

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff/Appellee,

vs.

JOHN DOE 1,

Defendant/Appellant,

and

JOHN DOE 2, JOHN DOE 3, and JOHN DOE 4,

Defendants.

COA# 307426
LC# 11-000781 CZ
Ingham County Circuit Court
Hon. Clinton Canady III

MILLER, CANFIELD, PADDOCK AND STONE, PLC
Michael P. Coakley (P34578)
Paul D. Hudson (P69844)
Attorneys for Plaintiff/Appellee
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
coakley@millercanfield.com
HUDSON@millercanfield.com

Barbara Harvey (P25478)
Attorney for Defendant-Appellant John Doe 1
1394 East Jefferson Avenue
Detroit, Michigan 48207-3104
(313) 567-4228
blmharvey@sbcglobal.net

JOHN T. HERMANN, P.C.
John T. Hermann (P52858)
Attorney for Defendant/Appellant John Doe 1
2684 11 Mile Road
Berkley, MI 48072
(248) 591-9291
hermannlawoffices@comcast.net

Paul Alan Levy (DC Bar 946400)
Public Citizen Litigation Group
Attorney for Defendant-Appellant John Doe 1
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

BRIEF OF APPELLEE THOMAS M. COOLEY LAW SCHOOL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.....	iii
STATEMENT REGARDING JURISDICTION OF THE COURT OF APPEALS	1
STATEMENT OF QUESTIONS INVOLVED.....	1
INTRODUCTION	2
STATEMENT OF FACTS	8
I. RECORD FACTS BEFORE THE CIRCUIT COURT WHEN IT DENIED DOE 1’S PURPORTED “MOTION TO QUASH”	8
A. Doe 1’s Defamatory Blog	8
B. Doe 1 Granted Weebly Sole Discretion to Disclose His Identifying Information When He Created His Defamatory Blog	12
C. Doe 1’s True Identity Was Revealed To Cooley By Information From Weebly Together With Information Doe 1 Provided To Cooley, And Doe 1 Disclosed His Identity On The Record In Open Court With Court Staff and Members of the Public Present	13
ARGUMENT.....	20
I. THE PURPORTED FIRST AMENDMENT ANONYMOUS SPEECH ISSUES DOE 1 SEEKS TO APPEAL ARE ALL MOOT BECAUSE DOE 1’S IDENTITY IS ALREADY KNOWN AND PUBLISHED AND THUS HE IS NO LONGER ANONYMOUS	20
II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DOE 1’S MOTION TO QUASH	22
A. Standard of Review	23
B. The Circuit Court Did Not Abuse Its Discretion in Denying Doe 1’s Purported “Motion to Quash” Because the Court Did Not Have Power to Quash a California Subpoena and Did Not Have Jurisdiction Over Weebly to “Prevent[]” Disclosure, the Only Requests for Relief Doe 1 Made in His Motion	23
C. The Circuit Court Did Not Abuse Its Discretion in Denying Doe 1’s Post-Weebly-Production Requests to Enter a Protective Order Preventing Cooley from Using the Weebly Information in Support of Its Claims Because Cooley Stated Valid Claims for Defamation and Tortious Interference, the Weebly Information Was Relevant to Those Claims, and Doe 1 Failed to Meet His Burden of Demonstrating Good Cause for Preventing the Discovery.....	26
1. Michigan law permits liberal discovery of information relevant to a plaintiff’s claims.....	27
2. The Weebly subpoena sought information relevant to Cooley’s claims.....	29
3. Doe 1 failed to meet his burden of showing “good cause” for a protective order.....	29

- a. Cooley stated a claim for defamation. 30
- b. Doe 1’s arguments that his statements are not actionable because they purportedly are mere “opinions” or “rhetorical hyperbole” are meritless, and the “tenor and context” of his statements demonstrate that they are actionable..... 34
- c. Doe 1’s assumption that Cooley is a public figure and was required to plead malice is unsupported by the record. 36
- d. “Inadvertent disclosure”..... 38
- III. **DENDRITE IS NOT THE LAW IN MICHIGAN, IT IS INCONSISTENT WITH MICHIGAN LAW, AND THE CIRCUIT COURT DID NOT ERR BY FOLLOWING ESTABLISHED MICHIGAN LAW**..... 40
 - A. *Dendrite* is Inconsistent With Michigan Law, Which Provides Adequate Procedural Protections for Anonymous Internet Speakers Without Requiring a Defamation Plaintiff to Survive *Dendrite*’s “Hypothetical Summary Judgment Test” Before Being Entitled to Any Discovery in Support of Its Claims and Without Inviting Unprincipled Results-Oriented Judging Based on *Dendrite*’s Nebulous “Balance of the Equities” Test..... 40
 - B. The Circuit Court Did Not Abuse Its Discretion in Determining that Cooley Would Have Met *Dendrite* if It Were the Law In Michigan 47
 - 1. Doe 1 had adequate notice of the subpoena..... 47
 - 2. Cooley pleaded claims for defamation and tortious interference against Doe 1. 47
 - 3. Cooley presented evidence supporting its defamation claims. 48
 - 4. The “balance of the equities” favors permitting Cooley to proceed with its valid claims against Doe 1..... 49
- CONCLUSION..... 50

INDEX OF AUTHORITIES

	Page(s)
CASES	
<i>Adell Broadcasting v Apex Media Sales</i> , 269 Mich App 6, 708 NW2d 778 (2005)	21
<i>Arista Records v Doe 3</i> , 604 F3d 110 (2d Cir 2010)	46
<i>Ashcroft v Free Speech Coalition</i> , 535 US 234, 122 S Ct 1389 (2002)	28
<i>Attorney General v Pub Serv Comm</i> , 269 Mich App 473, 713 NW2d 290 (2005)	20
<i>Augustine v Allstate Ins Co</i> , 292 Mich App 408, 807 NW2d 77 (2011)	23
<i>Bd. of Trustees, Sheet Metal Workers’ Nat. Pension Fund v Palladium Equity Partners, LLC</i> , 722 F Supp 2d 845 (ED Mich 2010).....	39
<i>Beauharnais v People of State of Illinois</i> , 343 US 250, 72 S Ct 725 (1952).....	28
<i>Blue Ridge Bank v Veribanc, Inc.</i> , 866 F2d 681 (4th Cir 1989).....	37
<i>Boladian v UMG Recordings, Inc.</i> , 123 F App’x 165 (6th Cir 2005)	42
<i>Bowman v Heller</i> , 420 Mass 517, 651 NE2d 369 (1995)	37
<i>Bufalino v Detroit Magazine, Inc.</i> , 433 Mich 766, 449 NW2d 410 (1989).....	37
<i>Burgess v Reformer Pub. Corp.</i> , 508 A2d 1359 (Vt 1986).....	37
<i>Chaplinsky v State of New Hampshire</i> , 315 US 568 (1942)	28
<i>Columbia Ins Co v Seescandy.com</i> , 185 FRD 573 (ND Cal 1999)	46
<i>Computer Aid, Inc. v Hewlett-Packard Co.</i> , 56 F Supp 2d 526 (ED Pa 1999).....	37
<i>Dendrite v Doe</i> , 342 NJ Super 134, 775 A2d 756 (NJ App 2001).....	1, 5, 6, 7, 19, 22, 23, 40, 41, 44, 45, 46, 47, 48, 49
<i>Domako v Rowe</i> , 438 Mich 347, 475 NW2d 30 (1991).....	28
<i>Eyde v Eyde</i> , 172 Mich App 49, 431 NW2d 459 (1988)	27
<i>Fischer Brewing Co., Inc. v Flax</i> , 740 NE2d 351 (Ohio App 2000)	24
<i>Gertz v Robert Welch, Inc.</i> , 418 US 323, 94 S Ct 2997 (1974)	36, 37, 38

Health Call v Atrium Home & Health Care Servs, Inc., 268 Mich App 83, 706 NW2d 843 (2005).....34

Heritage Optical Center, Inc. v Levine, 137 Mich App 793, 359 NW2d 210 (1984)33

In re Anonymous Online Speakers, 611 F3d 653 (9th Cir 2010), *on rehearing* 661 F3d 1168 (2011).....46

In re Chmura, 464 Mich 58, 626 NW2d 876 (2001)35

In re Subpoena Duces Tecum to America Online, Inc., 52 Va Cir 26 (2000) *reversed on other grounds by America Online, Inc v Anonymous Publicly Traded Co*, 261 Va 350 (2001).....46

In re Thompson, 162 BR 748 (Bkrtcy ED Mich 1993).....37

Kent Co Aeronautics Bd v Dep’t of State Police, 239 Mich App 563, 609 NW2d 593 (2000).....20

Kevorkian v American Medical Ass’n, 237 Mich App 1, 602 NW2d 233 (1999).....35

Krinsky v Doe 6, 159 Cal App 4th (Cal Ct App 2008)28

Lakeshore Community Hosp., Inc. v Perry, 212 Mich App 396, 538 NW2d 24 (1995)37

MacDonald et al. v Thomas M. Cooley Law School, WD Mich Case No. 1:11-cv-83138

Maxon v Ottawa Publishing Co, 929 NE2d 666 (Ill App 2010)5, 7, 44, 45, 46

Milkovich v Lorain Journal Co, 497 US 1, 110 S Ct. 2695 (1990).....34

Mitan v Campbell, 474 Mich 21, 706 NW2d 420 (2005).....30, 32, 33

Ogle v Hocker, 279 F App’x 391 (6th Cir 2008).....38

People v Richmond, 486 Mich 29, 782 NW2d 187 (2010).....21

Pursell v Wolverine-Pentronix, Inc, 44 Mich App 416, 205 NW2d 504 (1973).....6, 42

Reed Dairy Farm v Consumers Power Co, 227 Mich App 614, 576 NW2d 709 (1998).....27

Reno v ACLU, 521 US 844, 117 S Ct 2329 (1997).....28

Rinaldi v Civil Serv Comm, City of Livonia, 69 Mich App 58, 244 NW2d 609 (1976).....21

Saffian v Simmons, 477 Mich 8, 727 NW2d 132 (2007)23, 26, 40

SCD Chem Distrib, Inc v Medley, 203 Mich App 374, 512 NW2d 86 (1994).....21

Stone v Paddock Publications, Inc, 961 NE2d 380 (Ill App 2011)45

Szpak v Inyang, 290 Mich App 711, 803 NW2d 904 (2010).....27

Tavoulareas v Piro, 817 F2d 762 (DC Cir 1987)37

Time, Inc. v Firestone, 424 US 488, 96 S Ct 958 (1976).....37

Waldbaum v Fairchild Publications, Inc., 627 F2d 1287 (DC Cir 1980)37

Wilkerson v Carlo, 101 Mich App 629, 300 NW2d 658 (1980).....33

Williams v Detroit Bd. of Ed., 523 F Supp 2d 602 (ED Mich 2007)42

Wilson v Daily Gazette Co., 588 SE2d 197 (W Va 2003)37

Wolston v Reader’s Digest Ass’n, 443 US 157, 99 S Ct 2701 (1979)36

STATUTES

MCL 600.25916, 43

California Code of Civil Procedure § 2029.30024

California Code of Civil Procedure § 2029.60024

COURT RULES

Fed R Civ P 26.....39

Fed R Civ P 45(c)(3)(A)24

MCR 2.114.....6, 25, 42, 43, 46

MCR 2.115.....6, 42, 43

MCR 2.116.....6, 42, 43

MCR 2.118.....36

MCR 2.201.....13, 48

MCR 2.302.....18, 27, 29, 38, 39, 43

MCR 2.305.....27

MCR 2.307.....18

MCR 2.506.....26

MCR 2.625.....6, 43

MCR 7.211.....22

CONSTITUTIONAL PROVISIONS

US Const, Am I.....1, 3, 4, 19, 20, 21, 28, 29, 48, 49

STATEMENT REGARDING JURISDICTION OF THE COURT OF APPEALS

This Court lacks jurisdiction to hear Doe 1’s appeal because each of the four issues Doe 1 raises is moot. As detailed below in Section I, Doe 1 argues he had a First Amendment right to anonymity when he defamed Plaintiff/Appellee Thomas M. Cooley Law School on his Internet weblog, but it is undisputed that Doe 1 is no longer anonymous. Doe’s appeal, which seeks to protect anonymity that no longer exists, is moot. The Court therefore lacks jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

- 1. Doe 1 argues he had a First Amendment right to anonymity when he defamed Cooley on his Internet weblog. It is undisputed that Doe 1 is no longer anonymous. Is Doe 1’s appeal moot?

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

- 2. Doe 1 filed in the circuit court a purported “Motion to Quash” a subpoena issued by a California court to the California-based host of his weblog, asking the circuit court to quash the subpoena or in the alternative for a protective order preventing the host from disclosing identifying information about him. It is undisputed that the circuit court did not have the power to quash a California subpoena or issue a protective order preventing the California host from disclosing the subpoenaed information. The circuit court also rejected Doe 1’s request to enter a protective order preventing Cooley from using identifying information produced by the host because Cooley had stated a claim for defamation per se against Doe 1. Did the district court abuse its discretion in denying the motion?

