IN WAYNE COUNTY CIRCUIT COURT

FAZLUL SARKAR,

Plaintiff,

vs.

JOHN and/or JANE DOE(S),

Defendant(s).
_____/

Case No. 14-013099-CZ

Hon. Sheila Ann Gibson

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PLAINTIFF'S RESPONSE TO PUBPEER LLC'S MOTION TO QUASH SUBPOENA

INTRODUCTION

This case is not about free speech. It is about tortious conduct that is destroying a man's life and career.

Dr. Fazlul Sarkar, a prominent cancer researcher at Wayne State University, has an enemy hiding behind the anonymity afforded by the internet. So far, this unknown person[1] has been quite successful, sabotaging an excellent job that Dr. Sarkar had secured - a tenured position at the University of Mississippi - by falsely accusing him of research misconduct. Not finished, this anonymous defendant widely distributed fraudulent documents that Dr. Sarkar was subject of a U.S. Senate investigation. Shortly afterwards, Dr. Sarkar lost his tenure at Wayne State. Now, after 35 years as an expert in his field, Dr. Sarkar faces unemployment in a few short months.

Seeking to hold the anonymous person accountable, Dr. Sarkar filed a five-count complaint in this court against "John and/or Jane Does." In order to find out the identity of this person, Dr. Sarkar has subpoenaed PubPeer, an anonymously-held website for anonymous posters. Ostensibly, PubPeer is for dispassioned discussion of scientific research. In reality, like far too much of the anonymous internet world, it is a place for complaining, grinding axes, and making accusations.

PubPeer responded by filing a motion to quash the subpoena. They position themselves as champions of free speech, not a forum for destroyers of a man's career. They frame their motion to try and fool this court into thinking this case is only about whether scientific blots look alike, and that persons using their website should be allowed to say so.

But that argument misleads the court. The case is about blatantly false accusations of "scientific misconduct" that are a death sentence in the field of scientific research, where grants

[1] Hereafter, for consistency, defendant shall be referred to in the male singular. This is because one "John Doe" defendant has appeared in this action, filing a separate motion to dismiss to be heard at a later date, and to this point, there is no definite evidence of more than one defendant.

dry up and jobs go away at the first whisper of such charges. It is about sending these false accusations to a University 762 miles south for the sole purpose of disrupting Dr. Sarkar's new job. It is whether a person can make up a Senate investigation out of whole cloth, widely distribute forged flyers throughout Wayne State University, and watch Dr. Sarkar's tenured position there go away two weeks later. It is about whether a person can violate federal law and breach the confidentiality of Wayne State's inquiries and investigations, which were likely instigated in the first place by Dr. Sarkar's relentless, anonymous enemy.

PubPeer's motion also rests on a false premise. Cloaked in the First Amendment, PubPeer avoids serious discussion of the defendant's horrific conduct and instead suggests this case is only about the similarity of blots, even hiring an expert to opine on the issue.[2] They further suggest that plaintiff's lawsuit seeks to chill honest academic debate. They do this for a reason: they want to distract the court from the tortious conduct at issue.

Plaintiff, as a scientist and an academic, does not dispute the obvious proposition that open and honest debate about scientific articles is not only non-defamatory but absolutely essential. But this case is not about the First Amendment. These are not employees criticizing their government employers; they are not researchers engaging in good faith discussions; they are not dissidents railing against the tyranny of the majority. They are people who intentionally acted to try and destroy Dr. Sarkar's career, with false accusations of research misconduct, and other torts relating to malicious interference with employment and breaches of confidentiality.

Even PubPeer's terms of service recognize the distinction between commenting on blot similarity and accusations of research misconduct, imploring posters to refrain from the latter in

[2] See, e.g. defendant's brief at p. 21, "… Dr. Sarkar's central claim, which is that certain commenters defamed him by noting similarities between images …" Even a cursory review of plaintiff's complaint contradicts that blatantly misleading statement.

order to minimize legal risk (complaint, ¶¶ 26-30). Notably, even their expert declines to offer an opinion regarding Dr. Sarkar's scientific misconduct (affidavit of Dr. John W. Krueger, ¶ 86).

The process of learning defendant's identity is clearly set forth in the controlling case, *Cooley v. Doe,* 300 Mich App 245 (2013). The legal standard for testing Dr. Sarkar's complaint is well established in the court rules and prevailing law, and is not heightened simply because defendant hides his identity.

