STATE OF MICHIGAN

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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PUBPEER'S REPLY BRIEF[*]
IN SUPPORT OF MOTION TO QUASH SUBPOENA

[*] A stipulated order allowing the filing of this brief is being submitted to the Court.

INTRODUCTION

This case involves anonymous scientists who discovered what they believed to be anomalies in the research papers of Dr. Sarkar, a prominent cancer scientist. They reported those apparent anomalies—mainly similarities between images purporting to show different experiments—on PubPeer's website, sparking an online discussion about the anomalies and about the system of pre-publication peer review that failed to detect them.

Dr. Sarkar has now sought the identities of those anonymous scientists so that he may sue them for defamation. As he made clear in his latest filing, however, his defamation claim is *not* based on the commenters' identification of the anomalies. Indeed, Dr. Sarkar does not once dispute Dr. Krueger's conclusion that PubPeer's commenters raised valid concerns warranting a more complete investigation. See Krueger Aff ¶ 86.

Instead, Dr. Sarkar claims that the scientists falsely accused him of "research misconduct," costing him his job. That narrative makes little sense. Not a single one of the comments on PubPeer's site accused Dr. Sarkar of misconduct. They discussed his papers and the anomalies in them, and they called for further investigation. Several comments were sarcastic or hyperbolic. None alleged fabrication of data or research misconduct. Moreover, it is wholly implausible that a world-class research institution rescinded Dr. Sarkar's offer of employment based on the mere existence of anonymous internet posts concerning his research. The truth is difficult to discern, however, because Dr. Sarkar has conspicuously failed to plead the only two allegedly defamatory statements remotely connected to his harm: a "series of emails" sent to the University of Mississippi and a flyer distributed at Wayne State University.

For these reasons, this case is not—as Dr. Sarkar has tried to frame it—about allegations of "research misconduct." It is, instead, about Dr. Sarkar's attempt to chill open discussion of his

research on PubPeer's website. It is about the constitutional right of scientists to engage in lawful and anonymous debate about the work of their peers. The First Amendment guarantees them that right as a critical component of the right to speak. As the Court of Appeals has held, Dr. Sarkar may overcome that constitutional right and unmask PubPeer's commenters only if, at an absolute minimum, he demonstrates the legal sufficiency of his complaint. This he cannot do for the reasons explained in PubPeer's opening brief and further below, but primarily because all of the comments at issue are subjective opinions, rhetorical hyperbole, or simply not defamatory.

Under controlling law in *Ghanam v Does*, 303 Mich App 522, 533; 845 NW2d 128 (2014), Dr. Sarkar's failure to plead actionable statements is fatal to his subpoena. The proper remedy is to quash the subpoena or, as in the words of *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264; 833 NW2d 331 (2013), to issue a protective order "that the discovery [of the defendants' identities] not be had."

One point bears special emphasis: This case exemplifies the importance of the First Amendment right to speak anonymously. PubPeer has created a forum for open discussion of the methodologies and conclusions of scientific research of great public importance. That discussion relies on anonymity. Absent it, scientists would be wary of debating the research of their colleagues and, more pressingly, the research of the dominant scientists in their field, for fear of endangering their employment. Shielded by that anonymity, however, PubPeer's commenters have reviewed the research of many scientists, and many have responded with a defense of their research or a course-correction in their work. Dr. Sarkar has chosen a different path—one that attacks the anonymity that PubPeer provides and, in so doing, threatens free debate on scientific research. It is for this reason that PubPeer has moved to defend its users' rights and to preserve the platform it has created.

ARGUMENT

PubPeer's opening brief set forth the framework that should guide this Court's consideration of the motion to quash. Controlling First Amendment caselaw requires the Court to assess the legal merit of the complaint *before* enforcing a subpoena that would unmask PubPeer's anonymous commenters. The Court must determine whether Dr. Sarkar has pleaded the statements he complains of with specificity and, if so, whether any of those statements are capable of defamatory meaning. Even if so, the Court must still balance the weight of Dr. Sarkar's claims for relief against the First Amendment interest in anonymity of PubPeer's commenters. The Court must conduct all of this analysis on a statement-by-statement basis, determining whether each comment is capable of defamatory meaning and whether Dr. Sarkar is entitled to learn the identity of the commenter who made it.

