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.

Ingham County Circuit Court
Case No. 11-781-CZ
HON. CLINTON CANADY III

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APPLICATION OF JOHN DOE 1 FOR LEAVE TO APPEAL

TABLE OF CONTENTS

Table of Authorities. ii

Statement Showing How Appellant Would Suffer Substantial Harm From Awaiting Final Judgment. 2

Statement of Basis of Jurisdiction. 4

Statement of Questions Presented for Review. 5

Statement of Facts and Proceedings Below. 6

Introduction and Summary of Argument. 9

The Court Should Grant Leave to Appeal to Decide Whether 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.. 11

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.. . . 12

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. 16

C. Cooley Law School Has Not Made the Showing Required Before Identification of John Doe Speaker May Be Ordered in This Case. 22

Conclusion. 27

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80 NY2d 130, 603 NE2d 930 (1992). 25, 26

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2004 WL 2904405 (WDNC Dec 2, 2004). 20

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611 F.3d 653 (CA 9 2010). 3, 19

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604 F.3d 110 (CA 2 2010). 3

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2011 WL 5444622 (ND Cal Nov 9, 2011). 20, 25

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627 F2d 637 (CA 3 1980). 23

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182 F3d 183, 188 (CA 3 1999). 24

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149 F2d 770 (CA 2 1945). 25

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45 Wash App 29, 723 P.2d 1195 (Wash App 1986). 26

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464 Mich 58, 626 NW2d 876 (Mich 2001). 24

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936 F. Supp. 917 (MD Fla 1996). 25

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230 Mich App 607, 484 NW2d 632 (1998). 21, 22, 26

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aff'd, 445 NYS2d 621 (NY App Div 1981) 23

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2011 WL 1775765 (D Utah May 9, 2011). 20

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144 Mich App 205, 375 N.W.2d 391 (Mich App 1985). 26

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538 NW2d 24 (Mich App 1995). 23

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741 F2d 193 (CA 8 1984). 25

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929 NE2d 666 (Ill App 2010). 19

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836 A2d 42 (Pa 2003). 2

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No. 49A02-1103-PL-00234 (May 27, 2011). 3

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170 P3d 712 (Ariz App 2007). 3, 13, 18

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999 A.2d 184 (NH 2010). 3, 18

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103 S Ct 599 (2009) 3

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977 A.2d 941 (DC 2009). 4, 19

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362 US 60 (1960).. 12

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Defendant-appellant John Doe 1 seeks 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 have consistently balanced the interest of plaintiffs in redress for defamation against the interest of defendants who are accused of defamation by holding that a plaintiff needs to make both a legal and an evidentiary showing that its suit has merit before it can enforce a subpoena to identify an anonymous defendant. Because the order under appeal would, if followed, forever deny Doe a key First Amendment protection — the right to criticize a major public figure anonymously — and because the issue sought to be appealed would be rendered moot if an interlocutory appeal is not permitted, the Court should hear Doe's appeal now. Indeed, courts in every other state to confront the question, including federal courts of appeals, have held that interlocutory appeals are the proper way to address this issue.

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 are 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 SHOWING HOW APPELLANT WOULD SUFFER SUBSTANTIAL HARM FROM AWAITING FINAL JUDGMENT

John Doe will suffer not only substantial but indeed irreparable harm if he must await final judgment before appealing the circuit court's ruling. At issue on this motion is his First Amendment right to speak anonymously. *McIntyre v Ohio Elections Comm.*, 514 US 334 (1995) The denial of First Amendment rights, even for a moment, constitutes irreparable harm. *Elrod v Burns*, 427 US 347, 373 (1976). The irreparable harm is particularly serious because once Doe's name is released publicly, he can never get back his anonymity. As the Maine Supreme Court noted, "disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot." *Fitch v Doe*, 869 A2d 722, 725 (Me 2005). *See also Melvin v Doe*, 836 A2d 42, 50 (Pa 2003) ("once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure"). Thus, said the Pennsylvania Supreme Court, "the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, . . . that . . . falls within the class of rights that are too important to be denied review." *Id.*

The potential harm from the public identification of John Doe is substantial as well as irreparable, because Doe faces a significant danger of adverse, out-of-court action if Cooley is allowed to act on its knowledge of his identity. Doe is a third-year law student, who expects to be graduated and to join the bar; consequently, Cooley could irreparably injure his career by the way in which it describes his time as a student in communications with character and fitness committees or with prospective employers, or even by disclosing his identity as the author of the "Thomas Cooley Law School Scam" web site. Cooley alumni populate the legal community in which Doe expects to work, and may number among his potential co-counsel or opposing counsel; he may

depend on them for client referrals; and his livelihood may depend on their good opinions. Cooley identifies itself as having been founded by Michigan judges and as a source of public servants holding various political and adjudicative roles.

