STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff,

Case No. 11-781-CZ

vs.

Hon. Clinton Canady III

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, and JOHN DOE 4, unknown individuals,

Defendants.

_____/

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REPLY MEMORANDUM OF PUBLIC CITIZEN AS AMICUS CURIAE SUPPORTING DOE'S MOTION TO QUASH OR FOR A PROTECTIVE ORDER

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In response to Public Citizen's amicus brief, Cooley makes many meritless arguments. Most were anticipated and rebutted in Public Citizen's brief; this brief addresses three others.

I. DOE'S CRITICISM OF COOLEY IS NOT COMMERCIAL SPEECH.

First, Cooley argues that Doe's criticisms enjoy less protection under the First Amendment because its complaint alleges that Doe's purpose is to discourage attendance at Cooley, hence hurting its business, and criticism of a business is supposedly commercial speech. Opposition at 5, 7-8.

Commercial speech is speech that "does no more than propose a commercial transaction." *City of Rochester Hills v. Schultz*, 224 Mich. App. 323, 326, 568 N.W.2d 832, 834 (Mich. App. 1997), *rev'd on other grounds*, 459 Mich. 486, 592 N.W.2d 69 (Mich. 1999); *see also Michigan Beer & Wine Wholesalers Ass'n v. Attorney General,* 142 Mich. App. 294, 302, 370 N.W.2d 328, 332 (Mich. App. 1985) ("expression related solely to the economic interests of the speaker and its audience"). Speech does not become commercial simply because it **criticizes** a business. *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F. 3d 1002, 1017 (9th Cir. 2004); *CPC Int'l v. Skippy Inc.*, 214 F.3d 456, 461–63 (4th Cir. 2000).

Thus, when a man established two web sites, one discussing the merits of a local shopping mall, and then a second site to criticize the owner of the shopping mall for suing him over his first web site, the Sixth Circuit held that trademark law could not be applied to the domain names at which the sites were located because they were non-commercial speech. *Taubman Co. v. Webfeats*, 319 F.3d 770, 775-776, 777-778 (6th Cir. 2003). Similarly, when a community organization distributed leaflets criticizing the practices of a local realtor, the Supreme Court held that the speech was fully protected against injunctive relief by the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Although the Court did not address the commercial / non-commercial distinction, in 1971 commercial speech had no First Amendment protection; such

protection was not accorded until *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). It follows that the critical speech was deemed noncommercial despite its adverse impact on the business.

In a later section of its brief, Cooley misrepresents the Ninth Circuit's holding in *In re Anonymous Online Speakers,* 2011 WL 61635 (9th Cir. Jan. 7, 2011) (not officially reported). Cooley suggests that the court held that commercial speech was involved because the anonymous comments criticized the plaintiff, Opp. 8, but the court said nothing of the sort. In that case, Quixtar, the multi-level marketing company formerly known as Amway, filed suit against business rival TEAM, claiming that TEAM had created an online smear campaign to persuade Quixtar's affiliates to break off their ties with Quixtar and affiliate instead with TEAM. Quixtar then sought to identify several anonymous bloggers to prove that they were affiliated with TEAM and, therefore, that TEAM should be liable for their speech. After the trial court ordered the identities of three Does revealed, they sought mandamus review, arguing that compelled disclosure was barred by the First Amendment pursuant to the *Dendrite / Cahill* analysis. In denying mandamus, the court assumed that the bloggers' speech was commercial and held that, therefore, their speech would not be protected by the First Amendment's right of anonymous speech. Consequently, even if the trial court had misapplied the *Dendrite / Cahill* standard in deciding to release the Does' identities, the commercial nature of their speech would have deprived their anonymity of First Amendment protection. The court did not explain why it treated the speech as commercial, although the context— litigation between two business rivals—suggests such a basis. In any event, Cooley does not contend that Doe criticized it to secure students and hence tuition payments for a competing school. Consequently, his speech is not commercial, and *Anonymous Online Speakers* does not aid

Cooley here.

Finally, Cooley miscites *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) as holding that the criticism of the business there should be disclosed because it was commercial speech. Opp. 5. The opinion did mention commercial speech in passing, but then went on to hold that disclosure of the identity of an anonymous speaker who criticizes a business may be compelled so long as the plaintiff "makes a prima facie **showing** that an anonymous individual's conduct on the Internet is otherwise unlawful." 2004 WL 2904405, at *3 (emphasis added). The Court found that a showing was made because plaintiff's CEO "credibly averred that the statements are both false and damaging to the Plaintiff's trademark and to its business generally." *Id.* at *4. (The affidavit can be found online at www.cyberslapp.org/documents/AlvisCoatingvJohnDoesOppositiontoQuashHartmanDeclaration.pdf.). Consequently, even if Cooley were right that the speech was commercial, *Alvis* would stand for the proposition that an evidentiary showing is needed to identify the author of such speech.

