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

MOTION TO UNSEAL PORTIONS OF THE DECLARATIONS OF ZONIC AND ORTIZ

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

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

CASES

TABLE OF AUTHORITIES (Continued)

PAGE NO.

CASES (continued)

STATUTES

OTHER

INTRODUCTION

This writ proceeding arises out of the denial of the motion for a protective order brought by Petitioners, who are non-party journalists seeking to protect the confidentiality of their news sources. Petitioners Jason O'Grady, Monish Bhatia and Kasper Jade ("Petitioners") publish online publications dedicated to news about real-party-in-interest Apple Computer ("Apple"). Last November, Petitioners published news articles about an Apple product that Apple had not announced to the public. Apple alleges, however, that Petitioners, as part of their regular reporting on Apple, included some of Apple's trade secrets, provided by confidential sources. Three months later, Apple issued a subpoena directed to the Internet service provider who stored petitioner O'Grady's emails. The subpoena sought emails that might identify O'Grady's confidential sources and unpublished information. In response to Apple's efforts to obtain unprecedented discovery compelling disclosure of the confidential sources and unpublished journalistic information of these non-party journalists, Petitioners moved in the trial court for a protective order. The trial court denied the motion, and this writ proceeding followed.

By this motion, Petitioners seek to unseal portions of the record pertaining to Apple's own in-house investigation of its employees. Specifically, Petitioners ask this Court to order Apple to file a redacted version of the second declaration of Apple employee Robin Zonic (Petitioners' Appendix, Tab 28) in which paragraphs 1-4, 17-23 and 29 are

in the public record and to unseal the declaration of Apple employee Albert Ortiz, Jr. (Petitioners' Appendix, Tab 27) in its entirety, pursuant to Cal. Rules of Court, Rule 12.5.

The law favors public access to court records. While the trial court might have had some justification for sealing paragraphs 5-16 and 24-28 of the Zonic declaration on trade secrets grounds, no similar rationale exists for sealing the information in either declaration pertaining to Apple's in-house investigation. The description of Apple's in-house investigation set out in the declarations has no economic benefit in the market and, consequently, does not contain any trade secrets.

The characterization of the record regarding Apple's in-house investigation is one of the most sharply disputed issues in the case. Among other things, Petitioners contend that they are entitled to the benefits of the reporter's privilege enunciated in *Mitchell v. Superior Court,* 37 Cal. 3d 268 (1984). To overcome that privilege, Apple must show that it exhausted all avenues of discovery other than a subpoena for Petitioners' information. *Mitchell*, 37 Cal. 3d at 282 (denying discovery where "plaintiffs made no showing that they have exhausted alternative sources of information"); *accord. Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993). In order to make that showing, Apple has characterized the investigation described in the Zonic and Ortiz declarations as exhaustive, insofar as Zonic and Ortiz utilized "computer forensics" and interrogated Apple employees "under threat of being fired." By contrast, Petitioners have characterized Apple's investigation as rudimentary – perhaps a reasonable beginning, but far from

exhaustive.

The public will benefit if the debate over the exhaustion issue is fair and open. If the public is to understand the merits of each party's characterization, if oral argument before this Court is to be meaningful and if this Court's ultimate opinion is going to stand as precedent for others, then the shroud surrounding Apple's investigation must be lifted. Petitioners respectfully urge the Court to grant this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Presumption Is That Court Records Will Be Open And Available To The Public, And Only A Showing Of An Overriding Interest Will Overcome The Public's Right Of Access.

The public's right of access to court records is grounded in both the First Amendment to the United States Constitution and Article I, Section 2(a) of the California Constitution. *See Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992). These provisions create a strong presumption in favor of public access. *In re Providian Credit Card*, 96 Cal. 4th 292, 295 (2002); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1198 (1999) *quoting Craig v. Harney*, 331 U.S. 367. 374 (1947) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566 (1980). Indeed, for well over a hundred years, it has been "a first principle that the people have the right to know what is done in their courts." *In re Shortridge*, 99 Cal. 526, 530, (1893). A court can only override this presumption if there is a sufficiently strong countervailing interest that justifies that a document be filed under seal. *NBC*, 20 Cal. 4th at 1222.

