IN THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT

JASON O'GRADY, MONISH BHATIA, and KASPER JADE, Petitioners, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, Respondent. APPLE COMPUTER, INC. Real Party in Interest.	No. H028579 Santa Clara County Superior Court Case No. 1-04-CV-032178 The Hon. James Kleinberg, Judge Department 14: (408) 882-2250

PETITIONERS AND NON-PARTY JOURNALISTS JASON O'GRADY, MONISH BHATIA, AND KASPER JADE'S OPPOSITION TO REAL PARTY IN INTEREST APPLE COMPUTER, INC.'S RETURN BY WAY OF ANSWER AND DEMURRER

THOMAS E. MOORE III (SBN 115107)
TOMLINSON ZISKO LLP
200 Page Mill Rd 2nd Fl
Palo Alto, CA 94306
Telephone: (650) 325-8666
Facsimile: (650) 324-1808

RICHARD R. WIEBE (SBN 121156)
LAW OFFICE OF RICHARD R. WIEBE
425 California Street, Suite 2025
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

KURT B. OPSAHL (SBN 191303)
KEVIN S. BANKSTON (SBN 217026)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Petitioners Jason O'Grady, Monish Bhatia and Kasper Jade

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. While the Legal And Factual Issues Presented By The Petition Must Be Reviewed *De Novo*, Apple's Admissions Help Supplement the Record 1

A. Apple Concedes Some Key Facts 2

II. Two Recent Federal Circuit Court Rulings on the Federal Constitutional Reporter's Privilege Demonstrate Apple's Failure to Meet the High Standard for Overcoming the Privilege. 4

A. Apple Must First Depose the Employee-Suspects Before Subpoenaing Information from the Petitioner Journalists. 4

B. The Constitutional Privilege Remains Where Private Parties Are Seeking Redress For An Alleged Civil Wrong That Coincidentally Constitutes A Crime. 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Bischoff v. United States,
1996 WL 807391, 25 Media L. Rep. 1286 (E.D. Va. 1996) 6

DVD Copy Control Ass'n, Inc. v. Bunner,
31 Cal. 4th 864 (2003) 1

DVD Copy Control Ass'n., Inc. v. Bunner,
116 Cal. App. 4th 241 (2004) 1

Mitchell v. Superior Court,
37 Cal. 3d 268 (1984) 3

Price v. Time, Inc.,
__ F.3d __, 2005 WL 1653730 (11th Cir. July 15, 2005) 1, 4, 5

Wen Ho Lee v. Dept. of Justice,
__ F.3d __, 2005 WL 1513086 (D.C. Cir. June 28, 2005) 1, 4, 5, 6

Zerilli v. Smith,
656 F.2d 705 (D.C. Cir. 1981) 6

Statutes

5 U.S.C. § 552a 5

Other Authorities

81 Am.Jur.2d Witnesses § 682 (2004) 5

INTRODUCTION

Non-party journalists Jason O'Grady, Monish Bhatia, and Kasper Jade (collectively "Petitioners") will not repeat the arguments presented in their petition of for a writ of mandate and/or prohibition ("Petition") and their reply brief, and respectfully request that the Court treat their previously filed papers as their substantive response to Apple Computer, Inc. ("Apple")'s return by way of answer and demurrer ("Return") and their opposition to Apple's demurrer. However, Petitioners do note that Apple's Return admits several important facts, which are highlighted below.

In addition, after Petitioner's reply to Apple's opposition, two new federal circuit court cases, *Wen Ho Lee v. Dept. of Justice*, __ F.3d __, 2005 WL 1513086 (D.C. Cir. June 28, 2005) and *Price v. Time, Inc.* __ F.3d __, 2005 WL 1653730 (11th Cir. July 15, 2005), have addressed the federal constitutional reporter's privilege. These cases affirm that the constitutional reporter's privilege fully applies to this case and that Apple cannot exhaust all alternative sources of information and overcome the privilege without first deposing the potential sources it has identified. The Petitioner Journalists offer this new authority as further reason why their Petition should be granted.

ARGUMENT

I. While the Legal And Factual Issues Presented By The Petition Must Be Reviewed *De Novo,* Apple's Admissions Help Supplement the Record

The relevant factual and legal issues relating to the Petition must be determined *de novo*. *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 889-90 (2003); *DVD Copy Control Ass'n, Inc. v. Bunner*, 116 Cal. App. 4th 241, 250, 251-56 (2004). Nevertheless, the Court may consider Apple's admissions in the course of its *de novo* review.

