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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.**

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

21 **[PROPOSED] ORDER GRANTING**
22 **SPECIAL MOTION TO STRIKE**
23 **PLAINTIFF'S CLAIMS AGAINST**
24 **KEVIN RUSSELL UNDER CAL.**
25 **CIV. PROC. CODE § 425.16**

26 **Date: August 4, 2006**
27 **Time: 9:00 a.m.**
28 **Dept: Courtroom 2, 17th floor**
Hon. Jeffrey S. White

Defendant Kevin Russell's special motion to strike the Fifth and Seventh Claims for Relief in the complaint of plaintiff Robert Jacobsen came on regularly for hearing on August 4, 2006. Having reviewed the points and authorities and evidence submitted by the parties, and having heard oral argument, the Court finds as follows:

1. Kamind Associates, Inc., ("KAM") through its attorney Kevin Russell, sent a written Freedom of Information Act request under 5 U.S.C. § 552 ("FOIA") to the United State's Department of Energy.
2. Plaintiff Robert Jacobsen ("Jacobsen") contends that the written FOIA request contains libelous statements against him and has asserted a pendent state-law libel claim against defendants KAM, Matthew Katzer ("Katzer"), and Kevin Russell.

1 3. Jacobsen contends that as the attorney for KAM, Russell committed acts
2 amounting to unfair business practices under California Bus. & Prof. Code §17200 by
3 conspiring with, or aiding and abetting KAM in its alleged attempt to monopolize model
4 railroad multi-train control systems, by, among other things by submitting the written
5 FOIA request to the Department of Energy (DOE), with alleged intent to embarrass and
6 intimidate Jacobsen.

7 4. California Code of Civil Procedure § 425.16 (“Section 425.16”) is a substantive
8 rule of California law and applies to state law claims raised in federal court to the extent
9 its provisions do not conflict with the Federal Rules of Civil Procedure. *US v. Lockheed*
10 *Missiles & Space. Co.*, 171 F.3d 1208, 1218 (9th Cir. 1999).

11 5. Section 425.16 provides that any cause of action against a person arising from any
12 act of that person in furtherance of the person's right of petition or free speech under the
13 United States or California Constitution in connection with a public issue shall be
14 stricken unless the court determines that the plaintiff has established that there is a
15 probability that the plaintiff will prevail on the claim.

16 6. Attorneys are held to be “persons” protected under Cal. Civ. Proc. Code § 425.16
17 (b)(1) for litigation and pre-litigation activities on behalf of their clients. *Shekhter v.*
18 *Financial Indemnity Co.*, 89 Cal. App. 4th 141, 152-54 (2001).

19 7. Ruling on a Section § 425.16 motion is a two step process in which the court first
20 decides whether a defendant has made a threshold showing that the challenged cause of
21 action is one arising from protected activity. *Equilion Enterprises v. Consumer Cause,*
22 *Inc.*, 124 Cal. Rptr.2d 507, 52 P.3d 685 (2002). If the challenged cause of action arises
23 from protected activity, the court then determines whether the plaintiff has demonstrated
24 a probability of prevailing on the claim. *Id.*

25 8. Section 425.16 (e) defines an act in furtherance of a person's right to petition in
26 connection with a public issue to include “any written or oral statement or writing made
27 before a legislative, executive, or judicial proceeding, or any other official proceeding
28 authorized by law.”

1 9. KAM's FOIA request to the Department of Energy was made in the context of an
2 "official proceeding authorized by law" and is a protected activity under Section 425.16.

3 10. Jacobsen's Fifth Claim for Relief alleging an anticompetitive conspiracy under
4 California's unfair practices law, California Business and Professions Code § 17200,
5 arises from a protected activity under Section 425.16, in that it alleges injuries caused by
6 KAM's FOIA request to the Department of Energy, and those allegations are neither
7 incidental nor collateral to that claim for relief.

8 11. To establish an attorney's liability for conspiring with his/her client under
9 California law, a plaintiff must show that the attorney either violated an independent legal
10 duty to the plaintiff, or the attorney's acts went beyond the performance of a professional
11 duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of
12 the attorney's financial gain. Cal. Civ. Code § 1714.10.

13 12. Jacobsen did not show a probability of prevailing against Russell on the Fifth
14 Claim for Relief, in that he did not show that Russell violated an independent legal duty
15 to Jacobsen; acted in furtherance of Russell's financial gain, or performed any of the acts
16 complained of in any capacity other than as KAM's attorney.

17 13. Jacobsen's Seventh Claim for Relief, alleging libel committed in the FOIA request,
18 is based entirely on the above FOIA request and arises from a protected activity under
19 Section 425.16.

20 14. Jacobsen has not shown a probability of prevailing on the Seventh Claim for
21 Relief, because the subject FOIA request is absolutely privileged under California Civil
22 Code § 47 (b).

23 15. Jacobsen has not shown a probability of prevailing on the Seventh Claim for
24 Relief, because no statement in the complained-of FOIA request rises to the level of
25 defamation under California law.

26 Therefore, based upon the above findings and being fully advised in the premises,
27 it is ORDERED that Russell's special motion to strike Jacobsen's libel and unfair
28 business practices claims against Russell under Cal. Civ. Proc. Code § 425.16 is

1 GRANTED and Jacobson's Counts Five and Seven against Russell are stricken.

2 Judgment shall be entered for Russell and he shall recover his costs, including his
3 reasonable attorneys fees, incurred in bringing this motion.

4 Dated: _____

Hon. Jeffrey S. White
District Court Judge

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6 Approved as to form:

7 _____
8 Victoria K. Hall, Attorney
For Plaintiff Jacobsen

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