STATE OF MICHIGAN
IN THE COURT OF APPEALS

FAZLUL SARKAR,

Plaintiff–Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendant(s),

PUBPEER, LLC,

Appellee.

_____________________________________/

COA Case No. 326667

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

Counsel for Plaintiff–Appellant Sarkar:

Nicholas Roumel (P37056)
Edward A. Macey (P72939)
Nacht, Roumel, Salvatore, Blanchard, & Walker, P.C.
101 N. Main St., Ste. 555
Ann Arbor, MI 48104
(734) 663-7550
nroumel@nachtlaw.com

Counsel for a John Doe Defendant:

Eugene H. Boyle, Jr. (P42023)
H. William Burdett, Jr. (P63185)
Boyle Burdett
14950 E. Jefferson Ave., Ste. 200
Grosse Pointe Park, MI 48230
(313) 344-4000
burdett@bbdlaw.com

Counsel for Appellee PubPeer, LLC:

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Alex Abdo*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
aabdo@aclu.org

Nicholas J. Jollymore*
Jollymore Law Office, P.C.
One Rincon Hill
425 First Street
San Francisco, CA 94105
(415) 829-8238
nicholas@jollymorelaw.com

* admitted pro hac vice by circuit court

____/

PUBPEER'S ANSWER TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MCOA 4/17/2015 12:10:18 PM

TABLE OF CONTENTS

I. Statement of Jurisdiction. 1

II. Introduction. 1

III. Counter-statement of substantial harm. 5

IV. Counter-statement of questions presented. 6

V. Counter-statement of facts. 7

VI. Standard of review. 8

VII. Argument. 9

1. 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. 9
    - i. The First Amendment limits the compelled identification of anonymous internet speakers. 9
    - ii. 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. 9
    - iii. The participation of one of the anonymous defendants does not alter the analysis to permit unmasking without testing the sufficiency of Dr. Sarkar's complaint. 11
    - iv. A protective order would not protect the anonymous commenters' First Amendment right to remain anonymous. 14
2. The circuit court correctly held that Dr. Sarkar's defamation claim is not legally sufficient and that unmasking PubPeer's commenters would therefore be unconstitutional. 15
    - i. Dr. Sarkar failed to plead defamation with specificity. 17
    - ii. The statements Dr. Sarkar complains of are not capable of defamatory meaning as a matter of law. 19
3. The circuit court did not consider Dr. John Krueger's affidavit, but it would have been required to do so by the First Amendment before unmasking PubPeer's commenters. 28
4. The circuit court properly recognized that the First Amendment limits the unmasking of anonymous speakers no matter the name of the tort. 30

VIII. Conclusion. 32

RECEIVED by MCOA 4/17/2015 12:10:18 PM

TABLE OF AUTHORITIES

Cases

Beverly Hills Foodland, Inc v United Food & Commercial Workers Union, Local 655, 39 F3d 191 (CA8, 1994) 31

Cabrera v Ekema, 265 Mich App 402; 695 NW2d 78 (2005) 8

Compuware Corp v Moody's Investors Servs, 499 F3d 520 (CA6, 2007) 31

Ghanam v Does, 303 Mich App 522; 845 NW2d 128 (2014) .... passim

Greenbelt Co-op Publ'g Ass'n, Inc v Bresler, 398 US 6; 90 S Ct 1537; 26 L Ed 2d 6 (1970) 20

Haase v Schaeffer, 122 Mich App 301; 332 NW2d 423 (1982) 23

Hodgins v Times Herald Co, 169 Mich App 245; 425 NW2d 522 (1988) 20

Hustler Magazine, Inc v Falwell, 485 US 46; 108 S Ct 876; 99 L Ed 2d 41 (1988), ... 31

Ireland v Edwards, 230 Mich App 607; 584 NW2d 632 (1998) 20, 31

Jefferson Co Sch Dist No R-1 v Moody's Investor Servs, 175 F3d 848 (CA10 1999) 31

Lakeshore Community Hospital, Inc v Perry, 212 Mich App 396; 538 NW2d 24 (1995) 30

Ledl v Quik Pik Food Stores, Inc, 133 Mich App 583; 349 NW2d 529 (1984) 18

Locricchio v Evening News Ass'n, 438 Mich 84; 476 NW2d 112 (1991) 19

McIntyre v Ohio Elections Comm, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995) 9

Moldea v NY Times Co, 306 US App DC 1; 22 F3d 310 (1994) 21

Nordstrom v Auto-Owners, Inc, 486 Mich 962; 782 NW2d 779 (2010) 1

NY Times Co v. Sullivan, 376 US 254; 84 S Ct 710; 95 ALR 2d 1412 (1964) 21

ONY, Inc v Cornerstone Therapeutics, Inc, 720 F3d 490 (CA 2, 2013) 5, 23

Ornatek v Nevada State Bank, 93 Nev 17; 558 P2d 1145 (Nev, 1977) 26

People v Buie, 491 Mich 294; 817 NW2d 33 (2012) 30

People v Highland, 482 Mich 881; 752 NW2d 465 (2008) 1

Royal Palace Homes, Inc v Channel 7 of Detroit, Inc, 197 Mich App 48; 495 NW2d 392 (1992) 17, 18

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Slightam v Kidd, 120 Wis 2d 680; 357 NW2d 564 (Wis App, 1984) 26

Saad v Am Diabetes Ass'n, Slip Op, No 1:15-cv-10267-TSH, 2015 WL 1000407 (D Mass, March 5, 2015) 26

Smith v Anonymous Joint Enter, 487 Mich at 102; 793 NW2d 533 (2010) 18, 20, 22

Snyder v Phelps, 562 US 443; 131 S Ct 1207; 179 L Ed 2d 172 (2011) 21

Thomas M Cooley Law Sch v Doe 1, 300 Mich App 245; 833 NW2d 331 (2013) .... passim

