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 SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO QUASH

INTRODUCTION

On March 9, 2015, this Court granted PubPeer LLC's motion to quash the plaintiff's subpoena with respect to all but a single comment on PubPeer's website. The Court allowed supplemental briefing to determine whether the anonymous individual who posted that comment (the "commenter") should be unmasked. Dr. Sarkar apparently believes that learning the commenter's identity would help him discover who distributed an allegedly defamatory flyer on the campus of Wayne State University (the "distributor"). Thus, the question for the Court is whether an individual who made a lawful and anonymous comment on PubPeer's site should lose his or her constitutional right to anonymity on the off-chance that he or she was the same person who made an entirely separate statement in a separate forum. For three reasons discussed more fully below, the answer to that question is no.

First, neither the First Amendment nor Michigan law permits the unmasking of an anonymous speaker unless *his or her own speech* was defamatory or otherwise unlawful. The comment in question was not defamatory, and so the commenter has the constitutional right to remain anonymous. The proper recourse for a defamation plaintiff like Dr. Sarkar is to investigate the distributor of the flyer, not the commenter who lawfully exercised his or her right to speak anonymously on PubPeer's site.

Second, even if the Constitution permitted Dr. Sarkar to unmask the lawful commenter in his investigation of the distributor of the flyer, there is no reason to think that learning the one would help in the search for the other. Dr. Sarkar has not provided any reason to believe that the two are related, and, indeed, PubPeer can confirm that the Internet Protocol ("IP") address for the comment is not even inside the United States, let alone anywhere in the State of Michigan.

Finally, even if Dr. Sarkar could show that the commenter and the distributor of the flyer were one and the same—which he almost certainly could not—the *flyer itself* is incapable of

defamatory meaning. There is therefore no reason to intrude upon the commenter's constitutionally protected right to engage in anonymous speech.

After explaining those arguments below, PubPeer separately responds to several claims made in the supplemental brief that Dr. Sarkar filed on March 11. That brief is essentially an attempt to re-litigate this Court's ruling of March 9. In it, Dr. Sarkar makes two primary arguments. First, he disputes that *Ghanam v Does*, 303 Mich App 522, 533; 845 NW2d 128 (2014), controls this case, arguing instead that the Court may unmask PubPeer's anonymous commenters without testing the legal sufficiency of the complaint. See Pl Br Regarding Para 40(c) of Compl 3–4. Second, he argues that his causes of action other than defamation somehow avoid the constitutional restrictions on punishing constitutionally protected speech. *Id.* at 6–9. Neither of these arguments has any merit, and the Court should abide by its earlier ruling.

PubPeer does not address Dr. Sarkar's motion for reconsideration here, see MCR 2.119(F)(2) ("No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs."), but notes that the arguments made therein overlap largely with those in Dr. Sarkar's supplemental brief and lack merit for the same reasons addressed below.

ARGUMENT

1. PubPeer's supplemental argument on the sole comment now at issue.

a. The First Amendment does not permit the unmasking of an anonymous speaker unless *that person's speech* was defamatory or otherwise unlawful.

Dr. Sarkar seeks to discover the identity of PubPeer's commenter because he believes that it might lead him to the person who distributed the flyer at Wayne State.[1] Under controlling Michigan law, however, Dr. Sarkar may not unmask the anonymous PubPeer commenter unless

[1] See Compl ¶ 75 ("[I]t is highly probable, if not certain, that the same person(s) who [distributed the flyer] is/are the same person(s) who posted on PubPeer . . . ."). Dr. Sarkar has not pleaded any actual facts corroborating this speculative assertion.

that commenter's speech is defamatory or unlawful. This is not ordinary civil discovery, where facts may be obtained on a mere showing of relevance. The First Amendment requires that defamation plaintiffs satisfy a higher standard to unmask an anonymous commenter. This is so because an anonymous speaker's identity is constitutionally protected information. And without that greater protection, the right to anonymous speech would mean little, as there will always be a possibility that unmasking a public figure's lawful critics could aid in the identification of his or her defamatory critics.

