

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

FRANK D. SMITH, JR.,

Plaintiff,

v.

CORNELL UNIVERSITY;
NATIONAL SCIENCE
FOUNDATION;
LOS ALAMOS NATIONAL
LABORATORY;
UNIVERSITY OF CALIFORNIA;
UNITED STATES DEPARTMENT
OF ENERGY;

and

PAUL GINSPARG, Professor of
Physics and Computer Science,
Cornell University, Individually and
in his Official Capacity;
SIMEON WARNER, Research
Associate, Computer Science
Department, Cornell University,
Individually and in his Official
Capacity;
SARAH THOMAS, University
Librarian, Cornell University,
Individually and in her Official
Capacity;
and
JEAN POLAND, Associate
Librarian, Cornell University,

Case No.: 4:02-CV-280
(Jury Demand)

FILED IN CLERK'S OFFICE
U. S. D. C. Rome

DEC 06 2002

LUTHER D. THOMAS,
Clerk

By:
Deputy Clerk

Individually and in her Official	:
Capacity;	:
	:
and	:
	:
RICHARD LUCE, Administrative	:
Director, Los Alamos National	:
Laboratory, Individually;	:
JOHN C. BROWNE, Director, Los	:
Alamos National Laboratory,	:
Individually;	:
and	:
ROBERT L. VAN NESS, University	:
of California Assistant Vice President	:
for Laboratory Administration,	:
Individually;	:
	:
Defendants.	:

COMPLAINT

Plaintiff, by and through counsel, for his cause of action against the Defendants says as follows:

THE PARTIES

1.

Plaintiff Frank D. Smith, Jr., also known as Tony Smith, (Smith) is a citizen of the State of Georgia who resides in the Cartersville, Bartow County, Georgia, in the Northern District of Georgia.

2.

Based upon information and belief, Defendants Paul Ginsparg, Simeon Warner, Sarah Thomas, and Jean Poland are employees of Cornell University, Ithaca, New York. Based upon information and belief, service may be obtained on Paul Ginsparg at his residence at 507 Cayuga Heights Rd., Ithaca, New York 14850; on Simeon Warner at his residence at 274 Floral Ave., Ithaca, New York 14850; on Sarah Thomas at her residence at 415 Hanshaw Rd., Ithaca, New York 14850; and on Jean Poland at her residence at 523 The Parkway, Ithaca, New York 14850.

3.

Based upon information and belief, Defendant Cornell University (Cornell) is a university located in Ithaca, New York. Based upon information and belief, Cornell may be served at the Office of University Counsel, 300 CCC Building, Garden Ave., Ithaca, New York 14853, James J. Mingle, University Counsel and Secretary of the Corporation.

4.

Based upon information and belief, Defendant the National Science Foundation is an independent federal agency of the United States of America. Pursuant to F.R.C.P. 4, service upon Defendant NSF is by: U.S. Attorney for the Northern District of Georgia, Mr. William S. Duffey, Jr., United States Attorney's Office, Richard B. Russell Federal Building, 75

Spring Street, S.W., Suite 600, Atlanta, GA 30303-3309, upon the United States through the United States Attorney General, Mr. John Ashcroft, U.S. Department of Justice, 950 Pennsylvania Ave. NW, Washington, D.C., 20530-0001, and upon the NSF through NSF, Office of the Director, 4201 Wilson Blvd., Suite 12050, Arlington, VA 22230, Dr. Rita R. Colwell, Director.

5.

Based upon information and belief, Defendants John C. Browne and Richard Luce are employees of Los Alamos National Laboratory and the University of California System. Based upon information and belief, service may be obtained on John C. Browne and Richard Luce at their place of work at The Office of the Director, Los Alamos National Laboratory, Building SM30, Mailstop A-100, Bikini Atoll Rd., Los Alamos, New Mexico 87545.

6.

Based upon information and belief, Defendant Robert L. Van Ness is an employee of The University of California, upon whom, based upon information and belief, service of process may be obtained at his place of work at the Laboratory Administration Office, 1111 Franklin St., 5th Floor, Oakland, California 94607-5206.

7.

Based upon information and belief, Defendant The University of California (Cal) is a university of the State of California. Based upon information and belief, The University of California may be served at the Office of General Counsel of The Regents, University of California, 1111 Franklin St., Oakland, CA 94607, James E. Holst, General Counsel and Vice President for Legal Affairs.

