**STATE OF MICHIGAN**
**IN WAYNE COUNTY CIRCUIT COURT**

FAZLUL SARKAR,

Plaintiff,

vs.

JOHN and/or JANE DOE(S),

Defendant(s).
_____/

Case No. 14-013099-CZ

Hon. Sheila Ann Gibson



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**PUBPEER'S EMERGENCY MOTION FOR STAY PENDING APPEAL**
**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
Attorney for Moving Party PubPeer, LLC

**MOTION FOR STAY PENDING APPEAL**

By this motion, PubPeer LLC, a third party to whom a subpoena has been directed in the above-captioned case, respectfully moves the Court for an order staying enforcement of the subpoena against it until its interlocutory appeal is resolved. In support of this motion, PubPeer states as follows:

1. PubPeer is the recipient 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 [sic] that are described in [Plaintiff's] complaint." See Jollymore Aff Appx A.
2. On March 9, 2015, this Court granted PubPeer's motion to quash this subpoena with respect to all of the PubPeer comments in question, save for one.
3. On March 19, 2015, after reviewing supplemental briefing and hearing oral argument on the remaining comment, this Court denied PubPeer's motion to quash the subpoena with respect to that sole comment, and ordered production of the anonymous commenter's identifying information, subject to a protective order governing the plaintiff's use of that information.
4. PubPeer is preparing an emergency application for leave to appeal this Court's March 19 decision.
5. For the reasons set forth in PubPeer's brief in support of this motion, enforcement of the subpoena should be stayed pending PubPeer's interlocutory appeal. Denying this motion would result in irreparable harm to PubPeer and to the commenter at issue because, once PubPeer discloses the identifying information, that commenter's anonymity will be

forever lost, and the resulting damage to PubPeer's anonymous platform for scientific discussion will be irreversible.

Accordingly, PubPeer respectfully moves this Court to stay enforcement of the subpoena pending resolution of PubPeer's interlocutory appeal.

Respectfully submitted,

/s/ Daniel S. Korobkin


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*Counsel for PubPeer, LLC*


Dated: March 20, 2015

**BRIEF IN SUPPORT OF MOTION FOR STAY PENDING APPEAL**

## INTRODUCTION

On March 19, 2015, this Court ordered PubPeer LLC—a third party to whom a subpoena has been directed in this case—to produce identifying information for an anonymous comment on its website. PubPeer intends to promptly seek interlocutory review of that decision because the plaintiff, Dr. Sarkar, has not made the showing required to unmask that commenter. As PubPeer has explained, the comment at issue is legally privileged and, in any event, simply not capable of defamatory meaning. For that reason, the commenter is constitutionally entitled to remain anonymous. Moreover, the Court erred in ordering the unmasking of the commenter on the basis of an entirely *un-pleaded email* referred to in the comment. Settled Michigan law requires defamation plaintiffs to plead the very words of the alleged libel they complain of, not to merely speculate about its content.

PubPeer intends to immediately appeal and, pending resolution of the appellate process, hereby seeks a stay from this Court of its order requiring disclosure of the identifying information. A stay is needed because, absent it, PubPeer and the commenter would suffer irreparable harm: producing the information would irreversibly intrude upon the commenter's constitutional right to anonymity, and it would endanger PubPeer's mission of promoting anonymous scientific discussion of scientific research. In other words, if PubPeer were forced to unmask its commenter, there would be no way of restoring the commenter's anonymity or undoing the damage to PubPeer. The disclosure would effectively moot PubPeer's appeal and deny it the opportunity to seek appellate review.

For similar reasons, courts routinely stay the unmasking of anonymous speakers pending appellate review. This Court should do the same.

