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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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15 UNITED DISTRICT COURT FOR THE
16 NORTHERN DISTRICT OF CALIFORNIA

Case # 06-5427

17 Erick Gulsrud, Derivatively on Behalf of
18 Nominal Defendant APPLE COMPUTERS,
19 INC.,

20 Plaintiff,

21 vs.

22 FRED D. ANDERSON, WILLIAM V. CAMPBELL,
23 MILLARD S. DREXLER, STEVEN P. JOBS,
24 ARTHUR D. LEVINSON, JEROME B. YORK,
25 TIMOTHY D. COOK, AVADIS TEVANIAN, JR.,
26 JONTHAN RUBINSTEIN, RONALD B. JOHNSON,
27 PETER OPPENHEIMER, MITCHELL MANDICH,
28 ROBERT M. CALDERONI, JAMES J. BUCKLEY,
DANIEL L. EILERS, G. FREDERICK FORSYTH
and DOES 1 through 250, inclusive

-and-

APPLE COMPUTER, INC., a California
Corporation

Nominal Defendant,

VERIFIED SHAREHOLDER
DERIVATIVE COMPLAINT

VIOLATION OF SECTION 10(b)
AND RULE 10b-5 OF THE
SECURITIES EXCHANGE ACT
BREACH OF FIDUCIARY DUTY
UNJUST ENRICHMENT
CONSTRUCTIVE FRAUD
CORPORATE WASTE AND GIFT
VIOLATION OF CALIFORNIA
CORPORATIONS CODE

RS
FILE VIA FAX

NATURE OF THE ACTION

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2 1. This is a shareholders' derivative action brought by Plaintiff Erik Gulsrud in
3 the name and for the benefit of nominal defendant Apple Computer, Inc. ("Apple" or the
4 "Company"), a California corporation, against certain current and formed executive officers
5 and members of the Board of Directors of Apple (collectively "Defendants"). The action
6 arises from defendants' obtaining, approving, and/or acquiescing in the issuance of stock
7 options to certain senior executives that were unlawfully backdated to provide the recipients
8 with windfall compensation at the direct expense of Apple.

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10 2. Stock option grants to Apple executives were at all relevant times required to
11 carry an exercise price that was not less than the fair market value of Apple stock on the date
12 of grant and issuance, as measured by the public trading price of the stock at the market's
13 close on that date. Nevertheless, throughout the relevant period, stock option grants to Apple
14 executives were repeatedly backdate to grant dates on which the stock price was at a
15 significantly lower point during the quarter or fiscal year period. The claimed dates of grant
16 were untrue, and the options were actually granted on later dates and, with the benefit of
17 hindsight, falsely ascribed to earlier, more favorable dates. Backdating stock option grants to
18 obtain beneficial exercise prices is akin to picking lottery numbers on the day after the
19 winning numbers are reported in the news. It is a riskless and unlawful exercise that unjustly
20 appropriates corporate assets and benefits no one other than the grantee. Accordingly, all of
21 the now unexercised options should be immediately cancelled and all of the financial gains to
22 the recipients who exercised such options should be returned to the Company. Further, the
23 Company's directors who administered and determined to grant these options utterly failed to
24 fulfill their fiduciary duties to the Company and they too are accountable for that failure.

25
26 3. This illegal course of conduct caused the Company to overstate its earnings,
27 issue materially false and misleading financial statements with the Securities and Exchange
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1 Commission ("SEC") and lose hundreds of millions of dollars to the individuals charged
2 with the duty to protect it.

3 4. This action, on behalf of the Company, seeks to remedy the harms caused to
4 Apple by the backdating scheme and, in addition, to invalidate and nullify all executory
5 options contracts issued pursuant to the scheme. Defendants violated federal and state law,
6 including Sections 10(b) and Rule 10b-5 of the Securities Exchange Act ("Exchange Act")
7 by participating in the backdating scheme. By means of the scheme, the "Director
8 Defendants" caused the issuance of options bearing fraudulently low exercise prices to the
9 "Officer Defendants." Defendants also breached their duties as fiduciaries of the Company.
10 Defendants owed Apple duties of care, undivided loyalty, good faith, and truthful disclosure.
11 The Director Defendants breached these duties by obtaining, approving and/or acquiescing
12 in the issuance of backdated stock options to the Officer Defendants. All defendants abused
13 their control and engaged in a pattern of constructive fraud, corporate waste and gift that
14 unjustly enriched the Officer Defendants at the expense of Apple. This scheme was a clear
15 violation of the California Corporations Code.
16

