IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

MARK Z. JACOBSON, Ph.D., **Plaintiff,** **v.** **CHRISTOPHER T. M. CLACK, Ph.D.,** **and** **NATIONAL ACADEMY OF SCIENCES** **Defendants.**	**C. A. No. 2017 CA 006685 B** **Judge Elizabeth Wingo** **Next Court Event: None Scheduled**

PLAINTIFF MARK Z. JACOBSON'S
MOTION FOR RECONSIDERATION
OF ORDER GRANTING DEFENDANTS' MOTIONS
FOR COSTS AND ATTORNEY'S FEES UNDER THE D.C. ANTI-SLAPP ACT

Plaintiff Mark Z. Jacobson, Ph.D. ("Plaintiff"), by and through undersigned counsel and pursuant to Rules 59(e) and 60(b)(2), submits this Request for Reconsideration of the Court's April 20, 2020 Order (the "Order") granting Defendants' Motion for an Award of Attorney's Fees and Costs.

INTRODUCTION

The Court's Order awarding attorney's fees was based on its determination that Defendants were likely to prevail on the merits of Plaintiff's defamation claim, which it termed "the core of this case." (Order 28.) The Court appeared to accept Defendants' argument that the statements at issue constitute "expression of opinions" (Order 23), and ultimately concluded that the statements "reflect[ed] scientific disagreements, which were appropriately explored and challenged in

scientific publications," (Order 24-25) and that "do not accuse Prof. Jacobson of any misconduct or impugn his integrity." (Order 24.)

The Court also analyzed the Mann decision, but ignored the relevant holding therein that if "statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger policy debate." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1242–43 (D.C. App. 2016), as amended (Dec. 13, 2018).

Newly discovered evidence that was not before the Court – namely, written admissions by two of the three main authors of the Clack et al. 2015 *PNAS* paper (the "Clack Paper"), Dr. Christopher T.M. Clack, Ph.D. and Dr. Ken Caldeira (the "Clack Authors") – demonstrate that the contested statements were not mere scientific disagreements, but admitted factual errors by the Clack Authors – "false facts." Also, the relevant statements at issue are "something for which proof exists," thus questions of fact by definition and are in no way questions of scientific opinion. Third, additional law is provided indicating that legal fees cannot be applied in Washington D.C. upon a voluntary dismissal of a lawsuit prior to its disposition. Accordingly, the Court is requested to amend its Order and Deny Defendants' Motion for the award of attorney's fees against Prof. Jacobson, who voluntarily dismissed his case without prejudice.

In the first admission (Exhibit 1), Dr. Caldeira publicly admitted on February 16, 2019 that the values in Table 1 of Prof. Jacobson's 2015 *PNAS* paper (the "Jacobson Paper") were, in fact, average values and not maximum values (as falsely claimed in the Clack Paper). This admission alone establishes that, as Prof. Jacobson contended in his original Complaint, the Clack Paper made a material false statement of fact that is outside the realm of opinion or "scientific disagreement," regardless of whether it was made in a scientific forum. This "false fact" led directly to the main false and defamatory statement, made multiple times in the Clack Paper, that

Professor Jacobson and his coauthors committed "modeling errors." The statement that Professor Jacobson made modeling errors led directly to Professor Jacobson being made to appear "*odious, infamous, or ridiculous*" in the public eye.

Second, Dr. Clack admitted in writing (Exhibit 3) on September 21, 2017[1] that the Jacobson Paper included Canadian hydropower in its analysis despite the false factual representations in the Clack Paper that the Jacobson Paper contained U.S. hydropower output only and that such hydropower output could properly be compared with U.S.-only hydropower data.

Third, in light of the above admissions and the reasoning in the Court's Order, Plaintiff again submits for the Court's consideration a document (Exhibit 4) demonstrating that Dr. Clack knew that whether a hydropower error (the third egregiously false claim in the Clack Paper) occurred in the Jacobson Paper could be determined factually from computer model output generated by Prof. Jacobson. Exhibit 4 shows that Dr. Clack had not even looked at or asked for Prof. Jacobson's model results with respect to his hydropower assumption before publication, but did so only on July 10, 2017, two weeks after the June 27, 2017 publication of the Clack Paper. This request by Dr. Clack occurred after publication despite Prof. Jacobson's repeated requests for Defendants NAS and Dr. Clack to investigate claims of false facts before publication. Dr. Clack's email makes clear he was seeking actual model time-series output to determine factually whether a hydroelectric and/or flexible load model error occurred. There was no other reason to request model output.

Indeed, as any computer modeling specialist would testify, whether a model error (i.e., a "bug") appears is always a question of fact. *See, e.g., Regal W. Corp. v. GrapeCity, Inc.*, No. C11-5415 BHS, 2013 WL 1148422, at *7 (W.D. Wash. Mar. 19, 2013) ("GrapeCity, however, has

[1] Plaintiff did not come into possession of this information until after the prior hearing in this matter.

adequately shown that questions of fact exist as to the falsity of Softketeers' representations. For example, there is a question of fact whether the code was "faulty" as opposed to trivial, routine bug fixes."). By seeking model output to verify whether a hydropower (false claim #3) or flexible load (false claim #1) occurred in the Jacobson model, Dr. Clack admitted that it is a question of fact whether such an error occurred. In addition, by asking for data, he admitted that he had doubts about the veracity of Clack Paper claims about hydropower and flexible load errors in the Jacobson Paper model. The response provided by Prof. Jacobson indicates that there are obvious reasons to doubt the veracity of the accuracy of the Clack Paper.

In fact, the model results showed zero bug (modeling error) (Exhibit 5), which likely is why neither Dr. Clack nor NAS ever commented publicly or in any of the Court proceedings on the model results that were sent to them. Their argument that the statement is a question of scientific disagreement does not change the objective falsity of the statement. However, the fact that Defendants failed to investigate whether a bug occurred until after publication and the fact they failed to correct the publication once provided evidence of no bug demonstrates a reckless disregard for the truth, which is sufficient to constitute actual malice under D.C. law. Indeed, nowhere in any letter or pleading do Dr. Clack or NAS deny that the results provided to them through Exhibit 5 indicate no model error with respect to hydroelectric power or flexible loads.

