SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARK Z. JACOBSON, Ph.D., **Plaintiff,** **v.** **CHRISTOPHER T.M. CLACK, Ph.D., et al.,** **Defendants.**	**Case No. 2017 CA 006685 B** **Judge Elizabeth C. Wingo**

ORDER

Before the Court are two pending motions, and related responsive pleadings: (1) Defendant National Academy of Sciences' Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code § 16-5504(a) ("Motion"), filed by Defendant National Academy of Sciences ("NAS") on March 7, 2018; Plaintiff Mark Z. Jacobson's Opposition to Defendant National Academy of Science's Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code § 16-5504(a) ("Opposition"), filed by Plaintiff Mark Z. Jacobson ("Dr. Jacobson") on March 21, 2018; Defendant National Academy of Sciences' Reply in Support of Its Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code § 16-5504(a) ("Reply"), filed on March 30, 2018; and Plaintiff Mark Z. Jacobson's Sur-Reply in Further Opposition to Defendant National Academy of Sciences' Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code § 16-5504(a) ("Sur-Reply"), leave for the filing of which was granted by the Court on June 27, 2018; and (2) Defendant Christopher Clack's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, § 16-5504(a), filed by Defendant Dr. Christopher Clack ("Dr. Clack") on March 7, 2018 ("Clack Motion"); Plaintiff Mark Z. Jacobson's Opposition to Defendant Christopher Clack's Motion for Costs and Attorney's Fees Under the Anti-SLAPP

Act, filed on March 21, 2018; Defendant Christopher Clack's Reply Brief in Support of Defendant's Motion for Costs And Attorney's Fees, filed on March 30, 2018; and Plaintiff Mark Z. Jacobson's Sur-Reply in Further Opposition to Defendant Christopher Clack's Motion for Costs and Attorney's Fees under the D.C. Anti-SLAPP Act, leave for the filing of which was granted by the Court on June 27, 2018.[1]

For the reasons set forth below, the Court grants both motions, finding that Defendants have prevailed within the meaning of the D.C. Anti-SLAPP Act, and that there are no special circumstances on this record that would render an award unjust. Accordingly, the Court also sets forth a schedule to determine the appropriate award.

I. PROCEDURAL HISTORY

Dr. Jacobson initiated this action on September 29, 2017, by filing his Complaint against Dr. Clack, Chief Executive Officer of Vibrant Clean Energy, LLC, and NAS, a corporation organized pursuant to an Act of Congress that publishes the scientific journal "Proceedings of the National Academy of Sciences" ("PNAS") (together, "Defendants"). Compl. ¶¶ 2-3. The Complaint set forth four claims against Defendants—Count I (Defamation – Dr. Clack), Count II (Defamation – NAS), Count III (Breach of Contract – NAS), and Count IV (Promissory Estoppel – NAS) —for publishing an article written by Dr. Clack and others ("the Clack Article") that Dr. Jacobson asserted defamed his character and violated the publishing criteria applicable to publications in PNAS. *Id.* at ¶¶ 11, 74-101. The Clack Article evaluated an article previously published by NAS and co-authored by Dr. Jacobson ("the Jacobson Article"), which addressed

[1] Defendant Christopher Clack incorporated and adopted the majority of the arguments set forth by Defendant National Academy of Sciences in its pleadings. *See* Clack Motion at 2. Because both motions and the related responsive pleadings are substantively similar, the Court addresses both motions together but for the sake of clarity and efficiency cites only to NAS's Motion, and its related pleadings.

an important environmental issue, positing that "a large-scale U.S. transition to wind, water and solar power among all energy sectors could, by 2050, eliminate the need for other energy sources, particularly coal, oil, and natural gas, without the need for nuclear power, fossil fuels with carbon capture, or biofuels, while enabling supply to match demand on the grid...." *See id.* at ¶ 9.

On November 27, 2017, each Defendant filed a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, codified as D.C. Code § 16-5501, *et seq.*, or, in the alternative, pursuant to Super. Ct. Civ. R. 12(b)(6), seeking to dismiss all claims against them. Dr. Jacobson opposed each motion and filed a motion for leave to take targeted discovery pursuant to D.C. Code § 16-5502(c)(2) on January 5, 2018. Each Defendant opposed Dr. Jacobson's targeted discovery motion on January 19, 2018. On January 26, 2018, Defendants replied to Dr. Jacobson's opposition to their motions to dismiss. On February 2, 2018, at the Initial Scheduling Conference in this matter, this Court orally denied Dr. Jacobson's targeted discovery motion and set a motions hearing on the pending motions to dismiss.

At the motions hearing on Defendants' special motions to dismiss held on February 20, 2018, the parties presented arguments on the pending motions. At the conclusion of the hearing, the Court took the motions under advisement. Two days later, on February 22, 2018, Dr. Jacobson voluntarily dismissed the action without prejudice pursuant to Super. Ct. Civ. R. 41(a)(1)(A)(i). *See* Plaintiff Mark Z. Jacobson's Rule 41(a)(1)(A)(i) Voluntary Dismissal Without Prejudice, dated February 22, 2018.

Defendants thereafter filed the instant Motions on March 7, 2018, arguing that they remained entitled to costs and reasonable attorney's fees pursuant to § 16-5504(a) of the D.C. Anti-SLAPP Act because (1) the motions to dismiss were fully briefed and argued by the parties,

(2) Defendants had satisfied their burden of demonstrating that Plaintiff's claims arose from an act in furtherance of the right of advocacy on issues of public interest, (3) Plaintiff did not satisfy his burden of demonstrating that his claims were likely to succeed on the merits, and (4) Dr. Jacobson's subsequent dismissal of the case should not immunize him from the Act's provision authorizing fee awards to targets of SLAPP suits. Mot. ¶¶ 1-7. Defendants also seek a schedule for the submission of legal fees and expenses. *Id.* at 2. Dr. Jacobson filed Oppositions to the Motions on March 21, 2018, arguing primarily that the Complaint was rightfully voluntarily dismissed pursuant to District of Columbia Superior Court Rules of Civil Procedure Rule 41(a)(1)(A)(i), and that therefore there is no "prevailing party" as required by the statute. *See generally* Opp'n. Defendants filed Replies on March 30, 2018, further contending that the statute does not use the phrase "prevailing party," and that they did "prevail, in whole or in part" within the meaning of the Act and related case law. *See generally* Reply. The Replies also analogized the language of the Act to the fee shifting provision of the District of Columbia's Freedom of Information Act ("FOIA"), and argued that the catalyst theory applicable in such cases should also apply under the Anti-SLAPP Act. *Id.* at 2-3. On June 27, 2018, over Defendants' opposition, the Court granted the motion for leave to file a sur-reply addressing the FOIA analogy and the catalyst theory, filed on April 6, 2018, by Dr. Jacobson. *See* June 27, 2018 Order.

II. LEGAL STANDARD

Enacted in 2011, the District of Columbia's Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act, codified as D.C. Code § 16-5501, *et seq.*, (hereinafter "the Anti-SLAPP Act" or the "Act") was designed to protect defendants from lawsuits filed "to punish or prevent the expression of opposing points of view," because strategic lawsuits against

public participation (or "SLAPPs") chill speech even when they are meritless. *See* Committee Report on Bill 18-893 (Nov. 18, 2010) at 1 ("Committee Report");[2] *see also Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016). Because a defendant generally must dedicate a substantial "amount of money, time, and legal resources" to fight a SLAPP, the Anti-SLAPP Act "incorporate[s] substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." Comm. Rep. at 1. Specifically, the Act provides for a special motion to dismiss a complaint, in § 16-5502, and a special motion to quash discovery orders, requests for information, or subpoenas for personal identifying information in suspected SLAPPs, in § 16-5503. *Mann,* 150 A.3d at 1226-27.

Under the Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by "mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The burden then shifts to the responding party to demonstrate that the claim is likely to succeed on the merits. *Id.* In evaluating the likely success of the claim, the court must ask whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion. *Mann*, 150 A.3d at 1232. If the responding party's opposition fails to meet the statutory standard, the Act requires the trial court to dismiss the complaint, with prejudice. *Id.*; *see also* D.C. Code § 16-5502(b).