17 PARTIES

18 19 5. Plaintiff Erik Gulsrud is an individual who brings this action derivatively on
20 behalf of Apple since he owned shares of Apple stock during the relevant time period.
21

22 6. Nominal defendant Apple Computer, Inc. is a California corporation with its
23 principal executive offices located in Cupertino, California.
24

25 **DIRECTOR DEFENDANTS**

26 7. Defendant Fred D. Anderson ("Anderson") is a director of the Company. He
27 joined the Apple Board of Directors in 2004. Previously, Anderson served as the Company's
28 Executive Vice President and Chief Financial Officer from April 1996 to June 2004. As

1 alleged herein, defendant authorized and approved of the backdated stock option grants at
2 issue in this case.

3 8. Defendant William V. Campbell ("Campbell") is a director of the Company.
4 He joined the Apple Board of Directors in 1997 and is a member of the Audit and
5 Compensation is Committees. As alleged herein, defendant authorized and approved of the
6 backdated stock option grants at issue in this case.
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8 9. Defendant Millard S. Drexler ("Drexler") is a director of the Company. He
9 joined the Apple Board of Directors in 1999 and is a member of the Compensation
10 Committee. As alleged herein, defendant authorized and approved of the backdated stock
11 option grants at issue in this case.
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13 10. Defendant Steven P. Jobs ("Jobs") is a director of the Company. He joined the
14 Apple Board of Directors in 1997. As alleged herein, defendant authorized and approved of
15 the backdated stock option grants at issue in this case.
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17 11. Defendant Arthur D. Levinson ("Levinson") is a director of the Company. He
18 joined the Apple Board of Directors in 2000 and is a member of the Audit Committee. As
19 alleged herein, defendant authorized and approved of the backdated stock option grants at
20 issue in this case.
21

22 12. Defendant Jerome B. York ("York") is a director of the Company. He joined
23 the Apple Board of Directors in 1997 and is a member of the Audit Committee. As alleged
24 herein, defendant authorized and approved of the backdated stock option grants at issue in
25 this case.
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27 OFFICER DEFENDANTS

28 13. Defendant Timothy D. Cook ("Cook") is Chief Operating Officer of the

1 Company. As alleged herein, defendant received the backdated stock option grants at issue
2 in this case.

3 14. Defendant Avadis Tevanian, Jr. ("Tevanian") was Senior Vice President, Chief
4 Software Technology Officer of the Company between 1997 and 2003. As alleged herein,
5 defendant received the backdated stock option grants at issue in this case.
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7 15. Defendant Jonathan Rubinstein ("Rubinstein") is Senior Vice President, iPod
8 Division of the Company. As alleged herein, defendant received the backdated stock option
9 grants at issue in this case.
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11 16. Defendant Ronald B. Johnson ("Johnson") is Senior Vice President, Retail. As
12 alleged herein, defendant received the backdated stock option grants at issue in this case.
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14 17. Defendant Peter Oppenheimer ("Oppenheimer") is Senior Vice President and
15 Chief Financial Officer of the Company. As alleged herein, defendant received the
16 backdated stock option grants at issue in this case.

17 18. Defendant Mitchell Mandich ("Mandich") was Senior Vice President,
18 Worldwide Sales of the Company between 1997 and 2000. As alleged herein, defendant
19 received the backdated stock option grants at issue in this case.
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21 19. Defendant Robert M. Calderoni ("Calderoni") was Senior Vice President,
22 Finance and Operations Controller between 1996 and 1997. As alleged herein, defendant
23 received the backdated stock option grants at issue in this case.
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25 20. Defendant James J. Buckley ("Buckley") was Senior Vice President of the
26 Company between 1995 and 1996. As alleged herein, defendant received the backdated
27 stock option grants at issue in this case.

28 21. Defendant Daniel L. Eilers ("Eilers") was Senior Vice President, Worldwide

1 Marketing and Consumer Solutions between 1995 and 1996. As alleged herein, defendant
2 received the backdated stock option grants at issue in this case.

3 22. Defendant Frederick Forsyth ("Forsyth") was Senior Vice President of the
4 Company between 1990 and 1997. As alleged herein, defendant received the backdated
5 stock option grants at issue in this case.

