SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D.,	
Plaintiff,	Case No. 2012 CA 008263 B Calendar No.: 10 Judge: Natalia Combs Greene Next event: 9/27/2013
v.	Status Conference
NATIONAL REVIEW, INC., *et al.,*	
Defendants.	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR INTERLOCUTORY CERTIFICATION OF THE COURT'S JULY 19, 2013 ORDERS UNDER D.C. CODE § 11-721

Plaintiff Michael E. Mann, Ph.D. ("Dr. Mann") respectfully submits this Memorandum of Points and Authorities in Opposition to Defendants' Joint Motion for Interlocutory Certification of the Court's July 19, 2013 Orders Under D.C. Code § 11-712. For the reasons sets forth below, defendants' motion should be denied.

I. INTRODUCTION

In its two well-reasoned Orders of July 19, 2013 (the "Orders"), this Court denied the defendants' motions to dismiss pursuant to the D.C. Anti-SLAPP Act and Rule 12(b)(6). Defendants now urge this Court to certify these Orders for interlocutory review because "the free speech protections of the D.C. Anti-SLAPP Act and the First Amendment are controlling questions that should be decided as a matter of law before the parties incur the expense of extensive discovery." Defs.' Joint Motion at 1-2.

In view of the defendants' initial public bravado regarding Dr. Mann, their latest attempt to avoid a trial on this matter rings hollow--and basic principles of equity and fairness should estop them from now seeking an appeal. Defendants baited Dr. Mann to file this lawsuit. After he asked for a retraction and apology, the defendants told their readers that they would welcome a lawsuit because it would give them the opportunity to take discovery from Dr. Mann and his colleagues. They boasted they would hire dedicated staff to sift through that discovery and make it publicly available.[1] They raised hundreds of thousands of dollars from their readers to pursue this discovery.[2] They proclaimed they would "kick" Dr. Mann's "legal heinie" in court.[3]

But now, after an impartial court has ruled that their attacks on Dr. Mann crossed the line, defendants are running for cover. Faced now with the prospect of financial liability for their gleeful tirades, defendants do not want discovery, as it would involve discovery into their own conduct. And they certainly do not want to face a jury of their peers. They are hoping to escape by cloaking their conduct in an arrogant interpretation of the First Amendment without the essential rigor of discovery into their knowing and reckless falsehoods. Plainly aware that such discovery will boomerang to their own backsides, the defendants are looking for an escape. But it is too late for that, and defendants' hit and run tactics should not be countenanced. They asked for this lawsuit. They got it.

Remarkably, defendants' motion now asks this Court to radically transform our interlocutory appeal provision from a narrow exception to the final judgment rule into a default vehicle for the immediate appeal of any decision implicating First Amendment rights and/or any

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[1] *See* Rich Lowry, Get Lost, (August 22, 2012), available at http://www.nationalreview.com/articles/314680/get-lost-rich-lowry.

[2] *See* Jack Fowler, 'Mann' Up and Join Our Fight: The NR Legal-Defense Fund (December 18, 2012), available at: http://www.nationalreview.com/corner/335960/mann-and-join-our-fight-nr-legal-defense-fund-jack-fowler.

[3] *See* Jack Fowler, We Need Your Help (December 10, 2012), available at: http://www.nationalreview.com/articles/335221/we-need-your-help-jack-fowler.

decision that is deemed a "close case." But defendants' motion seriously misapprehends the types of cases that are appropriate for interlocutory review under § 11-721(d). Defendants' motion should be summarily denied because it fails to make any of the requisite showings under this provision: (1) a controlling question of law; (2) as to which there is a substantial ground for difference of opinion; and (3) that an immediate appeal from the order may materially advance the termination of the litigation. Without question, interlocutory certification is improper and defendants' motion should be denied.

