

1 CAMARA & SIBLEY LLP
 K.A.D. CAMARA (admitted *pro hac vice*)
 2 2339 University Boulevard
 Houston, Texas 77005
 3 Telephone: 713-893-7973
 Fax: 713-583-1131
 4 camara@camarasibley.com

5 WELKER & ROSARIO LLP
 DAVID VERNON WELKER (SBN 252658)
 6 2689 Sycamore Lane, Suite A6
 Davis, California 95616-5583
 7 Telephone: 949-378-2900
david.welker@werolaw.com

8
 9 IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

10 APPLE INC., a California corporation,

11 *Plaintiff,*

12 v.

13 PSYSTAR CORPORATION,

14 *Defendants.*

15 AND RELATED COUNTERCLAIMS

CASE NO. CV-08-03251-WHA

**PSYSTAR'S RESPONSE IN
 OPPOSITION TO APPLE'S
 ADMINISTRATIVE MOTION
 SEEKING LEAVE OF COURT TO
 FILE A REPLY TO PSYSTAR
 CORPORATION'S
 SUPPLEMENTAL BRIEFING ON
 THE RELEVANCE OF TOPIC 3
 TESTIMONY**

16
 17
 18 **RESPONSE**

19 The second supplemental brief that Apple seeks leave to file contributes only one thing worth
 20 responding to: an entirely unprofessional personal attack on lead counsel for Psystar, K.A.D. Camara
 21 of Camara & Sibley LLP — that is, a personal attack on me. Apple accuses me of disclosing
 22 information in violation of the protective order to Professor Charles R. Nesson of Harvard. I have
 23 done no such thing. Neither has anyone at my firm or at Psystar. If anyone at our firm or at Psystar
 24 ever violated the protective order, we would, of course, be subject to contempt proceedings in this
 25 Court. The accusation that I have somehow violated the protective order is nothing more than an
 26 attempt to distract this Court from what is at issue in this round of supplemental briefing — namely,
 27 PSYSTAR'S RESPONSE IN OPPOSITION TO APPLE'S ADMINISTRATIVE MOTION
 28 SEEKING LEAVE OF COURT TO FILE A REPLY TO PSYSTAR CORPORATION'S
 SUPPLEMENTAL BRIEFING ON THE RELEVANCE OF TOPIC 3 TESTIMONY CV 08-03251
 WHA

1 Apple's complete failure to provide testimony from a corporate representative on damages.

2 Professor Nesson is the William F. Weld Professor of Law at Harvard Law School. He was
3 my torts professor at Harvard, where he also teaches classes on evidence and the American jury, and
4 is now co-counsel with me in several ongoing cases against the recording industry and Google. We
5 are friends and colleagues. Professor Nesson has particular expertise in the public aspects of
6 litigating high-profile cases, having been counsel, for example, in the defense of Daniel Ellsberg in
7 connection with the release of the Pentagon Papers and in the toxic-tort litigation later described in
8 the book and movie *A Civil Action*. I told Professor Nesson about our engagement in *Apple v.*
9 *Psystar*, just as I have told him about many other cases on which our firm is working. I described for
10 him the allegations leveled by Apple against Psystar and some of the legal issues involved in this
11 case, including important legal questions about the first-sale doctrine, § 117 of the Copyright Act,
12 and the enforceability of the Apple EULA. I did not disclose to him or to anyone else any
13 information covered by the protective order in this case, such as the substance of deposition
14 testimony designated confidential or the contents of any document designated confidential.
15
16

17 Apple's only evidence that I violated the protective order is a post on Professor Nesson's
18 blog. A true and correct copy of this blog post is attached as Exhibit A. The blog post consists of an
19 email exchange between me and Rudy Pedraza. In the first message, Mr. Pedraza suggests having a
20 public event showcasing Psystar's products at the same time as Apple's then-upcoming inspection of
21 Psystar's premises. I replied to Mr. Pedraza's email and copied Professor Nesson on my reply. In
22 my reply, I describe certain aspects of our public-relations strategy in this case: how we should "start
23 explaining the dispositive motions arguments to the world — first sale and 117 non-infringement,
24 nominative use of trademarks, preemption, and copyright misuse"; and how I think that the idea of
25 the public exhibition is good, but that "[w]e need to make sure that our circus day doesn't vary in
26
27

