STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,

Plaintiff,

vs. CASE NO: 11-781-CZ

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

Defendant.
_____/

HONORABLE CLINTON CANADY, III, CIRCUIT JUDGE
LANSING, MICHIGAN - THURSDAY, OCTOBER 24, 2011

IN CAMERA REVIEW

APPEARANCES:

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I N D E X

Lansing, Michigan
October 27, 2011
at about 3:01 p.m.

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THE COURT: We are on the record in the matter of Thomas Cooley Law School versus John Does 1, 2, 3, 4 in file number 11-781-CZ. We have Mr. Coakley here for the Plaintiff. Mr. Hermann for John Doe Number 1, that's correct?

MR. HERMANN: Correct, Your Honor.

THE COURT: And your associate, Mr. Coakley, again, is who?

MR. COAKLEY: Mr. Hudson.

MR. HUDSON: Yes, good afternoon, Your Honor.

THE COURT: Okay. We are going to call Mr. Levy here.

MR. LEVY: I'm going to conference in your office after you called.

THE COURT: This is Judge Canady.

MR. LEVY: Forgive the frivolous response, yes. I am supposed to conference her, now that you have called. I will do that now. I will be off line until I got her back on.

THE COURT: All right. Ms. Harvey?
MR. HARVEY: Yes, Judge.
THE COURT: We are still on the record in Thomas Cooley versus John Doe Number 1. Although the case has also John Doe 2, 3 and 4, file number 11-781-CZ. Mr. Coakley and Mr. Hudson are here on behalf of the Plaintiffs. And Mr. Hermann is here on behalf of John Doe 1.
So we have several things up for today. I think I'm going to make an oral ruling. You can have a seat. Mr. Coakley is in regard to your request for reconsideration of my original ruling under 2.119, paren capitol (F). We were here last time. I indicated that we were not going to have any oral argument on that. I have reviewed the request for reconsideration. And I do not find that that raised anything that wasn't previously raised, nor do I find that there was any palpable error in my decision there. Nor do I find that I have been misled in any fashion. So I'm going to deny the request for reconsideration.
We should make the record clear that Mr. Levy is here in an amicus curiae position. Although, I did admit him to appear at the last

session, and that Barbara Harvey, although she is appearing last by telephone today from Detroit, is the local amicus counsel. They are here in that capacity, not as parties.
So we have – I have reviewed the in camera document, for what they're worth for me. So I'm just saying that I've reviewed those, and so where are we today, what else are we supposed to do today? Do you want me to make a ruling on that?
MR. COAKLEY: Yes, Your Honor. We would like a ruling.
THE COURT: I'm going to give Mr. Hermann – I guess, Mr. Levy can listen. Okay. I have reviewed the complaint. Okay. John Doe Number 1. Statements on their surface appear to be per se either slanderous or libel statements which I think takes it in a different category from opinions, or, you know, observations that an individual might make. It appears that he uses the word "criminal." But more importantly accuses Cooley of committing fraud. And that, in my initial observation, as set forth in the complaint, would rise to the level of possibly, based on the pleadings of per se slander or libel.

I don't know what actually it would be called under the blog.
So, therefore, my feeling, and I will allow Mr. Hermann to respond, is that takes it beyond opinion. And I think in connection with the identity of John Doe Number 1, we need to address, we know how Plaintiff got his identity. But if it's potentially per se, my initial feeling is that he could be named as a Defendant, just based on my review at this particular point.
I'll give Mr. Hermann an opportunity to respond so that a record can be made. Then we will go after that to 2, 3 and 4. Because I think we need to address them as well.
Mr. Hermann?
MR. HERMANN: Yes, Your Honor. I understand the Court's ruling with regard to the statement and the Court's opinion with regard to consideration that they appear to be based on a complaint libelous or slanderous per se. One of the issues that was raised early on in terms of the –
MR. LEVY: Mr. Hermann, if you could just speak up a little bit?
THE COURT: I don't know how loud this

goes.
MR. LEVY: I understand the problem.
THE COURT: Maybe if you could speak into the mike, Mr. Hermann. Maybe you can come up to the podium and speak into this one.
MR. HERMANN: Fair enough, Your Honor.
Your Honor, I believe that the Court's findings with regard to that still play into what Mr. Levy may perhaps address in terms of his *Dendrite* standard. I would let Mr. Levy perhaps address the Court in terms of the *Dendrite* standard. And one of those factors is the likelihood of success, given the ability to plead and properly allege in the complaint allege in your complaint an allegation of actionable libel or slander per se. And the Court's inclined or has indicated that it's inclined to find those statements as it's alleged in the complaint –
THE COURT: And that were printed on the blog?
MR. HERMANN: Correct.
THE COURT: I think that's more persuasive to me, that they were actually printed on the blog, or published on the blog. I guess they printed them.

MR. HERMAN: And that is but one of the standards or factors to be considered in the overall *Dendrite* analysis.

So one of the things that I would suggest to the Court, the Court could perhaps find, although the allegations in the complaint may be actionable, that the other factors under the *Dendrite* analysis could outweigh some of the considerations given the pleading requirements, and still, nonetheless, decide that the subpoena is in, in balancing the interests under the *Dendrite* standard, that even though there is an actionable allegation in the complaint, that the overwhelming majority of the considerations under the *Dendrite* analysis would weigh in favor of the Defendants such that a disclosure of his identity is unwarranted under the *Dendrite* standard.