6 **JURISDICTION AND VENUE**

7 23. This Court has Jurisdiction over this action under 28 U.S.C. § 1331, because
8 this is a civil action arising under the laws of the United States. This Court also has
9 exclusive jurisdiction over this action pursuant to Section 27 of the Securities Exchange Act,
10 15 U.S.C. §§78aa, because this action asserts claims under that Act and rules promulgated
11 thereunder. This Court has supplemental jurisdiction over the non-federal claims asserted
12 herein under 28 U.S.C. § 1367.

13 24. Venue is proper in this District because Apple is located in, and does business
14 in, this District.

15 **FACTUAL ALLEGATIONS**

16 25. The Officer Defendants received grants of stock options from the Company on
17 unusually favorable dates. These stock options were claimed to have been granted at or near
18 the stock's annual low, or immediately after a substantial dip in the stock price followed by a
19 substantial run-up. Analysis of this pattern of stock option grants reveals that these stock
20 options were backdated to allow the options' recipients to enjoy the largest possible returns at
21 the expense of the Company.

22 26. A stock option is a right to purchase a particular stock at a fixed price, called
23 the "exercise" or "strike" price. When the stock's market price exceeds the strike price, the
24 option holder may purchase the stock at the exercise price and resell it at the higher market
25 price, pocketing the different. The lower the strike price of the option, the larger the sum
26 obtained when the option is exercised.
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1 27. At all relevant times, Apple represented to the public that the exercise price of
2 all of the stock options would be no less than the fair market value of the Company's
3 common stock, measured by the publicly traded closing price for Apple stock on the date of
4 the grant.

5 28. Based upon a close analysis of the multi-year pattern of stock option grants on
6 dates with highly favorable exercise prices, it is clear that the purported grant dates of the
7 stock options were not the actual dates on which the options grants were made. Rather, the
8 pattern indicates that grants to the Officer Defendants were repeatedly backdated to dates
9 with exceedingly low stock prices, resulting in the following profits for the Officer
10 Defendants: Anderson sold 5,966,000 shares from July 17, 1998 to June 7, 2004; Calderoni
11 sold 100,000 shares on September 2, 1997 for \$555,050; Cook sold 6,300,000 shares from
12 June 3, 1999 to March 24, 2006 for \$114,869,010; Eilers sold 55,608 shares from January 24,
13 1995 to January 26, 1995 for \$583,208; Forsyth sold 80,000 shares from February 9, 1995 to
14 February 10, 1995 for \$870,000; Jobs sold 4,573,553 shares on March 19, 2006 for
15 \$295,725,937; Johnson sold 1,812,707 shares from October 28, 2004 to May 4, 2006 for
16 \$80,913,934; Levinson sold 140,000 shares from November 3, 2004 to February 16, 2005 for
17 \$4,855,884; Mandich sold 2,435,952 for \$38,785,901; Oppenheimer sold 1,711,975 shares
18 from May 14, 2002 to March 24, 2006 for \$81,4997,610; Rubinstein sold 6,086,838 from
19 May 13, 1998 to April 28, 2006 for \$125,831,020; Tevanian sold 6,367,112 shares from
20 August 6, 1997 to April 7, 2006 for \$253,989,697; and York sold 220,000 shares from
21 October 30, 1997 to October 19, 2004 for \$4,453,880.

22 29. The backdating of stock option grants and the issuance of these options in the
23 amounts awarded to the Officer Defendants caused, and continues to cause, substantial harm
24 to the Company. Backdating stock option grants represents a direct and continuing waste of
25 valuable corporate assets. Apple is the counterparty to the options contracts with its
26 executives, and the proceeds obtained, and yet to be obtained, by these executives through
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1 exercising their backdated stock options are therefore siphoned, on a dollar for dollar basis,
2 directly from Apple. In effect, the backdated grants gave the Officer Defendants an option to
3 purchase Apple shares directly from Apple at an unfair and improperly low price, with Apple
4 making up the difference.

5 30. The practice of backdating stock options also substantially harmed, and
6 continues to harm, Apple by virtue of the fact that the practice is unlawful, deceitful, and
7 caused the Company to misreport its financial data. Under the relevant accounting rules,
8 options priced below the stock's fair market value upon award are considered compensation
9 and must, therefore, be treated by the Company as an expense directly impacting earnings.
10 Upon information and belief, Apple did not properly expense this compensation to the
11 Officer Defendants even though the backdated stock options at issue in this action were
12 priced below the fair market value of the Company's stock at the date of grant and issuance.

13 31. As a result, the Company announced the discovery of "irregularities" relating
14 to the past stock option grants to Apple executives. This revelation has inflicted substantial
15 harm to the Company's reputation and reduced its market capitalization.

