IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D.,	*	
Plaintiff,	*	
v.	*	
		2012 CA 008263 B
NATIONAL REVIEW, INC., *et al*.,	*	**Judge Alfred S. Irving, Jr.**
Defendants.	*	
	*	

ORDER

Before the Court is Defendants Competitive Enterprise Institute and Rand Simberg's (collectively "the CEI Defendants") *Motion for Summary Judgment*, filed January 22, 2021. On March 3, 2021, Plaintiff filed an opposition and, on March 22, 2021, the CEI Defendants filed a reply. In addition, before the Court is Plaintiff's *Motion for Partial Summary Judgment*, filed January 22, 2021. On March 3, 2021, the CEI Defendants filed an opposition and, on March 22, 2021, Plaintiff filed a reply.

The CEI Defendants have moved for summary judgment on questions of actual malice, falsity, and certain damages. Plaintiff has moved for summary judgment on the issue of falsity.

I. Procedural History

On July 13, 2012, Defendant Rand Simberg ("Mr. Simberg") submitted to Defendant Competitive Enterprise Institute's ("CEI") Open Market weblog an article entitled "The Other Scandal in Unhappy Valley" (the "Simberg Article"). The Simberg Article concerned and criticized the work of Plaintiff Michael E. Mann ("Plaintiff"), who, in the late nineteen nineties, published research on climate change known as the hockey stick graph. CEI published the Simberg Article on the same day of Mr. Simberg's submission.

On October 22, 2012, Plaintiff filed a complaint averring that the Simberg Article defamed him. On December 15, 2012, the CEI Defendants filed a special motion to dismiss the complaint under the District of Columbia's Anti-SLAPP Act. On June 28, 2013, Plaintiff moved to amend the complaint, which motion the Hon. Natalia M. Combs-Greene granted on July 10, 2013. On July 19, 2013, Judge Combs-Greene denied CEI and Mr. Simberg's special motion to dismiss. On July 24, 2013, the CEI Defendants moved to dismiss Plaintiff's amended complaint, under the Anti-SLAPP Act. On August 20, 2013, the Presiding Judge of the Civil Division transferred the matter to the Civil I Calendar, over which then-Associate Judge Frederick H. Weisberg presided.

In the meantime, on September 17, 2013, the CEI Defendants noticed an appeal of Judge Combs-Greene's denial of their special motion to dismiss. On January 22, 2014, Judge Weisberg denied CEI and Mr. Simberg's second-filed special motion to dismiss. On January 24, 2014, the CEI Defendants noticed another appeal.

The District of Columbia Court of Appeals affirmed the denials of the special motions to dismiss, in part, and reversed, in part. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016). The Court of Appeals denied a petition for rehearing, but amended its opinion slightly in 2018. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018) (hereinafter "*CEI*"). The United States Supreme Court denied petitions for writ of certiorari, with Justice Samuel Alito writing a dissent. *See Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344 (2019) (Alito, J., dissenting).

The Court of Appeals' opinion answered questions of first impression related to the Anti-SLAPP Act and offered an extensive factual analysis of the instant case guided by relevant law. On May 31, 2019, the Hon. Jennifer M. Anderson dismissed a number of counts set forth in

Plaintiff's Amended Complaint. The surviving claims against CEI and Mr. Simberg are the defamation claims arising out of factual statements contained in the Simberg Article.

On January 22, 2021, the CEI Defendants filed the instant motion for judgment as to the remaining claims, with Plaintiff filing a partial motion for judgment on the same day.

II. Standard of Review

To prevail on summary judgment, the moving party "must demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001) (citing Super. Ct. Civ. R. 56(a)). If the moving party is successful, the burden shifts to the non-moving party, who must raise a genuine issue of material fact in order to survive summary judgment. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012); *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A party may move for summary judgment on "part of each claim or defense." Super. Ct. Civ. R. 56(a); *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F.Supp.3d 180, 191 (D.D.C. 2017).

In reviewing a motion for summary judgment, a court must construe all evidence in the light most favorable to, and make all inferences in favor of, the non-moving party. *See Linen v. Lanford*, 975 A.2d 1173, 1178 (D.C. 2008); *O'Donnell v. Associated Gen. Contractors of Am.*, 645 A.2d 1084, 1086 (D.C. 1994). "Summary judgment is an extreme remedy that is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *Maddox v. Bano*, 422 A.2d 763, 764 (D.C. 1980) (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)). "[M]ere conclusory allegations are insufficient to avoid entry of summary judgment." *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008) (internal quotations omitted). And, the "mere existence of a scintilla of

evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Id.* at 1124 (internal quotations and alterations omitted).

For purposes of the instant inquiry, a court must deny summary judgment "if the offered evidence and its inferences would permit the factfinder to hold for the nonmoving party under the appropriate burden of proof," appreciating that "the burden of proof varies with the nature of the civil action being litigated." *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979) (emphasis omitted). In other words, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "[I]f the claim must be demonstrated by heightened proof to succeed, the nonmovant claimant must produce more substantial evidence to successfully oppose summary judgment." *Sibley v. St. Albans Sch.*, 134 A.3d 789, 809 (D.C. 2016) (quotations omitted) (citing *Anderson*, 477 U.S. at 252).

III. Discussion

The elements of a claim for defamation are as follows:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff;
> (2) that the defendant published the statement without privilege to a third party;
> (3) that the defendant's fault in publishing the statement [met the requisite standard;] and
> (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

CEI, 150 A.3d at 1240 (alterations in original) (citing *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)).

Plaintiff contends that the Court of Appeals has already decided summary judgment in his favor. Pl.'s Mem. P. & A. Opp'n 13-16, 21-23. To be sure, the Court of Appeals addressed

special motions to dismiss, which differ in substance and factual support from a motion for summary judgment. What is clear, the Court of Appeals took the opportunity to conduct an extensive review of the factual record as it existed in 2016. *See CEI*, 150 A.3d 1232-60.

The Anti-SLAPP Act requires that, in a suit such as this one, after a defendant moves to dismiss and successfully shows that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest," the plaintiff must demonstrate that his claim is likely to succeed on the merits. *Id.* at 1232 (quoting D.C. Code § 16-5502(b)-(d)). The Court of Appeals articulated the standard of review at the special motion stage, as follows:

> [T]he court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion.

Id. at 1233. The Court of Appeals acknowledged that the Anti-SLAPP Act's standard must respect the right to a jury trial, and explained:

> [T]he standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that the claimant could not prevail as a matter of law, that is, after allowing for the weighing of evidence and permissible inferences by the jury.

Id. at 1236. When compared to the standard applied in the summary judgment context, the Court of Appeals found that "the question is substantively the same: [W]hether the evidence suffices to permit a jury to find for the plaintiff." *Id.* at 1238 n.32. As the Court notes below, at the summary judgment stage, the trial judge likely will have more evidence from which to rule more decisively than at the special motions stage.