Unelko Corp v Rooney, 912 F2d 1049 (CA9, 1990) 31

Varrenti v Gannett Co, 33 Misc 3d 405; 929 NYS2d 671 (2011) 23

Rules & Statutes

MCR 2.116(C)(8) .... passim

Other Authorities

Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 Cato Sup Ct Rev 57, 58 (2002) 9

RECEIVED by MCOA 4/17/2015 12:10:18 PM

I. Statement of Jurisdiction.

Appellee PubPeer does not object to Plaintiff–Appellant Dr. Sarkar's Statement of Jurisdiction. PubPeer notes, however, that Dr. Sarkar filed a motion for reconsideration in the circuit court on March 11, 2015, and that the motion is still pending. The Michigan Supreme Court has held that an application for leave to appeal to the Court of Appeals may be premature where there is a pending motion for reconsideration in the trial court. See *People v Highland*, 482 Mich 881; 752 NW2d 465 (2008) (stating that Court of Appeals should have dismissed defendant's application for leave as premature where reconsideration motion was pending in the circuit court). But cf. *Nordstrom v Auto-Owners, Inc*, 486 Mich 962; 782 NW2d 779 (2010) (holding that Court of Appeals had jurisdiction over an application for leave where the lower court had not yet ruled upon on a motion for reconsideration).

II. Introduction.

This case is about whether scientists may lawfully and anonymously discuss the research of their peers. It began when a number of anonymous scientists discovered what they believed to be anomalies in the research papers of Dr. Fazlul Sarkar, a prominent cancer scientist. They reported those apparent anomalies—mainly similarities between images purporting to show different experiments—on a website that PubPeer, LLC created to facilitate anonymous scientific discourse. The postings sparked an online discussion about the anomalies and about the 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. The circuit court—applying this Court's precedent in *Ghanam v Does*, 303 Mich App

RECEIVED by MCOA 4/17/2015 12:10:18 PM

522; 845 NW2d 128 (2014), and *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013)—agreed almost entirely with PubPeer. It granted PubPeer's motion to quash the subpoena with respect to all but a single comment on PubPeer's site. Dr. Sarkar now seeks leave to appeal from that 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 opinions 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. Dr. Sarkar's application for leave to appeal suggests that *Cooley* and *Ghanam* somehow permit defamation plaintiffs to strip speakers of their constitutional right to anonymity so long as a protective order is in place. This argument, addressed fully below, is meritless and reflects a basic misunderstanding of those two cases and of the meaning of the right to anonymity.

Second, the court properly held that Dr. Sarkar has not pleaded a legally sufficient claim of defamation with respect to all of the comments at issue here. Though Dr. Sarkar does not address this holding at all in his application, it is, in truth, 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. Dr. Sarkar's primary allegation against the anonymous commenters is that they

[1] By separate application, PubPeer is also seeking leave to appeal from the circuit court's order of disclosure with respect to the one remaining comment. See COA Case No. 326691.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

accused him of "research misconduct." Pl Br at 4–5. This is simply false. Not a single comment on PubPeer's site makes that accusation or anything approaching it. This is a critical point because, rather than discuss the actual content of the comments on PubPeer's site, Dr. Sarkar's application repeatedly uses a phrase that PubPeer's commenters never did.

What PubPeer's commenters actually discussed is straightforward and simply not defamatory. The vast majority of the comments identified anomalies in images used in Dr. Sarkar's research papers, primarily similarities between images that purport to depict the results of different experiments. It is not terribly surprising that many of PubPeer's commenters observed those similarities, because, as Dr. Sarkar conceded in the circuit court, there are indeed numerous similarities and other anomalies in the images used in his research papers. After this lawsuit was filed, PubPeer retained a prominent expert in the forensic analysis of scientific images—Dr. John Krueger—to review those apparent anomalies. Dr. Krueger analyzed each and every one of the PubPeer comments identifying anomalies in Dr. Sarkar's images, and he arrived at an unequivocal conclusion: the anomalies exist and, were Dr. Krueger still working at the U.S. Office of Research Integrity (where he worked for 20 years), he "would have recommended that ORI refer the images to the host institution where the research was conducted for . . . an investigation." Ex D at 35 (Krueger Aff ¶ 86). In other words, the primary discussion on PubPeer's site concerning Dr. Sarkar's research raised scientifically valid concerns.

The remaining PubPeer comments said one of two things. A number of them expressed the opinion that the numerous anomalies in Dr. Sarkar's images warranted further investigation. Those sorts of statements are incapable of defamatory meaning because they reflect inherently subjective opinions, not provably false facts. Even if they reflected facts capable of being proved true or false, they echo Dr. Krueger's conclusion that an investigation is warranted, and so it is

RECEIVED by MCOA 4/17/2015 12:10:18 PM

extraordinarily unlikely that Dr. Sarkar could show that those statements are in fact false. The rest of the comments contain the sort of hyperbolic and sarcastic Internet banter that this Court has held is not defamatory as a matter of law. None of those comments contains a provably false assertion of defamatory fact.

Dr. Sarkar also complains of a flyer allegedly distributed at Wayne State University and a "series of emails" sent to the University of Mississippi. Even if he had pleaded the flyer and the text of the emails in his complaint as required by Michigan law—which he did not—and even if the flyer and emails were defamatory, they would not support the unmasking of PubPeer's commenters. For the reasons explained in PubPeer's separately filed application for leave to appeal,[2] the First Amendment does not permit the unmasking of lawful speech in one forum to investigate unlawful speech in another. In any event, the flyer that Dr. Sarkar hyperbolically claims suggests that he is under investigation by a U.S. senator is, as explained below, little more than an "academic expression of concern," not defamatory as a matter of law. And Dr. Sarkar has not, to this day, identified or produced a single word from the "series of emails" allegedly sent to the University of Mississippi that he claims defamed him. Under hornbook Michigan defamation law, that failure is fatal to his claim of defamation based upon them.

