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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

Apple Computer, Inc.,

Plaintiff,

v.

Doe 1, an unknown individual, and Does 2-25, inclusive,

Defendants.

Case No. 104-cv-032178

PLAINTIFF APPLE COMPUTER, INC.'S OPPOSITION TO MOTION FOR PROTECTIVE ORDER BY MONISH BHATIA, KASPER JADE AND JASON D. O'GRADY

Date: March 4, 2005
Time: 10:00 a.m.
Location: Department 14
Judge: Hon. James Kleinberg

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I. INTRODUCTION

Apple Computer, Inc. ("Apple") filed this action against unknown persons who deliberately misappropriated the company's highly valuable trade secrets. Through several postings on a website, Jason O'Grady ("O'Grady") broadly disseminated verbatim copies of this information to the public despite conspicuous warnings that the material constituted trade secrets.

Pursuant to this Court's order, Apple served a subpoena on Nfox, and its principal, Karl Kraft (collectively, "Nfox"). The subpoena seeks e-mails directed at O'Grady's website that will identify the persons who illegally obtained the information from Apple. Nfox does not object to the subpoena and is prepared to comply. Having conducted an exhaustive but unsuccessful internal investigation, Apple believes that civil discovery is the only means to identify the defendants and seek relief for these unlawful acts.

EFF, which represents O'Grady and two other individuals who posted trade secrets, seeks to quash the subpoena. EFF argues that Nfox's compliance with the subpoena would violate the so-called "Federal Privilege" arising under the First Amendment as well as California's "Shield Law," (Cal. Const. Art. I, § 2; Cal. Evid. Code § 1070). These arguments have no merit.

As demonstrated below, the Federal Privilege is a qualified privilege. It is clearly overcome by Apple's compelling need for the information, its exhaustion of other investigative avenues, and the merits of its claims. It is well established that the California Shield is not a privilege against discovery; it is ***a narrow immunity against contempt judgments*** for certain individual newspersons engaged in legitimate news gathering activities. The Shield does not preclude efforts to enforce discovery of sources by other means, and the law does not apply to discovery efforts directed at Nfox.

There is no dispute that the misappropriation and disclosure of trade secrets by an individual to another party, such as a competitor, is subject to full discovery and both civil and criminal sanctions. It is EFF's belief, however, that free speech rights somehow protect this same conduct when the disclosure occurs through a website by a person claiming to be a journalist. This view has been squarely rejected. In *Branzburg v. Hayes,* the Supreme Court held that "[t]he [First] Amendment does not reach so far as to override the interest of the public in ensuring that

neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." 408 U.S. 665, 691-92 (1972). The Court should deny the motion and Nfox should respond to the subpoenas.

II. BACKGROUND

On November 19, 2004, O'Grady disseminated through www.powerpage.org ("PowerPage") extremely sensitive trade secrets relating to an unreleased Apple product code-named "Asteroid" or "Q97." (Declaration of Robin Zonic in Support of Apple's Opposition to Motion For Protective Order ("Zonic Decl.") ¶¶ 5-8; Declaration of Al Ortiz, Jr. in Support of Apple's Opposition to Motion For Protective Order ("Ortiz Decl.") ¶¶ 2-3.) O'Grady's posting contained an exact copy of a detailed drawing of Asteroid created by Apple. This drawing had been misappropriated from a confidential set of slides conspicuously labeled "Apple Need-to-Know Confidential." The material disseminated by O'Grady also included technical specifications about Asteroid copied verbatim from the confidential slide set. O'Grady's November 19 posting contained no other information or commentary, merely a promise to provide more details in future postings.

On November 22, as promised, O'Grady disseminated through PowerPage additional trade secrets regarding Asteroid. As with the previous posting, the disseminated material was copied verbatim from technical specifications contained in the confidential slide set. (Zonic Decl. ¶¶ 9-10.) One day later, on November 23, O'Grady again disseminated further technical specifications, also slavishly copied from technical information in the confidential slide set. (*Id.* ¶¶ 11-12.) Other than brief announcements, both postings were devoid of any material other than misappropriated trade secrets.