THE COURT: But then *Dendrite* also wasn't a multiple John Doe situation, and really the ruling came out on the secondary John Doe, is the way I read it, rather than on the primary John Doe.

MR. HERMANN: Well, and that's something I would have Mr. Levy address as well.

One of the other issues, Your Honor, is what impact, if any, the inadvertent disclosures

and the violations of the Court Rule, with regard to the disclosure would have. I understand the Court's ruling and opinion with regard to the fact that the allegations in the complaint, as far as the Court's concerned, do specify statements that the Court believes to be libel.

THE COURT: Could be.

MR. HERMANN: Yes. Could be. But at the same time, one of the other factors that we have here is a clear violation of the Court Rule. And that may be another step that needs to be analyzed in crafting an appropriate remedy in terms of what impact does that have on this case.

Here we did have a disclosure, an inadvertent disclosure the Court ruled was an inadvertent disclosure. And we did have the Court Rule, which we cited which specifies the exact remedy and responsibility on the part of the parties that received that information. Under the circumstances, it's clear that counsel did not comply with that Court Rule.

And what I would suggest, as an alternative, in addition to applying the *Dendrite* standard in analysis, would be that an appropriate remedy would be in exclusion from

using that information that was inadvertently disclosed, and disclosed it utilized, contrary to the Court Rule.

THE COURT: Well, don't we have – I mean, really, you have somebody who, at one point, was a John Doe who may have made per se a slanderous or libelous statement. And we have this inadvertent disclosure that gives us the name of the John Doe, apparently. And I don't know, we can have Mr. Levy address that, but the balancing test is, I mean, I don't think people have a right, we can see how the case law comes out, to make per se slanderous or libellus statements. And so the fact that the Plaintiff has pled that. So I don't think that they can go on a searching expedition to find out what other statements may have been made.

My initial feeling is we can hear from them, and not to allow them to go in and have discovery on these sites to see whatever else may have been exchanged. Because we get to the *Dendrite* balancing test in the privacy of these other people. And in this case, the distinction between John Doe Number 1 and 2, 3, and 4 appear to be responders to the information that John Doe

Number 1 posted. So I think that puts them in a different category, really. But, I mean, my initial thoughts on that are that Plaintiff could not go and get this information that was inadvertently disclosed beyond the name of John Doe Number 1, and use that to try to find out what else he may have said or whom else he may have contacted, and then pull all these other people in unnecessarily. I think that's pretty much the way I read *Dendrite*.

MR. HERMANN: And that may have been as the case was in August. Unfortunately, there have been a number of other subpoenas that have been issued and that are temporarily on hold.

THE COURT: Right.

MR. HERMANN: And the problem, also, is that I assume that Cooley is attempting to try and gather information about this particular individual's identity from multiple sources. Now that they know who he is, through the inadvertent disclosure, I suppose the strategy is, well, suppose we can't get his identity from Weebly Incorporated because of the inadvertent disclosure, let's go to Google and find out who he is. The problem with that is the only way that

they would know about his potential connection with Google is the information that was originally contained in the Weebly disclosure that would have the Hotmail addresses, the MSN Hotmail addresses, and the other identifying information.

In fact, in the Weebly disclosures, there's nothing that identifies this individual by name. There is an A. Siad information in there. But my client name is not A. Siad. What they were able to do is to take the information that they had from the Weebly disclosure, and cross-reference it with their own records, and determine through their own archive and database, who, at Cooley, or what former Cooley student maintained any one of these addresses. And that's how they were able to identify his identity. And what we were attempting to do is really a two-part strategy. One was to apply the *Dendrite* standard to say protect this individual's anonymous right to speech outweighs the risk of prejudice to the Plaintiff in terms of pursuing its rights. That's strategy Number 1. And strategy Number 2 would have been: What would be the appropriate remedy, or if the Court were to craft a remedy for violation of the Court

Rule, in which Cooley did disclose our did publish that information, or acquire that information, before they were allowed to do so. And that's where they use the analogy of the criminal law analogy of the fruit of the poisonous tree. Having seen that fruit of the poisonous tree, and having an opportunity to review that, they have been able to connect the dots in order to identify who this person is. And they no longer need the information in that disclosure. The key thing would be, if they are not allowed to use any of that information in the disclosure because of their violation of the Court Rules, then anything that flows from that would also be precluded.

THE COURT: Well, that would leave us with a situation where someone may have made a slanderous per se statement is not accounted for their actions.

MR. HERMANN: Perhaps that's true, Your Honor. And perhaps the litigation tactics of counsel in choosing not to abide by Court Rules is something to consider as well.

THE COURT: Well, we ruled that was inadvertent.

MR. HERMANN: That's correct. But the remedy –

THE COURT: Inadvertent disclosure, let me put it that way.

MR. HERMANN: Right. And in choosing to publish without permission of the court or counsel, that is a violation of the Court Rules. And I guess what I am trying to suggest, under that Court Rule, by the willful and deliberate violation of that Court Rule, I believe the Court has discretion, the power and the authority to delve or to create an appropriate remedy which would include a limitation on the use of that information.

Clearly that rule has been violated, and to the extent that it would prejudice my client's identity and all of the rights flowing with that, it certainly is something that would provide an alternate basis for relief in protecting my client's identity and disclosure of his name.

THE COURT: I don't know. Somebody would have to help me on that. I mean, if it's – I don't know how we can protect his identity.

