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8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

10 KEVIN VANGINDEREN,
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 Plaintiff,
 12
 v.
 13 CORNELL UNIVERSITY, BERT DEIXLER,
 14
 Defendants.
 15

) Case No. 08-CV-736-W-JMA

) Hon. Barry T. Moskowitz

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **BERT DEIXLER'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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6 Cal. Code of Civ. Pro. § 425.16passim

7 California Civil Code § 47passim

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

5 **INTRODUCTION**

6 As an attorney, the last thing Plaintiff should want is a system of laws in which attorneys
7 can be sued based on their judicial filings. Yet, that is precisely what Plaintiff seeks: a multi-
8 million dollar judgment against a defense attorney, Deixler, based upon his filings with this Court.
9 Plaintiff’s claim defies the most basic precepts of the right to petition government guaranteed by
10 the First Amendment, the California Constitution and California law.

11 Plaintiff first sued defendant Cornell University (“Cornell”) in California Superior Court in
12 October 2007 based on a purportedly libelous 1983 *Cornell Chronicle* report. Cornell removed
13 the state court action to this Court as *Vanginderen v. Cornell University*, 07-cv-2045-BTM-JMA
14 (the “2007 Action”). Deixler, as Cornell’s lead defense counsel, filed an anti-SLAPP motion
15 pursuant to California Code of Civil Procedure § 425.16. Cornell’s anti-SLAPP motion remains
16 under submission with this Court.

17 Meanwhile, on April 8, 2008, Plaintiff filed a second Superior Court complaint (the “New
18 Action”), which also has been removed, brazenly naming Cornell and its attorney, Deixler, based
19 exclusively upon the documents filed by Cornell in support of the anti-SLAPP motion in the 2007
20 Action. Plaintiff alleges libel and a smattering of disclosure torts against Deixler based on his
21 filing documents with this Court on behalf of Cornell; Plaintiff claims that Deixler is liable for the
22 very act of electronically filing those documents. Plaintiff alleges that Deixler filed the documents
23 with the intent that they appear on Justia.com, a website that tracks federal filings.

24 Plaintiff’s claims are frivolous. With the exception of malicious prosecution,¹ attorneys
25 and litigants are not liable in tort for statements contained in court filings. California Civil Code §
26 47(b) (codifying litigation privilege). Further, whether Deixler wanted the filing to appear on
27 Justia.com (which he did not) is of no consequence; California Civil Code § 47(d) shields from

28 ¹ As defense counsel in the 2007 Action, Deixler could not be sued for malicious prosecution
under any circumstances, and Plaintiff’s Complaint does not include such a claim.

1 tort liability those who communicate with the media regarding judicial proceedings. Moreover,
2 Deixler was *obligated* to file the documents electronically under CivLR 5.4 – “Electronic Case
3 Filing” and General Order No. 550 (May 22, 2007).

4 As discussed below, the Court should strike Plaintiff’s allegations against Deixler in the
5 New Action, and award Deixler his attorney’s fees and costs incurred herein.

6 **FACTUAL BACKGROUND**

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

8 While an undergraduate student at Cornell University in March 1983, Plaintiff was
9 investigated, arrested, charged and indicted for burglary and larceny. (Declaration of Clifford S.
10 Davidson (“Davidson Declaration”) ¶ 2 and Ex. B (unsealed records from Tompkins County
11 Court, Tompkins County District Attorney and Cornell University Department of Public Safety
12 [collectively, the “Unsealed Records”])). On March 8, 1983, in the course of Cornell’s
13 investigation into Vanginderen’s activities, Officer Barbara Bourne, an officer with Cornell’s
14 Department of Public Safety, filed a variety of investigative reports including Plaintiff’s
15 confession and Officer Bourne’s observation that Plaintiff was involved in at least 10 cases.
16 (Davidson Decl. ¶ 3 & Ex. B, pp. 15-16, 18, 23, 27, 29-30, 33-36).²

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

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

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28 ² Plaintiff fails to specify which of Officer Bourne’s many reports on March 8, 1983 forms the
basis for Plaintiff’s complaint.

1 **Plaintiff Files the 2007 Action; Cornell, through Deixler, Files Officer Bourne’s**
2 **Investigative Report with This Court in Support of Cornell’s Anti-SLAPP Motion**

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

10 Cornell removed the 2007 Action and it was assigned to this Court. On November 2,
11 2007, Deixler, as Cornell’s counsel, filed Cornell’s Special Motion to Strike Plaintiff’s Complaint
12 Pursuant to Section 425.16 of the California Code of Civil Procedure (the “anti-SLAPP Motion”).
13 The Unsealed Records were filed in support of the anti-SLAPP Motion. Davidson Decl. ¶ 3 & Ex.
14 B. The anti-SLAPP Motion has been under submission with this Court since December 21, 2007.

