IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF MARK Z. JACOBSON'S REPLY
TO OPPPOSITION TO MOTION FOR RELIEF/ALTERATION OF JUDGMENT

Plaintiff's Sep. 24, 2021, Motion provides the correct definition of a *scientific disagreement.* Meticulous analyses by four sworn Experts show Dr. Clack and NAS gave the Court a false meaning of the term and published false facts. Defendant provides no evidence countering the definition of a *scientific disagreement* and has never provided a source of his own definition. His refusal to correct his false definition and false facts even after four Experts in his field declare them false proves again malice in front of the Court. Defendant says the Expert testimonies are "*irrelevant.*" He must say this because they show he and NAS misled the Court. But the purpose of Experts is to assist the Court, so it is for the Court to decide their value.

Here, Plaintiff presents new cases showing (a) a false claim of error in Plaintiff's professional work is defamatory since it imputes to him "*incompetence in his trade*"; (b) *Mann* clearly supports this conclusion; (c) Dr. Clack has shown three types of malice, including intent

and motive to discredit and four lies in his paper and (d) the tests of whether a sentence is factual are if it is "*susceptible to proof or refutation by reference to concrete, provable data*" or "*implies a provably false fact.*" **These tests were not previously applied to the sentences at issue here.**

FALSE CLAIMS A PROFESSIONAL MADE MISTAKE ARE DEFAMATORY

In *Gould v. Maryland Sounds Ind., Inc.* [(1995) 31 Cal.App.4th 1137, 1154], the Court ruled that a factually false statement claiming a professional made a mistake is defamatory **even if it does not impute dishonesty or misconduct** because it imputes "*to him incompetence in his trade.*" In that case, an estimator was accused of making an error in a bid. The Court determined,

> "*We reach a different conclusion as to Leister's accusation Gould made a $100,000 mistake in estimating an MSI bid. This statement would tend to injure Gould by imputing to him incompetence in his trade*." (citations omitted)

Thus, Gould's honesty/integrity were not directly impugned. He was falsely accused of erring as a professional, thus defamed. The **exact situation arose here**. Plaintiff was falsely accused of many professional (computer modeling) errors. NAS admits D.C. mimics California law on this:

> "*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*' (Nov 27, 2017 NAS Memorandum at 9)

Mann [150 A.3d 1213 (DC 2016)] also clearly supports the *Gould* finding. *Mann* first says a statement defames "*if it tends to injure [the] plaintiff in his trade, profession*" which is what *Gould* found for false claims of professional error (same types of false claims as here). *Mann* then says,

> "*The statement 'must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.*"

"*Ridiculous*" means "*stupid or unreasonable and deserving to be laughed at.*" "*Infamous*" means "*famous for something considered bad*" (Cambridge Dictionary). By imputing Plaintiff, a modeler-by-profession for ~32 years, as *incompetent*, Dr. Clack caused him to appear *stupid, deserving to be laughed at*, and *famous for something considered bad.* Thus, *Mann* implies defamation here.

For both quotes, *Mann* references *Howard Univ v Best* [484 A.2d 958 989 (D.C. 1984)], which says a defamatory meaning must be determined only after a publication is "*considered as a whole in the sense in which it would be understood by the readers to whom it was addressed.*" That case refers to *Johnson v. Johnson Pub. Co.* [271 A.2d 696 (1970)], which says words must be read without ignoring "*their implications*" or "*their context.*" That case refers to *Gariepy v. Pearson* [207 F.2d 15 (DC Cir. 1953)], which gives examples of how context matters. E.g.,

> *"The words "Smith got rich fast" would not imply corruption, but the words "Smith got rich fast while he was a tax assessor" might."*

Here, the false fact "*In fact, the flexible load used by LOADMATCH is more than double the maximum possible value from table 1 of ref.* 11*"* combined with "*We note several modeling errors...that invalidate the results...*" imputes Plaintiff to be an incompetent computer modeler (*Gould, supra*). Same with "*This error is so substantial... "* combined with the model error claim. The resulting smears in news articles and social media prove the harmful "*implications*," thus defamatory nature of the statements (*Johnson*; *Howard*, supra), as concurred by Experts (Exh 1,4, Sep 24, 2021 Motion).