MR. LEVY: May I address that, Your Honor?

THE COURT: You will have a chance.

MR. COAKLEY: Excuse me, Your Honor. But –

THE COURT: Just a minute. Everybody will have a chance. I don't know how we can do that without disclosing his identity. That's what I am asking. I understand your argument that it was obtained inadvertently. Therefore, it should be excluded. But if we exclude it, a person who maybe made a per se statement that's libellus or slanderous, not be held accountable. So it's a tough balancing, you would agree, balancing test?

MR. HERMANN: It is a balancing test. And that's exactly what the *Dendrite* analysis encompasses is looking at a series of factors to weigh all of those factors in order to –

THE COURT: Right. The First Amendment Rights of free speech don't necessarily rise to slanderous per se statements, though. I'm just saying, my initial impression is they do not rise to slanderous per se statements.

MR. HERMAN: That's correct, Your Honor. And that is a factor, and one of the factors to be considered in the *Dendrite* analysis. It's not the only factor.

THE COURT: All right. Let's hear from

Mr. Levy. Then we'll hear from Mr. Coakley.

MR. COAKLEY: Your Honor, I object to Mr. Levy speaking, and arguing –

MR. LEVY: Um, Your Honor –

THE COURT: Mr. Levy, just a minute, we have an objection. Just a moment. Let me deal with Mr. Coakley's objection to you saying anything.

MR. LEVY: I am sorry, Your Honor.

THE COURT: All right. Well, you couldn't hear it. All right. Mr. Coakley?

MR. COAKLEY: Your Honor, as I understood the Court's ruling, the last time we were here, you were going to permit –

MR. LEVY: I can't hear, Your Honor.

THE COURT: He is going to come to the podium.

MR. COAKLEY: Your Honor, as I understood the Court's ruling at the last hearing, when amicus briefs were permitted to be filed, you ruled very clearly that Mr. Levy or anybody appearing as amicus would not be permitted oral argument.

THE COURT: I don't remember that. I thought they weren't going to be allowed discovery

and things like that. I don't recall saying that they wouldn't have oral argument. I don't know. I'm sure you ordered the transcript.

MR. COAKLEY: I did, Your Honor.

MR. LEVY: Your Honor, I thought what you said was that I could address the questions that arose during the hearing.

THE COURT: We are going to get the transcript. We will see. That was my understanding that you couldn't participate in discovery, that you couldn't issue your own set of Interrogatories, but you could probably comment. That was my feeling. But I don't know. They are going to tell me what I said.

MR. COAKLEY: Well, Your Honor, I'm going to have to stand on my own recollection, because apparently I don't have the transcript with me.

THE COURT: All right. Well, this is just a motion. And so I am going to allow Mr. Levy to answer questions or assist the Court in arriving at some solution to this issue. Mr. Levy?

MR. LEVY: Yes.

THE COURT: You're on.

MR. LEVY: The first thing is, I think I actually haven't heard Mr. Coakley speak to the

issue, but my guess is that I may agree with him in this respect, and not agree with Mr. Hermann about the impact of the violation of the Court Rule about disclosing information that's subject to a claim of privilege.

I think the impact of Your Honor's ruling in that regard was to take the parties back to where they were before the violation occurred so that Your Honor – so that the motion to quash is no longer moot. That the issue of whether you should recognize First Amendment privilege and how you should apply it in the context of this case is now squarely before you. And that assuming that you decide that the information was not, in fact, privileged, because, obviously, as soon as you reject the *Dendrite* analysis, or because you decide that following *Dendrite's* analysis you think the First Amendment right of anonymity is outweighed by what was said and what was shown in support of the action, that that really protects the interest that the Court Rule protects it is intended to provide. And so I just think what I would like to do is go directly to the question of should you allow disclosure of identity under the *Dendrite* analysis.

THE COURT: Okay.

MR. LEVY: Turning to that, I understand the Court's sensitive ruling that use of the word "criminal," and use of the word "fraud" in the statements of Doe 1 in contradiction to there were more factual things that Does 2, 3 and 4 made, puts Doe 1 in a situation of having committed a per se libel.

First, I want to address – I don't know if Your Honor is final on that. I don't want to address that. But I do think –

THE COURT: Well, I think what I'm saying is, I think it's a real question of fact whether or not those statements are per se on their face. And since they were published on a blog, I think that carries a lot of weight with me.

MR. LEVY: I would compare the use of the word "criminal."

THE COURT: Well, I think one of the – the word is criminal, and then there's the allegation of fraud. So I'm not – I don't know if criminal rises to the level of a per se or criminal, that's per se or not. It says commission of a crime. But I think fraud, really, crosses, gives a reasonable trier of fact, they could conclude that

that was a per se statement.

MR. LEVY: In the context – you have a blog that made very specific factual statements about Cooley, and then drew a conclusion from the facts stated that this showed that Cooley was a criminal, or that they had committed fraud. But I would compare that to what happened in the *Kevorkian* case, where Doctor *Kevorkian* was told he could not sue the American Medical Association and others for defamation for accusing him of criminal practices.

Now, of course Doctor Kevorkian was a rather notorious individual in the State of Michigan. And some might say, yes, he was in fact committing crimes. But the basis upon which the Michigan Court of Appeals ruled was that accusing him of criminal practices and criminal activities was just a rhetorical expression of opinion about Doctor Kevorkian's practices. So they were not defamatory. They were, rather, statements of opinion. And criminally and statutorily decided on paper –

THE COURT: All right. Mr. Levy, she missed the second case you mentioned.

