IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

MARK Z. JACOBSON, Ph.D.,	
Plaintiff,	
v.	**Civil Action No. 2017 CA 006685 B**
	Hon. Elizabeth Carroll Wingo
CHRISTOPHER T. M. CLACK, Ph.D.,	**Next Court Date: December 29, 2017**
	Event: Initial Conference
***et al.*,**	
Defendants.	

DEFENDANT NATIONAL ACADEMY OF SCIENCES' MEMORANDUM IN SUPPORT OF ITS SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

To silence those who disagree with him, plaintiff has sued the National Academy of Sciences ("the Academy") for defamation, breach of contract, and promissory estoppel solely because the Academy, in the Proceedings of the National Academy of Sciences ("PNAS"), published a paper by Dr. Clack and other scientists who challenged the methodologies and assumptions that plaintiff used in a paper on climate change and the feasibility of replacing high-polluting energy sources, that was previously published in PNAS. This case falls squarely within the letter and spirit of the District of Columbia Anti-SLAPP statute,[1] and should be dismissed promptly.

The goal of the Anti-SLAPP statute is to ensure that defendants are not intimidated or prevented by abusive lawsuits from engaging in public policy debates. By demanding retraction and $10 million, plaintiff seeks to censor the Academy for providing a forum for robust

[1] D.C. Code §§ 16-5501 et seq. SLAPP stands for "strategic lawsuits against public participation."

scientific debate on one of the foremost issues of public concern today, and chill the critical exchange of ideas essential to scientific progress and the public interest.

The Anti-SLAPP statute was enacted to prevent litigation intended to suppress the exercise of constitutionally protected speech. It is evident that plaintiff's aim is to limit free expression by eliminating any challenges to his paper: plaintiff threatened a preliminary injunction against the Academy to prohibit publication of the Clack paper, Compl. Ex. 8; he threatened to send cease and desist letters to the authors of the Clack paper and the presidents of the universities that employed them, Compl. Ex. 9; he demanded that the Academy limit the length of the Clack paper, Compl. Ex. 16; and he requested that there be no response to the rebuttal that the Academy afforded to him (published on the same day as the paper it was rebutting).

Plaintiff cannot state a claim as to the three counts of his complaint, which amount to little more than an unvarnished attempt to muzzle speech and end-run the First Amendment. His defamation claim must fail because he is suing over quintessential scientific debate and opinion about methodology and assumptions – exactly what the courts have consistently said should not be decided by the judiciary, but rather left to robust scientific debate and rebuttal, as PNAS has done. This Court should not be thrust into deciding whose scientific opinion is better. Plaintiff's breach of contract and promissory estoppel claims must fail because he is attempting to use non-binding editorial guidelines as a sword to censor any challenges to his work in perpetuity.

After filing suit, and nearly two years after his paper was published, plaintiff submitted Errata that address omissions in his paper which relate to two of what he claims are the three "egregious" defamatory statements.

The National Academy of Sciences respectfully asks this Court to dismiss this action in its entirety and with prejudice, pursuant to both the Anti-SLAPP statute and Rule 12(b)(6).

BACKGROUND

The Academy is a private, non-profit organization of distinguished scholars, established by an Act of Congress signed by President Lincoln.[2] The Academy is charged with providing independent, objective advice to the nation on matters related to science and technology.[3] The Academy publishes PNAS.

PNAS is a widely cited, comprehensive multidisciplinary scientific journal.[4] One of the premier international journals publishing the results of original research, PNAS is published daily online (with the full text of all papers) and weekly in print.[5]

In December, 2015, PNAS published a paper entitled, "*Low-cost solution to the grid reliability problem with 100% penetration of intermittent wind, water and solar for all purposes*," the lead author of which is the plaintiff in this case. The paper was subjected to peer review prior to publication.[6] In 2016, plaintiff's paper received the Academy's Cozzarelli Prize for scientific excellence and originality. Compl. ¶ 9.

In 2016, Dr. Clack and his co-authors submitted to PNAS a paper that challenged some of the methodologies and assumptions in plaintiff's paper. Compl. ¶ 11. The Clack paper was also subjected to peer review. PNAS sent the Clack drafts to the plaintiff for comment. Compl. Exs. 6 and 9. Plaintiff sent comments on the Clack drafts back to PNAS.[7] PNAS forwarded the

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[2] http://www.nationalacademies.org/brochure/index.html?_ga=2.146899760.64871978714972702.
[3] *Id.* 36 U.S.C. § 150303.
[4] http://www.pnas.org/site/aboutpnas/index.xhtml.
[5] *Id.*
[6] Peer review is a process whereby independent, knowledgeable experts review a paper before it is approved for publication. *See* http://www.pnas.org/site/misc/reviewprocess.pdf and Ex. H.
[7] Compl. Exs. 8, 9 & 16.

final draft of plaintiff's comments to the Clack authors.[8] They revised their paper based on information from plaintiff. *Compare* Compl. Ex. 7 and 11. The Academy also offered plaintiff an opportunity to publish a rebuttal to the Clack paper. Compl. Exs. 6 and 17.

Dissatisfied with the revisions, plaintiff accused the Clack authors of falsehoods. Compl. Ex. 9. He demanded that the Academy not publish the Clack paper, and at one point threatened to file a preliminary injunction to prevent publication. Compl. Ex. 8. He also argued that the Clack paper should be limited to a letter of 500 words, Compl. Ex. 16, even though PNAS has in the past published other comments as research papers. *See* Ex. B.