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

- 3. Did the circuit court abuse its discretion in determining in the alternative that Cooley would meet the test in *Dendrite v Doe*, 342 NJ Super 134 (NJ App 2001), a New Jersey intermediate appellate court decision, even if it were the law in Michigan, because Cooley stated a defamation claim and produced evidence in support of it?

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

MILLER, CANFIELD, PADDOCK AND STONE, P.L.L.C.

RECEIVED by Michigan Court of Appeals 8/29/2012 4:29:23 PM

INTRODUCTION

In February 2011, Defendant-Appellant John Doe 1, under the pseudonym “Rockstar05,” created an Internet weblog titled, “THOMAS M. COOLEY LAW SCHOOL SCAM.” In the blog, Doe 1, who identified himself as a former Cooley student who had transferred to another law school, accused Cooley of being a fraudulent enterprise through and through. He accused the school of being “criminals” and committing “fraud,” of being a “scam,” a “SHAM,” a “diploma mill,” of “sucker[ing]” its students, “misrepresentation,” “public deception,” “deceit,” “commit[ing] robbery,” lying about its tuition, and being “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.” And he detailed his specific statements of “criminal” and “fraud[ulent]” conduct over the course of a 5000-plus-word blog post. (Cooley attached the entire blog post and comments to the Complaint as Exhibit B, Dkt 4.)

Doe 1’s allegations of fraud and criminal conduct were not stray hyperbolic comments “made in passing,” as Doe 1 now claims. (Appellant’s Br. at 1.) Doe 1 certainly heaped on the vile hyperbole—he called Cooley a “PIECE OF SHIT,” a “shitty school,” a “bullshit school,” a “shithole,” a “hell-hole” full of “fucking bloodsuckers,” a school that goes “out of its way to fuck you over,” and “THE BIGGEST JOKE of all law schools.” (Compl. Ex. B; all emphases in original.) A good portion was just vile: He linked, for example, to another blog about Cooley that carries on its front page a picture of a “smoldering steaming pile of excrement” in a toilet bowl. (See link at *id.* p. 3, if you must.) At times he crossed from vile to downright offensive: He called one commenter on the blog a “retarded moron,” and another a “fucking faggot.” (*Id.* at pp. 22, 25.) And all of this from someone who aspires to membership in the legal profession.

But Doe 1’s allegations against Cooley, in the tenor and context of the blog as a whole, were more than just sophomoric rants. Cooley is not in the business of policing the nether-

regions of the Internet, and has no interest in doing so. Doe 1, however, told his readers—whom he expressly intended to be current and prospective Cooley students—that he was telling the “truth” about Cooley, “backed by statistics and facts, painting a real picture of what Cooley really is,” based on his “research” and “experience” as a student at Cooley. (*See id.* at p. 1, p. 8.) Doe 1 told his readers: “I tell it EXACTLY HOW IT IS,” (*id.* at p. 9), and that he was giving them “the dead honest truth” about Cooley (*id.* at p. 28). Doe 1, in other words, stated as fact, based on his research and experience, that Cooley was a fraudulent, criminal enterprise, and he detailed that purported fraud and criminal conduct in his over-5000-word blog post.

Cooley brought this case to stop the defamation, defend its reputation and that of its employees, faculty, students, and graduates, and to recover for the damages and other injuries Doe 1’s defamatory blog has caused. Now, in this interlocutory appeal, Doe 1 continues to try to hide from his defamatory words. He challenges a circuit court discovery order denying his purported “Motion to Quash” a subpoena that sought identifying information about him issued by a California court to the California-based host of his defamatory blog.

This Court should affirm the circuit court’s discovery order, for several reasons. First, Doe 1’s appeal is moot. Doe 1’s arguments on appeal all relate to his purported First Amendment right to remain anonymous while defaming Cooley on the Internet. But the blog host, Weebly, Inc., produced identifying information about Doe 1 *before* the circuit court entered its order denying Doe 1’s purported motion to quash. Cooley, its counsel, the court, members of the public present when Doe 1’s attorney identified him in open court on the record, and the California State Bar character and fitness committee all know his true identity. And it is undisputed that Weebly’s terms and conditions—to which Doe 1 agreed when he started the blog—granted Weebly sole discretion to disclose that information, whether in response to a subpoena or not.

Cooley thereafter filed an amended complaint naming Doe 1 by his true name (a complaint that, after 10 days on the docket, was temporarily struck and later stayed pending this appeal). Doe 1's lawyer then entered an appearance in this action and identified Doe 1 by his true name in open court. (Dkt 19.) As Doe 1 admitted in his application for leave to appeal, "once Doe's name is released publicly, he can never get back his anonymity." (Appl. for Leave to Appeal at 2.) He quoted a case stating that "disclosure of Doe's identity will strip Doe of anonymity, making a later appeal moot." (*Id.*) He quoted another case stating that, "once [anonymous speakers'] identities are disclosed, their First Amendment claim is *irreparably lost* as there are *no means by which later to cure such disclosure.*" (*Id.*; emphasis added.) And Doe 1 admitted that if an anonymous speaker's identity is disclosed—"even for a moment"—the First Amendment protection of anonymity (to the extent it exists) is lost forever. (*Id.*; emphasis added.)

Doe 1's identity has already been disclosed—to Cooley, its counsel, the court, members of the public present when Doe 1's attorney identified him in open court on the record, and the California State Bar character and fitness committee—and thus, according to Doe 1 himself and the cases he cites, any First Amendment protection of anonymity has already been lost forever, largely by his own actions. Doe 1 does not argue—nor could he—that he has some First Amendment right to be a little more anonymous than he is now. As Doe 1's logic dictates, any First Amendment claim he may have had to keep his identity secret from the public was "irreparably lost" and "moot" upon disclosure of his identity to Cooley because there were "no means by which later to cure such disclosure." (Appl. for Leave at 2.) Doe 1's appeal is moot.

Second, the circuit court did not abuse its discretion in denying Doe 1's purported motion to quash the Weebly subpoena. The only relief Doe 1 sought in his motion was (1) to "quash" the California subpoena; or (2) in the alternative, for a protective order "preventing Weebly, Inc.

from divulging” his identifying information. (Dkt 7.) The circuit court did not abuse its discretion in denying that relief: It is undisputed (Doe did not argue to the contrary below, nor does he here) that the court had no jurisdiction to quash a subpoena issued by a California court, and no jurisdiction over Weebly, Inc., a Delaware corporation with its principal place of business in California, to “prevent[]” it from disclosing identifying information about Doe 1.

Third, although Doe 1 did not seek this relief in his motion, the circuit court did not abuse its discretion in denying Doe 1’s post-Weebly-production requests, charitably construed, to enter a protective order preventing Cooley from using the Weebly information to (re-)file an amended complaint naming Doe 1. The circuit court properly determined that Cooley had stated claims for defamation per se against Doe 1—based on his false accusations of “criminal” and “fraud[ulent]” conduct—that the discovery sought was relevant to those claims, and that Doe 1 had not met his burden of demonstrating good cause for preventing the discovery under established Michigan law and court rules.

Fourth, the circuit court did not err in “fail[ing] to recognize” and then “incorrectly appl[ying]” the New Jersey intermediate appellate court’s five-part test in *Dendrite v Doe*, 342 NJ Super 134 (NJ App 2001). (See Appellant’s Br. at 25.) Doe 1 concedes that no Michigan court has adopted the test. (See *id.* at 9.) He concedes, in other words, that *Dendrite* was *not* the law in Michigan when the circuit court considered his motion to quash. Doe 1 nonetheless argues, as the primary basis of this appeal, that the circuit court somehow erred—abused its discretion no less—by “fail[ing] to recognize” and then purportedly “incorrectly appl[ying]” that non-Michigan law.

Doe 1’s arguments are meritless. The *Dendrite* test—which among other things requires a defamation plaintiff to survive a “hypothetical summary judgment test,” see *Maxon v Ottawa Publishing Co*, 929 NE2d 666 (Ill App 2010), before it is entitled to discovery on its claims—is

antithetical to Michigan’s decades-established policy of open liberal discovery and long-established pleading standards. Michigan does not and has never required a plaintiff to prove its claims before it is entitled to discovery in support of them. Moreover, *Dendrite*’s fifth element, a nebulous “balance of the equities,” practically *compels* a court, on no principled standards, to decide a potentially-case-dispositive issue at the outset of litigation based on nothing more than who the court thinks should win.¹ *Dendrite* is bad law, plain and simple, and the Court should reject Doe 1’s invitation to judicially write it into Michigan law and the United States Constitution.

Rejecting *Dendrite* would not leave anonymous Internet speakers without protections against frivolous defamation suits in Michigan—Doe 1’s alarmist protestations notwithstanding. To the contrary, existing Michigan law provides ample protections. To name a few: Michigan has a heightened pleading standard for defamation claims. *See Pursell v Wolverine-Pentronix, Inc.*, 44 Mich App 416, 421 (1973). If a plaintiff fails to meet that standard, a defendant can file a motion to dismiss, MCR 2.116(C)(8), to strike, MCR 2.115(B), or for a more definite statement, MCR 2.115(A). Michigan also has a court rule providing that a party or attorney’s signature on a complaint is a certification that the complaint is “well grounded in fact and is warranted by existing law” and is “not interposed for any improper purpose.” MCR 2.114(D)(2)-(3). And Michigan has court rules and statutes providing that if a plaintiff violates the signature rule or files a frivolous claim, he or she is subject to sanctions. *See* MCR 2.114(E), MCR 2.625(A)(2), MCL 600.2591.

Doe 1 did not avail himself of any of those protections—he did not file a motion to dismiss arguing that Cooley failed to state a defamation claim against him, and did not file a motion for sanctions arguing that Cooley’s claims were unsupported by fact or law or brought

¹ Doe 1 in fact argues that Cooley will not be able to prove liability without Doe’s true identity.

for an improper purpose—but the protections were available to him under Michigan law. And even still, he received extraordinary process and protection. On a single discovery motion, the circuit court, over the course of *three months*, reviewed 11 briefs, held three hearings, including an in camera review of the Weebly production, issued several interim orders, and even permitted a Washington, D.C. advocacy group (now representing Doe 1 on appeal) to file amicus curiae briefs and present oral argument supporting Doe 1’s discovery motion. (See Dkt 7, 14, 15, 17, 18, 27, 29, 30, 35, 43, 45, 48, 52, 55, 57, 58, 60.) Suffice it to say, existing Michigan law provides adequate procedural protections for anonymous Internet speakers, and this case proves it. As the Illinois Court of Appeals recently noted in rejecting an appellant’s invitation to write *Dendrite* into Illinois law, *Dendrite* “add[s] nothing to the protections provided by” existing law, and its “hypothetical summary judgment” and results-oriented “balance of the equities” tests would do nothing but uproot long-established and time-tested rules of law. See *Maxon v Ottawa Publishing Co*, 929 NE2d 666 (Ill App 2010).

Finally, Cooley would meet the *Dendrite* test, even if it were the law in Michigan. Although the circuit court properly recognized that *Dendrite* “is not the law” in Michigan, it nonetheless, in the alternative, conducted a careful consideration of the *Dendrite* factors and determined that Cooley met each one of them. That hypothetical determination was not an abuse of discretion.

Doe 1’s appeal amounts to nothing more than an argument that the circuit court misapplied law that undisputedly was not the law in Michigan when the court denied his discovery motion. This Court should affirm.

STATEMENT OF FACTS

I. RECORD FACTS BEFORE THE CIRCUIT COURT WHEN IT DENIED DOE 1'S PURPORTED "MOTION TO QUASH"

A. Doe 1's Defamatory Blog

On February 14, 2011, Defendant John Doe 1 created an Internet weblog titled, "THOMAS M. COOLEY LAW SCHOOL SCAM." (Dkt 4, Compl. ¶ 9) The blog was hosted by Internet weblog host Weebly, Inc., at <http://thomas-cooley-law-school-scam.weebly.com/index.html>. (*Id.* ¶¶ 9-10.) Doe 1 created the blog under the pseudonym "Rockstar05." (*Id.* ¶ 11.)

On February 14, 2011, Doe 1, under the "Rockstar05" pseudonym, authored a post with the same title as his blog. (*Id.* ¶ 14; the blog post with associated comments is attached to the Complaint as Exhibit B.) Doe 1 also posted several comments to the post in response to other comments made by readers of the blog. (*Id.*)

Doe 1 included partially identifying information about himself in his blog, including that he was a former Cooley student and had transferred to another law school. (*Id.* Ex. B.) Doe 1 claimed that his statements were the "truth" about Cooley. (*Id.* ¶¶ 12-13.) He did not state that any of the statements were merely his opinions. (*Id.* Ex. B.) Instead, he stated that his statements were the "truth" based on his "experience[]" and "research." (*Id.* ¶ 13; Compl. Ex. B at pp. 8-9) ("I have done the research and experienced most of this for you, providing the lowdown and exposing one of the biggest scams in modern American history").² Doe 1 told his readers, "I tell it EXACTLY HOW IT IS," and that his statements were "backed by statistics and facts, painting a real picture of what Cooley really is." (*Id.* Ex. B at 2, 9.)

