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STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE  
FAZLUL SARKAR,  
Plaintiff,  
vs. Case No. 14-013099-CZ  
JOHN and/or JANE DOE,  
Defendant.

\_\_\_\_\_ /

MOTIONS

HELD BEFORE THE HONORABLE SHEILA ANN GIBSON  
COURTROOM 1719  
Detroit, Michigan - Thursday, March 19, 2015

APPEARANCES:

NICHOLAS ROUMEL P37056  
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Ann Arbor, Michigan 48104

Appearing on Behalf of the Plaintiff

NICHOLAS JOLLYMORE  
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Appearing on Behalf of Defendant PubPeer

(Appearances continued)

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H. WILLIAM BURDETT, JR. P63185  
14950 E. Jefferson Avenue, Suite 200  
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Appearing on Behalf of Defendant Doe

REPORTED BY: Sherry E. Baker, CSR-1326

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I N D E X

PLAINTIFF'S WITNESSES

P A G E

N O N E

DEFENSE WITNESSES

N O N E

E X H I B I T S

NUMBER AND DESCRIPTION

IDENTIFIED

ADMITTED

N O N E

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1 Detroit, Michigan  
2 Thursday, March 19, 2015  
3 At About 11:08 a.m.

4 THE CLERK: This is Case Number  
5 14-013099, Sarkar versus Doe.

6 THE COURT: Appearances.

7 MR. BURDETT: Good morning, Your  
8 Honor. Bill Burdett on behalf of the John Doe,  
9 defendant.

10 MR. JOLLYMORE: Nicholas Jollymore  
11 on behalf of PubPeer.

12 MR. ROUMEL: Mr. Nicholas Roumel on  
13 behalf of the plaintiff, Dr. Sarkar.

14 THE COURT: Okay. Refresh my memory  
15 where we left off.

16 MR. ROUMEL: Well, we issued a  
17 subpoena, Your Honor, and they moved up PubPeer,  
18 the nonparty --

19 THE COURT: I remember that. Remind  
20 me where we left off.

21 MR. ROUMEL: So you asked for the  
22 supplemental brief, that one paragraph where we  
23 could get the identity of the person who posted  
24 that comment. I think it's paragraph 40C of our  
25 Complaint. And you asked for supplemental

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1 briefing which we exchanged.

2 We also have a Motion to Extend  
3 Summons while all of this is being played out.  
4 They wanted to extend their summons. That's a  
5 separate motion.

6 THE COURT: Wait a minute. Is that,  
7 who was that -- was that noticed up?

8 MR. ROUMEL: That is just a new one  
9 I filed and noticed up for today.

10 (Off the record)

11 MR. ROUMEL: We actually filed the  
12 stipulation first, but it was rejected because you  
13 have to file a motion on that. It's not opposed as  
14 far as I know, but that motion is up for today.

15 Then we have Mr. Burdett on behalf  
16 of his John Doe defendant who has a separate Motion  
17 for Summary Disposition which is presently  
18 scheduled March 31st. Prepared that and signed --

19 MR. BURDETT: Are we depending on  
20 the outcome of this motion because -- I actually  
21 have a Motion for -- which Mr. Roumel filed. It  
22 may be unnecessary to reach the conclusion of the  
23 summary disposition at this time. I withdraw it  
24 without prejudice if the Court is inclined to have  
25 the, if it Court's order from two weeks ago stands

1 insofar as there wouldn't be any need to reveal  
2 anyone because none of the statements that my  
3 client made would be revealed, and there would be  
4 no point in moving forward.

5 THE COURT: Okay. Now who did the  
6 motion for re -- 'cause we're sort of going around.

7 MR. ROUMEL: It probably makes sense  
8 for Mr. Jollymore to go first because it is really  
9 their Motion to Quash.

10 THE COURT: Okay.

11 MR. ROUMEL: -- unless you have an  
12 objection.

13 MR. JOLLYMORE: No, that's fine.

14 THE COURT: Let me get the Motion to  
15 Quash. And then do you want to, if we need to then  
16 deal with -- was your motion up?

17 MR. BURDETT: My motion is not up.  
18 It's scheduled for March 31st. Mr. Roumel filed  
19 his response yesterday. My reply isn't due until  
20 next Tuesday, and then we will schedule it sometime  
21 in April --

22 THE COURT: Okay, because you're not  
23 available --

24 MR. BURDETT: On March 31st, I'm  
25 going to be in federal trial.

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1 THE COURT: So that may need to be  
2 adjourned. And then there is also you said a  
3 Motion to Extend Summons, correct?

4 MR. ROUMEL: Yes. That's up for  
5 today.

6 (Off the record)

7 THE COURT: I don't have a copy of  
8 it.

9 MR. ROUMEL: The Motion to Extend?

10 THE COURT: Right, right, and she  
11 says she doesn't have a e-praeceipe.

12 MR. ROUMEL: I have it.

13 THE COURT: Let's just deal with  
14 this. Okay. Now where we left, it was relative  
15 to -- we entered an order from --

16 MR. JOLLYMORE: We entered an order  
17 where Your Honor quashed the subpoena for the  
18 identities of people who posted comments on  
19 Pubpeer.com except for one, I think you asked us to  
20 come back.

21 THE COURT: Okay. And we were going  
22 to make a determination as to whether or not that  
23 person's identity needs to be disclosed relative to  
24 paragraph --

25 MR. JOLLYMORE: Exactly.

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1 THE COURT: All right.

