IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

MARK Z. JACOBSON, Ph.D., **Plaintiff,** **v.** **CHRISTOPHER T. M. CLACK, Ph.D., *et al.*,** **Defendants.**	**Civil Action No. 2017 CA 006685 B** **Hon. Elizabeth Carroll Wingo** **Next Court Date: None Scheduled**

DEFENDANT NATIONAL ACADEMY OF SCIENCES' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTIONS FOR COSTS AND ATTORNEY'S FEES UNDER THE D.C. ANTI-SLAPP ACT

INTRODUCTION

Plaintiff's Motion for Reconsideration should be denied because it fails to meet the high standards required for a court to reconsider a prior order. Rather than identify errors of law or new facts, as required, Plaintiff's motion does nothing more than re-argue his unsuccessful Opposition and Surreply to Defendants' Motion for and Award of Attorney's Fees and Costs. But the third time is not the charm for Plaintiff's arguments, which are no more persuasive than they were the first and second time around. Despite Plaintiff's window dressing, his Motion offers nothing new in terms of either facts or legal developments that warrant vacating the April 20 Order. The only "new" material offered by Plaintiff are two purported post-publication "admissions" by authors of the Clack paper that were made more than one year before the April 20 Order and are thus untimely. But even disregarding Plaintiff's lack of diligence in not raising these statements earlier, neither so-called "admission" demonstrates the falsity of the challenged

statements in the Clack Paper, and neither makes the challenged statements defamatory. Further, Defendant National Academy of Sciences ("NAS") did not make and is not implicated by either of the "admissions." Thus, even accepting Plaintiff's flawed interpretation of the statements as accurate, they are not relevant to the Court's conclusion that NAS is entitled to attorney's fee and costs under the Anti-SLAPP Act.

Plaintiff also re-argues the applicability of *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. App. 2016), *as amended* (Dec. 13, 2018), which was thoroughly briefed by the parties and analyzed by the Court in its April 20 Order. But the "new admissions" do not change the analysis of the *Mann* case as it applies here. Indeed, the chasm between *Mann*, where the offending statements compared a scientist to a convicted child molester and implied that he had engaged in misconduct and fraud, and this case cannot be bridged by the new statements offered by Plaintiff, regardless of the spin he puts on them.

Likewise, Plaintiff's arguments as to whether Defendants can recover fees and costs where Plaintiff voluntarily dismissed his lawsuit are a re-tread of the same arguments rejected by the Court in the April 20 Order. Plaintiff does not point to a single legal authority contradicting the Court's conclusion, and the Court should reject Plaintiff's re-hashed arguments.

RELEVANT FACTUAL BACKGROUND

1. On December 8, 2015, Dr. Jacobson (and 3 co-authors) published a paper in the Proceeding of the National Academy of Sciences ("PNAS") titled *Low cost solution to the grid reliability problem with 100% penetration of intermittent wind, water and solar for all purposes.* ("Jacobson Paper").

2. On June 19, 2017 Dr. Clack and 20 other scientists and scholars published a paper in PNAS titled *Evaluation of a proposal for reliable low-cost grid power with 100% wind, water*

and solar (the "Clack Paper"). The Clack Paper identified numerous perceived flaws in the Jacobson Paper's assumptions, methodology and presentation.

3. Dr. Jacobson reviewed and commented extensively on the Clack Paper prior to its publication.[1] After the Clack Paper's publication Dr. Jacobson identified an additional alleged issue relating to its analysis of a chart identified in the Jacobson Paper as including only output from the contiguous 48 states in the United States. In communications to the Clack Paper authors Dr. Jacobson argued that despite how the chart was labeled in the Jacobson Paper it actually also included output imported from Canada. This, according to Dr. Jacobson, explained the discrepancy identified by the Clack Paper authors.

4. In July 2017 Dr. Clack requested additional data from Dr. Jacobson related to certain of his rebuttals to the Clack Paper. Dr. Jacobson refused to provide the requested data claiming it was too time consuming for him to do so (despite the fact that the Jacobson Paper states the data would be provided upon request). He agreed to provide a different set of data instead. *See* Exh. 9 to the Motion for Recon. None of the data provided by Dr. Jacobson contradicted or changed any of the Clack Paper's conclusions.

5. In October of 2017, Dr. Jacobson filed a lawsuit against NAS and Dr. Clack seeking $10 million plus punitive damages and attorney fees and demanding retraction of the Clack Paper.

6. In November of 2017, four months after the publication of the Clack Paper, two months after Dr. Clack's presentation and a month after filing his lawsuit, Dr. Jacobson sought to publish errata seeking to clarify the inconsistency in the Jacobson Paper relating to the Canadian output issue and the hydropower assumptions. *See* Order at fn. 14.

[1] The Clack Paper was originally selected for publication February 24, 2017.

