STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff, Case No. 11-781-CZ

vs. Hon. Clinton Canady III

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

Defendants.

_____/

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

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

Doe's motion to quash poses an issue that has been addressed consistently by state appellate courts and federal trial courts across the country: what procedures apply, and what showings are required, when a plaintiff asserts a claim for defamation or some other tort based on anonymous online speech and seeks to identify the anonymous speaker? Invoking the well-accepted First Amendment right to speak anonymously, and recognizing that First Amendment rights cannot be infringed without a compelling state interest, courts have held that anonymous would-be defendants must be notified of the threat to their First Amendment right to speak anonymously, would-be plaintiffs must make both a legal and an evidentiary showing of merit before government power may be deployed to identify anonymous critics, and the court must balance the interests of the plaintiff in securing relief from genuine harm based on a real violation of his rights and of the defendant in remaining anonymous. The Court is urged to follow this consensus approach in deciding whether to compel the identification of the one Doe who has sought to quash the subpoena for his identity. Applying this analysis, plaintiff has not shown at this time that it has a compelling interest in compelling disclosure.

INTEREST OF AMICUS CURIAE

Public Citizen is a public-interest organization based in Washington, D.C. It has more than 225,000 members and supporters nationwide, about 8000 of them in Michigan. Since 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs public debates. *See* http://www.citizen.org/litigation/briefs/internet.htm. Public Citizen has represented Doe defendants and Internet forum hosts, and has appeared as amicus curiae, in cases involving subpoenas seeking to identify hundreds of authors of anonymous Internet messages.

STATEMENT

This case arose from the controversy over various ways in which Thomas M. Cooley Law School ("Cooley") has promoted itself to potential students. A national controversy erupted over a ranking system that Cooley created that initially showed Cooley to be the twelfth best law school in the country and now, after adding eight more factors to the analysis, shows Cooley to be the second best in the country. There have also been complaints that Cooley has misrepresented data about the post-graduation employment of its students. A former Cooley student, identified in the original complaint as Doe 1, established a blog entitled Thomas Cooley Law School Scam, and included a detailed critique of Cooley's practices. Several other anonymous individuals posted additional criticisms of Cooley.

On July 14, 2011, Cooley sued both Doe 1 and three anonymous commenters, charging each with defamation for their respective statements about Cooley. Because Cooley publicized this litigation and a separate defamation suit filed against a law firm, Doe 1 learned that he had been sued, retained counsel, and filed a motion in this Court to quash any outstanding subpoenas to Weebly, the hosting service for the Cooley Scam blog. Doe 1 invoked the *Dendrite* test as a basis for his motion. *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

Five days after the motion was filed, Cooley served a California subpoena on Weebly, setting August 25, 2011 as the deadline for disclosure, but Weebly released Doe's identifying information on August 17, 2011. Cooley then opposed the motion, arguing that the motion to quash was moot because the information had already been released and Cooley had amended its complaint to identify Doe, that the service of a California subpoena had to be met with a motion to quash in California and precluded the motion that had previously been filed in this Court, Opposition to Motion to Quash ("Opp.") 6-7, and, indeed, that Doe's counsel should be

subjected to sanctions for filing a motion to quash without having seen the actual subpoena. *Id.* 7 n.4. Cooley also argued against the widely-applied *Dendrite* test, contending that because Cooley is a private company its litigation is not subject to First Amendment scrutiny, that it is enough that the discovery sought is relevant to the pleaded claims and that no additional rules are needed to protect anonymous speakers, and that, in any event, its complaint had pleaded viable causes of action. *Id.* 8-13. Cooley has not produced any evidence supporting the allegations in its complaint, because it contends that it can secure discovery based only on allegations of wrongdoing.

Doe filed a supplemental brief taking issue with the contention that his motion to quash was moot, contending instead that Cooley had violated Michigan's discovery rules by using information obtained from Weebly despite the fact that Doe had advanced a claim that the information was privileged. This Court agreed and required plaintiff to sequester the information and file all papers identifying Doe in camera so that the Court could decide, in the first instance, whether the motion to quash should be granted. September 8 Hearing Tr. 19-24. Public Citizen has now sought leave to file this brief explaining why the Court should adopt the *Dendrite* standard, and then explaining how that standard should be applied to the current record.

