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

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

Defendants.

_____________________________________/

MILLER, CANFIELD, PADDOCK AND STONE, PLC
Michael P. Coakley (P34578)
G. Alan Wallace (P69333)
Paul D. Hudson (P69844)
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
coakley@millercanfield.com
wallace@millercanfield.com
hudson@millercanfield.com
Attorneys for Plaintiff

_____________________________________/

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THOMAS M. COOLEY LAW SCHOOL'S BRIEF IN OPPOSITION
TO DEFENDANT'S MOTION TO QUASH

INTRODUCTION

There is no First Amendment right to defame. The United States Supreme Court has definitively held that defamatory statements are not entitled to any First Amendment protection whatsoever. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (the First Amendment "does not embrace certain categories of speech, including defamation"). That does not change when one logs onto the internet to "speak." Internet speech is afforded the same protections as other speech—no more no less—meaning defamatory internet statements have no First Amendment protection, just the same as any other defamatory statements. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). There is no First Amendment right to defame anonymously on the internet, either.

Here, Defendant John Doe 1, who has been identified [redacted] created an internet weblog under the pseudonym "Rockstar05" in which he posted false and defamatory statements about Plaintiff Thomas M. Cooley Law School. In a rambling post and follow-up comments, he falsely accused Cooley and its representatives of being "criminals" and of committing "fraud," among other false statements. Cooley brought this action to halt Rockstar's defamatory campaign, and then successfully petitioned a California court to issue a subpoena to the weblog host, Weebly, Inc., to discover information about Rockstar's identity. Weebly produced information responsive to the California subpoena, and Cooley then filed a First Amended Complaint on August 29, 2011, namin[redacted]s Defendant John Doe 1, a/k/a "Rockstar05."

After issuance of the California subpoena but before Weebly responded to it, Defendant filed this motion to quash, in which he cloaks himself in the illusory supposed protections of the First Amendment and internet pseudonymity. In seeking to keep his identity hidden, Defendant

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invokes high principles—likening himself to Mark Twain and his blog to the Federalist Papers. Nothing could be further from the truth.

The Court should deny the motion, for several reasons. First, the motion is moot. After Defendant filed the motion, Weebly, acting pursuant to the valid, subsisting California subpoena, produced the subpoenaed information. Simply put, there's nothing left to quash. Moreover, Cooley has filed a First Amended Complaint namin[redacted] as a defendant, and thus his identity is no longer hidden. Second, even if there still were a subpoena to quash, Defendant brings his motion in the wrong court. The subpoena was issued by a California court. Consequently, Defendant could have challenged it only there.

But perhaps most importantly, Defendant is no Mark Twain, and his blog is no Federalist Paper. His blog statements are defamatory, plain and simple, and thus not cloaked with any First Amendment protection. Michigan discovery rules permit liberal discovery of any matters relevant to a claim or defense, and the information requested and obtained by the subpoena—information relating to the identity of the defamer—is indisputably relevant to Cooley's defamation case. Cooley has stated actionable and viable defamation and tortious-interference claims against Defendant. The Court should deny Defendant's motion to quash the subpoena.

FACTS

I. DEFENDANT USED AN INTERNET PSEUDONYM TO DEFAME COOLEY ON AN INTERNET WEBLOG

On February 14, 2011, Defendant [redacted] created an internet weblog titled, "THOMAS M. COOLEY LAW SCHOOL SCAM." (First Am. Compl. ¶ 9.)[1] The blog was hosted by internet weblog host Weebly, Inc., at http://thomas-cooley-law-school-

[1] The original Complaint in this action alleged that Defendant John Doe 1 created the weblog. On August 29, 2011, Cooley filed a First Amended Complaint alleging th[redacted]s John Doe 1. (*See* First Am. Compl. ¶ 2.)

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scam.weebly.com/index.html. (*Id.* ¶¶ 9-10.) [redacted] created the blog under the pseudonym "Rockstar05." (*Id.* ¶ 11.)

