STATE OF MICHIGAN

IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff–Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendants,

PUBPEER, LLC,

Appellee.
_____/

COA Case No. 326667

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

FAZLUL SARKAR,

Plaintiff–Appellee,

vs.

JOHN and/or JANE DOE(S),

Defendants,

PUBPEER, LLC,

Appellant.
_____/

COA Case No. 326691

Wayne County Circuit Court
Case No. 14-013099-CZ (Gibson, J.)

APPELLANT PUBPEER'S BRIEF IN CASE NO. 326691

ORAL ARGUMENT REQUESTED

October 22, 2015

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Order Appealed from and Basis of Jurisdiction

PubPeer, LLC appeals from 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. This Court granted PubPeer's application for leave to file this interlocutory appeal on August 27, 2015.

This Court has jurisdiction to consider this appeal pursuant to MCL 600.308(2)(e) and MCR 7.203(B)(1) and the Court's August 27 order granting leave to appeal. This brief is timely because it was filed within 56 days of the order granting leave to appeal. See MCR 7.212(A)(1)(a)(iii).

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.

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 posted comments on those apparent anomalies on www.pubpeer.com, a website that PubPeer created for anonymous scientific discourse. Although the anomalies observed varied, they consisted primarily of *similarities* between images in Dr. Sarkar's work that purported to show the results of *different* experiments. The comments 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, Dr. Sarkar obtained a subpoena requiring PubPeer to disclose the identities of the 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. Along with its motion, PubPeer submitted an affidavit from a prominent expert in the forensic analysis of scientific images, who examined the online comments at issue in this suit and emphatically agreed that the anomalies discovered by PubPeer's commenters were, indeed, anomalies and that they were

concerning enough to warrant further investigation. Ex 2B at 3–4 (Krueger Aff ¶ 7).[1] The circuit court quashed Dr. Sarkar's subpoena with respect to all but a single comment on PubPeer's site. It did so on the basis of this Court's decisions in *Ghanam v Does*, 303 Mich App 522; 845 NW2d 128 (2014), and *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013), which recognized that online speakers have a First Amendment right to remain anonymous, unless a defamation plaintiff can demonstrate, at the very least, the legal sufficiency of his or her claims against the speaker. However, the circuit court later ordered PubPeer to disclose to Dr. Sarkar, subject to a protective order, the identifying information associated with the single comment on which it had previously reserved judgment. It is the right to anonymity of the person who posted that single comment that is the subject of this appeal.[2]

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* and *Cooley*, because, as explained below, the post is entirely innocuous and incapable of defamatory meaning. Instead, the court ordered the commenter unmasked based on its speculation that the commenter might *also* have sent an email to Dr. Sarkar's employer—Wayne State University—making defamatory allegations against him. At the time of the circuit court's order, neither the court nor PubPeer had seen the email: it had never been posted on PubPeer's site and it was not pleaded in the complaint. Accordingly, the court took the unprecedented and unconstitutional step of ordering the unmasking of an anonymous defendant in one forum (PubPeer's website) based on speculation that the defendant made defamatory statements in an entirely different forum (the email).

[1] Citations to exhibits refer to the exhibits in PubPeer's Excerpts of Record, submitted together with this brief.

[2] The other comments are the subject of Dr. Sarkar's interlocutory appeal in Case No. 326667, which has been consolidated with this case.

Dr. Sarkar obtained and submitted the email to the circuit court approximately two weeks after the court had issued its unmasking order, while PubPeer's application for leave to appeal that order was pending. Even if it were constitutional to unmask PubPeer's commenter on the basis of defamatory statements made in another forum (which it is not), the email contains not a single defamatory statement, and thus would not support unmasking. To the contrary, like many of the comments on PubPeer's site, the email merely highlights the similarities among the images used in Dr. Sarkar's papers and calls for further investigation. As explained below, subjective observations, expressions of concern, and calls for investigation cannot justify unmasking because such speech is not capable of defamatory meaning as a matter of law. Moreover, the email is plainly privileged under Michigan's "shared interest privilege" as a communication by a scientist with an interest in the reliability of a peer's research to the institution legally responsible for investigating any concerns with the research.

For multiple independent reasons, then, the circuit court erred in ordering the unmasking of PubPeer's anonymous commenter: none of the statements that were addressed in the unmasking order—either in the complaint or the unpleaded email—is capable of defamatory meaning; those statements, in any event, are legally privileged; and now, moreover, any defamation claim based on those statements is time barred. Accordingly, Dr. Sarkar has failed to state a claim, and he has thus fallen short of the showing that is constitutionally required of him under *Ghanam* and *Cooley* to justify unmasking.

Even if he had made such a showing, however, the core First Amendment rights implicated by the unmasking of PubPeer's anonymous commenter require additional precautions before unmasking in this case would be constitutionally permissible. This Court in *Ghanam* held that a defamation plaintiff seeking to unmask a defendant must establish, at a minimum, that his

or her pleadings would survive a motion for summary disposition under MCR 2.116(C)(8). But *Ghanam* involved pleadings that were deficient as a matter of law, and the *Ghanam* Court therefore had no occasion to consider what showing is required of a plaintiff whose pleadings would survive a motion under MCR 2.116(C)(8). If the Court agrees with PubPeer that Dr. Sarkar's pleadings are fatally flawed, this case is squarely governed by *Ghanam*, and the unmasking order must be reversed. If not, the Court faces the question of whether, in a case implicating core speech rights, a defamation plaintiff must substantiate his or her allegations with evidence before unmasking is warranted. For the reasons explained below, if it reaches this question, the Court should side with the vast majority of other jurisdictions and hold that the First Amendment requires defamation plaintiffs to substantiate their claims with evidence before stripping speakers of their constitutional right to remain anonymous.

Questions Presented for Review

May a defamation plaintiff compel the unmasking of an anonymous commenter on a website devoted to peer review of scientific publications:

1. Where the claim upon which the unmasking order was based is now time-barred?

    a. The circuit court did not address this question because the claim has only become time-barred since the circuit court's rulings.

    b. Appellant PubPeer says "no."

