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.)

APPELLEE PUBPEER'S BRIEF IN CASE NO. 326667

ORAL ARGUMENT REQUESTED

December 28, 2015

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Dr. Sarkar appeals from the March 9, 2015 order of the Wayne County Circuit Court (Gibson, J.) granting in part PubPeer, LLC's motion to quash Dr. Sarkar's subpoena. This Court granted Dr. Sarkar's application for leave to file this interlocutory appeal on August 27, 2015. PubPeer does not object to Dr. Sarkar's statement of this Court's jurisdiction.

Introduction

This case is about whether scientists may lawfully and anonymously discuss the research of their peers. It 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 discussed 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 has sued those anonymous commenters, as John and/or Jane Doe defendants, for defamation and sought their identifying information from PubPeer. PubPeer challenged the subpoena as an unconstitutional infringement of the First Amendment right of its users to remain anonymous and of its own First Amendment right to maintain a forum for candid scientific discussion, arguing that Dr. Sarkar could not make the preliminary showing of merit to his claims necessary to overcome those constitutional rights.

The circuit court—applying this Court's precedent 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)—agreed almost entirely with PubPeer. On March 9, 2015 it granted

PubPeer's motion to quash the subpoena with respect to all but a single comment on PubPeer's site. Dr. Sarkar now appeals this order.[1]

The circuit court made two critical—and correct—holdings in granting in part PubPeer's motion to quash. First, the court correctly recognized that this Court's decisions in *Cooley* and *Ghanam* require defamation plaintiffs to make a preliminary showing of merit to their claims before unmasking anonymous speakers. This Court imposed that requirement because the First Amendment protects the right to anonymity and because that constitutional protection may not be overcome by the mere filing of a lawsuit. At a minimum, the Court held, the complaint must state a legally sufficient claim of defamation; in other words, the complaint must plead defamation with specificity by reproducing the actual words of the alleged libel complained of, and those words must be capable of defamatory meaning as a matter of law. Although framed in multiple ways throughout his brief, Dr. Sarkar's core argument on appeal is that the circuit court's application of this Court's precedent to preliminarily assess the merits of his claims before unmasking the defendants was premature. Dr. Sarkar's argument, addressed fully below, reflects a basic misunderstanding of this Court's decisions in *Cooley* and *Ghanam*, and of the First Amendment right to anonymity that those decisions safeguard.

Second, the circuit court properly held that Dr. Sarkar has not pleaded a legally sufficient claim of defamation with respect to any of the comments at issue here. Dr. Sarkar does not address this holding in his opening brief. It is, however, the central issue in this case: whether the statements Dr. Sarkar has pleaded are capable of defamatory meaning as a matter of law. They are not.

[1] In a subsequent order, the circuit court directed PubPeer to disclose to Dr. Sarkar, subject to a protective order, the identifying information associated with a single comment. That order is the subject of PubPeer's interlocutory appeal in Case No. 326691, which has been consolidated with this case.

Dr. Sarkar's primary allegation against the anonymous commenters is that they accused him of "research misconduct." But there is no such accusation anywhere in the complaint, on PubPeer's site, or in the documents Dr. Sarkar references in the complaint. This is a critical point because, rather than discuss the actual comments he claims have harmed him, Dr. Sarkar has, throughout this litigation, relied on an allegedly libelous phrase, "research misconduct," that the anonymous defendants never even used.

What PubPeer's commenters actually did say cannot, as a matter of law, supply the basis for a valid defamation claim for three overlapping reasons.

First, all of the comments upon which Dr. Sarkar relies were made more than one year ago. Therefore, any claim based on them is time-barred.

Second, none of these comments was pleaded with specificity. The actual language alleged to be defamatory in many comments does not even appear in the complaint, but is only described in the abstract. Some of the comments, including a flyer allegedly posted at Wayne State University and a "series of emails" sent to the University of Mississippi, appear neither in the complaint nor on PubPeer's site, and some of them appear in the complaint but are quoted only in unintelligible fragments surrounded by Dr. Sarkar's own exaggerated characterizations. For the handful of comments actually reproduced in the complaint, Dr. Sarkar does not identify which portions he believes to be materially false and defamatory. All of these flaws are fatal to Dr. Sarkar's defamation claim under settled Michigan law, which requires that defamation plaintiffs plead "the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262.

Third, none of the comments is capable of defamatory meaning. The vast majority of them identify anomalies in images used in Dr. Sarkar's research papers—primarily *similarities*

between images that purport to depict the results of *different* experiments. This is scientific discourse, not defamation: such comments express the subjective opinions of scientists on a peer's work, and are based entirely on the fully disclosed facts in that peer's published papers.[2] The remaining comments either (i) suggest that the apparent anomalies in Dr. Sarkar's papers warrant further investigation, which, as a matter of law, is not defamatory, or (ii) engage in hyperbolic and sarcastic Internet banter of the sort that this Court has held is not defamatory as a matter of law. None of the comments, in short, contains a provably false assertion of fact, and none can therefore form the basis of a valid defamation claim.