In defining the contours of the Anti-SLAPP Act, the Court of Appeals explicitly noted that, while the Anti-SLAPP Act allows a defendant "the option to up the ante early in the litigation," the defendant "preserves the ability to move for summary judgment under Rule 56

later in the litigation, after discovery has been completed." *CEI*, 150 A.3d at 1239. As such, the Court of Appeals cautioned that its "legal conclusion is based on the evidence that has been presented at this juncture, in connection with the special motion to dismiss. Once discovery is completed, the legal conclusion that the evidence is sufficient to go to trial could change." *CEI*, 150 A.3d at 1258 n.61. Indeed, the Court of Appeals emphasized that it lacked evidence "in the form of affidavits or depositions attesting to the personal beliefs of Mr. Simberg, [Defendant Mark] Steyn, or the responsible personnel at CEI and National Review[.]" *Id.* at 1255 n.57. With the Court of Appeals' admonishments and instructions, it would be error for this Court to adopt the Court of Appeals' early analysis and rulings, when this Court now has been presented with much more factual evidence than that which the Court of Appeals considered. In short, a denial of summary judgment is not automatic, simply because of the Court of Appeals' 2016 decision, which were based upon a less expansive set of facts.

A. Actual Malice

When the plaintiff in a defamation suit qualifies as a public figure,[1] the First Amendment requires a showing of actual malice. *CEI*, 150 A.3d at 1251-52 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). In other words, the plaintiff must show that the defendant made the alleged defamatory statements with knowledge that the statements were either false or with reckless disregard for whether the statements were false. *Id*. If a defendant is an organization, actual malice may be found through the state of mind of persons within the organization responsible for publishing the statements. *New York Times*, 376 U.S. at 287.

The Supreme Court has recognized that "the concept of 'reckless disregard' cannot be fully encompassed in one infallible definition[.]" *Harte-Hanks Communications*, 491 U.S. 657,

[1] The parties agree, and the Court of Appeals has recognized, "that Dr. Mann is a limited public figure with respect to statements about global warming[.]" *CEI*, 150 A.3d at 1251 n.52.

667 (1989) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968)). The Supreme Court has offered that reckless disregard includes publication with a high degree of awareness of probable falsity, or while entertaining serious doubts as to the truth of the publication. *Id.*; *see also McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1508 (D.C. Cir. 1996); *Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 509 (D.C. 2020).

Actual malice must be shown by clear and convincing evidence. *CEI*, 150 A.3d at 1251-52 (citing *New York Times*, 376 U.S. at 287); *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016). The heightened evidentiary standard for a public figure's defamation claim imposes a "heavier burden than is required for most other civil plaintiffs," including at the summary judgment stage. *Nader*, 408 A.2d at 49-50.

To survive summary judgment on the issue of actual malice, "the plaintiff need only present evidence which shows a genuine issue of material fact from which a reasonable jury *could find* actual malice with convincing clarity." *Nader*, 408 A.2d at 49 (emphasis in original); *see also Anderson.*, 477 U.S. at 257 ("concluding that a court ruling on a motion for summary judgment must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists"). The Court of Appeals has described this standard as a "daunting one which very few public figures can meet." *Fridman*, 229 A.3d at 509 (quoting *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996).

The CEI Defendants argue that Plaintiff cannot show that they acted with actual malice in publishing the statements at issue.

i. CEI's Actual Malice

Initially, and briefly, Plaintiff advances a theory of actual malice alleging that CEI was "vicariously liable" for Mr. Simberg's actual malice. Pl.'s Mem. P. & A. Opp'n 35-42. On March 19, 2021, the Hon. Jennifer M. Anderson issued an order granting summary judgment to Defendant National Review and, in doing so, summarily rejected the same legal theory now lodged against CEI. *See* Order Granting Def. National Review's Mot. for Summ. J., March 19, 2021. Judge Anderson succinctly opined that "actual malice cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior*." *Id.* at 6 (citing *Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990)) (internal quotations omitted); *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996)). Plaintiff has requested that Judge Anderson reconsider her March 19, 2021 Order.

The Court finds Judge Anderson's reasoning sound and adopts it here. Consistent with Judge Anderson's ruling and this Court's independent assessment, the Court must reject Plaintiff's theory of vicarious actual malice. It appears plain from case law that actual malice requires an employment relationship in order for an individual's alleged malice to be imputed to an organization. *See McFarlane*, 74 F.3d at 1303 ("We doubt that actual malice can be imputed except under *respondeat superior*"); *Secord*, 747 F. Supp. at 779 ("Actual malice . . . cannot be imputed from one defendant to another absent an employer-employee relationship"). The Court refers the Parties to Judge Anderson's Order, rather than reiterating the same analysis, here.

The viability of Plaintiff's claims against CEI narrows sharply to the state of mind of Mr. Scribner, the CEI employee "principally responsible for publishing submitted posts[.]" Pl.'s SDMF ¶ 13; *see New York Times*, 376 U.S. at 287 (concluding that "actual malice would have to

be brought home to the persons in the Times' organization having responsibility for the [allegedly defamatory statements]").

Plaintiff does not dispute that Mr. Scribner is the sole CEI employee responsible for publishing the Simberg Article. Pl.'s Mem. P. & A. Opp'n 5; Pl.'s SDMF ¶¶ 13-19, 39, 369-70. Mr. Scribner joined CEI as an editor in 2009 immediately upon his graduation from college. Pl.'s SDMF ¶ 14. Mr. Simberg was the primary editor of the blog upon which the Simberg Article appeared in 2011 and 2012. Pl.'s SDMF ¶ 13. Mr. Scribner provides that, in 2012, he was a policy fellow with a focus on transportation and urban development policy and an assistant editor under Editorial Director Ivan Osorio. Scribner Decl. ¶ 4. He represents that his work consisted primarily of editing a variety of writings from CEI's in-house and outside affiliated writers. Scribner Decl. ¶¶ 6-14. Mr. Scribner worked for CEI until 2020, when he left for another policy house, where he now works as a senior transportation policy analyst. Scribner Decl. ¶ 3. The extent to which Mr. Scribner reviewed posts on the Open Market blog is disputed. Pl.'s SDMF ¶¶ 17-18.

The question now before the Court is "whether the evidence presented is such that a reasonable jury might find that actual malice ha[s] been shown with convincing clarity." *Anderson*, 477 U.S. at 257; *see also CEI*, 150 A.3d at 1253 (asking "substantively the same" question).

In the typical public figure defamation case, a defendant might attempt to evade a finding of actual malice by showing a justifiable belief that the allegedly defamatory statements attributable to him were true. Indeed, both Mr. Simberg and Mr. Steyn make such arguments. CEI claims that Mr. Scribner, and by extension CEI, simply "did not know" what the Simberg

Article asserted when CEI published it. CEI Reply 2. As such, it argues that its ignorance shields it from liability.