SUMMARY OF ARGUMENT

Although this case presents an issue of first impression in Michigan, courts elsewhere have decided that issue largely with one voice: Based on the well-accepted First Amendment right to speak anonymously, and recognizing that First Amendment rights cannot be infringed without a compelling state interest, courts generally hold, following the so-called *Dendrite* test, that anonymous would-be defendants must be notified of the threat to their First Amendment right to speak anonymously, and would-be plaintiffs must make both a legal and an evidentiary

showing of merit before government power may be deployed to identify anonymous critics.

The principal advantage of the *Dendrite* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to obtain redress for real harms. It ensures that online speakers who make wild and outrageous statements about public figures, companies, or private individuals will not be immune from identification and from being brought to justice. At the same time, the standard helps ensure that persons with legitimate reasons for criticizing public figures anonymously will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is discovery and the "outing" of anonymous speakers. In the first few years of the Internet, thousands of lawsuits were filed seeking to identify online speakers, and enforcement of subpoenas was almost automatic. ISP's reported staggering statistics about the number of subpoenas they received.

Although no firm numbers can be cited, experience leads amicus to believe that the number of suits being filed to identify online speakers dropped after *Dendrite* was decided. Decisions that adopted strict legal and evidentiary standards for defendant identification sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, identification of many online speakers, and publicity about verdicts against formerly anonymous defendants, discouraged would-be posters from indulging in the sort of online irresponsibility that originally created a Wild West atmosphere online. The Court should

preserve this balance by adopting the *Dendrite* test that weighs plaintiffs' interest in vindicating reputation in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech was not wrongful.

Public Citizen contends that, on the current record, the *Dendrite* test has not been met with respect to the identity of Doe 1. However, plaintiff should be given the opportunity to replead and to present admissible evidence showing a reasonable prospect of success on claims against Doe 1.

ARGUMENT

The Appeal Involves an Issue of First Impression in Michigan but State Appellate And Federal Courts Elsewhere Consistently Hold That Plaintiffs Must Do More Than Cooley Did Here to Be Entitled to Identify Anonymous Critics.

Cooley contends that because defamation is outside the First Amendment's protection and the speech at issue in this case is defamatory, the Court need not consider whether there are sound reasons to withhold the power of a court order to compel Weebly to identify the anonymous critic. However, Cooley's argument begs the question, and courts in other states, facing precisely the same argument, have understood that such arguments are fundamentally unsound. Cooley has not shown that Doe 1 defamed it, and has not even pleaded a viable cause of action against Doe 1—at this point, it has only claimed that some false statements have been made about it, and the issue in the case is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power.

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

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American*

Constitutional Law Found., 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). *See also NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998) (recognizing that discovery to identify anonymous advertisers engaged in lawful commercial speech could chill speech). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment**.
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> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 U.S. at 341-342, 356 (emphasis added).

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App. 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz.App. 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J.App. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may

wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that allows any company that files a lawsuit thereby gains the power to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Although Cooley argues that, as a private entity, it is not subject to the First Amendment, Opp. 16, this argument has no bearing on its application to this Court for the exercise of judicial authority. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to

compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP*, 357 U.S. at 461. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Id*. at 524; *NAACP*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347 (1995). *See also Midland Daily News*, *supra*, 151 F.3d at 475 (compelling interest needed to support discovery to identify anonymous advertisers).

The courts have recognized the serious chilling effect that subpoenas seeking to identify anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978). In an analogous area of law, courts have developed a standard for compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which a litigant seeking to identify an anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the case; (2) disclosure of the

source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C.Cir. 2005); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), quoting *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311-1312 (W.D. Mich. 1996).

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). *See also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . **People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities**.
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> (emphasis added).

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

The mere fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away the defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers.

Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457. But setting the bar too high will make it impossible for plaintiffs with perfectly valid claims to identify wrongdoers and proceed with their cases.

Court have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), established a five-part standard that became a model followed or adapted throughout the country:

> **1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
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> **2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
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> **3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
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> **4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
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> **5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.
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> *Id.* at 760-61.

