Cause No. D-1-GN-12-000003

Dr. Andrew J. Wakefield, MB., BS., FRCS,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**TRAVIS COUNTY, TEXAS**
	§	
The British Medical Journal, a d/b/a of BMJ Publishing Group Ltd., also d/b/a BMJ Group, and BMJ, Brian Deer, Individually, and Dr. Fiona Godlee, Individually,	§	
	§	
Defendants.	§	**250th JUDICIAL DISTRICT**

DEFENDANTS' AMENDED ANTI-SLAPP MOTION TO DISMISS UNDER TEX. CIV. PRAC. REM. CODE § 27.001 *et seq.* (subject to their special appearances)

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Subject to and without waiving their special appearances challenging personal jurisdiction, Defendants BMJ Publishing Group Ltd. ("BMJ") (erroneously sued as "The British Medical Journal, a d/b/a of BMJ Publishing Group Ltd., also d/b/a BMJ Group, and BMJ"), Dr. Fiona Godlee, and Brian Deer hereby move to dismiss Plaintiff Dr. Andrew Wakefield's claims against them pursuant to Texas's anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.* This amended motion includes additional evidence from discovery that Plaintiff requested in connection with the original motion.

I.
INTRODUCTION

In January 2012, Dr. Andrew Wakefield was named by *Time* magazine as one of the "Great Science Frauds" of modern history.[1] In April 2011, the *New York Times* described him as "one of the most reviled doctors of his generation."[2] In 2009, a Special Master presiding over vaccine litigation in the United States Court of Federal Claims recognized that Wakefield's 1998 paper in *The Lancet* medical journal, which suggested a possible link between the lifesaving Measles, Mumps, and Rubella ("MMR") vaccine and the development of autism in children, was considered a "scientific fraud."[3] *The Lancet* has now fully retracted Wakefield's paper, and its editor has stated publicly that the paper was "utterly false" and that Wakefield "deceived the journal."[4] Wakefield's home country's medical board, the United Kingdom's General Medical Council ("GMC"), convicted him in 2010 of multiple charges of "serious professional misconduct," including "dishonesty" and "unethical conduct." It further held that his misconduct

[1] *See* Ex. 14 to Amended Declaration of Marc Fuller in Support of Defendants' Anti-SLAPP Motion to Dismiss ("Fuller Amend. SLAPP Decl.") (2012 *Time* art.).

[2] Ex. 9 to Fuller Amend. SLAPP Decl. (2011 *New York Times* art.).

[3] *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968, at *111 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009).

[4] Ex. 13 to Fuller Amend. SLAPP Decl. (2010 *The Guardian* art.).

had been so severe and extensive that the only punishment that would adequately protect the public from him was the permanent revocation of his medical license.[5] As the *New York Daily News* put it, "Hippocrates would puke."[6]

Now the plaintiff in this frivolous libel case, Dr. Wakefield has sued one of the most prestigious medical journals in the world, the *BMJ*, its editor-in-chief, Dr. Godlee, and one of the most respected investigative journalists in the United Kingdom, Brian Deer. Wakefield's claims challenge a series of articles and editorials in the *BMJ* in January 2011 entitled "Secrets of the MMR Scare." There is nothing false about the series. Deer's reporting won him his second British Press Award, the U.K.'s equivalent of the Pulitzer Prize. And the *BMJ*'s editorial commentary merely stated what people familiar with the controversy already understood: Wakefield's research was a "fraud."

As Dr. Wakefield presses this case, he travels the world raising money for "The Dr. Wakefield Justice Fund."[7] It is a cynical scheme, but not a new one for Wakefield. In recent years, he has filed virtually identical claims against Deer and other U.K. publishers in various proceedings in London. In one of the cases, The Honorable Mr. Justice Eady, chief judge of the High Court's specialized media division, criticized Dr. Wakefield's litigation tactics:

> [Dr. Wakefield] wished to use the existence of libel proceedings for public relations purposes, and to deter critics, while at the same time isolating himself from the 'downside' of such litigation, in having to answer a substantial defence of justification.

Wakefield v. Channel Four Television Corp., Twenty Twenty Prods. Ltd. and Brian Deer, [2005] EWHC 2410 (QB) (Eng.). Indeed, Dr. Wakefield chose to file suit in Texas after BMJ's outside

[5] Ex. 14 to Declaration of Marc Fuller in Support of Defendants' Special Appearances ("Fuller Decl. ISO Special App.") (GMC Findings).

[6] Ex. 12 to Fuller Amend. SLAPP Decl. (2010 *New York Daily News* art.).

[7] Ex. 5 to Fuller Decl. ISO Special App. (www.drwakefieldjusticefund.org/).

counsel in the U.K. warned him that he would be forced to post a bond with the High Court if he filed this obviously vexatious case in London.[8]

Dr. Wakefield may have figured that, in Texas, there would be little "downside" to filing frivolous libel claims and using the suit to raise money and chill the free speech of his critics. Not so anymore. To avoid dismissal under our State's new anti-SLAPP statute, Dr. Wakefield must submit evidence to support each essential element of his libel claims. He cannot do this for several reasons. First, the statements he challenges are true. The GMC findings against him—numerous proven charges of dishonesty and research misconduct—are binding in this case, and they leave no room for Wakefield to argue that he was defamed by Defendants' reporting and editorial comment. During the GMC proceeding, Dr. Wakefield's own counsel admitted that the charges against him amounted to an allegation of "fraud." And Defendants have overwhelming additional evidence to establish the truth of the challenged statements.

Moreover, even if Dr. Wakefield could produce evidence of falsity and overcome Defendants' other defenses, his claims would still fail. He is indisputably a public figure, and therefore must prove that Defendants acted with actual malice—that they knew what they were publishing was false. Again, this is an impossible burden for Dr. Wakefield. The reporting he challenges was the product of years of investigation by one of the United Kingdom's best reporters, exhaustively sourced, then subjected to multiple editorial reviews, including an external review by an expert pediatrician. Through extensive discovery, including the production of thousands of pages of documents and the deposition of Brian Deer and the BMJ, Dr. Wakefield has had a full and fair opportunity to fish for evidence of actual malice. It was an expedition doomed to fail, and now it has. There is no falsity and no malice to be discovered.

[8] *See* Ex. 16 to Fuller Amend. SLAPP Decl.

Because Dr. Wakefield cannot satisfy his burden under the anti-SLAPP statute, his claims must be dismissed, and he must be ordered to pay Defendants' reasonable attorneys' fees and costs in defending this action. Moreover, given Dr. Wakefield's long history of frivolous libel litigation, the Court should award additional sanctions to deter Dr. Wakefield from continuing to use the legal system to harass and intimidate journalists covering this matter of paramount public concern.

II.
GROUNDS FOR THIS ANTI-SLAPP MOTION TO DISMISS

- **Substantial truth:** Dr. Wakefield cannot show that any of the challenged statements by Defendants were false. In determining falsity, Texas courts apply the "substantial truth" test. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990); *Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467, 472 (Tex. App.—Dallas 1994, writ denied). This test involves two fundamental principles of defamation law. First, the court's focus must be on whether the overall "gist" of the defendant's statement is substantially true; minor inaccuracies are insufficient to support a libel claim. *Rogers*, 889 S.W.2d at 472. Second, the plaintiff must show that the challenged statements by the defendant were more damaging to the plaintiff's reputation in the mind of the average viewer than literally true statements would have been. *Id.*; *see also McIlvain*, 794 S.W.2d at 16. Here, Dr. Wakefield cannot satisfy his burden because he is already bound by findings by the GMC, after a 217-day contested hearing, that: he was "dishonest"; that he included information in his *Lancet* paper that was "misleading . . . contrary to [his] duty to ensure that the information in the paper was accurate"; that he was "guilty of serious professional misconduct"; that he "behaved unethically"; and engaged in behavior that "exemplifie[d] a fundamental failure in the ethical standards expected of a medical practitioner." Overwhelming additional, undisputed evidence further establishes the accuracy of Defendants' challenged statements.

- **Opinion/Hyperbole:** Expressions of opinion, statements of rhetorical hyperbole, and colorful language that cannot objectively be proven true or false do not qualify as assertions of fact and are therefore not actionable in a libel case. *Carr v. Brasher*, 776 S.W.2d 567, 569-70 (Tex. 1989). Accordingly, statements such as "fraud," "fraudster," "determined cheat," "scandal of astounding proportions," "no scientific basis whatsoever," "sham," "fixed," "rigged," "bullshit," "laundering into the medical literature," "freelance charlatan preying on the parents of autistic children," and "work out a nice little living . . . at the expense of autistic children" are nonactionable, as they represent statements of opinion based on disclosed facts and/or rhetorical hyperbole.

- **Statute of Limitations:** Texas has a one-year statute of limitations for libel and slander claims. *See* Tex. Civ. Prac. & Rem. Code § 16.002. Dr. Wakefield filed this case on January 3, 2012. He challenges certain statements that appear on Deer's website,

www.briandeer.com, which were published online more than one year prior to the date of filing. *See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 143-46 (5th Cir. 2007) (statute of limitations for online publication begins to run on date that statement is first posted online). In fact, most of these statements were the subject of litigation between Wakefield and Deer more than seven years ago.

- **Public Figure/No Actual Malice:** Dr. Wakefield is a limited-purpose public figure. As a public figure, he must produce clear and convincing evidence that Defendants published the challenged statements with actual malice, which requires a showing that they acted with actual knowledge of falsity or a high degree of awareness of falsity. The record, including Defendants' declarations and supporting exhibits, conclusively demonstrates as a matter of law that Defendants did not act with actual malice. Dr. Wakefield has been allowed to conduct extensive document and deposition discovery, but still cannot point to any evidence of actual malice.

- **Fees and sanctions:** Under the anti-SLAPP statute, prevailing defendants are entitled to recover their "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action." *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1). The statute also requires an additional award of sanctions in order "to deter the [plaintiff] . . . from bringing similar actions" in the future. § 27.009(a)(2). Given Dr. Wakefield's long history of filing frivolous libel claims and complaints against Deer and others, he should be sanctioned an amount appropriate to deter future frivolous filings by him.

III.
EVIDENCE IN SUPPORT OF THIS ANTI-SLAPP MOTION TO DISMISS

In support of this anti-SLAPP Motion to Dismiss, Defendants rely on the following evidence, all of which is fully incorporated into and served with this Motion:

Amended Declaration of Brian Deer in Support of Defendants' Anti-SLAPP Motion to Dismiss ("Deer Amend. SLAPP Decl."), with Exhibits 1 - 94; and

Amended Declaration of Brian Deer in Support of Special Appearance ("Deer Amend. Decl. ISO Special App."), with Exhibits 1 – 19; and

Declaration of Fiona Godlee in Support of Defendants' Anti-SLAPP Motion to Dismiss ("Godlee SLAPP Decl."), with Exhibits 1 – 14 (filed March 9, 2012); and

Amended Declaration of Jane Smith in Support of Defendants' Anti-SLAPP Motion to Dismiss ("Smith Amend. SLAPP Decl."), with Exhibits 1 – 5; and

Declaration of Harvey Marcovitch in Support of Defendants' Anti-SLAPP Motion to Dismiss ("Marcovitch Decl.") (filed March 9, 2012); and

Amended Declaration of Marc Fuller in Support of Defendants' Anti-SLAPP Motion to Dismiss ("Fuller Amend. SLAPP Decl."), with Exhibits 1 – 16; and

Declaration of Marc Fuller in Support of Defendants' Special Appearances ("Fuller Decl. ISO Special App."), with Exhibits 1 – 15.

Defendants reserve the right to submit additional evidence in support of this Motion, including in response to any evidence submitted by Plaintiff in opposition to it.

IV.
FACTUAL BACKGROUND

A. Dr. Wakefield and the MMR Scare.

In February 1998, Dr. Andrew Wakefield, an academic gastroenterologist at the Royal Free Hospital School of Medicine in London, published a paper in the esteemed British medical journal *The Lancet*, in which he and his co-authors claimed to have "investigated ***a consecutive series of children*** with chronic enterocolitis and regressive developmental disorder."[9] One of the findings appeared, at first glance, to be shocking:

> Onset of behavioural symptoms was associated, by the parents, with measles, mumps, and rubella vaccination in eight of the 12 children[.]

In other words, of twelve children who happened to show up at the Royal Free Hospital complaining of bowel problems and demonstrating developmental disorders, parents of 8 of the children "associated" the onset of their child's behavioral symptoms with the MMR shot. This "association" was explained later in the paper as temporal proximity of within 14 days between shot and symptoms. And the "developmental disorder" was a diagnosis of regressive "Autism" in nine of the 12. In short, Wakefield's paper made it seem that the parents of "previously

[9] Ex. 1 to Deer Amend. SLAPP Decl. (Andrew J. Wakefield et al., *Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*, 351 LANCET 637–41 (1998) (emphasis added)).

normal" kids were coming in to the hospital and reporting that their kids received MMR shots and, a few days later, began exhibiting their first autistic behaviors.

