

STATE OF MICHIGAN
COURT OF APPEALS
FOURTH DISTRICT

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff-Appellee,

vs.

JOHN DOE 1, unknown individual,

Defendant-Appellant,

and

JOHN DOE 2, JOHN DOE 3, and
JOHN DOE 4, unknown individuals,

Defendants.

Docket No. 307426

Ingham County Circuit Court
Case No. 11-781-CZ
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BRIEF ON APPEAL FOR APPELLANT JOHN DOE 1

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Solers v Doe,
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Sony Music Entertainment v. Does 1-40,
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Southall v Little Rock Newspapers,
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Southwell v. Southern Poverty Law Center,
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Spelson v CBS, Inc.,
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Fischman, <i>Protecting the Value of Your Goodwill from Online Assault</i> , www.fhdlaw.com/html/bruce_article.htm.....	13
<i>Lessig, The Law of the Horse: What Cyber Law Might Teach</i> , 113 Harv L Rev 501, 504-505 (1999).....	13

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Thomas Cooley Law School, *Harvard Number 1, Cooley Number 2. Here's How*,
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Thompson, *On the Net, in the Dark*,
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Werthammer, *RNN Sues Yahoo Over Negative Web Site*,
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The Court granted leave for an interlocutory appeal presenting a First Amendment question of first impression in Michigan — what showings a plaintiff needs to make before it can invoke state power to compel the identification of its anonymous critics. Although the issue is one of first impression in this state, other state and federal courts, invoking the well-accepted First Amendment right to speak anonymously, and recognizing that First Amendment rights cannot be infringed without a compelling state interest, have consistently held that anonymous would-be defendants must be notified of the threat to their First Amendment right to speak anonymously, would-be plaintiffs must make both a legal and an evidentiary showing of merit before government power may be deployed to identify anonymous critics, and the court must balance the interests of the plaintiff in securing relief from genuine harm based on a real violation of his rights and of the defendant in remaining anonymous. The Court is urged to follow this consensus approach in deciding whether to compel the identification of the one Doe who has sought to quash the subpoena for his identity.

In this case, Thomas Cooley Law School sued a former student whose anonymous blog, entitled “Thomas M. Cooley Law School Scam,” raised trenchant objections to Cooley’s claims about itself, including its claim to be the second best law school in the country. He also discussed various ways the school treats students which, he suggested, maximize revenue without providing fair value to many students; the blogger referred in passing to such actions as “criminal” and as “fraud.” The circuit court declined to quash the subpoena, committing several significant legal errors—(1) it referred to the dominant legal test but failed to apply its requirements; (2) it held that the use of the words “criminal” and “fraud” constituted defamation per se, without acknowledging binding appellate precedent in this state, as well as the Sixth Circuit and elsewhere, holding that these words can be non-actionable opinion; (3) it held that a plaintiff who alleges defamation per se is excused from the “actual malice” requirement of *New York Times v. Sullivan*; and (4) it allowed

Cooley to identify its critic despite Cooley's failure to produce any evidence that anything the blogger said is false.

STATEMENT OF BASIS OF JURISDICTION

The November 8, 2011 order denying John Doe's Motion to Quash the Subpoena did not dispose of all remaining claims or finally adjudicate the rights and/or liabilities of the parties. The Court has jurisdiction under Michigan Court Rule 7.203(B)(1) because Defendant/Appellant sought, and was granted, leave to file an interlocutory appeal of the Circuit Court order.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. MAY A PLAINTIFF USE STATE POWER TO COMPEL IDENTIFICATION OF A DOE WHOSE SPEECH PLAINTIFF CLAIMS WAS WRONGFUL WITHOUT SHOWING THAT IT HAS VALID LEGAL CLAIMS THAT ARE SUPPORTED BY ADMISSIBLE EVIDENCE SO THAT ITS INTEREST IN OBTAINING A REMEDY FOR THOSE CLAIMS OUTWEIGHS THE FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY?

Defendant/Appellant says: No
Plaintiff/Appellee says: Yes
Circuit Court said: Yes

II. MAY PLAINTIFF COMPEL THE IDENTIFICATION OF AN ANONYMOUS BLOGGER WHO IS ALLEGED TO HAVE MADE FALSE STATEMENTS EVEN THOUGH THERE IS NO EVIDENCE OF FALSITY?

Defendant/Appellant says: No
Plaintiff/Appellant says: Yes
Circuit Court said: Did not specifically address

III. DID THE PLAINTIFF STATE VALID DEFAMATION CLAIMS BY ALLEGING THAT DEFENDANT JOHN DOE MADE FALSELY REFERRED TO PLAINTIFF'S LEADERSHIP USING THE TERMS "CRIMINALS" AND "FRAUD" BY VIRTUE OF SPECIFIC ACTIONS PLAINTIFF DOES NOT DISPUTE IT TOOK?

Defendant/Appellant says: No
Plaintiff/Appellee says: Yes
Circuit Court said: Yes, or did not specifically address

IV. IS A PUBLIC FIGURE PLAINTIFF EXCUSED FROM THE ACTUAL MALICE REQUIREMENT WHEN IT SUES OVER WORDS THAT IT CONTENDS ARE PER SE DEFAMATORY?

Defendant/Appellant says: No
Plaintiff/Appellee says: Yes
Circuit Court said: Yes

STATEMENT OF FACTS AND PROCEEDINGS BELOW

This case arose from the controversy over various ways in which Thomas M. Cooley Law School (“Cooley”) has promoted itself to potential students. A national controversy erupted over a ranking system that Cooley created that initially showed Cooley to be the twelfth best law school in the country and later, after adding eight more factors to the analysis, showed Cooley to be the second best in the country. *Harvard Number 1, Cooley Number 2. Here’s How*, http://www.cooley.edu/newsevents/2011/20411_judging_the_law_schools.html. There have also been complaints that Cooley has misrepresented data about the post-graduation employment of its students. A former Cooley student, identified in the original complaint as Doe 1, established a blog entitled Thomas Cooley Law School Scam, and included a detailed critique of Cooley’s practices. The blog is accessible online at <http://thomas-cooley-law-school-scam.weebly.com/>; a copy of the blog as it existed before this action was filed is attached to the Complaint as Exhibit B.

On July 14, 2011, Cooley sued Doe 1 and three anonymous commenters in the Circuit Court for Ingham County, charging each with defamation for their statements about Cooley. With respect to John Doe 1, Cooley’s only specific allegations about Doe’s supposed defamation were:

17. Among the false and defamatory statements about Cooley in John Doe 1’s blog post and John Doe’s comments to the blog post are the false, defamatory and/or per se defamatory accusations that Cooley and its representatives are “criminals” and have committed “fraud.” (Exhibit B). John Doe also falsely states that Cooley has deceived and provided false information to Cooley’s current and

prospective students in order to “lure” them to Cooley or to remain at Cooley rather than transfer to another school. (*Id.*) John Doe further falsely states that Cooley is the highest tax payer in Lansing and “essentially a multi-million dollar business” that uses its clout to “prey” on current and prospective students, stealing their tuition money to “become more rich.” (*Id.*)

The Complaint also alleged that Doe’s purpose in creating blog was to encourage current students to withdraw from Cooley, and to discourage prospective students from applying or enrolling, citing the words “DO NOT ATTEND THIS SCHOOL,” “avoid Cooley at all costs,” and “WILL RUIN YOUR LIFE.” *Id.* ¶ 18.

