* at 201.

Responding to the continuing use of SLAPPs by those seeking to silence opposition to their activities, twenty-six states and the Territory of Guam have now enacted anti-SLAPP statutes.[1]

The ACLU of the Nation's Capital has been directly involved, as counsel for defendants, in two SLAPPs involving District of Columbia residents.

In the first case, a developer that had been frustrated by its inability promptly to obtain a building permit sued a community organization (Southeast Citizens for Smart Development) and two Capitol Hill activists (Wilbert Hill and Ellen Opper-Weiner) who had opposed its efforts. The lawsuit claimed that the defendants had violated the developer's rights when they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media," and when they created a web site that urged people to "call, write or e-mail the mayor" to ask him to stop the project. The defendants' activities exemplified the kind of grassroots activism that should be hailed in a democracy, and the lawsuit was a classic SLAPP. The case was eventually dismissed, and the dismissal affirmed on appeal.[2] But the litigation took several years, and during all that time the defendants and their neighbors were worried about whether they might face liability. Because the ACLU represented the citizens and their organization at no charge, they were not financially harmed. But had they been required to retain paid counsel, the cost would have been substantial, and intimidating.

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[1] Links to these statutes can be found at http://www.casp.net/menstate.html.

[2] *Father Flanagan's Boys Home v. District of Columbia, et al.*, Civil Action No. 01-1732 (D.D.C.), *aff'd*, 2003 WL 1907987 (No. 02-7157, D.C. Cir. 2003).

In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and "interference with prospective business advantage," based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia. This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines on Guam, in an effort to silence her. And to intimidate his opponents, twenty "John Does" were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam.[3] But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

As professors Pring and Canan demonstrated, a SLAPP plaintiff's real goal is not to win the lawsuit but to punish his opponents and intimidate them and others into silence. *Litigation itself* is the plaintiff's weapon of choice; a long and costly lawsuit is a victory for the plaintiff even if it ends in a formal victory for the defendant. That is why anti-SLAPP legislation is needed: to enable a defendant to bring a SLAPP to an end quickly and economically.

Bill 18-893

Bill 18-893 would help end SLAPPs quickly and economically by making available to the defendant a "special motion to dismiss" that has four noteworthy features:

- The motion must be heard and decided expeditiously.
- Discovery is generally stayed while the motion is pending.
- If the motion is denied the defendant can take an immediate appeal.
- Most important, the motion is to be granted if the defendant shows that he or she was engaged in protected speech or activity, unless the plaintiff can show that he or she is nevertheless likely to succeed on the merits.

Speaking generally, this is sensible path to the desired goal, and speaking generally, the ACLU endorses it. If a lawsuit looks like a SLAPP, swims like a SLAPP, and quacks like a SLAPP, then it probably is a SLAPP, and it is fair and reasonable to put the burden on the plaintiff to show that it isn't a SLAPP.

We do, nevertheless, have a number of suggestions for improvement, including a substantive change in the definition of the conduct that is to be protected by the proposed law.

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[3] *Guam Greyhound, Inc. v. Brizill,* 2008 Guam 13, 2008 WL 4206682.

Section 2(1). The bill begins by defining the term "Act in furtherance of the right of free speech," which is used to signify the conduct that can be protected by a special motion to dismiss. In our view, it would be better to use a different term, because the "right of free speech" is already a term in very common use, with a broader meaning than the meaning given in this bill, and it will be impossible, or nearly so, for litigants, lawyers and even judges (and especially the news media) to avoid confusion between the common meaning of the "right of free speech" and the special, narrower meaning given to it in this bill. It would be akin to defining the term "fruit" to mean "a curved yellow edible food with a thick, easily-peeled skin." This specially-defined term deserves a special name that will not require a struggle to use correctly. We suggest "Act in furtherance of the right of advocacy on issues of public interest."

Section 2(1)(A). Because there is no conjunction at the end of section 2(1)(A)(i), the bill is ambiguous as to whether sections 2(1)(A)(i) and (ii) are conjunctive or disjunctive. That is, in order to be covered, must a statement be made "In connection with an ... official proceeding" *and* "In a place open to the public or a public forum in connection with an issue of public interest," or is a statement covered if it is made *either* "In connection with an ... official proceeding," *or* "In a place open to the public or a public forum in connection with an issue of public interest"?

We urge the insertion of the word "or" at the end of section 2(1)(A)(i) to make it clear that statements are covered in either case. A statement 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" certainly deserves anti-SLAPP protection whether it is made in a public place or in a private place. For example, a statement made to a group gathered by invitation in a person's living room, or made to a Councilmember during a non-public meeting, should be protected. Likewise, a statement made "In a place open to the public or a public forum in connection with an issue of public interest" deserves anti-SLAPP protection whether of not it is also connected to an "official proceeding." For example, statements by residents addressing a "Stop the Slaughterhouse" rally should be protected even if no official proceeding regarding the construction of a slaughterhouse has yet begun.[4]

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[4] It appears that these definitions, along with much of Bill 18-893, were modeled on the Citizen Participation Act of 2009, H.R. 4364 (111th Cong., 1st Sess.), introduced by Rep. Steve Cohen of Tennessee (*available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4364.IH:). In that bill it is clear that speech or activity that falls under any one of these definitions is covered.

Section 2(1)(B). Section 2(1)(B) expands the definition of protected activity to include "any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest." We fully agree with the intent of this provision, but we think it fails as a definition because it is backwards—it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.

This very problem arose in the *Brizill* case, where the Guam anti-SLAPP statute protected "acts in furtherance of the Constitutional rights to petition," and Mr. Baldwin argued that the statute therefore provided no broader protection for speech than the Constitution itself provided. *See* 2008 Guam 13 ¶ 28. He argued, for example, that Ms. Brizill's speech was not protected by the statute because it was defamatory, and defamation is not protected by the Constitution. As a result, the defendant had to litigate the constitutional law of defamation on the way to litigating the SLAPP issues. This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides. Bill 18-893 should be amended to avoid creating the same problem here.[5]

We therefore suggest amending Section 2(1)(B) to say: "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."

Section 2(4). Section 2(4) defines the term "government entity." But that term is never used in the bill. It should therefore be deleted.[6]

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[5] The Supreme Court of Guam ultimately rejected the argument that "Constitutional rights" meant "constitutionally protected rights," *see id.* at ¶ 32, but that was hardly a foregone conclusion, and the D.C. Court of Appeals might not reach the same conclusion under Section 2(1)(B).

[6] The same term is defined in H.R. 4364, but it is then used in a section providing that "A government entity may not recover fees pursuant to this section."

Section 3(b). We agree with what we understand to be the intent of this provision, setting out the standards for a special motion to dismiss. But the text of this section fails to accomplish its purpose because it never actually spells out what a court is supposed to do. We suggest revising Section 3(b) as follows:

> (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.

Section 3(c). We agree that discovery should be stayed on a claim as to which a special motion to dismiss has been filed. This is an important protection, for discovery is often burdensome and expensive. Because expression on issues of public interest deserves special protection, a plaintiff who brings a claim based on a defendant's expression on an issue of public interest ought to be required to show a likelihood of success on that claim without the need for discovery.

A case may exist in which a plaintiff could prevail on such a claim after discovery but cannot show a likelihood of success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPs.

As an exception to the usual stay of discovery, Section 3(c) permits a court to allow "specified discovery" after the filing of a special motion to dismiss "for good cause shown." We agree that a provision allowing some discovery ought to be included for the exceptional case. But while the "good cause" standard has the advantage of being flexible, it has the disadvantage of being completely subjective, so that a judge who simply feels that it's unfair to dismiss a claim without discovery can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way. In our view, it would be better if the statute spelled out more precisely the circumstances under which discovery might be allowed, and also included a provision allowing the court to assure that such discovery would not be burdensome to the defendant. For example: "...except that the court may order that specified discovery be conducted when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery."

Finally, we note that this section provides that discovery shall be stayed "until notice of entry of an order disposing of the motion." That language tracks H.R. 4364, but "notice of entry" of court orders is not part of D.C. Superior Court procedure. We suggest that the bill be amended to provide that "... discovery proceedings on the claim shall be stayed until the motion has been disposed of, including any appeal taken under section 3(e), ..."

Sections 3(d) and (e). We agree that a special motion to dismiss should be expedited and that its denial should be subject to an interlocutory appeal. The Committee may wish to consider whether the Court of Appeals should also be directed to expedite its consideration of such an appeal. The D.C. Court of Appeals often takes years to rule on appeals.

Section 4. Section 4 is focused on the fact that SLAPPs frequently include unspecified individuals (John and Jane Does) as defendants. As observed by professors Pring and Canan, this is one of the tactics employed by SLAPP plaintiffs to intimidate large numbers of people, who fear that they may become named defendants if they continue to speak out on the relevant public issue.

There can be very legitimate purposes for naming John and Jane Does as defendants in civil litigation. The ACLU sometimes names John and Jane Does as defendants when it does not yet know their true identities—for example, when unknown police officers are alleged to have acted unlawfully.[7] It is therefore necessary to balance the right of a plaintiff to proceed against an as-yet-unidentified person who has violated his rights, and to use the court system to discover that person's identity, against the right of an individual not to be made a defendant in an abusive SLAPP that was filed for the purpose of retaliating against, or chilling, legitimate civic activity.

We believe that Section 4 strikes an appropriate balance by making available to a John or Jane Doe a "special motion to quash," protecting his or her identity from disclosure if he or she was acting in a manner that is protected by the Anti-SLAPP Act, and if the plaintiff cannot make the same showing of likely success on the merits that is required to defeat a special motion to dismiss.

Like Section 3(b), however, Section 4(b) never actually spells out what a court is supposed to do. We therefore suggest revising Section 4(b) in the same manner we suggested revising Section 3(b):

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[7] *See, e.g., YoungBey v. District of Columbia, et al.*, No. 09-cv-596 (D.D.C.) (suing the District of Columbia, five named MPD officers, and 27 "John Doe" officers in connection with an unlawful pre-dawn SWAT raid of a District resident's home).

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 6(a). Section 6(a) provides that "This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest." This language is vague and tremendously broad. Almost any plaintiff can and will assert that he is bringing his claims "to enforce an important right affecting the public interest," and neither this bill nor any other source we know gives a court any guidance regarding what "an important right affecting the public interest" might be. The plaintiffs in the two SLAPP suits described above, in which the ACLU of the Nation's Capital represented the defendants, vigorously argued that they were seeking to enforce an important right affecting the public interest: the developer argued that it was seeking to provide housing for disadvantaged youth; the gambling entrepreneur argued that he was seeking to prevent vicious lies from affecting the result of an election.

Thus, this provision will almost certainly add an entire additional phase to the litigation of every SLAPP suit, with the plaintiff arguing that the anti-SLAPP statute does not even apply to his case because he is acting in the public interest. To the extent that courts accept such arguments, this provision is a poison pill with the potential to turn the anti-SLAPP statute into a virtually dead letter. At a minimum, it will subject the rights of SLAPP defendants to the subjective opinions of more than 75 different Superior Court judges regarding what is or is not "an important right affecting the public interest."

Moreover, we think the exclusion created by Section 6(a) is constitutionally problematic because it incorporates a viewpoint-based judgment about what is or is not in the public interest—after all, what is in the public interest necessarily depends upon one's viewpoint.