And so began "one of the great public health disasters in the UK in modern times."[10] Vaccine rates plummeted, and vaccine-preventable diseases began to reappear.[11] Recognizing the potential for Dr. Wakefield's paper to be misunderstood by the public and cause parents to believe incorrectly that their children would be safer without the vaccine, *The Lancet* published a critique by two specialists from the U.S. Centers for Disease Control and Prevention in the same issue that Dr. Wakefield's paper appeared.[12] But Dr. Wakefield stood apart from the journal and his co-authors in media interviews and public statements. Rather than reassure parents that the vaccine was safe, he suggested the opposite, stating that he would not support the continued use of the triple-component MMR vaccine.[13]

In the months and years that followed, larger and better-designed studies found no causal link between MMR and autism. As one U.K. court recognized, "[t]here is now no respectable body of opinion which supports [Dr. Wakefield's] hypothesis, that MMR vaccine and autism/enterocolitis are causally linked."[14] Yet even as these studies piled up as conclusive counterweights to the *Lancet* paper, Dr. Wakefield soaked up the media spotlight, supported by Hollywood celebrities such as Jenny McCarthy. Dr. Wakefield was featured in countless

[10] Declaration of Dr. Harvey Marcovitch ("Marcovitch Decl.") ¶ 14.

[11] *Id.*

[12] Frank DeStefano and Robert T. Chen, *Vaccine adverse events: causal or coincidental?*, 351 LANCET 611-12 (1998).

[13] Ex. 1 to Fuller Amend. SLAPP Decl. (1998 *Guardian* article); Marcovitch Decl. ¶ 14.

[14] *Professor John Walker-Smith v. General Medical Council*, No. [2012] EWHC 503 in the High Court of Justice, Queen's Bench Division, Administrative Court, ¶ 7 (Ex. 1 to Affidavit of Clifford Miller).

newspaper articles and television programs in both the U.K. and the U.S., promoting his research findings and repeating his claims regarding the MMR vaccine and autism.[15]

B. Brian Deer Begins to Investigate Dr. Wakefield's Role in the MMR Scare.

In September 2003, British investigative reporter Deer began working on a feature-length piece on the MMR scare for the *Sunday Times*.[16] With his first calls to supporters of Dr. Wakefield, he began learning information that had not been publicly disclosed.[17] For example, the twelve *Lancet* children were not the routinely sourced sample the paper suggested; members of an anti-vaccine litigation support group had taken part in the study.[18] Moreover, an interview with the mother of one child directly contradicted the information stated in the paper. And, remarkably, Dr. Wakefield had failed to disclose that the U.K.'s Legal Aid Fund had provided him with financial support to advance a lawsuit against the companies that manufactured the MMR vaccine.[19]

This background meant that Wakefield had grossly misreported his project. Contrary to its presentation in *The Lancet*, this had not been a situation where alert doctors at the Royal Free were connecting dots for the first time. Rather, the patients had come at the hospital with their families having already connected the dots. And what's worse, many were prospective litigants with a financial incentive in having a *doctor* connect the dots in a published article in a prestigious medical journal. With this background, the *Lancet* study began looking less like science, and more like an attempt to launder litigation claims through scientific publishing.

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[15] *See, e.g.*, Exs. 2-3 to Fuller Amend. SLAPP Decl.; Ex. 1 to Fuller Decl. ISO Special App.

[16] Deer Amend. SLAPP Decl. ¶ 16.

[17] *Id.* ¶ 17.

[18] *Id.* ¶ 17-18.

[19] *Id.* ¶¶ 19-20

Deer's first *Sunday Times* reports were published on February 24, 2004.[20] They included, among other information, details on Dr. Wakefield's undisclosed payments from plaintiffs' lawyers preparing litigation against vaccine manufacturers. Deer attempted to interview Dr. Wakefield prior to publication, but Wakefield refused through his publicist (yes, he had a publicist) even though his co-authors, the plaintiffs' lawyer who had hired Wakefield, and the editor of *The Lancet* all spoke with Deer.[21] Deer's editors at the *Sunday Times* even held the story in an extraordinary effort to obtain a pre-publication interview with Dr. Wakefield, who consented to speak only on the condition that Deer could not be present to follow up on his answers to questions.[22]

Within two weeks of Deer's February 2004 articles, ten of Dr. Wakefield's co-authors retracted their claim to have found a temporal link between administration of the MMR vaccine and the development of symptoms.[23] Later that year, Deer reported for the U.K.'s Channel 4 television, among other things, that Dr. Wakefield had submitted a patent application in 1997 for a "safer" measles vaccine and that there was no evidence of measles in the system of the children in the *Lancet* paper, contrary to Dr. Wakefield's claims.[24] Deer again invited Dr. Wakefield to sit for an interview that would be aired as part of the program.[25] Dr. Wakefield again refused. In fact, when Deer attempted to interview him at a conference in Indianapolis, Dr. Wakefield put

[20] Ex. 2 to Deer Amend. SLAPP Decl. (Brian Deer, Revealed: MMR Research Scandal, SUNDAY TIMES (London), Feb. 24, 2004, at A1; Brian Deer, MMR: The Truth Behind the Crisis, SUNDAY TIMES (London), Feb. 24, 2004).

[21] Deer Amend. SLAPP Decl. ¶ 21.

[22] *Id.* ¶¶ 22-23.

[23] Ex. 5 to Deer Amend. SLAPP Decl. (Simon H. Murch et al., *Retraction of an Interpretation*, 363 LANCET 750 (2004) (retraction by ten of Dr. Wakefield's co-authors)).

[24] Deer Amend. SLAPP Decl. ¶¶ 34.

[25] *Id.* ¶ 35.

his hand over the camera lens and walked away without comment.[26] Indeed, Dr. Wakefield—despite appearing in all manners of electronic and print media—has ***never*** agreed to an interview with Deer, despite continued requests.

C. After Being Convicted of Dishonesty and Research Misconduct by the U.K. Medical Board, Dr. Wakefield's Medical License Is Revoked.

After publication of the *Sunday Times* stories, Dr. Wakefield issued a press release denying any conflict of interest and claiming that legal aid money was not paid to him personally. In response to a call by British government officials for a GMC investigation, Dr. Wakefield said, "I not only welcome this, I insist on it and I will be making contact with the GMC personally, in the forthcoming week."[27] Dr. Wakefield got the GMC investigation he had publicly pretended to welcome. The result was the country's longest-ever "Fitness to Practise Panel" hearing, beginning in July 2007 and concluding in May 2010.[28]

The GMC Panel, comprised of three doctors and two lay members, heard testimony from 36 witnesses—including Wakefield and his former colleagues—and received evidence on the omitted, misleading, and misreported details of the children who were subjects of the study, Dr. Wakefield's research methods and biased procurement of the study's subjects, his ties to the planned lawsuit against vaccine manufacturers prior to beginning his study, and his undisclosed patent applications for a competing vaccine.[29]

After weighing the totality of evidence, the GMC Panel handed down its findings of fact on January 28, 2010, convicting Dr. Wakefield of "dishonesty," violating basic research ethics

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[26] *Id.*

[27] *Id.* ¶ 27; Ex. 3 to Deer Amend. SLAPP Decl. (statement of Dr. Andrew Wakefield).

[28] *See* Ex. 14 to Fuller Decl. ISO Special App. (General Medical Council, Determination on Serious Professional Misconduct (SPM) and Sanction, 24 May 2010).

[29] *See id.* at 2.

rules, and showing a "callous disregard" for the suffering of children involved in his research.[30] Included among them were four different proven findings of dishonesty against Dr. Wakefield, all proven to a standard of criminal fault—akin to "beyond a reasonable doubt" in the United States.[31] Among other things, the Panel found that Dr. Wakefield improperly caused some children to be subjected to invasive medical procedures such as colonoscopies and MRI scans. Dr. Wakefield also paid children at his son's birthday party to have blood drawn for research purposes. The GMC Panel found that Dr. Wakefield's *Lancet* research was "dishonest," "irresponsible," "misleading," and inaccurate.[32] The Panel found that Dr. Wakefield improperly failed to disclose his connections to planned litigation, his patents for a competing vaccine, and the bias inherent in his selection of study subjects. The GMC Panel further found that Dr. Wakefield's conduct "was such as to bring the medical profession into disrepute."[33]

Shortly after the GMC Panel issued its findings, *The Lancet* officially and fully retracted the Wakefield paper.[34] Signed by the editors of the medical journal, the retraction stated that "several elements" were "incorrect" and various claims had been "proven to be false."[35] *Lancet* editor Dr. Richard Horton said separately that a retraction became necessary as soon as he reviewed the GMC Panel's findings of fact:

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[30] *Id.* at 44-46, 55.

[31] *Id.* at 2; Deer Amend. SLAPP Decl. ¶ 81.

[32] Ex. 14 to Fuller Decl. ISO Special App. (General Medical Council, Determination on Serious Professional Misconduct (SPM) and Sanction, 24 May 2010, at 44-46, 55).

[33] *Id.* at 55.

[34] Ex. 1 to Deer Amend. SLAPP Decl. (*Retraction—Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*, 375 LANCET 445 (2010)).

[35] *Id.*

> It's the most appalling catalog and litany of some the most terrible behavior in any research and is therefore very clear that it has to be retracted.[36]

A few months after announcing its findings, the GMC Panel delivered its sanction for Dr. Wakefield's "serious professional misconduct."[37] On May 24, 2010, it announced that his name would be permanently erased from the U.K.'s medical register. Although it considered other remedies, including suspension, the GMC Panel determined that revocation of his license to practice medicine was the only sufficient penalty: "The Panel concluded that it is the only sanction that is appropriate to protect patients and is in the wider public interest, including the maintenance of public trust and confidence in the profession and is proportionate to the serious and wide-ranging findings made against him."[38]

D. Deer Continues to Cover the MMR Scare with Reports in the *Sunday Times* in 2009.

Deer followed the GMC proceedings closely. He attended the entire prosecution case and most of the rest of the hearing.[39] For him, the hearings offered an opportunity to obtain information from records that had previously been unavailable, such as the children's hospital records.[40] With that information, it became clear to Deer that the full extent of Wakefield's research misconduct had not been reported. Hence, in February 2009, Deer authored articles in the *Sunday Times* based upon the GMC proceedings. Prior to their publication, Deer reached out to Dr. Wakefield once again, writing to inform him of the articles' substance and asking for a

[36] Madison Park, *Medical Journal Retracts Study Linking Autism to Vaccine*, CNN, Feb. 2, 2010, *available at* http://articles.cnn.com/2010-02-02/health/lancet.retraction.autism_1_andrew-wakefield-mmr-vaccine-and-autism-general-medical-council.

[37] Ex. 14 to Fuller Decl. ISO Special App. (General Medical Council, Determination on Serious Professional Misconduct (SPM) and Sanction, 24 May 2010).

[38] *Id.*

[39] Deer Amend. SLAPP Decl. ¶ 45.

[40] *Id.* ¶ 46.

response for inclusion in the published reports.[41] Dr. Wakefield did not respond to Deer's offer directly, instead he later posted a statement on the Internet.[42]

E. The *BMJ* Articles and Editorials.

In 2010, the *BMJ* commissioned Deer to write a series of articles for a scientifically literate audience. The *BMJ* published this three-part series, "Secrets of the MMR Scare," in January 2011.[43] The first article in the series, "How the Case against the MMR Vaccine Was Fixed," exposed the misreporting in the data and methodology underlying Dr. Wakefield's *Lancet* paper.[44] This was the same reporting that had been published in the February 2009 *Sunday Times* reports, but replete with footnotes and written for a medically qualified readership. The second article, "How the Vaccine Crisis was Meant to Make Money," detailed Dr. Wakefield's commercial interests and companies he had established to exploit public alarm and litigation for personal gain, including the fact that his study was underwritten by plaintiffs' lawyers planning a lawsuit against vaccine manufacturers.[45] Again, this reporting had largely already appeared in the *Sunday Times*, as well as in Deer's 2004 documentary for Channel 4.[46]

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[41] *Id.* ¶ 290.

[42] Deer Amend. SLAPP Decl. ¶ 290.

[43] Deer's meticulously researched articles were supported with more than 200 citations to scientific studies, medical records, official documents, media accounts, government reports, and other sources. The print version of the first article contained 39 supporting endnotes with a cross-reference to the online version, which included the full 124 supporting endnotes. In addition to these endnotes and references, Mr. Deer included a 12-page data supplement, published online with the first article, containing two tabulations and an additional 93 citations. The second and third parts of Mr. Deer's series featured 55 and 27 endnotes, respectively.

[44] Ex. 5 to Godlee SLAPP Decl. (Brian Deer, *How the Case Against the MMR Vaccine was Fixed*, 342 BMJ 77-84 (2011)).

[45] Ex. 6 to Godlee SLAPP Decl. (Brian Deer, *How the Vaccine Crisis was Meant to Make Money*, 342 BMJ 136-42 (2011)).

[46] *Id.*

The third article in the series, "*The Lancet*'s Two Days to Bury Bad News," recounted the journal's response to Deer's initial findings.[47]

Based upon Deer's reporting, the *BMJ* published editorials analyzing the reports and drawing conclusions based upon the evidence presented in them.[48] Deer's first "Secrets" article and the *BMJ*'s first editorial now form the basis of most of Dr. Wakefield's claims in this case. This reporting specifically noted Dr. Wakefield's denials and cited his PCC complaint, which Dr. Wakefield concedes contains his response to the allegations against him.[49]

Both Deer and Dr. Godlee in the subsequent months offered additional commentary in the U.K. and in the U.S. For example, Deer appeared on CNN and gave a few radio interviews.[50] Dr. Godlee delivered a lecture on the controversy at the National Institutes of Health in Bethesda, Maryland, in September 2011. Dr. Wakefield also complains of statements in these commentaries.

