IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF MARK Z. JACOBSON'S OPPOSITION TO DEFENDANT NATIONAL ACADEMY OF SCIENCE'S MOTION FOR AN AWARD OF ATTORNEYS FEES AND COSTS PURSUANT TO D.C. CODE §16-5504(a)

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Date: March 21, 2018

Plaintiff, Mark Jacobson, Ph.D. ("Professor Jacobson" or "Plaintiff") hereby opposes the Motion of Defendant National Academy of Sciences ("NAS") for an award of Attorney's Fees and Costs Pursuant to D.C. Code Section 16-5504(a) ("Motion") and states as follows:[1]

INTRODUCTION

District of Columbia and U.S. Supreme Court case law clearly define a "prevailing party" as a party "who has been awarded some relief by the court." *Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C.2006) (quoting *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 603 (2001)); *D.C. Healthcare Systems, Inc. v. District of Columbia*, Civ. Case No. 16-1644, 2017 WL 6551184 (D.D. C. 2017); *Guttenberg v. Emery*, 68 F. Supp.3d 184, 191 (D.D.C. 2014)). Because Professor Jacobson voluntarily dismissed his Complaint as he was legally entitled to do pursuant to Rule 41(a)(1)(A)(i), before any ruling was made on Defendants' motions to dismiss, there is no prevailing party in the instant matter and the Motions of NAS and Defendant Christopher Clack for legal fees under D.C. Code 16-5504(a) must be denied.

There is a glaring omission in the Memorandum of Points and Authorities in Support of NAS's Motion ("NAS Memo."). Nowhere does NAS even cite to, let alone actually discuss or analyze, Rule 41(a)(1)(A)(i) of the District of Columbia Superior Court Rules of Civil Procedure – the rule under which Professor Jacobson voluntarily dismissed his lawsuit. As stated above and explained in more detail below, because Professor Jacobson dismissed under Rule 41(a)(1)(A)(i), as he had an absolute right to do, there is no "prevailing party" and therefore no

[1] The Memorandum of Points and Authorities in support of Defendant Christopher Clack's Motion for Costs and Attorney's Fees Under the D.C. Anti-SLAPP Act ("Clack Motion") incorporates and adopts the arguments set forth by NAS in its supporting Memorandum. Therefore, this Opposition also constitutes Professor Jacobson's response to the Clack Motion.

basis on which to award NAS (or Defendant Dr. Christopher Clack) attorney's fees and costs under the fee-shifting provision of the Anti-SLAPP statute, which itself is an exception to the "American Rule" that requires parties to pay their own legal fees.

Rather than acknowledge the actual procedural posture of this case, a voluntary dismissal under Rule 41(a)(1)(A)(i), NAS asks this Court to analyze, from NAS's perspective, Professor Jacobson's *motivations* in bringing, and dismissing, this litigation. NAS first attacks all of Professor Jacobson's claims, then assumes a ruling that "defendants satisfied their burden of demonstrating that Plaintiff's claims arose from an act in the furtherance of the right of advocacy…," and then incorrectly asserts that Professor Jacobson could not identify an enforceable contract, a promise, or any defamatory statements. NAS's mischaracterization of Professor Jacobson's pleadings is belied not only by the Complaint itself, but also by Professor Jacobson's arguments in opposition to NAS's Special Motion to Dismiss. Perhaps more disturbing, however, is NAS's baseless assault on Professor Jacobson's motivations in bringing this litigation in the first place. The assertion that Professor Jacobson used the judicial system to chill scientific debate and financially punish NAS ***is not true*** and is easily disproven by the public record (including Exhibit 1), which shows overwhelming public discourse by Clack co-Authors on the Clack Article, even after the lawsuit was filed. As Professor Jacobson has repeatedly asserted, he brought this litigation to redress the intentional publication and refusal to correct or retract three false facts spread throughout the Clack Article, by both NAS and Dr. Clack that damaged Professor Jacobson's reputation. Professor Jacobson made significant efforts, ***before*** resorting to litigation, indeed, ***before*** the Clack Article was even published, to obtain NAS's commitment to correct the Clack Article before it was published. Professor Jacobson did not seek to "chill" speech; he sought to ensure that the speech was factually correct

thus not defamatory. It was only in the face of the steadfast refusal of NAS and Dr. Clack to correct the publication that Professor Jacobson chose to sue to protect and restore his professional reputation or else suffer the consequences of such damage. The evidence of defamation by NAS and Dr. Clack is overwhelming, as briefly summarized here.