The information regarding Asteroid and other unreleased products is highly valuable to Apple. By carefully safeguarding such information, Apple can time product launches to maximize publicity and goodwill. (*Id.* ¶ 25.) In the hands of competitors, such information can cause great harm to Apple by enabling those competitors to direct their marketing and development efforts to frustrate Apple's plans. (Zonic Decl. ¶¶ 25-28; Ortiz Decl. ¶ 12.) Accordingly, Apple undertakes rigorous measures to protect such information as trade secrets.

The information disseminated by O'Grady was maintained on a strict, "need-to-know" basis at Apple. All persons who had access to this information were subject to confidentiality agreements that prohibited them from disclosing, publishing or disseminating the information. The information could not have been provided to O'Grady absent violations of Apple's confidentiality agreements and the laws protecting trade secrets. (Zonic Decl.¶ 29; Ortiz Decl. ¶¶ 13.)

Apple promptly and diligently conducted an investigation into these unauthorized disclosures but was unable to identify the persons who had misappropriated and transferred the trade secrets to O'Grady. (Zonic Decl. ¶ 17-23; Ortiz Decl. ¶¶ 2-10.) Having no other recourse to remedy the damage it had suffered, Apple commenced this action on December 13, naming only Does as defendants.

On December 14, 2004, the Court granted Apple's application to take expedited document discovery from PowerPage, AppleInsider, and a third website, www.thinksecret.com, that would lead to the identity of the Doe defendants. In the course of conducting that discovery, Apple learned that a company, Nfox, possessed e-mails that will likely identify one or more of the Doe defendants. In particular, Nfox possesses e-mails that reference "Asteroid" and were sent to one or more e-mail accounts associated with PowerPage. On February 4, 2005, the Court granted Apple's request for an order permitting specific document discovery to Nfox. (Declaration of David R. Eberhart in Support of Apple's Opposition to Motion For Protective Order ("Eberhart Decl.") ¶¶ 2, 7.)

In compliance with that order, Apple subsequently served subpoenas on Nfox in California and in Nevada seeking the following information:

> All documents relating to the identity of any person or entity who supplied information regarding an unreleased Apple product code-named "Asteroid" or "Q97" (the "Product"), including postings that appeared on PowerPage.com (the "Website") on November 19, November 22, November 23, and November 26, 2004. These documents include:
>
> > (a) all documents identifying any individual or individuals who provided information relating to the Product ("Disclosing Person(s)"), including true name(s), address(es), internet protocol ("IP") address(es), and e-mail address(es);
> >
> > (b) all communications from or to any Disclosing Person(s) relating to the Product;

(c) all documents received from or sent to any Disclosing Person(s) relating to the Product; and

(d) all images, including photographs, sketches, schematics and renderings of the Product received from or sent to any Disclosing Person(s).

(Eberhart Decl. ¶ 9.) To date, Nfox has not objected to the subpoenas on any grounds. (*Id.* ¶ 10.) Other than the Nfox subpoenas, no discovery is currently outstanding. (*Id.* ¶¶ 3-6, 11.)

III. ARGUMENT

A. The Acquisition And Dissemination Of The Asteroid Trade Secrets Constitute Violations Of California Law

Apple has established that the information regarding Asteroid disseminated by O'Grady constitutes a trade secret under the provisions of the Uniform Trade Secrets Statute as adopted in California, Civil Code Section 3426.1 *et seq.* (*See* Zonic Decl. ¶¶ 24-29; Ortiz Decl. ¶¶ 11-13.) As set forth in the statute, illegal misappropriations occurred not only when that information was taken from Apple, but when it was disseminated by a person who had reason to know that it was a trade secret. The clear markings on the slides – "Apple Need-To-Know Confidential" – as well as the text of the postings themselves – describing the unreleased Asteroid product by its internal code name – establish that the dissemination was caused by a person who knew, or had reason to know, that the information was a trade secret.

