STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,
a Michigan nonprofit corporation,

Plaintiff,

Case No. 11-781-CZ

vs.

Hon. Clinton Canady III

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

Defendants.

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THOMAS M. COOLEY LAW SCHOOL'S RESPONSE TO AMICUS CURIAE PUBLIC CITIZEN'S MEMORANDUM REGARDING DEFENDANT JOHN DOE 1'S MOTION TO QUASH

INTRODUCTION

Amicus curiae Public Citizen, Inc. asks this Court to do what neither the Michigan legislature nor any Michigan appellate court has done: create an exception to Michigan's liberal and open discovery rules by denying Thomas M. Cooley Law School's right to discover information about a common tortfeasor who defamed Cooley with anonymous online commercial speech.

There is no First Amendment right to defame. More specifically, there is no right for a defamation defendant to keep his identity hidden from the public while he defends a defamation suit against him. That is true even where the tortfeasor argues that the claims against him are meritless. As one court noted in rejecting the heightened standards Public Citizen seeks to impose here, "requiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet." *McMann v Doe*, 460 F Supp 2d 259 (D Mass 2006). This Court should not require a practical trial on the merits by erecting a wall around discovery, which Public Citizen argues for here, that Cooley would have to scale before engaging in simple discovery permitted by the court rules.

Most of Public Citizen's arguments are a rehash of arguments Defendant John Doe 1 raised in his Motion to Quash. Cooley fully responded to those arguments in its September 2, 2011 response brief and incorporates those arguments here. Cooley submits this brief, however, to further aid the Court in its consideration of Public Citizen's amicus brief.

ARGUMENT

I. THE COURT SHOULD DENY THE MOTION TO QUASH THE SUBPOENA BECAUSE DEFENDANT'S DEFAMATORY COMMENTS ARE ENTITLED TO NO FIRST AMENDMENT PROTECTION

A. Cooley's Subpoena Was Proper Under Michigan Discovery Rules

As discussed in Cooley's September 2, 2011 Brief in Opposition to Defendant's Motion to Quash, Defendant's motion to quash the Weebly subpoena fails on the merits. "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). MCR 2.302(B)(1) provides that "[p]arties may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action." MCR 2.302(B)(1) (emphasis added).

Unlike the foreign tests Public Citizen seeks to impose based on non-binding, unpersuasive case law from other states, Michigan courts have interpreted MCR 2.302(B) as requiring that discoverable material simply be relevant and not privileged. *Eyde v Eyde*, 172 Mich App 49, 55, 431 NW2d 459 (1988) ("There is no requirement that there be good cause for discovery of relevant and nonprivileged documents.") However, when a party moves to prevent discovery against Michigan's "open, broad discovery policy," the moving party bears the burden of proving "good cause" for the order. *See* MCR 2.302(C); MCR 2.305(A)(4); *Szpak v Inyang*, __NW2d__, 2010 WL 4751765 at *1 (Mich App 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 facts and circumstances of a controversy, *rather than aid in their concealment*." *Id.* (quoting *Domako v Rowe*, 438 Mich 347, 360 (1991); emphasis added). There is no exception to this policy for defamation proceedings generally, *Howe v*

Detroit Free Press, Inc, 440 Mich 203, 287 NW2d 347 (1992) (waiving statutory privilege for probation records, and allowing discovery of the records relating to the defamation action), and no case law supporting Public Citizen's claim for an exception for anonymous defamation online.

Instead of relying on the Michigan Court Rules, Public Citizen cites standards from foreign courts that it believes Michigan courts should adopt. Like Defendant, Public Citizen fails to cite any Michigan authority that would prevent Cooley from discovering the identity of the internet defamers in this case. Thus, under relevant Michigan authority, a party may seek the identity of internet defamers pursuant to subpoenas, where, as here, the identity is "relevant to the subject matter involved in the pending action." MCR 2.302(B)(1).

