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Attorneys for Defendant,  
CORNELL UNIVERSITY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN VANGINDEREN,

Case No. 08-CV-00736 BTM(JMA)

Plaintiff,

v.

**REPLY MEMORANDUM OF POINTS  
AND AUTHORITIES IN FURTHER  
SUPPORT OF CORNELL'S MOTION  
FOR ATTORNEYS' FEES**

CORNELL UNIVERSITY and,  
BERT DEIXLER

Defendant.

[Per chambers, no oral argument unless  
requested by the Court]

Hearing Date: March 13, 2009  
Time: 11:00 a.m.  
Place: Courtroom 15  
Action Filed: April 8, 2008

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Cornell University and Bert Deixler successfully moved to strike plaintiff's complaint in this lawsuit and, in accordance with the Order of this Court and applicable law, have made an application for an award of reasonable attorneys' fees. Having brought a \$10,000,000 lawsuit, plaintiff now has the temerity to oppose the motion not only on the basis of his own gratuitous

1 assessment of how defendants should have handled the defense but with an assault on the  
2 Court's decision. Thus, plaintiff opines on which attorneys he believes defendants should have  
3 used to defend the lawsuit and how much time they should have devoted to the defense. *See*  
4 *Opp.* at 1:17-2:7. And he asserts further that this Court erred in its decision granting defendants'  
5 motion to strike and that the Court's consideration of defendants' application for the statutorily  
6 mandated attorneys' fees would be "abhorrent." *See Opp.* at 2:8-2:20. Had plaintiff wished to  
7 avoid the consequences of his judicial forays, he has had numerous opportunities to do so both in  
8 this litigation and his prior litigation, which was also dismissed. Having made the decision to  
9 pursue his claims with full knowledge of the likely consequences, he should not now be heard to  
10 claim that the Court's adherence to established legal principles is "astonishing." *See Opp.* at  
11 2:18-2:20. His arguments are meritless, contrary to the law, and should be disregarded.<sup>1</sup>  
12

13  
14 **A. Defendants are Entitled to Attorneys' Fees**

15 An award of attorneys' fees in this case is mandatory: "In any [SLAPP suit], a prevailing  
16 defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and  
17 costs." Cal. Code Civ. Pro. § 425.16(c) (emphasis added); *Premier Med. Mgmt. Sys., Inc. v.*  
18 *California Ins. Guar. Ass'n*, 163 Cal. App. 4th 550, 556 (2008) ("A defendant who brings a  
19 successful motion to strike under section 425.16 is entitled to mandatory attorney fees."). There  
20 is no doubt that defendants are legally entitled to their attorneys' fees.

21  
22 **B. Defendants' Requested Fees Reflect Time Reasonably Spent. Therefore the Entire**  
23 **Fee Request Should Be Granted**

24 A fee award should include "all the hours *reasonably spent*, including those  
25 relating solely to the fee." *Premier*, 163 Cal. App. 4th at 556 (emphasis in original). In *Premier*,

26 <sup>1</sup> Plaintiff's insinuation that his filing of a notice of appeal deprives this Court of jurisdiction to consider  
27 defendants' motion for attorneys' fees, *See Opp.* at 1:18-1:20, similarly lacks merit. *See, e.g., Culinary &*  
28 *Service Employees Union, Local 555 v. Hawaii Employee Ben. Admin., Inc.*, 688 F.2d 1228, 1232 (9th  
Cir. 1982) (noting, without objection, that district court awarded attorneys' fees after notice of appeal  
filed).

1 which involved multiple defendants prevailing on anti-SLAPP motions, the California Court of  
2 Appeal affirmed the trial court's award of fees to each defendant in amounts of \$165,000  
3 (representing 217 hours of work), \$576,206 (representing 127.9 hours of work) and \$33,295. The  
4 court rejected appellants' arguments that the number of hours worked was excessive, even in  
5 light of significant overlap in the work of defendants' respective counsel. *Id.* at 560-563. The  
6 166.25 hours for which defendants seek attorneys' fees in the case at bar is less than the time  
7 spent in *Premier*, and defendants' attorneys are entitled to deference regarding the manner in  
8 which they allocated their time and the arguments they pursued. *See Moreno v. City of*  
9 *Sacramento*, No. 06-15021, 2008 WL 2875300, \*2 (9th Cir. July 28, 2008) ("By and large, the  
10 court should defer to the winning lawyer's professional judgment as to how much time he was  
11 required to spend on the case; after all, he won, and might not have, had he been more of a  
12 slacker.").

13  
14 Further, plaintiff presents no evidence to support his request that the Court reduce  
15 Defendants' fees - a showing he is required to make to justify any reduction. *See Premier*, 163  
16 Cal. App. 4th at 560. He disputes neither defendants' lodestar calculation, nor Proskauer's rates,  
17 and makes no substantive objection to any particular time entries or supporting documentation.  
18 Plaintiff's assertions wholly ignore the fact that defendants were entitled to brief vigorously  
19 every conceivable, non-frivolous defense against plaintiff's \$10,000,000 lawsuit because issues  
20 omitted from defendants' motion could not have been briefed on reply or at hearing and could  
21 not be raised in the appeal to the Ninth Circuit which plaintiff has now filed.

22 Finally, the Court should decline Plaintiffs invitation to reduce the fee award to one  
23 week of Mr. Roth's salary. As the Ninth Circuit recently explained,

24 The district court's inquiry must be limited to determining  
25 whether the fees requested by this particular legal team are  
26 justified for the particular work performed and the results  
27 achieved in this particular case. The court may permissibly look  
28 to the hourly rates charged by comparable attorneys for similar  
work, but may not attempt to impose its own judgment regarding  
the best way to operate a law firm, nor to determine if different  
staffing decisions might have led to different fee requests.

*Moreno*, 2008 WL 2875300, at \*5. Based on these principles, defendants are entitled to a full

1  
2 award of their attorneys' fees.


3  
4 **C. Conclusion**

5 For the foregoing reasons, defendants respectfully request that the Court grant  
6 defendants' attorneys' fees in the amount of \$38,380.

7  
8 DATED: February 9, 2009

NELSON E. ROTH  
CORNELL UNIVERSITY

9 BERT H. DEIXLER  
10 CLIFFORD S. DAVIDSON  
11 PROSKAUER ROSE LLP

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14 Nelson E. Roth  
15 Attorneys for Defendant,  
16 CORNELL UNIVERSITY  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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KEVIN VANGINDEREN,

Plaintiff,

v.

CORNELL UNIVERSITY et al.,

Defendants.

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W-JMA

**CERTIFICATION OF SERVICE BY CM/ECF & U.S. MAIL**

NELSON E. ROTH, does hereby declare, under penalty of perjury, that I electronically filed the foregoing Reply Memorandum of Points and Authorities in Further Support of Cornell's Motion for Attorney's Fees with the Clerk of the District Court using the CM/ECF system, and that a copy was sent by United States mail to:

Mr. Kevin Vanginderen  
637 3<sup>rd</sup> Avenue, Suite E-1  
Chula Vista, CA 91910

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on February 9, 2009.



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NELSON E. ROTH (SBN 67350)