IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, Petitioner, v. KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA, Respondent.	)	Case No. CL10000398-00

REPLY BRIEF IN SUPPORT OF PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMANDS ISSUED TO THE UNIVERSITY OF VIRGINIA

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INTRODUCTION

The Attorney General's Opposition itself makes clear that the Attorney General did not issue civil investigative demands under the Virginia Fraud Against Taxpayers Act to investigate fraud on Commonwealth taxpayers. Rather, the CIDs were issued in an unprecedented attempt to challenge a university professor's peer-reviewed data, methodologies, and conclusions. But FATA does not authorize the Attorney General to police academic debate – and it certainly does not authorize the Attorney General to target for government investigation those who conduct scientific research with which the Attorney General disagrees.

As the University stated in its petition and memorandum in support, the CIDs at issue are not authorized and cannot be enforced under FATA. The CIDs do not "state the nature of the conduct constituting the alleged violation of [FATA] that is under investigation," and because the Attorney General has not identified any conduct constituting an alleged FATA violation, there is no basis to believe that the University has information relevant to a FATA investigation.

The Attorney General does not confront these arguments head-on. Instead his Opposition leads off with a lengthy harangue about research papers issued in 1998 and 1999 while Dr. Mann was at the University of Massachusetts (which it refers to as MBH98 and MBH99), followed by musings about those papers, the "hockey stick" graph, the "Little Ice Age," the "Medieval Warm Period," and "Post Normal Science." This is evidently the basis for the conclusory assertion that the Attorney General is entitled to investigate Dr. Mann to obtain the "assurance" that he did not violate FATA in connection with grants obtained while he was at the University of Virginia. Opp'n 18-19. But nothing in this editorial screed, or anywhere else in the Opposition, describes alleged conduct that would constitute a FATA violation, or provides a reasonable basis to believe that Dr. Mann violated the Act. There is thus no basis to believe that the University has information relevant to a FATA investigation.

The Opposition attempts to muddy the water by arguing that the University is asserting "potential merits defenses" to a FATA lawsuit. Opp'n 1. Not so. In plain terms, the University is asserting that the Attorney General must meet the requirements of FATA to issue valid, enforceable CIDs, and that the Attorney General has failed to do so in this case. Given the important interest in academic freedom that is at stake, the Court should be particularly vigilant in limiting the Attorney General's power to that specifically granted under FATA. Such a potentially invasive investigative tool should not be permitted to be used to target academics merely because the Attorney General disputes the legitimacy of their research and conclusions.

I. CRITICISM OF SCIENTIFIC RESEARCH DOES NOT JUSTIFY A FATA INVESTIGATION.

The CIDs are aimed squarely at Dr. Mann's scientific conclusions. More than one-third of the Attorney General's Opposition is devoted to challenging and criticizing the research and conclusions of Dr. Mann and his co-authors, principally targeting MBH98 and MBH99, two papers issued in 1998-99 while Dr. Mann was at the University of Massachusetts and years before the enactment of FATA. *See* Opp'n 2-15. For example, the Opposition contends that MBH98 and MBH99 "gave rise to the now notorious 'hockey stick' graph which purported to show a slight cooling trend from 1000A.D. onward, with temperatures rising sharply in the twentieth century," and that "this conclusion was contrary to what had previously been regarded as the known historical record: a Medieval Warm Period, followed by the Little Ice Age, followed by warming after 1850." *Id.* at 2-3. The Attorney General complains that in the graph accompanying Dr. Mann's conclusions, the "Medieval Warm Period and the Little Ice Age disappeared." *Id.* at 3. FATA does not authorize an investigation into the disappearance of the "Medieval Warm Period" and the "Little Ice Age" from the presentation of Dr. Mann's research conclusions.