8.

Based upon information and belief, Defendant Los Alamos National Laboratory (LANL) is a Department of Energy sponsored research institution operated and administered by the University of California System. Based upon information and belief, LANL may be served at the Office of Laboratory Counsel, P. O. Box 1663 Mail Stop, A-187, Los Alamos, New Mexico 87545, Frank Dickson, Laboratory Legal Counsel; and/or pursuant to F.R.C.P. 4, service upon Defendant Los Alamos National Laboratory is by: U.S. Attorney for the Northern District of Georgia, Mr. William S. Duffey, Jr., United States Attorney's Office, Richard B. Russell Federal Building, 75 Spring Street, S.W., Suite 600, Atlanta, GA 30303-3309, upon the United States through the United States Attorney General, Mr. John Ashcroft, U.S. Department of Justice, 950 Pennsylvania Ave. NW, Washington, D.C., 20530-0001.

9.

Based upon information and belief, Defendant the Department of Energy (DOE) is a department of the government of the United States of America. Pursuant to F.R.C.P. 4, service upon Defendant DOE is by: U.S. Attorney for the Northern District of Georgia, Mr. William S. Duffey, Jr., United States Attorney's Office, Richard B. Russell Federal Building, 75 Spring Street, S.W., Suite 600, Atlanta, GA 30303-3309, upon the United States through the United States Attorney General, Mr. John Ashcroft, U.S. Department of Justice, 950 Pennsylvania Ave. NW, Washington, D.C., 20530-0001, and upon the DOE through DOE, Lee Liberman Otis, General Counsel, Office of General Counsel, U.S. Department of Energy, Room 6A-245, 1000 Independence Ave., SW, Washington D.C. 20585.

10.

As used in this complaint, the term “e-print archives” includes all Defendants in their various capacities related to the e-print archives with respect to the circumstances of each instance in which the term “e-print archives” is used in this complaint. In some cases, discovery may be necessary to determine which individual Defendants are related to each set of circumstances, but in all sets of circumstances Defendants NSF, LANL, Cal, and DOE are related and in all sets of circumstances since the transfer of administration of the e-print archives in 2001 Defendant Cornell is

related.

JURISDICTION AND VENUE

11.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § § 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

12.

Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events that gave rise to Plaintiffs' claims took place within the Northern District of Georgia.

13.

Factors indicating that the e-print archives are subject to jurisdiction and venue in this case include, but are not necessarily limited to, the following:

i. The e-print archives do business over the internet by contracting with authors, including residents of the Northern District of Georgia, to post their papers in the form of computer files that are knowingly submitted by authors and transmitted by authors to the e-print archives.

ii. The e-print archives are not a passive Web site that

does little more than make information available to those who are interested is indicated.

iii. The e-print archives are an interactive Web site where a user can exchange information with the host computer.

iv. The e-print archives have a high level of interactivity.

v. The e-print archives, whose business and commerce involves submissions and posting papers (as opposed to sales of goods or services for money, since the e-print archives receive financial support from taxpayers through such entities as the National Science Foundation), have sufficient contacts within the Northern District of Georgia to be subject to the jurisdiction of this court. A (probably very small) sample of such contacts during the year 2002, includes the following papers:

<http://arXiv.org/abs/hep-th/0206036> from gatech.edu

<http://arXiv.org/abs/cond-mat/0204530> from gatech.edu

<http://arXiv.org/abs/cond-mat/0204327> from gatech.edu

<http://arXiv.org/abs/cond-mat/0204213> from gatech.edu

<http://arXiv.org/abs/cond-mat/0203571> from gatech.edu

<http://arXiv.org/abs/math-ph/0208021> from cau.edu

<http://arXiv.org/abs/math.AG/0207287> from gatech.edu

<http://arXiv.org/abs/math.AG/0203260> from gatech.edu

<http://arXiv.org/abs/math.AG/0203241> from gatech.edu

<http://arXiv.org/abs/physics/0207095> from Plaintiff Smith's computer in Cartersville, Bartow County, Georgia, using his princeton.edu address (which is the last paper that Plaintiff Smith has been permitted to put on the Cornell archives)

