IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D., Plaintiff, v. NATIONAL REVIEW, INC., *et al.*, Defendants	 2012 CA 008263 B Judge Alfred S. Irving, Jr.

MEMORANDUM IN SUPPORT OF MOTION OF MICHAEL E. MANN, Ph.D. JOHN B. WILLIAMS, AND PETER J. FONTAINE TO RECONSIDER OR TO ALTER OR AMEND AWARD OF SANCTIONS

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William J. Murphy (Bar No. 350371)
John J. Connolly (Bar No. 495388)
100 E. Pratt St., Suite 2440
Baltimore, MD 21202
410 332 0444 (tel.)
410 659 0436 (fax)
wmurphy@zuckerman.com
jconnolly@zuckerman.com

Attorneys for Movants Michael E. Mann, Ph.D., John B. Williams, and Peter J. Fontaine with respect to sanctions order

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Plaintiff Michael E. Mann, Ph.D., along with his trial attorneys John B. Williams and Peter J. Fontaine ("the Attorneys" and, with Dr. Mann, "Movants"), submit this memorandum in support of their motion to reconsider or to alter or amend the award of sanctions set forth in its order dated March 12, 2025.[1]

I. INTRODUCTION

Although the Court's March 12 Order imposing sanctions applies solely to Dr. Mann, the real parties in interest in the underlying opinion include Mr. Williams and Mr. Fontaine. The chief basis for imposition of sanctions is the Court's conclusion that the Attorneys engaged in bad faith by violating the D.C. Rules of Professional Conduct (which do not apply to Dr. Mann), and therefore the Court had inherent authority to impose sanctions on Dr. Mann. *See* March 12 Opinion ("Op.") at 40. Movants were stunned by the opinion and order—coming as it did more than a full year after the issue was raised. Needless to say, Movants take the Order very seriously, as it impugns their reputations

[1] Movants suggest in the alternative that the Court should reduce the amount of fees and expenses sought by the Defendants in their filings on March 26, 2025. See infra Part III.H.

and declares that the Attorneys violated ethical rules. The Opinion concludes that the Attorneys made a false statement to the Court in violation of Rule 3.3(a)(1); that they offered false evidence in violation of Rule 3.3(a)(4); that they failed to correct those transgressions in violation of Rule 3.3(a)(1) and 3.3(d); and that these violations of Rule 3.3 constituted violations of Rule 8.4(c). The Court's analysis focuses almost exclusively on the actions and omissions by the Attorneys; the Court had no reason to impose sanctions against Dr. Mann who did not engage in bad faith conduct and testified truthfully throughout his lengthy examination at trial, as will be shown herein.

Movants respectfully contend that the Court did not give fair warning that it was contemplating imposing sanctions against Dr. Mann based on the Attorney's alleged violations of these Rules. Although one defendant referred to Rule 3.3(a)(4) in his motion for sanctions, no one cited Rules 3.3(a)(1), 3.3(d), or 8.4(c), or materially analyzed any Rule during briefing and oral argument on the motion. In considering these rules, moreover, the Court engaged in its own analysis of the evidence well beyond what the parties argued in the motions for sanctions, and in the process reached erroneous conclusions that are inconsistent with evidence the Court might not have possessed or appreciated. The Court rejected simple and benign explanations of the Attorneys' conduct, which are corroborated by overwhelming evidence, and instead concluded that two longtime members of the bar deliberately made false statements to the Court and introduced false evidence—even though the Movants themselves had identified the "false" evidence, fully disclosed it to adverse counsel long before trial, tried to correct it before and during trial, and affirmatively corrected it on multiple occasions long before the jury deliberated.

As more fully set forth below, Movants maintain that the Court misapplied the applicable rules, and failed to give the Attorneys a fair opportunity to explain why they did not violate any rule. Attached hereto are declarations from the Attorneys explaining that they did not and would not knowingly mislead the Court or introduce false evidence. A fair consideration of those declarations, along with objective evidence that corroborates their statements, warrants reconsideration of the Court's Order finding that the Attorneys violated ethical rules and, derivatively, warrants reversal of the award of sanctions imposed on Dr. Mann.

II. MATERIAL FACTS

The Court's sanctions all arise from Movants' attempts to introduce evidence concerning Dr. Mann's grant funding that Movants themselves had corrected before trial. As the parties seemingly agree, Dr. Mann's initial responses to interrogatories about his grant funding included tables that contained several errors, including several numerical errors caused by what Dr. Mann later concluded was an inaccurate application of his analytic theory.[2] During the first preparation for trial in January 2023, Dr. Mann noticed the errors, worked diligently to correct them, reconsidered the analysis for his largest post-defamation unfunded grant, and brought amendments to the Attorneys' attention. *See* Declaration of Peter J. Fontaine [Fontaine Decl.] ¶¶ 4-5; Declaration of Michael E. Mann, Ph.D. [Mann Decl.] ¶¶ 4-8; John B. Williams [Williams Decl.] ¶ 4. The Attorneys arranged to have corrected answers prepared and served on defense counsel. The changes

[2] At his 2020 deposition, Dr. Mann explained that "start date" meant the date the applicant proposed for the funding to begin, but the decision on whether to provide funding would precede the start date. Mann Dep. 75-77. The approval date was a more accurate measure of whether the funding decision could have been affected by the defamatory publications. Upon review of his interrogatory responses during trial preparation in 2023, Dr. Mann realized there were discrepancies between the approval date and the start date in final calculations that needed revision. See Mann Decl. ¶¶ 5-6.

sometimes favored Plaintiff and sometimes favored Defendants, but a fair reading of them in total indicate they worked decidedly in *Defendants'* favor and *against* Plaintiff. *See, e.g.*, Mann Decl. ¶ 5.

Most notably, Dr. Mann realized that one unfunded post-defamation grant showed a budget of $9.7 million but, because the grant would be disbursed to multiple institutions and multiple professors at Dr. Mann's institution, the actual budget for Dr. Mann's work alone was only about $112,000. *Id.* That change substantially reduced the post-defamation ratio of funded to unfunded grants, thereby reducing the discrepancy in that ratio for pre-defamation grants. Neither the Attorneys nor Dr. Mann had any hesitation in amending the interrogatory responses to ensure that incorrect evidence would *not* be introduced at trial even if it resulted in significant harm to the damages case (an aspect of the case that Defendants have consistently attacked). Mann Decl. ¶¶ 5-8; Fontaine Decl. ¶¶ 4-5.

