

STATE OF MICHIGAN

IN WAYNE COUNTY CIRCUIT COURT

FAZLUL SARKAR,

Plaintiff,

Case No. 14-013099-CZ

vs.

Hon. Sheila Ann Gibson

JOHN and/or JANE DOE(S),

Defendant(s).

14-013099-CZ

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PUBPEER'S MOTION TO QUASH SUBPOENA AND BRIEF IN SUPPORT

I hereby certify that I have complied with all provisions of LCR 2.119(B) on motion practice.

/s/ Daniel S. Korobkin
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MOTION TO QUASH SUBPOENA

By this motion, PubPeer, LLC, a non-party to whom a subpoena has been directed in the above-captioned case, moves the Court to quash the subpoena, and in support of this motion states as follows:

1. PubPeer is in receipt of a subpoena requesting the production of “all identifying information . . . of all users who have posted any of the [anonymous] comments that were posted on [PubPeer’s] web site that are described in [Plaintiff’s] complaint.” See Jollymore Aff Appx A.
2. For the reasons set forth in PubPeer’s brief in support of this motion, the First Amendment protects this information from disclosure, and good cause exists to quash the subpoena.
3. As required by Local Rule 2.119(B), undersigned counsel contacted counsel for Plaintiff on December 8, 2014 to request concurrence in this motion. Concurrence was denied, thus necessitating the filing of this motion.

Accordingly, PubPeer respectfully moves this Court to quash the subpoena.

Respectfully submitted,

/s/ Daniel S. Korobkin

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Dated: December 10, 2014

BRIEF IN SUPPORT OF MOTION TO QUASH SUBPOENA

INTRODUCTION

This case concerns the First Amendment right of scientists to anonymously discuss their peers' work. The plaintiff in this suit, Dr. Fazlul Sarkar, has sued a number of anonymous users of www.pubpeer.com for defamation and related torts based on their comments on his research. Their comments included subjective opinions, occasionally sarcastic hyperbole, and stereotypically bland scientific analysis. Because the commenters are anonymous, Dr. Sarkar sought a subpoena from this Court compelling PubPeer, LLC to divulge any identifying information in its possession for the commenters. PubPeer now moves to quash that subpoena and, in so doing, to defend the right to anonymity essential to its mission and guaranteed by the First Amendment.

PubPeer was launched in 2012 by a group of scientists who felt that the merits of scientific research should be discussed openly, without fear of recrimination from other members of the scientific community. It has accomplished that mission principally by allowing the scientists who post on its site to do so anonymously. This provides them the freedom necessary to contribute candid comment and debate on research methods, developments, results, and new directions without fear that they might alienate colleagues, compromise their own careers, or poison their professional relationships. Shielded by that anonymity, PubPeer's commenters have in turn produced a steady stream of discussion and debate of the work of their peers, at times resulting in the modification or retraction of high-profile research.¹

¹ See, e.g., Jollymore Aff ¶ 3 Appx B–C (Cyranski, *Acid-Bath Stem Cell Study Under Investigation*, Scientific American (February 18, 2014) <<http://www.scientificamerican.com/article/acid-bath-stem-cell-study-under-investigation/>> (accessed December 6, 2014); Landau, *Scientist Wants to Withdraw Stem Cell Studies*, CNN (March 12, 2014) <<http://www.cnn.com/2014/03/12/health/stem-cell-study-doubts/index.html>> (accessed December 6, 2014).

The subpoena to PubPeer jeopardizes the anonymity essential to PubPeer's mission. Because the First Amendment protects the right to speak anonymously, however, it requires that Dr. Sarkar make a preliminary showing of merit to his claims before he may unmask PubPeer's commenters. This he cannot do for three reasons.

First, his complaint fails to plead defamation with the specificity required by law. Many of the allegedly defamatory comments are not reproduced in the complaint; many are reproduced in only unintelligibly paraphrased fragments, absent their necessary context; and those that are quoted in full are quoted without any identification of the portions asserted to be defamatory.

Second, even for those comments reproduced in the complaint, none is capable of defamatory meaning. They express opinions, sarcasm and hyperbole, or facts that, even if false, would not be defamatory. For example, many state that images used in Dr. Sarkar's papers "look similar." That sort of subjective assessment is not provably false and thus not actionable.

Finally, the balance of interests overwhelmingly favors maintaining the anonymity of PubPeer's commenters. The comments at issue are part of the scientific exchange necessary to scientific scholarship and progress. Because academic discourse inevitably involves—and requires—a competition among peers, courts have been loath to impose liability on the often-heated exchanges that result. To safeguard the breathing space required by the First Amendment, they generally require academics unhappy with their critics to respond with data and debate rather than defamation suits. This Court should do the same.

Moreover, even if Dr. Sarkar's complaint were legally adequate as pleaded, he is extraordinarily unlikely to prevail on the merits of his claims. The core of his complaint appears to be that PubPeer's commenters noted similarities between images in his papers that purported to depict the results of different experiments. PubPeer's counsel retained an expert, Dr. John

Krueger, to determine whether the images in fact represent the results of different experiments. Dr. Krueger, who performed such analyses for 20 years for the federal government's Office of Research Integrity and who pioneered the forensic tools used to compare images, arrived at an emphatic conclusion: very strong evidence suggests that the images do *not* represent the results of different experiments. See Krueger Aff ¶ 7. In other words, the premise of Dr. Sarkar's claims appears to be false, and he has not pleaded or produced any evidence to the contrary.

For all these reasons, the Court should quash Dr. Sarkar's subpoena.

