# APPELLANT PUBPEER, LLC'S EXCERPTS OF RECORD

*Sarkar v Doe(s)*, COA Case No. 326691

# EXHIBIT 1

*Sarkar v Doe*, COA Case No. 326667

Complaint

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STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

FAZLUL SARKAR

Plaintiff,

Case No. 14-_____-CZ

v.

Hon.

JOHN and/or JANE DOE(S)

Defendants.



Attorney for Plaintiffs:
NACHT , ROUMEL, SALVATORE,
BLANCHARD, & WALKER, P.C.
Nicholas Roumel (P 37056)
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There has never been any other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court.

***/s/ Nicholas Roumel***
Nicholas Roumel , Attorney for plaintiff

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**COMPLAINT and JURY DEMAND**

Fazlul Sarkar makes his complaint as follows:

**PARTIES AND JURISDICTION**

1. Plaintiff Fazlul Sarkar ("Dr. Sarkar") is a resident of Plymouth, Wayne County, Michigan.

2. The identity of Defendant(s) John and/or Jane Doe(s) ("Defendants") are not yet known, pending discovery.

3. Claims in this action are made pursuant to the common law of the state of Michigan.

4. The amount in controversy is at least $25,000.

5. Jurisdiction and venue are proper in Wayne County, as it is where the Plaintiff resides and works, where some of the events giving rise to Plaintiff's claims took place, and where (on information and belief) Defendants reside and/or work.

## FACTUAL ALLEGATIONS

### Dr. Sarkar is a Pre-Eminent Researcher, Professor, and Author

6. Fazlul H. Sarkar, PhD is a distinguished professor of pathology at Karmanos Cancer Center, Wayne State University with a track record of cancer research for over 35 years.

7. He received his MS and PhD degrees in biochemistry in India in 1974 and 1978, respectively. In 1978, performed his postdoctoral training in molecular biology and virology at Memorial Sloan Kettering Cancer Center in New York among other institutions.

8. Dr. Sarkar arrived at Wayne State University in 1989. His research is focused on understanding the role of a "master" transcription factor, NF-κB, and the regulation of its upstream and downstream signaling molecules in solid tumors. Moreover, his focused research has also been directed toward elucidating the molecular mechanisms of action of "natural agents" and synthetic small molecules for cancer prevention and therapy. He has done a tremendous amount of work in vitro and in vivo, documenting that several "natural agents" could be useful for chemopreventive research. Most importantly, his work 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).

9. Dr. Sarkar is one of the pioneers in developing natural agents such as Isoflavones, Curcumin, and Indole compounds like DIM (B-DIM) for clinical use, and his basic science research findings led to the initiation of Clinical Trials in breast, pancreas, and prostate cancers at

the Karmanos Cancer Institute. He is a perfect example of a true translational researcher bringing his laboratory research findings into clinical practice.

10. Moreover, Dr. Sarkar is also involved in several collaborative projects including breast, lung, and pancreatic cancer for both preclinical and phase II clinical trials with other scientists within the institution as well as collaborative work with basic scientists and physician scientists at MD Anderson Cancer Center.

11. He has published over 430 original scientific articles in peer-reviewed journals and written more than 100 review articles and book chapters and also edited a book on pancreatic cancer.

12. 12.He also served as guest editor for "Hot Topic" for the journals of Pharmaceutical Research , Mini Reviews in Medicinal Chemistry and Cancer Metastasis Reviews. He also edited a total of four books. He served as senior editor for the AACR journal "Molecular Cancer Therapeutics" and he is currently an Academic Editor for the journal PLoS One and a member of the editorial board in 10 Cancer Journals. His research has been continuously funded by NCI, NIH, and the Department of Defense (DOD). Dr. Sarkar has trained numerous pre-doctoral and post-doctoral students throughout the last 20 years at Wayne State University. In addition, Dr. Sarkar has served and still serving on a number of departmental, university, and national committees and continues to serve both NIH and DOD study sections including NIH program projects, SPORE grants, and Cancer Center Core grants (site visit) for NCI-designated Comprehensive Cancer Centers. He is currently a Senior Editor of the journal "Molecular Cancer Therapeutics" and member of the editorial board of many scientific journals.[1]

[1] Biography from Cancer Metastasis Rev (2010) 29:379, and updated.

**The University of Mississippi Hires Dr. Sarkar and Grants Him Tenure**

13. Commencing in the fall, 2013, Dr. Sarkar sought employment with the University of Mississippi, a public university in Oxford, Mississippi.

14. On or after September 17, 2013, he received the "anticipated terms of an offer of a position," including:

- Triplett/Berakis Distinguished Professor, NCNPR (Research Institute of Pharmaceutical Sciences) and Dept. of Pharmacology with tenure
- Associate Director for Translational Research, NCNPR (Oxford Campus)
- Associate Director for Translational Research, UMMC Cancer Institute, and Professor, Dept. of Radiation Oncology
- Salary = $350,000
- Commitment to "help us realize the $2 million level on endowed professorship"
- Relocation expenses up to $15,000
- Laboratory and office space in two locations, Research Assistant Professors, up to two additional Research Associates, and administrative support
- A start up package of $750,000
- Moving expenses for the laboratory and senior personnel

15. After this communication, the University of Mississippi embarked on a thorough vetting process. Dr. Sarkar was honest and forthcoming during this process, which included multiple interviews and communications with Dr. Sarkar, his peers, and colleagues.

16. On March 11, 2014, the University of Mississippi extended a formal employment offer to Dr. Sarkar including the terms outlined in paragraph 14.

17. This offer letter was signed by Dr. David D. Allen, Dean and Professor, Executive Director of the Research Institute of Pharmaceutical Sciences, and supported by signatures of Chancellor Daniel W. Jones; Provost Morris H. Stocks; Vice Chancellor for Health Affairs James E. Keeton; President and CEO, Foundation Wendell W. Weakley; Dean, School of Pharmacy, Dr.

Allen; and Srinivasan Vijayakumar, the Interim Director of the Medical Center Cancer institute.

18. Dr. Sarkar's appointment was confirmed by Provost Stocks in a letter dated April 8, 2014 with "Terms and Conditions of Employment" signed by Dr. Sarkar on April 18, 2014.

19. Tenure was conferred upon Dr. Sarkar by the department and approved by The Board of Trustees of State Institutions of Higher Learning on May 15, 2014.

20. According to the terms of the offer, Dr. Sarkar was to begin active employment on July 1, 2014; his start date was adjusted to August 1, 2014 per later agreement and approval of the University of Mississippi's Provost's Office.

21. Dr. Sarkar duly submitted his resignation to Wayne State University on May 19, 2014.

22. He engaged the services of a real estate agent in Oxford, Mississippi, and made an offer on a house to move himself and his family. He put his house in Michigan on the market.

**PubPeer.com Is an Anonymous Web Site Devoted to Discussion Of Scientific Research Journal Articles after Publication**

23. PubPeer.com ("PubPeer") is a web site that describes itself as "an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists." In other words, it promotes discussion of scientific journal articles after they are published, citing frustration with the "lack of post-publication peer discussions on journal websites." [https://pubpeer.com/about]

24. Those who maintain the site are anonymous. Their URL registration is maintained by proxy. At PubPeer.com, it states only that "the site has been put together by a diverse team of early-stage scientists in collaboration with programmers who have collectively decided to remain

anonymous in order to avoid personalizing the website, and to avoid circumstances in which involvement with the site might produce negative effects on their scientific careers."

25. In keeping with the promotion of anonymity, PubPeer permits those who comment on the site to do so by registration as a user, either under their own name, a pseudonym, or a moniker such as "Peer 1" or "Peer 2;" or to make anonymous submissions without any registration.

26. PubPeer also publishes terms of service [https://pubpeer.com/misconduct]. Among these terms include:

- "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 cite the example, "What none of us can verify is any conclusion regarding precisely how or why an apparent instance of misconduct occurred. In particular, the state of mind or the intention of a researcher is not a verifiable fact."

- They add, "Comments based upon personal knowledge or hearsay are unacceptable."

- 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]

27. In another portion of the site [https://pubpeer.com/about], PubPeer states: "[F]abrication of data is very serious. Mixing up figure labels or making a small logical error in a complex interpretation are obviously both common and excusable."

28. To maintain these standards, the site states ["In order to keep discussion factual and minimise legal risks for everybody, we reserve the right to remove or edit comments that do not

conform to these guidelines or in our judgement expose us and you to legal risk in other ways." [https://pubpeer.com/misconduct]

29. PubPeer cautions, "Depending on the quantity of submitted comments it can take up to a week for "the system" to screen these comments. Comments are screened for content and spam. Only comments that discuss directly the data of the paper are allowed: **If your comment is a personal attack, rumor, or compliment it will never appear**." [https://pubpeer.com/faq, emphasis added]

30. PubPeer's FAQ section states flatly, "The site will not tolerate any comments about the scientists themselves." [https://pubpeer.com/faq]

**"Research Misconduct" is Strictly Defined by Federal Regulations and Has Extremely Serious Consequences**

31. "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.
>
> (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)]

33. Potential consequences from the U.S. Department of Health and Human Services, National Institutes of Health [“NIH”] include, but are not limited to:

- debarment from eligibility to receive Federal funds for grants and contracts,
- prohibition from service on PHS advisory committees, peer review committees, or as consultants,
- certification of information sources by the respondent that is forwarded by the institution,
- certification of data by the institution,
- imposition of supervision on the respondent by the institution,
- submission of a correction of published articles by the respondent, and
- submission of a retraction of published articles by the respondent.

34. NIH may take further administrative action regarding grants to the researcher, including:

- modification of the terms of an award such as imposing special conditions, or withdrawing approval of the PI or other key personnel,
- suspension or termination of an award,
- recovery of funds, and
- resolution of suspended awards.

35. In addition, the researcher’s institution (university) may impose additional penalties, such as loss of employment, reassignment of personnel, and imposition of a mentorship program.

36. Accordingly, any public accusation of “research misconduct” can, for all intents and purposes, be a career death sentence to a researcher.

**Numerous Anonymous Statements Were Posted On PubPeer About Dr. Sarkar That Violated Their Terms of Services, Were False, Spread Rumors, Disclosed Allegedly Confidential Information, and Accused Him of Research Misconduct**

37. PubPeer posted numerous statements about Dr. Sarkar that violated their own strict terms of service, and called into question whether any screening process was employed before posting.

38. The reason for PubPeer's in adequate screening may be gleaned from their own online admission: "The truth is that there a lot of things we would like to do/change with PubPeer but we are scientists focusing on running experiments and have little time/expertise to focus on PubPeer." [https://pubpeer.uservoice.com/forums/188932-general/suggestions/5330661-force-all-users-to-log-in]

39. Regardless of the reason(s), many statements that were posted about Dr. Sarkar not only violated PubPeer's terms of service, but were false, spread rumors, disclosed allegedly confidential information, and either implied or outright accused Dr. Sarkar of research misconduct. These statements were defamatory, and included but were not limited to the following:

40. At and commencing from *"Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells"* **[**https://pubpeer.com/publications/16546962]

a. In this discussion, "Peer 1's" commentary begins with an invitation for the reader to compare certain illustrations with others. But then an unregistered submission links to another page, where someone sarcastically asserted that a paper "[Used] the same blot to represent different experiment(s). I guess the reply from the authors would be inadvertent errors in figure preparation."

b. Perhaps that same unregistered submission complains, "You might expect the home institution to at least look into the multiple concerns which have been rasied." *(sic)* This statement is defamatory. Given the regulatory scheme described above that requires such investigations only where there are "good faith" complaints of "alleged research misconduct" [deliberate fabrication, falsification, or plagiarism], this unknown author has accused Dr. Sarkar of deliberate misconduct.

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."

d. The discussion that follows attack's Dr. Sarkar's character and expresses an invitation for his current employer (Wayne State), his potential future employer (the University of Mississippi), the National Institute of Health, and even the Department of Defense to investigate and take negative action against Dr. Sarkar:

**Unregistered Submission:**
(June 19th, 2014 1:11pm UTC)

Talking about the Board of Governors, see this public info

http://prognosis.med.wayne.edu/article/board-of-governors-names-dr-sarkar-a-distinguished-professor

**Peer 2:**
(June 19th, 2014 7:52pm UTC)

"currently funded by five National Institutes of Health RO1 grants"

That probably works out at about $200k per PubPeer comment. I should think that NIH must be pretty happy with such high productivity.

**Unregistered Submission:**
(June 20th, 2014 9:44am UTC)

just letting you know that the award for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange http://www.umc.edu/news_and_publications/thisweek.aspx?type=thisweek&date=6%2F9%2F2014 [*link is to the University of Mississippi site announcing Dr. Sarkar's hire*]

**Unregistered Submission:**
(June 20th, 2014 5:30pm UTC)

The last author is now correcting "errors" in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999-2014), which were all posted in PubPeer.

**Peer 2:**
(June 20th, 2014 6:39pm UTC)

From the newsletter:

"Sarkar has published more than 525 scholarly articles"

... nearly 50 of which have attracted comments on PubPeer!

It's not hard to imagine why Wayne State may not have fought to keep him. And presumably the movers and shakers at the University of Mississippi Medical Center didn't know that they should check out potential hires on PubPeer (they just counted the grants and papers). I wonder which institution gets to match up NIH grants with papers on PubPeer.

It can only be a matter of time, grasshopper, but that time may still seem long. You saw it first on PubPeer.

...

**Unregistered Submission:**
(July 5th, 2014 12:58am UTC)

From a look at this PI's funding on NIH website it seems this lab has received over $13 million from NIH during the last 18 years. An online CV shows he has received DOD funds as well, bringing the federal fund total close to $20 million. Why isn't the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong? Figures, tables could be made-up or manipulated as well.

> The problems on PubPeer is for about 50 papers-all based on image analysis. That is just 10% of the output from this lab (or $2 million worth of federal dollars). What about the other 90%? Sadly this is what happens when research output becomes a numbers game. An equivalent PI would be happy to have just 50 high impact papers properly executed, that moves the research field forward. This lab has 500; but now it will be very difficult to figure out the true scientific value of any of them. Sad!

41. At https://pubpeer.com/publications/16546962 there are comments that conclude that certain figures are "identical" to others, accusing him of research misconduct.

42. At https://pubpeer.com/publications/21680704 there are comments that conclude that certain figures show "no vertical changes," are the "same bands," and are "identical" to others, also accusing him of research misconduct.

43. At https://pubpeer.com/publications/22806240, there are comments that state: "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.

44. At https://pubpeer.com/publications/2D67107831BCCB85BA8EC45A72FCEF, another discussion takes place among anonymous posters, accusing Dr. Sarkar of "sloppiness" of such magnitude that it calls into question the scientific value of the papers. The comments further demand a "correction" with a "public set of data to show that the experiments exist," falsely stating that the data were false and that the experiments were fabricated.

45. An unregistered submission on the URL as #44 above doubts that the authors have taken "physics" and that they have decided to "show the world" fabricated data. The same, or perhaps a different unregistered submission concludes: "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."

46. At https://pubpeer.com/publications/21680704, *"Inactivation of AR/TMPRSS2-ERG/Wnt signaling networks attenuates the aggressive behavior of prostate cancer cells,"* accusations include “no vertical changes ... problematic,” and “same image.”

47. On July 24, 2014, at https://pubpeer.com/publications/22806240, *"Activated K-Ras and INK4a/Arf deficiency promote aggressiveness of pancreatic cancer by induction of EMT consistent with cancer stem cell phenotype,"* a comment made from “Peer 3” contains the comment “There seems to be a lot more "honest errors" to correct,” with the quotes communicating that they were not honest errors.

48. At https://pubpeer.com/publications/88B8619C6BD964F6EDDD98AD8ECE47, *"Inhibition of Nuclear Factor Kappab Activity by Genistein Is Mediated via Notch-1 Signaling Pathway in Pancreatic Cancer Cells,"* a discussion takes place between an unregistered submitter and “Peer 1,” accusing significant misconduct, as follows:

> **Unregistered Submission:**
> (March 29th, 2014 11:20pm UTC)
>
> The last author has more than 20 papers commented in Pubpeer.
>
> **Peer 1:**
> (March 30th, 2014 10:07am UTC)
> "The last author has more than 20 papers commented in Pubpeer. "
>
> He's been very productive.
>
> Presumably the journals know and his university knows. How long would it have taken for you to find out from them? Still counting.
>
> **Unregistered Submission:**
> (May 17th, 2014 7:38pm UTC)
>
> An Erratum to a report this previous PubPeer comment has been published by the authors in Int J Cancer. 2014 Apr 15;134(8):E3. In the erratum, the authors state that: “An error occurred during the creation of the composite figure for Fig-5B (Rb) and Fig-6B (I?B?) which has recently been uncovered although it has no impact on the overall findings and conclusions previously reported”

Not so fast!

See additional concerns (band recycling, not addressed in Erratum) in Figure 4A and Figure 6; here:

http://imgur.com/LVa2cVc
http://i.imgur.com/4ARd2Mp.png
http://i.imgur.com/miK0HGw.png

Based on these issues, can we agree with the authors that "an ERROR occurred during the creation of the composite figures" and that these (and previous "errors") have "NO IMPACT on the overall findings and conclusions previously reported"?

49. At https://pubpeer.com/publications/0189A776A6094A60759DB718F9C535, *"Foxm1 Is a Novel Target of a Natural Agent in Pancreatic Cancer,"* there are two comments that seem to be finishing each other's thought:

**Unregistered Submission:**
(July 23rd, 2014 6:37pm UTC)

FH Sarkar has never replied to any of the Pubpeer comments.

**Peer 1:**
(July 23rd, 2014 10:31pm UTC)

but if we send our concerns to his institution and the journals involved, hopefully there will be changes...

50. The dialogue set forth in #49 above urges the PubPeer "community" to target Dr. Sarkar, and contains a false statement, as the Plaintiff has previously replied to PubPeer comments [November 10, 2013 submission apologizing for the inadvertent error and promising a correction at this page: https://pubpeer.com/publications/170E31360970BE43408F4AC52E57FD, *"CXCR2 Macromolecular Complex In Pancreatic Cancer: A Potential Therapeutic Target In Tumor Growth."*]

51. The interaction between anonymous posters in the paragraphs above suggests that multiple users are independently conversing about Dr. Sarkar and making false accusations about

him. On information and belief, these are from the same person pretending to have a dialogue with someone else, or persons working in concert.

52. For example, a "dialogue" between two allegedly different posters took place on July 24, 2014. These posters, "Peer 1" and "Unregistered Submission," each posted in the middle of the night, one responding to the other just 56 minutes later. See: https://pubpeer.com/publications/A3845DA138FC83780CB5071ED74AEC, *"Concurrent Inhibition Of NF-Kappab, Cyclooxygenase-2, And Epidermal Growth Factor Receptor Leads To Greater Anti-Tumor Activity In Pancreatic Cancer."* This is either a very odd coincidence that two scientists were independently reading the same page regarding Dr. Sarkar (in the example stated in this paragraph, a page regarding a 2010 paper that at the time had only had 151 views) – on the same day, in the middle of the night; or drawing a reasonable inference from these facts, it's the same person feigning a dialogue; or two persons working in concert with one another.

53. These probably fake dialogues are an attempt to falsely communicate that there are more scientists concerned about Dr. Sarkar, and more persons communicating accusations, than there actually are. This is significant because there are so many criticisms of Dr. Sarkar that rely on the sheer number of PubPeer comments as an indication that he must be engaged in misconduct. See, for example, the examples cited at paragraphs 40 (d) and 48, above.

54. Another example of a tactic to artificially increase accusations of misconduct is to make a single comment on old papers. Similar to what is stated in paragraph 53 above, this too is significant because there are so many comments that rely on the sheer number of *papers with comments* on PubPeer (as opposed to just the total number of comments, *cf.* ¶ 53) to indicate misconduct:

a. There are two comments at this page: https://pubpeer.com/publications/5A875EBFF7D16C8CCE342257412E5B, *"B-DIM*

*Impairs Radiation-Induced Survival Pathways Independently Of Androgen Receptor Expression and Augments Radiation Efficacy in Prostate Cancer."* These two comments are in April and July, 2014, concerning a 2012 paper with no previous comments. This indicates someone intentionally seeking to increase the number of papers with comments on PubPeer.

b. Below is a comment simply inviting the reader to perform a search on Dr. Sarkar, at https://pubpeer.com/publications/58FE2E47C6FEB3BE00367F26BF7A83, *"P53-Independent Apoptosis Induced By Genistein In Lung Cancer Cells."* The comment has nothing at all to do with that 1999 paper, but instead is intended for the reader to search and see how many of Dr. Sarkar's papers have been commented about on PubPeer:

> **Unregistered Submission:**
> (April 21st, 2014 1:33am UTC)
>
> 1999-2014 here:
> https://pubpeer.com/search?q=Sarkar+FH

c. Another comment was made on July 24, 2014 at 7:04 AM from "Peer 1" at https://pubpeer.com/publications/997E578FC0B61F6BAE1974D4051157, *"Mitochondrial Dysfunction Promotes Breast Cancer Cell Migration and Invasion through HIF1α Accumulation via Increased Production of Reactive Oxygen Species."* This doubled the amount of comments on this 2006 paper.

d. A July 13, 2014 comment was made about a 2005 paper that previously had no comments: https://pubpeer.com/publications/6B44D6D4111B59BAB78E642C8D1758, *"Molecular Evidence for Increased Antitumor Activity of Gemcitabine by Genistein in Vitro and in Vivo Using an Orthotopic Model of Pancreatic Cancer."*

e. 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.

55. The comment that was made [as set forth in paragraph 54 (d)] appears innocuous on its face, merely stating that one illustration appears to be the same as another one, but "flipped." This would meet PubPeer's guidelines that it was permissible to state that one illustration appears the same as another. The comment is as follows:

> **Unregistered Submission:**
> (July 13th, 2014 6:26pm UTC)
>
> Compare Fig. 3B and Fig. 3D [AT
> http://cancerres.aacrjournals.org/content/65/19/9064.full.pdf+html]

> When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357.

56. However, while that comment communicates that these are the same illustration, they are in fact not – they are clearly different illustrations to the untrained eye. As such, this is another false accusation of research misconduct. While some PubPeer comments do point out illustrations that appear similar, others like this example are not. Accordingly, the comment set forth in this paragraph is false, made in bad faith, and defamatory.

57. To put the false comments publicly communicated on PubPeer in perspective, let it be stated emphatically: **Dr. Sarkar has *never* been found responsible for research misconduct**. He has published more than 533 papers. He has, to date, not had one retracted by a journal. For a tiny handful – less than 2% of his published total – he has voluntarily submitted errata. Of these errata, half have been published; for the other half, decisions from the journals are pending. These are unremarkable numbers given Dr. Sarkar's prodigious output, and are quite within the normal range of errata, if not low. For example, one recent publication estimated that error rates in cancer research articles averages 4%: "Together, JCO and JNCI published 190 errata, for an error rate of 4% ± 1% (standard deviation)." The article even noted this was "likely an underestimate." Dr. Sarkar's error rate is below this average. [Molckovsky, A. et al., *"Characterization of Published Errors in High-Impact Oncology Journals,"* Current Oncology 18.1 (2011): 26-32]

58. In addition to the false allegations of misconduct, another area of concern is that a poster disclosed making a complaint to Wayne State University about Dr. Sarkar [see paragraph 40 (c)]. Even though that same poster quoted WSU's response concerning the strict confidentiality of such issues, it did not stop that person from making the posting public.

59. As such, there is no privilege. As one court has 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).*" [*Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013)]

60. By posting about that complaint, that poster has lost any privilege s/he may have previously enjoyed from making any good faith, private confidential complaint. [E.g. *Mauvais-Jarvis,* Id.]. This is generously assuming, for the sake of pleading, that given the large amounts of defamatory public commentary about Dr. Sarkar, that any such complaint could be characterized as made in good faith, as required by federal regulation for allegations of research misconduct.

61. As self-described research scientists themselves, PubPeer should also know of the strict confidentiality associated with complaints to research institutions. Nonetheless, they allowed an anonymous, unregistered poster to disclose this confidential fact. Even more recklessly, they allowed this to be posted with no verification of whether such an investigation had actually taken place, or whether there had been any relevant findings against Dr. Sarkar. In short, by PubPeer allowing the communication to stand as fact, and otherwise violating its own internal policies and guidelines in multiple ways as alleged herein, PubPeer has also lost any privilege it may have to defend itself from a subpoena for the identity of the posters at issue in this case.

62. PubPeer itself is also artificially inflating the number of comments on Dr. Sarkar's papers. For example, a search for Dr. Sarkar's publications shows a list of his research articles along with the alleged number of comments each article has on PubPeer, but the numbers are often wrong. For example, *"Down-regulation of Notch-1 contributes to cell growth inhibition and*

*apoptosis in pancreatic cancer cells"* is stated to have 18 comments, but after clicking on the link, there are only six [https://pubpeer.com/publications/8EB4592F23B61CC3EE7CF29A7522AF].

63. Until such time as further discovery may uncover a connection between the hosts of PubPeer and those who have defamed Dr. Sarkar, and/or a good faith basis for claiming liability against PubPeer, Plaintiff acknowledges that the Community Decency Act, particularly the immunity provisions of § 230, may make PubPeer itself immune from suit.

64. Although PubPeer has since removed some of the allegedly defamatory comments, it has done so well after Plaintiff has suffered the greatest harm from its postings. In addition, PubPeer's violation of its own standards and disclosure of a confidential complaint when it allowed these postings are among the factors this court should examine – in addition to the posters' own defamatory, tortious, and bad faith conduct - in order to deny PubPeer any claim in law or equity that it may have to quash a subpoena for the poster's or posters' identities. [See also, e.g., *Ghanam v. Does*, 303 Mich App 522 (2014)]

**Defendants Sent the False, Defamatory, and Unprivileged Postings from PubPeer to The University of Mississippi and They Terminated Dr. Sarkar's Employment Just Weeks Before it was to Begin**

65. Dr. Larry Walker, the Director of the National Center for Natural Products Research at the University of Mississippi Cancer Institute, was the person with whom Plaintiff had primary communications at that University concerning his job offer.

66. As noted in more detail above, at paragraphs 16 – 20, the University of Mississippi extended a formal employment offer to Dr. Sarkar including the terms outlined in paragraph 14, and he accepted that offer. It was confirmed and tenure conferred upon Dr. Sarkar, and he was to begin active employment on July 1, 2014, later adjusted by mutual agreement to August 1, 2014.

67. However, in a letter dated June 19, 2014 – just eleven days before Dr. Sarkar was to begin his active employment – Dr. Walker rescinded that employment, as additionally confirmed by the Chancellor Jones on June 27, in effect terminating Dr. Sarkar before he'd even begun. Dr. Walker's June 19, 2014 letter cited PubPeer as the reason, stating in relevant part that he had "received a series of emails forwarded anonymously from *(sic?)*PubPeer.com, containing several posts regarding papers from your lab. These were also sent at about the same time to Dr. Kounosuke Watabe, Associate Director of Basic Sciences for the Cancer Institute at the University of Mississippi Medical Center. I learned yesterday that several were sent on the weekend of 14 June to Dr. David Pasco, Assistant Director of the National Center for Natural Products Research."

68. Dr. Walker added, "At this point, we cannot go forward with an employment relationship with you and your group. With these allegations lodged in a public space and presented directly to colleagues here (I am not sure of the scope of the anonymous distribution), to move forward would jeopardize our research enterprise and my own credibility."

**Defendant(s) Distributed Defamatory Postings**
**Throughout the Wayne State Research Community Falsely Communicating**
**That Dr. Sarkar Was Subject of a Senate Investigation**

69. After being rejected by Mississippi, upon settling in to resume his work at Wayne State, sometime in the first or second week of July, 2014, Dr. Sarkar was stunned to find that someone had widely distributed – in mailboxes throughout the Medical Center there - a screen shot from PubPeer showing the search results and disclosing the number of comments generated for each research article listed on the page.

70. In the upper left corner of the document is a header which is designed to make the document appear as if it is from the National Institute of Health; it reads: "6/9/2014 // .rassle./.O./ORI/e.hibit 1/45 ORI ..S." Additionally, in large letters diagonally across the page, as

if it were stamped, are the words: ACADEMIC EXPRESSION OF CONCERN; and under that, also diagonal, the words: GRASSLEY NIH/ORI/371-xx-xxx/folio A/exhibit C 1/45 [Exhibit A]

71. Charles Grassley is a Senator from Iowa who is well known to have taken an interest in National Institute of Health matters, including research fraud.

72. The clear inference from this document is that Sen. Grassley was investigating Dr. Sarkar and that the PubPeer postings were evidence in that investigation.

73. In fact, that is completely false. This was verified by a WSU inquiry to the NIH's Office of Research Integrity, and undersigned counsel's own investigation with Sen. Grassley's staff, which included discussions with three members of Sen. Grassley's special counsel.

74. Distribution of this doctored and false document by Defendant(s) throughout Dr. Sarkar's department was maliciously intended to embarrass him, harm him, and defame him.

75. It is highly probable, if not certain, that the same person(s) who did this despicable act is/are the same person(s) who posted on PubPeer and alleged making a complaint about Dr. Sarkar to Wayne State, and then learned of his employment with the University of Mississippi.

76. These Defendant(s) have but one aim: to bring down and destroy the career of Plaintiff by any means necessary, while hiding in the shadows of anonymity so that they themselves suffer no consequences. They deserve no protection of their identity from this court.

**Dr. Sarkar Attempted to Rescind His Resignation at Wayne State University But Lost His Tenure in the Process**

77. Having abruptly lost his expected job with the University of Mississippi just weeks before he was set to begin, and also having already submitted his resignation to Wayne State University, Dr. Sarkar was facing a dilemma of grave and immediate concern to him and his family

- having gone from his choice of two prestigious tenured positions at major research universities, to zero – with great uncertainty about his immediate employment future.

78. He attempted to rescind his resignation with Wayne State University, on June 20, 2014. In Michigan, a public entity is under no obligation to rescind a resignation at the request of the employee. See, e.g., *Schultz v. Oakland County et al.*, 187 Mich App 96 (1991), holding that a public employee's resignation is effective as soon as it is submitted.

79. Nonetheless, in apparent recognition of Dr. Sarkar's many years of contributions to its institution, Wayne State did allow him to do so in this instance – but only for a one year appointment through July 30, 2015, and in a *non-tenure track* position as a Distinguished Professor – making such an offer on August 11, 2014.

**PubPeer Refuses Demands to Disclose Identity of Posters**
**But "Outs" Dr. Sarkar**

80. On July 7, 2014, Plaintiff's undersigned counsel sent PubPeer (via a "contact" portal on their web site that supported attachments) a letter expressing concerns set forth above, as well as demands for retraction, record retention, and to disclose the identity of the posters of the comments described above.

81. While PubPeer did not respond to that letter, they did remove some of the comments at issue from their website.

82. However, that same day or the next day, someone sent screen shot copies of PubPeer postings to the NIH/ORI and to the Detroit *Free Press*, a major daily newspaper.

83. Someone from the *Free Press* attempted to contact Dr. Sarkar for comment.

84. Counsel wrote PubPeer on July 9 to express concern that immediately after counsel's July 7 letter, PubPeer screen shots were sent to the NIH/ORI and the *Free Press.*

85. PubPeer did not reply.

86. Counsel wrote a letter again asking for communication regarding the above issues, and again delivered it via the PubPeer web portal on July 24, 2014.

87. This time PubPeer responded, through counsel on July 29, 2014, denying liability and stating in part:

> Anonymity is essential to the PubPeer.com's mission to foster robust post-publication peer review, because it allows scientists to debate the merits of published research without fear of recrimination. PubPeer.com therefore rejects your demand for the identities of its contributors and would move to quash a subpoena, should you turn to legal process to obtain them.

88. On August 22, 2014, PubPeer posted a thread about Dr. Sarkar's letters to PubPeer, but without identifying Dr. Sarkar. [See "*PubPeer's first legal threat,*" [https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb14545].

89. On September 22, 2014, PubPeer publicly identified Dr. Sarkar as the scientist making the legal threat [Id.]. Furthermore, PubPeer released information contained in the demand letters written by Plaintiff's counsel. This "outing" resulted in media interest and several articles about the situation and issues described in this lawsuit.

90. To date, the "outing" of Dr. Sarkar is the only exception PubPeer has ever made to its policy of otherwise assuring the anonymity of users and the protection of the privacy of those who communicate with PubPeer. [See, e.g., www.pubpeer.com/FAQ; www.pubpeer.com/about; and http://blog.pubpeer.com/?p=15, PubPeer's counsel's July 29, 2014 letter, *inter alia*].

91. The outing was done without consent and followed PubPeer's attorney's September 9, 2014 letter to Plaintiff's counsel, warning that any public posting regarding Dr. Sarkar's legal claim (such as a request for retraction) would attract media attention, "influential people," and "focus a great deal of attention on the validity of his public research."

92. In light of these statements by PubPeer's counsel, the subsequent "outing" of Dr. Sarkar appears to be made in bad faith, and in retaliation for Dr. Sarkar's privately communicating a potential legal claim to PubPeer.

**Count I – Defamation**
**[Defendants Doe(s)]**

93. Defendant(s) John and/or Jane Doe(s) [hereafter "Does"] made certain public statements to third parties that were false, including but not limited to those detailed in paragraphs 37-79 above.

94. "Does" made these statements intentionally and maliciously, knowing that they were false, and/or with reckless disregard of the statements' truth or falsity, and/or at least negligently.

95. The statements were not privileged, not opinion, not truthful, and wholly unjustified.

96. The statements were false and defamatory concerning the Plaintiff, and/or they were crafted to falsely indicate that there were wholly independent dialogues among research scientists on PubPeer, and to falsely inflate the number of comments.

97. The statements caused special harm, in that they substantially interfered with Plaintiff's employment opportunity with the University of Mississippi, and his employment with Wayne State University.

98. The publication of these false statements has otherwise caused Plaintiff great damages, as stated herein and below.

**Count II - Intentional Interference with Business Expectancy**

99. Plaintiff had a valid business expectancy with the University of Mississippi.

100. "Does" knew of this business expectancy.

101. "Does" intentionally interfered with this business expectancy by sending communications in the form of PubPeer screen shots to various individuals at the University of Mississippi, as alleged above, particularly at paragraphs 65 – 68.

102. These communications were defamatory, illegal, unethical, fraudulent, and/or false, as set forth above. Moreover, the statements on PubPeer were crafted to falsely indicate that there were wholly independent dialogues among research scientists, and to falsely inflate the number of comments.

103. They were done with malice and without any justification except for the purpose of inducing the University of Mississippi to terminate Dr. Sarkar's employment with them.

104. The communications did in fact induce the University of Mississippi to terminate Dr. Sarkar's employment.

105. This termination caused Dr. Sarkar great damages, as alleged herein.

**Count III - Intentional Interference with Business Relationship**

106. Plaintiff had a valid continuing business relationship with Wayne State University.

107. "Does" knew of this business relationship.

108. "Does" intentionally interfered with this business expectancy by making false and unprivileged communications various individuals at Wayne State University and the local media, including but not limited to (a) those statements set forth in 37 – 64 and 69 – 76, including (b) PubPeer screen shots which falsely communicated that Plaintiff was subject of a special investigation involving Senator Charles Grassley.

109. These communications were defamatory, illegal, unethical, fraudulent, and/or false, as set forth above. Moreover, the PubPeer comments were crafted to falsely indicate that there were

wholly independent dialogues among research scientists on PubPeer, and to falsely inflate the number of comments.

110. They were done with malice and without any justification except for the purpose of inducing Wayne State to terminate Dr. Sarkar's employment with them.

111. The communications did in fact motivate Wayne State University, in whole or in part, to terminate Dr. Sarkar's tenure and place him on a limited, one year employment contract.

112. This termination caused Dr. Sarkar great damages, as alleged herein.

**Count IV - Invasion of Privacy (False Light)**

113. Without justification nor any authorization from Plaintiff, and in violation of federal regulations concerning allegations of research misconduct, "Does" widely distributed communications to the public, the media, and to other parties information purporting to indicate that Plaintiff was subject to investigation by his home institution, the federal government, and a United States Senator, as alleged more fully above.

114. These communications were unreasonable and highly objectionable by attributing to the Plaintiff characteristics, conduct, or beliefs that were false and placed him in a false position.

115. Nonetheless, "Does" must have known, or acted in reckless disregard as to the falsity of the published matter and the false light in which the Plaintiff was placed.

116. These unlawful actions caused great damages to Dr. Sarkar, as alleged herein and below.

**Count V – Intentional Infliction of Emotional Distress**

117. "Does" published false and doctored documents, purporting to indicate that Plaintiff was subject of a federal and/or Senatorial investigation.

118. "Does" also made false statements on PubPeer, and used tactics such as multiple user names that falsely indicated that there were wholly independent dialogues among research scientists on PubPeer, and otherwise sought to falsely inflate the number of comments.

119. "Does" distributed these statements widely as "proof" of Plaintiff's alleged misconduct.

120. This was extreme and outrageous conduct, designed specifically to tarnish Dr. Sarkar's reputation in the research community and in his workplace and intended workplace, 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.

121. This conduct was intended to inflict emotional distress on the Plaintiff, and/or made in reckless disregard as to whether such conduct would cause Plaintiff great emotional distress.

122. "Does" did in fact cause Plaintiff great emotional distress by such conduct, including but not limited to embarrassing him within his department, motivating the University of Mississippi to terminate Plaintiff's employment and tenure, Wayne State University to terminate his tenure, and otherwise damage him as set forth herein and below.

**Damages**

123. Defendants' actions were done willfully and knowingly, with reckless disregard to Plaintiff's rights.

124. Defendants' actions directly caused and proximately caused Plaintiff the following damages:

a. economic damages: including but not limited to lost wages and benefits at the University of Mississippi, Wayne State University, loss of tenure, loss of employment opportunities, loss of grant and research opportunities and income, and consequential damages as may be proven.

b. non-economic damages for the psychological harm to Plaintiff: including but not limited to embarrassment, humiliation, pain and suffering, mental and emotional distress; loss of reputation, and exemplary and/or punitive damages as may be allowed by law, to the greatest extent allowed by law.

**Jury Demand**

Plaintiff demands a trial by jury.

**Relief Requested**

***W H E R E F O R E*** Plaintiff requests this honorable court grant the following:

a. In excess of $75,000 damages against Defendant(s), as warranted by the law and the proofs, including:

   i. economic and non-economic damages as described above;

   ii. the greatest possible combination of non-economic, exemplary and/or punitive damages;

b. costs and pre- and post- judgment interest as permitted by law;

c. attorney fees as permitted by law;

d. issuance of an order to PubPeer and other entities who may have knowledge of "Does"' identities;

e. other remedies as are just, appropriate, and permitted by law or equity.

Respectfully submitted,

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

*/s/ Nicholas Roumel*

Nicholas Roumel
Attorney for Plaintiff

October 9, 2014

# EXHIBIT 2

*Sarkar v Doe*, COA Case No. 326667
PubPeer's Motion to Quash (12/10/2014)

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**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 MOTION TO QUASH SUBPOENA AND BRIEF IN SUPPORT**

I hereby certify that I have complied with all provisions of LCR 2.119(B) on motion practice.

/s/ Daniel S. Korobkin
Attorney for Moving Party PubPeer, LLC

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**MOTION TO QUASH SUBPOENA**

By this motion, PubPeer, LLC, a non-party to whom a subpoena has been directed in the above-captioned case, moves the Court to quash the subpoena, and in support of this motion states as follows:

1. PubPeer is in receipt of a subpoena requesting the production of "all identifying information . . . of all users who have posted any of the [anonymous] comments that were posted on [PubPeer's] web site that are described in [Plaintiff's] complaint." See Jollymore Aff Appx A.

2. For the reasons set forth in PubPeer's brief in support of this motion, the First Amendment protects this information from disclosure, and good cause exists to quash the subpoena.

3. As required by Local Rule 2.119(B), undersigned counsel contacted counsel for Plaintiff on December 8, 2014 to request concurrence in this motion. Concurrence was denied, thus necessitating the filing of this motion.

Accordingly, PubPeer respectfully moves this Court to quash the subpoena.

Respectfully submitted,

/s/ Daniel S. Korobkin


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** pro hac vice motions pending*

*Counsel for PubPeer, LLC*


Dated: December 10, 2014

## BRIEF IN SUPPORT OF MOTION TO QUASH SUBPOENA

### INTRODUCTION

This case concerns the First Amendment right of scientists to anonymously discuss their peers' work. The plaintiff in this suit, Dr. Fazlul Sarkar, has sued a number of anonymous users of www.pubpeer.com for defamation and related torts based on their comments on his research. Their comments included subjective opinions, occasionally sarcastic hyperbole, and stereotypically bland scientific analysis. Because the commenters are anonymous, Dr. Sarkar sought a subpoena from this Court compelling PubPeer, LLC to divulge any identifying information in its possession for the commenters. PubPeer now moves to quash that subpoena and, in so doing, to defend the right to anonymity essential to its mission and guaranteed by the First Amendment.

PubPeer was launched in 2012 by a group of scientists who felt that the merits of scientific research should be discussed openly, without fear of recrimination from other members of the scientific community. It has accomplished that mission principally by allowing the scientists who post on its site to do so anonymously. This provides them the freedom necessary to contribute candid comment and debate on research methods, developments, results, and new directions without fear that they might alienate colleagues, compromise their own careers, or poison their professional relationships. Shielded by that anonymity, PubPeer's commenters have in turn produced a steady stream of discussion and debate of the work of their peers, at times resulting in the modification or retraction of high-profile research.[1]

[1] See, e.g., Jollymore Aff ¶ 3 Appx B–C (Cyranoski, *Acid-Bath Stem Cell Study Under Investigation*, Scientific American (February 18, 2014) <http://www.scientificamerican.com/article/acid-bath-stem-cell-study-under-investigation/> (accessed December 6, 2014); Landau, *Scientist Wants to Withdraw Stem Cell Studies*, CNN (March 12, 2014) <http://www.cnn.com/2014/03/12/health/stem-cell-study-doubts/index.html> (accessed December 6, 2014).

The subpoena to PubPeer jeopardizes the anonymity essential to PubPeer's mission. Because the First Amendment protects the right to speak anonymously, however, it requires that Dr. Sarkar make a preliminary showing of merit to his claims before he may unmask PubPeer's commenters. This he cannot do for three reasons.

First, his complaint fails to plead defamation with the specificity required by law. Many of the allegedly defamatory comments are not reproduced in the complaint; many are reproduced in only unintelligibly paraphrased fragments, absent their necessary context; and those that are quoted in full are quoted without any identification of the portions asserted to be defamatory.

Second, even for those comments reproduced in the complaint, none is capable of defamatory meaning. They express opinions, sarcasm and hyperbole, or facts that, even if false, would not be defamatory. For example, many state that images used in Dr. Sarkar's papers "look similar." That sort of subjective assessment is not provably false and thus not actionable.

Finally, the balance of interests overwhelmingly favors maintaining the anonymity of PubPeer's commenters. The comments at issue are part of the scientific exchange necessary to scientific scholarship and progress. Because academic discourse inevitably involves—and requires—a competition among peers, courts have been loath to impose liability on the often-heated exchanges that result. To safeguard the breathing space required by the First Amendment, they generally require academics unhappy with their critics to respond with data and debate rather than defamation suits. This Court should do the same.

Moreover, even if Dr. Sarkar's complaint were legally adequate as pleaded, he is extraordinarily unlikely to prevail on the merits of his claims. The core of his complaint appears to be that PubPeer's commenters noted similarities between images in his papers that purported to depict the results of different experiments. PubPeer's counsel retained an expert, Dr. John

Krueger, to determine whether the images in fact represent the results of different experiments. Dr. Krueger, who performed such analyses for 20 years for the federal government's Office of Research Integrity and who pioneered the forensic tools used to compare images, arrived at an emphatic conclusion: very strong evidence suggests that the images do *not* represent the results of different experiments. See Krueger Aff ¶ 7. In other words, the premise of Dr. Sarkar's claims appears to be false, and he has not pleaded or produced any evidence to the contrary.

For all these reasons, the Court should quash Dr. Sarkar's subpoena.

## PROCEDURAL BACKGROUND

Dr. Fazlul Sarkar is a prominent cancer researcher who has published over 430 original scientific articles in peer-reviewed journals and written more than 100 review articles and book chapters. Compl ¶ 11. Around September 5, 2013, users on PubPeer's site began commenting on his papers. On July 7, 2014, Dr. Sarkar's counsel sent a letter to PubPeer demanding that many of the comments be removed and that PubPeer disclose the identities of the commenters. See Compl ¶ 80. On July 10, PubPeer's moderators removed or edited several of the comments, including those pending review before being posted. Dr. Sarkar filed this suit on October 9, against the anonymous commenters claiming defamation and related torts. On October 13, Dr. Sarkar obtained a subpoena for identifying information that PubPeer possesses for its anonymous commenters. Jollymore Aff Appx A. PubPeer now moves to quash the subpoena.

## ARGUMENT

The First Amendment limits the compelled identification of anonymous internet speakers. Before a defamation plaintiff may enforce a subpoena that would unmask an anonymous speaker, he must make a preliminary showing of merit to his claims. Under controlling Michigan precedent, that showing must at least be sufficient to survive a motion for summary disposition under MCR 2.116(C)(8). The vast majority of jurisdictions to have

considered the issue require defamation plaintiffs to also produce *evidence* sufficient to substantiate their allegations. Dr. Sarkar's claims do not pass either threshold test required to enforce his subpoena, and the subpoena should therefore be quashed.

**1. The First Amendment requires defamation plaintiffs to make a preliminary showing of merit before they may unmask anonymous speakers.**

**a. The First Amendment limits the compelled identification of anonymous internet speakers.**

The First Amendment protects the right to speak anonymously. *McIntyre v Ohio Elections Comm*, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995). The Supreme Court has long recognized that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. The Court's recognition guards the role that anonymity has played over the course of our nation's history—starting with the Federalist Papers—as "a shield from the tyranny of the majority." *Id.* at 357. The Court has been emphatic: anonymous speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* See also Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 Cato Sup Ct Rev 57, 58 (2002) ("For the Framers and their contemporaries, anonymity was the deciding factor between whether their writings would produce a social exchange or a personal beating.").

As the Michigan Court of Appeals has recognized, the "right to speak anonymously applies to those expressing views on the Internet." *Ghanam v Does*, 303 Mich App 522, 533; 845 NW2d 128 (2014).

