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U.S. COURT OF APPEALS

AUG 26 2010

FILED _____
DOCKETED _____ DATE _____ INITIAL _____

1 **Franz A. Wakefield, *Pro Se***
2 **COOLTvNETWORK.COM™, INC.**
3 **The *ClickVideoShop*™ Patent: U.S. 007,162,696 B2.**
4 17731 North West 14th Court
5 Miami, Florida 33169
6 Tel: (305) + 206.4832
7 FranzWakefield@cooltvnetwork.com

8 **UNITED STATES COURT OF APPEALS**
9 **FOR THE NINTH CIRCUIT.**

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12 FRANZ A. WAKEFIELD, Plaintiff-Appellant,

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18 v.

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22 APPLE INC., Defendants-Appellees,
23 STEVE JOBS,
24 And
25 SARAH JESSICA PARKER
26
27
28

Case №:

10-16550

Response

**Response to the
August 5, 2010 Order to
Show Cause.**

1 **Franz A. Wakefield, *Pro Se***
2 **COOLTVNETWORK.COM™, INC.**
3 **The *ClickVideoShop*™ Patent: U.S. 007,162,696 B2.**
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8
9
10 **UNITED STATES COURT OF APPEALS**

11 **FOR THE NINTH CIRCUIT**

12 **Franz A. Wakefield,**
13 **Plaintiff-Appellant,**

No: 10-16550

**Response to the August 5, 2010 Order to
Show Cause.**

14 **v.**

D.C. No. 5:09-cv-05420-JW
**U.S. District Court for Northern California
, San Jose**

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18 **Apple Inc., Steve Jobs, and**
19 **Sarah Jessica Parker**
20 **Defendants-Appellees**

21 **RESPONSE TO ORDER TO SHOW CAUSE**

22 This Appellate Court, after review of the record, has issued an Order dated on the
23 day of August 5, 2010 requiring me, *Pro Se* Appellant Franz A. Wakefield,
24 “WAKEFIELD,” to show cause why the judgment in this appeal should not be summarily
25 affirmed; I have made certified, sworn, factual, and correct representations to the Court
26 pursuant to Federal Rules of Civil Procedure Rule 11, and I have provided authentic
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28

1 evidence which supports the allegations in the Complaint and other submissions made by
2 me to the Court, that creates genuine issues of material fact that warrants discovery and
3 trial by jury. See. [DE 1, 52, 53, 62, 63, 64, 65, 71, and 75]. As a result, I believe that the
4 District Court has made an error in judgment in favor of the Appellees “APPLE Et. Al.,”
5 by dismissing the case and doing so with prejudice. Federal Rules of Civil Procedure Rule
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7
8 56, Summary Judgment, states:

9 “(e) Affidavits; Further Testimony.

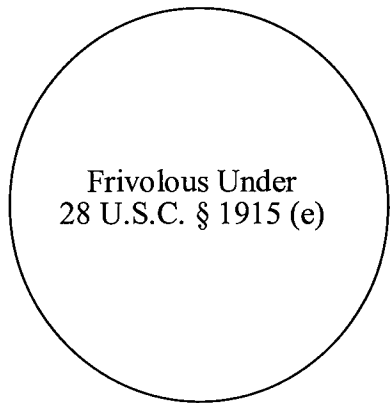
10 (2) Opposing Party’s Obligation to Respond. When a motion for summary
11 judgment is properly made and supported, an opposing party may not rely
12 merely on allegations or denials in its own pleading; rather, its response must
13 ---by affidavits or as otherwise provided in this rule --- set out specific facts
14 showing a genuine issue for trial...

15 (f) When Affidavits are Unavailable. If a party opposing the motion shows
16 by affidavit that, for specified reasons, it cannot present facts essential to
17 justify its opposition, the court may:

- 18 (1) deny the motion;
- 19 (2) order a continuance to enable affidavits to be obtained, depositions
20 to be taken, or other discovery to be undertaken;
- 21 (3) issue any other just order.” (*Emphasis Added*)