² References to page numbers in Exhibit B to the Complaint are to the page numbers in the lower left-hand corner of the blog printout, e.g., "6 of 28."

In the blog, Doe 1 falsely accused Cooley of being a fraudulent enterprise through and through. He accused Cooley of lying about the “advertised tuition” on its website, purportedly by “\$4,000.” (Compl. Ex. B at 6.) He falsely stated that Cooley had a “policy . . . in effect to make sure it takes you longer and is more difficult to obtain a degree,” so that Cooley could obtain more tuition money. (*Id.* at 3.) He falsely stated that Cooley’s grading and scheduling policies intentionally “ma[de] it IMPOSSIBLE to transfer” to another law school (despite the fact that he himself had transferred), again so that Cooley could make more money. (*Id.* at 4.) He falsely accused Cooley of being “essentially a multi-million dollar business.” (*Id.* at 6.) He falsely stated that “[i]n fact, in Lansing Michigan where the school is located they are the HIGHEST TAXPAYER[.]” (*Id.*)³ He falsely implied that Cooley therefore received special treatment from the local government: “I’m sure the City of Lansing would do ANYTHING for this disgusting mess.” (*Id.*) He falsely accused Cooley of admitting “any student with \$\$” with the intent to fail a significant portion of them but “keep [their] first year money” to “become more rich.” (*Id.* at 7.) He falsely accused Cooley of thereby “taking 50k from a poor debt-ridden kid,” and falsely accused Cooley of being “criminals” who “have accomplished robbery[.]” (*Id.*) He falsely stated that Cooley’s policies were in place to “lure more kids and get more money” and “more, more, money.” (*Id.*) He falsely equated Cooley’s policies with “robbing banks.” (*Id.*) And he falsely stated that there are “criminals over at Cooley” “that no one is going after[.]” (*Id.*)

Doe 1 continued his defamatory statements in the comments section of his blog. He accused Cooley of “FRAUD,” even listing the elements of fraud: “1) an intentional 2) misrepresentation of material fact 3) to induce another 4) actual reliance, and 5) damages.” (*Id.*)

³ Doe 1 falsely tells this Court in his brief that “these are Cooley’s words; they . . . cannot be found in the blog.” (Appellant’s Br. at 30.) He’s wrong. Those exact words appear on page 4 of the post, attached as Exhibit B to the Complaint. (*See* Dkt 7, Compl. Ex. B at 4.)

at 9.) He said he hoped unemployed Cooley graduates would “sue those criminals at Cooley to get their money back PLUS interest and hopefully enough punitive damages to shut this shithole down!” (*Id.*) He falsely stated that Cooley retained tuition “FUNDS FOR PROVIDING YOU WITH ABSOLUTELY NOTHING[.]” (*Id.* at 11.) He falsely accused Cooley of being “unethical” for all of these alleged transgressions, (*id.*), and “the most unethical and deceptive law school in the nation.” (*Id.* at 13.) He falsely stated that Cooley’s admissions and retention procedures are designed “to attract and retain more students, keeping the better, and rejecting the worse and pocketing money from 75% of the naïve fools who attend[.]” (*Id.*) He falsely stated that “COOLEY POCKETS \$108M/YEAR ON THIS SCAM!” (although he acknowledged that “these numbers may be inflated”). (*Id.* at 14.) He falsely stated that Cooley’s grade curve “is Cooley’s last laugh going all the way to the bank while making sure they fuck you over for the rest of your life: all that debt, and literally no means to a job to pay it off.” (*Id.*) He falsely stated that “Cooley is probably single handedly accounting for 50% of Michigan’s lawyer production....leading to the flooded market in what is already an ECONOMICALLY DECIMATED state to begin with.” (*Id.* at 19.) He said commenters had “not pointed out one mistake, fallacy, or inaccuracy” or “ANYTHING that is remotely inaccurate or untrue” in his post. (*Id.* at 22.)

Doe 1 also approved and published a comment⁴ that falsely stated that a “two-year multi-agency undercover investigation/sting operation” revealed that “Cooley withholds grades and information to conceal their federal student loan fraud”; that Cooley “with holds [sic] grades and information to conceal their federal student loan fraud”; that “Cooley administrators also operate the Michigan Higher Education Student Loan Authority’s student secondary market program” to

⁴ Doe in his words “filtered” the comments to the blog starting on April 11, 2011, and affirmatively approved every comment for publication that showed up on the blog after that date. (*See id.* at 23.)

commit “fraud”; and that a “good portion of Cooley’s ‘Administrators’ and ‘Executive Officers’ are actually full time employees at banks, investment firms, private equity firms and securities dealers” and “Cooley misspell [sic] names, omits letters from names, and/or uses maiden names for the Administrators on their website, literature, etc. to conceal their true employment because many of their names are also listed in their banks’ SEC filings.” (*Id.* at 23-24.)⁵

Doe 1 stated that he published his blog for the purpose of convincing prospective and current Cooley students not to apply to and/or enroll at Cooley. He instructed readers to “LISTEN TO ME,” and “[l]isten to my advice”: “DO NOT ATTEND THIS SCHOOL,” and “avoid Cooley at all costs” because it “WILL RUIN YOUR LIFE[.]” (Compl. ¶ 18; Compl Ex. B at 8.) He expressly said: “Prospective Law School Students- avoid Cooley at all costs.” (*Id.* at 15.) Doe 1 specifically included “metatags” for his blog, “designed to aid Internet search engine users when finding web pages” (Appellant’s br. at 31), for “Thomas M. Cooley Law School,” “SCAM,” and “fraud,” among others, to attract prospective and current students to his blog. (*See* Compl. Ex. B at 1.) He bragged that within “36 hours of being live,” the blog had received “over 800 unique visitors.” (*Id.* at 13.) He later bragged that he was “PROUD” that “THIS BLOG POST IS NOW ON THE FIRST PAGE OF GOOGLE WHEN YOU TYPE ‘THOMAS M. COOLEY LAW SCHOOL.’” (*Id.* at 28.) Doe 1 expressly stated that it was his “wish that this reaches the MAXIMUM AUDIENCE and is spread TO ALL THE NAIVE PROSPECTIVE LAW STUDENTS OF AMERICA FROM ALL ACROSS THE WORLD.” (*Id.* at 12.)

⁵ This commenter is Defendant John Doe 3. (*See* Compl. ¶¶ 19-22.)

B. Doe 1 Granted Weebly Sole Discretion to Disclose His Identifying Information When He Created His Defamatory Blog

When Doe 1 created the blog, he voluntarily submitted to the blog host, Weebly, Inc., an email address and other identifying information, granting *sole discretion* to Weebly to disclose that information. (See Dkt 29, Ex. A, Weebly Inc.’s Terms of Service.) Specifically, Weebly’s “Terms of Service” provide the following:

You acknowledge and agree that we may preserve Content and **may also disclose** Content if required to do so by law **or in the good faith belief that such preservation or disclosure is reasonably necessary to:** (a) **comply with legal process;** (b) enforce these Terms; (c) **respond to claims that any Content violates the rights of third parties;** or (d) protect our rights, property, or personal safety and those of our users and the public.

(*Id.* ¶ 8; emphasis added.) “Content” is defined in the terms to include “[a]ll information, data, text,” etc., that a user provides to Weebly. The Terms further provide:

You agree that you will not:

(a) upload, **post**, transmit or otherwise make available **any Content that is** unlawful, harmful, threatening, abusive, harassing, tortuous [sic], **defamatory**, vulgar, obscene, **libelous**, invasive of another’s privacy (up to, but not excluding any address, email, phone number, or any other contact information without the written consent of the owner of such information), hateful, or racially, ethnically **or otherwise objectionable[.]**

(*Id.*)

The terms of service to which Defendant John Doe 1 agreed when he created his blog, in other words, granted Weebly the discretion to disclose identifying information about Doe 1—not only when compelled to do so by a court subpoena, but also, among other reasons, “in the good faith belief that such . . . disclosure is reasonably necessary” to “enforce these Terms,” including terms that prohibit defamatory content, or to “respond to claims that any Content violates the rights of third-parties.” (*Id.*) Notably the terms do not call for Weebly to make any judgment

whether the content is in fact abusive, harmful, defamatory, etc. Instead, the right to disclose content arises upon a “*claim*” of such wrongful conduct.⁶

According to Doe 1 himself, other internet service providers, including Yahoo and AOL, have significantly more restrictive policies on when they will disclose identifying information about their users. (See Appellant’s Br. at 23-24) (stating that AOL’s terms allow AOL to disclose identifying information only “in response to lawful governmental requests or legal process (for example, a court order, search warrant or subpoena),” and Yahoo’s terms allow Yahoo to disclose information only in response to “subpoenas, court orders, or legal process.”) Doe 1, in other words, could have chosen a service provider that would only disclose his identifying information when compelled to do so by court process, but instead chose Weebly, which expressly retained sole discretion over whether to disclose his identifying information.

C. Doe 1’s True Identity Was Revealed To Cooley By Information From Weebly Together With Information Doe 1 Provided To Cooley, And Doe 1 Disclosed His Identity On The Record In Open Court With Court Staff and Members of the Public Present

On July 14, 2011, Cooley filed a Complaint against John Doe 1 and three other John Does. Cooley brought claims for defamation (Count 1) and tortious interference with business relations (Count II) against John Doe 1. In compliance with MCR 2.201(D), Cooley attached as Exhibit A to the Complaint an affidavit by Cooley’s associate dean for legal affairs and general counsel, James B. Thelen, attesting to Cooley’s diligent inquiry and efforts to identify and locate the Doe Defendants and determine their legal identities. (See Dkt 4, Complaint, Ex. A, Affidavit of James B. Thelen.) In the affidavit, Mr. Thelen stated that he had “informed the two website

⁶ Doe 1 sets up a strawman in his brief, stating that “nothing in Weebly’s Terms of Service purport to *commit* Weebly to release information just because someone claims that something false has been published[.]” (Appellant’s Br. at 22; emphasis added.) But Doe 1 does not dispute that Weebly’s Terms of Service granted Weebly sole *discretion* to release such information, which he expressly agreed to.

hosts, the Huffington Post/AOL and Weebly, Inc., that Defendants had posted defamatory statements concerning Cooley on websites hosted by them.” (*Id.* ¶ 5.) He further stated that “Cooley intends to subpoena the website hosts for identifying information relating to Defendants after the commencement of this action.” (*Id.* ¶ 6.) Mr. Thelen affirmatively attested to defamatory statements that formed a basis for the Complaint. (*Id.* ¶ 5.)

On July 15, Cooley petitioned the San Francisco County Superior Court of California to issue a subpoena to Weebly. Weebly has its headquarters and custodian of records in San Francisco. On August 3, 2011, the California court granted the petition and issued a subpoena to Weebly, Inc. (A copy of the California subpoena is attached as Exhibit A to Cooley’s Response to Doe 1’s Motion to Quash, Dkt 15.)

On behalf of “the People of the State of California” and carrying the official seal of the Superior Court of California, the subpoena ordered Weebly, Inc. to produce certain business records to counsel for Cooley by August 25, 2011. (*Id.*; all-caps omitted.) Specifically, the subpoena ordered Weebly, Inc. to produce documents including “user account and/or registration information submitted by or relating to the creators/authors of the weblog,” and relating to “Rockstar05.” (*Id.*) The subpoena also sought user account information relating to two pseudonymous commenters on the blog, “Informant” and “Anonymous,” who posted additional defamatory statements concerning Cooley and who were named as Defendants John Doe 2 and John Doe 3 in this action. (*Id.*)

John Doe 1 retained attorney John Hermann, whose appearance in this action on his behalf alone dated August 5, 2011 the circuit court entered on August 9, 2011. (Dkt 6.) Through counsel, Doe 1 filed “John Doe 1’s Motion to Quash Subpoena,” dated August 5 and entered by

the court below on August 9. (Dkt 7.)⁷ On August 10, 2011, after receiving a copy of Mr. Hermann's appearance on behalf of John Doe 1, Cooley sent Mr. Hermann a copy of the California subpoena. (*See* Dkt 14, Ex. 4, Aug. 10, 2011 Letter enclosing subpoena).