**b. Michigan appellate courts have required defamation plaintiffs to demonstrate at least the legal sufficiency of their claims before they may unmask anonymous speakers.**

Because the Constitution safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to enlist state authority to unmask anonymous speakers through the subpoena power must make a preliminary showing of merit to their legal claims. See, e.g., *Ghanam*, 303 Mich App at 534–42 (discussing cases). Although the Michigan Supreme Court has yet to address this question, the Court of Appeals has issued two opinions regarding the showing that must be made. See *id.*; *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256; 833 NW2d 331 (2013). The *Ghanam* and *Cooley* decisions held that, before allowing the identification of anonymous speakers, courts must determine "whether the [plaintiff's] claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8)," *Ghanam*, 303 Mich App at 541, and even if so, whether "the weight of the defendant's First Amendment rights" nonetheless constitutes "good cause" to refuse to enforce a subpoena that seeks to unmask the speaker, *Cooley*, 300 Mich App at 264–66. Further, "[t]his evaluation is to be performed even if there is no pending motion for summary disposition before the court," such as when, as in this case, the recipient of the subpoena contests it. *Ghanam*, 303 Mich App at 541.

**c. The vast majority of jurisdictions to have considered the issue require that defamation plaintiffs also substantiate their allegations with evidence.**

Notably, four of the six judges in *Cooley* and *Ghanam* would have gone further. In addition to requiring that defamation plaintiffs defend the legal sufficiency of their complaint as pleaded before unmasking anonymous defendants, they would have joined the vast majority of jurisdictions that have considered the issue and have explicitly required that defamation plaintiffs substantiate their claims with actual evidence. See *Cooley*, 300 Mich App at 348 (BECKERING, J., concurring in part and dissenting in part); *Ghanam*, 303 Mich App at 540 ("[W]e agree with the

dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite*/*Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10).”). Those other jurisdictions—generally following either the New Jersey appellate court in *Dendrite Int’l, Inc v Doe*, 342 NJ Super 134, 141; 775 A2d 756 (NJ App, 2001), or the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451 (Del, 2005)—have required defamation plaintiffs to put forward evidence establishing a prima facie case of defamation. See, e.g., Levy, *Developments in Dendrite*, 14 Fla Coastal L Rev 1, 10–16 (2012) (discussing “fairly unanimous” decisions of state appellate courts).

The Michigan Supreme Court has yet to address the standard that a defamation plaintiff must satisfy before unmasking an anonymous defendant.

**2. Dr. Sarkar has not made the showing required by Michigan law before he may unmask PubPeer’s commenters.**

Under *Cooley* and *Ghanam*, the First Amendment protects the anonymity of PubPeer’s commenters if Dr. Sarkar’s claim of defamation would not survive a motion for summary disposition under MCR 2.116(C)(8). For the reasons explained below, it would not.

Under Michigan law, “[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010). To ultimately prevail on a claim of defamation, a plaintiff must establish the following elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.

*Id.*

In addition to pleading actionable defamation, "[a] plaintiff must also comply with constitutional requirements that depend on 'the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.'" *Cooley*, 300 Mich App at 262. For the reasons explained in a motion that one of the anonymous defendants will soon file, Dr. Sarkar is a limited-purpose public figure, and the commenters' discussion of the scientific research that Dr. Sarkar chose to publish is speech on a matter of exceptional public concern. As such, the commenters' speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v Phelps*, 562 US 443; 131 S Ct 1207, 1215; 179 L Ed 2d 172 (2011).

**a. In almost every instance, Dr. Sarkar has failed to plead verbatim the allegedly defamatory words in their proper context.**

Michigan law requires defamation plaintiffs to plead "the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262. This requirement ensures that courts "'may judge whether the[ allegedly defamatory statements] constitute a ground of action.'" *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 53; 495 NW2d 392 (1992), quoting Gatley, Law & Practice of Libel & Slander 467 (1924 ed.). Moreover, the requirement of specificity is a constitutional safeguard that facilitates prompt dismissal of claims directed at protected speech. See *Cooley*, 300 Mich App at 262 ("[S]ummary disposition is an essential tool to protect First Amendment rights."). To meet this standard, a defamation plaintiff must plead the particular defamatory words complained of and their connection to the plaintiff. *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 590; 349 NW2d 529 (1984).

Dr. Sarkar has not pleaded defamation with specificity.

First, his complaint cites a number of comments by reference alone, without reproducing them. See *Ghanam*, 303 Mich App at 543 (holding defamation claim "facially deficient" because

"the alleged defamatory statements were not identified in plaintiff's complaint"). This is true of the many comments he refers to by citing only a website address, without actually reproducing the allegedly defamatory text. See, e.g., Compl ¶¶ 41–44. And it is true of his claim that an unknown individual sent a "series of emails" to the University of Mississippi. See Compl ¶ 67. The complaint does not supply the text of any of those allegedly defamatory emails.

Second, for those comments actually quoted in the complaint, the vast majority are quoted in only short fragments, surrounded by Dr. Sarkar's own exaggerated characterizations. This ignores settled Michigan law that the question of whether a statement is capable of being defamatory turns on "all the words used . . . , 'not merely a particular phrase or sentence.'" *Smith*, 487 Mich at 129, quoting *Amrak Prods, Inc v Morton*, 410 F3d 69, 73 (CA 1, 2005).

For example, paragraph 41 of the complaint, which is representative, states in full: "At https://pubpeer.com/publications/16546962 there are comments that conclude that certain figures are 'identical' to others, accusing him of research misconduct." The only statement reproduced in this paragraph is a single word—"identical." On its own, that word carries no defamatory meaning, much less the suggestion of research misconduct that Dr. Sarkar ascribes to it. It is not even apparent from the single-word quotation that the comment concerns Dr. Sarkar or his research, as it must for his claim to proceed. See *Ledl*, 133 Mich App at 590.

Similarly, the complaint refers to a "screen shot from PubPeer" apparently distributed at Wayne State University. Compl ¶ 69. The complaint does not reproduce that screenshot, but it claims that the screenshot, along with two lines of text quoted in the complaint, implicitly suggest "that Sen. Grassley was investigating Dr. Sarkar and that the PubPeer postings were evidence in that investigation." *Id.* ¶ 72. Absent the screenshot and the full text that accompanies it, it is impossible to determine whether Dr. Sarkar's claim of defamation by implication is

legally adequate. See *Locricchio v Evening News Ass'n*, 438 Mich 84, 122; 476 NW2d 112 (1991) ("[C]laims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.").

Dr. Sarkar's complaint is full of similar examples of fragmentary quotations that carry little meaning—let alone a defamatory one—on their own. See, e.g., Compl ¶¶ 40(a)–(b), 42–47. And yet context is critical in this case. Paragraph 44, for example, alleges that PubPeer commenters accused Dr. Sarkar of "sloppiness." Even if that word were capable of defamatory meaning, which it is not (see Part 2.b.ii.), the full comment in its proper context belies the complaint's crude characterization. That word appears in the middle of a paragraph explaining the importance of images when used as scientific data, and speaking to broader concerns with the "sloppiness" in "data quality control and data assurance" in labs and in peer review. See Jollymore Aff ¶ 9 (full comment cited in paragraph 44 of the complaint).[2]

Finally, even for those comments quoted in full in the complaint, Dr. Sarkar generally has not identified which portions of the comments are materially false and defamatory. The Court of Appeals' decision in *Royal Palace Homes* is instructive. There, building contractors claimed that news broadcasts had implied that they were "illegally and/or improperly operating" their business and that they were "involved in unprofessional and unworkmanlike construction practices." 197 Mich App at 50. In support, the contractors appended transcripts of the broadcasts, "but failed to identify any allegedly defamatory statements within them." *Id.* This,

[2] The full text of each of the comments referred to in the complaint, as those comments existed when Dr. Sarkar's counsel first contacted PubPeer, is attached to the affidavit of Nicholas J. Jollymore. The Court may consider the full text for two reasons. First, as explained above, the full context of the statements is necessary to determine whether they are capable of defamatory meaning. See also *Gustin v Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) ("[A] publication must be considered as a whole."). Second, as in *Ghanam*, this Court may "analyze the alleged defamatory statements to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile." 303 Mich App at 543.

the court held, was inadequate: "Defendants do not bear the burden of discerning their potential liability from these transcripts. Plaintiffs must plead precisely the statements about which they complain." *Id.* at 56–57. The same is true here. Paragraph 40(d) of the complaint, for example, quotes a page and a half of commentary without identifying which portions Dr. Sarkar believes to be false and defamatory. Paragraph 48 is similar.

Dr. Sarkar may respond that his grievance is obvious, given the many comments noting similarities between images in his research papers. See generally Jollymore Aff ¶¶ 4–21. With a single exception, however, notably absent from his complaint is any claim that those comments noting similarities are *false*.[3] See Compl ¶¶ 42, 46. In fact, Dr. Sarkar concedes that some undisclosed portion of the images analyzed by PubPeer's commenters are similar: "While some PubPeer comments do point out illustrations that appear similar, others like this example are not." *Id.* ¶ 56. He also concedes that he has "apologiz[ed] for [an] inadvertent error," *id.* ¶ 50, in response to at least one PubPeer comment identifying similarity. And, indeed, he and/or his co-authors have corrected at least one image that PubPeer commenters had identified as similar to another. Compare *id.* ¶ 43 (link to comment noting similarity), with http://onlinelibrary.wiley.com/doi/10.1002/jcp.24551/pdf (replacing the image analyzed by PubPeer commenters).

In the face of the complaint's concession that some of the PubPeer comments claiming similarity are true, Dr. Sarkar's vague claim that some other, unspecified number are false is legally inadequate. He must specifically identify the comments he believes to be defamatory.

[3] The single exception comes in paragraph 56, in which Dr. Sarkar alleges that two images labeled "similar" by a commenter "are clearly different illustrations to the untrained eye." As explained in Part 2.b.i., that claim of similarity is incapable of defamatory meaning.

The requirement of specificity is especially important in this case. The complaint repeatedly alleges that PubPeer's commenters have accused Dr. Sarkar of "research misconduct" as that term is defined by federal regulation. *See* Compl ¶ 39 ("many statements that were posted about Dr. Sarkar . . . either implied or outright accused Dr. Sarkar of research misconduct"); *id.* ¶¶ 31–36 (extensive discussion of federal regulations governing "research misconduct"). The complaint specifically states that "Dr. Sarkar has *never* been found responsible for research misconduct." *Id.* ¶ 57 (emphasis in original). But PubPeer's commenters have not accused Dr. Sarkar of "research misconduct" or of having "been found responsible for research misconduct."[4] The question remains whether Dr. Sarkar has pleaded specific comments posted on PubPeer's site that are provably false and defamatory. He has not.

For these reasons alone, the complaint fails the threshold requirement of specificity.

**b. No actionable words were pleaded.**

Even assuming the complaint is pleaded with specificity, the comments Dr. Sarkar complains of are not capable of defamatory meaning. "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. To be actionable, an allegedly defamatory statement "must be 'provable as false.'" *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998), quoting *Milkovich v Lorain Journal Co*, 497 US 1, 17–20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). It may not be mere "sarcas[m]," *Ghanam*, 303 Mich App at 550, "rhetorical hyperbole," *Greenbelt Co-op v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), or "[e]xaggerated language," *Hodgins v Times Herald Co*, 169 Mich App 245, 254; 425 NW2d 522 (1988). And it must convey a materially

[4] Even if they had, "[n]umerous courts have rejected claims of falsity when based on a misuse of formal legal terminology." *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 264; 487 NW2d 205 (1992).

false fact that a "reasonable fact-finder could conclude . . . implies a defamatory meaning." *Smith*, 487 Mich at 128.

The nature and venue of the statements is also critical: "Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam*, 303 Mich App at 546–47. This is especially true for a forum like PubPeer, which hosts discussion of published articles. As the D.C. Circuit explained, "there is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." *Moldea v New York Times Co*, 306 US App DC 1, 6; 22 F3d 310 (1994). "[W]hile a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." *Id.*

Here, none of the statements cited in the complaint is capable of defamatory meaning for the reasons discussed below. Broadly speaking, the statements cited fall into three categories: (1) the initial PubPeer comments noting similarities between images used in Dr. Sarkar's papers, (2) the follow-on PubPeer comments discussing those initial comments, and (3) a handful of miscellaneous statements that will be addressed separately below.

**i. The comments claiming similarities are not actionable.**

The initial PubPeer comments that claim similarities between images used in Dr. Sarkar's papers are not actionable for two reasons.

First, those comments convey only subjective opinions, not provably false facts. Many of the comments are phrased in this general style: "When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357." Compl ¶ 55.[5] Whether two

[5] See also Jollymore Aff ¶ 5 (comment from webpage cited in paragraph 40 of the complaint: "There is another concern in this paper: Fig. 7B (Bcl-XL panel) here appears to be similar to Fig. 5A in another paper."); *id.* ¶ 14 (comment from webpage cited in paragraph 49 of the complaint:

images "look[] similar," however, is entirely a matter of subjective opinion, and thus not provably false. Even for those comments that express greater confidence in the similarity between the images being compared, see, e.g., Compl ¶¶ 41–42, 46, such comparison is inherently subjective. Visual comparisons, by their nature, invite others to conduct their own subjective evaluations. Indeed, the PubPeer commenters noting the similarities did precisely that. They invited others to compare the images, either explicitly, see, e.g., Jollymore Aff ¶ 5 ("please compare . . . ."), by directing readers to the similar images, see, e.g., *id.* ¶ 7 ("Figure 3A Image of LNCaP, BR-DIM is identical to image of VCaP, siERG + BR-DIM."), or by manually placing the similar images in a single image file to allow comparison, see, e.g., *id.* ("Check this out: same bands for different time conditions http://i.imgur.com/4qJBeS7.png http://i.imgur.com/UaeqmWb.png.").

Second, even if the comparisons conveyed provably false facts, those facts are not defamatory. They do not, as a matter of law, "'tend[] so to harm the reputation of [the plaintiff] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Smith*, 487 Mich at 113. That is because the fact of similarity between images does not, on its own, suggest any impropriety. Instead, it invites a scientific discussion. Moreover, as with a claim that two songs sound alike or that two paintings look alike, there could be any number of innocuous explanations. In fact, Dr. Sarkar and/or his co-authors have offered an innocent explanation for the similarities between two images in a paper on at least one occasion. See http://onlinelibrary.wiley.com/doi/10.1002/jcp.24551/pdf ("In Wang et al. (2013), the authors have recently discovered an inadvertent error in Figure 4B (EZH2 lane).").

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"Fig. 3A in this paper contains images that appear to be similar to those in Fig. 1B in another paper.").

For these reasons, the core comments that Dr. Sarkar complains of—those claiming similarities between images in his research papers—are incapable of defamatory meaning.

**ii. The follow-on comments are not actionable.**

The original comments noting similarities drew additional comments, but none of them is capable of defamatory meaning. They are all either (1) opinions that are not provably false, (2) sarcastic and rhetorical hyperbole, or (3) simply not defamatory as a matter of law.

First, at least seven of the follow-on comments express only opinions, and not provably false facts.[6] For example, one comment states that "The last author is now correcting 'errors' in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999–2014), which were all posted in PubPeer." Compl ¶ 40(d). The first sentence is apparently true by Dr. Sarkar's own admission, see *id.* ¶ 50, and the second expresses a hope for future action, not a false fact about Dr. Sarkar. Other comments express the view that the allegations of similarity on PubPeer warrant investigation. See, e.g., *id.* ¶ 40(d) ("An online CV shows he has received DOD funds as well, bringing the federal fund total close to $20 million. Why isn't the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong?"). But that is solely an opinion,

[6] See Compl ¶ 40(b) ("You might expect the home institution to at least look into the multiple concerns which have been rasied [sic]."); *id.* ¶ 40(d) ("The last author is now correcting 'errors' in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999–2014), which were all posted in PubPeer."); *id.* ("It's not hard to imagine why Wayne State may not have fought to keep him."); *id.* ("From a look at this PI's funding on NIH website it seems this lab has received over $13 million from NIH during the last 18 years. An online CV shows he has received DOD funds as well, bringing the federal fund total close to $20 million. Why isn't the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong? Figures, tables could be made-up or manipulated as well."); *id.* ¶ 44 ("sloppiness"; "correction"; "public set of data to show that the experiments exist"); *id.* ¶ 45 ("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.").

incapable of defamatory meaning. See *Ghanam*, 303 Mich App at 547–48 (finding internet comment containing statement "maybe I need to call the investigators?" to be "not defamatory as a matter of law"); *Varrenti v Gannett Co*, 33 Misc 3d 405, 412–13; 929 NYS2d 671 (2011) (holding that comments that "call[ed] for an investigation into the [police department's] practices" were "expressions of protected opinion").

Dr. Sarkar's complaint makes much of the use of the word "sloppiness" by one commenter as well as the phrase "public set of data to show that the experiments exist." Compl ¶ 44. Initially, those words—which are the only ones from that comment actually pleaded in the complaint—are unintelligible fragments, incapable of defamatory meaning and not even self-evidently about Dr. Sarkar. See Part 2.a. Setting that deficiency aside, the context of the comment—which is set out in full in the margin,[7] and in its even lengthier context in paragraph 9 of the Jollymore Affidavit—makes clear that it is a measured, thoughtful, and entirely subjective explanation of the importance of quality control in prepublication peer review. But even absent that clarifying context, the word "sloppiness" is wholly subjective, and the related demand for proof of the results of the experiment is incapable of defamatory meaning. See *Cole v Westinghouse Broadcasting Co, Inc*, 386 Mass 303, 311; 435 NE2d 1021 (1982) ("[T]he phrases

[7] See Jollymore Aff ¶ 9 ("Well yes, it matter a lot. The paper was published through a process of prepublication peer review of the data submitted. If these are 'only images' then the simple conclusion is that 'these are only data' and we can simply forget science and work instead in metaphysics. Beyond that, it matters even more, because if data quality control and data assurance in the lab that produced the paper are sufficiently poor that this can slip through submission, response to reviewers and then proofing, someone has their eye well off the ball.

I would be the first to hold up my hand and agree that this happens, but the minimum message is 'get your eye back on the ball' and a response to the effect that steps have been taken to prevent such sloppiness would reassure the community that the paper is in fact OK. Otherwise the conclusion of the reader can only be that these are 'only images' then the paper is of less scientific value than the holiday snaps of the authors.

So a detailed answer is required, alongside a correction and with the latter, a public set of data to show the experiments exist.").

'sloppy and irresponsible reporting' and 'history of bad reporting techniques,' when viewed in their context, could not reasonably be viewed as statements of fact.").[8] Were researchers subject to civil liability for criticizing their peers' work as "sloppy" or for demanding further confirmation of their peers' results, academic debate would be hobbled. See, e.g., Hotz, *Most Science Studies Appear to Be Tainted by Sloppy Analysis*, Wall St J (September 14, 2007) <online.wsj.com/news/articles/SB118972683557627104> (accessed November 30, 2014).

Second, at least seven of the follow-on comments express only sarcasm or rhetorical hyperbole, not actionable defamation.[9] For example, one states: "I guess the reply from the authors would be inadvertent errors in figure preparation." Compl ¶ 40(a). Even the complaint recognizes that the phrase is sarcastic. *Id.* ("someone sarcastically asserted that"). Moreover, that sarcasm does not convey any defamatory fact. To be sure, it appears to express bewilderment at the apparent similarity noted by a previous commenter. See Jollymore Aff ¶ 5 (full text of comment cited in paragraph 40 of the complaint). But that sarcasm, even if made "with the intent

[8] See also *Moldea*, 306 US App DC at 8 (holding that "sloppy journalism" not actionable when read in context); *Hassig v FitzRandolph*, 8 AD3d 930, 931–32; 779 NYS2d 613 (2004) (holding that the statement that "the environmentalists are sloppy with the data they present on local cancer rates" was "opinion, rather than fact, and therefore they are not actionable").

[9] See Compl ¶¶ 40(a), 43 ("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.'"); *id.* ¶ 40(d) ("That probably works out at about $200k per PubPeer comment. I should think that NIH must be pretty happy with such high productivity."); *id.* ("just letting you know that the award for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange. [website link]."); *id.* ("It's not hard to imagine why Wayne State may not have fought to keep him. And presumably the movers and shakers at the University of Mississippi Medical Center didn't know that they should check out potential hires on PubPeer (they just counted the grants and papers). I wonder which institution gets to match up NIH grants with papers on PubPeer. It can only be a matter of time, grasshopper, but that time may still seem long. You saw it first on PubPeer."); *id.* ¶ 45 ("physics"; "show the world"); *id.* ¶ 47 ("There seems to be a lot more 'honest errors' to correct."); *id.* ¶ 48 ("Based on these issues, can we agree with the authors that 'an ERROR occurred during the creation of the composite figures' and that these (and previous 'errors') have 'NO IMPACT on the overall findings and conclusions previously reported'?").

to ridicule, criticize, and denigrate," *Ghanam*, 303 Mich App at 550, does not support a claim of defamation. The statement must convey a provably false fact, and it does not. Similarly, another commenter, as characterized by Dr. Sarkar's complaint, "doubts that the authors have taken 'physics' and that they have decided to 'show the world' fabricated data." Compl ¶ 45.[10] Initially, the actual comment nowhere claims that Dr. Sarkar's data was "fabricated." That embellishment is an invention of the complaint.[11] In any event, the comment is unmistakable hyperbole. It may be belittling, but it is nowhere defamatory. The same is true of the comment that begins with "It's not hard to imagine why Wayne State may not have fought to keep him," and ends with "It can only be a matter of time, grasshopper, but that time may still seem long." *Id.* ¶ 40(d). If the sarcasm were not evident enough in the first sentence, the final one leaves no doubt. See *Ghanam*, 303 Mich App at 549 ("The use of the ':P' emoticon makes it patently clear that the commenter was making a joke.").

Finally, a number of the follow-on comments convey facts that are simply not defamatory. For example, the complaint quotes one commenter's claim to have informed the president of Wayne State University of the statements made on PubPeer's site. Compl ¶ 40(c). There is nothing defamatory about that claim. Dr. Sarkar does not allege that the fact conveyed is false, and even if it were, falsely claiming to have forwarded PubPeer's comments along would not, in and of itself, lower Dr. Sarkar in the community's estimation. In any event, the statement is privileged under the fair-reporting privilege. See *Northland Wheels Roller Skating Ctr v Detroit Free Press, Inc*, 213 Mich App 317, 327; 539 NW2d 774 (1995). From another series of comments, see Compl ¶¶ 51–54, Dr. Sarkar concludes that the apparent discussion between

[10] As with the comment using the word "sloppiness," this comment is pleaded in only an unintelligible paraphrase and is therefore legally deficient.

[11] See Jollymore Aff ¶ 9 (full text of the comment cited in paragraph 44 of the complaint).

commenters is a "fake" one, designed to "artificially increase" the number of comments on Dr. Sarkar's papers. *Id.* ¶ 53–54. Even if true, there is nothing defamatory about the number of comments on Dr. Sarkar's papers.

**iii. The three miscellaneous statements are not actionable.**

The three remaining statements that Dr. Sarkar complains of are not actionable. First, he alleges that an unknown individual sent a "series of emails" to the University of Mississippi containing several PubPeer comments concerning his papers. Compl ¶¶ 66–68. As noted above, those emails are not actionable for the simple reason that Dr. Sarkar has not pleaded the actual text of the emails. He has not, in the language of the common law, pleaded his defamation claim *in haec verba*.

Second, Dr. Sarkar alleges that an unknown individual physically distributed to mailboxes at Wayne State "a screen shot from PubPeer showing the search results and disclosing the number of comments generated for each research article listed on the page." *Id.* ¶ 69. The individual apparently added other text to the document that, the complaint asserts, falsely implied that Dr. Sarkar is under investigation by U.S. Senator Chuck Grassley. *Id.* ¶¶ 70–73. As explained above, it is impossible to determine whether that inference is a legally actionable one, because Dr. Sarkar has not pleaded the full document. For that reason alone, his claim is deficient as a matter of law. Moreover, the only portion of the document apparently attributable to PubPeer's commenters is a screenshot showing the number of comments made on Dr. Sarkar's papers. Dr. Sarkar does not claim that it falsely reports that number. Nor would that fact, even if falsely reported, be capable of defamatory meaning.[12]

[12] Dr. Sarkar speculates that "[i]t is highly probable, if not certain, that the same person(s) who did this despicable act is/are the same person(s) who posted on PubPeer." Compl ¶ 75. But he does not allege any facts whatsoever in support of that belief.

Finally, Dr. Sarkar alleges that one commenter falsely stated that "FH Sarkar has never replied to any of the Pubpeer comments." *Id.* ¶¶ 49–50.[13] Even if technically false, this statement is simply not defamatory. The assumption underlying Dr. Sarkar's complaint is that failing to respond to internet comments suggests a cover-up, and that it is therefore defamatory to claim that Dr. Sarkar has not responded. This is not true, particularly in the informal context of anonymous internet banter. See *Dougherty v Capitol Cities Communications, Inc*, 631 F Supp 1566, 1573 (ED Mich, 1986) (denial is insufficient to infer malice in libel action because "'such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error'"). If Dr. Sarkar truly believed that his alleged failure to respond were likely to cause him harm, he likely would have responded to more than the single post he claims to have responded to. See Compl ¶ 50.

**c. The balance of interests favors the constitutional right to anonymity of PubPeer's commenters.**

Under *Cooley*, even if Dr. Sarkar's claims of defamation would survive a motion for summary disposition under MCR 2.116(C)(8), a court "may consider the weight of the defendant's First Amendment rights against the plaintiff's discovery request" in determining whether to compel the disclosure of their identities. 300 Mich App at 266. Here, the balance overwhelmingly favors maintaining anonymity.

There is more at stake in this case than the commenters' right to engage in protected speech anonymously. At stake is the freedom of academic discourse itself. The advancement of scientific knowledge depends on the ability to convey ideas without fear of retaliation.

[13] Somewhat ironically, the reply that Dr. Sarkar cites in his complaint was published on PubPeer's site anonymously, see Jollymore Aff ¶ 15 (comment from paragraph 50 of the complaint), and so it would not have been possible to verify that Dr. Sarkar had in fact replied to any of the comments.

Particularly in the sciences, where hypotheses are rigorously tested through careful experimentation, open methodologies, and peer-reviewed publications, anonymity is a critical component of robust review. Indeed, some prominent science journals employ double-blind peer review—in other words, anonymous review—to ensure honest appraisals.[14] For all these reasons, courts have been "especially careful when applying defamation and related causes of action to academic works, because academic freedom is 'a special concern of the First Amendment.'" *ONY, Inc v Cornerstone Therapeutics, Inc*, 720 F3d 490, 496 (CA 2, 2013), citing *Keyishian v Bd of Regents*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967). To subject scientific commenters to possible liability on claims as trifling as those at issue here would subvert that system and impoverish the vigorous debate necessary to scientific progress.

The court must balance these First Amendment interests against the strength of Dr. Sarkar's central claim, which is that certain commenters defamed him by noting similarities between images used in different papers he published. While the First Amendment issues are weighty, Dr. Sarkar has only a slight interest in asserting his claim of defamation. That is in part because the claims of similarity are simply not defamatory as a matter of law. See Part 2.b.i. But it is also because it is highly unlikely that Dr. Sarkar would ever be able to prove that the comments were *false*. PubPeer submits the attached affidavit of Dr. John W. Krueger to show that not only do those images appear *similar*—they very likely represent the same underlying experiments. It is unlikely that Dr. Sarkar would be able to prove the contrary.

Dr. Krueger spent 20 years at the U.S. Office of Research Integrity ("ORI") examining claims that images depicting purportedly different experiments in fact depicted the same

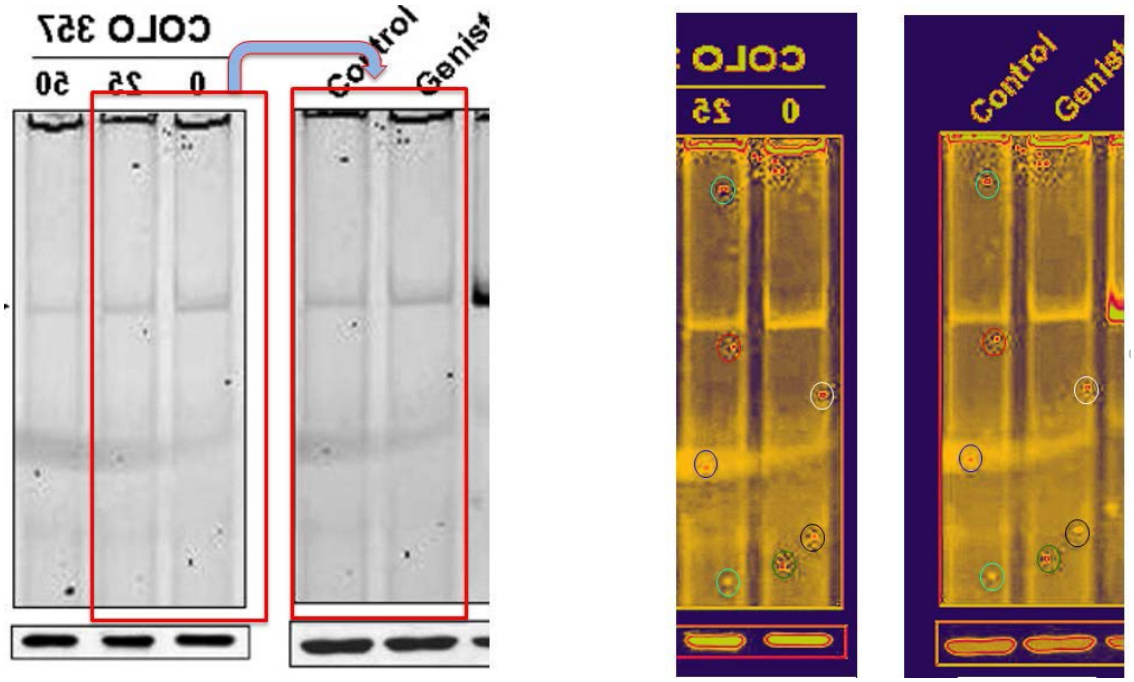
[14] The NIH is piloting a program that accepts anonymously submitted grant applications to ensure objectivity of review. While the names of individuals on the reviewing committee are available to the applicants, the identities of the first and second reviewer are not disclosed. See, e.g., <http://www.nih.gov/news/health/dec2012/od-07.htm> (accessed December 9, 2014).

experiment. Krueger Aff ¶¶ 5, 10. In this case, Dr. Krueger offered his expert opinion on just that question: whether the images identified by PubPeer's commenters depicted the same experiments, even though they purported to depict different ones. *Id.* ¶ 6. He conducted this analysis using two methods: (1) visual inspection as an expert in the field, and (2) using forensic tools that he developed during his time at ORI, including false-color enhancement. *Id.* ¶¶ 7, 28–46. Both methods focused on the subtle features visible in each image, including background details and any visible blemishes caused by the experimental procedures being used, which scientists call "artifacts." *Id.* ¶¶ 15–16, 21. In images of underlying experiments that are different, the background and the artifacts vary from image to image, because they are essentially random features. *Id.* ¶ 16. What Dr. Krueger found, both by expert visual inspection and through the use of false-color enhancement, however, was that features in the images at issue, including the background and artifacts, were common in both appearance and position. See e.g., *id.* ¶¶ 63–64, 67, 73–77, 84. These forensic evaluations led him to conclude that there was "strong support" for "the conclusion that the images [at issue] were not authentic or contained other irregularities." *Id.* ¶ 7. See also *id.* ¶ 84 ("the evidence in support of the conclusion that the images are not authentic is exceptionally strong").

Dr. Krueger's affidavit provides a detailed explanation of his analysis. Here, for the sake of example, PubPeer describes how Dr. Krueger analyzed one of the comments highlighted in the complaint (and discussed above), which states: "When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357." Compl ¶ 55. Below are graphic depictions of Dr. Krueger's results: First, on the left, are gray-scale pictures of two "Western blots," side-by-side but with one blot flipped horizontally, with red boxes drawn around the portions being compared. Dr. Krueger's visual inspection showed that the artifacts in

each blot (the dark spots) appeared the same and were in the same position. Krueger Aff ¶ 63. Second, on the right, are the same two blots shown side-by-side after false-color enhancement. For these particular blots, Dr. Krueger concluded that "[a] visual inspection of the images is sufficient to conclude that there is strong evidence to believe that these images are not authentic." *Id.* He also concluded that false-color enhancement showed that the artifacts were not randomly located, as would be expected if the images depicted different experiments, which "proves that the two images cannot be separate results from independent experimental determinations." *Id.* ¶ 67.

**Visual Comparison** **False-Color Enhancement**




Dr. Krueger performed a similar analysis for all of the PubPeer comments he reviewed, and he came to a similar conclusion with respect to all of them: that his forensic evaluation suggests—strongly in some cases, and definitively in others—that each of the pairs of figures highlighted by PubPeer's commenters depicted the same underlying experimental results, or that each of the other irregularities noted were in fact irregularities. *Id.* ¶¶ 7, 53–58, 85–86.

Under *Cooley*, the Court should balance the two competing interests at hand. On the one hand is clear constitutional protection of academic discourse. On the other hand is the remote likelihood that Dr. Sarkar could prove that statements observing similarities between images in his papers were defamatory. The balance clearly favors quashing the subpoena.

**d. Dr. Sarkar's other claims do not evade the constitutional limits on defamation claims.**

The complaint pleads a number of claims in addition to defamation: "Intentional Interference with Business Expectancy," "Intentional Interference with Business Relationship," "Invasion of Privacy (False Light)," and "Intentional Infliction of Emotional Distress." Compl ¶¶ 99–122. But 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. *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Nichols v Moore*, 396 F Supp 2d 783, 798–99 (ED Mich, 2005), aff'd, 477 F3d 396 (CA6, 2007); *Ireland*, 230 Mich App at 624–25. Consequently, Dr. Sarkar's other claims do not provide an alternate basis for unmasking the commenters.

**3. Dr. Sarkar has not met the heightened First Amendment standard required by the vast majority of jurisdictions before he may unmask anonymous commenters.**

Even if Dr. Sarkar's complaint were legally adequate, this Court should require that he substantiate his claims with evidence before compelling the identification of PubPeer's commenters. The vast majority of jurisdictions to have considered this question require such evidence to safeguard the constitutional right to anonymity. See *Ghanam*, 303 Mich App at 537 ("Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*, *Cahill*, or a modified version of those standards."). Absent such a requirement, defamation plaintiffs could successfully overcome the right to anonymity through artfully pleaded complaints, even if they had no realistic chance of proving their case.

It is true that neither *Cooley* nor *Ghanam* required the plaintiffs before them to substantiate their claims with evidence. But neither case dealt with a situation like this one, in which: (1) an expert has essentially confirmed the views that the plaintiff asserts are defamatory (that the sets of similar images depict the same underlying experiments); (2) the plaintiff thus has no prospect of success unless he can show that the expert's view is provably false and, in fact, false; and (3) the only evidence that could arguably approach that showing is the original data from the plaintiff's experiments, which are in his sole possession and yet not proffered by the plaintiff in support of his case.

It is in precisely such circumstances that the requirement embraced by nearly all courts to have considered the issue—that defamation plaintiffs seeking to unmask anonymous commenters substantiate their claims with evidence—is most needed to safeguard the right to anonymity.

## CONCLUSION

For these reasons, the Court should quash Dr. Sarkar's subpoena.

Respectfully submitted,

/s/ Daniel S. Korobkin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** pro hac vice motions pending*

*Drafting assistance provided by Samia Hossain, Brennan Fellow, American Civil Liberties Union Foundation, New York, NY (recent law graduate; application for admission to New York State bar to be filed).*

*Counsel for PubPeer, LLC*


Dated: December 10, 2014

# EXHIBIT 2A

*Sarkar v Doe*, COA Case No. 326667
Exhibit A, Jollymore Affidavit

# EXHIBIT A
## to PubPeer's Motion to Quash

Affidavit of Nicholas J. Jollymore

**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

Attorney for Plaintiff:

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**pro hac vice* motions pending

**AFFIDAVIT OF NICHOLAS J. JOLLYMORE**

STATE OF CALIFORNIA )
) ss.:
COUNTY OF SAN FRANCISCO )

I, Nicholas J. Jollymore, being duly sworn, depose and say:

1. I am an attorney admitted to practice in New York and California. I have been retained by PubPeer, LLC to assist Michigan counsel in resisting a subpoena filed on October 13, 2014 in this court by the plaintiff, Dr. Fazlul Sarkar. I file this affidavit in support of PubPeer's motion to quash the subpoena and for a protective order.
2. Attached hereto as **Appendix A** is a true and correct copy of the subpoena issued to PubPeer on October 13, 2014.
3. Attached hereto as **Appendix B** and **Appendix C** are true and correct copies of the following news stories:
    a. Cyranoski, *Acid-Bath Stem Cell Study under Investigation*, Scientific American (February 18, 2014).
    b. Landau, *Scientist wants to withdraw stem cell studies*, CNN (March 12, 2014).
4. In his complaint, Dr. Sarkar refers to a number of comments, in whole or in part, posted on PubPeer's website. Below are true and correct copies of the full text of those comments and the surrounding comments on the same webpage on which they appeared as they existed on PubPeer's website when Dr. Sarkar's counsel first contacted PubPeer.
5. The full text of the comments referred to in **Paragraph 40** of the complaint:

    **Peer 1: ( November 9th, 2013 5:30pm UTC )**

    Figure 1D

    UPPER Notch-1 panel: please compare NS of BxPC3 (lane 2 from left)
    with NS of HPAC (lane 4 from left) and CS of PANC-1 (lane 5 from left).

Note also the vertical line and darker background on the left side of the CS band of PANC-1.

LOWER Notch-1 panel: please compare CP of HPAC (lane 3 from left) with CP of PANC-1 (lane 5 from left). Also compare the CP band of BxPC3 (lane 1 from left) with the NP band of PANC-1 (lane 6 from left).

Now, please FLIP HORIZONTALLY the entire LOWER Notch-1 band. Now compare the NP band of BxPC3 in the lower Notch1 panel (lane 2 from left in the original) with the CS of BxPC3 in the upper Notch-1 panel (first lane from left). Also compare the CP bands of HPAC and PANC-1 in the lower Notch-1 panel with the NS bands of BxPC3 and HPAC in the upper Notch-1 panel.

Figure 5

Cyclin D1 Panel: please compare the shape and position of the CS band of HPAC with the CS band of PANC-1 in the Cyclin D1 panel (upper).

CDK2 Panel: please note the vertical line between the NS band of HPAC and CS band of PANC-1. Please note the box around the NS band of BxPC3 (magnify).

Figure 6A, B and C

Please compare the Rb bands in the three panels (A, B, and C). Compare the BxPC3 and HPAC bands in 6A and 6B, magnify and see the shapes and background, especially the small specks in the upper right corner of the second band (from left). Now, please FLIP HORIZONTALLY the RB bands in PANC-1 (panel C) and compare with the two other bands (BxPC3 and HPAC in panes A and B). Then, note the small specks in the upper right corner of the second band (from left).

Figure 7E and Figure 8D

Please compare the two Rb bands. But please increase the width of the Rb bands in Figure 8 and compare. Better seen in PowerPoint, magnify.

**Unregistered Submission: ( November 10th, 2013 3:40pm UTC )**

See this comment from a paper, seven years later

https://pubpeer.com/publications/22806240

**Unregistered Submission: ( November 10th, 2013 4:07pm UTC )**

You might expect the home institution to at least look into the multiple concerns which have been rasied.

**Unregistered Submission: ( November 10th, 2013 4:25pm UTC )**

And two years ago:

https://pubpeer.com/publications/21680704

**Unregistered Submission: ( November 12th, 2013 2:49pm UTC )**

2009 and 2010

https://pubpeer.com/publications/19813088

**Unregistered Submission: ( November 19th, 2013 11:02pm UTC )**

And another concern in 2009

https://pubpeer.com/publications/19531648

**Unregistered Submission: ( November 29th, 2013 3:51pm UTC )**

Another paper from 21012 with concerns

https://pubpeer.com/publications/22261338

**Unregistered Submission: ( May 26th, 2014 2:37am UTC )**

And just recently in 2014

https://pubpeer.com/publications/24719318

**Unregistered Submission: ( November 29th, 2013 5:38pm UTC )**

Compare the images in this paper with the images in another paper commented in PubPeer:

https://pubpeer.com/publications/16885366

See comparison of images here: http://imgur.com/WbrimS9

**Unregistered Submission: ( May 11th, 2014 4:32pm UTC )**

Fig. 8A in this paper is identical to Fig. 5A in Cancer, 2006 Jun 1;106(11):2503-13; (https://pubpeer.com/publications/16628653)

Figures can be seen side by side here: http://i.imgur.com/OeiHlr3.png

**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."
>
> **Unregistered Submission: ( June 19th, 2014 1:11pm UTC )**
>
> Talking about the Board of Governors, see this public info
>
> http://prognosis.med.wayne.edu/article/board-of-governors-names-dr-sarkar-a-distinguished-professor
>
> **Peer 2: ( June 19th, 2014 7:52pm UTC )**

"currently funded by five National Institutes of Health RO1 grants"

That probably works out at about $200k per PubPeer comment. I should think that NIH must be pretty happy with such high productivity.

**Unregistered Submission: ( June 20th, 2014 9:44am UTC )**

just letting you know that the award for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange

http://www.umc.edu/news_and_publications/thisweek.aspx?type=thisweek&date=6%2F9%2F2014

**Unregistered Submission: ( June 20th, 2014 5:30pm UTC )**

The last author is now correcting "errors" in several papers. Hopefully he will be able to address and correct the more than 45 papers (spaning 15 years of concerns: 1999-2014), which were all posted in PubPeer.

**Peer 2: ( June 20th, 2014 6:39pm UTC )**

From the newsletter:

"Sarkar has published more than 525 scholarly articles"

... nearly 50 of which have attracted comments on PubPeer!

It's not hard to imagine why Wayne State may not have fought to keep him. And presumably the movers and shakers at the University of Mississippi Medical Center didn't know that they should check out potential hires on PubPeer (they just counted the grants and papers). I wonder which institution gets to match up NIH grants with papers on PubPeer.

It can only be a matter of time, grasshopper, but that time may still seem long. You saw it first on PubPeer.

**Unregistered Submission: ( June 29th, 2014 3:11pm UTC )**

There is another concern in this paper:

Fig. 7B (Bcl-XL panel) here appears to be similar to Fig. 5A in another paper:

https://pubpeer.com/publications/16885366

See problems here:

http://i.imgur.com/DyHDecA.png

**Unregistered Submission: ( July 5th, 2014 12:58am UTC )**

From a look at this PI's funding on NIH website it seems this lab has received over $13 million from NIH during the last 18 years. An online CV shows he has received DOD funds as well, bringing the federal fund total close to $20 million. Why isn't the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong? Figures, tables could be made-up or manipulated as well. The problems on PubPeer is for about 50 papers-all based on image analysis. That is just 10% of the output from this lab (or $2 million worth of federal dollars). What about the other 90%? Sadly this is what happens when research output becomes a numbers game. An equivalent PI would be happy to have just 50 high impact papers properly executed, that moves the research field forward. This lab has 500; but now it will be very difficult to figure out the true scientific value of of any if them. Sad!

**Unregistered Submission: ( July 5th, 2014 2:42pm UTC )**

In reply to Unregistered Submission: ( July 5th, 2014 12:58am UTC )

"This lab has 500 [papers]".

Why not institute a system of automatic audit each time an author reaches a multiple of a hundred publications?

6. The full text of the comment referred to in **Paragraph 41** of the complaint is reproduced above as part of the comments referred to in Paragraph 40.

7. The full text of the comments referred to in **Paragraph 42** of the complaint:

**Unregistered Submission: ( October 15th, 2013 7:34pm UTC )**

Figure 6.

http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3167947/figure/F6/

PSA panel. Vertical changes in background between lanes 1 and 2, 3 and 4, and between lanes 5 and 6.

No vertical chnages in background in the other 4 panels.

Comparison between spliced and unspliced panels is problematic.

**Unregistered Submission: ( March 2nd, 2014 8:21pm UTC )**

Check this out: same bands for different time conditions

http://i.imgur.com/4qJBeS7.png

http://i.imgur.com/UaeqmWb.png

**Unregistered Submission: ( March 4th, 2014 2:59am UTC )**

Figure 4 legend clearly stated that VCaP cells were treated with DHT or testosterone for 24 hours.

**Unregistered Submission: ( October 15th, 2013 8:49pm UTC )**

Figure 3A

Image of LNCaP, BR-DIM is identical to image of VCaP, siERG + BR-DIM. Same image for two different cell types and conditions.

8. The full text of the comments referred to in **Paragraph 43** of the complaint:

**Peer 1: ( October 7th, 2013 1:25pm UTC )**

The EZH2 band in Figure 4B is the same band for E-Cadherin in Figure 4C, just flipped over 180 degrees.

**Peer 2: ( October 7th, 2013 5:14pm UTC )**

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".

**Unregistered Submission: ( April 6th, 2014 2:23pm UTC )**

http://i.imgur.com/6gveUnM.png

**Peer 3: ( July 24th, 2014 12:30am UTC )**

There is now an erratum for this article:

http://i.imgur.com/TcUdlND.png

There seems to be a lot more "honest errors" to correct.

9. The full text of the comments referred to in **Paragraph 44** of the complaint:

**Unregistered Submission: ( April 8th, 2014 5:28pm UTC )**

http://i.imgur.com/Kn1TV70.png

**Unregistered Submission: ( April 8th, 2014 9:50pm UTC )**

They are only images. Do they reaaly matter?

**Peer 1: ( April 11th, 2014 8:09pm UTC )**

Well yes, it matter a lot. The paper was published through a process of prepublication peer review of the data submitted. If these are "only images" then the simple conclusion is that "these are only data" and we can simply forget science and work instead in metaphysics. Beyond that, it matters even more, because if data quality control and data assurance in the lab that produced the paper are sufficiently poor that this can slip through submission, response to reviewers and then proofing, someone has their eye well off the ball.

I would be the first to hold up my hand and agree that this happens, but the minimum message is "get your eye back on the ball" and a response to the effect that steps have been taken to prevent such sloppiness would reassure the community that the paper is in fact OK. Otherwise the conclusion of the reader can only be that these are "only images" then the paper is of less scientific value than the

holiday snaps of the authors.

So a detailed answer is required, alongside a correction and with the latter, a public set of data to show the experiments exist.

**Unregistered Submission: ( April 12th, 2014 3:14pm UTC )**

In reply to Peer 1: (April11th, 2014 8:09 UTC).

Many thanks for your explanation of why images are important.

