

R. Scott Jerger (*pro hac vice*)
Field & Jerger, LLP
610 SW Alder Street, Suite 910
Portland, OR 97205
Tel: (503) 228-9115
Fax: (503) 225-0276
Email: scott@fieldjerger.com

John C. Gorman (CA State Bar #91515)
Gorman & Miller, P.C.
210 N 4th Street, Suite 200
San Jose, CA 95112
Tel: (408) 297-2222
Fax: (408) 297-2224
Email: jgorman@gormanmiller.com

Attorneys for Defendants
Matthew Katzer and Kamind Associates, Inc.

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

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

1 **NOTICE**

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

6 **MOTION**

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

12 **SUMMARY OF ARGUMENT**

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

16 Jacobsen’s libel claim should be stricken from the Complaint. The FOIA request is a
17 protected communication under California’s anti-SLAPP statute since it was made pursuant to
18 and in connection with an official proceeding authorized by law made in anticipation of bringing
19 legal action against Jacobsen. *Briggs v. v. Eden Council for Hope and Opportunity*, 19 Cal. 4th
20 1106, 1121, 969 P.2d 564 (1999); *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th
21 719, 729, 28 Cal. Rptr. 3d 833 (2005).

22 Jacobsen cannot establish a probability of success on the merits of his libel claim. First,
23 the FOIA request contains no statements of fact, and therefore cannot be libel. *Okun V. Superior*
24 *Court*, 29 Cal. 3d, 442, 450, 629 P.2d 1369, 175 Cal. Rptr. 157 (1981). Second, the FOIA
25 request is an absolutely privileged communication under California’s litigation privilege (Cal.
26

1 Civ. Code § 47(b)) as a communication made in anticipation of litigation. *Rubin v. Green*, 4 Cal.
2 4th 1187, 1194-1195 (1993).

3 **STATEMENT OF ISSUES TO BE DECIDED**

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

11 **STATEMENT OF RELEVANT FACTS**

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

1 **ARGUMENT**

2 Section 425.16 of the California Code of Civil Procedure is referred to as the “anti-SLAPP
3 statute.” SLAPP suits are “strategic lawsuits against public participation.” The statute provides
4 that:

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

10 Cal. Code Civ. Pro § 425.16(b)(1).

11 The anti-SLAPP statute contains an express directive that it is to be “construed broadly.”
12 Cal. Code Civ. Pro § 425.16(a). California courts, including the California Supreme Court, have
13 taken this directive very seriously. *Briggs v. v. Eden Council for Hope and Opportunity*, 19 Cal.
14 4th 1106, 1121, 969 P.2d 564 (1999); *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th
15 719, 729, 28 Cal. Rptr. 3d 833 (2005). The anti-SLAPP statute applies to “communications
16 designed to prompt official action,” which certainly is the case here. *Fontani* at 731.

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

24 Plaintiff Jacobsen has asserted a libel claim under California law against all defendants
25 predicated solely on KAM’s Freedom of Information Act (“FOIA”) request to the United States
26 Department of Energy (“DOE”) dated October 27, 2005. Complaint ¶¶ 106-113. The FOIA
request is attached as Exhibit 1 to Matt Katzer’s Declaration in support of this Motion.

1 Specifically, plaintiff Jacobsen alleges that the statement in the FOIA request that “KAMIND
 2 Associates Inc...has patents being infringed by the JMRI project sponsored by the LAB” has
 3 libeled Jacobsen. Complaint ¶ 107.¹

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

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

11 Jacobsen’s libel cause of action is based solely on KAM’s FOIA request. Complaint ¶¶
 12 106-113. Section 425.16 protects any act “in furtherance of [Katzer and KAM’s] right of free
 13 speech under the United States or California Constitution in connection with a public issue...”.
 14 Cal. Code Civ. Pro § 425.16(b)(1). The anti-SLAPP statute defines categories of acts “in
 15 furtherance of a person’s right of petition or free speech...in connection with a public issue.”
 16 Cal. Code Civ. Pro § 425.16 (e). Two of the relevant categories in this case include “any written
 17 or oral statement or writing made before a legislative, executive, or judicial body, or any other
 18 official proceeding authorized by law...” and “any written or oral statement or writing made in
 19 connection with an issue under consideration or review by a legislative, executive, or judicial
 20 body, or any other official proceeding authorized by law...”. Cal. Code Civ. Pro § 425.16 (e)(1),
 21 (2).

