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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**

10 APPLE COMPUTER, INC.,
11
12 Plaintiff,
13 v.
14 NICK DEPLUME, THE DEPLUME
ORGANIZATION LLC, and DOES 1-20.
15
16 Defendants.

) Case No. 1-05-CV-033341
)
) **DEFENDANT THE DEPLUME**
) **ORGANIZATION LLC'S**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **SPECIAL MOTION TO STRIKE**
) **COMPLAINT PURSUANT TO**
) **CALIFORNIA ANTI-SLAPP STATUTE,**
) **CCP § 425.16**
)
) Date: April 12, 2005
) Time: 9:00 a.m.
) Dept.: 4
) Judge: Hon. Jamie Jacobs-May

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INTRODUCTION

Defendant The dePlume Organization LLC (“dePlume”) brings this special motion to strike the Complaint filed by Apple Computer, Inc. (“Apple”), pursuant to the California Anti-SLAPP Law, CCP § 425.16. Because the articles challenged in the Complaint contained newsworthy information, the Anti-SLAPP Law clearly applies. Under the First Amendment, a journalist cannot be held liable for trade secret misappropriation or inducing breach of contract for publishing newsworthy information lawfully obtained, even if a source improperly obtained the information, and even if the journalist knew the information had been obtained illegally. By this standard, Apple cannot here demonstrate a probability of prevailing on any of its claims.

Moreover, the information published – a description of product features, of the type typically written about in the press, with no technical information about the method of manufacture – is not entitled to trade secret protection under the law: the challenged information already had been publicly disclosed, it had no economic value (particularly in the short time between Think Secret’s publication and Apple’s press releases), Apple has no evidence of “misappropriation” by Think Secret, and it cannot show any injury.

Apple’s lawsuit is an affront to the First Amendment, and an attempt to use Apple’s economic power to intimidate small journalists. If a publication such as the *New York Times* had published such information, it would be called good journalism; Apple never would have considered a lawsuit.

The following facts must be emphasized:

- The dePlume Organization is engaged in journalism, and its publication – *Think Secret* – publishes information about newsworthy topics, of interest to the public.
- The information challenged by Apple as alleged trade secrets does not disclose source code or similar technical information of interest only to Apple’s competitors, nor does it “convey only technical information about the method used by specific private entities to protect their intellectual property” (*DVD Copy Control Ass’n, Inc. v. Bunner*, 31 Cal. 4th 864, 883 (2001)), but involves comment on public issues of concern to the public.
- The Complaint contains no allegations that dePlume violated any agreement of confidentiality with Apple, nor that dePlume broke into Apple’s systems and stole information from Apple (such defendants are named as Doe defendants).
- The sole allegations in the Complaint of alleged improper activity by dePlume are that dePlume must have known that the information it obtained included trade secrets because (1) it offered anonymity to some sources, and (2) Think Secret’s website stated that it “appreciates your news tips and insider information” (Complaint ¶ 26) – both accepted methods used by traditional journalists without challenge.

- dePlume did not pay Apple employees to disclose proprietary company information, nor sell the alleged trade secret information to a competitor of Apple.
- The only alleged use Apple claims dePlume made of the alleged “trade secrets” is that it published this information in Think Secret, a journalistic publication.

STATEMENT OF FACTS

1. Think Secret’s Publication

Think Secret, published online at *www.thinksecret.com*, is operated by Nicholas Ciarelli, who writes under the nom de plume of “Nick dePlume.” Think Secret began operation in 1998. Ciarelli is currently a student at Harvard University. Declaration of Nicholas Ciarelli (“Ciarelli Dec.”) ¶ 2. Think Secret publishes articles primarily on the topic of Apple computers, with articles about Apple and its products, as well as about non-Apple products designed to interoperate with Apple products, Apple’s competitors, industry events and trade shows, and Apple partners.^{1/} Think Secret delivers approximately 2.5 million page views a month (recently 5 million), and publishes on average thirteen articles a month. dePlume does not pay any sources for information, nor sell any information. While Think Secret offers sources anonymity or confidentiality, none of the information in the challenged articles was from an anonymous source.^{2/} As to the challenged articles, dePlume did not know at the time of publication that any information were “trade secrets” of Apple. *Id.* ¶¶ 3,4,6-8.

2. The Complaint

The Complaint contains no allegation that Think Secret paid or offered payment to receive any information or alleged trade secrets, nor that it sold information or had an agreement of confidentiality with Apple. It contains no allegation that dePlume disclosed highly technical information of interest only to Apple’s competitors. Rather, the Complaint admits that the information in the Think Secret articles was of the type that Apple discloses to the public in its promotional activities. Complaint ¶ 15.

The Complaint makes the conclusory allegation that dePlume “engaged . . . in the systematic

^{1/} Think Secret also offers a link to an email discussion list for discussion about Apple. The Complaint contains no allegations that any alleged “trade secret” information was disclosed on this email discussion list, and so this discussion list is irrelevant as to issues in this litigation. Even if it were relevant, dePlume does not modify postings on this email discussion list. Ciarelli Dec. ¶ 5 & Ex. B.

