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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MATTHEW KATZER, an individual, KAMIND )  
ASSOCIATES, INC., an Oregon corporation dba )  
KAM Industries, and KEVIN RUSSELL, an )  
individual, )  
 )  
Defendants. )

Case Number C06-1905-JSW

Hearing Date: June 30, 2006  
Hearing Time: 9:00am  
Place: Ct. 2, Floor 17

Hon. Jeffrey P. White

DEFENDANTS MATTHEW  
KATZER AND KAMIND  
ASSOCIATES, INC.'S SPECIAL  
MOTION TO STRIKE PLAINTIFF'S  
LIBEL CLAIM UNDER CAL. CIV.  
PROC. CODE § 425.16;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF

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**NOTICE**

To the court and all interested parties, please take notice that a hearing on Defendants Matthew Katzer and Kamind Associates, Inc.’s Special Motion to Strike Plaintiff’s Libel Claim under Cal. Civ. Proc. Code § 425.16 will be held on June 30, 2006 at 9:00 a.m. in Courtroom 2, Floor 17, of the above-entitled court located at 450 Golden Gate Avenue, San Francisco, California.

**MOTION**

Defendants Matthew Katzer and Kamind Associates, Inc. (“KAM”) move the court for an order striking plaintiff’s Libel claim and awarding the Defendants their attorney fees in the amount of \$11,550 against plaintiff Jacobsen for bringing this motion pursuant to California’s Anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, and rely on the attached Declaration of R. Scott Jerger in support of this request for attorney fees.

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1 **SUMMARY OF ARGUMENT**

2 Jacobsen’s complaint alleges that KAM and Katzer “libeled” Jacobsen by filing a FOIA  
3 request with the DOE and implying that the JMRI project was infringing on KAM’s patent.  
4 Complaint ¶¶ 106-113.

5 Jacobsen’s libel claim should be stricken from the Complaint. The FOIA request is a  
6 protected communication under California’s anti-SLAPP statute since it was made pursuant to  
7 and in connection with an official proceeding authorized by law made in anticipation of bringing  
8 legal action against Jacobsen. *Briggs v. v. Eden Council for Hope and Opportunity*, 19 Cal. 4<sup>th</sup>  
9 1106, 1121 (1999); *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4<sup>th</sup> 719, 729 (2005).

10 Jacobsen cannot establish a probability of success on the merits of his libel claim. First,  
11 the FOIA request contains no statements of fact, and therefore cannot be libel. *Okun V. Superior*  
12 *Court*, 29 Cal. 3d, 442, 450 (1981). Second, the FOIA request is an absolutely privileged  
13 communication under California’s litigation privilege (Cal. Civ. Code § 47(b)) as a  
14 communication made in anticipation of litigation. *Rubin v. Green*, 4 Cal. 4<sup>th</sup> 1187, 1194-1195  
15 (1993).

16 **STATEMENT OF ISSUES TO BE DECIDED**

- 17 1. Does a written request to a government agency pursuant to the Freedom of Information  
18 Act, 5 U.S.C. § 552 (“FOIA”) constitute a protected activity within the meaning of  
19 California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16?  
20 2. If a FOIA request is a protected activity under Cal. Civ. Proc. Code § 425.16, can the  
21 plaintiff demonstrate a probability that the plaintiff will prevail on his libel claim based  
22 on a FOIA request sufficient to survive this Cal. Civ. Proc. Code § 425.16 special motion  
23 to strike?  
24  
25  
26

## STATEMENT OF RELEVANT FACTS

1  
2 KAM is a software company based in Portland, Oregon that develops software for model  
3 railroad enthusiasts. Katzer is KAM's chief executive officer and chairman of the board of  
4 directors. Katzer Decl. ¶ 2. KAM's attorney, Kevin Russell ("Russell") is also a defendant in  
5 this case. Katzer Decl. ¶ 3. The Java Model Railroad Interface ("JMRI") project is an online,  
6 open source community that also develops software for model railroad enthusiasts. Complaint ¶  
7 2. KAM believes that certain JMRI software infringes on KAM's patents. Katzer Decl. ¶ 3.  
8 KAM had reason to believe that the United States Department of Energy ("DOE") was  
9 sponsoring the JMRI project, including KAM's knowledge of previous government sponsorship  
10 of model railroad software projects and KAM's discovery of the DOE affiliation of an email  
11 address used to promote JMRI. Katzer Decl. ¶ 4. On October 7, 2005 Russell sent a request to  
12 the DOE under the Freedom of Information Act on behalf of KAM to obtain any publicly  
13 available information subject to disclosure under the FOIA about activities that appeared that  
14 might be potentially adverse to KAM and its interests. Katzer Decl. ¶ 3.

