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 Renewed Motion for Judgment as a Matter of Law and Alternative Motion for Remittitur of Punitive Damages

H. Christopher Bartolomucci
D.C. Bar No. 453423
Justin A. Miller (*pro hac vice*)
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, D.C. 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com

Counsel for Defendant Mark Steyn

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Rule

Pursuant to D.C. Superior Court Civil Rules 50(b) and 60, the Due Process Clause of the Fifth Amendment, and this Court's inherent power, Defendant Mark Steyn hereby renews his motion for judgment as a matter of law and also moves in the alternative for remittitur of the grossly excessive and unconstitutional unlawful $1 million punitive damages award.

BACKGROUND

At trial, after Plaintiff rested his case in chief, Steyn made an oral motion for judgment as a matter of law ("JMOL") and also filed a written motion for such relief. *See* Tr. 104–07 (1/31/24 AM); Tr. 9–15 (1/31/24 PM); Def. Mark Steyn's Motion for Judgment as a Matter of Law. After Defendants rested and Plaintiff waived any rebuttal case, Steyn renewed his JMOL motion. Tr. 12–14 (2/7/24 AM).[1]

The jury awarded Plaintiff Michael Mann $1 in nominal damages from each Defendant. Tr. 7–8, 10 (2/8/24). This Court had instructed the jury if "you find that there are no proven damages resulting or that the damages are only speculative, then you may award nominal damages" "such as $1." Tr. 68 (2/7/24 AM); *see* Jury Instructions at 9. As punitive damages, the jury awarded $1,000 from Defendant Rand Simberg and $1,000,000 from Steyn. Tr. 8, 11 (2/8/24).

JMOL STANDARDS

A renewed motion for judgment as a matter of law made post-trial is a vehicle for raising "legal questions" regarding the verdict. Civ. R. 50(b). A motion for JMOL must be granted where, as here, "the law and facts … entitle the movant to … judgment." Civ. R. 50(a)(2). In addition, a "judgment notwithstanding the verdict should be granted when the evidence is so one-sided against the non-moving party that the moving party must prevail." *Strass v. Kaiser Found. Health Plan of Mid-Atl.*, 744 A.2d 1000, 1022 (D.C. 2000) (citation omitted).

[1] All "Tr." citations herein are to the trial transcript unless noted otherwise.

ARGUMENT

I. The $1,000,000 Punitive Damage Award Is Grossly Excessive, Unconstitutional, and Otherwise Unlawful.

A. Steyn's Post Does Not Show the Mental State Required for Punitive Damages.

To recover punitive damages, it was Plaintiff's burden to prove by clear and convincing evidence that Steyn acted with actual malice and that his "*conduct in publishing* a defamatory statement *showed* maliciousness, spite, ill will, vengeance, or deliberate intent to harm the plaintiff." Tr. 75 (2/7/24 AM) (emphases added). Thus, Plaintiff had to prove that *the writing at issue* "showed" that Steyn possessed the requisite state of mind for punitive damages. *Id*. Plaintiff, however, did not come close to proving that, let alone by clear and convincing evidence.[2]

Steyn's post did not "show" maliciousness, spite, ill will, etc. The first statement the jury found to be defamation was Steyn's quotation of Rand Simberg's comparison of Michael Mann to Jerry Sandusky. But Steyn immediately distanced himself from the comparison, saying that although he (Simberg) "has a point," he (Steyn) was "[n]ot sure [he'd] have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does." The jury found that it was *not* defamation for Steyn to say that. Accordingly, Steyn's quotation of Simberg to set up his non-defamatory comment distancing himself from the Sandusky comparison cannot be deemed to show the malicious mental state necessary for punitive damages, as a matter of law.

Steyn's second statement the jury found to be defamation was that "Michael Mann was the man behind the fraudulent climate-gate 'hockey-stick' graph, the very ringmaster of the tree-ring circus." That statement, however, is light-hearted and figurative, not malicious. It features a circus metaphor and a play on words and evinces no spite or ill will. As a matter of law, this statement

[2] Steyn's "Football and Hockey" post is attached as Addendum A to Steyn's new trial motion.

does not "show" the state of mind required for punitive damages. The mere use of the word "fraudulent" in connection with the hockey stick graph does not show the necessary mental state.

