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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT JACOBSEN,

Plaintiff,

vs.

MATTHEW KATZER, KAMIND ASSOCIATES, INC., and KEVIN RUSSELL,

Defendants.

Case No. C 06 1905 JSW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION [F. R. CIV. P. 12(b)(2)] AND FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED [F. R. Civ. P. 12(b)(6)]

Date: August 4, 2006
Time: 9:00 a.m.
Dept: Courtroom 2, 17th floor
Hon. Jeffrey S. White

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SUMMARY OF ARGUMENT

Jacobsen's complaint is essentially for declaratory relief, dressed up with the usual allegations of inequitable conduct, attempted monopolization, and state-law torts. It contains two claims against Russell, KAM's attorney. Count 7 alleges Russell "libeled" Jacobsen in a FOIA request by implying that he infringed KAM's patent. Count 5 says he violated California's unfair practices law, Cal. Bus. & Prof. Code § 17200 et seq., by conspiring with his client to commit attempted monopolization.

Both claims are deficient. Counsel knows of no authority that a simple charge of patent infringement can constitute "libel." *See Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* 100 Cal. App. 4th 1017 (2002). This absence of precedent is persuasive; if such statements were actionable libel, virtually every complaint for declaratory relief would include a libel claim. Claims against attorneys for "conspiring" with a client are disfavored. California law requires plaintiffs to petition for a court order before filing such a claim unless it falls within one of two narrow exceptions--neither of which applies. Cal. Civ. Code § 1714.10. Federal antitrust law permits such claims only if the plaintiff shows the attorney's influence caused the allegedly anticompetitive conduct. *Amarel v. Connell*, 102 F.3d 1494, 1522-23 (9th Cir. 1996). Jacobsen filed no petition and makes no such showing, and he fails to state a claim against Russell.

Finally, no basis exists for personal jurisdiction. Russell is domiciled in Oregon and has no California contacts to support general jurisdiction. Jacobsen's only "ground" for jurisdiction is that Russell sent cease and desist letters to Jacobsen and sent a FOIA request, functionally identical to a cease and desist letter, to a government agency believed to sponsor the infringing product. Cease and desist letters will not support jurisdiction. *Yahoo! Inc. v. La Ligue contre le Racisme et l'Antisemitisme*, 433 F.3d 1199, 1208-09 (9th Cir. 2006).

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether Count 5 of the Complaint for libel states a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6).

2. Whether Count 7 of the Complaint states a claim on which relief can be granted against defendant Kevin Russell, as an attorney for alleged conspiracy with his client. Fed R. Civ. P. 12(b)(6).

3. Whether personal jurisdiction is proper as to defendant Kevin Russell. Fed. R. Civ. P. 12(b)(2).

STATEMENT OF FACTS

1. Allegations relevant to the motion to dismiss for failure to state a claim on which relief can be granted. F. R. Civ. P. 12(b)(6).

For purposes of the motion to dismiss for failure to state a claim *only*, Russell assumes that the following allegations are true.

Jacobsen is a University of California professor and a model railroad enthusiast. As part of his hobby he helps develop and promote open source software for use by other model railroad hobbyists ("JMRI project"). The project is apparently not a business entity and distributes its product free of charge on the internet. Complaint, ¶ 2. KAM is an Oregon corporation, Matthew Katzer is its principal, and Russell is its attorney. ¶'s 3-5. Katzer developed and patented software similar to the JMRI product. KAM owns the patents and competes with JMRI. Jacobsen alleges that in obtaining his patents Katzer failed to disclose prior art to the Patent Office and that the patents are unenforceable by reason of such allegedly inequitable conduct. ¶'s 11-38.