For such reasons, every state that has addressed the issue has approved the use of interlocutory appeals from orders identifying anonymous Internet speakers. *Melvin v Doe*, 836 A2d 42, 50 (Pa 2003); *Fitch v Doe*, 869 A2d 722, 725 (Me 2005). *See also Miller v Junior Achievement*, No. 49A02-1103-PL-00234 (Ind App May 27, 2011) (unpub). Despite the federal "final order" rule, which limits interlocutory appeals very strictly, *e.g.*, *Mohawk Industries v Carpenter*, 103 S Ct 599 (2009), two federal appellate courts have granted review of orders to identify Doe Internet defendants: one court allowed review by mandamus, *In re Anonymous Online Speakers*, 611 F3d 653 (CA 9 2010), on rehearing, 2011 WL 61635 (Jan. 7, 2011), and another by treating the order as "final" as a practical matter. *Arista Records v Doe 3*, 604 F3d 110, 119 (CA 2 2010).

Several other state appellate courts have allowed interlocutory appeals from orders identifying anonymous Internet defendants, although without any express discussion of appellate jurisdiction. *Mortgage Specialists v Implode-Explode Heavy Industries*, 999 A2d 184, 192 (NH 2010); *Independent Newspapers v Brodie*, 966 A2d 432, 456-457 (Md 2009); *Krinsky v Doe 6*, 72 Cal Rptr3d 231 (Cal App 2008); *In re Does 1-10*, 242 SW3d 805 (Tex App 2007); *Mobilisa v Doe*, 170 P3d 712 (Ariz App 2007); *Doe v Cahill*, 884 A2d 451 (Del 2005); *Immunomedics v Doe,* 342 NJ Super 160, 775 A2d 773 (NJ Super 2001). In other cases, the plaintiff was allowed to file an interlocutory appeal when its motion for discovery to identify a Doe defendant was denied. *Solers, Inc. v Doe*, 977 A2d 941 (DC 2009); *Dendrite v Doe*, 775 A2d 756 (NJ Super Ct App Div 2001).

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 filing of Plaintiff/Appellant's Motion for Reconsideration of the Circuit Court's two prior orders tolled the applicable time with which to appeal. Accordingly, the Court has jurisdiction under MCR 7.203(B)(1) because Defendant/Appellant is seeking 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 MERELY ALLEGING THAT DEFENDANT JOHN DOE MADE FALSE STATEMENTS REFERRING TO PLAINTIFF'S LEADERSHIP AS "CRIMINALS" AND A "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 now, after adding eight more factors to the analysis, shows 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.

On July 14, 2011, Cooley filed suit in the Circuit Court for Ingham County against both Doe 1 and three anonymous commenters, charging each with defamation for their respective 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.*)

Because Cooley issued a press release about this litigation, 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. Doe 1 invoked

the *Dendrite* test as a basis for his motion. *Dendrite v Doe*, 775 A2d 756 (NJ App 2001).

Instead of opposing the motion to quash, on August 10, 2011, Cooley proceeded to serve a California subpoena on Weebly, setting August 25, 2011, as the deadline for disclosure. 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, but another Weebly employee, who was not aware of Huffaker's promise, released Doe's identifying information to Cooley on August 17, 2011. Cooley then argued that the motion to quash was moot because the information had already been released and Cooley had amended its complaint to identify Doe. Opposition to Motion to Quash ("Opp.") 6-7. 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 has not produced any evidence supporting the allegations in its complaint, standing on its contention that it can secure discovery based only on allegations of wrongdoing.

Doe filed a supplemental brief taking issue with the contention that his motion to quash was moot, 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. The court below agreed and required 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. Public Citizen was granted leave to file a brief as amicus curiae, explaining why the Court should adopt the five-part *Dendrite* standard, 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. 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 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. Within the 21-day appeal period provided by Michigan's Rules of Court and Judge Canady's order, defendant John Doe hereby seeks leave to appeal.