15 **Plaintiff Files the New Action on April 8, 2008**

16 On April 8, 2008, Plaintiff filed the New Action against both Cornell and Deixler in San
17 Diego County Superior Court. The complaint alleges four causes of action against Cornell based
18 on the Unsealed Records, Compl. at 4, 5, 7 and 8, and eight causes of action against Deixler. All
19 claims against Deixler arise exclusively from his role in filing the documents. (*See, e.g.*, Compl.
20 at p. 5 (“On December 12, 2007, Defendant Bert Deixler acting as an agent of Defendant Cornell
21 University republished [Offircer Bourne’s] report onto the Internet by submitting it to [this Court],
22 with the knowledge, intent and purpose that it would immediately appear world wide upon the
23 Justia.com Web site.”; Compl. at p. 9 (“On December 12, 2007, Defendant Bert Deixler acting as
24 an agent of Defendant Cornell University wrote a false statement about that plaintiff
25 Defendant Deixler subsequently republished his false statement onto the Internet by submitting it
26 to [this Court] with the knowledge, intent and purpose that it would immediately appear world
27 wide upon the Justia.com Web site.”)

1 **DISCUSSION**

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

4 Plaintiff’s purported claims against Deixler seek to punish the petitioning conduct he
5 undertook on behalf of Cornell. California Code of Civil Procedure § 425.16, the anti-SLAPP
6 statute, therefore applies.³

7 The anti-SLAPP statute was enacted in 1993 in order to address “a disturbing increase in
8 lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of
9 speech and petition for the redress of grievances.” The statute applies to all “litigation without
10 merit filed to dissuade or punish the exercise of First Amendment rights of defendants.”
11 *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1089 (9th Cir. 2003) (quoting
12 *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 37 Cal. App. 4th 855, 858 (1995)). The anti-
13 SLAPP statute is to be interpreted broadly so as to protect Constitutional rights and to act as a
14 screening mechanism by “eliminate[ing] meritless litigation at an early stage in the proceedings.”
15 *Macias v. Hartwell*, 55 Cal. App. 4th 669, 672 (1997); *see also* Cal. Code Civ. Pro. § 425.16(a)
16 (“[T]his section shall be construed broadly.”). Defamation suits such as the one in the present case
17 are a primary target of the anti-SLAPP statute. *Fox Searchlight Pictures v. Paladino*, 89 Cal. App.
18 4th 294, 305 (2001); *accord Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (1994),
19 *disapproved on other grounds by Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53
20 (2002).

21 The anti-SLAPP statute creates a procedure whereby a defendant may move to strike a
22 complaint, or any cause of action, that arises “from any act of that [defendant] in furtherance of
23 the [defendant]’s right of petition or free speech under the United States Constitution in
24 connection with a public issue.” Cal. Code Civ. Pro § 425.16(b)(1). Such a complaint or cause of
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26 ³ It is well settled that the anti-SLAPP statute applies to state claims brought in federal court.
27 *United States v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) (noting
28 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 action “shall be subject to a special motion to strike, unless the court determines that the plaintiff
2 has established that there is a probability that the plaintiff will prevail on the claim.” *Id.*

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

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

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

17 (1) any written or oral statement or writing made before a
18 legislative, executive, or judicial proceeding, or any other official
19 proceeding authorized by law; (2) any written or oral statement or
20 writing made in connection with an issue under consideration or
21 review by a legislative, executive, or judicial body, or any other
22 official proceeding authorized by law; (3) any written or oral
23 statement or writing made in a place open to the public or a public
24 forum in connection with an issue of public interest; (4) or any other
25 conduct in furtherance of the exercise of the constitutional right of
26 petition or the constitutional right of free speech in connection with
27 a public issue or an issue of public interest.

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

In order to succeed in his special motion to strike, Deixler need not demonstrate that
Plaintiff intended to chill Deixler’s exercise of his petition or free speech activities, *Bosley Med.
Inst., Inc. v. Kremer*, 402 F.3d 672, 682 (9th Cir. 2005); *Seelig*, 97 Cal. App. 4th at 808, or that his
petitioning or speech was actually chilled, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110
(9th Cir. 2003). Deixler also need not show that his activities were protected as a matter of law.
Fox Searchlight, 89 Cal. App. 4th at 305. Rather, “a court must generally presume the validity of

1 the claimed constitutional right in the first step of the anti-SLAPP analysis Otherwise, the
2 second step would become superfluous in almost every case, resulting in an improper shifting of
3 the burdens.” *Governor Gray Davis Com. v. Am. Taxpayers Alliance*, 102 Cal. App. 4th 449, 458
4 (2002) (quoting *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089-90 (2001)).

