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SOUTHERN DISTRICT OF CALIFORNIA

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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
8

9 KEVIN VANGINDEREN,)
10 Plaintiff,)
11 v.)
12 CORNELL UNIVERSITY,)
13 BERT DEIXLER,)
14 Defendant.)

Case No. 08-CV-00736-~~PA~~JMA

Hon. Barry T. Moskowitz

PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION OF DEFENDANTS'
SPECIAL MOTIONS TO STRIKE
PLAINTIFF'S COMPLAINT
PURSUANT TO SECTION 425.16
OF THE CALIFORNIA CODE
OF CIVIL PROCEDURE

Hearing Date: July 3, 2008

Time: 11:00 a.m.

Place: Courtroom 15

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1 Plaintiff Kevin Vanginderen hereby submits his Memorandum of Points and Authorities
2 in Opposition to Defendants' Special Motions to Strike Plaintiff's Complaint.

3 I.

4 **INTRODUCTION**

5 The Defendants in this matter have displayed an unmitigated arrogance bred from the
6 unlimited legal budget of a multibillion dollar corporation. In their legal filings they have made a
7 multitude of condescending and ironic proclamations regarding the Plaintiff. The Defendants'
8 statement that the Plaintiff, "should know better" than to engage in this litigation indicates their
9 delusional belief in a universal license that allows them to make any outrageous statement that
10 they desire to this Court. They are also convinced that there is a special privilege which allows
11 them to misappropriate any document they wish and submit it to this Court as potential evidence
12 in disregard of the Rules of Evidence and Professional Responsibility. The Defendants have not
13 yet filed a single Answer to any of the twelve Complaints asserted in these matters but they have
14 already flooded this Court with hundreds of pages of filings and purported evidence in an attempt
15 to obfuscate the actual issues presented and in their desire to preclude the obligation to explain
16 the nefarious activities that have caused great harm to the life and livelihood of the Plaintiff.

17 The Defendants contend in this matter that their First Amendment rights include an all
18 encompassing license to: 1) lie in a court filing, by repeating verbatim a false statement which is
19 the basis of the underlying previous Libel claim under the flawed impression that if a false
20 statement is repeated enough times it then somehow becomes true; 2) submit to this Court, and
21 thus immediately publish onto the Internet, documents which the Defendants were aware were
22 sealed under another court's order at the time they were submitted to this Court; and 3) submit to
23 this Court, and thus immediately publish onto the Internet, an entire record of previously sealed
24 files as purported evidence that includes documents which are all unauthenticated, contains a
25 purported recorded transcript from an interrogation which would have been recorded illegally
26 under New York State law, includes documents which have no remote relevance in a
27 determination of the truth of the statement in the previous underlying Libel claim and includes
28 privileged attorney client communications from a twenty four year old matter.

1 discharge was granted to a plea for petit larceny on a separate Accusatory Instrument
2 (Defendant's Exhibit A) for the same incident and in 1985, the Chief Clerk of the Office of the
3 Supreme and County Court Clerk for the State of New York County of Tompkins informed
4 Cornell and the other parties that the entire record was sealed. (Defendant's Exhibit B, page 98)
5 The *Cornell Chronicle* did not report these events.

6 Sometime in 2007, the Defendant chose to place it's entire *Cornell Chronicle* collection
7 upon the Internet and this caused all editions to be prominently displayed upon *the Google.com*
8 search engine web site. (See Exhibit 1) The defamatory *Cornell Chronicle* article was not
9 discovered by the Plaintiff until September of 2007, when he ran a *Google* search of his name on
10 the Internet and determined that the Defendant had now published this article on the World Wide
11 Web. (See Exhibit 1 and Affidavit of Plaintiff) The article was first prominently displayed on the
12 Internet twenty four years after it was published in the *Cornell Chronicle* and is now readily
13 displayed with each *Google* search made of the Plaintiff's name. On September 2, 2007, the
14 Plaintiff requested that the Defendant remove its offending statements from the Internet. (See
15 Exhibit 2) The Defendant has adamantly refused to do such and they have now become even
16 more prominently published upon the World Wide Web than ever before. (See Exhibit 3)

17 The Plaintiff filed suit for the afore mentioned tortious activity on October 1, 2007. Bert
18 Deixler (Defendant) subsequently initiated a phone conversation with the Plaintiff in which he
19 stated that if the underlying original claim was not dismissed forthright, this matter would lead to
20 further publicity of the circumstances regarding the original Private Disclosure of Public Facts
21 claim. Defendant Deixler further emphasized this threat in writing. (See Exhibit 4 and Affidavit
22 of Plaintiff) The Defendants subsequently subverted and corrupted the electronic filing system of
23 the United States Federal Court into a vehicle for publishing onto the Internet a myriad of private
24 information regarding the plaintiff which has no bearing on the previous suit (Defendant's
25 Exhibit B) along with a repeat of the libelous statements (Defendant's Exhibit E, page 134, 135)
26 and they have decided to repeat this behavior once again in the present suit. The Defendants
27 have submitted into a public Federal Court record, and thus immediately published onto the
28 Internet, documents (Defendant's Exhibit A) which the defendants were aware were sealed under

1 a court order at the time they were submitted to the court. (See Exhibit 5 and 6) The Defendants
2 later lied within a court filing by repeating verbatim the false statement which is the basis of the
3 underlying previous Libel claim under the flawed impression that if a false statement is repeated
4 enough times it then somehow becomes true. (Defendant's Exhibit E, page 134, 135) The
5 Defendants simultaneously submitted to this Court an entire record of previously sealed files as
6 purported evidence and thus immediately published its contents onto the Internet. This record
7 includes only unauthenticated documents (Defendant's Exhibit B), a purported recorded
8 transcript from an interrogation which would have been recorded illegally under New York State
9 law (Defendant's Exhibit B), documents which have no remote relevance in a determination of
10 the truth of the statement in the previous underlying Libel claim (Defendant's Exhibit B) and
11 privileged attorney client communications from a twenty four years old matter. (Defendant's
12 Exhibit B).

13 III.

14 ARGUMENT

15 I. **The Complaints should not be considered a SLAPP Lawsuit under the**
16 **legislative intent of California Code of Civil Procedure §425.16 because**
17 **there is no First Amendment protection for Libel, an Invasion of Privacy**
or a Public Disclosure of Private Facts and there is no public
interest in the publication of a twenty four year old sealed record.

18 The Defendants' contention that the Plaintiff's Complaint should be classified as a
19 SLAPP (Strategic Lawsuit Against Public Participation) Lawsuit is a tenuous one. The current
20 litigation is certainly not a strategic lawsuit against public participation but rather a limited action
21 by a nonpublic person taking umbrage with the publication of false and private information upon
22 the Internet by large corporate entities. The First Amendment Center defines SLAPP Lawsuits as
23 "lawsuits filed in response to or retaliation for citizen communications with government entities
24 and employees". (www.firstamendmentcenter.org) The case at bar does not fit this description
25 in the least. The Defendants are not citizens but rather a multibillion dollar corporation and its
26 legal representative. They have made no communication with any government entity and the
27 Plaintiff has not filed any lawsuit in retaliation. The Plaintiff here simply seeks to protect his
28 reputation from an invasion of privacy and libelous statements.

1 The legislative intent of the anti-SLAPP statute asserted by the Defendant is based upon
2 the premise that, "The legislature finds and declares that there has been a disturbing increase in
3 lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of
4 speech and petition for the redress of grievances." (Cal. Code of Civ. Pro. § 425.16(a)) This
5 lawsuit is decidedly not brought primarily to chill the Defendants' free speech rights as the torts
6 of Libel, a Public Disclosure of Private Facts and Invasion of Privacy are not protected by free
7 speech rights and it is the Plaintiff not the Defendants who now seeks a redress of grievances.

8 The Defendants are also not entitled to the assert the anti-SLAPP statute because this
9 matter does not concern a public issue. The anti-SLAPP statute asserted by the Defendants
10 requires that it should only apply to a lawsuit brought, "in connection with a public issue". (Cal.
11 Code of Civ. Pro. § 425.16(b)(1)) There is quite simply no public issue here. The Defendant
12 ludicrously asserts that a twenty four year old charge resulting in a sealed record and a
13 conditional discharge to a nonpublic figure is somehow now a matter of public concern.

14 The Defendant has not established that the case at bar involves any matter of public
15 concern nor does it fit under the legislative intent of the anti-Slapp statute it now asserts. The
16 Defendants' Special Motion to Strike should be denied without further review.

17 **II. The Defendants' Motion should not be granted even if the complaints are**
18 **considered a SLAPP Lawsuit because the Plaintiff can demonstrate a high**
probability in succeeding in his three claims for Libel.