B. The Punitive Damage Award Violates D.C. Law and the First Amendment.

"It is well-recognized that punitive damages are not favored in the law" of the District of Columbia and so "they are available only in cases which present circumstances of extreme aggravation." *Sere v. Grp. Hospitalization, Inc*., 443 A.2d 33, 37 (D.C. 1982). Punitive damages are especially problematic in defamation cases. The Supreme Court has noted "the propensity of juries to award excessive damages for defamation." *Linn v. United Plant Guard Workers of Am*., 383 U.S. 53, 64 (1966). And excessive punitive damages in such cases involving the media chills speech protected by the First Amendment. Thus, "there is need to be concerned about the problem of excessive punitive damages, for this prospect portends a potentially more chilling restraint on appropriate latitude in news discussion than ensues from actions for compensatory damages." *Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 662 (D.C. Cir. 1966) (en banc).

The punitive damages awarded here violate both D.C. law and the First Amendment, for multiple reasons. *First*, Steyn did not publish with actual malice and thus punitive damages may not be imposed. *See Phillips v. Evening Star Newspaper Co*., 424 A.2d 78, 90 (D.C. 1980). "Proving actual malice is a heavy burden." *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997). And this Court has "an obligation to make an independent examination of the entire record to ensure the judgment is supported by clear and convincing evidence of actual malice." *Id*. (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984)). The *Mann* trial made one thing clear as crystal: Steyn's belief in the truth of his blog post is resolute. *See* Def. Mark Steyn's Mot. for New Trial 11–16 ("New Trial Mot."). No finding of actual malice may be made or sustained in this case. *See Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir. 1990) ("Carpenter's subjective belief in the truth of his allegations was manifested at the trial

of this matter, where he vehemently reiterated many of the accusations that he raised in papers filed with the FCC and correspondence sent to various politicians. Although Carpenter's judgment and logic may not have been sound, we cannot conclude that he acted with actual malice."); *Peter Scalamandre*, 113 F.3d at 560–64 (reversing and rendering judgment as to $4.5 million punitive award because plaintiff failed to prove actual malice by clear and convincing evidence).

Second, Plaintiff failed to present any non-speculative proof of damages; the jury awarded him $1 in *nominal* damages. *See* New Trial Mot. 16–18. And under both the First Amendment and D.C. law that means Plaintiff may not collect punitive damages. The Supreme Court has explained that, because of the First Amendment, a "defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages." *Linn*, 383 U.S. at 66; *accord Afro-Am. Publ'g Co.*, 366 F.2d at 662 (recognizing that under *Linn* "proof of compensatory" damages is "a prerequisite for punitive damages").

Under D.C. law, too, punitive damages may not be awarded to a "'plaintiff whose legal right has been technically violated but has proved no real damage.'" *Maxwell v. Gallagher*, 709 A.2d 100, 103 (D.C. 1998). In *Maxwell*, the appellees recovered a $1 nominal damage award and $75,000 in punitive damages. On appeal, the Court held that the "award of punitive damages was impermissible" due to the "failure of the appellees to present proof of loss." *Id*. at 101, 103 . So too here. Plaintiff proved no real damage and had no proof of loss. If he had, the jury would have awarded not just nominal but compensatory damages. Since the jury did not award compensatory damages, Plaintiff cannot recover punitive damages. *See Feld v. Feld*, 783 F. Supp. 2d 76, 77 (D.D.C. 2011) (recognizing the *Maxwell* rule that "a mere 'technical invasion' of a plaintiff's rights where no actual harm has occurred cannot support punitive damages"). "Under the law of the District of Columbia, one cannot receive punitive damages if only nominal damages are sought

and awarded." *Unidisco, Inc. v. Schattner*, No. B-80-2617, 1986 WL 84363, at *13 (D. Md. Aug. 4, 1986), *aff'd in part & rev'd in part on other grounds*, 824 F.2d 965 (Fed. Cir. 1987). In the District, "'a verdict assessing punitive damages can be returned only when there is also a verdict assessing compensatory or actual damages.'" *Zanville v. Garza*, 561 A.2d 1000, 1001 (D.C. 1989).