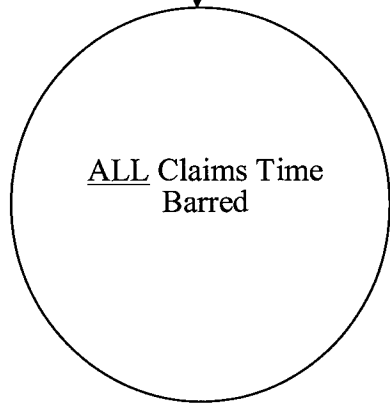
22 The judgment in this appeal should not be summarily affirmed because if this
23 Appellate Court takes a closer look at the main conclusions which it rests upon it will find
24 that they are flawed in light of the evidence and factual contentions which forms the
25 record. See. [DE 1, 52, 53, 64, 65, and 71].
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1 The Judgment has been made with the following flawed conclusions:
2



“Plaintiff’s allegations rise to the level of the irrational and wholly unbelievable...Since these claims are all unbelievable and irrational, the Court must dismiss Plaintiff’s claims as frivolous. 28 U.S.C. § 1915(e)(2)(B)(i). Accordingly, the Court GRANTS Defendants’ Motion to Dismiss. Since Plaintiff’s claims are patently frivolous, the Complaint is dismissed with prejudice.” *Emphasis Added See.* The June 15, 2010 Order at pages 6 -7.

10 Even if Non-Frivolous



“Since Plaintiff would have been on notice that his trade secrets were being used when the first iPod was released in 2001, his trade secret misappropriation claims are time-barred...Here, assuming a RICO claim existed, Plaintiff should have known of his injury on October 27, 2006, when he received the letter from Parker’s attorney communicating Parker’s lack of recollection of an agreement with Plaintiff after the IPOD had been released. Thus, Plaintiff’s RICO claim is time barred. Further, Plaintiffs contract claim is barred by the statute of frauds. An oral agreement lasting beyond one year is unenforceable under Florida’s Statute of Frauds. Here, Plaintiff alleges he made an oral agreement with Parker that was to last from 1999 until at least 2007. *Emphasis Added See.* The June 15, 2010 Order at pages 6-7.”

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25 **I. Frivolous Under 28 U.S.C. § 1915 (e).**

26 I, Franz A. Wakefield, “WAKEFIELD,” has provided factual testimony, evidence,
27 and authentic documents under certification pursuant to Federal Rules of Civil Procedure,
28

1 Rule 11 and pursuant to 28 U.S.C. § 1746 that amongst other things, state that:

2 a. I created drawing designs, descriptions, and software flows; and owned the
3 trade secrets which include the IDENTICAL name brands, IDENTICAL
4 device designs, IDENTICAL software flows, and IDENTICAL marketing
5 methods for the entire IPOD™, iTUNES™, iTUNES STORE™, and
6 iPhone™ product lines in as early as 1989 and that I asked for the help of
7
8 The Congressman William Lehman and the FBI during 1989 – present in
9 protecting these secrets and later proving that I created them.
10
11

12
13 b. I entered into a verbal contract with the entertainer Sarah Jessica Parker,
14 “SJP” to commercialize the above mentioned trade secrets; where I would be
15 paid for said commercialization upon the release of the first iPhone™
16 product line, (*The first iPhone™ product line released on June 29, 2007*).
17
18 See. [DE 1, 52, 53, 64, 65, and 71] *in its entirety.*
19
20

21 In making its ruling The Court would rather believe that my testimony is delusional,
22 unbelievable, and wholly incredible instead of allowing me the opportunity through
23 discovery, to obtain the information and tangible things from The FBI and/or Department
24 of Justice. I believe this ruling and any enforcement of this ruling is prejudice and bias; the
25 rewards and minimal resources required to effectively check to see if what I am testifying
26 to is true, and to see if the evidence I testify about exists, outweighs the risks of making a
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1 conclusory and biased judgment and affirmation that causes the irreparable harm of a
2 prudent businessman that has a loss value pricetag estimated at billions of dollars.

