SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Alfred S. Irving, Jr.

Defendant Simberg's Motion for
Judgment as a Matter of Law Under Rule 50(b)

Pursuant to Superior Court Civil Rule 50(b), Defendant Rand Simberg respectfully moves for judgment as a matter of law because Plaintiff has not presented a legally sufficient basis for the jury to have found Simberg liable on any statement in his blog post and the evidence does not support an award of punitive damages. In support of his Motion, Defendant Simberg submits the attached Memorandum and a Proposed Order.

Dated: March 8, 2024

Respectfully submitted,

/s/ Andrew M. Grossman

Andrew M. Grossman (D.C. Bar No. 985166)
agrossman@bakerlaw.com
David B. Rivkin (D.C. Bar No. 394446)
drivkin@bakerlaw.com
Mark W. DeLaquil (D.C. Bar No. 493545)
mdelaquil@bakerlaw.com
Renee M. Knudsen (D.C. Bar No. 1615689)
rknudsen@bakerlaw.com
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5403
Telephone: (202) 861-1500
Facsimile: (202) 861-1783

Victoria L. Weatherford (pro hac vice)
vweatherford@bakerlaw.com
BAKER & HOSTETLER, LLP
Transamerica Pyramid
600 Montgomery Street Suite 3100
San Francisco, CA 94111
Telephone: (415) 659-2634

Mark I. Bailen (D.C. Bar No. 459623)
mbailen@bakerlaw.com
MARK I. BAILEN PC
1250 Connecticut Ave, N.W. | Suite 700
Washington, DC 20036
Telephone: (202) 656-0422

Attorneys for Defendant Rand Simberg

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Alfred S. Irving, Jr.

(Proposed) Order

Upon Consideration of Defendant Rand Simberg's Renewed Motion for Judgment as a Matter of Law Under Rule 50(b), the memoranda in support thereof, and any opposition thereto, it is hereby:

ORDERED that Defendant Rand Simberg's Renewed Motion for Judgment as a Matter of Law Under Rule 50(b) is GRANTED, and it is hereby

ORDERED that the judgment entered on February 9, 2024 is VACATED and JUDGMENT IS ENTERED in favor of Defendant Rand Simberg and against Plaintiff Michael E. Mann.

SO ORDERED.

DATED this ____ day of _____, 2024.

_____
The Honorable Alfred S. Irving, Jr.
Associate Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Alfred S. Irving, Jr.

Memorandum of Points and Authorities in Support of Defendant Rand Simberg's Motion for Judgment as a Matter of Law Under Rule 50(b)

Table of Contents

Introduction 1

Background 2

A. The Trial 2

B. The Verdict 2

Legal Standard 3

Argument 4

I. There Was Not Sufficient Evidence To Find Simberg Liable for Defamation 4

A. No Reasonable Jury Could Conclude that Plaintiff Proved Actual Malice By Clear and Convincing Evidence 4

1. Simberg's Statements Were Supported by Voluminous Evidence 4

a. Simberg's Blog Post Cited Multiple Sources on Which He Relied 5

b. Simberg Relied on Hundreds of Climategate Emails 5

c. Simberg Relied on Numerous Secondary Sources 8

d. Simberg Relied on McIntyre & McKitrick's Peer-Reviewed Articles 10

e. Simberg Relied on Dr. Richard Muller (U.C. Berkeley) 10

f. Simberg Relied on Dr. Richard Lindzen (MIT) 11

g. Simberg Relied on the MBH Source Code 12

h. Simberg Relied on His Own Prior Work and Analysis 12

2. Plaintiff's Evidence of Actual Malice Is Completely Insufficient 12

a. Penn State Reports 12

b. NSF Report 14

c. Alleged Evidence of Bias or Zeal 16

d. Prejudicial Conduct by Plaintiff's Counsel 17

3. This Case Does Not Come Close to Other Cases Where Evidence of Actual Malice Was Legally Sufficient 19

4. The Court of Appeals Decision Is Not to the Contrary 20

a. The Jury Had More Evidence Than the Court of Appeals from Simberg that He Entertained No Serious Doubt About Truth 21

b. The Jury Had Less Evidence From Plaintiff Than the Court of Appeals Did Regarding Actual Malice 22

B. Simberg Is Entitled to Relief Because His Statements Were Substantially True 22

1. Statement "C": Academic and Scientific Misconduct 23

2. Statement "D": Plaintiff Could Be Said To Be the Jerry Sandusky of Climate Science and He Has Molested and Tortured Data.....25

C. Simberg Is Entitled to Relief Because His Statements Did Not Convey Defamatory Meaning 27

D. Simberg Is Entitled to Relief Because His Statements Were Opinion 29

E. Simberg Is Entitled to Relief Because Plaintiff's Speculative Evidence About Causation of Actual Injury Is Not Legally Sufficient 31

II. The Punitive Damages Award Must Be Vacated 32

A. Punitive Damages Cannot Be Awarded Without Actual Injury 32

B. Punitive Damages Should Not Have Gone to the Jury 32

C. Plaintiff Did Not Present Legally Sufficient Evidence of Malice 33

III. Simberg Preserves His Argument that His Statements Are Protected Opinion Under the First Amendment.....35

Conclusion 35

Table of Authorities

Cases

Air Wisconsin Airlines Corp. v. Hoeper,
571 U.S. 237 (2014).....22

Afro-Am. Pub. Co. v. Jaffe,
366 F.2d 649 (D.C. Cir. 1966).....33

Bay Gen. Indus., Inc. v. Johnson,
418 A.2d 1050 (D.C. 1980).....32

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984).....1

Bressler v. Fortune Mag., a Div. of Time Inc.,
971 F.2d 1226 (6th Cir. 1992).....4

Brown v. Nat'l Acad. of Scis.,
844 A.2d 1113 (D.C. 2004).....3, 19, 35

Brown & Williamson Tobacco Corp. v. Jacobson,
827 F.2d 1119 (7th Cir. 1987).....19

Buergas v. United States,
686 A.2d 556 (D.C. 1996).....34

CEI v. Mann,
150 A.3d 1213 (D.C. 2016).....20, 21, 22, 27

Clawson v. St. Louis Post-Dispatch, L.L.C.,
906 A.2d 308 (D.C. 2006).....27

Columbia First Bank v. Ferguson,
665 A.2d 650 (D.C. 1995).....33

Croley v. Republican Nat. Comm.,
759 A.2d 682 (D.C. 2000).....33

Curry v. Giant Food Co. of the D.C.,
522 A.2d 1283 (D.C. 1987).....33

Dongguk Univ. v. Yale Univ.,
734 F.3d 113 (2d Cir. 2013).....5

Evans-Reid v. D.C.,
930 A.2d 930 (D.C. 2007).....21

Farah v. Esquire Mag.,
736 F.3d 528 (D.C. Cir. 2013).....27

Foretich v. CBS, Inc.,
619 A.2d 48 (D.C. 1993) 4, 22

Franklin Inv. Co. v. Smith,
383 A.2d 355 (D.C. 1978) 32

Fridman v. Orbis Bus. Intel. Ltd.,
229 A.3d 494 (D.C. 2020) 4

Furline v. Morrison,
953 A.2d 344 (D.C. 2008) 3

George v. Cap. Traction Co.,
295 F. 965 (D.C. Cir. 1924) 21, 25

Harte-Hanks Commc'ns, Inc. v. Connaughton,
491 U.S. 657 (1989) 16, 17

Hendry v. Pelland,
73 F.3d 397 (D.C. Cir. 1996) 32

Jankovic v. Int'l Crisis Grp.,
822 F.3d 576 (D.C. Cir. 2016) 16

Klayman v. Segal,
783 A.2d 607 (D.C. 2001) 27

Liberty Lobby, Inc. v. Anderson,
No. 81-2240, 1991 WL 186998 (D.D.C. May 1, 1991) 20

Lohrenz v. Donnelly,
350 F.3d 1272 (D.C. Cir. 2003) 20

Lumpkins v. CSL Locksmith, LLC,
911 A.2d 418 (D.C. 2006) 12, 16

Majeska v. D.C.,
812 A.2d 948 (D.C. 2002) 3, 31

Manes v. Dowling,
375 A.2d 221 (D.C. 1977) 31

Masson v. New Yorker Magazine, Inc.,
501 U.S. 496 (1991) 22, 26, 27

McFarlane v. Esquire Mag.,
74 F.3d 1296 (D.C. Cir. 1996) 20

McFarlane v. Sheridan Square Press, Inc.,
91 F.3d 1501 (D.C. Cir. 1996) 21

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990) 35

Morgan v. Psychiatric Inst. of Washington,
692 A.2d 417 (D.C. 1997) 32

Myers v. Plan Takoma, Inc.,
472 A.2d 44 (D.C. 1983) 29

Nader v. de Toledano,
408 A.2d 31 (D.C. 1979) 4, 19, 20

Nat'l Rev., Inc. v. Mann,
140 S. Ct. 344 (2019) 35

Partington v. Bugliosi,
56 F.3d 1147 (9th Cir. 1995) 35

Raymond v. United States,
25 App. D.C. 555 (1905) 34

Rice v. District of Columbia,
818 F. Supp. 2d 47 (D.D.C. 2011) 3

Rosenthal v. Sonnenschein Nath & Rosenthal, LLP,
985 A.2d 443 (D.C. 2009) 32, 33

S. Air Transp., Inc. v. Am. Broad. Companies, Inc.,
877 F.2d 1010 (D.C. Cir. 1989) 29

Smith v. Washington Sheraton Corp.,
135 F.3d 779 (D.C. Cir. 1998) 3

St. Amant v. Thompson,
390 U.S. 727 (1968) 17

Time, Inc. v. Pape,
401 U.S. 279 (1971) 15

Vassiliades v. Garfinckel's, Brooks Bros.,
492 A.2d 580 (D.C. 1985) 32

Other Authorities

Rule 50(b) 2, 3, 35

Introduction

Plaintiff Michael Mann presented a case at trial that was bound to raise post-trial issues, for two principal reasons. First, Plaintiff presented "a dearth of any witnesses, fact witnesses, to corroborate [his] claims," Tr. 12:13–14 (2/5/24 AM) (Judge Irving). Second, Plaintiff's counsel repeatedly violated this Court's orders and put before the jury improper advocacy that forced the Court into a position of having to sustain numerous serious objections, including several during the opening statement and closing argument. The end result was a verdict that, while in Defendant Rand Simberg's favor on half the statements at issue, finds no foothold in the record. In particular, the evidence does not come close to satisfying Plaintiff's burden on actual malice of showing by "clear and convincing" evidence that Simberg acted with reckless disregard of falsity. In Simberg's favor are dozens of publications impugning Plaintiff and his work, including critiques from multiple professors at prestigious universities, multiple IPCC reviewers, and other reputable analysts. Proffered against Simberg are only two primary items: a Penn State investigation with plain-on-its-face deficiencies whose investigator wanted Plaintiff censured for his misconduct and a National Science Foundation ("NSF") report with "so much ambiguity" that the Court questioned its very admission. Even if one disregards the wealth of credible evidence on which Simberg based his views, on this record no rational juror could have held that Simberg acted with actual malice when he concluded that the NSF report was a "mess" and not relevant to his blog post and the Penn State reports lacked credibility. That, in turn, requires the Court to carry out its "obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (cleaned up). The Court should do so and enter judgment as a matter of law for Simberg.

