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12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 KEVIN VANGINDEREN,
 16 Plaintiff,
 17 v.
 18 CORNELL UNIVERSITY, BERT DEIXLER,
 19 Defendants.

) Case No. 08-CV-736-W-JMA
)
) Hon. Barry T. Moskowitz
)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **CORNELL'S SPECIAL MOTION TO**
) **STRIKE PLAINTIFF'S COMPLAINT**
) **PURSUANT TO SECTION 425.16 OF**
) **THE CALIFORNIA CODE OF CIVIL**
) **PROCEDURE**
)
) [Per chambers, no oral argument unless
) requested by the Court]
)
) [Notice of Motion and Motion, Davidson
) Declaration and Stanley Declaration filed
) concurrently]
)
) Hearing Date: July 3, 2008
) Time: 11:00 a.m.
) Place: Courtroom 15
)
) Action Filed: April 8, 2008

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1 Defendant Cornell University (“Cornell”) hereby submits its memorandum of points and
2 authorities in support of Cornell’s special motion to strike the complaint of plaintiff Kevin
3 Vanginderen (“Plaintiff”) in its entirety, with prejudice and without leave to amend.
4

5 **INTRODUCTION**

6 This is Plaintiff’s second bite at the poisoned apple. Plaintiff first sued Cornell in
7 California Superior Court in October 2007 based on a purportedly libelous *Cornell Chronicle*
8 report from 1983. *Cornell Chronicle* report. Cornell removed the state court action to this Court
9 as *Vanginderen v. Cornell University*, 07-cv-2045-BTM-JMA (the “2007 Action”). Cornell then
10 filed an anti-SLAPP motion, pursuant to section 425.16 of the California Code of Civil Procedure.
11 That motion is under submission before this Court.

12 Meanwhile, on April 8, 2008, Plaintiff filed a second Superior Court complaint (the “New
13 Action”), which also has been removed, brazenly naming Cornell and its attorney, Deixler, based
14 exclusively upon the documents filed by Cornell in support of the anti-SLAPP motion in the 2007
15 Action. Plaintiff, an attorney, must know better. He must know that defendants are entitled to
16 submit evidence in their defense; that litigants and attorneys are entitled to petition government
17 and courts in good faith without fear of reprisal; and that both such activities are protected under
18 California law (Cal. Civ. Code § 47(b) (establishing litigation privilege as an absolute defense to
19 tort claims, other than malicious prosecution)). He also ought to apprehend the patent
20 untimeliness of his claims against Cornell; the statute of limitations expired 25 years ago.

21 Regardless of what Plaintiff ought to know but may not still, he is accountable. As
22 discussed below, the Court should strike each of Plaintiff’s allegations against Cornell in the New
23 Action, and award Cornell its attorney’s fees and costs incurred herein.

24 **FACTUAL BACKGROUND**

25 **A. Officer Barbara Bourne and Cornell Investigate Plaintiff’s Crimes**

26 While an undergraduate student at Cornell University in March 1983, Plaintiff was
27 investigated, arrested, charged and indicted for burglary and larceny. (Declaration of Clifford S.
28 Davidson (“Davidson Declaration”) ¶ 3 and Ex. B (unsealed records from Tompkins County

1 Court, Tompkins County District Attorney and Cornell University Department of Public Safety
2 [collectively, the “Unsealed Records”])). On March 8, 1983, in the course of Cornell’s
3 investigation into Vanginderen’s activities, Officer Barbara Bourne, an officer with Cornell’s
4 Department of Public Safety, filed a variety of investigative reports including Plaintiff’s
5 confession and Officer Bourne’s observation that Plaintiff was involved in at least 10 cases.
6 (Davidson Decl. ¶ 3 & Ex. B, pp. 15-16, 18, 23, 27, 29-30, 33-36).¹

7 On March 17, 1983, the *Cornell Chronicle*, one of Cornell’s newspapers, ran a one-
8 paragraph report of Plaintiff’s arrest. (Davidson Decl. ¶ 4 & Ex. C, p. 105).

9 On or about August 22, 1983, after negotiating a plea bargain with prosecutors, Plaintiff
10 pled guilty to petit larceny and the court proceedings related to the initial felony charges
11 subsequently were sealed. (Davidson Decl. ¶ 2 & Ex. A, pp. 4, 6). However, Plaintiff’s criminal
12 record in New York, which reflects that he is a convicted thief, never has been sealed. (Davidson
13 Decl. ¶ 7 & Ex. F, p. 145 ¶¶ 4,5; Davidson Decl. ¶ 8 & Ex. G., p. 149 ¶ 4).

