

Appeal No. 10-15113

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

APPLE INC.,

*Plaintiff-Appellee,*

v.

PSYSTAR CORPORATION,

*Defendant-Appellant.*

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**APPLE INC.'S REQUEST FOR JUDICIAL NOTICE**

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Appeal From The United States District Court  
For The Northern District Of California  
Honorable William Alsup

Case No. CV 08-3251 WHA

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## REQUEST FOR JUDICIAL NOTICE

Apple Inc. (“Apple”), the plaintiff-appellee in this case, requests that the Court take judicial notice of a docket and certain filings the parties have made in two other cases that are directly related to this one. These documents, copies of which are attached hereto as Exhibits A-D, are cited in Apple’s Answering Brief to substantiate facts of which the Court may take judicial notice pursuant to Federal Rule of Evidence 201.

Rule 201 allows the federal courts to take notice of matters of record in other court proceedings “both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” *United States ex rel. Robinson Rancheria Citizens Council v. Borneo*, 971 F.2d 244, 248 (9th Cir. 1992) (internal citation omitted); *see also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, fn. 6 (9<sup>th</sup> Cir. 2006); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 (9th Cir. 2002) (judicial notice taken of amended complaint in another court); *Mullis v. U.S. Bankruptcy Court for Dist. of Nevada*, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987) (judicial notice taken of documents filed in bankruptcy court). Rule 201 mandates that a federal court take judicial notice “if requested by a party and supplied with the necessary information.” Fed. R. Evid. 201(d). “Judicial notice may be taken at any stage of the proceeding.” Fed. R. Evid 201(f).

Apple asks the Court to take judicial notice of a docket and docketed filings in two matters that are directly related to the present copyright-infringement case. First, Apple submits the Motion by Apple Inc. for Relief from Stay Pursuant to 11 U.S.C. Sec. 362(d), which Apple filed in United States Bankruptcy Court, Southern District of Florida, Miami Division Case No. 09-19921 BKC-RAM Chapter 11. (Attached hereto as Exhibit A). This motion was necessitated by Psystar's filing Chapter 11 bankruptcy shortly before the close of fact discovery and filing of dispositive motions in this case. Second, Apple submits Psystar's First Amended Complaint in United States District Court, Southern District of Florida, Miami Division Case No. 1:09-cv-22535 WMH, a declaratory-judgment action Psystar filed just a few weeks after the bankruptcy stay was lifted and the district court's docket in that case. (Attached hereto respectively as Exhibits B and C.) Psystar argues to this Court that the permanent injunction entered in this case should have been limited owing to the pendency of this declaratory-judgment case. Apple also submits the parties' Joint Motion for Stay of the Florida case pending resolution of this appeal. (Attached hereto as Exhibit D).

These documents illuminate matters that are "not subject to reasonable dispute," and substantiate facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R.

Evid. 201. Accordingly, Apple asks the Court to grant its Request for Judicial Notice.

Dated: July 8, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I declare that I am employed in the City and County of San Francisco, California, in the office of a member of the bar of this court at whose direction this service was made. I am over the age of 18 years and not a party to this action; my business address is Two Embarcadero Center, Eighth Floor, San Francisco, California, 94111. On the date set forth below, I served a true and accurate copy of the document(s) entitled:

**APPLE INC.'S REQUEST FOR JUDICIAL NOTICE**

on the party(ies) in this action by placing said copy(ies) in a sealed envelope each addressed as follows:

**VIA COURT'S ELECTRONIC FILING SYSTEM**

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[By First Class Mail] I certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants

[By Overnight Courier] I caused each envelope to be delivered by a commercial carrier service for overnight delivery to the offices of the addressee(s).

[By Electronic Transmission] I caused said document to be sent by electronic transmission to the e-mail address(es) indicated for the party(ies) listed above.

[By Court's Electronic Filing System] I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this date at San Francisco, California.

Dated: July 8, 2010.

/s/Diane G. Sunnen  
Diane G. Sunnen

## EXHIBIT A

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
(MIAMI DIVISION)  
www.flsb.uscourts.gov

In re: Case No. 09-19921 BKC-RAM  
Chapter 11 Case

Psystar Corporation,

Debtor.

\_\_\_\_\_ /

**MOTION BY APPLE INC. FOR RELIEF FROM STAY PURSUANT  
TO 11 U.S.C. § 362(d)**

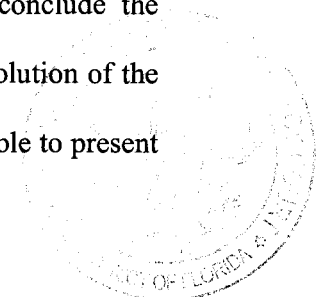
Pursuant to 11 U.S.C. § 362(d)(1), Apple Inc. (“Apple”) moves this Court for an order modifying the automatic stay imposed by these bankruptcy proceedings so that the case of *Apple Inc. v. Psystar Corporation*, Case No. CV 08-03251 WHA, which is currently pending in the Northern District of California and to which Debtor is a party, may proceed to trial and judgment as previously planned.

**MEMORANDUM IN SUPPORT**

Apple, by and through its undersigned counsel, hereby requests that this Court enter an order granting Apple relief from the automatic stay pursuant to Section 362(d)(1) of the United States Bankruptcy Code (the “Code”) to permit a pending action alleging copyright infringement, trademark infringement, breach of contract, and state law unfair competition to proceed in the United States District Court for the Northern District of California (the “District Court”). As demonstrated below, cause exists under the broad approach contemplated by the Bankruptcy Code to permit both Apple and the Debtor to proceed with and conclude the litigation that is approaching trial before the District Court. Moreover, prompt resolution of the pending lawsuit is essential to a determination of whether the Debtor ever will be able to present

to this Court a confirmable plan of reorganization.

Certified to be a true and correct  
copy of the original  
Katherine Gould Feldman, Clerk  
U.S. Bankruptcy Court  
So. Dist. Of Fla.  
By Darlene Thomas  
Deputy Clerk  
Date: 7/7/2010



I. JURISDICTION

This Court has jurisdiction to decide this motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(G). Venue is proper in this Court, pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested in this Motion is predicated on 11 U.S.C. § 362(d) and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure.

II. PROCEDURAL AND FACTUAL BACKGROUND

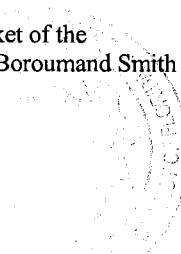
On May 21, 2009, Psystar Corporation (“Psystar” or “Debtor”) filed a voluntary petition for reorganization under Chapter 11 of Title 11 of the Code. Psystar continues to operate its business and manage its property as a debtor-in-possession pursuant to Sections 1107 and 1108. When Psystar commenced this proceeding, the fact discovery deadline was only weeks away and the trial date was quickly approaching in the copyright, trademark, breach of contract and unfair competition litigation before the District Court encaptioned *Apple Inc. v. Psystar Corporation*, Case No. CV 08-03251 WHA (Alsup, J.) (the “Infringement Action”). As described below, the Infringement Action involves issues critical to both Apple and the Debtor, and it is important that the automatic stay be lifted now to permit that matter to proceed to trial. Thus, the granting of the relief sought by this Motion will promote judicial economy and conserve the resources of all parties by allowing prompt resolution of the matters pending before the District Court.

A. Description of the Infringement Action<sup>1</sup>

Apple is one of the world’s most innovative companies in developing, manufacturing and marketing consumer products and services. Apple’s products include the

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<sup>1</sup> The following description is based on the record of the Infringement Action. The complete docket of the Infringement Action is attached as Exhibit A to the Declaration of Mehrnaz Boroumand Smith (“Boroumand Smith Declaration”). The Boroumand Smith Declaration is attached to this Motion as Exhibit 1.



Mac® line of desktop and portable computers, famous for their reliability, ease-of-use and innovative industrial design. Apple's most recent operating system for its Mac computers – Mac OS® X – was launched in 2001, and the most recent version of Mac OS X (version 10.5) is known as Mac OS X Leopard®. Apple's development teams have seamlessly designed the operating system and the Apple® hardware on which it runs such that the use of the computers is intuitive, efficient and fun. As a result, a Mac is simpler to use, service, update and maintain.

All Apple computers are sold to customers with Mac OS X Leopard preloaded. To enable Mac owners to upgrade their computers to this latest generation of the Mac operating system, Apple also licenses upgrade media (DVDs) containing the software, which can be acquired through Apple or authorized vendors, and then loaded onto the customer's Mac to accomplish the upgrade. Mac OS X Leopard runs only on Apple computers (unless illegally modified) and will not operate on non-Apple computers including "PCs" made by such companies as Dell, IBM, Sony and others.

Apple licenses the use of Mac OS X Leopard, and the intellectual property associated with it, through its Software License Agreement for Mac OS X Leopard. The Software License Agreement is a limited use license which allows the licensee to "install, use and run one (1) copy of the Apple Software on a single Apple-labeled computer at a time." The license further states that the licensee "agree[s] not to install, use or run the Apple Software on any non-Apple labeled computer or enable another to do so...." Furthermore, the license agreement states that it will automatically terminate if the licensee "fail[s] to comply with any term(s) of [the] License."

In contravention of Apple's Software License Agreement and its intellectual property rights, Psystar began manufacturing, marketing and selling non-Apple computers that

use a modified version of Apple's Mac OS X Leopard operating system in April 2008. Psystar markets and sells its personal computers through a website. Some of those computers use Microsoft's Windows operating system and some the Linux operating system. The vast majority of Psystar's sales, however, are of unauthorized "clone" or "knock-off" computers that are designed to run, without permission, a modified version of Apple's proprietary operating system. Discovery to date in the Infringement Action shows that in excess of 80 percent of Psystar's computer sales volume results from the sale of computers making unauthorized use of Apple's Mac OS X Leopard operating system. (Boroumand Smith Declaration, ¶ 8.) Because Psystar is doing this without Apple's permission – indeed, in violation of the terms of the Mac OS X Leopard license – Apple filed the Infringement Action in July, 2008.