Because Cooley issued a press release when it filed suit, Doe 1 learned that he had been sued, retained counsel, and on August 5, 2011, filed a motion in the court below to quash any outstanding subpoenas to Weebly, the California-based hosting service for the Cooley Scam blog. Docket Item 7. Doe 1 invoked the *Dendrite* test as a basis for his motion. *Dendrite v Doe*, 342 NJ Super 134, 775 A2d 756 (NJ App 2001). Doe also sent the motion to Weebly, asking that it not respond to any subpoena pending a ruling on that motion. Supplemental Memo. in Support of Motion to Quash, Docket Item 14, Exhibit 1. Weebly responded that Doe could consider the motion “squashed.” *Id.*

Instead of opposing the motion to quash, on August 10, 2011, Cooley sent Doe’s counsel copies of a California subpoena that he was serving on Weebly, setting August 25, 2011, as the deadline for disclosure. *Id.* Exhibit 4. Richard Huffaker, Weebly’s Chief of Customer Satisfaction, promised Doe’s attorney, John Hermann, that he would withhold disclosure to allow Doe an opportunity to obtain a ruling on his motion to quash, Docket Item 14, Exhibit 1, but another Weebly employee, who was not aware of Huffaker’s promise, released Doe’s identifying information to Cooley on August 17, 2011. Cooley Response to Motion to Quash, Docket Item 15, Exhibit C.

On August 18, 2011, Cooley’s counsel wrote a letter to Doe’s counsel, threatening to file an

amended complaint naming Doe publicly if Doe did not withdraw his motion to quash and publish a full retraction of his blog, using words satisfactory to Cooley; the latter also threatened to seek attorney fees and costs if the motion were not withdrawn. Levy Affidavit in Opposition to Motion to Dismiss Appeal as Moot, Exhibit 1. Doe refused to retract, and demanded that the information that had been disclosed while a motion to quash was pending be promptly returned or destroyed. Docket Item 14, Exhibit 7. Cooley proceeded to file an Amended Complaint identifying Doe by his true name. Docket Item 11. Cooley opposed the motion to quash on multiple grounds, including that Weebly's disclosure made the motion to quash moot and that the motion to quash should have been filed in California rather than Michigan. Docket Item 15 at 6-8. Cooley also argued against the widely-applied *Dendrite* test, contending that because Cooley is a private company its litigation is not subject to First Amendment scrutiny, that it is enough that the discovery sought is relevant to the pleaded claims and that no additional rules are needed to protect anonymous speakers, and that, in any event, its complaint had pleaded viable causes of action. *Id.* 8-13. Cooley chose not to provide any evidence supporting the allegations in its complaint, standing on its contention that it could override the First Amendment based only on allegations of wrongdoing.

Doe filed a supplemental brief taking issue with the contention that his motion to quash was moot, Docket Item 14, contending instead that Cooley had violated Michigan's discovery rules by using information obtained from Weebly despite the fact that Doe had advanced a claim that the information was privileged. Doe cited Michigan Court Rule 2.302(C)(7), which provides that when information is produced in discovery even though it is "subject to a claim of privilege or production as trial preparation material," once the party receiving the material learns of the claim of privilege, "the party must promptly return, sequester, or destroy the specified information and any copies it has

and may not use or disclose the information until the claim is resolved” upon learning of the claim of privilege. Doe argued in his supplemental brief that Cooley should be sanctioned for its defiance of Rule 2.302(C)(7). The court below agreed (although it rejected the request for sanctions) and issued an order designed to claw back the disclosure pending disposition of the motion to quash, requiring plaintiff to sequester the information and file all papers identifying Doe in camera so that the Court could decide, in the first instance, whether the motion to quash should be granted. September 8 Hearing Tr. 19-24.¹

Thereafter, Public Citizen was granted leave to file a brief as amicus curiae, explaining why the Court should adopt the five-part *Dendrite* standard for identifying anonymous speakers, which includes notice to the Doe, specification of the allegedly defamatory words, pleading of facially valid claims based on those words, presenting evidence sufficient to establish a prima facie case on the elements of the claim, and then balancing the rights of the plaintiff and the defendant. Public Citizen also explained how that standard should be applied to the current record.

At the hearing on October 24, 2011, Judge Canady ruled from the bench, denying the motion to quash but granting a stay of his ruling pending this Court’s ruling on a motion for leave to appeal. Judge Canady began by noting that is it an open question in Michigan whether the *Dendrite* standard is the governing rule, and that on appeal this case might decide that question. Tr. 43 (Oct. 24, 2011). Judge Canady indicated that he would review how the elements of the test applied in this case. *Id.* Because Doe had filed a motion to quash, Judge Canady decided that no further consideration of the notice issue was required. *Id.* 44. Judge Canady also ruled that, because Cooley had attached the

¹ Because Cooley did not appeal the ruling under Rule 2.302(C)(7), the issue is not addressed any further in this brief.

entire blog to its complaint, the requirement of spelling out the exact allegedly defamatory words had been met. *Id.* Turning to whether Cooley had stated a valid claim about specific allegedly defamatory statements on the blog, Judge Canady focused his attention on the words “criminal” and “fraud,” holding that both “could be considered to be per se [defamatory].” *Id.* He ruled that, when words are defamatory per se, even a public figure need not show actual malice; he concluded that actual malice is only needed for statements that are not per se defamation. *Id.* As for the requirement of presenting evidence to support each element of the prima facie case, Judge Canady said, “we haven’t got there yet,” *id.*, and added that Cooley “ha[s] the blog statement. . . . I don’t know what else you need once you have that.” *Id.* 45. Finally, turning to the First Amendment balancing test, Judge Canady ruled, “per se slanderous statements are not entitled to First Amendment protection.” *Id.* However, he held that the balancing question was a close one, *id.* at 46, and given how close the balance, fairness required that Doe 1 be allowed a stay of disclosure so that he could seek leave to appeal, because “when you talk about anonymity, it’s irreversible once it’s disclosed.” *Id.* 46-47. Judge Canady ordered that the information should be re-disclosed to Cooley but the disclosure should be stayed to let this Court decide whether and how the *Dendrite* analysis should be applied on the facts of this case. *Id.* 47, 49-50.

Judge Canady issued his written order implementing these rulings on November 8, 2011. Docket Item 60. Within the 21-day appeal period provided by Michigan’s Rules of Court and Judge Canady’s order, defendant John Doe sought leave to appeal. In the meantime, the case proceeded in the circuit court, subject to the stay. A variety of discovery motions are reflected in the docket; Cooley has also been permitted to take Doe’s deposition, subject to the sealing requirement. This Court granted leave to appeal; the circuit court then issued a stay of all proceedings pending the

outcome of the appeal. Docket Item 91.²

INTRODUCTION AND SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the anonymity right of those who have done no wrong. In cases such as this one, these rights come into conflict when a plaintiff complains about the content of material posted online and seeks a judgment granting relief against the posting of that material, including an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Moreover, suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables it to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or punish his speech. For example, an employer might discharge a whistleblower, and a public official might

² Shortly before this brief was due, Cooley moved to dismiss this appeal as moot. Because that motion was denied, we do not address mootness any further in this brief.

use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. There is evidence that access to identifying information to enable extra-judicial action may be the only reason some plaintiffs bring such suits (*infra* 13-14).

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors granting the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics simply by filing a complaint that purports to state an untested claim for relief under some tort or contract theory.