^{2/} Think Secret only infrequently obtains usable information from anonymous sources and rarely receives usable information about potential future Apple products. Think Secret generally does not publish information from an anonymous source unless corroborated. Ciarelli Dec. ¶ 7.

misappropriation of trade secrets,” “induce[d] and assist[ed] . . . the Doe Defendants ... [to] breach[] their obligations of confidentiality to Apple” and had “knowledge that such information constitutes trade secrets.” *Id.* ¶ 29. The only factual supporting allegations are that Think Secret “actively solicit[s] Apple trade secrets” by “offer[ing] anonymous voicemail and email systems,” the site states “Think Secret appreciates your news tips and insider information” and that it has “a ‘flawless record in providing accurate forecasts of Apple CEO Steve Jobs keynote announcements.’” *Id.* ¶¶ 26-27. Other than offering anonymity and requesting information, the Complaint makes no other relevant allegations of any actions by dePlume supporting the claim that it participates in misappropriation of trade secrets, or even knew that information it had obtained was a trade secret. Finally, the Complaint has no factual allegations demonstrating the information was a trade secret.

3. The Challenged Postings

The Complaint alleges that seven Think Secret articles disclose Apple trade secrets.^{3/} Complaint ¶¶ 30, 39, 41 & Ex. C (attached as Exs. A-H to the Declaration of Terry Gross (“Gross Dec.”)). Each of these articles simply discusses possible features of products or software that Apple was planning imminently to release; of the four challenged articles from May 2003, Apple issued public statements discussing the features of these products within two weeks to a month of the articles, and of the three challenged articles from late December 2004, Apple issued press releases or public statements within two weeks. Gross Dec. ¶¶ 6,8,11,12,15,18,19 & Exs. H, I, K, L, N. Each of these articles contains information of the type normally discussed in the media. *See id.* ¶¶ 9, 13, 16, 20, 21 & Exs. J, M, O, P; *see also* ¶ 23 & Ex. S; Declaration of Thomas Goldstein (“Goldstein Dec.”) ¶¶ 36-38; Declaration of Dan Gillmor (“Gillmor Dec.”) ¶ 22.

Virtually all of the information contained in the articles had previously been discussed publicly and in fact, concerned updates and not new product. Gross Dec. ¶¶ 9, 13, 16, 20 & Exs. J, M, O, P; *see also* n.11, *infra*. For example, the information about the inexpensive Mac had been the subject of widespread public discussion for months. Gross Dec.¶ 16 & Ex. O.

^{3/} While the Complaint also challenges two postings on a message board at <http://forums.applenova.com> (Complaint ¶ 37), the board is not owned or operated by dePlume and it has no information concerning the identities of any posters on this message board and Apple clearly knows this. Ciarelli Dec. ¶ 9 & Ex. C.

1 **4. Think Secret Is a Journalistic Website Engaged in Journalism**

2 According to the expert testimony of Thomas Goldstein, Professor of Journalism and Mass
3 Communications and Director of the Mass Communications Program at U.C. Berkeley, Think Secret
4 “is an online publication that is the electronic equivalent of print publications like newspapers or
5 magazines” and “it is a continuing journalistic enterprise with a stable public identity, no different than
6 a newspaper or magazine.” Goldstein Dec. ¶¶ 31, 33. Prof. Goldstein concludes that Think Secret is
7 engaged in journalism, and a good example of journalism. *Id.* ¶¶ 22-25, 27-28, 30, 34, 36-38. Dan
8 Gillmor, a professional journalist in the area of technology, reaches the same conclusion. Gillmor Dec.
9 ¶¶ 14-21. Gillmor reads and relies upon Think Secret in his reporting (*id.* ¶ 7), as do many other
10 respected journalists and publications. Gross Dec. ¶ 26 & Ex. V; *see also id.* ¶ 27 & Ex. W (Apple
11 subsidiary’s press release touts Think Secret’s evaluation of its product).

12 **5. The Challenged Articles Are Newsworthy**

13 Apple is a California corporation whose stock is publicly traded. Apple claims it “ignited the
14 personal computer revolution in the 1970s” and “lead[s] the industry in innovation with its award-
15 winning...computers.” *Id.* ¶¶ 28-29 & Ex. X. Apple has invited public attention. It maintains a
16 website, conducts webcasts and conference calls for earnings releases open to the public and posted
17 on its website. *Id.* ¶¶ 29-31 & Exs. X-Z. It regularly distributes press releases promoting the
18 company’s products. Apple published 83 press releases in 2004, including 45 that describe product
19 features. *Id.* ¶ 32 & Ex. AA. Apple issued press releases about the information in the challenged
20 Think Secret articles. *Id.* ¶¶ 6,8,11,12,15,18,19 & Exs. H,K,L,N. Journalism experts Goldstein and
21 Gillmor agree that the content of Think Secret’s website is newsworthy, both generally and in
22 particular as to the challenged articles. Goldstein Dec. ¶¶ 30, 32, 34, 36-38; Gillmor Dec. ¶¶ 21, 25.