PubPeer's opening brief analyzed each statement complained of, arguing that Dr. Sarkar had failed to plead all of them with specificity. Nonetheless, PubPeer itself attached the full text of all but two of the statements at issue. It then analyzed those statements and argued, as is apparent from a review of the actual statements, that not a single one is capable of defamatory meaning. PubPeer could not conduct this analysis for two of the statements complained of—the emails sent to the University of Mississippi and the flyer distributed at Wayne State University—because those statements were not pleaded. Finally, PubPeer's opening brief argued that, even if any of the statements were capable of defamatory meaning, the balance of interests tilted dramatically against allowing Dr. Sarkar to pursue his marginal claims.

Dr. Sarkar's opposition does little to rebut PubPeer's opening brief or to remedy the central failing of the complaint to establish that any of the comments on PubPeer's site were capable of defamatory meaning. PubPeer responds as follows:

***First*, the remedy is to quash the subpoena, not to issue a protective order.** Contrary to Dr. Sarkar's contention, see Pl Br 5–9, the First Amendment requires that this Court test the legal sufficiency of the complaint *before* unmasking the anonymous commenters. Both *Cooley* and *Ghanam* predicated their rulings on the First Amendment and make clear that, if Dr. Sarkar's complaint cannot withstand a motion for summary disposition under MCR 2.116(C)(8), the proper remedy is to quash the subpoena, so as to preserve the defendants' constitutional right to anonymity. Dr. Sarkar's brief appears to suggest that this remedy should not be available because the Court could issue a limited protective order. Pl Br 8–9. That is emphatically not the rule of *Cooley* and *Ghanam*, precisely because it would permit the plaintiff to obtain a significant form of relief (learning the identity of the commenters) and chill protected speech lawfully made behind a veil of anonymity. As the court said in *Ghanam*, "when a plaintiff seeks disclosure of the identity of an anonymous defendant who might not be aware of the pending defamation lawsuit, the plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit, and, *in addition*, the trial court is required to analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted." 313 Mich App at 529 (emphasis added).

***Second*, none of the comments is capable of defamatory meaning.** Dr. Sarkar has failed to show that even a single comment posted on PubPeer's site concerning his papers is legally capable of defamatory meaning. In its opening brief, PubPeer analyzed every statement that the complaint cites and explained why each is inherently subjective opinion, rhetorical hyperbole, or simply not defamatory. See, e.g., PubPeer Br 12–20. Dr. Sarkar's opposition does little to contend with that showing.

As an initial matter, Dr. Sarkar has retreated from all of the complaint's allegations that he was defamed by statements that images in his research were similar. See, e.g., Pl Br 1 ("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."); *id.* at 9 ("This case, however, is not about blots."). Indeed, Dr. Sarkar does not once question or attempt to dispute the showing of Dr. Krueger that the concerns raised by those comments are entirely valid. This concession of the truth of those comments requires the Court to quash the subpoena with respect to those comments.

Instead, Dr. Sarkar relies exclusively on the central fallacy of his complaint, that the comments accuse him of "research misconduct." See, e.g., Pl Br 1, 9, 17. That is simply not the case: Not a single comment appearing on PubPeer's site accuses Dr. Sarkar of "research misconduct."[1] Notwithstanding that fact, Dr. Sarkar's brief uses that phrase countless times in an attempt to bootstrap into this case the federal regulations governing "research misconduct." Those regulations are wholly irrelevant here. The only relevant question is whether the comments on PubPeer's site are defamatory.[2]

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[1] Dr. Sarkar's brief uses that phrase several times in quotes, suggesting that he is quoting a PubPeer commenter, when in fact no PubPeer commenter used that phrase or anything remotely approaching it. See, e.g., Pl Br 1 ("The case is about false accusations of 'scientific misconduct' . . . ."); *id.* at 9 ("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.'"); *id.* at 17 ("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.'").

[2] Dr. Sarkar suggests at various times throughout his brief that PubPeer's terms of service are somehow relevant to the question of defamation. That is not so. While PubPeer's terms of service establish its goal of promoting high-quality discussion, the relevant legal question here is solely whether the comments at issue were defamatory under Michigan law.