2. Where the comment posted by that individual was not capable of defamatory meaning?

    a. The circuit court did not explicitly answer this question but implicitly said "yes."

    b. Appellant PubPeer says "no."

3. 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?

    a. The circuit court did not explicitly answer this question but implicitly said "yes."

    b. Appellant PubPeer says "no."

4. Based on comments in an email allegedly sent by that same commenter, even though the email is un-pleaded, is not capable of defamatory meaning, and was never posted on the website owned by Appellant PubPeer?

    a. The circuit court said "yes."

    b. Appellant PubPeer says "no."

5. Where the circuit court did not require the plaintiff–appellee to produce any evidence in support of his claims and where the balance of interests under established defamation and First Amendment law favors maintaining the commenter's anonymity?

    a. The circuit court did not explicitly answer this question but implicitly said "yes."

    b. Appellant PubPeer says "no."

Statement of Facts and Proceedings Below

PubPeer.com is a forum for the peer-review of scientific publications. Ex 1 at 5 (Compl ¶ 23). Published scientists may register on PubPeer's site and make comments under their own names or pseudonyms, and anyone may submit anonymous comments without registration, although such comments are first screened by PubPeer's moderators. Ex 1 at 6 (Compl ¶ 25). Only comments discussing scientific papers and that otherwise comply with PubPeer's terms of use are permitted. Ex 1 at 7 (Compl ¶ 29).

The plaintiff in this lawsuit, 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 1 at 3 (Compl ¶ 11).

Around September 5, 2013, users on PubPeer's site began commenting anonymously on Dr. Sarkar's papers. The comments noted anomalies in a number of images used in Dr. Sarkar's work, which consisted mainly of similarities between images that purported to depict the results of different experiments. See, e.g., Ex 2A at 2–3 (Jollymore Aff ¶ 5) (anonymous commenter inviting users to "please compare" various images in Dr. Sarkar's work).

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 1 at 22 (Compl ¶ 80). On July 10, 2014, PubPeer's moderators removed or edited several of the comments, including a number that were pending review but had not been posted. Ex 2 at 4 (PubPeer Mot to Quash 4). Dr. Sarkar filed this suit on October 9, 2014 against the anonymous commenters, claiming defamation and related torts. Ex 1 at 24–27 (Compl ¶¶ 93–122). On October 13, 2014, Dr. Sarkar obtained a subpoena for any identifying information that PubPeer possesses about the anonymous commenters. See Ex 2A at 2, 18–19 (Jollymore Aff ¶ 2 & App'x A).

On December 10, 2014, PubPeer moved to quash the subpoena based on the First Amendment right of its commenters to remain anonymous and on its own First Amendment right to maintain a forum for anonymous scientific commentary. See Ex 2 at 2–4 (PubPeer Mot to Quash 2–4). PubPeer attached to its motion an affidavit from Dr. John Krueger, a prominent expert in the forensic analysis of scientific images. See Ex 2B (Krueger Aff). Dr. Krueger examined the comments at issue in this suit and emphatically agreed that the image similarities discovered by PubPeer's commenters were, indeed, anomalies and that they were concerning enough to warrant further investigation. Ex 2B at 3–4 (Krueger Aff ¶ 7). Dr. Sarkar's opposition to the motion to quash essentially conceded the accuracy of Dr. Krueger's conclusions—i.e., that

the images used in his papers contained the numerous anomalies that PubPeer's commenters had discovered. See Ex 3 at 1–3, 9 (Pl Resp to PubPeer Mot to Quash 1–3, 9).

The circuit court held a hearing on the motion to quash on March 5, 2015 and, as memorialized in an order dated March 9, 2015, granted the motion with respect to every comment cited in Dr. Sarkar's complaint save one. See Ex 6 (Circuit Court Order Granting in Part Mot to Quash Subpoena). The court ordered supplemental briefing and argument regarding that single comment, which was posted on June 18, 2014 and is reproduced in paragraph 40(c) of the complaint. See Ex 6 (Circuit Court Order Granting in Part Mot to Quash Subpoena ¶¶ 2–3). This comment was prompted by a previous post, which asked whether anyone had reported the perceived anomalies in Dr. Sarkar's work to his employer. An anonymous commenter responded with the sole comment at issue in this appeal:

> 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 1 at 10 (Compl ¶ 40(c)).

On March 19, 2015, the circuit court held a hearing regarding this comment and, as documented in a March 26, 2015 order, denied the motion to quash with respect to it. See Ex 8 (Mar 19 Hr'g Tr); Ex 9 (Circuit Court Order Denying in Part Mot to Quash Subpoena). The court ordered PubPeer to disclose any identifying information in its possession associated with the

comment, and 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. Ex 9 (Circuit Court Order Denying in Part Mot to Quash Subpoena).

On March 30 and 31, Dr. Sarkar and PubPeer filed respective cross-applications for leave to appeal the circuit court's orders granting in part and denying in part PubPeer's motion to quash. See Ex 10 (Pl App for Leave to Appeal (Case No 326667)); Ex 11 (PubPeer App for Leave to Appeal (Case No 326691)).

While briefing on the cross-applications was pending, Dr. Sarkar obtained and filed with the circuit court the "newly discovered" email to which the comment in paragraph 40(c) of the complaint apparently refers.[3] See Ex 1 at 10 (Compl ¶ 40(c)) ("Thank you for your email . . . ."); Ex 12 at 6–8 (Pl Suppl Br re Mot for Recons with Clare Francis Email 6–8). This email was sent to the "Secretary to the board of governors, Wayne State University," and reads in pertinent part:

> I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on PubPeer.
>
> . . . .
>
> Many of the entries mention things which amount to what many think of as **scientific misconduct**.