Third, under D.C. law, "[t]he court may set aside an award of punitive damages deemed to be excessive or against the weight of the evidence, or larger in amount than the court thinks it justly ought to be." *Afro-Am. Publ'g Co.*, 366 F.2d at 662 (footnotes omitted). In judging "whether punitive damages are excessive," the court should consider (i) the counsel fees "actually" paid by the plaintiff; (ii) whether the defendant profited from his behavior; and (iii) "the basic purposes of deterrence and punishment." *Id*. at 662–63. The court should also consider whether a punitive award is "excessively restrictive of freedom of press and comment." *Id*. At 663.

Applying these factors, the $1 million punitive award violates D.C. law. Mann has paid *nothing* to his small army of attorneys from three law firms for 12 years of litigation, Tr. 61–62 (1/24/24 PM), and Steyn did not profit from his conduct. Deterrence and punishment are proper objectives of a punitive award, but to serve those ends an award must be proportionate to the harm caused. And here there was no harm: The jury awarded Plaintiff no compensatory damages but only $1 in nominal damages. A $1,000,000 punitive award is grossly disproportionate to the amount of harm (*i.e*., no harm) reflected in a $1 nominal award. The $1,000,000 award produces massive over-deterrence and is wildly excessive punishment for the harm (read: none) caused.

Under both D.C. law and the First Amendment, a significant, if not singularly dispositive, consideration here is that the $1,000,000 punitive award is "excessively restrictive of freedom of press and comment." *Afro-Am. Publ'g Co.*, 366 F.2d at 663. That freedom, protected by the First Amendment, is essential to our republic and our constitutional democracy. If members of the press

can face crippling seven-figure punitive awards for writing on and expressing their views on controversial matters of great public importance—*i.e*., for doing their jobs—they will self-censor to our country's great detriment. When such enormous punitive damage awards are imposed on commentators in libel cases, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

Fourth, and finally, Plaintiff at trial painted a picture of Steyn as a wealthy elite but failed to offer any evidence of his net worth. This Court instructed the jury that, in considering punitive damages, it could consider "the net worth of the defendant at the time of trial." Jury Instructions at 15. But Plaintiff did not introduce any evidence of Steyn's net worth.

Punitive damages may not be "so great as to exceed the boundaries of punishment and lead to bankruptcy." *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 941 (D.C. 1995). Because "current net worth fairly depicts a tortfeasor's ability to pay punitive damages," *id*., "a plaintiff seeking to recover punitive damages based upon the wealth of the defendant … must establish the defendant's net worth at the time of trial." *Id*. at 940. This rule applies when "a plaintiff invokes the defendant's wealth." *Id*. at 941 n.19, which Plaintiff did here.

At trial, Plaintiff's counsel led the jury to believe that Steyn runs in elite circles and is a famous television personality. Plaintiff elicited from Steyn that he was a guest host for Sean Hannity on Fox News, for Rush Limbaugh, and for Tucker Carlson. Tr. 59–60 (1/23/24 AM). The jury heard that Steyn had a contract to write for National Review when he wrote the "Football and Hockey" post. *Id*. at 60. Plaintiff's counsel asked Steyn if he was "aware that the National Review bills itself as being able to influence a highly-engaged audience from elected officials to opinion and business leaders." *Id*. at 60–61. Counsel showed the jury a bio from the National

Review's website. *Id*. at 61–62. And the jury heard that Steyn is "an International Best-Selling Author" and "a Top 41 Recording Artist." *Id*. at 62. This line of questioning required Plaintiff to prove Steyn's net worth. Plaintiff put Steyn's wealth "in issue sufficiently to require proof of net worth as the gauge of ability to pay." *Daka*, 839 A.2d at 695. But no such proof came in.

C. The $1 Million Punitive Damage Award on $1 in Nominal Damages Is Grossly Excessive and Violates the Due Process Clause of the Fifth Amendment.

In "response to outlier punitive-damage awards" the Supreme Court has "announced due process standards that every award must pass." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003); and *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574–75 (1996)). The Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *State Farm*, 538 U.S. at 416; *BMW*, 517 U.S. at 562. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417.

The D.C. Court of Appeals has applied this doctrine and explained that, because punitive damages "'pose an acute danger of arbitrary deprivation of property,'" "meaningful and adequate review of punitive damages awards" is "critical." *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 46, 48 (D.C. 2010). *See*, *e.g*., *Daka, Inc. v. McCrae*, 839 A.2d 682, 699–700 (D.C. 2003) (vacating punitive award 26 times greater than compensatory award). Under the precedents of the Supreme Court and the Court of Appeals, the $1,000,000 punitive award in this case cannot stand.