23 **ARGUMENT**

24 **I. THE CALIFORNIA ANTI-SLAPP LAW PROTECTS FUNDAMENTAL**
25 **CONSTITUTIONAL FREE SPEECH AND IS TO BE CONSTRUED BROADLY**

26 In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid
27 exercise of the constitutional rights of freedom of speech," the Legislature enacted California's
28 anti-SLAPP law, CCP § 425.16. A defendant's burden on an anti-SLAPP motion is minimal:

 Section 425.16 posits . . . a two-step process for determining whether an action is a

1 SLAPP. First, the court decides whether the defendant has made a threshold showing
2 that the challenged cause of action is one arising from protected activity. (§ 425.16,
3 subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying
4 the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision
5 (e)". . . If the court finds that such a showing has been made, it must then determine
6 whether the plaintiff has demonstrated a probability of prevailing on the claim.

7 *Navellier v. Sletten*, 29 Cal.4th 82, 88 (2002) (citation omitted). A defendant need merely make a
8 *prima facie* showing that a cause of action arises from an act in furtherance of the right of free speech
9 in connection with a public issue. CCP § 425.16(b)(1); *Braun v. Chronicle Publishing*, 52 Cal.App.4th
10 1036, 1042-43 (1997). The anti-SLAPP statute "shall be construed broadly." CCP § 425.16(a); *Briggs*
11 *v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106, 1119 (1999).

12 The Complaint arises from statements expressly addressed by the anti-SLAPP law: "(3) any
13 written...statement or writing made in a place open to the public or a public forum in connection with
14 an issue of public interest; or (4) any other conduct in furtherance of the exercise of...the constitutional
15 right of free speech in connection with a public issue or an issue of public interest." CCP §
16 425.16(e)(3),(4). Think Secret's challenged articles clearly are "made in connection with an issue of
17 public interest." CCP § 425.16(e)(3),(4). Speech about the quality of commercial products constitutes
18 "matters of public interest" for First Amendment purposes. *Paradise Hills Associates v. Procel*, 235
19 Cal.App.3d 1528, 1544-1545 (1991); *Morningstar, Inc. v. Superior Court*, 23 Cal.App.4th 676, 695
20 (1994); *ComputerXpress v. Jackson*, 93 Cal.App.4th 993, 1005-08 (2001) (posts on Internet message
21 board about publicly-traded corporation with claims about company's products). Apple admits the
22 articles are of public interest, because it issues press releases on the same topics. Complaint ¶ 15.

23 The challenged articles were "made in a place open to the public or a public forum." CCP §
24 425.16(e)(3). *ComputerXpress*, 93 Cal.App.4th at 1006-08 (statements on Internet website open to
25 public are made in a public forum); *Global Telemedia Int'l v. Doe 1*, 132 F.Supp.2d 1261, 1265-66
26 (C.D. Cal. 2001); *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475 (2000). As a
27 matter of law, Think Secret is a public forum.

28 Think Secret's articles also arise from "the exercise of ... the constitutional right of free speech"
(CCP § 425.16(e)(4)), as reporting of news involves the exercise of free speech. *Dowling v.*
Zimmerman, 85 Cal.App.4th 1400, 1420 (2001) (statements and letter regarding public issue);
Lafayette Morehouse v. Chronicle Publishing Co, 37 Cal. App. 4th 855, 864 (1995).

1 **II. BECAUSE APPLE CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON**
2 **ITS CLAIMS, THIS SLAPP SUIT MUST BE DISMISSED**

3 Once a defendant has made a *prima facie* showing that the lawsuit arises from petition or
4 speech activity covered by CCP § 425.16, the burden shifts to plaintiff to establish a probability of
5 prevailing on its claims, by competent and admissible evidence. *Navellier*, 29 Cal. App. 4th at 88;
6 *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 15-16, 21 n. 16, 25 (1995). Apple cannot do so.

7 **A. Under the First Amendment a Publisher Cannot Be Held Liable for Publishing**
8 **Newsworthy Information That the Publisher Obtained Lawfully**

9 The U.S. Supreme Court repeatedly has made clear that the First Amendment forbids holding
10 news organizations civilly liable for publishing newsworthy information "about a matter of public
11 significance" that is obtained lawfully. *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (statute
12 prohibited publication of names of rape victims, and law required names to be kept confidential,
13 newspaper obtained victim's name from sheriff's report). The only limitation on the First
14 Amendment's protection arises when a bar on reporting is necessary "to further a state interest of the
15 highest order." *Id.* at 537-38 (Court concluded that not even the state's desire to protect the privacy of
16 rape victims met this test); *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97, 104 (1979) (criminal statute
17 punishing a newspaper for publishing name of juvenile offender, lawfully obtained through normal
18 newsgathering techniques, violated First Amendment); *Landmark Comm., Inc. v. Virginia*, 435 U.S.
19 829 (1978) (statue required information about a state judicial review commission to be kept
20 confidential, and punished dissemination of such information; newspaper lawfully obtained and
21 published information); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (injunction
22 prohibiting media's publication of the name and photograph of a juvenile defendant violated First
23 Amendment); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (statute punishing the
24 publication of name of a rape victim obtained lawfully violated First Amendment).^{4/}

25 In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), a case directly on point here, a newspaper had
26 received and published the contents of an intercepted telephone conversation (as dePlume here is
27 alleged to have done with alleged trade secrets). A statute provided for criminal liability for anyone

28 ^{4/} The California Constitution is more protective of free speech than its federal counterpart. *Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975) ("[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press"); *Gilbert v. National Enquirer*, 43 Cal. App. 4th 1135, 1144 (1996) (same).

