Case3:06-cv-01905-JSW Document315 Filed07/22/09 Page1 of 3

1 2 3 4	VICTORIA K. HALL (SBN 240702) LAW OFFICE OF VICTORIA K. HALL 3 Bethesda Metro Suite 700 Bethesda MD 20814 Victoria@vkhall-law.com Telephone: 301-280-5925 Facsimile: 240-536-9142			
5678	DAVID McGOWAN (SBN 154289) Warren Hall 5998 Alcala Park San Diego CA 92110 dmcgowan@sandiego.edu Telephone: 619-260-7973 Facsimile: 619-260-2748			
9 10	Attorneys for Plaintiff ROBERT JACOBSEN			
11	UNITED STATES DISTRICT COURT			
12	FOR THE NORTHERN DISTRICT OF CALIFORNIA			
13	SAN FRANCISCO DIVISION			
14	ROBERT JACOBSEN, an individual,	No. C06-1905-JSW		
15	Plaintiff,	\	OR ISSUANCE OF LETTER	
16	v.	OF REQUES		
17 18	MATTHEW KATZER, an individual, and KAMIND ASSOCIATES, INC., an Oregon corporation dba KAM Industries,	Courtroom: Judge: Date: Time:	F, 15th Floor Hon. James Larson Friday, Aug. 26, 2009 9:00 a.m.	
19	Defendants.))		
20))		
21				
22	NOTICE OF MOTION			
23	TO THE PARTIES AND THEIR ATTORNEYS OF RECORD			
24	PLEASE TAKE NOTICE that, on Wednesday, August 26, 2009, at 9:00 a.m. in Courtroom			
25	F, 15th floor of the San Francisco Division of the United States District Court for the Northern			
26	District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff			
27	Robert Jacobsen will seek a letter of request to be directed, pursuant to the Hague Convention on			
28		1_		
	No. C06-1905-JSW-JL MOTION FOR ISSUANCE	OF LETTER OF REQUE	EST	

Case3:06-cv-01905-JSW Document315 Filed07/22/09 Page2 of 3

Evidence, to the Aargau Central Cantonal Authority in Switzerland, requesting the examination of a necessary and material witness, Robert Bouwens, on oral examination of interrogatories and directing production of documents. This motion is based on the following.

FACTS

Plaintiff Robert Jacobsen has accused Defendants Matthew Katzer and KAMIND Associates, Inc. of infringing his copyrights in Java Model Railroad Interface (JMRI) software. Katzer and KAMIND acknowledge that they copied, modified, and distributed portions of JMRI software, but say that Robert Bouwens, a Swiss national living in the Aargau canton in Switzerland, committed the acts. Bouwens' testimony directly relates to willfulness elements of the copyright infringement and DMCA violation claims.

As far as Jacobsen is aware, the last time that Bouwens was in the United States was July 2008. The parties have contacted Bouwens. Bouwens did not respond to Jacobsen's email. Defendant Katzer and Defendants' counsel, Scott Jerger, has also contacted Bouwens to see if Bouwens would be willing to make himself available for deposition. Despite repeated attempts to obtain Bouwens' cooperation, Bouwens finally responded, and refused to cooperate.

ARGUMENT

Federal Rules of Civil Procedure 28(b) states that a deposition may be taken pursuant to any applicable convention or treaty, or upon the issuance of a letter of request, also known as a letter rogatory. Plaintiff seeks to depose and obtain documents from Robert Bouwens, a Swiss national living in Switzerland, who is unwilling to testify voluntarily. In these circumstances, a letter of request is the only means to obtain the testimony.

Switzerland is a signatory to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters [hereinafter Hague Evidence Convention]. Switzerland has some of the strictest laws, including criminal statutes, relating to foreigners gathering evidence for use in a foreign court. Some lawyers who have sought evidence in Switzerland while unaware of these rules have been subjected to criminal prosecution. A letter request made through diplomatic channels pursuant to the Hague Evidence Convention is the only way to obtain evidence from an unwilling witness.

-2-

Case3:06-cv-01905-JSW Document315 Filed07/22/09 Page3 of 3

Federal courts have the authority to issue letters of request. United States v. Staples, 256				
F.2d 290, 292 (9th Cir. 1958); Fed. R. Civ. P. 28(b)(2). See also 28 U.S.C. Sec. 1781. A letter				
request shall be directed to the Central Authority where the witness lives. Hague Evidence				
Convention Art. 2.				
A letter of request may be issued on appropriate terms after an application and notice of it; and without a showing that taking the deposition in another manner is impracticable or inconvenient.				
Fed. R. Civ. P. 28(b) (punctuation and subsection letters removed).				
The issuance of a letter of request to Robert Bouwens is necessary and proper to obtain				
critical evidence of Defendants Katzer and KAMIND's willfulness relating to copyright				
infringement and DMCA violations. As noted, Katzer and KAMIND acknowledge that they				
copied, modified, and distributed portions of JMRI's copyrighted software, but they deny their acts				
were intentional. They place the blame on Bouwens, whom they contracted with to create a				
program to convert JMRI code to the format used with KAMIND's software. Bouwens created				
this program, and sent it and the modified JMRI files to Katzer. According to the documents that				
Katzer has produced, Katzer and Bouwens regularly set up phone calls to do business rather than				
exchange emails. Therefore, it is necessary to examine Bouwens by oral deposition and to require				
him to produce documents in his possession that relate to the willfulness issue.				
A letter of request using the Hague Evidence Convention model form is attached.				
CONCLUSION				
For the reasons stated above, the Court should grant the order to issue the letter of request.				
Respectfully submitted,				
DATED: July 22, 2009 By /s/ Victoria K. Hall, Esq. (SBN 240702) LAW OFFICE OF VICTORIA K. HALL 3 Bethesda Metro Suite 700 Bethesda MD 20814 Telephone: 301-280-5925				
Facsimile: 240-536-9142				
ATTORNEY FOR PLAINTIFF				
2				