First, nowhere in either NAS's or Dr. Clack's briefs do they even claim that Professor Jacobson's list of three major false facts published in the Clack Article is wrong. Instead, they merely argue that Dr. Clack and his co-authors have presented their own opinion, or version, of the facts, as if facts could have two versions. For example, whereas Professor Jacobson states with evidence that Table 1 of his paper factually contains average values, NAS and Dr. Clack claim that it is the Clack Authors' opinion that Table 1 contains "maximum" values (which is wrong and has not been substantiated with a shred of evidence), thus results in model errors that "invalidate the (Jacobson) study and its results." Such false claims of model error led to headlines that made Professor Jacobson appear "odious, infamous, or ridiculous," because it made him appear publicly, to millions of people, to be a sloppy and dishonest scientist. The headlines used terms like "lie," "scam," and "errors":

- "The case for 100 percent renewables rests on a lie" (6/26/17 Energy Collective)
- "People are starting to catch on to the 100% renewable energy scam" (6/22/17 Manhat. Inst)
- "Scientists blast Jacobson 100% wind, water, and solar plan for errors" (6/20/17 PV Mag)
- "Study destroys 'Tooth fairy' research used by activists…" (6/22/17 Energy In Depth)
- "Landmark 100 percent renewable energy study flawed, say 21…experts" (6/23/17 SciAm)
- "Debunking the scientific fantasy of 100% renewables" (6/26/17 Forbes)
- "The appalling delusion of 100% renewables exposed" (6/24/17 National Review)
- "Celebrity professor beloved by Democrats smacked down by peers" (6/22/17 College Fix)
- "Experts debunk 100% renewables decarbonization" (6/20/17 Power Magazine)
- "Scientists sharply rebut influential renewable energy plan" (6/19/17 MIT Tech Review)
- "100 percent wishful thinking: The green-energy cornucopia" (9/9/17 Green Social Thought)
- "Road to renewable energy filled with potholes of magic thinking" (8/16/17 The Hill)

Further, NAS admittedly refused even to investigate the claims of false facts brought before it, both prior to and after publication. NAS' admitted refusal to investigate is an absolute admission of "*reckless disregard*," thus "*malice*," under D.C. law. Specifically, *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016) states:

> A plaintiff may prove actual ***malice*** by showing that the defendant either (1) had "subjective knowledge of the statement's falsity" or (2) ***acted with "reckless disregard for whether or not the statement was false.***
>
> * * * *
>
> "[I]t is only when a plaintiff offers evidence that `a defendant has reason to doubt the veracity of its source' does its ***`utter failure to examine evidence*** within easy reach or to make obvious contacts in an effort to confirm a story' ***demonstrate reckless disregard.***"

Mann, 150 A.2d at 1252 (quoting *Doe v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014) (emphasis added), 1259 (quoting *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 590 (D.C. Cir. 2016) (further internal citation omitted) (emphasis added).

NAS and Dr. Clack further claim that Professor Jacobson cannot point to any language in the Clack Article where the language itself is "unpleasant or offensive," beyond the statements about modeling error. Dr. Clack further claimed that Professor Jacobson has provided "no evidence of actual malice," ***even though showing "reckless disregard" does prove actual malice***, Exhibit 1 is new smoking-gun proof that Dr. Clack and his primary coauthor Dr. Caldeira (one of three coauthors who performed research for the Clack paper) both acted with intentional, actual malice to tarnish the reputation of Professor Jacobson. The exhibit is a tweet by Dr. Caldeira on March 3, 2018, which Dr. Clack endorsed by "liking" it. The tweet claims that Professor Jacobson "cook(ed) the books":

> I want to spend my time engaging the work of people who deal with their colleagues in a professional manner, who are transparent in their assumptions, ***and who do not try to cook the books to achieve preconceived results***.

Exhibit 1 (emphasis added). This statement proves once and for all that at least two of the three main authors of the Clack Article continue to this day to intentionally tarnish the reputation of Professor Jacobson. It also proves that Professor Jacobson's lawsuit ***did not*** chill speech, let alone scientific debate. To the contrary, the person who prompted Dr. Caldeira's statement asked if the "**prospect of getting sued scared you away?**" (Exhibit1). Dr. Caldeira's response, and Dr. Clack's decision to "like" the response, proves no speech was chilled. Further, NAS has continued to publish articles in PNAS, demonstrating its speech has not been chilled in the least.

NAS also assumes that it knows why Professor Jacobson dismissed the lawsuit, wrongly asserting that Professor Jacobson was "undoubtedly motivated by a desire to avoid an adverse opinion from the Court" and satisfied that he had already subjected Defendants to incur legal fees and costs. To the contrary, the dismissal had nothing to do with the probability of success of his Complaint, which he filed because it was valid and correct, both factually and legally. If Professor Jacobson were concerned about an adverse Court opinion, he never would have spent the legal fees to file the lawsuit to begin with. Also, he did not file this lawsuit to chill the Defendants' speech, and their speech has not been chilled. Professor Jacobson knows this was not a SLAPP lawsuit; it was to correct factually false statements that damaged his reputation.

Not only are NAS's assumptions about Professor Jacobson's motivations for bringing, and now dismissing, the litigation wrong, ***they are irrelevant.*** Despite the attempt by NAS to have this Court look to the laws of other jurisdictions (California and Massachusetts) to resolve its Motion, the Rules of Civil Procedure of ***this*** Court and the statutes and case law of ***this*** jurisdiction lead to only one conclusion – that Professor Jacobson had ***an absolute right*** to voluntarily dismiss this lawsuit at this stage; neither NAS nor Dr. Clack is a "prevailing party" under the Anti-SLAPP statute; and there is no basis under ***D.C. law***, that permits the Court to

consider awarding NAS or Dr. Clack their attorneys fees or costs. Accordingly, Professor Jacobson respectfully requests the Court to deny both the NAS Motion and the Clack Motion.