The complaint contains five allegations against Russell. First, it charges that in applying for two recent KAM patents, Russell failed to provide information relating to prior art. Complaint, ¶ 25. Second, Jacobsen alleges that Russell knew KAM's original '329 patent was invalid or unenforceable and filed and withdrew two allegedly "baseless" lawsuits against third parties for infringement of KAM's patents (he does not allege that the " baseless" complaints were *served*). Third, he says Russell sent demand letters to

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Jacobsen stating that JMRI infringed the '329 patent, offered to license the patent, and followed up with invoices for accrued royalties. ¶'s 58-63.

Fourth, Jacobsen states that "on occasion" he used an e-mail account belonging to the United States Department of Energy (DOE) to promote JMRI, and Russell sent a FOIA request to DOE seeking to discover his JMRI correspondence. Complaint, ¶ 64. Allegedly, the request "falsely accused Jacobsen of patent infringement and claimed the [Berkeley Livermore] Lab had sponsored the allegedly infringing JMRI project activities." Jacobsen says the request was intended to "embarrass Plaintiff Jacobsen and to intimidate him into shutting down the JMRI project and paying royalties to Defendant KAM." ¶'s 65 and 66.

Fifth, Jacobsen alleges that Russell drafted an agreement conveying a domain name from KAM to a third person. Complaint, 33:4-11. Jacobsen claims he had prior rights to the domain name as a trademark, and alleges Katzer had knew the mark was Jacobsen's and improperly registered it. Complaint, ¶'s 98-105.

Count 4 of the complaint alleges that KAM has market power and that its attempts to enforce its patent amount to attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2. Complaint, ¶ 's 85-94. Russell is named as a defendant in Count 5, based on an identical antitrust theory under California's unfair practices law, Cal. Bus. & Prof. Code § 17200. Count 5 incorporates all prior allegations in the complaint and states that Russell conspired with his client to engage in anticompetitive activity. ¶'s 95-97.

Count 7 alleges that Russell committed libel by "falsely accusing Plaintiff Jacobsen and seeking documents related to the JMRI project" in the FOIA request. Complaint, ¶ 107. It states on information and belief that Russell knew "DOE had nothing to do with the JMRI Project, but made the allegation to effect Defendants' goal to shut down the JMRI Project and to pay royalties to Defendant KAM." ¶ 111. Allegedly, the request embarrassed Jacobsen and prevented his earning income because he diverted time to explaining the request. ¶'s 112-113.

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2. Facts relevant to personal jurisdiction (Fed. R. Civ. P. 12(b)(2).

Unlike the motion to dismiss for failure to state a claim, a motion for lack of jurisdiction raises fact issues and places the burden of proof on Jacobsen. 2 William W. Schwarzer et al., *California Practice Guide: Federal Civil Procedure before Trial* ¶ 9:113-9:115 (2005).

Russell is domiciled in Oregon and has only one California client. He transacts no business in California, owns no property here and only occasionally visits California. Russell decl., ¶'s 1-4. The FOIA request was sent to the Department of Energy in Washington, D.C. in October, 2005. Exhibit 1 to Katzer decl. It states that KAM's patents "are being infringed by the JMRI project sponsored by the LAB [Berkeley Livermore Laboratory]." It does not expressly identify Jacobsen as an infringer, and it does not suggest that any person *willfully* infringed KAM's patent. Exhibit 1 to Russell decl. When the request was sent, KAM had good reason to believe DOE did sponsor the JMRI project. Other government agencies have helped promote open-source software. Katzer decl., ¶ 4.a. The DOE circulated a large volume of JMRI material; KAM was able to locate and down-load well in excess of 2,000 documents, including requests for funding, from the DOE account. Katzer decl., ¶'s 4.b.-4.d. KAM legitimately considered these activities hostile to its interests and legitimately sought information about those activities. Katzer decl., ¶ 7.

As it appeared the government was inadvertently competing with it , KAM also legitimately cautioned DOE that it believed the DOE's apparent sponsorship of the JMRI project might constitute patent infringement. Katzer decl., ¶ 7.