There is extensive case law concerning what evidence may be used to support a finding of actual malice. Circumstantial evidence, for example, may be used to show a defendant's state of mind, including evidence of motive. However, the Supreme Court has instructed that "courts must be careful not to place too much reliance on such factors." *Harte-Hanks Communications*, 491 U.S. at 668. Reckless disregard for falsity may be shown inferentially, "by proof that the defendant had a 'high degree of awareness of [the statement's] probable falsity." *CEI*, 150 A.3d at 1252 (alterations in original) (citing *Harte-Hanks Communications*, 491 U.S. at 688). Evidence that a statement was fabricated, is inherently improbable, or based wholly on an unverified anonymous source that the defendant had reason to doubt will likely support a finding of actual malice. *Tavoulareas v. Piro*, 817 F.2d 762, 790 (D.C. Cir. 1987) (citing *St. Amant*, 390 U.S. at 732).

Courts have found that certain types of commonly presented evidence, if offered alone, are flatly deficient to show actual malice. This includes evidence of "personal spite, ill will or intention to injure on the part of the writer[.]" *Harte-Hanks Communications*, 491 U.S. at 666 n.7 (quotations omitted); *Tavoulareas*, 817 F.2d at 795 (concluding that "[t]o recover, plaintiffs cannot ground their claim 'on a showing of intent to inflict harm,' but must, instead, show an 'intent to inflict harm through falsehood'" (quoting *Henry v. Collins*, 380 U.S. 356, 357 (1965)). Some circumstances may justify reliance on evidence of ill-will, but only where the probative value of that evidence will outweigh the risk that "such evidence will chill honestly believed speech." *Tavoulareas*, 817 F.2d at 795.

The failure to investigate, even if a reasonably prudent person would have done so under the circumstances, or even where such failure constitutes a departure from professional standards of conduct, will not give rise to actual malice. *Harte-Hanks Communications*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 730-32; *Tavoulareas*, 817 F.2d at 797. But the "purposeful avoidance of truth is in a different category." *Harte-Hanks Communications*, 491 U.S. at 692. Discredited testimony is "not normally" a sound basis upon which to deny summary judgment. *Anderson*, 477 U.S. at 256-57 (quotations omitted).

A combination of the above factors, however, may properly support a finding of actual malice, particularly in the absence of evidence to the contrary. *Tavoulareas*, 817 F.2d at 789 ("[A] plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence."). A court must "consider assertions of good faith in view of all the circumstances." *CEI*, 150 A.3d at 1213 (citing *St. Amant*, 380 U.S. at 732). And, as is true of all civil cases, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson*, 477 U.S. at 255.

It follows logically that a court must consider an assertion of ignorance, rather than of good faith, in view of all the circumstances. The CEI Defendants argue that Mr. Scribner "was not even aware of [the Simberg Article's] substance at the time of the publication." Defs.' Mem. P. & A. Mot. Summ. J. 13. The CEI Defendants contend that Mr. Scribner "ran his eyes" over the Simberg Article, merely checking for formatting errors and typos, with no attention paid to the assertions therein. Reply 2; CEI SUMF ¶¶ 364-65. Plaintiff, on the other hand, argues that Mr. Scribner did, in fact, read the post in full, as evidenced by edits he made before publishing it. Pl.'s SDMF ¶¶ 364-65.

There is a dispute whether Mr. Scribner spent just a few minutes with the Simberg Article before publishing, or if an hour lapsed between receipt and publishing. CEI SUMF ¶ 367; Scribner Decl. ¶¶ 36-44; Williams Decl., Ex. 70, 110:3-6 (hereinafter "Scribner Dep."). The resolution of the dispute, however, seems not to have an effect on the Court's ultimate ruling. It is undisputed, however, that Mr. Scribner published the Simberg Article on the same day of its submission.

Mr. Scribner testified at his deposition that he only had the article for "a 10-minute period between submission and posting." Scribner Dep. 110:3-6. The CEI Defendants claim that "Scribner did not spend more than a few minutes reviewing the post." CEI SUMF ¶ 367. As support, they attached Mr. Scribner's declaration, in which he swears to the following:

> I couldn't have spent more than a few minutes . . . reviewing the Unhappy Valley Post, and I didn't really read it before publishing it. Instead, my usual practice was to run my eyes over Mr. Simberg's posts to identify formatting errors, while toggling back and forth between WordPress's plain-text-editor view and its HTML view.

Scribner Decl. ¶ 36. Mr. Scribner's declaration avers that the WordPress system's revision history for the Simberg Article shows that he made "four non-substantive changes to the post," which is apparently consistent with his usual practice with Mr. Simberg's submissions. Scribner Decl. ¶¶ 37-43. Mr. Scribner's declaration further offers the following:

> I understand that there is some uncertainty about whether I published the Unhappy Valley Post ten minutes after Mr. Simberg submitted it or an hour and ten minutes after he submitted it, based on uncertainty over computer time-zone settings. While I remember the timestamps on my emails, when I looked at them a year or so ago, indicated the former, I don't have a direct recollection from the evening of July 13, 2012. It's possible that I may have let the post sit for awhile, as I completed other work or was returning home from the office, or that I didn't spot the notification email immediately.

Scribner Decl. ¶ 44. Plaintiff highlights that, "after reviewing the time-stamped emails, Mr. Scribner conceded that he may have had possession of the article for an hour before he approved it." Pl.'s CS ¶ 52.

Plaintiff mounts his attack on CEI's ignorance theory largely with circumstantial evidence. Plaintiff contends that Mr. Scribner "knew who [Plaintiff] was and he knew what climategate was[,]" and that Mr. Scribner "participated in discussions about [Plaintiff] and climategate." Pl.'s Mem. P. & A. Opp'n 17; Pl.'s CS at ¶¶ 36-61. Moreover, Plaintiff argues that Mr. Scribner was aware of the accusations of fraud against Plaintiff, and was aware of the results of several of the investigations into Plaintiff's conduct. Pl.'s Mem. P. & A. Opp'n 18; Pl.'s CS at ¶¶ 36-61. Plaintiff accuses Mr. Scribner of playing "a central part of the CEI attack on Dr. Mann, working on articles that accused Dr. Mann and other scientists of 'scandalous behavior . . . collusion and cover-up . . . and manipulating data" and editing articles, "castigating the investigations as whitewashes." Pl.'s Mem. P. & A. Opp'n 18; Pl.'s CS ¶ 41. Further, Plaintiff attacks Mr. Scribner's credibility, urging that a jury may disbelieve his testimony should he maintain his ignorance of the content of the Simberg Article. Pl.'s Mem. P. & A. Opp'n 24.

Plaintiff goes to great lengths to tie Mr. Scribner to "the CEI attack on Dr. Mann[,]" calling him "one of CEI's most caustic critics of [Plaintiff.]" Pl.'s Mem. P. & A. Opp'n 18-19. Plaintiff offers various media pieces that Mr. Scribner had a hand in and which tend to evidence Mr. Scribner's knowledge of Plaintiff, CEI's position on global warming, and the Climategate event. One piece that Plaintiff repeatedly highlights is a portion of a CEI publication called "The Good, the Bad, and the Ugly." Williams Decl., Ex. 77, at 10. Mr. Scribner admits that he wrote the piece, a departure from other media where he simply provided edits or facilitated publishing. Scribner Dep. 47:20-48:5. Mr. Scribner describes "The Good, the Bad, and the Ugly," as

"compiled through existing publications rather than new material." Scribner Dep. 48:14-17, 51:6-9. One "Ugly" section covers the Muir Russell Report, which was the result of an investigatory commission into the Climategate emails that Mr. Scribner describes as showing scientists "illegally conspiring against politically disfavored scientists[,]" and a CEI director's comments on the same. Williams Decl., Ex. 77, at 10.