Ultimately, this court must decide whether a man whose life has been turned upside-down by these reprehensible and tortious acts is even allowed to pursue his lawsuit, or whether he shall be stopped in his tracks by an order granting PubPeer's motion. All Dr. Sarkar asks is to be able to have his claims tested fair and square in a court of law. He is willing to agree to the terms of a protective order regarding the anonymous poster's identity while he pursues his suit. While he may not win in the end, justice demands he be allowed to proceed. PubPeer's motion should be denied.

FACTUAL BACKGROUND

Plaintiff's October 9, 2014 complaint lays out in 124 detailed paragraphs the allegations forming the basis of its five counts. Dr. Sarkar is a widely-published scientist who has published more than 533 papers (complaint, ¶ 57). His research focuses on cancer prevention and therapy, including work that has led to the discovery of the role of chemopreventive agents in sensitization of cancer cells (reversal of drug resistance) to conventional therapeutics (chemo-radio-therapy) (complaint, ¶ 80). His research has been continuously funded by the National Cancer Institute, the National Institute of Health, and the Department of Defense (complaint, ¶ 12).

PubPeer is a website that allows users to comment anonymously on any publication in a scientific journal. It defines itself as "an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists" (complaint, ¶ 23). The website is

run by anonymous people, with the URL registration maintained by a proxy (complaint, ¶ 24). The terms of service explicitly instruct users: "First, PLEASE don't accuse any authors of misconduct on PubPeer" (complaint, ¶ 26). The website also states that: "The site will not tolerate any comments about the scientists themselves" (complaint, ¶ 30).

Despite these admonitions, PubPeer allowed a series of comments by one person, or a small group of people coordinating their statements, which defame Dr. Sarkar and accuse him of research misconduct. They accuse him of falsifying data and appear to orchestrate a movement, to cost Dr. Sarkar a job at the University of Mississippi, and to notify Wayne State of alleged research misconduct. These anonymous posters did not merely question conclusions in Dr. Sarkar's work or find errors. They went well beyond that, to challenge his motives and imply that he had engaged in "research misconduct."

Those are not mere words. As detailed in plaintiff's complaint, research misconduct is an extremely serious charge to level against a scientist, often fatal to one's career (complaint, ¶¶ 33-36). One infamous accusation resulted in suicide despite the scientist's formal exoneration (http://aeon.co/magazine/philosophy/are-retraction-wars-a-sign-that-science-is-broken/). Given the gravity of such an accusation, the federal government has created clear regulatory guidelines for what is and is not research misconduct (complaint, ¶ 31). They include:

> ... fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.
>
> (a) Fabrication is making up data or results and recording or reporting them.
>
> (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
>
> (c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.
>
> (d) Research misconduct does not include honest error or differences of opinion.

Id. (quoting 42 C.F.R. § 93.103 (2005)). Research misconduct must be "committed intentionally, knowingly, or recklessly." 42 C.F.R. § 93.104 (2005).

The defendant in this case is not content to follow this confidential, regulated scheme. Intent on destroying Dr. Sarkar, he widely distributed a screen shot from PubPeer showing the search results and disclosing the number of comments generated from each research article listed on the page. Effectively, defendant manufactured that there were widespread concerns about Dr. Sarkar's research and then used this supposed concern to sabotage his job with the University of Mississippi. He even went so far as to manufacture that there was a Senate investigation, led by Senator Charles Grassley (complaint, ¶ 70-73). This immediately preceded Dr. Sarkar losing tenure at WSU. As such, defendant has worked anonymously and tirelessly to defame Dr. Sarkar, and maliciously deprive him of economic opportunities.

Dr. Sarkar has brought claims for defamation, intentional or tortious interference (two counts, one for Mississippi and one for Wayne State), false light invasion of privacy, and intentional infliction of emotional distress. These claims are clearly cognizable under Michigan law, and to allow defendant to hide behind their anonymity would actually serve as a blow to First Amendment rights, as they would allow the stifling of scientific research through the risk that innocent mistakes lead to claims of "research misconduct" and the potential loss of livelihood.