14 **Plaintiff Files the 2007 Action; Cornell Files Officer Bourne’s Investigative Report**
15 **with This Court in Support of Cornell’s Anti-SLAPP Motion**

16 On October 1, 2007, Plaintiff filed his complaint in the 2007 Action in San Diego County
17 Superior Court. The complaint alleged libel and public disclosure based on the then-twenty-four-
18 year-old *Cornell Chronicle* report of Plaintiff’s crimes, and sought \$1,000,000 in damages. Upon
19 Plaintiff’s filing the 2007 Action, Cornell requested that Plaintiff stipulate to the unsealing of the
20 criminal records regarding the larceny and burglary charges. Plaintiff refused. Cornell therefore
21 moved to unseal Plaintiff’s records. The County Court of the State of New York, Tompkins
22 County granted Cornell’s motion on November 16, 2007. (Davidson Decl. ¶ 3 & Ex. B, p. 7).

23 Cornell removed the 2007 Action and it was assigned to this Court. On November 2,
24 2007, Deixler, as Cornell’s counsel, filed Cornell’s Special Motion to Strike Plaintiff’s Complaint
25 Pursuant to Section 425.16 of the California Code of Civil Procedure (the “anti-SLAPP Motion”).
26

27 ¹ Plaintiff fails to specify which of Officer Bourne’s many reports on March 8, 1983 forms the
28 basis for Plaintiff’s complaint.

1 The Unsealed Records were filed in support of the anti-SLAPP Motion. Davidson Decl. ¶ 3 & Ex.
2 B. The anti-SLAPP Motion has been under submission with this Court since December 21, 2007.

3 **C. Plaintiff Files the New Action on April 8, 2008**

4 On April 8, 2008, Plaintiff filed the New Action in San Diego Superior Court, South
5 County Division, this time against Cornell and Bert Deixler, Cornell's lead attorney. The
6 complaint alleges four purported causes of action against Cornell based on Officer Bourne's
7 March 8, 1983 police reports. (Compl. at 4, 5, 7 and 8). All claims are related to the Unsealed
8 Records.²

9 **DISCUSSION**

10 **A. The Complaint Is A SLAPP Lawsuit, Therefore Plaintiff Must Demonstrate A**
11 **Reasonable Probability of Succeeding in His Claims**

12 Plaintiff's purported claims against Cornell, based on Officer Bourne's investigative report
13 contained in the Unsealed Records, seek to punish Cornell's conduct in furtherance of its
14 constitutional rights to petition and free speech. It was Cornell's right to report Plaintiff's criminal
15 activities to law enforcement officials. California Code of Civil Procedure Section 425.16, the
16 anti-SLAPP statute, therefore applies.³

17 The anti-SLAPP statute was enacted in 1993 in order to address "a disturbing increase in
18 lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of

19 _____
20 ² It is unclear whether Plaintiff also alleges that Cornell conspired with Justia.com to post its
21 filings in the 2007 Action to that website. Neither Cornell nor its counsel contacted Justia.com in
22 connection with the 2007 Action, (Declaration of Nelson E. Roth ¶ 6, filed concurrently), though
23 Cornell would have been perfectly entitled to do so. *See* Cal. Civ. Code § 47(d) (establishing
24 privilege for providing reports of judicial proceedings to media).

25 Also unclear is whether Plaintiff alleges that Cornell is responsible for the purported conduct of
26 defendant Bert Deixler. However, even if Plaintiff so alleges, Cornell is not liable for such
27 conduct because even if Deixler performed the acts alleged, those acts are privileged. *See*
28 *generally* concurrently-filed Memorandum of Points and Authorities in Support of Bert Deixler's
Special Motion to Strike Plaintiff's Complaint Pursuant to California Code of Civil Procedure
Section 425.16.

³ It is well settled that the anti-SLAPP statute applies to state claims brought in federal court.
United States v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 973 (9th Cir. 1999) (noting
that disallowing anti-SLAPP motions in federal court would encourage forum shopping, contrary
to the purposes of the Erie Doctrine); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136,
1148 (S.D. Cal. 2005) (citing *Lockheed* and applying anti-SLAPP statute).