Dr. Mann identified two attachments (B and C) to the corrected interrogatory responses as trial exhibits 102 and 103 and Movants fully expected to use those exhibits to introduce the updated and fully accurate facts about Dr. Mann's grant funding. Defendants, by contrast, listed and introduced the *superseded* interrogatory responses as a trial exhibit (Exhibit 517A). During pretrial proceedings, the Court excluded Exhibits 102 and 103 on unrelated grounds.[3] That left Movants without a focused list of Dr. Mann's grant applications to guide Dr. Mann's testimony about how the Defendants' publications affected his success in securing grants. As a result, on direct examination, Dr. Mann testified about his grant funding as best he could from memory, with Mr. Fontaine making

[3] The basis for exclusion was the Court's finding that portions of Dr. Mann's answers to interrogatories contained hearsay derived from his conversations with an NSF program manager, David Verardo.

some use of Dr. Mann's CV as an imperfect proxy for recollecting the grants at issue. *See* Trial Transcript, Jan. 24, 2024 (AM session) [hereafter, "Tr. 1/24a"] at 67, 70. Mr. Fontaine contemporaneously prepared a demonstrative table of the before-and-after-publication funding amounts and success rates, and that table became Plaintiff's Exhibit 116, which was admitted without objection. *Id.* at 68, 71. That exhibit, and the testimony that supported it, was intended to reflect the substance of the *corrected* interrogatory responses; neither the Attorneys nor Dr. Mann in any way relied on the superseded interrogatories or the numbers in those interrogatories. *See* Fontaine Decl. ¶¶ 17-18; Mann Decl. ¶ 9.

On cross-examination, defense counsel introduced into evidence Dr. Mann's *superseded* interrogatory responses as Exhibit 517A. Tr. 1/24p at 74. That document included as "Attachment C" the table of grant funding that had been superseded by Dr. Mann's revised interrogatory answers. (Defendants had redacted Attachment C to remove the column that relied on hearsay testimony.) Defense counsel did not ask for an instruction limiting the use of Exhibit 517A, and the Court did not suggest that Exhibit 517A had been introduced for a limited purpose. Tr. 1/24p at 74-75. During the same cross-examination of Dr. Mann, defense counsel had the Court read to the jury a series of "judicial admissions" generally stating that Dr. Mann did not know whether any of the unfavorable grant-funding decisions were caused by the defamatory publications at issue. Tr. 1/24p at 62-67. The Court had previously ruled that those admissions could be used as a "substitute for evidence." Order at 4 (July 19, 2023) (citation omitted).

Under the Court's pretrial orders, Dr. Mann was permitted to explain the judicial admissions with "any clarifying facts he deems warranted." Superseding Pretrial Order (Nov. 22, 2023) at 8; *see also* Order at 4 (July 19, 2023) ("Plaintiff will be 'entitled to make

an explanation of the circumstances of the admission.'") (citation omitted). Although the Attorneys would have preferred to use the corrected interrogatory responses as a guide for Dr. Mann's testimony about grants, the Court previously had excluded the entirety of Exhibits 102 and 103, leaving Dr. Mann with only Attachment C to Exhibit 517A as a guide to refresh his recollection. The Attorneys believed they could now use Exhibit 517A for that purpose because it had been introduced as evidence by Defendants during Dr. Mann's cross. Tr. 1/24p at 74; Fontaine Decl. ¶ 22. On redirect of Dr. Mann, Mr. Fontaine referred to Attachment C in Exhibit 517A, "which Ms. Weatherford placed into evidence last week," and asked if it contained "a list of the rejected grant applications" and a "list of the grant proposals that were funded." Tr. 1/29p at 20. Defense counsel started to object on the grounds that Exhibit 103, the corrected interrogatory responses, had been excluded by motion *in limine*. Tr. 1/29p at 21. The Court asked, "Specifically, what information are we talking about?" *Id.* Mr. Fontaine responded, "The *list of the grants* that he received and did not receive, which are the same grants that you read into the record on the judicial admissions." *Id.* (emphasis added). Mr. Fontaine added that "the witness needs to be able to explain the grants that – you know, that he did not receive," as the Court had previously permitted, "[a]nd so I'm trying to guide him through that and get that testimony on the record." Tr. 1/29p at 22. In other words, Mr. Fontaine was focused on the *list of unfunded grants* contained in Attachment C of the exhibit, which was the subject of the judicial admissions, not the amounts of the grants, which all parties and counsel well knew had been changed. *See* Fontaine Decl. ¶¶ 20-23. Ms. Weatherford pointed out that the *in limine* ruling had excluded testimony from Dr. Mann about David Verardo—a project manager who provided a hearsay comment to Dr. Mann about the possible reasons for rejection of his grants—but Mr. Fontaine pointed out that "we are not

going to be getting into Mr. Verardo's testimony." Mr. Williams then explained that "[a]ll we are looking at right now is the *list of … proposals*. And it's already in evidence." Tr. 1/29p at 24. (emphasis added). The Court overruled Defendants' objection "largely for the reason that 517A is now in evidence. And so if these columns were not redacted, then fair game." Tr. 1/29p at 26.

Defense counsel then pointed out that the discovery responses in Exhibit 517A had been superseded by the supplemental responses served in 2023. Tr. 1/29p at 27. Mr. Fontaine responded that "[t]hey're in evidence. The *grant applications* are in evidence, and he should be able to talk about them." *Id.* (emphasis added). In response to the Court's question about how the supplemental responses superseded "what we have here now in evidence," the Attorneys stated that the relevant table of unfunded post-publication grants in the revised interrogatories (i.e., Attachment C to Exhibit 517A) and the same table in the original version (attached to Exhibit 517A) did not differ "substantively." Tr. 1/29p at 27.

The Court has concluded that this response by the Attorneys was knowingly false. Op. 33. As explained below, however, the Attorneys had no intention whatever to mislead the Court. *See* Fontaine Decl. ¶ 23; Williams Decl. ¶¶ 5-6 (explaining belief that Court was aware of the corrected responses based in part on pretrial proceedings). In the moment, the Attorneys were focused on how they planned to use Exhibit 517A in Dr. Mann's redirect examination, which was to go through the *list of unfunded grants*, and not to rely on or even reference the superseded numbers. Fontaine Decl. ¶ 23. Their "not substantively" response was intended to convey that the portion of the exhibit they planned to use was essentially the same as the corrected version. That response may have been inartful, but it was assuredly not intended to mislead the Court. *Id.* ¶ 24.

Exhibit 517A comprised 97 pages and the relevant Attachment C was printed in small type and difficult to read on a normal size sheet of paper. To assist the examination, Movants prepared Attachment C as an enlarged demonstrative and moved its admission as Plaintiff's Exhibit 117. Before using Attachment C to Exhibit 517A, however, Mr. Fontaine showed it to defense counsel. Once again, defense counsel did not object. Tr. 1/29p at 29. Only then was the document shown to the witness and the jury. And, as explained in more detail below, neither Mr. Fontaine nor Dr. Mann referenced the superseded numbers during Dr. Mann's redirect testimony. At the conclusion of the examination, Mr. Fontaine moved Attachment C to Exhibit 517A, which was designated as Exhibit 117, into evidence. Once again, defense counsel had "[n]o objection." Tr. 1/29p at 41.

