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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

APPLE INC., a California)	
corporation,)	
)	
Plaintiff,)	
)	
VS.)	No. C 08-3251 WHA
)	
PSYSTAR CORPORATION, a Florida)	
corporation, and DOES 1-10,)	
inclusive,)	
)	San Francisco, California
Defendants.)	Friday
)	September 4, 2009

TRANSCRIPT OF PROCEEDINGSAPPEARANCES:

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P R O C E E D I N G S

1
2 **SEPTEMBER 4, 2009**

10:05 A.M

3
4 **THE CLERK:** Calling civil 08-3251, Apple versus
5 Psystar.

6 Counsel, please state your appearance for the record.
7 Would you like everyone to come to the microphone,
8 Your Honor?

9 **THE COURT:** Yes.

10 **THE CLERK:** Counsel, please come to the microphone.

11 **MR. GILLILAND:** Good morning, Your Honor.

12 Jim Gilliland and Mehrnaz Smith and Megan Chung for
13 the plaintiff Apple.

14 **THE COURT:** Good morning.

15 **MR. CAMARA:** Good morning, Your Honor.

16 Kiwi Camara for the defendant Psystar Corporation.

17 **THE COURT:** Everyone have a seat.

18 I read most of this material. Have you resolved all
19 of your problems? First, let me ask this --

20 **MR. CAMARA:** Half of them, Your Honor.

21 **THE COURT:** What half have you resolved?

22 **MR. CAMARA:** We have resolved parts two and three of
23 the briefing.

24 We have resolved the dispute about Mr. Schiller's
25 testimony concerning whether he had compared Apple products to

1 Psystar products.

2 And we've resolved the issue about the missing
3 affidavit and about whether or not that was relied on in one of
4 the expert reports.

5 So the outstanding issues are the testimony of
6 Jacques Vidrine and the document production.

7 **MS. CHUNG:** It is my understanding, Your Honor, that
8 Psystar is withdrawing their motions on sections two and three.

9 **MR. CAMARA:** We are, Your Honor.

10 **THE COURT:** Well, all right.

11 Now, I need to -- reading your material here, I want
12 to -- something dawned on me. I am conducting a wedding in
13 October. The wedding is one of my former law clerks. Not
14 Ms. Chung. She is already married. It's a different law clerk
15 from about five years ago. And she is marrying Tom --

16 **MR. CAMARA:** LaPerle.

17 **THE COURT:** -- LaPerle.

18 So in October I will be standing in front of Thomas
19 LaPerle, who I see here is now a witness.

20 **MR. CAMARA:** Congratulations, Your Honor.

21 We have no problem.

22 **THE COURT:** All right. So that you waive any
23 conflict?

24 **MR. CAMARA:** We waive any conflict arising out of
25 your presiding.

1 **THE COURT:** How about Apple?

2 **MS. CHUNG:** We have no issues, Your Honor.

3 **THE COURT:** What?

4 **MS. CHUNG:** We waive any conflict. We have no
5 issues.

6 **THE COURT:** Fine. That's not an issue then.
7 Okay. So tell me, what is the first issue?

8 **MR. CAMARA:** Your Honor, the first issue is the
9 testimony of Jacques Vidrine. Mr. Vidrine is the head of OS X
10 security. He was not disclosed either in Apple's initial
11 disclosures or in any supplementation to any of those
12 disclosures.

13 **THE COURT:** Wait a minute. Disclosures only require
14 them to disclose who they are going to rely on.

15 **MR. CAMARA:** This is true.

16 He wasn't disclosed in response to any -- in any
17 form, in response to any question about who had conducted
18 investigation into whether Psystar circumvented Apple's
19 technological protection measures.

20 He was not disclosed in response to any --

21 **THE COURT:** Wait. You are using the word
22 "disclosure," and that bothers me. You've got to use the right
23 terminology here.

24 Rule 26(a) says, "The name and, if known, address and
25 telephone number of each individual likely to have discoverable

1 information that the disclosing party may use to support its
2 claims or defenses." "May use to support its claims or
3 defenses." It does not have to disclose witnesses that are
4 going to help you.

5 Now, if you had propounded an interrogatory and said,
6 "Name each person who has done X, Y, or Z," and Mr. Vidrine fit
7 within that, they would have to tell you that in the answer.

8 But your motion -- I read it. Your motion is
9 directed at a disclosure violation. You say, "Apple failed to
10 disclose by agreeing in its initial disclosures or in any
11 supplement to those disclosures."

12 Well, if that's true, then the answer is they can't
13 rely on Vidrine, period, for any purpose.

14 **MR. CAMARA:** Okay, Your Honor.

15 **THE COURT:** Are you planning on relying on Vidrine as
16 a witness on summary judgment and/or at trial, Ms. Chung?

17 If you are, you are out of luck unless you get relief
18 from your default.

19 **MS. CHUNG:** Your Honor, we have the issue of the
20 notice of pendency in other action in Florida case. And my
21 response to that will depend on that issue.

22 Because our position was that we had an outstanding
23 discovery response to Psystar. And we specifically asked them
24 if they -- and we asked them with meet and confer with the
25 prior counsel for Psystar about R&D development, as well as any

1 new products that are coming into the case.

2 **THE COURT:** Wait a minute. On the present
3 pleadings --

4 **MS. CHUNG:** Yes.

