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. ORAL HEARING REQUESTED

Defendants Competitive Enterprise Institute and Rand Simberg's
Motion for Summary Judgment

Pursuant to Superior Court Civil Rules 12-I and 56, Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg respectfully move for summary judgment on all remaining counts of Plaintiff's Amended Complaint on the grounds that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. CEI and Simberg also move for partial summary judgment on Plaintiff's demands for compensatory and punitive damages on the grounds that no genuine issue of material fact exists and that they are entitled to partial summary judgment as a matter of law. In support of their Motion, Defendants CEI and Simberg submit the attached Memorandum of Points and Authorities; Statement of Undisputed Material Facts, with declarations and exhibits attached thereto; and a Proposed Order.

Rule 12-I Certification

I hereby certify that counsel for Defendants CEI and Simberg conferred with Plaintiff's counsel regarding Plaintiff's consent to the relief sought in this Motion, and Plaintiff's counsel represented that Plaintiff does not consent.

Oral Hearing Requested

Dated: January 22, 2021

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 22, 2021, I caused a copy of the foregoing Motion, and all accompanying papers, to be served by CaseFileXpress upon the following:

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Memorandum of Points and Authorities in Support of Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Summary Judgment

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Introduction

Plaintiff is a climate scientist who obtained minor renown in the late 1990s for research depicting a historically anomalous recent rise in global temperature levels and has since engaged himself in climate-policy activism. From the beginning, Plaintiff's "hockey stick" research—so called for the shape of his temperature graph with its upward-pointing "blade"—was subject to substantial criticism, particularly that he monkeyed with the statistics to produce the hockey stick-shaped result and then concealed its statistical invalidity. That view, already supported in the scholarly literature, found further support when a cache of private emails among climate scientists was released in 2009, an event known as "Climategate." One email disclosed a "trick" by Plaintiff "to hide the decline" in recent temperatures, others reflected his participation in a scheme to destroy information so as to stymie public-records requests by researchers critical of his research, and still others revealed his efforts to suppress research critical of his publications and research results. Plaintiff's employer, the Pennsylvania State University ("Penn State") conducted an investigation that was widely derided as a "whitewash" for its dismissal of most charges without investigation and evident eagerness to clear Plaintiff on the remaining charge.

Plaintiff now claims that Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg defamed him in a weblog post calling for a new investigation that Simberg contributed to CEI's Open Market weblog. But the First Amendment prohibits liability unless they acted with "actual malice," which requires that each separate defendant intended to convey the defamatory implication alleged by Plaintiff and "in fact entertained serious doubts as to the truth" of it before publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). "This constitutional standard is a daunting one which very few public figures can meet." *Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 509 (D.C. 2020) (quotation marks omitted). The undisputed facts demonstrate that Plaintiff is not among those very few.

First, it is undisputed that the single CEI employee responsible for publication of Simberg's post, Marc Scribner, entertained no doubt as to its truth. Scribner did not even know what the post was about when he clicked the button to publish it. Moreover, Scribner knew little of Plaintiff and

the charges against him, let alone how they had been resolved. Scribner relied on Open Market's contributors to ensure the accuracy of the posts they submitted, and the First Amendment entitled him and CEI to do so without risk of liability. Because Scribner entertained no doubt as to the truth of Simberg's post, CEI cannot be held liable.

Second, it is undisputed that Simberg did not intend to convey the implication alleged by Plaintiff—that Plaintiff was guilty of fraud. Actual malice is a subjective standard, and it does not permit liability for false implications that were not intended, even implications that were obvious or should have been foreseen. Only a "calculated falsehood" will support actual malice, but Simberg did not calculate to accuse Plaintiff of fraud. He sought to criticize Penn State's prior investigation of Plaintiff's conduct as a whitewash because it failed to grapple with the widely-reported red flags raised by the Climategate emails, by criticisms of Plaintiff's research, and by Plaintiff's behavior toward scientists and others who disagreed with his research and advocacy. Even if Simberg's words were imprecise and could be interpreted to level an accusation, the First Amendment does not permit liability merely because a writer chose the wrong language or because some readers understood it that way.

Third, had Simberg intended to accuse Plaintiff of fraud, it is undisputed that he in fact entertained no serious doubts as to that charge. Simberg understood the Climategate emails to reveal, among other things, statistical chicanery in Plaintiff's research and Plaintiff's participation in a scheme to destroy information to evade public-records requests. Simberg was aware that scores of scientists, academics, journalists, and others familiar with the facts had publicly accused Plaintiff of fraud, data manipulation, and misconduct based on the Climategate disclosures. Even Plaintiff's fellow climate scientists questioned the veracity, honesty, and defensibility of his work. Although Penn State had purported to clear Plaintiff, its investigation was widely condemned as a whitewash, which Simberg believed was apparent on the face of its reports: they simply ignored damning language from the very Climategate emails that they claimed to be investigating. Based on what he understood from numerous sources whose credibility he had no reason to doubt,

Simberg outlined why he believed a "fresh, independent investigation" was warranted, and the First Amendment entitled him to do so.

Fourth, Plaintiff cannot carry his burden to prove falsity. Simberg's statements were, at the least, substantially true. It is undisputed that Plaintiff's research did depend on abnormal and undisclosed data manipulation to achieve its results. Plaintiff concealed his reliance on unusual "padding" to keep the upward-pointing blade on his famous hockey-stick graph; concealed his reliance on inadequate data; concealed reported measures of his research's lack of statistical significance; engaged in what a co-author called "manipulation of evidence"; participated in the destruction of documents to evade public-records requests; and repeatedly lied to and withheld material information from Penn State's investigators and others. Simberg's statements, even if accorded an implication he did not intend, are substantially true, and that too bars liability.

Finally, if Plaintiff's claims may proceed, the Court should enter partial summary judgment that Plaintiff is not entitled to compensatory or punitive damages. To obtain either of these categories of damages, Plaintiff's burden is to prove an actual injury that was caused by CEI and Simberg's alleged wrongdoing and the amount of damages that is precisely commensurate with that injury. It is undisputed, however, that Plaintiff suffered no such injury, particularly one *caused by Simberg's post*. For that reason, even if his claims may proceed to trial, he can obtain at most only nominal damages.

Factual Background

A. CEI and Its "Open Market" Weblog

The Competitive Enterprise Institute is a free-market think tank founded in 1984 that researches and publishes on matters of economic and regulatory policy. Statement of Undisputed Material Facts ("SUMF") ¶ 1. From 2006 to 2014, it published the "Open Market" weblog as a forum for its policy staff and affiliated policy experts to comment on policy-related news and participate in fast-moving policy debates. *Id.* ¶ 7. Rather than solicit posts for Open Market, CEI relied on Open Market's contributors to identify appropriate topics and submit posts on their own initiative. *Id.* ¶ 8. It also relied on contributors for the substance and accuracy of their posts. *Id.*

¶ 16. Although only designated editors could publish submitted posts, the pre-publication editing process involved only the correction of typographical and grammatical errors and formatting errors. *Id.* ¶¶ 10, 11, 15. CEI trusted its contributors to exercise good judgment in their posts and to ensure the accuracy of what they posted, and it did not expect the relatively junior editor principally responsible for publishing posts to second-guess or check its expert contributors' policy positions, reasoning, factual claims, style, or tone. *Id.* ¶¶ 15–16.

That editor was Marc Scribner, who joined CEI as a full-time employee right after he graduated from college in 2009. *Id.* ¶¶ 13–14. By 2012, Scribner split his time between his editing duties and working on transportation policy, and hoped to transition fully to policy. *Id.* ¶ 14. Throughout the workday, Scribner was frequently interrupted by incoming email notifications from Open Market's publishing software that new posts had been submitted and were ready for his review. *Id.* ¶¶ 12, 19. Scribner sought to publish posts promptly, and so—anywhere from four to ten or more times per day—he would stop what he was doing to review and publish an Open Market post. *Id.* ¶ 19. While Scribner reviewed all posts for formatting errors, which were a frequent problem and could break the website's display, he knew that certain contributors like Simberg were careful writers and that reviewing their posts for typographical and grammatical errors was not necessary. *Id.* ¶¶ 17–18. To make good use of his time, Scribner took care in reading through the posts that he believed needed it, but only ran his eyes over the formatting of other posts that he knew, based on the author, were unlikely to require correction. *Id.*

B. Simberg's Relationship with CEI

Rand Simberg is an aerospace consultant who also works on space policy, particularly concerning the commercialization of space. SUMF ¶ 22. His background is in engineering, and he holds multiple engineering degrees from the University of Michigan in Ann Arbor and a Master of Science in Engineering Management degree from West Coast University. *Id.* ¶ 23. He worked for many years in aerospace engineering and project management at the Aerospace Corporation and Rockwell International Corporation. *Id.* ¶ 24. In recent years, he has focused on public policy and has published extensively on space technology and policy, including the 2013 book *Safe Is*

Not an Option. *Id.* ¶ 25. Simberg also maintains a personal weblog, "Transterrestrial Musings," where he comments on news, science, politics, and policy. *Id.* ¶ 26.

In 2011, CEI engaged Simberg to work on space policy as an Adjunct Scholar. *Id.* ¶ 31. Simberg agreed to produce two significant publications for CEI, as well as regular posts for Open Market or op-eds, on space policy and related issues. *Id.* During this period, Simberg was a regular contributor to Open Market, authoring numerous posts on space policy. *Id.* ¶ 32. Scribner reviewed and published Simberg's posts and edited a white paper authored by Simberg on property rights in space. *Id.* ¶¶ 39–40. Scribner saw that Simberg's writings addressed complex policy issues in highly technical language and that Simberg was a careful writer. *Id.* ¶¶ 41–42. From working on Simberg's posts, Scribner recognized that substantive editing was not necessary and knew that, if there were any errors or mistakes, Simberg could correct them himself, as Simberg regularly did after being given permission to revise his posts after publication. *Id.* ¶¶ 42–44, 364–65. Simberg's engagement with CEI concluded in March or April of 2012. *Id.* ¶ 35. CEI continued to list him on its website as an "Adjunct Scholar," as was its typical practice for affiliates with whom it worked from time to time. *Id.* ¶ 37. And Simberg continued, without compensation, to contribute posts to Open Market. *Id.* ¶ 38.

C. Plaintiff's "Hockey Stick" Research and "Climategate"

Plaintiff Michael Mann is a Professor of Meteorology at Penn State University whose controversial "hockey stick" publications conclude the 20th century experienced a historically anomalous rise in global temperatures. SUMF ¶ 45. For a 1998 paper ("MBH98"), Plaintiff ran regressions on a pieced-together dataset of hundreds of proxies for historical temperature—primarily tree rings, but also ice cores, pinecone dimensions, and coral growth—in an attempt to reconstruct global temperature patterns from 1400 to the present. *Id.* ¶ 49. His statistical reconstruction of global temperatures over time showed little variation until 1880 and a sharp upswing thereafter—the "hockey stick." *Id.* ¶¶ 47–49. A 1999 paper ("MBH99") extended the reconstruction back another 400 years, to 1000 A.D. *Id.* ¶ 50. Based on this analysis, it concluded that the 1990s were the warmest decade going back a millennium and that recent warming was anomalous and severe. *Id.*

Plaintiff's research drew extensive criticism and controversy. A number of papers concluded that Plaintiff's statistical models are predisposed to generating the hockey-stick result, based on irregular choices Plaintiff made in his methodology. *Id.* ¶ 53. For example, Professor Ross McKitrick and Stephen McIntyre published a peer-reviewed article finding that, due to certain abnormal and undisclosed statistical steps undertaken by Plaintiff, "a hockey-stick shaped [result] is nearly always generated from (trendless) red noise with the persistence properties of the North American tree ring network." *Id.* ¶ 54. They also found that Plaintiff had failed to disclose standard validation statistics which demonstrated that Plaintiff's results lacked statistical significance. *Id.* ¶ 55. Plaintiff, in turn, responded by attacking those who questioned his research, including McIntyre, typically by accusing them of fraud or misconduct and of being paid off by the energy industry. *Id.* ¶¶ 131–32, 138, 151–74, 328.

Critics of Plaintiff's research found support in the 2009 release of 1,000 or so private emails and other documents and data exchanged among climate scientists, including Plaintiff—an event quickly dubbed "Climategate." *Id.* ¶ 117. One email described what it called "Mike's Nature trick," referring to Plaintiff's actions "to hide the decline" in global temperatures where the hockey stick's upward-trending blade was supposed to be. *Id.* ¶ 129. Other emails reflected efforts involving Plaintiff to blackball scientists skeptical of the hockey stick and to boycott scientific journals publishing criticisms of it or other research with which Plaintiff disagreed, to block other scientists and researchers from accessing data and climate-model code, and to destroy materials so that they could not be obtained through public-records requests. *Id.* ¶¶ 130–42.

Climategate sparked worldwide debate over the reliability of historical temperature reconstructions and over potential improprieties by the scientists behind that research, particularly Plaintiff. A blizzard of publications by scientists, journalists, and commentators analyzed the Climategate materials and reported that they demonstrated that Plaintiff had participated in "fraud," "scientific fraud," "criminal act[s]," and "data manipulation fraud," among other bad acts. *Id.* ¶¶ 332–36. The Climategate emails themselves, as well as those from a subsequent release known as "Climategate 2.0," disclosed that Plaintiff's academic peers, including co-authors, regarded his work

as "suspect," "crap," "clearly deficient," "wrong," not "statistically significant," plagued by "robustness problems," "deceptive," not "honest," "truly pathetic and should never have been published," and otherwise unsupportable. *Id.* ¶ 338.

A number of investigations ensued, only two of which—by Penn State and the National Science Foundation ("NSF")—investigated Plaintiff's conduct. *Id.* ¶¶ 175–320. In its investigation, Penn State "synthesized" four charges of potential "research misconduct" based on media reports: whether Plaintiff had (1) falsified data, (2) participated in the destruction of data, (3) misused privileged or confidential information, or (4) "seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities." *Id.* ¶ 231. Penn State dismissed the first three charges after interviewing Plaintiff, without investigation. *Id.* ¶¶ 247–77. It investigated the fourth charge and found in Plaintiff's favor based on, among other things, Plaintiff's "level of success in proposing research" and getting funding, that he "receive[d] so many awards and recognitions," and that he had published in "highly respected scientific journals." *Id.* ¶ 300.

The NSF found that Penn State's investigation was inadequate, particularly as concerned the data-falsification charge, and so conducted its own limited investigation on that charge. *Id.* ¶¶ 303–11. Relying largely on Penn State's investigatory materials, NSF found that much of Plaintiff's research and conduct at issue occurred before he had received NSF funding as a principal investigator in late 2001, and it further limited its inquiry under its regulatory definition of "research misconduct" to whether Plaintiff had "fabricated the raw data he used for his research or falsified his results." *Id.* ¶¶ 313–16. Applying those limitations, it found "no specific evidence that [Plaintiff] falsified or fabricated any data." *Id.* ¶ 317.

Penn State's investigation was widely condemned as a "whitewash" by scientists (including one who participated in it), journalists, and others familiar with the facts. *Id.* ¶¶ 335, 352–54. In subsequent years, numerous observers (including Simberg, on his personal weblog) compared Penn State's investigation of Plaintiff to the university's failure to seriously investigate allegations

of misconduct against another prominent faculty member, football coach Jerry Sandusky, who had been accused and was later convicted of child abuse. *Id.* ¶¶ 335, 351, 379.

D. Simberg's Weblog Post

On July 12, 2012, former FBI director Louis Freeh released his report on Penn State's handling of the Sandusky allegations. SUMF ¶ 355. Reading about the report, Simberg was struck again by the parallels between how Penn State had "investigated" that situation and how it had "investigated" the Climategate disclosures relating to Plaintiff, and he decided that the report provided a news hook for commentary calling for a new, more serious investigation. *Id.* ¶¶ 356–57, 361.

Simberg drafted the piece and then submitted it for publication to *PJMedia*, an online publication. *Id.* ¶ 358. After *PJMedia* passed, Simberg submitted it for publication on Open Market through its publishing software late in the day on Friday, July 13. *Id.* ¶¶ 359–60. Scribner received an email notification from the publishing software that a new post had been submitted. *Id.* ¶ 362. Knowing that Simberg was a meticulous writer whose writing did not require careful review, Scribner spent no more than a few minutes running his eyes over the post's formatting in the publishing software, correcting several minor items that he happened to notice: an extra space, a missing space beside an HTML tag, and use of "New York" rather than "N.Y." in a parenthetical following the identification of a member of Congress. *Id.* ¶¶ 365–67. As per his usual practice with Simberg's posts, Scribner paid no attention to the post's substance, assuming that it was about space policy or some other technical field. *Id.* ¶¶ 364–65, 368. After going over the formatting, Scribner hit the button to publish the post. *Id.* ¶ 369. Simberg and Scribner have never spoken and did not communicate concerning the post prior to its publication. *Id.* ¶ 371. Neither discussed the post with any CEI employee. *Id.* ¶¶ 371, 376.

Simberg's post, of course, was about Penn State's investigation of Plaintiff, and Simberg had given it the title "The Other Scandal in Unhappy Valley," referring to a colloquialism for Penn State ("Happy Valley") with which Scribner was unfamiliar at the time. *Id.* ¶ 363. As Simberg explained in the post, Penn State and the NSF had "declared [Plaintiff] innocent of any

wrongdoing," but "many in the skeptic community called [the Penn State investigation] a white-wash" because the "university circled the wagons and narrowed the focus of its own investigation to declare him ethical"—that is, narrowed the focus to exclude the serious questions raised by the Climategate emails. Those emails, Simberg argued, raised red flags: they "revealed [Plaintiff] had been engaging in data manipulation to keep the blade on his famous hockey-stick graph" and showed him to be (per Marc Morano, editor of the popular Climate Depot website) "'the posterboy of the corrupt and disgraced climate science echo chamber'" that acted to suppress criticism of Plaintiff's hockey-stick research. Thus, 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." Having covered up the Sandusky allegations, Simberg asked, would Penn State "do any less to hide academic and scientific misconduct, with so much at stake" in terms of reputation and funding? He concluded by calling for "a fresh, truly independent investigation." *Id.* ¶ 369.

Simberg's post attracted little or no attention for about week, at which point CEI became aware of criticism of the line referencing Plaintiff and Sandusky. *Id.* ¶ 363. CEI decided that the line was "inappropriate" for its website and so removed it and appended an editor's note explaining the revision. *Id.* ¶ 393. In the meantime, the pundit Marc Steyn had published a post on National Review's weblog "The Corner" quoting in part and linking to Simberg's post. *Id.* ¶ 394.

E. This Litigation

Plaintiff's longstanding view has been that climate scientists should "threaten a lawsuit" when necessary to prevent the publications of articles and research critical of his own research findings. SUMF ¶ 140. Plaintiff and his allies had long sought to "torpedo" CEI for its opposition to their climate-policy activism, and he believed that Simberg's post provided an opportunity for (as he told an ally) "taking down CEI" through legal action. SUMF ¶¶ 395, 400.

On October 22, 2012, Plaintiff filed suit against CEI, Simberg, National Review, and Steyn for libel and intentional infliction of emotional distress. His amended complaint alleged that the phrases "data manipulation," "academic and scientific misconduct," and "posterboy of the corrupt

and disgraced climate science echo chamber" falsely imputed to him "academic corruption, fraud, and deceit as well as the commission of a criminal offense" (Counts I, II) and that the Sandusky reference falsely imputed to him "the commission of a criminal offense and the violation of the public trust" (Counts VII). Amended Complaint ("Compl.") ¶¶ 35, 48, 103. He also challenged a press release by CEI that linked to a National Review statement calling his hockey-stick research "intellectually bogus" (Count V). The complaint did not allege that Simberg was a CEI employee or that CEI was vicariously liable for his actions. SUMF ¶ 27.