In the Infringement Action, Apple contends that, in violation of Apple's copyright and trademark rights and the terms of the Mac OS X Leopard Software License Agreement, Psystar began online sales of a computer named OpenMac running a modified, unauthorized version of Mac OS X Leopard in April 2008. (*See* Amended Complaint, attached as Exhibit B to the Boroumand Smith Declaration.) Following its initial launch, Psystar renamed the OpenMac as the Open Computer and also sells a more advanced version of the computer known as the OpenPro. Like the Open Computer, the OpenPro also runs a modified, unauthorized version of Mac OS X Leopard on non-Apple-labeled hardware. According to Psystar's Chief Executive Officer, Psystar has sold thousands of these computers (hereinafter the "Psystar Products").<sup>2</sup>

The Amended Complaint, filed December 2, 2008, alleges that in selling the Psystar Products with Apple's proprietary Mac OS X Leopard software, Psystar is breaching and

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<sup>2</sup> Psystar has subsequently introduced the Open 3, Open Q, and Rackmount OpenPro computers that also are marketed with and utilize modified, unauthorized versions of Mac OS X Leopard.

inducing the breach of Apple's Mac OS X Leopard Software License Agreement. (*Id.*) Also, in order to run Mac OS X Leopard on Psystar Products, Psystar has modified and/or copied Apple's proprietary software and is directly and contributorily infringing Apple's copyrights in its Mac OS X Leopard software, and has violated the Digital Millennium Copyright Act ("DMCA") by circumventing the technological protection measures that effectively control access to Apple's copyrighted works. The Amended Complaint further alleges that Psystar is infringing Apple's registered, unregistered and common law trademarks and non-functional trade dress. Finally, the Amended Complaint alleges Psystar's actions violate both statutory and common law unfair competition laws. (*Id.*)

Apple's Amended Complaint seeks a permanent injunction to stop the continuing infringement by Psystar. The Amended Complaint also seeks actual damages, statutory damages, treble damages and attorneys' fees.

**B. Status of the Infringement Action**

Apple has aggressively pursued the Infringement Action, seeking and obtaining an early trial date and proceeding expeditiously to redress Psystar's ongoing violations of Apple's copyright, trademark, statutory and contractual rights. Since the filing of the Infringement Action on July 3, 2008, the parties have engaged in extensive motion practice and extensive fact discovery. (*See* Boroumand Smith Declaration, Exhibit A.) The initial motion practice concerned Psystar's counterclaims under various federal and state antitrust theories. Apple filed its motion to dismiss Psystar's original counterclaims on September 30, 2008; on November 11, 2008, Judge Alsup issued an order granting Apple's motion to dismiss, finding that Psystar could not assert any viable antitrust claim. (*Id.*) On December 8, 2008, Psystar moved to file amended counterclaims and on February 6, 2009 Judge Alsup issued an order

allowing Psystar to file some, but not all, of its proposed amended counterclaims. On February 12, 2009, Psystar filed its First Amended Counterclaim, alleging two counterclaims, limited to declaratory relief regarding alleged copyright misuse. Psystar's First Amended Counterclaim contains no affirmative claim for damages that could possibly yield any recovery against Apple. (*Id.*; *see* Boroumand Smith Declaration, Exhibit C.)

Meanwhile, the parties have also engaged in extensive fact discovery in the Infringement Action: responding to document requests, interrogatories, requests for admissions and conducting depositions. (*See* Boroumand Smith Declaration, ¶ 6.) Indeed, Psystar commenced this bankruptcy case just weeks before the June 26, 2009 close of all fact discovery and the affirmative expert report deadline in the Infringement Action, shortly after the May 8, 2009 granting of Apple's motion to compel additional documents from Psystar, and just prior to a June 4, 2009 scheduled deposition resulting from that motion to compel. After a brief period for expert discovery, the pre-trial conference was scheduled for October 26, 2009, in advance of the November 9, 2009 trial date.<sup>3</sup>

Since the filing of this case, there is no evidence that Psystar has altered its business model or in any way ceased its infringing conduct. Its website remains operational and it continues to offer for sale Open Computers running Mac OS X Leopard. Thus, it appears that Psystar's post-petition operations are identical to its pre-petition conduct in all relevant respects, thus subjecting the Debtor to ongoing claims of infringement.

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<sup>3</sup> On June 1, 2009 the District Court issued an order staying the Infringement Action "until the automatic stay lifts at which time the parties must immediately notify the Court and arrange for a case management conference." (*See* Boroumand Smith Declaration, Exhibit D.)

With the exception of Psystar itself, all of the critical participants in the Infringement Action are located in Northern California. Apple's counsel in the Infringement Action is located in San Francisco, California. Psystar's counsel of record in the Infringement Action is located in Palo Alto, California. Many fact and expert witnesses in the Infringement Action are located in the Northern District of California.

III. RELIEF REQUESTED

Apple requests that this Court modify the automatic stay pursuant to Section 362(d)(1) of the Code to allow the Infringement Action to proceed before Judge Alsup so as to permit a final determination of Apple's and Psystar's claims. As requested by Apple, modification of the stay would not permit any act by Apple to collect any judgment against the Debtor other than through the bankruptcy claims process or further order of this Court after notice and a hearing.

IV. LEGAL STANDARDS

While Apple is fully aware of the protections afforded the Debtor pursuant to the automatic stay, Section 362(d) provides that a bankruptcy court may lift the automatic stay to allow pending litigation to proceed in another forum in circumstances such as those that exist here:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay – (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

11 U.S.C. § 362(d)(1).

The Code does not define "cause" and courts therefore decide motions for relief from stay on a case-by-case basis. *In re Murray Indus., Inc.*, 121 B.R. 635, 637 (Bankr. M.D.

Fla. 1990) (granting motion for relief from stay to allow creditor to sue on unpaid invoices). The term “cause” is viewed by courts as a “broad and flexible concept.” *In re The Score Board, Inc.*, 238 B.R. 585, 593 (D. N.J. 1999). The decision to lift the automatic stay is left to the sound discretion of the Bankruptcy Court. *In re Dixie Broad., Inc.*, 871 F.2d 1023, 1026 (11th Cir. 1989).

Relief from the stay may be granted for cause when it is necessary to permit litigation in another forum to be concluded. *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 807 (9th Cir. 1985); *accord, Busch v. Busch*, 2003 Bankr LEXIS 557, at \*8 (B.A.P. 10th Cir. June 6, 2003). “Allowing a matter to proceed to another forum may constitute ‘cause’ to lift the stay.” *Murray Indus.*, 121 B.R. at 636. Indeed, the legislative history to Section 362(d)(1) expressly supports this conclusion:

**It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.**

S. Rep. No. 95-989 at 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836 (emphasis added).

In the Eleventh Circuit, bankruptcy courts consider the totality of the circumstances to determine whether cause for relief from the automatic stay exists. *In re Bryan Road, LLC*, 382 B.R. 844, 854-55 (Bankr. S.D. Fla. 2008) (granting creditor motion for relief from automatic stay based on the totality of the circumstances); *In re Laminate Kingdom LLC*, 2008 WL 1766637, at \*3 (Bankr. S.D. Fla. Mar. 13, 2008) (same). Relevant considerations include “balanc[ing] the prejudice to the debtor against the hardship to the moving party if the stay remains in effect as well as . . . the efficient use of judicial resources, the location of witnesses, documents, and other necessary parties.” *In re Aloisi*, 261 B.R. 504, 508 (Bankr.

M.D. Fla. 2001). The bankruptcy court may also consider “whether a creditor has a probability of success on the merits of his case.” *Id.*

Most recently, the Middle District of Florida supplemented this balancing test by considering twelve specific factors widely viewed by bankruptcy courts as relevant to determining whether to allow pending litigation to proceed outside of bankruptcy court. *In re Beane*, --- B.R. ---, 2008 WL 6053198 (M.D. Fla. July 15, 2008) (concluding the bankruptcy court did not err in granting relief from the automatic stay for the purpose allowing a matter to proceed in Tax Court). These twelve factors included:

- (1) whether relief would result in a partial or complete resolution of the issues;
- (2) lack of any connection with or interference with the bankruptcy case;
- (3) whether the other proceeding involves the debtor as a fiduciary;
- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether the debtor’s insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interests of other creditors;
- (8) whether the judgment claim arising from the other action is subject to equitable subordination;
- (9) whether movant’s success in the other proceeding would result in a judicial lien avoidable by the debtor;
- (10) the interests of judicial economy and the expeditious and economical resolution of litigation;
- (11) whether the parties are ready for trial in the other proceeding;
- and
- (12) the impact of the stay on the parties and the balance of harms.

*Id.* at \*4 (quoting *In re Sonmax Indus.*, 907 F.2d 1280, 1286 (2d Cir. 1990)).

Whether applying the balancing test alone, or in conjunction with analyzing the twelve factors identified in *In re Beane*, courts have widely found the kind of facts and circumstances present in this case to constitute sufficient “cause” for modifying the automatic

stay. As demonstrated below, bankruptcy courts regularly grant relief from stay to permit the conclusion of pending litigation regarding a debtor's alleged infringement of another's intellectual property rights.