The Supreme Court has stated that "the ratio between compensatory and punitive damages is … a central feature in our due process analysis." *Exxon Shipping*, 554 U.S. at 507. The Court has held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm,* 538 U.S. at 425. Here,

the ratio between the punitive damages and nominal damages awarded by the jury is not a single-digit ratio, but an astonishing *one million to one* ratio (1,000,000**:**1).

The Supreme Court has "instructed courts reviewing punitive damages to consider three guideposts." *Id.* at 418. The guideposts are "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id*.

1. Degree of Reprehensibility

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. Non-violent acts are less serious than ones "'marked by violence or the threat of violence,'" *id*. at 576, and the Court has placed "special emphasis on the principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.'" *Id*. (quoting *TXO Prod. Corp v. All. Res. Corp*., 509 U.S. 443, 453 (1993)). An assessment of the reprehensibility of the defendant's conduct should consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419 (citing *BMW*, 517 U.S. at 576-77).

Here, "none of the aggravating factors associated with particularly reprehensible conduct is present." *BMW*, 517 U.S. at 576. The harm, if any, that Steyn inflicted on Mann "was purely economic in nature" (a claimed loss of grant funding) and non-violent—Steyn's conduct was speech, *i.e*., an internet blog post. *Id.* The post caused no harm to "the health and safety of others." *Id*. Nor was Mann a "financially vulnerable" victim. *Id*. In 2012, he was a tenured and renowned

professor with countless supporters and defenders. The jury found he had no compensable loss and awarded only nominal damages. With respect to the repeated-versus-isolated factor, Steyn, with ample justification, called the hockey stick graph "fraudulent" more than once, in writings since 2001. But the Court of Appeals expressly held that Steyn's use of that word, standing alone, would not be defamation "as a matter of law." *CEI v. Mann*, 150 A.3d 1213, 1247 (D.C. 2016). Steyn's repost of Simberg's comparison of Penn State's investigation of Mann to its investigation of Sandusky was a topic Steyn wrote about only once, in the blog post at issue; it was "an isolated incident." *State Farm*, 538 U.S. at 419. Finally, no competent evidence of Steyn's subjective mental state was introduced to show "intentional malice, trickery, or deceit" on his part. *Id*. *See* New Trial Mot. 11–16 (no actual malice).

All in all, the relevant factors point strongly to the conclusion, as they did in *BMW*, that the punished conduct "was not sufficiently reprehensible to warrant imposition of a $[1] million exemplary damages award." 517 U.S. at 580 ("$2 million" altered to $1 million). Here, the $1 million punishment is "'grossly out of proportion to the severity of the offense.'" *Id.* at 576. As this case shows, there can be a fine line between defamatory speech and speech fully protected by the First Amendment. Even if Steyn crossed that hazy line (he didn't) while commenting on a matter of great public interest, controversy, and importance,[3] his conduct (i.e., his speech) was not so reprehensible as to justify punishment at the million-dollar level. The First Amendment is too important to be repealed bit by bit by overwrought and random jury verdicts.

[3] *See Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 344 (2019) (Alito, J., dissenting from cert denial) ("[T]his case presents questions that go to the very heart of the constitutional guarantee of freedom of speech and freedom of the press … on one of the most important public issues of the day.").

2. Ratio of punitive damages to actual harm

The second guidepost considers ratio of the punitive award "to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580. A "comparison between the compensatory award and the punitive award is significant" because "exemplary damages must bear a 'reasonable relationship' to compensatory damages." *Id*. at 580–81. Where, as here, a massive punitive award is out of whack compared to the defendant's actual damages, a due process violation is likely. In *BMW*, it was significant that "[t]he $2 million in punitive damages awarded to Dr. Gore … is 500 times the amount of his actual harm as determined by the jury." *Id*. at 582. The Court set that award, with its 500:1 ratio, aside. In *State Farm*, which involved a much smaller ratio, 145:1, the Court stated that the case was "neither close nor difficult." *State Farm*, 538 U.S. at 418. The D.C. Court of Appeals has called the 145:1 ratio "staggering." *Daka*, 839 A.2d at 699. A ratio of 1,000,000**:**1 is 6,895 times more staggering than that. [145 x 6,895 = 999,775].

