SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Mark Z. Jacobson, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	2017 CA 006685 B
	)	Judge Elizabeth Wingo
Christopher T.M. Clack, Ph.D.	)	Next Court Date: None Scheduled
	)	
and	)	
	)	
National Academy of Sciences,	)	
	)	
Defendants.	)	
_____	)	

DEFENDANT CHRISTOPHER CLACK'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION.

INTRODUCTION

Defendant Christopher Clack hereby opposes 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. ("Mot. for Recon.").

Plaintiff, Dr. Mark Jacobson ("Plaintiff" or "Dr. Jacobson") has filed a 31 page brief with more than 40 pages of accompanying exhibits in support of his motion for reconsideration of this Court's Order granting Dr. Clack's ("Defendant" or "Dr. Clack") motion for attorney fees under the Anti-SLAPP Act. Dr. Jacobson's asks the Court to revisit all of its detailed findings and rulings in light of alleged "new evidence" that consists of: 1) a non-party's sardonic remark on Twitter (a year *after* Plaintiff dismissed his case and 20 months *after* the Clack Paper was published) and 2) a line in a slide (that refers to Plaintiff's explanation for one of his mistakes) from a power point presentation made three months *after* the Clack Paper was published.

Nothing in Plaintiff's motion explains how this alleged "evidence" could possibly affect the Court's key findings that the three statements at issue in the litigation related to Dr. Jacobson's methodology and conclusions in a scientific paper are not defamatory as a matter of law.

Regarding the Court's award of attorney fees Plaintiff has reargued the exact same points already considered by the Court and has not cited any change in the law or any authority that is contrary to this Court's well-reasoned analysis.

RELEVANT FACTUAL CHRONOLOGY

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]

4. *After* the Clack Paper's publication Dr. Jacobson for the first time raised a new 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 the

[1] The Clack Paper was originally selected for publication February 24, 2017 and a draft was provided to Dr. Jacobson.

data actually also included output imported from Canada. This, according to Dr. Jacobson explained the discrepancy identified by the Clack Paper authors.

5. 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.

6. In September of 2017, Dr. Clack made a presentation for a Canadian audience that included a slide discussing the Jacobson Paper. On the slide, Dr. Clack notes that the Jacobson Paper assumptions ***"Rely on Canadian hydroelectricity when necessary (in a paper that stated it was contiguous US only)."*** Exh. 3 to Mot. For Recon. This statement was consistent with the discrepancies identified in the Clack Paper and also included Dr. Jacobson's subsequent explanations of the issue identified in the Clack Paper.

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

8. 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 for the first time sought to publish errata seeking to publicly clarify the inconsistency in the Jacobson Paper relating to the Canadian output issue noted above and the hydropower assumptions. *See* Order at fn. 14.

9. Dr. Clack and NAS filed motions to dismiss the Complaint under the Anti-SLAPP Act. After extensive briefing by the parties, the Court held a hearing on the motions on February 20, 2018.

10. Two days after the hearing on defendants' motions to dismiss Dr. Jacobson dismissed his lawsuit.

11. Dr. Clack (and NAS) filed motions for attorney fees.

12. On February 16, 2019 (a year after Jacobson dismissed his lawsuit) Dr. Ken Caldeira, the head of the Carnegie Institute of Ecology at Stanford University and one of the co-authors of the Clack Paper, responded to a Tweet from Dr. Jacobson asking:

> "Just to see if @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."

Dr. Caldeira sardonically replied:

> "Yes, I should have realized that when someone rights that 67.66% of the load is flexible, they might mean to communicate that 100% of the load is flexible but only 67.66% of the time."

i.e. I should have realized that your paper actually means something totally different than what it says. Dr. Clack is neither included in nor referenced in this exchange. Dr. Caldeira's tweet was not an admission by him or anyone else that anything in the Clack Paper was false or defamatory. See Exhibit A Declaration of Dr. Kenneth Caldeira.