V. ARGUMENT

A. Cause Exists To Lift The Stay And Therefore The Infringement Action Should Be Permitted To Proceed Through Judgment As Planned

1. The Balance Of Harms Clearly Supports Granting Relief From The Automatic Stay

Whether applying the balancing test or analyzing the twelve factors from *In re Beane*, bankruptcy courts afford great deference to the balance of the harms. As applied to the facts presently before the Court, not only will the Debtor suffer little, if any, prejudice should the stay be lifted, but denying the Motion and maintaining the stay will prejudice Apple. Apple, like all owners of intellectual property, has a strong interest in making sure that its property rights are protected from unauthorized use. Refusing to grant relief from stay will cause delay in protecting those rights.

Indeed, having these issues resolved before the District Court is essential to the determination of whether the Debtor can successfully reorganize and emerge from Chapter 11. At some point prior to any attempted reorganization, it must be determined whether the Debtor's current business model – selling computers running Apple's proprietary Mac OS X Leopard operating system without permission or authorization from Apple – is a viable business or, instead, unlawful copyright and trademark infringement, and, if the latter, whether an alternative business model would support a successful reorganization. The Debtor has no legitimate property rights in an infringing product and cannot pursue reorganization of its business affairs based on the sale of products that violates applicable non-bankruptcy law. As a result, the

Infringement Action must be resolved promptly by a court – either in California or Florida. Since no action is currently pending in this Court, the District Court in California is the most appropriate forum to resolve the dispute between Apple and the Debtor.

A recent case arising in a similar context is instructive. In *In re The SCO Group, Inc.*, 395 B.R. 852 (Bankr. D. Del 2007), the Delaware bankruptcy court found cause to grant a creditor's motion for relief from stay so that a copyright infringement action pending in federal district court in Utah could proceed. The facts in *SCO Group* are similar to the present case. The predecessor to debtor SCO, a software developer, and creditor Novell, Inc., entered into an agreement under which Novell transferred certain software licenses to SCO's predecessor. Later, SCO alleged a claim of copyright infringement against Novell in district court arising out of the agreement, and Novell alleged copyright counterclaims. On summary judgment, the district judge found that Novell was entitled to copyright royalties from SCO, and left other issues, including the amount of damages, for trial. *Id.* at 855. Before the case could be tried, however, SCO filed for bankruptcy. Novell moved for relief from the automatic stay so that the pre-existing action could proceed as planned in the district court.

Observing that “the automatic stay is not meant to be absolute, and in appropriate instances relief may be granted,” the bankruptcy court *granted the request for relief from stay* upon consideration of various factors. *Id.* at 856. The *SCO Group* court first weighed the relative trial burdens and concluded that lifting the stay would not cause SCO to suffer undue prejudice because SCO had separate litigation counsel in the pending action who had already prepared extensively for trial, and thus “the trial preparation will not be burdensome to the Debtors.” *Id.* at 858. The bankruptcy court reasoned that given the parties' ongoing trial preparation, the “longer the trial is delayed, the more burdensome it is to both parties to ready

themselves again.” *Id.* Importantly, the bankruptcy court also recognized the critical importance to the bankruptcy process of first resolving any underlying infringement litigation, finding that, “without a ruling on the Liability Issues [from the district court], Novell’s rights in these bankruptcy cases remain undetermined and the value of Novell’s claim will remain a troubling issue for the Court, Novell, and Debtors.” *Id.* at 859.

Here, like in *SCO Group*, Psystar has separate counsel in the Infringement Action who will litigate that action without the distraction of the proceedings in this Court and who has already participated in all of the fact discovery conducted to date in the Infringement Action. Therefore, Psystar will not be burdened by preparing for trial in the Infringement Action.<sup>4</sup> To the contrary, Psystar *will* be burdened if the Infringement Action remains stalled, which would only cause its counsel to turn to other clients and matters, and then expend additional time in the future to “ready themselves again.” *Id.* at 858.

With regard to the impact on reorganization, this Court cannot approve a reorganization plan for Psystar without a full and final determination of whether Psystar’s business infringes Apple’s intellectual property rights and breaches or induces the breach of Apple’s Software License Agreement. Apple’s claim – almost surely the largest against Psystar – will have to be liquidated at some time in this Chapter 11 case. In addition, a determination

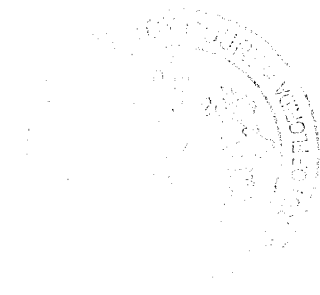
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<sup>4</sup> The Debtor may contend that the continued expense of litigation counsel constitutes irreparable injury sufficient to justify continuation of the stay. The applicable law, however, establishes that litigation expenses do not constitute irreparable injury. *Peterson v. Cundy*, 116 B.R. 247, 250 (D.Colo. 1990) (prospect of litigation expenses not enough to prevent lift of stay); *see also In re Santa Clara County Fair Ass’n, Inc.*, 180 BR 564, 566 (B.A.P. 9th Cir. 1995) (fact that defense costs might dissipate the estate alone does not compel a court to deny relief from automatic stay to pursue litigation); *Davis v. Sheldon (In re Davis)*, 691 F.2d 176, 178 (3d Cir. 1982) (the cost, anxiety, and inconvenience of defending oneself do not constitute irreparable injury); *In re McGraw*, 18 Bankr. 140, 142 (W.D. Wis. 1982) (even though debtor had no malpractice insurance, cost of defense is an insufficient prejudice); *In re Harris*, 85 Bankr. 858, 860 (Bankr. D. Colo. 1988) (noting that no court has found that litigation costs alone justify continuation of the stay); *In re Nkongho*, 59 Bankr. 85, 86 (Bankr. D.N.J. 1986) (rejecting debtor’s claim that litigation expenses precluded modification of stay); *In re Nicholas, Inc.*, 55 Bankr. 212, 217-18 (Bankr. D. N.J. 1985) (same); *Barlow v. Phillips (In re Phillips)*, 40 Bankr. 194, 197 (Bankr. D. Colo. 1984) (same).

will have to be made regarding the propriety of the Debtor's post-petition conduct. Without these determinations, the value of Apple's claim (and indeed, the value of all creditors' claims), the value of Apple's administrative expense claim for post-petition infringement and the viability of a Psystar reorganization "will remain a troubling issue" for all parties and this Court. *Id.* at 859.

In contrast, Apple will be unduly prejudiced if the stay is not lifted. Delay of the Infringement Action will permit Psystar to continue selling its infringing computer systems in violation of Apple's intellectual property rights with impunity, thus tarnishing the reputation of Apple's genuine products to Apple's obvious detriment. See *In re SpaceCo Bus. Solutions, Inc.*, 2007 Bankr. LEXIS 4620, at \*23, 86 U.S.P.Q.2d 1325 (Bankr. D. Colo. Oct. 18, 2007) (finding that balance of harms weighed in favor of lifting the stay because delay of pending patent infringement action would cause "irrevocable harm to [movant] through lost market share and sales revenues" generated by the allegedly infringing products); *In re Deep*, 279 B.R. 653, 659 (Bankr. N.D.N.Y. 2002) ("Thus, if the Debtors are actually committing copyright infringement, harm to the Movants, and even to the estate due to the potential administrative expenses that would also be accruing, would continue" if the automatic stay is not lifted).

This Court should not allow Psystar to use the automatic stay to insulate its continued, unlawful sale of products that infringe Apple's intellectual property rights. Absent relief from stay, the Debtor's infringement, the harm to Apple, and the detriment to the estate due to accruing administrative expense will continue unabated. The stay should therefore be lifted to allow Apple to proceed to trial in the District Court.



2. Lifting The Stay Will Facilitate These Bankruptcy Proceedings

Not only will the Debtor *not* be unduly prejudiced if this Court allows the Infringement Action to proceed as planned, the Debtor's estate will actually *benefit*, as prompt resolution of its dispute with Apple is essential to determining whether it can exit bankruptcy with a confirmable reorganization plan. As noted above, this is because the Infringement Action challenges the heart of Psystar's business model: the manufacturing, marketing and sale of unauthorized, non-Apple computers running Apple's Mac OS X Leopard operating system without Apple's permission. *See SpaceCo*, 2007 Bankr. LEXIS 4620, at \*29 (granting motion for relief from stay to allow pending patent infringement action to proceed and noting that the allegedly infringing products "may not even be assets of the estate if the Pennsylvania Court determines that the Debtor has been infringing on Innovative's patents."). Thus, lifting the automatic stay to permit the Infringement Action to proceed as planned will actually *facilitate* orderly proceedings in this Court. *SCO Group*, 395 B.R. at 859 ("the Debtors simply cannot file a confirmable plan of reorganization until they know what liability they have to Novell. The resolution of the issues remaining in the District Court litigation will assist the Debtors, not burden them."); *In re Abrass*, 268 B.R. 665, 688 (Bankr. M.D. Fla. 2001) (granting creditor's motion for relief from stay to file a complaint against the debtor, a real estate broker, with state agency; complaint to state agency could result in the broker's license being revoked and would have drastic effect on viability of the debtor's Chapter 13 plan).

While the granting of the motion for relief may result in the Debtor being enjoined from infringing Apple's intellectual property, that is not a cognizable harm. Debtor has no recognizable interest in having its violation of the copyright and trademark laws protected from an injunction, nor does it have any legitimate property rights in infringing products. The

issue of infringement will need to be adjudicated in a federal court, and Judge Alsup in the Infringement Action can most efficiently and effectively adjudicate those claims. While Section 362 of the Bankruptcy Code protects the property of the estate, it is not intended to allow the Debtor to commit post-petition wrongs with that property.

In sum, there is no reason to conclude that Psystar will suffer *any* prejudice if the automatic stay is lifted, whereas if the stay is not lifted, Apple will suffer prejudice and delay in the vindication of its rights, and thus compromise its ability to protect its intellectual property. Accordingly, the Motion should be granted.

