

1 GEORGE A. RILEY (S.B. #118304)
2 DAVID EBERHART (S.B. #195474)
3 DHAIVAT H. SHAH (S.B. #196382)
4 IAN N. RAMAGE (S.B. #224881)
5 O'MELVENY & MYERS LLP
6 Embarcadero Center West
7 275 Battery Street
8 San Francisco, California 94111-3344
9 Telephone: (415) 984-8700
10 Facsimile: (415) 984-8701

11 Attorneys for Plaintiff
12 Apple Computer, Inc.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SANTA CLARA**

15 Apple Computer, Inc.,

16 Plaintiff,

17 v.

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

20 Defendants.

Case No. 104-cv-032178

**NOTICE OF DEPOSITION
OF NFOX.COM**

21 **TO ALL INTERESTED PARTIES:**

22 PLEASE TAKE NOTICE THAT Apple intends to take the deposition of
23 Nfox.com at the offices of O'Melveny & Myers LLP, 275 Battery Street, San Francisco,
24 CA 94111, commencing at 9:00 a.m. on February 24, 2004.

25 A copy of the deposition subpoena is attached hereto and served herewith.

26 Also attached are copies of the court order and commission granting leave to
27 serve discovery on Karl Kraft and Nfox.com.

28 PLEASE TAKE FURTHER NOTICE that Apple intends to record the
testimony at the above-referenced deposition by audiotape and/or videotape, in addition to
recording the testimony by stenographic means. The deposition will be taken before an
officer who is authorized to administer an oath.

1 NOTICE IS FURTHER GIVEN that deponent is required to produce at the time
2 and place set forth above the following documents:

3 All documents relating to the identity of any person or entity who
4 supplied information regarding an unreleased Apple product code-named
5 "Asteroid" or "Q97" (the "Product"), including postings that appeared on
6 Powerpage.com (the "Website") on November 19, November 22,
7 November 23, and November 26, 2004. These documents include:

8 (a) all documents identifying any individual or individuals who
9 provided information relating to the Product ("Disclosing Person(s)"),
10 including true name(s), address(es), internet protocol ("IP") address(es),
11 and e-mail address(es);

12 (b) all communications from or to any Disclosing Person(s)
13 relating to the Product;

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

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

19 Production of the above documents will complete deponent's obligations with
20 respect to the subpoenas, following which no testimony will be required.

21 Dated: February 4, 2005

22 GEORGE A. RILEY
23 DAVID R. EBERHART
24 DHAIVAT H. SHAH
25 IAN N. RAMAGE
26 O'MELVENY & MYERS LLP

27 By 

28 David R. Eberhart
Attorneys for Apple Computer, Inc.

SF1:575672.1

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): George A. Riley (S.B. #118304) David R. Eberhart (S.B. #195474) O'Melveny & Myers, LLP 275 Battery Street, Suite 2600 San Francisco, California 94111 TELEPHONE NO.: (415) 984-8700 FAX NO.: (415) 984-8701 ATTORNEY FOR (Name): Apple Computer, Inc.	FOR COURT USE ONLY CASE NUMBER: 104-CV-032178
NAME OF COURT: Santa Clara County Superior Court STREET ADDRESS: 191 North First Street MAILING ADDRESS: same as above CITY AND ZIP CODE: San Jose, California 95113 BRANCH NAME:	
PLAINTIFF/ PETITIONER: APPLE COMPUTER, INC. DEFENDANT/ RESPONDENT: DOE 1, ET AL	
DEPOSITION SUBPOENA For Production of Business Records	

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):
 Nfox.com c/o Karl Kraft

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

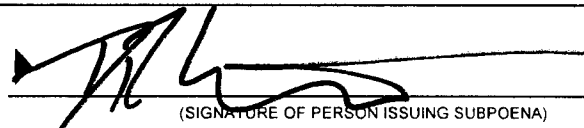
To (name of deposition officer): David R. Eberhart On (date): February 24, 2005 At (time): 9:00 A.M. Location (address): O'Melveny & Myers, LLP 275 Battery Street, Suite 2600, San Francisco, California 94111 Do not release the requested records to the deposition officer prior to the date and time stated above.

