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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

APPLE COMPUTER, INC.,

Plaintiff,

v.

DOE 1, et al.,

Defendants.

Case No. 1-04-CV-032178

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NON-PARTY JOURALISTS' MOTION FOR PROTECTIVE ORDER

Date: April 8, 2005
Time: 8:30 a.m.
Location: Department 14
Judge: Hon. James Kleinberg

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I. INTRODUCTION

In the course of gathering news, journalists frequently rely on confidential sources. (Goldstein Decl., ¶ 18.) Journalists must be able to promise confidentiality in order to obtain information on matters of public interest. (*Id.* at ¶ 19.) Forced disclosure of confidential or unpublished sources and information will cause individuals to refuse to talk to reporters, resulting in a "chilling effect" on the free flow of information and the public's right to know.

The reporter's need for confidential sources is so important to society that the people of California elevated the reporter's shield against discovery from a statutory protection to the California Constitution in 1980. As the arguments that accompanied this proposed amendment explained:

> The free flow of information to the public is one of the most fundamental cornerstones assuring freedom in America. Guarantees must be provided so that information to the people is not inhibited. … And the use of confidential sources is critical to the gathering of news. *Unfortunately, if this right is not protected, the real losers will be all Californians who rely on the unrestrained dissemination of information by the news media.*

Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec. (June 3, 1980) p. 19 (italics in original); *see also Delaney v. Superior Court,* 50 Cal.3d 785, 794-796 (1990) (discussing the proposition).

The reporter's privilege applies to online publication and print publication equally. Both print magazines and online magazines share the essential characteristics of journalism, especially as more and more news publications are exclusively online (e.g., online news sites Slate <www.slate.com>, Salon <www.salon.com>, and C|Net News <www.news.com>). (Goldstein Decl., ¶ 23-29; Gillmor Decl., ¶ 7-8, Ex. F-K). Indeed, online news sources are often the place where news first breaks, before traditional journalists get the story. (Gillmor Decl., ¶ 9, Ex. L-M.) Moreover, coverage by online news periodicals has made important contributions to public debate. (*Id.* at ¶ 10, Ex. N-O.)

As James Madison understood, "[a] popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 9 James Madison, WRITINGS OF JAMES MADISON, 103 (G. Hunt ed., 1910). Protections for the media's sources and

unpublished information are critical means for journalists in acquiring information and communicating it to the public. (Gillmor Decl., ¶¶ 17-19) As journalists, non-parties Jason O'Grady, Monish Bhatia and Kasper Jade[1] (collectively the "Non-Party Journalists") must be protected by the reporter's shield embodied both in Article I, Section 2(b) of the California Constitution and in California Evidence Code Section 1070, as well as the reporter's privilege under the First Amendment of the United States Constitution.

Likewise, the shield protects a reporter's sources and unpublished information regardless of the location—journalists regularly use the services of third parties in preparing stories, and a litigant cannot circumvent the strong public policy interests underlying the shield and First Amendment privilege simply by seeking a journalist's records from a third-party entrusted with custody of them.

Because of the protections provided by these principles, the Non-Party Journalists cannot be compelled to disclose the source of any information procured in connection with their journalistic endeavors, nor any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. Accordingly, a protective order is proper because Apple Computer, Inc. ("Apple") cannot show a likelihood that the information it seeks from the Non-Party Journalists will lead to the discovery of admissible evidence, and therefore cannot overcome the burden, expense and intrusiveness that its discovery will cause.

II. BACKGROUND

A. Procedural History

Apple filed this action on December 13, 2004, and simultaneously filed an "*Ex Parte* Application For An Order For Issuance Of Commission And Leave To Serve Subpoenas," seeking subpoenas to three online news sites: PowerPage, Apple Insider, and Think Secret (collectively, the "Apple News Sites"). For each Apple News Site, Apple sought to identify the sources used in the site's news articles and unpublished information used for preparing those articles.

[1] "Kasper Jade" is a pseudonym.