PROCEDURAL BACKGROUND

Dr. Fazlul Sarkar is a prominent cancer researcher who has published over 430 original scientific articles in peer-reviewed journals and written more than 100 review articles and book chapters. Compl ¶ 11. Around September 5, 2013, users on PubPeer's site began commenting on his papers. On July 7, 2014, Dr. Sarkar's counsel sent a letter to PubPeer demanding that many of the comments be removed and that PubPeer disclose the identities of the commenters. See Compl ¶ 80. On July 10, PubPeer's moderators removed or edited several of the comments, including those pending review before being posted. Dr. Sarkar filed this suit on October 9, against the anonymous commenters claiming defamation and related torts. On October 13, Dr. Sarkar obtained a subpoena for identifying information that PubPeer possesses for its anonymous commenters. Jollymore Aff Appx A. PubPeer now moves to quash the subpoena.

ARGUMENT

The First Amendment limits the compelled identification of anonymous internet speakers. Before a defamation plaintiff may enforce a subpoena that would unmask an anonymous speaker, he must make a preliminary showing of merit to his claims. Under controlling Michigan precedent, that showing must at least be sufficient to survive a motion for summary disposition under MCR 2.116(C)(8). The vast majority of jurisdictions to have

considered the issue require defamation plaintiffs to also produce *evidence* sufficient to substantiate their allegations. Dr. Sarkar’s claims do not pass either threshold test required to enforce his subpoena, and the subpoena should therefore be quashed.

1. The First Amendment requires defamation plaintiffs to make a preliminary showing of merit before they may unmask anonymous speakers.

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

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

As the Michigan Court of Appeals has recognized, the “right to speak anonymously applies to those expressing views on the Internet.” *Ghanam v Does*, 303 Mich App 522, 533; 845 NW2d 128 (2014).

b. Michigan appellate courts have required defamation plaintiffs to demonstrate at least the legal sufficiency of their claims before they may unmask anonymous speakers.

Because the Constitution safeguards the right to speak anonymously, courts have uniformly held that plaintiffs seeking to enlist state authority to unmask anonymous speakers through the subpoena power must make a preliminary showing of merit to their legal claims. See, e.g., *Ghanam*, 303 Mich App at 534–42 (discussing cases). Although the Michigan Supreme Court has yet to address this question, the Court of Appeals has issued two opinions regarding the showing that must be made. See *id.*; *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256; 833 NW2d 331 (2013). The *Ghanam* and *Cooley* decisions held that, before allowing the identification of anonymous speakers, courts must determine “whether the [plaintiff]’s claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8),” *Ghanam*, 303 Mich App at 541, and even if so, whether “the weight of the defendant’s First Amendment rights” nonetheless constitutes “good cause” to refuse to enforce a subpoena that seeks to unmask the speaker, *Cooley*, 300 Mich App at 264–66. Further, “[t]his evaluation is to be performed even if there is no pending motion for summary disposition before the court,” such as when, as in this case, the recipient of the subpoena contests it. *Ghanam*, 303 Mich App at 541.

c. The vast majority of jurisdictions to have considered the issue require that defamation plaintiffs also substantiate their allegations with evidence.

Notably, four of the six judges in *Cooley* and *Ghanam* would have gone further. In addition to requiring that defamation plaintiffs defend the legal sufficiency of their complaint as pleaded before unmasking anonymous defendants, they would have joined the vast majority of jurisdictions that have considered the issue and have explicitly required that defamation plaintiffs substantiate their claims with actual evidence. See *Cooley*, 300 Mich App at 348 (BECKERING, J., concurring in part and dissenting in part); *Ghanam*, 303 Mich App at 540 (“[W]e agree with the

dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite/Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10).”). Those other jurisdictions—generally following either the New Jersey appellate court in *Dendrite Int’l, Inc v Doe*, 342 NJ Super 134, 141; 775 A2d 756 (NJ App, 2001), or the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451 (Del, 2005)—have required defamation plaintiffs to put forward evidence establishing a prima facie case of defamation. See, e.g., Levy, *Developments in Dendrite*, 14 Fla Coastal L Rev 1, 10–16 (2012) (discussing “fairly unanimous” decisions of state appellate courts).

The Michigan Supreme Court has yet to address the standard that a defamation plaintiff must satisfy before unmasking an anonymous defendant.

2. Dr. Sarkar has not made the showing required by Michigan law before he may unmask PubPeer’s commenters.

Under *Cooley* and *Ghanam*, the First Amendment protects the anonymity of PubPeer’s commenters if Dr. Sarkar’s claim of defamation would not survive a motion for summary disposition under MCR 2.116(C)(8). For the reasons explained below, it would not.

Under Michigan law, “[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010). To ultimately prevail on a claim of defamation, a plaintiff must establish the following elements:

- (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.

Id.

In addition to pleading actionable defamation, “[a] plaintiff must also comply with constitutional requirements that depend on ‘the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.’” *Cooley*, 300 Mich App at 262. For the reasons explained in a motion that one of the anonymous defendants will soon file, Dr. Sarkar is a limited-purpose public figure, and the commenters’ discussion of the scientific research that Dr. Sarkar chose to publish is speech on a matter of exceptional public concern. As such, the commenters’ speech “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v Phelps*, 562 US 443; 131 S Ct 1207, 1215; 179 L Ed 2d 172 (2011).

a. In almost every instance, Dr. Sarkar has failed to plead verbatim the allegedly defamatory words in their proper context.

Michigan law requires defamation plaintiffs to plead “the exact language that the plaintiff alleges to be defamatory.” *Cooley*, 300 Mich App at 262. This requirement ensures that courts “‘may judge whether the[allegedly defamatory statements] constitute a ground of action.’” *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 53; 495 NW2d 392 (1992), quoting *Gatley, Law & Practice of Libel & Slander* 467 (1924 ed.). Moreover, the requirement of specificity is a constitutional safeguard that facilitates prompt dismissal of claims directed at protected speech. See *Cooley*, 300 Mich App at 262 (“[S]ummary disposition is an essential tool to protect First Amendment rights.”). To meet this standard, a defamation plaintiff must plead the particular defamatory words complained of and their connection to the plaintiff. *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 590; 349 NW2d 529 (1984).