1 who “willfully discloses...the contents of any wire or oral communication, knowing or having reason
2 to know that the information was obtained through the interception of a wire or oral communication
3 in violation of this subsection.”^{5/} The Court assumed the newspaper “had reason to know” the tapes
4 of the communications had been obtained unlawfully. *Id.* at 525. The issue was “[w]here the punished
5 publisher of information has obtained the information in question in a manner lawful in itself but from
6 a source who obtained it unlawfully, may the government punish the ensuing publication of that
7 information?” *Id.* at 528. The Court looked at the interests served by the statute prohibiting publication
8 of intercepted communications – “first, the interest in removing an incentive for parties to intercept
9 private conversations, and second, the interest in minimizing the harm to persons whose conversations
10 have been legally intercepted” (*id.* at 529)^{6/} and balanced these interests against the newspaper’s
11 interest in free speech. The Supreme Court noted that, because the subject matter of the intercepted
12 communications was “unquestionably a matter of public concern, and respondents were clearly
13 engaged in debate about that concern,” (*id.* at 535), “we need not decide whether that interest is strong
14 enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other
15 information of purely private concern.” *Id.* at 533 (emphasis added). The Court concluded that “[i]n
16 these cases, privacy concerns give way when balanced against the interest in publishing matters of
17 public importance,” as “[o]ne of the costs associated with participation in public affairs is an attendant
18 loss of privacy.” *Id.* at 534. The Court emphasized that “a stranger’s illegal conduct does not suffice
19 to remove the First Amendment shield from speech about a matter of public concern.” *Id.* at 535.^{7/}
20 *Bartnicki* makes clear that a journalist who publishes newsworthy information that the journalist
21 obtained lawfully cannot be held liable for privacy violations, *even if the journalist knew that the*

22 ^{5/} The statute at issue in *Bartnicki*, 18 U.S.C. § 2511(c), is virtually identical to the California Uniform
23 Trade Secrets Act (“UTSA”), Civil Code section 3426.1.

24 ^{6/} The Supreme Court noted that these interests might be sufficient to justify the statute’s sanctions
25 against the *interceptor* of the communication, but that “it by no means follows that punishing disclosures of
lawfully obtained information of public interest by one not involved in the initial legality is an acceptable
means of serving those ends.” *Bartnicki*, 532 U.S. at 529.

26 ^{7/} California courts similarly have recognized that, under the First Amendment, the mere act of obtaining
27 and publishing information about a matter of legitimate public interest cannot give rise to liability. *See*
28 *Kapellas v. Kofman*, 1 Cal. 3d 20, 36 (1969) (sustaining demurrer without leave to amend on grounds that
“newsworthy” publication privileged against invasion of privacy claim alleging public disclosure of private
facts); *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 516-20 (1986) (newspaper article revealing
State Bar evaluation of judge privileged even though such information is confidential under California law).

1 information had been obtained or disclosed unlawfully by the source.

2 The California Supreme Court addressed the interplay between the First Amendment and the
3 UTSA in *DVD Copy Control Ass'n v. Bunner*, 31 Cal. 4th 864 (2003). The UTSA, like the statute in
4 *Bartnicki*, prohibits publication of information containing trade secrets if “[a]t the time of disclosure
5 or use, [the person] knew or had reason to know that his or her knowledge of the trade secret was”
6 “derived from or through a person who had utilized improper means to acquire it.” Cal. Civ. Code
7 § 3426.1(b)(2)(B)(I). In *Bunner*, the Supreme Court accepted as true that defendant had not stolen trade
8 secrets, but had posted on his website a computer program used to crack DVD encryption technology
9 written by a third party and containing trade secrets, and the defendant “kn[e]w or ha[d] reason to
10 know that the secrets were acquired by improper means.” *Id.* at 870. The Court noted that:

11 In this case, the content of the trade secrets neither involves a matter of public concern
12 nor implicates the core purpose of the First Amendment. . . . DVD CCA’s trade secrets
13 in the CSS technology . . . convey *only technical information about the method used*
14 *by specific private entities to protect their intellectual property. . . . [Bunner] did*
15 *not post them to comment on any public issue or to participate in any public*
16 *debate. Indeed, only computer encryption enthusiasts are like to have an interest*
17 *in the expressive content* – rather than the uses – of DVD CCA’s trade secrets. Thus,
18 these trade secrets, as disclosed by Bunner, address matters of purely private concern
19 and not matters of public importance.