This court granted Apple's application on December 14, 2004, authorizing Apple to serve subpoenas to "Powerpage.com,[2] Appleinsider.com, and Thinksecret.com requiring each to produce all documents relating to any information posted on its site relating to an unreleased Apple product code named 'Asteroid' …" and to serve subpoenas on each of the Apple News Sites for information leading to the identity of "any individual or individuals who have knowledge regarding the posts on its site disclosing information about the Product … and individuals who received and/or edited information related to the Product." Order Granting *Ex Parte* Application for Discovery and Issuance of Commissions, Dec. 14, 2004 ("Discovery Order 1").

Apple drafted a subpoena to Apple Insider (care of non-party Monish Bhatia) seeking information to identify the sources used in Apple Insider's article, unpublished information used for preparing the article, as well as the identify of the author, a reporter writing under the pseudonym Kasper Jade.

On December 14, Apple also obtained a commission for a subpoena to Red Widget, PowerPage's Texas-based Internet service provider, apparently believing incorrectly that PowerPage was owned by Red Widget. No Texas subpoena was ever served on Red Widget. Nevertheless, Karl Kraft, who is affiliated with Red Widget and also president of email service provider Nfox.com, Inc., informed Apple of his belief that certain email messages in O'Grady's PowerPage's email account contained the term "Asteroid."[3] (Opsahl Declaration, ¶¶ 2-3 and Ex. B; *see also* O'Grady Decl., ¶¶ 23-24.)

On February 3, 2005, Apple sent a facsimile notifying the Non-Party Journalists' counsel of its intention to seek an *ex parte* order authorizing expedited discovery to Nfox. (*Id.* at ¶ 7 and Ex. C.) The Non-Party Journalists' counsel responded the same day, asking Apple to meet and confer about the important issues raised by Apple's discovery requests. (*Id.* at ¶ 8 and Ex. D.) Subsequently, Non-Party Journalists' counsel engaged in a further good faith attempt at an informal resolution of each issue presented by this motion. (*Id.* at ¶¶ 6, 10-12, Ex. J-L.)

[2] There is no "powerpage.com;" presumably Apple's proposed order had meant to say ".org."
[3] By communicating the content of O'Grady's communications to Apple, apparently without prompting, Nfox violated the Stored Communications Act, 18 U.S.C. § 2702.

On February 4, 2005, this Court granted Apple's *ex parte* application, authorizing subpoenas to Nfox and its principal, Karl Kraft. (Order Granting *Ex Parte* Application for an Order Granting Leave to Serve Expedited Disc. on Nfox.com and Karl Kraft, February 4, 2005, hereinafter "Discovery Order 2.") Three California subpoenas/deposition notices were served the same day, and three Nevada subpoenas the following week. (Opsahl Decl., ¶¶ 7-8, Ex. E-H.)

B. Factual Background

1. Jason O'Grady and O'Grady's PowerPage

Non-party Jason O'Grady is a journalist who owns and operates "O'Grady's PowerPage," an online news magazine that provides its readers with news and information about Apple Macintosh compatible software and hardware products. (O'Grady Decl. at ¶ 1.) O'Grady has been working with Macintosh computers since 1985, starting with the original 128k Apple Macintosh computer. (*Id.* at ¶ 2.) He co-founded the first dedicated Apple PowerBook User Group (PPUG) in the United States. (*Id.*)

In addition to PowerPage, O'Grady has contributed articles to MacWEEK, MacWorld, MacAddict, MacPower (Japan). (*Id.* at ¶ 3.) O'Grady has an article published in MacWorld magazine's February 2005 issue, and is currently writing an article for an upcoming edition. (*Id.*) These print magazines are exclusively dedicated to the same news beat as PowerPage, i.e., news related to Apple Macintosh and Apple Macintosh-compatible products. (*Id*). He has also written chapters for *The Macintosh Bible*, Eighth Edition and *The Macintosh Bible*, Panther Edition (Peachpit Press), books that provide information for users of Macintosh computers. *Id.*

Based in Abington, Pennsylvania, PowerPage began publishing daily news since December 1995. (*Id.* at ¶¶ 5-6.) PowerPage is currently located at the web address www.powerpage.org, publishing at that location since 2002. (*Id.* at ¶ 7.) Previously, PowerPage published under Go2mac.com and ogrady.org. (*Id.*) Over the last two years, PowerPage has averaged over 300,000 unique visits per month. (*Id.* at ¶ 11.) By comparison, the leading print magazine for Macintosh related news is MacWorld, which had an average monthly paid circulation of 253,241 for the first

six months of 2004.[4] (Opsahl Decl., ¶ 9, Ex. I.)