Cooley meets that standard. Cooley alleged in the Complaint that Defendant John Doe 1 posted false and defamatory statements about Cooley in an internet blog post. (*See* Compl. ¶¶16-17). The fact of the blog post is not in dispute. Based on the blog post, Cooley brought claims against Defendant John Doe 1 for defamation and tortious interference with Cooley's business relations. Cooley's subpoena only seeks the identity of the Defendant and other information about his and other posters on his blog's defamation of Cooley, which in a claim of defamation or tortious interference goes to the heart of the matter. *See* MRE 401 (relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Cooley's subpoena seeking identifying information relating to Defendant John Doe 1 is therefore proper under the Michigan Court Rules.

As Cooley noted in its Brief in Opposition to Defendant's Motion to Quash, other courts agree that relevance of an anonymous defendant's identity is a sufficient basis for allowing discovery. *In re Subpoena Duces Tecum to America Online*, 52 Va Cir 26, 2000 WL 1210372

(Va Cir Ct, Jan 31, 2000), *rev'd on other grounds in AOL v Anonymous Publicly Traded Co*, 542 SE2d 377 (Va 2001). Public Citizen does not contest that *America Online* supports the position that the relevance of Defendant's identity is a sufficient basis for allowing discovery. Public Citizen notes, however, that, similar to this case, the court in *America Online* was forced to consider a foreign jurisdiction's judgment regarding the sufficiency of a subpoena. In a similar manner, this Court considers the sufficiency of a subpoena that has been properly filed and served in California Superior Court.

Any constitutional provision for anonymous speech does not extend to the speech at issue here. As with imminent threats, fighting words, and obscenity, the First Amendment does not protect defamation. *Chaplinsky v State of New Hampshire*, 315 US 568, 571 (1942); *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002). The internet does not accord defamatory speech any special treatment merely because it was published online. The Supreme Court has found no basis for granting speech on the internet either diminished or heightened protection. *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. *Krinsky*, 159 Cal App 4th at 1164. Defamation is defamation, on the internet or not.

Accordingly, Defendant's defamatory statements are not protected by the First Amendment. In a false and futile attempt to sidestep Cooley's valid statement of its claim for defamation, Defendant asserts that Cooley's argument "begs the question" because no determination has been made that the accused statements are defamatory. This argument is an attempt to shift the moving burden to Cooley—requiring Cooley to prove the falsity and intent of Defendant's statements just to engage in the relevant discovery it is entitled to under Michigan court rules and law. If every defamation plaintiff were required to prove his case in order to

know his defamer's identity, the simple act of creating a blog with a screen name would afford Defendant a heightened protection that no other form of speech enjoys. This cannot be – and clearly is not – the law.

Moreover, Doe 1's statements attacking Cooley are commercial speech. Traditionally, commercial speech has been afforded limited First Amendment protection. *Bd of Trustees of SUNY v Fox*, 492 US 469, 477 (1989). Commercial speech is not afforded the same protection as core political speech. *See id.*; *see also Meyer v Grant*, 486 US 414, 422, 425 (1988). Here, Defendant attacked Cooley as a "business" (his characterization). The express motivation of Defendant's defamatory statements was to dissuade prospective students from attending Cooley. The commercial aspect of Defendant's defamatory statements means that little, if any, constitutional protection should be accorded to Defendant's statements.

Other jurisdictions have denied motions to quash subpoenas in cases involving similarly defamatory, commercial speech. *See Alvis Coatings, Inc v John Does 1 – 10*, No. 3L94 CV 374-H, 2004 WL 2904405, (WDNC, Dec 2, 2004). In *Alvis Coatings v Does*, a federal district court considered a motion to quash a subpoena seeking the identity of an anonymous defendant accused of defaming the plaintiff corporation on various websites. *Id.* The defamatory statements called plaintiff, a corporation engaged in marketing commercial and residential coating products, a "criminal" and stated that plaintiff's products were nothing more than common paint. The court denied the motion to quash because it found that defendant's statements were both defamatory and commercial speech, thus not protected by the First-Amendment. *Id.* at *3-4.

