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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 **ROBERT JACOBSEN,**
14 **Plaintiff,**

15 **vs.**

16 **MATTHEW KATZER, KAMIND**
17 **ASSOCIATES, INC., and KEVIN**
18 **RUSSELL,**

19 **Defendants.**

) **Case No. C 06 1905 JSW**

) **OBJECTIONS TO PLAINTIFF'S**
) **EVIDENCE SUBMITTED IN**
) **OPPOSITION TO RUSSELL'S**
) **SPECIAL MOTION TO STRIKE**

) **Date: August 11, 2006**
) **Time: 9:00 a.m.**
) **Dept: Courtroom 17, 16th floor**
) **Hon. Jeffrey S. White**

20 Defendant Kevin Russell objects to the following evidence submitted by plaintiff Robert
21 Jacobsen in opposition to the special motion to strike set for hearing on August 11, 2006 before
22 this Court:

23 A. Objections to the "Declaration of Robert Jacobsen in opposition to the motion to
24 strike claims 5 and 7 by defendant Kevin Russell."

25 1. Paragraph 46 of the Jacobsen declaration, appearing at Page 8, Lines 21-23, in its
26 entirety. The ground for this objection is that the statement is too vague and conclusionary to
27 support a damages claim. Civil L. R. 7-5(b).

28 2. Underscored language in Paragraph 56 of the Jacobsen declaration, appearing at Page
10, Lines 16-19, which states:

1 As a faculty member I am on salary during the school year, but paid
2 via research contracts during the summer based on specific days
3 worked. As such I had to forgo being paid for certain days during
Summer 2005 due to time spent addressing Mr. Russell and
Katzer's patent assertions.

4 The ground for this objection is that the statement is conclusionary and is unsupported by facts
5 indicating the amount of time during which Jacobsen was allegedly diverted, and the amount of
6 money he allegedly lost. Civil L. R. 7-5(b).

7 3. Paragraph 57 of the Jacobsen declaration, appearing at Page 10, Lines 20-24, in its
8 entirety. The ground for this objection is that said paragraph consists entirely of inadmissible
9 speculation and conjecture. *Travelers Casualty And Surety Company Of America v. Telestar*
10 *Constr. Company, Inc.*, 252 F. Supp. 2d 917, 925 (D. Ariz. 2003); Civil L. R. 7-5(b).

11 4. Paragraph 68 of the Jacobsen declaration, appearing, at Page 13, lines 8-9, in its
12 entirety. A ground for this objection is that the statement is conclusory. A further ground is that
13 it is testimony given by an interested party relating to a prior invention and is not corroborated.
14 *Schumer v. Laboratory Computer Systems*, 308 F.3d 1304, 1315-16 (Fed. Cir. 2002). An
15 additional ground for this objection is that the statement is hearsay, as the "technology" disclosed
16 in version 0.9.0 is not before the Court.

17 5. Paragraph 87 of the Jacobsen declaration, appearing at Page 15, Lines 14-19, in its
18 entirety. A ground for this objection is that the statement is conclusory. A further ground is that
19 it is testimony given by an interested party relating to a prior invention and is not corroborated.
20 *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b). An additional ground for this objection is
21 the best evidence rule, as neither the specifications for the "LocoNet system" nor a copy of '406
22 patent is provided. F. R. Evid. 1002; Civil L. R. 7-5(b).

23 6. Paragraph 88 of the Jacobsen declaration in its entirety. The ground for this objection is
24 lack of any foundation for the witness's personal knowledge. Civil L. R. 7-5(b).

25 7. Paragraph 89 of the Jacobsen declaration in its entirety. The ground for this objection is
26 lack of any foundation for the witness's personal knowledge. Civil L. R. 7-5(b).

27 8. Paragraph 90 of the Jacobsen declaration in its entirety. The ground for this objection is
28 lack of any foundation for the witness's personal knowledge. Civil L. R. 7-5(b).

1 9. Paragraph 98 of the Jacobsen declaration in its entirety. The ground for this objection is
2 lack of any foundation for the witness's personal knowledge. Civil L. R. 7-5(b).

3 10. Paragraph 100 of the Jacobsen declaration in its entirety. The ground for this
4 objection is lack of any foundation for the witness's personal knowledge. Civil L. R. 7-5(b).