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

12 **1. The Anti-SLAPP Statute Applies to Deixler’s Filings in the 2007 Action**

13 The anti-SLAPP Statute unquestionably applies to Deixler’s filings in connection with the
14 2007 Action, as those judicial filings were “act[s] in furtherance of a person’s right of petition or
15 free speech under the United States or California Constitution in connection with a public issue”
16 within the meaning of section 425.16(e). Abundant case law supports this position. See, e.g.,
17 *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006) (“A cause of action ‘arising from’ defendant’s
18 litigation activity may appropriately be the subject of a section 425.16 motion to strike ‘Any
19 act’ includes communicative conduct such as the filing, funding, and prosecution of a civil action.
20 This includes qualifying acts committed by attorneys in representing clients in litigation.” [internal
21 citations omitted]); *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1115
22 (1999) (holding that anti-SLAPP statute applied to defamation and emotional distress claims
23 arising from defendant attorney’s litigation activities); *Gallanis-Politis v. Medina*, 152 Cal. App.
24 4th 600, 609 (2007) (quoting *Rusheen*, 37 Cal. 4th at 1055-56) (“A cause of action ‘arising from’
25 defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to
26 strike.”); *Kashian v. Harriman*, 98 Cal. App. 4th 892, 908-909 (2002) (applying anti-SLAPP
27 statute to unfair competition and defamation claims arising from defendant attorney’s litigation
28

1 activities); *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 17 (1995) (applying anti-SLAPP statute
2 to businessman’s communications in connection with administrative proceeding).

3 Plaintiff’s second, third, fifth and sixth purported causes of action each arise from
4 Deixler’s alleged December 12, 2007 submissions to the Court. For example, Plaintiff’s second
5 cause of action alleges:

6 On December 12, 2007, Defendant Bert Deixler acting as an agent
7 of Defendant Cornell University republished [the investigative
8 report] onto the Internet by submitting it to the United States District
9 Court, Southern District of California, with the knowledge, intent
10 and purpose that it would immediately appear world wide upon the
11 Justia.com Web site.

12 Compl. at p. 5.⁴ Plaintiff’s seventh, eighth, ninth and tenth purported causes of action each arise
13 from Deixler’s alleged November 2, 2007 filing of sealed records with the Court. For example,
14 Plaintiff’s seventh cause of action alleges:

15 On November 2, 2007, Defendant Bert Deixler acting as an agent of
16 Defendant Cornell University published sealed records pertaining to
17 the plaintiff into a public forum by submitting them to United States
18 District Court, Southern District of California with the knowledge
19 that the records were sealed.

20 Compl. at p. 10. For the sake of brevity, Deixler does not set forth the other causes of action.

21 On their face, therefore, the claims against Deixler arise from petition activity. Section
22 425.16 therefore applies and Plaintiff must demonstrate the legal and factual sufficiency of his
23 claims. As discussed below, he cannot.

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

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

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

(“[I]n order to avoid dismissal of each claim under section 425.16, plaintiff bore the burden of

⁴ As discussed below, all Deixler did on December 12, 2007 is file the Declaration of Nelson E. Roth, which summarized and authenticated the Unsealed Records. To the extent that statements contained in the Roth Declaration or Unsealed Records give rise to a tort claim, which they do not, those statements cannot be attributed to Deixler.

1 demonstrating a probability that she would prevail on the particular claim.”) Plaintiff “must
2 demonstrate that the complaint is legally sufficient and supported by a prima facie showing of
3 facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”
4 *Metabolife Int’l*, 264 F.3d at 840 (citation omitted); *Loftus*, 40 Cal. 4th at 714 (noting that claims
5 must be stricken “if the plaintiff is unable to demonstrate both that the claim is legally sufficient
6 and that there is sufficient evidence to establish a prima facie case with respect to the claim.”). In
7 order to be considered for this purpose, Plaintiff’s evidence must be “competent and admissible.”
8 *Macias v. Hartwell*, 55 Cal. App. 4th 669, 675 (1997). He “cannot simply rely on the allegations
9 in the complaint, but must provide the court with sufficient *evidence* to permit the court to
10 determine whether there is a probability that the plaintiff will prevail on the claim.” *The*
11 *Traditional Cat Ass’n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004) (granting anti-SLAPP
12 motion) (internal quotations and citations omitted) (emphasis in original). The court “must also
13 examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims
14 and, if so, whether there is evidence to negate any such defenses.” *McGarry v. Univ. of San*
15 *Diego*, 154 Cal. App. 4th 97, 109 (2007).