Accordingly, Dr. Sarkar may not unmask PubPeer's commenter unless he demonstrates that, at a minimum, the comment is capable of a defamatory meaning. He cannot do so. Here is the full text of the comment (preceded by the question that prompted it):

> **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."

Compl ¶40(c).

There is nothing remotely defamatory or malicious about this comment. The text consists of a simple cut-and-paste from an email that someone, possibly the commenter, received from Wayne State. Although the comment does not say it, the most that could be inferred from its text is that the commenter personally reported image similarities to Wayne State.[2] For a claim of defamation, however, Dr. Sarkar is required to plead the exact language that he alleges to be defamatory. Here, he would have to plead the exact text of any emails or other such reports of similarities to Wayne State. Since he has not pleaded that text, he cannot base his claim of defamation on it. See PubPeer Mot to Quash Br 8. Setting that defect aside, there is nothing defamatory about expressing such concerns. Dr. Sarkar himself has conceded that there were image similarities in his papers. See PubPeer Mot to Quash Reply Br 5 (discussing concession).

Since he cannot plead actual defamatory words, Dr. Sarkar has attempted to twist the meaning of this PubPeer comment into a charge of "research misconduct." Pl Br Regarding Para 40(c) of Compl 3, 5. That's not what the comment says or even implies. At most, it suggests that the image similarities warrant further investigation. As a matter of law, however, calling for an investigation is simply not defamatory. See *Haase v Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982) ("'I am here to investigate' . . . clearly does not rise to the level of defamation."); see also PubPeer Mot to Quash Br 16 (citing cases). So that it may investigate possible misconduct, Wayne State in fact explicitly encourages such tips from the general public and protects informers as a matter of both university policy and federal law.[3] Moreover, Dr. Sarkar is wrong in arguing that Wayne State's use of the phrase "scientific misconduct

[2] See Jollymore Aff ¶ 5 for the full context for the comment.

[3] See Wayne State University Policy and Procedure Regarding Research Misconduct, Policy § 4.1.1, *available at* http://research.wayne.edu/misconduct/docs/university-research-misconduct-procedure-policy.pdf (encouraging reporting); *id.* § 4.3–4.4 (stating confidentiality protections for informers); see also 42 CFR § 93.108 (federal confidentiality provision).

investigation" suggests that the PubPeer commenter accused him of misconduct. See Pl Br Regarding Para 40(c) of Compl 3, 5. It is the university's obligation to determine whether a misconduct investigation is warranted after reviewing reports of concern about an employee's research.[4] The fact that concerns were reported is not defamatory, and the fact that the university followed its protocol of determining whether to investigate (without actually revealing its decision) is equally innocuous.

In any event, there is an independent reason why Dr. Sarkar cannot show that the comment is defamatory: the comment is privileged under Michigan law as a fair and true report of a governmental record. See MCL § 600.2911(3). The comment recounts an apparently accurate official statement sent by Wayne State in response to an inquiry. Reporting that statement is privileged as the publication of a fair and true report. See *Kefgen v Davidson*, 241 Mich App 611, 626; 617 NW2d 351 (2000) (dismissing claim that defendant's distribution of an official letter was defamatory); *Northland Wheels Roller Skating Ctr v Detroit Free Press, Inc*, 213 Mich App 317, 327; 539 NW2d 774 (1995) (holding that fair reporting privilege extended to newspaper articles where authors represented "fair and true" reports of police records); *Stablein v. Schuster*, 183 Mich App 477, 482; 455 NW2d 315 (1990) (newspaper immune from liability for reporting contents of allegedly libelous letter read by school board official at official meeting); *McCracken v Evening News Ass'n*, 3 Mich App 32, 38–39; 141 NW2d 694 (1966).

Case precedent mandates that this is where the analysis ends. Because the commenter did not engage in defamatory speech, or because the comment is privileged as a fair and true report, his or her anonymity is protected. Nonetheless, Dr. Sarkar suggests that he may unmask the

[4] See *id.* § 6.3 (". . . [the WSU Deciding Official] must determine in writing whether an investigation is warranted.").

commenter—even if that commenter's speech is protected—to help him discover who distributed the flyer at Wayne State.