—Assume, for example, that D.C. Right To Life (RTL) makes public statements that having an abortion causes breast cancer. Assume Planned Parenthood sues RTL, alleging that those statements impede its work and cause psychological harm to its members. RTL files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But Planned Parenthood responds that its lawsuit is not subject to the Anti-SLAPP Act because it was

"brought ... solely to enforce an important right affecting the public interest," to wit, the right to reproductive choice.

—Now assume that Planned Parenthood makes public statements that having an abortion under medical supervision is virtually risk-free. RTL sues Planned Parenthood, alleging that those statements impede its work and cause psychological harm to its members. Planned Parenthood files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But RTL responds that its lawsuit is not subject to the Anti-SLAPP Act because it was "brought ... solely to enforce an important right affecting the public interest," to wit, the right to life.

Are both lawsuits exempt from the Anti-SLAPP Act? Neither? One but not the other? We fear that the result is likely to depend on the viewpoint of the judge regarding which asserted right is "an important right affecting the public interest." But the First Amendment requires the government to provide evenhanded treatment to speech on all sides of public issues. We see no good reason for the inclusion of Section 6(a), and many pitfalls. Accordingly, we urge that it be deleted.[8]

Thank you for your consideration of our comments.

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[8] Section 10 of H.R. 4364, on which Section 6(a) of Bill 18-893 is modeled, begins with the catchline "Public Enforcement." It therefore appears that Section 10 was intended to exempt only enforcement actions brought by the government.

Even if that is true, we see no good reason to exempt the government, as a litigant, from a statute intended to protect the rights of citizens to speak freely on issues of public interest. To the contrary, the government should be held to the strictest standards when it comes to respecting those rights. *See, e.g., White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (holding that the advocacy activities of neighbors who opposed the conversion of a motel into a multi-family housing unit for homeless persons were protected by the First Amendment, and that an intrusive eight-month investigation into their activities and beliefs by the regional Fair Housing and Equal Opportunity Office violated their First Amendment rights).

We therefore urge the complete deletion of Section 6(a), as noted above. However, if the Committee does not delete Section 6(a) entirely, its coverage should be limited to lawsuits brought by the government.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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[redacted]

ATTORNEY GENERAL

[redacted]

September 17, 2010

The Honorable Phil Mendelson
Chairperson
Committee on Public Safety & the Judiciary
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Ste. 402
Washington, D.C. 20004

Re: Bill 18-893, the "Anti-SLAPP Act of 2010"

Dear Chairperson Mendelson:

I have not yet had the opportunity to study in depth Bill 18-893, the "Anti-SLAPP Act of 2010" ("bill"), which will be the subject of a hearing before your committee today, but I do want to register a preliminary concern about the legislation.

To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 813 (D.C. Official Code § 1-206.02(a)(4) (2006 Repl.)), which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure...unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]." As you know, the Superior Court subsequently adopted rules of procedure for civil actions, including Rules 12(c) (Motion for judgment on the pleadings), 26-37 (Depositions and Discovery), and 56 (Summary judgment), which appear to afford the parties to civil actions rights and opportunities that sections 3 and 4 of the bill can be construed to abrogate. Thus, the bill may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council. Accordingly, I suggest that – if you have not already done so – you solicit comments concerning the legislation from the D.C. Courts.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Vincent C. Gray** **Chairman, Council of the District of Columbia**
FROM:	**Natwar M. Gandhi** **Chief Financial Officer**
DATE:	**November 16, 2010**
SUBJECT:	**Fiscal Impact Statement – "Anti-SLAPP Act of 2010"**
REFERENCE:	**Bill Number 18-893, Draft Committee Print Shared with the OCFO on November 15, 2010**

Conclusion

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would provide a special motion for the quick dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest,"[1] which are commonly referred to as strategic lawsuits against public participation (SLAPPs). SLAPPs are generally defined as retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue. Often the goal of SLAPPs is not to win, but rather to engage the defendant in a costly and long legal battle. This legislation would provide a way to end SLAPPs quickly and economically by allowing for this special motion and requiring the court to hold an expedited hearing on it.

In addition, the proposed legislation would provide a special motion to quash attempts arising from SLAPPs to seek personally identifying information, and would allow the courts to award the costs of litigation to the successful party on a special motion.

[1] Defined in the proposed legislation as (A) 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; (ii) In a place open to the public or a public forum in connection with an issue of public interest; or (B) 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.

Lastly, the proposed legislation would exempt certain claims from the special motions.

Financial Plan Impact

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation. Enactment of the proposed legislation would not have an impact on the District's budget and financial plan as it involves private parties and not the District government (the Courts are federally-funded). If effective, the proposed legislation could have a beneficial impact on current and potential SLAPP defendants.

COMMITTEE PRINT

Committee on Public Safety & the Judiciary

November 18, 2010

A BILL

18-893

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation, to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this act, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) 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; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest.

(B) 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.

(2) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(3) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

Sec. 3. Special Motion to Dismiss.

(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.

(c)(1) Except as provided in paragraph (2), upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the attached fiscal impact statement as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Attachment

B

 Dodd-Frank's Democratic Dissenters — From Brian Schweitzer To Debbie Wasserman Schultz

OpenMarket.org

- Regulation
  - Alcohol Regulation Roundup
  - Health and Illness
  - Healthcare
  - Insurance
  - Intellectual Property
  - Labor
  - Mobility
  - Nano & Biotech
  - Precaution & Risk
  - Privacy
  - Regulation of the Day
  - Space
  - Tech & Telecom
- Economy
  - Deregulate to Stimulate
  - Employment
  - Property Rights
- Energy
  - Ethanol
- Environment
  - Agriculture
  - Global Warming
  - Natural Resources
  - Private Conservation
- International
  - Trade
- Legal
- Indv. Liberty
  - Nanny State
- About

The Other Scandal In Unhappy Valley

by Rand Simberg on July 13, 2012 · 56 comments

in Global Warming, Transparency

So it turns out that Penn State has covered up wrongdoing by one of its employees to avoid bad publicity.

But I'm not talking about the appalling behavior uncovered this week by the Freeh report. No, I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since.

To review, when the emails and computer models were leaked from the Climate Research Unit at the University of East Anglia two and a half years ago, many of the luminaries of the "climate science" community were shown to have been behaving in a most unscientific manner. Among them were Michael Mann, Professor of Meteorology at Penn State, whom the emails revealed had been engaging in data manipulation to keep the blade on his famous hockey-stick graph, which had become an icon for those determined to reduce human carbon emissions by any means necessary.

As a result, in November of 2009, the university issued a press release that it was going to undertake its own investigation, independently of one that had been launched by the National Academy of Sciences (NAS) in response to a demand from Congressman Sherwood Boehlert (R- N.Y.). In July of the next year, the panel set up to investigate declared him innocent of any wrongdoing:

> Penn State Professor Michael Mann has been cleared of any wrongdoing, according to a report of the investigation that was released today (July 1). Mann was under investigation for allegations of research impropriety that surfaced last year after thousands of stolen e-mails were published online. The e-mails were obtained from computer servers at the Climatic Research Unit of the University of East Anglia in England, one of the main repositories of information about climate change.
>
> The panel of leading scholars from various research fields, **all tenured professors at Penn State**, began its work on March 4 to look at whether Mann had "engaged in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting or reporting research or other scholarly activities."

My emphasis.

Despite the fact that it was completely internal to Penn State, and they didn't bother to interview anyone except Mann himself, and seemingly ignored the contents of the emails, the warm mongers declared him exonerated (and the biggest victim in the history of the world). But many in the skeptic community called it a whitewash:

> This is not surprising that Mann's own university circled the wagons and narrowed the focus of its own investigation to declare him ethical.
>
> The fact that the investigation cited Mann's 'level of success in proposing research and obtaining funding' as some sort of proof that he was meeting the 'highest standards', tells

> you that Mann is considered a sacred funding cash cow. At the height of his financial career, similar sentiments could have been said about Bernie Madoff.
>
> Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality.

Richard Lindzen of MIT weighed in as well:

> "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally," Lindzen said in an e-mail from France.

But their criticism was ignored, particularly after the release of the NAS report, which was also purported to exonerate him. But in rereading the NAS "exoneration," some words stand out now. First, he was criticized for his statistical techniques (which was the basis of the criticism that resulted in his unscientific behavior). But more importantly:

> The OIG also independently reviewed Mann's emails and PSU's inquiry into whether or not Mann deleted emails as requested by Phil Jones in the "Climategate" emails (aka Allegation 2). The OIG concluded after reviewing the the published CRU emails and **the additional information provided by PSU** that "nothing in [the emails] evidenced research misconduct within the definition of the NSF Research Misconduct Regulation." Furthermore, the OIG accepted the conclusions of the PSU inquiry regarding whether Mann deleted emails and agreed with PSU's conclusion that Mann had not.

Again, my emphasis. In other words, the NAS investigation relied on the integrity of the university to provide them with all relevant material, and was thus not truly independent. We now know in hindsight that it could not do so. Beyond that, there are still relevant emails that we haven't seen, two years later, because the University of Virginia continues to stonewall on a FOIA request, and it's heading to the Supreme Court of the Commonwealth of Virginia.

Michael Mann, like Joe Paterno, was a rock star in the context of Penn State University, bringing in millions in research funding. The same university president who resigned in the wake of the Sandusky scandal was also the president when Mann was being ~~whitewashed~~ investigated. We saw what the university administration was willing to do to cover up heinous crimes, and even let them continue, rather than expose them. Should we suppose, in light of what we now know, they would do any less to hide academic and scientific misconduct, with so much at stake?

It's time for a fresh, truly independent investigation.

Two inappropriate sentences that originally appeared in this post have been removed by the editor.

Tenney Naumer July 14, 2012 at 2:06 pm

> This is one of the most disgusting and amoral attempts to smear an honest and courageous scientist's reputation that I have ever seen. Dr. Mann has been cleared of any sort of

Attachment C

NATIONAL REVIEW ONLINE www.nationalreview.com PRINT

The Corner

The one and only.

Football and Hockey

By Mark Steyn

July 15, 2012 6:22 P.M.

In the wake of Louis Freeh's report on Penn State's complicity in serial rape, Rand Simberg writes of Unhappy Valley's other scandal:

> I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

Not 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. Michael Mann was the man behind the fraudulent climate-change "hockey-stick" graph, the very ringmaster of the tree-ring circus. And, when the East Anglia emails came out, Penn State felt obliged to "investigate" Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same cove

who investigated Mann. And, as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.

If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up? Whether or not he's "the Jerry Sandusky of climate change", he remains the Michael Mann of climate change, in part because his "investigation" by a deeply corrupt administration was a joke.

Permalink

Attachment D

NATIONAL REVIEW ONLINE www.nationalreview.com PRINT

Get Lost

By Rich Lowry

August 22, 2012 1:15 P.M.

So, as you might have heard, Michael Mann of Climategate infamy is threatening to sue us.

Mann is upset — very, very upset — with this Mark Steyn Corner post, which had the temerity to call Mann's hockey stick "fraudulent." The Steyn post was mild compared with other things that have been said about the notorious hockey stick, and, in fact, it fell considerably short of an item about Mann published elsewhere that Steyn quoted in his post.

So why threaten to sue us? I rather suspect it is because the Steyn post was savagely witty and stung poor Michael.

Possessing not an ounce of Steyn's wit or eloquence, poor Michael didn't try to engage him in a debate. He sent a laughably threatening letter and proceeded to write pathetically lame chest-thumping posts on his Facebook page. (Is it too much to ask that world-renowned climate scientists spend less time on Facebook?)