## BACKGROUND

The plaintiff, Dr. Fazlul Sarkar, has brought a civil suit alleging defamation and related torts against an unknown number of anonymous defendants who posted comments on a PubPeer's website, which is dedicated to peer review of scientific publications. Shortly after filing suit, Dr. Sarkar obtained a subpoena requiring PubPeer to unmask the anonymous commenters on its website. PubPeer moved to quash the subpoena, arguing that the First Amendment and Michigan caselaw require defamation plaintiffs to make a preliminary showing of merit before intruding upon the constitutional right to remain anonymous. On March 9, 2015, this Court granted PubPeer's motion to quash the plaintiff's subpoena with respect to all but a single one of the comments cited in the complaint. The Court reviewed supplemental briefing on this remaining issue and, at the end of a hearing held on March 19, 2015, denied PubPeer's motion to quash with respect to the sole commenter's identity. The Court ordered PubPeer to produce the identifying information associated with that commenter's comment to Dr. Sarkar, subject to a protective order. The Court scheduled a hearing to consider a proposed protective order but it is anticipated that the hearing will be adjourned based on a stipulation of the parties that they would first attempt to agree as to its content.

## ARGUMENT

### I. A stay is warranted to avoid irreparable harm arising from the loss of the commenter's constitutionally protected right to remain anonymous.

PubPeer's soon-to-be-filed appeal involves the fundamental First Amendment protection of the right to speak anonymously. *See McIntyre v Ohio Elections Comm*, 514 US 334, 342 (1995) ("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."). The Supreme Court has long recognized that the denial of First Amendment

rights, even for a moment, constitutes irreparable harm. *See Elrod v Burns*, 427 US 347, 373 (1976).

In this case, the risk of irreparable harm is particularly acute. If PubPeer were compelled to release identifying information for the commenter in question, his or her anonymity could never be restored. As the Maine Supreme Court noted in analogous circumstances, "disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot." *Fitch v Doe*, 869 A2d 722, 725 (Me, 2005). *See also Melvin v Doe*, 836 A2d 42, 50 (Pa, 2003) ("once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure"); *Pilchesky v Gatelli*, 12 A3d 430, 442 (Pa Super 3, 2011) ("[B]efore the Internet Service Provider discloses the anonymous subscribers' identities, it must notify them in advance to afford them a reasonable opportunity to . . . stay the discovery prior to their identities being revealed." (internal quotation marks omitted)). And, as the Pennsylvania Supreme Court has noted, "the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, . . . that . . . falls within the class of rights that are too important to be denied review." *Id.*

The potential harm from the unmasking of the commenter is not only irreparable—it is substantial. Even with a protective order, the commenter may face a significant danger of out-of-court retribution if Dr. Sarkar learns his or her identity. This is in fact the very reason PubPeer has permitted anonymous commentary: without it, scientists would have to risk their careers to offer candid public feedback on the research of their peers. Indeed, it is likely for this reason that the Michigan Court of Appeals, in *Ghanam v Does*, approved the use of an interlocutory appeal to review an order that would have unmasked an anonymous internet speaker. *See Ghanam v Does*, 303 Mich App 522, 533; 845 NW2d 128 (2014). *See also Melvin v Doe*, 836 A2d 42, 50

(Pa, 2003); *Fitch v Doe*, 869 A2d 722, 725 (Me, 2005).[1] Despite the federal "final order" rule which limits interlocutory appeals very strictly, *e.g.*, *Mohawk Indus v Carpenter*, 103 S Ct 599 (2009), two federal appellate courts have granted review of orders to identify anonymous internet defendants. *See In re Anonymous Online Speakers*, 611 F3d 653 (CA 9, 2010); *Arista Records v Doe 3*, 604 F3d 110, 119 (CA 2, 2010).