2 MR. JOLLYMORE: So what I'd like to  
3 do is walk the Court through the language of the  
4 statement. I mean I have printed -- it's also in  
5 page three of our papers and page two.

6 THE COURT: Of your, of your --

7 MR. JOLLYMORE: Of our brief.

8 THE COURT: The supplemental?

9 MR. ROUMEL: Supplemental.

10 THE COURT: Okay.

11 MR. ROUMEL: Find it on page three.

12 THE COURT: Yes.

13 MR. JOLLYMORE: So just to go back a  
14 little bit, Michigan law tells us that the standard  
15 on a motion to quash a subpoena for anonymous  
16 speech is you look at the sufficiency of the  
17 pleadings.

18 And what that means in this case is  
19 you look at under Rule (C)(8) whether plaintiff has  
20 stated a claim by pleading this language; that is,  
21 is it defamatory because it is a libel action.

22 And in order to determine whether  
23 it's defamatory, you look at the language. Now the  
24 question, the issue of whether a statement is  
25 defamatory is a decision for the judge. The judge

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1 doesn't make a factual decision of whether it's  
2 true or false, but the judge looks at the language  
3 and interprets the language.

4 It's a question of interpreting  
5 language which is why the judges rule as a matter  
6 of law 'cause you'll find a large body of  
7 precedents saying this is defamatory. This is not  
8 defamatory. And we've cited some of those cases  
9 here.

10 THE COURT: Okay.

11 MR. JOLLYMORE: The Court makes that  
12 decision. Now when you look at the language, you  
13 will find the simple rule of reason. The question  
14 is what would the reasonable reader understand this  
15 language to mean?

16 And you look at the language first,  
17 and you can also look at inferences that can  
18 reasonably be made from the language, not wild  
19 speculation, but reasonable inferences that a  
20 reasonable reader would infer in understanding the  
21 meaning of this language.

22 THE COURT: Okay.

23 MR. JOLLYMORE: So this particular  
24 comment posted on PubPeer, there is three parts.  
25 There is a question. It has an answer. And then

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1 at the bottom, it has a cut and paste of an e-mail  
2 from Wayne State University.

3 So I'd like to go through the  
4 language, the reasonable reader standard and talk  
5 about what inferences could be made from this  
6 language without taking undue time.

7 So the first part of it is has  
8 anybody reported this to the institute. Now that's  
9 a question. And if you look at the language, no  
10 reasonable reader would understand that to defame  
11 Dr. Sarkar. He's not even mentioned.

12 THE COURT: Okay, but what led into  
13 that? What was the this that they were referring  
14 to?

15 MR. JOLLYMORE: If you look at the  
16 context in which this statement appeared, there are  
17 other posts on PubPeer.com that discuss  
18 similarities between images and different research  
19 studies that Dr. Sarkar had published.

20 There was a lot of discussion on  
21 PubPeer about why are these images similar. So  
22 read in context, the this has to refer to the  
23 similarity of images and questions that were raised  
24 about that and also Dr. Sarkar because it was his  
25 research. So those are reasonable inferences to

1 make -- (inaudible).

2 So then there's an answer to this  
3 question, and the answer is: On September and  
4 October of 2013, the president of Wayne State was  
5 informed several times.

6 On its face, that would not be  
7 defamatory, but the inference he made was that the  
8 president of Wayne State was informed about these  
9 questions about the similarity of images in Dr.  
10 Sarkar's research. That's not defamatory either --  
11 (inaudible) that issue.

12 But then let's go down to the cut  
13 and pasted paragraph that says the -- paragraph  
14 that says thank you for your e-mail. That's the  
15 one that raises the issue, that plaintiff raises  
16 the issue.

17 So what that statement does is it  
18 addresses an e-mail that was sent to Wayne State.  
19 This was a response to an e-mail. We don't know  
20 from whom that e-mail was sent, but a reasonable  
21 inference probably that it was sent by the person  
22 who posted this comment on PubPeer.

23 And what it says is thank you for  
24 your e-mail. We sent it to the appropriate person.  
25 So it says the e-mail was sent to someone.

1                   And at the bottom of it, it says, we  
2                   can't tell you whether this e-mail that contained  
3                   allegations resulted in an (inaudible).

4                   Now in the middle of it is the  
5                   sentence that Dr. Sarkar focuses on. It says, "As  
6                   you are aware, scientific misconduct investigations  
7                   are by their nature confidential".

8                   So I submit that this language on  
9                   its face is not defamatory. You need inferences in  
10                  order --

11                  THE COURT: Well, what about the  
12                  inference that he committed some scientific  
13                  misconduct? Because that's what I see. As you're  
14                  aware, scientific misconduct investigations are by  
15                  their nature confidential. So that would be  
16                  inferring that there was some scientific  
17                  misconduct.

18                  MR. JOLLYMORE: I think that's not a  
19                  reasonable inference, and I'll tell you why. One  
20                  is we don't have the e-mail that the poster  
21                  presumably sent to Wayne State. That's missing.  
22                  That's not here. PubPeer doesn't have it, I don't  
23                  believe. Dr. Sarkar doesn't have it.

24                  Wayne State has it. And if we  
25                  looked at that e-mail, we could tell if this

1       commenter made some defamatory allegations, like  
2       you're guilty of research misconduct, against Dr.  
3       Sarkar.