The constitutional guarantees of free speech provide no refuge for persons who steal and disseminate trade secrets. *DVD Copy Assoc. v. Bunner*, 31 Cal. 4th 864, 874-88 (2003). To the contrary, trade secrets are constitutionally protected property interests, and the acquisition and dissemination of such secrets are subject to both civil remedies as well as criminal penalties. Cal. Civil Code § 3426.3; Cal. Penal Code § 499(c); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984); *Bunner*, 31 Cal. 4th at 880. Apple is entitled to the full measure of relief provided under law for these illegal acts.

B. The Qualified Federal Privilege Does Not Bar Discovery From Nfox

To invoke the Federal Privilege, O'Grady must serve an "investigative reporting" function. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). While the Federal Privilege is not restricted to any particular medium, it is restricted to "legitimate members of the press" and does

not "grant status to any person with a manuscript, a web page or a film." *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998). The activities discussed herein – both general and specific to this case – demonstrate that PowerPage and O'Grady do not perform an investigative reporting function in the manner of a legitimate news media outlet. Regularly publishing information without fact checking, accepting wholesale, anonymous postings and systematically disseminating trade secrets do not constitute investigative reporting.

1. The Federal Privilege Does Not Shelter Trade Secret Misappropriation

Even if O'Grady may claim the Federal Privilege, it does not prevent a plaintiff from obtaining discovery regarding tortious conduct by the journalist or his source. *See Food Lion v. Capital Cities*, 951 F. Supp. 1211, 1215-16 (M.D.N.C. 1996) (denying privilege to journalist's tortious trespass); *United Liquor Co. v. Gard*, 88 F.R.D. 123, 127 (D. Ariz. 1980) (denying privilege to source's unlawful disclosure of information); *see also Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) ("'It would be frivolous to assert ... that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.'") (quoting *Branzburg*, 408 U.S. at 691).

Nor can the Federal Privilege immunize the theft of trade secrets. The Uniform Trade Secrets Act ("UTSA"), enacted as California Civil Code Section 3426.1 *et seq.*, is a content-neutral law of general applicability that protects a property interest in trade secrets. *Bunner*, 31 Cal. 4th at 877-81. Apple's complaint seeks a remedy for the misappropriation of a highly-confidential internal document that revealed future product plans. This is precisely the type of harm that California's trade secret law is intended to redress. "By sanctioning the acquisition, use, and disclosure of another's valuable, proprietary information by improper means, trade secret law minimizes 'the inevitable cost to the basic decency of society when one ... steals from another.'" *Id.* at 881 (*quoting Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)).

O'Grady declares that he obtained information regarding the Asteroid product "from my confidential source(s) with the intent of disseminating it to the public." (O'Grady Decl. ¶ 18.) O'Grady is conspicuously silent on whether he knew that his sources were Apple employees or that they obtained their trade secrets in violation of a duty of confidentiality to Apple. O'Grady

never suggests that the information he received was anything other than a trade secret and, as established in the Zonic Declaration, the pages were conspicuously marked "Apple Need-to-Know Confidential."[1] (Zonic Decl. ¶ 4.) Even assuming that O'Grady has not violated the UTSA, his source(s) cannot find refuge in the Federal Privilege where they have violated that act. "The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." *Branzburg*, 408 U.S. at 691.

2. Apple's Compelling Need For The Subpoenaed Information Overcomes The Qualified Federal Privilege

The Federal Privilege is not absolute, and Apple's compelling need for the discovery at issue overcomes that privilege.[2] Where the Federal Privilege applies at all, it must be balanced against the policy favoring full disclosure of relevant evidence in civil litigation. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 276 (1984). *Mitchell* established a five-part test for weighing whether discovery should be permitted over an assertion of the Federal Privilege: (1) the "nature of the litigation and whether the reporter is a party"; (2) whether the information sought goes "to the heart" of the plaintiff's claim; (3) whether the plaintiff has reasonably exhausted alternative sources of information; (4) the importance of protecting confidentiality in the case at hand; and, optionally, (5) a *prima facie* showing on the merits of plaintiff's claim. *Id.* at 279-84. The EFF Parties concede that the *Mitchell* test applies; each of the *Mitchell* factors weighs in favor of Apple's discovery.