All of this is transparent nonsense, as our letter of response outlines.

In common polemical usage, "fraudulent" doesn't mean honest-to-goodness criminal fraud. It means intellectually bogus and wrong. I consider Mann's prospective lawsuit fraudulent. Uh-oh. I guess he now has another reason to sue us.

Usually, you don't welcome a nuisance lawsuit, because it's a nuisance. It consumes time. It costs money. But this is a different matter in light of one word: discovery.

If Mann sues us, the materials we will need to mount a full defense will be extremely wide-ranging. So if he files a complaint, we will be doing more than fighting a nuisance lawsuit; we will be embarking on a journalistic project of great interest to us and our readers.

And this is where you come in. If Mann goes through with it, we're probably going to call on you to help fund our legal fight and our investigation of Mann through discovery. If it gets that far, we may eventually even want to hire a dedicated reporter to comb through the materials and regularly post stories on Mann.

My advice to poor Michael is to go away and bother someone else. If he doesn't have the good sense to do that, we look forward to teaching him a thing or two about the law and about how free debate works in a free country.

He's going to go to great trouble and expense to embark on a losing cause that will expose more of his methods and maneuverings to the world. In short, he risks making an ass of himself. But that hasn't stopped him before.

— *Rich Lowry is the editor of* NATIONAL REVIEW.

Permalink

Attachment

E

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D.,	)	
Plaintiff,	)	Case No. 2012 CA 008263 B
v.	)	Judge Natalia M. Combs Greene
NATIONAL REVIEW, INC., et al.,	)	Calendar Ten
Defendants.	)	

ORDER

This matter is before the Court on Defendants' National Review and Mark Steyn's Special Motion to Dismiss Pursuant to the District of Columbia's Anti-SLAPP Act, the Opposition and Reply, and Defendants' National Review and Mark Steyn's Motion to Dismiss pursuant to Rule 12(b)(6) and the Opposition thereto. Upon careful review of the pleadings and consideration of the arguments advanced at a hearing on the matter, and for the reasons set forth herein, the Motions are denied.

Background

Plaintiff, Michael Mann, is a Professor of meteorology at The Pennsylvania State University ("Penn State"). Plaintiff also serves as Director of the Earth System Science Center at Penn State. Plaintiff is well known for his research on global warming and his co-authorship of the 'Hockey Stick Graph,' which "purports to identify long-term trends in global temperatures based . . . on theoretical models involving temperature proxies, such as the analysis of tree

growth rings."[1] (Def's Mtn. at 6.) Plaintiff has authored numerous peer-reviewed papers and published two books. In 2001, Plaintiff served as "lead author" for a chapter of the United Nations' International Panel on Climate Change ("IPCC") Third Scientific Assessment Report. [2] *Id.* In 2002, Plaintiff "was named as one of the fifty leading visionaries in science and technology by Scientific American, and has received numerous awards for his research." *Id*[3].

In 2009 approximately one thousand emails were apparently "misappropriated from a server at the University of East Anglia's Climate Research Unit ("CRU")." *Id*. at 8. These emails included correspondence between Plaintiff and CRU scientists, in which the CRU was cast in a negative light. *Id.* One particular email, written by Phil Jones (a CRU scientist) stated: "I've just completed Mike's Nature *trick* of adding in the real temps to each series for the last 20 years (*i.e.* from 1981 onwards) [and] from 1961 for Keith's to *hide the decline*." *Id*. As a result of these emails coming to light, the University of East Anglia began an investigation into the "'honesty, rigor, and openness with which the CRU scientists have acted." *Id.* The investigators concluded that the "'rigor and honesty of the CRU scientists was not in doubt," but that Jones' email referencing Plaintiff's "'Nature *trick*" was "'misleading'." *Id.* at 9.

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[1] "The 'Hockey Stick Graph' – named for its iconic shape resembling a hockey stick – attempts to represent estimates of the world's temperatures between 1000 and 2000 A.D., based (in large part) on the observed growth in various tree rings throughout the world. The 'Hockey Stick Graph' illustrates the authors' theory of gradual decline in temperatures from 1000 A.D. until about 1900 A.D., followed by a sharp increase in the late 20th century." (Def.'s Mot. 6.)

[2] The data Plaintiff used in the creation of the 'Hockey Stick Graph' was referenced in the Report.

[3] In his Complaint, Plaintiff alleges that he and his colleagues, as a result of their research, were awarded the Nobel Peace Prize as a result of their research. Defendants claim that the Nobel Peace Prize award, referenced in the Complaint, states that the award was given jointly to Vice President Al Gore and the IPCC. *Id*. at 7.

In 2010, Penn State tasked its Investigatory Committee, "appointed by University administrators and comprised entirely of Penn State faculty members," to investigate Plaintiff in connection with the CRU emails. *Id.* at 10. Plaintiff was cleared of three of the four substantive charges against him. The decision by the investigative group was apparently based on an interview with Plaintiff. Defendants claim that the Committee failed to interview any scientist who had previously been critical of Plaintiff's work. Penn State investigated the last charge (which involved Plaintiff's research and an allegation that it might "deviate from accepted research norms) through an interview with Professor Richard Lindzen of MIT, a critic of Plaintiff's work, who later "expressed dismay with the scope of the investigation and the Committee's analysis of the East Anglia emails." *Id.* at 11.

Also in 2010, the United States Environmental Protection Agency (the "EPA") investigated Plaintiff as a result of constant pressure from Defendant The National Review, Defendant Steyn (collectively the "NR Defendants") and others. (Pl. Mtn at 22.) The EPA concluded there was "no evidence of scientific misconduct." *Id.* A subsequent investigation of Plaintiff's work was conducted, by the National Science Foundation (the "NSF"), which found that "Penn State did not adequately review the allegation in its inquiry, especially in light of its failure to interview critics of [Plaintiff's] work." (Def. Mtn. at 11.)

In 2012, attention was again brought to Penn State's investigation of Plaintiff, when Penn State released the results of an unrelated investigation conducted by FBI Director Louis Freeh. That investigation concerned allegations of sexual abuse by Jerry Sandusky, a Penn State assistant football coach. *Id*. at 12. Freeh's report stated there had been a "failure by university officials to properly investigate known allegations of misconduct when they arose." *Id.* The report further stated that Penn State should "undertake a thorough and honest review of its

culture," which placed "the avoidance of the consequences of bad publicity above virtually every other value." *Id.*

A few days after Freeh's report was released, Defendant, the National Review ("an influential magazine and website" that offers "conservative news, commentary and opinion,") published, on its website, a piece by Defendant Steyn, entitled "*Football and Hockey*". The piece was published by the *National Review Online*, in a section called "*The Corner." Id*. at 13. Defendant Steyn's blog post contained an excerpt and link to Defendant Simberg's earlier internet post for Defendant Competitive Enterprise Institute's website OpenMarket.org, entitled "*The Other Scandal in Unhappy Valley*." *Id*. Defendant Simberg's blog post compared the Sandusky scandal, and Penn State's failure to properly handle the matter with the Penn State's investigation into Plaintiff's work.[4] *Id.* Defendant Steyn's article endorsed Defendant Simberg's commentary, however Defendant Steyn indicated he was "not sure [he] would have extended the metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does". Defendant Steyn nevertheless agreed that Defendant Simberg "had a point." *Id.* Defendant Steyn also stated: "Michael Mann was the man behind the fraudulent climate-change hockey stick graph, the very ringmaster of the tree-ring circus." *Id.* at 14. Defendant Steyn concluded the piece by enumerating the similarities between Penn State's investigation into allegations of misconduct by both Sandusky and Plaintiff, and "questioned the university's similar handling of the two matters." *Id.*

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[4] Defendant Simberg compared Plaintiff to Sandusky by this statement: "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." *Id.* at 13.

Eight days after Defendant Steyn's article was posted on the *National Review Online* website, Plaintiff demanded a retraction and that an apology be issued for the accusations of "academic fraud." *Id*. The *National Review* responded by letter, and *via* an online post by Editor Rich Lowry, which explained that the term 'fraudulent' was used in Defendant Steyn's article to mean "intellectually bogus and wrong," and did not carry the connotation of "criminal fraud". *Id.*

On October 22, 2012, this action was filed in which Plaintiff alleges libel and intentional infliction of emotional distress against Defendants National Review and Defendant Steyn, along with co-Defendants Competitive Enterprise Institute and Simberg (the "CEI Defendants"). Plaintiff's suit is based primarily upon the NR Defendants' and the CEI Defendants' following statements: (1) Defendant Simberg's statement published in Openmarket.org that Plaintiff had engaged in "data manipulation" and "scientific misconduct" and the was the "poster-boy of the corrupt and disgraced climate science echo chamber;" (2) Defendant Steyn's statement in the National Review Online that Plaintiff "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus;" and (3) Mr. Lowry's statement in *National Review Online* that indicated Plaintiff's work is "intellectually bogus."

Discussion

The NR Defendants' Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP Act

Anti-SLAPP Act

As an umbrella statement, the NR Defendants argue that their comments are protected by the First Amendment thus Plaintiff may not recover.[5] The NR Defendants argue that the Anti-SLAPP Act applies because Plaintiff's lawsuit stems from statements that were made on an Internet site (a public forum that discusses issues of public interest). Further these Defendants argue that Plaintiff's suit is based on an issue of public interest because climate change and global warming are issues involving environmental and community well being. The NR Defendants also argue that Plaintiff's claims involve an issue of public interest because Plaintiff is a public figure as he is "well-known for his work regarding global warming and the 'Hockey Stick Graph'."

Plaintiff counters that the Anti-SLAPP Act was not meant to protect against this type of lawsuit. Plaintiff argues that: "Anti-SLAPP suits are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so." Plaintiff asserts that the Anti-SLAPP Act was enacted to give courts a chance to look into the merits of a claim in order to prevent large corporations (or those who are economically superior) from commencing meritless litigation to stifle the participation of less well financed individuals in the litigation process. Plaintiff further argues that his intent in

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[5] Plaintiff asserts that Defendants' statements are not constitutionally protected because they are capable of verification as objective evidence could be assessed to determine whether Plaintiff deliberately altered his data.

bringing this suit does not comport with the reasons for the Anti-SLAPP Act.[6] It appears that while Plaintiff argues the Motion should be denied in this case on this basis; it also appears that Plaintiff does not seriously challenge the applicability of the Anti-SLAPP Act because it arises from an act in furtherance of the right of advocacy on issue of public interest."[7] D.C. Code § 16-5501 defines "an act in furtherance of the right of advocacy on issues of public interest" as " any written or oral statement made . . . (ii) in a place open to the public or a public forum in connection with an issue of public interest." That section also defines an issue of public interest, *inter alia*, as "an issue related to . . . environmental . . . well-being."

The D.C. Code §16-5502 provides:

> (a) A party may file a special motion to dismiss to 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.
>
> (c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.
>
> (2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery

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[6] The Court does not fully appreciate Plaintiff's argument in this regard as Plaintiff has not brought the Special Motion and is not a large corporation.