5 **THE COURT:** Forget that case in Florida for a moment.

6 **MS. CHUNG:** Okay.

7 **THE COURT:** If you didn't disclose Vidrine, you are
8 not going to be allowed to use him. That's just the way it is.

9 Now, a substantial justification for using him would
10 be if at the last minute some new issue came out of left field,
11 and they brought it up on the other side such that you were
12 surprised, and now you've got to enlarge the group of witnesses
13 you want to rely on.

14 I would allow you, for that kind of substantial
15 justification, to submit a new supplement to your initial
16 disclosures, even at this late hour, if it really was that
17 scenario.

18 But I'm not going to do it because there's some
19 lawsuit in Florida. That has nothing to do with my lawsuit.

20 **MS. CHUNG:** I understand, Your Honor.

21 **THE COURT:** So the normal answer to this problem is
22 they didn't have to disclose Vidrine. But the penalty for not
23 doing it is they can't use him.

24 **MS. CHUNG:** We understand.

25 **THE COURT:** So that's -- that's --

1 **MS. CHUNG:** We do believe there was new issues raised
2 by counsel. But if you give me one moment, I will --

3 **THE COURT:** All right.

4 (Pause)

5 **MS. CHUNG:** Your Honor, Apple will not use
6 Mr. Vidrine either for trial or for purposes of summary
7 judgment.

8 **THE COURT:** Any of your experts who are going to be
9 relying on him?

10 **MS. CHUNG:** No.

11 **THE COURT:** That's an indirect way.

12 So Vidrine is out of your case totally?

13 **MS. CHUNG:** Yes.

14 **THE COURT:** That ends the Rule 26 problem.

15 **MR. CAMARA:** It does, Your Honor.

16 **THE COURT:** All right. So now how about the document
17 request problem?

18 **MR. CAMARA:** Your Honor, the documents have been
19 produced by Apple as a continuous sequence of digitized files.

20 **THE COURT:** I read that. But they said that your
21 predecessors agreed to that. And you have been even worse,
22 they say.

23 **MR. CAMARA:** There is no evidence of the agreement
24 either that Apple has produced in writing. There is no e-mail
25 that manifests that agreement. There is no signed document of

1 any kind that manifests that agreement.

2 We have conferred with prior counsel twice today,
3 once before the meet and confer with Apple, and once after.

4 Before the meet and confer, we asked if there was any agreement
5 that the documents be produced other than in the ordinary
6 manner in which they are kept. Former counsel said there was
7 no such agreement.

8 At the meet and confer, Apple told us they reached an
9 oral agreement with prior counsel that the documents would be
10 produced, clumped by source or custodian of the document, but
11 with no further information about what the source was or the
12 internal organization of the documents from that source.

13 We took that information and again asked former
14 counsel whether there was any such agreement. And I have
15 e-mail from five minutes ago, from former counsel, saying that
16 there was no such agreement.

17 And so the manner in which the documents are
18 produced, it's a continuous stream, which gives us no
19 information about how each of the individuals -- and Apple
20 stores documents by individuals rather than centrally --
21 organized those documents, nothing at all, other than the page
22 by page electronic files themselves.

23 **THE COURT:** Ms. Chung.

24 **MS. CHUNG:** Your Honor, we attended that meet and
25 confer with opposing counsel. So did Mr. Gilliland,

1 Ms. Boroumand Smith.

2 And we did have that agreement that we will not be
3 providing source information, including metadata which contains
4 the folder structure or file path information that Mr. Camara
5 seeks now at this late hour.

6 **THE COURT:** Wait a minute. When were these documents
7 produced?

8 **MS. CHUNG:** These documents have been produced by
9 Psystar since December of 2008, without any of the folder
10 structure, and since January of 2009, from Apple.

11 **THE COURT:** If this violated something, why didn't
12 someone raise it before now?

13 **MS. CHUNG:** That is exactly our point, Your Honor.
14 We never raised it because we knew that this agreement existed.

15 And Psystar has raised other issues with myself
16 directly to meet and confer about document production, but
17 never raised this issue.

18 **THE COURT:** If this was a violation of something, why
19 didn't your prior counsel say something about it?

20 **MR. CAMARA:** I don't know that, Your Honor. I'm not
21 aware of what caused many of the decisions that were made by
22 prior counsel.

23 I will say that when we came into the case, we have
24 supplemented all of our productions, with possibly one
25 exception, so that they are organized by document requests.

1 So Psystar is now picking one of the two alternatives
2 under the rule. To the extent Apple has a complaint -- and
3 they haven't raised one yet, but to the extent they do, we will
4 correct the rest of our production to be responsive by document
5 request.

6 The delay may be evidence or not evidence of an
7 agreement, but we think we are entitled to get the documents
8 produced correctly, or to get an appropriate sanction for our
9 time in organizing those documents if there is in fact --

10 **THE COURT:** Both sides did it. Sounds like both
11 sides did it this way, so there was an agreement.

12 Isn't that evidence of an agreement, that it was
13 unobjected to for all this time? It's a course of conduct
14 unobjected to. That tends to show there was an agreement to do
15 it this way.

16 **MR. CAMARA:** It does, Your Honor. But there are
17 agreements in writing about a whole variety of other far less
18 important things than this.