I. PROFESSOR JACOBSON PROPERLY EXERCISED HIS RIGHT TO VOLUNTARILY DISMISS HIS LAWSUIT

Professor Jacobson voluntarily dismissed this action pursuant to Rule 41(a)(1)(A)(i) of the D.C. Superior Court Rules of Civil Procedure, which provides:

> (a) VOLUNTARY DISMISSAL.
> (1) By the Plaintiff.
> (A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable statute, the plaintiff may dismiss an action without a court order by filing:
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment[.]

Because neither Defendant had served an answer or a motion for summary judgment, Professor Jacobson was well within his right to voluntarily dismiss the action and there can be no doubt or question that Professor Jacobson's voluntary dismissal was appropriate.

A Rule 41(a)(1)(A)(i) notice of voluntary dismissal "takes immediate and final effect. '[O]nce the plaintiff has filed a notice of voluntary dismissal pursuant to Rule 41(a)(1)(A)(i), 'there is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.' " *D.C. Healthcare Systems, Inc. v. District of Columbia*, Civ. Case No. 16-1644, 2017 WL 6551184 (D.D. C. 2017) (quoting *Miniter v. Sun Myung Moon*, 736 F. Supp. 2d 41, 45 n.7 (D.D.C. 2010)). *See also Evans v. Dreyfuss Brothers, Inc.*, 971 A.2d 179, 186 (D.C. 2009) (a "dismissal without prejudice 'renders the proceedings a nullity and leaves the parties as if the action had never been brought.'") (citations omitted). Because the plaintiff in *D.C. Healthcare Systems* filed a voluntary dismissal under Rule 41(a)(1)(A)(i), the Partnership was not a "prevailing party" and its attorneys fee motion under 42 U.S.C. Section 1988(b) as a prevailing party was denied. 2017 WL 6551184, *1, *2. This case further states: *See also Guttenberg v.*

Emery, 68 F. Supp.3d 184, 191 (D.D.C. 2014) ("a Rule 41(a) voluntary dismissal without prejudice is the "opposite" of an adjudication upon the merits and leaves the parties as if the action had never been brought") (quoting *Semtek Int'l, Inc. v. Lockheed Martin Corp.*,531 U.S. 497, 505 (2001)).

II. BECAUSE OF THE VOLUNTARY DISMISSAL, THERE IS NO PREVAILING PARTY

The case law is clear that when an action is dismissed pursuant to a notice of voluntary dismissal under D.C. Superior Court Rule 41(a)(1)(A)(i) (and under identical Federal Rule of Civil Procedure 41(a)(1)(A)(i)), there is no "prevailing party." Thus, even where a statute allows fee-shifting in contravention of the American Rule, there is no basis to award fees because there is no "prevailing party" when an action is voluntarily dismissed under Rule 41(a)(1)(A)(i).

"Prevailing party" is, as noted by the United States Supreme Court, a "legal term of art" that refers to a party who has been "awarded some relief by the court[.]" *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604 (2001). The term is "not some newfangled legal term invented for use in late-20th-century fee-shifting statues." *Id.* 532 U.S. at 610 (Scalia, J., concurring). In *Buckhannon*, the plaintiff, an operator of assisted living centers, failed a state fire marshal inspection because the residents "were incapable of 'self-preservation'" under state law, and a cease-and-desist order was served requiring the plaintiff to close the facility. 532 U.S. at 600. The plaintiff sued the state of West Virginia, alleging that the state law's "self-preservation" requirement violated the federal Fair Housing Amendments Act of 1988 ("FHAA"). *Id*. at 601. During the litigation, West Virginia agreed to stay the cease-and-desist order and enacted legislation to eliminate the "self-preservation" requirement. *Id*. at 601. The trial court then granted West Virginia's motion to

dismiss the case as moot because the new legislation eliminated the allegedly offensive provisions. *Id*. Plaintiff then asked for attorney's fees as the prevailing party under the FHAA. *Id*. at 601 Although there was no adjudication on the merits, the plaintiff argued it had "prevailed" because its litigation was a catalyst that caused the defendant to voluntarily change its behavior, *id*. at 601, which is the same argument that NAS (and Dr. Clack) make here.