Background

A. The Trial

Plaintiff presented six witnesses over nearly seven trial days: Dr. Raymond Bradley, Dr. Naomi Oreskes, Dr. John Abraham, Plaintiff Michael E. Mann, Defendant Rand Simberg, and Defendant Mark Steyn. "[T]here was very little relevance to Drs. Bradley and Oreskes' testimony," Tr. 9:9-10 (2/5/24 AM) (Judge Irving), and a "dearth of any witnesses, fact witnesses, to corroborate [Plaintiff's] claims," Tr. 12:13–14 (2/5/24 AM) (Judge Irving). Plaintiff did not call any witness from Penn State regarding Penn State's investigation or any witness from the NSF regarding the NSF investigation. When Plaintiff rested, Defendants moved orally and in writing for judgment as a matter of law under Rule 50(a).

Defendants collectively had just over three full trial days to present both of their cases-in-chief. Defendants called six live witnesses: Dr. Abraham Wyner, Dr. Judith Curry, Mr. Stephen McIntyre, Dr. Roger Pielke, Jr., Dr. Ross McKitrick, and Defendant Rand Simberg. Defendants also called five witnesses to testify via deposition: Dr. Alan Scaroni, Dr. Henry Foley, Dr. Graham Spanier, Dr. Eugene Wahl, and Mr. Ed Brunson.

B. The Verdict

The jury found that Simberg did not defame Plaintiff with respect to two of the challenged statements. The first, statement "A," was: "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." The second, statement "B," was: "Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality."

The jury found that Simberg defamed Plaintiff as to two statements. The first, statement "C," was: "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?" The second, statement "D," was: "Mann could be said to be the Jerry Sandusky of climate science, except for 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." Tr. 7:22 (2/8/24 PM).

Regarding actual malice, the jury found that Simberg did not publish any statement in his blog post with "knowledge of the falsity of that fact," but that Simberg did publish statement "C" and statement "D" with "reckless disregard for whether the fact was false." Tr. 6:22–7:3 (2/8/24 PM). The jury awarded Plaintiff $1 in compensatory damages and $1,000 in punitive damages against Simberg. Tr. 7:23–8:13 (2/8/24 PM). The final judgment was entered on February 9, 2024.

Legal Standard

"A court should render judgment as a matter of law when…there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Rice v. District of Columbia*, 818 F. Supp. 2d 47, 54 (D.D.C. 2011). When a plaintiff has the burden of proof and fails to make the requisite showing on an essential element, the defendant is entitled to judgment as a matter of law. *Waterhouse v. District of Columbia*, 298 F.3d 989, 992–93 (D.C. Cir. 2002). The plaintiff's evidence must be "significantly probative," rather than "merely colorable" for the jury's verdict to stand. *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 782 (D.C. Cir. 1998) (quotation marks omitted). "The jury…may not be allowed to engage in idle speculation." *Majeska v. D.C.*, 812 A.2d 948, 950 (D.C. 2002) (citation omitted); *see also Brown v. Nat'l Acad. of Scis.*, 844 A.2d 1113, 1122 (D.C. 2004). In considering a Rule 50(b) motion, the Court should review all record evidence. *Furline v. Morrison*, 953 A.2d 344, 351 (D.C. 2008).

To succeed on his defamation claim, Plaintiff's burden was to prove these elements: "(1) that the defendant published a false statement about the plaintiff; (2) that the statement was defamatory; (3) that the plaintiff suffered actual injury as a result; and (4) by clear and convincing evidence, that the defendant published the statement either knowing that the statement was false, or with reckless disregard of whether it was false or not." Superseding Pretrial Order at 24 (11/22/23).

Argument

I. There Was Not Sufficient Evidence To Find Simberg Liable for Defamation[1]

A. No Reasonable Jury Could Conclude that Plaintiff Proved Actual Malice By Clear and Convincing Evidence

In this country, an individual cannot be held liable for criticizing a public figure when the individual relies on multiple sources of credible evidence supporting the individual's statements over an ambiguous purportedly contradictory source. That fairly describes the evidence respecting Simberg in this case, and that is why Plaintiff failed to carry his burden of proving actual malice by "clear and convincing evidence." *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993). "This constitutional standard 'is a daunting one' which very few public figures can meet." *Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 509 (D.C. 2020) (citation omitted). "Merely 'showing that the defendant should have known better' than to believe the truth of his publication does not suffice." *Id.* (cleaned up). The actual malice inquiry focuses on the "defendant's attitude toward the truth or falsity of the content of [the] publication," not "attitude toward the plaintiff." *Nader v. de Toledano*, 408 A.2d 31, 40 (D.C. 1979). "Actual malice may not be inferred from the mere fact of defamatory publication alone, from the character and content of a publication, from the inherent seriousness of a defamatory charge or accusation, or from mere investigatory failures." *Id.* at 41.

1. Simberg's Statements Were Supported by Voluminous Evidence

Uncontroverted evidence at trial established that Simberg relied on hundreds of Climategate emails, numerous secondary sources from reputable analysts, peer-reviewed articles published in preeminent journals such as *Geophysical Research Letters*, analysis from professors at elite universities like MIT and Berkeley, and his own review of the MBH source code. That makes this case like *Bressler v. Fortune Mag., a Div. of Time Inc.*, 971 F.2d 1226, 1233 (6th Cir. 1992), where the defendant "gleaned consistent statements from multiple reliable sources," which compelled the U.S. Court of Appeals for the Sixth Circuit "to conclude that actual malice cannot be

[1] Because the jury found that statements "A" and "B" on the verdict form did not defame Plaintiff, the following analysis only concerns statements "C" and "D."

found on this record," to overturn the jury's verdict, and to direct "entry of judgment in favor of the defendant." *Id.*; *see also Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 124 (2d Cir. 2013) (holding that "the defendants could hardly be accused of gross negligence, much less actual malice" because their statements "were based on reliable sources"). This Court should hold the same given the voluminous trial record of reliable sources that Simberg relied upon.

a. Simberg's Blog Post Cited Multiple Sources on Which He Relied

In his blog post, Simberg linked to many sources that he relied on in writing statements "C" and "D." Tr. 28:21–24 (1/30/24 AM).[2] Those sources include: an article on Climate Audit, *Mike's Nature Trick* (Ex. 505); an article from Mike Cronin (Ex. 704); an article Simberg wrote for PJ Media, *Climategate: When Scientists Become Politicians* (Ex. 754); another article Simberg wrote for PJ Media, *The Death of the Hockey Stick* (Ex. 780); another article on PJ Media from Nina Yablok, *Penn State Rocked by Investigation of Abuse Scandal* (Ex. 787); the article, *Milloy Comments On Penn State Scandal and Investigation Of Mann* (Ex. 790); an article from Joe Romm on Think Progress (Ex. 791); an article from Marc Morano on Climate Depot (Ex. 792A); an article published by Scholars & Rogues, *NSF Confirms Results of Penn State Investigations* (Ex. 793); an article from The Blackboard (Ex. 794); and a press release from Penn State (Ex. 789).

b. Simberg Relied on Hundreds of Climategate Emails

Simberg read and relied on "hundreds" of emails from Climategate, Tr. 22:23 (2/6/24 PM), including emails from the later release—Climategate 2.0—that were not considered by Penn State or the NSF, Tr. 65:7–19 (1/30/24 PM). These emails informed Simberg's belief that Plaintiff engaged in academic and scientific misconduct (statement "C") and that Plaintiff could be said to be the Jerry Sandusky of climate science because he molested and tortured data in the service of politicized science (statement "D"). Among the emails on which Simberg relied are the following:

[2] Unless otherwise noted, all transcript citations are to the trial transcript, and all exhibits cited in this brief are to trial exhibits. *See* Declaration of Victoria Weatherford, Attachments A–D (including all cited materials).

- ***Exhibit 533–The "Mike's Nature Trick" Email***. In this email, Phil Jones writes, "I've just completed Mike Nature trick of adding in the real temps to each series for the last 20 years (ie from 1981 onwards) and from 1961 for Keith's to hide the decline." This email informed Simberg's state of mind on the truth of statements "C" and "D." *See* Tr. 32:18–33:2 (2/6/24 PM).

- ***Exhibit 603–The "Human Filth" Email***. In this email, Plaintiff advises colleagues not to share source codes in response to a FOIA request for the source codes and uses abusive language—such as "human filth," "asshole," "stupid," and "lazy"—to describe the FOIA requestor. Plaintiff then writes that the "new administration cannot start soon enough." Simberg testified that this email informed his opinion on both statements "C" and "D," particularly statement "D" that Plaintiff was acting in service of politicized science based on Plaintiff's words about waiting for the new administration. Tr. 38:25–39:22 (2/6/24 PM).

- ***Exhibit 635–The "Dirty Laundry" Email***. In this email, Plaintiff instructs a colleague not to pass along statistical results about his work without checking with Plaintiff because "[t]his is the sort of 'dirty laundry' one doesn't want to fall into the hands" of others. Simberg testified that this informed statement "C" and statement "D" because, in fact, what Plaintiff "is trying to hide is dirty laundry. And when he says 'fall in the hands of those who might potentially try to distort things,' I think what he means is fall into the hands of people who might actually analyze the data and try to replicate it." Tr. 34:10–16 (2/6/24 PM).

- ***Exhibit 636–The "Delete Anything" Email***. In this email, Plaintiff describes McIntyre & McKitrick's work as "pure crap" and advises Phil Jones to "delete anything" from McIntyre and not to correspond with McIntyre, who had contacted Jones with a concern about a paper that Jones had co-authored. Simberg testified that this email informed his opinions in statement "C" about academic and scientific misconduct, especially with Plaintiff condoning the deletion of emails. Tr. 35:6–36:11 (2/6/24 PM).

- ***Exhibit 640–The "We Can't Afford To Lose GRL" Email***. Here, Plaintiff writes that it is "one thing to lose 'Climate Research'" but we "can't afford to lose GRL," so he advised a group of colleagues "to record their experiences" with editors at GRL. Simberg testified that this

email informed his state of mind when writing statement "C" about academic and scientific misconduct because controlling journals or trying to get contrarian editors fired "is not what scientists do" and statement "D" about "molest[ing] and tortur[ing] data in the service of politicized science" because controlling the narrative is "what politicians do." Tr. 40:4–41:6 (2/6/24 PM).