3. Apple Has Demonstrated A Reasonable Probability Of Success

Another factor that persuaded the *SCO Group* court to grant relief from stay was that Novell had demonstrated a reasonable probability of success on the merits. *SCO Group*, 395 B.R. at 859 (noting that “[e]ven a slight probability of success on the merits may be sufficient to support lifting an automatic stay in an appropriate case.”). Here, Apple has, at minimum, a reasonable probability of success on the merits given that Psystar has sold computers called “OpenMac” (and continues to sell similar computers under different names) that admittedly run an unauthorized version of Apple’s Mac OS X Leopard operating system. Discovery to date in the Infringement Action also establishes that Apple has a reasonable probability of success. Indeed, Psystar, by its own admission, is not authorized to sell non-Apple computers running Mac OS X Leopard and yet continues to do so. Lastly, Psystar’s primary defenses against Apple’s claims – its original antitrust counterclaims – have already been rejected by the District Court.

B. Allowing The Infringement Action To Proceed As Planned Will Conserve Judicial Resources And Allow The Complex And Technical Infringement Issues To Be Tried In An Experienced And Familiar Forum That Has Already Managed The Litigation For Almost One Year

Lifting the automatic stay to allow the Infringement Action to proceed will also better serve the interest in judicial economy, a factor highly relevant to deciding whether an automatic stay should be lifted. In *Deep, supra*, the debtors initiated declaratory relief actions against some of the movants, seeking a determination that Aimster/Madster, an online service, was not an “infringing system.” 279 B.R. at 655. Subsequently, the movants filed a copyright infringement suit against the debtors in a different district court. A Multidistrict Litigation Panel consolidated all actions in the Northern District of Illinois (the “MDL Court”). After consolidation, the debtors filed a petition for bankruptcy, and movants sought relief from the automatic stay so that the consolidated actions could proceed.

The bankruptcy court *lifted the stay* to allow the preliminary injunction motion pending in the MDL Court to be decided. *Id.* at 660. Allowing the MDL Court to resolve the pending motion “would serve the interests of judicial economy and expedite the resolution of key litigation between the Debtors and Movants.” *Id.* at 658. This was true even though the record suggested that the MDL Court would require a post-stay evidentiary hearing. *Id.* at 658-59. The bankruptcy court also found that the balance of harms weighed in favor of lifting the stay because

if [the Movants] needed to proceed with a preliminary injunction request in this court to stop the alleged infringements, the vehicle for obtaining that would be an adversary proceeding pursuant to Fed. R. Bankr. P. 17. That has not been commenced yet. Thus, if the Debtors are actually committing copyright infringement, harm to the Movants, and even to the estate due to the potential administrative expenses that would also be accruing, would continue. **Since the Debtors can only use property of the estate in a lawful manner and they agree that the question of**

**copyright infringement must be resolved by some court, potential harm to the Debtors does not weigh as heavily.**

*Id.* at 659 (emphasis added).

The situation here is similar to the situation in *Deep*. An action by Apple in the bankruptcy court would be limited to post-petition infringement, and because that action is not yet commenced, it would necessarily plow the same ground that the District Court action has already plowed for almost a year. It is simply more economical and efficient at this point in the proceedings for Judge Alsup to adjudicate this matter. The Infringement Action has progressed to a point that to now make the parties retrace their efforts in this Court would cause needless delay, waste judicial resources and create the possibility of inconsistent decisions, all of which Apple wishes to avoid. See *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 167 (Bankr. D.Conn. 2002) (court that is “more advanced on the ‘learning curve’” should be permitted to litigate matter outside of bankruptcy). Meanwhile, administrative expenses resulting from the post-petition infringement would continue to accrue. Because “the question of copyright infringement must be resolved by some court,” the Infringement Action should proceed in the District Court, where considerable progress has already occurred. *Deep*, 279 B.R. at 659.

In addition, copyright and trademark infringement suits such as the Infringement Action often require a court to delve into highly technical and sometimes esoteric factual and legal issues surrounding computer software and hardware. The District Court holds significant experience in deciding some of the country’s most sophisticated intellectual property cases. After ten months of litigation, Judge Alsup is readily familiar with the contested issues. *Id.* at 658 (citing original forum’s familiarity with issues as reason for lifting automatic stay); see also *SCO Group*, 395 B.R. at 860 (“It is undeniable that the Lawsuit involves many highly technical issues that the District Court has already addressed and mastered.”). Otherwise, maintenance of

the stay – which will in all likelihood force the parties to litigate the copyright issues in bankruptcy court – would waste judicial resources and cause unnecessary delay in resolving an issue key to determining whether Psystar can properly emerge from bankruptcy.<sup>5</sup> *See In re Loudon*, 284 B.R. 106 (B.A.P. 8th Cir. 2002) (bankruptcy court did not abuse its discretion in granting relief from stay to allow state action alleging common law trademark infringement to proceed to judgment); *In re G.S. Distrib., Inc.*, 331 B.R. 552 (Bankr. S.D.N.Y. 2005) (granting motion to lift automatic stay to allow trademark infringement action to proceed in district court, citing, among other reasons, the district court's expertise and familiarity with the issues). Obviously, it would be far more efficient to have these post-petition issues, which are identical to those that have been litigated over the past year before the District Court, heard in that forum contemporaneously with both parties' pre-petition claims.

C. The Relevant Factors From The *Beane* 12-Factor Test Weigh In Favor Of Lifting The Stay

The balancing test tips overwhelmingly in favor of granting Apple relief from stay. An analysis of the twelve *Beane* factors only confirms this result. Indeed, each of the factors relevant<sup>6</sup> to the current situation (Factors 1, 2, 4, 7, 10, 11 and 12) weighs heavily in favor of granting the Motion.<sup>7</sup>

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<sup>5</sup> Although *Deep* involved only a lift of stay so that a preliminary injunction motion could be heard, not a trial on the merits, there is no reason here not to allow the Infringement Action to proceed to full judgment on both equitable and legal liability. If it is determined that Psystar has infringed Apple's copyright – the chief issue in the case – then the calculation of damages will be relatively straightforward. In any event, by this motion Apple only seeks the opportunity to liquidate its claim; Apple does not seek to actually collect damages other than through the claims process approved by this Court.

<sup>6</sup> Courts applying these factors agree that not all of the factors will be implicated in every case. *See Mazzeo v. Lenhart (In re Mazzeo)*, 167 F.3d 139, 143 (2d Cir. 1999); *In re Enron Corp.*, 306 B.R. 465, 476 (Bankr. S.D.N.Y. 2004).

<sup>7</sup> Factors 3, 5, 6, 8 and 9 are inapplicable in that the Infringement Action does not allege that Psystar is a fiduciary, does not involve primarily third parties, and there is no evidence that Psystar's insurer has assumed full responsibility for defending it. Nor is there reason to think that a judgment claim arising from the Infringement

(continued...)

***Factor 1: Whether Relief Would Result In Partial Or Complete Resolution Of Issues***

The first factor involves whether relief would result in the complete resolution of the issues to be adjudicated. Here, a decision in the Infringement Action will completely resolve whether Psystar's conduct infringes Apple's intellectual property rights, Apple's entitlement to an injunction prohibiting such conduct, and the liability of the Debtor for all such infringement. This factor weighs in favor of granting relief from stay. No other parties need be joined to fully resolve the issue.

***Factor 2: Connection Or Interference With Bankruptcy Case***

The second factor examines potential interference between the non-bankruptcy action and the bankruptcy case. The Infringement Action will not interfere with the bankruptcy case; instead, as explained above, it will determine the amount of Apple's claim, determine Apple's entitlement to injunctive relief, and facilitate the determination of whether a confirmable reorganization plan for the Debtor is possible.

***Factor 4: Specialized Tribunal With Necessary Expertise***

The fourth factor weighs any specialized experience possessed by the non-bankruptcy court. While the federal district court is not a specialized tribunal as such, a federal district court hearing a copyright and trademark infringement and DMCA case is comparable to a specialized tribunal. Copyright, trademark and DMCA cases tend to be highly specialized areas of federal law. The federal courts have exclusive jurisdiction over copyright infringement cases

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(...continued)

Action would be subject to equitable subordination, nor that Apple's success would result in a judicial lien avoidable by Psystar.

and cases alleging violations of the DMCA,<sup>8</sup> and these cases are typically heard by the federal district courts where they are a routine part of the docket of a federal district court judge, especially in the Northern District of California.<sup>9</sup> In addition to the specialized knowledge of copyright and trademark cases possessed by the federal court, Judge Alsup has gained specialized knowledge of the subject matter and technology involved in the Infringement Action and has ample experience presiding over these types of cases. Finally, even without the existence of a specialized tribunal, bankruptcy courts have deferred to other courts' specialized knowledge, recognizing that a more experienced forum is better equipped to address certain issues. *See, e.g., Universal Life Church, Inc. v. IRS (In re Universal Life Church, Inc.)*, 127 B.R. 453, 455 (E.D. Cal. 1991) (bankruptcy court properly modified automatic stay in deference to Tax Court), *aff'd*, 965 F.2d 777 (9th Cir. 1992); *Lewis v. Wells (In re Bob Lee Beauty Supply Co.)*, 56 B.R. 17, 20 (Bankr. N.D. Ala. 1985) (deferring to state court's expertise in probate); *Eastern Consol. Util., Inc. v. Commonwealth (In re Eastern Consol. Utils., Inc.)*, 17 B.R. 809, 811 (Bankr. E.D. Pa. 1982) (deferring to administrative panel with special expertise in contract law).