Like the Defendant in *Alvis Coatings*, Doe has called Cooley a "criminal," and Doe's statements are simultaneously defamatory and commercial speech. Therefore, like the court in *Alvis Coatings*, the Court should deny Defendant's motion.

Because Cooley has satisfied the Michigan Court Rules' pleading and discovery requirements, this Court should deny Defendant's Motion to Quash, permit Cooley to use the Weebly information, and permit Cooley further discovery under the Court Rules.

B. Cooley Meets the Standards Adopted By Other Courts Regarding Motions to Quash Subpoenas Seeking the Identities of Anonymous Internet Defamers

Nonetheless, Public Citizen asks the Court for special protection from Cooley's validly issued subpoena. Without mentioning the Michigan Court Rules for discovery, Public Citizen, an advocacy group based in Washington, D.C., has beckoned this Court to adopt the standards used in *Dendrite v Doe*, 775 A2d 756 (NJ App 2001), and *Doe v Cahill*, 884 A2d 451 (Del 2005).[1]

The *Dendrite* court required a plaintiff to (1) provide notice of the subpoena to the Doe defendants; (2) specifically identify the defamatory or actionable statements made by the defendant; (3) set forth a prima facie cause of action against the anonymous defendant; and (4) demonstrate that the need for disclosure outweighs the defendant's First Amendment right of anonymous speech. *Dendrite*, 775 A2d at 141-42. The *Cahill* court required a plaintiff seeking the identity of an anonymous internet user to plead a prima facie case capable of surviving summary judgment, but rejected *Dendrite*'s balancing test. *Cahill*, 884 A2d 451.

1. Other Courts Have Criticized and Limited *Dendrite* and *Cahill*

Courts have criticized the standards of both *Dendrite* and *Cahill*. *See In re Anonymous Online Speakers*, __F3d__, 2011 WL 61635 at *4, *6 (9th Cir 2011); *McMann v Doe*, 460 F Supp 2d 259, 267 (D Mass 2006); *see also Krinsky v Doe*, 159 Cal App 4th 1154, 1170 (2008)

[1] There is a spectrum of standards outside of Michigan for revealing anonymous defendants for defamatory internet postings. *SaleHoo Group, Ltd v AMC Co*, 722 F Supp 2d 1210, 1216 (WD Wash 2010). *Cahill* and *Dendrite* are two of the strictest standards. *McMann v Doe*, 460 F Supp 2d 259, 266 (D Mass 2006). Other courts have found that a good faith basis for claims was sufficient to reveal anonymous defendants. *See id.*

(Court in which the subpoena at issue in this case was properly filed found "it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet.")

At the same time, courts that have embraced the standards from *Dendrite* and *Cahill* have applied them narrowly. Most notably the New Jersey Appellate Court, the jurisdiction that first decided *Dendrite*, has rejected expanding the application of *Dendrite* to facts such as those in the present case. *Too Much Media, LLC v Hale*, 413 NJ Super 135, 163, 993 A2d 845 (NJ App 2010). In *Too Much Media v Hale*, the New Jersey Appellate court firmly stated that *Dendrite* narrowly applies to discovery of anonymous users of internet service providers (ISPs). *Too Much Media*, 413 NJ Super at 140, 775 A2d 756 ("First, we limited our decision to 'standards to be applied by courts in evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards.' Plaintiffs here are not seeking discovery from an ISP, and defendant is not an ISP. Dendrite's protections have never been extended beyond ISPs."). The *Too Much Media* court refused to apply *Dendrite* for a defendant, who operated a website and blog which published defamatory content, relying on the fact that *Dendrite*'s holding was narrowly applied to internet service providers, not simply websites. *See id.* Weebly is not an ISP, providing Defendant with his only connection to the World Wide Web; it is a website similar to that in *Too Much Media*, providing only a weblog, which Defendant uses to defame Cooley. As the court did in *Too Much Media*, this Court should refuse to expand the application of *Dendrite*.