It is critical to emphasize one overarching point: Dr. Sarkar has sued PubPeer's commenters for doing what scientists do every day. PubPeer's commenters dutifully reviewed the research of one of their peers—Dr. Sarkar—and they pointed out apparent flaws. Some of the commenters believed that the flaws were so numerous that they warranted a full investigation to discover their cause. This is how scientists decide whether to rely on the work of their peers, and that decision is critical, because science builds upon experiments of the past. One scientist's

[2] COA Case No. 326691.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

decision to commence a multi-million-dollar clinical trial inevitably depends upon the validity of the dozens or hundreds of experiments that came before. If that underlying research is flawed, the research that flows from it will also be flawed. And so it is imperative that scientists be permitted to discuss and debate their work, their findings, and their methodologies, and also that they be able to do so candidly and critically. Courts have long recognized that imperative and concluded that courtrooms are not the proper venue to resolve 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 suit would endanger this essential component of the scientific mission.

For these reasons, and those articulated below, the circuit court properly granted PubPeer's motion to quash with respect to the comments at issue here, and this Court should deny Dr. Sarkar's application for leave to appeal.

III. Counter-statement of substantial harm.

As stated above, PubPeer has filed its own interlocutory application for leave to appeal,[3] and if PubPeer's application is granted then it may serve the interest of judicial economy to consolidate Dr. Sarkar's interlocutory appeal with that of PubPeer. Viewing Dr. Sarkar's application alone, however, there is no reason for this Court to grant interlocutory review of an order that limits the plaintiff's means of pursuing discovery. Dr. Sarkar claims that the statute of limitations for some of his claims is running, but that is not the sort of harm that should justify this Court's interlocutory review, particularly where, as here, Dr. Sarkar has already taken advantage of alternative means of acquiring the information he seeks. He has served a subpoena

[3] COA Case No. 326691.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

upon Wayne State University to learn the identities of several individuals who reported concerns with his research. See Ex K (Subpoena to Wayne State Univ). The fact that Dr. Sarkar may not be able to comply with the statute of limitations or other procedural requirements as to all possible defendants is not a sufficient basis upon which to grant him leave to file an interlocutory appeal.

IV. Counter-statement of questions presented.

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

1. Without demonstrating the legal sufficiency of his complaint?

- i. The circuit court said "no."
- ii. Plaintiff–Appellant Dr. Sarkar says "yes."
- iii. 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?

- i. The circuit court said "no."
- ii. Plaintiff–Appellant Dr. Sarkar says "yes."
- iii. PubPeer says "no."

3. Where a prominent expert has agreed with the concerns raised by the anonymous commenters, and the plaintiff has not made any evidentiary showing to the contrary?

- i. The circuit court did not answer this question.
- ii. Plaintiff–Appellant Dr. Sarkar says "yes."
- iii. PubPeer says "no."

4. Based on tort claims other than defamation that are also based upon the commenters' protected speech?

- i. The circuit court said "no."

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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

iii. PubPeer says "no."

V. Counter-statement of facts.

PubPeer objects to several unfounded assertions in Dr. Sarkar's application for leave to appeal, particularly with regard to: the number of commenters who made statements about his work on PubPeer's site; any supposed connection between the commenters and the distributor of a flyer at Wayne State University; and the commenters' motivations in pointing out anomalies in Dr. Sarkar's research. PubPeer states the facts of this case as follows:

Dr. Sarkar is a prominent cancer researcher who has published over 430 original scientific articles in peer-reviewed journals and written more than 100 review articles and book chapters. Ex A at 3 (Compl ¶ 11). PubPeer, LLC operates a website—www.pubpeer.com—dedicated to post-publication peer review of scientific publications. *Id.* at 5 (Compl ¶ 23). Around September 5, 2013, users on PubPeer's site began commenting on Dr. Sarkar's papers. Ex B at 4 (Mot to Quash). The comments noted anomalies in a number of images used in Dr. Sarkar's papers. Those anomalies consisted mainly of similarities between images that purported to depict the results of different experiments.

On July 7, 2014, Dr. Sarkar's counsel sent a letter to PubPeer demanding that many of the comments be removed and that PubPeer disclose the identities of the commenters. Ex A at 22 (Compl ¶ 80). On July 10, PubPeer's moderators removed or edited several of the comments, including those pending review before being posted. *Id.*; Ex B at 4 (Mot to Quash). Dr. Sarkar filed this suit on October 9 against the anonymous commenters, as John and/or Jane Doe defendants, claiming defamation and related torts. See Ex A (Compl). On October 13, Dr. Sarkar obtained a subpoena for any identifying information that PubPeer possesses for the anonymous commenters. See Ex C (Jollymore Aff ¶ 2 Appx A).

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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 B (Mot to Quash). It attached to its motion an affidavit from Dr. John Krueger, a prominent expert in the forensic analysis of scientific images. See Ex D (Krueger Aff). Dr. Krueger examined the 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. *Id.* at 3–4 (Kruger Aff ¶ 7). Dr. Sarkar's opposition to the motion to quash essentially conceded the accuracy of Dr. Krueger's conclusions. See Ex E at 9 (Pl Resp to Mot to Quash). In other words, he essentially conceded that the images used in his papers contained the numerous anomalies that PubPeer's commenters had discovered.

