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(Short title of case)

Case Name: **Sarkar v John Doe**

1. Brief Type (select one): APPELLANT(S) APPELLEE(S) REPLY
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2. This brief is filed by or on behalf of [insert party name(s)]: **Dr. Sarkar**
3. This brief is in response to a brief filed on _____ by _____.
4. ORAL ARGUMENT: REQUESTED NOT REQUESTED
5. THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
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- Table of Contents [MCR 7.212(C)(2)]
 - Index of Authorities [MCR 7.212(C)(3)]
 - Jurisdictional Statement [MCR 7.212(C)(4)]
 - Statement of Questions [MCR 7.212(C)(5)]
 - Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
 - Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
 - Relief Requested [MCR 7.212(C)(9)]
 - Signature [MCR 7.212(C)(9)]
7. This brief is signed by [type name]: /s/ **Nicholas Roumel**
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IN THE MICHIGAN COURT OF APPEALS

Consolidated Cases:

FAZLUL SARKAR,

Plaintiff-Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),

and

PUBPEER LLC,

Non-party Appellee.

COA Case No. 326667

Wayne Co. Circuit Court
Case No. 14-013099-CZ
Hon. Sheila Ann Gibson

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Statement of Jurisdiction

This is a consolidated appeal from the Wayne County Circuit Court, *Sarkar v. John and/or Jane Doe(s)*, case no. 14-013099-CZ. The parties to this appeal are plaintiff Dr. Sarkar and a non-party, PubPeer, from whom a subpoena was sought seeking information identifying the anonymous defendants, so that those defendants might be served with process.

After Dr. Sarkar served his subpoena, PubPeer responded by seeking to quash the subpoena. The motion was heard and on March 9, 2015, the trial court entered an “Order Granting In Part Motion to Quash Subpoena and Requiring Supplemental Briefing.” In essence, this order quashed the subpoena in all but one part, excepting information underlying the basis of paragraph 40 (c) of plaintiff’s complaint. The court ordered supplemental briefing regarding that information and set a new hearing.

After further consideration, on March 26, 2015, the trial court entered an “Order Denying Motion to Quash Regarding Paragraph 40 (c) of Plaintiff’s Complaint.”

The parties each filed an interlocutory appeal from those respective orders.

Dr. Sarkar sought interlocutory appeal from the March 9, 2015 order on March 30, 2015. The Court of Appeals assigned this case docket number 326667.

PubPeer sought interlocutory appeal from the March 26, 2015 order on March 31, 2015. The Court of Appeals assigned this case docket number 326691.

August 27, 2015 this court granted leave to appeal in both cases and consolidated them for purposes of appeal.

Jurisdiction on appeals by leave are governed by MCR 7.203 (B). Once an application for leave is granted, the case proceeds as an appeal of right [MCR 7.205 (D) (3)].

Questions Presented

- I. Whether the lower court erred when it granted a non-party, PubPeer's, motion to quash, where the court also erroneously:
- A. Permitted the non-party to argue standards for summary disposition under MCR 2.116 (C) (8);
 - B. Considered two affidavits in purporting to consider the non-party's motion under MCR 2.116 (C) (8), which only permits examination of the pleadings;
 - C. Required the plaintiff to produce actual documentary evidence in purporting to consider the non-party's motion under MCR 2.116 (C) (8), which only permits examination of the pleadings;
 - D. Made factual inferences against the plaintiff;
 - E. Required a higher pleading standard for defamation that required by law;
 - F. Did not separately consider the standards of the plaintiff's other four causes of action besides defamation;
 - G. Used the wrong standard in examining the motion under MCR 2.116 (C) (8) rather than considering it as a motion for protective order under MCR 2.302.

PLAINTIFF-APPELLANT SAYS "YES"

NON-PARTY PUBPEER WOULD SAY "NO"

Introduction

Dr. Fazlul Sarkar filed a lawsuit, alleging tortious conduct that is destroying his life and career. He does not know who is responsible. He sought a discovery subpoena on a non-party website (“PubPeer”), to help him learn the identity of the defendants. The lower court quashed the subpoena, and Dr. Sarkar appeals.

Dr. Sarkar is a prominent cancer researcher at Wayne State University. He has an enemy hiding behind the anonymity afforded by the internet. So far, this unknown person¹ has been quite successful, sabotaging an excellent job that Dr. Sarkar had secured - a tenured position at the University of Mississippi - by falsely accusing him of research misconduct. Not finished, this anonymous defendant widely distributed fraudulent documents that Dr. Sarkar was subject of a U.S. Senate investigation. Shortly afterwards, Dr. Sarkar lost his tenure at Wayne State. Now, after 35 years as an expert in his field, Dr. Sarkar faces unemployment in a few short months.

Seeking to hold the anonymous person accountable, Dr. Sarkar filed a five-count complaint in this court against “John and/or Jane Does.” In order to find out the identity of this person, Dr. Sarkar subpoenaed PubPeer, an anonymously-held website for anonymous posters. Ostensibly, PubPeer is for dispassioned discussion of scientific research. In reality, like far too much of the anonymous internet world, it is a place for complaining, grinding axes, and making accusations.

PubPeer responded by filing a motion to quash the subpoena. They position themselves as champions of free speech, not a forum for destroyers of a man’s career. They frame their pleadings to try and fool this court into thinking this case is only about whether scientific blots look alike, and that such anonymous speech is protected.

¹ Hereafter, for consistency, defendant shall be referred to in the male singular. This is because one “John Doe” defendant appeared in the lower court, and to this point, there is no definite evidence of more than one defendant.

But that argument misleads the court. The case is about blatantly false accusations of “scientific misconduct” that are a death sentence in the field of scientific research, where grants dry up and jobs go away at the first whisper of such charges. It is about sending these false accusations to a University 762 miles south for the sole purpose of disrupting Dr. Sarkar’s new job. It is whether a person can make up a Senate investigation out of whole cloth, widely distribute forged flyers throughout Wayne State University, and watch Dr. Sarkar’s tenured position there go away two weeks later. It is about whether a person can violate federal law and breach the confidentiality of Wayne State’s inquiries and investigations, which were likely instigated in the first place by Dr. Sarkar’s relentless, anonymous enemy.

PubPeer’s motion also rests on a false premise. Cloaked in the First Amendment, PubPeer avoids serious discussion of the defendant’s horrific conduct and instead suggests this case is only about the similarity of blots.² They further suggest that plaintiff’s lawsuit seeks to chill honest academic debate. They do this for a reason: they want to distract the court from the tortious conduct at issue.

Plaintiff, as a scientist and an academic, does not dispute the obvious proposition that open and honest debate about scientific articles is not only non-defamatory but absolutely essential. But this case is not about the First Amendment. These are not employees criticizing their government employers; they are not researchers engaging in good faith discussions; they are not dissidents railing against the tyranny of the majority. They are people who intentionally acted to try and destroy Dr. Sarkar’s career, with false accusations of research misconduct, and other torts relating to malicious interference with employment and breaches of confidentiality.

² See, e.g. defendant’s brief below at p. 21, “... Dr. Sarkar’s central claim, which is that certain commenters defamed him by noting similarities between images ...” Even a cursory review of plaintiff’s complaint contradicts that blatantly misleading statement.

Even PubPeer's terms of service recognize the distinction between commenting on blot similarity and accusations of research misconduct, imploring posters to refrain from the latter in order to minimize legal risk.

The process of learning defendant's identity is clearly set forth in the controlling case, *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013). The legal standard for testing Dr. Sarkar's complaint is well established in the court rules and prevailing law, and is not heightened simply because defendant hides his identity.

Ultimately, this court must decide whether a man whose life has been turned upside-down by these reprehensible and tortious acts is even allowed to pursue his lawsuit, or whether he shall be stopped in his tracks by the order granting PubPeer's motion to quash. All Dr. Sarkar asks is to be able to have his claims tested fair and square in a court of law. He expressed his willingness, in the court below, to a protective order regarding the anonymous poster's identity while he pursues his suit. While he may not win in the end, justice demands he be allowed to proceed. The order granting PubPeer's motion should be reversed.

Facts

Plaintiff's October 9, 2014 complaint lays out in 124 detailed paragraphs the allegations forming the basis of its five counts. Dr. Sarkar is a widely-published scientist who has published more than 533 papers (complaint, ¶ 57). His research focuses on cancer prevention and therapy, including work that has led to the discovery of the role of chemopreventive agents in sensitization of cancer cells (reversal of drug resistance) to conventional therapeutics (chemo-radio-therapy) (complaint, ¶ 80). His research has been continuously funded by the National Cancer Institute, the National Institute of Health, and the Department of Defense (complaint, ¶ 12).

PubPeer is a website that allows users to comment anonymously on any publication in a scientific journal. It defines itself as “an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists” (complaint, ¶ 23). The website is run by anonymous people, with the URL registration maintained by a proxy (complaint, ¶ 24). The terms of service explicitly instruct users: “First, PLEASE don’t accuse any authors of misconduct on PubPeer” (complaint, ¶ 26). The website also states that: “The site will not tolerate any comments about the scientists themselves” (complaint, ¶ 30).

Despite these admonitions, PubPeer allowed a series of comments by one person, or a small group of people coordinating their statements, which defame Dr. Sarkar and accuse him of research misconduct. They accuse him of falsifying data and appear to orchestrate a movement, to cost Dr. Sarkar a job at the University of Mississippi, and to notify Wayne State of alleged research misconduct. These anonymous posters did not merely question conclusions in Dr. Sarkar’s work or find errors. They went well beyond that, to challenge his motives and imply that he had engaged in “research misconduct.”

Those are not mere words. As detailed in plaintiff’s complaint, research misconduct is an extremely serious charge to level against a scientist, often fatal to one’s career (complaint, ¶¶ 33-36). One infamous accusation resulted in suicide despite the scientist’s formal exoneration (<http://aeon.co/magazine/philosophy/are-retraction-wars-a-sign-that-science-is-broken/>). Given the gravity of such an accusation, the federal government has created clear regulatory guidelines for what is and is not research misconduct (complaint, ¶ 31). They include:

... fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

(a) Fabrication is making up data or results and recording or reporting them.

- (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
- (c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.
- (d) Research misconduct does not include honest error or differences of opinion.

Id. (quoting 42 C.F.R. § 93.103 (2005)). Research misconduct must be “committed intentionally, knowingly, or recklessly.” 42 C.F.R. § 93.104 (2005).

The defendant in this case is not content to follow this confidential, regulated scheme. Intent on destroying Dr. Sarkar, he widely distributed a screen shot from PubPeer showing the search results and disclosing the number of comments generated from each research article listed on the page. Effectively, defendant manufactured that there were widespread concerns about Dr. Sarkar’s research and then used this supposed concern to sabotage his job with the University of Mississippi. He even went so far as to manufacture that there was a Senate investigation, led by Senator Charles Grassley (complaint, ¶ 70-73). This complete immediately preceded Dr. Sarkar losing tenure at WSU. As such, defendant has worked anonymously and tirelessly to defame Dr. Sarkar, and maliciously deprive him of economic opportunities.

Dr. Sarkar has brought claims for defamation, intentional or tortious interference (two counts, one for Mississippi and one for Wayne State), false light invasion of privacy, and intentional infliction of emotional distress. These claims are clearly cognizable under Michigan law, and to allow defendant to hide behind their anonymity would actually serve as a blow to First Amendment rights, as they would allow the stifling of scientific research through the risk that innocent mistakes lead to claims of “research misconduct” and the potential loss of livelihood.

Argument

In granting PubPeer's motion to quash, the court made plain legal errors that were outcome determinative. These must be corrected for justice to prevail.

A. It Was Error to Allow a Non-Party to Argue Standards for Summary Disposition

The court made a plain legal error when it allowed a non-party, PubPeer, to argue a motion for summary disposition - or more precisely, the standards for such a motion - and to consider that argument in granting their motion to quash. Specifically, the court's error was in applying the standards of *Ghanam v. Does*, 303 Mich App 522 (2014), rather than *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013), because in this case, a defendant has appeared.

Normally, a non-party is not allowed to file a motion for summary disposition. Only a party may file. MCR 2.116 (B) states that "A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule." *Ghanam* provides a limited exception, allowing a non-party to argue (C) (8) standards if there is no actual party to make the argument. That exception does not apply here, because in the lower court, a defendant had already appeared, filed a motion for summary disposition, and scheduled its motion to be heard. The attorney for that defendant even addressed this court at oral argument on March 5. Thus there is no need – and indeed, *Cooley* prohibits – the non-party from arguing the standards of MCR 2.116 (C) (8).

Ghanam allows a non-party to argue that the complaint is deficient under MCR 2.116 (C) (8) on the theory that if there is no defendant to raise the motion, the non-party may do it instead. That court reasoned, "... there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*." [*Ghanam* at 530]

The court went on to distinguish the cases: “... in *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit.” See *Id.* at 252, 270. As the partial dissent in *Cooley* noted, “[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit--which may well be too late” *Id.* at 274 (BECKERING, J., concurring in part and dissenting in part). In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8).” [*Ghanam*, *Id.* at 539-540]

Thus if there is no defendant, the court must apply *Ghanam* and “analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted.” [*Ghanam*, *Id.* at 530] But if there *is* a defendant to argue for summary disposition, then a non-party may *not* argue the summary disposition standards. In short, *Ghanam* applies if there is no defendant able to argue a motion for summary disposition,³ and *Cooley* applies if there is a defendant, because in such a case, it is not necessary for a non-party to assert a party’s rights.

In *Cooley*, the unknown defendant purported to be a former student who created a website at Weebly.com that criticized the law school. Cooley filed suit and then subpoenaed Weebly.com for identifying information. Defendant moved to quash the subpoena. The Court of Appeals rejected application of the burdensome showing required by some courts, such as New Jersey state court in *Dendrite Int’l, Inc. v. Doe*, 342 NJ Super 134; 775 A.2d 756 (NJ App, 2001) holding instead that “Michigan’s procedures for a protective order, when combined with Michigan’s

³ Illustrating this proposition is what actually happened in the lower court. John Doe 1 filed and noticed a motion for summary disposition to be heard, but withdrew the motion after the court granted PubPeer’s motion to quash. There is absolutely no reason to have a non-party argue a party’s motion for summary disposition under the guise of a protective order.

procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity." 300 Mich. App at 264.

The court went on to say, "[T]he trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed a motion for summary disposition." *Id.* at 269. The court went on to explain: "Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. **We conclude that Doe 1's motion for a protective order did not present the appropriate time or place to do this.** These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted." [*Cooley*, *Id.* at 269; emphasis added]

Subsequently, in *Ghanam*, *Id.* at 530, the court acknowledged that *Cooley* applied in the context where "any of the anonymous were aware of the pending matter or involved in any aspect of the legal proceedings." But, even in such instances where (unlike here) the defendant does not know about the case, there is only a slightly elevated standard: *Ghanam* requires only that "plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit" and the court must "analyze the complaint under MCR 2.116 (C) (8) to ensure that the plaintiff has stated a claim on which relief can be granted." *Id.*

Although this case is governed by *Cooley*, there is little doubt that any potential defendant is unaware of this dispute. As an initial matter, at least one defendant in this case formally appeared in the trial court. Furthermore, it is likely that any person who uses PubPeer would be aware of

this dispute. PubPeer has posted correspondence from the undersigned counsel, intended to alert potential defendants of the lawsuit. The lawsuit was subsequently fully discussed by PubPeer's editors and numerous anonymous commenters (<https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb24568>). The lawsuit has also been covered throughout the international scientific journal community, including Nature (<http://www.nature.com/news/peer-review-website-vows-to-fight-scientist-s-subpoena-1.16356>), the Scientist (<http://www.the-scientist.com/?articles.view/articleNo/41070/title/PubPeer--Pathologist-Threatening-to-Sue-Users/>), Science (<http://news.sciencemag.org/scientific-community/2014/12/defamation-case-pubpeer-moves-quash-subpoena-unmask-anonymous>), Wired (http://www.wired.com/2014/12/pubpeer-fights-for-anonymity/?utm_source=twitterfeed&utm_medium=twitter), and many others. In addition, there is prominent coverage on a website called www.retractionwatch.com, whose related postings are all specifically referenced on PubPeer (<https://pubpeer.com/topics/1/3F5792FF283A624FB48E773CAAD150#fb14544>). These articles have garnered hundreds of comments and catalyzed significant debate on these issues. Given the likely small number of involved people who may be defendants in this action and the repeated focus that PubPeer and other sites have made on the issue, it is nearly certain that everyone who may be a potential defendant has been well aware of the lawsuit for some time.