Forget metaphysics the authors do not seem to have taken physics.

"data submitted" was the evidence the authors decided to show the world.

I do understand that mistakes happen, but as pointed out bay other commentators there are about 30 papers by the senior author which have similar problematic images.

I understand that Wayne State university is aware of some of the papers.

More than that I do not know.

**Unregistered Submission: ( April 12th, 2014 7:48pm UTC )**

Thanks to the community of PubPeer members that these problems haven been brought to light. The problems with the data published by the senior author uncovered here span a period of almost 14 years. 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.

10. The full text of the comments referred to in **Paragraph 45** of the complaint is reproduced above as part of the comments referred to in Paragraph 44.

11. The full text of the comments referred to in **Paragraph 46** of the complaint is reproduced above as part of the comments referred to in Paragraph 42.

12. The full text of the comment referred to in **Paragraph 47** of the complaint is reproduced

above as part of the comments referred to in Paragraph 43.

13. The full text of the comments referred to in **Paragraph 48** of the complaint:

**Unregistered Submission: ( March 26th, 2014 8:29pm UTC )**

Gel shift lanes in figure 1A (lanes 0 and 10) and in figure 2B (lanes 0 and 24) and in figure 5C (lanes 3 and 4) appear identical.

**Unregistered Submission: ( March 29th, 2014 11:20pm UTC )**

The last author has more than 20 papers commented in Pubpeer.

**Peer 1: ( March 30th, 2014 10:07am UTC )**

"The last author has more than 20 papers commented in Pubpeer. "

He's been very productive.

Presumably the journals know and his university knows. How long would it have taken for you to find out from them? Still counting.

**Unregistered Submission: ( May 17th, 2014 7:38pm UTC )**

An Erratum to a report this previous PubPeer comment has been published by the authors in Int J Cancer. 2014 Apr 15;134(8):E3. In the erratum, the authors state that: “An error occurred during the creation of the composite figure for Fig-5B (Rb) and Fig-6B (I?B?) which has recently been uncovered although it has no impact on the overall findings and conclusions previously reported”

Not so fast!

See additional concerns (band recycling, not addressed in Erratum) in Figure 4A and Figure 6; here:

http://imgur.com/LVa2cVc

http://i.imgur.com/4ARd2Mp.png

http://i.imgur.com/miK0HGw.png

Based on these issues, can we agree with the authors that “an ERROR

occurred during the creation of the composite figures" and that these (and previous "errors") have "NO IMPACT on the overall findings and conclusions previously reported"?

14. The full text of the comments referred to in **Paragraph 49** of the complaint:

**Unregistered Submission: ( July 23rd, 2014 3:30pm UTC )**

Fig. 3A in this paper contains images that appear to be similar to those in Fig. 1B in another paper

(Journal of Cellular Biochemistry 112:78

**Unregistered Submission: ( July 23rd, 2014 6:07pm UTC )**

See images here:

http://i.imgur.com/lC1kULL.png

**Unregistered Submission: ( July 23rd, 2014 6:37pm UTC )**

FH Sarkar has never replied to any of the Pubpeer comments.

**Peer 1: ( July 23rd, 2014 10:31pm UTC )**

but if we send our concerns to his institution and the journals involved, hopefully there will changes...

15. The full text of the comments referred to in **Paragraph 50** of the complaint:

**Peer 1: ( November 9th, 2013 3:41pm UTC )**

Figure 2A and 2B

Please compare the HPAC band in Figure 2A (third panel from the top, CXCR2) with the L3.6pl band in Figure 2B (middle panel, PLC-beta3). Compare also the small black dots in the two bands. Note also the different background of the Input lane on the left in the L3.6pl band of Figure 2B. The bands in 2A and 2B are indicated to represent two different cell lines.

**Unregistered Submission: ( November 10th, 2013 7:25pm UTC )**

We feel terribly sorry for our inadvertent error during figure

preparation. Thank you for pointing out this error, and we realized the blots were indeed misplaced. We have already contacted the journal regarding how to submit a corrigendum with the correct blots. We will keep you updated.

16. The full text of the comments referred to in **Paragraph 52** of the complaint:

**Unregistered Submission: ( October 19th, 2013 9:55pm UTC )**

Figure 2A

COX2 band in COLO-357 and HPAC cells, vertical lines and background that does not fit the rest of the blot. EGFR band in COLO-357 shows and halo and does not fit with the rest. 400X

Figure 6A, EMSA assay (magnify and place bands side by side the corresponding lanes referred below)

1. Control (third lane from left) is the same lane in Gem (nine lane from left). Magnify and match the small dots. The intensity of the NFkappaB band between these two lanes appears "different" but the dots match perfectly.

2. B-DIM, lane 4, matches GEM, lane 8. Note that the small dots match perfectly and also the top of the two bands superimpose exactly. But, interestingly, the NFkappaB band is slightly "different", (darker and rectangular) in GEM from that in B-DIM.

Question related to these EMSA lanes: what are the chances that all imperfections (small dots) in the lanes match perfectly and not the NFkappaB band?

Figure 6C. The EGFR and pEGFR bands in the blot have a peculiar rectangular frame, which does not fit the background and the nature of the technique. 400x

**Peer 1: ( July 24th, 2014 1:13am UTC )**

Could you please present an illustration that pinpoints the issues?

**Unregistered Submission: ( July 24th, 2014 2:09am UTC )**

http://i.imgur.com/N2S5ymW.png

http://i.imgur.com/wDmetjE.png

17. The full text of the comments referred to in **Paragraph 54(a)** of the complaint:

**Unregistered Submission: ( April 11th, 2014 9:56pm UTC )**

In Figure 3B, please compare B-DIM image with image B-DIM + Rad. These appear to be identical images for two different conditions.

**Unregistered Submission: ( July 15th, 2014 8:45am UTC )**

Here is an illustration of the issue in the figure. Note that this was in 2012.

http://imgur.com/WJXzwxq

18. The full text of the comments referred to in **Paragraph 54(b)** of the complaint:

**Unregistered Submission: ( April 19th, 2014 3:54pm UTC )**

Problematic images since 1999:

http://imgur.com/iddPDcF

**Unregistered Submission: ( April 21st, 2014 1:33am UTC )**

1999-2014 here:

https://pubpeer.com/search?q=Sarkar+FH

19. The full text of the comments referred to in **Paragraph 54(c)** of the complaint:

**Unregistered Submission: ( October 17th, 2013 3:05am UTC )**

In Figure 2A, the image of cells in A clone + NAC appears identical to the image of A clone in Figure 6D.

In Figure 3A, the image of A clone at 0 hr appears identical to the image of B clone + NAC at 24 hrs. Apparently identical images therefore are representing different treatments and/or cells.

**Peer 1: ( July 24th, 2014 7:04am UTC )**

There are more concerns about figures in this paper.

Concerns about Figure 2A and B, 4C and D, 6C and D, and S2A:

Several panels appear to be very similar to, or overlapping with each other, although they are representing different experiments. "Unregistered" on October 17, 2013, already pointed out one of these similarities but there are more. In Figure 2B, the same group of cells appears to be visible in two different panels.

See concerns highlighted here: http://i.imgur.com/PGbz9B8.jpg

Concern about Figure 3A.

As previously reported on October 17, the 'A clone 0h' panel looks very similar to the 'B clone + NAC 24h' panel.

Concern about Figure 3B.

Many groups of cells appear multiple times on different panels. The 24h panels all appear to have the cells seen on the 0h panels, at exactly the same position, plus more cells. Ellipses of the same color highlight most (but not all) similar looking groups of cells.

See concerns about Figure 3 highlighted here: http://i.imgur.com/qVEqhoB.jpg

**Peer 2: ( July 27th, 2014 4:09pm UTC )**

A will recommend that you contact both the institution and journal. There must be and end to this

20. The full text of the comments referred to in **Paragraph 54(d)** of the complaint:

**Unregistered Submission: ( July 13th, 2014 6:26pm UTC )**

Compare Fig. 3B and Fig. 3D

When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357.

**Unregistered Submission: ( August 16th, 2014 3:45pm UTC )**

See images here:

http://i.imgur.com/b2q3lPj.png

21. The full text of the comment referred to in **Paragraph 55** of the complaint is reproduced above as part of the comments referred to in Paragraph 54(d).

I declare under the penalty of perjury under the laws of Michigan that the foregoing is true and correct.

Executed this 9th day of December, 2014, at San Francisco, California.

NICHOLAS J. JOLLYMORE

Subscribed and sworn to (or affirmed) before me this 9th day of December, 2014, by Nicholas J. Jollymore, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

SIGNATURE:

COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

M. DAVIS
COMM. #1927115
NOTARY PUBLIC-CALIFORNIA
SAN FRANCISCO COUNTY
My Comm. Expires Mar. 9, 2015

# Appendix A
# to Jollymore Affidavit

Subpoena issued to PubPeer

Approved, SCAO

Original - Return
1st copy - Witness
2nd copy - File
3rd copy - Extra

| STATE OF MICHIGAN<br>3rd JUDICIAL DISTRICT<br>JUDICIAL CIRCUIT<br>COUNTY PROBATE | SUBPOENA<br>Order to Appear and/or Produce | CASE NO.<br>14-013099-CZ<br>Hon. Sheila Ann Gibson |
|---|---|---|

Police Report No. (if applicable)

Court address: 201 CAYMC, 2 Woodward Ave., Detroit, MI 48226

Court telephone no.: (313) 224-0250

| Plaintiff(s)/Petitioner(s) | | Defendant(s)/Respondent(s) |
|---|---|---|
| ☐ People of the State of Michigan<br>☑ Fazlul Sarkar | v | John and/or Jane Doe (s) |
| ☑ Civil ☐ Criminal | | Charge |

☐ Probate In the matter of

In the Name of the People of the State of Michigan. TO:

PubPeer.com c/o Nicholas Jollymore, Jollymore Law Office One Rincon Hill 425 First St. San Francisco, CA 94105

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

**YOU ARE ORDERED:**

☐ 1. to appear personally at the time and place stated below: You may be required to appear from time to time and day to day until excused.

☐ The court address above ☑ Other: 101 N. Main Street, Suite 555, Ann Arbor, MI 48104

| Day | Date | Time |
|---|---|---|
| Monday | November 10, 2014 | 2:00 p.m. |

☐ 2. Testify at trial / examination / hearing.

☑ 3. Produce/permit inspection or copying of the following items: All identifying information, including but not limited to user names, IP addresses, email addresses, profile information, and any other identifying characteristics of all users who have posted any of the comments that were posted on your web site that are described in the attached complaint that was filed in Wayne county, MI.

☐ 4. Testify as to your assets, and bring with you the items listed in line 3 above.

☐ 5. Testify at deposition.

☐ 6. MCL 600.6104(2), 600.6116, or 600.6119 prohibition against transferring or disposing of property is attached.

☐ 7. Other:

☑ 8.

| Person requesting subpoena | Telephone no. |
|---|---|
| Nicholas Roumel | (734) 663-7550 |
| Address: 101 N. Main Street, Suite 555 | |
| City: Ann Arbor, MI 48104 | State: Zip: |

**NOTE:** If requesting a debtor's examination under MCL 600.6110, or an injunction under item 6. this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

**FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.**

10/13/14
Date

Judge/Clerk/Attorney

P37056
Bar no.

Court use only
☐ Served ☐ Not served

MC 11 (4/14) **SUBPOENA, Order to Appear and/or Produce**

MCL 600.1455, 600.1701, 600.6110, 600.6119, MCR 2.506

**SUBPOENA**

Case No. 14-013099-CZ

**PROOF OF SERVICE**

**TO PROCESS SERVER:** You must make and file your return with the court clerk. If you are unable to complete service, you must return this original and all copies to the court clerk.

**CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE**

☐ **OFFICER CERTIFICATE**

I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party [MCR 2.104(A)(2)], and that: (notarization not required)

OR

☐ **AFFIDAVIT OF PROCESS SERVER**

Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notarization required)

☐ I served a copy of the subpoena, together with _____ (including any required fees) by
Attachment

☐ personal service ☐ registered or certified mail (copy of return receipt attached) on:

| Name(s) | Complete address(es) of service | Day, date, time |
|---|---|---|
| | | |

☐ I have personally attempted to serve the subpoena and required fees, if any, together with _____
Attachment
on the following person and have been unable to complete service.

| Name(s) | Complete address(es) of service | Day, date, time |
|---|---|---|
| | | |

| Service fee | Miles traveled Fee | |
|---|---|---|
| $ | $ | |
| **Incorrect address fee** | **Miles traveled Fee** | **TOTAL FEE** |
| $ | $ | $ |

_____
Signature

_____
Name (type or print)

_____
Title

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

**ACKNOWLEDGMENT OF SERVICE**

I acknowledge that I have received service of the subpoena and required fees, if any, together with _____
Attachment

_____ on _____
Day, date, time

_____ on behalf of _____.
Signature

**AFFIDAVIT FOR JUDGMENT DEBTOR EXAMINATION**

I request that the court issue a subpoena which orders the party named on this form to be examined under oath before a judge concerning the money or property of:
for the following reasons:

_____
Signature

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

MCR 2.105

**Appendix B**
**to Jollymore Affidavit**

Cyranoski, *Acid-Bath Stem Cell Study under Investigation*, Scientific American (February 18, 2014)

SCIENTIFIC AMERICAN™

Permanent Address: http://www.scientificamerican.com/article/acid-bath-stem-cell-study-under-investigation/



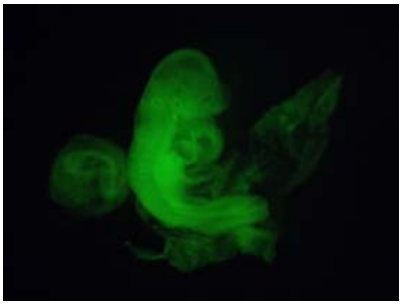
# Acid-Bath Stem Cell Study under Investigation

A research institute is launching an inquiry after allegations of irregularities in two blockbuster papers

nature

February 18, 2014 | By David Cyranoski and Nature magazine |

A leading Japanese research institute has opened an investigation into a groundbreaking stem-cell study after concerns were raised about its credibility.



The controversial work involved a mouse embryo injected with cells made pluripotent through stress. *Credit: Haruko Obokata*



The RIKEN center in Kobe announced on Friday that it is looking into alleged irregularities in the work of biologist Haruko Obokata, who works at the institution. She shot to fame last month as the lead author on two papers published in *Nature* that demonstrated a simple way to reprogram mature mice cells into an embryonic state by simply applying stress, such as exposure to acid or physical pressure on cell membranes. The RIKEN investigation follows allegations on blog sites about the use of duplicated images in Obokata's papers, and numerous failed attempts to replicate her results.

Cells in an embryonic state can turn into the various types of cells that make up the body, and are therefore an ideal source of patient-specific cells. They can be used to study the development of disease or the effectiveness of drugs and could also be transplanted to regenerate failing organs. A consistent and straightforward path to reprogramming mature cells was first demonstrated in 2006, when a study showed that the introduction of four genes could switch the cells into an embryonic form known as induced pluripotent stem (iPS) cells. The introduction of genes, however, introduces uncertainties about the fidelity of the cells, and Obokata's reports that the feat could be done so simply were met with awe, and a degree of scepticism (see 'Acid bath offers easy path to stem cells').

That scepticism deepened last week when blogs such as PubPeer started noting what seem to be problems in the two *Nature* papers and in an earlier paper from 2011, which relates to the potential of stem cells in adult tissues. In the 2011 paper, on which Obokata is first author, a figure showing bars meant to prove the presence of a certain stem-cell marker appears to have been inverted and then used to show the presence of a different stem-cell marker. A part of that same image appears in a different figure indicating yet another stem-cell marker. The paper contains another apparent unrelated duplication.

The corresponding author of that study, Charles Vacanti, an anaesthesiologist at Harvard Medical School in Boston, told *Nature* that he learned only last week of a "mix up of some panels". He has already contacted the journal to request a correction. "It certainly appears to have been an honest mistake [that] did not affect any of the data, the conclusions or any other component of the paper," says Vacanti.

The problems in the two recent *Nature* papers, on both of which Obokata is a corresponding author (Vacanti is a co-author on both, and corresponding author on one), also relate to images. In one paper, one of the sections in a genomic analysis in the first figure appears to be spliced in. In the other paper, images of two placentas meant to be from different experiments look strikingly similar.

Teruhiko Wakayama, a cloning specialist at Yamanashi University in Yamanashi prefecture, is a co-author on both of the papers and took most of the placental images. He admits that the two look similar but says it may be a case of simple confusion. Wakayama, who left RIKEN during the preparation of the manuscript, says he sent more than a hundred images to Obokata and suggests that there was confusion over which to use. He says he is now looking into the problem.

The scepticism has been inflamed by reports of difficulty in reproducing Obakata's latest results. None of ten prominent stem-cell scientists who responded to a questionnaire from *Nature* has had success. A blog soliciting reports from scientists in the field reports eight failures. But most of those attempts did not use the same types of cells that Obokata used.

Some researchers do not see a problem yet. Qi Zhou, a cloning expert at the Institute of Zoology in Beijing, who says most of his mouse cells died after treatment with acid, says that "setting up the system is tricky". "As an easy experiment in an experienced lab can be extremely difficult to others, I won't comment on the authenticity of the work only based on the reproducibility of the technique in my lab," says Zhou.

Jacob Hanna, a stem-cell biologist at the Weizmann Institute of Science in Rehovot, Israel, however, says "we should all be cautious not to persecute novel findings" but that he is "extremely concerned and sceptical". He plans to try for about two months before giving up.

The protocol might just be complicated — even Wakayama has been having trouble reproducing the results. He and a student in his laboratory did replicate the experiment independently before publication, after being well coached by Obokata. But since he moved to Yamanashi, he has had no luck. "It looks like an easy technique — just add acid — but it's not that easy," he says.

Wakayama says that his independent success in reproducing Obokata's results is enough to convince him that the technique works. He also notes that the cells produced by Obokata are the only ones known — aside from those in newly fertilized embryos — to be able to produce, for example, placenta, so could not have been substituted cells. "I did it and found it myself," he says. "I know the results are absolutely true."

Several scientists have contacted one or some of the authors for more details on the protocol without getting a response. Hongkui Deng, a stem-cell biologist at Peking University in Beijing, was told that "the authors will publish a detailed protocol soon". Vacanti says he has had no problem repeating the experiment and says he will let Obokata supply the protocol "to avoid any potential for variation that could lead to confusion".

Obokata did not respond to enquiries from *Nature*'s news team.

A spokesperson for Nature Publishing Group, which publishes *Nature*, said: "The matter has been brought to *Nature*'s attention and we are investigating."

This article is reproduced with permission from the magazine *Nature*. The article was first published on February 17, 2014.

nature

**Appendix C**
**to Jollymore Affidavit**

Landau, *Scientist wants to withdraw stem cell studies*, CNN (March 12, 2014)

# Scientist wants to withdraw stem cell studies

*By Elizabeth Landau , CNN*
*updated 2:52 PM EDT, Wed March 12, 2014*

CNN.com

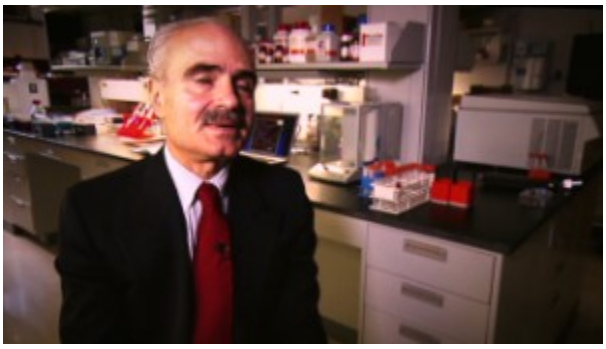
**(CNN)** -- Scientists hailed a new method of making stem cells as a breakthrough. But questions about the data used for the two studies published in Nature in January have led one of the co-authors to call for a retraction.

Researchers had said they could turn mature cells into embryonic-like stem cells by stressing them in various ways, such as by putting them in an acidic environment. The embryonic-like stem cells can then be coaxed into becoming any other kind of cell possible.

This method, demonstrated using white blood cells of mice, could be faster and simpler than existing methods. Scientists called them STAP, or stimulus-triggered acquisition of pluripotency, cells.

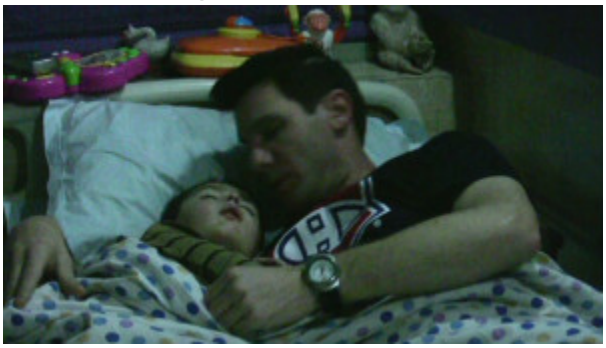
Is it too good to be true?

Study co-author Teruhiko Wakayama, professor at the University of Yamanashi in Japan, told Japanese public broadcaster NHK this week he's not confident anymore the experiments generated STAP cells.



*Reversing heart failure with stem cells*


*Understanding the stem cell breakthrough*



*Indian clinic's stem cell therapy real?*

Doubts about the studies have been cropping up on blogs such as PubPeer in the weeks since their publication. The Riken Center for Developmental Biology in Kobe, Japan, said in February it was investigating "alleged irregularities" in research by Haruko Obokata, lead author of the studies who works at Riken, Nature reported.

Upon reviewing test data, Wakayama discovered multiple problems, including "questionable images," NHK reported.

What's more, outside experts were unable to reproduce the findings of Wakayama's group; Riken then disclosed detailed methods of making the cells, NHK reported.

Wakayama told NHK he has requested that his co-authors retract the studies and then would like outside experts to do verification studies. He said he is "no longer sure about the credibility of the data used as preconditions for the experiments," NHK reported.

A Riken official told The Japan News that "the basis of the articles" -- the fact that STAP cells were produced -- "is unshakable."

In a statement, Riken said that more time is needed to submit final conclusions of the ongoing investigation. The center said it is also considering retraction.

Dr. Charles Vacanti, a study co-author, said in a statement that he stands by the research.

"I firmly believe that the questions and concerns raised about our STAP cell paper published in Nature do not affect our findings or conclusions," said Vacanti, who is director of the Laboratory for Tissue Engineering and Regenerative Medicine at Brigham and Women's Hospital in Boston.

Harvard Medical School, with which Vacanti is also affiliated, said in a statement: "We are fully committed to upholding the highest standards of ethics and to rigorously maintaining the integrity of our research. Any concerns brought to our attention are thoroughly reviewed in accordance with institutional policies and applicable regulations."

## Stem cell breakthrough may be simple, fast, cheap

The thriving science of stem cell research seeks to develop therapies to repair bodily damage and cure disease by being able to insert cells that can grow into whatever tissues or organs are needed.

Before the technique described in Nature, the leading candidates for creating stem cells artificially were those derived from embryos and stem cells from adult cells that require the insertion of DNA to become reprogrammable.

Stem cells are created the natural way every time an egg that is fertilized begins to divide. During the first four to five days of cell division, so-called pluripotent stem cells develop. They have the ability to turn into any cell in the body. Removing stem cells from the embryo destroys it, making this type of research controversial because some say an embryo is a human life.

Researchers have also developed a method of producing embryonic-like stem cells by taking a skin cell from a patient, for example, and adding a few bits of foreign DNA to reprogram the skin cell to become like an embryo and produce pluripotent cells, too. However, these cells are usually used for research because researchers do not want to give patients cells with extra DNA.

The new method does not involve the destruction of embryos or insertion of new genetic material into cells, Vacanti said. It also avoids the problem of rejection: The body may reject stem cells from other people, but this method uses an individual's own mature cells.

To study the STAP cell phenomenon, researchers first genetically altered mice donating stem cells to "label" those cells with the color green. For instance, they modified mice such that their cells would light up green in response to a particular wavelength of light.

The scientists exposed blood cells from these genetically altered mice to an acidic environment. A few days later, they saw that these cells turned into the embryonic-like state and grew in spherical clusters.

Scientists put the cell clusters into a mouse embryo that had not been genetically modified. It turned out, the implanted clusters could form tissues in all of the organs that the researchers tested. The scientists knew that the cells came from the original mouse because they turned green when exposed to a particular light.

Besides modifying acidity, researchers also stressed the cells in other ways, such as lowering the oxygen environment and disrupting the cell membrane. Increasing acidity was one of the most effective methods of turning mouse blood cells into STAP cells.

Among the unknowns about this technique are its effectiveness in humans, and what risks the method

might pose.

Vacanti told CNN in January he hopes the process could get tested clinically in humans within three years. He noted that induced pluripotent stem cells are already being explored in Japan in humans and the same "platforms" could be used for STAP cells.

CNN's Yoko Wakatsuki contributed to this report.

# EXHIBIT 2B

*Sarkar v Doe*, COA Case No. 326667
Exhibit B, Krueger Affidavit

# EXHIBIT B
## to PubPeer's Motion to Quash

Affidavit of Dr. John W. Krueger

**STATE OF MICHIGAN**

**IN WAYNE COUNTY CIRCUIT COURT**

FAZLUL SARKAR,

Plaintiff, Case No. 14-013099-CZ

vs. Hon. Sheila Ann Gibson

JOHN and/or JANE DOE(S),

Defendant(s).
_____/

**AFFIDAVIT OF DR. JOHN W. KRUEGER**

I, John W. Krueger, being duly sworn, say as follows:

1. My name is John W. Krueger, Ph.D. For twenty years, from 1993 to 2013, I worked in the federal government as one of the original Investigator–Scientists in the Division of Research Investigations (which later became the Division of Investigative Oversight), within the Office of Research Integrity (ORI) of the Department of Health and Human Services.

2. As explained more fully below, while at ORI, I was responsible for the forensic evaluation of scientific images. While there, I developed the tools that ORI used—and still uses today—to forensically evaluate the authenticity of scientific images.[1]

3. I have been retained by counsel for PubPeer, LLC to offer my professional opinion on a series of comments made on PubPeer's site concerning images that appear in research papers co-authored by Dr. Fazlul Sarkar, the plaintiff in this lawsuit. This examination

[1] See Forensic Actions for Photoshop <http://ori.hhs.gov/advanced-forensic-actions> (link to download the "actions," and to the explanatory "READ ME" files concerning how and why the Actions work and advice as to application and interpretation of the results).

draws no conclusion about the effect of any irregularity found in an image or images upon the integrity of the reported science, nor about who might be responsible.

## Executive Summary

4. Counsel for PubPeer provided me comments made on PubPeer's website that made two general types of observations: (1) that sets of images in papers co-authored by Dr. Sarkar looked "similar" or "identical" to each other (some invited comparison without stating an opinion one way or the other), and (2) that images in the papers displayed evidence of other irregularities (such as splicing of selected data). The exact comments provided to me, along with the titles of the related research papers, are listed further below in the Resources section.

5. At ORI, I would frequently receive similar comments about images used in scientific research papers. Typically, the comments would also claim that the similarities or other irregularities were evidence that the images at issue were not "authentic"—in other words, either that they did not in fact depict the results of *separate* experiments (but had been reused, whether intentionally or inadvertently), or that they had been manipulated in an inconsistent way (for example, when data appeared to have been selectively spliced into or out of the some but not all of the results in a consistent fashion). My job, then, was to analyze the images to determine whether there was sufficient evidence to conclude that the images were *not* authentic. If so, I would recommend to ORI that it send the results of my analysis to the host institution or university where the research had been conducted, and ask the institution to obtain and review the original data to learn if the latter supported the questioned image. If the institution concurred with my assessment regarding authenticity, it would conduct fact-finding and a formal review (under its own procedures) to determine whether the irregularities were due to research misconduct.

6. Counsel for PubPeer asked me to conduct a similar analysis here: to determine whether the images discussed by the PubPeer comments show evidence they are *not* authentic—again, whether they show evidence that they might not in fact depict the results of separate experiments, or were instead reused or modified in an inconsistent way that would affect the interpretation of the experiment. I performed that analysis and forensic comparison for a total of 28 separate issues that were identified in 18 observations from PubPeer. (That review included (by my count) approximately 44 images extracted from 25 full figures.)

7. As explained in greater depth below, I concluded as follows:

a. My initial assessment of each image or images was based on visual observations of the source image(s), which I obtained afresh from each journal. In all 28 issues, there was sufficient visual support—based on morphology (shape), location, orientation and relative intensity (darkness) of the features in question in the images—to conclude that the images or their components were not authentic (did not depict *different* experiments as they purported to) or that they contained other irregularities (such as inconsistent splicing of data).

b. The online source material was not of the best quality, and so I tested my initial visual observation using independent forensic methods that are more sensitive in detecting characteristic features in the kinds of images at issue. These methods specifically employed two tools, or "Forensic Actions" for Photoshop, that I had pioneered, and which are available from the ORI. In all 28 cases, my forensic evaluations yielded even more

definitive evidence that strongly supported the conclusion that the images I analyzed were not authentic or contained other irregularities.

c. In 1 of the 28 questions I examined, the more sensitive forensics revealed new and more discrete evidence that was different from that originally posed by the PubPeer comments, but which nonetheless supported the questioning of the specific data in that case.

8. The scope of my review was limited to the figures cited in the PubPeer comments that I reviewed. When, during the course of examining the panel of its data at issue, new anomalies were identified elsewhere in the same figure, I documented those results as well. Although not presented in this affidavit, I identified other anomalies in six of the figures.

**Professional Background**

9. Attached to this affidavit as Exhibit A is a true and correct copy of my curriculum vitae. I briefly lay out below the relevant experience documented therein.

10. My direct expertise in forensic image analysis stems from 20 years of relevant federal work in my second career, starting as one of the original Investigator–Scientists in the Division of Research Investigations (or later the Division of Investigative Oversight), Office of Research Integrity (1993–2013). In this position, I was responsible for the initial assessment of allegations of data falsification and also for the oversight of investigations into allegations of falsification of research. Both tasks involved a heavy commitment to forensic assessment of the evidence, either for the allegations (sometimes made ‘anonymously,’ meaning that ORI had no way to determine the source the allegation) for referral to institutions, or in the evaluation of the resultant institutional findings. This was one of the more interesting ‘silent’ jobs in science, as it provided many new opportunities. At ORI, I:

a. Pioneered and developed *de novo* the image processing methods for forensic examinations, including ORI's Forensic Tools, which are available on the ORI website (see links below). These tools have been provided and used world-wide.

b. Developed the interpretations of the results, and advised and supported Journal editors in these matters;

c. Trained numerous others in these methods (including my ORI colleagues and numerous institutional officials and faculty members) who were doing the investigations, as well as journal production editors doing image screening;

d. Was heavily involved in education of the community about these new forensic methods and their interpretation. (See links to articles, material about ORI's forensic tools, and list of presentations, in my curriculum vitae; any item is available upon specific request);

e. Established the Image Forensics Lectures for Institutional Officials at ORI's RIO BootCamp program (BootCamps I–VII);

f. Established and successfully maintained the Macintosh Computer Forensics and software support in ORI. As part of this responsibility I also laid out the group Forensics lab ("Harvey's room" at ORI);

g. My experience included working closely with lawyers defending ORI positions regarding appeals of specific PHS findings to the HHS Departmental Appeals Board.

11. Just as important as the ORI experiences working actual cases, I have developed an expertise in the judicious interpretation of the results of testing questioned images in science. This skill stems from my first career, which culminated in running my own laboratory as an independent, NIH-supported bench researcher and senior faculty member at the Albert Einstein College of Medicine (1975–1993). Prior to ORI I obtained a Ph.D. in Biomedical Engineering from Iowa State University (‘71); I then trained at Imperial College, London (’72), was a *locum* lecturer at the Royal Free Hospital School of Medicine, and then a postdoctoral fellow at the center for Bioengineering University of Washington in Seattle (‘72–‘75). At AECOM, I:

a. Was a peer reviewer for multiple papers in cardiac cell physiology, and served as an expert reviewer for NIH site visits for four program projects.
b. Taught medical undergraduates, graduate students and postdoctoral fellows, and ten New York Academy of Science summer research interns (i.e., high-schoolers).
c. My laboratory pioneered the laser diffraction methods for studying contraction in the subcellular level in heart muscle, and first reported the contraction of the isolated heart cell. (The latter methods became a common tool in the pharmaceutical industry.)
d. With an MD–Ph.D student, now director of Cardiology at the University of Pittsburgh; the laboratory pioneered successful application of a new method to study excitation-contraction coupling in the single heart cell, that has formed the platform for more advanced techniques by others.

e. Because of the above I was an Established Fellow of the New York Heart Association and the Wunsch Fellow in "Biophysical Engineering," and I received specific invitations to international meetings.

f. I also generated two patents on micromanipulators and hydraulic control (US Patent Office #4,946,329 and #5,165,297) that received commercial attention.

**Background on Image Analysis**

12. A scientific image is simply a picture purporting to show that a test was carried out and that the test produced a certain outcome. In other words, a scientific image reflects real data.

13. The value of a scientific image does not stem from the image itself or even necessarily from its quality, but from the results of the underlying test it purports to depict. One way of thinking about this is to consider two separate photographic prints taken of the same family at a Thanksgiving dinner. One might be grainy and the other crisp; or perhaps one was printed in color, the other in black and white. If the question is whether Uncle Joe was present for Thanksgiving dinner, and dancing later with Aunt Rita, however, *both* may be equally valuable in answering that question.

14. The primary question in evaluating a scientific image is whether it is an *authentic* representation of the data it purports to represent. This question often arises in the context of two images that purport to represent separate records of *different* experiments, but which contain similarities that suggest that the images in fact depict the *same* experiment, or the same observational record. To evaluate that possibility, the images would be reviewed to determine whether they were in fact derived from the same experiment. For example, returning to my imagined Thanksgiving event, does one of my two pictures actually show Uncle Joe dancing

with someone wearing Aunt Rita's unusual dress but instead sporting Aunt Nelda's face? If so, the proper conclusion would be that one or both of the images are not authentic.

15. It is critical to recognize that it is not necessary for two images to be pixel-for-pixel matches in order to conclude that they represent a record of the same experiment. This is so because two image files derived from the same source may "travel different routes" to their destination towards separate publication or use in reporting research. For example, they may have been subjected to different forms of digital compression—such as JPG compression—which would introduce differences. They may also have been modified in separate ways. One might have been lightened to make it easier to view, and another might have been resampled by being shrunken horizontally to fit on the page. Different changes can made by different parties and also be introduced during printing at separate Journals. To return to our hypothetical Thanksgiving dinner, an analogy might be as follows: Uncle Joe sends a digital picture of the dinner to the entire family; Aunt Rita prints out a 4x6 color copy; Aunt Nelda prints out an 8x10 black-and-white copy; and Uncle Max crops out everyone from the photo except himself and then prints it out. All three siblings would have images depicting the same, or portions of the same, event or "experiment." But the three images would look superficially distinct: one would be small and in color, another large and in black-and-white, and the final depicting only a single person rather than an entire family. Additionally, the various recording devices or printers they used may have introduced other differences, such as dots or lines that do not relate to the underlying observation.

16. These blemishes are generally referred to as "artifacts" in the context of scientific images. They are especially significant in image analysis because they generally ought to be randomly distributed from image to image or, at least, randomly positioned with respect to the

data from independent experiments or events in time. (Do the two pictures of Uncle Joe show that both "Aunt Rita" and "Aunt Nelda" share the same context, i.e., are other couples dancing elsewhere in the same position in each picture?) When they are not randomly distributed or randomly positioned, especially with respect to the data, artifacts produce unquestioned support for concluding that two images with conflicting content actually depict the same experiment.

17. Again, pixel-for-pixel perfection is not necessary in order to conclude that two images depict the same experiment. Instead, the question is whether there are characteristic features unexpectedly in common between the images that indicate that they are "too similar to be different."

18. Relatedly, it is important to understand that affirmative similarities between images are more determinative than differences. In other words, the similarities between features in two images may lead to the conclusion that they derived from the experiment, even if there are differences between the images. The chief uncertainty arises from a false negative (i.e., wrongly missing the similarity between two images) due to poor image quality, rather than false positives (incorrectly concluding that two unrelated images are the same data).

19. Below, I explain how scientists forensically evaluate images, including how they examine whether two images purporting to represent different experiments in fact represent the same experiment. Then, I explain how I applied that methodology to the various images in the papers co-authored by Dr. Sarkar commented upon by PubPeer's users.

*General principles of forensic image analysis.*

20. In assessing whether a scientific image or its components are authentic or, instead, depict conflicting results of the same experimental observation, the question to be answered is

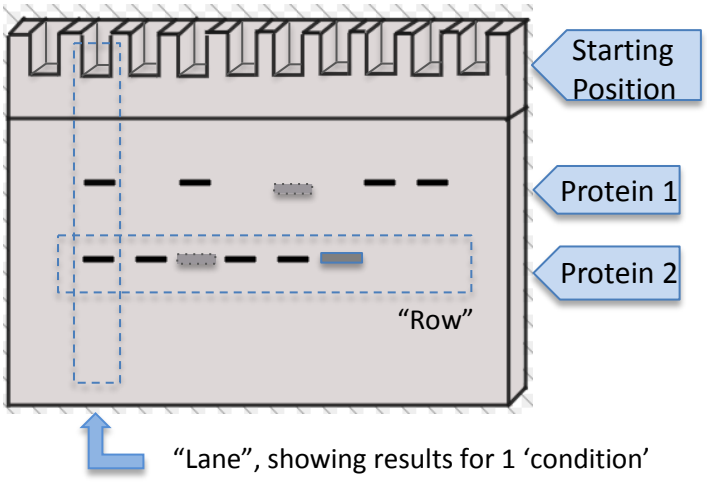
whether the content of each is "too similar to be different"—too similar, in other words, to have been derived from different experiments.[2]

21. The mode of analysis of the image will depend on the nature of the experiment being documented. In general, however, the images are compared to determine whether their contents share features that are unexpected to be common to each. This analysis includes any features in the images, their shapes, their position, the background noise, any artifacts, and, importantly, the relationship between two or more of the features. In comparing images, it is often very revealing to look at features that would otherwise not be noteworthy (nor of particular interest to the scientist who produced them), such as fine details hidden in the light background, or specific features buried in the dark bands. Artifacts can also be very revealing. An artifact in a scientific image is simply a feature of the image that results from the procedures being used rather than from the specimen under study. In common parlance, they could be thought of as blemishes or noise. What is important to science is the signal; what is important to forensics is the noise.

22. As explained above, two images need not be pixel-for-pixel matches in order to conclude that they depict the same experiment. This is because the test is not whether the *images* are the same object, but whether the images depict the same underlying *experimental observation*.

[2] An "image" in science is (1) a graphical representation of data ('raw' or 'primary' data); (2) that are the results of a unique experimental determination, reproducibly recorded by a device; and (3) that has intrinsic features that can reveal its lack of authenticity. Importantly, an "image" in science contains all the information needed to assess its inauthenticity because it is data that purports to be the product of a unique experimental determination. Thus, any question about a scientific image can be assessed, irrespective of whether the questioner is known or not. The image alone provides sufficient witness for its own worth.

23. Most of the images that I reviewed from the papers co-authored by Dr. Sarkar are images of so-called "Western blots." A Western blot is an experiment that is widely used to study proteins because it allows researchers to detect specific proteins in the sample being studied. Very generally speaking, Western blots work by forcing the proteins from different samples through a "gel" (literally, a jelly-like substance sandwiched between two glass plates) using an electrical current so that the proteins separate, usually by their three-dimensional structure (larger proteins move more slowly through the gel) or by their polypeptide length (longer proteins move more slowly through the gel). Once the proteins are separated, they are then typically transferred from the gel to a membrane, where they are "stained" to allow them to be photographed. The picture below is a very simplified representation of a Western blot. The protein samples are loaded into the "wells" at the top of the gel, and the proteins then migrate down the gel in their respective "lanes" upon application of an electrical current. The end result (once transferred to a membrane, stained by using probes that make selected proteins visible, and photographed or otherwise recorded by an imaging device) is a unique pattern of "bands" showing how far each protein of interest migrated down the gel.



24. The individual lanes (10 shown here) permit testing the effect of a combination of different conditions upon *the amount* the protein of interest, as shown by the relative size and darkness (density) of its band. Typically, an image of a row of proteins of interest is selected for reporting the results. When the result of the same test is compared to its effect upon another protein, a new row will be selected. Obviously, the same lanes must be shown in both rows to interpret any differences.

25. Sometimes the effect of a test on multiple proteins is examined, but not all of the results prove to be needed. In this case the image of the rows can be cut and spliced together to rearrange their layout for a logical order of presentation. When this is done, all rows must include the same tests (say, those in lanes 1-4, and 6-9), and the splices must appear at the same position in all rows. Splice lines that differ from row to row can 'de-authenticate' a blot, because then the conditions for the respective tests can't match.

26. When analyzing Western blots for authenticity, the same principles outlined above apply. The analysis looks to the features in the Western blot (the main features are typically the bands), their shapes, their position, their particular size/intensity (related to how much is protein is present), the background noise, any artifacts, and the relationship between the features. Artifacts in Western blots can take the form of distortions of the lanes, unusual features of the bands, faint boundaries of the blot, standards (or marker proteins for measurement), and even rulers placed on the blot for photography, etc. Enhancement may reveal faint characteristic features that were "hidden" in the lighter background around the bands, or even the inner details of single bands and their margins.

27. Some forms of artifacts might re-occur, such as those introduced by faulty equipment (for a Western blot, it might a faulty film dryer or the edge of a blot on an

autoradiographic film). The key question in cases of "replicating" artifacts is whether a fixed relationship to other features should exist? Thus, the key feature that makes an artifact determinative of inauthenticity is not its expected irreproducibility, but the fact that it should not be reproduced in the same relationship to independent features of the blots in two separate experiments.

*Tools of forensic image analysis.*

28. The first step in any image analysis typically involves visual observation of the image to determine whether there is cause for further examination. Visual observation relies on the human eye to detect the sorts of similarities discussed above that may be indicative that the images are not authentic, i.e., that they derive from the same experiment. An irregularity may not be initially perceived because it gets "lost in the crowd," but after it is discovered it is often visually quite clear.

29. The second step involves forensic analysis of the images to determine whether the initial cause for concern is supported, or whether there might be additional evidence that can be detected. There are many tools to conduct such forensic analysis. The two discussed below are the ones that I used in analyzing the images from the papers co-authored by Dr. Sarkar and are ones that I pioneered in my time at ORI. They are freely available online and have been the primary tools that ORI uses in investigating claims that images are not authentic. They are useful because they provide a more sensitive way to visualize characteristic features in images for comparison. For Western blots, they allow a more sophisticated comparison of individual bands, artifacts, and background. They simply define the evidence in concrete terms so that the questions can be resolved.

30. There are invariably features in images that are hidden from human perception. The first tool, called "Advanced Gradient Map-Adjustment Layers," promotes detection and

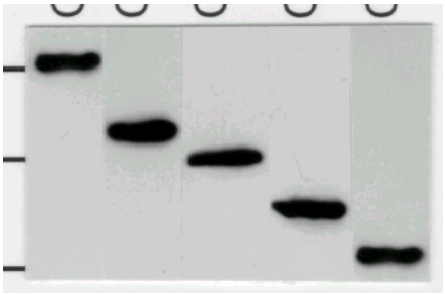
awareness of those features. This tool increases the contrast in, and then applies a false-colorization to, the image to help visualize the subtle features so that they can be compared. Its usefulness derives from the fact that human visual perception is limited. The eye, which responds by detecting contrast, can distinguish only about 50 shades of gray or fewer, but it can detect 100 shades of color. However, unlike the eye, a computer's ability to distinguish shades is not dependent on contrast in the image; it can selectively amplify very slight differences in shade. In addition, the small differences in shade that remain can be made further visible by converting them to different colors. In Western blots, enhancement of the small differences in shades (especially at the margins of features) can expose minute structural details in the morphology (shape) of bands, which otherwise would look smooth and featureless.[3]

[3] This forensic tool works by (1) remapping the relation between the input to the output intensities, so as to extend the areas of high contrast, and by (2) false-colorizing the grey scale image (see "READ ME" files here: http://ori.hhs.gov/advanced-forensic-actions). Together, both effects promote detection of similarities by overcoming the physiological limitation of human vision to detect small differences in grey-scale images.

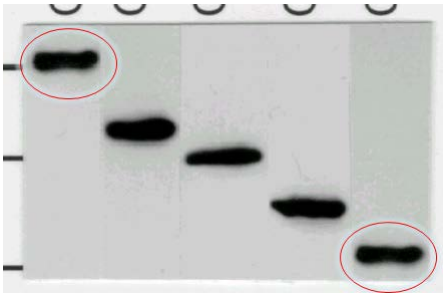
The false-color enhancement does not introduce new content to the image; rather it simply presents the same content in a different form, albeit at first appearing "strange." The latter action (false-colorizing) promotes perception of any features that are visualized by breaking down psychological factors leading to "confirmational bias."

In practice the rate of false positives is very low (so far, in my personal experience, it has not yet occurred). The approach is accepted by the scientific community and used by journals for pre-publication image screening; the method is available online and it can be easily explained without mathematics; when used with the adjustment layers in Adobe Photoshop, the results can be shared and precisely replicated and examined retrospectively without destruction of the tested image. They are available at http://ori.hhs.gov/forensic-tool and http://ori.hhs.gov/advanced-forensic-actions.

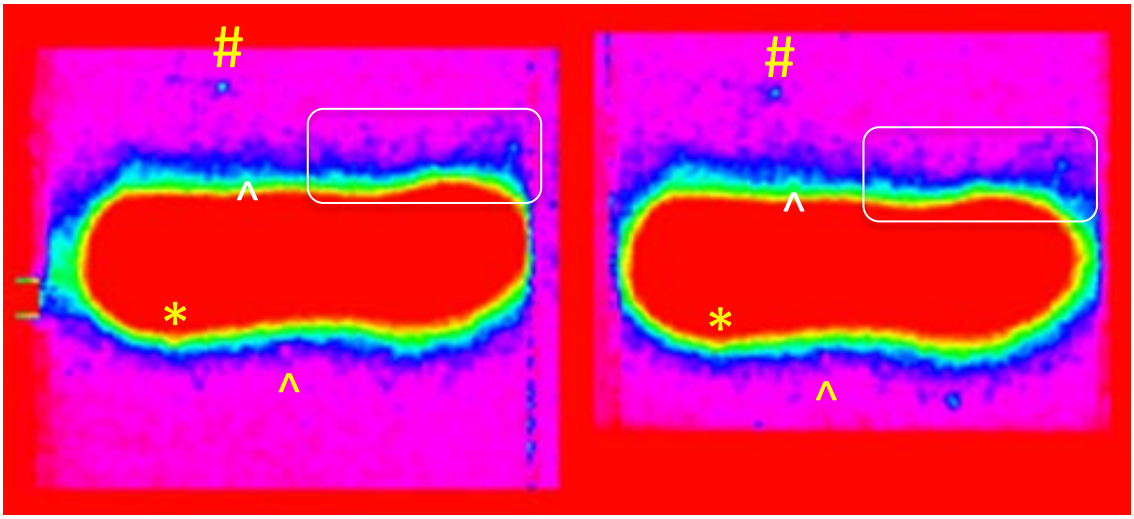
31. Here is an example from my time at ORI of the use of this first tool. This first image shows an image of a Western blot from a closed ORI case.



