**IN THE SUPERIOR COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFF MARK Z. JACOBSON'S REPLY**
**IN SUPPORT OF HIS MOTION FOR RECONSIDERATION**

Plaintiff Mark Z. Jacobson, Ph.D. ("Plaintiff"), pursuant to Rule 12-I(g) submits this Reply in Support of his Request for Reconsideration of the Court's April 20, 2020 Order (the "Order").

## INTRODUCTION

Defendants NAS and Clack both filed opposition briefs on June 1, 2020 ("NAS Opposition" and "Clack Opposition"). The Oppositions consist of nearly identical purported statements of facts containing material misrepresentations, and the Clack Opposition relies on a declaration of Kenneth Caldeira, an author of the Clack Paper. The misstatements are easily controverted by reference to documents already in the record in this matter. Plaintiff provides the attached Affidavit of Mark Z. Jacobson to aid the Court in understanding why the Oppositions contain factual misrepresentations or highly misleading statements.

## RESPONSE TO OPPOSITION BRIEFS

### I. Plaintiff's Motion is Proper under the Rule 59(e) and 60(b)(2) standards

Defendants mislead the Court in stating that Plaintiff's Motion for Reconsideration ("Motion") is improper. Plaintiff's Motion cites the legal standard for both rules.

Rule 59(e) permits a party to appropriately challenge any order where the grounds for relief are based on an error of law. *See 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)"). Defendants misstate this standard to claim that new authority must be provided.

Here, Plaintiff respectfully submits that the Court erred in its Order for, *inter alia*, the following reasons: (1) the "egregious" errors pointed out by Prof. Jacobson are errors of fact. While Dr. Clack and NAS have claimed scientific disagreement, they have provided no evidence of it, and the claims are disproven by evidence and admissions (see generally, Jacobson Affidavit); (2) the Court misapplied *Mann* to the facts in the record; (3) the Court erred in the standard of proof it applied; and (4) the Court erred in awarding attorneys' fees in a case that had been voluntarily dismissed.[1] [2]

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

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[1] NAS argues that "Plaintiff identifies no errors of law." (Opp. 5). As noted above, that is completely untrue.

[2] Dr. Clack argues that Plaintiff does not identify new authority in its brief, which is incorrect as Plaintiff identifies a case showing that whether a code was faulty is a question of fact. *See Regal W. Corp. v. GrapeCity, Inc.*, No. C11-5415 BHS, 2013 WL 1148422, at *7 (W.D. Wash. Mar. 19, 2013). Plaintiff also identifies a recent case, *Bakos v. CIA*, No. CV 18-743 (RMC), 2019 WL 3752883 (D.D.C. Aug. 8, 2019) that followed the reasoning of *Abbas* and supports the rationale that departures from the American Rule must be based on clearly articulated authority, which Plaintiff respectfully submits was not present here. *Id.* at *2.

. . . ."[3] Plaintiff in good faith represented that two of the three pieces of evidence presented to the Court were not discoverable by him until after Defendants filed their motions for attorney's fees in March 2018. One admission, Dr. Caldeira's tweet, occurred on February 16, 2019. The second came from a slide in a September 21, 2017 PowerPoint presentation by Dr. Clack. This slide also was not in Plaintiff's possession until after the motions were filed (Jacobson Aff. ¶ 1), and the Court denied Plaintiff's motion take any discovery in this matter that would have allowed Plaintiff to obtain this slide earlier.[4]

## II. Defendants Misrepresent Material Facts in the Oppositions

### A. Prof. Jacobson references Canadian hydropower in his Paper

Dr. Clack and NAS falsely suggest to the Court that, because Prof. Jacobson provided an errata clarifying in one place that Table S2 of the Jacobson Paper contains Canadian hydropower, the original Jacobson Paper failed to make any reference to Canadian hydropower. (Clack Opp. 7) (Prof. Jacobson "mischaracterize[d] what information is depicted in the chart"). This is completely false and misleads the Court because Footnote 1 of Table S2 of the Jacobson Paper clearly references the source of hydropower data, and that source specifically states imported Canadian hydro is part of U.S. hydro resources treated. (Jacobson Aff. ¶¶ 30-31). The errata provided by Prof. Jacobson was meant to clarify the nature of the data in Table S2 for people (like Dr. Clack) who failed to carefully read Footnote 1 of Table S2. *Id.* ¶¶ 36-40. Dr. Clack failed to do his homework and simply missed this footnote, then based his conclusions in the Clack Paper on his misunderstanding of the data. Later, he and NAS refused to correct this error, and NAS refused

[3] Defendants claim that "due diligence" is required for presentation of new evidence, (NAS Opp. 5), but do not provide any authority for what such due diligence must consist of. NAS and Clack's arguments regarding the timing for Plaintiff raising the newly discovered evidence are completely *ipse dixit* and without legal support.

[4] Plaintiff readily admitted on page 4 of his Motion that the third piece of evidence was previously before the Court.

to investigate whether it was untrue and even though Dr. Clack has not admitted he knew it was true prior to the lawsuit. *Id.* ¶ 33.