3
4 “[If...] ‘evidence is to be always disbelieved because the story told seems
5 remarkable or impossible, then a party whose rights depend on the proof
6 of some facts out of the usual course of events will always be denied justice
7 simply because his story is improbable.’ We should not overlook the shrewd
8 proverbial admonition that sometimes truth is stranger than fiction. Post v.
9 United States, 5 Cir., 135 F. 1, 11, 70 L.R.A. 989; cf. Hastings v. Brooklyn
10 Ins. Co., 138 N.Y. 517, 34 N.E. 342, 20 L.R.A. 440; Walters v. Syracuse
11 Rapid Transit R. Co., 178 N.Y. 50, 52, 70 N.E. 98; Heist v. Blaisdell, 198 Pa.
12 377, 48 A. 259, 262; Blumenthal v. Boston, etc., R. Co., 97 Me. 255, 260
13 , 54 A. 747; Moore, Facts (1898) §§ 146, 147, 152, 170, 171, 173, 175.”
14 **See. Arnstein v. Porter., 154 F. 2d 464; 1946.**

15 See. [DE 1, 52, 53, 64, 65, and 71] in its entirety.

16 **II. All Claims are Time-Barred**

17 Further, the Court incorrectly determined based on the facts, sworn testimony, and the
18 record that “[p]laintiff’s claims, even if non-frivolous, would be barred.” The Final Order
19 dated June 15, 2010 states at pages 6 thru 7, the following:

20 “Under California’s Uniform Trade Secrets Act, an action for misappropriation
21 of a trade secret must be brought ‘within three years after the misappropriation
22 is discovered or by the exercise of reasonable diligence should have been
23 discovered.’ Cal. Civ. Code § 3426.6. Since Plaintiff would have been on notice
24 that his trade secrets were being used when the first iPod was released in 2001
25 , his trade secret misappropriation claims are time-barred. The limitations period
26 for a RICO claim is four years...Here, assuming a RICO claim existed, Plaintiff
27 should have known of his injury on October 27, 2006, when he received the letter
28 from Parker’s attorney communicating Parker’s lack of recollection of an agree-
ment with Plaintiff after the iPod had been released. Thus, Plaintiff’s RICO claim
is time barred. Further, Plaintiff’s contract claim is barred by the statute of frauds.
An oral agreement lasting beyond one year is unenforceable under Florida’s Statute
of Frauds. Here, Plaintiff alleges he made an oral agreement with Parker that was to

1 last from 1999 until at least 2007.” *Emphasis Added*

2
3 But on numerous occasions in the prosecution of the case it was communicated that an oral
4 agreement was made to commercialize my trade secrets including the product line called
5 iPOD™ and that payment was to be made to me immediately AFTER the release of the
6 first iPHONE™ product line; which released on June 29, 2007. Under this contractual term
7 the Appellees were not in breach of the agreement after the release of the iPOD™ product
8 line which released in 2001 and The Court should not have concluded that at this time,
9 2001, that I should have been on notice that my trade secrets were being used without my
10 consent, because this use and commercialization during 2001 when the iPOD™ released
11 was in-line with the terms of the agreement made with entertainer Sarah Jessica
12 Parker. Thus, there was no alarm of theft or misappropriation until the release of the
13 iPHONE™ and I was not paid. This should not be very difficult to understand.

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18 See. [DE 1]---Breach of Oral Agreement, [DE 52]—pgs. 17, 18, 19, 21-29, and [DE 64]—
19 pgs. 9-19.

20 Further, The Court determined in its Order that “[t]he limitations period for a RICO
21 claim is four years...Here, assuming a RICO claim existed, Plaintiff should have known of
22 his injury on October 27, 2006, when he received the letter from Parker’s attorney
23 communicating Parker’s lack of recollection of an agreement with Plaintiff after the iPod
24 had been released. Thus, Plaintiff’s RICO claim is time barred.” See. [DE 75 and 76]---
25 pgs. 6-7. Consequently, four years from October 27, 2006 is October 27, 2010, the case
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1 was filed timely on November 17, 2009¹, well within the statutory limitations for filing a
2 RICO claim. See. [DE 1], and [DE 75 and 76]—pg. 3, ¶ 2.

3
4 Finally, based on the facts that form the record, the sworn testimony and the
5 certification of said documents pursuant to Federal Rules of Civil Procedure, Rule 11 the
6 oral agreement should not be barred by the statute of frauds because all of the terms could
7 be completed within one year, and there was no sale of goods. The Statute of Frauds,
8 provides that if the contract by its terms cannot be completed within a year, or if it involves
9 the sale of goods for over \$500, under the Uniform Commercial Code, it must be in writing
10 to be enforced. So long as complete performance within one year is within the realm of
11 possibility, the contract need not be in writing to be enforceable; it may be oral. The UCC
12 defines goods as all things that are movable at the time the contract is made, except for
13 money used as payment. This rule is narrowly interpreted, so if there is any possibility, no
14 matter how remote, that the contract could be fully performed within one year, the contract
15 need not be reduced to writing.