PowerPage includes news reports, feature stories and editorials, as well as how-to's, tips and other practical advice for Macintosh users. (O'Grady Decl., ¶ 9 and Ex. B.) It publishes an average of 15-20 articles per week, with over 60 articles published in the month of November 2004. (*Id.* at ¶ 10.) O'Grady functions as the publisher and one of nine editors and reporters for PowerPage. (*Id.* at ¶ 8 and Ex. A.) O'Grady has been credentialed as media for the MacWorld Exposition, which is the premier trade show and conference dedicated to Macintosh computers and peripherals. (*Id.* at ¶ 12 and Ex. C.) Apple has provided O'Grady with free access to its ".Mac" service as a member of the media, and Apple CEO Steve Jobs has personally provided quotes for PowerPage in response to O'Grady's media inquiries. (*Id.* at ¶¶ 13-14 and Ex. D.)

On November 19, 2004, O'Grady wrote an article for PowerPage discussing a rumored new product from Apple called "Asteroid," with two follow-up articles on November 22 and 23. (*Id.* at ¶¶ 15-16.) The information in the article was obtained for the journalistic purpose of communicating information to the public. (*Id.* at ¶ 17-18.) The PowerPage articles reported that Apple was developing an add-on device that would let musicians plug their electric guitars and other instruments into a Macintosh computer. (O'Grady Decl., ¶¶ 15-16 and Ex. E, F & G.) The device was said to contain analog inputs for plugging in instruments or other audio sources, a FireWire connection to the Macintosh computer, along with audio jacks needed to output sound. (*Id.*) The articles included two artist's renderings of the rumored device. (*Id.*) On November 26, 2004, PowerPage published an article by an author writing under the pseudonym "Dr. Teeth and the Electric Mayhem," which summarized some additional details from an article on createdigitalmusic.com and discussed the various artists' renderings. (O'Grady Decl., ¶ 20a nd Ex. H.)

Through an email dated December 7, 2004, to PowerPage, Apple's counsel demanded that PowerPage remove the four articles, and O'Grady complied shortly after receiving the email message. (*Id.* at ¶¶ 21-22 and Ex. I.)

[4] In addition, MacWorld gave out an average of 132,826 non-paid copies to newly-registered users of Apple products.

2. Monish Bhatia, Kasper Jade and Apple Insider

Non-Party Monish Bhatia is the publisher of the "Mac News Network" (located at www.macnn.com), and provides hosting service to a number of different sites, including Apple Insider, an online news magazine that provides its readers with a collection of articles, editorials, stories, pictures, and other features about Apple Macintosh compatible software and hardware products. (Jade Decl., ¶¶ 2, 7.) Bhatia provides Apple Insider with systems administration, bandwidth allocation and other operational services. (*Id.* at ¶ 7.)

Non-party Kasper Jade owns and operates Apple Insider and performs reporting and editorial functions under the pseudonym "Kasper Jade." (*Id.* at ¶ 1.) He has served as the primary publisher, editor and reporter for Apple Insider since the spring of 2003, and previously served as a reporter for Apple Insider between September 1998 and April 2001. (*Id.* at ¶¶ 1, 6.)

With servers based in McLean, Virginia, Apple Insider has been publishing daily or near-daily technology news at the web address www.appleinsider.com since September 1998. (*Id.* at ¶¶ 3, 7.5.) Apple Insider is a heavily trafficked site. For example, Apple Insider received over 438,000 unique visitors in July 2004, the last month for which figures are currently available. (*Id.* at ¶ 5.) Apple Insider publishes an average of 7 to 15 articles per week. (*Id.* at ¶ 4.) For example, 39 articles were published in November 2004. (*Id.*)

On November 23, 2004, Apple Insider published an article written by Jade entitled "Apple developing FireWire audio interface for GarageBand." (*Id.* at ¶ 8 and Ex. B.) The article cited to unnamed sources to provide information about the "Asteroid" product, and contained an artists rendering by non-party Paul Scates. (*Id.*)

III. ARGUMENT

Pursuant to California Code of Civil Procedure Section 2017(c), any "affected person[s]" may move for a protective order against "burden, expense, or intrusiveness … that … outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Cal. Code Civ. Proc. ("CCP") § 2017(c); *see also* CCP § 1987.1 (stating that this court is empowered to "make any other order as may be appropriate to protect ... the witness … from unreasonable or oppressive demands including unreasonable violations of a witness's … right of privacy.").

