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By e-mail and first-class mail

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Re: Demand Letter to the Competitive Enterprise Institute

Dear John:

I write to respond to your August 21, 2012 demand letter to the Competitive Enterprise Institute regarding a post titled "The Other Scandal in Unhappy Valley" written by Rand Simberg and published on the "OpenMarket.org" blog.

I left you a voice message last week about your demand to CEI, and we have been in touch over the past six weeks regarding the demand your client sent to National Review on the same topic. You asked us about service of process on National Review and Mark Steyn, and my telephone call last week in part was to discuss service of process issues relating to CEI, as we several weeks ago responded to you concerning National Review and Mr. Steyn. We have not heard back from you regarding any of these subjects and are therefore left wondering about Dr. Mann's intentions as to all of the publishers and authors we represent in this matter.

As for CEI's position on the Simberg blog post, it has published statements that are fully protected under the First Amendment and will not remove or retract the post. However, CEI would be willing to provide Dr. Mann the opportunity to publish a comment responding to Mr. Simberg and discussing these subjects more generally on www.globalwarming.org. Please let us know if Dr. Mann is interested.

Dr. Mann complains about two statements made in the post: 1) that he has engaged in "academic and scientific misconduct" and 2) that he "engaged in data manipulation" and has behaved "in a most unscientific manner." Neither of these statements is actionable. Moreover, if Dr. Mann pursues this matter, he and his research would be subjected to a very extensive discovery of materials that he has fought hard to protect in other proceedings. Such materials would be required for CEI to defend itself.

As we previously stated in our response on behalf of the National Review, Dr. Mann is unquestionably a public figure who has placed himself squarely in the middle of the heated scientific debate over climate change. The appellate courts have consistently held that scientists who inject themselves into public controversies over "scientific and political debates" are public figures. *See, e.g., Reuber v. Food Chemical News, Inc.,* 925 F.2d 703, 706 (4th Cir. 1991) (researcher who "voluntarily injected himself into public controversy" over use of malathion, a potential carcinogen, in Medfly outbreak found to be public figure); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (public figures are those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and who "invite attention and comment"). Dr. Mann refers to himself as a "public figure" on his Facebook page. *See* Michael E. Mann, Facebook, https://www.facebook.com/MichaelMannScientist?sk=wall.

Moreover, Dr. Mann has frequently spoken to the press and published opinions and letters in prominent newspapers (including The Washington Post and The Wall Street Journal) about his research. *See, e.g.*, Opinion, Michael E. Mann, "Get the anti-science bent out of politics," Wash. Post, Oct. 8, 2010; Letter, Michael E. Mann, "Climate Contrarians Ignore Overwhelming Evidence," Wall. St. J., Dec. 5, 2011. In fact, he quite literally wrote the book on the climate change controversy. *See* Michael Mann, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines*, Columbia University Press 2012; *see also* Michael E. Mann and Lee R. Kump, *Dire Predictions: Understanding Global Warming*, DK Publishing 2008. He thus has adequate "access to channels of effective communication" to rebut any accusations he believes to be false. *Reuber*, 925 F.2d at 708-09 (scientist who testified before Congress on well-known controversy, gave an interview, and published numerous papers had sufficient access to channels of communication to be public figure) (*citing Fitzgerald v. Penthouse Int'l*, 691 F.2d 666, 668 (4th Cir. 1982)).

For the purposes of libel law, Dr. Mann is therefore a public figure who would be required to demonstrate by clear and convincing evidence that CEI published a provably and substantially false statement about him with actual malice; that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (reckless disregard refers to state of mind in

which a defendant "in fact entertained serious doubts as to the truth of his publication"). He could never meet such a daunting burden.

In discussing Dr. Mann and his work, Mr. Simberg and CEI weighed in on an impassioned scientific debate over climate change and Dr. Mann's infamous "hockey stick" graph. The federal courts have given considerable breathing room in cases involving scientific controversies with "serious public impact." *See Reuber*, 925 F.2d at 715. For example, in reversing a defamation judgment for the plaintiff in *Reuber*, the Fourth Circuit held:

> In the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it prints is true. If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment. Prior censorship by the press of every conceivably false charge in the course of an intense public controversy also possesses dangers to the values protected by the First Amendment – dangers which in some particulars parallel those of censorship by the state.

Id. at 717 (citations omitted). *Reuber* was thus clear that courts must "reject the attempt to silence one's adversaries in a public controversy by suing organizations attempting to inform the public about questions raised as to the research of every putative defamation plaintiff." *Id.* at 718.

This dispute over the science behind climate change is precisely the type of vigorous scientific debate that the First Amendment protects. As Dr. Mann has acknowledged, his climate research has continued to come under fire even after he was "exonerated" – to use his term – by Penn State and other organizations. *See* Opinion, Michael E. Mann, "Get the anti-science bent out of politics," Wash. Post, Oct. 8, 2010. Not only did Virginia Attorney General Ken Cuccinelli attempt to investigate the University of Virginia, Dr. Mann's former employer, regarding his research, members of the United States Congress have suggested that his actions may have been criminal and called for a probe into the validity of his research. *Id.*

Politicians, scientists, and journalists have also continued to question Dr. Mann's tactics in defending the "hockey stick" graph, particularly in light of the thousands of leaked e-mails about the controversy that have painted him in a less than flattering light. *See, e.g.*, Andrew Montford, *The Hockey Stick Illusion: Climategate and the Corruption of Science,* Stacey International, 2010; James Delingpole,

Opinion, "Climategate 2.0," Wall St. J., Nov. 28, 2011. In referencing the "Climategate" e-mails, Congressman Darrell Issa did not mince words: "[I]t's very clear that those people played fast and loose with both the truth and our money." Darren Goode, "Issa calls for 'relook' at climate science," The Hill, Sept. 23, 2010.