The circuit court held a hearing on the motion to quash on March 5, 2015, and, as memorialized in a subsequent order, granted the motion with respect to every comment cited in Dr. Sarkar's complaint save one. See Ex G (Order Granting In Part Mot to Quash). Dr. Sarkar now seeks interlocutory review of that order.[4]

VI. Standard of review.

This Court reviews a trial court's decision on whether to compel discovery 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

[4] In a subsequent order dated March 26, 2015, the circuit court denied PubPeer's motion to quash with respect to the remaining comment and ordered PubPeer to produce identifying information associated with that comment subject to a protective order. By separate application, PubPeer is seeking leave to appeal from the March 26 order. See COA Case No. 326691. On April 16, 2015, the circuit court held a hearing on PubPeer's motion to stay enforcement of that order of disclosure. At the hearing, the court granted the motion and stayed the proceedings pending this Court's review.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

principled outcomes, or when it makes an error of law." *Cooley*, 300 Mich App at 263 (footnotes omitted). Issues of constitutional law are reviewed de novo. *Id*. at 263–64.

VII. Argument.

1. 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.

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

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

Furthermore, as this Court has recognized, the "right to speak anonymously applies to those expressing views on the Internet." *Ghanam*, 303 Mich App at 533.

ii. 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.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Because the Constitution safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to unmask anonymous speakers through the subpoena power must 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 opinions regarding the showing that must be made. See *id.*; *Cooley*, 300 Mich App 245. Under *Ghanam* and *Cooley*, when a defamation plaintiff seeks to unmask an anonymous defendant, the court must first determine whether the complaint is legally sufficient. A legally sufficient defamation complaint is one that "claim[s] with specificity . . . the exact language that the plaintiff alleges to be defamatory," *Cooley*, 300 Mich App at 262, and that pleads statements that are "actually capable of defamatory meaning," *Ghanam*, 303 Mich App at 544. If a plaintiff does not meet these requirements, then the court must quash the subpoena that would unmask the anonymous speaker.

When the anonymous defendant is participating in the litigation, as in *Cooley*, that defendant may himself or herself initiate that review through a motion for summary disposition filed under MCR 2.116(C)(8). When the anonymous defendant is *not* participating—as here and in *Ghanam*—the Court must undertake that review of its own initiative or upon a motion filed by the third-party recipient of the subpoena in question. As the Court said in *Ghanam*, "[t]his evaluation is to be performed even if there is no pending motion for summary disposition before the court." *Id.* at 541.

Furthermore, this Court has held that, even if the plaintiff's complaint is legally adequate, courts may consider whether "the weight of the defendant's First Amendment rights" nonetheless constitutes "good cause" to refuse to enforce a subpoena that seeks to unmask the speaker. *Cooley*, 300 Mich App at 264–66.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

iii. The participation of one of the anonymous defendants does not alter the analysis to permit unmasking without testing the sufficiency of Dr. Sarkar's complaint.

Dr. Sarkar's leave application 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, e.g., Pl Br at 6–7; Ex E at 8 (Pl Resp to Mot to Quash). This reflects a basic misunderstanding of this Court's decisions in *Cooley* and *Ghanam*. Those decisions sought to balance a plaintiff's interest in pursuing his or her complaint with a speaker's constitutional right to remain anonymous. The balance that they arrived at was simple: courts must assess the legal sufficiency of a defamation plaintiff's complaint *before* stripping a speaker of his or her right to remain anonymous. See *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)."); *Ghanam*, 303 Mich App at 530 ("the trial court is required to analyze the complaint under MCR 2.116(C)(8)").

To be sure, the circumstances in *Cooley* and *Ghanam* differed from one another in an important way, and so, as explained below, the rules they set forth differ slightly. But they both held that defamation plaintiffs should not be allowed to strip a speaker of his or her constitutional right to remain anonymous without at least demonstrating the legal sufficiency of their claims. Indeed, the argument that Dr. Sarkar defends here—that a constitutional right may be deprived based on a complaint that is *legally deficient*—is not simply wrong, but perplexingly so. What legitimate interest could a plaintiff have in unmasking a defendant when that plaintiff has not even pleaded a legally sufficient claim? Dr. Sarkar does not and cannot answer that question, because there is no such interest. In any event, *Cooley* and *Ghanam* have already resolved this question.

A plain reading of those two cases makes this point clear. In *Cooley* and *Ghanam*, this Court considered requests by defamation plaintiffs to unmask anonymous defendants. As noted

RECEIVED by MCOA 4/17/2015 12:10:18 PM

above, those two cases differed from one another in an important respect. In *Cooley*, the plaintiff already knew the identity of the defendant being sued, and that defendant had appeared in court to dispute the charge of defamation and to protect his identity from further disclosure. *Cooley*, 300 Mich App at 252. In *Ghanam*, however, the plaintiff did not know the identities of the anonymous defendants, and those defendants were not before the court. Instead, the third party being subpoenaed for their identities was defending their anonymity. 303 Mich App at 527.

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

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

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Ghanam, 303 Mich App at 541; see *id.* at 539 ("[I]n *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit.").[5]

In short, both *Cooley* and *Ghanam* provided for review of the legal sufficiency of a defamation plaintiff's complaint *before* unmasking. The critical difference is that *Cooley* permitted a participating defendant to initiate that review, whereas *Ghanam* mandated that trial courts do so upon their own initiative, or upon the motion of a subpoeaned third party, when the defendant has not appeared to do so.

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

---

[5] *Ghanam* also held that a defamation plaintiff "must have made reasonable efforts to provide the anonymous commenter with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity. That means that at a minimum, if possible, the plaintiff must post a message on the same message board or other forum where the alleged defamatory message appeared, notifying the anonymous defendant of the legal proceedings." *Id.* at 541. Dr. Sarkar has never alleged that he has complied with this requirement, and it does not appear that he has. Doing so would be trivial: Dr. Sarkar would simply need to post a message on each of the PubPeer comment threads he alleges to be defamatory. That he has not done so is reason enough to deny his application for leave to appeal the circuit court's order granting PubPeer's motion to quash. See *id.* at 542–43 ("Because plaintiff did not show that he made reasonable attempts to inform the anonymous defendants of his efforts to discover their identities, he has not met the first requirement. Therefore, on this basis alone, the trial court erred by not granting Munem's motion seeking a protective order.").