On the same date [redacted] under the "Rockstar05" pseudonym, authored a post with the same title as the blog. (*Id.* ¶ 14; the blog post with associated comments is attached to the First Amended Complaint as Exhibit B.) [redacted] also posted several comments to the post in response to other comments made by readers of the blog. (*Id.*)

[redacted] identified himself on the blog as a former Cooley student, and 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.) He stated that his statements were based on his personal knowledge and "research." (*Id.* ¶ 13.)

[redacted] made several false and defamatory statements about Cooley in the blog. Specifically, among other false and defamatory statements in [redacted] blog post and [redacted] comments to the blog post are the false, defamatory, and per se defamatory accusations that Cooley and its representatives are "criminals" and have committed "fraud." (*Id.* ¶ 16.) [redacted] also falsely states that Cooley has deceived and provided false information to Cooley's current and prospective students in order to "lure" them to Cooley or to induce them to remain at Cooley rather than transfer to another school; that Cooley's course add/drop policy "is in effect to make sure it takes you longer and is more difficult to obtain a degree from this poor excuse of a law school"; and that Cooley is the highest tax payer in Lansing and "essentially a multi-million dollar business" that uses its clout to "prey" on current and prospective students, stealing their tuition money to "become more rich." (*Id.*)

[redacted] stated in the post that he made the statements for the purpose of convincing current Cooley students not to apply to and/or enroll at Cooley, and instructed prospective students in the

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post: "DO NOT ATTEND THIS SCHOOL," and "avoid Cooley at all costs" because it "WILL RUIN YOUR LIFE[.]" (First Am. Compl. ¶ 17; First Am. Compl Ex. B.)

II. COOLEY SUBPOENAED THE WEBLOG HOST FOR INFORMATION RELATING TO DEFENDANT, AND THE WEBLOG HOST HAS ALREADY PROVIDED IDENTIFYING INFORMATION

On July 14, 2011, Cooley filed a Complaint against Rockstar05, as 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. On July 15, Cooley petitioned the San Francisco County Superior Court of California to issue a subpoena to the blog host, Weebly, Inc. Weebly, Inc. 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.)

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. (Ex. A; all-caps omitted.) Specifically, the subpoena ordered Weebly, Inc. to produce the documents listed in Exhibit A to the subpoena, 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 have been named as Defendants John Doe 2 and John Doe 3 in this action. (*Id.*)[2]

John Doe 1 retained attorney John Hermann, who entered an appearance in this action on August 5, 2011. On the same date, John Doe 1, through counsel, filed the instant John Doe 1's

[2] Defendant's motion purports to quash the subpoena in its entirety, but Defendant has no standing to challenge the portions of the subpoena relating to the other John Doe defendants.

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Motion to Quash Subpoena. After receiving a copy of Mr. Hermann's appearance on behalf of John Doe 1, on August 10, 2011 Cooley sent Mr. Hermann a copy of the subpoena. (*See* attached Exhibit A, Aug. 10, 2011 Letter enclosing subpoena).[3]

On August 17, 2011, Weebly, unprompted by Cooley, sent an email correspondence to counsel for Cooley attaching information responsive to the subpoena. (*See* attached Exhibit B, Weebly Email.) In the response, Weebly provided identifying information relating to Rockstar05, including email addresses and IP addresses. (Ex. B.)

Cooley sent Weebly's subpoena response to Mr. Hermann on August 18, 2011. (*See* attached Exhibit C.) Cooley informed Mr. Hermann that Defendant's motion to quash was moot given Weebly's response, requested that Defendant 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 any 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* attached Exhibit D.) Mr. Hermann responded on August 26, 2011 and refused to withdraw the motion. (*See* attached Exhibit E.)

On August 29, 2011, Cooley filed its First Amended Complaint namin[redacted] as Defendant John Doe 1, a/k/a "Rockstar05."