According to the Attorney General, the "hockey stick graph" and its underlying data had "public policy significance" because they could "counter the argument that the world should not accept the massive costs of CO_2 mitigation." *Id.* at 4. Of course, as appropriately occurs in any public policy debate, academics on the other side of the debate presented a different perspective on climate change issues in their own analyses and studies. *Id.* at 4-5. One point of disagreement related to the validity of the "algorithm" used to generate the "hockey stick graph." *Id.* at 5. Some on the opposite side of the debate also contended that the research of Dr. Mann and others should be labeled "Post Normal Science," in which a claim of consensus in a peer community is an admission of "operating in an environment of objective uncertainty." *Id.* at 11.

The Attorney General makes no attempt to specifically connect these critiques – academic debates about algorithms and systemic uncertainty – to the grants identified in the CIDs. Instead he argues that the critiques supply "sufficient reason to review the requested information," in case the University might "have documents bearing on the possibility that Professor Mann used MBH98 and MBH99 or other data to support grant applications knowing them to be misleading," or in case Dr. Mann might have used "language on any grant application or claim for payment that was misleading because of undisclosed or otherwise unknown special meaning[.]" Opp'n 13.

This is empty argument. Academic critiques of Dr. Mann's research and conclusions provide no basis for a FATA investigation or the issuance of CIDs. A political disagreement with certain conclusions drawn from Dr. Mann's data, a graph created by analyzing the data using a specific algorithm, and recognition of an ongoing policy debate about whether the world should "accept the massive costs of CO_2 mitigation" is not a basis to launch an investigation alleging fraud on the taxpayers of the Commonwealth. There is no reason to believe that there is

any academic impropriety in Dr. Mann's research[1] and, more importantly, no justification to investigate Dr. Mann for violating FATA based on alleged flaws in his research, methods, or conclusions.

Precedent is squarely on the University's side. For example, in *United States ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 868 (D. Md. 1995), scientists and the Universities of California and Texas were sued for allegedly submitting false data to the National Institutes of Health in connection with brain tumor research and for using that data in grant applications. The data were allegedly false because another scientist claimed not to be able to replicate the results under ostensibly similar conditions. The court rejected the theory of liability at its core:

> At most, the Court is presented with a legitimate scientific dispute, not a fraud case. Disagreements over scientific methodology do not give rise to False Claims Act liability. Furthermore, the legal process is not suited to resolving scientific disputes or identifying scientific misconduct.

Id. at 886 (citations omitted). So have numerous other courts. *See United States ex rel. Owens v. First Kuwaiti General Trading & Contracting Co.*, -- F.3d --, 2010 WL 2794369, at *8 (4th Cir. July 16, 2010) (holding that "honest disagreements" are not actionable under the False Claims Act and recognizing that " '[b]ad math is no fraud,' " and " 'the common failings of engineers and other scientists are not culpable under the Act' ") (citation omitted); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992) (rejecting claim that "allegedly faulty calculation" could violate the False Claims Act because "[b]ad math is no fraud"; the statute "is concerned with

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[1] Several academic and scientific bodies have investigated Dr. Mann's research and the so-called Climategate emails. University Mem. 3-5. None has found any manipulation or falsification of data, including in two reports made public after the University's opening Memorandum was filed. *See* Exhibit 35, The Pennsylvania State University Final Report at 15-19 (June 4, 2010) (concluding that Dr. Mann had met the academic community's standards for proposing and conducting research and adhered to "established standards and practices regarding the reporting of research"); Exhibit 36, Independent Climate Change E-mails Review at 10-11 (July 2010) (concluding that "the rigour and honesty [of the CRU scientists] are not in doubt").

ferreting out 'wrongdoing,' not scientific errors. What is false as a matter of science is not, by that very fact, wrong as a matter of morals. The Act would not put either Ptolemy or Copernicus on trial.") (citations omitted); *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 983 (10th Cir. 2005) (" 'Expressions of opinion, scientific judgment, or statements as to conclusions about which reasonable minds may differ cannot be false.' ") (citation omitted); *United States ex rel. Anderson v. Northern Telcom, Inc.*, 52 F.3d 810, 815-816 (9th Cir. 1995) (" 'the common failings of engineers and other scientists are not culpable under the Act' ") (citation omitted); *United States v. Prabhu*, 442 F. Supp. 2d 1008, 1034 (D. Nev. 2006) (to be a false claim, there must be a "lie," not "a scientific or technical dispute").