20 *Id.* at 883-84 (italics in original; emphasis in bold added). The Supreme Court, finding that publication
21 of the technical information about the DVD encryption “does not substantially relate to a legitimate
22 matter of public concern,” concluded that “the First Amendment interests served by the disclosure of
23 DVD CCA’s trade secrets are less significant than the First Amendment interests served by the
24 disclosures at issue in *Bartnicki*.” *Id.* at 884, 885.

25 In this case, Apple simply cannot sustain its burden of showing a compelling interest “of the
26 highest order” justifying sanctions for publishing or communicating the published information because
27 the published information was newsworthy, and because Apple has no valid claim that dePlume
28 obtained the information unlawfully. Unlike in *Bunner*, the information published by Think Secret
clearly is newsworthy. It is not “technical information” about some private formula or method of
interest only to a limited group that is only “of purely private concern and not matters of public
importance.” *Bunner*, 31 Cal. 4th at 883-84. Rather, the challenged Think Secret articles communicate
information of interest to a large segment of the public, and is of the same type as is communicated

1 regularly by the mainstream and trade press. Gross Dec. ¶¶ 21, 24, 25 & Exs. Q, T, U; Goldstein Dec.
2 ¶¶ 31, 32, 34, 36; Gillmor Dec. ¶¶ 21-24. Apple cannot seriously dispute this issue, as Apple publishes
3 press releases with similar information. Gross Dec. ¶¶ 6,8,11,12,15,18,19 & Exs. H, I, K, L, N. Apple
4 further admits the public interest in the information in the Think Secret articles by its allegation that
5 Apple intends to publicly release such information in its promotional activities. Complaint ¶ 15.

6 Moreover, Apple can make no valid claim that dePlume obtained the alleged trade secrets
7 unlawfully. As noted, dePlume did not pay for or sell any of the information (Ciarelli Dec. ¶ 6), and
8 the Complaint makes no such claim. Apple's only claims that suggest unlawfulness are that dePlume
9 "induced" sources to provide trade secrets by offering anonymity, and by requesting "inside"
10 information. Complaint ¶¶ 26,29,44-46.^{8/} However, utilizing these techniques to obtain information
11 is not unlawful. "Routine reporting techniques . . . include asking persons questions, including those
12 with confidential or restricted information. While the government may desire to keep some
13 proceedings confidential and may impose the duty upon participants to maintain confidentiality, *it may*
14 *not impose criminal or civil liability upon the press for obtaining and publishing newsworthy*
15 *information through routine reporting techniques."* *Nicholson*, 177 Cal. App. 3d at 519-20 (emphasis
16 added); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("A journalist is free to seek out sources of
17 information not available to members of the general public...and the government cannot restrain the
18 publication of news emanating from such sources"). Thus, in *Nicholson*, the court held that an
19 allegation that a newspaper engaged in "soliciting, inquiring, requesting and persuading agents,
20 employees and members of the State Bar to engage in the unauthorized and unlawful disclosure of
21 information knowing such information to be confidential" states only "that the media defendants
22 sought out the newsworthy information which they subsequently published" and concludes that "this
23 type of activity . . . is within the newsgathering activities which are protected by the First
24 Amendment." *Id.* at 520. Apple's allegations concerning Think Secret are virtually identical.

25 Apple's claim that Think Secret offered sources anonymity is irrelevant to this lawsuit, as none

26 ^{8/} In the anti-SLAPP context, Apple is bound by the allegations in the complaint and has no right to seek
27 to amend to add other allegations. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073 (2001). Therefore,
28 Apple is not entitled to now claim that there was other conduct by dePlume that was unlawful, or to challenge
other articles from Think Secret. Moreover, Apple has no right to conduct a discovery fishing expedition in
the hope that it can find some factual support for the legal conclusions in its complaint. CCP § 425.16(g).

1 of the challenged information was obtained from anonymous sources. Ciarelli Dec. ¶ 8. Even if it were
2 relevant, that a journalist offered confidentiality or anonymity to sources does not lead to the
3 conclusion that the journalist obtained the information unlawfully.^{9/} The practice of offering anonymity
4 and confidentiality to sources are fundamental techniques of journalism, essential to the public's right
5 to know, and should not subject a journalist to liability. Goldstein Dec. ¶¶ 46 ("The judicious use of
6 anonymous sources is consistent with good journalistic practices"), 47-52; Gillmor Dec. ¶¶ 29-32.