<http://arXiv.org/abs/hep-ph/0201039> from berry.edu

<http://arXiv.org/abs/astro-ph/0004252> from berry.edu

vi. The business of the e-print archives, which includes submissions and posting of papers, is covered by the Georgia long-arm statute, Georgia Code 9-10-91.

vii. The New York courts held a Georgia defendant to be subject to New York long-arm jurisdiction in the case of American Network, Inc. v. Access America, 1997 WL 466507 (S.D.N.Y. August 14, 1997). A Temple Law School web page at

<http://www.temple.edu/lawschool/dpost/jurisdictioncases.htm>

comments on that case, stating:

"... The District Court concluded that exercising personal jurisdiction over a Georgia Corporation, based on the maintenance of a web site and 6 contracts with New York residents was reasonable. ... As for a due process analysis, the court acknowledged that simply maintaining a web site on the internet would not, necessarily, by itself constitute purposeful availment.

However, Access's consistent marketing to the entire U.S., as well as, servicing its customers in New York, were sufficient. Based on these activities it was foreseeable that Access could be haled into court not only where its web site had been viewed, but where Access had secured customers. ...".

For the e-print archives, “contracts” correspond to submissions and posting of papers, and “customers” correspond to authors of papers.

PRELIMINARY STATEMENT

14.

This is a civil rights action against employees and the agencies of Cornell University (Cornell), the National Science Foundation (NSF), the Los Alamos National Laboratory (LANL), the University of California System, and the United States Department of Energy (DOE) for depriving Plaintiff Smith of established constitutional and statutory rights.

15.

This action seeks a judgment declaring that the regulation, policies and administration of the above-named defendants prohibiting and suppressing the publishing of legitimate scientific work on an open, federally and state funded scientific public forum contravenes the First and Fourteenth Amendments to the United States Constitution (U. S. Const.

Amend. I, XIV.) and 42 U.S.C. § 1983. This proceeding also seeks orders that defendants carry out open authorship policy for the public forum and provide a due process for aggrieved parties to contest adverse rulings.

GENERAL BACKGROUND

16.

According to a 1996 article by Defendant Paul Ginsparg (Ginsparg) on the web at arXiv.org/blurb/pg96unesco.html the e-print archives are "... a set of automated archives for electronic communication of research information that have been operational in many fields of physics, and some related and unrelated disciplines, starting from 1991. These archives now [1996] serve over 35,000 users worldwide from over 70 countries, and process more than 70,000 electronic transactions per day. In some fields of physics, they have already supplanted traditional research journals as conveyers of both topical and archival research information. ... These systems are entirely automated (including submission process and indexing of titles/authors/abstracts), and allow access via e-mail, anonymous ftp, and the WorldWideWeb. The communication of research results occurs on a dramatically accelerated timescale and much of the waste of the hardcopy distribution scheme is eliminated. In addition, researchers who might not ordinarily communicate with one another can quickly set up a virtual

meeting ground, and ultimately disband if things do not pan out, all with infinitely greater ease and flexibility than is provided by current publication media.

It is important to distinguish the form of communication facilitated by these systems from that of usenet newsgroups or garden variety "bulletin board" systems. In "e-print archives," researchers communicate exclusively via research abstracts that describe material otherwise suitable for conventional publication. This is a very formal mode of communication in which each entry is archived and indexed for retrieval at arbitrarily later times; Usenet newsgroups and bulletin boards, on the other hand, represent an informal mode of communication, more akin to ordinary conversation, with unindexed entries that typically disappear after a short time. ... For some fields of physics, the on-line electronic archives immediately became the primary means of communicating ongoing research information, with conventional journals entirely supplanted in this role. ...”.

STATEMENT OF FACTS

17.

The e-print archives have declared a policy of open authorship for the e-print archives, as is indicated by a web page at http://arXiv.org/help/oa/sfc_data_provider with heading “Open Archives /

Santa Fe Convention: information about this data provider” which web page states:

“Full name of the archive ... arXiv e-print archive ...

Content in the archive ... Contains author self-archived e-prints of research in physics, mathematics, non-linear systems and computer science. ...

Date of implementing the Santa Fe convention ... 2000-02-15 ...

Submission mechanism ... Web upload preferred; ftp and email also accepted. ...

Description of submission policy ... Open but with some moderation of appropriateness to archives and subject classes. Restrictions on size and format; submissions required to be complete. ...