4                   THE COURT:    Okay.

5                   MR. JOLLYMORE:  May I just say one  
6       more thing, Your Honor?

7                   THE COURT:  (No response.)

8                   MR. JOLLYMORE:  I think a reasonable  
9       inference from the beginning of the second sentence  
10      in this passage is that whoever was there at Wayne  
11      State who referred this e-mail that we don't have  
12      to the appropriate person is a person whose job it  
13      is to refer e-mails for investigation about whether  
14      or not there was scientific misconduct.

15                   And that's the most I think it can  
16      reasonably be inferred from this that this person's  
17      job is to receive inquiries, and Wayne State  
18      encourages them, if you look at the --

19                   THE COURT:  Okay, but the fact of  
20      the matter remains is that this person saying this  
21      is supposed to be confidential, and this person  
22      made it public.

23                   MR. JOLLYMORE:  Investigations --

24                   THE COURT:  As you're aware --

25                   MR. JOLLYMORE:  -- but which person

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1 made it public?

2 THE COURT: Whoever the author of  
3 this yes, in September and October, the president  
4 of Wayne State was informed several times. The  
5 Secretary of the Board of Governors who is also --  
6 wrote back, you know. It's like somebody had  
7 access to this.

8 Like I said, this does raise -- to  
9 me I would say if this is confidential, this person  
10 put it out there. They put it out there to raise  
11 some sort of inquiry to the situation. And these  
12 things are supposed to be confidential, so he put  
13 it out here.

14 MR. JOLLYMORE: Actually if you look  
15 at the website -- we included the link in our  
16 papers -- Wayne State encourages people to submit  
17 inquiries, and those are not confidential. Please  
18 send us stuff about research if you have questions.

19 What this e-mail says is that  
20 whatever was referred here was sent off for a  
21 possible investigation of scientific misconduct.

22 It's not a conclusion. It's not  
23 even a statement that there was an allegation in  
24 the e-mail of scientific misconduct. It's just a  
25 statement of what happened when this e-mail

1 arrived.

2 THE COURT: But that would raise my  
3 eyebrows when I receive something like this.

4 MR. JOLLYMORE: Well, that's what  
5 plaintiff argues, but I don't think it's a  
6 reasonable inference. I think that plaintiff  
7 should look at this e-mail, should go to Wayne  
8 State and -- find out if it said this is  
9 misconduct, or if it said please look at the  
10 similarities between the images 'cause the only  
11 reasonable inference you can draw in this language  
12 I submit are that similarities were questioned and  
13 sent it to Wayne State.

14 And Wayne State sent it off a  
15 determination of whether it's scientific misconduct  
16 and said sorry, we can't do anymore about that  
17 because it's confidential.

18 MR. ROUMEL: Thank you, Your Honor.  
19 I'd like to do two things. First of all, try to  
20 bring us back to what I believe where we, I believe  
21 where we are at procedurally, and the second thing  
22 is to respond to counsel. Because of the flow, I  
23 think I want to respond to counsel first.

24 The most important thing to say is  
25 that Mr. Jollymore may be correct. His inference

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1 is something he is entitled to argue at a trial,  
2 but on summary disposition standard, all those  
3 inferences must be taken in the light most  
4 favorable to the plaintiff.

5 And the way that that is read, I  
6 believe the Court has raised some questions, it can  
7 be inferred. I have said, I have informed the  
8 president several times.

9 And then they talk about scientific  
10 misconduct investigations are, by their nature,  
11 confidential which they're also confidential by  
12 law. And Wayne does not deal with comments on  
13 whether inquiry into allegations are under way.

14 And as the Court pointed out, this  
15 person posted this to a public website. By law,  
16 any of those inquiries, you make a good faith  
17 allegation of scientific misconduct, it has to be  
18 confidential.

19 So right there, that's where you're  
20 talking the defamation. That may support our  
21 invasion of privacy count, and so that would  
22 entitle us to do that.

23 But it gets me back to what this  
24 motion is really about. We started out, we filed  
25 our lawsuit. We subpoenaed PubPeer. We just asked



1 for identifying information about who these people  
2 were. It's discovery.

3 This person by indicating that they  
4 made several inquiries to Wayne State to the  
5 president, it indicated a familiarity with Wayne  
6 State. It indicated a familiarity obviously with  
7 Dr. Sarkar's research.

8 This person may very well have  
9 knowledge about the person who distributed the  
10 fliers at Wayne State. It might not be the same  
11 person. It might be.

12 But here's a person simply in the  
13 spirit of discovery who has knowledge. I would be  
14 entitled to find out who this person is, to  
15 possibly depose this person. And if the person is  
16 not a defendant, I don't need to make them a  
17 defendant; but they have knowledge about the case,  
18 and as such, I'm entitled to depose them.

19 Now in this protective order under  
20 MCR 2.302, they, PubPeer, are entitled to come back  
21 and say we want some protection here. Dr. Sarkar  
22 is not asking to unmask this person at this point  
23 in the litigation.

24 We are happy to enter into a  
25 protective order that protects this person's

1 identity. We won't publicize it. We won't put it  
2 in any court papers. We just want to be able to  
3 deal with counsel and depose this person and find  
4 out what they want. If they're not a defendant, we  
5 don't bring them in.