As such, the approach in *Cooley* should apply, which acknowledges that any defendant's interest in privacy can be protected by an appropriate protective order. In *Cooley*, by the time of the decision on the motion to quash, the plaintiff had actually learned the defendant's identity. The Court considered how to protect the defendant's First Amendment rights and determined that a fact-based protective order inquiry was instructive. The Court specifically rejected exactly the claim that PubPeer is making in this case, that the court should impose a judicially-created anti-

cyber-SLAPP legislation or to rewrite discovery and summary disposition rules. 300 Mich. App. at 267. PubPeer does not make any argument under *Michigan* law that suggests that this situation could not be dealt with through the basic protections of a protective order.

In summary, there are two controlling precedential cases where a plaintiff seeks the identity of anonymous defendants. *Ghanam* applies if there are no known defendants; *Cooley* applies if there is a known defendant. Accordingly, it was plain legal error for the lower court to rely on *Ghanam* and allow the non-party to argue the summary disposition standards, because in this case, there is a known defendant with the ability (and a pending motion) to do that very thing.

Moreover, this plain error affected the outcome, because as the transcript demonstrates, the trial court relied upon PubPeer's counsel's attack on the sufficiency of the pleadings under MCR 2.116 (C) (8) in mostly granting their motion.

Because the court permitted this attack on the pleadings by a non-party, the following sections are presented to demonstrate that the court also palpably erred in the way it applied that legal standard, because it considered affidavits and made factual inferences against the plaintiff.

B. It Was Error to Consider Dr. Krueger's Affidavit and the Other Affidavit Attached to PubPeer's Motion to Quash

The court's error in considering the (C) (8) factors was compounded when it considered the affidavit of Dr. Krueger (opining about Dr. Sarkar's research) attached to PubPeer's motion. Even assuming *arguendo* that the court were permitted to consider (C) (8) factors on the motion to quash, MCR 2.116 does not permit reference to affidavits in determining a (C) (8) motion by its plain language: "Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)." This additional error ensured that any reliance on *Ghanam* was not harmless.

There are countless cases going back decades that affirm this hard rule, including:

“Summary judgment motion for failure to state claim on which relief can be granted tests complaint's legal sufficiency on pleadings alone.” *Long v Chelsea Community Hosp.* 219 Mich App 578 (1996), *Vogh v American International Rent-A-Car, Inc.* 134 Mich App 362 (1984).

“A motion for summary disposition under MCR 2.116(C) (8) tests the legal basis of the claim and is granted if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery; it is examined on the pleadings alone, absent considerations of supporting affidavits, depositions, admissions, or other documentary evidence, and all factual allegations contained in the complaint must be accepted as true.” *Dolan v Continental Airlines/Continental Express* 454 Mich 373 (1997).

As argued above, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to argue the standards of MCR 2.116 (C) (8). The error was exacerbated by PubPeer’s submission of two affidavits in support of their motion. They may not submit them, and this court may not consider them. Specifically, their expert’s affidavit must be completely disregarded, and it is not harmless, because its focus was that the anonymous commenters’ statements were substantially true and not defamatory – an argument the lower court considered.

C. It Was Error to Make Factual Inferences against the Plaintiff

Furthermore, clear precedent requires that all factual allegations and the inferences to be drawn from them are to be taken in the light most favorable to the non-moving party and taken as true. However, the court’s remarks at oral argument repeatedly assumed an interpretation of the pleadings favorable to the defendant. That is improper when considering the pleadings alone. In evaluating a motion for summary judgment for failure to state a claim, “all factual allegations are taken to be true along with any reasonable inferences or conclusions which can be drawn from the facts alleged.” *Schenk v Mercury Marine Div., Lowe Industries* 155 Mich App 20 (1986).

“A court must accept as true all well-pled factual allegations as well as any conclusions which can reasonably be drawn therefrom and grant the motion only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Marley v Huron Valley Men's Facility Warden* 165 Mich App 78 (1987), *Hankins v Elro Corp.* 149 Mich App 22 (1986), *Dzierwa v Michigan Oil Co.* 152 Mich App 281 (1986).

The pleadings shall be construed “most favorably to the nonmoving party.” *Blair v Checker Cab Co.* 219 Mich App 667 (1996).

As argued in the first section, because there was an appearing defendant, PubPeer was not permitted under *Cooley* to even argue the standards of MCR 2.116 (C) (8). The error was compounded by the court’s interpretation of all of Dr. Sarkar’s factual allegations, and the inferences therefrom, in a light favorable to PubPeer.

D. It Was Error to Require a Higher Pleading Standard for Defamation Than Required By Law

The above section demonstrated that in general, factual allegations and the inferences to be drawn from them are to be taken as true for purposes of analyzing the pleadings under a (C) (8) motion. It is especially true in defamation actions, where any genuine issue as to material facts would act to prevent the court from discounting the pleadings and allow the claim to go to the factfinder, in this case the jury, if the words were capable in law of a defamatory meaning. *Robbins v Evening News Asso.* 373 Mich 589 (1964). In its response to PubPeer’s motion to quash, plaintiff cited several cases as to why his complaint satisfied the pleadings standards of MCR 2.116 (C) (8) (see, e.g., p. 13-14), especially *Smith v. Anonymous Joint Enter.*, 487 Mich 102, 128-9 (2010) (“a court must consider all the words ... analyzed in their proper context;” and that the court must look beyond what is said to what is “implied”). Plaintiff also cited *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) to the effect that opinion may be defamatory, and *Loricchio v. Evening News*

Ass'n, 438 Mich. 84, 123 n.32 (1991) supporting defamation by innuendo “without a direct showing of false statements.” [Also see *Royal Palace Homes, Inc. v Channel 7 of Detroit, Inc.* 197 Mich App 48 (1992).

This court erred by focusing on the words alone, and determining truth or falsity as a matter of law. The Supreme Court has “consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury.” *Ireland v. Edwards*, 230 Mich App 607, 621-622 (1998); also see *Steadman v Lapensohn*, 408 Mich 50, 53-54 (1980); *Cochrane v Wittbold*, 359 Mich 402, 408 (1960).

E. It Was Error to Require the Production of Evidence

PubPeer argued, and the court agreed, that plaintiff was required to produce evidence at this stage, to wit: the document that suggested Dr. Sarkar was under U.S. Senate inquiry. The transcript will indicate that after the court directed plaintiff produce this document, a copy was handed over on the record to the attorneys for PubPeer. For the same reasons set forth above, that any analysis under MCR 2.116 (C) (8) must be based on the pleadings alone, this was plain error.

F. It Was Error to Not Separately Consider the Standards of Plaintiff’s Other Four Causes of Action

As for Dr. Sarkar’s other four claims, PubPeer’s motion to quash spent all of four sentences on them, and incorrectly cited the law. They argued that the other torts rise and fall with the defamation claims, but that is only if the torts are based on the same statements. *Ireland*, 230 Mich App at 624-5. Here all the torts rest on different conduct. The intentional interference with business expectancy (University of Mississippi) rested on the malicious sending of documents to three different administrators at that institution with the intent to cause them to terminate their job offer to Dr. Sarkar, which was successful. The intentional interference with business relationship claim rests on the faking of a senate inquiry to get Wayne State to terminate that job, and succeeded in

having them remove tenure. The invasion of privacy claim was based on disclosure of alleged and heavily regulated investigatory proceedings that are required by law to be confidential. The intentional infliction of emotional distress tort was based on this entire pattern of conduct, single-mindedly designed to ruin Dr. Sarkar's career, life's work, reputation, grants, and prospects.

All of these torts have different standards; they are cited in plaintiff's response to PubPeer's motion to quash. Neither PubPeer nor the court addressed the elements of any of these torts. It was error to determine that independent torts based on *different* conduct than the defamatory statements standing alone were determined by analysis of the defamation claims.

G. It Was Error to Not Consider PubPeer's Motion under MCR 2.302 for Protective Orders

As *Cooley* mandates, when a defendant has appeared, the court is to treat a motion by a non-party, regarding a request for information, as one for a protective order under MCR 2.302. This court erred by not considering it under that standard.

MCR 2.302 states in relevant part:

(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; ...

(5) that discovery be conducted with no one present except persons designated by the court; ...

(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

However, in its remarks, this court did not consider any of these factors. This court made what the *Cooley* court held was plain error: considering that it had only two choices, to either quash the subpoena, or not. *Cooley* stressed that this court must consider alternatives in between these “polar opposites.” *Cooley* at 267-268.

Cooley also said a court **may** balance the interests concerning a protective order, and “may consider that a party seeking a protective order has alleged that the interests he or she is asking the trial court to protect are constitutionally shielded.” *Cooley* at 269. But the court made it clear that in balancing the interests, the trial court cannot consider the sufficiency of the pleadings. Put another way, what a nonparty can’t get in the front door – evaluation of the claims under MCR 2.116 (C) (8) - it can’t get in the back door either: “We conclude that Doe 1’s motion for protective order did not present the appropriate time or place” to consider the “legal[] sufficiency [of the] claims for defamation and tortious interference with a business relationship. ... The court’s only concerns during a motion under MCR 2.302 should be whether the plaintiff has stated good cause for protective order and to what extent to issue a protective order if it determines that one is warranted.” *Id.* In other words, this court could have considered PubPeer’s and their users First Amendment rights in general – but not in the context of analyzing the pleadings.

This court did not balance these factors. Had it properly done so, the court should have considered the following in mitigating against protection for PubPeer, including:

- (1) That Pub Peer did not follow its own guidelines in publishing the comments;
- (2) That they removed scores of comments after Dr. Sarkar’s counsel’s initial demand letter;
- (3) That the person or persons they are protecting has published allegations that there is a confidential investigation, a factor that the court in *Mauvais-Jarvis v. Wong*, 2013 IL App (1st)

120070 (Ill. App. Ct. 1st Dist. 2013) found to be determinative in denying privilege to the commenter;

(4) That the anonymous persons made up a US Senate inquiry out of whole cloth.

Given the great harm Dr. Sarkar has suffered, the strong public policy that such injured persons should have access to the courts to pursue their claims, and the wrongdoing by both PubPeer and the anonymous defendants, there was no cause to grant the most drastic remedy in PubPeer's favor: a motion to quash the subpoena in all but one respect. The court abused its discretion by not balancing the factors as required by *Cooley* and fashioning a more limited protective order, that would have safeguarded the anonymity of defendants for public consumption, while allowing plaintiff to fairly test his claims going forward. This was what the court did correctly in denying PubPeer's motion to quash regarding the comments in paragraph 40 (c) of plaintiff's complaint, and permitting disclosure under the terms of a protective order, as more fully discussed below.

H. The Court Was Correct to Deny PubPeer's Motion to Quash Regarding Paragraph 40 (c) of Plaintiff's Complaint

The court denied PubPeer's motion to quash in only one respect, with regard to paragraph 40 (c) of Plaintiff's motion.

Paragraph 40 (c) of plaintiff's complaint reads as follows:

40 c. Then an unregistered user (likely the same one, given the context) reveals that s/he is either a person at Wayne State University who made a formal complaint against Dr. Sarkar, or is otherwise privy to the a person who did so:

Unregistered Submission:
(June 18th, 2014 4:51pm UTC)

Has anybody reported this to the institute?

Unregistered Submission:

(June 18th, 2014 5:43pm UTC)

Yes, in September and October 2013 the president of Wayne State University was informed several times.

The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:

"Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.

"Thank you for bringing this matter to our attention."

The statement before the court was actually the second one (i.e. the reply to the first inquiry). The statement, and all reasonable inferences to be drawn from it, indicate that the person posting has great familiarity with Wayne State University (WSU) administration, to wit:

- The president of WSU was "informed several times"
- The Secretary to the Board of Governors is also the Senior Executive Assistant to the president
- The person posting apparently claims to have details of scientific research misconduct, because the nature of the response apparently acknowledges a claim of scientific misconduct.

The statement is also evidence that research misconduct was alleged by the person emailing, and when posted on PubPeer, is a clear indication that person is alleging that Dr. Sarkar committed research misconduct – which is a public accusation at the very heart of Dr. Sarkar's case (and contrary to PubPeer's denials that such an accusation was never made on their web site). In oral argument on March 19, 2015, the court indicated that Wayne State's emailed response, posted on PubPeer's website, could support an inference that the poster was accusing Dr. Sarkar of research misconduct, and denied the motion to quash pending entry of a protective order.

Tellingly, when the entire email chain was later subpoenaed from Wayne State University (after the March 19 hearing), it revealed that the poster behind paragraph 40 (c) was in fact not only accusing Dr. Sarkar of research misconduct, but was well aware that a sizeable number of anonymous postings on PubPeer about Dr. Sarkar were accusing him of research misconduct. As such, the court's instinct was entirely correct. The person who posted Wayne State's response on PubPeer initiated that response with the following email, sent on November 10, 2013:

“Dear Secretary to the board of governors, Wayne State University, Julie Miller:

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

“You can find the entries on Pubpeer here: ...

“Many of the entries mention things which amount to what many think of as **scientific misconduct...**” [emphasis in original; entire email attached]⁴

This email is hugely significant.

Most importantly, it completely contradicts the multiple assertions made by PubPeer in its written and oral arguments to the lower court (and to this court) that “the comments Dr. Sarkar complains of are not capable of defamatory meaning ...” [PubPeer's motion to quash, p. 12]. Specifically, concerning paragraph 40 (c) (the email chain reproduced above), PubPeer argued:

“... Dr. Sarkar has attempted to twist the meaning of this PubPeer comment into a charge of ‘research misconduct.’ ... That's not what the comment says or even implies. ... Moreover, Dr.

⁴ The email is signed “Clare Francis.” This is almost certainly a pseudonym for someone who is apparently somewhat notorious for making accusations against various scientists of research misconduct. See, for example, <http://www.elsevier.com/connect/its-not-that-clare-francis-is-a-pseudonym-its-that-the-pseudonym-is-clare-francis>. It is apparent that “Clare Francis” is one of the anonymous defendants whose identity is necessary so that Dr. Sarkar's complaint may move forward. It should be noted that the subpoena response from WSU does not include the IP address of “Clare Francis,” and that information is still needed from PubPeer pursuant to the court's order denying the motion to quash that is subject of the instant appeal.

Sarkar is wrong in arguing that Wayne State's use of the phrase 'scientific misconduct investigation' suggests that the PubPeer commenter accused him of misconduct." [PubPeer's supplemental brief, pp. 4-5]

Simply put, PubPeer is dead wrong. They have argued repeatedly that there is no way any of the pleaded statements are capable of defamatory meaning – i.e., accusing Dr. Sarkar of intentional research misconduct. On the contrary – even the anonymous poster and emailer was astute enough to know that “Many of the entries mention things which amount to what many think of as **scientific misconduct...**” This supports Dr. Sarkar's argument all along that in the scientific community, people reading on PubPeer would be fully aware that he was being accused of intentional research misconduct - a serious charge and accusation of illegal acts - rather than simply stating their opinion that certain images resembled each other.

If this anonymous defendant who emailed WSU was aware that the posts on PubPeer could be read as accusations of scientific misconduct, then it completely destroys PubPeer's arguments that none of the statements on PubPeer were capable of defamatory meaning.

This result is also consistent with the recent unpublished U.S. District Court decision in *Steele v. Burek*, 2014 U.S. Dist. LEXIS 162724 (US DC ED Mich., 11/20/14), where the Hon. Sean Cox ruled that defendant's claim that she "filed legal action" against Plaintiff for "intellectual property theft" was defamatory, where there had been a legal demand letter but no actual lawsuit, because the statement implied that the complained-of conduct had actually occurred. When “viewing the allegations in the light most favorable to the Plaintiff,” the court found that the “allegations of plagiarism are serious and have the tendency to lower an author's reputation in his or her community of fans and colleagues.”

The court also found that discounting of the Plaintiff's experience in the field (4 years as opposed to 6) was material enough to warrant a defamation claim as well, because "it was made specifically by Burek for purposes of de-valuing Steele's expertise" and to harm her reputation.

The court finally held that spreading these allegations via Facebook was sufficient to support a tortious interference claim. Similarly, the allegations here of research misconduct, and the false representation that there was a Senatorial investigation of plaintiff, support the same torts.