7. On November 27, 2018, NAS and Dr. Clack filed motions to dismiss the Complaint under the Anti-SLAPP Act. Those motions were briefed extensively by all parties.

8. On January 5, 2018, Dr. Jacobson filed a motion for targeted discovery, to which he was not entitled under the SLAPP statute. That motion was also briefed by the parties and argued during the February 2, 2018, case status conference.

9. On February 20, 2018, the Court held a hearing on the defendants' motions to dismiss.

10. Two days after the hearing on the motions to dismiss on February 22, 2018, Dr. Jacobson dismissed his lawsuit.

11. On March 7, 2018, NAS and Dr. Clack filed motions for attorney fees.

12. On April 20, 2020 the Court granted Defendants' motions for attorney fees and issued an Opinion setting out its findings and conclusions.

13. On May 18, 2020, Dr. Jacobson filed the current motion for reconsideration.

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER RULE 59(E) OR RULE 60(B) BECAUSE HE HAS NOT IDENTIFIED NEW FACTS OR A LEGAL ERROR THAT WARRANT RECONSIDERATION OF THE APRIL 20 ORDER

Plaintiff does not identify a single error of law or new fact to justify reconsideration under Rule 59(e) or Rule 60(b), respectively. *See In re Tyree*, 493 A.2d 314, 317 n.5 (D.C. 1985) (errors in law required to justify reconsideration under Rule 59(e)); *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 804 (D.C. 1984) (new facts required to justify reconsideration under Rule 60(b)). Because Plaintiff is merely rehashing his arguments in opposition to NAS motion for fees, he fails to meet the requirements of either Rule. That is, the Rules do not "'enable a party to complete presenting [its] case after the court has ruled against

[it].'" *District No. 1 – Pacific Coast Div. v. Travelers Cas. And Sur. Co.*, 782 A.2d 269, 278 (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 8282 (7th Cir. 1995)).

Moreover, both Rules require due diligence by the party seeking to invoke them. Rule 59(e) motions may not be used to raise arguments or present evidence that could have been raised prior to the entry of judgment, and Rule 60(b) motions require the movant to show good reason for failing to act sooner. *Id.* (citing 11 C. WRIGHT AND MILLER, AND M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2810.1 at 127-28 and § 2857 at 260 (1995 ed.)).

A. Plaintiff Identifies No Errors of Law

With respect to his motion under Rule 59(e), Plaintiff does nothing more than make the same legal arguments and discuss the same authorities that he raised in his prior briefing, and that were considered thoroughly by this Court in its 36-page Order. Rather than even identifying a plain error of law, he argues in terms of what the Court "should" have done, advancing the same arguments that he made in his prior briefing. This is simply insufficient to justify the relief Dr. Jacobson seeks in his motion for reconsideration.

B. The "New" Statements Identified By Plaintiff Do Not Change The Conclusion That Plaintiff Was Not Likely To Prevail In His Lawsuit

1. Plaintiff's submission of the new statements is untimely

Nor does Plaintiff present any new facts that he could not have raised well before the April 20 Order was issued. Indeed, the most recent new statement of supposed factual error that he cites was publicly tweeted in February 2019, more than one year before the Court's ruling. He offers no excuse for why he did not raise the three statements that form the basis of his motion for reconsideration prior to the Court's ruling, and thus has not acted with the due diligence required by Rule 60(b).

First, Plaintiff proffers a public tweet by Dr. Caldeira dated February 16, 2019. *See* Mot. for Reconsideration at 3. Indeed, Dr. Caldeira apparently made his tweet in direct response to a communication from Dr. Jacobson. Yet he offers no explanation as to why he did not move to supplement his briefing on Defendants' Motions for Attorney's Fees and Costs at some point during the fourteen months between the tweet and the Court's April 20 Order.

Second, Dr. Jacobson identifies a slide in a September 21, 2017, PowerPoint presentation by Dr. Clack. In that slide, Dr. Clack stated that Dr. Jacobson's assumptions rely on Canadian hydroelectricity, despite the fact that his paper stated that it considered contiguous United States only. This slide was tweeted a month prior to Dr. Jacobson filing his lawsuit, almost 17 months prior to Dr. Caldeira's above statement, and five months before the February 20, 2018, hearing on Defendants' motions to dismiss. Plaintiff makes the unsupported assertion that he did not "come into possession" of this statement until after the February 20 hearing, but that does not excuse his waiting until after the Court issued its April 20 opinion to bring the statement to the Court's attention.

Third, Dr. Jacobson identifies statements in Dr. Clack's article regarding modeling errors supposedly without taking steps to verify that claim. This statement, however, was previously identified and fully briefed by the Parties. It is simply not a "new" fact that would justify the Court's reconsideration of its Order. .

