

1 VICTORIA K. HALL (SBN 240702)
LAW OFFICE OF VICTORIA K. HALL
2 3 Bethesda Metro Suite 700
Bethesda MD 20814
3 Victoria@vkhall-law.com
Telephone: 301-28-5925
4 Facsimile: 240-536-9142

5 DAVID McGOWAN (SBN 154289)
Warren Hall
6 5998 Alcala Park
San Diego CA 92110
7 dmccgowan@sandiego.edu
Telephone: 619-260-7973
8 Facsimile: 619-260-2748

9 Attorneys for Plaintiff
ROBERT JACOBSEN

10

11 UNITED STATES DISTRICT COURT

12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 SAN FRANCISCO DIVISION

14 ROBERT JACOBSEN,

15 Plaintiff,

16 v.

17 MATTHEW KATZER, et al.,

18 Defendants.

) No. C-06-1905-JSW-JL

) **PLAINTIFF ROBERT JACOBSEN'S**
) **MOTION FOR DISCOVERY PLAN**

) Courtroom: F, 15th Floor
) Judge: Hon. James Larson
) Date: Weds., July 8, 2009
) Time: 9:30 a.m.

19

20

21

22

23

24

NOTICE OF MOTION

25

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD

26

27

28

PLEASE TAKE NOTICE that, on Wednesday, July 8, 2009, at 9:30 a.m. in Courtroom F, 15th floor of the San Francisco Division of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff

1 Robert Jacobsen will seek changes in discovery. This motion is based on the following.¹

2
3 **I. Introduction**

4 Plaintiff Robert Jacobsen seeks an order relating to a discovery plan. This order would
5 make changes relating to interrogatories and depositions, and define the subjects for discovery.

6
7 **II. Procedure**

8 This case involves patents, copyright, trademark and DMCA issues relating to open source
9 software and model trains.

10 After Defendants answered in February 2009, Jacobsen filed an administrative motion for a
11 status conference. This status conference was to set dates for Rule 26(a) updates, a Rule 26(f)
12 discovery conference between counsel, and a Rule 16 conference. The district court granted the
13 motion, and set the status conference hearing for May 1, 2009. At the May 1 hearing, the district
14 court told Jacobsen that that day was the Rule 16 conference, and that it would set all pretrial dates
15 then, without a discovery plan. The district court stated that if the parties wanted a discovery plan,
16 they could raise the matter with the discovery magistrate judge. The district court stated that
17 discovery would open May 4, 2009 and close in early October 2009. The parties have never met
18 and conferred as required by Rule 26(f).

19 After leaving the May 1 hearing, Jacobsen's counsel learned of her grandfather's death
20 earlier that morning. She was in New Mexico through the end of the following week. Upon her
21 return, Katzer's counsel also had a death in the family. Afterward, the parties' counsel began
22 negotiations over a protective order and a discovery plan. They have been unable to agree on the
23 discovery plan. Jacobsen files this motion for a discovery order.

24 In the meantime, the parties have exchanged their first set of discovery requests. Jacobsen
25 sent his first discovery request on May 5, 2009. Defendants sent their first discovery request on
26 May 11, 2009.

27
28 ¹ This filing replaces the Jacobsen's motion for discovery plan [Docket #303] filed Tuesday, May 26, 2009.

1 On a related note, Jacobsen has determined that he has well over 1 million documents that
2 may be responsive to Katzer’s discovery requests, and may have several hundred thousand emails
3 that are responsive. The parties are negotiating limits on document production, but Jacobsen still
4 expects that between 1 million and 2 million pages will be produced, possibly more.

5
6 **III. Facts**

7 Jacobsen, the plaintiff, is the owner and assignee of JMRI software. Katzer and KAMIND,
8 the defendants, are competitors. Jacobsen added a copyright infringement claim after learning that
9 Katzer and KAMIND had converting JMRI files into a format to use with KAMIND software.
10 Jacobsen registered some versions after learning about the initial infringement. Because Katzer
11 and KAMIND engaged in a different type of infringement after Jacobsen registered his works,
12 Jacobsen may be eligible for statutory damages. Later versions were registered within the 3-month
13 period and may also be eligible for statutory damages. However, depending on the facts, Jacobsen
14 might not be eligible for statutory damages. He thus needs to establish another damages theory—
15 value of use—to obtain more than nominal damages.

16 Approximately 60 developers assigned their rights to Jacobsen. They can offer key
17 testimony on the amount of time they spent developing the files that Katzer and KAMIND
18 converted. Their testimony may also be needed on other issues relating to the software. Their
19 testimony is expected to be brief, probably not longer than 30 minutes per developer.

20 Jacobsen may also need to take testimony from decoder manufacturers. Jacobsen estimates
21 that there are approximately 50 manufacturers. Again, Jacobsen expects testimony from the
22 majority of manufacturers to be brief.

23 **IV. Argument**

24 Pursuant to Federal Rules of Civil Procedure 26(f), Jacobsen moves for an order adjusting
25 discovery. He requests the number of interrogatories be increased from 25 to 35. To obtain
26 testimony from developers and also, possibly decoder manufacturers, Jacobsen requests that,
27 instead of 10 depositions of 7 hours maximum each, the parties each have 100 hours of depositions.
28 Katzer and KAMIND oppose this request.