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

ARGUMENT

I. RELEVANT LEGAL STANDARD.

Plaintiff argues that he is entitled to reconsideration under Rule 59(e) because of alleged legal errors in the Court's Opinion. Reconsideration is an extraordinary remedy that should be

used sparingly. *District No. 1 - Pacific Coast Dist. V. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278 (D.C. 2001). A Rule 59(e) motion to reconsider is not "an opportunity to reargue facts and theories upon which a court has already ruled. The motion must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions." *Amoco Prod. Co. v. Fry,* 908 F. Supp. 991, 993 (D.D.C. 1995).[2] A motion for reconsideration should only be granted "if the moving party can present new facts or clear errors of law that compel a change in the court's prior ruling." *Id.*

Plaintiff's argument that "newly discovered evidence" requires reconsideration of the Court's prior ruling is also governed by Rule 60(b)(2). Under Rule 60(b)(2) newly discovered evidence is evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." The movant must demonstrate that the newly discovered evidence could not have been discovered in advance of trial. *See American Continental Ins. Co. v. Pooya,* 666 A.2d 1193, 1199 (D.C. 1995). Furthermore, new evidence "does not encompass evidence not previously discovered because of "lack of due diligence" or other evidence that "was readily capable of being learned." *Id.* (quoting *Oxendine v. Merrell Dow Pharmaceuticals,* 563 A.2d 330, 334 (D.C. 1989)).

II. PLAINTIFFS' ALLEGED NEW EVIDENCE.

A. Dr. Caldeira's Tweet.

Dr. Jacobson contends that this Court should reverse its carefully reasoned decision because, a year after he abandoned his lawsuit, one of the 20 authors he **did not** sue for defamation, Dr. Ken Caldeira, made a sardonic comment on Twitter. Even though the statement

[2] Rule 59(e) is identical to Federal Rule of Civil Procedure 59(e). Accordingly, citations to federal case law interpreting the federal rule are instructive.

does not refer to Dr. Clack at all, Plaintiff argues the tweet somehow constitutes an admission by Dr. Clack that the paper he published in June 2017 was defamatory.

First, even if the statement by Dr. Caldeira actually said what Dr. Jacobson imagines (it clearly does not), it would have absolutely no relevance to defamation claims Plaintiff specifically targeted at Dr. Clack. This is not "new evidence" and provides no support that Dr. Clack believed any of the criticisms made in the Clack Paper were not justified, were inaccurate or were made to disparage Dr. Jacobson.

Second, the comment can in no reasonable way be read as supporting any of Dr. Jacobson's positions or as any sort of admission that anything in the Clack Paper is incorrect or defamatory. To the contrary, although sardonically written, the Tweet at issue confirms Dr. Caldeira's continued critical view of the Jacobson Paper in general and the "Table 1 issue" in particular. In his motion papers, Plaintiff cuts off the tweet with a (…) at a curious point - in the middle of the first sentence "Yes I should have realized…." Read in full, the sardonic nature of the response is clear. Dr. Caldeira was expressing his view that Dr. Jacobson's current explanations are not consistent with what is actually written in the Jacobson Paper. Indeed, at the time, Dr. Jacobson appears to have read Dr. Caldeira's tweet exactly as it was intended replying immediately - "***Seriously***, Ken you made that up out of thin air." (*See* Exh. 3 to Mot. for Recon.)(emphasis added). There is no explanation whatsoever as to why Plaintiff now regards this as an "admission" by Dr. Caldeira (much less by Dr. Clack). Whether Dr. Jacobson and Dr. Caldeira continue to disagree on the issue is beside the point entirely as explained in the Court's decision. Order at p. 24 ("the question is not who is right…")(quoting *Mann* 150 A.3d at 1242).

B. The September 2017 Chart.

Dr. Jacobson's second piece of "new evidence" is, if anything, even less persuasive. It relates to a presentation Dr. Clack made several months after the Clack Paper was published and after Dr. Jacobson's had provided his rebuttals to the points in the Clack Paper. Plaintiff argues that, because Dr. Clack acknowledged Dr. Jacobson's explanation of one of the cited errors in his paper (relating to the failure to identify that certain of Plaintiff's assumptions relied on Canadian power), Dr. Clack somehow admitted that it was not a mistake at all. Plaintiff fails to explain how this alleged evidence affects any of the Court's rulings.