19 The Plaintiff can establish a high probability in succeeding on all Libel claims. All
20 elements within California Jury Instruction 7.00, are met and no statute of limitations bars the
21 suit because the Plaintiff was not aware of the tortious acts until December of 2007. Under
22 California Law, "Libel is a false and unprivileged publication by writing, printing, picture, effigy
23 or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule,
24 or disgrace, or which causes such party to be shunned or avoided, or which has a tendency to
25 injure such party in such party's occupation". (California Jury Instruction 7.00)

26 The first count of Libel arises from statements present within documents dated March 8,
27 1983, written by Barbara Bourne of Defendant Cornell University. (Defendant's Exhibit B, pages
28 18, 19, 23) In her report Ms. Bourne has alleged that the Plaintiff was responsible for fifteen

1 separate crimes. The Defendant has not presented any evidence, admissible or not, which
2 ascertains that fifteen individual crimes occurred for which the Plaintiff may be found
3 responsible nor does any documentation exist which presents even a scintilla of evidence that the
4 Plaintiff may be responsible for even half that number of incidents. If the Defendants now wish
5 to prove these statements to be true they possess the burden to prove that fifteen separate
6 distinguishable crimes had actually occurred, detailing specifically what was purportedly taken
7 and when, who may have reported them missing, what if any reports substantiate these alleged
8 circumstances and what purported evidence may tie the Plaintiff to fifteen crimes in any way.

9 The Defendants' statements in the report are false. (See Affidavit of Plaintiff) The
10 publication is in writing and a fixed representation to the eye. The statements in the report were
11 certainly conveyed to the *Cornell Chronicle* in 1983, and therefore were not privileged. This
12 report is the original source of the *Cornell Chronicle's* libelous statements and has resulted in a
13 chain of causation that is the root cause for all litigation in this matter. The statements regarding
14 the accusation of the commission of fifteen separate crimes would certainly expose any person to
15 contempt, ridicule, disgrace and have an tendency to injure someone in their occupation. A
16 statement is defamatory on its face, "if it charged plaintiff with a crime". (California Jury
17 Instruction 7.09)

18 The second count of Libel arises from Defendant Bert Deixler's decision to republish Ms.
19 Bourne's libelous report by placing it into a public court record and thus immediately upon the
20 Internet on the Justia.com Web Site. (Defendant's Exhibit B, F and Declaration of Timothy
21 Stanley with Exhibit A) Defendant Deixler was aware that the libelous report was defamatory
22 and inadmissible as evidence when he presented it to the United States Federal Court, Southern
23 District of California in December of 2007. The presentation of the report as purported evidence
24 was not accompanied with any supporting statement or affidavit from Ms. Bourne to authenticate
25 it or confirm its accuracy.

26 The Defendants were presented with three options in regard to the proper manner in
27 which to present to this Court the libelous report of Barbara Bourne in the previous litigation
28 record. The first option was the most logical one, simply do not present it all. The report

1 consists of nothing more than an unauthenticated and sloppy writing which includes wild
2 unsubstantiated accusations against the Plaintiff. While the report is apparently signed by a Ms.
3 Barbara Bourne, there is no verification of whom actually produced it. The second option for the
4 Defendants was to authenticate the report and then make an attempt to introduce it into evidence
5 at a trial after it was properly vetted by a judge for its potential admissibility under relevance,
6 prejudice, best evidence and hearsay objection grounds. The Defendants chose the third and
7 most egregious option, they decided to expose themselves to additional liability by hastily
8 introducing it as purported evidence as soon as they obtained it. Twenty four years after it was
9 first produced, they decided it was now appropriate to publish it for a second time into a public
10 court record without any regard to its admissibility.

11 The Defendants have not categorically denied nor disproved that there was some form
12 communication between themselves and Justia.com in order to further publish these documents
13 upon the Internet. Further discovery is necessary to determine the true extent of a relationship.
14 This issue would not, however, be one to determine liability for the publication, rather it would
15 pertain to the extent of damages for which they are liable. Even if the Defendants had not
16 directly pursued the publication of these documents upon the Internet, upon the Internet they now
17 are. The Defendants can not escape the fact that they and they alone are the ultimate source and
18 sole causation for the presence of such.

19 The Defendants' statements are false. (See Affidavit of Plaintiff) The publication is in
20 writing and a fixed representation to the eye. The document is not admissible evidence and
21 therefore is not privileged. (Cal. Civil Code § 47 (2)(A)) The statements regarding the
22 accusation of the commission of fifteen separate crimes would certainly expose any person to
23 contempt, ridicule, disgrace and have an tendency to injure someone in their occupation. A
24 statement is defamatory on its face, "if it charged plaintiff with a crime". (California Jury
25 Instruction 7.09)

26 The third count of Libel arises from Defendant Bert Deixler's repeat of the libelous
27 statements made by the *Cornell Chronicle*, stating in a court filing that the Plaintiff was "charged
28 . . . in connection with 10 incidents of petit larceny and five burglaries." (Defendant's Exhibit E,

1 pages 134, 135) The Defendants' statement is false. (See Affidavit of Plaintiff) The statement is
2 not privileged because it is a statement known to be false or deceptive. (Cal. Civil Code § 47
3 (2)(A)) The publication is in writing and a fixed representation to the eye. The statement
4 regarding the commission of fifteen separate crimes would certainly expose any person to
5 contempt, ridicule, disgrace and have an tendency to injure someone in their occupation. A
6 statement is defamatory on its face, "if it charged plaintiff with a crime". (California Jury
7 Instruction 7.09)

8 **III. The Defendants' Motion should not be granted even if the complaints are**
9 **considered a SLAPP Lawsuit because the Plaintiff can demonstrate a high**
10 **probability in succeeding on three claims for Placing Plaintiff in a False**
11 **Light.**

11 The Plaintiff can establish a high probability in succeeding on all Placing Plaintiff in all
12 False Light claims. All elements within California Jury Instruction 7.22, are met and no statute
13 of limitations bars the suit. Under civil rights privacy protection, the essential elements Placing
14 Plaintiff in a False Light are:

- 15 1) The defendant made a public disclosure of a fact about the plaintiff;
- 16 2) The fact disclosed was false, and portrayed the plaintiff in a false light;
- 17 3) The false light in which the plaintiff was placed would be highly offensive to a reasonable
18 person;
- 19 4) The defendant had knowledge or acted in reckless disregard of the falsity of the publicized fact
20 and the false light in which the plaintiff would be placed; or
21 The defendant acted negligently in failing to learn whether the publicized fact placed the plaintiff
22 in a false light;
- 23 5) The public disclosure caused plaintiff to sustain damages.

24 Reckless disregard means that the defendant must have had serious doubts about the truthfulness
25 of the facts disclosed and light in which the plaintiff would be placed at the time of the
26 disclosure. (California Jury Instruction 7.22)

27 In essence these elements are simply a milder standard than those for Libel. Since all
28 elements of the Libel claims are met, the elements for Placing Plaintiff in a False Light claims are

1 also certainly met.

2 The first count of Placing Plaintiff in a False Light arises from statements present within
3 documents dated March 8, 1983, written by Barbara Bourne an employee of Defendant Cornell
4 University. (Defendant's Exhibit B, pages 18, 19, 23) The statements were certainly conveyed to
5 the *Cornell Chronicle* in 1983, as the original source of the false statements within their
6 publication and they were therefore not privileged. In her report Ms. Bourne has alleged that the
7 Plaintiff was responsible for fifteen separate crimes. This fact disclosed was false and portrayed
8 the Plaintiff in a false light; The false light in which the Plaintiff was placed would be highly
9 offensive to a reasonable person as a statement regarding the commission of fifteen separate
10 crimes would certainly expose any person to contempt, ridicule, disgrace and have an tendency to
11 injure someone in their occupation.; the Defendants had knowledge or acted in reckless disregard
12 of the falsity of the publicized fact and the false light in which the plaintiff would be placed and
13 the defendant acted negligently in failing to learn whether the publicized fact placed the Plaintiff
14 in a false light; and the public disclosure caused Plaintiff to sustain damages. (See Affidavit of
15 Plaintiff)

16 The second count of Placing Plaintiff in a False Light arises from Defendant Bert Deixler's
17 decision to republish Ms. Bourne's false report by placing it into a public court record and
18 immediately onto the Internet on the Justia.com Web Site. (Defendant's Exhibit B, F and
19 Declaration of Timothy Stanley with Exhibit A) Defendant Deixler was aware that the false
20 report was defamatory and inadmissible as evidence when he presented it to the United States
21 Federal Court, Southern District of California in December of 2007. The presentation of the
22 report as purported evidence was not accompanied with any supporting statement or affidavit
23 from Ms. Bourne to authenticate it or confirm its accuracy. The document is not admissible
24 evidence and therefore is not privileged. (Cal. Civil Code § 47 (2)(A)) In her report Ms. Bourne
25 has alleged that the Plaintiff was responsible for fifteen separate crimes. This fact disclosed was
26 false, and portrayed the Plaintiff in a false light; The false light in which the Plaintiff was placed
27 would be highly offensive to a reasonable person as a statement regarding the commission of
28 fifteen separate crimes would certainly expose any person to contempt, ridicule, disgrace and

1 have an tendency to injure someone in their occupation; the Defendants had knowledge or acted
2 in reckless disregard of the falsity of the publicized fact and the false light in which the plaintiff
3 would be placed and the defendant acted negligently in failing to learn whether the publicized
4 fact placed the Plaintiff in a false light; and the public disclosure caused Plaintiff to sustain
5 damages. (See Affidavit of Plaintiff)