CEI and Simberg moved to dismiss under the D.C. Anti-SLAPP Act, arguing that Plaintiff's claims challenged unverifiable statements of opinion that, as such, were not actionable. The Court denied its motion. On appeal, the Court of Appeals affirmed in part and reversed in part. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1247 (D.C. 2016), *as amended* (Dec. 13, 2018). It reversed on Plaintiff's emotional distress claim and claim challenging the "intellectually bogus" statement, *id.* at 1262, 1249, ordering them dismissed. It allowed the other claims to proceed, finding that, on the extant record, Simberg's statements could be understood as assertions of fact. *Id.* at 1243.

Legal Standard

Summary judgment is required "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." SCT Civ. R. 56(a). "If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, then the burden shifts to the plaintiff to show that such an issue exists." *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012) (quotation marks omitted). "[A] plaintiff's mere unsworn statement of material facts, …general pleadings or a denial" is insufficient to defend against a summary judgment motion supported by affidavits, depositions, or other evidence; "rather [the plaintiff] must respond similarly by [providing] material facts under oath which raise genuine issues of fact for trial." *Maupin v. Haylock*, 931 A.2d 1039, 1042 (D.C.2007) (quotation marks and citations omitted). Summary judgment should be entered "'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden of proof at trial.'" *Night and Day Mgt., LLC v. Butler*, 101 A.3d 1033, 1037 (D.C. 2014) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Argument

I. The First Amendment's "Actual Malice" Requirement Bars Plaintiff's Claims Against CEI and Simberg

A. Plaintiff's Burden Is To Prove by Clear and Convincing Evidence that Each Defendant Knew the Statements at Issue To Be False or in Fact Entertained Serious Doubts as to Their Truth

"Freedoms of expression require 'breathing space.'" *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 272 (1964)). To safeguard "the principle that debate on public issues should be uninhibited, robust, and wide-open," the First Amendment prohibits defamation liability for a statement concerning a public figure, as Plaintiff concedes himself to be,[1] "'unless he proves that the statement was made with "actual malice." *Nader v. Toledano*, 408 A.2d 31, 38–39 (D.C. 1979) (quoting *Sullivan*, 376 U.S. at 279–80). By design, "[t]his constitutional standard is a daunting one which very few public figures can meet." *Fridman*, 229 A.3d at 509 (quotation marks omitted).

"Actual malice" is a term of art. It is "not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665, 666 (1989). Instead, it requires the plaintiff to prove "by clear and convincing evidence 'that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *Sullivan*, 376 U.S. at 279–80). To demonstrate "reckless disregard," the plaintiff must present "*clear and convincing* evidence 'to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Tavoulareas v. Piro*, 817 F.2d 762, 788 (D.C. Cir. 1987) (quoting *St. Amant*, 390 U.S. at 731). This "requires a showing of subjective doubts by the defendants. It does not turn on whether a reasonably prudent person would have published

[1] *See Competitive Enter. Inst.*, 150 A.3d at 1252 n.52.

under the circumstances." *Id.* at 789. Even an "extreme departure from professional standards…cannot provide a sufficient basis for finding actual malice." *Harte-Hanks*, 491 U.S. at 665.

The public-figure plaintiff's burden at the summary judgment stage is no less daunting. "In a libel action brought by a public figure, summary judgment for the defendant is appropriate unless the plaintiff produces the clear and convincing evidence that a reasonable jury would need in order to find that the defendant published the defamatory material with actual malice." *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)); *accord Thompson*, 134 A.3d at 314 (reciting and applying same standard). Whether the record supports a "finding of actual malice is a question of law." *Harte-Hanks*, 491 U.S. at 685; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

Finally, when the defendant is an organization, actual malice turns on the state of mind only of its employees responsible for the publication. The Supreme Court held as much in *New York Times v. Sullivan*. 376 U.S. at 287 ("The state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication."); *see also Waskow v. Associated Press*, 462 F.2d 1173, 1175 (D.C. Cir. 1972) ("[T]he fact that a news organization possesses information that indicates the falseness of a news item does not establish the organization acted with knowledge of the falseness. The proper focus is on the state of mind of the persons in the organization having responsibility for the publication.") (quotation marks and alterations omitted). The inquiry is limited to the organization's employees: "under *New York Times*[,] actual malice may not be attributed outside *respondeat superior*." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1303 (D.C. Cir. 1996); *Nader*, 408 A.2d at 56 & n.15 (holding that only state of mind of employees of company, and not independent-contractor author, could be imputed to company in assessing actual malice). The Court has already held as much in this litigation, and it is therefore the law of the case. Order Denying Pl.'s Mot. To Compel, at 3 (Sept. 30, 2019) ("When the defendant is a media organization, the proper inquiry is the mind of the persons with responsibility for the publication of that statement."); Order Granting in Part Pl.'s Mot for

Reconsideration, at 3 (Feb. 25, 2020) (limiting inquiry to "the specific individuals within CEI who are responsible for this article, instead of on the entire organization").

B. The Only CEI Employee Involved in the Publication of Simberg's Post Entertained No Doubt as to Its Truth

Plaintiff is unable to show by the required clear and convincing evidence that, at the time of publication, CEI possessed actual malice. The single CEI employee responsible for publication of Simberg's post entertained no doubt as to its truth, much less the "serious doubts" required to support actual malice.

As concerns CEI, the sole person whose state of mind is at issue is Scribner. Scribner is the only CEI employee who saw Simberg's post before it was published, he discussed it with no one, and he hit the button to publish the post on Open Market. SUMF ¶¶ 369–71. There is no other person "having responsibility for the publication." *Sullivan*, 376 U.S. at 287. Simberg's state of mind cannot be imputed to CEI because he was not a CEI employee. Plaintiff has neither alleged nor argued that Simberg was a CEI employee. Nor could Plaintiff substantiate any such argument now, which it would be his burden to do as the party "asserting the relationship." *Henderson v. Charles E. Smith Mgmt.*, 567 A.2d 59, 62 (D.C. 1989). "The right to control an employee's conduct in the performance of the task and in its result is determinative," *Levy v. Currier*, 587 A.2d 205, 212 (D.C. 1991), and CEI had no such right at any time, let alone months after its engagement of Simberg as an independent contractor had concluded, SUMF ¶¶ 29, 35. The undisputed facts show that Simberg authored the challenged post at his own initiative, without control or compensation by CEI. *Id.* ¶¶ 30–34, 361. Accordingly, Simberg's state of mind cannot be imputed to CEI. *McFarlane v. Esquire Magazine*, 74 F.3d at 1303; *Nader*, 408 A.2d at 56.

There is no evidence, much less the clear and convincing evidence required, that Scribner "in fact entertained serious doubt as to the truth" of Simberg's post. *St. Amant*, 390 U.S. at 731. Scribner was not even aware of its substance at the time of publication. SUMF ¶ 365, 368. It is undisputed that his usual practice when Simberg submitted a post was to run his eyes over it to check for formatting errors, *id.* ¶ 364, and it is undisputed that Scribner did precisely that with this

post, *id.* ¶ 365. Even if one might criticize Scribner's failure to review the substance of Simberg's post, "the Supreme Court has flatly held that insufficient investigation alone may not support a libel verdict in the absence of evidence that the defendant subjectively held 'serious doubts' about the truth of its statements." *Tavoulareas*, 817 F.2d at 797 (discussing *St Amant*, 390 U.S. at 731). Because Scribner had no subjective belief concerning the post's truth, he could not possibly have acted with actual malice when he published it.

Plaintiff has incorrectly contended in motion practice that Scribner was aware of the substance of Simberg's post, but even accepting that contention as true would not undermine CEI's entitlement to judgment because it is not probative of the "serious doubt" required to support actual malice. "The seriousness of a defamatory charge, in itself, is not probative of recklessness, since there is no basis for the proposition that 'more serious' charges are less likely to be true than 'less serious' charges." *Tavoulareas*, 817 F.2d at 797 (quotation marks and alterations omitted). And Scribner had no basis to seriously doubt what Simberg had written or Simberg generally. Scribner himself had little knowledge of or interest in climate science or policy. SUMF ¶ 372–73. While Scribner was generally aware of Plaintiff's "hockey stick" research and the Climategate emails, he was not aware of the substance of any specific charges that had been leveled against Plaintiff, how those charges had been handled, and how they had been resolved. *Id.* What he did know is that Simberg had a technical and scientific background and took great care in his writing. *Id.* ¶ 374. Having no reason to doubt Simberg's credibility, *id.* ¶ 375, Scribner was entitled to rely on what Simberg wrote and had no obligation to investigate the matter himself. *See, e.g.*, *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1319 (7th Cir. 1988) (holding that, "for purposes of constitutional malice, [a publication's] editors were under no obligation to check [a freelance writer's] facts at all, unless something blatant put them on notice that he was reckless about the truth") (quotation marks omitted); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1284 (D.C. Cir. 2003) (approving reliance "on a knowledgeable, non-anonymous source"); *St. Amant*, 390 U.S. at 733.

The undisputed facts show that a single CEI employee was responsible for publishing Simberg's post and that this employee entertained no serious doubt as to its truth. Accordingly,

Plaintiff cannot meet his burden of showing that CEI published Simberg's post with actual malice, and CEI is therefore entitled to summary judgment.

C. Plaintiff Cannot Meet His Burden of Proving that Simberg Acted with Actual Malice

Plaintiff is also unable to show by clear and convincing evidence that Simberg acted with actual malice. Simberg did not intend to convey the defamatory implication alleged by Plaintiff—that Plaintiff engaged in "academic corruption, fraud and deceit as well as the commission of a criminal offense," Compl. ¶¶ 35, 48—and that necessarily defeats actual malice. Even if Simberg had intended that implication, Plaintiff still cannot meet his burden of proving that Simberg "in fact entertained serious doubt as to [its] truth," *St. Amant*, 390 U.S. at 731, especially given Simberg's reliance on numerous sources supporting it.

1. Simberg Did Not Intend To Convey That Plaintiff Committed Fraud

Under the actual malice standard, Simberg cannot be held liable for an implication that he did not intend. As Judge Sack's treatise explains: "under *New York Times* [*v. Sullivan*] a statement must be judged entirely on the basis of what the [defendant] intended it to mean.... A person who believes and intends to say one thing is not lying, and is therefore not guilty of 'actual malice,' merely because he chooses the wrong language to say or because those who hear the statement reasonably believe it to mean something different." Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 5:5.1[B] (5th ed. 2017, 4/20 update) (citing authorities) (footnotes omitted). This flows from actual malice's requirement that "the plaintiff [] demonstrate with clear and convincing evidence that the defendant *realized* that his statement was false or that he *subjectively entertained* serious doubt as to the truth of his statement." *Bose*, 466 U.S. at 511 n.30 (emphases added). In other words, only a "calculated falsehood," and not an unintended one, will support actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).[2]

[2] This required showing of subjective intent to convey a defamatory message is distinct from the separate element of whether a statement is susceptible to a defamatory meaning. That "a statement reasonably can be read to contain a defamatory inference" does not demonstrate that a defendant "intended the statement to contain such a defamatory implication." *Woods*, 791 F.2d at 487; *see also Saenz*, 841 F.2d at 1318–19 & n.3 (holding that there was insufficient evidence of subjective intent where, "[a]t most, the plaintiff's proof shows that the article is capable of supporting false and defamatory implications").

A public figure's libel claim premised on implications not intended by the defendant therefore fails as a matter of law. The Ninth Circuit's decision in *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), illustrates the point. The entertainer Wayne Newton sued NBC and its journalists over reports concerning his relationship with the Mafia and purchase of a casino. *Id.* at 666. The district court upheld a massive jury verdict for Newton on the ground that the broadcasts conveyed the "clear and inescapable impression…that Newton did not have enough money to buy the Aladdin Hotel so he called a friend, Guido Penosi, who had ties to organized crime; and that Mr. Penosi helped him raise the money and thus obtained a hidden interest in the Aladdin Hotel." *Id.* at 679 (quotation marks and alteration omitted). The Ninth Circuit reversed on actual malice, holding that even the "clear and inescapable" impression left by the broadcasts was not probative of what actual malice demands, "that NBC and its journalists *intended* to leave that impression." *Id.* at 681 (emphasis added). Nor did it matter that the defamatory implication "should have been foreseen" by the defendants. *Id.* at 680. It would "eviscerate[] the First Amendment protections established by *New York Times*," the court concluded, to "permit liability to be imposed…for what was not intended to be said." *Id.* at 681.

In accord with *Newton*, the case law consistently holds that a public-figure defamation plaintiff's burden is to prove by clear and convincing evidence that the defendant subjectively intended to convey an allegedly defamatory implication. *See, e.g.*, *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1064 (9th Cir. 1998) (affirming summary judgment in absence of clear and convincing evidence that broadcaster "intended to convey the defamatory implication" that judge used a crystal ball to make decisions); *Saenz*, 841 F.2d at 1309 (affirming summary judgment in absence of clear and convincing evidence that defendants intended to accuse plaintiff of being a torturer, as opposed to being aware of torture and doing nothing to stop it); *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 90 (3d Cir. 2013) (affirming judgment notwithstanding the verdict where the plaintiff made no showing "that establishes defendants' intent to communicate the defamatory meaning"); *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 486 (7th Cir. 1986) (affirming summary judgment in absence of evidence that defendants intended to convey that

businessman "was a liar, was financially insolvent, or was a religious fraud"); *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002) (vacating jury verdict and ordering judgment for defendant where evidence did not show that defendant intended to accuse the plaintiff of being a felon); *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007) (affirming summary judgment in absence of evidence that defendant intended to convey that plaintiff was in financial distress); *see also* Sack on Defamation, *supra*, § 5:5.1[b] nn.493–97 (canvassing additional decisions).

Plaintiff cannot meet his burden of proving that Simberg intended to convey the alleged implication that Plaintiff engaged in fraud or the like. The 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. While Simberg's personal belief was that Mann had engaged in misconduct, what he sought to convey in his post was that Penn State's investigation had failed to grapple with the numerous red flags raised by the Climategate emails, criticisms of Plaintiff's research, and Plaintiff's behavior toward scientists and others who disagreed with his research and advocacy. SUMF ¶ 377. Simberg's intended message was that the Sandusky affair demonstrated Penn State did not take seriously allegations against prominent faculty members, that Penn State's investigation of Plaintiff was shoddy, and that a "fresh, truly independent investigation" was therefore warranted. *Id.* ¶¶ 377–78; Simberg Decl. ¶¶ 95–98. The post itself confirms this was Simberg's intended message: he called for a new investigation of whether the allegations against Plaintiff were true, rather than demand that Plaintiff be fired, indicted, or suffer any other consequence that would follow if they were true. SUMF ¶ 377. Accordingly, Simberg lacked actual malice.

2. Simberg Entertained No Doubts as to the Truth of His Post

Even if one assumes *arguendo* that Simberg intended the alleged defamatory implication, 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. Simberg relied on numerous sources, many of which he linked in his post, and this negates Plaintiff's claim that he acted with actual

malice. Specifically, it is undisputed, SUMF ¶¶ 330–31, that Simberg understood the following prior to publication:

- Many of the Climategate emails were by or concerning Plaintiff. SUMF ¶ 327. They revealed, among other things, that Plaintiff had used a "trick of adding in the real temps to each series for the last 20 years…to hide the decline"; that he sent favored colleagues temperature-related data that he called "dirty laundry" and sought to keep from further disclosure; that he privately expressed doubts in his own data to allies; that he repeatedly encouraged colleagues to deny requests for data made by researchers seeking to reconstruct his research; that he repeatedly defamed such researchers as being involved in "fraud" or being dishonest in communications with other climate scientists encouraging them not to cooperate; that he sought to organize boycotts, or force out the editors, of journals that published research with which he disagreed; that he encouraged scientists to use the threat of defamation litigation to block the publication of journal articles that were critical of his own research and had retained his own attorney for that purpose; that he encouraged other climate scientists to denounce research without taking the time to understand it because he disagreed with its results; and that he was requested to delete information to stymie public-record requests and ask a colleague to do the same, which request he promised to pass on "ASAP." SUMF ¶ 328. Other emails by Plaintiff indicated that he sought to have a journal editor fired for accepting papers critical of his work and that he could not reproduce his own research results. *Id.* ¶ 329.

- The Climategate emails revealed that Plaintiff's scientific colleagues (including co-authors) believed his work to be "suspect," "crap," "clearly deficient," "wrong," not "statistically significant," plagued by "robustness problems," "deceptive," not "honest," "truly pathetic and should never have been published," indefensible ("can not be defended"), and made up ("we will still not know where his estimates are coming from"). SUMF ¶ 338.

- Professor Ross McKitrick and researcher Stephen McIntyre had published a peer-reviewed article finding that, due to certain abnormal statistical steps undertaken by Plaintiff, the models underlying his "hockey stick" research are biased, such "that a hockey-stick shaped PC1

is nearly always generated from (trendless) red noise with the persistence properties of the North American tree ring network." SUMF ¶ 321. It reports that the specific "step" causing this result was not disclosed by Plaintiff when he published his research. The article also reports that Plaintiff's research failed to report "R^2 and other cross-validation statistics…for the controversial 15th century period," and it finds "that they are statistically insignificant." *Id.* ¶¶ 322–23. McKitrick and McIntyre's research findings were confirmed by a "major investigation into the hockey stick" conducted by the statistician Professor Edward Wegman of George Mason University and by a "National Research Council Report on the hockey stick." *Id.* ¶ 324.

- McIntyre published an analysis of Plaintiff's leaked climate-model code describing the code as "a smoking gun" and concluding that "[t]he code is so hacked around to give predetermined results that it shows the bias of the coder. In other words, make the code ignore inconvenient data to show what I want it to show." The analysis quotes a comment from Plaintiff's own code stating that temperature data "will be artificially adjusted to look closer to the real temperatures"—in other words, that the data will be manipulated to achieve a particular result. Simberg Decl. ¶ 28.

- McIntyre published an analysis of the data and techniques underlying Plaintiff's "Nature trick," as disclosed in the Climategate emails. McIntyre explained that the trick was a statistical manipulation to delete certain data that conflicted with the hockey-stick message and that Plaintiff, in a leaked email, identified the "reason" the "inconvenient data" was deleted: "to avoid giving 'fodder to the skeptics.'" Simberg Decl. ¶ 34. Journalist Charlie Martin reported further on this analysis, explaining that if the complete data-set at issue had been used, "[t]he hook upward, the blade of the hockey stick, would have been much less dramatic, the implied global warming much less significant. By truncating the data as they did, the global warming looks much worse." The truncation, Martin explained (quoting a Climategate email), "was the result of a long discussion of how to best deal with 'pressure to present a nice tidy story.'" Simberg Decl. ¶¶ 39. McIntyre also analyzed Plaintiff's use of statistical "smoothing" techniques, concluding that Plaintiff's "solution" to the problem of a downward-pointing temperature graph "was to use the

instrumental record for padding, which changes the smoothed series to point upwards." Simberg Decl. ¶ 89.