- ***Exhibit 775–The "Truly Pathetic" Email***. In this Climategate 2.0 email, Dr. Bradley describes Plaintiff's work as "truly pathetic" and that it "should never have been published." He further writes that he does not "want to be associated with that 2000 year 'reconstruction.'" Simberg testified that this email informed his state of mind when writing both statements at issue, especially statement "D," given that Bradley was Plaintiff's co-author and voiced such substantial criticisms. Tr. 72:25–73:2 (2/6/24 PM).

- ***Exhibit 1044–The "Very Deceptive" Email***. In this Climategate 2.0 email, Tom Wigley (a respected colleague of Plaintiff's) writes to Plaintiff that a figure Plaintiff had sent was "very deceptive" and expressed concern about the "number of dishonest presentations of model results by individual authors and the IPCC." Simberg testified that he relied on this email in writing statement "C" about academic and scientific misconduct and statement "D" that Plaintiff "could be said to be the Jerry Sandusky of climate science" because "he has molested and tortured data in the service of politicized science," because it showed Plaintiff's colleague criticizing Plaintiff's work for being "very deceptive." Tr. 68:19–70:1 (2/6/24 PM).

- ***Exhibit 1101–The "Delete the Emails" Email***. In this email with the title "IPCC and FOI," Plaintiff forwards an email to Eugene Wahl from Phil Jones asking Plaintiff to "delete any emails you may have had with Keith [Briffa] re AR4 [IPCC Fourth Assessment Report]." This email showed that Plaintiff had "no problem getting rid of evidence" and informed Simberg's mental state in writing statement "C" about scientific misconduct and "D" about Plaintiff's improper behavior because deleting emails in response to a FOIA request is "not something a scientist should do" and "it's illegal." Tr. 41:8–42:2 (2/6/24 PM).

c. Simberg Relied on Numerous Secondary Sources

Simberg read and relied on various secondary sources from reputable authors in writing the statements at issue in his blog post, including:

- ***Exhibit 779–John O'Sullivan (legal analyst and science writer)***. This four-page article compares Plaintiff to Sandusky and identified six similarities between them. When Simberg wrote statement "D" that Plaintiff "could be said to be the Jerry Sandusky of climate science," he was not expressing an original idea but was making a comparison that he believed was well-founded based on this article and others' corroboration of the meaningful similarities between Plaintiff and Sandusky. Tr. 86:5–14 (2/6/24 PM); *see* Ex. 1128 (chart Plaintiff and Sandusky).

- ***Exhibit 756–Viscount Monckton (British scientist and IPCC reviewer)***. This article stated that "[t]he tiny, close-knit clique of climate scientists who invented and now drive the 'global warming' fraud — for fraud is what we now know it to be — tampered with temperature data so assiduously that, on the recent admission of one of them, land temperatures since 1980 have risen twice as fast as ocean temperatures. One of the thousands of emails recently circulated by a whistleblower at the University of East Anglia, where one of the world's four global-temperature datasets is compiled, reveals that data were altered so as to prevent a recent decline in temperature from showing in the record" and that the scientists mentioned in the Climategate emails "are not merely bad scientists — they are crooks." When Simberg wrote about statements "C" and "D," he had this article in mind as corroborating his statement, including its conclusion that the "data were altered so as to prevent a recent decline in temperatures from showing in the record." Tr. 50:21–51:4 (2/6/24 PM).

- ***Exhibit 755–Stephen Dubner (popular science writer and author)***. This cites an article from Andrew Revkin at *The New York Times*, who wrote that the Climategate emails showed a scientist writing about "using a statistical 'trick' in a chart illustrating a recent sharp warming trend" that "will undoubtedly raise questions about the quality of research on some specific questions and the actions of some scientists." When Simberg wrote statements "C" and "D," this article is one he had in mind as corroborating his view that Penn State's investigation may

have hidden "academic and scientific misconduct" and that Plaintiff "molested and tortured data." Tr. 49:15–19 (2/6/24 PM). Simberg also testified that he was not a "fierce partisan on either side" but he was a "big fan of science" and "was appalled" with what the emails revealed. *Id.*

- ***Exhibit 750–James Delingpole (science writer from UK newspaper, The Telegraph)***. This article organized the Climategate emails into categories, including (1) manipulation of evidence, (2) private doubts about whether the world really is heating up, (3) suppression of evidence, (4) fantasies of violence against prominent climate skeptic scientists, (5) attempts to disguise the inconvenient truth of the Medieval Warm Period, and (6) how best to squeeze dissenting scientists out of the peer-review process. When Simberg asked in his blog post whether Penn State would cover up academic and scientific misconduct (statement "C"), much as it had with Sandusky (statement "D"), he had these categories of Climategate emails in mind as corroborating his view that what happened in the Climatic Research Unit was improper and Penn State turned a blind eye to the wrongfulness of the conduct rather than undertaking a serious investigation. Tr. 42:17–24 (2/6/24 PM). Simberg linked to this article in his blog post. *Id.*

- ***Exhibit 747–Environmentalists Exposed As Liars***. This article describes the leak from Climategate as showing emails where scientists were "expressing joy that a scientist who disagreed with their research had died. Documents describing how they are covering up the scientific facts they don't like because it proves them wrong." When Simberg wrote the question in his blog post (statement "C") about whether Penn State would cover up academic and scientific misconduct, this article is one of the ones he had in mind as corroborating his view because the article showed egregious conduct from the Climatic Research Unit that Plaintiff was involved in and yet Penn State's investigation "cleared" Plaintiff of any wrongdoing. Tr. 31:21–32:4 (2/6/24 PM). The article also stated that the "emails include damning admission of [] how Mann played 'tricks' to diminish recent-year cooling." When Simberg wrote statement "D," that Plaintiff "could be said to be the Jerry Sandusky of climate science" because "he has molested and tortured data in the service of politicized science," he had this article in mind as corroborating his opinion. *Id.*

d. Simberg Relied on McIntyre & McKitrick's Peer-Reviewed Articles

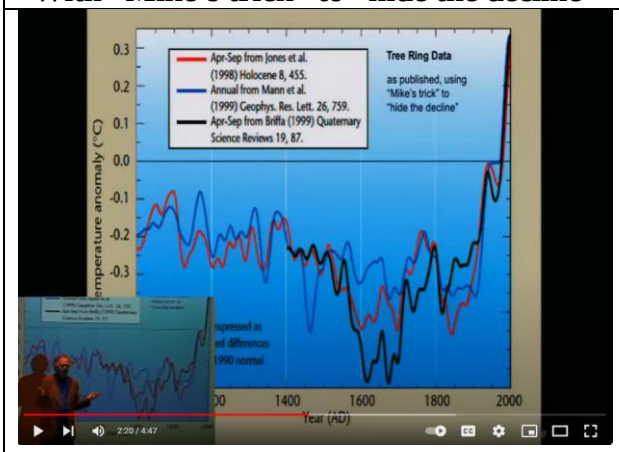
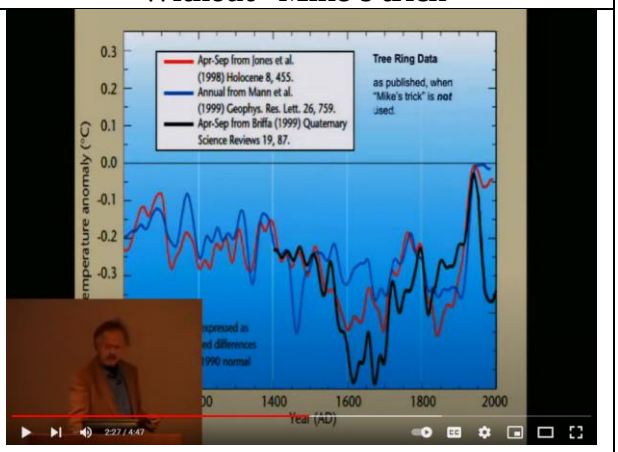
Simberg relied on peer-reviewed articles from Steve McIntyre and Dr. Ross McKitrick, which Simberg read as corroborating statement "D" that Plaintiff "could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science." In the *E&E* article, McIntyre & McKitrick wrote that Plaintiff's statistical methodology "strongly over-weights hockey stick-shaped proxies and that it is so efficient in mining a hockey stick shape that it nearly always produces a hockey-stick shaped PC1 even from persistent red noise." Ex. 571.4. In the *GRL* article, McIntyre and McKitrick wrote that the MBH code "contains an unusual [and never before reported] data transformation" that "results in the PC algorithm mining the data for hockey stick patterns." Ex. 572.1. When asked about this "data transformation," McKitrick testified that with a standard statistical method "the dominant pattern was not a Hockey Stick," but when the exact same dataset was evaluated through Plaintiff's non-standard statistical method "the dominant pattern in the data was a Hockey Stick." Tr. 78:12–15 (2/6/24 AM); Ex. 1126.

With McIntyre and McKitrick's work in mind, Tr. 21:18–21 (2/6/24 PM), Simberg wrote statement "D" in a punchier and more memorable fashion to communicate with the general public. Dr. Bradley surely wouldn't fault Simberg for that. *See* Tr. 132:18–20 (1/22/24 AM) (Bradley testifying that writing on climate science to the "general public" differs from scholarly writing to make it more "readable and interesting"). Instead of using complicated academic terms, Simberg borrowed Nobel Prize winning economist Ronald Coase's famous quip on "torturing data" and wrote that Plaintiff "could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in the service of politicized science."

e. Simberg Relied on Dr. Richard Muller (U.C. Berkeley)

Simberg relied on a presentation from Dr. Richard A. Muller, a U.C. Berkeley professor and distinguished physicist, as corroborating statement "C" that the Climategate emails showed "academic and scientific misconduct" and statement "D" that Plaintiff "could be said to be the Jerry Sandusky of climate science" and that he "molested and tortured data." Tr. 51:21–23 (1/30/24

PM). Dr. Muller explained—after the Penn State investigations concluded—that the scientists exposed in the Climategate emails "deceived the public" and "deceived other scientists." Ex. 620A. Dr. Muller showed a comparison of the temperature reconstruction graph with "Mike's Trick," which showed a temperature increase at the end, and without "Mike's Trick," which showed a temperature decline at the end:

Tree Ring Data as Published With "Mike's trick" to "hide the decline"	**Tree Ring Data as Published Without "Mike's trick"**
	

Ex. 620A. Dr. Muller explained that based on the original raw data—"as any Berkeley scientist would have published it"—the tree ring data should have resulted in the graph without Mike's trick and that publication of the graph with Mike's trick "would not have survived peer review in any journal that I'm known to publish in." Ex. 620A. Dr. Muller explained that producing the graph with Mike's trick is something "you're not allowed to do [] in science. This is not up to our standards." Ex. 620A. Dr. Muller's analysis informed Simberg's state of mind, and Simberg viewed it as corroborating what he wrote in his blog post. Tr. 58:8–15 (1/30/24 PM).

f. Simberg Relied on Dr. Richard Lindzen (MIT)

Simberg relied on and quoted Dr. Richard Lindzen, a professor emeritus at MIT in the meteorology department and member of the National Academy of Sciences. Simberg quoted the statement from Dr. Lindzen that "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." Ex. 704. Dr. Lindzen's opinion on the Penn State investigation informed Simberg's view on statements "C" and "D."

g. Simberg Relied on the MBH Source Code

Simberg read and relied on "the source code that was being shown and the internal criticism of it, because it was a mess. And as somebody who has done a lot of coding myself, I looked at it and I was kind of appalled as well." Tr. 22:15–20 (2/6/24 PM). Notably, during his closing, Plaintiff's counsel criticized Simberg for not reading the MBH papers, Tr. 27:6 (2/7/24 PM), but ignored the fact that Simberg read the source code, which is the substantive work underlying the papers.

h. Simberg Relied on His Own Prior Work and Analysis

Before writing the blog post at issue, Simberg had written other pieces on the same or similar topics. *See* Exs. 642, 644, 656, 657. Simberg's prior writings and research done in preparing those blog posts informed his view that statements "C" and "D" were true. Simberg's prior public work and private emails confirm that he has consistently held and expressed the same views.

