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

12 ROBERT JACOBSEN,
13 Plaintiff,

14 vs.

15 MATTHEW KATZER, KAMIND
ASSOCIATES, INC., and KEVIN
16 RUSSELL,

17 Defendants.
18

) Case No. C 06 1905 JSW

)
) OBJECTIONS TO PLAINTIFF'S
) EVIDENCE SUBMITTED IN
) OPPOSITION TO RUSSELL'S
) MOTIONS TO DISMISS

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

19 Defendant Kevin Russell objects to the following evidence submitted by plaintiff
20 Robert Jacobsen in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction
21 [F. R. Civ. P. 12(b)(2)] and for Failure to State a Claim on Which Relief Can Be Granted
22 [F. R. Civ. P. 12(b)(6)] set for hearing on August 11, 2006 before this Court:

23 A. Objections to the "Declaration of Robert Jacobsen In Opposition To The
24 Motion To 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
26 its entirety. The ground for this objection is that the statement is too vague and
27 conclusionary to support a damages claim. Civil L. R. 7-5(b).

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

3 As a faculty member I am on salary during the school year,
4 but paid via research contracts during the summer based on
5 specific days 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.

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

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

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

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

27 6. Paragraph 88 of the Jacobsen declaration in its entirety. The ground for this
28 objection is lack of any foundation for the witness's personal knowledge. Civil L. R. 7-

1 5(b).

2 7. Paragraph 89 of the Jacobsen declaration in its entirety. The ground for this
3 objection is lack of any foundation for the witness's personal knowledge. Civil L. R. 7-

4 5(b).

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

7 5(b).

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

10 5(b).

11 10. Paragraph 100 of the Jacobsen declaration in its entirety. The ground for this
12 objection is lack of any foundation for the witness's personal knowledge. Civil L. R. 7-

13 5(b).

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

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

20
21 Tanner Decl. Ex. F. contains pages that were inserted into the
22 '461 application at the request of Dr. Tanner. They disclose
features of the WinLok program that were claimed by Katzer
in his patent application.

23 A ground for this objection is that the statement is conclusory. A further ground is that it
24 is testimony given by an interested party relating to a prior invention and is not
25 corroborated. An additional ground is that the testimony is *hopelessly vague*, confusing
26 and generalized. *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b). A further
27 objection is that the statement, if true, is irrelevant. The Win Lok program does not
28 anticipate a KAM patent merely because it contains similar "features." It would be

1 necessary to show that said program contained all the elements of at least one claim in the
2 patent application. E.g. *Digital Control, Inc. v. McLaughlin Mfg. Company, Inc.*, 248 F.
3 Supp. 2d 1019, 1021-22 (W.D. Wash. 2003) and cases cited.

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

9 14. Paragraph 112 of the Jacobsen declaration, appearing at Page 18, Lines 19-20
10 in its entirety. A ground for this objection is that the statement is conclusory. A further
11 ground is that it is testimony given by an interested party relating to a prior invention and
12 is not corroborated. An additional ground is that the testimony is that the testimony is
13 confusing and generalized. *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b).

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

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

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

1 16. Exhibit AK, which is mentioned in Paragraph 117 of the Jacobsen declaration.
2 The ground for this objection is that there is no testimony of a person with personal
3 knowledge authenticating that Exhibit. *Orr v. Bank of America, NT & SA*, 285 F.3d 764,
4 773-75 (9th Cir. 2002) and case cited; Civil L. R. 7-5(b).

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

9 18. Paragraph 122 of the Jacobsen declaration, appearing at Page 21, Lines 2-6.
10 The ground for this objection is relevancy. The date on which a trademark for a product
11 alleged to be prior art is irrelevant unless it is assumed that (a) the trademarked product
12 existed (b) in its present form, (c) at the time the trademark issued.

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

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

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

1 Evid. 1002; Civil L. R. 7-5(b).

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

9 23. Paragraph 132 of the Jacobsen declaration, appearing at Page 23, Line 17. A
10 ground for this objection is that the statement is conclusory. A further ground is that it is
11 testimony given by an interested party relating to a prior invention and is not
12 corroborated. An additional ground is that the testimony is confusing and generalized.
13 *Schumer*, 308 F.3d 1304, 1315-16; Civil L. R. 7-5(b).

14

15 A. Objections to the "Declaration of Hans Tanner in opposition to the special
16 motion by defendant Kevin Russel to strike claims 5 and 7 in the complaint."

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

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