V.
TEXAS'S ANTI-SLAPP STATUTE APPLIES TO DR. WAKEFIELD'S CLAIMS.

Dr. Wakefield's frivolous claims in this case are clearly subject to an anti-SLAPP motion to dismiss. The statute defines the "exercise of the right of free speech" as any "communication made in connection with a matter of public concern." *Id.* § 27.001(3). The term "matter of

[47] Ex. 7 to Godlee SLAPP Decl. (Brian Deer, The Lancet*'s Two Days to Bury Bad News*, 342 BMJ 200-04 (2011)). In November 2011, the *BMJ* also published another article by Deer as a follow-up feature on the continuing controversy. *See* Ex. 71 to Deer Amend. SLAPP Decl. (Brian Deer, *Pathology Reports Solve "New Bowel Disease" Riddle*, 343 BMJ 985-89 (2011)).

[48] Ex. 9 to Godlee SLAPP Decl. (Fiona Godlee et al., *Wakefield's Article Linking MMR Vaccine and Autism was Fraudulent*, 342 BMJ 64-66 (2011)); Ex. 10 to Godlee Decl. (Fiona Godlee, *Institutional and Editorial Misconduct in the MMR Scare*, 342 BMJ d378 (2011)).

[49] Godlee SLAPP Decl. ¶ 26; Ex. 11 to Godlee SLAPP Decl. (email from Dr. Andrew J. Wakefield to Dr. Fiona Godlee dated Jan. 13, 2011).

[50] Although Dr. Wakefield contends that Deer posted additional material to his website after the *BMJ* series was published, these materials were posted as early as April 2010. This is well outside the one-year statute of limitations on libel claims under Texas law, *see* Tex. Civ. Prac. & Rem. Code § 16.002(a), and any claims based upon these materials are thus time-barred. *See infra* Section VIII.

public concern" expressly includes issues relating to "health or safety," "community well-being," or a "public figure." *Id.* § 27.001(7); *see also Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App.—San Antonio 2001, pet. denied) (childrens' health and safety are matters of public concern). As discussed below, Dr. Wakefield is a public figure, and Defendants' reporting relates to issues of health, safety, and community wellbeing. Accordingly, because the anti-SLAPP statute clearly applies to this case, the only way for Dr. Wakefield to avoid dismissal of his claims is to establish by ***clear and specific evidence*** a prima facie case for ***all*** of the essential elements of his claims. For the reasons discussed below, he cannot satisfy this burden.

VI.
DR. WAKEFIELD'S CLAIMS FAIL BECAUSE HE CANNOT SHOW THAT THE CHALLENGED STATEMENTS ARE FALSE.

Dr. Wakefield's libel claims fail at the most basic level: ***He cannot show that any of the challenged statements are false.*** The GMC Panel already determined that Wakefield's *Lancet* research was "dishonest" and "misleading." Dr. Wakefield had a judicial appeal of these findings, but he abandoned it. Accordingly, the Panel's findings are binding in this case and leave no room for Dr. Wakefield's libel claims in this case. Even without the GMC Panel's findings, moreover, overwhelming undisputed evidence establishes the substantial truth of Defendants' reporting.

A. Dr. Wakefield Must Prove that Defendants' Statements Are Not *Substantially* True.

One of the "essential elements" of Dr. Wakefield's libel claims against Defendants is falsity, and Dr. Wakefield bears the burden of proving this element. *McIlvain*, 794 S.W.2d at 15 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-79 (1986)). In determining whether a libel plaintiff has met his burden, Texas courts apply the "substantial truth" test. *Id.* at 16; *Rogers*, 889 S.W.2d at 472; *see also Basic Capital Mgmt., Inc. v. Dow Jones & Co.*, 96

S.W.3d 475, 481 (Tex. App.—Austin 2002, no pet.) (recognizing that substantial truth test is rooted in the First Amendment). This test involves two fundamental principles of libel law. First, the court's focus must be on whether the overall "gist" of the defendant's statement is substantially true; minor inaccuracies are insufficient to support a libel claim. *Rogers*, 889 S.W.2d at 472. Second, the plaintiff must show that the challenged statements by the defendant were more damaging to the plaintiff's reputation in the mind of the average viewer than literally true statements would have been. *Id.*; *see also McIlvain*, 794 S.W.2d at 16.

Applying this test, Texas courts have repeatedly rejected attempts by plaintiffs to construct a libel case on a foundation of alleged literal inaccuracies, disputed word choice, or quibbles over the exercise of editorial prerogative. *See, e.g.*, *Dolcefino v. Randolph*, 19 S.W.3d 906, 920 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (statement that city officer "could not" identify contractor's qualifications held substantially true where literal truth was that officer refused to identify those qualifications during a press conference and instead referred reporters to contractor's resume); *Dolcefino v. Turner*, 987 S.W.2d 100, 115 (Tex. App.—Houston [14th Dist.] 1998) (allegation of $6.5 insurance scam carried same "gist" as accurate allegation of $1.7 million scam would have), *aff'd*, 38 S.W.3d 103 (Tex. 2000); *Swate v. Schiffers*, 975 S.W.2d 70, 75 (Tex. App.—San Antonio 1998, pet. denied) (statement that plaintiff had assaulted a female investigator who attempted to serve him with subpoena was substantially true where article at issue described many problems with plaintiff's medical practice, even though literal truth was the plaintiff was found not guilty of assault); *Rogers*, 889 S.W.2d at 471-72 (holding that news reports that charity only spent 10% of its donations on actual charitable services, when it actually spent 43%, were substantially true).

The "substantial truth" test provides considerable latitude where statements referring to "fraud" are at issue. *E.g.*, *Harrington v. Hotwire, Inc.*, No. A106583, 2005 WL 1579769 at *3 (Cal. Ct. App. July 6, 2005) (not designated for publication) (finding defendant need not prove plaintiff had "literally defrauded" someone to prevail on its substantial truth claim, but only must show the statement was "substantially true to justify the gist or sting of the remark"); *see also Schwartz v. Am. Coll. of Emergency Physicians*, 215 F.3d 1140, 1147 (10th Cir. 2000) (holding that article stating that plaintiff was "being sued for stock fraud" was substantially true where plaintiff was not being sued for fraud but for "making deceptive statements made relating to stock transactions"); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir. 1978) (imprecise description of violation of securities laws as "fraud" did not render statement false).

Under this standard for determining "substantial truth," the Court need not resolve every quibble Dr. Wakefield might have with Defendants' reporting. The challenged statements are substantially true if, for example, Dr. Wakefield was guilty of anything similar to "fraud," such as "dishonesty," "unethical" conduct, "serious professional misconduct," or providing "misleading" information about his research. If any one of these substantially similar charges sticks, then his claims must be dismissed.

B. Dr. Wakefield Is Precluded from Relitigating the GMC's Findings, Which Establish the Substantial Truth of the Challenged Statements.

Dr. Wakefield's problem, of course, is that those charges have already stuck. In 2010, after a 217-day contested hearing in which Dr. Wakefield was represented by counsel, the GMC "Fitness to Practise Panel" found him guilty of "serious professional misconduct," including that he:

- was "***dishonest***";[51]

[51] Ex. 14 to Fuller Decl. ISO Special App. at p. 43.

- was "***irresponsible***";[52]

- had included information in the *Lancet* paper that was "***misleading*** . . . ***contrary to [his] duty to ensure that the information in the paper was accurate***";[53]

- was "***guilty of serious professional misconduct***";[54]

- had "***behaved unethically***";[55]

- had engaged in behavior that "***exemplifie[d] a fundamental failure in the ethical standards expected of a medical practitioner***";[56]

To support these determinations, the Panel also made numerous specific findings of fact regarding Dr. Wakefield's research for the *Lancet* paper, including thathe:

- had been involved in advising Richard Barr, an attorney acting for persons alleged to have suffered harm from the MMR vaccine, about "***the research that would be required to establish that the vaccine was causing injury"***;[57]

- had provided Barr with a cost proposal and a detailed protocol for a medical research study on children who had "***been vaccinated with the measles or measles/rubella vaccine***" and who suffered from both "***disintegrative disorder***" and "***gastrointestinal symptoms***";[58]

- had failed to disclose anywhere in the *Lancet* paper that "***the purpose of the project was to investigate a postulated new syndrome following vaccination***," even though the research study had been "***established with [that] purpose***";[59]

- had included numerous patients in the research study even though those patients "***did not qualify***" for inclusion in the study because they "***failed to meet the inclusion criteria***" outlined in the study proposal (which Dr. Wakefield had himself signed);[60]

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[52] *Id.* at p. 43.

[53] *Id.* at p. 45.

[54] *Id.* at p. 60.

[55] *Id.*

[56] *Id.* at p. 61.

[57] *Id.* at p. 2.

[58] *Id.* at p. 3-4.

[59] *Id.* at p. 43.

[60] *Id.* at p. 56.

- had falsely stated in the *Lancet* paper that the research patients had been ***"self-referred"*** to the department of paediatric gastroenterology via "***routine referrals***", when in fact—

    - several of the patients "***did not constitute routine referrals***" because the referring doctors had referred the patients specifically for "***investigation of the role played by the measles vaccination or the MMR vaccination into their developmental disorders***," despite having no history of gastrointestinal symptoms; and

    - rather than being "self-referred," several patients had been referred to the study via "***active involvement in the referral process***" by Dr. Wakefield himself;[61]

- had "***omitted correct information about the purpose of the study or the patient population***" in the *Lancet* paper and had done so in a manner that was "***irresponsible***" and "***misleading***";[62]

- had "***a clear and compelling duty to ensure that the factual information contained in the [*Lancet*] paper was true and accurate***" and "***failed in this duty***."[63]

These findings by the Panel involve substantially the same accusations—if not in identical terminology—as those disputed by Dr. Wakefield in this case. Although the Panel did not expressly use the words "fraud," "cheat," or "liar," the findings it made and the terminology it used have at least the same "gist" and "sting" as the statements challenged by Wakefield here. And if there were any serious doubt that the Panel's findings are close enough to "fraud" to be dispositive of the substantial truth analysis in this case, Dr. Wakefield's own lawyer's argument before the Panel clarifies any conceivable confusion. In arguing against a finding of "dishonesty" regarding his dealings with the Legal Aid Board (which was funding his research), Dr. Wakefield's counsel implored the GMC Panel to "***step back and consider the reality***" of the charges against Dr. Wakefield:

> ***the reality of [the GMC's position] is . . . an allegation of fraud.***[64]

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[61] *Id.* at p. 44.

[62] *Id.* at p. 43.

[63] *Id.* at p. 57.

[64] Deer Amend. SLAPP Decl. ¶ 87.

Indeed it was, and the "fraud" was proved many times over. [65]

To the extent that Dr. Wakefield believes he can relitigate these findings by filing a civil suit in Texas, he is wrong. Collateral estoppel, also known as issue preclusion, prevents the relitigation of issues already resolved in a prior proceeding. *Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). This preclusive effect extends beyond prior judicial proceedings; it also bars relitigation of issues previously adjudicated by an administrative agency. *Ramirez v. State Bd. of Med. Exam'rs*, 99 S.W.3d 860, 864 (Tex. App.—Austin 2003, pet. denied) (holding that appellant was collaterally estopped from relitigating issues previously decided by the Texas Medical Board); *see also Turnage v. JPI Multifamily, Inc.*, 64 S.W.3d 614, 620 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (applying collateral estoppel to issues decided by an administrative law judge).

For collateral estoppel to apply, three elements must be met: (1) the parties were cast as adversaries in the prior proceeding; (2) the issues sought to be litigated in the current proceeding were "fully and fairly litigated" in the prior proceeding; and (3) those issues were "essential" to the outcome of the prior proceeding. *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 288

[65] Further comparison of the challenged statements against the GMC Panel findings demonstrates the similarity between the two. For example, Dr. Wakefield alleges that Defendants' challenged statements accused him of "fraudulently and intentionally manipulating and falsifying data and diagnoses in connection with" the *Lancet* paper. Dr. Wakefield points to statements that (1) his case study was "fixed" and based on "bogus data," (2) his findings were "manufactured" to give "the appearance of a link [to] autism," (3) he "altered, manipulated or misrepresented data" for the twelve cases in the *Lancet* paper, (4) his research had "no scientific basis whatsoever," (5) he "repeatedly changed and misreported diagnoses, histories[,] and descriptions" of his research patients, and (6) he "rigged" the *Lancet* paper. But the GMC Panel found that Dr. Wakefield approached Mr. Barr about "the research that would be required to establish that the vaccine was causing injury" and established the study to "establish a [predetermined] purpose." Dr. Wakefield hand-picked certain patients for the study, even though they "failed to meet the inclusion criteria." In other words, the results of the study were "fixed," "manufactured," or "rigged." In addition, the GMC Panel also found that Dr. Wakefield's dishonesty and unprofessionalism continued to the patient participants' diagnosis, the gathering of data, and the reporting of the data, just as the Defendants stated. Dr. Wakefield's "transgressions," the GMC Panel concluded, were "wide-ranging" and "relat[ed] to ***every*** aspect of his research." These "transgressions" were found to be "intentional," "compounded," and done with a "persistent lack of insight as to the gravity of his conduct." *See* Ex. 14 to Fuller Decl. ISO Special App.

(Tex. 2002); *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).[66] All three elements of the collateral estoppel test are established in this case.

