SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| Mark Z. Jacobson, Ph.D.,<br><br>Plaintiff,<br><br>v.<br><br>Christopher T.M. Clack, Ph.D.,<br><br>and<br><br>National Academy of Sciences,<br><br>Defendants. | 2017 CA 006685 B<br>Judge Elizabeth Wingo<br>Next Court Event:<br>Initial Scheduling Conference:<br>12/29/2017 |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CHRISTOPHER CLACK'S SPECIAL MOTION TO DISMISS PURSUANT TO THE ANTI-SLAPP ACT OR IN THE ALTERNATIVE TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(B)(6).**

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## PRELIMINARY STATEMENT

The District of Columbia Anti-SLAPP Act was enacted to prevent exactly the type of defamation claims presented by this lawsuit. In blatant violation of the protections afforded by the First Amendment, plaintiff is pursuing costly litigation to stifle debate on an important issue of public interest and to prevent his scientific theories from being fully scrutinized and evaluated. Plaintiff's theory of defamation, if accepted, would have a severe chilling effect on scientific debate in the United States and weaken the scientific method as a vehicle to advance the state of public knowledge. The statements at issue relate to published scientific work; they are not personal attacks and are not defamatory as a matter of law and, as such, plaintiff's claim should be dismissed by the Court.

Plaintiff, Dr. Mark Jacobson, a prominent energy and environmental scientist, published a paper promoting a shift in the United States' environmental priorities and policies toward almost exclusive reliance on wind, water and solar energy. In response, defendant Dr. Christopher Clack, along with 20 other prominent scientists and scholars, published a peer reviewed evaluation of that proposal pointing out what they regarded as flaws in its methodology, assumptions and conclusions. Their criticism challenged the substance of the paper but said nothing about the plaintiff personally. Notably, the Complaint contains no allegation that Dr. Clack questioned plaintiff's qualifications, honesty, integrity or good faith. Nevertheless, Dr. Jacobson took the extraordinary step of filing this lawsuit seeking to have the Court simply remove Dr. Clack and his co-authors' evaluation and views from the public debate. Courts have long recognized that litigation is not the appropriate vehicle to settle such scientific disagreements, and the Anti-SLAPP Act is intended to ensure that intimidation and threats of lawsuits do not stifle discussion, debate or criticism regarding issues important to the public interest.

Both Dr. Jacobson and Dr. Clack are prominent environmental scientists who have done influential work in the study of renewable energy. Both are supporters of transitioning the Unites States and the world to zero carbon emissions. The debate at issue in this case relates to *the demonstrated feasibility* of actually achieving 100% renewable energy use from only wind, water and solar power by the year 2050. Dr. Jacobson published a paper claiming such a 100% reliance target is achievable. Dr. Clack and his co-authors reviewed that paper and identified a number of issues that, in their collective scientific opinion, called into question Dr. Jacobson's conclusion. Dr. Jacobson took umbrage with this criticism and outside the public forum (through private emails and letters), he provided explanations for and arguments against the points raised by Dr. Clack and his co-authors and demanded that their evaluation not be published in light of these private communications. Although Dr. Jacobson contends that Dr. Clack and his co-authors were required to simply accept his private arguments and explanations, in each instance, they either simply disagreed with the arguments, determined that the explanations did not adequately address the problems or were inconsistent with the actual text, tables and figures in the paper being evaluated.

Scientific debate does not require that one side simply accept explanations or arguments that it finds implausible or unsupportable (especially when those arguments are not contained in the published work). Indeed, the scientific method only works where independent scrutiny is applied to scientists' publications and their work is challenged through additional published peer-reviewed papers. Dr. Clack and his co-authors fully disclosed and explained the bases and reasoning for each of their critical statements, and their evaluation can be assessed, challenged or disagreed with on its merits.

Dr. Clack's paper did exactly what such evaluations are supposed to do. It raised questions about plaintiff's methodology and conclusions; some of which Dr. Jacobson subsequently acknowledged and corrected. Indeed, it is important to note that *after filing this lawsuit*, Dr. Jacobson, for the first time, published a "clarification" to his paper identifying omissions directly related to issues which are the subject of the litigation. Had Dr. Clack and his co-authors not published their work, it is unlikely that the public record would have been clarified regarding these issues and future policy and further study would have proceeded based on an incomplete and erroneous understanding of Dr. Jacobson's methodology, assumptions and conclusions. This is precisely how scientific debate is supposed to be conducted. Scientists present arguments through peer reviewed journals and subject themselves to comment and criticism. That criticism is then rebutted or the initial findings are corrected, adjusted or clarified to address the points raised. This process breaks down where, as here, scientists with sufficient resources seek to use the courts to intimidate other scientists into silence under the threat of having to defend costly, protracted litigation. Indeed, the contention that a scientist can be liable for defamation because he or she argued that a study contained "mistakes" or faulty assumptions would have a devastating impact on the future of scientific discourse in the United States. Plaintiff has not identified statements that were defamatory and his claims should be dismissed pursuant to the Anti-SLAPP Act or, alternatively, under Superior Court Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