The Supreme Court rejected the plaintiff's catalyst argument, explaining that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." 532 U.S. at 605. *See Gibson v. Walgreen Co.,* No. 6:07–cv–1053–Orl–28KRS, 2008 WL 2607775 (M.D. Florida 2008) (applying *Buckhannon,* holding that there is no "prevailing party" after a voluntary dismissal under Rule 41(1)(a)(1)(ii)). Here, Professor Jacobson's voluntary dismissal of his original Complaint resulted in no material change in circumstance relative to before the Complaint was filed from the perspective of NAS or Dr. Clack, unlike in *Buckhannon,* where a material but non-judicial change in circumstance (the passing of a law) did occur. Thus, the Supreme Court ruling, which states, "Never have we awarded attorney's fees for nonjudicial 'alteration of actual circumstances,'" (*id*. at 606) must apply to an even greater degree here than in *Buckhannon*. District of Columbia courts interpret the term "prevailing party" in the same way that the *Buckhannon* Court did. *See e.g. Settlemire v. D.C. Office of Emp. Appeals,* 898 A.2d 902, 907 (D.C.2006) (a prevailing party is one who has "been awarded some relief by the court") (quoting *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603, 121 S.Ct. 1835)). Like the plaintiff in Buckhannon, NAS and Dr. Clack incorrectly argue that Professor Jacobson dismissed the lawsuit as a ploy to avoid paying legal fees based on what they assume is an inevitable ruling in their favor. The plaintiff in Buckhannon made a similar argument – that the "'catalyst theory'

is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees." 532 U.S. at 608. The Court rejected these assertions, "which are entirely speculative and unsupported by any empirical evidence . . .." *Id.*

The plaintiff in *Buckhannon* made the additional argument that the legislative history of the fee-shifting statute at issue, the FHAA, stated that a party may be considered to have "prevailed" even though neither formal relief nor a consent judgment was obtained. 532 U.S. at 607-08. The Court rejected plaintiff's argument. "Particularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority,' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term." 532 U.S. at 608. Here, the legislative history of the fee-shifting statute at issue, the Anti-SLAPP Act, contains no language comparable with that in the FHAA's legislative history–language that the *Buckhannon* Court found insufficient to overcome the American Rule.

III. THE ANTI-SLAPP FEE-SHIFTING PROVISION REQUIRES A "PREVAILING PARTY"

NAS seeks an award under the fee-shifting provision of the D.C. Anti-SLAPP Statute, D. C. Code §§16-5501 *et seq*, which permits a prevailing party to seek costs and reasonable attorneys fees. D.C. Code §16-5504. (emphasis added). NAS asserts that it has "effectively prevailed" because its Special Motion to Dismiss "caused plaintiff to abandon his lawsuit almost immediately following the Court's February 20 Anti-SLAPP hearing." NAS Memo. at 3. The statute, however, does not permit a movant who claims it has "effectively prevailed" to recover fees, only a movant who has actually "prevailed" by obtaining a court ruling. As discussed above, "prevailing party" status is a legal term that allows the unusual recovery of attorneys fees only where the party has been awarded relief by the Court. NAS is essentially trying to use the

catalyst theory of prevailing party that was rejected by *Buckhannon* and by the D.C. Court of Appeals. *Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C.2006) (quoting *Buckhannon*'s requirement that to be prevailing party, the Court must have awarded relief). NAS asserts, "Plaintiff did not satisfy his burden of proving that his claims were likely to succeed on the merits. The Academy is therefore entitled to a presumption that it should be awarded its fees and costs." NAS Memo. at 3. Besides the fact that Professor Jacobson rejects this conjecture, for all the reasons stated in his Oppositions to the Special Motions to Dismiss as well as those provided herein, no such ruling has been made by the Court. The fact remains that NAS has not been awarded any relief by the Court; Professor Jacobson's notice of voluntary dismissal does not constitute relief awarded by the Court; and therefore NAS is not a prevailing party.

Significantly, in support of its argument, NAS misleadingly fails to cite any of the substantial District of Columbia case law regarding "prevailing parties" and the effect of a notice of voluntary dismissal under 41(a)(1)(A)(i).[2] Rather, NAS asserts that because there is no D.C. case law specifically addressing voluntary dismissal specifically in the Anti-SLAPP context (again ignoring the fact that substantial D.C. case law exists with regard to the issue of who is a prevailing party), the Court should look elsewhere. Thus, NAS pivots to other jurisdictions. None of the cases cited by NAS are dispositive for this Court. Indeed, none of the California or Massachusetts cases cited by NAS are even precedent in those jurisdictions because none were

[2] The only D.C. case cited by NAS is *Doe v. Burke*, 133 A.3d 569 (D.C. 2016). That case, however, involved a special motion to quash under the D.C. Anti-SLAPP statute (not a special motion to dismiss) and there was no question that the defendant prevailed. Although the trial court had denied the motion to quash, the Court of Appeals reversed and remanded the case back to the trial court where the defendant then moved for fees. 133 A.3d at 572. Whether defendant was or was not a prevailing party was not at issue, nor did the case involve a voluntary dismissal.

issued by the highest courts in those states, although that is not immediately apparent from the way in which NAS has cited to and described the opinions. The four California opinions cited by NAS were all issued by appellate division courts. The two Massachusetts opinions cited by NAS were issued by trial courts. In addition to the fact that the cases cited by NAS lack any precedential value for this Court, all of the cases are distinguishable and inapposite.