"[T]he special motion to dismiss not only provides substantial advantages to the defendant over and above those usually available in civil litigation, but also imposes procedural and financial burdens on the plaintiff." *Mann*, 150 A.3d at 1238. "The Act authorizes the trial

[2] A copy of the Committee Report can be found at: http://lims.dccouncil.us/Download/23048/B18-0893-CommitteeReport1.pdf.

court to award costs and fees – including attorney's fees – to a moving party who prevails 'in whole or in part' on a special motion to dismiss." *Id.;* D.C. Code § 15-5504(a). Specifically, pursuant to §16-5504(a), "[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 … the costs of litigation, including reasonable attorney fees." "[A] successful movant under [the Anti-SLAPP Act] is entitled to reasonable attorney's fees in the ordinary course – *i.e.*, presumptively – unless special circumstances in the case make a fee award unjust." *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016).

III. ANALYSIS

Defendants contend that if the Court does not award fees and costs in this case, Dr. Jacobson will have "accomplished his goal of financially punishing [Defendants] for serving as a neutral forum for all sides of the scientific debate over renewable energy, [or participating in such a forum,] thereby chilling debate on an important issue of public concern." NAS Memo. at 2. Defendants assert that although the Court did not grant their special motions to dismiss under the Anti-SLAPP Act, Defendants are entitled to a fee award because: (1) they have effectively "prevailed" and there is a presumption of entitlement to a reasonable attorney's fee award for parties who "prevail, in whole or in part" under the Act; and (2) there are no existing special circumstances that would make any fee award unjust. *See generally* NAS Memo.

A. The Meaning of "Prevail in Whole or In Part" in the Anti-SLAPP Act

In their pleadings, Defendants offer two primary arguments for finding that they have prevailed and are presumptively entitled to a fee award: (1) that persuasive Anti-SLAPP authority from other jurisdictions suggest Defendants have "prevailed" in this case, *see* NAS Memo. at 2-6; Reply at 5; and (2) that under the "catalyst theory" applied to the identically worded fee-shifting provision of another act, the District of Columbia's FOIA, would dictate that

these Defendants have prevailed under the D.C. Anti-SLAPP Act. *See* Reply at 1-3. Although the statutory language argument was not asserted by Defendants until their Reply, this Court, like the Court of Appeals in *Mann*, begins its analysis with that argument first, that is, "with the language of the statute." 150 A.3d at 1233.

1. The Language of the Statute

Turning first to the statutory language used, the Court agrees with Defendants that the language used in the statute supports an award of attorney's fees under the circumstances here. In his Opposition, Plaintiff asserts that Defendants are not a "prevailing party" under the statute, as a "prevailing party" is defined under D.C. law "as a party 'who has been afforded some relief by the court.'" Opp'n. at 1 (citing *Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C. 2006)). Defendants argue, in response, that the statute does not use the term "prevailing party," and that the Court of Appeals has made clear that the language actually used, that is, "prevails, in whole or in part," is different than "prevailing party" and its "use in a statute suggests a legislative intent to authorize attorney's fees more often than in other types of cases." Reply, at 1-2. Analogizing to the District of Columbia's FOIA statute, which uses the same language, they assert that "the moving party should therefore be awarded its fees if there was a causal nexus between the moving party's action and the results achieved." *Id.* at 3. In opposing that assertion, Plaintiff relies on a statement in *Abbas v. Foreign Policy Group, LLC,* a 2015 case from the United States Court of Appeals for the District of Columbia Circuit, that "[t]he [Anti-SLAPP] Act does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)." 783 F.3d 1328, 1136 n.5 (D.C. Cir. 2015); Sur-Reply at 2. Plaintiff further asserts that "the D.C. Court of Appeals has

unequivocally stated that *a plaintiff may voluntarily dismiss its lawsuit to avoid liability under D.C. Code §16-5504(a).*" *Id.* at 3 (emphasis in the original, citing *Doe*, 133 A.3d at 578-79).

As an initial matter, this Court does not view the Court of Appeals' language in *Doe* as precluding the grant of the pending motions in this case. In making the statement cited above, the Court in *Doe* was not addressing the question at issue here, but instead, was addressing whether there were circumstances in that case rendering an award of fees unjust because, that plaintiff argued, the defendant there had rejected a settlement offer and continued to litigate the motion, thus incurring unnecessary fees. 133 A.3d at 578. In rejecting that argument, the Court of Appeals, quoting from an amicus brief, stated that "[plaintiff] was on notice from the time [that] motion was filed that [defendant] believed her lawsuit was a SLAPP" and "[h]ad [plaintiff] wished to *minimize her potential exposure* to a fee award, she could have dismissed her lawsuit at any time, rather than continue after [defendant] rejected her settlement offer." *Id.* at 578-79 (emphasis added). Thus, the Court of Appeals did not use the word "avoid," as Plaintiff does, but instead used the word "minimize" to describe the effect of voluntary dismissal on her potential exposure to a fee award. In this Court's view, "minimize" either suggests, or at least leaves open the possibility, that some exposure would already have been incurred. Similarly, this Court does not find the language from the D.C. Circuit case compels the conclusion Defendant seeks either, as the court in that case was also not specifically addressing the question at issue here, but instead, was addressing whether, having decided that the D.C. Anti-SLAPP Act's special motion to dismiss provision does not apply in the District's federal courts, attorney's fees were available. And indeed, the proposition expressed is generally correct; there is no reason to believe that a plaintiff who asserts claims that properly qualify as SLAPP claims, combined with other claims unrelated to chilling public participation, should be

subject to fees under the Anti-SLAPP Act for the non-SLAPP claims, even if those claims are dismissed at the same time for other reasons. To the extent that it asserts anything further, however, the statement was not supported by any analysis, and is in any event, not binding on this Court.[3] Thus, neither decision, in this Court's view, precludes a finding that the statute was intended to encompass an award of atttorney's fees under the circumstances here. Thus, it is necessary to examine the language of the statute in order to resolve the pending motions.

In other contexts, the Court of Appeals has noted that the statutory term "prevail" is ambiguous. *See Frankel v. D.C. Office for Planning & Econ. Dev.*, 110 A.3d 553, 557 n.7 (D.C. 2015). In the District of Columbia, "[w]hen [the Courts] are called upon to interpret and apply a legislative enactment, [the Courts] are necessarily constrained by the language of the statute, and, where appropriate, guided by its legislative history." *Davis v. Moore*, 772 A.2d 204, 233 (D.C. 2001) (Ruiz, J., concurring in part and dissenting in part). Thus, the Courts "give effect to the legislative will by divining what the legislative enactment means." *Id.* And it is clear that the language of this section was deliberately chosen by the D.C. Council; the language was amended following the issuance of the Committee Report, at which time the language in the proposed legislation was "substantially prevails." *See* Comm. Report, November 18, 2010 Committee Print, at 3. At the Final Reading on December 7, 2010, Councilmember Phil Mendholson offered an amendment, which changed the language to "prevails in whole or in part," in order, according to the Councilmember, "to better reflect the intent of this section." See Dec. 7, 2010

[3] Indeed, the Court of Appeals in *Mann* case found the *Abbas* Court's analysis at least partially incorrect on a different issue under the Act. *See* 150 A.3d at 1238 n.32 (rejecting the conclusion in *Abbas* that the "likely to succeed on the merits" standard was different from and more difficult than the summary judgment standard).

Legislative Meeting Hr'g, at 1:37:10;[4] *see also* Enrolled Original of the Anti-SLAPP Act of 2010, at 2.[5] The Court therefore concludes that the use of the specific language was deliberate, and was intended to reflect the interpretations such language has been given within other District of Columbia statutes, such as FOIA. *See Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014) (assuming that the term "public figure" imports the definition of "public figure" used throughout defamation law); *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) (explaining that as a general rule, the Court of Appeals presumes that where a legislature adopts a term of art, it "knows and adopts the cluster of ideas that were attached to each borrowed word"); *see also* D.C. Code § 2-537(c) (D.C.'s FOIA statute's attorney's fee provision).