II. ARGUMENT

A. The Court's July 19 Orders Are Not Appealable As of Right.

At the outset, defendants spend a significant portion of their brief not addressing the requirements of D.C. Code § 11-721(d), but arguing that they may be entitled to immediate appellate review under the "collateral order" doctrine. Defs.' Joint Mem. in Support of Their Motion For Interlocutory Cert. of the Court's July 19, 2013 Orders Under D.C. Code § 11-721 ("Defs.' Mem.") at 5-6 (citing *Sherrod v. Breitbart*, --- F.3d ----, No. 11-7088, 2013 WL 3185062 (D.C. Cir. June 25, 2013)). But the question of whether the Court's July 19 Orders are reviewable under the collateral order doctrine is irrelevant to whether this Court should certify for interlocutory review pursuant to D.C. Code § 11-721(d). Nonetheless, the defendants have made clear that should they fail to convince this Court to certify pursuant to § 11-721(d), then they will seek an appeal pursuant to the collateral order doctrine. Dr. Mann will address such a request if and when it is made to the D.C. Court of Appeals. He only notes here that whether the July 19 Orders are immediately appealable pursuant to the collateral order doctrine is doubtful. *See Sherrod*, 2013 WL 3185062, at *1-3. In fact, when recently faced with an effort to seek

review of denial of a motion to dismiss pursuant to the D.C. Anti-SLAPP statute, the D.C. Court of Appeals denied review and specifically noted that the trial court's order denying the Anti-SLAPP motion was "not appealable under the collateral order doctrine." *See Newmyer v. Sidwell Friends School*, No. 12-CV-847 (D.C. Dec. 5, 2012), attached hereto as Exhibit 1.

Nor does defendants' lengthy dissertation on the purposes of the Anti-SLAPP statute and defendants' right to seek quick dismissal under the statute counsel for granting interlocutory review. The D.C. Anti-SLAPP statute provides a mechanism for summary procedures in the Superior Court for matters of public concern. It does not provide for quick appellate resolution of First Amendment rights. Accordingly, defendants' argument that this Court should grant certification because the D.C. Council "expressed a strong preference for immediate appealability" of denials of Anti-SLAPP motions is wholly without merit. Defs.' Mem. at 4-5. Whether or not the D.C. Council would have preferred to include a right to immediate appeal is irrelevant. The Council considered such a provision, and ultimately rejected it. *See Newmyer v. Sidwell Friends School* ("the District's anti-SLAPP statute does not provide for interlocutory review"). Accordingly, defendants cannot look to the Anti-SLAPP statute itself to support their efforts for interlocutory certification.

Of course, if defendants are correct that they have the right to an immediate appeal of the Court's Orders pursuant to the collateral order doctrine (a proposition Dr. Mann disputes), certification would be superfluous and would not hasten the termination of this lawsuit. And if the D.C. Court of Appeals thinks that this Court's denials of defendants' motions to dismiss should be reviewed now, then it will tell us if and when the defendants seek review directly to it.

B. This Is Not An Extraordinary Case For Which Interlocutory Certification Is Warranted.

A trial court may certify an order for immediate appeal only if (1) the order involves a controlling question of law; (2) there are substantial grounds for difference of opinion with regard to that controlling question of law; and (3) an immediate appeal from the order may materially advance the termination of the litigation. D.C. Code § 11-721(d). Certification is proper only when all three requirements are met, and even then the decision to grant or deny certification is within the sound discretion of the trial court. Moreover, the D.C. Court of Appeals has made it clear that the authority to grant immediate appeal must be exercised "sparingly" and "only in exceptional cases." *Plunkett v. Gill*, 287 A.2d 543, 544 (D.C. 1972) (denying a request for interlocutory review of the Superior Court's denial of a motion to dismiss). Accordingly, a party seeking certification must

> meet a high standard to overcome the strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed ... the movant 'bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'

ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 246 F.R.D. 39, 43 (D.D.C. 2007) (internal citations and quotation marks omitted; ellipsis in original). Defendants have failed to meet this high standard.

1. Defendants Do Not Point To A "Controlling Question of Law."

Defendants submit that the question of whether defendants defamed Dr. Mann is a "controlling question of law" proper for interlocutory appeal. Defs.' Mem. at 2. What defendants ignore is that an order denying a motion to dismiss cannot justify interlocutory

review. There has to be something more. In fact, courts routinely deny certification of orders denying motions to dismiss. *See, e.g.*, *Nat'l Comm'ty Reinvestment Coalition v. Accredited Home Lenders*, 597 F. Supp. 2d 120, 122 (D.D.C. 2009) (denying a motion for interlocutory appeal of denial of motion to dismiss where the movant "simply reiterated its position" and failed to point to a split within the district court on the underlying issue); *Sierra Equity Group, Inc. v. White Oak Equity Partners, LLC*, 687 F. Supp. 2d 1322, 1325 (S.D. Fla. 2009) (finding that certification of interlocutory appeal of order denying motion to dismiss was not appropriate where interlocutory appeal would delay ultimate termination of litigation and there was no substantial ground for difference of opinion). Thus, defendants' assumption that the July 19 Orders contain controlling questions of law is not sufficient, by itself, to warrant certification.