## FACTUAL BACKGROUND

### A. Jacobson And His Co-Authors Publish 100% Renewable Energy Paper.

Plaintiff, Dr. Mark Jacobson, is a "renowned research scientist on global warming and air pollution and the development of large-scale clean, renewable energy solutions."[1] On December 8, 2015, Dr. Jacobson and three co-authors, Dr. Mark Delucchi, Dr. Bethany Frew and Ms. Mary Cameron (the "Jacobson Authors") published an article in the Proceedings of the National Academy of Sciences ("PNAS"),[2] claiming that a large scale U.S. transition to wind, water and solar power among all energy sectors could be achieved by 2050 (the "Jacobson Paper"). They further claimed that the transition would eliminate the need for other energy sources, particularly coal, oil and natural gas, without the need for nuclear power, fossil fuels with carbon capture, or biofuels, while enabling supply to match demand on the energy grid.[3] According to the Complaint, the paper described "results of original research of exceptional importance."[4]

### B. Dr. Clack And His Co-Authors Publish An Evaluation Of The Jacobson Paper.

Defendant, Dr. Christopher Clack is an expert in energy grid planning and renewable energy. He currently is the CEO of Vibrant Clean Energy and was formerly a research scientist for the Cooperative Institute for Research in Environmental Sciences at the University of Colorado Boulder and the National Oceanic and Atmospheric Administration.[5] After the publication of the Jacobson Paper, Dr. Clack and twenty other prominent energy and climate

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[1] Plaintiff's Complaint and Jury Demand (hereinafter "Compl.") at ¶ 1.

[2] PNAS is published by the National Academy of Sciences ("NAS").

[3] *Id.* at ¶ 9.

[4] *Id.*

[5] Biography of Christopher Clack can be found at www.vibrantcleanenergy.com/about-us.

scientists (the "Clack Authors"),[6] who disagreed with its methodology and its conclusions submitted a paper to PNAS evaluating what they perceived to be flaws in the Jacobson Paper's methodology and conclusions ("Clack Paper").[7] The Clack Paper underwent a rigorous peer review process by anonymous, independent experts and was accepted for publication by the National Academy of Sciences in February 2017.[8]

The Clack Paper focused on the methodology, assumptions and conclusions in the Jacobson Paper. It did not suggest that Dr. Jacobson or his co-authors had engaged in misconduct or falsified any information or that they possessed improper motives or knowingly sought to mislead anyone. The Clack Paper described the basis and rationale for its criticisms and identified the criteria it was using to evaluate the Jacobson Paper:

> In our view, to show that a proposed energy system is technically and economically feasible, a study must, at a minimum, show through transparent inputs, outputs, analysis, and validated modeling that the required technologies have been commercially proven at scale, at a cost comparable with alternatives; that the technologies can, at scale, provide adequate and reliable energy, that the deployment rate required of such technologies and their associated infrastructure is plausible and commensurate with other historical examples in the energy sector and that the deployment and operation of the technologies do not violate environmental regulations. We show that [the Jacobson paper does] not meet these criteria and, accordingly do not show the technical, practical or economic feasibility of a 100% wind, solar and hydroelectric energy vision.

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[6] The 20 co-authors of the Clack Paper are identified on the first page of the Clack Paper, *infra* n.6. The co-authors include scientists from prestigious academic institutions including four of plaintiff's colleagues at Stanford University (Dr. Adam Brandt, Dr. James Sweeney, Dr. John Weyant and Dr. Kenneth Caldeira), the Lead Energy Specialist from the World Bank (Dr. Morgan Bazilian) and a senior scientist contributor from the Environmental Defense Fund (Dr. Jane Long).

[7] *See* Clack Paper, attached hereto as Clack Exh. A.

[8] All research papers published in PNAS go through a rigorous review process. A paper must first be reviewed and approved by the NAS editorial board. It is then assigned to an NAS editor who is an active scientist and researcher and then it must undergo independent peer review by at least two separate subject matter experts. Finally, the paper must receive final approval from an NAS editorial board member. *See* PNAS.org/site/misc/reviewprocess.pdf., attached hereto as Clack Exh. B.

Based on the evaluation of the information presented in the Jacobson Paper, the Clack Authors concluded that the feasibility of relying on a narrowed set of options (wind, water and solar) were not supported by the Jacobson Paper's analysis.[9]

### C. Plaintiff Addresses Issues Raised By The Clack Authors.

After the publication of the Jacobson Paper but before the Clack Paper was published, Dr. Jacobson attempted to explain or clarify several of the issues identified by the authors of the Clack Paper.

#### 1. February 2016 Email Communication Between Dr. Jacobson And Dr. Clack.

In February of 2016, Dr. Clack contacted Dr. Jacobson to discuss a substantial discrepancy he had identified in the Jacobson Paper relating to the paper's hydropower output model. Specifically, Dr. Clack noted that the total output of hydropower from the figures presented was far greater than what was shown in the tables and text and, therefore, was not supported by the model's assumptions. In response, Dr. Jacobson sent an email to Dr. Clack admitting that the Jacobson Paper failed to disclose a critical assumption contained in the model - *i.e.,* the model assumed a massive increase in the availability of hydropower by 2050 as compared to currently available levels.[10] Dr. Jacobson also admitted in his email that his model failed to factor in any cost associated with this increase, but claimed that he had subsequently determined that the costs would not be significant.[11] Dr. Clack still believed the model contained errors, however, not only because the assumption identified by Dr. Jacobson was not disclosed in

[9] Clack Paper, Clack Exh. A at 6723.