The three provably false facts by the Clack Authors directly led to the main defamatory statement, made multiple times in the Clack Paper, that Professor Jacobson and his coauthors committed "*modeling errors*." This is an outright misrepresentation of the truth, not a matter of scientific disagreement.

As the D.C. Court of Appeals held in *Mann*, "[s]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Id.* at 1241.

The *Mann* court further clarified that false factual statements do not gain protection merely because they were made in a scientific forum: "if the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger debate." *Id.* at 1242-43; *id.* at 1245 ("the First Amendment gives no protection to an assertion 'sufficiently factual to be susceptible of being proved true or false' even if the assertion is expressed by implication in 'a statement of opinion'") (quoting *Jankovic v. Int'l Crisis Grp.*, 593 F.3d 22, 27 (D.C. Cir. 2010) and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

In the present case, statements of "modeling errors" directly led to newspaper headlines that made Prof. Jacobson appear "odious, infamous, or ridiculous." Words, whether explicit or implicit, that make a person appear "odious, infamous, or ridiculous" give rise to a valid defamation claim. *Houlahan v. Freeman Wall Aiello*, 15 F. Supp. 3d 77, 82 (D.D.C. 2014), quoting *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C.2000).

Further, an objectively false statement that defames a person (e.g., that makes them appear "odious, infamous, or ridiculous") does not find shelter in the First Amendment merely because it does not "attack an individual's honesty and integrity or imply as fact that an individual is engaged in professional misconduct." (Order 24).

Finally, the Court should not have directed Plaintiff to pay attorney's fees merely because he chose to forgo further litigation. In a further show of their bad faith, based on their submission of invoices to Plaintiff, ***Defendants seek to recover in excess of $700,000 in attorney's fees***, a shockingly high amount for a case that centered upon a single dispositive motion with no answer even filed.

Importantly, the Court is not required by the Anti-SLAPP Act statute (the "Act") to award attorney's fees to Defendants. Given the newly come to light admissions of the Clack Paper

authors and the other arguments herein, the Court should reverse its ruling awarding attorney's fees to Defendants.

FACTS

I. The Admissions by Drs. Clack and Caldeira

A. Dr. Caldeira's admission that the values in the Jacobson Paper were average values and not maximum values

On February 16, 2019, after the parties had briefed the issues before the Court, Dr. Caldeira agreed in a public tweet that Table 1 of the Jacobson Paper factually contains average, not maximum values. When asked, "*Just to see whether @KenCaldeira can act in good faith, please tell us, @KenCaldeira, does Table 1 of our paper contain avg or max values? You claimed max. Will you correct this factually false claim & resulting conclusion in PNAS? If no, your false fact is intentional.*" To that, Dr. Caldeira replied, "*Yes, I should have realized . . . .*" See **Exhibit 1**, Caldeira Tweet. This admission alone establishes that, as a factual matter, one of the three primary authors of the Clack Paper admitted to the falsity of one of the three defamatory statements it made about the Jacobson Paper.

Even without Dr. Caldeira's admission, it is a fact, not an opinion, that the values in Table 1 of the Jacobson Paper are average values and not maximum values. See **Exhibit 2**, which first shows Table 1 of the Jacobson Paper. Specifically, the bottom left value in Table 1 shows a total for the 48 contiguous U.S. states of 1,572.8 GW, which is the sum of values from individual sectors above it. The footnote to the table states that the numbers in that column originate from a different paper (Jacobson et al., 2015, Energy & Environmental Science), which is also shown in Exhibit 2 at 2. Table 1 (left column) of the second paper has the same value within roundoff error (1,591 GW for 50 U.S. states minus 14.5 GW for Alaska minus 3.8 GW for Hawaii = 1572.7 GW for the 48 contiguous U.S. states).

Moreover, the text on the second page of Exhibit 2 clearly states, "Table 1 summarizes the state-by-state end-use load calculated by sector…The table is derived from a spreadsheet analysis of **annually-averaged** end-use load date." (emphasis added). (Ex. 2 at 2). Thus, because the footnote of Table 1 of the Jacobson Paper references the Energy and Environmental Science paper as the source of data, Table 1 of the Jacobson Paper factually contains average values, and as Dr. Caldeira admitted, there is zero "scientific debate" about this.

B. Dr. Clack's admission that the Jacobson Paper included Canadian hydropower in its analysis

Following the previous briefing on the Motion to Dismiss, Plaintiff has uncovered evidence not previously available to Plaintiff to present to the Court revealing that Dr. Clack was fully aware of the factual falsity of his claim in the Clack Paper about the Jacobson Paper, when he stated, "Average future generation assumed by refs. 11 (Jacobson et al., *PNAS*, 2015 = the Jacobson Paper) and 12 (Jacobson et al., *Energy and Environmental Sciences*, 2015) is 13% higher than the highest peak year in the last 25 y and 85% higher than the minimum year in the last 25 y." (Clack Paper, attached hereto as **Exhibit 6**, at 4.) This statement is false factually and a misrepresentation of the Jacobson Paper results, since it misrepresents the Jacobson Paper as including only U.S. hydropower output rather than U.S. plus imported Canadian output, then goes on to compare U.S. plus Canadian output from the Jacobson paper with U.S.-only data.

First, Section 5.4 of Reference 12 (specifically referred to above by the Clack Paper) clearly and unambiguously states that the hydropower total assumed in that paper includes Canadian hydropower:

> "In addition, 23 U.S. states receive an estimated 5.103 GW of delivered hydroelectric power from Canada. Assuming a capacity factor of 56.47%, Canadian hydro currently provides 9.036 GW worth of installed capacity to the U.S. This is included as part of existing hydro capacity in this study to give a total existing (year-2010 capacity in the U.S. in Table 2 of 87.86 GW)."

Furthermore, Reference 11 (Jacobson Paper) clearly and unambiguously states in Footnote 1 of Table S2 that the hydropower data in that table are from that same paper, Jacobson et al. (*Energy and Environmental Sciences*, 2015), which is Reference 12 of the Clack Paper and Reference 4 of the Jacobson Paper. As such, the Jacobson Paper uses U.S. plus imported Canadian hydropower.