Although the standard for resolving such disputes is an issue of first impression in Michigan, this Court will not be writing on an entirely clean slate because there is a developing consensus among those courts that have considered this question that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, there is a developing consensus that a court faced with a demand for discovery to identify an anonymous Internet speaker so that he may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate his rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of his claims; and, in many jurisdictions (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the

defendant from losing his right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief—identifying its anonymous critics—and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of its case. Moreover, the *Dendrite* test is consistent with the many Michigan precedents favoring early disposition of defamation actions because the mere burdens of the litigation can create an impermissible chilling effect on protected expression. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, without taking any discovery—and other cases show that plaintiffs with valid claims are easily able to meet the *Dendrite* test—the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

I. MICHIGAN SHOULD APPLY THE SAME STANDARDS AS EVERY OTHER APPELLATE COURT THAT HAS DECIDED THE ISSUE BY REQUIRING SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED.

Appellate courts in eleven states, as well as two federal appellate courts, have addressed the same question on which the decision in this case turns—what showing should a plaintiff have to make before it may be granted access to the subpoena power to identify an anonymous Internet user who has criticized the plaintiff? As shown below at pages 16 to 20, every appellate court that has addressed the question has decided that it is not enough for the plaintiff to file a facially valid complaint; every appellate court has held that the plaintiff must make a factual showing, not just that

the anonymous defendant has made harsh critical statements, but also that the statements are actionable and that there is an evidentiary basis for the prima facie elements of the claim. Some appellate courts have required, as well, an express balancing of the plaintiff's interest in prosecuting its lawsuit against the anonymous defendant's reasons for needing to stay anonymous.

This section of the brief shows the unanimity of judicial treatment of this issue and urges that the Michigan follow the same course. The following section shows that the court below incorrectly applied the *Dendrite / Cahill* test, misapprehended the law of defamation, and apparent presumed that Doe's statements were in fact false and defamatory, as though the matter were before the Court on a motion to dismiss the complaint, which requires the Court to accept the pleadings as alleged.

A defamation plaintiff is uniquely in a position to know why the statement that it alleges to be false is, in fact, false and defamatory. Unlike, for example, a personal injury plaintiff, who may know only that she or he is suffering in some way, without knowing why, the defamation plaintiff typically knows, before it decides to file suit, the evidence that would show the defendant's accusation to be false and defamatory. There is typically no reason why, at the outset of a case, a public figure about which false statements have been made cannot present evidence of falsity.

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v Village of Stratton*, 536 US 150, 166-167 (2002); *McIntyre v Ohio Elections Comm.*, 514 US 334 (1995); *Talley v California*, 362 US 60 (1960). *See also NLRB v. Midland Daily News*, 151 F3d 472, 475 (CA 6 1998) (recognizing that discovery to identify anonymous advertisers engaged in lawful commercial speech could chill speech). These cases have celebrated the important role

played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **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.**

* * *

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356 (emphasis added).

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v ACLU*, 521 US 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v Brodie*, 407 Md 415, 966 A2d 432 (Md 2009); *In re Does 1-10*, 242 SW3d 805 (Tex App 2007); *Mobilisa v Doe*, 217 Ariz 103, 170 P3d 712 (Ariz App 2007); *Doe v Cahill*, 884 A2d 451 (Del 2005); *Dendrite v Doe*, 342 NJ Super 134, 775 A2d 756 (NJ App 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to

the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv L Rev 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L Rev 1537 (2007).

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, Cal. Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, Nov. 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately.

Fischman, *Your Corporate Reputation Online*, www.fhdllaw.com/html/corporate_reputation.htm;
Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdllaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because “[t]he mere filing of the John Doe action will probably slow the postings.” Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* See *Swiger v Allegheny Energy*, 2006 WL 1409622 (ED Pa May 19, 2006) (company represented by the largest and most respected law firm in Philadelphia filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

In the court below, Cooley argued that, as a private entity, it is not subject to the First Amendment, Memorandum in Opposition to Motion to Quash at 16, but this argument ignored the fact that Cooley’s subpoena invoked judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v Robert Welch, Inc.*, 418 US 323, 349 (1974); *New York Times Co. v Sullivan*, 376 US 254, 265 (1964), and it is why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 US 415 (1971); *Shelley v Kraemer*, 334 US 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous

speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 US at 347. We have found no binding Michigan authority on point, but the Sixth Circuit has squarely held that a compelling interest is needed to support discovery to identify anonymous advertisers. *Midland Daily News*, 151 F3d at 475.

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, “If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v 2theMart.com*, 140 F Supp2d 1088, 1093 (WD Wash 2001). *See also Columbia Insurance 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 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.**

(emphasis added).

B. Every Appellate Court to Address the Issue Has Required a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff.

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away defendant’s anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar “too low will chill potential posters from exercising their First Amendment right to speak anonymously. The

possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.” *Cahill*, 884 A2d at 457.

Courts have drawn on the media’s privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v Doe*, 342 NJ Super 134, 775 A2d 756 (NJ App 2001), established a five-part standard that became a model followed or adapted throughout the country:

- 1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
- 2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
- 3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
- 4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
- 5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

The fifth part of the *Dendrite* test is somewhat controversial; as shown below, some jurisdictions follow it and some do not. Doe argued below that Court should adopt it. But the important point at this stage of the proceedings is that the first four parts of the test represent the minimum protections required by the First Amendment, and that therefore have been adopted by all the appellate courts that have addressed the issue. Michigan should do no less, and, explained below, the trial court’s decision should therefore be reversed based on those parts of the test alone.

The following is a comprehensive summary of the state appellate courts that have endorsed the *Dendrite* test, including the final balancing stage:

Mobilisa v Doe, 217 Ariz 103, 170 P3d 712 (Ariz App 2007), where a private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.

Independent Newspapers v Brodie, 407 Md 415, 966 A2d 432 (Md 2009), where the court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.

Mortgage Specialists v Implode-Explode Heavy Industries, 999 A2d 184 (NH 2010), where a mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the *Dendrite* test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.

Pilchesky v. Gatelli, 12 A3d 430 (Pa Super 2011), which held that a city council chair had to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.

In re Indiana Newspapers, 963 NE2d 534 (Ind App 2012), where the recently retired head of a local charity sought to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account.

Several other state appellate courts have followed a summary judgment standard without express balancing:

Doe v Cahill, 884 A2d 451 (Del 2005), where the trial court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. The Delaware Supreme Court reversed, ruling that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including evidence that the statements are false.

Krinsky v Doe 6, 159 Cal App4th 1154, 72 Cal Rptr3d 231 (Cal App 2008), where the appellate court reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as “a management consisting of boobs, losers and crooks.”

In re Does 1-10, 242 SW3d 805 (Tex App 2007), which reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.

Solers v Doe, 977 A2d 941 (DC 2009), where the court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.

