

ORIGINAL

1 NELSON E. ROTH, SBN 67350
ner3@cornell.edu
2 CORNELL UNIVERSITY
300 CCC Building
3 Garden Avenue
Ithaca, New York 14853-2601
4 Telephone: (607)255-5124
Facsimile: (607)255-2794
5

6 BERT H. DEIXLER, SBN 70614
bdeixler@proskauer.com
7 CLIFFORD S. DAVIDSON, SBN 246119
cdavidson@proskauer.com
8 PROSKAUER ROSE LLP
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3206
9 Telephone: (310) 557-2900
Facsimile: (310) 557-2193
10

11 Attorneys for Defendant,
CORNELL UNIVERSITY

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

FILED

08 APR 28 PM 1:16

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JMA
DEPUTY

'08 CV 736 W JMA

15 KEVIN VANGINDEREN,
16 Plaintiff,

17 v.

18 CORNELL UNIVERSITY, BERT
19 DEIXLER,
20 Defendants.

Case No.

**NOTICE OF REMOVAL OF
CIVIL ACTION FROM THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF SAN DIEGO,
SOUTH COUNTY DIVISION**

Hon.

(San Diego Superior Court, South
County Division
Case No. 37-2008-00069807-CU-DF-
SC)

[Defendant Bert Deixler's Joinder
and Declaration of Clifford S.
Davidson filed concurrently
herewith]

Action Filed: April 8, 2008

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

2 PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441 and
3 1446, defendant Cornell University (“Cornell”) hereby removes to this Court the
4 state court action described below. Removal is based on the following grounds.

5 1. On April 8, 2008, an action was commenced in the Superior Court of
6 the State of California, County of San Diego, South County Division, entitled *Kevin*
7 *Vanginderen v. Cornell University, Bert Deixler*, Case No. 7-2008-00069807-CU-
8 DF-SC (the “State Court Action”). A true and correct copy of the Summons and
9 Complaint in the State Court Action are collectively attached to the concurrently-
10 filed Declaration of Clifford S. Davidson (“Davidson Declaration”) as Exhibit A.

11 2. On April 15 and 17, 2008, the Complaint in the State Court Action was
12 served on Defendants.

13 3. The State Court Action is a civil action over which this Court has
14 original jurisdiction under 28 U.S.C. § 1332, and is one which Defendant may
15 remove to this Court pursuant to the provisions of 28 U.S.C. § 1441(b). The matter
16 in controversy exceeds the sum of \$75,000 as the Complaint by plaintiff Kevin
17 Vanginderen (“Plaintiff”) seeks damages in the amount of \$1,000,000. As discussed
18 in detail below, there is complete diversity of the parties because defendant Bert
19 Deixler (“Deixler”), a non-diverse co-defendant, was fraudulently joined in this
20 action. This Court is the proper venue as the State Court Action is pending in the
21 South County Division of the San Diego County Superior Court, which is within
22 this District.

23 4. According to the Complaint in the State Court Action, and upon
24 Defendant’s information and belief, Plaintiff was at the time of the filing of this
25 action, and still is, a citizen of the State of California. *See Davidson Decl. ¶ 2 & Ex.*
26 *A.*

1 5. Cornell was at the time of filing of this action, and still is, an
2 educational institution chartered and incorporated under the laws of the State of
3 New York, with its principal place of business in the State of New York.

4 6. This Notice of Removal is being filed within 30 days of service of the
5 Complaint in the State Court Action, the pleading from which it appeared that
6 removal was proper. Accordingly, the notice of removal is timely filed pursuant to
7 28 U.S.C. § 1446(b).

8 7. Notice of this removal is being given both to the adverse party
9 (Plaintiff) and to the San Diego Superior Court, South County Division, pursuant to
10 28 U.S.C. § 1446(d). A true and correct copy of the Notice to Adverse Party, which
11 will be finalized, filed and served shortly following the filing of this Notice of
12 Removal, is attached to the Davidson Declaration as Exhibit B. A true and correct
13 copy of the Notice to State Court, which will be finalized and filed with the San
14 Diego County Superior Court, South County Division in the State Court Action, is
15 attached to the Davidson Declaration as Exhibit C.

16 THE STATE COURT ACTION IS PROPERLY REMOVED TO THIS COURT
17 BECAUSE DEFENDANT DEIXLER WAS FRAUDULENTLY JOINED

18 8. This Court should ignore Deixler's non-diverse, California residency
19 for purposes of 28 U.S.C. §§ 1332 and 1441(b) because he has been fraudulently
20 joined in this case.