As discussed below, Apple's subpoenas, both served and proposed, to the Apple News Sites and Non-Party Journalists will not lead to the discovery of admissible evidence, and are extremely intrusive and burdensome because they conflict with the public policies embodied in the California reporter shield law, the First Amendment reporter's privilege, and the reporters' rights of privacy. Because these laws prevent Apple from receiving the information it seeks, a protective order is appropriate to protect the Non-Party Journalists from undue burden, expense, intrusion, and invasion of their rights of privacy.

A. California's Constitution, Evidence Code and Case Law Shields Journalists

Apple's discovery requests conflict with the California Constitution, which shields journalists like the Non-Party Journalists from being required to disclose the information Apple seeks. Cal. Const., art. I, § 2(b). Originally enacted as Section 1070 of the Evidence Code, the people of California elevated the shield to constitutional status in 1980, illustrating the voter's "intention to favor the interests of the press in confidentiality over the general and fundamental interest of the state in having civil actions determined upon a full development of material facts." *Playboy Enters., Inc. v. Superior Court*, 154 Cal.App.3d 14, 27 - 28 (1984). The Constitutional reporter's shield provides that:

> A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Cal. Const., art. I, § 2(b); *accord* Cal. Evid. Code § 1070. Apple seeks to require the Non-Party Journalists to produce all documents relating to any information posted on their sites relating to "Asteroid," which would include unpublished information obtained for drafting the articles, as well as the sources of information procured for the articles.

As the California Supreme Court held in *New York Times Co. v. Superior Court*, 51 Cal.3d 453, 457 (1990), this Constitutional provision provides "absolute protection to nonparty journalists in civil litigation from being compelled to disclose unpublished information." This absolute

immunity cannot be overcome even "by a showing of need for unpublished information." *Id.* at 461; *see also Miller v. Superior Court*, 21 Cal.4th 883, 890 (1999) ("The shield law is, by its own terms, *absolute* rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process." (emphasis original)); *In re Willon*, 47 Cal. App. 4th 1080, 1090-91 (1996) (affirming the absolute nature of the protection in civil cases).

Likewise, California cases have recognized that these provisions protect against disclosure of the identity of a source or any information that might lead to the identity of the source. *See e.g. Rosato v. Superior Court*, 51 Cal.App.3d 190, 218 (1975) (privilege "extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information.")

1. The Non-Party Journalists are Protected by the Reporter's Shield

California's reporter's shield was intended to be broad in its reach, because it protects all persons "connected with … a newspaper, magazines, or other periodical publication," without limitation. Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070. O'Grady and Jade each publishes an online news periodical, edits submission by others and writes news articles. (O'Grady Decl., ¶ 8; Jade Decl., ¶ 1) Bhatia, by virtue of performing technical and administrative functions, is certainly "connected with" the Apple Insider news organization. (Jade Decl., ¶ 7) Indeed, two California cases have even applied the reporter's shield to protect freelance reporters. *People v. Von Villas*, 10 Cal.App.4th 201, 231-32 (1992) (holding that the shield laws encompassed the writer's position as a freelance writer even before he entered into publication agreements with two magazines.); *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal.App.3d at 28-29 (1984) (shield law protects nonparty publisher from the production of notes, tapes and records of an interview conducted by a freelance reporter.) Power Page and Apple Insider are, like newspapers or magazines, news periodical publications. (Goldstein Decl., ¶¶ 31-32; Gillmor Decl., ¶ 4.)