32. Concerns had been raised about the authenticity of the bands in the first and fifth lanes (the bands on the far left and the far right):



33. The two bands were subjected to the Advanced Gradient Map-Adjustment Layers tool, yielding these two images, shown side-by-side for comparison (with my annotations):



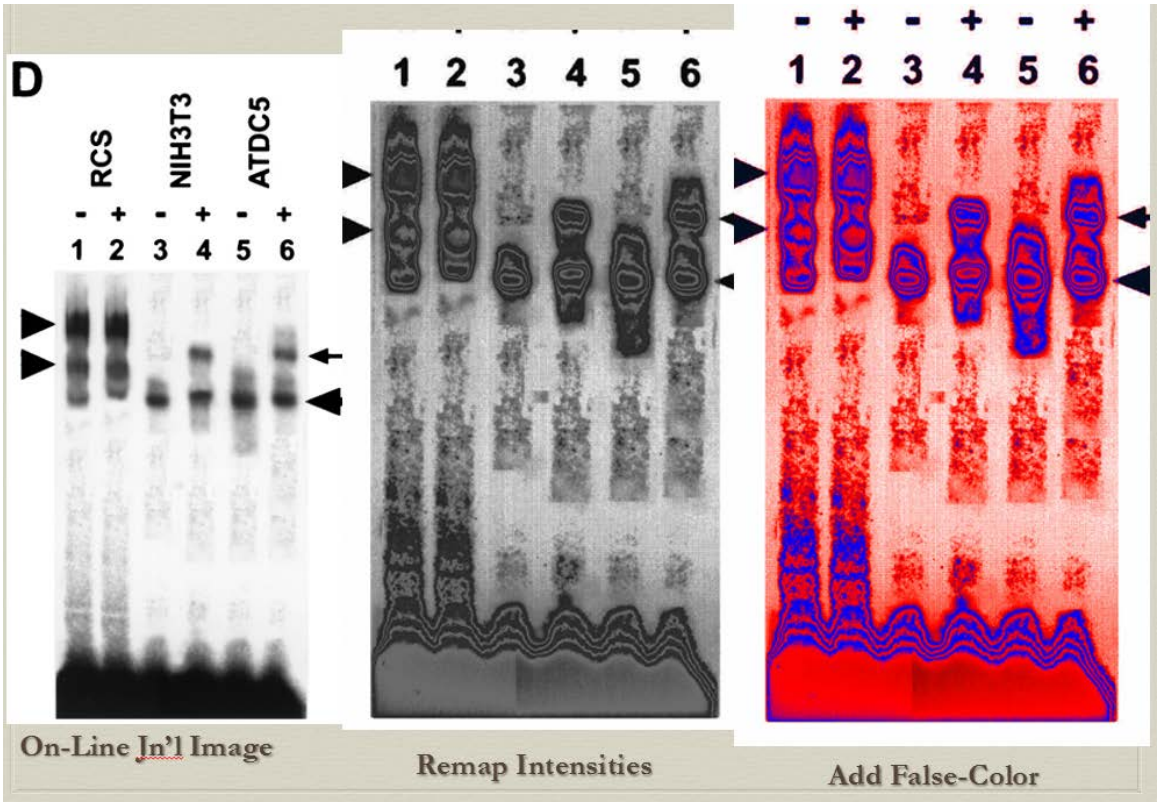
34. Contrast enhancement and false-coloring of the image demonstrated that the respective bands share similar miniature features, features which ought otherwise be random and unique to each band. For example, note the similarity in the morphology of each band, as shown by the inner margin of its red interior. Note, too, the similar artifacts above and on the right side of each band, and the blue spot denoted at #. And note other similarities along the margin of the band. The demonstration of similarity is made more compelling because separate artifacts that exist are present in similar relationship—both to each other and to the band itself.

35. Close inspection can also identify some examples where the fine detail differs between the two images, but those differences could have been introduced by the copying of the data. (This example represented the pasting of a separate photographic print over the blot.) More important, any of the small features that are dissimilar here do not account for the fact that all features that are similar have the same spatial relation—both to each other and to the band. This illustrates also why the existence of affirmative similarities are always more significant than pixel-to-pixel differences.

36. This image analysis showed that the first and the last lanes, purported to be different in origin, actually were from the same experiment. As should be obvious, the question is solely whether the images are too similar to show the results of different experiments. The differences may have arisen from different handling of the bands or the image compression applied to them, while the similarities and their position would not have done so.

37. Here is another example of the application of the first tool to show forensic detail in the background, and within the band itself. (Image from a closed ORI Case) Note, in particular, the similarities between the backgrounds (very easily visible with the false color) of each of the lanes. Those backgrounds ought to be random and relatively featureless, and yet clear

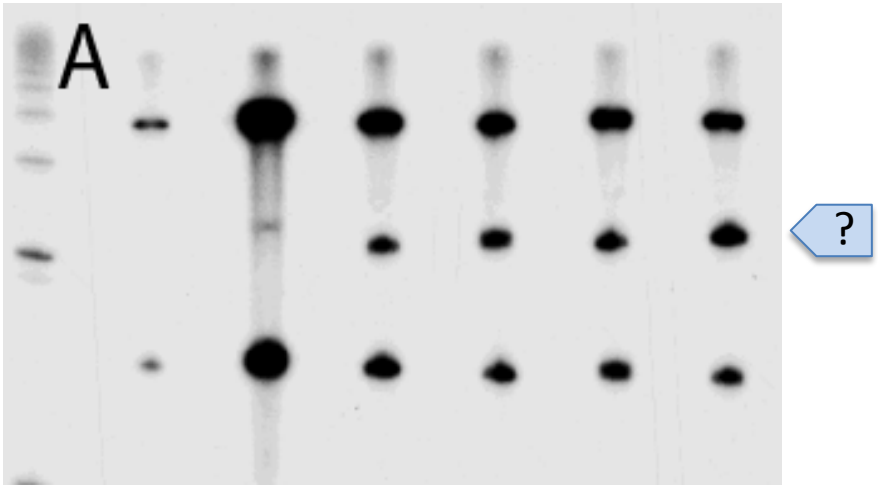
evidence exists of reuse and sharp boundaries where none should exist. Note, too, the similar morphology and internal structure of each of various pairs of the bands. For example, the uppermost bands in lanes 1 and 2 look unexpectedly similar in the false-color image, as do the components of bands that are side-by-side in lanes 5 and 6 (the band in lane 5 appears vertically stretched as compared to the band in lane 6).



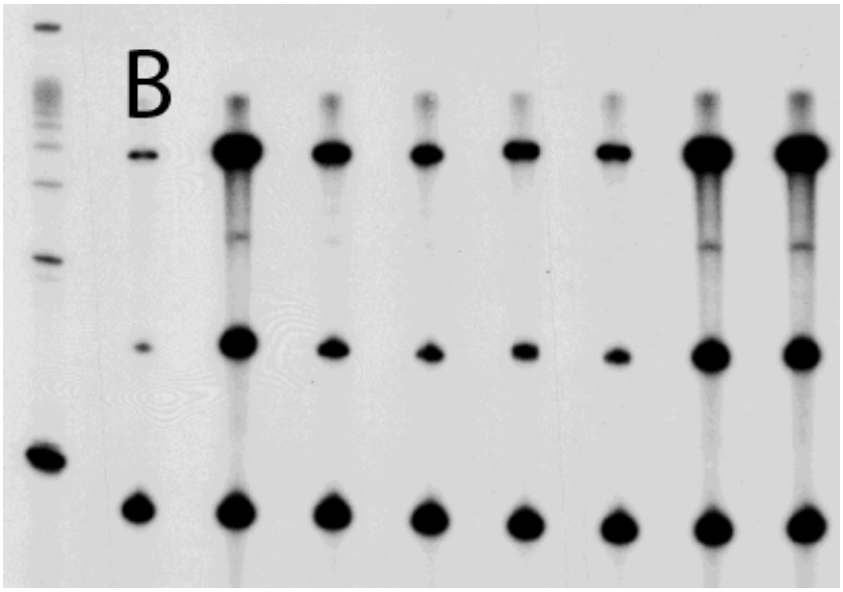

38. The second tool that I used in analyzing the images from Dr. Sarkar's papers is called "Overlay Features in One of Two Images." It works by overlaying two images in a way that allows both the visualization and the interpretation of their differences. The images are color-coded to identify from which image a disparate feature arose.[4]

[4] The basis of the color-coded image overlay method to compare the shapes and features in two images is well accepted in science, being fully analogous to the approach widely used for the co-localization of proteins in cell biology. All forensic tools are available, along with "READ ME" advisory files, at http://ori.hhs.gov/advanced-forensic-actions.

39. Here is a final example, again from my time at ORI, of the use of this tool, an illustration that was developed for teaching Institutional Officials. This first image "A" is of a Northern blot (similar, for our purposes, to a Western blot) from one paper:

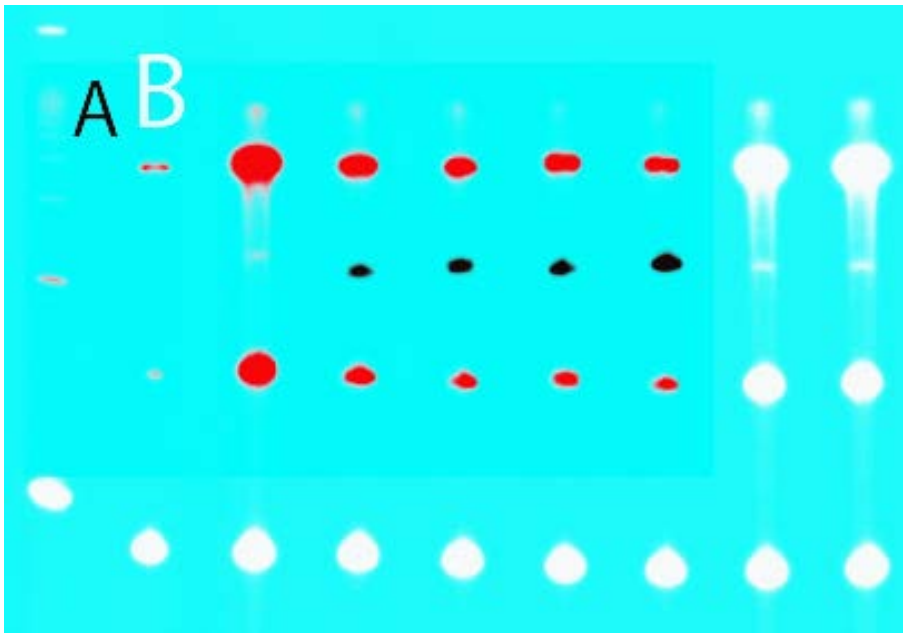



40. And here is a separate image "B" of a Northern blot from another paper:



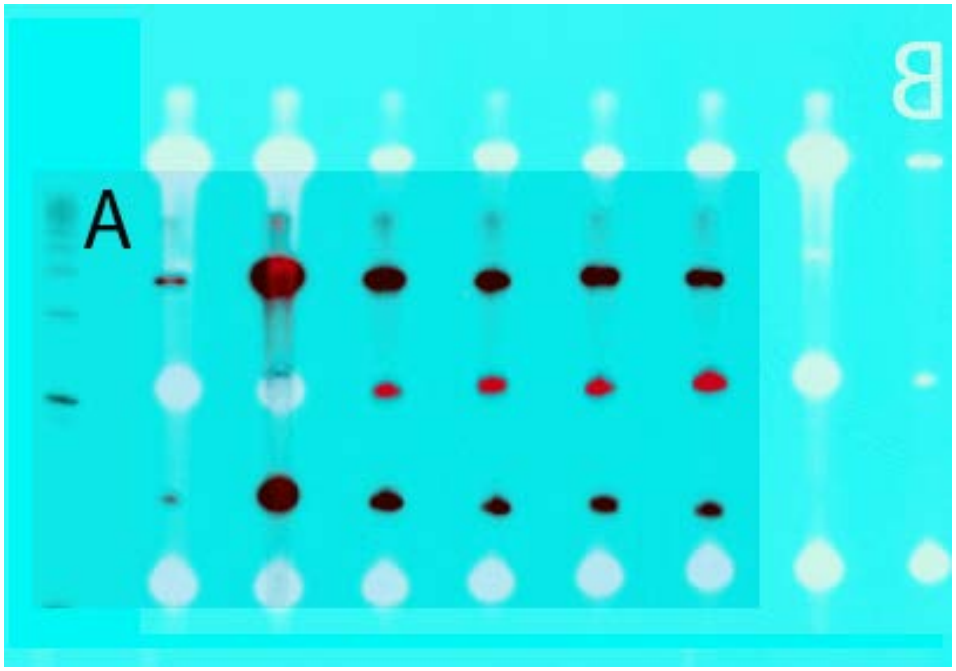
41. These two blots were designed to raise concern, because the two show evidence of similar origin: Specifically, the first two rows of bands in the second blot look suspiciously like the 1st and 3rd row of bands in the first blot, yet the first blot (Image “A”) has another row of bands between the rows that is not present in the second blot (Image “B”).

42. Whether the two conflicting images are from the same source can be tested using the overlay tool. Here is the result of such an overlay comparison to test the possible differences between the two images and to identify from which image they arose. In this overlay, differences from features that are derived only from the first image “A” appear black, differences from features that are derived only from “B” are white, and features from both images that overlap precisely appear red with uniform edges. (You can see this, starting with the color of the labels “A” and “B” in the original images.)




43. The overlay shows that 1st and the 3rd rows of bands in Image “A” are the same as the 1st and the 2nd rows in Image “B,” yet the other lanes are different. One of the images is not authentic data.

44. Here is a result of a second overlay of the same two images, but this time, the second image "B" has been flipped (*reversed*) horizontally (i.e., across its vertical axis) and repositioned to overlie its second row upon the second row of questioned data in the first image "A." The color-coding for the similarity and the differences in the overlay is the same as before. The overlay comparison shows the questioned second row of four bands in "A" was fabricated by copying and reversing, and splicing into "A" the second row of data from "B."




45. As before, red features *with uniform boundaries* denote overlap of the same bands (where the margins are not the same, they are different features (as seen in the second lane)).

46. These examples demonstrate 1) how image enhancements may extract more information from the content of an image than would be visibly apparent in a questioned image (i.e., points 28-37), and 2) how a comparison by direct overlay to reveal differences can be used to test the origins of bands in a questioned image (i.e., points 38-45).

## Analysis of Images in PubPeer's Case

47. Counsel for PubPeer retained me to evaluate six sets of questions arising from eight papers co-authored by Dr. Sarkar. PubPeer's counsel provided me the text of the PubPeer comments relating to those six sets of questions, and I independently evaluated the images focused on by those comments to determine whether the evidence shows those images are not authentic. Collectively, those questions involved the examination of 28 separate issues, identified in 25 separate Figures of data in those eight papers.

*Methodology.*

48. My preliminary assessment was based on a visual inspection of the questioned images, provided either as PDF figures from the publication, and/or images obtained via PowerPoint slides of the relevant figure as downloaded from the journal.

49. Where possible, I conducted a more definitive examination using better-quality images that I was able to obtain from the journal's online image browser, using the "html" version of the paper. When possible, the images were expanded at the source using the journal's online image browser.

50. When deemed useful, I also tested each set of images using one of the independent forensic tools described above.

51. The primary issue I examined was whether individualized features in the separate images, the distinctive appearance of individual bands, and/or the related background, collectively were too similar to be the results of different experimental observations. In several images, I instead examined whether there was evidence of selective splicing or other irregularities demonstrating tampering with the image contents.

52. I concluded that there was sufficient reason to question the authenticity of the images I examined if any relevant similarities in the images could not otherwise be ruled out as being due to other factors.

*Results.*

53. As stated above, I concluded that, for each of the 28 image-issues that I evaluated, strong evidence supports the conclusion that the images are not authentic or contain other irregularities symptomatic of tampering. As also stated above, in one of the sets I examined, the more sensitive forensics revealed new and more discrete evidence that was different from that originally posed by the PubPeer comments, but which nonetheless supported the questioning of the specific data in that case.

54. I first based my opinion on my visual observations of material that I obtained directly from the journals. I concluded that sufficient reason existed to question the authenticity of the images.

55. Additionally I used a fully independent means of comparing the questioned images, one that visualized specific features in the morphological details of the bands and in amorphous features of the associated background. This approach provided a more sensitive means of evaluating the content "hidden" in same image(s), and it utilized the same sources that were available to the PubPeer commenters. That more sensitive approach fully supported my initial conclusion that the questioned images were not authentic, either because they were too similar to be different or because they showed evidence of inconsistent modification (e.g., splicing for one band that did not correlate with other bands in the same lane).

56. In one exception, however, the more sensitive examination found direct evidence for displacement of the questioned band from elsewhere in the image of the results (as opposed to its being copied and reused, a practice for which evidence was found in multiple other

images). Thus, even here, the question as to the authenticity of the band is fully sustained, but it is based on a different reason than that originally proffered.

57. Finally, the more sensitive methods that I applied detected *other* anomalies in the images occurring elsewhere in the same figures at issue. Collateral observations were associated with six figures.

58. Below, I explain my analysis in the context of a few examples from the 28 analyses that I conducted. These few examples are representative of my analysis and of my conclusions.

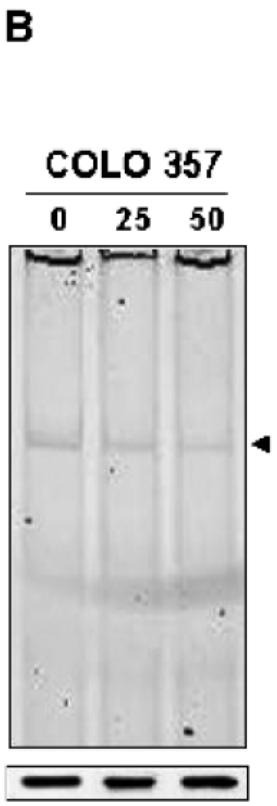
*Examples of analysis of images from papers co-authored by Dr. Sarkar.*

59. **First example.** The first example concerns images in the following paper published in 2005: *Molecular Evidence for Increased Antitumor Activity of Gemcitabine by Genistein In vitro and In vivo Using an Orthotopic Model of Pancreatic Cancer, Sanjeev Banerjee,*1 Yuxiang Zhang,1 Shadan Ali,1 Mohammad Bhuiyan,1 Zhiwei Wang, Paul J. Chiao, Philip A. Philip, James Abbruzzese, and Fazlul H. Sarkar.

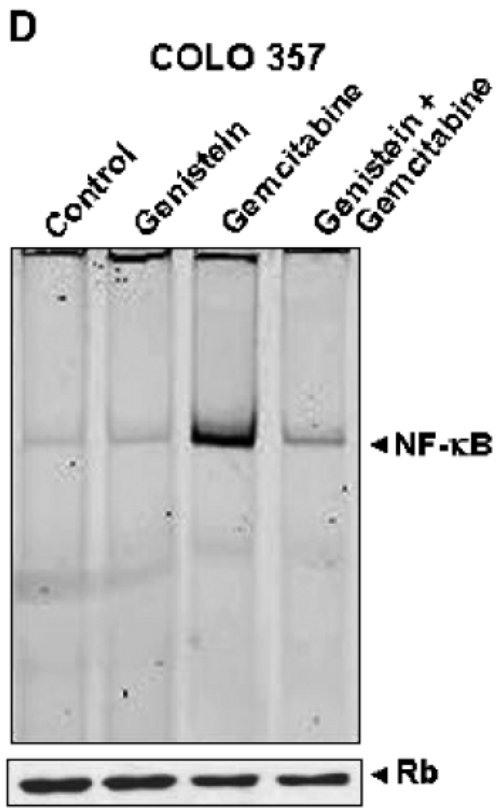
60. The comment that PubPeer commenters made on the article, as provided to me by PubPeer's counsel, was as follows:

| |
|---|
| Compare Fig. 3B and Fig. 3D<br><br>When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357. |

61. I examined Figures 3B and 3D to determine whether they show evidence of inauthenticity. Here are the Colo357 portions of each of the two figures as they appear in the journal article:




From Figure 3B




From Figure 3D

62. The comment calls for a comparison between the first two lanes of each portion of the figure, with the lanes from Figure 3B being flipped. I performed that flip, which resulted in the following comparison:

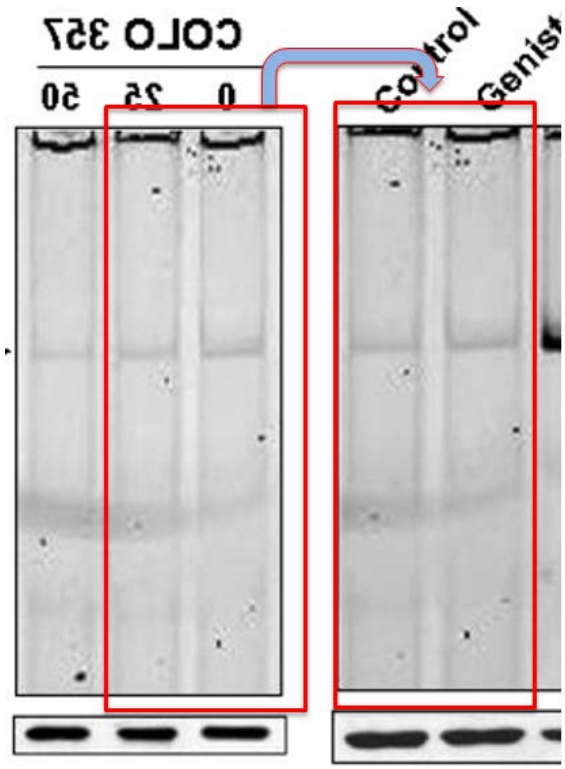
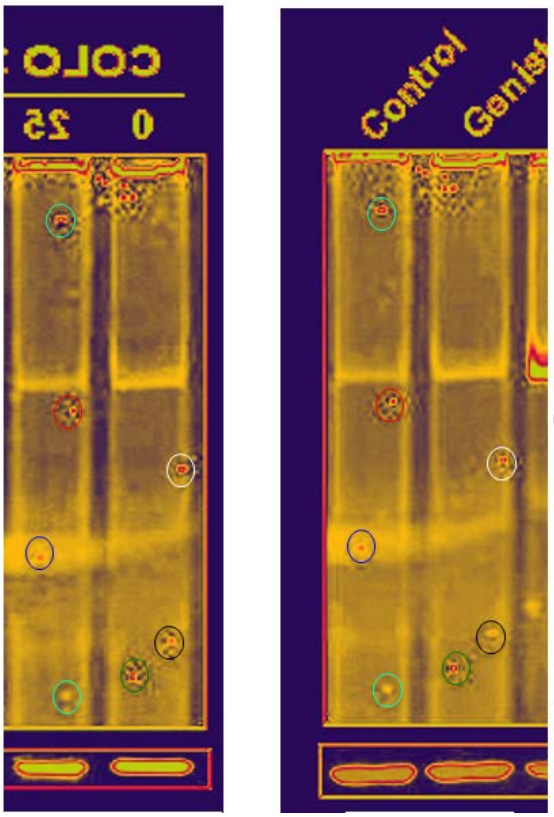



Figure 3B (flipped) vs. Figure 3D

63. Based on a visual inspection alone, there are multiple examples of artifact that are common both in appearance and in position, to both images. A visual inspection of the images is sufficient to conclude that there is strong evidence to believe that these images are not authentic.[5]

[5] Note that the lanes in each figure appear to be of different widths. As I explained before, differences are less revealing than similarities, and the different widths do not alter my conclusion. It is common for researchers to shrink or expand their results to fit the layout of a new figure, or to allow easier comparison across experiments. Journal art editors also do this during printing.

64. I repeated the comparison using images directly obtained from the journal. The dynamic range of the features visualized was extended through false-color enhancement. As explained above, such enhancement visualizes features in both the background and in the random noise that occurs in common between the two panels. The enhancement further confirmed that the respective features in each image are all in the same position relative to each other. This strongly confirmed the visual inspection.




65. Note that the small circles in the false-color image above were added on top of one of the images, grouped together, copied, and then overlain on the second image. They show that the relative position of the artifacts, both with respect to each other and with respect to the experimental results, are the same.

66. One might ask whether the possibility exists that the multiple artifacts are in the same position because they were present on a device used to record different sets of data? What

establishes the significance of the artifact, however, is not its presence, but the similarity of its relationship with experimental results, a relationship that should vary in the repositioning of new results when making an independent record of their observation.

67. Thus multiple artifacts that ought to be randomly located occur in the same relative position in two images. Despite this expectation, the artifacts are also in the same relation to the layout of the blot's lanes, and to its band position. The latter agreement proves that the two images cannot be separate results from independent experimental determinations.

68. **Second example.** The second example concerns images in the following paper published in 2006: *Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells*, Zhiwei Wang, Yuxiang Zhang, Yiwei Li, Sanjeev Banerjee, Joshua Liao, and Fazlul H. Sarkar.

69. The comment that PubPeer commenters made on the article, as provided to me by PubPeer's counsel, was as follows:

> Figure 1D
>
> UPPER Notch-1 panel: please compare NS of BxPC3 (lane 2 from left) with NS of HPAC (lane 4 from left) and CS of PANC-1 (lane 5 from left). Note also the vertical line and darker background on the left side of the CS band of PANC-1.
>
> LOWER Notch-1 panel: please compare CP of HPAC (lane 3 from left) with CP of PANC-1 (lane 5 from left). Also compare the CP band of BxPC3 (lane 1 from left) with the NP band of PANC-1 (lane 6 from left).
>
> Now, please FLIP HORIZONTALLY the entire LOWER Notch-1 band. Now compare the NP band of BxPC3 in the lower Notch1 panel (lane 2 from left in the original) with the CS of BxPC3 in the upper Notch-1 panel (first lane from left). Also compare the CP bands of HPAC and PANC-1 in the lower Notch-1 panel with the NS bands of BxPC3 and HPAC in the upper Notch-1 panel.

Figure 5

Cyclin D1 Panel: please compare the shape and position of the CS band of HPAC with the CS band of PANC-1 in the Cyclin D1 panel (upper).

CDK2 Panel: please note the vertical line between the NS band of HPAC and CS band of PANC-1. Please note the box around the NS band of BxPC3 (magnify).

Figure 6A, B and C

Please compare the Rb bands in the three panels (A, B, and C). Compare the BxPC3 and HPAC bands in 6A and 6B, magnify and see the shapes and background, especially the small specks in the upper right corner of the second band (from left). Now, please FLIP HORIZONTALLY the RB bands in PANC-1 (panel C) and compare with the two other bands (BxPC3 and HPAC in panes A and B). Then, note the small specks in the upper right corner of the second band (from left).

Figure 7E and Figure 8D

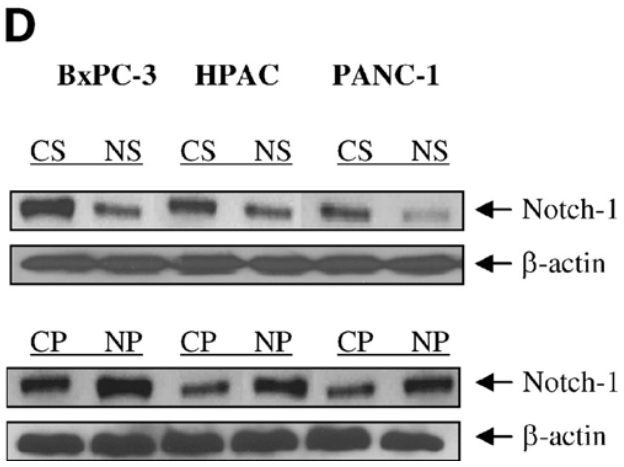
Please compare the two Rb bands. But please increase the width of the Rb bands in Figure 8 and compare. Better seen in PowerPoint, magnify.

70. A comment related to the same paper, comparing a figure from it to a figure from another paper, was as follows:

Fig. 8A in this paper is identical to Fig. 5A in Cancer, 2006 Jun 1;106(11):2503-13; (https://pubpeer.com/publications/16628653)

Figures can be seen side by side here:
http://i.imgur.com/OeiHlr3.png

71. There are many comparisons being drawn by these comments, so I will describe my analysis of just a few of them. The first paragraph invites comparison between various portions of Figure 1D:




72. The comment first asks for a comparison of (1) the NS lane of BxPC-3, (2) the NS lane of HPAC, and (3) the CS lane of PANC-1. The comment next notes the vertical line and darker background between the fourth and fifth lanes (between the NS lane of HPAC and the CS lane of PANC-1).

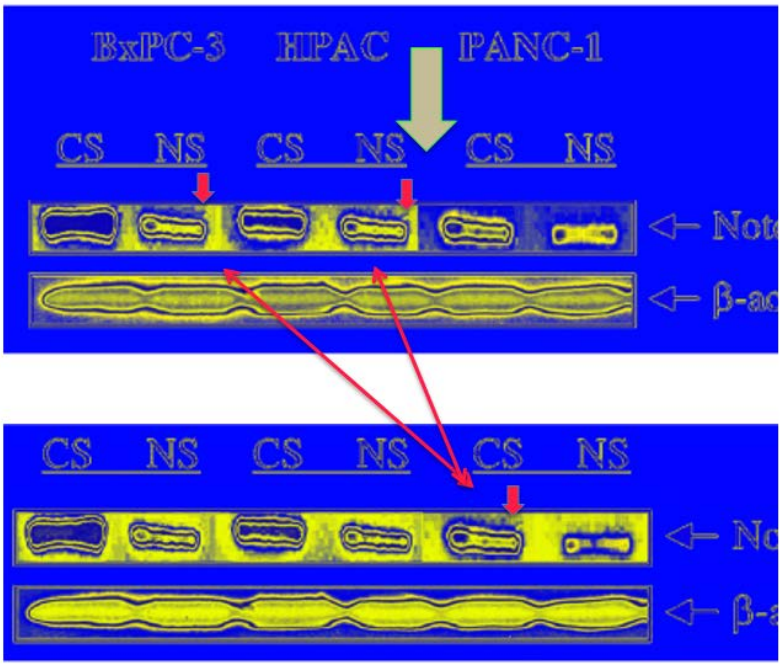
73. Based on a visual comparison, alone, the image does in fact show unexpected and multiple points of similarity between these bands relative to the respective shape, the orientation (rising to the left), and the asymmetrical distribution of band density (i.e., intensity) at the left, at the middle, and at right end of each band. The full Journal image also shows a sharp shift in background intensity between the NS lane of HPAC and the CS lane of PANC-1. Here are just the relevant bands, excerpted from the figures and magnified:

NS lane of BxPC-3 NS lane of HPAC CS lane of PANC-1

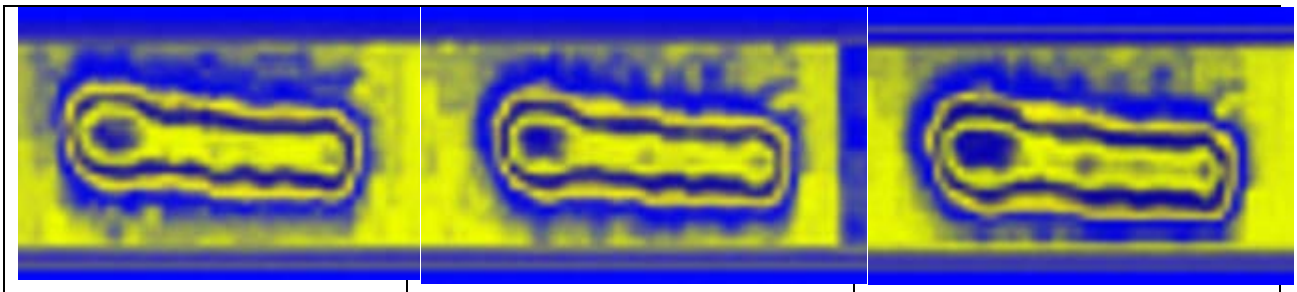
74. The overall similarity between the bands shown in the excerpts is slightly easier to see if their magnification is reduced. However more information can be revealed by examining the features of the bands from the Journal image, as illustrated next.

75. I extracted and copied the image from the enlarged version on the journal's html website source. False-color enhancement of the bands in Figure 1D showed additional features that confirm the similarities and the shift in background intensity. In the false-color images below, the top image shows a color enhancement, which reveals additional similarities between the NS lane of BxPC-3 and the NS lane of HPAC. It also reveals the clear and sharp shift in background intensity that occurs just before the 5th band, consistent with selective photo-editing in the row, which is absent in the associated loading control row (the second row). (A less distinctive, vertical line in the background occurs after the 2nd band.). Moreover, the features of the irregular margins of the 2nd, 4th, and 5th bands show multiple points of coincidence in the

patterns of intensity (noted by the red arrows) in the top illustration below (which consists of two different visualizations of the same image panel).



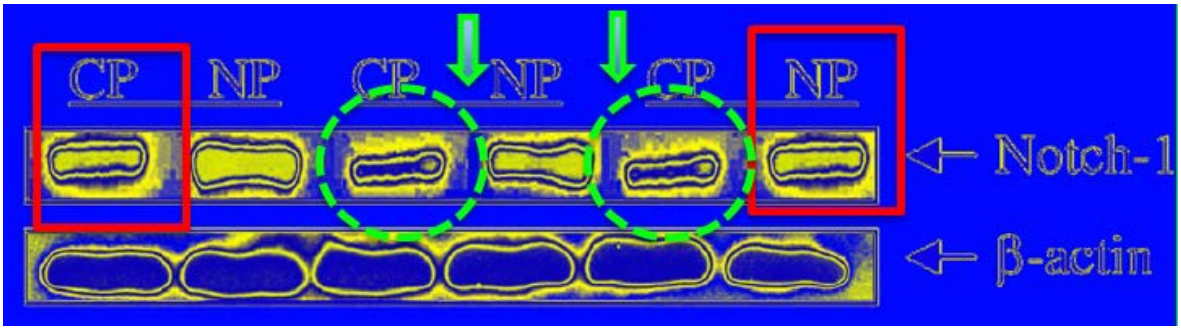

76. The color reversals at the margins of the 5th band are accounted for by the effect in the visualization method of the selective lightening of the 5th and 6th band data. The lower of the two panels shows brightening the same image above by 15 levels does not change the pattern at the band's margin, and now the 5th band also resembles the 2nd and 4th. Thus, evidence shows the similarity of the 2nd, 4th, and 5th in the top Notch-1 row. Here are those three bands, extracted from the false-color image above (with the final band lightened by 15 levels):



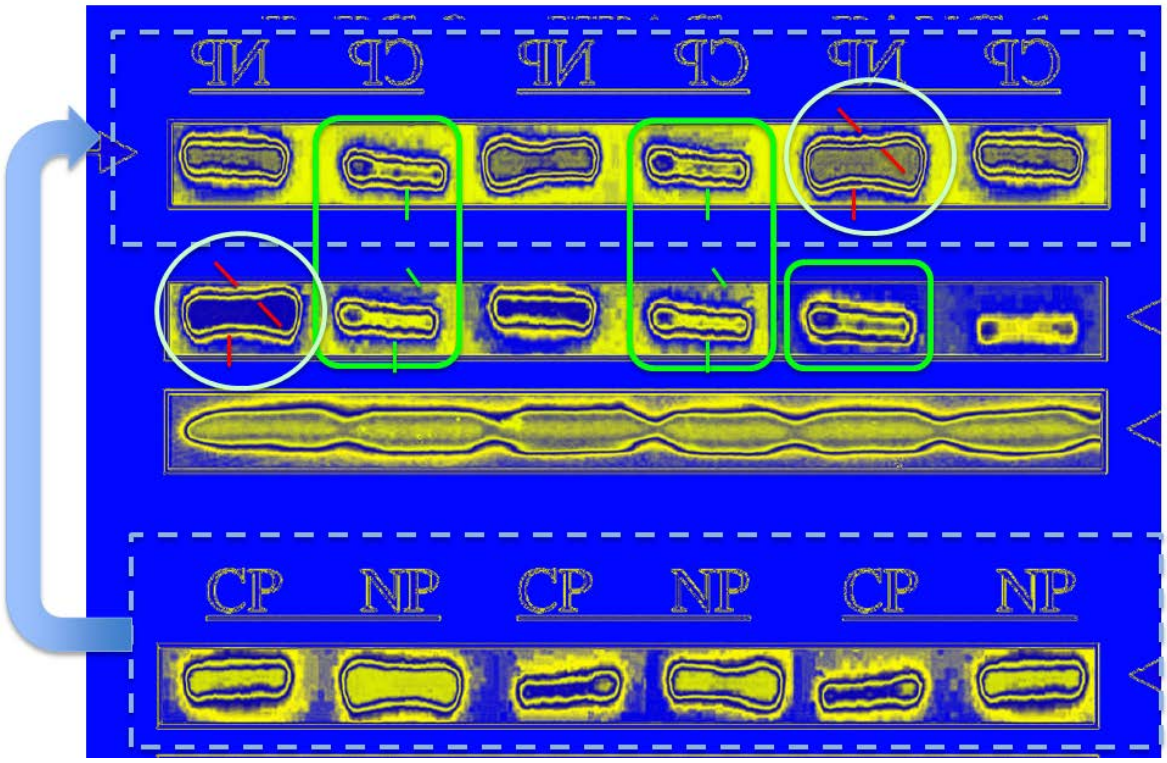
| NS lane of BxPC-3 | NS lane of HPAC | CS lane of PANC-1 |
|---|---|---|

77. On the basis of this analysis and image enhancement of Figure 1D, there is evidence that strongly supports the conclusion that the image is not authentic.

78. The second paragraph of the comment on Figure 1D invites comparison between bands in the lower Notch-1 panel: the CP band of HPAC with the CP band of PANC-1 (the red boxes below); and the CP band of BxPC3 with the NP band of PANC-1 (the green dotted circles below). For the sake of brevity, I will include the false-color image I produced to examine these comparisons without as much explanation. Suffice it to say that the there is strong evidence to conclude that the bands identified are not authentic




79. The same is true of the third paragraph of the comment, which invites comparison of two sets of bands once the entire lower Notch-1 panel is flipped: the NP band of BxPC-3 in the lower Notch-1 panel with the CS band of BxPC-3 in the upper Notch-1 panel (circles below); and the CP bands of HPAC and PANC-1 in the lower Notch-1 panel with the NS bands of BxPC-3 and HPAC in the upper Notch-1 panel (green boxes below). Again, for the sake of brevity, the false-color image I created to analyze these bands is produced below, without the same detailed explanations I provided above. Note that the top row in the image has been flipped horizontally (from the row on the very bottom) and lightened to match the background of the other row. The small annotations in the image below show a few of the similar features that led to my conclusion that there is strong reason to believe that the image is not authentic.




80. I will not fully document my analysis here of the remaining paragraphs of the comments in this second example, but in each case, I reached a similar conclusion, that the figures analyzed showed strong evidence to question their authenticity.

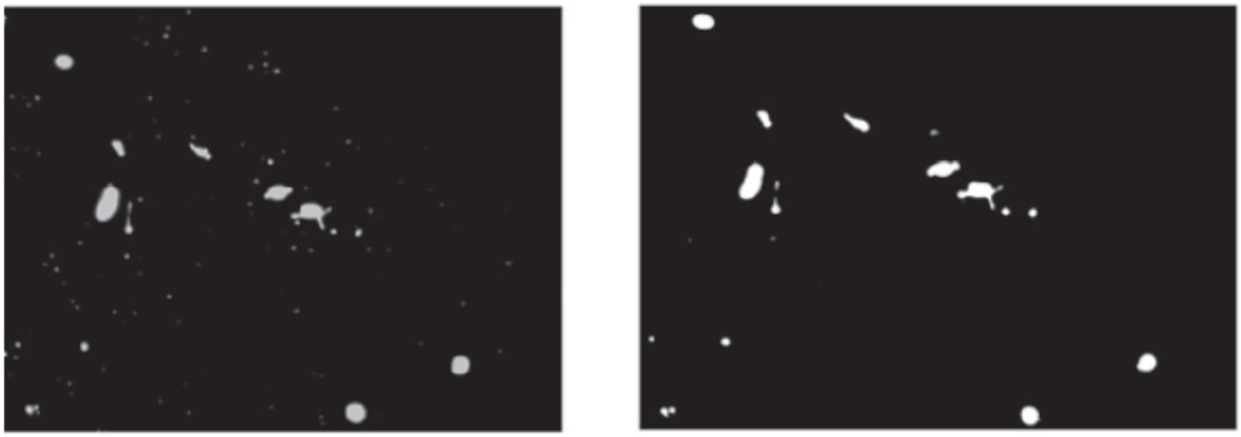
81. **Third example.** I will provide one final brief example of my analysis. This third and final example concerns images in the following paper published in 2011: *Inactivation of AR/TMPRSS2-ERG/Wnt Signaling Networks Attenuates the Aggressive Behavior of Prostate Cancer Cells*, Yiwei Li, Dejuan Kong, Zhiwei Wang, Aamir Ahmad, Bin Bao, Subhash Padhye, and Fazlul H. Sarkar.

82. One of the several comments that PubPeer commenters made on the article, as provided to me by PubPeer's counsel, was as follows:

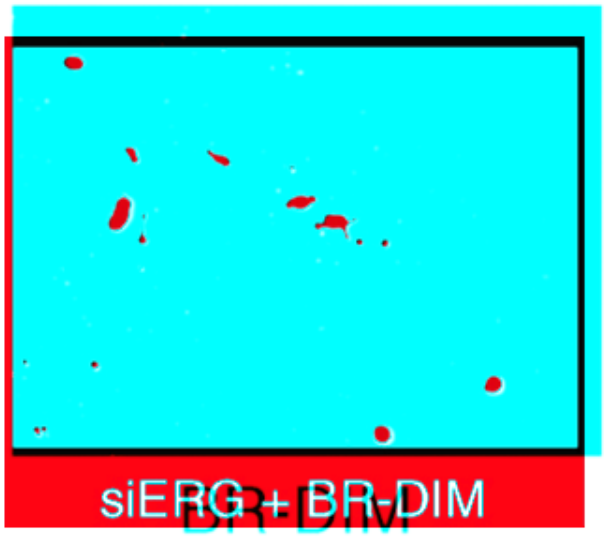
| |
|---|
| Figure 3A<br><br>Image of LNCaP, BR-DIM is identical to image of VCaP, siERG + BR-DIM. |

Same image for two different cell types and conditions.

83. The images in question, which are below, depict the results of a fluorescence experiment conducted on a population of cells.



84. The shapes, locations, patterns, and intensity of fluorescence emanating from a population of single cells should be fully independent of another population, yet in this case there are points of agreement for at least 13 separate features. I verified this through use of the overlay tool discussed above (Points 38-45), which produced the image below. Given the multiple sources of expected biologic variation, the evidence in support of the conclusion that the images are not authentic is exceptionally strong.



*Conclusion.*

85. The examples provided above are just a few of the analyses I conducted in examining the 28 separate issues involving ~44 images excerpted from data reported in 25 separately Published Figures (e.g., Figures 6A, 6B, and 6C are taken to be three figures, because they purport to be results of three experiments). With respect to every image or set of images that I examined, I concluded that there was strong evidence to believe that the images at issue were not authentic or contained other irregularities. Although not reproduced above, I would be happy to submit documentation of the balance of my analyses.

86. PubPeer's counsel did not ask me to determine whether the fact that the images I examined are not authentic is evidence of research misconduct by someone involved in the preparation of the papers. To make such a determination one would need direct access to the original data, and a fact-finding process that would require a fuller review by the institution. 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.

**Resources**

87. Below is a list of the PubPeer comments provided to me by PubPeer's counsel, along with the names of the eight papers associated with those comments. In all, the comments identified 25 images or sets of images that I examined. A number of the comments came in the form of images.

88. Comments on:

a. *Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells,* Zhiwei Wang, Yuxiang Zhang, Yiwei Li, Sanjeev Banerjee, Joshua Liao, and Fazlul H. Sarkar.

b. *Notch-1 Down-Regulation by Curcumin Is Associated with the Inhibition of Cell Growth and the Induction of Apoptosis in Pancreatic Cancer Cells*, Zhiwei Wang, Yuxiang Zhang, Sanjeev Banerjee, Yiwei Li, Fazlul H. Sarkar.

Figure 1D

UPPER Notch-1 panel: please compare NS of BxPC3 (lane 2 from left) with NS of HPAC (lane 4 from left) and CS of PANC-1 (lane 5 from left). Note also the vertical line and darker background on the left side of the CS band of PANC-1.

LOWER Notch-1 panel: please compare CP of HPAC (lane 3 from left) with CP of PANC-1 (lane 5 from left). Also compare the CP band of BxPC3 (lane 1 from left) with the NP band of PANC-1 (lane 6 from left).

Now, please FLIP HORIZONTALLY the entire LOWER Notch-1 band. Now compare the NP band of BxPC3 in the lower Notch1 panel (lane 2 from left in the original) with the CS of BxPC3 in the upper Notch-1 panel (first lane from left). Also compare the CP bands of HPAC and PANC-1 in the lower Notch-1 panel with the NS bands of BxPC3 and HPAC in the upper Notch-1 panel.

Figure 5

Cyclin D1 Panel: please compare the shape and position of the CS band of HPAC with the CS band of PANC-1 in the Cyclin D1 panel (upper).

CDK2 Panel: please note the vertical line between the NS band of HPAC and CS band of PANC-1. Please note the box around the NS band of BxPC3 (magnify).