Ex 12 at 7–8 (Pl Suppl Br re Mot for Recons with Clare Francis Email 7–8) (emphasis in original).[4]

[3] The email was submitted on April 9, 2015 in connection with Dr. Sarkar's motion for reconsideration, which remains pending in the circuit court, where proceedings are stayed. See Order Granting Mot for Stay Pending Appeal. "Clare Francis," whose signature appears on the email, is a well-known pseudonymous whistleblower in the sciences. See Grens, What to Do About "Clare Francis," The Scientist (Sept 14, 2013), http://www.the-scientist.com/?articles.view/articleNo/37482/title/What-to-Do-About--Clare-Francis-/.

[4] The full text of the email reads:

> Dear Secretary to the board of governors, Wayne State university, Julie Miller,

On August 27, 2015, this Court granted the parties' respective applications for leave to appeal and consolidated the cases for appellate review.

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.* 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.

> 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:
>
> [URL illegible]
>
> 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.
>
> [URL illegible]
>
> The university president and dean of the medical school have been contacted on numerous occasions, but nothing seems to be happening.
>
> Your sincerely,
>
> Clare

Ex 12 at 7–8 (Pl Suppl Br re Mot for Recons with Clare Francis Email 7–8) (emphasis in original).

Argument

I. The First Amendment and this Court's precedents require defamation plaintiffs to make a preliminary showing of merit before they unmask anonymous speakers.[5]

A. The First Amendment protects anonymous Internet speakers from compelled identification.[6]

The First Amendment protects the right to speak anonymously. *McIntyre v Ohio Elections Comm'n*, 514 US 334, 341–43; 115 S Ct 1511; 131 L Ed 2d 426 (1995). The U.S. 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.

[5] PubPeer preserved this issue on pages 5–7 of its Motion to Quash, see Ex 2 at 5–7, and on pages 10–13 of its Supplemental Brief, see Ex 7 at 10–13.

[6] PubPeer preserved this issue on page 5 of its Motion to Quash.

B. This Court's precedents require that defamation plaintiffs demonstrate at least the legal sufficiency of their claims before they may unmask anonymous speakers.[7]

Because the First Amendment safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to unmask anonymous speakers through subpoenas must make a preliminary showing that their claims have merit. 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 considered it twice. See *id.*; *Cooley*, 300 Mich App at 256–63. In *Ghanam* and *Cooley*, the Court held that when a defamation plaintiff seeks to unmask an anonymous defendant, the First Amendment requires a court to first determine, at a minimum, 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's complaint does not meet these requirements, the court must quash a subpoena that would unmask an anonymous speaker.

When the anonymous defendant is participating in the litigation, as was the case in *Cooley*, that defendant may initiate review of the pleadings through a motion for summary disposition filed under MCR 2.116(C)(8). When the anonymous defendant is not participating—as in this appeal and in *Ghanam*—the Court must undertake review on its own initiative or upon a motion filed by the third-party recipient of the subpoena in question. As the Court emphasized in *Ghanam*, review of the sufficiency of the plaintiff's claims "is to be performed even if there is no pending motion for summary disposition before the court." 303 Mich App at 541.

[7] PubPeer preserved this issue on page 6 of its Motion to Quash, see Ex 2 at 6, and on pages 10–13 of its Supplemental Brief, see Ex 7 at 10–13.

Furthermore, 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.

C. The vast majority of jurisdictions also require defamation plaintiffs to substantiate their allegations with evidence.[8]

Four of the six judges who decided *Cooley* and *Ghanam* agreed with the vast majority of other jurisdictions that any defamation plaintiff who seeks to unmask an anonymous speaker must do more than merely state a claim for relief. See *Ghanam*, 303 Mich App at 540; *Cooley*, 300 Mich App at 272–92 (Beckering, J., concurring in part and dissenting in part); see also Paul Alan Levy, *Developments in* Dendrite, 14 Fla Coastal L Rev 1, 10–16 (2012) (describing relevant decisions of state appellate courts as "fairly unanimous"). In recognition of the important First Amendment interests implicated when defamation plaintiffs seek to unmask anonymous speakers, as well as the risk of bad faith on the part of plaintiffs,[9] virtually every other jurisdiction demands, at a minimum, that plaintiffs produce evidence establishing a prima facie case of defamation. Furthermore, whereas *Cooley* permits trial courts to weigh the strength of the plaintiff's claim against the strength of the First Amendment interests involved, many other jurisdictions mandate such balancing. See, e.g., *Dendrite Int'l, Inc v Doe No 3*, 342 NJ Super 134, 142; 775 A2d 756 (NJ App, 2005).

The Michigan Supreme Court has not yet addressed the standard that a defamation plaintiff must satisfy before unmasking an anonymous defendant. Although on two occasions

[8] PubPeer preserved this issue on pages 6–7 of its Motion to Quash, see Ex 2 at 6–7.

[9] As the Delaware Supreme Court noted: "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics." *Doe v Cahill*, 884 A2d 451, 457 (Del, 2005).

this Court has declined to require evidentiary substantiation, the Court has approached the issue conservatively, limiting its holdings to the facts at hand and recognizing the possibility that the rule will require refinement in future cases. See *Cooley*, 300 Mich App at 270–72 (emphasizing the fact-specific nature of the holding and noting that the "legal system in Michigan is capable of responding, either retroactively through litigation or prospectively through Supreme Court rulemaking," to cases presenting different circumstances). As explained below, see Part III, this case may present an opportunity for the Court finally to consider whether to join the majority of jurisdictions in requiring that defamation plaintiffs do more than file a well-pleaded complaint before piercing the anonymity guarded by the First Amendment.

II. Dr. Sarkar has not made the preliminary showing of merit required under this Court's precedents for unmasking PubPeer's anonymous commenter.[10]

For multiple overlapping reasons, Dr. Sarkar has failed to state a claim for defamation, and unmasking is therefore unwarranted under *Cooley* and *Ghanam*. First, the comment upon which the unmasking order was based was made more than a year ago, and any defamation claim based on it is now time-barred. Second, that statement is one of pure opinion, and therefore incapable of defamatory meaning. Third, the statement is privileged under Michigan law and, therefore, cannot supply the basis for a defamation claim. And finally, to the extent the unmasking order was based on statements in an email referenced in the complaint, those statements cannot supply the basis for a defamation claim for a similar array of overlapping reasons: they were made more than one year ago; they were never pleaded; they never appeared on PubPeer's site; they are incapable of defamatory meaning; and they are privileged.