Despite the explicitly-stated and explicitly referenced fact that both papers included Canadian hydropower, Dr. Clack falsely compared Canadian plus U.S. values from the Jacobson Paper with U.S. data only. Dr. Clack admitted, on September 17, 2017, that he knew that the Jacobson Paper included imported Canadian hydropower, yet he and NAS continued to misrepresent to the Court that it is a scientific disagreement about whether the Jacobson Paper contained Canadian hydropower. Further, he used the twisted argument that the Jacobson Paper number is correct and the U.S. data are correct, so there is no false statement. This is a twisted, bad faith argument, since knowingly comparing U.S. plus Canadian model output with U.S. only data not only violates all scientific ethics, but it also misrepresents factually the accuracy of the Jacobson Paper results.

Further, there is no scientific issue about whether the Jacobson Paper contained Canadian hydropower. It is a factual issue, and Dr. Clack was aware of the fact because he referenced the paper that included the definition of the data. Specifically, Reference 12 of the Clack Paper explicitly states that that study included Canadian hydropower. Reference 11 of the Clack Paper explicitly references Reference 12 of the Clack Paper as the source of hydropower data. There is no ambiguity, and in fact it is an absolute question of fact as to whether the Jacobson Paper included Canadian hydropower.

Dr. Clack knew this statement was false and misrepresentative of Jacobson Paper results, because he knew it falsely compared Jacobson Paper U.S. plus Canadian hydropower numbers

with U.S. data only rather than comparing U.S. versus U.S. only or U.S. plus Canadian versus U.S. plus Canadian data, which is the factually correct comparison.

On September 21, 2017, Dr. Clack gave a Powerpoint presentation that included information on the Jacobson Paper. In a slide from that presentation, Dr. Clack admits that Professor Jacobson included Canadian hydropower output data in the analysis. See VCE PowerPoint Slide, attached as **Exhibit 3**. On the bottom of his own slide, where he is describing Prof. Jacobson's PNAS paper, Dr. Clack states that Prof. Jacobson's work "*Rel(ies) on Canadian hydroelectricity when necessary...*" Based on this admission alone, Dr. Clack admits that Figure 3 of the Clack Paper is erroneous, and the negative conclusions drawn from Figure 3 of his paper about the Jacobson Paper are erroneous as well.

This is material because the Clack Paper did not account for the Jacobson Paper's use of Canadian hydropower data, and conducted an apples to oranges comparison based on the false premise that the Jacobson Paper only included U.S. data to reach its false and defamatory conclusions about the Jacobson Paper. Thus, Dr. Clack admitted in writing in Exhibit 3 that he and his authors provided false and misrepresentative factual statements and conclusions about the Jacobson Paper regarding this issue. Despite his admitting this false comparison of the Jacobson Paper after publication, Dr. Clack has still refused to correct the error. NAS has similarly refused even to investigate this false factual statement despite being informed of it multiple times.

C. Dr. Clack falsely asserted the Jacobson Paper contained "model errors" without taking steps available to him to verify that claim in the Clack Paper

On July 11, 2017, two weeks after publishing the Clack Paper, Dr. Clack sent an email to Prof. Jacobson requesting results for the hydropower output model used in the Jacobson Paper. See Email dated July 11, 2017 attached as **Exhibit 4**, ("Model Output Request") (requesting the "outputs" for the LOADMATCH model). The significance of the Model Output Request is that

Dr. Clack made the assumption that the LOADMATCH output model used in the Jacobson Paper had two major modeling errors (also known as "bugs") (regarding hydroelectric power and flexible loads), without ever verifying that the assumed error actually existed.

Whether or not the LOADMATCH model contains a bug with respect to the hydropower assumption is and always has been a factual issue, and never a matter of opinion or scientific disagreement. *See, e.g., Regal W. Corp. v. GrapeCity, Inc.*, No. C11-5415 BHS, 2013 WL 1148422, at *7 (W.D. Wash. Mar. 19, 2013) ("GrapeCity, however, has adequately shown that questions of fact exist as to the falsity of Softketeers' representations. For example, there is a question of fact whether the code was "faulty" as opposed to trivial, routine bug fixes."). Whether a model contains a bug is a question of fact that is provably true or false. The fact that Dr. Clack sent a request for model output is an admission by Dr. Clack that he thought he would be able to determine factually whether a model error occurred based on model results. It is thus an admission that Dr. Clack knew whether hydropower and flexible load errors occurred is a question of fact. Further, Dr. Clack's assertion that model errors occurred when he did not even attempt to look at results of the model before publication establishes that he acted with reckless disregard for whether or not his claim was true or false.

As it turned out, the results of his request revealed that there was zero model error, yet neither Dr. Clack nor NAS ever sought to correct the paper. See Response from Prof. Jacobson providing model results, attached as **Exhibit 5**. Exhibit 5 shows Prof. Jacobson's response to Dr. Clack, in which he demonstrates factually there was no model error in the calculation of hydroelectric power:

> "*With respect to the 30-second hydropower time-series (which I have generated after taking some time), here is the summed hydropower energy over 6 years (52547.9874993792 hours, or 6.306 million 30-second time steps:*"

> "*2413.37597110289 TWh*"
>
> "*This is exactly consistent with the 2413 TWh in Table 2 of our 2015 PNAS paper and with the 2413.38 TWh I previously provided you from the 1-hour time series and with the 2413.37 TWh from the 1 month time series, both of which are located at*"
>
> http://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/HydroTimeSeriesPNAS2015.xlsx
>
> "*The peak hydropower discharge rate from the 30-s time series was 1.36999094810873 TW*"
>
> "*This is close to the 1.348 TW maximum in the hourly average time series.*"
>
> "*Thus, the fact that we kept hydropower energy constant while increasing the peak discharge rate is exactly consistent with what I told you on February 29, 2016 and exactly consistent with the hourly and monthly time series, which I posted previously, and with the figures in our 2015 paper and in Table 2 of our paper. In fact, the hourly and monthly time series merely derive mathematically from the 30-second time series.*"

Id. Significantly, NAS was copied on the email with this same evidence. *Id.* In addition, Exhibits 1, 2, and 5 illustrate zero model error with respect to flexible loads.

Despite the fact that both Dr. Clack and NAS were provided with factual evidence that there was no model error, neither NAS nor Dr. Clack disclosed this to the Court; instead both Dr. Clack and NAS claimed in their pleadings that the question of whether an error occurred in the model was an "issue of scientific debate" rather than a question of fact that could be disproven or proven with the actual model output.