Illinois intermediate appellate courts have found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery because the state's rules already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Maxon v Ottawa Pub. Co.*, 402 IllApp3d 704, 929 NE2d 666 (Ill App 2010); *Stone v Paddock Pub. Co.*, 961 NE2d 380 (Ill App 2011). And the United States Court of Appeals for the Ninth Circuit, in the course of denying petitions for mandamus relief, *In re Anonymous Online Speakers*, 611 F3d 653, 661 (CA9 2010), *revised opinion adopted on rehearing*, 661 F3d 1168 (CA9 2011), said that “imposition of a heightened standard is understandable” in a case involving political speech, but that when the Doe defendants are commercial actors tearing down a competitor, less protection for anonymity is appropriate. Similarly, in a case involving the

infringement of large numbers of copyrighted sound recordings, the Court of Appeals for the Second Circuit upheld an order that the ISP identify the anonymous defendant because the plaintiff had made a concrete prima facie showing of infringement, including the submission of an affidavit, sworn on personal knowledge, that identified specific copyrighted sound recordings and specified the means by which the affiant had identified Doe's Internet Protocol address with the copying of those recordings. *Arista Records v Doe 3*, 604 F3d 110 (CA2 2010).

Federal district courts have repeatedly followed *Cahill* or *Dendrite*. E.g., *Highfields Capital Mgmt. v Doe*, 385 F Supp2d 969, 976 (ND Cal 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (ND Cal Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v Doe*, 2011 WL 1629572 (D Nev Apr. 27, 2011) (following *Highfields Capital*); *Koch Indus. v Doe*, 2011 WL 1775765 (D Utah May 9, 2011) ("The case law ... has begun to coalesce around the basic framework of the test articulated in *Dendrite*," quoting *SaleHoo Group v Doe*, 722 F Supp2d 1210, 1214 (WD Wash 2010)); *Best Western Int'l v Doe*, 2006 WL 2091695 (D Ariz July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (WD La Dec. 20, 2001) (preferring *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v TubeSockTedD*, 596 F Supp2d 128, 132 (DDC 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v Does*, 2004 WL 2904405 (WDNC Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v Individuals whose true names are unknown*, 561 F Supp2d 249 (D Conn 2008) (identification ordered only after the plaintiffs provided detailed

affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to secure enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. E.g., *Fodor v Doe*, *supra*; *Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v Does*, *supra*. Indeed, in *Immunomedics v Doe*, 342 NJ Super 160, 775 A2d 773 (NJ App 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. Moreover, this argument fails to acknowledge the fact that an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or its supporters), and relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts do not and should not give relief without proof.

In the court below, Cooley cited two very early trial court decisions which, it contended, required only that the trial court apply a motion to dismiss standard to the complaint and find that the plaintiff is proceeding in good faith. *Columbia Insurance Co. v Seescandy.com*, 185 FRD 573 (ND Cal 1999); *In re Subpoena Duces Tecum to America Online*, 52 Va Cir 26, 37 (Cir Ct Va Jan. 31, 2000), *reversed on other grds sub nom America Online v Anonymous Publicly Traded Co.*, 261 Va 350, 542 SE2d 377 (Va 2001). Not only were both decisions well before *Dendrite* and its

unanimous progeny which adopted a more exacting standard and renounced the “good faith / motion to dismiss” standard that had been argued to them, but Cooley ignores the fact that both decisions made reference to requiring “evidence.” The *AOL* case spoke of courts being “satisfied by the pleadings or evidence,” and *Seescandy* ordered identification of the Doe, who had been sued for trademark infringement, only after the plaintiff introduced evidence in support of its trademark claims against the anonymous defendants, including a series of emails showing actual confusion. 185 FRD at 580.

The unanimous approach in other states, requiring presentation of evidence in support of the elements of a defamation plaintiff’s prima facie case, is also consistent with Michigan’s longstanding view that summary disposition is needed to ensure that the burdens of defamation litigation do not themselves create a chilling effect on protected expression. *Ireland v Edwards*, 230 Mich App 607, 613 n4, 484 NW2d 632 (Mich App 1998), quoting *Lins v Evening News Ass’n*, 129 Mich App 419, 425, 342 NW2d 573 (Mich App 1983). The destruction of a defendant’s First Amendment right of anonymous speech is yet another way that libel litigation can chill speech, and *Dendrite*’s solution of an early look at the merits of the claim, to decide whether there is a good reason to take away anonymity, is a sound approach to balancing the parties’ respective interests.

Cooley argued below that there is nothing to balance on the anonymous defendant’s side of the scale because defamation is outside the First Amendment’s protection and the speech at issue in this case is defamatory. The lower court accepted a variant of this point when it ruled that, because the speech at issue is per se defamatory, it enjoys no First Amendment protection. But Cooley’s argument begs the question, and courts elsewhere, facing precisely the same argument, have understood that such arguments are fundamentally unsound. Indeed, the Supreme Court held

just this past Term that even in the defamation context, false speech can be protected by the First Amendment unless the speech is shown to have been knowingly or recklessly false. *United States v. Alvarez*, 132 SCt 2537, 2545 (2012). At this point, Cooley has made only allegations; the issue is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power. As we show in the next part of the brief, although Cooley has claimed that some false statements have been made about it, it has submitted no evidence in support of those claims, nor shown that the statements on which the suit is based are factual (instead of being nonactionable opinion) or that, as Judge Canady assumed, public figures are excused from pleading actual malice when the statements about them are defamatory per se.

In the circuit court, Cooley also argued that Doe has no legitimate expectation of privacy because Weebly's terms of service forbid defamatory postings and allow disclosure of identifying information "if required to do so by law" or "to comply with legal process." If Cooley makes this argument as an alternative ground for affirmance, it should be rejected for the same reason as the previous one — it is question-begging. The issue in this case is whether the law should require disclosure and whether the legal process should be enforced. Moreover, no evidence in the record establishes that the statements about Cooley are false or otherwise actionable, and nothing in Weebly's Terms of Service purport to commit Weebly to release information just because someone claims that something false has been published in the comment section, has filed a lawsuit on that theory, and has obtained a subpoena. Consequently, the argument based on Weebly's Terms of Service fails on its own terms.

The argument should also be rejected as a matter of public policy. Companies that host Internet content authored by others, whether those companies are newspapers, hosting companies

like Weebly or Google or Yahoo, or Internet Service Providers like AOL or Comcast, all have similar provisions in their Terms of Service and Privacy Policies. They do this for two reasons — so that their users will not be surprised when the companies exercise their discretion to remove objectionable material, and so that the companies can comply with subpoenas and other forms of legal process without being sued by their users for breach of contract. But because such terms are in such general use, if the law provided that posters who use the services of companies are subject to having their identifying information revealed without any opportunity for notice and no opportunity to argue about whether a sufficient showing of wrongdoing has been made, the result would be the very same chilling effect that has persuaded courts such as the Delaware Supreme Court in *Doe v. Cahill*, 884 A2d 451 (Del 2005), the Arizona Court of Appeals in *Mobilisa v. Doe*, 217 Ariz 103, 170 P3d 712 (Ariz App 2007), and the various other state appellate and federal district courts whose decisions are discussed above, to adopt the balancing test in the first place.

Indeed, in many of those cases, the terms of service and privacy policies of the companies to which the plaintiffs had sent subpoenas contain the same sort of provisions as the provisions to which appellees direct the Court’s attention here. For example, Yahoo’s Terms of Service forbid the posting of defamatory content, ¶ (a), <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>, and its privacy allows Yahoo to release information “when . . . [w]e respond to subpoenas, court orders, or legal process.” <http://info.yahoo.com/privacy/us/yahoo/>. But it was subpoenas to Yahoo! that were at issue in *Dendrite*, *Highfields Capital Mgmt. v Doe*, and *Krinsky*. Similarly, the Privacy Policy for Independent Newspapers, Inc. (“INI”) provided, “Individuals posting libelous or defamatory comments are not welcome at this site and are granted no right to anonymity should a court of law seek a poster’s identity.” *Independent Newspapers v Brodie*, 966 A2d 432, 444 n13

(Md 2009). Yet subpoenas to INI were at issue in both that case and *Cahill*.