19 For example, e-mail service is documented in writing.
20 The fact that things will appear in TIF files appears in
21 writing.

22 We have consulted prior counsel, and they've denied
23 that there is any such agreement.

24 We have no evidence of such an agreement. Apple has
25 produced no evidence of such an agreement.

1 And the burden on us of this deviation from the rules
2 and the local order and your supplemental order is massive
3 because of the volume of documents that Apple has produced and
4 the complete lack of structure to those documents.

5 Now, we have offered a variety of concessions. We
6 agreed not to seek the source information that's required by
7 the supplemental order, who the custodian was and how they
8 searched for the documents.

9 We requested in our briefing that they reproduce all
10 the documents sorted by document request. That would be very
11 burdensome. We would be willing to accept the folder structure
12 that shows us how these documents were kept in each individual
13 custodian's hands.

14 So we are doing our best to make this as minimally
15 burdensome for Apple as possible. But a giant array of
16 documents, one electronic file with a Bates label as its file
17 number per page is --

18 **THE COURT:** How hard would it be for you to give an
19 affidavit, Ms. Chung, that would say Bates numbers A through B
20 came from so and so's file; C through D came from somebody
21 else's file? How hard would it be for you to do that?

22 **MS. CHUNG:** Your Honor, we produced thousands of
23 pages and collected from many, many custodians. So at this
24 time, I cannot tell you how long that would take for us to
25 actually go back and correspond and correlate to this

1 information that you're seeking -- or Mr. Camara is seeking.

2 And I would like to correct one representation made
3 by Mr. Camara. He said he's not seeking a concession, the
4 source information. But that is not true.

5 He is absolutely seeking the source information
6 because he is seeking the file path and the folder structure
7 for every electronic document Apple has produced.

8 That is a tremendous amount of burden on Apple at
9 this time, when we are in the midst of expert discovery and
10 preparing for summary judgment stages, for us to do this at
11 this time.

12 **MR. CAMARA:** Your Honor, this is going to impose a
13 massive burden on one party or the other. There is no question
14 about that.

15 Either we do our best to reconstruct this and sort it
16 out by going through the documents manually, as we've done in
17 part and haven't finished, or Apple does it.

18 The question, I would think, is it's much easier for
19 Apple to do this than it is for us to do that.

20 **MS. CHUNG:** But, Your Honor, my point is that it was
21 Psystar's burden, if they had any objections, to raise it
22 during fact discovery with prior counsel, or even when
23 Mr. Camara joined as the representing counsel for Psystar.

24 And for them to ask now, even after fact discovery
25 deadline, is burdensome. And it's actually besides -- it's

1 beyond the time when they should have asked this information.

2 And he had the opportunity and the chance at every
3 deposition he took to ask questions about the documents, the
4 organization of the documents. And Mr. Camara and his
5 colleagues did not choose to do so.

6 So Apple should not be burdened, at this time, to do
7 the work for Psystar that they failed to do and they chose not
8 to do.

9 **MR. CAMARA:** We raised this issue on the tenth day
10 after the fact discovery, which is the deadline in Your
11 Honor's --

12 **THE COURT:** I know, but that's literally the last day
13 it could be raised. I went back to check.

14 **MR. CAMARA:** I agree, Your Honor.

15 **THE COURT:** This is the kind of thing that
16 responsible counsel would have raised on the first time they
17 got documents that didn't comply, so that going forward it
18 could be fixed.

19 And, instead, now you're trying to go back to
20 re-litigate issues that were raised for the first time -- which
21 should have been raised a long time ago.

22 **MR. CAMARA:** Your Honor, we certainly would have
23 preferred that these had been raised earlier.

24 When we came in the case we made a strategic decision
25 about what was most important. We decided preparing for those

1 depositions and taking those depositions -- which consumed many
2 of the business days in August, and for which a large part of
3 my team actually moved out to California -- was the priority at
4 that point. We don't think, though, that that strategic
5 decision excuses Apple's failure to comply with the rules.

6 We're not asking for a special concession because we
7 came into the case late. We're merely asking for the
8 information that the federal rules entitle us to. And we're
9 not even asking for all --

10 **THE COURT:** They did entitle you to that way back
11 then. But I don't think -- you just can't --

12 Ms. Chung, are you prepared to swear under oath, now,
13 as to this prior agreement?

14 **MS. CHUNG:** Yes, Your Honor.

15 **THE COURT:** Please take the witness stand.

16 The clerk will swear in Ms. Chung.

17 **THE CLERK:** Please raise your right hand.

18 (The oath was administered to Ms. Chung.)

19 **MS. CHUNG:** Yes.

20 **THE CLERK:** Please, be seated.

21 **THE COURT:** Ms. Chung, what's your name? What is
22 your name? Speak clearly into the microphone.

23 **MS. CHUNG:** Megan Chung.

24 **THE COURT:** Is that microphone on? I don't hear her.

25 **THE CLERK:** I thought it was.

1 **MS. CHUNG:** It's not on.

2 (Pause.)

3 **MS. CHUNG:** Megan Chung.

4 **THE COURT:** Thank you.

5 What is your connection to this case?

6 **MS. CHUNG:** I am counsel of record on behalf of
7 plaintiff and counter-defendant Apple Inc.

