

1 Kevin Vanginderen, Plaintiff Pro Per  
2 637 Third Ave., Suite E1  
3 Chula Vista, CA 91910  
4 Telephone: (619) 585-7414  
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6 **UNITED STATES DISTRICT COURT**  
7 **SOUTHERN DISTRICT OF CALIFORNIA**

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

Case No. 08-CV-00736-<sup>PTM</sup>JMA

Hon. Barry T. Moskowitz

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

Hearing Date: August 22, 2008  
Time: 11:00 a.m.  
Place: Courtroom 15

FILED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
AUG 22 2008  
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 First Amended 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 anything to this Court as potential  
12 evidence in disregard of the Rules of Evidence and Professional Responsibility. The Defendants  
13 have not yet filed a single Answer to any of the twelve causes of actions asserted in these matters  
14 but they have already flooded this Court with hundreds of pages of filings and purported  
15 evidence in an attempt to obfuscate the actual issues presented and in their desire to preclude the  
16 obligation to explain the nefarious activities that have caused great harm to the life and  
17 livelihood of the Plaintiff.

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

1 privileged attorney client communications from a twenty four year old matter.

2 The Defendant's desire to have this matter decided upon the basis of a previous ruling by  
3 this Court in a related matter is ill founded because that ruling is currently under appeal before  
4 the Ninth Circuit and many of the issues currently presented are similar. This Court should  
5 reserve a ruling on this matter pending the outcome of that appeal.

6 The circumstances involved in the filing of this case are certainly not what the legislature  
7 had intended to prevent when it enacted anti-SLAPP legislation. The Defendants have subverted  
8 and corrupted the electronic filing system of the United States Federal Court into a vehicle for  
9 publishing onto the Internet a myriad of private information regarding the Plaintiff which has no  
10 bearing on the previous suit along with libelous statements. The Defendants' defamatory  
11 statements regarding the Plaintiff are not protected under free speech protections or under any  
12 other Constitutional basis. Their contention that they are somehow protected by a legal  
13 immunity is negated by the exceptions inherent within the very statute they assert. There are  
14 simply no legal justifications for the libelous statements, public disclosures of private facts and  
15 invasions of privacy that the Defendants have chosen to cast upon the Plaintiff.

16 **II.**

17 **STATEMENT OF FACTS**

18 Plaintiff Kevin Vanginderen (Plaintiff) attended an undergraduate degree program at  
19 Cornell University (Defendant) and obtained a Bachelor of Science degree between August of  
20 1979, and May of 1983. On March 17, 1983, a small article in the *Cornell Chronicle*, a  
21 publication produced by the Defendant's Division of University Communications, stated that,  
22 "Department of Public Safety officials have charged Kevin G. Vanginderen of 603 Winston  
23 Court Apartments with third degree burglary in connection with 10 incidents of petit larceny and  
24 five burglaries on campus over a year". (Defendant's Exhibit C, presented with the Defendant's  
25 original Motion to Strike filed on 5/5/2008 ) The *Cornell Chronicle* article was false, the charge  
26 did not involve fifteen separate crimes as stated. The Accusatory Instrument brought against the  
27 Plaintiff declares only a solitary charge in connection with a single event: the taking of books  
28 from a room in a campus academic building. (Defendant's Exhibit A)

1 In August of 1983, all charges against the Plaintiff were dismissed in the County Court of  
2 Tompkins County, New York on the basis that the District Attorney had overcharged the Plaintiff  
3 for the circumstances involved. (Defendant's Exhibit B, page 99, presented with the Defendant's  
4 original Motion to Strike filed on 5/5/2008) As a result of the dismissal, the entire court file was  
5 sealed pursuant to New York's CPL §160.50, which requires all records to be sealed upon a  
6 dismissal. Subsequently, on August 23, 2007, a conditional discharge was granted to a plea for  
7 petit larceny on a separate Accusatory Instrument (Defendant's Exhibit A) for the same incident  
8 and in 1985, the Chief Clerk of the Office of the Supreme and County Court Clerk for the State  
9 of New York County of Tompkins informed Cornell and the other parties that the entire record  
10 was sealed. (Defendant's Exhibit B, page 98, presented with the Defendant's original Motion to  
11 Strike filed on 5/5/2008) The *Cornell Chronicle* did not report these events.

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

23 The Plaintiff filed suit for the afore mentioned tortious activity on October 1, 2007. Bert  
24 Deixler (Defendant) subsequently initiated a phone conversation with the Plaintiff in which he  
25 stated that if the underlying original claim was not dismissed forthright, this matter would lead to  
26 further publicity of the circumstances regarding the original Private Disclosure of Public Facts  
27 claim. Defendant Deixler further emphasized this threat in writing. (See Exhibit 4 and Affidavit  
28 of Plaintiff) The Defendants subsequently subverted and corrupted the electronic filing system of

1 the United States Federal Court into a vehicle for publishing onto the Internet a myriad of private  
2 information regarding the plaintiff which has no bearing on the previous suit (Defendant's  
3 Exhibit B, presented with the Defendant's original Motion to Strike on 5/5/2008) along with a  
4 repeat of the libelous statements (Defendant's Exhibit E, page 134, 135, presented with the  
5 Defendant's original Motion to Strike filed on 5/5/2008) and they have decided to repeat this  
6 behavior once again in the present suit. The Defendants have submitted into a public Federal  
7 Court record, and thus immediately published onto the Internet, documents (Defendant's Exhibit  
8 A) which the defendants were aware were sealed under a court order at the time they were  
9 submitted to the court. (See Exhibit 5 and 6) The Defendants later lied within a court filing by  
10 repeating verbatim the false statement which is the basis of the underlying previous Libel claim  
11 under the flawed impression that if a false statement is repeated enough times it then somehow  
12 becomes true. (Defendant's Exhibit E, page 134, 135, presented with the Defendant's original  
13 Motion to Strike filed on 5/5/2008) The Defendants simultaneously submitted to this Court an  
14 entire record of previously sealed files as purported evidence and thus immediately published its  
15 contents onto the Internet. This record includes only unauthenticated documents (Defendant's  
16 Exhibit B, presented with the Defendant's original Motion to Strike filed on 5/5/2008), a  
17 purported recorded transcript from an interrogation which would have been recorded illegally  
18 under New York State law (Defendant's Exhibit B, presented with the Defendant's original  
19 Motion to Strike filed on 5/5/2008), documents which have no remote relevance in a  
20 determination of the truth of the statement in the previous underlying Libel claim (Defendant's  
21 Exhibit B, presented with the Defendant's original Motion to Strike filed on 5/5/2008) and  
22 privileged attorney client communications from a twenty four years old matter. (Defendant's  
23 Exhibit B, presented with the Defendant's original Motion to Strike filed on 5/5/2008). It is  
24 notable that the Defendants' chose to include all of these irrelevant and questionable documents  
25 as part of their Exhibit B in their original Motion to Strike filed on 5/5/2008, but now they have  
26 substantially culled their Exhibit B in the new Motion to Strike filed on 6/30/08, to not include  
27 the same offending documents.

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III.

ARGUMENT

I. The Complaints should not be considered a SLAPP Lawsuit under the legislative intent of California Code of Civil Procedure §425.16 because 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.

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

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

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



1 conditional discharge to a nonpublic figure is somehow now a matter of public concern.

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

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

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

15 The first count of Libel arises from statements present within documents dated March 8,  
16 1983, written by Barbara Bourne of Defendant Cornell University. (Defendant's Exhibit B,  
17 pages 18, 19, 23) In her report Ms. Bourne has alleged that the Plaintiff was responsible for  
18 fifteen separate crimes. The Defendant has not presented any evidence, admissible or not, which  
19 ascertains that fifteen individual crimes occurred for which the Plaintiff may be found  
20 responsible nor does any documentation exist which presents even a scintilla of evidence that the  
21 Plaintiff may be responsible for even half that number of incidents. If the Defendants now wish  
22 to prove these statements to be true they possess the burden to prove that fifteen separate  
23 distinguishable crimes had actually occurred, detailing specifically what was purportedly taken  
24 and when, who may have reported them missing, what if any reports substantiate these alleged  
25 circumstances and what purported evidence may tie the Plaintiff to fifteen crimes in any way.

26 The Defendants' statements in the report are false. (See Affidavit of Plaintiff) The  
27 publication is in writing and a fixed representation to the eye. The statements in the report were  
28 certainly conveyed to the *Cornell Chronicle* in 1983, and therefore were not privileged. This  
report is the original source of the *Cornell Chronicle's* libelous statements and has resulted in a

1 chain of causation that is the root cause for all litigation in this matter. The statements regarding  
2 the accusation of the commission of fifteen separate crimes would certainly expose any person to  
3 contempt, ridicule, disgrace and have an tendency to injure someone in their occupation. A  
4 statement is defamatory on its face, "if it charged plaintiff with a crime". (California Jury  
5 Instruction 7.09)

6 The second count of Libel arises from Defendant Bert Deixler's decision to republish Ms.  
7 Bourne's libelous report by placing it into a public court record and thus immediately upon the  
8 Internet on the Justia.com Web Site. (Defendant's Exhibit B, E and Declaration of Timothy  
9 Stanley with Exhibit A, presented with the Defendant's original Motion to Strike filed on  
10 5/5/2008) Defendant Deixler was aware that the libelous report was defamatory and  
11 inadmissible as evidence when he presented it to the United States Federal Court, Southern  
12 District of California in December of 2007. The presentation of the report as purported evidence  
13 was not accompanied with any supporting statement or affidavit from Ms. Bourne to authenticate  
14 it or confirm its accuracy.

15 The Defendants were presented with three options in regard to the proper manner in  
16 which to present to this Court the libelous report of Barbara Bourne in the previous litigation  
17 record. The first option was the most logical one, simply do not present it all. The report  
18 consists of nothing more than an unauthenticated and sloppy writing which includes wild  
19 unsubstantiated accusations against the Plaintiff. While the report is apparently signed by a Ms.  
20 Barbara Bourne, there is no verification of whom actually produced it. The second option for the  
21 Defendants was to authenticate the report and then make an attempt to introduce it into evidence  
22 at a trial after it was properly vetted by a judge for its potential admissibility under relevance,  
23 prejudice, best evidence and hearsay objection grounds. The Defendants chose the third and  
24 most egregious option, they decided to expose themselves to additional liability by hastily  
25 introducing it as purported evidence as soon as they obtained it. Twenty four years after it was  
26 first produced, they decided it was now appropriate to publish it for a second time into a public  
27 court record without any regard to its admissibility.

28 This issue of whether there was some form communication between the Defendants and

1 Justia.com in order to further publish these documents upon the Internet is not one that  
2 determines liability for the recent publication, rather, it would pertain to the extent of damages  
3 for which they are liable. Even if the Defendants had not directly pursued the publication of  
4 these documents upon the Internet, solely as a result of their actions, upon the Internet they now  
5 appear. The Defendants can not escape the fact that they and they alone are the ultimate source  
6 and sole causation for the presence of such.