Figure 6A, B and C

Please compare the Rb bands in the three panels (A, B, and C). Compare the BxPC3 and HPAC bands in 6A and 6B, magnify

| |
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| and see the shapes and background, especially the small specks in the upper right corner of the second band (from left). Now, please FLIP HORIZONTALLY the RB bands in PANC-1 (panel C) and compare with the two other bands (BxPC3 and HPAC in panes A and B). Then, note the small specks in the upper right corner of the second band (from left).<br><br>Figure 7E and Figure 8D<br><br>Please compare the two Rb bands. But please increase the width of the Rb bands in Figure 8 and compare. Better seen in PowerPoint, magnify. |
| Fig. 8A in this paper is identical to Fig. 5A in Cancer, 2006 Jun 1;106(11):2503-13; (https://pubpeer.com/publications/16628653) Figures can be seen side by side here: http://i.imgur.com/OeiHlr3.png |

89. Comments on:

a. *Inactivation of AR/TMPRSS2-ERG/Wnt Signaling Networks Attenuates the Aggressive Behavior of Prostate Cancer Cells*, Yiwei Li, Dejuan Kong, Zhiwei Wang, Aamir Ahmad, Bin Bao, Subhash Padhye, and Fazlul H. Sarkar.

| |
|---|
| Figure 3A<br><br>Image of LNCaP, BR-DIM is identical to image of VCaP, siERG + BR-DIM. Same image for two different cell types and conditions.<br><br>Figure 6.<br><br>http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3167947/figure/F6/<br><br>PSA panel. Vertical changes in background between lanes 1 and 2, 3 and 4, and between lanes 5 and 6.<br><br>No vertical chnages in background in the other 4 panels.<br><br>Comparison between spliced and unspliced panels is problematic. |

Check this out: same bands for different time conditions
http://i.imgur.com/4qJBeS7.png
http://i.imgur.com/UaeqmWb.png

90. Comment on:

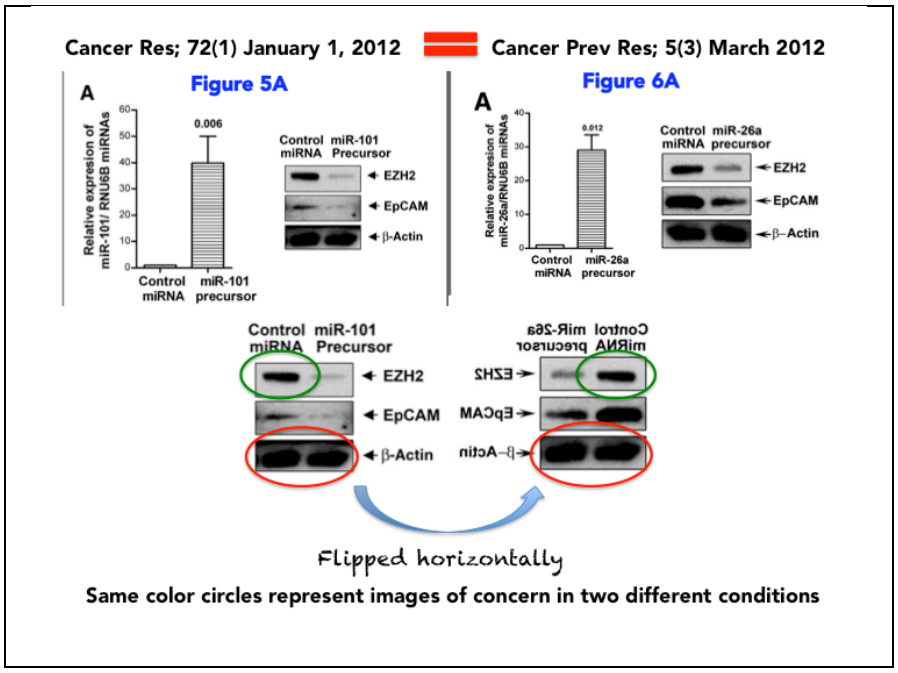
a. *Activated K-Ras and INK4a/Arf Deficiency Promote Aggressiveness of Pancreatic Cancer by Induction of EMT Consistent With Cancer Stem Cell Phenotype*, ZHIWEI WANG, SHADAN ALI, SANJEEV BANERJEE, BIN BAO, YIWEI LI, ASFAR S. AZMI, MURRAY KORC, and FAZLUL H. SARKAR.

The EZH2 band in Figure 4B is the same band for E-Cadherin in Figure 4C, just flipped over 180 degrees.

91. Comment on:

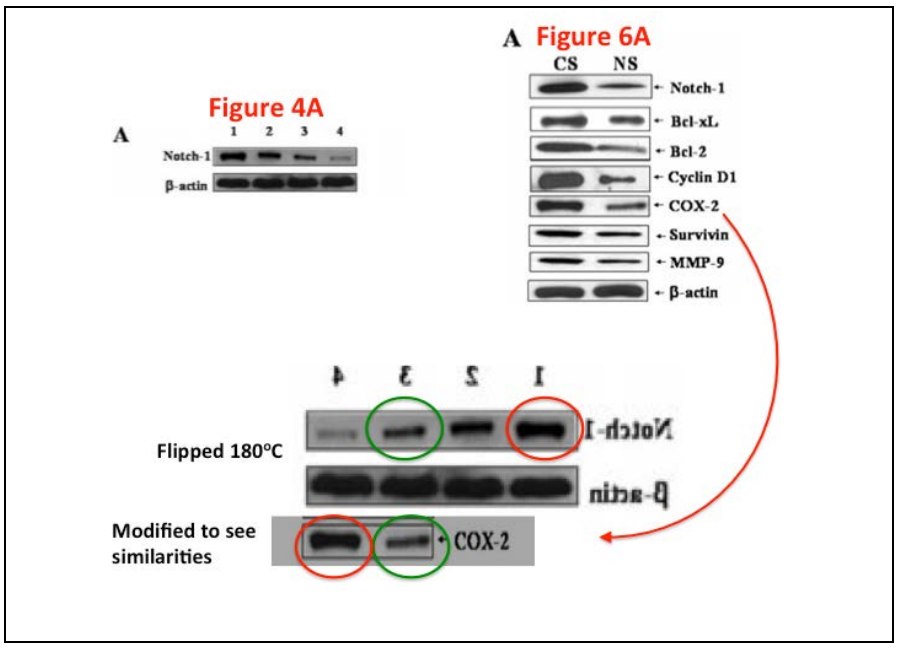
a. *Metformin Inhibits Cell Proliferation, Migration and Invasion by Attenuating CSC Function Mediated by Deregulating miRNAs in Pancreatic Cancer Cells*, Bin Bao, Zhiwei Wang, Shadan Ali, Aamir Ahmad, Asfar S. Azmi, Sanila H. Sarkar, Sanjeev Banerjee, Dejuan Kong, Yiwei Li, Shivam Thakur, and Fazlul H. Sarkar.

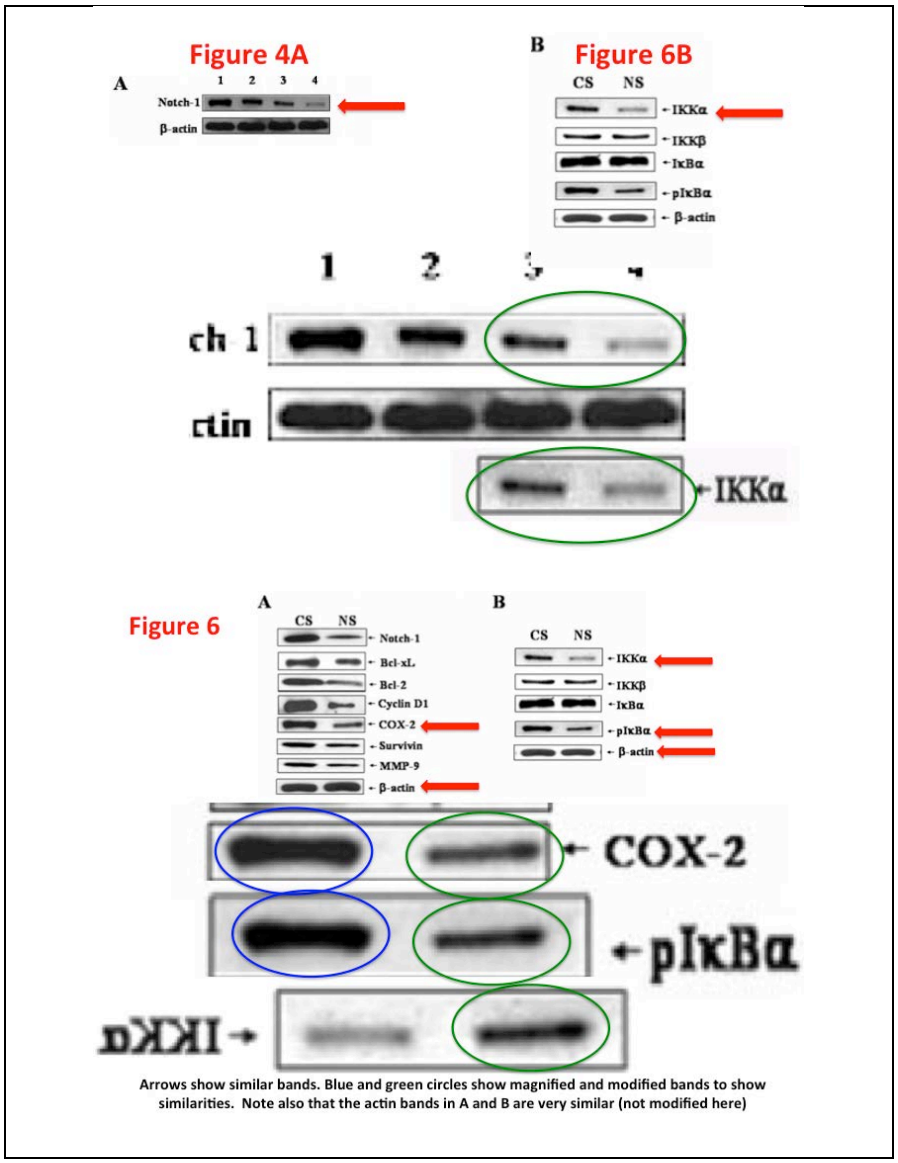
b. *Curcumin Analogue CDF Inhibits Pancreatic Tumor Growth by Switching on Suppressor microRNAs and Attenuating EZH2 Expression*, Bin Bao, Shadan Ali, Sanjeev Banerjee, Zhiwei Wang, Farah Logna, Asfar S. Azmi, Dejuan Kong, Aamir Ahmad, Yiwei Li, Subhash Padhye, and Fazlul H. Sarkar.




92. Comments on:

a. *Inhibition of nuclear factor jB activity by genistein is mediated via Notch-1 signaling pathway in pancreatic cancer cells*, Zhiwei Wang, Yuxiang Zhang, Sanjeev Banerjee, Yiwei Li and Fazlul H. Sarkar.






93. Comments on:

a. *Molecular Evidence for Increased Antitumor Activity of Gemcitabine by Genistein In vitro and In vivo Using an Orthotopic Model of Pancreatic Cancer*, Sanjeev Banerjee, Yuxiang Zhang, Shadan Ali, Mohammad Bhuiyan, Zhiwei Wang, Paul J. Chiao, Philip A. Philip, James Abbruzzese, and Fazlul H. Sarkar.

Compare Fig. 3B and Fig. 3D

When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357.

John W Krueger

Dr. John Krueger

Signed and sworn before me this 9 day of December, 2014

Tayyaba Aleemuddin

Notary Public

TAYYABA ALEEMUDDIN
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires November 10, 2015

# Exhibit A

**JOHN W. KRUEGER, Ph.D**

**Expertise: Forensic Examination of Questioned Images in Science**

**General background:**

My direct expertise stems from 20 years of relevant Federal work, my second career starting as one of the original Investigator/Scientists in the Division of Research Investigations (or later the Division of Investigative Oversight), Office of Research Integrity (1993-2013). In this position, I was responsible for oversight of investigations into allegations of falsification of research. This task involved a heavy commitment to forensic assessment of the evidence, either for the allegations (sometimes made anonymously) for referral to institutions, or in the evaluation of the resultant institutional finding. This was one of the more interesting jobs in science, as it providing many opportunities. At ORI, I:

- Pioneered and developed *de novo* the image processing methods for forensic examinations, including ORI's Forensic Tools, that are available on the ORI website (see links below). These tools have been provided and used world-wide, and they have been subject of articles both here and on the internet.
- Developed the interpretations of the results, and advised and supported Journal editors in these matters;
- Trained numerous others in these methods (including my ORI colleagues and numerous institutional officials and faculty members) who were doing the investigations, as well as journal production editors doing image screening;
- Was heavily involved in education of the community about these new forensic methods and their interpretation. (See links to articles, material about ORI's forensic tools, and list of presentations, below; any item is available upon specific request);
- Established the Image Forensics Lectures for Institutional Officials at ORI's RIO BootCamp program (BootCamps I-VII);
- Established and successfully maintained the Macintosh Computer Forensics and software support in ORI (despite OASH recalcitrance du to federal preferences for the PC platform). As part of this responsibility I also laid out the group Forensics lab ("Harvey's room" at ORI);
- My experience includes working closely with lawyers in defending ORI position regarding appeals of PHS findings the HHS Departmental Appeals Board.

Just as important as the ORI experiences working actual cases, an expertise in the judicious interpretation of the results of testing questioned images in science. This skill

stems from my first career, which culminated in running my own laboratory as an independent, NIH-supported bench researcher and senior faculty member at the Albert Einstein College of Medicine (1975-1993). Prior to ORI I obtained a Ph.D. in Biomedical Engineering from Iowa State University ('71); I then trained at Imperial College, London ('72), was a *locum* lecturer at the Royal Free Hospital School of Medicine, and then a postdoctoral fellow at the center for Bioengineering University of Washington in Seattle ('72-'75). At AECOM, I:

- Was peer reviewer for multiple papers in cardiac cell physiology, and served as an expert reviewer for NIH site visits for four program projects.
- Taught medical undergraduates, graduate students and postdoctoral fellows, and ten NYAS summer research interns (high-schoolers).
- Was an established Fellow of the New York heart Association and the Wunsch Fellow in "Biophysical Engineering."
- My laboratory at pioneered the laser diffraction methods for studying contraction the subcellular level in heart muscle, first reported the contraction of the isolated heart cell. The latter methods became a common tool in pharmaceutical industry.
- With an MD-Ph.D student, now director of Cardiology at University of Pittsburgh, the laboratory pioneered successful application of a new method to study excitation-contraction coupling in the single heart cell, that has formed the platform for more advanced techniques by others.
- I also generated two patents on micromanipulators and hydraulic control (US Patent Office #4,946,329 and #5,165,297) that received commercial attention.

*(A complete pre-ORI academic CV and list of publications is available upon request).*

**Relevant Formal Training in Federal Law Enforcement, Investigations, and Image Processing:**

- Introduction to Criminal Investigations, Federal Law Enforcement Training Center (FLETC), Glynco, Ga. 1994.
- Computer Evidence Analysis Training Program, Financial Fraud Institute, Federal Law Enforcement Training Center (FLETC), Glynco, Ga. 1994.
- Image Processing on the Macintosh, Division of Computer Research and Technology, Benos Trus, NIH DCRT, 1994.
- Advanced Interviewing Techniques, Federal Law Enforcement Training Center (FLETC), Glynco, Ga. 1995.
- Forensic Psychiatry and Questioned Documents Examination, George Washington University Continuing Education Program (taught at ORI), 1996.
- Short Course on The Detection of Deception (Reid Technique), by Joe Buckley, provided at ORI. (~1998)
- Introduction to the Image Processing Toolkit, John Russ. Image Processing Short Course, North Carolina State University, Raleigh, NC. May 1998.

**Papers for ORI**

- John Krueger, "Images as Evidence: Forensic Examinations of Scientific Images," pp. 261-268 in "Investigating Research Integrity, Proceedings of the First ORI Research Conference on Research Integrity," NH Steneck and MD Scheetz, (Eds) DHHS/ORI Publication, 2000.
- John Krueger, "Forensic Examination of Questioned Scientific Images," in *Accountability in Research* 9: 105-125, 2002. This is the first description of ORI's methods and the use of image processing to examine questioned images in science. (Later I was invited to tour the FBI Image processing lab, where I learned the FBI provided this paper to new trainees in the FBI image processing lab.)
- James E. Mosimann, John E. Dahlberg, Nancy M. Davidian, and John W. Krueger, "Terminal Digits and the Examination of Questioned Data," in *Accountability in Research* 9: 75-92, 2002.

***ORI Newsletters* on Image Processing, and Issues of Image Falsification, Corrections**
http://ori.hhs.gov/newsletters

- [Krueger, John W] Image Processing Useful in Misconduct Investigations." *ORI Newsletter* 3(2): 6, March 1995. [This is apparently the suggestion for this approach in the analysis or questioned images in science.) It was soon uploaded by another on the NIH-Image Bulletin board on March 31, 1995.]
- John Krueger, "Confronting Manipulations of Digital Images in Science," *ORI Newsletter* 13(3): 8-9, June 2005. [This paper reported the results of tracking the increase in ORI's image falsification cases, and cited website for the newly created Forensic Tools.]
- John W. Krueger, "Journal Audits of Image Manipulation," *ORI Newsletter* 17(1): 2-3, December 2008.
- John Krueger, "Incidences of ORI cases involving falsified images." *Office of Research Integrity Newsletter* 17(4): pp. 2-3, September 2009.
- Sandra Titus, Ph.D., John Krueger, Ph.D., and Peter Abbrecht, MD, Ph.D, "Promoting Integrity in Clinical Research," *ORI Newsletter* 19(4): 1-3, September 2011.
- John Krueger, "Further Correcting the Literature: PubMed "Comments" Link Publications to PHS Research Misconduct Findings," *ORI Newsletter* 19(4): 4-8, September 2011.
- John Krueger, Ph.D., "What do Retractions Tell Us?" *ORI Newsletter* 21(1): 1-6, December 2012. (page 2 missing?)

*(ORI Story on My Retirement: ORI Newsletter 21(3): 3, June 2013)*

**ORI Related Video Interviews/Demonstrations:**

- Image Processing Case Demonstration filmed for Japanese Television Program, shown on NHK Tokyo TV, February 8, 2006.
- Three "Expert Interviews" for university of Texas video training (present on ORI website)
- Image Processing Case Demonstration filmed for one hour BBC television program on scientific misconduct, "Betrayers of the Truth," 1994.

**Components of ORI Website and RCR training:**

- Handling Misconduct: - Technical Assistance, Image Processing in Research Misconduct cases, ORI website http://ori.dhhs.gov/misconduct/Tips_ImageProcessing.shtml.
- Initiated and Created of ORI's Forensic Tools, i.e, Forensic Droplets and Actions, starting in 2005 http://ori.hhs.gov/actions, and updated in July 2012 http://ori.hhs.gov/advanced-forensic-actions including explanatory Read Me Files on Image searching and interpretation. These are ORI forensic tools for the Examination of Scientific Images on ORI Websites http://ori.hhs.gov/forensic-tools
- RCR Educational Resource Material: http://ori/dhhs.gov/education/products/rcr_misconduct.shtml. Links for three web inrterviews, as ORI expert for Image Analysis: University of Texas Research Misconduct Training Program, Melissa Proll, Ph.D, located at http://www.uth.tms.edu/orsc/training/Research Misconduct/index.htm
- Initiated and developed the ORI Forensic Video Project, a novel step by step video demonstration of good forensic setup and analysis technic with Photoshop, which was produced professionally and completed through the first phase that involved methods that were provided in support of ORI cases. http://www.cmc2.tv/forensic/ (This website was never publicly released, however, since it lacked support for public release and the content is still relevant, but the demonstration has since become dated by the version of Photoshop.)

**Supporting Journals and the Scientific Community**

- Organizer of workshop at ORI to hear perspectives of selected experts in computer image processing, NIH researchers, and journal editors: "Image Manipulation Workshop: Guidelines and Tools," ORI, January 25, 2005. External participants including Drs. Hani Farid (Dartmouth University), Mike Rossner (Managing Editor, JCB, Kenneth Yamada (NIH) and others.

- Provided innumerable confidential consultations to Journal editors about specific cases.
- Provided ORI Forensic Tools per request to many Journals (including Nature, Science, FASEB, American Microbiological Society, JBC) and to many foreign institutions including the Pasteur Institute (Paris), one of the Max Plank Institutes, and a Swedish University. I also have provided the tools upon request to scientists teaching RCR, to a defense lawyer, and even (I suspected) to a potential respondent. The tools have been used in reporting allegations to ORI, and by at least one reporter in advancing her story.

**Intern Training**:

Successfully applied/obtained HHS funding for Government Intern Forensic Training; Trained Jennifer Urbanowski (graduate student from Forensic Science program, George Washington University). Spring and summer, 2004.

**Presentations for ORI: 2013 – 1994 (reverse chronological order)**
(PowerPoints of specific talks available upon request)

(Separate sessions color-keyed for Image Forensic Training:

for **Journal Production Editors** are **hi-lited in Green**;
for **Institutional (university) Research Integrity Officials** are **hi-lited in Red;**
for **NIH Research Administrator** are **hi-lited in Blue**.

1. "Retractions, problem Images, . . . and the "Future?" AAAS Washington, DC April 15, 2013 (Assembled Editors in Washington DC, and via Web, European editors in Cambridge, Paris, and South America)
2. "Some Forensic of Scientific Images" – Technical Session for Art Editors, AAAS, April 15, 2013 (Assembled Editors in Washington DC, and via Web, European editors in Cambridge, Paris, and South America)
3. John W. Krueger, "Image Forensics Issues in 'Research Misconduct' Cases." Joint AAAS-ABA Committee, National Conference of Lawyers and Scientist, AAAS, Washington, DC. March 14, 2013.
4. "Retractions, Problem Images, and Their Detection," Discussion/Demonstration for the American Society for Nutrition and the Publication Editors, Federation of American Societies for Experimental Biology (FASEB), Bethesda, MD, December 14, 2012.
5. "Confronting Integrity Issues in Publishing," American Society for Biochemistry and Molecular Biology (ASBMB) Publications Committee (Web Meeting), October 23, 2012.
6. "Image Integrity in Publishing Scientific Data," The Borden Institute, Fort Detrick, MD, 9-11am, September 7, 2012.

7. "Principles in Assessing Integrity in Scientific Publishing," The Borden Institute, Fort Detrick, MD, 9-11am, September 7, 2012.
8. "Public Awareness and the Detection of Research Misconduct," Nature Publishing Group, New York, NY, July 23, 2012.
9. "Principles in Assessing Image Allegations," Training Demonstration Session, Nature Publishing Group, New York, NY, July 23, 2012.
10. Introductory Comments and slides for "Setting the Research Record Straight," Presentation and Panel Member, Science Online New York City (SoNYC), Rockefeller University, New York, NY, March 20, 2012, http://sonyc9-eorg.eventbrite.com/ and http://www.livestream.com/sonyc (A video of this talk and panel discussion was available.)
11. "Research Misconduct – Not '*If*' but '*When,*'" ORI Presentation to NIH ESA Seminar Series, December 16, 2011.
12. "De-Authenticate" What's wrong and Why? PowerPoint Training Puzzle examples of closed ORI cases provided to NIH ESA Seminar participants, December 16, 2011.
13. "Image Integrity in Scientific Publishing," Annual Meeting, Council of Science Editors Annual Meeting, *Baltimore, MD*; May 1, 2011.
14. "Research Misconduct – It Happens," ORI Presentation to NIH ESA Seminar Series, *Bethesda, MD*; 1-2:30pm March 11, 2011.
15. "Wrestling with Research Misconduct," ORI Presentation to NIH Extramural Scientist Administrator (ESA) Seminar Series, *Bethesda, MD*; 1-2:30 pm, January 28, 2011.
16. Discussant; *Panel for Session on Research Integrity, Government University-Industry Round Table (GUIRR)*; National Academy of Sciences; July 27, 2010
17. "Image Manipulation and Analysis" **Videocast**; *NIH Extramural Staff Training Seminar; Handling Allegations of Research Misconduct*; Natcher Bldg; NIH; Rockville, MD; July 13, 2010 http://odoerdb2.od.nih.gov/oer/training/esa/esa training 20100713.htm
18. "Investigating Research Misconduct -Tools-of-the Trade" *3rd Biennial IdeaA Conference*; 2 hour presentation, Workshop Session 3, *NISBRE, NCRR*; Bethesda, MD; June 18, 2010 (NIH sponsored meeting for career skills of junior faculty members)
19. "Digital Manipulation of Images in Science (Session 1-Overview)" *American Society for Microbiology*; Washington, DC; April 20, 2010
20. "Digital Manipulation of Images in Science (Session II- Technical Aspects and Demonstration)" *American Society for* Microbiology; Washington, DC; April 20, 2010
21. "ORI 'Forensics': Examining Questioned Images." Boot Camp VII, University of Oregon, Eugene, Oregon, October 13, 2009.
22. "The Vogel Case: What are the Allegations? [Handling] Questioned Images." Boot Camp VII, University of Oregon, Eugene, Oregon, October 13, 2009.
23. "Evidence in the Oversight of Investigations," Boot Camp VII, University of Oregon, Eugene, Oregon, October 13, 2009.
24. "ORI 'Forensics': Examining Questioned Images." RIO Boot Camp VI, Northwestern University, Chicago, Illinois, June 9, 2009.

25. "Evidence in the Oversight of Investigations," RIO Boot Camp VI, Northwestern University, Chicago, Illinois, June 9, 2009.
26. "Detection of Image Manipulation – How-to's and What-if's," American Physiological Society, at FASEB, Bethesda, Maryland, May 28, 2009.
27. "Image Demonstration and Points," American Physiological Society, Production Editors, at FASEB, Bethesda, Maryland, 12-2pm, May 28, 2009.
28. "ORI's Forensics: Questioned Images in Science," RIO Boot Camp V, Tulane University New Orleans, LA, November 18, 2008
29. "How Evidence Informs the Investigation." RIO Boot Camp V, Tulane University New Orleans, LA, November 19, 2008
30. "Falsification of Images in Science," Workshop on "Investigating Research Misconduct," Second Biennial NISBRE, NIH-NCRR Meeting, Wardham Park Marriott, Washington, DC, August 8, 2008. (NIH sponsored meeting to promote career skills of junior faculty members)
31. Falsified Images in Science," Discussion Group in Research Misconduct, Public Service, Public Trust, Uniformed Services University in the Health Sciences, Bethesda, MD, July 23, 2008.
32. "How Evidence Informs the Investigation." RIO Boot Camp IV, University of Washington, Seattle, WA, June 1-4, 2008.
33. "ORI's Forensics: Questioned Images in Science," RIO Boot Camp IV, University of Washington, Seattle, WA, June 4, 2008.
34. "Image Manipulation/Falsification in Science – Detection and Choices," Emerging Trends in Scholarly Publishing, Allen Press Seminar, National Press Club, Washington, DC, April 17, 2008.
35. "ORI's Forensic Examination of Questioned Images in Science." RIO Boot Camp III, Poynter Center, Indiana University, IN, April 2, 2008.
36. "Analysis of the Case Images." RIO Boot Camp III, Poynter Center, Indiana University, IN, April 3, 2008.
37. "ORI Forensics" Examination of Questioned Images in Science. RIO Boot Camp II, Johns Hopkins University, Baltimore, MD, November 4, 2007.
38. "Vogel – Case Boot Camp Analysis." RIO Boot Camp II, Johns Hopkins University, Baltimore, MD, November 7, 2007.
39. "Detection and Interpretation of Manipulated Images in Science," Plenary Session, Annual Meeting of the Council of Science Editors, Austin, TX, May 20, 2007.
40. "ORI 'Methods": Examination of Questioned Images in Science," ORI/Harvard Medical School/Harvard School of Public Health, Harvard Teaching Hospitals Conference "Data Fabrication and Falsification: How to Avoid Detect, Evaluate and Report," Boston, MA, March 29, 2007.
41. [Copy of presentation above provided per request to Publication Director, ASBMB Publications, April 5, 2007.]
42. "ORI Forensics" Examination of Questioned Images in Science. RIO Boot Camp I, University of Michigan, Ann Arbor, MI. May 4, 2007.
43. "Vogel – Case Boot Camp Analysis." RIO Boot Camp I, University of Michigan, Ann Arbor, MI. May 4, 2007.

44. "Detection and Interpretation of Falsified Images in Science, Nature Publishing Group, New York City, April 25, 2007.
45. "Image Forensics," Demonstration and Training session: Nature Publishing Group, New York City, April 25, 2007.
46. "Confronting Digital Manipulation of Images (and Research Misconduct)," Discussion Nature Publishing Group, NYC, March 22, 2006.
47. "Image Manipulation in Science," presentation and working discussion on image screening for senior staff and Dr. Donald Kennedy, AAAS headquarters, Washington, DC. December 2005. (Science publicly announced that it would prescreen selected articles on December 22, 2005.)
48. (On site RRTA) 3 hour presentation to Institutional Investigative Committee on ORI Image Analysis, Milwaukee, Wi. , Thursday, July 21, 2005.
49. "Digital Manipulation of Images in Research and Scientific Misconduct," Drake University, Des Moines, IO, March 3, 2005.
50. "Digital Manipulation of Images in Research and Scientific Misconduct," Iowa State University, Ames, IO, March 4, 2005.
51. "Where Responsible Conduct of Research Meets Scientific Misconduct," Iowa Health, Des Moines, IO, March 4, 2005, 2005.
52. "Image Manipulation Workshop: Guidelines and Tools," ORI Meeting with Invited Experts, January 25, 2005
53. "Falsification of Images in Science," (CME Credit) Medical University of South Carolina, Charleston, SC, September 30, 2003.
54. "Color Tagging for Interpreting Overlap in Questioned Gray Scale Images," talk and poster at the 2002 ORI Research Conference on Research Integrity, Bolger Center, Potomac, MD, November 17, 2002.
55. "Images as 'Evidence' - Recognizing and Investigating Scientific Misconduct," Medical College of Wisconsin, Milwaukee, WI, May 1, 2002.
56. "Recognizing and Investigating Scientific Misconduct, " National Council of University Research Administrators' Region IV Meeting, Madison, WI, April 30, 2002.
57. "Case Study: Uncooperative Respondent and Working with Experts - Scientific Preparation for Departmental Appeals Board (DAB) Hearing," ORI Advanced Investigative Techniques for Research Misconduct, Lister Hill Center, NLM, Bethesda, MD, March 20, 2002.
58. "ORI Image Analyses - General Approach and Methods," ORI Advanced Investigative Techniques for Research Misconduct, Lister Hill Center, NLM, Bethesda, MD, March 21, 2002.
59. "Demonstrations of ORI Computer Analyses - Image Processing," walk-around demonstration table at the ORI Advanced Investigative Techniques for Research Misconduct, Lister Hill Center, Bethesda, MD, March 21, 2002.
60. "Recognizing and Reporting Scientific Misconduct," American Speech Hearing Association/ORI conference on Promoting Research Integrity in Communications Sciences and Disorders and Related Disciplines. May 3-4, 2001, Rockville, MD
61. "Research Misconduct - The [NSF and the] ORI Experience" at a meeting entitled *Research Integrity - Who is Responsible?*, sponsored by University of South Alabama in Mobile, AL, on April 17, 2001.

62. Advanced Investigative Techniques for Research Misconduct workshop, sponsored by ORI, Harvard Medical School, and the University of Pittsburgh, September 24- 25, 2001, in Bethesda, MD.
    a. "ORI Image Analysis - General Approaches and Methods"
    b. "Comments" on an image case study presentation given by Dr. L. Wittie, SUNY
    c. Case studies on "Dealing with Uncooperative Respondents,"
    d. Case studies on working with experts and the Departmental Appeals Board at the ORI.
63. "Recognizing and Reporting Scientific Misconduct" at the conference sponsored by ORI and ASHA on Promoting Research Integrity in Communications Sciences and Disorders and Related Disciplines, held May 3-4, 2001, in Rockville, MD.
64. "Images as Evidence: Forensic Examination of Scientific Images," at the ORI sponsored "Research Conference on Research Integrity," in Bethesda, MD, on November 20, 2000.
65. "Investigative Methods," in Break out Session, AAAS-ORI meeting, "Responding to Allegations of Research Misconduct, Inquiry, Investigation, and Outcomes: A Practicum,: St. Charles, IL June 5, 2000.
66. Break out session on Misconduct/Responsible Conduct of Science, at Federal Funding Opportunities, A Conference for Researchers and Research Administrators," Friday Center, UNC, Chapel Hill, NC, April 11-12, 1996
67. "ORI Investigations and Issues in Scientific Misconduct." Department of Biology, Iona College, New Rochelle, NY, October 16, 1995.
68. "Allegations of Research Misconduct in U.S. Academic Institutions." Bioethics Center, University of Maryland-Baltimore, April 20, 1995.
69. "Myths, Misconduct, and the Office of Research Integrity." William Paterson State College, Paterson, NJ, October 24, 1994
70. Panelist for Discussion on Misconduct in Science, MARC Scholars program, for talks celebrating inauguration of new President, City College of New York, NY, October 8, 1994.
71. "Image Processing in the Forensic Analysis of Figures", ORI Poster at the National Academy of Sciences Convocation of Scientific Misconduct, NAS bldg., Washington DC, June 6-7, 1994.
72. "DRI Extramural Interactions," ORI Poster at the National Academy of Sciences Convocation of Scientific Misconduct, NAS bldg., Washington DC, June 6-7, 1994.
73. "Federal Response to Investigations of Scientific Misconduct," for course Responsible Conduct of Research, Center for Biomedical Ethics, University of Maryland, Baltimore, MD, 4 pm, April 20, 1994.

# EXHIBIT 3

*Sarkar v Doe*, COA Case No. 326667

Plaintiff's Response to PubPeer's Motion 2/27/2014

**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,
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***/s/ Nicholas Roumel***

***/s/ Edward A. Macey***

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February 27, 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 26th Day of February, 2015.

***/s/ Nicholas Roumel***

***/s/ Edward A. Macey***

Nicholas Roumel
Edward A. Macey

# EXHIBIT 4

*Sarkar v Doe*, COA Case No. 326667
PubPeer's Reply 3/3/2015

**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]

[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

[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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*Counsel for PubPeer, LLC*

Dated: March 3, 2015

# EXHIBIT 5

*Sarkar v Doe*, COA Case No. 326667
March 5, 2015 Hearing Transcript

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

FAZLUL SARKAR,

Plaintiff,

vs. Case No. 14-013099-CZ

JOHN and/or JANE DOE,

Defendants.

_____/

DEFENDANT PUBPEER'S MOTION

HELD BEFORE THE HONORABLE SHEILA ANN GIBSON

COURTROOM 1719 CAYMC

Detroit, Michigan - Thursday, March 5, 2015

APPEARANCES:

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(Appearances Continued)

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Appearing on Behalf of Defendants Doe

REPORTED BY: Sherry E. Baker, CSR-1326

# I N D E X

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## E X H I B I T S

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Detroit, Michigan

Monday, March 9, 2015

At About 11:50 a.m.

THE CLERK: This is Case Number 14-013099-CZ, Sarkar v. Doe.

MR. ABDO: Good morning, Your Honor. Alex Abdo for third party, Pubpeer.

MR. ROUMEL: Good morning. Nicholas Roumel for Dr. Sarkar.

MR. BURDETT: Good morning, Your Honor. Bill Burdett on behalf of the John Doe defendant responsible for the specific statements set forth in my appearance.

THE COURT: Okay. Now this was Pubpeer's --

MR. ABDO: Yes, Your Honor.

THE COURT: -- motion. Okay. Like I said, I had -- tell me where we are with this.

MR. ABDO: Your Honor, this lawsuit was filed in October of last year. And shortly after it was filed, the plaintiff sought a subpoena from the Court asking for the identifying information of the anonymous defendants who are scientists who have commented on Dr. Sarkar's paper on Pubpeer's website.

We, on behalf of Pubpeer, intervened to challenge that subpoena, and that's where we are today. The motion is fully briefed. And so if I might, I would just like to frame how I think this case should be understood.

This is really a case that's about scientists who have identified anomalies in the research papers of the plaintiff, Dr. Sarkar. They have reported those anomalies on Pubpeer's website.

Pubpeer is a site that hosts this sort of anonymous scientific discussion. It was built by scientists for scientists. Already in its short existence, there's been a tremendous success.

It has generated critical feedback for major scientific publications. It has prompted the correction or the retraction of numerous studies.

And as I think was its mission all along, it has provoked a broader debate about whether pre-publication peer review is sufficient to insure the high quality of scientific research.

The initial posts that were published on Pubpeer's site relating to Dr. Sarkar's work contribute to that broader debate, and they've prompted another debate relating

specifically to those anomalies and also to the question of assisting peer review that failed to detect them.

That debate lies before the First Amendment. And the decision of the participants in the debate, terminate anonymous, is every bit as protected by the First Amendment as the words they spoke.

That is because anonymity is an important -- (inaudible) of the right to speak. Without it many critical contributions to American public discourse might never have been published including the Federalist Papers which were published anonymously by some of our nation's founders including the works of Mark Twain published under a pseudonym, including the scientific comments at issue here.

The plaintiff, Dr. Sarkar, has now to sought to unmask those anonymous defendants.

THE COURT: What's the purpose?

MR. ABDO: He's sought unmask them to sue them for defamation. He's argued that the statements are defamatory.

Under controlling Michigan law from the Court of Appeals because the statements and

because the decision of the commenters to remain anonymous is protected by the Constitution, Dr. Sarkar must make a preliminary showing of merit before he can unmask the commenters. That is what the Court of Appeals has held the First Amendment requires.

We don't think he can make that showing. What they've held is that he must specifically do two things. He must demonstrate the legal sufficiency of his Complaint under a Motion for Summary Disposition under 2.116(C)(8), and he must show that the balance of interests favors unmasking the anonymous defendants.

We don't think he can make that showing for three reasons which I'll briefly state. We have addressed them at length in our pleadings.

The first is that he has not pleaded his claim with specificity as required by Michigan law. The second is that -- (inaudible; paper shuffling and cough) -- the comments are not capable of defamatory meaning as a matter of law.

THE COURT: For what reason?

MR. ABDO: They are not for a couple of reasons. First, he's actually, Dr. Sarkar has, I think, disavowed any claim of defamation as to

the majority of the comments. The majority, about two thirds of the comments on Pubpeer's site relate to these apparent similarities between images used in his papers.

Dr. Sarkar has been clear. He's not claiming defamation on the basis of those claims of similarity. And even if he were, he'd have a very hard time because the claims are subjective, and they're nonetheless supported by an expert that we hired on behalf of Pubpeer to look at the images. That's submitted as the expert with the affidavit of Dr. John Kruger (pht.).

THE COURT: Okay. So there's no defamation that he is alleging on the claims of similarities.

MR. ABDO: That's right.

THE COURT: So where does that leave us?

MR. ABDO: With respect to the rest of the claims, none of them are capable of defamatory meaning. Several of them call for further investigation of the images. Several of them note that there are many similarities.

At least one of them states that the similarities are evidence that the system of

pre-publication peer review is quote unquote broken, but none of them allege research misconduct which is the core of Dr. Sarkar's Complaint.

He takes these comments as alleged research misconduct, but not a single one of the comments uses that phrase or any other comparable phrase. None of them allege research misconduct.

They're simply scientists discussing four scientific questions relating to Dr. Sarkar's research. And courts have never imposed civil liability on the basis of comments like that.

That's especially true in the case of scientific research. Scientific research requires that scientists be free to discuss and debate the conclusions of their peers. That is how scientific method works.

You posit something, and other scientists maybe disagree with you, and they state their disagreements. Then scientists hash it out.

I think the decision from the second circuit in the Ony case, O-n-y which we cited speaks, I think, specifically to this point. The Court there said courts have been loathed to assign civil liability for scientific use. The proper place for those disputes to be aired out is in

scientific papers and discussions, not through defamation suits.

Even if the Court were to disagree with that and find that some of these statements implied a defamatory meaning, even then Dr. Sarkar, his claims have failed a matter of law 'cause there is no way he could demonstrate actual malice on the part of these commenters which you would have to under people in First Amendment law.

He couldn't, at the very least in part because again a noted expert has looked at these images and confirmed that there is reason for concern and has stated that he himself would have referred these images for review by the university to investigate him further. The comments on Pubpeer's site are essentially of that sort.

The final point, the final few points I'd like to make, Your Honor, is even if the Court disagreed with all of that and thought that some of these statements were capable of defamatory meaning, the Court would still need to balance the interests.

They would need to balance on the one hand the fact that unmasking these anonymous scientists would shill legitimate speech and

perhaps irreversibly damage Pubpeer's core vision of promoting free scientific debate against the interest of Dr. Sarkar, on the other hand, pursuing what is at best a marginal case, a case with a very unlikely prospect of success.

The final point I'll make, Your Honor, is one that we made in our opening brief which relates to whether the Court should require evidence at this stage, whether the Court should require Dr. Sarkar to substantiate his claims with a prima facie showing of evidence.

If the Court were to disagree with us -- we don't think the Court needs to. We think the Court can resolve this as a matter of law under a standard (C)(8) Motion for Summary Disposition; but even if the Court disagreed, this case would be a prime example of why every other jurisdiction in the country has required defamation plaintiffs to substantiate their claims with evidence before unmasking anonymous speakers.

It's held that that evidentiary showing is critical to protecting the First Amendment interests in anonymity. No court has held that plaintiffs can never make that showing, but they said that that showing is crucial to

protecting their constitutional right.

We think, especially on the basis of the declarations we submitted, Dr. Sarkar would not be able to make that evidentiary showing which is again to say that he has a very, very unlikely prospect of success. For that reason, the motion is -- (inaudible, paper shuffling).

THE COURT: Mr. Roumel, any response?

MR. ROUMEL: Your Honor --

THE COURT: Yes.

MR. ROUMEL: Thank you. I'd like to address the following, what this case is about, what this motion is about. What this motion is not about, and I'm going to give an advance on that, it's not about summary disposition because the Court of Appeals has spoken that this Court may not look at (C)(8).

Pubpeer's, against the legal standards, completely wrong in their briefing -- and they also talk only about defamation. Dr. Sarkar's Complaint is five completely different claims based on completely different comment which they submit four sentences in their brief.

What is this case about? Plaintiff

is trying to protect his reputation and his good name. The law protects that interest. The U.S. Supreme Court has said that society has a pervasive and strong interest in preventing and redressing attacks upon reputation. Rosenblatt versus Baer.

Shakespeare said in Othello that the good name in man and woman dear, my Lord, is the immediate jewel of their souls. A good name or reputation as one court has said, is essential to that person's standing in society, his location, even his family.

But there is somebody who's trying to destroy Dr. Sarkar's good name and reputation. This enemy has accused him of researched misconduct on the Pubpeer website.

He found out that Dr. Sarkar accepted a very lucrative position at University of Mississippi. Dr. Sarkar's been at Wayne State for 35 years. He took a job where he was granted tenure at the University of Mississippi.

It was a six-month vetting process in that job. They completely checked out everything. They made him this offer. He accepted. They granted him tenure. He resigned from Wayne State. He bought a house in

Mississippi.

This anonymous person sent screen shots from this Pubpeer's website to three different administrators in Mississippi.

These screen shots that they sent, we don't know exactly what they were because we haven't been able to get those from Mississippi yet; but from the letters from Mississippi, we know that what they are was screen shots that accused him of research misconduct. So they rescinded their job to Dr. Sarkar. He lost that job.

Having already resigned from Wayne State, he was able to get his job back there; but the next thing that his anonymous enemy did, and this is something they conveniently overlook, forged the document that implied that he was subject to a U.S. Senate inquiry from Dr. -- Senator --

THE COURT: Where did this document come from? The document, you are saying they forged the document.

MR. ROUMEL: They put this in the mailboxes of Wayne State. It's a screen shot of Pubpeer's showing comments. It says academic expression of concern as quoted in my -- I don't

know if the Court wants to see this.

THE COURT: No.

MR. ROUMEL: And --

THE COURT: What is it that you want? Yeah, I'm gathering -- you know, it's in terms of a global, a global release, you know, if there is something particular relative to, you know, this screen shot -- I understand about freedom of speech and so forth and so on, that the parties are free to make their statements and all that, and I agree with you there, but when it comes down to someone presenting information to another entity, there's a problem there.

MR. ABDO: Your Honor, those statements have not been pleaded; and for that very basic reason, they are deficient under Michigan law. The screen shot, for example, is the first time you've seen it.

It's not pleaded in the Complaint. We have no basis to believe that that's actually the one. That alone is enough of a reason to deny it. It would be fine for the Court to allow him to amend to include that so we can then discuss it.

THE COURT: Right, okay. And that's what I will do. I will allow him to amend, but my

initial response is to quash -- I'm not going to give you a blanket, I'm not going to grant you a subpoena on the blanket basis relative to what's on Pubpeer's site.

So if you, you know, if you want to present something specifically relative to the screen shot information -- did you have prior knowledge about these forged documents that are apparently distributed at Wayne State.

MR. ROUMEL: What we are looking for, Your Honor, is a protective order. Here's what I was getting to, also. There are two cases in the Court of Appeals that govern getting the identity of anonymous people.

THE COURT: Well, see, now the thing is I'm not going to give -- as I indicated, we can nip it in the bud, I'm not giving you a blanket.

MR. ROUMEL: I'm not looking for a blanket.

THE COURT: It's going to have to be specific. It's going to have to be very specific. I'm not real savvy, but I understand the screen shots and all that stuff, but in terms of -- I'm not giving you a blanket subpoena. It's going to have to be very pointed in terms of what you're

requesting.

MR. ROUMEL: What I was asking for is in the subpoena. I was going to grab a copy. So what we're asking for essentially is the -- they have the ISPs. They have the internet service providers. They have the -- we've asked for user names, IP addresses or e-mail addresses, profile information for the people who posted the statements that we've quoted.

THE COURT: Well, no, see, I'm not just going to give you the information relative to the -- like I said, you have to be able to define it more succinctly somehow.

And I'm not going to prepare your case, try it, or you know, fine tune your request, but I'm just not going to let you say here are all the people who responded to this post. I'm not giving you that. I definitely can say right now I'm not going to give you that.

If you want to narrow the scope in terms of this information and I don't know if you can go back and how you undo everything and look at addresses and determine who did some of this stuff, fine but, I'm just not going to give you everybody.

MR. ROUMEL: That's what that is

asking. It is narrowly tailored. We're asking for the identifying information. That doesn't mean they're automatically defendants. But the only way for us to find out who destroyed his two jobs is to go to their website.

Remember, they're not the party. They're just an entity with information. We subpoenaed that information.

In order to pursue his lawsuit, Dr. Sarkar wants to find out who these defendants are. They are hiding behind the anonymity. I understand that --

THE COURT: Wait, wait, wait, but I'm not granting you, I'm not granting you permission just to go in and see who commented. If you're just looking for who commented, I'm not going to give you that.