In light of these defects in Dr. Sarkar's claims, the circuit court correctly quashed his subpoena. In doing so, the circuit court took an important step—compelled by this Court's precedents and caselaw from around the country—in safeguarding the scientific process. A contrary result would have threatened this process by interfering with scientists' ability to discuss and debate their peers' work candidly and critically. Courts have long recognized that courtrooms are not the proper venue to resolve such scientific disputes. See, e.g., *ONY, Inc v Cornerstone Therapeutics, Inc*, 720 F3d 490, 497 (CA 2, 2013) ("Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury."). Dr. Sarkar's subpoena endangered this essential component of the scientific mission.

[2] Indeed, these comments were well-founded. Dr. Sarkar conceded in the circuit court that there are numerous similarities and other anomalies in the images used in his research papers. And, along with its motion to quash, PubPeer submitted an affidavit from Dr. John Krueger, a prominent expert in the forensic analysis of scientific images, who examined the comments at issue in this suit and emphatically agreed that the anomalies discovered by PubPeer's commenters were concerning enough to warrant further investigation. Given that it found Dr. Sarkar's pleadings deficient, the circuit court had no occasion to rely on this affidavit, and it did not do so. As explained in Part III, however, had the court found the pleadings to be adequate on their face, it would have been required to consider the Krueger affidavit before ruling on the motion to quash.

For these reasons, and those explained below, the circuit court properly granted PubPeer's motion to quash with respect to the comments at issue in this appeal, and this Court should therefore affirm the circuit court's March 9, 2015 order.

Counter-Statement of Questions Presented

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

1. Without demonstrating the legal sufficiency of his complaint?
    a. The circuit court said "no."
    b. Plaintiff–Appellant Dr. Sarkar says "yes."
    c. Appellee PubPeer says "no."
2. Where his claims are legally inadequate because (i) the actual text of the anonymous commenters' speech has not been pleaded with specificity, and (ii) the speech is not, in any event, defamatory as a matter of law?
    a. The circuit court said "no."
    b. Plaintiff–Appellant Dr. Sarkar says "yes."
    c. Appellee PubPeer says "no."
3. Where his claims are time-barred?
    a. The claims became time-barred after the circuit court issued its order, and so it did not address this question.
    b. Plaintiff–Appellant Dr. Sarkar has not addressed this question, although he would presumably say that the claims are not time-barred.
    c. Appellant PubPeer says "no."
4. Based on tort claims other than defamation that are also based upon the commenters' protected speech?
    a. The circuit court said "no."
    b. Plaintiff–Appellant Dr. Sarkar says "yes."

c. Appellee PubPeer says "no."

5. Where, even if the claims were legally sufficient, the plaintiff has produced no evidence to support them, and in unrebutted testimony a prominent expert has agreed with the concerns raised by the defendants in their anonymous comments?

   a. The circuit court did not answer this question.

   b. Plaintiff–Appellant Dr. Sarkar says "yes."

   c. Appellee PubPeer says "no."

Counter-Statement of Facts

PubPeer.com is a forum for the peer-review of scientific publications. Ex 1 at 5 (Compl ¶ 23).[3] 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. *Id.* at 6 (Compl ¶ 25). Only comments discussing scientific papers are permitted, and commenters are advised to comply with PubPeer's terms of use. *Id.* 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. *Id.* 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

[3] Unless otherwise indicated, citations to exhibits refer to the exhibits in PubPeer's Excerpts of Record, submitted with its opening brief in Case No. 326691, which has been consolidated with this case.

of different experiments.[4] 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. *Id.* 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

[4] Dr. Sarkar's assertion that a single commenter is responsible for the commenters at issue in this case, See Pl Opening Br in Case No 326667, at 4, is flatly contradicted by the record, see, e.g., Ex 2A at 5, 8–9 (Jollymore Aff ¶¶ 5, 8) (showing multiple commenters with unique pseudonyms assigned by PubPeer's site).

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 5 (Mar 5 Hr'g Tr); Ex 6 (Circuit Court Order Granting in Part Mot to Quash Subpoena). The court ordered supplemental briefing and argument regarding that single comment, which is reproduced in paragraph 40(c) of the complaint. See Ex 6 (Circuit Court Order Granting in Part Mot to Quash Subpoena ¶¶ 2–3). On March 19, 2015, the circuit court held a hearing regarding the remaining 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).[5]

On March 30 and 31, Dr. Sarkar and PubPeer filed respective 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)).

On August 27, 2015, this Court granted both parties' applications for leave to appeal and consolidated the cases for appellate review. PubPeer and Dr. Sarkar filed their opening briefs on October 22, 2015. This brief responds to Dr. Sarkar's brief in his appeal from the circuit court's March 9, 2015 order granting PubPeer's motion to quash the subpoena in part (Case No. 326667).

[5] One of the anonymous defendants appeared through counsel to acknowledge having posted a number of the comments at issue and to defend his or her constitutional right to remain anonymous. This defendant was permitted to withdraw his or her motion for summary disposition without prejudice as moot after the circuit court quashed the subpoena with respect to all of the comments for which this defendant had claimed responsibility.

Standard of Review

This Court reviews a trial court's decision on whether to quash a subpoena for abuse of discretion. See *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). "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." *Cooley*, 300 Mich App at 263 (citations omitted). Issues of constitutional law are reviewed de novo. *Id.* at 263.

Argument

I. The circuit court correctly held that this Court's precedents require it to test the legal sufficiency of Dr. Sarkar's pleadings before unmasking PubPeer's commenters.