In *Frankel*, the Court of Appeals emphasized that the FOIA statute, which allows for attorney's fee awards to a party who "prevails in whole or in part," is different than a statute that only allows awards to a "prevailing party," and that "[t]his difference suggests that the D.C. Council intended to authorize attorney's fees in FOIA cases more often than in other types of cases." 110 A.3d at 557. There, the Court of Appeals specifically found that the language encompassed awards to parties who were not awarded relief by the Court, who could "demonstrate[] a causal nexus ... between the action [brought in court] and the agency's surrender of the information." *Frankel,* 110 A.3d at 558 (internal quotation marks omitted). In part, the Court came to such a conclusion because so holding "accurately reflects the purposes of the FOIA attorney's fee provision." *Id.* Plaintiff asserts that unlike in FOIA, where, following an agency's voluntary change in position, "the plaintiff walks away with a hard copy of some, if

[4] Archived hearings can be found on the D.C. Council website. The December 7, 2010 hearing is located at http://dc.granicus.com/MediaPlayer.php?view_id=&clip_id=498&caption_id=846692.
[5] *See* http://lims.dccouncil.us/Download/11571/B18-0893-ENROLLMENT.pdf.

not all, of the documents it was seeking," in this context, a defendant does not "gain the relief it sought in filing the Special Motion to Dismiss – a determination that the plaintiff's suit is a SLAPP, that the suit is without merit, and that the suit should be dismissed without prejudice." Sur-Reply at 5. The Court does not find that argument persuasive, however, as it depends on a very specific definition of a defendant's goal; others, such as the judge in the California case, *Coltrain v. Shewalter*, would define a Defendant's goal more broadly. 66 Cal. App. 4th 94, 107 (1998) (stating that "the defendant's goal is to make the plaintiff go away with its tail between its legs" and concluding as a result that "ordinarily the prevailing party will be the defendant" when the case is voluntarily dismissed). Here, the Court concludes that caselaw supports an interpretation of the statutory language that effectuates the purpose statute and encompasses awards to parties who were not awarded relief by the Court, but nonetheless achieved the purpose of the motion, that is, a swift end to the litigation.

2. Anti-SLAPP Caselaw in Other Jurisdictions

Both parties agree that this case raises an issue that has not been addressed by the Court of Appeals in the District of Columbia; although there is caselaw guiding the Court's decisions as to other aspects of the Anti-SLAPP Act, there is no case law addressing what is required to show that a party has "prevailed" under the Act. Defendants, therefore, assert that case law from other jurisdictions, primarily California and Massachusetts,[6] should be viewed by the Court as

[6] Defendants also cite to the Illinois Supreme Court's decision in *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 397 (Ill. 2010), which found that the lower appellate court's failure to address whether that suit constituted a SLAPP effectively withheld the relief provided by the anti-SLAPP act for true SLAPP defendants, which includes attorney's fees and costs to the prevailing movants. Although the trial court, after denying the SLAPP motion, had subsequently dismissed the suit with prejudice on other grounds, the Court found that the appeal of the original decision was not moot. *Id.* The Illinois Supreme Court further found that the lower appellate court's decision not to address the issue of attorney's fees "constitutes a nullification of a principal part of the anti-SLAPP legislation." *Id.* The Court then went on to conclude that the

persuasive authority supporting a finding that Defendants have "prevailed" within the meaning of the statute and are thus presumptively entitled to attorney's fees. *Id.* at 2-6. Plaintiff argues that the cases cited are neither controlling nor persuasive, and should not guide this Court's decision.

D.C. caselaw is clear that courts may view decisions of the courts of other states as persuasive authority in the absence of controlling case law from the District. *See, e.g., James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 339 (D.C. 2016) (noting that decisions from Texas and Kansas "serve as persuasive authority on the question in this case given the dearth of controlling case law from this jurisdiction"); *see also Mann*, 150 A.3d at 1236 n. 31 (discussing caselaw from Colorado and California in setting forth the standard for evaluating what a party needs to show to demonstrate a "likelihood of success on the merits"). Analysis of such caselaw is particularly appropriate where, as here, the legislative history of the D.C. Anti-SLAPP Act specifically states that the act "follows the model set forth in a number of other jurisdictions." Comm. Report at 1.

The Court does conclude, however, that the caselaw from the two different jurisdictions is not equally compelling. Defendants argue that Massachusetts courts have "held that plaintiffs can be liable for attorney's fees and costs notwithstanding their voluntary dismissal of their complaint before the court could rule on a pending Anti-SLAPP motion." *See* NAS Memo at 4-5

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suit filed was a SLAPP suit under Illinois' Act, that plaintiffs there had not met their burden to move forward, and thus, the motion to dismiss should have been granted under their anti-SLAPP act, entitling defendant to fees. Thus, the Court agrees with Plaintiff that Defendants' characterization of that case, as finding that "the right to recover attorney's fees[] continue[s] to exist even when plaintiff's claims have been dismissed with prejudice on other grounds," is not entirely accurate. *See* Mot. at 5 n.6; Opp'n. at 12. The Court does not find Plaintiff's assertion that the case provides "no support for NAS," *see* Opp'n. at 13, entirely accurate either, however, as the case does highlight the importance of analyzing the merits of a special motion to dismiss in determining any right to fees.

(citing *Winthrop Healthcare Investors, L.P. v. Cogan*, 28 Mass. L. Rptr. 75 (Sup. Ct. Mass. 2010); 2010 Mass. Super. LEXIS 342 (Sup. Ct. Mass 2010). In that case, under closely analogous factual circumstances, the Court indicated that voluntary dismissal (under a rule very similar to the one pursuant to which this case was dismissed) of a case eight days after a hearing on an Anti-SLAPP motion might not be permitted. *Winthrop*, 2010 Mass. Super. LEXIS 342 at *5-6 ("Consequently, were the court to rule on the merits of the issue, the court would rule that the filing of the anti-SLAPP motion with the court trumps the attempt at voluntary dismissal."). There, however, the Court in *Winthrop* granted defendant attorney's fees under another statute that allows for attorney's fees for bad faith litigation, rendering that question moot; the court did, however, note that "... plaintiffs' quick filing of a Notice of Dismissal after the [Anti-SLAPP] hearing casts further doubt on the plaintiff's good faith as it was an obvious attempt to avoid attorney's fees and costs under the anti-SLAPP statute." *Id.* at 77; *see also Cardno Chemrisk, LLC v. Foytlin*, 33 Mass. L. Rptr. 489 (Sup. Ct. Mass. 2016) (stating that where an appeal had been filed regarding the denial of a special motion to dismiss and related request for attorney's fees under an anti-SLAPP statute, the "potential claim for costs and attorney's fees under the Anti-SLAPP statute is, for all intents and purposes, a counterclaim that remains alive" following an attempt to file a voluntary dismissal). Dr. Jacobson argues that the relevant portions of the Massachusetts cases regarding Anti-SLAPP are dicta since they were decided on other grounds, and the cases are inapposite. Opp'n. at 11. And in general, the Court agrees with Dr. Jacobson as to the Massachusetts cases, as those cases address different paths to the end sought by Defendants, that is, the award of attorney's fees to protect a defendant faced with a SLAPP; Defendants here do not ask the Court to take those paths, by, for example, vacating the voluntary dismissal, nor by awarding attorney's fees on the basis that the suit constitutes general "bad

faith" litigation. But the cases are relevant to the extent that they do emphasize the importance of awards of attorney's fees as a tool in addressing the problem that anti-SLAPP statutes were enacted to address.