In *Cardno Chemrisk, LLC v. Foytlin*, 33 Mass L. Rptr. 489, 2016 WL 4919461 (Superior Court of Mass. 2016) (NAS Memo. at 5), the plaintiff filed a motion to voluntarily dismiss under Massachusetts Rule of Civil Procedure 41(a)(2) (which a court has discretion to grant or deny) after the defendants had filed an appeal of the trial court's denial of their special motion to dismiss (under Anti-SLAPP) and while that appeal was still pending. The court exercised its discretion to deny the plaintiff's motion on the basis that it was premature while the appeal was still pending. 2016 WL 4919461, *1.

NAS also cites (and quotes at length from) *Winthrop Healthcare Investors, L.P. v. Cogan*, 28 Mass. L. Rptr. 75, 2010 WL 5891673 (Superior Court of Mass. 2010). *See* NAS Memo. at 4-5. NAS relies on *Winthrop* because, in response to the plaintiff's argument that it had a right to voluntarily dismiss the action, the defendant argued that his pending Anti-SLAPP motion to dismiss should be considered as a motion for summary judgment for purposes of precluding a voluntary dismissal. Although the court considered the defendant's argument, it noted that the defendant had not cited any supporting case law, nor could the court itself find any. 2010 WL 5891673, at *2. Ultimately, the court found the issue moot. *Id*. Thus, the court's discussion of the issue is dicta.

Moreover, there is no authority in this jurisdiction to consider an anti-SLAPP Motion to Dismiss the same as a motion for summary judgment for purposes of a voluntary dismissal. Had

the D.C. Council intended to preserve a movant's right to a ruling on an Anti-SLAPP motion once filed, and if granted, a ruling on fees and costs, the D.C. Council could have included a section in the anti-SLAPP statute that provided that a Special Motion to Dismiss has the same effect as a Motion for Summary Judgment for purposes of Rule 41(a)(1)(i). Alternatively, the D.C. Council could have required defendants to file a "Special Motion for Summary Judgment." It did neither of these things, however. Rule 41(a)(1)(i) existed at the time the D.C. Council enacted the anti-SLAPP law. Therefore, in the absence of an exception to that Rule for anti-SLAPP matters, full effect must be given to a notice of voluntary dismissal such as was filed here. With all due respect to this Court, it is up to the D.C. Council, not this Court to make these decisions. While a motion for summary judgment and Special Motion to Dismiss have some similarities, they are not the same motion, as the D.C. Court of Appeals made clear in *Mann*, 150 A.3d at 1238 (Special Motion to Dismiss under the anti-SLAPP Act is separate from, and not intended to be redundant of, a Rule 12 motion to dismiss and a motion for summary judgment "later in the litigation, after discovery has been completed").

NAS also relies on a case from Illinois (Memo. at n.6), but that case is also inapposite. NAS describes *Wright Development Group, LLC v. Walsh*, 939 N.E.2d 389, 397 (2010) as holding that "a defendant's rights under the Illinois Anti-SLAPP statute, including the right to recover attorney's fees, continue to exist even when the plaintiff's claims have been dismissed with prejudice on other grounds." NAS Memo. at 5 n.6. This inaccurate statement of the holding of the case belies the case's procedural complexities. The court denied the defendant's an anti-SLAPP motion to dismiss, but the ruling was not made until more than ninety days after it was filed, in violation of the anti-SLAPP Act. 939 N.E.2d at 627. The defendant moved for reconsideration, or, alternatively, to make findings so that he could take an immediate

interlocutory appeal as provided by the Act. *Id*. at 628-29. The trial court denied the motions to reconsider and for interlocutory appeal, and it also entered a briefing schedule on defendant's remaining motion to dismiss (the "Rule 2-615 Motion") on the pleadings (not under the anti-SLAPP Act). The court granted defendant's Rule 2-615 Motion and dismissed the complaint with prejudice. *Id*. at 629. The defendant appealed the trial court's interlocutory orders denying his motion for reconsideration and denying his request to take an interlocutory appeal of the court's denial of his anti-SLAPP motion to dismiss. *Id*. at 630. The appellate court denied the appeal as moot because the trial court had granted the Rule 2-615 Motion to Dismiss. The issue on appeal to the Illinois Supreme Court was not whether a right to attorneys fees continues to exist after a plaintiff's claims have been dismissed on other grounds, as NAS claims. Rather, the issue on appeal to the Supreme Court was whether the trial court erred when it denied the defendant's "independent and substantive right to appellate review [as provided by the anti-SLAPP Act] of final trial court orders denying a motion to dispose of a lawsuit brought pursuant to the Act," *id*. at 632, which orders were entered *before* the Rule 2-615 Motion to Dismiss had been granted. Accordingly, *Wright Development* provides no support for NAS.