7 Here, Apple's interest in protecting the confidentiality of private business information is clearly
8 no greater than the privacy interest in minimizing harm persons whose private conversations were
9 illegally intercepted (*Bartnicki*), preserving anonymity of juvenile offenders or rape victims (*Florida*
10 *Star*, *Daily Mail*, *Cox Broadcasting*, *Oklahoma Publishing*), or maintaining confidentiality of judicial
11 disciplinary proceedings (*Landmark*). Yet in each of these cases, the First Amendment concerns
12 outweighed privacy interests.^{10/}

13 **B. Apple Cannot Demonstrate a Reasonable Probability of Success On Its**
14 **Misappropriation of Trade Secrets Claim**

15 "[A] *prima facie* claim for misappropriation of trade secrets requires the plaintiff to
16 demonstrate: (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the
17 plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff."
18 *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1665 (2003). Apple cannot meet its

19 ^{9/} The First Amendment, the California Constitution, Article 1, section 1, and the right of privacy include
20 the right to speak anonymously. *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 1540-41
21 (1999); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio*
22 *Elections Comm.*, 514 U.S. 334, 341-42, 356 (1995) ("an author's decision to remain anonymous, like other
23 decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of
24 speech protected by the First Amendment. * * * Under our Constitution, anonymous pamphleteering is not a
25 pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent"); *Talley v. California*,
362 U.S. 60 (1960). These rights are fully applicable to speech on the internet. *American Civil Liberties Union*
v. Johnson, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *American Civil Liberties Union v. Miller*, 977 F. Supp.
1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 (1999), *aff'g* 19 F. Supp.2d
1081 (C.D. Cal.1998) (protecting anonymous denizens of web site at *www.annoy.com* "created and designed
to annoy" legislators through anonymous communications).

26 ^{10/} Not only is Apple's interest not of the highest order, but it could be served by means less restrictive
27 of First Amendment rights (*Daily Mail*, 443 U.S. at 102), such as imposition of liability on the individual who
28 misappropriated the information. *See Landmark*, 435 U.S. at 841 & n.12 (option of imposing punishment on
commission members who disclosed confidential information made it unnecessary to impose sanctions on third
parties); *Ross v. Midwest Communications*, 870 F.2d 271, 275 (5th Cir. 1989) (imposing liability on person
who wrongfully obtained information of victim's identity less intrusive than imposing liability on republisher).

burden as to any of these required elements, let alone all three.

1. Apple cannot demonstrate that the challenged information constitutes trade secrets

a. The challenged information had already been publicly disclosed prior to the Think Secret publications

Information that is generally known is not protectable as a trade secret. Cal. Civ. Code § 3426.1(d)(1); *DVD Copy Control Assoc. v. Bunner*, 116 Cal. App. 4th 241, 251-53 (2004); *Restatement (3d) Unfair Competition* § 39, comment (f). “Public disclosure...is fatal to the existence of a trade secret.” *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 304 (2002); *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 923 F. Supp. 1231, 1254 (N.D. Cal. 1995). Here, for all of the challenged articles, virtually all of the information had previously been published. Gross Dec. ¶¶ 9, 13, 16, 20 & Exs. J, M, O, P. Apple cannot meet its burden of demonstrating that the challenged information it claims to be trade secrets was not generally known.^{11/}

b. The challenged information had no “independent economic value” when published by Think Secret

A trade secret requires proof of “independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.” Cal. Civ. Code § 3426.1(d)(1). This requires “that the secrecy of this information provides a business with a ‘substantial business advantage.’” *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (1997); *see also Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1090-91 (9th Cir.

^{11/} While Apple did submit a sealed declaration that identified a few items in the challenged articles alleged to be trade secrets, this declaration only mentioned the three December 2004 articles, and Apple has not made any identification of alleged trade secrets in the May 2003 articles. Confidential Declaration of Robin Zonic ¶¶ 3-7. Accordingly, Apple has waived any claim as to trade secret misappropriation for the May 2003 articles. *See, e.g., Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 253 (1968); *Restatement (3d) Unfair Competition* § 39, comment (d) (“[a] person claiming rights in a trade secret bears the burden of defining the information for which protection is sought with sufficient definiteness to permit a court to apply the criteria for protection”). Moreover, virtually none of the alleged trade secrets can be contended to be trade secrets at the present time, because Apple has made public announcements concerning these products. Gross Dec. ¶¶ 6, 8, 11, 12, 15, 18, 19 & Exs. H, I, K, L, N; *see Steinberg Moorad & Dunn, Inc. v. Dunn*, 2002 WL 31968234, at *24 (C.D. Cal. Dec. 26, 2002). Even as to the few alleged trade secrets mentioned in the Conf. Zonic Dec., this type of information does not qualify as trade secrets, as they only are: (a) the name or code name of the product update (Confidential Declaration of Terry Gross ¶¶ 5(a)(i), 5(c)(i), 5(c)(iv)); (b) a few characteristics of the computer system on which the software will run (*id.* ¶¶ 5(c)(ii)); (c) a few possible features or characteristics of the product (*id.* ¶¶ 5(a)(ii), 5(b)(i), 6(c)(vi)); (d) will require a serial number (*id.* ¶ 6(c)(iii)); and (d) a self-obvious statement that a cheaper product will be marketed to a different audience than one that buys more expensive versions of the product (*id.* ¶ 5(b)(ii)).