Aside from this one example, Plaintiff does not offer any other of Mr. Scribner's own writings showing great knowledge of the subject matter or exhibiting an animus towards Plaintiff. Plaintiff puts forward several articles that Mr. Scribner may or may not have edited. For example, another piece of the same title, "The Good, the Bad, and the Ugly," explains that the EPA rejected a CEI petition that mentioned the Climategate emails. Williams Decl., Ex. 78. The Court can only conclude that the relationship between the article and Plaintiff is tenuous at best.

Mr. Scribner's involvement in the rest of the articles that Plaintiff offers is not clear, but even if Mr. Scribner edited each, the most that this evidence shows is that Mr. Scribner was aware of the Climategate story and Plaintiff's involvement. The Court agrees that it would strain credulity that Mr. Scribner was entirely ignorant of the story, considering that the Climategate story was a topic of discussion for CEI at the time. No matter, the evidence does not demonstrate that Mr. Scribner was the zealously biased subject matter expert that Plaintiff would have this Court so find. There were many topics of the day of which Mr. Scribner would have enjoyed some awareness. Climategate appears to have been just one.

It is apparent from Plaintiff's evidence that many writers and employees at CEI held a deep bias against Plaintiff, and sought to tarnish his work by highlighting the Climategate emails and discrediting the investigations into them. The state of mind of those writers and employees

is not at issue, here. Were they the source of the Simberg Article, finding actual malice would likely be a much more straightforward task. Mr. Scribner is the sole CEI employee responsible for publication of the Simberg Article. When viewed in the light most favorable to Plaintiff, the evidence shows that Mr. Scribner was an editor who reviewed many pieces written by other CEI employees or outside authors for formatting errors and occasionally summarized another author's work. The Simberg Article was submitted by an outside author to CEI's online blog, and Mr. Scribner's role was simply to review it for formatting errors and publish it, which he did on the day Mr. Simberg submitted it for publication.

What the Court has gleaned from the facts, as well, is that the blog does not appear to have been a highly-regulated and formalized publication, and likely little effort on the part of CEI went into the Simberg Article prior to its publication. A reasonable publisher may have stopped to verify the statements in the Simberg Article, but that is not the standard that the Court must apply, here. *See Harte-Hanks Communications*, 491 U.S. at 665-666.

The Court of Appeals allowed this case to proceed because "the notion that the emails support that [Plaintiff] has engaged in misconduct has been so definitively discredited, a reasonable jury could, if it so chooses, doubt the veracity of [CEI's] claimed honest belief in that very notion." *CEI*, 150 A.3d at 1260. The Court of Appeals was "struck by the number, extent, and specificity of the investigations, and by the composition of the investigatory bodies." *Id.* at 1253. It concluded that a jury could determine that CEI recklessly disregarded the truth. *Id.* at 1260. At that time, however, there was "no evidence in the record . . . attesting to the personal beliefs of . . . the responsible personnel at CEI . . . and how they came to have such beliefs in light of the [investigative] reports[.]" *Id.* at 1256 n.57.

The Court now has the benefit of such evidence and it must find the evidence to be insufficient. It is likely that, had the CEI employees with deep bias against Plaintiff had a hand in publishing the Simberg Article, the Court of Appeals' reasoning would stand today, as the investigatory reports exonerating Plaintiff are extensive, numerous, and reliable. However, it appears that the sole responsible personnel at CEI, Mr. Scribner, in fact held no clear, strong beliefs as to the veracity of the statements at issue because he was not aware of the underlying bases supporting or contradicting the statements. This Court appreciates that the "ignorance" defense is not widespread in case law, but analysis of the First Amendment's actual malice requirement warrants consideration of it, here.

In *Harte-Hanks Communications v. Connaughton*, an unsuccessful candidate for a judgeship in Ohio sued a local newspaper that ran a story accusing the candidate of bribery. 491 U.S. at 660. A jury found for the candidate, finding by clear and convincing evidence that the story was published with actual malice. *Id.* at 661. The Sixth Circuit affirmed. *Id.* at 662. The Supreme Court affirmed, but made clear that the actual malice standard requires more than a "reasonable publisher" standard. *Id.* at 665-67. The Supreme Court found that the editors and writers at the newspaper acted with actual malice because they were intimately involved in investigating and writing the story, and made several questionable choices. *Id.* at 682. These included the "utterly bewildering" choice of not interviewing a critical witness, running the story despite interviewing six witnesses who offered contradictory accounts, and ignoring other critical evidence. *Id*.

The newspaper employees in *Harte Hanks Communications* made deliberate choices to avoid the truth, in pursuit of a story they wished to publish. Plaintiff, here, does not argue for a "reasonable publisher" standard, likely because the argument clearly fails. But, critically,

Plaintiff has failed to produce evidence showing any "purposeful avoidance of truth" on the part of CEI, through Mr. Scribner. *Id.* at 692. Indeed, the evidence is clear that there was little time for Mr. Scribner to investigate the underpinning of the Simberg Article to reveal a purposeful avoidance of the truth.

In another case, *Fridman v. Orbis Bus. Intelligence, Ltd.*, the Court of Appeals reviewed the grant of a special motion to dismiss brought under the District of Columbia's Anti-SLAPP Act, which, as explained above, required an analysis similar to the analysis conducted for summary judgment. 229 A.3d at 499. The plaintiffs, Russian businessmen, claimed that Orbis Business Intelligence, a research group, defamed them by claiming the plaintiffs had illicit connections to Russian government officials in the well-known "Steele Dossier." *Id.* at 500-01. The Court of Appeals found that the plaintiffs had failed to produce evidence of actual malice. *Id.* at 509-11. There, the plaintiffs had attempted to prove actual malice by showing that Orbis relied on an anonymous tip. *Id.* at 509-510. The Court of Appeals opined that reliance upon an anonymous tip "will amount to actual malice only if the defendant 'had obvious reason to doubt' the statement's veracity" and found that the plaintiffs could "not point to anything establishing that it was reasonable to infer that there were obvious reasons for [the author] to doubt the credibility of his source." *Id.* at 510. The Court of Appeals was further unpersuaded by plaintiffs' attempt to show bias stemming from Orbis' hiring for the purpose of investigating Donald Trump. *Id.* The Court of Appeals found that a bias against Donald Trump did not necessarily extend to bias against the plaintiffs. *Id.*

Here, citing to the Court of Appeals 2016 decision, Plaintiff contends that the "obvious reasons for [the author] to doubt the credibility of his source," lies within the sum and substance of the several investigatory reports into the Climategate emails and their findings. *Id.* Plaintiff

has not shown Mr. Scribner to be a subject-matter expert. And, while Mr. Scribner may have been passively familiar with the reports as a result of his duties as an editor, Plaintiff has not clearly shown Mr. Scribner's meaningful knowledge of the intricacies of the investigatory reports sufficient to have vetted the claims in the Simberg Article.

