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By e-mail and first-class mail

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Re: Demand Letter to The National Review

Dear John:

I write to respond to your July 20, 2012 demand letter to National Review regarding the blog post "Football and Hockey" by Mark Steyn. Our review reveals that the magazine has published statements that are fully protected under the First Amendment. There is no need for National Review to remove or retract the post.

Dr. Mann complains about two statements: 1) that as "the man behind the fraudulent climate-change 'hockey-stick' graph," he is "the very ringmaster of the three-ring circus" on climate change; and 2) that he "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." Neither of these statements is actionable. Moreover, if Dr. Mann decides to pursue this matter, he and his research would be subjected to a very extensive discovery of materials that he has fought so hard to protect in other proceedings. Such materials would be required for National Review to defend itself.

Dr. Mann is unquestionably a public figure who has placed himself squarely in the middle of the heated scientific debate over climate change. The appellate courts have consistently held that scientists who inject themselves into public controversies over "scientific and political debates" are public figures. *See, e.g., Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 706 (4th Cir. 1991) (researcher who "voluntarily injected himself into public controversy" over use of malathion, a potential carcinogen, in Medfly outbreak found to be public figure); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (public figures are those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the

issues involved" and who "invite attention and comment"). In fact, Dr. Mann describes himself as a "public figure" on his Facebook page. See Michael E. Mann, Facebook, https://www.facebook.com/MichaelMannScientist?sk=wall.

Moreover, Dr. Mann has frequently spoken to the press and published opinions and letters in prominent newspapers (including The Washington Post and The Wall Street Journal) about his research. *See, e.g.*, Opinion, Michael E. Mann, "Get the anti-science bent out of politics," Wash. Post, Oct. 8, 2010; Letter, Michael E. Mann, "Climate Contrarians Ignore Overwhelming Evidence," Wall. St. J., Dec. 5, 2011. In fact, he quite literally wrote the book on the climate change controversy. *See* Michael Mann, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines*, Columbia University Press 2012; *see also* Michael E. Mann and Lee R. Kump, *Dire Predictions: Understanding Global Warming*, DK Publishing 2008. He thus has adequate "access to channels of effective communication" to rebut any accusations he believes to be false. *Reuber*, 925 F.2d at 708-09 (scientist who testified before Congress on well-known controversy, gave an interview, and published numerous papers had sufficient access to channels of communication to be public figure) (*citing Fitzgerald v. Penthouse Int'l*, 691 F.2d 666, 668 (4th Cir. 1982)).

Dr. Mann is thus a public figure who would be required to prove by clear and convincing evidence that National Review published a provably false statement with actual malice; that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (reckless disregard refers to state of mind in which a defendant "in fact entertained serious doubts as to the truth of his publication"). Dr. Mann could never meet such a daunting burden.

In discussing Dr. Mann and his work, National Review weighed in on an impassioned scientific debate over climate change and Dr. Mann's infamous "hockey stick" graph. The federal courts have given considerable breathing room in cases involving scientific controversies with "serious public impact." *See Reuber*, 925 F.2d at 715. For example, in reversing a defamation judgment for the plaintiff in *Reuber* the Fourth Circuit held:

> In the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it prints is true. If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment. Prior censorship by the press of every conceivably false charge in the course of an intense public controversy also possesses

> dangers to the values protected by the First Amendment – dangers which in some particulars parallel those of censorship by the state.

Id. at 717 (citations omitted).

This dispute over the science behind climate change is precisely the type of vigorous scientific debate that the First Amendment protects. As Dr. Mann has acknowledged, his climate research has continued to come under fire even after he was "exonerated" by Penn State and other organizations. *See* Opinion, Michael E. Mann, "Get the anti-science bent out of politics," Washington Post, Oct. 8, 2010. Not only did Virginia Attorney General Ken Cuccinelli attempt to investigate the University of Virginia, Dr. Mann's former employer, regarding his research, members of the United States Congress have called for an investigation into the validity of his research. *Id.*

Politicians, scientists and journalists have also continued to question Dr. Mann's tactics in defending the "hockey stick" graph, particularly in light of the thousands of leaked e-mails about the controversy that have painted him in a less than flattering light. *See, e.g.*, Andrew Montford, *The Hockey Stick Illusion: Climategate and the Corruption of Science*, Stacey International, 2010; James Delingpole, Opinion, "Climategate 2.0," Wall St. J., Nov. 28, 2011. In referencing the "Climategate" e-mails, Congressman Darrell Issa did not mince words: "[I]t's very clear that those people played fast and loose with both the truth and our money." Darren Goode, "Issa calls for 'relook' at climate science," The Hill, Sept. 23, 2010. Mr. Simberg and Mr. Steyn have simply come to the same conclusion that many others have in the past decade – that Dr. Mann's research may not be scientifically viable.

The statements of which Dr. Mann complains are not actionable. The statement identifying Dr. Mann as "the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the three-ring circus," is both substantially true and classic rhetorical hyperbole that is protected under the First Amendment. *See Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir. 1978) (use of the term "fraud" was "accurate and appropriate" in the context in which it was used); *see also Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 US. 6, 14 (1970) (statement that plaintiff engaged in "blackmail" was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered [his] negotiating position extremely unreasonable"). Here, "even the most careless reader must have perceived" that Mr. Steyn's use of the term "fraudulent" did not accuse Dr. Mann of fraud in the criminal sense, but rather was used to call out his conclusions on climate science as intellectually suspect. *Id.*

Indeed, it is clear from his writings that Dr. Mann is no stranger to rhetorical hyperbole. In his most recent book, he repeatedly accused members of Congress including Issa and James Sensenbrenner of engaging in or threatening "McCarthyist" tactics in the climate change debate. *See* Michael Mann, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines*, Columbia University Press 2012, at

245-48, 256 ("Several of the usual suspects, including Darrell Issa and James Sensenbrenner, promised they would once again pursue inquisitions against climate scientists. … I think their hesitance was a result of … the worry they'd stir up a hornet's nest if they actually pursued McCarthyist tactics against scientists.")

The First Amendment protects Mr. Steyn's statements just as it would protect those made by Dr. Mann.

Furthermore, no reasonable individual reading the blog post would have concluded, as a factual matter, that Dr. Mann committed any of the deplorable acts for which Mr. Sandusky was convicted or anything remotely similar. The post made a highly rhetorical comparison between the Penn State cover-up of the Sandusky scandal under former President Graham Spanier and the possibility of a similar whitewashing at the *same* institution by the *same* leadership of inconsistencies in Dr. Mann's research. This comparison is neither "extreme nor outrageous" such that it would form the basis for a viable claim of intentional infliction of emotional distress. *See*, *e.g.*, *Green v. American Broadcasting Cos.*, 647 F. Supp. 1359, 1362 (D.D.C. 1986) (intentional infliction of emotional distress "consists of 'extreme and outrageous' conduct, which 'intentionally or recklessly' causes the plaintiff 'severe emotional distress' (citations and quotations omitted)). In addition, because Dr. Mann's claim of intentional infliction of emotional distress would arise from National Review's exercise of free speech, he could not recover "without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). This he cannot do.

Yours very truly,

Bruce D. Brown

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cc: Jack Fowler
Rich Lowry
David B. Rivkin, Jr., Esq.