First, the parties were "cast as adversaries" during the GMC proceeding. Under this prong, "[s]trict mutuality of parties is no[t] required." *Trapnell*, 890 S.W.2d at 801 (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980)). Only the party ***against whom*** collateral estoppel is asserted must have been a party to the prior proceeding, and Dr. Wakefield was obviously a party to his own GMC hearing. *Indem. Ins. Co. v. City of Garland*, 258 S.W.3d 262, 271 (Tex. App.—Dallas 2008, no pet.) (citing *Trapnell*, 890 S.W.2d at 801-02); *see also Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991).

Second, the issues precluded here were "fully and fairly litigated" before the GMC Panel. To meet this element, courts consider the following factors: whether the party was fully heard on the issue in the prior proceeding, whether the decisionmaker supported its ruling with a reasoned opinion, and whether the decision was subject to appeal or in fact appealed. *Mower*, 811 S.W.2d at 562.

A GMC Panel's order revoking a doctor's license is entered only after a full evidentiary and adversarial hearing before an impartial panel that is open to the public.[67] In Dr. Wakefield's case, the Panel entered its findings after 217 days of evidence, submissions and deliberation. Dr. Wakefield could have appealed the findings to a judicial tribunal. Although he filed an appeal,

[66] Texas courts apply this same test when determining whether a foreign judgment should collaterally estop relitigation of issues in Texas. *See Brosseau v. Ranzau*, 81 S.W.3d 381, 377-78 (Tex. App.—Beaumont 2002, pet. denied) (Mexican judgment); *St. Clair-Urdaneta, Inc. v. Marathon Oil Co.*, No. 05-96-00423-CV, 1999 WL 72202, at *6-8 (Tex. App.—Dallas 1999, pet. denied) (mem. op.) (Colombian litigation).

[67] Marcovitch Decl. ¶ 6, 7.

he later dismissed it.[68] Thus, the Panel's order became final.[69] These issues have been fully litigated.

Moreover, the GMC proceedings were fair. Doctors referred for formal discipline—known as a "Fitness to Practise" hearing in the U.K.—are given written notice of the allegations against them so that the doctor has an adequate opportunity to investigate and prepare a defense, typically through the legal representation provided by a medical defense organization to which the doctor subscribes.[70] Doctors are allowed discovery, including third-party subpoenas, in addition to the information discovered in the investigation process.[71] Evidence is offered and admitted under rules of evidence intended to ensure reliability of the evidence admitted.[72] Doctors call witnesses, cross-examine adverse witnesses, and file briefs or other papers as part of the proceeding. The Panel's findings and sanction are subject to judicial review.

Third, the issues here were unquestionably "essential" to the outcome of the GMC's proceeding. Under this element, courts consider the "ultimate issues" examined in the prior proceeding—the factual determinations that were necessary to form the basis of the prior judgment. *Tarter v. Metro. Sav. & Loan Ass'n*, 744 S.W.2d 926, 927-28 (Tex. 1988); *accord State v. Getman*, 255 S.W.3d 381, 384-85 (Tex. App.—Austin 2008, no pet.) ("The entire record from the earlier proceeding must be examined with realism and rationality to determine precisely what fact or combination of facts were necessarily decided and which will then bar their relitigation."). This element is readily met here. The Panel's findings were express findings of

[68] *Walker-Smith v. GMC* at ¶ 1 ("[The Fitness to Practise Panel] ordered that the names of Dr. Wakefield and Professor Walker-Smith be erased from the register. Both initially appealed, but Dr. Wakefield has subsequently abandoned his appeal.").

[69] Marcovitch Decl. ¶ 9.

[70] *Id.* ¶ 6.

[71] *Id.* ¶ 7.

[72] *Id.*

fact, proven to a criminal standard of surety. Each determination of professional misconduct led to the Panel's ultimate disposition to revoke Dr. Wakefield's medical license.

Finally, the Texas Supreme Court has considered, in determining whether to apply collateral estoppel, whether the purposes of that doctrine would be served in applying the doctrine to a particular case. *Trapnell*, 890 S.W.2d at 801. Collateral estoppel, it noted, is designed to "promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments." *Id.* These goals are well-served by applying the doctrine in this case. The GMC Panel undertook a lengthy and extensive proceeding—and expended significant resources to do so—in ultimately determining that the allegations against Dr. Wakefield's medical research in London more than a decade ago were true. By asking this Court to reconsider the merit of those allegations, Dr. Wakefield would have the Court "double up" on the Panel's adjudication without any compelling reason to do so. Further, applying collateral estoppel in this case will prevent "the possibility of inconsistent findings." *See id.* at 804. Any ruling here in favor of Dr. Wakefield's defamation claims would necessarily conflict with the Panel's findings discrediting his conduct related to the *Lancet* paper. There is no justification in this case, where the collateral estoppel test is clearly met, for allowing Dr. Wakefield to re-litigate facts that the medical-licensing tribunal in the U.K. already determined to be true. Barred from revisiting the GMC Panel's determinations, Dr. Wakefield's claims necessarily fail.

C. The Undisputed Evidence Also Establishes the Truth of the Challenged Statements.

Even if Dr. Wakefield's claims could survive the binding effect of the GMC Panel's findings against him, it would be of no matter. The evidence of Wakefield's research misconduct is overwhelming, and, in many respects, undisputed. Because a complete catalogue of Dr. Wakefield's research misconduct simply cannot fit in a legal "brief," Defendants respectfully refer the Court to the Amended Declaration of Brian Deer, which details and

documents the innumerable frauds of omission and misrepresentations in Dr. Wakefield's *Lancet* research. The following discussion briefly summarizes some of the more obvious and indisputable examples of Wakefield's research misconduct, any one of which alone defeats his libel claims under the substantial truth test.

1. Dr. Wakefield Concealed His Glaring Conflicts of Interest and Withheld Important Details about the Patient Population.

It has long been beyond any serious dispute that Wakefield fraudulently misrepresented the purpose and nature of his *Lancet* research, as well as the background of the patient population. Particularly in light of the type of "study" the *Lancet* research was—a sample of only 12 children that relied for its principle factual finding on the unverified claims of the children's parents—disclosure about the purpose of the study and the background of the patient population was essential. But Dr. Wakefield withheld this essential information, keeping the *Lancet* readers and the general public in the dark about his own conflicts of interest and the bias inherent in his study. Even now that the facts are known, Wakefield persists in his fraud, falsely alleging in his Petition that the *Lancet* "study was [not] commissioned and funded for planned litigation"[73] and falsely testifying in his April 12, 2012, affidavit, that "The *Lancet* Report was not prepared as part of a litigation research project."[74]

In fact, documents conclusively establish that Dr. Wakefield's *Lancet* research was born of his affiliation with attorney Richard Barr, a U.K. solicitor who represented the anti-vaccine campaign group, JABS, and was preparing class-action litigation against the manufacturers of the MMR vaccine. In February 1996, Wakefield and Barr finalized an agreement by which Wakefield would be paid £150 an hour (plus expenses) as an "expert witness" for Barr's

[73] Pet. ¶ 4.5 (alleging that Deer's statement that the *Lancet* "study was commissioned and funded for planned litigation" is "false and defamatory").

[74] *See* Affidavit of Andrew J. Wakefield ¶ 13.

clients.[75] Soon thereafter, the U.K.'s Legal Aid Board, which was financing Barr's prospective litigation, authorized up to £55,000 for Dr. Wakefield to conduct a "clinical and scientific study" for Barr's firm, Dawbarns Solicitors.[76] ***This was before any of the* Lancet *children were seen at the Royal Free Hospital.*** A little more than one year later, in May 1997, Dr. Wakefield touted his litigation study to Royal Free management:

> My group . . . is currently involved in the investigation of a cohort of children with regressive autism and inflammatory bowel disease. . . . [W]e have been awarded a grant of some £50,000 by the Legal Aid Board to investigate the possible association of this syndrome with the MMR vaccine. This money has been provided through Dawbarns Solicitors . . . .[77]

When asked by management of the government-run institution whether there was any conflict of interest, Wakefield falsely stated that there was none:

> . . . I am writing to confirm that there is no conflict of interest in relation to the Legal Aid funding for our clinical study of children with autism and intestinal inflammation. . . [T]here is no intention whatsoever on behalf of the Legal Aid Board or its agents to take action against the National Health Service: it is against the manufacturers of vaccine that any future actions will be taken if and when our studies indicate that it is a valid strategy.[78]

There is no disputing that this was the research Wakefield published a few months later in the *Lancet*. In an interview with Deer, Barr himself admitted that he was surprised when he read the *Lancet* paper that Wakefield had not included the Legal Aid Board funding acknowledgment.[79] And Wakefield admitted in his correspondence with Royal Free

[75] *See* Deer Amend. SLAPP Decl. ¶ 42; Ex. 8.

[76] *See* Deer Amend. SLAPP Decl. ¶ 20.

[77] *See* Deer Amend. SLAPP Decl. ¶ 213; Ex. 11.

[78] *See* Deer Amend. SLAPP Decl. Ex. 11.

[79] *See* Deer. Amend. SLAPP Decl. ¶ 21. An audio recording of this portion of Deer's interview with Barr appears at http://briandeer.com/audio/richard-barr.mp3.

management that the litigation study was the research being presented in his *Lancet* paper.[80] But Wakefield disclosed none of this and his other serious conflicts of interest in the *Lancet*.[81]

Dr. Wakefield was no more honest about the background of the patient population described in his *Lancet* paper. In *The Lancet*, Wakefield referred to the 12 anonymous children as a "***consecutive series***" and purported to find:

> Onset of behavioral symptoms was associated, ***by the parents***, with [MMR] vaccination in eight of the 12 children[.][82]

A decade later, Wakefield underscored the centrality of the parental claims to the *Lancet* findings and interpretation, making clear that the "parental history" was "the only thing" in the *Lancet* research that "'allowed a link between MMR and autism.'"[83] But who were these parents? And how did they come to bring their children to the Royal Free in London, an institution that had no recognized specialty in autism? As it turns out, the children were actively recruited, and in Wakefield's own testimony before the GMC, he admitted that their self-referral was based on the very things that the *Lancet* paper purported to "find" — a combination of gastrointestinal problems, developmental regression, and a parental association between the MMR vaccine and onset of "behavioural symptoms".[84] In other words, the paper's "findings" were built into the selection of the twelve research subjects, and were therefore not "found" at all. The paper's

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[80] *See* Deer Amend. SLAPP Decl. ¶ 122; Ex. 11 ("Please find enclosed a copy of our first paper submitted to the *Lancet* concerning the children under investigation.").

[81] In addition to the fees Wakefield received from lawyers throughout the vaccine scare (which totaled more than £435,000), Wakefield had filed a patent for a single-shot "safer" vaccine that would replace MMR and set up a network of companies that would provide litigation-driven diagnostic and consulting services. *See* Deer Amend. SLAPP Decl. ¶¶ 34, 44; Ex. 9 (business plan projecting that income from "litigation driven" testing of patients "could be about £3,300,000 rising to about £28,000,000 as diagnostic testing in support of therapeutic regimes come on stream").

[82] *See* Deer Amend. SLAPP Decl. Ex. 1 (*Lancet* paper).

[83] Ex. 16 to Deer Amend. Decl. ISO Special App. Ex. 16 (PCC Compl.).

[84] Ex. 12 to Deer Amend. SLAPP Decl. Ex. 12 (GMC Day 66).

anonymous references to the children further hid the common referral sources and personal connections among the group. Two of the 12 kids (Children 6-7) were brothers. Several were referred through the anti-vaccine litigation campaign group JABS. The mother of the brothers introduced the mother of another kid (Child 12) to Wakefield. None of them was from London, and one was a U.S. citizen living in California. Dr. Wakefield made contact with all of the parents prior to their arrival at the Royal Free.[85] This was hardly surprising, given that the attorney Barr had touted Dr. Wakefield in a February 1996 newsletter to his clients and contacts:

> If your child has suffered from all or any of these symptoms could you please contact us, and it may be appropriate to put you in touch with Dr Wakefield.[86]

These parents then reported to the Royal Free, they reliably pointed the finger at MMR, and Dr. Wakefield laundered their claims into "findings" in the *Lancet* paper. Again, none of this information about the patient population was publicly disclosed.

2. A Comparison of the Drafts of the *Lancet* Paper Reveals Wakefield's Alteration of Patient Data.

Wakefield knew what the litigation required to support the claims of Barr's clients against vaccine manufacturers: a close temporal link between vaccination and the onset of regressive autism. As Deer explains in his declaration, a 14-day period between shot and symptoms had been a standard in prior U.K. litigation involving the DTP vaccine.[87] And Wakefield clearly understood the importance of temporal proximity. In a report to the Legal Aid Board in 1996, Barr wrote:

> Dr. Wakefield feels that if we can show a clear time link between the vaccination and the onset of symptoms we should be able to dispose of the suggestion that it is simply a chance encounter. . . . In we can show that the onset of the autism is

[85] *Id.*

[86] The lawyer's February 1996 newsletter was introduced in the GMC proceeding on Day 37 and Day 58 of the GMC proceeding.

[87] Deer Amend. SLAPP Decl. ¶¶ 11-15.