DR. CLACK's INTENT AND MOTIVE TO DISCREDIT

"*Shame the work by similar authors, on grid reliability, was discredited*"(Aug 24,2017 Clack tweet-Exh 30 Sep 29, 2017 Complaint & Exh 1). This unprovoked smear by Dr. Clack of Plaintiff's different paper shows Dr. Clack's intent to discredit Plaintiff. His motive was envy of attention Plaintiff was receiving (Exh 2). Actual malice is "*a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person*" [*Brown v Kelly* (1989) 48Cal3d 711,723]. Dr. Clack's malice in context (*Johnson, supra*) with the false facts prove defamation.

Actual malice also arises because Dr. Clack had "*knowledge that [the statement] was false*" [*Thompson v Armstrong*, 134 A.3d 305,311 (DC 2016)]. Dr. Clack knew his claim, "*This error is so substantial, we hope there is another explanation...*" contained two lies. He knew (1)

what the explanation was, so pretending he didn't was a lie, and (2) he had no evidence of error because he knew the high hydropower discharge rate was an assumption: "*I am not disagreeing with the possibility that it can be done with…hydro…*" (Mar 2, 2016 email; Exh 4, Sep 29, 2017 Complaint). He then compounded his lies with two more in "*One possible explanation for the errors in the hydroelectric modeling…*" The lies are (3) suddenly MULTIPLE hydro *modeling errors* arose when he had no proof of one, and (4) he knew the exact, not *possible*, explanation. Thus, Dr. Clack lied four times in two sentences to **discredit** Plaintiff, which was his purpose (Exh 1). The sentences in context (*Gariepy*) with his lies and motive (Exh 2) are defamation.

The third type of malice is refusal to investigate properly and correct when given evidence. The Supreme Court says defamation arises upon "*extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*" The paper

> "*…had published the story without any independent support for his affidavit; that it did not, before publication, view his notes…; that the magazine did not interview a person with Burnett..., view the game films, or check for any adjustments...*" [*Curtis Pub. Co. v Butts* (1967) 388 US 130]

Experts find Dr. Clack did not do due diligence and recklessly disregarded truth, which is malice.

WHAT CONSTITUTES A STATEMENT OF FACT

The tests for determining if a statement is factual are whether it is "*susceptible to proof or refutation by reference to concrete, provable data*" [*Gould, supra*] and "*whether a reasonable juror could conclude that…statements expressed or implied a verifiably false fact.*" [*Dominion, v. Powell*, Civil Action 1:21-cv-00040 (CJN) (DDC Aug. 11, 2021); *Rosen v. Amer. Israel Public Affairs Com., Inc.*, 41, A.3d 1250 (DC 2012)]. In *Dominion*, the Court reeled off examples:

> *"These statements are either true or not; either Powell has a video…or she does not… either Dominion was created to produce altered voting results…or…it was not…either Dominion did so or…it did not. In sum, Dominion has adequately alleged that Powell made a number of statements that are actionable because a reasonable juror could conclude that they were either statements of fact or statements of opinion that implied or relied upon facts that are provably false.*"

Using these tests, we consider Defendant's statements brought up in the Sep 29, 2017 Complaint:

(1) "*In fact, the flexible load used by LOADMATCH is more than double the maximum possible value from table 1 of ref.* 11. *The maximum possible from table 1 of ref. 11 is given as 1,064.16 GW, whereas figure 3 of ref. 11 shows that flexible load (in green) used up to 1,944GW(on day 912.6). Indeed, in all of the figures in ref. 11 that show flexible load, the restrictions enumerated in table 1 of ref. 11 are not satisfied.*" (P.18)

(2) "*This error is so substantial that we hope there is another explanation for the large amounts of hydropower output depicted in these figures.*" (P. 21)

(3) "*…generation proposed in ref. 11 is 402.2 TWh, 13% higher than the 25-y historical maximum of 356.5 TWh (1997)…*" (P. 29)

(4) "*We note several modeling errors presented in ref. 11 that invalidate the results…*" "*…contained modeling errors…*" "*…have been modeled in erroneous ways and that these errors alone invalidate the study and its results…*" (On P. 18, 20, 21, 23 of Sep. 29, 2017 Complaint refers to false claims of "*model error*" due to false claims (1) and (2).