[7] Recently, Judge Walton of the United States District Court for the District of Columbia issued a decision and discussed the standard or burden Plaintiff faces once the Court finds the Anti-SLAPP applies. *Boley v. Atlantic Monthly Group,* C.A. No 13-89 (RBW)(D.D.C. June 25, 2013)

> be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.
>
> (d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

The Anti-SLAPP Act was adopted in the District of Columbia in 2010. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012). The Anti-SLAPP Act protects speech regarding the public interest such as qualifications for public office. *Id.* The Anti-SLAPP Act gives "absolute or qualified immunity to individuals engaged in protected actions." *Id.* Where the proponent of a motion brought pursuant to the Anti-SLAPP Act "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." *Id. See also*, *3M Co. v. Boulter*, 842 F. Supp.2d 85 93 (D.D.C. 2012).

An extensive discussion as to whether the Anti-SLAPP Act applies in this case is not necessary for the reasons stated *supra.*[8] The NR Defendants' comments were made with respect to climate issues, which are environment issues, thus an issue of public interest. In addition, the comments were made in publications (blogs, columns and articles) that were published to the public (available on online websites) thus the comments fit under the definition of an act in

[8] Plaintiff's real argument appears to be that the Motion should be denied.

furtherance of the right of advocacy. Thus, the Court finds application of the Anti-SLAPP Act appropriate because the case involves issues of climate change, clearly a topic of public interest.

Standard/Burden

The NR Defendants argue that the Anti-SLAPP Act's word use of "likely" rather than "probability" poses a higher burden than that of "probability" (found in the corresponding California Statute) because likely means "having a high probability of occurring or being true." Merriam-Webster Online Dictionary. The NR Defendants translate this to mean that Plaintiff must prove the falsity of all the challenged statements rather than the "mere possibility."

Plaintiff counters that the relevant legal standard is the same as that to be applied in deciding a motion summary judgment, not a standard requiring the high burden the NR Defendants argue should be applied. Plaintiff argues that the D.C. Anti-SLAPP Act is fashioned after the corresponding California statute (a statute which requires that there is "a probability that the plaintiff will prevail on the claim.") Plaintiff also argues that the sole distinction between the D.C. Anti-SLAPP Act and the California statute is that the former requires the plaintiff to demonstrate that he is "likely" to succeed on the merits while the latter requires that the plaintiff establish that there is a "probability" that he will prevail on the claim. Plaintiff argues that there is no difference in the meaning of "likely" and "probability."

Blacks Law Dictionary defines the "likelihood of success on the merits test" in the context of a preliminary injunction as requiring the litigant to "show a reasonable probability of success in the litigation or appeal." BLACKS LAW DICTIONARY (9th ed. 2009). The California statute requires the plaintiff to show a "probability of prevailing on the claim by making a *prima facie* showing of facts that would, if proved, support a judgment in the plaintiff's favor." *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (Cal. Dist. Ct. App. 2004).

The probability standard is similar to that used to determine a "motion for directed verdict, or summary judgment." Although the Court may not weigh the evidence, as noted *supra,* the Plaintiff must provide sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint). *Id.*

The District of Columbia Anti SLAPP Act does not provide a definition of the standard and there has not been a decision on this issue from our Court of Appeals. *See* note 4. *supra*. The legislative history of the Anti-SLAPP Act, an almost identical act to the California act, indicates that the California act served as the model for the District of Columbia's Anti-SLAPP Act. The Court disagrees with the argument that there is such a high burden as advanced by the NR Defendants. The standard "likely to succeed on the merits" or likelihood of success on the merits, is a high burden but not as high as suggested by the NR Defendants. As noted, the standard of the likelihood to succeed on the merits, in the context of a preliminary injunction, is proof by a preponderance of the evidence. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003).

The Court is in agreement with the decision issued by Judge Walton on this issue and finds the case law from California (upon which the D. C. Anti-SLAPP Act is modeled) instructive. In California, as Judge Walton noted; "…a Plaintiff seeking to show a probability of prevailing on a claim in response to an anti-SLAPP motion must satisfy a standard comparable to that used on a motion for judgment as a matter of law" *See Boley v. Atlantic Monthly Group, supra.* (quoting *Price v. Stossel*, 620 F. 3d 992, 1000 (9th Cir. 2010)). Thus, the Court finds, Plaintiff must present a sufficient legal basis for his claims and if he fails to do so, the motion should be granted.

Defamation

The NR Defendants move the Court to dismiss the case because Plaintiff will be unable to make a *prima facie* case for libel. The NR Defendants argue that Plaintiff cannot prove "actual malice" as required where a plaintiff is a public figure. The NR Defendants also argue that Plaintiff must prove the falsity of all the statements at issue.

Plaintiff counters that, to succeed on a defamation claim, he must prove "actual malice" by a showing that "the defendant in fact entertained serious doubts" as to the truth of the publication or acted with a high degree of awareness of its probable falsity. Plaintiff argues that the statements made by the NR Defendants are not only false, but defamatory *per se*,[9] and that the NR Defendants made these statements with knowledge of their falsity or reckless disregard for their truth. Plaintiff claims whether he engaged in fraud is verifiable by either analyzing the elements of fraud[10] or considering the objective investigations conducted regarding his research.[11]

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following elements

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[9] This Order does not discuss defamation *per se* because in his Opposition, Plaintiff only makes this reference in passing and does not support the statement with any substantive argument.

[10] Plaintiff claims that the Court may consider evidence as to whether Plaintiff made any knowing and material misrepresentations in his research with intent to deceive, and then arrive at a conclusion as to whether he committed fraud.

[11] Plaintiff claims that there were six investigations into whether he committed fraud. Those most notable were done by the EPA and the National Science Foundation (NSF).

are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Payne*, 25 A.3d at 924.

The Court of Appeals has stated that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id.*

The NR Defendants move the Court to dismiss Plaintiff's case because the alleged defamatory remarks are opinion thus Plaintiff cannot prove them as false. NR Defendants argue that issues of science are opinion because "[s]cientific truth is elusive." NR Defendants argue that, the considerations of the language and context[12] of the posts ("*Get Lost*" and "*Football Hockey*") suggests that the NR Defendants were making fun of Plaintiff rather than accusing him

[12] NR Defendants argue that the readers of Defendant Steyn's column knew to "expect strongly-worded, and often caustic, opinions in places."

of fraud.[13] NR Defendants claim that the article "Get Lost" which referred to Plaintiff's work as "intellectually bogus" is not offensive nor does it impugn "academic corruption, fraud and deceit" as Plaintiff argues. Finally, the NR Defendants argue that Plaintiff's work and theories are not provably false because they are propositions based on data that is not properly verifiable (data from years where accurate measures were not taken or recorded).

Plaintiff counters that the statements at issue are not opinion. Plaintiff argues that taken in context Defendants' statements are actionable opinion because defamatory statements can still appear in publications that often express opinion.

Prior to the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), statements that were considered to be opinion were generally treated as non-defamatory. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Under *Milkovich*, opinions are actionable "if they imply a provably false fact or rely upon stated facts that are provably false." *Id.* at 597. If the proponent of the statement, however is "expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.2d 1222, 1227 (7th Cir. 1993). In determining whether the statement is an opinion, the context of the statement should be considered. *Id.* (quoting *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994).

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[13] The NR Defendants assert that the use of the interrogatory style in the statement "if an institution is prepared to cover up systematic rape of minors, what won't it cover up?" is further evidence that the statement was an opinion (one especially meant to raise questions about Penn State's investigation of its "star" employees).

The First Amendment protects opinions however the statement must be one that is purely opinion and not one that stems from facts. The Court disagrees with the NR Defendants' contention that the statement "perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions," can only clearly be viewed as an opinion. The Court certainly recognizes that (within the confines of the law) the NR Defendants may employ harsh language, as appears to be the norm in the climate debate environment, however the Court finds this statement goes beyond harsh debate or "rhetorical hyperbole". Rather the statement questions facts –it does not simply invite readers to "ask questions". In addition, the accusation that Plaintiff has acted in a "most unscientific manner . . . in data manipulation to keep a blade on his famous hockey-stick graph," relies on the interpretation of facts (the emails).

The Court recognizes that the blogs and publications by the NR Defendants at issue in this case may employ these words because it appears to have become what some may describe as the norm (in global warming criticism), and because the tone set by the use of harsh and contentious statements is in line with what some may argue is the reputation developed by the NR Defendants; having legitimacy and is fair argument. The question becomes, and it is difficult in this case, is whether the line (as recognized by the law) has been crossed. Defendants argue that the accusation that Plaintiff's work is fraudulent may not *necessarily* be taken as based in fact because the writers for the publication are tasked with and posed to view work critically and interpose (brutally) honest commentary. In this case, however, the evidence before the Court, at this stage, demonstrates something more and different that honest or even brutally honest commentary, and creases that line of reasoning.

Fraud is defined as: "(1) A deception deliberately practiced in order to secure unfair or unlawful gain; (2) a piece of trickery; a trick; (3)(a) one that defrauds; cheat; (b) one who assumes a false pose; an imposter." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 722 (3rd ed. 1996). Fraudulent is defined as: "(1) Engaging in fraud; deceitful; (2) characterized by, constituting, or gained by fraud: fraudulent business practices." *Id.* Given the dictionary definition as well as the common readers' thought about the use of these words (fraud and fraudulent) the Court finds that these statement taken in context must be viewed as more than honest commentary—particularly when investigations have found otherwise. Considering the numerous articles that characterize Plaintiff's work as fraudulent, combined with the assertions of fraud and data manipulation, the NR Defendants have essentially made conclusions based on facts. Further, the assertions of fraud "rely upon facts that are provably false" particularly in light of the fact that Plaintiff has been investigated by several bodies (including the EPA) and determined that Plaintiff's research and conclusions are sound and not based on misleading information.

In addition, the NR Defendants' attempt to minimize the seriousness of their reference to Plaintiff as a fraud by claiming that this reference may be compared to the statement "intellectually bankrupt" to "intellectually bogus" is not credible. It is obvious that "intellectually bankrupt" refers to a lack of sense or intellect but the same may not be said for "intellectually bogus." The definition of "bogus" in the Merriam-Webster online dictionary, *inter alia*, is "not genuine . . . sham." BOGUS, MERRIAM-WEBSTER: ONLINE DICTIONARY AND THESAURUS, http://www.merriam-webster.com/dictionary/bogus. In Plaintiff's line of work, such an accusation is serious. To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud (taken in the context and knowing that Plaintiff's work has

been investigated and substantiated on numerous occasions). The Court must, at this stage, find the evidence indicates that the NR Defendants' statements are not pure opinion but statements based on provably false facts.[14]

The NR Defendants move the Court to find that the statements at issue are rhetorical hyperbole, which the Supreme Court protects because public debate need not "suffer for lack of imaginative expression which has been traditionally added much to the discourse of the Nation." The NR Defendants argue that the statements are witty and obviously exaggerations, thus not actionable. The NR Defendants also argue that the statements criticized Plaintiff's work as fraudulent (though they explicitly disclaimed criminal offense) and not Plaintiff himself and defamation cannot be upheld where the criticism is of the person's ideas and not of the person himself.

Plaintiff claims that there is nothing rhetorical about the NR Defendants' accusations of fraud, and that the statements do not qualify as rhetorical hyperbole. Plaintiff points to statements made by readers of Defendants' publications in an attempt to paint Defendants' statements as defamatory.[15] Plaintiff notes other publications that have published statements about how Plaintiff was defamed.

In *Milkovich*, the Supreme Court found that statements that are not made from actual facts are protected to prevent public debate from a deprivation of "imaginative expression" or

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[14] The Court does view this as a very close case.

