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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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**MOTION AND BRIEF REGARDING COMMENTS
IN PARAGRAPH 40(c) OF PLAINTIFF'S COMPLAINT**

For the reasons set forth below, plaintiff moves that the court grant the motion to release the identifying information set forth in paragraph 40 (c) of plaintiff's complaint, subject to a protective order with appropriate terms and conditions regarding public anonymity.

FACTS

PubPeer, a non-party, was served with a subpoena seeking the identity of potential defendants who posted on their website. They responded with a motion to quash. The court heard argument on March 5, 2015, and in a March 9, 2015 order, granted PubPeer's motion except with regard to the identity of the poster of the statement in 40 (c) of plaintiff's complaint. That statement is as follows:

> 40 c. Then an unregistered user (likely the same one, given the context) reveals that s/he is either a person at Wayne State University who made a formal complaint against Dr. Sarkar, or is otherwise privy to the a person who did so:
>
> **Unregistered Submission:**
> (June 18th, 2014 4:51pm UTC)
>
> Has anybody reported this to the institute?
>
> **Unregistered Submission:**
> (June 18th, 2014 5:43pm UTC)
>
> Yes, in September and October 2013 the president of Wayne State University was informed several times.
>
> The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:
>
> "Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and 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.
>
> "Thank you for bringing this matter to our attention."

The statement at issue is actually the second one (i.e. the reply to the first inquiry). The statement, and all reasonable inferences to be drawn from it, indicate that the person posting has great familiarity with Wayne State University (WSU) administration, to wit:

- The president of WSU was "informed several times"
- The Secretary to the Board of Governors is also the Senior Executive Assistant to the president
- The person posting apparently claims to have details of scientific research misconduct, because the nature of the response apparently acknowledges a claim of scientific misconduct.

The statement is also evidence that research misconduct was alleged by the person emailing, and when posted on PubPeer, is a clear indication that person is alleging that Dr. Sarkar committed research misconduct – which is a public accusation at the very heart of Dr. Sarkar's case (and contrary to PubPeer's denials that such an accusation was never made on their web site).

LEGAL STANDARD

A. PubPeer, A Non-Party, May Not Argue Standards for Summary Disposition

As noted in plaintiff's contemporaneous motion for reconsideration, the court may not allow a non-party, PubPeer, to argue a motion for summary disposition - or more precisely, the standards for such a motion under MCR 2.116 (C) (8). Nor may the court consider that argument (as well as their attached affidavits) in granting their motion to quash. Specifically, the court's error was in applying the standards of *Ghanam v. Does*, 303 Mich App 522 (2014), rather than *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013). (Plaintiff refers to that motion for reconsideration for the details of his legal argument.)

To allow the non-party PubPeer another opportunity to argue the sufficiency of the pleadings is plain error under *Cooley*, because where a defendant has appeared (as here, with "John Doe 1"), a non-party may only argue the standards of a protective order under MCR 2.302 without reference to MCR 2.116 (C) (8). As such, the subject of this motion and brief pursuant to the court's March 9, 2015 order is in error.

Nonetheless, given the court's order, the plaintiff will directly address the comments in paragraph 40 (c) and why the court should not quash.

B. This Court Must Take All Facts, Including All Factual Inferences In Favor of the Plaintiff

Clear precedent requires that all factual allegations and the inferences to be drawn from them are to be taken in the light most favorable to the non-moving party and taken as true. In evaluating a motion with reference to MCR 2.116 (C) (8), or summary judgment for failure to state a claim, "all factual allegations are taken to be true along with any reasonable inferences or conclusions which can be drawn from the facts alleged." *Schenk v Mercury Marine Div., Lowe Industries* 155 Mich App 20 (1986).

"A court must accept as true all well-pled factual allegations as well as any conclusions which can reasonably be drawn therefrom and grant the motion only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Marley v Huron Valley Men's Facility Warden* 165 Mich App 78 (1987), *Hankins v Elro Corp.* 149 Mich App 22 (1986), *Dzierwa v Michigan Oil Co.* 152 Mich App 281 (1986).

The pleadings shall be construed "most favorably to the nonmoving party." *Blair v Checker Cab Co*. 219 Mich App 667 (1996).