16 32. Further, the option backdating likely caused Apple to violate the Internal
17 Revenue Code and Apple may be required to pay additional taxes and interest associated
18 with deductions it previously took for compensation associated with such exercised stock
19 options.
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21 33. Backdating stock options also severely undermines the already grossly
22 excessive incentives that purportedly justified the use of stock options to compensate Apple's
23 executives. Stock option compensation is intended to encourage officers to maximize the
24 return to shareholders by aligning the interests of management with those of shareholders. In
25 contrast, by permitting the Officer Defendants to receive stock option grants backdated to
26 correspond to low points in the stock price, the Direct Defendants created an absurd incentive
27 for management to engineer dips and volatile swings in the stock price.
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1 judgment. Such acts were, moreover, unlawful and incapable of ratification. Accordingly,
2 the actions complained of herein are not protected by the business judgment rule, and the
3 related requirement of pre-suit demand on the Board of Directors is therefore inapplicable
4 and excused.

5 42. The wrongful acts complained of herein were, furthermore, approved by
6 and/or performed for the benefit of an overwhelming majority of the Board of Directors as it
7 is presently constituted. As members of the Board of Directors during the period of
8 backdating, the Director Defendants approved backdate stock options.

9 43. Therefore, the Director Defendants were either directly responsible for
10 administering the unlawfully backdated options grants challenged in this litigation, or directly
11 and personally benefited from the backdated grants. There is substantial reason to doubt that
12 the current members of the Board of Directors can and/or will pursue litigation to remedy
13 harms resulting from their own performance of, and/or acquiescence in, unlawful acts with
14 no ascertainable connection to the exercise of business judgment.

15 **CLAIMS FOR RELIEF**

16 **COUNT I**

17 **Against the Individual Defendants for Violation of Section 10(b) of the Securities** 18 **Exchange Act and Rule 10B-5 Promulgated Thereunder**

19
20 44. Plaintiff incorporates by reference and realleges each and every allegation
21 contained above as though fully set forth herein.

22 45. This Count is brought pursuant to Section 10(b) of the Exchange Act and Rule
23 10b-5(a), (b) and (c) against all Individual Defendants on behalf of Apple.

24 46. During the relevant period, the Individual Defendants, individually and in
25 concert, directly, and indirectly, by use of the means or instrumentalities of interstate
26 commerce, the mails, and or the facilities of a national securities exchange:

27 (a) Employed devices, schemes and/or artifices involving the issuance of fraudulently
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1 priced options to defraud Apple;

2 (b) Made untrue statements of material fact and/or omitted to state material facts
3 necessary in order to make the statements made, in light of the circumstances in
4 which they were made, not misleading, in order to defraud Apple; and/or

5 (c) Engaged in acts, practices, and a course of conduct that operated as a fraud or
6 deceit upon Apple causing the issuance of fraudulently priced options contracts.

7 Throughout the relevant period, Defendants individually and in concert, directly
8 and indirectly, by the use and means of instrumentalities of interstate commerce
9 and/or of the mails, engaged and participated in a continuous course of conduct
10 designed to divert hundreds of millions of dollars to Defendants via improper
11 option grants.

12 47. The Individual Defendants made material misrepresentations concerning the
13 validity of and the true grant dates for the stock option contracts at issue in this action
14 knowingly and/or in reckless disregard for the truth, with the purpose and effect of misleading
15 and defrauding Apple concerning fraudulently priced options contracts.

16 48. The Individual Defendants used or engaged in devices, schemes, artifices,
17 practices and/or courses conduct knowingly and/or in reckless disregard of the truth, with the
18 purpose and effect of misleading and defrauding Apple.

19 49. By virtue of the foregoing, the Individual Defendants have violated Section
20 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

21 50. As detailed herein, Apple suffered significant damages as a direct result of its
22 issuance of fraudulently priced stock options, which options were issued as a direct and
23 proximate result of Defendants' misconduct alleged herein.
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COUNT II

**AGAINST THE INDIVIDUAL DEFENDANTS FOR BREACH OF FIDUCIARY
DUTY**

51. Plaintiff incorporates by reference and realleges each and every allegation contained above as though fully set forth herein.

52. The Individual Defendants, by reason of their positions as fiduciaries of the Company, owed duties of due care, undivided loyalty, good faith, and truthful disclosure. The individual Defendants violated and breached these duties. Each of the Officer Defendants were recipients of backdated options bearing fraudulent prices. Each of the Director Defendants approved, ratified or were otherwise responsible for administering and/or permitting the backdated options to be granted the Office Defendants.