The *Fridman* Court's analysis of bias is relevant here, as well, in that Mr. Scribner's bias against Plaintiff is arguably evidenced in only one piece in the "Good, the Bad, and the Ugly." Again, that piece was a compilation of other authors' works, not wholly Mr. Scribner's own writing, and did not concern Plaintiff directly. Aside from that piece, Plaintiff has only demonstrated that Mr. Scribner possessed a general knowledge of Climategate and perhaps a generalized bias to one side of the climate change debate. Plaintiff has not produced sufficient amounts of Mr. Scribner's own work criticizing Plaintiff or demonstrating a commitment to bend the truth in pursuit of his own ideological ends for a jury to find CEI liable.

Importantly, the Supreme Court has instructed that courts "[m]ust be careful not to place too much reliance" on circumstantial evidence, though it may, sometimes, carry the day for a defamation claim. *Harte-Hanks Communications*, 491 U.S. at 668. "This constitutional standard 'is a daunting one' which very few public figures can meet." *Fridman*, 229 A.3d at 509 (citing *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996)). Permitting a plaintiff to bring his claim before a jury by simply "introduc[ing] pieces of circumstantial evidence tending to show that the defendant published in bad faith . . . would be inadequate to ensure correct application of both the actual malice standard and the requirement of clear and convincing evidence." *Tavoulareas*, 817 F.2d at 789. Here, no reasonable jury could find, based upon Plaintiff's evidence, a noteworthy bias or knowledge giving rise to actual

malice, and certainly not by the clear and convincing evidence standard that is required. *Anderson*, 477 U.S. at 256.

Plaintiff attacks CEI's ignorance theory further by attempting to discredit Mr. Scribner's testimony, declaring that "Mr. Scribner has told different stories at different times in this case[.]" Pl.'s Mem. P. & A. Opp'n 20. Discredited testimony is not typically considered sufficient for drawing a contrary conclusion. *Anderson*, 477 U.S. at 256-57 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984)). To be sure, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson*, 477 U.S. at 255. Even presuming Plaintiff's assertion as true, there is simply not sufficient evidence upon which a reasonable jury could find, by clear and convincing evidence, actual malice on the part of CEI.

Plaintiff "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Id.* at 257. Plaintiff has failed to offer evidence that CEI acted with actual malice in publishing the Simberg Article sufficient for a reasonable jury to find in his favor. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged." *Harte-Hanks Communications*, 491 U.S. at 686. The First Amendment requires that a defamation claim pursued by a public figure be supported by a showing of particularly bad-faith behavior by a defendant, lest the freedom of speech be infringed and the press be dissuaded from participation in important national conversations. Indeed, media defendants have the right to publish pieces from outside writers, as CEI did here, on matters of public concern. Plaintiff's failure to show actual malice is the result of the nature of the blog in which the Simberg Article appears: It is a blog designed for low-effort

management on the part of CEI, where outside writers enjoy a platform for their opinions, with only cursory review by a relatively low-ranking CEI employee prior to publication.

ii. Mr. Simberg's Actual Malice

The CEI Defendants argue that Plaintiff is "unable to show by clear and convincing evidence that Simberg acted with actual malice." Defs.' Mem. P. & A. Mot. Summ. J. 15. The CEI Defendants predicate this conclusion on two separate arguments: First, Mr. Simberg did not intend to convey that Plaintiff committed fraud and, second, even if he did, Mr. Simberg harbored no doubts as to the truth of the Simberg Article.

1. Intent

The CEI Defendants argue that, applying the *New York Times* standard, a statement is judged by the intent of the writer and that liability does not result from a writer's choice of the wrong language, or because those who read the statement are mistaken as to what was intended by the words. Defs.' Mem. P. & A. Mot. Summ. Judg. 15 (quoting Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 5:5.1[B] (5th ed. 2017, 4/20 update)). The CEI Defendants provide a line of authority that explains "intent" as a separate element of defamation pertinent to the actual malice determination. Defs.' Mot. Mem. P. & A. Summ. J. 15-16 (citing *Bose Corp.*, 466 U.S. at 511 n.30; *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 90 (3d Cir. 2013); *Compuware v. Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007); *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002); *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1064 (9th Cir. 1998); *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 666-80 (9th Cir. 1990); *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 1318 n.3, 1318-19 (7th Cir. 1988); *Woods v. Evansville Press Co.*, 719 F.2d 480, 487 (7th Cir. 1986)). The CEI Defendants argue that "[t]he undisputed

evidence shows that Simberg did not intend to level that accusation, but to criticize Penn State's investigation of Plaintiff's conduct as a whitewash." Defs.' Mem. P. & A. Mot. Summ. J. 17. They offer that, although Mr. Simberg believed Plaintiff to have engaged in misconduct, the post was specifically targeting Penn State's investigation, not Plaintiff.

To support their position, the CEI Defendants employ, to a near-breaking point, a decision of the United States Court of Appeals for the Ninth Circuit, *Newton v. National Broadcasting Co., Inc.*, in which the Ninth Circuit overturned a jury verdict in favor of Wayne Newton in a claim he had levied against NBC. 930 F.2d at 687, *cert. denied*, 502 U.S. 866 (1991). The district court had denied both summary judgment and judgment notwithstanding the verdict. *Id.* at 667-68. The statements at issue were in a news report detailing investigations into Newton's alleged connection to the mafia. *Id.* at 666-67. The Ninth Circuit overturned the verdict, in part, because "[t]he district court erred in its ruling that an interpretation of the broadcast that 'should have been foreseen' by the NBC journalists can give rise to liability." *Id.* at 680. The Ninth Circuit explained that "constitutional malice does not flow from a finding that an 'intelligent speaker' failed to describe the words he used as the finder of fact did." *Id.* at 681. It concluded:

> Yet that ground, in the end, is the basis for the district court's ruling: since the implication it took from the broadcast was "clear and inescapable" to the court, it concluded that the jury could properly find that NBC and its journalists intended to leave that impression. Such an approach eviscerates the First Amendment protections established by *New York Times*. It would permit liability to be imposed not only for what was not said but also for what was not intended to be said.

Id. The CEI Defendants claim that "Plaintiff cannot meet his burden of proving that Simberg intended to convey the alleged implication that Plaintiff engaged in fraud or the like." Defs.' Mem. P. & A. Mot. Summ. J. 17.

The CEI Defendant's bold argument is defeated by the plain text of the Simberg Article. Some rather acute examples include: (i) "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[;]" (ii) ". . . many of the luminaries of the 'climate science' community were shown to have been behaving in the most unscientific manner. Among them were [Plaintiff];" and (iii) "the emails revealed [Plaintiff] had been engaging in data manipulation to keep the blade on his famous hockey-stick graph[.]" *CEI*, 150 A.3d at 1262-63. To be sure, the thrust of the Simberg Article may be properly read as calling for a new investigation. However, Plaintiff's alleged misconduct is posited as the reason for a new investigation, and is repeatedly asserted as fact. Mr. Simberg's assertions hold far more certainty than NBC's comparatively careful news story in *Newton*. 930 F.2d at 666-67.