Moreover, AOL's Terms of Service state that users may "[n]ot post content that . . . is . . . defamatory, libelous, deceptive . . . or tortious," <http://legal.aol.com/terms-of-service/full-terms/>, and its privacy policy provides that identifying information "may be accessed and disclosed in response to lawful governmental requests or legal process (for example, a court order, search warrant or subpoena"), <http://privacy.aol.com/privacy-policy/>, yet it was a subpoena to AOL that produced *Melvin v Doe*, 575 Pa 264, 836 A2d 42 (2003). Amicus has been unable to find online terms of service for The Suggestion Box, the subpoena recipient at issue in *Mobilisa v Doe*, but Mobilisa's appellate brief, which is available at <http://cyberslapp.org/documents/mobilisaappellate.pdf>, quoted them as allowing disclosure "to comply with a legal order from a court." Brief at 7-8.³

Although these decisions often do not expressly address the argument that the anonymous users have a lesser expectation of privacy because their ISP's forbid tortious conduct and allow for disclosure in response to subpoena, each of these decisions would be wrong if Cooley's argument to this Court were correct.

II. COOLEY HAS NEITHER FOLLOWED THE PROPER PROCEDURES NOR MADE THE SHOWING REQUIRED BEFORE IDENTIFICATION OF JOHN DOE SPEAKER MAY BE COMPELLED.

The circuit court erred in several respects in analyzing the showing that Cooley had to make in support of its subpoena to identify Doe 1. In focusing on two words in a long blog post as well as the blogger's response to others' comments, the court overlooked caselaw showing that such

³ There are similar provisions at <http://www.google.com/intl/en/privacy/privacy-policy.html>, <http://www.google.com/accounts/TOS>, <http://explore.live.com/code-of-conduct>, <http://privacy.microsoft.com/en-us/fullnotice.aspx#use>, <http://twitter.com/privacy>, <http://www.facebook.com/#!/terms.php>, and <http://www.facebook.com/#!/policy.php>. In practice, each of these companies withholds compliance with subpoenas until it has given notice and allowed time to object.

words, in contexts such as Doe’s blog, are routinely held to be non-actionable rhetorical hyperbole rather than actionable statements of fact. The court apparently accepted the complaint’s conclusory allegations of falsity and defamation at face value, although such conclusory allegations would not have sufficed to prevail against even a motion to dismiss on the pleadings, given the absence of factually specific allegations that, if true, would show falsity and actual malice. The court failed to acknowledge that the First Amendment requires public figures to show actual malice in all cases, even when the statements alleged are per se defamatory. And, as detailed below, the circuit court failed to recognize that the First Amendment demanded an evidentiary showing supporting falsity, such as would be required to support a motion for summary disposition.

A. Cooley’s Failure to Follow Proper Notice Procedures So That Doe Had a Fair Opportunity to Oppose Its Subpoena Infected the Processing of the Case Even Though Doe Learned from the Media That Cooley Had Sued Him.

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiff to notify the Doe of its efforts to take away his anonymity. Although Doe knows about the Cooley’s subpoena proceeding, we begin by discussing the notice issue for two reasons—first, to urge the Court to craft a notice requirement to guide the lower courts in future cases, and second, to show how, if Cooley had given Doe notice in the proper manner, many of the side-issues in this case about alleged mootness and alleged proceeding in the wrong court could have been avoided. Indeed, if Cooley defends this appeal by repeating its argument below that it is enough that it is proceeding against Doe in good faith, Cooley’s deliberate delays in notice bear on its good faith.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a

subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v. Seescandy.com*, 185 FRD at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 342 N.J. Super. at 141, 775 A.2d at 760.

Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v Flowers*, 547 US 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, at least if there is a continuing dialogue among participants, and the Court is urged to follow the *Dendrite* example by requiring posting in addition to other means that are likely to be effective.

In many cases, posting will not be the only way of giving notice to the Doe. If a subpoena is sent to the ISP that provides Internet access to the Doe, then the ISP will commonly have a mailing address for its customer. Or if the host of the web site requires registration as a condition of posting, and requires the provision of an email address as part of registration, then sending a notice to that email address can be an effective way of providing notice. To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and either drop or stop using

their old addresses; they do not always think to notify all of the web sites where they have given their old addresses. For example, in the 2009 *Brodie* case in Maryland, Public Citizen's client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the Washington Post that mentioned her pseudonym, which had figured in the oral argument. The Court should require plaintiffs to use multiple means to notify the anonymous defendants, to maximize the chance that at least one technique will be successful.

The industry standard is to provide two weeks or fifteen days' notice, although a Virginia statute requires twenty-five days. Va. Code §§ 8.01-407.1(1) and (3). The time allowed for the Doe to oppose the subpoena should take into consideration whether the controversy is purely a local one; if participation is national, the time for notice should take into consideration not just the time needed to find counsel where the Doe resides, but also to find local counsel in the jurisdiction where a motion to quash would have to be filed.⁴

Here, although Cooley did not learn the name of Doe's Michigan counsel until he entered an appearance on August 5, 2011, it could easily have given Doe notice of its July 15 application to the California court for a subpoena in aid of an out-of-state proceeding, by posting a comment on Doe's blog, using the precise procedure ordered in *Dendrite*. Moreover, had Cooley provided notice this

⁴ The Virginia statute requires plaintiff to serve its entire showing of a meritorious case on the ISP along with the subpoena, thirty days before the date when compliance is due, and requires the ISP to furnish a copy of plaintiff's packet to the Doe within five days after that. *Id.* This enables the Doe to prepare a motion to quash without having to contact plaintiff. Indeed, lawyers who represent Does often find that plaintiff's counsel does not cooperate by providing its basis for seeking identification. The Virginia statute avoids that problem.

way, even after the subpoena was issued, Doe could have filed his motion to quash in California, before the subpoena was served, thus avoiding the argument about whether Doe had sought to quash in the wrong court.⁵

Moreover, not only could Cooley easily have provided notice, but *Seescandy*, the early trial court decision on which Cooley relied below in arguing against the *Dendrite* standard, required notice to the anonymous defendant of the subpoena proceeding seeking to identify him. 185 FRD at 579. Yet Cooley failed to follow its own authority in this regard.

B. Cooley Has Not Pleaded Verbatim the Allegedly Defamatory Words in Their Proper Context.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights. "The law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action." *Royal Palace Homes v Channel 7 of Detroit*, 197 Mich App 48, 53 495 NW2d 392 (Mich App 1992) (emphasis deleted). Michigan is but one of many states that require that defamatory words be set forth verbatim in a complaint for defamation, as do many federal courts. *Asay v Hallmark Cards*, 594 F2d 692, 699 (CA8 1979).

⁵ Cooley's argument in this regard is mistaken. To be sure, the Michigan Circuit Court did not have jurisdiction over Weebly, but it surely had jurisdiction over Cooley. And contrary to Cooley's argument below, a motion to quash does not seek to enjoin the subpoena recipient from providing information; it seeks to prevent the subpoena issuer from taking advantage of the judicial power to compel compliance with the subpoena. Had a Michigan trial judge ruled that Cooley could not use discovery to identify the anonymous defendant, Cooley would surely have had to drop its discovery efforts in California.

