Civil No. H028579

IN THE

Court of Appeal

FOR THE

STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JASON O'GRADY, MONISH BHATIA, AND KASPER JADE,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,
Respondent,

and

APPLE COMPUTER, INC.,
Real Party in Interest.

Petition for Writ of Mandate And/Or Prohibition from the Superior Court
for the
County of Santa Clara
Case No. 1-04-CV-032178
The Honorable James Kleinberg

REAL PARTY IN INTEREST APPLE COMPUTER, INC.'S RETURN BY WAY OF ANSWER AND DEMURRER TO PETITION FOR A WRIT OF MANDATE AND/OR PROHIBITION

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Real Party in Interest Apple Computer, Inc. ("Apple"), returns by way of verified answer and demurrer to the Petition for Writ of Mandate and/or Prohibition, as follows:

ANSWER

1. Apple admits the allegations in Paragraph 1.
2. Apple denies that Jason O'Grady is a journalist and denies that "O'Grady's PowerPage" is an online news magazine. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 2 and on that basis denies the same.
3. Apple lacks sufficient information to admit or deny the allegations in Paragraph 3 and on that basis denies the same.
4. Apple lacks sufficient information to admit or deny the allegations in Paragraph 4 and on that basis denies the same.
5. Apple admits that the PowerPage website is currently located at the web address www.powerpage.org. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 5 and on that basis denies the same.
6. Apple admits that it has provided O'Grady free access to its .Mac service based on Apple's understanding that O'Grady was affiliated with MacWorld and Peachpit Press. Apple denies that it has provided O'Grady free access to its .Mac service based on O'Grady's affiliation with PowerPage. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 6 and on that basis denies the same.

7. Apple denies that Apple Insider is an online news magazine. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 7 and on that basis denies the same.

8. Apple denies that Kasper Jade is a journalist and denies that Kasper Jade performs the reporting and editorial functions of a journalist or newsperson. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 8 and on that basis denies the same.

9. Apple denies that Jade has performed a journalist's or newsperson's functions as a publisher, editor or reporter for Apple Insider. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 9 and on that basis denies the same.

10. Apple admits that Apple Insider uses the web address www.appleinsider.com. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 10 and on that basis denies the same.

11. Apple admits that Non-party Nfox.com is a Nevada corporation based in Las Vegas and that Karl Kraft is the president of Nfox.com. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 11 and on that basis denies the same.

12. Apple admits that it is the plaintiff in this case and that it designs, manufactures and markets personal computers and related software, peripherals and other consumer electronics devices. Apple further admits that it advertises those products to the public. Apple admits that its complaint alleges a cause of action for misappropriation of trade secrets and that those trade secrets are alleged to exist in

information about an unannounced and undisclosed Apple product. Apple further admits that it contends that unknown parties, designated as Doe defendants, disclosed trade secret information about this product. Apple denies the remaining allegations in Paragraph 12.

13. Apple admits the allegations in Paragraph 13.

14. Apple admits that articles were posted at PowerPage on November 19, 22 and 23, 2004 regarding an unreleased Apple product code-named "Asteroid." Apple denies that Mr. O'Grady wrote the portions of those articles that were copies of Apple trade secrets; Apple lacks sufficient information to admit or deny the allegation that Mr. O'Grady wrote the remaining portions of those articles and on that basis denies the same. Apple denies the remaining allegations in Paragraph 14.

15. Apple admits that the PowerPage articles stated that the device had a FireWire connection. Apple further admits that the November 19, 2004 PowerPage article contained Apple's rendering of the Asteroid product design and that the November 22, 2004 PowerPage article contained a rendering described in the article as "a concept drawing from Bob Borries." Apple admits that the November 19, 22 and 23, 2004 PowerPage articles and the images contained therein did not display any "Apple Confidential – Need to Know Only" legend. Apple denies the remaining allegations in Paragraph 15.

16. Apple admits that PowerPage published on November 26, 2004 an article by "Dr. Teeth and the Electric Mayhem" and that the article purported, in part, to provide a "basic summary" of an article at createdigitalmusic.com. Apple further admits that the November 26

PowerPage article discussed the renderings in the PowerPage articles dated November 19 and 22, 2004, and in an Apple Insider article dated November 23, 2004. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 16 and on that basis denies the same.

17. Apple admits that on December 7, 2004, Apple demanded that PowerPage remove the articles dated November 19, 22, 23 and 26, 2004. Apple further admits that those articles are no longer available at the PowerPage site. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 17 and on that basis denies the same.