6 Having said all that, there are some  
7 red flags in that e-mail that indicate that this  
8 person might very well be a defendant. But that's  
9 what discovery is all about, Your Honor, and that's  
10 what a plaintiff is entitled to when you file a  
11 lawsuit.

12 The final thing I do want to say is  
13 that there are really two main cases in Michigan on  
14 anonymity, and we talked about the last one. To  
15 summarize very briefly, we strongly believe this  
16 case is governed by the Cooley case, not the Ghanam  
17 case.

18 The main difference is Cooley  
19 applies if there is a defendant who is a peer who  
20 can assert a motion for summary because a party is  
21 the only one that can make a motion for summary.  
22 That's why Mr. Burdett is here. He represents the  
23 defendant.

24 Ghanam applies if there is no  
25 defendant. The reasoning is that if there is no

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1 defendant who's appeared, somebody should be able  
2 to stand in for those anonymous defendants and  
3 argue akin to a summary disposition motion.

4 Here it's not necessary, nor is it  
5 really permitted under our interpretation of the  
6 Cooley case for PubPeer to argue this summary  
7 judgment, summary disposition standards.

8 All they can do, as Cooley says, is  
9 argue for conditions to protect. Cooley says that  
10 Michigan Court Rules and the ability of the  
11 appearing defendant to argue summary disposition or  
12 -- protection.

13 And so in that spirit, we don't  
14 agree that this, that they can argue those summary  
15 disposition standards; but even if they can, if you  
16 take them in the spirit of all inferences in the  
17 plaintiff's favor, and if any meaning that can  
18 capably, I believe the standard is it can be  
19 capably read to support defamation in any way, then  
20 it could possibly be defamatory.

21 It could also support the  
22 intentional interference claim if that person  
23 distributed the fliers, and it could also support  
24 the invasion of privacy claim.

25 Again it's discovery -- protection,

1 and the person may not be a defendant.

2 MR. JOLLYMORE: May I respond, Your  
3 Honor?

4 THE COURT: Yes.

5 MR. JOLLYMORE: The standard that  
6 counsel says applies is not correct. Yes, indeed,  
7 the Court must read the allegations -- Complaint in  
8 a way most favorable to the plaintiff.

9 So we assume the standards are false  
10 -- the statements are false; but the rule of  
11 construing libel statements is a reasonable reader,  
12 not construing the statements that were published  
13 most favorably.

14 The plaintiff must look at the  
15 language and make a judgment of what would a  
16 reasonable reader understand this to mean. So  
17 that's not a correct statement of the law.

18 Counsel also says that this person  
19 obviously has a great familiarity with Wayne State.  
20 That's not the conclusion I would make. No.

21 I would draw the conclusion that  
22 whoever sent this e-mail sent it under their name  
23 and their title, Secretary of the Board of  
24 Governors, Executive Assistant to the President.  
25 That's a reasonable assumption, not that someone

1 because they know the title of someone has an  
2 intimate familiarity with Wayne State.

3 Now counsel says this is civil  
4 discovery. Let us look into this. Indeed it is,  
5 but there are special standards when counsel seeks  
6 to unmask the identity of an anonymous speaker  
7 because the First Amendment comes into play. So  
8 it's not just ordinary discovery.

9 If we're required to produce what  
10 information we have and if Mr. Roumel can depose  
11 this witness, it sends a signal that anybody who  
12 posts a comment on PubPeer is liable to be hauled  
13 into court and deposed by plaintiff's counsel.

14 That under cuts the mission of  
15 PubPeer which is to provide a forum where  
16 scientists can discuss science.

17 THE COURT: Okay. I understand, but  
18 still above what PubPeer's mission is, there still  
19 is the law that has to be adhered to relative to  
20 supporting claims for defamation, invasion of  
21 privacy and the like. Those legal premises have to  
22 be supported above and beyond what PubPeer's --

23 MR. JOLLYMORE: Mission.

24 THE COURT: -- mission, mission  
25 should be.

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1 MR. JOLLYMORE: Yes, but Michigan  
2 law tells us how to approach this. The Cooley case  
3 and the Ghanam case.

4 THE COURT: Right.

5 MR. JOLLYMORE: Now the Cooley case,  
6 counsel says, it could only, it applies because the  
7 defendant is before the Court. Well, this  
8 defendant, this, the person whoever it was that  
9 posted this is not one of Mr. Burdett's clients.

10 THE COURT: I mean does it say this  
11 defendant, or does it say a defendant?

12 MR. JOLLYMORE: Well, in Cooley,  
13 there was only one defendant, and that defendant  
14 was before the Court. And in fact, the identity of  
15 that defendant had been disclosed inadvertently by  
16 the website.

17 So the only obvious remedy was a  
18 protective (inaudible). And it didn't matter if he  
19 disclosed the identity of the Doe number one in  
20 that case to the plaintiff's counsel because that  
21 counsel already had it.

22 So issuing a protective order saying  
23 don't spread it any further is okay in that case,  
24 and that's what the Court said.

25 The Court also remanded it for

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1 reconsideration of the alternative Motion to Quash  
2 the Subpoena which in this case where there's no  
3 counsel other than PubPeer's counsel representing  
4 the poster of this one.

5 In this case, Cooley really doesn't  
6 apply. The facts are most closer to Ghanam. In  
7 Ghanam, the poster of the comment, was not -- and  
8 the Court said, what you do -- in fact, Cooley said  
9 this, too.