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ARGUMENT

Count 5 of the complaint should logically be last in order; it is a catch-all claim for relief that repeats Count 4 and conflates all the other claims into one. For purposes of economy Russell addresses Count 7 for libel, then Count 5, and finally the issue of personal jurisdiction.

A. Count 7 of the complaint for libel, fails to state a claim on which relief can be granted.

1. Count 7 of the complaint fails to state a claim on which relief can be granted for actual libel.

A statement is not libelous unless it is *defamatory*. A defamatory statement calls into question the plaintiff's "honesty, integrity or competence" or reasonably implies "any reprehensible personal characteristic." *Polygram Records, Inc. v. Superior Court* 170 Cal. App. 3d 543, 550 (1985). The Court determines as a matter of law whether the allegedly libelous statement is "fairly susceptible of a defamatory meaning." *Isuzu Motors v. Consumers Union of United States, Inc.*, 12 F. Supp.2d 1035, 1045-46 (C.D. Cal. 1998). A statement that only questions the quality of a plaintiff's product is not defamatory and is actionable, if at all, as trade libel or product disparagement. *Polygram Records* at 548-550. It is arguable that any unfavorable statement about a plaintiff's product reflect on his/her competence; however, California courts "have gone to some lengths" in refusing to draw that inference. *Isuzu Motors* at 1046.

Accusing a person of patent infringement is not defamatory in itself. It affects the plaintiff's property rather than his/her character and may imply nothing more than a difference of opinion:

> Depending on how a statement is made, a charge of patent infringement would not hold a company to hatred, ridicule or disgrace. Among business people, patents are known to be complicated and in infringement issues even more so. The statement by one party that another is infringing does not carry an intrinsic moral or business turpitude. For instance, it is not the same as calling one a liar, bankrupt or untrustworthy.

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CMI, Inc. v. Intoximeters, Inc., 918 F. Supp. 1068, 1084 (W.D.Ky. 1995); *accord Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017.[1]

California law does not consider charges of patent infringement defamatory. In *Atlantic Mutual*, a competitor sued J. Lamb, Inc. for falsely accusing the competitor of patent infringement. Lamb's insurer denied coverage and sought declaratory relief. Reversing judgment for the insurer, the court ruled that the "very broad 'personal injury' coverage" in Lamb's insurance policy "was intended for disparaging publications in addition to those that were solely defamatory." 100 Cal. App. 4th 1017, 1025. The personal injury clause covered any "oral or written publication of material that slanders or libels a person or organization or *disparages a person's or organization's goods, products or services*." *Id.* at 1032 (original emphasis). There was "coverage for product disparagement and trade libel as well as defamation," so that the insurer had a duty to defend the action. *Id.* at 1035. The charge of patent infringement was only disparaging--*it was not defamatory.*

Count 7 of the complaint alleges that Russell "libeled" Jacobsen in a FOIA request by stating that the JMRI project infringed KAM's patent. Jacobsen is mistaken. the statement was not defamatory because it affected only the JMRI product and not Jacobsen's personal reputation. *Atlantic Mutual*, 100 Cal.App.4th 1017, 1032-35. Patent law is complicated. Reasonable people often differ as to whether a patent is or is not infringed, and these differences are not (without more) actionable as defamation. *CMI, Inc.*, 918 F. Supp. 1068, 1084.

2. Count 7 fails to state a claim on which relief can be granted for trade libel.

Trade libel is "an intentional disparagement of the quality of property that results in pecuniary damages." *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1113 (C.D.

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[1]*But see Republic Tobacco Co. v. North Atlantic Trading Company, Inc.*, 381 F.3d 717, 728-730 (7th Cir. 2004) (A letter to customers stating that "Republic was involved in improperly defacing its competitor's merchandise and conducting its business in violation of trademark and patent laws" amounts to libel per se under Illinois law.