After Professor Jacobson initially (before publication) brought Dr. Clack's false claim in the Clack paper about a hydropower modeling error ("This error is so substantial that we hope there is another explanation for the large amounts of hydropower output depicted in these figures") to the attention of Dr. Clack and PNAS, Dr. Clack merely inserted another untrue statement into what became the published version of the Clack Paper, "One possible explanation for the errors in

the hydroelectric modeling is that the authors assumed they could build capacity in hydroelectric plants for free within the LOADMATCH model." (Ex. 6, Clack Paper 8.)

This additional statement was deceptive for three reasons. First, Dr. Clack had already agreed in writing that he knew that Prof. Jacobson increased the peak discharge rate by adding turbines to existing dams to increase the peak discharge rate without changing the annual average water flow rate from dams (and had the ability and requirement to request model output to verify this before his publication). As such, Dr. Clack already knew this was not "one possible explanation," it was the only and actual explanation. Yet, Dr. Clack pretended again he was not aware of the exact truth.

Second, the correct explanation did not involve any model error, yet Dr. Clack erroneously claimed it did (he stated, "one possible explanation for the errors in hydroelectric modeling" Clack Paper SI at 2). While Prof. Jacobson did not explain the assumption clearly in the four corners of the original paper, he did provide the information to Dr. Clack by email and the assumption was readily determinable from model results and data, which are, by definition, part of the paper (e.g., the Jacobson Paper clearly states, "Data available upon request (from M.Z.J.)." Failing to include the cost or a clear explanation of the hydro assumption in the four corners of the paper was a mistake in the Jacobson et al. paper, but it had nothing to do with the results of the model, which are part of the paper since they are incorporated by reference and available upon request, as stated directly in the paper. Regardless, in reality the model results indicate zero model error (see Exhibit 5). Because Dr. Clack was factually aware of those results, he and NAS had a duty to correct their false claims of a model error. Yet they never did so despite numerous requests from Prof. Jacobson.

Third, although Dr. Clack knew the correct explanation and knew that the explanation explained the discrepancy, Dr. Clack failed to remove any claims of model error throughout the paper with regards to the hydropower assumption. This omission could only be intentional since he had agreed in writing over a year before that he understood what Professor Jacobson did. Dr. Clack could have easily stated that he disagreed with Prof. Jacobson's cost or feasibility assumptions or stated that he did not think the result was realistic, but that is not what he did. Instead, he maliciously sought to discredit the modeling of Professor Jacobson despite his awareness of the soundness of the model output data.

In sum, not only did Dr. Clack deceive NAS once by pretending he knew nothing about the hydropower assumption in the first draft of his paper, but he deceived NAS and the public a second time by inserting a statement in the final version that compounded the deceit of the first statement.

To this day, Dr. Clack and NAS's attorneys assert that the demonstrably false claim of model error is a debatable scientific issues rather than consisting of verifiable facts.

II. The Errors Led to the Clack Paper's Erroneous and Defamatory Conclusion

The main conclusion of the Clack Paper was, "From the information given by ref. 11, it is clear that both hydroelectric power and flexible load have been modeled in erroneous ways and that these errors alone invalidate the study and its results." Yet, Dr. Caldeira has now admitted in writing that Table 1 has average, not maximum values. Thus, the Clack Paper's claim that "In fact, the flexible load used by LOADMATCH is more than double the maximum possible value from table 1 of ref. 11" is factually false, not a question of scientific disagreement. This alone renders half of the main conclusion false as a factual matter.

Second, Dr. Clack has admitted in writing that he never requested hydropower output prior to publication to determine whether hydropower model error occurred. By requesting hydropower output after publication, he admitted a model error can be determined factually from model output. Whether an error in the LOADMATCH model occurred with respect to hydropower was determined factually, and the results were sent to Dr. Clack and PNAS. See Exhibit 5. The results are exactly consistent with the published output, and they show factually that there is zero error in the model as it conserves water exactly, as also indicated in this public spreadsheet of results https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/HydroTimeSeriesPNAS2015.xlsx.

Thus, two of the three provably and/or admittedly false statements by the Clack Authors directly led to the main conclusion in the Clack Paper, "From the information given by ref. 11, it is clear that both hydroelectric power and flexible load have been modeled in erroneous ways and that these errors alone invalidate the study and its results." The factual falsity of this statement has nothing to do with scientific debate. It has to do with hard facts and admissions in writing.

III. Why Professor Jacobson Withdrew His Lawsuit

The reason Prof. Jacobson voluntarily withdrew his lawsuit without prejudice had nothing to do with a concern he would lose the case. The case was always been about provably false factual statements that led to the defamatory claim by Dr. Clack and NAS of model error. In fact, prior to the lawsuit, Prof. Jacobson requested that Defendants issue corrections of the factually false statements and/or a retraction before to avoid the lawsuit entirely. He later offered to drop the lawsuit entirely if *PNAS* would publish simple factual corrections. Both PNAS and Dr. Clack refused, preferring to continue with the litigation.

Rather, Prof. Jacobson chose to dismiss the case in large part because of the unexpectedly expensive costs of litigating the case, as set forth in a public statement issued on February 22, 2018 (available at https://twitter.com/mzjacobson/status/966800003439054848 and reprinted in pertinent part below):

> **9. Q. Why did you dismiss the lawsuit on February 22, 2018?**
>
> A. It became clear, just like in the Mann case, which has been going on for 6 years, that it is possible there could be no end to this case for years, and both the time and cost would be enormous. Even if the motions for dismissal were defeated, the other side would appeal, and that alone would take 6-12 months if not more. Even if I won the appeal, that would be only the beginning. It would mean time-consuming discovery and depositions, followed by a trial. The result of the trial would likely be appealed, etc., etc.
>
> Second, a main purpose of the lawsuit has been to correct defamation by correcting the scientific record through removing false facts that damaged my coauthors and my reputations. While I have not succeeded in having the scientific record in the C17 article corrected, I have brought the false claims to light so that at least some people reading C17 will be aware of the factually inaccurate statements.
>
> As such, after weighing the pros and cons, I find that I have no more reason to fight this battle. I believe it is better use of my time continuing to help solving pressing climate and air pollution problems.