There is simply no legal precedent, however, to support Dr. Sarkar's wish to unmask the commenter to find *an entirely different person* who distributed an allegedly defamatory flyer. The decision in *Ghanam* is instructive. There, the court separately examined statements made by each commenter to determine whether each was capable of a defamatory meaning and whether, therefore, each commenter should be unmasked or remain anonymous. See *id.* at 547–50. It did not predicate an individual's right to anonymity on the conduct of *others*. Indeed, every case considering whether a defamation plaintiff may unmask an anonymous defendant has looked to the conduct of *that defendant* in determining whether to enforce the subpoena—not the conduct of others. In *Dendrite International, Inc v Doe,* for example, the court stated that "the discovery of John Doe No. 3's identity largely turns on whether *his statements* were defamatory or not." 342 NJ Super 134, 141; 775 A2d 756 (NJ App, 2001) (emphasis added).

The protection for the anonymity of lawful speech is especially important in the context of whistleblowers. Unmasking PubPeer's commenter would not only violate his or her constitutionally protected anonymity, but it would also deter others from lawfully reporting concerns to research institutions because of the risk that they could be unmasked as well.

b. There is no reason to believe that unmasking PubPeer's commenter would aid Dr. Sarkar in identifying the distributor of the flyers.

As discussed above, Dr. Sarkar hopes that discovery of the identity of PubPeer's commenter will lead him to the distributor of the flyer. But Dr. Sarkar has neither alleged nor provided any basis to believe that those individuals and actions are related. Thus, even if he could overcome the constitutional limitation explained above, he has not made out the factual predicate for his request to unmask PubPeer's commenter.

During the hearing on March 5, it was hypothesized that, if the anonymous commenter lives in Michigan or works or studies at Wayne State, that would be reason to believe that he or she was the one who distributed the flyer. The facts of this case do not support such an inference. Even if an individual in Detroit or anywhere else in Michigan posted an anonymous comment online about Dr. Sarkar, there is no reason to believe that the same individual distributed the flyer on Wayne State's campus. That is simply too speculative a basis upon which to revoke the commenter's constitutional right to remain anonymous.

In any event, the comment at issue did *not* come from an IP address in Michigan, or even this country. It came from an IP address in a foreign country. Providing that IP address to Dr. Sarkar would do nothing to help him identify the person who distributed the flyer in question. If the Court deems it relevant, PubPeer can document, in an *in camera* and *ex parte* filing, how it determined that the IP address in question came from a foreign country.

In sum, Dr. Sarkar has failed to explain how unmasking PubPeer's commenter would help him identify the distributor of the flyers, and he has failed to demonstrate that the individual who distributed the flyer is the same as the individual who wrote the non-defamatory comment on PubPeer's site. Absent these showings, there is no reason to believe that the PubPeer commenter has done anything to justify the forfeiture of his or her anonymity.

c. The flyer distributed at Wayne State is not defamatory, and so unmasking PubPeer's commenter would serve no legitimate purpose.

Even assuming that Dr. Sarkar could overcome the constitutional limitation explained above and then show that the PubPeer commenter and the distributor of the flyer were one and the same—that would *still* be an inadequate basis for unmasking the PubPeer commenter. That is because nothing in the flyer *itself* is defamatory, and so Dr. Sarkar could not meet the requirements of *Ghanam* and *Cooley* to unmask the commenter.

At the hearing on March 5, counsel for Dr. Sarkar provided PubPeer, for the first time, with a copy of the allegedly defamatory flyer distributed at Wayne State.[5] Despite his claim that the flyer was part of a scheme to make deliberately false accusations of "research misconduct" against Dr. Sarkar, the flyer itself has turned out to be vague, obscure, and ultimately, innocuous.