PNAS published both the Clack paper and plaintiff's rebuttal on the same day – June 19, 2017 – online.[9] Though the guidelines generally provide 500 words for a rebuttal, plaintiff asked for and was permitted far more words. As published, his rebuttal was 1,300 words long. Ex. A; Compl. ¶ 69. The rebuttal, which included a point-by-point response to the Clack paper including 26 footnotes, opened: "The premise and all error claims by Clack . . . are demonstrably false." Ex. A. Plaintiff told the Academy that no response to his rebuttal should be allowed. Indeed, plaintiff himself has acknowledged that "PNAS published our response to Clack equally and simultaneously, giving us the last words by not allowing Clack to respond to us."[10]

When the Academy refused plaintiff's demands for retraction of the Clack paper and for $10 million, plaintiff filed his Complaint, which states: "Dr. Jacobson has acknowledged that the Jacobson Article was not clear in the actual text . . . about the hydropower assumption and

[8] Compl. Ex. 10.
[9] http://www.pnas.org/content/114/26/E5021.full.
[10] https://www.ecowatch.com/national-review-mark-jacobson-2454398939.html.

that there was an omission of the cost of the additional hydropower turbines," but avers that neither was material. Compl. ¶72.

Twelve days after filing the Complaint, and 21 months after the publication of his paper, plaintiff submitted to PNAS (and later posted on his website[11]) Errata, which acknowledge omissions about the assumptions he made in his 2015 paper, including two that relate to what he claims are the three allegedly most "egregious" defamatory statements in Clack's paper. Ex. C.

ARGUMENT

I. Legal Standards For Dismissal

The Anti-SLAPP Act ensures prompt dismissal of lawsuits based upon "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). Once defendant shows the alleged acts were in furtherance of the right of advocacy on issues of public interest, the Court must dismiss the complaint with prejudice unless plaintiff can demonstrate that he is likely or probable to succeed on the merits. *See* D.C. Code § 16-5502(b) and (d).

To survive a Rule 12(b)(6) motion, a complaint "must set forth sufficient information to outline the legal elements of a viable claim for relief." *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) (internal quotation omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Murray v. Motorola, Inc.*, 982 A.2d 764, 783 n.32 (D.C. 2009).

[11] https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/combining.html.

II. The Complaint Asserts Claims Arising From Protected Advocacy Rights

The Anti-SLAPP Act[12] protects against claims arising from statements or other acts in furtherance of the right of advocacy on issues of public interest. Because this case involves an issue of public interest – renewable energy and climate change – plaintiff has the burden of demonstrating *at this stage of the litigation* that he is likely to succeed on the merits of his claims. Plaintiff cannot meet this burden, and accordingly, the Academy is entitled to the expeditious dismissal of plaintiff's claims, with prejudice.

The Act defines an issue of public interest as one "related to health or safety, environmental, economic, or community well-being." D.C. Code § 16-5501(3). Acts in furtherance of the right of advocacy on issues of public interest include "any written or oral statement made" in a "public forum in connection with an issue of public interest" or "[a]ny other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(A) and (B). Publication of the Clack paper unquestionably involved issues of public interest: climate change, reliance on fossil fuels, the use of nuclear power, and the feasibility of large-scale renewable energy projects are hotly debated within both the academic community and society generally. The Academy's publication of the Clack paper also constituted a written statement made "in a public forum . . . to members of the public." Both plaintiff's and the Clack authors' papers appeared in the online version of PNAS, a forum where anyone with internet access may view it. *See Farah v. Esquire Magazine*, 863 F. Supp. 2d 29, 38 (D.D.C. 2012) (an online blog post qualifies as a written or oral statement made in a place open to the public). Because the Clack

[12] D.C. Code § 16-5501 (2013) *et seq.* The analysis and outcome would be the same under California's Anti-SLAPP Act, Cal. Code Civ. Proc. § 425.16(a). This Court has found the D.C. Act to be "an almost identical act to the California act." *Mann v. Nat'l Review, Inc.*, No. 12-CA-8263 B, 2013 D.C. Super. LEXIS 7, at *10 (D.C. Super. Ct. July 19, 2013), *rev'd in part on other grounds*, 150 A.3d 1213, 1240 (D.C. 2016).

paper was made in a public forum in connection with an issue of public interest that relates to health, safety, environmental, economic, and community well-being, the Academy has satisfied its burden of establishing a *prima facie* case, and is therefore entitled to dismissal with prejudice.

Plaintiff thus bears the heavy burden of establishing that his claims are "likely" to succeed on the merits. *See* D.C. Code § 16-5502(b). The burden imposed is the same as the exacting standard applied to preliminary injunctions: "a substantial likelihood that he will prevail on the merits."[13] Because plaintiff cannot meet his heavy burden, all claims against the Academy should be dismissed with prejudice.

III. Plaintiff Cannot Show His Defamation Claim Is Likely To Succeed On The Merits

Plaintiff's defamation claim is based on statements that are not defamatory, and must therefore be dismissed under both the Anti-SLAPP Act and Rule 12(b)(6). The statements merely involved the expression of opinions in the type of scientific debate that should be resolved in the scientific arena, not in the courts. As the courts have recognized, "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Underwager v. Salter,* 22 F.3d 730, 736 (7th Cir. 1994).[14] And "[t]he remedy for this kind of academic dispute is the publication of a rebuttal, not an award of damages." *Lott v. Levitt,* 556 F.3d 564, 570 (7th Cir. 2009).[15]

Four months before the Clack paper was published, the Academy notified plaintiff that Dr. Clack and his co-authors had submitted for publication a paper challenging the conclusions

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[13] *Ctr. for Advanced Defense Studies v. Kaalbye*, No. 2014 CA 002273 B, 2015 WL 4477660 at *3 (D.C. Super. Ct. Apr. 7, 2015) (quoting *Zirkle v. District of Columbia,* 830 A.2d 1250, 1255 (D.C. 2003) (internal citations omitted).