8 **THE COURT:** Describe briefly what the issue is that
9 you were telling us about before you went under oath.

10 **MS. CHUNG:** Psystar filed a motion in which it had
11 stated that Apple -- or it had requested that Apple provide
12 folder structure information and source information for all
13 documents that Apple had produced.

14 But Apple had an agreement, it's my belief, and I
15 participated on the call with Psystar's lead trial counsel,
16 Mr. Robert Yorio and Colby Springer, about an agreement that
17 the parties do not provide source information, including
18 metadata, in September of 2008, with follow-up communications
19 in the fall of 2008.

20 **THE COURT:** All right. You're saying in
21 September 2008, you personally were in a conversation with
22 opposing counsel; is that correct?

23 **MS. CHUNG:** Yes.

24 **THE COURT:** And was this in person or on the
25 telephone?

1 **MS. CHUNG:** We talked on the telephone to start our
2 26(f) conference.

3 **THE COURT:** And who else was present?

4 **MS. CHUNG:** Mr. Gilliland, James Gilliland, and
5 Mehrnaz Boroumand Smith, of Townsend, Townsend and Crew,
6 representing Apple Inc., participated on the conference call
7 with Mr. Robert Yorio and Mr. Colby Springer representing
8 Psystar Corporation.

9 **THE COURT:** All right. Specifically, what was said
10 by each side? Don't use conclusory language. What was said by
11 each side on this subject?

12 **MS. CHUNG:** At the time of the 26(f) conference in
13 September, we discussed specifically our document production
14 and Your Honor's supplemental standing order.

15 Ms. Boroumand Smith raised the issue of the
16 requirements in Judge Alsup's supplemental standing order with
17 respect to the privilege log and document production, and that
18 it would be burdensome for the parties to have to provide such
19 information at the time of the production and of the service of
20 the privilege log. Mr. -- I can't recall specifically if it
21 was Mr. Yorio or Mr. Springer who agreed.

22 And then it was followed up with specifically
23 conversation about metadata that -- and I believe that issue
24 was raised by, again, Ms. Boroumand Smith, and that we would be
25 also excluding the source information in the form of metadata,

1 with the possible -- no. So that we would be excluding the
2 source information of the metadata. And Mr. Springer agreed to
3 that.

4 And then Mr. Gilliland said with the exception of
5 possibility the Web site content, because Psystar may be
6 changing their Web site content and we may need to be able to
7 see the information with respect to the metadata on that
8 Web site content. To which Mr. Springer responded that they
9 would need to talk to Psystar about Web site information.

10 Following that conversation, I had a conversation
11 with Mr. Springer about Web site information. And then another
12 conversation, I believe, Ms. Boroumand Smith had with
13 Mr. Springer, where the issue of version control came up for
14 the source code, Psystar source code and the Web site
15 information. And we discovered that Psystar did not maintain
16 version control for the source code or for the Web site, so the
17 metadata issue with respect to the Web site became moot.

18 **THE COURT:** All right. Any questions, Mr. Camara?

19 **MR. CAMARA:** You mentioned that you reached an
20 agreement with Mr. Yorio and Mr. Springer about what is
21 required to be produced under Judge Alsup's standing
22 supplemental order in civil cases; is that right?

23 **MS. CHUNG:** Yes.

24 **MR. CAMARA:** Did you further discuss the scope of
25 Apple's obligations under the federal rules, setting aside the

1 special supplemental order?

2 **MS. CHUNG:** We discussed further that we would not be
3 providing/producing electronic documents in its native format.
4 That, instead, we would be -- the parties -- now, I don't
5 remember if we raised it or if Mr. Yorio raised the issue, but
6 that the counsel on the conference call in September agreed
7 that we would be producing the documents not in its native
8 format but, rather, in PDF and TIF electronic -- searchable
9 electronic format.

10 After that conversation, Psystar counsel -- I can't
11 remember if it was Mr. Springer or now Mr. Grewe who raised the
12 issue of producing a hard copy.

13 **MR. CAMARA:** And, in fact, that agreement was reduced
14 to writing about not producing in native format, right?

15 **MS. CHUNG:** Actually, I cannot recall that. I
16 don't -- I don't remember seeing that.

17 **MR. CAMARA:** Okay. So you mentioned one part of the
18 federal rules you discussed, which is whether you would produce
19 in native format.

20 Did you discuss in any other way Apple's obligations
21 under the federal rules, setting aside, again, the supplemental
22 order?

23 **MS. CHUNG:** We never discussed about Apple's
24 obligations.

25 **MR. CAMARA:** Your Honor, that's our point. Our point

1 is that even setting aside --

2 **THE COURT:** Have you finished your examination?

3 **MR. CAMARA:** Why did you not reduce the agreement you
4 entered into about the supplemental order to writing?

5 **MS. CHUNG:** I'm sorry?

6 **MR. CAMARA:** You testified that you didn't reduce the
7 agreement you reached with Mr. Springer and Mr. Yorio in
8 September of 2008, to writing.

9 You didn't reduce it to writing; is that right?

10 **MS. CHUNG:** I thought either myself or Ms. Boroumand
11 Smith had reduced it to writing to opposing counsel. But when
12 we searched, since you filed your motion, we could not find it.