MR. LEVY: I think I cited it twice. The

Chmura case.

THE COURT: That's the one that she didn't get.

MR. LEVY: Okay. Where –

THE COURT: Spell that for her.

MR. LEVY: *C-H-M-U-R-A*. That's a Michigan Supreme Court decision, saying that when Judge *Chmura*, I'm not sure whether he was a judge or simply running for Judge, said that certain political figures stole the abundance of suburban tax payers by causing it to be spent on the Detroit city schools, that this wasn't the literal accusation of criminality, but just the figurative expression of opinion.

So it would be argued, and, similarly, you have cases like the *Santaturi*(sp) case in which the word "fraud" was held to be rhetorical hyperbole. Now, this is really, I think, question of law, not a question of fact, whether it's rhetorical hyperbole. We certainly, respecting Your Honor's ruling, or tentative ruling, understanding that I have to go to the next stage because of your inclination is to regard these statements as being statements of – that are per se defamatory.

But I think a very substantial argument can be made that these are so rhetorical that they are statements of opinion rather than statements of fact. And, therefore, if they are an opinion, of course, they are not actionable.

But even assuming that you decide that these are statements of – actionable statements of fact as a matter of law, then I think you still, under the *Dendrite* standard, there would still be requirements that the Plaintiff should have to make.

First of all, the Plaintiff should have to allege that the false statements about it were made with actual knowledge. Now, we agree with Cooley that it's not fair to have to produce evidence of actual malice. But at the very least it should have to allege that to go -- made false statements about it with actual malice. Because for the reasons that I explained in our reply brief, it should be clear that a law school which claims to be the second best law school in the country puts itself forward for comments on the quality of its legal education. Therefore, it is a public figure with respect to those comments, if not generally, because of its role in the

community.

So the first thing that I think Cooley has not done, even if you adhere to your sensitive inclination in determining that the use of the words "criminal" and "fraud" rise to the level of per se defamation, is that the Plaintiff has not pleaded a proper case given the fact that it's a public figure because it has not pleaded actual malice.

And the second thing Cooley has not done, under whether it be the *Dendrite* standard or the *Cahill* standard, there are two different approaches that Courts of Appeals in these various states across the country have been applying, is that it haven't put forth any evidence that anything stated by the Doe in the case is false.

It's interesting that there was an affidavit submitted with a complaint from Mr. Thelen, the dean of the law school, attesting to their efforts to obtain the Doe's identity. It would have been so easy to put in an affidavit attesting to the falsity of the statements that Doe made. And yet, for reasons, basically stood on its view of the law. And of course it's

entitled to stand on its view of the law. But I think I would ask the Court to wonder why it is that given how easy it is to show the falsity of the statements, that they had made no efforts to do so by putting in evidence.

THE COURT: All right. Thank you. Mr. Coakley?

MR. COAKLEY: Thank you, Your Honor.

THE COURT: You need to come up here so that Mr. Levy can hear.

MR. COAKLEY: Your Honor, let me, if I may, first address this allegation that there has been some violation of the Court Rules.

THE COURT: You covered that. I already ruled it was inadvertent. We don't need to go back over that.

MR. COAKLEY: Thank you, Your Honor.

So really, all we are asking for here is what we are entitled to under Michigan law and under Michigan Court Rules, which is, you know, liberal and open discovery, full discovery, which we need to prosecute our case.

THE COURT: But, I mean, if I allow you to add John Doe as a named party, then you can proceed down regular discovery lines, rather than

dragging all these other folks in. I agree with Mr. Levy, I think for people who are on blogs, and they might respond to something, I don't think that you can use discovery as a fishing expedition to try and go and find something other than what you already have. You have statements from, at least, John Doe Number 1, that are published. You have those.

But as far as the necessity to go out and try to dig up some other statements, I'm hard-pressed to go there on this internet and his ISP addresses.

MR. COAKLEY: I guess I'm not understanding what other statements you think we're looking for.

THE COURT: I don't know. I mean, I don't see the need for you to do anything with those since you already have the statement. That's what I'm saying. You have the statement. So it's going to be a question of fact, I guess, as to whether or not it's a per se statement. But if I allow you to name him as a party, I don't think you need anything else from those subpoenas. That's what I am telling you.

MR. COAKLEY: From the other John Does?

THE COURT: Yeah. Any other subpoenas

about who he contacted or who he may have interacted with, or who else contacted him. I don't see it.

MR. COAKLEY: Well, Your Honor, unless you're going to decide that –

THE COURT: I think you can then take his deposition and ask him, and then we can see what he says.

MR. COAKLEY: We could take his deposition, Your Honor. But before we have our discovery on what he has done, who said what to whom.

THE COURT: Right. But *Dendrite* talks about – and I think it's a fine line that we have to balance the First Amendment rights of all these other people he may have contacted. So why should they be exposed to this because of something he said? And they may have responded, or they may have made some kind – hey, I agree, does that become actionable against them? That's my concern that when you go to these cites –

MR. COAKLEY: I guess you would have to rely on our good faith and exercise of our rights of discovery.

THE COURT: That's true. But we don't want any more inadvertent things to happen, frankly.