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[3] As discussed below, Defendant filed this motion to quash the subpoena without ever having seen the actual subpoena or knowing specifically what information it sought or even the court from which it issued. For these reasons alone, Defendant's motion clearly violates MCR 2.114(D)(2) and merits imposition of an "appropriate sanction" on Defendant and/or his counsel. MCR 2.114(E). Defendant blames Cooley, asserting that Cooley "refused" to provide him with a copy of the subpoena. That is false. Defendant's lawyer entered his appearance in this action concurrently with the filing of the motion to quash. Cooley provided counsel with a copy of the subpoena promptly after receiving a copy of the appearance. (*See* Ex. B.)

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ARGUMENT

I. DEFENDANT'S MOTION TO QUASH THE SUBPOENA IS MOOT BECAUSE WEEBLY, INC. HAS ALREADY PRODUCED INFORMATION RESPONSIVE TO THE CALIFORNIA SUBPOENA AND COOLEY HAS ALREADY NAMED [redacted] AS DEFENDANT JOHN DOE 1 IN ITS FIRST AMENDED COMPLAINT

Defendant's motion is moot. A motion 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").

Here, Defendant's motion seeks to enjoin Weebly from producing information relating to the identity of the creator of the defamatory blog post at issue in this action. Weebly produced that information in response to the California subpoena on August 17, 2011—thus "perform[ing]" "the act that is sought be enjoined." *Kent*, 239 Mich App at 584. Defendant's motion to quash the subpoena therefore is moot. *Id.* There's nothing left to quash.

The fact that Defendant asks for a protective order as alternative relief does not save the motion's mootness. The only protective relief Defendant seeks is for a "protective order preventing Weebly, Inc. from divulging the name, identity, location or other personal information of Defendant JOHN DOE 1[.]" (Motion to Quash at 2-3.) That relief, too, is foreclosed by Weebly's response.

Moreover, Cooley has filed a First Amended Complaint naming [redacted] Defendant John Doe 1, a/k/a "Rockstar05." [redacted] tity is therefore no longer hidden, and consequently [redacted] cannot obtain the only relief he seeks—keeping his identity hidden. Respectfully, the Court should deny the motion as moot.

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II. DEFENDANT MAY NOT SEEK TO QUASH THE SUBPOENA IN THIS COURT

Even if Defendant's motion were not moot, it would nonetheless be improper. Defendant apparently filed this motion to quash a California subpoena without ever having seen the subpoena. (*See* Motion at 2 n.1) (noting that he did not have a copy of the subpoena before he filed his motion). He apparently did not know that the subpoena was issued by a California court. (*See id.*) And he apparently filed a motion to quash the subpoena without even knowing precisely what information the subpoena sought. (*Id.*)[4]

The subpoena he seeks to quash was issued by the San Francisco County Superior Court of California on behalf of "the People of the State of California." (Ex. A; 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") (attached as Exhibit F).

Indeed, 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

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[4] Defendant blames Cooley, asserting that Cooley "refused" to provide his lawyer with a copy of the subpoena. That is false. Defendant's lawyer entered his appearance in this action concurrently with the filing of this motion to quash. Cooley sent John Doe 1's lawyer a copy of the subpoena promptly after receiving his appearance in this action. (*See* Ex. _, P. Hudson Letter enclosing subpoena.) But by rushing to court to file his motion before he had learned of the material facts of the California subpoena, Defendant and/or his counsel violated MCR 2.114(D)(2).

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of Columbia court. *Fischer Brewing Co., Inc. v. Flax*, 740 N.E.2d 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.*

Moreover, despite asking for an order "prohibiting Weebly from revealing the name, identity, or location of" him, Defendant does not provide any factual basis for this Court's asserting jurisdiction over Weebly. On information and belief, Weebly is a Delaware corporation with its principal place of business in California, and Defendant has not identified any contacts with Michigan that would render the company subject to this Court's jurisdiction.

It appears that the reason Defendant filed his motion in this Court is to attempt to get two chances to quash the subpoena. Defendant has conceded as much, indicating that he intends to file a similar motion to quash the Weebly subpoena in California Superior Court. (*See* Exhibit E, J. Hermann Letter.) In essence, then, Defendant is looking for two shots at quashing the subpoena, first here and then in California. This Court should reject that improper attempt.