Moreover, not a single one of the comments on PubPeer's site *implies* an allegation of research misconduct. This is clear from a review, below, of the eight comments that Dr. Sarkar specifically discusses in his opposition:

1. "[T]he same blot [was used] to represent different experiment(s). I guess the reply from the authors would be 'inadvertent errors in figure preparation.'" Pl Br 15; Compl ¶ 40(a); Jollymore Aff ¶ 8.

This comment notes a possible explanation for the similarity observed in two images. To be sure, the tone of the comment is potentially hyperbolic or perhaps dryly sarcastic, but it simply does not convey a provably false fact.

2. "You might expect the home institution to at least look into the multiple concerns which have been raised." Pl Br 15; Compl ¶ 40(b); Jollymore Aff ¶ 5.

This comment expresses a purely subjective opinion: that the commenter believes that the "concerns which have been raised" (which, context shows, are several similarities between images, see Jollymore Aff ¶ 5) merit further investigation. Mere calls for investigation are classic expressions of subjective opinion, not capable of defamatory meaning as a matter of law. See PubPeer Br 16 (citing cases). This is so because to say that a matter should be investigated is not to prejudge the outcome of that investigation. Ultimately, this is the false premise at the core of Dr. Sarkar's claim of defamation by implication: that commenters calling for further inquiry have defamed him simply by calling for that inquiry. Moreover, PubPeer's commenters are not alone in their view that the similarities in images between the papers that Dr. Sarkar co-authored warrant further analysis. See, e.g., Krueger Aff ¶ 86 ("Had I been presented with these images while still at ORI, I would have recommended that ORI refer the images to the host institution where the research was conducted for such an investigation. Based on my experience at ORI, and given the demonstrable credibility of the numerous issues identified by PubPeer, I believe it very likely that ORI would have made such a referral in this case.").

3. "Has anybody reported this to the institute?" Pl Br 15; Compl ¶ 40(c); Jollymore Aff ¶ 5.

This comment asks a simple and non-defamatory question. Dr. Sarkar appears to believe it is defamatory because reporting a concern to a university necessarily implies misconduct. This is simply not true. Universities are responsible for determining whether anomalies in research are due to misconduct, but they cannot do so unless those anomalies are reported to them.[3]

4. "the award for doing what he/she allegedly did is promotion [sic] a prestigious position at a different institution. Strange." Pl Br 15; Compl ¶ 40(d); Jollymore Aff ¶ 5.

This comment truthfully notes that Dr. Sarkar had been offered a prestigious job. The comment explicitly takes no position on what Dr. Sarkar "allegedly did," but even if it did, the context of the comment is clear that the allegations relate only to similarities between images (which Dr. Sarkar does not contest), not research misconduct. See Jollymore Aff ¶ 5.

5. "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." Pl Br 16; Compl ¶ 45; Jollymore Aff ¶ 9.

This comment similarly refers only to the similarities between images in Dr. Sarkar's papers, see Jollymore Aff ¶ 9, and offers an inherently subjective opinion that the system of pre-publication peer review is "broken" for having failed to detect those similarities.

6. "There seems to be a lot more 'honest errors' to correct." Pl Br 16; Compl ¶ 47; Jollymore Aff ¶ 8.

This comment refers to "honest errors" in a potentially sarcastic manner. Whatever the tone, though, it simply does not imply research misconduct. At most, it raises a question as to the cause of the errors. But to ask the question in so banal a manner—that is, to say that the concerns

[3] Dr. Sarkar argues that the commenter who responded to this comment "eviscerated" the confidentiality of "these [Wayne State] proceedings." Pl Br 11. That is plainly false. The commenter—who is under no confidentiality obligation—claimed only that the concerns noted in that comment thread (again, similarities in images) had been reported to the university. The university—which *is* under a confidentiality obligation—specifically refused to confirm whether it was investigating that report: "Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be." Jollymore Aff ¶ 5.

merit investigation—is not to accuse of falsification. Were it otherwise, neither scientists nor any other academic could question the work of their peers without incurring civil liability. And again, PubPeer's commenters are not alone in asking the question. See Krueger Aff ¶ 86.

7. "Sarkar has never replied to any of the PubPeer comments." Pl Br 16; Compl ¶ 49; Jollymore Aff ¶ 14.