- Professor Ivan Kenneally published an analysis of the Climategate emails finding that they provide "evidence of scientific dishonesty," reveal "the manipulation of scientific data either to provide the appearance of greater support for global warming science or to undermine the claims of skeptics," and demonstrate that Plaintiff sought "to 'contain' the very inconvenient truth of the Medieval Warm Period, so important in overthrowing Mann's classic 'Hockey Stick' model of anthropogenic warming, even though he admits they don't have an appropriate model to do that legitimately." Kenneally also explained that the emails demonstrate Plaintiff defamed McIntyre's research critical of Plaintiff's "even before reviewing [it]" and was implicated in "concealing data." Simberg Decl. ¶ 32.

- Scientist Vincent Gray, founder of the New Zealand Climate Science Coalition and an expert reviewer for the Intergovernmental Panel on Climate Change, stated in a published article that he had personal knowledge, based on his personal interactions with the scientists whose emails were leaked in Climategate, that they were engaged in "fraud" and, specifically, "faking" their results. Simberg Decl. ¶ 35.

- Scientist James Lewis published an article analyzing the Climategate emails concluding that they revealed "fraud." Simberg Decl. ¶ 36.

- Scientist Ian Plimer, professor emeritus of earth sciences at the University of Melbourne and author of a 2009 book on climate models, published an article stating that the Climategate emails "show that data was massaged, numbers were fudged, diagrams were biased, there was destruction of data after freedom of information requests, and there was refusal to submit taxpayer-funded data for independent examination." He further stated that, in hockey-stick research publications like Plaintiff's: "Data were manipulated to show that the Medieval Warming didn't occur, and that we are not in a period of cooling. Furthermore, the warming of the 20th century was artificially inflated." Simberg Decl. ¶ 33.

- Meteorologist Joseph D'Aleo, who was Director of Meteorology for the Weather Channel, published an article stating that the Climategate emails "proved…data was being manipulated," revealed "data manipulation fraud," and indicated "coordinated effort to manipulate instrumental data…to produce an exaggerated warming that would point to man's influence." Simberg Decl. ¶ 40.

- Scientist Richard A. Muller, Professor of Physics at the University of California Berkeley, analyzed Plaintiff's research and the Climategate disclosures and concluded that Plaintiff "erased" data showing no recent warming and "replaced it with temperature going up." Simberg Decl. ¶ 52.

- Journalist Christopher Monkton reported that the Climate emails "demonstrate that the scientists at issue, including Plaintiff, "tampered with temperature data," were "fraudsters," "simply…made up" their data on "global temperature trends," "have refused…to reveal their data and their computer program listings" because doing so would confirm the fabrication, and engaged in criminal "procurement of data destruction." Simberg Decl. ¶ 27.

- Journalist James Delingpole reported that the Climategate emails demonstrated "collusion in exaggerating warming data, possibly illegal destruction of embarrassing information, organised resistance to disclosure, manipulation of data, [and] private admissions of flaws in their public claims" by climate scientists, including Plaintiff. He reported that the emails' "most damaging revelations" concern how "scientists may variously have manipulated or suppressed evidence in order to support their cause," specifically identified Plaintiff's actions as evidencing "Manipulation of evidence," and identified emails involving Plaintiff as demonstrating "Suppression of evidence." Simberg Decl. ¶ 22.

- Journalist Robert Tracinski reported that the Climategate emails, particularly ones involving Plaintiff's conduct, confirmed prior "evidence of corruption in the basic temperature records maintained by key scientific advocates of the theory of man-made global warming." Tracinski reported that Plaintiff's statistical technique was to "mix[] two different kinds of data… in a way designed to produce a graph of global temperatures that ends…with an upward 'hockey

stick' slope." He stated that the emails reveal "an enormous case of organized scientific fraud" and "a criminal act" in the form of accepting public research funding that was then "use[d] to falsify data and defraud the taxpayers," including through the "manipulation of the data." Simberg Decl. ¶ 30.

- Attorney and public-policy analyst John Hinderaker reported that the Climategate emails demonstrated that Plaintiff denounced McIntyre's research critical of Plaintiff's research without even reading it and made an "attack on McIntyre…fabricated out of whole cloth." Hinderaker reported, based on the emails, that Plaintiff had a "practice of withholding data from public review" which called into question the veracity of Plaintiff's research and that Plaintiff and his colleagues were "making up the science as they go along and are fitting facts to reach a predetermined conclusion rather than objectively seeking after truth." Hinderaker also reported that the emails show that Plaintiffs and his colleagues "preferred to delete their emails with one another about the crucially important IPCC report…rather than allow them to come to light" and acted "like a gang of co-conspirators rather than respectable scientists." Simberg Decl. ¶¶ 24–25.

- Journalist Charlie Martin analyzed the Climategate emails and found that they demonstrated "a willingness to manipulate the data to make a political case" that constituted "misconduct and possibly scientific fraud." Simberg Decl. ¶ 29.

- Penn State's investigation of Plaintiff dismissed three of four charges without investigation, including the charges of data falsification and participation in destruction of information to evade public-records requests. At the inquiry stage, it ignored the "hide the decline" language in the "Mike's Nature trick" email which contradicts Plaintiff's explanation (accepted by the committee) that a "trick" is just a way of referring to standard statistical practice, accepted Plaintiff's explanation that he was not involved in the destruction of information without addressing that Plaintiff actually solicited a third party to destroy information, and focused the subsequent investigation on data-sharing and the like. The investigatory committee, according to its report: did not interview the most obvious witnesses like McIntyre and Jones; did not obtain direct access to Plaintiff's emails and files from the relevant period before Plaintiff arrived at Penn State in

2005; ignored a prominent witness's remarks expressing astonishment that the other charges had been dropped; asked that witness only about norms for sharing codes and data and not about Plaintiff or his conduct; and ultimately found in Plaintiff's favor based on things that have nothing to do with any allegation, including his "level of success in proposing research" and getting funding, that he "receive[d] so many awards and recognitions," and that he had published in "highly respected scientific journals." Simberg Decl. ¶¶ 43–44

- The National Science Foundation found that Penn State's investigation was inadequate, particularly as concerned the data-falsification charge. NSF did not investigate Plaintiff's participation in the destruction of information by a third party. NSF's investigation on data falsification did not address Plaintiff's most controversial research from the 1990s and 2000, before he had received NSF funding as a principal investigator; did not obtain access to Plaintiff's emails and files from the relevant period before Plaintiff arrived at Penn State in 2005; and did not investigate Plaintiff's statistical practices or modeling. The NSF's position was that, if Plaintiff manipulated his data through arbitrary statistical techniques to arrive at an upward-sloping hockey stick no matter what, or excluded inconvenient data that did lead to that result, then those actions would not fit its regulatory definition of "research misconduct." So while NSF found "no specific evidence that [Plaintiff] falsified or fabricated any data," that finding did not and could not "exonerate" Plaintiff. Simberg Decl. ¶ 45.

- Professor Richard Lindzen, who was Alfred P. Sloan Professor of Meteorology at the Massachusetts Institute of Technology and personally participated in Penn State's investigation, publicly declared that the investigation was a "whitewash." He further stated that, through the investigation, "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." Simberg Decl. ¶ 93.

- Researcher Stephen McIntyre, widely recognized as a leading authority on Plaintiff's research, analyzed Penn State's inquiry and investigatory reports and found that Penn State "fail[ed] to ensure proper investigation of Climategate emails." He explained that Penn State conducted "no investigation…on any of the key issues," including Plaintiff's "Nature trick,"

Plaintiff's "role in the email deletion enterprise," and Plaintiff's "failure to report adverse data." McIntyre concluded: "It's hard not to transpose the conclusions of the Penn State Climategate 'investigation' into Penn State's attitude towards misconduct charges in their profitable football program," referring to Sandusky's misconduct. Simberg Decl. ¶ 53.

- Journalist Clive Crook, writing in the *Atlantic Monthly*, stated that Penn State's inquiry "would be difficult to parody," particularly given that "[t]hree of four allegations [were] dismissed out of hand at the outset" based on Plaintiff's "level of success in proposing research, and obtaining funding to conduct it," and "awards and recognitions." He stated that, in Penn State's investigation, "the case for prosecution is never heard"; instead, Plaintiff "is asked if the allegations (well, one of them) are true, and says no," and that's it. Simberg Decl. ¶ 53.

- Former NASA scientist Dr. Pierre Latour stated that Penn State's investigation of Plaintiff was a "whitewash investigation[]" that demonstrated "Penn State is corrupt." Science writer John O'Sullivan reported that the Penn State investigation "permitted no witnesses to be called to oppose Mann and no adverse evidence was considered, in breach of the applicable Penn State policy." Simberg Decl. ¶ 63.

- Science commentator and author Steve Milloy stated that Penn State's inquiry "extended little further than the Climategate e-mails themselves, an interview with Mann, materials submitted by Mann and whatever e-mails and comments floated in over the transom" and concluded that it was "[n]ot thorough at all." Milloy observed that the report ignored the crucial "hide the decline" language in the "Mike's Nature trick" email; ignored that Plaintiff had been requested to ask a third party to destroy records and confirmed via email that he carried out the request; did not seriously address "the accusation that Mann conspired to silence skeptics"; and appeared to indicate that the investigation's purpose was to bolster public confidence in Plaintiff's research findings. Milloy called it a "primer for a whitewash." Simberg Decl. ¶ 91.

- Mark Morano, editor of the popular and award-winning Climate Depot website, stated that Penn State "circled the wagons and narrowed the focus of its own investigation to declare him ethical." He called the investigation a "whitewash" and stated that it would not "change

th[e] simple reality" that Plaintiff "has become the posterboy of the corrupt and disgraced climate science echo chamber." Simberg Decl. ¶ 92. Simberg quoted Morano's statement verbatim in his post. SUMF ¶ 380.

The undisputed facts demonstrate that, if Simberg had intended to accuse Plaintiff of fraud, he had a firm basis to do so, notwithstanding a limited investigation that was widely viewed as a "whitewash" by credible scientists, reporters, and writers familiar with the facts. *Id.* ¶¶ 331–35. There is no indication that Simberg entertained any doubts on the impropriety of Plaintiff's conduct. Based on what he understood, from numerous sources whose credibility he had no reason to doubt, *id.* ¶¶ 337, 381, 385, 388, 392, Simberg was restrained in merely calling for a "fresh, independent investigation." *Compare St. Amant*, 390 U.S. at 730–32 (holding no jury question of actual malice was presented where defendant relied solely upon biased informant for allegations of serious criminal misconduct but had no "reasons to doubt the veracity of the informant"). Plaintiff cannot show that Simberg acted with actual malice.

II. Plaintiff Cannot Carry His Burden of Proving Falsity Because Simberg's Challenged Statements Were Substantially True

Plaintiff also cannot carry his "burden of showing falsity." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). The First Amendment requires Plaintiff to carry "the ultimate burden in his case-in-chief of proving the *falsity* of a challenged statement by 'clear and convincing proof.'" *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *see also Buckley v. Littell*, 539 F. 2d 882, 889 (2d Cir. 1976). A plaintiff's mere "colorless denial" of a statement's substantial truth will not defeat summary judgment for the defendant. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 188 (2d Cir. 2000). Moreover "[m]inor 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) (quotation marks omitted). Thus, a "statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (quotation marks omitted). 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).

Plaintiff cannot carry his burden of proving falsity of the statements he challenges[3] for the following reasons:

- **Plaintiff Engaged in Concealed Data Manipulation To Keep the Blade on His "Hockey Stick."** The unbroken upward curve of the hockey-stick reconstructions in MBH98 and MBH99 is the result of "padding" the reconstructed temperatures with instrumental data. SUMF ¶¶ 101–055. Without this padding, the "blade" would descend in recent years. *Id.* ¶ 105. Neither MBH98 nor MBH99 discloses this padding. *Id.* ¶ 106–07.

- **Plaintiff's Research Involved Abnormal and Undisclosed Data Manipulation**. The hockey-stick graph in MBH98 was derived using principal component analysis ("PCA"), a statistical technique that is highly dependent on input choices. SUMF ¶¶ 67–60. Plaintiff's input choices included an unconventional "short-centering" of tree-ring principal components that made it likely a hockey-stick shape would emerge in the first principal component. *Id.* ¶¶ 63–69. Plaintiff did not disclose this abnormal manipulation in MBH98, despite admitting that he depended on it to obtain his results. *Id.* ¶¶ 65, 70–71. The MBH98 hockey-stick graph was also dependent on the decision of how many principal components to retain. *Id.* ¶¶ 86–88. If the short-centering described

[3] Plaintiff challenges the following statements from Simberg's post:

> "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";
>
> "[M]any 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";
>
> "Mann has become the posterboy of the corrupt and disgraced climate science echo chamber. No university whitewash investigation will change that simple reality"; and
>
> "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?"

Compl. ¶ 26.

above is corrected, Plaintiff's reconstruction would not be statistically meaningful without the retention of three additional principal components not used by Plaintiff in MBH98. *Id.* ¶ 88.

- **Plaintiff Concealed His Research's Lack of Statistical Significance**. The MBH98 reconstruction failed many "common measures used to assess the accuracy of statistical predictions" identified by the National Academy of Sciences, indicating that the reconstruction "can be seen to be unreliable in an objective way." SUMF ¶ 89. The computer program Plaintiff used for MBH98 calculated one of those measures, r^2, but Plaintiff did not disclose this failed validation statistic in his publication. *Id.* ¶ 93, 97–100.

- **Plaintiff Deceptively Concealed His Reliance on Inadequate Data**. The MBH99 hockey-stick graph depends on "sparse" and therefore unreliable strip-bark proxy data to achieve its reconstruction. SUMF ¶¶ 82, 85. MBH99 does not clearly disclose that its results depend on this sparse and unreliable data. *Id.* ¶ 84. A draft of MBH99 disclosed, in language that was subsequently removed, that "a potentially reliable and verifiable pre-AD 1400 reconstructions [sic] rests disproportionately on regionally restricted information-the first PC of the North American ITRDB data." *Id.* ¶ 85.

- **Plaintiff's Own Co-Author Found He Deceptively "Manipulat[ed]" Research**. Plaintiff oversaw the deceptive editing of a climate reconstruction published by Briffa in IPCC TAR Chapter 2 that eliminated reconstructed temperatures from 1960 to 1980 to hide the decline in temperatures. SUMF ¶ 111–15. Plaintiff's co-lead author characterized his actions as "manipulation of evidence." *Id.* ¶ 116.

- **Plaintiff Participated in the Destruction of Documents To Evade Public-Records Requests and Concealed His Role from Penn State**. Plaintiff facilitated the destruction of communications by climate scientist Eugene Wahl with an IPCC lead author concerning the IPCC Fourth Assessment Report's treatment of temperature-reconstruction research. SUMF ¶ 141–46. When this matter was investigated by Penn State, Plaintiff failed to disclose that he goaded Wahl in a conversation to destroy the communications. *Id.* ¶ 147. Plaintiff has since cited the Fourth Assessment Report as validating his research. *Id.* ¶ 150.

- **Plaintiff Lied To Penn State's Investigation**. Plaintiff misled Penn State in its research-misconduct investigation of him through omissions and misrepresentations. Mann misled the investigators about his communications with Wahl, SUMF ¶¶ 147–48, 253–58; falsely accused McIntyre of making legal threats, *id.* ¶¶ 249–52; and lied about his actions concerning requests for the data underlying MBH98, *id.* ¶ 288–96.

- **Plaintiff Sought To Delegitimize His Critics Through Lies and Personal Attacks**. Among other things, Plaintiff declared McIntyre's work "fraudulent" to a *New York Times* reporter, SUMF ¶ 155; falsely represented that McIntyre was funded by the fossil-fuel industry, *id.* ¶ 156; and threatened *Nature* for inviting McIntyre to comment on Plaintiff's research, *id.* ¶ 157. Plaintiff falsely accused climate scientists Hans von Storch, Eduardo Zorita, and Ulrich Cubasch of committing scientific misconduct. *Id.* ¶ 158–60. Plaintiff attacked Roger Pielke, Jr., a moderate voice in the climate-change debate, to get him fired from the *FiveThirtyEight* website and from *Nature*'s weblog. *Id.* ¶ 161–66. And Plaintiff falsely accused Lindzen of being a climate-change denier based on Lindzen's criticism of Plaintiff's research. *Id.* ¶ 169–74.

- **Plaintiff Boycotted Over Criticism of His Research and Then Lied About It**. Plaintiff boycotted a peer-reviewed journal because it published an article by two scientists associated with the Harvard-Smithsonian Center for Astrophysics that disagreed with Plaintiff's conclusion in MBH99 that the 20th century probably was the warmest of the last millennium. SUMF ¶ 133–36. Plaintiff then lied about his involvement. *Id.* ¶ 137.

- **Penn State's Investigation Was a Whitewash.** The implication of Simberg's post alleged by Plaintiff concerns his own conduct, not Penn State's; Penn State's actions in its investigation therefore do not support the falsity of any claim that Plaintiff engaged in "academic corruption, fraud, and deceit as well as the commission of a criminal offense." Compl. ¶¶ 35, 48. Penn State's investigation is also incapable, as a factual matter, of bearing that weight or supporting any claim that Plaintiff has been "exonerated." Penn State's investigation did not address or determine whether Plaintiff engaged in data manipulation, whether he "tortured" data, or whether his hockey-stick research was fraudulent. SUMF ¶ 276. Nor did it determine whether Plaintiff acted to

suppress or falsify data or participated in the destruction of materials to block public-records requests. *Id.* ¶¶ 275–77. Instead, it relied on Mann's explanations for his actions, without verifying them. *Id.* ¶ 248. Penn State's investigation was also tainted by irregularities. Dean William Easterling, a friend of Plaintiff's who was nominally recused, nonetheless participated in it. *Id.* ¶ 232–35. Although Penn State's research-misconduct investigation policy provides no role for the university's president, *id.* ¶ 242, then-Penn State President Graham Spanier nonetheless injected himself into the process by reviewing and revising the inquiry report and secretly meeting with the inquiry's chair, *id.* ¶¶ 243–45. A day after that meeting, the chair met privately with Plaintiff, leaving Plaintiff to understand—before the investigation committee had even been convened—that he had "absolutely nothing to worry about." *Id.* ¶¶ 270–72. Even Plaintiff recognized that the investigation involved only a "cover our a$$es charge." *Id.* ¶ 281. It was, as Plaintiff evidently understood, a whitewash. And NSF's limited investigation did not remedy the shortcomings of Penn State's investigation and could not "exonerate" Plaintiff. *Id.* ¶¶ 303–20.

The undisputed facts show that Simberg's statements, even if accorded an implication he did not intend, are substantially true. Plaintiff cannot meet his burden of proving falsity.

III. Plaintiff Is Not Entitled to Compensatory Damages or Punitive Damages

CEI and Simberg are entitled to partial summary judgment on Plaintiff's requests for compensatory and punitive damages because Plaintiff cannot show that he suffered any compensable injury caused by their alleged wrongdoing.

The Court has already established that, to recover compensatory damages, Plaintiff is "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." Order Granting in Part CEI Defs.' Mot. To Compel, at 2 (May 5, 2020). In the absence of such a showing, "the plaintiff is only entitled to nominal damages." *Id.* at 3. The Court also held that "to obtain punitive damages as Plaintiff wishes here, Plaintiff must establish 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. These holdings rejected Plaintiff's arguments to the contrary,

Plaintiff did not seek their reconsideration, and they are the law of the case and definitively settled in this litigation.[4] *See In re Baby Boy C.*, 630 A.2d 670, 678 (D.C. 1993) ("[O]nce the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court.") (quotation marks omitted).