Submission page ... <http://arXiv.org/help/submit> ...”.

Said web page was active at least as recently as 26 November 2002.

18.

The e-print archives submission page at <http://arXiv.org/help/submit> referred to in paragraph 17. hereof is consistent with the policy of open authorship for the e-print archives, by not placing any limitation whatsoever on qualification of individuals to be authors on the e-print archives, and only stating requirements as to format and form such as “... Please note that we do not accept submissions with omitted figures, tables or sections. We also do not accept ‘abstract only’ submissions. ... Because putting papers on

the archives entails certain responsibilities, authors must make their own submissions. ...”.

19.

Plaintiff Smith is informed and believes that the term “Open Archives / Santa Fe Convention” used in paragraph 17. hereof refers to the Santa Fe Convention and its successor Open Archives Initiative Protocol, which are described on the internet:

at http://www.openarchives.org/sfc/sfc_entry.htm which web page states:

“...the Santa Fe Convention for the Open Archives Initiative

Officially released on February 15th 2000 ...

the Santa Fe Convention ... is the result of a meeting of the Open Archives Initiative which was held in Santa Fe, New Mexico, on October 21-22

1999. This convention has been endorsed unanimously by all the

participants at the meeting, who represented organizations maintaining or

planning e-print archives intended for open access and organizations

interested in providing services, such as search interfaces or citation-

linking, based on the data in those archives. The convention presents a

simple technical and organizational framework to support basic

interoperability among e-print archives. ...

Objective

Scholarly authors can make electronic documents available to a global

audience by submitting them to e-print archives. At the time of writing this convention (January 2000), the number of established e-print archives is small. One is arXiv.org, the Los Alamos e-print archive created by Paul Ginsparg, which has become a crucial hub for communicating research findings in physics. We anticipate the creation of many more e-print archives in the coming years. ...

The Santa Fe Convention is discontinued. Please use the Open Archives Initiative Protocol for Metadata Harvesting instead. ...”;
and

at <http://www.openarchives.org/OAI/openarchivesprotocol.htm> which web page states:

“... The Open Archives Initiative Protocol for Metadata Harvesting ...
The Open Archives Initiative Protocol for Metadata Harvesting (referred to as the OAI-PMH in the remainder of this document) provides an application-independent interoperability framework based on metadata harvesting. ...”.

20.

Despite their clear statement described in paragraph 17. of a policy of open authorship for the e-print archives, when Plaintiff Smith requested on August 2002 a copy of the authorship policy of the e-print archives, he was not told that the e-print archives have a policy of open authorship for the e-

print archives, but rather, Defendant Jean Poland (Poland) stated in a message to Plaintiff Smith on 12 August 2002 “... At this time we are reviewing the policies for submission of material to arXiv and I will be happy to forward a copy of those to you when we they are complete. ...”, and at least as late as 11 October 2002 register-query@arXiv.org stated in a message “... the policies are currently undergoing revision. ...”. However, Plaintiff Smith has yet to receive any copy of such policies, and Plaintiff Smith was not informed of the existence of the policy of open authorship for the e-print archives, but only learned of it on 26 November 2002 when he received on his home computer an e-mail signed “- Someone who reads” with a message referring to the Open Archives / Santa Fe Convention.

21.

Plaintiff Smith is an author of papers in Physics.

22.

During the year 2001 the administration of the e-print archives moved from Defendant Los Alamos National Laboratory (LANL) to Defendant Cornell, but Defendant LANL remained active as the primary backup site for the e-print archives.

23.

From 1991 to 2001, the e-print archives were a public forum primarily based on government property at Defendant LANL.

24.

From 2001 to the present, the e-print archives continue to be a public forum, with primary back-up site based on government property at Defendant LANL and with government funding, including funds from Defendant NSF, for the site at Defendant Cornell.

25.

The e-print archives have been since 1991, and are now, a public forum that has been intentionally opened for expressive purposes for authors of papers in Physics, Mathematics, Nonlinear Sciences, and Computer Science (see Cornell web page at <http://arXiv.org/>) and as to which such authors, including Plaintiff Smith, who is an author of papers in Physics, are guaranteed access by the First Amendment to the United States Constitution, and as to which access cannot be denied without due process.

26.