The Court has explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm,* 538 U.S. at 425. At the same time, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW*, 517 U.S. at 582.

Here, the ratio between punitive and other damages is a staggering 1,000,000**:**1. That ratio clearly exceeds a single-digit ratio to a significant degree. The Supreme Court has stated that "[w]hen the ratio is a breathtaking 500 to 1, … the award must surely 'raise a suspicious judicial eyebrow.'" *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)). When the ratio is a mind-blowing 1,000,000 to 1, the judicial jaw must surely drop all the way to the ground. This case involves no "particularly egregious act." *Id.* at 582. "The harm [if any] arose" from Steyn's keyboard, "not from some physical assault or trauma; there were no physical

injuries." *State Farm*, 538 U.S. at 426. Since "there is a presumption against an award that has a 145-to-1 ratio," *id*., that presumption is irrefutable when the ratio is 1,000,000-to-1.

Steyn submits that *if* any punitive award is appropriate here (none is), the jury's award as to him, to pass constitutional muster, must be reduced to somewhere between $1,000 (the amount assessed against co-defendant Simberg) and $5,000, at the very most. Even that may be too generous because it would entail a highly questionable ratio of 1,000**:**1 or 5,000**:**1. *Cf*. *Daka*, 839 A.2d at 700-01 ("[A]n award in this case that multiplies the sum awarded for compensatory damages by more than a factor of five will bear a very heavy burden of justification.").

3. Legislatively authorized penalties and comparable verdicts

The third guidepost compares "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." *State Farm*, 538 U.S. at 428. Therefore, when reviewing a punitive award for excessiveness, a court "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (cleaned up).

The District of Columbia has no statute imposing civil penalties for libel and it never has. It once had a criminal libel statute that imposed a maximum fine of $1,000. *See Raymond v. United States*, 25 App. D.C. 555, 560 (1905). The punishment here is 1,000 times greater than the highest possible fine under the old statute. Even adjusted for inflation, $1,000 is just over $35,000 today, which is still "an amount dwarfed" by the punitive award at issue. *State Farm*, 538 U.S. at 428. Significantly, the repeal of the District's criminal libel law reflects a decision that speech—an activity protected by the First Amendment—should not be punished with fines, even if the speech is libelous. "The *existence* of a criminal penalty" has a bearing here, *id.* (emphasis added), and so does the non-existence of such penalties. Substantial deference is owed to the legislative judgment

to impose neither criminal nor civil fines for libel. *See BMW*, 517 U.S. at 583. The District of Columbia is no longer in speech police business.

In applying the third guidepost, the Court of Appeals has also looked to other D.C. jury "awards in comparable cases involving similar conduct." *Modern Mgmt*., 997 A.3d at 60. The closest comparator would seem to be *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980), where the court held that no punitive damages could be imposed that case, where the jury awarded plaintiff $1 in nominal damages, because defendant lacked actual malice. *Id*. at 90.

In *Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996), a defamation case, the jury awarded $1 in compensatory damages and $1 in punitive damages. *Id*. at 1070. The Court "remanded for further proceedings quantifying punitive damages" because "the trial court precluded Ayala from introducing evidence bearing on punitive damages, including evidence of his attorney fees and costs." *Id*. at 1070–71. Here, Mann did not pay any attorney fees. Tr. 61–62 (1/24/24 PM).

Outside of the defamation context, in *Maxwell v. Gallagher*, 709 A.2d 100 (D.C. 1998), a judge (not a jury) awarded $1 in nominal damages and $75,000 in punitive damages on a breach of fiduciary duty claim in a case about a disputed stock transfer. *Id*. at 101. The Court of Appeals held that "because the trial judge expressly found that appellees had proven no actual damages, punitive damages could not be awarded." *Id*. at 105.

Howard University v. Wilkins, 22 A.3d 774 (D.C. 2011), is not a defamation case and not a true comparator. Wilkins won at trial on a retaliatory discharge claim under the D.C. Human Rights Act. The trial court rejected her defamation claim on summary judgment, *id*. at 777, and that ruling was affirmed, *id*. at 785-87. The jury awarded Wilkins $1 in compensatory damages and $42,677 in punitive damages on her DCHRA claim. *Id*. at 777. The Court of Appeals affirmed the punitive award, holding it was not so excessive as to be unconstitutional. *Id*. at 785. The Court

gave special emphasis to the fact that there is no cap on damages available under the federal 1866 and 1870 Civil Rights Acts on which the DCHRA was based. *Id*.