[10] PubPeer preserved this issue on pages 7–20 of its Motion to Quash, see Ex 2 at 7–20, pages 4–10 of its Reply Brief, see Ex 4 at 4–10, and pages 2–6 of its Supplemental Brief, see Ex 7 at 2–6.

A. The claim on which the unmasking order was based is now time-barred.

The limitations period for a defamation action is one year.[11] MCL 600.5805(9). "A defamation claim accrues when 'the wrong upon which the claim is based was done,'" *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005) (quoting MCL 600.5827); see also *Hawkins v. Justin*, 109 Mich App 743, 746; 311 NW2d 465 (1981) ("[Accrual] in the case of libel is from the time of publication even though the person defamed has no knowledge thereof until sometime afterwards."), and runs until a "John Doe" defendant is identified and named in an amended complaint, see *Thomas v Process Equip Corp*, 154 Mich App 78, 84; 397 NW2d 224 (1986) ("[T]he filing of a 'John Doe' complaint does not toll or satisfy the period of limitation; for all practical purposes all defendants specifically unnamed are not yet parties to a suit."); *Fazzalare v Desa Indus, Inc*, 135 Mich App 1, 6; 351 NW2d 886 (1984) (same).

The circuit court ordered the commenter responsible for the statement in paragraph 40(c) of the complaint unmasked. As of June 18, 2015, however, neither that comment (dated June 18, 2014) nor the email to which it refers (dated November 10, 2013) can supply the basis for a timely defamation claim. Ex 1 at 10 (Compl ¶ 40(c)); Ex 12 at 6–8 (Pl Suppl Br re Mot for Recons with Clare Francis Email 6–8). Dr. Sarkar has therefore failed to state a claim; under *Cooley* and *Ghanam*, the unmasking order must be reversed.

[11] The limitations periods for the other torts that Dr. Sarkar alleges, see Ex 1 at 24–27 (Compl ¶¶ 99–122) (intentional interference with business expectancy and business relationship, false light, intentional infliction of emotional distress), are in some cases longer than one year, see, e.g., *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385–86; 689 NW2d 145 (2004) (three years for false light). As explained below, however, Dr. Sarkar has pleaded these ancillary torts as a means of circumventing various fatal flaws in his defamation claim. The injury of which he complains is to his reputation. Under such circumstances, the applicable limitations period is the one-year period applicable to defamation claims. See *Meyer v Hubbell*, 117 Mich App 699, 704–05; 324 NW2d 139 (1982).

B. In any event, Dr. Sarkar has failed to plead actionable defamation.[12]

Even setting aside the time bar, this Court should reverse the circuit court because that court erred in denying PubPeer's motion to quash with respect to the sole commenter in question. Under *Cooley* and *Ghanam*, Dr. Sarkar may not unmask PubPeer's commenter unless the defamation claim would survive a motion for summary disposition under MCR 2.116(C)(8). It would not. The commenter's statements on PubPeer are not capable of defamatory meaning and are, in any event, privileged. For various independent reasons, moreover, the email to which the commenter's post refers is a similarly invalid basis for a defamation claim: it was never pleaded; it never appeared on PubPeer; it is not capable of defamatory meaning; and it is privileged.

1. The comment in paragraph 40(c) of the Complaint is not capable of defamatory meaning.[13]

The sole comment on PubPeer's site at issue here is not capable of defamatory meaning and, therefore, cannot justify unmasking. As explained below, the comment simply does not communicate any provably false and defamatory facts. At most, it implies that the anomalies in some of Dr. Sarkar's research papers warrant further investigation. That statement is pure opinion, incapable of defamatory meaning.

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 Enter*, 487 Mich 102, 113; 793 NW2d 533 (2010). To prevail on a claim of defamation, a plaintiff must establish four elements:

[12] PubPeer preserved this issue on pages 7–20 of its Motion to Quash, see Ex 2 at 7–20, pages 4–10 of its Reply Brief, see Ex 4 at 4–10, and pages 2–6 of its Supplemental Brief, see Ex 7 at 2–6.

[13] PubPeer preserved this issue on pages 12–20 of its Motion to Quash, see Ex 2 at 12–20, pages 4–8 of its Reply Brief, see Ex 4 at 4–8, and pages 4–5 of its Supplemental Brief, see Ex 7 at 4–5.

(1) "a false and defamatory statement concerning the plaintiff," (2) unprivileged publication, (3) fault, and (4) harm. *Id.*

"[S]everal 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." *Cooley*, 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 v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), "[e]xaggerated language," *Hodgins v Times Herald Co*, 169 Mich App 245, 254; 425 NW2d 522 (1988), or "pure opinion." *Ghanam*, 303 Mich App at 547. 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 context of a statement, including the medium in which it appears, are also critical in determining whether it is defamatory. See *id.* at 129 ("[A]llegedly defamatory statements must be analyzed in their proper context. To hold otherwise could potentially elevate form over substance."). As this Court has recognized, "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; see also *Cahill*, 884 A2d at 465 ("[I]n this context, readers are unlikely to view messages posted

anonymously as assertions of fact."). Given that PubPeer hosts discussion of published articles, the context of the statements at issue here also triggers heightened First Amendment concerns: as the D.C. Circuit has 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 NY 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.*; see also *Snyder v. Phelps*, 562 US 443, 452; 131 S Ct 1207; 179 L Ed 2d 172 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.").[14]

The sole comment at issue in this appeal is reproduced below (preceded by the question that prompted it):