In this case, the lower court's ruling regarding paragraph 40 (c) of the complaint was the right result, but for the wrong reasons. This was because under the circumstances presented to the court, where a defendant had appeared, the non-party PubPeer was not permitted to base its motion on the standards of MCR 2.116 (C) (8), failure to state a claim upon which relief can be granted.

The court should not have allowed a non-party, PubPeer, to argue a motion for summary disposition – or more precisely, the standards for such a motion – and to consider that argument in granting their motion to quash. Specifically, the court's error was in applying the standards of *Ghanam v. Does*, 303 Mich App 522 (2014), rather than *Thomas M. Cooley Law School v. Doe*, 300 Mich App 245 (2013), because in this case, a defendant has appeared.

Normally, as noted above, a non-party is not allowed to file a motion for summary disposition. *Ghanam* provides a limited exception, allowing a non-party to argue that the complaint is deficient under MCR 2.116 (C) (8) **only if** there is no defendant who is able to make a motion for summary disposition. But that was not the case here, as a defendant had appeared, filed a motion for summary disposition, and appeared at all hearings, even addressing the lower court at oral argument. Thus there is no need – and indeed, *Cooley* prohibits – the non-party PubPeer from arguing the standards of MCR 2.116 (C) (8), as discussed more fully above. Instead, the trial court should have treated it as a motion for protective order under MCR 2.302(C). [*Cooley*, Id. at 269]

Summary

In summary, there are two controlling precedential cases where a plaintiff seeks the identity of anonymous defendants. *Ghanam* applies if there are no known defendants; *Cooley* applies if there is a known defendant. Accordingly, it was error for the court to rely on *Ghanam* and allow the non-party to argue the summary disposition standards, because in this case, there is a known defendant with the ability (and his own pending motion) to do that very thing.

In the one instance regarding paragraph 40 (c), the error did not affect the outcome. The court reached the correct result to consider PubPeer's interests in requiring the disclosure, under the terms of an appropriate protective order under MCR 2.302, per *Cooley*.

Conclusion

Plaintiff is sympathetic to the spirit of the arguments made by PubPeer. Anonymous commenters can be valuable and should not be silenced by more powerful forces who use the legal system to learn identities and then retaliate against the commenters. Likewise, academic dispute, even when anonymous, is certainly valuable. However, despite PubPeer's best efforts to make this case one of academic freedom, it is not. This case is about holding accountable those who would anonymously try to destroy Dr. Sarkar's career through intentional efforts to paint him as an unethical researcher engaged in research misconduct. Defendants were not seeking the "truth," they deliberately engaged in conduct designed specifically to harm Dr. Sarkar, even though Dr. Sarkar has never been found to engage in research misconduct and actually has an error rate less than that of other cancer researchers. In reality, the accusations of research misconduct are analogous to accusing someone of commission of a crime, and amount to defamation *per se*.

Dr. Sarkar has stated clear claims for tortious conduct, including defamation, that should go forward. His request for discovery to PubPeer should have been granted, with an appropriate

protective order, analyzed under *Cooley* and the Michigan Court Rules. Even assuming *arguendo* that *Ghanam's* stricter standards apply, plaintiff made a sufficient claim to go forward. Accordingly, PubPeer's motion to quash was wrongly granted.

Relief Requested

WHEREFORE plaintiff requests this honorable court reverse the lower court's March 9, 2015 order to quash, uphold the March 26, 2015 order denying the motion to quash with regard to paragraph 40 (c) of the complaint, and remand for further proceedings, permitting the subpoena to be issued on appropriate conditions in a protective order.

Respectfully submitted,

NACHT, ROUMEL, & SALVATORE, P.C.

/s/ Nicholas Roumel

Nicholas Roumel
Attorneys for Plaintiff

October 22, 2015

INDEX OF EXHIBITS

ExhibitDescription

- | | |
|---|--|
| 1 | Complaint |
| 2 | False Senate Investigation Document |
| 3 | WSU Subpoena Response |
| 4 | <i>Steele v. Burek</i> , 2014 U.S. Dist. LEXIS 162724 (US DC ED Mich., 11/20/14) |

Exhibit 1

Complaint

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

FAZLUL SARKAR

Plaintiff,

Case No. 14-_____ -CZ

v.

Hon.

JOHN and/or JANE DOE(S)

Defendants.

14-013099-CZ

FILED IN MY OFFICE
WAYNE COUNTY CLERK
10/9/2014 1:55:28 PM
CATHY M. GARRETT

Attorney for Plaintiffs:
NACHT , ROUMEL, SALVATORE,
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(734) 663-7550
nroumel@nachtlaw.com

There has never been any other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court.

/s/ Nicholas Roumel
Nicholas Roumel , Attorney for plaintiff

COMPLAINT and JURY DEMAND

Fazlul Sarkar makes his complaint as follows:

PARTIES AND JURISDICTION

1. Plaintiff Fazlul Sarkar (“Dr. Sarkar”) is a resident of Plymouth, Wayne County, Michigan.
2. The identity of Defendant(s) John and/or Jane Doe(s) (“Defendants”) are not yet known, pending discovery.
3. Claims in this action are made pursuant to the common law of the state of Michigan.
4. The amount in controversy is at least \$25,000.

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

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- “First, PLEASE don't accuse any authors of misconduct on PubPeer. Firstly, we are scientists. We should only work with data and logic. Our conclusions must be verifiable.”
- They cite the example, “What none of us can verify is any conclusion regarding precisely how or why an apparent instance of misconduct occurred. In particular, the state of mind or the intention of a researcher is not a verifiable fact.”
- They add, “Comments based upon personal knowledge or hearsay are unacceptable.”
- They provide an example, “[I]t is acceptable to state that "band X appears to be surrounded by a rectangle with different background to the rest of the gel". It is NOT acceptable to state that "The authors have deliberately pasted in a different band".”
- They further explain, “[I]f a statement is made along the lines of "X deliberately falsified the data", we would be in the position of having to prove each step of the falsification and also the state of mind of the researcher (that it was done deliberately). The standard of proof can be very exacting and require information to which we would not have access (especially the private thoughts of the researcher!).” [<https://pubpeer.com/faq>]

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

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

conform to these guidelines or in our judgement expose us and you to legal risk in other ways.”

[<https://pubpeer.com/misconduct>]

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

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

“Research Misconduct” is Strictly Defined by Federal Regulations and Has Extremely Serious Consequences

31. “Research Misconduct” is a term of art in the scientific community. It is defined by federal regulations as:

“... fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

(a) Fabrication is making up data or results and recording or reporting them.

(b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

(c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

(d) Research misconduct does not include honest error or differences of opinion.”

[42 C.F.R. § 93.103 (2005)]

32. A finding of “research misconduct” requires “a significant departure from accepted practices of the relevant research community;” and that the “misconduct be committed intentionally, knowingly, or recklessly.” [42 C.F.R. § 93.104 (2005)]

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Then an unregistered user (likely the same one, given the context) reveals that s/he is either a person at Wayne State University who made a formal complaint against Dr. Sarkar, or is otherwise privy to the a person who did so:

Unregistered Submission:

(June 18th, 2014 4:51pm UTC)

Has anybody reported this to the institute?

Unregistered Submission:

(June 18th, 2014 5:43pm UTC)

Yes, in September and October 2013 the president of Wayne State University was informed several times.

The Secretary to the Board of Governors, who is also Senior Executive Assistant to the President Wayne State University, wrote back on the 11th of November 2013:

"Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.

"Thank you for bringing this matter to our attention."

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

Unregistered Submission:

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

Talking about the Board of Governors, see this public info

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

Peer 2:

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

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

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

Unregistered Submission:

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

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

Unregistered Submission:

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

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

Peer 2:

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

From the newsletter:

"Sarkar has published more than 525 scholarly articles"

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

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

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

...

Unregistered Submission:

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

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

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

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

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

43. At <https://pubpeer.com/publications/22806240>, there are comments that state: “You are correct: using the same blot to represent different experiment(s). I guess the reply from the authors would be “inadvertent errors in figure preparation,” which also accuse him of research misconduct and sarcastically noting that any defense to the contrary would be inadequate.

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

45. An unregistered submission on the URL as #44 above doubts that the authors have taken “physics” and that they have decided to “show the world” fabricated data. The same, or perhaps a different unregistered submission concludes: “One has to wonder how this was not recognized earlier by the journals, reviewers, funding agencies, study sections, and the university. Something is broken in our system.”

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

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

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

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

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

Peer 1:
(March 30th, 2014 10:07am UTC)
"The last author has more than 20 papers commented in Pubpeer. "

He's been very productive.

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

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

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

Not so fast!

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unregistered Submission:

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

1999-2014 here:

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

c. Another comment was made on July 24, 2014 at 7:04 AM from "Peer 1" at <https://pubpeer.com/publications/997E578FC0B61F6BAE1974D4051157>, "*Mitochondrial Dysfunction Promotes Breast Cancer Cell Migration and Invasion through HIF1 α Accumulation via Increased Production of Reactive Oxygen Species.*" This doubled the amount of comments on this 2006 paper.

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

e. All told, there are 42 papers with Dr. Sarkar as lead researcher that have garnered only one comment on PubPeer, many of them extremely recent comments on relatively old papers.

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

Unregistered Submission:

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

Compare Fig. 3B and Fig. 3D [AT

<http://cancerres.aacrjournals.org/content/65/19/9064.full.pdf+html>]

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

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

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

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

59. As such, there is no privilege. As one court has noted:

“Because the consequences of a research misconduct proceeding can be dire, the [federal] regulations impose conditions of strict confidentiality on allegations of research misconduct. As section 93.108 of the regulations states: "Disclosure of the identity of respondents and complainants in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law." 42 C.F.R. § 93.108(a) (2005). Disclosure of records or other evidence from which research subjects might be identified is also limited to "those who have a need to know to carry out a research misconduct proceeding." 42 C.F.R. § 93.108(b) (2005).” [*Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013)]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PubPeer Refuses Demands to Disclose Identity of Posters But “Outs” Dr. Sarkar

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

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

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

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

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

85. PubPeer did not reply.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count II - Intentional Interference with Business Expectancy

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

100. “Does” knew of this business expectancy.

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

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

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

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

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

Count III - Intentional Interference with Business Relationship

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

107. “Does” knew of this business relationship.

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

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

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

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

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

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

Count IV - Invasion of Privacy (False Light)

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

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

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

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

Count V – Intentional Infliction of Emotional Distress

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

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

119. “Does” distributed these statements widely as “proof” of Plaintiff’s alleged misconduct.

120. This was extreme and outrageous conduct, designed specifically to tarnish Dr. Sarkar’s reputation in the research community and in his workplace and intended workplace, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

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

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

Damages

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

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

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

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

Jury Demand

Plaintiff demands a trial by jury.

Relief Requested

WHEREFORE Plaintiff requests this honorable court grant the following:

- a. In excess of \$75,000 damages against Defendant(s), as warranted by the law and the proofs, including:
 - i. economic and non-economic damages as described above;
 - ii. the greatest possible combination of non-economic, exemplary and/or punitive damages;
- b. costs and pre- and post- judgment interest as permitted by law;
- c. attorney fees as permitted by law;
- d. issuance of an order to PubPeer and other entities who may have knowledge of “Does” identities;
- e. other remedies as are just, appropriate, and permitted by law or equity.

Respectfully submitted,

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

/s/ Nicholas Roumel

Nicholas Roumel
Attorney for Plaintiff

October 9, 2014

Exhibit 2

False Senate Investigation Document

Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells

Mol. Cancer Ther., 2006

Zhiwei Wang, Yuxiang Zhang, Yiwei Li, Sanjeev Banerjee, Joshua Liao, Fazlul H Sarkar

22 comment(s)

Curcumin analogue CDF inhibits pancreatic tumor growth by switching on suppressor microRNAs and attenuating EZH2 expression

Cancer Res., 2012

Bin Bao, Shadan Ali, Sanjeev Banerjee, Zhiwei Wang, Farah Logna, Asfar S Azmi, Dejuan Kong, Aamir Ahmad, Yiwei Li, Subhash Padhye, Fazlul H Sarkar

5 comment(s)

Inhibition of nuclear factor kappaB activity by genistein is mediated via Notch-1 signaling pathway in pancreatic cancer cells

Int. J. Cancer, 2006

Zhiwei Wang, Yuxiang Zhang, Sanjeev Banerjee, Yiwei Li, Fazlul H Sarkar

4 comment(s)

In vitro and in vivo molecular evidence of genistein action in augmenting the efficacy of cisplatin in pancreatic cancer

Int. J. Cancer, 2007

Sanjeev Banerjee, Yuxiang Zhang, Zhiwei Wang, Mingxin Che, Paul J Chin, James L Abbuzzese, Fazlul H Sarkar

4 comment(s)

Inactivation of AR/TMPRSS2-ERG/Wnt signaling networks attenuates the aggressive behavior of prostate cancer cells

Cancer Prev Res (Phila), 2011

Yiwei Li, Dejuan Kong, Zhiwei Wang, Aamir Ahmad, Bin Bao, Subhash Padhye, Fazlul H Sarkar

4 comment(s)

Activated K-Ras and INK4a/Arf deficiency promote aggressiveness of pancreatic cancer by induction of EMT consistent with cancer stem cell phenotype

J. Cell. Physiol., 2012

Zhiwei Wang, Shadan Ali, Sanjeev Banerjee, Bin Bao, Yiwei Li, Asfar S Azmi, Murray Korc, Fazlul H Sarkar

3 comment(s)

Epigenetic silencing of miR-34a in human prostate cancer cells and tumor tissue specimens can be reversed by BR-DIM treatment

Am J Transl Res, 2012

Dejuan Kong, Elisabeth Heath, Wei Chen, Michael Cher, Isaac Powell, Lance Heilbrun, Yiwei Li, Shadan Ali, Seema Sethi, Oudai Hassan, Clara Hwang, Nilesh Gupta, Dhananjay Chitale, Wael A Sakr, Mani Menon, Fazlul H Sarkar

3 comment(s)

FoxM1 down-regulation leads to inhibition of proliferation, migration and invasion of breast cancer cells through the modulation of extracellular matrix degrading factors

Breast Cancer Res. Treat., 2010

Aamir Ahmad, Zhiwei Wang, Dejuan Kong, Shadan Ali, Yiwei Li, Sanjeev Banerjee, Raza Ali, Fazlul H Sarkar

3 comment(s)

Refine your search:

The PubPeer database contains every single article ever published with a DOI. If you don't find what you're looking for simply paste a DOI, PubMed ID, or a arXiv ID into the search bar.

ACADEMIC EXPRESSION OF CONCERN
Grassley/NIH/PHS/1371-xx-xxx/folio-Alexhibit 6 1/45

Exhibit 3

WSU Subpoena Response

Julie Hearshen Miller

From: Clare Francis <clare.francis1946@googlemail.com>
Sent: Monday, November 11, 2013 3:29 PM
To: Julie Hearshen Miller
Subject: scientific concerns about published work FH Sakar, Karmanos cancer institute/Wayne State university

Dear Julie Miller,

Many thanks for doing that. I could not ask for more.

Yours sincerely,

Clare

On Mon, Nov 11, 2013 at 9:21 PM, Julie Hearshen Miller <julie.h.miller@wayne.edu> wrote:

November 11, 2013

Dear Ms. Francis:

Thank you for your e-mail, which I have forwarded to the appropriate individual within Wayne State University. As you are aware, scientific misconduct investigations are by their nature confidential, and Wayne would not be able to comment on whether an inquiry into your allegations is under way, or if so, what its status might be.

Thank you for bringing this matter to our attention.

Sincerely,

Julie H. Miller

Julie Hearshen Miller

Secretary to the Board of Governors

Senior Executive Assistant to the President

Wayne State University

4231 Faculty/Administration Building

Detroit, MI 48202

313-577-2034 (Office)

313-577-4231 (Fax)

From: Clare Francis [mailto:clare.francis1346@gocciemail.com]

Sent: Sunday, November 10, 2013 12:59 PM

To: julie.h.miller@wayne.edu

Cc: debra.harris@wayne.edu

Subject: scientific concerns about published work FH Sakar, Karmanos cancer institute/Wayne State university

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

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

You can find the entries on Pubpeer here:

[https://pubpeer.com/search/?u=sakar&sessionId=35\(FE399E7033B15F233&adv=none](https://pubpeer.com/search/?u=sakar&sessionId=35(FE399E7033B15F233&adv=none)

On opening the page you will see multiple capsules. On clicking on these they will open and you can read what people have written.

The entries try to stick to the scientific points for the most part.