53. The Director Defendants, including the Officer Defendants, each abandoned and abdicated their fiduciary responsibilities to the Company. Their conduct could not have been an exercise of good faith business judgment. Further, the defendants breached their fiduciary duties to the Company by allowing the filing and dissemination of false and inaccurate financial statements not prepared in accordance with GAAP.

54. As a direct and proximate result of the Individual Defendants' breach of fiduciary duty and waste of corporate assets, the Company has sustained, and will continue to sustain, substantial harm.

55. The Individual Defendants are liable to the Company as a result of the acts alleged herein.

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COUNT III

**AGAINST THE DIRECTOR DEFENDANTS FOR AIDING AND ABETTING A
BREACH OF FIDUCIARY DUTY FIDUCIARY DUTY**

56. Plaintiff incorporates by reference and realleges each and every allegation contained above as though fully set forth herein.

57. By reason of their positions as fiduciaries of the Company, the Officer Defendants owed duties of care, undivided loyalty, good faith, and truthful disclosure. The Officer Defendants violated and breached these duties.

58. By virtue of their role in creating and administering the Corporation's stock option plan, and their approval and authorization of the stock options that were backdated as alleged herein, the Director Defendants were able to, and in fact did, render aid and assistance to the Officer Defendants in their breach of fiduciary duty. The Director Defendants did so knowing, or but for their gross negligence would have known, of the Officer Defendants' fiduciary breach.

59. As a direct and proximate cause of the Director Defendants' aiding and abetting the Officer Defendants' breach of fiduciary duty, the Company has sustained, and will continue to sustain, substantial harm.

60. The Director Defendants are liable to the Company as a result of the acts alleged herein.

COUNT IV

AGAINST THE OFFICER DEFENDANTS FOR UNJUST ENRICHMENT

61. Plaintiff incorporates by reference and realleges each and every allegation contained above as though fully set forth herein.

62. As a direct and proximate result of the acts alleged herein, the Officer

1 Defendants wrongfully deprived the Corporation of substantial wealth and were unjustly
2 enriched thereby.

3 63. The Officer Defendants are liable to the Corporation as a result and should be
4 required to disgorge their unjust gains and return them to the Corporation.

5 **COUNT V**
6 **VIOLATION OF CALIFORNIA CORPORATIONS CODE § 25402**

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8 64. Plaintiff incorporates by reference and realleges each and every allegation
9 contained above as though fully set forth herein.

10 65. The Officer and Director Defendants who owned common stock in Apple also
11 had access to information regarding the option-backdating scheme and its harmful affects on
12 the Company that was not available to the general public.

13 66. These Individual Defendants sold their stock with knowledge of adverse non-
14 public information in violation of California Corporations Code §25502.5.

15
16 **PRAYER FOR RELIEF**

17 WHEREFORE, plaintiff demands judgment as follows:

18 A. Awarding to the Company money damages against all Individual Defendants,
19 jointly and severally, for all losses and damages suffered as a result of the acts and
20 transactions complaint of herein;

21 B. Awarding to the Company restitution from each of the Officer Defendants
22 and ordering disgorgement of all profits, benefits, and/or other compensation obtained by the
23 Officer Defendants as a result of the acts and transactions complaint of herein;

24 C. Rescission of all option contracts granted to the Officer Defendants as a
25 result of the acts and transactions complaint of herein and the cancellation, nullification,
26 and declaration as void of any and all current or future obligations of the Company under
27 all executory contracts obtained by the Officer Defendants as a result of the acts and
28

1 transactions complaint herein;

2 D. Formation of a constructive trust to hold all executory options contracts
3 issued to the Officer Defendants;

4 E. Awarding punitive damages against the Officer Defendants;

5 F. Awarding to Plaintiffs the costs and disbursements of the action, including
6 reasonable attorneys' fees, accountants' fees, expert's fees, costs and expenses;
7

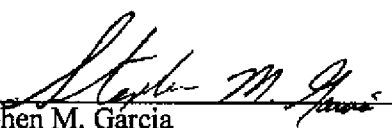
8 G. For such other relief as the Court may deem just and proper.
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10 **JURY DEMAND**

11 Plaintiff demands a trial by jury.
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15 Dated: September 1, 2006

**THE GARCIA LAW FIRM
SEGAL MCCAMBRIDGE SIGNER &
MAHONEY, LTD.**

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19 By: 
20 Stephen M. Garcia
21 Attorneys for Plaintiffs
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