RECEIVED by MCOA 4/17/2015 12:10:18 PM

The participation of that single Doe defendant does not significantly change the analysis. At most, it may have provided the circuit court a basis to defer resolution of PubPeer's motion to quash with respect to *that Doe defendant's* comments, until the court resolved his or her motion for summary disposition. But that defendant's participation does not provide a basis to unmask all of the *other* commenters on PubPeer's site who are, as in *Ghanam*, not participating in this litigation and whose right to anonymity is not represented by the single participating defendant. Again, those commenters' protection comes, if at all, from application of *Ghanam* to test the sufficiency of the complaint's allegations against them.

iv. A protective order would not protect the anonymous commenters' First Amendment right to remain anonymous.

Dr. Sarkar incorrectly claims that "any defendant's interest in privacy can be protected by an appropriate protective order." See Pl Br at 10. That argument was rejected by both *Cooley* and *Ghanam*, and for obvious reasons. The First Amendment protects the right to remain anonymous primarily so that an anonymous speaker can avoid being unmasked by the *subject* of his commentary. Thus, 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. In other words, the primary purpose of the right to anonymity would be thwarted by the protective order that Dr. Sarkar proposes, and lawful anonymous speech would inevitably be chilled as a result.

Dr. Sarkar appears to have derived his contrary and counter-intuitive rule—that anonymity can be preserved by outing an anonymous critic to solely the subject of that criticism—from the factual peculiarity of *Cooley*. The plaintiff in that case already knew the identity of the anonymous defendant. Because the Court could not order the plaintiff to forget the defendant's name, there was no way for the Court to provide full relief to the defendant. Indeed,

RECEIVED by MCOA 4/17/2015 12:10:18 PM

the plaintiff argued that no relief at all was available because the defendant's anonymity had been "destroyed." *Cooley*, 300 Mich App at 254. The Court rejected that argument, however, holding that, although anonymity could not be restored, a protective order could prevent *further* harm by limiting *further* disclosure. *Id.* at 254–55. Critically, though, the Court did *not* hold that the availability of a protective order eliminated the need to test the legal sufficiency of a defamation plaintiff's complaint before unmasking. Quite the opposite: it held that anonymous defendants participating in a lawsuit may challenge subpoenas that would reveal their identities through a motion for a protective order *and* a motion for summary disposition. *Id.* at 264–67. And subsequently, this Court held in *Ghanam* that when an anonymous defendant is not before the court, the MCR 2.116(C)(8) standard governs whether the plaintiff may use the discovery process to unmask the defendant. 303 Mich App at 541.

For these reasons, the circuit court correctly tested the legal sufficiency of Dr. Sarkar's complaint before unmasking PubPeer's anonymous commenters.

2. The circuit court correctly held that Dr. Sarkar's defamation claim is not legally sufficient and that unmasking PubPeer's commenters would therefore be unconstitutional.

Under *Cooley* and *Ghanam*, Dr. Sarkar may not unmask PubPeer's commenters unless his claim of defamation would survive a motion for summary disposition under MCR 2.116(C)(8). The circuit court held that Dr. Sarkar's complaint would not satisfy that standard. Dr. Sarkar's application for leave does not actually challenge that holding; instead, it focuses on the circuit court's procedural rulings, primarily its interpretation of *Ghanam* and *Cooley*. Nevertheless, the circuit court's holding was correct. As explained more fully below, Dr. Sarkar's complaint is legally inadequate for two primary reasons.

First, he failed to plead his claim of defamation with specificity. Many of the PubPeer comments he complains of are not reproduced at all in the complaint or only in short fragments

RECEIVED by MCOA 4/17/2015 12:10:18 PM

surrounded by his own exaggerated characterizations. See, e.g., Ex A at 9, 12–13 (Compl ¶¶ 40(a)–(b), 42–47). Moreover, the complaint claims that unknown individuals distributed an allegedly defamatory flyer on the campus of Wayne State University and sent an allegedly defamatory "series of emails" to the University of Mississippi—but it does not reproduce that flyer or identity even a single word from this "series of emails." See *id*. at 20 (Compl ¶¶ 67, 69). These pleading failures alone justified the circuit court's order quashing the subpoena with respect to most of the claims in the complaint.

Second, none of the statements pleaded or referred to in the complaint are capable of defamatory meaning as a matter of law. Notwithstanding Dr. Sarkar's failure to plead his claim of defamation with specificity, the Court can still determine whether the PubPeer comments and the flyer—though not the "series of emails"—are defamatory, because the comments and the flyer are now in the record. PubPeer itself submitted the full text of all of comments, see Ex C (Jollymore Aff), and the circuit court prompted Dr. Sarkar to produce a copy of the flyer to PubPeer at the hearing held on March 5, 2015, see Ex I (Flyer Allegedly Distributed at Wayne State Univ).[6]

RECEIVED by MCOA 4/17/2015 12:10:18 PM

---

[6] Strangely, Dr. Sarkar argues that the circuit court erred in considering the full text of the comments and the flyer. See Pl Br 11, 13. In doing so, the circuit court was merely following this Court's precedent in *Ghanam*. There, the plaintiff also failed to plead his claim of defamation with specificity, but the Court nonetheless considered the statements, which were later put into the record, to determine whether permitting the plaintiff to amend his complaint to include them would be futile. See *Ghanam*, 303 Mich App at 543 ("Thus, even 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.").