13 **MR. CAMARA:** And is it customary at Townsend to
14 reduce agreements with opposing counsel to writing?

15 **MS. CHUNG:** Normally, when we have good relationship
16 with opposing counsel, it is not my practice to reduce it in
17 writing.

18 **MR. CAMARA:** So an agreement like this, about the
19 form of all of Apple's discovery, you would not have sent a
20 confirming e-mail to opposing counsel? That is not Townsend's
21 practice?

22 **MS. CHUNG:** I can't speak for Townsend practice
23 because we don't necessarily have a policy on that.

24 **MR. CAMARA:** And it's not your practice to send a
25 confirming --

1 **MS. CHUNG:** My practice is not -- I -- my practice
2 is, generally, to reduce in writing only if I feel it will
3 become an issue and when all the issues have been met and
4 conferred with opposing counsel and decided.

5 **MR. CAMARA:** If you had reduced other issues to
6 writing in this case -- for example, if I told you there were
7 writings that evidence your agreement about not providing
8 native format files, would you then be surprised that you
9 didn't reduce this other agreement to writing?

10 **MS. CHUNG:** No.

11 **MR. CAMARA:** You said you only reduce things to
12 writing when you have an adversarial relationship with opposing
13 counsel; is that right?

14 **MS. CHUNG:** I do not reduce to writing if I have a
15 good relationship with opposing counsel.

16 **MR. CAMARA:** Do you have a good relationship with
17 Carr & Ferrell?

18 **MS. CHUNG:** At the time of the 26 conference and in
19 2008, yes, we were able to reach many agreements.

20 **MR. CAMARA:** Would it surprise you, then, that you
21 reduced to writing all kinds of agreements with Carr & Ferrell,
22 including agreements about e-mail service, about the production
23 of documents in native format, and about a host of other
24 topics?

25 **MS. CHUNG:** I don't believe I reduced to writing

1 those topics.

2 **MR. CAMARA:** Are you aware of whether or not other
3 members of the Townsend, Townsend and Crew team present here
4 habitually reduced agreements to writing?

5 **MS. CHUNG:** Well, I don't know about "habitually,"
6 but I do know that they have reduced to writing some agreements
7 with Carr & Ferrell.

8 **MR. CAMARA:** Have you seen Ms. Smith reducing
9 agreements to writing?

10 **MS. CHUNG:** I have seen her reduce -- put in writing
11 the agreements with Carr & Ferrell, especially this year, in
12 2009.

13 **THE COURT:** How much more do you have?

14 **MR. CAMARA:** That's it, Your Honor.

15 **THE COURT:** All right. Thank you.

16 Ms. Chung, you can step down.

17 Here's the answer. I don't know whether there was an
18 agreement or not. It's too hard to tell. I think Ms. Chung is
19 acting in good faith in thinking there was an agreement, but
20 maybe the other side didn't know.

21 Here's the main point. This whole -- I'm not going
22 to rule on that. This should have been raised a long time ago,
23 if it was a problem. Now you're raising it way after the fact,
24 and it's too late to reorganize things.

25 I'm sympathetic to your issue, so here's what we're

1 going to do. Write this down. Each side, by Tuesday at noon,
2 can send a letter to the other side and identify up to 50
3 pages, and say, "Tell me where these 50 pages came from." And
4 then the other side has got to respond by Friday of next week,
5 say, "Here's the file that it came from."

6 For example, you would want to say Mr. Vidrine's desk
7 file hard copy. That would be adequate. Or Vidrine's computer
8 e-mails.

9 So each of you can pick out the 50 you're most
10 interested in knowing about, and serve it on the other side.
11 And you'll learn where the sources were for those 50.

12 But beyond that, we are not going to go back and redo
13 it for all the other documents in the case, most of which don't
14 matter anyway. And so you pick out the 50 that you care about.
15 50 individual pages.

16 Now, if it happens to be a 30-page document, you can
17 pick out the first page. And then the other 30, presumably,
18 came from the same source. So you can do that.

19 But you can't then object on the ground, oh, they've
20 used up 30 pages because it was a 30-page document. No.
21 That's one page. In a way, this is like 50 different documents
22 or 50 different pages.

23 You need Bates number. Each of you used unique Bates
24 numbers, right?

25 **MR. CAMARA:** Yes, Your Honor.

1 **MS. CHUNG:** Yes.

2 **THE COURT:** Give them a list of the 50 Bates numbers
3 you are interested in. And the other side has got to respond.
4 Say the name of the person. Was it a hard copy? Was it a desk
5 file? What was the name of the file, if it was a desk file?

6 For example, if the name of the desk file said, "Ways
7 to suppress competition," then you would say, "Vidrine's file
8 on ways to suppress competition."

9 **MS. CHUNG:** Yes, Your Honor.

10 **MR. CAMARA:** Your Honor, might we also ask for a
11 small award of fees for the bringing of this motion?

12 **THE COURT:** No.

13 **MR. CAMARA:** Thank you, Your Honor.

14 **THE COURT:** Because you are lucky to get this. And
15 both sides are going to get it. You are going to have to
16 respond, too.

17 This motion should have been brought a long time ago.
18 The fact that it wasn't does tend to indicate there was an
19 agreement. Then new counsel came in and decided to go a
20 different way.