A somewhat less exacting standard, formulated in *Cahill*, requires the submission of evidence to support the plaintiff's claims, but not an explicit balancing of interests after the evidence is deemed otherwise sufficient to support discovery. *Cahill,* 884 A.2d 451. In *Cahill*, the trial court had ruled that a town councilman who sued over statements attacking his fitness to

hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false. The *Cahill* court rejected the final "balancing" stage of the *Dendrite* standard.

All of the other state appellate courts, plus several federal district courts, that have addressed the issue of subpoenas to identify anonymous Internet speakers have adopted some variant of the *Dendrite* or *Cahill* standard. Several courts expressly endorse the *Dendrite* test, requiring notice and opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit balancing of the reasons supporting disclosure and the reasons supporting continued anonymity. These decisions include:

> *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), where a private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.
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> *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), where the court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.
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> *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010), where a mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the

> *Dendrite* test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.
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> *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011), which held that a city council chair had to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.

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

> *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008), where the appellate court reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as "a management consisting of boobs, losers and crooks."
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> *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007), which reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.
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> *Solers v. Doe*, 977 A.2d 941 (D.C. 2009), where the court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.[1]

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. Although its holding reached only the issue of appellate jurisdiction, in reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action:

> [C]ourt-ordered disclosure of Appellants' identities presents a significant

[1] In *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010), the Illinois Court of Appeals found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery because the state's rules already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe.

> possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that **once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure**.
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> 836 A.2d at 50 (emphasis added)

Federal district courts have repeatedly followed *Cahill* and *Dendrite*. *E.g.*, *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (followed *Highfields Capital)*; *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011): ("'The case law ... has begun to coalesce around the basic framework of the test articulated in *Dendrite*,'" quoting *SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of

defamation and intentional infliction of emotional distress).[2]

In its Opposition to the Motion to Quash, at 12, Cooley cited *Krinsky* for the proposition that the California courts have supposedly rejected the proposition that plaintiff show that its claims could survive a motion to dismiss. In fact, that court agreed with *Dendrite*'*s* requirement of notice, 72 Cal. Rptr.3d at 244, as well as requiring both a legal and an evidentiary showing sufficient to make out a prima facie case on plaintiff's claims for relief against the Doe. *Id.* at 244-245. Applying that standard, the court rejected the subpoena because it concluded that the Doe's statements were hyperbolic opinion, and hence not actionable. *Id.* at 249-251.

Cooley also cited *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 sub nom. AOL v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), as agreeing with its argument that mere relevance of the Doe's identity to the litigation is a sufficient basis for allowing discovery. Opp. 10. But Cooley ignores several aspects of the *AOL* decision, which was issued a year before *Dendrite*. A Virginia subpoena had been issued on commission from the state courts of Indiana where the underlying action for defamation and disclosure of confidential information was pending. The trial court began its analysis with deference to the judgment of the Indiana court about the sufficiency of the basis for the subpoena, conducting its own First Amendment analysis as an extra layer of protection for the Doe. *Id.* at *8. And even then, the court applied a test that allows consideration of "the pleadings or evidence" presented by the plaintiff to be certain that plaintiff has a "legitimate" as well as a good faith basis for claiming to have been the

[2] The mandamus posture of *In re Anonymous Online Speakers,* 611 F.3d 653 (9th Cir. 2010), prevented the Court of Appeals from setting out a standard for adjudicating subpoenas to identify online speakers, but strong dictum indicated that *Dendrite* analysis would not properly apply if it was clear that the Does were engaged in commercial speech. Doe 1's blog is not commercial speech.

victim of actionable conduct. *Id.* Moreover, the identifying information must be "centrally needed" to advance the claim, *id.*, which might not be true if there is no evidence showing a basis for the claim. The Virginia trial judge court did not address whether it was a motion to dismiss or summary judgment or indeed any other standard that would be applied to decide whether this test was met. This somewhat more permissive, though still protective standard, was adopted without benefit of the many decisions that followed, adopting a higher standard.

