

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

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

**PETITION TO SET ASIDE THIRD CIVIL INVESTIGATIVE DEMAND
ISSUED TO THE UNIVERSITY OF VIRGINIA**

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Dated: October 20, 2010

*Counsel for the Rector and Visitors of
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PRELIMINARY STATEMENT

In late August, this Court set aside in their entirety two Civil Investigative Demands (“CIDs”) issued by the Office of the Attorney General (“Attorney General”) to the University of Virginia targeting a former faculty member’s research and scholarly communications. The Attorney General has now issued a third CID that targets the same former professor on the same grounds the Court has already found insufficient. While nominally issued in support of a purported investigation under Virginia’s Fraud Against Taxpayers Act (“FATA”), the latest CID, like the last two this Court set aside, constitutes an unprecedented and improper governmental intrusion into ongoing scientific research. More specifically, this CID, like the others, targets a University professor for investigation because the Attorney General disagrees with his academic research regarding climate change. FATA does not authorize the issuance of CIDs for such purposes. Nor does it permit the Attorney General to use CIDs to infringe on the academic freedom that is so vital to university communities throughout the Commonwealth and Nation.

For the same reasons the first two CIDs were set aside, and as set forth below, the Rector and Visitors of the University of Virginia, pursuant to Va. Code § 8.01-216.18, respectfully petitions this Court for an order setting aside the third CID in its entirety.

CID AUTHORITY

1. Under FATA, the Attorney General may issue a CID¹ *only* if (i) the CID states “the nature of the conduct constituting the alleged violation of a false claims law that is under investigation,” and (ii) the Attorney General has an objective “reason to believe” that the CID recipient has information relevant to investigating a FATA violation . Va. Code §§ 8.01-216.10(A), 8.01-216.11; *see also id.* at § 8.01-216.2 (definition of “investigation”); August 30,

¹ A CID is similar to an administrative subpoena and may, under circumstances limited by statute, command the production of documents, information or testimony.

2010 Letter Opinion 2 (Ex. 1 hereto). Like the two CIDs issued in April 2010 (“April CIDs”), the CID issued in September 2010 (“September CID”) meets neither requirement.

FACTUAL AND PROCEDURAL HISTORY

The April CIDs Set Aside by the Court

2. In April 2010, the Attorney General issued two identical CIDs to the University seeking extensive information regarding the research and scholarly communications of a former University professor, Dr. Michael Mann, who served as an Assistant Professor in the Department of Environmental Sciences from 1999 to 2005. The University petitioned to set aside the April CIDs. *See* Petition to Set Aside Civil Investigative Demands Issued to the University of Virginia (filed May 27, 2010).

3. Before joining the University and its Department of Environmental Sciences in 1999, Dr. Mann and two other authors (Raymond S. Bradley and Malcolm K. Hughes) had published two research papers relating to climate change, *Global-Scale Temperature Patterns and Climate Forcing Over the Past Six Centuries* and *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*—identified by the Attorney General as “MBH98” and “MBH99.” Consistent with positions the Attorney General has taken in political and public policy debates and in pending litigation with the United States Environmental Protection Agency (“EPA”),² the Attorney General challenges the scientific

² In February 2010, the Commonwealth filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the EPA’s Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). *Commonwealth of Virginia v. EPA*, Case No. 10-1036 (D.C. Cir., filed February 16, 2010). Citing the so-called “climategate” emails (*see* ¶ 9, *infra*), the Commonwealth argued that EPA should reconsider its finding that climate change poses a threat to public health and welfare. On April 15, 2010, the Commonwealth filed a motion to remand the D.C. Circuit proceedings to adduce additional evidence; specifically, the “climategate” emails. Doc. No. 1240064. This motion was denied by order dated June 16, 2010. The

methods and academic conclusions described in those two articles published more than a decade ago.

4. In opposing the University's petition to set aside the April CIDs, the Attorney General cited criticism from others in the climate research field regarding those academic articles as the statutorily required "reason to believe" that the University has documents relevant to potential violations of FATA by Dr. Mann. The Attorney General made this argument notwithstanding the fact that these articles were published (a) before Dr. Mann joined the University's faculty and (b) years before FATA became effective in 2003.

5. In an August 30, 2010 Letter Opinion and September 14, 2010 Order (Ex. 2 hereto) setting aside the April CIDs, the Court rejected the Attorney General's contention. The Court ruled that the Attorney General lacked an objective reason to believe that the University had material relevant to the investigation of a FATA violation because the April CIDs failed to identify any suspected conduct by Dr. Mann that allegedly violated FATA. Letter Op. 4 ("What the Attorney General suspects that Dr. Mann did that was false or fraudulent in obtaining funds from the Commonwealth is simply not stated."). The Court further stated:

When the Court asked [counsel for the Attorney General] where it was stated in his brief the "nature of the conduct" of Dr. Mann that was a violation of the statute, [counsel] referred the Court to the first 15 pages of his Brief in Opposition to Petition. The Court has read with care those pages and understands the controversy regarding Dr. Mann's work on the issue of global warming. However, it is not clear what he did that was misleading, false or fraudulent in obtaining funds from the Commonwealth of Virginia.