6 The third count of Libel arises from Defendant Bert Deixler's repeat of the libelous
7 statements made by the *Cornell Chronicle*. He stated in a court filing that the Plaintiff was
8 "charged . . . in connection with 10 incidents of petit larceny and five burglaries." (Defendant's
9 Exhibit E, pages 134, 135) The Defendants' statement is false. (See Affidavit of Plaintiff) The
10 statement is not privileged because it is a statement known to be false or deceptive. (Cal. Civil
11 Code § 47 (2)(A)) This disclosed fact portrayed the Plaintiff in a false light; The false light in
12 which the Plaintiff was placed would be highly offensive to a reasonable person as a statement
13 regarding the commission of fifteen separate crimes would certainly expose any person to
14 contempt, ridicule, disgrace and have an tendency to injure someone in their occupation; the
15 Defendants had knowledge or acted in reckless disregard of the falsity of the publicized fact and
16 the false light in which the plaintiff would be placed and the defendant acted negligently in
17 failing to learn whether the publicized fact placed the Plaintiff in a false light; and the public
18 disclosure caused Plaintiff to sustain damages. (See Affidavit of Plaintiff)

19 **IV. The Defendants' Motion should not be granted even if the complaints are**
20 **considered a SLAPP Lawsuit because the Plaintiff can demonstrate a high**
21 **probability in succeeding in his two claims for Public Disclosure of**
22 **Private Facts.**

23 The Plaintiff can establish a high probability in succeeding on all Public Disclosure of
24 Private Facts claims. All elements within California Jury Instruction 7.21, are met and no statute
25 of limitations bars the suit. Under civil rights privacy protection, the essential elements Public
26 Disclosure of Private Facts are:

- 26 1) The defendant made a public disclosure of a fact about the plaintiff;
- 27 2) Before this disclosure the fact was private, that is, not known to the public;
- 28 3) The fact made known to the public would be highly offensive to a reasonable person of

- 1 ordinary sensibilities;
- 2 4) the defendant disclosed the fact with knowledge that it was highly offensive or with reckless
- 3 disregard of whether it was highly offensive or not;
- 4 5) The fact made known was not newsworthy; and
- 5 6) The public disclosure of this fact caused plaintiff to sustain injury, damage, loss or harm.
- 6 (California Jury Instruction 7.21)

7 The first count of Public Disclosure of Private Facts arises from the Defendants' decision

8 to include sealed records from 1983, within the Defendants' Motion to Strike Complaint filing of

9 November 2, 2007. (Defendant's Exhibit A) The Defendants' current contention that these

10 records were not sealed at the time is absurd. The original Accusatory Instrument brought

11 against the Plaintiff (Defendant's Exhibit A) is certainly part of the sealed record. Defendant

12 Attorney Nelson Roth acknowledged such on September 19, 2007, in an email to the Plaintiff.

13 (See Exhibit 5) Attorney Roth also submitted a Motion to Unseal Records to the City of Ithaca

14 Court on October 7, 2007, that was never acted upon. (See Exhibit 6) The Defendants did not

15 obtain an Order to Unseal Records from any court until November 16, 2007, two weeks after

16 they submitted the sealed record to this Court. Attorney Roth was well aware that as a result of

17 the dismissal of all charges, the entire court file was sealed pursuant to New York's CPL

18 §160.50, which requires all records "in any court" (CPL §160.50(1)(c)) to be sealed upon a

19 dismissal. The Defendants have asserted that very code as the basis for their Motion to Unseal

20 Record, (See Exhibit 6) so it is now difficult for them to allege that they believed they were

21 submitting a unsealed record to this Court on November 2, 2007. Attorney Roth now absurdly

22 contends that because he was physically able to surreptitiously retrieve a document that he knew

23 to be sealed from a naive court clerk, it then somehow transformed into a public document

24 suitable for public dissemination in a court file twenty four years later.

25 There was no order to unseal these records issued by any court when the Defendants

26 placed these records into the public court record on November 2, 2007. The fact made known is

27 highly offensive to a reasonable person as it could be a basis to deny an offer of employment or

28 housing. The Defendant was certainly aware that dissemination of this sealed information is

1 highly offensive. A twenty four year old charge to a nonpublic figure resulting in a conditional
2 discharge and a sealed record is not newsworthy. The disclosure has caused loss of reputation,
3 emotional distress and loss of income. The Defendant has provided no evidence that any these
4 elements are not be met.

5 The second count of Public Disclosure of Private Facts arises from the Defendants'
6 decision to include within the Defendants' Motion to Strike Complaint filing of November 2,
7 2007, sealed records from the record of 1983, (Defendant's Exhibit A) with the knowledge and
8 result that it would be published upon the Internet on the Justia.com Web Site. On November 8,
9 2007, or earlier, the entire court record from previous suit filed October 1, 2008, was published
10 upon the Internet on the Web Site Justia.com. (See Exhibit 7) The Defendant was either directly
11 responsible for the Internet publication of this record or had knowledge the sealed documents
12 would appear upon it. This has resulted in a second and more extremely pervasive publication of
13 the private facts revealed as a result of the tort leading to the first count of a Public Disclosure of
14 Private Facts.

15 The Defendants have once again failed to categorically state nor prove that their was no
16 communication between themselves and Justia.com to further publish these documents upon the
17 Internet. Further discovery is necessary to determine the true extent of a relationship. This issue
18 would not, however, be one to determine liability for the publication, rather it would pertain to
19 the extent of damages for which they are liable. Even if the Defendants had not pursued the
20 publication of these documents upon the Internet as they suggest, upon the Internet they now are,
21 and the Defendants can not escape the fact that they and they alone are the ultimate source and
22 the sole reason for the presence of such.

23 **V. The Defendants' Motion should not be granted even if the complaints are**
24 **considered a SLAPP Lawsuit because the Plaintiff can demonstrate a high**
probability in succeeding in his two claims for Intrusion into Private Affairs.

25 The Plaintiff can establish a high probability in succeeding on all Intrusion into Private
26 Affairs claims. All elements within California Jury Instruction 7.20, are met and no statute of
27 limitations bars the suit. Under civil rights privacy protection, the essential elements Intrusion
28 into Private Affairs are:

- 1) The defendant intentionally intruded physically or otherwise, upon the solitude or seclusion, private affairs or concerns of the plaintiff;
 - 2) The intrusion was substantial, and of a kind that would be highly offensive to an ordinarily reasonable person; and
 - 3) The intrusion caused plaintiff to sustain injury, damage, loss or harm.
- (California Jury Instruction 7.20)

The first count of Intrusion into Private Affairs arises from the Defendants' decision to include the entire previously sealed record of 1983, within the Defendants' Motion to Strike Complaint filing of December 14, 2007, and thus publicly disseminate that entire record. (Defendant's Exhibit B) The Defendant has unwisely decided to take the entire previously sealed record and submit every single document within it, relevant or not, as exhibits. Clearly these submitted exhibits could never be presented as evidence at trial without authentication and they would be subject to the scrutiny of this Court in regard to prejudice, hearsay, authentication and relevance. The submission of these records to this Court as purported evidence has accomplished the Defendants' ulterior motive, to publicize the twenty four year old sealed record in as broad a manner as possible in order to exact revenge. (Defendant's Exhibit E and F)

The entire previously sealed record filed by the Defendants on December 14, 2007. includes documents which are all unauthenticated (Defendant's Exhibit B), contains a purported recorded transcript from an interrogation which would have been recorded illegally under New York State law (Defendant's Exhibit B), includes documents such as reference letters which have no remote relevance in a determination of the truth of the statement in the previous underlying Libel claim (Defendant's Exhibit B) and also includes privileged attorney client communications from a twenty four years old matter. (Defendant's Exhibit A and B). There exists no legitimate basis for their introduction to this Court.

In the previous litigation the Defendants were once again presented with three options in regard to whether or not it was appropriate for them to present to this Court the entire record of previously sealed files they received from multiple sources. The first option was the most logical one, carefully sift through the record for any relevant documents that may tend to disprove any of

1 the elements of the original Complaints. They could then select only those documents that have a
2 possibility of being accepted as admissible evidence and authenticate them before submitting
3 them to this Court. The second option for the Defendants was to authenticate any relevant
4 documents and then have them properly vetted by a judge for their potential admissibility under
5 relevance, prejudice, best evidence and hearsay objection grounds before any attempt to
6 introduce them into evidence at a trial. Once again the Defendants chose the third and most
7 egregious option, they decided to expose themselves to additional liability by rabidly presenting
8 all files as purported evidence to this Court as soon as they were obtained. This behavior caused
9 every record to be immediately published in their entirety into a public court record and
10 additionally upon the Internet.