***Factor 7: Whether Litigation In Another Forum Would Prejudice Other Creditors***

The seventh factor addresses whether creditors would be prejudiced by continuation of the non-bankruptcy litigation. Here, no prejudice to other parties in interest exists. Permitting the Infringement Action to proceed will not prejudice the Debtor's creditors

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<sup>8</sup> See 28 U.S.C. § 1338.

<sup>9</sup> For example, a Court Link search performed on June 2, 2009 of cases assigned to Judge Alsup that involve(d) copyright, trademark or DMCA issues indicates that Judge Alsup has been assigned at least 169 such cases. (See Boroumand Smith Declaration, ¶ 7.)

since resolution of the issues before Judge Alsup must be addressed and damages, if any, fixed so that the extent of Apple's claims are known. *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc. (In re Mid-Atlantic Handling Sys., LLC)*, 304 B.R. 111, 130-31 (Bankr. D. N.J. 2003). The Debtor cannot pursue reorganization of its business affairs based upon the sale of products that violate applicable non-bankruptcy law. The Debtor has no legitimate property rights in an infringing product, and the Debtor may only use property of the estate in a lawful manner. *Deep*, 279 B.R. at 659. As a result, the infringement issues must be resolved by a court – either in California or Florida. Moreover, the relief from stay is limited to Apple procuring a judgment and injunctive relief against the Debtor. Apple will not levy against the Debtor's estate without further order of this Court.

***Factor 10: Judicial Economy And Expeditious Resolution Of Litigation***

This factor evaluates issues of judicial economy. As discussed in more detail above, allowing the Infringement Action to proceed before the district judge already familiar with the issues after ten months of litigation would hasten the resolution of the claims. Moving the litigation to this forum, on the other hand, would require the parties (and this Court) to start anew, thereby wasting the significant resources already expended as well as this Court's time.

***Factor 11: Whether Parties Are Ready For Trial In The Other Proceeding***

This factor focuses on the procedural status of the alternate proceeding. As discussed in more detail above, after extensive motion practice to refine the pleadings to their current state, the parties are only a few weeks away from completing discovery (indeed, by the time this motion is heard, discovery was scheduled to have been completed), and only a few months remain until the November trial date.

***Factor 12: Impact Of The Stay On The Parties And The Balance Of Harms***

This factor was discussed in extensive detail in Section V.A.1, *supra*, and weighs heavily in favor of granting relief from stay.

VI. CONCLUSION

Apple's claims for infringement by the Debtor and redress for the continuing and existing harm caused by the infringing conduct must be decided either in the Northern District of California or before the Bankruptcy Court in Florida. Allowing the parties' claims to be prosecuted in the pre-existing Infringement Action will best serve the interest of judicial economy and expedite the resolution of the dispute.

For all of the foregoing reasons, Apple respectfully requests that this Court grant the present motion, find that cause exists under 11 U.S.C. § 362(d)(1) to modify the automatic stay imposed by these bankruptcy proceedings, and enter an order permitting the Infringement Action to proceed on its current schedule through judgment.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing, **MOTION BY APPLE INC. FOR RELIEF FROM STAY PURSUANT TO 11 U.S.C. § 362(d)**, was served electronically via the Court's CM/ECF system upon the parties who are currently on the list to receive e-mail notice/service for this case on this 5th day of June, 2009.

Dated: June 5, 2009

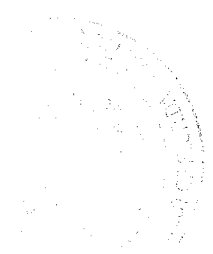
Respectfully Submitted,

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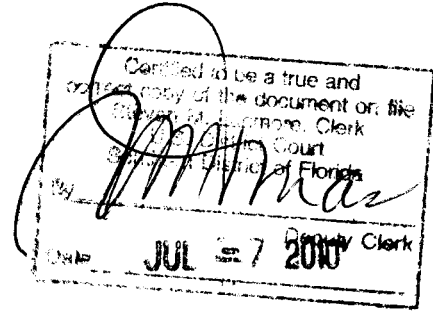
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**EXHIBIT 1**  
**Declaration of Mehrnaz Boroumand Smith**

## EXHIBIT B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION



PSYSTAR CORPORATION,

*Plaintiff,*

v.

APPLE INC.,

*Defendant.*

Case No. 1:09-cv-22535-WMH  
Jury Demanded

**FIRST AMENDED COMPLAINT**

Psystar is entitled to file this First Amended Complaint as an amendment “as a matter of course” under Rule 15(a)(1)(A) because Psystar has not yet been served with a responsive pleading.

**I. STATEMENT OF THE CASE**

1. Psystar is a Florida corporation with its headquarters and principal place of business at 10475 NW 28th Street, Doral, Florida. Psystar assembles and sells personal computers in the United States and abroad. Its products include the Open(3), Open(Q), Open(7), and OpenPro, and the all-in-one Rebel Series, which includes the Rebel 19” and the Rebel 22”. Psystar’s computers are capable of running a variety of operating systems, including Microsoft Windows, many variants of Linux, and Mac OS X. This dispute is over Psystar’s right to continue selling computers running Mac OS X — and, in particular, to sell computers running the newly released successor to Mac OS X Leopard, Mac OS X Snow Leopard.

2. Psystar computers outperform comparable Macintoshes sold by Apple, in large part because of the superior hardware that Psystar sells. Using Geekbench

benchmarks, the Rebel 19" outperformed the iMac 20" and the Rebel 22" outperformed the iMac 24" on every metric. According to Jason D. O'Grady of ZDNet: "In short, the Psystar pretty much trounces the closest price Mac available from Apple." According to Rich Brown of CNET: "The Psystar's hardware advantage translates to some impressive performance wins." Psystar competes with Apple by selling superior personal computers at substantially lower prices.

3. Apple is a California corporation with its headquarters and principal place of business at 1 Infinite Loop, Cupertino, California. Apple developed the Mac OS X operating system, the current model of which is called Mac OS X Leopard. Apple has announced that it views Psystar's assembling and selling personal computers running Mac OS X Leopard as illegal. Apple has sued Psystar in the United States District Court for the Northern District of California alleging that Psystar's use of Mac OS X Leopard is illegal. Apple seeks a permanent injunction shutting down Psystar's business.

4. Apple has announced that it will release Mac OS X Snow Leopard as a successor to Mac OS X Leopard on Friday, August 28, 2009. Psystar believes that it is legally entitled to resell copies of Mac OS X Snow Leopard on Psystar computers, but is confident, based on the ongoing litigation with Apple over Mac OS X Leopard, that Apple will view Psystar's decision to sell computers running Mac OS X Snow Leopard as illegal. Counsel for Apple has also so stated. Accordingly, Psystar brings this action to seek a declaratory judgment that it may sell and continue to sell computers running Mac OS X Snow Leopard, provided, of course, that Psystar continues to purchase copies of Mac OS X Snow Leopard from Apple and others, like Amazon and Best Buy, who resell Apple's products.

5. Psystar further brings this action to seek an injunction, and damages pending the issuance of such an injunction, for Apple's anticompetitive attempts to tie Mac OS X Snow Leopard to its Macintosh line of computers (sometimes referred to as "Apple-branded hardware"). Apple is the only company in the world that integrates operating system and hardware development. Although it sells copies of Mac OS X Snow Leopard separately from its Macintoshes — the line of computers that includes the Mac Mini, the iMac, the MacBook, the MacBook Pro, the MacBook Air, and the Mac Pro — it purports to limit the use of these copies of Mac OS X Snow Leopard to Macintoshes. It does this both technically, by computer code that attempts to verify that Mac OS X Snow Leopard is running on a Macintosh, and through the "license agreement" that is associated with Mac OS X Snow Leopard.

6. By tying its operating system to Apple-branded hardware, Apple restrains trade in personal computers that run Mac OS X, collects monopoly rents on its Macintoshes, and monopolizes the market for "premium computers." Apple's share of revenue in the market for premium computers — computers priced at over \$1,000 — is currently 91%. Apple's conduct violates the Clayton and Sherman Acts in that Apple is monopolizing the market for premium computers, illegally integrating across the markets for hardware and operating systems for use in personal computers, entering into illegal exclusive-dealing agreements that prevent buyers of Mac OS X from buying their hardware from competitors like Psystar, illegally tying Mac OS X to Macintoshes and thereby substantially decreasing competition in the market for hardware for premium personal computers, and entering into license agreements and, upon information and

belief, reseller agreements that restrain trade in that they require that Mac OS X be run only on Apple-branded hardware.

7. Like Windows, Mac OS X is an operating system that allows a computer to function and to run applications like word processors, Internet browsers, and the like. Unlike Windows, Mac OS X is based on a variety of open source (i.e., publicly available) pieces of computer software, including the Mach microkernel developed at Carnegie Mellon University and the so-called Berkeley Software Distribution (BSD), a variant of UNIX. Apple has continued to release parts of Mac OS X as open source, as it is required to do because of its decision to incorporate open-source software. Apple calls these open-source releases Darwin. A critical difference between Mac OS X and Windows is that Mac OS X is built on a foundation of open-source software not developed by Apple and in which Apple cannot and does not claim any exclusive rights.

8. The Psystar computers that run Mac OS X Snow Leopard are able to do so by running software, written by Psystar, that interfaces with the open-source portion of Mac OS X Snow Leopard. The manner in which Psystar computers run Mac OS X Snow Leopard is entirely different from the manner in which Psystar computers run Mac OS X Leopard. Both the technical details of Apple's attempt to tie Mac OS X to Macintoshes and the computer software that Psystar uses to enable Mac OS X to run on Psystar computers changed with the release of Snow Leopard. Accordingly, the factual and technical issues in this case are entirely different from those at issue in the California litigation, which is limited to Psystar computers that run Mac OS X Leopard.