Doe 1 never filed a motion in California seeking to prevent disclosure from Weebly, despite the fact he knew that Cooley's subpoena to Weebly, a California company, issued from a California court, and despite the fact that he knew, as detailed above, that Weebly's terms of service granted it sole discretion whether to release identifying information about him. The relief Doe 1 sought in his purported "Motion to Quash" was for the Michigan trial court to (1) "quash" the California subpoena or, in the alternative, (2) "to issue a protective order preventing Weebly, Inc. from divulging the name, identity, location or other personal information of Defendant JOHN DOE 1 without adequate and/or proper protections." (Dkt 7, Motion to Quash at 2.) Doe 1 did not present facts or argument to the lower court suggesting that Michigan courts have jurisdiction over Weebly to quash or prevent disclosure in response to a valid outstanding California subpoena, which they do not. (*See id.*) And Doe 1 did not request in the motion for the trial court to enter a protective order requiring or preventing Cooley from doing anything with respect to the subpoena. (*See id.*) Doe 1 asked the Court only to either quash the California subpoena, which it did not have jurisdiction to do, or to "prevent[] Weebly, Inc. from divulging" his information, which it also did not have jurisdiction to do. (*See id.*)

Instead of going to a California court with jurisdiction over Weebly, Doe 1 chose to go behind Cooley's and the trial court's backs to attempt to keep Weebly from divulging his identify. Without informing Cooley, the trial court, or the California court, Doe 1's counsel decided to merely send a copy of his Michigan court motion to quash to Weebly—without

⁷ Doe 1's motion purported to quash the subpoena in its entirety, but Doe 1 had no standing to challenge the portions of the subpoena relating to the other John Doe defendants.

having seen the California subpoena and without referencing it—apparently with the misplaced hope that the act of sending the motion by itself would be sufficient to prevent Weebly from making any disclosure. (See Dkt 14, Ex. 1, 2.) In other words, instead of filing a California motion to quash, Doe 1’s counsel took a calculated risk that he could get Weebly to quietly sit on the subpoena while he tried to get the lower court in Michigan to quash a California subpoena. His maneuver having backfired he now wants the Court to save him from himself. In light of the fervor with which he now belatedly presses the cause of his anonymity, this tactic shows a cavalier attitude toward it consistent with his grant to Weebly of sole discretion to disclose.

Initially, Weebly apparently told Doe 1 on August 9, 2011 that it had not yet received the subpoena, but that Doe 1 could “consider the subpoena squashed at this point.” (*Id.* 8/9/2011 R. Huffaker email.) Again, Doe 1 did not disclose this communication to the trial court or Cooley. Weebly then told Doe 1’s counsel on August 10, 2011 that it had received the subpoena and could “give you until August 22nd to get this *actually quashed*” by a court. (*Id.* Ex. 1, 8/10/2011 R. Huffaker email; emphasis supplied.) Even Weebly had no difficulty recognizing that the California subpoena was effective and compulsory until further order of the court. Yet Doe 1’s counsel then inexplicably emailed his contact at Weebly—again without informing either the California court, the court below, or Cooley—to state his self-serving erroneous opinion that the Michigan “Motion to Quash stops any enforcement action on the subpoena” in California, despite identifying no basis for the Michigan court’s jurisdiction over Weebly and taking no action with respect to the California court. (*Id.*, 8/10/2011 J. Hermann email.)

On August 17, 2011, Weebly sent email correspondence to Cooley’s counsel that included identifying information relating to Doe 1. (See Dkt 15, Exhibit B, Weebly Email.) In the response, Weebly provided to Cooley email addresses Doe 1 had previously supplied to Weebly and a list of IP addresses associated with account holder access to Doe 1’s Weebly-

hosted blog. (*Id.*) Considering the Weebly information together with other information Doe 1 stated in his defamatory blog and that he voluntarily previously supplied to Cooley, Cooley was able to determine Doe 1's true identity. At that time, Doe 1 had not filed *any* motion in California seeking to prevent Weebly's disclosure, despite having had fourteen days from his first email to Weebly on August 3, 2011 until Weebly's August 17 disclosure, and despite telling Cooley he intended to file a California motion and seeking concurrence in that purported motion. (*See* Dkt 14, Ex. 5.) There were nine days between the filing of his Michigan motion and Weebly's disclosure. Weebly's response was consistent with its terms and conditions, which granted it sole discretion to produce identifying information about its users, whether in response to a subpoena or not. (*See* Dkt 43.)

Cooley sent Weebly's subpoena response to Mr. Hermann on August 18, 2011. (*See* Dkt 15, Exhibit C.) Cooley informed Mr. Hermann that Doe 1's motion to quash was moot given Weebly's response, requested that Doe 1 withdraw the motion no later than August 19, and notified him that if he failed to withdraw the motion Cooley intended to seek costs and fees relating to responding to his now moot and baseless motion. (*Id.*) Cooley did not get a response from Mr. Hermann. On August 24, 2011, Cooley again told Mr. Hermann that the motion was moot, asked him to withdraw the motion immediately, and notified Mr. Hermann that Cooley intended to file a First Amended Complaint. (*See id.* Ex. D.) Mr. Hermann finally responded on August 26, 2011, refusing to withdraw the motion to quash and demanding that the Weebly materials be returned or destroyed because they had purportedly been "inadvertently disclosed." (*See id.* Ex. E.)

On August 29, 2011, with the only motion pending being Doe 1's improper and moot "Motion to Quash," which did not seek any valid relief, Cooley filed its First Amended Complaint, naming Doe 1 as a defendant by his true legal name. On September 2, 2011, Doe 1

filed a supplemental brief in support of the motion to quash. (Dkt 14.) In that brief, Doe 1 erroneously suggested that Cooley had some duty under MCR 2.302(B)(7)—which applies only to “information that is subject to a claim of privilege or of protection as trial-preparation material” and is designed to protect parties from waiver of privilege in large document productions—to return the Weebly information and not use it because it purportedly had been “inadvertently produced.” Doe 1 had not made any “claim of privilege or of protection as trial-preparation material.”

On September 7, 2011, the circuit court held a hearing on the motion to quash. Mr. Hermann appeared on behalf of Doe 1, and in open court, on the record with court staff and members of the public present, identified Doe 1 by his true name. (Dkt 19, Tr. 9/7/2011 at 3.) On September 8, the court entered an order striking the First Amended Complaint from the record pending its *in camera* review of Weebly’s response to the subpoena.⁸

Between August 29, 2011, when Cooley filed the First Amended Complaint, and September 8, 2011, when the court temporarily struck it, the First Amended Complaint naming Doe 1 by his true name was a matter of public record for 10 days. In a highly publicized case, any interested member of the public could access the public docket, see Doe 1’s true name, and obtain the First Amended Complaint naming Doe 1 by his true name and the allegations against

⁸ Cooley filed a motion for reconsideration of that order on September 29, 2011, on the ground that MCR 2.302(B)(7) plainly does not apply to the Weebly disclosure here. The circuit court denied the motion for reconsideration on October 24, 2011.

him. Even today, a year later, documents remain on the public docket that carry Doe 1's true name. (*See, e.g.*, Dkt 15, 19.)⁹

On October 24, 2011, the circuit court held a third hearing on Doe 1's motion to quash. After full briefing and oral argument by Doe 1's lawyer and Public Citizen, Inc. as amicus curiae, the court denied Doe 1's motion to quash. The court held that Cooley stated an actionable claim for per se defamation against Doe 1, and was entitled to obtain and use discovery from Weebly under the Michigan Court Rules and established Michigan law. (Dkt 58.) The court also noted that, in its determination, Cooley had met each of the factors in the nonbinding decision in *Dendrite v Doe*, 775 A2d 756 (NJ App 2001). On November 8, 2011, the court entered an order denying Doe 1's motion to quash, holding that Cooley was entitled to use the information obtained from Weebly in support of its claims, and vacating its September 8, 2011 order striking the First Amended Complaint. (Dkt 60.) The order provided, however, that upon its entry Doe 1 would have 21 days to seek leave to appeal and that Cooley was not permitted to file an amended complaint naming Doe 1 by his true legal identity until after this Court's resolution of the application for leave to appeal. (*Id.*)

Doe 1 applied for leave to appeal in this Court on November 29, 2011. On May 25, 2012, the Court granted leave to appeal, limited to the issues raised in the application.

⁹ The circuit court held another hearing on October 3, 2011. The court did not rule on Doe 1's motion to quash, but entered an erroneous order stating that Weebly had purportedly "inadvertently produced" within the meaning of MCR 2.302(B)(7), requiring Cooley to submit the Weebly information to the court for in camera review (despite the fact that Cooley had already submitted all of the Weebly information to the court), ordering that Cooley not undertake additional discovery generated from the Weebly information, and ordering the First Amended Complaint to remain stricken pending the in camera review. (Dkt 48.) Cooley filed a motion for reconsideration of this order as well, which the court denied on October 24, 2011.

ARGUMENT

I. THE PURPORTED FIRST AMENDMENT ANONYMOUS SPEECH ISSUES DOE 1 SEEKS TO APPEAL ARE ALL MOOT BECAUSE DOE 1’S IDENTITY IS ALREADY KNOWN AND PUBLISHED AND THUS HE IS NO LONGER ANONYMOUS

Doe 1’s interlocutory appeal is moot—just as his Motion to Quash (Dkt 7) was mooted in the trial court below when Weebly unilaterally sent Cooley identifying information about Doe 1 before the trial court made any rulings on the Motion to Quash.¹⁰

An issue is moot “[w]here the act that is sought to be enjoined has already been performed.” *Kent Co Aeronautics Bd v Dep’t of State Police*, 239 Mich App 563, 584 (2000); *see also Attorney General v Pub Serv Comm*, 269 Mich App 473, 485 (2005) (“An issue is moot if an event has occurred which renders it impossible for the court to grant relief”). Because Cooley had already learned Doe 1’s legal name before the trial court ruled on Doe 1’s Motion to Quash—which Doe 1 admits sought to prevent Cooley from obtaining information in response to the California subpoena that might help Cooley find out who Doe 1 was—that motion was both practically and legally moot, as is Doe 1’s appeal now.

The four purported issues Doe 1 raises on appeal relate to his purported First Amendment right to anonymous speech. By Doe 1’s own admission, all of those issues are moot for the very simple reason that *Doe 1’s identity has already been disclosed and Doe 1 is no longer anonymous*.

On August 17, 2011, Weebly provided information to Cooley, including Doe 1’s email address that—together with information Doe 1 had earlier voluntarily provided to Cooley—enabled Cooley to determine Doe 1’s identity shortly thereafter. Cooley then filed a First Amended Complaint *naming* Doe 1 by his true legal name on August 29, 2011. That document

¹⁰ Cooley raised this argument below in its response to Doe 1’s motion. (*See* Dkt 15.)

was temporarily stricken on September 8, 2011, but until then it was publicly available on the lower court's public docket for all the world to see for fully ten days. Doe 1's lawyer, Mr. Hermann, then entered his appearance on the record *in open court naming Doe 1 by his true name* on September 7, 2011 with court staff and members of the public present, and mentioned Doe 1's name no fewer than four times. (*See* Dkt 19 at 3-5.) It surely cannot get any more public than that.

As Doe 1 himself admitted in his application for leave, "once Doe's name is released publicly, he can never get back his anonymity." (Appl. for Leave at 2.) Doe 1 is right about that; he's wrong to advance the legal and factual fictions that his identity is somehow still secret. As Doe 1 says, disclosure of his identity "even for a moment" means his "First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure." (*Id.*) (quoting *Melvin v Doe*, 836 A2d 42, 50 (Pa 2003)). Doe 1's identity has been disclosed for more than a moment—it was a matter of public court record in a widely publicized case for at least ten days, and Cooley, court staff, and members of the public have known his identity for over a year. Doe 1 does not argue—nor could he—that he has some First Amendment right to be somewhat anonymous. Any First Amendment claim Doe 1 had (he in fact had none at any rate) was "irreparably lost" months ago, and there is "no means by which to . . . cure such disclosure." *Id.* Indeed, Doe 1 admits that "disclosure of Doe's identity . . . make[s] a later appeal moot." (*Id.*) (quoting *Fitch v Doe*, 869 A2d 722, 725 (Me 2005)).¹¹

This Court "will not undertake a constitutional analysis when [it] can avoid it." *See Rinaldi v Civil Serv Comm, City of Livonia*, 69 Mich App 58, 69 (1976). Simply put, this is not the case to address the First Amendment issues Doe 1 raises. By Doe 1's own logic and

¹¹ Nor does this appeal present any issues "capable of repetition yet evading review," a very limited exception to the mootness doctrine that no party argues applies here. *See People v Richmond*, 486 Mich 29, 40 (2010).

admissions and the undisputed fact that Doe 1 is no longer anonymous—either to Cooley or the public at large—Doe 1’s purported appeal is moot. *See also SCD Chem Distrib, Inc v Medley*, 203 Mich App 374, 382 (1994); *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 12 (2005) (“Although not decided by the trial court, the issue was presented and we may affirm on an alternative ground”).¹²

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DOE 1’S MOTION TO QUASH

Doe 1’s entire appeal is premised on his argument that the circuit court purportedly “failed to recognize” and then purportedly “incorrectly applied” the New Jersey intermediate appellate court’s five-factor test in *Dendrite v Doe*, 342 NJ Super 134 (NJ App 2001). (*See* Appellant’s Br. at 11.) But Doe 1 concedes that *Dendrite* is *not* the law in Michigan and was not the law in Michigan when the circuit court issued the order he now challenges in this appeal. (*See id.* at 1.) As explained below, under existing Michigan law, the circuit court did not abuse its discretion in denying Doe 1’s purported motion to quash, and this Court therefore should affirm. The circuit court did not somehow abuse its discretion in “fail[ing] to recognize” and then purportedly “incorrectly appl[y]ing” a standard that is not the law in Michigan.