11 The Defendants intentionally intruded upon the solitude or seclusion, private affairs or
12 concerns of the Plaintiff by publicly exposing the entire previously sealed record in a public
13 forum. The intrusion was substantial, and of a kind that would be highly offensive to an
14 ordinarily reasonable person as it could be a basis to deny an offer of employment or housing. .
15 The intrusion caused Plaintiff to sustain injury, damage, loss or harm. (See Affidavit of Plaintiff)

16 The second count of Intrusion into Private Affairs arises from the Defendants' decision to
17 include the entire previously sealed record of 1983, within the Defendants' Motion to Strike
18 Complaint filing of December 14, 2007, with the knowledge and result that it would be
19 immediately published upon the Internet on the Justia.com Web Site. On November 8, 2007, or
20 earlier the entire court record from previous suit filed October 1, 2007, was published upon the
21 Internet on the Justia.com Web Site. (See Exhibit 7) The Defendants were either responsible for
22 the Internet publication of this record or had knowledge that the previously sealed documents
23 would appear upon it. This has resulted in a second and more extremely pervasive publication of
24 the private facts contained within the first count of a Intrusion into Private Affairs.

25 On October 30, 2007, Defendant Bert Deixler placed a phone call to the Plaintiff in which
26 he stated that if the underlying original claim was not dismissed forthright, this matter would lead
27 to further publicity of the circumstances regarding the original Private Disclosure of Public Facts
28 claim. (See Affidavit of Plaintiff) He reiterated this not so veiled threat in a written

1 correspondence to the Plaintiff dated October 31, 2007. (See Exhibit 4) On October 29, 2007,
2 two days prior to the Defendants' ultimatum deadline, the Internet profile of the Plaintiff
3 included no offending statements other than the original libelous account posted by the Cornell
4 Library Web Site. (See Exhibit 7 and Affidavit of Plaintiff) On November 8, 2007, this Court's
5 entire record of the previous litigation had become published upon the Internet on the Web Site
6 Justia.com, with a link to view and print every document in the file. (See Exhibit 8 and Affidavit
7 of Plaintiff) This published Internet record would soon include the entire previously sealed
8 record filed by the Defendants on December 14, 2007. On January 24, 2008, the entire
9 circumstances of the first case were further publicized in a prominent *Cornell Daily Sun* article
10 which was published on the Internet. In March of 2008, the *Cornell Alumni Magazine* published
11 another prominent article regarding all of these events and also placed it upon the Internet. The
12 Defendants have now fulfilled their "promise" to the Plaintiff and have thoroughly polluted his
13 Internet profile with references to virtually nothing other than the entire previously sealed record.
14 (Exhibit 9) The Defendants' cannot escape from the fact that they are solely responsible for the
15 entirety of these circumstances and that none would have occurred if they had not decided to
16 engage in their obstinant and inexplicable behavior.

17 The Defendants have presented a self serving statement by Justia.com CEO Timothy
18 Stanley in which he declares that no "discussion" or "conversation" has occurred between he or
19 his company and the Defendants. His carefully worded statement does not deny, however, that
20 there was no communication regarding this litigation with the Defendants, be it by fax, email or
21 written correspondence. Additionally, while Mr. Stanley has stated that his company normally
22 discovers the potential cases that it decides to publicize from the PACER system, he does not
23 specifically delineate that this has been the manner in which his company has discovered the
24 current matter. Mr. Stanley also fails to mention in his statement that his web site home page
25 establishes that his company has entered into a promotional relationship with the Defendant
26 Cornell University as it prominently advertises and presents a direct link to two Cornell search
27 engines. (Exhibit 10) Also of note is the circumstance that Mr. Stanley has pursued a
28 relationship with the *Google* company similar to that of the Defendant Cornell University in an

1 effort to disseminate all information on their prospective web sites to the widest online audience
2 possible. (Exhibit 11)

3 The Defendants' statement that the Plaintiff does not believe they are entitled to submit
4 any documentary evidence on their behalf to this Court is false. The Defendants are entitled to
5 submit properly authenticated and relevant documentation that could tend to disprove any of the
6 contentions in the Complaints filed in the previous litigation. Any other documents submitted to
7 this Court are superfluous and were presented for no other reason than to publicize them within a
8 public record and hence upon the Internet. The only evidence that could be properly introduced
9 in the previous litigation would be that which could somehow prove that a libelous statement or a
10 public disclosure of private facts had somehow not occurred or was somehow privileged. The
11 Defendants would find it impossible to justify how the majority of the submitted unsealed files
12 which includes letters of reference could meet this standard. The myriad of documents in that
13 file establish nothing of relevance to the limited issue of the potential truth of the libelous
14 statement in the previous litigation. Not one of the presented records establish that fifteen
15 separate crimes had ever been committed nor that the Plaintiff could be even remotely connected
16 with even half that amount, therefore, the voluminous record should not have been recklessly
17 submitted to this Court.

18 The Defendants once again intentionally intruded upon the solitude or seclusion, private
19 affairs or concerns of the Plaintiff by publicly exposing the entire previously sealed record in a
20 public forum. The intrusion was substantial, and of a kind that would be highly offensive to an
21 ordinarily reasonable person as it could be a basis to deny an offer of employment or housing and
22 it caused the Plaintiff to sustain injury, damage, loss and harm. (See Affidavit of Plaintiff)

23 Seven months ago a *Google* search of the Plaintiff's name would have revealed none
24 other than information about his published Law Review article or information regarding his law
25 practice as a Certified Specialist. The Plaintiff's profile is now utterly polluted with little other
26 than references to a twenty five year old incident including articles from *The Cornell Daily Sun*
27 and the *Cornell Alumni Magazine* that delineate vivid details of everything the Defendants' have
28 chosen to publicize about the Plaintiff to the world. The Plaintiff should have never again in his

1 life had to trouble his mind with the most excruciating episode of his life. The Defendants have
2 inexplicably forced him to endure world wide publicity of this matter and hundreds of hours of
3 litigation in order to correct the injustices they now cast upon him.

4 **VI. The Defendants' Motion should not be granted even if the complaints are**
5 **considered a SLAPP Lawsuit because the Defendants can not demonstrate**
6 **that any claims are barred by any affirmative defenses or privileges.**

7 Statutes of limitations are affirmative defenses that the Defendant may someday attempt
8 to assert but they have not yet done so as it has not yet filed any Answers to any Complaints.
9 Under Federal Law, a claim accrues when the plaintiff knows or has reason to know of the injury.
10 *Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999)* No statute of limitations bars the suit
because the Plaintiff was not aware of the libelous statements until December of 2007.

11 **A. The Plaintiff's claims are not time-barred because the single publication rule**
12 **is not applicable in this matter since there was both a republication in 2007**
13 **and because the original publication was not first communicated in any form**
14 **of the media which allows the discovery rule to toll these claims as the**
15 **Plaintiff was not aware of the first publication nor the subsequent**
16 **republication until it was first placed upon the Internet in 2007.**

17 The single publication rule should not apply to this matter because the report of Barbara
18 Bourne from 1983, was not a communication in the mass media. A recent California Supreme
19 Court ruling asserted that if a publication was published with even only a limited circulation then
20 the single publication rule should apply, however, the Court additionally reiterated that the
21 delayed discovery rule is meant to apply in cases in which it is difficult for a plaintiff to learn or
understand the injury suffered, or when the cause of injury is hidden. *Hebrew Academy of San*
Francisco v. Goldman, S134873, citing Shively v. Bozanich, 31 Cal. 4th 1230 (2003).

22 In the case at bar the discovery rule should be applied to the count of Libel regarding the
23 twenty five year old libelous statements about the Plaintiff within the report produced by Barbara
24 Bourne. The Plaintiff was not aware of the libelous statements until December 15, 2007, when
25 he first learned of the existence of the twenty five year old report regarding himself by Barbara
26 Bourne at the time it was delivered to him by the Defendant Bert Deixler in a court filing. (See
27 Affidavit of Plaintiff) Since he was not aware of the existence of the report until twenty four
28 years after it was written, he could not have reasonably discovered it until it was recently

1 prominently displayed upon the Internet in the year 2007.

2 The discovery rule should prevent the application of any statute of limitation as a bar to
3 the present case because the statute only starts when a plaintiff learns of possible wrongdoing.
4 *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914 Cal.(2005); *Hopkins v. Dow Corning Corp.*, 33
5 F.3d 1116, 1120 9th Cir.(1994) *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 926-27 (1988); *Dawson v.*
6 *Eli Lilly and Co.*, 543 F. Supp 1330, 1338 D.C. (1982). Under the common law rule, “discovery
7 rules are adopted to avoid unfairness of interpreting a statute of limitations to accrue when the
8 injury first occurs, if at that time plaintiff does not have enough information to bring suit.” *see*
9 *Dawson*, 543 F. Supp at 1338. Different accrual dates could apply to different causes of action.
10 *see Fox*, 110 P.3d 914 Cal. at 924 The delayed discovery rule is meant to apply in cases in
11 which it is difficult for a plaintiff to learn or understand the injury suffered, or when the cause of
12 injury is hidden. The discovery rule has been applied in matters: that “involve a defamatory
13 writing that has been kept in a place to which the plaintiff has no access or cause to seek access.”
14 *Shively v. Bozanich*, *supra*, 31 Cal. 4th 1230, 1249; “when the defamatory statement is hidden
15 from view, for example in a personnel file that generally cannot be inspected by the plaintiff.”
16 *Shively v. Bozanich*, *supra*, 31 Cal. 4th 1230, 1249, citing *Manguso v. Oceanside Unified School*
17 *Dist.* (1979) 88 Cal.App.3d 725; and “when the defamation was communicated in confidence,
18 that is, ‘in an inherently secretive manner’” *Shively v. Bozanich*, *supra*, 31 Cal. 4th 1230, 1249,
19 citing *McGuinness v. Motor Trend Magazine* (1982) 129 Cal. App.3d 59, 61.