Unlike the Massachusetts cases, however, the California cases cited by Defendants, as well as others citing those cases, are directly on point. The California courts have found that dismissal—either by the trial court for other reasons or voluntarily by the plaintiff— after an anti-SLAPP motion has been filed neither automatically absolves a plaintiff of the responsibility to pay attorney's fees nor automatically requires such an award. *See, e.g., ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.*, 42 Cal. Rptr. 3d 256, 268 (2006) ("A plaintiff may not avoid liability for attorney fees and costs by voluntarily dismissing a cause of action to which an anti-SLAPP motion is directed."); *Pfieffer Venice Props. V. Bernard*, 123 Cal. Rptr. 647, 652 (2002) ("A plaintiff's voluntary dismissal of a suit… neither automatically precludes a court from awarding a defendant attorney's fees and costs under that section, nor automatically requires such an award."). The California courts have so concluded because without the ability to award attorney's fees following a dismissal prior to resolution of a motion pursuant to the Anti-SLAAP Act, "plaintiffs would have accomplished all the wrongdoing that triggers defendant's eligibility for attorney's fees, but the defendant would be cheated of redress." *Coltrain,* 66 Cal.App.4th at 107.

California courts therefore generally use one of two methods to determine whether fees are appropriate in such circumstances. One approach applies something similar to the catalyst theory of FOIA. In that approach, the court essentially presumes the motion caused, (i.e., is the catalyst for) the dismissal, but allows the plaintiff an opportunity to rebut the presumption. *See Coltrain,* 66 Cal. App. 4th at 107 (holding that a presumption arises that defendants are the

prevailing party following a voluntary dismissal in an anti-SLAPP action because the defendant will have realized its objective in having the litigation dismissed, but allowing plaintiff to "try to show it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits" of the anti-SLAPP motion). Other cases, however, have reached a different conclusion as to whether a plaintiff's reasons for voluntarily dismissing the action bear on the issue of attorney fees, noting that because the purpose of a SLAPP suit is not to succeed on the merits but to silence the defendants, settlement of such an action would, in some instances, merely mean that the plaintiff had succeeded in chilling the exercise of constitutional rights. *See, e.g., Liu v. Moore*, 69 Cal. App. 4th 745, 752 (1999). Therefore, "a majority of the Courts of Appeal [in California] require that the trial court determine the merits of the anti-SLAPP motion to strike notwithstanding the prior dismissal of the underlying suit." *Roe v. Halbig*, 29 Cal. App. 5th 286, 305 (6th Distr. Ct. App. 2018). For those Courts of Appeal, "a fee motion is wholly dependent upon a determination of the merits of the SLAPP motion." *Pfeiffer Venice Props.*, 101 Cal. App. 4th at 218. The trial court must rule on the merits of the motion to determine a defendant's right to attorney's fees under an Anti-SLAPP fee-shifting provision in order to avoid frustrating the purpose of the statute's remedial provisions. *Id.* at 653; *see also Liu*, 69 Cal. App. 4th at 751 ("A defendant who is voluntarily dismissed, with or without prejudice, after filing [an Anti-SLAPP motion], is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant's motion for attorney's fees and costs….").

Dr. Jacobson rejects any application of these cases in the District, asserting that the cases are "inapposite" because they are all out-of-state cases and are intermediate appellate decisions

reaching varying conclusions. Opp'n. at 13. The Court disagrees with Dr. Jacobson as to the persuasiveness of these cases, and concludes that it is appropriate to consider these decisions in interpreting the District's Anti-SLAPP Act.[7] Specifically, the California cases are, in this Court's view, instructive regarding the appropriate way to interpret the statute in order to give effect to its purpose. The purpose of the District's Anti-SLAPP Act is to "provide substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of political or public policy debate aimed to punish or prevent the expression of opposing points of view." Comm. Report at 1. Mounting legal costs are a key characteristic of a SLAPP suit. *See id.* To address that issue, the District adopted provisions providing for attorney's fees to "successful" parties anti-SLAPP motions. *Id.* at 4. In this Court's view, given the language used by the D.C. Council in the attorney's fee provision, this Court must interpret the statute in light of the purpose of the Anti-SLAPP statute and its legislative history. *See Mann*, 150 A.3d at 1237 (adopting an interpretation of language within the Anti-SLAAP Act that "comports with the legislative aim of building special protections for a defendant who makes a prima facie case that the claim arises from advocacy on issues of public interest"). Thus, the Court concludes that it is appropriate to follow the case law of California, as the cases are generally analogous, well-

[7] Other judges of this Court have likewise concluded that the California jurisprudence is appropriate to consider in evaluating this issue. *See Toufanian v. Shukes*, 2020 SC3 000003 (Order, 2/28/20, J. Anthony Epstein). In that case, Judge Epstein recognized that "[t]he litigation costs provision of the D.C. Anti-SLAPP Act is different from its California counterpart." *Id.* at 4 (citing *Doe*, 133 A.3d at 584 (McLeese, J., dissenting in part) (California law makes an award of attorney fees mandatory)). Nonetheless, after noting that defendant's brief cited "cases interpreting California's anti-SLAPP statute to permit an award of litigation costs even if the plaintiff dismisses a claim challenged in a special motion to dismiss," Judge Epstein remanded the case, concluding that the trial court "should have considered whether in light of the purpose of § 16-5504(a), an award of litigation costs is warranted where [plaintiff] did not move to dismiss his claim until after [defendant] incurred the expense of filing a special motion to dismiss." *Id.* (citing *Mann*, 150 A.3d 1239 (discussing "the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights")).

reasoned and consistent with the legislative purpose of the act in question. *See Boley v. Atl. Monthly Group*, 950 F.Supp.2d 249, 255 (D.D.C. 2013) ("Where appropriate... the Court will look to decisions from other jurisdictions (particularly those from California, which has a well-developed body of anti-SLAPP jurisprudence) for guidance in predicting how the D.C. Court of Appeals would interpret its own anti-SLAPP law.").

3. Conclusion

Based on the statutory language in this case as well as the persuasive caselaw from other jurisdictions, particularly California, the Court concludes that consistent with the purpose of the Act, it is appropriate to interpret "prevails, in whole or in part" to apply to a Defendant whose case is voluntarily dismissed by the Plaintiff following the filing of a special motion to dismiss under the Act in some circumstances. The Court finds such a conclusion particularly appropriate here, where the special motions to dismiss were not just fully briefed, but also fully argued at hearing, and taken under advisement by the Court.

The Court also finds that the approach followed by the majority of California Courts of Appeal more effectively serves the purpose set forth in the District's anti-SLAPP Act, rather than following a form of the catalyst theory, which would rest the determination on a Plaintiff's proof of reasons for dismissal unrelated to its likelihood of success on the merits, such as settlement of the matter. The Court concludes that the requirement that the motion be meritorious is necessary to ensure that attorney's fees are awarded only where such an award would serve the goals of the Act. As the Court noted in *Liu*,

> If such a judicial determination were not first required ... then a plaintiff's voluntary dismissal of the action could have the effect of (1) depriving a true SLAPP defendant of statutorily authorized fees, or (2) entitling a defendant to such relief in a non-SLAPP action which was dismissed by the plaintiff for entirely legitimate reasons. In both situations, the purpose of the statute's remedial provisions would be frustrated.