MR. COAKLEY: You know, the question here is, where do we draw the line. This John Doe Number 1, he said that all of his statements in his blog, including the ones that we believe, and I think you have tentatively said that there is a colorable recoverable claim for per se defamation. He said it was based on his research, his investigation. So –

THE COURT: But if you have him, you have a trial, that's what trials are for, isn't? I don't think it's necessary for us to go out and drag –

MR. COAKLEY: That's what discovery is for, isn't it?

THE COURT: – in another 150 people. Because I'm concerned, let me just state it, I'm concerned about a chilling effect, frankly. I'm not a constitutional scholar. But I am concerned that when you have carte blanche discovery of these ISP cites, it's a huge chilling effect on folks. I mean, if they know whatever I say, somebody is going to come after me, somebody is going to sue me, somebody is going to drag me through this, because I say I agreed with what John Doe Number 1 says, I'm concerned about that. I think the First Amendment does allow people to

say what they want to say.

I don't feel, at least my initial interpretation is, that that rises to the level of making per se slanderous statements. I don't think your First Amendment right protects that. But it does protect virtually everything else. I don't know. Mr. Hermann may have an argument. Maybe Cooley is a public official, treated as a public figure maybe. These are just conclusions. I don't know. But at least on the surface, I think it's still a question of fact. And I think that has to be developed. I don't think it's a basis where I would rule as a question of law that it's not. Let me put it that way.

MR. COAKLEY: Right. And I agree with you. And that's why we need the discovery to develop the facts. There are lots of other folks out there.

THE COURT: What other facts do we have? We have the blog. You have to ask the John Doe Number 1 what's the basis of your statements, I guess. I don't think you need to go get a thousand other ISP cites and go in and try to find out what they said, and then send in some questions and everything. That's the chilling

effect that you've got. You've got the guy with the big stick coming in, beating down all these other people out there, in order to send a message that: Don't say this about us again.

MR. COAKLEY: But we haven't done that, Your Honor. That's my point.

THE COURT: I'm saying, that's my concern.

MR. COAKLEY: I understand that.

THE COURT: I'm not saying that you had done that. And that's what creates a chilling effect.

MR. COAKLEY: I understand that. That's what I am trying to tell you, Your Honor. There are lots more – I wish I would have brought one example to you. Lots more offensive rankling statements, blogs, about Cooley out there. We haven't taken after everybody. We make good faith allegations. We wouldn't do anything different for anybody else who is saying things about Cooley.

THE COURT: I don't know when Cooley draws the line, Mr. Coakley. I don't know. I don't want to drag all these other folks in because of something John Doe might have said. John Doe Number 1, that is.

MR. COAKLEY: Well, I guess I don't know where the line is being drawn on what we can do to try and find out what John Doe said to whom, and when he said it in order to test his statement in his blog where he per se defamed us, that it was based on his investigation.

THE COURT: That's the balancing test.

MR. COAKLEY: We are after his statement. We are not after everybody else's statements.

THE COURT: But you want to go the ISP site and find out what he told other people.

MR. COAKLEY: That's right. Those would be party admissions.

THE COURT: They're dragged in. They then become a part of this. And so suppose you get in there, and you say, oh, this guy, logically you would follow that guy and see what he said. So let's follow him. And he says something that you considered to be per se slanderous. And then we have him, too. So you go, A is John Doe 1. You go to B, then you say this is what he told B. And then let's see what B said. Then you're out here with D, E and F. And then you're saying, well, he published this stuff, too.

MR. COAKLEY: Well, the only thing I can

say about that, Your Honor is, one, we have acted in good faith and we wouldn't do anything different going forward. Two, that's why we have the subpoena process. If somebody objects to a subpoena that we have issued –

THE COURT: Well, realistically, Mr. Coakley, you have some guy out here who is a student, he doesn't have the resources, I assume this guy couldn't go out to California and fight. This is the real world.

MR. COAKLEY: That's the reality, Your Honor.

THE COURT: You have an unlimited budget.

MR. COAKLEY: Think about that.

THE COURT: So you get down to Number F, or Number G, and he's just a guy working down here at the store, and then you talk about, well, he can come fight the subpoena. I mean, let's be realistic. This is the real world.

MR. COAKLEY: John Doe has two attorneys here. Two attorneys on the phone.

THE COURT: I am talking about the guy D, E and F. Who is down there, just a regular guy, he says, oh, holy gun, what have I got myself in. And you're talking about, well, you can come to

court and fight that if you want. Why would I want to put that guy in that position?

MR. COAKLEY: Mr. Hermann can object. We are not interested in chasing down every rabbit trail, Your Honor. What I really object to, what is very troublesome to me is, we have no idea where the line is drawn. Is it at D? Is it at C? Is it at D? What happens if we discover some information from B that leads us to information material to John Doe's state of mind, or John Doe 2's state of mind? Are we supposed to stop and not continue our discovery because we are getting down the line where somebody might not be able to come into court and move to quash the subpoena or exercise their rights? We have public citizens law from Washington, D.C. in this case on a discovery issue.

THE COURT: Well, I think it's a First Amendment right.

MR. COAKLEY: They have a Yale law fellow who drafted their last brief.

THE COURT: Where did you go to school, Mr. Hudson? Where did you go to school?

MR. HUDSON: I went to Georgetown.

THE COURT: Georgetown? That's close to

Yale.

MR. HUDSON: It's much lower in rank.