22 Since Katzer and KAM are seeking to strike a cause of action arising from statements
 23 made before a legislative, executive or judicial or any other official proceeding or in connection
 24 with such a proceeding, KAM and Katzer need not show that the statements were made in
 25

26 ¹ 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 connection with a public issue. *See Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.
2 4th 1106, 1123, 969 P.2d 564 (1999).

3 1. The FOIA request was made pursuant to and in connection with an “official
4 proceeding authorized by law”

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

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

19 The FOIA request was made pursuant to and in connection with an “official proceeding
20 authorized by law” and is therefore a protected activity under California’s anti-SLAPP statute.
21 There is no question under California law that the DOE is an “official body authorized by law.”
22 Administrative agencies are exactly the “official bodies” envisioned by the California legislature
23 when it drafted the anti-SLAPP legislation and by California courts that have interpreted this
24 language. *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719, 729, 28 Cal. Rptr. 3d
25 833 (2005) (finding that the anti-SLAPP statute applies to governmental agencies); *Briggs* at
26

1 1121 (holding that the anti-SLAPP law protects “all direct petitioning of governmental bodies
2 including courts and administrative agencies).

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

9 While no California anti-SLAPP case specifically addresses a FOIA request, California
10 courts have held, time and time again, that communications intended to prompt a governmental
11 agency charged with enforcing the law to investigate or remedy a wrongdoing are protected
12 communications. See *Briggs* at 1123, *Fontani* at 729. The California Supreme Court has held
13 that the constitutional right to petition includes the basic act of seeking administrative action.
14 *Briggs* at 1115. This principle has been applied to (1) a letter that a defendant had sent to various
15 celebrities seeking support for a complaint the defendant initiated to the Attorney General (*Dove*
16 *Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830
17 (1996)), and (2) a complaint filed with the Securities and Exchange Commission
18 (*ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 113 Cal. Rptr. 2d 625 (2001)).

19 Similarly, in cases interpreting the exact language at issue under the litigation privilege
20 statute (Cal. Civ. Code § 47(b)), California courts have held that similar information requests to
21 government agencies constitute “official proceedings authorized by law.” Since Cal. Civ. Code
22 § 47(b) contains the same language as the anti-SLAPP statute, California Courts have used cases
23 interpreting the litigation privilege to inform the anti-SLAPP analysis. See e.g., *Mann* at 475.
24 The California Supreme Court has held that the litigation privilege applies to a communication
25 intended to prompt an administrative agency charged with enforcing the law to investigate or
26 remedy a wrongdoing. *Hagberg v. California Federal Bank*, 32 Cal. 4th 350, 362, 81 P.3d 244

1 (2004) (citing cases finding a letter urging the Office of Attorney General to institute an
 2 investigation privileged, a malicious report to the DMV privileged, a complaint to the Division
 3 of Real Estate privileged, a report of governmental malfeasance by a whistleblower privileged,
 4 and complaints to administrative agencies to investigate wrongdoing privileged). The privilege
 5 protects communications to or from government officials that precede the initiation of formal
 6 proceedings. *Id. citing Slaughter v. Friedman*, 32 Cal. 3d 149, 185 Cal. Rptr. 244, 649 P.2d 886
 7 (1982). Since the FOIA request was made pursuant to and in connection with an “official
 8 proceeding authorized by law,” and was intended to prompt the DOE to answer the information
 9 request and investigate JMRI activities, it is a protected activity under the California anti-SLAPP
 10 statute.

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

13 Alternatively, the FOIA request is a protected activity as it was made in anticipation of
 14 bringing a legal action against Jacobsen. The California Supreme Court has held that
 15 “communications preparatory to or in anticipation of the bringing of an action or other official
 16 proceeding...are...entitled to the benefits of section 425.16.” *Briggs* at 115, *see also Dove Audio*
 17 *Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830 (1996). As
 18 discussed above, the anti-SLAPP law is to be construed broadly. The FOIA request was sent in
 19 an effort to gain information in anticipation of a possible patent infringement suit. Katzer Decl. ¶

20 7. A FOIA request sent in anticipation of litigation is protected activity under the California
 21 anti-SLAPP statute.