2. Plaintiff's Evidence of Actual Malice Is Completely Insufficient

Plaintiff's evidence that Simberg published his blog post with actual malice completely fails the constitutional requirement that he prove actual malice by clear and convincing evidence. "The standard of clear and convincing evidence is an intentionally elevated one; unlike the preponderance standard…, the standard of clear and convincing proof requires evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 426 (D.C. 2006) (citation and quotation marks omitted). Plaintiff's primary evidence on actual malice is that Simberg knew about the Penn State reports and the NSF report. *See* Tr. 26:22–24 (2/7/24 PM) (Plaintiff's closing argument). But these reports, with their many shortcomings, do not undermine Simberg's reliance on the many credible sources discussed above. In addition, Simberg reviewed and was entitled to rely upon reputable sources that undercut the reports' credibility and thoroughness and contradicted their conclusions.

a. Penn State Reports

Simberg's knowledge of the Penn State investigation and reports does not show actual malice for multiple reasons that Plaintiff did not even attempt to refute at trial.

First, the Penn State reports do not address the same issues raised in Simberg's blog post. The Penn State reports specifically evaluated Plaintiff's conduct under the technical and narrow definition of Research Misconduct provided in the University's RA-10 policy. *See* Ex. 21 (inquiry report) and Ex. 27 (final investigation report). Dr. Alan Scaroni testified that the Penn State inquiry committee did not consider whether Plaintiff manipulated data, molested data, or tortured data, and it did not evaluate whether the hockey stick was fraudulent. Scaroni Tr. 99:10–100:03 (9/1/20). Simberg testified that what Penn State investigated "didn't really address the real issues," which included "all the unscientific behavior, all the abusive behavior, all the misogynistic stuff." Tr. 54:15–17 (2/6/24 PM).

Second, there were substantive defects in the investigation. Simberg testified that "what struck [him] most about [the investigation] was who they didn't interview. [Penn State] didn't interview any of the people involved in the emails," such as Phil Jones, Eugene Wahl, or Steve McIntyre. Tr. 57:17–20 (2/6/24 PM). Simberg relied on an article from McIntyre, Tr. 64:7–18 (2/6/24 PM), that supports Simberg's view that the Penn State reports lacked credibility because Penn State "didn't even interview or take evidence from critics – as they were required to do under the applicable Penn State policy." Ex. 773. Simberg further testified that allegation #2, for example, concerned whether Plaintiff "engage[d] in or participate[d] in, directly or indirectly, any actions with the intent to delete, conceal or otherwise destroy emails, information and/or data related to AR4 as suggested by Phil Jones?" Ex. 21 at 3. But on allegation #2, the inquiry committee only interviewed Plaintiff without even "attempt[ing] to call Gene Wahl and say, did you delete the emails," Tr. 56:1–2 (2/6/24 PM), despite uncontroverted evidence that Wahl deleted the emails because of Plaintiff. Wahl Tr. 137:12–18.

Third, the committees responsible for the inquiry and investigation were "all Penn State people," which Simberg believed created an inherent conflict of interest that undermined the credibility of the investigation because "no matter how much integrity they have, they are going to have a natural inclination to want to protect the reputation of their colleague and of the university." *See* Tr. 56:13–16 (2/6/24 PM).

Fourth, Simberg relied on many reputable sources discounting the credibility of Penn State's reports. To begin with, MIT's Dr. Richard Lindzen participated in Penn State's investigation as a witness and publicly proclaimed the investigation a "whitewash." *See* Ex. 704. Dr. Lindzen further criticized Penn State's work as "'thoroughly amazing" because "these issues are explicitly stated in the emails." Ex. 508. Simberg also relied on an article by the famously erudite Clive Crook in the *Atlantic Monthly*, Tr. 65:17–24 (2/6/24 PM), where Crook wrote that "[t]he Penn State inquiry exonerating Michael Mann – the paleoclimatologist who came up with 'the hockey stick' – would be difficult to parody. Three of four allegations are dismissed out of hand at the outset: the inquiry announces that, for 'lack of credible evidence,' it will not even investigate them." Ex. 508. Simberg also relied on Dr. Muller's analysis, which was provided after the Penn State investigation "cleared" Plaintiff, as evidence that the concerns about Plaintiff were "not properly investigated." Tr. 60:25 (1/30/24 PM).

In light of this evidence, the jury did not have a legally sufficient basis to rely on Simberg's knowledge of the Penn State investigation and reports as evidence that Simberg entertained any serious doubts about the truth of his statements.[3]

b. NSF Report

Simberg's knowledge of the NSF report likewise does not show actual malice, not least because there are many facial defects in the report undermining its weight.

First, the NSF report includes inherent ambiguities and limitations that undermine its weight. *See* Tr. 10:3–4 (1/30/24 PM). The report does not identify Plaintiff, MBH98, MBH99, the hockey stick graph, Penn State, or the Climatic Research Unit. On top of all that, the NSF report is "confusing," as the Court noted. Tr. 13:2–4 (1/23/24 PM); *see also* Tr. 79:6–7 (1/30/24 AM)

[3] To be clear, even the NSF report found the Penn State investigation inadequate: "The University conducted its investigation and provided us with a copy of its Investigation Report. In accordance with the NSF Research Misconduct Regulation, we reviewed it along with the Inquiry Report and found that it did not provide the supporting evidence and documentation necessary for OIG to concur with the University's conclusions." Trial Ex. 41 at 1; *see also id*. at 2 ("Regarding the University's first Allegation (data falsification), however, we concluded that the University did not adequately review the allegation in either its inquiry or investigation processes…").

(the Court noting the ambiguity in the NSF report); Tr. 113:17–18 (1/23/24 PM) (same). In Simberg's view, the NSF report was a "mess"—the report "didn't mention Professor Mann or Penn State University," "had weird formatting," and "was confusing," which were all reasons why the NSF report was "not something" Simberg "would have relied on" in writing his blog post. Tr. 66:21–25 (1/30/24 AM). Simberg dismissed the NSF report because of these extensive ambiguities, and therefore the NSF report did not provide probative evidence for the jury to decide whether Simberg acted with actual malice. *Cf.* Tr. 25:16–19 (1/23/24 PM) ("THE COURT: It's that it's not clear enough, without a percipient witness, to discuss it -- for the jury, really, to read and interpret and construe and understand that this is what the report is about.").

Second, the NSF investigation's limited scope did not cover the same subject that Simberg wrote about in his blog post. The NSF report evaluated whether the "subject" engaged in "research misconduct" under a narrow, technical definition of research misconduct. That was not the subject of Simberg's blog post. *See* Tr. 61:18–24 (2/6/24 PM) ("[Q.] And just to make crystal clear, before we continue, did you ever accuse Professor Mann of research misconduct under the National Science Foundation research misconduct regulations? A. I didn't."). The NSF report even notes that Allegations #3 and #4 "were not issues covered under our Research Misconduct Regulation." Ex. 41 at 2. It did not evidence actual malice for Simberg to interpret the report as not encompassing the subject of his blog post. *See Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) (adopting one of many "rational interpretations of a document that bristled with ambiguities" was not evidence of actual malice because "[t]he deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*").

Third, the NSF report is simply not the type of credible document on which a finding of actual malice can be based. The report is only four pages long. The report does not identify who was interviewed, why those individuals were selected, or the substance of the interviews. The report does not clearly identify what documents and emails were examined, how extensively those documents and emails were examined, or why the NSF disagreed with contrary interpretations of them. The report does not state who at NSF was responsible for conducting the investigation or

preparing the report. *See* Ex. 41. And given the NSF Report's finding that the "subject did not directly receive NSF research funding as a Principal Investigator until late 2001 or 2002," Ex. 41 at 3, the NSF report in fact may not have even considered the hockey stick research from MBH98 and MBH99 because the NSF did not fund Plaintiff during those years.

Given all these limitations on the NSF report, the jury does not have a legally sufficient basis to find that Simberg acted with actual malice when he concluded that the NSF report was "confusing"—an assessment the Court agreed with—and a "mess" that did not speak with any clarity to the issues Simberg wrote about in his blog post. Thus, Simberg's knowledge about the NSF report is not clear and convincing "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Lumpkins*, 911 A.2d at 426.

c. Alleged Evidence of Bias or Zeal

A defendant's "motive in publishing a story…cannot provide a sufficient basis for finding actual malice." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989). While "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry," the Supreme Court has cautioned that "courts must be careful not to place too much reliance on such factors." *Id.* at 668.

Plaintiff's counsel argued that Simberg's bias showed "evidence of recklessness," which he incorrectly equated with actual malice. Tr. 28:1–20 (2/7/24 PM) (Williams). Plaintiff's counsel contended that an email thread (Ex. 47) shows actual malice because Simberg called Plaintiff a "liar" and "charlatan," who should "lose his job" and be "drummed out of the profession," and Simberg stated that Al Gore's documentary should not be shown in schools. Tr. 17:5–11 (1/30/24 AM). But this line of argumentation solicited a verdict on an improper basis because "the mere presence of some ulterior motive—whether a profit motive, a motive to produce the most interesting stories, or a personal desire to harm the subject of a story—is not enough to support a finding of actual malice." *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 596 (D.C. Cir. 2016). "Absent evidence that the [defendant's] alleged motive shows an 'intent to inflict harm through falsehood,' a 'willingness to publish unsupported allegations,' or a desire to publish 'with little or no regard for

[the report's] accuracy,' the plaintiff has not produced motive-based evidence probative of actual malice." *Id.* Plaintiff's counsel argued that Simberg's "bias and zeal" are evidence of actual malice, and in certain cases they can show evidence of actual malice, but Plaintiff never connected any evidence in the trial record about motive with intent to inflict harm *through falsehood*. This email actually proves the exact opposite of trying to inflict harm through falsehood: Simberg writes, "I'm going with the bulk of the evidence here." Ex. 47 at 1. Without the missing link showing intent to harm through falsehood, evidence of zeal or bias "cannot provide a sufficient basis for finding actual malice," *Harte-Hanks*, 491 U.S. at 665, and should be disregarded as insufficient evidence.

d. Prejudicial Conduct by Plaintiff's Counsel

In the absence of evidence showing actual malice through clear and convincing evidence, Plaintiff's counsel repeatedly employed improper tactics to inflame the jury and elicit an improper verdict. The Court noted that throughout the trial "there were many evidentiary objections [from Defense counsel], but…there were grounds for them. And they…concerned largely the Court's and the Court of Appeals' prior rulings or implicated elementary, obvious evidentiary principles, such as hearsay, relevance versus admissibility, demonstratives versus exhibits, that should have been more carefully considered long before the trial." Tr. 8:23–9:6 (2/5/24 AM). On actual malice, the trial was plagued with serious misconduct by Plaintiff's counsel.