As explained further below, defense counsel then recross-examined Dr. Mann by pointing out that the numbers on Exhibit 117 had been revised by Dr. Mann in supplemental interrogatory responses. Movants did not object to any of that testimony. The first correction came immediately, on recross-examination of Dr. Mann. Movants fully expected this "correction," given that Defendants withdrew their initial objection to Exhibit 117 because they *wanted* to correct the numbers on recross. And Defendants' counsel in fact elicited from Dr. Mann an explanation of how the grant numbers on Exhibit 117 had been corrected in a later version of his interrogatory responses. The Attorneys made no objections to the recross examination at all and they in no way attempted to prevent Defendants from correcting the numbers on Exhibit 117. *See* Tr. 1/29p at 56-80.

In fact, defense counsel on recross of Dr. Mann introduced two exhibits (1114 and 1115) that contained, in red ink, explicit corrections to Exhibit 117. *Movants did not object*

to the introduction of those exhibits. Tr. 1/29p at 81. And Movants later agreed that only the *corrected* exhibits, and *not* Exhibit 117, would be furnished to the jury for their deliberations. Tr. 2/7a at 43-44. The Attorneys also agreed they would not present damages arguments based on the superseded numbers in closing. *Id.* at 44-45.

Moreover, following defense counsel's recross that highlighted the numerical changes to Exhibit 117, Mr. Fontaine elicited a further correction from Dr. Mann:

> BY MR. FONTAINE:
>
> Q. Dr. Mann, you testified that you went through and made some corrections to the information that had previously been submitted. What was the net effect on the numbers?
>
> A. I think, in the end, it substantially decreased, the apparent loss of funding. We – because of that -- there was that one proposal that was for $9 million, and *I believe I said to you guys, that's misleading, because there wasn't a $9 million contract coming to Penn State. Penn State's contract was much smaller than that. We should get the numbers right, even if it actually would make a less compelling case for losing funding*.

Tr. 1/29p at 80-81 (emphasis added).

On January 31, 2024, after Dr. Mann's testimony concluded, the Court *sua sponte* asked the parties to brief what the Court should do about the loss-of-grant-funding theory. Tr. 1/31p at 42. The Court explained its concern that the grant numbers introduced by Movants were incorrect. Mr. Williams tried to explain that "[t]here had been earlier mistakes that were corrected, and that's why we gave them the correct numbers." Tr. 1/31p at 43-44. But in response to the Court's direction, the parties filed briefs the next day, and only then did Defendants seek sanctions, barely mentioning the Rules of Professional Conduct. On February 1, Mr. Steyn filed for sanctions that briefly cited Rule 3.3(a)(4). Mr. Simberg filed a "Response Brief" that included a brief request for "legal fees for the expenses incurred in the trial marked by Plaintiff and his Counsel's

misconduct," without citing any disciplinary rule. Dr. Mann filed a simultaneous "bench memorandum" that did not respond directly to the Defendants' papers. Dr. Mann and Mr. Simberg filed additional briefs on February 4; neither mentioned the disciplinary rules. Finally, on February 6, Mr. Simberg filed a "Motion for an Adverse Inference Instruction," seeking a jury instruction that the "false testimony" concerning Dr. Mann's history of grants required the jury to find that the "statements in question" did not cause reputational injury.

The Court held argument the next day, on February 7, in the middle of trial. At the motions hearing, Movants readily agreed that Exhibit 117 would not be furnished to the jury and Movants would not attempt to argue damages from "those grant fundings," Tr. 2/7a at 43-44—and they did not. At that point the Court appeared to have fully ruled on the motions for sanctions and for an adverse-inference instruction. Tr. 2/7a at 45 (after those two concessions, defense counsel stated "I think that's it, Your Honor," and the Court responded, "That is, indeed, where the Court would have gone. And that's why we asked for the briefing."). Yet on February 9, the Court issued an Order Setting Post-trial Briefing Schedule, *sua sponte* mentioning that it would "reserve a decision on Mr. Steyn's outstanding February 1" motion for sanctions, and observing in a footnote that the motion had sought reasonable attorney's fees and expenses. The Order did not mention any request for monetary sanctions by Mr. Simberg.

Thirteen months later the Court issued a 46-page opinion granting the motions for sanctions after extensive analysis of the Attorneys' compliance with the Rules of Professional Conduct. The Court stated that "[a]lthough Mr. Simberg's filing is styled as a brief, the Court will treat it as a motion for sanctions in accordance with the relief he seeks." Op. 2 n.1. And the Court awarded fees and expenses to both Mr. Steyn and Mr.

Simberg, who have now submitted fee applications seeking $27,579.40 (Steyn) and $16,762.82 (Simberg).

III. ARGUMENT

A. Standard of review.

The March 12 Order is an interlocutory ruling[4] subject to the revisory power of the Court under Rule 54(b). Super. Ct. Civ. R. 54(b) ("any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). Under that Rule, the standard for granting reconsideration is whether "it is consonant with justice to do so." *Marshall* v. *United States*, 145 A.3d 1014, 1018 (D.C. 2016). Movants contend that reconsideration is warranted in part because they did not have fair notice that the Court was contemplating sanctions for violations of the Rules of Professional Conduct.

To the extent the March 12 Order is considered a final ruling, Movants request that the Court alter or amend the ruling pursuant to Rule 59(e), taking additional evidence to correct errors of law and fact. Motions under Rule 59(e) are "committed to the broad discretion of the trial judge." *District No. 1-Pacific Coast Dist.* v. *Travelers Cas. & Surety Co.*, 782 A.2d 269, 278 (D.C. 2001).

Sanctions issued under a court's inherent power may be imposed only "with great caution." *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 43 (1991). The Court must find by clear and convincing evidence at least "bad faith," and probably "subjective bad faith"—a very

[4] Among other things, the March 12 Order expressly left open the amount of the sanction and set a briefing schedule on that issue.

high standard. *See Priority One Servs., Inc.* v. *W&T Travel Serv.*, 987 F. Supp. 2d 1, 5 (D.D.C. 2013). Recklessness is not sufficient. *See United States* v. *Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992) ("Of course, recklessness is a less stringent standard than bad faith ...."); *Priority One Servs.*, 987 F. Supp. 2d at 5. Although the D.C. Court of Appeals has stated the requisite bad faith may be shown by violations of the ethics rules, the test is whether the lawyer *knowingly* violated the rules. *See Yeh* v. *Hnath*, 294 A.3d 1081, 1089 (D.C. 2023) ("we have recognized that a party proved bad faith by clear and convincing evidence only in a limited set of scenarios: where a lawyer knowingly violated the rules of professional conduct ....").

B. The Court, using its own calculations, reached an erroneous conclusion about the true size of the post-publication funded grants, and relied on that erroneous conclusion to determine that the Attorneys knowingly violated Rule 3.3(a)(1) and (4).