II. NEW JERSEY HAS NOT LIMITED THE APPLICATION OF *DENDRITE*.

Citing *Too Much Media v. Hale*, 413 N.J. Super. 135, 993 A.2d 845 (N.J. App. 2010), Cooley argues that New Jersey has limited the protection of the *Dendrite* standard to prevent its application to cases like this one. Opp. 7. Cooley has not only completely misunderstood the case and mischaracterized its holdings, it also ignores the New Jersey Supreme Court's opinion affirming that decision in part. The main issue in the case was whether a self-styled online journalist who was sued for defamation for statements that she had made on Internet message boards could invoke the New Jersey Shield Law's absolute privilege against discovery to bar inquiry into the identity of her sources. In the course of their discussion of this subject, both the Appellate Division and the

Supreme Court referred in passing to the impact of the qualified First Amendment privilege limiting subpoenas to identify anonymous Internet speakers, and both courts said that this protection did not protect Hale against the subpoenas because, unlike *Dendrite,* it was not her sources who had spoken online, it was she herself, 413 N.J. Super. at 163, 993 A.2d at 862, *aff'd as modified,* 206 N.J. 209, 239, 20 A.3d 364, 381; and because, again unlike *Dendrite*, the discovery was not being sought to enable suit against the anonymous sources but rather to support the contention that she herself was liable for making false statements knowing they were false. *Id.*

Cooley relies, however, on a short dictum in the Appellate Division's opinion stating that *Dendrite* applies to discovery from any ISP, but "[p]laintiffs here are not seeking discovery from an ISP, and defendant is not an ISP. Dendrite has never been extended beyond ISP's." Opp. 7. Even if this dictum limited the application of *Dendrite* in New Jersey, that limit would not help Cooley here because its subpoena here was directed to an ISP, Weebly.[1] Moreover, in affirming the Appellate Division's ruling while modifying its judgment in some respects, 206 N.J. 209, 20 A.3d 364, the New Jersey Supreme Court did not accept the Appellate Division's characterization of *Dendrite*'s limits. Instead, the **only** reason it gave for not applying *Dendrite* was that the speech at issue was not anonymous, but rather was the speech of the named defendant. 206 N.J. at 239, 20 A.3d at 381.

III. COOLEY'S PUBLIC FIGURE STATUS BARS ENFORCEMENT OF ITS SUBPOENA.

Cooley's contention that it is not a public figure, Opp. 10-12, is far-fetched. First, Cooley is a general purpose public figure because it has "assumed [a] role[] of especial prominence in the

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[1]Cooley is also wrong to argue that New Jersey courts apply *Dendrite* only to Internet users who post on message boards. *See Juzwiak v. Doe*, 415 N.J. Super. 442, 2 A.3d 428 (2010); *A.Z. v. Doe,* 2010 WL 816647 (N.J. App. Mar. 8, 2010).

affairs of society." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Several courts have recognized that private post-secondary institutions qualify as general-purpose public figures in defamation suits because of the public mission of such institutions, and because of the number of students they educate. *See Long Island Univ. v. Grucci for Congress*, 781 N.Y.S.2d 148, 149 (N.Y. App. Div. 2004) (private university is public figure); *Ithaca College v. Yale Daily News Publ'g Co.*, 433 N.Y.S.2d 530, 533-34 (N.Y. Sup. Ct. 1980), *aff'd*, 445 N.Y.S.2d 621 (N.Y. App. Div. 1981) (although a "small liberal arts institution," plaintiff is public figure because of the "public aspects of its formation, character and conduct," namely that it educates "a large number of students—equivalent in population to each of three of the towns in Tompkins County . . . serves the public good, is responsible for fair dealing with its students . . . and is recognized to be of 'general fame or notoriety in the community [with] pervasive involvement in the affairs of society'"; therefore "[w]e cannot view such an institution of higher learning as other than a public figure for all purposes"); *Univ. of the South v. Berkley Publ'g Corp.*, 392 F. Supp. 32, 33 (S.D.N.Y. 1974) (University of the South, a private liberal arts college, "is a 'public figure' within the meaning of the line of cases flowing from *New York Times Co. v. Sullivan*"). *Cf. Lakeshore Community Hospital v. Perry*, 538 N.W.2d 24, 28 (Mich. Ct. App. 1995) (privately owned hospital is public figure, in part because of its critical public function and prominence in the community).

Cooley may be a private institution, but it is engaged in the crucial public mission of training the next generation of lawyers. It is also the largest law school in the United States based on the size of its student enrollment and the size of its faculty, giving it a prominent place in both the community of Lansing, Michigan and the community of legal academia. These facts easily distinguish this case from the two cases that Cooley cites as denying public figure status for

"educational plaintiffs similar to Cooley." Opp. 11, citing *Commercial Programming Unltd. v. CBS*, 81 Misc.2d 678, 367 N.Y.S.2d 986 (N.Y. Sup. 1975), *rev'd on other grounds,* 50 A.D.2d 351, 378 N.Y.S.2d 69 (N.Y. App. Div. 1975) (large computer school), and *Ramirez v. Rogers,* 540 A.2d 475 (Me. 1988) (small local gymnastic school). Moreover, even if *Commercial Programming Unltd.* supported Cooley here, it is no longer good law in New York in light of the subsequent appellate decision in *Long Island University, supra.*

Cooley also qualifies as a limited purpose public figure because conflicts over the school's business practices are a matter of legitimate public controversy, and because it has invited attention to itself through the student recruitment strategy that forms the basis for the supposed defamation. Cooley's business practices are matters of legitimate public concern even though it is a private corporation. As the New Jersey Supreme Court recognized in *Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392 (1995), even businesses that do not engage in activities that constitute traditional matters of public concern can become limited public figures when there are allegations of consumer fraud: "The public does, however, have a legitimate interest in any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern. When the media addresses those issues of legitimate and compelling public concern, the actual-malice standard of proof will apply, regardless of the type of business involved." *Id.* at 413.