Although the CEI Defendants contend that the intent requirement "is distinct from the separate element of whether a statement is susceptible to a defamatory meaning," Defs.' Mem. P. & A. Mot. Summ. J. 15 n.2, the Court notes that the Court of Appeals has already found that "[a] jury could find that the article accuses Dr. Mann of engaging in specific acts of academic and scientific misconduct in the manipulation of data[.]" *CEI*, 150 A.3d at 1243. Plaintiff, as well, points to Mr. Simberg's own deposition, in which he was asked: "Did your article communicate the fact that [Plaintiff] was deceitful and a fraud?" To which Mr. Simberg replied: "It communicated my opinion that he was." Williams Decl., Ex. 11, Simberg Dep. 142:12-14 (hereinafter "Simberg Dep."). In his deposition, Mr. Simberg asserts repeatedly that he only intended to call for an investigation and that any assertions of fraud were merely his "opinion." *See*, *e.g.*, Simberg Dep. 142:10-149:4.

The CEI Defendants' other authority contains facts far more akin to those of *Newton* than to those here. In *Dodds v. American Broadcasting Co.*, the Ninth Circuit found that there was no evidence that ABC actually intended, in a broadcast about judicial decision-making, to accuse a sitting judge of using a toy crystal ball to make decisions. 145 F.3d 1053, 1064 (9th Cir. 1998). In *Saenz v. Playboy Enterprises*, the Seventh Circuit found that there was no evidence that Playboy Magazine intended to accuse a United States official of personally advising foreign police in suppressing political dissent and the use of torture. 841 F.2d 1309, 1318-20 (7th Cir. 1988). Tellingly, the Seventh Circuit found that, "rather than demonstrating that [the author] or Playboy intended to label him a torturer, the bulk of [plaintiff's] evidence merely indicates that the defendants could not reasonably have concluded that he was a torturer." *Id.* at 1318. The article at issue in *Saenz* merely linked the official to the torture, but did not explicitly state that he participated or advised in its execution. *Id.* Here, Mr. Simberg has plainly stated that Plaintiff "has molested and tortured data in the service of politicized science[,]" *inter alia*. This, in addition to circumstantial evidence that Plaintiff highlights in opposition, is enough for a reasonable jury to find intent by clear and convincing evidence. To be sure, the facts teased through additional discovery, only support the Court of Appeals' conclusion in its 2016 Opinion.

2. Reckless Disregard for the Truth

The CEI Defendants argue that, even if Mr. Simberg had intended to accuse Plaintiff of fraud, "Plaintiff still could not carry his burden of proving by clear and convincing evidence that Simberg entertained serious doubts as to the truth of that implication." Defs.' Mem. P. & A. Mot. Summ. J. 17. The CEI Defendants point to a list of sources published, or made public, prior to Mr. Simberg's writing his article. These include the Climategate emails "by or concerning Plaintiff[,]" peer-reviewed articles and further analysis criticizing Plaintiff's hockey

stick research as biased, and purported deficiencies of the formal investigations into Plaintiff's conduct. Defs.' Mem. P. & A. Mot. Summ. J. 18-25. The CEI Defendants argue that Mr. Simberg "had a firm basis" to accuse Plaintiff of fraud, "[b]ased on what he understood from numerous sources whose credibility he had no reason to doubt." Defs.' Mem. P. & A. Mot. Summ. J. at 25.

Plaintiff's challenge to this narrative appears to be two-fold. First, Plaintiff offers a logic-based semantic argument, that goes as follows: (i) Mr. Simberg accused Plaintiff of "academic and scientific misconduct[;]" (ii) Mr. Simberg provided a definition of the terms by citing the Research Misconduct Regulations of the National Science Foundation, and linked to an article that clearly stated that Plaintiff had been cleared of such charges; (iii) Mr. Simberg was therefore aware of National Science Foundation's research misconduct standards; and (iv) Mr. Simberg made accusations of misconduct, in spite of the standards. Plaintiff concludes that "[t]he evidence of actual malice in this case is clear and convincing: Mr. Simberg knew that the allegation of misconduct was false." Pl.'s Mem. P. & A. Opp'n 25.

This argument does not settle the issue of actual malice as cleanly as Plaintiff concludes. A jury need not rely upon technical definitions of "misconduct" or any other term that Mr. Simberg uses in his article. The meanings are easily understood by a layperson. And, while the Court of Appeals found that the evidence on the record at the time showed Mr. Simberg's accusations to be false, evidence tending to show the opposite has been offered. *CEI*, 150 A.3d at 60-64. The fashion in which Mr. Simberg presented his statements, and the potential defamatory meaning, are up to jury interpretation.

Plaintiff's second challenge speaks more to the heart of the dispute. As discussed in relation to CEI, the Court of Appeals, in reviewing the evidence in 2016, and asking

"substantively the same" question as the Court asks, now, found the existence of the various investigatory reports enough to give rise to an inference of actual malice. *CEI*, 150 A.3d at 1238 n.33, 1253. The Defendants' argument on appeal asserted that the nature of the reports did not give them cause to doubt the veracity of their statements; the Court of Appels disagreed. *Id.* at 1255-60. The Court of Appeals extensively considered claims of the reports' "unreliability" and "subjectivity," and concluded that they were not unreliable or inherently subjective such that Mr. Simberg's accusations could be made in flagrant disregard of their findings.[2] *Id.* at 1255-58.

At the time of the Court of Appeals' review, the record lacked evidence attesting to Mr. Simberg's personal beliefs in juxtaposition with the investigatory reports. *Id.* at 1255 n.56. The Court of Appeals observed that, "[o]nce discovery is completed, the legal conclusion that the evidence is sufficient to go to trial could change." *Id.* at 1258 n.60. Mr. Simberg has presented numerous sources upon which he relied in writing the Simberg Article, including the Climategate emails and peer-reviewed articles. Defs.' Mem. P. & A. Mot. Summ. J. 18-25. While the Court may not weigh such evidence against the findings of the various investigatory bodies, *See Anderson*, 477 U.S. at 255, Mr. Simberg must still contend with the fact that he was aware of the investigatory reports and their conclusions. *See, e.g.*, Simberg Dep. 156:21-22; 167:8-10. Yet, notwithstanding the reports' conclusions, he lobbed his accusations.

Plaintiff points to the fact that Mr. Simberg admits that he did not contact Stephen McIntyre or Ross McKitrick, two researchers who published a peer-review article that Mr. Simberg relied upon in making his statements against Plaintiff. Simberg Dep. 128:8-129:11. The Court does not comment upon the lengths to which Mr. Simberg should have gone to verify

[2] The Court will decline to repeat, here, the extensive review of the various investigations that the Court of Appeals as sufficiently conducted. The Court simply refers the Parties to the Court of Appeals' 2016 Opinion, as amended in 2018. *Id.* at 1255-58.

that his statements were true, as a matter of accurate reporting, but failing a reasonable standard of journalism is no cause of action for defamation. *Harte-Hanks Communications*, 491 U.S. at 688.

