Nos. 14-CV-101 and 14-CV-126

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, et al.,	)	
	)	On Appeal from the
	)	Superior Court of the
Appellants,	)	District of Columbia,
	)	Civil Division
and	)	No. 2012 CA 008263 B
	)	
NATIONAL REVIEW, INC.	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
MICHAEL E. MANN,	)	
	)	
Appellee.	)	

BRIEF OF AMICUS CURIAE MARK STEYN IN SUPPORT OF NEITHER PARTY

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Amicus Curiae Mark Steyn brings this brief in support of neither affirmance or reversal, but instead in support of an expeditious ruling on this matter.

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BRIEF OF AMICUS CURIAE MARK STEYN
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INTEREST OF AMICUS CURIAE

Mark Steyn is a defendant in this action. Steyn is a popular writer, cultural commentator, and columnist on matters of public interest, and he opposes the public policy positions advocated by Plaintiff-Appellee. Steyn is also a human rights activist whose efforts on behalf of freedom of speech have been recognized by the Canadian Committee for World Press Freedom, the Eric Breindel Memorial Foundation in New York, by the Danish Free Press Society, and by the repeal in 2013 of Canada's Section 13 censorship law. While Steyn has not appealed the denial of his own motion to dismiss on Anti-SLAPP grounds as have the other

defendants in this action, he is directly concerned with the outcome of this appeal. In particular, Steyn supports the use of the D.C. Anti-SLAPP Act to combat attempts by Plaintiff-Appellee and others to stifle public debate via the threat of protracted and inevitably expensive litigation. But in this case the anti-SLAPP process itself – shortly to be entering its third year – has been manipulated by plaintiff-appellee Mann to become merely an additional phase of protracted procedural punishment.

This brief is filed, under D.C. App. R. 29(a), by consent of all parties.

SUMMARY OF ARGUMENT

"For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[1] "[D]iscussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."[2]

Despite these deeply-rooted principles of freedom of expression enshrined and repeatedly confirmed by this country's highest court, there are still those who would seek to stifle public debate through the courts themselves. The District of Columbia's Anti-SLAPP statute, like similar statutes in other jurisdictions, is meant to curtail, or to quickly end, lawsuits

[1] Bridges v. California, 314 U.S. 252, 270 (1941).

[2] Beauharnais v. Illinois, 343 U.S. 250, 264 (1952).

that seek to impose liability for "acts in furtherance of the right of advocacy on issues of public interest."[3]

In this action, Plaintiff-Appellee Michael Mann has sought to punish the defendants for their legitimate criticism and commentary on his work and role in the intense national debate over so-called man-made climate change. Defendants moved to dismiss Mann's abusive complaint, including on anti-SLAPP grounds, and when the lower court denied those motions, three of the four defendants sought immediate review of the anti-SLAPP portion of that decision. While defendant Steyn has not appealed, he agrees with the other defendants that the anti-SLAPP issues raised in this case deserve immediate resolution. Steyn did not appeal because he thought vindication would come faster by proceeding right away with discovery and trial. That hope has been dashed by a stay of proceedings in the trial court. That stay, granted at Mann's request, included Steyn's counterclaims against Mann for his campaign to deny freedom of speech rights not only to Steyn but to those scientists in other jurisdictions who make the mistake of disagreeing with him.

Decisions denying anti-SLAPP motions should of course be immediately appealable. That, however, is not the only issue here. Neither Mann nor Steyn live or work in the District of Columbia. Neither Mann nor Steyn has any meaningful connection to

[3] D.C. Code Section 16-5501, et seq.

the District. In such circumstance, the D.C. Superior Court owes a duty to the parties to move the case along as swiftly as possible. It is clear that, as part of his SLAPP strategy, Mann went venue shopping rather than suing in the jurisdiction where he lives and works or where Steyn lives and works. It is deeply prejudicial to the defendants to reward Mann for his venue shopping by permitting this litigation to drag on for a third year before trial -- the very result the D.C. Anti-SLAPP statute is designed to prevent.