First, Plaintiff's counsel repeatedly violated this Court's orders and invoked the wrong legal standard on actual malice. Before trial, the Court held that "use of the colloquial terms of malice and recklessness may confuse jurors. Therefore, the Parties will be limited to using the correct terms of art: 'actual malice' and 'reckless disregard.'" MIL Order at 21 (Apr. 3, 2023). In his closing argument, Plaintiff's counsel violated this order and repeatedly used the terms "recklessness" and "recklessly" throughout the argument about actual malice, even stringing "recklessly" with "carelessly" in one instance to further water-down the term "reckless disregard." *See* Tr. 25:4–28:1 (2/7/24 PM). This argument violated the MIL order, confused the jury, and ignored the factual record. It also invoked the wrong legal standard because "[f]ailure to investigate does not in itself establish bad faith." *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). And it ignored

the factual record that Simberg did read and review the source code, which is the substantive work underlying the MBH papers. *See* Tr. 22:15–20 (2/6/24 PM). Plaintiff's counsel also accused Simberg of acting "[c]arelessly and recklessly" when he "rushed to get that article out," Tr. 27:22–23 (2/7/24 PM), which is confusing to the jury and irrelevant to the question of whether Simberg had serious doubt about the truth of his statements. These were not inadvertent misstatements by Plaintiff's counsel. He is an experienced trial attorney who previously has tried defamation cases. He knew or should have known that he was mischaracterizing the actual malice standard.

Second, Plaintiff's counsel repeatedly mischaracterized the evidence in the record and the statements at issue. In closing, Plaintiff's counsel argued that Simberg "knew that his statements were false" because "[h]e told us so. Remember, he researched the definition of research misconduct, and that he did not believe that Dr. Mann committed research misconduct." Tr. 25:23–26:3 (2/7/24 PM) (Williams). But nowhere in Simberg's blog post does Simberg accuse Plaintiff of engaging in "research misconduct." *See* Ex. 56. When Simberg was asked at trial whether he was accusing Plaintiff of engaging in research misconduct, Simberg testified at least six times that he was not accusing Plaintiff of research misconduct.[4] But when the question was asked a seventh time in a confusing manner, Plaintiff seized on Simberg's somewhat unclear answer[5] to argue to

[4] *See* Tr. 61:18–24 (2/6/24 PM) ("[Q.] And just to make crystal clear, before we continue, did you ever accuse Professor Mann of research misconduct under the National Science Foundation research misconduct regulations? A. I didn't."); Tr. 58:3–4 (1/30/24 AM) ("Research misconduct is not what I was referring to by scientific misconduct."); Tr. 62:17–19 (1/30/24 AM) ("[W]hat I wasn't accusing him of was research misconduct by the very narrow definition used by Penn State and the NSF"); Tr. 63:25–64:1 (1/30/24 PM) ("I did not accuse Professor Mann of research misconduct."); Tr. 67:13 (1/3024 PM) ("I wasn't accusing him of [research misconduct]."); Tr. 90:16–17 (2/6/24 PM) ("I said I wasn't – what I wasn't accusing him of was research misconduct.").

[5] Plaintiff's position that Simberg testified he was accusing Plaintiff of research misconduct is not a fair reading of the transcript. Aside from the at least six other clear and contrary answers on this question, Simberg is reading from the transcript his response to a different question that Plaintiff's counsel then relied on to conclude that Simberg testified that Simberg was accusing Plaintiff of research misconduct. *Compare* Tr. 62:13–16 (1/30/24 AM) ("[Q.] [Y]ou are saying you were not accusing him in this article of academic and scientific misconduct, right? A. No. I was accusing him of that."), *with* Tr. 90:16–23 (2/6/24 PM) (THE WITNESS: I said I wasn't -- what I wasn't accusing him of was research misconduct. BY MR. WILLIAMS: Q. No, no, no. A. Okay. All

the jury that "[r]esearch misconduct…is what Rand Simberg accused Mike Mann of." Tr. 26:10–12 (2/7/24 PM) (Williams). But importantly, the phrase "research misconduct" is nowhere to be found on the verdict form because it's not in the blog post. Nonetheless, Plaintiff's counsel repeatedly argued for the jury to reach a verdict of liable based on statements that were not in the blog post. *See* Tr. 26:15–19 (2/7/24 PM) (Williams).

In sum, Plaintiff's entire case on actual malice was infected with repeated use of improper tactics from his counsel to elicit an improper verdict, repeated violation of the Court's orders, and mischaracterization of the evidence in closing. *See Brown*, 844 A.2d at 1125 (affirming decision granting post-trial relief because "the scope and degree of counsel's flagrant disregard of numerous orders from the trial judge was exceptional.").

3. This Case Does Not Come Close to Other Cases Where Evidence of Actual Malice Was Legally Sufficient

Plaintiff presented an incredibly weak case on actual malice that comes nowhere close to crossing the hurdle for demonstrating actual malice by clear and convincing evidence. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1134 (7th Cir. 1987) (holding that there was sufficient evidence of actual malice when defendants reported that a cigarette company had adopted a "pot, wine, beer, and sex" advertising strategy, defendants learned before publication that the company had never actually adopted the strategy, and then defendants destroyed all their interview and research notes).

Plaintiff has previously relied on *Nader*, but that reliance is misplaced. *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979). First, *Nader* is factually distinguishable because the defendant there stated that a Senate report showed that plaintiff had falsified and distorted evidence, but the report itself stated the exact opposite. *Id.* at 38. Here, by contrast, Simberg did not write that the NSF report impugned Plaintiff, such as by claiming that the NSF report found Plaintiff engaged in research misconduct. Instead, Simberg's position was that the NSF Report did not prove his

---

right. Dine. Q. Sir, you say, 'No, I was accusing him of that.' Isn't that what you said? A. Yes, that's what I said.").

statements about Plaintiff to be false because Simberg regarded the NSF report as a "mess" that did not cover the topics in his blog post. *See Liberty Lobby, Inc. v. Anderson*, No. 81-2240, 1991 WL 186998, at *8 (D.D.C. May 1, 1991) ("[K]nowledge of the existence of a contradictory source, without more, does not constitute clear and convincing evidence of actual malice."). Further demonstrating his lack of actual malice, Simberg notified his readers that the NSF report existed, and that disclosure "tends to rebut a claim of malice, not to establish one." *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1304 (D.C. Cir. 1996); *see also Lohrenz v. Donnelly*, 350 F.3d 1272, 1286 (D.C. Cir. 2003) (publishing contrary views alongside publisher's own perspective weighs against finding actual malice); *see also* Tr. 78:25–79:12 (2/6/24 PM) (Simberg testifying that he links to "opposing view[s]" because he doesn't want to "hide things"). Second, *Nader* is also procedurally distinguishable because it was a summary judgment case, and the court expressly stated that "at summary judgment the plaintiff is not required to prove to the court 'actual malice with convincing clarity' as he must do at trial because that would of necessity require a weighing of evidence by the court." *Nader*, 408 A.2d at 49. *Nader* does not support Plaintiff's position on actual malice.

4. The Court of Appeals Decision Is Not to the Contrary

Plaintiff presented less evidence on actual malice to the jury than he presented to any other decisionmaker in the history of this case. On appeal, the Court of Appeals characterized the relevant record on actual malice as including four separate reports of investigations supporting Plaintiff against one email referring to "Mike's Nature Trick." *CEI v. Mann*, 150 A.3d 1213, 1260 (D.C. 2016), *as amended* (Dec. 13, 2018). But the record at trial was materially different, and the Court noted that "plaintiff[] must concede that fact." Tr. 10:7–16 (2/5/24 AM). Because "the sufficiency of the evidence to support a finding of actual malice is a question of law," this Court must evaluate whether the evidence on actual malice presented at trial to the jury is legally sufficient to support the jury's verdict. *CEI*, 150 A.3d at 1252. The answer is no.

a. The Jury Had More Evidence Than the Court of Appeals from Simberg that He Entertained No Serious Doubt About Truth

The pre-discovery record before the Court of Appeals contained very little evidence respecting Simberg and the reams of materials that he relied upon in writing his blog post, beyond those articles specifically hyperlinked in the blog post. By contrast, at trial Simberg provided the jury with voluminous evidence providing a firm basis for his statements and establishing that he had no serious doubt about the truth of his blog post. *See supra* § I.A.1. When the Court of Appeals evaluated actual malice, it distinguished *Jankovic III*, which found no actual malice because the defendant had relied on an "able analyst." *CEI*, 150 A.3d at 1260. But the evidence is now overwhelming that Simberg relied on reputable sources to inform his mental state when he wrote the statements at issue. Simberg relied on Steve McIntyre (IPCC reviewer), Dr. Ross McKitrick (Canadian scientist), Dr. Richard Muller (Berkeley), Dr. Richard Lindzen (MIT), Dr. Tom Wigley (climate scientist and contributor to IPCC reports), Viscount Monckton (British scientist who reviewed for IPCC), James Delingpole (writer for the UK Telegraph), Stephen Dubner (popular science writer and author of Freakonomics), Clive Crook (writer for *Atlantic Monthly*), and John O'Sullivan (legal analyst and science writer), along with reams of documentary evidence from both releases of Climategate emails, secondary sources, and peer-reviewed scholarly publications.