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

14 The third count of Libel arises from Defendant Bert Deixler's repeat of the libelous  
15 statements made by the *Cornell Chronicle*, stating in a court filing that the Plaintiff was "charged  
16 . . . in connection with 10 incidents of petit larceny and five burglaries." (Defendant's Exhibit E,  
17 pages 134, 135, presented with the Defendant's original Motion to Strike filed on 5/5/2008) The  
18 Defendants' statement is false. (See Affidavit of Plaintiff) The statement is not privileged  
19 because it is a statement known to be false or deceptive. (Cal. Civil Code § 47 (2)(A)) The  
20 publication is in writing and a fixed representation to the eye. The statement regarding the  
21 commission of fifteen separate crimes would certainly expose any person to contempt, ridicule,  
22 disgrace and have an tendency to injure someone in their occupation. A statement is defamatory  
23 on its face, "if it charged plaintiff with a crime". (California Jury Instruction 7.09)

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

27 The Plaintiff can establish a high probability in succeeding on all Placing Plaintiff in all  
28 False Light claims. All elements within California Jury Instruction 7.22, are met and no statute

1 of limitations bars the suit. Under civil rights privacy protection, the essential elements Placing  
2 Plaintiff in a False Light are:

- 3 1) The defendant made a public disclosure of a fact about the plaintiff;
- 4 2) The fact disclosed was false, and portrayed the plaintiff in a false light;
- 5 3) The false light in which the plaintiff was placed would be highly offensive to a reasonable  
6 person;
- 7 4) The defendant had knowledge or acted in reckless disregard of the falsity of the publicized fact  
8 and the false light in which the plaintiff would be placed; or  
9 The defendant acted negligently in failing to learn whether the publicized fact placed the plaintiff  
10 in a false light;
- 11 5) The public disclosure caused plaintiff to sustain damages.

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

15 In essence these elements are simply a milder standard than those for Libel. Since all  
16 elements of the Libel claims are met, the elements for Placing Plaintiff in a False Light claims are  
17 also certainly met.

18 The first count of Placing Plaintiff in a False Light arises from statements present within  
19 documents dated March 8, 1983, written by Barbara Bourne an employee of Defendant Cornell  
20 University. (Defendant's Exhibit B, pages 18, 19, 23) The statements were certainly conveyed  
21 to the *Cornell Chronicle* in 1983, as the original source of the false statements within their  
22 publication and they were therefore not privileged. Despite the Defendant's statement to the  
23 contrary, in her report Ms. Bourne has alleged that the Plaintiff was responsible for fifteen  
24 separate crimes by stating the Plaintiff was "in some way involved with" or "established as the  
25 perpetrator" of fifteen separate listed crimes. This fact disclosed was false and portrayed the  
26 Plaintiff in a false light; The false light in which the Plaintiff was placed would be highly  
27 offensive to a reasonable person as a statement regarding the commission of fifteen separate  
28 crimes would certainly expose any person to contempt, ridicule, disgrace and have an tendency to

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

6       The second count of Placing Plaintiff in a False Light arises from Defendant Bert Deixler's  
7 decision to republish Ms. Bourne's false report by placing it into a public court record and  
8 immediately onto the Internet on the Justia.com Web Site. (Defendant's Exhibit B, E and  
9 Declaration of Timothy Stanley with Exhibit A, presented with the Defendant's original Motion  
10 to Strike filed on 5/5/2008) Defendant Deixler was aware that the false report was defamatory  
11 and inadmissible as evidence when he presented it to the United States Federal Court, Southern  
12 District of California in December of 2007. The presentation of the report as purported evidence  
13 was not accompanied with any supporting statement or affidavit from Ms. Bourne to authenticate  
14 it or confirm its accuracy. The document is not admissible evidence and therefore is not  
15 privileged. (Cal. Civil Code § 47 (2)(A)) In her report Ms. Bourne has alleged that the Plaintiff  
16 was responsible for fifteen separate crimes. This fact disclosed was false, and portrayed the  
17 Plaintiff in a false light; The false light in which the Plaintiff was placed would be highly  
18 offensive to a reasonable person as a statement regarding the commission of fifteen separate  
19 crimes would certainly expose any person to contempt, ridicule, disgrace and have an tendency to  
20 injure someone in their occupation; the Defendants had knowledge or acted in reckless disregard  
21 of the falsity of the publicized fact and the false light in which the plaintiff would be placed and  
22 the defendant acted negligently in failing to learn whether the publicized fact placed the Plaintiff  
23 in a false light; and the public disclosure caused Plaintiff to sustain damages. (See Affidavit of  
24 Plaintiff)

25       The third count of Libel arises from Defendant Bert Deixler's repeat of the libelous  
26 statements made by the *Cornell Chronicle*. He stated in a court filing that the Plaintiff was  
27 "charged . . . in connection with 10 incidents of petit larceny and five burglaries." (Defendant's  
28 Exhibit E, pages 134, 135, presented with the Defendant's original Motion to Strike filed on

1 5/5/2008) The Defendants' statement is false. (See Affidavit of Plaintiff) The statement is not  
2 privileged because it is a statement known to be false or deceptive. (Cal. Civil Code § 47 (2)(A))  
3 This disclosed fact portrayed the Plaintiff in a false light; The false light in which the Plaintiff  
4 was placed would be highly offensive to a reasonable person as a statement regarding the  
5 commission of fifteen separate crimes would certainly expose any person to contempt, ridicule,  
6 disgrace and have an tendency to injure someone in their occupation; the Defendants had  
7 knowledge or acted in reckless disregard of the falsity of the publicized fact and the false light in  
8 which the plaintiff would be placed and the defendant acted negligently in failing to learn  
9 whether the publicized fact placed the Plaintiff in a false light; and the public disclosure caused  
10 Plaintiff to sustain damages. (See Affidavit of Plaintiff)

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

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

- 19 1) The defendant made a public disclosure of a fact about the plaintiff;
- 20 2) Before this disclosure the fact was private, that is, not known to the public;
- 21 3) The fact made known to the public would be highly offensive to a reasonable person of  
22 ordinary sensibilities;
- 23 4) the defendant disclosed the fact with knowledge that it was highly offensive or with reckless  
24 disregard of whether it was highly offensive or not;
- 25 5) The fact made known was not newsworthy; and
- 26 6) The public disclosure of this fact caused plaintiff to sustain injury, damage, loss or harm.  
(California Jury Instruction 7.21)

27 The first count of Public Disclosure of Private Facts arises from the Defendants' decision  
28 to include sealed records from 1983, within the Defendants' Motion to Strike Complaint filing of

1 November 2, 2007. (Defendant's Exhibit A) The Defendants' current contention that these  
2 records were not sealed at the time is absurd. The original Accusatory Instrument brought  
3 against the Plaintiff (Defendant's Exhibit A) is certainly part of the sealed record. Defendant  
4 Attorney Nelson Roth acknowledged such on September 19, 2007, in an email to the Plaintiff.  
5 (See Exhibit 5) Attorney Roth also submitted a Motion to Unseal Records to the City of Ithaca  
6 Court on October 7, 2007, that was never acted upon. (See Exhibit 6) The Defendants did not  
7 obtain an Order to Unseal Records from any court until November 16, 2007, two weeks after  
8 they submitted the sealed record to this Court. Attorney Roth was well aware that as a result of  
9 the dismissal of all charges, the entire court file was sealed pursuant to New York's CPL  
10 §160.50, which requires all records "in any court" (CPL §160.50(1)(c)) to be sealed upon a  
11 dismissal. The Defendants have asserted that very code as the basis for their Motion to Unseal  
12 Record, (See Exhibit 6) so it is now difficult for them to allege that they believed they were  
13 submitting a unsealed record to this Court on November 2, 2007. Attorney Roth now absurdly  
14 contends that because he was physically able to surreptitiously retrieve a document that he knew  
15 to be sealed from a naive court clerk, it then somehow transformed into a public document  
16 suitable for public dissemination in a court file twenty four years later.

17       There was no Order to Unseal these records issued by any court when the Defendants  
18 placed these records into the public court record on November 2, 2007. The fact made known is  
19 highly offensive to a reasonable person as it could be a basis to deny an offer of employment or  
20 housing. The Defendant was certainly aware that dissemination of this sealed information is  
21 highly offensive. A twenty four year old charge to a nonpublic figure resulting in a conditional  
22 discharge and a sealed record is not newsworthy. The disclosure has caused loss of reputation,  
23 emotional distress and loss of income. The Defendant has provided no evidence that any these  
24 elements are not be met.

25       The second count of Public Disclosure of Private Facts arises from the Defendants'  
26 decision to include within the Defendants' Motion to Strike Complaint filing of November 2,  
27 2007, sealed records from the record of 1983, (Defendant's Exhibit A) with the knowledge and  
28 result that it would be published upon the Internet on the Justia.com Web Site. On November 8,

1 2007, or earlier, the entire court record from previous suit filed October 1, 2008, was published  
2 upon the Internet on the Web Site Justia.com. (See Exhibit 7) The Defendant was either directly  
3 responsible for the Internet publication of this record or had knowledge the sealed documents  
4 would appear upon it. This has resulted in a second and more extremely pervasive publication of  
5 the private facts revealed as a result of the tort leading to the first count of a Public Disclosure of  
6 Private Facts.

7           Once again, the issue of whether there was some form communication between the  
8 Defendants and Justia.com in order to further publish these documents upon the Internet is not  
9 one that determines liability for the recent publication, rather, it would pertain to the extent of  
10 damages for which they are liable. Even if the Defendants had not directly pursued the  
11 publication of these documents upon the Internet, solely as a result of their actions, upon the  
12 Internet they now appear. The Defendants can not escape the fact that they and they alone are the  
13 ultimate source and sole causation for the presence of such.

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

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

21 1) The defendant intentionally intruded physically or otherwise, upon the solitude or seclusion,  
22 private affairs or concerns of the plaintiff;

23 2) The intrusion was substantial, and of a kind that would be highly offensive to an ordinarily  
24 reasonable person; and

25 3) The intrusion caused plaintiff to sustain injury, damage, loss or harm.

(California Jury Instruction 7.20)

26           The first count of Intrusion into Private Affairs arises from the Defendants' decision to  
27 include the entire previously sealed record of 1983, within the Defendants' Motion to Strike  
28 Complaint filing of December 14, 2007, and thus publicly disseminate that entire record.



