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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: August 11, 2006
Hearing Time: 9:00am
Place: Ct. 2, Floor 17
Hon. Jeffrey S. White

DEFENDANTS MATTHEW
KATZER AND KAMIND
ASSOCIATES, INC.'S
MEMORANDUM IN REPLY TO
PLAINTIFF ROBERT JACOBSEN'S
MEMORANDUM IN OPPOSITION
TO DEFENDANT MATTHEW
KATZER AND KAMIND
ASSOCIATES, INC.'S SPECIAL
MOTION TO STRIKE PLAINTIFF'S
LIBEL CLAIM

1 **STATEMENT OF ISSUES TO BE DECIDED**

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

9 **STATEMENT OF RELEVANT FACTS**

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

22 **ARGUMENT**

23 **A. The FOIA request was made pursuant to and in connection with an “official proceeding**
24 **authorized by law”**

25 Jacobsen’s attempt to distinguish the FOIA request from a protected communication
26 made in an “official proceeding” tortures logic with semantics. KAM and Katzer’s FOIA

1 request is not a “minor business transaction,” nor it is a “transaction of money for copies,” nor,
2 clearly, is it an “attempted bribe.” Memorandum in Opposition to Defendant Matthew Katzer
3 and Kamind Associates, Inc.’s Special Motion to Strike Plaintiff’s Libel Claim (hereinafter
4 “Reponse”) at 7-9, 13. The FOIA request is a request for information pursuant to the Freedom of
5 Information Act sent to the FOIA officer of the US DOE. Pursuant to the FOIA statute, each
6 regulatory agency promulgates extensive rules regulating the production of documents. As
7 required by rule, the DOE charges for direct costs and copies of documents and the FOIA request
8 has a notation on it from the DOE, apparently, indicating the upper monetary limit that KAM and
9 Katzer were willing to pay for copies of the relevant documents. *See* 10 C.F.R. § 1004.9.

10 Likewise the fact that the FOIA request triggers a document production process as
11 opposed to an administrative investigation is a distinction without a difference. Jacobsen makes
12 this distinction since most of the cases involving protected communications under the anti-
13 SLAPP statute involve complaints to administrative agencies that are meant to trigger an
14 investigation. The distinction is not relevant to the threshold inquiry-which is whether the FOIA
15 request is in furtherance of KAM and Katzer’s right to petition the government. *Kajima Eng’g*
16 *& Construction, Inc. v. City of Los Angeles*, 95 Cal.App.4th 921, 924 (Ct. App. 2002). “[T]he
17 critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance of
18 the defendant’s right of petition or free speech.” *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78
19 (Cal. 2002). Clearly, the FOIA request falls within KAM and Katzer’s constitutional right to
20 petition the DOE. The California Supreme Court has held that “the constitutional right to
21 petition includes the basic act of seeking administrative action.” *Briggs v. Eden Council for Hope*
22 *& Opportunity*, 19 Cal.4th 1106, 1115 (Cal. 1999). To come under the purview of the anti-
23 SLAPP statute, the “statute requires simply *any* writing or statement made in, or connection
24 with, an issue under consideration or review by, the specified proceeding or body. [The anti-
25 SLAPP statute] safeguards free speech and petition conduct aimed at advancing self government,
26 as well as conduct aimed at more mundane pursuits.” *Id. citing Braun v. Chronicle Publishing*

1 *Company*, 52 Cal. App.4th 1036, 1046 (1997) (emphasis in original). A FOIA request ensures an
 2 informed citizenry, as discussed *infra*, is therefore an important check on the executive branch
 3 and part of a person’s right of petition and free speech.

4 Additionally, while it might be relevant in the litigation privilege context, whether the
 5 allegedly libelous statement in the FOIA request (the statement that the JMRI project sponsored
 6 by the DOE is infringing on KAM patents) is true or is a “hollow threat” (Response at 7), it is
 7 irrelevant to the issue of whether the FOIA request is a protected communication in an official
 8 proceeding under the anti-SLAPP act. The fact that KAM contacted a government agency
 9 requesting an administrative action is sufficient to bring the FOIA request within the protection
 10 of the anti-SLAPP statute. *Cf. Mann v. Quality Old Time Service, Inc.*, 120 Cal.App 4th 90, 105
 11 (Cal. App. 2004). The “validity” of the speech is not a proper inquiry in determining whether the
 12 anti-SLAPP statute potentially applies. *Id.* The merits of KAM’s infringement claim become
 13 relevant only at the second step of the anti-SLAPP analysis, where Jacobsen must present
 14 evidence showing a reasonable probability of success on his claims. *Id.* In *Mann*, the California
 15 Court of Appeal held that reports to the National Response Center and the National Terrorist
 16 Hotline *falsely* claiming that an industrial water system company was “pouring illegal
 17 carcinogenic chemicals into public drainage systems throughout Southern California” were
 18 protected as communications in furtherance of their constitutional right to petition the
 19 government. *Mann* at 101, 106 (emphasis added).