Around 8 August 2002 Plaintiff Smith initiated efforts to put on the e-print archives public forum his paper TS-QM03-1 entitled “Penrose-Hameroff Quantum Tubulin Electrons, Chiao Gravity Antennas, and Mead Resonance” on the e-print archives, and to be registered as an author on the e-print archives public forum.

27.

Plaintiff Smith's efforts to put his paper TS-QM03-1 on the e-print archives public forum and to be registered as an author on thereon were rejected by the e-print archives public forum, and the e-print archives stated that Plaintiff Smith is in "... a large pool here - typically flagged by reader complaints - encouraged to find alternate outlets. ...", thus placing Plaintiff Smith on a blacklist, in violation of his rights under the Constitution and laws of the United States.

28.

The action of the e-print archives in creating and maintaining a blacklist is inconsistent with the policy of open authorship for the e-print archives.

29.

The e-print archives' blacklisting of individuals other than Plaintiff Smith in the "large pool" of individuals on the e-print archives blacklist prevents Plaintiff Smith from reading their papers on the public forum that is the e-print archives, in violation of Plaintiff Smith's rights under the Constitution and laws of the United States.

30.

Said "large pool" of individuals on the e-print archives' blacklist may constitute a class entitled to certification as a class action pursuant to Rule

23 of the Federal Rules of Civil Procedure, but discovery is necessary to determine whether all the elements of Rule 23(a), including numerosity, commonality, and typicality, are present, and to determine whether any such class action would fit into at least one of the categories of Rule 23(b), such as that Injunctive or declaratory relief would be proper on a class-wide basis.

31.

Despite request by Plaintiff Smith, the e-print archives have failed and refused to tell Plaintiff Smith who, if anyone, complained about him, or what is the content of any complaints, or why he was put on the blacklist, and have failed and refused to provide a reasonable forum for him to contest his placement on the blacklist, or to plead his case that he should be registered as an author and that his paper TS-QM03-1 should be put on the e-print archives.

32.

Among the grounds mentioned by the e-print archives with respect to their failure to grant authorship to Plaintiff Smith and to put his paper TS-QM03-1 on the archives are the following:

i. that Plaintiff Smith was not qualified because he used a .net address, when in fact during the five year period 1 Jan 97 through 31 Dec 01 the e-print archives accepted about 177 submissions from .net

addresses.

ii. that Plaintiff Smith was not qualified because his university .edu e-mail address is an alumni account, when in fact Plaintiff Smith is informed and believes that other US individuals have been successfully submitting works to the e-print archives from alumni e-mail accounts.

iii. that Plaintiff Smith was disqualified because he lacks "... someone with ... a suitable institutional affiliation ... " who is "... with expertise in the relevant subject matter ..." to "...sponsor [his] activities ...", when in fact the e-print archives even failed and refused to grant authorship to Edmund Storms when Brian Josephson, a Nobel Laureate and Professor of Physics at the University of Cambridge, Cambridge, UK, tried to sponsor said Edmund Storms. Further, Plaintiff Smith is informed and believes that other US individuals have been successfully submitting works to the e-print archives without such sponsorship.

iv. that Plaintiff Smith was disqualified because "... There is no evidence that any of these [Plaintiff Smith's submissions to the e-print archives] has been considered peer-reviewable by a conventional journal ...", even though none of Plaintiff Smith's submissions to the e-print archives have ever been submitted to any refereed journal only because Plaintiff Smith has consciously chosen not to deal with the tedious process of dealing with refereed journals. Further, Plaintiff Smith is informed and

believes that other US individuals have been successfully submitting works to the e-print archives without getting peer review from any conventional refereed journal.

v. In September 1999, when the e-print archives were being administered by Los Alamos National Laboratory (xxx.lanl.gov), Plaintiff Smith and the archive administrators at xxx.lanl.gov reached an agreement whereby Plaintiff Smith could put papers on the general physics archive gen-ph by using his .net e-mail account tsmith@innerx.net, without being registered as an author.

However, the e-print archives (having taken over administration of the e-print archives from xxx.lanl.gov during the year 2001) unilaterally and arbitrarily abrogated that agreement, saying "... This is no longer xxx.lanl.gov, so the history is not strictly relevant. ...".

33.