[10] Compl. at ¶ 51

[11] *Id.*

the paper itself, but also because he regarded the alleged assumption to be wholly unrealistic and he did not believe the costs associated with the assumption would be insignificant.[12]

Despite having privately admitted this omission in February 2016, for over a year, Dr. Jacobson did not amend his paper to fully disclose the hydropower assumption nor did he publicly clarify, correct or explain the alleged omission in PNAS or any other publication. Indeed, as of the publication of the Clack Paper, 16 months after Dr. Jacobson's private email exchange with Dr. Clack, a reader of Dr. Jacobson's paper would have had no way of knowing of this alleged assumption nor of assessing the implications of that assumption on the Jacobson Paper's conclusions and the alleged substantiation for those conclusions.

**2. Dr. Jacobson Complains To NAS About The Clack Paper Criticism.**

In February of 2017, after NAS had peer reviewed and accepted the Clack Paper for publication, it provided a courtesy copy to Dr. Jacobson and offered him the opportunity to write a letter responding to the points raised in the Clack Paper.[13] Upon receipt of the draft, Dr. Jacobson sent NAS a list of reasons why he contended the Clack Paper's criticisms were wrong, false or misleading.[14] NAS reviewed Dr. Jacobson's comments but determined that no substantive changes to the Clack Paper were warranted.[15] NAS sent a finalized version of the Clack Paper to Dr. Jacobson in May 2017.[16] Dr. Jacobson again complained to NAS about the substantive content of the Clack Paper and NAS agreed to send his list of issues to all of the Clack Authors. The 21 Clack Authors thereafter reviewed Dr. Jacobson's list of issues but none

[12] *See* February 29 Email exchange, Compl., Exh. 4; *see also* Clack Authors' Response to Jacobson et. al. (June 2017), attached hereto as Clack Exh. C.

[13] Compl. at ¶12.

[14] *Id.* at ¶¶13-15.

[15] *Id.* at ¶¶16-17.

[16] *Id.* at ¶16.

of them felt that Dr. Jacobson's arguments warranted any change to the paper's findings or conclusions.[17] In some instances, the Clack Authors simply disagreed with Dr. Jacobson's points and in other instances they did not believe his *post hoc* explanations made sense given the actual content of the Jacobson Paper itself and the science at issue.[18]

In light of Dr. Jacobson's repeated complaints and threats of litigation, the NAS editorial board conducted an additional editorial board review of the Clack Paper and again determined there were no substantive issues.[19] NAS sent Dr. Jacobson a final version of the Clack Paper on May 9, 2017.[20] Dr. Jacobson again demanded that NAS not publish the paper. However, prior to NAS or anyone else publishing or publicizing the Clack Paper, on May 31, 2017, Dr. Jacobson, himself, published a version of it including his annotated comments.[21]

On June 19, 2017, NAS published the Clack Paper in PNAS and in the same online edition also published a Letter Response from the Jacobson Authors addressing the Clack Paper. In that letter response, the Jacobson Authors were given the opportunity to address the Clack Paper and to defend their modeling and conclusions.[22] On July 3, 2017, in response, Dr. Jacobson's demand that NAS retract the Clack Paper, NAS wrote to both Dr. Jacobson and Dr. Clack stating:

> Both the original Jacobson *et. al.* article from 2015 and the recent Clack *et al.* article passed muster through peer review. There is clearly a scientific disagreement about how to address these issues, and the scientific community will have to make their own assessment of these articles.

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[17] *Id.* at ¶18.

[18] *See* Clack Authors' Response, Clack Exh. C.

[19] *See* Compl., Exh. 17.

[20] Compl. at ¶ 18.

[21] *See* Compl., Exh. 26.

[22] Jacobson Letter Response, The United States Can Keep the Grid Stable at Low Cost with 100% Clean, Renewable Energy in All Sectors Despite Inaccurate Claims, attached hereto as Clack Exh. D.

...( )

> We urge you to continue to work to resolve the matter through additional research.[23]

The Clack authors posted their substantive Response to the Jacobson Letter Response online.[24] However, rather than allow the scientific community "to make their own assessment" or seek "to resolve the matter through additional research," Dr. Jacobson filed this lawsuit on September 29, 2017 demanding that the Clack Paper and the points raised therein be removed entirely from the public debate. Dr. Jacobson also demanded that Dr. Clack and NAS each pay him $10 million as damages.

### D. After The Filing Of This Suit The Jacobson Authors Publicly Clarify Issues In The Jacobson Paper.

After filing his lawsuit on November 7, 2017, Dr. Jacobson posted a "clarification" to the Jacobson Paper on his Stanford University website.[25] The Clarification addressed omissions related to issues publicly identified for the first time in the Clack Paper and for which Dr. Jacobson has sued Dr. Clack. Specifically, the Clarification disclosed that Table S2 includes "Canadian installations providing pre-existing imported hydropower." The Clarification also disclosed that the hydropower included in Table S2 "is not only the contemporary installed hydropower capacity, it is also the maximum *potential* annually average discharge rate of hydropower both today and in 2050," – *i.e.*, the model assumes the availability of significant additional hydroelectric power.

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[23] July 3, 2017 Letter from NAS to Clack and Jacobson, attached hereto as Clack Exh. E.

[24] Clack Author's Response, Clack Exh. C, published at www.vibrantenergy.com/wp-content/uploads/2017/06/ReplyResponse.pdf.

[25] *See* November 7 Errata Clarification (the "Clarification"), http://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/Clarification-PNAS15.pdf , attached hereto as Clack Exh. F. To defendant's knowledge, Dr. Jacobson has not submitted this Clarification to PNAS for the purpose of correcting the published version of the Jacobson Paper.