This comment may technically be false, but it is not defamatory, as Dr. Sarkar's failure to respond to all but the single comment he claims to have responded to is neither here nor there. Moreover, as noted in PubPeer's opening brief, the commenter could not have known that Dr. Sarkar had responded to the single comment he responded to, given that the response was submitted anonymously. See PubPeer Br 20 n.13.

8. "if we send our concerns to his institution and the journals involved, hopefully there will be changes." Pl Br 16; Compl ¶ 49; Jollymore Aff ¶ 14.

Finally, this last comment, in referring to "our concerns," is quite clearly describing the similarities in the images in Dr. Sarkar's papers. See Jollymore Aff ¶ 14 (comment preceded by comment that "this paper contains images that appear to be similar"). As such, there is nothing defamatory in hoping that reporting those similarities would result in "changes."

***Third*, the number of commenters is irrelevant.** Dr. Sarkar's allegation that a single anonymous critic has attempted to create the illusion of widespread concern is both untrue and irrelevant. See Pl Br 16–17. It is untrue because the record establishes that there are multiple commenters responsible for the comments on Dr. Sarkar's papers. See, e.g., Jollymore Aff ¶ 8 (showing three unique commenters: Peer 1, Peer 2, and Peer 3).[4] And it is irrelevant because zero plus zero is still zero: That many non-defamatory comments were made about Dr. Sarkar's papers does not somehow amount to defamation. Were the opposite true, then the mere fact that

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[4] If the Court deems it relevant, PubPeer can document through an affidavit that there are, in fact, many more than just three unique commenters on Dr. Sarkar's papers.

someone exercised their right to free speech many times could be defamatory. No caselaw supports that radical proposition.

***Fourth*, the actual text must be pleaded.** Dr. Sarkar's failure to plead the actual text of many of the statements he complains of is fatal to any claims based on those statements. This failure is particularly important for two allegedly defamatory statements: the "series of emails" sent to the University of Mississippi and the flyer distributed at Wayne State University. See Compl ¶¶ 67, 69–70. Those two statements are the only ones actually tied to the harm that Dr. Sarkar alleges. And yet he has not pleaded the text of either, making it impossible for this Court to assess, as it must, whether the emails or the flyer are capable of defamatory meaning or even attributable to commenters on PubPeer's site. Dr. Sarkar appears to argue that Michigan law does not require him to plead the actual statements, but that is incorrect. PubPeer Br 8–9.

***Fifth*, tortious-interference claims cannot circumvent the First Amendment.** Dr. Sarkar states that his claim for tortious interference is distinct from his claim for defamation. See Pl Br 17–19. Even if true, that is irrelevant because the same First Amendment restrictions that apply to defamation claims apply equally to claims of tortious interference. See PubPeer Br 24. Such claims cannot be predicated on speech protect by the First Amendment. The Court of Appeals' decision in *Lakeshore Community Hospital, Inc. v. Perry*, 212 Mich App 396; 538 NW2d 24 (1995), is squarely on point. It held that "where the conduct allegedly causing the business interference is a defendant's utterance of negative statements concerning a plaintiff, privileged speech is a defense." *Id.* at 401. The same analysis applies here.

***Finally*, the balance of interests favors quashing the subpoena.** Dr. Sarkar's opposition all but ignores the command of both *Cooley* and *Ghanam* that his claims be weighed against the First Amendment interest in anonymity before enforcement of his subpoena. See

PubPeer Br 20–24. Even if some of the comments he complains of are, as pleaded, technically capable of defamatory meaning—which they are not—the Court should quash his subpoena because the balance of interests favors anonymity. This is especially so for three reasons. First, Dr. Sarkar has not pleaded the only two statements that have allegedly caused him actual harm—the series of emails and the flyer. Second, notwithstanding Dr. Sarkar's attempt to cast his complaint as being about allegations of "research misconduct," all of the comments at issue are based on the similarities in Dr. Sarkar's images, the truth of which he does not deny. Finally, unmasking PubPeer's anonymous commenters would stifle the submissions on PubPeer's site and risk irreversibly damaging the overwhelmingly constructive forum it has established.

CONCLUSION

For these reasons, the subpoena should be quashed.

Respectfully submitted,

/s/ Daniel S. Korobkin

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