Cahill's application is also limited. *See In re Anonymous Online Speakers*, __F3d__, 2011 WL 61635 at *4, *6 (9th Cir 2011). While deciding the issue of revealing anonymous online defamers, the Court of Appeals for the Ninth Circuit reasoned the case did not involve

"political speech," which was at issue in *Cahill*. Instead, *Anonymous Online Speakers* involved an online smear campaign disparaging a company and its business practices through anonymous postings and video much like Defendant's defamatory smear campaign here. *Id.* at *1. The court stated that this speech was commercial speech and afforded less protection than the political speech at issue in *Cahill*. *Id.* at *6 (citing *Central Hudson Gas & Electric Cop v Public Serv Comm'n of NY*, 447 US 557, 564, 100 SCt 2343 (1980)). But applying the highly deferential "clear error" standard of review, the Court of Appeals did not disturb the district court's decision not to reveal the posters' identities. *In re Anonymous Online Speakers*, 2011 WL 61635 at *6. Here, this Court is not reviewing another court's errors; it does not have to defer to another court's erroneous decision. Instead, this Court should apply the reasoning that the court in *Anonymous Online Speakers* recognized but had no opportunity to apply: the First Amendment does not protect defamatory commercial speech.

Applying the logic of *In re Anonymous Online Speakers*, neither *Cahill* nor *Dendrite* would offer added protection to Defendant's defamatory remarks. Defendant here engaged in a defamatory smear campaign just like the defendant's in *Anonymous Online Speakers*. Public Citizen's failed attempt to liken defendant's blog to the core political speech of the Federalist Papers is unpersuasive. Defendant's statements are commercial speech, pure and simple. Although Cooley is a school rather than a business and provides legal education rather than products, Doe 1 referred to Cooley as a *business*, and he attacked Cooley as a business. (Pltf.'s First Am Compl. Ex. B.) As commercial speech, Defendant's defamation does not fall within the narrowly construed exceptions to the liberal open discovery crafted by the Michigan Supreme Court in the Michigan Court Rules and common law. Defendant is not entitled to the same protection afforded political speakers by the *Cahill* and *Dendrite* courts.

2. Cooley Has Satisfied the Requirements of Amicus' Proposed Standards

And yet, even were the Court to adopt the standards recommended by Public Citizen, Cooley would satisfy them.

i. Defendant Received Actual Notice of the Subpoena

First, Defendant received actual notice of the subpoena. Amicus argues that pursuant to the inapplicable *Dendrite*, Cooley did not provide sufficient notice to John Doe #1. Amicus contends that Cooley was required to post messages on Rockstar05's blog in order to sufficiently effectuate notice. (Amicus Br. at 18.) But Defendant's counsel was already aware of the subpoena as of August 3, 2011, fourteen days before Weebly produced information in response to the subpoena. (Def.'s Supp. Br., Ex. 2.) Defendant had ample opportunity to respond to the subpoena in the proper forum, or to contact Weebly, which he apparently did as early as August 3, 2011. (*Id.*) Amicus' spurious claims of Cooley supposedly "hiding the ball" and not giving notice are simply wrong. In fact, Doe 1 had actual, effective notice, and Doe 1 acted upon that notice.

ii. Cooley Pled Actionable Words and Provided Necessary Context

Public Citizen acknowledges that Cooley has pled actionable words. (Amicus Br. at 19.) Public Citizen erroneously contends, however, that Cooley did not satisfy the inapplicable *Dendrite*'s "actionable words" requirement by not providing the context for the words. But Cooley attached copies of Defendant's blog with its original Complaint, providing the actionable words in their original context. (Pltf.'s Compl. Ex. B.) Public Citizen's argument on this point is wrong.

iii. Cooley's Complaint Satisfies Dendrite's Pleading Requirements

As demonstrated in Cooley's Brief in Opposition to Defendant's Motion to Quash, Cooley has stated a prima facie case for both defamation and tortious interference. (Pltf.'s Br. in