This Court should also reject Doe 1’s invitation to legislate from the bench and rewrite Michigan law to add *Dendrite*’s “hypothetical summary judgment” and nebulous “balance of the

¹² Cooley argued in its response to Doe 1’s application for leave to appeal that the appeal was moot. This Court granted leave on May 25, 2012, but did not address the mootness issue. On July 11, 2012, Cooley filed a motion to dismiss the appeal as moot under MCR 7.211(C)(2)(c). The Court denied the motion on July 20, 2012, stating that “this Court would not have granted leave to appeal if it regarded this appeal as moot,” and that “if this Court ultimately resolves this appeal in appellant’s favor, it could grant meaningful relief by, for example, directing that any files or transcripts in the circuit court record are to be sealed or redacted to the extent that they disclose appellant’s true identify. In this regard, merely because appellant’s true identity was publicly accessible in the circuit court file for some period of time it does not follow that appellant’s true identity actually became widely known or that appellant lacks a substantial interest in preventing further disclosure of his true identity.” This ruling is contrary to settled law that, once the subject’s identity is disclosed even for a moment, anonymity is destroyed and can never be regained. It amounts to closing the barn door after the horse has left.

equities” tests and then retroactively apply them to Doe 1’s motion to quash. As also explained below, existing Michigan law provides adequate procedural protections for anonymous Internet speakers facing defamation suits.

Finally, the Court should reject Doe 1’s primary argument on appeal—namely, that the circuit court “incorrectly applied” *Dendrite*. Even if *Dendrite* were the law in Michigan, the circuit properly exercised its discretion to determine, in the alternative, that Cooley would meet each of its requirements even if it were the prevailing standard.

A. Standard of Review

This Court “review[s] the grant or denial of a discovery motion for an abuse of discretion.” *Augustine v Allstate Ins Co*, 292 Mich App 408, 419 (2011). “[A]n abuse of discretion occurs only when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Saffian v Simmons*, 477 Mich 8, 12 (2007).

B. The Circuit Court Did Not Abuse Its Discretion in Denying Doe 1’s Purported “Motion to Quash” Because the Court Did Not Have Power to Quash a California Subpoena and Did Not Have Jurisdiction Over Weebly to “Prevent[]” Disclosure, the Only Requests for Relief Doe 1 Made in His Motion

The circuit court was exceedingly careful and deliberate in its analysis of Doe 1’s “Motion to Quash.” Over the course of three months, the court considered 11 briefs, held three hearings, including an in camera review of the Weebly production, issued several interim orders, and even permitted a Washington, D.C. advocacy group (now representing Doe 1 on appeal) to file amicus curiae briefs and present oral argument relating to Doe 1’s discovery motion. (*See* Dkt 7, 14, 15, 17, 18, 27, 29, 30, 35, 43, 45, 48, 52, 55, 57, 58, 60.) After all of that process and careful consideration, the circuit court denied Doe 1’s motion to quash the Weebly subpoena, and in doing so, it simply did not abuse its discretion.

Doe 1 sought two forms of relief in his motion: (1) he asked the circuit court to “quash” a subpoena issued by a California court to Weebly, Inc., a Delaware corporation with its principal place of business in California; and (2) in the alternative, he asked the circuit court “to issue a protective order preventing Weebly, Inc. from divulging the name, identity, location or other personal information of Defendant JOHN DOE 1 without adequate and/or proper protections.” (Dkt 7, Motion to Quash at 2.)

The circuit court did not abuse its discretion in denying either of those requests for relief. First, Doe 1’s request for a Michigan court to quash a subpoena issued by a California court was improper. The subpoena he sought to quash was issued by the San Francisco County Superior Court of California on behalf of “the People of the State of California.” (Dkt 15, Response to Motion to Quash, Ex. A, Subpoena; all-caps omitted.) The proper place to challenge the subpoena would have been in that California court, pursuant to California Code of Civil Procedure § 2029.300 et seq., which governs motions to quash California subpoenas in actions pending in other states. *See* Ca. Code Civ. P. § 2029.600 (“If a dispute arises relating to discovery under this article, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief may be filed in the superior court in the county in which discovery is to be conducted and, if so filed, shall comply with the applicable rules or statutes of this state”) (Dkt 15, Exhibit F).

Courts considering motions to quash subpoenas issued by foreign courts have held that the issuing court is the *only* place a party can challenge a subpoena. The Ohio Court of Appeals, for example, held that an Ohio trial court had “no authority to rule on motions for a protective order or a motion to quash that went to the heart of [a] subpoena” issued by a District of Columbia court. *Fischer Brewing Co., Inc. v Flax*, 740 NE2d 351, 355 (Ohio App 2000). The court held that “it would have been beyond the [Ohio] court’s authority to quash the foreign

subpoenas or grant protective orders[.]” *Id.*; *see also* Fed R Civ P 45(c)(3)(A) (providing that “the issuing court” is the place to bring a motion to quash or modify a subpoena).

Indeed, Doe 1 himself *did not argue otherwise* in his motion to quash. He filed his purported motion to quash before he had even *seen* the California subpoena. (*See* Dkt 7, Motion to Quash at 2 n.1) (noting that he did not have a copy of the subpoena when he filed the motion).¹³ Thus, Doe 1 made no argument in his motion that the court had the power to quash the San Francisco County Superior Court of California’s subpoena. Doe 1’s counsel entered an appearance in the circuit court on August 9, 2011 (*see* Dkt 7), and Cooley promptly sent him a copy of the subpoena the very next day, August 10. (*See* Dkt 14, Ex. 4, Aug. 10, 2011 Letter enclosing subpoena). Doe 1 himself, once he received a copy of the subpoena, acknowledged that California was the proper place to file a motion to quash. In a letter dated August 11, 2011, Doe 1’s counsel told Cooley that, in addition to the Michigan motion to quash, he intended to file “similar motion to quash in the Superior Court for the County of San Francisco”—and *requested concurrence from Cooley in that motion* by the following day, August 12. (Dkt 14, Ex. 5.) But he never filed a motion in California, deciding instead to go around the subpoena by contacting Weebly on his own—without telling the circuit court, the California court, or Cooley—to try to convince Weebly through backchannels not to produce identifying information about Doe 1 pursuant to a valid and subsisting subpoena of the California court. (*See* Dkt 14 Exs. 1-3.)

¹³ Doe 1 blamed Cooley, asserting that Cooley “refused” to provide his lawyer with a copy of the subpoena. That is false. Doe 1’s lawyer entered his appearance in this action concurrently with the filing of his motion to quash, entered by the circuit court on August 9, 2012. Cooley sent Doe 1’s lawyer a copy of the subpoena promptly after receiving his appearance in this action. (*See* Dkt 14 Ex. 4.) But by rushing to court to file his motion before he had learned of the material facts of the California subpoena, Doe 1’s counsel violated MCR 2.114(D)(2).

On those undisputed facts, the circuit court did not abuse its discretion when it denied Doe 1's purported motion to "quash" the California subpoena. The court did not have power to grant that relief, and Doe 1 never argued that it did.¹⁴

Second, the circuit court did not abuse its discretion in denying Doe 1's alternative request for a "protective order preventing Weebly, Inc. from divulging the name, identity, location or other personal information of Defendant JOHN DOE 1 without adequate and/or proper protections." (Dkt 7, Motion to Quash at 2.) Doe 1 did not argue and did not present any facts suggesting that Weebly, a Delaware company with its principal place of business in California, was subject to personal jurisdiction in Michigan. Doe 1 did not identify *any* contacts with Michigan that would render the company subject to the circuit court's jurisdiction. (See Dkt 7.) Weebly never appeared in the circuit court, and never consented to its jurisdiction. Simply put, on the record before the circuit court, the circuit court had no jurisdiction over Weebly to "prevent[]" Weebly from disclosing identifying information relating to Doe 1. This was just another unfounded tactic Doe 1 attempted.

The circuit court therefore did not abuse its discretion in denying the two requests for relief Doe 1 made in his motion. Its decision to deny Doe 1's purported motion to quash certainly was not "outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12 (2007).

C. The Circuit Court Did Not Abuse Its Discretion in Denying Doe 1's Post-Weebly-Production Requests to Enter a Protective Order Preventing Cooley from Using the Weebly Information in Support of Its Claims Because Cooley Stated Valid Claims for Defamation and Tortious Interference, the Weebly

¹⁴ Assuming, *arguendo*, the subpoena had been issued under the Michigan rules, Weebly would have been obligated to comply with the subpoena absent either a court order relieving it of that burden or written direction from Cooley—not from Doe 1 or his counsel—to not respond. See MCR 2.506(H)(4). Doe never argued below that a similar rule applied in California regarding the California subpoena, or that his *ex parte*, unorthodox (at best) communications directly to Weebly somehow relieved Weebly of its obligation to respond to the California subpoena.

Information Was Relevant to Those Claims, and Doe 1 Failed to Meet His Burden of Demonstrating Good Cause for Preventing the Discovery

Although Doe 1 requested no other relief in his “Motion to Quash,” he argued in various supplemental briefs and at oral argument following Weebly’s production that the circuit court should issue a protective order preventing Cooley from using the Weebly information in the case. The circuit court did not abuse its discretion in denying these additional requests.

1. Michigan law permits liberal discovery of information relevant to a plaintiff’s claims.

“It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case.” *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616 (1998). The court rules reflect that policy, providing that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending motion.” MCR 2.302(B)(1). And that right to discovery does not depend on a party first making any evidentiary showing regarding its claims or any showing of cause for the discovery. *See Eyde v Eyde*, 172 Mich App 49, 55 (1988) (“There is no requirement that there be good cause for discovery of relevant and nonprivileged documents”). If a plaintiff has stated claims, it is entitled to seek relevant discovery in support of them and to avail itself of all of the process available to all litigants under the Michigan Court Rules and law.

Considering Michigan’s “open, broad discovery policy,” *Reed*, 227 Mich App at 616, a party that moves to prevent discovery bears the burden of proving “good cause” for the order. *See* MCR 2.302(C); MCR 2.305(A)(4); *Szpak v Inyang*, 290 Mich App 711, 714 (2010). If the moving party fails to make such a showing, the discovery must be permitted. *Id.* Courts are guided by the policy that the discovery process “should promote the discovery of the facts and

circumstances of a controversy, rather than aid in their concealment.” *Domako v Rowe*, 438 Mich 347, 360 (1991).

Neither the legislature nor the Michigan courts have altered that framework in defamation cases seeking the identity of anonymous internet defamers. Indeed, Doe 1 has not cited a single Michigan case holding that parties are not entitled to seek the identity of alleged internet defamers named as Doe defendants in a defamation action.

Permitting defamation plaintiffs to discover the identity of their alleged defamers also makes good sense. The First Amendment is not a license to defame. Indeed, the United States Supreme Court has held that defamatory statements are *excluded* from the First Amendment’s protections. Along with fighting words and obscenity, defamatory statements are in a “limited class[] of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.” *Chaplinsky v State of New Hampshire*, 315 US 568, 571-72 (1942). The First Amendment “has its limits; [and] it does not embrace certain categories of speech, including defamation[.]” *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002); *see Beauharnais v People of State of Illinois*, 343 US 250, 266 (1952).

That does not change when the speaker powers up his computer to type and publish his vulgar defamatory statements on the Internet. To be sure, “[s]peech on the internet is . . . accorded First Amendment protection.” *Krinksy v Doe 6*, 159 Cal App 4th (Cal Ct App 2008). But the Supreme Court has found no “basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno v ACLU*, 521 US 844, 870 (1997). Thus, “[w]hen vigorous criticism descends into defamation . . . constitutional protection is no longer available”—even when done anonymously on the Internet. *Krinksy*, 159 Cal App 4th at 1164 (emphasis added).

The First Amendment, in other words, offers no protection whatsoever to defamatory statements or the Internet defamers who make them—whether the speakers try to hide behind Internet pseudonyms, as Doe 1 attempts, or not. It makes good sense, then, that the Michigan discovery rules and caselaw likewise permit liberal discovery seeking the identity of the alleged defamer, subject to procedural protections discussed below, when a plaintiff states a defamation claim, as the circuit court held Cooley has here. Under current Michigan law, as it existed when the circuit court considered Doe 1’s motion and issued its order denying it, a plaintiff may seek the identity of an alleged internet defamer pursuant to a discovery subpoena if the identity is “relevant to the subject matter involved in the pending action,” MCR 2.302(B)(1), and, if the alleged defamer files a motion for protective order, the defamer fails to meet his burden of showing “good cause” for a protective order limiting the discovery.

2. The Weebly subpoena sought information relevant to Cooley’s claims.

The Weebly subpoena easily met the relevance requirement under MCR 2.302(B)(1). The subpoena sought information relating to Doe 1’s true legal identity, information critical to Cooley’s claims against him. Doe 1’s identity is “relevant to the subject matter involved in the pending action,” because Cooley is entitled to know its defamer and recover from him, and thus is discoverable. MCR 2.302(B)(1).

