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.
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> (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.
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> (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.
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> (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