**B. Defendants falsely claim Prof. Jacobson refused to provide 30-second model data**

NAS and Dr. Clack misrepresent to the Court that Prof. Jacobson refused to provide 30-second model data. (NAS Opp. 3 ¶ 4; Clack Opp. 3 ¶ 5). Prof. Jacobson spent several hours developing for Dr. Clack model output for three relevant parameters at 30-second resolution and offered these data to Dr. Clack. (See Jacobson Aff. ¶¶ 51-57) (see also Exhibit 5 to Mot. at 2) ("If you want to see these three series at 30 second resolution, I can make these available to you.). Accordingly, both Defendants blatantly misrepresent the record.

**C. Prof. Jacobson references errors in the LOADMATCH code in his Complaint**

Dr. Clack falsely asserts that "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." (Clack Opp. 8). While Plaintiff acknowledges the Complaint did not use the word "bug," a "modeling error" is a "bug" not only by definition but also as treated in the Clack Paper itself. Dr. Clack's argument dodges the substance of Plaintiff's contention that the Clack Paper falsely asserts as a fact that the LOADMATCH code contains two major modeling bugs. (Complaint ¶ 43) ("Dr. Clack and his co-authors fabricated the assertion that it was a maximum load as well as their concomitant conclusion that it was a modeling error"). Plaintiff's Motion uses the synonymous term "bug" to assist the Court in understanding that the Clack Paper's false statement is *factual* in nature, not a matter of scientific disagreement.

The contents and structure of the Clack Paper itself suggests its authors understand this distinction. For one, "model errors" in the Clack Paper were placed under a heading called "Modeling Errors," and poor assumptions were placed under a separate heading called

"Implausible Assumptions." (Jacobson Aff. ¶¶ 11-12; Mot. Ex. 6 (Clack Paper) at 3). The Clack Paper also distinguished between "modeling errors" and "incorrect, implausible, and/or inadequately supported assumptions" as two entirely different entities, so "modeling errors" did not mean "poor assumptions" in the paper. (Jacobson Aff. ¶¶ 12-14; Mot. Ex. 6 (Clack Paper) at 3). Whether one calls it an "error" or a "bug," Defendants' contentions regarding the LOADMATCH code are factual in nature, and are objectively, provably false. *See Regal W. Corp. v. GrapeCity, Inc.*, No. C11-5415 BHS, 2013 WL 1148422, at *7 (W.D. Wash. Mar. 19, 2013) ("there is a question of fact whether the code was 'faulty' as opposed to trivial, routine bug fixes") (Jacobson Aff. ¶ 15, citing https://en.wikipedia.org/wiki/Software_bug, last accessed June 3, 2020) ("A software bug is an error, flaw or fault in a computer program or system that causes it to produce an incorrect or unexpected result, or to behave in unintended ways.").

Prof. Jacobson describes in detail the false claim of modeling bug by the Clack Authors with respect to flexible load. (See Jacobson Aff. ¶¶ 15-21). The false claim arose due to the Clack Author's mistaken belief that Table 1 in the Jacobson Paper contains maximum rather than average values. *See id.* ¶ 20-22. Prof. Jacobson himself derived the data for Table 1. *Id.* ¶ 21. His sworn testimony establishes that the values in Table 1 have always been annual average values. *Id.* ¶ 21. It is also easily provable from the paper itself, model results, and the paper referenced in Table 1 as the source of the data. *Id.* ¶ 19. No evidence exists contradicting this claim nor was any offered in the Clack Paper nor in any Clack or NAS filing in this matter. *Id.* ¶ 20. Thus, Defendants have failed to present any facts showing a scientific disagreement on this subject other than unsupported statements in court filings.

## III. Defendants' Arguments Fail

Defendants offer numerous arguments that mislead the Court or fail to address the substance of Plaintiff's arguments

NAS argues that the *Mann* case holds that, in the realm of scientific debate, only "personal attacks" are actionable. (NAS Opp. 8-9). This is the same error of law that Plaintiff respectfully submits that the Court made in its application of *Mann* here. (See Mot. 19-27). Defendants' argument also ignores the holding in Mann that "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.[5] Such reasoning is instructive because it prevents giving shelter to any baseless assertion (that is, a conclusion based on an untrue fact) as long as it is made in a scientific forum.

NAS cries that the sky is falling, saying that it "would turn every instance of academic criticism into a defamation claim." (NAS Opp. 9) This misses the mark – such criticism is only actionable if it is based on untrue statements as the ones at issue here.

Here, one of the Clack Paper's authors, Dr. Caldeira, 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.

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[5] NAS disingenuously claims that Plaintiff cites no authority for this proposition, but Plaintiff quotes extensively (not selectively) from *Mann* and from Supreme Court precedent as well. *See, e.g. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) ("[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.").