20 The Plaintiff in the case at bar was simply incapable of discovering the report Barbara
21 Bourne wrote about himself twenty five years ago since it was obviously not made available to
22 him at the time it was first written nor when it was later sealed. The Plaintiff had no reason to
23 suspect that any such report even existed until he was presented with it in the previous litigation
24 in December of 2007. The report was not printed in any form of media until 2007, therefore
25 there is no statute that could bar any part of the claims for Libel due to the required application of
26 the delayed discovery rule in the case at bar.

27 **B. Plaintiff’s Libel and False Light claims are legally sufficient**
28 **because the offending statements are not true and the Defendants**
have not shown them to be true.

1 The statements within the report of Barbara Bourne dated March 8, 1983, and the libelous
2 statement of Bert Deixler in his court filing of December 14, 2007, are neither fair nor true.
3 Defendant Cornell University employed Ms. Bourne at the time she wrote her libelous statements
4 that allege that the Plaintiff was responsible for fifteen separate crimes. (Defendant's Exhibit B,
5 pages 18, 19, 23) Defendant Bert Deixler has repeated the libelous statements made by the
6 *Cornell Chronicle*, stating in a court filing that the Plaintiff was "charged . . . in connection with
7 10 incidents of petit larceny and five burglaries." (Defendant's Exhibit E, pages 134, 135) The
8 Defendants' statements are patently false and they have presented no evidence of their truth.

9 The Defendants have not presented any evidence, admissible or not, which ascertains that
10 fifteen individual crimes occurred for which the Plaintiff may be responsible. There is no
11 submitted documentation which indicates how there exists even a scintilla of evidence that the
12 Plaintiff may be responsible for even half that number of incidents. In its defense against the
13 Plaintiff the Defendants have presented an Accusatory Instrument as purported evidence but that
14 document simply indicates that at the time of arrest only one charge brought against the Plaintiff
15 in connection with a single event: the taking of books from a room in a campus academic
16 building. (Defendant's Exhibit A) This document does not support their libelous statements.

17 The Defendants poor decision to submit Ms. Bourne's libelous statements into a public
18 record and thus, republish and now expose them to the Plaintiff for the first time, has now availed
19 them of the obligation to prove her statements are true. The Defendants have not and are simply
20 incapable of doing so. They have supplied no statement from her asserting the authenticity of the
21 documents she has allegedly prepared nor any evidence from her to assert the truth of the
22 statements within them. Quite simply, if the Defendants now wish to prove the purported truth of
23 the libelous statements they have made, they have the burden to prove not only that fifteen
24 separate and distinct crimes actually occurred and specifically what was taken and when, who
25 reported each crime, what if any reports were taken at the time and what purported evidence tied
26 the Plaintiff in any way to each of the alleged fifteen crimes. Ms. Bourne's report of March 8,
27 1983, does not illustrate any of the required information regarding these questions that could
28 possibly prove the truth of the matters asserted. The report simply includes statements of

1 sweeping generalizations and a list of obtuse purported incident numbers. While this report
2 contains blanket accusations against the Plaintiff regarding alleged crimes, it fails to include any
3 specificity as to which incidents had theoretically occurred or why these were considered separate
4 incidences rather than possibly multiple reports of single events. The Defendants have made no
5 legitimate effort to assert the truth of their libelous statements.

6 C. **The Defendants cannot properly assert any immunity privilege when their**
7 **behavior falls within the exceptions to Cal. Civil Code § 47.**

8 The Defendants have chosen to assert that Cal. Civil Code § 47, grants them unlimited
9 immunity to make any statement and submit any document they wish to include within any court
10 record. The Defendants refuse to recognize, however, that within that Code there are many
11 exceptions which apply directly to them.

12 The exceptions to the “immunity privilege” include: 1) Violating Rule 5-120 of the State
13 Bar Rules of Professional Conduct in regard to clearly inadmissible evidence and statements
14 known to be false or deceptive (Cal. Civil Code § 47 (2)(A)); 2) Breaches of a court order (Cal.
15 Civil Code Cal. Civil Code § 47 (2)(B)), and 3) Violations of any requirement of confidentiality
16 by law (Cal. Civil Code § 47 (2)(C)). In addition, under California Law a jury must determine if
17 the privilege is abused. A privilege is abused when a defendant publishes a defamatory statement
18 about plaintiff, without a good faith belief in the truth of the statement; or, without reasonable
19 grounds for believing the statement true; or, motivated by hatred or ill will towards plaintiff.
20 (California Jury Instructions 7.05, 7.05.1)

21 Defendant employee Barbara Bourne and Defendant Bert Deixler have asserted that the
22 Plaintiff is responsible for many crimes where there they have provided no proof that these
23 alleged crimes have actually occurred. The Defendants now assert that the “litigation privilege”
24 protects them from any and all of their statements regarding this matter, whether or not they know
25 them to be false. They apparently believe they have a license to lie to this Court. This alleged
26 privilege would then presumably would allow them to additionally make the false accusation that
27 the plaintiff has been charged in connection with multiple counts of mass murder. The
28 Defendants have clearly demonstrated that they have abused any privilege which they may believe

1 they are entitled to assert .

2 The Defendant's position that Barbara Bourne's libelous report is protected by a privilege
3 because it was somehow a report *to* a police officer is a tenuous one. Her statements were ones
4 presumably made *by* a campus security officer and not statements made *to* an officer as the
5 Defendants suggest. This report, or a description of it, was obviously conveyed to a member of
6 *Cornell Chronicle* staff when the original offending article was first written. While one section of
7 a report in the file written by someone other than her does contain a small reference to the
8 possibility that her statements may have been for some reason forwarded to the IPD (presumably
9 the Ithaca Police Department), there was no logic for this circumstance because that department
10 provided no participation in the matter whatsoever. The Defendant's argument that her statements
11 are now somehow privileged simply because they may have for no apparent reason forwarded
12 them to another police agency is absurd. The Defendants are thus asserting that any officers may
13 absolve themselves of tortious behavior simply by conveying their libelous remarks to a additional
14 parties.

15 The Defendants can not overcome the fact that the incredibly sloppy work product and
16 wild accusations of Barbara Bourne are the root cause of all of the litigation in this matter and an
17 incredible amount of damage to the Plaintiff. Defendant Deixler has decided to compound the
18 harm to the Plaintiff with further ancillary damages when he republished this misinformation.

19 Defendant Bert Deixler has subverted and corrupted the electronic filing system of the
20 United States Federal Court into a vehicle for publishing his libelous statement onto the Internet
21 along with a myriad of private information regarding the plaintiff which has no bearing on the
22 previous suit. The Plaintiff's record in this matter was sealed in 1983 and again in 1985. The
23 Plaintiff's FBI report contains no record of any of these events. This episode was forgotten for
24 twenty four years by every party involved and totally unknown to the general public. Today,
25 however, entirely as a result of the Defendant's actions, a *Google* search of the Plaintiff's name
26 reveals little other than references to the twenty five year old incident. The Defendant cannot
27 plausibly assert they have committed no wrong or that they have some form of blanket immunity
28 which allows them to conduct themselves in such a devastating manner.

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2



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Date: Wed, 05 Sep 2007 15:49:18 -0400

To: kvangin1@yahoo.com

From: "Edward Weissman" <esw3@cornell.edu>

Subject: Re: Reference Question from Kevin Vanginderen

Dear Kevin Vanginderen,

We received your message and we are looking into your complaint. We will get back to you shortly.

Edward Weissman
Assistant to the University Librarian
Cornell University
201 Olin Library
Ithaca, NY 14853-5301

e-mail: esw3@cornell.edu

voice: 607 255-5754

fax: 607 255-6788

>Name : Kevin Vanginderen

>Status : other

>Email : kvangin1@yahoo.com

>Question : I have done a recent google search of my name on the internet and I am very disturbed to find a website address from your library specifically at:

>dspace.library.cornell.edu/bitstream/1813/5350/14/014_24.pdf

>This post is slanderous and untrue and at minimum a public disclosure of private information going back over 25 years. I have google searched my name every year for the past ten years and this is the first time this disturbing post has ever come up. Why is it on your library site now? Please remove this immediately from your website or I will be forced to take legal action to have it removed.