1 (Defendant's Exhibit B, presented with the Defendant's original Motion to Strike filed on  
2 5/5/2008) The Defendant has unwisely decided to take the entire previously sealed record and  
3 submit every single document within it, relevant or not, as exhibits. Clearly these submitted  
4 exhibits could never be presented as evidence at trial without authentication and they would be  
5 subject to the scrutiny of this Court in regard to prejudice, hearsay, authentication and relevance.  
6 The submission of these records to this Court as purported evidence has accomplished the  
7 Defendants' ulterior motive, to publicize the twenty four year old sealed record in as broad a  
8 manner as possible in order to exact revenge. (Defendant's Exhibit E and F, presented with the  
9 Defendant's original Motion to Strike filed on 5/5/2008) The entire previously sealed record  
10 filed by the Defendants on December 14, 2007. includes documents which are all  
11 unauthenticated (Defendant's Exhibit B, presented with the Defendant's original Motion to  
12 Strike filed on 5/5/2008), contains a purported recorded transcript from an interrogation which  
13 would have been recorded illegally under New York State law (Defendant's Exhibit B,  
14 presented with the Defendant's original Motion to Strike filed on 5/5/2008), includes documents  
15 such as reference letters which have no remote relevance in a determination of the truth of the  
16 statement in the previous underlying Libel claim (Defendant's Exhibit B, presented with the  
17 Defendant's original Motion to Strike filed on 5/5/2008), and also includes privileged attorney  
18 client communications from a twenty four years old matter. (Defendant's Exhibit A and ,  
19 presented with the Defendant's original Motion to Strike filed on 5/5/2008) There exists no  
20 legitimate basis for their introduction to this Court.

21 In the previous litigation the Defendants were once again presented with three options in  
22 regard to whether or not it was appropriate for them to present to this Court the entire record of  
23 previously sealed files they received from multiple sources. The first option was the most logical  
24 one, carefully sift through the record for any relevant documents that may tend to disprove any of  
25 the elements of the original Complaints. They could then select only those documents that have a  
26 possibility of being accepted as admissible evidence and authenticate them before submitting  
27 them to this Court. The second option for the Defendants was to authenticate any relevant  
28 documents and then have them properly vetted by a judge for their potential admissibility under

1 relevance, prejudice, best evidence and hearsay objection grounds before any attempt to  
2 introduce them into evidence at a trial. Once again the Defendants chose the third and most  
3 egregious option, they decided to expose themselves to additional liability by rabidly presenting  
4 all files as purported evidence to this Court as soon as they were obtained. This behavior caused  
5 every record to be immediately published in their entirety into a public court record and  
6 additionally upon the Internet.

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

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

21         On October 30, 2007, Defendant Bert Deixler placed a phone call to the Plaintiff in which  
22 he stated that if the underlying original claim was not dismissed forthright, this matter would lead  
23 to further publicity of the circumstances regarding the original Private Disclosure of Public Facts  
24 claim. (See Affidavit of Plaintiff) He reiterated this not so veiled threat in a written  
25 correspondence to the Plaintiff dated October 31, 2007. (See Exhibit 4) On October 29, 2007,  
26 two days prior to the Defendants' ultimatum deadline, the Internet profile of the Plaintiff  
27 included no offending statements other than the original libelous account posted by the Cornell  
28 Library Web Site. (See Exhibit 7 and Affidavit of Plaintiff) On November 8, 2007, this Court's

1 entire record of the previous litigation had become published upon the Internet on the Web Site  
2 Justia.com, with a link to view and print every document in the file. (See Exhibit 8 and Affidavit  
3 of Plaintiff) This published Internet record would soon include the entire previously sealed  
4 record filed by the Defendants on December 14, 2007. On January 24, 2008, the entire  
5 circumstances of the first case were further publicized in a prominent *Cornell Daily Sun* article  
6 which was published on the Internet. In March of 2008, the *Cornell Alumni Magazine* published  
7 another prominent article regarding all of these events and also placed it upon the Internet. The  
8 Defendants have now fulfilled their "promise" to the Plaintiff and have thoroughly polluted his  
9 Internet profile with references to virtually nothing other than the entire previously sealed record.  
10 (Exhibit 9) The Defendants' cannot escape from the fact that they are solely responsible for the  
11 entirety of these circumstances and that none would have occurred if they had not decided to  
12 engage in their obstinant and inexplicable behavior.

13 The Defendants have presented a self serving statement by Justia.com CEO Timothy  
14 Stanley in which he declares that no communication has occurred between he or his company and  
15 the Defendants. His carefully worded statement does not deny, however, that there was no  
16 communication regarding this litigation with the *Google* company, a party in interest in this  
17 matter which is a business partner with both his company and the Defendant Cornell University  
18 and is potentially the funding source for the Defendant's exorbitant legal expenses in this  
19 litigation. Mr. Stanley fails to mention in his statement that his web site home page establishes  
20 that his company has entered into a promotional relationship with the Defendant Cornell  
21 University as it prominently advertises and presents a direct link to two Cornell search engines.  
22 (Exhibit 10) or that Mr. Stanley has pursued a relationship with the *Google* company similar to  
23 that of the Defendant Cornell University in an effort to disseminate all information on their  
24 prospective web sites to the widest online audience possible. (Exhibit 11)

25 The Defendants' statement that the Plaintiff does not believe they are entitled to submit  
26 any documentary evidence on their behalf to this Court is false. The Defendants are entitled to  
27 submit properly authenticated and relevant documentation that could tend to disprove any of the  
28 contentions in the Complaints filed in the previous litigation. Any other documents submitted to

1 this Court are superfluous and were presented for no other reason than to publicize them within a  
2 public record and hence upon the Internet. The only evidence that could be properly introduced  
3 in the previous litigation would be that which could somehow prove that a libelous statement or a  
4 public disclosure of private facts had somehow not occurred or was somehow privileged. The  
5 Defendants would find it impossible to justify how the majority of the submitted unsealed files  
6 which includes letters of reference could meet this standard. The myriad of documents in that  
7 file establish nothing of relevance to the limited issue of the potential truth of the libelous  
8 statement in the previous litigation. Not one of the presented records establish that fifteen  
9 separate crimes had ever been committed nor that the Plaintiff could be even remotely connected  
10 with even half that amount, therefore, the voluminous record should not have been recklessly  
11 submitted to this Court.

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

17 Seven months ago a *Google* search of the Plaintiff's name would have revealed none  
18 other than information about his published Law Review article or information regarding his law  
19 practice as a Certified Specialist. The Plaintiff's profile is now utterly polluted with little other  
20 than references to a twenty five year old incident including articles from *The Cornell Daily Sun*  
21 and the *Cornell Alumni Magazine* that delineate vivid details of everything the Defendants' have  
22 chosen to publicize about the Plaintiff to the world. The Plaintiff should have never again in his  
23 life had to trouble his mind with the most excruciating episode of his life. The Defendants have  
24 inexplicably forced him to endure world wide publicity of this matter and hundreds of hours of  
25 litigation in order to correct the injustices they now cast upon him.

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

Statutes of limitations are affirmative defenses that the Defendant may someday attempt

1 to assert but they have not yet done so as it has not yet filed any Answers to any Complaints.  
2 Under Federal Law, a claim accrues when the plaintiff knows or has reason to know of the injury.  
3 *Two Rivers v. Lewis*, 174 F.3d 987, 991 (9<sup>th</sup> Cir. 1999) No statute of limitations bars the suit  
4 because the Plaintiff was not aware of the libelous statements until December of 2007.

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

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

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

26 The discovery rule should prevent the application of any statute of limitation as a bar to  
27 the present case because the statute only starts when a plaintiff learns of possible wrongdoing.  
28 *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914 Cal.(2005); *Hopkins v. Dow Corning Corp.*, 33  
*F.3d 1116, 1120 9<sup>th</sup> Cir.(1994)* *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 926-27 (1988); *Dawson v.*  
*Eli Lilly and Co.*, 543 F. Supp 1330, 1338 D.C. (1982). Under the common law rule, "discovery

1 rules are adopted to avoid unfairness of interpreting a statute of limitations to accrue when the  
2 injury first occurs, if at that time plaintiff does not have enough information to bring suit.” *see*  
3 *Dawson, 543 F. Supp at 1338*. Different accrual dates could apply to different causes of action.  
4 *see Fox, 110 P.3d 914 Cal. at 924* The delayed discovery rule is meant to apply in cases in  
5 which it is difficult for a plaintiff to learn or understand the injury suffered, or when the cause of  
6 injury is hidden. The discovery rule has been applied in matters: that “involve a defamatory  
7 writing that has been kept in a place to which the plaintiff has no access or cause to seek access.”  
8 *Shively v. Bozanich, supra, 31 Cal. 4<sup>th</sup> 1230, 1249*; “when the defamatory statement is hidden  
9 from view, for example in a personnel file that generally cannot be inspected by the plaintiff.”  
10 *Shively v. Bozanich, supra, 31 Cal. 4<sup>th</sup> 1230, 1249*, citing *Manguso v. Oceanside Unified School*  
11 *Dist. (1979) 88 Cal.App.3d 725*; and “when the defamation was communicated in confidence,  
12 that is, ‘in an inherently secretive manner’” *Shively v. Bozanich, supra, 31 Cal. 4<sup>th</sup> 1230, 1249*,  
13 citing *McGuinness v. Motor Trend Magazine (1982) 129 Cal. App.3d 59, 61*.

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

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

24 The statements within the report of Barbara Bourne dated March 8, 1983, and the libelous  
25 statement of Bert Deixler in his court filing of December 14, 2007, are neither fair nor true.  
26 Defendant Cornell University employed Ms. Bourne at the time she wrote her libelous statements  
27 that allege that the Plaintiff was responsible for fifteen separate crimes. (Defendant’s Exhibit B,  
28 pages 18, 19, 23) Defendant Bert Deixler has repeated the libelous statements made by the  
*Cornell Chronicle*, stating in a court filing that the Plaintiff was “charged . . . in connection with

1 10 incidents of petit larceny and five burglaries". (Defendant's Exhibit E, pages 134, 135,  
2 presented with the Defendant's original Motion to Strike filed on 5/5/2008) The Defendants'  
3 statements are patently false and they have presented no evidence of their truth.

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

12 The Defendants poor decision to submit Ms. Bourne's libelous statements into a public  
13 record and thus, republish and now expose them to the Plaintiff for the first time, has now availed  
14 them of the obligation to prove her statements are true. The Defendants have not and are simply  
15 incapable of doing so. They have supplied no statement from her asserting the authenticity of the  
16 documents she has allegedly prepared nor any evidence from her to assert the truth of the  
17 statements within them. Quite simply, if the Defendants now wish to prove the purported truth of  
18 the libelous statements they have made, they have the burden to prove not only that fifteen  
19 separate and distinct crimes actually occurred and specifically what was taken and when, who  
20 reported each crime, what if any reports were taken at the time and what purported evidence tied  
21 the Plaintiff in any way to each of the alleged fifteen crimes. Ms. Bourne's report of March 8,  
22 1983, does not illustrate any of the required information regarding these questions that could  
23 possibly prove the truth of the matters asserted. The report simply includes statements of  
24 sweeping generalizations and a list of obtuse purported incident numbers. While this report  
25 contains blanket accusations against the Plaintiff regarding alleged crimes, it fails to include any  
26 specificity as to which incidents had theoretically occurred or why these were considered separate  
27 incidences rather than possibly multiple reports of single events. The Defendants have made no  
28 legitimate effort to assert the truth of their libelous statements.