69 Cal. App. 4th at 752-753. The Court will, therefore, assess the merits of Defendants' special motions to dismiss as a predicate to deciding whether Defendants are entitled to attorney's fees.[8]

B. Analysis of the Special Motions to Dismiss

The party filing a special motion to dismiss must first show entitlement to the protections of the Act by "mak[ing] a prima facie showing that the claim at issue arises from an act in

[8] The Court recognizes, however, that requiring a determination on the merits is not as straightforward in some cases as this one, where the issue has already been briefed and argued, and may pose more difficult issues if, for example, a plaintiff dismisses without responding to a special motion to dismiss under the Anti-SLAPP Act, or dismisses upon receipt of such a motion prior to its filing. Thus, there is clearly some support for the argument that the catalyst theory of *Coltrain*, particularly as it is similar to the approach followed in D.C. FOIA cases, should be applied in the District instead. Should the Court of Appeals conclude that the catalyst theory is the more appropriate method for determining who qualifies as a party who has "prevailed, in whole or in part," on this record, the Court notes that it would still conclude that Defendants here are entitled to attorney's fees. Plaintiff posted a lengthy explanation on the internet, which was attached to NAS's Motion as Ex. 3, stating his reasons for dismissal of the case. The Court does not find the explanation would rebut a presumption that Defendants prevailed in this case. The timing of the dismissal in this case is particularly noticeable, as it came a mere two days after a hearing in which this Court's concerns regarding the merits of Plaintiff's case were likely evident in the Court's questions. Indeed, the following exchange took place after the Court had directed multiple questions regarding Plaintiff's legal theories toward Plaintiff's counsel:

> *Mr. Thaler*: The anti-SLAPP statute that if you want me to launch into my legal position with regard to this case as applied to anti-SLAPP I could do that. I feel honestly Your Honor that it's the defendant's motion and their burden to demonstrate why they should prevail, but if you would like me to do my analysis at this point, I could. I just feel that it puts my client at a disadvantage being asked to argue the opposition to their motion before they've argued, but I can do that if Your Honor would like.
>
> *The Court*: To be honest I was trying to be efficient and focus on the things that were less clear to me.

2/20/18 Tr. at 12. Thus, given the nature of the hearing and the timing of the dismissal, combined with the lack of any other new event or information in that explanation (which largely rehashes arguments and positions already taken in the pleadings), the Court would find under that theory as well that in this case Defendants prevailed and are entitled under the Act to attorney's fees and costs. Defendant does, in his posted explanation, note the likely length and cost of any proceeding. *See* NAS Motion, at Ex. 3, at 5-6 (Question 9). A similar explanation was firmly rejected as a basis for rebutting the presumption in *Coltrain*. *See Coltrain*, 66 Cal. App. 4th at 107-08.

furtherance of the tight of advocacy on issues of public interest." D.C. Code § 16-5502(b). The burden then shifts to the responding party to demonstrate that the original claim is likely to succeed on the merits. *Id.* In evaluating the likely success of the claim, the court must ask whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion. *Mann*, 150 A.3d at 1232. If the responding party fails to meet the statutory standard, the Act requires the trial court to dismiss the complaint, with prejudice. *Id.*; *see also* D.C. Code § 16-5502(b). For the following reasons, the Court finds Defendants met their burden to make a prima facie showing of a protected activity, Plaintiff did not meet his burden of showing a likelihood of success, and therefore, for the purposes of resolving the request for attorney's fees, Defendants have prevailed in whole or in part under the statute.

1. Prima Facie Showing of Protected Activity

To prevail on a special motion to dismiss, defendants must first make a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interests." D.C. Code § 16-5502(b). The Act defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include:

> (A) Any written or oral statement made:
>
> i. In connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
> ii. In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1)(A)-(B). The Act further defines an "[i]ssue of public interest" to mean "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or good, product, or service in the market place." D.C. Code § 16-5501(3). Furthermore, the First Amendment, the tenets of which are embedded in the the Anti-SLAPP Act, has historically protected a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Thomas v. News World Comm.*, 681 F.Supp. 55, 64 (D.D.C. 1988) (citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

In the instant case, the Court finds the Defendants have made a prima facie showing that Dr. Jacobson's claims for defamation, breach of contract, and promissory estoppel arise from protected advocacy rights. Both the Jacobson Article and the Clack Article were published in a public forum, that is, the scientific journal PNAS, and involved matters related to the environment and the feasibility of reliance on sources of renewable energy. Such conduct falls squarely within the meaning of a "written statement... in a place open to the public or a public forum in connection with an issue of public interest." § 16-5501(A)(ii); *see also Farah v. Esquire Magazine*, 863 F. Supp. 2d 29, 38 (D.D.C. 2012) (holding that satirical blog post "fits entirely within the scope of § 16-5501(1)(A)").

Dr. Jacobson, in his opposition, does not dispute that the parties are engaged in a "public national debate about sources of renewable energy," but asserts "[t]hat is not enough" to establish his underlying suit was a SLAPP, subject to the law's provisions; instead, Defendants "must also demonstrate that Dr. Jacobson's purpose in filing the lawsuit is consistent with the purpose of SLAPP." Plaintiff Mark Z. Jacobson's Opposition to Defendant National Academy of Sciense's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAAP Act, or in the

Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) (hereinafter, "Special Motion to Dismiss Opposition" or "Spec. Mot. Opp'n.") at 2. This argument, however, is unpersuasive, given the clear guidance of the District of Columbia Court of Appeals to the contrary. In *Doe,* the Court of Appeals stated:

> Nothing in this language, or in the words of the attorney's fees provision, § 16-5504(a), implies that to qualify for fees the anonymous defendant successful in quashing a subpoena must have resisted a SLAPP claim 'classic' or exemplary in nature, rather than one arising—solely but pivotally—from the defendant's exercise of a special form of speech or advocacy.

Doe, 133 A.3d at 573. The Court relied on the actual statutory language to determine what lawsuits will receive the protections of the Act, concluding that "[t]he protections of the Act, in short, apply to lawsuits which the D.C. Council has deemed to be SLAPPs…." *Id.* In other words, the D.C. Anti-SLAPP Act contains no requirement that the Court determine that the underlying suit is a "genuine" SLAPP before proceeding on a special motion to dismiss filed pursuant to the statute; once a defendant has demonstrated that the statutory definitions are met in a case, the burden shifts to the plaintiff. And indeed, counsel for Plaintiff essentially conceded that point at the motions hearing, in responding to the Court's questioning on that issue:

> *The Court:* And, it's defined as any written or oral statement made in connection with an issue under consideration by review or review by a legislature executive or judicial body or any other official proceeding in law or any other place open to the public or public forum in connection with an issue of public interest. An issue of public interest expressly states means at issue related to environment.
>
> *Mr. Thaler:* I understand that reading of that and so I think that could be a fair reading of the statute as applied here. And the Mann court I think also passed – or agree that that was assumedly a matter in the public discourse. So, I understand, Your Honor and for purposes of today I think that we would agree that we can pass over that with the note that we do object in the sense that I don't think a fair reading of the intent of the statute has been made in case law yet.

Feb. 28, 2018 Tr. at 8-9. Here, Defendants have shown this suit arises from written statements made in a public forum in connection with a matter of public interest. Thus, Defendants met their initial burden.

2. Likelihood of Success on the Merits

As Defendants made a prima facie showing that Dr. Jacobson's claims "arise from an act in furtherance of the right of advocacy on issues of public interest," the burden shifts to Dr. Jacobson "to demonstrate that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b). In evaluating the likely success of a claim, the court must ask whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion. *Mann*, 150 A.3d at 1232.[9] Dr. Jacobson asserted claims of defamation, breach of contract, and promissory estoppel against Defendants. The Court will address each of these claims in turn.

a. Defamation

For a plaintiff to prevail on a defamation claim under District of Columbia law, they must prove:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the Defendant's fault in publishing the statement amount to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

[9] In this case, although the parties did not produce witnesses at the hearing, both attached voluminous materials to their pleadings, including the Complaint, which the Court reviewed in evaluating the likelihood of success on the merits. All parties agreed at the hearing that it was appropriate to proceed in that fashion given the nature of the claims in this case. 2/20/18 Tr. at 3.

Oparaugo v. Watts, 884 A.2d 63, 76 (D.C. 2005) (quoting *Crowley v. North Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n.2 (D.C. 1997)). If a plaintiff is a public figure, they must further prove defendant acted with actual malice – that is, "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times*, 376 U.S. at 279-80).

Dr. Jacobson's Complaint alleges that Defendants defamed his character by: (1) falsely stating that the values in Table I of the Jacobson Article were maximum values instead of average values; (2) falsely stating that the authors of the Clack Article were unaware of any explanation for the large peak discharge of hydropower depicted in three figures in the Jacobson Article; and (3) falsely claiming in Figure 3 of the Clack Article that the Jacobson Article's annual hydropower output was higher than historical averages when the figure compares U.S. data with Jacobson Article U.S. plus imported Canadian output. *See* Compl. ¶¶ 74-92.[10] Lastly, Dr. Jacobson contends that NAS acted with malice when they published the Clack Article despite Dr. Jacobson's numerous attempts to correct the articles conclusions, and Dr. Clack acted with malice by refusing to retract the article and by falsely asserting the Jacobson Article contained a modeling error via social media. Compl. ¶¶ 79-80, 90.