## ARGUMENT

### I. Plaintiff's Claim Should Be Dismissed Under The D.C. Anti-SLAPP Act.

The D.C. Anti-SLAPP Act[26] was designed to allow defendants to counter lawsuits based on statements involving matters of public concern by filing a special motion to dismiss. D.C. Code 16-5502.[27] To challenge a lawsuit under the D.C. Anti-SLAPP Act, a defendant must show that the action is based on defendant's acts "in furtherance of the right of advocacy on issues of public interest."[28] The Act defines an "issue of public interest" as "an issue related to health or safety; environmental, economic, or community well-being....." D.C. Code § 16–5501 (3)

Under the Anti-SLAPP Act, once a defendant makes a prima facie showing that the claims at issue arise from an act in furtherance of the right of advocacy on issues of public interest, the burden shifts to the plaintiff, who must "demonstrate [] that the claim is likely to succeed on the merits." D.C. Code 16-5502(b). To meet this burden, a plaintiff must present evidence that would allow a jury to find in their favor under the applicable legal standard. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016). If the plaintiff cannot produce such evidence, the plaintiff's claim must be dismissed with prejudice, and the litigation is brought to an end. *Id.*

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[26] SLAPP stands for a "strategic lawsuit against public participation."

[27] Under the Anti-SLAPP statute, a defendant is not limited to matters alleged in plaintiff's complaint. *See,Center for Advanced Defense Studies v. Kaalbye Shipping Intl. at al.,* No. 2014 CA 002273, 2015 WL 4477660 (D.C. Super April 7, 2015) at *4, n.9 (stating that SLAPP Act reflects a legislative judgment by the D.C. Council to ensure that those engaged in public policy debates are not intimidated or prevented from doing so and noting statute allows defendant to rely on matters outside the pleadings).

[28] D.C. Code § 16–5501 (1) An act in furtherance of the right of advocacy on issues of public interest" as:

(A) Any written or oral statement made:

(ii) In a place open to the public or a public forum in connection with an issue of public interest;

### A. The Anti-SLAPP Act Applies To Plaintiff's Claim.

There can be no dispute that the Anti-SLAPP Act applies to plaintiff's defamation claim against Dr. Clack. The alleged defamatory statements were made in a peer reviewed academic journal as part of a public debate between acknowledged experts in the field of energy and climate science and concerns the feasibility of shifting public policy toward a 100% reliance on wind, water and solar renewable energy by the year 2050.[29] The D.C. Court of Appeals has ruled that the Anti-SLAPP statute specifically applies to statements relating to public debates about the environment and climate. *See Competitive Enter.*, 150 A.3d 1213 (D.C. 2016) (holding that case arising out of statements related to environmental issues subject to the Anti-SLAPP Act).

Further, Dr. Jacobson has put himself at the forefront of the debate on transitioning to wind, water and solar renewable energy. He has submitted written testimony to the United States Congress relating to the renewable energy position advocated in the Jacobson Paper and other similar studies.[30] In addition, Dr. Jacobson has publicly backed the bill to enact the 100 by '50 Act, which calls on the United States to be completely free of fossil fuels by 2050 and was introduced by U.S. Senators Jeff Merkley, Bernie Sanders, Edward J. Markey, and Cory Booker.[31] Dr. Jacobson is also a founder of the Solution Project which actively advocates that local and state governments move toward 100% wind, water and solar renewable energy models

[29] *See e.g.*, Jacobson Paper, Compl. Exh. 3.

[30] *See* Written Testimony to the United States House of Representatives Committee on Energy and Commerce Democratic Forum on Climate Change November 19, 2015, attached hereto as Clack Exh. G.

[31] 100 by '50 Act, S. 987, 115th Cong. (2017); *see* https://www.merkley.senate.gov/news/in-the-news/merkley-plans-100-renewable-power-push.

by 2050.[32] As such, the subject matter of this litigation clearly relates to important issues of public interest, and the claims against Dr. Clack are subject to the Anti-SLAPP Act.

### B. Plaintiff Cannot Produce Evidence Sufficient To Show He Would Succeed On The Merits Of His Defamation Claim.

Plaintiff's claims must be dismissed with prejudice unless he can meet the burden imposed on him by the statute to produce sufficient evidence showing that his claims are likely to succeed on the merits. *See Farah v. Esquire Magazine Inc.,* 863 F. Supp. 2d 29, 38 (D.D.C. 2012) (dismissing claims under Anti-SLAPP); *Lehan v. Fox Television Stations, Inc.*, No. 2011 CA 004592 B, 2011 WL 11535276 (D.C. Sup. Ct. Dec. 2, 2011) (dismissing claims under Anti-SLAPP).

To succeed on a claim for defamation of a public figure such as Dr. Jacobson, a plaintiff must prove that the statements at issue are: i) defamatory; ii) capable of being proven true or false; iii) "of and concerning" the plaintiff; iv) false and v) made with actual malice, *i.e.,* with knowledge of falsity or with reckless disregard for whether or not they are true or false. *Coles v. Walsh Free Weekly, Inc.,* 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd*, 319 U.S. App. D.C. 215, 88 F.3d 1278 (1996). Moreover, the actual malice standard requires clear and convincing proof that the defendant published with actual subjective awareness of probable falsity. *Jankovic v. Int'l Crisis Group,* 822 F.3d 576, 590 (D.C. Cir. 2016).