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

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.

B. This Court held in both *Cooley* and *Ghanam* that the legal sufficiency of a defamation complaint must be tested before anonymous defendants may be unmasked.

Because the Constitution safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to unmask anonymous speakers through a subpoena must first 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 decisions on the showing that must be made. See *id.*; *Cooley*, 300 Mich App 245. Under *Ghanam* and *Cooley*, when a defamation plaintiff seeks to strip a defendant of the right to speak anonymously, 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 prevent disclosure of the anonymous speaker's identity.

When the anonymous defendant is participating in the litigation, as was the case in *Cooley*, that defendant can initiate review of the claims against himself or herself through a motion for summary disposition filed under MCR 2.116 (C)(8). When the anonymous defendant is not participating—as 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. Thus, although the posture in which a defamation plaintiff's claims are to be assessed may differ depending on whether *Cooley* or *Ghanam* applies, both cases establish this critical rule: a trial court must assess the merits of the claims *before* stripping a speaker of his or her right to remain anonymous. See *Ghanam*, 303 Mich App at 530 ("[T]he trial court is required to analyze the complaint under MCR 2.116(C)(8)."); *Cooley*, 300 Mich App at 266 ("The plaintiff will have to survive an actual motion for summary disposition on its claims under MCR 2.116(C)(8).").

C. The participation of one of the anonymous defendants in this case does not excuse Dr. Sarkar from having to demonstrate the sufficiency of his claims before unmasking is permitted.

Dr. Sarkar argues that the circuit court erred in testing the legal sufficiency of his complaint because one of the anonymous defendants has participated in this litigation. See Appellant's Br in Case No 326667, at 6–10. His position rests on a fundamental misunderstanding of *Cooley* and *Ghanam*. In this case, as in all cases, there must be a determination that the complaint is legally sufficient *before* unmasking is constitutionally permissible.

In *Ghanam*, a number of defendants were sued for posting anonymous comments about a public official on a website. None of them was participating in the litigation, and none of their identities was known to the plaintiff. See 303 Mich App at 528–29. This Court held that the "trial court [wa]s 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" before unmasking was warranted. *Id.* at 530. It then evaluated the pleadings, found them deficient, and reversed the trial court's decision allowing discovery of the anonymous speakers' identities. *Id.* at 543–50.

Dr. Sarkar gives no reason why the non-participating defendants in this case are situated differently from the anonymous defendants in *Ghanam*, and there is none. The fact that one

defendant has appeared by counsel plainly has no bearing on the circumstances of the other anonymous defendants in this case, who are not participating in the lawsuit and who therefore find themselves in precisely the same position as the defendants in *Ghanam*. *Ghanam* therefore controls, and requires that there be a determination that Dr. Sarkar's claims have merit before unmasking is permitted. *Id.* at 530.

Dr. Sarkar argues that *Cooley* is controlling because one anonymous defendant has appeared in this case through counsel. But *Cooley* does not stand for the broad proposition that an anonymous defendant's appearance through counsel renders any assessment of the legal sufficiency of the complaint premature at this stage of the litigation. *Cooley* involved a defendant whose identity was already known to the plaintiff due to an inadvertent disclosure by the website that had been subpoenaed. See 300 Mich App at 252–53. Given the availability of a protective order to prevent any *further* disclosure of the defendant's identity, there was no harm that could come from deferring consideration of the sufficiency of the plaintiff's complaint until that participating defendant's inevitable motion for summary disposition under MCR 2.116(C)(8). *Id.* at 266. Thus, although *Cooley* expressed a preference for the participating defendant to initiate review of the sufficiency of the complaint under MCR 2.116(C)(8) rather than MCR 2.302, the logic motivating that preference obtains only under the unique facts of that case, where the defendant's identity was already known to the plaintiff, and therefore no further harm could come from awaiting resolution of a motion for summary disposition.[6]

[6] Importantly, in *Cooley* this Court *reversed* the trial court's order denying the anonymous defendant's motion for a protective order to protect his identity. See *id.* at 266. Dr. Sarkar's reading of *Cooley*—that it precludes the trial court from considering the merits of his claims before unmasking—is thus diametrically opposed to its actual holding: even where, unlike here, a defendant's First Amendment rights have already been partially reduced, a trial court must consider whether to protect any remaining anonymity pending its assessment of the merits of the plaintiff's claims.

Here, unlike in *Cooley*, the lone defendant who has appeared by counsel remains anonymous to Dr. Sarkar. Deferring evaluation of the sufficiency of the claims against that defendant until after unmasking would therefore irreversibly infringe his or her constitutional right to remain anonymous without any assessment of whether there is any basis for doing so. Neither *Ghanam* nor *Cooley* permits this result, which would be plainly unconstitutional, given that a plaintiff with legally insufficient claims has no legitimate interest that could outweigh the well-recognized right to speak anonymously. See *Ghanam*, 303 Mich App at 540–41 ("[A] showing [of merit] by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights."); *Cooley*, 300 Mich App at 266 (holding that, even when a defendant's identity is partially disclosed, the "combined safeguards of a protective order under MCR 2.302 and the summary disposition standards and procedures under MCR 2.116(C)(8)" are still necessary to protect anonymous speech rights).