Regardless of the basis for his dismissal, the three questions at issue are all questions of fact ("something for which proof exists."), and the facts support, at minimum, Prof. Jacobson's defamation claim. It was improper for the Court to infer otherwise, suggesting that the "timing of the dismissal" (Order 18 n.8) indicated a lack of merit to Plaintiff's claim.

The rules permit a dismissal of Plaintiff's case at this stage for any reason, and the Court's acceptance of the Rule 41(a)(1)(A)(i) dismissal is a formality. *See Bakos v. CIA*, No. CV 18-743 (RMC), 2019 WL 3752883, at *2 (D.D.C. Aug. 8, 2019) ("a court's acceptance of [a] voluntary dismissal is merely a formality,' 'properly viewed as a procedural ruling that cannot serve as the basis for a determination that [a party] prevailed'").

ANALYSIS

I. Legal Standard for a Motion for Reconsideration

A. Rule 59(e) Standard

This Court has broad discretion to review its order pursuant to a motion for reconsideration under Super. Ct. Civ. R. 59(e). *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 810 (D.C. 1984); *Dahlgren v. Audiovox Communs. Corp.*, No. 2002 CA 007884 B, 2010 D.C. Super. LEXIS 10, at *2-3 (D.C. Super. Ct. Sept. 17, 2010) (citations and quotations omitted) (the discretion should be exercised when the Court "has made an error not of reasoning but of apprehension"). Although Rule 59(e) refers to alteration or amendment of a "judgment," a Rule 59(e) motion, often captioned as a motion for reconsideration, may appropriately challenge any order where the grounds for relief are based on an error of law. *Id.*; *see also Blyther v. Chesapeake & Potomac Tel. Co.*, 661 A.2d 658, 662 (D.C. 1995) (Ruiz, J., concurring) ("Judges are constantly reexamining their prior rulings in a case on the basis of new information or argument, or just fresh thoughts."); *Frain v. D.C.*, 572 A.2d 447 (D.C. 1990) ("The essence of appellants' argument was that Judge Salzman's initial decision was incorrect and that he should reconsider it. This kind of motion is properly brought pursuant to Rule 59(e)").

Additionally, should the Court not grant the instant Motion, Plaintiff's Motion tolls the time for him to file an appeal of the Court's Order. *Frain*, 572 A.2d at 450 ("a timely motion filed pursuant to Rule 59 tolls the time for appeal of the underlying judgment").

B. Rule 60(b) Standard

Rule 60(b)(2) permits a motion to relieve a party from a final judgment on the grounds of "newly discovery evidence that, with reasonable diligence, could not have been discovered in time . . . ." In *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 804 (D.C.1984), the

Court of Appeals explained that motions for reconsideration are generally analyzed under both Rules 59(e) and 60(b):

> Because the two rules overlap, 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2817 (1973 & Supp.1983), it is not always clear whether a particular motion properly constitutes a Rule 59(e) or a Rule 60(b) motion. The approach of the federal courts, consistent with the policy of liberal construction of the rules, has generally been to consider a motion which is proper under either rule as made pursuant to Rule 59(e) if timely filed under that rule, *see, Coleman v. Lee Washington Hauling Co., supra,* 388 A.2d at 46–47 n. 5 (permitting the court to reach the merits of the underlying judgment), and under Rule 60(b) if not timely filed under Rule 59(e) (permitting the court at least to consider the denial of the motion to reconsider).

Id. at 805.

II. Prof. Jacobson Was Likely to Prevail in His Lawsuit

A. The Three Questions of Fact in this Case

Black's Law Dictionary defines a fact as "An actual and absolute reality, as distinguished from mere supposition or opinion; a truth, as distinguished from fiction or error." Black's Law Online Dictionary, 2nd Ed., available at https://thelawdictionary.org/fact/ (last visited May 18, 2020) (underlining in original).

The three key facts at issue are as follows:

a) Whether Table 1 of Jacobson et al. (2015) contains maximum or average values.

b) Whether the projected 2050 average annual hydropower output in Jacobson et al. (2015) (as presented in Table 3 of Clack et al., 2017) included United States plus Canadian versus just United States hydropower.

c) Whether a bug existed in the LOADMATCH computer code that caused the peak discharge rate of hydropower (nameplate capacity) to accidently exceed the installed capacity listed in Table S2 of Jacobson et al. (2015) without conserving water or

energy or whether that was an intended feature of the code that preserved the annual average energy output thus water flow rate.

Given the dictionary definition of a fact, "an actual and absolute reality, as distinguished from mere supposition or opinion" (Cambridge Dictionary), each of the questions above is clearly a question of fact. Each has a "yes" or "no" answer. The fact that each has a yes/no answer is now established further by admissions by Dr. Clack and Caldeira, as discussed next.

The first false factual statement in the Clack Paper (presented in paragraphs 42-49 of the original Complaint) led directly to the false claim in the Clack Paper that "*flexible loads*" in Table 1 of the Jacobson Paper were inconsistent with those shown in figures, giving rise to a "*modeling error*." The second false fact (paragraphs 62-64 of the original Complaint) resulted directly in the erroneous conclusion in the Clack Paper, "… implausibility of the assumed increase in hydroelectric net generation." The third false fact (paragraphs 50-61 of the original Complaint) along with the first false fact led directly to the false conclusion in the abstract "…this work…contained modeling errors…" In other words, if the Clack Authors had not produced three false facts, they would not have been able to draw the false conclusions about modeling errors that they did. The factually false conclusion about modeling error subsequently resulted in newspaper headlines and online articles and tweets that caused Prof. Jacobson to look "odious, infamous, or ridiculous" in the public's eye. *Houlahan*, 15 F. Supp. 3d at 82.

B. Under D.C. Law, the Statements Were Fact, not Opinion

The admissions of two of the Clack Paper authors show that defamatory statements described in Plaintiff's Complaint are not only facts, but facts that are not disputed by the authors of the Clack Paper. Dr. Caldeira admitted that the values in the Jacobson Paper were average values and not maximum values. Dr. Clack admits that the Jacobson Paper included Canadian

hydropower in its analysis. Dr. Clack also admitted, by requesting hydropower and flexible load data after publication, that whether a modeling error occurred with respect to hydropower and flexible loads was a question of fact determinable from data and that he had doubts about the factual truthfulness of his claims of modeling error in the Clack Paper.