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

I believe that this is the webpage of the person concerned. I do not know this person. The issues are scientific ones, not personal ones.

<http://pathology.med.wayne.edu/profile.php?id=45054>

The university president and dean of the medical school have been contacted on numerous occasions, but nothing seems to be happening.

Your sincerely,

Clare

Amy Stirling Lammers

From: Clare Francis <clare.francis1946@googlemail.com>
Sent: Wednesday, October 09, 2013 7:06 AM
To: president@wayne.edu
Cc: provost@wayne.edu; Dahlberg, John E (HHS/OASH); francis.collins; cope_opsmanager; research@wayne.edu
Subject: concerns 36 publications FH Sarkar, Wayne State

1. Int J Cancer. 2007 Feb 15;120(4):906-17.
2. Clin Cancer Res. 2004 Jul 1;10(13):4412-6.
3. Anticancer Res. 2004 Sep-Oct;24(5A):2885-91.
4. Mol Cancer Ther. 2004 Dec;3(12):1615-21.
5. J Cell Biochem. 2010 May;110(1):171-81.
6. Am J Transl Res. 2010 Sep 28;3(1):28-47.
7. Int J Cancer. 2009 Apr 1;124(7):1675-84.
8. Cancer Res. 2009 Apr 1;69(7):2757-65.
9. Mol Cancer Res. 2009 Dec;7(12):1973-83.
10. Mol Cancer Ther. 2008 Feb;7(2):341-9.
11. Int J Cancer. 2008 Aug 15;123(4):958-66.
12. Mol Cancer Ther. 2008 Jun;7(6):1708-19.
13. Clin Cancer Res. 2008 Jul 15;14(14):4427-36.
14. J Ovarian Res. 2008 Nov 24;1(1):9.
15. Mol Cancer Res. 2007 Feb;5(2):171-81.
16. Cancer Res. 2007 Mar 1;67(5):2141-9.
17. Clin Cancer Res. 2007 May 1;13(9):2811-21.
18. J Biol Chem. 2007 Jul 20;282(29):21542-50.
19. Cancer Res. 2007 Sep 1;67(17):8293-300.
20. Int J Cancer. 2006 Apr 15;118(8):1930-6.
21. Cancer Res. 2006 Jan 15;66(2):1025-32.
22. Mol Cancer Ther. 2006 Nov;5(11):2747-56.
23. Cancer Res. 2006 Aug 1;66(15):7653-60.
24. Mol Cancer Ther. 2006 Mar;5(3):483-93.
25. BMC Cancer. 2006 Apr 26;6:107.
26. Cancer Res. 2006 May 1;66(9):4816-25.
27. Cancer Res. 2006 Oct 15;66(20):10064-72.
28. Cancer Res. 2005 Aug 1;65(15):6934-42.
29. Am J Transl Res. 2012;4(1):14-23.
30. Cancer Res. 2005 Oct 1;65(19):9064-72.
31. Mol Cancer Ther. 2005 Dec;4(12):1943-51.
32. Cancer Lett. 2009 Jun 18;278(2):201-9.
33. Cancer Lett. 2012 May 1;318(1):86-92.
34. Transl Oncol. 2013 Apr;6(2):216-25.
35. PLoS One. 2013 Jul 29;8(7):e69485.
36. Anticancer Res. 2009 Jan;29(1):395-401.

Guidance of level of proof:

" We must always keep in mind that the standard of 'proof' that we look for is a general 'more likely than not' standard, not a deeply rigorous, criminally-oriented, 'beyond a shadow of doubt' standard."

I only look at the free ones. The others need to be checked too.

1. Int J Cancer. 2007 Feb 15;120(4):906-17.

In vitro and in vivo molecular evidence of genistein action in augmenting the efficacy of cisplatin in pancreatic cancer.

Banerjee S, Zhang Y, Wang Z, Che M, Chiao PJ, Abbruzzese JL, Sarkar FH.

Source

Department of Pathology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Grant sponsor: National Cancer Institute NIH; Grant number: 1R01CA101870-03; Grant sponsor: University of Texas MD Anderson Cancer Center; Grant number: SP20CA 101936-04.

<http://onlinelibrary.wiley.com/doi/10.1002/ijc.22332/pdf>

Figure 1(b). Please go to 270%.

Upper panel. The lower band in lane 5 has a vertical, straight, sharp left edge.

Figure 5 (a). Please compare the Akt panel (lowest panel) with a horizontal mirror image of the beta-actin panel above it (two panels above). Note: in the lower surface of the band in lane 3 of the Akt panel there is a small nick. You can find this small nick in the corresponding place in the lower surface of the band in lane 2 of the beta-actin panel above it.

Figure 6(d). Bcl-xL panel. Bands in lanes 1 and 3 have similar shapes.

The band in lane 2 has a different shape. There are steps in the levels of the bands between lanes 1,2 and 3.

I do not believe that the bands come from the same blot.

2. Clin Cancer Res. 2004 Jul 1;10(13):4412-6.

Cytochrome p450 and glutathione transferase expression in squamous cell cancer.

Ali S, El-Rayes BF, Heilbrun LK, Sarkar FH, Ensley JF, Kucuk O, Philip PA.

Source

Karmanos Cancer Institute, Wayne State University, Detroit, Michigan, USA.

Grant support: NIH Cancer Center Support Grant CA-22453.

Figure 2.

<http://clincancerres.aacrjournals.org/content/10/13/4412/F2.large.jpg>

p16 panel. Vertical, straight changes in background between lanes 5 and 6, and between lanes 8 and 9.

Beta-actin panel. Vertical, straight change in background between lanes 7 and 8.

Differential splicing makes comparison between panels problematic.

3. Anticancer Res. 2004 Sep-Oct;24(5A):2885-91.

EGF-receptor related protein causes cell cycle arrest and induces apoptosis of colon cancer cells in vitro and in vivo.

Levi E, Mohammad R, Kodali U, Marciniak D, Reddy S, Aboukameel A, Sarkar FH, Kucuk O, Rishi AK, Majumdar AP.

Source

Veterans Affairs Medical Center, Pathology and Laboratory Medicine Service, Wayne State University School of Medicine, Detroit, MI 48201, USA.

<http://ar.iiarjournals.org/content/24/5A/2885.long>

This work was supported by grants from the NIH/AIAA (RO1 AG14 343) and the Department of Veterans Affairs (VA Merit Review), USA.

Figure 5B. Please compare the 6 hour and the 24 hour alpha-tubulin panels.

4. Mol Cancer Ther. 2004 Dec;3(12):1615-21.

Epidermal growth factor receptor-related peptide inhibits growth of PC-3 prostate cancer cells.

Marciniak DJ, Rishi AK, Sarkar FH, Majumdar AP.

Source

Departments of Internal Medicine and Pathology, John D. Dingell Veterans Affairs Medical Center, Karmanos Cancer Center, Wayne State University School of Medicine, Detroit, Michigan 48201, USA.

Figure 3.

<http://mct.aacrjournals.org/content/3/12/1615/F3.large.jpg>

Figure 3A. p-EGFR panel. Vertical, straight changes in background between left, middle and right lanes.

p-ERK panel. Band middle lane has vertical, straight left edge.

p-Akt panel. Band middle lane has vertical, straight right edge.

5. J Cell Biochem. 2010 May;110(1):171-81. doi: 10.1002/jcb.22523.

Concurrent inhibition of NF-kappaB, cyclooxygenase-2, and epidermal growth factor receptor leads to greater anti-tumor activity in pancreatic cancer.

Ali S, Banerjee S, Schaffert JM, El-Rayes BF, Philip PA, Sarkar FH.

Source

Division of Hematology/Oncology, Karmanos Cancer Institute, Wayne State University, Detroit, Michigan 48201, USA.

Work partly supported by NIH grants RO1CA131151 and RO1CA132794.

Figure 6.

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3093967/figure/F6/>

Figure 6A. Please compare lanes 3 and 9.

Please compare lanes 4 and 8, paying attention to the tops of the lanes.

6. Am J Transl Res. 2010 Sep 28;3(1):28-47.

Differentially expressed miRNAs in the plasma may provide a molecular signature for aggressive pancreatic cancer.

Ali S, Almhanna K, Chen W, Philip PA, Sarkar FH.

Financial support provided through **RO1 grant funding from National Institute of Health awarded to FHS (5ROCA131151, 3RO1CA131151-02S1, and 5RO1CA132794).**

Figure 5.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=2981424_ajtr0003-0028-f5.jpg

Figure 5C. E-Cadherin panel. Vertical change background between lanes 1 and 2.

Vimentin panel. Vertical changes in background between lanes 3,4,5 and 6.

FEN-1 panel. Vertical changes in background between lanes 1 and 2, and between lanes 4,5 and 6. There is a horizontal change in background below the bands in lanes 2 to 4.

PTEN panel. Band lane 6 is in lighter than background, near rectangle.

PDCD4 panel. Bands lanes 2 to 5 on near rectangles of darker than general background.

Maspin panel. Vertical change in background between lanes 4 and 5.

Beta-actin panel. Vertical change in background between lanes 6 and 7. There is also a change in background between lanes 3 and 4.

Differential splicing makes comparison between panels problematic.

7. Int J Cancer. 2009 Apr 1;124(7):1675-84. doi: 10.1002/ijc.24015.

Radiation-induced HIF-1alpha cell survival pathway is inhibited by soy isoflavones in prostate cancer cells.

Singh-Gupta V, Zhang H, Banerjee S, Kong D, Raffoul JJ, Sarkar FH, Hillman GG.

Source

Department of Radiation Oncology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI.

Grant sponsor: American Cancer Society; Grant number: ROG-06-097-01; Grant sponsor: The Department of Defense; Grant number: DMAD17-03-1-0042; Grant sponsor: National Institutes of Health; Grant number: 5R01CA108535-05.

Figure 4.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=2670478_nihms99912f4.jpg

Please compare the APE1/Ref-1 panels in 4B and 4C. Remember that the control lane in 4B is not in the APE1/Ref-1 panel in 4C.

Please compare the Rb panels in 4B and 4C. They are different.

8. Cancer Res. 2009 Apr 1;69(7):2757-65. doi: 10.1158/0008-5472.CAN-08-3060. Epub 2009 Mar 24. TW-37, a small-molecule inhibitor of Bcl-2, inhibits cell growth and induces apoptosis in pancreatic cancer: involvement of Notch-1 signaling pathway.

Wang Z, Azmi AS, Ahmad A, Banerjee S, Wang S, Sarkar FH, Mohammad RM.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University, Detroit, Michigan 48201, USA.

Grant support: National Cancer Institute, NIH grant R01CA109389 (R.M. Mohammad), NIH grant 5R01CA101870 (F.H. Sarkar), and NIH grant U19CA113317 (S. Wang).

Figure 3.

<http://cancerres.aacrjournals.org/content/69/7/2757/F3.large.jpg>

Left Cyclin A panel. Vertical change in background between lanes 3 and 4.

Left cyclin B1 panel. Horizontal change in background above bands lanes 2 to 6.

Right beta-actin panel. Please compare bands lanes 3 and 6.

Figure 4.

<http://cancerres.aacrjournals.org/content/69/7/2757/F4.large.jpg>

Figure 4A. Hey-1 panel. Vertical change in background between lanes 3 and 4.

No vertical changes in background in the other 4 panels.

9. Mol Cancer Res. 2009 Dec;7(12):1973-83. doi: 10.1158/1541-7786.MCR-09-0309. Epub 2009 Dec 8. A novel inhibitor of DNA polymerase beta enhances the ability of temozolomide to impair the growth of colon cancer cells.

Jaiswal AS, Banerjee S, Panda H, Bulkin CD, Izumi T, Sarkar FH, Ostrov DA, Narayan S.

Source

Department of Anatomy and Cell Biology and University of Florida Shands Cancer Center, University of Florida, Gainesville, FL 32610, USA.

Grant support: National Cancer Institute-NIH grants CA-097031 and CA-100247 (S. Narayan).

Figure 2.

<http://mcr.aacrjournals.org/content/7/12/1973/F2.large.jpg>

Figure 2A. Vertical changes in background between lanes 1,2,3, and between lanes 4 and 5.

Figure 2B. Vertical changes in background between lanes 3 and 4.

Figure 4.

<http://mcr.aacrjournals.org/content/7/12/1973/F4.large.jpg>

Figure 4A. Vertical, light areas at right ends of bands at top of panel in lanes 1 and 5, but not in lanes 2,3 and 4.

10. Mol Cancer Ther. 2008 Feb;7(2):341-9. doi: 10.1158/1535-7163.MCT-07-0476.

Induction of growth arrest and apoptosis in human breast cancer cells by 3,3-diindolylmethane is associated with induction and nuclear localization of p27kip.

Wang Z, Yu BW, Rahman KM, Ahmad F, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Figure 2.

<http://mct.aacrjournals.org/content/7/2/341/F2.large.jpg>

Figure 2B. Please compare the bands in the p-Akt and the Actin panels.

They are all quite similar except for the bands in lanes 5.

Figure 4.

<http://mct.aacrjournals.org/content/7/2/341/F4.large.jpg>

Figure 4B. MEK panel. Change in background between lanes 11 and 12.

11. *Int J Cancer*. 2008 Aug 15;123(4):958-66. doi: 10.1002/ijc.23610.

TW-37, a small-molecule inhibitor of Bcl-2, inhibits cell growth and invasion in pancreatic cancer.

Wang Z, Song W, Aboukameel A, Mohammad M, Wang G, Banerjee S, Kong D, Wang S, Sarkar FH, Mohammad RM.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University, Detroit, MI 48201, USA.

Grant sponsor: National Cancer Institute, NIH; Grant number: R01CA-109389; Grant sponsor: NIH; Grant number: 5R01CA101870; Grant sponsor: NIH; Grant number: P30CA22453; Grant sponsor: NIH; Grant number: U19CA11317; Grant sponsor: Department of Defense Breast Cancer Program; Grant number: BC0009140.

<http://onlinelibrary.wiley.com/doi/10.1002/ijc.23610/pdf>

Go to 240%.

Figure 3b. Cyclin D1 panel. Vertical changes in background between left, middle and right lanes.

It is supposed to be a dose response.

Survivin panel. Vertical change in background between middle and right lanes.

12. *Mol Cancer Ther*. 2008 Jun;7(6):1708-19. doi: 10.1158/1535-7163.MCT-08-0354.

Apoptosis-inducing effect of erlotinib is potentiated by 3,3'-diindolylmethane in vitro and in vivo using an orthotopic model of pancreatic cancer.

Ali S, Banerjee S, Ahmad A, El-Rayes BF, Philip PA, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI, USA.

Figure 3.

<http://mct.aacrjournals.org/content/7/6/1708/F3.large.jpg>

Right PARP panel. Lower bands in lanes 2 and 4 have sharp, vertical, straight right ends.

Figure 5.

<http://mct.aacrjournals.org/content/7/6/1708/F5.large.jpg>

Figure 5, left panel. Signal lanes 7 and 8 has "frilly" left and right edges. This is different from other lanes.

13. Clin Cancer Res. 2008 Jul 15;14(14):4427-36. doi: 10.1158/1078-0432.CCR-08-0458.

Anti-invasive and antimetastatic activities of ribosomal protein S6 kinase 4 in breast cancer cells.
Thakur A, Sun Y, Bollig A, Wu J, Biliran H, Banerjee S, Sarkar FH, Liao DJ.

Source

Department of Pathology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, Michigan, USA.

Grant support: NIH grant R01 CA100864 (D.J. Liao), Elsa U. Pardee Foundation (A. Thakur), and Susan G. Komen Breast Cancer Foundation grant BCTR02-01648 (D.J. Liao).

Figure 1.

<http://clincancerres.aacrjournals.org/content/14/14/4427/F1.large.jpg>

Figure 1A. Row 1. c-Myc panel. Vertical changes in background between lanes 3,4 and 5.

Row 2, right set of panels. c-Myc panel. Vertical change in background between lanes 2 and 3.

RSK4 panel. No vertical changes in background.

Row 4. Please compare RSK4 bands in lanes 1 and 2.

Please compare RSK4 bands in lanes 2,4 and 8.

Please compare Rb bands in lanes 2 and 4.

Figure 5.

<http://clincancerres.aacrjournals.org/content/14/14/4427/F5.large.jpg>

Figure 5A. RSK4 panel. Vertical changes in background between lanes 1 and 2, and between lanes 3 and 4.