> related in time to the vaccine we should be able to establish the point that it is no coincidence that children become autistic after the vaccination.[88]

In a 1999 confidential report to the Legal Aid Board, Wakefield himself stated:

> There is a consistent temporal relationship between exposure to MMR and the onset of behavioral symptoms, whether the parents made a contemporaneous link between these two events or not.[89]

Similarly, in his 1998 patent application, Wakefield invoked temporal proximity:

> Before vaccination the infants were shown to have a normal developmental pattern but often within days of receiving the vaccination some infants can begin to noticeably regress over time leading to a clinical diagnosis of autism.[90]

It is not surprising, therefore, that temporal proximity looms large in the *Lancet* paper. Wakefield reported that parents of 8 of the children linked the vaccine to the onset of behavioral symptoms.[91] The range of days between shot and symptoms was between "immediately" and 14 days, with the average being 6.3 days. But this data was progressively altered by Wakefield as he prepared the paper, long after children had come and gone from the hospital. A comparison of a draft of the paper with its final, published version, shows how Wakefield manufactured the data, in an obvious effort to fix a tight temporal proximity to support the litigation.

In late 2005 or 2006, Deer obtained a copy of the draft paper.[92] This earlier version is dated in handwriting "Aug 1997", which was about six months after the last of the 12 children was investigated at the Royal Free and about six months before the paper was published.[93] In the draft, Wakefield reports that ***9*** of the 12 parents reported an association between MMR and onset

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[88] Ex. 12 to Deer Amend. SLAPP Decl. (GMC Day 66).

[89] Ex. 35 to Deer Amend. SLAPP Decl. (1999 LAB Report).

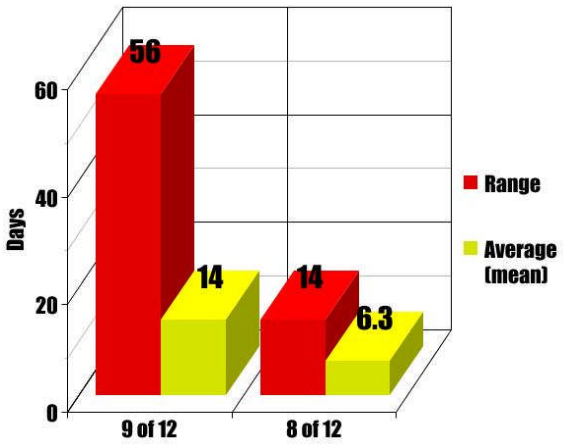
[90] Ex. 34 to Deer Amend. SLAPP Decl. (Patent App.).

[91] Ex. 1 to Deer Amend. SLAPP Decl. (*Lancet* paper).

[92] Deer Amend. SLAPP Decl. ¶ 121; Ex. 37 (*Lancet* draft).

[93] *Id.*

of behavioral symptoms.[94] In other words, between versions, Wakefield ***removed*** one family's disclosure of a claimed association. The effect on the temporal link was striking. The following chart shows the range and the average number of days in the draft, with the ninth family's association included, then the final version, after Wakefield dropped it:



Again, this alteration was made by Wakefield ***after*** the kids had left the hospital and the parental disclosures recorded in their records.[95]

A comparison of the drafts shows that Wakefield changed other data, too. For example, the number of children whose colons were reported to be *"endoscopically normal"* (meaning that they looked normal to an endoscopist viewing the bowel on a TV monitor) fell with the passage of time—from 6 of 12 to 4 of 12—notwithstanding the fact that the last endoscopy had been performed about six months before the August '97 version.[96] Moreover, the number of

[94] *Id.* In fact, hospital records show that 11 of the 12 families reported the association. Wakefield says he did not include all of these associations in the *Lancet* paper because he wanted to avoid "selection bias."

[95] In addition to tightening the temporal link between the shot and onset of symptoms, Wakefield's alterations and manipulations of the data had the effect of making the find "data" more believable. If Wakefield had revealed that 11 of 12 families (or perhaps even 9 of 12 families) had associated MMR with their child's problems when they came to the hospital, it would have risked heightened editorial scrutiny and peer review of study, potentially unmasking the true nature of the patient group and fatally damaging his mission for Mr. Barr.

[96] Deer Amend. SLAPP Decl. ¶ 131 (comparing Exs. 1 & 37 – *Lancet* paper and *Lancet* draft).

children reported in the paper as having a "red halo" around lymphoid follicles in the gut (also determined by observation and suggesting inflammation) doubled over time: from *2 of 12* in draft to *4 of 12* in the final paper.[97] And the number reported as having "patchy" inflammation in their colons—possible disease as determined by "histology" (meaning pathologists looking at tissue samples under a microscope)—rose between versions: from *eight of 12* in the draft to *11 of 12* in the final paper.[98]

In light of these and other differences between these versions of the same paper, Dr. Wakefield's protestation that he did not "manufacture", "intentionally manipulate" or "alter" the data are obviously.

3. Dr. Wakefield's Pro Forma Hospital Records and Prior Admissions in the *Channel 4* Case Cannot Be Reconciled with the *Lancet* Paper.

When Dr. Wakefield sued Deer and *Channel 4*, he was forced to disclose pro forma records that he had been generated at the Royal Free. These records aggregated histories and other data from his research on the children.[99] Deer did not disclose these records in his *BMJ* reporting, but now that Wakefield has filed suit again and required disclosure in this case, any prior confidentiality requirements from the U.K. litigation no longer apply. It can now be reported, therefore, that these pro forma records—*Wakefield's own records*—cannot be reconciled with what he published in *The Lancet*.

As Deer explains in his Amended Declaration, when Wakefield produced the pro forma records in the *Channel 4* litigation, he redacted the names of the children on the first pages of each set.[100] Had the redaction effort been more careful, Deer would not have been able to make

[97] *Id.* ¶ 132.

[98] *Id.* ¶ 133.

[99] *Id.* ¶ 143.

[100] *Id.* ¶ 146.

heads nor tails of them. But perhaps due to oversight, each child's name and hospital patient number survived, unredacted, in a histology section inside.[101] Accordingly, vital information about what Dr. Wakefield knew of these children was revealed to Deer, and discrepancies between this information and what Wakefield reported in his paper became apparent, for example:

- For Child 1, the *Lancet* and the pro forma both report that the child received his MMR at age 12 months.[102] But whereas the *Lancet* reported that the child's initial behavioral symptom was "1 week" after MMR, Wakefield's pro forma record[103] states that the child continued to experience normal development until 6 months after MMR.[104]

- For Child 6, the "diagnosis" is reported in the *Lancet* as "Autism," but the pro forma reports it as "Aspergers."[105] Moreover, even though the *Lancet* describes all 12 children as a "group of previously normal children," the pro forma states that Child 6's initial development was ***not*** normal.[106]

- For Child 12, although the *Lancet* reports his diagnosis as "Autism," the pro forma reports it as "Aspergers Syndrome." The pro forma also states that the child's "current diagnosis" at the Royal Free was "Language Delay," "Possible Attention Deficit Disorder," and "Possible Features of Asperger's."[107] "Autism" appears nowhere.

- For Child 11, who had traveled to the Royal Free from California, the pro forma lists the date of MMR vaccination as July 5, 1992, when the child was 15 months.[108] But whereas the *Lancet* reported normal development until 1 week after MMR, the pro forma reported that Child 11 developed normally until only 13 months of age—***two months before MMR***.[109]

- For Child 5, the pro forma reports that his parents ***did*** blame MMR for their child's condition, 2 months after MMR.[110] But this association was omitted from the *Lancet*,

[101] *Id*. *at* ¶ 147.

[102] Ex. 1 to Deer Amend. SLAPP Decl. (*Lancet* Table 2); Ex. 43 (Pro Forma for Child 1).

[103] Ex. 43 to Deer Amend. SLAPP Decl. (Pro Forma for Child 1).

[104] *Id.*

[105] Ex. 1 to Deer Amend. SLAPP Decl. (*Lancet* Table 2); Ex. 44 (Pro Forma for Child 6).

[106] *Id.*

[107] Ex. 1 to Deer Amend. SLAPP Decl. (*Lancet* Table 2); Ex. 45 (Pro Forma for Child 12).

[108] Ex. 46 to Deer Amend. SLAPP Decl. (Pro Forma for Child 11).

[109] *Id.*

[110] Ex. 47 to Deer Amend. SLAPP Decl. (Pro Forma for Child 5).

where Table 2 reports that the parents did not associate any reaction from exposure to MMR.[111]

In short, these previously confidential pro formas remove any doubt that Wakefield misreported patient data in his *Lancet* article.

In addition to these pro formas, the *Channel 4* litigation also yielded signed, verified admissions by Dr. Wakefield about the children that were inconsistent with the information about them in his *Lancet* paper. In a process similar to interrogatories under our system, Wakefield submitted a signed, verified response that, for each child, identified that first "behavioral and other symptoms" that had been reported to him.[112] As he had with the pro formas, Wakefield attempted to render the information useless to Deer, this time by re-anonymizing the already anonymous children. Specifically, Dr. Wakefield assigned the children reference numbers that did not correspond to the numbers he had assigned them in the paper.[113] But again, the obfuscation was inadequate; the reference numbers in the responses corresponded with the pro formas, which contained the children's real names. And, again, the information contained in these verified responses cannot be squared with the *Lancet* paper for most of the children whose cases purportedly linked autism with MMR, such as:

- For Child 1, Wakefield reported in the *Lancet* paper that the "age at onset of first symptom" was 12 months, but his verified responses in the *Channel 4* litigation state that this child had "[n]ormal development to approximately 18 months, followed by regression . . . ."[114]

[111] Ex. 1 to Deer Amend. SLAPP Decl. (*Lancet* Table 2).

[112] Ex. 17 to Deer Amend. SLAPP Decl. (*Channel 4* Pt. 18 Response).

[113] *Id.*

[114] Ex. 1 to Deer Amend. SLAPP Decl. (*Lancet* Table 2); Ex. 17 (*Channel 4* Pt. 18 Response).

- For Child 2, Wakefield reported in the *Lancet* paper that the "age at onset of first symptom" was 13 months, but his verified responses in the *Channel 4* litigation state that the child had normal development until 15 months.[115]

- For Child 7, the *Lancet* paper reported that the interval from MMR to first behavioral symptom was 24 hours, but his verified responses in the *Channel 4* litigation state that the child developed symptoms "[w]ithin one month of MMR[.]"

- For Child 10, the *Lancet* paper reported that the "age at onset of first symptom" was 15 months, but his verified responses in the *Channel 4* litigation state that the child had normal development until 16 months.

- For Child 11, the *Lancet* paper reported that the child developed his "first behavioural symptom" one week after MMR, but his verified responses in the *Channel 4* litigation state that the child had normal development until 18 months.

In light of these signed and verified responses in the prior *Channel 4* case, Wakefield cannot now maintain that he did not alter, manufacture, or manipulate the patient data in the *Lancet* paper.

4. Dr. Wakefield's Complaints about Defendants' Reporting Cannot Sustain His Libel Claims.

Given the extensive and indisputable record of Dr. Wakefield's alterations and misrepresentations, it is not surprising that he fails to identify any false statements in the Defendants' reporting. Indeed, none of his quibbles about Defendants' reporting have any merit, and none can support his libel claims in this case:

- **Dr. Wakefield's Review of the Medical Records (Pet. ¶ 4.11).** Dr. Wakefield suggests that he is not to blame for any discrepancy between the GP records of the children and the medical data he reported in *The Lancet* because, according to him, he did not have those records in his possession. This argument is a red herring. Indeed, none of the misreporting described above relies on GP records. From the unreported conflicts of interest to the misleading description of the patient population to the discrepancies between the drafts to the inability to reconcile the *Lancet* paper with the pro forma records and the *Channel 4* disclosures, the case against Dr. Wakefield does not turn on whether he had access to GP records.[116] But even if it did, and even if he did not in fact review the GP records, it would hardly help him. After all, he represented in the *Lancet* paper that he ***did*** review these records, stating: "Children underwent gastroenterological,

[115] *Id.*

[116] Indeed, it is difficult to judge which statement would be more injurious to his reputation—that he never bothered to review the records or that he did review them and misreported the information in them.

neurological, and developmental assessment ***and review of developmental records***."[117] Later in the paper, he even elaborates on this: "Developmental histories ***included a review of prospective developmental records*** from parents, health visitors, and general practitioners."[118] If these statements are untrue, he has once again demonstrated another example of research misconduct—here by misstating the underlying methodology.

- **"Autism" Diagnoses (Pet. ¶ 4.12).** Dr. Wakefield cannot dispute the fact that most of the children reported in the *Lancet* paper as having been "diagnosed" with "Autism" had not received such a diagnosis before they came to the Royal Free, and they did not receive an "Autism" diagnosis while at the Royal Free. As Dr. Wakefield's pro formas and other documents reflect, several of these children had Aspergers or other disorders. Of course, these other conditions are not Autism but are distinct diagnoses under the DSM-IV nosology that the *Lancet* paper purported to apply. Moreover, Aspergers is not regressive, and therefore it would not have supported Wakefield's theory.