1 1986) (“confidential material must convey an actual or potential *commercial* advantage, presumably
2 measurable in dollar terms...*which gives one who uses it an advantage over competitors*”). “When
3 information has no independent economic value, a claim for misappropriation lacks merit.” *Gemini*
4 *Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 1263 (2002); *GAB Bus.*
5 *Serv., Inc. v. Lindsey & Newsom Claim Serv., Inc.*, 83 Cal. App. 4th 409, 428 (2000) (confidential
6 salary information not trade secret because no evidence of “independent economic value”).

7 Whether the vast amount of information that Apple includes in “Future Product Information”
8 qualifies for trade secret protection is irrelevant to this motion. What is at issue is *whether the actual*
9 *information that appeared in the seven challenged Think Secret articles was an Apple trade secret at*
10 *the time of publication*. In other words, did the actual information in these seven articles have any
11 “independent economic value” from the date it was first published until several weeks later when
12 Apple published the information? Apple’s complaint has few allegations as to why the alleged secrets
13 had “independent economic value.” Though Apple’s asserts that competitors could benefit from
14 “access to Apple’s Future Product Information” (Complaint ¶ 14), it cannot legitimately contend that
15 *as to the information in the Think Secret articles* competitors could or did bring a competing product
16 to market in the few weeks between the Think Secret articles and Apple’s public announcements.

17 Apple’s true concern is that, by having Think Secret and other publications report on upcoming
18 products, Apple “lose[s] control over the timing and nature of product releases” which “diminish[es]
19 the interest of both the mainstream and trade media in the launch of a new product . . . [and] may also
20 dampen customer demand for current products.” Complaint ¶ 15. Yet Apple cannot show a
21 reasonable probability of prevailing on this claim, as it cannot show that, in the few weeks between
22 the articles and Apple’s announcements, there was any diminution of press interest or dampening of
23 consumer demand. If anything, the reverse is true, as pre-release speculation about the features of
24 about-to-be released Apple products helped generate press interest in the product launch.

25 **2. Apple cannot demonstrate that dePlume “misappropriated” the** 26 **challenged information**

27 A critical element of a UTSA claim is that a defendant engaged in “misappropriation.” While
28 Apple’s shotgun complaint contains numerous legal conclusions so characterizing dePlume’s actions,
it contains no factual allegations of conduct that constitutes misappropriation as defined by the UTSA.

1 The UTSA contains several alternative definitions of “misappropriation.” Cal. Civ. Code
2 § 3426.1(b). The only definitions of misappropriation that could apply to dePlume are that its actions
3 constitute “disclosure or use of a trade secret of another without express or implied consent by a person
4 who: (A) Used *improper means* to acquire knowledge of the trade secret; or (B) At the time of
5 disclosure or use, *knew or had reason to know* that his or her knowledge of the trade secret was . . .
6 (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its
7 secrecy or limit its use.” Cal. Civ. Code § 3426.1(b)(2)(A),(B)(iii) (emphasis added); *Steinberg*
8 *Moorad*, 2002 WL 31968234, at *24 (“plaintiff [must] show the defendant knew or had reason to
9 know that the information was trade secret and that the disclosure was unlawful”).

10 Apple cannot show that dePlume used any “improper means” nor that dePlume “knew or had
11 reason to know” the information had been derived from a person under a duty to maintain its secrecy.
12 “Improper means” is defined as “theft, bribery, misrepresentation, breach or inducement of a breach
13 of a duty to maintain secrecy, or espionage through electronic or other means.” Cal. Civ. Code §
14 3426.1(a). The only allegation in the Complaint on this issue is that dePlume “induced certain
15 persons” to disclose Apple trade secrets in violation of a duty not to do so. Complaint ¶¶ 2, 6, 10, 29,
16 30, 39, 41, 42, 44, 45. The only “facts” Apple alleges to support such a conclusion, however, are that
17 Think Secret requested “inside” information and offered anonymity. *Id.* ¶¶ 24-27.^{12/}

18 While dePlume could find no cases discussing what constitutes “inducement of a breach of a
19 duty to maintain secrecy” within the definition of “improper means” in the UTSA, the standard is
20 logically the same as for inducing breach of contract. “[I]ntentional interference with a contract occurs
21 when the defendant ‘knows that the interference is *certain or substantially certain* to occur as a result
22 of his action.’” *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 586 (2003), citing *Quelimane*
23 *Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 55 (1998). But offering anonymity and requesting
24 information, even “inside” information, cannot be equated to having knowledge that these actions were
25 “certain” or “substantially certain” to cause some unnamed person or persons to breach confidentiality
26 duties allegedly owed to Apple. *1-800 Contacts, Inc.*, 107 Cal. App. 4th at 586 (agreeing to work with
27 competitor’s former counsel in business venture that competed, and touting counsel’s breadth of

28 ^{12/} Anonymity is irrelevant to the issue of inducement here, as none of the information in the challenged
articles came from anonymous sources. *Ciarelli* Dec. ¶ 8.

1 knowledge, held “insufficient to constitute prima facie proof that [defendant] was acting with
2 knowledge that [former in-house lawyer] would violate his [confidentiality] agreement”).