Opposition at 13, 15.) Public Citizen, however, seeks to impose a standard for pleading and access to discovery based on a false premise—that Cooley is a public figure, and as such must meet a nearly impossible burden at the pleading stage: not just plead, but *prove*, actual malice, based on the state of mind of an anonymous speaker. It is a Catch-22: Cooley must know the state of mind of a specific speaker and prove it before Cooley can discover the identity of the speaker. This would allow Defendant to have it both ways: he remains anonymous because Cooley cannot prove he acted with actual malice, and Cooley cannot prove that he acted with malice (according to Public Citizen's standard) because Defendant remains anonymous. Public Citizen implicitly recognizes the quandary, noting that "actual malice is usually not an element that a public figure can be expected to establish" against an unknown defendant at the pleading stage. (Amicus Br. at 26.)

iv. Cooley Decidedly is No Public Figure

The United States Supreme Court has recognized two types of public figures: a general-purpose public figure and a limited-purpose public figure. *Gertz v Robert Welch, Inc*, 418 US 323, 351, 94 SCt 2997 (1974). The general-purpose public figure is one who has achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* The limited-purpose public figure is an individual who, by voluntarily injecting himself into a particular public controversy, becomes a public figure for a limited range of issues. *Id.*

Although Public Citizen erroneously asserts that Cooley is "unquestionably a public figure," it did not even bother to say whether it believes Cooley is a general-purpose or limited-

purpose public figure. While Public Citizen cites cases that discuss "matters of public concern"[2] and general public figures, Public Citizen cannot seriously contend that Cooley's alleged fame and notoriety is so pervasive as to make it a public figure for all purposes and contexts. Cooley is not widely known to anyone outside of legal education, and more generally, there is not even a showing that Cooley is pervasively known even within the legal profession.

Although Public Citizen has not alleged Cooley to be a limited-purpose public figure, such a finding is not merited here. Ultimately, determining whether a plaintiff is a public figure is, in most cases, a fact-specific inquiry, requiring an examination of the particular circumstances that gave rise to the alleged defamation. *Gertz*, 418 U.S. at 352. "Media attention does not alone transform a private controversy into a public one." *Bowman v Heller*, 420 Mass 517, 651 NE2d 369, 374 (1995); *see also Wilson v Scrips-Howard Broadcasting Co*, 642 F2d 371, 374 (6th Cir 1981). And importantly a plaintiff's response to a defendant's defamatory statements does not qualify as a thrust into public controversy. *Grass v News Group Pub, Inc*, 570 FSupp 178, 182–83 (SDNY 1983).

Courts have repeatedly declined to find public figure status for educational plaintiffs similar to Cooley. *Commercial Programming Unlimited v Columbia Broadcasting Systems, Inc,* 375 NYS 2d 986 (NY Sup 1975) (concluding that plaintiffs, the largest computer vocational school in the nation and its owner, were not public figures because plaintiffs were not generally renowned); *Ramirez v Rogers*, 540 A2d 475 (Me 1988) (gymnastic school was not a limited-purpose public figure despite showcasing its student on a national talent-search television show).

[2] *Royal Palace Homes v Channel 7 of Detroit*, 197 Mich App 48, 52-53, 495 NW2d 392, 394 (1992); *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 274, 487 NW2d 205 (1992) (concurring opinion); *Gonyea v. Motor Parts Federal Credit Union*, 192 Mich. App. 74, 76-77, 480 N.W.2d 297, 299 (1991) (not discussing "public figures," only discussing the degree of fault that must be pled; stating the degree of fault is negligence in Michigan)

In this case, Cooley has not voluntarily injected itself into a public controversy. Doe, though using a website, is not a media defendant. And the issue—whether Cooley is a "criminal" who defrauds its students—does not rise to the level of public controversy under applicable case law. There is no controversy, and Doe's defamatory statements have not made it one. Considering these factors, the Court should find Cooley is not a public figure, either general or limited-purpose.