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III. 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 the Michigan Discovery Rules

Even if Defendant's motion were not moot, and even if a challenge in this Court were proper, Defendant's motion to quash the Weebly subpoena would fail 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). Specifically, 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).

When against that "open, broad discovery policy" a party moves to prevent discovery, 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, *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 the facts and circumstances of a controversy, rather than aid in their concealment." *Id.* (quoting *Domako v. Rowe*, 438 Mich 347, 360 (1991)).

The Michigan courts have not altered that framework in defamation cases seeking the identity of anonymous internet defamers. Indeed, Defendant 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. Thus, in Michigan, parties may seek the identity of alleged internet defamers pursuant to discovery subpoenas if 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.) Cooley brought claims against Defendant John Doe 1 for defamation and tortious interference with Cooley's business relations. (*See* Compl. Counts I-II.) The "subject matter involved in the pending action," therefore, is Defendant John Doe 1's defamatory statements about Cooley. Cooley's subpoena seeking identifying information relating to the defamatory speaker is undoubtedly relevant to that subject matter; indeed, the identity of the defamer goes right to the heart of the defamation claim. *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

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evidence"). Cooley's subpoena seeking identifying information relating to Defendant John Doe 1 is therefore proper under the Michigan Court Rules.

Other courts agree with that framework. 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.*

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 expressly *excluded* defamatory statements 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 U.S. 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 U.S. 234, 245-46 (2002); *see Beauharnais v. People of State of Illinois*, 343 U.S. 250, 266 (1952).

That does not change when one opens up a web browser. "Speech 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 U.S. 844, 870 (1997). Thus, "[w]hen vigorous criticism descends into defamation . . . constitutional protection is no

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longer available"—even when done anonymously on the internet. *Krinksy*, 159 Cal. App. 4th at 1164.

The First Amendment, in other words, offers no protection whatsoever to defamatory statements or the internet defamers who make them. Thus, it makes good sense that the Michigan discovery rules and caselaw likewise do not provide special protection, and instead permit liberal discovery seeking the identity of the alleged defamer.

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

Defendant nonetheless asks the Court for special protection from Cooley's validly issued subpoena. Citing *Columbia Ins Co v Seescandy.com*, 185 FRD 573, 578 (ND Cal 1999) and *Dendrite Int'l, Inc v. John Doe No. 3*, 775 A2d 756 (NJ Super App Div 2001), Defendant argues that "[t]he court should require the Plaintiff to demonstrate legitimate claims against John Doe 1so [sic] that it can balance Plaintiffs [sic] need for the requested information with Defendant's First Amendment right." (Br. at 7.)

The *Seescandy* court required a plaintiff seeking the identity of an anonymous internet user to (1) identify the individual with "sufficient specificity" to allow the federal court to determine whether diversity-of-citizenship jurisdictional requirements had been met; (2) describe previous steps to identify the anonymous defendant; (3) establish that the plaintiff's claims could survive a motion to dismiss; and (4) file a discovery request with the court with a statement of reasons justifying the request. *Seescandy*, 185 FRD at 580. The *Dendrite* court required a plaintiff (1) to provide notice of the subpoena to the Doe defendants; (2) require the plaintiff to 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

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for disclosure outweighs the defendant's First Amendment right of anonymous speech. *Dendrite*, 775 A2d at 141-42.

Courts have sharply criticized the *Seescandy* and *Dendrite* tests. Specifically, courts have noted that the first requirement of the *Seescandy* test is irrelevant in state-court cases where, as here, diversity of citizenship is not an issue. *See Krinsky v Doe*, 159 Cal App 4th 1154, 1170 (2008). Courts have further noted that the *Seescandy* notice requirement "benefits no one" where, as here, the anonymous defendant challenges the subpoena; "[o]bviously [the anonymous defendant] has already learned of the subpoena or he would not be seeking protection." *Id.* at 1171.