Rather, a "controlling question of law" under § 11-721(d) is one that asks the appellate court to determine what the law is, and not whether the trial court correctly applied the law to the facts of the case. *See First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1117 (D.D.C. 1996); *Keystone Tobacco Co. v. U.S. Tobacco Co.,* 217 F.R.D. 235, 239 (D.D.C. 2003) ("Where the crux of an issue decided by the Court is fact-dependent, the Court has not decided 'a controlling question of law' justifying immediate appeal; certification of the underlying legal question could only result in the court of appeals improperly wading into the factual pond of an ongoing matter."); *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004) ("The term 'question of law' does not mean the application of settled law to fact.").

The question of whether this Court correctly applied the well-settled law of defamation to the specific facts of this case is precisely what defendants seek the D.C. Court of Appeals to answer in this case. For example, defendants would ask the D.C. Court of Appeals to determine whether the specific statements at issue in this case are protected opinion or rhetorical hyperbole.

This by necessity would require the appellate court to apply established precedent to the facts of this lawsuit. In deciding whether the offending statements were mere opinions, the appellate court would consider how those statements were understood by defendants' readers, and would analyze the specific context of those statements. Only after considering those factual issues and applying them to the law of defamation, would the appellate court be able to answer the question of whether the statements are protected opinion. And if the appellate court decides that the statements are not protected, then defendants would ask the D.C. Court of Appeals to determine whether the facts of this case show that defendants made the specific statements with actual malice, whether with knowledge of their falsity or a reckless disregard for the truth. This also would require the appellate court to delve into the as-yet not fully developed factual question of whether defendants knew that Dr. Mann was not a fraud or recklessly disregarding the multiple investigations exonerating Dr. Mann. This inquiry would require a fact-intensive examination of the nature of the investigations of Dr. Mann, defendants' knowledge of those investigations, and defendants' assertion that none of these investigations exonerated Dr. Mann.

Given the intensely fact-specific nature of the application of the opinion defense and the law of actual malice to this case, neither issue is a controlling question of law under § 11-721(d). Accordingly, interlocutory certification is improper for this reason alone.

2. Defendants Fail to Submit a "Substantial Ground For Difference of Opinion."

In addition to failing to submit a controlling question of law, defendants also fail to demonstrate a "substantial ground for difference of opinion." The threshold for establishing the "substantial ground for difference of opinion" with respect to a "controlling question of law" required for certification is a high one. To satisfy the requirement that an issue be contestable, "it is not enough that there be a difference of opinion, there must be substantial ground for such

difference." *Shepherd Investments Int'l, Ltd. v. Verizon Commc'ns, Inc.,* No. 03-C-0703, 2005 WL 1475323, at *2 (E.D. Wis. June 22, 2005). Far from meeting that standard, defendants have not identified any opinion or other authority that actually conflicts with this Court's decision. Rather, defendants have simply reiterated their argument that because other courts have found purportedly harsher language in different contexts non-defamatory, then there must be a substantial difference of opinion as to whether defendants' allegations of fraud, misconduct, data manipulation, and corruption are capable of defamatory meaning. Defs.' Mem. at 3. This is insufficient:

> Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *First Am. Corp.*, 948 F. Supp. at 1116).

Here, there is no confusion on what the applicable law is in determining whether the statements at issue are capable of defamatory meaning and were made with actual malice. Rather, the caselaw regarding the opinion defense and actual malice is quite clear and has been settled for decades. *See, e.g., Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 10 (1990); *Moldea v. New York Times Co.,* 22 F.3d 310, 313 (D.C. Cir. 1994) ("*Moldea II*") ("statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false."); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989) (a party acts with actual malice when it deliberately ignores evidence that calls into question its published statements or when it encounters persuasive evidence that contradicts the published statement). Critically, defendants' motion to certify does not cite any relevant disagreement among the courts or in the caselaw regarding the law of defamation or opinion. *See Judicial Watch,* 233 F.

Supp. 2d at 22 (explaining that because a relevant D.C. Circuit opinion "represent[ed] the current, undisputed law of this Circuit, there is no 'substantial ground for difference of opinion' on this question for the purposes of § 1292(b) analysis"); *Graham v. Mukasey*, 608 F. Supp. 2d 56, 57 (D.D.C. 2009) ("[M]ovant does not show the existence of any split in this district or this circuit regarding any controlling issue of law in this case …."); *Keystone Tobacco,* 217 F.R.D. at 239; *First Am. Corp.*, 948 F. Supp. at 1117.