5 11. The paper attached as Exhibit AA and mentioned in Paragraph 103 of the Jacobsen
6 declaration. The ground for this objection is lack of authentication. *Orr v. Bank of America, NT*
7 *& SA*, 285 F.3d 764, 773-75 (9th Cir. 2002) and case cited.; Civil L. R. 7-5(b).

8 12. The following underscored language in Paragraph 105 of the Jacobsen declaration,
9 appearing at Page 17, Lines 25-27, which states:

10
11 Tanner Decl. Ex. F. contains pages that were inserted into the '461
12 application at the request of Dr. Tanner. They disclose features of
the WinLok program that were claimed by Katzer in his patent
application.

13 A ground for this objection is that the statement is conclusory. A further ground is that it is
14 testimony given by an interested party relating to a prior invention and is not corroborated. An
15 additional ground is that the testimony is *hopelessly vague*, confusing and generalized.
16 *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b). A further objection is that the statement,
17 if true, is irrelevant. The Win Lok program does not anticipate a KAM patent merely because it
18 contains similar "features." It would be necessary to show that said program contained all the
19 elements of at least one claim in the patent application. E.g. *Digital Control, Inc. v.*
20 *McLaughlin Mfg. Company, Inc.*, 248 F. Supp. 2d 1019, 1021-22 (W.D. Wash. 2003) and
21 cases cited.

22 13. Paragraph 107 of the Jacobsen declaration, appearing at Page 18, Lines 2-3, in its
23 entirety. A ground for this objection is that the statement is conclusory. A further ground is that
24 it is testimony given by an interested party relating to a prior invention and is not corroborated.
25 An additional ground is that the testimony is confusing and generalized. *Schumer*, 308 F.3d
26 1304, 1315-16; Civil L. R. 7-5(b).

27 14. Paragraph 112 of the Jacobsen declaration, appearing at Page 18, Lines 19-20 in its
28 entirety. A ground for this objection is that the statement is conclusory. A further ground is that

1 it is testimony given by an interested party relating to a prior invention and is not corroborated.
2 An additional ground is that the testimony is that the testimony is confusing and generalized.
3 *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b).

4 15. The underscored language contained in Paragraph 115 of the Jacobsen declaration,
5 appearing at Page 19, Lines 1-10.

6 Attached hereto as Exhibit AJ is a true and correct copy of slides
7 from a presentation on "Railroad Open System architecture
8 (ROSA) by Dr. Tanner at the NMRA National Convention during
9 July 1997. The presentation was during the DDC Working Group
10 meeting. Pages 7 through 13 describe functionality claimed
11 by Katzer's patents. For example, page 7 shows a program
12 operating multiple DCC systems over communications paths.
13 This is a capability claimed by Katzer's patents. Page 7 and
14 12, together with 13, show operation of communication
15 systems in concert with a database of common status
16 information. This is a capability claimed by Mr. Katzer's
17 patents.

13 A ground for this objection is that the statement is conclusory. A further ground is that it is
14 testimony given by an interested party relating to a prior invention and is not corroborated. An
15 additional ground is that the testimony is confusing and generalized. *Schumer*, 308 F.3d 1304,
16 1315-16. Yet a further ground is the Best Evidence Rule, as the patents with which Exhibit AJ is
17 to be compared are not attached. F. R. Evid. 1002; Civil L. R. 7-5(b).

18 16. Exhibit AK, which is mentioned in Paragraph 117 of the Jacobsen declaration.
19 The ground for this objection is that there is no testimony of a person with personal
20 knowledge authenticating that Exhibit. *Orr v. Bank of America, NT & SA*, 285 F.3d 764,
21 773-75 (9th Cir. 2002) and case cited; Civil L. R. 7-5(b).

22 17. Exhibit AL, which is mentioned in Paragraph 118 of the Jacobsen declaration.
23 The ground for this objection is that there is no testimony of a person with personal
24 knowledge authenticating that Exhibit. *Orr*, 285 F.3d 764, 773-75 (9th Cir. 2002) and
25 case cited; Civil L. R. 7-5(b).

26 18. Paragraph 122 of the Jacobsen declaration, appearing at Page 21, Lines 2-6.
27 The ground for this objection is relevancy. The date on which a trademark for a product
28 alleged to be prior art is irrelevant unless it is assumed that (a) the trademarked product

1 existed (b) in its present form, (c) at the time the trademark issued.