[15] Some of these statements are "NR flatly stated that Mann had written a fraudulent paper" and "even if the NRO is an opinion magazine, it is not permitted to make false statements and present them as facts especially when they damage another person's reputation.

"rhetorical hyperbole"[16] that has "traditionally added much to the discourse of this Nation." *Milkovich*, 497 A.2d at 2. *See also*, *Wilner*, 760 A.2d at 589. Rhetorical hyperbole is not actionable in defamation because it cannot be interpreted as factual assertions. *Wilner*, 760 A.2d at 597. To determine whether a statement is rhetorical hyperbole, *i.e*. a statement that is verifiable, courts must look to the context of the statement. *Weyrich v. New Republic, Inc.* 235 F.3d 617, 624 (D.D.C. 2001).

An analysis of this argument is similar to or the same as what is applied to evaluate the NR Defendants' contention that their statements were opinion. Language such as "intellectually bogus" and "ringmaster of the tree-ring circus" in the context of the publications' reputation and columns certainly appear as exaggeration and not an accusation of fraud. On the other hand, when one takes into account all of the statements and accusations made over the years, the constant requests for investigations of Plaintiff's work, the alleged defamatory statements appear less akin to "rhetorical hyperbole" and more as factual assertions. NR Defendant's publication of Defendant Steyn's article quotes from Defendant Simberg's article *The Other Scandal in Unhappy Valley*. Defendant Steyn then writes: Not 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. Michael Mann was the man behind the fraudulent climate change "hockey-stick" graph" *National Review Online, Football and Hockey*, by Mark Steyn (July 15, 2012). The content and context of the statements is not indicative of play and "imaginative expression" but rather

[16] Rhetorical hyperbole refers to exaggerations used as a rhetorical device. Rhetorical hyperbole is often a figure of speech that is used to evoke strong feelings or create a strong impression but not intended to be taken literally.

aspersions of verifiable facts that Plaintiff is a fraud. At this stage, the Court must find that these statements were not simply rhetorical hyperbole.

The NR Defendants argue that their statements are protected by the "Fair Comment" privilege which protects opinions based on facts that are well known to readers. Plaintiff counters that the "Supportable Interpretation" and "Fair Comment" privileges do not apply. Plaintiff contends that Supportable Interpretation privilege only applies if the challenged statements are evaluations of a literary work, such as when a reviewer offers commentary that is tied to the work being reviewed. When a writer launches a personal attack on a person's character, reputation, or competence then the Supportable Interpretation standard does not apply. Plaintiff claims that the NR Defendants' statements were a personal attack on Plaintiff's conduct and that NR Defendants' comments are not opinions but rather misstatements of fact and therefore the Fair Comment privilege does not apply.

When the media defames a private individual, the law in the District of Columbia is that the standard of care is negligence unless a common law privilege applies. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87 (D.C. 1980). The District of Columbia has several common law privileges, one of which is the fair comment privilege. *Id.* The law in the District of Columbia provides the media the privilege of "fair comment on matters of public interest." *Id.* at 88. The privilege only applies to opinion and not misstatements of fact.[17] *Id.* (finding that the

[17]The rationale for this is found in *De Savitsch v. Patterson*, 159 F.2d 15, 17 (D.C. Cir. 1946) in which the court said "to state accurately what a man has done, and then to say that in your opinion such conduct was disgraceful or dishonorable, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well founded or not. Misdescriptions of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the reader no opportunity for judging himself for (sic) the character of the conduct condemned, nothing but a false picture being presented for judgment."

Evening Star Newspaper could not employ the fair comment privilege because it printed false facts regarding the existence of a quarrel).

To be in a position to take advantage of this privilege a defendant must "clear[] two major hurdles to qualify for the fair report privilege." *Id*. at 89. A defendant must show that the publication was "fair and accurate" and that the "publication properly attributed the statement to the official source." *Id.* In this case, the accusations of fraud are statements that are provably false. Whether Plaintiff's work is fraudulent is certainly a matter of public interest, however several reputable bodies have investigated Plaintiff's work (even if the Court does not consider the investigation conducted by Penn State as one of these bodies[18]) and Plaintiff's work has been found to be sound. Having been investigated by almost one dozen bodies due to accusations of fraud, and none of those investigations having found Plaintiff's work to be fraudulent, it must be concluded that the accusations are provably false. Reference to Plaintiff, as a fraud is a misstatement of fact. The NR Defendants' reference to Plaintiff as "the man behind the fraudulent climate-change 'hockey-stick' graph" is arguably a misstatement of fact (the evidence indicates otherwise as Plaintiff's work has been found to be sound). Thus, the Court finds, at this stage the fair comment privilege does not apply to the NR Defendants.

Actual Malice

The NR Defendants argue that Plaintiff cannot prove "actual malice" because his work has been questioned frequently. The NR Defendants argue that just because some investigative bodies have accepted Plaintiff's work as proper does not mean that Plaintiff's work is not still

[18] Here the Court notes the NR Defendants' argument that the various investigations have not been thorough, fair or complete.

questioned by others. Finally, the NR Defendants argue that there is sufficient evidence that indicate Plaintiff's work was "intellectually bogus" thus Plaintiff would be unable to prove that the NR Defendants were aware of the falsity of their comments or that the NR Defendants entertained serious doubts about the truth of their statements.

Plaintiff counters that the NR Defendants' statements were made with the knowledge of their falsity or reckless disregard for their truth.

"Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (citing the Supreme Court in *New York Times Co.*, 376 U.S. at 279-80, which held that "the Constitution limits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.") The plaintiff must prove "actual malice" by "clear and convincing evidence." *Id.* at 924. There must also be sufficient evidence that indicates that the defendant had serious doubts regarding the truth of the published statement. *Id.* (explaining that a publication made where there are serious doubts is an indication of reckless disregard for truth or falsity thus demonstrates "actual malice"). The *New York Times Co.* rule was extended to include libel actions by public figures. *Nader*, 408 A.2d at 40 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) which defined a public figure as "[one] who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are classed as public figures.")

Plaintiff does not seriously challenge the assertion that he is a public figure and the Court finds that given his work and notoriety the characterization as a public figure (albeit limited) is

appropriate. As a public figure, Plaintiff may only succeed in a suit for libel if he can prove "actual malice" because, as a public figure, he has opened himself to criticism and differing opinions. At this stage, the evidence is slight as to whether there was actual malice. There is however sufficient evidence to demonstrate some malice or the knowledge that the statements were false or made with reckless disregard as to whether the statements were false. Plaintiff has been investigated several times and his work has been found to be accurate. In fact, some of these investigations have been due to the accusations made by the NR Defendants. It follows that if anyone should be aware of the accuracy (or findings that the work of Plaintiff is sound), it would be the NR Defendants. Thus, it is fair to say that the NR Defendants continue to criticize Plaintiff due to a reckless disregard for truth. Criticism of Plaintiff's work may be fair and he and his work may be put to the test. Where, however the NR Defendants consistently claim that Plaintiff's work is inaccurate (despite being proven as accurate) then there is a strong probability that the NR Defendants disregarded the falsity of their statements and did so with reckless disregard.

The record demonstrates that the NR Defendants have criticized Plaintiff harshly for years; some might say, the name calling, accusations and jeering have amounted to a witch hunt,[19] particularly because the NR Defendants appear to take any opportunity to question Plaintiff's integrity and the accuracy of his work despite the numerous findings that Plaintiff's work is sound. At this stage, the evidence before the Court does not amount to a showing of clear and convincing as to "actual malice," however there is sufficient evidence to find that

[19] The Court does not, by this Order endorse or make any finding regarding this characterization of the type of dialogue engaged in by the NR Defendants.

further discovery may uncover evidence of "actual malice." It is therefore premature to make a determination as to whether the NR Defendants did not act with "actual malice."

NR Defendants Motion to Dismiss Pursuant to Rule 12(b)(6)

Standard

Rule 12 vests the Court with the authority to dismiss an action when it "fails to state a claim upon which relief can be granted." Super. Ct. Civ. R. 12(b)(6). Pursuant to this Rule, "[d]ismissal is warranted only if, construing the complaint in the light most favorable to the non-moving party and assuming the factual allegations to be true for purposes of the motion, 'it appears, beyond doubt, that the plaintiff can prove no facts which would support the claim.'" *Leonard v. Dist. of Columbia*, 794 A.2d 618, 629 (D.C. 2002) (quoting *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997)). The determination of whether dismissal is proper must be made on the face of the pleadings alone. *See Telecommunications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985).

A plaintiff is required to plead enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007). In order to survive a motion to dismiss, a plaintiff's complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.*, 127 S.Ct. at 1964-65. "When the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 1966.

Defamation

The NR Defendants argue that the First Amendment bars Plaintiff's recovery because the NR Defendants' statements are protected speech. Further that the facts as pled by Plaintiff are insufficient to make malice plausible because Plaintiff's work and theories are questionable.

Plaintiff counters that his claims should survive a 12(b)(6) because he has pled facts that demonstrate that the NR Defendants knew fraud was nonexistent, or deliberately ignored evidence that their accusations of fraud, misconduct or data manipulation were false. Plaintiff claims that multiple government and academic institutions have exonerated him and that the NR Defendants were aware of this. Plaintiff asserts that the Motions are frivolous and "nothing more than a cynical ploy to evade liability" and "delay proceedings."

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). Plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Payne*, 25 A.3d at 924.

The Court of Appeals has held that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with

knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from the mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id.*

Given the Court's discussion and decision *supra,* on the Special Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act, the Court will not repeat that discussion here. The Court finds the Motion to Dismiss pursuant to Rule 12(b(6) must be denied for the same reasons as stated *supra.* Accordingly, it is this 19th day of July 2013 hereby,

ORDERED that the Motions are **DENIED**. It is further,

ORDERED that the **STAY IS LIFTED**. It is further,

ORDERED that the parties shall appear for a status hearing on September 27, 2013 at 9:00 a.m.

SO ORDERED.

Natalia M. Combs Greene
(Signed in Chambers)

Copies to:

Parties

Attachment F

IN THE 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 Natalia M. Combs Greene Calendar Ten

OMNIBUS ORDER

This matter is before the Court on Defendants' Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to the District of Columbia's Anti-SLAPP Act, the Opposition and Reply, and Defendants' Competitive Enterprise Institute and Rand Simberg's Motion to Dismiss pursuant to Rule 12(b)(6) and the Opposition thereto. Upon careful review of the pleadings and consideration of the arguments advanced at a hearing on the matter, and for the reasons set forth herein, the Motions are denied.

Background

Plaintiff, Michael Mann, is a Professor of meteorology at The Pennsylvania State University ("Penn State"). Plaintiff also serves as Director of the Earth System Science Center at Penn State. Plaintiff is well known for his research on global warming and his co-authorship of the 'Hockey Stick Graph,' which "purports to identify long-term trends in global temperatures

based . . . on theoretical models involving temperature proxies, such as the analysis of tree growth rings."[1] (Def's Mtn. at 6.) Plaintiff has authored numerous peer-reviewed papers and published two books. In 2001, Plaintiff served as "lead author" for a chapter of the United Nations' International Panel on Climate Change ("IPCC") Third Scientific Assessment Report.[2] *Id.* In 2002, Plaintiff "was named as one of the fifty leading visionaries in science and technology by Scientific American, and has received numerous awards for his research." *Id.*[3]

In 2009 approximately one thousand emails were apparently "misappropriated from a server at the University of East Anglia's Climate Research Unit ("CRU")." *Id*. at 8. These emails included correspondence between Plaintiff and CRU scientists, in which the CRU was cast in a negative light. *Id.* One particular email, written by Phil Jones (a CRU scientist) stated: "I've just completed Mike's Nature *trick* of adding in the real temps to each series for the last 20 years (*i.e.* from 1981 onwards) [and] from 1961 for Keith's to *hide the decline*." *Id*. As a result of these emails coming to light, the University of East Anglia began an investigation into the "'honesty, rigor, and openness with which the CRU scientists have acted." *Id.* The investigators concluded that the "'rigor and honesty of the CRU scientists was not in doubt," but that Jones' email referencing Plaintiff's "'Nature *trick*" was "'misleading'." *Id.* at 9.