Dr. Mann's 2023 corrected interrogatory answers included a table calculating that his post-publication funded grants summed to $595,044. Movants included that table and related information in proposed trial exhibits 102 and 103, but those exhibits were excluded in pretrial rulings for unrelated reasons. *See* Order on Mot. in Lim. (Oct. 10, 2023). At trial, lacking any document to provide the precise figure, Dr. Mann testified that he received "about half a million ... [a]bout 500,000" in funded grants post-publication, Tr. 1/24a at 69, a figure counsel wrote onto a chart that became Exhibit 116.

In its ruling on sanctions the Court performed its own calculation of the amount of Dr. Mann's funded grants in the post-publication period. Based on those calculations, the Court concluded that the "four funded grants totaled $927,128—significantly greater than the $500,000 amount to which Dr. Mann testified and Mr. Fontaine offered as part of Exhibit 116." Op. 38. The Court acknowledged that the March 2023 revised

interrogatories made certain changes, including eliminating one grant of $90,612 from the post-publication funded category, Op. 38-39, but concluded that the "four funded grants now totaled $895,215, with a resulting disparity closer to $2.4 million—still a far cry from the $500,000 in funded grants and $2.8 million disparity presented to the jury." No party had made that precise argument, but the Court nevertheless concluded that the discrepancy between "about $500,000" and $927,128 (or $895,215) was so large that Exhibit 116 and Dr. Mann's accompanying testimony was "plainly false evidence." Op. 39.

Movants respectfully suggest that the Court did not appreciate the relevant evidence and reached a clearly erroneous conclusion about the post-publication funded grants. To reach the $927,128 figure, the Court summed four grants from Trial Exhibit 1115, a summary chart that Defendants prepared to highlight the *errors* in Dr. Mann's original interrogatory responses concerning his grant funding. But at trial Dr. Mann was trying to testify consistent with his 2023 *revised* interrogatory answers, which *corrected* the prior errors. The corrected figures were displayed in proposed Exhibits 102 and 103. Those exhibits were not admitted at trial, but the corrected calculations were not excluded, and Dr. Mann did his best to testify to the *corrected* figures, not the superseded ones. *See* Fontaine Decl. ¶ 11.

The corrected total post-publication funded amount is stated on Exhibit 102 as $595,044. *See also* Fontaine Decl. ¶ 15. That amount is the sum of two numbers: $145,002 and $450,042, which correspond to the "Collaborative Research" and "Earthcube Building Blocks" grants on Exhibit 103. *Id.* Dr. Mann did not count the WSC-Cat 2 grant of $300,514 (or $300,171, as Dr. Mann had revised it) in the post-publication funded category in Exhibit 102. *Id.*; Mann Decl. ¶ 6. That change was not made on a whim, much less as a deliberate attempt to falsify evidence, but because Dr. Mann found hard evidence

establishing that the project had been approved *before* the July 12, 2012, date of publication. Mann Decl. ¶ 6 & & Exs. A-B. As of April 26, 2012, the application had passed the confidential grant reviewer process and all that was needed was a project management plan, as Dr. Mann learned on May 3, 2012. *See id.* Ex. A at PLF01049864. On June 12, 2012, Dr. Mann's budget was set. *See id.* Ex. B at PLF01041486-89. In addition, as the Court noted, Dr. Mann's revised interrogatory responses excluded one of two listed "Megadrought" grants from the post-publication funded category because Dr. Mann determined that the second listing (for $90,612) was not a new grant, but reflected a transfer of funds from the existing grant between institutions when one of the co-principal investigators changed positions. Mann Decl. ¶ 7; Fontaine Decl. ¶ 16.

The table below shows the discrepancy between the Court's calculations in its sanctions opinion and Dr. Mann's pre-trial *corrected* calculations, as displayed in (unadmitted) Exhibits 102 and 103.

	Post-pub funded amt		
	Court's calculations		**Mann calc.**
Grant short title	**Ex 1115**	**Ex 103**	**Exs 102-03**
WSC-Cat 2	$300,514	$300,171	
Megadrought	$90,612		
Collab. research: Qnt. reconst.	$145,002	$145,002	$145,002
Earthcube Bldg Blocks	$391,000	$450,042	$450,042
TOTAL	$927,128	$895,215	$595,044

Unable to reference his corrected tables at trial, Dr. Mann estimated that the total of grants funded post-publication was "[a]bout 500,000," Tr. 1/24a at 69, when the actual number on his 2023 spreadsheet was $595,044. *See* Ex. 102. That imprecision was a function of having to rely on memory, not deceit. Mann Decl. ¶ 9; Fontaine Decl. ¶ 18.

In short, Movants were not deceiving the Court or the jury by suggesting that the post-publication funded grants totaled "about 500,000" when the actual number was $927,128

or $895,215. Dr. Mann's revised interrogatory answers plainly showed that the discrepancy was much smaller. Neither Dr. Mann's testimony attempting to recite the corrected figures, nor the brief summary of that testimony in Exhibit 116, can reasonably be construed as a deliberately false statement. Movants respectfully request that the Court reconsider its opinion and order to the extent it relies on this allegedly false testimony and evidence.

C. The Attorneys did not knowingly make a false representation to the Court in stating that a portion of a superseded interrogatory answer was not substantively different from a corrected version.

The Court concluded that the Attorneys "knowingly made a false statement of fact to the Court" and thereby violated Rule 3.3(a)(1) in response to the Court's question about whether Exhibit 517A, an old version of Dr. Mann's interrogatory responses, was different from the corrected interrogatory responses that Dr. Mann had served on Defendants well before trial. *See* Op. 33. The relevant colloquy is reprinted below, with the statements the Court found to be false underlined:

> MS. WEATHERFORD: Certainly, Your Honor. The only other issue we have is that the discovery responses in 517 have been superseded, so they are not, in fact, the plaintiff's discovery responses in this case—current responses.
>
> MR. FONTAINE: They're in evidence. The grant applications are in evidence, and he should be able to talk about them.
>
> THE COURT: And how do the responses supersede what we have here now in evidence?
>
> MS. WEATHERFORD: The plaintiff provided supplemental responses in March 2023.
>
> THE COURT: That differ from the chart here?
>
> MS. WEATHERFORD: They do. Yes.
>
> MR. FONTAINE: <u>Not—</u>
>
> MR. WILLIAMS: <u>No.</u>

> MR. FONTAINE: Not substantively, and they kept it out.
>
> MS. WEATHERFORD: You know what? Your Honor, your point is well taken on this. If they want to go ahead and show the old responses, we'll deal with it.

Op. 15 (quoting Tr. 1/29p at 27).

Rule 3.3(a)(1) provides in relevant part that "A lawyer shall not knowingly … [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer …." Under the Rules, *knowingly* is a high bar. *See* D.C. R. Prof'l Cond. 1.0(f) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question."). "A person's knowledge may be inferred from circumstances," *id.*, but the standard remains *actual* knowledge. That means to violate Rule 3.3(a)(1), the lawyer must *know* that he or she is making a false statement of fact to the Court.