21 So I'm not ruling that there was or was not an
22 agreement. I'm just saying for the sake of making this an
23 easier case for both of you to try and get organized, it would
24 be useful for you to have that information.

25 Okay. So what else do I need to decide today?

1 **MR. CAMARA:** I believe the plaintiffs have requested
2 a status conference about the Florida matter. We have no other
3 discovery disputes.

4 **THE COURT:** All right. What's the deal on -- what do
5 you want, Ms. Chung, on the Florida matter?

6 **MS. CHUNG:** Actually, Mr. Gilliland will be speaking
7 on that matter.

8 **THE COURT:** All right.

9 **MS. CHUNG:** Thank you, Your Honor.

10 **MR. GILLILAND:** Good morning, Your Honor.

11 **THE COURT:** Good morning.

12 **MR. GILLILAND:** First, I want to thank you for
13 carving the time out of your schedule to meet with us today.

14 The reason that Apple asked for this status
15 conference is because of the filing last week of a complaint in
16 the Southern District of Florida, in which Psystar basically
17 mimics the allegations and claims that are pending here and
18 which will be resolved, we believe, at trial in January. So in
19 the interest of efficiency and not asking the courts to do
20 duplicative labor, we wanted to talk with Your Honor about how
21 to now proceed.

22 Basically, the case filed in Florida, which we have
23 submitted to the Court, asked for declaratory relief that
24 Psystar does not infringe Apple's copyrights by loading its
25 Apple software onto Psystar computers; that Psystar does not

1 violate the Digital Millennium Copyright Act by circumventing a
2 technological protection measure. And those issues, as the
3 Court well knows, are precisely the ones set forth in this
4 lawsuit.

5 Psystar, also in Florida, reasserts the antitrust
6 causes of action that this Court already considered and
7 dismissed in November of 2008.

8 So the question presented, of course, is: Why did
9 they do that? What's the basis for arguing that there should
10 be a separate lawsuit in Florida?

11 And Psystar's justification, which we think is
12 groundless, is that the Florida action involves Version 10.6 of
13 Apple's operating system, called a Snow Leopard. And as
14 represented to the Court in Florida, this lawsuit in California
15 only involves Version 10.5, which is called "Leopard."

16 **THE COURT:** Is called what?

17 **MR. GILLILAND:** Leopard.

18 **THE COURT:** Leper --

19 **MR. GILLILAND:** L-e-o-p-a-r-d.

20 **THE COURT:** Leopard.

21 **MR. GILLILAND:** Leopard.

22 **THE COURT:** The other one was Snow Leopard, but this
23 is Leopard?

24 **MR. GILLILAND:** That's correct. One has spots and
25 the other is white or something.

1 **MR. CAMARA:** They both have spots.

2 **MR. GILLILAND:** But the representation, Your Honor,
3 that this lawsuit only involves Leopard, or Version 10.5, is
4 wrong. That's not what our allegations say. And those are not
5 the only issues that will be resolved by this Court.

6 If you will indulge me for a moment, I will show you
7 references to our complaint.

8 **THE COURT:** All right.

9 **MR. GILLILAND:** These are quotes from the amended
10 complaint.

11 Paragraph 15 says that in October, 2008, Psystar
12 announced it was going to sell new products with a new
13 unauthorized version of Mac OS X operating system. That's not
14 limited to Version 10.5 or Version 10.6. It's Mac OS X.

15 In Paragraph 24 we allege that Apple never authorized
16 Psystar to install any of Mac OS, Mac operating system. Again,
17 not limited to Version 10.

18 With respect to the copyright infringement actions,
19 we do specifically reference this is Leopard, but we also
20 allege that they have infringed our copyright in Mac OS X and
21 the Mac operating system.

22 And in the Digital Millennium Copyright Act
23 allegations, paragraph 46, we allege that Psystar admits that
24 Mac OS X, again without limitation on the version, normally
25 will not run on non-Apple-labeled computers. But Psystar has

1 come up with technology to allow it to run on Psystar
2 computers.

3 In certain respects, Your Honor, it's as though there
4 were an infringement action pending in this court in which a
5 publisher, such as the Rudder Group, alleged infringement of
6 the copyright on the treatise *Federal Civil Procedure Before*
7 *Trial* by Judges Schwarzer and Taschima, and then 3,000 miles
8 away the infringer filed an action saying, "We want declaratory
9 relief that we do not infringe the copyright on the 2009
10 update."

11 Version 10.6, Snow Leopard, is written on top of
12 Version 10.5. You can't run Snow Leopard without having
13 Leopard. And the copyrights to Mac OS X cover the subsequent
14 versions, as well.

15 **THE COURT:** I understand the background. But this is
16 not a motion. This is just a status conference.

17 **MR. GILLILAND:** Yes.

18 **THE COURT:** So what is your point? Why did you want
19 a status conference?

20 **MR. GILLILAND:** First of all, to alert the Court to
21 this issue. And, secondly, to request a couple of
22 possibilities.

23 One is that we reopen discovery for 30 days, so that
24 Apple can get the source code for, apparently, Psystar's new
25 product, and we take a step back.

1 This relates to what Ms. Chung said earlier. On
2 Friday of last week, seven days ago, Psystar announced that it
3 was selling a computer that runs with Snow Leopard. We have
4 not seen the source code for that technology, but we believe
5 that it is subsumed within the allegations in our complaint.