C. In Defamation Cases in Particular, Any Factual Inference Against the Plaintiff's Position is a Question for the Factfinder, not for the Court as a Matter of Law

The above section demonstrated that in general, factual allegations and the inferences to be drawn from them are taken as true when analyzing pleadings under a (C) (8) motion. It is especially true in defamation cases, where any genuine issue as to material facts would require the court to allow the claim to go to the factfinder, in this case the jury, if the words were capable in law of a defamatory meaning. *Robbins v Evening News Assn*. 373 Mich 589 (1964). In its response to PubPeer's motion to quash, plaintiff cited several cases as to why his complaint satisfied the pleadings standards of MCR 2.116 (C) (8) (see, e.g., p. 13-14), especially *Smith v. Anonymous Joint Enter.*, 487 Mich 102, 128-9 (2010) ("a court must consider all the words … analyzed in their proper context;" and that the court must look beyond what is said to what is "implied"). Plaintiff also cited *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) to the effect that opinion may be defamatory, and *Loricchio v. Evening News Ass'n*, 438 Mich. 84, 123 n.32 (1991) supporting defamation by innuendo "without a direct showing of false statements." [Also see *Royal Palace Homes, Inc. v Channel 7 of Detroit, Inc*. 197 Mich App 48 (1992).

This court is to focus on the words alone, and may not determine truth or falsity as a matter of law. The Supreme Court has "consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury." *Ireland v. Edwards*, 230 Mich App 607, 621-622 (1998); also see *Steadman v Lapensohn*, 408 Mich 50, 53-54 (1980); *Cochrane v Wittbold*, 359 Mich 402, 408 (1960).

Here, the cited statement, and the inferences to be drawn from it in plaintiff's favor, indicates that the poster made a claim of "scientific misconduct" to WSU which was then posted on PubPeer and distributed to two universities, which then took adverse employment actions against plaintiff. This is a sufficient basis for a defamation claim.

D. The Court Must Consider Plaintiff's Other Four Causes of Action

Disregarding that PubPeer may not argue standards under MCR 2.116 (C) (8), for purposes of proceedings under the court's March 9, 2015 order, it is important to note that defamation is only one of the claims in this case. As for Dr. Sarkar's other four claims, PubPeer's motion to quash spent all of four sentences on them, and incorrectly cited the law. They argued that the other torts rise and fall with the defamation claims, but that is only if the torts are based on the same statements. *Ireland*, 230 Mich App at 624-5.

Here all the torts rest on different conduct. The intentional interference with business expectancy (University of Mississippi) rested on the malicious sending of documents to three different administrators at that institution with the intent to cause them to terminate their job offer to Dr. Sarkar, which was successful. The intentional interference with business relationship claim rests on the faking of a senate inquiry to get Wayne State to terminate that job, and succeeded in having them remove tenure. The invasion of privacy claim was based on disclosure of alleged and heavily regulated investigatory proceedings that are required by law to be confidential. The intentional infliction of emotional distress tort was based on this entire pattern of conduct, single-mindedly designed to ruin Dr. Sarkar's career, life's work, reputation, grants, and prospects.

All of these torts have different standards; they are cited in plaintiff's response to PubPeer's motion to quash. PubPeer has not addressed the elements of any of these torts. It was error to determine that independent torts based on *different* conduct than the defamatory statements standing alone were determined by analysis of the defamation claims.

Most clearly, plaintiff's two claims for tortious interference (one for Mississippi, the other for Wayne State) are viable:

> 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, but also intentional, malicious conduct (including dissemination of a forged document) specifically designed to cause plaintiff to lose his jobs with the University of Mississippi and WSU. 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 in 40 (c) of the complaint and deny the motion to quash on that basis, even if the defamation claim fails.

The standards for invasion of privacy are also viable. By exposing an accusation that is required by federal law to be strictly confidential, regarding scientific research misconduct, the poster in paragraph 40 (c) invaded plaintiff's privacy. In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. *Duran v The Detroit News, Inc.*, 200 Mich App 622, 631-632 (1993). Additionally, the defendant must have known of or acted in reckless disregard as to the falsity of

the publicized matter and the false light in which the plaintiff was placed. *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 666 (1987).

Here, it is forbidden by federal regulations to breach the confidentiality of these investigations, as pled in paragraph 59 of plaintiff's complaint:

> **"**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)*." [*Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013)]

To illegally breach this confidentiality, while implying serious enough research misconduct to have justified contacting the president of WSU "several times," invades plaintiff's privacy and places him in a false light.