[14] *See also Resolute Forest Products, Inc. v. Greenpeace International,* No. 17-cv-02824, 2017 WL 4618676, at *9 (N.D. Cal. Oct. 16, 2017) ("The academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this kind.").

[15] *See also Dillworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) ("[J]udges are not well equipped to resolve academic controversies, . . . and scholars have their own remedies for unfair criticism of their work – the publication of a rebuttal.").

in plaintiff's paper. *See* Compl. ¶ 12; Compl. Ex. 6. The Academy offered plaintiff the opportunity to publish a response to the Clack paper, and to coordinate the publication of the Clack paper and plaintiff's response so readers could see both papers on the same day. *See* Compl. Ex. 6. In addition, the Academy provided plaintiff with three separate drafts of the Clack paper before it was published, so plaintiff could fully evaluate and address the Clack statements in his rebuttal. *See* Compl. ¶¶ 12, 16 & 18; Compl. Exs. 6, 17.

The Academy published plaintiff's rebuttal on-line the same day as the Clack paper. *See* Ex. A.[16] The rebuttal began:

> The premise and all error claims by Clack et al. (1) in PNAS, about Jacobson et al.'s (2) report, are demonstrably false. We reaffirm Jacobson et al.'s conclusions. [Emphasis added].

It addressed point-by-point what plaintiff considered to be inaccurate in the Clack paper, under the headings "False Premise," "False Error Claims," "Unsubstantiated Claims About Assumptions," and "False Model Claims," and concluded:

> In sum, Clack et al.'s analysis (1) is riddled with errors and has no impact on Jacobson et al.'s (2) conclusions. [Emphasis added].

By simultaneously giving readers both the Clack challenges to plaintiff's paper and plaintiff's rebuttal, the Academy served as an objective forum for scientific debate, enabling readers to evaluate the authors' respective opinions. That is how scientific disputes are supposed to be evaluated and resolved.

A. Plaintiff Cannot Establish The Elements Of Defamation

Plaintiff alleges that, by publishing the Clack paper, the Academy published false statements "to the District of Columbia, national and international scientific community audience that reads articles published in PNAS." Compl. ¶ 85. He also contends that the paper was

[16] Plaintiff's rebuttal is publicly available at www.pnas.org/cgi/doi/10.1073/pnas.1708069114.

published "to the much larger additional D.C., national and international press readership." Compl. ¶ 76.

Under District of Columbia defamation law, plaintiff must prove:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement [met the requisite standard]; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Competitive Enterprise Institute v. Mann, 150 A.3d 1213, 1240 (D.C. 2016) (citations and internal quotations omitted) (emphasis added).[17] A publication is defamatory under District of Columbia law "if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Competitive Enterprise Institute v. Mann*, 150 A.3d at 1241. To be actionable, the allegedly defamatory statement "must be more than unpleasant or offensive; the language must make the plaintiff appear odious, infamous, or ridiculous." *Id.* (citations and internal quotations omitted).[18]

The elements of a defamation claim are similar in California: libel is "a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, . . . or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45 (emphasis added). *See also Smith v. Maldonado*, 72 Cal. App. 4th 637, 645, 85 Cal. Rptr.2d 397, 402 (1999) (defamation "involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.") (emphasis added).

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[17] *See also Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2011).

[18] *See also Rosen v. American Israel Public Affairs Committee, Inc.*, 41 A.3d 1250, 1256 (D.C. 2012); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 671 (D.C. Cir. 1987); *Xereas v. Heiss*, 933 F. Supp.2d 1, 17 (D.D.C. 2013); *Machie v. Nguyen*, 824 F. Supp.2d 146, 152 (D.D.C. 2011).

Plaintiff bears an additional and especially heavy burden of proof because he is a public figure in the ongoing scientific debate over the feasibility of replacing fossil fuels. He "cannot recover [on his defamation claim] unless he proves by clear and convincing evidence that the defendant published the [allegedly] defamatory statement with actual malice, *i.e.*, with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).[19] This standard is "a daunting one." *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996).

Plaintiff cannot demonstrate that he is likely to satisfy these requirements.

B. Plaintiff Cannot Prove The Academy Published Defamatory Statements

The First Amendment "protects public debate on matters of public concern, including scientific matters." *McMillan v. Togus Regional Office, Dep't of Veteran Affairs*, 294 F. Supp. 2d 305, 316 (E.D.N.Y. 2003), *aff'd* 120 F. App'x 849 (2d Cir. 2005). In the scientific arena, matters of public concern depend upon vigorous and unfettered debate:

> As in political controversy, "science is, above all, an adversary process. It is an arena in which ideas do battle. . . ." Our technology and lives depend on modern science. Any unnecessary intervention by the courts in the complex debate and interplay among scientists that comprises modern science can only distort and confuse. . . . Scientists should not have to conduct their studies defensively, looking over their shoulders at unnecessary costly litigations.

Id. at 317 (internal citations omitted). Thus, "[a]s a matter of constitutional principle, when the issue is whether liability may be imposed for speech expressing scientific or policy views, the question is not who is right; the First Amendment protects the expression of all ideas, good and bad." *Competitive Enterprise Institute v. Mann*, 150 A.3d at 1242.