8-b. Since the filing of the original complaint, Psystar has released two additional products that it wishes to add to this case. First, Psystar now licenses the

software that it uses to make Mac OS X Snow Leopard compatible with non-Apple computers to third-party original equipment manufacturers (OEM's). Psystar believes that this activity, too, is legal, and that Apple's attempts to restrain it are illegal. Second, Psystar now sells copies of the software that it uses to make Mac OS X Snow Leopard compatible with non-Apple computers directly to end users. Psystar has christened this product Rebel EFI. Psystar believes that this activity, too, is legal, and that Apple's attempts to restrain it are illegal. Finally, Psystar expressly wishes to make all future versions of OS X, all current and future Apple software products that are integrated with each other or with OS X, and all current and future Psystar products part of this case so that Psystar can obtain a full and final declaration of its legal rights on which it can continue to build its business.

## **II. JURISDICTION AND VENUE**

9. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1332 (diversity), and 1338 (copyrights and trademarks). This case arises under the Clayton Antitrust Act, the Sherman Antitrust Act, the Lanham Act, and the Copyright Act. This Court therefore has subject-matter jurisdiction under § 1331. This case is between citizens of different States — Psystar is a citizen of Florida and Apple is a citizen of California — and involves more than \$75,000 in controversy. This Court therefore has subject-matter jurisdiction under § 1332.

10. This Court has both general and specific personal jurisdiction over Defendant Apple Inc. This Court has general jurisdiction over Apple because Apple has engaged in pervasive and intentional business contacts in this District, including but not limited to advertising and selling copies of Mac OS X, Macintosh computers, iPods,

iPhones, and other products in this District both through physical Apple Stores and through the online Apple Store. Some of these sales were sales to Psystar. This Court has specific jurisdiction over Apple because the unlawful actions here alleged affect Psystar's business in this District, were targeted at those who sell Macintosh OS X on non-Apple hardware (a group that principally includes Psystar), and, upon information and belief, were in many instances specifically targeted at Psystar itself.

11. Venue is proper in this Court under 28 U.S.C. § 1391 because Apple resides in this district as *reside* is defined in § 1391(c), that is, because Apple's contacts with this District, as described in the preceding paragraph, are sufficient to give rise to personal jurisdiction over Apple in this District were this District a State. Each of the contacts described in the preceding paragraph also satisfy the requirements for jurisdiction of Florida courts contained in Fla. Stat. Ann. § 48.193.

12. Apple may be served through its registered agent for service of process in Florida, CT Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324. Apple's headquarters and principal place of business are at 1 Infinite Loop, Cupertino, California 95014.

### III. THE CALIFORNIA LITIGATION

13. This case raises a wholly separate set of issues wholly those in *Apple Inc. v. Psystar Corp.*, No. 3:08-cv-3251-WHA, in the United States District Court for the Northern District of California, because that case is limited to Psystar computers running Mac OS X Leopard. This case concerns the successor to Mac OS X Leopard, Mac OS X Snow Leopard. Both the technical mechanisms used by Apple to tie Mac OS X Snow Leopard to Macintoshes and the technology used by Psystar to get Mac OS X Snow

Leopard to run on Psystar computers are new and different and not within the scope of the California litigation. Moreover, fact discovery in the California litigation has closed, the deadline for amendments to pleadings has passed, and that litigation is proceeding expeditiously to trial on January 11, 2010; any attempt to pursue these claims in that forum would inevitably and unnecessarily delay trial.

#### **IV. CAUSES OF ACTION**

##### **A. Declaratory Judgment Act**

14. Psystar is subject to the threat of a coercive action filed by Apple with respect to Snow Leopard parallel to the action that Apple has filed in California with respect to Leopard. In particular, Psystar stands threatened by a lawsuit by Apple alleging at least that Psystar's selling computers that run Mac OS X Snow Leopard constitutes copyright infringement in violation of the Copyright Act, circumvention of a technological access-control mechanism in violation of the Digital Millennium Copyright Act, and a breach of the "license agreement" that Apple contends governs the relationship between it and those who buy copies of Mac OS X Snow Leopard. Psystar also stands threatened with potential claims for contributory copyright infringement and inducing copyright infringement, inducing breach of contract, trademark infringement and dilution, trade-dress infringement, and unfair competition — all claims that Apple has asserted with respect to Leopard in the California litigation.

15. A large part of Psystar's business is selling computers that run Mac OS X. Psystar expects to sell substantial numbers of computers running Mac OS X Snow Leopard following Snow Leopard's release on Friday. Psystar seeks to clarify for its own benefit and for the benefit of its customers the application of federal law to its computers

running Mac OS X Snow Leopard. A declaration by this Court of the legal rights of Apple and Psystar with respect to Psystar computers running Mac OS X Snow Leopard would clarify, to put it bluntly, the legality of Psystar's business — and would remove the substantial negative effect on Psystar's business of continued uncertainty and legal wrangling between Apple and Psystar. In particular, Psystar seeks declarations on the following topics.

16. Psystar seeks first a declaration that its activities with respect to Mac OS X Snow Leopard do not constitute copyright infringement. Psystar intends to purchase every copy of Mac OS X Snow Leopard that it resells with its computers, as has been its practice with prior versions of Mac OS X. It purchases these copies both directly from Apple and through resellers like Amazon and Best Buy. The Copyright Act expressly permits Psystar to take steps necessary to run Mac OS X Snow Leopard on its computers, even if these steps require making incidental copies of Mac OS X Snow Leopard. *See* 17 U.S.C. § 117(a). The Copyright Act also expressly permits Psystar to resell the particular copies of Mac OS X Snow Leopard that it has lawfully purchased. *See* 17 U.S.C. § 109 (the first-sale doctrine). Psystar's customers are then permitted by § 117 to again make copies necessary to run Mac OS X Snow Leopard on their Psystar computers. Together, §§ 109 and 117 render Psystar's actions with respect to Mac OS X Snow Leopard not copyright infringement.

17. Psystar further seeks a declaration that its actions do not constitute a violation of the anti-circumvention provisions of the Digital Millennium Copyright Act. *See* 17 U.S.C. § 1201. Psystar does not gain access to Apple's copyrighted work — the code for Mac OS X Snow Leopard — at any point during the operation of its computers.

Psystar merely allows Mac OS X Snow Leopard to run in the ordinary fashion, while providing software of its own to make Mac OS X Snow Leopard compatible with its hardware. Moreover, Psystar's acts fall within § 1201(f), which permits circumvention for purposes of achieving interoperability between a copyrighted computer program and other programs. Any circumvention by Psystar is solely for the purpose of making Psystar's software (which allows Mac OS X Snow Leopard to run on Psystar computers) interoperable with Mac OS X Snow Leopard.

18. Psystar's position with respect to Mac OS X Snow Leopard is analogous to that of a person developing a software application to run on top of Mac OS X Snow Leopard. Just as Microsoft writes Word to run with Mac OS X and Google writes its web browser Chrome to run with Mac OS X, Psystar writes its software to run with Mac OS X Snow Leopard. In fact, the part of Mac OS X Snow Leopard that Psystar interacts with is within the open-source portion of Mac OS X and makes use of features of Mac OS X Snow Leopard designed to allow software developers to extend Mac OS X Snow Leopard to work with different hardware. Admittedly, Apple hopes that this hardware be peripherals such as video cameras or USB memory sticks, but nothing in the technology of Mac OS X Snow Leopard prevents use of the same facilities to extend Mac OS X Snow Leopard for use on non-Apple personal computers.

19. Psystar further seeks a declaration that the "license agreement" that accompanies Mac OS X Snow Leopard is not enforceable insofar as it purports to prevent owners of copies of Mac OS X Snow Leopard from running that software on their own non-Macintosh computers — and, in particular, on Psystar's computers. To the extent that the license agreement purports to make copyright infringement that which is not

copyright infringement under federal law or purports to forbid as a matter of contract law that which is expressly permitted by federal copyright law, state law that permits enforcement of the license agreement is in conflict with federal law and is therefore preempted.

20. Moreover, Psystar seeks a declaration that the license agreement is unenforceable for lack of privity and lack of consideration. The license agreement is accessible only after a user purchases a shrinkwrapped copy of Mac OS X Snow Leopard. And the license expressly states that it may be returned only according to the terms of the reseller — for example, Amazon or Best Buy. These resellers often include return terms that forbid the return of unwrapped software. Putting these terms together, a purchaser of Mac OS X Snow Leopard has no opportunity to see the license agreement before losing the ability to undo the sale by returning his or her copy of Snow Leopard. Although shrinkwrap license agreements may be enforceable in other contexts, the particular facts of Apple's shrinkwrap agreement for Mac OS X render it unenforceable against Psystar or Psystar's customers.

20-b. Psystar further seeks a declaration that its licensing of its technology for running Mac OS X Snow Leopard on non-Apple computers to original equipment manufacturers does not violate either the Copyright Act or the DMCA. Psystar further seeks a declaration that its direct sale of Rebel EFI to end users does not violate either the Copyright Act or the DMCA.

**B. Federal Antitrust Acts**

21. Apple violated § 1 of the Sherman Act, 15 U.S.C. § 1, by tying and attempting to tie Mac OS X Snow Leopard to Macintosh computers — that is, by

requiring those who want access to Mac OS X Snow Leopard to also buy a Macintosh computer on which to run Mac OS X Snow Leopard. *See Technical Resource Services, Inc. v. Dornier Medical Systems, Inc.*, 134 F.3d 1458, 1464–65 (11th Cir. 1998) (collecting cases). The software license agreement that accompanies Mac OS X Snow Leopard constitutes a contract in restraint of trade. It further constitutes an illegal exclusive-dealing arrangement under § 3 of the Clayton Act, 15 U.S.C. § 14, because it purports to condition sales of Mac OS X Snow Leopard on an agreement that the purchaser will not deal with those who compete with Apple in selling personal computers, a group that includes Psystar. *See, e.g., Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1169 (9th Cir. 1997).