Plaintiff has presented the jury with no evidence whatsoever to undermine the credibility of this body of evidence demonstrating that Simberg had a firm basis for what he wrote and no reason to seriously (or at all) doubt the veracity of his many sources. Accordingly, Simberg's "good faith reliance on…reputable sources…precludes a finding of actual malice." *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510 (D.C. Cir. 1996). "[W]here the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision if reviewable, must be set aside." *George v. Cap. Traction Co.*, 295 F. 965, 968 (D.C. Cir. 1924). This alone dooms Plaintiff's case. *See Evans-Reid v. D.C.*, 930 A.2d

930, 940 (D.C. 2007) (noting that "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for judgment as a matter of law." (alterations accepted)).

b. The Jury Had Less Evidence From Plaintiff Than the Court of Appeals Did Regarding Actual Malice

Plaintiff could not provide a proper evidentiary basis at trial for much of the evidence on actual malice that the Court of Appeals relied on for its decision. The Court of Appeals relied on "[t]he University of East Anglia Independent Climate Change Emails Review, Penn State University, [and] the United Kingdom House of Commons." *CEI*, 150 A.3d at 1253. But of these reports, only the Penn State reports and the NSF report were admitted at trial, with the Court cautioning that the NSF report had limited weight. *See* Tr. 11:4–7 (1/31/24 PM) (Judge Irving instructing Plaintiff's counsel to only discuss the reports from "Penn State and the NSF, and there will be no reference, implicit or explicit, to the UK Reports. They do not come in under Rule 44. They do not come in under the catch-all.").

B. Simberg Is Entitled to Relief Because His Statements Were Substantially True

The evidence established that Rand was right, and Plaintiff failed his burden to show that any of the statements at issue were false. "'The burden of proving falsity rests squarely on the plaintiff. He or she must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue.'" *Fonville v. D.C.*, 38 F. Supp. 3d 1, 11 (D.D.C. 2014). (citation omitted). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (cleaned up). "It is not necessary for a defendant to establish the literal truth of the precise statements made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Foretich*, 619 A.2d at 60 (cleaned up). In other words, the question is whether a challenged statement is substantially true, and "it is irrelevant whether trained lawyers or judges might with the luxury of time have chosen more precise words." *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 255 (2014).

1. Statement "C": Academic and Scientific Misconduct

Uncontroverted evidence established that Plaintiff engaged in academic and scientific misconduct, and the jury's verdict to the contrary is not based on legally sufficient evidence.

First, there is uncontroverted evidence that members of the Penn State inquiry committee wanted to censure Plaintiff and concluded that he had breached ethical standards. The inquiry committee included Dr. Hank Foley, Dr. Alan Scaroni, and Ms. Candice Yekel. *See* Ex. 21 at 10. Here is what the inquiry committee wrote about their work before receiving any input from President Spanier about the investigation. On January 25, 2010, Dr. Foley wrote to the other members of the inquiry committee: "I felt that we could simply censure Dr. Mann in our findings." Ex. 543. On January 26, Dr. Scaroni wrote to the inquiry committee: "I am uncomfortable applying the word 'innocent' in regard to any of the charges. My willingness to 'set aside' accusations 1-3 was not because I find him to be innocent, rather because it is unlikely that a faculty committee will have access to the depth of information needed to make a definitive finding, one way or the other." Ex. 544. Also on January 26, Ms. Yekel wrote: "I thought we were going to make a statement in our report similar to what Hank described in #4 below that we felt Mann did in fact breech the ethical standards described in AD47." Ex. 544. Then, on January 27, President Spanier writes with his comments on the draft of the inquiry report about the need to bring "clarity" and "closure," Ex. 546 at 1–2, and the inquiry report that issued on February 3 did not include any language about censure or breach of ethical standards. Rand was right, and Plaintiff never called any witness from Penn State and never presented any evidence to rebut this.

Second, there is uncontroverted evidence that Plaintiff forwarded an email telling Eugene Wahl to delete emails in response to a FOIA request, and that Wahl did so based on Plaintiff's email. *See* Ex. 1101 (Plaintiff forwarded the email stating, "Mike, Can you delete any emails you may have had with Keith re AR4? Keith will do likewise. He's not in at the moment - minor family crisis. *Can you also email Gene and get him to do the same?* I don't have his new email address."). This misconduct violated the requirement in Penn State's AD-47 policy stating that "professors have a particular obligation to promote conditions of free inquiry." Ex. 21 at 8. Mann testified that

he sent this email to Wahl, Tr. 38:1–17 (1/25/24 AM), and Wahl testified that he "decided to delete the emails," Wahl Tr. 134:15–18 (6/30/20) (testifying via deposition at trial). Wahl testified that he deleted the emails based on this email from Plaintiff, and when Wahl asked Plaintiff for context on the request to delete emails, Plaintiff told him that faculty members at the University of East Anglia were being criticized. Wahl Tr. 135:25–137:18 (6/30/20). Plaintiff did not disclose this conversation to the Penn State investigators. Recognizing that deleting emails is wrong, Plaintiff himself testified that he "should have told Eugene Wahl…don't do this. It's inappropriate." Tr. 40:10–11 (1/25/24 AM). But Plaintiff did the opposite: he sent the email. When Simberg wrote the question in his blog post about engaging in academic and scientific misconduct, this is what he had in mind because deleting emails in response to a FOIA request is "not something a scientist should do" and "it's illegal." Tr. 42:1–2 (2/6/24 PM).

Third, there is uncontroverted evidence that Plaintiff viciously attacked other scientists, which violates Penn State's policy requiring professors to "show due respect for the opinion of others." Ex. 21. Perhaps the most probative evidence of Plaintiff's utter lack of respect for others is his email to Gavin Schmidt, a senior scientist at NASA, and William Connolly, a prolific writer for Wikipedia. Tr. 33:12–15 (2/5/24 AM) (Curry). In this email, which Plaintiff made a public record by sending to a government email address, Plaintiff accuses Dr. Curry of "sleeping her way to the top," Ex. 902—a smear that to "a professional woman" is "the worst thing that anyone can say about you" because it "discredits your accomplishments and it gives people permission to ignore you." Tr. 35:1–4 (2/5/24 AM) (Curry). Plaintiff referred to McIntyre as "human filth." Ex. 603; *but see* Tr. 11:20–25 (2/5/24 PM) (McIntyre testifying that he left Oxford after two years of studying to return home to "support [his] mother and the rest of [his] family"). Dr. Pielke also testified that Plaintiff's attacks were "kind of terrorizing the community for people like me." Tr. 38:5–6 (2/6/24 AM); *see also* Tr. 33:20–25 (2/6/24 AM) (Dr. Pielke testifying about Plaintiff's attack against him). McIntyre testified that Plaintiff had falsely accused him of scientific fraud, dishonesty, being a liar for hire, and a white supremacist. Tr. 67:22–25 (2/5/24 PM); *see also* Ex. 531 (Bradley explained that Plaintiff's "angry, vitriolic emails" don't do any good and that Plaintiff

has "left a trail of scorched earth from Nature to Science and now to GRL."). Tellingly and unsurprisingly, no one, not even Plaintiff himself, testified that all of this conduct from Plaintiff was proper academic and scientific conduct. Simberg testified that this is the type of conduct he had in mind when he wrote about academic and scientific misconduct. *See* Tr. 54:15–17 (2/6/24 PM).

In sum, the jury's finding that Simberg's statement about academic and scientific misconduct was false is not supported by legally sufficient evidence, and "where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision if reviewable, must be set aside." *George*, 295 F. at 968.

2. Statement "D": Plaintiff Could Be Said To Be the Jerry Sandusky of Climate Science and He Has Molested and Tortured Data

This statement is pure opinion and not capable of defamatory meaning, which makes it impossible to prove true or false. *See infra* §§ C–D. But assuming this statement is viewed as capable of being proven true or false, the evidence at trial established that this statement was primarily a comparison of Penn State's favorable treatment of its star players. *See* Tr. 86:2–4 (2/6/24 PM) (Simberg testifying that the point of this statement "was to, A, make clear that Professor Mann is not a child molester; and, B, that Penn State had treated both cases similarly."). Consider the similarities between Plaintiff and Sandusky: both worked for Penn State, both were high-profile employees, both brought in significant funding for Penn State, both were accused of wrongdoing, both were "investigated" during President Spanier's tenure, both enjoyed beneficial involvement from President Spanier, both were "exonerated," both received no punishment, and both investigations were criticized by the public as "whitewashes" or "cover-ups." *See* Ex. 887 (Chronicle of Higher Education); Ex. 779 (O'Sullivan); Ex. 520 (McElhinney); Ex. 1128 (chart). Simberg was clear in his blog post and testimony that he was not accusing Plaintiff of engaging in child molestation—in fact, Simberg said the exact opposite. *See* Ex. 57A. But aside from that major difference, there were obvious parallels between Plaintiff and Sandusky based on how Penn State handled

investigations into wrongdoing committed by both employees. Tellingly, Plaintiff presented no evidence disputing any of the points of comparison that justified the analogy between Plaintiff and Sandusky, such as that one of them was not a high-profile employee, that one of them was not accused of wrongdoing, that President Spanier was not involved in one of the investigations, or that one of them was punished following Penn State's investigation. The record established that, while harsh, the gist of the comparison is true. *Masson*, 501 U.S. at 517 (holding that there is no defamation when "the substance, the gist, the sting, of the libelous charge be justified").

To the extent the statement is about molesting and torturing of data, the gist of that statement is true because Plaintiff presented a graph that deceptively showed an unprecedented warming trend in the late 20th century by using manipulative statistical methods. Dr. Wyner testified that "there's a factual basis for the idea that the data, as represented, went through a process that adaptively dealt with the data in a way that produced manipulative conclusions." Tr. 54:20–23 (2/1/24 AM). Dr. McKitrick testified that, when the same dataset was evaluated through a standard statistical method, "the dominant pattern was not a Hockey Stick," but when evaluated through Plaintiff's non-standard statistical method "the dominant pattern in the data was a Hockey Stick." Tr. 78:12–15 (2/6/24 AM); *see also* Ex. 1126. Without Plaintiff's "data transformation," the dataset would produce a pronounced hockey stick "less than one percent of the time." Tr. 76:18–19 (2/6/24 AM) (McKitrick). Dr. McKitrick testified that Plaintiff's statistical method "had the effect of mining the dataset to look for Hockey Stick shapes and load the weight on them." Tr. 77:5–7 (2/6/24 PM). Simberg might have used a more benign term like "data transformation" instead of "molesting and torturing data," but the gist of his statement is true and he was entitled to make this editorial choice regarding phrasing. No witness presented contrary testimony. As the Court noted, "it seemed that there was very little relevance to Drs. Bradley and Oreskes' testimony," Tr. 9:9–10 (2/5/24 AM), and neither one discussed Plaintiff's statistical method. Dr. Oreskes did not speak to the issue at all. Tr. 52:4–5 (1/22/24 PM) (disclaiming intent to testify about Plaintiff's work). Dr. Bradley also did not testify about the statistical work done in the MBH papers other than to say that Plaintiff did the work on the statistics in both papers and made all of statistical assumptions

that went into the papers. Tr. 46:23–47:7 (1/22/24 AM). Dr. Abraham offered no testimony on this. Plaintiff testified superficially about statement "D," Tr. 60:7–61:11 (1/24/24 AM), but did not address whether his statistical choices disproportionately resulted in hockey stick patterns.