2 19. Paragraph 123 of the Jacobsen declaration, appearing at Page 21, Lines 7-11.
3 The ground for this objection is relevancy. The date on which a trademark for a product
4 alleged to be prior art is irrelevant unless it is assumed that (a) the trademarked product
5 existed (b) in its present form, (c) at the time the trademark issued.

6 20. Paragraph 124 of the Jacobsen declaration, appearing at Page 21, Lines 12-16.
7 The ground for this objection is relevancy. The date on which a trademark for a product
8 alleged to be prior art is irrelevant unless it is assumed that (a) the trademarked product
9 existed (b) in its present form, (c) at the time the trademark issued.

10 21. The first sentence of Paragraph 127 of the Jacobsen Declaration, appearing at
11 Page 22, Lines 4-5, which states: "Engine Commander 2.0 beta 2 provided functionality
12 claimed by the '406 patent." A ground for this objection is that the statement is conclusory. A
13 further ground is that it is testimony given by an interested party relating to a prior invention and
14 is not corroborated. An additional ground is that the testimony is confusing and generalized.
15 *Schumer*, 308 F.3d 1304, 1315-16. Yet a further ground for this objection is the Best Evidence
16 Rule, as no copy of '406 patent is provided, and Exhibit AT does not contain any information
17 that would permit a comparison. F. R. Evid. 1002; Civil L. R. 7-5(b).

18 22. Paragraph 129 of the Jacobsen declaration, appearing at Page 23, Lines 4-5.
19 A ground for this objection is that the statement is conclusory. A further ground is that it is
20 testimony given by an interested party relating to a prior invention and is not corroborated. An
21 additional ground is that the testimony is confusing and generalized. *Schumer*, 308 F.3d 1304,
22 1315-16. Yet a further ground for this objection is the Best Evidence Rule, as no copy of '406
23 patent is provided, and no additional documents are identified that would permit a comparison.
24 F.R. Evid. 1002; Civil L. R. 7-5(b).

25 23. Paragraph 132 of the Jacobsen declaration, appearing at Page 23, Line 17. A
26 ground for this objection is that the statement is conclusory. A further ground is that it is
27 testimony given by an interested party relating to a prior invention and is not corroborated. An
28 additional ground is that the testimony is confusing and generalized. *Schumer*, 308 F.3d 1304,

1 1315-16; Civil L. R. 7-5(b).

2 A. Objections to the “Declaration of Hans Tanner in opposition to the special motion by
3 defendant Kevin Russel to strike claims 5 and 7 in the complaint.”

4 24. Paragraph 20 of the Tanner declaration, appearing at Page 3, Lines 26-27. A
5 ground for this objection is that the statement is conclusory. A further ground is that it is
6 testimony given by an interested party relating to a prior invention and is not corroborated. An
7 additional ground is that the testimony is confusing and generalized. *Schumer*, 308 F.3d 1304,
8 1315-16; Civil L. R. 7-5(b).

9 25. Paragraphs 24 through 26, inclusive, of the Tanner declaration, appearing at Page 4,
10 lines 8-14, as it appears these assertions are submitted as evidence of the truth of statements
11 contained in the attached Exhibit F. A ground for this objection is that the statement is
12 conclusory. A further ground is that it is testimony given by an interested party relating to a prior
13 invention and is not corroborated. An additional ground is that the testimony is confusing and
14 generalized. *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b). Yet a further ground is that
15 the statements constitute double hearsay.

16 26. Paragraphs 29 through 31, inclusive, of the Tanner declaration, beginning at Page 4,
17 Line 18, and ending at Page 5, Line 4, as it appears these assertions are submitted as evidence of
18 the truth of statements contained in the attached Exhibit F. A ground for this objection is that the
19 statement is conclusory. A further ground is that it is testimony given by an interested party
20 relating to a prior invention and is not corroborated. An additional ground is is confusing and
21 generalized. *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b). Yet a further ground is that
22 the statements constitute double hearsay.

23 27. Paragraph 32 of the Tanner declaration, appearing at Page 5, Lines 5-7. A ground
24 for this objection is that the statement is conclusory. A further ground is that it is testimony given
25 by an interested party relating to a prior invention and is not corroborated. An additional ground
26 is that the testimony is confusing and generalized. *Schumer*, 308 F.3d 1304, 1315-16; Civil L.
27 R. 7-5(b). Yet a further ground is that the statement constitutes double hearsay.

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