1 any material way from how we do business ordinarily.” I also describe how we are negotiating with
2 Apple over deposition dates and suggest that “[a] nice follow-up post [to the Psystar blog] might be
3 the roster of Apple people being deposed — we can invite the world to send us questions.” Finally, I
4 say that I am copying Professor Nesson “who I told about the case, who likes our side and story, and
5 who is expert in public litigation.”
6

7 Nothing in this email exchange is protected by the protective order in this case. Even the
8 identity of the deponents, which was later published on Psystar’s blog, is not protected by the
9 protective order in this case. With respect to depositions, only the substance of the witnesses’
10 testimony (and summaries of it) is protected by the protective order. I disclosed nothing like this to
11 Professor Nesson or to anyone else. And, of course, I am permitted to describe to Professor Nesson
12 or to anyone else the legal issues involved in this case and the nature of the allegations leveled by
13 Apple against Psystar — information that is available from the publicly filed pleadings and motions.
14

15 Apple has attempted to draw a veil of secrecy over this litigation and over the conduct at issue
16 in this litigation that, in my view, goes well beyond what is warranted. That is why so many
17 documents of interest to the computer industry have had to be filed under seal and made available only
18 in heavily redacted form, despite the widespread interest in the case among members of the public and
19 the media that a simple Google search reveals. There is no secret about the fact that since our firm’s
20 engagement, a part of Psystar’s strategy has been to engage with the press and attempt to clear up
21 some of the very negative and, in our view, mistaken coverage that has appeared about Psystar’s
22 business and this litigation. Engaging with the press in this way is Psystar’s right, both under the
23 protective order and as a constitutional matter. Neither Psystar nor I plan to violate the protective
24 order; neither Psystar nor I have violated the protective order; and Apple’s suggestion to the contrary
25 is unprofessional in the extreme.
26
27

1 Dated: September 2, 2009

2 CAMARA & SIBLEY *LLP*

3
4 By: /s/ K. A. D. Camara

5 K.A.D. CAMARA

6 *Attorney for Defendant / Counterclaimant*
7 *Psystar Corporation*

1 **CERTIFICATE OF SERVICE**

2 I, Michael Wilson, declare I am employed in the City of Houston and County of Harris, Texas
3 in the office of Camara & Sibley. I am over the age of eighteen and not a party to this action. My
4 business address is Camara & Sibley, 2339 University Boulevard, Houston, Texas 77005.

5 I served the following document(s):

6 **PSYSTAR'S RESPONSE IN OPPOSITION TO APPLE'S ADMINISTRATIVE MOTION
7 SEEKING LEAVE OF COURT TO FILE A REPLY TO PSYSTAR CORPORATION'S
8 SUPPLEMENTAL BRIEFING ON THE RELEVANCE OF TOPIC 3 TESTIMONY**

9 Case No. CV 08-03251 WHA

10 on the interested parties in this action by placing a true and correct copy thereof, on the above date,
11 enclosed in a sealed envelope, following the ordinary business practice of Camara & Sibley LLP. I
12 sent the document(s) to the following:

<p>13 James G. Gilliland, Jr. 14 TOWNSEND AND TOWNSEND AND CREW LLP 15 Two Embarcadero Center, 8th Floor 16 San Francisco, California 94111 17 Telephone: (415) 576-0200 18 Facsimile: (415) 576-0300</p>	<p>19 email: jggilliland@townsend.com</p>
--	---

20 [By First Class Mail] I am readily familiar with my employer's practice for collecting
21 and processing documents for mailing with the United States Postal Service. On the date listed herein,
22 following ordinary business practice, I served the within document(s) at my place of business, by
23 placing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, for
24 collection and mailing with the United States Postal Service where it would be deposited with the
25 United States Postal Service that same day in the ordinary course of business.

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

28 [By Hand] I directed each envelope to the party(ies) so designated on the service list to
be delivered by courier this date.

[By Facsimile Transmission] I caused said document to be sent by facsimile
transmission to the fax number indicated for the party(ies) listed above.

[By Electronic Transmission] I caused said document to be sent by electronic
transmission to the e-mail address indicated for the party(ies) listed above via the court's ECF
notification system.

I declare under penalty of perjury under the laws of the United States of America that the
foregoing is true and correct, and that this declaration was executed on September 2, 2009 at Houston,
Texas.

/s/ Michael Wilson
Michael Wilson