- a. by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
 - b. by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
 - c. by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows:
 See attachment.
- Continued on Attachment 3.
4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: February 4, 2005

David R. Eberhart
 (TYPE OR PRINT NAME)


 (SIGNATURE OF PERSON ISSUING SUBPOENA)
 Attorney for Apple Computer, Inc.
 (TITLE)

(Proof of service on reverse)

1 ATTACHMENT 3

2 **DEFINITIONS AND INSTRUCTIONS**

3 Unless the context indicates otherwise, the following words and phrases have the
4 meanings given:

5 1. "You" or "your" mean and refer to Nfox.com, its employees, agents,
6 representatives and attorneys, and its corporate predecessors, successors, affiliates,
7 divisions, branches, subsidiaries and related entities, and all persons acting for or on its
8 behalf; and Karl Kraft, his agents, representatives and attorneys, and all persons acting for
9 or on his behalf.

10 2. Your production must include requested documents, materials and files from
11 any file server, mainframe computer, mini computer, personal computer, notebook or
12 laptop computer, personal data assistant, or other storage device, including but not limited
13 to e-mail. All requested files that are still on storage media and identified as erased, but
14 are still recoverable, shall be included.

15 3. The term "document" is used as interpreted under the California Civil Code
16 and the California Evidence Code and includes, without limitation, all originals and
17 copies, duplicates, drafts, and recordings of any written, printed, graphic, photographic,
18 electronic or otherwise recorded matter, however produced or reproduced, and all
19 writings, as defined in California Evidence Code § 250, of any nature, whether on paper,
20 magnetic tape, electronic or optical media or other information storage means, including
21 film, tapes, computer disks or cards, or personal data assistant memory; and where any
22 such items contain any marking not appearing on the original or are altered from the
23 original, then such items shall be considered to be separate original documents.

24 4. The term "relate," "related," "relates," or "relating" means concerning,
25 referring to, summarizing, reflecting, constituting, containing, embodying, pertaining to,
26 involved with, mentioning, discussing, consisting of, comprising, showing, commenting
27 on, evidencing, describing or otherwise relating to the subject matter.

28 5. As used herein, "all," "any," "each," or "every" means "all, any, each and

1 every.”

2 6. All documents shall be produced in the booklet, binder, file, folder,
3 envelope, or other container in which the documents are kept or maintained by you. If for
4 any reason the container cannot be produced, please produce copies of all labels or other
5 identifying markings. Documents attached to each other should not be separated.

6 7. In the event any document is withheld on a claim of attorney/client privilege
7 or work product immunity, provide a detailed privilege log that describes the nature and
8 basis for your claim and the subject matter of the document withheld, in a manner
9 sufficient to disclose facts upon which you rely in asserting your claim, and to permit the
10 grounds and reasons for withholding the document to be identified. Such description
11 should, at a minimum:

- 12 a. state the date of the document;
- 13 b. identify each and every author of the document;
- 14 c. identify each and every person who prepared or participated in the
15 preparation of the document;
- 16 d. identify each and every person who received the document;
- 17 e. identify each and every person from whom the document was received;
- 18 f. state the present location of the document and all copies thereof;
- 19 g. identify each and every person having custody or control of the document
20 and all copies thereof;
- 21 h. describe the subject and purpose of the document; and
- 22 i. provide sufficient further information concerning the document and
23 circumstances thereof to explain the claim of privilege or immunity and
24 permit the adjudication of the propriety of that claim.

25 8. If a document once existed, but has been lost, destroyed, erased or otherwise
26 is no longer in your possession, identify the document and state the details concerning the
27 loss or destruction of such document, including the name and address of the present
28 custodian of any such document known to you.

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DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 1:

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).

Dated: February 4, 2005

GEORGE A. RILEY
DAVID R. EBERHART
DHAIVAT H. SHAH
IAN N. RAMAGE
O'MELVENY & MYERS LLP

By 

David R. Eberhart
Attorneys for Apple Computer, Inc.