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20 In this case the oral contract that I made with “SJP” is enforceable, valid, and did not
21 have to be in writing because ALL OF THE TERMS COULD BE PERFORMED WITHIN
22 ONE YEAR, and IT DID NOT INVOLVE THE SALE OF GOODS. The terms of the oral
23

24
25 ¹ The case was delivered via Express Mail and received by The Clerk of The United States
26 District Court for The Central District of California on October 27, 2009, and filed on
27 November 2, 2009 with the case number 09-05779 HRL. I requested that the case be
28 transferred to the Northern District of California based on an issued Court Order pursuant
to diversity and venue purposes as indicated by 28 USC § 1391(c). The case was
transferred to the Northern District of California on December 15, 2009 and assigned the
case number 09-5420 JW. See. Attached Exhibit 1.

1 contract made with “SJP” during 1999 – 2000² are:

- 2 1. Use my trade secrets and other intellectual property in her custody for
3 presenting the products to “JOBS” in confidence to determine if he would be
4 interested in creating a business deal to commercialize the products.
5

6 To Complete this task “SJP” would:

- 7 a. Create a marketing company that would create in confidence a marketing
8 presentation of my trade secrets and other intellectual property.
9 b. Approach “JOBS” and “APPLE” and attempt to commercialize my trade
10 secrets by forming a strategic business alliance, contingent on “JOBS” and
11 “APPLE’S” acceptance of the requirements set by my trade secrets (designs,
12 deployment and marketing methods, brands...etc.), and the agreed payment
13 of me 2% of the gross revenues generated by the products, their constituent
14 services, and applications, including accessories.
15 c. Maintain an interest bearing forensically accounted bank account with my
16 funds until the release of the iPhone™.
17 d. That she be paid a percentage on top of my 2% for brokering the deal, which
18 should not exceed 5% in total.
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25 ² The defense for “SJP” has stated in their motion at page 14 that: “By Wakefield’s own
26 admission, Parker breached the alleged contract at or near its inception back in 1989 when
27 she failed to secure Apple’s agreement to Wakefield’s terms prior to the disclosure and
28 ‘misappropriation’ of his inventions, and also by failing to comply with her other alleged
contractual obligations.” This is a false representation of the facts that I have stated through
out this case; the oral contract made with “SJP” was made in 1999 – 2000. **See. [DE 1]and
[DE 52] in its entirety.**

1 All of these terms can be completed within one year. Item one (1), above, could be
2 realistically completed in a week or a month by utilizing the guidelines set by Items (a) –
3 (d). Creating a marketing company, could be completed in 24 hours, creating a marketing
4 presentation of my trade secrets could be completed within 24 hours to a week,
5 approaching “JOBS” and “APPLE” to present the proposed deal and strategic alliance
6 could be completed in a series of phone calls and meetings that realistically could be
7 completed in a week or month, to create a bank account with an automatic ledger, and
8 direct deposit based on sales could be completed in a few hours, to decide on what
9 percentage (from 1% - 3%) she believed she deserved and wanted to get paid in addition
10 to my 2 % of gross revenues could be completed in a few minutes, to incorporate her
11 percentage payment into the agreement made with “JOBS” and “APPLE” could be
12 completed in a few minutes. Thus, complete performance of the contract within one year is
13 within the realm of possibility, and thus the contract need not be in writing to be
14 enforceable. Further, there was no sale of goods movable at the time the contract was
15 made, neither between “SJP” and myself nor between “SJP” and “JOBS”/“APPLE;” only
16 the agreed business alliances and the method and percentage amount of payment³. There
17 was no requirement made to “SJP” that her contact with “JOBS” or “APPLE” to complete
18 the terms of our oral contract be in California, New York, Florida, or any other particular
19 state.

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27 California Civil Code Section 1646 states clearly that:

28 ³ There was no way to know exactly how successful the iPod™ product line would be nor
how much money the products would generate.