Plaintiff did not meet his burden to provide the jury with legally sufficient evidence to find that statements "C" and "D" were false. In contrast, Simberg presented uncontroverted evidence that the gist of these statements was true. *See Masson*, 501 U.S. at 517.

C. Simberg Is Entitled to Relief Because His Statements Did Not Convey Defamatory Meaning

Plaintiff had the burden to prove that statements "C" and "D" in fact conveyed defamatory meanings. "A statement may not be isolated and then pronounced defamatory, or deemed capable of defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire article." *Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 313 (D.C. 2006) (cleaned up). "Whether a defamatory statement of opinion is actionable often depends on the context of the statement in question." *CEI*, 150 A.3d at 1241. "Context' is a critical legal concept" because it "serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning." *Klayman v. Segal*, 783 A.2d 607, 614 (D.C. 2001). "Context is critical because it is in part the settings of the speech in question that makes their nature apparent, and which helps determine the way in which the intended audience will receive them. 'Context' includes not only the immediate context of the disputed statements, but also the type of publication, the genre of writing, and the publication's history of similar works. The broader social context, too, is vital to a proper understanding of the disputed statements." *Farah v. Esquire Mag.*, 736 F.3d 528, 535 (D.C. Cir. 2013).

Uncontroverted evidence at trial established that the climate science debate was characterized by heated rhetoric and harsh criticism. Tr. 35:1–14 (1/24/24 PM) (Plaintiff testifying that the debate gets "ugly" and "heated"); Tr. 36:25 (1/22/24 PM) (Oreskes testifying that the climate debate can be "rough"); Tr. 132:11–133:6 (1/22/24 AM) (Bradley testifying that "Dr. Mann's approach to criticism of the Hockey Stick was, in your words, take no prisoners attack," which

expression describes "a situation where an enemy wants to surrender and they get shot anyway."); Tr. 83:9–11 (2/6/24 AM) (McKitrick testifying that Plaintiff drags the tenor of the climate debate down because of Plaintiff's "abuse" and "very unconstructive interactions with people"); Tr. 20:21 (2/5/24 AM) (Curry testifying that the tenor of the debate was "really nasty"); *see also* Ex. 531 (Bradley describing Plaintiff's emails as "angry" and "vitriolic"); Ex. 902 (Plaintiff accusing Dr. Curry of sleeping her way to the top); Ex. 1068 (Plaintiff writing in Huffington Post that Dr. Curry was a "serial climate disinformer"); Ex. 1060 (Plaintiff tweeting that Dr. Pielke should "STFU," which means "shut the fuck up"); Ex. 603 (Plaintiff referring to McIntyre as "human filth.").

Plaintiff repeatedly refers to critics as "deniers," which is a slur associated with being a Holocaust denier. *See* Tr. 33:25 (2/6/24 AM) (Pielke); Tr. 25:24 (2/5/24 AM) (Curry testifying that Plaintiff "started calling actual scientists climate deniers"). Plaintiff repeatedly referred to McIntyre as a "fraud" and described McIntyre and McKitrick's work in the 2005 GRL paper as "pure scientific fraud," *see* Ex. 532; Tr. 43:3–9 (2/5/24 PM) (McIntyre), despite uncontroverted evidence that McIntyre and McKitrick's 2005 GRL paper was never subject to a correction or retraction. *See* Tr. 82:22–25 (2/6/24 AM) (McKitrick). Shortly before trial, Plaintiff drew a comparison between McIntyre and white supremacy, which Plaintiff published on X (formerly Twitter) to his roughly 220,000 followers. Ex. 1100. Tellingly, when Simberg presented this tweet as evidence of whether a statement is capable of defamatory meaning, Plaintiff's counsel responded "this is not comparing [McIntyre] to a white supremacist. It's comparing his statistical techniques that he used. And [Plaintiff] didn't call him a white supremacist." Tr. 66:18–21 (2/5/24 PM).

So too here. Just as Plaintiff's comparison of McIntyre to white supremacy was comparison about McIntyre's statistical techniques, Simberg's comparison of Plaintiff to Sandusky was about Plaintiff's statistical techniques. Statements like this are not calling McIntyre a white supremacist or Plaintiff a child molester—it's using highly charged language to emphasize a point about the statistical techniques used. In the context of the climate change debate that was established with overwhelming proof at trial, statements "C" and "D" do not and cannot convey defamatory meanings.

D. Simberg Is Entitled to Relief Because His Statements Were Opinion

Plaintiff has the burden to prove that statements "C" and "D" are not opinion. "Statements that cannot readily be proven true or false are, of course, more likely to be viewed as statements of opinion, not fact," and "in the course of legitimate debate over issues of public importance, offensive rhetoric on the borderline between fact and opinion is to be expected." *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 47 (D.C. 1983). "In determining whether an allegedly defamatory statement is an expression of opinion rather than fact, a court will consider the totality of the circumstances, taking into account four factors. First, does the language of the challenged statement have a precise core meaning or is it ambiguous? Viewers are more likely to treat ambiguous statements as opinion. Second, is the statement verifiable? If it cannot be readily verified, it is more likely an expression of opinion. Third, is the full context of the article or report such that it would cause the average viewer to infer that a challenged statement is based on fact? Finally, is the broader context or setting such as to signal to the public that the statement is one of fact or opinion?" *S. Air Transp., Inc. v. Am. Broad. Companies, Inc.*, 877 F.2d 1010, 1016 (D.C. Cir. 1989).

Both of the remaining statements at issue cannot readily be proven true or false. For statement "D," the phrase "the Jerry Sandusky of climate science" has no meaning outside the remainder of the publication, and the uncontroverted evidence at trial established both that there were many parallels between Penn State's treatment of Sandusky and Plaintiff, Tr. 85:19–88:3 (2/6/24 PM), and that the phrase "torturing data" is not meant as a factual statement, Tr. 42:4–10 (1/30/24 PM) (Simberg). Wyner testified that the term "torturing data" refers to Nobel Prize winning economist Ronald Coase's famous statement that "if you torture the data long enough, it will confess." Tr. 75:2–13 (1/31/24 PM); *see also* Ex. 20; Ex. 769 (an article that Simberg relied on using this phrase from Coase). Wyner testified that this phrase is "clearly rhetorical journalism speak for this isn't good" because there is "no statistical term of art that refers to molestation of data." Tr. 75:2–13 (1/31/24 PM). The phrase "torturing data" does "not have a specific scientific meaning," but is rather "a colloquialism we use." Tr. 75:2–13 (1/31/24 PM).

None of the four factors from *Southern Air Transport* support the view that the statement that Plaintiff "could be said to be the Jerry Sandusky of climate change" based on "molesting and torturing data" is a statement of fact rather than opinion. First, Plaintiff presented no evidence that the phrase has a precise core meaning, but Simberg presented evidence to the contrary that the phrase does not have a specific meaning. Tr. 75:2–13 (1/31/24 PM) (Wyner). Second, Plaintiff provided no evidence to suggest that the statement is verifiable, but Simberg presented evidence that the statement cannot be verified because it is just a colloquialism. Tr. 75:2–13 (1/31/24 PM) (Wyner). Third, Plaintiff presented no evidence on how this statement would be interpreted in light of the rest of the article, but Simberg testified that all of these statements were his opinions. Tr. 21:21 (2/6/24 PM) (Simberg testifying about what materials he relied on to inform his "opinions that are at issue in this lawsuit"). Fourth, Plaintiff also presented no evidence on this factor, but Simberg testified that blogs are generally characterized more as platforms for starting conversations rather than as a place for communicating facts. *See* Tr. 48:22–49:6 (1/31/24 PM) (Simberg testifying that blogs are places for having "conversations," where anybody can "publish their own words" and "[y]ou can have thoughts about something, and everyone is entitled to [their] opinions."); Tr. 50:6–8 (1/31/24 PM) (Simberg testifying that "[b]logging is a form of research" that is an "organic and dynamic…way of learning something and getting other points of view"); Tr. 9:12–10:1 (1/30/24 AM) (similar). For these reasons, the jury did not have a legally sufficient reason to find that statement "D" was not opinion, and the only evidence in the record established the opposite: the statement was Simberg's opinion.

A similar analysis applies to statement "C." Notably, statement "C" ends with a question mark, which undercuts Plaintiff's position that the statement was intended as one of fact. *See Abbas v. Foreign Policy Group LLC*, 783 F.3d 1328, 1338 (D.C. Cir. 2015) (noting that "posing questions has rarely given rise to successful defamation claims"). Statement "C," as Simberg testified, "doesn't even say Michael Mann" and Simberg's intent was to communicate that "if academic and scientific misconduct were occurring at Penn State, it wouldn't be surprising if they were to cover it up as well." Tr. 84:12–16 (2/6/24 PM). That testimony is consistent with the overall context of

the article, which ended with a plea for "a fresh, truly independent investigation." Even though Plaintiff did engage in academic and scientific misconduct, Simberg was not accusing Plaintiff of academic and scientific misconduct in his blog post, as he explained in his testimony—Simberg was expressing his opinion that Penn State would cover up the lesser wrongdoing of academic and scientific misconduct given that it had covered up the far greater wrongdoing by Sandusky.

E. Simberg Is Entitled to Relief Because Plaintiff's Speculative Evidence about Causation of Actual Injury Is Not Legally Sufficient

Plaintiff presented zero non-speculative evidence that Simberg's blog post caused Plaintiff actual injury. In fact, Plaintiff testified to the opposite: "[Q.] But you have not introduced a shred of evidence to support the idea that Mr. Simberg and I are uniquely responsible for all of the harm you've suffered; have you? A. Uniquely responsible? I don't know how one could ever establish something that absolute." Tr. 20:9–13 (1/29/24 AM) (Mann). When asked for any corroboration that the "disapproving glance" at Wegman's was because of Simberg's blog post, Plaintiff testified, "I don't have any specific evidence of individuals, names of individuals." Tr. 139:20–21 (1/25/24 AM). All the evidence in the record proves the opposite of actual injury: Plaintiff's salary increased, *see* Ex. 580, Plaintiff's reputation was unchanged, *see* Tr. 83:21 (2/6/24 AM), Plaintiff associated with celebrities, *see* Tr. 125:19–22 (1/24/24 AM), Plaintiff became a prominent voice on climate issues, *see* Tr. 7:8–8:21 (1/24/24 PM), and Plaintiff was awarded the very next year after the blog posts with recognition as a top "thinker" in Bloomberg's 50 Most Influential People in Finance alongside Elon Musk and Sheryl Sandberg, *see* Ex. 906.