More importantly, courts—including the California courts, from where the subpoena here issued—have rejected the *Seescandy* and *Dendrite* requirements that a plaintiff establish that its claims could survive a motion to dismiss and that a nebulous balance of the need for the disclosure outweighs the defendant's purported First Amendment rights. The California Court of Appeals, for example, 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." *Id.* at 1170. The court noted that "California subpoenas filed in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleading and motions; consequently, it could generate more confusion to define an obligation by referring to a particular motion procedure." *Id.* The court further noted that the *Dendrite* balancing requirement was "not . . . necessary" because "[w]hen there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment." *Id.* at 1172. "When vigorous criticism descends into defamation . . . constitutional protection is no longer

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available." *Id.* at 1164 (holding that a plaintiff is entitled to discovery of the identity of an anonymous alleged internet defamer if the plaintiff makes a prima facie case of defamation).

At any rate, Cooley meets those standards as well. Cooley has set forth a prima facie case of defamation that would survive a motion to dismiss. 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).

Here, Cooley alleges in paragraph 15 of the First Amended Complaint that [redacted] made false and defamatory statements concerning Cooley in the blog post and in the comments forum associated with the blog post," which is attached as Exhibit B. (First Am. Compl. ¶ 15.) Cooley specifically identifies several defamatory statements in paragraph 16:

> Among the statements about Cooley in [redacted] blog post and [redacted] comments to the blog post are the false, defamatory, and/or per se defamatory accusations that Cooley and its representatives are "criminals" and have committed "fraud." (Exhibit B.) [redacted] also falsely states that Cooley has deceived and provided false information to Cooley's current and prospective students in order to "lure" them to Cooley or to induce them to remain at Cooley rather than transfer to another school; that Cooley's course add/drop policy "is in effect to make sure it takes you longer and is more difficult to obtain a degree from this poor excuse of a law school"; and that Cooley is the highest tax payer in Lansing and "essentially a multi-million dollar business" that uses its clout to "prey" on current and prospective students, stealing their tuition money to "become more rich." (*Id.*)

(First Am. Compl. ¶ 16.)[5]

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[5] Similarly, in the original Complaint, Cooley alleged in paragraph 16 that "John Doe 1 made false and defamatory statements concerning Cooley in the blog post and in the comments forum associated with the blog post" and specifically set forth defamatory statements in paragraph 17. (*See* Compl. ¶¶ 16-17.)

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This is "an unprivileged communication to a third party." *Mitan*, 474 Mich at 24. Specifically, Cooley alleges in paragraph 34 of the First Amended Complaint that published and communicated those false and defamatory statements concerning Cooley to third parties without privilege or authorization" by posting the statements on his publicly accessible blog. (First Am. Compl. ¶ 34.) Cooley also alleges "fault amounting at least to negligence." *Mitan*, 474 Mich at 24. Cooley alleges in paragraph 36 of the First Amended Complaint that cted with fault amounting to negligence, recklessness, and/or actual malice in publishing the false and defamatory statements concerning Cooley." (First Am. Compl. ¶ 36.)

Finally, Cooley alleges 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 (1984). Cooley alleges in paragraph 36 and 37 of the First Amended Complaint that statements concerning Cooley are defamatory per se, including becau ccuses Cooley of violating criminal laws" and because they were injurious to Cooley's business reputation. (First Am. Compl. ¶¶ 36-37.) Cooley further alleges tha tatements "caused Cooley special harm" and that "[a]s a result o lse 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." (*Id.*)

Cooley therefore has pleaded each element of defamation under Michigan law and has stated a prima facie case of defamation supported by evidence of the defamatory statements themselves, which are specifically identified and attached to the First Amended Complaint.

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Cooley has also pleaded 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).

Cooley alleges: (1) "Cooley has valid business relationships and business expectancies with its current and prospective students, donors and prospective donors, faculty members, and employers and student externship site hosts, among others," (First Am. Compl. ¶ 58); (2 [redacted] knew of Cooley's valid business relationships and business expectancies at all relevant times hereto," (*id.* ¶ 59); (3) [redacted] ntentionally interfered with Cooley's valid business relationships and business expectancies by intentionally making defamatory statements concerning Cooley and/or by intentionally making statements unjustified in law with malice for the purpose of invading Cooley's business relationships and business expectancies, inducing or causing a breach or termination of Cooley's business relationships and business expectancies," (*id.* ¶ 60); and (4) "As a result of [redacted] ntentional interference with Cooley's valid business relationships and business expectancies, 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," (*id.* ¶ 61.) Cooley has therefore alleged and supported each element of tortious interference with business relations under Michigan law.