Dr. Sarkar has not pleaded defamation with specificity.

First, his complaint cites a number of comments by reference alone, without reproducing them. See *Ghanam*, 303 Mich App at 543 (holding defamation claim “facially deficient” because

“the alleged defamatory statements were not identified in plaintiff’s complaint”). This is true of the many comments he refers to by citing only a website address, without actually reproducing the allegedly defamatory text. See, e.g., Compl ¶¶ 41–44. And it is true of his claim that an unknown individual sent a “series of emails” to the University of Mississippi. See Compl ¶ 67. The complaint does not supply the text of any of those allegedly defamatory emails.

Second, for those comments actually quoted in the complaint, the vast majority are quoted in only short fragments, surrounded by Dr. Sarkar’s own exaggerated characterizations. This ignores settled Michigan law that the question of whether a statement is capable of being defamatory turns on “all the words used . . . , ‘not merely a particular phrase or sentence.’” *Smith*, 487 Mich at 129, quoting *Amrak Prods, Inc v Morton*, 410 F3d 69, 73 (CA 1, 2005).

For example, paragraph 41 of the complaint, which is representative, states in full: “At <https://pubpeer.com/publications/16546962> there are comments that conclude that certain figures are ‘identical’ to others, accusing him of research misconduct.” The only statement reproduced in this paragraph is a single word—“identical.” On its own, that word carries no defamatory meaning, much less the suggestion of research misconduct that Dr. Sarkar ascribes to it. It is not even apparent from the single-word quotation that the comment concerns Dr. Sarkar or his research, as it must for his claim to proceed. See *Ledl*, 133 Mich App at 590.

Similarly, the complaint refers to a “screen shot from PubPeer” apparently distributed at Wayne State University. Compl ¶ 69. The complaint does not reproduce that screenshot, but it claims that the screenshot, along with two lines of text quoted in the complaint, implicitly suggest “that Sen. Grassley was investigating Dr. Sarkar and that the PubPeer postings were evidence in that investigation.” *Id.* ¶ 72. Absent the screenshot and the full text that accompanies it, it is impossible to determine whether Dr. Sarkar’s claim of defamation by implication is

legally adequate. See *Locricchio v Evening News Ass’n*, 438 Mich 84, 122; 476 NW2d 112 (1991) (“[C]laims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.”).

Dr. Sarkar’s complaint is full of similar examples of fragmentary quotations that carry little meaning—let alone a defamatory one—on their own. See, e.g., Compl ¶¶ 40(a)–(b), 42–47. And yet context is critical in this case. Paragraph 44, for example, alleges that PubPeer commenters accused Dr. Sarkar of “sloppiness.” Even if that word were capable of defamatory meaning, which it is not (see Part 2.b.ii.), the full comment in its proper context belies the complaint’s crude characterization. That word appears in the middle of a paragraph explaining the importance of images when used as scientific data, and speaking to broader concerns with the “sloppiness” in “data quality control and data assurance” in labs and in peer review. See Jollymore Aff ¶ 9 (full comment cited in paragraph 44 of the complaint).²

Finally, even for those comments quoted in full in the complaint, Dr. Sarkar generally has not identified which portions of the comments are materially false and defamatory. The Court of Appeals’ decision in *Royal Palace Homes* is instructive. There, building contractors claimed that news broadcasts had implied that they were “illegally and/or improperly operating” their business and that they were “involved in unprofessional and unworkmanlike construction practices.” 197 Mich App at 50. In support, the contractors appended transcripts of the broadcasts, “but failed to identify any allegedly defamatory statements within them.” *Id.* This,

² The full text of each of the comments referred to in the complaint, as those comments existed when Dr. Sarkar’s counsel first contacted PubPeer, is attached to the affidavit of Nicholas J. Jollymore. The Court may consider the full text for two reasons. First, as explained above, the full context of the statements is necessary to determine whether they are capable of defamatory meaning. See also *Gustin v Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) (“[A] publication must be considered as a whole.”). Second, as in *Ghanam*, this Court may “analyze the alleged defamatory statements to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile.” 303 Mich App at 543.

the court held, was inadequate: “Defendants do not bear the burden of discerning their potential liability from these transcripts. Plaintiffs must plead precisely the statements about which they complain.” *Id.* at 56–57. The same is true here. Paragraph 40(d) of the complaint, for example, quotes a page and a half of commentary without identifying which portions Dr. Sarkar believes to be false and defamatory. Paragraph 48 is similar.

Dr. Sarkar may respond that his grievance is obvious, given the many comments noting similarities between images in his research papers. See generally *Jollymore Aff* ¶¶ 4–21. With a single exception, however, notably absent from his complaint is any claim that those comments noting similarities are *false*.³ See Compl ¶¶ 42, 46. In fact, Dr. Sarkar concedes that some undisclosed portion of the images analyzed by PubPeer’s commenters are similar: “While some PubPeer comments do point out illustrations that appear similar, others like this example are not.” *Id.* ¶ 56. He also concedes that he has “apologiz[ed] for [an] inadvertent error,” *id.* ¶ 50, in response to at least one PubPeer comment identifying similarity. And, indeed, he and/or his co-authors have corrected at least one image that PubPeer commenters had identified as similar to another. Compare *id.* ¶ 43 (link to comment noting similarity), with <http://onlinelibrary.wiley.com/doi/10.1002/jcp.24551/pdf> (replacing the image analyzed by PubPeer commenters).