All of Plaintiff's arguments about these statements could have been submitted to the Court prior to entry of the April 20 Order. Plaintiff's Motion thus is untimely and should be denied.

2. Plaintiff misrepresents the context of the "new" statements, which are not admissions and which cannot be imputed to NAS

In addition to being untimely, the new statements identified by Dr. Jacobson are not admissions at all, and cannot be imputed to NAS so as to justify reconsideration as to NAS.[2] First, Dr. Caldeira's statement is simply not actionable. As discussed in greater detail in Dr. Clack's Opposition, in Dr. Jacobson's motion and brief, he edited Dr. Caldeira's challenged statement in a dramatic and misleading way. When it is read in its entirety, it is clear that that statement is a continued scientific disagreement with Dr. Jacobson's methodology, not an admission that Dr. Caldeira's scientific judgment was wrong. In any event, that statement was made by Dr. Caldeira in a tweet and cannot in any way be attributed to NAS.

Second, the PowerPoint slide identified by Dr. Jacobson similarly fails. As set out above, the slide acknowledges that Dr. Jacobson's model included both United States and Canadian hydroelectricity, but notes that Dr. Jacobson's article purported to rely on United States power only. Not only is that statement not an admission, but, as noted by the Court, Dr. Jacobson himself acknowledged this error when he printed a correction to his article. Moreover, this statement also cannot be attributed to NAS and cannot support reconsideration as to the Court's ruling in favor of NAS.

Finally, Dr. Jacobson again points to Dr. Clack's criticism of his modeling with respect to the output from hydroelectric plants. This criticism, however, was included in the complaint, and in the motion to dismiss and all of its briefing. And, in the Order, the Court rejected this statement as a basis for a defamation claim. Dr. Jacobson attempts to breathe new life into this

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[2] Plaintiff argues that the new statements demonstrate NAS's "reckless disregard" for the truth. Mot. for Reconsideration at 24. But as Plaintiff concedes, he made this same argument in his Opposition to NAS's Motion to Dismiss, which the Court rejected. *See id.* Because Plaintiff's characterization of the statements as "admissions" is wrong, the statements do nothing to resurrect his unsuccessful argument regarding NAS's state of mind. Further, Plaintiff makes no attempt to show that NAS even knew about any of the new statements. Accordingly, they have no bearing on the Court's conclusion that Plaintiff was unlikely to succeed on his defamation claim.

claim by noting that others have criticized him as a result of Dr. Clack's article or summarized Dr. Clack's article *in their own words*. Again, this is simply insufficient to make this statement defamatory and to provide a basis for Dr. Jacobson's motion.

3. Even accepting Plaintiff's interpretation of the "new" statements, they are not actionable under *Mann*

Dr. Jacobson's selective quotes from the *Mann* decision also do not provide a basis for reconsideration of the Court's Order. The Court was well aware of and thoroughly considered the *Mann* decision, as evidenced by the robust discussion of that case in the April 20 Order. Plaintiff has not pointed to any legal authority suggesting that the Court's construction of *Mann* is erroneous. Instead, Plaintiff re-treads its prior arguments that *Mann* removes First Amendment protection from "statements of opinion" that "imply a provably false fact, or rely upon stated facts that are provably false." Mann, 150 A.3d at 1241; Mot. at 5. According to the Plaintiff, the three "admissions" identified in his Motion prove that the Clack Paper's conclusion that Plaintiff committed "modeling errors" was demonstrably false as a matter of fact. He then argues that such "false facts" are actionable under *Mann* and cannot be viewed as a matter of scientific agreement.

Even if one were to accept Plaintiff's presentation of the Caldeira and Clack statements as accurate, they do not make the Clack Paper defamatory under *Mann*. While Plaintiff selectively quotes from *Mann* for the proposition that a statement couched as opinion can be actionable if it implies a falsehood, he ignores how the *Mann* court applied this principle. *Mann* distinguished between challenged statements "tak[ing] issue with the soundness of Dr. Mann's methodology and conclusions" and those statements that were "personal attacks" on Dr. Mann's honesty and integrity and that asserted or implied that he had engaged in misconduct and deceit. The Court of Appeals concluded that the former were within the ambit of scientific or political

debate and thus protected by the First Amendment, while the personal attacks and implications of wrongdoing and deception were not. *Mann*, 150 A.3d at 1242. The latter included statements in an article comparing Dr. Mann to convicted child molester Jerry Sandusky and alleging that he had engaged in "wrongdoing," "deceptions," "data manipulation," and "academic and scientific misconduct." *Id.* at 1243. The article's author argued that such statements were in service of his criticism of Dr. Mann's "hockey stick" graph depicting climate change and the research underlying it. The Court of Appeals rejected this argument, noting that the article did not comment on Dr. Mann's methodology at all. Rather, the article called for further investigation of Dr. Mann, implying as fact that he had engaged in personal wrongdoing. *Id.* at 1244.