Defendant ignores all of those well-pleaded allegations, and falsely states that, "[s]urprisingly, Plaintiff has yet to identify what, if any, portions of the blog post exceeded the scope of mere opinion (i.e. constitutionally protected speech) or what, if any, portions were false

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and/or true." (Br. at 6.) To the contrary, as detailed above, Cooley specifically identified in paragraph 17 of the Complaint and paragraph 16 of the First Amended Complaint several specific statements in Defendant's blog post and specifically alleged that those statements were false and defamatory.

Defendant also repeatedly states that the blog post "explicitly states that the commentary contained in the blog an [sic] 'expression of his own personal opinion[.]'" (Br. at 2) (double underline in original); (*see also* Br. at 6) (the post "specifically states that the contents of the post were an expression of his own personal opinion"). That is false. The words "personal opinion"—words that Defendant purportedly quotes directly from the blog post—do not appear anywhere in the blog post. (*See* Compl. Ex B; First Am. Compl. Ex. B.) It is misleading for Defendant to suggest otherwise.

Finally, Defendant argues that "the court should require Plaintiff to demonstrate that the strength of its case is 'a subordinating interest compelling' enough to justify abridging defendants [sic] First Amendment right." (Br. at 11.) Defendant's argument is meritless. The case he cites in support of it, *Bates v City of Little Rock*, 361 U.S. 516 (1960), addressed government intrusion on NAACP members' right of assembly. The Court held that where a state actor infringes on an individual's freedom of assembly, the state actor must have a "subordinating interest which is compelling" to justify the infringement. *Id.* at 524. This case does not involve freedom of assembly, nor does it involve a state actor or the strict-scrutiny analysis that accompanies state action. *Bates* is therefore inapposite.[6]

[6] Defendant also cites *NAACP v Alabama*, 357 US 449, 461 (1958) for the proposition that a "court order to compel production of individuals' identities 'is subject to the closest scrutiny' when it impinges on fundamental rights." (Br. at 9.) That case also involved a state actor (Alabama), and its strict-scrutiny test is likewise inapposite.

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At bottom, Cooley validly issued a subpoena seeking the identity of a blogger who defamed Cooley behind the illusory wall of internet pseudonymity. The subpoena complied with the discovery rules and controlling law, and Defendant's challenge to it is meritless.[7]

IV. THE COURT SHOULD AWARD COOLEY ITS COSTS AND FEES INCURRED IN RESPONDING TO DEFENDANT'S MOOT AND MERITLESS MOTION

After Weebly responded to the subpoena, Defendant's motion was moot. Cooley informed Defendant of that fact and requested on three occasions that Defendant withdraw the motion. Defendant refused. Cooley therefore respectfully requests that the Court award Cooley its costs and attorneys' fees incurred in responding to this motion after August 19, 2011, the date by which Cooley first requested that Defendant withdraw his moot and meritless motion. MCR 2.114(D)(2), (E).

Respectfully submitted,

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By: Michael P. Coakley

Michael P. Coakley (P34578)
G. Alan Wallace (P69333)
Paul D. Hudson (P69844)
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
coakley@millercanfield.com
wallace@millercanfield.com
hudson@millercanfield.com
Attorneys for Plaintiff

By Jocelyn Shoshana Levin (P58978)

Dated: September 2, 2011
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[7] Defendant also repeatedly refers to Cooley's action as a purported "SLAPP" suit. (*See* Br. at 1, n.1). Those references should be ignored. Michigan does not have any such SLAPP law, Defendant does not cite any Michigan cases supporting such a law, and Cooley's well-pleaded and meritorious claims would preclude an anti-SLAPP assertion even if there were such a law.

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