1 speech and petition for the redress of grievances.” The statute applies to all “litigation without
2 merit filed to dissuade or punish the exercise of First Amendment rights of defendants.”
3 *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1089 (9th Cir. 2003) (quoting
4 *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 37 Cal. App. 4th 855, 858 (1995)). The anti-
5 SLAPP statute is to be interpreted broadly so as to protect Constitutional rights and to act as a
6 screening mechanism by “eliminate[ing] meritless litigation at an early stage in the proceedings.”
7 *Macias v. Hartwell*, 55 Cal. App. 4th 669, 672 (1997); *see also* Cal. Code Civ. Pro. § 425.16(a)
8 (“[T]his section shall be construed broadly.”). Defamation suits such as the one in the present case
9 are a primary target of the anti-SLAPP statute. *Fox Searchlight Pictures v. Paladino*, 89 Cal. App.
10 4th 294, 305 (2001); *accord Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (1994),
11 *disapproved on other grounds by Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53
12 (2002).

13 The anti-SLAPP statute creates a procedure whereby a defendant may move to strike a
14 complaint, or any cause of action, that arises “from any act of that [defendant] in furtherance of
15 the [defendant]’s right of petition or free speech under the United States Constitution in
16 connection with a public issue.” Cal. Code Civ. Pro § 425.16(b)(1). Such a complaint or cause of
17 action “shall be subject to a special motion to strike, unless the court determines that the plaintiff
18 has established that there is a probability that the plaintiff will prevail on the claim.” *Id.*

19 Courts evaluate an anti-SLAPP motion in two steps:

20 First, a defendant must make an initial prima facie showing that the
21 plaintiff’s suit arises from an act in furtherance of the defendant’s
22 rights of petition or free speech. Second, once the defendant has
made a prima facie showing, the burden shifts to the plaintiff to
demonstrate a probability of prevailing on the challenged claims.

23 *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007) (internal quotations and citations omitted);
24 *see Taus v. Loftus*, 40 Cal. 4th 683, 712 (2007). A SLAPP lawsuit defendant satisfies the first
25 prong of Section 425.16(b) upon demonstrating that the causes of action sought to be stricken are
26 based upon “any act of [defendant] in furtherance of [defendant’s] right of petition or free speech
27 under the United States or California Constitution in connection with a public issue.” *Wilcox*, 27
28 Cal. App. 4th at 820 (*quoting* Cal. Code Civ. Pro. § 425.16(b)). Pursuant to Section 425.16(e), an

1 “act in furtherance of a person’s right of petition or free speech under the United States or
2 California Constitution in connection with a public issue” includes:

3 (1) any written or oral statement or writing made before a
4 legislative, executive, or judicial proceeding, or any other official
5 proceeding authorized by law; (2) any written or oral statement or
6 writing made in connection with an issue under consideration or
7 review by a legislative, executive, or judicial body, or any other
8 official proceeding authorized by law; (3) any written or oral
statement or writing made in a place open to the public or a public
forum in connection with an issue of public interest; (4) any other
conduct in furtherance of the exercise of the constitutional right of
petition or the constitutional right of free speech in connection with
a public issue or an issue of public interest.

9 The broadly-defined threshold showing is “intended to be given broad application in light of its
10 purposes.” *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 808 (2002) (citations omitted).

11 In order to succeed in its special motion to strike, Cornell need not demonstrate that
12 Plaintiff intended to chill Cornell’s exercise of its petition or free speech activities, *Bosley Med.
13 Inst., Inc. v. Kremer*, 402 F.3d 672, 682 (9th Cir. 2005); *Seelig*, 97 Cal. App. 4th at 808, or that its
14 petitioning or speech was actually chilled, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110
15 (9th Cir. 2003). Cornell also need not show that its activities were protected as a matter of law.
16 *Fox Searchlight*, 89 Cal. App. 4th at 305. Rather, “a court must generally presume the validity of
17 the claimed constitutional right in the first step of the anti-SLAPP analysis Otherwise, the
18 second step would become superfluous in almost every case, resulting in an improper shifting of
19 the burdens.” *Governor Gray Davis Com. v. Am. Taxpayers Alliance*, 102 Cal. App. 4th 449, 458
20 (2002) (quoting *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089-90 (2001)).

21 Merely referencing the allegations of the Complaint itself satisfies Cornell’s required
22 showing. See *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2002) (“In the anti-SLAPP context,
23 the critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance
24 of the defendant’s right of petition or free speech.”); *Kajima Eng’g & Construction, Inc. v. City of
25 Los Angeles*, 95 Cal. App. 4th 921, 929 (2002) (holding that, in deciding an anti-SLAPP motion, a
26 court must examine solely the activity that has been alleged in the pleading as the basis for the
27 challenged cause of action).