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[19] *See also Competitive Enterprise Institute v. Mann*, 150 A.3d at 1241-42; *Resolute Forest Products, Inc. v. Greenpeace International*, No. 17-cv-02824, 2017 WL 4618676, at *10 (N.D. Cal. Oct. 16, 2017).

Statements of opinion can only provide the basis for a defamation claim if "'they imply a provably false fact, or rely upon stated facts that are provably false.'" *Id.* Thus, "under the First Amendment [an allegedly false] statement is not actionable 'if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.'" *Id.* at 1241 (citations omitted).

Applying these principles in a case involving published comments about a scientist engaged in the debate over global warming, the Court of Appeals drew the line between statements that were actionable and those that were not:

> [T]he law distinguishes between statements expressing ideas and false statements of fact. To the extent statements in [defendants'] 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. But defamatory statements that are personal attacks on an individual's honesty and integrity and assert or imply that [plaintiff] engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable.

Id. at 1242 (emphasis added). Thus, the court found statements such as "wrongdoing," "deceptions," "data manipulation," "misconduct," and "the Jerry Sandusky of climate science" to be defamatory (*Id.* at 1243), but found not defamatory the statement that Dr. Mann's work was "fraudulent," taking that word to mean "intellectually bogus and wrong." *Id.* at 1249.

The statements challenged by plaintiff fall far short of the line drawn in *Mann*. They also fall far short of the terms plaintiff uses about others: for example, he told his 13,900 twitter followers that one commentator "fakes data" (Ex. D at p. 3), that another "intentionally falsified data" (*Id.* at p. 5), and that yet another's comment on his work was a "flat out lie" (*Id.* at p. 4). Indeed, plaintiff has told his twitter followers that the Clack paper is "intentionally scientifically fraudulent with falsified data." *Id.* at p. 10.

Plaintiff has identified what he characterizes as three "egregious" false statements contained in the Clack paper. Compl. ¶ 84. Ironically, two of the three supposedly "egregious" false statements relate to omissions that plaintiff identified in the Errata he submitted to the Academy and posted on his website after suit was filed and more than 21 months after his paper was published. He has also referred to Exhibit 12 to the complaint as a list of "additional numerous falsehoods and misstatements." *Id.* None of those alleged falsehoods or misstatements involves a provably false statement about plaintiff's honesty or integrity, or imply that plaintiff engaged in professional misconduct or deceit. Rather, they simply reflect opinions of the Clack authors about the methodology and conclusions that plaintiff described in his paper, which is protected speech that cannot form the basis for a defamation claim. Moreover, both the allegedly false statements in the Clack paper and plaintiff's explanations of why he believes the statements are false involve highly esoteric scientific issues that are ill-suited to resolution by a judge or jury -- precisely the type of issues that "must be settled by the methods of science rather than by the methods of litigation." *Underwager v. Salter*, 22 F.3d at 736.

1. <u>Alleged False Statement Regarding The Figures In Plaintiff's Table 1</u>

Plaintiff alleges that the following is one of the three supposedly "egregious" statements in the Clack paper that defamed him:

> [T]he flexible load used by LOADMATCH is more than double the maximum possible value from table 1 of [the Jacobson Article]. The maximum possible from table 1 of [the Jacobson Article] is given as 1,064.16 GW, whereas figure 3 of [the Jacobson Article] shows that flexible load (in green) used up to 1,944 GW (on day 912.6).

Compl. ¶¶ 42-43 and 84. Plaintiff contends this language is false and defamatory because it refers to the load figures in plaintiff's paper as "maximum" load figures, instead of "average" load figures. Compl. ¶¶ 42-49. He contends that he told the Academy the load figures were "average" figures before the Clack paper was published. Compl. ¶ 42.

Even assuming that the Table 1 figures are "average" figures, the statement was not defamatory. The statement did not "make the plaintiff appear odious, infamous, or ridiculous," did not constitute a personal attack on plaintiff's "honesty and integrity," and did not imply that he had engaged in "professional misconduct and deceit." *Competitive Enterprise Institute v. Mann*, 150 A.3d at 1241-42, At most, the Clack authors' statement involved an interpretation of a table in plaintiff's paper. This is not defamation.

Moreover, before the Clack paper was published, the Academy provided the Clack authors with plaintiff's written explanation of his position on the "maximum" vs. "average" issue, so they could determine whether they agreed with his position. Compl. Exs. 9 (Item 25) and 10. And, simultaneous with publishing the Clack paper, the Academy published plaintiff's rebuttal, which explained why plaintiff believed the numbers should be characterized as "average" instead of "maximum." Ex. A at p. 2. The Academy therefore provided its readers with both plaintiff's and the Clack authors' positions on how the data should be interpreted, which is how scientific disagreements are supposed to be addressed and resolved.

2. Alleged False Statement Regarding Plaintiff's Hydropower Discharge Rates

Plaintiff alleges that the underlined phrase in the following language from the Supporting Information attached to the Clack paper is the second "particularly egregious" statement that defamed him:

> The hydroelectric production profiles depicted throughout the dispatch figures reported in both the paper and its supplemental information routinely show hydroelectric output far exceeding the maximum installed capacity as well. . . . This error is so substantial that we hope there is another explanation for the large amounts of hydropower depicted in these figures.