The four California cases cited by NAS are also inapposite. Not only are they all out-of-state cases, they are all intermediate appellate decisions. In *Pfeiffer Venice Props. V. Bernard*, 123 Cal. Rptr. 647, 650 (Cal. Ct. App. 2002), the court held that a court "has jurisdiction to award attorneys fees to a ***prevailing*** defendant whose SLAPP motion was not heard" (emphasis added) because the matter was dismissed by the court itself, *not* voluntarily dismissed by the plaintiff as in the present case. As discussed above, under applicable ***District of Columbia*** law, there is no "prevailing" party when an action is voluntarily dismissed. In *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*, 42 Cal. Rptr. 3d 256, 268 (Cal. Ct. App. 2006)

the appellate court relied on *Pfeiffer* (which, as just demonstrated, is distinguishable). Moreover, the *ARP* Court actually granted the anti-SLAPP Motion and that ruling was not rendered moot by the fact that the Court also granted a motion to dismiss on the pleadings.

NAS also cites both *Liu v. Moore*, 81 Cal. Rptr. 2d 807, 809 (Cal. Ct. App. 1999) and *Coltrain v. Sherwalter*, 77 Cal. Rptr. 2d 600, 608 (Cal. Ct. App. 1998), although the two cases were decided differently. Neither case, however, is apposite here. The *Coltrain* Court found that in California, although a plaintiff's voluntary dismissal gives rise to a presumption that the defendant is the prevailing party, the plaintiff can defeat this presumption by showing it "had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits." The law in the District of Columbia does not support an analysis that applies any presumption, in either direction. The *Liu* Court held that when a plaintiff voluntarily dismisses while a motion to strike under the anti-SLAPP Act is pending, the court should decide the merits of the motion to strike. 81 Cal. Rptr. at 811. Again, there is no support under D.C. case law for such a proposition.

IV. PROFESSOR JACOBSON DOES NOT NEED TO SHOW SPECIAL CIRCUMSTANCES THAT WOULD RENDER FEE AWARD TO NAS UNJUST

In its final argument, NAS asserts that Professor Jacobson is required to, but cannot, demonstrate that there are special circumstances that would demonstrate that an award of fees to NAS would be unjust. Professor Jacobson need not make such a showing because NAS's Motion should be denied for the reasons discussed herein – neither NAS nor Dr. Clack is a "prevailing party" and therefore they are not entitled to attorneys fees and costs. Thus, there is no additional requirement that Professor Jacobson prove "special circumstances."

NAS casts aspersions on Professor Jacobson's decision to file and then dismiss the lawsuit. The assertions by NAS that Professor Jacobson cannot demonstrate special

circumstances (which he is not even required to do) ignores the compelling reasons why Professor Jacobson filed this lawsuit. Here, unlike the plaintiffs in any of the cases that NAS relied on in support of its Motion for fees, or in any of the cases that either Dr. Clack or NAS relied on in their Special Motions to Dismiss, Professor Jacobson attempted to obtain corrections to the defamatory statements ***before*** filing suit. In fact, he tried multiple times. Had NAS required Dr. Clack to correct the misstatements before or even right after publication, the harm to Professor Jacobson's reputation would have been contained and there would have been no need to file this lawsuit. Both NAS and Dr. Clack are fully aware that litigation was not Professor Jacobson's first choice. He continued to try to work with both NAS and Dr. Clack, but both refused. Exhibit 1 shows beyond any doubt the reason why; namely, Dr. Clack maliciously intended to cause the greatest possible damage to Professor Jacobson's reputation.

NAS concludes by asserting, without any basis, that Professor Jacobson could not possibly have prepared the February 22, 2018 on-line explanation of his reasons for dismissing the lawsuit in just the two days that had lapsed since the hearing on the Special Motions to Dismiss and that he must have started preparing it before that hearing, insinuating that Professor Jacobson had already decided prior to the hearing to dismiss. That simply is not true. The online explanation was started and completed by Professor Jacobson on the same day it was posted.

CONCLUSION

Under applicable District of Columbia law, the Voluntary Dismissal filed by Professor Jacobson took immediate and final effect on February 22, 2018 and there is no further role for this Court to play. Professor Jacobson respectfully requests the Court to deny the Motions for fees and costs filed by both Dr. Clack and NAS.

Respectfully submitted,

Dated: March 21, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2018, I caused the foregoing Plaintiff Mark Z. Jacobson's Plaintiff Mark Z. Jacobson's Opposition To Defendant National Academy Of Science's Motion For An Award Of Attorneys Fees And Costs Pursuant To D.C. Code §16-5504(a), and Proposed Order, to be served via CaseFileXpress on the following:

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Paul S. Thaler

EXHIBIT 1

Mike Novick @MikeN64536 · Feb 23

Ken, are you guys evaluating the new paper, or has the prospect of getting sued scared you away?

1 2

Ken Caldeira <----- Coauthor of Dr. Clack on PNAS 2017 paper

@KenCaldeira Following

Replying to @MikeN64536 @mzjacobson

I want to spend my time engaging the work of people who deal with their colleagues in a professional manner, who are transparent in their assumptions, and who do not try to cook the books to achieve preconceived results.