If Dr. Sarkar continues to oppose consideration of the full text of the comments as well as the flyer, the proper remedy would simply be to deny leave to appeal based on his failure to plead his claim of defamation with specificity. *Id.* ("Here, the alleged defamatory statements were not identified in plaintiff's complaint. Instead, plaintiff only (and for the first time) cited the alleged defamatory statements in his response to Munem's motion for a protective order. Thus,

As is evident from a review of the comments and the flyer, none is capable of defamatory meaning. Despite Dr. Sarkar's repeated claim that PubPeer's commenters accused him of "research misconduct," not a single comment makes that accusation or anything remotely approaching it. Instead, the comments come in three general categories: (1) the majority simply note anomalies in images used in Dr. Sarkar's research papers; (2) several opine that the anomalies warrant further investigation; and (3) a handful consist of hyperbolic and sarcastic discussion of the anomalies, consistent with the sort of Internet banter held not to be actionable in *Ghanam*. As explained below, there is nothing defamatory about any of these comments. As for the flyer, it is similarly incapable of defamatory meaning. Its predominant—and, indeed, only discernible—message is that it is an "academic expression of concern" about Dr. Sarkar's research. As a number of courts have held, expressions of concern are not defamatory. Beyond that, the flyer is an inscrutable jumble of text that carries no apparent meaning, let alone a defamatory one.

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

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), quoting Gatley, Law & Practice of Libel & Slander 467 (1924 ed.). Moreover, the requirement of specificity is a constitutional safeguard that facilitates prompt dismissal of claims directed at protected speech. See *Cooley*, 300 Mich App at 262 ("[S]ummary disposition is an essential tool to protect First Amendment rights."). To meet this standard, a defamation plaintiff

defendants were entitled to summary disposition under MCR 2.116(C)(8), and it was improper to permit plaintiff to depose Munem.").

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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).

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 A 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 A at 12 (Compl ¶ 41) ("At https://pubpeer.com/publications/16546962 there are comments that conclude that certain figures are 'identical' to others, accusing him of research misconduct."); *id.* (Compl ¶ 44) ("At https://pubpeer.com/publications/2D67107831BCCB85BA8EC45A72FCEF, another discussion takes place among anonymous posters, accusing Dr. Sarkar of 'sloppiness' of such magnitude that it calls into question the scientific value of 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). Finally, 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 A at 10–14 (Compl ¶¶ 40(d), 48); see also *Royal Palace Homes*, 197 Mich App at 56–57 ("Defendants do

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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 A 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). Absent the screenshot and the full text that accompanies it, it is impossible to determine whether Dr. Sarkar's claim of defamation by implication is legally adequate. See *Locricchio v Evening News Ass'n*, 438 Mich 84, 122; 476 NW2d 112 (1991) ("[C]laims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.").

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 A 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 and the flyer).[7]

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

ii. The statements Dr. Sarkar complains of are not capable of defamatory meaning as a matter of law.

[7] Even if Dr. Sarkar had pleaded the flyer and the "series of emails," they would not provide a basis to unmask PubPeer's commenters. As explained in PubPeer's recently filed application for leave to appeal from a different order of the circuit court, they would, at most, provide a basis to unmask only the distributor of the flyer and the sender of the emails. See COA Case No. 326691.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Even if Dr. Sarkar had pleaded his claim of defamation with specificity, 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 remotely approaching it. Rather, as explained fully below, the comments fall into three general categories, none of which is capable of defamatory meaning.

"Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide." *Ghanam*, 303 Mich App at 544. To be actionable, an allegedly defamatory statement "must be 'provable as false.'" *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998), quoting *Milkovich v Lorain Journal Co*, 497 US 1, 17–20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). It may not be mere "sarcas[m]," *Ghanam*, 303 Mich App at 550, "rhetorical hyperbole," *Greenbelt Co-op Publ'g Ass'n, Inc v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), or "[e]xaggerated language," *Hodgins v Times Herald Co*, 169 Mich App 245, 254; 425 NW2d 522 (1988). And it must convey a materially false fact that a "reasonable fact-finder could conclude . . . implies a defamatory meaning." *Smith*, 487 Mich at 128.[8]

The nature and venue of the statements is also critical: "Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam*, 303 Mich App at 546–

[8] In his application, Dr. Sarkar confuses the determination of defamatory meaning with the standard for reviewing a complaint. Pl Br at 12–13. 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. Courts simply consider the plain meaning of the words and determine whether they are capable of defamatory meaning as a matter of law. This is a strictly legal question. *Ghanam*, 303 Mich App at 544.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

47. This is especially true for a forum like PubPeer, which hosts discussion of published articles. As the D.C. Circuit explained, "there is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." *Moldea v New York Times Co*, 306 US App DC 1, 6; 22 F3d 310 (1994). "[W]hile a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." *Id.*

In addition to pleading actionable defamation, "[a] plaintiff must also comply with constitutional requirements that depend on 'the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.'" *Cooley*, 300 Mich App at 262 (internal citation removed). As PubPeer has discussed in its application for leave to appeal, Dr. Sarkar is a limited-purpose public figure. See COA Case No. 326691. Settled First Amendment jurisprudence prohibits a public official from recovering damages for a defamatory falsehood unless he proves that the statement was made with "actual malice." *NY Times Co v Sullivan*, 376 US 254, 280–81; 84 S Ct 710; 11 L Ed 2d 686 (1964). Furthermore, because Dr. Sarkar's cancer research and any anomalies within it are "'subject[s] of general interest and of value and concern to the public,'" the PubPeer commenters' speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v Phelps*, 562 US 443; 131 S Ct 1207, 1211–15; 179 L Ed 2d 172 (2011) (internal citation removed).