The jury's verdict cannot be based on "speculation," *Majeska v. D.C.*, 812 A.2d 948, 950 (D.C. 2002), and Plaintiff presented zero non-speculative evidence that any actual injury was "in fact the direct result of the injuries caused by the defendant." *Manes v. Dowling*, 375 A.2d 221, 225 (D.C. 1977). Indeed, Plaintiff testified to the exact opposite, and Plaintiff's counsel conceded that "[y]ou're never going to get causation. You're never going to say because of this, this happened in a defamation case," to which the Court responded, "So then how can you put that before

the jury?" Tr. 28:19–23 (1/31/24 PM). The answer is that the jury cannot return a sound verdict without proof of causation and actual injury. Absent that evidence, the jury's verdict cannot stand.

II. The Punitive Damages Award Must Be Vacated

"Courts do not favor punitive damages, and any award of punitive damages must be supported by the evidence of record and the law. A trial court, therefore, must determine whether a sufficient legal foundation exists to award punitive damages" *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 593 (D.C. 1985) (cleaned up). "The test for punitive damages in this jurisdiction is a rigorous one" and may "be awarded only in cases of outrageous or egregious wrongdoing." *Rosenthal v. Sonnenschein Nath & Rosenthal, LLP*, 985 A.2d 443, 455 (D.C. 2009) (cleaned up). Evidence that a defendant acted "imprudently or incompetently" falls "far short of showing the blatant wrongdoing necessary for a jury to infer that he acted either with deliberate malice or conscious disregard." *Hendry v. Pelland*, 73 F.3d 397, 400 (D.C. Cir. 1996). Plaintiff's evidence was legally insufficient, and the punitive damages award should be vacated.

A. Punitive Damages Cannot Be Awarded Without Actual Injury

Plaintiff did not suffer actual injury from Simberg's blog post. *See supra* § II.E. Without proof of actual injury, the jury cannot award punitive damages because "actual damages are a prerequisite to exemplary or punitive damages in this jurisdiction." *Bay Gen. Indus., Inc. v. Johnson*, 418 A.2d 1050, 1058 (D.C. 1980). "For punitive damages may not be awarded where there is no basis for an award of compensatory damages." *Franklin Inv. Co. v. Smith*, 383 A.2d 355, 358 (D.C. 1978), and "damages may not be based on mere speculation or guesswork." *Morgan v. Psychiatric Inst. of Washington*, 692 A.2d 417, 426 (D.C. 1997). When the jury issued a nominal damages award of $1 against Simberg, the jury necessarily found that "there are no proven damages resulting, or that the damages are only speculative." Jury Instruction § 11.32. For this reason, the punitive damages award must be struck.

B. Punitive Damages Should Not Have Gone to the Jury

Because of the dearth of evidence on actual malice, the issue of punitive damages should not have even been given to the jury. "When there is insufficient evidence of malice to go to the

jury, 'it is the duty of the trial court to direct a verdict for the defendant.'" *Columbia First Bank v. Ferguson*, 665 A.2d 650, 657 (D.C. 1995) (citation omitted); *see also Curry v. Giant Food Co. of the D.C.*, 522 A.2d 1283, 1295 (D.C. 1987) ("[A] mere characterization of certain conduct as malicious does not create a question for a jury to consider in the absence of evidence of actual malice."); *Croley v. Republican Nat. Comm.*, 759 A.2d 682, 696 (D.C. 2000) (holding the evidence was insufficient to send punitive damages to the jury). For all of the reasons explained above, *supra* § I.A, Plaintiff did not satisfy his burden to present clear and convincing evidence of actual malice, so the issue of punitive damages should not have been submitted to the jury.

C. Plaintiff Did Not Present Legally Sufficient Evidence of Malice

Plaintiff also did not provide legally sufficient evidence of common-law malice, which requires clear and convincing evidence that Simberg "acted with evil motive, actual malice, or in willful disregard for the rights of the plaintiff." *Rosenthal*, 985 A.2d at 455. But here, the jury found the opposite: that Simberg did not publish false statements knowingly, Tr. 6:21 (2/8/24 PM), and this finding strongly cuts against punitive damages, especially where there is no evidence of reprehensibility. The jury's finding on reckless disregard is not enough.

In deciding whether punitive damages are warranted, the court should consider (i) the counsel fees "actually" paid by the plaintiff; (ii) whether the defendant profited from his behavior; and (iii) "the basic purposes of deterrence and punishment." *Afro-Am. Pub. Co. v. Jaffe*, 366 F.2d 649, 662 (D.C. Cir. 1966). These factors all cut against punitive damages because Plaintiff has not paid any fees in twelve years for his multiple law firms, *see* Tr. 80:19–81:10 (1/24/24 PM) (Mann), and Simberg has not received any compensation for his blog post, Tr. 75:20–76:3 (1/30/24 PM) (Simberg). On deterrence, Simberg's testimony is that he has already "suffered a lot having published it," Tr. 76:2–3) (1/30/24 PM), so further punishment would be excessive. There is also no evidence of reprehensibility, which is evaluated based on factors such as whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of

intentional malice, trickery, or deceit, or mere accident." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). Here, there was no physical harm, no reckless indifference to health or safety, Plaintiff was not financially vulnerable, the blog post was an isolated incident, and the jury found that Simberg did not knowingly publish false statements. Moreover, the District does not have criminal libel prohibitions, which cuts against the propriety of punitive damages. *See Raymond v. United States*, 25 App. D.C. 555, 560 (1905). In light of all that, there is no evidence of reprehensibility, and the punitive damages award must be vacated.

Without any evidence of evil motive, Plaintiff's counsel instead resorted to multiple improper tactics for inflaming the jury and eliciting an improper award. First, Plaintiff's counsel inverted the burden of proof by arguing that Defendants "don't really have any proof that they didn't act recklessly." Tr. 101:7–8 (2/7/24 PM). But that's not Defendants' burden. Plaintiff must prove actual malice and common-law malice with clear and convincing evidence. By telling the jury it was Simberg's burden to prove a lack of recklessness, Plaintiff invited a jury verdict on an improper basis, which is obvious error. Second, Plaintiff's counsel invoked an incorrect legal standard and ignored this Court's order instructing counsel not to use the words "recklessness" because of the likelihood of jury confusion. *See* MIL Order at 21 (Apr. 3, 2023). Third, Plaintiff's counsel mischaracterized the evidence. *See supra* § I. Fourth, Plaintiff's counsel invited the jury to award punitive damages to send a message that "[t]hese attacks on Climate Scientists have to stop, and you now have the opportunity." Tr. 108:1–2 (2/7/24 PM) (Williams). This is a classic attempt to make the jury return a punitive damages award based on emotion, not evidence. Such argument is highly improper. *See Buergas v. United States*, 686 A.2d 556, 559 (D.C. 1996) ("send a message" arguments are improper because they elicit a verdict on emotion, not evidence).

Plaintiff's counsel's improper "send a message" argument is especially egregious because, following the parties meet and confer in December 2022, Plaintiff's counsel represented that he would not make such an argument in closing and Simberg agreed not to file a motion in limine on the subject. That agreement was reflected in the parties' Joint Pretrial Statement, *see* JPTS at 8 (filed 6/30/23). Given the make-up of the jury and their views on climate science, Plaintiff's

argument was especially prejudicial, and likely informed the verdict. Throughout the trial, Plaintiff repeatedly presented improper arguments forcing the judge to repeatedly instruct the jury to disregard what Plaintiff's counsel had done, and this invariably colored the most diligent juror. In sum, "the scope and degree of counsel's flagrant disregard of numerous orders from the trial judge was exceptional," *Brown*, 844 A.2d at 1125, and justifies awarding Simberg relief.

III. Simberg Preserves His Argument that His Statements Are Protected Opinion Under the First Amendment

To the extent necessary to preserve the argument for possible appellate review, *see Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 347 (2019) (Alito, J., dissenting), Simberg reasserts that the statements challenged by Plaintiff are not actionable as defamation under the First Amendment because each is "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). The context, disclosed factual basis, hyperbolic language, and non-verifiability of the statements Plaintiff challenges all confirm that those statements are not actionable assertions of fact that Plaintiff engaged in literal fraud, but First Amendment-protected expressions of opinion and interpretation regarding the Climategate scandal and its aftermath. Simberg's language was typical of the public debate over climate science, and he provided, via hyperlinks and references, the factual basis for his opinions. "[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995). That rule should prevail here, and it should have prevailed in Simberg's appeal of the denial of their special motion to dismiss under the D.C. Anti-SLAPP Act. The Court of Appeals, however, held otherwise.

Conclusion

The Court should enter judgment as a matter of law for Simberg under Rule 50(b) because Plaintiff failed to present legally sufficient evidence on the elements of defamation, especially on the element of actual malice which requires proof by clear and convincing evidence.

Dated: March 8, 2024

Respectfully submitted,

/s/ Andrew M. Grossman

Victoria L. Weatherford (pro hac vice)
vweatherford@bakerlaw.com
BAKER & HOSTETLER, LLP
Transamerica Pyramid
600 Montgomery Street, Suite 3100
San Francisco, CA 94111
Telephone: (415) 659-2634

Mark I. Bailen (D.C. Bar No. 459623)
mbailen@bakerlaw.com
MARK I. BAILEN PC
1250 Connecticut Ave, N.W. | Suite 700
Washington, DC 20036
Telephone: (202) 656-0422

Andrew M. Grossman (D.C. Bar No. 985166)
agrossman@bakerlaw.com
David B. Rivkin (D.C. Bar No. 394446)
drivkin@bakerlaw.com
Mark W. DeLaquil (D.C. Bar No. 493545)
mdelaquil@bakerlaw.com
Renee M. Knudsen (D.C. Bar No. 1615689)
rknudsen@bakerlaw.com
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5403
Telephone: (202) 861-1500
Facsimile: (202) 861-1783

Attorneys for Defendant Rand Simberg

Certificate of Service

I hereby certify that on March 8, 2024, I caused a copy of the foregoing, and all accompanying papers, to be served by eFileDC upon the following:

John B. Williams, Esq.
Fara N. Kitton, Esq.
WILLIAMS LOPATTO PLLC
1200 New Hampshire Ave, NW, Suite 750
Washington, DC 20036
Email: jbwilliams@williamslopatto.com
Counsel for Plaintiff Michael Mann

Patrick J. Coyne, Esq.
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
901 New York Ave., N.W.
Washington, D.C. 20001-4413
Email: patrick.coyne@finnegan.com
Counsel for Plaintiff Michael Mann

Ty Cobb, Esq.
Ty Cobb, PLLC
3913 49th Street, NW
Washington, DC 20016
Email: Gbhshof@gmail.com
Counsel for Plaintiff Michael Mann

Melissa Howes
Email: melissa@ajpromos.com
Mark Steyn
Email: mdhs@marksteyn.com
H. Christopher Bartolomucci
Email: cbartolomucci@schaerr-jaffe.com
Defendant Mark Steyn

Peter J. Fontaine, Esq
Brian Kint, Esq.
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Email: pfontaine@cozen.com
Email: bkint@cozen.com
Counsel for Plaintiff Michael Mann

/s/ Andrew M. Grossman
Andrew M. Grossman