This Court's Order did not squarely address whether the admission regarding average vs. maximum values was defamatory, other than to state generally that it was a "statement[] reflecting scientific disagreements." (Order 24). But Dr. Caldeira's admission reveals that it was not a disagreement at all nor an issue of scientific debate.

The Court states in its ruling that, in the *Mann* 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." (Order 24). However, that position applies only to *opinions* about the soundness of a methodology. The *Mann* Court also clarifies, "But if the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger debate." *Mann*, 150 A.3d at 1242. Moreover, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). Here, one of the Clack Paper's authors by his admission agrees with Prof. Jacobson that the statement regarding average vs. maximum values is false as a factual matter. Dr. Clack also admits that he was factually incorrect to assume the Jacobson Paper included only U.S. hydropower output.

C. The Statements Harmed Prof. Jacobson's Reputation

In its Order, the Court assessed that the statements "[d]o not attack his dishonesty or accuse him of misconduct." But that is not the standard articulated by *Mann*, which held that "statements [that] assert or imply false facts that defame the individual" do not enjoy First Amendment protection. *Mann*, 150 A.3d at 1242.

In addition, defamatory statements that injure a person's professional standing can be explicit or implicit statements. *Houlahan*, 15 F. Supp. 3d at 82. In *Houlahan*, the court held that "[w]ith respect to the remaining two statements, although they do not explicitly call Plaintiff's professionalism into question, a reasonable person could read these statements to imply that Plaintiff's conduct was unprofessional." *Id.*

In the present case, statements of "*modeling errors*" directly led to newspaper headlines that made Prof. Jacobson appear "odious, infamous, or ridiculous." Words, whether explicit or implicit, that make a person appear "odious, infamous, or ridiculous" give rise to a valid defamation claim. *Houlahan v. Freeman Wall Aiello*, 15 F. Supp. 3d 77, 82 (D.D.C. 2014), quoting *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C.2000). "Under District of Columbia defamation law . . . a court's power to find that a statement is not defamatory as a matter of law is limited: "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *Houlahan*, 15 F. Supp. 3d at 82, quoting *White v. Fraternal Order of Police,* 909 F.2d 512, 518 (D.C. Cir. 1990).

That the misrepresentations in the Clack Paper had a defamatory meaning and impugned Prof. Jacobson's reputation is apparent by just a few examples of the many negative articles (and titles thereof) published soon after publication of the Clack Paper and that reported on its erroneous

conclusion. The false statement and articles immediately caused Prof. Jacobson to appear "odious, infamous, or ridiculous," because after publication of the Clack Paper, the following headlines appeared in front of millions of people within hours to weeks. These headlines made Prof. Jacobson out to be a sloppy and dishonest scientist. The headlines used terms like "lie," "scam," and "errors":

- "The case for 100 percent renewables rests on a lie" (6/26/17 Energy Collective)
- "People are starting to catch on to the 100% renewable energy scam" (6/22/17 Manhat. Inst)
- "Scientists blast Jacobson 100% wind, water, and solar plan for errors" (6/20/17 PV Mag)
- "Study destroys 'Tooth fairy' research used by activists…" (6/22/17 Energy In Depth)
- "Landmark 100 percent renewable energy study flawed, say 21…experts" (6/23/17 SciAm)
- "Debunking the scientific fantasy of 100% renewables" (6/26/17 Forbes)
- "The appalling delusion of 100% renewables exposed" (6/24/17 National Review)
- "Celebrity professor beloved by Democrats smacked down by peers" (6/22/17 College Fix)
- "Experts debunk 100% renewables decarbonization" (6/20/17 Power Magazine)
- "Scientists sharply rebut influential renewable energy plan" (6/19/17 MIT Tech Review)
- "100 percent wishful thinking: The green-energy cornucopia" (9/9/17 Green Social Thought)
- "Road to renewable energy filled with potholes of magic thinking" (8/16/17 The Hill)

One of the articles, for example, stated, "The conclusion of the critique [in the Clack Paper] is damning. Professor Jacobson . . . committed 'modeling errors,' the scholars wrote." Fisticuffs Over the Route to a Clean-Energy Future, E. Porter, New York Times, June 20, 2017, available at https://www.nytimes.com/2017/06/20/business/energy-environment/renewable-energy-national-academy-matt-jacobson.html.

As similarly described by the Scientific American blog, in an article titled "Landmark 100 Percent Renewable Energy Study Flawed, Say 21 Leading Experts," the Clack Paper "found that Jacobson's analysis "… contained modeling errors…" R. Fares, June 23, 2017, available at https://blogs.scientificamerican.com/plugged-in/landmark-100-percent-renewable-energy-study-flawed-say-21-leading-experts/ (last visited May 15, 2020). Quoting from the Clack Paper, one online publication concluded that "[i]n plain English, what the [Clack] review says is: Jacobson's

work is a joke." http://www.powerlineblog.com/archives /2017/11/green-weenie-of-the-year-mark-jacobson.php, posted November 2, 2017 by S. Hayward in Energy Policy (emphasis added).

Thus, not only was the defamatory statement (that the Jacobson Authors committed modeling errors) based on false facts admitted to by Dr. Clack and Dr. Caldeira, but the defamatory statement clearly led to the ridicule of Prof. Jacobson. The newspaper headlines directly resulted in harm to Prof. Jacobson's reputation, hate mail, and the questioning of previous results related to his model of renewable energy roadmaps. This, in turn, led to specific losses of funding in addition to his loss in reputation.

The intent by Dr. Clack and Dr. Caldeira to impugn Prof. Jacobson's professional reputation is further demonstrated by Dr. Caldeira's tweet of March 3, 2018 (**Exhibit 7**, second page), which Dr. Clack endorsed by "liking" it. The tweet claims that Professor Jacobson "cook(ed) the books":

> I want to spend my time engaging the work of people who deal with their colleagues in a professional manner, who are transparent in their assumptions, ***and who do not try to cook the books to achieve preconceived results***.

Id. (emphasis added).