At base, defendants' motion to certify is nothing more than another effort by them to air their disagreements with this Court's conclusions about the arguments defendants set forth in their motions to dismiss. Applying settled law, this Court correctly rejected defendants' contention that the statements at issue were non-actionable opinion or rhetorical hyperbole. But to obtain certification, they "must do more than show continued disagreement with [this Court's] decision" because "[e]ven vehement disagreement with a court's ruling does not establish the substantial ground for difference of opinion sufficient to satisfy the statutory requirements for interlocutory appeal." *Graham*, 608 F. Supp. 2d at 57; *see Judicial Watch*, 233 F. Supp. 2d at 20 (similar); *First Am. Corp.*, 948 F. Supp. at 1117; *see also Ringling Bros.*, 246 F.R.D. at 43 (denying certification where movant "offered nothing in its request for certification beyond continued disagreement with" the court's order denying partial summary judgment). Defendants' motion to certify falls well short.

The Orders denying defendants' motions to dismiss rest properly and soundly on the rule that a statement is not protected by the "opinion defense" if it states or implies a verifiable fact. See July 19 Order denying the CEI Defendants' Motion to Dismiss (the "Order") at 13 ("opinions are actionable 'if they imply a provably false fact or rely upon stated facts that are provably false'"). The Court reviewed the defendants' various accusations against Dr. Mann—

corruption, data manipulation, academic misconduct, scientific misconduct, fraud—and correctly found that these were accusations that could be proven true or false—and thus not protected. And many of the cases that defendants rely upon for their contention that there is substantial difference of opinion on whether the particular language at issue is capable of defamatory meaning rely upon the very same standard as this Court did in rejecting defendants' opinion defense. *See, e.g., Phantom Touring, Inc. v. Affiliated Pubs.,* 953 F.2d 724, 727 (1st Cir. 1992) (the relevant question for determining whether the opinion defense applies is "whether the challenged language . . . reasonably would be understood to declare or imply provable assertions of fact"); *see also, Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1100 (N.D. Cal. 1999) (the First Amendment only protects opinions that "do not imply facts capable of being proved true or false").

Having failed to assert any difference of opinion as required by law, defendants fall back on the dubious proposition that because the Court viewed this case as a "close" case, interlocutory certification is proper.[4] The fact that the Court's decision on the motions to dismiss may not have been an easy one, does not translate into a substantial difference of opinion as required by § 11-721(d). If that were the case, then every difficult case would be appropriate for interlocutory review. This is simply not the law. As the D.C. Court of Appeals has repeatedly noted, interlocutory review should not be allowed "merely to provide [] review of difficult rulings in hard cases." *In re J.A.P.*, 749 A.2d 715, 718 (D.C. 2000) (citing *Plunkett*, 287 A.2d at 545).

[4] While defendants imply that the Court deemed all of the arguments addressed in the motions to dismiss "close," this is an apparent distortion of the Court's Orders. Rather, the Court noted only that the question of whether defendants' statements were constitutionally protected opinion was close. *See* Order at 16 n.14.

Nor is there any basis for defendants' contention that because this case implicates First Amendment issues, then by necessity interlocutory certification is proper. This is absurd. It is simply not the case that publishers who raise a First Amendment defense, unlike all other defendants, are exempt from the final judgment rule. If that were accurate, then every defamation case in which defendants raise the opinion defense—and there are many—would be immediately appealable. This is not—and cannot be—the law, and defendants' citation to a handful of cases in other jurisdictions where interlocutory review has been granted does not change that fact. *See, e.g., Horsley v. Rivera*, 292 F.3d 695 (11th Cir. 2002) (granting certification and reversing a trial court's denial of a motion to dismiss because no television viewer would understand that Geraldo Rivera's assertion that plaintiff, an anti-abortion activist, was an "accomplice to homicide" to be a literal accusation that plaintiff was guilty of a felony); *Washington Post v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) (granting interlocutory review where the district court itself had stated that it was "in doubt" as to whether plaintiff could prove actual malice)[5]; *Citizen Publishing Co. v. Miller*, 116 P.3d 107 (Ariz. 2005) (certifying and reviewing the denial of a publisher's motion to dismiss a claim for intentional infliction of emotional distress where the trial court found that the offending speech was not protected under the First Amendment because it could incite imminent lawless action).