Plaintiff Smith is informed and believes that the actions of the e-print archives with respect to Plaintiff Smith's requests with respect to authorship are arbitrary and capricious, and based on whims and personal opinions, in violation of the principles enunciated in *Niemotko v. Maryland*, 340 U.S. 268 (1951) by Mr. Chief Justice Vinson, who delivered the opinion of the Court, saying, at page 272:

"... The right to equal protection of the laws, in the exercise of those

freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body. ... the lack of standards in the license-issuing "practice" renders that "practice" a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection. ...”.

34.

Despite repeated pleas by Plaintiff Smith, there has been no action taken by Defendants to register him as an author on the e-print archives or to allow the submission of his papers, including TS-QM03-1, to the e-print archives,
or to carry out the policy of open authorship for the e-print archives,
or to provide a forum and procedure for contesting rulings by the e-print archives.

35.

Defendant National Science Foundation (NSF), a federal agency, provides funds for the e-print archives. According to the web page <http://arXiv.org/> of the e-print archives: "... \$\$This archive is based upon activities supported by the U.S. National Science Foundation under Agreement No. 0132355 (7/01-6/04) with Cornell University.\$\$...”.

36.

Defendant Cornell is funded in part by the State of New York, as is evidenced by a Cornell web page at www.info.cornell.edu/CUFACTS/ that states in part

"... College of Agriculture and Life Sciences* ...[is a]... * New York State- assisted unit. ..."

and a web page at campusgw.library.cornell.edu/gateway.html of the unit of Defendant Cornell that administers the e-print archives saying that it also administers library matters for "... Science and Technology ... Agriculture ..." with a link from the word "Agriculture" to a web page at campusgw.library.cornell.edu/cgi-bin/subj.cgi?subject=Agriculture.

37.

Plaintiff Smith is a member of the State Bar of Georgia, and of the Bars of this U. S. District Court for the Northern District of Georgia, the Eleventh Circuit Court of Appeals, and the Supreme Court of the U. S. , and his actions as counsel in this action, including his likely testimony as a witness, are permitted under Article I, Section I, Paragraph XII of the Constitution of the State of Georgia, which states: "Right to the courts. No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.", and under exception (3) of Rule 3.7(a) of the State Bar of Georgia

Rules of Professional Conduct, which states: “RULE 3.7 LAWYER AS WITNESS (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: ... (3) disqualification of the lawyer would work substantial hardship on the client.”.

GENERAL FACTUAL ALLEGATIONS

38.

Plaintiffs incorporate by reference and reallege paragraphs 1-37 of this complaint.

39.

Defendants’ discriminatory conduct, their intentional, reckless, and negligent failure to take action to remedy the discriminatory conduct deprived Plaintiff Smith of his liberty and freedom of speech and expression to express his ideas through a federally funded organ of expression, the e-print archives, without due process.

40.

At all relevant times, Defendants Defendants Paul Ginsparg, Simeon Warner, Richard Luce, John C. Browne, Robert L. Van Ness, Sarah Thomas and Jean Poland were acting within the course and scope of their employment and under color of state law.

41.

Defendants failed to take steps to address or prevent the harm to Plaintiff Smith, including, but not limited to:

- failing to allow Plaintiff Smith to submit his scientific work;
- failing to register Plaintiff Smith as an author;
- failing to carry out the policy of open authorship for the e-print archives;
- failing to provide a forum and procedure for contesting rulings by the e-print archives.
- failing to properly train and supervise employees;
- failing to educate employees about statutory and constitutional requirements;
- and failing to implement guidelines and training programs.

42.

The acts and omissions of the Defendants not only failed to remedy, but also fostered and promoted the denial of freedom of speech and expression without due process suffered by Plaintiff Smith.

43.

The acts and omission alleged above by Defendants were committed in bad faith and with deliberate indifference towards the rights and well being of Plaintiff Smith.

44.

At all relevant times, Defendants Simeon Warner, Richard Luce, Sarah Thomas and Jean Poland were acting in a ministerial, operational, and non-discretionary capacity and/or performing ministerial, operational, and non-discretionary functions or duties.

45.

At all relevant times, Defendants Paul Ginsparg, John C. Browne, and Robert L. Van Ness owed a ministerial, operational, and non-discretionary duty to Plaintiff Smith to take reasonable care in training and supervising employees and subordinates.

FIRST CLAIM FOR RELIEF

46.

Plaintiff Smith incorporates by reference and realleges paragraphs 1-45 of this complaint.