EXHIBIT 3

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Oct 29, 2007 ... (Attachments: # 1 Affidavit of **Kevin Vanginderen** in support of memorandum of points and authorities)(vet) (Entered: November 26, 2007) ...
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November 21, 2007, 12, Memorandum of Points and Authorities in Opposition re 7 MOTION to Strike Plaintiff's Complaint filed by **Kevin Vanginderen**. ...
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Jan 24, 2008 ... According to the Cornell Daily Sun, **Kevin Vanginderen**, a Cornell graduate and now a lawyer in California, filed a \$1 million lawsuit against ...
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EXHIBIT 4

PROSKAUER ROSE LLP

2049 Century Park East
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Los Angeles, CA 90067-3206
Telephone 310.557.2900
Fax 310.557.2193

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WASHINGTON

Bert H. Deixler
Member of the Firm

Direct Dial 310.284.5663
bdeixler@proskauer.com

October 31, 2007

Via Federal Express

Kevin Vanginderen, Esq.
637 3rd Avenue, Suite E-1
Chula Vista, CA 91910

Re: Kevin Vanginderen v. Cornell University

Dear Mr. Vanginderen:

You will recall that we spoke on October 16, 2007, and in that conversation I informed you that our firm had been engaged by Cornell University in connection with the action you had filed against Cornell. In that conversation I informed you that it was my opinion that your claims were meritless and that we would promptly remove the case to United States District Court and thereafter file an anti-SLAPP motion pursuant to California Code of Civil Procedure § 425.16.

As you are aware, we have removed the case as promised. Enclosed is a copy of the Memorandum of Points and Authorities in Support of Special Motion to Strike, together with the Request for Judicial Notice and related declarations, which we intend to file by 5:00 p.m. Friday, November 2, 2007.

Cornell has decided that it would afford you one last clear chance to dismiss the action with prejudice rather than litigating publicly what appear to be the legally irrefutable circumstances surrounding your arrest and conviction in 1983. I would add my personal urging because I believe that the case is both unwinnable for you and unlikely to enhance your reputation in the communities in which you work and live.

Please inform me no later than 5:00 p.m. Pacific time on November 1, 2007, that you have filed a dismissal of the action with prejudice in the United States District Court and supply me with a copy of that electronic filing.

PROSKAUER ROSE LLP

October 31, 2007

Page 2

If I haven't received that assurance, coupled with the written confirmation, Cornell will proceed with the anti-SLAPP motion and when it is granted will seek and collect attorneys' fees attendant to the bringing of that motion.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bert H. Deixler". The signature is fluid and cursive, with a large initial "B" and "D".

Bert H. Deixler

BHD:pr

Enclosures

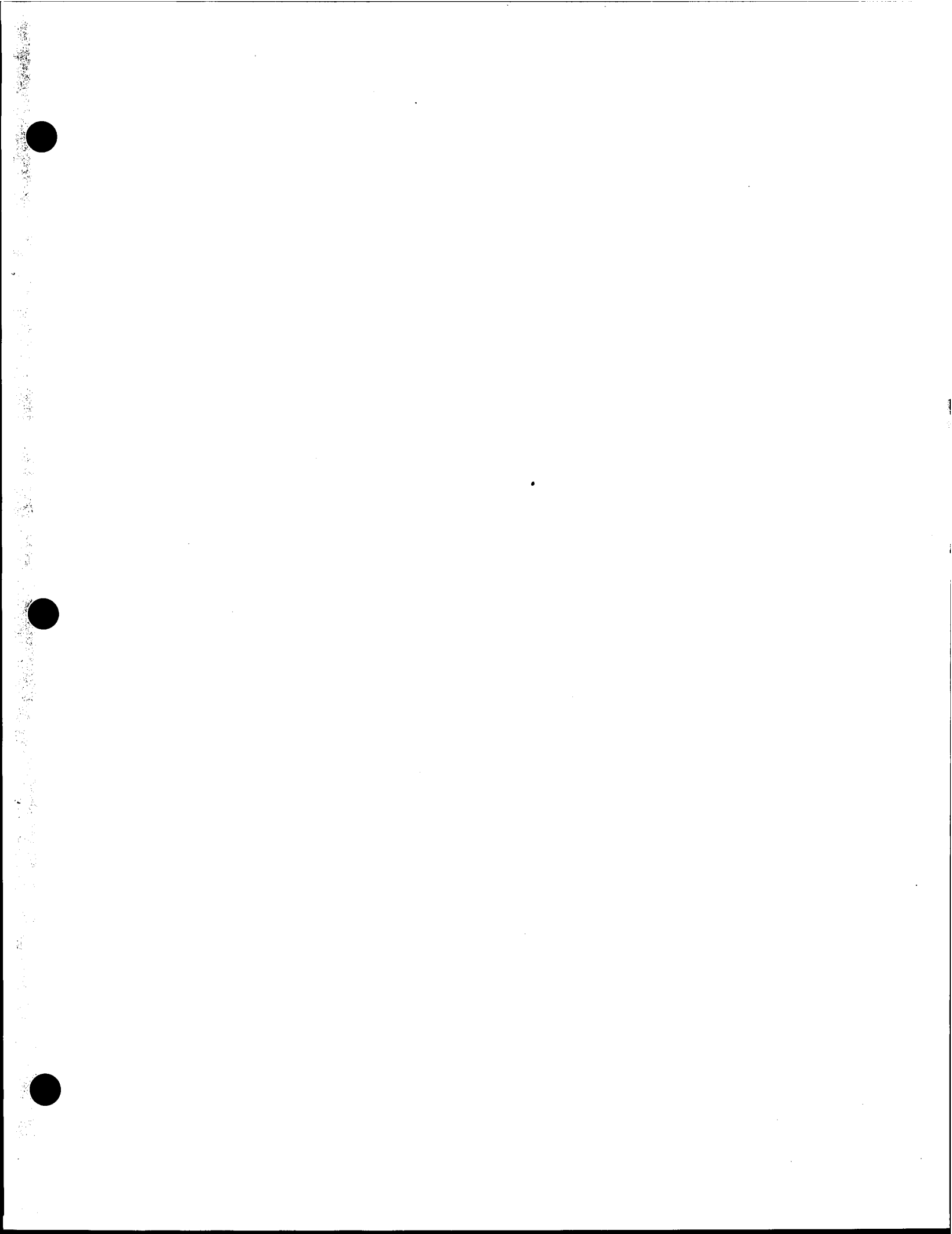


EXHIBIT 5



Print - Close Window

Date: Wed, 19 Sep 2007 21:15:59 -0400
To: "Kevin Vanginderen" <kvangin1@yahoo.com>
From: "Nelson E. Roth" <ner3@cornell.edu>
Subject: Re: Inquiry to Cornell University Library

Dear Mr. Vanginderen:

Thank you for getting back to me. Before responding either to your request that the Cornell Library redact page 6 of the digitized copy of the March 27, 1983 Cornell Chronicle it maintains in its collection (or remove it from the collection) or to the assertions of law in your e-mail, we would like to be sure that we have all of the pertinent facts so that we can assess the accuracy of the publication and your present factual assertions. Thus, it would be very helpful to us in addressing your request if we could examine the original police and prosecution records relating to the matters referenced in the publication. I understand that the records are available but were sealed in 1985. For that reason, we will need to obtain a court order to unseal the records. This is routinely done, of course, in the event of litigation, but we will need a stipulation from you to obtain a court order at this point to examine the records. If you are willing to sign a stipulation so that we may attempt to resolve this matter short of litigation, please let me know and I will prepare the appropriate document.

Sincerely,

Nelson E. Roth



EXHIBIT 6

CITY OF ITHACA
CITY COURT:

CRIMINAL PART

07 OCT -9 AM 9:19

IN THE MATTER OF THE APPLICATION
OF CORNELL UNIVERSITY TO UNSEAL
RECORDS FROM THE PROCEEDING
CAPTIONED:

PEOPLE OF THE STATE OF NEW YORK

vs.

KEVIN VANGINDEREN,

Defendant.

**ORDER TO
SHOW CAUSE**

Upon the annexed affidavit of Nelson E. Roth, sworn to October 5, 2007 with attached exhibit, and upon all prior papers and proceedings heretofore had herein, and sufficient cause appearing therefor; it is hereby,

ORDERED, that Kevin Vanginderen or his attorney(s) show cause before this Court, at a Motion Term thereof, to be held at the Ithaca City Court, located at 118 East Clinton Street, City of Ithaca, State of New York, on 10/17, 2007 at 9:30 a.m. or as soon thereafter as counsel can be heard, why an order should not be entered herein unsealing all records and papers relating to the arrest and prosecution of the above-captioned criminal matter; and it is hereby

FURTHER ORDERED, that service of a copy of this Order to Show Cause and the Affidavit of Nelson E. Roth in Support of Motion to Unseal Record with attached exhibit be made upon Kevin Vanginderen, Pro se, by Federal Express (no signature required) at the address listed on his Civil Action Case No. 37-2007-00076496-CU-DF-SC, at 637 3rd Avenue, Suite E-1, Chula Vista, CA 91910 on or before 10/12, 2007 at 5:00 p.m.; and it is hereby

FURTHER ORDERED, that any and all answering affidavit and memorandum of law be served upon the attorney for movant Cornell University at the Office of University Counsel, 300 CCC Building, Garden Avenue, Ithaca, NY 14853 on or before 10/15, 2007.

IT IS SO ORDERED.