3. Doe 1 failed to meet his burden of showing “good cause” for a protective order.

Doe 1 did not specifically identify in his motion to quash any factors constituting “good cause” for a protective order preventing Cooley from using the Weebly information in the case. Doe 1 also elected not to file a motion to dismiss challenging the legal sufficiency of Cooley’s claims against him. Doe 1 argued in his motion to quash and subsequently, however, that “the comments identified in Plaintiff’s complaint that were allegedly made by John Doe 1 fail to

support a legally actionable claim(s)” and that “Plaintiff has failed to establish that the contents of comments posted by John Doe 1 exceed the realm of mere expression of personal opinion (i.e. constitutionally protected speech).” (Dkt 7, Motion to Quash ¶ 4.)

a. *Cooley stated a claim for defamation.*

The circuit court did not abuse its discretion in rejecting those arguments as supporting a protective order that would have prevented Cooley from using the Weebly information. The circuit court noted that it had “reviewed the complaint,” and from it concluded that the alleged “[s]tatements on their surface appear to be per se either slanderous or libel statements[.]” (Dkt 58, at p. 6.) The court noted that Doe 1 accused Cooley of “criminal” conduct and “more importantly accuses Cooley of committing fraud.” (*Id.*) The court concluded that, “as set forth in the complaint,” those allegations “would rise to the level . . . based on the pleadings of per se slander or libel.” (*Id.*)

The circuit court did not err in concluding that Cooley had stated a claim for defamation. Under Michigan law, “[t]he elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” *Mitan v Campbell*, 474 Mich 21, 24 (2005).

In the Complaint, Cooley alleged that Doe 1 made several “false and defamatory statement[s] concerning” Cooley in his blog, including accusing Cooley of being “criminals” and committing “fraud.” (*See* Compl. ¶ 17; Compl. Ex. B). Cooley identified several defamatory statements in the Complaint, and attached the entire defamatory blog as Exhibit B. As seen in Exhibit B, Doe 1 detailed his defamatory statements of criminal and fraudulent activity by Cooley over the course of an over-5000-word blog post. He falsely accused Cooley of lying

about the “advertised tuition” on its website, purportedly by “\$4,000.” (Compl. Ex. B at 6.) He falsely stated that Cooley had a “policy . . . in effect to make sure it takes you longer and is more difficult to obtain a degree,” so that Cooley could obtain more tuition money. (*Id.* at 3.) He falsely stated that Cooley’s grading and scheduling policies intentionally “ma[de] it IMPOSSIBLE to transfer” to another law school—even though he himself transferred—again so that Cooley could make more money. (*Id.* at 4.) He falsely accused Cooley of being “essentially a multi-million dollar business.” (*Id.* at 6.) He falsely stated that “[i]n fact, in Lansing Michigan where the school is located they are the HIGHEST TAXPAYER[.]”¹⁵ (*Id.*) He falsely implied that Cooley therefore received special treatment from the local government: “I’m sure the City of Lansing would do ANYTHING for this disgusting mess.” (*Id.*) He falsely accused Cooley of admitting “any student with \$\$” with the intent to fail a significant portion of them but “keep [their] first year money” to “become more rich.” (*Id.* at 7.) He falsely accused Cooley of thereby “taking 50k from a poor debt-ridden kid,” and falsely accused Cooley of being “criminals” who “have accomplished robbery[.]” (*Id.*) He falsely stated that Cooley’s policies were in place to “lure more kids and get more money” and “more, more, money.” (*Id.*) He falsely equated Cooley’s policies with “robbing banks.” (*Id.*) And he falsely stated that there are “criminals over at Cooley” “that no one is going after[.]” (*Id.*)

Doe 1 continued his defamatory statements in the comments section of his blog. He accused Cooley of “FRAUD,” even listing the elements of fraud: “1) an intentional 2) misrepresentation of material fact 3) to induce another 4) actual reliance, and 5) damages.” (Compl. Ex. B at 9.) He said he hoped unemployed Cooley graduates would “sue those criminals at Cooley to get their money back PLUS interest and hopefully enough punitive

¹⁵ Doe 1 tells this Court in his brief that “these are Cooley’s words; they . . . cannot be found in the blog.” (Appellant’s Br. at 30.) He’s wrong. Those exact words appear on page 4 of the post, attached as Exhibit B to the Complaint. (*See* Dkt 7, Compl. Ex. B at 4.)

damages to shut this shithole down!” (*Id.*) He falsely stated that Cooley retained tuition “FUNDS FOR PROVIDING YOU WITH ABSOLUTELY NOTHING[.]” (*Id.* at 11.) He falsely accused Cooley of being “unethical” for all of these alleged transgressions, (*id.*), and “the most unethical and deceptive law school in the nation.” (*Id.* at 13.) He falsely stated that Cooley’s admissions and retention procedures are designed “to attract and retain more students, keeping the better, and rejecting the worse and pocketing money from 75% of the naïve fools who attend[.]” (*Id.*) He falsely stated that “COOLEY POCKETS \$108M/YEAR ON THIS SCAM!” (although he acknowledged that “these numbers may be inflated”). (*Id.* at 14.) He falsely stated that Cooley’s grade curve “is Cooley’s last laugh going all the way to the bank while making sure they fuck you over for the rest of your life: all that debt, and literally no means to a job to pay it off.” (*Id.*) He falsely stated that “Cooley is probably single handedly accounting for 50% of Michigan’s lawyer production....leading to the flooded market in what is already an ECONOMICALLY DECIMATED state to begin with.” (*Id.* at 19.) He said commenters had “not pointed out one mistake, fallacy, or inaccuracy” or “ANYTHING that is remotely inaccurate or untrue” in his post. (*Id.* at 22.) In light of the above, Cooley undisputably pled numerous “false and defamatory statements” that Doe 1 made concerning Cooley. *Mitan*, 474 Mich at 24. And, taken as a whole, the blog defames Cooley by falsely implying it is an unethical and fraudulent enterprise.

Cooley alleged “an unprivileged communication to a third party,” the second element of defamation. Cooley alleged that “John Doe 1 published [his] false and defamatory statements concerning Cooley to third parties without privilege or authorization,” by posting the allegations on a publicly accessible Internet blog. (Compl. ¶ 35.)

Cooley also alleged the third element of defamation, “fault amounting at least to negligence on the part of the publisher,” *Mitan*, 474 Mich at 24: Cooley alleged that “John Doe

1 acted with fault amounting at least to negligence in publishing the false and defamatory statements concerning Cooley.” (Compl. ¶ 36.)

Finally, Cooley alleged both the “actionability of the statement[s] irrespective of special harm (defamation per se)” and the “existence of special harm caused by publication.” *Mitan*, 474 Mich at 24. “[A]n accusation of a commission of a crime . . . is defamatory per se,” *Wilkerson v Carlo*, 101 Mich App 629, 632 (1980), as is a “false and malicious statement[] injurious to a person in his or her business,” for which “special damages need not be alleged or proved.” *Heritage Optical Center, Inc. v Levine*, 137 Mich App 793, 797 (1984). Cooley alleges in paragraph 37 of the Complaint that “John Doe 1’s statements concerning Cooley are defamatory per se, including because Doe 1 accuses Cooley of violating criminal laws.” (Compl. ¶ 37.) The statements are also defamatory per se because they are injurious to Cooley in its business as a non-profit law school. *Heritage Optical Center*, 137 Mich App at 797. Cooley further alleges that Doe 1’s statements “caused Cooley special harm” and that “[a]s a result of Doe 1’s false and defamatory statements concerning Cooley, Cooley has suffered and will continue to suffer damage, including economic damages, damages to its reputation, and/or damage to its current and prospective business relations.” (Compl. ¶¶ 37-38.)

Cooley thus pled each element of defamation under Michigan law, and, moreover, fully supported its allegations by including as Exhibits A and B to the Complaint the entire defamatory blog post and a sworn affidavit by Cooley’s general counsel and associate dean of legal affairs attesting that Doe 1 “had posted defamatory statements concerning Cooley” on his

blog. (See Dkt 4, Compl. Ex. A, Affidavit of James B. Thelen.) The trial court’s conclusion that Cooley stated a claim for defamation is fully within the court’s sound discretion and judgment.¹⁶

- b. *Doe 1’s arguments that his statements are not actionable because they purportedly are mere “opinions” or “rhetorical hyperbole” are meritless, and the “tenor and context” of his statements demonstrate that they are actionable.*

In his motion to quash, Doe 1 falsely told the circuit court that, “[i]n the blog, Rockstar05 explicitly states that the commentary contained in the blog [was] an ‘expression of his own personal opinion,’ based on his personal experience and views.” (Dkt 7, Brief in Support of Motion to Quash at 2.) That purported quote from the blog was *not* actually anywhere in the original accused post—Doe 1 added it to the blog *after* Cooley filed this action. (See Dkt 4, Compl. Ex. B.)

Moreover, Doe 1’s argument on appeal that his statements are “constitutionally protected as opinion” is baseless. (See Appellant’s Br. at 31.) The United States Supreme Court has expressly *rejected* applying a “wholesale defamation exemption for anything that might be labeled ‘opinion.’” *Milkovich v Lorain Journal Co*, 497 US 1, 18 (1990). “[E]xpressions of ‘opinion’ may often imply an assertion of objective fact,” and thus what matters is the “tenor and context of the passage.” *Id.*

The “tenor and context” of Doe 1’s defamatory statements demonstrates that his statements are actionable defamatory statements, and Doe’s statements strongly imply assertions of objective fact, false though they are. Indeed, contrary to his claims now that he was just

¹⁶ Cooley also pled in Count II each element of tortious interference with business relations under Michigan law. Those elements are: “(1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.” *Health Call v Atrium Home & Health Care Servs, Inc.*, 268 Mich App 83, 90 (2005).

expressing his “opinion,” in the actual blog he stated that he was telling the “truth” about Cooley, “backed by statistics and facts, painting a real picture of what Cooley really is,” based on his “research” and “experience” as a student at Cooley. (*See* Dkt 4, Compl. Ex. B. at p. 1, p. 8.) Doe 1 told his readers: “I tell it EXACTLY HOW IT IS,” (*id.* at p. 9), and that he was giving them “the dead honest truth” about Cooley (*id.* at p. 28). Indeed, the very title of his blog, “THOMAS M. COOLEY LAW SCHOOL SCAM,” set the “tenor” for his statements—he was telling current and prospective Cooley students that Cooley is a “scam.” The “tenor and context” of Doe 1’s statements confirm that Doe 1’s defamatory allegations of “criminal” conduct and “fraud” are actionable.

Doe 1’s argument that his statements are not actionable because they were “rhetorical hyperbole” fails for similar reasons. (Appellant’s Br. at 31.) He cites cases where stray use of the words “criminal” or loose accusations that politicians were “stealing” from taxpayers were deemed nonactionable. *See In re Chmura*, 464 Mich 58, 81-82 (2001); *Kevorkian v American Medical Ass’n*, 237 Mich App 1, 13 (1999). But those cases are entirely distinguishable. Doe 1 did not make mere stray, rhetorical, hyperbolic accusations of “criminal” or “fraudulent” conduct. As detailed above, he accused Cooley of being “criminals” and of committing “fraud” for very specific (false and defamatory) reasons, reasons he detailed in his 5000-word blog post, including falsely accusing Cooley of lying about its tuition, instituting policies aimed at stealing money from its students, and administering a fraudulent and criminal student-loan bundling scheme. As Doe 1 himself puts it in his appeal brief, he “concluded” in the blog that Cooley’s actions were criminal “after setting forth a long list of Cooley activities that are said to induce potential students to pay tuition.” (Appellant’s Br. at 31.) Doe 1’s allegation of criminal conduct, in other words, was the “conclu[sion]” he expressly wanted his readers to reach after reading his “long list” of allegations purportedly demonstrating that criminal conduct. And then

he topped it off by telling his readers that his allegations were “the dead honest truth” about Cooley, based on his “research” and “experience,” and were “backed by statistics and facts.” (Compl. Ex. B at 1, 8, 28.)

That’s not “rhetorical hyperbole.” That’s defamation.

c. *Doe 1’s assumption that Cooley is a public figure and was required to plead malice is unsupported by the record.*

Doe 1’s argument that Cooley failed to plead the “required element of actual malice” is also meritless. (*See* Appellant’s Br. at 32.) The argument is based on Doe 1’s false assumption that “[b]ecause Cooley is a public figure, it was required to plead that Doe made allegedly false statements with actual malice.” (*Id.* at 33.) Plus Doe 1 fails to acknowledge Cooley’s allegation that “John Doe 1 acted with fault amounting at least to negligence in publishing the false and defamatory statements concerning Cooley,” (Compl. ¶ 36), and fails to explain why that allegation would be insufficient to allege malice were that a requirement. Doe 1’s assumption that Cooley is a public figure is not based on any facts in the record—he argues that Cooley is “plainly a public figure” based on its purported (outside-the-record) “extensive efforts to market itself to prospective law students.” (Appellant’s Br. at 33.) Doe 1 does not even specify whether he believes Cooley is an “all-purpose” or a limited purpose” public figure.