The first *Mitchell* factor addresses the "nature of the litigation" and affirms the principle that "[i]n general, disclosure is appropriate in civil cases, especially when a reporter is a party to the litigation." *Id.* at 279. Although O'Grady is not a named defendant, Apple has alleged that

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[1] Although the question of protective relief is not yet ripe as to "Kasper Jade," his declaration also omits any claim that the information he received was not a trade secret. (*See* Declaration of Kasper Jade in Support of Motion for Protective Order.)

[2] In contrast to the California Shield, discussed below, some courts have held that the Federal Privilege applies to documents held by the non-reporter.

additional Doe defendants acted in concert with Doe 1 to misappropriate Apple's trade secrets. Especially in light of the troubling facts discussed above, discovery may show that. O'Grady is one of those Doe defendants – for example, he may have disclosed the trade secrets when he knew, or had reason to know, that the source of the information had breached a duty of confidentiality to Apple. Absent the requested discovery, O'Grady will be effectively shielded from such potential liability. This is precisely the concern recognized in *Mitchell*, even though that case considered the issue in the context of a libel action. This factor weighs in Apple's favor.

The second *Mitchell* factor – whether the discovery sought goes to the heart of plaintiff's claim – is the "most crucial" of the five factors to be balanced. *Dalitz v. Penthouse Int'l, Ltd.*, 168 Cal. App. 3d 468, 478 (1985). This factor mandates disclosure. Apple seeks the identity of the Doe defendants so that it may name them in the Complaint, develop an affirmative case against them, and seek redress for injuries arising from the misappropriation of its trade secrets. Apple cannot even begin merits discovery until it identifies a defendant and serves the Complaint. Where a source acted unlawfully in disclosing information to a journalist, the identity of the source goes "to the heart" of plaintiff's claim because the plaintiff must discover the identity of the source to recover for his injuries. *United Liquor*, 88 F.R.D. at 126; *accord Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004) ("Ascertaining the identities and residences of the Doe defendants is critical to plaintiffs' ability to pursue litigation, for without this information, plaintiffs will be unable to serve process.").

The EFF Parties' contention that the requested discovery "goes beyond Apple's core trade secret claim" is false. First, discovery regarding "Dr. Teeth," "Bob Borries," and "Paul Scates" is not at issue – the subpoenas to Nfox do not request that information. Even if that discovery were at issue, however, those individuals were involved in the publication of Apple's trade secrets. (*See* Zonic Decl. ¶¶ 9, 13, 16.) As such, discovery regarding those individuals is essential to Apple's trade secret claims. Second, discovery to Nfox regarding the identity and communications of individuals providing information about Asteroid does not "include people who provided non-trade secret information." By its very nature, any information provided about Asteroid – a secret project – was, itself, a trade secret. (*See* Zonic Decl. ¶¶ 24-29; Ortiz Decl.

¶¶ 11-13.)

The third *Mitchell* factor also favors disclosure because Apple has reasonably exhausted all alternative sources of information. As detailed in the Ortiz and Zonic declarations, Apple has performed a thorough and exhaustive internal investigation to ascertain the identity of the individual or individuals responsible for leaking the trade secrets at issue. Apple studied the trade secrets posted on the PowerPage and AppleInsider websites, identified the documentary source of that information, and identified the Apple personnel who accessed that document. (Zonic Decl. ¶¶ 4-20; Ortiz Decl. ¶¶ 2-7.) Apple interviewed each of these employees, more than 25 interviews in total, but was unable to uncover the individual(s) responsible for the leak. (Zonic Decl. ¶¶ 17-23; Ortiz Decl. ¶¶ 5-10.) Apple has exhausted all alternative means of obtaining this information.

The fourth *Mitchell* factor also weighs in favor of disclosure – no public good is served by protecting the misappropriation of Apple's trade secrets. Notwithstanding EFF's lofty claims, the defendant(s) were not involved in the "revelation of hidden criminal or unethical conduct" or some other matter of "great public importance." *See Mitchell*, 37 Cal. 3d at 283. Instead, the defendant(s) were involved in the misappropriation of private, commercial information that constituted valuable trade secrets. Although the EFF Parties concede, as they must, that this fourth factor does not discourage disclosure (Mot. at 12), the factor squarely supports disclosure. The misappropriation and dissemination of trade secrets is not a matter of public concern and does not warrant the protections of the First Amendment. *Bunner*, 31 Cal. 4th at 883-85.