- **The Father of Child 11 (Pet. ¶ 4.13).** In Dr. Wakefield's study, Child 11 was reported to have begun experiencing symptoms "1 week" after the MMR vaccine. However, the child's hospital discharge papers indicated symptoms that began *before* he was ever given the MMR vaccine.[119] And the child's father told Deer that his son's symptoms began *three months after* the vaccine was administered,[120] which Dr. Wakefield belatedly acknowledged in his 2010 book.[121] To falsely smear Deer, Dr. Wakefield describes a letter purportedly sent to Deer by the father of Child 11. Pet. ¶ 4.13. According to Dr. Wakefield, this letter accused Deer of "misrepresenting facts" about the child. Yet Deer never received such accusation, nor has the father requested any clarification, correction, or retraction.[122] In fact, the father of Child 11 instead called the *Lancet* paper "simply an outright fabrication."[123] To Deer, he wrote: "Next time I'm in London, I will give you a call. I have learned quite a bit from you on quality investigative reporting. We need more of it here in USA!"[124]

- **The Official Hospital Pathologist Reports (Pet. ¶ 4.14).** Dr. Wakefield contends that the reporting at issue alleges that he "altered or ignored information from on-duty pathologists as to whether or not the children detailed in the *Lancet* paper had intestinal inflammation." *See* Pet. ¶ 4.14. But the articles make no such claim. While the Petition alleges that Defendants "misleadingly" omitted information about Dr. Amar Dhillon's

[117] Wakefield, *supra* note 9, 351 LANCET at 637 (emphasis added).

[118] *Id.* (emphasis added).

[119] Deer Amend. SLAPP Decl. ¶ 260; Ex. 48 (letter from Child 11's father).

[120] Deer Amend. SLAPP Decl. ¶ 265; Ex. 49 to Deer Decl. (letter from Child 11's father to Daniel Olmsted and Deer).

[121] Deer Amend. SLAPP Decl. ¶ 267; Ex. 57 (excerpt from Wakefield book).

[122] Deer Amend. SLAPP Decl. ¶¶ 262-263.

[123] Deer Amend. SLAPP Decl. ¶ 265; Ex. 49 (letter from father of Child 11 to Olmsted and Deer).

[124] Deer Amend. SLAPP Decl. ¶ 266; Ex. 85 (Nov. 2011 email from Child 11's father).

> role as a systematic pathologist in order to "create the false impression that Dr. Wakefield had altered the diagnosis for some of the children in the Lancet Paper," it omits the fact that Dr. Dhillon was a named co-author of the *Lancet* paper who, along with nine other co-authors, retracted the paper's interpretations in 2004.[125] Thus when the *BMJ* articles were published in 2011, Dr. Wakefield continued to assert the validity of the paper's Interpretationsection, but Dr. Dhillon did not. Further, it is clear from a statement by Dr. Dhillon to the BMJ in November 2011 that Dr. Wakefield's claim in the *Lancet* of "histological findings" (meaning findings under a microscope) of colitis is wrong. Dr Dhillon states that any diagnosis of colitis requires clinical input and patient histories, neither of which were available to him. Thus, he states, he did not diagnose colitis in any child.

In short, there is no merit to any of Dr. Wakefield's complaints about Defendants' reporting. He cannot identify any false statements in the *BMJ*'s reporting, and even if he could, the indisputable evidence of his misconduct is so extensive that his claims must be dismissed.

VII.
DEFENDANTS' STATEMENTS OF OPINION AND RHETORICAL HYPERBOLE ARE NOT ACTIONABLE.

Most of the statements that Dr. Wakefield has chosen to challenge in this case do not require the Court to conduct any substantial truth analysis. Those statements are simply nonactionable as a matter of law, either because they are protected statements of opinion or because they are merely colorful expressions or rhetorical hyperbole incapable of being objectively verified. Texas courts have long held that an expression of opinion that cannot objectively be proven true or false does not qualify as an assertion of fact and is therefore not actionable. *Carr*, 776 S.W.2d at 569-70; *Shaw v. Palmer*, 197 S.W.3d 854, 857 (Tex. App.—Dallas 2006, pet. denied) ("Expressions of opinion may be derogatory and disparaging; nevertheless they are protected by the First Amendment of the United States Constitution and by article I, section 8 of the Texas Constitution."). Similarly, rhetorical hyperbole and similar types of colorful language are not actionable assertions of fact. *See Greenbelt Coop. Publ'g Ass'n v.*

[125] Deer Amend. SLAPP Decl. ¶ 29; *see also* Ex. 5 (Simon H. Murch et al., *Retraction of an Interpretation*, 363 LANCET 750 (2004) (retraction by ten of Dr. Wakefield's co-authors, including Dr. Dhillon)).

Bresler, 398 U.S. 6, 14 (1970) (word "blackmail" was no more than rhetorical hyperbole, not factual statement); *Curtis Publ'g Co. v. Birdsong*, 360 F.2d 344, 345, 348 (5th Cir. 1966) (reference to plaintiffs as "those bastards" was nonactionable epithet). Here, most of the challenged statements identified in Dr. Wakefield's Petition are nonactionable because, read in the context of the entire publication, (1) the statements are mere expressions of opinion based on disclosed facts or (2) the statements are merely hyperbole and colorful expressions rather than objectively verifiable facts.

A. Several of Defendants' Statements, Including that Dr. Wakefield's Research Must Have Been "Fraud," Are Nonactionable Expressions of Opinion.

The thrust of Dr. Wakefield's case is that Defendants libeled him by stating that his research was "false" and "fraudulent." And, to be sure, Defendants did believe it was false and fraudulent. But a careful reading of Defendants' statements, in context, reveals that the statements are expressions of opinion based on disclosed facts. Defendants surveyed the evidence against Dr. Wakefield and offered their opinion on the best explanation for his misconduct. This is protected speech and cannot be the basis for a libel claim.

In determining whether a statement involves an assertion of fact or protected opinion, Texas courts examine the statement in the context of the entire challenged article. *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002). The United States Supreme Court has similarly held that a statement is a constitutionally protected opinion when the "general tenor of the article" negates the impression that actual facts are being asserted. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Courts must consider "the broader social context into which the statement fits" because "[s]ome types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Ollman v. Evans*, 750

F.2d 970, 983 (D.C. Cir. 1984); *see also Bentley*, 94 S.W.3d at 583 (citing *Ollman*, 750 F.2d at 983).

Here, the analysis of Defendants' challenged statements begins with the plain observation that the allegation of "fraud" in the "Secrets" series appears in an editorial, not the articles.[126] Courts have long recognized that the editorial pages of a publication are the province of protected opinion. *See, e.g., Brian v. Richardson*, 660 N.E.2d 1126, 1130 (N.Y. 1995) (noting "common expectation" that editorial sections of newspaper will contain "speculation [and] diversified forms of expression and opinion"). Similarly, Texas courts have held that statements in editorials were protected statements of opinion. *Palestine Herald-Press Co. v. Zimmer*, 257 S.W.3d 504, 506, 512 (Tex. App.—Tyler 2008, pet. denied); *El Paso Times v. Kerr*, 706 S.W.2d 797, 799-800 (Tex. App.—El Paso, 1986, writ ref'd n.r.e.).

The actual language of the *BMJ*'s editorial commentary further confirms that it is an expression of opinion. In the editorial, "Wakefield's Article Linking MMR Vaccine and Autism Was Fraudulent," the editors survey the history of the MMR scare and allegations against Dr. Wakefield, then offer their opinion that the most plausible explanation for the gross misreporting and misconduct alleged against Dr. Wakefield is that he was acting fraudulently. The Petition even quotes the language that proves this point:

> Is it possible that he was wrong, but not dishonest: that he was so incompetent that he was unable to fairly describe the project, or to report even one of the 12 children's cases accurately? No.[127]

In other words, the evidence is presented to the reader, then the question of interpretation posed: *Can this be anything other than fraud?* And the answer, in the editor's opinion, is "*No*." *See*

[126] *See* Ex. 5 to Godlee SLAPP Decl. (Brian Deer, *How the Case Against the MMR Vaccine was Fixed*, 342 BMJ 77-84 (2011)).

[127] Pet. ¶ 4.6.

Moldea v. N.Y. Times Co., 15 F.3d 1137, 1144-45 (D.C. Cir. 1994) ("Because the reader *understands* that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusion based upon those facts, this type of statement is not actionable in defamation."). Dr. Wakefield may dispute the diagnosis, but he cannot base a libel claim on it because opinions like this are protected speech. *See Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 642-43 (Tex. App.—Fort Worth 1998, no pet.) (ABC's opinion that the most likely reason for a nursing home's deficient care was "profiteering" was not actionable). This is particularly true in the area of scholarly and scientific publishing. Courts have long recognized that "[s]cientific controversies must be settled by the methods of science rather than by methods of litigation." *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994); *Gordon & Breach Sci. Publishers, S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1541 (S.D.N.Y. 1994) ("Academic freedom is 'a special concern of the First Amendment.'") (quoting *Keysian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Arthur v. Offit*, No. CIV.A. 01:09–cv–1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) ("Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context."). One federal court recently applied this principle in dismissing a libel claim brought by an anti-vaccine activist and cohort of Dr. Wakefield against a prominent pediatrician and a magazine publisher, based on the doctor's published accusation that the plaintiff "lies":

> Not only does Plaintiff's claim of the statement's falsity invite an open-ended inquiry into Plaintiff's veracity, but it also threatens to ensnare the Court in the thorny and extremely contentious debate over the perceived risks of certain vaccines, their theoretical association with particular diseases or syndromes, and, at bottom, which side of this debate has "truth" on their side. That is hardly the sort of issue that would be subject to verification based upon a 'core of objective evidence.'

Arthur, 2010 WL 883745, at *6 (quoting *Milkovich*, 497 U.S. at 21).

Moreover, as interpreted by Dr. Wakefield in his Petition, the word "fraud" is quintessentially a matter of opinion. Dr. Wakefield alleges that suggestion of "fraud" "impute[s] to him a *malignant intent* that he *knowingly* altered data."[128] But if this is correct, then such a suggestion is necessarily a statement of opinion. *See id.* at *6 (libel claim based on statement that plaintiff is a "liar" would improperly "invite an open-ended inquiry into [p]laintiff's veracity"). And, for the same reasons, Defendants' statements referring to "dishonesty," "breach of trust," determined cheat," and other similar expressions are nonactionable opinion.

B. Defendants' Expressions of Rhetorical Hyperbole Are Not Actionable.

For similar reasons, Texas courts have long held that a statement of rhetorical hyperbole or one using colorful language is nonactionable. *See CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293–94 (4th Cir. 2008) ("The First Amendment . . . safeguard includes protection for 'rhetorical hyperbole, a vigorous epithet' and 'loose, figurative, or hyperbolic language' . . . necessary to 'provide[ ] assurance that public debate will not suffer for lack of imaginative expression [.]'") (quoting *Milkovich*, 497 U.S. at 20-21). Such a statement "does not, in its common usage, convey a verifiable fact, but is, by its nature, somewhat indefinite and ambiguous. . . ." *Falk & Mayfield, L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). For example, Texas courts have identified a long list of statements that are simply too indefinite to sustain a viable libel claim. *See, e.g.*, *id.* (accusing a law firm of "lawsuit abuse" nonactionable); *Zimmer*, 257 S.W.3d at 512 (accusing coach of using "obscene gesture" nonactionable); *Kerr*, 706 S.W.2d at 799 (holding that an accusation of "cheating" in an editorial was nonactionable); *Associated Press v. Cook*, 17 S.W.3d 447, 454 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (labeling the plaintiff a "blight on law

[128] *See* Pet. ¶ 4.23 (emphasis added).

enforcement" who has caused "unbelievable problems" was nonactionable); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 339-40 (Tex. App.—San Antonio 1988, writ denied) (holding that statements calling the plaintiff a "quack, a hoke artist, and a fearmonger," are "vintage hyperbole, and are not capable of proof one way or the other").

In fact, courts have held the very same expressions challenged by Dr. Wakefield to be nonactionable:

- Dr. Wakefield committed "fraud" or is a "fraudster" (Pet. at ¶¶ 4.4, 4.5, 4.6, 4.7, 4.20, and 4.22);[129]
- Dr. Wakefield was "dishonest" (Pet. at ¶ 4.6), committed a "deeply shocking" "breach of trust" (Pet. at ¶ 4.7), and embarked on a "campaign of lies" (Pet. at ¶ 4.18);[130]
- Dr. Wakefield is a "determined cheat" (Pet. at ¶ 4.18);[131]

[129] *See Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) (holding that a statement that labeled a play production a "fraud" was protected hyperbole); *Sabratek Corp. v. Keyser*, No 99 CIV. 8589(HB), 2000 WL 423529, at *6 (S.D.N.Y. Apr. 19, 2000) (concluding that statements calling a person a "pathological liar" and a "fraud" "do not constitute defamatory statements of fact, rather, they are appropriately labeled hyperbole and opinion"); *Foote v. Sarafyan*, 432 So.2d 877, 879 (La. Ct. App. 1982) (holding that accusation of "payroll fraud" was merely "harsh opinion," which is not actionable under defamation law), *writ denied*, 440 So.2d 736 (La. 1993); *Henry v. Halliburton*, 690 S.W.2d 775, 789-90 (Mo. 1985) (finding an accusation that insurance agents are "frauds" to be protected opinion).

[130] *See Riley v. Harr*, 292 F.3d 282, 293 (1st Cir. 2002) (indicating that a statement that plaintiff was a "liar" was protected opinion because the author reported the underlying facts); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (holding that a lawyer's statement that a judge was "dishonest" was "rhetorical hyperbole, incapable of being proved true or false"); *West v. Thompson Newspapers*, 872 P.2d 999, 1019 (Utah 1994) ("Whether [plaintiff] actually intended to dupe voters into electing him mayor by misrepresenting his position on municipal power is something only West himself knows, not something that is subject to objective verification.").