In a separate tweet by Dr. Clack on August 24, 2017 (**Exhibit 8**), in response to a tweet, Dr. Clack replied: "Shame the work by similar authors on grid reliability was discredited" and he linked to his *PNAS* paper. Thus, not only was the *PNAS* paper defamatory, but Dr. Clack and Dr. Caldeira's behavior after that was in bad faith. This demonstrates a pattern of intent to publicly harm Prof. Jacobson's reputation.

D. The New Evidence Further Demonstrates that Defendants Acted with Actual Malice

As Plaintiff argued in its Opposition to the Defendants' Motion to Dismiss, (see, e.g., Opposition to NAS Motion 16-19), NAS acted with reckless disregard for the truth or falsity of the claims in the Clack Paper. During the several month period in which Prof. Jacobson attempted to explain the misrepresentations to NAS, NAS gave no indication that it made any effort to investigate a single one of Prof. Jacobson's assertions regarding factual misstatements in the Clack Paper. To the contrary, (1) one NAS Board Member refused even to investigate, correct, or forward to the Clack Authors for correction any of the false or highly misleading statements Prof. Jacobson brought to NAS's attention, and (2) the editorial board refused to investigate these same claims, submitted again on May 5, 2017 (See Email thread, attached hereto as **Exhibit 9**), instead merely sending them to the Clack Authors to consider. After the Clack Paper was published, Prof. Jacobson provided NAS and Dr. Clack with a copy of his July 11, 2017 email providing the model output data that Dr. Clack had finally requested two weeks after allowing the Clack Paper to be published.

This evidence demonstrates a reckless disregard for the truth. Dr. Clack improperly led the public to believe the false claim in his paper, "This error is so substantial that we hope there is another explanation for the large amounts of hydropower output depicted in these figures." (Ex. 6, Clack Paper at 8 and Supporting Information ("SI")) at § S 1.1). After Professor Jacobson informed PNAS of this deception, Dr. Clack made the additional untrue statement that "[o]ne possible explanation for the errors in the hydroelectric modeling is that the authors assumed they could build capacity in hydroelectric plants for free within the LOADMATCH model." (*Id.* at SI at 2.)

As stated in *Mann*, "[a] plaintiff may prove actual malice by showing that the defendant either (1) had 'subjective knowledge of the statement's falsity,' or (2) acted with 'reckless disregard for whether or not the statement was false.'" 150 A.3d at 1242-43. A plaintiff can establish actual malice under the "reckless disregard" standard by establishing that "the defendant in fact entertained serious doubts as to the truth of [the] publication." *Id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968)); ("reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing"). The plaintiff may show that the defendant had such serious doubts about the truth of the statement inferentially, by proof that the defendant had a "high degree of awareness of [the statement's] probable falsity." *Id.* (quoting *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 688, 109 S.Ct. 2678). A showing of reckless disregard is not automatically defeated by the defendant's testimony that he believed the statements were true when published; the fact finder must consider assertions of good faith in view of all the circumstances. *St. Amant*, 390 U.S. at 732, 88 S.Ct. 1323 ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports"). "Thus, in considering the evidentiary sufficiency of the plaintiff's response to a special motion to dismiss filed under D.C. Code § 16-5502 (b), the question for the court is whether the evidence suffices to permit a reasonable jury to find actual malice with convincing clarity." *Mann*, 150 A.3d at 1252.

Thus, actual malice occurs when there is "reckless disregard for whether or not the statement was false," and recklessness "may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." In the present case, Prof. Jacobson provided ample evidence and reason to give Dr. Clack and NAS doubt about the accuracy of their report (e.g., Exhibits 2 and 5). By requesting model output after publication, Dr. Clack also

"entertained serious doubts as to the truth of the publication" and acknowledged that the questions about hydropower and flexible load modeling errors were indeed questions of fact that could be resolved from the output. Yet, neither NAS nor Dr. Clack corrected their factually false claims of model error with respect to flexible loads (admitted to in Exhibit 1 and demonstrated in Exhibits 2 and 5) or hydropower (demonstrated in Prof. Jacobson's reply in Exhibit 5 and herein).

This additional statement was deceitful for three reasons, as previously discussed in Facts Section I.C, *supra*.

In sum, not only did Dr. Clack deceive NAS once by pretending he knew nothing about the hydropower assumption in the first draft of his paper, but he deceived NAS and the public a second time by inserting a statement that compounded the deceit of the first statement.

E. A Jury Could Reasonably Find That Prof. Jacobson Would Prevail

Based on the forgoing, under the *Mann* standard, "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." 150 A.3d at 1232. Notably, the *Mann* court cautioned against too strict an application of the likely to succeed standard lest it violate constitutional standards:

> This canon leads us to interpret the phrase "likely to succeed on the merits," undefined in the D.C. Anti–SLAPP statute, in a manner that does not supplant the role of the fact-finder, lest the statute be rendered unconstitutional. We, therefore, conclude that to remove doubt that the Anti–SLAPP statute respects the right to a jury trial, the standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that the claimant could not prevail *as a matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury.

Id. at 1235-36 (emphasis in original). In other words, a special motion to dismiss "is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act." *Id.* at 1239.

The above admissions and evidence before the Court meet the legally sufficient standard that a jury could reasonably find that Prof. Jacobson's defamation claim is supported by that evidence.

III. The Court Erred in Awarding Attorney's Fees After Prof. Jacobson Voluntarily Dismissed his Lawsuit

D.C. Code § 16-5504 provides a permissive standard for the award of attorney's fees to a party bringing a motion under §§ 16-5502 or 16-5503 – the Act does not require the Court to award such fees. Here, such an award is not warranted because two of the authors of the Clack Paper admit the falsity of two of the central statements upon which the paper bases its conclusion, and Dr. Clack acted with a reckless disregard for the falsity of his statement that the Jacobson Paper contained "model errors" without taking steps available to him to verify that claim before publication. Similarly, NAS failed to investigate whether the claims of the Clack Paper were truthful even after being put on notice of their potential falsity.

Additionally, the Court has erred in adopting a new standard under D.C. law that wrongly and unfairly punishes a Plaintiff for voluntarily dismissing his case merely to avoid, *inter alia*, the considerable expense of additional litigation. Plaintiff incorporates by reference the previous arguments set forth in its Opposition and Sur-Reply to the Defendants' Motions to Dismiss that D.C. would reject the application of the "catalyst theory" to D.C.'s Anti-SLAPP Act. The D.C. Court of Appeals has unequivocally stated that a plaintiff may voluntarily dismiss its lawsuit to avoid liability for attorney's fees under D.C. Code § 16-5504(a). *See Doe v. Burke*, 133 A.3d 569, 578-79 (D.C. 2016) (stating "had [plaintiff] wished to minimize her potential exposure to a fee award, she could have dismissed her lawsuit at any time. . . .") (citation omitted).