That said, ultimately, Public Citizen's argument that Cooley is a public figure is a smoke-screen. If Cooley were a public figure, limited-purpose or otherwise, as Public Citizen argues, the *Dendrite* and *Cahill* standards would require Cooley to plead actual malice on the part of the unknown defendant. Public Citizen recognizes that this is counter-intuitive, arguing that "actual malice is usually not an element that a public figure can be expected to establish" against an unknown defendant. (Amicus Br. at 26.) Thus, Public Citizen simultaneously asks this Court to adopt *Dendrite* and stray from its framework in the present case. It is quickly obvious that, in this respect, *Dendrite* and *Cahill* offer no sound standard whatsoever.

Other jurisdictions have criticized the *Cahill* and *Dendrite* standards for exactly these reasons. *McMann v Doe*, 460 F Supp 2d 259 (D Mass 2006) (rejecting *Cahill* and *Dendrite* requirement that defendants show actual malice or plead facts to survive a hypothetical motion for summary judgment). In *McMann v Doe*, a federal district court acknowledged that some standard was necessary to reveal anonymous defendants, but found the standards in *Cahill* and *Dendrite* counterintuitive. "[R]equiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet." *McMann*, 260 F Supp 2d at 267. Attempting to make sense of these standards, the court in *McMann* decided not to reveal the anonymous defendant, but only

because the plaintiff there had failed to state a claim. *Id.* At 268. Here, Cooley has stated two valid claims.

In addition to a prima facie showing, Public Citizen seeks to have the Court rule on whether Defendant's defamatory statements are "hyperbolic opinion" while simultaneously admitting that Defendant's defamation includes a mixture of opinion and fact. (Amicus Br. at 20.) Cooley has sufficiently pled those facts, including the defamatory words themselves, from which Doe 1's intent can be readily inferred. This Court should not practically require a trial on the merits in order to engage in simple discovery.

iv. The Balance of Interests Tilts In Favor of Sustaining the Subpoena

Finally, Cooley meets *Dendrite*'s balancing test, because Defendant has no recognized interest in anonymity. Public Citizen's only argument for Defendant's continued demand for remaining anonymous is his unwarranted fear of out-of-court action on the part of Cooley and the broader legal community. Although Public Citizen's fears of out-of-court retaliation are unjustified, in reality, they will be unaffected by this Court's decision. As Public Citizen stated, "once speakers lose anonymity, they can never get it back." (Amicus Br. at 28.) As the Court noted at the hearing on Defendant's motion to quash, the issue of Defendant's identity is moot. Therefore, the balance of interest tilts in Cooley's favor. Cooley meets even the unsupported heightened standards Public Citizen urges on the Court.

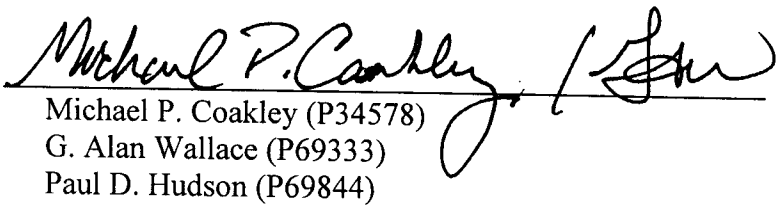
CONCLUSION

After Weebly responded to the subpoena, Defendant no longer had a recognized interested in anonymity. Amicus' supporting brief does not offer any reason to overlook this fact. Even before Weebly's response, Defendant's defamatory commercial speech had no First Amendment protection. Amicus offers no Michigan authority supporting the imposition of a new discovery standard, but, instead, seeks to alter Michigan's discovery policy in order to

protect a type of speech that no jurisdiction has found fit for protection. Cooley, therefore, respectfully requests that the Court award Cooley its costs and attorneys' fees incurred in responding to this supporting brief.

Respectfully submitted,

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

By: 

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