In addition, if Dr. Sarkar is permitted to learn the commenter's identity, PubPeer's mission of facilitating post-publication peer review would be imperiled. Whistleblowers within the scientific community would undoubtedly be chilled from voicing their concerns if they could not do so anonymously. That outcome would be at odds with Supreme Court precedent, which recognizes that anonymous speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre*, 514 US at 357. Other federal courts have also noted that "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v 2theMart.com*, 140 F Supp 2d 1088, 1093 (WD Wash, 2001). *See also Columbia Ins Co v Seescandy.com*, 185 FRD 573, 578 (ND Cal, 1999):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak

[1] Other state appellate courts have allowed interlocutory appeals from orders identifying anonymous online speakers, although without any express discussion of appellate jurisdiction. *See Mortgage Specialist v Implode-Explode Heavy Indus*, 999 A2d 184, 192 (NH, 2010); *Independent Newspapers v Brodie*, 966 A2d 432, 456-57 (Md, 2009); *Krinsky v Doe 6*, 72 Cal Rptr 3d 231 (Cal App, 2008); *In re Does 1-10*, 242 SW3d 805 (Tex App, 2007); *Mobilisa v Doe*, 170 P3d 712 (Ariz App, 2007); *Doe v Cahill*, 884 A2d 451 (Del, 2005); *Immunomedics v Doe*, 775 A2d 773 (NJ Super, 2001). In other cases, the plaintiff was allowed to file an interlocutory appeal when its motion for discovery to identify a Doe defendant was denied. *See Solers, Inc v Doe*, 977 A2d 941 (DC, 2009); *Dendrite v Doe*, 775 A2d 756 (NJ Super Ct App Div 2001). In each of these cases, no discovery regarding the identity of the anonymous speaker was taken until the appeal was completed.

> one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

For these reasons, PubPeer and its commenter would suffer irreparable harm if PubPeer were forced to unmask its anonymous commenter. This Court's disclosure order should therefore be stayed pending appellate review.

## II. Dr. Sarkar cannot overcome the commenter's right to remain anonymous.

A stay is also warranted because PubPeer is likely to prevail in its appeal. As PubPeer has explained, Dr. Sarkar has not made the showing required by the First Amendment and Michigan law to unmask the anonymous commenter. They require that, at a minimum, Dr. Sarkar demonstrate the legal sufficiency of his complaint. He cannot do so with respect to this comment for several reasons.

First, the comment itself is simply not capable of defamatory meaning. See PubPeer Supp Br 4. The comment was as follows (preceded by the question that prompted it):

> **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."

Compl ¶40(c).

There is nothing remotely defamatory about this comment. The text consists of a simple cut-and-paste of an email from a public university suggesting that someone—perhaps the commenter—reported concerns to the university. Expressing concerns and calling for an investigation is not defamatory as a matter of law. See *Haase v Schaeffer*, 122 Mich App 301, 305; 332 NW2d 423 (1982) ("'I am here to investigate' . . . clearly does not rise to the level of defamation."); see also PubPeer Mot to Quash Br 16 (citing cases). And the commenter's republication of the university email is legally privileged under Michigan's fair-reporting statute. See MCL § 600.2911(3).

Because the comment is privileged and, in any event, not defamatory, the First Amendment protects the commenter's right to have made the comment anonymously. Dr. Sarkar may not unmask that commenter to go on a fishing expedition for other allegedly defamatory statements. See PubPeer Suppl Br 5–6.

Second, Dr. Sarkar appears to believe that the commenter separately sent an email to Wayne State making defamatory allegations, but Dr. Sarkar has not pleaded the text of any such email. That deficiency is fatal. Michigan law requires defamation plaintiffs to plead "the exact language that the plaintiff alleges to be defamatory." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013). 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.). 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).

Here, Dr. Sarkar has not pleaded the "exact language" of the email because he can only speculate as to its content, and even as to its existence. If he believes that Wayne State received such an email, his proper recourse is to attempt to subpoena that allegedly defamatory email directly from Wayne State.

## CONCLUSION

For the foregoing reasons, the Court should stay enforcement of the subpoena pending resolution of PubPeer's interlocutory appeal.

Respectfully submitted,

/s/ Daniel S. Korobkin


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Dated: March 20, 2015