A. Apple Concedes Some Key Facts

While denying the Petitioners are journalists generally, Apple nonetheless admits that it has treated Petitioner O'Grady as a journalist with respect to its .Mac service, claiming this treatment was limited to his affiliation with MacWorld magazine and Peachpit Press.[1] Return ¶ 6. This admission is consistent with the fact that Apple CEO Steve Jobs has in the past personally responded to O'Grady's media inquiries, a fact that Apple cannot rebut. Return ¶ 6.

Furthermore, by claiming insufficient knowledge to admit or deny whether Petitioner O'Grady wrote the non-trade secret portions of the PowerPage articles, Apple implicitly admits that portions of the articles are not trade secrets. This admission contradicts Apple's previous assertion that Petitioner O'Grady, rather than exercising editorial or journalistic judgment, merely reprinted verbatim copies of its trade secrets (*see e.g.* Opposition of Apple to Petition ("Opp.") at pp. 1-2, 31-32).

In addition, Apple states that it lacks sufficient information to admit or deny a variety of other facts established by the declarations in the record. While some of these ignorances are surprising,[2] they are a tacit admission that Apple has no evidence to contest the veracity of these declarations. For example, in Paragraph 30, Apple shows that it cannot rebut the expertise of declarants Prof. Goldstein and Dan Gillmor, who each opined that the Petitioners are journalists. Thus, Apple lacks any substantial basis in the record with which to support its denial that Petitioners are journalists.

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[1] Curiously, Apple simultaneously disclaims any knowledge of O'Grady's relationship with MacWorld and Peachpit Press. Return ¶ 4.

[2] For example, it stretches the bounds of credulity that Apple would lack sufficient knowledge about whether Dan Gillmor, who since 1994 covered the technology beat for the *San Jose Mercury News*, Apple's hometown newspaper, is indeed a noted technology journalist. Return ¶ 30; Gillmor Decl., ¶ 15 (Appendix of Trial Court Pleadings, Ex. 19, NPJ151:18-22).

In Paragraph 12 of its Return, Apple denies Petitioners' allegation that "Apple's theory is that one of its own employees was the source of the original disclosure." This contradicts Apple's argument for a prima facie trade secret case based on the notion the alleged trade secrets must have been misappropriated because "all employees who had such access [to the alleged trade secrets] were subject to confidentiality agreements." (Opp. at 27; *see also* Zonic Decl. ISO *Ex Parte* App., ¶ 17 (Ex. 5, NPJ26:15-19); Zonic Decl. ISO Apple Opp., ¶ 29 (Ex. 28, NPJ406:9-15.))

With respect to its rudimentary investigation, Apple explicitly admits that it "has not taken statements under penalty of perjury, [or] conducted depositions." Return ¶ 20. As shown by *Price v. Time*, discussed in Section II(A) below, and the multitude of exhaustion cases cited in the Petition and the reply brief (Petition, pp. 35-38; Petitioner's reply brief, pp. 18-21), this alone is fatal to Apple's exhaustion argument.

Apple further admits that it has not "requested the forensic analysis of personal digital assistants, home computers, [or] laptops" of its employees. *Id.* Apple also concedes that it failed to use independent investigators. Return ¶ 21. This is not the "showing that they have exhausted alternative sources of information" that the California and federal Constitutions require Apple to make. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 282 (1984).

In response to the Petition's Paragraph 21, Apple first denies that the articles contained identified sources for the misappropriated information, and then denies that it failed to contact these sources. Return ¶ 21. Yet elsewhere, Apple admits that the articles contained information from Bob Borries and Paul Scates. Return ¶¶ 15, 18. Accordingly, a careful reading of Apple's Return confirms that Apple has not contacted Bob Borries and Paul Scates, and somehow contends they are not identified sources. This

further evidences Apple's failure to exhaust alternatives, for it has previously sought to subpoena from Petitioners the identities of Mr. Borries and Mr. Scates. (Disc. Order 1 (Ex. 8, NPJ72:1-10.))