It is, perhaps, for this reason that Dr. Sarkar now argues that the Court cannot even consider the text of the flyer, and claims that the Court improperly ordered him to produce evidence. See Pl Br Regarding Para 40(c) of Compl 10. This argument is misguided. As PubPeer has explained, see PubPeer Mot to Quash Br 8–9, Michigan law requires that defamation plaintiffs plead the exact text they complain of so that courts can determine—on a motion for summary disposition—whether the text, in its full context, is capable of defamatory meaning as a matter of law. Dr. Sarkar is therefore required to plead the actual flyer. If he prefers not to, the Court should simply grant the rest of the motion to quash, because Dr. Sarkar would have failed to satisfy Michigan's threshold legal requirement for defamation claims. As discussed at the hearing on March 5, however, Dr. Sarkar may remedy that failure by amending his complaint to plead the text. This is, in effect, what happened in *Ghanam*, in which the court noted the complaint's failure to plead the text complained of, but nonetheless considered the later-provided text to determine whether it would be futile to permit the plaintiff to amend to include it. See *Ghanam*, 303 Mich App at 543.

That issue aside, there is nothing defamatory about the flyer. The only clear message the flyer conveys is that someone has lodged an "ACADEMIC EXPRESSION OF CONCERN" about Dr. Sarkar's research because eight of his published articles have drawn comments on PubPeer. The flyer discloses the number of comments posted for each article, but the text of

[5] The flyer is attached hereto as Exhibit A.

those comments does not appear anywhere on the flyer, so the basis for the "ACADEMIC EXPRESSION OF CONCERN" is unclear. Regardless, that message is not defamatory. Expressions of concern are quintessentially subjective opinions. See PubPeer Motion to Quash Reply Br 6; see also *Ornatek v Nevada State Bank*, 93 Nev 17, 20; 558 P2d 1145 (Nev, 1977) ("McDaniel said nothing to officers of the First National Bank which carried a defamatory meaning. His concern . . . is simply an expression of concern."); *Slightam v Kidd*, 120 Wis 2d 680; 357 NW2d 564 (Wis App, 1984) (holding that defendant's statements "were nondefamatory as a matter of law and represent an expression of concern, opinion or fair comment").

A very recent case from the U.S. District Court for the District of Massachusetts is squarely on point.[6] In *Saad v American Diabetes Association*, a scientist sued a research journal for defamation based on its "expression of concern to alert readers to questions about the reliability of data" in the scientist's articles. Slip Op at 3, No 1:15-cv-10267-TSH (D Mass, March 5, 2015). Like Dr. Sarkar, that scientist conceded "that mistakes had been made in the treatment of digital images in some of [his] articles," which, the court reasoned, "would certainly provide a basis for the [journal's] concern." *Id.* at 3 n.2. The court held that:

> [T]he expression of concern does not accuse [the scientist] of dishonesty. It merely expresses the [journal's] concern about the reliability of the articles as it attempts to obtain more information. [The scientist] does not explain how such an expression of concern would not be a protected statement of opinion, nor does he point to a single phrase that he alleges to be false.

Id. at 3. The same is true here.

In his complaint, Dr. Sarkar also states that the flyer implies that U.S. Senator Charles Grassley is investigating Dr. Sarkar. See Compl ¶ 72. It requires a heightened imagination to see such an implication. The flyer has two lines of text that contain the words "Grassley" and "NIH,"

[6] The decision is attached hereto as Exhibit B.

surrounded by a series of inscrutable letters and numbers that have no plain meaning. The text is in fact so indecipherable that no reasonable individual could interpret it as an actual assertion or implication that a U.S. Senator was investigating Dr. Sarkar. The dominant message of the flyer—indeed, the only implication of verifiable fact that any reasonable reader could take from it—is that someone has expressed academic concern about Dr. Sarkar's work. That message is core speech protected by the First Amendment.

Because the flyer does not make any provably false and defamatory statement about Dr. Sarkar, it does not contain speech that would be actionable in his lawsuit. The flyer contains only speech protected by the First Amendment, which may not be the basis for unmasking its author, let alone the author of a wholly unrelated comment in an entirely separate forum.

2. PubPeer's response to Dr. Sarkar's supplemental brief.

In his supplemental brief, filed on March 11, Dr. Sarkar revisits many of the antecedent issues this Court weighed and ruled on at the hearing on March 5. Dr. Sarkar's arguments are no different from those already properly rejected, and the Court should thus stand by its order.

a. The Court must consider the legal sufficiency of Dr. Sarkar's complaint *before* unmasking PubPeer's anonymous commenters.