Specifically, the California Supreme Court has established that

before a document can be ordered sealed, a trial court must hold a hearing and expressly find that:

(i) There exists an overriding interest that supports sealing the document;

(ii) There is a substantial probability that the interest will be prejudiced absent sealing the document;

(iii) The proposed sealing of the document is narrowly tailored to serve the overriding interest; and

(iv) There is no less restrictive means of achieving the overriding interest.

NBC, 20 Cal. 4th at 1222. In response to the requirements delineated by the Court in *NBC*, the Judicial Council promulgated Rules 243.1 and 243.2 of the California Rules of Court, which govern sealing requests in the trial court, as well as Rule 12.5, which governs sealing requests in reviewing courts. Those rules reflect the Court's holdings in *NBC* and establish the procedures for implementing them. *See* comment, Cal. Rules of Ct., Rule 243.1.

In this case, the trial court's order found, among other things, that the Zonic and Ortiz declarations supporting Apple's opposition to the protective order contained Apple's trade secrets, that the protection of those secrets constituted an overriding interest, that there was a substantial probability that such overriding interest would be prejudiced if the declarations were not filed under seal and that no less restrictive means existed to achieve the overriding interest than to seal the declarations. (Order Sealing the

Confidential Declarations of Albert Ortiz and Robin Zonic, dated February 28, 2005 (Petitioners' Appendix, Tab 29).) [1] If this motion sought the review of the trial court's sealing order, those findings might be entitled to deference. However, because this motion addresses this Court's own records and because Rule 12.5(f)(2) permits this Court to unseal records which were sealed in the trial court, this Court is entitled to engage in an independent review of the justification for sealing the declarations. *Huffy Corp. v. Superior Court*, 112 Cal. App. 4th 97, 105 (2003).

As part of that independent review, this Court is further entitled to look to Apple's publicly-filed papers before this Court to see what those papers reveal. An actual probability of prejudice absent sealing is a necessary prerequisite to maintaining documents under seal. *NBC*, 20 Cal. 4th at 1218; *Pack v. Kings County Human Services Agency*, 89 Cal. App. 4th 821, 832 (2001). The possibility of prejudice is greatly reduced if publicly-filed documents have already revealed much about the nature of the document under consideration. *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1278, 1284 (2003).

II. There Is No Overriding Interest That Would Justify Maintaining The Descriptions Of Apple's In-House Investigation Under Seal.

In *NBC*, the California Supreme Court listed the interests that might be sufficiently important to constitute an "overriding interest" for the purposes of sealing a document. 20 Cal. 4th at 1222 n. 46. That list

---

[1] In addition, the trial court issued an order on December 13, 2004, sealing the initial declaration of Robin Zonic and Apple's *Ex Parte* Application for a commission. This order contained no findings whatsoever (*See* Petitioners' Appendix, Tab 4).

included:

(a) A civil litigant's right to a fair trial;

(b) Protection of minor victims of sex crimes;

(c) Privacy interests of prospective jurors during individual *voir dire*;

(d) Protection of witnesses from extreme intimidation or embarrassment;

(e) Protection of trade secrets;

(f) Protection of information within the attorney-client privilege; and

(g) Enforcement of binding contractual obligations not to disclose.

The Court intended this list to be illustrative, not exhaustive. *Id.* Nevertheless, the only interest that Apple sought to support before the trial court was Apple's interest in protecting its trade secret information. (Zonic Decl. ¶¶ 30-32; Ortiz Decl. ¶¶ 14-16.)

Protecting trade secret information is a possible justification for a sealing order. *Universal*, 110 Cal. App. 4th at 1281. However, a naked claim that a given set of information constitutes a trade secret is not enough. *In re Providian*, 96 Cal. 4th at 298. In delineating the overriding interest and the injury to be prevented, broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. *Universal*, 110 Cal. App. 4th at 1282 *quoting In re Cendant Corp.*, 260 F.3d 183, 194 (2001).

In its *ex parte* application below to seal the Zonic and Ortiz

declarations, Apple did not provide any specific examples or articulated reasoning supporting its position that information about its in-house investigation is a trade secret that meets the sealing requirements of the California Rules of Court. (Apple's *Ex Parte* Application and Memorandum re Sealing, filed February 25, 2005 (Petitioners' Appendix, Tab 26).) It asserted only that the product information in the declarations was a trade secret, not that the information about Apple's in-house investigation was a trade secret:

> The pleadings that Apple seeks to seal contain valuable trade secret information. Disclosure of the contents of these pleadings would expose the confidential details of an unreleased product and allow Apple's competitors to acquire an unfair advantage over Apple. The disclosures would also serve to validate the accuracy of the information that defendants have disclosed [about the product] and compound the harm to Apple. Apple's overriding interest in protecting its trade secrets overcomes the right of public access to the record and supports sealing these pleadings.