Cooley is not a public figure in this action, and therefore it is not required to plead or prove malice.¹⁷ Cooley is certainly not an all-purpose (or “general-purpose”) public figure, purported outside-the-record “extensive efforts to market” notwithstanding. The United States Supreme Court has cautioned that it is only a “small group of individuals who are public figures for all purposes.” *Wolston v Reader’s Digest Ass’n*, 443 US 157, 165 (1979); *Gertz v Robert*

¹⁷ Even if Cooley were required to plead malice and its allegations of malice were deemed insufficient, Cooley would be entitled to amend its complaint to add allegations of malice either as a matter of course under MCR 2.118(A)(1) within 14 days after being served with a responsive pleading or by leave under MCR 2.118(A)(2).

Welch, Inc., 418 US 323, 351 (1974). “Absent clear evidence of *general* fame or notoriety in the community, and *pervasive* involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” *Gertz*, 418 US at 352 (emphasis added); *Bufalino v Detroit Magazine, Inc.*, 433 Mich 766, 780 (1989) (*Gertz* is a “rigorous standard[]”); *id.* (“[T]he general-purpose public figure designation should sparingly be found”) (Levin, J., concurring). Generally, only “well-known celebrat[ies,]” such as “well-known athlete[s] or entertainer[s,]” who have become “household” names are deemed general-purpose public figures. *See Tavoulaareas v Piro*, 817 F2d 762, 772 (DC Cir 1987) (“A person becomes a general purpose public figure only if he or she is a well-known celebrity, his name a household word,” such as a “well-known athlete or entertainer—apparently the archetypes of the general purpose public figure”) (internal quotation marks omitted); *Bowman v Heller*, 420 Mass 517, 651 NE2d 369, 373 (1995) (“The fame required for an individual to be a public figure for all purposes, as opposed to a limited purpose public figure, is very great; the individual must be a ‘household name’ *on a national scale*”) (emphasis added).¹⁸

¹⁸ In the years since *Gertz*, the United States Supreme Court has not recognized *any* general-purpose public figures. And the lower courts applying *Gertz*, including courts applying Michigan defamation law, have held that *Gertz* “sets up what amounts to a fairly strong presumption *against* a finding” of general-purpose status. *In re Thompson*, 162 BR 748, 766 (Bkrtcy ED Mich 1993) (applying Michigan law; emphasis added). “This test is a strict one,” *Waldbaum v Fairchild Publications, Inc.*, 627 F2d 1287, 1292 (DC Cir 1980), “a stringent one,” *Burgess v Reformer Pub. Corp.*, 508 A2d 1359, 1361 (Vt 1986), a “high bar,” *Wilson v Daily Gazette Co.*, 588 SE2d 197, 205-06 (W Va 2003), a “rigorous standard[,]” *Bufalino*, 433 Mich at 773, and “attainment of general public figure status is not to be lightly assumed, *even if the plaintiff is involved in community affairs[.]*” *Blue Ridge Bank v Veribanc, Inc.*, 866 F2d 681, 687 (4th Cir 1989) (emphasis added). “Evidence of a limited circle of notoriety does not satisfy the high bar outlined by *Gertz* for establishing the all-purpose public figure doctrine.” *Wilson*, 588 SE2d at 205-06 (W Va 2003); *see Time, Inc. v Firestone*, 424 US 488, 453 (1976) (refusing to find that the plaintiff was a general-purpose public figure because he “did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society”); *Computer Aid, Inc. v Hewlett-Packard Co.*, 56 F Supp 2d 526, 535-36 (ED Pa 1999). The case on which Doe 1 relies is distinguishable and not controlling. The hospital in *Lakeshore Community Hosp., Inc. v Perry*, 212 Mich App 396, 403 (1995), had a unique standing in the community, being the “only facility in the community” of its type, which had assumed an especially “prominent and critical role” in the community, and which was in part “controlled by the village government.”

Nor is Cooley a limited-purpose public figure in this action. To be limited-purpose public figures, individuals or entities must “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Gertz*, 418 US at 345. Put another way, a limited-purpose public figure “thrust[s] himself into the vortex of a public issue[.]” *Ogle v Hocker*, 279 F App’x 391, 399 (6th Cir 2008). Doe 1 has not identified in the record a public controversy relating to his defamatory statements that Cooley committed “fraud” or “criminal” acts, and has not cited facts in the record that Cooley “thrust [itself] to the forefront” or “into the vortex” of a public controversy relating to his statements.¹⁹ Doe 1’s unsupported assumption that Cooley is a public figure is meritless, and in any event is irrelevant to this appeal as the trial court made no findings or rulings on the issue below.²⁰

d. “*Inadvertent disclosure*”

Doe 1 attempted to muddy the waters in the circuit court, and tries again here with a smear campaign, by arguing that Cooley purportedly violated a duty under MCR 2.302(B)(7) to return the information Weebly produced because Weebly’s response supposedly was an “inadvertent disclosure” within the meaning of the rule. That argument is a plain red herring and, more to the point, just plain wrong.

MCR 2.302(B)(7) by its terms applies only to “information that is subject to a claim of *privilege* or of *protection as trial-preparation material*.” MCR 2.302(B)(7) (emphasis added).

¹⁹ Doe 1 says on page 3 of his brief that “[t]here have also been complaints that Cooley has misrepresented data about the post-graduation employment of its students.” (Appellant’s Br. at 3.) Doe 1 does not support that statement with any fact in the record. To the extent he is referring to a baseless purported class action filed against Cooley in *MacDonald et al. v Thomas M. Cooley Law School*, WD Mich Case No. 1:11-cv-831, the United States District Court for the Western District of Michigan recently dismissed that action for failure to state a claim (plaintiffs and Cooley have filed notices of appeal). Moreover, that action was filed long after Doe 1’s defamatory statements and thus cannot be the purported “public controversy.”

²⁰ Doe 1 also fails to acknowledge Cooley’s allegation that “John Doe 1 acted with fault amounting at least to negligence in publishing the false and defamatory statements concerning Cooley,” (Compl. ¶ 36), and fails to explain why that allegation would be insufficient to allege malice were that a requirement.

The rule was one of several electronic-discovery amendments to the court rules, and was enacted to protect parties against inadvertent waiver of the attorney-client privilege and work-product doctrine in large-scale electronic document productions. *See* Comment to 2008 Amendment (noting that MCR 2.302(B)(7) was introduced in a set of amendments designed to “update Michigan’s discovery rules as they relate to electronically stored information”). The rule, which mirrors Federal Rule of Civil Procedure 26(b)(5)(B), provides procedures for parties to prevent waiver of attorney-client-privileged or trial-preparation materials after they are inadvertently produced in discovery. *See* Advisory Committee Notes to Fed R Civ P 26 (noting that the rule is aimed at protecting against “privilege waiver” and the increased risk of waiver “because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed” [for attorney-client privileged or trial-preparation material]); *see Bd. of Trustees, Sheet Metal Workers’ Nat. Pension Fund v Palladium Equity Partners, LLC*, 722 F Supp 2d 845 (ED Mich 2010) (applying Fed R Civ P 26(b)(5)(B) to a party’s claim of attorney-client privilege with respect to documents it produced in a 4.3-million-page electronic document production).

The Weebly production was neither subject to a claim of “privilege” nor of “protection as trial-preparation material,” and thus MCR 2.302(B)(7) by its terms does not apply. Moreover, it is simply irrelevant to the issues on appeal: The circuit court (erroneously) determined that the rule *did* apply, but still denied Doe 1’s motion to quash.²¹

At bottom, Doe 1 failed to meet his burden of showing “good cause” for a protective order that would prevent Cooley from using the Weebly information in this action. Cooley

²¹ Doe 1 erroneously suggests that because Cooley did not seek an interlocutory appeal of this ruling it is somehow stuck with it. (Appellant’s Br. at 6.) That argument is meritless—the order was non-final and is subject to revision if necessary by the circuit court up until final judgment, and subject to appeal if necessary thereafter.

stated claims for defamation and tortious interference, and the Weebly subpoena undisputedly sought information relevant to those claims—the identity of the tortfeasor. Doe 1 failed to meet his burden of showing good cause to prevent that discovery. The circuit court properly applied long-established Michigan law, and did not abuse its discretion in denying Doe 1’s motion to quash. To say the least, the circuit court’s order was not “outside the range of reasonable and principled outcomes.” *Saffian*, 477 Mich at 12.

III. DENDRITE IS NOT THE LAW IN MICHIGAN, IT IS INCONSISTENT WITH MICHIGAN LAW, AND THE CIRCUIT COURT DID NOT ERR BY FOLLOWING ESTABLISHED MICHIGAN LAW

Unable to demonstrate that the circuit court abused its discretion in denying his motion to quash under existing Michigan law, Doe 1 argues that the circuit court somehow erred by failing to adopt and apply case law from an intermediate appellate court in New Jersey. Doe 1 concedes that no Michigan court has adopted the test in *Dendrite v Doe*, 342 NJ Super 134 (NJ App 2001). (See Appellant’s Br. at 9.) He concedes, in other words, that *Dendrite* was *not* the law in Michigan when the circuit court considered his motion to quash. Doe 1’s appeal instead amounts to a hypothetical: If *Dendrite* actually were the law in Michigan, then, Doe 1 says, the circuit court would have erred in applying it. Doe 1’s argument fails at several levels.

A. *Dendrite* is Inconsistent With Michigan Law, Which Provides Adequate Procedural Protections for Anonymous Internet Speakers Without Requiring a Defamation Plaintiff to Survive *Dendrite*’s “Hypothetical Summary Judgment Test” Before Being Entitled to Any Discovery in Support of Its Claims and Without Inviting Unprincipled Results-Oriented Judging Based on *Dendrite*’s Nebulous “Balance of the Equities” Test

The *Dendrite* test is inconsistent with Michigan law. The *Dendrite* court held that, before a defamation plaintiff was entitled to seek *any* discovery identifying its tortious defamer, the plaintiff had to: (1) give notice to the defamer; (2) allege the defamatory speech with specificity; (3) plead a claim that could survive a motion to dismiss (even where the defamer had not

actually *filed* a motion to dismiss); and (4) produce *evidence* of each and every element of its claims (despite not permitting a plaintiff to first *seek* any evidence through discovery) such that the claim could survive a hypothetical summary motion for summary judgment. And that wasn't enough for the New Jersey court: The court held that even where the defamed plaintiff had proven its case with evidence on each element of its claims, it still had to then survive the court's nebulous "balance of the equities" test, where the court, on no expressed principled standards, would weigh the "potential harm" to the plaintiff of not being able to proceed in its case in any way (although it's unclear how that could be anything but certain harm) against the claimed harm to the defamer of losing his anonymity. *Dendrite*, 775 A2d at 760-61. (Indeed, even Doe 1, whose lawyer on appeal has gone around the country urging courts to adopt *Dendrite*, concedes that this last factor is "somewhat controversial.") (See Appellant's Br. at 16.)

Dendrite is bad law, plain and simple. That some other state courts have followed some version of *Dendrite* doesn't make it any better. Forcing a defamed plaintiff to prove its well-pled case before being able to seek discovery in support of it and relieving the defendant of the burden to test the adequacy of the complaint through the common procedure of a motion to dismiss—and even then allowing a judge to veto all discovery when he or she thinks the "balance" tips against it—is plainly inconsistent with decades of Michigan law on pleading and discovery standards. Indeed, the *Dendrite* process is contrary to the whole notion of notice pleading reflected in the Michigan Court Rules and established precedent interpreting those rules. Michigan law simply does not require a plaintiff to prove its well-pled case before being permitted to seek discovery in support of it.

That is not to say, however, that Michigan law disregards the interests of anonymous Internet speakers. *Dendrite* and its flock profess to be concerned with providing due process to defamation defendants to ensure that free speech is not chilled by frivolous defamation lawsuits

filed solely to identify and harass Internet detractors. Existing Michigan law addresses this concern directly. In this regard, Michigan law imposes a heightened pleading standard for defamation claims. *See Pursell v Wolverine-Pentronix, Inc.*, 44 Mich App 416, 421 (1973) (“The essentials of a cause of action for libel or slander must be stated in the complaint, including allegations as to the particular defamatory words complained of, the connection of the defamatory words with the plaintiff where such words are not clear or are ambiguous, and the publication of the alleged defamatory words”); *Boladian v UMG Recordings, Inc.*, 123 F App’x 165, 169 (6th Cir 2005) (“Michigan law . . . requires that the elements of a claim of defamation be specifically pleaded”); *Williams v Detroit Bd. of Ed.*, 523 F Supp 2d 602, 606 (ED Mich 2007) (“A plaintiff must plead his defamation claim with specificity, and cannot rely on general, conclusory allegations”). If a complaint fails to meet that heightened standard, a defamation defendant can file a motion for a more definite statement of the defamation claim under MCR 2.115(A), a motion to strike under MCR 2.115(B), or a motion to dismiss under MCR 2.116(C)(8) for “fail[ing] to state a claim on which relief can be granted.” A defendant can accompany any of those motions with a motion to stay to ensure that his motion is considered before action on a subpoena.