10 You look at the standard, to get  
11 back to Your Honor's comment, the standard of how  
12 we determine what the elements of civil discovery  
13 should be is a motion under 2.116(C)(8). The  
14 standards are summary disposition --

15 THE COURT: Okay --

16 MR. JOLLYMORE: Not that there's a  
17 summary disposition motion made --

18 THE COURT: Okay.

19 MR. JOLLYMORE: -- but if you look  
20 at that rule to determine the standards.

21 THE COURT: Okay, and then that  
22 takes us back to one, looking at the language, the  
23 rules of reason and what reasonable inferences  
24 could be drawn, correct?

25 MR. JOLLYMORE: Indeed, yes.

1 THE COURT: So that's where we are.  
2 That's the standard that we have to look to.

3 MR. JOLLYMORE: It is.

4 THE COURT: Okay.

5 MR. JOLLYMORE: Now I mean there is  
6 other arguments that counsel has raised, a couple  
7 of which I'd like to address.

8 THE COURT: Okay.

9 MR. JOLLYMORE: The issue of  
10 clients, now --

11 THE COURT: But you know, I don't  
12 think I'm at the client.

13 MR. JOLLYMORE: Pardon me.

14 THE COURT: I'm not even at the  
15 client. I'm not there. I'm here with the language  
16 that's set forth on the website. I don't even want  
17 to get to the flyer because the flyer isn't really  
18 germane in my mind to the motion that we have.

19 MR. JOLLYMORE: So all I can say is  
20 we have to be very careful that the inferences we  
21 make from this language don't even mention Dr.  
22 Sarkar.

23 And the only context that it appears  
24 in this discussion of generals and similarity is no  
25 special scientific misconduct anywhere in these



1 posts that making an inference that says just  
2 because Wayne State has a procedure for  
3 investigating scientific misconduct --

4 THE COURT: Well, someone asked the  
5 first writer that you cited on page three, the June  
6 18th one indicates has anybody reported because I'm  
7 sure there was a discussion that there was some  
8 discrepancies above.

9 And you know, I'm just dealing with  
10 what you gave me, but I'm sure you said there was  
11 some discussion about the images and the similarity  
12 of the images and not --

13 MR. JOLLYMORE: Yes -- full context  
14 of --

15 THE COURT: Right, and not knowing,  
16 you know, not being, this outside of my lane, as I  
17 usually say. All I can see is that there was a  
18 discussion, and someone questioned the validity of  
19 Dr. Sarkar's study. That's what it appears.

20 MR. JOLLYMORE: But look at the  
21 Michigan case law. Ghanam itself says the  
22 statement that I think I have to turn this over to  
23 the investigators, that's not defamatory.

24 THE COURT: No, I'm --

25 MR. JOLLYMORE: There is another

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1 Michigan state case appellate decision that says  
2 the statement in effect, I'm here to investigate.  
3 It's not defamatory.

4 So if they're questioning something  
5 about Dr. Sarkar's work and send it to Wayne State,  
6 all they're doing is asking for an investigation.

7 THE COURT: Oh, yeah, but see, you  
8 know --

9 MR. JOLLYMORE: By case law, that's  
10 not defamatory.

11 THE COURT: But the fact of the  
12 matter remains is that, even though we're looking  
13 at the summary disposition standard here, we're  
14 still dealing with a discovery request. This is a  
15 discovery request.

16 MR. JOLLYMORE: Yes, but special  
17 standards apply to this particular --

18 THE COURT: And I think, that's what  
19 I'm saying is that we are relying on, as you  
20 indicated, the summary disposition standard.

21 MR. JOLLYMORE: One more thing. The  
22 Ghanam case that we should be guided by, although  
23 they are both First Amendment decisions, the court  
24 said you both grew. Beyond that, you challenge the  
25 interests involved. The interest, the First

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1 Amendment interest of protecting anonymous speakers  
2 from retaliation or injury to their professional  
3 career versus the interest in finding out whether  
4 -- (inaudible; papers shuffling). And it's a  
5 weighty interest versus a not very significant.

6 So if you follow the law which is  
7 Ghanam and you look at the summary disposition  
8 standard which leads you to look at whether this is  
9 defamatory and apply the reasonable reader test and  
10 then you balance, further balance the First  
11 Amendment interests against the importance of  
12 discovery.

13 I have to say just turning over what  
14 identifying information that PubPeer has to Dr.  
15 Sarkar's counsel -- even if he says, okay, I won't  
16 tell anybody, all I want to do is depose the guy,  
17 has a very serious, chilling effect on the kind of  
18 speech that has made PubPeer a website that  
19 scientists are basically flocking to.

20 THE COURT: Mr. Roumel.

21 MR. ROUMEL: Yes, I can respond.  
22 There is language in Ghanam that says, specifically  
23 says no. When there is a defendant who can argue  
24 the summary judgment, the summary disposition  
25 standards, Cooley applies, not our case, Ghanam.

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1 And I put that language --

2 THE COURT: When there is a  
3 defendant?

4 MR. ROUMEL: I think the -- draw  
5 distinction about the number of defendants. I  
6 don't think it mattered because the reasoning  
7 behind the case was there's going to be a defendant  
8 to argue the summary disposition.