Defendants attempt to rely on a Declaration from Dr. Caldeira that purports to challenge the nature of his admission, and claim that the tweet was "sardonic" in nature.[6] Yet as Prof. Jacobson, who was part of the Twitter conversation explains, that does not change the meaning of the admission. (Jacobson Decl. ¶¶ 23-27) (Dr. Caldeira not only admitted (by stating, "Yes") in his response that Table 1 of the Jacobson Paper contains average, and not maximum values, but he then subsequently explained in the rest of his response why he made his error in the first place") ("Dr. Caldeira's new false explanation, even if he believed it were true, would not explain the Clack Paper's false claim that Table 1 of the Jacobson Paper contains maximum values instead of average values."). Moreover, Defendants' "sardonic" defense raises an issue of credibility that is appropriately addressed to a jury, which, as Plaintiff contends, is why the Court cannot rely on the record before it to hold that Defendants are prevailing parties. (Mot. 26-27).

Notably, Dr. Clack defends the slide from his September 21, 2017 presentation as "a completely accurate description and fully consistent with the Clack Paper's critique and Dr. Jacobson's correction." (Clack Opp. 7). In other words, he does not deny Plaintiff's contention that the Clack Paper contains a false factual statement, and indeed admits that "the chart [in the Jacobson Paper] includes Canadian as well as U.S. out-put."[7] *Id.* Dr. Clack attempts to absolve himself because Plaintiff issued an errata to the Jacobson Paper, but Plaintiff's errata was only to provide clarity to information <u>that already was in the Jacobson Paper</u> about the contents of Table S2 and which the Clack Paper authors carelessly missed. (Jacobson Aff. ¶¶ 39-40). Notably, both Dr. Clack and NAS themselves refuse to issue a correction to this false factual statement on which the Clack Paper bases its conclusion. (Jacobson Aff. ¶ 33).

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[6] Defendants fault Plaintiff's quote for using an ellipsis, but the introductory phrase makes abundantly clear the nature of the admission. Indeed, Defendants do not argue that the remainder of the sentence changes the meaning of the statement, but rather that it is necessary to show that Dr. Caldeira was being "sardonic."

[7] Given this admission, the tone of Dr. Caldeira's tweet is a complete red herring and irrelevant to the discussion.

This further admission by Dr. Clack is significant because he previously took positions in this litigation – and allowed the Court to believe – that whether the chart contained Canadian as well as U.S. hydropower output was a matter of scientific disagreement. This led to the Court issuing the following statement: "The Court has reviewed the Complaint, the motion and the related pleadings as well as the attachments thereto, and finds that the three asserted 'egregious errors' are statements reflecting scientific disagreements." (Order 24). Despite the fact that Dr. Clack knew before the litigation commenced and now admits that the chart contains Canadian as well as U.S. hydropower output, he has failed to correct this statement in the Clack Paper.

Similarly, Dr. Caldeira admits in his Declaration that Table 1 of the Jacobson Paper contains average, not maximum, values, but he then explains in the rest of his Declaration why he made the error in the first place. (Jacobson Aff. ¶ 24). His explanation, which did not appear in the Clack Paper, also is false, which is why Prof. Jacobson responded to it. *Id.* ¶ 25. Thus, Dr. Caldeira admitted Table 1 had average values twice, not once. *Id.* ¶ 24. Regardless, Table 1 factually contains average values. *Id.* ¶ 27.

Finally, NAS argues that Plaintiff repeats his argument regarding the D.C. Anti-SLAPP Act, but claims that Plaintiff "ignores" that the Act "expressly allows" fee shifting. NAS' characterization is an obvious strawman argument. Plaintiff acknowledges that the Act permits fee-shifting, but points out that, following Plaintiff's voluntary dismissal, the Court was required to accept the dismissal and was no longer able to award attorneys' fees under the Act. The Act only permits the award of attorney's fees on a special motion to dismiss. Once the voluntary dismissal was filed, the special motion to dismiss was no longer properly pending and the Court was without statutory authority to depart from the American Rule and award attorney fees.

Notably, both Defendants completely fail to rebut Plaintiff's argument that the Court erred in the burden of proof that it applied to determine that Plaintiff was not likely to prevail. (Mot. 26-27) ("a jury could reasonably find that Prof. Jacobson's defamation claim is supported by that evidence"). Accordingly, the Court may treat this argument as conceded. *Adams v. United States*, No. CV 10-1646 (RCL), 2011 WL 13351538, at *2 (D.D.C. Dec. 6, 2011) ("a court may treat those arguments that the [other party] failed to address as conceded"); *Martin v. Georgetown Univ.*, No. 2012CA004576, 2012 WL 12124731, at *9 (D.C. Super. Ct. Nov. 14, 2012) (dismissing count of complaint where opposition failed to address argument).

**CONCLUSION**

For the reasons enumerated above, Prof. Jacobson requests that the Court amend its Order and DENY Defendants' Motion for the award of attorney's fees.

Respectfully submitted,

Date: June 8, 2020

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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.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via Case File Xpress this 8th day of June, 2020 on:

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