14. J Ovarian Res. 2008 Nov 24;1(1):9. doi: 10.1186/1757-2215-1-9.

Sensitization of ovarian cancer cells to cisplatin by genistein: the role of NF-kappaB.
Solomon LA, Ali S, Banerjee S, Munkarah AR, Morris RT, Sarkar FH.

Source

Division of Gynecologic Oncology, Karmanos Cancer Center, Wayne State University, Detroit, Michigan, USA.

Figure 3.

<http://www.ovarianresearch.com/content/1/1/9/figure/F3?highres=y>

A2780 section of panels.

Survivin panel. Vertical change in background between lanes 2 and 3.

Light, vertical streak at right edge of band lane 7.

C200 section of panels.

PARP panel. Please compare lower bands in lanes 5 and 7.

Please compare lower bands lanes 6 and 8.

15. Mol Cancer Res. 2007 Feb;5(2):171-81.

Aberrant expression of X-linked genes RbAp46, Rsk4, and Cldn2 in breast cancer.

Thakur A, Rahman KW, Wu J, Bollig A, Biliran H, Lin X, Nassar H, Grignon DJ, Sarkar FH, Liao JD.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University, 110 East Warren Avenue, Detroit, MI 48201, USA.

Panels do not look authentic. Please ask for high quality images of the originals.

16. Cancer Res. 2007 Mar 1;67(5):2141-9.

Down-regulation of apurinic/aprimidinic endonuclease 1/redox factor-1 expression by soy isoflavones enhances prostate cancer radiotherapy in vitro and in vivo.

Raffoul JJ, Banerjee S, Singh-Gupta V, Knoll ZE, Fite A, Zhang H, Abrams J, Sarkar FH, Hillman GG.

Source

Department of Radiation Oncology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Figure 2.

<http://cancerres.aacrjournals.org/content/67/5/2141/F2.large.jpg>

Figure 2A. Please compare the left and right Rb panels.

Figure 2B. Please compare the left and right Rb panels.

Please compare the figure 2B Rb panels with horizontal mirror images of the figure 2A Rb panels.

17. Clin Cancer Res. 2007 May 1;13(9):2811-21.

c-Myc-induced chemosensitization is mediated by suppression of cyclin D1 expression and nuclear factor-kappa B activity in pancreatic cancer cells.

Biliran H Jr, Banerjee S, Thakur A, Sarkar FH, Bollig A, Ahmed F, Wu J, Sun Y, Liao JD.

Source

Department of Pathology, Wayne State University School of Medicine, Detroit, Michigan, USA.

Figure 5.

<http://clincancerres.aacrjournals.org/content/13/9/2811/F5.large.jpg>

Figure 5D. Please compare the right beta-actin panel with a horizontal mirror image of the left beta-actin panel.

They are not the same, but there are many similarities.

18. J Biol Chem. 2007 Jul 20;282(29):21542-50. Epub 2007 May 23.

Regulation of FOXO3a/beta-catenin/GSK-3beta signaling by 3,3'-diindolylmethane contributes to inhibition of cell proliferation and induction of apoptosis in prostate cancer cells.

Li Y, Wang Z, Kong D, Murthy S, Dou QP, Sheng S, Reddy GP, Sarkar FH.

Source

Department of Pathology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, Michigan 48201, USA.

<http://www.jbc.org/content/early/2007/05/23/jbc.M701978200>

Figure 3C. Please compare the cytosol and nuclear panels.

19. Cancer Res. 2007 Sep 1;67(17):8293-300.

Down-regulation of Forkhead Box M1 transcription factor leads to the inhibition of invasion and angiogenesis of pancreatic cancer cells.

Wang Z, Banerjee S, Kong D, Li Y, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University, Detroit, MI 48201, USA.

Grant support: National Cancer Institute, NIH (5R01CA101870-05) to F.H. Sarkar.

Figure 1. Cancer Res. 2007 Sep 1;67(17):8293-300.

<http://cancerres.aacrjournals.org/content/67/17/8293/F1.large.jpg>

Figure 1D. FoxM1 panel. Please compare lanes 2 and 4.

Please compare beta-actin panel figure 1D Cancer Res. 2007 Sep 1;67(17):8293-300

with top beta-actin panel figure 1D Mol Cancer Ther. 2006 Mar;5(3):483-93.

<http://mct.aacrjournals.org/content/5/3/483/F1.large.jpg>

Figure 4. Cancer Res. 2007 Sep 1;67(17):8293-300.

<http://cancerres.aacrjournals.org/content/67/17/8293/F4.large.jpg>

Figure 4C. Multiple, differential splicing in the panels.

Figure 5.

<http://cancerres.aacrjournals.org/content/67/17/8293/F5.large.jpg>

Please compare uPAR panel figure 5B Cancer Res. 2007 Sep 1;67(17):8293-300

with cyclin D1 panel figure 5B Mol Cancer Ther. 2006 Mar;5(3):483-93.

Figure 5 Mol Cancer Ther. 2006 Mar;5(3):483-93.

<http://mct.aacrjournals.org/content/5/3/483/F5.large.jpg>

20. Int J Cancer. 2006 Apr 15;118(8):1930-6.

Inhibition of nuclear factor kappaB activity by genistein is mediated via Notch-1 signaling pathway in pancreatic cancer cells.

Wang Z, Zhang Y, Banerjee S, Li Y, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Grant sponsor: National Cancer Institute, NIH; Grant number:5R01CA101870-0

<http://onlinelibrary.wiley.com/doi/10.1002/ijc.21589/pdf>

Please compare bands lanes 1 and 2 BclxL panel figure 3 Cancer. 2006 Mar 15;106(6):1260-8

with bands IkappaBalpha panel figure 6 Int J Cancer. 2006 Apr 15;118(8):1930-6.

The treatments are different.

Please compare the beta-actin panel figure 3B Cancer. 2006 Mar 15;106(6):1260-8.

with beta-actin panel figure 5A Int J Cancer. 2006 Apr 15;118(8):1930-6.

Please compare Rb panel figure 4C Cancer. 2006 Mar 15;106(6):1260-8.

with Rb panel figure 5B Int J Cancer. 2006 Apr 15;118(8):1930-6, paying attention to trail of grey signal over the right ends of the bands in lanes 2 .

For reference:

Cancer. 2006 Mar 15;106(6):1260-8.

Cisplatin-induced antitumor activity is potentiated by the soy isoflavone genistein in BxPC-3 pancreatic tumor xenografts.

Mohammad RM, Banerjee S, Li Y, Aboukameel A, Kucuk O, Sarkar FH.

Source

Division of Hematology and Oncology, Department of Internal Medicine, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Supported in part by grants from the **National Cancer Institute, National Institutes of Health (Grants 1R01CA101870-02 and 5R01CA083695-04)** to F.H.S. and in part by a subcontract award (to F.H.S.) from the University of Texas M. D. Anderson Cancer Center through a Specialized Program of Research Excellent (SPORE) grant (1P20-CA010193-02) on pancreatic cancer awarded to James Abbruzzese.

<http://onlinelibrary.wiley.com/doi/10.1002/cncr.21731/pdf>

21. Cancer Res. 2006 Jan 15;66(2):1025-32.

Antitumor activity of epidermal growth factor receptor-related protein is mediated by inactivation of ErbB receptors and nuclear factor-kappaB in pancreatic cancer.

Zhang Y, Banerjee S, Wang Z, Xu H, Zhang L, Mohammad R, Aboukameel A, Adsay NV, Che M, Abbruzzese JL, Majumdar AP, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University of Medicine, Detroit, MI 48201, USA.

Grant support: National Cancer Institute/NIH grant 1R01CA101870-02 (F.H. Sarkar), University of Texas M.D. Anderson Cancer Center Specialized Programs of Research Excellence grant S P20CA 101936-02 on pancreatic cancer (J. Abbruzzese), and Puschelberg Foundation.

Figure 1.

<http://cancerres.aacrjournals.org/content/66/2/1025/F1.large.jpg>

Figure 1B. pEGFR(Y1173) panel. Please compare lanes 3 and 5.

Please compare lanes 4 and 6.

Figure 3.

<http://cancerres.aacrjournals.org/content/66/2/1025/F3.large.jpg>

Figure 3C. pHER3 panel. Please compare bands lanes 2 and 5.

Please compare bands lanes 3 and 9.

Beta-actin panel. Please compare bands lanes 4 and 9.

22. Mol Cancer Ther. 2006 Nov;5(11):2747-56.

Therapeutic intervention of experimental breast cancer bone metastasis by indole-3-carbinol in SCID-human mouse model.

Rahman KM, Sarkar FH, Banerjee S, Wang Z, Liao DJ, Hong X, Sarkar NH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, 9374 Scott Hall, 540 East Canfield, Detroit, MI 48201, USA.

Please compare figure 4C Mol Cancer Ther. 2006 Nov;5(11):2747-56

with figure 2 Cancer Res. 2006 Mar 1;66(5):2778-84

and with figure 4E Cancer Res. 2005 Aug 1;65(15):6934-42.

Figure 4. Mol Cancer Ther. 2006 Nov;5(11):2747-56.

<http://mct.aacrjournals.org/content/5/11/2747/F4.large.jpg>

Figure 2. Cancer Res. 2006 Mar 1;66(5):2778-84

<http://cancerres.aacrjournals.org/content/66/5/2778/F2.large.jpg>

Figure 4. Cancer Res. 2005 Aug 1;65(15):6934-42.

<http://cancerres.aacrjournals.org/content/65/15/6934/F4.large.jpg>

23. Cancer Res. 2006 Aug 1;66(15):7653-60.

Epidermal growth factor receptor-related protein inhibits cell growth and invasion in pancreatic cancer.

Wang Z, Sengupta R, Banerjee S, Li Y, Zhang Y, Rahman KM, Aboukameel A, Mohammad R, Majumdar AP, Abbruzzese JL, Sarkar FH.

Source

Departments of Pathology and Internal Medicine, Division of Hematology and Oncology, Karmanos Cancer Institute, Wayne State University, 110 East Warren Avenue, Detroit, MI 48201, USA.

Grant support: National Cancer Institute/NIH grant 1R01CA101870-02 (F.H. Sarkar) and subcontract award (F.H. Sarkar) from the University of Texas M.D. Anderson Cancer Center through a Specialized

Programs of Research Excellence grant S P20CA 101936-02 on pancreatic cancer awarded to James Abbruzzese.

Figure 2.

<http://cancerres.aacrjournals.org/content/66/15/7653/F2.large.jpg>

Figure 2C. Notch-1 panel. Please compare bands lanes 2 and 4.

There are small differences, but many similarities.

Hes-1 panel. Please compare bands lanes 3 and 5.

There are small differences, but many similarities.

Figure 2D. Please compare bands lanes 1,2 and 3 Notch-1 panel figure 2D with vertically stretched versions of bands lanes 2,3 and 4 Hes-1 panel figure 2C.

Please compare bands lanes 4 and 5 Notch-1 panel figure 2D with vertically stretched horizontal mirror images of bands lanes 5 and 6 Hes-1 panel figure 2C.

Figure 6.

<http://cancerres.aacrjournals.org/content/66/15/7653/F6.large.jpg>

MMP-9 panel. Please compare bands lanes 3 and 4.

Please compare: Hes-1 panel figure 2C Cancer Res. 2006 Aug 1;66(15):7653-60

with Cyclin A panel figure 5 Mol Cancer Ther. 2006 Mar;5(3):483-93.

Please compare: Cyclin D1 panel figure 2C Cancer Res. 2006 Aug 1;66(15):7653-60

with Bcl-XL panel figure 5 Mol Cancer Ther. 2006 Mar;5(3):483-93.

24. Mol Cancer Ther. 2006 Mar;5(3):483-93.

Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells.

Wang Z, Zhang Y, Li Y, Banerjee S, Liao J, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, 9374 Scott Hall, 540 East Canfield, Detroit, MI 48201, USA.

Grant support: National Cancer Institute, NIH grant 5R01CA101870-02 and The University of Texas M.D. Anderson Cancer Center subcontract award (F.H. Sarkar) through Specialized Program of Research Excellence in Pancreatic Cancer grant 1P20-CA010193-01 (J. Abbruzzese).

Figure 1.

<http://mct.aacrjournals.org/content/5/3/483/F1.large.jpg>

Figure 1D.

Top Notch-1 panel. Please compare bands in lanes 2,4 and 5.

Bottom Notch-1 panel. Please compare bands in lanes 1 and 6.

Please compare bands lanes 3 and 5.

Please compare bands lanes 3 and 5 bottom notch-1 panel with horizontal mirror images bands lanes 2 and 4 top Notch-1 panel.

Figure 5.

<http://mct.aacrjournals.org/content/5/3/483/F5.large.jpg>

Cylin A panel. Please compare bands lanes 3 and 5.

Beta-actin panel. Please compare bands lanes 2 and 5.

Please compare bands lanes 3 and 6.

Cylin D1 panel. Bcl-2 panel. Please compare bands lanes 2 and 4.

25. BMC Cancer. 2006 Apr 26;6:107.

Genistein inhibits radiation-induced activation of NF-kappaB in prostate cancer cells promoting apoptosis and G2/M cell cycle arrest.

Raffoul JJ, Wang Y, Kucuk O, Forman JD, Sarkar FH, Hillman GG.

Source

Department of Radiation Oncology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Figure 4.

<http://www.biomedcentral.com/1471-2407/6/107/figure/F4?highres=y>

Figure 4A. p21WAF1/Cip1 panel. Don't understand the step up and different shape of band in lane 4.

Figure 5.

<http://www.biomedcentral.com/1471-2407/6/107/figure/F5?highres=y>

Figure 5A. Top panel. Signal in lanes 2 and 3 has vertical, straight right edges.

26. Cancer Res. 2006 May 1;66(9):4816-25.

Antitumor and antimetastatic activities of docetaxel are enhanced by genistein through regulation of

osteoprotegerin/receptor activator of nuclear factor-kappaB (RANK)/RANK ligand/MMP-9 signaling in prostate cancer.

Li Y, Kucuk O, Hussain M, Abrams J, Cher ML, Sarkar FH.

Source

Department of Pathology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, Michigan 48201, USA.

Grant support: National Cancer Institute, NIH, grants 5R01CA101870, 5R01CA083695 (F.H. Sarkar), and 5R01DK067687 (M.L. Cher), and Aventis Pharmaceuticals (F.H. Sarkar).

Figure 3.

<http://cancerres.aacrjournals.org/content/66/9/4816/F3.large.jpg>

Figure 3C. Left OPG panel. Please compare bands lanes 3 and 7.

27. Cancer Res. 2006 Oct 15;66(20):10064-72.

Down-regulation of androgen receptor by 3,3'-diindolylmethane contributes to inhibition of cell proliferation and induction of apoptosis in both hormone-sensitive LNCaP and insensitive C4-2B prostate cancer cells.

Bhuiyan MM, Li Y, Banerjee S, Ahmed F, Wang Z, Ali S, Sarkar FH.

Source

Departments of Pathology and Internal Medicine, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, Michigan 48201, USA.

Figure 4.

<http://cancerres.aacrjournals.org/content/66/20/10064/F4.large.jpg>

Please compare the C4-2B and LNCaP PSA panels.

Figure 5.

<http://cancerres.aacrjournals.org/content/66/20/10064/F5.large.jpg>

Figure 5C. Left C4-2B cells panel. Please compare the right 2 lanes.

There are small differences, but many similarities.

28. Cancer Res. 2005 Aug 1;65(15):6934-42.

Inactivation of nuclear factor kappaB by soy isoflavone genistein contributes to increased apoptosis induced by chemotherapeutic agents in human cancer cells.

Li Y, Ahmed F, Ali S, Philip PA, Kucuk O, Sarkar FH.

Source

Erratum in

- Cancer Res. 2005 Dec 1;65(23):11228.

Figure 4.

<http://cancerres.aacrjournals.org/content/65/15/6934/F4.large.jpg>

Figure 4A. It is quite subtle, but there are vertical, straight, grey streaks between lanes 1 and 2, and 5 and 6. It is supposed to be a dose response.

29. Am J Transl Res. 2012;4(1):14-23. Epub 2012 Jan 5.

Epigenetic silencing of miR-34a in human prostate cancer cells and tumor tissue specimens can be reversed by BR-DIM treatment.

Kong D, Heath E, Chen W, Cher M, Powell I, Heilbrun L, Li Y, Ali S, Sethi S, Hassan O, Hwang C, Gupta N, Chitale D, Sakr WA, Menon M, Sarkar FH.