As set forth above and in the attached declarations, the Attorneys did *not* know they were making a false statement. *See* Fontaine Decl. ¶¶ 23-24; Williams Decl. ¶¶ 6-8. When the Court asked whether charts differed, they instinctively responded "no" or "not substantively" because they were focused on the portion of the chart that they planned to review with Dr. Mann; i.e., the *list* of nonfunded grants that were the subject of the judicial admissions, not the superseded funding numbers associated with those grants. *Id.* That list had not changed. Fontaine Decl. ¶ 23.

The Attorneys were acutely aware that defense counsel knew the numbers on the chart *had* been changed substantively, since the Attorneys themselves had flagged the errors and furnished corrected figures. Fontaine Decl. ¶ 5; Williams Decl. ¶ 4. And defense counsel, doubtless seeing her own opportunity to correct the superseded numbers in the presence of the jury, withdrew her initial instinct to object: "You know what? Your Honor,

your point is well taken on this. If they want to go ahead and show the old responses, we'll deal with it." Tr. 1/29p at 27. The Attorneys anticipated that this response meant defense counsel planned to highlight the various corrections Dr. Mann had made to Attachment C of his earlier interrogatory responses. But in the Attorneys' mind, Defendants clearly consented to the publication of Attachment C to the jury—which included the superseded numbers that defense counsel would be attacking on recross.

The Attorneys' testimony on this point may not be dispositive, but it is highly probative. *See In re Krame*, 284 A.3d 745, 761 (D.C. 2022) (lawyer's testimony that he understood trust instrument to permit him to take a flat fee may not have been reasonable, but could not be ignored by board when hearing committee credited it). Mr. Williams and Mr. Fontaine are both longtime members of the bar with unblemished disciplinary records. Williams Decl. ¶ 2; Fontaine Decl. ¶¶ 2, 28. They would not dream of tarnishing their reputations by knowingly lying to a court. *See* Williams Decl. ¶ 3. And even if they were so inclined, it would have made no sense for them to try to convince the Court that the two charts were the same when they themselves had made sure their opponents knew they were not the same.

Yet the Court seemingly believed that Movants' purpose was to display the superseded numbers to the jury while Dr. Mann was testifying about other aspects of the chart. That never occurred to the Attorneys, and they deny it in their declarations. *See* Fontaine Decl. ¶ 24; Williams Decl. ¶ 3. To be sure, in retrospect Mr. Fontaine wishes he elicited from Dr. Mann a preliminary statement that the numbers on Exhibit 117 had been superseded, *see* Fontaine Decl. ¶ 24, but he was assuredly not trying to deceive anyone into believing the numbers were accurate. At the time of the colloquy, all counsel and parties unequivocally knew that Exhibit 517A (and its Attachment C) contained material

differences in some of the dollar amounts for the identified project grants—that was the whole purpose of Dr. Mann's correction to his interrogatory responses that he served before trial. Moreover, the Attorneys *twice* asked if defense counsel had any objection to Exhibit 117, first before displaying it to the witness (and to the jury), and second when introducing it as evidence. Twice defense counsel did not object. The Attorneys understood that defense counsel did not object precisely because they wanted to point out that Dr. Mann had corrected many of the numbers, as defense counsel in fact did. And the Attorneys did not object to any of that cross-examination. Finally, as explained above, Mr. Fontaine himself elicited a statement from Dr. Mann on redirect that confirmed not only that he had corrected what was by far the most helpful unfunded grant amount in his original interrogatory answers, but that the correction *undermined* his own argument.

In sum, the evidence cannot sustain the extraordinary finding that two lawyers knowingly made a false statement of fact to the Court by indicating that two documents were not substantively different. Movants respectfully request that the Court reverse that finding, and the monetary sanctions that depend upon it.

D. The Attorneys did not knowingly offer evidence they knew to be false through Exhibit 117.

The Court also concluded that the Attorneys violated Rule 3.3(a)(4) by knowingly offering evidence, in the form of Exhibit 117, that the Attorneys knew to be false. Op. 35. The Court observed that Exhibit 117 contained two numerical errors, and Movants acknowledged before, during, and after trial that those numbers were incorrect. Again, it was the Movants who identified those errors and reported them to Defendants before trial. But the Attorneys did not "knowingly … offer" those mistaken numbers; their sole intent in using Exhibit 117 was to refresh Dr. Mann's recollection about the identity of the

unfunded grants at issue, not to suggest to the jury that the superseded numbers on the exhibit were correct. *See* Williams Decl. ¶¶ 4-7; Fontaine Decl. ¶¶ 23-25.

Ample evidence corroborates the Attorneys' declarations:

- Ms. Weatherford unquestionably knew that some of the numbers on Exhibit 117 were incorrect, but she decided that she wanted to address those errors in the jury's presence through cross-examination. As a result, she did not object to Movants' use of the table that became Exhibit 117. See Tr. 1/29p at 27 ("If they want to go ahead and show the old responses [i.e., what became Exhibit 117], we'll deal with it.").

- Even after Ms. Weatherford's decision not to object, Mr. Fontaine asked Ms. Weatherford whether there was "[a]ny objection" to showing Dr. Mann Exhibit 117, the enlargement of the superseded table from Exhibit 517A. She responded, on the record: "No objection." Tr. 1/29p at 29.

- Neither Mr. Fontaine nor Dr. Mann referred to the superseded numbers during his redirect examination based on Exhibit 117. Tr. 1/29p at 29-56.

- During Ms. Weatherford's cross-examination, Dr. Mann agreed that the numbers on Exhibit 117 had been corrected—as the Attorneys knew he would. Tr. 1/29p at 63-64 (Q. … "So from your June 2020 answers under penalty of perjury to your March 2023 answers under penalty of perjury, the amount of that not funded grant after the blog post changed from about $9.7 million to $112,000; isn't that right? A. Yes, it did.").

- During cross-examination, Ms. Weatherford introduced two exhibits that contained red-inked edits striking the incorrect numbers on Exhibit 117 and adding the corrected numbers, and Movants *did not object to those exhibits*. Exs. 1114, 1115; *see* Tr. 1/29p at 81.

- On redirect examination, Mr. Fontaine elicited from Dr. Mann a statement that the corrected numbers *favored the Defendants*. Tr. 1/29p at 80-81.

- At the argument on the sanctions motion, Movants *agreed* that Exhibit 117 would not be sent to the jury room and that the Attorneys would not refer to the superseded numbers in closing. Tr. 2/7a at 44. Moreover, the corrected exhibits introduced by the defense *did* go to the jury room.

Rule 3.3(a)(4) has two separate knowledge components. To violate the rule, a lawyer must *knowingly* offer evidence that the lawyer *knows* to be false. The Court's opinion overlooks the first knowledge component. The events recited above overwhelmingly

establish that Movants did not knowingly offer false evidence by displaying Exhibit 117 during Dr. Mann's redirect examination. These undisputed events establish that they were *not* asking or hoping that the jury would rely on the corrected numbers. Movants themselves corrected the numbers before trial; they asked but were denied the opportunity to use the corrected numbers at trial; they did not reference the superseded numbers during Dr. Mann's examination or at any other time before the jury; they did not object to Defendants' cross-examination highlighting the corrections; they freely agreed that the defense could introduce corrected documents in their examination of Dr. Mann; and they freely agreed that only the numbers from the corrected documents would be presented to the jury and sent to the jury room. On top of all that, two longtime members of the bar have submitted declarations saying that they had no intention to introduce false evidence to the jury.