In the face of the complaint’s concession that some of the PubPeer comments claiming similarity are true, Dr. Sarkar’s vague claim that some other, unspecified number are false is legally inadequate. He must specifically identify the comments he believes to be defamatory.

³ The single exception comes in paragraph 56, in which Dr. Sarkar alleges that two images labeled “similar” by a commenter “are clearly different illustrations to the untrained eye.” As explained in Part 2.b.i., that claim of similarity is incapable of defamatory meaning.

The requirement of specificity is especially important in this case. The complaint repeatedly alleges that PubPeer’s commenters have accused Dr. Sarkar of “research misconduct” as that term is defined by federal regulation. *See* Compl ¶ 39 (“many statements that were posted about Dr. Sarkar . . . either implied or outright accused Dr. Sarkar of research misconduct”); *id.* ¶¶ 31–36 (extensive discussion of federal regulations governing “research misconduct”). The complaint specifically states that “Dr. Sarkar has *never* been found responsible for research misconduct.” *Id.* ¶ 57 (emphasis in original). But PubPeer’s commenters have not accused Dr. Sarkar of “research misconduct” or of having “been found responsible for research misconduct.”⁴ The question remains whether Dr. Sarkar has pleaded specific comments posted on PubPeer’s site that are provably false and defamatory. He has not.

For these reasons alone, the complaint fails the threshold requirement of specificity.

b. No actionable words were pleaded.

Even assuming the complaint is pleaded with specificity, the comments Dr. Sarkar complains of are not capable of defamatory meaning. “Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide.” *Ghanam*, 303 Mich App at 544. To be actionable, an allegedly defamatory statement “must be ‘provable as false.’” *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998), quoting *Milkovich v Lorain Journal Co*, 497 US 1, 17–20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). It may not be mere “sarcas[m],” *Ghanam*, 303 Mich App at 550, “rhetorical hyperbole,” *Greenbelt Co-op v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970), or “[e]xaggerated language,” *Hodgins v Times Herald Co*, 169 Mich App 245, 254; 425 NW2d 522 (1988). And it must convey a materially

⁴ Even if they had, “[n]umerous courts have rejected claims of falsity when based on a misuse of formal legal terminology.” *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 264; 487 NW2d 205 (1992).

false fact that a “reasonable fact-finder could conclude . . . implies a defamatory meaning.”

Smith, 487 Mich at 128.

The nature and venue of the statements is also critical: “Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact.” *Ghanam*, 303 Mich App at 546–47. This is especially true for a forum like PubPeer, which hosts discussion of published articles. As the D.C. Circuit explained, “there is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works.” *Moldea v New York Times Co*, 306 US App DC 1, 6; 22 F3d 310 (1994). “[W]hile a critic’s latitude is not unlimited, he or she must be given the constitutional ‘breathing space’ appropriate to the genre.” *Id.*

Here, none of the statements cited in the complaint is capable of defamatory meaning for the reasons discussed below. Broadly speaking, the statements cited fall into three categories: (1) the initial PubPeer comments noting similarities between images used in Dr. Sarkar’s papers, (2) the follow-on PubPeer comments discussing those initial comments, and (3) a handful of miscellaneous statements that will be addressed separately below.

i. The comments claiming similarities are not actionable.

The initial PubPeer comments that claim similarities between images used in Dr. Sarkar’s papers are not actionable for two reasons.

First, those comments convey only subjective opinions, not provably false facts. Many of the comments are phrased in this general style: “When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357.” Compl ¶ 55.⁵ Whether two

⁵ See also Jollymore Aff ¶ 5 (comment from webpage cited in paragraph 40 of the complaint: “There is another concern in this paper: Fig. 7B (Bcl-XL panel) here appears to be similar to Fig. 5A in another paper.”); *id.* ¶ 14 (comment from webpage cited in paragraph 49 of the complaint:

images “look[] similar,” however, is entirely a matter of subjective opinion, and thus not provably false. Even for those comments that express greater confidence in the similarity between the images being compared, see, e.g., Compl ¶¶ 41–42, 46, such comparison is inherently subjective. Visual comparisons, by their nature, invite others to conduct their own subjective evaluations. Indeed, the PubPeer commenters noting the similarities did precisely that. They invited others to compare the images, either explicitly, see, e.g., Jollymore Aff ¶ 5 (“please compare . . .”), by directing readers to the similar images, see, e.g., *id.* ¶ 7 (“Figure 3A Image of LNCaP, BR-DIM is identical to image of VCaP, siERG + BR-DIM.”), or by manually placing the similar images in a single image file to allow comparison, see, e.g., *id.* (“Check this out: same bands for different time conditions <http://i.imgur.com/4qJBeS7.png> <http://i.imgur.com/UaeqmWb.png>”).

Second, even if the comparisons conveyed provably false facts, those facts are not defamatory. They do not, as a matter of law, “tend[] so to harm the reputation of [the plaintiff] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Smith*, 487 Mich at 113. That is because the fact of similarity between images does not, on its own, suggest any impropriety. Instead, it invites a scientific discussion. Moreover, as with a claim that two songs sound alike or that two paintings look alike, there could be any number of innocuous explanations. In fact, Dr. Sarkar and/or his co-authors have offered an innocent explanation for the similarities between two images in a paper on at least one occasion. See <http://onlinelibrary.wiley.com/doi/10.1002/jcp.24551/pdf> (“In Wang et al. (2013), the authors have recently discovered an inadvertent error in Figure 4B (EZH2 lane).”).

“Fig. 3A in this paper contains images that appear to be similar to those in Fig. 1B in another paper.”).