1 **1. The Anti-SLAPP Statute Applies to Statements Made In the Course of**
2 **Police Investigations, Or in Anticipation of Legal Proceedings**

3 Code of Civil Procedure § 425.16 applies to statements and other conduct related to police
4 investigations, a key component of the right to petition government. In *Salma v. Capon*, No.
5 A115057, -- Cal. Rptr. 3d --, 2008 WL 946092 (Cal. App. Apr. 9, 2008), the most recent case on
6 point, the plaintiff sued for defamation – among other things – based on the defendant’s allegedly
7 false statements to police. The court applied section 425.16 to the plaintiff’s claims:

8 Capon avers that he had ‘repeatedly spoken to both the Town of
9 Hillsborough Police Department and the San Mateo DA’s office
10 about the fraud that led to the loss of my home since August, 2004.
11 I have also attempted numerous times to file a formal written
12 complaint seeking an investigation into it’ He later filed
13 reports to the police about personal property that was in his home in
December 2003 and never returned to him. Capon also attempted to
press charges against the persons who allegedly assaulted him in
December 2003. **All of these communications sought official
investigations into perceived wrongdoing, which might
culminate in criminal prosecution or other official proceedings.
Such communications are protected by section 425.16.**

14 *Salma*, No. A115057, -- Cal. Rptr. 3d --, 2008 WL 946092, at *5 (emphasis added; alterations in
15 original). In reaching this conclusion, the *Salma* court drew upon *Briggs v. Eden Council for*
16 *Hope & Opportunity*, 19 Cal. 4th 1106 (1999). In *Briggs*, the California Supreme Court held that
17 the anti-SLAPP statute applies to statements made in anticipation of litigation. *Id.* at 1115
18 (collecting cases). Other authorities have so held. *See, e.g., Chabak v. Monroy*, 154 Cal. App. 4th
19 1502, 1511-1512 (2007) (“Chabak’s cause of action is based on Monroy’s reporting to the [police]
20 that [Chabak molested her] Monroy’s statement to the police arose from her right to petition
21 the government and thus is protected activity.”); *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1570
22 (2005) (holding that reports to police of criminal activity arose from the right to petition
23 government, which is protected under section 425.16).

24 The allegations against Cornell – to the extent they are decipherable – purport to derive
25 from at least one of Officer Bourne’s March 8, 1983 investigative reports: “A report written by
26 Ms. Bourne on that date alleged that plaintiff was responsible for fifteen separate crimes”
27 Compl. at pp. 4, 5, 7 and 8. Section 425.16 applies and Plaintiff must demonstrate the legal and
28 factual sufficiency of his claims. As discussed below, he cannot.

1 **B. Plaintiff Cannot Demonstrate A Reasonable Probability in Succeeding in His Claims**

2 The Court should dismiss this SLAPP lawsuit because Plaintiff cannot make the required
3 showing that he has a reasonable probability of success. Once a court determines that a Complaint
4 arises from an act in furtherance of protected petition or speech activity, “the plaintiff must show a
5 ‘reasonable probability’ of prevailing in its claims for those claims to survive dismissal.”

6 *Metabolife Int’l v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001); *see Loftus*, 40 Cal. 4th at 713

7 (“[I]n order to avoid dismissal of each claim under section 425.16, plaintiff bore the burden of
8 demonstrating a probability that she would prevail on the particular claim.”) Plaintiff “must

9 demonstrate that the complaint is legally sufficient and supported by a prima facie showing of
10 facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”

11 *Metabolife Int’l*, 264 F.3d at 840 (citation omitted); *Loftus*, 40 Cal. 4th at 714 (noting that claims

12 must be stricken “if the plaintiff is unable to demonstrate both that the claim is legally sufficient
13 and that there is sufficient evidence to establish a prima facie case with respect to the claim.”) In

14 order to be considered for this purpose, Plaintiff’s evidence must be “competent and admissible.”

15 *Macias v. Hartwell*, 55 Cal. App. 4th 669, 675 (1997). He “cannot simply rely on the allegations

16 in the complaint, but must provide the court with sufficient *evidence* to permit the court to

17 determine whether there is a probability that the plaintiff will prevail on the claim.” *The*

18 *Traditional Cat Ass’n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004) (granting anti-SLAPP

19 motion) (internal quotations and citations omitted) (emphasis in original). The court “must also

20 examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims

21 and, if so, whether there is evidence to negate any such defenses.” *McGarry v. Univ. of San*

22 *Diego*, 154 Cal. App. 4th 97, 109 (2007).