21 9. "Fraudulent joinder is a term of art. If the plaintiff fails to state a cause
22 of action against a resident defendant, and the failure is obvious according to the
23 settled rules of the state, the joinder of the resident defendant is fraudulent." *Ritchey*
24 *v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (quoting *McCabe v. Gen.*
25 *Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987); *see also Rosenblatt v. Ernst &*
26 *Young Intern., Ltd.*, 87 F. Supp. 2d 1048, 1051 (S.D. Cal. 2000) ("A non-diverse
27 party named in the state court action may be disregarded if the federal court
28 determines that party's joinder is a 'sham' or 'fraudulent' in that no possible cause

1 of action has been stated against that party.”) “Fraud” in this context refers to the
2 demerits of a plaintiff’s claim, not necessarily to a plaintiff’s motives. *See*
3 *Rosenblatt*, 87 F. Supp. 2d at 1051-52 (citing *McCabe*, 811 F.2d at 1339) (“The
4 term ‘fraudulent’ is not used in the tort sense. No intent to deceive or other ‘bad’
5 motive on a plaintiff’s part need be shown.”)

6 10. Although a district court typically will not look to defendants’
7 pleadings in assessing whether removal is proper, “[w]here fraudulent joinder is an
8 issue, we will go somewhat farther. The defendant seeking removal to the federal
9 court is entitled to present the facts showing the joinder to be fraudulent.” *Ritchey*,
10 139 F.3d at 1318 (internal quotations and citations omitted) (collecting cases).

11 11. The insufficiency of Plaintiff’s claims against Deixler is obvious
12 according to the settled rules and laws of California; Deixler possesses complete
13 defenses to Plaintiff’s claims. The State Court Action is based on petition activities
14 that Cornell and Deixler undertook in response to Plaintiff’s first lawsuit against
15 Cornell, which he filed on October 1, 2007. Davidson Decl. ¶ 6 & Ex. D (complaint
16 in October 1, 2007 action). That action was removed to this Court and bears the
17 Case Number 07-CV-2045-BTM-JMA. Cornell filed a Special Motion to Strike on
18 November 2, 2007, which was been under submission since December 21, 2007.
19 Davidson Decl. ¶ 7 & Ex. E.

20 12. Although Plaintiff alleges eight causes of action against Deixler in the
21 State Court Action, each of them arises from the same set of facts: Deixler
22 electronically filed necessary evidence with this Court – evidence that Cornell,
23 through Deixler, filed in conjunction with its Special Motion to Strike. That
24 electronic filing later was featured on, and distributed through, www.justia.com, a
25 website that monitors filings in federal court.

26 13. Deixler’s activities on Cornell’s behalf squarely fall within the
27 litigation privilege codified at Cal. Civ. Code §§ 47(b) and (d). Civil Code § 47(b)
28 provides an absolute privilege for any publication, whether made in a document

1 filed with a court or in correspondence or oral communications between parties or
2 their counsel, made in furtherance of a legislative, judicial, quasi-judicial,
3 administrative or other official proceeding provided the publication has a connection
4 or logical relation to the proceeding. *Adams v. Superior Court*, 2 Cal. App. 4th 521,
5 528-29 (1992); *Urbaniak v. Newton*, 226 Cal. App. 3d 1128, 1141 (1991); *Abraham*
6 *v. Lancaster Community Hospital*, 217 Cal. App. 3d 796, 812-13 (1990); *Asia*
7 *Investment Co. v. Borowski*, 133 Cal. App. 3d 832, 843 (1983).

8 14. The scope of the absolute privilege afforded by Section 47(b) is
9 extremely broad. Section 47(b) bars each and every tort other than malicious
10 prosecution, including claims of abuse of process, tortious interference, defamation,
11 unfair business practice and unfair competition. Broad application of the absolute
12 privilege is necessary to shield parties, counsel and witnesses from having their
13 motives questioned and being subjected to litigation and to achieve the purpose of
14 Section 47(b): to afford litigants the utmost freedom of access to the courts to secure
15 and defend their rights without fear of being sued. *Pacific Gas & Electric Co. v.*
16 *Bear Stearns & Co.*, 50 Cal. 3d 1118, 1132-33 (1990); *Adams*, 2 Cal. App. 4th at
17 529; *Abraham v. Lancaster Community Hospital*, *supra*, 217 Cal. App. 3d at 813.