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[1] "The 'Hockey Stick Graph' – named for its iconic shape resembling a hockey stick – attempts to represent estimates of the world's temperatures between 1000 and 2000 A.D., based (in large part) on the observed growth in various tree rings throughout the world. The 'Hockey Stick Graph' illustrates the authors' theory of gradual decline in temperatures from 1000 A.D. until about 1900 A.D., followed by a sharp increase in the late 20th century." (Def.'s Mot. 6.)

[2] The data Plaintiff used in the creation of the 'Hockey Stick Graph' was referenced in the Report.

[3] In his Complaint, Plaintiff alleges that he and his colleagues, as a result of their research, were awarded the Nobel Peace Prize as a result of their research. Defendants claim that the Nobel Peace Prize award, referenced in the Complaint, states that the award was given jointly to Vice President Al Gore and the IPCC. *Id*. at 7.

In 2010, Penn State tasked its Investigatory Committee, "appointed by University administrators and comprised entirely of Penn State faculty members," to investigate Plaintiff in connection with the CRU emails. *Id.* at 10. Plaintiff was cleared of three of the four substantive charges against him. The decision by the investigative group was apparently based on an interview with Plaintiff. Defendants claim that the Committee failed to interview any scientist who had previously been critical of Plaintiff's work. Penn State investigated the last charge (which involved Plaintiff's research and an allegation that it might "deviate from accepted research norms) through an interview with Professor Richard Lindzen of MIT, a critic of Plaintiff's work, who later "expressed dismay with the scope of the investigation and the Committee's analysis of the East Anglia emails." *Id.* at 11.

Also in 2010, the United States Environmental Protection Agency (the "EPA") investigated Plaintiff as a result of constant pressure from the CEI Defendants and others. (Pl. Mtn at 22.) The EPA concluded there was "no evidence of scientific misconduct." *Id.* A subsequent investigation of Plaintiff's work was conducted, by the National Science Foundation (the "NSF"), which found that "Penn State did not adequately review the allegation in its inquiry, especially in light of its failure to interview critics of [Plaintiff's] work." (Def. Mtn. at 11.)

In 2012, attention was again brought to Penn State's investigation of Plaintiff, when Penn State released the results of an unrelated investigation conducted by FBI Director Louis Freeh. That investigation concerned allegations of sexual abuse by Jerry Sandusky, a Penn State assistant football coach. *Id*. at 12. Freeh's report stated there had been a "failure by university officials to properly investigate known allegations of misconduct when they arose." *Id.* The report further stated that Penn State should "undertake a thorough and honest review of its

culture," which placed "the avoidance of the consequences of bad publicity above virtually every other value." *Id.*

A few days after Freeh's report was released, Defendant, the National Review ("an influential magazine and website" that offers "conservative news, commentary and opinion,") published, on its website, a piece by Defendant Steyn, entitled "*Football and Hockey*". The piece was published by the National *Review Online*, in a section called "*The Corner." Id*. at 13. Defendant Steyn's blog post contained an excerpt and link to Defendant Simberg's earlier internet post for Defendant Competitive Enterprise Institute's website OpenMarket.org, entitled "*The Other Scandal in Unhappy Valley*." *Id*. Defendant Simberg's blog post compared the Sandusky scandal, and Penn State's failure to properly handle the matter with the Penn State's investigation into Plaintiff's work.[4] *Id.* Defendant Steyn's article endorsed Defendant Simberg's commentary, however Steyn indicated he was "not sure [he] would have extended the metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does". Steyn nevertheless agreed that Defendant Simberg "had a point." *Id.* Defendant Steyn also stated: "Michael Mann was the man behind the fraudulent climate-change hockey stick graph, the very ringmaster of the tree-ring circus." *Id.* at 14. Defendant Steyn concluded the piece by enumerating the similarities between Penn State's investigation into allegations of misconduct by both Sandusky and Plaintiff, and "questioned the university's similar handling of the two matters." *Id.*

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[4] Defendant Simberg compared Plaintiff to Sandusky by this statement: "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet." *Id.* at 13.

Eight days after Defendant Steyn's article was posted on the *National Review Online* website, Plaintiff demanded a retraction and that an apology be issued for the accusations of "academic fraud." *Id*. The *National Review* responded by letter, and *via* an online post by Editor Rich Lowry, which explained that the term 'fraudulent' was used in Defendant Steyn's article to mean "intellectually bogus and wrong," and did not carry the connotation of "criminal fraud". *Id.*

On October 22, 2012, this action was filed in which Plaintiff alleges libel and intentional infliction of emotional distress against Defendants National Review and Steyn (the "NR Defendants"), along with co-Defendants Competitive Enterprise Institute and Simberg (the "CEI Defendants"). Plaintiff's suit is based primarily upon the NR Defendants' and the CEI Defendants' following statements: (1) Defendant Simberg's statement published in Openmarket.org that Plaintiff had engaged in "data manipulation" and "scientific misconduct" and the "posterboy of the corrupt and disgraced climate science echo chamber;" (2) Defendant Steyn's statement in the National Review Online that Plaintiff "was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus;" and (3) Mr. Lowry's statement in *National Review Online* that indicated Plaintiff's work is "intellectually bogus."

Discussion

Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP ACT

Anti-SLAPP Act

The CEI Defendants argue that their commentary on Plaintiff's global warming research and the investigations of said research is protected by the Anti-SLAPP Act because the commentary was an "act in furtherance of the right of advocacy on issues of public interest."

The CEI Defendants assert that because the statute applies, Plaintiff's claim must be dismissed without further action unless Plaintiff is able to carry the heavy burden imposed on him by the Anti-SLAPP Act (to successfully demonstrate that his claims are "likely to succeed on the merits.")[5] The CEI Defendants argue that the standard "likely to succeed on the merits" requires Plaintiff to prove that the statements complained of are: (1) Defamatory; (2) capable of being proven true or false; (3) concern Plaintiff; (4) false; and (5) made with the requisite degree of intent or fault. The CEI Defendants also argue that Plaintiff's status, as a public figure, requires proof of "actual malice" by clear and convincing evidence.

Plaintiff counters that the Anti-SLAPP Act was not meant to protect against this type of lawsuit. Plaintiff argues that: "Anti-SLAPP suits are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so." Plaintiff asserts that the Anti-SLAPP Act was enacted to give courts a chance to look into the merits of a claim in order to prevent large corporations (or those who are economically superior) from commencing meritless litigation to stifle the participation of less well financed individuals in the litigation process. Plaintiff further argues that his intent in bringing this suit does not comport with the reasons for the Anti-SLAPP Act. It appears that while Plaintiff argues the Motion should be denied in this case on this basis; it also appears that Plaintiff does not seriously challenge the applicability of the Anti-SLAPP Act because it arises

[5] Recently, Judge Walton of the United States District Court for the District of Columbia issued a decision and discussed the standard or burden Plaintiff faces once the Court finds the Anti-SLAPP applies. *Boley v. Atlantic Monthly Group,* C.A. No 13-89 (RBW)(D.D.C. June 25, 2013)

from an act in furtherance of the right of advocacy on issue of public interest."[6] D.C. Code § 16-5501 defines "an act in furtherance of the right of advocacy on issues of public interest" as " any written or oral statement made . . . (ii) in a place open to the public or a public forum in connection with an issue of public interest." That section also defines an issue of public interest, *inter alia*, as "an issue related to . . . environmental . . . well-being."

The D.C. Code §16-5502 provides:

> (a) A party may file a special motion to dismiss to 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.
>
> (c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.
>
> (2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.
>
> (d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

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[6] The Court does not fully appreciate Plaintiff's argument in this regard as Plaintiff does not bring the Special Motion and is not a large corporation.

The Anti-SLAPP Act was adopted in the District of Columbia in 2010. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012). The Anti-SLAPP Act protects speech regarding the public interest such as qualifications for public office. *Id.* The Anti-SLAPP Act gives "absolute or qualified immunity to individuals engaged in protected actions." *Id.* Where the proponent of a motion brought pursuant to the Anti-SLAPP Act "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." *Id. See also*, *3M Co. v. Boulter*, 842 F.Supp.2d 85 93 (D.D.C. 2012).

An extensive discussion as to whether the Anti-SLAPP Act applies in this case is not necessary for the reasons stated *supra.*[7] The CEI Defendants' comments were made with respect to climate issues, which are environment issues, thus an issue of public interest. In addition, the comments were made in publications (blogs, columns and articles) that were published to the public (available on online websites) thus the comments fit under the definition of an act in furtherance of the right of advocacy. Thus, the Court finds application of the Anti-SLAPP Act appropriate because the case involves issues of climate change, clearly a topic of public interest.

Standard/Burden

The CEI Defendants argue that the standard "likely to succeed on the merits" is a heavy burden and that Plaintiff is unable to meet that burden. The CEI Defendants argue that because other states do not employ the same standard ("*likely* to succeed on the merits") the District of

[7] Plaintiff's real argument appears to be that the Motion should be denied.

Columbia intended its version of the Anti-SLAPP Act to be more strict. The CEI Defendants also argue that the Merriam-Webster Dictionary definition defines "likely" as "having a high probability of occurring or being true," and "very probable." The standard of likelihood to succeed on the merits, in the context of a preliminary injunction is proof by a preponderance of the evidence. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003); *see also*, *District of Columbia*, 670 A.2d 354, 366 (D.C. 1996) (stating that "likely to succeed on the merits" indicates the *possibility* that the plaintiff will prevail at trial).

Plaintiff counters that the relevant legal standard is the same as that to be applied in deciding a motion summary judgment, not a standard requiring the high burden the CEI Defendants argue should be applied. Plaintiff argues that the D.C. Anti-SLAPP Act is fashioned after the corresponding California statute (a statute which requires that there is "a probability that the plaintiff will prevail on the claim.") Plaintiff also argues that the sole distinction between the D.C. Anti-SLAPP Act and the California statute is that the former requires the plaintiff to demonstrate that he is "likely" to succeed on the merits while the latter requires that the plaintiff establish that there is a "probability" that he will prevail on the claim. Plaintiff argues that there is no difference in the meaning of "likely" and "probability."