Here, in contrast, as thoroughly discussed in the prior briefing, the crux of Plaintiff's issue with the Clack paper is that it challenged his methodology. Indeed, the challenged statements going to the three so-called "key facts" that Plaintiff points to in his Motion all relate to his methodology and reporting. *See* Mot. at 18. These are exactly the type of statements that *Mann* recognized as protected. None of the statements that Plaintiff takes issue with imply that that Plaintiff engaged in deliberate wrongdoing or misconduct or otherwise cast aspersions on Plaintiff's personal integrity. This was the sound conclusion of the April 20 Order regarding the statements in the Clack paper, and the statements Dr. Jacobson identifies in his motion for reconsideration do not alter this assessment. Plaintiff takes issue with the Court's conclusion, arguing that a false statement need not attack an individual's honesty or integrity to be actionable as defamatory. *See* Mot. for Reconsideration at 6. Plaintiff's novel theory, offered without citation, ignores altogether the limitations on the *Mann* holding and would turn every instance of academic criticism into a defamation claim.[3]

[3] Plaintiff ignores that the Court found that Plaintiff failed to meet his burden of proving a likelihood of success on the merits of either his breach of contract or promissory estoppel claim. He has not moved to reconsider

C. Plaintiff Has Not Established That The Court Erred As A Matter of Law In Awarding Attorney's Fees

Plaintiff's argument that NAS is not entitled to attorney's fees and costs because it is not a "prevailing party" is also a re-tread of his prior unsuccessful arguments. The only new case law that he cites is *Bakos v. Central Intelligence Agency*, No. CV 18-743 (RMC), 2019 WL 375288, at *2 (D.D.D. Aug. 8, 2019). But *Bakos* is inapposite. It considered fee shifting under the federal Equal Access to Justice Act, which awarded fees to a "prevailing party." As the Court recognized in the April 20 Order, the standard for fee shifting under D.C.'s Anti-SLAPP Act is whether a party "prevail[ed], in whole or in part," which is different than a pure prevailing party standard.

Plaintiff disagrees with the Court's reliance on the analogous D.C. FOIA statute and California's interpretation of the fee-shifting provision of its anti-SLAPP statute, but he cites no authority calling the Court's reasoning on these two points into question. His only explanation for his belief that the Court's reasoning is wrong is that an analogous statute (D.C.'s FOIA) and another state's case law (California's) should not be sufficient to overcome the American Rule's "strong presumption" against fee shifting. This argument is unpersuasive, as it ignores the fact that D.C.'s Anti-SLAPP statute *expressly allows* for fee shifting. Plaintiff also faults the Court for too casually distinguishing *Abbas v. Foreign Policy Group LLC*, 783 F.3d 1328 (D.C. 2015), as concluding that a special motion to dismiss under D.C.'s anti-SLAPP statute would not apply in federal court. Mot. for Reconsideration at 29. To the contrary, the Court pointed out that the situation in *Abbas* is inapposite to the facts in this case. In *Abbas*, the court considered whether a plaintiff that had asserted both SLAPP claims and other non-SLAPP claims should be subject to

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these findings. Thus, even if his re-treaded argument regarding his defamation claim under *Mann* were successful, it would not foreclose NAS's recovery of attorney's fees.

fee-shifting under the anti-SLAPP statute for the non-SLAPP claims. That situation does not apply here.

Finally, Plaintiff improperly refers to the size of the legal bills submitted by Defendants in accordance with the April 20 Order as proof of the unjust nature of the April 20 Order. Mot. for Reconsideration at 6. The amount of fees and costs to be awarded is not currently before the Court. Per the April 20 Order, that issue will be decided by the Court only after Defendants submit their praecipes setting forth their requests and Plaintiff submits any timely objections. Further, Plaintiff does not cite any authority for the proposition that the amount of the fees and costs incurred is relevant to whether fee shifting is appropriate under the anti-SLAPP statute. Lastly, Plaintiff's characterization of this litigation as involving a "single dispositive motion with no answer even filed" (Mot. for Reconsideration at 6) is way off the mark. Plaintiff ignores the parties' briefing (including his surreply) regarding Defendant's motions for attorney's fees and costs, as well as the fact that he insisted on pursuing discovery in this case. Plaintiff's litigious posture is responsible for the fees and costs incurred in this case, as further evidenced by his instant motion for reconsideration, which lacks merit and should be denied.

Dated: June 1, 2020

Respectfully submitted,

/s/ Evangeline C. Paschal

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2020, a copy of the foregoing Defendant National Academy of Sciences' Opposition to Plaintiff's Motion for Reconsideration of Order Granting Defendants' Motion for Costs and Attorney's Fees Under the D.C. Anti-Slapp Act was served by mail on:

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