Nor, as a final matter, is it any comfort to any of the defendants in this case that a protective order of the kind sought in *Cooley* could prevent disclosure of the defendants' identities to *third parties* pending resolution of the merits of Dr. Sarkar's claims. Such an order would be plainly inadequate to protect the First Amendment rights at issue here. The First Amendment protects the right to remain anonymous not only to third parties, but also—indeed, more importantly—to the *subject* of the commentary (in this case, Dr. Sarkar). Ensuring through a protective order that Dr. Sarkar *alone* would learn the identity of his anonymous critic would be like protecting someone's Fourth Amendment rights by allowing only the police to search his home without a warrant. Dr. Sarkar attempts to derive a contrary rule from *Cooley*, which emphasized the utility of a protective order in vindicating the anonymous speech rights in

question in that case. 300 Mich App at 266. But here, all defendants' identities are unknown to Dr. Sarkar, and this aspect of *Cooley* is therefore inapposite. Unlike in *Cooley*, a key purpose of the right to anonymity would be thwarted by the protective order that Dr. Sarkar proposes, and lawful anonymous speech would be chilled as a result.

For these reasons, the circuit court was correct to test the legal sufficiency of Dr. Sarkar's complaint before permitting discovery of the identities of PubPeer's anonymous commenters.

II. The circuit court correctly held that Dr. Sarkar's claims are not legally sufficient and that unmasking PubPeer's commenters would therefore be unconstitutional.

Unmasking PubPeer's commenters would be unconstitutional unless Dr. Sarkar's defamation claim would, at a minimum, survive a motion for summary disposition under MCR 2.116(C)(8). The circuit court correctly held that, with respect to all statements at issue in this appeal, Dr. Sarkar's complaint does not satisfy that standard.

Notably, Dr. Sarkar's opening brief does not challenge that finding. Instead, Dr. Sarkar focuses entirely on the standard the circuit court applied in evaluating his claims—in particular, on the court's interpretation of *Cooley* and *Ghanam*—while saying nothing about the claims themselves or the Internet comments they are based upon, and making no arguments as to why he has any legitimate interest in unmasking the defendants in this case. For the reasons explained below, his claims are legally inadequate, and therefore no such interest exists.

A. The defamation claim is time-barred.

The limitations period for a defamation action is one year.[7] MCL 600.5805(9). "A defamation claim accrues when 'the wrong upon which the claim is based was done,'" *Mitan v*

[7] 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)

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 *Rheaume v Vandenberg*, 232 Mich App 417, 424; 591 NW2d 331 (1998) ("The filing of a 'John Doe' complaint does not toll the statute of limitation with respect to parties not yet specifically named."); *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).

Since the circuit court's March 9, 2015 order granting in part PubPeer's motion to quash, the one-year limitations period has run for all statements upon which Dr. Sarkar's defamation claim is based. The dates of publication for the comments at issue on this appeal range from March 29, 2014 to July 24, 2014. See Ex 1 at 13, 15–16 (Compl. ¶¶ 47–48, 52, 54(a) & (c)). The date of publication for the flyer is unclear, but must have occurred in or before July 2014, when it was discovered at Wayne State. See *id.* at 20 (Compl ¶ 69). Accordingly, as of the end of July 2015, none of the comments relied upon by Dr. Sarkar can supply the basis for a timely defamation claim. Because Dr. Sarkar has failed to state a claim, the order granting PubPeer's motion to quash must be affirmed. *Ghanam*, 303 Mich App at 540; see also *Gray v Pann*, 203

(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. See *infra* Part II.D. 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).

Mich App 461, 463; 513 NW2d 154 (1994) (Court of Appeals can affirm trial court on any basis supported by the record).

B. Dr. Sarkar failed to plead defamation with specificity.

Even if Dr. Sarkar's claims were not time-barred, they are legally defective because he has failed to plead defamation with specificity, as required by controlling law.

Settled 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). It is, moreover, 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), and any written document upon which a claim is based must be attached to the complaint, see MCR 2.113(F)(1).

Here, Dr. Sarkar did not plead his claim of defamation with specificity.

First, the PubPeer comments referred to in the complaint are not pleaded with specificity. Dr. Sarkar pleaded a number of comments by reference alone, without actually reproducing the allegedly defamatory text. See, e.g., Ex 1 at 12 (Compl ¶¶ 41–44); *Ghanam*, 303 Mich App at 543 (holding defamation claim "facially deficient" because "the alleged defamatory statements were not identified in plaintiff's complaint"). For the vast majority of those he does quote, he quotes only short and unintelligible fragments of the actual text, surrounded by his own

exaggerated characterizations. See, e.g., Ex 1 at 12 (Compl ¶ 41) ("At [a page on PubPeer's website] there are comments that conclude that certain figures are 'identical' to others, accusing him of research misconduct."); *id.* (Compl ¶ 44) ("At [a page on PubPeer's website], another discussion takes place among anonymous posters, accusing Dr. Sarkar of 'sloppiness' of such magnitude that it calls into question the scientific value of his 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."). 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 v Anonymous Joint Enter*, 487 Mich 102, 129; 793 NW2d 533 (2010) (quoting *Amrak Prods, Inc v Morton*, 410 F3d 69, 73 (CA 1, 2005)). As for the handful of comments pleaded in their entirety, Dr. Sarkar generally has not identified which portions he believes to be materially false and defamatory. See, e.g., Ex 1 at 10–14 (Compl ¶¶ 40(d), 48); see also *Royal Palace Homes*, 197 Mich App at 56–57 ("Defendants do not bear the burden of discerning their potential liability from these transcripts. Plaintiffs must plead precisely the statements about which they complain.").