Compl. Exhibit 11 at SI p. 2; Compl. ¶¶ 50, 54-55 (emphasis added). Plaintiff contends that the Clack paper made an "intentionally misleading" statement when it said "we hope there is another

explanation" (Compl. ¶ 51), because plaintiff told Clack and the Academy that he had achieved the high discharge capacity estimates reflected in his paper by assuming additional turbines would be added to existing hydroelectric dams (Compl. ¶¶ 51, 52). There are at least four reasons why the Clack statement cannot support a defamation claim.

First, the Clack statement does not assert or imply any fact at all, much less a false fact that makes "plaintiff appear odious, infamous, or ridiculous."[20]

Second, based on information provided by plaintiff, the Clack authors revised their paper to state that plaintiff had assumed additional turbines would be added to the existing hydroelectric plants, and explained why they believed that was not a reasonable assumption to make. *See* Compl. Ex 11 at p. 6723 (plaintiff relied on "adding turbines" at "current reservoirs without consideration of hydrological constraints or the need for additional supporting infrastructure") & SI p. 2 ("[T]he authors assumed they could build capacity in hydroelectric plants for free . . . . [T]he extra piping needed to supply water to these turbines would cause considerable engineering issues . . . .").

Third, plaintiff acknowledges that his own paper did not disclose his "additional turbines" assumption, Compl. ¶ 52, and he recently asked the Academy to publish errata to correct that omission. Ex. C.

Finally, in the rebuttal published simultaneously with the Clack paper, plaintiff explained both the "additional turbines" assumption that had not been disclosed in his original paper, and why he believed the turbines could be added at reasonable cost. Ex. A at p. 1-2.

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[20] *Competitive Enterprise Institute v. Mann*, 150 A.3d at 1241; *Rosen v. American Israel Public Affairs Committee, Inc.*, 41 A.3d at 1256; *Community for Creative Non-Violence v. Pierce*, 814 F.2d at 671; *Xereas v. Heiss*, 933 F. Supp.2d at 17; *Machie v. Nguyen*, 824 F. Supp.2d at 152.

Thus, the explanation for the large amounts of hydropower production projected in plaintiff's paper was provided to PNAS readers by both the Clack paper and by plaintiff's rebuttal.

3. Alleged False Statement In Figure 3 Of The Clack Paper

Plaintiff alleges that a drawing -- the following "Figure 3" -- from the Clack paper is the third "particularly egregious" statement that defamed him:

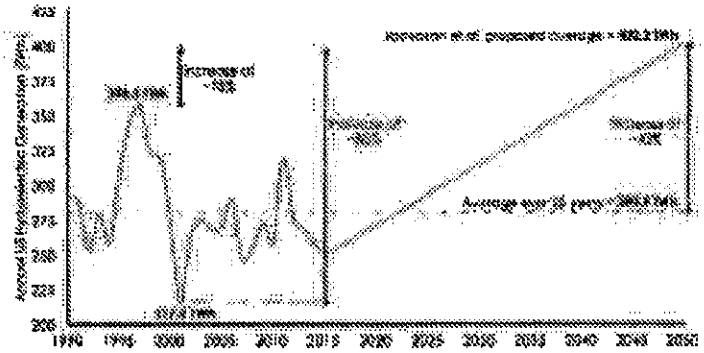

Fig. 3. Historical and proposed hydroelectric generation per year. The historical data (www.eia.gov/todayinenergy/detail.php?id=2650) show generation averaging 280.9 TWh/yr; generation proposed in ref. 11 is 402.2 TWh, 13% higher than the 25-y historical maximum of 356.5 TWh (1997) and 85% higher than the historical minimum of 217 TWh (2001).

Compl. ¶ 84. Plaintiff claims this figure is misleading because it compares the United States' historical annual production of hydroelectric power to the future annual hydroelectric power that plaintiff's paper projected, which he says included both the United States' projected power production and additional projected power to be imported from Canada. Compl. ¶ 63.[21]

But nothing in Figure 3 constitutes a false statement of fact. Plaintiff does not allege that either set of numbers is wrong. Instead, he claims that comparing the two sets of numbers is like comparing apples and oranges, because one set involved only United States power generation while the other allegedly included some Canadian power generation as well. *See* Compl. ¶ 62.

[21] Plaintiff contends that, "[b]y failing to subtract off the 45 TWh of Canadian imported hydropower out of 402.2 TWh of total hydropower, the Clack Authors misled readers into thinking the Jacobson Authors assumed an unreasonably high annually-averaged hydropower output." Compl. ¶ 63.

But that would present a simple disagreement over scientific methodology, which cannot be defamation. *E.g. Competitive Enterprise Institute v. Mann*, 150 A.3d at 1242.

Moreover, even though Figure 3 was in pre-publication drafts that plaintiff received and spent months flyspecking, he insists that he did not realize that the future projections (taken from his own paper) should not have been compared to historical U.S. production until after the Clack paper was published. Compl. ¶ 62. If plaintiff himself did not notice the allegedly "egregious" problem with Figure 3 when he was scrutinizing the paper,[22] it could not possibly have made him appear odious, infamous or ridiculous to PNAS readers.

Finally, as in the case of the "additional turbines" assumption he omitted to mention in his paper, plaintiff has now found it necessary to explain his "Canadian power" assumption in the errata he submitted after filing suit. *See* Ex. C (where plaintiff "clarifies" footnote 4 of his paper to explain he included the Canadian power).