Movants respectfully suggest that the Court's conclusion on Rule 3.3(a)(4) is not "consonant with justice" and should reconsidered.

E. The Attorneys did not violate Rule 3.3(a)(1) or 3.3(d) by failing to correct misrepresentations or a fraud on the court.

The Court held that the Attorney's conduct violated Rules 3.3(a)(1) and 3.3(d) "by not promptly disclosing the erroneous nature of Exhibit 117 and Exhibit 517A and correcting their prior misrepresentations." Op. 35-36; *see id.* at 39. Movants respectfully suggest that the Court misunderstood the facts and misapplied these rules.

1. Rule 3.3(d) does not apply.

Rule 3.3(d) provides that "[a] lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is

permitted by Rule 1.6(d)." Subsection (d) of Rule 3.3 simply does not apply either to the alleged misrepresentations or to the alleged offering of false evidence. A lawyer's duty to correct misrepresentations to the Court is governed by Rule 3.3(a)(1), not 3.3(d), and that duty is considered in the next section. And a lawyer's duty to correct false evidence that the lawyer himself introduces is not reasonably covered by Rule 3.3(d), which applies when a lawyer learns of a fraud on the court after it has occurred. *See* R. 3.3 cmt. [8] ("Paragraph (d) provides that if a lawyer learns that a fraud *has been perpetrated* on the tribunal ...."') (emphasis added). In this case, the Attorneys were the ones making the representations and offering the evidence—but of course they do not agree with the Court's view of their conduct, or that the conduct at issue constitutes a "fraud ... upon the tribunal."

2. **Under either Rule 3.3(a)(1) or 3.3(d), the Attorneys satisfied any obligation to correct "false statements" or the offering of false evidence.**

Rule 3.3(a)(1) requires lawyers to correct a false statement of material fact or law previously made to the tribunal by the lawyer, and Rule 3.3(d) requires a lawyer to "promptly take reasonable remedial measures" after learning "that a fraud has been perpetrated on the court." Neither rule expressly prescribes a specific form the correction must take.[5] In this case, however, the record overwhelmingly demonstrates that Movants promptly corrected any false statement or evidence. By the end of Dr. Mann's testimony, and certainly by the end of the in-trial argument on the motions for sanctions, the Court clearly understood that the Attorneys were *not* representing that the numbers on Exhibit

[5] The Rules also do not state precisely *when* the correction must be made, although Rule 3.3(c) states that the duties in subsection (a) "continue to the conclusion of the proceeding" but gives no further guidance. Rule 3.3(d) states only that the reasonable remedial measures must be taken "promptly." Whatever the timing standard, the corrective measures described herein clearly satisfied it, as they began immediately after Dr. Mann's redirect testimony and were concluded long before the case went to the jury.

117 were substantively identical to the numbers on the corrected interrogatory responses, and both the Court and the jury fully understood that the numbers on Exhibit 117 were *not* correct.

The first correction came immediately, on recross-examination of Dr. Mann. Movants fully expected this "correction," given that Defendants withdrew their initial objection to Exhibit 117 because they *wanted* to correct the numbers on recross. And in fact Defendants' counsel elicited from Dr. Mann an explanation of how the grant numbers on Exhibit 117 had been corrected in a later version of his interrogatory responses. Tr. 1/29p at 61-72. The Attorneys made no objections to the recross examination and they in no way attempted to prevent Defendants from correcting the numbers on Exhibit 117. *See* Tr. 1/29p 56-80. Moreover, on redirect, Mr. Fontaine elicited a further correction from Dr. Mann: "I believe I said to you guys, that's misleading, because there wasn't a $9 million contract coming to Penn State. Penn State's contact [sic] was much smaller than that. We should get the numbers right, even if it actually would make a less compelling case for losing funding." Tr. 1/29p at 80-81.

That testimony unequivocally corrects any prior misimpression about the numbers on Exhibit 117. Corrected testimony from the witness who presented the incorrect evidence is the preferred method for satisfying Rule 3.3(d).[6] It also satisfies the obligation under Rule 3.3(a)(1) because Dr. Mann's testimony makes very clear that Plaintiff's counsel were *not* representing to the Court that the numbers in Exhibit 117 and the corrected interrogatory answers were the same. Again, it would have been unfathomable

[6] When a lawyer learns that a client has testified falsely or committed a fraud on the court, the usual first step is for the lawyer to "remonstrate" with the client confidentially to correct the falsehood. *See* ABA Model R. Prof'l Cond. 3.3 cmt. [10]; *compare* D.C. R. Prof'l Cond. 3.3 cmt. [8] ("the lawyer should ordinarily first call upon the client to rectify the fraud"). If remonstration does not work, the lawyer may need to take other measures, including "disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d)."

for the Attorneys to make that statement when they themselves had furnished the corrected interrogatory answers to the Defendants, and also tried to have those corrected answers introduced into evidence.

But that is not all. At the conclusion of Dr. Mann's testimony, Defendants moved to admit Exhibits 1114 and 1115 into evidence. Exhibit 1114 contained a red-inked handwritten correction of the two principal numbers that the Court found to be misrepresentations or false evidence, and Exhibit 1115 showed other corrections to Exhibit 117 marked in red. *The Attorneys did not object to the admission of these Exhibits*. Tr. 1/29p at 81. Finally, at the argument on the motion for sanctions during trial, Movants agreed that Exhibits 117 and 517A would not be sent to the jury room, and they would not argue damages based on those numbers. Tr. 2/7a at 44. By contrast, Exhibits 1114 and 1115 *were* furnished to the jury to consider during their deliberations. *See* Tr. 1/29p at 81 (admitting exhibits without objection).

In short, the record unequivocally establishes that Movants timely corrected any misrepresentations to the Court by the Attorneys and took prompt remedial measures to ensure that Movants had *not* knowingly provided false evidence to the jury. For these reasons, Movants respectfully request that the Court reverse its conclusion that Counsel violated Rules 3.3(a)(1) and 3.3(d) "by not promptly disclosing the erroneous nature of Exhibit 117 and Exhibit 517A and correcting their prior misrepresentations," and reconsider its order of sanctions as a result of that change.

F. The Attorneys did not violate Rule 8.4(c).

The Court found that the Attorneys' "violations of Rule 3.3 also constitute violations of Rule 8.4(c)" as "'conduct involving dishonesty … or misrepresentation.'" Op. 37, 39. This conclusion was erroneous for both technical and substantive reasons.