Accordingly, to withstand partial summary judgment on the availability of compensatory and punitive damages, Plaintiff's burden is to make a showing sufficient to establish the existence of each of the three elements identified above: (1) an actual injury (2) that was caused by CEI and Simberg's alleged wrongdoing and (3) the amount of damages that is precisely commensurate with that injury. Plaintiff cannot carry this burden because the undisputed evidence is that he suffered no such injury caused by CEI and Simberg. SUMF ¶¶ 401–17. Indeed, his compensation grew substantially following publication of Simberg's post, *id.* ¶ 409, and 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, *id.* ¶¶ 403–13. Even assuming that Plaintiff suffered some kind of injury—notwithstanding all the professional honors and awards he touts receiving in the years immediately following Simberg's post, *id.* ¶ 417—he 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, including scores who (unlike Simberg) expressly labeled him and his work a "fraud." *Id.* ¶ 414–16. Plaintiff cannot carry his burden of proving damages caused by CEI and Simberg, and they are therefore entitled to partial summary judgment on Plaintiff's requests for compensatory or punitive damages against them.

[4] As the Court recognized, Plaintiff's reliance on the presumption of general damages only gets him "so far as having an actionable case without pleading any special harm that is normally required in a tort case." Order at 3 (citing *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 312–13 (D.C. 2006)). And, as the Court also recognized, the First Amendment establishes proof of "compensable harm as a prerequisite to the recovery of additional punitive damages." *Id.* at 4 (citing *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 66 (1966); *Intercity Maint. Co. v. Local 254, Serv. Employees Int'l Union AFL-CIO*, 241 F.3d 82, 90 (1st Cir. 2001)). Subsequently, the Court awarded the CEI Defendants discovery sanctions, rejecting Plaintiff's claim that his arguments on damages were substantially justified under law. Order Granting Defendants CEI's and Simberg's Mot. for Expenses (June 22, 2020).

IV. The CEI Defendants Preserve Their Argument that the Challenged Statements Are Not Actionable Assertions of Fact

To preserve the argument for possible appellate review, the CEI Defendants reassert 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 the CEI Defendants' appeal of the denial of their special motion to dismiss under the D.C. Anti-SLAPP Act. The Court of Appeals, however, held otherwise, *Competitive Enter. Inst.*, 150 A.3d at 1247.

Conclusion

The Court should enter summary judgment in CEI and Simberg's favor or, at the least, enter partial summary judgment in their favor on compensatory and punitive damages.

Dated: January 22, 2021

Respectfully submitted,

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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 Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Summary Judgment, Statement of Undisputed Material Facts, the memoranda and exhibits in support thereof, and any opposition thereto, it is hereby:

ORDERED that Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Summary Judgment is GRANTED;

ORDERED that judgment shall be entered in favor of Defendants Competitive Enterprise Institute and Rand Simberg on all remaining claims of Plaintiff's Amended Complaint.

DATED this ____ day of _____, 2021.

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

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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 Irving

Statement of Undisputed Material Facts in Support of Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Summary Judgment

Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg (collectively, the "CEI Defendants") submit this Statement of Undisputed Material Facts in support of their Motion for Summary Judgment. This Statement is supported by the exhibits attached to Plaintiff's Amended Complaint ("Compl."); signed declarations of CEI Employees Gregory P. Conko ("Conko Decl.") and Ryan Lynch ("Lynch Decl."); a signed declaration of former CEI employee Marc Scribner ("Scribner Decl."); a signed declaration of Rand Simberg ("Simberg Decl."); a signed declaration of the CEI Defendants' counsel, Andrew M. Grossman, attaching documents produced in discovery in this matter and excerpts of deposition transcripts and verifying that such documents are true and correct copies ("Grossman Decl."); and a signed declaration of Mr. Grossman filed under seal attaching confidential documents produced in discovery in this matter and verifying that such documents are true and correct copies ("Sealed Grossman Decl.").

The Competitive Enterprise Institute

1. CEI is a public policy organization founded in 1984 that conducts research on economic and regulatory policy issues, advocates for free-market policies, and participates in litigation over regulatory policy issues. Conko Decl. ¶ 3.

2. CEI employs numerous policy experts to carry out most of its policy work. Conko Decl. ¶ 4.

3. From time to time, CEI has affiliated itself with non-employee policy experts to contribute to CEI's policy work on particular policy issue areas through publications, events, media outreach, and other research and advocacy. Conko Decl. ¶ 5.

4. These affiliates are typically accorded the title, with respect to their CEI activities, of "adjunct," "adjunct policy analyst," or "adjunct fellow." Conko Decl. ¶ 5.

5. Some of these affiliates are compensated for their work on a per-project, independent-contractor basis, and others are not compensated at all. Conko Decl. ¶ 5.

6. In 2011 and 2012, CEI identified these affiliates generally on its website as "Adjunct Scholars" and also by their specific titles, such as "Adjunct Analyst" or "Adjunct Fellow." Conko Decl. ¶ 5.

CEI's "Open Market" Weblog

7. From 2006 to 2014, CEI published the "Open Market" weblog, separate from its main website, for CEI staff and affiliates to comment on policy issues and news. Lynch Decl. ¶ 2; Scribner Decl. ¶¶ 14–15.

8. CEI did not assign or solicit specific Open Market posts, but relied on contributors to identify topics for posts and write and submit posts. Conko Decl. ¶ 10; Scribner Decl. ¶ 45.

9. CEI published Open Market with the WordPress weblog software. Lynch Decl. ¶ 3; Scribner Decl. ¶ 16.

10. Contributors to Open Market were given login credentials enabling them to save draft posts, edit their own draft posts, and submit their own posts for publication but could not, themselves, publish posts. Lynch Decl. ¶¶ 7, 9.

11. Editors were given login credentials enabling them to review and edit other users' submitted or published posts and to publish posts. Lynch Decl. ¶¶ 7, 9.

12. When an Open Market contributor submitted a post, the WordPress software automatically sent a notification email to several CEI employees, including the Open Market editors, identifying the post's author and title and containing a link to access the post in the WordPress backend interface. These notification emails did not contain the text of the post or any other information about it. Scribner Decl. ¶ 19.

13. In 2011 and 2012, CEI employee Marc Scribner was the primary editor of Open Market and principally responsible for publishing submitted posts. Lynch Decl. ¶ 17; Scribner Decl. ¶¶ 14, 20.

14. Scribner joined CEI on a full-time basis as an editor in 2009, immediately following his graduation from college and, over the subsequent years, gradually transitioned away from editing and toward working on transportation policy. Scribner Decl. ¶¶ 2–4.

15. Scribner's editorial role for Open Market was to make sure that posts submitted by Open Market's contributors were free of typographical, grammatical, and formatting errors, not to review or check contributors' policy positions, reasoning, factual claims, style, or tone. Scribner Decl. ¶ 25.

16. CEI's then-active "Social Media Guidelines" provided that the contributors themselves were responsible for the substance of their Open Market posts, including ensuring that posts were "factually accurate" and used a "professional" tone. Scribner Decl. ¶ 25; Grossman Decl., Ex. 5, at 379.

17. Scribner reviewed all posts for formatting errors, particularly errors involving HTML formatting tags. Scribner Decl. ¶ 23.

18. For contributors whom he believed to be careful writers whose posts were unlikely to contain typographical and grammatical errors, Scriber would review only the formatting of their submitted posts, without reviewing what they had written. Scribner Decl. ¶ 22–23.

19. Because Open Market was a rapid-response platform for CEI, Scribner sought to publish submitted posts as quickly as reasonably possible, even when doing so interrupted his other work, which it did four to ten or more times each day. Scribner Decl. ¶ 20.

20. The server that hosted the Open Market website was configured to record requests to the web-server software in a log file for debugging purposes, and these logs were automatically overwritten after a few weeks. Lynch Decl. ¶¶ 25–26.

21. These log records could only indicate that a computer or device at a certain IP address retrieved a certain resource at a certain time and could not match requests with WordPress usernames or identify what a user was doing in WordPress's backend interface. Lynch Decl. ¶ 25.

Rand Simberg and His Relationship with CEI

22. Simberg is a consultant on the technology, regulation, policy, and business of space exploration and development, and regularly publishes commentary on those topics and others. Simberg Decl. ¶ 1.

23. Simberg holds dual bachelor's degrees in Engineering Science and Applied Mathematics (BSE) from the College of Engineering of the University of Michigan, Ann Arbor, and a Master of Science in Engineering Management (MSE) degree from West Coast University in Los Angeles. Simberg Decl. ¶ 1.

24. Simberg worked for many years in aerospace engineering and project management at the Aerospace Corporation and Rockwell International Corporation. Simberg Decl. ¶ 1.

25. In recent years, Simberg has focused on public policy and has published extensively on space technology and policy, including the 2013 book *Safe Is Not an Option*. Simberg Decl. ¶ 1.

26. Since 2001, Simberg has published a personal weblog, "Transterrestrial Musings," where he comments on news, science, politics, and policy. Simberg Decl. ¶ 5.

27. Plaintiff has not alleged that Simberg was an employee of CEI or that CEI is vicariously liable for Simberg's actions. *See* Compl.

28. Simberg has never been an employee of CEI. Conko Decl. ¶ 7; Simberg Decl. ¶ 75.

29. At the time he submitted the weblog post "The Other Scandal in Unhappy Valley" on July 13, 2012, Rand Simberg was an unpaid "Adjunct Scholar" of CEI. Conko Decl. ¶ 6; Simberg Decl. ¶¶ 80–81.

30. Simberg was not compensated by CEI for "The Other Scandal in Unhappy Valley." Conko Decl. ¶ 8; Simberg Decl. ¶ 81.

31. CEI had previously engaged Simberg to work on space policy as an "Adjunct Scholar," including producing two significant publications and regular Open Market posts or op-eds. Conko Decl. ¶ 7; Simberg Decl. ¶ 74.

32. During the period of his engagement, Simberg regularly contributed posts on space policy to Open Market. Simberg Decl. ¶ 76; Scribner Decl. ¶¶ 28, 30.

33. Simberg did not work from CEI's offices. Conko Decl. ¶ 9; Simberg Decl. ¶ 74.

34. Simberg set his own work schedules, was not subject to the direct supervision of any CEI personnel, and exercised his own judgment about what topics to cover in his writing for CEI, including his Open Market posts. Conko Decl. ¶ 8; Simberg Decl. ¶ 75–76.

35. Simberg's engagement with CEI concluded in March or April 2012. Conko Decl. ¶ 7; Simberg Decl. ¶ 80.

36. CEI made its final payment to Simberg in April 2012. Simberg Decl. ¶ 80.

37. After Simberg's engagement concluded, CEI continued to list Simberg on its website as an "Adjunct Scholar," as it typically did with affiliates with whom it worked from time to time. Conko Decl. ¶ 8.

38. After Simberg's engagement concluded, Simberg continued to contribute posts to Open Market, without compensation. Conko Decl. ¶¶ 6, 8; Simberg Decl. ¶ 81.

39. Scribner reviewed and published Simberg's Open Market posts. Simberg Decl. ¶ 78; Scribner Decl. ¶ 30.

40. Scribner edited a policy white paper by Simberg on property rights in space that identified Simberg's professional background. Scribner Decl. ¶ 29.

41. From working on Simberg's paper and Open Market posts, Scribner learned that Simberg had a technical and scientific background and saw that Simberg's writing addressed complex and highly technical issues. Scribner Decl. ¶¶ 29–30.

42. Scribner saw that Simberg was a careful writer, making few errors that required correction. Scribner Decl. ¶ 31.

43. After Simberg requested on several occasions that Scribner make minor revisions to Simberg's published Open Market posts, Scribner had Simberg's WordPress permissions changed so that Simberg could edit his own published posts; Scribner did this, in part, based on his impression of Simberg as a good and careful writer. Scribner Decl. ¶ 31.

44. Because Scribner knew that Simberg reviewed his own posts after they were published, and because Simberg could edit them, Scribner expected that Simberg would make any needed revisions or corrections himself. Scribner Decl. ¶ 32.

Plaintiff's "Hockey Stick" Research

A. The Hockey-Stick Graph

45. Plaintiff is a faculty member in the Departments of Meteorology and Geosciences within the College of Earth and Mineral Sciences at Pennsylvania State University. Compl. ¶ 7.

46. Plaintiff is known for his work regarding global warming and the so-called hockey-stick graph. Compl. ¶ 15.

47. Each hockey-stick graph purports to display a statistically meaningful relationship between temperature proxies, generally tree ring data, and historic global climate temperature over some or substantially all of the last millennium. Grossman Decl., Exs. 43–44.

48. Each hockey-stick graph has a long "handle" comprised of relatively constant temperatures before around 1880 and a sharp upward "blade" beginning around 1880 through the end of the graph, generally 1980. Grossman Decl., Exs. 43–44.

49. Plaintiff published a version of the hockey-stick graph in Mann et al., *Global-scale temperature patterns and climate forcings over the past six centuries*, 392 Nature (6678); 779-787 ("MBH98"). Grossman Decl., Ex. 43.

50. Plaintiff published a version of the hockey-stick graph in Mann et al., *Northern hemispheres temperatures during the past millennium: Inferences, uncertainties, and limitations*, 26 Geophysical Research Letters (6): 759-762 ("MBH99"). Grossman Decl., Ex. 44.

51. Plaintiff published a version of the hockey-stick graph in Folland et al., Chapter 2: Observed Climate Variability and Change, IPCC Third Assessment Report, Figure 2.20 ("IPCC TAR Chapter 2"), Grossman Decl., Ex. 45 at 134. Figure 2.21 was also included in the IPCC Third Assessment Report Summary for Policymakers. Grossman Decl, Ex. 45 at 3.

52. Plaintiff published a version of the hockey-stick graph in Mann et al., *Proxy-based reconstructions of hemispheric and global surface temperature variations over the past two millennia, Proceedings of the National Academy of Sciences of the United States* 105(36): 13252-13257 ("MANN2008"). Grossman Decl., Ex. 46.

53. Peer-reviewed articles criticizing the hockey-stick graph and Plaintiff's associated research include *Corrections to the Mann et al. (1998) Proxy Data Base and Northern Hemispheric Average Temperature Series*, authored by Stephen McIntyre and Ross McKitrick on November 1, 2003 and published in Energy & Environment; *Hockey Sticks, Principal Components, and Spurious Significance*, written by Stephen McIntyre and Ross McKitrick and published in Geophysical Research Letters on February 12, 2005; *Seeing the Wood From the*

Trees, authored by Keith Briffa and Tim Osborn and published on May 7, 1999 in Science; *Proxy Climatic and Environmental Changes of the Past 1,000 Years*, written by Willie Soon and Sallie Baliunas and published in Climate Research on January 31, 2003; *Reconstructing Past Climate From Noisy Data*, by Hans von Storch et al. published in Science on October 22, 2004; Gerd Burger and Ulric Cubasch, *Are Multiproxy Climate Reconstructions Robust*, published in Geophysical Research Letters in December 2005; the Ad Hoc Committee Report on the 'Hockey Stick' Global Climate Reconstruction, published in 2006 and authored by Edward Wegman, et al.; *Rejoinder: A Statistical Analysis of Multiple Temperature Proxies: Are Reconstructions of Surface Temperatures Over the Last 1,000 Years Reliable?*, authored by Blakeley B. McShane and Abraham Wyner and published on April 20, 2011 in the Annals of Applied Statistics; Stephen McIntyre and Ross McKitrick, Reply to comment by van Storch and Zorita on 'Hockey sticks, principal components, and spurious significance,'" published in Geophysical Research Letters in October 2005; and Stephen McIntyre and Ross McKitrick, Reply to comment by Huybers on 'Hockey sticks, principal components, and spurious significance,'" published in Geophysical Research Letters in October 2005.

54. McIntyre and McKitrick (2005) found that, due to certain abnormal and undisclosed statistical steps undertaken in MBH98, "a hockey-stick shaped PC1 is nearly always generated from (trendless) red noise with the persistence properties of the North American tree ring network." Grossman Decl., Ex. 54 at 4.

55. McIntyre and McKitrick (2005) also found that MBH98 failed to disclose standard validation statistics that demonstrated its results to lack statistical significance. Grossman Decl., Ex. 54.

56. The hockey-stick graph and Plaintiff's associated research have been subject to criticism in the popular press, including climate-science blogs. Simberg Decl. ¶¶ 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 50, 51, 52, 54, 58, 59, 61, 65, 67, 68, 72.

B. Principal-Component Analysis

57. The hockey-stick graphs in MBH98 and MBH99 were derived using principal component analysis ("PCA"). Grossman Decl., Ex. 47 ("Mann Dep.") 200:2-21 (v. 1).

58. PCA is a transformation of a matrix of numbers into another matrix of numbers of the same size. The columns of the transformed matrix are called the "principal components" and they are ordered so that the most significant attributes of the original data matrix come first. Grossman Decl., Ex. 48 ¶ 57.

59. Principal component analysis has historically been employed in psychometry and intelligence testing. Grossman Decl., Ex. 49 ("Wyner Dep.") 137:18-138:14.

60. The outcome of PCA is highly dependent on certain input choices made by the researcher. Grossman Decl., Ex. 48 ¶¶ 50, 54.

C. Normalization and Short-Centering

61. One set of choices in PCA is whether and how to normalize data that are in different units. Grossman Decl., Ex. 48 ¶ 62.

62. The most common approach to normalization is to standardize over the entire data: first "center" the data by subtracting the mean of each series and then "scale" the data by dividing by the standard deviation of each series. Grossman Decl., Ex. 48 ¶ 62.

63. In MBH98 and MBH99, Plaintiff normalized his tree-ring principal components, over the period from 1902-1980. Grossman Decl., Ex. 50 ("McIntyre Dep.") 86:1-7.

64. The tree-ring principal components Plaintiff normalized over the period from 1902–1980 included data from a longer period of time than 1902–1980.

65. Plaintiff stated in correspondence to Wahl that normalization was necessary for him to "obtain good verification results." Grossman Decl., Ex. 51 at PLF00988701.

66. Plaintiff's normalization of tree-ring principal components over the period from 1902-1980 has been publicly referred to as "short centering." McIntyre Dep. 95:5-96:5; Grossman Decl., Ex. 48 ¶ 62.

67. The baseline with respect to which anomalies are calculated can influence principal components in unanticipated ways. Grossman Decl, Ex. 52 at 90.

68. Because the instrumental temperature record from 1902-1980 used by Plaintiff indicates increased warming, Plaintiff's normalization of his tree-ring principal components over the period from 1902-1980 prioritized proxy series where the average value from 1902-1980 differed substantially from the mean in earlier periods. Grossman Decl., Exs. 48, 54 at 2–3.

69. When Plaintiff's short-centering method is applied to randomly generated proxy networks that share the autoregressive properties of the actual networks used by Plaintiff in MBH98 and MBH99, a hockey stick shape (sometimes pointing upwards, sometimes downwards) generally emerges in the first principal component. Grossman Decl., Exs. 48 ¶ 67, 54 at 4.

70. MBH98 does not disclose that Plaintiff normalized his tree-ring principal components, over the period from 1902-1980. Grossman Decl., Ex. 43

71. MBH99 does not disclose that Plaintiff normalized his tree-ring principal components, over the period from 1902-1980. Grossman Decl., Ex. 44.