I. Michigan Law Has Clear Guidelines For Ordering the Disclosure of Identifying Information of a Party

The authority of courts to allow subpoenas for identifying information of anonymous internet posters is detailed in two separate published Court of Appeals opinions. While PubPeer's brief contains a long discussion of First Amendment doctrine and the way that this issue has been considered in courts across the country, the discussion is irrelevant where this court is bound by clear statements from the Michigan Court of Appeals, which addressed a very similar situation in

Thomas M. Cooley Law School v. Doe, 300 Mich. App. 245 (2013). The unknown defendant in *Cooley* purported to be a former student who created a website at Weebly.com that criticized the law school. Cooley filed suit and then subpoenaed Weebly.com for identifying information. Defendant moved to quash the subpoena. The Court of Appeals rejected application of the burdensome showing required by some courts, such as New Jersey state court in *Dendrite Int'l, Inc. v. Doe*, 342 NJ Super 134; 775 A.2d 756 (NJ App, 2001) holding instead that "Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity." 300 Mich. App at 264.

Subsequently, in *Ghanam v. Does*, 303 Mich. App. 522, 530 (2014), the court acknowledged that *Cooley* applied in the context where "any of the anonymous were aware of the pending matter or involved in any aspect of the legal proceedings." But, even in such instances where (unlike here) the defendant does not know about the case, there is only a slightly elevated standard: *Ghanam* requires only that "plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit" and the court must "analyze the complaint under MCR 2.116(c)(8) to ensure that the plaintiff has stated a claim on which relief can be granted." *Id*.

Nonetheless, this case is governed by *Cooley*. As an initial matter, at least one defendant in this case indisputably knows about the case. That person ("A John Doe Defendant") has had an attorney appear on his behalf and already filed a motion for partial summary disposition. Furthermore, it is likely that any person who uses PubPeer would be aware of this dispute. PubPeer has posted correspondence from the undersigned counsel, and the lawsuit has been fully discussed by PubPeer's editors and numerous anonymous commenters (*https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb24568*). The lawsuit

has also been covered throughout the international scientific journal community, including Nature (*http://www.nature.com/news/peer-review-website-vows-to-fight-scientist-s-subpoena-1.16356*), the Scientist (*http://www.the-scientist.com/?articles.view/articleNo/41070/title/PubPeer--Pathologist-Threatening-to-Sue-Users/*), Science (*http://news.sciencemag.org/scientific-community/2014/12/defamation-case-pubpeer-moves-quash-subpoena-unmask-anonymous)*, Wired (*http://www.wired.com/2014/12/pubpeer-fights-for-anonymity/?utm_source=twitterfeed&utm_medium=twitter*), and many others. In addition, there is prominent coverage on a website called www.retractionwatch.com, whose related postings are all specifically referenced on PubPeer (*https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb14544).* Given the likely small number of involved people who may be defendants in this action and the repeated focus that PubPeer and other sites have made on the issue, it is nearly certain that everyone who may be a potential defendant is well aware of the lawsuit.

As such, the approach in *Cooley* should apply, which acknowledges that any defendant's interest in privacy can be protected by an appropriate protective order. In *Cooley*, by the time of the decision on the motion to quash, the plaintiff had actually learned the defendant's identity. The Court considered how to protect the defendant's First Amendment rights and determined that a fact-based protective order inquiry was instructive. The Court specifically rejected exactly the claim that PubPeer is making in this case, that the court should impose a judicially-created anti-cyber-SLAPP legislation or to rewrite discovery and summary disposition rules. 300 Mich. App. at 267. PubPeer does not make any argument under *Michigan* law that suggests that this situation could not be dealt with through the basic protections of a protective order.

The Court in *Cooley* determined only that a plaintiff should sufficiently state a claim to survive a motion under MCR 2.116(c)(8) and then can determine whether and how to protect a defendant's First Amendment right to anonymity through a proper protective order.[3]

> Protective orders are very flexible. A trial court may tailor the scope of its protective order to protect a defendant's First Amendment interests until summary disposition is granted. For instance, a trial court may order (1) that a plaintiff not discover a defendant's identity, or (2) that as a condition of discovering a defendant's identity, a plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested.

300 Mich. App. at 255. The Court ruled that in determining these cases that any legitimate privacy interests the defendants may have could be adequately protected, while still requiring their identities to be divulged so that the plaintiffs could proceed with their case. Here, Dr. Sarkar is willing to keep all defendants names "confidential" and not divulge them outside of the case.