"A statement is 'defamatory' if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990) (citations omitted). However, "an allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous." *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984) (citation

[32] Solution Project website at http://www.thesolutionsproject.org/.

omitted). "The plaintiff has the burden of proving the defamatory nature of the publication, and the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it is addressed." *Best, supra*, 484 A.2d at 989 (citations omitted). "[A]ny single statement or statements must be examined within the context of the entire [article]." *Heard v. Johnson*, 810 A.2d 871, 886 (D.C. 2002). In assessing allegedly defamatory statements, the D.C. Court of Appeals has admonished that "[a]ny risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech." *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 48-49 (D.C. 1983).

Dr. Jacobson has identified three specific statements that he alleges are defamatory: 1) the statement that there is a modeling error reflected in Table 1 of the Jacobson Paper[33]; 2) the statement that a hydropower output discrepancy is so substantial that the authors "hope there is another explanation for the large amounts of hydropower depicted in these figures"[34]; and 3) a chart in the Clack paper that depicts historical hydroelectric power in the United States from 1990-2015.[35]

None of those statements can be considered defamatory. The first two statements relate to the Clack Authors' interpretation and evaluation of the methodologies or assumptions in the Jacobson Paper and the basis for each statement is clearly explained in the Clack Paper itself. The third statement does nothing more than relate historical data (which is not alleged to be false in and of itself). None of the statements are about the plaintiff. That Dr. Jacobson disagrees with the Clack Paper's points and criticisms (even vehemently) does not make the statements

[33] Compl. at ¶ 42.

[34] *Id.* at ¶ 50.

[35] *Id.* at ¶ 62.

defamatory. Indeed, Dr. Jacobson's contention that scientists cannot call something an error or argue that it is a mistake for a model to incorporate unrealistic or inappropriate assumptions without fear of being sued for defamation would effectively shut down necessary scientific debate. Further, nor reasonable person could conclude that such statements in the context of a scientific debate cast plaintiff in an "odious, infamous or ridiculous light."

### 1. Plaintiff Cannot Establish That The Statements Made In Defendant's Scientific Evaluation Are False or Defamatory.

#### a. Statements Made In The Course Of Scientific Debate Are Not Defamatory.

The alleged defamatory statements cited by Dr. Jacobson were made in the context of evaluating the validity of what plaintiff, himself, has described as "original research of exceptional importance." Courts have regularly held that scientific debate is a matter of great public concern and, as such, "occupies the highest rung of the hierarchy of First Amendment values." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality). "[I]n the area of freedom of speech... courts must always remain sensitive to any infringement on genuinely serious... scientific expression." *Miller v. California*, 413 U. S. 15, 23 (1973); *see also Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C. 1991) ("[T]he First Amendment protects scientific expression and debate just as it protects political and artistic expression").

As recently as last year, the D.C. Court of Appeals reiterated the principal that statements that "take issue with the soundness of [plaintiff's] methodology and conclusions - *i.e.*, with ideas in a scientific or political debate - [] are protected by the First Amendment."[36] Other courts similarly hold that statements made regarding substantive scientific issues cannot form the basis

[36] *Competitive Enter.*, 150 A.3d at 1242.

for a defamation claim. The United States Court of Appeals for the Second Circuit has held that "as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation." *ONY v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 492, 496-498 (2d Cir. 2013). The court went on to explain:

> Importantly, [scientific] conclusions are presented in publications directed to the relevant scientific community, ideally in peer-reviewed academic journals that warrant that research approved for publication demonstrates at least some degree of basic scientific competence. These conclusions are then available to other scientists who may respond by attempting to replicate the described experiments, conducting their own experiments, or analyzing or refuting the soundness of the experimental design or the validity of the inferences drawn from the results. In a sufficiently novel area of research, propositions of empirical "fact" addressed in the literature may be highly controversial and subject to rigorous debate by qualified experts. Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury.

*Id.*

Similarly, in *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994), Judge Easterbrook admonished that "scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models--not larger awards of damages--mark the path toward superior understanding of the world around us.") *See also Saad v. American Diabetes Assoc*, 123 F. Supp. 3d 175, 179 (D. Mass. 2015) (dispute over the reliability of the data in articles is not fit for resolution in the form of a defamation lawsuit); *Arthur v. Offit,* No. 01:09-cv-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) (plaintiff's defamation claim threatens to improperly ensnare the court in thorny and contentious scientific debate); *McMillan v. Togus Reg'l Office, Dept. of Veterans Affairs,* 294 F. Supp. 2d 305, 317 (E.D.N.Y. 2003) ("Scientists should not have to conduct their studies defensively, looking over their shoulders at unnecessary litigations."). Good faith scientific

dispute and debate is simply not actionable as defamation. *Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists,* 2009 WL 838549 at *16 (S.D. Ind. Mar. 26, 2009) (the only way plaintiff could show actual malice would be if clear and convincing evidence showed the entire study were rigged with the intent of publishing an article the authors knew would be false). The statements at issue here clearly constitute scientific debate and should be evaluated by the scientific community not by the courts. Differences between scientists on whether something should properly be characterized as an omission or an error is obviously not defamatory.

**b. The Alleged Defamatory Statements Are Interpretations, Assessments and Opinions.**

It is well settled that statements expressing interpretation, conjecture or surmise are not actionable as defamation. *Guilford Tranp. Indus., Inc. v. Wilner,* 760 A.2d 580, 596 (D.C. 2000). Whether a statement is one of fact or law is a question of law for the court, and in assessing whether a statement can fairly be characterized as an opinion, courts look to the context in which it appears. *See Dowd v. Calabrese,* 589 F. Supp. 1206, 1221 (D.D.C. 1984). Here, consideration of the challenged statements within the context of the Clack Paper as a whole conclusively demonstrate that the statements are the scientific interpretations and opinions of the Clack Authors.