As a technical matter, if Counsel did not violate the specific prohibitions on false statements and false evidence in Rule 3.3, as Movants demonstrate above, then the Court should also reverse its conclusion with respect to the more general prohibitions on dishonest conduct in Rule 8.4(c). As the note prefacing the Rules of Professional Conduct discussing "Scope" provides:

> In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific Rules that address specific types of conduct. The Rule of interpretation expressed here is meant to make it clear that the general Rule does not supplant, amend, enlarge, or extend the specific rule….

D.C. R. Prof'l Cond., Scope cmt. [5]; *see also* D.C. Comm. Ethics Op. 334 (2006) ("Scope Comment [5] makes clear that where conduct is proper, either explicitly or implicitly, under a specific rule dealing with that type of conduct, a more general rule should not be used to render that conduct improper."). In *In re Cater*, 887 A.2d 1, 16 n.14 (2005), the respondent had been charged with violating both Rule 5.3(b) in failing to supervise an employee who embezzled money from incapacitated adults, and for violating Rule 1.1(a) (competence) for the same conduct. The Hearing Committee and the Board on Professional Responsibility found no violations of those rules, with several Board members dissenting. On appeal, the Board argued that the respondent could not be liable under Rule 1.1(a) if he was not liable under Rule 5.3(b). The Court of Appeals, citing the Scope note, stated that "'preemption' may occur where the lawyer's conduct is found to have complied with the more specific rule," but did not apply it in the case at bar because the Court found the respondent *did* violate Rule 5.3(b). 887 A.2d at 16 n.14.

Although application of this "preemption" doctrine is nuanced, it should apply here, where the Attorney's obligations concerning false statements to the tribunal and introduction of false evidence are specifically covered by Rule 3.3. Unlike Rule 8.4(c), Rule 3.3 recognizes exceptions to the duty of candor; for instance, where correction of a false statement to a tribunal or taking remedial measures to correct a fraud on the court would not be permitted by Rule 1.6(d). *See* D.C. R. Prof'l Cond. 3.3(a)(1), 3.3(d). Accordingly, if the Court agrees that the Attorneys did not violate Rule 3.3, it should also reverse its holding with respect to Rule 8.4(c).

Substantively, if the Attorneys did not "knowingly" make a false statement or fail to correct a material false statement, or did not "knowingly" offer evidence known to be false, they also did not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Although dishonesty is the most expansive of the four types of misconduct proscribed by Rule 8.4(c), a finding of dishonesty under the Rule still requires knowing falsity or recklessness with regard to the truth—negligent conduct is not sufficient. *See In re Romansky*, 825 A.2d 311 (2003) [*Romansky I*]. The Court of Appeals has made clear that courts must consider whether the respondent "had a culpable state of mind." *See id.* at 317. Although recklessness might be enough (for a rules violation), "[r]ecklessness is a culpable mental state tantamount to actual knowledge and intent." *In re Cleaver-Bascombe*, 892 A.2d 396, 414 (2006) (Glickman, J., dissenting); *see Romansky I*, 825 A.2d at 316 (recklessness is "a state of mind in which a person does not care about the consequences of his or her action") (quoting Black's Law Dictionary 1277 (7th ed. 1999)). And, to be clear, "recklessness" is not sufficient to establish the subjective bad faith necessary for sanctions under the Court's inherent power. *See supra* Part III.A.

Disciplinary bodies adjudicating dishonesty charges under Rule 8.4(c) ordinarily must consider the respondent's explanation for the conduct. *Romansky I*, 825 A.2d at 317 ("the Board must determine whether Romansky's explanation for his conduct is true"). To find a violation of Rule 8.4(c) where the respondent plausibly denies dishonest intent, the contrary evidence must be strong. *See In re Romansky*, 938 A.2d 733 (D.C. 2007) (*Romansky II*) (where respondent denied knowingly adding an unauthorized premium to a client invoice, but other evidence supported a finding that lawyer easily could have learned that the premium was unauthorized, the evidence was virtually in equipoise and the Court could not conclude that bar counsel had proved recklessness).

The Attorneys have explained in the attached declarations that they absolutely had no intention of misleading the Court or offering false evidence. Williams Decl. ¶¶ 3-8; Fontaine Decl. ¶¶ 18-28. They explain that before trial, the Attorneys themselves (with Dr. Mann's input) identified the errors in Exhibit 517A (which was the source of Exhibit 117), and that they unequivocally informed defense counsel of the numerical errors by serving them with Dr. Mann's revised interrogatory responses. Williams Decl. ¶ 4; Fontaine Decl. ¶¶ 4-5. The issue came up several times in pretrial proceedings, including in litigation on the admissibility of the tables attached to the revised interrogatory responses. In light of that history, the Attorneys honestly believed that everyone listening to the in-court colloquy about the differences between Exhibit 517A and the revised interrogatory answers, including the Court, understood the numerical discrepancies when the Court asked whether there was any difference between the two documents at issue. *See* Fontaine Decl. ¶¶ 23-24; Williams Decl. ¶¶ 5-6. In responding to the Court's question, the Attorneys were focused on the portions of the Exhibit Mr. Fontaine intended to reference in Dr. Mann's redirect testimony. And when they said there was no

"substantive[]" difference between the two tables, what they meant was that there was no substantive difference between the list of unfunded post-publication grants, which was all Mr. Fontaine intended to use on redirect and all he did use.[7]

Substantial extrinsic evidence supports the Attorneys' testimony that they did not knowingly make a false statement. Most significantly, the Attorneys themselves had identified the numerical discrepancies to Defendants' counsel, who were obviously listening to the colloquy and who had every incentive to correct the "not substantively" response if they believed the Court misunderstood it. Instead, Defendants' counsel declined to object to Exhibit 117 and indicated they would address it on cross-examination. The Attorneys knew, and they believed at the time that the Court knew, that defense counsel meant that she would highlight the numerical discrepancies for the jury. Moreover, as set forth above, the Attorneys never objected to that cross-examination, and in fact reinforced on redirect that the numbers on Exhibit 117 were not correct by eliciting testimony from Dr. Mann that his corrections reduced the force of his claim regarding the loss of grant funding.

In sum, the weight of the evidence strongly supports the Attorneys' sworn statements that they had no intent to deceive when they responded to the Court's inquiry about changes made to Exhibit 117. For these reasons, the Court should reverse its finding that the Attorneys violated Rule 8.4(c) and reconsider the award of sanctions in light of that change.

[7] In retrospect, the Attorneys realize the Court would not have been as tuned-in to the changes to the interrogatory responses as the Attorneys and defendants' counsel were, and the Attorneys certainly wish they had given a more detailed response to the Court's question; e.g., that there were no substantive differences in the portion of the two documents that would be highlighted in Dr. Mann's examination. But they did not knowingly make any false statement to the Court.