As testimony in support of D.C.'s Anti-SLAPP legislation put it, in a strategic lawsuit against public participation ("SLAPP"), "[l]itigation itself is the plaintiff's weapon of choice."[4] The longer this lawsuit takes, the greater the danger that defendants will be prevented from exercising their right to participate in a public debate of great national interest because of fear of liability, or even just lengthy legal proceedings, at the hands of plaintiff Mann or others like him who wish to silence their critics instead of debating them.

But the damage spreads far beyond just the defendants here. Significant delays in the resolution of this lawsuit, even assuming the defendants are rightly vindicated in the end, will

[4] Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report on Bill 18-893, "Anti-SLAPP Act of 2010," (Nov. 18, 2010) ("Report"), at 4, quoting testimony of Arthur B. Spitzer, Legal Director for the ACLU.

send a signal to others who might wish to comment on the climate debate (or any other subject of public interest): remain silent, or risk years of litigation, even if you have done nothing wrong. In other words, do not speak out unless you are prepared to risk being "sued into silence."[5]

This Court can stop the damage here. An expeditious ruling will send a message that the D.C. Anti-SLAPP Act can serve its intended purpose of protecting those who exercise their right to free expression from malicious, often protracted lawsuits meant to stifle that very right. This Court should rule on this appeal as quickly as possible.

I.

THIS COURT SHOULD DECIDE THIS MATTER EXPEDITIOUSLY

Above all, this Court should decide these appeals -- and any other appeals of decisions to deny motions made under the D.C. Anti-SLAPP Act -- as quickly as possible on a priority basis. As the facts of the present action show, failure to do so will do further damage to a central purpose of that statute, which has already been significantly undermined before the trial court.

As a prominent campaigner for freedom of speech in his native Canada, in Australia and other parts of the British Commonwealth, and in Europe, defendant Steyn believes anti-SLAPP

[5] George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, Pace Env. L. Rev., Paper 132, 1 (1989).

decisions should be immediately appealable. This is also clearly the intent of the people's representatives in the District of Columbia. This particular matter was first placed before the Court of Appeals by the defendants' original appeal of Judge Combs Greene's original order denying defendants' original motion to dismiss Mann's original complaint. That was in the summer of 2013. There should be no need for the issue of appealability to take until 2015 to be resolved one way or the other. In this case, the anti-SLAPP process has obviously failed Steyn and the other defendants. But for those who follow in the District's courts, it is vitally important that the issue of appealability should be decided as swiftly as possible.

What Judge Weisberg called the "convoluted procedural history" of this case derives from Mann's abuse of the judicial process. The delays stem from Mann's need to amend his original complaint because of its false claim that he is a Nobel Laureate and that Steyn and the other defendants had committed the crime of "defamation of a Nobel Prize recipient." Mann's fraudulent misrepresentation of his credentials and academic standing later earned him a rebuke from Geir Lundestad, director of the Nobel Institute in Oslo.[6] One can well understand why the exposure of

[6] Thomas Richard, Professor Mann claims to win Nobel Prize; Nobel Committee says he has not, Oct. 26, 2012, Examiner.com, http://www.examiner.com/article/professor-mann-claims-to-win-nobel-prize-nobel-committee-says-he-has-not.

Mann's fraudulent claim should cause him embarrassment but it should surely not justify resetting the procedural clock back to the beginning on this case, which is what in effect happened.

In his later court filings, Mann has made equally preposterous and objectively false claims. For example, Mann has claimed that he has been "exonerated" by such bodies as the University of East Anglia, the U.S. National Oceanic and Atmospheric Agency, and even by the government of the United Kingdom, none of which have investigated Dr Mann at all, never mind "exonerated" him.