[14] 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 (quotation marks omitted). Dr. Sarkar is a limited-purpose public figure for purposes of the First Amendment, and the PubPeer commenters' discussion of Dr. Sarkar's scientific research is speech on a matter of exceptional public concern. Dr. Sarkar is, by his own description, a renowned cancer researcher. See Ex 1 at 2–3 (Compl ¶¶ 6–12). His research is supported by a number of federal grants. Ex 1 at 3 (Compl ¶ 12). He has published over 500 articles, including many in prominent scientific journals. Ex 1 at 3 (Compl ¶ 11). And his research has led to a number of clinical trials. Ex 1 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. Ex 1 at 3 (Compl ¶ 12). He has, accordingly, established himself as a leader in his field and subjected his research to substantial public scrutiny. Settled First Amendment jurisprudence therefore prohibits him "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 (1964); cf., e.g., *Reuber v Food Chem News, Inc*, 925 F2d 703, 709 (CA 4, 1991) (finding researcher who described himself as eminent in his field to be public figure for purposes of controversy about his research results); *Chandok v Klessig*, 648 F Supp 2d 449, 459 (NDNY, 2009) (similar for author "well known within the plant biology community"); *Hoffman v Wash Post Co*, 433 F Supp 600, 604 (DDC, 1977) (similar for plaintiff who had achieved "prominence in the field of protein supplements"), aff'd, 188 US App DC 200; 578 F2d 442 (1978).

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 1 at 10 (Compl ¶ 40(c)).

Read in context, the word, "this," in the question, "Has anybody reported *this* to the institute?" refers to comments posted earlier in the thread about anomalies in many of Dr. Sarkar's papers, such as the following:

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.

Ex 2A at 2–3 (Jollymore Aff ¶ 5) (emphasis added).[15]

Following this and other similar posts, one PubPeer commenter asked, "Has anybody reported *this* to the institute?" The commenter that the circuit court ordered unmasked responded: "Yes, in September and October 2013 the president of Wayne State University was

[15] PubPeer provided the full comment thread in an affidavit submitted with its motion to quash. See Ex 2A (Jollymore Aff). 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 (requiring a "false and defamatory statement *concerning the plaintiff*" (emphasis added)).

informed several times." This comment, at most, implies the commenter's agreement that there were, indeed, similarities among Dr. Sarkar's images, and that further investigation was warranted. For multiple reasons, this does not constitute defamation.

First, the observation that images in a research paper appear similar is an inherently subjective opinion, not a statement of fact, and therefore not capable of defamatory meaning. Statements of opinion are quintessentially subjective, and therefore non-defamatory, unless they "impl[y] that there are undisclosed facts on which the opinion is based." *Orr v Argus-Press Co*, 586 F2d 1108, 1115 (CA 6, 1978) (quoting Restatement of Torts, 2d, § 566). The comment in paragraph 40(c) expresses an implied opinion based entirely on the public comments of other PubPeer users and the published work of Dr. Sarkar. The commenter in question nowhere suggests that he or she was privy to Dr. Sarkar's experiments themselves, participated in writing Dr. Sarkar's papers, or had any other involvement that would allow him or her to "imply that [his or] her statement was based upon facts not known to the general public." *Harris v Bornhorst*, 513 F3d 503, 523 (CA 6, 2008). The inference of image similarity is based entirely on images in Dr. Sarkar's published work. It is therefore incapable of defamatory meaning. Cf., e.g., *Fisher v Detroit Free Press, Inc*, 158 Mich App 409, 415; 404 NW2d 765 (1987) ("[C]haracterizations of a legal theory are constitutionally protected opinions when based upon disclosed facts of the case.").

Second, an allegation of visual similarity is not one that "tends to so 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. It is, to the contrary, 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. The comment in paragraph 40(c) and the comments that lead up to it are prime examples of this deliberative process in action, and courts are not the venue to mediate its terms. See *ONY, Inc v Cornerstone Therapeutics, Inc*, 720 F3d 490, 492 (CA 2, 2013) ("[S]tatements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation.").

Dr. Sarkar has, to his credit, retreated from the claim in his complaint that allegations of similarity are defamatory. See Ex 3 at 1 (Pl Resp to PubPeer Mot to Quash 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."). Instead, he now claims that he has been accused of research misconduct. See *id.* ("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.'"). There is, however, no such accusation in paragraph 40(c) or in any other PubPeer comment cited in the complaint. Nor can one be inferred from any suggestion in paragraph 40(c) that investigation is warranted. 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"); *Jones 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*, 929 NYS2d 671, 677 (Sup Ct, 2011) (finding a "call for an investigation" in Internet comments to be non-defamatory).

For multiple independent reasons, then, the comment in paragraph 40(c) is not actionable defamation. At most, it expressed concern over possible 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 recommending investigation into their peers' work, scientific and academic debate would grind to a halt.

2. The comment in paragraph 40(c) of the Complaint is privileged.[16]

Even putting these fatal flaws in Dr. Sarkar's claim aside, his reliance on the comment in paragraph 40(c) is misplaced for the independent reason that the comment is privileged under Michigan law as a fair and true report of a government record. The comment therefore may not form the basis of a defamation action. See MCL 600.2911(3) ("Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, [or] a public and official proceeding . . . ."). The comment recounts an apparently accurate official statement sent by Wayne State in response to an inquiry. Publishing that statement is privileged as 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) (finding newspaper immune from liability for reporting contents of allegedly libelous letter read by school board official at official meeting).

[16] PubPeer preserved this issue on page 18 of its Motion to Quash, see Ex 2 at 18, page 5 of its Supplemental Brief, see Ex 7 at 5.

3. The email referred to in the comment is not pleaded.[17]

The circuit court ordered the unmasking of PubPeer's commenter also based on speculation that the commenter may have sent an email to Wayne State making defamatory allegations against Dr. Sarkar. This email, although referenced in the complaint, was never pleaded—indeed, not even Dr. Sarkar had seen the email until March 31, 2015, long after he filed suit. See Ex 12 at 2 (Pl Suppl Br re Mot for Recons with Clare Francis Email 2). Because in Michigan a "plaintiff's complaint [must] set forth . . . the defamatory words complained of," *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 589; 349 NW2d 529 (1984), and any written document upon which a claim is based must be attached to the complaint, see MCR 2.113(F)(1), the email cannot supply the basis for any defamation claim in the current complaint, cf. *Ghanam*, 303 Mich App at 543 ("[P]laintiff's complaint is patently deficient by virtue of his failure to cite the actual complained-of statements in the complaint.").