The EFF Parties contend that the fifth *Mitchell* factor is inapplicable, but this optional factor also favors disclosure. *Mitchell* held that, in the context of a defamation case, a court ***may*** require the plaintiff to make a *prima facie* showing of falsity. *Mitchell*, 37 Cal. 3d at 283. Apple has made the analogous *prima facie* showing here – *i.e.*, that Apple's trade secrets have been misappropriated. (*See* Zonic Decl. ¶¶ 4-16, 24-29; Ortiz Decl. ¶¶ 2-3, 11-13.) Nothing in *Mitchell* indicates that such a showing should not support discovery in a non-defamation case. As *Mitchell* established, "[a] showing of falsity [in a defamation case] is not a prerequisite to discovery, but it may be essential to tip the balance in favor of discovery." *Id.* at 284.

Thus, a consideration of the *Mitchell* factors demonstrates that Apple has a compelling need for the information that overcomes any assertion of the qualified Federal Privilege. The request for a protective order should be denied.

C. The California Shield Does Not Bar Enforcement Of The Nfox Subpoena

The EFF parties' attempt to use the California Shield to prevent Nfox's compliance with the subpoena is flatly contrary to well established judicial authority. As demonstrated below, the California Shield is not a privilege against discovery of information, as the EFF parties urge. The law only creates a narrow immunity from a judgment of contempt for specified newspersons who refuse to disclose certain information in their possession. Newspersons who claim the immunity as well as news organizations and other parties can be compelled to reveal the same information by other means and sanctions. Thus, the Shield in no way impedes efforts to compel the disclosure of relevant information by means other than contempt, and certainly would not apply to the Nfox discovery.

1. California Shield Provides Only A Personal Immunity From Contempt

The California Shield provides only one right: ***a newsperson's personal immunity from being adjudged in contempt*** for refusal to disclose sources or unpublished materials. The extremely narrow nature of this immunity has led to confusion regarding its scope:

> The description "shield law" conjures up visions of broad protection and sweeping privilege. The California shield law, however, is unique in that it affords only limited protection. It does not create a privilege for newspeople, rather it provides an immunity from being adjudged in contempt. This rather basic distinction has been misstated and apparently misunderstood by members of the news media and our courts as well.

KSDO v. Superior Court, 136 Cal. App. 3d 375, 379-80 (1982). The California Shield does not, moreover, protect newspersons or the organizations with which they are associated from sanctions other than contempt, such as issue preclusion and sanctions. *Rancho Pubs. v. Superior Court*, 68 Cal. App. 4th 1538, 1543 (1999); *Mitchell*, 37 Cal. 3d at 274.

A newsperson's limited and personal immunity against being adjudged in contempt cannot be converted into a prohibition of discovery, particularly discovery directed only at parties who are not enumerated newspersons under the Shield. The California Supreme Court has

squarely held "that the shield law *prohibits only a judgment of contempt* and that, unlike a privilege, the shield law does not protect against other sanctions." *Delaney v. Superior Court*, 50 Cal. 3d 785, 797 n.6 (1990) (emphasis added).

The ballot argument cited by the EFF Parties does not support an expansion of the California Shield. In fact, other portions of that argument confirm that the purpose of the Shield is immunity from contempt: "At least six reporters in California in recent years have spent time in jail rather than disclose their sources to a judge ... . To jail a journalist because he protected his source is an assault not only on the press but on all Californians as well." Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec. (June 3, 1980) p. 19, *quoted in Delaney*, 50 Cal. 3d at 802 n.13.

Nfox does not claim to be a newsperson, has not refused to comply with the subpoenas, and faces no prospects of being adjudged in contempt. The California Shield is simply inapplicable to discovery from Nfox. "The unambiguous language of the law refers only to an immunity from contempt." *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 463 (1990).[3]

2. The EFF Parties Are Not Entitled To Assert The California Shield Even If The Law Applied To The Pending Discovery

Even if, contrary to the authority cited above, the California Shield had some applicability to these proceedings, the EFF parties are not entitled to the law's protections. O'Grady's actions – the wholesale dissemination of trade secrets through postings on a web site – do not qualify for the Shield's immunity against contempt for refusing to disclose information relating to those actions.