Thus, the Non-Party Journalists can avail themselves of the protection upon the prima facie showing that the information was obtained "for the journalistic purpose of communicating information to the public." *Rancho Publ'ns. v. Superior Court*, 68 Cal.App.4th 1538, 1546 (1999)

(discussing scope of reporter's shield). The publishers, editors and authors connected with Power Page and Apple Insider are engaged in the process of trade journalism, and communicate their news to hundreds of thousands of visitors per month. (Goldstein Decl., ¶¶ 31-32; Gillmor Decl., ¶ 4; O'Grady Decl., ¶¶ 5-20; Jade Decl., ¶¶ 2-8.) Accordingly, each of the Non-Party Journalists is protected by the California Constitution.

The California protection is a shield against contempt, and subpoenaing parties may be entitled to other remedies for failure to comply with a subpoena. *New York Times*, 51 Cal.3d at 462 (citing CCP § 1992.) Regardless of the theoretical availability of a small fine pursuant to Section 1992, Apple is unable to show that this discovery will lead to admissible evidence, and therefore unable to justify the burden, expense and intrusion this discovery would cause the Non-Party Journalists.

B. <u>The Federal First Amendment Shields Journalists</u>

Compelled disclosure of a journalist's source runs afoul of the First Amendment because some speakers may be chilled into silence without the promise of confidentiality. Even apart from California's constitutional shield provisions, the First Amendment independently provides a qualified privilege to journalists. *See Mitchell v. Superior Court*, 37 Cal.3d 268 (1984) (holding that the first Amendment to the federal Constitution also confers "a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources."); *Rancho Publ'ns.*, 68 Cal.App.4th at 1547-50 (listing cases in which California courts have applied "the qualified constitutional privilege to block civil discovery that impinges upon free speech or privacy concerns of the recipients of discovery demands and innocent third parties as well."); *see also Shoen v. Shoen*, 5 F.3d 1289, 1293-97 (9th Cir. 1993) (*Shoen I*) (broadly applying First Amendment privilege).

As noted by the California Supreme Court, federal Judge J. Skelly Wright eloquently explained the importance of the First Amendment reporter's privilege:

> The First Amendment … guarantees a free press primarily because of the important role it can play as 'a vital source of public information.' … Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

> Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

Mitchell, 37 Cal.3d at 274-75 (quoting *Zerilli v. Smith,* 656 F.2d 705, 710-11 (D.C.Cir. 1981) (internal citations omitted)). *Mitchell* also cited the "dramatic illustrations of the value of the reporter's privilege" in *Democratic National Committee v. McCord*, 356 F.Supp. 1394, 1397 (D.D.C. 1973) (considering a subpoena for sources who supplied media with information regarding the 1972 Watergate burglary, court "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public,") and *Gilbert v. Allied Chemical Corp*. 411 F.Supp. 505, 508 (E.D.Va. 1976) ("[I]f a news station or newspaper is forced to reveal the confidences of their reporters, the sources so disclosed, other confidential sources of other reporters, and potential confidential sources will be significantly deterred from furnishing further information to the press"). *Mitchell,* 37 Cal.3d at 275.

The First Amendment's protections are fully applicable to the Internet. As explained by the U.S. Supreme Court:

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Reno v. ACLU, 521 U.S. 844, 870 (1997) (citations omitted). Accordingly, the Supreme Court applied unqualified First Amendment scrutiny to the new medium. *Id.*

1. <u>The Non-Party Journalists Are Entitled to the Federal First Amendment Privilege</u>

The California Supreme Court has held that under the First Amendment, "in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources." *Mitchell*, 37 Cal.3d at 279 (applying qualified constitutional immunity rather than shield law to allow newspersons to withhold identity of sources in defamation suit.) As reporters, editors or publishers, the Non-Party Journalists are entitled to this constitutional privilege. (*See* Goldstein Decl., ¶ 31.)

Likewise, in the federal courts, the First Amendment privilege has been applied broadly to protect journalists of all stripes. In *Shoen I*, the Ninth Circuit found that a book writer had standing to invoke a reporter's privilege, holding:

> What makes journalism journalism is not its format but its content. . . . The test . . . is whether the person seeking to invoke the privilege had "the intent to use material – sought, gathered or received – to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process." If both conditions are satisfied, then the privilege may be invoked.