Defendants counter that the statements "merely involved the expression of opinions in the type of scientific debate that should be resolved in the scientific arena, not in the courts," and that Dr. Jacobson is unable to prove the statements published in the Clack Article were

[10] Dr. Jacobson also alleges the Clack Article was "replete with additional numerous falsehoods and misstatements." *See* Pl.'s Compl. ¶¶ 75 and 84, and Ex. 12 (05/25/17 "Line-by-Line Response by M.Z. Jacobson, M.A. Delucchi to 'Evaluation of proposal for reliable low-cost grid power with 100% wind, water, and solar"). At the hearing, however, Plaintiff's Counsel confirmed that Plaintiff was proceeding on the three primary assertions, not the additional statements, and that the Court need not address whether each of the additional allegations were defamatory. 2/20/18 Tr. at 4.

defamatory. *See* Defendant National Academy of Sciences' Memorandum in Support of Its Special Motion to Dismiss Pursuant to the D.C. Anti-SLAAP Act, or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) (hereinafter "NAS Special Motion" or "NAS Spec. Mot.") at 7-10. This Court agrees.

In *Mann*, the D.C. Court of Appeals found that two of three scientific articles addressing global warming could be found to have included defamatory statements as to plaintiff by calling him "the Jerry Sandusky of climate science," and stating he was engaged in "academic and scientific misconduct," among other things. 150 A.3d at 1243-49. In that case, the Court of Appeals made clear that statements taking issue with the soundness of a plaintiff's methodology and conclusions are covered by the First Amendment, which protects the expression of all ideas, good and bad. *Id.* at 1242 ("As a matter of constitutional principle, when the issue is whether liability may be imposed for speech expressing scientific or policy views, the question is not who is right; the First Amendment protects the expression of all ideas, good and bad."). However, defamatory statements made in the scientific arena that attack an individual's honesty and integrity or imply as fact that an individual is engaged in professional misconduct are not constitutionally protected and may be protected. *Id.*

Here, although Dr. Jacobson asserts that the statements made in the Clack Article have affected his reputation in the scientific community, the statements simply do not accuse Dr. Jacobson of any misconduct or impugn his integrity. The Court has reviewed the Complaint, the motion and the related pleadings as well as the attachments thereto, and finds that the three asserted "egregious errors"[11] are statements reflecting scientific disagreements, which were

[11] Specifically, the first statement challenged as defamatory is the following:

> Similarly, as detailed in SI Appendix [to the Clack article], section S1.2, the total amount of load labeled as flexible in the figures of [the Jacobson Article] is much

appropriately explored and challenged in scientific publications;[12] they simply do not attack Dr. Jacobson's honesty or accuse him of misconduct.[13] As stated above, the First Amendment protects expressions of "good and bad ideas." *Mann*, 150 A.3d at 1242. Whether the Clack Article's challenge to the Jacobson article's methodology and conclusions would qualify as scientifically "good" or "bad" is a question best resolved in the scientific or academic forum, not the court.

> greater than the amount of flexible load represented in their supporting tabular data. In fact, the flexible load used by LOADMATCH is more than double the maximum possible value from table 1 of [the Jacobson Article]. The maximum possible from table 1 of [of the Jacobson Article] is given as 1, 064.16 GW, whereas figure 3 of [the Jacobson Article] shows that flexible load (in green) used up to 1, 944 GW (on day 912.6). Indeed, in all the figures in [the Jacobson Article] that show flexible load, the restrictions enumerated in table 1 [of the Jacobson Article] are not satisfied.

See Compl. ¶43 and more generally, ¶¶ 42-49; *see also* NAS Spec. Mot. at 12. The second statement, explained in more detail in ¶¶ 50-61 of the Complaint, is the following:

> The hydroelectric production profiles depicted throughout the dispatch figures reported in both the paper and its supplemental information routinely show hydroelectric output far exceeding the maximum installed capacity as well.... This error is so substantial that we hope there is another explanation for the large amount of hydropower depicted in these figures.

NAS Spec. Mot. at 13 (including not just the challenged statement, but a description of what the Clack Article asserted was the "substantial" error); *see also* Compl. ¶ 50. Finally, the third allegedly defamatory statement is not precisely a statement, but the contents of "Figure 3" of the Clack Article; Dr. Jacobson claims that the Clack Article incorrectly compares "apples to oranges" by failing to disclose that its Figure 3 compares Dr. Jacobson's data, which was based on a combined total of U.S. plus imported Canadian numbers, to Dr. Clack's U.S. only data. Compl. ¶¶ 62-64. The Court notes that this third "egregious error" is sufficiently subtle that even Dr. Jacobson did not catch it until after the Clack article was published, despite his careful review of the article pre-publication. *Id.* at ¶ 62.

[12] The materials attached to the filings make clear Dr. Jacobson's rebuttal to the critique was simultaneously published with the Clack Article. *See* NAS Spec. Mot., Ex. A.

[13] In contrast, it does appear that Dr. Jacobson has employed the kind of language that could be considered defamatory in discussing the critiques of his paper on social media. *See* NAS Spec. Mot., Ex. D (reflecting Dr. Jacobson's accusations that other scientists, including Dr. Clack, used "flat out lie[s]," "intentionally falsified data," or were "intentionally scientifically fraudulent.")

The only even potentially questionable statement is the second asserted error, that "[t]his error is so substantial that we hope there is another explanation for the large amount of hydropower depicted in these figures," as, without context, it arguably suggests that in the absence of another explanation, there could be misconduct. In attempting to bolster his argument that this statement could be found to be defamatory, Dr. Jacobson points out that 16 months prior to publication of the Clack Article, Dr. Jacobson provided an explanation of the figures in question to Dr. Clack by e-mail. *See* Pl.'s Compl., Ex. 4 (2/29/16 E-mail from Dr. Jacobson to Dr. Clack explaining that "I looked into the issue of the high discharge rate for conventional hydro, and it turns out the numbers are corrected as simulated; however, I did neglect to clarify that we increased the number of generators/turbines for each hydro plant (without increasing the dam capacity) and neglected to include the additional costs for turbines/generators…"). However, it is very clear from those e-mails that Dr. Clack continued to disagree with Dr. Jacobson's conclusions even after he was provided with an explanation for the large hydropower output. Pl's Compl., Ex. 5, at 3 ("You would still need 1100GW + of capacity, and the river head flows won't allow that sort of electric production… The dam heads would have to be significantly raised, causing more flooding of the areas and cost."). In any event, those emails were not part of the original publication, and the Clack Article is a direct response to the Jacobson Article; it is not a response to private e-mails between two of the many authors. Moreover, the Clack Article did include some of the assumptions that Dr. Jacobson expressed in that email. *See* Compl., Ex. 11 at 6273 ("[T]he conclusions [in Plaintiff's paper] rely heavily on free, nonmodeled hydroelectric capacity expansion (adding turbines that are unlikely to be feasible without major reconstruction of existing facilities) at current reservoirs without consideration of hydrological constraints or the need for additional supporting

infrastructure (penstocks, tunnels, and space) ...."); *see also* NAS Spec. Mot. Reply, at 3. More importantly, in context, no reasonable juror could find this to be a statement that there was in fact misconduct, because the authors of the Clack article immediately provide a possible explanation, two sentences later. *See* Compl. Ex. 11, at SI p. 2 ("One possible explanation for the errors in the hydroelectric modeling is that the authors assume they could build capacity in hydroelectric plants for free within the LOADMATCH model."). Thus, as a matter of law this statement cannot be taken as defamatory. *See Mann*, 150 A.3d at 1241 ("[S]tatements that constitute imaginative expression and rhetorical hyperbole are not actionable because they cannot reasonably be interpreted as stating actual facts about an individual. Such statements are used not to implicate underlying acts but merely in a loose, figurative sense to demonstrate strong disagreement with another's ideas.") (internal quotation marks and citations omitted).[14] Indeed, the contrast with the statements found defamatory in Mann could not be greater. *Id.* at 1243-44 (noting that the "[t]he article's focus is on [the plaintiff] personally, alleging that he has engaged in 'wrongdoing,' 'deceptions,' 'data manipulation,' and 'academic and scientific misconduct,'" and that "[t]he article calls [the plaintiff] 'the Jerry Sandusky of climate science,' comparing [the plaintiff's] 'molest[ing] and tortur[ing] data in the service of politicized science' to Sandusky's 'molesting children,'" but that " the article does not comment on the specifics of [the plaintiff's] methodology at all"). Therefore, because no jury, properly instructed on the law, could find that the statements in this case are defamatory in light of the evidence that has been produced or proffered in connection with the motion, the Court need not address the remaining factors of the test. *See Mann*, 150 A.3d at 1242 ("To the extent statements in appellants' articles take issue