Dr. Sarkar continues to press the argument already rejected by this Court—that the Court may not analyze the legal sufficiency of the complaint before unmasking PubPeer's commenters. This is simply incorrect. Both *Ghanam* and *Cooley* require this Court to assess the legal sufficiency of Dr. Sarkar's complaint *before* unmasking the anonymous defendants.

An analysis of those two cases makes that point clear. *Cooley* and *Ghanam* are the only two cases in which the Michigan Court of Appeals has considered a defamation plaintiff's attempt to unmask anonymous critics. The facts in those two cases are different in a crucial way. In *Cooley*, not only did the plaintiff already know the identity of the defendant being sued, but

that defendant had appeared in court to dispute the charge of defamation and to protect his identity from further disclosure. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 252; 833 NW2d 331 (2013). In *Ghanam*, however, the anonymous defendants were not known to the plaintiff and were not before the court. Instead, the third party being subpoenaed for identifying information was resisting the subpoena and defending the defendants' anonymity. 303 Mich App at 527.

Based on that factual difference, the two decisions arrived at slightly different conclusions about the procedures required by the First Amendment to adequately protect the constitutional right to anonymity. *Cooley* held 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." *Cooley*, 300 Mich App at 264. The opinion contemplated that the anonymous defendant—who, again, was actively participating in the litigation—would use both a motion for a protective order and a motion for summary disposition, in tandem, to protect his or her constitutional right to anonymity. Indeed, *Cooley* viewed those procedures as "largely overlap[ping]" with the procedures adopted by other jurisdictions, which uniformly require a defamation plaintiff to make a preliminary showing of merit *before* unmasking an anonymous speaker. *Id.* at 266.

In *Ghanam*, by contrast, the anonymous defendants were not before the court and so could not defend their right to anonymity. That circumstance, the court held, distinguished the case from *Cooley* and necessitated a different rule—one requiring the trial court to determine "whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8) . . . even if there is no pending motion for summary disposition before the court." *Ghanam*, 303 Mich App at 541.

This case is nearly identical to *Ghanam*: with the exception of a single Doe defendant, the anonymous defendants who Dr. Sarkar is attempting to unmask are not before this Court. Therefore, the only protection available for those other defendants' right to anonymity is this Court's application of *Ghanam* to test the legal sufficiency of Dr. Sarkar's claims against them. And as in *Ghanam*, the third party that has been subpoenaed for identifying information—here, PubPeer—may assist the Court in applying a summary-disposition standard to defend the anonymity critical to its users and to its mission.

Dr. Sarkar attempts to distinguish *Ghanam* by pointing out that a single Doe defendant is participating in these proceedings and has filed a motion for summary disposition. That fact is all but irrelevant. At most, it provides a basis for the Court to defer resolution of PubPeer's motion to quash with respect to *that Doe defendant's* comments, until the Court resolves the pending motion for summary disposition. But that defendant's participation provides no basis to unmask all of the *other* commenters on PubPeer's site who are, as in *Ghanam*, not participating in this litigation and whose right to anonymity is not represented by the single participating defendant. Again, those commenters' protection comes, if at all, from this Court's application of *Ghanam* to test the sufficiency of the complaint's allegations against them. There is, in any event, little reason to defer resolution of the motion to quash with respect to the single Doe defendant, given that the comments he or she made are plainly not defamatory as a matter of law.

For these reasons, the Court must assess the legal sufficiency of Dr. Sarkar's complaint *before* unmasking PubPeer's anonymous users.

b. Whether a statement is capable of defamatory meaning is a question of law for the Court to decide.

In analyzing the legal sufficiency of Dr. Sarkar's complaint, the Court must determine whether he has alleged provably false facts capable of a defamatory meaning. See PubPeer Mot

to Quash Br 7–8. This entails two separate inquires. First, the Court must determine whether Dr. Sarkar has actually pleaded the words alleged to be defamatory. Second, it must determine whether the words pleaded are capable of defamatory meaning as a matter of law.