The audacity of the falsehoods in Mann's court pleadings is breathtaking. For example, on page 19 of his brief below dated January 18, 2013, he cites the international panel chaired by the eminent scientist Lord Oxburgh, FRS as one of the bodies that "exonerated" him, whereas on page 235 of Mann's own book, The Hockey Stick and the Climate Wars, he states explicitly that "our own work did not fall within the remit of the committee, and the hockey stick was not mentioned in the report." It is deeply disturbing that a plaintiff should make such fraudulent claims in his legal pleadings. It is even more disturbing that the first such fraudulent claim -- to be a Nobel Laureate and thus in the same pantheon as Banting, Einstein, and the Curies -- should have led to the amended complaint and the procedural delays that then followed. It would be even more profoundly damaging were his

other transparently false claims to be entertained for another two years before trial.

It is clear from the ease with which Mann lies about things that would not withstand ten minutes of scrutiny in a courtroom that he has no intention of proceeding to trial. Mann requested from the trial court a stay of proceedings in Steyn's discovery against Mann on the grounds that it would be unduly onerous to have to proceed with two different discovery phases, one for Steyn, one for the other defendants. This is an absurd complaint. Steyn responded to Mann's request for discovery on February 12, 2014, and did not find them unduly time-consuming, any more than Mann would find his, even though Mann has sought to make this case about climate change rather than about his own conduct, integrity and reputation. Few of Mann's fellow scientists and advocates for "climate change" regard him as an exemplar of their field. The very scientist who coined the term "global warming" back in the 1970's, Wallace Smith Broecker of Columbia's Department of Earth and Environmental Sciences used a common vulgarity to describe Mann's science as very poor and unprofessional.[7] Steyn asks this Court, as part of any decision

[7] Fred Pearce, Climate change debate overheated after skeptic grasped 'hockey stick,' Feb. 9, 2012, The Guardian, www.theguardian.com/environment/2010/feb/09/hockey-stick-michael-mann-steve-mcintyre ("'A lot of the data sets he uses are shitty, you know. They are just not up to what he is trying to do . . .'").

it renders, to lift the stay of both Mann's suit against him and his countersuit against Mann and to allow both to proceed with discovery, deposition and to trial.

In its report on the D.C. Anti-SLAPP legislation, the D.C. Council stated that the Anti-SLAPP Act was intended to provide defendants "with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest."[8] It is meant to enhance "a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view."[9] The defendants here sought to use the statute to resolve this case with the efficiency and economy that statute promises. Nevertheless, as even the trial court recognized, "there has been too much procedural delay already in this case."[10]

One centerpiece of the act is the special motion to dismiss that the court must hear expeditiously. But the road to a final ruling on Defendants-Appellants' anti-SLAPP motions here has been anything but short. Mann filed his original complaint in October 2012. The defendants made motions to dismiss in December 2012,

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[8] Report at 4.

[9] Id. at 1.

[10] Apr. 11, 2014 Decision (Weisberg, J.).

and Mann sought to file an amended complaint. In June 2013, Mann filed an amended complaint, and on July 19, 2013, Judge Natalia Combs Greene of the D.C. Superior Court denied the already-pending motions to dismiss. This denial and Mann's amended complaint effectively reset the case to the beginning. The defendants again moved to dismiss, the motions were wrongly denied on January 22, 2014, and three of the defendants now appeal that decision to the extent it denies dismissal of the case based on the D.C. Anti-SLAPP Act. Steyn did not appeal, but instead filed an answer and counterclaims against Mann.[11]

As of now, the entire litigation before the trial court, including all discovery and all activity relating to Steyn's counterclaims, is stayed pending resolution of this appeal.[12] The briefing schedule set by this Court for this appeal extends through September 2014, and it has been placed on this Court's calendar for consideration in November 2014. After that, additional months will likely pass before the appeal is decided. In short, a third year may pass before this litigation reaches the end of the motion to dismiss stage. That is hardly the sort of expeditious resolution the Anti-SLAPP Act is supposed to provide defendants.

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[11] While Steyn is confident in the merits of his motion to dismiss arguments, he chose not to appeal in the interests of moving the case forward.