MR. HERMANN: It's Number 3 beneath Cooley on the best law schools, Your Honor.

MR. COAKLEY: So that's my concern. These folks do have resources, Your Honor. They have a public law center in California. They are all working together. That's the real world. That's what we're up against. All of these folks are communicating through the internet, through blogs, through Facebook, whatever it is. So it isn't some poor fellow down the road at the convenience store, you know, that we're all interested in. What we're interested in, the folks that are defaming us in a medium where the effect is immediate. And it's very devastating. You know how fast this stuff travels on the internet.

So we need what the Michigan Court Rules provide to us, which is liberal and open discovery. And *Dendrite*, it's interesting academic discussion. But that's not the law in Michigan.

THE COURT: It's not the law. I'm just offering some guidance.

MR. COAKLEY: It's not the law. The law in

Michigan is –

THE COURT: It will come out of this case. That's what the law in Michigan, it's going to come out of this case.

MR. COAKLEY: That's it, Your Honor. We made good faith allegations. We should be permitted to – we have the burden here. And we should be permitted to pursue our discovery. If somebody thinks that we get out of line, I don't think that's going to happen. But if somebody thinks we got out of line, there is a place for that. It's right here.

THE COURT: All right.

MS. HARVEY: Hello?

THE COURT: He is still reviewing his notes. I'm sorry.

MR. COAKLEY: I think we have covered it, Your Honor. We would ask that we be permitted to name John Doe. We be permitted to pursue our discovery as provided by the Michigan Court Rules in Michigan law. And I don't know if you want to address the other John Does, Your Honor. But I would note that although we have subpoenas, a couple of subpoenas out on those, and some others in the wings, we have nobody appearing on behalf

of the other John Does. There is no motion to quash. And I would say only one other thing about that. To my mind, we have made allegations with respect to the other John Does that are tantamount to fraud.

THE COURT: But they don't, in my opinion, it's like I told Mr. Hermann, tentatively they don't rise to per se statements, in my opinion. Just a question fact, unlike John Doe Number 1. And, also, as I stated, I'm taking into consideration that they are simply responding to go, they aren't publishing. I mean, it's published. But they weren't publishing on their blog. They're sort of just responding to John Doe Number 1. I think that makes a distinction, in my mind.

MR. COAKLEY: Just so the record is clear, Your Honor, John Doe Number 2, that person claimed Cooley is a sham corporation. I mean what does a sham mean? Fraudulent.

THE COURT: It's an opinion, I would think. It's not like they committed a crime. That's a question of fact. But I'm just saying, in looking at that, and again the distinction is a person is responding. I don't know what the law is on that.

I guess the Court of Appeals will tell me. When you have primary blog, or John Doe Number 1, and then 2, 3 and 4 respond to him, are they in the same category. I guess the argument that Mr. Levy about malice will come into play there on 2, 3 and 4. I don't know, but we aren't there yet. So...

MR. COAKLEY: So they allege that John Doe Number 2 is alleging securities fraud. John Doe Number 3 alleges that Cooley was engaged in student loan fraud, committed fraud. And John Doe Number 4 said that Cooley was bilking students and taxpayers out of billions of dollars. Those, to my mind, are allegations of fraud. We think that they all satisfy the per se defamation standard. And we would ask that we be permitted to pursue our discovery against them along the same lines as John Doe Number 1. Thank you.

THE COURT: Mr. Hermann?

MR. HERMANN: Yes, Your Honor. I have a proposal and possibly a solution.

THE COURT: All right.

MR. HERMANN: I've heard the Court's preliminary opinions, and it appears that the Court is leaning in a certain way. I don't want to – the Court's heard its arguments. And you

appear to be leaning in a certain direction. I do tend to agree with the Court in a sense that this case may perhaps define the law in Michigan. So with that being said, perhaps rather than conducting discovery as a suggest, what I would request of the Court is that if the Court were to allow Cooley to amend, and identify my client by his name, through the disclosures that were used by, or disclosed through the Weebly disclosures, that there be a 21-day stay period to allow my client the opportunity to appeal. And that any discovery that has been commenced would be also stayed during that time period. Any new discovery could be renewed after that 21-day stay period with the opportunity of any objection on any of the Does to raise an issue of continuation of a stay if there is an appeal in effect.

Under those circumstances, we would certainly take an application for leave to appeal. And this may be something that would be addressed on the Court of Appeals, and perhaps more guidance from the Court of Appeals and/or law created in this state.

THE COURT: Okay.

MR. COAKLEY: Your Honor, if the amendment

is permitted, then the Defendant will have 21 days to answer.

MR. LEVY: Mr. Coakley, would you step forward? I apologize.

MR. COAKLEY: If the amendment is permitted, then he will have 21 days to answer the complaint. Or, you know, even if he is unsatisfied with the allegation, I assume he could file a motion to dismiss. That's the way to test the allegations, to my mind.

THE COURT: I think they were really questioning whether or not, in light of there being an inadvertent disclosure, is the appropriate remedy to name him. Because that's the only way you got the name of John Doe 1. That's the appellate question, as I saw it. It's not like a summary disposition on, I'm making a ruling that it's per se. I'm just saying it could be per se.

MR. COAKLEY: That's a good faith allegation. No, I understood that.

THE COURT: Right. So I think it's my understanding what Mr. Hermann was suggesting is that the real issue is, should the John Doe Number 1 be named as a party in light of the inadvertent

disclosure of the information.