Finally, the person who disseminated the forged document at WSU engaged in conduct sufficiently extreme and outrageous as to be liable for intentional infliction of emotional distress. The elements of that tort are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. … Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Linebaugh v Sheraton Michigan Corp,* 198 Mich App 335, 339, 342 (1993), reversing a dismissal where defendant disseminated an illustration implying that plaintiff had engaged in illegal activity (pedophilia)

E. It Was Error to Require the Production of Evidence

At oral argument on March 5, the court directed plaintiff to turn over to PubPeer the document that suggested Dr. Sarkar was under U.S. Senate inquiry. This was error. MCR 2.116 does not permit reference to documents or evidence in determining a (C) (8) motion by its plain language: "Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)." There are countless cases going back decades that affirm this hard rule, including:

"Summary judgment motion for failure to state claim on which relief can be granted tests complaint's legal sufficiency on pleadings alone." *Long v Chelsea Community Hosp.* 219 Mich App 578 (1996), *Vogh v American International Rent-A-Car, Inc*. 134 Mich App 362 (1984).

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal basis of the claim and is granted if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery; it is examined on the pleadings alone, absent considerations of supporting affidavits, depositions, admissions, or other documentary evidence, and all factual allegations contained in the complaint must be accepted as true." *Dolan v Continental Airlines/Continental Express* 454 Mich 373 (1997).

Accordingly, the court may not consider any argument based on the document provided.

F. This Court May Only Consider PubPeer's Motion under MCR 2.302 for Protective Orders

As *Cooley* mandates, when a defendant has appeared, the court is to treat a motion by a non-party, regarding a request for information, as one for a protective order under MCR 2.302. This court must consider this remaining statement under that standard.

MCR 2.302 states in relevant part:

> (C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; …

(5) that discovery be conducted with no one present except persons designated by the court; …

(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; …

The *Cooley* court stated it was error for the trial court to consider that it had only two choices, to either quash the subpoena, or not. *Cooley* stressed that this court must consider alternatives in between these "polar opposites." *Cooley* at 267-268.

Cooley also said a court **may** balance the interests concerning a protective order, and "may consider that a party seeking a protective order has alleged that the interests he or she is asking the trial court to protect are constitutionally shielded." *Cooley* at 269. But the court made it clear that in balancing the interests, the trial court cannot consider the sufficiency of the pleadings. Put another way, what a nonparty can't get in the front door – evaluation of the claims under MCR 2.116 (C) (8) - it can't get in the back door either: "We conclude that Doe 1's motion for protective order did not present the appropriate time or place" to consider the "legal[] sufficiency [of the] claims for defamation and tortious interference with a business relationship. … The court's only concerns during a motion under MCR 2.302 should be whether the plaintiff has stated good cause for protective order and to what extent to issue a protective order if it determines that one is warranted." Id. In other words, this court may consider PubPeer's and their users First Amendment rights in general – but not in the context of analyzing the pleadings.

If this court balances these factors per *Cooley,* it should consider the following in mitigating against protection for PubPeer, including:

(1) That Pub Peer did not follow its own guidelines in publishing the comments;

(2) That they removed scores of comments after Dr. Sarkar's counsel's initial demand letter;

(3) That the person or persons they are protecting has published allegations that there is a confidential investigation, a factor that the court in *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013) found to be determinative in denying privilege to the commenter;

(4) That the anonymous persons made up a US Senate inquiry out of whole cloth.

Given the great harm Dr. Sarkar has suffered, the strong public policy that such injured persons should have access to the courts to pursue their claims, and the wrongdoing by both PubPeer and the anonymous defendants, there is no cause to grant the most drastic remedy in PubPeer's favor: a motion to quash the subpoena in this final respect concerning paragraph 40 (c). The court must balance the factors as required by *Cooley* and fashioning a more limited protective order, that would safeguard the anonymity of defendants for public consumption, while allowing plaintiff to fairly test his claims going forward.

SUMMARY AND CONCLUSION

Under *Cooley,* the non-party PubPeer may not argue sufficiency of the pleadings under MCR 2.116 (C) (8) and may accordingly not be heard concerning the subject of the court's March 9 order, nor may the court consider those factors in regards to the identity of the poster in paragraph 40 (c) of plaintiff's complaint. Instead, this court should balance the equities and allow disclosure of the person's identity with sufficient protection to prevent public disclosure.

If standards under MCR 2.116 (C) (8) are to be considered, plaintiff has sufficiently pled defamation, intentional interference with business expectancy and relationship, invasion of privacy, and intentional infliction of emotional distress, taking the pleadings alone in a light most favorable to his claims, and the court should allow disclosure under these standards as well so that plaintiff may pursue his claims.

W H E R E F O R E plaintiff respectfully that the court deny PubPeer's motion to quash regarding the statements in paragraph 40 (c) of the complaint, and permit production of the identifying information on appropriate conditions.

Respectfully submitted,

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

s/Nicholas Roumel

Nicholas Roumel
Attorney for Plaintiff

March 11, 2015

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 11th Day of March, 2015.

/s/ Nicholas Roumel

Nicholas Roumel