## ARGUMENT

15  
16 Section 425.16 of the California Code of Civil Procedure is referred to as the "anti-SLAPP  
17 statute." SLAPP suits are "strategic lawsuits against public participation." The statute provides  
18 that:

19 A cause of action against a person arising from any act of that person in  
20 furtherance of the person's right of petition or free speech under the United States  
21 or California Constitution in connection with a public issue shall be subject to a  
22 special motion to strike, unless the court determines that the plaintiff has  
23 established that there is a probability that the plaintiff will prevail on the claim.

24 Cal. Code Civ. Pro § 425.16(b)(1).

25 The anti-SLAPP statute contains an express directive that it is to be "construed broadly."  
26 Cal. Code Civ. Pro § 425.16(a). California courts, including the California Supreme Court, have  
taken this directive very seriously. *Briggs v. v. Eden Council for Hope and Opportunity*, 19 Cal.

1 4<sup>th</sup> 1106, 1121 (1999); *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4<sup>th</sup> 719, 729  
2 (2005). The anti-SLAPP statute applies to “communications designed to prompt official action,”  
3 which certainly is the case here. *Fontani* at 731.

4 Defendants' motion is timely as it is being filed within 60 days of service of the  
5 Complaint. Cal. Code Civ. Pro § 425.15(f). This court has found that a state law libel claim may  
6 be the subject of an anti-SLAPP motion to strike in federal court. *Globetrotter Software, Inc. v.*  
7 *Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999). Additionally,  
8 defendants' motion properly takes the form a “special motion to strike” as required by the Ninth  
9 Circuit Court of Appeal. *United States of America et al. v. Lockheed Missiles and Space Co.,*  
10 *Inc.*, 190 F.3d 963, 973 (9<sup>th</sup> Cir. 1999).

11 Plaintiff Jacobsen has asserted a libel claim under California law against all defendants  
12 predicated solely on KAM's Freedom of Information Act (“FOIA”) request to the United States  
13 Department of Energy (“DOE”) dated October 27, 2005. Complaint ¶¶ 106-113. The FOIA  
14 request is attached as Exhibit 1 to Matt Katzer's Declaration in support of this Motion.  
15 Specifically, plaintiff Jacobsen alleges that the statement in the FOIA request that “KAMIND  
16 Associates Inc...has patents being infringed by the JMRI project sponsored by the LAB” has  
17 libeled Jacobsen. Complaint ¶ 107.<sup>1</sup>

18 Determining whether Jacobsen's libel claim should be stricken under the anti-SLAPP  
19 statute is a two step process. Defendants Katzer and KAM must make an initial *prima facie*  
20 showing that Jacobsen's libel claim arises from a protected activity, an act in furtherance of the  
21 defendants' right of petition or free speech. *Globetrotter* at 1129. If defendants make this  
22 showing, the burden shifts to Jacobsen to demonstrate a probability of prevailing on the libel  
23 claim. *Id.*

24  
25  
26 <sup>1</sup> It is difficult to comprehend how making a FOIA request could possibly constitute an act of "libel." Defendants are not aware of any case law that would support such a result as discussed *infra*.

1 **A. The FOIA request is a Protected Activity under California's Anti-SLAPP statute**

2 Jacobsen's libel cause of action is based solely on KAM's FOIA request. Complaint ¶¶  
 3 106-113. Section 425.16 protects any act "in furtherance of [Katzner and KAM's] right of free  
 4 speech under the United States or California Constitution in connection with a public issue...".  
 5 Cal. Code Civ. Pro § 425.16(b)(1). The anti-SLAPP statute defines categories of acts "in  
 6 furtherance of a person's right of petition or free speech...in connection with a public issue."  
 7 Cal. Code Civ. Pro § 425.16 (e). Two of the relevant categories in this case include "any written  
 8 or oral statement or writing made before a legislative, executive, or judicial body, or any other  
 9 official proceeding authorized by law..." and "any written or oral statement or writing made in  
 10 connection with an issue under consideration or review by a legislative, executive, or judicial  
 11 body, or any other official proceeding authorized by law...". Cal. Code Civ. Pro § 425.16 (e)(1),  
 12 (2).