G. Dr. Mann is not subject to the Rules of Professional Conduct and he did not otherwise act in bad faith.

Although the order of sanctions is grounded largely in the Attorneys' alleged violations of the Rules of Professional Conduct, the order technically applies only to Dr. Mann. Dr. Mann is not subject to the Rules of Professional Conduct, of course, and the Court cannot sanction Dr. Mann on that basis. And even leaving the Rules aside, most of the Attorneys' conduct at issue cannot reasonably be ascribed to Dr. Mann. Dr. Mann did not make or endorse the Attorneys' statement to the Court that Exhibit 117 was not substantively different from his prior interrogatory responses. Nor can Dr. Mann be faulted for the publication of Exhibit 117 to the jury; he is not a lawyer and has no reason to understand the nuances of publishing documents that are or are not in evidence.

Dr. Mann *is* responsible for his own testimony under oath, but that testimony was truthful. Like untold numbers of witnesses, he misremembered one precise number ($595,044) and, lacking a document to refresh his recollection, provided a truncated estimate ("about 500,000"). But that statement assuredly was not knowingly false. Dr. Mann himself had calculated the $595,044 figure and had furnished it in his amended interrogatory responses to defense counsel, who could have refreshed Dr. Mann with it at any time, and he certainly would have acknowledged it as the precise figure. Indeed, Dr. Mann confirmed through defense counsel's cross-examination and through Mr. Fontaine's redirect examination that the *numbers* on Exhibit 117 had been updated and that the most significant updates were unfavorable for his case.

Movants respectfully suggest that the evidence cannot possibly support a finding that Dr. Mann knowingly made any false statements or presented false evidence or otherwise

acted in bad faith. For these reasons, the Court should reverse the sanctions imposed on Dr. Mann.

H. If the Court awards fees to Mr. Steyn, it should use the more reasonable rates proffered by Mr. Simberg and eliminate duplicative or unnecessary charges.

For the foregoing reasons Movants request that the Court eliminate the sanctions award altogether. If the Court rejects these arguments, Movants request that the Court reduce the fee awards requested, particularly by Mr. Steyn, on reasonableness grounds. Fee-shifting under the court's inherent power "should be exercised with especial 'restraint and discretion.'" *Goodyear Tire & Rubber Co.* v. *Haeger*, 581 U.S. 101, 108 n.5 (2017). In *Goodyear*, the Supreme Court held that "the court can shift only those attorney's fees incurred because of the misconduct at issue." *See id.* at 108. The award must be compensatory rather than punitive; indeed, courts must apply "a but-for test," meaning a court may award only those fees that the complaining party would not have paid but for the misconduct. *See id.* at 109. And of course courts may only impose fees that are reasonable.

Mr. Steyn's petition for fees, unlike Mr. Simberg's, does not disclose the rates Mr. Steyn's counsel actually charged in this matter, much less the amount Mr. Steyn paid. Instead, Mr. Steyn seeks fees based on the Laffey Matrix, which would allow rates up to $1141 per hour for Mr. Bartolomucci. *See* Steyn Pet., Exs. 1, 2. The Laffey rates are meant as an estimate, but actual rates are at minimum relevant to the analysis, if not now dispositive under *Goodyear*. *See*, *e.g.*, *Adolph Coors Co.* v. *Truck Ins. Exch.*, 383 F. Supp. 2d 93 (D.D.C. 2005); *Wye Oak Tech., Inc.* v. *Republic of Iraq*, 557 F. Supp. 3d 65, 91 (D.D.C. 2021) ("the attorneys' billing practices are an important element in a reasonable

rate determination" and "an attorney's usual billing rate is in fact presumptively the reasonable rate") (quotations and citations omitted).

In the absence of any indication of actual rates or charges for Mr. Steyn's counsel, Movants suggest that the fees actually charged by Mr. Simberg's counsel are a better representation of fair rates for both Defendants in this matter than the Laffey Matrix, and that the Court award Mr. Steyn no more than the amount requested by Mr. Simberg. The disparity makes little sense given that the Court prescribed identical blocks of time that would be reimbursable under the sanctions award, apart from the motions practice and the fees-on-fees component. And with respect to fees-on-fees, Mr. Steyn seeks recovery of 4.5 hours for his lead counsel at the Laffey rate of $1,141 (*see* Steyn Subm., Ex. 1, p. 3), whereas Mr. Simberg seeks 0.2 hours at $525/hr. for his lead counsel, and 3.6 hours at $365/hr. for an associate's work. *See* Simberg Subm., Ex. B. Accordingly, if the Court is still inclined to award fees, Mr. Steyn's request should be adjusted downward significantly.

As to Mr. Simberg's request, Movants do not contest the hourly rates, but the Court should eliminate some of the unreasonable time entries. Mr. Simberg billed for three attorneys to "[a]ttend trial"; two should be considered reasonable for purposes of fee-shifting. In addition, Mr. Simberg seeks reimbursement for the work of four attorneys, including three partners, who spent 22.1 hours preparing "responses to the Court's request for briefing." That is an unreasonable use of resources, and Movants suggest that the Court should reduce it by 50 percent.

IV. CONCLUSION

For the reasons stated, Movants respectfully request that their motion for reconsideration be granted; that the Court vacate its opinion finding that Plaintiff's

Counsel violated the Rules of Professional Conduct; and that the Court reverse the award of sanctions imposed on Dr. Mann, who was blameless in connection with the testimony and exhibits that formed the basis of the Court's March 12 Order.

Dated: April 8, 2025

Respectfully submitted,

ZUCKERMAN SPAEDER LLP

By: /s/ *William J. Murphy*

William J. Murphy (Bar No. 350371)
John J. Connolly (Bar No. 495388)
100 E. Pratt St., Suite 2440
Baltimore, MD 21202
410 332 0444 (tel.)
410 659 0436 (fax)
wmurphy@zuckerman.com
jconnolly@zuckerman.com

Attorneys for Movants Michael E. Mann, Ph.D., John B. Williams, and Peter J. Fontaine with respect to sanctions order

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 2025, I caused copies of the foregoing paper to be sent by email to the persons identified below.

Victoria Weatherford
BAKER & HOSTETLER LLP
Transamerica Pyramid Center
600 Montgomery Street, Suite 3100
San Francisco, CA 94111
vweatherford@bakerlaw.com

Mark W. DeLaquil
Andrew M. Grossman
Kristen Rasmussen
Renee M. Knudsen
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW,
Suite 1100
Washington, DC 20036
mdelaquil@bakerlaw.com
agrossman@bakerlaw.com
krasmussen@bakerlaw.com
rknudsen@bakerlaw.com

Mark I. Bailen
The Law Offices of Mark I. Bailen, PC
1250 Connecticut Avenue NW
Suite 700
Washington, DC 20036
mb@bailenlaw.com

Counsel for Defendant Rand Simberg

Melissa Howes
Email: melissa@ajpromos.com
Mark Steyn
Email: mdhs@marksteyn.com
H. Christopher Bartolomucci
Email: cbartolomucci@schaerr-jaffe.com

Defendant Mark Steyn

/s/ *John J. Connolly*
John J. Connolly