2:07 PM - 3 Mar 2018

1 Like <----- Dr. Christopher Clack twitter icon indicating he "likes" this tweet

1 1

Tweet your reply

Mark Z. Jacobson @mzjacobson · Mar 3

Replying to @KenCaldeira @MikeN64536

Ad hominem. You had full knowledge of exactly what we did before you published false facts, such as "we hope there is another explanation", our Table 1 had max values, & we had a model error. web.stanford.edu/group/efmh/jac... You didn't even examine our data like prudent scientists do

1

Mark Z. Jacobson @mzjacobson · Mar 3

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF MARK Z. JACOBSON'S OPPOSITION TO DEFENDANT CHRISTOPHER CLACK'S MOTION FOR COSTS AND ATTORNEYS FEES UNDER THE ANTI-SLAPP ACT

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Date: March 21, 2018

Dr. Clack's Memorandum of Points and Authorities In Support of his Motion for Costs and Attorney's Fees Under the D.C. Anti-SLAPP Act ("Clack Motion")[1] relies on, and incorporates by reference, the Memorandum of Points and Authorities that the Defendant National Academy of Sciences filed in support of its Motion for an Award of Attorney's Fees and Costs Pursuant to D.C. Code §16-5504(a) ("NAS Motion"). Accordingly, in response to the Clack Motion, Plaintiff, Mark Jacobson, Ph.D. ("Professor Jacobson") hereby relies on, and incorporates by reference, his Opposition to the NAS Motion. As that Opposition shows, neither Defendant here is a "prevailing party," defined by the D.C. Court of Appeals and the U.S. Supreme Court as one "who has been awarded some relief by the court." *Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C.2006) (quoting *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*), 532 U.S. 598 (2001)). Because neither Defendant is a prevailing party, neither may seek fees. NAS (and therefore Dr. Clack) further acknowledges that there is ***no*** law in the District of Columbia that supports their requests for fees in the face of Professor Jacobson's voluntary dismissal of the lawsuit.

In addition to incorporating by reference the arguments made by NAS in support of its own Motion, Dr. Clack's Memorandum of Points and Authorities includes a brief narrative

[1] Dr. Clack is incorrect that in his Anti-SLAPP Act Motion he "specifically requested that the Court award him the statutorily provided costs and reasonable attorney's fees for defendant against plaintiff's claims," as he states at page 2 of his Memorandum in support of his instant motion. Rather, in his Anti-SLAPP Act Motion, Dr. Clack merely "reserve[d] the right to file a further motion seeking an award of the costs of litigation, including attorney's fees, pursuant to D.C. Code 16-5504(a)." Clack Motion at 1 (emphasis added).

discussing what he asserts are the equitable reasons to grant his Motion for fees and costs, to which Professor Jacobson responds as follows:[2]

As he did in the Memorandum of Points and Authorities in support of his Special Motion to Dismiss, Dr. Clack seeks to prove there were no untrue statements in his Article by virtue of the fact that the Article was peer reviewed and co-authored with 20 other scientists. As Professor Jacobson explained in his briefs in opposition to the Special Motions to Dismiss filed by both Dr. Clack and NAS, the Clack Article was peer reviewed *before*, not after, Professor Jacobson learned that the Clack Article even existed. Accordingly, the peer reviewers never even saw Professor Jacobson's assertions that the Article contained materially false statements.

Second, the fact that Dr. Clack had twenty co-authors is irrelevant because as admitted to by the Clack Authors in their own paper (and never subsequently denied), eighteen of those twenty co-authors never even performed research or made any contribution beyond "writing the paper" for the article. As such, they did not meet the criteria under NAS policies for being identified as "authors," who must, by NAS rules, make a substantial contribution.

Third, Dr. Clack states that Professor Jacobson dismissed the lawsuit without notice to Clack or to NAS, but no such notice is required under D.C. Superior Court Rule 41(a)(1)(A)(i).

Fourth, Dr. Clack complains (as does NAS) that Professor Jacobson "forced" the Defendants to expend time and money to defend themselves from his "baseless claims." Clack Memo. at 2. However, Professor Jacobson's claims are completely valid, for all the reasons explained in his briefs in opposition to the Special Motions to Dismiss, through counsel at the

[2] Although Professor Jacobson believes that the equities weigh in his favor, the Court need not reach these equitable issues because, as explained in Professor Jacobson's opposition to the NAS Motion, he had an absolute right to dismiss his lawsuit.

hearing on those Motions, and through the summary of claims and new evidence provided as Exhibit 1 of Professor Jacobson's Opposition to NAS' Motion for Award of Attorneys Fees.

Moreover, Professor Jacobson did not "force" the Defendants to do anything. He gave both Defendants many opportunities before he filed his Complaint to resolve this situation without the expenditure of *any* money. They could have corrected the misstatements and published a truthful article or retracted the article and resubmitted a new paper meeting PNAS's guidelines without the false statements, but they both refused, clearly intending to incur as much damage as possible (*e.g.*, Exhibit 1 to Professor Jacobson's Opposition to NAS' Motion for Award of Attorneys Fees).