1 “A contract is to be interpreted according to the law and usage of the place
2 where it is to be performed; or, if it does not indicate a place of performance
3 , according to the law and usage of the place where it is made.”
4 (*Emphasis Added*)

5 Thus, pursuant to Florida Law, Fla. Stat. § 95.11 (3)(k) the oral agreement and this claim is
6 valid, enforceable and within the statutory time frame set by law. See. [DE 52]---pgs 24 -
7 **25.**

8 The statute states:

9
10 “95.11 Limitations other than for the recovery of real property.—Actions other
11 than for recovery of real property shall be commenced as follows:

12 (3) WITHIN FOUR YEARS.—

13 (k) A legal or equitable action on a contract, obligation, or liability not founded
14 on a written instrument, including an action for the sale and delivery of goods,
15 wares, and merchandise, and on store accounts.”

16 Thus, the statutory clock for the breach of the oral contract between me and “SJP” and to
17 file a RICO claim, runs four years from June 29, 2007 the release date of the iPhone™ and
18 lack of payment to me at that time. The misappropriation of my trade secrets runs three
19 years from that same date and time. This case was filed well within those particular time
20 restraints. The case was filed in the Northern District of California based on diversity and
21 venue purposes based on 28 USC § 1391(c).
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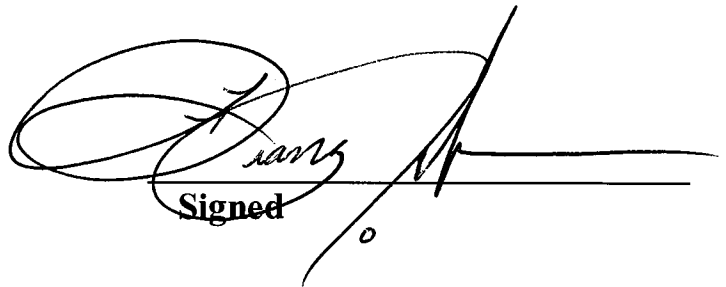
23
24 Although “SJP” denies the existence of the oral contract, this can be easily
25 overcome through discovery. The “Clean Room” process that was created by me where my
26 trade secrets were documented with The Congressman William Lehman, and The FBI
27 documents my intentions of working with “JOBS” and “APPLE” through “SJP” and also
28

1 documents the important points and terms that would memorialize the oral contract and the
2 business alliances. If “JOBS” and “APPLE” paid funds to “SJP” for development of these
3
4 products this can also be found out through discovery. It would be difficult at that time for
5 her or her defense to deny the existence of the oral contract and the business alliances.
6 See. [DE 64]---pgs. 15-19.

7
8 Thus, I believe that the case should be remanded for discovery and trial and I believe
9 that the Appeal should proceed and not be summarily decided.

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13 August 25, 2010

14 **Date**

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Signed

Franz A. Wakefield
Party Appearing, *Pro Se*

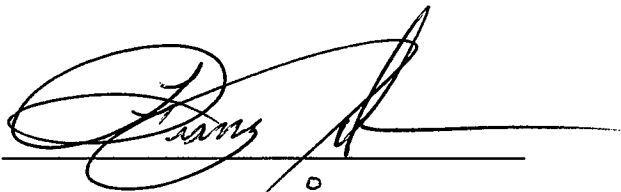
CERTIFICATE OF SERVICE

CASE NAME:

FRANZ A. WAKEFIELD, v. APPLE INC., STEVE JOBS, AND SARAH JESSICA PARKER

CASE NO: 10-16550

I CERTIFY THAT ON August 25, 2010 A COPY OF THE RESPONSE TO SHOW CAUSE WAS SERVED, BY EXPRESS MAIL TO THE CLERK OF THE COURT AS LISTED BELOW IN THE SERVICE LIST.

A handwritten signature in cursive script, appearing to read 'Franz', followed by a horizontal line and a small circle below it.