Source

Departments of Pathology, Oncology, Karmanos Cancer Institute, Wayne State University School of Medicine Detroit, Michigan.

Figure 4.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=3275434_ajtr0004-0014-f4.jpg

Figure 4B. PSA panel. Vertical change in background between lanes 2 and 3.

GAPDH panel. Signal to right band lane 2 has vertical right end.

AR panel. No vertical changes in background.

Comparison between spliced and unspliced panels is problematic.

30. Cancer Res. 2005 Oct 1;65(19):9064-72.

Molecular evidence for increased antitumor activity of gemcitabine by genistein in vitro and in vivo using an orthotopic model of pancreatic cancer.

Banerjee S, Zhang Y, Ali S, Bhuiyan M, Wang Z, Chiao PJ, Philip PA, Abbruzzese J, Sarkar FH.

Source

Department of Pathology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, Michigan 48201, USA.

Figure 3.

<http://cancerres.aacrjournals.org/content/65/19/9064/F3.large.jpg>

Please compare the signal, including the dots, in the control lane of the right panel figure 3D

with a horizontal mirror image of the non specific lane right panel figure 3A.

Please compare the left 2 lanes of the left panel figure 3D with a horizontal mirror image of the left 2 lanes of the left panel figure 3B.

Please compare the 2nd lane right panel figure 3C with horizontal mirror image lane 1 right panel figure 3B.

31. Mol Cancer Ther. 2005 Dec;4(12):1943-51.

Simultaneous targeting of the epidermal growth factor receptor and cyclooxygenase-2 pathways for pancreatic cancer therapy.

Ali S, El-Rayes BF, Sarkar FH, Philip PA.

Source

Department of Hematology, Karmanos Cancer Institute, Wayne State University, Detroit, MI 48201, USA.

Figure 5.

<http://mct.aacrjournals.org/content/4/12/1943/F5.large.jpg>

Figure 5B. Beta-actin panel. Please compare bands lanes 2 and 3.

32. Cancer Lett. 2009 Jun 18;278(2):201-9. doi: 10.1016/j.canlet.2009.01.009. Epub 2009 Feb 23.

Sensitization of squamous cell carcinoma to cisplatin induced killing by natural agents.

Ali S, Varghese L, Pereira L, Tulunay-Ugur OE, Kucuk O, Carey TE, Wolf GT, Sarkar FH.

Source

Division of Hematology/Oncology, Karmanos Cancer Center, Wayne State University, Detroit, MI, USA.

Figure 4.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=3350786_nihms371211f5.jpg

Right suvivin panel. Vertical, light streak between bands lanes 3 and 4.

Vertical, light streak to right band lane 4.

Primary data should be at hand.

33. Cancer Lett. 2012 May 1;318(1):86-92. doi: 10.1016/j.canlet.2011.12.006. Epub 2011 Dec 9.

B-DIM impairs radiation-induced survival pathways independently of androgen receptor expression and augments radiation efficacy in prostate cancer.

Singh-Gupta V, Banerjee S, Yunker CK, Rakowski JT, Joiner MC, Konski AA, Sarkar FH, Hillman GG.

Source

Department of Radiation Oncology, Barbara Ann Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Figure 2.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=3288414_nihms346634f2.jpg

Figure 2B. Left Rb panel. Band lane 2 has vertical, straight left edge.

Right Rb panel. Band lane 4 has horizontal, straight top.

Only small things, but they are not natural.

34. Transl Oncol. 2013 Apr;6(2):216-25. Epub 2013 Apr 1.

CXCR2 macromolecular complex in pancreatic cancer: a potential therapeutic target in tumor growth.

Wang S, Wu Y, Hou Y, Guan X, Castelveter MP, Oblak JJ, Banerjee S, Filtz TM, Sarkar FH, Chen X, Jena BP, Li C.

Source

Department of Biochemistry and Molecular Biology, Wayne State University School of Medicine, Detroit, MI.

Figure 2.

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3610555/figure/F2/>

Figure 2B. L3.6pl panel. Vertical change in background between lanes 4 and 5.

HPAC panel. Vertical change in background halfway along lane 4.

35. PLoS One. 2013 Jul 29;8(7):e69485. doi: 10.1371/journal.pone.0069485. Print 2013.

Mitochondrial dysfunction promotes breast cancer cell migration and invasion through HIF1 α accumulation via increased production of reactive oxygen species.

Ma J, Zhang Q, Chen S, Fang B, Yang Q, Chen C, Miele L, Sarkar FH, Xia J, Wang Z.

Source

Department of Biochemistry and Molecular Biology, Bengbu Medical College, Bengbu, Anhui, China.

Please compare beta-actin panel figure 6B with left 2 lanes beta-actin panel figure 5B. The recorded cells are different.

Please compare band left lane HIF α panel figure 6B with band rightmost lane beta-actin panel figure 5B.

Figure 6.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=3726697_pone.0069485.g006.jpg

Figure 5.

http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=3726697_pone.0069485.g005.jpg

36. Anticancer Res. 2009 Jan;29(1):395-401.

Curcumin synergizes the growth inhibitory properties of Indian toad (*Bufo melanostictus* Schneider) skin-derived factor (BM-ANF1) in HCT-116 colon cancer cells.

Giri B, Gomes A, Sengupta R, Banerjee S, Nautiyal J, Sarkar FH, Majumdar AP.

Source

Laboratory of Toxinology and Experimental Pharmacodynamics, Department of Physiology, University of Calcutta, Kolkata 700 009, India.

Figure 3.

<http://ar.iiarjournals.org/content/29/1/395/F3.large.jpg>

Figure 3A. Cyclin B panel. Please compare bands lanes 2 and 3.

Horizontal change background below band lane 2.

Horizontal change background above band lane 3.

Figure 4.

<http://ar.iiarjournals.org/content/29/1/395/F4.large.jpg>

Bad panel. Please compare bands lanes 2 and 3.

Figure 5.

<http://ar.iiarjournals.org/content/29/1/395/F5.large.jpg>

Lane 4. Horizontal, straight bar just above NF-kappaB band.

Dots with halos at left edge of bands about halfway up lanes 1 and 3.

Grey dots about 1/5th the way up lanes 2 and 4.

Dots with light areas next to them just under halfway up lanes 2 and 4.

Amy Stirling Lammers

From: Clare Francis <clare.francis1946@googlemail.com>
Sent: Wednesday, October 09, 2013 12:49 PM
To: president@wayne.edu
Cc: provost@wayne.edu; Dahlberg, John E (HHS/OASH); francis.collins; research@wayne.edu; cope_opsmanager
Subject: 1. additional observations on Cancer Res. 2009 May 15;69(10):4468-75. concerns new paper: Mol Cancer Ther. 2007 Oct;6(10):2757-65.

1. Cancer Res. 2009 May 15;69(10):4468-75.

2. Int J Cancer. 2011 Oct 1;129(7):1781-91.

3. Mol Cancer Ther. 2007 Oct;6(10):2757-65.

1. Additional observations Cancer Res. 2009 May 15;69(10):4468-75.

Please compare lanes 3 and 4 Rb panel figure 4 Cancer Res. 2009 May 15;69(10):4468-75
<http://cancerres.aacrjournals.org/content/69/10/4468/F4.large.jpg>

with lanes 1 and 2 beta-actin panel figure 2D Mol Cancer Ther. 2007 Oct;6(10):2757-65.
<http://mct.aacrjournals.org/content/6/10/2757/F2.large.jpg>

Please compare lane 2 Rb panel figure 4 Cancer Res. 2009 May 15;69(10):4468-75
with lane 3 beta-actin panel figure 2D Mol Cancer Ther. 2007 Oct;6(10):2757-65.

Please compare lane 6 Rb panel figure 4 Cancer Res. 2009 May 15;69(10):4468-75
with lane 4 beta-actin panel figure 2D Mol Cancer Ther. 2007 Oct;6(10):2757-65.

Cancer Res. 2009 May 15;69(10):4468-75. doi: 10.1158/0008-5472.CAN-08-4423. Epub 2009 May 12.
3,3'-Diindolylmethane enhances taxotere-induced apoptosis in hormone-refractory prostate cancer cells through survivin down-regulation.

Rahman KM, Banerjee S, Ali S, Ahmad A, Wang Z, Kong D, Sakr WA.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

Grant support: Department of Defense grant W81XWH-07-01-0145 (KM W. Rahman).

Figure 2.

<http://cancerres.aacrjournals.org/content/69/10/4468/F2.large.jpg>

Figure 2B.

Left PSA panel. Band lane 3 on near geometrical piece of background.

Left FOXM1 panel.

Band lane 1 has vertical, light sharp white streak at right end.

Band lane 3 has vertical, light sharp white streak at left end.

Left beta-actin panel.

Bands lanes 1 and 2 are fuzzy. Bands lanes 3 and 4 are much more distinct in outline.

Figure 4.

<http://cancerres.aacrjournals.org/content/69/10/4468/F4.large.jpg>

Figure 4C.

Rb panel. Please compare bands in lanes 1 and 4.

Please compare band lane 5 with horizontal mirror image band lane 4.

Please compare band lane 8 with horizontal mirror image band lane 2.

2. Int J Cancer. 2011 Oct 1;129(7):1781-91. doi: 10.1002/ijc.25839. Epub 2011 Mar 8.

3,3'-Diindolylmethane enhances taxotere-induced growth inhibition of breast cancer cells through downregulation of FoxM1.

Ahmad A, Ali S, Wang Z, Ali AS, Sethi S, Sakr WA, Raz A, Rahman KM.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, MI 48201, USA.

<http://onlinelibrary.wiley.com/doi/10.1002/ijc.25839/pdf>

Grant sponsor: Department of Defense; Grant numbers: W81XWH-04-1-0689, W81XWH-05-1-0505

Figure 3b.

MDA-MB-231 panels.

p27 panel. Vertical change in background between lanes 1 and 2.

p21 panel. Vertical change in background between lanes 1 and 2.

MCF-7 panels.

p27 panel. Vertical change in background between lanes 2 and 3.

p21 panel. Vertical change in background between lanes 2 and 3.

3. Mol Cancer Ther. 2007 Oct;6(10):2757-65. Epub 2007 Oct 3.

Inactivation of NF-kappaB by 3,3'-diindolylmethane contributes to increased apoptosis induced by chemotherapeutic agent in breast cancer cells.

Rahman KM, Ali S, Aboukameel A, Sarkar SH, Wang Z, Philip PA, Sakr WA, Raz A.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, 715 HWCRC, 4100 John R, Detroit, MI 48201, USA.

Grant support: Department of Defense Concept Award grants W81XWH-04-1-0689 and W81XWH-05-1-0505 (KM W. Rahman).

Figure 2.

<http://mct.aacrjournals.org/content/6/10/2757/F2.large.jpg>

Figure 2C. PARP panel. Top row of bands. Vertical, light streak at left edge of band lane 1.

Bottom row on bands. Straight, sharp change in background above bands in lanes 2 and 3.

Bands look like they have been added to the panel.

Figure 3.

<http://mct.aacrjournals.org/content/6/10/2757/F3.large.jpg>

Survivin panel. Bands lanes 5 and 6 have horizontal, stright tops with a light halo above that.

Figure 4.

<http://mct.aacrjournals.org/content/6/10/2757/F4.large.jpg>

Figure 4C. NFkappaB (top) panel. Vertical, straight chnages in background between lanes 4,5,6 and 7.

RB panel. Please compare bands in lanes 1 and 3.

Please compare bands in lanes 5 and 8.

Please compare band lane 6 with a horizontally compressed horizontal mirror image of bands in lanes 1 and 3.

Amy Stirling Lammers

From: Clare Francis <clare.francis1946@googlemail.com>
Sent: Wednesday, October 09, 2013 6:39 PM
To: ccr
Cc: cope_opsmanager; president@wayne.edu; research@wayne.edu; provost@wayne.edu
Subject: concerns: Clin Cancer Res. 2000 Mar;6(3):891-900.

Clin Cancer Res. 2000 Mar;6(3):891-900.

Ciprofloxacin mediated cell growth inhibition, S/G2-M cell cycle arrest, and apoptosis in a human transitional cell carcinoma of the bladder cell line.

Aranha O, Wood DP Jr, Sarkar FH.

Source

Department of Pathology, Karmanos Cancer Institute, Wayne State University School of Medicine, Detroit, Michigan 48201, USA.

Figure 4.

<http://clincancerres.aacrjournals.org/content/6/3/891/F4.large.jpg>

Figure 4(A). Upper panel. Vertical change in background between lanes 1 and 2. No vertical change in background in lower panel.

Figure 4(b). Lower 2 bands TD2 lane on own rectangle of background.

Please compare the right 6 lanes of beta actin panel figure 6

<http://clincancerres.aacrjournals.org/content/6/3/891/F6.large.jpg>

with the beta actin panel figure 4

The treatments are different.

Amy Stirling Lammers

From: Clare Francis <clare.francis1946@googlemail.com>
Sent: Thursday, October 10, 2013 8:44 AM
To: mct@aacr.org
Cc: weiw@karmanos.org; shieldsa@wayne.edu; president@wayne.edu; research@wayne.edu; provost@wayne.edu
Subject: additional observation: Mol Cancer Ther. 2005 Dec;4(12):1943-51.

Mol Cancer Ther. 2005 Dec;4(12):1943-51.

Simultaneous targeting of the epidermal growth factor receptor and cyclooxygenase-2 pathways for pancreatic cancer therapy.

Ali S, El-Rayes BF, Sarkar FH, Philip PA.

Source

Department of Hematology, Karmanos Cancer Institute, Wayne State University, Detroit, MI 48201, USA.

Figure 4.

<http://mct.aacrjournals.org/content/4/12/1943/F4.large.jpg>

Figure 4A. Control beta-actin band has **vertical, straight, sharp left edge**

Figure 5.

<http://mct.aacrjournals.org/content/4/12/1943/F5.large.jpg>

Figure 5B. Beta-actin panel. Low resolution. Please compare bands lanes 2 and 3.

Amy Stirling Lammers

From: PubPeer <contact@pubpeer.org>
Sent: Saturday, May 31, 2014 2:37 PM
To: president@wayne.edu
Subject: New comment

A member of PubPeer has sent you a notification of a new comment left on the paper:

"Down-regulation of Notch-1 contributes to cell growth inhibition and apoptosis in pancreatic cancer cells"

By Zhiwei Wang, Yuxiang Zhang, Yiwei Li, Sanjeev Banerjee, Joshua Liao, Fazlul H Sarkar
Mol. Cancer Ther. 2006

You can see the comment at:

<http://pubpeer.com/publications/8EB4592F23B61CC3EE7CF29A7522AF>

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Amy Stirling Lammers

From: thescientist@lelantos.org
Sent: Thursday, August 21, 2014 5:37 PM
To: bstanton@med.wayne.edu; vparisi@med.wayne.edu; president@wayne.edu
Subject: concerns regarding dr. Fazlul H. Sarkar
Attachments: SarkarFH_CancerResearch.pptx; SarkarFH_JCellularBiochem,Phys.pptx; SarkarFH_IntJMolSci.pptx

To whom it may concern,

July 2nd I sent an expression of concern regarding dr. Fazlul H. Sarkar. I did not get any reply to my inquiry (please see copy below) and was wondering if my message has been received.

I have attached some examples of the apparent data manipulations which illustrate the severity of this case (please see the attached PowerPoint presentations).

Sincerely yours,
Alexander Berg

Dear Dr. Stanton,

I am not sure if you are informed regarding the ongoing discussion regarding a scientist at Wayne State University, Dr. Fazlul H Sarkar and many of his publications at PubPeer. PubPeer represents one of the most important discussion forums for scientists, where registered scientists can bring up questions regarding specified publications for discussion. The first and last author of the discussed articles are always informed and are encouraged to reply.

I have noticed that articles by Dr. Sarkar have an unusual high number of entries in PubPeer and that scientist are questioning his practice. There are several examples of what seems to be serious data irregularities, which is problematic. As far as I can see, Dr. Sarkar has never replied to any of these inquiries.

I am not accusing Dr. Sarkar for misconduct, but the flawed data that have been revealed speaks for itself and is cause for concern. The cases can be found by searching Sarkar FH at www.pubpeer.com.

I am concerned about the reputation of Wayne University and the scientific community in general and would recommend an independent investigation to conclude in this case.

I am sorry to bring this to your attention, but after reading these discussions I felt that it was important to inform you.