22. Apple violated § 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing and attempting to monopolize the market for premium personal computers, that is, personal computers priced above \$1,000. The elements of a monopolization claim are “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Morris Comm. Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1293–94 (11th Cir. 2004) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).

23. Apple has the power to control prices and exclude competition from the market for premium personal computers because it has the exclusive right to Mac OS X Snow Leopard and uses that right to prevent competitors such as Psystar from selling competing personal computers that run Mac OS X Snow Leopard. Apple’s Macintoshes have a 91% revenue market share in the market for premium personal computers. Apple

willfully acquired this market power by abusing its copyright monopoly in Mac OS X. Although Apple properly has a monopoly in those aspects of Mac OS X that are original works of authorship and that are therefore copyrightable, Apple is not entitled to extend its monopoly over Mac OS X Snow Leopard — a piece of software — to the quite different market for the computers on which Mac OS X Snow Leopard can run. For the same reasons, Apple also has and has obtained and maintained a monopoly in the market for personal computers with a UNIX operating system. (Microsoft Windows is not a UNIX operating system.)

24. These violations of the federal antitrust acts affected interstate commerce because Apple ties Mac OS X Snow Leopard to Macintoshes and attempts to enforce this tying arrangement in every state. In particular, Apple has attempted to prevent Psystar from selling computers running Mac OS X Snow Leopard not only in Florida, but in every state.

25. These violations of the federal antitrust acts have damaged and will damage Psystar in its business and property because they deny Psystar business that otherwise would go to Psystar by creating doubt about the legality of Psystar computers running Mac OS X Snow Leopard. The items of damage to Psystar include damage to Psystar's business reputation and to the reputation of its products and sales lost that could have been made absent Apple's attempts to restrict Mac OS X Snow Leopard to Macintoshes.

**C. Lanham Act**

26. Apple represents that only Macintoshes can legally run Mac OS X Snow Leopard. This representation is false. Apple's misrepresentation harms Psystar's

business because it creates the false impression that it is illegal for Psystar to make and sell computers that run legally purchased copies of Mac OS X Snow Leopard. Apple's misrepresentations about its exclusive right to run Mac OS X Snow Leopard violate the Lanham Act, 15 U.S.C. § 1125(a), which prohibits false or misleading descriptions or representations of fact that misrepresent the nature of the speaker's or another's goods, services, or commercial activities. Here, Apple's misrepresentation both misrepresents that Apple is the exclusive legal seller of personal computers that run Mac OS X Snow Leopard and misrepresents that Psystar has no right to sell personal computers that run Mac OS X Snow Leopard.

27. Apple's misrepresentations about the legality of running Mac OS X Snow Leopard on non-Apple computers appear throughout Apple's advertising and promotional materials. The license agreement that accompanies Mac OS X Snow Leopard represents that Mac OS X Snow Leopard can only be run on Apple-branded hardware and, specifically, that it is not to be run on non-Apple hardware. Apple describes its operating system as an operating system for Macintosh computers, using the "Macintosh" brand name, which refers to computers made by Apple. Apple describes its operating system as integrated with the hardware it sells, as though it could not operate on hardware sold by others. And Apple in its court filings has made clear its claim that Mac OS X Snow Leopard can be legally run only on Macintoshes.

#### **V. JURY DEMAND**

28. Psystar demands trial by jury on all claims, defenses, and other issues in this case.

**VI. PRAYER FOR RELIEF**

29. Psystar respectfully prays for relief as follows:

- a. money damages for lost sales and injury to Psystar's business reputation and to the reputation of its personal computer products;
- b. attorneys' fees for bringing this action;
- c. treble damages;
- d. a declaration of the legal rights of the parties including those items identified in Part IV(A) of this complaint;
- e. an injunction preventing Apple from attempting to prevent Psystar from making and selling computers that run Mac OS X Snow Leopard and from representing that Psystar's making and selling such computers is other than perfectly legal;
- f. an injunction requiring Apple to cease tying Mac OS X Snow Leopard to its Macintosh personal computers; and
- f. any other relief to which Psystar may be entitled in law or equity.

Dated: October 27, 2009.

Respectfully submitted,

s/ K.A.D. Camara

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## EXHIBIT C

BLG, MEDREQ

**U.S. District Court  
Southern District of Florida (Miami)  
CIVIL DOCKET FOR CASE #: 1:09-cv-22535-WMH**

Psystar Corporation v. Apple Inc.  
Assigned to: Senior Judge William M. Hoeverler  
Cause: 15:0015 Antitrust Litigation

Date Filed: 08/27/2009  
Jury Demand: Plaintiff  
Nature of Suit: 410 Anti-Trust  
Jurisdiction: Federal Question

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
08/27/2009	<a href="#">1</a>	COMPLAINT against Apple Inc.. Filing fee \$ 350.00 Receipt#: 547285, filed by Psystar Corporation.(mmo) (Entered: 08/27/2009)
08/27/2009	<a href="#">2</a>	Summons Issued as to Apple Inc. (mmo) (Entered: 08/27/2009)
10/27/2009	<a href="#">3</a>	First AMENDED COMPLAINT, filed by Psystar Corporation.(Weisberg, Alexander) (Entered: 10/27/2009)
11/24/2009	<a href="#">4</a>	Defendant's MOTION to Dismiss <a href="#">3</a> Amended Complaint ( Responses due by 12/14/2009), MOTION to change/transfer venue to the Northern District of California by Apple Inc.. (Attachments: # <a href="#">1</a> Exhibit 1 - 7, # <a href="#">2</a> Exhibit 8 - 10, # <a href="#">3</a> Exhibit 11 - 12, # <a href="#">4</a> Exhibit 13 - 15)(Schafer, Harry) Modified reliefs/text on 11/25/2009 (lk). (Entered: 11/24/2009)
11/24/2009	<a href="#">5</a>	Defendant's MOTION for Hearing re <a href="#">4</a> Defendant's MOTION to Dismiss <a href="#">3</a> Amended Complaint by Apple Inc. (Schafer, Harry)text Modified on 11/25/2009 (jc). (Entered: 11/24/2009)

11/25/2009	<a href="#">6</a>	Clerks Notice to Filer re <a href="#">4</a> Defendant's MOTION to Dismiss <a href="#">3</a> Amended Complaint MOTION to Adopt/Join <a href="#">3</a> Amended Complaint MOTION for Order of SaleDefendant's MOTION to Dismiss <a href="#">3</a> Amended Complaint MOTION to Adopt/Join <a href="#">3</a> Amended Complaint. <b>Filer Selected the Wrong Motion Relief (s)</b> ; ERROR - The Filer selected the wrong motion relief(s) when docketing the motion(Motion to adopt/Motion for sale). The correction was made by the Clerk. It is not necessary to refile this document but future motions filed must include applicable reliefs. (lk) (Entered: 11/25/2009)
11/25/2009	<a href="#">7</a>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for James G. Gilliland, Jr.. Filing Fee \$75. Receipt # 1012611. (cw) (Entered: 11/30/2009)
11/25/2009	<a href="#">8</a>	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings for Mehrnaz Boroumand Smith. Filing Fee \$75. Receipt # 1012610. (cw) (Entered: 11/30/2009)
12/04/2009	<a href="#">9</a>	PAPERLESS ORDER granting <a href="#">7</a> Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings ; granting <a href="#">8</a> Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings. Signed by Senior Judge William M. Hoeveler on 12/4/2009. (lcs) (Entered: 12/04/2009)
12/10/2009	<a href="#">10</a>	RESPONSE in Opposition re <a href="#">4</a> Defendant's MOTION to Dismiss <a href="#">3</a> Amended ComplaintMotion to Change Venue MOTION for Order of SaleDefendant's MOTION to Dismiss <a href="#">3</a> Amended Complaint filed by Psystar Corporation. (Attachments: # <a href="#">1</a> Exhibit, # <a href="#">2</a> Exhibit, # <a href="#">3</a> Exhibit, # <a href="#">4</a> Exhibit, # <a href="#">5</a> Exhibit) (Weisberg, Alexander) (Entered: 12/10/2009)
12/21/2009	<a href="#">11</a>	REPLY to Response to Motion re <a href="#">4</a> Defendant's MOTION to Dismiss <a href="#">3</a> Amended ComplaintMotion to Change Venue MOTION for Order of SaleDefendant's MOTION to Dismiss <a href="#">3</a> Amended Complaint filed by Apple Inc.. (Attachments: # <a href="#">1</a> Exhibit 1 - 7)(Schafer, Harry) (Entered: 12/21/2009)
06/09/2010	<a href="#">12</a>	PAPERLESS ORDER SETTING STATUS CONFERENCE AND REQUIRING MEDIATION. ( Status Conference set for 7/21/2010 11:30 AM in Miami Division before Senior Judge William M. Hoeveler.)This conference will be held at Federal Courthouse Square, Courtroom 9, Ninth Floor, 301 North Miami Avenue, Miami, Florida. The parties shall prepare and file their joint scheduling report prior to the status conference. Within thirty (30) days from the date of this order, the parties shall select a certified mediator under Local Rule 16.2.B and shall schedule a time, date and place for mediation. In the event the parties cannot agree on a certified mediator, they shall advise the Clerk and the Clerk shall designate a certified mediator under a blind rotation system. Signed by Senior Judge William M. Hoeveler on 6/9/2010. (lcs) (Entered: 06/09/2010)
07/07/2010	<a href="#">13</a>	Joint MOTION to Stay <i>This Case Pending the Resolution of the Plaintiff's Appeal Before the Ninth Circuit</i> by Apple Inc., Psystar Corporation. Responses due by 7/26/2010 (Schafer, Harry) (Entered: 07/07/2010)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
07/08/2010 12:57:49			
<b>PACER Login:</b>	tt0071	<b>Client Code:</b>	000000-000000
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:09-cv-22535-WMH
<b>Billable Pages:</b>	2	<b>Cost:</b>	0.16

## EXHIBIT D

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

Case No. 09-22535 CIV – HOEVELER/GARBER

PSYSTAR CORPORATION,

Plaintiff,

vs.