Second, Dr. Sarkar failed to plead the flyer allegedly distributed at Wayne State University. The complaint refers to a "screen shot from PubPeer" apparently contained in the flyer, Ex 1 at 20 (Compl ¶ 69), but the complaint does not reproduce that screenshot. Instead, 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.* (Compl ¶ 72). Without 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.").

Finally, Dr. Sarkar failed to plead any text from the allegedly defamatory "series of emails" he claims were sent to the University of Mississippi. See Ex 1 at 20 (Compl ¶ 67). This failure is particularly notable because the record has not been supplemented with these emails (as it has been with the PubPeer comments, the flyer, and the "Clare Francis" email to Wayne State, which is the subject of PubPeer's appeal in Case No. 326691). 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."). Indeed, even if Dr. Sarkar had pleaded the flyer and the "series of emails," they would not provide a basis to unmask PubPeer's commenters because none of the allegedly defamatory statements in these documents ever appeared on PubPeer's website. As explained in PubPeer's opening brief in Case No. 326691, the unmasking of lawful speech made in one forum based on allegedly unlawful speech made elsewhere would be unprecedented and plainly unconstitutional. See Appellant PubPeer's Br in Case No 326691, at 28–29; see also *Ashcroft v Free Speech Coal*, 535 US 234, 255; 122 S Ct 1389; 152 L Ed 2d 403 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech.").

Because Dr. Sarkar failed to meet the minimum standard of pleading defamation with specificity, the circuit court correctly granted PubPeer's motion to quash.

C. The statements Dr. Sarkar complains of are not defamatory as a matter of law.

Even if Dr. Sarkar's defamation claim were not time-barred and had been pleaded with specificity, it would still fail as a matter of law because the statements he complains of are not capable of defamatory meaning. Dr. Sarkar claims that PubPeer's commenters have accused him

of "research misconduct," but that is simply untrue. Not a single PubPeer comment makes that accusation or anything approaching it. Rather, as explained fully below, the comments fall into three general categories, none of which is capable of defamatory meaning.[8]

"Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide."[9] *Ghanam*, 303 Mich App at 544. "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*, 487 Mich at 113. An allegedly defamatory statement must also 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

[8] In order to assist the circuit court in assessing the comments in the complaint, PubPeer provided the full text and surrounding context of these comments as they appeared on PubPeer's site at the time Dr. Sarkar first complained to PubPeer. See Ex 2A (Jollymore Aff). Under Michigan law, the full text and context may be considered, even though not pleaded, in order to determine whether any of the comments is capable of defamatory meaning and whether, therefore, granting Dr. Sarkar leave to amend the complaint would be futile. See, e.g., *Gustin v Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) ("[A] publication must be considered as a whole."); *Ghanam*, 303 Mich App at 543–50 ("[E]ven though plaintiff's complaint is patently deficient by virtue of his failure to cite the actual complained-of statements in the complaint, we will analyze the alleged defamatory statements to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile.").

[9] For this reason, Dr. Sarkar is incorrect when he asserts that the circuit court erred in failing to draw factual inferences in his favor. See Pl Opening Br in Case No 326667, at 11–12. It is true that on a motion for summary disposition, courts interpret the facts alleged in a complaint in the light most favorable to the plaintiff. When courts analyze whether allegedly defamatory words are capable of defamatory meaning, however, that principle has no relevance. This is strictly a legal question; accordingly, courts simply consider the plain meaning of the words and determine whether they are capable of defamatory meaning as a matter of law. *Ghanam*, 303 Mich App at 544.

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 *Doe v Cahill*, 884 A2d 451, 465 (Del, 2005) ("[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, "[t]here 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.").[10]

1. The PubPeer comments identifying anomalies in the images used in Dr. Sarkar's research are not capable of defamatory meaning.

The vast majority of the allegedly defamatory comments on PubPeer's site identify anomalies in images in Dr. Sarkar's publications, primarily instances in which two images

[10] As explained in PubPeer's opening brief in Case No. 326691, Dr. Sarkar is a limited-purpose public figure, and he therefore cannot prevail unless he proves the statements in question were made with actual malice. See Appellant PubPeer's Br in Case No 326691, at 18 n.14.

purporting to depict the results of different experiments look "similar." Dr. Sarkar no longer appears to contend that these comments are defamatory. See Ex 3 at 9 (Pl Resp to PubPeer Mot to Quash 9) ("This case . . . is not about blots."). In any event, such statements are not capable of defamatory meaning for two reasons.

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). Many of the comments in question 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." Ex 1 at 16–17 (Compl ¶ 55) (emphasis added).[11] Whether two images in Dr. Sarkar's papers "look[] similar," however, is entirely a matter of subjective opinion. Even for those comments that express greater confidence in the similarity between the images being compared, see, e.g., *id.* at 12–13 (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., Ex 2A at 2–4 (Jollymore Aff ¶ 5) ("please compare . . ."), by directing readers to the similar images, see, e.g., *id.* at 7–8 (Jollymore Aff ¶ 7) ("Figure 3A Image of LNCaP, BR-DIM is identical to image of VCaP, siERG + BR-DIM."), or by manually placing

[11] See also Ex 2A at 7 (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.* at 12 (Jollymore Aff ¶ 14) (comment from webpage cited in paragraph 49 of the complaint: "Fig. 3A in this paper contains images that appear to be similar to those in Fig. 1B in another paper.").