For these reasons, the core comments that Dr. Sarkar complains of—those claiming similarities between images in his research papers—are incapable of defamatory meaning.

ii. The follow-on comments are not actionable.

The original comments noting similarities drew additional comments, but none of them is capable of defamatory meaning. They are all either (1) opinions that are not provably false, (2) sarcastic and rhetorical hyperbole, or (3) simply not defamatory as a matter of law.

First, at least seven of the follow-on comments express only opinions, and not provably false facts.⁶ For example, one comment states that “The last author is now correcting ‘errors’ in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999–2014), which were all posted in PubPeer.” Compl ¶ 40(d). The first sentence is apparently true by Dr. Sarkar’s own admission, see *id.* ¶ 50, and the second expresses a hope for future action, not a false fact about Dr. Sarkar. Other comments express the view that the allegations of similarity on PubPeer warrant investigation. See, e.g., *id.* ¶ 40(d) (“An online CV shows he has received DOD funds as well, bringing the federal fund total close to \$20 million. Why isn’t the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong?”). But that is solely an opinion,

⁶ See Compl ¶ 40(b) (“You might expect the home institution to at least look into the multiple concerns which have been rased [sic.]”); *id.* ¶ 40(d) (“The last author is now correcting ‘errors’ in several papers. Hopefully he will be able to address and correct the more than 45 papers (spanning 15 years of concerns: 1999–2014), which were all posted in PubPeer.”); *id.* (“It’s not hard to imagine why Wayne State may not have fought to keep him.”); *id.* (“From a look at this PI’s funding on NIH website it seems this lab has received over \$13 million from NIH during the last 18 years. An online CV shows he has received DOD funds as well, bringing the federal fund total close to \$20 million. Why isn’t the NIH and DOD investigating? The problems came to light only because they were gel photos. What else could be wrong? Figures, tables could be made-up or manipulated as well.”); *id.* ¶ 44 (“sloppiness”; “correction”; “public set of data to show that the experiments exist”); *id.* ¶ 45 (“One has to wonder how this was not recognized earlier by the journals, reviewers, funding agencies, study sections, and the university. Something is broken in our system.”).

incapable of defamatory meaning. See *Ghanam*, 303 Mich App at 547–48 (finding internet comment containing statement “maybe I need to call the investigators?” to be “not defamatory as a matter of law”); *Varrenti v Gannett Co*, 33 Misc 3d 405, 412–13; 929 NYS2d 671 (2011) (holding that comments that “call[ed] for an investigation into the [police department’s] practices” were “expressions of protected opinion”).

Dr. Sarkar’s complaint makes much of the use of the word “sloppiness” by one commenter as well as the phrase “public set of data to show that the experiments exist.” Compl ¶ 44. Initially, those words—which are the only ones from that comment actually pleaded in the complaint—are unintelligible fragments, incapable of defamatory meaning and not even self-evidently about Dr. Sarkar. See Part 2.a. Setting that deficiency aside, the context of the comment—which is set out in full in the margin,⁷ and in its even lengthier context in paragraph 9 of the Jollymore Affidavit—makes clear that it is a measured, thoughtful, and entirely subjective explanation of the importance of quality control in prepublication peer review. But even absent that clarifying context, the word “sloppiness” is wholly subjective, and the related demand for proof of the results of the experiment is incapable of defamatory meaning. See *Cole v Westinghouse Broadcasting Co, Inc*, 386 Mass 303, 311; 435 NE2d 1021 (1982) (“[T]he phrases

⁷ See Jollymore Aff ¶ 9 (“Well yes, it matter a lot. The paper was published through a process of prepublication peer review of the data submitted. If these are ‘only images’ then the simple conclusion is that ‘these are only data’ and we can simply forget science and work instead in metaphysics. Beyond that, it matters even more, because if data quality control and data assurance in the lab that produced the paper are sufficiently poor that this can slip through submission, response to reviewers and then proofing, someone has their eye well off the ball.

I would be the first to hold up my hand and agree that this happens, but the minimum message is ‘get your eye back on the ball’ and a response to the effect that steps have been taken to prevent such sloppiness would reassure the community that the paper is in fact OK. Otherwise the conclusion of the reader can only be that these are ‘only images’ then the paper is of less scientific value than the holiday snaps of the authors.

So a detailed answer is required, alongside a correction and with the latter, a public set of data to show the experiments exist.”).

‘sloppy and irresponsible reporting’ and ‘history of bad reporting techniques,’ when viewed in their context, could not reasonably be viewed as statements of fact.”⁸ Were researchers subject to civil liability for criticizing their peers’ work as “sloppy” or for demanding further confirmation of their peers’ results, academic debate would be hobbled. See, e.g., Hotz, *Most Science Studies Appear to Be Tainted by Sloppy Analysis*, Wall St J (September 14, 2007) <online.wsj.com/news/articles/SB118972683557627104> (accessed November 30, 2014).

Second, at least seven of the follow-on comments express only sarcasm or rhetorical hyperbole, not actionable defamation.⁹ For example, one states: “I guess the reply from the authors would be inadvertent errors in figure preparation.” Compl ¶ 40(a). Even the complaint recognizes that the phrase is sarcastic. *Id.* (“someone sarcastically asserted that”). Moreover, that sarcasm does not convey any defamatory fact. To be sure, it appears to express bewilderment at the apparent similarity noted by a previous commenter. See Jollymore Aff ¶ 5 (full text of comment cited in paragraph 40 of the complaint). But that sarcasm, even if made “with the intent

⁸ See also *Moldea*, 306 US App DC at 8 (holding that “sloppy journalism” not actionable when read in context); *Hassig v FitzRandolph*, 8 AD3d 930, 931–32; 779 NYS2d 613 (2004) (holding that the statement that “the environmentalists are sloppy with the data they present on local cancer rates” was “opinion, rather than fact, and therefore they are not actionable”).