9 And that's why you don't need to  
10 argue summary disposition where this defendant, Mr.  
11 Burdett's, motion is up later, but we're arguing  
12 this motion alternatively.

13 We're saying even if you do apply  
14 those standards that we still should prevail  
15 because those inferences have to be drawn.

16 And it's not a rule of reason in  
17 Michigan. The Robbins (pht.) case says that the  
18 standard is sufficient. Any meaning is capable of  
19 defamatory meaning.

20 Once you look at the pleadings,  
21 accept all the pleadings as -- take all inferences  
22 in the plaintiff's favor. Any capable meaning  
23 that's defamatory, at this stage in the proceedings  
24 has to be accepted. So Cooley said kind of style  
25 it then as a protective order under 2.302.

1                   Let's take an analogy. Let's say  
2                   the person posted and said, I saw this shooting  
3                   downtown. And I saw this and that. I might want  
4                   to depose that person 'cause they're a witness  
5                   because they know about that shooting.

6                   Now maybe that person knows more  
7                   than they're letting on, what they posted. And  
8                   maybe as they investigate further, I'll find that  
9                   person might be worth bringing some sort of  
10                  complaint or action against.

11                  But for now, this person has shown I  
12                  have knowledge. I have made several complaints to  
13                  the president of Wayne State. And by the nature of  
14                  the response, they're saying allegations of  
15                  scientific misconduct are taken very seriously.

16                  The inference from that is that the  
17                  person has made an allegation of scientific  
18                  misconduct. The person has posted this on a public  
19                  website, and we know from federal regulations that  
20                  I quoted in my brief that they're just supposed to  
21                  be private.

22                  And so that person in and of itself  
23                  might be liable for invasion of privacy. And under  
24                  that basis, the defendant equally put defamation  
25                  aside.

1           So we're asking for something very  
2 narrow. We want the identity of this person. We  
3 want to keep this person's confidentiality. We are  
4 not interested in exposing them, but there's one  
5 thing.

6           If the Court would allow me to sort  
7 of make a conclusion about the first amendment. It  
8 is kind of ironic there. Thank you 'cause I know  
9 the Court probably -- but here's the thing.

10           The law protects public employees  
11 who -- from being fired in their job. That's what  
12 our firm does. Our firm is an employment law firm.  
13 We do this all the time. A public employee raises  
14 First Amendment protected speech, and they're  
15 retaliated against, the law protects them. They  
16 can't be fired.

17           PubPeer says right on their website  
18 the reason we're anonymous is because we are afraid  
19 for our jobs. But if they really believe that the  
20 First Amendment protects their speech, then they  
21 need to put their name out there and have the  
22 courage to go forward and say I can't be fired for  
23 what I'm saying because the First Amendment  
24 protects it.

25           But by their act of not identifying

1 themselves, they know deep in their hearts that the  
2 First Amendment doesn't protect. It doesn't  
3 protect them here. We are entitled to discovery.

4 MR. BURDETT: Your Honor, I have to  
5 make one quick comment. First of all, I do not  
6 represent, I have only filed an appearance with  
7 regard to 14 statements. Paragraph 40C that is at  
8 issue today is not one I represent. I'm not here  
9 to argue it on behalf for anyone that made that  
10 comment. I have not been retained to do that.

11 THE COURT: Okay.

12 MR. BURDETT: So therefore is there  
13 is no one standing up for whoever the John Doe  
14 defendant is in that instance other than PubPeer.

15 I would also have to respond to Mr.  
16 Roumel's comments about the issue of anonymity.  
17 The Federalist Papers were anonymous. There is a  
18 long history. All of Thomas Paine's papers  
19 criticizing the king were anonymous because there  
20 is a fear of extrajudicial response and  
21 retaliation.

22 And the idea that somehow someone  
23 might not be able to be fired when there is  
24 something like this, it is just, it shocks me that  
25 Mr. Roumel would have that opinion about the First

1 Amendment because it is no where to be found in the  
2 history of the Constitution at all.

3 We endorse anonymous speech in this  
4 country. We allow it to move forward. That is the  
5 subject of my Motion for Summary Disposition, but I  
6 couldn't let that comment go by.

7 MR. JOLLYMORE: May I make two  
8 points in response to Mr. Roumel, please?

9 THE COURT: Yes.

10 MR. JOLLYMORE: One is the Robbins  
11 case may say, although I didn't find it very clear,  
12 that any defamatory meaning may be considered. But  
13 even so, you have to determine whether the meaning  
14 is defamatory. You have to look at the words. You  
15 have to look at reasonable inferences.

16 Let me address privacy. Dr.  
17 Sarkar's counsel makes a lot of comments about  
18 investigations being private. That's right.  
19 People at Wayne State cannot publicize their  
20 investigations.

21 But if I can say anything I please  
22 about somebody's scientific misconduct, if I post  
23 it on Pubpeer.com, I'm not violating any  
24 confidentiality issues -- I mean privacy issues.  
25 I'm not bound -- I'm not an investigator for Wayne

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1 State. And I'm entitled, as all of us are, to  
2 speak my mind. If I were an investigator that  
3 might be different.

4 And at any rate, the law of privacy  
5 says if it's already public, then it's not private  
6 anymore. Well, this commenter, if this commenter  
7 says anything that was an invasion of privacy here,  
8 which I don't see, but maybe you can reach it by  
9 inference, it's already been posted by PubPeer by  
10 many other comments.