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 comments on PubPeer's site identify anomalies in the images in Dr. Sarkar's publications, primarily instances in which two images purporting to depict the results of different experiments look "similar." Such statements are not capable of defamatory meaning for two reasons.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

First, those comments convey only inherently subjective opinions, not provably false facts. Many of the comments are phrased in this general style: "When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357." Ex A at 16–17 (Compl ¶ 55).[9] Whether two images "look[] similar," however, is entirely a matter of subjective opinion, and thus not provably false. Even for those comments that express greater confidence in the similarity between the images being compared, see, e.g., *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 C 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 the similar images in a single image file to allow comparison, see, e.g., *id.* ("Check this out: same bands for different time conditions http://i.imgur.com/4qJBeS7.png http://i.imgur.com/UaeqmWb.png.").

Second, even if the comparisons conveyed provably false facts, those facts are not defamatory. They do not, as a matter of law, "'tend[] so to harm the reputation of [the plaintiff] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Smith*, 487 Mich at 113. That is because the fact of similarity between images does not, on its own, suggest any impropriety. Instead, it invites a scientific discussion.

[9] See also Ex C 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.").

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Before relying on the work of their peers in arriving at their own conclusions or in designing their own future experiments, scientists debate the merit of the work. Courts are not the proper venue to mediate the terms of that debate. See *ONY, Inc*, 720 F3d at 496 ("We conclude that, as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation.").

Significantly, Dr. Sarkar has conceded that his claim of defamation is not based on the allegations of similarities in the images in his papers. See, e.g., Pl Br at 2 ("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."); Ex E at 9 (Pl Resp to Mot to Quash) ("This case, however, is not about blots.").

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

A number 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 A 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"); *Haase v Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982) ("I am here to investigate" does not "rise to the level of defamation."); *Varrenti v Gannett Co*, 33 Misc 3d 405, 412–13; 929 NYS2d 671 (2011) (holding that comments that "call[ed] for

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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 seven of the statements express only opinions, and not provably false facts.[10] For example, one comment states that "The last author is now correcting 'errors' in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999–2014), which were all posted in PubPeer." Ex A at 11 (Compl ¶ 40(d)). The first sentence is apparently 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.

[10] See Ex A 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.* ("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.").

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Several other comments express only sarcasm or rhetorical hyperbole, not actionable defamation.[11] 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.* ("someone 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," *Ghanam*, 303 Mich App at 550, does not support a claim of defamation. 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." Ex A at 11 (Compl ¶ 40(d)). If the sarcasm were not evident enough in the first sentence, the final one leaves no doubt. See *Ghanam*, 303 Mich App at 549 ("The use of the ':P' emoticon makes it patently clear that the commenter was making a joke.").

[11] 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.* ¶ 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.* at 11 (Compl ¶ 40(d)) ("just letting you know that the award for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange. [website link]."); *id.* ("It's not hard to imagine why Wayne State may not have fought to keep him. And presumably the movers and shakers at the University of Mississippi Medical Center didn't know that they should check out potential hires on PubPeer (they just counted the grants and papers). I wonder which institution gets to match up NIH grants with papers on PubPeer. It can only be a matter of time, grasshopper, but that time may still seem long. You saw it first on PubPeer."); *id.* 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'?").

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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

During the March 5 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 University, 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 Ex I (Flyer Allegedly Distributed at Wayne State Univ). 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*. The flyer discloses the number of comments posted for each article, but the text of those comments does not appear anywhere on the flyer, so the basis for the "ACADEMIC EXPRESSION OF CONCERN" is unclear. Regardless, that message is not defamatory. Expressions of concern are quintessentially subjective opinions.[12] A very recent case from the U.S. District Court for the District of Massachusetts is squarely on point. In *Saad v American Diabetes Association*, a scientist sued a research journal for defamation based on its "expression of concern to alert readers to questions about the reliability of data" in the scientist's articles. Slip Op at 3, No 1:15-cv-10267-TSH, 2015 WL 1000407 (D Mass, March 5, 2015).[13] Like Dr. Sarkar, that scientist conceded "that mistakes had been made in the treatment of digital

[12] See *Ornatek v Nevada State Bank*, 93 Nev 17, 20; 558 P2d 1145 (Nev, 1977) ("McDaniel said nothing to officers of the First National Bank which carried a defamatory meaning. His concern . . . is simply an expression of concern."); *Slightam v Kidd*, 120 Wis 2d 680; 357 NW2d 564 (Wis App, 1984) (holding that defendant's statements "were nondefamatory as a matter of law and represent an expression of concern, opinion or fair comment").

[13] The full opinion is attached as Exhibit J.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

images in some of [his] articles," which, the court reasoned, "would certainly provide a basis for the [journal's] concern." *Id.* at 3 n.2. The court held that:

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

Id. at 3. The same is true here. 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 stated that the flyer implies that U.S. Senator Charles Grassley is investigating him, Ex A 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 Ex I (Flyer Allegedly Distributed at Wayne State Univ). 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.[14]

For these reasons, the comments at issue are simply not actionable defamation. 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.

---

[14] In any event, Dr. Sarkar has never explained why the fact that PubPeer comments are alluded to in the flyer means that he is entitled to unmask the individuals who posted those comments on PubPeer's website.

RECEIVED by MCOA 4/17/2015 12:10:18 PM

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

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 D at 3–4 (Krueger Aff ¶ 7). Dr. Krueger went even further: while noting that "PubPeer's counsel did not ask me to determine whether the fact that the images I examined are not authentic is evidence of research misconduct," 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, the concerns are almost certainly valid and, therefore, not actionable.

As is apparent from the transcript of the hearing on PubPeer's motion to quash, the circuit court did not actually consider Dr. Krueger's affidavit in granting PubPeer's motion in part. See Ex F (Tr of March 5 Hr'g). Thus, there is nothing for Dr. Sarkar to appeal with respect to Dr. Krueger's affidavit.