13 Since Katzner and KAM are seeking to strike a cause of action arising from statements  
 14 made before a legislative, executive or judicial or any other official proceeding or in connection  
 15 with such a proceeding, KAM and Katzner need not show that the statements were made in  
 16 connection with a public issue. *See Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.  
 17 4<sup>th</sup> 1106, 1123 (1999).

18 1. The FOIA request was made pursuant to and in connection with an "official  
 19 proceeding authorized by law"

20 The Freedom of Information Act requires federal agencies to make available to the public  
 21 certain agency records upon written request from a member of the public. *See generally*, 5  
 22 U.S.C. § 552. The statute creates a process by which members of the public are permitted to  
 23 request such records and a process for agency processing and response to such record requests. 5  
 24 U.S.C. § 552(3). The DOE has published implementing regulations further regulating the  
 25 processing of a FOIA request by the DOE. 10 C.F.R. § 1004.  
 26

1 Pursuant to the Freedom of Information Act, KAM sent a FOIA request to the DOE  
2 requesting documents relating to the Java Model Railroad Interface (“JMRI”) program. Katzer  
3 Decl., Exhibit 1. KAM sent this request in an effort to gain information regarding potential  
4 infringement of patents owned by KAM in anticipation of litigation. Katzer Decl. ¶¶ 5, 7.  
5 Katzer reasonably believed that the DOE sponsored the JMRI project based on the fact that  
6 plaintiff Jacobsen promoted the JMRI project in at least 2,320 emails from a government email  
7 address hosted by the DOE and based on the fact that governmental agencies have historically  
8 sponsored model railroad software of this type. Katzer Decl. ¶ 4.

9 The FOIA request was made pursuant to and in connection with an “official proceeding  
10 authorized by law” and is therefore a protected activity under California’s anti-SLAPP statute.  
11 There is no question under California law that the DOE is an “official body authorized by law.”  
12 Administrative agencies are exactly the “official bodies” envisioned by the California legislature  
13 when it drafted the anti-SLAPP legislation and by California courts that have interpreted this  
14 language. *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4<sup>th</sup> 719, 729 (2005) (finding  
15 that the anti-SLAPP statute applies to governmental agencies); *Briggs* at 1121 (holding that the  
16 anti-SLAPP law protects “all direct petitioning of governmental bodies including courts and  
17 administrative agencies).

18 Likewise, the FOIA request is an official “proceeding” under California law. Federal law  
19 establishes a regimented procedure for obtaining information from federal agencies. KAM’s  
20 FOIA request was authorized by and sent pursuant to this law. The FOIA request was designed  
21 to obtain information on the JMRI project from DOE, and to alert the DOE that the JMRI project  
22 was infringing on KAM patents. Katzer Decl ¶ 5. The DOE was required by law to respond to  
23 the FOIA request.

24 While no California anti-SLAPP case specifically addresses a FOIA request, California  
25 courts have held, time and time again, that communications intended to prompt a governmental  
26 agency charged with enforcing the law to investigate or remedy a wrongdoing are protected

1 communications. See *Briggs* at 1123, *Fontani* at 729. The California Supreme Court has held  
2 that the constitutional right to petition includes the basic act of seeking administrative action.  
3 *Briggs* at 1115. This principle has been applied to (1) a letter that a defendant had sent to various  
4 celebrities seeking support for a complaint the defendant initiated to the Attorney General (*Dove*  
5 *Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4<sup>th</sup> 777, 784 (1996)), and (2) a  
6 complaint filed with the Securities and Exchange Commission (*ComputerXpress, Inc. v. Jackson*,  
7 93 Cal. App. 4<sup>th</sup> 993 (2001)).