D. Inclusion of Strip-Bark Data

72. The tree-ring proxy series analyzed in MBH98 and MBH99 included data from the North American tree ring network ("NOAMER"). Grossman Decl., Exs. 53, 54 at 4.

73. The NOAMER includes tree-ring data from bristlecone pines in the Western United States. Grossman Decl., Ex. 54 at 4.

74. The bristlecone pines in the Western United States that are included in the NOAMER and considered by Plaintiff include strip-bark samples. Mann Dep. 234:16-238:1 (v. 1).

75. The NRC concluded that "strip-bark samples should be avoided for temperature reconstructions." Grossman Decl., Ex. 52 at 52.

76. Plaintiff's FTP site including MBH98 data included a "censored directory." McIntyre Dep. 119:21-120:15.

77. The "censored directory" included about seventy North American tree ring sites. McIntyre Dep. 119:21-120:15; Grossman Decl., Ex. 54 at 4.

78. PC calculations in the "censored directory" were completed with approximately fifty series, with series corresponding to a tree ring site. McIntyre Dep. 119:21-120:15; Grossman Decl., Ex. 54 at 4.

79. The PC calculations in the "censored directory" that were completed with approximately fifty series do not display a hockey-stick shape. McIntyre Dep. 119:21-120:15; Grossman Decl., Ex. 54 at 4.

80. The PC calculations in the "censored directory" that were completed with approximately fifty series do not constitute a statistically skillful reconstruction (as that term is used in MBH98) for some or all of the period from 1400-1980. McIntyre Dep. 119:21-120:15; Grossman Decl., Ex. 54 at 4.

81. The approximately twenty series that were not included in the PC calculations in the "censored directory" were composed primarily of sites in the Western United States collected by Donald Graybill. McIntyre Dep. 119:21-120:15; Grossman Decl., Ex. 54 at 4.

82. The MBH99 hockey-stick graph is dependent on sparse data from the Western United States in the periods before 1400 AD. Mann Dep. 240:1-2 (v. 1).

83. Plaintiff made an adjustment to certain tree-ring data from the Western United States, purportedly to adjust for alleged CO_2 fertilization. Mann Dep. 244:9-18 (v. 1).

84. MBH99 does not clearly disclose that its results depend on this sparse and unreliable data. Mann Dep. 242:8-243:7 (v. 1).

85. A draft of MBH99 disclosed, in language that was subsequently removed, that "a potentially reliable and verifiable pre-AD 1400 reconstructions [sic] rests disproportionately on regionally restricted information-the first PC of the North American ITRDB data." Grossman Decl., Ex. 140 at 5.

E. Principal-Component Retention

86. There are many different rules concerning the retention of principal components in PCA. Mann Dep. 263:21-265:2 (v. 1).

87. Application of Preisendorfer's rule and normalization of tree-ring components over the length of their series to the data analyzed in MBH98 would indicate retention of additional principal components beyond those used by Plaintiff. Grossman Decl., Ex. 48 ¶ 69.

88. When the tree-ring principal components used in MBH98 are centered over their entire series, the MBH98 hockey-stick graph is not statistically skillful (under the criteria employed by Mann himself) without the retention of three additional principal components. Grossman Decl., Ex. 55.

F. Verification Statistics

89. "[C]ommon measures used to assess the accuracy of statistical predictions" include reduction of error (RE), coefficient of efficiency (CE), and the squared correlation (r^2). Grossman Decl., Ex. 52 at 92. Reconstructions that lack those measures "can be seen to be unreliable in an objective way." Grossman Decl., Ex. 52 at 92.

90. The use of RE, CE, and r^2 as verification statistics in dendroclimatic studies was described in climate science literature no later than 1994. Cook et al. (1994), Spatial regression methods in dendroclimatology: A review and comparison of two techniques, Int. J. Climatol. 14, 379-402.

91. MBH98 uses a verification statistic called β, which is equivalent to RE. Mann Dep. 246:22-247:19 (v. 1).

92. MBH99 uses a verification statistic called β, which is equivalent to RE. Mann Dep. 246:22-247:19 (v. 1).

93. MBH98 did not report CE or r^2 for its surface temperature reconstructions. *See generally* Grossman Decl., Ex. 43.

94. MBH99 did not report CE or r^2 for its surface temperature reconstructions. *See generally* Grossman Decl., Ex. 44.

95. Plaintiff never calculated CE for the surface temperature reconstructions in MBH98. Mann Dep. 252:8-16 (v. 1).

96. Plaintiff never calculated CE for the surface temperature reconstructions in MBH99. Mann Dep. 252:8-16 (v. 1).

97. The computer code for MBH98 (multiproxy.f) includes the following code segment:

```
amean1 = zero
 amean2 = zero
 amean3 = zero
 amean4 = zero
 varverglob = zero
 varvernhem = zero
 varcalglob = zero
 varcalnhem = zero
 corrglob = zero
 corrnhem = zero
 do iy=iymin,iymax
 amean1 = amean1+globv(iy)
 amean2 = amean2+nhemv(iy)
 amean3 = amean3+globc(iy)
 amean4 = amean4+nhemc(iy)
 end

do amean1 = amean1/float(iymax-iymin+1)
 amean2 = amean2/float(iymax-iymin+1)
 amean3 = amean3/float(iymax-iymin+1)
 amean4 = amean4/float(iymax-iymin+1)

do iy=iymin,iymax
 varcalglob = varcalglob + (globc(iy)-amean3)**2
 varcalnhem = varcalnhem + (nhemc(iy)-amean4)**2
 varverglob = varverglob + (globv(iy)-amean1)**2
 varvernhem = varvernhem + (nhemv(iy)-amean2)**2
 corrglob = corrglob + (globv(iy)-amean1) $ *(globc(iy)-amean3)
 corrnhem = corrnhem + (nhemv(iy)-amean2) $ *(nhemc(iy)-amean4)
 end do

corrglob = corrglob/sqrt(varverglob*varcalglob)
 corrnhem = corrnhem/sqrt(varvernhem*varcalnhem)

…

open (unit=9,file='corrs-verif1.out',status='unknown')
write (9,*) 'globe: ',corrglob,corrglob**2
 write (9,*) 'nhem: ',corrnhem,corrnhem**2
```

Grossman Decl., Ex. 56.

98. The code segment identified in paragraph 97 calculates the r^2 value for certain surface temperature reconstructions in MHB98. McIntyre Dep. 143:4-146:1.

99. Reconstructions that have poor validation statistics (e.g., low CE) will have correspondingly wide uncertainty bounds, and so can be seen to be unreliable in an objective way. Grossman Decl., Ex. 52 at 92.

100. A CE statistic close to zero or negative suggests that the reconstruction is no better than the mean, and so its skill for time averages shorter than the validation period will be low. Grossman Decl., Ex. 52 at 92.

G. Smoothing and Infilling

101. The hockey-stick graphs in MBH98 and MBH99 include a line that is smoothed over a multi-year period using a filter and padded with instrumental data in the final approximately twenty years of the reconstruction. Grossman Decl., Exs. 43 at 783, 44 at 761, and 57.

102. In the MBH98 and MBH99 hockey-stick graphs, Plaintiff "infilled" missing proxy data through a persistence method that included the previous proxy values in the applicable data series. Mann Dep. 267:14-268:20 (v. 1).

103. The hockey-stick graphs in MBH98 and MBH99 were smoothed over a multi-year period that considered approximately twenty years of data from before and after the year in question. Grossman Decl., Exs. 43 at 783, 44 at 761, and 57.

104. For all dates after approximately 1980 that were considered for smoothing purposes in MBH98 and MBH99, Plaintiff used instrumental temperature measurements rather than reconstructed temperature values. Grossman Decl., Exs. 43 at 783, 44 at 761, and 57.

105. If Plaintiff had not padded the smoothed MBH98 and MBH99 hockey-stick graphs with instrumental data, the graphs would have shown declining temperatures in their final years. Grossman Decl., Ex. 57.

106. MBH98 does not disclose that the hockey-stick graph was padded with instrumental data. Mann Dep. 275:19-278:20 (v. 1).

107. MBH99 does not disclose that the hockey-stick graph was padded with instrumental data. Mann Dep. 275:19-278:20 (v. 1).

108. The coordinating lead authors on IPCC TAR Chapter 2 were C.K. Folland and T.R. Karl. Grossman Decl., Ex. 45 at 99.

109. The lead authors on IPCC TAR Chapter 2 included John Christy and Plaintiff. Grossman Decl., Ex. 45 at 99.

110. IPCC TAR Chapter 2, Figure 2.21 purports to show climate reconstructions by Plaintiff, Jones, and Briffa (2000), *Annual climate variability in the Holocene: interpreting the message of ancient trees*, Quant. Sci Rev. 19, 87-105. Grossman Decl., Ex. 45 at 134.

111. Plaintiff was the IPCC TAR Chapter 2 lead author who supervised the creation of Figure 2.21. Grossman Decl, Ex. 105 ("Christy Dep.") 50:14-17.

112. IPCC TAR Chapter 2, Figure 2.21 ends Briffa (2000)'s reconstruction (shown in green) at around 1960. Grossman Decl., Exs. 45 at 134, and 58.

113. Briffa (2000) reconstructed temperatures through 1980. Grossman Decl., Ex. 58.

114. Briffa (2000)'s reconstructed temperatures generally declined between 1960-1980. Grossman Decl., Ex. 58.

115. IPCC TAR Chapter 2 does not state that Figure 2.21 fails to show Briffa (2000)'s reconstruction between 1960-1980. Grossman Decl., Ex. 45 at 99–181.

116. Christy characterized Plaintiff's actions regarding this portion of TAR Chapter 2 as "manipulation of evidence." Christy Dep. 100:9-102:4.

Climategate

117. In or around November 2009, a collection of emails, documents, and data from the Climactic Research Unit ("CRU") of the University of East Anglia ("UAE") were publicly released by an unknown person, an event that became known as "Climategate." Simberg Decl. ¶ 6.

118. The released materials are authentic, in that they accurately reproduce communications, documents, and data held by CRU or its personnel. Simberg Decl. ¶¶ 19, 29.

119. Numerous of the Climategate materials contained communications by Plaintiff; communications to Plaintiff; communications concerning Plaintiff, his research, or his conduct; or other information concerning Plaintiff or his research. Grossman Decl., Exs. 8–17; Simberg Decl. ¶¶ 8–17.

120. Numerous scientists, journalists, and other commentators understood the Climategate disclosures and related materials to evidence fraud or deceptive conduct, including by Plaintiff. Simberg Decl. ¶¶ 19, 20, 21, 27, 28, 29, 30, 32, 35, 36, 40, 44, 52, 56, 60.

121. Numerous scientists, journalists, and other commentators understood the Climategate disclosures and related materials to evidence data manipulation, including by Plaintiff. Simberg Decl. ¶¶ 19, 20, 21, 22, 23, 26, 27, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, 51, 52, 56, 60, 61, 67, 71, 89.

122. Numerous scientists, journalists, and other commentators understood the Climategate disclosures and related materials to reveal misconduct, including criminal misconduct, by parties including Plaintiff. Simberg Decl. ¶¶ 22, 25, 27, 29, 30, 31, 33, 37, 44, 55, 91.

123. The Office of Inspector General of the National Science Foundation found that "many" of the Climategate emails "contained language that reasonably caused individuals, not

party to the communications, to suspect some impropriety on the part of the authors." Grossman Decl., Ex. 59 at 2–3.

124. In or around November 2011, further CRU materials were publicly released by an unknown person, an event that became known as "Climategate 2.0." Simberg Decl. ¶ 54.

125. Numerous of the Climategate 2.0 materials contained communications by Plaintiff; communications to Plaintiff; communications concerning Plaintiff, his research, or his conduct; or other information concerning Plaintiff or his research. Simberg Decl. ¶¶ 54–61.

126. Numerous of the Climategate 2.0 materials contained communications by climate scientists expressing criticism of Plaintiff, his research, and his conduct. Simberg Decl. ¶¶ 54–61.

127. Plaintiff has confirmed the authenticity of his emails that were released in Climategate 2.0. Simberg Decl. ¶ 60.

A. Climategate Emails and Plaintiff's Conduct

128. In a September 22, 1999 email, Plaintiff stated that a correspondent "definitely overstates any singular confidence I have in my own (Mann et al) series," referring to the data involved in his hockey-stick research. Grossman Decl., Ex. 8.

129. In a November 16, 1999 email to Plaintiff and others, Phil Jones of the CRU stated that he was preparing a climate "diagram" and had "just completed Mike's Nature trick of adding in the real temps to each series for the last 20 years (ie [sic] from 1981 onwards) amd [sic] from 1961 for Keith's to hide the decline." Grossman Decl., Ex. 9.

130. In a July 31, 2003 email to climate scientist Timothy Osborn, Plaintiff provided climate-reconstruction data and directed Osborn not to "pass this along to others" because the

data "is the sort of 'dirty laundry' one doesn't want to fall into the hands of those who might potentially try to distort things." Grossman Decl., Ex. 10.

131. In a December 30, 2004 email to Phil Jones, Plaintiff responded to Jones's message that researcher Stephen McIntyre had requested that Jones remove comments from a draft manuscript stating that McIntyre and a co-author had used the wrong data set to reconstruct Plaintiff's 1998 hockey-stick research. McIntyre explained that he used the data set that Plaintiff and his colleague directed him to use. Mann stated, "I would immediately delete anything you receive from this fraud." He further called McIntryre's research "pure crap" and stated, "I would NOT RESPOND to this guy. As you know, only bad things can come of that." He proceeded to impugn McIntyre's honesty and falsely claimed that McIntyre "is funded by the same people as Singer, Michaels, etc.," referring to Plaintiff's belief that McIntyre was being funded by the energy industry. Grossman Decl., Ex. 11.

132. In a May 12, 2006 email to several climate scientists, Plaintiff responded to another scientist's email that he was going to provide data that researcher Stephen McIntyre had requested. He urged the scientist not to do so, stating, "personally, I don't see why you should make any concessions for this moron." Plaintiff also accused McIntyre of being a liar for stating that he was unable to access data on Plaintiff's FTP site. Grossman Decl., Ex. 12.

133. In a March 11, 2003 email, Plaintiff encouraged a group of climate scientists to launch a boycott of a peer-reviewed journal because it published research with which he disagreed and to "ignore" the paper at issue. Grossman Decl., Ex. 13.

134. In 2003, *Climate Research* published an article by Willie Soon and Sallie Baliunas, scientists then associated with the Harvard-Smithsonian Center for Astrophysics, disagreeing with Plaintiff's conclusion in MBH99 that the 20th century probably was the

warmest of the last millennium. Soon, W et al. (2003), *Proxy climatic and environmental changes of the past 1000 years*, Climate Research 23, 89-110.

135. Following the publication of Soon & Baliunas, Plaintiff and colleagues boycotted *Climate Research* by refusing to submit or review for it. Grossman Decl., Ex. 60.

136. Plaintiff explained that the boycott of *Climate Research* was intended to damage the journal by letting "it suffer increasingly from its lack of credibility." Grossman Decl., Ex. 60.

137. Plaintiff represented to climate scientist Chip Knappenberger that he was "not familiar" with the boycott of *Climate Research*. Grossman Decl., Ex. 61.

138. In an October 26, 2003 email, Plaintiff encouraged a large group of climate scientists to denounce a research article published in a peer-reviewed journal because he disagreed with its conclusions. He did this, and provided a "suggested response" that the paper be dismissed as "nonsense," despite admitting in the email that he did not even bother to understand the paper's methodology. He stated, "[t]he important thing is to deny that this had any intellectual credibility whatsoever and, if contacted by any media, to dismiss this for the stunt that it is." He concluded that the journal "is being run by the baddies" and was a "shill for industry." Grossman Decl., Ex. 14.

139. In a January 20, 2005 email, Plaintiff proposed to a group of climate scientists that they try to force out editors of a peer-reviewed journal that had published research with which he disagreed. Grossman Decl., Ex. 15.

140. In a September 11, 2007 email, Plaintiff stated that another climate scientist should "threaten a lawsuit" for defamation to prevent a journal from publishing a paper critical of his research. Plaintiff stated that he "had a top lawyer already representing [him]," and that he

could put the other scientist "in touch w/ a[] leading attorney who would do this pro bono." Grossman Decl., Ex. 16.

B. Destruction of Information

141. In a May 29, 2008 email, Phil Jones asked Plaintiff to "delete any emails you may have had with Keith [Briffa] re AR4? Keith will do likewise…. Can you also email Gene [Wahl] and get him to do the same?" Plaintiff responded, "I'll contact Gene about this ASAP." Grossman Decl., Ex. 17.

142. At the time, Eugene Wahl was a professor at Alfred University. Grossman Decl., Ex. 62 ("Wahl Dep.") 102:19-21.

143. About twenty-six seconds after Plaintiff wrote to Jones that he would "contact Gene about this ASAP," Plaintiff forwarded Jones's email to Wahl's "alfred.edu" email address and his "yahoo.com" email address. Grossman Decl., Ex. 17.

144. Plaintiff and Wahl discussed Jones's request that Wahl destroy communications with Briffa relating to the IPCC Fourth Assessment Report a few days after Plaintiff forwarded Jones's email to Wahl. Wahl Dep. 135:25-136:10. Plaintiff informed Wahl that Jones had requested the document deletion because East Anglia faculty members were being criticized. Wahl Dep. 136:12-15. Plaintiff did not tell Wahl that he sent the email merely so that Wahl was aware of the matter. Wahl Dep. 136:18-137:1

145. Wahl then deleted his communications with Briffa concerning the IPCC Fourth Assessment Report. Wahl Dep. 137:16-21.

146. Certain documents Briffa deleted concerning the IPCC Fourth Assessment Report were later released in Climategate. Those documents concerned the Fourth Assessment Report's treatment of Plaintiff's work. Grossman Decl., Ex. 63.

147. Plaintiff did not disclose to PSU investigators his conversation that convinced Wahl to delete the documents. Grossman Decl., Exs. 64, 65.

148. In communications with Penn State University relating to the University's RA-10 proceeding into Plaintiff's conduct, Plaintiff informed Penn State that he forwarded Jones's email to Wahl so that he was aware of the matter. Grossman Decl., Ex. 17.

149. PSU investigators did not interview Wahl as part of their "investigation" into Plaintiff. Grossman Decl., Exs. 66 ("Scaroni Dep.") 72:7-18, and 67 ("Yekel Dep.") 97:13-22.

150. Plaintiff has referred to the IPCC Fourth Assessment Report as validating his research. Grossman Decl., Ex. 68.

C. Attacks on Critics

151. Plaintiff disparaged on multiple occasions the scientific work of Steven McIntyre and McIntyre personally. Grossman Decl., Exs. 11, 68, 69, 70, 71, 72, 73, 74, and 75.

152. McIntyre is a Canadian citizen-scientist who has authored multiple peer-reviewed works on climate science that are critical of MBH98. Grossman Decl., Ex. 76 at 73; Mann Dep. 128:12-134:10 (v. 1); Grossman Decl., Ex. 77 Nos. 3-9.

153. McIntyre has commented extensively on Plaintiff's scientific work on his "Climate Audit" weblog. Grossman Decl., Exs. 56, 57, 78, 79, 80, 81, 82, 83, 84, 85; Simberg Decl. ¶¶ 28, 34, 53.

154. None of McIntyre's peer-reviewed publications have been retracted. McIntyre Dep. 30:1-4.

155. Plaintiff attempted to convince the *New York Times* not to publicize McIntyre's work on grounds that it was "fraudulent." Grossman Decl., Ex. 76 at 73.

156. Plaintiff represented that McIntyre was funded by the fossil-fuel industry. McIntyre Dep. 168:23-169:13.

157. Plaintiff made veiled legal threats against *Nature* for inviting McIntyre to post on the Nature blog site by including Plaintiff's attorney (Georgetown Law Professor David Vladeck) and claiming that "[i]t would truly be disturbing if Nature were to allow their blog site to be yet again hijacked for the purpose of publishing criticisms of" his work. Grossman Decl, Ex. 68.

158. Plaintiff disparaged climate scientist Hans von Storch by accusing him of committing scientific misconduct, after they published work critical of certain aspects of MBH98/MBH99. Grossman Decl., Ex. 86.

159. Plaintiff disparaged climate scientist Eduardo Zorita by accusing him of committing scientific misconduct, after they published work critical of certain aspects of MBH98/MBH99. Grossman Decl., Ex. 86.

160. Plaintiff disparaged Ulrich Cubasch by accusing him of committing scientific misconduct, after they published work critical of certain aspects of MBH98/MBH99. Grossman Decl., Ex. 86.

161. Roger Pielke, Jr., is a Professor of Environmental Studies at the University of Colorado. Grossman Decl., Ex. 87.

162. Plaintiff has attempted to delegitimize Pielke. Grossman Decl., Exs. 88, 89, 90.

163. Plaintiff successfully participated in getting Pielke fired from the *FiveThirtyEight* website, Grossman Decl., Ex. 91 ("Pielke Dep.") 29:15-23.

164. Plaintiff successfully participated in getting Pielke fired the *Nature* blog site, Pielke Dep. 30:8-22.

165. Plaintiff falsely accused Pielke of being associated with the Heartland Institute, Pielke Dep. 32:19-34:1; Grossman Decl., Ex. 89.

166. Plaintiff accused Pielke of misrepresenting the scientific literature on the relationship between climate change and natural disaster damages to the House of Representatives, Pielke Dep. 37:16-39:8; Grossman Decl., Ex.88.

167. Judith Curry is Professor Emeritus at the Georgia Institute of Technology. Grossman Decl., Ex. 92.

168. Plaintiff published an op-ed in the *Huffington Post* equating Curry to a serial climate misinformer. Grossman Decl., Ex. 93 ("Curry Dep.") 205:9-18.

169. Richard Lindzen was the Alfred P. Sloan Professor of Meteorology at the Massachusetts Institute of Technology. Grossman Decl., Ex. 94.

170. Plaintiff falsely accused Lindzen of accepting industry funding as a tacit payoff for public advocacy of an industry viewpoint on science. Grossman Decl., Exs. 95 ("Lindzen Dep.") 67:14-69:4, 96.

171. Plaintiff falsely accused Lindzen of knowingly lying about Mann's work and distorting other scientists' work. Lindzen Dep. 69:5-70:9.

172. Plaintiff accused Lindzen of being a climate change denier. Grossman Decl., Ex. 97; Lindzen Dep. 66:9-14.

173. Much of Lindzen's family was killed in the Holocaust. Lindzen Dep. 63:20-23.

174. Lindzen does not deny that human activity impacts the climate. Lindzen Dep. 63:24-64:8.

Investigations Following Climategate

A. U.K. House of Commons Science and Technology Committee

175. The United Kingdom House of Commons Science and Technology Committee issued a report entitled "The disclosure of climate data from the Climatic Research Unit at the University of East Anglia" on March 24, 2010. ("UKHCSTC Report"). Grossman Decl., Ex. 106.

176. The UKHCSTC Report considered "what were the implications of the disclosures for the integrity of scientific research, were the terms of reference and scope of the Independent Review announced on 3 December 2009 by UEA adequate, [and] how independent were the other two international data sets." Grossman Decl., Ex. 106 at 8.

177. The UKHCSTC Report does not consider whether the hockey-stick graph is the product of data manipulation. Grossman Decl., Ex. 106.

178. The UKHCSTC Report does not state that it investigated Plaintiff's conduct. Grossman Decl., Ex. 106.

179. The UKHCSTC Report does not state that it made factual findings concerning Plaintiff's conduct. Grossman Decl., Ex. 106.

180. The UKHCSTC Report does not state that it is the statement of a public office. Grossman Decl., Ex. 106.

181. The UKHCSTC Report does not set forth the activities of a public office. Grossman Decl., Ex. 106

182. The UKHCSTC Report does not set forth factual findings. Grossman Decl., Ex. 106.

183. The UKHCSTC Report does not set forth factual findings from a legally authorized investigation. Grossman Decl., Ex. 106.

B. U.K. Secretary of State for Energy and Climate Change

184. The United Kingdom Secretary of State for Energy and Climate Change issued a report entitled "Government Response to the House of Commons Science and Technology Committee 8th Report of Session 2009-10: The disclosure of climate data from the Climatic Research Unit at the University of East Anglia" in September 2010. ("UK SEEC Report"). Grossman Decl., Ex. 107.

185. The UK SEEC Report does not mention Plaintiff. Grossman Decl., Ex. 107.

186. The UK SEEC Report does not mention the hockey-stick graph. Grossman Decl., Ex. 107.

187. The UK SEEC Report does not state that it investigated Plaintiff's conduct. Grossman Decl., Ex. 107.

188. The UK SEEC Report does not state that it made factual findings concerning Plaintiff's conduct. Grossman Decl., Ex. 107.

189. The UK SEEC Report does not state that it adopted the findings of the Muir Russell Report. Grossman Decl., Ex. 107.

190. The UK SEEC Report does not state that it is the statement of a public office. Grossman Decl., Ex. 107.

191. The UK SEEC Report does not set forth the activities of a public office. Grossman Decl., Ex. 107.

192. The UK SEEC Report does not set forth factual findings. Grossman Decl., Ex. 107.

193. The UK SEEC Report does not set forth factual findings from a legally authorized investigation. Grossman Decl., Ex. 107.

C. Oxburgh Panel

194. On April 12, 2010, a panel chaired by Professor Ron Oxburgh and consisting of Professors Huw Davies, Kerry Emanuel, Lisa Graumlich, David Hand, Herbert Huppert, and Michael Kelly submitted a report to the University of East Anglia concerning the integrity of the Climatic Research Unit's research ("Oxburgh Report"). Grossman Decl., Ex. 108.

195. Plaintiff is not part of the Climatic Research Unit. Grossman Decl., Ex. 108

196. Plaintiff has never been part of the Climatic Research Unit. Grossman Decl., Ex. 108.

197. The Oxburgh Report does not mention Plaintiff. Grossman Decl., Ex. 108.

198. The Oxburgh Report does not mention the hockey-stick graph. Grossman Decl., Ex. 108.

199. The Oxburgh Report does not state that it investigated Plaintiff's conduct. Grossman Decl., Ex. 108.

200. The Oxburgh Report does not state that it made factual findings concerning Plaintiff's conduct. Grossman Decl., Ex. 108.

201. The Oxburgh Report does not state that it is the statement of a public office. Grossman Decl., Ex. 108.

202. The Oburgh Report does not set forth the activities of a public office. Grossman Decl., Ex. 108.

203. The Oxburgh Report does not set forth factual findings. Grossman Decl., Ex. 108.

204. The Oxburgh Report does not set forth factual findings from a legally authorized investigation. Grossman Decl., Ex. 108.

D. Muir Russell Report

205. In July 2010, a panel chaired by Sir Muir Russell and consisting of professors Geoffrey Boulton, Peter Clarke, James Norton, and David Eyerton, submitted a report to the University of East Anglia concerning the behavior of CRU scientists ("Muir Russell Report"). Grossman Decl., Ex. 109.

206. The Muir Russell Report does not investigate the conduct of any scientists that were not part of the CRU. Grossman Decl., Ex. 109.

207. The Muir Russell Report does not state that it investigated Plaintiff's conduct. Grossman Decl., Ex. 109.

208. The Muir Russell Report does not state that it made factual findings concerning Plaintiff's conduct. Grossman Decl., Ex. 109.

209. The Muir Russell Report's section addressing allegations concerning temperature reconstructions does not mention Plaintiff. Grossman Decl., Ex. 109.

210. The Muir Russell Report does not state that it is the statement of a public office. Grossman Decl., Ex. 109.

211. The Muir Russell Report does not set forth the activities of a public office. Grossman Decl., Ex. 109.

212. The Muir Russell Report does not set forth factual findings. Grossman Decl., Ex. 109.

213. The Muir Russell Report does not set forth factual findings from a legally authorized investigation. Grossman Decl., Ex. 109.

E. The Department of Commerce Report

214. On February 18, 2011, the Office of the Inspector General of the United States Department of Commerce submitted a report to Senator James M. Inhofe concerning certain

activities of the National Oceanic and Atmospheric Administration ("NOAA"). ("DOC IG Report"). Grossman Decl., Ex. 110.

215. The DOC IG Report does not state that it investigated Plaintiff's conduct. Grossman Decl., Exs. 110, 111 ("Zinser Dep.") 14:10-21.

216. The DOC IG Report does not state that it made factual findings concerning Plaintiff's conduct. Grossman Decl., Ex. 110.

217. The DOC IG Report did not reach any conclusions concerning Plaintiff's conduct. Zinser Dep. 24:17-19.

218. The DOC IG Report did not reach any conclusions concerning whether Plaintiff manipulated data. Zinser Dep. 24:20-22.

219. The DOC IG Report did not reach any conclusions concerning whether Plaintiff engaged in academic or scientific misconduct. Zinser Dep. 24:23-25:22.

220. The DOC Report did not reach any conclusions concerning whether the hockey-stick graph was fraudulent. Zinser Dep. 25:23-26:1.

221. The only relationship between the investigation that gave rise to the DOC IG Report and Climategate is that the IG investigated NOAA data collection and the action of certain NOAA employees. Zinser Dep. 14:23-15:23.

F. The U.S. Environmental Protection Agency Reconsideration Decision

222. On August 13, 2010, the U.S. Environmental Protection Agency ("EPA") published its denial of the petitions to reconsider the endangerment and cause or contribute findings for greenhouse gases under Section 202(a) of the Clean Air Act in the Federal Register. 75 Fed. Reg. 49,556 (Aug. 13, 2010) ("Endangerment Reconsideration Decision"). Grossman Decl., Ex. 112.

223. The Endangerment Reconsideration Decision found that the petitioners had not met the criteria for reconsideration under section 307(d) of the Clean Air Act. Grossman Decl., Ex. 112 at 49,558/2-3.

224. The Endangerment Reconsideration Decision does not state that it investigated Plaintiff's conduct. Grossman Decl., Ex. 112.

225. The Endangerment Reconsideration Decision does not state that it made factual findings concerning Plaintiff's conduct. Grossman Decl., Ex. 112.

226. The Endangerment Reconsideration Decision does not state that it investigated the hockey-stick graph. Grossman Decl., Ex. 112.

227. The Endangerment Reconsideration Decision does not set forth factual findings. Grossman Decl., Ex. 112.

228. The Endangerment Reconsideration Decision does not set forth factual findings from a legally authorized investigation. Grossman Decl., Ex. 112.

G. The Penn State RA-10 Proceeding

229. On November 24, 209, Penn State convened a proceeding under Research Administration Policy No. 10 ("RA-10") into Plaintiff's conduct ("RA-10 Proceeding"). Grossman Decl., Ex. 98 at 1.

230. The first step in the RA-10 Proceeding was the formation of an Inquiry Committee. The Inquiry Committee was initially comprised of Dr. Eva Pell, Senior Vice President for Research, Dr. Alan Scaroni, Associate Dean for Graduate Education and Research from the College of Earth and Mineral Sciences, and Ms. Candice Yekel, Director of the Office for Research Protections. Grossman Decl., Ex. 98 at 1. Dr. William Brune, Head of the Department of Meteorology, served in a consulting capacity for the Committee. Grossman Decl.,

Ex. 98 at 1. Dr. Henry C. Foley, served in an ex officio role on the Inquiry Committee and then replaced Dr. Pell upon his assumption of the position of Vice President for Research on January 1, 2010. Grossman Decl., Ex. 98 at 1.

231. Dr. Pell synthesized four allegations against Plaintiff for consideration by the Inquiry Committee: "(1) Did you engage in, or participate in, directly or indirectly, any actions with the intent to suppress or falsify data? (2) Did you engage in, or participate 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? (3) Did you engage in, or participate in, directly or indirectly, any misuse of privileged or confidential information available to you in your capacity as an academic scholar? (4) Did you engage in, or participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities?" Grossman Decl., Ex. 98 at 2-3.

232. On November 24, 2010, Dean William Easterling recused himself from the RA-10 proceeding. Grossman Decl., Ex. 98 at 2.

233. Easterling was a personal friend of Plaintiff. Mann Dep. 166:15-168:7 (v. 1).

234. Despite Easterling's recusal, he nonetheless participated in the RA-10 proceeding. Mann Dep. 166:15-168:7 (v. 1); Grossman Decl., Ex. 113.

235. Easterling recommended every person interviewed by the Investigation Committee except for Richard Lindzen and Plaintiff. Grossman Decl., Ex. 114 at 6–8.

236. Following the conclusion of the RA-10 proceeding, Scaroni contacted McIntyre and informed him that the reason he was not contacted as part of the RA-10 proceeding was because of Easterling's involvement. Grossman Decl., Ex. 115; McIntyre Dep. 386:12-387:9.

237. Policy RA-10 provided that the purpose of the Inquiry Committee is to engage in information-gathering and preliminary fact-finding to determine whether an allegation or apparent instance of research misconduct warrants an investigation. Grossman Decl., Ex. 116 at 2.

238. Policy RA-10 provided that an investigation was a formal examination and evaluation of relevant facts to determine whether research misconduct has taken place or, if research misconduct has already been confirmed, to assess its extent and consequences and determine appropriate action. Grossman Decl., Ex. 116 at 2.

239. Policy RA-10 provides that the confidentiality of information shall be protected to the maximum extent possible. Grossman Decl., Ex. 116 at 3.

240. Policy RA-10 provides that if the person or persons conducting the inquiry lack the necessary and appropriate technical expertise or background in the field in question, technical consultants should be appointed to assist in the inquiry. Grossman Decl., Ex. 116 at 3.

241. Policy RA-10 does not prohibit the Inquiry Committee from interviewing persons with knowledge of the allegations under consideration. Grossman Decl., Ex. 116.

242. Policy RA-10 does not provide any role for the Penn State University President. Grossman Decl., Ex. 116.

243. Then-Penn State President Graham Spanier edited the Inquiry Report and privately met with the inquiry's chair, Foley. Grossman Decl., Ex. 117; Scaroni Dep. 145:12-15.

244. President Graham Spanier's editing of the Inquiry Report and meeting with Foley were not disclosed to the other members of the Inquiry Committee. Yekel Dep. 159:2-6.

245. President Graham Spanier's editing of the Inquiry Report and meeting with Foley were not publicly disclosed. Grossman Decl, Ex. 98.

246. Penn State made an image of Plaintiff's computer as part of the RA-10 proceeding but never reviewed that computer image as part of the RA-10 proceeding. Yekel Dep. 84:12-89:19.

247. On January 12, 2010, the Inquiry Committee interviewed Plaintiff. Grossman Decl., Ex. 98 at 4.

248. The Inquiry Committee did not attempt to confirm the veracity of Plaintiff's statements. Scaroni Dep. 40:5-41:1.

249. Plaintiff represented to the Penn State Inquiry Committee that McIntyre made legal threats to the National Corporation for Atmospheric Research (NCAR"). Grossman Decl., Ex. 64 at 7.

250. McIntyre made no legal threats to NCAR. McIntyre Dep. 170:14-172:15.

251. Plaintiff represented to the Penn State Inquiry Committee that McIntyre made legal threats to James Famiglietti, then-editor of *Geophysical Research Letters*. Grossman Decl., Ex. 64 at 7.

252. McIntyre likewise made no legal threats to Famiglietti. McIntyre Dep. 170:14-172:15.

253. On January 15, 2010, Plaintiff followed up with a letter with attachments to Dr. Foley concerning additional information related to the RA-10 proceeding. CEI-S-15. In this communication, Plaintiff informed Penn State that he forwarded Jones's email concerning the deletion of communications related to the IPCC Fourth Assessment to Wahl so that Wahl was aware of the matter. Grossman Decl, Ex. 118.

254. Plaintiff did not inform Penn State that he and Wahl discussed Jones's request that Wahl destroy communications with Briffa relating to the IPCC Fourth Assessment Report a few days after Plaintiff forwarded Jones's email to Wahl. Wahl Dep. 135:25-137:1.

255. Plaintiff did not tell Wahl that he sent the email merely so that Wahl was aware of the matter. Wahl Dep. 135:25-137:1.

256. Plaintiff did not inform Penn State that he told Wahl during this discussion that Jones had requested the document deletion because East Anglia faculty members were being criticized. Wahl Dep. 135:25-137:1.

257. After the conversation with Plaintiff, Wahl deleted his communications with Briffa concerning the IPCC Fourth Assessment Report. Wahl Dep. 137:12-21.

258. Penn State did not interview Wahl as part of its investigation of Plaintiff. Scaroni Dep. 71:13-72:18; Yekel Dep. 97:11-22.

259. In early January 2010, Foley communicated with Dr. Gerald North, a professor at Texas A&M University, concerning the RA-10 Inquiry. Grossman Decl., Ex. 119. No other Inquiry Committee member communicated with Dr. North. Grossman Decl., Ex. 120 ("Foley Dep.") 55:1-14.

260. No transcript was made of Foley's communications with Dr. North. Foley Dep. 55:1-14.

261. Dr. North had previously submitted a letter of recommendation to Penn State concerning Plaintiff. Grossman Decl., Ex. 121.

262. Dr. Donald Kennedy of Stanford University emailed Penn State regarding the RA-10 Proceeding. Grossman Decl., Ex. 122. No member of the Inquiry Committee interviewed Dr. Kennedy. Scaroni Dep. 71:13-72:18.

263. On January 22, 2010, the Inquiry Committee met concerning the RA-10 Proceeding. Grossman Decl., Ex. 123.

264. On January 25, 2010, Foley wrote to Yekel and Scaroni, copying Penn State Counsel, stating that for the first three allegations, a majority of the Inquiry Committee did not believe that they had sufficient information to determine whether Plaintiff was guilty or not guilty, but that it would have been difficult for the Inquiry Committee to have discovered the type of data necessary to prove Plaintiff's guilt or innocence. For that reason, the Inquiry Committee would set aside allegations 1–3 as indeterminate. Grossman Decl., Ex. 124 at 1.

265. Foley proposed censuring Plaintiff, based on Foley's belief that Plaintiff's statements and conduct, as expressed in the emails, was improper. Grossman Decl., Ex. 124 at 2; Foley Dep. 77:4-79:25.

266. Later on January 25, 2010, Scaroni emailed Foley, Yekel, and Penn State Counsel stating that he was uncomfortable with applying the word innocent in regard to any of the charges and that Scaroni was willing to set aside accusations 1-3 not because Scaroni found Plaintiff to be innocent, but instead because it is unlikely that a faculty committee conducting the investigation would have access to the depth of information necessary to make a definitive finding, one way or another. Grossman Decl., Ex. 125.

267. Later in that same email chain, on January 26, 2010, Yekel wrote that she thought the Inquiry Committee was going to make a statement that Plaintiff breeched the ethical standards described in AD47. Grossman Decl., Ex. 125.

268. On January 27, Foley emailed Penn State President Graham Spanier a draft inquiry report. Grossman Decl., Ex. 117. That draft report was two pages long. Grossman Decl., Ex. 117 at 2-3. For allegations 1-3, the draft report stated only that the Inquiry Committee found

nothing to warrant an investigation and will not pursue this further. Grossman Decl., Ex. 117 at 2.

269. In response, Spanier expressed his belief to Foley that the letter as drafted was insufficient and requested a meeting with Foley. Grossman Decl., Ex. 126 at 1-2.

270. The next day, Foley met with Plaintiff. Grossman Decl., Ex. 141.

271. Foley did not inform Scaroni or Yekel about this meeting. Scaroni Dep. 154:3-6; Yekel Dep. 159:16-21.

272. Following this meeting, Plaintiff sent an email to multiple individuals not affiliated with Penn State stating, "I was very much given the impression that I have absolutely nothing to worry about, that this will all be done in a way that is very supportive." Grossman Decl., Ex. 127.

273. Penn State issued a 10-page Inquiry Report signed by Foley, Scaroni, and Yekel on February 3, 2010. Grossman Decl., Ex. 98 at 10.

274. The Inquiry Report included approximately eight pages of text that was not included in the January 27 draft that Foley sent to Spanier, including a discussion of Plaintiff's "composure" and "forthright responses" to the Inquiry Committee and a footnote purporting to explain "Mike's Nature Trick" as just a way of referring to a statistical method, without any express acknowledgment of the trick being used "to hide the decline." Grossman Decl., Ex. 98 at 4-5.

275. The Inquiry Report refused to allow allegations 1-3 to proceed to an investigation committee, Grossman Decl., Ex. 98 at 5-6 based on a lack of information whether Plaintiff committed research misconduct as the Committee members understood it, not because the Inquiry Committee believed Plaintiff was exonerated. Scaroni Dep. 41:6-42:9.

276. The Inquiry Committee did not consider whether Plaintiff engaged in data manipulation or the molestation or "torture" of data, nor whether his hockey-stick research was fraudulent. Scaroni Dep. 98:8-101:10.

277. In dismissing allegation 2, the Inquiry Committee did not consider Plaintiff's actions concerning Wahl's destruction of information, only whether Plaintiff himself destroyed communications. Scaroni Dep. 102:14-105:6.

278. The Inquiry Report referred allegation 4 to an investigation committee. The Inquiry Report's decision did not refer to the conduct of Plaintiff that Foley indicated provided a basis to censure Plaintiff. Grossman Decl, Ex. 98 at 9.

279. Around the time of the issuance of the Inquiry Report, Spanier and Plaintiff had a phone conversation concerning the RA-10 Proceeding. Grossman Decl., Ex. 128.

280. Both Spanier and Plaintiff profess to have no recollection of the conversation. Grossman Decl., Ex. 129 ("Spanier Dep.") 33:14-17; Mann Dep. 150:5-11 (v. 1).

281. Following the conversation, Plaintiff sent an email characterizing the Investigation Committee's investigation of allegation 4 as "the 'cover our a$$es' charge, i.e., it's non-specific enough that it allows Penn State to say that they fully investigated at least some aspect of the allegations, which allowing them to dismiss in short order the truly serious allegations." Grossman Decl, Ex. 128.

282. The Penn State RA-10 Proceeding then moved to the Investigation Committee.

283. The investigation was generally limited to issues regarding the sharing of code, data, and drafts, without considering the more serious issues raised by Climategate. Grossman Decl, Ex. 99.

284. The Investigation Committee interviewed five individuals: (a) Plaintiff; (b) William Easterling, who was purportedly recused; (c) Dr. William Curry, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution; (d) Dr. Jerry McManus, Professor, Department of Earth and Environmental Sciences, Columbia University, and (e) Dr. Richard Lindzen, Alfred P. Sloan Professor, Department of Earth, Atmospheric and Planetary Sciences, Massachusetts Institute of Technology. Grossman Decl, Ex. 99 at 7.

285. McManus and Curry were recommended by Easterling. Grossman Decl, Ex. 114 at 6, 8.

286. The Investigation Committee did not interview anyone other than Plaintiff with personal knowledge of the events and conduct under investigation. Grossman Decl, Ex. 99.

287. The Investigation Committee interviewed Plaintiff on April 19, 2009. Grossman Decl., Ex. 65.

288. The Committee questioned Plaintiff concerning McIntyre's statements that he had been referred to an incorrect version of Plaintiff's data on Plaintiff's FTP site, that this incorrect version was posted before McIntyre's request and was not formulated expressly for him, and that to date, no source code or other evidence has been provided to fully demonstrate that the incorrect version, now deleted, did not in fact constitute the sum of Plaintiff's and his then-fellow, Scott Rutherford's, other work. Grossman Decl., Ex. 65 at 10.

289. In response, Plaintiff represented that the situation was caused by Plaintiff's colleague, Scott Rutherford, providing information to McIntyre in a Microsoft Excel spreadsheet format at McIntyre's request, even though McIntyre purportedly had access to the information because it had been available on Plaintiff's University of Virginia FTP site since 2000. Grossman Decl., Ex. 65 at 10-12.

290. McIntyre did not request information from Plaintiff in spreadsheet format. McIntyre Dep. 167:4-168:19, 180:4-181:25.

291. Plaintiff had not included all the data used in MBH98 on his FTP site at the time McIntyre requested it from Plaintiff. McIntyre Dep. 182:16-183:2, 196:13-197:10.

292. Rutherford had informed various individuals, including Plaintiff, that he did not remember the specifics of his correspondence with McIntyre but "tried to be more accommodating" or "helpful" by putting data that "consists of 2077 files" into "a single data file." Grossman Decl., Ex. 130.

293. Rutherford also suggested in private correspondence with Plaintiff around the time of the underlying events that he may have purposely corrupted the data provided to McIntyre. Grossman Decl., Ex. 131.

294. Plaintiff's representations to the Investigation Committee concerning McIntyre were similar to statements he made to fellow scientists in 2003 that McIntyre's work was flawed because McIntyre had declined to use data underlying MBH98 that Plaintiff had purportedly made publicly available on his FTP site in lieu of a Spreadsheet that McIntyre had purportedly requested that Rutherford create. Grossman Decl., Exs. 132, 133.

295. At that time, Plaintiff requested that late Stanford University Professor Stephen Schneider provide this misinformation to Senator John McCain's staff. Grossman Decl, Ex. 130.

296. The use of an Excel spreadsheet for this type of analysis was considered derogatory in the scientific community as showing a purported lack of sophistication. McIntyre Dep. 193:16-194:7.

297. In his interview by the Investigation Committee, Lindzen exclaimed that it was "thoroughly amazing" that the first three charges had simply been dropped, without

investigation, because "these are issues that he [Plaintiff] explicitly stated in the emails. I'm wondering what's going on?" Grossman Decl, Ex. 134 at 3.

298. With regard to the issues of the sharing of code and data, Lindezen offered his opinion that Plaintiff's practices seriously deviated from accepted practices within the academic community for proposing, conducting or reporting research or other scholarly activities. Grossman Decl., Ex. 134 at 4-6.

299. The Investigation Committee issued its report on June 4, 2010 ("Investigation Report"). Grossman Decl, Ex. 99. The Investigation Report explains that "[t]he Investigatory Committee members did not respond to Dr. Lindzen's statement" concerning the deficiencies in the RA-10 Proceeding, Grossman Decl, Ex. 99 at 13.

300. The Investigation Report finding in Plaintiff's favor cited Plaintiff's "level of success in proposing research" and getting funding, the fact that he worked "jointly with other scientists," that he "receive[d] so many awards and recognitions," and that he had published in "highly respected scientific journals," Grossman Decl., Ex. 99 at 16–18,

301. Following issuance of the Investigation Report, Lindzen publicly announced that the investigation was a "whitewash" and also stated that, based on the investigation, "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." Grossman Decl, Ex. 135.

302. Lindzen continues to hold that view. Lindzen Dep. 58:24-59:6.

H. The National Science Foundation Inspector General Report

303. Following the Penn State RA-10 Proceeding, the Inspector General of the National Science Foundation ("NSF IG") reviewed the Inquiry Report and Investigation and

engaged in a limited investigation concerning Penn State's first allegation, pertaining to data falsification. Grossman Decl., Ex 59.

304. The NSF IG did not conduct an investigation into allegations three and four. Grossman Decl., Ex 59 at 2. Instead, the NSF IG determined based solely on a paper record received from Penn State that the University's proceedings were adequate. Grossman Decl., Ex 59 at 2. The NSF IG also determined that these allegations were not within the meaning of its research misconduct regulations. Grossman Decl., Ex 59 at 2.

305. The NSF IG also did not conduct an investigation into allegation two, pertaining to the deletion of communications related to the IPCC Fourth Assessment Report. Grossman Decl., Ex 59 at 2. The NSF IG stated that it reviewed "the email and concluded that nothing contained in them evidenced research misconduct within the definition of the NSF Research Misconduct Regulation," but it did not specify what emails it reviewed. Grossman Decl., Ex 59 at 2.

306. The NSF IG found that "[t]he University had been provided an extensive volume of emails from [Plaintiff] and determined that emails had not been deleted." Grossman Decl., Ex 59 at 2.

307. The NSF IG's stated reliance on Penn State's receipt of "an extensive volume of emails from [Plaintiff] and determin[ation] that emails had not been deleted" indicates that the NSF IG was not aware that Penn State had not reviewed the documents it collected from Plaintiff's computer to determine whether any deletion had or had not occurred. Grossman Decl., Ex 59 at 2.

308. The NSF IG did not consider or investigate Plaintiff's communications with Wahl concerning email deletion or Wahl's actual deletion of documents following his communications with Plaintiff. Grossman Decl., Ex 59 at 2.

309. For Penn State allegations 2-4, the NSF IG Report did not make factual findings concerning Plaintiff's conduct. Grossman Decl., Ex 59.

310. For Penn State allegations 2-4, the NSF IG Report did not set forth factual findings from a legally authorized investigation. Grossman Decl., Ex 59.

311. For Penn State allegation 1, pertaining to data falsification, the NSF IG concluded that Penn State did not adequately review the allegation in the RA-10 Proceeding. Grossman Decl., Ex 59 at 2.

312. The NSF IG conducted a limited investigation into that allegation only. Grossman Decl., Ex 59.

313. The NSF IG concluded that Plaintiff "did not directly receive NSF research funding as a Principal Investigator until late 2001 or 2002." Grossman Decl., Ex 59 at 3.

314. The NSF IG did find that "concerns" had been "raised about the quality of the statistical analysis techniques that were used in [Professor Mann's] research," but it did not investigate that or make any finding on that issue. Grossman Decl., Ex 59 at 3.

315. The NSF IG concluded that that issue was "appropriate for scientific debate" and "not, in itself,…evidence of research misconduct" under its regulations. Grossman Decl., Ex 59 at 3.

316. The NSF IG's consideration was limited to whether Plaintiff "fabricated the raw data he used for his research or falsified his results." Grossman Decl., Ex 59 at 3.

317. Applying the limitations on the scope of its investigation, the NSF IG found "no specific evidence that [Plaintiff] falsified or fabricated any data." Grossman Decl., Ex 59 at 3.

318. For Penn State allegation 1, the NSF IG did not investigate Plaintiff's conduct with regard to MBH98 and MBH99. Grossman Decl., Ex 59 at 3.

319. For Penn State allegation 1, the NSF IG Closeout Memorandum did not make factual findings concerning Plaintiff's conduct with regard to MBH98 and MBH99. Grossman Decl., Ex 59 at 3.

320. For Penn State allegation 1, the NSF IG Closeout Memorandum did not make factual findings of a legally authorized investigation concerning Plaintiff's conduct with regard to MBH98 and MBH99. Grossman Decl., Ex 59 at 3.

Simberg's Knowledge of Plaintiff's Research and Climategate

321. Simberg understood a peer-reviewed article by Professor Ross McKitrick and researcher Stephen McIntyre to find that, due to certain abnormal statistical steps undertaken by Plaintiff, the models underlying his "hockey stick" research are biased, such "that a hockey-stick shaped PC1 is nearly always generated from (trendless) red noise with the persistence properties of the North American tree ring network." Simberg Decl. ¶ 67.

322. Simberg understood this article to report that the specific "step" causing this result was not disclosed by Plaintiff when he published his research. Simberg Decl. ¶ 67.

323. Simberg understood this article to report that Plaintiff's research failed to report "r^2 and other cross-validation statistics…for the controversial 15th century period" and to report "that they are statistically insignificant." Simberg Decl. ¶ 67.

324. Simberg understood that McKitrick and McIntyre's research findings were confirmed by a "major investigation into the hockey stick" conducted by the statistician

Professor Edward Wegman of George Mason University and by a "National Research Council Report on the hockey stick." Simberg Decl. ¶ 68.

325. Simberg generally followed the Climategate controversy and its aftermath. Simberg Decl. ¶ 7.

326. Simberg read most or all of the Climategate emails and most or all of the "Climategate 2.0" emails released in November 2011. Simberg Decl. ¶ 6.

327. Simberg understood Climategate emails to indicate improprieties by Plaintiff in his research and other conduct. Simberg Decl. ¶¶ 8–17.

328. Simberg understood those emails to indicate: that Plaintiff had used a "trick of adding in the real temps to each series…to hide the decline" in recent global temperature levels; that he sent favored colleagues temperature-related data that he called "dirty laundry" and sought to keep from further disclosure; that he privately expressed lack of confidence in his own data and research to allies; that he repeatedly encouraged colleagues to deny requests for data made by researchers seeking to reconstruct his research; that, in communications with other climate scientists encouraging them not to cooperate, he repeatedly attacked such researchers as being involved in "fraud" or being dishonest; that he sought to organize boycotts, or force out the editors, of journals that published research with which he disagreed; that he encouraged scientists to use the threat of defamation litigation to block the publication of journal articles that were critical of his own research and had retained his own attorney for that purpose; that he encouraged other climate scientists to denounce research without taking the time to understand it because he disagreed with its results; and that he was requested to delete information to stymie a public-record request and ask a colleague to do the same, which request he promised to pass on "ASAP." Simberg Decl. ¶¶ 8–17.

329. Simberg understood other emails by Plaintiff to reveal that he encouraged a boycott of a climate journal; appealed to his friends on the editorial board of a journal to have an editor fired for accepting papers critical of his work; "accuse[d] co-authors and other respected scientists of incompetence, berating them in emails copied to colleagues living throughout the world"; and admitted that he could not reproduce his own results. Simberg Decl. ¶ 62.

330. Simberg, in his own weblog posts and articles, linked to and often quoted articles, weblog posts, and other sources which reported on and analyzed the Climategate disclosures, post-Climategate investigations, and related matters. Simberg Decl. ¶¶ 19–41, 50–72, 88–94.

331. Simberg read the articles, weblog posts, and other sources to which he linked. Simberg Decl. ¶¶ 18, 49, 88.

332. Numerous of these sources stated that the Climategate disclosures and related materials evidenced fraud or deceptive conduct, including by Plaintiff. Simberg Decl. ¶¶ 19, 20, 21, 27, 28, 29, 30, 32, 35, 36, 40, 44, 52, 56, 60.

333. Numerous of these sources stated that the Climategate disclosures and related materials revealed data manipulation, including by Plaintiff. Simberg Decl. ¶¶ 19, 20, 21, 22, 23, 26, 27, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, 51, 52, 56, 60, 61, 67, 71, 89.

334. Numerous of these sources stated that the Climategate disclosures and related materials revealed misconduct, including criminal misconduct, by parties including Plaintiff. Simberg Decl. ¶¶ 22, 25, 27, 29, 30, 31, 33, 37, 44, 55, 91.

335. Numerous of these sources stated that the post-Climategate investigations, particularly Penn State's, were a "whitewash" or otherwise inadequate. Simberg Decl. ¶¶ 45, 50, 53, 57, 63, 91, 92, 93, 94.

336. Numerous of these sources reported that the Climategate materials demonstrated that Plaintiff had participated in, among other things, "fraud," "scientific fraud," "criminal act[s]," and "data manipulation fraud." Simberg Decl. ¶¶ ¶¶ 19, 20, 27, 29, 30, 32, 35, 36, 40.

337. In relying on these sources' representations and claims, Simberg had no obvious reasons to doubt the veracity of:

a. Charlie Martin, Simberg Decl. ¶¶ 20, 29, 39, 54;

b. Jerry Pournelle, Simberg Decl. ¶ 21;

c. James Delingpole, Simberg Decl. ¶ 22;

d. Andrew Montford, Simberg Decl. ¶¶ 23, 50, 71;

e. John Hinderaker, Simberg Decl. ¶¶ 24–25;

f. *The New York Times*, Simberg Decl. ¶ 26;

g. Christopher Monckton, Simberg Decl. ¶ 27;

h. Stephen McIntyre, Simberg Decl. ¶¶ 28, 34, 39, 51, 53, 67, 68, 89;

i. Robert Tracinski, Simberg Decl. ¶ 30;

j. Ivan Kenneally, Simberg Decl. ¶ 32;

k. Ian Plimer, Simberg Decl. ¶ 33;

l. Vincent Gray, Simberg Decl. ¶ 35;

m. James Lewis, Simberg Decl. ¶ 36;

n. Derek Lowe, Simberg Decl. ¶ 37;

o. Joseph D'Aleo, Simberg Decl. ¶ 40;

p. Bjorn Lomborg, Simberg Decl. ¶ 41;

q. Richard Lindzen, Simberg Decl. ¶¶ 44, 93;

r. Fred Pierce, Simberg Decl. ¶ 50;

s. *Der Spiegel*, Simberg Decl. ¶ 51;

t. Richard A. Muller, Simberg Decl. ¶ 52;

u. Clive Crook, Simberg Decl. ¶ 53;

v. Jeff Dunetz, Simberg Decl. ¶ 55;

w. David Holland, Simberg Decl. ¶ 57;

x. Anthony Watts, Simberg Decl. ¶¶ 58–62, 71;

y. John O'Sullivan, Simberg Decl. ¶ 63;

z. Ross McKitrick, Simberg Decl. ¶¶ 67, 68;

aa. Steve Milloy, Simberg Decl. ¶ 91;

bb. Marc Morano, Simberg Decl. ¶ 92; or

cc. *The Pittsburgh Tribune*, Simberg Decl. ¶ 93.

338. Numerous of these sources reported that Plaintiff's own peer climate-scientists, including several co-authors, stated in private emails that Plaintiff's work was "suspect," "crap," "clearly deficient," "wrong," not "statistically significant," plagued by "robustness problems," "deceptive," not "honest," "truly pathetic and should never have been published," indefensible ("can not be defended"), and made up ("we will still not know where his estimates are coming from"). Simberg Decl. ¶¶ 23, 54, 55, 58, 59.

339. Simberg read Penn State's "RA-10 Inquiry Report: Concerning the Allegations of Research Misconduct Against Dr. Michael E. Mann, Department of Meteorology, College of Earth and Mineral Sciences, The Pennsylvania State University." Simberg Decl. ¶ 43; Grossman Decl., Ex. 98.