23 **1. The New Action Is Legally Insufficient because the Statute of**
24 **Limitations Has Run and Any Statement to Police Was Absolutely**
25 **Privileged**

26 The one-year statute of limitations on all of Plaintiff’s claims against Cornell has run. Cal.

27 Code Civ. Pro. § 340(c) (establishing one-year statute of limitations for libel claims); *Briscoe v.*

28 *Reader’s Digest Ass’n, Inc.*, 4 Cal. 3d 529, 543 (1971) (“[A] false light cause of action is in

1 substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel
2 claim. . . .” (internal quotations and citations omitted)).⁴

3 Further, all of Plaintiff’s claims against Cornell arise from Officer Bourne’s investigation
4 reports and statements to Cornell’s Department of Public Safety, the Ithaca Police Department and
5 the Tompkins County District Attorney. Those communications are absolutely privileged under
6 California Civil Code section 47(b), known as the “litigation privilege”:

7 A privileged publication or broadcast is one made: . . .(b) In any (1)
8 legislative proceeding, (2) judicial proceeding, (3) in any other
9 official proceeding authorized by law, or (4) in the initiation or
10 course of any other proceeding authorized by law and reviewable
pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of
Part 3 of the Code of Civil Procedure, except as follows: [listing
exceptions not applicable here].

11 California cases firmly establish that the absolute litigation privilege applies to statements made in
12 furtherance of a criminal investigation or potential court proceedings. The leading California case
13 on this issue is *Hagberg v. California Federal Bank FSB*, 32 Cal. 4th 350 (2004).⁵ There, the
14 California Supreme Court considered whether the defendant bank could be held liable to plaintiff
15 for defamation and other torts based on defendant’s erroneous statement to police that plaintiff
16 presented a counterfeit check. The Court held that the litigation privilege protected the
17 defendant’s statement to police:

18 We granted review in this case to consider whether tort liability may
19 be imposed for statements made when a citizen contacts law
20 enforcement personnel to report suspected criminal activity on the
21 part of another person. As we shall explain, we agree with the trial
court, the Court of Appeal, and the great weight of authority in this
state in concluding that such statements are privileged pursuant to
Civil Code section 47, subdivision (b) (section 47(b)), and can be

22 _____
23 ⁴ For purposes of this special motion to strike, the Court need not engage in a conflict of laws analysis because
24 California and New York law are substantially the same in relevant respects. *Brown v. Baden (In re Yagman)*, 796
25 F.2d 1165, 1170 (9th Cir. 1986) (“It is axiomatic that, unless there is a difference between the laws of the states, a
choice need not be made.”). Both states apply a one-year statute of limitations to libel and false light (to the extent
New York recognizes false light at all). Cal. Code Civ. Pro. § 340(c); NY CLS CPLR § 215(3).

26 ⁵ Even if New York law applies to this case, the protections of the litigation privilege apply. *See, e.g., Toker v. Pollak*,
27 44 N.Y.2d 211, 220-221 (1978) (holding that those making statements to police are protected from defamation so long
as they have a good faith belief in the truth of their claims); *see also Present v. Avon Prods, Inc.*, 253 A.D.2d 183, 188
28 (1999) (“This qualified privilege also extends to reports to the police or the District Attorney’s Office about another’s
suspected crimes.”); *Kwawukume v. JP Morgan Chase*, 13 Misc. 3d 1242(A), 2006 WL 3452404, at *6 (N.Y. City
Civ. Ct. Nov. 29, 2006) (“In this case, defendants enjoyed a qualified privilege to communicate among its employees
and report to police a good-faith bona fide communication that plaintiff presented suspicious currency . . .”).