The Court of Appeals also noted that a jury may properly rely upon the CEI Defendants' "zeal in advancing their cause against the hockey stick graph's depiction of a warming global climate[.]" *Id.* at 1259. Unlike Mr. Scribner, who has an insufficient record of criticism against Plaintiff to support a jury finding of actual malice, Mr. Simberg has repeatedly thrown himself into the fray of the climate change debate and has publicly criticized Plaintiff prior to writing the Simberg Article, in no uncertain terms. He has stated publicly that "I am a true skeptic on the subject [of climate change] . . . I've reached a tipping point. Now consider me a 'denier.'" Williams Decl., Ex. 107. He has written that "schools shouldn't be allowed to show [Al] Gore's documentary, other than as an example of hysterical, lying propaganda." Williams Decl., Ex. 12. He has, prior to the article now in dispute, claimed: "I think that [Plaintiff] should have lost his job over [Climategate]. He was committing scientific fraud to promote a political agenda." Williams Decl., Ex. 106. Moreover, the Simberg Article was not the first time that Mr. Simberg compared Plaintiff to Jerry Sandusky. Williams Decl., Ex. 108. Plaintiff offers further examples, but those listed here tend to support a jury finding by clear and convincing evidence that Mr. Simberg wrote the Simberg Article with actual malice.

The Court of Appeals rightly cautioned that the analysis of Mr. Simberg's actual malice must not be mistaken for an analysis of opinions that he expressed in participation in the global debate over global warming. *CEI*, 150 A.3d at 1253 ("Much as Dr. Mann's pride in his work may be wounded by criticisms of the hockey stick graph, [Defendants] are entitled to their opinions on the subject and to express them without risk of incurring liability for defamation.").

Indeed, the First Amendment protects such participation. *Id.* "But defamatory statements that are personal attacks on an individual's honesty and integrity and assert or imply as fact that Dr. Mann engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable." *Id*. at 1243. Plaintiff offers significant evidence that Mr. Simberg held ill-will for Plaintiff and that he was zealous in advancing his side of the climate change debate. The combination of such evidence would give a reasonable jury sufficient justification to find that Mr. Simberg acted with actual malice. The Court must deny summary judgment on this issue.

II. Falsity

The First Amendment requires that, in a public figure defamation case, the plaintiff bear the burden of showing that the challenged statements are false. *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991); *Phila. Newspapers v. Hepps*, 475 U.S. 767, 776-77 (1986) ("Placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result."). Statements that "imply a provably false fact, or rely upon stated facts that are provably false" can be actionable. *CEI*, 150 A.3d at 1241 (citing *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000)). "There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence." *Harte-Hanks Communications*, 491 U.S. at 661 n.2; *see also Newton*, 930 F.2d at 669 n.7; *Tavoulareas*, 817 F.2d at 786 n.33. A "colorless denial" of a statement's substantial truth will not defeat a properly supported request for summary judgment for a defendant. *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 188 (2nd Cir. 2000).

Both Plaintiff and the CEI Defendants have moved for summary judgment on perhaps the most controversial question in this case: Whether Mr. Simberg's statements accusing Plaintiff of fraud and misconduct are true or false.

A. CEI Defendant's Motion for Summary Judgment on the Issue of Falsity

The CEI Defendants argue that "Plaintiff cannot carry his burden of proving falsity of the statements he challenges[.]" Defs.' Mem. P. & A. Mot. Summ. J. 26. The CEI Defendants offer evidence that Plaintiff manipulated data, and concealed such manipulation from the public as well as investigators. Defs.' Mem. P. & A. Mot. Summ. J. 26-29. The CEI Defendants further offer evidence criticizing Penn State's investigation into Plaintiff's activities. Defs.' Mem. P. & A. Mot. Summ. J. at 28. Plaintiff argues in opposition that the CEI Defendants' offered "facts" to support summary judgment are hotly contested, and that many accusations do not relate to the defamatory statements at issue. Pl.'s Mem. P. & A. Opp'n 43-46.

The extensive Statement of Disputed Material Facts plainly shows that there remain a great number of genuine disputes of material fact as to the methods that Plaintiff used to develop his hockey stick graph, the conclusions to be drawn from the Climategate emails, and Plaintiff's actions while under investigation. Pl.'s SDMF ¶¶ 45-320. A reasonable jury could find, from this evidence, in favor of either Plaintiff or the CEI Defendants.

In short, deciding the veracity of Mr. Simberg's article would be an inappropriate intrusion into the role of the jury. The CEI Defendants have not "demonstrate[d] that there is no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." *Grant*, 786 A.2d 580. Indeed, the truth or falsity of the statements in the Simberg Article is the core of this case.

It is worth briefly repeating, as the Court of Appeals has stated that, "[t]o the extent statements in [the Simberg Article] take issue with the soundness of Dr. Mann's methodology and conclusions— i.e., with ideas in a scientific or political debate—they are protected by the First Amendment." *CEI*, 150 A.3d at 1242. Therefore, evidence of Plaintiff's methodology will be strictly limited to that which is relevant to prove or disprove the veracity of the defamatory statements against Plaintiff.

In refusing the CEI Defendants' argument that Mr. Simberg's statements are not actionable because they are mere opinion, the Court of Appeals, rather helpfully for the Court's purposes, established the following:

> Mr. Simberg's article contains two principal defamatory assertions about Dr. Mann. The first is that Dr. Mann has been "shown" to have behaved in a "deceptive" and "most unscientific manner" because he "molested and tortured data in the service of politicized science" as was "revealed" in the leaked CRU emails. This is followed by a related defamatory assertion, that Dr. Mann engaged in "academic and scientific misconduct" that Penn State's investigation exonerating Dr. Mann of these charges failed to uncover because Penn State was biased and its investigation was a "whitewash."

Id. at 1244-45. It is these statements that must be proven at trial, for Plaintiff to succeed. This is not a lawsuit over the existence or legitimacy of climate change. Nor is it a lawsuit over the veracity of the hockey stick graph, although the perception of the hockey stick graph will undoubtedly be implicated by the activities that took place in its formation and the investigation into Plaintiff's conduct.

The Court must deny summary judgment on the issue of falsity.

B. Plaintiff's Partial Motion for Summary Judgment on the Issue of Falsity

In his Opposition to the CEI Defendants' motion for summary judgment, Plaintiff posits that "[s]ubstantial truth is a defense that permits the court to overlook *minor inaccuracies and*

mistakes" and that, "[a]s an affirmative defense, the burden is on the defendant[.]" Pl.'s Mem. P. & A. Opp'n 42 (emphasis in original). In his own Partial Motion for Summary Judgment, Plaintiff argues both that there is no genuine issue of material fact relating to the showing that he himself must make in his claim, and that the CEI Defendants should not be able to assert truth as an affirmative defense. Pl.'s Mem. P. & A. Mot. Partial Summ. J. 25-36.