16 **1. The New Action Is Legally Insufficient**

17 **a. Plaintiff’s Claims Are Barred by the Litigation Privilege**

18 All of Plaintiff’s claims against Deixler arise from Deixler’s filings with this Court. Those
19 filings are absolutely privileged under California Civil Code section 47(b), known as the
20 “litigation privilege”:

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

28 The litigation privilege “[A]ppplies to any communication (1) made in judicial or quasi-judicial
proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of
the litigation; and (4) that have some connection or logical relation to the action.”

1 *Sengchanthalangsy v. Accelerated Recovery Specialists, Inc.*, 473 F. Supp. 2d 1083, 1086 (S.D.
2 Cal. 2007) (citing *Silberg v. Anderson*, 50 Cal. 3d. 205, 213 (1990)). The applicability of the
3 privilege is broad and impenetrable. “For well over a century, communications with some relation
4 to judicial proceedings have been absolutely immune from tort liability by the privilege codified
5 as section 47 (b).” *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993) (internal quotations and citations
6 omitted); accord *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal. App. 4th 1, 5
7 (2006) (“Both section 425.16 and Civil Code section 47 are construed broadly, to protect the right
8 of litigants to the utmost freedom of access to the courts without [the] fear of being harassed
9 subsequently by derivative tort actions.” [internal quotations and citations omitted; alterations in
10 original]).

11 Although Deixler filed the Unsealed Records in good faith, he would be entitled to section
12 47(b) protection even if he filed them maliciously. *Sengchanthalangsy*, 473 F. Supp. 2d at 1087.

13 A defendant’s *bona fides* is irrelevant:

14 We have explained that both the effective administration of justice
15 and the citizen’s right of access to the government for redress of
16 grievances would be threatened by permitting tort liability for
17 communications connected with judicial or other official
18 proceedings. Hence, without respect to the good faith or malice of
the person who made the statement, or whether the statement
ostensibly was made in the interest of justice, ‘courts have applied
the privilege to eliminate the threat of liability for communications
made during all kinds of truth-seeking proceedings: judicial, quasi-
judicial, legislative and other official proceedings.’

19 *Hagberg v. California Federal Bank FSB*, 32 Cal. 4th 350, 360 (2004) (quoting *Silberg*, 50 Cal.
20 3d. at 213).

21 To the extent Plaintiff alleges causes of action against Deixler based on invasion of
22 statutory or California constitutional privacy rights, such claims are barred. The California
23 Supreme Court has held that the policy interests of the litigation privilege outweigh plaintiffs’
24 individual privacy interests, even to the extent they derive from the California Constitution. *Jacob*
25 *B. v. County of Shasta*, 40 Cal. 4th 948, 962 (2007) (“The same compelling need to afford free
26 access to the courts exists whatever label is given to a privacy cause of action. Indeed, as the Court
27 of Appeal noted here, ‘recognition of such a distinction would allow a plaintiff to easily overcome
28

1 the privilege on any privacy claim by simply inserting the adjective ‘constitutional’ into his or her
2 pleadings and jury instructions.” [some internal quotation omitted]).

3 Plaintiff therefore can prove no set of facts that would defeat Deixler’s complete defense
4 under section 47(b). For the above reasons, the complaint must be stricken. *See, e.g., Rusheen*, 37
5 Cal. 4th at 1066 (reversing lower court’s denial of anti-SLAPP relief because suit based on
6 submission of perjured proof of service was a privileged submission under the litigation privilege
7 and plaintiff could not prove adequacy of his case); *Smith v. Fireside Thrift Co.*, No. C 07-03883
8 WHA, 2007 U.S. Dist. LEXIS 71011, at *8-12 (N.D. Cal. Sept. 18, 2007) (granting anti-SLAPP
9 motion against plaintiff alleging tort because claim barred by litigation privilege); *Neville v.*
10 *Chudacoff*, 160 Cal. App. 4th 1255, 1270 (2008) (affirming grant of defendant’s anti-SLAPP
11 motion – based on litigation privilege – where plaintiff sued defendant attorney for alleged
12 defamation in connection with letter sent in course of litigation).