Nevertheless, it bears mentioning that, had the circuit court been inclined to order the unmasking of PubPeer's commenters, it would have been constitutionally required to consider

RECEIVED by MCOA 4/17/2015 12:10:18 PM

Dr. Krueger's affidavit and to have required Dr. Sarkar to respond by substantiating his claims with a prima facie evidentiary showing. The vast majority of jurisdictions to have considered the question require such an evidentiary showing prior to unmasking to safeguard the constitutional right to anonymity. See *Ghanam*, 303 Mich App at 537 ("Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*, *Cahill*, or a modified version of those standards."). Absent such a requirement, defamation plaintiffs could successfully overcome the right to anonymity through artfully pleaded complaints, even if they had no realistic chance of proving their case. It is true that this Court has yet to embrace that higher evidentiary standard, and that neither *Cooley* nor *Ghanam* required the plaintiffs before them to substantiate their claims with evidence. But neither case dealt with a situation like this one, in which: (1) an expert has essentially confirmed that the concerns articulated by the commenters on PubPeer's site are valid and merit further investigation; (2) the plaintiff thus has no prospect of success unless he can show that the expert's view is provably false and, in fact, false; and (3) the only evidence that could arguably approach that showing is the original data from the plaintiff's experiments, which are in his sole possession and yet not proffered by the plaintiff in support of his case. It is in precisely such circumstances that the requirement embraced by nearly all courts to have considered the issue—that defamation plaintiffs seeking to unmask anonymous commenters substantiate their claims with evidence—is most needed to safeguard the right to anonymity.

The circuit court would have been required to consider Dr. Krueger's affidavit for another reason. Both *Cooley* and *Ghanam* made clear that *two* procedures protect the right to anonymous speech: the summary disposition standard set out in MCR 2.116(C)(8) and the "good cause" standard for protective orders. Under the second procedure, courts may balance a

RECEIVED by MCOA 4/17/2015 12:10:18 PM

plaintiff's interest in unmasking with a defendant's interest in remaining anonymous. See *Cooley*, 300 Mich App at 268 ("The trial court appears not to have considered whether or to what extent to protect Doe 1's identity after it determined not to quash the subpoena. On remand, the trial court should consider whether good cause exists to support Doe 1's request for a protective order.") The Michigan Supreme Court has defined "good cause" as a "satisfactory, sound or valid reason." See *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks omitted). Dr. Krueger's affidavit would certainly be relevant to the "good cause" analysis. It makes clear that Dr. Sarkar's interest in unmasking PubPeer's commenters is ultimately marginal, given the unlikelihood that he could show Dr. Krueger's conclusions to be false. The circuit court would have had to balance that prospect against the PubPeer commenters' constitutional right to remain anonymous. The affidavit reinforces how heavily that balance weighs against unmasking.

Again, the circuit court did not consider Dr. Krueger's affidavit even though it would have been required to do so before unmasking PubPeer's commenters. There is thus no error necessitating interlocutory review.

4. The circuit court properly recognized that the First Amendment limits the unmasking of anonymous speakers no matter the name of the tort.

Dr. Sarkar has repeatedly argued that his causes of action other than defamation provide an independent basis to unmask PubPeer's users. See, e.g., Pl Br at 14–16; Ex E at 9–12 (Pl Resp to Mot to Quash). But this argument misses the point. It is true that his other claims have different elements than defamation. But all of those claims are predicated on *speech*—whether the posting of comments, the distribution of the flyer, or the sending of emails. And when a plaintiff seeks damages for speech, the First Amendment unquestionably applies. It protects subjective expressions of opinion, not just from liability for defamation, but from liability for any

RECEIVED by MCOA 4/17/2015 12:10:18 PM

of the torts that Dr. Sarkar has pleaded. This is settled constitutional law that Dr. Sarkar's briefs have consistently ignored.

Many cases make this point unmistakably clear. In *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396, 403; 538 NW2d 24 (1995), this Court dismissed a claim of tortious interference with a business relationship because the alleged interference consisted of "expressions of opinion, protected under the First Amendment." See also *id.* at 401 ("[W]here the conduct allegedly causing the business interference is a defendant's utterance of negative statements concerning a plaintiff, privileged speech is a defense."). Likewise, in *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988), the U.S. Supreme Court held that a claim of intentional infliction of emotional distress cannot be predicated upon speech "without [a] showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" And in *Ireland*, 230 Mich App at 624–25, this Court applied the same First Amendment limitations to claims of false light invasion of privacy, defamation, and intentional infliction of emotional distress.[15]

These cases all stand for the unremarkable proposition that the limitations on lawsuits against speech protected by the First Amendment—primarily, that the statements must be provably false rather than subjective opinion—cannot be overcome by changing the name of the tort. Because the speech at the core of Dr. Sarkar's suit is protected by the Constitution, it cannot serve as the basis for his suit or for unmasking PubPeer's commenters.

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

RECEIVED by MCOA 4/17/2015 12:10:18 PM

VIII. Conclusion.

For the reasons set forth above, PubPeer respectfully requests that this Court deny Dr. Sarkar's application for interlocutory review and/or affirm the circuit court's March 9, 2015 order granting in part PubPeer's motion to quash.

Respectfully submitted,

/s/ Daniel S. Korobkin

Alex Abdo*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
aabdo@aclu.org

Nicholas J. Jollymore*
Jollymore Law Office, P.C.
One Rincon Hill
425 First Street
San Francisco, CA 94105
(415) 829-8238
nicholas@jollymorelaw.com

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

* admitted pro hac vice by circuit court

Drafting assistance provided by Samia Hossain, Brennan Fellow, American Civil Liberties Union Foundation, New York, NY (recently admitted to the New York State bar).

Counsel for PubPeer, LLC

Dated: April 17, 2015

RECEIVED by MCOA 4/17/2015 12:10:18 PM