II. THE CIDs ARE UNENFORCEABLE.

A. The CIDs Fail FATA's Core Requirements.

The Opposition admits, as it must, that to be valid, a CID must state "the nature of *the conduct constituting the alleged violation* of a false claims law *that is under investigation.*" Va. Code Ann. § 8.01-216.11 (emphasis added); Opp. 23. The Opposition contends that the CIDs at issue meet this statutory requirement because the University, as evidenced by its Petition, "understands what is being investigated." *Id.* But FATA requires more than that the University "understand" what the CIDs seek—not just as a notice provision, but as a check on the Attorney General's authority to use (and potentially abuse) a powerful investigative tool.

As for the "reason to believe" standard, the Attorney General offers the perfectly circular rationale that it can issue CIDs for information relevant to an "investigation" so long as the Attorney General says that it is conducting an "investigation" to which the information is relevant. *Id.* at 23-24. This *ipso facto* contention misses the obvious and central limitation on the Attorney General's authority under FATA: the Attorney General is only authorized to investigate *FATA violations*. Va. Code § 8.01-216.2 (definition of "investigation"); *id.* § 8.01-

216.4 ("The Attorney General shall investigate any violation of § 8.01-216.3."). In that regard, the Opposition's repeated citation to and reliance on *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), is misguided. Among other things, that case did not involve an administrative subpoena, let alone one with a "reason to believe" statutory requirement.[2]

To issue a CID under FATA, the Attorney General must be investigating a FATA violation, must be able to specify "the nature of the conduct constituting the alleged [FATA] violation," and must have "reason to believe" the CID-recipient has material relevant to the FATA violation under investigation. University Memorandum in Support of Petition ("Mem.") 12-13. FATA does not authorize the Attorney General to conduct an investigation merely to obtain the "assurance" that no FATA violation occurred – particularly where, as here, the Attorney General has failed to even state the nature of the conduct allegedly under investigation.

The Opposition is thus incorrect to assert that these statutory requirements can be met perfunctorily in this case by merely (1) listing three subsections of FATA; (2) reciting academic criticism of Dr. Mann's research, and (3) identifying five grants under which Dr. Mann did some research, particularly when four of the grants are federal,[3] four pre-date FATA, and *none* is mentioned in any of the recited critiques of Dr. Mann's work. Opp'n 23-24. As discussed above

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[2] Additionally, as the Fourth Circuit has recognized, *Morton Salt* does not in any way eliminate the "requirement that subpoenas be used only for a legitimate and authorized governmental purpose." *In re Subpoena Duces Tecum*, 228 F.3d 341, 349 (4th Cir. 2000) (discussing *Morton Salt* and holding that "[t]he value of constraining governmental power . . . is nevertheless recognized in the judicial supervision of subpoenas").

[3] The Attorney General provides no support for the argument that a researcher's efforts to apply for or conduct research under a *federal* grant can somehow result in a violation of *Virginia's* false claims statute. The federal government sets the parameters for applying for federal grants, receipt of federal grants, and post-grant requirements. *See generally* 2 C.F.R. Parts 215 & 220. And while the Attorney General seems concerned as to whether climate science is a "Post Normal Science" that "has produced jargon" with specialized meanings that federal grantors might not have understood, Opp'n 13, the Virginia Attorney General's FATA investigatory authority does not extend to policing whether federal grantors understand the meaning of scientific terms in federal grant applications for federal grant funds.