As the California Supreme Court emphasized in *Delaney*, the Shield may be invoked only by enumerated newspersons who are engaged in the specific activities described in the law. *Delaney*, 50 Cal. 3d at 805 n.17. There, the Court strongly rejected recourse to policy arguments to change or enlarge the law's express definitions and scope. Broadening the scope of the Shield

[3] Nor does the Stored Communications Act preclude discovery from Nfox. Even assuming Nfox is subject to that act, which O'Grady has not demonstrated, the act provides that compliance with valid legal process is a complete defense: "good faith reliance on … a court warrant or order … is a complete defense to any civil or criminal action brought under" the act. 18 U.S.C. § 2707(e)(1).

beyond its express terms would upset the constitutional balance between the interests of justice in full disclosure and the reasons for limiting the use of contempt citations to compel legitimate journalists to reveal unpublished information.

Consistent with its limited purposes and scope, the Shield can be invoked only by certain enumerated newspersons. The immunity can be claimed by 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." Cal. Evid. Code § 1070(a). The immunity can also be claimed by a "radio or television news reporter." Cal. Evid. Code § 1070(b). There is no immunity for many other classes of persons purportedly engaged in information collection and dissemination such as, for example, lecturers, authors, researchers or pamphleteers. The choice of certain enumerated newspersons reflects the professional standards that define those classes. For example, the Code of Ethics of the Society of Professional Journalists states that "Journalists should test the accuracy of information from all sources," "identify sources whenever feasible" and "always question sources' motives before promising anonymity." (Eberhart Decl. ¶ 13.)

In light of the statutory language and the case law, O'Grady cannot meet his burden of establishing that he is entitled to the immunity afforded by the Shield. *Delaney*, 50 Cal. 3d at 806 n.20. First, by his activities, O'Grady does not fall within the enumerated categories set forth in the law. Although the law has been repeatedly amended to include new forms of media, it has never been enlarged to cover posting information on a website. Persons who post such information, moreover, are not members of any professional community defined by standards and common practices. Indeed, anyone with a computer and Internet access could claim the Shield if O'Grady's arguments were accepted. The language of the statute, however, forecloses such claims.

Second, "the person or entity invoking the shield law [must] be engaged in legitimate journalistic purposes, or have exercised judgmental discretion in such activities." *Rancho Pubs.*, 68 Cal. App. 4th at 1544-45. Despite O'Grady's conclusory assertions regarding PowerPage's journalistic activities, an examination of the website shows that its general practice is to publish information without the verification and investigation that are the essential hallmarks of

journalism. PowerPage contains the following admonitions:

- "If your comments are interesting or newsworthy, do not e-mail us! Instead, please post a brief story to the PowerPage newswire ... . Fame and fortune await!"
- "If you wish to remain anonymous, feel free to leave the identity field blank or choose a pseudonym ... . Anonymity has no effect on whether we will accept or reject a story."
- "If your matter requires maximum privacy, please use an anonymous re-mailer."

(Eberhart Decl. ¶ 12.)

If O'Grady does not commonly know the identities of his sources, he has severely limited his ability to ascertain the truth of the information submitted. This directly contravenes ethics codes applicable to legitimate journalists. (Declaration of Professor Thomas Goldstein in Support of Non-Party Journalists' Motion For A Protective Order ¶ 16.)

With respect to the specific acts at issue here, moreover, O'Grady performed no journalistic function. Instead, he – or the person who misappropriated and supplied the information to O'Grady – slavishly copied the contents of a trade secret Apple document. (*See* Zonic Decl. ¶¶ 4-16.) The verbatim republication of such information is not journalism, it is misappropriation of trade secrets. *See* Cal. Civil Code § 3426.1(b).