Dr. Sarkar's brief confuses the determination of defamatory meaning with the standard for reviewing a complaint. See Pl Br Regarding Para 40(c) of Compl 5. On a motion for summary disposition, the Court must interpret the complaint in the light most favorable to the plaintiff. However, the Court does *not* interpret allegedly defamatory words, or the meanings they imply, most favorably to the plaintiff. The court merely considers their plain meaning and determines whether a reasonable reader could understand them to be defamatory. This is a strictly legal question: "Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide." *Ghanam*, 303 Mich App at 544; see also *Cooley*, 300 Mich App at 263 ("Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory . . . .").

c. The other torts pleaded are subject to the same First Amendment limitations as defamation.

Dr. Sarkar's supplemental brief and his motion for reconsideration mistakenly argue that his causes of action other than defamation provide an independent basis to unmask PubPeer's users. See Pl Br Regarding Para 40(c) of Compl 6–9. This argument misses the point. It is true that his other claims have different elements than defamation. But all of those claims are predicated on *speech*—whether the posting of comments, the distribution of the flyer, or the sending of emails. And when a plaintiff seeks damages for speech, the First Amendment most emphatically applies. It protects subjective expressions of opinion, not just from liability for

defamation, but from liability for any of the torts that Dr. Sarkar has pleaded. This is settled constitutional law that Dr. Sarkar's briefs have consistently ignored.

Many cases make this point unmistakably clear. In *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396, 403; 538 NW2d 24 (1995), the Michigan Court of Appeals dismissed a claim of tortious interference with a business relationship because the alleged interference consisted of "expressions of opinion, protected under the First Amendment." See also *id.* at 401 ("[W]here the conduct allegedly causing the business interference is a defendant's utterance of negative statements concerning a plaintiff, privileged speech is a defense."). Likewise, in *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988), the Supreme Court held that a claim of intentional infliction of emotional distress cannot be predicated upon speech "without [a] showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" And in *Ireland v Edwards*, 230 Mich App 607, 624–25; 584 NW2d 632 (1998), the Michigan Court of Appeals applied the same First Amendment limitations to claims of false light invasion of privacy, defamation, and intentional infliction of emotional distress.[7]

These cases all stand for the unremarkable proposition that the limitations on lawsuits against speech protected by the First Amendment—primarily, that the statements must be provably false rather than subjective opinion—cannot be overcome by changing the name of the

[7] There are many, many more such cases. See, e.g., *Compuware Corp v Moody's Investors Servs*, 499 F3d 520, 529–34 (CA6, 2007) (applying First Amendment limitations to claim for breach of contract); *Jefferson Co Sch Dist No R-1 v Moody's Investor Servs*, 175 F3d 848, 856–58 (CA10 1999) (same for intentional interference with contract and intentional interference with business relations); *Beverly Hills Foodland, Inc v United Food & Commercial Workers Union, Local 655*, 39 F3d 191, 196 (CA8, 1994) (same for tortious interference with right to contract); *Unelko Corp v Rooney*, 912 F2d 1049, 1057–58 (CA9, 1990) (same for trade libel and tortious interference with business relationships).

tort. Because the speech at the core of Dr. Sarkar's suit is protected by the Constitution, it cannot serve as the basis for his suit or for unmasking PubPeer's commenters.

CONCLUSION

Dr. Sarkar's attempt to learn the identity of the distributor of the flyer by way of the identity of the PubPeer commenter is based on a long string of tenuous assumptions—that the commenter engaged in unlawful conduct, that the commenter and distributor are the same person, and that the contents of the flyer defamed Dr. Sarkar. There is no basis for any of these assumptions, and therefore no reason to unmask the PubPeer commenter. For these reasons, the Court should quash the subpoena with respect to the remaining comment.

For the other reasons provided above and in PubPeer's prior briefs, the Court should also reject Dr. Sarkar's attempt to re-litigate the Court's partial grant of the motion to quash.

PubPeer preserves its argument that the First Amendment requires not only that the Court test the legal sufficiency of Dr. Sarkar's claims before unmasking, but that it require a prima facie evidentiary showing as well. See PubPeer Mot to Quash Br 24–25. The Court need not reach that question, however, as Dr. Sarkar cannot satisfy the threshold requirement.

Respectfully submitted,

/s/ Daniel S. Korobkin

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