47.

The above-described conduct by Defendants violated the right of Plaintiff Smith not to be deprived of equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §11 of the Constitution of the State of New York and 42 U.S.C. § 1983.

48.

Plaintiff Smith requests that the Court:

order Defendants Cornell and its employees and to cease and desist from taking any action inconsistent with the policy of open authorship for the e-print archives,

and to correct and rectify any and all past actions inconsistent with the policy of open authorship for the e-print archives,

and to provide a forum and procedure for contesting rulings by the e-print archives;

or, in the alternative,

order Defendants LANL, DOE, and Cal and their employees to cease and desist acting as primary backup for the e-print archives,

and to resume full administration of the e-print archives using the data, equipment, and personell under their possession or control,

and to cease and desist from taking any action inconsistent with the policy of open authorship for the e-print archives,

and to correct and rectify any and all past actions inconsistent with the policy of open authorship for the e-print archives,

and to provide a forum and procedure for contesting rulings by the e-print archives.

SECOND CLAIM FOR RELIEF

49.

Plaintiff Smith incorporates by reference and realleges paragraphs 1-48 of this complaint.

50.

The above described conduct by Defendants violated Plaintiff Smith's right to freedom of speech under the First Amendment of the United State Constitution, Article I, § 8 of the Constitution of the State of New York and 42 U.S.C. § 1983 by deterring Plaintiff Smith from exercising his First Amendment rights.

51.

Plaintiff Smith requests that the Court:
order Defendants Cornell and its employees and to cease and desist from taking any action inconsistent with the policy of open authorship for the e-print archives,
and to correct and rectify any and all past actions inconsistent with the policy of open authorship for the e-print archives,
and to provide a forum and procedure for contesting rulings by the e-print archives;

or, in the alternative,
order Defendants LANL, DOE, and Cal and their employees to cease and

desist acting as primary backup for the e-print archives,
and to resume full administration of the e-print archives using the data,
equipment, and personell under their possession or control,
and to cease and desist from taking any action inconsistent with the policy
of open authorship for the e-print archives,
and to correct and rectify any and all past actions inconsistent with the
policy of open authorship for the e-print archives,
and to provide a forum and procedure for contesting rulings by the e-print
archives.

THIRD CLAIM FOR RELIEF

52.

Plaintiff Smith incorporates by reference and realleges paragraphs 1-51 of this complaint.

53.

Defendants Paul Ginsparg, John C. Browne, and Robert L. Van Ness were negligent in failing to adequately train and supervise their employees and subordinates. Defendants' negligent failure to train and supervise was done in bad faith.

54.

As a result of Defendants' negligence, Plaintiff Smith was deprived

of the benefits of the submission of important scientific work to the scientific community in a timely fashion.

55.

Plaintiff Smith requests that the Court order Defendants to provide adequate training and supervision of their employees and subordinates.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Smith respectfully requests that the Court:

(a) order Defendants Cornell and its employees and to cease and desist from taking any action inconsistent with the policy of open authorship for the e-print archives,
and to correct and rectify any and all past actions inconsistent with the policy of open authorship for the e-print archives,
and to provide a forum and procedure for contesting rulings by the e-print archives;

or, in the alternative,
order Defendants LANL, DOE, and Cal and their employees to cease and desist acting as primary backup for the e-print archives,
and to resume full administration of the e-print archives using the data,

equipment, and personell under their possession or control,
and to cease and desist from taking any action inconsistent with the policy
of open authorship for the e-print archives,
and to correct and rectify any and all past actions inconsistent with the
policy of open authorship for the e-print archives,
and to provide a forum and procedure for contesting rulings by the e-print
archive.

(b) order Defendants to provide adequate training and supervision
of their employees and subordinates;

(c) Award Plaintiff Smith his costs, expenses, and reasonable
attorneys' fees pursuant to, inter alia, 42 U.S.C. § 1988, 28 U.S.C. § 2412
and other federal and state laws;

(d) Grant such other and further relief as the Court may deem just
and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, Plaintiff

demands trial by jury for all of the issues pled herein so triable.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY
RELIEF, AND NO OTHER JUDGE HAS REFUSED SUCH RELIEF AS
IS SOUGHT HEREIN.

Respectfully submitted this 6 day of December, 2002.

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