Sincerely Yours,

Alexander Berg

Amy Stirling Lammers

From: Richard Needleman <rneedle@comcast.net>
Sent: Thursday, September 25, 2014 8:27 AM
To: president@wayne.edu
Subject: Fazul Sarkar and WSU

Dear President Wilson,

I am receiving many inquiries from my colleagues about the fraud committed by Fazul Sarkar—yes, it is obvious fraud.

Their primary question is not how this could have happened at WSU, but rather how WSU could have rehired him after his appointment to Mississippi was rescinded.

Wayne State's reputation was severely damaged by your predecessor's attempt to remove tenure protections, and now this scandal is doing similar damage.

WSU should consider if 1.2 million in grant funds, and considerably less in overhead, is really worth the damage his continued presence is causing to our national reputation.

Sincerely,

Richard

Richard Needleman Ph.D.
Professor of Biochemistry and Molecular Biology
WSU School of Medicine
540 E Canfield Ave
Detroit, MI 48201

Office: 313.577.1426

Labs: 313.577.8726
313.577.8742

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rneedle@med.wayne.edu
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Exhibit 4

Steele v. Burek



User Name: Nicholas Roumel

Date and Time: Oct 22, 2015 1:12 p.m. EDT

Job Number: 25300234

Document(1)

1. [Steele v. Burek, 2014 U.S. Dist. LEXIS 162724](#)

Client/Matter: Sarkar

Steele v. Burek

United States District Court for the Eastern District of Michigan, Southern Division

November 20, 2014, Decided; November 20, 2014, Filed

Case No. 14-11969

Reporter

2014 U.S. Dist. LEXIS 162724

Lisa Steele, Plaintiff, v. Susan Burek, Jon Shelden, and Nancy Fitzgerald Hoggard, Defendants.

Subsequent History: Magistrate's recommendation at [Steele v. Burek, 2015 U.S. Dist. LEXIS 133069 \(E.D. Mich., Aug. 28, 2015\)](#)

Motion denied by, Sanctions disallowed by [Steele v. Burek, 2015 U.S. Dist. LEXIS 142834 \(E.D. Mich., Oct. 21, 2015\)](#)

Core Terms

personal jurisdiction, alleges, motion to dismiss, forum state, legal action, court finds, contacts, defamatory, effects, defamation, resident, availed, cause of action, online, intellectual property, tortious interference, purposefully, theft, activities, reputation, purposes, argues, libel, expectancy, pleadings, joined, Reply, Chickens, internet, parties

Counsel: [*1] For Lisa Steele, Plaintiff: Krista A. Jackson, Kotz Sangster Wysocki P.C., Bloomfield Hills, MI.

For Susan Burek, Nancy Fitzgerald Hoggard, Jon Shelden, Defendants: Jonathan B. Frank, Jackier, Gould, Bloomfield Hills, MI.

Judges: Honorable Sean F. Cox, United States District Judge.

Opinion by: Sean F. Cox

Opinion

OPINION AND ORDER DENYING DEFENDANT BUREK'S MOTION TO DISMISS (Doc. #12) and GRANTING DEFENDANT HOGGARD'S MOTION TO DISMISS (Doc. #11)

This is a defamation case. Plaintiff Lisa Steele ("Plaintiff") alleges that Defendants Susan Burek ("Burek"), Nancy Fitzgerald Hoggard ("Hoggard") and Jon Shelden ("Shelden") (collectively, "Defendants") made false, defamatory statements in numerous forums about Plaintiff and her book, "Fresh Eggs Daily: Raising Happy, Healthy Chickens . . . Naturally," which allegedly damaged Plaintiff's professional reputation and her business relationships.

This matter is before the Court on Defendant Burek's Motion to Dismiss For Failure to State A Claim, (Doc. #12), to which Defendant Shelden has joined (Doc. #25), and Defendant Hoggard's Motion to Dismiss For Lack of Personal Jurisdiction (Doc. #11). The motions have been fully briefed by the parties and the Court heard oral argument on [*2] the motions on October 30, 2014. For the reasons set forth below, the Court shall DENY Defendant Burek's motion and GRANT Defendant Hoggard's motion.

BACKGROUND

Factual Background

Plaintiff Lisa Steele lives in Virginia. (Amd. Compl., Doc. #8, at ¶ 1). Plaintiff is the author of a book entitled *Fresh Eggs Daily: Raising Happy, Healthy Chickens . . . Naturally*. ("Fresh Eggs Daily") (Amd. Compl., Doc. #8, at ¶ 7). *Fresh Eggs Daily* contains "advice and know-how on the subject of raising chickens and other poultry using organic and non-chemical means . . ." (Amd. Compl., Doc. #8, at ¶ 7).

Defendant Susan Burek is a Michigan resident and a blogger who also writes about organic poultry farming. (Amd. Compl., Doc. #8, at ¶¶ 2, 8).

Beginning sometime in early 2014, according to Plaintiff, Burek began waging a war against Plaintiff in order to "remove from circulation [Plaintiff's book, *Fresh Eggs Daily*] that Burek views as a competitive product to a book that she intends to publish." (Amd. Compl., Doc. #8, at ¶ 13). Plaintiff makes numerous allegations regarding the types of actions Burek took to attack Plaintiff personally and professionally. Below are a few key examples of Burek's allegedly offensive [*3] conduct:

- Burek sent a letter to Plaintiff and to her publisher, St. Lynn's Press, alleging that Plaintiff committed copyright infringement of Burek's blog posts. (Amd. Compl., Doc. #8, at ¶ 9);
- Burek stated on a Facebook page "of a related publication," that is "Liked" by more than 250,000 people: "I have legal action filed against Ms. Steele and St. Lynn's publishing for intellectual property theft," even though that statement was not true. (Amd. Compl., Doc. #8, at ¶ 15);
- Burek and Shelden "have orchestrated a group effort via online communications on Facebook and elsewhere, to seed negative reviews and vindictive feedback . . . for *Fresh Eggs Daily* . . . [and for Plaintiff's] anticipated future works . . ." (Amd. Compl., Doc. #8, at ¶ 22).

Plaintiff further alleges that Defendant Burek recruited others to assist her in waging this offensive against her, including Defendants Hoggard and Shelden.

Defendant Hoggard is a Nevada resident. (Amd. Compl., Doc. #8, at ¶ 4). Plaintiff alleges that Hoggard assisted Burek by stating that she was "going to contact Better Homes & Gardens," at their editorial office in New York, New York to inform them about Plaintiff's alleged copyright infringement [*4] and "to persuade that publication not to accept contributions from [Plaintiff]." (Amd. Compl., Doc. #8, at ¶¶ 23-24).

Defendant Shelden is a Michigan resident. (Amd. Compl., Doc. #8, at ¶ 3). Plaintiff alleges that Defendant Shelden was involved in orchestrating the "group effort" against Plaintiff. (Amd. Compl., Doc. #8, at ¶ 22). Plaintiff also alleges that Shelden made various offensive comments in several online forums about Plaintiff and *Fresh Eggs Daily*. (Amd. Compl., Doc. #8, at ¶¶ 19-20, 22, 25-26, 35).

Plaintiff alleges that she was harmed by Defendants' activities because her publisher, St. Lynn's, "halted printing of the book, costing St. Lynn's and [Plaintiff] the opportunity to meet rising demand for the book . . ." (Amd. Compl., Doc. #8, at ¶ 18).

Procedural History

On May 16, 2014, Plaintiff filed her Complaint against Defendants Burek, Shelden, and Hoggard based on their allegedly tortious conduct both online and offline. (Doc. #1). Plaintiff alleged both diversity and federal question jurisdiction. On June 26, 2014, Plaintiff filed a First Amended Complaint as of right. (Doc. #8). In her Amended Complaint, Plaintiff alleges the following causes of action:

- Count I - Defamation [*5] against Burek and Shelden;
- Count II - Defamation Per Se against All Defendants;

Count III - Tortious Interference with Contracts and Business Expectancies against All Defendants;

Count IV - Declaratory Judgment of Noninfringement of Copyright against Burek.¹

On July 11, 2014, Defendant Hoggard filed her Motion to Dismiss for Lack of Personal Jurisdiction. (Doc. #11). Plaintiff responded (Doc. #15) and Defendant Hoggard replied. (Doc. #17).

Also on July 11, 2014, Defendant Burek filed her Motion to Dismiss for Failure to State a Claim (Doc. #12). Plaintiff responded (Doc. #16) and Defendant Burek replied. (Doc. #18).

On October 17, 2014, Defendant Shelden appeared in this action (Doc. #24) after being served via alternate service. (See Order for Alternate Service, Doc. #21). On that same date, Defendant Shelden filed a "Notice of Joinder/Concurrence" to Defendant Burek's Motion to Dismiss. (Doc. #25).

STANDARD OF DECISION

A. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)*

When deciding a [*6] motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all the factual allegations contained in the complaint as true. [Lambert v. Hartman, 517 F.3d 433, 439 \(6th Cir. 2008\)](#).

In order to survive a *Rule 12(b)(6)* motion to dismiss, Plaintiff's complaint need contain only "enough facts to state a claim for relief that is plausible on its face." See [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#), citing [Twombly, 550 U.S. at 557](#). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." [Iqbal, 556 U.S. at 679](#).

B. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(2)*

In a motion to dismiss for want of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, the plaintiff has the burden of proving the court's jurisdiction over the defendant. [Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 887 \(6th Cir. 2002\)](#). "[I]n the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." [Theunissen v. Matthews, 935 F.2d 1454, 1458 \(6th Cir. 1991\)](#). If the court finds no need for an evidentiary hearing, "the burden [*7] on the plaintiff is relatively slight" and the court must "consider the pleadings and affidavits in the light most favorable to the plaintiff." [Am. Greetings Corp. v. Cohn, 839 F.2d 1164, 1169 \(6th Cir. 1988\)](#), citing [Welsh v. Gibbs, 631 F.2d 436, 438-39 \(6th Cir. 1980\)](#). Where no evidentiary hearing is held, the plaintiff need only make a prima facie showing of jurisdiction to avoid dismissal. [Neogen, 282 F.3d at 887](#).

However, "[i]f the district court concludes that the written submissions have raised issues of credibility or disputed issues of fact which require resolution, it may conduct a preliminary evidentiary hearing. Where this occurs the plaintiff must show by a preponderance of the evidence that jurisdiction exists." [Cohn, 839 F.2d at 1169](#), citing [Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1285 \(9th Cir. 1977\)](#).

ANALYSIS

I. Defendant Burek's Motion to Dismiss For Failure to State a Claim

¹ The parties have stipulated to the dismissal of Plaintiff's Count Four. (Stip. and Order, Doc. #13). Therefore, arguments pertaining to the issue of whether Burek owns a copyright have been omitted for the sake of efficiency.

A. Defamation Claims

Defendant contends that Plaintiff's allegations, as they relate to her defamation claims, are insufficient because the allegedly defamatory statements are true, substantially true, or not plead with specificity. The parties focus on two statements that Plaintiff claims Burek made, and argues that neither are sufficient to sustain a defamation action:

"I have legal action filed against Ms. Steele and St. Lynns publishing for intellectual property theft." (Amd. Compl. at ¶ 15);

That Plaintiff has [*8] only four years of experience in the field of raising and caring for chickens. (Amd. Compl. at ¶ 40).

A federal court sitting in diversity applies the law of the state in which it sits. [In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig., 756 F.3d 917, 937 \(6th Cir. June 27, 2014\)](#). Under Michigan law, "[a] communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." [Ireland v. Edwards, 230 Mich. App. 607, 614, 584 N.W.2d 632 \(1998\)](#), citing [New Franklin Enterprises v. Sabo, 192 Mich. App. 219, 221, 480 N.W.2d 326 \(1991\)](#). Not all defamatory statements are actionable, however. *Id.* Rather, "[i]f a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Id.*, citing [Milkovich v. Lorain Journal Co., 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 \(1990\)](#).

To establish a claim for defamation, Plaintiff must show: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. [Thomas M. Cooley Law Sch. v. Doe 1, 300 Mich. App. 245, 262, 833 N.W.2d 331 \(2013\)](#). Plaintiff must plead her defamation claim with specificity by identifying the exact language that she alleges to be defamatory. *Id.*

Where, as here, Plaintiff alleges that defamatory statements were made in writing on the internet, the [*9] statements at issue are libelous rather than slanderous. [Stablein v. Schuster, 183 Mich. App. 477, 480, 455 N.W.2d 315, 317 \(1990\)](#) ("Libel may be defined as a statement of and concerning the plaintiff which is false in some material respect and is communicated to a third person by written or printed words and has a tendency to harm the plaintiff's reputation."). "For a claim of libel, a plaintiff must plead *the very words of the libel . . .*" [Thomas M. Cooley, 300 Mich. App. at 263](#) (internal citation and quotations omitted) (emphasis in original). "Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice." *Id.*

Plaintiff argues that Burek's proclamation that "I have legal action filed against Ms. Steele and St. Lynns publishing for intellectual property theft" is objectively false because, to date, no complaint has been filed against Plaintiff. (Pl. Resp. to Def. Burek's Mo., Doc. #16, at 1; see also Amd. Compl. ¶ 15). Plaintiff argues that it is *materially* [*10] false because "the difference between a baseless demand letter and the filing of a lawsuit is obvious, and it is substantial . . . the false statements by Burek about her supposed lawsuit were a major part of her concerted and consistent efforts to malign Steele and bring others to her cause." (Pl. Resp. to Burek's Mo., Doc. #16, at 2). For example, Plaintiff alleges that Burek's false statement about Plaintiff's "intellectual property theft" of Burek's work has induced other individuals to post negative reviews of Plaintiff's book on Amazon.com, and in turn, these negative reviews have had a negative impact on online sales of Fresh Eggs Daily. (Amd. Compl. ¶ 32).

Defendant Burek replies that, "by sending a cease and desist letter, Burek began the process of a legal action. Whether she actually filed a complaint is immaterial. The 'gist' of her statement that she filed a legal action was substantially true." (Def. Burek's Mo., Doc. #12, at 4).

The Court finds that Defendant Burek's statement regarding her filing of "legal action" against Plaintiff for "intellectual property theft" is a statement of fact and it is false. The Seventh Circuit has considered a similar

statement and determined [*11] that "the words 'legal action' can only be intended to mean some sort of lawsuit or official proceeding . . . it stretches reason to interpret 'legal action' as 'any activity of a lawyer . . .'" [Republic Tobacco Co. v. N. Atl. Trading Co.](#), 381 F.3d 717, 730 (7th Cir. 2004). Thus, Defendant Burek's argument that "legal action" encompasses the communication of a demand letter is rejected.

The question then becomes whether Burek's statement is defamatory, i.e. whether it has the tendency "to lower an individual's reputation in the community or deter[] third persons from associating or dealing with that individual." [Ireland](#), 230 Mich. App. at 614. The Court must decide as a matter of law whether a particular statement is defamatory. [Nichols v. Moore](#), 477 F.3d 396, 399 (6th Cir. 2007), citing [Fisher v. Detroit Free Press, Inc.](#), 158 Mich. App. 409, 404 N.W.2d 765 (1987).

The Court finds the Seventh Circuit's analysis in [Republic Tobacco](#) persuasive. In [Republic Tobacco](#), defendant North Atlantic Trading Company believed that plaintiff was violating trademark and unfair competition laws to defendant's detriment. [Republic Tobacco](#), 381 F.3d at 722. Defendant stated in a letter to one of plaintiff's customers that "[w]e own the patent-trademark which has been violated . . . Our Attorneys initiated legal action . . . and had to include the Chain in the Trademark-Patent violation." [Id.](#) at 723. The Seventh Circuit concluded not only that this statement was false, but also [*12] that it was defamatory, because "even if it were true [that plaintiff had been sued], the statement was not simply that [plaintiff] had been sued, but it provided factual detail about [plaintiff's] alleged inappropriate activity." [Id.](#) at 730.

The Court finds that Defendant Burek's statement that she "filed legal action" against Plaintiff for "intellectual property theft" is defamatory. As in [Republic Tobacco](#), Defendant Burek not only stated that she initiated legal action against Plaintiff, but she also stated that she initiated legal action because Plaintiff committed intellectual property theft. The Court further finds that allegations of plagiarism are serious and have the tendency to lower an author's reputation in his or her community of fans and colleagues. Therefore, the Court finds that Plaintiff has stated a plausible cause of action for defamation based on Burek's "legal action" statement.