In sum, there is no precedent for a D.C. jury to award $1 million or more in punitive damages—or even a smaller, five- or six-figure award—in a defamation case where the jury awarded only $1 in compensatory or nominal damages. And there is no D.C. Court of Appeals decision upholding a five-, six-, or seven-figure punitive damage award in a defamation case, let alone such a case involving a mere $1 in compensatory or nominal damages.

When "a plaintiff claiming defamation received an award of only nominal damages but also received punitive damages" the "[c]ase law suggests that punitive damages in that context are quite modest." *Webber v. Dash*, 607 F. Supp. 3d 407, 420 (S.D.N.Y. 2022) (citing *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 191 (2d Cir. 2000) (upholding $1 nominal damage and remitting $15,000 punitive damages to $10,000 where one of three articles found to be defamatory was not defamatory); *Fischer v. OBG Cameron Banfill LLP,* No. 08 Civ. 7707, 2010 WL 3733882, at *3 (S.D.N.Y. Sept. 24, 2010) (awarding $1 in nominal damages and $7,500 in punitive damages for defamatory email exchange and letter to the INS seeking plaintiff's removal from the country)). Although *Webber* looked to awards in New York, jury verdicts and court-reviewed awards in the District of Columbia do not show a different pattern. Because Plaintiff recovered only nominal damages, any punitive award should be "quite modest" and it should not exceed four figures.

* * *

Applying the three guideposts identified by the Supreme Court as necessary to ensure due process in punitive damages, the $1,000,000 punitive award here on $1 in other damages is clearly excessive, unjust, unreasonable, and unconstitutional. It cannot stand. As a matter of law, no

punitive award may be imposed here. Even if this Court disagrees with that conclusion, the award should be remitted based on the due process guideposts to the amount of $5,000 or less. [4]

II. Steyn's Post Is Shielded by the First Amendment From Defamation Liability.

The First Amendment protects the right to criticize other speakers, including politicians, scientists, and politically-active scientists such as Michael Mann, especially on matters of great public importance. This case presents "questions that go to the very heart of the constitutional guarantee of freedom of speech and freedom of the press." *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 344 (2019) (Alito, J., dissenting from denial of certiorari) ("*Mann*"). Mann seems to think persons like Steyn have no right to criticize the work of scientists. The First Amendment disagrees. It guarantees Steyn's right to form the view that the hockey stick graph was fraudulent and to share that view with those who wished to receive it. And it guarantees his right to quote another blogger and react to that blogger's post without being held liable for anyone's words but his own.

The First Amendment protects the right of citizens and the press to "speak freely and without fear about the most important issues of the day." *Id.* at 346. The press cannot do so without being free to quote and describe what they will comment on. This case involves criticism of a scientist's output at the heart of a heated political debate, but the jury's verdict shuts down half of that debate. And that is what Plaintiff wanted. It was Mann's purpose to "send[] a message that falsely attacking climate scientists is not protected speech." Addendum D to New Trial Mot. When Steyn's post is placed both in the context of the debate and that it was a blog post, the law is clear that his statements were protected speech.

[4] "Unlike in the usual case where a remittitur is ordered, it will be unnecessary here" to give Plaintiff Mann "the option of accepting the remitted amount or a new trial on punitive damages." *Daka*, 839 A.2d at 701.

Statements about the quality of scientific scholarship are not provably false. *See CEI*, 150 A.3d at 1247. And the First Amendment protects Steyn's choice to offer "a pungently phrased expression of opinion regarding one of the most hotly debated issues of the day." *Mann*, 140 S. Ct. at 347. Steyn's statements were "couched as an expression of opinion on the quality of" the fraudulent hockey stick graph, which is "a work of scholarship relating to an issue of public concern." *Id.* As such, his comments are protected speech.