[12] See Apr. 11, 2014 Decision (Weisberg, J.).

To mitigate as much as possible the damage caused to defendants by the ongoing delays in this litigation, and to salvage some of the benefit of a special motion to dismiss, the Court should decide this appeal as soon as possible.

II.

DELAY IS PARTICULARLY DAMAGING TO THE DEFENDANTS HERE

The delays suffered by defendants in this action are particularly damaging and must be mitigated as much as possible. While the right to a speedy trial applies to criminal, not civil, actions, the nature of a defamation allegation against a writer or publication whose work is directed at the general public has a potential to cause still wider damage, and such a writer or publication who finds himself or herself the target of such an allegation needs to clear the matter up as soon as possible.

The goal of a SLAPP is to punish defendants and intimidate them into silence, not to win the suit. "[W]inning is not a SLAPP plaintiff's primary motivation."[13] "[L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish

[13] Blumenthal v. Drudge, Civ. No. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001).

plaintiff's underlying objective."[14]

As individuals or companies whose incomes are tied to their credibility with their existing or potential audiences, defendants here –- like any writers or public commentators -– risk particular damage when they are falsely accused of defamation even aside from general chilling of speech. If defendants develop a reputation for spreading malicious falsehoods, rather than informed news or spirited commentary, their very livelihoods will suffer as their audiences shrink. While the fees provision of the Anti-SLAPP statute can compensate wrongly sued defendants for legal expenses, they do not remedy the damage that can be done to a writer's own reputation by false accusations of defamation. Nor do they (as the special motion to dismiss is meant to do) mitigate the chilling effect on the speech of defendants and others when faced with the prospect of lengthy, potentially expensive and embarrassing, litigation.[15] That chilling effect harms both speakers and audiences seeking information and commentary.

Any further delay in resolving this action would in short

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[14] Id., quoting Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 450 (1994).

[15] Steyn has filed counterclaims against Mann, seeking damages resulting from Mann's impermissible attempts to stifle free speech. The resolution of these counterclaims is stalled along with the rest of the litigation pending the outcome of this appeal.

only aggravate the harm already done to defendants by Mann's SLAPP. Consistent with the D.C. statute, this Court should cut that harm off as soon as possible.

III.

EXPEDITIOUS RESOLUTION ALSO NECESSARY TO PROTECT NONPARTIES

A SLAPP's impact is not limited to the defendants named in a particular litigation. Rather, it extends to others who might be intimidated into refraining from speaking out on issues of public interest (and audiences losing out on the contributions of those speakers to the marketplace of ideas).[16] Anti-SLAPP statutes, including D.C.'s, are similarly meant to offer protection not only to the specific litigants in a particular case, but also to those who would publicly engage an issue but for fear of legal retribution by someone with an opposing view. Anti-SLAPP motions therefore also should be resolved quickly because a free, open public debate among all interested participants should be able to proceed, without the fear of the chilling effects of a SLAPP, as soon as possible.

The law was meant to provide "substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent

[16] As the Report on the D.C. Anti-SLAPP legislation explained, "The impact [of a SLAPP] is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well." Report at 1.

the expression of opposing points of view." Report at 1. This is true at both the individual lawsuit level and in general. Having a well-founded, expeditious judicial response to SLAPPs will build confidence in the citizenry that participation in public debate is not a ticket to a ruinous lawsuit.

CONCLUSION

As Justice Brandeis recognized nearly ninety years ago:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through pubic discussion, they eschewed silences coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[17]

But that guarantee of free speech requires more than mere words to protect against the onslaught of Mann and others who believe that guarantee applies only to themselves and not to

[17] Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

their opponents. By resolving Defendants-Appellants' appeals of the denial of their anti-SLAPP motions promptly, and by doing the same for other lawsuits that come before it, this Court will take a significant step toward protecting and promoting the free exchange of ideas that is one of the pillars of our civilization.

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Respectfully submitted,

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