Moreover, Plaintiff ignores the basic premise that if you mischaracterize what information is depicted in a chart (*i.e.* refer to contiguous U.S. out-put when the chart includes U.S. plus Canadian output) it is not false to suggest that the chart is wrong. The Clack paper pointed that out that the information in the Jacobson Paper's chart was not correct based on the authors own description of what it was intended to represent. The fact that Dr. Jacobson subsequently realized this error - after the Clack Paper was published - in no way makes his initial chart correct or the Clack Paper's criticism incorrect. As noted by the Court, Dr. Jacobson appeared to admit the validity of the Clack Paper's analysis by belatedly submitting a Correction to the Jacobson Paper on this very issue.

Dr. Clack's slide - which was presented after Dr. Jacobson had identified this issue to the Clack Paper authors (but not to PNAS readers generally) - is a completely accurate description of and fully consistent with the Clack Paper's critique and Dr. Jacobson's subsequent correction. It acknowledges Dr. Jacobson's explanation that, contrary to its description in his paper, the chart includes Canadian as well as U.S. out-put but also acknowledges that the paper itself remained uncorrected and inaccurate. Indeed, for whatever reason, Dr. Jacobson resisted making corrections to his paper that he knew were necessary for several years.

Finally, even if this slide had any probative value at all Plaintiff fails to provide any explanation as to why it was not reasonably available prior to the hearing in this case 6 months after the presentation was made, and according to Plaintiff's exhibit, posted on Twitter (September 2017) (See Exh. 3) or, more importantly, how it contradicts any factual or legal argument made by defendants or is in any way distinguishable from the arguments Plaintiff made at great length in his filings which have been considered and rejected by the Court.

C. Alleged Absence of a Bug in Test Data

Dr. Jacobson's third alleged basis for the Court to grant his reconsideration motion is related to the statement that the Jacobson Paper showed hydroelectric output far exceeding the maximum installed capacity. Plaintiff now for the first time argues that the Court needs to inquire into:

> "whether a "bug" existed in the LOADMATCH computer code that caused the peak discharge rate of hydropower (nameplate capacity) to accidentally 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."

Mot. For Recon. At 18. First, nowhere in the Clack Paper, the Complaint in this case or any of the filings by any party has the question of a "bug in the source code" of LOADMATCH been raised. Dr. Clack has never alleged - and Dr. Jacobson has not identified any such statement - that there was an unintended "bug" or unknown glitch in the actual source code used by Dr. Jacobson. Rather, the Clack Paper simply asserts that the assumptions made in the paper were not scientifically reasonable or possible. Indeed, as noted by the Court, the Clack Paper stated that "one possible explanation for the errors in the hydroelectric modeling is that the authors assume they could build capacity in hydroelectric plants for free." Order at 27. Nor is there

even any explanation as to why identification of a "bug in the source code" could possibly be relevant to Dr. Jacobson's Complaint, Dr. Clack's motion to dismiss or this Court's Order.[3]

Nevertheless, Dr. Jacobson now argues that this issue must be analyzed "in light of" Dr. Caldeira's tweet and the 2017 power point slide. He does not, however, explain how either of those items affect or contradict the Court's careful analysis, reasoning and rulings regarding the hydroelectric output statements in the Clack Paper.

Plaintiff also asserts that by requesting data from Dr. Jacobson relating to his rebuttal to the Clack Paper, Dr. Clack has somehow "admitted that he had doubts about the veracity Clack Paper claims about hydropower and flexible load errors in the Jacobson Paper model."[4] There is absolutely no support provided for this wild conjecture.

III. IMPROPER RE-ARGUMENT OF FACTS AND LAW

A. The Court's Opinion Did Not Ignore the *Mann* Decision.

Plaintiff argue that the Court ignored the relevant holding in the Mann decision that statements that assert false facts that defame an individual can be actionable. To the contrary the Court "reviewed the Complaint, the motion and the related pleadings as well as the attachments thereto" and found the statements were **not** defamatory statements but scientific disagreements

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[3] The case cited by Plaintiff, *Regal West Corp. v. Grapecity, Inc.,* No. C11-5415 BHS, 2013 WL 1148422, at *7 (W.D. Wash. Mar. 19, 2013) is a case involving alleged defects in an automated transportation management ("ATM") system defendant developed for and sold to plaintiff. The issue in that case was to what extent were the alleged defects "trivial" or did they render the entire system "faulty." The case has no applicability to the issues in this case.