As the United States Supreme Court ruled in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept, of Health and Human Resources*, 532 U.S. 598, 606 (2001), "Never have we

awarded attorney's fees for nonjudicial 'alteration of actual circumstances.'" D.C. courts have interpreted the term prevailing party in the same way that the Buckhannon Court did. *See e.g. Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C.2006) (a prevailing party is one who has "been awarded some relief by the court") (quoting *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603).

The Anti-SLAPP statute does not permit a movant who claims it has "effectively prevailed" to recover fees, only a movant who has actually "prevailed" by obtaining a court ruling "on a motion brought under § 16-5502 or § 16-5503." D.C. Code § 16-5504. As discussed above, "prevailing party" status is a legal term that allows the unusual recovery of attorney's fees only where the party has been awarded relief by the Court in the specific form allowed by the statute.

As Plaintiff previously noted, there is no authority in this jurisdiction to consider an anti-SLAPP Motion to Dismiss the same as a motion for summary judgment for purposes of a voluntary dismissal. Had the D.C. Council intended to preserve a movant's right to a ruling on an Anti-SLAPP motion once filed, and if granted, a ruling on fees and costs, the D.C. Council could have included a section in the anti-SLAPP statute that provided that a Special Motion to Dismiss has the same effect as a Motion for Summary Judgment for purposes of Rule 41(a)(l)(i). Alternatively, the D.C. Council could have required defendants to file a "Special Motion for Summary Judgment." It did neither of these things, however.

There is case law in this jurisdiction specifically interpreting whether it is proper to award attorney's fees under the Act when a Court has not ruled on a special motion to dismiss. The United States Court of Appeals for the District of Columbia held in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015) that:

> After granting or denying a special motion to dismiss under the Anti-SLAPP Act, a court may grant attorney's fees and costs to the prevailing party. See D.C.

> Code § 16-5504. **The 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).

Id. at n.5 (emphasis added). Thus, similar to *Buckhannon* and *Settlemire*, *Abbas* explains that attorney's fees are available only after the court has granted or denied relief under a special motion to dismiss, and nothing else. *See id.* D.C. Code § 16-5504(a) **only** permits that relief after the court issues a finding on a special motion to dismiss or quash under the Act, and the Court had no authority under the Act to award attorney's fees after the dismissal was filed. *See also Bakos v. CIA*, No. CV 18-743 (RMC), 2019 WL 3752883, at *2 (D.D.C. Aug. 8, 2019) ("a court's acceptance of [a] voluntary dismissal is merely a formality,' 'properly viewed as a procedural ruling that cannot serve as the basis for a determination that [a party] prevailed'") (quoting *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002).

The Court's Order distinguishes *Abbas* merely because *Abbas* decided that the Act's special motion to dismiss would not apply in federal court. But the rationale in *Abbas* is compelling regardless: this Court, absent explicit authority, should not create an exception to the American Rule against awarding attorney's fees without explicit statutory authority to do so. The District of Columbia has "chosen to apply the general principles of the American Rule" and held that "it is entitled to the respect of the court, till it is changed, or modified by statute." *See Synanon Found., Inc. v. Bernstein*, 517 A.2d 28, 35-36 (D.C. App. 1986) ("[t]he general practice of the United States is in opposition to [the award of attorney's fees to the prevailing party]") (quoting *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306, 1 L.Ed. 613 (1796)).

Rather than adhere to that long-standing principal, the Court finds an analogy to the D.C. FOIA statute compelling enough to expand the reach of Section 16-5504 and award attorney's fees

in a situation outside of the specific confines of the statute. This is incorrect, and neither an analogy to another statute like FOIA, which involves a completely different context for the application of that statute, nor an analysis of another state's caselaw interpreting a different statute should suffice to overcome the American Rule's strong presumption. *Bakos*, 2019 WL 3752883, at *1 ("The American rule is that parties must bear their own attorney's fees unless a statute or contract explicitly authorizes fee-shifting."). Ultimately, the Court relied on a combination of analogy and another state's (California's) interpretation of a completely different Anti-SLAPP statute to circumvent the American Rule, holding that California's "caselaw supports an interpretation of the statutory language that effectuates the purpose [of the] statute and encompasses awards to parties who were not awarded relief by the Court." (Order 11).

The Court acknowledged the unsettled nature of the law as to how to approach its analysis of Plaintiff's voluntary dismissal and that the D.C. Court of Appeals could disagree. (See Opinion 18 n.8). Plaintiff respectfully submits that the Court erred in its ruling and awarded fees in circumstances that go outside the basis set forth in the statute.

CONCLUSION

For the reasons enumerated above, namely that Dr. Clack and Dr. Caldeira have admitted that the "egregious errors" in question were false and that Dr. Clack and NAS recklessly neglected to investigate whether they were false, Prof. Jacobson requests that the Court amend its Order and DENY Defendants' Motion for the award of attorney's fees.

Respectfully submitted,

Date: May 18, 2020

COHEN SEGLIAS PALLAS
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/s/ Jackson S. Nichols

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POINTS AND AUTHORITIES

1. Rule 41(a)(1)(A)(i) of the Superior Court Rules of Civil Procedure.
2. Rule 59(e) of the Superior Court Rules of Civil Procedure.
3. Rule 60(b)(2) of the Superior Court Rules of Civil Procedure.
4. The cases cited herein.
5. The inherent authority of the Court.

RULE 12-I CERTIFICATION

Undersigned counsel hereby certifies that on April 24, 2020, he wrote to counsel for Defendants NAS and Dr. Clack informing them of Plaintiff's intent to file a motion for reconsideration and providing the basis for the motion, and followed up on May 17, 2020 to seek their consent to this Motion. Defendants did not consent to the instant Motion.

/s/ *Jackson S. Nichols*
Jackson S. Nichols, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via Case File Xpress this 18th day of May, 2020 on:

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