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

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

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

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

25           The Defendant’s position that Barbara Bourne’s libelous report is protected by a privilege  
26 because it was somehow a report *to* a police officer is a tenuous one. Her statements were ones  
27 presumably made *by* a campus security officer and not statements made *to* an officer as the  
28 Defendants suggest. This report, or a description of it, was obviously conveyed to a member of



1 *Cornell Chronicle* staff when the original offending article was first written. While one section of  
2 a report in the file written by someone other than her does contain a small reference to the  
3 possibility that her statements may have been for some reason forwarded to the IPD (presumably  
4 the Ithaca Police Department), there was no logic for this circumstance because that department  
5 provided no participation in the matter whatsoever. The Defendant's argument that her statements  
6 are now somehow privileged simply because they may have for no apparent reason forwarded  
7 them to another police agency is absurd. The Defendants are thus asserting that any officers may  
8 absolve themselves of tortious behavior simply by conveying their libelous remarks to a additional  
9 parties.

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

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


24 The Defendants believe their status as an Ivy League University and a high priced litigator  
25 allows them carte blanche to say and do anything they see fit. They argue that they possess a  
26 blanket immunity for their actions but their strained assertion of Cal. Civil Code § 47, fails to  
27 mention the many exceptions within that Code which negate its application in the case at bar. The  
28 Defendant's apparently believe that all State and Federal Rules of Evidence should not apply to

1 them in these matters. They additionally wish to convince this Court that it would be proper to  
2 disregard the Plaintiff's right to an actual trial by deciding the entire litigation in these both cases  
3 solely upon unsupported paper filings. Their outrageous behavior is obviously intended as a shot  
4 across the bow of any other future potential litigants whom may also decide to try to clear their  
5 names or question the activities of the Defendants in publicizing private information regarding  
6 themselves. This arrogant behavior should not be tolerated by this Court.

7 **CONCLUSION**

8 Plaintiff respectfully requests that Defendants' Motions to Strike be denied because the  
9 anti-SLAPP statute should not apply in this matter and the Plaintiff has shown a reasonable  
10 probability to prevail on all his claims.

11  
12 Dated: August 5, 2008

13   
14 Kevin Vanginderen

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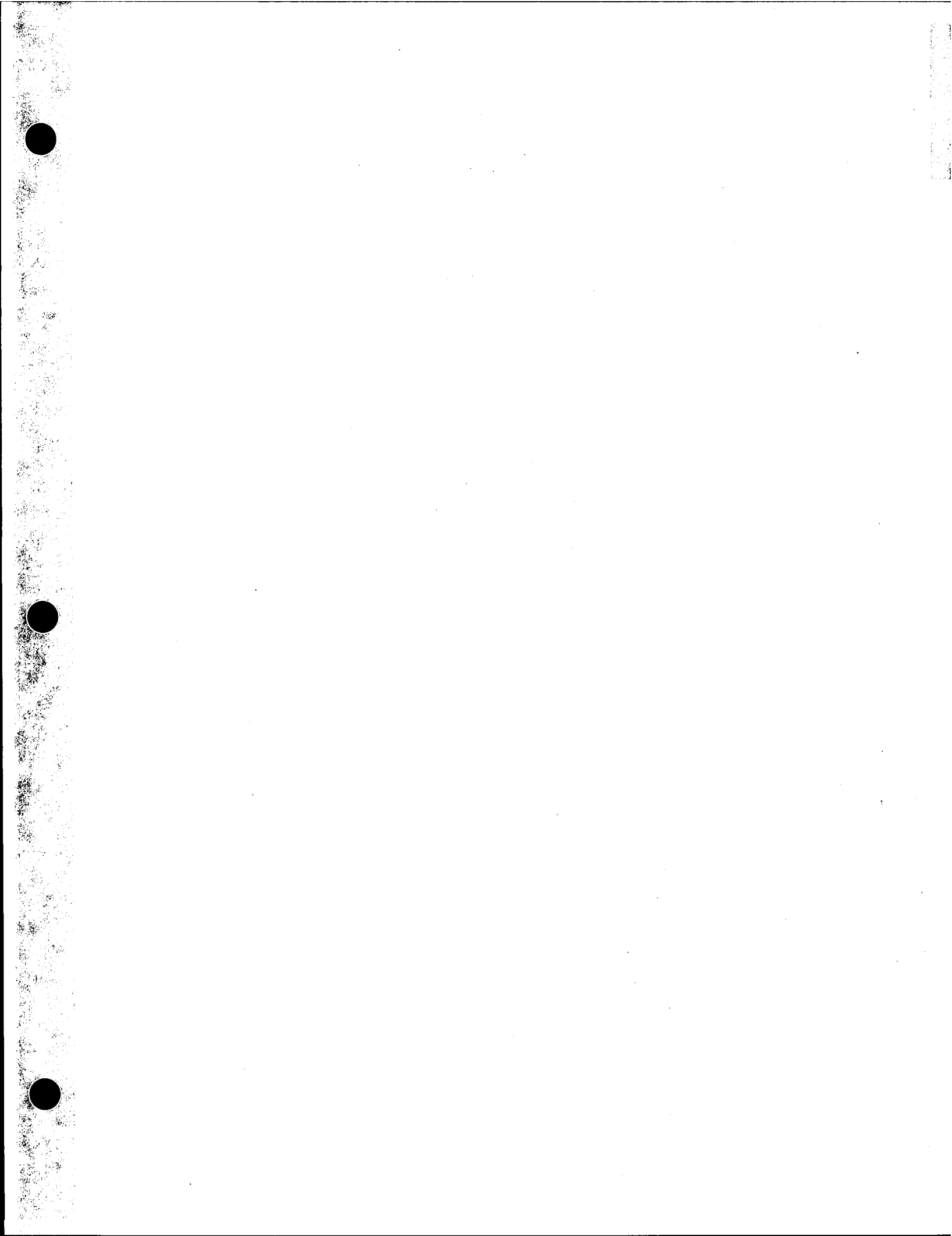
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**EXHIBIT**

**1**

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[Sign in](#)

Google

Kevin Vanginderen

Search

[Advanced Search](#)  
[Preferences](#)

New! [View and manage your web history](#)

Web

Results 1 - 10 of about 65 for **Kevin Vanginderen**. (0.16 seconds)

Did you mean: [Kevin \*Van genderen\*](#)

[Beta Theta Alumni E-mail \(Pi Kappa Alpha at Cornell University\)](#)

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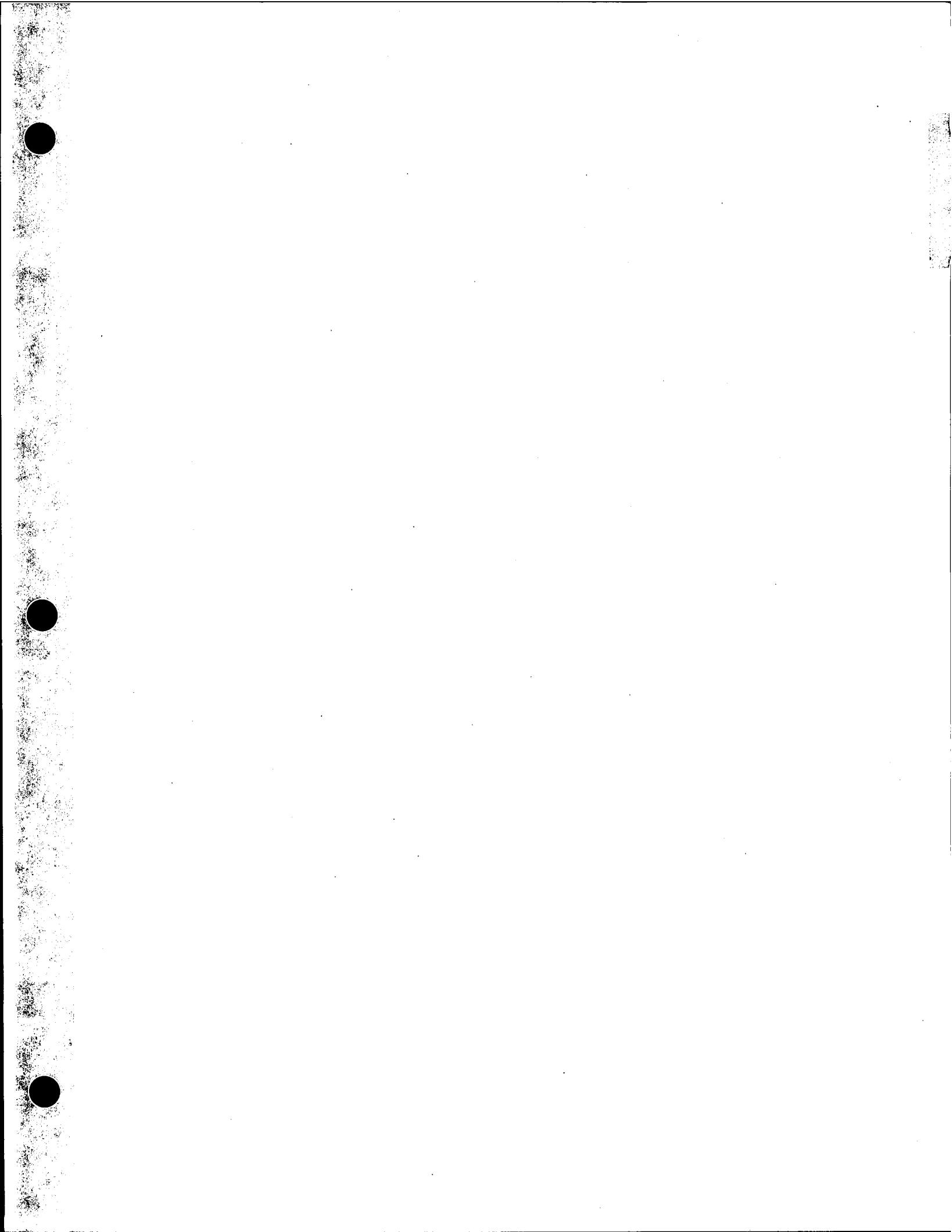
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charged **Kevin G. Vanginderen** of 603 Winston. Court Apartments with third degree burglary in. connection with 10 incidents of petit larceny and ... dspace.library.cornell.edu/bitstream/1813/5350/14/014\_24.pdf - [Similar pages](#)