4. The email referred to in the comment is not defamatory.[18]

Even if pleaded, however, the email would not be defamatory.[19] The email contains no freestanding factual allegations about Dr. Sarkar. It merely refers university officials to a link containing comments already posted on PubPeer. Dr. Sarkar has nevertheless argued that the following two sentences in the email are capable of defamatory meaning:

1. "I am writing to you about **multiple scientific concerns** about the published work of **Fazlul H Sarkar** which have been aired on PubPeer."

[17] PubPeer preserved this issue on pages 8–12 of its Motion to Quash, see Ex 2 at 8–12.

[18] PubPeer could not present this argument or the following one to the circuit court because the email was not disclosed until after PubPeer filed its application for leave to appeal.

[19] Thus, not only is unmasking unwarranted, but permitting Dr. Sarkar to amend the complaint to include the email would be futile. See MCR 2.116(I)(5) (amendment unwarranted if it "would not be justified"); see also *Ghanam*, 303 Mich App at 543 (addressing whether leave to amend should be granted after deciding, in the context of a motion for a protective order, that the complaint was deficient).

2. "Many of the entries mention things which amount to what many think of as **scientific misconduct**."

Ex 12 at 7–8 (Pl Suppl Br re Mot for Recons with Clare Francis Email 7–8) (emphasis in original).

The first sentence is nothing more than an expression of concern, incapable of defamatory meaning. Expressions of concern state subjective opinions and are therefore quintessentially non-defamatory. See *Ornatek v Nev State Bank*, 93 Nev 17, 20; 558 P2d 1145 (Nev, 1977) ("[The defendant] said nothing to officers of the First National Bank which carried a defamatory meaning. His concern about [the plaintiff's] debt to the Nevada State Bank is simply an expression of concern."); *Slightam v Kidd*, 120 Wis 2d 680, at *6; 357 NW2d 564 (Ct App, Sept 5, 1984) (mem) ("[T]he statements about home deliveries were nondefamatory as a matter of law and represent an expression of concern, opinion or fair comment.").

More broadly, imposing defamation liability on scientific expressions of concern would be devastating for scientific inquiry. Scientific progress relies on scientists documenting their concerns about the work of their peers. For this very reason, courts have been loath to encumber scientific debate with judicial scrutiny. *See ONY*, 720 F3d at 496 (refusing to intercede in a scientific debate by imposing defamation liability for expressions of scientific criticism). This Court should treat the email's scientific observations with the same restraint.

The second sentence is similarly incapable of defamatory meaning. It expresses an opinion about what people may think about previously aired concerns regarding Dr. Sarkar's work. But, as explained above, "a statement of opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Fisher*, 158 Mich App at 413. Here, the email refers not to any undisclosed facts, but rather to other individuals' observations of similarities in Dr. Sarkar's images—observations which had already been posted

on PubPeer, and which are themselves incapable of defamatory meaning. As a matter of law, it is not defamatory to state an opinion drawn from previously aired scientific observations and expressions of concern. Again, that is the essence of scientific discourse.

At most, the email suggests that its author believes further investigation is warranted. This Court has repeatedly held, however, that calls for investigation are not defamatory. *See Ghanam*, 303 Mich App at 548; *Jones*, 122 Mich App at 305. Because the email is incapable of defamatory meaning, it cannot supply the basis for unmasking the identity of its author.

5. The email referred to in the comment is privileged.

The email to Wayne State cannot be grounds for a defamation action for the separate reason that it is subject to a qualified privilege under Michigan law:

> A qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty and embraces a duty not a legal one but of a moral or social character of imperfect obligation.

Timmis v Bennett, 352 Mich 355, 368; 89 NW2d 748 (1958). Once this privilege attaches to a statement, it may be overcome "only by showing that the statement was made with actual malice or with knowledge of its falsity or reckless disregard of the truth." *Meisner & Assocs, PC v Stamper & Co*, No 280190, 2009 WL 211900, at *3 (Mich Ct App, Jan 29, 2009) (mem).

The email at issue in this case is privileged because its author and its recipient have a shared interest in Dr. Sarkar's research. The author of the email appears to be "Clare Francis," a well-known and pseudonymous whistleblower in the sciences.[20] Clare Francis's interest in Dr.

[20] See Grens, What to Do About "Clare Francis," The Scientist (Sept 14, 2013), http://www.the-scientist.com/?articles.view/articleNo/37482/title/What-to-Do-About--Clare-Francis-/.

Sarkar's publications, which are a matter of public concern,[21] stems from being a fellow scientist invested in the rigorous review of scientific theories. Because Wayne State "serves an important societal purpose" in producing viable medical research, "it is right in the interests of society that [Clare Francis] should tell third persons certain facts, which he [or she] in good faith proceeds to do." See *Nuyen v Slater*, 372 Mich 654, 660; 127 NW2d 369 (1964) (holding that, "[a]s a private citizen interested in the proper administration of the local county health department," defendant was qualifiedly privileged to submit complaint to the health department about private conduct of a nurse); *Schuitmaker v Krieger*, No 233944, 2003 WL 1950238, at *6 (Mich Ct App, Apr 24, 2003) (mem) ("[Counseling ethics board] had a moral and social obligation to hear complaints about a member counselor that could impact the lives of others, and defendant had a similar corresponding obligation in revealing possible improper conduct to [ethics board] in order to protect others from the same conduct."). Wayne State, for its part, has a federally mandated duty to investigate any reported scientific concerns with its researchers' work product. See 42 CFR 93.300(b). Due to Clare Francis's concerns, and Wayne State's duty to investigate them, the email is subject to the qualified privilege. Cf. *Chandok v Klessig*, 632 F3d 803 (CA 2, 2011) (applying qualified privilege to statements made by director of a medical laboratory about postdoctoral fellow's alleged scientific research misconduct).