⁹ See Compl ¶¶ 40(a), 43 (“You are correct: using the same blot to represent different experiment(s). I guess the reply from the authors would be ‘inadvertent errors in figure preparation.’”); *id.* ¶ 40(d) (“That probably works out at about \$200k per PubPeer comment. I should think that NIH must be pretty happy with such high productivity.”); *id.* (“just letting you know that the award for doing what he/she allegedly did is promotion a prestigious position at a different institution. Strange. [website link.]”); *id.* (“It’s not hard to imagine why Wayne State may not have fought to keep him. And presumably the movers and shakers at the University of Mississippi Medical Center didn’t know that they should check out potential hires on PubPeer (they just counted the grants and papers). I wonder which institution gets to match up NIH grants with papers on PubPeer. It can only be a matter of time, grasshopper, but that time may still seem long. You saw it first on PubPeer.”); *id.* ¶ 45 (“physics”; “show the world”); *id.* ¶ 47 (“There seems to be a lot more ‘honest errors’ to correct.”); *id.* ¶ 48 (“Based on these issues, can we agree with the authors that ‘an ERROR occurred during the creation of the composite figures’ and that these (and previous ‘errors’) have ‘NO IMPACT on the overall findings and conclusions previously reported’?”).

to ridicule, criticize, and denigrate,” *Ghanam*, 303 Mich App at 550, does not support a claim of defamation. The statement must convey a provably false fact, and it does not. Similarly, another commenter, as characterized by Dr. Sarkar’s complaint, “doubts that the authors have taken ‘physics’ and that they have decided to ‘show the world’ fabricated data.” Compl ¶ 45.¹⁰ Initially, the actual comment nowhere claims that Dr. Sarkar’s data was “fabricated.” That embellishment is an invention of the complaint.¹¹ In any event, the comment is unmistakable hyperbole. It may be belittling, but it is nowhere defamatory. The same is true of the comment that begins with “It’s not hard to imagine why Wayne State may not have fought to keep him,” and ends with “It can only be a matter of time, grasshopper, but that time may still seem long.” *Id.* ¶ 40(d). If the sarcasm were not evident enough in the first sentence, the final one leaves no doubt. See *Ghanam*, 303 Mich App at 549 (“The use of the ‘:P’ emoticon makes it patently clear that the commenter was making a joke.”).

Finally, a number of the follow-on comments convey facts that are simply not defamatory. For example, the complaint quotes one commenter’s claim to have informed the president of Wayne State University of the statements made on PubPeer’s site. Compl ¶ 40(c). There is nothing defamatory about that claim. Dr. Sarkar does not allege that the fact conveyed is false, and even if it were, falsely claiming to have forwarded PubPeer’s comments along would not, in and of itself, lower Dr. Sarkar in the community’s estimation. In any event, the statement is privileged under the fair-reporting privilege. See *Northland Wheels Roller Skating Ctr v Detroit Free Press, Inc*, 213 Mich App 317, 327; 539 NW2d 774 (1995). From another series of comments, see Compl ¶¶ 51–54, Dr. Sarkar concludes that the apparent discussion between

¹⁰ As with the comment using the word “sloppiness,” this comment is pleaded in only an unintelligible paraphrase and is therefore legally deficient.

¹¹ See Jollymore Aff ¶ 9 (full text of the comment cited in paragraph 44 of the complaint).

commenters is a “fake” one, designed to “artificially increase” the number of comments on Dr. Sarkar’s papers. *Id.* ¶ 53–54. Even if true, there is nothing defamatory about the number of comments on Dr. Sarkar’s papers.

iii. The three miscellaneous statements are not actionable.

The three remaining statements that Dr. Sarkar complains of are not actionable. First, he alleges that an unknown individual sent a “series of emails” to the University of Mississippi containing several PubPeer comments concerning his papers. Compl ¶¶ 66–68. As noted above, those emails are not actionable for the simple reason that Dr. Sarkar has not pleaded the actual text of the emails. He has not, in the language of the common law, pleaded his defamation claim *in haec verba*.

Second, Dr. Sarkar alleges that an unknown individual physically distributed to mailboxes at Wayne State “a screen shot from PubPeer showing the search results and disclosing the number of comments generated for each research article listed on the page.” *Id.* ¶ 69. The individual apparently added other text to the document that, the complaint asserts, falsely implied that Dr. Sarkar is under investigation by U.S. Senator Chuck Grassley. *Id.* ¶¶ 70–73. As explained above, it is impossible to determine whether that inference is a legally actionable one, because Dr. Sarkar has not pleaded the full document. For that reason alone, his claim is deficient as a matter of law. Moreover, the only portion of the document apparently attributable to PubPeer’s commenters is a screenshot showing the number of comments made on Dr. Sarkar’s papers. Dr. Sarkar does not claim that it falsely reports that number. Nor would that fact, even if falsely reported, be capable of defamatory meaning.¹²

¹² Dr. Sarkar speculates that “[i]t 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.” Compl ¶ 75. But he does not allege any facts whatsoever in support of that belief.

Finally, Dr. Sarkar alleges that one commenter falsely stated that “FH Sarkar has never replied to any of the Pubpeer comments.” *Id.* ¶¶ 49–50.¹³ Even if technically false, this statement is simply not defamatory. The assumption underlying Dr. Sarkar’s complaint is that failing to respond to internet comments suggests a cover-up, and that it is therefore defamatory to claim that Dr. Sarkar has not responded. This is not true, particularly in the informal context of anonymous internet banter. See *Dougherty v Capitol Cities Communications, Inc*, 631 F Supp 1566, 1573 (ED Mich, 1986) (denial is insufficient to infer malice in libel action because “such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error”). If Dr. Sarkar truly believed that his alleged failure to respond were likely to cause him harm, he likely would have responded to more than the single post he claims to have responded to. See Compl ¶ 50.

c. The balance of interests favors the constitutional right to anonymity of PubPeer’s commenters.