PRO SE, APPELLANT

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1 Service List

2 "WAKEFIELD" vs. APPLE INC., STEVE JOBS, & SARAH JESSICA PARKER

3
4 **CASE №: 10-16550**

5
6 **CLERK OF THE COURT**

7 **United States Court of Appeals Ninth Circuit**

8 **95 7th Street**

9 **San Francisco, California 94103**

10
11 **David Atlas, Esq.**

12 **Hernstadt Atlas LLP**

13 **11 Broadway, Suite 615**

14 **New York, New York 10004**

15
16 **Ronald D. Arena, Esq.**

17 **Arena Hoffman LLP**

18 **44 Montgomery Street, Suite 1200**

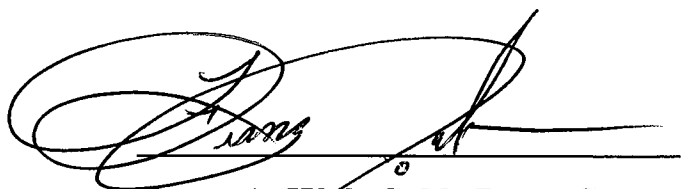
19 **San Francisco, Ca. 94104**

20 **Emily Maxwell, Partner**

21 **Howrey LLP**

22 **525 Market St., Suite 3600**

23 **San Francisco, Ca. 94105-2708**

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28 **Franz A. Wakefield, *Pro Se***

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• EXHIBIT 1---CASE FILED TIMELY

From: U.S._Postal_Service_ <U.S._Postal_Service@usps.com>

To: franzwakefield@cooltvnetwork.com

Cc:

Date: Wednesday, October 28, 2009 06:21 am

Subject: USPS Shipment Info for EG17 3290 791U S

This is a post-only message. Please do not respond.

Franz Wakefield has requested that you receive a Track & Confirm update, as shown below.

Track & Confirm e-mail update information provided by the U.S. Postal Service.

Label Number: EG17 3290 791U S

Service Type: Express Mail PO-Add

Shipment Activity Location Date & Time

Delivered LOS ANGELES CA 90012 10/27/09 10:30am

Arrival at Post Office LOS ANGELES CA 90012 10/27/09 10:20am

Processed through Sort LOS ANGELES CA 90009 10/27/09 5:54am
Facility

Acceptance MIAMI FL 33169 10/26/09 4:43pm

Reminder: Track & Confirm by email

Date of email request: 10/27/09

Future activity will continue to be emailed for up to 2 weeks from the Date of Request shown above. If you need to initiate the Track & Confirm by email process again at the end of the 2 weeks, please do so at the USPS Track & Confirm web site at <http://www.usps.com/shipping/trackandconfirm.htm>

USPS has not verified the validity of any email addresses submitted via its online Track & Confirm tool.

For more information, or if you have additional questions on Track & Confirm services and features, please visit the Frequently Asked Questions (FAQs) section of our Track & Confirm site at <http://www.usps.com/shipping/trackandconfirmfaqs.htm>

Attachments:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Franz Wakefield,

NO. C 09-05420 JW
NO. C 09-05779 HRL

Plaintiff,

v.

**ORDER GRANTING RELATION OF
CASES; DISMISSING AS DUPLICATIVE**

Apple, Inc., et al.,

Defendants.

_____ /
The Court *sua sponte* considers whether C 09-5420 and C 09-05779 are related within the meaning of Civ. L.R. 3-12.

On November 2, 2009, Plaintiff filed an action in the Central District of California.¹ Plaintiff then requested the Central Case to be transferred to the Northern District of California.² (*Id.*) On December 15, 2009, the Central Case was transferred from the Central District to this district. (*Id.*) While Plaintiff's case was in the process of being transferred, Plaintiff filed the Northern Case. (*Id.*) On January 4, 2010, Judge Lloyd ordered the cases related. (Docket Item No. 7.) This Court now *sua sponte*, relates the 05779 case with its 05420 case.

_____ /
¹ Wakefield v. Apple, Inc., Case No. C 09-05779 HRL ("Central Case"); (*See* Order Re: C 09-5779 RS and C 09-5420 HRL, Central Case, Docket Item No. 6.)

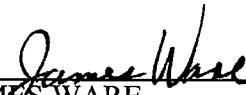
² Wakefield v. Apple, Inc., Case No. C 09-5420 JW ("Northern Case").

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Upon review of the Complaints in each case, the Court finds them to be identical. Since the Complaints in each case are identical, the Court dismisses Wakefield v. Apple, Inc., No. C 09-5779 HRL as duplicative.

The Clerk shall close C 09-05779.

Dated: May 3, 2010



JAMES WARE
United States District Judge

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THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Emily L. Maxwell MaxwellE@howrey.com
Ronald D. Arena rarena@arenahoffman.com

Franz A Wakefield
17731 North West 14th Court
Miami, FL 33169

Dated: May 3, 2010

Richard W. Wieking, Clerk

**By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy**