IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

Defendant Mark Steyn's Motion for a New Trial

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Rule

Pursuant to this Court's Civil Rules 59 and 60, the Fifth Amendment Due Process Clause, and this Court's inherent power, Defendant Mark Steyn hereby moves for a new trial.

BACKGROUND

Plaintiff Michael Mann asserted a defamation claim against Defendants Mark Steyn and Rand Simberg based on blog posts published in 2012.[1] Trial was held between January 16 and February 8, 2024. The jury returned a verdict in favor of the Plaintiff. As to Steyn, the jury awarded $1 in compensatory damages and $1 million in punitive damages. Tr. 10–11 (2/8/24).[2] As to Simberg, the jury awarded $1 in compensatory damages and $1,000 in punitive damages. *Id*. at 7–8. This Court entered judgment on the verdict.

NEW TRIAL STANDARDS

Rule 59 allows a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court or [D.C.] courts." Super. Ct. Civ. R. 59(a)(1)(A). This Court has broad discretion to grant a new trial. *Scott v. Crestar Fin. Corp*., 928 A.2d 680, 687 (D.C. 2007). It has both "the power and the duty to grant a new trial if the verdict is against the clear weight of the evidence, or if for any reason or combination of reasons justice would miscarry if the verdict were allowed to stand." *Id*. "The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Id*. Importantly, "[w]hen acting on a motion for new trial the trial judge need not view the evidence in the light most favorable to the non-moving party." *Id*. Instead, "the judge can, in effect, be the 'thirteenth juror'; he or she may weigh evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *Id*. (all *Scott* quotations cleaned up). *See also Faggins*

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[1] Steyn's post (Ex. 60) is attached hereto as Addendum A.

[2] All "Tr." citations herein are to the trial transcript unless otherwise noted. All transcripts cited herein are compiled in Addendum E.

v. Fischer, 853 A.2d 132, 140 (D.C. 2004); *Fisher v. Best*, 661 A.2d 1095, 1098 (D.C. 1995).

ARGUMENT

I. A New Trial Is Required Because Plaintiff and Plaintiff's Counsel Presented to the Jury False Testimony and False Evidence That They Knew Were False.

At trial Dr. Mann gave false testimony about his claimed loss of grant funding—testimony he knew was false.[3] And his counsel elicited that false testimony, also knowing it to be false. They also showed the jury an exhibit with false grant amounts, Ex. 117 (not admitted),[4] which they knew was false. The falsity was huge. As the Court noted, "one entry was for 9 million, and then it was significantly reduced to something a little over a hundred thousand." Tr. 45 (1/31/24 PM). This Court found that Plaintiff and his counsel knew the testimony and exhibit were false but sought to sway the jury with those falsehoods. *Id*. at 42 ("[C]learly, the plaintiff was aware that the jury was being presented with an exhibit that contained incorrect information. And you wanted the jury to take that back to the jury room and deliberate on those figures."). The misconduct, this Court said, was "stunning." *Id*. at 41. This Court told Plaintiff's team: "[Y]ou sort of have to own this problem. Because it was placed before the jury, the numbers, the $9 million. And you queried Dr. Mann on it. And it is your evidence, all of it." Tr. 40 (2/7/24 AM). But they did not own it. Plaintiff's team never recanted the false testimony and false exhibit. Nor did this Court make them own it. This Court never instructed the jury to disregard the false testimony and exhibit, and it denied the defense motion for an adverse inference instruction. Plaintiff's counsel was free to, and did, make grant funding a feature of his closing argument. *See* Tr. 31–33 (2/7/24 PM).

As a remedy for this knowing misconduct, the Court should order a new trial. Due process

[3] Defendant Steyn hereby incorporates by reference the facts, citations, and arguments presented in his pending motion for sanctions, which is attached as Addendum B.

[4] All trial exhibits cited herein, unless very lengthy, are compiled in Addendum C.

is denied by "a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). To vindicate Steyn's right to a fair trial and the integrity of the judicial process, a new trial is required. *See Breezevale Ltd. v. Dickinson*, 879 A.2d 957 (D.C. 2005) (affirming much harsher sanction of dismissal of lawsuit where plaintiff knew documents were forgeries); *Hawthorne v. United States*, 504 A.2d 580, 589–90 (D.C. 1986) (criminal defendant is "entitled to a new trial if there is any reasonable likelihood that false testimony could have affected the judgment of the jury") (cleaned up). Here, the false testimony and exhibit on grant funding almost certainly affected the verdict. Plaintiff's team was always "very clear what our damages case is … loss of grant funding." Tr. 82 (1/23/24 PM). His counsel stressed grant funding in his closing argument: "[H]is grant funding went down after the defamations. … It was the defamations that led to this decline." Tr. 32–33 (2/7/24 PM). The false testimony and exhibit very likely contributed to the verdict on actual injury and the enormous punitive damage award against Steyn. *See* Tr. 40 (2/7/24 AM) (The Court: "especially seeing $9 million on a board that's been published to the jury … the 9 million is going to strike them as quite impressive, and it was not corrected until the recross examination").

II. A New Trial Is Required Because of the Improper and Prejudicial Closing Arguments by Plaintiff's Counsel.

A. Counsel urged the jury to award punitive damages because "these attacks on climate scientists have to stop."

Plaintiff's counsel made highly improper and prejudicial jury arguments in his rebuttal. Counsel raised the issue of punitive damages and then told the jury "[t]hese attacks on Climate Scientists have to stop, and you now have the opportunity --." Tr. 108 (2/7/24 PM). At that point, both Defendants objected, and the Court immediately sustained the objection. *Id*. At a bench conference, the Court then had this colloquy with Plaintiff's counsel:

> THE COURT: You received an admonition really from the Court of Appeals, Climate Science discussions, discourse are not part of this case.
>
> MR. WILLIAMS: I understand.
>
> THE COURT: And so you're raising this, and the jury will think that Climate Science is the subject of this case. This is a defamation case.
>
> MR. WILLIAMS: All right.
>
> THE COURT: And I'm going to let you know once again, all right?
>
> MR. STEYN: Before we -- Judge Anderson specifically told the Plaintiff that he does not represent Science.

Id. Back on the record, the Court stated:

> The objection is sustained. Members of the Jury, this case is a defamation case. And, yes, as we've told you that there are aspects of the case concerning Science that sort of -- it's an underlay or an overlay, but this case is not about the Climate Science, Climate Change debate. All right. So, it will be helpful if you keep that clear when you're reviewing the facts. This is not a Science, whether there's global Warming or not. That's not the subject of this case. All right. And then with respect to defamation, I will give you the instruction once again.

Id. at 109. Although it sustained Defendants' objections, the Court did not instruct the jury to disregard counsel's improper argument that "these attacks on Climate Scientists have to stop."

After counsel concluded his rebuttal, the Court proceeded to re-read the instruction on the elements of defamation, *id*. at 110–112, but these instructions did not address—and did nothing to cure—counsel's improper argument on punitive damages.

B. Counsel's highly improper argument that "these attacks on climate scientists have to stop" requires a new trial to avoid a miscarriage of justice.

The "case law in this jurisdiction has put counsel on notice that certain types of arguments are impermissible and that counsel who practice here … are expected to abide by those decisions." *Dyson v. United States*, 450 A.2d 432, 443 (D.C. 1982). Here, counsel's argument in connection with Plaintiff's punitive damage claim that "these attacks on climate scientists have to stop" was such an impermissible argument. Indeed, the speed with which the Court sustained Defendants' objections confirms the obvious impropriety of the argument.

The Court of Appeals "has stated repeatedly that an attorney must not ask a jury to 'send a message' to anyone." *Bowman v. United States*, 652 A.2d 64, 71 (D.C. 1994). This is the law for good reason: "Juries are not in the message-sending business. Their sole duty is to return a verdict based on the facts before them." *Id*. *See also Coreas v. United States*, 565 A.2d 594, 604 (D.C. 1989) ("Argument which encourages the jury to 'send a message' has been found improper by this court."); *Powell v. United States*, 455 A.2d 405, 410 (D.C. 1982) ("The function of the jury is to determine the facts based on evidence presented. The jurors are not empaneled to send messages on behalf of their community."). And the parties here agreed and represented to the Court that "Plaintiff will not present any argument or evidence related to any claim that the jury should 'send a message' through its verdict." Jt. Pretrial Statement at 8 (§ E-13).

Telling the jury "these attacks on climate scientists have to stop" was a forbidden send-a-message argument. *See Scott*, 928 A.2d at 685 n.7, 689 (affirming grant of new trial based on plaintiff's counsel's improper closing arguments; in rebuttal counsel asked the jury for '"a verdict that lets Crestar know that they can't have this kind of stuff, that this stuff has got to stop,'" and the Court of Appeals agreed that counsel made an "improper 'send a message' argument"). Although in *Scott* plaintiff's counsel "never used the specific phrase 'send a message' in closing argument" the trial court concluded that "the clear import and intent of what counsel argued was to ask the jury to 'send a message' to defendants." *Id*. at 686. The Court of Appeals agreed. *Id*. at 689. So too here. And Plaintiff's team dispelled any doubt that they had asked the jury to "send a message" about stopping attacks on climate scientists by issuing a press release after the verdict that quoted Mann as saying "I hope this verdict sends a message that falsely attacking climate scientists is not protected speech." Michael E. Mann (@MichaelEMann), Twitter (Feb. 8, 2024, 5:11 PM), https://tinyurl.com/y9ca3jym, attached as Addendum D.

Counsel's argument that "these attacks on climate scientists have to stop" was particularly egregious because both this Court and the Court of Appeals have repeatedly made clear that this case is not about climate science, let alone "attacks on climate scientists." *See* Pretrial Conf. Tr. 9 (10/16/23) (this Court's observation that the Court of Appeals "went through great efforts to ensure that the case … do[es] not get into the realm whether there is or is not global warming, or climate change"); Tr. 29 (1/16/24 AM) (THE COURT: "It's not a climate change case."); Tr. 58 (1/23/24 AM) ("THE COURT: As you well know and as we discussed extensively this is not a case of Climate Change."). Indeed, this Court admonished Plaintiff's counsel during his opening statement not to turn the trial into a case about climate change. *See* Tr. 26 (1/18/24 AM) (counsel objected to Mr. Williams' argument that Defendants "were hostile to [Plaintiff's] findings and his warnings about Climate Change, which showed that Climate Change was real"); *id*. at 27 ("I am going to admonish you, Mr. Williams, to ensure that this opening remains within the confines of what the case is about as established by both the Court of Appeals and this Court.").

Counsel's improper jury argument was prejudicial, no doubt about it. His insistence that "these attacks on climate scientists have to stop" inflamed the jury, which imposed $1 million in punitive damages on Mr. Steyn (and $1,000 in punitives on Simberg, despite his *negative* $200,000 net worth)—even though Mann had suffered only a $2 loss. And "[t]he prejudicial effect of the [attorney] misconduct was compounded by the timing of the comments." *Powell*, 455 A.2d at 411. Plaintiff counsel's "improper remarks were made during rebuttal argument. Defense counsel was thereby denied the opportunity to contest or explain the statements in summation before the jury." *Id*.

Although the Court sustained the objections raised to the improper argument, it did not instruct the jury to disregard the argument. And although the Court re-read its instruction on the

elements of defamation, that instruction was not effective in curing the improper argument. Counsel made the improper argument as part of a request for punitive damages, *see* Tr. 107–08 (2/7/24 PM), and the instructions this Court re-read (*see id*. at 110–12) did not relate to punitive damages. This Court did not re-read its instructions on punitive damages. Nor did the Court tell the jury that a desire to stop attacks on climate scientists is not a permissible basis for a punitive award. Thus, what the Court did was "insufficient to compensate for the prejudice inflicted." *Powell,* 455 A.2d at 411. It did not cure counsel's highly improper and prejudicial argument.

C. Counsel's Politically Charged and Inflammatory Comparison of Defendants to Donald Trump and "Election Deniers" Requires a New Trial.

Counsel have a duty not to incite the "passion or prejudice" of the jury. *Scott*, 928 A.2d at 689; *see Brown v. United States*, 766 A.2d 530, 540 (D.C. 2001) (closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response") (quotation marks omitted). Violating that duty, Plaintiff's counsel in rebuttal equated Defendants with "Donald Trump" and "election deniers"—"[t]he people who continued to deny that Trump los[t] the election" despite "overwhelming evidence to the contrary." Tr. 107 (2/7/24 PM). Counsel said "the same issue is true here." *Id*. And he offered this politically charged argument in support of his request for punitive damages. *Id*. When counsel segued into his stop-the-attacks on climate scientists argument, both Defendants objected. *Id*. at 108.

Comparing Defendants to Donald Trump and election deniers was an inflammatory—indeed, incendiary—appeal to politics and the January 6 violence. "Mr. Trump received only five percent of the vote in the District of Columbia in the 2020 presidential election" and "a mob of Mr. Trump's supporters stormed the U.S. Capitol building—which is located in the District of Columbia—on January 6, 2021." *Democracy Partners, LLC v. Project Veritas Action Fund*, No. 17-1047-PLF, 2021 WL 4785853, at *4 (D.D.C. Oct. 14, 2021). Likening Defendants to Trump

and election deniers in front of a jury comprised of District of Columbia residents was highly improper and surely prejudicial. It was also a nod to huge verdicts recently returned against Trump and a not subtle suggestion that this jury should do the same. The grossly excessive punitive award against Steyn indicates the improper tactic worked. *See Scott*, 928 A.2d at 688 ("Excessiveness refers not only to the amount of the verdict but to whether ... the award of damages appears to have been the product of passion, prejudice, … or consideration of improper factors").[5]

Courts have thrown out verdicts obtained after closing arguments comparing the defendant to notorious figures or invoking horrific events, and this Court should do the same. *See United States v. Steinkoetter*, 633 F.2d 719, 720 (6th Cir. 1980) (defendant compared to Pontius Pilate and Judas Iscariot); *Brown v. United States*, 370 F.2d 242, 246 (D.C. Cir. 1966) ("[I]n the context of current events, raising the spectre of martial law was an especially flagrant and reprehensible appeal to passion and prejudice."). "Such a comparison creates an overwhelming prejudice in the eyes of the jury." *Martin v. Parker*, 11 F.3d 613, 616 (6th Cir. 1993). And under D.C. law, improper jury arguments "are looked upon with special disfavor when they appear in the rebuttal because at that point defense counsel has no opportunity to contest or clarify" them. *Turner v. United States*, 26 A.3d 738, 744 (D.C. 2011) (cleaned up). *Accord Coreas*, 565 A.2d at 605.

Counsel deliberately played the "Trump" card and put Defendants on par with "election deniers." He appealed to D.C. residents' deep antipathy to Trump and recalled the horrific events of January 6. That improper rebuttal argument, combined with his other ones, necessitates a new

[5] Counsel's comparison was especially egregious and prejudicial because the January 6 violence occurred in the District of Columbia and because, as counsel knew, one of the jurors, Juror 931, works for the U.S. Senate Sergeant-at-Arms to watch for security risks, "including demonstrations that are affecting my agency." Tr. 92 (1/17/24 AM). Juror 931's office was at the center of the January 6 riot. *See* Michael Balsamo & Sophia Tulp, *US Senate sergeant-at-arms during Capitol riot dies at 71*, Associated Press (June 28, 2022), https://tinyurl.com/4bu7kw7u. Juror 931 served as the foreman of the jury.

trial. Although Steyn did not immediately object when counsel first uttered Trump's name, the Court should have intervened at that moment. When lawyers "overstep the boundaries of proper argument, the trial judge should take responsibility for maintaining control." *Bates v. United States*, 766 A.2d 500, 509 (D.C. 2000). "'Swift and stern corrective action' by the trial judge is appropriate" to avoid prejudice to the defendant. *Id*. This Court may grant a new trial as a remedy for an improper jury argument even if there is no objection. *See Scott*, 928 A.2d at 689 (affirming trial court's decision to grant new trial because of improper send-a-message argument even though counsel "did not object to the offending argument"). In any event, Steyn did object when counsel connected his election-deniers analogy to his stop-the-attacks argument. Tr. 108 (2/7/24 PM).

D. Counsel's improper argument that Steyn and his co-defendant "don't really have any proof they didn't act recklessly" requires a new trial.

Plaintiff's counsel also made an improper jury argument on the issue of Defendants' alleged actual malice. Mr. Williams said: "You see, they don't really have any proof that they didn't act recklessly." Tr. 101 (2/7/24 PM). Both Defendants immediately objected and asked the Court for an instruction to the jury. *Id*. They explained that "Mr. Williams continues to conflate reckless with recklessly. It's incorrect. It's misleading to the jury. … Highly prejudicial and legally incorrect." *Id*. After defense counsel insisted "Your Honor, I do want an instruction"—clearly meaning an instruction to the jury to disregard the improper argument—the Court said it would "reread the instructions" previously given to the jury. *Id*. at 102. The Court did not sustain (or overrule) Defendants' objections or instruct the jury to disregard counsel's improper argument. The Court allowed Plaintiff's counsel to resume his rebuttal and, after it ended, the Court re-read its general instruction on the four elements of defamation. *See id*. at 110–12.

Plaintiff's counsel's statement—that Defendants "don't really have any proof that they didn't act recklessly"—was improper argument for several reasons. *First*, Defamation law does

not ask whether a defendant acted "recklessly." To establish actual malice, the law required Plaintiff to prove, by clear and convincing evidence, that Defendants acted with reckless disregard for whether their statements were true or false—meaning they entertained serious doubts about the truth of their statements or had a high degree of awareness of their statements' probable falsity. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1252 (D.C. 2016) ("*CEI*"). Thus, Plaintiff's counsel blatantly misstated the law. *Second*, to make matters worse, he inverted the burden of proof. He led the jury to believe that *Defendants* had to prove they were not reckless when, in fact, *Plaintiff* had the burden to prove Defendants' reckless disregard for the truth or falsity of their statements by clear and convincing evidence. Third, as a factual matter, Plaintiff's counsel misstated the evidence. It was false to say that Defendants "don't really have any proof that they didn't act recklessly." Defendants *did* have and present proof that they *did not* act with reckless disregard for the truth or falsity of their statements. *See infra* Part III at 13–15.

For these reasons, Plaintiff counsel's argument was improper, incorrect, misleading, and prejudicial. Once again, the "prejudicial effect" of counsel's "misconduct was compounded" by the fact his "improper remarks were made during rebuttal argument" and so defense counsel was "denied the opportunity to contest or explain the statements." *Powell*, 455 A.2d at 411.

Counsel's improper and prejudicial argument was not cured by the Court. The Court failed to sustain Defendants' objections and thus left the jury free to conclude that Plaintiff's counsel had said nothing wrong. Nor did the Court instruct the jury that it should disregard counsel's improper argument. Instead, the Court re-read its instruction on the four elements of defamation. But the point the jury needed to hear—that counsel's statement that "they don't really have any proof that they didn't act recklessly" was a misstatement of the law and the facts—was not conveyed by simply re-reading the instruction on the elements of defamation. To the extent the two sentences

in the instruction on "reckless disregard" were somewhat helpful, they got lost amid the general instruction on the four elements of defamation, a lengthy instruction that took three pages to transcribe. *See* Tr. 110–112 (2/7/24 PM). The Court did nothing to connect specifically in the jurors' minds the "reckless disregard" instructions to counsel's improper argument. The Court further undercut any curative effect from re-reading the general instruction on the elements of defamation by then giving other basic, and lengthy, instructions. *See id*. at 112–118.

In short, re-reading the general instruction on the four elements of defamation was clearly "insufficient to compensate for the prejudice inflicted." *Powell,* 455 A.2d at 411. The reality is "'one cannot unring a bell,' and we cannot be sure that a curative instruction would have undone the damage." *Scott*, 928 A.2d at 689 (quoting *Thompson v. United States*, 546 A.2d 414, 425 (D.C. 1988)). The Court should have sustained Defendants' objections and should have instructed the jury to disregard the improper argument; its failure to do so was error requiring a new trial.

This improper jury argument, by itself and when combined with the improper "send a message" argument, warrants a new trial.

III. The Clear Weight of the Evidence Confirms Steyn Lacked Actual Malice.

The jury's verdict as to actual malice is against the clear weight of the evidence and justice would miscarry if the verdict stood. *Scott*, 928 A.2d at 687. On a new trial motion, this Court need not view the evidence in the light most favorable to Plaintiff but may instead act as a "thirteenth" (or seventh) juror. *Id*. Furthermore, because of the vital First Amendment interests at stake, courts "reviewing a determination of actual malice" must "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984). This rule applies to a trial court's post-judgment review of a jury verdict. *Id*. at 501; *Tavoulareas v. Piro*, 817 F.2d 762, 805 n.2 (D.C. Cir. 1987) (Wald, C.J., concurring in the judgment).

To prove actual malice, a plaintiff must show by clear and convincing evidence that "the defendant either (1) had subjective knowledge of the statement's falsity, or (2) acted with reckless disregard for whether or not the statement was false." *CEI*, 150 A.3d at 1252 (cleaned up). The first test—subjective knowledge—"requires the plaintiff to prove that the defendant actually knew that the statement was false." *Id.* And the second—reckless disregard— "requires more than a departure from reasonably prudent conduct." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id*. (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). "The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity.'" *Id*. (quoting *Garrison v. State of Louisiana,* 379 U.S. 64, 74 (1964)). "As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id*. (citing *St. Amant,* 390 U.S. at 731, 733). The Court has also "emphasiz[ed] that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Id*. at 666. "The phrase 'actual malice' … has nothing to do with bad motive or ill will." *Id*. at 666 n.7.

The *St. Amant* case teaches the right way to analyze actual malice. In a televised speech, St. Amant republished statements by Albin, a union member, to the effect that Thompson, a deputy sheriff, had accepted bribe money from the union's president. The Louisiana Supreme Court held that St. Amant defamed Thompson, finding that "St. Amant had broadcast false information about Thompson recklessly" and pointing out that St. Amant "failed to verify the information with those in the union office." 390 U.S. at 730. The U.S. Supreme Court, however, rejected this analysis as not a "proper test of reckless disregard." *Id*. at 732. It explained that the record did not show "an

awareness by St. Amant of the probable falsity of Albin's statement about Thompson" and that St. Amant's "[f]ailure to investigate" was not "evidence [of] a doubtful mind." *Id*. at 732–33, 733.

Here, the jury verdict on actual malice is against the clear weight of the evidence and cannot withstand the independent review required by *Bose*. The jury first found that Steyn had knowledge his statements were false. Tr. 9 (2/8/24). But there is, in fact, no evidence that Steyn *subjectively knew* his statements were untrue. Indeed, Plaintiff's closing argument to the jury did not even suggest that Steyn had such subjective knowledge. Nor did Plaintiff's brief opposing Steyn's Rule 50 motion so suggest. And Steyn's own testimony was directly contrary. *See* Tr. 85 (1/23/24 AM) ("Q. In 2012 it was your view that the Hockey Stick is fraudulent? A. Correct."); *id*. at 38 ("Q. Now, … you had maintained that the Hockey Stick was fraudulent since the time it first came out. … A. Correct."); *id*. at 43–44 ("Q. Now, since you took this position back in 2001, … you've been resolute in that position ever since, right? … A. Yes."). The jury did not have to credit Steyn's testimony, but not crediting it does not equal actual malice. It simply leaves the record with no credited evidence as to Steyn's subjective knowledge. And the mere absence of such evidence does not satisfy Plaintiff's burden to prove actual malice by clear and convincing evidence. *See Bose*, 466 U.S. at 512 ("When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.").

The jury also found that Steyn acted with reckless disregard for whether his statements were false. Tr. 9–10 (2/8/24). That, too, is against the clear weight of the evidence. The evidence of Steyn's actual malice was thin to the point of emaciation. Plaintiff's counsel summed up his theory on reckless disregard this way: "You see, they don't really have any proof that they didn't act recklessly." Tr. 101 (2/7/24 PM). But counsel misstated the evidence. Steyn did offer proof

that he did not act with reckless disregard of the truth or falsity of his 2012 post.

Before posting, Steyn read the Penn State report, the Louis Freeh report, the Lord Oxburgh report, and the Muir Russell report. Tr. 14 (1/23/24 AM). He "looked at all four of those things to make sure that the Simberg article was correct." *Id*. Steyn was familiar with Simberg; he had previously read posts on Simberg's website. *Id*. at 27. And he "had been writing, on and off, about Penn State and Sandusky for most of the previous year." *Id*. at 35. Although Steyn did not recall whether he saw the NSF report "before or after writing my piece," *id*. at 16, that testimony in no way proves actual malice. Steyn regarded the two U.K. reports as "the more relevant reports" since "the UK East Anglia was the scene of the crime," *i.e*., the place where the Climategate e-mail scandal occurred. *Id*. at 17–18. Steyn read the finding in the Muir Russell report that the hockey stick was "misleading." *Id*. at 31. In his trial testimony, Steyn quoted that finding from page 13 of the report. *Id*. at 52. Steyn also read the Climategate emails, including the notorious email in which Phil Jones referenced "Mike's Nature trick" and "hide the decline." Ex. 533. From that email alone, Steyn and countless other observers could, and did, fairly come to the conclusion, free from any actual malice, that the hockey stick was deceptive or misleading—*i.e*., fraudulent.

Having read the U.K. reports, Steyn did not believe he had to, as Plaintiff put it, "educate [him]self about the findings of the American Government." Tr. 20 (1/23/24 AM). And even if he should have read the NSF report in addition to the four reports he did read, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks*, 491 U.S. at 688. Nor is it sufficient to note that Steyn did not "consult[ ]" with scientists "to find out their views whether the Hockey Stick was fraudulent." Tr. 69 (1/23/24 AM). The First Amendment protects Steyn's right to form his own views. Plaintiff did not get an apology or retraction, but he never asked Steyn for one. *Id*. at 74.

National Review, not Steyn, placed the college newspaper ad poking fun at Mann. Tr. 71 (1/22/24 PM) ("It wasn't me."). In any event, this Court ruled "It's irrelevant." *Id*. at 72.

Far from having serious doubts about the truth of his statements, Steyn had "[n]o reason to doubt [his] position on the Hockey Stick." Tr. 44 (1/23/24 AM). Steyn testified: "I stand by every word in that post, because that post is the truth." *Id*. at 75. Steyn had been writing about—and criticizing—the hockey stick graph in widely-read newspapers for more than a decade before his 2012 post. In 2001, he wrote in the *Telegraph* that the graph uses "incompatible sets of data" in that "it measures the 11th to the 19th centuries with one system (tree ring samples) and the 20th with another (thermometers)." Ex. 5. *See* Tr. 77–78 (1/23/24 AM). In 2006, he wrote in the *Australian* that "[t]his graph was almost laughably fraudulent, not least because it used a formula that would generate a hockey stick shape, no matter what data you input, even completely random, trendless, arbitrary computer-generated data." Ex. 8. *See* Tr. 79–80 (1/23/24 AM). And Steyn had even more reasons to deem the graph fraudulent. *First*, "the Tree Rings do not correlate with the temperature record in our lifetime. … But we're supposed to believe that they can accurately tell you the temperature for the year 1512 or 1482." *Id*. at 78–79. *Second*, "for the years 1400 to 1404, there was no data, so [Mann] just cut and pasted some data from later in the 15th Century." *Id*. at 76. *Third*, for some years in the mid-15th Century, Mann relied on just "one reliable tree" from the Gaspé Peninsula in Quebec. *Id*. at 75–76, 80. *Fourth*, by using certain data starting in the year 1550, "Mann conveniently eliminate[d]" the 1530s, which "has always been known to be the warmest decade in Europe." *Id*. at 76. Others may, and surely did, disagree with Steyn's critique of the hockey stick as fraudulent. But the First Amendment protects Steyn's right to express that truth and opinion as much as it protects their freedom to disagree.

At trial, Plaintiff repeatedly invoked *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979), but

that case is inapposite. *Nader* was a summary judgment case, and the Court of Appeals held that "at summary judgment the plaintiff is not required to prove to the court 'actual malice with convincing clarity' as he must do at trial." *Id*. at 49. Here, of course, Plaintiff Mann was required to prove actual malice at trial by clear and convincing evidence. Defendant de Toledano wrote that a Senate report had "demonstrate[d] conclusively that Nader falsified and distorted evidence to make his case against the automobile." *Id*. at 38. The Court of Appeals held that, under its summary judgment test (which, again, did not require the plaintiff to show clear and convincing evidence of actual malice), summary judgment could not be granted to the journalist on the issue of actual malice because the report itself stated that Nader's charges "were made in good faith based on the information available to him." *Id*. at 37. Thus, de Toledano had made a claim about the findings of the Senate report that the report itself contradicted, and that was sufficient for Nader to survive summary judgment. The instant case is very different, not only because of the different procedural posture, but also because Steyn did not make any claim about the findings of a report at variance with the report itself. Steyn's post said that Penn State's report "declined to find one its star names guilty of any wrongdoing"—no evidence of actual malice there—and the post did not mention any other report concerning Mann. Ex. 60.

IV. The Clear Weight of the Evidence Confirms That Mann Lacks Actual Injury.

Plaintiff failed to prove actual injury. An "actual" injury is one that is "[r]eal; substantial" as "[o]pposed to potential, possible, virtual, theoretical, hypothetical, or nominal." *Actual, Black's Law Dictionary* 33 (5th ed. 1979). In a defamation case, actual injury "must be supported by competent evidence concerning the injury." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 350 (1974). The plaintiff must have "concrete proof" that his reputation was harmed. *Rocci v. MacDonald-Cartier*, 731 A.2d 1205, 1208 (N.J. Super. Ct. App. Div. 1999) (citing *Sisler v. Gannett Co*., 516 A.2d 1083, 1096 (N.J. 1986)), *aff'd as modified*, 755 A.2d 583 (N.J. 2000); *Weidner v. Anderson*,

174 S.W.3d 672, 684 (Mo. Ct. App. 2005). Here, there is no competent, concrete evidence of reputational harm or, indeed, any actual injury.

First, no competent evidence showed that Steyn's blog post *caused* a loss of grant funding. Plaintiff makes the simplistic claim that he had more grants before the post and fewer grants after the post. That is not proof of causation. It is instead a logical fallacy. *See Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (discussing "the logical fallacy *post hoc ergo propter hoc* (after this, therefore because of this)" and explaining that "we do not infer that the rooster's crow triggers the sunrise"). Counsel admitted to the Court that he could show only correlation, not causation. *See* Tr. 28 (1/31/24 PM) ("MR. WILLIAMS: It is correlation, Your Honor. … You're never going to get causation."). *But see* Jury Instructions at 9 (§ 12.02) (causation requirement); *id*. at 11 (plaintiff must show actual injury "as a result" of defamatory statement). Mann does not know whether reviewers of his grant applications even considered the Defendants' posts. *See* Tr. 62–67 (1/24/24 PM) (judicial admissions read to the jury).

Second, the dirty look from a stranger in the supermarket is almost laughable as an attempt to show actual injury. There is no evidence the stranger even read Steyn's post, no evidence the dirty look had anything to do with the post, and no evidence the stranger even recognized Mann in the grocery. Did Mann read his mind? Mann's apparent paranoia is not a cognizable injury.

Third, Dr. John Abraham's testimony does not show actual injury. On the contrary, he testified that Dr. Mann's reputation was "excellent." Tr. 99 (1/30/24 PM). "His work is highly regarded in the Scientific Community." Tr. 40 (1/31/24 AM). He did not ask Mann to work on a paper because he was "concerned" that some co-authors would be "skittish" about it. *Id*. at 68, 83. This concern was wholly speculative. He did not know if any of his co-authors had even read the Steyn and Simberg blog posts. *Id*. at 68. And he did not know of any researcher who refused to

collaborate with Mann because of the posts. *Id*. at 76. In a revealing moment, Abraham testified it was "this whole ClimateGate thing," *i.e*., the 2009 email scandal, that caused his concern about Mann (*id*. at 63)—not the 2012 blog posts. The Court should credit *that* candid testimony, not his assertion that the posts caused concern. Abraham was an extremely biased witness. He helped to found the Climate Science Legal Defense Fund to help Mann and others. *Id*. at 93, 102. He has called Mann a "hero" and co-authored seven peer-reviewed articles with him. *Id*. at 65.

Fourth, any "injury" was in large part self-inflicted. Mann himself emailed Steyn's post to his "climatebloggers" group and tweeted out the *Chronicle of Higher Education* article to his hundreds of thousands of followers. Ex. 535. Mann objects to being compared to Jerry Sandusky but for years he voluntarily and repeatedly associated himself with Graham Spanier, even after Spanier's indictment and conviction. A self-inflicted injury is not cognizable as an injury. *See Nat'l Family Planning & Repro. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Mann breached his duty to mitigate his damages. *See* Jury Instructions at 10 (§ 12.07).

Finally, since 2012, Mann's career trajectory has shot up like the blade of his hockey stick. His professional accomplishments, total annual income, "h index" and standing with the people he cares about—scientists, politicians, and celebrities—have gone up and up. Ex. 112 (Mann CV). He received a promotion to an Ivy League university. The blog posts prevented none of this.

In sum, at trial Mann failed to prove by competent evidence so much as a molecule of actual injury. Relief from the verdict and judgment is required for that reason alone.

V. Steyn's Statements Were True, Non-Defamatory, and Constitutionally Protected.

Every word of Steyn's post is true. The hockey stick graph *is* fraudulent. "It does not prove what it purports to prove." Mark Steyn, *"A Disgrace to the Profession"* at iii (2015). Synonyms for fraudulent include false, misleading, specious, and spurious. *See Fraudulent, Merriam-Webster Thesaurus Online*, https://www.merriam-webster.com/thesaurus/fraudulent

(last visited Mar. 8, 2024). That is "the plain and natural meaning of the words of the statement." Jury Instructions at 11.

The clear weight of the evidence at trial showed the hockey stick graph was misleading. *See*, *e.g.*, Ex. 620 (video of Berkeley professor Richard Muller explaining how the hockey stick is deceptive); Ex. 533 (email about "Mike's Nature trick" and "hide the decline"); Ex. 598 ("cover our a$$es" email); Steyn testimony *supra* at pg. 15. Dr. Abraham Wyner, a statistics professor at Wharton, offered the expert opinion that the hockey stick is misleading. *See* Tr. 78 (1/31/24 PM). It is misleading, among other reasons, because it fails to predict historic global temperatures better than randomly generated information. *See* Tr. 63, 65–67, 74–75 (2/1/24 AM). Mann called no witnesses at trial to defend the hockey stick other than himself and his co-author, Dr. Ray Bradley.

Because of the First Amendment, Steyn is "entitled to [his] opinions on the [hockey stick] and to express them without risk of incurring liability for defamation." *CEI*, 150 A.3d at 1253. Referring in passing to the hockey stick as fraudulent in a blog post without elaboration or emphasis is opinion because "the statement is indefinite and ambiguous." *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc). The offending adjective appears in the middle of an allegorical sentence depicting "Michael Mann [as] the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." Steyn's short post did not pause to explain how the graph is misleading, because that was not the aim of the post. At trial Plaintiff introduced no evidence on how Steyn's use of the word "fraudulent" would be received by readers.

Steyn's criticism of Mann's hockey stick graph was in keeping with the tenor of the climate science debate, though far less inflammatory than Mann's own discourse. *See*, *e.g.*, Ex. 685 (Mann's email accusing three scholars of "scientific misconduct" and behaving "unethically and dishonestly"); Ex. 603 (Mann's email calling Stephen McIntyre "human filth"); Ex. 1100 (Mann's

tweet calling McIntyre a white supremacist); Tr. 66–67 (1/24/24 PM) (judicial admission). When compared to Mann calling Steyn "this pathetic excuse for a human being," Ex. 554, Steyn calling the hockey stick graph "fraudulent" and Mann "the very ringmaster of the tree-ring circus" is downright tame. Given the tenor of the debate, Steyn's statement would not have moved the needle on Mann's reputation in his communities one iota. The jury found that it was not defamation for Simberg to write that "the emails revealed [Mann] had been engaging in data manipulation to keep the blade on his famous hockey stick graph." Tr. 7 (2/8/24). If it was not defamation for Simberg to say Mann manipulated the data to keep the hockey stick's shape, it was not defamatory for Steyn to say the graph is fraudulent (*i.e.*, misleading).

Nor did Steyn defame Mann by quoting the Jerry Sandusky line from Simberg's post. In Steyn's very next sentence he *distanced* himself from that line, while allowing that Simberg "has a point." Because the jury found that this comment on Simberg's post was *not* defamation, *see* Tr. 10 (2/8/24), it cannot be defamatory for Steyn to quote the text of another author upon which his post was commenting. Quoting other blogs and commenting on them is what bloggers do. Where, as here, the comment is not defamation, the quotation cannot be defamatory either. "The District of Columbia has long recognized and accorded the media the privilege of fair comment on matters of public interest." *Phillips v. Evening Star Newspaper Co*., 424 A.2d 78, 88 (D.C. 1980).

VI. The Grossly Excessive, Unconstitutional, and Otherwise Unlawful Award of Punitive Damages Requires a New Trial.

On this issue, Steyn incorporates the arguments presented in his motion for judgment as a matter of law or remittitur (at 2–13) filed concurrently with this motion.

CONCLUSION

For the foregoing reasons, this Court should grant Defendant Steyn's motion, vacate the judgment, and hold a new trial on liability and punitive damages.

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Respectfully submitted,

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