340. Simberg believed that report to reflect the inadequacy of Penn State's investigation and reflect a whitewash because he understood it to indicate:

a. The inquiry committee "synthesized" four allegations and then dismissed three without investigation after meeting with Plaintiff, whose "composure" and "forthright responses" the report complimented.

b. Among the charges dismissed without investigation was the one regarding falsification of data.

c. The committee accepted Plaintiff's explanation that a "trick" was just a way of referring to a "statistical method," but it ignored that the relevant email concerned a "trick…to hide the decline," which indicates something more than just standard statistical practice.

d. The committee also dismissed the allegation that Plaintiff had acted to "engage in, or participate in, directly or indirectly, any actions with the intent to delete, conceal or otherwise destroy emails, information and/or data." It accepted Plaintiff's statement that he did not do so, without addressing that, in the Climategate emails at issue, Plaintiff had been requested to ask a third party to destroy information and responded affirmatively to this request.

e. The committee did allow one allegation—concerning whether Plaintiff undertook "actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research or other scholarly activities"—to proceed to investigation, but it stated that the investigation should focus only on "the question of accepted faculty conduct surrounding scientific discourse." The report seems to suggest that this decision was actually a favor to Plaintiff, expressing the expectation that the investigation will help to shore up

"confidence in his findings as a scientist," which Simberg considered a suspicious thing to say when undertaking investigation of alleged misconduct.

Simberg Decl. ¶ 43.

341. Simberg read Penn State's "RA-10 Final Investigation Report Involving Dr. Michael E. Mann." Simberg Decl. ¶ 44, Grossman Decl., Ex. 99.

342. Simberg believed that report to reflect the inadequacy of Penn State's investigation and reflect a whitewash because he understood it to indicate:

a. The investigatory committee interviewed four people besides Plaintiff, and only one of them could fairly be called a critic of Plaintiff's research.

b. The committee did not interview the most obvious sources like Stephen McIntyre, who knew more about Plaintiff's research than anyone; Phil Jones, who authored many of the emails at issue; or any of Plaintiff's most prominent academic critics.

c. The investigation was generally limited to issues regarding the sharing of code, data, and drafts, without considering the more serious issues raised by Climategate.

d. When the committee interviewed Professor Richard Lindzen of the Massachusetts Institute of Technology, he exclaimed that it was "thoroughly amazing" that the first three charges had simply been dropped, without investigation. He told the committee: "I mean these are issues that [Plaintiff] explicitly stated in the emails. I'm wondering what's going on?" But "[t]he Investigatory Committee members did not respond to Dr. Lindzen's statement." The committee did not care that Professor Lindzen believed that the other allegations had merit.

e. All the committee members wanted to know from Professor Lindzen was about norms for sharing codes and data and did not ask him anything about Plaintiff, even about Plaintiff's actions concerning the sharing of codes and data. They did not even want to know what he had to say about the limited conduct they were supposed to be investigating.

f. The committee relied on Plaintiff to turn over relevant materials and did not obtain direct access to his emails and files from the period relevant to most of the conduct at issue, which took place before he started at Penn State in 2005.

g. The committee cited, in support of its finding in Plaintiff's favor, Plaintiff's "level of success in proposing research" and getting funding, the fact that he worked "jointly with other scientists," that he "receive[d] so many awards and recognitions," and that he had published in "highly respected scientific journals." It relied on things that have nothing to do with the allegation the committee was supposed to be investigating, whether Plaintiff "deviated from accepted practices" with his research.

Simberg Decl. ¶ 44.

343. Simberg read the National Science Foundation's ("NSF") "Closeout Memorandum" concerning Plaintiff. Simberg Decl. ¶ 45.

344. Simberg believed the NSF report did not remedy the inadequacy of Penn State's investigation because he understood it to indicate:

a. The NSF investigated only one of the four allegations raised by Penn State.

b. For the allegation concerning participation in the destruction of information, the NSF did not conduct any investigation or consider or look into the request that Plaintiff ask a third party to delete information.

c. The NSF did not address Plaintiff's most controversial research from the 1990s and 2000 because it concluded that he "did not directly receive NSF research funding as a Principal Investigator until late 2001 or 2002."

d. The NSF did not obtain access to Plaintiff's emails and files, such as those at the University of Virginia that were subject to FOIA litigation, for the relevant period before Plaintiff arrived at Penn State in 2005.

e. The NSF found that "concerns" had been "raised about the quality of the statistical analysis techniques that were used in [Plaintiff's] research," but it did not investigate that or make any finding on it. The NSF's position was that, if Plaintiff manipulated his models or data through statistical techniques to arrive at an upward-sloping hockey stick no matter what, that issue was "appropriate for scientific debate" and "not, in itself,…evidence of research misconduct" under its regulation. This indicated that, so long as Plaintiff did not make up the underlying data out of whole cloth, the NSF's view was that it was outside the purview of its investigation and conclusions.

Simberg Decl. ¶ 45.

345. Simberg was not aware of any other investigations of Professor Mann's conduct.

Simberg Decl. ¶ 49.

346. Simberg skimmed the report of the "Independent Climate Change E-mails Review" and understood it not to investigate or make any findings concerning Plaintiff's conduct. Simberg Decl. ¶ 46.

347. Simberg skimmed the "Report of the International Panel set up by the University of East Anglia to examine the research of the Climatic Research Unit" and understood it not to investigate or make any findings concerning Plaintiff's conduct. Simberg Decl. ¶ 47.

348. Simberg skimmed the U.S. Department of Commerce Inspector General report that was issued in February 2011 and understood it not to investigate or make any findings concerning Plaintiff's conduct. Simberg Decl. ¶ 48.

349. Simberg read Stephen McIntyre's commentary stating that "no investigation was ever carried out [by] Penn State on any of the key issues" concerning Plaintiff's conduct. Simberg Decl. ¶ 53.

350. Simberg read Clive Crook's commentary stating that Penn State's investigation of Plaintiff's conduct "would be difficult to parody." Simberg Decl. ¶ 53.

351. Simberg read John O'Sullivan's commentary stating that "[b]oth the Sandusky and Mann cover-ups involved a poorly executed investigation" by Penn State, that "[b]oth demonstrate a strong inclination to circle the wagons and seemingly show no interest in truth or justice," and that both "never interviewed witnesses against Mann or Sandusky." Simberg Decl. ¶ 63.

352. Simberg read Steve Milloy's commentary stating that Penn State's inquiry was "[n]ot thorough at all," dismissed allegations without adequate support for dismissal, and was "a primer for a whitewash." Simberg Decl. ¶ 91.

353. Simberg read Marc Morano's commentary stating that Penn State, through its investigation, "circled the wagons and narrowed the focus of its own investigation to declare [Plaintiff] ethical" that Plaintiff "has become the posterboy of the corrupt and disgraced climate science echo chamber," and that Penn State's investigation was a "whitewash." Simberg Decl. ¶ 92.

354. Simberg read that Professor Richard Lindzen, who participated in Penn State's investigation, publicly announced that the investigation was a "whitewash" and also stated that, based on the investigation, "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." Simberg Decl. ¶ 93.

Simberg's Weblog Post

355. The Freeh Report on Penn State's handling of allegations concerning former football coach Jerry Sandusky was released on July 12, 2012. Simberg Decl. ¶ 82.

356. The Freeh Report reminded Simberg of the parallels between Penn State's investigation of allegations concerning Plaintiff and its investigation of allegations concerning Sandusky. Simberg Decl. ¶ 82.

357. Simberg believed that the release of the Freeh Report provided a news hook to revisit the issue of Penn State's investigation of Plaintiff and call for a more serious investigation. Simberg Decl. ¶ 83.

358. Simberg initially submitted the post via email to *PJMedia*, which declined it. Simberg Decl. ¶ 84–85.

359. After *PJMedia* declined it, Simberg submitted the post for publication on Open Market. Simberg Decl. ¶ 86.

360. Simberg entered the title and text of the post directly into Open Market's WordPress software and selected two categories for it, "Global Warming" and "Transparency." Simberg Decl. ¶¶ 83, 86.

361. CEI did not solicit the post from Simberg; instead, Simberg wrote and submitted it on his own initiative. Conko Decl. ¶ 10; Scribner Decl. ¶ 45; Simberg Decl. ¶¶ 83, 86.

362. When Simberg submitted the post, Open Market's WordPress software sent an automatic notification email, which Scribner received that evening. The email identified Simberg as the author, identified the title of the post as "The Other Scandal in Unhappy Valley," and did not contain the post's text or Simberg's category selections. Scribner Decl. ¶ 34; Grossman Decl., Ex. 6.

363. Scribner did not know that "Happy Valley" referred to Penn State and did not learn that it did until approximately a week later, when colleagues noted criticism of the post's line referencing Plaintiff and Sandusky. Scribner Decl. ¶ 35.

364. Scribner's usual practice for Simberg's posts was to run his eyes over them to identify and correct formatting errors, without reading them, before publishing them on Open Market. Scribner Decl. ¶ 36.

365. Per his usual practice, Scribner ran his eyes over the post to identify and correct formatting errors, without reading it. Scribner Decl. ¶ 34.

366. Scribner made four changes to the post, Lynch Decl. ¶ 20, Grossman Decl., Ex. 2: First, Scribner removed an extraneous space at the end of a paragraph. Scribner Decl. ¶ 38. Second, Scribner replaced "New York" with "N.Y." in a parenthetical following the identification of a member of Congress that was adjacent to one of the HTML tags that were Scribner's focus. Scribner Decl. ¶ 39. Third, Scribner inserted a missing space following an

HTML tag. Scribner Decl. ¶ 40. Fourth, Scribner inserted a formatting tag to truncate display of the post on Open Market's homepage and category pages. Scribner Decl. ¶ 41.

367. Scribner did not spend more than a few minutes reviewing the post. Scribner Decl. ¶¶ 36, 44.

368. Scribner assumed the post concerned space policy or some other technical field that was not of interest to him. Scribner Decl. ¶ 35.

369. Scribner published the post himself by clicking a button in Open Market's WordPress software. Lynch Decl. ¶ 16; Scribner Decl. ¶ 43; Compl., Ex. A.

370. No one else was involved in publishing the post. Lynch Decl. ¶ 18; Scribner Decl. ¶ 45.

371. Prior to the post's publication, Scribner did not discuss the post with any anyone and had never spoken with Simberg. Scribner Decl. ¶¶ 45, 28.

372. Climate policy was not Scribner's area of professional focus or interest, and CEI had not asked him to research or publish anything about Plaintiff. Scribner Decl. ¶ 49

373. Prior to publication of the post, Scribner had not read the Climategate emails, did not know exactly what Plaintiff had been accused of doing, and had not read any investigatory reports concerning the matter. Scribner Decl. ¶ 49.

374. Prior to publication of the post, Scribner regarded Simberg as reliable and a careful writer, knew Simberg to have a technical and scientific background, and had not received any criticism regarding Simberg's Open Market posts, Scribner Decl. ¶ 30.

375. In relying on Simberg for the substance of the post, Scribner had no obvious reasons to doubt Simberg's veracity. Scribner Decl. ¶ 30.

376. Prior to the post's publication, Simberg had not discussed the post, Plaintiff, or Climategate with any CEI personnel. Simberg Decl. ¶ 87.

377. Simberg did not intend in his post to accuse Plaintiff of fraud, academic misconduct, or any crime. What Simberg intended to convey was that Penn State failed to undertake a thorough, good-faith investigation of Plaintiff's research and conduct and that a "fresh, truly independent investigation" was therefore warranted. Simberg Decl. ¶¶ 88, 95–98.

378. Simberg intended the post's reference to Sandusky to convey the inadequacy of Penn State's investigation of allegations concerning another prominent faculty member, Plaintiff. Simberg Decl. ¶ 98.

379. Simberg had previously published a post on his personal weblog referring to both Plaintiff and Sandusky and conveying the same message regarding the inadequacy of Penn State's investigation of Plaintiff. Simberg Decl. ¶ 63.

380. Simberg's post quoted verbatim a statement by Climate Depot editor Marc Morano, including the following: "Mann has become the posterboy of the corrupt and disgraced climate science echo chamber." Compl., Ex. A; Simberg Decl. ¶ 92.

381. In relying on Morano's statement, Simberg had no obvious reasons to doubt Morano's veracity. Compl., Ex. A; Simberg Decl. ¶¶ 88, 92.

382. The phrase "engaging in data manipulation" in Simberg's post was hyperlinked to a post entitled "Mike's Nature Trick" on Stephen McIntyre's Climate Audit website. Compl., Ex. A; Simberg Decl. ¶ 89.

383. The "Mike's Nature Trick" post states that Plaintiff's "solution" to the "problem" of a "divergence" between reconstructed temperatures and the "instrumental series" "was to use

the instrumental record for padding, which changes the smoothed series to point upwards," and it describes and depicts this manipulation. Simberg Decl. ¶ 89.

384. Simberg understood McIntyre's "Mike's Nature Trick" post to describe how Plaintiff had manipulated data in his research. Simberg Decl. ¶ 89.

385. In relying on McIntyre's "Mike's Nature Trick" post, Simberg had no obvious reasons to doubt McIntyre's veracity. Simberg Decl. ¶ 88–89.

386. Simberg's post linked to comments by science commentator and author Steve Milloy on Penn State's inquiry of Professor Mann. Compl., Ex. A; Simberg Decl. ¶ 91.

387. Milloy's comments stated that Penn State's inquiry concerning several allegations against Plaintiff was "[n]ot thorough at all," ignored pertinent language in the "Mike's Nature trick" email, did not fully address the allegation of participation in the destruction of information, appeared to have the purpose of bolstering confidence in Plaintiff's research, and was "a primer for a whitewash." Simberg Decl. ¶ 91.

388. In relying on Milloy's comments, Simberg had no obvious reasons to doubt Milloy's veracity. Simberg Decl. ¶¶ 88, 91.

389. Simberg's linked to a *Pittsburgh Tribune* article and quoted verbatim from it a statement by Massachusetts Institute of Technology's Professor Richard Lindzen on Penn State's investigation of Plaintiff that "Penn State has clearly demonstrated that it is incapable of monitoring violations of scientific standards of behavior internally." Compl., Ex. A; Simberg Decl. ¶ 93.

390. The article reports that Professor Lindzen participated in Penn State's investigation of Plaintiff. Simberg Decl. ¶ 93.

391. The article reports that Professor Lindzen called Penn State's investigation of Plaintiff a "whitewash." Simberg Decl. ¶ 93.

392. In relying on Professor Lindzen's statements, Simberg had no obvious reasons to doubt Professor Lindzen's veracity. Simberg Decl. ¶¶ 88, 93.

393. On July 20, 2012, CEI determined that a sentence in the post referencing Sandusky was "inappropriate" for CEI's website, and Scribner removed it. Scribner Decl. ¶ 48.

394. Meanwhile, Mark Steyn had published a post on National Review's "The Corner" weblog quoting and linking to Simberg's post. Compl., Ex. B.

Plaintiff's Response to Simberg's Weblog Post

395. In January 2010 correspondence with Plaintiff, John Mashey discussed working with Plaintiff to "torpedo" CEI through legal action. Grossman Decl., Ex. 100.

396. In a July 21, 2012 email, Plaintiff stated that he was "going after National Review," because it was "a far more established outfit" and had "much more to lose," but stated that "CEI will get what's coming to [it] in due course." Grossman Decl., Ex. 101.

397. On August 21, 2012, Plaintiff's attorney sent a letter to CEI threatening suit. Grossman Decl., Ex. 102.

398. On October 22, 2012, Plaintiff filed suit against CEI, Simberg, National Review, and Steyn. Compl.

399. A day later, Plaintiff communicated to a reporter that he intended to use discovery in this suit to expose CEI's donors and obtain its private communications with public policy allies. Grossman Decl., Ex. 103.

400. In a July 23, 2013 email, Plaintiff stated, with respect to this litigation, that "taking down CEI would be helpful." Grossman Decl., Ex. 104.

Plaintiff's Damages

401. Plaintiff contends that he did not receive the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grants, for which he applied, as a result of Simberg's post. Grossman Decl., Ex. 136 No. 2.

402. Plaintiff does not know the identities of the reviewers for the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grants. Grossman Decl., Ex. 137 Nos. 90, 96, 102, 108, 114, 120, 126, 132.

403. Plaintiff does not know whether the reviewers for the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grant applications considered Simberg's post in their review of his grant applications. Grossman Decl., Ex. 142 Nos. 92, 98, 104, 110, 116, 122, 128, 134.

404. Plaintiff does not know whether the person or persons who ultimately decided whether or not to fund the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grant applications considered Simberg's post in their decision not to fund the grant applications. Grossman Decl., Ex. 142 Nos. 94, 100, 106, 112, 118, 124, 130, 136.

405. Plaintiff did not analyze the competing grant proposals for the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grant applications to determine whether or not they were inferior to Plaintiff's proposals. Mann Dep. 73:11-16 (vol. 2).

406. There is no evidence that the persons who ultimately decided whether or not to fund the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grant applications did not take steps to learn what Plaintiff believes are the true facts contradicting the alleged defamatory implication of Simberg's post. Mann Dep. 111:1-25 (vol. 2).

407. Plaintiff does not know how much loss of personal income the decisions not to fund the NSF Decadal-Multidecadal Climate Variability, NSF Few in Africa, Forecasting Fire Risk, NSF WAVESS, Building Environmental Literacy, NSF Modeling in Western North America, ENSO as a Land-Ocean-Atmosphere Process, and NSF Paleodrought Network grant applications caused him. Mann Dep. 128:24-129:1 (v. 2).

408. Plaintiff's compensation from Penn State for the years 2006 through 2019 is reflected in IRS Form W-2 for Plaintiff from the years 2006 to 2019 produced by Penn State and stated in Sealed Grossman Decl., Ex. 138 at PSU004743–56.

409. Penn State did not reduce Plaintiff's compensation as a result of the Simberg post. Sealed Grossman Decl., Ex. 138 at PSU004743–56.

410. Plaintiff is unaware of anyone in the climate-science community who believed the alleged defamatory implication of Simberg's post. Mann Dep. 59:8-15 (vol. 2).

411. Plaintiff does not claim that there is any empirical basis for his assertion that the individuals who make the decision whether to fund grants are predisposed not to fund individuals who have suffered accusations of misconduct that are widely shown to be false, as Plaintiff contends the of Simberg's post has been. Mann Dep. 70:22-71:4 (vol. 2).

412. Plaintiff is unable implication to identify any communal activities in his community from which he was excluded as a result of Simberg's post. Mann Dep. 175:6-11 (vol. 2).

413. Plaintiff is unable to identify any individual or individuals in his community who indicated their disapproval of him as a result of Simberg's post. Dep. Mann 172:22-173:9 (vol. 2)

414. Plaintiff is unable to determine what damages he alleges in this case were caused by Simberg's post rather than Steyn's post. Mann Dep. 12:15-14:2 (vol. 2).

415. Plaintiff contends that thousands of individuals have made false and defamatory statements about him or his work. Mann Dep. 17:14-20 (vol. 2).

416. Plaintiff is unable to determine whether the damages he alleges in this case were caused by Simberg's post rather than by the statements of the numerous persons, not CEI or Simberg, who have accused him of fraud, deceptive conduct, data manipulation, and/or misconduct. Simberg Decl. ¶¶ 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 51, 55, 52, 56, 60, 61, 67, 71, 89, 91.

417. Plaintiff was the recipient of numerous honors and rewards in the 2012-2014 time period. Mann Dep. 52:13-24 (vol. 2); Grossman Decl., Ex. 139.