13 **b. Plaintiff’s Claims Are Barred by the Noerr-Pennington Doctrine**

14 The Noerr-Pennington Doctrine, which derives from the First Amendment of the Federal
15 Constitution, generally bars tort claims that arise from petition activity. *United Mine Workers of*
16 *America, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222, 19 L. Ed. 2d 426, 88 S. Ct. 353
17 (1967); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005). It
18 is analogous to the anti-SLAPP statute. *Kearney v. Foley & Lardner*, 2008 U.S. Dist. LEXIS
19 20101, No. 05-CV-2112-L (LSP), at *3 n.3 (S.D. Cal. Mar. 14, 2008). For the reasons stated in
20 section II(A)(1) above, Plaintiff’s claims are barred because they arise from Deixler’s petition
21 activities.

22 **2. The New Action is Factually Insufficient**

23 As noted above, the litigation privilege provides absolute immunity from tort liability for
24 statements to police. "If there is no dispute as to the operative facts, the applicability of the
25 litigation privilege is a question of law. Any doubt about whether the privilege applies is resolved
26 in favor of applying it." *Sengchanthalangsy*, 473 F. Supp. 2d at 1087 (quoting *Kashian*, Cal. App.
27 4th at 912-13). Deixler therefore need not demonstrate the factual insufficiency of Plaintiff’s
28

1 claims in order to prevail on its anti-SLAPP motion. Nevertheless, Deixler can show that
2 Plaintiff's claims against Cornell have no factual basis.

3 First, Deixler did not "declare[]" in writing that the Plaintiff was charged in connection with
4 fifteen separate crimes," as alleged in Plaintiff's third and sixth causes of action. Compl. at pp. 6,
5 9. The only documents submitted on December 12, 2007 were a request for judicial notice and the
6 Declaration of Nelson E. Roth submitted in support thereof. Deixler's only role on that date was
7 to cause those documents to be filed in his capacity as Cornell's attorney.

8 Second, even if Deixler's filings were not privileged, and even if they stated or implied
9 that Plaintiff had been charged in connection with fifteen separate crimes, such an assertion would
10 be factually correct for the reasons described in section II(B) of Cornell's Memorandum of Points
11 and Authorities in Support of Special Motion to Strike Plaintiff's Complaint Pursuant to Section
12 425.16 of the California Code of Civil Procedure (2007 Action, Docket #7-2) (Davidson Decl. ¶ 5
13 & Ex. D); and section II(C) of Cornell's Reply in Further Support of Special Motion to Strike
14 Plaintiff's Complaint Pursuant to Section 425.16 of the California Code of Civil Procedure (2007
15 Action, Docket #15) (Davidson Decl. ¶ 6 & Ex. E).

16 Third, Plaintiff's seventh, eighth, ninth and tenth causes of action inaccurately allege that
17 Deixler published sealed or "previously sealed" records pertaining to Plaintiff by submitting them
18 to the Court. Such documents were never sealed and were obtained merely by asking the Ithaca
19 City Court for said records. *See* Declaration of Valerie Cross Dorn in Support of Defendant's
20 Request for Judicial Notice in Support of Special Motion to Strike Plaintiff's Complaint Pursuant
21 to Section 425.16 of the California Code of Civil Procedure (2007 Action, Docket #8-3)
22 (Davidson Decl. ¶ 7 & Ex. F) ¶¶ 4,5; Declaration of Nelson E. Roth in Support of Cornell's
23 Supplemental Request for Judicial Notice in Support of Special Motion to Strike Plaintiff's
24 Complaint Pursuant to Section 425.16 of the California Code of Civil Procedure (2007 Action,
25 Docket #13-4) (Davidson Decl. ¶ 8 & Ex. G) ¶¶ 3,4.⁵

26 _____
27 ⁵ To the extent the Ithaca City Court erred by releasing the records, or to the extent that court
28 ought to have sealed the records, Deixler cannot constitutionally be held liable for filing them in
open court. *See Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679, 696 (2004)
("Accordingly, following *Cox* and its progeny, we conclude that an invasion of privacy claim
based on allegations of harm caused by a media defendant's publication of facts obtained from

1 Fourth, Plaintiff's megalomaniacal paranoia notwithstanding, Deixler had no desire to
2 publish either the Unsealed Materials or Cornell's pleadings on Justia.com. Neither he nor
3 Cornell nor anyone at his law firm ever contacted anyone associated with the website. Declaration
4 of Timothy Stanley ¶ 6, filed concurrently herewith.

5 For all of the above reasons, Plaintiff cannot demonstrate the factual sufficiency of his
6 claims.

7 **CONCLUSION**

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

12
13 DATED: May 5, 2008

Lary Alan Rappaport
Clifford S. Davidson
PROSKAUER ROSE LLP

14
15
16 /s/ -- Clifford S. Davidson
Clifford S. Davidson

17 Attorneys for Defendant,
18 BERT DEIXLER

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28 public official records of a criminal proceeding is barred by the First Amendment to the United
States Constitution.”)