The very title of the Clack Paper indicates that it is an *evaluation* and expressly sets forth the criteria being used to evaluate the Jacobson paper. The Clack Authors fully explain the basis and reasoning for their criticisms of the Jacobson Paper, including their assumptions in making such criticisms (*i.e.* that numbers are being treated as maximums or that a particular figure represents hydro output in the United States). As a threshold matter, courts have been clear that when a writer discloses the facts upon which a statement is based, the reader will understand that the statement reflects the writer's view based on an interpretation of the facts disclosed, such that

the reader remains "free to draw his or her own conclusions based upon those facts." *Moldea v. N.Y. Times, Co.* 15 F.3d 1137, 1145 (D.C. Cir. 1994). Here, the Clack Authors explained in detail the basis for their criticisms. Moreover, disagreements on the proper way to model future energy usage or interpretation of how such models have been presented are not matters that can be fairly characterized as "false." Dr. Jacobson appears to believe that since he explained to the Clack Paper Authors why he believed their criticism was incorrect, they were required to accept that explanation, scrap their paper and refrain from further critique. That of course is not the law.

### 1) The Clack Paper's Criticism of Table 1 In The Jacobson Paper Is Not "False."

Dr. Jacobson contends that the Clack Authors' criticism of his modeling in Table 1 is "false" because the Clack authors assumed the values in that Table were maximums, but Dr. Jacobson claims they clearly represent averages.[37] First, contrary to Dr. Jacobson's contentions, nothing in Table 1 is "clearly labeled" as an annual average load. The language Dr. Jacobson points to in the Complaint does not in any way indicate that Table 1 includes average annual loads. Not one of the 21 authors of the Clack Paper read Table 1 to reasonably represent annual average loads, even in light of Dr. Jacobson's "explanation" provided after the Clack Paper was submitted for publication. The Clack Authors' rationale for interpreting the values in Table 1 as "total loads" used to calculate a maximum value is set forth in detail in the Supportive Information published with the Clack Paper.[38] Dr. Clack and his co-authors, were under no obligation to simply accept Dr. Jacobson's explanation or arguments regarding those values where, in the view of 21 highly respected experts in the field, the explanation was not consistent

[37] Compl. at ¶¶ 44-46.

[38] See Clack Paper (Supportive Information, Clack Exh. A at § 1.2, p. 3.

with their understanding of the text or data presented in the Jacobson Paper itself. The Clack Paper goes into detail regarding how it treats the values in Table 1 and explains how it calculates "a maximum value" assigned to the flexible load.[39] Dr. Jacobson was free to disagree with the Clack Author's interpretation and, in fact, he published an explanation of his position in a Letter Response to PNAS in the same online publication in which the Clack Paper appeared.

**2) The Clack Paper's Statement About A Discrepancy In The Jacobson Paper's Hydro-Electric Power Output Model Is Not "False."**

Dr. Jacobson states that the Clack Paper's discussion of the discrepancies in the Jacobson Paper's hydro-electric output numbers is defamatory. Notably, Dr. Jacobson admits that a key alleged assumption regarding those numbers (the availability of a massive amount of additional hydropower at no cost) "was not clear from the Jacobson Paper."[40] Nevertheless, Dr. Jacobson has sued Dr. Clack because the Clack Authors stated that they "hope there is another explanation for the discrepancy," than what is actually set forth in the paper itself. First, such a statement is not an assertion of fact that can give rise to a claim for defamation. *See e.g. Abbas v. Foreign Policy Group, LLC,* 783 F.3d 1328, 1338-39 (D.C. Cir. 2015) (raising a question no matter how embarrassing is not defamatory). Moreover, Dr. Clack did not accept the undisclosed assumption as a valid explanation when it was provided in February of 2016 and neither he nor his 21 co-authors accepted it as a valid explanation when plaintiff again raised it in May of 2017.[41] Dr. Clack and his authors were certainly not required to suggest arguments that the Jacobson Paper, itself, omits. Further, in the year following the February 2016 email exchange, Dr. Jacobson took no steps to clarify the public record, amend his paper to identify the alleged

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[39] *Id.*

[40] Complaint ¶¶ 51-53.

[41] *See* Compl. at ¶57; Compl. Exh. 4; Clack Author's Response, Clack Exh. C.

assumption he made, provide support for the use of such an assumption or acknowledge the costs associated with the assumption. The public remained in the dark about this alleged assumption until the Clack Paper was published and Dr. Jacobson decided to publicly respond.

In any event, - each assuming the hydro-electric assumption were disclosed - the Clack authors *did* specifically address the possibility that the Jacobson Paper's modeling included undisclosed, additional hydro-electric power and concluded that such an assumption (even if it were included in the paper) would be inappropriate because it would be technically and economically impossible.[42] Thus, there is nothing even arguably "false" or misleading in the Clack paper.