11 THE COURT: Well, no. I'm talking  
12 about I'm really looking at the paragraph that's in  
13 quotes. Are you saying someone else printed and  
14 published this e-mail from the Secretary of the  
15 Board of Governors?

16 MR. JOLLYMORE: No. It appears that  
17 the commenter --

18 THE COURT: Because --

19 MR. JOLLYMORE: -- commenter.

20 THE COURT: Yeah, because it says  
21 they wrote back. So you know, the inference is  
22 there that whoever, you know, and you know, it  
23 might be an improper inference, but it appears that  
24 whoever, you know, is commenting in this chain here  
25 has something to do with submitting the information

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1 to the Wayne State Board of Governors.

2 MR. JOLLYMORE: Let's assume that's  
3 true, and that's a -- inference, but it's not a  
4 reasonable inference to infer what was referred.

5 THE COURT: Scientific, something  
6 about scientific misconduct.

7 MR. JOLLYMORE: Not really. We  
8 don't know it was referred.

9 THE COURT: Okay. So that's a  
10 question of fact.

11 MR. JOLLYMORE: No, it isn't.

12 THE COURT: You indicated that it's  
13 the Court's duty to look at it, and the Judge  
14 interprets the language to determine whether or not  
15 there is, it's defamatory. And what the Court does  
16 do is take the evidence in the light most favorable  
17 to the non-moving party.

18 And there could be an inference  
19 drawn that there is an attempt to defame Dr. Sarkar  
20 by putting this information out there because of  
21 the person from Wayne in writing back say if you  
22 understand that scientific misconduct investigation  
23 by their nature are confidential, but yet and  
24 still, this individual publishes the information  
25 that they got from Wayne State University alluding

1 to the fact that there was something that was  
2 inappropriate in Dr. Sarkar's studies, whatever.

3 And we subsequently know at this  
4 point in time that Dr. Sarkar had multiple job  
5 opportunities that were sort of squelched as a  
6 result of a series of events. And this was one of  
7 those in the chain of the series of events.

8 And what's being attempted to, I'm  
9 sorry, to be done by Mr. Roumel. I said Nicholas  
10 first, but excuse me for that, using your first  
11 name --

12 MR. ROUMEL: That's fine, Your  
13 Honor.

14 THE COURT: But for Mr. Roumel  
15 making the request is to be able to further his  
16 discovery in the case in chief which this is just  
17 one aspect of.

18 And really taking the evidence in  
19 light most favorable to the non-moving party, the  
20 Court feels that there is the inference can be  
21 drawn, a reasonable person, like I say, I'm a  
22 judicial person, an attorney, and the fact remains  
23 if you're looking at lay person's, their level of  
24 understanding of a subject matter would be at a  
25 lower level.

1           So the Court finds that there would  
2           be a reasonable inference, not a legal, even from a  
3           legal perspective, the Court sees that from a  
4           reasonable inference, there could be an inference,  
5           a reasonable reason that there could be a  
6           reasonable inference that there was -- I don't want  
7           to say inference again, but there could be an  
8           inference that this was of a nature to attempt to  
9           defame Dr. Sarkar.

10           So taking evidence in the light most  
11           favorable to the non-moving party, the Court finds  
12           that this, based upon the three criteria that were  
13           set forth by Ms. -- that this could be a situation  
14           that deemed inflammatory nature. That being said  
15           the Court would order that, not that, that the  
16           information be released to Mr. Roumel.

17           And the Court will further note that  
18           there will be a protective order put in place  
19           relative to this statement. And I know that, Mr.  
20           Burdett, this really doesn't have a bearing on you,  
21           but we need to deal with getting you a new date for  
22           your --

23                       MR. BURDETT: Well, Your Honor, if  
24           you wanted to --

25                       MR. JOLLYMORE: I'd like to just add

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1 one comment. When we were here on March 5, Your  
2 Honor talked about disclosing information in  
3 camera.

4 THE COURT: Right.

5 MR. JOLLYMORE: I'd like you to  
6 consider, please, that we disclose what identifying  
7 information PubPeer has, and it isn't much. It's  
8 one IP address --

9 THE COURT: Okay.

10 MR. JOLLYMORE: -- to Your Honor ex  
11 parte for consideration.

12 THE COURT: Okay.

13 MR. JOLLYMORE: -- of whether the  
14 order should really go that far.

15 THE COURT: Okay. So what we'll do  
16 is we'll say the Court will do an in camera  
17 inspection and then make a determination what, if  
18 any, protective order needs to be put in place.

19 MR. JOLLYMORE: All right.

20 MR. ROUMEL: Right. And I'm  
21 assuming pursuant to the Court's order that that IP  
22 address will be turned over to us and whatever the  
23 protective order says that we can or can't do with  
24 that information.

25 THE COURT: Right. So what we want

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1 to do, we've got to take -- there's a step prior to  
2 the protective order. We have to have that  
3 presented to the Court for in-camera inspection  
4 and --

5 MR. ROUMEL: But it's just an IP  
6 address, right?

7 MR. JOLLYMORE: That's it.

8 MR. ROUMEL: It's just a series of  
9 numbers. So why don't we just turn it over to  
10 counsel with protective order in place?