Moreover, when law school officials inject themselves into a public controversy over the quality of the education they provide, they become limited public officials for purposes of the controversy. *See Avins v. White*, 627 F.2d 637 (3d Cir. 1980) (determining that a private law school's accreditation process was a legitimate public controversy because of its importance to the

local bar and to any individual interested in attending law school in the area, and that the plaintiff law school dean voluntarily injected himself into the controversy). Indeed, in several cases the officials of institutions of higher learning were held to be public figures;[2] had the schools themselves sued over the same statements, surely the schools themselves would have been deemed public figures.

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 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 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 F.2d 264, 273-74 (3d Cir. 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 F.2d 98, 101 (4th Cir. 1983) (charitable foundation was limited public figure, even though it had generated

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[2]*Curtis Pub. Co. v. Butts,* 388 U.S. 130 (1967) (university athletic director); *Vandenburg v. Newsweek*, 441 F.2d 378, 379 (5th Cir. 1971) (university track coach); *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp.2d 158 (D. Me 2007) (university's director of judicial affairs), *aff'd*, 528 F.3d 94 (1st Cir. 2008); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (university vice-president); *Bradford v. Judson,* 12 So.3d 974, 981 (La. App. 2009) (president of alumni association); *Southall v. Little Rock Newspapers*, 332 Ark. 123, 131, 964 S.W.2d 187, 191 (Ark. 1998) (law school assistant dean); *Scarpelli v. Jones*, 229 Kan. 210, 217, 626 P.2d 785, 790 (1981) (professor and chairman of the department of pathology).

the relevant controversy itself, because of its massive solicitation efforts and the extravagant claims it made in those efforts).

Further, a law school official was held to be a public figure for purposes of a defamation suit relating to a public controversy about the quality of the law school. *Torgerson v. Minneapolis Star & Tribune Co.*, 7 Media L. Rep 1805 (Minn. 4th Dist. Ct. 1981) (dean of start-up law school was public figure for a defamation suit against a newspaper over articles dealing with controversy over report by county bar criticizing the law school, because dean had injected himself into controversy and because education of potential lawyers is inherently matter of public concern). When Cooley proclaimed last February that it was the second-best law school in the country, it held itself out for comment on its quality as a law school, and made itself a public figure with respect to any such commentary.

Cooley argues that even if it is a public figure, that status is irrelevant at this stage of the case because *Cahill* and *Dendrite* both indicated that a plaintiff need not come forward with evidence of actual malice to secure the identification of an anonymous Internet speaker. Public Citizen agrees with Cooley that, in most cases, it is unfair to expect a plaintiff to make a **showing** on actual malice without having had the opportunity to take the Doe's deposition, but neither *Cahill*, nor *Dendrite*, nor any other case of which amicus is aware, has said that a public figure plaintiff is excused from **pleading** actual malice. Cooley's briefing of this case makes clear that it expects to be able to win this libel case without meeting the high standards expected of a public figure. If that is so, then Cooley simply does not have a realistic expectation of prevailing in this case, and under the "early look" principles of the *Dendrite* line of cases, Doe's motion for a protective order should be granted.

CONCLUSION

The Court should apply the *Dendrite* standard in deciding whether to allow disclosure of Doe's identity. On the current record, the motion to quash should be granted.[3]

Respectfully submitted,

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October 20, 2011

[3]Counsel are grateful for the assistance of Eric Fish, a Yale Public Interest Fellow, in the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing memorandum and motion and proposed order have been served this 20th day of October, 2011, by depositing a copy of the same in the United States Mail, first-class postage prepaid, and properly addressed to the counsel for the parties as follows. Given the shortness of time involved, the brief has also been sent to counsel by email

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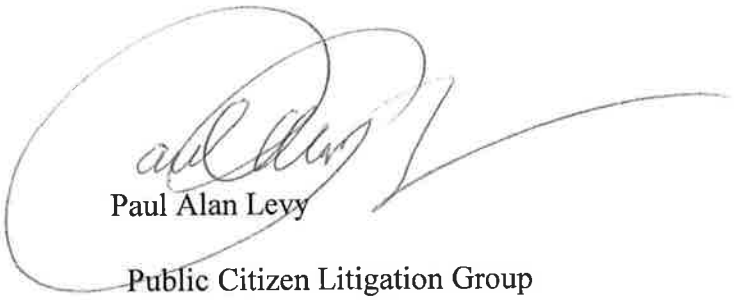

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