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."). None of the commenters 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). To the contrary, all inferences of similarity are based exclusively on the publicly available facts in Dr. Sarkar's published work. 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 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. 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 PubPeer comments on Dr. Sarkar's work are prime examples of this deliberative process in action, and courts are not the venue to mediate its terms. See *ONY*, 720 F3d at 492 ("[S]tatements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation.").

2. The several comments that opine that the anomalies warrant further investigation are not capable of defamatory meaning.

Several of the comments on PubPeer's site relating to Dr. Sarkar express the view that the anomalies identified by other commenters warrant further investigation. See, e.g., Ex 1 at 11–12 (Compl ¶ 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?"). 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) (finding statement, "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 comments "call[ing] for an investigation into the [police department's] practices" were "expressions of protected opinion").

3. The remaining comments consist of rhetorical hyperbole and subjective opinions not capable of defamatory meaning.

The remaining comments on PubPeer's site that concern Dr. Sarkar consist of rhetorical hyperbole and subjective opinions not capable of defamatory meaning. At least six of the comments express only opinions, and not provably false facts.[12] For example, one comment states that "[t]he last author is now correcting 'errors' in several papers. Hopefully he will be

[12] See Ex 1 at 9 (Compl ¶ 40(b)) ("You might expect the home institution to at least look into the multiple concerns which have been rasied [sic]."); *id.* at 11 (Compl ¶ 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.* (Compl ¶ 40(d)) ("It's not hard to imagine why Wayne State may not have fought to keep him."); *id.* at 11–12 (Compl ¶ 40(d)) ("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.* at 12 (Compl ¶ 44) ("sloppiness"; "correction"; "public set of data to show that the experiments exist"); *id.* (Compl ¶ 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.").

able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999–2014), which were all posted in PubPeer." Ex 1 at 11 (Compl ¶ 40(d)). The first sentence is true by Dr. Sarkar's own admission, see *id.* at 14 (Compl ¶ 50) (noting Dr. Sarkar's comment on PubPeer apologizing for "the inadvertent error"). The second sentence expresses a hope for future action, not a false fact about Dr. Sarkar.

Several other comments express only sarcasm or rhetorical hyperbole, not actionable defamation.[13] For example, one states: "I guess the reply from the authors would be inadvertent errors in figure preparation." *Id.* at 9 (Compl ¶ 40(a)). Even the complaint recognizes that the phrase is sarcastic. *Id.* ("[S]omeone sarcastically asserted that . . . ."). Moreover, that sarcasm does not convey any fact capable of being proved true or false. To be sure, it appears to express bewilderment at the apparent similarity noted by a previous commenter. But that sarcasm, even if made "with the intent to ridicule, criticize, and denigrate," does not support a claim of defamation. *Ghanam*, 303 Mich App at 550. Similarly, another comment 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.* at 11 (Compl ¶ 40(d)). If

[13] See *id.* at 9, 12 (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.* at 11 (Compl ¶ 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.* (Compl ¶ 40(d)) ("[J]ust 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.* (Compl ¶ 40(d)) ("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.* at 12 (Compl ¶ 45) ("physics"; "show the world"); *id.* at 13 (Compl ¶ 47) ("There seems to be a lot more 'honest errors' to correct."); *id.* at 14 (Compl ¶ 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'?").

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.").

This sarcasm and rhetorical hyperbole is not actionable, and therefore cannot supply a basis for unmasking. See *Greenbelt*, 398 US at 14; *Ghanam*, 303 Mich App at 550.

4. There are no allegations of research misconduct anywhere in the comments in question, and the Clare Francis email does not change that fact.

Dr. Sarkar has, to his credit, retreated from the claim in his complaint that allegations of similarity and rhetorical hyperbole 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 any of the comments pleaded in the complaint.

Perhaps in recognition of the absence of any comments supporting his position, Dr. Sarkar emphasizes that the author of the "Clare Francis email"—which is the subject of PubPeer's appeal in Case No. 326691—described "[m]any of the entries [on PubPeer as] mention[ing] 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); see also Pl Opening Br in Case No 326667, at 19 ("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."). But this email neither accuses Dr. Sarkar of research misconduct nor somehow magically transforms the observations of similarity and rhetorical hyperbole on PubPeer's website into accusations of research misconduct. As explained in PubPeer's opening brief in Case No. 326691, the individual identifying himself or herself as Clare Francis merely stated a subjective opinion based on previously aired, publicly available scientific observations and expressions of concern; this is scientific discourse, not defamation. See Appellant PubPeer's Br in Case No 326691, at 25–26. Nor does Clare Francis's statement indicate his or her belief that the PubPeer comments accuse Dr. Sarkar of research misconduct. Rather, Clare Francis simply opines that the PubPeer comments point to observations that could "*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 added). In other words, the PubPeer comments may, in the subjective opinion of Clare Francis or others, point to evidence of research misconduct. They are not, however, accusations of research misconduct. Nor are they accusations of facts that, if false, amount to an accusation of research misconduct.