[131] *See Kerr*, 706 S.W.2d at 799 (holding that statement that the prosecution's burden of proof "is no excuse for cheating" was protected opinion); *Palm Beach Newspapers, Inc. v. Early*, 334 So.2d 50, 52-53 (Fla. Dist. Ct. App. 1976) (finding that statement accusing superintendent of "cheating," read in the proper context, was nonactionable rhetorical hyperbole); *Shivarelli v. CBS, Inc.*, 776 N.E.2d 693, 699 (Ill. App. Ct. 2002) (concluding that investigative reporter's statement that plaintiff was "cheating the city" "was a nonactionable opinion, as it was too broad, conclusory, and subjective to be objectively verifiable").

- Dr. Wakefield's study was "fixed" and based on "bogus data" (Pet. at ¶ 4.5), "had no scientific basis whatsoever" (Pet. at ¶ 4.21), and was a "sham" that had been "rigged" and proven "baseless" (Pet. at ¶ 4.21);[132]

- Dr. Wakefield's work is "bullshit" (Pet. at ¶ 4.22);[133]

- Dr. Wakefield had an "undisclosed goal" to help sue vaccine manufacturers (Pet. at ¶ 4.5) and is now trying to "work out a nice living . . . at the expense of autistic children" (Pet. at ¶ 4.18);[134]

- Dr. Wakefield is "professionally ruined" and "remains championed by a sad rump of disciples" (Pet. at ¶ 4.5);[135]

- Dr. Wakefield is a "freelance charlatan preying on the parents of autistic children" (Pet. at ¶ 4.20);[136] and

- Dr. Wakefield was involved in a "scandal of astounding proportions" (Pet. at ¶ 4.21).[137]

In short, each of these statements involves an expression of opinion, rhetorical hyperbole, or colorful language, all of which are constitutionally protected under established law.

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[132] *See Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248-49 (1st Cir. 2000) (finding a statement calling plaintiff's closeness with the president "faked" to be protected opinion); *Klein v. Victor*, 903 F. Supp. 1327, 1334 (E.D. Mo. 1995) (holding that labeling research to be "pseudo-scientific propaganda materials" was protected opinion because "[w]hat one social scientist considers to be pseudo-scientific another could consider legitimate, but, in the context used here, neither can be tested or proven"); *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1530 (W.D. Okla. 1992) (concluding that a statement that medical organizations were "shams perpetrated on the public by greedy doctors" was protected opinion).

[133] *See Silk v. City of Chicago*, No. 95 C 0143, 1996 WL 312074, at *35 (N.D. Ill. June 7, 1996) (noting that a statement by an employer referring to an employee's alleged disability as "bullshit" "may qualify as a protected expression of opinion"); *Quinn v. Jewel Food Stores, Inc.*, 658 N.E.2d 1225, 1231 (Ill. App. Ct. 1995) (holding that a reference to the plaintiff's "bullshit" was not a statement of fact, but rather a "characterization[] and opinion[] formed based on the agent's interview with plaintiff").

[134] *See Brewe*r, 986 S.W.2d at 642-43 (holding that ABC's statement that the most likely reason for a nursing home's deficient care was "profiteering" was nonactionable opinion).

[135] *See Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.) (finding that statement accusing plaintiff of being a "radical" who was "backed and financed by the big shot labor bosses" was not defamatory).

[136] *See Ernst v. Bassett*, 521 So.2d 414, 420 (La. Ct. App. 1988) (holding that a car owner's statement that a car restoration operator was a "charlatan" was protected opinion).

[137] *See Phantom Touring*, 953 F.2d at 728 (finding that a statement that labeled a play production a "scandal" was "obviously protected hyperbole").

VIII.
DR. WAKEFIELD'S CLAIMS BASED ON BRIAN DEER'S WEBSITE PUBLICATIONS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Dr. Wakefield's claims challenging the statements posted on Deer's website, *see* Pet. ¶ 4.21, fail for the additional reason that they are barred by the one-year statute of limitations governing libel claims in Texas. *See* Tex. Civ. Prac. & Rem. Code § 16.002(a). When applied to an allegedly libelous online publication, the "one-year statute of limitations begins to run on the first day the publication is posted on the Internet." *Hamad v. Ctr. for Jewish Cmty. Studies*, Fed. Appx. 414, 416-17 (5th Cir. 2008) (per curiam). *See also Belo*, 512 F.3d at 143-46 (surveying cases and holding that "every court" to consider the issue since 2002 has held that the limitations period begins to run from the date when the statement is published on a website); *see also Shanklin v. Fernald*, 539 F. Supp. 2d 878, 883 (W.D. Tex. 2008) ("When applied to online publications . . . limitations begin to run from the date an article is first posted and made available to the public on the internet.").

At paragraph 4.21 of the Petition, Dr. Wakefield identifies several challenged statements that he alleges were posted "[a]s early as April 11, 2011[.]" He identifies the URL where those challenged statements appear: briandeer.com/mmr/lancet-summary.htm.[138] But contrary to Dr. Wakefield's allegations, those statements were all posted at the same URL well before April 11, 2011. In fact, approximately one year earlier, on April 17, 2010, those same statements had already been posted at the same URL.[139] Indeed, Dr. Wakefield sued Deer for many of these

[138] Pet. ¶ 4.21 n.2.

[139] *See* Deer Amend. SLAPP Decl. ¶¶ 296-297; Ex. 90 (archived version of web page as it appeared on April 17, 2011). This archived copy of the web page may also be accessed at http://web.archive.org/web/20100417171645/http://briandeer.com/mmr/lancet-summary.htm.

same statements in the United Kingdom in 2005—more than seven years ago.[140] Accordingly, by the time Dr. Wakefield filed this case on January 3, 2012, the one-year limitations period for these claims had already expired.

IX.
DR. WAKEFIELD IS A PUBLIC FIGURE, AND HE CANNOT SHOW ACTUAL MALICE.

Even if Dr. Wakefield could satisfy his anti-SLAPP burden as to the elements discussed above, he cannot produce "clear and specific" evidence sufficient to support the essential element of actual malice. *See* Tex. Civ. Prac. & Rem. Code § 27.005(c) (plaintiff must "establish[] by clear and specific evidence a prima facie case for each essential element of the claim . . ."). There is no doubt that Dr. Wakefield is a public figure, and therefore he cannot prevail on his defamation claims without showing that Defendants published the challenged statements with actual knowledge of their falsity, or at least a high degree of awareness that they were probably false. *See, e.g.*, *Carr*, 776 S.W.2d at 571 ("In the present case, both sides agree that [Plaintiff] is a public figure. Thus, as an element of his cause of action, [Plaintiff] has the burden at trial of proving by clear and convincing evidence that [Defendants] acted with actual malice."). Because Dr. Wakefield has no evidence of actual malice, and because Defendants' evidence affirmatively negates any possible finding of actual malice, Wakefield's claims must be dismissed.

A. Dr. Wakefield Is a Public Figure.

The United States Supreme Court has recognized two types of public figures. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974). Some individuals, because of their fame or notoriety in the community, are public figures for all purposes. *Id.* Other individuals, who

[140] Ex. 4 to Deer Amend. Decl. ISO Special App. (*Andrew Wakefield v. Deer*, Particulars of Claim, Claim No. HQ05X00801 in the High Court of Justice, Queen's Bench Division).

voluntarily inject themselves or are drawn into a particular matter of public concern, are limited-purpose public figures. *Id.* Here, Dr. Wakefield—recently described by major U.S. news organizations as one of the "Great Science Frauds" in modern history[141] and one of the most "reviled doctors of his generation"[142]—is so infamous that he is a general-purpose public figure. But even if he is not a general-purpose public figure, he is at least a limited-purpose public figure.

Courts in Texas employ a three-pronged test in deciding whether a libel plaintiff is a limited-purpose public figure:

1. the controversy at issue must be public both in the sense that people are discussing it and that people, other than the immediate participants in the controversy, are likely to feel the impact of its resolution,

2. the plaintiff must have more than a trivial or tangential role in the controversy, and

3. the alleged defamation must be germane to the plaintiff's participation in the controversy.

WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571-72 (Tex. 1998) (citing *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987) and *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980)). Under this test, Dr. Wakefield is undoubtedly at least a limited-purpose public figure.

1. The "MMR Scare" Is a Public Controversy.

The first element of the test is easily satisfied. Since Dr. Wakefield's paper was first published in *The Lancet* in 1998, the "MMR scare," as it has come to be known, has been an issue of intense public controversy. One expert pediatrician described the scare as "one of great

[141] Ex. 14 to Fuller Amend. SLAPP Decl. (*Time*).

[142] Ex. 9 to Fuller Amend. SLAPP Decl. (*NYT*).

public health disasters in the UK in modern times."[143] The controversy raged in the United States too, with major news organizations covering Dr. Wakefield's theories in prime-time features on network news programs and front-page stories in national newspapers.[144]

2. Dr. Wakefield Had More than a Trivial or Tangential Role in the Scare.

There is also no doubt that Dr. Wakefield has played more than a "trivial or tangential" role in this public controversy. Indeed, he has been the ***central*** figure in the MMR scare. Dr. Wakefield was the lead author of the *Lancet* paper. He featured prominently in subsequent media coverage. He was quoted in the *Guardian* and other British newspapers,[145] appeared in a *60 Minutes* feature,[146] featured in a front-page article in the *Washington Post*,[147] and testified before Congress.[148] A few years later, he wrote a book, *Callous Disregard: Autism & Vaccines—The Truth Behind a Tragedy*, featuring a foreword by celebrity Jenny McCarthy.[149] Even after being publicly shamed by the GMC Panel's findings that he was guilty of "serious professional misconduct," he declared on national television in the U.S. that he is not "going away."[150] He has made good on that promise, appearing repeatedly on television and giving speeches at "vaccination choice" events and fundraisers.[151]

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[143] Marcovitch Decl. ¶ 14.

[144] *See, e.g.*, Ex. 2 to Fuller Amend. SLAPP Decl. (*60 Minutes*); Ex. 1 to Fuller Decl. ISO Special App. (*Washington Post*).

[145] Ex.1 to Fuller Amend. SLAPP Decl. (*Guardian*).

[146] Ex. 2 to Fuller Amend. SLAPP Decl. (*60 Minutes*).

[147] Ex. 1 to Fuller Decl. ISO Special App. (*Washington Post*).

[148] Ex. 4 to Fuller Amend. SLAPP Decl. (Hearing transcript).

[149] Ex. 6 to Fuller Amend. SLAPP Decl. (*Callous Disregard*).

[150] Ex. 5 to Fuller Amend. SLAPP Decl. (NBC *Today* Show).

[151] Exs. 5-7 to Fuller Decl. ISO Special App.

3. Dr. Wakefield's Claims Are Germane to His Participation in the Controversy.

Finally, the last element of the test—that the alleged defamation is germane to plaintiff's participation in the controversy—is also satisfied here. The allegedly defamatory statements address matters that are deeply intertwined with the public controversies surrounding Dr. Wakefield, including the validity and ethics of Dr. Wakefield's paper.

Accordingly, under the *McLemore* test, Dr. Wakefield is clearly (at least) a limited-purpose public figure.

B. Defendants Did Not Act with Actual Malice.

As a public figure, Dr. Wakefield must prove by clear and convincing evidence that Defendants' statements were made with "actual malice." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The phrase "actual malice" is a term of art quite different from common-law malice. In the libel context, actual malice is defined as the making of a statement "with knowledge that it was false, or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279-80. Actual malice is not ill will, spite, or evil motive. *Casso v. Brand*, 776 S.W.2d 551, 558, 563 (Tex. 1989). The actual-malice standard does not focus on the libel defendant's attitude toward the plaintiff; rather, it looks at the libel defendant's state of mind concerning the truth of the publication. *See Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858 (Tex. 2005). Similarly, "reckless disregard" is a constitutional term of art, requiring a subjective inquiry to determine if the defendant had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003).

Here, Dr. Wakefield cannot satisfy his actual malice burden because there is no evidence that Defendants published any of the challenged statements with actual knowledge of their falsity

or a high degree of awareness of probable falsity. As explained fully in the declarations of Deer, Dr. Godlee, Jane Smith, and Dr. Marcovitch, the reporting challenged by Dr. Wakefield was painstaking prepared and carefully edited. They had confidence in the reporting, the editorial review, and the accuracy of the challenged statements. Dr. Wakefield's denials were considered and found not to be compelling or credible. In fact, the record reveals not only an absence of any evidence of actual malice, but ample affirmative evidence to negate any suggestion of actual malice.[152]

1. Actual Malice Is an Exceedingly Difficult Standard to Satisfy.

Courts consistently recognize that "[t]he standard of actual malice is a daunting one." *Howard v. Antilla,* 294 F.3d 244, 252 (1st Cir. 2002) (quoting *McFarlane v. Esquire Magazine,* 74 F.3d 1296, 1308 (D.C. Cir. 1996)); *Bentley*, 94 S.W.3d at 591. Actual malice cannot be proved in the abstract. Where the plaintiff sues on several specific statements, he must demonstrate actual malice as to each statement separately. *See, e.g., Church of Scientology Int'l v. Time Warner, Inc.*, 903 F. Supp. 637, 641 (S.D.N.Y. 1995) (the "Court considers each allegedly libelous statement individually to determine whether a rational finder of fact could find actual malice by clear and convincing evidence"), *aff'd,* 238 F.3d 168 (2d Cir. 2001); *Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc.*, 836 F. Supp. 1204, 1212 (D. Md. 1993) ("The plaintiffs must prove that the defendants made each statement 'with knowledge that it was false

[152] In other jurisdictions with anti-SLAPP statutes, courts routinely grant dismissal of the case under that anti-SLAPP statute because the plaintiff failed to present clear and convincing evidence that the defendant acted with actual malice. *See, e.g., Beckham v. Bauer Publ'g Co., L.P.*, No. CV10-7980-R, 2011 WL 977570, (C.D. Cal. Mar. 17, 2011) (granting anti-SLAPP motion to dismiss suit on grounds that plaintiff failed to satisfy actual malice burden); *see also Christian Research Inst. v. Alnor*, 55 Cal. Rptr. 3d 600 (Cal. Ct. App. 2007); *Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752 (Cal. Ct. App. 2007); *Ghafur v. Bernstein*, 32 Cal. Rptr. 3d 626 (Cal. Ct. App. 2005); *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863 (Cal. Ct. App. 2005). This is consistent with Texas summary-judgment practice, in which courts routinely grant summary judgment for failure to show actual malice by clear and convincing evidence. *See, e.g., Cantu*, 168 S.W.3d 847; *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004); *Forbes*, 124 S.W.3d 167 (Tex. 2003).

or with reckless disregard of whether it was false or not.'") (citation omitted), *aff'd*, 34 F.3d 1066 (4th Cir. 1994).