MR. HERMANN: Or the *Dendrite* analysis.

THE COURT: We haven't got to the *Dendrite* analysis yet.

MR. COAKLEY: That's the real issue. They want to take the *Dendrite* issue up. We have been stalled for two months on discovery. I think that's unfairly prejudicial to our ability to prosecute our case. They have got 21 days, you know, to do whatever they want to do after a complaint is amended. So I don't see that there is any need for a stay.

THE COURT: Okay.

MR. LEVY: Can I speak to the question of the stay, Your Honor?

THE COURT: Okay, Mr. Levy. Briefly.

MR. LEVY: Yes. I assume that in Michigan, as in most states, the Courts discourage interlocutory appeals. But what the Courts of Appeals have uniformly recognized in other states, and I think a fair argument could probably be made under Michigan procedure as well, is that once the Does' identity is put publically in the complaint, the anonymity is irretrievably lost. And so, therefore, the Courts of Appeals, Supreme Court in

other states have been willing to entertain interlocutory appeals about whether the First Amendment right of anonymity should be taken away.

As I understand it, the Does' argument, Your Honor, which we would certainly support, is that it's fair to have a stay that gives the Doe an opportunity to get to the Courts of Appeals to ask for a continuation of the stay so that the merits of the *Dendrite* issue could be put to the Court of Appeals.

THE COURT: All right. In this matter we have multiple issues that's background. Cooley Law School filed their complaint against John Does 1, 2 and 3 alleging slander, defamatory statements, including some that – per se statements.

It appears that John Doe Number 1 was the principal blogger who put some information on his site. It appears, at this point, without further evidentiary proceeding, John Does 2, 3 and 4 were simply responders or concurring, sending other information back in.

What happened in this case, that Cooley Law School issued subpoenas to the ISP sites to,

I guess, the blogger, at that point, who had an unknown identity. And that the Defendant for John Doe 1 came to the Court and asked that there be a motion to quash those subpoenas, had contact with 1 of the disclosures, was it Weebly?

MR. HERMANN: Yes, Your Honor.

THE COURT: And they said they would honor it. But it turned out they did not. And they inadvertently disclosed information that apparently contained another user name for John Doe 1. And that apparently turns out the identity to have been a secondary user name that he used while he was a student at Cooley Law School. And the result was that Cooley was able to identify John Doe Number 1.

Now, at a prior hearing, this Court struck the amended complaint, really, pending today's decision. We entered an order stating that the Court should receive, in camera, the information from subpoenas that were already outstanding. We have been advised that there are a lot of subpoenas outstanding now, apparently, involving John Does 2, 3 and 4, I guess, also, trying to identify their ISP information to try to work their way back.

Earlier in my discussions, I had talked about how I felt that there was a chilling effect when you allow people or any entity, really, to go in and try to track down whatever anybody said on the Internet.

Now, the law in Michigan isn't set yet. So maybe this case will set it. But in the *Dendrite* case they talked about the standard. And I think there that case also dealt with John Doe 1, 2, 3 and 4. And I think the standard came out of Number 3. It wasn't the primary 1. I don't know what the result of the case was about the primary John Doe in that case. But, apparently, John Doe 3 was not a primary.

And in that court, and I'm not saying that's the law in Michigan, but it seems reasonable to look at it for analysis purposes, that they set forth five guidelines. One, the Plaintiff must make good faith efforts to notify the pollster, and give the pollster a reasonable opportunity to respond.

Well, as far as John Doe Number 1, we don't have that issue because they responded and came in and filed motions to quash.

Number 2, the Plaintiff must specifically

identify the pollster's allegedly actionable statements. Now, as far as Number 1 is concerned, we have a copy of what was posted on the blog, which I have already indicated, tentatively, could be considered to be per se talking about crimes and committing fraud. So I think that we have that.

Three, the complaint must set forth a prima facie cause of action. It's thin. But they did say that they felt it was a per se statement. And so per se statement, I don't know if that requires an actual malice per se, if it's a per se statement. If I recall correctly, I don't know, maybe Mr. Hudson can help me out. But if it's a general statement, I think you have show malice, or some type of actual pecuniary loss versus a per se statement, I don't think you actually do. But we aren't there yet.

But I think although I would acknowledge Mr. Levy's comments that the complaint isn't the most specific, but I think as skeletal, anyways, it's set forth a prima facie cause of action.

Okay. The Plaintiff must support each element of the claim with sufficient evidence. Well, we haven't got there yet. I think that's

the whole position of the Plaintiffs saying that, Judge, we should have this opportunity to go out, see what other evidence is out there, whatever statements Mr. John Doe Number 1 may have made. But I think that for John Doe Number 1, they have the blog statement. I think that was the point I was trying to make. I don't know what else you need once you have that, as far as my example of how far are we going to go if we allow the subpoenas to stay out there. And who are you going to draw in if you find out that somebody down the line said something. Are you going to add them in this lawsuit, too. So -- because the real issue is the constitutional issue. I'm not claiming that I was a great constitutional scholar. I was a litigator, Mr. Coakley.

MR. COAKLEY: As am I, Your Honor.

THE COURT: So 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 disclosure of the anonymous Defendants. I think that's the crux of the case here. Complicated by the fact that the identity only came about as a result of the inadvertent disclosure made biweekly

that ultimately allowed the Plaintiff to identify who Juror Doe Number 1 was, and also filed an amended complaint. So we got the issue of what's the appropriate remedy for inadvertent disclosure. Defendant would argue it's the fruit of the poisonous tree versus if it is a per se statement, should the person who made the statement be held accountable. That's just how I see it.