Dr. Sarkar cannot overcome this privilege because he has not pleaded any facts that indicate Clare Francis acted recklessly. Nor could he. "Reckless disregard for the truth" requires more than "merely [a] showing that the statements were made with preconceived objectives or insufficient investigation." *Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 741 (1984). Clare Francis has simply reported the existence of various comments and suggested that further

[21] *See supra*, note 14.

investigation is warranted.[22] The email is therefore protected speech that cannot be the basis for civil liability.

6. Even if it had been pleaded and were defamatory, the email would not justify subpoenaing PubPeer because the email never appeared on PubPeer's site.[23]

Although the email was referenced in a statement on PubPeer's site, see Ex 1 at 10 (Compl ¶ 40(c)) ("Thank you for your e-mail . . . ."), it never actually appeared there. Accordingly, the circuit court's order directs the unmasking of an anonymous defendant in one forum (PubPeer's site) based on speculation that he or she made defamatory statements in an entirely different forum (the email). That distinguishes this case from *Cooley*, *Ghanam*, and every other unmasking case—all of which involved an effort to unmask an anonymous defendant in a particular forum based on his or her speech *in that forum*.

The unmasking of lawful speech made in one forum based on allegedly unlawful speech made elsewhere would be unprecedented, and plainly unconstitutional. The First Amendment does not permit Dr. Sarkar to unmask an anonymous comment on PubPeer's site unless *that comment* was defamatory because, absent that showing, the commenter has not 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

[22] As explained below, unrebutted evidence strongly supports Claire Francis's call for further inquiry. See Part III.

[23] PubPeer preserved this issue on pages 8–12 of its Motion to Quash, see Ex 2 at 8–12, and on pages 2–3 and 5–6 of its Supplemental Brief, see Ex 7 at 2–3, 5–6.

compelling interest and is narrowly tailored to achieve that interest.'"). 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 outside the bounds of First Amendment protection. See *United States v Stevens*, 559 US 460, 468; 130 S Ct 1577; 176 L Ed 2d 435 (2010). The comment on PubPeer was lawful and, thus, has not lost its First Amendment protection, even if speech in another forum (i.e., the email) was unlawful. Accordingly, 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 no precedent to support the contrary view.

It is no answer to speculate, as the circuit court did, that PubPeer's commenter and the individual who sent the email to Wayne State are the same person. 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. "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). This is precisely what Dr. Sarkar asks the Court to do here.[24]

[24] Dr. Sarkar has pleaded various torts in addition to defamation, including intentional interference with a business expectancy and a business relationship, false light invasion of privacy, and intentional infliction of emotional distress. See Ex 1 at 24–27 (Compl ¶¶ 99–122). The fundamental injury of which he complains, however, is harm to his reputation. The additional claims are thus veiled attempts to circumvent the fatal flaws in his defamation claim

III. If the Court finds Dr. Sarkar's pleadings to be legally sufficient, it should require Dr. Sarkar to substantiate them with evidence before ordering the unmasking of PubPeer's commenter.[25]

If the Court finds Dr. Sarkar's pleadings to be legally sufficient, it should require Dr. Sarkar to substantiate his allegations with evidence before unmasking PubPeer's anonymous commenter. 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.[26] Furthermore, without examining the evidentiary support for a defamation claim, it is impossible to adequately balance the strength of the plaintiff's interests against the defendant's First Amendment right to remain anonymous. Because that right is irretrievably lost at the moment of unmasking, the lack of an adequate mechanism to balance interests thwarts the constitutionally required interest-balancing at the heart of defamation law, see, e.g., *Rouch v. Enquirer & News of Battle Creek Mich*, 440 Mich 238, 242–43; 487 NW2d 205 (1992) ("In [defamation] case[s] we are called upon to examine the balance between protecting an individual's reputation from false and defamatory statements and fostering . . . cherished

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by changing the label of the tort. Accordingly, they similarly would not survive a motion under MCR 2.116(C)(8), and therefore cannot, under *Cooley* and *Ghanam*, justify unmasking. See *Ireland v Edwards*, 230 Mich App 607, 624–25; 584 NW2d 632 (1998) (plaintiff cannot avoid flaws in defamation claim by recasting defamation claim as different tort); see also *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988) (finding the constitutional requirements applicable to defamation apply also to ancillary tort claims such as the ones pleaded here); *Nichols v Moore*, 396 F Supp 2d 783, 798–99 (ED Mich, 2005) (same), aff'd, 477 F3d 396 (CA 6, 2007).

[25] PubPeer preserved this issue on pages 24–25 of its Motion to Quash, see Ex 2 at 24–25, and page 15 of its Supplemental Brief, see Ex 7 at 15.

[26] This risk is particularly acute in the unmasking context, where bad faith is endemic. See *Cahill*, 884 A2d at 457 ("[T]he sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money. The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." (quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke LJ 855, 896 (2000)) (quotation marks omitted)).

constitutional rights guaranteeing freedom of speech and the press."), and thereby creates an intolerable risk that speech rights will be curtailed. It is for these very reasons that the vast majority of jurisdictions to have considered this question require defamation plaintiffs to satisfy a higher standard. See, e.g., *Cahill*, 884 A2d at 461 ("[W]e must adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation.").