6 Consequently, we suggest as follows: That the
7 parties -- that the Court allow discovery for another 30 days;
8 that Psystar turn over the source code for its new product;
9 that we be allowed to ask Mr. Pedraza what he did; and Apple
10 will make Mr. Vidrine available to testify about any changes in
11 the technological protection measure, so that those issues can
12 be finally resolved at the trial in January.

13 Beyond that, we will, of course, make a motion either
14 in this court to stay the proceedings in Florida, or in the
15 Florida court to transfer them here, or both.

16 But in the short run, in order to make this as
17 efficient as possible, our request is that the Court allow us
18 to take the small amount of discovery specifically related to
19 the newest product, released seven days ago. And, in exchange,
20 we will offer to make Mr. Vidrine available for anything that
21 relates to the changes as between Leopard and Snow Leopard.

22 **THE COURT:** Mr. Camara, what do you say?

23 **MR. CAMARA:** Your Honor, the difference between the
24 Florida case and this case is that Florida relates to Snow
25 Leopard, this to Leopard. And that changes the evidence that

1 is at issue in both cases.

2 The technological protection mechanism that Apple
3 uses in Snow Leopard is different from the mechanism that it
4 uses in Leopard, which means the evidence for the circumvention
5 claims, the DMCA claims and the copyright infringement claims
6 will be different in Florida than here.

7 And the technique that Psystar uses to cause Snow
8 Leopard to run on non-Apple hardware is completely different in
9 Snow Leopard than in Leopard. So, again, the evidence is
10 completely different.

11 And if we look at the manner in which the parties --
12 or more specifically Apple has conducted discovery so far, we
13 see that they have carved out at every occasion Snow Leopard
14 from this case.

15 And here I'm going to describe deposition testimony.
16 I don't know if you want to somehow move to close this to the
17 world, but I'm going to talk about AEO testimony, if you want
18 to do anything.

19 **MS. CHUNG:** Yes.

20 **MS. SMITH:** Yes.

21 **MR. GILLILAND:** Apparently, Your Honor, we are going
22 to talk about the specifics of the technological protection
23 measure; and, therefore, we would request the courtroom be
24 disclosed.

25 **THE COURT:** These people in the audience here, are

1 they members of the public, or what?

2 **UNIDENTIFIED SPEAKER:** Public San Francisco resident.
3 Non-reporter.

4 **THE COURT:** Well, I don't like to close the
5 courtroom.

6 Give me a general statement. Why would you be
7 getting into this?

8 **MR. CAMARA:** I just want to quote portions of
9 deposition transcripts which are designated "Attorneys' Eyes
10 Only." Not for any technical details, but merely to show that
11 Apple has continually objected to all testimony about Snow
12 Leopard.

13 **THE COURT:** Well, is that part true, that Apple
14 objected to testimony on Snow Leopard?

15 **MR. GILLILAND:** No, Your Honor.

16 In fact, I have deposition testimony about Snow
17 Leopard that I can hand you.

18 **MR. CAMARA:** And I can quote deposition objections
19 from Ms. Smith, if you would like.

20 **THE COURT:** Well, I can't resolve this part today, no
21 matter what you quote.

22 So, all right. I understand. I'm not ruling against
23 you or for you on this point, Mr. Camara. I want to understand
24 your full argument.

25 **MR. CAMARA:** Sure. So this case, we think the

1 discovery has been fully completed with respect to Leopard,
2 with respect to whether Psystar's business practices throughout
3 its inception until the time it switched from Leopard to Snow
4 Leopard are legal or not. That discovery as been conducted.
5 Fact discovery is closed. We are now in expert discovery. And
6 we have a schedule that will work for both sides to
7 expeditiously resolve the legality of Psystar's business up
8 until Snow Leopard, by trial in January.

9 We don't want to upset that by going into all new
10 fact discovery about the manner in which Psystar circumvents or
11 does not circumvent Snow Leopard, and about the nature of the
12 technological protection measures that Apple uses in Snow
13 Leopard.

14 If Apple had wanted to raise those claims, it could
15 have done so by expressly supplementing to include Snow Leopard
16 when it came out. It could have done so, again, by --

17 **THE COURT:** Help me understand. When did Snow
18 Leopard 10.6 come out?

19 **MR. CAMARA:** I believe it was August 28th, which
20 is --

21 **THE COURT:** Of this year?

22 **MR. CAMARA:** Of this year.

23 **THE COURT:** August 28th.

24 **MR. CAMARA:** Which is after the close of fact
25 discovery in this case.

1 **THE COURT:** And when did your company make this
2 announcement about your product?

3 **MR. CAMARA:** It was last week. I don't remember
4 precisely which day last week.

5 **THE COURT:** And just tell me, what did your
6 announcement say?

7 **MR. CAMARA:** We announced we are offering for sale
8 computers running Snow Leopard.

9 **THE COURT:** Okay.

10 **MR. CAMARA:** So we would propose to have those issues
11 be litigated in the Florida court.

12 The Florida court, of course, will be free to give
13 any preclusive effect that is appropriate to the decision of
14 this court in January.

15 So to the extent the issues are the same -- we think
16 they are not the same, but to the extent they are the same,
17 Mr. Gilliland will be able to make preclusion motions in the
18 federal court in Florida.