18. Apple admits that on November 23, 2004, Apple Insider published an article entitled "Apple developing FireWire audio interface for GarageBand" and that the article cited unnamed sources for information about the "Asteroid" product. Apple further admits that the article contained a rendering of the product. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 18 and on that basis denies the same.

19. Apple denies that it has not exhausted all alternative means of identifying the Does. Apple admits that it has identified a document that it believes to be the source of the misappropriated trade secret information published on PowerPage and Apple Insider and that Apple took reasonable measures to secure this document. Apple further admits that the document consists of electronic slides describing the Asteroid product and that the slides have "Apple Need-to-Know Confidential" legends. Apple admits that electronic slides created by presentation programs like Microsoft's PowerPoint

or Apple's Keynote can be edited to alter or remove text they contain. Apple denies that the document Apple believes to be the source of the misappropriated trade secret information was a PowerPoint or Keynote document and denies that the "Apple Need-to-Know Confidential" legend could be easily edited or removed from that document. Apple admits that it identified approximately 30 employees who had access to the document, that Apple's security employees asked these employees if they had information about the misappropriation of the document and/or information contained therein, and that each of these employees denied knowledge of the misappropriation. Apple denies the remaining allegations in Paragraph 19.

20. Apple denies that it did not request forensic analysis of technology capable of transferring the slides or other relevant information outside of Apple. Apple admits the remaining allegations in Paragraph 20.

21. Apple admits that it did not use non-employee investigators to investigate the trade secret misappropriation alleged in the Complaint. Apple denies that non-employee investigators could pursue the investigation more aggressively than Apple's security personnel or that Apple's security personnel feared internal retaliation within Apple as a result of their investigation. Apple further denies that Petitioners are journalists, denies that the articles about Asteroid contained identified sources for the misappropriated information, and denies that Apple did not even attempt to contact identified sources for the misappropriated information. Apple lacks

sufficient information to admit or deny the remaining allegations in Paragraph 21 and on that basis denies the same.

22. Apple admits that it filed on December 13, 2004 its Ex Parte Application For An Order For Issuance Of Commission And Granting Leave To Serve Subpoenas And Memorandum Of Points And Authorities In Support Of Same and admits that this Ex Parte Application sought authority to issue subpoenas to PowerPage, Apple Insider and Think Secret to identify the proper defendants. Apple denies that PowerPage, Apple Insider and Think Secret – or any of them – are online news sites. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 22 and on that basis denies the same.

23. Apple denies that PowerPage, Apple Insider and Think Secret – or any of them – are online news sites. Apple admits the remaining allegations in Paragraph 23.

24. Apple admits that on December 14, 2004 Apple obtained a commission for a subpoena to Red Widget and that Apple believed that Red Widget owned Power Page. Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 24 and on that basis denies the same.

25. Apple admits that no Texas subpoena was served on Red Widget and that Karl Kraft is President of Nfox.com. Apple further admits that Karl Kraft informed counsel for Apple of his belief that email messages in the Powerpage.org email account contained the term "Asteroid." Apple lacks sufficient information to admit or deny the remaining allegations in Paragraph 25 and on that basis denies the same.

26. Apple admits the allegations in Paragraph 26.

27. Apple admits the allegations in Paragraph 27.

28. Apple lacks sufficient information to admit or deny the allegation that "Nfox.com's designated custodian of records" is the equivalent of "Custodian of Records of Nfox.com and/or Karl Kraft, or such Custodian of Record designated by Karl Kraft" and on that basis denies the same. Apple admits the remaining allegations in Paragraph 28.

29. Apple lacks sufficient information to admit or deny the allegations in Paragraph 29 and on that basis denies the same.

30. Apple admits that on February 14, 2005, Petitioners filed a motion for protective order under Code of Civil Procedure Section 2017(c). Apple admits that the motion sought a protective order on the grounds of Article I, Section 2(b) of the California Constitution, California Evidence Code Section 1070 and *Mitchell v. Superior Court,* 37 Cal. 3d 268 (1984), and that the motion stated, "In addition, email service providers, such as Nfox.com, are specifically prohibited by federal law from 'knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service,' with limited exceptions that do not apply here. 18 U.S.C. § 2702 Accordingly, the protective order should include records held by third parties, including without limitation the Non-Party Journalists' email service providers." Apple further admits that the Petitioners submitted with their motion the Declaration Of Professor Thomas Goldstein In Support Of Non-Party Journalists' Motion For A Protective Order and the Declaration Of Dan Gillmor In Support Of Protective Order. Apple

lacks sufficient information to admit or deny the allegations that the sources are confidential, that Thomas Goldstein and Dan Gillmor are experts, that Thomas Goldstein is a UC Berkeley journalism professor, and that Dan Gillmor is a noted technology journalist and on that basis denies each of those allegations. Apple denies the remaining allegations in Paragraph 30.