Under *Cooley*, even if Dr. Sarkar’s claims of defamation would survive a motion for summary disposition under MCR 2.116(C)(8), a court “may consider the weight of the defendant’s First Amendment rights against the plaintiff’s discovery request” in determining whether to compel the disclosure of their identities. 300 Mich App at 266. Here, the balance overwhelmingly favors maintaining anonymity.

There is more at stake in this case than the commenters’ right to engage in protected speech anonymously. At stake is the freedom of academic discourse itself. The advancement of scientific knowledge depends on the ability to convey ideas without fear of retaliation.

¹³ Somewhat ironically, the reply that Dr. Sarkar cites in his complaint was published on PubPeer’s site anonymously, see *Jollymore Aff* ¶ 15 (comment from paragraph 50 of the complaint), and so it would not have been possible to verify that Dr. Sarkar had in fact replied to any of the comments.

Particularly in the sciences, where hypotheses are rigorously tested through careful experimentation, open methodologies, and peer-reviewed publications, anonymity is a critical component of robust review. Indeed, some prominent science journals employ double-blind peer review—in other words, anonymous review—to ensure honest appraisals.¹⁴ For all these reasons, courts have been “especially careful when applying defamation and related causes of action to academic works, because academic freedom is ‘a special concern of the First Amendment.’” *ONY, Inc v Cornerstone Therapeutics, Inc*, 720 F3d 490, 496 (CA 2, 2013), citing *Keyishian v Bd of Regents*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967). To subject scientific commenters to possible liability on claims as trifling as those at issue here would subvert that system and impoverish the vigorous debate necessary to scientific progress.

The court must balance these First Amendment interests against the strength of Dr. Sarkar’s central claim, which is that certain commenters defamed him by noting similarities between images used in different papers he published. While the First Amendment issues are weighty, Dr. Sarkar has only a slight interest in asserting his claim of defamation. That is in part because the claims of similarity are simply not defamatory as a matter of law. See Part 2.b.i. But it is also because it is highly unlikely that Dr. Sarkar would ever be able to prove that the comments were *false*. PubPeer submits the attached affidavit of Dr. John W. Krueger to show that not only do those images appear *similar*—they very likely represent the same underlying experiments. It is unlikely that Dr. Sarkar would be able to prove the contrary.

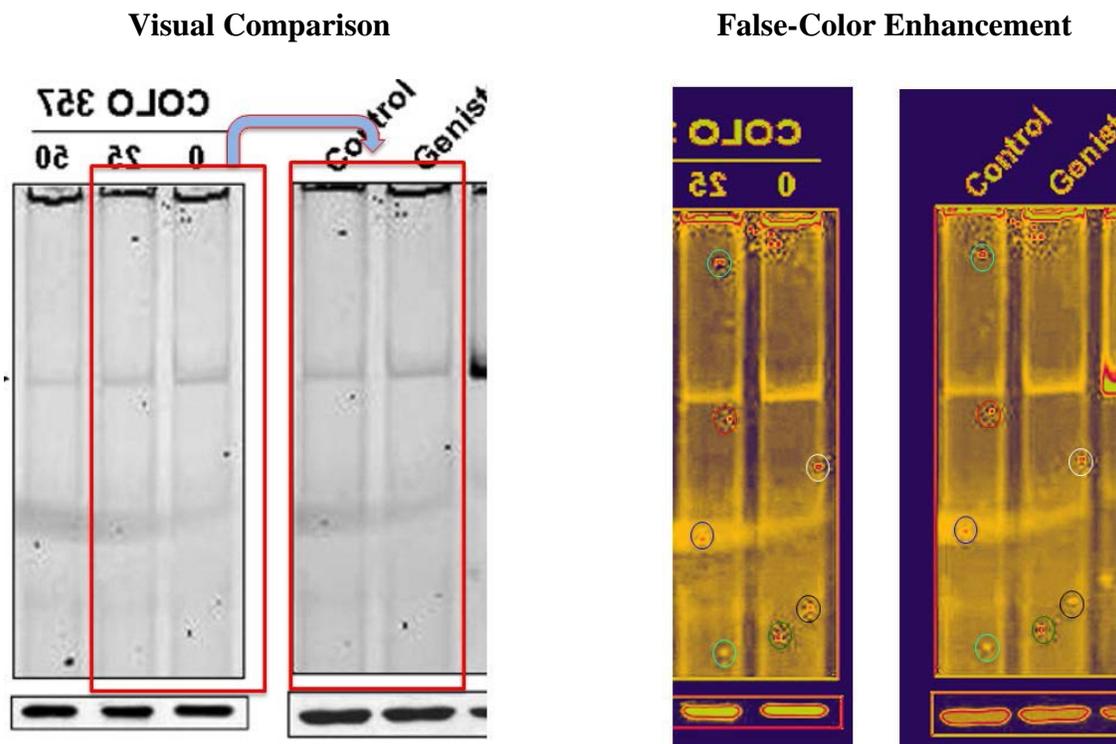
Dr. Krueger spent 20 years at the U.S. Office of Research Integrity (“ORI”) examining claims that images depicting purportedly different experiments in fact depicted the same

¹⁴ The NIH is piloting a program that accepts anonymously submitted grant applications to ensure objectivity of review. While the names of individuals on the reviewing committee are available to the applicants, the identities of the first and second reviewer are not disclosed. See, e.g., <<http://www.nih.gov/news/health/dec2012/od-07.htm>> (accessed December 9, 2014).