Plaintiff's position that the burden to show falsity is on the CEI Defendants is incorrect. The Supreme Court, in *Phila. Newspapers*, has provided the following:

> We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

475 U.S. at 776. The Supreme Court spoke at length about what restrictions were to be placed on speech in the context of defamation claims where the First Amendment applies. *Id*. at 776-79. Justice O'Connor concluded:

> Because such a chilling effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could only result in a deterrence of speech which the Constitution makes free.

Id. at 777 (citations and internal quotations omitted). Plaintiff is only able to identify one potentially persuasive public figure defamation case, *Lohrenz v. Donnelly*, where a court appeared to consider the argument of truth as an affirmative defense. 223 F.Supp.2d 35, 59 (D.D.C. 2002). The finding on the question of substantial truth was immaterial to the outcome of the case and, on appeal, the United States Court of Appeals for the District of Columbia Circuit made no mention of the substantial truth analysis. *See Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003). Outside of this anomaly, Plaintiff cites to several cases that are unpersuasive for a

host of reasons. Pl.'s Mem. P. & A. Mot. Partial Summ. J. 29-30 (citing *Schiavone Constr. Co. v. Time, Inc.*, 619 F.Supp. 684, 700 n.10 (unpersuasive in that the court explicitly states "[P]laintiffs here assume that burden [of showing truth.]"); *Killian v. Doubleday & Co.*, 79 A.2d 657, 660 (Pa. 1951) (pre-*New York Times v. Sullivan*); *Register Newspaper Co. v. Stone.*, 102 S.W. 800 (Ky.App. 1907) (pre-*New York Times v. Sullivan*); *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 475-76 (1955) (pre-*New York Times v. Sullivan*); *Weber v. Fernandez*, Case No. 02-18-00275-CV, 2019 Tex. App. LEXIS 2487, at *25-32 (Tex.App.Fort Worth Mar. 28, 2019) (unpersuasive in that the court explicitly states that "[plaintiff] did not carry his burden [to show falsity.]")).

It would be in violation of the First Amendment for this Court to grant summary judgment on the issue of falsity due to the CEI Defendants' failure to meet a burden showing truth. *Phila. Newspapers*, 475 U.S. at 777. And, for the same reasons explained above with regard to the CEI Defendants' motion for summary judgment on the issue of falsity, it would be an impermissible encroachment into the province of the jury for the Court now to decide the veracity of Mr. Simberg's statements.

The Court must deny Plaintiff's Motion for Partial Summary Judgment.

III. Compensatory and Punitive Damages

Plaintiff is seeking compensatory damages that require proof. *See* Order Granting, in Part, Defs. CEI and Simberg's Mot. Compel, May 5, 2020, at 2. Plaintiff is therefore "require[d] . . . to prove the (1) existence of an actual injury, (2) causation traced back to the defendant's wrongdoing, and (3) the amount that is precisely commensurate with the injury suffered." *Id.* at 2 (citing *Amiri v. Government of the Dist. of Columbia*, Case No. 97-0881, 2000 U.S. Dist. LEXIS 7263, at *3 (D.D.C. May 17, 2000)). Plaintiff also seeks punitive damages, which requires him to establish that "he has suffered compensable harm as a prerequisite to the

recovery of additional punitive damages" by "proving the elements set forth above." *Id.* at 4 (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 66 (1966)).

The CEI Defendants argue that Plaintiff's "compensation grew substantially following publication of the Simberg's post[,]" and that he has won "professional honors and awards" during that period. Defs.' Mem. P. & A. Mot. Summ. J. 30. The CEI Defendants further argue that Plaintiff "has no way to determine whether that injury was caused by Simberg and CEI as opposed to the thousands of other people whom he says have defamed him[.]" Defs.' Mem. P. & A. Mot. Summ. J. 30.

Plaintiff argues that presumed damages may be recovered for "harm to reputation and standing in the community, personal humiliation, and mental anguish and suffering." Pl.'s Mem. P. & A. Opp'n 46. Plaintiff argues that actual damages require proof of injury and causation, such as lost sales or referrals. Pl.'s Mem. P. & A. Opp'n 47 (citing Defamation: A Lawyer's Guide § 9:1). Plaintiff offers that punitive damages requires a showing of actual malice. Pl.'s Mem. P. & A. Opp'n 47 (citing *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1510 (D.D.C. 1987); *Connors, Fiscina, Swartz & Zimmerly v. Rees*, 599 A.2d 47, 49 n.2 (D.C. 1991)).

Plaintiff offers the testimony of John Abraham, Ph.D., who testified that "I know that [Plaintiff] has been omitted from major research projects because of [the Simberg Article]. In fact, I was the lead author on an article that was published in 2013 where I made the decision not to include him amongst the authors." Williams Decl., Ex. 84, at 202:10-15. He further added "I said [at the time] that I [was] reluctant to bring [Plaintiff] onto any of my research projects because he's radioactive, and that was because of these articles." *Id.* at 206:19-22.

Plaintiff offers the Expert Report of John R. Mashey, which claims the following:

> For the four years prior to July 2012, [Plaintiff] received grants of over $3 million on proposals for which he was the principal or co-

> principal investigator. In the four years after July 2012, he received grants of slightly less than $1 million on proposals for which he was the principal or co-principal investigator.

Williams Decl., Ex. 52, at 41. The CEI Defendants argue that "Plaintiff cannot identify any loss he has suffered—through decisions of Penn State, grant reviewers, or anyone else—as a result of Simberg's post." Defs.' Mem. P. & A. Mot. Summ. J. 30.

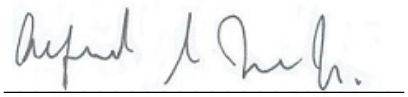
Plaintiff also claims, in his own deposition, that he received disapproving glances in the community, "[o]ften enough for him to notice[,]" that he attributed to his having been accused of participating in "a massive Penn State conspiracy" and having been compared "to a child molester." Williams Decl., Ex. 73, at 171:15-172:18.

There is conflicting evidence as to the effect the Simberg Article had on Plaintiff's reputation and income. Indeed, there was much talk about the Climategate emails and subsequent investigations into Plaintiff's conduct at the time. These other occurrences may have had a deleterious result for Plaintiff's reputation and income, thus obfuscating any damage attributable specifically to the Simberg Article. But, Plaintiff has raised evidence sufficient to survive summary judgment on this question, and the Court may not weigh the evidence at this stage. *Anderson*, 477 U.S. at 249. A reasonable jury could find that the Simberg Article caused injury to Plaintiff sufficient to support compensatory damages. And, as discussed at length above, a jury may find actual malice in Mr. Simberg's publishing of the Simberg Article. The Court must deny summary judgment on the issue of damages.

ACCORDINGLY, it is by the Court this 22nd day of July 2021, hereby

ORDERED that Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Summary Judgment is **GRANTED, in part**, as it relates to Plaintiff's claims against Competitive Enterprise Institute; and **DENIED, in part**, as it relates to Plaintiff's claims against Rand Simberg; and it is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment Against the Competitive Enterprise Institute and Rand Simberg on the Issue of Falsity, and Motion to Strike their Affirmative Defense that their Statements were Not "Substantively False" is **DENIED**.



Judge Alfred S. Irving, Jr.

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