These are all statements of fact because (1) values in Table 1 are either maximum or not; (2) a hydro computer model error either occurred or not; (3) Plaintiff either includes Canadian hydro or doesn't; and (4) the model either produced errors due to (1) and (2) or didn't. **Even if Statement 2 is an opinion, it implies a provably false fact (that an error occurred)**, so is actionable [*Rosen, Mann, supra*]. All experts concur the statements are factual [e.g., "*numbers in Table 1 are either max…or…average.*"*(*Exh 3, Sep. 24, 2021 Motion]. Evidence in all Plaintiff's briefs, including Exhibits 1-8 of the Sep. 24, 2021 Motion, prove the facts are false.

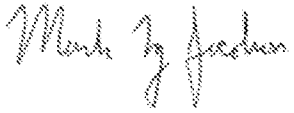
CONCLUSION

Defendant's statements were of fact since they are "*susceptible to proof or refutation;*" defamatory because they impute "*incompetence in [Plaintiff's] trade*" and make him appear "*odious, infamous or ridiculous;*" and malicious for three reasons. Thus, the Court is asked to VACATE its fee order.

Respectfully submitted,

Date: October 10, 2021

Mark Z. Jacobson



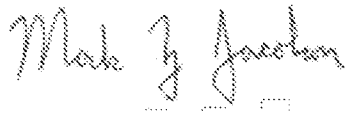
Mark Z. Jacobson, Pro Se
946 Valdez Place, Stanford, CA 94305
(650) 468-1599; jacobson@stanford.edu

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of foregoing was served via Case File Xpress this 24th day of September 2021 on:

Evangeline C. Paschal Esposito, Esq.
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Counsel for Defendant
National Academy of Sciences

Drew W. Marrocco, Esq.
Clinton A. Vince, Esq.
Dentons US LLP
1900 K Street, N.W.
Washington, D.C. 20006
Counsel for Defendant
Christopher T.M. Clack, Ph.D.



Mark Z. Jacobson

EXHIBIT 1

← Tweet

Andrea VassalloMeyer
@andreamv

Are you an @NPR listener? Care about the environment? My friend @mzjacobson is talking today 3pm EST/2pm CST

> **Mark Z. Jacobson** @mzjacobson · Aug 24, 2017
> Speaking on @NPR @SciFri at noon Pacific Time to talk about 139-country roadmaps cell.com/joule/fulltext... @StanfordWoods @100isNow @Joule_CP

9:29 AM · Aug 24, 2017 · Twitter Web Client

Tweet your reply

Reply

Mark Z. Jacobson @mzjacobson · Aug 24, 2017
Replying to @andreamv and @NPR
Thanks, Andrea. Actually on Friday :)

1 2

Andrea VassalloMeyer @andreamv · Aug 24, 2017
Oops. I guess I have promote it for another day!

Dr Christopher T M Clack, PhD @DrChrisClack · Aug 24, 2017
Replying to @andreamv @NPR and @mzjacobson
Shame the work by similar authors, on grid reliability, was discredited:
pnas.org/content/114/26...

2

EXHIBIT 2

Leonardo DiCaprio
@LeoDiCaprio

Following

Read @MZJacobson's piece on renewable energy and the plan to transition to 100% by 2050: beforetheflood.com/explore/the-so...

11:42 AM · 3 Nov 2016

2,200 Retweets **5,122** Likes

254 2.2K 5.1K

Tweet your reply

Christopher Clack @clacky007 · 3 Nov 2016

Replying to @LeoDiCaprio

.@LeoDiCaprio Why not read my piece on the most cost effective way to remove carbon: theconversation.com/the-cheapest-w... #renewableenergy #climatechange

The cheapest way to scale up wind and solar energy? High-tech po...
The U.S. could dramatically increase solar and wind power without expensive energy storage. The key is to overlay high-voltage direct curr...
theconversation.com

4 3 4

Steve Bloom @stevebloom55 · 3 Nov 2016

So hmm, relative to what @mzjacobson has already done, this is a specific HVDC grid configuration with added efficiencies?