4. <u>The Additional Alleged Falsehoods Listed In Plaintiff's Exhibit 12</u>

In addition to the three, so-called "egregious" statements discussed above, plaintiff alleges that Exhibit 12 to his complaint identifies numerous other "false and misleading statements" in the Clack paper. Compl. ¶ 84. Incorporating Exhibit 12 into his complaint violates the letter and spirit of Rule 8, which requires a short and concise statement of the claims. The Academy is nonetheless compelled to respond to the assertions set out in Exhibit 12.

Exhibit 12 is a "Line-by-Line Response" to the entire Clack paper, which parses through and debates the validity of almost every sentence from the paper in excruciating scientific detail.

[22] The lists of alleged errors that he submitted to the Academy not only failed to mention the problem that he now claims exists in Figure 3, they actually asserted that there was an entirely different explanation for the projections depicted in Clack's Figure 3. *See, e.g.*, Compl. Ex. 8 (Item 24) ("Figure 3 of Clack et al. falsely shows that the Jacobson et al. (2015b) hydropower output in 2050 is 402.2 TWh. In fact, they forgot to multiply by the transmission and distribution efficiency, a mean of 0.925, so it is really 372.035 TWh, much closer to current output.").

Nothing in Exhibit 12 shows that the Clack paper contained any statement that made plaintiff "appear odious, infamous, or ridiculous." And nothing in Exhibit 12 shows the Clack paper made personal attacks on plaintiff's honesty and integrity, or asserted he had engaged in professional misconduct or deceit to manufacture results.

Rather, Exhibit 12 merely shows that plaintiff disagrees with the scientific analyses and opinions that the Clack authors expressed in their paper. Plaintiff's complaints about the paper are therefore matters that can and must be addressed through scientific debate. They do not provide the basis for a defamation claim. *See, e.g., Competitive Enterprise Institute v. Mann*, 150 A.3d at 1242 ("As a matter of constitutional principle, when the issue is whether liability may be imposed for speech expressing scientific or policy views, the question is not who is right; the First Amendment protects the expression of all ideas, good and bad."); *Resolute Forest Products, Inc. v. Greenpeace International*, No. 17-cv-02824, 2017 WL 4618676, at *9 (N.D. Cal. Oct. 16, 2017) ("The academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this kind."); *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation.").[23]

C. Plaintiff Is A Public Figure And Cannot Prove That The Academy Acted With Actual Malice

Plaintiff's defamation claim must also be dismissed because he is a public figure and cannot show that the Academy acted with actual malice when it published the Clack paper.

1. Plaintiff Is A Public Figure In The Scientific Debate Over The Feasibility Of Replacing Fossil Fuels

[23] If the Court wishes to review the litany of allegedly "false and misleading statements" described in Plaintiff's "Line-by-Line Response" to the Clack paper, a brief explanation of why each one cannot possibly support a defamation claim is set forth in Exhibit E.

An individual may be a public figure for a limited purpose where he "injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Welch,* 418 U.S. 323, 351 (1974). Plaintiff is a public figure for purposes of the ongoing public and scientific dispute over the need for and feasibility of replacing fossil fuels. Plaintiff's complaint asserts that he is "a renowned scientist on global warming and air pollution and the development of large-scale clean, renewable energy solutions for those problems," Compl. ¶ 1, who has published two books, published 152 peer-reviewed scientific papers, and been cited more than 11,000 times in the peer-reviewed literature. *Id.*[24]

Thus, plaintiff has injected himself into the public and scientific controversy over fossil fuels and alternative energy sources, and is a public figure for purposes of this case.

2. Plaintiff Cannot Show That The Academy Acted With Actual Malice

As a public figure, plaintiff cannot recover on a defamation claim unless he proves "by clear and convincing evidence" that the Academy published a defamatory statement "with actual malice, *i.e.,* with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine, Inc.,* 501 U.S. at 510, quoting *New York Times Co. v. Sullivan,* 376 U.S. at 279-80. Plaintiff cannot meet that standard, and the defamation claim should be dismissed.

The Clack paper was authored by twenty-one scientists and, pursuant to the Academy's practices, was subjected to peer review before it was published. The Academy therefore had

[24] Moreover, plaintiff's sixty-four page on-line *curriculum vitae* shows that his involvement in the public debate over the use of fossil fuels and alternative energy sources is not limited to the scientific journals: he has made over 480 presentations, and served on more than 35 panels. He has given more than 55 interviews to producers of television shows and documentaries. Plaintiff also has a Twitter account with almost 14,000 followers. Plaintiff's curriculum vitae is posted at http://web.stanford.edu/group/efmh/jacobson/vita/.

assurance that the paper's analyses and statements were supported by over twenty scientists, and had satisfied peer review.

Moreover, six weeks before the Clack paper was published, the Academy provided its authors with the May 5, 2017 version of plaintiff's "Line-By-Line Responses" to the paper. *See* Compl. Ex. 10. And the Clack authors made some changes to their original draft in response to what they received from plaintiff, including the addition of language to address plaintiff's assumption about adding turbines to existing hydroelectric dams. *See* Part III.B(2), *supra.* Thus, before the Clack paper was published, the Academy also had assurance that the authors were aware of plaintiff's criticisms of their paper and had made the changes they thought were necessary.

Finally, as previously discussed, the Academy gave plaintiff sixteen weeks' advance notice before publishing the Clack paper, multiple pre-publication drafts of the paper, and the opportunity to publish a rebuttal to the paper. And the Academy published plaintiff's rebuttal the same day it published the Clack paper. The Academy therefore ensured that plaintiff was given ample opportunity to identify any error he believed existed in the Clack paper, and that the PNAS readers would receive plaintiff's views simultaneously with the Clack authors' views.