This Court, not a jury, should have decided if Steyn's statements were provably false. *See Mann*, 140 S. Ct. at 345–46. This issue has "serious implications" for the First Amendment. *Id*. at 346. Juries are especially unsuited for this gatekeeping function where, as here, the question of provable falsity is "highly technical" and "controversial." *Id*. In fact, sitting an impartial jury *at all* presents special difficulties "[w]hen allegedly defamatory speech concerns a political or social issue that arouses intense feelings." *Id*. This case reinforces the wisdom of the federal rule. The jury's verdict shows its confusion about the provable falsity of the statements at issue. The jury somehow decided that Steyn was liable for reposting Simberg's post but not for his commentary on that post—and that Steyn's statement about the fraudulent graph was defamatory, although "such an ambiguous statement may not be presumed to necessarily convey a defamatory meaning." *CEI*, 150 A.3d at 1247.

The First Amendment protects press commentary on news and others' reactions to the news. Steyn's comments about Penn State's investigations into Mann and Jerry Sandusky were a response to "then-front-page-news" following the explosive findings in the Freeh Report. *CEI*, 150 A.3d at 1223–24. Steyn's post quoted an article from Simberg and reacted to it. The jury found that Steyn's comments in reaction were *not* defamatory, but that his quotation of Simberg *was* defamatory. The press cannot comment on newsworthy events without quoting what they are

commenting on. Liability for republication of a statement depends on "whether there has been a change in the content of the defamatory statement or whether the publisher actively sought a new audience." *Banks v. Hoffman*, 301 A.3d 685, 713 n.49 (D.C. 2023), *vacated pending en banc review*, 308 A.3d 201 (D.C. 2024) (per curiam) (mem.); *see also Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 880 (W.D. Va. 2016). Steyn's change here was to *distance* himself from the quote. "The District of Columbia has long recognized and accorded the media the privilege of fair comment on matters of public interest." *Phillips*, 424 A.2d at 88. The freedom of the press cannot exist if a member of the press cannot quote what he plans to discuss.

"[T]he freedom of speech and the press are most seriously implicated … in cases involving disfavored speech on important political or social issues." *Mann*, 140 S. Ct. at 347–48. Mann's graph "has featured prominently in the politically charged debate about climate change," *CEI*, 150 A.3d at 1220, which "has staked a place at the very center of this Nation's public discourse" and is debated daily in all its aspects by "[p]oliticians, journalists, academics, and ordinary Americans." *Mann*, 140 S. Ct. at 348. The press' ability to discuss this issue is essential to our form of self-government. The verdict in this case will have a horrible "chilling effect" on discussing controversial political issues like climate change. *CEI*, 150 A.3d at 1242. Americans must be free to "engage[] in a debate of such public concern" with their own "expression of their ideas on the subject, even with pointed language." *Id.* When it comes to "scientific or policy views, the question is not who is right; the First Amendment protects the expression of all ideas, good and bad." *Id.* The Constitution does not recognize "a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974). Even a "pernicious an opinion … depend[s] for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id*. Our nation relies on "a profound national commitment to the principle that debate on public issues should be

uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times*, 376 U.S. at 270. This verdict silences further debate. Steyn was dragged through ten years of litigation and told to pay $1,000,001 for quoting another author about Penn State's investigation of Mann and for calling Mann's graph fraudulent. That result is repugnant to the First Amendment.

The First Amendment forbids this Court from considering Steyn's post in a vacuum. Steyn was writing at the center of a political maelstrom surrounding Mann, his graph, and Penn State. Indeed, "the existence of a political controversy is part of the total context that gives meaning to statements made about [Mann]." *Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring). The surrounding context shows that Steyn's comments were in the tenor of the debate and reflected rhetorical flourishes to emphasize his point that he sincerely believes Mann's graph to be fraudulent and Penn State to be corrupt . "When we read charges and countercharges about a person in the midst of such controversy we read them as hyperbolic, as part of the combat, and not as factual allegations whose truth we may assume." *Id*. As came out at trial, Steyn believes every word he wrote, and the rhetoric he chose to make that point is protected speech.

This Court should also consider the context of Steyn's speech. "Context is critical" and it "includes not only the immediate context of the disputed statements, but also the type of publication, the genre of writing, and the publication's history of similar works." *Farah v. Esquire Mag.*, 736 F.3d 528, 535 (D.C. Cir. 2013). Steyn posted on National Review's online blog, *The Corner*. Its readers expected initial reactions to and biting commentary on breaking news. In the same way that a satirical article must be evaluated as satire, *see id*. at 536–37, a blog post must be evaluated as blogging. The jury's verdict signals to bloggers and other writers that they may not criticize a scientist's claims except in a peer-reviewed publication. Plaintiff's argument that Steyn

should be faulted for failing to consult with scientists or study certain government reports before posting is antithetical to the nature of blogging. The First Amendment protects Steyn's right to expression in the blogging context, and his post must be evaluated in that context. Because Steyn's blog post is entitled to protection as a blog, Steyn is entitled judgment as a matter of law.