In sum, defendants utterly fail to demonstrate that the Court's Orders denying their motions to dismiss were based upon a legal question for which there is substantial grounds for difference of opinion. Rather, they have rested their motion on the unpersuasive argument that the Court incorrectly applied well-settled defamation law to the specific and unique facts of this

[5] Importantly, the lower court's decision that was certified for review was issued in the immediate aftermath of the Supreme Court's decision in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); therefore, the law regarding the question of actual malice was far from well-settled. *Keogh v. Pearson*, 244 F. Supp. 482, 484 (D.D.C. 1965).

case. While this is an argument that may ultimately be made to the D.C. Court of Appeals after this Court has entered final judgment, it is not one that can be properly brought to the D.C. Court of Appeals by way of interlocutory certification.

3. Interlocutory Review Would Not Materially Advance The Ultimate Termination Of This Case.

Defendants only cursorily address the requirement under § 11-721(d) that interlocutory review materially advance the ultimate termination of this lawsuit. For that reason alone, their motion plainly fails. There is a reason, of course, defendants do not try to show that an interlocutory review will materially advance ultimate termination. While there has been some evidence submitted to this Court on defendants' motions to dismiss, the full and critical record regarding the opinion defense and actual malice is far from complete. Faced with such a record, the appellate court will be forced either to accept all of Dr. Mann's allegations in the light most favorable to him, or to recognize that proper termination of this case requires full discovery yet to be conducted in this Court. In either event, an interlocutory appeal would be utterly improvident.

Accordingly, it is doubtful that granting of interlocutory certification would hasten resolution of this litigation, and it is very possible that it would only add unnecessary and unwarranted delay. As the D.C. Court of Appeals has stated, interlocutory appeals "must be used only when the alternative would mean greater delay and expense than would be caused by the interlocutory review itself." *Plunkett*, 287 A.2d at 545. In this case, defendants' request for interlocutory review has already added cost and delay for the parties and this Court.

III. CONCLUSION

For all the foregoing reasons, defendants' joint motion to certify an interlocutory appeal under D.C. Code § 11-721(d) should be denied.

DATED: August 16, 2013

Respectfully submitted,
COZEN O'CONNOR

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August 2013, I caused a copy of the foregoing Memorandum of Points and Authorities in Opposition to Defendants' Joint Motion for Interlocutory Certification of the Court's July 19, 2013 Orders Under D.C. Code § 11-712 to be served via CaseFileXpress on the following:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D.,	
Plaintiff,	Case No 2012 CA 008263 B Calendar No.: 10 Judge: Natalia Combs Greene Next event: 9/27/2013 Status Conference
v.	
NATIONAL REVIEW, INC., *et al.,*	
Defendants.	

PROPOSED ORDER

Upon consideration of Defendants' Joint Motion for Interlocutory Certification of the Court's July 19, 2013 Orders Under D.C. Code § 11-712, and all responses thereto, it is hereby

ORDERED, that the Motion for Interlocutory Certification is **DENIED.**

SO ORDERED.

Dated: _____, 2013

_____
Natalia M. Combs-Greene
(Associate Judge)

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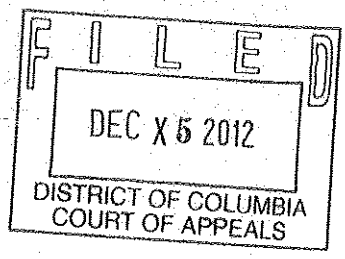
EXHIBIT 1

District of Columbia
Court of Appeals



No. 12-CV-847

ARTHUR G. NEWMYER,
Appellant,

v.

2011 CAM 3727

SIDWELL FRIENDS SCHOOL, *ET AL.*,
Appellees.

Before: Easterly, Associate Judge, and Nebeker and King, Senior Judges.

ORDER

On consideration of appellee James f. Huntiongton's motion to dismiss and the opposition thereto, it is

ORDERED that appellee's motion to dismiss is granted and this interlocutory appeal is hereby dismissed. The subject order is not appealable under the collateral order doctrine, *see Cohen v. Beneficial Loan Corp.*, 357 U.S. 541, 546 (1947), and the District's anti-SLAPP statute does not provide for interlocutory review. *See, e.g., Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009).

PER CURIAM

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