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

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

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

8 Under California law, libel is “a false and unprivileged publication by writing, printing,
9 picture, effigy, or other fixed representation to the eye, which exposes any person to hatred,
10 contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a
11 tendency to injure him in his occupation.” Cal. Civ. Code § 45. An essential element of libel is
12 that the publication in question must contain a false *statement of fact*. *Okun V. Superior Court*,
13 29 Cal. 3d, 442, 450, 629 P.2d 1369, 175 Cal. Rptr. 157 (1981). Here, the FOIA request contains
14 no statement of fact at all, rather it is a request for information pursuant to federal law. To the
15 extent that the FOIA request contains any statements other than information request, it only
16 contains statements of opinion, not statements of fact. Reasonable people can differ as to
17 whether a patent is being infringed. *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1084
18 (W.D. Ky. 1995)

19 Additionally, Jacobsen cannot show a probability of success on this claim because the
20 FOIA request is absolutely privileged by virtue of the litigation privilege codified in California
21 Civil Code section 47(b).² Under section 47(b), the statements in the FOIA request are
22 privileged communications made in a “judicial proceeding” or, alternatively, communications
23

24 ² 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 made in an “official proceeding authorized by law” Regarding the former, the 47(b) privilege is
2 extremely broad and applies to communications so long as they have “some relation” to an
3 anticipated lawsuit. *Rubin v. Green*, 4 Cal. 4th 1187, 1194-1195 (1993). The privilege
4 encompasses not only testimony made in court statements and pleadings, but also statements
5 made prior to filing a lawsuit whether in preparation for anticipated litigation or to investigate
6 the feasibility of filing a lawsuit. *Id.*

7 As discussed above, KAM filed the FOIA request in anticipation of filing a patent
8 infringement suit against JMRI. The litigation privilege is “intended to assure utmost freedom of
9 communication between citizens and public authorities whose responsibility is to investigate and
10 remedy wrongdoing.” *Fontani* at 842-843 citing *Hagberg* at 360. The California litigation
11 privilege statute’s protection is not limited to statements made in a courtroom or administrative
12 proceedings, but also includes communications that are part of an investigatory process that may
13 lead to a later proceeding. *Id.* The privilege extends to preparatory communications
14 investigating the feasibility of filing a lawsuit, including “communications with ‘some relation to
15 a proceeding that is...under serious consideration’ to ‘potential court actions’ to ‘preliminary
16 conversations and interviews related to contemplated action’ and we also have determined that
17 the privilege applies to communications made, prior to the filing of a complaint, by a person
18 ‘meeting and discussing’ with potential parties the ‘merits of the proposed...lawsuit.’” *Hagberg*
19 at 810 citing *Rubin v. Green* at 1194-1195. Clearly, the FOIA request -- which was made in
20 anticipation of litigation and seeks information specifically relating to potential JMRI
21 infringements of KAM patents -- is a privileged communication under California’s litigation
22 privilege law.

23 Alternatively, the FOIA request is a privileged communication made in “any other
24 official proceeding authorized by law.” The FOIA request was sent in conformity with the
25 formalities of the federal Freedom of Information Act and the DOE, as the keeper of the relevant
26 records, was required by law to respond to the request. The privilege protects “communications

1 to or from governmental officials which may precede the initiation of formal proceedings.”
2 *Slaughter v. Friedman*, 32 Cal. 3d 149, 156, 185 Cal. Rptr. 244, 649 P.3d 886 (1982).

3 As discussed in subsection A above, there are numerous instances where California
4 courts have held that communications to administrative agencies are privileged under 47(b). A
5 California Court has recently found that allegedly “harassing” reports that a company was
6 “pouring illegal carcinogenic chemicals into public drainage systems throughout Southern
7 California” to government agencies were absolutely privileged communications under Cal. Civ.
8 Code § 47(b) regardless of whether the communication was made with malice or the intent to
9 harm. *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App 4th 90, 106-109, 15 Cal. Rptr. 3d
10 215, (2004 Cal. App.). The allegation in the FOIA request submitted to the DOE regarding
11 patent infringement is a reasonable statement of opinion associated with a valid information
12 request. Under the logic of *Mann* and the other California cases interpreting the privilege in the
13 context of communications to governmental agencies, the FOIA request is entitled to the
14 protection of the statute as a privileged communication.

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

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

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1 **D. Conclusion**

2 Based on the above, this Court should grant KAM and Katzer's special motion to strike
3 Jacobsen's libel claim and award KAM and Katzer reasonable attorney fees in the amount of
4 \$11,550.

5 Dated May 12, 2006.

6 _____ /s/
7 R. Scott Jerger (*pro hac vice*)
8 Field & Jerger, LLP
9 610 SW Alder Street, Suite 910
10 Portland, OR 97205
11 Tel: (503) 228-9115
12 Fax: (503) 225-0276
13 Email: scott@fieldjerger.com
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