

1 David M. Zeff (S.B. #63289)  
2 Law Offices of David M. Zeff  
3 1388 Sutter St., Suite 820  
4 San Francisco, CA 94109  
5 Telephone: (415) 923-1380  
6 Facsimile: (415) 923-1382  
7 ZeffLaw1@aol.com

8 Attorneys for Defendant  
9 Kevin Russell

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

12	<b>ROBERT JACOBSEN,</b>	)	<b>Case No. C 06 1905 JSW ENE</b>
13	<b>Plaintiff,</b>	)	<b>Date: December 19, 2008</b>
14	<b>vs.</b>	)	<b>Time: 9:00 a.m.</b>
15	<b>MATTHEW KATZER, KAMIND</b>	)	<b>Courtroom No. 2</b>
16	<b>ASSOCIATES, INC., and KEVIN</b>	)	<b>Honorable Jeffrey S. White</b>
17	<b>RUSSELL,</b>	)	<b>MEMORANDUM OF POINTS AND</b>
18	<b>Defendants.</b>	)	<b>AUTHORITIES BY DEFENDANT</b>
		)	<b>KEVIN RUSSELL IN OPPOSITION</b>
		)	<b>TO PLAINTIFF'S MOTION FOR</b>
		)	<b>LEAVE TO FILE SUR-REPLY</b>

19 **STATEMENT OF ISSUES TO BE DECIDED**

20 Whether Plaintiff Robert Jacobsen's Motion for Leave to File a third, 20-page  
21 Surreply to Defendants' Reply in the Briefing for Defendants' Motion to Dismiss for  
22 Mootness, filed 11 days before the hearing, should be denied?

23 **INTRODUCTION**

24 Jacobsen's proposed sur-reply is a piece of gutter-practice.  
25 For at least four reasons, Jacobsen's motion for leave to file yet another, 20 page  
26 sur-reply brief in opposition to KAMIND's motion should be *denied*. The Federal Rules  
27 do not provide for sur-replies; they require some justification. The only "new fact"  
28 Jacobsen cites to justify his sur-reply is a false and indefensible personal slur. It is not

1 true, as Jacobsen says, that the Patent Office “charged” Kevin Russell with inequitable  
2 conduct. Rather, it was Jacobsen’s attorney who made such a charge, in the letter which  
3 is the only “evidence” submitted in support of Jacobsen’s sur-reply. That letter is  
4 inadmissible hearsay and is irrelevant to any issue on KAMIND’s motion to dismiss.  
5 Disciplinary complaints are normally kept confidential, and Jacobsen’s use of his own  
6 letter to smear and defame a respected attorney tactics is an abuse of the judicial process.  
7 *Younger v. Solomon*, 38 Cal. App. 3d 289, 295-302 (1977).

8 **STATEMENT OF FACTS**

9 Jacobsen’s original complaint claimed Kevin Russell committed libel by filing a  
10 FOIA request with the Department of Energy which falsely accused Jacobsen of  
11 infringing the ‘329 patent. Document 1, pp. 33-36. The Court granted defendants’  
12 motions to strike and for attorney fees because (1) the FOIA request was petitioning  
13 activity protected by the Constitution and California Civil Procedure Code § 425.16, and  
14 (2) in fact, the FOIA request did *not* accuse Jacobsen of patent infringement. Document  
15 111, pp. 6 and 11-12. Defendant KAMIND later disclaimed the ‘329 patent and moved  
16 to dismiss Jacobsen’s declaratory relief claims as moot.

17 Before KAMIND’s motion could be heard, Jacobsen filed two sur-replies  
18 opposing it. The second sur-reply includes personal attacks on Russell and Katzer,  
19 stating that the Court’s October 20, 2006 order granting motions to strike were based on  
20 their allegedly false statements that they believed in good faith the ‘329 patent was valid.  
21 Document 226-2. The Court expressly authorized Russell to oppose that second sur-  
22 reply. Document 235, p. 10. Jacobsen then withdrew the second sur-reply and  
23 incorporated the same personal attacks in a re-drafted opposition to the motion. It alleges  
24 the Court “relied” on Russell’s statements in granting attorney fees, and asserts that fees  
25 paid pursuant to the Court’s order amount to “damages” and give Jacobsen standing to  
26 litigate his otherwise moot declaratory relief claims. Document 243, pp. 2, 6-7.

27 Because these personal attacks on Russell were made in an “opposition,” and  
28 because the Court expressly authorized Russell to answer them, Russell filed a reply

1 pointing out some of the deficiencies in Jacobsen’s argument. Among other things, it  
2 states that KAMIND disclaimed the ‘329 patent for purely economic reasons and not  
3 because of any disbelief in its validity. Document 253.

4 Jacobsen seeks to justify this third sur-reply by claiming he has discovered a “new  
5 fact,” stating:

6 That new fact is this: Kevin Russell has been charged with inequitable  
7 conduct by the Office of Enrollment and Discipline (OED), bar counsel for  
8 the PTO. OED held off investigation, pending the outcome of this case. In  
order to put an end to the investigation. Russell and Katzer disclaimed the  
entire ‘329 patent and then had Defendants move to dismiss for mootness.

9 Document 274, 7:16-20. The basis for this accusation is a letter *written by Jacobsen’s*  
10 *attorney* and attached to her declaration, which alleges Russell committed inequitable  
11 conduct in applying for patents—not including the ‘329 patent at issue in this lawsuit.  
12 Document 276-2.

### 13 ARGUMENT

14 For each of the following reasons, Jacobsen’s motion for leave to file a third, 20-  
15 page sur-reply should be denied.

16 • Neither the Federal Rules nor the Local Rules of the Northern District of  
17 California authorize sur-replies. This is Jacobsen’s third sur-reply in connection with a  
18 single motion. He has no special right to the last word.

19 • Jacobsen’s “new fact” is not a fact. It is a baseless personal slur against a  
20 respected attorney. There is no evidence that any person, other than Jacobsen’s lawyer,  
21 ever “charged” Russell with inequitable conduct.

22 • Assuming Russell was “charged” with inequitable conduct, and KAMIND was  
23 motivated by the “charge” to disclaim the ‘329 patent, it would not be relevant, because  
24 regardless of their alleged motive, Jacobsen’s declaratory relief claim would still be moot.  
25 *Benitek Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1343-47 (Fed. Cir. 2007).

26 • Jacobsen’s insertion of Ms. Hall’s letter into the public record is an inexcusable  
27 personal attack having nothing to do with the issues of the case. The document is self-  
28 serving hearsay and inadmissible to prove anything. It serves no purpose other than