Dated: October 9 2007

s/Judith A Rossiter
Judith A. Rossiter, Judge

CITY OF ITHACA
CITY COURT:

CRIMINAL PART

IN THE MATTER OF THE APPLICATION
OF CORNELL UNIVERSITY TO UNSEAL
RECORDS FROM THE PROCEEDING
CAPTIONED:

AFFIDAVIT OF
NELSON E. ROTH
IN SUPPORT OF
APPLICATION TO
UNSEAL RECORD

PEOPLE OF THE STATE OF NEW YORK

vs.

KEVIN VANGINDEREN,

Defendant

STATE OF NEW YORK :
: ss.:
COUNTY OF TOMPKINS :

Nelson E. Roth, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the courts of the State of New York, and am one of the attorneys defending Cornell University in a civil matter just commenced in the Superior Court of California, County of San Diego by Kevin Vanginderen. I am fully familiar with the procedural facts and circumstances of this matter as set forth below.

2. I make this affidavit in support of Cornell's application pursuant to CPL §160.50(1)(d) to unseal all records and papers relating to the arrest and prosecution of the above-captioned matter, as necessary to Cornell's defense in the civil action brought by the defendant-now-plaintiff Vanginderen, which is currently pending in Superior Court of California, County of San Diego.


3. Vanginderen's complaint, a copy of which is attached hereto as Exhibit A, was served upon Cornell University on October 3, 2007, nearly twenty four years after his arrest for crimes alleged in the above-captioned matter prosecuted in this Court. A report of his arrest was published in the Cornell Chronicle on March 17, 1983. The newly commenced civil action centers around that article published on March 17, 1983. Vanginderen contends that the article is

defamatory, and desires to re-write history by removing the article from the digitized copy of the Cornell Chronicle now available on-line.

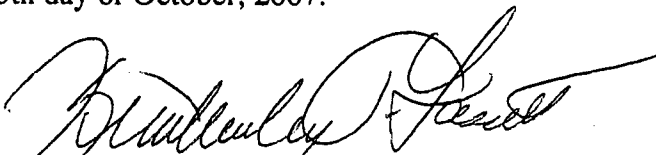
4. As stated in his complaint, Vanginderen communicated by email to Cornell prior to filing suit. However, when Cornell requested Vanginderen to consent pursuant to CPL §160.50(1)(d) to an unsealing order so that Cornell could evaluate the facts surrounding his threatened claim, he abruptly declined to consent and instead filed the lawsuit, Exhibit A.

5. The alleged conduct of Vanginderen reported in the Cornell Chronicle on March 17, 1983 is at the very heart of his pending civil complaint, as revealed in the allegations of the complaint itself, wherein Vanginderen claims that the report of his arrest is false and libelous. Case law is clear that a plaintiff waives the statutory privilege accorded by CPL § 160.50 when the plaintiff files a civil action placing in issue the contents of the sealed records, thus warranting the unsealing of those records upon a proper application by the party who must defend against the civil action. See Commercial Union Insurance Co. v. Jones, 216 A.D.2d 967, 968 (4th Dep't 1995); In re Scott D, 13 A.D.3d 622, 623 (2d Dep't 2004); cf. Green v. Montgomery, 95 N.Y.2d 693, 699 (2001) (applying same waiver analysis in the context of unsealing a juvenile record).

Wherefore, Cornell respectfully requests that the records of the criminal proceeding in the above-captioned matter be unsealed forthwith, including this Court's records, the records held by the District Attorney's Office and the records held by Cornell University Police.


NELSON E. ROTH

Sworn to before me this
5th day of October, 2007.


Notary Public

KIMBERLEY J. FASSETT
Notary Public, State of New York
No. 01FA6143171
Appointed in Schuyler County
Commission Expires April 3, 2010



EXHIBIT 7

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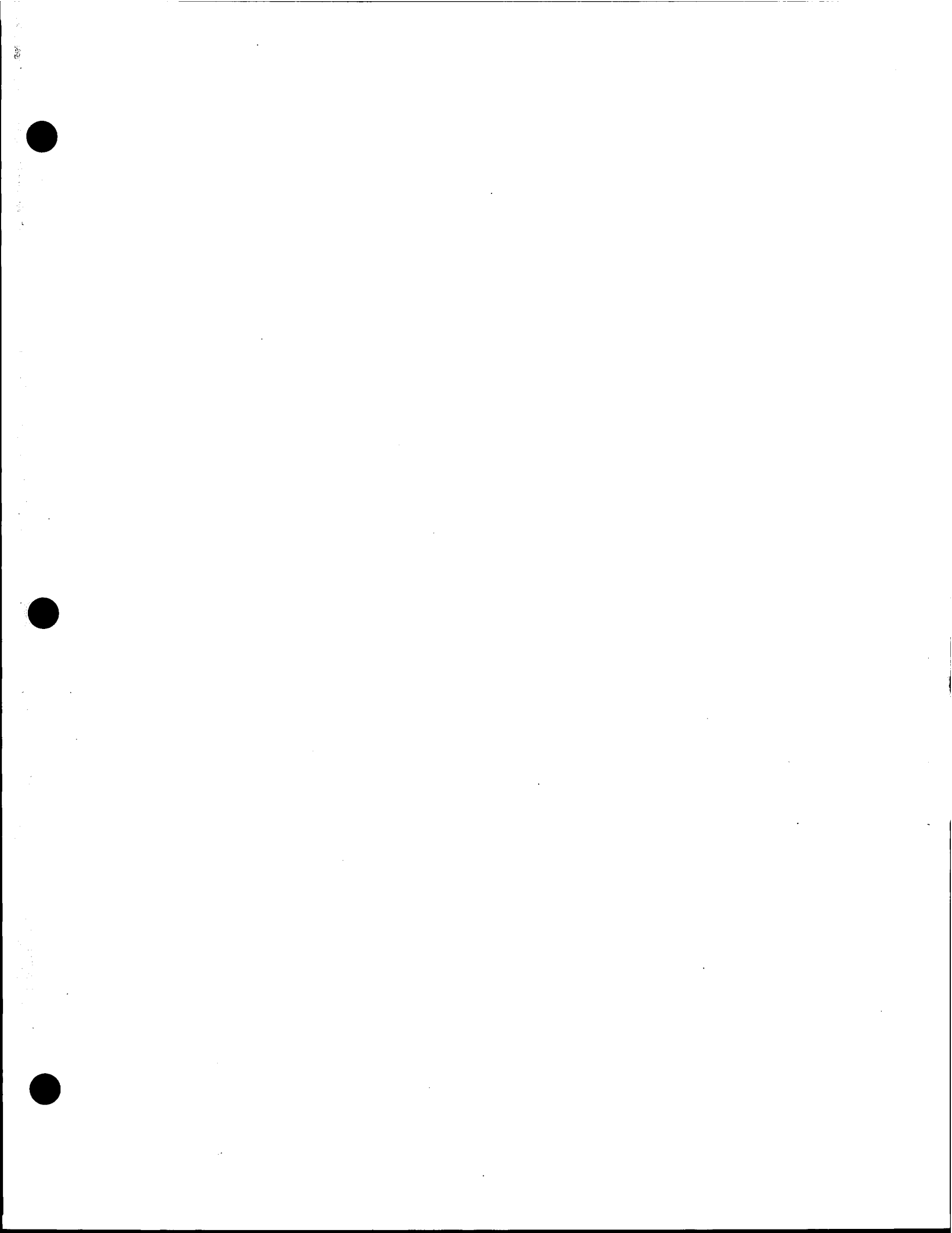
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8

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Vanginderen v. Cornell University

Libel claim - claims university's digitization of campus newspaper constituted "re-publication" thus reviving claim that would ordinarily be extinguished over twenty years ago. Disclosure of private facts claim.

Tags: [cornell](#), [defamation](#), [disclosure private facts](#), [libel](#), [library](#), [privacy](#), [publication](#), [single publication rule](#)

Plaintiff: Kevin Vanginderen

Defendant: Cornell University

Case Number: 3:2007cv02045

Filed: October 29, 2007

Court: California Southern District Court

Office: San Diego Office [[Court Info](#)]

County: San Diego

Presiding Judge: Judge Barry Ted Moskowitz

Referring Judge: Magistrate Judge Jan M. Adler

Nature of Suit: Torts - Injury - Assault, Libel, and Slander

Cause: 28:1441 Petition for Removal Libel,Assault,Slander

Jurisdiction: Diversity

Jury Demanded By: None

Date Filed	#	Document Text	Date Entered
October 29, 2007	1	NOTICE OF REMOVAL as to Kevin Vanginderen from San Diego Superior Court, case number 37-2007-00076496-CU-DF-SC. (Filing fee \$ 350 Receipt number 143754), filed by Cornell University. t/w Notice of Party with Financial Interest.(pdc)(bar).	October 29, 2007
October 29, 2007	2	NOTICE of Party With Financial Interest by Cornell University. (vet)	October 30, 2007
October 30, 2007	3	CERTIFICATE OF SERVICE by Cornell University (Davidson, Clifford) Modified on 11/1/2007 - atty not associated w/ party and signature is in incorrect format, atty contacted (vet,).	October 30, 2007
October 31, 2007	4	PRO HAC VICE APPOINTED: Charles S. Sims appearing for Defendant Cornell University (mkz) (mam).	October 31, 2007