in Section I, there simply is no specific alleged conduct violating FATA that the Attorney General is investigating. One of the cases cited by the Opposition highlights this point. In *Paramount Builders, Inc. v. Commonwealth*, 260 Va. 22, 27 (2000) (Opp'n 17), the Virginia Supreme Court addressed whether a civil investigative order issued under the Consumer Protection Act satisfied the statutory requirement to state the conduct alleged to be a violation. The Court found that the Commonwealth met that requirement by alleging *actual* violations – such as Paramount "failed to leave copies of the contracts and signed 'right to cancel' waivers at consumers' homes or failed to give such copies to consumers upon request in a timely manner in violation of §§ 59.1-21.4(2) and 59.1-200(19)" and "misrepresented that Paramount was the 'sole distributor' or only 'locally authorized dealer of various building supplies' in violation of § 59.1-200(3)." There is nothing remotely akin to such specific statements in the CIDs here.[4]

B. The University is Not a "Person" Subject to a CID under FATA.

The Attorney General argues that the University is a "person" because it is a corporation as well as a state agency. Opp'n 25. This ignores the well-established principle, grounded in immunity principles, that Commonwealth entities are not bound by statutes of general application "unless named expressly or included by necessary implication." *Commonwealth ex rel. Pross v. Board of Sup'rs of Spotsylvania*, 225 Va. 492, 494 (1983); *see also* University Mem. at 14-15; *Jones v. Commonwealth*, 267 Va. 218, 224-25 (2004); *Bowers v. Rector & Visitors of Univ. of Va.*, 2007 WL 853815, at *4 (W.D. Va. Mar. 16, 2007). FATA "expressly" identifies the University as within the definition of "Commonwealth"—which includes "any agency of

[4] The Attorney General suggests that the CIDs should be enforced because it could re-issue them to "restate what is stated in this brief." Opp'n 24 n.5. But since the Opposition clarifies that the CIDs stem from a political disagreement with certain conclusions drawn from Dr. Mann's data, his use of an algorithm to depict that data in graphic form, and use of that graph in the ongoing public policy debate about mitigating the effects of climate change, any "re-issued" CID would also fail to identify conduct that could constitute a FATA violation. *Supra* 2-5.

state government"—*not* within the definition of "person." Va. Code § 8.01-216.2. Thus, unlike the analogous federal statute, *see* 31 U.S.C. § 3733(*l*)(4), Virginia specifically did not define "person" for purposes of the CID provision to include state entities, even though Virginia has done so in other statutes. *See, e.g.*, Va. Code Ann. §§ 1-230, 5.1-1, 8.01-412.9.[5]

The Attorney General nonetheless argues that FATA "allows for suits against the University." Opp'n 26. The only thing the Opposition cites for support is a jurisdictional bar prohibiting suits against Commonwealth entities. Va. Code Ann. § 8.01-216.8. Nothing in FATA affirmatively grants jurisdiction or authority for a FATA suit against the University.

C. The Breadth of the CIDs Undermines Their Enforceability.

The Opposition argues that the CIDs are not overly broad because the University has not requested that they be narrowed or produced some subset of documents, and because the Court should defer to the Attorney General (albeit without providing any support for this asserted entitlement to deference).[6] Opp'n 31-34. As an initial matter, the recitation of discussions between the University's counsel and the Attorney General – particularly those during the period when the University was in the difficult position of being represented by the Attorney General in responding to the Attorney General's own CIDs – is no cure for the obvious overbreadth of the CIDs under FATA. Indeed, the Opposition admits that the Attorney General seeks research,

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[5] Nor is the University a "person" as a matter of "necessary implication." Opp'n 25. The Attorney General contends that without being able to issue FATA CIDs to state agencies, it will not be able to ever get information for a FATA investigation. But a CID is not the only way the Attorney General can request information in a valid FATA investigation from state agencies.