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 right of those who have done no wrong to remain anonymous. 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 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 14-15).

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 her case. Moreover, the *Dendrite* test is consistent with the many Michigan precedents holding 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.

THE COURT SHOULD GRANT LEAVE TO APPEAL TO DECIDE WHETHER 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 ten states, as well as a federal appellate court, 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 the judicial treatment of this issue, and urges that the Michigan courts follow the same course. It then shows that the court below incorrectly applied the *Dendrite* / *Cahill* test, by misapprehending the law of defamation, and by apparently presuming that the statements as alleged 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. Whatever the motivation may be, . . . 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*, 966 A2d 432 (Md 2009); *In re Does 1-10*, 242 SW3d 805 (Tex App 2007); *Mobilisa v Doe,* 170 P3d 712 (Ariz App 2007); *Doe v Cahill,* 884 A2d 451 (Del 2005); *Dendrite v Doe*, 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,* California 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, November 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.fhdlaw.com/html/corporate_ reputation. htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.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 needed to support discovery to identify anonymous advertisers. *Midland Daily News*, *supra*, 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.

Court 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*, 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. If the Court grants leave to appeal, Doe will explain why the 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.

The leading authority for rejection of the fifth, explicit balancing stage of the analysis is the Delaware Supreme Court in *Doe v Cahill,* 884 A2d 451. In *Cahill*, 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. However, the Delaware Supreme Court ruled 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.

On the merits, Doe will argue for the adoption of the original *Dendrite* standard rather than the *Cahill* variation, but for the present purpose of seeking leave to appeal it is sufficient to note that his motion to quash should have been granted under either approach, and **every** other appellate court to address the issue has adopted either *Dendrite* or *Cahill.*

The following is a comprehensive summary of the state appellate courts that have endorsed the *Dendrite* test:

> *Mobilisa v Doe*, 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*, 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.

Several other state appellate courts have followed a *Cahill*-like summary judgment standard. For example:

Krinsky v Doe 6, 72 Cal Rptr 3d 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.*, 929 NE2d 666 (Ill App 2010); *Stone v Paddock Pub. Co.*, 2011 WL 5838672 (Ill App Nov. 17, 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 (CA 9 2010), new opinion adopted on rehearing, 2011 WL 61635 (Jan. 7, 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.

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) (followed *Highfields Capital)*; *Koch Industries 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) (preferred *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 get 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*, 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.

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 decided 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 in other states, facing precisely the same argument, have understood that such arguments are fundamentally unsound. At this point, Cooley has made

only allegations, and the issue in the case 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 the actual malice requirement when the statements about them are defamatory per se.

C. Cooley Law School Has Not Made the Showing Required Before Identification of John Doe Speaker May Be Ordered in This Case.

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 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 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 compelled the plaintiff to produce an evidentiary showing supporting falsity, such as would be required to support a motion for summary disposition.

Rhetorical expressions of opinion 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. 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. Schools of higher education have repeatedly been treated as public figures in defamation cases. *Long Island Univ. v Grucci for Congress*, 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*, 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).

The word "criminal" appears in Doe's February 14 blog post after setting forth a long list of Cooley activities that are said to induce potential students to pay tuition. Cooley did not allege, and