Cooley also argued, Opp. at 10, that the First Amendment does not protect Doe because his speech is "false" and "defamatory", *citing Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). But this argument begs the question, because there has been no determination that anything that Doe has said is false or defamatory. Even if some of Doe's comments are deemed defamatory in that the Court concludes that they make statements of fact about Cooley rather being hyperbole, such an accusation would not be improper if it is true. And Cooley has chosen not to submit any evidence of falsity, but rather stood on its legal argument that no showing is required.

Dendrite, Cahill, and their progeny strike a balance between a plaintiff's interest in proceeding with a valid claim and the anonymous defendant's right to remain anonymous if she has done no wrong. The balance is effected by applying procedural and substantive standards, including an early look at the merits of the case to ensure that there is an evidentiary basis for believing that the plaintiff has a reasonable chance of success on the merits. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity. Just as Cooley has produced no evidence to support its claims, it never explains to this Court how it would be harmed by being required to show a prima

facie case before it gets to identify this particular critic. Its failure to produce either evidence or argument about why evidence should not be required would permit exactly the abuse of process that all of the caselaw presented above is intended to curb. .

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

(1) Plaintiff Did Not Ensure the Proper Notice to Doe.

When courts receive requests for permission to subpoena anonymous Internet posters, they should require plaintiffs to undertake efforts to notify the posters that they are the subject of subpoenas, and then withhold any action for a reasonable period of time until defendants have had time to retain counsel. *Columbia Ins.*, 185 F.R.D. at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 775 A.2d at 760.

Indeed, notice and an opportunity to defend are fundamental requirements of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, at least if there is a continuing dialogue among participants. Accordingly, the Court should follow the

Dendrite example by requiring posting in addition to other likely means of effective notice.

In many cases, posting will not be the only way of notifying the Doe. If a subpoena is sent to the ISP that provides Internet access to the Doe, then the ISP will commonly have a mailing address for its customer. Or if, as here, the host of the web site requires registration, and requires the provision of an email address as part of registration, then sending a notice to that email address can be an effective way of providing notice. To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and either drop or stop using their old addresses; they do not always think to notify every web site where they have given their old addresses.[3]

The industry standard is to provide between two weeks and twenty days' notice to Doe posters, although a Virginia statute requires twenty-five days. Va. Code §§ 8.01-407.1(1) & (3). The time allowed for the Doe to oppose the subpoena should take into consideration whether the controversy is purely a local one. If participation is national, the time for notice should take into consideration the time needed not only to find counsel where the Doe resides, but also to find local counsel in the jurisdiction where a motion to quash would have to be filed.[4]

In this case, Cooley argues that notice is irrelevant, because Doe learned about the

[3]In the *Brodie* case in Maryland, Public Citizen's client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the *Washington Post* that mentioned her pseudonym, which had figured in the oral argument.

[4]The Virginia statute requires plaintiff to serve its entire showing of a meritorious case on the ISP along with the subpoena, thirty days before the date when compliance is due, and requires the ISP to furnish a copy of plaintiff's materials to the Doe within five days after that. *Id.* This enables the Doe to prepare a motion to quash without having to contact plaintiff. Indeed, lawyers who represent Does often find that plaintiff's counsel does not cooperate by providing its basis for seeking identification. The Virginia statute avoids that problem.

litigation and filed a motion to quash discovery aimed at identifying him, but in fact this case shows the importance of the notice requirement. In representing Does in anonymity cases, and advising other lawyers who are providing such representation, staff attorneys for amicus have found that plaintiffs do their best to hide the ball, making it more difficult for the Doe to file an effective motion to quash. Here, for example, Cooley did not tell Doe that it had issued a Michigan subpoena on July 14, nor did Cooley inform Doe about its efforts to obtain a California subpoena from the Superior Court for the County of San Francisco, California until that issuance was already a fait accompli. Cooley then argued that the motion to quash filed in this Court was irrelevant because only a California court could quash the San Francisco County Superior Court subpoena, Opp. 7-8, and that sanctions should be awarded because a motion to quash was filed before Doe or his counsel had seen the actual subpoena. *Id.* 5 n.3. Lack of information needed to file a proper motion to quash can impede effective representation of Does to protect their First Amendment right to speak anonymously, and the Court should embrace *Dendrite*'s notice requirement to remove such obstacles in future cases. Indeed, as provided by the Virginia statute, the Court should require that the notice provide access to a copy of the complaint and to the showing that is needed to comply with the First Amendment, thus giving the Doe a true opportunity to protect his anonymity rights should he desire to do so.