D. No Right To Anonymous Speech Precludes The Pending Discovery

Even if it were at issue, "Dr. Teeth's" purported right to anonymous speech must yield for the same reasons discussed above relevant to the Federal Privilege.[4] As a threshold matter, the EFF Parties have not shown that the pending discovery will actually reveal Dr. Teeth's identity. The O'Grady declaration states that Dr. Teeth made a pseudonymous submission to PowerPage that was forwarded to support@powerpage.org. (O'Grady Decl. ¶¶ 19-20.) O'Grady does not, however, state that the contents of Dr. Teeth's submission disclose his true identity. As such, O'Grady has not established that the discovery to Nfox will intrude on any right to anonymity.

Assuming that the pending discovery will disclose Dr. Teeth's identity, the limited right to anonymity cannot preclude the discovery. Numerous courts have considered subpoenas for the identities of Doe defendants and have found that the plaintiff's need for the information

[4] As discussed below, discovery regarding Kasper Jade's identity is not currently at issue.

overcomes the First Amendment anonymity right. *See, e.g., Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999); *Alvis Coatings, Inc. v. John Does 1-10*, No. 3L94 CV 374-H, 2004 WL 2904405, at *3-4 (W.D.N.C. Dec. 2, 2003); *Sony Music*, 326 F. Supp. 2d at 564-67. While these courts have arrived at slightly different formulations for the appropriate showing to pierce anonymity, the general requirement is that the plaintiff show (i) a *prima facie* case for the underlying violation, and (ii) that the requested discovery is in good faith and central to plaintiff's claims. *See Alvis Coatings*, 2004 WL 2904405, at *3; *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001). As demonstrated in the discussion of the *Mitchell* factors above, Apple has presented a *prima facie* case of trade secret misappropriation and the discovery to Nfox is central to Apple's claims. This showing overcomes any First Amendment right to anonymity.

E. The EFF Parties' Request For Advisory Opinions Should Be Denied

Because the Nfox subpoenas are the only pending discovery in this action, the only issue ripe for determination is whether O'Grady should receive protective relief against those subpoenas. EFF's Motion, however, also seeks orders:

- that Monish Bhatia and "Kasper Jade" are "journalists";
- that Apple is prohibited from serving or enforcing any discovery to O'Grady, Bhatia, or "Kasper Jade" to learn the identity of their sources;
- that Apple may not seek to discover the identity of the individual using the pseudonym "Kasper Jade"; and
- that Apple is prohibited from serving or enforcing any discovery to any third party service provider used by O'Grady, Bhatia, or "Kasper Jade" that seeks the identities of their sources.

These issues are not ripe for adjudication because Apple has not served discovery on any of these entities. The Court's Order of December 14 permitting some of that discovery, moreover, does not change that fact. Depending on the results of the Nfox discovery, Apple may never pursue the discovery allowed on December 14.

Apple's pending discovery (directed only to Nfox) seeks to uncover the identity of the individual(s) named as Doe defendant(s) in the complaint. If Apple determines the identity of the proper defendant(s), it will be able to amend the complaint to name the proper parties and serve

the complaint. There may be no need for discovery to PowerPage, O'Grady, Bhatia, AppleInsider, or "Kasper Jade." If such discovery is needed, however, it may be entirely different from the limited discovery that the Court permitted on December 14, 2004. The opening of discovery, moreover, will permit the parties to develop a factual record on which the Court can properly assess the issues that the EFF Parties seek to present prematurely. "The requirement of ripeness prevents courts from issuing purely advisory opinions," such as those sought by the EFF parties, because "judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." *San Miguel Consolidated Fire Protection District v. Davis*, 25 Cal. App. 4th 134, 157-58 (1994) (citation and internal quotation marks omitted); *accord In re Executive Life Ins. Co. v. Aurora Nat'l Life Assurance Co.*, 32 Cal. App. 4th 344, 398 (1995) (declining to issue advisory opinion).

Thus, the only questions properly before the Court are whether discovery to Nfox is precluded by one or more of the California Shield, the Federal Privilege, or the First Amendment right of anonymity. As demonstrated above, those principles do not limit the pending discovery to Nfox.

IV. CONCLUSION

For the foregoing reasons, the motion for protective order should be denied in all respects.

Dated: February 25, 2005

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