Paragraphs 17 and 18 of the complaint, which set forth Doe’s allegedly defamatory words, were written mostly in Cooley’s own language characterizing what Doe has said, including very brief quoted matter that prevents the Court from judging the context in which the supposedly defamatory words were used. For example, Cooley quoted the word “lure” from the blog but surrounded that word with its own characterization of what Cooley was said to have done to lure students. There is nothing objectively defamatory in charging a law school, or, indeed, any other business, with “luring” prospective customers. Advertisements, after all, are designed to lure customers to the business. On the other hand, the contention that Doe accused Cooley of having “deceived and provided false information” to students was not a quotation from the blog, but rather was Cooley’s own characterization of what the blog said. Similarly, the paragraph accused the blog of saying that Cooley is “stealing their tuition money,” but that supposed accusation was not in quotation marks and appeared nowhere on Doe’s blog. Consequently, the Court cannot assess what Doe really said and cannot judge whether the actual statements represent rhetorical or hyperbolic opinion, which cannot be the subject of a defamation claim, or are actionable statements of fact. The complaint there fails the second prong of the *Dendrite* test as well.

C. Cooley Has Not Pleaded a Legally Sufficient Claim for Defamation.

Cooley’s complaint does not alleged a valid claim of defamation against Doe, for several reasons.

1. No Actionable Words Were Pleaded.

First, several of the statements alleged in the complaint are simply not defamatory. For example, Cooley quotes the blog’s assertions that Cooley is “essentially a multi-million dollar business” and that Cooley is trying to “become more rich.” But these are surely not defamatory

statements; any sensible company would like to be characterized in these terms. Even institutions of higher education try to build up their endowments, and take in and spend many millions of dollars. To the sure, Doe has a low opinion of Cooley, and he cites these facts in the course of denouncing Cooley. But that does not make these specific statements defamatory. Similarly, Cooley complains that Doe is wrong to identify it as the “highest tax payer in Lansing” (these are Cooley’s words; they do not appear in the complaint in quotation marks, and cannot be found in the blog), but the status of being the highest taxpayer in a city is not something that would tend to lower a company in the estimation of the public.

Several of the allegedly defamatory statements on Doe’s blog are not actionable statements of fact, but rather rhetorical or hyberbolic expressions of opinion, which are non-defamatory as a matter of law and hence cannot support a defamation claim. *Ireland v Edwards*, 230 Mich App 607, 618-619, 584 NW2d 632, 638 (1998); *Cahill*, 884 A2d at 467. Paragraph 17 of the Complaint quoted several fragments of statements by Doe 1 as allegedly defamatory including the words “criminal” and “fraud,” but the paragraph surrounds the quoted words or phrases with Cooley’s own, non-quoted characterizations of the context of the allegedly defamatory statements. Even on its face, the pleading is inadequate to support a defamation claim, under black-letter law that context is crucial in determining whether a particular statement about the plaintiff is constitutionally protected opinion or an actionable statement of fact that is capable of being proved false. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 793 NW2d 533, 542 n40, 548-549 (2010); *Dupuis v City of Hamtramck*, 502 F Supp2d 654, 658 (ED Mich 2007). The context that matters is what the alleged defamer has actually said, not what plaintiff thinks the defendant’s actual words mean. Yet Cooley never explained how the court below could conclude that Doe used the allegedly defamatory words

“criminal” or “fraud” in a way that made them statements of fact and not opinion, and the court never addressed that issue.

The word “criminal” appeared in Doe’s February 14 blog post where, after setting forth a long list of Cooley activities that are said to induce potential students to pay tuition, Doe concluded, “Congrats you criminals, you have accomplished robbery!” and “no one is going after these criminals over at Cooley!!!!” But the only part of these expressions that Cooley alleged to be “false” was the use of the word “criminal.” Such language amounted to “rhetorical hyperbole” that is constitutionally protected as opinion. *See In re Chmura*, 464 Mich 58, 81-82, 626 NW2d 876, 891 (Mich 2001) (campaign literature stating that political figures “stole” the money of suburban taxpayers by causing it to be spent on Detroit city schools was not a literal accusation of criminality); *Kevorkian v American Medical Ass’n*, 237 Mich App 1, 13, 602 NW2d 233, 239 (Mich App 1999) (statements accusing doctor of “criminal practices,” “continued killings,” and “criminal activities” were simply rhetorical expressions of opinion about doctor’s controversial practices).

Similarly, the word “fraud” was used in two ways on Doe’s web site: in the tags at the top and bottom of the blog, which represent overall characterizations of the page as a whole that are designed to aid Internet search engine users when finding web pages that are relevant to their interests, and in two highly rhetorical comments that Doe posted responding to comments from viewers. <http://thomas-cooley-law-school-scam.weebly.com/1/post/2011/02/the-thomas-cooley-law-school-scam3.html>. And many cases have held that, in context, referring to a defamation plaintiff or its product as a “fraud” was rhetorical hyperbole and hence constitutionally protected opinion. *Phantom Touring v Affiliated Publications*, 953 F2d 724, 728 (CA1 1992); *Colodny v Iverson, Yoakum, Papiano & Hatch*, 936 F Supp 917, 923-924 (MD Fla 1996); *Spelson v CBS, Inc.*, 581 F

Supp. 1195, 1203-1204 (ND Ill 1984); *Wood v Del Giorno*, 974 So2d 95, 97, 100 (La App 2007); *600 West 115th Street Corp. v Von Gutfeld*, 80 NY2d 130, 143, 603 NE2d 930, 937 (1992). Whatever one may think of the validity of such self-promotional tools as the ranking system that deems Cooley the second-best law school in the country, Doe was surely within his constitutional rights when he expressed his opinion that Cooley is a fraud. Neither word was a defamatory statement of fact, hence neither is actionable.

2. The Constitutionally Required Element of Actual Malice Was Not Pleaded.

Despite Doe's vigorous objections, the court below never addressed the sufficiency of the pleadings, as a matter of law, to support a defamation claim by a public figure. *Long Island Univ. v Grucci for Congress*, 10 AD3d 412, 781 NYS2d 148, 149 (NY App Div 2004); *Ithaca College v Yale Daily News Publ'g Co.*, 433 NYS2d 530, 533-34 (NY Sup Ct 1980), *aff'd*, 445 NYS2d 621 (NY App Div 1981); *Univ. of the South v Berkley Publ'g Corp.*, 392 F Supp 32, 33 (SDNY 1974). *Cf. Lakeshore Comm. Hosp. v. Perry*, 212 Mich App 396, 538 NW2d 24, 28 (Mich App 1995) (privately owned hospital is public figure, considering its critical public function and prominence in community); *Avins v White*, 627 F2d 637 (CA 3 1980) (law school dean is public figure). Indeed, in several cases the officials of institutions of higher learning were held to be public figures;⁶ had the schools themselves sued over the same statements, surely the schools themselves would have

⁶ *Curtis Pub. Co. v Butts*, 388 US 130 (1967) (university athletic director); *Vandenburg v Newsweek*, 441 F2d 378, 379 (CA5 1971) (university track coach); *Fiacco v Sigma Alpha Epsilon Fraternity*, 484 F Supp2d 158 (D Me 2007) (university's director of judicial affairs), *aff'd*, 528 F3d 94 (CA1 2008); *In re Baxter*, 2001 WL 34806203 (WD La Dec. 20, 2001) (university vice-president); *Bradford v Judson*, 12 So3d 974, 981 (La App 2009) (president of alumni association); *Southall v Little Rock Newspapers*, 332 Ark 123, 131, 964 SW2d 187, 191 (Ark 1998) (law school assistant dean); *Scarpelli v Jones*, 229 Kan 210, 217, 626 P2d 785, 790 (Kan 1981) (professor and chairman of the department of pathology).

been deemed public figures.