Moreover, MCR 2.114(D) provides that, by signing a complaint, the attorney or party certifies that the complaint is well-grounded in law and fact and not brought for an improper purpose:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that . . . to the best of his or her knowledge, information, and belief formed after reasonably inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and . . . the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(D)(2)-(3). MCR 2.114(E) then provides for sanctions for a violation of that rule:

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.

MCR 2.114(E). And MCR 2.114 provides a further sanctions mechanism for frivolous claims:

“In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2),” which provides that “if the court finds on motion of a party that an action or defense was frivolous, costs *shall be* awarded as provided by MCL 600.2591.” MCR 2.625(A)(2) (emphasis supplied).

For whatever reason, Doe 1 chose not to avail himself of any of these procedures under Michigan law. He did not file a Rule 2.116 motion to dismiss arguing that Cooley failed to state a claim for defamation; he did not file a Rule 2.115 motion to strike or for a more definite statement; and he did not file a Rule 2.114 motion for sanctions arguing that Cooley’s complaint was not “well grounded in fact” or “warranted by existing law,” or that it was “interposed for an[] improper purpose.”

He chose instead only to file an improper “Motion to Quash,” which the circuit court charitably construed as a motion for a protective order under MCR 2.302(C)—yet another procedure available under existing Michigan law. And even for that single discovery motion, the circuit court afforded Doe 1 abounding process. Over the course of *three months* of deliberation on his motion, the circuit court considered 11 briefs, held three hearings, including an in camera review of the Weebly production, issued several interim orders, and even permitted a Washington, D.C. advocacy group (now representing Doe 1 on appeal) to file amicus curiae briefs and present oral argument relating to Doe 1’s discovery motion. (*See* Dkt 7, 14, 15, 17, 18, 27, 29, 30, 35, 43, 45, 48, 52, 55, 57, 58, 60.)

Suffice it to say that existing Michigan law provides ample procedural mechanisms for anonymous Internet defamation defendants to challenge the claims against them. And this case demonstrates that Michigan courts can be counted on to apply that law with care, affording defamation defendants more than adequate process when considering a subpoena seeking identifying information about the defendant. Given these procedures, there is simply no reason to re-write Michigan law to graft, by judicial decree, and retroactively no less, as Doe 1 urges, *Dendrite*'s additional purported protections.

Indeed, that is precisely what the Illinois Court of Appeals recently held in deciding to reject the *Dendrite* test under Illinois law. In *Maxon v Ottawa Publishing Co*, 929 NE2d 666 (Ill App 2010), the court considered a petition for discovery “of identifying information concerning the persons responsible for certain comments posted on Ottawa Publishing’s Web site, which the [plaintiffs] alleged were defamatory.” 929 NE2d at 669. The publisher, like Doe 1 here, argued that the court should adopt *Dendrite* due to a purported “growing trend in other jurisdictions . . . [to] take extra steps to protect the anonymity of internet posters.” *Id.*

The court rejected that argument, refused to graft *Dendrite* onto Illinois law, and reversed the trial court’s denial of the petition for discovery of the anonymous Internet posters. *Id.* at 675-76. The court was particularly critical of *Dendrite*’s requirement that a defamation plaintiff must first produce evidence of each and every element of its claims to seek discovery in support of them. *Id.* at 671. The court held that a defamation plaintiff should not have to “withstand a hypothetical motion for summary judgment as if brought by one of the potential defendants.” *Id.* *Dendrite*’s “hypothetical summary judgment test” was inconsistent with Illinois’ court rules and contrary to defamation plaintiffs’ “urgent need to identify a potential defendant so that all injured parties may have redress for injuries suffered[.]” *Id.* at 672. The court noted that “trial courts in Illinois possess sufficient tools and discretion to protect any anonymous individual from any

improper inquiry into his or her identity.” *Id.* at 673. Those procedures included the fact that complaints in Illinois must be verified, that Illinois requires fact pleading setting forth defamation with specificity, and that Illinois had a court rule permitting a defendant to file a motion to dismiss a defamation claim that did not state a claim for relief. *Id.* The court “[found] that the requirements articulated in *Dendrite* and *Cahill* add nothing to the protections provided by” existing Illinois law. *Id.* at 675. The court held that the plaintiffs had stated a claim for defamation against the anonymous internet commenters, and reversed the lower court’s denial of the plaintiffs’ petition for discovery of their identities. *Id.*; *see also Stone v Paddock Publications, Inc*, 961 NE2d 380 (Ill App 2011).

This Court should follow the Illinois Court of Appeals’ approach in *Maxon*. Like courts in Illinois, courts in Michigan “possess sufficient tools and discretion to protect any anonymous individual from any improper inquiry into his or her identity.” *Maxon* at 673. “*Dendrite* and *Cahill* add nothing” to those protections other than a “hypothetical summary judgment test” that is flatly inconsistent with Michigan law and an unprincipled “balance of the equities” test that practically requires judges to decide a sometimes-case-dispositive issue based on nothing more than who they think should win. The Court should reject *Dendrite*.

Doe 1 argues that *Maxon* is distinguishable because Illinois, unlike Michigan, is a fact pleading state that requires “specification of the defamatory words,” and requires a verified complaint. (Appellant’s Br. at 18.) But Michigan, too, under its heightened pleading standard for defamation claims, requires that a defamation plaintiff plead “the particular defamatory words complained of,” among other heightened requirements. And although Michigan does not require verified complaints, its court rules, as detailed above, contain additional certification provisions to ensure that claims are factually and legally supported, including the provision that a party or attorney’s signature on a complaint “constitutes a certification” that the complaint “is

well grounded in fact and is warranted by existing law” and “not interposed for any improper purpose.” MCR 2.114(D)(2)-(3). The Illinois Court of Appeals rejected *Dendrite* under state law and court rules materially analogous to Michigan’s, and *Maxon* is therefore materially indistinguishable.

Other courts have likewise permitted discovery of an anonymous Internet defamer’s identity without requiring *Dendrite*’s “hypothetical summary judgment” or “balance of the equities” tests. A Virginia court, for example, denied a motion to quash and permitted discovery on a subpoena for the identity of an alleged internet defamer. *See In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va Cir 26, 37 (2000) *reversed on other grounds by America Online, Inc v Anonymous Publicly Traded Co*, 261 Va 350 (2001). The Court held that, because the plaintiff had stated a defamation claim under the jurisdiction’s notice pleading standards, had “a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed,” and “the subpoenaed information [was] centrally needed to advance that claim,” the plaintiff was entitled to the discovery. *Id.*; *see also In re Anonymous Online Speakers*, 611 F3d 653, 661 (9th Cir 2010), *on rehearing*, 661 F3d 1168 (2011); *Arista Records v Doe 3*, 604 F3d 110 (2d Cir 2010); *Columbia Ins Co v Seescandy.com*, 185 FRD 573 (ND Cal 1999).

Doe 1 is therefore flat wrong when he repeatedly tells the Court here that the *Dendrite* test has “been adopted by all the appellate courts that have addressed the issue,” and when he tells the Court here that courts have been “unanimous” in adopting *Dendrite*. (Appellant’s Br. at 16; *see also id.* at 10; urging this Court to “apply the same standards as every other appellate court that has decided the issue” [emphasis and all-caps omitted]; *id.*, “every appellate court that has addressed the question” has applied some variation of *Dendrite*; *id.* at 20-20, referring to *Dendrite*’s purported “unanimous progeny.”) The Illinois Court of Appeals *expressly rejected*

Dendrite, and several other courts, identified above, have permitted discovery of an anonymous Internet defamer’s identity without adopting *Dendrite*’s “hypothetical summary judgment” or “balance of the equities” tests.

This Court should likewise reject *Dendrite* and reject Doe 1’s request to apply it retroactively in this case.

B. The Circuit Court Did Not Abuse Its Discretion in Determining that Cooley Would Have Met *Dendrite* if It Were the Law In Michigan

Following Doe 1 down another level into his hypothetical world where *Dendrite* was the law in Michigan when the circuit court denied his motion to quash, the circuit court did not abuse its discretion in holding, in the hypothetical alternative, *that Cooley in fact met each and every element of Dendrite*. The circuit court, though properly noting that *Dendrite* is “not the law,” nonetheless considered Doe 1’s *Dendrite* argument and rejected it because Cooley would meet *Dendrite* even if it were the law.

1. Doe 1 had adequate notice of the subpoena.

With respect to *Dendrite*’s first factor, notice, the circuit court properly determined that Doe 1 had adequate notice of the subpoena. Indeed, Doe 1 had notice of a subpoena to Weebly no later than August 3, 2011 (*see* Dkt 14, Ex. 2, 8/3/2011 Hermann email), filed a motion to quash the subpoena on August 9, and then received three months of process in the circuit court before the court denied his motion, including full briefing through counsel, three hearings, and a Washington D.C. advocacy group arguing on his behalf. Doe 1 had notice of the subpoena.

2. Cooley pled claims for defamation and tortious interference against Doe 1.

With respect to the second and third *Dendrite* factors, which require a plaintiff to allege the defamatory speech with specificity and plead a claim that could survive a hypothetical motion to dismiss, as discussed in detail *supra* Section II(C)(2)(a), Cooley pled claims for

defamation per se and tortious interference against Doe 1 and set them forth with specificity in the complaint. The circuit court did not err in determining, after “review[ing] the complaint,” and the entire blog attached to the complaint, that the alleged “[s]tatements on their surface appear to be per se either slanderous or libel statements[.]” (Dkt 58, Transcript of Proceedings of In Camera Review Hearing at p. 6.) The court noted that Doe 1 accused Cooley of “criminal” conduct and “more importantly accuses Cooley of committing fraud.” (*Id.*) The court concluded that “as set forth in the complaint,” those allegations “would rise to the level . . . based on the pleadings of per se slander or libel.” (*Id.*) Cooley satisfied the second and third elements of the *Dendrite* test. *See Dendrite*, 775 A2d at 760-61.

3. Cooley presented evidence supporting its defamation claims.

Doe 1 argues that “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.” (Appellant’s Br. at 5.) Doe 1 is wrong.

First, Cooley did not “cho[o]se not to provide any evidence” supporting its claims—existing Michigan law undisputedly did not require Cooley to produce such evidence with no motion for summary disposition (or even a motion to dismiss) pending. Second, at any rate, Cooley *did* produce evidence supporting its claims. Cooley attached the entire defamatory blog as Exhibit B to the Complaint—likely the *central* piece of evidence supporting Cooley’s claims. Cooley also attached as Exhibit A to the Complaint a sworn affidavit by Cooley’s general counsel and associate dean for legal affairs stating that Doe 1 “had posted defamatory statements concerning Cooley” on his blog. (*See* Dkt 4, Compl. Ex. A, Affidavit of James B. Thelen.)²² It is simply not true that Cooley did not “provide any evidence supporting the allegations in its

²² The primary purpose of this affidavit was to detail Cooley’s efforts to identify the Doe defendants, in compliance with MCR 2.201(D).

complaint.” (Appellant’s Br. at 5.) This evidence—Doe 1’s defamatory statements plus an affidavit swearing they are defamatory—would satisfy *Dendrite*’s fourth factor of presenting prima facie evidence of defamation.

Moreover, going down yet another level into Doe 1’s hypothetical *Dendrite* world, Doe 1 himself concedes that the most he can hope for, if *Dendrite* were to apply retroactively to this case, and if the evidence Cooley presented were not already enough to satisfy *Dendrite*, is a remand for Cooley to submit additional affidavits attesting to the falsity of Doe 1’s statements. (See Appellant’s Br. at 38.) Were Cooley to do so on remand, it would then be entitled to file a complaint naming Doe 1, even under *Dendrite* and even assuming Cooley has not met *Dendrite* already.

4. The “balance of the equities” favors permitting Cooley to proceed with its valid claims against Doe 1.

Finally, the “balance of the equities” favors Cooley. According to the *Dendrite* court, this factor requires courts to “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.” *Dendrite*, 775 A2d at 760-61. As detailed above, that “balancing test” provides absolutely no principled standards—the degree of a First Amendment right, to the extent it exists at all, does not vary case to case, nor does the “strength of a prima facie case,” which is “prima facie” by definition in every case. That leaves only “the necessity of the disclosure of the anonymous defendant’s identity to allow [Cooley] to properly proceed.” *Id.* And that factor weighs heavily in Cooley’s favor—refusing to allow Cooley to use the Weebly information to file an amended complaint naming Doe 1 by his true legal identity would place a severe impediment to Cooley’s ability to proceed against him. The balance of the equities therefore favors Cooley.

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on August 29, 2012, I electronically filed the foregoing document with the Clerk of Court using the Odyssey ECF system, which will send notice of the filing to all attorneys of record.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Paul D. Hudson

Michael P. Coakley (P34578)

Paul D. Hudson (P69844)

150 West Jefferson, Suite 2500

Detroit, MI 48226

(313) 963-6420

coakley@millercanfield.com

hudson@millercanfield.com

Attorneys for Plaintiff/Appellant

20,357,599.5\018763-00020

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

RECEIVED by Michigan Court of Appeals 8/29/2012 4:29:23 PM