19 Meanwhile, we will get an expeditious ruling from the
20 jury, and from this Court on summary judgment, about the legal
21 issues involved in Psystar's business from its inception until
22 a week ago, which is what discovery has been about in this case
23 to this point.

24 **THE COURT:** Mr. Gilliland, what do you now say in
25 response?

1 **MR. GILLILAND:** That nothing could possibly be more
2 inefficient than what Mr. Camara has just proposed.

3 This Court has studied these issues deeply. We have
4 a trial coming up in January. It involves all the
5 technological protection measures in Leopard.

6 And if there are any modest changes in Snow Leopard,
7 let's just find out what they are right now, and include them
8 in the trial in January.

9 Why in the world would we start all over again with a
10 whole new court 3,000 miles away, when this court and the
11 parties are primed and ready to go?

12 **MR. CAMARA:** Your Honor, the change -- the new
13 discovery that would have to be taken is not trivial.

14 For example, Mr. Vidrine, who the Court has already
15 ordered will not be able to testify, is the person who is
16 charged with designing the new technological protection
17 measures for Snow Leopard.

18 If Apple thought Snow Leopard was covered by this
19 case, they should have disclosed Mr. Vidrine. He is the guy
20 who designed the protection measures. We would have to take
21 his deposition.

22 **THE COURT:** Well, I understand that. Possibly -- I'm
23 not saying it would be, but possibly this new development which
24 just occurred would constitute, quote, substantial
25 justification for a revised disclosure, even at this late date,

1 and to add Mr. Vidrine. And then he would be made available
2 and so forth.

3 Look, here is the answer to this. The answer is:
4 You've got to bring a motion.

5 Right now I'm not going to open discovery. We have a
6 trial. But if you want to bring a formal motion to -- there's
7 no way we could have a trial in January if we do what you want
8 to do, because you then are thinking, "Oh, that judge has
9 nothing to do but work on my case."

10 That's not true. I've got 400 cases. And you would
11 then be taking a month of my time away to work on summary
12 judgment, and so forth, and expect me to get this case ready
13 for trial by January.

14 If you want to give up your trial date in January and
15 say, "Okay, let's litigate the issue of Snow Leopard and 10.6
16 and the new product by the defendant," the Court would consider
17 that.

18 I can see relevance, of course, to the -- I'd also be
19 concerned, if it is true -- I don't know that it's true that
20 there's been stonewalling by Apple on the issue of Snow
21 Leopard, so that it would be unfair to allow you to enlarge the
22 pleadings. I'm not saying it has been stonewalling, but that's
23 what you want to show me.

24 And so you can make that submission. And then the
25 Court would have to decide whether to enlarge the discovery

1 period and redo the trial schedule.

2 So I'm not ruling yes or no. This is too
3 complicated, too many nuances for me to give you an answer off
4 the top of my head. I think this has got to be briefed.

5 In the meantime, if the Court in Florida is going to
6 have to make a ruling on whether to go forward with that case
7 or transfer it, or whatever -- and I will say for the record
8 I'm happy for that case to be transferred here. I'm not
9 resisting that. I'm not inviting it, either. I'm just saying
10 it would be a plausible thing for the judge there to say the
11 case ought to be transferred here.

12 Or maybe it will be an MDL, In Re Snow Leopard. In
13 Re Snow Leopard litigation. I can just see that now. Maybe it
14 will go to Florida because then I won't have to do any more
15 work on this case.

16 Look, that's the best I can do for you. You're going
17 to have to bring a formal motion. But, in the meantime, the
18 case schedule stands.

19 **MR. GILLILAND:** Do you mind if we bring that motion
20 on less than 35 days notice, Your Honor?

21 **THE COURT:** I think you should. So your opening
22 motion, when can you do it?

23 **MR. GILLILAND:** One week from today, Your Honor --
24 yes, we can do it Friday of next week.

25 **THE COURT:** All right. That's going to be the 11th.

1 Then I will give one week for the reply, on the 18th. Then
2 any -- I'm sorry, for the opposition, is what I meant to say.
3 The reply will be the 21st.

4 That means that you will be working over the weekend.

5 **MR. GILLILAND:** That won't be the first time we've
6 done that in this case. Right, Mr. Camara?

7 **MR. CAMARA:** Not surprised.

8 **THE COURT:** I am surprised to hear that.

9 All right. 9/24 will be the argument, at 8:00 a.m.

10 **MR. GILLILAND:** Thank you very much, Your Honor.

11 **THE COURT:** That's about 20 days, instead of 35.

12 **MR. GILLILAND:** Appreciate that.

13 **MR. CAMARA:** Thank you, Your Honor.

14 There is one more outstanding issue, which is that
15 motion with supplemental briefing that was done last week,
16 about compelling testimony on damages, I don't know if the
17 Court --

18 **THE COURT:** That's still pending. What about it?

19 **MR. CAMARA:** I don't know if the Court wanted to take
20 any further argument on that.

21 **THE COURT:** I don't want any more argument. I
22 understand that issue. I think we now have everything we're
23 supposed to have on that. Don't we?

24 **MR. GILLILAND:** Yes, Your Honor.

25 **MR. CAMARA:** Yes, Your Honor.