Indeed, Cooley's extensive efforts to market itself to prospective law students also makes it a public figure. Several courts have held that when companies market their products for purchase, they inject themselves into public discussion in such a way that they become limited purpose public figures. See *Bose Corp. v Consumers Union*, 508 F Supp 1249, 1273 (D Mass 1981), *supplemented*, 529 F Supp 357 (D Mass 1981), *rev'd on other grounds*, 692 F2d 189 (CA1 1982), *aff'd*, 466 US 485 (1984) (private corporation was limited public figure with respect to a defamation suit over claims about its product, because "[b]y creating a new design . . . and then emphasizing that unique design in its extensive promotional campaign, the plaintiff precipitated discussion about the relative merits of the Bose 901 and other loudspeaker systems"); *Steaks Unlimited v Deaner*, 623 F2d 264, 273-74 (CA3 1980) (meat producer is not general purpose public figure but is limited public figure for purposes of a defamation suit over claims about its products, because it advertised those products to the public); *Nat'l Found. for Cancer Research v Council of Better Bus. Bureaus*, 705 F2d 98, 101 (CA4 1983) (charitable foundation was limited public figure, even though it had generated the relevant controversy itself, because of its massive solicitation efforts and the extravagant claims it made in those efforts).

Because Cooley is a public figure, it was required to plead that Doe made allegedly false statements with actual malice—that is, with knowledge that the statements were false, or at least with reckless disregard for the statements' probable falsity. *Masson v New Yorker Magazine*, 501 US 496, 510 (1991); *New York Times v Sullivan*, 376 US 254, 262 (1964); *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 274, 487 NW2d 205 (Mich 1992) (concurring opinion). But the complaint does not plead actual malice; it pleads only that Doe made the statements "with

fault amounting at least to negligence.” ¶ 36. Because Cooley is plainly a public figure, its failure even to allege actual malice in its complaint means that it has not satisfied the third requirement of *Dendrite*, in that it does not plead any valid libel claims against Doe.

The lower court suggested that the requirement of actual malice does not apply if the defamation is per se, but the law is to the contrary. For example, in *Ireland v Edwards*, 230 Mich App 607, 615, 584 NW2d 632, 637 (Mich App 1998), the Court held that a plaintiff who had been accused of not being a fit mother was subject to the actual malice requirement. In *Postill v Booth Newspapers*, 118 Mich App 608, 619, 325 NW2d 511, 516 (Mich App 1982), public officials who were accused of committing very specific crimes and, indeed, of having a long record of committing violent crimes, nevertheless were subject to the *New York Times* actual malice requirement. In *Kurz v The Evening News Ass’n*, 144 Mich App 205, 208, 212, 375 NW2d 391, 393, 395 (Mich App 1985), *vacated on other grounds*, 428 Mich 886, 403 NW2d 805 (Mich 1987), the actual malice requirement was applied to a plaintiff who had reportedly “threatened to kill someone and fired one shot from his gun.” Indeed, as this Court pointed out in *Faxon v Michigan Republican State Central Committee*, 244 Mich App 468, 482, 624 NW2d 509, 515 (Mich App 2001), the *New York Times* case itself was one where the state courts had found the defamation to be per se. *Id.*, quoting *New York Times Co. v Sullivan*, 376 US 254, 262 (1964).

3. Pleading the Tort of Interference with Business Does Not Evade the Constitutional Limits on Defamation Claims.

In the court below, Cooley alleged that Doe had committed the tort of intentional interference with business relations, and cited that cause of action as an additional reason to allow its subpoena to be enforced. Although the circuit court did not rely on that claim in denying the motion to quash,

Cooley might argue for affirmance of the order before on that alternate ground. But Cooley cannot avoid the First Amendment limitations on its defamation claims by changing the label of the tort. *Hustler Magazine v Falwell*, 485 US 46, 56 (1988); *Nichols v Moore*, 396 F Supp2d 783, 799 (ED Mich 2005), *aff'd*, 477 F3d 396 (CA6 2007); *Ireland v Edwards*, 230 Mich App 607, 624-25, 584 NW2d 632 (1998). The foregoing cases held that such claims as invasion of privacy and intentional infliction of emotional distress must meet the First Amendment limits for defamation claims, and the Sixth Circuit has applied the same rule to business-related claims, refusing to allow plaintiffs to “avoid the protection afforded by the Constitution . . . merely by the use of creative pleading” that changes the name of the cause of action. *Compuware Corp. v Moody’s Investors Services*, 499 F3d 520, 530 (CA6 2007) (claim for breach of contract). A necessary element of claims for tortious interference with business is the use of “wrongful means” to achieve the end, such as by fraud or misrepresentation, and when the wrongful means is a statement that injures reputation, the same First Amendment protections apply. *Jefferson County School Dist. No. R-1 v Moody’s Investor Services*, 175 F3d 848, 857-858 (CA10 1999) (intentional interference with contract, intentional interference with business relations); *Unelko Corp. v Rooney*, 912 F2d 1049, 1058 (CA9 1990) (product disparagement, “trade libel” and tortious interference with business relationships); *Blatty v New York Times Co.*, 42 Cal3d 1033, 1047-1048, 728 P2d 1177, 1185-1186 (1986) (negligent interference with prospective economic advantage); *Redco Corp. v CBS*, 758 F2d 970, 973 (CA3 1985) (unless defendants “can be found liable for defamation, the intentional interference with contractual relations count is not actionable”); *Amerisource Corp. v Rx USA Int’l*, 2010 WL 2160017 at *7 (EDNY May 6, 2010). Consequently, the tortious interference with business relations count does not provide an alternate basis for meeting *Dendrite*’s third requirement.

D. Cooley Presented No Evidence That Doe's Statements About It Were False.

Even if the Court concludes that at least one statement is objectively verifiable and hence actionable, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of relief in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F2d 5, 6-9 (CA2 1982); *Richards of Rockford v PGE*, 71 FRD 388, 390-391 (ND Cal 1976). *Cf. Schultz v Reader's Digest*, 468 F Supp 551, 566-567 (ED Mich 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all

issues in the case before it is allowed to obtain their identities. *Cervantes v. Time*, 464 F2d 986, 993-994 (CA8 1972). “Mere speculation and conjecture about the fruits of such examination will not suffice.” *Id.* at 994.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff’s claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

Here, even if the complaint were facially adequate, Cooley’s subpoena fails because it has adduced no evidence in support of its complaint. There is, for example, no evidence that anything said on the blog is false. There is no evidence that Doe misstated facts underlying his use of the hyperbolic labels “criminals” and “fraud,” nor even, assuming those labels are fact not opinion, any evidence that the labels were wrongly applied to Cooley. There is no reason why Cooley should not have sufficient command of evidence showing that statements about it are false, and there is, concomitantly, no reason why Cooley should be unable to produce evidence of falsity at the outset of the litigation, assuming that the statements really are false. By the same token, Cooley’s obstinate refusal to offer any evidence in support of its claims suggests that its defamation claims are, in fact, spurious.