11 MR. JOLLYMORE: Because --

12 THE COURT: Tell me what your desire  
13 is.

14 MR. JOLLYMORE: Our desire is meet  
15 with Your Honor and talk about what an IP address  
16 means, what information can we obtain from it and  
17 how hard it is and whether or not it makes sense to  
18 give it to Dr. Sarkar under protective order as  
19 opposed to just quashing the subpoena.

20 We'd like the opportunity that Your  
21 Honor set out before to do an in camera review.

22 THE COURT: Okay. We'll take baby  
23 steps. We'll take baby steps.

24 MR. JOLLYMORE: Whatever the Court  
25 decides, Your Honor.

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1 THE COURT: We'll have an in camera  
2 inspection.

3 MR. ROUMEL: Couldn't we do that  
4 right now since it's just a short amount of  
5 numbers?

6 MR. JOLLYMORE: I'm not prepared to  
7 do that. I don't have the IP address.

8 MR. ROUMEL: Okay. Next time we're  
9 in court we can do it.

10 THE COURT: Which is?

11 MR. ROUMEL: We've got to set that  
12 date for Mr. Burdett's motion.

13 THE COURT: Do you want to wait that  
14 long? You said you had an issue.

15 MR. ROUMEL: Does anybody object to  
16 me presenting this motion to present summons? I  
17 have an order prepared.

18 MR. JOLLYMORE: How long are you --

19 MR. ROUMEL: I am asking for the  
20 years. You didn't object before.

21 MR. JOLLYMORE: -- a year.

22 MR. ROUMEL: But you didn't--

23 THE COURT: To extend summons? You  
24 said to extend --

25 MR. ROUMEL: The point is we've been

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1 here for several months trying to determine who the  
2 defendants have been. So we've been hung up on our  
3 90 days.

4 THE COURT: Okay, because I only  
5 usually extend summons 60 days.

6 MR. ROUMEL: Can we extend it 60  
7 days from today?

8 THE COURT: Yes.

9 MR. ROUMEL: I'll prepare an order  
10 to be sent.

11 THE COURT: Yes.

12 MR. BURDETT: Your Honor, the order  
13 entered on March 8th quashing the subpoena there  
14 really isn't any need for my Motion for Summary  
15 Disposition because of the fact that there is no  
16 risk of my client being revealed through the  
17 subpoena process.

18 I don't want to necessarily burden  
19 the Court with it; although, I'd love to come back  
20 and argue it. I think if we withdrew it without  
21 prejudice --

22 THE COURT: Without prejudice,  
23 that's fine.

24 MR. BURDETT: Mr. Roumel has a  
25 Motion for Reconsideration for that March 8th order



1 up, depending on the outcome of that, we would  
2 revisit the need for summary disposition at that  
3 time.

4 THE COURT: Okay. So at this point  
5 in time, you're indicating you will withdraw?

6 MR. BURDETT: Yes, it is withdrawn  
7 without prejudice.

8 THE COURT: Without prejudice.

9 MR. ROUMEL: Is there any dispute  
10 that Mr. Burdett's appeared in the action regarding  
11 the defendant?

12 MR. BURDETT: I don't think there is  
13 any dispute that I appeared. I'm standing here.

14 MR. ROUMEL: So is there any reason  
15 why I cannot depose your client?

16 MR. BURDETT: You cannot depose my  
17 client. He's in office.

18 THE COURT: That is a separate  
19 issue.

20 MR. ROUMEL: (Inaudible).

21 MR. BURDETT: If you have some  
22 information that you want to disclose, you know,  
23 but I do not believe that there is any information  
24 on the record that would identify my client. At  
25 this point, I'm not disclosing it.

1 MR. ROUMEL: The point is officially  
2 withdrawing the motion, so we don't need to come  
3 back for that.

4 THE COURT: Correct. And what I was  
5 saying, so we won't be coming --

6 (Off the record)

7 THE COURT: Okay. So we're back on  
8 the record. The 24th at 11 o'clock we'll convene  
9 for one, the Court to have an ex parte inspection  
10 of whatever it is Mr. Roumel presents.

11 Following that, based upon what we  
12 have, we'll make the determination at that time  
13 whether or not there needs to be a protective order  
14 and what will be included.

15 MR. JOLLYMORE: I think that  
16 actually may be helpful because we may be able to  
17 do a better job of outlining what steps we would  
18 take once we have an IP address and go through  
19 those steps to show what protections --

20 THE COURT: And you need to be  
21 prepared to fully discuss that so that we can walk  
22 away with proposed order that will be presented to  
23 the Court.

24 MR. ROUMEL: Understood, Your Honor.

25 THE COURT: Is there anything else,

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1 gentlemen?

2 MR. ROUMEL: No.

3 THE COURT: We'll look for the  
4 order. Thank you.

5 (At 11:56 a.m., proceedings  
6 concluded.)

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1 CERTIFICATE OF REPORTER

2  
3  
4 STATE OF MICHIGAN )  
5 ) SS  
6 COUNTY OF WAYNE )

7  
8 I, SHERRY E. BAKER, CSR-1326, HEREBY  
9 CERTIFIES that the foregoing pages 1 through 44  
10 inclusive, were reduced to typewritten form by  
11 means of computer transcription; and comprise a  
12 full, true and accurate transcript of the  
13 proceedings had in the above-entitled cause.

14  
15   
16 Sherry E. Baker, CSR-1326  
17 Official Court Reporter

18  
19  
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24 DATED: This 27th day of April, 2015.  
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