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Cal. 2003). The trade libel tort is limited to circumstances where a business can show it *lost customers and revenue*:

> To prove trade libel, Plaintiff must show (1) a statement that (2) was false, (3) disparaging, (4) published to others in writing, (5) induced others not to deal with it, and (6) caused special damages.

Id. "[T]he plaintiff must prove in all cases that the publication has played a material and substantial part inducing others not to deal with him, and that as a result he has suffered special damages." *Nichols v. Great American Ins. Companies*, 169 Cal. App. 3d 766, 773 (1985). Special damages must be pled with particularity. *New.Net* at 1113; Fed. R. Civ. P. 9(g). Plaintiff "may not rely on a general decline in business arising from the falsehood, and must instead identify particular customers and transactions of which [he] was deprived as a result of the [trade] libel." *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 109 (2004).

Count 7 fails to plead the elements of trade libel or any other tort, because it fails to show that Russell induced any person not to deal with Jacobsen. *New.Net*, 356 F. Supp. 2d 1090, 1113. Jacobsen does not plead special damages, let alone pled them with particularity. Instead, he asserts that the *FOIA* request "embarrassed and worried" him and "caus[ed] him to have to have to explain Defendants' harassing conduct to his employer" (Complaint, ¶ 113) and that he "had to divert significant work time from other projects to deal with the false statement and the FOIA request, resulting in a loss of income." Complaint, ¶ 96. h. He fails to state a claim. *New.Net* at 1113. Jacobsen is admittedly a *hobbyist*. He has not lost customers. He admits he never had any paying customers. Complaint, ¶ 2. He has not been damaged; he has been only inconvenienced in pursuing his hobby. Count 7 fails to state the elements of any tort and should be dismissed without leave to amend.

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B. Count five of the complaint for attorney-client conspiracy fails to state a claim on which relief can be granted.

1. Count 5 should be dismissed for failure to comply with Cal. Civ. Code § 1714. 10.

Lawsuits against attorneys for what they did in representing clients may chill advocacy, subvert the lawyer-client relationship and undermine the lawyer-client privilege. They are strongly disfavored.

Cal. Civ. Code §1714.10 "requires a plaintiff to obtain a court order prior to filing any claim premised upon an attorney's conspiracy with a client." *Flores v. Emerich & Fike,* 416 F. Supp.2d 885, 909 (E.D. Cal. 2006). The statute provides only two exceptions, if "(1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." Cal. Civ. Proc. Code § 1714.10 (c)[2]; *Berg & Berg Enterprises v. Sherwood Partners, Inc.*, 131 Cal. App. 4th 802, 815-18 (2005). The purpose of the petition requirement is to "weed out at an early stage unmeritorious conspiracy claims that disrupt the attorney-client relationship." *Berg & Berg Enterprises*, 131 Cal. App. 4th 802, 820. The requirement of a petition is "anomalous," because the exceptions only codify common law; unless the claim fits one of the two exceptions it lacks merit and should be dismissed in any event. *Berg & Berg Enterprises*, 131 Cal. App. 4th 802, 817-18.

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[2] Section 1714.10 states, in part: "(a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. . . . ."

"(c) This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.

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An attorney breaches an "independent legal duty" under the first exception if he/she commits an obvious tort such as actual fraud or malicious prosecution, or violates a fiduciary duty personally owed to a plaintiff. *Berg & Berg Enterprises*, 131 Cal. App. 4th 802, 824-825 and cases cited; Cal. Civ. Code § 1714.10 (c). Attorneys are not normally liable for a client's alleged antitrust violations. *Amarel v. Connell*, 102 F.3d 1494, 1522-23; *Brown v. Donco Enterprises, Inc.* (6th Cir. 1986) 783 F.2d 644, 645-47.

The second exception requires that the attorney's acts "go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." Cal. Civ. Code § 1714.10 (c)(2). "Financial gain" means "economic advantage over and above monetary compensation received in exchange for professional services actually rendered on behalf of a client." *Berg & Berg Enterprises*, 131 Cal.App.4th 802, 833-836.