8 Similarly, in cases interpreting the exact language at issue under the litigation privilege  
9 statute (Cal. Civ. Code § 47(b)), California courts have held that similar information requests to  
10 government agencies constitute “official proceedings authorized by law.” Since Cal. Civ. Code  
11 § 47(b) contains the same language as the anti-SLAPP statute, California Courts have used cases  
12 interpreting the litigation privilege to inform the anti-SLAPP analysis. See e.g., *Mann v. Quality*  
13 *Old Time Service, Inc.*, 120 Cal. App 4<sup>th</sup> 90, 108-109 (2004). The California Supreme Court has  
14 held that the litigation privilege applies to a communication intended to prompt an administrative  
15 agency charged with enforcing the law to investigate or remedy a wrongdoing. *Hagberg v.*  
16 *California Federal Bank*, 32 Cal. 4<sup>th</sup> 350, 362 (2004) (citing cases finding a letter urging the  
17 Office of Attorney General to institute an investigation privileged, a malicious report to the  
18 DMV privileged, a complaint to the Division of Real Estate privileged, a report of governmental  
19 malfeasance by a whistleblower privileged, and complaints to administrative agencies to  
20 investigate wrongdoing privileged). The privilege protects communications to or from  
21 government officials that precede the initiation of formal proceedings. *Id.* citing *Slaughter v.*  
22 *Friedman*, 32 Cal. 3d 149 (1982). Since the FOIA request was made pursuant to and in  
23 connection with an “official proceeding authorized by law,” and was intended to prompt the  
24 DOE to answer the information request and investigate JMRI activities, it is a protected activity  
25 under the California anti-SLAPP statute.  
26

2. The FOIA request was made in anticipation of bringing legal action against Jacobsen

Alternatively, the FOIA request is a protected activity as it was made in anticipation of bringing a legal action against Jacobsen. The California Supreme Court has held that “communications preparatory to or in anticipation of the bringing of an action or other official proceeding...are...entitled to the benefits of section 425.16.” *Briggs* at 115, *see also Dove Audio Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4<sup>th</sup> 777, 784. As discussed above, the anti-SLAPP law is to be construed broadly. The FOIA request was sent in an effort to gain information in anticipation of a possible patent infringement suit. Katzer Decl. ¶ 7. A FOIA request sent in anticipation of litigation is protected activity under the California anti-SLAPP statute.

Lastly, as a matter of public policy, a FOIA request is exactly the type of communication that the California anti-SLAPP law is intends to protect. It is in the public interest to encourage free speech and public participation in and investigation of matters of public significance, and the ability of the public to investigate and research government records should not be chilled by the spectre of retaliatory litigation. *Cf.* Cal. Code Civ. Pro § 425.16 (a).

**B. Jacobsen cannot establish a probability of success on the merits of his libel claim**

The second inquiry under section 425.16 is whether Jacobsen can establish a probability of success on the merits of his libel claim. To establish this, Jacobsen must offer enough admissible evidence to make a *prima facie* showing of facts that would merit a favorable judgment. *Fontani* at 842. As an initial matter, Jacobsen cannot show that Katzer individually “libeled” him, as the FOIA request explicitly states it is made on behalf of KAM. *Exhibit 1* to Katzer Decl.

Under California law, libel is “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” Cal. Civ. Code § 45. An essential element of libel is

1 that the publication in question must contain a false *statement of fact*. *Okun V. Superior Court*,  
 2 29 Cal. 3d, 442, 450 (1981). Here, the FOIA request contains no statement of fact at all, rather it  
 3 is a request for information pursuant to federal law. To the extent that the FOIA request contains  
 4 any statements other than information request, it only contains statements of opinion, not  
 5 statements of fact. Reasonable people can differ as to whether a patent is being infringed. *CMI*,  
 6 *Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1084 (W.D. Ky. 1995)

7 Additionally, Jacobsen cannot show a probability of success on this claim because the  
 8 FOIA request is absolutely privileged by virtue of the litigation privilege codified in California  
 9 Civil Code section 47(b).<sup>2</sup> Under section 47(b), the statements in the FOIA request are  
 10 privileged communications made in a “judicial proceeding” or, alternatively, communications  
 11 made in an “official proceeding authorized by law” Regarding the former, the 47(b) privilege is  
 12 extremely broad and applies to communications so long as they have “some relation” to an  
 13 anticipated lawsuit. *Rubin v. Green*, 4 Cal. 4<sup>th</sup> 1187, 1194-1195 (1993). The privilege  
 14 encompasses not only testimony made in court statements and pleadings, but also statements  
 15 made prior to filing a lawsuit whether in preparation for anticipated litigation or to investigate  
 16 the feasibility of filing a lawsuit. *Id.*