20 Since the FOIA request was made pursuant to in connection with an “official proceeding
 21 authorized by law,” and was intended to prompt the DOE to answer the information request and
 22 investigate JMRI activities, it is a protected activity under the California anti-SLAPP statute.

23 **B. The FOIA request was made in anticipation of bringing legal action against Jacobsen**

24 The FOIA request was sent by KAM in anticipation of bringing good faith litigation
 25 against JMRI for patent infringement. It seems disingenuous, at best, to attempt to claim, for
 26 purposes of avoiding KAM and Katzer’s Motion to Strike, that KAM and Katzer’s FOIA request

1 is a “hollow threat” that had a “remote chance” of being used in any litigation. Response at 7.
 2 Jacobsen has gone through the trouble of filing a declaratory action in federal court because he is
 3 “in reasonable and serious apprehension of imminent suit for infringement of the ‘329 patent.”
 4 Complaint, ¶ 6. Jacobsen cannot have it both ways. If Jacobsen truly believed that KAM and
 5 Katzer’s FOIA request was a tactical ploy to negotiate a bargain, this litigation would not have
 6 ensued.

7 The FOIA request was sent in an effort to gain information in anticipation of good faith
 8 litigation against JMRI for patent infringement. Katzer Decl. ¶ 7. The FOIA request is a
 9 reasonable tool to gain information about JMRI activities from the DOE since KAM and Katzer
 10 are aware of at least 2,230 emails from Jacobsen’s DOE email address promoting JMRI. Katzer,
 11 Decl. ¶ 4c. As a communication sent in anticipation of litigation, the FOIA request is protected
 12 activity under the California anti-SLAPP statute.

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

14 Once KAM and Katzer have made a *prima facie* showing that Jacobsen’s libel claim
 15 arises from a protected activity, the burden shifts to Jacobsen to demonstrate a probability of
 16 success of prevailing on his libel claim. *Globetrotter Software, Inc. v. Elan Computer Group,*
 17 *Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

18 Jacobsen failed to address the merits of his libel claim in his Response, but apparently
 19 Jacobsen concedes that if this Court finds that the FOIA request is a protected activity under Cal.
 20 Code Civ. Pro. § 425.16, then he will not prevail on his libel claim. Jacobsen’s Memorandum in
 21 Opposition to Defendant Russell’s Motion to Strike Claims 5 and 7 at 13. KAM and Katzer
 22 agree with Jacobsen that if this Court finds that the FOIA request is protected under the
 23 California anti-SLAPP law, then Jacobsen will not prevail on the merits of his libel claim.

24 Additionally, the FOIA request does not contain any statements of fact that call into
 25 question Jacobsen’s honesty, integrity, competence or character. The FOIA request does state
 26 that the JMRI project is infringing on KAM’s patents, however the mere claim of patent

1 infringement is not defamatory. *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1084 (W.D.
 2 Ky. 1995) (“The statement by one party that another is infringing does not carry an intrinsic
 3 moral or business turpitude. For instance, it is not the same as calling one a liar, bankrupt or
 4 untrustworthy”). An essential element of libel is that the publication in question must contain a
 5 false *statement of fact*. *Okun v. Superior Court*, 29 Cal. 3d, 442, 450 (1981). Reasonable people
 6 can differ as to whether a patent is being infringed. *CMI, Inc.*, 918 F. Supp. at 1084 . Here, the
 7 FOIA request contains no statement of fact at all, rather it is a request for information authorized
 8 by and made pursuant to federal law. To the extent that the FOIA request contains any
 9 statements other than information request, it only contains the legal opinion that the JMRI
 10 project is infringing on KAM’s patents, not statements of fact. Because the FOIA request does
 11 not contain any defamatory statements exposing Jacobsen to hatred, contempt, ridicule, or
 12 obloquy, causing Jacobsen to be shunned or avoided, or having a tendency to injure Jacobsen in
 13 his occupation, the FOIA request cannot be the basis for a libel claim. Therefore, Jacobsen
 14 cannot prevail on his libel claim.

15 **D. It is in the public interest to protect FOIA requests to government agencies**

16 Congress enacted the FOIA to “ensure an informed citizenry, vital to the functioning of a
 17 democratic society.” *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d
 18 871, 872 (D.C. Cir. 1992). As discussed in KAM and Katzer’s Memorandum, this is precisely
 19 the kind of constitutional free speech that the California anti-SLAPP act is intended to protect.
 20 The public must be able to scrutinize the workings of government without fear of retaliatory
 21 litigation. *Cf.* Cal. Code. Civ. Pro. § 425.16(a).

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E. Conclusion

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

Dated June 16, 2006.

/s/
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I certify that on June 16, 2006, I served Matthew Katzer’s and KAM’s corrected Special Motion to Strike and Supporting Memorandum on the following parties through their attorneys via the Court’s ECF filing system:

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