The *Cooley* Court was clear, however, that the motion to quash was not the time to make any final decisions on the merits. "[T]he trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed a motion for summary disposition." *Id.* at 269. This logic applies similarly here, where the Court should not make a premature ruling on a third parties motion to quash. At most, the Court should order that a response is not due to the subpoena before this Court's ruling on the pending motion for partial summary disposition. However, such a ruling is not necessary because plaintiff will agree to a protective order that safeguards many of defendant's First Amendment rights. Plaintiff has no interest at this

[3] In PubPeer's brief, they frequently refer to a "balancing" test. However, this is purely in the context of whether to allow for a protective order. Here, the actual defendant has not specifically sought a protective order, and PubPeer has no standing to seek a protective order for a third party. There is no general "balancing" that is required before requiring production of information that would allow a plaintiff to learn the identity of an anonymous defendant.

stage in sharing the information outside of the case and would agree not to use the identity for any purpose outside of this litigation. Plaintiff's sole goal is to be able to litigate the case against those who have caused him severe damage. An appropriately-crafted protective order would protect both plaintiff's right to vindicate his claims while protecting defendant's speech.

II. This Case Raises Serious Claims of Defamation and Other Torts

Much of PubPeer's brief and the supporting affidavits is detailing whether any concerns with Dr. Sarkar's research were legitimate – effectively whether two blots of data were copied or independent experiments. Dr. Sarkar's complaint is not premised on whether there were good faith disputes about whether there were errors in his research. He certainly disagrees with certain critiques, but he shares PubPeer's purported interest in encouraging appropriate scrutiny of research and ensuring that mistakes are discovered. This case, however, is not about blots. This case is about how one or more people worked together to manufacture a dispute that Dr. Sarkar's research was not erroneous but fraudulent and that he had engaged in "research misconduct." Those allegations can ruin a researcher's career, and for Dr. Sarkar, costing him both a tenured position at the University of Mississippi and his tenure status at Wayne State.

This crucial distinction, while ignored in PubPeer's briefing, is recognized by PubPeer itself on its website. As detailed in plaintiff's complaint, PubPeer's website includes in its terms of service such comments as:

> "First, PLEASE don't accuse any authors of misconduct on PubPeer. Firstly, we are scientists. We should only work with data and logic. Our conclusions must be verifiable."
>
> * * *
>
> They provide an example, "[I]t is acceptable to state that "band X appears to be surrounded by a rectangle with different background to the rest of the gel". It is NOT acceptable to state that "The authors have deliberately pasted in a different band"."

> They further explain, “[I]f a statement is made along the lines of "X deliberately falsified the data", we would be in the position of having to prove each step of the falsification and also the state of mind of the researcher (that it was done deliberately). The standard of proof can be very exacting and require information to which we would not have access (especially the private thoughts of the researcher!).” [https://pubpeer.com/faq] (complaint, ¶ 26).

This is the crucial line that defendant zoomed past, moving beyond raising concerns about research to denigrating the researcher’s motives with an intent to destroy his professional life. PubPeer’s entire brief in this case is directed at the former situation – can we have anonymous commenters challenging research, which is not the point of this dispute. It is likely that if defendant had merely followed PubPeer’s terms of service (or if PubPeer had properly moderated commenters)[4] there would be no dispute. However, whether the court rules and existing law provide protection for those, legitimate forms of anonymous conduct is not relevant to this dispute. What matters here is that a person who falsely accuses someone of research misconduct, without proof, and who engages in a concerted effort to destroy that person’s career can be forced to provide his or her name to defend legitimate claims of tortious conduct.

The key concept in understanding the defamatory nature of the issue is the concept of research misconduct. As described in plaintiff’s complaint:

> “Research Misconduct” is a term of art in the scientific community. It is defined by federal regulations as:
>
> "... fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.
>
> (a) Fabrication is making up data or results and recording or reporting them.
>
> (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

[4] To the extent this court may consider equitable factors in its discretionary ruling, PubPeer’s own flagrant disregard for its own terms of service, and its incapability of moderating comments, compels a conclusion that they should not be granted any relief in this matter.

> (c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.
>
> (d) Research misconduct does not include honest error or differences of opinion." [42 C.F.R. § 93.103 (2005)]

> 32. A finding of "research misconduct" requires "a significant departure from accepted practices of the relevant research community;" and that the "misconduct be committed intentionally, knowingly, or recklessly." [42 C.F.R. § 93.104 (2005)].