But if there is something specific you want because, you know, I don't know who -- if the screen shot was, you know, I don't know, it's somebody's else's, not necessarily these individuals.

And I don't know who's responding on the site, but I'm not just giving you everybody who responded, you know. How many people responded to

that.

MR. ROUMEL: Well, that's the thing. We believe it's about three or four people.

MR. ABDO: There is no basis for that, Your Honor. We could, if necessary, provide evidence that there are somewhere between 10 and 15 individuals who commented.

THE COURT: Okay.

MR. ROUMEL: There are three or four people who did 90 percent of the comments.

THE COURT: Maybe we should do, have an in-camera inspection.

MR. ABDO: Your Honor, if I might, I'd like to just take the Court back to the first step which I think is controlled by one of the two cases that Mr. Roumel is referring to which is the Ghanum case.

Ghanum requires the Court to, on a statement by statement basis, determine, before granting a subpoena, whether the statements are sufficient to survive a Motion for Summary Disposition.

And the Court held that that analysis must take place before unmasking. Once a defendant is unmasked, you cannot --

THE COURT: So that's --

MR. ABDO: -- any new statements are capable of hampering meaning. The two that just focus on most are not even statements that came from Pubpeer's site and don't show defamation on behalf of any of the individuals who submitted information on Pubpeer's site.

There's someone who sent a series of e-mails to Mississippi. We've never seen those e-mails. They're are not pleaded.

THE COURT: So those are e-mails. They're not anything that appeared?

MR. ABDO: They did not appear on Pubpeer's site. We don't have the text of them; and for that very reason, the Complaint is deficient under Michigan law. Michigan law requires plaintiffs to plead the very text of the defamatory statements, so we can't even respond to those.

THE COURT: Okay. So I can nip that in the bud. You're saying that this information didn't come from Pubpeer's site.

How are you trying to hold Pubpeer responsible?

MR. ROUMEL: They did come from

Pubpeer. We don't have copies, but the letter from University of Mississippi -- Your Honor, if I may, I cannot let these statements go unchallenged. When he said that senatorial document's not pleaded, the exact language is quoted in the Complaint.

THE COURT: Okay, but a senatorial document, how are you relating that back to Pubpeer?

MR. ROUMEL: Because the people -- maybe it should go back, take a step back. How does this whole world work? When you're a researcher --

THE COURT: No, no, no. Let's answer my question. How are you relating what's on the senatorial document 'cause that's what you're basing it on, the senatorial -- because Pubpeer is, like I said initially, freedom of speech I'm for. People can state their mind on that site. That's not a problem.

I do have a concern when you're talking about this senatorial document. Where did that come from? I don't think that relates to Pubpeer.

MR. ROUMEL: They took that and

they -- well, we know from Pubpeer that the people commenting on Pubpeer have great familiarity with what's going at Wayne State.

The one person, for example, posted, "I have related all my concerns about Dr. Sarkar's conduct to Wayne State University. I sent an e-mail to Wayne State. Here's the e-mail I sent to Wayne State. Here's Wayne State's response".

THE COURT: Okay, but see, that's, see, you need to look at the e-mail. You need to look at the e-mail.

MR. ROUMEL: This is not an e-mail.

THE COURT: No, what you just said --

MR. ROUMEL: It's not an e-mail.

THE COURT: I'm sorry, listen, sir. Listen, sir. I'm basing my comments on what you just said. You said I said --

MR. ROUMEL: Oh, I see what you're saying.

THE COURT: Yes.

MR. ROUMEL: Yes, the e-mail.

THE COURT: Yes.

MR. ROUMEL: That is quoted --

THE COURT: That's what I'm talking

about. I'm not looking -- Pubpeer.

MR. ROUMEL: It's on page 10. It's quoted, every word is quoted in my Complaint on page 10.

THE COURT: But you're not listening to me.

MR. ROUMEL: Yes, Your Honor.

THE COURT: You need to get to the bottom of the e-mail, not what's on Pubpeer's site. You said, I sent -- you're quoting somebody. And they said, I sent an e-mail to Wayne State. That's where you need to -- you're barking up the wrong tree. You need to deal with what's going, who sent what to Wayne State.

MR. ROUMEL: The person who posted on Pubpeer is the one that sent that e-mail.

THE COURT: But I'm saying I'm not going to infringe on Pubpeer's freedom of speech, the First Amendment rights and the people who respond to that. You've got somebody separate who may be on Pubpeer, but the fact of the matter, we're not going to breach Pubpeer's anonymity based upon this one individual who dealing with Wayne State and who's dealing with the university -- is it University of Mississippi?

MR. ROUMEL: Yes, Your Honor.

THE COURT: Somebody's sending stuff to University of Mississippi.

MR. ROUMEL: I'm not explaining myself well. We are not asking to unmask Pubpeer's anonymity. I don't care who Pubpeer's run by.

THE COURT: No, no, no. The people who write on Pubpeer.

MR. ROUMEL: This person posted on Pubpeer anonymously. In this person's posting on Pubpeer, this person said, I sent e-mails to Wayne State University.

THE COURT: Okay.

MR. ROUMEL: Here is the content of the e-mail that I posted. Here is how Wayne State responded.

THE COURT: So you should have asked me for that one particular person.

MR. ABDO: Your Honor, with respect to that one particular comment, those are not the primary e-mails that Dr. Sarkar's complaining of. The primary e-mails were sent to the University of Mississippi which the text no where appears on Pubpeer's site.

MR. ROUMEL: I would respectfully

ask brother counsel to not characterize what I am --

THE COURT: Okay, but just answer me this. In terms of the one individual, this one responder, can we at least have an in camera -- I'm not giving them up your whole list.

I'm not doing that, but if there can be a nexus shown between one particular person or two particular persons, I would like to have an in-camera inspection of that information. Do you see what I'm saying?

MR. ABDO: You'd like that identifying information of that person in camera to establish --

THE COURT: Yes, and whatever links, I don't know, like I say, I'm not technically savvy, that technically savvy, but I know you can link it all up somehow to a person, correct, can you not?

MR. ABDO: For some people. Pubpeer might not for everyone. For unregistered users, Pubpeer would have perhaps their IP addresses. And it's possible that the IP address could be used to go a telecom to link them up. Pubpeer wouldn't be able to.

But Your Honor, specifically, with respect to this comment, I think this is the right analysis. I think the right analysis is to look comment by comment and ask whether each is defamatory.

THE COURT: Yes.

MR. ABDO: The specific comment that Mr. Roumel is referring to is an individual stating in a common thread. Someone said, Has anybody reported these concerns? And again, the concerns are the similarities.

"Has anybody reported these concerns to Wayne State or to the institute?" One individual responded, "Yes, I have reported them". We don't think that's defamatory.

To report concerns to an institution is not defamatory. It is merely to say an investigation should take place.

THE COURT: Okay, but that might be the basis when you put everything together. I'm not saying, but that could be the basis for his defamatory -- are you saying that Pubpeer defamed?

MR. ROUMEL: No.

THE COURT: Okay.

MR. ROUMEL: Because I don't know

who they are for sure, I can't conclude one hundred percent that Pubpeer didn't do some of these postings.

Your Honor's asking about connecting the dots. And we know that this submission is a person who posted on the site saying, Yes, I reported to Wayne State.

And I think this person says several times, they were informed several times in September and October of 2013. That would indicate that this poster has some intimate connection with Wayne State.

Then we get to this forged senatorial document. This was handed out in people's mailboxes in Dr. Sarkar's department at Wayne State very widely also indicate that this person --

THE COURT: But that has --

MR. ROUMEL: -- connected with Wayne State.

THE COURT: That has no bearing on Pubpeer.

MR. ROUMEL: I'm not holding them liable. I just want information from them. What this is is a discovery motion, Your Honor.

If I may, because counsel has gotten away with completely misquoting the law in Michigan, and I need to respond to that. I'm sorry. I know this is a complex case. This man just wants to proceed with his lawsuit.

THE COURT: I said, you know, I understand complex cases. That's not my concern. I'm saying let's cut to the chase. And what I indicated was with regards to -- you're not getting a carte blanche invitation into Pubpeer's whatever base you call it, the client base, whoever responds. You're not getting that.

What I did say is if you have the information to present a narrow scope, and there's one or two IP addresses or users that you can clearly articulate, then the Court will consider that after an in-camera inspection.

MR. ROUMEL: Right. And the problem is unregistered people like this person. They don't register.

THE COURT: Well, they can't do anything about it.

MR. ROUMEL: Well, there might be IP identifying information. Mr. Abdo has said is that sometimes the persons who use the computer can do

things to mask where the computer is coming from.

THE COURT: If that's the case, there is nothing we can do; but like I said, I'm not opening up Pubpeer's client base.

MR. ROUMEL: Of course not, Your Honor. I'm not asking for that.

THE COURT: Like I said, you have to make the specific allegations. And relative to the claim that I made numerous reports to the university, whoever made that chain, if you can trace it back, that's all I'm saying that you have to disclose. That's it.

MR. ABDO: Your Honor, and I recognize that it's become very focused. So I hate to continue with that, but what the Court in Ghanam said is defamation plaintiffs are not entitled to unmask individuals unless it can make out a defamation claim against that individual.

I understand Mr. Roumel is arguing -- I think that he wants the identity of this individual to see if it's the same as somebody else. He wants to figure out who this person is so he can figure out whether it's the same person who forged this document.

THE COURT: And that's discovery. I

think he's entitled.

MR. ABDO: That's right. That is discovery. And I think there First Amendment limitations on discovery when it comes to anonymity.

THE COURT: That's why I said that we would do it in camera, and then the Court will make its determination on the record whether or not it's going to be released. But I need --

MR. ABDO: I'm not sure -- maybe I'm missing. I'm not sure what information Dr. Sarkar has that would allow him to determine whether or random comments on Pubpeer is the same as somebody else. There's no --

THE COURT: Okay. Listen, listen, and I can connect the dots. If it so happens that this IP address comes from Wayne State University, Bullseye. Do you see what I'm saying? If that's Wayne State University, then he can start narrowing it down through whatever he does on that end. So I think that's a valid claim.

If that, the IP address of whoever this is can be traced back to Wayne State University, he's got some ammunition. Because the fact of the matter is, you know, people, people try

to hide behind this type of thing. You know, justifiably, there's the First Amendment, right and they can except when it comes to a point in time when you're hurting someone else.

MR. ABDO: I absolutely agree with that, Your Honor; although this particular comment was not hurting him. This was not a defamatory comment. This individual was entitled to make this comment --

THE COURT: Okay.

MR. ABDO: -- behind the veil of anonymity, and that anonymity cannot be pierced because they may have committed some other tort.

If this other tort was the same person, then the remedy for Mr. Sarkar was to investigate the forgery of that document, not to try to go through a fishing expedition of Pubpeer's --

THE COURT: No, but that's why I said it's not a fishing expedition. I'm not going to close the door because if there is -- like I said, I'm going to go back to what I said initially.

We can do it in camera. And then, like I said, you can explain to me the paper trail

because you have to be able to connect the dots.

Here we have, you know, you've got the, what's that senate thing?

MR. ROUMEL: You want --

THE COURT: No, what's it called again?

MR. ROUMEL: Academic expression of concern.

MR. ABDO: Can I make one more recommendation, Your Honor?

I'm sorry. I didn't mean to interrupt.

THE COURT: Go ahead.

MR. ABDO: Another alternative would be to, if the concern of the Court would be this forged document might be defamatory, I think then the proper course would be at the very least to first require Mr. Roumel to plead this properly so that we can then dictate as a legal matter whether this is capable of -- I suspect, having just viewed it now from a few feet away, that there is nothing in here --

THE COURT: Are you saying this is the first time you saw that document?

MR. ABDO: Yes, Your Honor, it is.

He's quoted portions of it, but he hasn't quoted the most relevant portion which is the portion --

THE COURT: And he hasn't provided you with the document?

MR. ABDO: No, Your Honor.

THE COURT: That's a problem, Mr. Roumel.

MR. ROUMEL: Your Honor, if I may --

THE COURT: But no, Mr. Roumel, you have not presented the document.

MR. ROUMEL: I'm not required to. That's what I want to get to, Your Honor. That's what I haven't had a chance to do. I stated at the it outset they have been completely misleading the Court as to the legal standard. If I could have just a few minutes on this.

There are two cases in the Court of Appeals on this issue. There's the Cooley case and the Ghanam by case.

Cooley says that the Michigan Court Rules adequately balance their First Amendment rights, and that's all you need. MCR 2.302 which is a Motion for Protective Order and that adequately protects their constitutional rights.

Ghanam is different. Ghanam applies

and has two other conditions that they ask for. Under Ghanam, they say if you, if the defendants don't know about the case, then the Court must analyze the Complaint under MCR 2.116(C)(8), but that's not the case here.

This case is governed by Cooley. The reason it's governed by Cooley is because Pubpeer outted Dr. Sarkar. When I wrote a letter to them, they posted it. It got hundreds of comments. They voluntarily went to the press.

THE COURT: Who?

MR. ROUMEL: Pubpeer. So to follow this through, this has been written about in dozens of journals both nationally and internationally.

One defendant not only knows about it, but clearly has already appeared. Mr. Burdett is representing one defendant. He hasn't identified the defendant yet, but that fact alone means that Ghanam does not apply to this Court.

Cooley specifically says that this Court may not consider the pleading under 2.118. The Court, of course, knows that 2.118 is one of the few where you are not allowed to consider affidavits, documents. Their expert affidavit may not even be considered by this Court because

2.116(C)(8) is tested by the pleadings alone. There are cases going back 50 years to talk about that.

THE COURT: Okay, wait. See --

MR. ROUMEL: This is just --

THE COURT: Hold on, hold on. Because now you're talking about a SD motion when we were looking at the subpoena. So you know, you're jumping around.

MR. ROUMEL: No, Your Honor. He keeps arguing that the Court should analyze this under 2.116(C)(8). That is not the law.

When you come in and you're a non-party, and this case is governed by Cooley and the defendants know about the case. We just don't know who they are, but we know they know about the case because one has appeared.

And under Cooley, the Court is not permitted to look beyond the Complaint. And they are not permitted to test the sufficiency of the pleadings. I quote from Cooley --

THE COURT: Okay. You're saying we're not to look beyond the Complaint, but I think he's saying the Complaint isn't inadequately pled.

MR. ROUMEL: The Complaint's

adequate. That's 28 pages. I quote every single document. When he says that I'm not, he's not telling you the truth.

THE COURT: Wait, wait, wait. You said you quoted every document, but when you refer to a document, don't you have to include the document?

MR. ROUMEL: No, you don't. In fact, they even admit it in their brief, page 25 of their brief. They say this. This is a really funny statement. The first 24 pages, they say he didn't produce the evidence. Then on page 25, he says, it is true that neither Cooley nor Ghanam requires plaintiffs to substantiate their claims with evidence; but in this case, this is so serious that you should allow it.

There's no citation of law. There isn't a single case that requires that when you plead, you have to attach documents to defeat. The only thing you look at is you have to take every well pleaded allegation as true under (C)(8). There is --

THE COURT: Every what pleaded?

MR. ROUMEL: Her are the standards.

THE COURT: You said every well

pleaded?

MR. ROUMEL: Absence --

THE COURT: Did you say well pleaded?

MR. ROUMEL: You test the legal sufficiency of the pleadings alone. You have to not consider any supporting affidavits, depositions, admissions or any other documentary evidence.

You must accept all factual allegations accepted as true. All factual allegations are to be taken as true along with any reasonable inferences or conclusions which can be drawn from the facts alleged.

And you must, the Court must construe them most favorably to the non-moving party, the unmoving party. The motion tests only the legal, not the factual sufficiency of the pleadings. It rests on the pleadings alone.

In a defamation case, this is not just -- is there any possible interpretation of the case of a sentence or a phrase that is capable of a defamatory meaning that includes suggested juxtapositions, terms of phrase, incendiary headlines to broadcast a whole constituted

defamation by innuendo or implication, (inaudible) versus Evening News Association.

THE COURT: Let me stop you right there because in terms of the defamation, you're looking at all of those -- the documents separately don't lead to defamation, but maybe when you add them together.

But I don't see just on the basis of the documents that you got defamation because this is freedom of speech. Those individuals are free to voice their opinion on that site. So I don't see, like I say, if you look at that document, you look at that document, you look at that document, there is not defamation. Maybe if you loop them together and make a connection, fine, but I don't see it. Mr. Abdo.

MR. ROUMEL: It's incapable of a defamatory meaning. All of these statements that we've quoted over dozens and dozens of pleadings where we quoted pages and pages in quotes of the documents that state that it's just a travesty that this guy's allowed to work. It's a travesty that no institution has ever filed, is not looking into these claims.

He's been doing this 35 years. He's

never been found guilty of research misconduct. He's never had a paper retracted. His error rate is less than half of the average. It's an error rate, there is an error rate that's normal.

THE COURT: Can you move over a little bit.

MR. ROUMEL: There's an error rate that's normal. He is less than half of it. So when they go and they say to the University of Mississippi, look at all these comments on Pubpeer, this guy has a problem.

THE COURT: Okay. Wait, wait. See, it's not Pubpeer. It's whoever said look it. Where did this look it come from?

MR. ROUMEL: It is Pubpeer because they took the pages from Pubpeer.

THE COURT: No, no, no. Hold on. Hold on. Mr. Burdett.

MR. BURDETT: As a guy who argued Ghanam in front of the Michigan Court of Appeals, I do have a little understanding of what was going on there. I was representing the entity that was called the Warren Forum that was standing in the same shoes as Pubpeer is right now.

THE COURT: Okay.

MR. BURDETT: That was the instance where the Court of Appeals said directly that you need to look at the statements on a case by case basis. And that's a very important thing to do because when Mr. Roumel says that there is, it is outrageous that people are investigating this, that doesn't appear anywhere. The word misconduct doesn't appear anywhere in a single statement that was made.

Now my client is remaining anonymous, and I appeared on behalf of 14 statements that were made. None of those statements said misconduct. We filed a Motion for Summary Disposition this basis because they cannot be viewed to be viewed to be defamatory at all.

THE COURT: That's what I said. That's where I was going in terms of -- and I'm going to nip this in the bud. If there is a limited basis, then you can draw connection. Like I said, we'll look at it in camera. I'm not giving you a global carte blanche invitation into who everyone is who commented on that site.

And I go back to what I said. If you can prove that, and I think we narrowed one comment, one person's comment to whoever said I

reported it to Wayne State, that's all I'm giving up.

MR. ROUMEL: That's how we started, Your Honor.

THE COURT: Like I said, it's still going to remain in-camera.

MR. ABDO: Can I ask one thing, Your Honor?

THE COURT: Yes.

MR. ABDO: If the goal is to determine whether that one comment is connected to the forged document, can we at least require Mr. Roumel that document is capable of defamatory meaning because if it is not, if it's not capable of defamatory meaning, as I suspect, then there is no basis to unmask anyone to try to discover if they're connected to it.

MR. ROUMEL: Mr. Abdo, that document is not -- that document is supporting my intentional appearance with business expectancy claim. That is the tort you have ignored. You keep talking about --

MR. ABDO: Your Honor, if I might draw the Court's attention to page nine of our reply brief where we specifically deal with these

other torts, the problem for Dr. Sarkar is that every one of those other torts is also subject to First Amendment limitations.

When the Court conduct they complained of is speech, the First Amendment doesn't just drop out because you're calling it tortious interference rather than defamation. The First Amendment protects it all the same.

And that is what the Lakeshore Community Hospital case from the Michigan Court of Appeals says very specifically. We cited other cases in our opening brief that deal with the other torts at issue.

MR. ROUMEL: The problem with that is once again it's been misread by counsel because that, in that case, the intentional interference claim was based on the same statements. In this case, the defamation is based on certain statements.

The intentional interference claim was based on the forged senatorial document, not the defamation statements. So that case doesn't apply. That case is using the same conduct for, same conduct for all of the torts, then it's covered. We're not.

And he spent four sentences in his brief on our other four torts. He didn't even discuss the standards. He hasn't even -- when you forge a document and you pretend that a senator is investigating my client, that is not only defamatory, it is an independent basis when you put it in the mailboxes of his department, and two weeks later he losses tenure.

We want to find out who did that. The only way we do that is by getting their --

THE COURT: Like I told you, I'm not giving it to you. The only thing I'm going to potentially release, and that's after an in-camera investigation, is that one line of, whoever's responsible for that one line of discussion. That's it. I'm not doing it.

MR. ABDO: Can we first, Your Honor, also have an opportunity at Pubpeer to use this document and then brief to the Court whether we think it's capable --

THE COURT: Yes.

MR. ABDO: -- of defamation 'cause if it's not capable of defamatory meaning --

THE COURT: Yes.

MR. ABDO: Then I think there is no

point even going down that road.

THE COURT: So what we'll do is -- are you handing it to him now?

MR. ROUMEL: Your Honor, I respectfully state under the court rules, he has no standing to challenge whether it's defamatory. A non-party is not allowed to do that.

THE COURT: Well, you're asking to --

MR. ROUMEL: The cases are crystal clear.

MR. ABDO: Does not have to be Ghanam.

MR. ROUMEL: Ghanam does not apply because --

THE COURT: Stop.

MR. ABDO: If I can just read from it. And I think quite clearly, Cooley was a very different case. Cooley involved, the defendant was in front of the Court. The plaintiff already knew the identity. And the only question was should the Court fashion a protective order.

THE COURT: It's distinguishable. Cooley is distinguishable.

MR. ABDO: Here's what the Court in

Ghanam said. When a plaintiff seeks disclosure of the identity of an anonymous defendant who might not be aware of the pending defamation suit, the plaintiff is first required to make reasonable efforts to notify defendant.

And in addition, the trial court is required to analyze the Complaint under MCR 2.116(C)(8) to insure that the plaintiff stated a claim on which relief can be granted.

That's because right now the only entity in a position to defend the anonymous anonymity rights of the unnamed defendants is Pubpeer. That's why the Court in Ghanam required --

THE COURT: So like I said, back to my statement, Mr. Roumel, are you going to present him with a copy of that document today?

MR. ROUMEL: He's happy to have it --

THE COURT: Like I told you, I said that -- I forgot the name of the case. The other case that Ghanam controls, what's the other one?

MR. ROUMEL: Cooley. Even Ghanam states --

THE COURT: That's my decision. If

you want to take that up to the Court of Appeals, you're free do so. I'm saying that Cooley does not apply.

MR. ROUMEL: Well, the plain language --

THE COURT: We don't need to do that. So the question is did he provide you with the --

MR. ABDO: He has provided the document.

THE COURT: You wanted two weeks?

MR. ABDO: I think even a week would be sufficient time to brief this one document.

THE COURT: Okay. Are you sure you want a week?

MR. ABDO: Two weeks would be great. Thank you, Your Honor.

(Off the record)

THE COURT: Let's say eleven o'clock on the 19th. Hopefully my jury will be deliberating at that time or getting ready to deliberate.

MR. ABDO: Your Honor, can I --

THE COURT: Yes.

MR. ROUMEL: Eleven o'clock on the

19th, Your Honor.

THE COURT: Yes.

MR. BURDETT: Your Honor, there's one scheduling issue. I've got a Motion for Summary Disposition pending that was scheduled March 31st.

THE COURT: Here?

MR. BURDETT: Here.

THE COURT: On this?

MR. BURDETT: On this matter.

THE COURT: Did we send you a scheduling order?

MR. BURDETT: Yes, you did, Your Honor.

THE COURT: Okay.

MR. BURDETT: I'm scheduled to be in federal trial in Pittsburgh that starts on the 30th and will run 30th, 31st through to April 2nd.

THE COURT: Why don't you -- my AA will be in tomorrow, and you can call and reschedule.

MR. BOND: Wonderful. Thank you, Your Honor. I'll work with co-counsel and opposing counsel to schedule it.

THE COURT: Okay. Just make sure

you call 'cause my AA is the one who coordinates that.

MR. BURDETT: What's your AA's name?

THE COURT: Arnetha.

MR. BURDETT: Arnetha.

MR. ABDO: Your Honor, can I ask got one accommodation, and I apologize. I'm going on maternity leave starting that week, and I'll be out for eight weeks.

THE COURT: Oh, my God.

MR. ABDO: It's equal leave policy.

THE COURT: You want to do it before then?

MR. ABDO: I would just suggest this. It seems as though the Court is inclined to grant the Motion to Quash as to everything but the one statement and then have further briefing with respect to that one statement.

Maybe it would be possible if the Court did just that, grant the Motion to Quash with respect to everything but the one statement and then allow further briefing.

And then I think between me and my co-counsel, we could arrange, so we can be

available for the Court.

THE COURT: So, but you don't want me to -- what did we say -- Mr. Abdo, you're saying not the 19th?

MR. ABDO: I think the 19th would work, but I think if all that were an issue --

THE COURT: Just tell me what you're asking for.

MR. ABDO: For the Court to grant the Motion to Quash as to everything but the one statement.

THE COURT: Okay.

MR. ABDO: To allow us an opportunity to brief whether this document --

THE COURT: Granted, but now -- pardon me.

MR. ABDO: And the 19th works.

THE COURT: All right.

MR. ABDO: Would that be for hearing or --

THE COURT: That's why that will be for a hearing. The briefs need to be in, initial briefs must be by the 16th so that there's any reply briefs, they must be -- no, 'cause we're doing Thursday, right.

(Off the record)

MR. ABDO: We can submit a brief the week before, Your Honor.

THE COURT: The initial briefs due the 13th and any reply briefs due the 16th. Initial briefs due the 13th. Reply briefs due the 16th.

MR. ABDO: Okay.

THE COURT: As I indicated, I'm granting the Motion to Quash as to everything else other than that one line of questioning where there's a reference to statements being provided whatever the particular language is to Wayne State.

MR. ABDO: Yes, Your Honor.

THE COURT: All right.

MR. ABDO: Thank you, Your Honor.

THE COURT: So we'll see you guys on the 19th at 11 o'clock.

MR. ROUMEL: Just moving forward, Your Honor, so assuming that they have some sort of idea -- provide, what, they'll provide that to the Court and assume the Court see that IP address, I'm not perhaps a little uncertain where we're going to go from there.

THE COURT: I don't know either.

It's not my case, but we will discuss it on the 19th. We will see where we are on the 19th, and we'll discuss its then.

MR. BURDETT: Your Honor, do you want Pubpeer to prepare a motion?

THE COURT: Yes.

UNIDENTIFIED SPEAKER: Do you want both briefs on the 13th, or do you want us to respond by the 16th?

THE COURT: As I indicated, any initial briefs that are to be provided must be presented on the 13th. Like I say, if you want to each prepare your initial brief, that is fine. If you're going to reply to the other's brief, that must be done by the 16th.

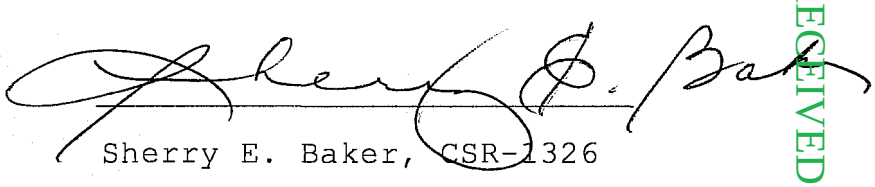
UNIDENTIFIED SPEAKER: Okay, thank you.

(At 12:39 p.m., proceedings concluded.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN )
) SS
COUNTY OF WAYNE )

I, SHERRY E. BAKER, CSR-1326, HEREBY CERTIFIES that the foregoing pages 1 through 52 inclusive, were reduced to typewritten form by means of computer transcription; and comprise a full, true and accurate transcript of the proceedings had in the above-entitled cause.



Sherry E. Baker, CSR-1326
Official Court Reporter

DATED: This 17th day of March, 2015.

# EXHIBIT 6

*Sarkar v Doe*, COA Case No. 326667
Circuit Court Order Granting in Part Motion to Quash Subpoena 3/9/2015

**STATE OF MICHIGAN**

**IN WAYNE COUNTY CIRCUIT COURT**

FAZLUL SARKAR,

Plaintiff, Case No. 14-013099-CZ

vs. Hon. Sheila Ann Gibson

JOHN and/or JANE DOE(S),

Defendant(s).
_____/



**ORDER GRANTING IN PART MOTION TO QUASH SUBPOENA AND REQUIRING SUPPLEMENTAL BRIEFING**

PubPeer LLC's motion to quash subpoena was filed on December 10, 2014 and brought before this Court for hearing on March 5, 2015. For the reasons set forth on the record, it is ORDERED as follows:

1. PubPeer's motion to quash is GRANTED IN PART. The subpoena is hereby QUASHED, except with respect to the comments in paragraph 40(c) of plaintiff's complaint.
2. The Court shall hear further arguments on the motion to quash the comments in paragraph 40(c) of plaintiff's complaint, and the parties may submit supplemental briefs thereon on March 13, 2015, and responses, if any, on March 16, 2015.
3. PubPeer's motion to quash the subpoena with respect to the comments in paragraph 40(c) of the complaint shall be brought before this Court for a hearing on March 19, 2015 at 11:00 a.m.

**IT IS SO ORDERED.**

Dated: 3/9/2015

/s/ Sheila A. Gibson
Wayne County Circuit Judge

The above order is approved as to form:

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Dated: March 6, 2015

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Dated: March 6, 2015

# EXHIBIT 7

*Sarkar v Doe*, COA Case No. 326667
PubPeer's Supplemental Brief re Comment in par.40(c) of Complaint 3/13/2015

**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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*Counsel for PubPeer, LLC*


Dated: March 13, 2015

# EXHIBIT 8

*Sarkar v Doe*, COA Case No. 326667

March 19 Hearing Transcript

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

FAZLUL SARKAR,

Plaintiff,

vs. Case No. 14-013099-CZ

JOHN and/or JANE DOE,

Defendant.

_____/

MOTIONS

HELD BEFORE THE HONORABLE SHEILA ANN GIBSON

COURTROOM 1719

Detroit, Michigan - Thursday, March 19, 2015

APPEARANCES:

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Appearing on Behalf of Defendant PubPeer

(Appearances continued)

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Grosse Pointe Park, Michigan 48230

Appearing on Behalf of Defendant Doe

REPORTED BY: Sherry E. Baker, CSR-1326

# I N D E X

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Detroit, Michigan

Thursday, March 19, 2015

At About 11:08 a.m.

THE CLERK: This is Case Number 14-013099, Sarkar versus Doe.

THE COURT: Appearances.

MR. BURDETT: Good morning, Your Honor. Bill Burdett on behalf of the John Doe, defendant.

MR. JOLLYMORE: Nicholas Jollymore on behalf of PubPeer.

MR. ROUMEL: Mr. Nicholas Roumel on behalf of the plaintiff, Dr. Sarkar.

THE COURT: Okay. Refresh my memory where we left off.

MR. ROUMEL: Well, we issued a subpoena, Your Honor, and they moved up PubPeer, the nonparty --

THE COURT: I remember that. Remind me where we left off.

MR. ROUMEL: So you asked for the supplemental brief, that one paragraph where we could get the identity of the person who posted that comment. I think it's paragraph 40C of our Complaint. And you asked for supplemental

briefing which we exchanged.

We also have a Motion to Extend Summons while all of this is being played out. They wanted to extend their summons. That's a separate motion.

THE COURT: Wait a minute. Is that, who was that -- was that noticed up?

MR. ROUMEL: That is just a new one I filed and noticed up for today.

(Off the record)

MR. ROUMEL: We actually filed the stipulation first, but it was rejected because you have to file a motion on that. It's not opposed as far as I know, but that motion is up for today.

Then we have Mr. Burdett on behalf of his John Doe defendant who has a separate Motion for Summary Disposition which is presently scheduled March 31st. Prepared that and signed --

MR. BURDETT: Are we depending on the outcome of this motion because -- I actually have a Motion for -- which Mr. Roumel filed. It may be unnecessary to reach the conclusion of the summary disposition at this time. I withdraw it without prejudice if the Court is inclined to have the, if it Court's order from two weeks ago stands

insofar as there wouldn't be any need to reveal anyone because none of the statements that my client made would be revealed, and there would be no point in moving forward.

THE COURT: Okay. Now who did the motion for re -- 'cause we're sort of going around.

MR. ROUMEL: It probably makes sense for Mr. Jollymore to go first because it is really their Motion to Quash.

THE COURT: Okay.

MR. ROUMEL: -- unless you have an objection.

MR. JOLLYMORE: No, that's fine.

THE COURT: Let me get the Motion to Quash. And then do you want to, if we need to then deal with -- was your motion up?

MR. BURDETT: My motion is not up. It's scheduled for March 31st. Mr. Roumel filed his response yesterday. My reply isn't due until next Tuesday, and then we will schedule it sometime in April --

THE COURT: Okay, because you're not available --

MR. BURDETT: On March 31st, I'm going to be in federal trial.

THE COURT: So that may need to be adjourned. And then there is also you said a Motion to Extend Summons, correct?

MR. ROUMEL: Yes. That's up for today.

(Off the record)

THE COURT: I don't have a copy of it.

MR. ROUMEL: The Motion to Extend?

THE COURT: Right, right, and she says she doesn't have a e-praecipe.

MR. ROUMEL: I have it.

THE COURT: Let's just deal with this. Okay. Now where we left, it was relative to -- we entered an order from --

MR. JOLLYMORE: We entered an order where Your Honor quashed the subpoena for the identities of people who posted comments on Pubpeer.com except for one, I think you asked us to come back.

THE COURT: Okay. And we were going to make a determination as to whether or not that person's identity needs to be disclosed relative to paragraph --

MR. JOLLYMORE: Exactly.

THE COURT: All right.

MR. JOLLYMORE: So what I'd like to do is walk the Court through the language of the statement. I mean I have printed -- it's also in page three of our papers and page two.

THE COURT: Of your, of your --

MR. JOLLYMORE: Of our brief.

THE COURT: The supplemental?

MR. ROUMEL: Supplemental.

THE COURT: Okay.

MR. ROUMEL: Find it on page three.

THE COURT: Yes.

MR. JOLLYMORE: So just to go back a little bit, Michigan law tells us that the standard on a motion to quash a subpoena for anonymous speech is you look at the sufficiency of the pleadings.

And what that means in this case is you look at under Rule (C)(8) whether plaintiff has stated a claim by pleading this language; that is, is it defamatory because it is a libel action.

And in order to determine whether it's defamatory, you look at the language. Now the question, the issue of whether a statement is defamatory is a decision for the judge. The judge

doesn't make a factual decision of whether it's true or false, but the judge looks at the language and interprets the language.

It's a question of interpreting language which is why the judges rule as a matter of law 'cause you'll find a large body of precedents saying this is defamatory. This is not defamatory. And we've cited some of those cases here.

THE COURT: Okay.

MR. JOLLYMORE: The Court makes that decision. Now when you look at the language, you will find the simple rule of reason. The question is what would the reasonable reader understand this language to mean?

And you look at the language first, and you can also look at inferences that can reasonably be made from the language, not wild speculation, but reasonable inferences that a reasonable reader would infer in understanding the meaning of this language.

THE COURT: Okay.

MR. JOLLYMORE: So this particular comment posted on PubPeer, there is three parts. There is a question. It has an answer. And then

at the bottom, it has a cut and paste of an e-mail from Wayne State University.

So I'd like to go through the language, the reasonable reader standard and talk about what inferences could be made from this language without taking undue time.

So the first part of it is has anybody reported this to the institute. Now that's a question. And if you look at the language, no reasonable reader would understand that to defame Dr. Sarkar. He's not even mentioned.

THE COURT: Okay, but what led into that? What was the this that they were referring to?

MR. JOLLYMORE: If you look at the context in which this statement appeared, there are other posts on PubPeer.com that discuss similarities between images and different research studies that Dr. Sarkar had published.

There was a lot of discussion on PubPeer about why are these images similar. So read in context, the this has to refer to the similarity of images and questions that were raised about that and also Dr. Sarkar because it was his research. So those are reasonable inferences to

make -- (inaudible).

So then there's an answer to this question, and the answer is: On September and October of 2013, the president of Wayne State was informed several times.

On its face, that would not be defamatory, but the inference he made was that the president of Wayne State was informed about these questions about the similarity of images in Dr. Sarkar's research. That's not defamatory either -- (inaudible) that issue.

But then let's go down to the cut and pasted paragraph that says the -- paragraph that says thank you for your e-mail. That's the one that raises the issue, that plaintiff raises the issue.

So what that statement does is it addresses an e-mail that was sent to Wayne State. This was a response to an e-mail. We don't know from whom that e-mail was sent, but a reasonable inference probably that it was sent by the person who posted this comment on PubPeer.

And what it says is thank you for your e-mail. We sent it to the appropriate person. So it says the e-mail was sent to someone.

And at the bottom of it, it says, we can't tell you whether this e-mail that contained allegations resulted in an (inaudible).

Now in the middle of it is the sentence that Dr. Sarkar focuses on. It says, "As you are aware, scientific misconduct investigations are by their nature confidential".

So I submit that this language on its face is not defamatory. You need inferences in order --

THE COURT: Well, what about the inference that he committed some scientific misconduct? Because that's what I see. As you're aware, scientific misconduct investigations are by their nature confidential. So that would be inferring that there was some scientific misconduct.

MR. JOLLYMORE: I think that's not a reasonable inference, and I'll tell you why. One is we don't have the e-mail that the poster presumably sent to Wayne State. That's missing. That's not here. PubPeer doesn't have it, I don't believe. Dr. Sarkar doesn't have it.

Wayne State has it. And if we looked at that e-mail, we could tell if this

commenter made some defamatory allegations, like you're guilty of research misconduct, against Dr. Sarkar.

THE COURT: Okay.

MR. JOLLYMORE: May I just say one more thing, Your Honor?

THE COURT: (No response.)

MR. JOLLYMORE: I think a reasonable inference from the beginning of the second sentence in this passage is that whoever was there at Wayne State who referred this e-mail that we don't have to the appropriate person is a person whose job it is to refer e-mails for investigation about whether or not there was scientific misconduct.

And that's the most I think it can reasonably be inferred from this that this person's job is to receive inquiries, and Wayne State encourages them, if you look at the --

THE COURT: Okay, but the fact of the matter remains is that this person saying this is supposed to be confidential, and this person made it public.

MR. JOLLYMORE: Investigations --

THE COURT: As you're aware --

MR. JOLLYMORE: -- but which person

made it public?

THE COURT: Whoever the author of this yes, in September and October, the president of Wayne State was informed several times. The Secretary of the Board of Governors who is also -- wrote back, you know. It's like somebody had access to this.

Like I said, this does raise -- to me I would say if this is confidential, this person put it out there. They put it out there to raise some sort of inquiry to the situation. And these things are supposed to be confidential, so he put it out here.

MR. JOLLYMORE: Actually if you look at the website -- we included the link in our papers -- Wayne State encourages people to submit inquiries, and those are not confidential. Please send us stuff about research if you have questions.

What this e-mail says is that whatever was referred here was sent off for a possible investigation of scientific misconduct.

It's not a conclusion. It's not even a statement that there was an allegation in the e-mail of scientific misconduct. It's just a statement of what happened when this e-mail

arrived.

THE COURT: But that would raise my eyebrows when I receive something like this.

MR. JOLLYMORE: Well, that's what plaintiff argues, but I don't think it's a reasonable inference. I think that plaintiff should look at this e-mail, should go to Wayne State and -- find out if it said this is misconduct, or if it said please look at the similarities between the images 'cause the only reasonable inference you can draw in this language I submit are that similarities were questioned and sent it to Wayne State.

And Wayne State sent it off a determination of whether it's scientific misconduct and said sorry, we can't do anymore about that because it's confidential.

MR. ROUMEL: Thank you, Your Honor. I'd like to do two things. First of all, try to bring us back to what I believe where we, I believe where we are at procedurally, and the second thing is to respond to counsel. Because of the flow, I think I want to respond to counsel first.

The most important thing to say is that Mr. Jollymore may be correct. His inference

is something he is entitled to argue at a trial, but on summary disposition standard, all those inferences must be taken in the light most favorable to the plaintiff.

And the way that that is read, I believe the Court has raised some questions, it can be inferred. I have said, I have informed the president several times.

And then they talk about scientific misconduct investigations are, by their nature, confidential which they're also confidential by law. And Wayne does not deal with comments on whether inquiry into allegations are under way.

And as the Court pointed out, this person posted this to a public website. By law, any of those inquiries, you make a good faith allegation of scientific misconduct, it has to be confidential.

So right there, that's where you're talking the defamation. That may support our invasion of privacy count, and so that would entitle us to do that.

But it gets me back to what this motion is really about. We started out, we filed our lawsuit. We subpoenaed PubPeer. We just asked

for identifying information about who these people were. It's discovery.

This person by indicating that they made several inquiries to Wayne State to the president, it indicated a familiarity with Wayne State. It indicated a familiarity obviously with Dr. Sarkar's research.

This person may very well have knowledge about the person who distributed the fliers at Wayne State. It might not be the same person. It might be.

But here's a person simply in the spirit of discovery who has knowledge. I would be entitled to find out who this person is, to possibly depose this person. And if the person is not a defendant, I don't need to make them a defendant; but they have knowledge about the case, and as such, I'm entitled to depose them.

Now in this protective order under MCR 2.302, they, PubPeer, are entitled to come back and say we want some protection here. Dr. Sarkar is not asking to unmask this person at this point in the litigation.

We are happy to enter into a protective order that protects this person's

identity. We won't publicize it. We won't put it in any court papers. We just want to be able to deal with counsel and depose this person and find out what they want. If they're not a defendant, we don't bring them in.

Having said all that, there are some red flags in that e-mail that indicate that this person might very well be a defendant. But that's what discovery is all about, Your Honor, and that's what a plaintiff is entitled to when you file a lawsuit.

The final thing I do want to say is that there are really two main cases in Michigan on anonymity, and we talked about the last one. To summarize very briefly, we strongly believe this case is governed by the Cooley case, not the Ghanam case.

The main difference is Cooley applies if there is a defendant who is a peer who can assert a motion for summary because a party is the only one that can make a motion for summary. That's why Mr. Burdett is here. He represents the defendant.

Ghanam applies if there is no defendant. The reasoning is that if there is no

defendant who's appeared, somebody should be able to stand in for those anonymous defendants and argue akin to a summary disposition motion.

Here it's not necessary, nor is it really permitted under our interpretation of the Cooley case for PubPeer to argue this summary judgment, summary disposition standards.

All they can do, as Cooley says, is argue for conditions to protect. Cooley says that Michigan Court Rules and the ability of the appearing defendant to argue summary disposition or -- protection.

And so in that spirit, we don't agree that this, that they can argue those summary disposition standards; but even if they can, if you take them in the spirit of all inferences in the plaintiff's favor, and if any meaning that can capably, I believe the standard is it can be capably read to support defamation in any way, then it could possibly be defamatory.

It could also support the intentional interference claim if that person distributed the fliers, and it could also support the invasion of privacy claim.

Again it's discovery -- protection,

and the person may not be a defendant.

MR. JOLLYMORE: May I respond, Your Honor?

THE COURT: Yes.

MR. JOLLYMORE: The standard that counsel says applies is not correct. Yes, indeed, the Court must read the allegations -- Complaint in a way most favorable to the plaintiff.

So we assume the standards are false -- the statements are false; but the rule of construing libel statements is a reasonable reader, not construing the statements that were published most favorably.

The plaintiff must look at the language and make a judgment of what would a reasonable reader understand this to mean. So that's not a correct statement of the law.

Counsel also says that this person obviously has a great familiarity with Wayne State. That's not the conclusion I would make. No.

I would draw the conclusion that whoever sent this e-mail sent it under their name and their title, Secretary of the Board of Governors, Executive Assistant to the President. That's a reasonable assumption, not that someone

because they know the title of someone has an intimate familiarity with Wayne State.

Now counsel says this is civil discovery. Let us look into this. Indeed it is, but there are special standards when counsel seeks to unmask the identity of an anonymous speaker because the First Amendment comes into play. So it's not just ordinary discovery.

If we're required to produce what information we have and if Mr. Roumel can depose this witness, it sends a signal that anybody who posts a comment on PubPeer is liable to be hauled into court and deposed by plaintiff's counsel.

That under cuts the mission of PubPeer which is to provide a forum where scientists can discuss science.

THE COURT: Okay. I understand, but still above what PubPeer's mission is, there still is the law that has to be adhered to relative to supporting claims for defamation, invasion of privacy and the like. Those legal premises have to be supported above and beyond what PubPeer's --

MR. JOLLYMORE: Mission.

THE COURT: -- mission, mission should be.

MR. JOLLYMORE: Yes, but Michigan law tells us how to approach this. The Cooley case and the Ghanam case.

THE COURT: Right.

MR. JOLLYMORE: Now the Cooley case, counsel says, it could only, it applies because the defendant is before the Court. Well, this defendant, this, the person whoever it was that posted this is not one of Mr. Burdett's clients.

THE COURT: I mean does it say this defendant, or does it say a defendant?

MR. JOLLYMORE: Well, in Cooley, there was only one defendant, and that defendant was before the Court. And in fact, the identity of that defendant had been disclosed inadvertently by the website.

So the only obvious remedy was a protective (inaudible). And it didn't matter if he disclosed the identity of the Doe number one in that case to the plaintiff's counsel because that counsel already had it.

So issuing a protective order saying don't spread it any further is okay in that case, and that's what the Court said.

The Court also remanded it for

reconsideration of the alternative Motion to Quash the Subpoena which in this case where there's no counsel other than PubPeer's counsel representing the poster of this one.

In this case, Cooley really doesn't apply. The facts are most closer to Ghanam. In Ghanam, the poster of the comment, was not -- and the Court said, what you do -- in fact, Cooley said this, too.

You look at the standard, to get back to Your Honor's comment, the standard of how we determine what the elements of civil discovery should be is a motion under 2.116(C)(8). The standards are summary disposition --

THE COURT: Okay --

MR. JOLLYMORE: Not that there's a summary disposition motion made --

THE COURT: Okay.

MR. JOLLYMORE: -- but if you look at that rule to determine the standards.

THE COURT: Okay, and then that takes us back to one, looking at the language, the rules of reason and what reasonable inferences could be drawn, correct?

MR. JOLLYMORE: Indeed, yes.

THE COURT: So that's where we are. That's the standard that we have to look to.

MR. JOLLYMORE: It is.

THE COURT: Okay.

MR. JOLLYMORE: Now I mean there is other arguments that counsel has raised, a couple of which I'd like to address.