never argued, that even a single one of these factual characterizations of Cooley's practices vis-a-vis its students was false. Doe concludes, "Congrats you criminals, you have accomplished robbery!" and "no one is going after these criminals over at Cooley!!!!" Both the Michigan Supreme Court, and this Court, have held that comparable references to criminality were "rhetorical hyperbole" that is constitutionally protected as opinion. For example, in *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 13, 602 NW2d 233, 239 (Mich App 1999), the question was whether defendants could be sued for defamation when they accused a doctor, who helped patients wanting to end their own lives, of "criminal practices," "continued killings," and "criminal activities." Without addressing whether there was any factual basis for the characterizations, the Court held that the libel suit was barred as a matter of law because the references to criminality were simply rhetorical expressions of opinion about doctor's controversial practices. In *In re Chmura*, 464 Mich 58, 81-82, 626 NW2d 876, 891 (Mich 2001), the issue was not defamation, but the Supreme Court borrowed from libel law in holding that the constitution barred application of a canon of judicial ethics to bar a judge from saying in his campaign literature that political figures "stole" the money of suburban taxpayers by causing it to be spent on Detroit city schools. The Supreme Court held that Judge Chmura had not literally accused Detroit Mayor Coleman Young of criminality, but was simply using colorful language to express strong opinions about the impropriety of his positions. Unpublished decisions of this Court have said the same, *e.g.*, *Hyrman v Brooks*, 2005 WL 1026988 (Mich App 2005), at *2 (accusation that treasurer facing recall election was "taking monies under false pretenses" protected as opinion); *Porter v Fieger,* 2001 WL 738398 (Mich App 2001) (lawyer's public reference to police officer as "murderer" and "executioner" was protected opinion), as have many decisions from other jurisdictions. *E.g.*, *Beverly Enterprises v. Trump*, 182 F3d 183, 188 (CA 3 1999) (union president was engaged in constitutionally protected rhetorical hyperbole when he said

of nursing home operator "you people are all criminals"); *Lauderback v ABC*, 741 F2d 193, 195 (CA 8 1984) (calling insurance agent "a crook and a liar" did not suggest specific criminal conduct). *See also Letter Carriers v Austin*, 418 US 264, 285 (1974) (referring to scabs as "traitors" is opinion, not a factual assertion that the subject of the speech "has committed the criminal offense of treason"); *Greenbelt Coop. Publ'g Ass'n v Bresler*, 398 US 6, 13-14 (1970) (use of word "blackmail" was not accusation of specific criminal act, but a rhetorical opinion).

Doe's blog used the word "fraud" in two highly rhetorical comments that responded to comments from viewers. http://thomas-cooley-law-school-scam.weebly.com/1/post/2011/02/the-thomas-cooley-law-school-scam3.html. Does has not found any controlling Michigan appellate decisions about whether the word "fraud" is constitutionally protected rhetorical hyperbole, but many cases from other jurisdictions, including the United States Court of Appeal for the Sixth Circuit, 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 (CA 1 1992); *Orr v Argus-Press Co.*, 586 F.2d 1108, 1115 (CA 6 1978); *Bleecker v Drury*, 149 F2d 770, 771 (CA 2 1945); *Obsidian Finance Group, LLC v. Cox*, — FSupp2d — , 2011 WL 3734457 (D Ore Aug. 23, 2011); *Art of Living Foundation v Does*, 2011 WL 2441898 (ND Cal June 15, 2011) at *7-8; *SPX Corp. v Doe*, 253 F Supp2d 974, 978, 972 (ND Ohio 2003) (posts not only accused company of fraud but warned it to be ready for FBI and SEC investigations); *Nicosia v De Rooy*, 72 FSupp2d 1093, 1104 (ND Cal 1999) (referring to having discovered from research that the plaintiff was "a self-serving fraud and criminal" is rhetorical hyperbole, and not statement of fact"); *Colodny v Iverson, Yoakum, Papiano & Hatch*, 936 F Supp 917, 923-924 (M.D. 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 (NY 1992); *Camer v Seattle Post-Intelligencer*, 45 Wash App 29, 40-41, 723 P2d 1195 (Wash App 1986) (expressions such as "unethical," "cancer con-artists," "cancer quacks," and "fraud" were constitutionally protected statements of opinion); *Henry v Halliburton*, 690 SW2d 775, 778 (Mo 1985) (calling insurance agent "a fraud and a twister" protected opinion because it did not suggest that agent committed specific crime). Whatever one may think of the validity of such self-promotional tools as the ranking system that deems Cooley the next-to-best law school in the country, Doe was surely within his constitutional rights when he expressed his opinion that Cooley was acting in a fraudulent manner.

But even if these statements were deemed statements of fact rather than opinion, the complaint is still faulty as a matter of law because Cooley never alleged that Doe had actual malice; instead, the complaint pleads that Doe made the statements negligently. 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), 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).

Third, 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 was 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.

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.

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CONCLUSION

John Doe 1's request for leave to appeal should be granted, and the case set down for full briefing.

Respectfully submitted,

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November 28, 2011

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Proof of Service

I certify that on November 28, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the Odyssey E-File system, which will send notification of such filing to all counsel of record.

/s/ John Hermann