Research journals have established guidelines for dealing with errors that fall well short of research misconduct. Corrections are issued routinely as a result of the normal vetting process in scientific journals, sometimes resulting in the issuance of "errata." As detailed in plaintiff's complaint, the average error rate in cancer research has been estimated at around 4%. Dr. Sarkar's error rate is much lower, at 2%. He has never had an article retracted, and he has certainly never been found responsible for research misconduct.

In addition, research misconduct investigations are highly confidentially to protect both good faith complainants and researchers. The anonymity of these proceedings was, ironically, eviscerated by a defendant whose anonymity PubPeer seeks to protect; this defendant admitted making a complaint to Wayne State and then publicized their response email (complaint, ¶ 40(c)).

One court has commented on why strict confidentiality of such proceedings is critical. In *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013) the court noted:

> **"**Because the consequences of a research misconduct proceeding can be dire, the [federal] regulations impose conditions of strict confidentiality on allegations of research misconduct. As section 93.108 of the regulations states: "Disclosure of the identity of respondents and complainants in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law." *42 C.F.R. § 93.108(a) (2005)*. Disclosure of records or other evidence from which research subjects might be identified is also limited to "those who have a need to know to carry out a research misconduct proceeding." *42 C.F.R. § 93.108(b) (2005).*"

In *Mauvais-Jarvis*, the court construed a privilege claim against a defendant who violated the confidentiality of the institution's research investigation by publicizing it. That is exactly what happened here.

III. Plaintiff's Defamation Count States a Claim for Relief

In order to establish defamation, a plaintiff must prove: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Michigan Microtech, Inc. v. Federated Publications, Inc.*, 187 Mich. App. 178, 182 (1991).

PubPeer also alleges Dr. Sarkar is a "limited purpose public figure," although it fails to develop this argument. This designation is not particularly germane to this case because the only difference for a claim regarding a limited purpose public figure is that plaintiff has to demonstrate malice, rather than mere negligence. *Michigan Microtech*, 187 Mich. App. at 183-84. However, malice is easily shown here. The complaint details at length how defendant fabricated an alleged widespread controversy about Dr. Sarkar's work and then used that information to directly cost him a job at the University of Mississippi. He also falsified documents and distributed them at Wayne State in an effort to discredit Dr. Sarkar in his own institution and make it appear that a U.S. Senate investigation was ongoing. These are sufficient allegations to demonstrate malice.

However, Dr. Sarkar is not a limited purpose public figure. "A private person becomes a limited-purpose public figure when he voluntarily injects himself or is drawn into a particular public controversy and assumes a special prominence in its resolution." *Michigan Microtech*, 187 Mich. App. at 185. To the extent Dr. Sarkar has a public profile, it is in his publications related to cancer treatment. This is not a "public controversy." It is safe to say that everyone wants effective

cancer treatments. The only "public controversy" he is a part of is the one created by PubPeer and defendant; Dr. Sarkar did not "voluntarily inject[]" himself into any controversy. He obviously would have much preferred that the actions of defendant did not occur so that he could be successfully teaching as a tenured faculty at the University of Mississippi. *See Id*. (finding plaintiff was not limited purpose public figure because it did not "thrust itself into the issue" but instead the defendant brought it into the issue). Crucially, the "public figure status must exist prior to the alleged defamation and not by virtue of the notoriety created by it." *Hodgins Kennels, Inc. v. Durbin*, 170 Mich. App. 474, 483 (1988) (rev'd on other grounds 432 Mich. 894).

Dr. Sarkar's complaint more than satisfies any standard for a motion under MCR 2.116(c)(8).[5] It lays out in detail specific comments made by defendant that are defamatory. These comments are specifically quoted in the complaint and are actionable forms of defamation and thus satisfy the requirement reiterated in *Cooley* that a plaintiff "claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich. App. at 262 (internal quotations omitted). Contrary to PubPeer's arguments, there is no requirement, at the pleading stage, that a plaintiff cite "all the words used . . . , 'not merely a particular phrase or sentence.'" (PubPeer's Br. at 9).