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**Teresa Vanginderen, Kevin** and Justin, Morro Bay, CA "Thank you! Our birth went superbly well. I don't think it could have gone better ... a five hour ... www.centerforthesacredfeminine.org/id6.html - 16k - [Cached](#) - [Similar pages](#)





**EXHIBIT**

**2**



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

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To: kvangin1@yahoo.com

---

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

---

Subject: Re: Reference Question from Kevin Vanginderen

---

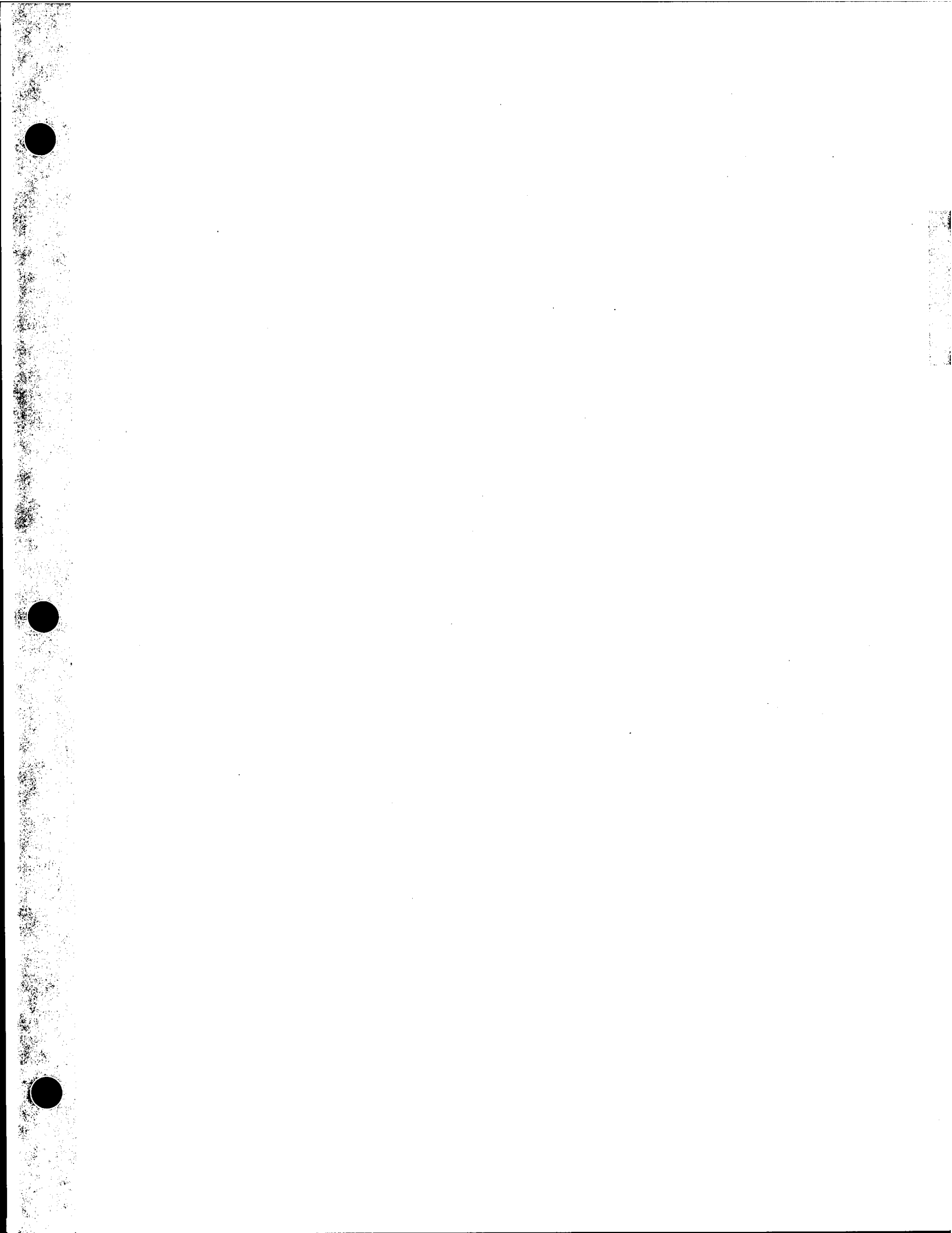
Dear Kevin Vanginderen,

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](mailto:esw3@cornell.edu)  
 voice: 607 255-5754  
 fax: 607 255-6788

>Name : Kevin Vanginderen  
 >Status : other  
 >Email : [kvangin1@yahoo.com](mailto: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](http://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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### Vanginderen v. Cornell University :: Justia News

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**. ...  
[dockets.justia.com/docket/court-casdce/case\\_no-3:2007cv02045/case\\_id-257249/](http://dockets.justia.com/docket/court-casdce/case_no-3:2007cv02045/case_id-257249/) - 85k -  
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### Kevin G Vanginderen

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Jan 24, 2008 ... **Kevin Vanginderen** '83, a practicing California lawyer, filed a complaint in San Diego County Superior Court last October for libel and ...  
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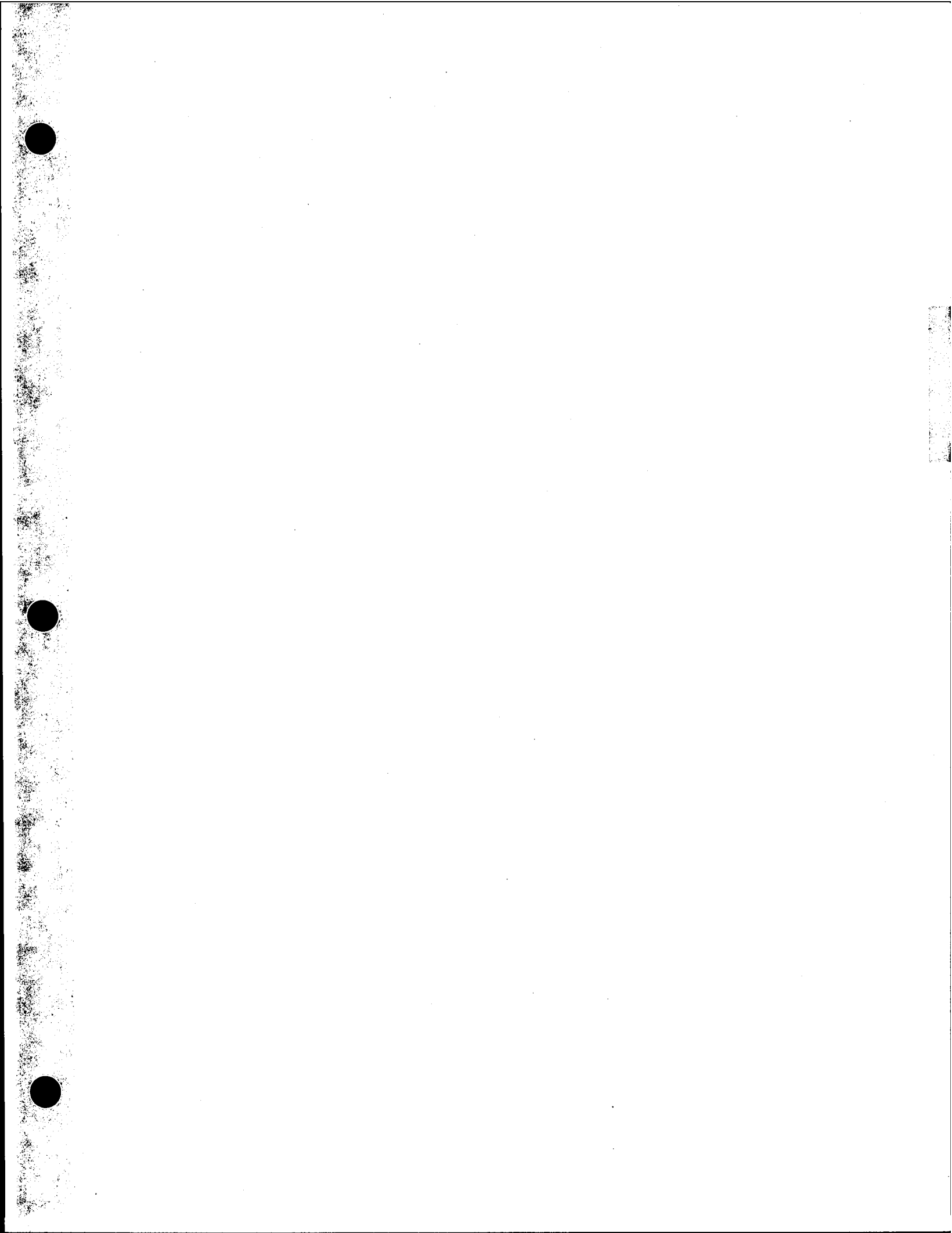
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[blawgsearch.justia.com/google-coop.aspx?cx=001017683474852908061:doc-\\_bxozry&q=Kevin+Vanginderen&...](http://blawgsearch.justia.com/google-coop.aspx?cx=001017683474852908061:doc-_bxozry&q=Kevin+Vanginderen&...) - 6k - [Cached](#) - [Similar pages](#)

### California Man Sues Cornell; Google Generation a Myth? - Library ...

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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### Vanginderen v. Cornell University - 8

**Kevin Vanginderen**, Docket #D46-171. 5 Exhibit B: The archived image of the March 17, 1983 Cornell Chronicle 6 that is the subject of this litigation. ...  
[www.docstoc.com/docs/473136/Vanginderen-v-Cornell-University---8](http://www.docstoc.com/docs/473136/Vanginderen-v-Cornell-University---8) - 35k -



**EXHIBIT**

**4**

**PROSKAUER ROSE LLP**

2049 Century Park East  
Suite 3200  
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 3<sup>rd</sup> 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.

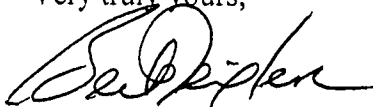


PROSKAUER ROSE LLP

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.