### 3) The Clack Paper's Depiction Of Historic U.S. Hydro-Electric Power Output Is Not "False."

Dr. Jacobson suggests that a figure in Dr. Clack's article showing hydroelectric output from the United States is "false" because it does not include output imported from Canada. First, the Clack paper clearly identifies what is reflected in the chart *i.e.* the hydro-electric output for the United States,[43] so it is in no sense of the word false. To the extent that Dr. Jacobson's complaint is that Dr. Clack does not state that the Jacobson Paper allegedly adds imported power from Canada, that information is not contained anywhere in the Jacobson Paper. Dr. Jacobson never even raised this issue until after the Clack Paper had been published. Further, the relevant

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[42] The Clack Paper stated:

> 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 model]...The hydroelectric power plants that exist today do not have the space required to expand their capacity by 10-15 times. Indeed, the extra piping needed to supply water to these turbines would cause considerable engineering issues due to the age of the plants and the river flows. A report from IRENA shows that around the world the average cost of hydroelectric is $3500/kw...[factoring in only increased power the additional cost of the hydroelectric power would be] $3.1 Trillion.

Clack Paper, Supporting Information, Clack Exh. A at S.1.1 at p. 2.

[43] *See* Clack Paper, Clack Exh A at 6725 ("we plot in Fig. 3 the last 25 y of generation from the United States")

table in the Jacobson Paper's Supportive Information is labeled hydropower "in the CONUS" (meaning continental United States).[44] Notably, Dr. Jacobson has not identified anything in the Jacobson Paper that even suggests that its model establishing the United States has sufficient resources of wind, water and solar power for all purposes adds in hydroelectric power from Canada.

### 4) The Statements Incorporated By Reference In The Complaint Are Not Defamatory.

Dr. Jacobson purports to incorporate by reference every critique set forth in his line by line rebuttal to the Clack Paper, as a separate defamation claim.[45] As a threshold matter, there are no specific allegations in the Complaint that any of these additional statements are false, are defamatory, were made about Dr. Jacobson or were made with actual malice. Indeed, virtually all of the statements identified in the rebuttal relate to Dr. Jacobson's disagreements with interpretations, conclusions, opinion or citations made by the Clack Authors.

The additional statements set forth in the rebuttal are nothing more than standard academic disagreements. None of them can fairly be said to relate to Dr. Jacobson in any way. For example, statements 1, 2, 3, 4, 7, 8, 11 and 33 in Exhibit 12 simply state Dr. Jacobson's disagreement with the Clack Authors' characterization and interpretation of third party studies.[46] The claims are in no way defamatory. Similarly, statements 6, 12, 13, 17, 20, 24, 27, 29, 32, 36 and 37 relate to Dr. Jacobson's disagreements with the Clack Authors assessments of the feasibility or appropriateness of certain assumptions made by the Jacobson Paper or the appropriation of certain comparisons.[47] Again, this is pure scientific opinion and nothing set

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[44] *See* Jacobson Paper Supportive Information, Compl. Exh. 3, Table S2 at 14.

[45] Comp. at ¶ 75; *see, e. g.* Jacobson Rebuttal, Compl., Exh. 12.

[46] Compl., Exh. 12.

[47] *Id.*

forth in the rebuttal is outside the normal parameters of scientific debates. For other statements, Dr. Jacobson simply contends that they are irrelevant to his main point in the paper - *i.e.*, 38 and 39.[48] The parties may debate the relevance of the statements, but that obviously does not make them defamatory. The remainder of the rebuttal simply rehashes the points Dr. Jacobson raised about the three specific issues which are actually included in the Complaint and are discussed above. Simply pointing to a series of letters containing vague assertions does not meet the pleading standards under the District of Columbia Rule of Civil Procedure and these allegations should be disregarded by the Court.

### 2. The Statements Do Not Cast Plaintiff In An Odious, Ridiculous Or Infamous Light

Defamatory statements must cast the subject in an "odious, ridiculous or infamous light." *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984). Courts have held that where a plaintiff is complaining about an attack on his ideas instead of his character, he has no claim for defamation. *Lott v. Levitt*, 556 F.3d 564, 570 (7th Cir. 2009). Dr. Jacobson's complaints all relate to substantive criticism of his methodology and conclusions as presented in the Jacobson Paper. There is no allegation that Dr. Clack ever criticized Dr. Jacobson personally or accused him of any type of misconduct. The Clack Authors simply identified areas in the Jacobson Paper where, in their assessment, the claims of the authors did not appear to be supported by the science and models as presented in the paper itself. Suggesting a study has errors or invalid assumptions does not cast the authors of such a study in an odious, ridiculous or infamous light and no reasonable person would conclude otherwise.

As noted above, the D.C. Court of Appeals recently addressed allegedly defamatory statements made in the context of a scientific dispute in *Competitive Enterprise Inst. v. Mann*,

[48] *Id.*

150 A.3d 1213 (D.C. 2016). In that case, the Court of Appeals expressly stated that "[t]o the extent statements in [defendant's] articles take issue with the soundness of [plaintiff's] methodology and conclusions - *i.e.*, with ideas in a scientific or political debate - they are protected by the First Amendment." *Id.* at 1242. Those are precisely the type of statements at issue here and, as such, they are protected by the First Amendment. The Court of Appeals contrasted such protected substantive scientific statements with "personal attacks on an individual's honesty and integrity" including allegations that plaintiff "engaged in professional misconduct and deceit to manufacture the results he desired" *Id.*[49] No similar statements are at issue here.