This conduct was not malicious. It was, instead, the process used in the search for the scientific truth. *E.g., McMillan v. Togus Regional Office,* 294 F. Supp. 2d at 317 ("'[S]cience is, above all, an adversary process. It is an arena in which ideas do battle . . . .'"). The Academy merely provided the forum for plaintiff and the Clack authors to debate their respective views.

IV. Plaintiff's Breach of Contract And Promissory Estoppel Claims Fail As A Matter Of Law

Like the defamation claim, plaintiff's contract and promissory estoppel claims "amount [ ] to nothing more than a backdoor attempt" to stifle protected expression.[25] Both the breach of contract and promissory estoppel claims fail because they are predicated on two unfounded propositions: (1) that the Academy's editorial guidelines are somehow binding on the Academy and not subject to modification or the discretion of the Academy; and (2) that plaintiff has the right to demand that his interpretation of the editorial guidelines be strictly applied to any paper challenging his work. Further, both counts also depend on the dubious proposition that plaintiff submitted his paper to PNAS, one of the most widely-cited scientific publications in the world, and part of the respected and prestigious Academy, because of the PNAS editorial guidelines, and that his selection constituted consideration for the implied agreement that PNAS would strictly apply plaintiff's interpretation of the editorial guidelines to other authors in the future. Compl. ¶¶ 95, 100, 101. Plaintiff further alleges that the Academy breached this "contract" with plaintiff when it published the Clack paper. Compl. ¶ 96. But he can point to nothing whatsoever to suggest that his interpretation of the editorial guidelines is binding on PNAS, or that he or any other author may impose his or her views of the guidelines – that is the purview of the publisher, PNAS.

A. Plaintiff's Breach Of Contract Claim Fails Because He Cannot Demonstrate The Existence Of An Implied Contract With The Academy

Plaintiff cannot show the existence of an implied contract with the Academy.[26]

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[25] *See Compuserve Corp. v. Moody's Investors Services*, 499 F.3d 520, 531 (6th Cir. 2007).

[26] A breach of contract claim includes four elements: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). Plaintiff's claim also fails under California law because he cannot identify a contract or enforceable promise, a requirement of such a claim. *Lewis v. YouTube, LLC*, 244 Cal. App. 4th 118, 124,

The only written documents exchanged between plaintiff and the Academy are the Academy's author conflict of interest and comments form (the "Author COI and Comments Form") (Ex. F), and the PNAS License to Publish (Ex. G). By their express terms, these forms did not require PNAS to abide by the editorial guidelines. The Academy could not breach a written contract that did not obligate it to do anything.

In the absence of a written contract, plaintiff asserts that the Academy's editorial guidelines somehow created a separate implied contract. But general guidelines do not provide a basis for a breach of contract claim. *See Jurin v. Google Inc.*, 768 F. Supp. 2d 1064 (E.D. Cal. 2011). In *Jurin*, plaintiff brought a breach of contract claim against Google, alleging Google breached its contract by failing to investigate trademark infringement as required by Google's AdWords policy. The court found the parties did not have a contract regarding investigation of trademark infringement, noting that the plaintiff had:

> not referred to any written agreement between itself and Defendant above and beyond the AdWords policy. Plaintiff alleges no facts to support its contention that this policy was a contract between Plaintiff and Defendant, and not just a general policy statement on Defendant's website. A broadly stated promise to abide by its own policy does not hold Defendant to a contract.

Id. at 1073 (emphasis added). *See Beverage Distrib., Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 29 (9th Cir. 1971) (" [a] gratuitous and unsolicited statement of policy or of intention which receives the concurrence of the party to whom it is addresses, does not constitute a contract").[27]

Plaintiff does not and cannot point to any facts showing the Academy's intent to be bound by editorial guidelines. *See Ponder v. Chase Home Fin., LLC*, 666 F. Supp. 2d 45, 48–49

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197 Cal. Rptr. 3d 219, 224 (2015), *review denied* (Apr. 13, 2016) (citing *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011).

[27] *See also Dyer v. Northwest Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) ("[B]road statements of company policy do not generally give rise to contract claims."); *In re Northwest Airlines Privacy Litig.*, No. Civ. 04-126 (PAM/JSM), 2004 WL 1278459, at *6 (D. Miss. June 6, 2004) ("general statements of policy are not contractual.").

(D.D.C. 2009), citing *Vereen v. Clayborne*, 623 A.2d 1190, 1193 (D.C. 1993) ("An implied-in-fact contract . . . is inferred from the conduct of the parties in the milieu in which they dealt.").[28] Instead, he offers only the conclusory allegation that he believed that the Academy would "adhere to its publication policies for all publications." Compl. ¶ 95.

Moreover, plaintiff does not point to a single written or oral communication, or any action by the Academy that objectively manifests the Academy's intent to be contractually bound by its editorial guidelines. Nor could he. According to plaintiff's theory, the Academy allegedly transferred to plaintiff the right to dictate the form, authorship, and content of any paper critical of his work. Instead of any facts to support such an abdication of editorial control, plaintiff merely alleges that he was aware of the Academy's editorial guidelines, that his selection of PNAS for publication of his paper constituted consideration for an implied agreement between plaintiff and the Academy, and that the Academy would "adhere to its publication policies for all publications." Compl. ¶ 95. But plaintiff's awareness of the Academy's editorial guidelines falls far short of facts showing that the Academy intended for its discretionary editorial guidelines to become a binding agreement that plaintiff could unilaterally enforce for all future PNAS publications.