Letter Op. 4.

Commonwealth's petition for review challenging the EPA's greenhouse gas actions endangerment finding remains active and pending.

6. The April CIDs referenced five grants awarded to Dr. Mann and others—specifically, four federal grants and one internal University grant from 2001 (two years before FATA became effective). In addition to finding that the Attorney General failed to satisfy the “reason to believe” and “nature of the conduct” requirements necessary to issue valid CIDs under FATA, *see* Va. Code §§ 8.01-216.10(A), 8.01-216.11, the Court also ruled that federal grants are beyond the scope of FATA. *Id.* at 5. This Court further explained that because FATA applies only from its 2003 effective date forward,³ even if the other FATA statutory requirements had been met, the Attorney General could only investigate as a FATA-violation “acts of Dr. Mann to obtain state money after January 1, 2003.” *Id.* at 6.

7. On September 28, 2010, the Attorney General noted an appeal of this Court’s ruling to the Virginia Supreme Court.⁴

The September CID

8. On September 29, 2010, the day after noting an appeal from this Court’s ruling, the Attorney General issued the September CID to the University. *See* Ex. 3 hereto (Civil Investigative Demand No. 3-MM). Like the April CIDs, the September CID fails to satisfy the requirements of FATA and should be set aside in its entirety.

9. Like the April CIDs, the September CID again identifies Dr. Mann as the target of the Attorney General’s inquiry. Like the April CIDs, the September CID states that it is issued “in connection with an investigation by the Attorney General into possible violations by Dr. Michael Mann of §§ 8.01-216.3(A)(1), (2), and (3) of FATA.” September CID 1. And like

³ FATA became effective January 1, 2003. *See* Virginia Acts 2002, c.842. It only applies prospectively, as this Court has recognized. *See* Letter Op. 5-6.

⁴ The University intends to cross-assign error as to whether the University—as a Commonwealth entity—is a “person” subject to the CID provision of FATA. While the University operates by statute as a public corporation, it is an agency of the Commonwealth, and it is not subject to statutes of general applicability.

the April CIDs, the September CID purports to seek information “relat[ing] to data and other materials that Dr. Mann presented in seeking the award of or claims for payment” under a \$214,700 University grant entitled *Resolving the Scale-wise Sensitivities in the Dynamical Coupling Between Climate and the Biosphere*. The September CID identifies the grantor as the University of Virginia-Fund for Excellence in Science and Technology (“FEST”), the Principal Investigator as J.D. Albertson, and the Co-Investigators as H. Epstein and M.E. Mann. *Id.* at 2.

10. Also like the April CIDs, the September CID makes reference to so-called “climategate” emails. In November 2009, thousands of emails and related documents were stolen from a computer system at the Climatic Research Unit (“CRU”) of the University of East Anglia in England. Some claimed that those emails showed that certain members of the climate science community manipulated research data and conclusions. Those allegations have been investigated and refuted by numerous entities, including an international panel established by the University of East Anglia, the United Kingdom’s House of Commons Science and Technology Committee, and The Pennsylvania State University, where Dr. Mann has been a faculty member since 2005. Although considerable media attention was devoted to the allegations initially raised about the import of these “climategate” emails, the subsequent investigations have found no fraud or misconduct by Dr. Mann. *See* Brief in Support of Petition to Set Aside Civil Investigative Demands Issued to the University of Virginia, Exs. 3, 4, 7 (filed June 29, 2010); Reply Brief in Support of Petition to Set Aside Civil Investigative Demands Issued to the University of Virginia, Ex. 35 (filed July 20, 2010).

11. Perhaps most glaringly: In an attempt to satisfy FATA’s “reason to believe” and “nature of the conduct” requirements, Attachment B to the September CID recites *verbatim* from the first fifteen pages of the Attorney General’s brief in opposition to the University’s petition to

set aside the April CIDs, to which the Attorney General’s counsel specifically referred the Court during oral argument. In other words, as a statement of the nature of the conduct and grounds for “reason to believe” a FATA violation has occurred, the September CID sets forth the exact same text the Court has already “read with care” and found deficient.

Breadth of the September CID

12. The requests for information in the September CID are extremely broad and not tailored to the University FEST grant—much less any potential FATA violation related thereto. Included among the requests are all “correspondence, messages or e-mails sent to or received by Dr. Michael Mann” and 38 other scientists and academics as well as “[a]ll research assistants, secretaries or administrative staff with whom Dr. Mann worked while he was at the University of Virginia.” September CID 10-11.⁵ The CID goes on to request all documents to or from Dr. Mann that in any way reference these 38 other scientists and academics or any research assistant, secretary, or administrative staff with whom Dr. Mann worked. *Id.* at 12-13. Both of these requests span a seven-year period, from 1999-2006. *Id.* at 4.

13. As was the case with the April CIDs, the September CID makes no attempt to connect these dozens of individuals and the 2001 University FEST grant supposedly under investigation. Moreover, two notable exclusions from this 38-person list stand out: neither the Principal Investigator of the University FEST grant nor Dr. Mann’s Co-Investigator is listed among the dozens of people whose correspondence with Dr. Mann is sought. *Compare* September CID at 2 (identifying Dr. Mann and the other two grant investigators for the University grant) *with* 12-13 (listing the 38 individuals). The September CID also seeks “all computer algorithms, programs, source code or the like created or edited by Dr. Michael Mann”

⁵ The April and September CIDs name the same 38 scientists and academics. While the list appears to include 39 individuals, Dr. Vincent Grey is listed twice.

from 1999 through 2006, without any attempt to connect the request to the University’s 2001 FEST grant. *Id.* at 14.

14. Furthermore, the September CID seeks materials from “Departments, Schools, Programs or persons” with no relevance to the FEST grant, including “Administration” and the “IT Department.” *Id.* at 6. Indeed, “Administration” would appear to include administrators in departments throughout the University—such as the English or Art History Departments—with no connection to Dr. Mann or the FEST grant.

Agreements Regarding this Process

15. Like other Commonwealth entities, the University is typically represented by the Attorney General and/or counsel reporting to the Attorney General. The University has obtained the approval of the Attorney General to engage special outside counsel to represent the University’s interests in this matter.

GROUND FOR RELIEF

16. Failure to State Nature of Conduct Constituting Violation. The September CID is invalid, like the April CIDs, for failure to state the “the nature of the conduct constituting the alleged violation of a false claims law that is under investigation.” Va. Code § 8.01-216.11.

17. No Objective “Reason to Believe.” The September CID is invalid, like the April CIDs, because there is no objective “reason to believe” that the University has information relevant to investigating a FATA violation. Va. Code § 8.01-216.10(A). The Attorney General has not stated anything in addition to what the Court already has held to be insufficient.

18. No Statutory Authority to Issue the September CID. The September CID is invalid because FATA does not authorize the issuance of CIDs to the Commonwealth and her agencies

and instrumentalities. Commonwealth entities are not “persons” subject to statutes of general applicability unless the statute specifically states otherwise, which FATA does not.

19. The September CID Impermissibly Infringes with Academic Freedom. The September CID directly encroaches on First Amendment principles and important public policies protecting the academic freedom of institutions of higher learning from government intrusion into research and scientific inquiry. As applied by the Attorney General, the September CID violates First Amendment principles long recognized and repeatedly affirmed by the Supreme Court of the United States.

20. Overbroad Exercise of the Attorney General’s Limited Statutory Authority. The September CID is invalid because it constitutes an impermissibly overbroad use of the Attorney General’s limited authority under FATA to investigate fraud on the taxpayers of the Commonwealth.

21. The Information Requested in the September CID Is Overbroad. The September CID is overbroad because it seeks documents and information far beyond what is relevant to an investigation of a potential FATA violation focused on the University grant.

22. Compliance with the September CID Would Be Unduly Burdensome. Compliance with the sweeping temporal and substantive scope of the September CID would constitute an undue burden.

23. The September CID Requests Information Protected by Law. Relief from the September CID 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.

The University's assessment of the September CID and the requested documents and information is ongoing and, thus, the University reserves the right to assert such other grounds for relief as the University may deem appropriate.

For these reasons and the grounds identified herein, as well as those set forth in the University's petition to set aside the April CIDs and its briefs in support thereof expressly incorporated herein, the Rector and Visitors of the University of Virginia respectfully petition this Court for an order setting aside the September CID pursuant to Virginia Code § 8.01-216.18.

PRAYER FOR RELIEF

WHEREFORE, the University respectfully requests that the Court enter an Order to:

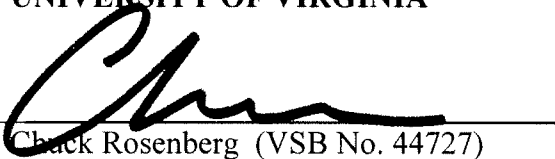
Set aside the September CID in its entirety; and

Award such other relief that the Court deems just and appropriate.

Respectfully submitted,

**THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA**

By: _____



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Date: October 20, 2010

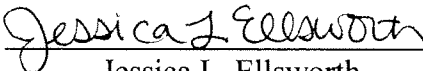
*Counsel for the Rector and Visitors of
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CERTIFICATE OF SERVICE

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

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