II. Two Recent Federal Circuit Court Rulings on the Federal Constitutional Reporter's Privilege Demonstrate Apple's Failure to Meet the High Standard for Overcoming the Privilege

Two federal circuit court opinions issued in the last month addressing the federal constitutional reporter's privilege, *Price v. Time* and *Wen Ho Lee v. DOJ*, support Petitioners on two issues before this Court. First, depositions under oath must be taken before a plaintiff has reasonably exhausted its alternative sources of information. Second, the constitutional reporter's privilege does not dissipate when the alleged civil action has a parallel criminal statute. In each case, the circuit court's holding contradicts Apple's argument, and demonstrates that Apple has not met the high standard for overcoming the constitutional reporter's privilege.

A. Apple Must First Depose the Employee-Suspects Before Subpoenaing Information from the Petitioner Journalists

Price v. Time is a defamation case against *Sports Illustrated* magazine concerning a story about Mr. Price, the head coach for the University of Alabama football team, which alleged sexual misconduct based on confidential sources. Like Apple's informal interviews with the employee-suspects (Return ¶19), Price or his counsel had interviewed the four women likely to be the source, but each of them denied being the confidential source.

The Eleventh Circuit determined "that Price has not yet exhausted all reasonable efforts to discover through other means the identity of the confidential source," holding that before seeking the sources from the

journalist, "he must *depose* the four women from whom he is most likely to discover that identity." *Price* at *1, 18 (emphasis added).

The Eleventh Circuit specifically found that merely interviewing the women was not sufficient because "none of the women was under oath when she spoke to Price." *Price* at *18. As the court noted:

> "The object of requiring an oath is to instill in the witness an awareness of the seriousness of the obligation to tell the truth, or to affect the conscience of the witness and thus compel the witness to speak the truth, and also to lay the witness open to punishment for perjury in case the witness willfully falsifies."

Id. (quoting 81 Am.Jur.2d Witnesses § 682 (2004)). The court acknowledged that there was "no guarantee that any witness will tell the truth but, in deciding what efforts are reasonably necessary in this context, we indulge the expectation that runs throughout the law that testimony given under oath will be truthful." *Id.* In short, the constitutional reporter's privilege's exhaustion test requires depositions of those individuals who are likely the source, and Apple's interviews, which it admits were not taken under oath (Return ¶ 20), are simply insufficient.

B. The Constitutional Privilege Remains Where Private Parties Are Seeking Redress For An Alleged Civil Wrong That Coincidentally Constitutes A Crime

In *Wen Ho Lee v. DOJ*, the District of Columbia Circuit considered the appeal of five journalists' refusal to answer questions regarding confidential sources during a non-party deposition in a civil case under the federal Privacy Act, 5 U.S.C. § 552a. The plaintiff, an engineer at the Los Alamos National Laboratory, had sued the government for allegedly illegally disclosing information about him to news media him during its investigation into suspected espionage at the laboratory.

Like the California trade secrecy law, the Privacy Act also has parallel criminal provisions. *See* 5 U.S.C. § 552a(i)(1). Nevertheless, while ultimately upholding the contempt finding for four of the five

journalists, the court did not ignore the constitutional privilege's balancing test, as Apple urges this Court to do (*see* Opp. at 3; *see also* Opp. at 17), but instead applied it fully. In conducting the privilege analysis, the D.C. Circuit Court noted that "*Zerilli* [*v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)] provides for a non-party journalist's qualified privilege in a civil action such as this one, where testimony of journalists is sought because government officials have been accused of illegally providing the journalists with private information." *Wen Ho Lee* at *5; *accord Bischoff v. United States*, 1996 WL 807391, *2, 25 Media L. Rep. 1286 (E.D. Va. 1996) (holding that the privilege remains available even where the civil tort also constitutes a crime). While the court ultimately upheld the contempt order for four of the five journalists, the court also noted that by taking 20 depositions before deposing the journalists**,** "Lee has done far more to exhaust alternatives than the plaintiff in *Zerilli*," who had not deposed the four individuals named by the Department of Justice as likely sources of the leak. *Wen Ho Lee* at *7.

CONCLUSION

For the reasons stated above and in all the papers submitted by Petitioners to this Court, Petitioners respectfully request this Court overrule Apple's demurrer and issue a writ of mandate and/or prohibition directing the trial court to vacate its order denying Petitioners' motion for a protective order and issue a new and different order granting the motion for a protective order.

DATED: July 25, 2005

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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Kurt B. Opsahl
Attorneys for Petitioners JASON O'GRADY, MONISH BHATIA, and KASPER JADE

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), I certify that this opposition to Apple's Return contains 1,732 words.

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Kurt B. Opsahl