Blacks Law Dictionary defines the "likelihood of success on the merits test" in the context of a preliminary injunction as requiring the litigant to "show a reasonable probability of success in the litigation or appeal." BLACKS LAW DICTIONARY (9th ed. 2009). The California statute requires the plaintiff to show a "probability of prevailing on the claim by making a *prima facie* showing of facts that would, if proved, support a judgment in the plaintiff's favor." *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (Cal. Dist. Ct. App. 2004). The probability standard is similar to that used to determine a "motion for directed verdict, or

summary judgment." Although the Court may not weigh the evidence, as noted *supra,* the Plaintiff must provide sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint). *Id.*

The District of Columbia Anti SLAPP Act does not provide a definition of the standard and there has not been a decision on this issue from our Court of Appeals. *See* note 4. *supra*. The legislative history of the Anti-SLAPP Act, an almost identical act to the California act, indicates that the California act served as the model for the District of Columbia's Anti-SLAPP Act. The Court finds the argument (as to the high burden) advanced by the CEI Defendants not well founded. The standard "likely to succeed on the merits" or likelihood of success on the merits, is a high burden but not as high as suggested by the CEI Defendants. As noted, the standard of the likelihood to succeed on the merits, in the context of a preliminary injunction, is proof by a preponderance of the evidence. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003).

The Court is in agreement with the decision issued by Judge Walton on this issue and finds the case law from California (upon which the D. C. Anti-SLAPP Act is modeled) instructive. In California, as Judge Walton noted; "…a Plaintiff seeking to show a probability of prevailing on a claim in response to an anti-SLAPP motion must satisfy a standard comparable to that used on a motion for judgment as a matter of law". *See Boley v. Atlantic Monthly Group, supra* (quoting *Price v. Stossel*, 620 F. 3d 992, 1000 (9th Cir. 2010)). Thus, the Court finds, Plaintiff must present a sufficient legal basis for his claims and if he fails to do so, the motion should be granted.

Defamation

The CEI Defendants argue that Plaintiff will be unable to make a *prima facie* case for libel. The CEI Defendants argue that the First Amendment protects debate on issues of public concern of which scientific matters are included. Further, that Plaintiff will be unable to prove "actual malice" (as required where the plaintiff is a public figure) by clear and convincing evidence because the statements at issue are not assertions of fact. Finally the CEI Defendants argue that Plaintiff will be unable to prove that the CEI Defendants made the statements without care for the truth because there is evidence which suggests Plaintiff's work is not reliable.

Plaintiff counters that, to succeed on a defamation claim, he must prove "actual malice" by a showing that "the defendant in fact entertained serious doubts" as to the truth of the publication or acted with a high degree of awareness of its probable falsity. Plaintiff argues that the statements made by the CEI Defendants are not only false, but defamatory *per se*,[8] and that the CEI Defendants made these statements with knowledge of their falsity or reckless disregard for their truth. Plaintiff claims whether he engaged in fraud is verifiable by either analyzing the elements of fraud[9] or considering the objective investigations conducted regarding his research.[10]

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313

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[8] This Order does not discuss defamation *per se* because in his Opposition, Plaintiff only makes this reference in passing and does not support the statement with any substantive argument.

[9] Plaintiff claims that the Court may consider evidence as to whether Plaintiff made any knowing and material misrepresentations in his research with intent to deceive, and then arrive at a conclusion as to whether he committed fraud.

[10] Plaintiff claims that there were six investigations into whether he committed fraud. Those most notable were done by the EPA and the National Science Foundation (NSF).

(D.C. 2006). A plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Payne*, 25 A.3d at 924.

The Court of Appeals has stated that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id.*

The CEI Defendants argue primarily that Plaintiff is unable to present a *prima facie* case of libel because the statements in question are not actionable, as any reasonable reader would believe that the statements consist of opinions on issues of intense public debate. The CEI Defendants ask that the Court consider: (1) specific language of the challenged statement; (2) the statements verifiability; (3) the full context of the statement; and (4) the broader context or

setting in distinguishing their statements from assertions or implications of fact.[11] These Defendants argue that if the Court considers these four factors, the Court will conclude that the debate over global warming (in which CEI Defendants contend its statements are a part) is contentious and acrimonious (giving rise to commonplace highly opinionated language). The CEI Defendants argue that their statements are not exceptional, but just common statements made within the global warming arena. Finally, they contend that their statements are not actionable because they raise questions rather than make factual assertions that are capable of "being proved true or false" (specifically, that the CEI Defendants believe their statements invite readers to "ask questions" and arrive at their own conclusions).

Plaintiff counters that the statements at issue are not opinion(s). He argues that taken in context, the CEI Defendants' are actionable and not opinion because defamatory statements may appear in publications that often express opinion.

Prior to the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), statements that were considered to be opinion were generally treated as non-defamatory. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Under *Milkovich*, opinions are actionable "if they imply a provably false fact or rely upon stated facts that are provably false." *Id.* at 597. If the proponent of the statement, however is "expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Id.* (quoting *Haynes v.*

[11] The CEI Defendants argue that their statements were pure opinions

Alfred A. Knopf, Inc., 8 F.2d 1222, 1227 (7th Cir. 1993). In determining whether the statement is an opinion, the context of the statement should be considered. *Id.* (quoting *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994).

The First Amendment protects opinions however the statement must be one that is purely opinion and not one that stems from facts. The Court disagrees with the CEI Defendants' contention that the statement "perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions," can only clearly be viewed as an opinion. The Court certainly recognizes that (within the confines of the law) the CEI Defendants may employ harsh language, as appears to be the norm in the climate debate environment, however the Court finds this statement goes beyond harsh debate or "rhetorical hyperbole". Rather the statement questions facts –it does not simply invite readers to "ask questions". In addition, the accusation that Plaintiff has acted in a "most unscientific manner . . . in data manipulation to keep a blade on his famous hockey-stick graph," relies on the interpretation of facts (the emails).

The Court recognizes that the blogs and publications by the CEI Defendants at issue in this case may employ these words because it appears to have become what some may describe as the norm (in global warming criticism), and because the tone set by the use of harsh and contentious statements is in line with what some may argue is the reputation developed by the CEI Defendants; having legitimacy and is fair argument. The question becomes, and it is difficult in this case, is whether the line (as recognized by the law) has been crossed. Defendants argue that the accusation that Plaintiff's work is fraudulent may not *necessarily* be taken as based in fact because the writers for the publication are tasked with and posed to view work critically and interpose (brutally) honest commentary. In this case, however, the evidence before the

Court, at this stage, demonstrates something more and different that honest or even brutally honest commentary, and creases that line of reasoning.

Fraud is defined as: "(1) A deception deliberately practiced in order to secure unfair or unlawful gain; (2) a piece of trickery; a trick; (3)(a) one that defrauds; cheat; (b) one who assumes a false pose; an imposter." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 722 (3rd ed. 1996). Fraudulent is defined as: "(1) Engaging in fraud; deceitful; (2) characterized by, constituting, or gained by fraud: fraudulent business practices." *Id.* Given the dictionary definition as well as the common readers' thought about the use of these words (fraud and fraudulent) the Court finds that these statement taken in context must be viewed as more than honest commentary—particularly when investigations have found otherwise. Considering the numerous articles that characterize Plaintiff's work as fraudulent, combined with the assertions of fraud and data manipulation, the CEI Defendants have essentially made conclusions based on facts. Further, the assertions of fraud "rely upon facts that are provably false" particularly in light of the fact that Plaintiff has been investigated by several bodies (including the EPA) and determined that Plaintiff's research and conclusions are sound and not based on misleading information.

In addition, the CEI Defendants' attempt to minimize the seriousness of their reference to Plaintiff as a fraud by claiming that this reference may be compared to the statement "intellectually bankrupt" to "intellectually bogus" is not credible. It is obvious that "intellectually bankrupt" refers to a lack of sense or intellect but the same may not be said for "intellectually bogus." The definition of "bogus" in the Merriam-Webster online dictionary, *inter alia*, is "not genuine . . . sham." BOGUS, MERRIAM-WEBSTER: ONLINE DICTIONARY AND THESAURUS, http://www.merriam-webster.com/dictionary/bogus. In Plaintiff's line of work, such

an accusation is serious. To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud (taken in the context and knowing that Plaintiff's work has been investigated and substantiated on numerous occasions). The Court must, at this stage, find the evidence indicates that the CEI Defendants' statements are not pure opinion but statements based on provably false facts.[12]

The CEI Defendants argue that their statements are rhetorical hyperbole, which are not actionable assertions of fact, and thus they are entitled to dismissal of the action. The CEI Defendants contend that any reasonable reader would interpret their statements as rhetorical hyperbole. Plaintiff counters there is nothing rhetorical about the CEI Defendants' accusations of fraud, and that the statements do not qualify as rhetorical hyperbole. Plaintiff points to statements made by readers of the CEI Defendants' publications as evidence that Defendants' statements are defamatory.[13] Plaintiff notes other publications that have published statements about how Plaintiff was defamed.

In *Milkovich*, the Supreme Court found that statements that are not made from actual facts are protected to prevent public debate from a deprivation of "imaginative expression" or "rhetorical hyperbole"[14] that has "traditionally added much to the discourse of this Nation."

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[12] The Court does view this as a very close case.

[13] Some of these statements are "this is some of the most disgusting and amoral attempts to smear an honest and courageous scientist's reputation that I have ever seen," and "falsely screaming 'fraud' about one study done over a dozen years ago and ignoring the 11 other studies that confirm it reveals the accuser has no interests [sic] in the truth." At the hearing on the Motions, there was much discussion or critical reference made to the source of this particular comment and the character and worth of the commentator (questioning whether this comment should be taken with any legitimacy). The Court finds this issue unimportant for purposes of the questions decided herein and at this point in the litigation.

[14] Rhetorical hyperbole refers to exaggerations used as a rhetorical device. Rhetorical hyperbole is often a figure of speech that is used to evoke strong feelings or create a strong impression but not intended to be taken literally.

Milkovich, 497 A.2d at 2. *See also*, *Wilner*, 760 A.2d at 589. Rhetorical hyperbole is not actionable in defamation because it cannot be interpreted as factual assertions. *Wilner*, 760 A.2d at 597. To determine whether a statement is rhetorical hyperbole, *i.e*. a statement that is verifiable, courts must look to the context of the statement. *Weyrich v. New Republic, Inc.* 235 F.3d 617, 624 (D.D.C. 2001).

An analysis of this argument is similar to or the same as what is applied to evaluate the CEI Defendants' contention that their statements were opinion. Language such as "intellectually bogus" "data manipulation" and "scientific misconduct" in the context of the publications' reputation and columns certainly appear as exaggeration and not an accusation of fraud. On the other hand, when one takes into account all of the statements and accusations made over the years, the constant requests for investigations of Plaintiff's work, the alleged defamatory statements appear less akin to "rhetorical hyperbole" and more as factual assertions. Defendant Simberg's article "*The Other Scandal In Unhappy Valley*" suggested that Penn State had covered up Plaintiff's alleged fraudulent conduct and misrepresentations of data. The content and context of the statements is not indicative of play and "imaginative expression" but rather aspersions of verifiable facts that Plaintiff is a fraud. At this stage, the Court must find that these statements were not simply rhetorical hyperbole.

Application of the Fair Comment Privilege

The CEI Defendants argue that their statements are protected by the "Fair Comment" privilege, which protects opinions based on facts that are well known to the readers. Plaintiff counters that the "Supportable Interpretation" and "Fair Comment" privileges do not apply. Plaintiff contends that Supportable Interpretation privilege only applies if the challenged statements are evaluations of a literary work, such as when a reviewer offers commentary that is

tied to the work being reviewed. When a writer launches a personal attack on a person's character, reputation, or competence then the Supportable Interpretation privilege does not apply. Plaintiff claims that the CEI Defendants' statements were a personal attack on Plaintiff's conduct and that the CEI Defendants' comments are not opinions but rather misstatements of fact and therefore the Fair Comment privilege does not apply.