31. Apple admits the allegations in Paragraph 31.

32. Apple admits the allegations in Paragraph 32.

33. Apple notes that the Petition contains two paragraphs marked as "Paragraph 33." Apple admits the allegations in the first Paragraph 33.

34. Apple denies that petitioners are journalists. Apple admits the remaining allegations in the second Paragraph 33.

35. Apple denies each and every allegation in Paragraph 34.

36. Apple denies each and every allegation in Paragraph 35.

37. Apple admits that the Respondent trial court's discovery order is not appealable. Apple denies the remaining allegations in Paragraph 36.

38. Apple denies each and every allegation in Paragraph 37.

39. Apple denies that petitioners are entitled to the relief requested in Paragraphs 39 through 41 or to any other relief.

As a separate and distinct affirmative defense, Apple alleges as follows:

FIRST AFFIRMATIVE DEFENSE

40. The Petition fails to state a claim upon which relief can be granted.

WHEREFORE, Apple respectfully requests that:

1. The Petition for Writ of Mandate and/or Prohibition be denied;
2. Petitioners take nothing by this action;
3. Apple recover its costs in this action; and
4. The Court award such other relief as it considers proper.

DEMURRER

The Petition for Writ of Mandate and/or Prohibition should be denied because it fails to state a claim on which the writ relief requested by Petitioners can be granted. The Court's June 2, 2005 Order stated that Apple may choose to treat its preliminary opposition as the written return to the Petition, and Apple hereby requests that the Court treat its preliminary opposition as the Memorandum of Points and Authorities supporting its return by way of demurrer to the Petition.

WHEREFORE, Apple respectfully requests that:

1. This demurrer be sustained without leave to amend the Petition;
2. The Petition for Writ of Mandate and/or Prohibition be denied;
3. Petitioners take nothing by this action;
4. Apple recover its costs in this action; and
5. The Court award such other relief as it considers proper.

Dated: July 5, 2005

GEORGE A. RILEY
DAVID R. EBERHART
JAMES A. BOWMAN
O'MELVENY & MYERS LLP

By _____
David R. Eberhart
Attorneys for Real Party in
Interest Apple Computer, Inc.

VERIFICATION

I, David R. Eberhart, declare:

I am an attorney at law, duly licensed and admitted to practice in all of the courts of the State of California. I am a partner in the law firm of O'Melveny & Myers LLP, attorneys of record for Real Party in Interest Apple Computer, Inc.

I have read the foregoing Answer to Petition for Writ of Mandate and/or Prohibition and know the contents thereof to be true of my own personal knowledge. I, rather than Apple, verify this Answer because its contents are within my personal knowledge based on, among other things, my involvement and familiarity with the relevant trial court proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of July, 2005 in San Francisco, California.

David R. Eberhart

SF1:592569.2

PROOF OF SERVICE

I am a citizen of the United States and employed in the County of San Francisco, State of California, at the law firm of O'Melveny & Myers, located at 275 Battery Street, San Francisco, California 94111. I am not a party to this action.

On this 5th day of July, 2005 I caused to be served the following document:

REAL PARTY IN INTEREST APPLE COMPUTER, INC.'S RETURN BY WAY OF ANSWER AND DEMURRER TO PETITION FOR A WRIT OF MANDATE AND/OR PROHIBITION

by putting a true and correct copy thereof together with a copy of this declaration, in a sealed envelope, with delivery fees paid or provided for, for delivery via United States Mail to:

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Attorney for Amicus Curiae the Business
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Also on July 5, 2005, I caused the personal service of the above referenced documents by requesting that an agent or employee of Taylor/Price Attorney Service deliver to the recipient named below, either by handing the documents to the recipient or by leaving the documents with the receptionist or other person authorized to accept courier deliveries on behalf of the addressee:

Clerk of the Court
Santa Clara County Superior Court
for delivery to the Honorable James Kleinberg
191 North First Street
San Jose, California 95113

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on this 5th day of July, 2005, at San Francisco, California.

SHIVON MEBLIN

SF1:593118.1