[14] The Court notes that four months after the Clack Article was published, Dr. Jacobson sought to publish errata relating to two of the three "egregious errors," including the second one, to "clarify our hydropower assumption because the original text describing this assumption was not clear...." NAS Spec. Mot., Ex. C at 1-2.

with the soundness of [Plaintiff's] methodology and conclusions — i.e., with ideas in a scientific or political debate — they are protected by the First Amendment.").

b. Breach of contract

The defamation claims are clearly the core of this case. Plaintiff, however, also asserted two additional claims against NAS, breach of contract and promissory estoppel. To succeed on a claim for breach of contract, a party must establish: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of the duty; and (4) damages caused by the breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). In determining whether a valid contract exists, an exchange of promises or a detriment to the promise constitutes legally sufficient consideration, so long as it is bargained-for. *Wash. Inc. Ptnrs. Of Del., LLC v. Sec. House*, 28 A.3d 566, 574 (D.C. 2011).

According to Dr. Jacobson, caselaw in the District supports a finding that policies may constitute contracts. *See* Pl.'s Opp'n. to Spec. Mot. to Dismiss at 21; *see also Strass v. Kaiser Foundation Health Plan of Mid-Atlantic*, 744 A.2d 1000, 1010-11 (D.C. 2000); *Sisco v. GSA National Capital Federal Credit Union,* 689 A.2d 52, 55-56 (D.C. 1997). In this case, Dr. Jacobson's complaint describes several instances in which NAS violated its editorial policies, and thus, he alleges, breached its contract with him by publishing the Clack Article. Compl. ¶¶ 93-98. Dr. Jacobson's overarching claims are that: (1) the Clack Article was a "Letter," not a "Research Report" and should have met specific criteria for publishing such a Letter, including timing and limitations on size (*see* Compl. ¶¶ 22-24); (2) the Clack Article included approximately 18 authors who did not "contribute substantially to the work" (*see* Compl. ¶¶ 25-27); (3) authors of the Clack Article failed to disclose conflicts of interest (*see* Compl. ¶¶ 29-33);

and (4) NAS failed to investigate all claims of fabrication and falsification, which also violates COPE. *See* Compl. ¶¶ 35-36.

In *Strass*, a case where the trial court set aside a verdict in favor of an employee, the Court of Appeals found that there was sufficient evidence for the jury to have found a breach of contract, and that a disclaimer in an employment manual does not necessarily shield a defendant employer from an implied contractual obligation to follow its discipline policies before terminating an otherwise at-will employee where the language of other portions of the manual suggested an intent to be bound. 744 A.2d at 1003, 1012. In that case, the Court of Appeals noted several specific provisions, including one that indicated that the manual "shall be controlling" in the absence of conflicts with union contracts, and a statement that it is the employer's "'policy to adhere to an established protocol,'" as well as other provisions "covered by the mandatory term, 'shall' rather than the permissive, 'may'" when describing the rights and obligations of Kaiser and its employees. *Id.* at 1012-13. Accordingly, the court remanded the case after determining that a jury might reasonably have concluded that Kaiser intended to be bound by the terms of the manual, including its progressive discipline policy. *Id.* at 1014. Similarly, in *Sisco*, the court found that the employee manual's reservation of certain rights and use of the word "guide" to describe the policy were "insufficient to overcome the assurance conveyed by an objective reading of the entire document that termination will be governed by its terms." 689 A2d at 55. In so concluding, the Court focused on, among others, provisions distinguishing probationary employees who "may be dismissed without recourse" from the guide for progressive discipline for everyone else, which "shall" be handled as set forth in the manual. 689 A2d at 54-55. *Sisco* held that the provisions contained within the manual were "inconsistent with an unstated intent to reserve the right to fire for no reason at all." *Sisco*, 689 A.2d at 56.

Both *Strass* and *Sisco* address the question of when policy manuals create contractual obligations in the employment arena, and appear to be directly limited to that context. *See, e.g. Sisco,* 689 A.2d at 55 ("the teaching of these decisions is that assurances by an employer in a personnel or policy manual distributed to all employees that are clear enough in limiting the right to terminate to specific causes or events will overcome the presumption of at-will employment"). As an initial matter, at the February 20, 2018 hearing, the Court specifically asked Plaintiff's counsel if he was aware of any cases outside the employment context in which a policy manual had been found to create a contract; he was not, but offered to supplement the record. 2/20/18 Tr. at 10. Rather than supplementing the record, however, Plaintiff dismissed the case two days later. Thus, the record remains devoid of any cases outside the employment context that find contractual obligations to be imposed by a policy manual. In its Special Motion, in contrast, NAS cites multiple cases stating as a general principal that policy manuals do not constitute a contract. *See* NAS Motion at 21; *see also Jurin v. Google Inc.*, 768 F. Supp. 2d 1064, 1073 (E.D. Cal. 2011) ("A broadly stated promise to abide by its own policy does not hold Defendant to a contract."); *Dyer v. Northwest Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) ("[B]road statements of company policy do not generally give rise to contract claims."). Therefore, the Court does not find the caselaw cited by Plaintiff regarding employer-employee relationships provides any basis for a reasonable jury correctly instructed on the law to conclude that a contract was created in this context.

Moreover, even if the Court were to find that such authority should be extended beyond the employer-employee context, the Court would find as a matter of law that no contractual obligation was created here. As NAS points out in its Reply and as noted above in the discussion of *Strass* and *Sisco*, even within the employment context, there must be some evidence of an

intent to be bound within the language of the policy for a general policy to create contractual terms. *See* NAS Reply in Support of its Special Motion to Dismiss, at 6; *see also Hyman v. First Union Corp..,* 982 F. Supp. 8, 12-13 (D.D.C. 1997) (analyzing Maryland, Virginia, and DC law to determine when representations within a policy will be sufficient to transform an employee's at-will status). And as correctly noted by NAS, at no point in the three and a half pages of Plaintiff's Opposition discussing the breach of contract claim does Dr. Jacobson point to any language within the policy – or indeed in any other document – from which a reasonable jury could find that NAS intended to be bound by the terms of the policy. *See* Spec. Mot. Opp'n. at 19-23. Moreover, after a review of the policies in the record, the Court concludes that unlike the policies in *Strass* and *Sisco,* the PNAS policies do not provide any language that can be interpreted as indicating intent to be contractually bound on behalf of NAS. *See* Compl., Ex. 1, 2 and 14. For example, with respect to conflicts of interest, the Policy states, "Failure to disclose a **Conflict Of Interest** *may* result in author sanctions." *Id.*, Ex. 14 at 3 (bolding in original; italicization for emphasis added). The only general statements in the policies in the record are that "PNAS is committed to transparency in its review process" and that "PNAS is a member of the Committee on Publication Ethics (COPE) … and subscribes to its policies." *Id.*, Ex. 1 at 1. Such statements contain no mandatory language, make no specific promises, and evince no intent to be bound.