When the media defames a private individual, the law in the District of Columbia is that the standard of care is negligence unless a common law privilege applies. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87 (D.C. 1980). The District of Columbia has several common law privileges, one of which is the fair comment privilege. *Id.* The law in the District of Columbia provides the media the privilege of "fair comment on matters of public interest." *Id.* at 88. The privilege only applies to opinion and not misstatements of fact.[15] *Id.* (finding that the Evening Star Newspaper could not employ the Fair Comment privilege because it printed false facts regarding the existence of a quarrel).

To be in a position to take advantage of this privilege a defendant must "clear[] two major hurdles to qualify for the fair report privilege." *Id*. at 89. A defendant must show that the publication was "fair and accurate" and that the "publication properly attributed the statement to the official source." *Id.* In this case, the accusations of fraud are statements that are provably false. Whether Plaintiff's work is fraudulent is certainly a matter of public interest, however

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[15]The rationale for this is found in *De Savitsch v. Patterson*, 159 F.2d 15, 17 (D.C. Cir. 1946) in which the court said "to state accurately what a man has done, and then to say that in your opinion such conduct was disgraceful or dishonorable, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well founded or not. Misdescriptions of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the reader no opportunity for judging himself for (sic) the character of the conduct condemned, nothing but a false picture being presented for judgment."

several reputable bodies have investigated Plaintiff's work (even if the Court does not consider the investigation conducted by Penn State as one of these bodies[16]) and Plaintiff's work has been found to be sound. Having been investigated by almost one dozen bodies due to accusations of fraud, and none of those investigations having found Plaintiff's work to be fraudulent, it must be concluded that the accusations are provably false. Reference to Plaintiff, as a fraud is a misstatement of fact. Thus the CEI Defendants accusation of "data manipulation" could be a misstatement of the facts (the evidence indicates that Plaintiff's work is sound). Therefore, the Court finds the fair comment privilege is not available to the CEI Defendants in this case.

Actual Malice

The CEI Defendants argue that there is sufficient evidence to indicate that Plaintiff's work was "intellectually bogus" thus Plaintiff would be unable to prove that the CEI Defendants knew that their comments were false or that they entertained serious doubts about the truth of their statements. The CEI Defendants argue that Plaintiff will be unable to prove "actual malice" (as required where the plaintiff is a public figure) by clear and convincing evidence because the statements at issue are not assertions of fact (and even if they are, because Plaintiff's work is constantly questioned it follows that the CEI Defendants would not question the truth of their publications).

Plaintiff counters that the CEI Defendants' statements were made with the knowledge of their falsity or reckless disregard for their truth, thus "actual malice" is evident. Plaintiff argues

[16] Here the Court notes Defendants' argument that the various investigations have not been thorough, fair or complete.

that his work has been proved accurate by several investigations, thus the CEI Defendants plainly disregarded the falsity of their statements.

"Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (citing the Supreme Court in *New York Times Co.*, 376 U.S. at 279-80, which held that "the Constitution limits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.") The plaintiff must prove "actual malice" by "clear and convincing evidence." *Id.* at 924. There must also be sufficient evidence that indicates that the defendant had serious doubts regarding the truth of the published statement. *Id.* (explaining that a publication made where there are serious doubts is an indication of reckless disregard for truth or falsity thus demonstrates "actual malice"). The *New York Times Co.* rule was extended to include libel actions by public figures. *Nader*, 408 A.2d at 40 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) which defined a public figure as "[one] who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are classed as public figures.")

Plaintiff does not seriously challenge the assertion that he is a public figure and the Court finds that given his work and notoriety the characterization as a public figure (albeit arguably limited) is appropriate. As a public figure, Plaintiff may only succeed in a suit for libel if he can prove "actual malice" because, as a public figure, he has opened himself to criticism and differing opinions. At this stage, the evidence is slight as to whether there was actual malice. There is however sufficient evidence to demonstrate some malice or the knowledge that the

statements were false or made with reckless disregard as to whether the statements were false. Plaintiff has been investigated several times and his work has been found to be accurate. In fact, some of these investigations have been due to the accusations made by the CEI Defendants. It follows that if anyone should be aware of the accuracy (or findings that the work of Plaintiff is sound), it would be the CEI Defendants. Thus, it is fair to say that the CEI Defendants continue to criticize Plaintiff due to a reckless disregard for truth. Criticism of Plaintiff's work may be fair and he and his work may be put to the test. Where, however the CEI Defendants consistently claim that Plaintiff's work is inaccurate (despite being proven as accurate) then there is a strong probability that the CEI Defendants disregarded the falsity of their statements and did so with reckless disregard.

The record demonstrates that the CEI Defendants have criticized Plaintiff harshly for years; some might say, the name calling, accusations and jeering have amounted to a witch hunt,[17] particularly because the CEI Defendants appear to take any opportunity to question Plaintiff's integrity and the accuracy of his work despite the numerous findings that Plaintiff's work is sound. At this stage, the evidence before the Court does not amount to a showing of clear and convincing as to "actual malice," however there is sufficient evidence to find that further discovery may uncover evidence of "actual malice." It is therefore premature to make a determination as to whether the CEI Defendants did not act with "actual malice."

[17] The Court does not, by this Order endorse or make any finding regarding this characterization of the type of dialogue engaged in by the CEI Defendants.

Intentional Infliction of Emotional Distress

The CEI Defendants argue that Plaintiff's claim for intentional infliction of emotional distress ("IIED") fails because the Supreme Court has made it clear that public figures may not recover for the tort of intentional infliction of emotional distress by reason of publications without showing (in addition) that the publication contains a false statement of fact which was made with "actual malice." Defendants contend that their statements are not actionable because they are pure opinion and hyperbole and are not false assertions of fact.

Plaintiff counters that his claim for IIED will succeed because the comment in which Plaintiff was likened or compared to "Jerry Sandusky" by the CEI Defendants was extreme and outrageous. Plaintiff also argues that his claim will survive because the comparison to Sandusky caused him to experience "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea."

Similar to the legal standard for defamation, a public figure may only "recover for intentional infliction of emotional distress by showing that there was a false statement of fact, which was made with 'actual malice.'" *Foretich v. CBS, Inc.*, 619 A.2d at 59 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). The public figure must prove "actual malice" by clear and convincing evidence." *Id.*[18] The Supreme Court's ruling in this area is clear that the

[18] The question here is whether can prove actual malice, not that the general elements of a claim for IIED. The elements of a claim for IIED: "(1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v. District of Columbia*, 9 A.3d 484, 494 (D.C. 2010) (citing *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003). The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 (D.C. 1991). Mental anguish and stress "do not rise to the level of severe emotional distress."

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constitutional protections given to defendants that are charged with defamation of a public figure are extended to other civil actions alleging emotional harm. *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004).

The argument advanced in support of Plaintiff's claim for IIED is similar to the claim of defamation. There is sufficient evidence presented that is indicative of "actual malice." The CEI Defendants have consistently accused Plaintiff of fraud and inaccurate theories, despite Plaintiff's work having been investigated several times and found to be proper. The CEI Defendants' persistence despite the EPA and other investigative bodies' conclusion that Plaintiff's work is accurate (or that there is no evidence of data manipulation) is equal to a blatant disregard for the falsity of their statements. Thus, given the evidence presented the Court finds that Plaintiff could prove "actual malice."

Defendants' CEI and Simberg's Motion to Dismiss Pursuant to Rule 12(b)(6)

Standard

Rule 12 vests the Court with the authority to dismiss an action when it "fails to state a claim upon which relief can be granted." Super. Ct. Civ. R. 12(b)(6). Pursuant to this Rule, "[d]ismissal is warranted only if, construing the complaint in the light most favorable to the non-moving party and assuming the factual allegations to be true for purposes of the motion, 'it appears, beyond doubt, that the plaintiff can prove no facts which would support the claim.'"

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Futrell, 816 A.2d at 808. The defendant's actions must be the proximate cause of "plaintiff's emotional upset of so acute a nature that harmful physical consequences are likely to result." *Id.*

Leonard v. Dist. of Columbia, 794 A.2d 618, 629 (D.C. 2002) (quoting *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997)). The determination of whether dismissal is proper must be made on the face of the pleadings alone. *See Telecommunications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985).

A plaintiff is required to plead enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1974 (2007). In order to survive a motion to dismiss, a plaintiff's complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.*, 127 S.Ct. at 1964-65. "When the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 1966.

Defamation

The CEI Defendants argue that the Court should dismiss the claim because the challenged statements are constitutionally protected and subject to the "fair comment privilege." The CEI Defendants argue that Plaintiff's claim is insufficient to support allegations of "actual malice." The CEI Defendants further argue that Plaintiff has not pled factual content (only conclusory allegations) that are provably false.

Plaintiff counters that his claims should survive a 12(b)(6) because he has pled facts that demonstrate that the CEI Defendants knew fraud was nonexistent, or deliberately ignored evidence that their accusations of fraud, misconduct or data manipulation were false. Plaintiff claims that multiple government and academic institutions have exonerated him and that the CEI Defendants were aware of this. Plaintiff asserts that the Motions are frivolous and "nothing more than a cynical ploy to evade liability" and "delay proceedings."

A defamatory statement is one that "injure[s] the plaintiff in his trade, profession or community standing, or lower[s] him in the estimation of the community." *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011) (citing *Clawson v. St. Louis Post-Dispatch, LLC.*, 906 A.2d 308, 313 (D.C. 2006). Plaintiff presents a *prima facie* case of defamation where the following elements are met: "(1) Defendant made a false or defamatory statement concerning the plaintiff; (2) . . . defendant published the statement *without privilege* to the third party; (3) . . . defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Payne*, 25 A.3d at 924.

The Court of Appeals has held that to recover for defamation, a public figure must prove that the defamatory statement was made with "actual malice." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979); *see also*, *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). This means the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Foretich*, 619 A.2d at 59 (quoting *New York Times Co.*, 376 U.S. at 297). Courts may not infer "actual malice" from the mere reason that the defamatory publication was made. *Nader*, 408 A.2d at 41. The courts must look to the character and content of the publication, and the inherent seriousness of the defamatory accusation. *Id.*

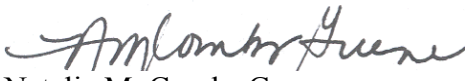
Given the Court's discussion and decision *supra,* on the Special Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act, the Court will not repeat that discussion here. The Court finds the Motion to Dismiss pursuant to Rule 12(b(6) must be denied for the same reasons as stated *supra.* Accordingly, it is this 19th day of July 2013 hereby,

ORDERED that the Motions are **DENIED**. It is further,

ORDERED that the **STAY IS LIFTED**. It is further,

ORDERED that the parties shall appear for a status hearing on September 27, 2013 at 9:00 a.m.

SO ORDERED.



Natalia M. Combs Greene
(Signed in Chambers)

Copies to:

Parties

Attachment G

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 Natalia M. Combs Greene Calendar No. 10

Order

Before the Court is the Motion To Extend Appeal Deadline. Upon consideration of the Motion, and good cause having been shown, it is this 13th day of August 2013 hereby

ORDERED that the Motion is **GRANTED**, and the time for filing notices of appeal of the Court's July 19, 2013, Orders is extended to and including September 17, 2013.

SO ORDERED.

Natalia M. Combs Greene
(Signed in Chambers)