Shoen I, 5 F.3d at 1293 (quoting test in *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2nd Cir. 1987), *cert denied* 481 U.S. 1015 (1987)). *Shoen I* saw no difference in "manner of dissemination" because "'[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* (quoting *von Bulow*, 811 F.2d at 144); *see also* Goldstein Decl. ¶13-17, 29. Here, the Non-Party Journalists intended to use the material received from confidential sources to disseminate information to the public, and did so when the articles were published. (O'Grady Decl. at ¶¶ 15-18; Jade Decl. at ¶ 8.)

2. Apple Has Not Met Its Burden to Overcome the First Amendment Reporter's Privilege

In the ordinary civil case the litigant's "interest in disclosure should yield to the journalist's privilege." *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) (*Shoen II*) (quoting *Zerilli* 656 F.2d at 712). Compelled disclosure from a journalist must be a "'last resort' permissible only when the party seeking disclosure has no other practical means of obtaining the information." *Mitchell,* 37 Cal.3d at 282 (citations omitted). In *Mitchell,* the California Supreme Court held that courts should evaluate five factors in determining whether disclosure by a reporter should be compelled. *Id*. at 279-83.

The first *Mitchell* factor, whether the reporter is a party to the litigation, counsels against disclosure. The Non-Party Journalists are not parties to this litigation. The second *Mitchell* factor, whether the information sought "goes to the heart of the plaintiff's claim," also counsels against disclosure. *Id.* at 280. At its heart, Apple's claim indicates a failure of its own mechanisms for preventing the dissemination of alleged trade secret information to the news media by Apple's own employees. (*See* Complaint ¶ 9). There is no indication of industrial espionage by a competitor, a

profit motive or even malice. Apple should deal with its problems with its employees internally, with as little impact on the news media as possible.

Furthermore, under this factor, "mere relevance is insufficient to compel discovery." *Mitchell*, 37 Cal.3d at 280. Yet, much of the proposed discovery goes beyond Apple's core trade secret claim. For example, Apple has sought to obtain identity information for the pseudonymous reporter "Dr. Teeth," who was merely summarizing publicly available information, and commenting on already existing artists' renderings. (Disc. Order 1; O'Grady Decl. at ¶20 and Exhibit H.) Likewise, Apple seeks identity information for Bob Borries and Paul Scates, two artists who created rendering of what the "Asteroid" product might look like, without any showing that these renderings were based on trade secret information. Disc. Order 1. The subpoenas served on Nfox, O'Grady's email service provider, seek the identity and communications of "any individual ... who provided information related to the Product [Asteroid]," a broad category which would include people who provided non-trade secret information. *See* Disc. Order 2.

Under the third *Mitchell* factor, Apple must show that the material sought is unavailable despite the exhaustion of all reasonable alternative sources. *Mitchell*, 37 Cal.3d at 282. Seeking information from reporters must be the "'last resort,'" not the first resort as Apple is attempting here. *Id*. In using the term "exhaust," the *Mitchell* Court meant pursuing all alternative avenues of discovery to reduce "to the core," whatever information remains unavailable. *Id*. To overcome the qualified privilege, Apple must first investigate its own house before seeking to disturb the freedom of the press and disclose those efforts and the results of those efforts to the court in detail. *Id.* (denying discovery where "plaintiffs made no showing that they have exhausted alternative sources of information.")

The fourth *Mitchell* factor – great public importance and a substantial risk of harm to the source – neither favors disclosure nor discourages it. The fifth *Mitchell* factor – establishing a *prima facie* showing on the underlying claim – only applies where the reporter is a party-defendant. *Id.* at 283. Accordingly, the independent First Amendment privilege provides an additional reason to grant the protective order requested by the Non-Party Journalists.

3. The First Amendment Also Protects Pseudonymous Speech

Independent of the reporter's privilege, the First Amendment protects the privacy rights of all speakers, reporters or not, who "wish to promulgate their information and ideas in a public forum while keeping their identities secret." *Rancho Publ'ns.*, 68 Cal.App.4th at 1547. Accordingly, the First Amendment requires courts to "carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights." *Id.* at 1549.