November 1, 2007	5	NOTICE of Appearance by Nelson Eugene Roth on behalf of Cornell University (Roth, Nelson) (vet,).	November 1, 2007
November 1, 2007	6	NOTICE of Appearance by Clifford Scott Davidson on behalf of Cornell University (Davidson, Clifford) (vet,).	November 1, 2007
November 2, 2007	7	MOTION to Strike <i>Plaintiff's Complaint</i> by Cornell University. (Attachments: # 1 Memo of Points and Authorities Memorandum of Points and Authorities in Support of Defendant's Special Motion to Strike Plaintiff's Complaint Pursuant to Cal. Code Civ. Pro. sec. 425.16)(Deixler, Bert) (vet,).	November 2, 2007
November 2, 2007	8	NOTICE: Request for Judicial Notice in support re 7 MOTION to Strike <i>Plaintiff's Complaint</i> by Cornell University (Attachments: # 1 Exhibits in Support of Special Motion to Strike# 2 Declaration of Valerie Cross Dorn in Support of Request for Judicial Notice# 3 Declaration of Anne Richardson Kenney in Support of Defendant's Request for Judicial Notice)(Deixler, Bert) Modified on 11/5/2007 - edited text (vet,).	November 2, 2007
November 2, 2007	9	CERTIFICATE OF SERVICE by Cornell University re 7 MOTION to Strike <i>Plaintiff's Complaint</i> , 8 Notice (Other) (Deixler, Bert) Modified on 11/5/2007 - edited text (vet,).	November 2, 2007
November 7, 2007	10	DECLARATION re 8 Notice (Other), Notice (Other) by Defendant Cornell University. (Attachments: # 1 Declaration Declaration of Valerie Cross Dorn in Further Support of Defendant's Request for Judicial Notice in Support of Special Motion to Strike Plaintiff's Complaint Pursuant to Section 425.16 of the California Code of Civil Procedure)(Davidson, Clifford)	November 7, 2007
November 7, 2007	11	CERTIFICATE OF SERVICE by Cornell University re 10 Declaration, <i>Declaration of Valerie Cross Dorn</i> (Davidson, Clifford)	November 7, 2007

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Plaintiff: Kevin Vanginderen

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Defendant: Cornell University

Represented By: Clifford Scott Davidson, Nelson E. Roth, Bert H Deixler, Charles S. Sims

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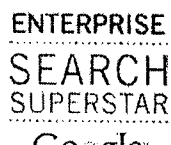
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1 Kevin Vanginderen, Plaintiff Pro Per
637 Third Ave., Suite E1
2 Chula Vista, CA 91910
Telephone: (619) 585-7414
3
4

5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
7

8 KEVIN VANGINDEREN,)	Case No. 08-CV-00736-W-JMA
9 Plaintiff,)	Hon. Barry T. Moskowitz
10 v.)	AFFIDAVIT OF PLAINTIFF KEVIN
11 CORNELL UNIVERSITY,)	VANGINDEREN IN SUPPORT
BERT DEIXLER,)	OF PLAINTIFF'S MEMORANDUM OF
12 Defendant.)	POINTS AND AUTHORITIES
13)	IN OPPOSITION OF DEFENDANT'S
14)	MOTION TO STRIKE PLAINTIFF'S
15)	COMPLAINT
		Hearing Date: July 3, 2008
		Time: 11:00 a.m.
		Place: Courtroom 15

16 I, Kevin Vanginderen, declare:

17 1. I am the Plaintiff for the above captioned matter commenced on April 8, 2008, against
18 Cornell University and their Attorney Bert Deixler in the Superior Court of California, County of
19 San Diego, for the causes of action of Libel, Placing Plaintiff in a False Light, Public Disclosure
20 of Private Facts and Invasion of Privacy by the Defendants. I am fully familiar with the
21 procedural facts and circumstances of this matter as set forth below.

22 2. I attended an undergraduate degree program at Cornell University (Defendant) and
23 obtained a Bachelor of Science degree between August of 1979, and May of 1983.

24 3. The causes of action originate from a libelous article published in the *Cornell Chronicle*
25 by Cornell University (Defendant) regarding an arrest and a single charge brought against myself
26 in March of 1983, and the subsequent litigation as a result of that article.

27 4. The incident I was charged for in 1983, was the taking of books from a room in a
28 campus academic building. The incident occurred at a cubicle attached to one of my classrooms

1 at that time. I did not confess to, commit, nor was I ever told by anyone that I was investigated for
2 fifteen crimes in 1983.

3 5. In August of 1983, all charges brought against me were dismissed in the County Court
4 of Tompkins County, New York on the basis that the District Attorney had overcharged me for
5 the circumstances involved. The records were then sealed.

6 6. On August 23, 2007, a conditional discharge was granted to my plea for petit larceny on
7 a separate Accusatory Instrument for the same incident and I subsequently learned that in 1985 the
8 entire record was sealed.

9 7. The Defendants had not received an Order to Unseal Records until November 16, 2007.

10 8. Until September 2, 2007, I had never seen any copy of, nor had even been aware of the
11 existence of, the *Cornell Chronicle* nor any article within that publication regarding myself.

12 9. I first learned that a libelous article regarding myself was contained within the March
13 17, 1983, edition of the *Cornell Chronicle* on September 2, 2007, when I conducted an annual
14 *Google* search of my name on the Internet.

15 10. During September of 2007, I made repeated requests to Defendant Cornell to remove
16 the offending article from the Internet on grounds of invasion of privacy and libel but the
17 Defendant refused to remove the article.

18 11. On October 1, 2007, I filed a suit against Defendant Cornell University for a single
19 count each of Libel and Public Disclosure of Private Facts.

20 12. On October 30, 2007, Defendant Bert Deixler placed a phone call to myself during
21 which he stated that if the underlying original claim was not dismissed forthright, this matter
22 would lead to further publicity of the circumstances regarding the original Private Disclosure of
23 Public Facts claim. He reiterated this not so veiled threat in a written correspondence to myself
24 dated October 31, 2007.

25 13. On November 8, 2007, I dsicovered the entire court record from the initial case was
26 published upon the Internet on the Justia.com Web Site, with a link to view and print every
27 document in the file.

28 14. On October 29, 2007, two days prior to the Defendants' ultimatum to drop the inital

1 case, the Internet profile of myself included no offending statements other than the original
2 libelous account posted by the Cornell library web site.

3 15. On December 15, 2007, I first learned that the Defendants had obtained from
4 numerous sources the entire formerly sealed record of the incident that was reported in the *Cornell*
5 *Chronicle* edition dated March 17, 1983, and then published that entire record upon the Internet,
6 on the Web Site Justia.com.

7 16. On December 15, 2007, I first learned of a libelous report regarding myself produced
8 by Barbara Bourne dated March 8, 1983, when it was delivered to me by the Defendant Bert
9 Deixler in a court filing.

10 17. On January 24, 2008, *The Cornell Daily Sun*, and in March of 2008, the *Cornell*
11 *Alumni Magazine* published prominent articles regarding all of these events and placed them upon
12 the Internet, further publicizing the entire circumstances.

13 18. On March 24, 2008, it became apparent to me that the Defendant Bert Deixler had
14 thoroughly polluted my Internet profile with references to virtually nothing other than the entire
15 previously sealed record.

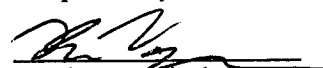
16 19. I have obtained an FBI Criminal Record of myself and there is not any entry for any
17 incidents of 1983.

18 20. The publication of the entire sealed record of this incident upon the Internet has
19 resulted in great emotional distress to myself and has caused my business to suffer greatly. I have
20 signed ninety percent fewer clients at my business since these disclosures became public in 2007.

21
22 I declare under penalty of perjury under the laws of the State of California, that the foregoing
23 is true and correct and this AFFIDAVIT was executed this 3rd day of June, 2008, in San Diego
24 County, California.

25 Dated: June 3, 2008

26 Respectfully submitted,

27 
28 Kevin Vanginderen

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF San Diego

I have read the foregoing _____ and know its contents.

CHECK APPLICABLE PARAGRAPHS

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am an Officer a partner a of

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, at _____, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name

Signature

PROOF OF SERVICE

1013a (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF San Diego

I am employed in the county of San Diego, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 637 Third Avenue, Suite E-1, Chula Vista, CA 91910

On, June 4, 2008 I served the foregoing document described as A copy of the Plaintiff's Memorandum of Points and Authorities in Opposition of Defendant's Special Motion to Strike Plaintiff's Complaint and Plaintiff's Affidavit on Defendant Attorneys in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows: Clifford Davidson, Esq., Proskauer Rose LLP, 2049 Century Park East, Suite 3200, Los Angeles, CA 90067-3206 Nelson Roth, Esq., Office of University Counsel, 300 CCC Building, Garden Ave., Ithaca, New York 14853

BY MAIL

I deposited such envelope in the mail at Post Office, Third Avenue, Chula Vista, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on _____, at _____, California.

(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, at _____, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Juan Ramirez

Type or Print Name

Signature

(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG)

(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)

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