3 These allegations also are insufficient to show that dePlume knew or had reason to know that
4 the source (or someone in the chain who disclosed the information to the source) was under a
5 confidentiality agreement. Think Secret did not know that the information it had obtained for the
6 challenged articles were Apple trade secrets. Ciarelli Dec. ¶ 8. Journalists often obtain information
7 from sources who request anonymity or confidentiality, and who are providing “inside” information,
8 but these factors do not inform journalists that the information is a trade secret subject to a
9 confidentiality agreement. Goldstein Dec. ¶¶ 43, 44, 50, 52; Gillmor Dec. ¶¶ 31, 32.

10 In fact, Apple’s contention that, as to the information in the Think Secret articles, dePlume
11 allegedly “understand[s] that such information is available only by the breach of legal obligations owed
12 to Apple” (Complaint ¶ 26) would mean that no journalist could publish any information or
13 speculation about any possible future product by any company. This simply cannot be the law, as a
14 journalist would be required to perform the impossible task of determining whether information being
15 provided is speculation, or in fact is a trade secret. Such a standard will chill reporting. Goldstein Dec.
16 ¶ 53; Gillmor Dec. ¶¶ 30-32. There are numerous print and internet publications that engage in
17 constant discussion about possible products to be issued by Apple, and clearly such public discussion
18 means that the information, even if once a trade secret, no longer is. See Gross Dec. ¶¶ 24, 25 &
19 Exs. T, U. Given such widespread discussion, Apple will be unable to prove that dePlume knew that
20 the information in its articles could only have come from someone who breached an Apple
21 confidentiality agreement.

22 3. Apple cannot demonstrate that it suffered any damage from the Think 23 Secret publications

24 Apple also cannot establish that dePlume’s publication of Apple’s alleged trade secrets directly
25 and proximately caused it damage. *Sargent Fletcher*, 110 Cal. App. 4th at 1665; *Steinberg Moorad*,
26 2002 WL 31968234, at *23 (under section 3426 “indirect trade secret misappropriation requires proof
27 that ... Plaintiff suffered harm as a direct and proximate result of Defendant’s use or disclosure of the
28 trade secret”).

The UTSA provides several measures of damages upon proof of misappropriation of trade

1 secrets: (1) "the actual loss caused by misappropriation;" (2) unjust enrichment; or (3) "[i]f neither
2 damages nor unjust enrichment caused by misappropriation are provable," a reasonable royalty "for
3 no longer than the period of time the use could have been prohibited." Cal. Civ. Code § 3426.3. Here,
4 Apple can show no actual loss directly and proximately resulting from Think Secret's publication
5 shortly before Apple's own announcement of its products; nor can it show unjust enrichment or
6 entitlement to a royalty, because dePlume received no monetary benefit. *Unilogic, Inc. v. Burroughs*
7 *Corp.*, 10 Cal. App. 4th 612, (1992) (nonsuit on misappropriation claim because defendant made no
8 sales of the product and insufficient evidence of any monetary benefit); *cf. Bunner*, 116 Cal. App. 4th
9 at 254 ("typical defendant in a trade secret case is a competitor who has misappropriated the plaintiff's
10 business secret for profit in a business venture").^{13/}

11 **C. Apple Cannot Demonstrate a Reasonable Probability of Success On Its Tortious**
12 **Interference With Contract Claim**

13 Intentional interference with a contract requires proof of: (1) a valid contract between plaintiff
14 and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed
15 to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the
16 contractual relationship; and (5) resulting damage. *Quelimane Co.*, 19 Cal. 4th at 56; *Pacific Gas &*
17 *Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990). For the reasons set forth above, Apple
18 cannot establish the requisite knowledge and intent to induce a breach (*see* Point II.B.2, *supra*), nor
19 resulting damage (*see* Point II.B.3, *supra*).

20 **CONCLUSION**

21 For the reasons stated above, defendant respectfully requests that this Court enter an order
22 dismissing plaintiff's complaint with prejudice and awarding defendant its attorney's fees and costs.

23 Dated: March 4, 2005

GROSS & BELSKY LLP

24 By: 
Terry Gross

25 Attorneys for Defendant
THE DEPLUME ORGANIZATION LLC

26
27 ^{13/} Any reasonable royalty would be *de minimis* in any event because the royalty period could only be the
28 few days between Think Secret publication and Apple's own public announcement, when the use could no
longer "have been prohibited." Cal. Civ. Code § 3426.3(b).

CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, not a party to the cause. My business address is 180 Montgomery Street, Suite 2200, San Francisco, California 94104.

On March 4, 2005, I served the foregoing:

**DEFENDANT THE DEPLUME ORGANIZATION LLC'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION STRIKE COMPLAINT
PURSUANT TO CALIFORNIA ANTI-SLAPP STATUTE, CCP § 425.16**

by hand upon:

George A. Riley
O'Melveny & Meyers
Embarcadero Center West
275 Battery Street
San Francisco, CA 94111-3305

I am familiar with the practices of this business for collection and processing of correspondence for mailing with the U.S. Postal Service. I placed such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices.

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

Executed this 4th day of March 2005, at San Francisco, California.


LARRY NELSON