An attorney who acts "solely on behalf of a client" is immune from antitrust liability. Liability applies only if the attorney exerted his influence "so as to direct [the client] to engage in the complained of acts for an anticompetitive purpose." *Amarel v. Connell*, 102 F.3d at 1522. Reasonable people often differ as to whether specific conduct is "anticompetitive." Attorneys "normally act in response to their clients' directives" and are required to "resolve doubts as to the bounds of the law" in their clients' favor. *Brown*, 783 F.2d at 646. They should not be held liable for what ethical canons require. *Id.* A complaint which only pleads acts performed by the attorney in his/her capacity as attorney should be dismissed without leave to amend. *Spanish International Communications Corp. v. Leibowitz*, 608 F. Supp. 178, 179-180 (S.D. Fla. 1985).

Count 5 fails to comply with the statute and should be dismissed. Cal. Civ. Code §1714.10. Jacobsen did not obtain a court order and does not plead either of the two statutory exceptions. Cal. Civ. Code § 1714.10 (c). As KAM's attorney, Russell did not owe an independent duty under the antitrust laws. If anyone breached such a duty, it was KAM. Jacobsen does not show that Russell acted in his own interest or in any capacity other than as KAM's attorney. He does not show that Russell exerted influence over his

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client. He does not state a claim on which relief can be granted. *Amarel v. Connell*, 102 F.3d 1494, 1522-23.

2. The conspiracy claim against Russell is contrary to policy and is brought for an improper purpose.

Claims against attorneys for conspiring with their clients them are disfavored because they "disrupt the attorney-client relationship." *Berg & Berg Enterprises*, 131 Cal. App. 4th 802, 820. They conflict with the attorney's ethical duty to his/her client. *Brown*, 783 F.2d 644, 645-47. They "place the attorney in a potentially adverse position to his client." *See Babb v. Superior Court*, 3 Cal. 3d 841, 847-48 (malicious prosecution actions are disfavored for that reason). They can be used to force the attorney to disclose client confidences.

Count 5 alleges a conspiracy to violate the unfair practices law ("UPL") which only provides for injunctive and restitutionary relief. Cal. Bus. & Prof. Code § 17200 et seq.; *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal.4th 1134 1144 (2003) . Jacobsen cannot recover damages from Russell under the UPL, and if Jacobsen obtains an injunction it will bind Russell as KAM's attorney. Plaintiff has no legitimate reason to name Russell as a defendant and has apparently named him in order to place him in a position adverse to his client, preclude a possible advice-of-counsel defense, and bypass attorney-client privilege. Such tactics are contrary to policy and should be rejected.

C. The complaint should be dismissed for lack of personal jurisdiction over Russell.

Unlike the motion to dismiss for failure to state a claim, the personal jurisdiction motion raises fact issues, and requires Jacobsen to prove facts sufficient to warrant jurisdiction over Russell. 2 William W. Schwarzer et al., *supra*, ¶ 9:113-9:115 (2005).

1. Russell has no ties with California that warrant general jurisdiction.

Unless a defendant's contacts with a forum are so substantial, continuous, and systematic that the defendant can be deemed to be "present" in that forum for all

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purposes, a forum may exercise only "specific" jurisdiction based on the relationship between the defendant's forum contacts and the plaintiff's claim. *Yahoo! Inc.*, 433 F.3d 1199, 1205 (9th Cir. 2006). Russell is domiciled in Oregon, owns no property in California, has only one California client, and transacts no business here. Russell decl., ¶'s 1-5. Thus jurisdiction is proper, if at all, *only* if based on specific jurisdiction. *Yahoo!*, at 1205.