[6] The Opposition asserts that the University has somehow waived privilege by not filing a privilege log. The University has sought to quash the CIDs in their entirety, while stating as one of its Grounds for Relief that: "[r]elief from the CIDs should be granted with respect to all documents and information covered by applicable statutory and common law privileges, protections and doctrines, and *the University reserves the right to raise such objections with respect to specific documents and information as appropriate*." Petition 8. It puts the cart before the proverbial horse, and the Attorney General offers no support, to contend that a privilege log should have accompanied the University's Petition to set aside the CIDs in their entirety.

data, and e-mails "whether or not directly connected to the specific grants." Opp. 32. And like the CIDs themselves, the Opposition fails to identify any connection between the dozens of individuals mentioned in the CIDs and the five grants purportedly under investigation. *Id.* at 32; *see also, e.g.*, University Mem. Exhibit 1, Request No. 5 (requesting substantive research materials, regardless of connection to obtaining funds from the Commonwealth), Request No. 9 (requesting *all* computer algorithms, programs, and source code created by Dr. Mann).

By definition, a FATA investigation may only be used to investigate a potential FATA violation, Va. Code Ann. § 8.01-216.2, and the information requested in a CID must be "relevant to a [FATA] investigation," *id.* at § 8.01-216.10(A). Here, the extreme breadth of the information sought fails that basic test. Notwithstanding the Attorney General's concerns about the Little Ice Age, the Medieval Warm Period, and Post Normal Science, FATA does not give the Attorney General license to sift through Dr. Mann's research data, materials, discussions, conclusions, and correspondence with dozens of other academics over a period spanning more than ten years.

III. ENFORCEMENT OF THE CIDs WOULD INFRINGE ACADEMIC FREEDOM AND CHILL SCIENTIFIC DEBATE.

The Opposition does not dispute the severe chill on academic freedom and scientific debate that the CIDs have sent through the Commonwealth's colleges and universities. *See* University Mem. at 9-10, 22-27 & Exhibits 17-23, 29-34. Instead it treats those concerns dismissively, asserting that academic freedom and the First Amendment do not provide a defense to fraud. Opp'n 35-36.[7] But where, as here, the Attorney General does not identify any specific

[7] The Attorney General also asserts that any right to academic freedom is the right of an individual faculty member or researcher to assert. Opp'n 37-38. That argument was directly rejected in the very Fourth Circuit case the Opposition cites, *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). The court there made clear that the right to "academic freedom," whatever the contours of that right, "inheres in a University, not in individual professors." *Id.* at 410.

alleged conduct violating FATA or present any reason to believe that any fraud on the Commonwealth was committed by Dr. Mann, the Attorney General has no authority to "investigate" scientific research or the expression of academic ideas. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) ("to prevail over academic freedom," the extent of intrusion must be "carefully limited"); *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1300 (4th Cir. 1987) (even when First Amendment problems raised by a subpoena "do not, in and of themselves, rise to the level of constitutional violations, the concerns that underlie those constitutional provisions must enter into the balancing of interests" required in considering whether to quash a subpoena).

The Opposition leaves no doubt that the Attorney General's real complaint is with the public policy implications of Dr. Mann's scientific conclusions and his presentation of those conclusions in a particular graphical depiction. The implications of this position are staggering in their breadth; according to the Attorney General, whenever an academic offers a disagreement with another academic's scientific conclusions, that disagreement opens the debate up to participation from the Attorney General's office in the form of a civil investigative demand. No discipline – and no professor – falls outside this claimed authority. That the Attorney General may not (yet) feel the need to "investigate" the conclusions of, say, a history or medical school professor, as vigorously as the Attorney General is going after Dr. Mann is of no comfort. His rationale for issuing the CIDs would apply across any discipline. The Court should examine the CIDs with serious rigor and set them aside in their entirety.

CONCLUSION

For the foregoing reasons, the University requests that this Court enter an order setting aside the CIDs in their entirety and providing such other relief as is deemed just and proper.

Date: July 20, 2010

Respectfully submitted,

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2010, a true and correct copy of the foregoing was served by U.S. Certified Mail, postage prepaid, as follows:

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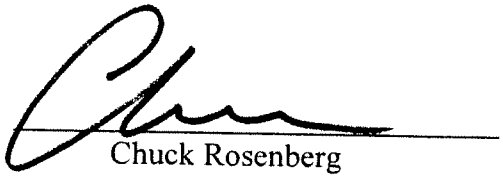

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