To be sure, *Cooley* and *Ghanam* both declined to require the plaintiffs before them to substantiate their claims with evidence. If the Court finds Dr. Sarkar's pleadings sufficient, however, those decisions would not control the outcome here. The *Cooley* panel, for its part, determined that unmasking could be justified on the sufficiency of the pleadings alone in a case in which the anonymous defendant's identity *was already known to the plaintiff*—thus, the question was not whether to reveal the defendant's identity, but whether to *further* reveal it. See 300 Mich App at 252–53, 270–71 (recognizing the question was not disclosure to the plaintiff, but public disclosure). The First Amendment interest at stake was therefore an interest in *incremental* protection of anonymity. And this distinction was significant: the panel expressly recognized that different facts might require a different approach—for example, when a plaintiff has no "real expectation of damages, . . . and is suing simply to learn [the defendant's] identity." *Id.* at 270. That, however, was "not the case before [the panel]" in *Cooley*, and the panel accordingly "decline[d], under the well-recognized concept of judicial restraint, to [address it]." *Id.*

The *Ghanam* panel faced circumstances similar to this case, but it had no occasion to determine whether the higher standard for unmasking was warranted. Unlike in *Cooley*, the defendants in *Ghanam* remained completely anonymous. See 303 Mich App at 524–27. Given

this (and other) distinctions from *Cooley*, the *Ghanam* panel recognized the circumstances before it as distinguishable from those in *Cooley*. See *id.* at 529 ("[T]he instant case is distinguishable from *Cooley*, and while its analysis is applicable here, *Cooley*'s holding is not controlling of the outcome in this case."). Although the panel "agree[d] with the dissent in *Cooley* that it would have been preferable to also adopt the . . . standard requiring a plaintiff to . . . produce evidence sufficient to survive a motion under MCR 2.116(C)(10)," the panel nevertheless "decline[d] . . . to adopt a second standard of law in this complex and emerging area of jurisprudence in an effort to avoid creating unnecessary confusion and inconsistency." *Id.* at 540 & n.10. It then analyzed the pleadings under MCR 2.116(C)(8), found them deficient as a matter of law, and reversed the trial court's decision to permit discovery of the defendants' identities. *Id.* at 543–49.

In light of the legally deficient complaint in *Ghanam*, the *Ghanam* panel had no occasion to weigh evidence or to balance the plaintiff's interest in prosecuting his case against the defendant's constitutional right to remain anonymous. Thus, if the Court agrees with PubPeer's analysis of the many deficiencies in Dr. Sarkar's complaint, this case is on all fours with *Ghanam*, and the order denying in part PubPeer's motion to quash must be reversed. On the other hand, if the Court finds the complaint in this case legally sufficient, it must confront a question that was not before the *Ghanam* panel—namely, when a plaintiff does not yet know a defendant's identity and is able to state a claim for relief, is anything more required before unmasking is warranted? The answer to that question should be an emphatic *yes*.[27]

[27] By similar token, although the *Cooley* panel stated that a "trial court *may* consider the weight of the defendant's First Amendment rights against the plaintiff's discovery request when determining whether to issue a protective order," 300 Mich App at 266 (emphasis added), it had no occasion to determine whether explicit interest-balancing was warranted in the case before it (or in any future case), because it remanded for the trial court to address the antecedent question of whether the pleadings were legally sufficient, *id.* at 269. Thus, nothing prevents this Court from finding that explicit interest-balancing is not just permissive, but *required*, in this case.

This case demonstrates precisely why Dr. Sarkar should be required to substantiate his claims before unmasking is warranted. In his bare-bones pleadings, Dr. Sarkar complains about expressions of concern and calls for further inquiry in the context of a scientific debate. Not only are these subjective opinions not defamatory—they are also shared by PubPeer's expert, Dr. John Krueger, who forensically examined the images in Dr. Sarkar's papers that were discussed by PubPeer's commenters. Dr. Krueger performed forensic analysis for twenty years for the federal government's Office of Research Integrity and pioneered the forensic tools used to compare scientific images. Ex 2B at 1, 4–5 (Krueger Aff ¶¶ 1, 9–11). He emphatically agreed that many of Dr. Sarkar's images appear similar and that inquiry into possible misconduct is warranted. See Ex 2B at 3–4, 22–35 (Krueger Aff ¶¶ 7, 53–86); see also Ex 2B at 35 (Krueger Aff ¶ 86) ("Had I been presented with these images while still at [the federal government's Office of Research Integrity], I would have recommended that ORI refer the images to the host institution where the research was conducted for [a research misconduct] 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.").

To the extent any of the anonymous defendants' statements in this case are provably false (and they are not), the only evidence that could prove them false is the original data from Dr. Sarkar's experiments, which Dr. Sarkar conspicuously has not offered in support of his case. To permit unmasking without some inquiry into this (lack of) evidence would run afoul of the paramount constitutional principle in defamation cases: that the relevant interests be balanced in order to protect lawful speech. The integrity of the process of scientific debate depends on the panel's recognizing and vindicating this principle by either finding Dr. Sarkar's pleadings

deficient or remanding for the circuit court to determine whether Dr. Sarkar can make out a prima facie case, and whether the balance of interests in this case favor unmasking.[28]

Conclusion

For these reasons, the Court should reverse the circuit court's March 26, 2015 order denying in part PubPeer's motion to quash and remand the case with instructions to dismiss the claims in Dr. Sarkar's complaint to the extent they are based on paragraph 40(c) of the complaint or the email referenced therein.[29] Alternatively, the Court should vacate the unmasking order and remand with instructions to evaluate whether Dr. Sarkar can prove a prima facie claim for relief and to balance Dr. Sarkar's interest in prosecuting his claims against the defendant's constitutional right to remain anonymous.

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Respectfully submitted,

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[28] Nothing about the position PubPeer urges the Court to adopt in any part of this brief would require the Court to depart from its prior published decisions in *Cooley* and *Ghanam*. Since the beginning of this litigation, however, it has been PubPeer's position that *Cooley* and *Ghanam* were wrongly decided because they failed to require defamation plaintiffs to substantiate their claims with evidence before unmasking anonymous speakers. See Ex 2 at 24–25 (PubPeer Mot to Quash 24–25). Accordingly, should the panel decide to "follow[] [those] decision[s] only because it is required to do so," PubPeer urges the panel to "indicat[e] its disagreement with" them in its decision, as required in order to trigger reexamination of those precedents by a Special Panel of this Court. MCR 7.215(2) & (3).

[29] For reasons to be explained in PubPeer's response to Dr. Sarkar's opening brief in Case No. 326667, the remainder of the claims in the complaint are similarly without merit and should also be dismissed.

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