III. Because the Jury Found That Steyn's Second Statement Is Not Defamation, His First Statement Is Not Defamation Either.

The jury found that Steyn's first and third statements were defamation but his second was not. Tr. 10 (2/8/24). Steyn's first statement quoted a line from Simberg's post: "'Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.'" With his second statement Steyn immediately distanced himself from that line: "Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point."

Because the jury found that Steyn's second statement is not defamation, the first one cannot be defamation either, as a matter of law. Steyn quoted a line from Simberg and then disassociated himself from it as written while adding a non-defamatory comment that Simberg "has a point." It cannot be defamation for Steyn, a member of the press, to quote another's writing accurately and identify its source and then offer non-defamatory criticism and comment about the writing. Steyn did not merely republish Simberg, and this case does not fall within the republication doctrine.

Quoting, criticizing, and commenting on Simberg, as Steyn did here, is also privileged. *See Phillips*, 424 A.2d at 88 ("The District of Columbia has long recognized and accorded the media the privilege of fair comment on matters of public interest."). Steyn was entitled to recite and opine on Simberg's line. "'To state accurately what a man has done, and then to say that in your opinion such conduct was disgraceful or dishonorable, is comment which may do no harm'"

and so is privileged. *Id*. (quoting *DeSavitch v. Patterson*, 159 F.2d 15, 17 (D.C. Cir. 1946)). The First Amendment, too, protects the right of bloggers to quote and comment on other blogs.

Finally, Steyn hereby adopts Simberg's arguments that his line about Jerry Sandusky was not defamation, and if Simberg prevails so must Steyn prevail as to his own first statement.

IV. By Itself, Steyn's Third Statement Is Not Defamation.

Steyn's third statement was that "Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree ring circus." If judgment as a matter of law is granted (as it should be) as to Steyn's *first* statement, then his *third* statement, standing alone, cannot be a basis for defamation liability. Why? Because of *CEI v. Mann*. There, the Court of Appeals explained that Steyn's third statement, by itself, is not defamatory as a matter of law:

> We agree that if the use of "fraudulent" in this one sentence were the only arguably defamatory statement in Mr. Steyn's article, we would have to conclude that it is insufficient as a matter of law, as such an ambiguous statement may not be presumed to necessarily carry a defamatory meaning. In such a case, the First Amendment tips the judicial balance in favor of speech.

150 A.3d at 1247 (citing *Bose*, 466 U.S. at 505). This Court is, of course, constrained to follow the Court of Appeals on this point.

V. Judgment Should Be Granted to Steyn on Actual Malice, Actual Injury, Truth, and Defamatory Meaning.

Steyn's motion for a new trial argues that the verdict is contrary to the great weight of the evidence on the issues of actual malice, actual injury, truth, and defamatory meaning. *See* New Trial Mot. 11–20. Those arguments are incorporated here and require judgment as a matter of law. Although the standards under Rule 50 and Rule 59 are not identical, the somewhat higher Rule 50(b) standard is met here. *See Strass*, 744 A.2d at 1022 ("[J]udgment notwithstanding the verdict should be granted when the evidence is so one-sided against the non-moving party that the

moving party must prevail."). Under the Rule 50(b) standard, Steyn must prevail, particularly on the issues of actual malice and actual injury. The evidence is very clear (i) that Steyn believes, and always believed, that every word of his post is true; and (ii) that Mann was not injured at all by the post. *See* New Trial Mot. 11–18.

CONCLUSION

For the foregoing reasons, Steyn's motion should be granted, and the Court should render judgment as a matter of law in his favor as to liability and punitive damages. Alternatively, the Court should grant a remittitur as to the excessive punitive damage award and reduce that award to no more than $5,000.

Dated: March 8, 2024

Respectfully submitted,

s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci
D.C. Bar No. 453423
Justin A. Miller (*pro hac vice*)
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com

Counsel for Defendant Mark Steyn