Id. at 3:15 to 3:23 (citations omitted). Rule 243.2, subdivision (b)(1) required that Apple file "declaration[s] containing facts sufficient to justify the sealing," but the portions of the Zonic and Ortiz declarations that seek to justify their sealing state only that disclosure of the product-related information would harm Apple, not that disclosure of Apple's in-house investigation will harm Apple. (Zonic Decl. ¶ 31; Ortiz Decl. ¶ 15.)

Likewise, the trial court did not specifically find that the information about Apple's in-house investigation was a trade secret and did not specifically find any overriding interest that would warrant sealing the information about Apple's in-house investigation. Nor did the court make any attempt to "direct the sealing of only those documents and pages or, if

reasonably practicable, portions of those documents and pages, that contain material that needs to be placed under seal." Cal. Rules of Ct., Rule 243.1 (e)(1)(ii). Instead, it ordered the wholesale sealing of the entire Zonic and Ortiz declarations.

The descriptions of Apple's in-house investigation are not trade secrets.[2] Under California's version of the Uniform Trade Secrets Act, (Civ. Code §§ 3426 *et seq.*), a trade secret is information that is not publicly known, that derives economic value from not being known to competitors and that is subject to reasonable efforts to maintain its secrecy. Civ. Code § 3426.1(d). The descriptions of the in-house investigation are not trade secrets for two reasons: They contain no information of any economic value to Apple's competitors, and Apple has already disclosed the key aspects of that investigation in publicly-filed documents during the course of these writ proceedings.

The information about Apple's in-house investigation revealed by the Zonic and Ortiz declarations contains nothing that would be of any value to Apple's competitors. The declarations state that Zonic and Ortiz isolated the names of Apple employees who had access to the information, interviewed those persons, and conducted a search of Apple's email system. (Zonic Decl. ¶¶ 17-23 (Petitioners' Appendix, Tab 28); Ortiz Decl. ¶¶ 2-10 (Petitioners' Appendix, Tab 27).) Zonic and Ortiz revealed nothing about their investigative techniques that that would be of any utility whatsoever to

---

[2] While this motion focuses on the in-house investigation, by limiting the relief requested Petitioners do not concede that the remainder of the sealed declarations contain trade secrets.

a competitor. Indeed, their investigation was perfectly ordinary in every respect. *See* 1 R. Milgrim, *Milgrim on Trade Secrets*, § 1.03, p. 1-162 (2005) ("Common knowledge is not, absent special considerations, protectable.")

Moreover, Apple did not maintain the secrecy of the in-house investigation when disclosure served its purposes. In its public Opposition Brief, Apple disclosed the sum and substance of what is in the declarations:

> These investigators carefully reviewed materials posted on the PowerPage and AppleInsider websites and determined that these materials had been copied directly from information detailed in an internal Apple slide set. . . Access to this slide set was limited to a small group of individuals within the company.
>
> * * *
>
> The investigators then personally interviewed these employees, each of whom would lose their jobs if they misled investigators.
>
> * * *
>
> Apple security also directed and assessed the results of broad forensic searches of Apple's email servers for any communications regarding the confidential information disclosed on the websites.

(Opposition Brief, pp. 7-8.) In short, the protection of trade secret information cannot be an overriding interest sufficient to justify sealing the portions of the Zonic Declaration and the entirety of the Ortiz Declaration because Apple has not shown that any trade secret information is involved and has, in any event, already publicly disclosed the substance of that information.[3]

---

[3] Apple might argue that it has some sort of privacy interest that would be sufficient to override the presumption of public access. However, Apple's having availed itself of the protection of the courts effectively waives any potential privacy interest that it might have:

III. Apple's Characterization Of Its Investigation As Exhaustive Is Sharply Contested, And The Public Will Benefit If The Debate On The Issue Is Fair And Open.

One of the major issues separating the parties on this writ proceeding is whether Apple's in-house investigation was exhaustive within the meaning of *Mitchell v. Superior Court,* 37 Cal. 3d 268 (1984). Public access to the evidence that supports each party's position is not only crucial to the truthfinding function of these proceedings but also to public confidence that justice has been meted out fairly.