The Court also notes that while "[u]nder general contract principles a contract may be express or implied in fact where agreement is manifested by conduct," *see Yasuna v. Miller*, 399 A.2d 68, 74 (D.C. 1979), Plaintiff has also not identified any conduct in the record by NAS that would suggest any intent to be bound. NAS, however, entered into the record many articles published by NAS commenting on other articles that are not in the form of a Letter. *See* NAS

Spec. Mot., Ex. B (providing critiques published by NAS of other articles not in the form of a Letter). Indeed, even within the context of this case, it is clear that NAS was consistent in *not* following the limitations set forth in its general policies; Dr. Jacobson's Letter, published in response, was more than double the word limit set forth in the policy for Letters. *See* Opp'n. to NAS Spec. Mot. at 22 and n. 11. Based on all of the foregoing, the Court finds that no jury, properly instructed on the law, could reasonably find that a contract was formed between NAS and Dr. Jacobson. Therefore, Dr. Jacobson has not met his burden of showing a likelihood of success on his breach of contract claim.[15]

c. Promissory Estoppel

To succeed on a claim for promissory estoppel in the District of Columbia, there must be "evidence of a promise, the promise must reasonably induce reliance upon it, and the promise must be relied upon to the detriment of the promisee." *Wallace v. Eckert*, 57 A.3d 943, 958 (D.C. 2012). Dr. Jacobson asserts that "the publication and editorial policies governing submissions for publication constituted a promise by Defendant NAS to authors submitting publications that all authors would be required to adhere to the same polices," and avers that he was induced by PNAS's promised publication policies to submit the Jacobson Article to PNAS over any other competing scientific journal. Compl. ¶¶ 101. However, Dr. Jacobson does not point to any language actually making any such promise, whether to Dr. Jacobson specifically or to anyone else, and instead only asserts generally that "the policies constitute a promise by NAS that criticisms and comments of previously published Research Articles will be accepted for publication only if they take the form of a Letter and abide by a more limited word and citation count." Opp'n. at 23. He also does not cite any caselaw that would support such a broad

[15] Given this conclusion, the Court need not address Defendant's argument pursuant to D.C. Code § 28-3502, the statute of frauds, which was briefed only cursorily by both parties.

concept of "a promise." And in fact, District of Columbia caselaw makes clear that "[f]or purposes of estoppel, a promise need not be as specific and definite as a contract, but in the final analysis there must be a promise." *Bender v. Design Store Corp.*, 404 A.2d 194, 196 (D.C. 1979) (internal citation omitted). Here, where the record would not allow a jury, properly instructed on the law, to reasonably find that a promise was ever made, the Court finds Dr. Jacobson has failed to meet his burden on his claim for promissory estoppel as well.

3. Conclusion Regarding Prevailing in Whole or in Part

Based on the foregoing, the Court finds both that the claims in this case are covered by the Anti-SLAPP Act, and that a jury properly instructed on the applicable legal and constitutional standards could not reasonably find that Dr. Jacobson's claims are supported in light of the evidence that has been produced in connection with the motion. Thus, the Court concludes that for purposes of the resolution of the motion for attorney's fees, Defendants have "prevailed in whole or in part," and are therefore presumptively entitled to attorney's fees unless there are special circumstances making an award of fees in this case unjust. *Doe*, 133 A.3d at 578.

C. Special Circumstances Making Fee Award Unjust

Pursuant to caselaw interpreting the D.C. Anti-SLAPP Act, even if a party prevails on a special motion to dismiss under the Act, the non-moving party may avoid an award of fees by showing that special circumstances would render such an award unjust. *Doe*, 133 A.3d at 578. Moreover, Dr. Jacobson was clearly aware that special circumstances may be shown to avoid such an award if Defendants were determined to have prevailed under the Act. The Court notes that there is a suggestion in his brief that he has chosen to rest solely on his argument that he was not the prevailing party. *See* Opp'n., at 14 ("Professor Jacobson need not make such a showing

[of special circumstances] because NAS's Motion should be denied for the reasons discussed herein...."). Nonetheless, it does appear that he is in fact making such an argument when he immediately thereafter asserts that "unlike the plaintiffs in any of the cases that NAS relied on in support of its Motion for fees, or in any of the cases that either Dr. Clack or NAS relied on in their Special Motions to Dismiss, Professor Jacobson attempted to obtain corrections to the defamatory statements ***before*** filing suit." *Id.* at 15. To the extent that he is asserting that his conduct prior to filing the suit would constitute a special circumstance that would render an award of reasonable fees unjust in this case, the Court does not agree. Prior to publishing the Clack Article, NAS offered Dr. Jacobson the opportunity to comment on the paper, which was revised to reflect some of those comments. *See* Compl., Exs. 6, 7, 9 and 11. It also offered Dr. Jacobson the opportunity to respond to the criticism in a Letter, a response that was not only published simultaneously, but was allowed more than double the normal word limits for a Letter. *See Id.*, Exs. 6 and 17; Spec. Mot. Opp'n. at 22 and n. 11 (acknowledging that NAS accommodated Dr. Jacobson by permitting a Letter of 1,000 words instead of 500, and ultimately in fact publishing a 1,300 word version); *see also* NAS Spec. Mot. at 4 and Ex. A. Dr. Jacobson, however, apparently not content to allow the merit of his views of their asserted errors speak for itself despite a simultaneous forum in the same publication, continued to oppose the publication of the Clack Article. Compl. ¶ 66, Ex. 26. Even after it was published, he demanded its retraction multiple times, *see, e.g.*, Compl., Exs. 19, 20, 27, and ultimately filed this lawsuit against Defendants seeking damages totaling $10 million, punitive damages, and costs and reasonable attorney's fees when his demands were not met. Compl., Prayer for Relief, at 40-41. He further pursued his case through the entire litigation of the special motions to dismiss, which included the filing of extensive pleadings and a motions hearing, causing Defendants to incur

additional litigation fees, before abruptly dismissing the case two days after the hearing on the motions. Under those circumstances, the Court does not find the asserted distinction sufficient to constitute special circumstances rendering an award of fees unjust.

IV. CONCLUSION

The D.C. Anti-SLAPP Act was enacted to protect the right of advocacy on issues of public interest against lawsuits intended to punish or censor speech. The safeguards provided by the Act, including reasonable attorney's fees and costs, are critical parts of the statute that must serve its purpose and be upheld. Defendants are entitled to recoup such fees pursuant to D.C. Code § 16-5504(a). Thus, the Court will now direct that the parties communicate in order to minimize any disputes regarding the amount of such fees, before Defendants file praecipes to set forth the fees and costs requested, and any remaining objections thereto are filed. The Court directs that the parties proceed according to the schedule set forth below.

Accordingly, it is this 20th day of April, 2020, hereby

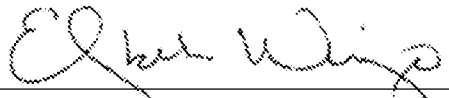
ORDERED that Defendant National Academy of Sciences' Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code § 16-5504(a) is **GRANTED**; and it is further

ORDERED that Defendant Christopher Clack's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, § 16-5504(a) is **GRANTED**; and it is further

ORDERED that Defendants shall provide their proposed attorney's fees and costs to Plaintiff in writing on or before May 4, 2020, who shall promptly respond with any objections to the specific requests, on or before May 18, 2020. Defendants shall evaluate the merit of any such objections, and adjust their fees if appropriate, before filing praecipes with the Court detailing their requested fees and costs on or before **June 1, 2020.** Plaintiff shall file any remaining objections to the reasonableness of the specific fees requested, on or before June 15,

2020, attaching documentation to demonstrate that such objections were previously raised and rejected by Defendants. The Court will not consider any objections not previously raised to Defendants in evaluating the merits of Defendants' requested fees.

SO ORDERED.



JUDGE ELIZABETH CARROLL WINGO
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(*Signed in Chambers*)

Copy via CaseFileXpress to:

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