[4] The email exchange cited by Dr. Jacobson (which was included in the prior briefing) refers to a request from Dr. Clack for additional information from Dr. Jacobson in response to his disagreements with the Clack Paper. Notably, Dr. Jacobson refused to provide the data because it would take too much work on his end and instead provided a far more limited set of data. Even though the Jacobson Paper states the data would not be provided upon request, the 30-second data requested by Dr. Clack has to date never been made publicly available. Nothing Dr. Jacobson actually provided contradicted anything in the Clack Paper. If Dr. Jacobson really believes he is in possession of data that would confirm his positions he should share it with the scientific community to support the alleged merits of his arguments.

"which were appropriately explored and challenged in scientific publications." Order at 24-25. Indeed, the Court found that the contrast of the statements at issue here "with the statements found defamatory in *Mann* could not be greater." Order at 27. Nothing in the 31 pages of Plaintiff's brief or the exhibits attached thereto can reasonably said to challenge this Court's conclusion citing *Mann* that the statements at issue in this case take "issue with the soundness of plaintiff's methodology and conclusions" and are protected by the First Amendment. Nor has plaintiff provided any basis to challenge the Court's conclusion (also citing *Mann*) that the statements did not "defame" Dr. Jacobson as an individual.

B. Plaintiff's Argument That Statements Were Defamatory Because They Were "False Facts" Has Already Rejected By the Court.

Much of Plaintiff's Motion for Reconsideration is simply a rehash of arguments exhaustively covered in the previous briefing. Plaintiff provides the same "analysis" previously submitted to the Court and argues at length that the Clack Paper was factually wrong in its criticisms. *See e.g.* Mot. To Recon. at 3 (the statements are "false facts"). These arguments are indistinguishable from the arguments already made by Plaintiff at length in his Complaint, opposition to the motions to dismiss and voluminous exhibits including 17 pages of written addenda describing in detail why he claims the Clack Paper authors are wrong. *See e.g.* Plaintiff Mark Z. Jacobson's Opposition to Defendant Christopher Clack's Special Motion to Dismiss Pursuant to the Anti-SLAPP Act at pp 10-19 and Exhs 3-5. Dr. Clack incorporates the defendants' prior submissions on these issues.

C. Plaintiff Has Not Identified Any New Authority or Law that Would Support Any of His Arguments Against the Court's Award of Attorney Fees.

Plaintiff claims that the Court erred by circumventing the American Rule that a part must bear its own legal fees and costs. Citing *Bakos v. CIA* , No. CV 18-743 (RMC), 2019 WL 3752883 at*1. However, Plaintiff ignores the fact that the Anti-SLAPP Act expressly authorizes

fee-shifting. *Bakos* itself acknowledges this key exception to the American Rule. "The American rule is that parties must bear their own attorney's fees unless a statute or contract explicitly authorizes fee-shifting." *Id.* (emphasis added). All of Plaintiff's other arguments regarding the award of legal fees simply parrot the ones he made previously. In doing so, Plaintiff ignores the Court's careful and detailed discussion of the statutory language, legislative history and purpose of the Anti-SLAPP Act and the Court's recognition that the D.C. Court of Appeals has held the term of art "prevailing party" is different from the term of art "prevails in whole or in part." Plaintiff also fails to provide any substantive analysis as to why the Court's acceptance of the reasoning in the cited California cases is misplaced or incorrect or why those cases are not persuasive; he simply asserts the Court should have ignored the cases because they are not from D.C. Finally, Plaintiff mischaracterizes the Court's discussion of *Abbas v. Foreign Policy Group, LLC* 783 F.3d 1328 (D.C. Cir. 2015) stating this Court distinguished *Abbas* "merely because *Abbas* decided that the Act's special motion to dismiss would not apply in federal court."[5] The Court went further than that and noted that *Abbas* was addressing a situation that does not exist here - namely whether a plaintiff that 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.[6]

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Dr. Clack's initial motion to dismiss, Plaintiff's motion for reconsideration should be denied and Dr. Clack should be awarded the additional costs and fees associated with responding to this motion.

Dated: June 1, 2020 Respectfully submitted,

[5] Mot. Recon at 29.
[6] Order at p. 9.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2020, I caused the foregoing Defendant Christopher Clack's Opposition to Motion for Reconsideration, to be served via CaseFileXpress on the following:

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