THE COURT: Okay.

MR. JOLLYMORE: The issue of clients, now --

THE COURT: But you know, I don't think I'm at the client.

MR. JOLLYMORE: Pardon me.

THE COURT: I'm not even at the client. I'm not there. I'm here with the language that's set forth on the website. I don't even want to get to the flyer because the flyer isn't really germane in my mind to the motion that we have.

MR. JOLLYMORE: So all I can say is we have to be very careful that the inferences we make from this language don't even mention Dr. Sarkar.

And the only context that it appears in this discussion of generals and similarity is no special scientific misconduct anywhere in these

posts that making an inference that says just because Wayne State has a procedure for investigating scientific misconduct --

THE COURT: Well, someone asked the first writer that you cited on page three, the June 18th one indicates has anybody reported because I'm sure there was a discussion that there was some discrepancies above.

And you know, I'm just dealing with what you gave me, but I'm sure you said there was some discussion about the images and the similarity of the images and not --

MR. JOLLYMORE: Yes -- full context of --

THE COURT: Right, and not knowing, you know, not being, this outside of my lane, as I usually say. All I can see is that there was a discussion, and someone questioned the validity of Dr. Sarkar's study. That's what it appears.

MR. JOLLYMORE: But look at the Michigan case law. Ghanam itself says the statement that I think I have to turn this over to the investigators, that's not defamatory.

THE COURT: No, I'm --

MR. JOLLYMORE: There is another

Michigan state case appellate decision that says the statement in effect, I'm here to investigate. It's not defamatory.

So if they're questioning something about Dr. Sarkar's work and send it to Wayne State, all they're doing is asking for an investigation.

THE COURT: Oh, yeah, but see, you know --

MR. JOLLYMORE: By case law, that's not defamatory.

THE COURT: But the fact of the matter remains is that, even though we're looking at the summary disposition standard here, we're still dealing with a discovery request. This is a discovery request.

MR. JOLLYMORE: Yes, but special standards apply to this particular --

THE COURT: And I think, that's what I'm saying is that we are relying on, as you indicated, the summary disposition standard.

MR. JOLLYMORE: One more thing. The Ghanam case that we should be guided by, although they are both First Amendment decisions, the court said you both grew. Beyond that, you challenge the interests involved. The interest, the First

Amendment interest of protecting anonymous speakers from retaliation or injury to their professional career versus the interest in finding out whether -- (inaudible; papers shuffling). And it's a weighty interest versus a not very significant.

So if you follow the law which is Ghanam and you look at the summary disposition standard which leads you to look at whether this is defamatory and apply the reasonable reader test and then you balance, further balance the First Amendment interests against the importance of discovery.

I have to say just turning over what identifying information that PubPeer has to Dr. Sarkar's counsel -- even if he says, okay, I won't tell anybody, all I want to do is depose the guy, has a very serious, chilling effect on the kind of speech that has made PubPeer a website that scientists are basically flocking to.

THE COURT: Mr. Roumel.

MR. ROUMEL: Yes, I can respond. There is language in Ghanam that says, specifically says no. When there is a defendant who can argue the summary judgment, the summary disposition standards, Cooley applies, not our case, Ghanam.

And I put that language --

THE COURT: When there is a defendant?

MR. ROUMEL: I think the -- draw distinction about the number of defendants. I don't think it mattered because the reasoning behind the case was there's going to be a defendant to argue the summary disposition.

And that's why you don't need to argue summary disposition where this defendant, Mr. Burdett's, motion is up later, but we're arguing this motion alternatively.

We're saying even if you do apply those standards that we still should prevail because those inferences have to be drawn.

And it's not a rule of reason in Michigan. The Robbins (pht.) case says that the standard is sufficient. Any meaning is capable of defamatory meaning.

Once you look at the pleadings, accept all the pleadings as -- take all inferences in the plaintiff's favor. Any capable meaning that's defamatory, at this stage in the proceedings has to be accepted. So Cooley said kind of style it then as a protective order under 2.302.

Let's take an analogy. Let's say the person posted and said, I saw this shooting downtown. And I saw this and that. I might want to depose that person 'cause they're a witness because they know about that shooting.

Now maybe that person knows more than they're letting on, what they posted. And maybe as they investigate further, I'll find that person might be worth bringing some sort of complaint or action against.

But for now, this person has shown I have knowledge. I have made several complaints to the president of Wayne State. And by the nature of the response, they're saying allegations of scientific misconduct are taken very seriously.

The inference from that is that the person has made an allegation of scientific misconduct. The person has posted this on a public website, and we know from federal regulations that I quoted in my brief that they're just supposed to be private.

And so that person in and of itself might be liable for invasion of privacy. And under that basis, the defendant equally put defamation aside.

So we're asking for something very narrow. We want the identity of this person. We want to keep this person's confidentiality. We are not interested in exposing them, but there's one thing.

If the Court would allow me to sort of make a conclusion about the first amendment. It is kind of ironic there. Thank you 'cause I know the Court probably -- but here's the thing.

The law protects public employees who -- from being fired in their job. That's what our firm does. Our firm is an employment law firm. We do this all the time. A public employee raises First Amendment protected speech, and they're retaliated against, the law protects them. They can't be fired.

PubPeer says right on their website the reason we're anonymous is because we are afraid for our jobs. But if they really believe that the First Amendment protects their speech, then they need to put their name out there and have the courage to go forward and say I can't be fired for what I'm saying because the First Amendment protects it.

But by their act of not identifying

themselves, they know deep in their hearts that the First Amendment doesn't protect. It doesn't protect them here. We are entitled to discovery.

MR. BURDETT: Your Honor, I have to make one quick comment. First of all, I do not represent, I have only filed an appearance with regard to 14 statements. Paragraph 40C that is at issue today is not one I represent. I'm not here to argue it on behalf for anyone that made that comment. I have not been retained to do that.

THE COURT: Okay.

MR. BURDETT: So therefore is there is no one standing up for whoever the John Doe defendant is in that instance other than PubPeer.

I would also have to respond to Mr. Roumel's comments about the issue of anonymity. The Federalist Papers were anonymous. There is a long history. All of Thomas Paine's papers criticizing the king were anonymous because there is a fear of extrajudicial response and retaliation.

And the idea that somehow someone might not be able to be fired when there is something like this, it is just, it shocks me that Mr. Roumel would have that opinion about the First

Amendment because it is no where to be found in the history of the Constitution at all.

We endorse anonymous speech in this country. We allow it to move forward. That is the subject of my Motion for Summary Disposition, but I couldn't let that comment go by.

MR. JOLLYMORE: May I make two points in response to Mr. Roumel, please?

THE COURT: Yes.

MR. JOLLYMORE: One is the Robbins case may say, although I didn't find it very clear, that any defamatory meaning may be considered. But even so, you have to determine whether the meaning is defamatory. You have to look at the words. You have to look at reasonable inferences.

Let me address privacy. Dr. Sarkar's counsel makes a lot of comments about investigations being private. That's right. People at Wayne State cannot publicize their investigations.

But if I can say anything I please about somebody's scientific misconduct, if I post it on Pubpeer.com, I'm not violating any confidentiality issues -- I mean privacy issues. I'm not bound -- I'm not an investigator for Wayne

State. And I'm entitled, as all of us are, to speak my mind. If I were an investigator that might be different.

And at any rate, the law of privacy says if it's already public, then it's not private anymore. Well, this commenter, if this commenter says anything that was an invasion of privacy here, which I don't see, but maybe you can reach it by inference, it's already been posted by PubPeer by many other comments.

THE COURT: Well, no. I'm talking about I'm really looking at the paragraph that's in quotes. Are you saying someone else printed and published this e-mail from the Secretary of the Board of Governors?

MR. JOLLYMORE: No. It appears that the commenter --

THE COURT: Because --

MR. JOLLYMORE: -- commenter.

THE COURT: Yeah, because it says they wrote back. So you know, the inference is there that whoever, you know, and you know, it might be an improper inference, but it appears that whoever, you know, is commenting in this chain here has something to do with submitting the information

to the Wayne State Board of Governors.

MR. JOLLYMORE: Let's assume that's true, and that's a -- inference, but it's not a reasonable inference to infer what was referred.

THE COURT: Scientific, something about scientific misconduct.

MR. JOLLYMORE: Not really. We don't know it was referred.

THE COURT: Okay. So that's a question of fact.

MR. JOLLYMORE: No, it isn't.

THE COURT: You indicated that it's the Court's duty to look at it, and the Judge interprets the language to determine whether or not there is, it's defamatory. And what the Court does do is take the evidence in the light most favorable to the non-moving party.

And there could be an inference drawn that there is an attempt to defame Dr. Sarkar by putting this information out there because of the person from Wayne in writing back say if you understand that scientific misconduct investigation by their nature are confidential, but yet and still, this individual publishes the information that they got from Wayne State University alluding

to the fact that there was something that was inappropriate in Dr. Sarkar's studies, whatever.

And we subsequently know at this point in time that Dr. Sarkar had multiple job opportunities that were sort of squelched as a result of a series of events. And this was one of those in the chain of the series of events.

And what's being attempted to, I'm sorry, to be done by Mr. Roumel. I said Nicholas first, but excuse me for that, using your first name --

MR. ROUMEL: That's fine, Your Honor.

THE COURT: But for Mr. Roumel making the request is to be able to further his discovery in the case in chief which this is just one aspect of.

And really taking the evidence in light most favorable to the non-moving party, the Court feels that there is the inference can be drawn, a reasonable person, like I say, I'm a judicial person, an attorney, and the fact remains if you're looking at lay person's, their level of understanding of a subject matter would be at a lower level.

So the Court finds that there would be a reasonable inference, not a legal, even from a legal perspective, the Court sees that from a reasonable inference, there could be an inference, a reasonable reason that there could be a reasonable inference that there was -- I don't want to say inference again, but there could be an inference that this was of a nature to attempt to defame Dr. Sarkar.

So taking evidence in the light most favorable to the non-moving party, the Court finds that this, based upon the three criteria that were set forth by Ms. -- that this could be a situation that deemed inflammatory nature. That being said the Court would order that, not that, that the information be released to Mr. Roumel.

And the Court will further note that there will be a protective order put in place relative to this statement. And I know that, Mr. Burdett, this really doesn't have a bearing on you, but we need to deal with getting you a new date for your --

MR. BURDETT: Well, Your Honor, if you wanted to --

MR. JOLLYMORE: I'd like to just add

one comment. When we were here on March 5, Your Honor talked about disclosing information in camera.

THE COURT: Right.

MR. JOLLYMORE: I'd like you to consider, please, that we disclose what identifying information PubPeer has, and it isn't much. It's one IP address --

THE COURT: Okay.

MR. JOLLYMORE: -- to Your Honor ex parte for consideration.

THE COURT: Okay.

MR. JOLLYMORE: -- of whether the order should really go that far.

THE COURT: Okay. So what we'll do is we'll say the Court will do an in camera inspection and then make a determination what, if any, protective order needs to be put in place.

MR. JOLLYMORE: All right.

MR. ROUMEL: Right. And I'm assuming pursuant to the Court's order that that IP address will be turned over to us and whatever the protective order says that we can or can't do with that information.

THE COURT: Right. So what we want

to do, we've got to take -- there's a step prior to the protective order. We have to have that presented to the Court for in-camera inspection and --

MR. ROUMEL: But it's just an IP address, right?

MR. JOLLYMORE: That's it.

MR. ROUMEL: It's just a series of numbers. So why don't we just turn it over to counsel with protective order in place?

MR. JOLLYMORE: Because --

THE COURT: Tell me what your desire is.

MR. JOLLYMORE: Our desire is meet with Your Honor and talk about what an IP address means, what information can we obtain from it and how hard it is and whether or not it makes sense to give it to Dr. Sarkar under protective order as opposed to just quashing the subpoena.

We'd like the opportunity that Your Honor set out before to do an in camera review.

THE COURT: Okay. We'll take baby steps. We'll take baby steps.

MR. JOLLYMORE: Whatever the Court decides, Your Honor.

THE COURT: We'll have an in camera inspection.

MR. ROUMEL: Couldn't we do that right now since it's just a short amount of numbers?

MR. JOLLYMORE: I'm not prepared to do that. I don't have the IP address.

MR. ROUMEL: Okay. Next time we're in court we can do it.

THE COURT: Which is?

MR. ROUMEL: We've got to set that date for Mr. Burdett's motion.

THE COURT: Do you want to wait that long? You said you had an issue.

MR. ROUMEL: Does anybody object to me presenting this motion to present summons? I have an order prepared.

MR. JOLLYMORE: How long are you --

MR. ROUMEL: I am asking for the years. You didn't object before.

MR. JOLLYMORE: -- a year.

MR. ROUMEL: But you didn't--

THE COURT: To extend summons? You said to extend --

MR. ROUMEL: The point is we've been

here for several months trying to determine who the defendants have been. So we've been hung up on our 90 days.

THE COURT: Okay, because I only usually extend summons 60 days.

MR. ROUMEL: Can we extend it 60 days from today?

THE COURT: Yes.

MR. ROUMEL: I'll prepare an order to be sent.

THE COURT: Yes.

MR. BURDETT: Your Honor, the order entered on March 8th quashing the subpoena there really isn't any need for my Motion for Summary Disposition because of the fact that there is no risk of my client being revealed through the subpoena process.

I don't want to necessarily burden the Court with it; although, I'd love to come back and argue it. I think if we withdrew it without prejudice --

THE COURT: Without prejudice, that's fine.

MR. BURDETT: Mr. Roumel has a Motion for Reconsideration for that March 8th order

up, depending on the outcome of that, we would revisit the need for summary disposition at that time.

THE COURT: Okay. So at this point in time, you're indicating you will withdraw?

MR. BURDETT: Yes, it is withdrawn without prejudice.

THE COURT: Without prejudice.

MR. ROUMEL: Is there any dispute that Mr. Burdett's appeared in the action regarding the defendant?

MR. BURDETT: I don't think there is any dispute that I appeared. I'm standing here.

MR. ROUMEL: So is there any reason why I cannot depose your client?

MR. BURDETT: You cannot depose my client. He's in office.

THE COURT: That is a separate issue.

MR. ROUMEL: (Inaudible).

MR. BURDETT: If you have some information that you want to disclose, you know, but I do not believe that there is any information on the record that would identify my client. At this point, I'm not disclosing it.

MR. ROUMEL: The point is officially withdrawing the motion, so we don't need to come back for that.

THE COURT: Correct. And what I was saying, so we won't be coming --

(Off the record)

THE COURT: Okay. So we're back on the record. The 24th at 11 o'clock we'll convene for one, the Court to have an ex parte inspection of whatever it is Mr. Roumel presents.

Following that, based upon what we have, we'll make the determination at that time whether or not there needs to be a protective order and what will be included.

MR. JOLLYMORE: I think that actually may be helpful because we may be able to do a better job of outlining what steps we would take once we have an IP address and go through those steps to show what protections --

THE COURT: And you need to be prepared to fully discuss that so that we can walk away with proposed order that will be presented to the Court.

MR. ROUMEL: Understood, Your Honor.

THE COURT: Is there anything else,

gentlemen?

MR. ROUMEL: No.

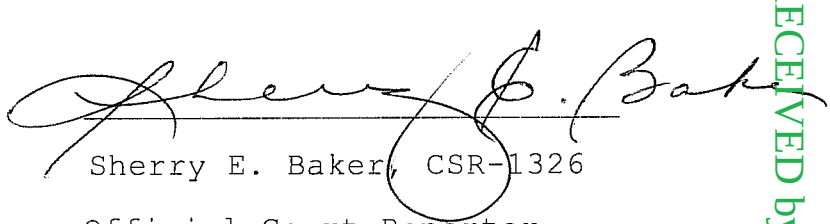
THE COURT: We'll look for the order. Thank you.

(At 11:56 a.m., proceedings concluded.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN )
) SS
COUNTY OF WAYNE )

I, SHERRY E. BAKER, CSR-1326, HEREBY CERTIFIES that the foregoing pages 1 through 44 inclusive, were reduced to typewritten form by means of computer transcription; and comprise a full, true and accurate transcript of the proceedings had in the above-entitled cause.



Sherry E. Baker, CSR-1326
Official Court Reporter

DATED: This 27th day of April, 2015.

# EXHIBIT 9

*Sarkar v Doe*, COA Case No. 326667
Circuit Court Order Denying in Part Motion to Quash Subpoena 3/26/2015

**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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**ORDER DENYING MOTION TO QUASH**
**REGARDING PARAGRAPH 40 (c) OF PLAINTIFF'S COMPLAINT**

This Court entered an order on March 9, 2015, and pursuant to that order, further arguments were heard on March 19, 2015 concerning PubPeer's motion to quash the subpoena with respect to paragraph 40(c) of plaintiff's complaint.

The court being fully advised, for the reasons stated on the record, IT IS ORDERED:

The motion is denied with respect to paragraph 40(c) of plaintiff's complaint. At the March 19 hearing, the court directed PubPeer to produce *in camera* the IP address and any other identifying information in its possession, associated with the posting that was the subject of argument at the March 19 hearing, subject to an appropriate protective order to govern further disclosure of the information.

Since that hearing, the parties stipulated, and the court ordered on March 23, to adjourn the *in camera* hearing that had been scheduled for March 24, and PubPeer shall produce the information described above directly to the plaintiff, with an appropriate protective order, subject to the terms of the March 23 order.

DATED: 3/26/2015

/s/ Sheila A. Gibson
Wayne County Circuit Judge

Approved as to form:

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Dated: March 26, 2015

# EXHIBIT 10

*Sarkar v Doe*, COA Case No. 326667
Plaintiff's Application for Leave to Appeal 3/30/2015

**IN THE MICHIGAN COURT OF APPEALS**

FAZLUL SARKAR,

Plaintiff-Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),

and

PUBPEER LLC,

Non-party Appellee.
_____/

Wayne Co. Circuit Court
Case No. 14-013099-CZ
Hon. Sheila Ann Gibson


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**APPLICATION FOR LEAVE TO APPEAL**

## Table of Contents

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## Statement of Jurisdiction

This is an interlocutory appeal from the trial court's order granting a non-party, PubPeer's, motion to quash a subpoena entered on March 9, 2015. This court has jurisdiction pursuant to MCR 7.203 (B) (1).

## Questions Presented

I. Whether the lower court erred when it granted a non-party, PubPeer's, motion to quash, where the court also erroneously:

A. Permitted the non-party to argue standards for summary disposition under MCR 2.116 (C) (8);

B. Considered two affidavits in purporting to consider the non-party's motion under MCR 2.116 (C) (8), which only permits examination of the pleadings;

C. Required the plaintiff to produce actual documentary evidence in purporting to consider the non-party's motion under MCR 2.116 (C) (8), which only permits examination of the pleadings;

D. Made factual inferences against the plaintiff;

E. Required a higher pleading standard for defamation that required by law;

F. Did not separately consider the standards of the plaintiff's other four causes of action besides defamation;

G. Used the wrong standard in examining the motion under MCR 2.116 (C) (8) rather than considering it as a motion for protective order under MCR 2.302.

PLAINTIFF-APPELLANT SAYS "YES"

NON-PARTY PUBPEER WOULD SAY "NO"

## Statement re Interlocutory Appeal

Dr. Sarkar has already faced substantial harm. He has lost two tenured jobs at public universities due to the tortious conduct of the anonymous defendant(s). He has a right under law to file suit and hold defendant(s) accountable. Towards that end, he served a discovery subpoena on the non-party PubPeer. By the time PubPeer's motion to quash the subpoena was heard and decided, it was exactly five months after he filed his case (October 9, 2014 – March 9, 2015). He is still no closer to learning the identity of the anonymous defendant(s).

His summonses (which were extended 60 days by order of March 23, 2015) are now set to expire May 18, 2015. Unless he is granted relief from the Court of Appeals, he may never be able to learn the identity of defendant(s), serve his summons(es) on time, and maintain compliance with the statute of limitations.

## Introduction

Dr. Fazlul Sarkar filed a lawsuit, alleging tortious conduct that is destroying his life and career. He does not know who is responsible. He sought a discovery subpoena on a non-party website, to help him learn the identity of the defendants. The lower court quashed the subpoena, and Dr. Sarkar appeals.[1]

Dr. Sarkar is a prominent cancer researcher at Wayne State University. He has an enemy hiding behind the anonymity afforded by the internet. So far, this unknown person[2] 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 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.

[1] On March 9, 2015, the lower court quashed the subpoena as to all but one anonymous comment. That is the order appealed from. On March 26, 2015, the lower court denied the motion to quash as to the remaining comment, and it is anticipated that PubPeer will file for interlocutory appeal as to that order. It is logical that the two appeals should be consolidated and heard together.

[2] Hereafter, for consistency, defendant shall be referred to in the male singular. This is because one "John Doe" defendant appeared in the lower court, and to this point, there is no definite evidence of more than one defendant.

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 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.[3] 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

[3] See, e.g. defendant's brief below 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.

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 order to minimize legal risk.

The process of learning defendant's identity is clearly set forth in the controlling case, *Thomas M. Cooley Law School 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 the order granting PubPeer's motion to quash. 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. The order granting PubPeer's motion should be overturned.

## Facts

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.

## Argument

In granting PubPeer's motion to quash, the court made plain legal errors that were outcome determinative. These must be corrected for justice to prevail.

### A. It Was Error to Allow a Non-Party to Argue Standards for Summary Disposition

The court made a plain legal error when it allowed a non-party, PubPeer, to argue a motion for summary disposition - or more precisely, the standards for such a motion - and to consider that argument 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), because in this case, a defendant has appeared.

Normally, a non-party is not allowed to file a motion for summary disposition. Only a party may file. MCR 2.116 (B) states that "A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule." *Ghanam* provides a limited exception, allowing a non-party to argue (C) (8) standards if there is no actual party to make the argument. That exception does not apply here, because in the lower court, a defendant had already appeared, filed a motion for summary disposition, and scheduled its motion to be heard. The attorney for that defendant even addressed this court at oral argument on March 5. Thus there is no need – and indeed, *Cooley* prohibits – the non-party from arguing the standards of MCR 2.116 (C) (8).

*Ghanam* allows a non-party to argue that the complaint is deficient under MCR 2.116 (C)(8) on the theory that if there is no defendant to raise the motion, the non-party may do it instead. That court reasoned, "... there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*." [*Ghanam* at 530]

The court went on to distinguish the cases: "... in *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit." See Id. at 252, 270. As the partial dissent in *Cooley* noted, "[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit--which may well be too late . . . ." Id. at 274 (BECKERING, J., concurring in part and dissenting in part). In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8)." [*Ghanam,* Id. at 539-540]

If there is no defendant, the court must apply *Ghanam* and "analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted." [*Ghanam,* Id. at 530] But if there ***is*** a defendant to argue for summary disposition, then a non-party may ***not*** argue the summary disposition standards. In short, *Ghanam* applies if there is no defendant able to argue a motion for summary disposition,[4] and *Cooley* applies if there is a defendant, because in such a case, it is not necessary for a non-party to assert a party's rights.

[4] Illustrating this proposition is what actually happened in the lower court. John Doe 1 filed and noticed a motion for summary disposition to be heard, but withdrew the motion after the court granted PubPeer's motion to quash. There is absolutely no reason to have a non-party argue a party's motion for summary disposition under the guise of a protective order.

In *Cooley*, the unknown defendant 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.

The court went on to say, "[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. The court went on to explain: "Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. **We conclude that Doe 1's motion for a protective order did not present the appropriate time or place to do this.** These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted." [*Cooley*, Id. at 269; emphasis added]

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 has appeared in the case. 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*). These articles have garnered hundreds of comments and catalyzed significant debate on these issues. 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 has been well aware of the lawsuit for some time.

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.

In summary, there are two controlling precedential cases where a plaintiff seeks the identity of anonymous defendants. *Ghanam* applies if there are no known defendants; *Cooley* applies if there is a known defendant. Accordingly, it was plain legal error for this court to rely on *Ghanam* and allow the non-party to argue the summary disposition standards, because in this case, there is a known defendant with the ability (and a pending motion) to do that very thing.

Moreover, this plain error affected the outcome, because s the transcript will indicate, the court indicated that the court relied upon PubPeer's counsel's attack on the sufficiency of the pleadings under MCR 2.116 (C) (8) in mostly granting their motion.

Because the court permitted this attack on the pleadings by a non-party, the following sections are presented to demonstrate that the court also palpably erred in the way it applied that legal standard, because it considered affidavits and made factual inferences against the plaintiff.

### B. It Was Error to Consider Dr. Krueger's Affidavit and the Other Affidavit Attached to PubPeer's Motion to Quash

The court's error in considering the (C) (8) factors was compounded when it considered the affidavit of Dr. Krueger (opining about Dr. Sarkar's research) attached to PubPeer's motion. Even assuming *arguendo* that the court were permitted to consider (C) (8) factors on the motion to quash, MCR 2.116 does not permit reference to affidavits 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)." This additional error ensured that any reliance on *Ghanam* was not harmless.

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).

As argued above, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to argue the standards of MCR 2.116 (C) (8). The error was exacerbated by PubPeer's submission of two affidavits in support of their motion. They may not submit them, and this court may not consider them. Specifically, their expert's affidavit must be completely disregarded, and it is not harmless, because its focus was that the anonymous commenters' statements were substantially true and not defamatory – an argument the lower court considered.

### C. It Was Error to Make Factual Inferences against the Plaintiff

Furthermore, 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. However, the court's remarks at oral argument repeatedly assumed an interpretation of the pleadings favorable to the defendant. That is improper when considering the pleadings alone. In evaluating a motion for 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).

As argued in the first section, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to even argue the standards of MCR 2.116 (C) (8). The error was compounded by the court's interpretation of all of Dr. Sarkar's factual allegations, and the inferences therefrom, in a light favorable to PubPeer.

### D. It Was Error to Require a Higher Pleading Standard for Defamation Than Required By Law

The above section demonstrated that in general, factual allegations and the inferences to be drawn from them are to be taken as true for purposes of analyzing the pleadings under a (C) (8) motion. It is especially true in defamation actions, where any genuine issue as to material facts

would act to prevent the court from discounting the pleadings and 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 Asso*. 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 erred by focusing on the words alone, and determining 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).

**E. It Was Error to Require the Production of Evidence**

PubPeer argued, and the court agreed, that plaintiff was required to produce evidence at this stage, to wit: the document that suggested Dr. Sarkar was under U.S. Senate inquiry. The transcript will indicate that after the court directed plaintiff produce this document, a copy was handed over on the record to the attorneys for PubPeer. For the same reasons set forth above, that any analysis under MCR 2.116 (C) (8) must be based on the pleadings alone, this was plain error.

### F. It Was Error to Not Separately Consider the Standards of Plaintiff's Other Four Causes of Action

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. Neither PubPeer nor the court 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.

### G. It Was Error to Not 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 erred by not considering it 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;

However, in its remarks, this court did not consider any of these factors. This court made what the *Cooley* court held was plain error: considering 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 could have considered PubPeer's and their users First Amendment rights in general – but not in the context of analyzing the pleadings.

This court did not balance these factors. Had it properly done so, the court should have considered 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 was no cause to grant the most drastic remedy in PubPeer's favor: a motion to quash the subpoena in all but one respect. The court abused its discretion by not balancing the factors as required by *Cooley* and fashioning a more limited protective order, that would have safeguarded the anonymity of defendants for public consumption, while allowing plaintiff to fairly test his claims going forward.[5]

[5] This was what the court did correctly in denying PubPeer's motion to quash regarding the comments in paragraph 40 (c) of plaintiff's complaint, and permitting disclosure under the terms of a protective order [court's order of March 30, 2015, and subject to the anticipated interlocutory appeal of PubPeer.

## 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, that should go forward. His request for discovery to PubPeer should have been granted, with an appropriate protective order, analyzed under *Cooley* and the Michigan Court Rules. Even assuming *arguendo* that *Ghanam's* stricter standards apply, plaintiff made a sufficient claim to go forward. Accordingly, PubPeer's motion to quash was wrongly granted.

## Relief Requested

***WHEREFORE*** plaintiff requests this honorable court reverse the lower court's March 9, 2015 order to quash and remand for further proceedings, permiting the subpoena to be issued on appropriate conditions in a protective order.

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

*/s/ Nicholas Roumel*

Nicholas Roumel
Attorneys for Plaintiff

March 30, 2015

# EXHIBIT 11

*Sarkar v Doe*, COA Case No. 326667

PubPeer's Application for Leave to Appeal 3/31/2015

**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

FAZLUL SARKAR,

Plaintiff–Appellee,
vs.

JOHN and/or JANE DOE(S),

Defendant(s),

PUBPEER, LLC,

Appellant.
_____/

COA Case No. _____

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)


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**PUBPEER'S APPLICATION FOR INTERLOCUTORY LEAVE TO APPEAL**

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## I. Order appealed from and basis of jurisdiction.

PubPeer, LLC seeks leave to appeal the March 26, 2015 order of the Wayne County Circuit Court (Gibson, J.) denying in part PubPeer's motion to quash the plaintiff's subpoena. The circuit court's order is attached as Exhibit O.

The circuit court's register of actions is attached as Exhibit Q. The transcript for the March 5 hearing on PubPeer's Motion to Quash is attached as Exhibit G. The transcript for the March 19 supplemental hearing on PubPeer's Motion to Quash has been ordered and will be submitted to the Court as Exhibit N.

This Court has jurisdiction to consider this application pursuant to MCR 7.203(B)(1) and MCR 7.205(A)(1) because PubPeer is seeking leave to appeal from an order of the circuit court that is not a final judgment appealable as of right, and because this application was filed within 21 days of the date of that order.

## II. Introduction.

This case concerns the First Amendment right of scientists to discuss their peers' work anonymously on the Internet. That right has been threatened by an order from the circuit court requiring PubPeer, LLC—which operates a website devoted to anonymous, post-publication peer review of scientific publications—to identify one of the anonymous scientists on its site. Doing so would irreparably compromise that scientist's constitutionally guaranteed right to remain anonymous and therefore necessitates this Court's interlocutory review. If the order is not reviewed now, this Court would be effectively powerless after final judgment to redress the substantial harm threatened, because once the constitutional right to anonymity has been lost, it cannot be regained.

This case began when several anonymous scientists discovered what they believed to be anomalies in the research papers of Dr. Fazlul Sarkar, a prominent cancer scientist. They

reported those apparent anomalies—mainly similarities between images purporting to show the results of different experiments—on www.pubpeer.com, a website that PubPeer created for anonymous scientific discourse. The reports sparked an online discussion about those similarities and about the traditional system of pre-publication peer review that failed to detect them. Dr. Sarkar sued the anonymous commenters as Jane/John Doe defendants for defamation, arguing that they had falsely accused him of research misconduct. Even though not a single one of the comments on PubPeer's site alleged research misconduct or anything remotely approaching it, Dr. Sarkar obtained a subpoena requiring PubPeer to disclose the identities of its anonymous scientists so that his suit against them could proceed.

PubPeer moved to quash the subpoena based on the First Amendment's protection of the anonymity of its commenters, arguing that Dr. Sarkar could not make the preliminary showing of merit to his claims necessary to overcome that constitutional right. On the basis of this Court's decision in *Ghanam v Does*, 303 Mich App 522; 845 NW2d 128 (2014), the circuit court agreed and quashed Dr. Sarkar's subpoena with respect to all but a single comment on PubPeer's site.[1] It later ordered PubPeer to disclose to Dr. Sarkar, however, the identifying information associated with that single comment, subject to a protective order. It is the right to anonymity of the person who posted that single comment that is the subject of this appeal.

Notably, the court did *not* base its unmasking order on the content of that commenter's post on PubPeer. Indeed, it could not have done so under *Ghanam* because the post is entirely innocuous and incapable of defamatory meaning, as explained below. Instead, in an apparently unprecedented ruling, the court ordered the commenter unmasked because of its speculation that

[1] On March 11, Dr. Sarkar moved the circuit court to reconsider that ruling. That motion is still pending. On March 30, Dr. Sarkar filed an application for leave to appeal from the circuit court's March 9 order.

the commenter might *also* have sent an email to Dr. Sarkar's employer—Wayne State University—making defamatory allegations against him. The content of that email, and indeed its existence, is entirely a matter of speculation, however, because Dr. Sarkar has not pleaded any portion of it or otherwise identified its content at any point in this litigation.

The circuit court's disclosure order is unconstitutional for several independent reasons.

First, the order is unconstitutional because it requires PubPeer to unmask a commenter whose speech on PubPeer's site was lawful and constitutionally protected. This Court's precedents—specifically, *Ghanam* and *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013)—permit the unmasking of only those anonymous speakers who have essentially forfeited their right to remain anonymous by publishing actionable defamation. To give effect to that protection, *Ghanam* and *Cooley* require defamation plaintiffs to demonstrate—before unmasking—that their claims would survive a motion for summary disposition under MCR 2.116(C)(8).

Dr. Sarkar cannot make that showing because the comment on PubPeer's site is incapable of defamatory meaning and, in any event, legally privileged as a fair report. The comment is incapable of defamatory meaning because it contains only two statements, neither of which is defamatory: (1) a statement that someone reported the anomalies in Dr. Sarkar's research papers to Wayne State University, and (2) a reproduction of Wayne State's email in response to the reporting of those anomalies. The comment suggests, at most, that the commenter agreed that there were anomalies in Dr. Sarkar's images and that they merited further investigation. There is nothing defamatory about those scientific observations, and Dr. Sarkar has, to his credit, appeared to abandon any claim that reporting scientific anomalies in a peer's work is defamatory. The comment is also legally privileged because it simply reproduces an email sent

by Wayne State University in response to an inquiry. Publication of such official statements is legally privileged as a fair report.

Second, the order is unconstitutional because the circuit court ordered unmasking on the basis of an entirely un-pleaded email. The court speculated that PubPeer's commenter had sent an email to Wayne State and that the email contained defamatory allegations. Hornbook Michigan law requires plaintiffs to plead libel with specificity "by identifying the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262. Because Dr. Sarkar has never pleaded the text of the email or otherwise identified its content at any point during this litigation, his claim of defamation based upon it would not survive a motion under MCR 2.116(C)(8). Therefore, it would be unconstitutional to unmask PubPeer's commenter on the basis of that email.

The circuit court made two additional constitutional errors that present issues of first impression in this Court.

First, the court ordered the unmasking of someone responsible for concededly lawful speech (the PubPeer comment) based on speculation that the same individual was responsible for different speech in a different forum (the email to Wayne State). But neither *Ghanam* nor any other case considering the unmasking of anonymous speakers permits the unmasking of someone responsible for *lawful* speech to discover the identity of someone responsible for *unlawful* speech. Doing so would violate the First Amendment by burdening constitutionally protected expression. This Court should grant leave to clarify that constitutional limitation.

Second, the circuit court ordered unmasking without requiring Dr. Sarkar to substantiate his claim of defamation with a prima facie evidentiary showing. Although virtually every other jurisdiction that has considered the issue has imposed such a requirement as an essential

protection against the unwarranted unmasking of anonymous speakers, this Court declined to require that showing of the plaintiffs before it in *Cooley* and *Ghanam*. This case differs from *Cooley* and *Ghanam*, however, because PubPeer has submitted evidence from an expert in the field, and Dr. Sarkar has not come forward with any evidentiary showing of his own.

PubPeer hired a prominent expert in the forensic analysis of scientific images to examine the concerns raised by PubPeer's commenters. Dr. John Krueger, who performed such analyses for 20 years for the federal government's Office of Research Integrity and who pioneered the forensic tools used to compare scientific images, arrived at an emphatic conclusion: he agreed with every single comment he examined from PubPeer's site, concluding that there are similarities between the images in Dr. Sarkar's papers and that those similarities warrant further investigation.

Thus, even if Dr. Sarkar's complaint is *legally* adequate, this Court should require that Dr. Sarkar substantiate his claims with a prima facie *evidentiary* showing prior to unmasking, especially in light of Dr. Krueger's submission. Unless Dr. Sarkar can make such a showing, it is extraordinarily unlikely that he could prevail on his claim that the PubPeer commenter at issue defamed him, and it would therefore be fruitless to strip that commenter of his or her anonymity.

The circuit court erred in one final way: by failing to heed *Cooley*'s invitation to balance the anonymous speaker's First Amendment interests against the plaintiff's interests in unmasking. Here, that balance overwhelmingly favors maintaining the anonymity of PubPeer's commenters. The comments at issue are part of the scientific exchange necessary to scientific scholarship and progress. Because academic discourse inevitably involves—and requires—a competition among peers, courts have been loath to impose liability on the often-heated exchanges that result. To safeguard the breathing space required by the First Amendment, they

generally require academics unhappy with their critics to respond with data and debate rather than defamation suits.

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.[2] 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.

For these reasons, PubPeer respectfully requests that this Court grant interlocutory review of the circuit court's order of disclosure and reverse

**III. Statement showing substantial harm by awaiting final judgment.**

The circuit court has ordered PubPeer to disclose identifying information for one of its anonymous commenters. Allowing that order to be enforced without interlocutory review would cause substantial and irreparable harm.

[2] See, e.g., Ex C (Jollymore Aff ¶ 3 Appx B–C) (Cyranoski, *Acid-Bath Stem Cell Study Under Investigation*, Scientific American (February 18, 2014) http://www.scientificamerican.com/article/acid-bath-stem-cell-study-under-investigation (accessed December 6, 2014); Landau, *Scientist Wants to Withdraw Stem Cell Studies*, CNN (March 12, 2014) http://www.cnn.com/2014/03/12/health/stem-cell-study-doubts/index.html (accessed December 6, 2014)).

This appeal concerns the constitutional right to speak while remaining anonymous, a core right protected by the First Amendment. See *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995) ("an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). The Supreme Court has long recognized that the denial of First Amendment rights, even for a moment, constitutes irreparable harm. See *Elrod v Burns*, 427 US 347, 373; 96 Ct 2673; 49 L Ed 2d 547 (1976).

The risk of irreparable harm in this case is particularly acute because once an anonymous speaker is unmasked, his or her anonymity cannot be restored. If PubPeer were compelled to comply with the circuit court's order to release the identifying information of its anonymous commenter, this Court would be effectively powerless to later correct that injustice. As the Maine Supreme Court noted in analogous circumstances, "disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot." *Fitch v Doe*, 869 A2d 722, 725 (Me, 2005); see also *Melvin v Doe*, 836 A2d 42, 50 (Pa, 2003) ("once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure"). And, as the Pennsylvania Supreme Court stated, "the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and . . . falls within the class of rights that are too important to be denied review." *Melvin*, 836 A2d at 50.

The potential harm from the unmasking of the commenter is not only irreparable—it is substantial. If this commenter is unmasked for making a non-defamatory statement, every scientist who has discussed a peer's work on PubPeer is potentially at risk of being unmasked. And once the commenter's identity is disclosed to the plaintiff, the commenter may face out-of-

court reprisal. Indeed, the use of defamation suits for the sole purpose of discovering the identities of one's critics so as to exact extrajudicial retribution is well documented.[3]

The disclosure order would, moreover, risk widespread harm to PubPeer's mission. The scientists who currently engage in peer review on PubPeer's site would be chilled from discussing the work of their peers if there were a risk that their identities would be disclosed in circumstances similar to those here. This is in fact the very reason PubPeer has permitted anonymous commentary: without it, scientists would have to risk their careers to offer candid public feedback on the research of their peers.

For these reasons, it is unsurprising that courts routinely permit interlocutory review of orders that would unmask anonymous speakers. The Michigan Court of Appeals did so in *Ghanam*, as have numerous other state courts. See, e.g., *Mortg Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 999 A2d 184, 192 (NH, 2010); *Melvin*, 836 A2d at 50; *Fitch*, 869 A2d at 725; *Doe v Cahill*, 884 A2d 451, 454 (Del, 2005); *Indep Newspapers, Inc v Brodie*, 966 A2d 432, 456–57 (Md App, 2009); *Krinsky v Doe 6*, 72 Cal Rptr 3d 231, 234 (Cal App, 2008); *In re Does 1–10*, 242 SW3d 805, 811 (Tex App, 2007); *Mobilisa, Inc v Doe*, 170 P3d 712, 715 (Ariz App, 2007);

[3] See, e.g., *Swiger v Allegheny Energy*, 2006 WL 1409622, at *1 (ED Pa, May 19, 2006), aff'd, 540 F3d 179 (CA 3, 2008) (company represented by respected law firm in Philadelphia filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity); see also Paul Alan Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*, 37 Litigation, no. 3, 2011 at 3, <http://www.citizen.org/documents/litigating-civil-subpoenas-to-identify-anonymous-internet-apeakers-paul-alan-levy.pdf> ("I have always found it quite telling that when we enter an appearance to oppose efforts by plaintiffs seeking discovery into the identities of anonymous defendants, the most common response on the part of the plaintiffs' lawyers is either to drop the case or to file no opposition and hence allow the motion to quash to be granted. The second most common response is for the plaintiffs to simply argue that no proof should be required, without submitting evidence to support their claims just in case they should lose on their legal argument. What this tells me is that these plaintiffs sought discovery to identify their critics without having any real intention of going forward with a libel case.").

*Immunomedics, Inc v Doe*, 775 A2d 773,774 (NJ Super, 2001). Similarly, despite the federal "final order" rule, which strictly limits interlocutory appeals, see, e.g., *Mohawk Indus, Inc v Carpenter*, 558 US 100; 103 S Ct 599; 175 L Ed 2d 458 (2009), two federal appellate courts have granted review of orders to identify anonymous internet defendants. See *In re Anonymous Online Speakers*, 661 F3d 1168 (CA 9, 2011); *Arista Records, LLC v Doe 3*, 604 F3d 110, 119 (CA 2, 2010).

In the proceedings below, the plaintiff argued that a protective order restricting the ways in which the plaintiff could use the anonymous commenter's identity would somehow safeguard the commenter's anonymity. This fundamentally misunderstands anonymity. The primary purpose of the anonymity that PubPeer provides is to prevent researchers *such as the plaintiff* from learning the identities of their anonymous critics. Once the commenter's identifying information is disclosed to the plaintiff, the protection afforded by his or her anonymity is lost forever. Limiting the plaintiff's use of the commenter's identity would do nothing to prevent that principal harm. And the broader harm from even a disclosure restricted by a protective order would also be immediate. Whistleblowers within the scientific community would undoubtedly be chilled from voicing their concerns if they could not do so without risking disclosure of their identities to the very subjects of those concerns.

For these reasons, PubPeer and its commenter would suffer substantial and irreparable harm if PubPeer were forced to unmask its anonymous commenter before entry of a final judgment. Accordingly, this Court should grant leave to appeal.

## IV. Questions presented for review.

May a defamation plaintiff compel the identification of an anonymous commenter on a website devoted to peer review of scientific publications:

1. Where the comment posted by that individual was not capable of defamatory meaning?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

2. Where the comment posted by that individual contained only a concededly fair and true report of an official response by Wayne State University to an inquiry?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

3. Based on speculation regarding an email allegedly sent by that same commenter, even though the plaintiff has not pleaded or otherwise identified a single word of that email?

    i. The circuit court said "yes."

    ii. Appellant PubPeer says "no."

4. Where the circuit court did not balance the First Amendment interests of the commenter against the plaintiff's interest in unmasking, as required by this Court's precedent?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

5. Where the balance of interests under the First Amendment favors maintaining the commenter's anonymity?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

6. Where the plaintiff has made no prima facie evidentiary showing to substantiate the complaint's allegation that the commenter's apparent claims—that images used in the plaintiff's papers were similar—were false?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

7. Where a prominent expert in forensic analysis of images used in scientific papers has, through an affidavit submitted in the circuit court, confirmed the commenter's apparent concern with the similarity between images used in the plaintiff's research papers and has stated that, as a former employee of the federal Office of Research Integrity, he would have recommended a further investigation of the plaintiff's research?

    i. The circuit court did not explicitly answer this question but implicitly said "yes."

    ii. Appellant PubPeer says "no."

## V. Statement of facts and proceedings below.

Dr. Fazlul Sarkar is a prominent cancer researcher who has published over 430 original scientific articles in peer-reviewed journals and written more than 100 review articles and book chapters. Ex A at 3 (Compl ¶ 11). Around September 5, 2013, users on PubPeer's site began commenting on his papers. Ex B at 4 (Mot to Quash). On July 7, 2014, Dr. Sarkar's counsel sent a letter to PubPeer demanding that many of the comments be removed and that PubPeer disclose the identities of the commenters. Ex A at 22 (Compl ¶ 80). On July 10, PubPeer's moderators removed or edited several of the comments, including those pending review before being posted. *Id.*; Ex B at 4 (Mot to Quash). Dr. Sarkar filed this suit on October 9 against the anonymous commenters, claiming defamation and related torts. See Ex A (Compl). On October 13, Dr. Sarkar obtained a subpoena for any identifying information that PubPeer possesses for the anonymous commenters. See Ex C (Jollymore Aff ¶ 2 Appx A).

On December 10, 2014, PubPeer moved to quash the subpoena. See Ex B at 2–4 (Mot to Quash). The circuit court held a hearing on the motion to quash on March 5 and, as memorialized in a subsequent order, granted the motion with respect to every comment cited in Dr. Sarkar's complaint save one. See Ex H (Order Granting In Part Mot to Quash). The court ordered supplemental briefing and argument regarding that single comment, which is reproduced at paragraph 40(c) of the complaint. *Id.* On March 19, the circuit court held a hearing regarding

that comment and, as documented in a later order, denied the motion to quash with respect to that comment. See Ex O (Order Denying In Part Mot to Quash). The court ordered PubPeer to disclose any identifying information in its possession associated with the second comment reproduced in paragraph 40(c) of the complaint. *Id.* The court also signaled its intent to issue a protective order to limit the ways in which the plaintiff could use or further disclose that identifying information. *Id.*

On the day following the hearing, March 20, 2015, PubPeer moved the circuit court to stay its order pending PubPeer's efforts to obtain interlocutory review. See Ex P (Mot for Stay). The circuit court has not yet ruled on that motion. This application now seeks interlocutory review.

## VI. Standard of review.

This Court reviews the denial of a motion to quash a subpoena for abuse of discretion. See *Cooley*, 300 Mich App at 263. "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Id.* (footnotes omitted). Issues of constitutional law are reviewed de novo, and in First Amendment cases, the appellate court is "obligated to independently review the entire record to ensure that the lower court's judgment does not constitute a forbidden intrusion of the field of free expression." *Id*. at 263–64 (quotation marks omitted).