5. The flyer is incapable of defamatory meaning because it is a subjective expression of concern.

During the March 5, 2015 hearing on PubPeer's motion to quash, counsel for Dr. Sarkar provided PubPeer with a copy of the allegedly defamatory flyer distributed at Wayne State, the contents of which are not fully pleaded in the complaint. Despite Dr. Sarkar's claim that the flyer was part of a scheme to make deliberately false accusations of "research misconduct" against him, the flyer turned out to be vague, obscure, and, ultimately, incapable of defamatory meaning.

See Sarkar's Ex 2 (Flyer Allegedly Distributed at Wayne State).[14] 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. *Id.*

That message is not defamatory. Expressions of concern are quintessentially subjective opinions. See *Ornatek v Nev 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) (mem) (holding that defendant's statements "were nondefamatory as a matter of law and represent an expression of concern, opinion or fair comment").[15] A recent case from the U.S. District Court for the District of Massachusetts makes this point unambiguously clear. 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. No 15 Civ 10267, 2015 WL 1000407, at *1 (D Mass, Mar 5, 2015) (mem). 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 *1 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.

[14] Citations to "Sarkar's Exhibits" refer to the exhibits submitted by Dr. Sarkar as an addendum to his opening brief in this appeal.

[15] A copy of all unpublished opinions cited in this brief is included in the appendix to the brief.

Id. at *1. The same is true here. 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.

Dr. Sarkar has also claimed that the flyer implies that U.S. Senator Charles Grassley is investigating him, Ex 1 at 21 (Compl ¶ 72), but the references in the flyer to "Grassley" and "NIH" are surrounded by a series of inscrutable letters and numbers that have no plain meaning. See Sarkar's Ex 2, at 1 (Flyer Allegedly Distributed at Wayne State 1). The text is so indecipherable that no reasonable individual could interpret it as an actual assertion or implication that a U.S. Senator was investigating Dr. Sarkar.

Even if the flyer were defamatory, however, it would be irrelevant in this case because the allegedly defamatory statements made in it *never* appeared on PubPeer's site. Dr. Sarkar has never explained why statements made in a physical flyer distributed at Wayne State could ever justify unmasking one of PubPeer's users. As PubPeer explained in its opening brief in Case No. 326691, it would be unconstitutional to unmask the lawful speech of PubPeer's users on the basis of allegedly unlawful speech made elsewhere. See Appellant PubPeer's Br in Case No 326691, at 28–29.

For multiple overlapping reasons, then, the comments at issue on this appeal are simply not actionable defamation and do not justify unmasking PubPeer's users. At most, the commenters expressed scientific concern over anomalies in scientific images and suggested that the anomalies warranted further investigation. As none of the statements at issue here is defamatory as a matter of law, the circuit court properly granted PubPeer's motion to quash and its order must be affirmed.

D. Dr. Sarkar's other claims are improper attempts to circumvent the fatal flaws in his defamation claim.

Dr. Sarkar argues that the various torts he has pleaded in addition to defamation—intentional interference with a business expectancy and a business relationship ("IIBE" and "IIBR"), false light invasion of privacy ("False Light"), and intentional infliction of emotional distress ("IIED"), see Ex 1 at 24–27 (Compl ¶¶ 99–122)—provide an independent basis for unmasking in this case, see Pl Opening Br in Case No 326667, at 13–14. These claims, however, are based on the same conduct as the defamation claim: the posting of comments, the distribution of the flyer, and the sending of emails. And they allege precisely the same injury: harm to reputation caused by *speech*. Accordingly, they cannot be used to circumvent the fatal flaws in the defamation claim. See *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); *Ireland*, 230 Mich App at 624–25 (plaintiff cannot avoid flaws in defamation claim by recasting defamation claim as different tort).

Dr. Sarkar's assertion that his other tort claims are distinct from his defamation claim, see Pl Opening Br in Case No 326667, at 14 ("[A]ll the torts rest on different conduct."), is unsupported and, indeed, inexplicable. As the basis for his IIBE claim, he alleges that the defendants "intentionally interfered with [his] business expectancy by *sending communications* in the form of PubPeer screen shots to various individuals at the University of Mississippi [i.e., the unpleaded emails], as alleged above, particularly *at paragraphs 65–68*." Ex 1 at 25 (Compl ¶ 101) (emphasis added). Similarly, in support of his IIBR claim, he alleges that the defendants "intentionally interfered with [his] business [relationship] by *making false and unprivileged communications* [with] 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 [i.e., the flyer]." *Id.* (Compl ¶ 108) (emphasis added). These allegations make plain that the basis for these ancillary torts is the publication of allegedly defamatory speech—which, of course, is precisely the conduct that forms the basis for Dr. Sarkar's defamation claim. See *id.* at 24 (Compl ¶ 93) (basing defamation claim on the statements "detailed in paragraphs 37–79" of the complaint).