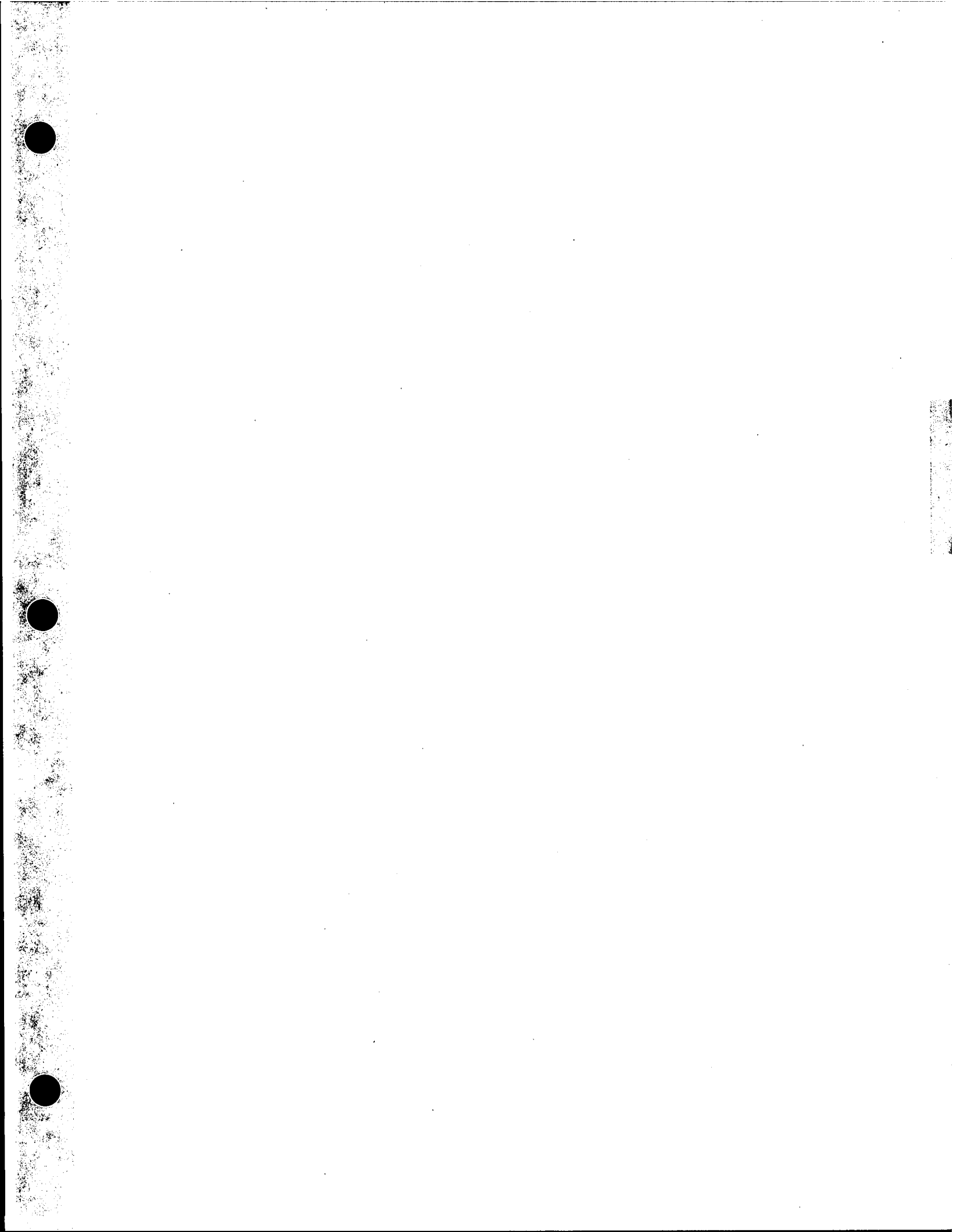
Very truly yours,

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**



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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

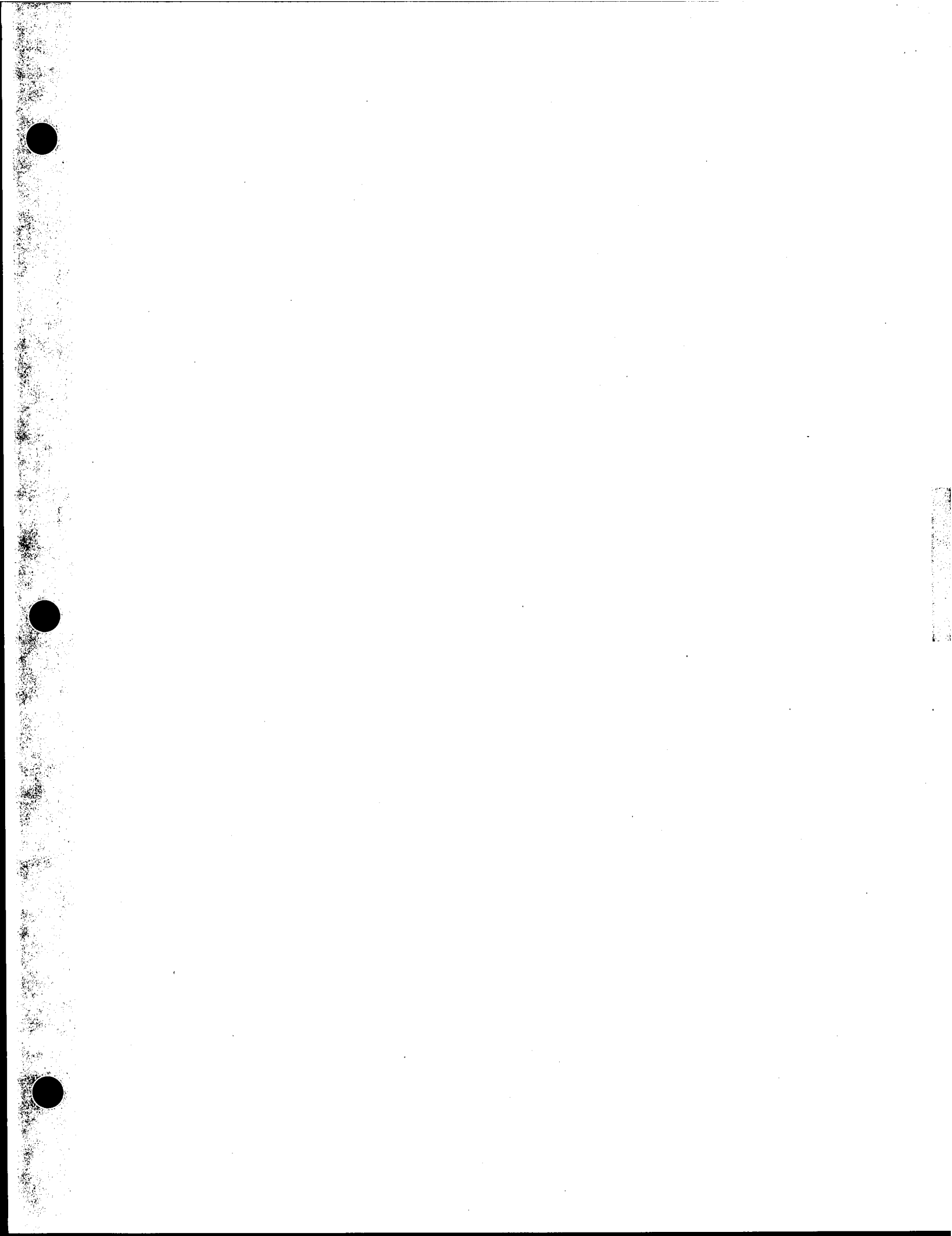
Dear Mr. Vanginderen:

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

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

07 OCT -9 AM 9:19

PEOPLE OF THE STATE OF NEW YORK  
vs.  
KEVIN VANGINDEREN,

**ORDER TO  
SHOW CAUSE**

Defendant.

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 3<sup>rd</sup> 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

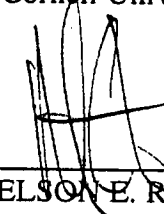


defamatory, and desires to re-write history by removing the article from the digitized copy of the Cornell Chronicle now available on-line.

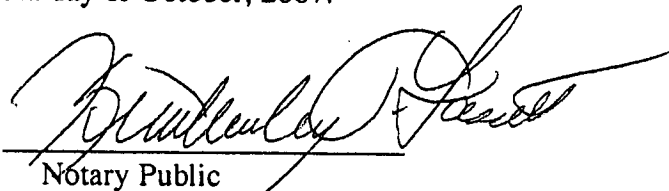
4. As stated in his complaint, Vanginderen communicated by email to Cornell prior to filing suit. However, when Cornell requested Vanginderen to consent pursuant to CPL §160.50(1)(d) to an unsealing order so that Cornell could evaluate the facts surrounding his threatened claim, he abruptly declined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

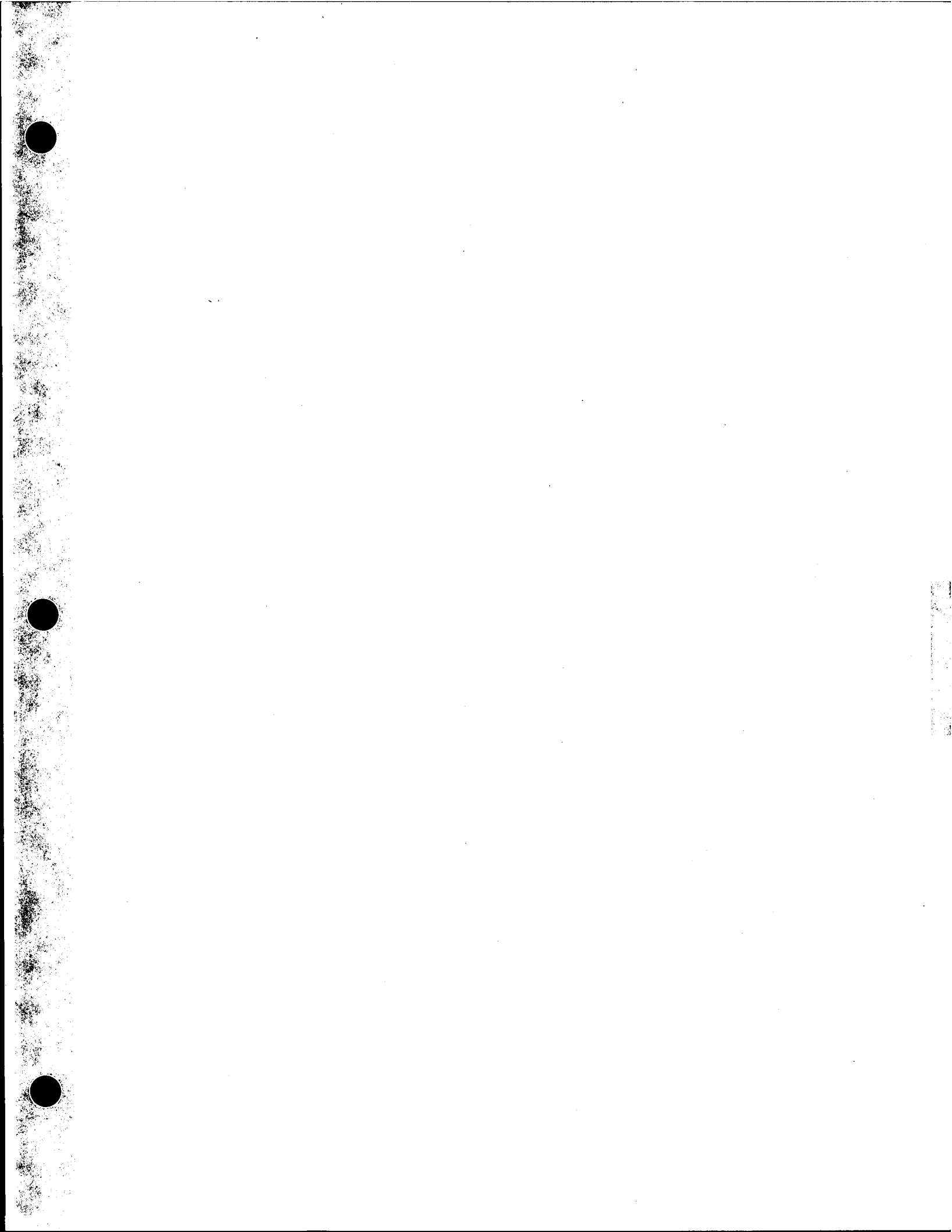
Wherefore, Cornell respectfully requests that the records of the criminal proceeding in the above-captioned matter be unsealed forthwith, including this Court's records, the records held by the District Attorney's Office and the records held by Cornell University Police.