Professor Jacobson takes particular issue with Dr. Clack's "woe is me" statement that he "felt constrained from publicly opining on or discussing the issues set forth in his paper or the Complaint." Clack Memo. at 2. Dr. Clack's statement is patently false. As noted in Professor Jacobson's Opposition to Dr. Clack's Special Motion to Dismiss (page 6 and Exhibits 1 and 2), Dr. Clack continued to be vocal through social media (specifically, Twitter) not just about the topic of climate change, particular renewable energy sources and Professor Jacobson's Article, but also *about this lawsuit*. Similarly, many other Clack Authors made numerous critical public comments about the lawsuit and the Jacobson Article after the filing of the lawsuit.

As recently as March 7, 2018, Dr. Clack "liked" the following March 3, 2018 tweet (Exhibit 1 to Professor Jacobson's Opposition to NAS' Motion for Award of Attorneys Fees) by one of the co-authors of the Clack Article, Dr. Ken Caldeira, which states (in reference to Professor Jacobson):

> I want to spend my time engaging the work of people who deal with their colleagues in a professional manner, who are transparent in their assumptions, and ***who do not try to cook the books to achieve preconceived results***.

3/3/18 Caldeira Tweet (emphasis added). By "liking" this tweet, Dr. Clack demonstrated that he has no hesitation in continuing to discredit Professor Jacobson. Further, the question that prompted Dr. Caldeira's statement was, does the "prospect of getting sued scared you away?" If Dr. Caldeira's speech were chilled by the lawsuit, he would have answered, "yes" or at least been cautious. Instead, he leveled a defamatory attack that clearly indicated his speech was not chilled, and Dr. Clack endorsed this sentiment by "liking" the post.

When Professor Jacobson filed the lawsuit, he saw it as the only possible avenue to restoring his reputation from the damaging news articles and public shaming on social media that immediately followed NAS's publication of the Clack Article. As noted in Professor Jacobson's Opposition to the NAS Motion, several of the headlines of the more damaging articles include the following:

- "The case for 100 percent renewables rests on a lie" (6/26/17 Energy Collective)
- "People are starting to catch on to the 100% renewable energy scam" (6/22/17 Manhattan Inst)
- "Scientists blast Jacobson 100% wind, water, and solar plan for errors" (6/20/17 PV Mag)
- "Study destroys 'Tooth fairy' research used by activists…" (6/22/17 Energy In Depth)
- "Landmark 100 percent renewable energy study flawed, say 21…experts" (6/23/17 SciAm)
- "Debunking the scientific fantasy of 100% renewables" (6/26/17 Forbes)
- "The appalling delusion of 100% renewables exposed" (6/24/17 National Review)
- "Celebrity professor beloved by Democrats smacked down by peers…" (6/22/17 College Fix)
- "Experts debunk 100% renewables decarbonization" (6/20/17 Power Magazine)
- "Scientists sharply rebut influential renewable energy plan" (6/19/17 MIT Tech Review)
- "100 percent wishful thinking: The green-energy cornucopia" (9/9/17 Green Social Thought)
- "Road to renewable energy filled with potholes of magic thinking" (8/16/17 The Hill)

See also Exhibit 28 to Professor Jacobson's Complaint. Professor Jacobson's repeated efforts to obtain a correction before and even after publication were rebuked by both Dr. Clack and NAS. It is the Defendants themselves who left Professor Jacobson no choice other than to bring this action to restore his reputation. Thus, Professor Jacobson did not file this lawsuit as a SLAPP.

His decision to dismiss the lawsuit was in no way based on an assessment on his part that the Court would rule in favor of either Dr. Clack or NAS. Furthermore, his use of a court rule that allows a voluntary dismissal under the particular procedural posture of this case, a rule that countless plaintiffs have used in a myriad of cases, and which no D.C. case prohibits when an Anti-SLAPP Special Motion to Dismiss has been filed, should not be characterized as either a "ploy" to circumvent the attorneys fees provision in the Anti-SLAPP statute or as "gamesmanship," as Dr. Clack asserts (Memo. at 2, 3).

Dr. Clack's bold assertion at page 3 that he has "***in fact***, prevailed on his motion" (emphasis added) and is therefore entitled to fees and costs is, simply, wrong. As Professor Jacobson explains in his Opposition to the NAS Motion, there are no "prevailing" parties when a case is voluntarily dismissed under D.C. Superior Court Rule 41(a)(1)(A)(i). Because Dr. Clack is not a "prevailing party," there is no basis on which to award him his fees or costs.

CONCLUSION

For all the foregoing reasons, and those in Professor Jacobson's Opposition to the NAS Motion, which Opposition is incorporated herein by reference, Professor Jacobson respectfully requests the Court to deny Dr. Clack's Motion for fees and costs.

Respectfully submitted,

Dated: March 21, 2018

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/s/ Paul S. Thaler

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2018, I caused the foregoing Plaintiff Mark Z. Jacobson's Plaintiff Mark Z. Jacobson's Opposition To Defendant Christopher Clack's Motion For Costs And Attorneys Fees Under The Anti-SLAPP Act and Proposed Order, to be served via CaseFileXpress on the following:

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