The same is true of the False Light and IIED claims. In support of the former, Dr. Sarkar alleges that the defendants "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." *Id.* at 26 (Compl ¶ 113) (emphasis added). In other words, he alleges that the defendants published defamatory speech. Cf. *id.* at 24 (Compl ¶ 93) (citing this same conduct as the basis for the defamation claim). In support of the IIED claim, Dr. Sarkar alleges that the defendants "*published false and doctored documents*, purporting to indicate that Plaintiff was subject of a federal and/or Senatorial investigation," and that the defendants "also *made false statements* on PubPeer" and "*distributed these statements* widely as 'proof' of Plaintiff's alleged misconduct." *Id.* at 26–27 (Compl ¶ 117–19) (emphasis added). As with the other ancillary torts, there is no distinction between this conduct and the conduct that underlies the defamation claim. Both claims are based on speech, and are therefore subject to the same limitations. See *Hustler Magazine*, 485 US at 56 (finding the First Amendment applies to defamation as well as ancillary torts based on speech).

Because Dr. Sarkar's additional torts are merely veiled attempts to circumvent the fatal flaws in his defamation claim, they would not survive a motion under MCR 2.116(C)(8), and they cannot justify unmasking.

E. Permitting Dr. Sarkar to amend the complaint would be futile.

For the reasons explained above, Dr. Sarkar's claims are not only improperly pleaded (i.e., without the requisite specificity), but also *incapable* of being properly pleaded. Even if Dr. Sarkar amended his complaint to include the full text of the allegedly defamatory statements of which he complains, those statements would still be an insufficient basis for a defamation claim (or any ancillary tort claim) because they are time-barred and, in any event, incapable of defamatory meaning as a matter of law. Thus, not only is unmasking unwarranted, but permitting Dr. Sarkar to amend the complaint would be futile, see MCR 2.116(I)(5) (amendment unwarranted if it "would not be justified"), and this Court should therefore remand with instructions to dismiss the complaint, see *Ghanam*, 303 Mich App at 550 (reversing trial court's order allowing unmasking of anonymous defendant and remanding for entry of judgment for defendants after concluding that allowing plaintiff to amend his complaint would be futile).

III. The circuit court did not consider Dr. John Krueger's affidavit, but it would have been required to do so under the First Amendment if it had held that Dr. Sarkar's complaint is legally sufficient.

Along with its motion to quash Dr. Sarkar's subpoena, PubPeer submitted an affidavit from Dr. John Krueger, a prominent expert who spent 20 years at the U.S. Office of Research Integrity conducting forensic analysis of scientific images using the tools that he pioneered while there. PubPeer retained Dr. Krueger to examine the claims made by its commenters that images in Dr. Sarkar's papers contained a number of anomalies. Dr. Krueger arrived at an emphatic conclusion: he determined that there was "definitive evidence that strongly supported the

conclusion that the images [commented on by PubPeer's commenters] were not authentic or contained other irregularities." See Ex 2B at 3–4 (Krueger Aff ¶ 7). Dr. Krueger went even further: he stated that "[h]ad 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." *Id.* at 35 (Krueger Aff ¶ 86). In short, Dr. Krueger's affidavit makes clear that, even if the concerns raised by PubPeer's commenters about Dr. Sarkar's research were capable of defamatory meaning (and they are not), the concerns are almost certainly valid and, therefore, not actionable.

Dr. Sarkar argues the circuit court erred by relying on Dr. Krueger's affidavit in granting in part PubPeer's motion to quash. But the circuit court did no such thing. To the contrary, during the March 5, 2015 hearing, it repeatedly faulted Dr. Sarkar for failing to make sufficiently specific allegations. See Ex 5 at 29 (Mar 5 Hr'g Tr 29) (court stating to counsel for Dr. Sarkar that "you have to make the specific allegations"); *id.* at 35 (Mar 5 Hr'g Tr 35) (court acknowledging Dr. Sarkar's counsel as arguing that "we're not to look beyond the Complaint," but noting that the question is whether "the Complaint isn't inadequately pled"). Dr. Sarkar points to no indication that the circuit court considered Dr. Krueger's affidavit, and there is none.

Nevertheless, had the circuit court found Dr. Sarkar's complaint legally sufficient, the court would in fact have been constitutionally *required* to consider Dr. Krueger's affidavit, and to have also considered any substantiating evidence (or the lack thereof) from Dr. Sarkar, before unmasking any anonymous defendants in this case. As PubPeer argued in its opening brief in its appeal from the March 26 order, unless trial courts consider evidentiary substantiation at the unmasking stage, defamation plaintiffs can successfully overcome the right to anonymity through artfully pleaded complaints, even if they have no realistic chance of proving their case.

See Appellant PubPeer's Br in Case No 326667, at 30–34. The constitutionally required interest-balancing at the heart of defamation law would thus be defeated. Nearly all courts to have considered this question have, for this reason, required defamation plaintiffs seeking to unmask anonymous commenters to substantiate their claims with evidence. See *Ghanam*, 303 Mich App at 537 (noting that "[c]ourts from other jurisdictions that have addressed these issues have mainly" required some degree of evidentiary substantiation). Nothing in this Court's prior precedents would prevent the panel from bringing the Michigan standard in line with these precedents, should it find the complaint legally sufficient.

Conclusion

For these reasons, the Court should affirm the circuit court's March 9, 2015 order granting in part PubPeer's motion to quash, and remand the case with instructions to dismiss Dr. Sarkar's complaint.

December 28, 2015

Respectfully submitted,

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