2. The Evidence Here Precludes a Finding of Actual Malice.

In support of this Motion, Defendants have submitted lengthy declarations, which detail the investigation, development, and review of the reporting and each individual's role in it, as well as their subjective explanations for why they were confident that the reporting was truthful. Since the filing of their original anti-SLAPP motion, they have produced hundreds of documents relating to Deer's investigation and hundreds of emails relating to BMJ's internal review of Deer's reports and the development of the editorials in the "Secrets" series. Deer sat for a 6 ½ hour deposition in London, and Dr. Wakefield deposed a corporate representative of BMJ on anti-SLAPP issues.

It is undisputed that Brian Deer, who had researched and reported this story for years, was responsible for the development of all three articles, which also provided the factual underpinnings of the two editorials. Having sat through the entirety of the prosecution's case in the GMC proceedings (which included Dr. Wakefield's testimony on all of the relevant issues), Deer drafted the three reports himself and submitted them to the BMJ for editorial review. For the next six months, they would undergo a process unlike any other that Deer had experienced. Dr. Godlee, the *BMJ*'s editor-in-chief, personally spent hundreds of hours reviewing the pieces and discussing them with Deer. As an additional level of review, Jane Smith, a longtime deputy editor, checked all of the cites to the GMC transcript that appeared in the first article, including several footnotes where Dr. Wakefield's own testimony was cited. In short, based on Deer's stellar reputation as an award-winning investigative reporter and this review process, Defendants did not have doubts about the accuracy of the factual content of their articles and editorials, and they certainly did not publish with actual knowledge of any falsity. In addition to the absence of

any evidence of actual malice, the following undisputed facts constitute additional, affirmative evidence that precludes any finding of actual malice:

- **Rational Interpretations of Complex Evidence Are Protected.** The U.S. Supreme Court has held that where complex events and evidence might support a "number of possible rational interpretations," an author's "deliberate choice of [one] such . . . interpretation, though arguably reflecting a misconception, [is] not enough to create a jury issue of 'malice[.]" *Time, Inc. v. Pape*, 401 U.S. 279, 289-90 (1971) (rejecting claim based on reporter's erroneous description of complex proceedings, where the underlying information was susceptible to several rational interpretations); *see also Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (review that inarticulately and erroneously described sensation of listening to music through plaintiff's headphones was protected); *Cantu*, 168 S.W.3d 855, 857 (Tex. 2005) ("An understandable misinterpretation of ambiguous facts does not show actual malice . . . the [defendant's] articles were a rational interpretation[.]"). This "rational interpretation" test helps maintain a "constitutional zone of protection" in which public debate and media coverage may flourish. *Pape*, 401 U.S. at 291. This breathing space allows the reporter to make the "difficult choices that confront an author." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991). Otherwise, the threat of a defamation lawsuit would loom over every exercise of interpretive license or editorial discretion. Rather than aggressively report or editorialize on complex events, the media would be forced into an "arid, desiccated recital of bare facts." *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971). Here, in light of the scientific complexity of the underlying research and medical records, Defendants' reporting reflects (at the very least) a rational interpretation of the evidence, and therefore well within the "breathing space" afforded by the First Amendment.

- **Defendants Included Dr. Wakefield's Denials in Their Article and Editorial.** Inclusion of general denials by a defamation plaintiff constitutes affirmative evidence of lack of actual malice. *See Cantu*, 168 S.W.3d at 858 ("The *Herald*'s prompt follow-up article quoting Cantu's version of his remarks and the opinions of his supporters is evidence of the absence of actual malice, not the opposite."). Here, the *BMJ* included references to Dr. Wakefield's many earlier denials—which he previously set out at book-length—and cited (and even hyperlinked in the online version) Dr. Wakefield's complaint to the U.K.'s Press Complaints Commission regarding Deer's substantially similar 2009 *Sunday Times* reporting.[153] Even Dr. Wakefield conceded after publication of the first article and editorial that his PCC complaint fully responded to the allegations against him. Specifically, in his email to Dr. Godlee about a week after the first

[153] Dr. Wakefield contends that the *BMJ* is conflicted because it did not initially disclose that it accepts advertising from pharmaceutical companies, including some that make the MMR vaccine. *See* Pet. ¶ 4.8. Unlike Dr. Wakefield, who has repeatedly declined to admit any mistakes, the *BMJ* acknowledged this oversight and issued a correction that is attached to every electronically accessed version of the editorial. *See* Ex. 13 to Godlee SLAPP Decl. (*Correction to Institutional and Editorial Misconduct in the MMR Scare*, 342 BMJ d1680 (2011)). In any event, this complaint was previously determined to be entirely inconsequential by a neutral review authority. *See* Ex. 14 to Godlee SLAPP Decl. (BBC Editorial Standards Committee finding); Godlee SLAPP Decl. ¶ 30.

installment in the series ran, Dr. Wakefield declared that his book "deals comprehensively with Deer's allegations, including all of the matters that you have labeled as 'fraud.'"[154]

- **Post-publication Responses to Contrary Opinions.** Offering to publish contrary views on a report after publication is affirmative evidence of the lack of actual malice. *Cantu*, 168 S.W.3d at 858 ("[P]rompt follow up article quoting [plaintiff's] version of his remarks and the opinions of his supporters is evidence of the absence of actual malice, not the opposite."). Here, although given the opportunity, Dr. Wakefield declined an offer to provide a published response. Many of his supporters, however, wrote to offer their support for him.[155] The *BMJ* published many of these critical responses through its "Rapid Response" feature on its website, www.bmj.com.[156] Dr. Godlee published a considered reply to these responses in February 2011,[157] defending the *BMJ*'s reporting and editorial statements.

- **Deer's Repeated Attempts to Interview Wakefield.** Attempts to interview a defamation plaintiff prior to publication constitute affirmative evidence of lack of actual malice. *See, e.g., Newton v. Nat'l Broad. Co., Inc.*, 930 F.2d 662, 686 (9th Cir. 1990) (repeated attempts to interview plaintiff dispel accusation of actual malice and purposeful avoidance of the truth); *Loeb v. New Times Commc'ns Corp.*, 497 F. Supp. 85, 93 (S.D.N.Y. 1980) ("It cannot be said that the defendants' conduct constitutes an 'extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Loeb himself was interviewed.") (internal quotations omitted). Here, Deer pursued an interview with Dr. Wakefield for nearly seven years prior to the *BMJ*'s publication of his reporting in January 2011. Deer attempted to interview Dr. Wakefield for the 2004 *Sunday Times* stories.[158] Dr. Wakefield refused to meet with him.[159] Deer invited Dr. Wakefield to sit for an interview that would be aired as part of the Channel 4 program that same year.[160] Dr. Wakefield again refused.[161] Deer attempted to interview Dr. Wakefield again for the 2009 *Sunday Times* stories.[162] Dr. Wakefield refused once more. With this pattern well established, the *BMJ* directed readers to Dr. Wakefield's prior denials. The only purposeful avoidance was by Dr. Wakefield.

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[154] Ex. 11 to Godlee SLAPP Decl. (email from Dr. Andrew J. Wakefield to Dr. Fiona Godlee dated Jan. 13, 2011).

[155] *See id.*

[156] Godlee SLAPP Decl. ¶ 28.

[157] Ex. 12 to Godlee SLAPP Decl. (Dr. Godlee reply to email complaints).

[158] Deer Amend. SLAPP Decl. ¶¶ 23-24, 288.

[159] *Id.*

[160] *Id.* ¶ 289.

[161] *Id.*

[162] *Id.* ¶ 290; Ex. 89 to Deer Amend. SLAPP Decl. (email from Deer to Wakefield).

- **Dr. Wakefield's Long History of Frivolous Filings and Unsubstantiated Denials Had Eviscerated His Credibility.** The *BMJ*'s "Secrets" series drew extensively from information that Deer had already reported in the *Sunday Times*, first in 2004 and then in 2009, as well as for a Channel 4 documentary program in 2004. In 2005, Dr. Wakefield sued Deer in two libel cases in the UK, one based on the *Sunday Times* reporting and one on the Channel 4 reporting.[163] Dr. Wakefield showed no interest in actually pressing his claims, however.[164] He sought a stay in both cases, then voluntarily dismissed them. Similarly, he filed a complaint with the PCC over the 2009 *Sunday Times* reports, but abandoned it. As a result of these events, Deer was fully aware of Dr. Wakefield's denials and responses to the allegations against him and took them into account in his reporting. Moreover, these events led Deer to believe that Dr. Wakefield's libel threats, complaints, and denials were not genuine, but rather issued for public-relations purposes and to intimidate his critics (as Mr. Justice Eady found in the *Channel* 4 case).

- **The Allegations against Dr. Wakefield in the "Secrets" Series Were Similar to Allegations that Had already Been Made by Others and Proven against Wakefield.** By January 2011, the suggestion that Wakefield had engaged in fraud and other misconduct was not far-fetched. After all, Deer's 2009 *Sunday Times* reports had made essentially the same allegations as the "Secrets" series. Although Dr. Wakefield had filed a complaint with the PCC, he abandoned it after the PCC refused to rule on it before hearing Deer's and the *Sunday Times*'s explanations. That same year, a Special Master for the United States Court of Federal Claims recognized after a careful review of expert testimony, scholarly articles, transcripts, and other evidence, that "[i]n the view of the scientific community, either Dr. Wakefield was "too enthusiastic over his interpretation of the flawed data or . . . there was some degree of scientific fraud" behind his research.[165] Similarly, a second Special Master in a related case stated flatly that "not only has [Dr. Wakefield's] 'autistic enterocolitis' theory not been accepted into gastroenterology textbooks, but that theory, and Dr. Wakefield's role in its development, have been strongly criticized as constituting defective or fraudulent science."[166] Moreover, in 2010, the GMC issued its determination that Dr. Wakefield had been dishonest and unethical.[167] *The Lancet* had fully retracted his 1998 paper, with the editor describing the paper as "utterly false" and claiming that Dr. Wakefield had "deceived" him. In light of this context, any suggestion that the *BMJ* and Deer acted with reckless disregard as to Dr. Wakefield's probable innocence is simply untenable. No one, except for the small minority of his remaining supporters, believed Dr. Wakefield's protestations of innocence.

[163] Deer Amend. SLAPP Decl. ¶ 36.

[164] *Id.* ¶¶ 37-38.

[165] *Cedillo,* 2009 WL 331968, at *87.

[166] *Id.* at *111.

[167] Ex. 14 to Fuller Decl. ISO Special App.

X.
REQUEST FOR FEES AND SANCTIONS

Because Dr. Wakefield cannot satisfy his burden under the anti-SLAPP statute, his claims against Defendants must be dismissed. In addition, the anti-SLAPP statute provides for a mandatory award of "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action." *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1). This Court must also impose sanctions against Dr. Wakefield under the anti-SLAPP statute to "deter [him] from bringing similar actions" in the future. Tex. Civ. Prac. & Rem. Code § 27.009(a)(2).[168] As described above, and in Defendants' Brief in Support of Special Appearances, Dr. Wakefield has a long history of filing similarly frivolous suits and complaints in the United Kingdom, and has been previously criticized for improper litigation tactics against Deer and other UK publishers. *See, e.g.*, *Wakefield v. Channel Four Television Corp., Twenty Twenty Prods. Ltd. and Brian Deer*, [2005] EWHC 2410 (QB) (Eng.) ("[Dr. Wakefield] wished to use the existence of libel proceedings for public relations purposes, and to deter critics, while at the same time isolating himself from the 'downside' of such litigation, in having to answer a substantial defence of justification.").

XI.
CONCLUSION AND PRAYER

Subject to and without waiving their Special Appearances, Defendants pray that the Court grant their anti-SLAPP Motion to Dismiss, dismiss with prejudice all of Plaintiff's claims against them, enter Judgment that Plaintiff take nothing, and award Defendants fees, costs,

[168] "If the court orders dismissal of a legal action under this chapter, the court *shall* award to the moving party . . . sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." Tex. Civ. Prac. & Rem. Code § 27.009(a)(2) (emphasis added).

expenses, and appropriate sanctions, along with such other and further relief to which they are justly entitled.

Respectfully submitted,

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