As far as John Doe Number 1 is concerned, my initial feeling is that per se slanderous statements are not entitled to First Amendment protection. So that's really a balancing test. It's a close balancing test. But in trying to fashion a remedy here, the Defendant would say that due to the question of anonymity, and if I ruled that John Doe Number 1 name can be added to the complaint, that once I do that, it's irreversible. And they have suggested that if I am inclined to make such a ruling, that they be granted a 21-day period to file leave to the Court of Appeals, staying that order during that time. I'm sort of persuaded by that. I mean, once we make the disclosure, it's out there. Even if they were going to appeal down the road, I don't know, maybe my analysis is incorrect.

But I think when you talk about anonymity, it's irreversible once it's disclosed. So if we are going to go to the Court of Appeals, we might as well go to all the issues. So I think the appropriate remedy for the inadvertent disclosure is that the John Doe Number 1, I'm not going to mention his name right now, can be added as a party in the name that Cooley discovered.

But I think any other subpoena should be quashed in this regard for the reasons I stated about my concern about the chilling effect, how far we go down the line, who else is going to be dragged into the case. And I think the protection of free speech outweighs that because we had the published blog. I think that depending on what the Court of Appeals says, if they say it's all right to amend the complaint, then they can have discovery, then we can come back and revisit the issue at that time to see what specific information we want to get. As I stated, my concern is that's just one massive fishing expedition. We don't really know if he said anything at all. Judge, let us go contact all the people he has contacted, let us go down and get John Does 2, 3 and 4, and see what else

we can find. And I'm concerned about that. I think we need to have something more specific. Even under the *Dendrite*, we have to have some information rather than trying to use discovery to get some more information. And I'm saying that because here it's on the blog. I'm persuaded by that.

In regards to 2, 3 and 4, I think that Plaintiff has to show, and I'm going to stay all those other subpoenas, concerning John Does 2, 3 and 4, stay them at this time, also. And I think under the *Dendrite* analysis, that we have to give them a reasonable opportunity to appear. That's 2, 3 and 4.

So I think under *Dendrite*, you may not know who 2, 3 and 4 might be. *So I guess Dendrite* suggested you could, I guess, put it under Cooley's website, maybe put something under John Doe Number 1's website about 2, 3 and 4. I'm letting you know you may want to appear whomever you are. So I am not going to allow you to go in the back door, Mr. Coakley, by going in 2, 3 and 4, who aren't represented. And, yes, I know that the law says everybody is entitled to be represented. But in this type of case, I

don't know what the financial resources of the people are. So if they don't respond, you issue the subpoenas. You go get it all through the back door anyways. So that would sort of defeat the purpose for my ruling today.

So all of these things, we are going to stay the entry of the order for 21 days. I think it's a paramount constitutional issue concerning the First Amendment rights and bloggers. I do think that. And I think that it's irreversible to John Doe Number 1 once he is named, that we can't go back in the event the Court of Appeals agrees with Mr. Coakley. So that's going to be the order of the Court.

MR. HERMANN: Your Honor, I don't want to dust off my appellate practice. I don't have my Court Rules in front of me. But in order to perfect the appeal, I suppose we need an order from the Court.

THE COURT: I think you submit the order under seal, I think, is the way it goes. And then we would have the order that allows it to go to Court of Appeals. I guess we can look it up, if you want.

MR. HERMANN: And I'm just thinking out

loud, procedurally. Perhaps would it be an order allowing the Plaintiffs, in this matter, the opportunity to amend, and then in a separate order staying execution of that pending the appeal? Because I believe that the Court of Appeals would need the actual paper written copy of the order that we would be appealing.

THE COURT: Fine. We can do it that way.

MR. COAKLEY: Your Honor, just one point of clarification. I know you made your ruling. But John Doe Number 4 is not one of the commenters on John Doe 1's blog.

THE COURT: Right. But we are just going to hold up on all of those until we get some clarification. If the Court of Appeals upholds me and denies leave, then we will work with that. Right now all those subpoenas are stayed, and the ones on John Doe Number 1 are quashed.

MR. HERMANN: Fair enough, Your Honor.

THE COURT: You guys will get the appropriate form so that you can check with the appellate people.

MR. HERMANN: Thank you, Your Honor.

THE COURT: All right. Like I said, I was a litigator. All right. Anything else?

MR. HERMANN: No, Your Honor.

THE COURT: Mr. Levy?

MR. LEVY: Thank you so much for hearing me, Your Honor.

THE COURT: All right. Good luck. Thank you.

MS. HARVEY: Thank you, Your Honor.

MR. COAKLEY: Thank you, Your Honor.

(Proceedings concluded at 4:06 p.m.)

STATE OF MICHIGAN)
COUNTY OF INGHAM)

I, TERESA J. ABRAHAM, Certified Shorthand Reporter and Notary Public in and for the County of Ingham, State of Michigan, Thirtieth Judicial Circuit Court, do hereby certify that the facts stated in the foregoing pages are true and correct, and comprise a complete, true and correct transcript of the proceedings taken in this matter on this the 24th day of October, 2011.

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Teresa J. Abraham, CSR-3445

Date: October 28, 2011