For this reason, courts have recognized that "[p]eople … should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity[ies]." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

The Supreme Court has repeatedly upheld the First Amendment right to speak anonymously. *Buckley v. American Constitutional Law Found.,* 525 U.S. 182, 197-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341-44 (1995); *Talley v. California*, 362 U.S. 60, 64 (1960). These cases celebrate the important role played by anonymous or pseudonymous writings through history, from Ben Franklin's anonymous scoldings of 18th-century Boston delivered under the name "Silence Dogood" to the explicitly political advocacy of the Federalist Papers. As the Supreme Court said in *McIntyre:*

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, *an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.*

McIntyre, 514 U.S. at 341-342 (emphasis added).

In *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088 (W.D. Wash. 2001), the federal court considered a case in which a large corporation attempted to use a subpoena to obtain the identities of pseudonymous speakers on an Internet message board operated by 2TheMart.com. Since the petitioner had "failed to demonstrate that the identity of these Internet users is directly and

materially relevant to a core defense in the underlying securities litigation," the court granted the speakers' motion to quash the subpoena. *Id.* at 1097. The court said, "The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously." *Id.* at 1093. Without such ability, people may no longer participate in public message boards. "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Id.* at 1093.

2TheMart's First Amendment balancing test protects non-party reporters "Dr. Teeth" and Jade's rights to privacy. Each has elected to exercise his fundamental right to speak pseudonymously. Apple's unserved subpoena to Apple Insider seeks to obtain Jade's true identity, presumably for the purpose of issuing a subpoena to Jade for unpublished information from his story and the identities of his confidential sources. (*See* Disc. Order 1 (also permitting discovery of the identity of "Dr. Teeth.") Because the reporter's shield provisions discussed above would protect this underlying information, Apple cannot demonstrate that these reporter's identity would lead to admissible evidence, and therefore cannot overcome their First Amendment interest.

C. The Reporter's Privilege Extends to Records Held By Third Parties

It makes no difference whether the journalist's records are held by a third-party. As explained by *Rancho Publications,* "[c]ompelled source disclosure runs afoul of the First Amendment because some speakers may be chilled into silence without the cover of anonymity." *Rancho Publ'ns.*, 68 Cal.App.4th at 1547. Any material subject to the reporter's privilege remain protected, regardless of whether they are held on behalf of a reporter by a third-party, because it is their very disclosure that offends the First Amendment. "'Third-party discovery poses an unmistakable threat to source confidentiality. If a litigant subpoenas the proper documents, it can easily discover the identity of a source.'" *Id.* at 1548, n.6 (quoting Bradley S. Miller, Note, *The Big Chill: Third-Party Documents and the Reporter's Privilege*, 29 U. MICH. J.L. REFORM 613, 631 (1996) (arguing that "[b]ecause freedom of the press depends on journalists' abilities to obtain information, courts should recognize a right to deny discovery of third-party records…")).

While no California case has directly addressed the issue of confidential source information

held on behalf of a reporter by third parties, California courts have long held that constitutional interests protect documents held by third parties. *See, e.g. Valley Bank of Nevada v. Superior Court,* 15 Cal.3d 652, 657-59 (1975) (right of privacy protects financial records held by bank); *Olympic Club v. Superior Court*, 229 Cal.App.3d 358, 361-62 (1991) (right of association protects names of applicants rejected during past decade).

Other jurisdictions have applied the reporter's privilege to records held by a third party. In *Phillip Morris v. ABC*, 1995 WL 301428 at *6, 23 Media L. Rep. 1434 (Va. Cir. Ct., Jan. 26, 1995) the court correctly understood, "[t]he subpoena of third party records … is tantamount to asking the reporter directly, therefore the reporter's qualified privilege against disclosure of confidential sources is held to extend to any and all documentary or electronically compiled evidence that is the product of the reporter's news gathering activities." Likewise, in *Food Lion v. Capitol Cities/ABC*, 1996 WL 575946, at *2, 24 Media L. Rep. 2431 (M.D.N.C., Sept. 6, 1996), the court found that subpoenas for reporter's records held by third parties "clearly infringe ABC's First Amendment rights with regard to its confidential sources" because they "will necessarily tend to reveal confidential sources."

In addition, email service providers, such as Nfox.com, Inc. 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.

IV. CONCLUSION

For the reasons stated above, this court should grant the Non-Party Journalists' Motion for Protective Order.

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Respectfully submitted,
ELECTRONIC FRONTIER FOUNDATION

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