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12 UNITED STATES DISTRICT COURT  
 13 SOUTHERN DISTRICT OF CALIFORNIA

<p>15 KEVIN VANGINDEREN,          16 Plaintiff,          17 v.          18 CORNELL UNIVERSITY,          19 Defendant.</p>	<p>) Case No. 07-CV-2045 BTM(JMA)          )          )          ) <b>REPLY MEMORANDUM OF POINTS          AND AUTHORITIES IN FURTHER          SUPPORT OF CORNELL’S MOTION          FOR ATTORNEYS’ FEES</b>          )          )          ) [Per chambers, no oral argument unless          requested by the Court]          )          ) Hearing Date: August 22, 2008          ) Time: 11:00 a.m.          ) Place: Courtroom 15          )          ) Action Filed: October 1, 2007          )</p>
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25 The essence of Plaintiff’s opposition is that his lawsuit was so futile, Cornell should have  
 26 spent no more than a week’s worth of attorney time defeating it. *See Opp.* at 3:8-3:19.  
 27 Accordingly, Plaintiff requests that the Court deny Cornell its attorneys’ fees altogether or award  
 28

1 fees equal to “one week’s salary of Defendant Attorney Nelson Roth.” Opp. at 4. These requests  
2 are baseless.<sup>1</sup> Cornell should receive the full amount of requested fees.

3 **A. Cornell Is Entitled to Attorneys’ Fees**

4 An award of attorneys’ fees in this case is mandatory: “In any [SLAPP suit], a prevailing  
5 defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and  
6 costs.” Cal. Code Civ. Pro. § 425.16(c) (emphasis added); *Premier Med. Mgmt. Sys., Inc. v.*  
7 *California Ins. Guar. Ass’n*, 163 Cal. App. 4th 550, 556 (2008) (“A defendant who brings a  
8 successful motion to strike under section 425.16 is entitled to mandatory attorney fees.”) Cornell  
9 therefore unquestionably is entitled to its attorneys’ fees.

10 **B. Cornell’s Requested Fees Reflect Time Reasonably Spent, Therefore the Entire Fee**  
11 **Request Should Be Granted**

12 Cornell is entitled to a fee award for “*all* the hours *reasonably spent*, including those  
13 relating solely to the fee.” *Premier*, 163 Cal. App. 4th at 556 (emphasis in original). In *Premier*,  
14 which involved multiple defendants prevailing on anti-SLAPP motions, the California Court of  
15 Appeal affirmed the trial court’s award of fees to each defendant in amounts of \$165,000  
16 (representing 217 hours of work), \$76,206 (representing 127.9 hours of work) and \$33,295. The  
17 court rejected appellants’ arguments that the number of hours worked was excessive, even in light  
18 of significant overlap in the work of defendants’ respective counsel. *Id.* at 560-563. The 166.25  
19 hours for which Cornell seeks attorneys’ fees is less than the time spent in *Premier*, and Cornell’s  
20 attorneys are entitled to deference regarding the manner in which they allocated their time and the  
21 arguments they pursued. *See Moreno v. City of Sacramento*, No. 06-15021, 2008 WL 2875300,  
22 \*2 (9th Cir. July 28, 2008) (“By and large, the court should defer to the winning lawyer's  
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24 <sup>1</sup> Plaintiff’s claim that his filing of a notice of appeal deprives this Court of jurisdiction to consider  
25 Cornell’s motion for attorneys’ fees similarly lacks merit. *See, e.g., Culinary & Service*  
26 *Employees Union, Local 555 v. Hawaii Employee Ben. Admin., Inc.*, 688 F.2d 1228, 1232 (9th Cir.  
27 1982) (noting, without objection, that district court awarded attorneys’ fees after notice of appeal  
28 filed).

1 professional judgment as to how much time he was required to spend on the case; after all, he  
2 won, and might not have, had he been more of a slacker.”).

3 Further, Plaintiff presents no evidence to support his request that the Court reduce  
4 Cornell’s fees award – a showing he is required to make. *See Premier*, 163 Cal. App. 4th at 560.  
5 He disputes neither Cornell’s lodestar calculation, nor Proskauer’s rates, nor any particular time  
6 entries or supporting documentation. Rather, Plaintiff baldly asserts that Cornell should not  
7 receive its fees for the time spent researching and briefing the issue of republication and the effects  
8 of digitization on the statute of limitations. *See Opp.* at 1-3. Plaintiff argues that Cornell’s  
9 attorneys should not have been so “vigorous” in light of the frivolousness of Plaintiff’s complaint.  
10 *Opp.* at 1:21-2:12. This argument is flawed for several reasons. First, in its anti-SLAPP motion,  
11 Cornell was entitled to brief vigorously every conceivable, non-frivolous defense against  
12 Plaintiff’s \$1,000,000 lawsuit; issues it failed to address in the motion could not have been briefed  
13 on reply or at hearing. The fact that the Court did not reach the republication issue has no bearing  
14 on Cornell’s ability to recover for the work its lawyers reasonably performed in this regard.

15 Second, Plaintiff himself created the need for Cornell’s briefing of the statute of limitations  
16 issue. As noted in the November 2, 2007 Declaration of Valerie Cross Dorn (Dkt. # 8-3), Plaintiff  
17 refused to stipulate to the unsealing of his criminal records. Dorn Decl. ¶ 6. Had Plaintiff so  
18 stipulated, perhaps Cornell would have seen the patent frivolity of Plaintiff’s complaint and would  
19 not have briefed the novel republication issue. However, because Cornell did not see those  
20 records until mid-November, well after the deadline for responding to Plaintiff’s complaint,  
21 Cornell had no choice but to brief the republication issue. Cornell therefore should recover its  
22 fees.

23 Finally, the Court should decline Plaintiff’s invitation to reduce Cornell’s fee award to one  
24 week of Mr. Roth’s salary. As the Ninth Circuit recently explained,

25 The district court’s inquiry must be limited to determining whether  
26 the fees requested by this particular legal team are justified for the  
27 particular work performed and the results achieved in this particular  
28 case. The court may permissibly look to the hourly rates charged by  
comparable attorneys for similar work, but may not attempt to  
impose its own judgment regarding the best way to operate a law

1 firm, nor to determine if different staffing decisions might have led  
2 to different fee requests.

3 *Moreno*, 2008 WL 2875300, at \*5. Rather, Cornell is entitled to a full award of its  
4 attorneys' fees.

5 **C. Cornell Is Entitled to the Fees Associated with Bringing this Motion**

6 Cornell is entitled to fees associated with bringing the Motion and drafting this reply.  
7 *Premier*, 163 Cal. App. 4th at 556 (noting that anti-SLAPP statute entitles prevailing defendants to  
8 award of all fees, including fees associated with a fees motion). Plaintiff therefore respectfully  
9 requests that the Court award four additional hours at \$350 per hour, for a total of \$1,400  
10 associated with drafting this Reply. *See* concurrently filed Declaration of Clifford S. Davidson ¶  
11 2.

12 **D. Conclusion**

13 For the foregoing reasons, Cornell requests that the Court grant to Cornell attorneys' fees  
14 in the amount of \$66,965.25.

15  
16 DATED: July 31, 2008

NELSON E. ROTH  
CORNELL UNIVERSITY

BERT H. DEIXLER  
CLIFFORD S. DAVIDSON  
PROSKAUER ROSE LLP

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20 /s/ -- Clifford S. Davidson  
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Clifford S. Davidson

22 Attorneys for Defendant,  
23 CORNELL UNIVERSITY  
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