APPLE INC.,

Defendant.

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**JOINT MOTION TO STAY THIS CASE PENDING THE RESOLUTION  
OF THE PLAINTIFF'S APPEAL BEFORE THE NINTH CIRCUIT**

Plaintiff Psystar Corporation (“Psystar”) and Defendant Apple Inc. (“Apple”), by and through their counsel of record, hereby respectfully seek the entry of an order staying this case until after the Ninth Circuit Court of Appeals (the “Ninth Circuit”) decides the appeal of the parties’ prior pending action that was filed by Apple in the Northern District of California (the “California Action”). In support of this joint motion, Psystar and Apple refer the Court to their supporting memorandum below.

## MEMORANDUM

### **I. INTRODUCTION**

The Court recently entered an Order setting a status conference in this matter for July 21, 2010. During the course of the Local Rule 16 meeting regarding the scheduling report and proposed scheduling order, the parties agreed that moving forward with the instant action at this time will unnecessarily waste party resources and does not promote judicial economy. As discussed below, there is significant overlap between the factual and legal issues at play in the instant case and Psystar's appeal of the California Action. The parties concur that the Ninth Circuit's appellate decision will greatly inform the scope of the instant case and the parties' assessment of whether or not this action should proceed. Awaiting the outcome of the California Action therefore will preserve the resources of the Court as well as the resources of both parties. Accordingly, the parties jointly move for a stay of this case pending issuance of the Ninth Circuit's ruling of Psystar's appeal of the California Action.

### **II. FACTUAL AND PROCDURAL BACKGROUND**

#### **A. The Instant Action**

Apple licenses its proprietary operating system software, Mac OS® X, for use exclusively on Apple computers. Psystar's business model is based primarily on the sale of Psystar computers that run Mac OS X and/or software that enables Mac OS X to run on non-Apple computers. Apple and Psystar have been litigating Psystar's conduct and the related copyright, trademark, and breach of contract issues since July, 2008, when Apple filed suit against Psystar in the Northern District of California.

On August 28, 2009, Apple released the latest version of its operating system software, Mac OS X Snow Leopard®, which is a derivative work of the prior versions of Mac OS X. One day earlier, on August 27, 2009, Psystar filed the instant copyright and antitrust case. In its

original complaint, Psystar sought declaratory relief from this Court that “it may sell and continue to sell computers running Mac OS X Snow Leopard, provided, [] that Psystar continues to purchase copies of Mac OS X ....” [D.E. 1 at ¶ 4.] Psystar also sought a declaration that its activities with respect to Mac OS X Snow Leopard do not constitute copyright infringement or violate the anti-circumvention provisions of the Digital Millennium Copyright Act and that Apple’s accompanying Software License Agreement, which prohibits the use of Mac OS X on non-Apple hardware, is unenforceable. [D.E. 1 at ¶¶ 16-20.] Psystar further alleged that Apple’s limitation of Mac OS X to Apple hardware violates federal antitrust laws and that Apple’s representations that Mac OS X Snow Leopard can only legally run on Apple computers violate the Lanham Act. [D.E. 1 at ¶¶ 21-27.] In response, Apple moved the district court in the Northern District of California to dismiss or enjoin the Florida case. [D.E. 138.] The district court denied Apple’s motion without prejudice to a motion to transfer the Florida case to California. [D.E. 152.]

On October 27, 2009, Psystar filed its First Amended Complaint (“Amended Complaint”) in the instant action. [D.E. 3.] Psystar’s Amended Complaint seeks additional declaratory relief that by selling or licensing Rebel EFI (Psystar software that enables Mac OS X Snow Leopard to run on non-Apple computers) to consumers, Psystar does not violate Apple’s rights. [D.E. 3 at ¶¶ 8(b) and 20(b).]

On November 24, 2009, Apple filed a motion to dismiss or transfer (“Apple’s Motion”) this case on the grounds that the factual and legal issues in the Amended Complaint have been adjudicated in the California Action, and therefore should be dismissed or transferred to the district court in California. [D.E. 4.] Apple’s Motion has been fully briefed by the parties, and both sides have requested oral argument.

**B. The Related California Action**

The instant case is the second litigation between the parties relating to Psystar's reproduction, creation of derivative works from, and distribution of Apple's copyrighted Mac OS® X operating system. On July 3, 2008, Apple filed its complaint in the California Action (*Apple Inc. v. Psystar Corp.*, 3:08-cv-03251-WHA), alleging breach and induced breach of its Software License Agreement for Mac OS X, direct and contributory copyright infringement, trademark and trade dress infringement, and violation of state and common law unfair competition laws. [Cal. D.E. 1.]

In response, Psystar answered [Cal. D.E. 12] and asserted counterclaims contending that Apple's limitation of the use of its Mac OS X software to Apple-labeled hardware was a violation of state and federal antitrust and unfair competition laws. Apple moved to dismiss Psystar's antitrust and unfair competition counterclaims [Cal. D.E. 16] and the district court granted Apple's motion on November 18, 2008, with leave to amend. [Cal. D.E. 33.] Psystar did not reassert its antitrust counterclaims. [Cal. D.E. 40.] Instead, Psystar alleged counterclaims for declaratory relief of copyright misuse and for unfair competition. [Cal. D.E. 52.]

On December 2, 2008, Apple amended its complaint to include a claim under the Digital Millennium Copyright Act ("DMCA") for Psystar's circumvention of technological protection measures employed by Apple to prevent unauthorized access to Mac OS X. [Cal. D.E. 38.] Psystar filed its amended answer on December 16, 2008, asserting the affirmative defense of copyright misuse. [Cal. D.E. 41.] Discovery proceeded through the spring and summer of 2009.

On October 8, 2009, both parties filed for summary judgment in the California Action. [Cal. D.E. 181, 182.] The district court in California granted Apple's motion for summary judgment on November 13, 2009, holding that Psystar violated Apple's copyrights in Mac OS X

by copying, distributing, and creating derivative works, that Psystar violated DMCA Sections 1201(a)(1)(A), 1201(a)(2), and 1201(b)(1), and that Psystar's defenses were meritless. [Cal. D.E. 214.] The court also denied Psystar's summary judgment motion, finding that Psystar's affirmative defenses to copyright infringement and the DMCA were not applicable.

The parties subsequently stipulated as to damages and the disposition of the remainder of the claims [Cal. D.E. 239.] Following briefing by the parties, the court entered a Permanent Injunction against Psystar [Cal. D.E. 242] and Final Judgment [Cal. D.E. 243] on December 15, 2009. The California court expressly enjoined Psystar's manufacture and sale of computers running Mac OS X Snow Leopard – one of the two products on which Psystar seeks declaratory relief in its Amended Complaint in the instant case. [Cal. D.E. 242.] The California court also invited Psystar to file a motion to determine whether Rebel EFI, the second product in this case, should be excluded from the scope of the injunction. *Id.* Psystar never filed a motion regarding Rebel EFI in the California Action.

Psystar appealed the California court's denial of its summary judgment motion on the copyright misuse defense and the scope of the permanent injunction – two issues that are at the heart of Psystar's Amended Complaint in this lawsuit – to the Ninth Circuit Court of Appeals on May 17, 2010. (Case No. 10-15113.) Apple's Answering Brief will be filed on July 8, 2010.

### **III. A Stay of This Action Pending the Ninth Circuit's Decision Is Warranted**

“[T]he power to stay proceeding is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir.1982)(“The district court has a general discretionary power to stay proceedings before it in the control of its docket and in the interests of justice.”); *see also Innovative Patented Technology, LLC. v. Samsung*

*Electronics Co., Ltd.*, 2008 WL 2726914, \*1 (S.D. Fla. 2008)(“District courts have the inherent power to stay litigation pending the outcome of a related proceeding in another forum.”) Based upon the foregoing, a stay until after the Ninth Circuit issues its ruling is warranted in this case. As described above, the issues on appeal are at the heart of the instant case and their resolution will impact the direction of this case. If the Court agrees and grants the instant motion, the parties respectfully request that the Court also postpone the upcoming hearing on July 21st and issue an order that the parties complete their good faith meet and confer pursuant to Local Rule 16.1 (regarding the schedule for this case, the appearance of additional parties, amendment of pleadings and ways to streamline discovery and simplify the issues) within thirty (30) days after the Ninth Circuit issues its ruling. Accordingly, the parties would file a Rule 16.1 Conference Statement fourteen (14) days after completion of the meet and confer and then appear before the Court at scheduling conference, the date of which shall be determined by the Court.

#### **IV. Conclusion**

For these reasons, Psystar and Apple respectfully request the entry of an order granting this motion and staying this case until after the Ninth Circuit rules. Similarly, the parties respectfully request the Court postpone the currently scheduled status hearing.

Dated: July 7, 2010

Respectfully submitted,

/s/ K.A.D. Camara

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**SERVICE LIST**  
**Psystar Corporation v. Apple, Inc.**  
**Case No. 09-22535-CIV-HOEVELER/GARBER**  
**U.S. District Court, Southern District of Florida**

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