That language comes from *Smith v. Anonymous Joint Enter.*, 487 Mich. 102, 129 (2010) and considered various defendant's challenge to a jury verdict, not a challenge to a complaint. *Smith* is highly supportive of plaintiff's position because it makes clear that words cannot be taken in isolation to determine whether they are defamatory. For instance, the Court notes that 'opinion' is not automatically shielded from an action for defamation because expressions of 'opinion' may

[5] The appearing "John Doe" defendant has filed a motion under MCR 2.116(c)(8) that will be before this Court on or around March 31, 2015. Plaintiff will demonstrate more fully in that motion why the claims are sufficient to state a claim for defamation.

often imply an assertion of objective fact.' As explained by the U.S. Supreme Court, the statement 'In my opinion Jones is a liar' may cause just as much damage to a person's reputation as the statement 'Jones is a liar.'" *Id*. at 128 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). The Court in *Smith* continued that "even a statement of opinion may be defamatory when it implies assertions of objective facts." The Court adopted language from the First Circuit, the language relied upon by PubPeer, that "a court must consider all the words used in allegedly defamatory material, not merely a particular phrase or sentence." *Id*. at 129 (quoting *Armark Productions Inc. v. Morton*, 410 F.3d 69, 72-73 (1st Cir. 2005). The Court concluded that "allegedly defamatory statements must be analyzed in their proper context."

Likewise, defamation can be through implication and need not be direct. "Defamation may be made indirectly by insinuation, by sarcasm**,** or by mere questions as well as by direct assertion in positive terms and it is not less actionable because made indirectly; and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Moritz v. Medical Arts Clinic, P.C.*, 315 N.W.2d 458, 460 (No. Dakota 1982). Michigan Courts have recognized a cause of action for defamation by implication, which would allow a plaintiff to recover "without a direct showing of false statements." *Loricchio v. Evening News Ass'n*, 438 Mich. 84, 123 n.32 (1991). "The dispositive question . . . is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning." *Smith*, 487 Mich at 128. Accordingly, plaintiff need not *prove* at this stage that the statements are defamatory. Under MCR 2.116(c)(8), all "well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v. Rozwood*, 461 Mich. 109, 119 (1999) (internal quotations omitted).

The statements at issue in this case are not mere opinion, but direct statements or clear implications that falsely convey that Dr. Sarkar has engaged in research misconduct, i.e. has intentionally fabricated results. This is demonstrably false. Dr. Sarkar has, at most, made some innocent errors at a rate below that of the average cancer researcher. Many of the statements are couched in opinion-type language but are still making objectionable statements as noted by the Supreme Court in *Milkovich*. Likewise, the entire context is essential to understanding why the comments are objectionable. When isolated (as PubPeer attempts to do), the statements seem less harmful; but collectively and in full context, the statements are capable of defamatory meaning.

Paragraph 40 of the complaint cites statements by defendant stating or implying intentional falsification. One notes "the same blot [was used] to represent different experiment(s). I guess the reply from the authors would be inadvertent errors in figure preparation." Later, a defendant stated "You might expect the home institution to at least look into the multiple concerns which have been raised." Outside the context, this statement may not be defamatory; but given the complex regulatory scheme at issue, which allows investigations only in response to good-faith accusations of research misconduct, the statement is defamatory. The same problem occurs just after someone asks, "Has anybody reported this to the institute?"[6] followed by the reply that someone has. These are serious accusations of research misconduct, a potential death-knell to a scientist's career.

Further down, someone states "the reward for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange." The use of "allegedly" does not save the person from defamation any more than does the use of "in my opinion." *Anderson v. Hebert*, 798 N.W.2d 275, 281 (Wis. App. 2011) ("allegedly" does not render a statement nondefamatory).

[6] An analogy that any lawyer would instantly recognize as an accusation of ethical misconduct would be, "Has anybody reported this to the State Bar?" or "Someone should report this to the State Bar!"

Similar comments are also listed in the complaint, including "You are correct using the same blot to represent different experiment(s). I guess the reply from the authors would be "inadvertent errors in figure preparation," which also accuse him of research misconduct and sarcastically noting that any defense to the contrary would be inadequate (complaint, ¶ 43).

Defendants state, "One has to wonder how this was not recognized earlier by the journals, reviewers, funding agencies, study sections, and the university. Something is broken in our system." Yet the only way these institutions could notice this is if there was research misconduct.

Defendant also stated, in a sarcastic tone consistent with many of these defamatory statements that "There seems to be a lot more 'honest errors' to correct" (complaint, ¶ 47).[7] Defendants allege that Sarkar "has never replied to any of the PubPeer comments" (which is false) and that they should report "our concerns to his institution and the journals involved," which again would only be appropriate in instances of research misconduct.

An important aspect of the claims, particularly as it relates to the tortious interference claim, is that defendant acted to create the allusion of a widespread problem. Numerous papers would receive one comment on PubPeer, sometimes not even expressing any concern about the article at issue. Then, the mere fact that an article had a comment was used as the basis to claim

[7] PubPeer suggests that sarcasm cannot give rise to defamation, but the citation to *Ghanam* is a different type of sarcasm. In *Ghanam,* the statement at issue was that an individual municipal employee had ordered more garbage trucks because he "needs more tires to sell to get more money for his pockets" and was followed by an emoticon suggesting that it was a joke. 303 Mich. App. at 527. Thus, in that case, the speaker did not really mean what was in the statement. Here, instead, the sarcasm is being used in the other direction – a purportedly innocent explanation actually is clearly implying wrongdoing on the part of Dr. Sarkar. It is clear that "the form of the language used is not controlling, and there may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion, or sarcasm or irony" *Cantrell v. American Broadcasting Cos.*, 529 F. Supp. 746, 756 (N.D. Ill 1971)(quoting Prosser, Law of Torts, Chap. 19, section 111, p. 746 (4th Ed. 1971)). Prosser goes on to state that "The imputation may be carried quite indirectly." *Kelly v. Iowa State Education Asso*., 372 N.W.2d 288, 295 (Iowa, 1985).

that Dr. Sarkar was making numerous mistakes. All told, there are 42 papers with Dr. Sarkar as lead researcher that have garnered only one comment on PubPeer, many of them extremely recent comments on relatively old papers, likely made by defendant to create the illusion of "traffic."

The complaint sufficiently sets out the direct language used by defendant to outright state and otherwise communicate that Dr. Sarkar has intentionally falsified data and committed "research misconduct." This - not minute disagreements about whether two images are "similar"- is the heart of plaintiff's claim, and more than sufficient at the pleading stage. Any reading of the complaint, including its specific quotations, makes it clear that defendant were not merely insinuating that plaintiff's research was wrong but that he was engaged in falsification of data and other misconduct. That's the line that defendant crossed that rendered his statements defamatory, and that's the reason that PubPeer's reliance on "academic freedom" must be rejected. They are free to call Dr. Sarkar wrong (when an honest belief), but not call or insinuate that he is unethical.

IV. Plaintiff's Claim for Tortious Interference Is Also Viable and Provides Independent Grounds for Compelling Disclosure of Defendants' Identities

PubPeer's brief focused on plaintiff's defamation claims; however Plaintiff has four other equally viable causes of action. Most clearly, plaintiff's two claims for tortious interference (one for Mississippi, the other for Wayne State) are extremely clear.

> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another.

Winiemko v. Valenti, 203 Mich. App. 411, 416 (1994). Here, the complaint clearly states that Dr. Sarkar had a business expectancy with the University of Mississippi, that defendant knew about it (it is specifically referenced in the PubPeer comments); that defendant interfered with it by raising false accusations about Dr. Sarkar's research, and that plaintiff was damaged when he lost the job.

Plaintiff has also stated a claim as to his relationship with Wayne State. There, the interference is even clearer because Defendants circulated paper that showed the misleading and false PubPeer comments as well as including a completely false paper that suggested that Dr. Sarkar was subject to a special investigation by Senator Grassley.

Not surprisingly, PubPeer does not suggest that plaintiff has not stated a claim for tortious/intentional interference. Instead, it merely states without development that "Dr. Sarkar cannot avoid the First Amendment limitations on his defamation claims by changing the label of the tort. Claims such as those pleaded here must satisfy the constitutional restrictions on defamation claims." (PubPeer Br. at 24). For support, PubPeer cites *Ireland v. Edwards*, 230 Mich. App. 607, 624 (1994), which does dismiss an intentional infliction of emotional distress claim where "because all of plaintiff's claims are based on the same statements, and because she cannot overcome the First Amendment limitations regarding these statements, summary disposition was properly granted with regard to all of plaintiff's claims." However, none of the cases that PubPeer cites, including *Ireland*, deal with a tortious interference claim. Plaintiff's tortious interference claim is not subject to this limitation for two separate reasons.

First, Michigan law is clear that intentional interference can apply even where defamation does not exist. *See Janice A. Brewer & Brian Storming II, Inc. v. Buck*, No.243127, 2004 Mich. App. LEXIS 1844 (Jul 1, 2004) ("The trial court erred in holding that plaintiff could not prevail on a claim of intentional interference with business relations without first establishing that a

defamatory statement had been made."). A claim can specifically be made if the defendant engaged in a lawful act, so long as he or she did so with malice. *See Michigan Podiatric Medical Ass'n v National Foot Care Program, Inc*, 175 Mich. App. 723, 736 (1989).

Second, plaintiff's tortious interference claim is not limited to the allegedly defamatory statements. Instead, it also relies on conduct that manipulated the PubPeer system to suggest a great deal of concern about Dr. Sarkar's research when, at most, only a couple of people were involved. This includes instances such as the creation of comments on numerous articles to create the illusion of widespread problem. Therefore, defendant has erred in suggesting that plaintiff's tortious interference claim rises and falls with the defamation claim. In fact, the tortious interference claim independently gives rise for a justification to compel the identification of defendant and deny the motion to quash, even if the defamation claim fails.

V. Plaintiff's Suit Is Not Filed in order to Identify Defendants but to Seek a Remedy for Tortious Conduct

In suits against anonymous internet posters, there is always a concern that the purpose of the litigation is simply to identify the person and not to actually vindicate legal rights. For instance, a company may file suit against unknown employees criticizing the company in order to learn their identity. However, the employer's intent may be to fire the employee rather than to actually pursue a defamation lawsuit. Here, however, Dr. Sarkar has no power or authority over any other people. Due to defendant(s)'s action, he is a year-to-year professor at Wayne State. Furthermore, he has suffered a serious injury, in the loss of the Mississippi job that is substantial not just in a generic amount of damages but in damage to him as an individual. Dr. Sarkar has every intent to fully litigate his claims and has not filed suit merely to learn the identity of his defamers.

Dr. Sarkar does want to aggressively pursue his legal remedies, but in order to do so, he obviously needs the identity of the anonymous posters. As noted, Dr. Sarkar consents to a

protective order that limits the use of defendant's identities to the current litigation, with no disclosure outside of the lawsuit. This Court has no need to further protect defendant, such as the "extreme case" where the "plaintiff in a defamation case sues an anonymous defendant solely to subpoena the defendant's Internet provider for identifying information in order to retaliate against the defendant in some fashion outside of the court action." *Ghanam*, 303 Mich. App. at 529. The additional protections contemplated in *Cooley* and *Ghanam* therefore do not apply. This case should be dealt with through the basic processes and procedures of the Michigan Court Rules, with entry of an appropriate protective order, as necessary, to resolve the dispute.

CONCLUSION

Plaintiff is sympathetic to the spirit of the arguments made by PubPeer. Anonymous commenters can be valuable and should not be silenced by more powerful forces who use the legal system to learn identities and then retaliate against the commenters. Likewise, academic dispute, even when anonymous, is certainly valuable. However, despite PubPeer's best efforts to make this case one of academic freedom, it is not. This case is about holding accountable those who would anonymously try to destroy Dr. Sarkar's career through intentional efforts to paint him as an unethical researcher engaged in research misconduct. Defendants were not seeking the "truth," they deliberately engaged in conduct designed specifically to harm Dr. Sarkar, even though Dr. Sarkar has never been found to engage in research misconduct and actually has an error rate less than that of other cancer researchers. In reality, the accusations of research misconduct are analogous to accusing someone of commission of a crime, and amount to defamation *per se*.

Dr. Sarkar has stated clear claims for tortious conduct, including defamation. Defendants thus have no right to remain anonymous, and PubPeer's motion to quash must be denied.

W H E R E F O R E plaintiff requests this honorable court deny PubPeer's motion to quash and permit the subpoena to be issued on appropriate conditions in a protective order.

Respectfully submitted,
NACHT, ROUMEL, SALVATORE,
BLANCHARD, & WALKER, P.C.

/s/ Nicholas Roumel

/s/ Edward A. Macey

Nicholas Roumel
Edward A. Macey
February 27, 2015 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys/parties of record herein by electronic filing on the 26th Day of February, 2015.

/s/ Nicholas Roumel

/s/ Edward A. Macey

Nicholas Roumel
Edward A. Macey