Indeed, some of the statements that Cooley alleges to have been defamatory are apparently true. Cooley complains about the blog's calling it "essentially a multi-million dollar business" and having used the words "become more rich." But Cooley itself refers to its operations as a "business" in Count Two of its complaint. ¶¶ 59-62. Moreover, the Form 990 that Cooley filed with the IRS for the year ending August 31, 2010 shows that its operating profit exceeded \$20,000,000 on revenues of nearly \$118,000,000, <http://www.guidestar.org/FinDocuments/2010/381/988/2010-381988915-075b3670-9.pdf>. Cooley's tuition and fees alone exceeded expenses by more than \$10,000,000 in 2010. The IRS filings for other years, found on the GuideStar site, show that Cooley's revenues consistently exceed expenses. No law prevents a non-profit from accumulating capital (i.e., "become more rich"); but the forms suggest that the blog statements about Cooley that are claimed in the complaint to be defamatory are true. If Cooley has evidence that shows that Doe's factual statements about it are false, such evidence is surely within its grasp and can be produced as a basis for showing that it has a realistic chance of prevailing on its defamation claims.

E. The Balance of Cooley's Interest in Avoiding Criticism and Doe's First Amendment Right to Remain Anonymous Tips Decidedly in Doe's Favor.

Even if, on remand, Cooley submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

Missouri ex rel. Classic III v Ely, 954 SW2d 650, 659 (Mo App 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporter's source disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

[A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite, 775 A2d at 760-761.

See also *Mobilisa v Doe*, 170 P3d at 720; *Highfields Capital Mgmt. v Doe*, 385 F Supp2d at 976.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of his case on subjects that are based on information within his own control, there is no basis to breach the anonymity of the defendants. *Bruno & Stillman v Globe Newspaper Co.*, 633 F2d 583, 597 (CA1 1980); *Southwell v Southern Poverty Law Center*, 949 F Supp 1303, 1311 (WD Mich 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F2d 5, 8-9 (CA2 1982); *Zerilli v Smith*, 656 F2d 705, 714 (CADDC 1981) ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). The requirement that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff's goal, to overcome the defendant's interest in anonymity, is part and parcel of the requirement that disclosure be "necessary" to the prosecution

of the case, and that identification “goes to the heart” of the plaintiff’s case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is “necessary.”

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction, and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker’s name is published to the world, she loses her anonymity and can never get it back. Moreover, any violation of an individual speaker’s First Amendment rights constitutes irreparable injury. *Elrod v Burns*, 427 US 347, 373-374 (1976). In some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation.

Moreover, the adoption of a balancing approach can favor plaintiffs as well as anonymous defendants. For example, several courts have held that, although anonymous defendants accused of copyright infringement could be engaged in speech of a sort, the First Amendment value of offering copyrighted recordings for download is low, and the likely impact of being identified as one of several hundred alleged infringers is also likely low. *Call of the Wild Movie v Does 1-1*, 062, 770 F Supp2d 332, 349 (DDC 2011); *Sony Music Entertainment v Does 1-40*, 326 F Supp2d 556 (SDNY 2004); *London-Sire Records v Doe 1*, 542 F Supp2d 153, 164 (D Mass 2008). Hence, such courts accept a lower level of evidence to support the prima facie case of infringement. *Call of the Wild*, 770 F Supp2d at 351 nn7, 8. It has been argued that these cases represent a copyright exception to the *Dendrite* rule, but other courts have, more properly, held that the cases turn on the nature of the speech at issue. *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (ND Cal Nov. 9, 2011).

Similarly, in *In Re Anonymous Online Speakers*, 661 F3d 1168, 1177 (CA9 2011), the court of appeals said that when a Doe lawsuit is filed over commercial speech, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

Applying the balancing stage, there is a very real danger of extra-judicial retaliation against Doe that merits consideration in striking the proper balance. Doe is a former student at Cooley Law School who, as this brief is being filed, is sitting for the bar examination. Because Doe formerly attended Cooley, prospective employers who know faculty or administrators at Cooley are certain to ask about Doe there; those references could make the difference between Doe's getting hired or having his application rejected. This is not an idle concern, in that Cooley has already asked the judge below for a ruling that the order sequestering information about Doe's authorship of the blog does not prevent the school from providing confidential answers to a State Bar, in response to a questionnaire Doe's character and fitness to practice law, that discussed Doe's blog about Cooley. Docket Item 74 (filed under seal to protect Doe's identity). It is apparent from this motion that Cooley intended to attack Doe's fitness.

But Doe also has to worry about how being identified as the author of his anti-Cooley blog will affect his ability to make a living as a lawyer. Cooley has passionate supporters as well as detractors, and those supporters will be among the legal community with whom Doe will have to work as co-counsel or as opposing counsel, upon whom he may depend for client referrals, and on whose good opinions his livelihood may depend. Indeed, Cooley boasts that it was founded by Michigan judges and that its graduates (and its board of directors) serve in various political and

adjudicative roles. Being known as the author of the Thomas Cooley Law School Scam web site could be very costly to Doe. The danger of such extra-judicial harm should weigh heavily in the balancing analysis.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains.

In that regard, reversal of the order allowing Doe to be identified, based on either lack of sufficient evidence or balancing the equities, would not compel dismissal of the complaint. The plaintiff retains the opportunity to renew its motion after submitting more evidence. Moreover, Cooley's tort claims are at best weak ones—Cooley is a public figure, and there is intense public interest in its claim to be the second-best law school in the country. Moreover, given the shrinking number of jobs for lawyers and serious questions about whether the high cost of a legal education is still a sensible investment for college graduates whose post-law-school job prospects may be lower than ever, prospective students have a significant interest in obtaining as much information as they can about the various law schools that are competing for their tuition dollars.

The point is illustrated by a lawsuit charging Cooley with false advertising that inflated its success in placing students in lucrative employment. *MacDonald v Thomas Cooley Law School*, 2012 WL 299410 (WD Mich July 20, 2012). Cooley won dismissal of the suit, but the court agreed that Cooley's claims about the employment of its graduates "without question . . . are inconsistent, confusing, and inherently untrustworthy," *id.* *9, while concluding that, given the investment of time

and money that a student makes by enrolling in a given law school, it is up to prospective students to approach law schools with “extreme caution,” *id.*, following the maxim “caveat emptor.” *Id.* *11. But the maxim caveat emptor assumes that the marketplace of ideas about Cooley will be robust and diverse, rather than diminished and chilled by coercive litigation. The experiences of a former student could be of particular value to those who are considering whether to entrust their legal education to Cooley. This is yet one more reason why Cooley has little legitimate interest in being able to identify Doe so that it can sue him.

* * *

In sum, the lower court’s failure to apply the *Dendrite* or *Cahill* standard, or even the settled standards applicable to defamation suits filed by public figures, represents an error of law that would put Michigan at odds with the unanimous approach of the other states that have addressed this issue, by allowing the abuse of judicial power to destroy Doe’s First Amendment right to speak anonymously, despite Cooley’s failure to show that its claims against Doe have merit.

CONCLUSION

The order denying John Doe 1 motion to quash should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2012, a copy of the foregoing brief was filed with the court's electronic filing system, which will automatically serve it on counsel for plaintiff-appellee as follows:

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