2. The complaint fails to identify any adequate basis for specific jurisdiction over Russell.

From long experience with lawsuits like this one, the Federal Circuit holds that a patentee's cease and desist letters "are not sufficient to satisfy the requirements of Due Process in declaratory judgment actions," despite the "potentially direct relationship between such letters and a declaratory judgment action." *Red Wing Shoe Company v. Hockerson-Halberstadt, Inc.* 148 F.3d 1355, 1360 (Fed. Cir. 1998). This is true, even if a cease and desist letter or a press release impliedly threatening litigation is also sent to the plaintiff's customer. *Silent Drive, Inc. v. Strong Industries, Inc.*, 326 F.3d 1194, 1200-02 (Fed. Cir. 2003). "Principles of fair play and substantial justice afford a patentee sufficient latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign forum." *Red Wing, at 1360.* A different rule would frustrate the policy favoring settlement of disputes by forcing patentees to file suit without warning. *Id.* at 1360-61.

The Ninth Circuit follows *Red Wing.* Unless they are actually tortious or otherwise wrongful, ease and desist letters or communications threatening litigation are insufficient to create personal jurisdiction over the sender. *Yahoo!*, 443 F.3d 1199, 1208-09, and cases cited.

The complaint identifies only two grounds for personal jurisdiction over Russell. It states that the defendants "repeatedly sent monthly bills" for claimed royalties to Jacobsen, and that Russell "filed a Freedom of Information Act ('FOIA') request with the U.S. Department of Energy falsely accusing plaintiff Jacobsen of patent infringement,"

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and seeking access to "all of Jacobsen's e-mails relating to JMRI." Complaint, ¶ 7. The "monthly bills" were sent to support cease and desist letters stating that the JMRI product infringed KAM's patent and offering a licensing agreement. Complaint, ¶'s 58-63.

Neither of these allegations will support personal jurisdiction. "Monthly bills" for royalties that only emphasize claims made in a demand letter are no different from the demand letter itself. Even allegedly fraudulent bills do no harm to their recipient unless he/she pays them. They are conceptually indistinguishable from cease-and-desist letters and are not a basis for personal jurisdiction. *Yahoo!*, 443 F.3d 1199, 1208-09. To the extent the FOIA request expresses a belief that the DOE sponsored an infringing product, it is also no different from a cease and desist letter. It was "not abusive, tortious or otherwise wrongful." *Yahoo!*, 443 F.3d 1199, 1209. It did not harm Jacobsen or disrupt any business relationship of his.

Jacobsen attempts to plead around jurisdictional limits by calling the FOIA request a "libel." It is not. It does not accuse Jacobsen of dishonesty or incompetence. Exh. 1 to Russell decl. At most, it implies that Jacobsen promotes an infringing product, which is not defamatory. *Atlantic Mutual,* 100 Cal. App. 4th 1017, 1025, 1032-1035. If a simple charge of patent infringement is found "libelous," the entire *Red Wing* line of cases must be overruled. Any simple infringement letter to a manufacturer would then constitute "libel," either of the manufacturer or at least the responsible employee[s]. Jacobsen admittedly used his DOE account to promote a product he knew KAM would challenge. Complaint, 24:1-2. He invited inquiry by creating the impression DOE sponsored the project. Katzer decl., ¶ 4. The FOIA request cannot be distinguished from a cease and desist letter, and it cannot create jurisdiction where none exists. *Yahoo!*, 443 F.3d 1199, 1208-09.

Jacobsen also complains that the FOIA request "sought to gain access to" his e-mail communications about the JMRI project. Complaint, 4:9-11. Counsel has searched in vain for a case in which any person was accused of "wrongfully" seeking information in a FOIA request. The applicable DOE regulation, 10 C.F.R. §1004.10(b)(6), exempts

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"Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from disclosure under FOIA. Assuming the request was unduly intrusive, Jacobsen was adequately protected. There is no basis for jurisdiction over Russell. The complaint against him should be dismissed.

CONCLUSION

For the reasons stated, the complaint as against Russell should be dismissed without leave to amend.

Dated: May 10, 2006

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