experiment. Krueger Aff ¶¶ 5, 10. In this case, Dr. Krueger offered his expert opinion on just that question: whether the images identified by PubPeer’s commenters depicted the same experiments, even though they purported to depict different ones. *Id.* ¶ 6. He conducted this analysis using two methods: (1) visual inspection as an expert in the field, and (2) using forensic tools that he developed during his time at ORI, including false-color enhancement. *Id.* ¶¶ 7, 28–46. Both methods focused on the subtle features visible in each image, including background details and any visible blemishes caused by the experimental procedures being used, which scientists call “artifacts.” *Id.* ¶¶ 15–16, 21. In images of underlying experiments that are different, the background and the artifacts vary from image to image, because they are essentially random features. *Id.* ¶ 16. What Dr. Krueger found, both by expert visual inspection and through the use of false-color enhancement, however, was that features in the images at issue, including the background and artifacts, were common in both appearance and position. See e.g., *id.* ¶¶ 63–64, 67, 73–77, 84. These forensic evaluations led him to conclude that there was “strong support” for “the conclusion that the images [at issue] were not authentic or contained other irregularities.” *Id.* ¶ 7. See also *id.* ¶ 84 (“the evidence in support of the conclusion that the images are not authentic is exceptionally strong”).

Dr. Krueger’s affidavit provides a detailed explanation of his analysis. Here, for the sake of example, PubPeer describes how Dr. Krueger analyzed one of the comments highlighted in the complaint (and discussed above), which states: “When Colo357 lane for 0 and 25 in 3B is flipped it looks similar to the control and genistein in Fig. 3D for Colo357.” Compl ¶ 55. Below are graphic depictions of Dr. Krueger’s results: First, on the left, are gray-scale pictures of two “Western blots,” side-by-side but with one blot flipped horizontally, with red boxes drawn around the portions being compared. Dr. Krueger’s visual inspection showed that the artifacts in

each blot (the dark spots) appeared the same and were in the same position. Krueger Aff ¶ 63. Second, on the right, are the same two blots shown side-by-side after false-color enhancement. For these particular blots, Dr. Krueger concluded that “[a] visual inspection of the images is sufficient to conclude that there is strong evidence to believe that these images are not authentic.” *Id.* He also concluded that false-color enhancement showed that the artifacts were not randomly located, as would be expected if the images depicted different experiments, which “proves that the two images cannot be separate results from independent experimental determinations.” *Id.* ¶ 67.



Dr. Krueger performed a similar analysis for all of the PubPeer comments he reviewed, and he came to a similar conclusion with respect to all of them: that his forensic evaluation suggests—strongly in some cases, and definitively in others—that each of the pairs of figures highlighted by PubPeer’s commenters depicted the same underlying experimental results, or that each of the other irregularities noted were in fact irregularities. *Id.* ¶¶ 7, 53–58, 85–86.

Under *Cooley*, the Court should balance the two competing interests at hand. On the one hand is clear constitutional protection of academic discourse. On the other hand is the remote likelihood that Dr. Sarkar could prove that statements observing similarities between images in his papers were defamatory. The balance clearly favors quashing the subpoena.

d. Dr. Sarkar’s other claims do not evade the constitutional limits on defamation claims.

The complaint pleads a number of claims in addition to defamation: “Intentional Interference with Business Expectancy,” “Intentional Interference with Business Relationship,” “Invasion of Privacy (False Light),” and “Intentional Infliction of Emotional Distress.” Compl ¶¶ 99–122. But Dr. Sarkar cannot avoid the First Amendment limitations on his defamation claims by changing the label of the tort. Claims such as those pleaded here must satisfy the constitutional restrictions on defamation claims. *Hustler Magazine, Inc v Falwell*, 485 US 46, 56; 108 S Ct 876; 99 L Ed 2d 41 (1988); *Nichols v Moore*, 396 F Supp 2d 783, 798–99 (ED Mich, 2005), aff’d, 477 F3d 396 (CA6, 2007); *Ireland*, 230 Mich App at 624–25. Consequently, Dr. Sarkar’s other claims do not provide an alternate basis for unmasking the commenters.

3. Dr. Sarkar has not met the heightened First Amendment standard required by the vast majority of jurisdictions before he may unmask anonymous commenters.

Even if Dr. Sarkar’s complaint were legally adequate, this Court should require that he substantiate his claims with evidence before compelling the identification of PubPeer’s commenters. The vast majority of jurisdictions to have considered this question require such evidence to safeguard the constitutional right to anonymity. See *Ghanam*, 303 Mich App at 537 (“Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*, *Cahill*, or a modified version of those standards.”). Absent such a requirement, defamation plaintiffs could successfully overcome the right to anonymity through artfully pleaded complaints, even if they had no realistic chance of proving their case.

It is true that neither *Cooley* nor *Ghanam* required the plaintiffs before them to substantiate their claims with evidence. But neither case dealt with a situation like this one, in which: (1) an expert has essentially confirmed the views that the plaintiff asserts are defamatory (that the sets of similar images depict the same underlying experiments); (2) the plaintiff thus has no prospect of success unless he can show that the expert's view is provably false and, in fact, false; and (3) the only evidence that could arguably approach that showing is the original data from the plaintiff's experiments, which are in his sole possession and yet not proffered by the plaintiff in support of his case.

It is in precisely such circumstances that the requirement embraced by nearly all courts to have considered the issue—that defamation plaintiffs seeking to unmask anonymous commenters substantiate their claims with evidence—is most needed to safeguard the right to anonymity.

CONCLUSION

For these reasons, the Court should quash Dr. Sarkar's subpoena.

Respectfully submitted,

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