  
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, 20 10



**EXHIBIT 2**

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Kevin Vanginderen

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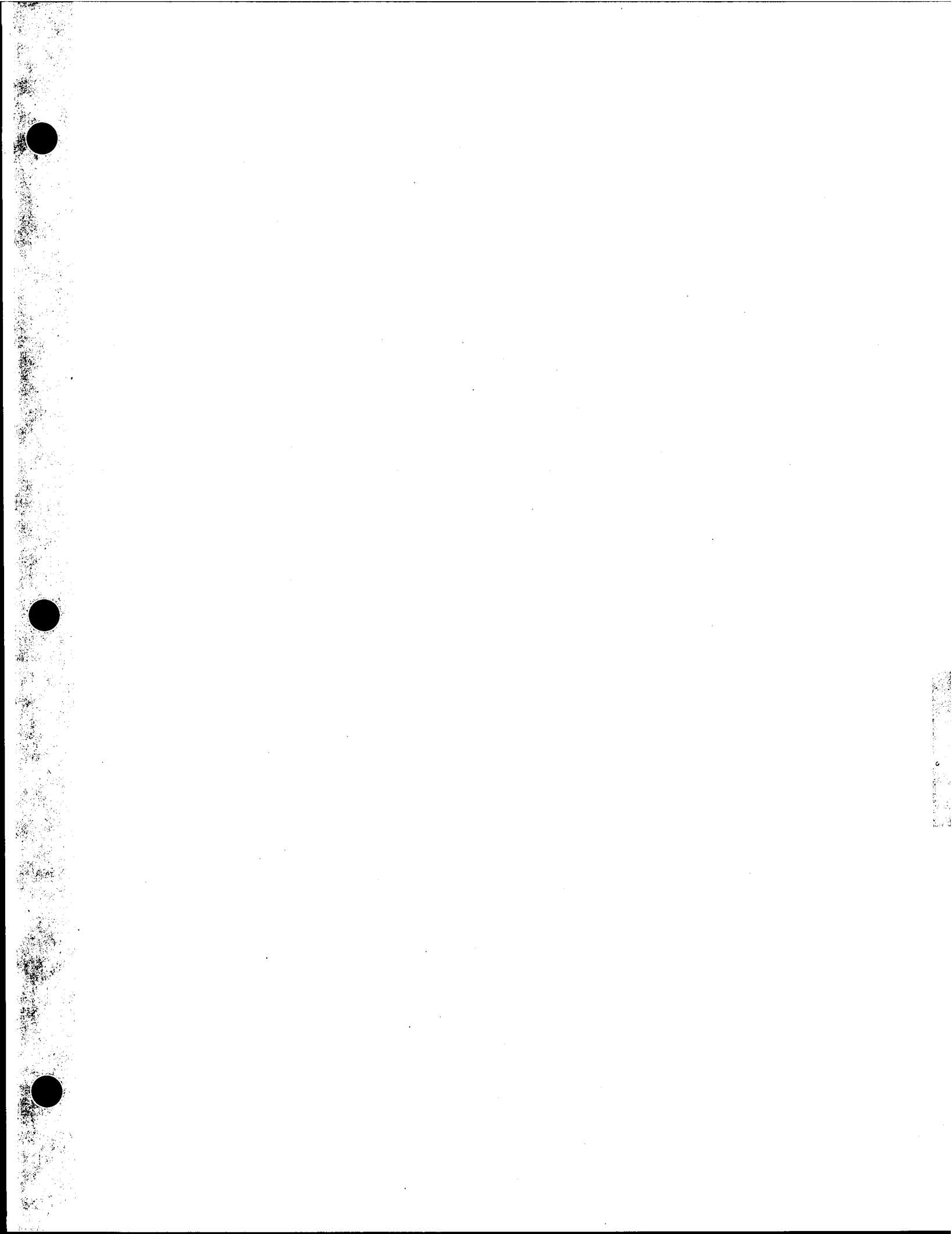
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**EXHIBIT 8**



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## Vanginderen v. Cornell University

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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	<a href="#">1</a>	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	<a href="#">2</a>	NOTICE of Party With Financial Interest by Cornell University. (vet)	October 30, 2007
October 30, 2007	<a href="#">3</a>	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	<a href="#">4</a>	PRO HAC VICE APPOINTED: Charles S. Sims appearing for Defendant Cornell University (mkz) (mam).	October 31, 2007

November 1, 2007	<a href="#">5</a>	NOTICE of Appearance by Nelson Eugene Roth on behalf of Cornell University (Roth, Nelson) (vet, ).	November 1, 2007
November 1, 2007	<a href="#">6</a>	NOTICE of Appearance by Clifford Scott Davidson on behalf of Cornell University (Davidson, Clifford) (vet, ).	November 1, 2007
November 2, 2007	<a href="#">7</a>	MOTION to Strike <i>Plaintiff's Complaint</i> by Cornell University. (Attachments: # <a href="#">1</a> 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	<a href="#">8</a>	NOTICE: Request for Judicial Notice in support re <a href="#">7</a> MOTION to Strike <i>Plaintiff's Complaint</i> by Cornell University (Attachments: # <a href="#">1</a> Exhibits In Support of Special Motion to Strike# <a href="#">2</a> Declaration of Valerie Cross Dorn in Support of Request for Judicial Notice# <a href="#">3</a> 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	<a href="#">9</a>	CERTIFICATE OF SERVICE by Cornell University re <a href="#">7</a> MOTION to Strike <i>Plaintiff's Complaint</i> , <a href="#">8</a> Notice (Other) (Deixler, Bert) Modified on 11/5/2007 - edited text (vet, ).	November 2, 2007
November 7, 2007	<a href="#">10</a>	DECLARATION re <a href="#">8</a> Notice (Other), Notice (Other) by Defendant Cornell University. (Attachments: # <a href="#">1</a> 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	<a href="#">11</a>	CERTIFICATE OF SERVICE by Cornell University re <a href="#">10</a> 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

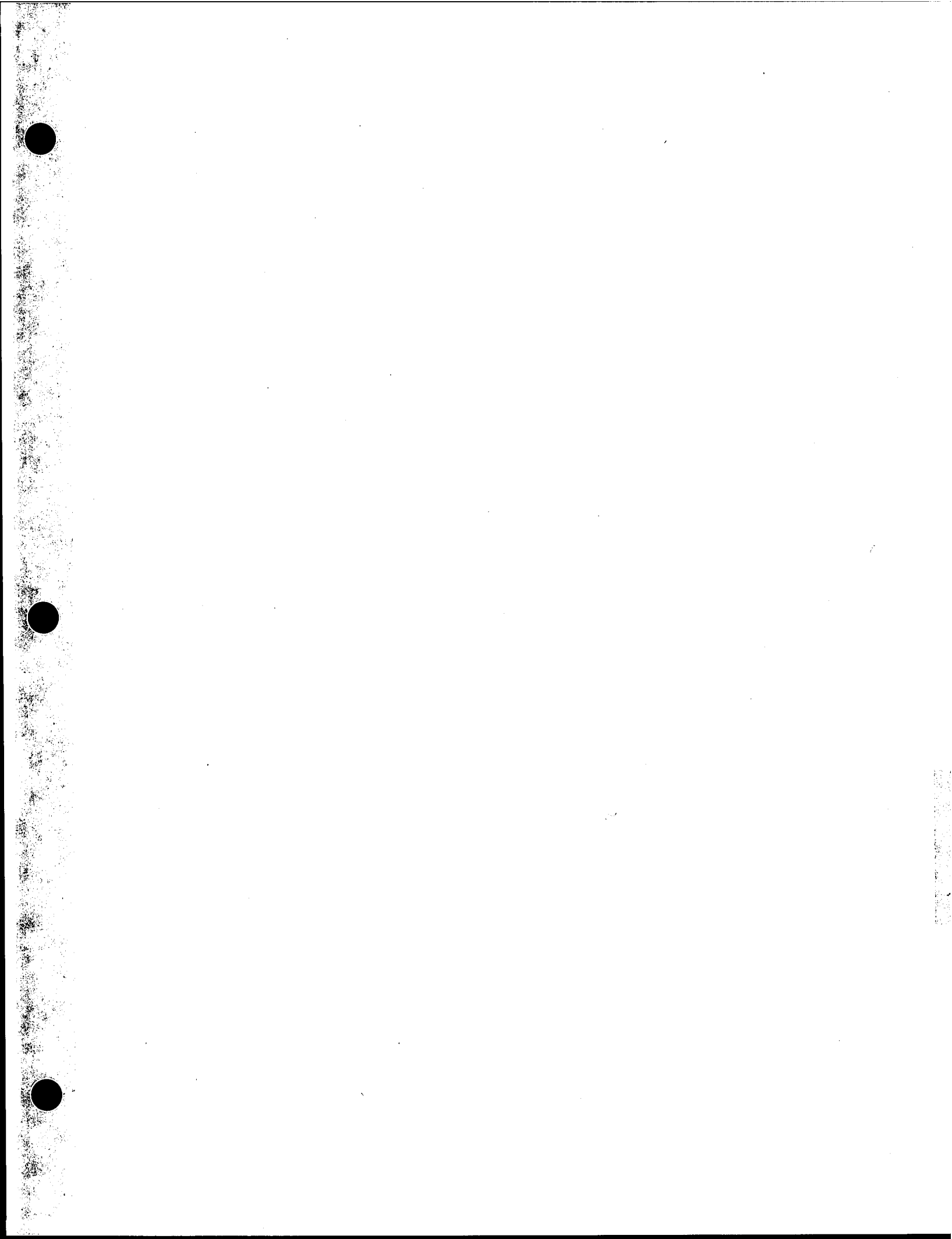
Represented By: Clifford Scott Davidson, Nelson E. Roth, Bert H Deixler, Charles S. Sims