SF1:573817.1

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11 Attorneys for Plaintiff
12 Apple Computer, Inc.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA

15 Apple Computer, Inc.,
16 Plaintiff,
17 v.
18 Doe 1, an unknown individual, and Does
19 2-25, inclusive,
20 Defendants.

Case No. 104-cv-032178

~~PROPOSED~~ ORDER GRANTING
EX PARTE APPLICATION FOR
AN ORDER GRANTING LEAVE TO
SERVE EXPEDITED DISCOVERY
ON NFOX.COM AND KARL KRAFT

21 Based on the *ex parte* application of Plaintiff Apple Computer, Inc.
22 (“Apple”), and good cause appearing,

23 IT IS HEREBY ORDERED that Apple’s request for discovery is granted
24 and that Apple is authorized to serve subpoenas, whether through the use of commissions
25 or in-state process, on Nfox.com and Karl Kraft seeking the following information:

26 All documents relating to the identity of any person or entity who
27 supplied information regarding an unreleased Apple product code-named
28 “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)”),

FILED

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CHIEF E
CLERK
SUPERIOR COURT OF CA
COUNTY OF SANTA CLARA
BY *[Signature]*
C A PINACATE

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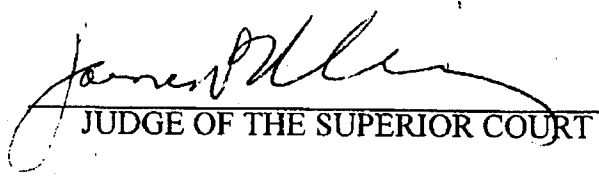
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(c) all documents received from or sent to any Disclosing
Person(s) relating to the Product; and

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

DATED: February 11, 2005


JUDGE OF THE SUPERIOR COURT

SF1:569530.3

1 GEORGE A. RILEY (S.B. #118304)
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12 Apple Computer, Inc.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SANTA CLARA**

15 Apple Computer, Inc.,
16 Plaintiff,
17 v.
18 Doe 1, an unknown individual, and
19 Does 2-25, inclusive,
20 Defendants.

21 Case No. 104-cv-032178
22 **COMMISSION**

23 WHEREAS, a certain civil action is pending in the Superior Court for Santa
24 Clara County, California in which Apple Computer, Inc. ("Apple") is plaintiff and
25 defendants are unknown individuals; and

26 WHEREAS, Apple believes that Nfox.com, an entity that provides
27 collocation and e-mail server services for Powerpage.org, is likely to have information
28 relating to the identity of the proper defendant or defendants; and

WHEREAS, Apple has requested that the Clerk of the Court issue
a commission for a subpoena seeking documents from Nfox.com and/or its owner Karl
Kraft; and

WHEREAS, the documents requested by Apple are identified in the
Attachment hereto;

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WHEREAS, pursuant to California Code of Civil Procedure Section 2026(c), the Clerk may issue a commission for deposition in a foreign jurisdiction; and

WHEREAS, pursuant to California Code of Civil Procedure Section 2029, the Court will honor commissions from another state for deposition in California; and

NOW THEREFORE, the Court requests that process issue requiring the attendance and enforcing the obligations of Nfox.com and Karl Kraft to produce documents. Any document production may be effectuated and/or enforced by the methods authorized under the laws of the State of Nevada.

DATED: February 4, 2005

Kiri Torre
Chief Executive Officer/Clerk

C. A. PINACATE



CLERK OF THE SUPERIOR COURT

1 ATTACHMENT

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11 should, at a minimum:

- 12 a. state the date of the document;
- 13 b. identify each and every author of the document;
- 14 c. identify each and every person who prepared or participated in the
15 preparation of the document;
- 16 d. identify each and every person who received the document;
- 17 e. identify each and every person from whom the document was received;
- 18 f. state the present location of the document and all copies thereof;
- 19 g. identify each and every person having custody or control of the document
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14 the Product; and

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

17
18 Dated: February 4, 2005

19
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21 DAVID R. EBERHART
22 DHAIVAT H. SHAH
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24 O'MELVENY & MYERS LLP

25 By 

26 David R. Eberhart
27 Attorneys for Apple Computer, Inc.

28 SFI:573817.1