17 As discussed above, KAM filed the FOIA request in anticipation of filing a patent  
 18 infringement suit against JMRI. The litigation privilege is “intended to assure utmost freedom of  
 19 communication between citizens and public authorities whose responsibility is to investigate and  
 20 remedy wrongdoing.” *Fontani* at 842-843 *citing Hagberg* at 360. The California litigation  
 21 privilege statute’s protection is not limited to statements made in a courtroom or administrative  
 22 proceedings, but also includes communications that are part of an investigatory process that may

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24 <sup>2</sup> Cal Civ. Code § 47 provides:

25 A privileged publication or broadcast is one made:

- 26 (a) In the proper discharge of an official duty.  
 (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by  
 law, or (4) in the initiation or course of any other proceeding authorized by law...

1 lead to a later proceeding. *Id.* The privilege extends to preparatory communications  
2 investigating the feasibility of filing a lawsuit, including “communications with ‘some relation to  
3 a proceeding that is...under serious consideration’ to ‘potential court actions’ to ‘preliminary  
4 conversations and interviews related to contemplated action’ and we also have determined that  
5 the privilege applies to communications made, prior to the filing of a complaint, by a person  
6 ‘meeting and discussing’ with potential parties the ‘merits of the proposed...lawsuit.” *Hagberg*  
7 at 810 citing *Rubin v. Green* at 1194-1195. Clearly, the FOIA request -- which was made in  
8 anticipation of litigation and seeks information specifically relating to potential JMRI  
9 infringements of KAM patents -- is a privileged communication under California’s litigation  
10 privilege law.

11 Alternatively, the FOIA request is a privileged communication made in “any other  
12 official proceeding authorized by law.” The FOIA request was sent in conformity with the  
13 formalities of the federal Freedom of Information Act and the DOE, as the keeper of the relevant  
14 records, was required by law to respond to the request. The privilege protects “communications  
15 to or from governmental officials which may precede the initiation of formal proceedings.”  
16 *Slaughter v. Friedman*, 32 Cal. 3d 149, 15 (1982).

17 As discussed in subsection A above, there are numerous instances where California  
18 courts have held that communications to administrative agencies are privileged under 47(b). A  
19 California Court has recently found that allegedly “harassing” reports that a company was  
20 “pouring illegal carcinogenic chemicals into public drainage systems throughout Southern  
21 California” to government agencies were absolutely privileged communications under Cal. Civ.  
22 Code § 47(b) regardless of whether the communication was made with malice or the intent to  
23 harm. *Mann* at 106-109. The allegation in the FOIA request submitted to the DOE regarding  
24 patent infringement is a reasonable statement of opinion associated with a valid information  
25 request. Under the logic of *Mann* and the other California cases interpreting the privilege in the  
26

1 context of communications to governmental agencies, the FOIA request is entitled to the  
2 protection of the statute as a privileged communication.

3 **C. Katzer and KAM are entitled to prevailing party attorney fees**

4 Section 425.16(c) provides that “a prevailing defendant on a special motion to strike shall  
5 be entitled to recover his or her attorneys’ fees and costs.” Under this provision, “any SLAPP  
6 defendant who brings a successful motion to strike is entitled to mandatory attorney fees.”  
7 *Ketchum v. Moses*, 24 Cal. 4<sup>th</sup> 1122, 1131 (2001). Therefore, should Katzer and KAM prevail on  
8 this special motion to strike, they are entitled to recover their reasonable attorney fees incurred in  
9 the amount of \$11,550. See Jerger Decl. ¶ 3.

10 **D. Conclusion**

11 Based on the above, this Court should grant KAM and Katzer’s special motion to strike  
12 Jacobsen’s libel claim and award KAM and Katzer reasonable attorney fees in the amount of  
13 \$11,550.

14 Dated May 15, 2006.

15 \_\_\_\_\_  
16 /s/  
17 R. Scott Jerger (*pro hac vice*)  
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24 I certify that on May 15, 2006, I served Matthew Katzer’s and KAM’s corrected Special  
25 Motion to Strike and Supporting Memorandum on the following parties through their attorneys  
26 via the Court’s ECF filing system:

27 Victoria K. Hall  
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36 /s/  
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