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**Beta Theta Alumni E-mail (Pi Kappa Alpha at Cornell University)**

Kevin Vanginderen, kvangin1@yahoo.com. '84, Steve Amador, samador@rcn.com. Paul Barresi, Ppabarr@aol.com. Michael Bates, Mbates@hologic.com ...  
betathetadata.net/btemail.htm - 216k - [Cached](#) - [Similar pages](#)

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Plaintiff: Kevin Vanginderen Defendant: Cornell University, Cornell University, Cornell

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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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charged Kevin G. Vanginderen of 603 Winston. Court Apartments with third degree burglary in. connection with 10 incidents of petit larceny and ...  
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### Digitization Suit at Cornell - 3/1/2008 - Library Journal

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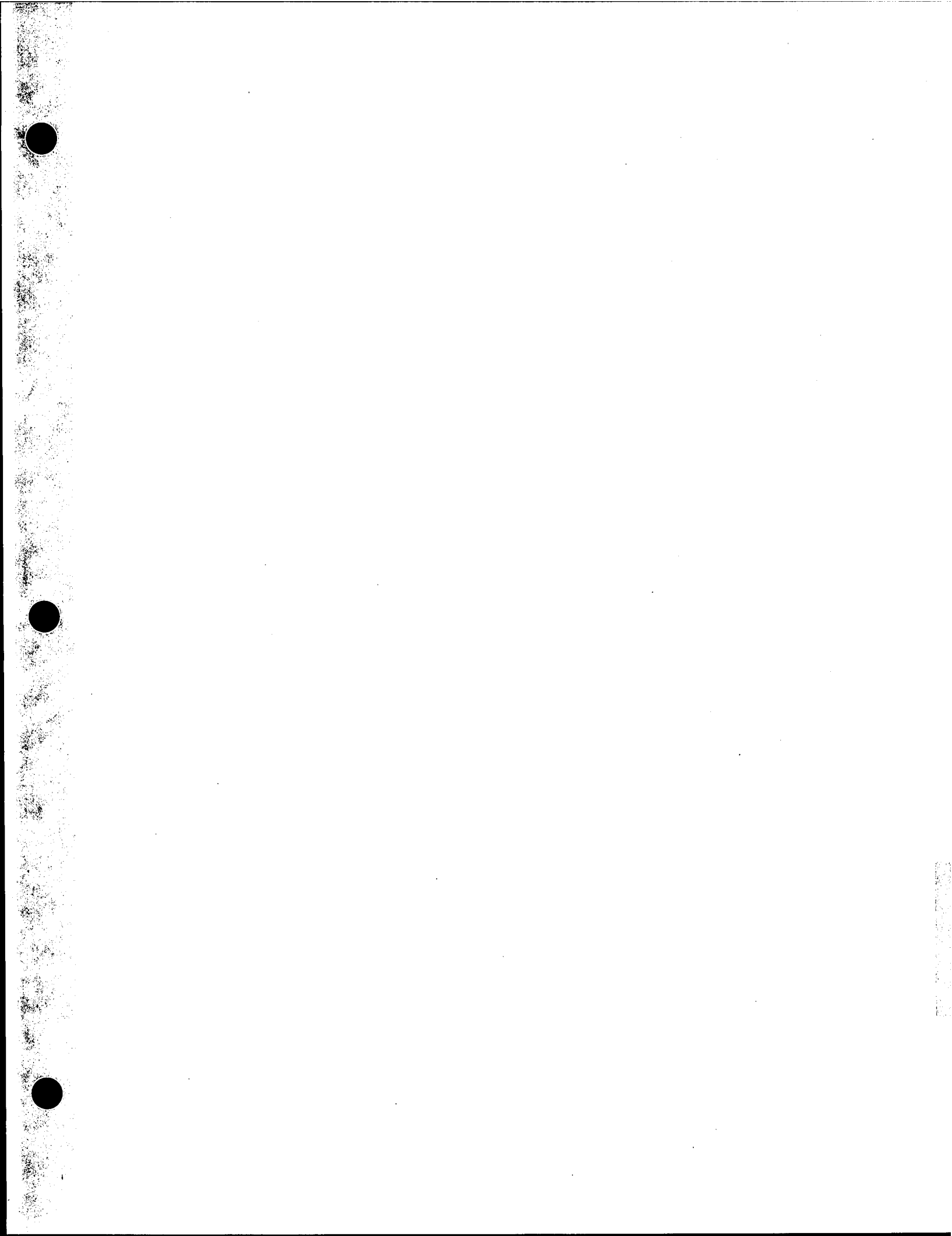
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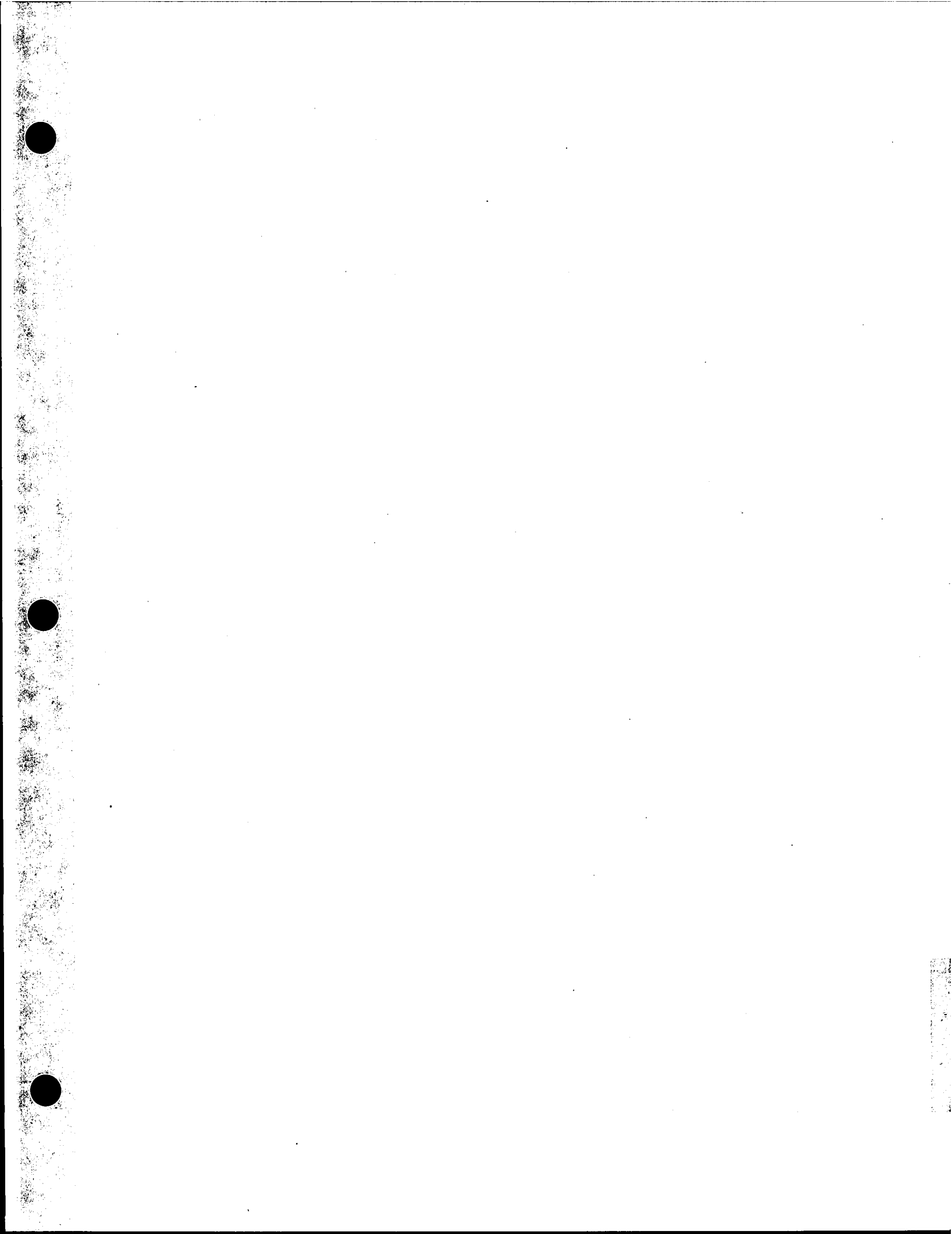
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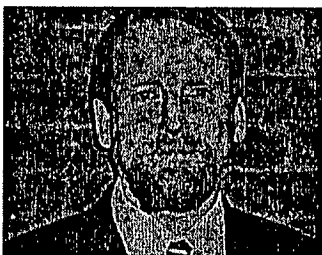
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1 Kevin Vanginderen, Plaintiff Pro Per  
637 Third Ave., Suite E1  
2 Chula Vista, CA 91910  
Telephone: (619) 585-7414  
3  
4

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
	)	VANGINDEREN IN SUPPORT
11 CORNELL UNIVERSITY,	)	OF PLAINTIFF'S MEMORANDUM OF
BERT DEIXLER,	)	POINTS AND AUTHORITIES
	)	IN OPPOSITION OF DEFENDANT'S
12 Defendant.	)	MOTION TO STRIKE PLAINTIFF'S
	)	FIRST AMENDED COMPLAINT
	)	
13	)	
14	)	Hearing Date: August 22, 2008
	)	Time: 11:00 a.m.
15	)	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. I did not confess to, commit, nor was I ever told by anyone in 1983,

1 that I was ever being investigated for fifteen separate crimes.

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

5 6. The District Attorney decided to reduce the charge to a single count of petit larceny.

6 7. 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 Court informed the parties that record of the 1983 arrest was sealed.

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

10 9. 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 10. 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 11. 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 12. 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 13. 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 14. On November 8, 2007, I discovered 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 15. On October 29, 2007, two days prior to the Defendants' ultimatum to drop the initial

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 16. 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 17. 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 18. 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 19. 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 20. I have obtained an FBI Criminal Record of myself and there is not any entry for any  
17 incidents of 1983.

18 21. 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 4<sup>th</sup> day of August, 2008, in San Diego  
24 County, California.

25 Dated: August 4, 2008

26

Respectfully submitted,

27

  
Kevin Vanginderen

28

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 August 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 First Amended 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

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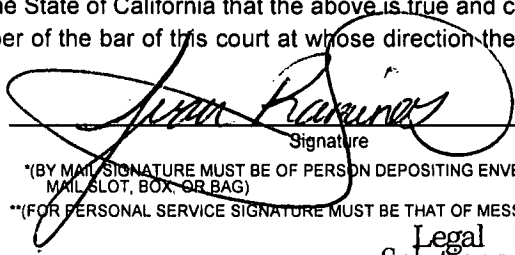
Executed on \_\_\_\_\_, at \_\_\_\_\_, California.

(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)

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