18 15. Consistent with the purpose of Section 47(b) and the strong policy
19 underlying free access to the courts, Section 47(b) is to be liberally interpreted with
20 any doubt as to whether the litigation privilege applies to be resolved in favor of
21 application. *Adams*, 2 Cal. App. 4th at 529.

22 16. Further, even if Plaintiff accurately claims that Deixler intended to
23 disseminate the case to www.justia.com (which he did not), such dissemination was
24 privileged under Cal. Civ. Code § 47(d), which provides a privilege for a "fair and
25 true report in, or a communication to, a public journal of (A) a judicial, (B) a
26 legislative, or (C) other public official proceedings, or (D) of anything said in the
27 course thereof."
28

1 17. Deixler's activities also fall under the free speech protections of the
2 First Amendment to the Federal Constitution; Article 1, section 1 of the California
3 Constitution; and the Noerr-Pennington doctrine. *See, e.g., Pacific Gas & Electric*
4 *Co.*, 50 Cal. 3d at 1133. Deixler will vindicate his rights under these protections in a
5 Special Motion to Strike, pursuant to California Code of Civil Procedure Section
6 425.16, to be filed soon hereafter.

7 18. For all of the foregoing reasons, the Court should ignore Deixler's
8 California residency and permit Cornell to exercise its right to remove the State
9 Court Action pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

10 19. In the event the Court should have any questions about the propriety of
11 removal or may be inclined to remand this action, Cornell respectfully requests that
12 the Court issue an order to show cause why the case should not be remanded,
13 allowing the parties an opportunity to provide the Court with full briefing and
14 argument. Such a procedure is warranted since a remand order is not subject to
15 review.

16
17
18 DATED: April 28, 2008

NELSON E. ROTH
CORNELL UNIVERSITY

BERT H. DEIXLER
CLIFFORD S. DAVIDSON
PROSKAUER ROSE LLP



Clifford S. Davidson

Attorneys for Defendant,
CORNELL UNIVERSITY

21
22
23
24
25
26
27
28

**UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

150236 - MB

**April 28, 2008
13:25:50**

Civ Fil Non-Pris

USAO #: 08CV0736 CIVIL FILING
Judge.: THOMAS J WHELAN
Amount.: \$350.00 CK
Check#.: BC68431

Total-> \$350.00

FROM: KEVIN VANGINDEREN VS
CORNELL UNIV, BERT DEIXLER

CIVIL COVER SHEET

FAXED

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Kevin Vanginderen

DEFENDANTS

Cornell University, Bert Deixler

08 APR 28 PM 1:16

'08 CV 736 DISTRICT COURT WEST VALLEY JMA

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego, CA
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Tompkins, NY
(IN U.S. PLAINTIFF CASES ONLY) DEPUTY

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
(appearing in pro per)
637 Third Ave., Suite E1
Chula Vista, California 91910
(619) 585-7414

ATTORNEYS (IF KNOWN)
(SEE ATTACHMENT)

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | | |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| | PT | DEF | | PT | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)
Defendant removes this case pursuant to 28 U.S.C. sec. 1441(b). This court has original jurisdiction over the matter, pursuant to 28 U.S.C. sec. 1332. There is complete diversity of the parties; Defendant Deixler has been fraudulently joined as explained in the Notice of Removal.

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input checked="" type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 882 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 884 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commercial/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 880 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 810 Motion to Vacate Sentence HABEAS CORPUS: <input type="checkbox"/> 830 General <input type="checkbox"/> 835 Death Penalty <input type="checkbox"/> 840 Mandamus & Other <input type="checkbox"/> 850 Civil Rights <input type="checkbox"/> 855 Prison Conditions	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609

VI. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- 1 Original Proceeding
- 2 Removal from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 10,000,000 CHECK YES only if demanded in complaint:
JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Barry T. Moskowitz Docket Number 07-CV-2045-BTM-JMA

DATE: April 28, 2008 SIGNATURE OF ATTORNEY OF RECORD:

150286 04/28/08
MB \$350-

ORIGINAL

OR

ATTACHMENT TO CIVIL COVER SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Item I(c), "Attorneys"

Nelson E. Roth

Cornell University

300 CCC Building

Garden Avenue

Ithaca, New York 14853-2601

Phone: (607) 255-5124

Facsimile: (607) 255-2794

Bert H. Deixler, Clifford S. Davidson

Proskauer Rose LLP

2049 Century Park East, 32nd Floor

Los Angeles, CA 90067-3206

Phone: (310) 557-2900

Facsimile: (310) 557-2193