Mr. Simberg simply came to the same conclusion that many others have in the past decade – that Dr. Mann's research may not be scientifically viable. Moreover, Mr. Simberg went into detail about the investigations pursuant to which Dr. Mann claims to have been exonerated. Mr. Simberg's efforts to include that side of the debate belie any assertion that CEI or Mr. Simberg acted with actual malice. Mr. Simberg wrote in the post that both Penn State and the National Academy of Sciences undertook their own investigations of Dr. Mann following the release of the East Anglia e-mails. He further acknowledged that, as a result of their investigations, Penn State and the NAS claimed to have absolved Dr. Mann of any wrongdoing. Mr. Simberg quoted extensively from the Penn State press release detailing the results of its investigation and linked directly to the Penn State and the NAS reports. The care Mr. Simberg took in presenting the evidence that purported to exonerate Dr. Mann demonstrates that neither he nor CEI were ignoring evidence or doing anything other than offering their own take on the controversy. And as discussed below, Mr. Simberg had a more than ample basis upon which to reject the conclusions of the Penn State and the NAS reports.

In addition, the statements of which Dr. Mann complains are not actionable. Both the statement that he engaged in "academic and scientific misconduct" and the statement that he "engaged in data manipulation" and has behaved "in a most unscientific manner" are non-actionable opinions which Mr. Simberg supported by supplying readers with the underlying facts so that they could draw their own conclusions about the quality of Dr. Mann's work.

It is well established that an author's subjective viewpoint is protected as opinion when it is a "supportable interpretation" based on truthful disclosed facts. *See Moldea v. New York Times Co.*, 22 F.3d 310, 315 (D.C. Cir. 1994) ("*Moldea II*"). In *Moldea II*, the characterization in a New York Times book review that Dan Moldea's history of the National Football League contained "too much sloppy journalism to trust the bulk of th[e] book's 512 pages," *id.* at 312, was non-actionable opinion because the evaluation that Moldea was a "sloppy" journalist was buttressed in the review by reference to examples of mistakes in Moldea's reporting, including one that the court was "troubled by" and would not recognize as correct. *Id.* at 318.

The phrase "academic and scientific misconduct" appears in the last sentence of a 900-word post in which Mr. Simberg sets out the case against Dr. Mann's research and accuses Penn State of an inadequate investigation of his body of

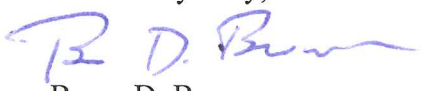
research. The piece also included extensive links that further provided the factual basis for Mr. Simberg's conclusions. For example, in support of the statements of which Dr. Mann complains, the post stated that the National Academy of Sciences report that "purported" to exonerate Dr. Mann in fact "criticized" him "for his statistical techniques (which was the basis of the criticism that resulted in his unscientific behavior)." The post then provided a link to the report for readers to examine it for themselves. Moreover, in rejecting the claim that the Penn State and NAS reports sufficed to exonerate Dr. Mann, Mr. Simberg joined a position that many other commenters have taken.

Here, Mr. Simberg has fully set forth the information on which he based his conclusion that Dr. Mann engaged in "academic and scientific misconduct." The statements are thus non-actionable. *See also Diez v. Pearson*, 834 S.W.2d 250 (Mo. Ct. App. 1992) (allegations of misconduct are non-actionable where newspaper supplied underlying facts). The same is true of the statements that Dr. Mann "engaged in data manipulation" and has behaved "in a most unscientific manner." Both statements are supported by facts stated by Mr. Simberg, both statements contain hyperlinks that take the reader directly to the evidence to which Mr. Simberg refers, and both statements are inherently hyperbolic.

As to the statements regarding Mr. Sandusky, no reasonable individual reading the blog post would have concluded, as a factual matter, that Dr. Mann committed any of the deplorable acts for which Mr. Sandusky was convicted – or anything remotely similar. Mr. Simberg made a highly rhetorical comparison between the Penn State cover-up of the Sandusky scandal under former President Graham Spanier and the possibility of a similar whitewashing at the *same* institution by the *same* leadership of inconsistencies in Dr. Mann's research. This comparison is neither "extreme nor outrageous" such that it would form the basis for a viable claim of intentional infliction of emotional distress. *See, e.g., Green v. American Broadcasting Cos.*, 647 F. Supp. 1359, 1362 (D.D.C. 1986) (intentional infliction of emotional distress "consists of 'extreme and outrageous' conduct, which 'intentionally or recklessly' causes the plaintiff 'severe emotional distress'" (citations and quotations omitted)).

In addition, because Dr. Mann's claim of intentional infliction of emotional distress would arise from CEI's exercise of free speech, he could not recover "without showing in addition that the publication contains a false statement of fact which was made with "actual malice.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). He cannot satisfy this heightened standard.

Yours very truly,



Bruce D. Brown

cc: David B. Rivkin, Jr., Esq.
Fred L. Smith, Jr.