1 the basis of tort liability only if the plaintiff can establish the
2 elements of the tort of malicious prosecution.
3 *Id.* at 355; *accord Id.* at 362-364 (“[T]he overwhelming majority of cases conclude that when a
4 citizen contacts law enforcement personnel to report suspected criminal activity and to instigate
5 law enforcement personnel to respond, the communication also enjoys an unqualified privilege . . .
6 . We find these decisions to be persuasive, as we shall explain.”). The Court held that the
7 litigation privilege extends to all tort causes of action, and reiterated its prior holding that the
8 litigation privilege applies to defamation. *Id.* at 361, 375. Because the privilege is absolute, a
9 defendant’s *bona fides* is irrelevant:

10 We have explained that both the effective administration of justice
11 and the citizen’s right of access to the government for redress of
12 grievances would be threatened by permitting tort liability for
13 communications connected with judicial or other official
14 proceedings. Hence, without respect to the good faith or malice of
15 the person who made the statement, or whether the statement
16 ostensibly was made in the interest of justice, ‘courts have applied
17 the privilege to eliminate the threat of liability for communications
18 made during all kinds of truth-seeking proceedings: judicial, quasi-
19 judicial, legislative and other official proceedings.’
20 *Id.* at 360 (quoting *Silberg v. Anderson*, 50 Cal. 3d. 205, 213 (1990). Officer Bourne’s statements
21 were made in good faith, though they need not have been. Indeed, Plaintiff confessed to his
22 criminal conduct and ultimately plead guilty to larceny as part of a plea bargain. Davidson Decl. ¶
23 3 & Ex. B, pp. 22-23, 29-30, 33-36.

24 Because the statute of limitations has run and because Cornell’s statements to police were
25 privileged, Plaintiff cannot demonstrate the legal sufficiency of his claims. The complaint must be
26 stricken.

27 **2. To the Extent Plaintiff Alleges Claims Based on Cornell’s Filings in the**
28 **2007 Action, Such Claims Are Barred by the Litigation Privilege**

It is unclear whether Plaintiff’s claims against Cornell stem from Cornell’s filings –
submitted through Deixler – in the 2007 Action. To the extent that Plaintiff makes claims against
Cornell on the basis of those filings, such claims are barred by the litigation privilege and the
Noerr-Pennington Doctrine. Cal. Civ. Code 40(b); *see, e.g., Rubin v. Green*, 4 Cal. 4th 1187, 1193
(1993) (internal quotations and citations omitted) (“For well over a century, communications with
some relation to judicial proceedings have been absolutely immune from tort liability by the

1 privilege codified as section 47 (b).”); *Healy v. Tuscan Hills Landscape & Recreation Corp.*, 137
2 Cal. App. 4th 1, 5 (2006) (“Both section 425.16 and Civil Code section 47 are construed broadly,
3 to protect the right of litigants to the utmost freedom of access to the courts without [the] fear of
4 being harassed subsequently by derivative tort actions.” [internal quotations and citations omitted;
5 alterations in original]); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389
6 U.S. 217, 222, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) (Noerr-Pennington doctrine); *Empress LLC*
7 *v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) (same); *Kearney v. Foley*
8 *& Lardner*, 2008 U.S. Dist. LEXIS 20101, No. 05-CV-2112-L (LSP), at *3 n.3 (S.D. Cal. Mar. 14,
9 2008) (same).

10 To the extent that Plaintiff’s claims against Cornell overlap with those against Deixler,
11 Cornell hereby incorporates by reference the concurrently-filed Memorandum of Points and
12 Authorities in Support of Deixler’s Special Motion to Strike Plaintiff’s Complaint Pursuant to
13 California Code of Civil Procedure section 425.16.

14 **3. The New Action is Factually Insufficient**

15 As noted above, the litigation privilege provides absolute immunity from tort liability for
16 statements to police. Cornell therefore need not demonstrate the factual insufficiency of Plaintiff’s
17 claims in order to prevail on its anti-SLAPP motion. Nevertheless, Cornell can show that
18 Plaintiff’s claims against Cornell have no factual basis.

19 A review of the statements contained in the investigative records filed with the Court in the
20 2007 Action reveal that Officer Bourne never stated on March 8, 1983 that, “the plaintiff was
21 responsible for fifteen separate crimes.” Compl. at pp. 4, 5, 7 & 8. Of course, Plaintiff does not
22 identify the specific statement on which he is suing – probably because no such statement exists.
23 The New Action therefore is Factually Insufficient; Cornell invites Plaintiff to attempt to
24 demonstrate otherwise.

25 **CONCLUSION**

26 The Court should send Plaintiff a swift message: Courts will not suffer legally and
27 factually insufficient SLAPP suits based on protected petition activities. For the foregoing
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1 reasons, the Court should strike Plaintiff's complaint in its entirety with prejudice and without
2 leave to amend. Further, Plaintiff should be taxed with Cornell's costs and fees in this matter.

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DATED: May 5, 2008

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