### 3. Plaintiff Cannot Prove By Clear And Convincing Evidence That Dr. Clack Acted With Actual Malice.

Plaintiff cannot prove "actual malice." Under D.C. law, where a plaintiff is a public figure or a public figure for the limited purpose of the statements at issue, he or she must prove by clear and convincing evidence that defendant's statements were made with knowledge that they were false or with reckless disregard of whether they were false or not. *Beeton v District of Columbia*, 779 A.2d 918, 923-924 (D.C. 2001). To show reckless disregard, there must be sufficient evidence that indicates that the defendant had serious doubts regarding the truth of the published statements. *Id.* Courts may not infer "actual malice" from mere reason that the defamatory publication was made. *Nader v de Toledano*, 408 A.2d 31, 41 (D.C. 1979). The courts must look to the character and content of the publication, and the inherent seriousness of the defamation accusation. *Id.* Moreover, to prevail, the plaintiff bears a higher burden of proof

[49] The types of statements the Court of Appeals found were potentially actionable in *Mann* included statements that the plaintiff was the "poster boy of the corrupt and disgraced climate science echo chamber" and that he personally engaged in "wrongdoing," "deceptions," "data manipulation" and "academic and scientific misconduct." The article at issue also called the plaintiff "the Jerry Sandusky of climate science," comparing plaintiff's "'molest[ing] and tortur[ing] data in the service of politicized science' to Sandusky's 'molesting of children.'" *Competitive Enter.*, 150 A.3d at 1243.

than the preponderance of the evidence standard usually applicable in civil cases; the plaintiff must persuade the fact-finder that the defendant acted with actual malice in publishing the defamatory statements by clear and convincing evidence. *See N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964) (referring to the "convincing clarity which the constitutional standard demands").

**a. Plaintiff Is A Public Figure**

Dr. Jacobson is undoubtedly a public figure with respect to the renewable energy debate and the policies advocated in the Jacobson Paper. In addition to writing and speaking regularly on this issue, Dr. Jacobson provided testimony before the United States Congress on the feasibility of 100% wind, water and solar reliance by the year 2050.[50] He also co-authored an article with a United States Senator advocating his 2050 proposal for the United States and is a public sponsor of the Senate 100 by '50 bill.[51] Indeed, Dr. Jacobson has placed himself at the forefront of this particular public policy issue in order to influence the resolution in favor of 100% wind water and solar including by affirmatively publishing the paper at issue in this litigation. *See e.g. Competitive Enter.*, 150 A.3d at 1251 n.51 (holding that climate scientist was limited public figure in area of study for purposes of defamation claim).

**b. The Paper Reflects The Views Of Twenty-One Prominent Energy and Climate Researchers And Was Independently Peer Reviewed.**

Far from being a personal attack on Dr. Jacobson, the Clack Paper reflects the views of a diverse and prestigious group of energy and climate scientists. There is no allegation that any of the 21 co-authors has any personal animosity toward Dr. Jacobson. In addition to representing

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[50] Clack Exh. H.

[51] https://www.theguardian.com/commentisfree/2017/apr/29/bernie-sanders-climate-change-big-oil. Article by Senator Bernie Sanders and Mark Jacobson; *see* footnote 33 *supra*.

the combined view of 21 separate authors, the Clack Paper also went through careful independent peer review and editorial board review at NAS.[52] The Clack Paper explains in detail the basis for its criticisms and conclusions. That the Clack Authors were unwilling to change their paper after reviewing Dr. Jacobson's criticisms of it in no way suggests they acted with malice. To the contrary, in conjunction with the NAS editorial board, the Clack Authors carefully considered the points raised and concluded that their criticisms were on sound scientific and academic ground.[53]

## II. Plaintiff's Claim Should Be Dismissed For Failure To State A Claim Upon Which Relief May Be Granted.

District of Columbia Superior Court Rule 12(b)(6) vests the Court with the authority to dismiss an action when it "fail[s] to state a claim upon which relief can be granted." Super. Ct. R. 12(b)(6). Pursuant to this Rule, dismissal is warranted if the plaintiff cannot prove facts which would support his claim. Here, the statements alleged by plaintiff are not defamatory as a matter of law. Importantly, the D.C. Court of Appeals has advised that Rule 12(b)(6) motions are particularly appropriate with respect to defamation claims involving public debate:

> [P]erhaps more than any other [area], the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function. At the threshold, it is the court, not the jury that must vigilantly stand guard against even slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal."

*Myers v. Plan Takoma, Inc.*, 472 A.2d at 50.

Defendant's motion to dismiss under D.C. Super. Ct R. 12(b)(6) rests on the same grounds as his Special Motion to Dismiss. The Supreme Court has clearly stated that defamation laws cannot be used to stifle free speech and that there exists a "profound national commitment

[52] NAS peer review guidelines, Clack Exh. B.

[53] *See e.g.*, Clack Authors' Response, Clack Exh. C.

to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Whether a statement is capable of defamatory meaning is a question of law and if the alleged statement is not reasonably capable of defamatory meaning the claim must be dismissed. *Klayman v. Segal,* 782 A.2d 607, 612-13 (D.C. 2001).

Even if the Court were to assume plaintiff's allegations are true, and taking into account all of the documents incorporated by reference in the Complaint and its exhibits, the First Amendment forecloses plaintiff's recovery for the protected speech targeted by the Complaint. Here, the statements that plaintiff made an error, that the Clack Authors "hoped there was another explanation" for a discrepancy in the Jacobson Paper and the inclusion in their paper of a figure that accurately portrayed historic U.S. hydro-electric power cannot, as a matter of law, be construed as defamatory. As such, for all the reasons stated above, plaintiff's claim must be dismissed for failure to state a claim upon which relief may be granted under Rule 12(b)(6).

## CONCLUSION

For the reasons set forth above, the defamation claim against Dr. Clack should be dismissed under the District of Columbia Anti-SLAPP Act or, in the alternative, under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

*/s/ Drew W. Marrocco*

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