Plaintiff also argues that Burek's and Sheldon's discounting of her experience (i.e. stating that Plaintiff has four years of experience rather than her actual six "or more" years of experience in organic chicken farming) is materially false because "it was made specifically by Burek for purposes [*13] of de-valuing Steele's expertise" and to harm her reputation. (Pl. Resp., Doc. #16, at 4). Defendant replies that there is no material difference between stating that Plaintiff has four years of experience rather than six years of experience. (Def. Reply, Doc. #18 at 2).

When viewing the allegations in the light most favorable to Plaintiff, the Court finds that Defendant's statement regarding Plaintiff's level of experience could plausibly be construed as defamatory. Defendant's statement is a representation of fact, that we must assume is false as Plaintiff has alleged, and was likely made with the intent of harming Plaintiff's reputation in their shared community.

Based on the foregoing, the Court shall DENY Defendant Burek's Motion to Dismiss Plaintiff's defamation claims.

B. Tortious Interference Claim

Plaintiff alleges that Defendants Burek, Sheldon and Hoggard have tortiously interfered with her contracts and prospective business relationships. (Amd. Compl., Doc. #8 at 13). In order to prevail on a tortious interference claim, Plaintiff must ultimately prove (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part [*14] of the interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. [WHIC-USA, Inc. v. Carlisle](#), 2005 Mich. App. LEXIS 1990, 2005 WL 1959503 (Mich. Ct. App. Aug. 16, 2005), citing [Lakeshore Community Hosp. Inc v. Perry](#), 212 Mich. App. 396, 401, 538 N.W.2d 24 (1995).

Under Michigan law, the third element "requires the plaintiff to demonstrate that the third party was induced either to breach the contract or to break off the prospective business relationship by an intentional act that is either (1)

wrongful per se; or (2) lawful, but done with malice and unjustified in law." [*Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n*, 623 F.3d 281, 287 \(6th Cir. 2010\)](#) (applying Michigan law) (citation and quotations omitted).

Defendant Burek argues, quite summarily, that the Court should dismiss this claim because "there is no allegation of anything unjustified or wrongful" in the Amended Complaint. (Def. Mo., Doc. #12, at 5).

Plaintiff responds that she has pleaded all the required elements of tortious interference, and has done so with sufficient particularity. Specifically, Plaintiff points to a few paragraphs of the Amended Complaint, where Plaintiff alleges:

52. Defendants Burek, Sheldon, and Hoggard intentionally, and with the intention to cause harm to Steele, sought to disrupt and to deprive Steele of the [*15] value of ongoing economic activities and interests embodied in contracts and/or established business relationships and sales channels with the following, among others:

- a. St. Lynn's Press
- b. Amazon.com
- c. Barnes & Noble and its online arm at BN.com
- d. Better Homes and Gardens Magazine
- e. Hobby Farms Magazine

53. The Defendants achieved their desired interference by a coordinated combination of false and misleading statements, manufactured and strategically placed product reviews with online retailers of Steele's book *Fresh Eggs Daily*, and direct communications with representatives of publications for which Steele was a contributing writer.

54. These actions and communications have had their desired effect, as the potential sales of *Fresh Eggs Daily*, actual orders of *Fresh Eggs Daily* that have not been fulfilled, and Steele's business opportunities and revenue from *Fresh Eggs Daily*, St. Lynn's Press, and other outlets have been limited or ended.

55. As a result of the Defendants [sic] actions as described above and in this Count III, Steele has been damaged, in a precise amount to be proven by the evidence at trial.

(Amd. Compl. at ¶¶ 52-55). The crux of Plaintiff's tortious interference claim [*16] is that Defendants essentially "orchestrated a group effort . . . to seed negative reviews and vindictive feedback not only for *Fresh Eggs Daily*, but for Steele's anticipated future works . . .," (Amd. Compl. at ¶ 22), in order to "remove a product [Burek] views as competitive from the market while she prepares her product to compete."² (Amd. Compl. at ¶ 30).

Viewing the Complaint in the light most favorable to Plaintiff, the Court finds that Plaintiff has pleaded a plausible claim for tortious interference. If Plaintiff's allegations are indeed true, as this Court is required to assume for purposes of this motion, then it appears clear that Defendants Burek and Sheldon set out to cause Plaintiff economic harm by initiating a campaign of negative online reviews of Plaintiff's book and by notifying several of Plaintiff's business contacts that Burek "filed legal action" against Plaintiff for "intellectual property theft" (which is false).

Based on the foregoing, the Court finds that Plaintiff's allegations support a plausible claim for tortious interference. Therefore, the Court shall [*17] DENY Defendant Burek's Motion to Dismiss (Doc. #11) accordingly. Because Defendant Sheldon has joined Defendant Burek's motion (Doc. #25) without making any additional argument, the Motion to Dismiss shall be denied as to him as well.

² According to Plaintiff, Burek is in the process of writing a book on the same topic as Plaintiff's book.

II. Defendant Hoggard's Motion to Dismiss for Lack of Personal Jurisdiction

Defendant Nancy Fitzgerald Hoggard moves this Court for dismissal of Plaintiff's complaint for lack of personal jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(2)*. Plaintiff bears the burden of establishing that this Court has personal jurisdiction over Defendant Hoggard. [Theunissen, 935 F.2d at 1458](#).

Defendant Hoggard is a citizen of Nevada. Plaintiff is a citizen of Virginia. Defendants Sheldon and Burek are citizens of Michigan. Plaintiff has brought suit against Defendant Hoggard for defamation *per se* and tortious interference with business contracts and expectancies (Amd. Compl., Doc. #8, at Counts II and III).

Personal jurisdiction over an out-of-state defendant arises from certain minimum contacts with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* (quoting [Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#)). "Depending on the type of minimum contacts in a case, personal jurisdiction can either [*18] be specific or general." [Air Products and Controls, Inc., 503 F.3d at 550](#). General jurisdiction depends on a showing that the defendant has continuous and systematic contacts with the forum state to justify the state's exercise of judicial power with respect to any and all claims the plaintiff may have against the defendant. [Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 149 \(6th Cir. 1997\)](#). Specific or limited personal jurisdiction "exposes the defendant to suit in the forum state only on claims that 'arise out of or relate to' a defendant's contacts with the forum." *Id.* Here, the parties appear to agree that Defendant Hoggard may be subject to specific, but not general, personal jurisdiction in Michigan.

A district court's analysis of personal jurisdiction over an out-of-state defendant generally entails two steps: 1) first, the court must determine whether the forum's relevant long-arm statute authorizes the exercise of jurisdiction over defendant; and, if so, 2) the court must determine whether the exercise of that jurisdiction comports with constitutional due process. *Id.*

However, "[t]he two inquiries merge where the forum state's long-arm statute extends, as does Michigan's long-arm statute, to the limits permitted under the *due process clause*." [Children's Orchard, Inc., v. Children's Orchard Store #142, 2010 U.S. Dist. LEXIS 52760, 2010 WL 2232440, at *4 \(E.D. Mich. 2010\)](#) (citing [*19] [Mich. Coal. of Radioactive Material Users, Inc., v. Griepentrog, 954 F.2d 1174, 1176 \(6th Cir. 1992\)](#)). Therefore, this Court may focus its inquiry on whether the exercise of personal jurisdiction over Defendant Hoggard would violate the *Due Process Clause of the Fourteenth Amendment of the U.S. Constitution*. *Id.*

The Sixth Circuit has established a three-part test for determining whether the exercise of jurisdiction comports with due process:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

[Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 \(6th Cir. 1968\)](#). While these criteria are helpful, courts are not to "apply them mechanically because the inquiry into whether jurisdiction exists turns on the facts of the individual case at hand." [Chrysler Corp. v. Uptown Motorcars-Hartford, Inc., 173 F.3d 854](#) [published in full-text format at [1999 U.S. App. LEXIS 6295\], 1999 WL 196558 \(6th Cir. 1999\)](#).

I. Purposeful Availment

"[T]he question of whether a defendant has purposefully availed itself of the privilege of doing business in the forum state is 'the *sin qua non* for *in personam* jurisdiction.'" [Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1263 \(6th Cir. 1996\)](#) (quoting [Mohasco Indus., Inc., 401 F.2d at 381-82](#)). The purposeful availment requirement is satisfied when the defendant's contacts with the forum state create a substantial [*20] connection with the forum state, and when the defendant's conduct and connection with the forum are such that he "should reasonably

anticipate being haled into court there." [Compuserve, 89 F.3d at 1263](#). Purposeful availment is required to ensure that "random," "fortuitous," or "attenuated" contacts do not cause a defendant to be haled into a jurisdiction. *Id.*

Two distinct tests have evolved in cases dealing with the intersection of personal jurisdiction and internet activity. [Cadle Co. v. Schlichtmann, 123 Fed. App'x 675, 677-79 \(6th Cir. 2005\)](#) (noting that, to determine specific personal jurisdiction, *Zippo* applies when defendant operates a website and *Calder* applies when defendant has published or disseminated information); [Lifestyle Lift Holding co., Inc. v. Prendiville, 768 F. Supp. 2d 929, 934-35 \(E.D. Mich. March 9, 2011\)](#) (considering *Zippo* and *Calder* tests in internet libel case); [Farquharson v. Metz, 2013 U.S. Dist. LEXIS 106374, 2013 WL 3968018 at *2 \(D. Mass. July 30, 2013\)](#) (applying *Calder* effects test to case involving allegedly defamatory statements posted on Facebook); see also Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, [98 Nw. U. L. Rev. 473](#) (Winter 2004). The first test, known as the *Zippo* test, applies when a defendant operates a website that is "interactive to a degree that reveals specifically intended interaction with residents of the state." [Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 \(6th Cir. 2002\)](#), citing [Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 \(W.D. Pa. 1997\)](#). If the interactivity of a defendant's website meets this criterion, then the defendant will be found to have purposefully availed itself [*21] of the privilege of acting in a particular state. *Id.*

The second test is known as the *Calder* effects test. See [Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 \(1984\)](#). The *Calder* effects test focuses on "the effects the conduct at issue had in the forum state." [Thomas v. Barrett, 2012 U.S. Dist. LEXIS 100054, 2012 WL 2952188 \(W.D. Mich. 2012\)](#). Under *Calder*, "personal jurisdiction exists where an individual purposefully directs activities toward the forum state with the intent to cause harm there." [Scotts Co. v. Aventis S.A., 145 Fed. App'x 109, 113 \(6th Cir. 2005\)](#).

The Court finds, and the parties agree, that the [Calder](#) effects test rather than the [Zippo](#) test is most appropriate here. The Court shall apply the *Calder* effects test to the facts of this case because Plaintiff has not alleged or shown that Defendant Hoggard maintains a website, interactive or otherwise, such that the *Zippo* test would be applicable.

Plaintiff argues that Defendant Hoggard has "purposefully availed herself of the privilege of acting in [Michigan], by participating in, being guided by, and reporting to the Michigan-based online torts group." (Pl. Resp., Doc. #15, at 3). At oral argument on this motion, Plaintiff expanded on this theory, arguing that Defendant Hoggard purposefully availed herself of the privilege of acting in Michigan because she joined a Facebook group that was created and is administered by [*22] a Michigan resident.

Defendant Hoggard maintains that the *Calder* effects test has not been met because she "did not expressly aim to disseminate anything into Michigan, nor were the brunt of the effects felt in Michigan." (Def. Reply, Doc. #17, at 1).

The Court finds that Plaintiff has failed to show that Defendant Hoggard purposefully availed herself of the privilege of acting in Michigan under the *Calder* effects test. The *Calder* effects test cannot be met because Plaintiff has not alleged or shown that the effects of Defendant Hoggard's actions were felt in Michigan. Indeed, it appears undisputed that the effects of Hoggard's actions were felt in Virginia, where Plaintiff resides.

Furthermore, even if the Court were to accept Plaintiff's argument that Defendant Hoggard had contact with Michigan by virtue of her participation in a Michigan-based Facebook group, Plaintiff has failed to show that Defendant Hoggard *purposefully* directed her activity toward Michigan. Plaintiff has not shown that Defendant Hoggard knew that Defendants Burek and Sheldon resided in Michigan. Thus, it is far from proven that Defendant Hoggard intended to join a Michigan-based or Michigan-centric Facebook group. [*23]³ As far as the allegations show, Defendant Hoggard could have thought that she was joining a California-based torts group, or a New York-based torts group. Most importantly, Hoggard's own activities were directed at Plaintiff, who resides in Virginia. The Court finds that the purposeful availment prong has not been met.

³ At oral argument on this motion, Plaintiff argued that the Facebook group was "located" in Michigan because it was created by, and is administered by, Burek, who is a Michigan resident. For purposes of the Court's personal jurisdictional analysis, the Court assumes without deciding that this Plaintiff's averment is correct in this regard.

ii. Arising Out Of Requirement

The second prong of the test requires that the cause of action must arise from Defendant's contacts with the forum state. The Sixth Circuit has "articulated the standard for this prong in a number of different ways, such as whether the causes of action were 'made possible by' or 'lie in the wake of, the defendant's contacts, or whether the causes of action are 'related to' or 'connected with' the defendant's contacts with the forum state." [Air Prods. and Controls, 503 F.3d at 553](#), citing [Youn v. Track, Inc., 324 F.3d 409, 419 \(6th Cir. 2003\)](#) (internal citations omitted); see also [Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1267 \(6th Cir. 1996\)](#) ("If a defendant's [*24] contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts.")

In addition, the Sixth Circuit has "characterized this standard as a 'lenient standard' and has explained that the cause of action need not 'formally' arise from defendant's contacts." *Id.* (citing [Bird v. Parsons, 289 F.3d 865, 875 \(6th Cir. 2002\)](#)).

Plaintiff claims that "the cause of action arises out of Hoggard's activities in the forum state, which activities were Hoggard's group-directed torts, coordinated as part of her participation in the Michigan-based group." (Pl. Resp., Doc. #15, at 3).

The Court finds that the "arising out of" requirement has not been met because Defendant Hoggard's alleged wrongdoing in this case did not arise out of her contacts with Michigan residents. Rather, Plaintiff's causes of action against Defendant Hoggard arise out of her various postings on the internet that she made from behind her computer screen in Nevada. (Amd. Compl. at ¶¶ 23-24) ("Defendant Hoggard took this online review strategy to a harmful extreme Hoggard posted, 'I am going to email the mags a [sic] listed a few minutes ago either today or tomorrow . . .' In a separate post, [*25] Hoggard stated, 'I'm going to contact Better Homes & Gardens").

In short, Plaintiff's alleged injuries did not arise from the fact that Burek, Sheldon, and Hoggard were all members of a Facebook group that was created and administrated by a Michigan resident. Therefore, the Court finds that Plaintiff has not carried her burden of showing that the "arising out of" requirement of the due process analysis has been met.

iii. The Reasonableness Requirement

In determining whether the exercise of jurisdiction is reasonable, the Court should consider the following factors: 1) the burden on the defendant; 2) the interest of the forum state; 3) the plaintiff's interest in obtaining relief; and 4) other states' interests in securing the most efficient resolution of the controversy. [Air Prods. and Controls, Inc., 503 F.3d at 554](#).

Where the first two prongs are met, "an inference of reasonableness arises" and "only the unusual case will not meet this third criteria." *Id.* As discussed above, that is not the case here.

Plaintiff argues that "the exercise of personal jurisdiction over Hoggard is reasonable based on the [sic] her contacts with the forum specific to these claims, as her actions were directed to the Michigan group and guided [*26] by the Michigan group." (Pl. Resp., Doc. #15, at 3).

The Court finds that Plaintiff's argument is without merit. The Court concludes that it would be patently unreasonable to subject a defendant to personal jurisdiction in a state solely because he or she joined a Facebook group that happened to be created by a citizen of that state. A finding that Michigan courts have personal jurisdiction over Defendant Hoggard in this situation would be the type of "random" assertion of *in personam* jurisdiction that offends due process.

The Court finds that it would violate Defendant Hoggard's due process rights for a Michigan court to exercise specific personal jurisdiction over her under the facts of this case. Therefore, the Court shall GRANT Defendant

Hoggard's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2). The Court shall DENY Plaintiff's request to transfer the case to the Eastern District of Virginia.

CONCLUSION

For the foregoing reasons, the Court shall DENY Defendant Burek's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. #12) and GRANT Defendant Hoggard's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) (Doc. #11).

IT IS SO ORDERED.

/s/ Sean F. Cox

Sean F. Cox

United States District Judge

Dated: November 20, 2014