Cooley seeks to excuse its lack of notice on the ground that it was not until August 5 that its counsel learned the identity of Doe's counsel, but there is no reason why Cooley could not have posted notice of its efforts on the blog itself, thus effectively providing notice to Doe 1. Amicus understands that plaintiff used the blog to contact Doe shortly after suit was filed, and indeed exchanged emails with Doe using an address that Doe had created for the purpose; there is no reason why plaintiff could not have used the same method to provide Doe with a copy of

the subpoena.[5]

(2) Cooley Has Identified Several Allegedly Actionable Words, but It Has Not Alleged the Words in the Necessary Context.

The second stage of the *Dendrite* test has been not satisfied in this case. It is important to require the plaintiff to set out the precise words claimed to be defamatory (and the context of those words) because it is often possible to determine, just from the words themselves, that no tenable claim for defamation could be brought. For example, some statements may not be actionable because they do not meet the First Amendment's "of and concerning" requirement. *New York Times Co.*, 376 U.S. at 288. Statements may be non-defamatory as a matter of law because they are rhetorical expressions of opinion, which cannot support a defamation claim. *Ireland v. Edwards*, 230 Mich. App. 607, 618-619, 584 N.W.2d 632, 638 (1998); *Cahill*, 884 A.2d at 467. Some may not be actionable because the statute of limitations has run since the date of their posting.[6]

Paragraph 17 of the Complaint quoted several fragments of statements by Doe 1 as allegedly defamatory, but the paragraph surrounds the quoted words or phrases with Cooley's own, non-quoted characterizations of the context of the allegedly defamatory statements. It is black-letter law that context is crucial in determining whether a particular statement about the plaintiff is constitutionally protected opinion or an actionable statement of fact that is capable of being provided false. *Smith v. Anonymous Joint Enterprise*, 487 Mich. 102, 793 N.W.2d 533,

[5] Because Doe is seeking relief from the Court, the inadequate notice is not alone a basis for granting the motion to quash. However, amicus' interest in this motion is the adoption of a proper standard, and amicus urges the Court to address the notice issue to better inform other judges who may consider motions for leave to pursue similar discovery in future cases, and to inform lawyers about what they should do in seeking such discovery.

[6]Courts generally hold that the single publication rule applies to Internet postings. *Nationwide Bi-Weekly Admin. v. Belo Corp.*, 512 F.3d 137, 143-146 (5th Cir. 2007).

542 n.40, 548-549 (2010); *Dupuis v. City of Hamtramck*, 502 F. Supp.2d 654, 658 (E.D. Mich. 2007). The context that matters is what the alleged defamer has actually said, not what plaintiff thinks the defendant's actual words mean. Because the complaint fails to allege verbatim the context of the single words or short phrases that are alleged to be defamatory, Cooley has not met the second stage of the *Dendrite* test.

(3) Cooley Has Not Pleaded Valid Claims for Defamation or for Tortious Interference with Business Relations.

There are several respects in which Cooley has not pleaded a valid claim for defamation, as required by the third stage of the *Dendrite* test. First, because Cooley is unquestionably a public figure, it is constitutionally required to plead actual malice to state a valid claim for defamation. *Royal Palace Homes v. Channel 7 of Detroit*, 197 Mich. App. 48, 52-53, 495 N.W.2d 392, 394 (1992); *see also Rouch v. Enquirer & News of Battle Creek Michigan*, 440 Mich. 238, 274, 487 N.W.2d 205, 221 (1992) (concurring opinion). *Gonyea v. Motor Parts Federal Credit Union*, 192 Mich. App. 74, 76-77, 480 N.W.2d 297, 299 (1991) (actionable degree of fault is one of the elements of a defamation claim that must be pleaded with specificity). But the complaint alleges only that Doe 1 "acted with fault amounting to at least negligence." ¶ 48.[7]

Second, most of the statements attributed to Doe 1 in paragraph 17 of the complaint are rhetorical opinion, which are expressed based on articulated statements of fact. The underlying statements of fact might be defamatory if they were false, but the complaint never so alleges; it

[7]Doe may be sued only for his own comments on the blog. Pursuant to 47 U.S.C. § 230, neither Doe Number 1, as the provider of an interactive computer system, nor any of the commenter Does, as the users of such systems, may be held liable for content posted to the blog by any of the other defendants. *Shiamili v. The Real Estate Group of New York*, 17 N.Y.3d 281, — N.E.2d — (2011); *Barrett v. Rosenthal*, 40 Cal.4th 33 (2006).

only claims that the opinions are false. For example, Cooley alleges that Doe falsely accused Cooley and its representatives of being "criminals" and of having committed "fraud." So far as amicus can discern, the word "criminal" appears in Doe's February 14 blog post where, after setting forth a long list of Cooley activities that are said to induce potential students to pay tuition, Doe concludes, "Congrats you criminals, you have accomplished robbery!" and "no one is going after these criminals over at Cooley!!!!" But the only part of these expressions that is alleged to be "false" is the use of the word "criminal." Such language amounts to "rhetorical hyperbole" that is constitutional protected as opinion. *See In re Chmura*, 464 Mich. 58, 81-82 626 N.W.2d 876, 891 (Mich. 2001) (campaign literature stating that political figures "stole" the money of suburban taxpayers by causing it to be spent on Detroit city schools was not a literal accusation of criminality"); *Kevorkian v. American Medical Ass'n*, 237 Mich. App. 1, 13, 602 N.W.2d 233, 239 (1999) (statements accusing doctor of "criminal practices," "continued killings," and "criminal activities" were simply rhetorical expressions of opinion about doctor's controversial practices).

As for the word "fraud," amicus found the term used two ways on Doe's web site: in the tags at the top and bottom of the blog, which represent overall characterizations of the page as a whole that are designed to aid Internet search engine users when finding web pages that are relevant to their interests, and in two highly rhetorical comments that Doe posted responding to comments from viewers. http://thomas-cooley-law-school-scam.weebly.com/1/post/2011/02/the-thomas-cooley-law-school-scam3.html. And many cases have held that, in context, referring to a defamation plaintiff or its product as a "fraud" was rhetorical hyperbole and hence constitutionally protected opinion. *Phantom Touring v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir. 1992); *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 923-924

(M.D. Fla. 1996); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1203-1204 (N.D. Ill. 1984); *Wood v. Del Giorno*, 974 So.2d 95, 97, 100 (La. App. 2007); *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 143, 603 N.E.2d 930, 937 (1992). Whatever one may think of the validity of such self-promotional tools as the ranking system that deems Cooley the second-best law school in the country, Doe is surely within his constitutional rights when he expresses his opinion that Cooley is a fraud.

Other statements simply do not appear to be defamatory. For example, Cooley charges Doe with accusing it of being the highest taxpayer in Lansing, of being "essentially a multi-million dollar business," and using money from its customers (that is, its students) to "become more rich." But there is nothing inherently defamatory in claims that Cooley is a large taxpayer, that it makes millions of dollars selling legal education to students, or, indeed, that is building up a substantial endowment with the profits on tuition over expenses. Doe may have put these facts in more derogatory terms, but that does not make the factual statements defamatory.

Finally, Cooley cannot avoid the First Amendment limitations on its defamation claims by changing the label of the tort. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Nichols v. Moore*, 396 F. Supp.2d 783, 799 (E.D. Mich. 2005), *aff'd*, 477 F.3d 396 (6th Cir 2007); *Ireland v. Edwards*, 230 Mich. App. 607, 624-25, 584 N.W.2d 632 (1998). Although the foregoing cases held that such claims as invasion of privacy and intentional infliction of emotional distress must meet the First Amendment limits for defamation claims, the Sixth Circuit has applied the same rule to business-related claims, refusing to allow plaintiffs to "avoid the protection afforded by the Constitution . . . merely by the use of creative pleading" that changes the name of the cause of action. *Compuware Corp. v. Moody's Investors Services*, 499 F.3d 520, 530 (6th Cir. 2007) (claim for breach of contract). A necessary element of claims for

tortious interference with business is the use of "wrongful means" to achieve the end, such as by fraud or misrepresentation, and when the wrongful means is a statement that injures reputation, the same First Amendment protections apply. *Jefferson County School Dist. No. R-1 v. Moody's Investor Services*, 175 F.3d 848, 857-858 (10th Cir.1999) (intentional interference with contract, intentional interference with business relations); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (product disparagement, "trade libel" and tortious interference with business relationships); *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1047-1048, 728 P.2d 1177, 1185-1186 (1986) (negligent interference with prospective economic advantage); *Redco Corp. v. CBS*, 758 F.2d 970, 973 (3rd Cir. 1985) (unless defendants "can be found liable for defamation, the intentional interference with contractual relations count is not actionable"); *Amerisource Corp. v. Rx USA Int'l*, 2010 WL 2160017 at *7 (E.D.N.Y. May 6, 2010).

(4) Cooley Has Provided No Evidentiary Support for Its Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of a cause of action to show a realistic chance of winning a lawsuit against that defendant. This requirement has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, because it prevents plaintiffs from being able to identify critics simply by filing facially adequate complaints.

Plaintiffs often argue that they need to identify the defendants simply to proceed with their case. However, no relief is generally awarded to plaintiffs until they come forward with **evidence** in support of their claims, and the Court should recognize that identification of otherwise anonymous speakers is a major form of relief in cases like this. Requiring actual evidence to enforce subpoenas is particularly appropriate where the relief itself may undermine,

and thus violate, defendants' First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* California Law Week, Vol. 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, Nov. 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461& dept_id=4969&rfi=8. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation. htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id. See Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company represented by the largest law firm in Philadelphia filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 567-568 (E.D. Mich. 1979). In effect, the plaintiff should be required to present admissible evidence establishing a prima facie case, if not to "satisfy the trial court that he has evidence to establish that there is a genuine issue of fact" regarding the falsity of the publication. *Downing v. Monitor Publ'g Co.*, 415 A.2d 683, 686 (N.H. 1980); *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination simply will not suffice." *Id.* at 994.[8]

When a plaintiff who seeks to compel disclosure of the identity of an anonymous critic, the extent to which he should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. In suits for defamation, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Moreover, if the Doe's comments have caused injury, the plaintiff should have evidence of that fact. Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a

[8]*Downing* took comfort from the fact that the plaintiff there was represented by "respected counsel." 415 A.2d at 686. However, courts should not adopt a standard that depends on an evaluation of the quality of the lawyers appearing in the case. Less experienced lawyers, and even pro se parties, who often seek subpoenas to identify anonymous critics, should receive equal respect before the law.

condition of enforcing a subpoena for the identification of a Doe defendant. However, actual malice is usually not an element that a public figure can be expected to establish without knowing the identity of the defendant and having the opportunity to take his deposition. *E.g.*, *Cahill*, 884 A.2d at 464.

In this case, for example, although several of Doe's comments are highly rhetorical, some of the other comments are more factual in nature, such as the statement that Cooley is "essentially a multi-million dollar business." But Cooley itself refers to its operations as a "business" when Count Two of its complaint charges Doe with interfering with its "business relations" with potential students and to those students' tuition as a "business expectancy." Moreover, the Form 990 that Cooley filed with the IRS for the year ending August 31, 2010 shows that its operating profit exceeded $20,000,000 on revenues of nearly $118,000,000, http://www.guidestar.org/FinDocuments/2010/381/988/2010-381988915-075b3670-9.pdf. Cooley's tuition and fees alone exceeded expenses by more than $10,000,000 in 2010.[9] And review of the GuideStar web site shows that, according to Cooley's Form 990's, this "non-profit" consistently earns a very substantial profit. If Cooley has evidence that shows that Doe's factual statements about it are false, such evidence is surely within its grasp and can be produced as a basis for showing that it has a realistic chance of prevailing on its defamation claims.

Cooley cannot argue that requiring evidence to support its claims is a burden so onerous that plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Many plaintiffs succeeded in identifying Doe defendants in

[9]The form shows that Cooley paid Thomas E. Brennan $370,000 in that year, even though, according to its web site, he retired from both its Presidency and its Board of Directors in 2002. http://www.cooley.edu/ overview/thomasbrennan.htm. However, it is Brennan's law school ranking system that allows Cooley to claim to be among the nation's elite law schools. http://www.cooley.edu/rankings/_docs/Judging_12th_Ed_2010.pdf.

jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v. Does*, *supra.* Indeed, in *Immunomedics v. Doe*, 775 A.2d 773 (2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery.

(5) On the Current Record, The Balance Tips Sharply Against Disclosure of Doe's Identity.

If Cooley submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

> [t]he final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
>
> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo.App. 1997).

Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must 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.
>
> 775 A.2d at 760.

A standard comparable to the test for grant or denial of a preliminary injunction, where the court considers the likelihood of success and balances the equities, is particularly appropriate because an order of disclosure is an injunction—not even a preliminary injunction. Refusal to

quash a subpoena for the name of an anonymous speaker always causes irreparable injury, because once speakers lose anonymity, they can never get it back. Moreover, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. Plaintiffs can renew their motions after submitting more evidence. The inclusion of a balancing stage allows Does to show that identification may expose them to significant danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence on the elements of plaintiff's claims so that the equities can be correctly balanced.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. The Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. The balancing stage allows courts to apply a *Dendrite* analysis to many different causes of action, not just defamation, following the lead of the Arizona Court of Appeals, which in *Mobilisa v. Doe* warned against the consequences of limiting the test to only certain causes of action. 170 P.3d at 719. If courts impose such limits, plaintiffs who hope to identify and intimidate anonymous speakers could simply conjure up additional causes of action to allege against them.

For example, several courts have held that, although anonymous defendants accused of copyright infringement could be engaged in speech of a sort, the First Amendment value of offering copyrighted recordings for download is low, and the likely impact of being identified as one of several hundred alleged infringers is also likely low. *Call of the Wild Movie, LLC v. Does 1-1,062,* — F.Supp.2d —, 2011 WL 996786 (D.D.C. Mar. 22, 2011); *Sony Music Entertainment*

v. Does 1-40, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008). Hence, such courts accept a lower level of evidence to support the prima facie case of infringement. *Call of the Wild*, at *13 nn.7, 8. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

In this case, as amicus has argued in the foregoing part of this brief, Cooley's tort claims are at best weak ones — Cooley is a public figure, and there is intense public interest in its claim to be the second-best law school in the country. Moreover, given the shrinking number of jobs for lawyers and serious questions about whether the high cost of a legal education is still a sensible investment for college graduates whose post-law-school job prospects may be lower than ever, prospective students have a significant interest in obtaining as much information as they can about the various law schools that are competing for their tuition dollars.

On the other hand, Doe faces a significant danger of adverse, out-of-court action if Cooley is allowed to keep its knowledge of his identity. Doe makes clear on his blog that he is still a law student; consequently, Cooley is well situated to do him harm by the way in which it describes his time as a student in communications with character and fitness committees or with prospective employers. Moreover, the Court's September 8 hearing was reportedly attended by a significant number of Cooley supporters, which suggests that despite the widespread ridicule to which Cooley has been subjected, it also has passionate defenders among current students and alumni. Those passionate supporters will be among the legal community with whom Doe will have to work as co-counsel or as opposing counsel, upon whom he may depend for client referrals, and on whose good opinions his livelihood may depend. Indeed, Cooley boasts that it was founded by Michigan judges and that its graduates (and its board of directors) serve in various political and adjudicative roles. Being known as the author of the Thomas Cooley Law

School Scam web site could be very costly to Doe. The danger of such extra-judicial harm should weigh heavily in the balancing analysis.

CONCLUSION

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

Respectfully submitted,

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September 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum has been served this 20th day of September, 2011, by depositing a copy of the same in the United States Mail, first-class postage prepaid, and properly addressed to the counsel for the parties as follows

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