In *NBC*, the California Supreme Court described the "important and specific structural role" of public access as follows:

> Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.

20 Cal. 4th at 1219.

In this case, public access to the evidence regarding Apple's in-house investigation will enhance the truthfinding function, because the Court and the parties will be able discuss that evidence openly during oral argument. Apple has mischaracterized the evidence as reflecting an investigation so exhaustive that it is left with no other recourse but to subpoena the

---

> '[W]hen individuals employ the public powers of state courts to accomplish private ends, . . . they do so in full knowledge of the possibly disadvantageous circumstance that documents and records filed . . . will be open to public inspection.' . . . '[I]n a sense [such civil litigants] take the good with the bad, knowing that with public protection comes public knowledge' of otherwise private facts.

NBC, 20 Cal. 4th at 1211 n. 27 (*quoting Estate of Hearst*, 67 Cal. App. 3d 777, 783-84, 136 Cal. Rptr. 821 (1977)).

Petitioners' documents:

> Apple's highly experienced investigators followed every available lead to determine which employees had accessed the Asteroid trade secrets. . . . The investigators then personally interviewed these employees – all of whom faced losing their jobs if they lied to or misled the investigators.

(Opposition Brief, p. 21.) The *amici* who have filed briefs in Apple's support have slavishly echoed Apple's theme, even though they have not themselves had access to the declarations:

> Apple has documented its thorough investigatory effort, in which to experienced investigators traced the posted materials back to a confidential set of slides and then interviewed all employees who had access to the slides, warning them that they could be terminated if they concealed the truth.

(Brief of *Amicus Curiae* Genentech, Inc. p. 16.)

> A company whose valuable trade secrets have been stolen and publicized has the strongest possible incentive to track down any internal source of the leak. Investigations of employee theft are accordingly prompt and vigorous. Apple's investigation in this case confirms as much. According to the record, Apple brought in trained corporate security investigators who not only conducted a forensic examination of Apple's computer system, but interrogated every employee known to have had access to the stolen documents -- on pain of dismissal for failure to be forthright.

(Brief of Intel Corp. and the Business Software Alliance supporting Apple Computer, Inc., pp. 8-9.)

> It was perfectly reasonable for Apple to conduct an internal investigation in which relevant employees were identified, their workplace computers were subject to forensic analysis, and experienced investigators interviewed them.

(Brief of Information Technology Industry Council in support of Real Party in Interest Apple Computer, Inc., p. 11.)

Petitioners' position is that the declarations say nothing of the sort. The declarations do not lay any sort of foundation as to Zonic's and Ortiz's experience in conducting trade secret investigations, the declarations make no mention of any kind of search of the employees' workplace computers, the declarations make no mention of many other potential sources of evidence concerning the disclosure or other potential investigative techniques, and the declarations do not breathe a word about the possibility that the interviewed employees might have been subject to termination for giving misleading answers. At best, the declarations reflect a start to an investigation that, if it were continued vigorously, might well lead to the source of the leak without having to subpoena any reporters' emails.

The truth of what Apple has done and, more importantly, has not done to investigate the disclosure of information about the "Asteroid" product is in the declarations. Substantial light can be shed on the diametrically opposed views of the evidence during oral argument, but only if the portions of the Zonic Declaration and all of the Ortiz Declaration can be discussed openly and quoted as necessary. Otherwise, the Court and the parties will be unable to delve beyond broad and general characterizations into the merits of Apple's efforts.

Public access will also enhance the public's perception that justice was meted out appropriately. As evidenced by the briefs filed by the *amici*, this case has attracted widespread attention. It is important for the public to see the evidence supporting the parties' characterizations, it is important that the Court's written opinion refer to the details of that evidence so that

the public can appreciate the Court's reasons for its decision, and it is important that the facts be explicated in the opinion so that the opinion may serve as precedent and guidance in future cases.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court order Apple to file a redacted version of the second Zonic declaration in which paragraphs 1-4, 17-23 and 29 are in the public record and order the Clerk to unseal the Ortiz declaration in its entirety.

DATED: July 1, 2005

Respectfully submitted,

TOMLINSON ZISKO LLP

By _____
Thomas E. Moore III
Attorneys for Petitioners JASON O'GRADY, MONISH BHATIA, and KASPER JADE