## VII. Argument.

### a. The First Amendment and this Court's precedents require defamation plaintiffs to make a preliminary showing of merit before they may unmask anonymous speakers.[4]

#### i. The First Amendment limits the compelled identification of anonymous internet speakers.[5]

The First Amendment protects the right to speak anonymously. *McIntyre*, 514 US at 341–43. The Supreme Court has long recognized that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. The Court's recognition guards the role that anonymity has played over the course of our nation's history—starting with the Federalist Papers—as "a shield from the tyranny of the majority." *Id.* at 357. The Court has been emphatic: anonymous speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* See also Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 Cato Sup Ct Rev 57, 58 (2002) ("For the Framers and their contemporaries, anonymity was the deciding factor between whether their writings would produce a social exchange or a personal beating.").

As this Court has recognized, the "right to speak anonymously applies to those expressing views on the Internet." *Ghanam*, 303 Mich App at 533.

[4] PubPeer preserved this issue on pages 5–7 of its Motion to Quash (Ex G) and on pages 10–13 of its Supplemental Brief (Ex J).

[5] PubPeer preserved this issue on page 5 of its Motion to Quash (Ex G).

### ii. *Ghanam* and *Cooley* require defamation plaintiffs to demonstrate at least the legal sufficiency of their claims before they may unmask anonymous speakers.[6]

Because the Constitution safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to unmask anonymous speakers through the subpoena power must make a preliminary showing of merit to their legal claims. See, e.g., *Ghanam*, 303 Mich App at 534–42 (discussing cases). Although the Michigan Supreme Court has yet to address this question, this Court has issued two opinions regarding the showing that must be made. See *id.*; *Cooley*, 300 Mich App at 256-63. Under *Ghanam* and *Cooley*, when a defamation plaintiff seeks to unmask an anonymous defendant, the court must first determine whether the complaint is legally sufficient. A legally sufficient defamation complaint is one that "claim[s] with specificity . . . the exact language that the plaintiff alleges to be defamatory," *Cooley*, 300 Mich App at 262, and that pleads statements that are "actually capable of defamatory meaning," *Ghanam*, 303 Mich App at 544. If a plaintiff does not meet these requirements, then the court must quash the subpoena that would unmask the anonymous speaker.

When the anonymous defendant is participating in the litigation, as in *Cooley*, that defendant may himself or herself initiate that review through a motion for summary disposition filed under MCR 2.116(C)(8). When the anonymous defendant is *not* participating—as here and in *Ghanam*—the Court must undertake that review of its own initiative or upon a motion filed by the third-party recipient of the subpoena in question. As the Court said in *Ghanam*, "[t]his evaluation is to be performed even if there is no pending motion for summary disposition before the court." 303 Mich App at 541.

[6] PubPeer preserved this issue on page 6 of its Motion to Quash (Ex G) and on pages 10–13 of its Supplemental Brief (Ex J).

Furthermore, this Court has held that, even if the plaintiff's complaint is legally adequate, courts may consider whether "the weight of the defendant's First Amendment rights" nonetheless constitutes "good cause" to refuse to enforce a subpoena that seeks to unmask the speaker. *Cooley*, 300 Mich App at 264–66.

### iii. The vast majority of jurisdictions also require defamation plaintiffs to substantiate their allegations with evidence.[7]

Notably, four of the six judges in *Cooley* and *Ghanam* would have gone further. In addition to requiring that defamation plaintiffs defend the legal sufficiency of their complaint as pleaded before unmasking anonymous defendants, they would have joined the vast majority of jurisdictions that have considered the issue and have explicitly required that defamation plaintiffs substantiate their claims with actual evidence. See *id.* at 274 (Beckering, J., concurring in part and dissenting in part); *Ghanam*, 303 Mich App at 540 ("[W]e agree with the dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite*/*Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10)"). Those other jurisdictions—generally following either the New Jersey appellatecourt in *Dendrite Int'l, Inc v Doe*, 342 NJ Super 134; 775 A2d 756 (NJ App, 2001), or the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451 (Del, 2005)—have required defamation plaintiffs to put forward evidence establishing a prima facie case of defamation. See, e.g., Levy,*Developments in Dendrite*, 14 Fla Coastal L Rev 1, 10–16 (2012) (discussing "fairly unanimous" decisions of state appellate courts).

The Michigan Supreme Court has yet to address the standard that a defamation plaintiff must satisfy before unmasking an anonymous defendant.

[7] PubPeer preserved this issue on pages 6–7 of its Motion to Quash (Ex G).

### b. The circuit court erred in ordering the unmasking of PubPeer's commenter because Dr. Sarkar's complaint is legally insufficient.[8]

The circuit court erred in denying PubPeer's motion to quash with respect to the sole commenter in question because his or her speech was not capable of defamatory meaning and because the circuit court based its order on an entirely un-pleaded email.

Under Michigan law, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation marks omitted). To ultimately prevail on a claim of defamation, a plaintiff must establish four elements: (1) "a false and defamatory statement concerning the plaintiff," (2) unprivileged publication, (3) fault, and (4) harm. *Id.*

As this Court noted in *Cooley*, "several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice." 300 Mich App at 263. In other words, "[w]hether 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.

To be actionable, an allegedly defamatory statement "must be 'provable as false.'" *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998), quoting *Milkovich v Lorain Journal Co*, 497 US 1, 17–20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). It may not be mere "sarcas[m]," *Ghanam*, 303 Mich App at 550, "rhetorical hyperbole," *Greenbelt Co-op Publ'g Ass'n, Inc v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), or "[e]xaggerated

[8] PubPeer preserved this issue on pages 7–19 of its Motion to Quash (Ex G), pages 4–5 of its Reply Brief (Ex F), and on pages 2–6 of its Supplemental Brief (Ex J).

language," *Hodgins v Times Herald Co*, 169 Mich App 245, 254; 425 NW2d 522 (1988). And it must convey a materially false fact that a "reasonable fact-finder could conclude . . . implies a defamatory meaning." *Smith*, 487 Mich at 128.

The nature and venue of the statements is also critical: "Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam*, 303 Mich App at 546–47. This is especially true for a forum like PubPeer, which hosts discussion of published articles. As the D.C. Circuit explained, "there is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." *Moldea v New York Times Co*, 306 US App DC 1, 6; 22 F3d 310 (1994). "[W]hile a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." *Id.*

In addition to pleading actionable defamation, "[a] plaintiff must also comply with constitutional requirements that depend on 'the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.'" *Cooley*, 300 Mich App at 262 (internal citation removed). Here, Dr. Sarkar is a limited-purpose public figure, and the commenters' discussion of the scientific research that Dr. Sarkar chose to publish is speech on a matter of exceptional public concern. Dr. Sarkar is, by his own description, a renowned cancer researcher. See Ex A at 2–3 (Compl ¶¶ 6–12). His research is supported by a number of federal grants. *Id.* at 3 (Compl ¶ 12). He has published over 500 hundred articles, including many in prominent scientific journals. *Id.* (Compl ¶ 11). And his research has led to a number of clinical trials. *Id.* at 2–3 (Compl ¶¶ 9–10). Dr. Sarkar is on the editorial board of numerous scientific journals, and serves on both NIH and DOD study sections to review grant applications, both indicating he is a leader in his field. *Id.* at 3 (Compl ¶ 12). In

short, Dr. Sarkar has subjected his scientific research to public scrutiny. See *Gertz v Robert Welch, Inc*, 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974) ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures . . . .").[9] Settled First Amendment jurisprudence "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *NY Times Co v. Sullivan*, 376 US 254, 280–81, 84 S Ct 710; 95 ALR2d 1412 (1964).

Moreover, because Dr. Sarkar's cancer research and any anomalies within it are "'subject[s] of general interest and of value and concern to the public,'" the PubPeer commenters' speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v Phelps*, 562 US 443; 131 S Ct 1207, 1211–15; 179 L Ed 2d 172 (2011) (internal citation removed).

**i. The comment at issue cannot justify unmasking because it is not defamatory and because it is, in any event, legally privileged as a fair report.**[10]

Under *Cooley* and *Ghanam*, Dr. Sarkar may not unmask PubPeer's commenter if his claim of defamation would not survive a motion for summary disposition under MCR 2.116(C)(8). For the reasons explained below, it would not.

[9] For these reasons, this case is significantly different from *Hutchinson v Proxmire*, in which the Supreme Court held that a scientist whose "published writings reach[ed] a relatively small category of professionals concerned with research in human behavior" was not a public figure. 443 US 111, 135; 99 S Ct 2675; 61 L Ed 2d 411 (1979).

[10] PubPeer preserved this issue on pages 18–19 of its Motion to Quash (Ex G) and on pages 2–6 of its Supplemental Brief (Ex J).

The sole comment at issue in this appeal is reproduced below (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."

Ex A at 10 (Compl ¶40(c)).

This comment is simply not capable of defamatory meaning. It responds to the earlier comment by claiming that "this" had been reported to Wayne State University, and then it reproduces the response from Wayne State. In the circuit court, Dr. Sarkar argued that the comment amounts to an allegation of research misconduct. But the comment says nothing of the sort. At most, it suggests that the commenter (1) agrees with the "this" referred to in the previous comment and (2) believes that the "this" warranted further investigation by Wayne State. Neither suggestion is capable of defamatory meaning.

First, read in context, the "this" refers to anomalies in images in Dr. Sarkar's papers that had been identified earlier in the comment thread—but expressing concern over those anomalies

is not defamatory. The comments in this specific thread are similar to most of the comments on PubPeer's site relating to Dr. Sarkar's work: they note a number of anomalies in the images appearing in Dr. Sarkar's papers and invite other readers to compare the images for themselves. See Ex C at 2–7 (Jollymore Aff ¶ 5). Nearly all of the anomalies noted consist of apparent similarities between images that purport to depict the results of different experiments. Here is the comment that initiated the comment thread at issue (note, in particular, the commenter's repeated invitation to compare various images):

> **Peer 1: ( November 9th, 2013 5:30pm UTC )**
>
> Figure 1D
>
> UPPER Notch-1 panel: *please compare* NS of BxPC3 (lane 2 from left) with NS of HPAC (lane 4 from left) and CS of PANC-1 (lane 5 from left).
>
> Note also the vertical line and darker background on the left side of the CS band of PANC-1.
>
> LOWER Notch-1 panel: *please compare* CP of HPAC (lane 3 from left) with CP of PANC-1 (lane 5 from left). Also *compare* the CP band of BxPC3 (lane 1 from left) with the NP band of PANC-1 (lane 6 from left).
>
> Now, please FLIP HORIZONTALLY the entire LOWER Notch-1 band. Now *compare* the NP band of BxPC3 in the lower Notch1 panel (lane 2 from left in the original) with the CS of BxPC3 in the upper Notch-1 panel (first lane from left). Also *compare* the CP bands of HPAC and PANC-1 in the lower Notch-1 panel with the NS bands of BxPC3 and HPAC in the upper Notch-1 panel.
>
> Figure 5
>
> Cyclin D1 Panel: *please compare* the shape and position of the CS band of HPAC with the CS band of PANC-1 in the Cyclin D1 panel (upper).CDK2 Panel: please note the vertical line between the NS band of HPAC and CS band of PANC-1. Please note the box around the NS band of BxPC3 (magnify).
>
> Figure 6A, B and C
>
> *Please compare* the Rb bands in the three panels (A, B, and C). Compare the BxPC3 and HPAC bands in 6A and 6B, magnify and see the shapes and background, especially the small specks in the upper right corner of the second

> band (from left). Now, please FLIP HORIZONTALLY the RB bands in PANC-1 (panel C) and *compare* with the two other bands (BxPC3 and HPAC in panes A and B). Then, note the small specks in the upper right corner of the second band (from left).
>
> Figure 7E and Figure 8D
>
> *Please compare* the two Rb bands. But please increase the width of the Rb bands in Figure 8 and compare. Better seen in PowerPoint, magnify.

*Id.* (emphasis added).[11] Following that initial comment, other individuals highlighted similar anomalies in other papers. Then, as reproduced in paragraph 40(c) of the complaint, one commenter asked whether "anybody [had] reported *this* to the institute." Ex A at 10 (Compl ¶ 40(c)) (emphasis added).

In context, "this" quite obviously refers to the anomalies in Dr. Sarkar's images that had just been discussed. The commenter that the circuit court ordered unmasked then responded that "this" had been reported to Wayne State University. See *id.* ("Yes, in September and October 2013 the president of Wayne State University was informed several times."). That statement appears to convey agreement that there were similarities in Dr. Sarkar's images.

In the circuit court, Dr. Sarkar conceded that his claim of defamation is not based on the allegations of similarities in the images in his papers. See, e.g., Ex E at 1 (Pl Response to Mot to Quash) ("They frame their motion to try and fool this court into thinking this case is only about

[11] PubPeer provided the full comment thread in an affidavit submitted with its motion to quash. See Ex C at 2–7 (Jollymore Aff ¶ 5). The Court may consider the full thread for two reasons. First, the full context of the statement at issue is necessary to determine whether it is capable of defamatory meaning. See, e.g., *Gustin v Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) ("[A] publication must be considered as a whole."). Second, absent the full context, the comment cited in paragraph 40(c) of the complaint is facially deficient for an even more basic reason than explained above. Out of context, there is nothing in the comment to suggest that it even concerns Dr. Sarkar, as it must to be actionable. See *Smith*, 487 Mich at 113 ("a false and defamatory statement *concerning the plaintiff*" (emphasis added)). Similarly to *Ghanam*, however, the Court may consider the context now, even though not pleaded, "to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile." 303 Mich App at 543.

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."). But even if that were his claim, it would fail.

Claims of visual similarity are inherently subjective, not provably false. Whether two images look "similar" is entirely a matter of opinion, not of fact. Moreover, even if the claims of similarity conveyed provably false facts, they would still not be defamatory. They do not, as a matter of law, "'tend[] so to harm the reputation of [the plaintiff] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Smith*, 487 Mich at 113 (citation omitted). That is because the fact of similarities between images does not suggest any impropriety. Instead, the identification of such anomalies is a core component of scientific discourse. Before relying on the work of their peers in arriving at their own conclusions or in designing their own future experiments, scientists debate the merit of the work. Courts are not the proper venue to mediate the terms of that debate. See *ONY, Inc v Cornerstone Therapeutics, Inc*, 720 F3d 490, 496 (CA 2, 2013) ("We conclude that, as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation.").

Second, the comment's apparent suggestion that the similarities merit further investigation is similarly incapable of defamatory meaning. Calls for investigation are inherently subjective, not provably false. As a matter of law, therefore, calling for an investigation is simply not defamatory. See *Ghanam*, 303 Mich App at 548 (finding internet comment containing statement "maybe I need to call the investigators?" to be "not defamatory as a matter of law"); *Haase v Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982) ("I am here to investigate" does not "rise to the level of defamation."); *Varrenti v Gannett Co*, 33 Misc 3d 405, 412–13; 929

NYS2d 671 (2011) (holding that comments that "call[ed] for an investigation into the [police department's] practices" were "expressions of protected opinion").

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, Inc 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).

For these reasons, the comment at issue is simply not actionable defamation. At most, it expressed concern over anomalies in scientific images and suggested that the anomalies warranted further investigation. Were scientists subject to civil liability for debating the merit of their peers' research or for demanding further investigation into their peers' work, scientific and academic debate would grind to a halt.

### ii. The email sent to Wayne State cannot justify unmasking because the email is entirely un-pleaded.[12]

The circuit court ordered the unmasking of PubPeer's commenter based on speculation that the commenter may also have sent an email to Wayne State University making defamatory allegations against Dr. Sarkar. That decision was erroneous because the email in question has not been pleaded or otherwise identified at any point in this litigation. Dr. Sarkar has speculated that it exists because the response from Wayne State refers to such an email. Ex A at 10 (Compl ¶ 40(c)) ("Thank you for your e-mail . . . ."). But Dr. Sarkar has never quoted that email or alleged any of the supposedly defamatory text in it. This is fatal to his claim of defamation based on the email, and it is likewise fatal to his attempt to unmask anyone—let alone PubPeer's commenter—on the basis of it.

It is settled law in Michigan 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; *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 590; 349 NW2d 529 (1984) ("plaintiff's complaint [must] set forth . . . the defamatory words complained of"); *Wynn v Cole*, 68 Mich App 706, 713; 243 NW2d 923 (1976) (abrogated on other grounds) ("A complaint in libel must include the contents of the libelous statement . . . ."). In *Ghanam*, for example, this Court held that the "plaintiff's complaint is patently deficient by virtue of his failure to cite the actual complained-of statements in the complaint." 303 Mich App at 543.

Dr. Sarkar's complaint fails that basic requirement because it fails to plead the text of the hypothetical email. Moreover, the requirement of pleading the text with specificity is especially

[12] PubPeer preserved this issue on pages 8–12 of its Motion to Quash (Ex G) and on pages 4–5 of its Supplemental Brief (Ex J).

important in the context of anonymous speech, because it is what allows courts to review the legal sufficiency of a defamation claim *before* unmasking. Without the text of the alleged libel to examine, courts could not—as *Cooley* contemplated—test the sufficiency of the claim "on the pleadings alone." 300 Mich App at 263. Without that ability, a motion for summary disposition could not serve, again in the words of *Cooley*, as "an essential tool to protect First Amendment rights." *Id.* at 262.

For this reason alone, the circuit court erred in ordering the unmasking of PubPeer's commenter on the basis of an entirely un-pleaded email.

**c. The circuit court erred in ordering the unmasking of PubPeer's commenter based on its speculation that the commenter was the same person who sent the email to Wayne State.**[13]

Even if Dr. Sarkar had pleaded the text of the email to Wayne State, and even if that email were defamatory, it would not serve as a basis for unmasking PubPeer's commenter.

That is because the PubPeer comment and the email appeared in two different forums. The comment, of course, appeared on PubPeer's website, whereas the email was sent independently to Wayne State. Whatever defamatory speech may have been contained in the email, it did not appear on PubPeer's site. Thus, this case is unlike *Ghanam*, *Cooley*, and, it appears, every other unmasking case. In those cases, courts considered only whether to unmask an anonymous defendant in a particular forum based on whether his or her speech *in that forum* was defamatory. No court that PubPeer is aware of has considered whether it would be constitutional to unmask concededly *lawful* speech based on unlawful speech made elsewhere.

It would not be, and this Court should, in a ruling of first impression, clarify that constitutional limitation. The First Amendment does not permit Dr. Sarkar to unmask an

[13] PubPeer preserved this issue on pages 8–12 of its Motion to Quash (Ex G) and on pages 5–6 of its Supplemental Brief (Ex J).

anonymous comment on PubPeer's site unless *that comment* was defamatory or unlawful because, absent that showing, the commenter cannot be shown to have effectively forfeited his or her constitutional right to remain nameless. This flows directly from bedrock First Amendment principles. First Amendment rights may be restricted only to serve compelling interests and only through restrictions drawn as narrowly as possible. See, e.g., *Citizens United v Fed Election Comm'n*, 558 US 310, 340; 130 S Ct 876 (2010) ("Laws that burden . . . speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (internal citation removed)). Allowing a defamation plaintiff to unmask an anonymous defendant satisfies those conditions, if at all, only because the speech of the anonymous defendant has been shown to be actionable defamation—that is, speech that is outside the bounds of First Amendment protection. The comment on PubPeer's site was lawful and, thus, has not lost its First Amendment protection, even if speech in another forum (i.e., the email) was unlawful. Thus, the commenter on PubPeer may not be unmasked. See *Carroll v President & Comm'rs of Princess Anne*, 393 US 175, 183–84; 89 S Ct 347; 21 L Ed 2d 325 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and . . . the exact needs of the case.").

There is simply no legal precedent to support the contrary view: that speech lawfully made in one forum may be unmasked based on speech unlawfully made in other. This Court's 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 303 Mich App at 547–50. It did not predicate an individual's right to anonymity in one forum on speech made in

another forum. Cf. *Dendrite* 342 NJ Super at 141 ("[T]he discovery of John Doe No. 3's identity largely turns on whether *his statements* were defamatory or not." (emphasis added)).

It is no answer to speculate, as did the circuit court, that PubPeer's commenter and the individual who sent the email to Wayne State may be one and the same person. As an initial matter, that logic would eviscerate the right to anonymity, because there will always be a possibility that a person's anonymous lawful critics are, in fact, the same as that person's anonymous unlawful critics. More importantly, it would violate the constitutional prohibition on penalizing constitutionally protected speech as a means of suppressing unlawful speech. As the Supreme Court has made clear: "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v Free Speech Coal*, 535 US 234, 255; 122 S Ct 1389; 152 L Ed 2d 403 (2002); see also *Ex parte Lo*, 424 SW3d 10, 18 (Tex Crim App 2013), reh den (Mar. 19, 2014) ("The State may not justify restrictions on constitutionally *protected* speech on the basis that such restrictions are necessary to effectively suppress constitutionally *unprotected* speech . . . ."(emphasis in original)). The analogue is true here: the court may not order the unmasking of lawful speech in the punishment of unlawful speech.

**d. The circuit court erred in not requiring Dr. Sarkar to substantiate his claims with evidence before unmasking PubPeer's commenter.**[14]

Even if Dr. Sarkar could overcome the hurdles above to unmasking PubPeer's commenter, the circuit court erred in not requiring that he substantiate his claims with a prima facie evidentiary showing before unmasking PubPeer's commenter. The vast majority of jurisdictions to have considered this question require such evidence to safeguard the constitutional right to anonymity. See *Ghanam*, 303 Mich App at 537 ("Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*, *Cahill*, or a

[14] PubPeer preserved this issue on pages 24–25 of its Motion to Quash (Ex G).

modified version of those standards."). Absent such a requirement, defamation plaintiffs could successfully overcome the right to anonymity through artfully pleaded complaints, even if they had no realistic chance of proving their case. This Court has yet to embrace that higher standard, although it has discussed it in both *Cooley* and *Ghanam*. If the Court concludes that Dr. Sarkar can otherwise satisfy the requirements of *Cooley* and *Ghanam*, then this case would present a unique circumstance—distinguishable from both of those cases—warranting adoption of the higher standard, which would require a prima facie evidentiary showing of merit before unmasking.

It is true that neither *Cooley* nor *Ghanam* required the plaintiffs before them to substantiate their claims with evidence. But neither case dealt with a situation like this one, in which: (1) an expert has essentially confirmed that the concerns articulated by the commenters on PubPeer's site are valid and merit further investigation; (2) the plaintiff thus has no prospect of success unless he can show that the expert's view is provably false and, in fact, false; and (3) the only evidence that could arguably approach that showing is the original data from the plaintiff's experiments, which are in his sole possession and yet not proffered by the plaintiff in support of his case.

It is in precisely such circumstances that the requirement embraced by nearly all courts to have considered the issue—that defamation plaintiffs seeking to unmask anonymous commenters substantiate their claims with evidence—is most needed to safeguard the right to anonymity.

**e. The balance of the interests overwhelmingly favors maintaining the anonymity of PubPeer's commenter.**[15]

Even if PubPeer's commenter had published speech capable of a defamatory meaning, this Court must "consider the weight of the defendant's First Amendment rights against the

[15] PubPeer preserved this issue on pages 20–24 of its Motion to Quash (Ex G).

plaintiff's discovery request" in determining whether to compel the disclosure of the commenter's identity. *Cooley*, 300 Mich App at 266. Here, the balance overwhelmingly favors maintaining anonymity, and the circuit court erred in failing to consider that balance at all.

There is more at stake in this case than the commenter's right to engage in protected speech anonymously. At stake is the freedom of academic discourse itself. The advancement of scientific knowledge depends on the ability to convey ideas without fear of retaliation. Particularly in the sciences, where hypotheses are rigorously tested through careful experimentation, open methodologies, and peer-reviewed publications, anonymity is a critical component of robust review. Indeed, some prominent science journals employ double-blind peer review—in other words, anonymous review—to ensure honest appraisals.[16] For all these reasons, courts have been "especially careful when applying defamation and related causes of action to academic works, because academic freedom is 'a special concern of the First Amendment.'" *ONY, Inc*, 720 F3d at 496, citing *Keyishian v Bd of Regents*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967). To strip scientific commenters of anonymity based on claims as slight as those at issue here would subvert that system and impoverish the vigorous debate necessary to scientific progress.

The Court must balance these First Amendment interests against the strength of Dr. Sarkar's central claim, which is that commenters on PubPeer's site accused him of "research misconduct" despite never having used those words or anything comparable. His claim relies on a stream of inferences about the intent and motivations of scientists who, in reality, did little more than what scientists do every day: review the work of their peers and debate its merit.

[16] The NIH is piloting a program that accepts anonymously submitted grant applications to ensure objectivity of review. While the names of individuals on the reviewing committee are available to the applicants, the identities of the first and second reviewer are not disclosed. See, e.g., <http://www.nih.gov/news/health/dec2012/od-07.htm> (accessed December 9, 2014).

While the First Amendment issues in this case are weighty, Dr. Sarkar has only a slight interest in unmasking anonymous commenters in order to pursue his claim of defamation.

Under *Cooley*, the Court should balance these two competing interests. On the one hand is clear constitutional protection of academic discourse. On the other is the remote likelihood that Dr. Sarkar could show that anything PubPeer's commenter said was provably false and defamatory. The balance clearly favors quashing the subpoena.

## VIII. Conclusion and relief requested.

For the reasons set forth above, PubPeer respectfully requests that this Court grant this application for leave to appeal and reverse the March 26, 2015 order denying in part PubPeer's motion to quash.

Respectfully submitted,

/s/ Daniel S. Korobkin


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*Drafting assistance provided by Samia Hossain, Brennan Fellow, American Civil Liberties Union Foundation, New York, NY (recent law graduate; registered in New York State bar but not yet admitted).*

*Counsel for PubPeer, LLC*


Dated: March 31, 2015

# EXHIBIT 12

*Sarkar v Doe*, COA Case No. 326667
Plaintiff's Supplemental Brief re Motion for Reconsideration with Clare Francis Email 4/9/2015

**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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---

**SUPPLEMENTAL BRIEF WITH NEW EVIDENCE**
**IN SUPPORT OF MOTION FOR RECONSIDERATION**

Plaintiff previously (on March 11, 2015) moved for reconsideration of the court's March 9, 2015 order quashing the subpoena to PubPeer of most of the comments regarding the plaintiff. Plaintiff supplements that motion with newly discovered evidence as follows:

**FACTS**

Plaintiff subpoenaed certain documents from Wayne State University (WSU). Included in the subpoena response that was received on March 31, 2015 was the email exchange that is referenced in paragraph 40 (c) of plaintiff's complaint. That paragraph reads:

> 40 c. Then an unregistered user (likely the same one, given the context) reveals [on PubPeer] 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."

As the court will recall, the court denied PubPeer's motion to quash the subpoena concerning this paragraph only, stating on the record (words to the effect) that the response from WSU could be interpreted to infer that the poster alleged research misconduct against Dr. Sarkar.

The entire email chain has now been obtained from WSU and is attached as an exhibit to this memoranda. It indicates that the court's instinct was entirely correct. The person who posted wrote on November 10, 2013:

> "Dear Secretary to the board of governors, Wayne State University, Julie Miller:
>
> "I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on Pubpeer.
>
> "You can find the entries on Pubpeer here: ...
>
> "Many of the entries mention things which amount to what many think of as **scientific misconduct.**..." [emphasis in original; entire email attached][1]

This email is hugely significant.

Most importantly, it completely contradicts the multiple assertions made by PubPeer in its written and oral arguments to the court that "the comments Dr. Sarkar complains of are not capable of defamatory meaning ..." [PubPeer's motion to quash, p. 12]. Specifically, concerning paragraph 40 (c) (the email chain reproduced above), PubPeer argued:

"... Dr. Sarkar has attempted to twist the meaning of this PubPeer comment into a charge of 'research misconduct.' ... That's not what the comment says or even implies. ... Moreover, Dr. Sarkar is wrong in arguing that Wayne State's use of the phrase 'scientific misconduct investigation' suggests that the PubPeer commenter accused him of misconduct." [PubPeer's supplemental brief, pp. 4-5]

Simply put, PubPeer is dead wrong. They have argued repeatedly that there is no way any of the pleaded statements are capable of defamatory meaning – i.e., accusing Dr. Sarkar of

[1] The email is signed "Clare Francis." This is almost certainly a pseudonym for someone who is apparently somewhat notorious for making accusations against various scientists of research misconduct. See, for example, http://www.elsevier.com/connect/its-not-that-clare-francis-is-a-pseudonym-its-that-the-pseudonym-is-clare-francis. It is apparent that "Clare Francis" is one of the anonymous defendants whose identity is necessary so that Dr. Sarkar's complaint may move forward. It should be noted that the subpoena response from WSU does not include the IP address of "Clare Francis," and that information is still needed from PubPeer pursuant to the court's order denying the motion to quash for this particular email (paragraph 40 (c) of the complaint).

intentional research misconduct. On the contrary – even the anonymous poster and emailer was astute enough to know that "Many of the entries mention things which amount to what many think of as **scientific misconduct.**..." This supports Dr. Sarkar's argument all along that in the scientific community, people reading on PubPeer would be fully aware that he was being accused of intentional research misconduct - a serious charge and accusation of illegal acts - rather than simply stating their opinion that certain images resembled each other.

If this anonymous defendant who emailed WSU was aware that the posts on PubPeer could be read as accusations of scientific misconduct, then it completely destroys PubPeer's arguments that the statements on PubPeer were not capable of such a defamatory meaning.

Since the pleadings must be taken in a light most favorable to the plaintiff, with all inferences to be drawn in the plaintiff's favor: to the extent this court relied on the argument that the complained-of words could not be interpreted as accusations of intentional misconduct, the **new evidence** obtained from WSU compels a different conclusion.

## LEGAL STANDARD

MCR 2.119 (F) permits rehearing or reconsideration of a decision where a there was a "palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." "No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs." [Id., (2)] This court rule gives the court "considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties…" *Bakian v Nat'l City Bank (In re Estate of Moukalled)*, 269 Mich App 708, 714 (2006).

In addition, a motion for reconsideration may be based on a different court rule such as MCR 2.612 (C) (1) (b), newly discovered evidence, which is a fair characterization of the recent WSU subpoena response.

***W H E R E F O R E*** for the reasons set forth above, and in his original motion for reconsideration, plaintiff respectfully that the court reconsider its order of March 9, 2015 and deny PubPeer's motion to quash, or rehear the matter accordingly.

Respectfully submitted,

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

***s/Nicholas Roumel***

Nicholas Roumel
April 9, 2015 Attorney 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 9th day of April, 2015.

***/s/ Nicholas Roumel***

Nicholas Roumel

**Julie Hearshen Miller**

---

**From:** Clare Francis <clare.francis1946@googlemail.com>
**Sent:** Monday, November 11, 2013 3:29 PM
**To:** Julie Hearshen Miller
**Subject:** scientific concerns about published work FH Sakar, Karmanos cancer institute/Wayne State university

Dear Julie Miller,

Many thanks for doing that. I could not ask for more.

Yours sincerely,

Clare

On Mon, Nov 11, 2013 at 9:21 PM, Julie Hearshen Miller <julie.h.miller@wayne.edu> wrote:

November 11, 2013

Dear Ms. Francis:

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.

Sincerely,

Julie H. Miller

Julie Hearshen Miller

Secretary to the Board of Governors

Senior Executive Assistant to the President

Wayne State University

4231 Faculty/Administration Building

Detroit, MI 48202

313-577-2084 (Office)

313-577-4233 (Fax)



**From:** Clare Francis [mailto:clare.francis1246@googlemail.com]
**Sent:** Sunday, November 10, 2013 12:59 PM
**To:** julie.h.miller@wayne.edu
**Cc:** debra.harris@wayne.edu
**Subject:** scientific concerns about published work FH Sakar, Karmanos cancer institute/Wayne State university

Dear Secretary to the board of governors, Wayne State university, Julie Miller,

I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on Pubpeer.

You can find the entries on Pubpeer here:

https://pubpeer.com/search?q=sarkar&searchid=3511E3995E7030E15F2538&dv=none

On opening the page you will see multiple capsules. On clicking on these they will open and you can read what people have written.

The entries try to stick to the scientific points for the most part.

Many of the entries mention things which amount to what many think of as **scientific misconduct**.

I believe that this is the webpage of the person concerned. I do not know this person. The issues are scientific ones, not personal ones.

http://pathology.med.wayne.edu/profile.php?id=45054

The university president and dean of the medical school have been contacted on numerous occasions, but nothing seems to be happening.

Your sincerely,

Clare

# EXHIBIT 13

*Sarkar v Doe*, COA Case No. 326667
Circuit Court Order Staying Proceedings 4/20/2015

**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



**ORDER GRANTING MOTION FOR STAY PENDING APPEAL**

PubPeer LLC's motion for stay pending appeal was filed on March 20, 2015 and brought before this Court for hearing on April 16, 2015. For the reasons set forth on the record, it is ORDERED as follows:

1. The motion for stay pending appeal is GRANTED.

2. All proceedings in this case are STAYED pending resolution of PubPeer's appeal.

**IT IS SO ORDERED.**

Dated: 4/20/2015

/s/ Sheila A. Gibson
Wayne County Circuit Judge

The above order is approved as to form:

/s/ Nicholas Roumel (by consent)
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Counsel for Plaintiff

Dated: April 16, 2015

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Counsel for PubPeer LLC

Dated: April 16, 2015

/s/ H. William Burdett, Jr. (by consent)

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Counsel for a John Doe Defendant

Dated: April 16, 2015

# EXHIBIT 14

*Sarkar v Doe*, COA Case No. 326667
Plaintiff's Response to PubPeer's Application for Leave to Appeal 4/17/2015

**IN THE MICHIGAN COURT OF APPEALS**

FAZLUL SARKAR,

Plaintiff-Appellee,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),
and

PUBPEER LLC,

Non-party Appellant.
_____/

COA Case No. 326691

Wayne Co. Circuit Court
Case No. 14-013099-CZ
Hon. Sheila Ann Gibson


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**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

## Table of Contents

## Index of Authorities

## Statement of Jurisdiction

This is an interlocutory appeal from the trial court's order denying, in part, a non-party, PubPeer's, motion to quash a subpoena entered on March 9, 2015. This court has jurisdiction pursuant to MCR 7.203 (B) (1).

## Questions Presented

I. Whether the lower court erred when it denied, in part, a non-party, PubPeer's, motion to quash.

PLAINTIFF-APPELLANT SAYS "NO"

NON-PARTY PUBPEER WOULD SAY "YES"

## REQUIRED SECTIONS

### A. Nature of the Action

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 the trial court against "John and/or Jane Does." In order to find out the identity of this person, Dr. Sarkar 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. Their position is misleading for two reasons.

[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.

First, they frame their legal argument 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 under principles of free speech. Second, they claim, without legal basis, that the First Amendment extends greater protection to anonymous persons.

These arguments mislead 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 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 about 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 vanish 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.

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. Defendant is 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.

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 affirmance of an order granting PubPeer's motion to quash. All Dr. Sarkar asks is to be able to have his claims tested fair and square in a court of law. He has always been 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.

**B. Character of Pleadings and Proceedings**

The pleadings and proceedings germane to this appeal are as follows:

Dr. Sarkar filed a detailed, 124 paragraph complaint against "John and/or Jane Doe(s)" in Wayne County Circuit Court. He raised five counts:

(1) Defamation, based upon false accusations of research misconduct, a violation of federal law that is false.

(2) Intentional interference with business expectancy rested on the malicious sending of documents to three different administrators at the University of Mississippi with the intent to cause them to terminate their job offer to Dr. Sarkar, which was successful, even after Dr. Sarkar had given notice at Wayne State University and bought a house in Oxford, Mississippi.

(3) 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.

(4) The invasion of privacy claim was based on disclosure of alleged and heavily regulated investigatory proceedings that are required by law to be confidential.

(5) 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.

Four days later, he served a subpoena on the non-party web site, PubPeer, for information to identify the persons posting about Dr. Sarkar, who might either be defendants or have discoverable information about the other torts, such as the identity of the persons who sabotaged Dr. Sarkar's tenured jobs. PubPeer responded with a motion to quash. The court granted that motion except in one aspect, ordering PubPeer to turn over identifying information relating to one particular comment.

Both Plaintiff and PubPeer filed respective interlocutory appeals from the court's "split" decision. While Dr. Sarkar disagrees with PubPeer's position, he agrees that this court should consider the appeals together and agree to hear this matter to give clear direction to the trial court.

### C. Dates of Important Instruments and Events

Dr. Sarkar's complaint was filed October 9, 2014.

He served his subpoena on PubPeer on October 13, 2014. PubPeer responded with a motion to quash, largely resting on First Amendment grounds.

After a series of various delays and extensions, PubPeer's motion was heard on March 5, 2015 and (in an order dated March 9, 2015) granted in all but one aspect.[2]

The court scheduled further arguments concerning allegations in paragraph 40 (c) of the complaint. That hearing was held on March 19, 2015, and in an order dated March 26, the court denied PubPeer's motion to quash on that one paragraph.

What that meant is that PubPeer was ordered to turn over to the plaintiff, subject to a suitable protective order, the identifying information for the anonymous poster described in one particular subparagraph of the complaint – 40 (c).

Dr. Sarkar filed for interlocutory appeal on March 30, 2015, concerning the March 9 order quashing discovery of the identity of the persons posting most of the statements. PubPeer filed the instant appeal of the March 26 order on March 31, 2015.

The trial court heard PubPeer's motion to stay proceedings on April 16, 2015, and granted that motion in an order dated April 20.

---

[2] Dr. Sarkar filed a motion for reconsideration of that decision on March 11, 2015, supplementing that motion with new evidence on April 10, 2015. That motion was never addressed by the trial court.

Curiously, an appearance was filed on December 11, 2014 by an attorney purporting to represent someone calling himself "A John Doe Defendant," even without being served. This defendant's *appearance*, with no apparent legal justification, claimed to accept responsibility for only some of the conduct in Dr. Sarkar's complaint. He filed a motion for summary disposition based upon the conduct he anonymously admitted to, but withdrew it on the record on March 19, 2015, citing the court's March 9 order.

### D. Rulings and Order of the Trial Court

See above.

### E. Verdict and Judgment

Not applicable.

### F. Substance of Proof

See facts and argument below.

## STATEMENT OF FACTS

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 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.

**ARGUMENT**

In quashing Dr. Sarkar's subpoena seeking identifying information for all but one comment, the court erred. That is the subject of Dr. Sarkar's own application for leave to file interlocutory appeal, and will not be recounted here. However, the court took a different approach when denying PubPeer's motion regarding paragraph 40 (c), and made the correct decision - although perhaps for the wrong reasons.

Paragraph 40 (c) of plaintiff's complaint reads 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 before the court was 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). In oral argument on March 19, 2015, the court indicated that Wayne State's emailed response, posted on PubPeer's website, could support an inference that the poster was accusing Dr. Sarkar of research misconduct, and denied the motion to quash pending entry of a protective order.

Tellingly, when the entire email chain was later subpoenaed from Wayne State University (after the March 19 hearing), it revealed that the poster behind paragraph 40 (c) was in fact not only accusing Dr. Sarkar of research misconduct, but was well aware that a sizeable number of anonymous postings on PubPeer about Dr. Sarkar were accusing him of research misconduct. As such, the court's instinct was entirely correct. The person who posted Wayne State's response on PubPeer initiated that response with the following email, sent on November 10, 2013:

> "Dear Secretary to the board of governors, Wayne State University, Julie Miller:
>
> "I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on Pubpeer.
>
> "You can find the entries on Pubpeer here: ...

"Many of the entries mention things which amount to what many think of as **scientific misconduct.**..." [emphasis in original; entire email attached][3]

This email is hugely significant.

Most importantly, it completely contradicts the multiple assertions made by PubPeer in its written and oral arguments to the lower court (and to this court) that "the comments Dr. Sarkar complains of are not capable of defamatory meaning ..." [PubPeer's motion to quash, p. 12]. Specifically, concerning paragraph 40 (c) (the email chain reproduced above), PubPeer argued:

"... Dr. Sarkar has attempted to twist the meaning of this PubPeer comment into a charge of 'research misconduct.' ... That's not what the comment says or even implies. ... Moreover, Dr. Sarkar is wrong in arguing that Wayne State's use of the phrase 'scientific misconduct investigation' suggests that the PubPeer commenter accused him of misconduct." [PubPeer's supplemental brief, pp. 4-5]

Simply put, PubPeer is dead wrong. They have argued repeatedly that there is no way any of the pleaded statements are capable of defamatory meaning – i.e., accusing Dr. Sarkar of intentional research misconduct. On the contrary – even the anonymous poster and emailer was astute enough to know that "Many of the entries mention things which amount to what many think of as **scientific misconduct.**..." This supports Dr. Sarkar's argument all along that in the scientific community, people reading on PubPeer would be

[3] The email is signed "Clare Francis." This is almost certainly a pseudonym for someone who is apparently somewhat notorious for making accusations against various scientists of research misconduct. See, for example, http://www.elsevier.com/connect/its-not-that-clare-francis-is-a-pseudonym-its-that-the-pseudonym-is-clare-francis. It is apparent that "Clare Francis" is one of the anonymous defendants whose identity is necessary so that Dr. Sarkar's complaint may move forward. It should be noted that the subpoena response from WSU does not include the IP address of "Clare Francis," and that information is still needed from PubPeer pursuant to the court's order denying the motion to quash that is subject of the instant appeal.

fully aware that he was being accused of intentional research misconduct - a serious charge and accusation of illegal acts - rather than simply stating their opinion that certain images resembled each other.

If this anonymous defendant who emailed WSU was aware that the posts on PubPeer could be read as accusations of scientific misconduct, then it completely destroys PubPeer's arguments that none of the statements on PubPeer were capable of defamatory meaning.

The tricky part is that the lower court reached the right result, but for the wrong reasons, because under the circumstances presented to the court, where a defendant had appeared, the non-party PubPeer was not permitted to base its motion on the standards of MCR 2.116 (C) (8), failure to state a claim upon which relief can be granted.

The court should not have allowed a non-party, PubPeer, to argue a motion for summary disposition – or more precisely, the standards for such a motion – and to consider that argument 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), because in this case, a defendant has appeared.

Normally, a non-party is not allowed to file a motion for summary disposition. Only a party may file. MCR 2.116 (B) states that "A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule."

*Ghanam* provides a limited exception. It allows a non-party to argue that the complaint is deficient under MCR 2.116 (C) (8) **only if** there is no defendant who is able to make a motion for summary disposition, on the theory that if there is no defendant to

raise the motion, the non-party may do it instead. That court held: “In the instant case, however, there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*.” [*Ghanam* at 530]

The court went on to clarify: “But in *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit. See Id. at 252, 270. As the partial dissent in *Cooley* noted, "[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit--which may well be too late . . . ." Id. at 274 (BECKERING, J., concurring in part and dissenting in part). In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8).” [*Ghanam,* Id. at 539-540]

If there is no defendant, the court must apply *Ghanam* and “analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted.” [*Ghanam,* Id. at 530] But if there ***is*** a defendant to argue for summary disposition, then a non-party may ***not*** argue the summary disposition standards. In short, *Ghanam* applies if there is no defendant able to argue a motion for summary disposition, and *Cooley* applies if there is a defendant.

Here, a defendant had appeared, filed a motion for summary disposition, and appeared at all hearings, even addressing the lower court at oral argument. Thus there is no need – and indeed, *Cooley* prohibits – the non-party PubPeer from arguing the standards of MCR 2.116 (C) (8). *Cooley* held:

"[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. The court went on to explain: "Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. **We conclude that Doe 1's motion for a protective order did not present the appropriate time or place to do this.** These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted." [*Cooley,* Id. at 269; emphasis added]

In summary, there are two controlling precedential cases where a plaintiff seeks the identity of anonymous defendants. *Ghanam* applies if there are no known defendants; *Cooley* applies if there is a known defendant. Accordingly, it was error for the court to rely on *Ghanam* and allow the non-party to argue the summary disposition standards, because in this case, there is a known defendant with the ability (and his own pending motion) to do that very thing.

Fortunately, in this particular instance regarding paragraph 40 (c), the error did not affect the outcome. The court reached the correct result to consider PubPeer's interests in requiring the disclosure, under the terms of an appropriate protective order under MCR 2.302, per *Cooley.*

## SUMMARY AND CONCLUSION

The lower court reached the correct result regarding its order denying PubPeer's motion to quash concerning paragraph 40 (c) of the complaint. The complete email chain obtained afterwards from Wayne State confirmed that the inference drawn by the court was correct.

Nonetheless, the court's consideration of the motion under MCR 2.116 (C) (8) was incorrect. Reliance on the *Ghanam* standards is not applicable where a defendant has appeared. The court should have instead analyzed the motion under the *Cooley* case and to balance the interests of the party, and permit the subpoena under the terms of a protective order under MCR 2.302.

Given that both Dr. Sarkar and PubPeer have filed motions for interlocutory appeal, and the trial court has stayed proceedings, plaintiff does not oppose PubPeer's application for leave to appeal. It makes sense to consolidate the appeals for consideration and decision.

Plaintiff agrees with PubPeer that the First Amendment issues raised in this case are important, but there should be no heightened standard for free speech for anonymous persons; nor should the First Amendment protect against clearly tortious conduct, where Dr. Sarkar has sufficiently pled defamation, intentional interference with business expectancy and relationship, invasion of privacy, and intentional infliction of emotional distress.

Ultimately, this court should allow appropriate disclosure from PubPeer so that Dr. Sarkar may pursue his claims in the trial court.

## RELIEF REQUESTED

***W H E R E F O R E*** Dr. Fazlul Sarkar respectfully requests that the court consolidate PubPeer's application for leave to appeal with his own, and consider them together, ultimately deciding the appeals in Dr. Sarkar's favor, and permit production of the identifying information from PubPeer on appropriate conditions so that Dr. Sarkar's lawsuit may proceed.

Respectfully submitted,

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

***s/Nicholas Roumel***

Nicholas Roumel
Attorney for Plaintiff

April 21, 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 regular mail on the 21th Day of April, 2015.

*/s/ Nicholas Roumel*

Nicholas Roumel

# EXHIBIT 15

*Sarkar v Doe*, COA Case No. 326667
Court of Appeals Order Granting Leave to Appeal
8/27/2015

# Court of Appeals, State of Michigan

## ORDER

Fazlul Sarkar v John Doe

Docket No. 326667

LC No. 14-013099-CZ

Kirsten Frank Kelly
Presiding Judge

Michael J. Talbot

Cynthia Diane Stephens
Judges

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The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4). On the Court's own motion pursuant to MCR 7.216(A)(7), the Court orders that this case be CONSOLIDATED with the application filed in Docket No. 326691.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 27 2015

Date

Chief Clerk