Perhaps recognizing that the Academy's own guidelines do not create the contract he seeks to enforce, plaintiff alleges that, because PNAS is a member of the Committee on Publication Ethics ("COPE"), it is required "to investigate every single claim of fabrication both before and after publication of an article" according to COPE's general guidelines. Compl. ¶ 97. Given that the Academy's own guidelines do not create a contract, it is specious to suggest that

[28] The party alleging an implied contract bears the burden of establishing each of the essential elements of breach of an implied contract. *Grunseth v. Marriott Corp.*, 872 F.Supp. 1069, 1073 (D.D.C. 1995); *Ponder v. Chase Home Fin., LLC*, 666 F. Supp. 2d 45, 48 (D.D.C. 2009).

an enforceable contract can be created by the guidelines of an organization of which PNAS is a member. In any event, the COPE guidelines make clear that they are merely general guidelines. As explained on its website, "COPE provides advice to editors and publishers on all aspects of publication ethics." The COPE Code of Conduct provides that "[b]est practices for editors would include . . . being *guided* by the COPE flowcharts . . . in cases of suspected misconduct,"[29] and "Best Practice Guidelines are more aspirational."[30] COPE does not impose any requirements on its members for investigating claims of fabrication, and provides no basis for plaintiff to enforce those guidelines in any event.

Finally, plaintiff cannot demonstrate that the Academy intended to be bound by its general guidelines, given that it did not apply strictly those guidelines to plaintiff's own rebuttal to the Clack paper. And the Academy has, in fact, published comments as research papers, thereby both undermining plaintiff's reliance and demonstrating that the Academy was not – and had no intent to be -- contractually bound by its guidelines. Moreover, even apart from the Academy's practices, plaintiff's breach of contract claim would be barred by the statute of frauds because there is no signed writing reflecting an intent to be bound. D.C. Code § 28–3502 (1996).

B. Plaintiff's Promissory Estoppel Claim Fails Because The Academy Did Not Promise To Strictly Enforce Its Editorial Guidelines

Plaintiff also cannot establish a claim for promissory estoppel. To establish a claim for promissory estoppel, a plaintiff must show (1) a promise; (2) that the promise reasonably induced reliance on it; and (3) that the promisee relied on the promise to his or her detriment.

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[29] *See* COPE Code of Conduct and Best Practice Guidelines for Journal Editors, page 3 (emphasis added), available at: https://publicationethics.org/about.
[30] *Id.* at page 1.

Simard v. Resolution Trust Corp., 639 A.2d 540, 552 (D.C. 1994).[31] "[R]eliance on an indefinite promise is not reasonable." *In re U.S. Office Prods. Co. Secs. Litig.*, 251 F. Supp. 2d 77, 97 (D.D.C. 2003). And "though a promise need not be as specific and definite as a contract, it must still be a promise with definite terms on which the promisor would expect the promisee to rely." *Id.*, citing *Bender v. Design Store Corp.*, 404 A.2d 194, 196 (D.C. 1979). Plaintiff's promissory estoppel claim fails because there is no promise on which plaintiff could have reasonably relied: as discussed above, the Academy did not make any promises regarding its editorial guidelines.

Further, plaintiff cannot show reliance. Plaintiff alleges that he was induced by the editorial guidelines "to submit the Jacobson Article for publication in PNAS rather than any other competing scientific journal." Compl. ¶ 101. This allegation is facially pretextual. PNAS is one of the world's most-cited scientific journals in publication today.[32] PNAS is part of the prestigious National Academy of Sciences.[33] Common sense would suggest that the reputation and readership of PNAS is a far greater inducement to an author than the Academy's general editorial guidelines. Moreover, plaintiff cannot show reliance because publication of the Clack paper as a research paper is consistent with prior Academy practice. *See, e.g.*, Ex. B. Plaintiff cannot show reliance on a promise when the Academy's prior actions demonstrate affirmatively that no such promise existed.

CONCLUSION

As demonstrated above, this is a case where the important purpose behind the Anti-SLAPP Act – to ensure defendants are not intimidated or prevented from engaging in public policy debates by abusive lawsuits – must be vindicated by dismissal of plaintiff's claims in their

[31] The elements of promissory estoppel are the same under California law; plaintiff fails to state a claim under California law as well. *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411, 416, 186 Cal. Rptr. 3d 408, 413 (2015), as modified (Apr. 29, 2015).
[32] http://www.nasonline.org/publications/pnas.
[33] *See* PNAS Marketing Brochure, *available at*: http://www.pnas.org/site/aboutpnas/index.xhtml.

entirety with prejudice. The three counts – intended to stifle expression on a critical issue in America today – are merely a transparent attempt to circumvent the First Amendment, and plaintiff cannot prevail on the merits. Pursuant to the Anti-SLAPP Act and Rule 12(b)6), the Academy respectfully asks this Court to dismiss plaintiff's claims in their entirety and with prejudice.

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Respectfully submitted,

Of Counsel:
Audrey Byrd Mosley (D.C. Bar No. 263376)
General Counsel
Marc S. Gold
Deputy General Counsel
NATIONAL ACADEMY OF SCIENCES
2101 Constitution Avenue, N.W.
Washington, D.C. 20418

Eric H. Feiler
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

/s/ Joseph P. Esposito
Joseph P. Esposito (D.C. Bar No. 375507)
William E. Potts, Jr. (D.C. Bar No. 945824)
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel. No. (202) 955-1500
jesposito@hunton.com
wpotts@hunton.com

Counsel for Defendant National Academy of Sciences