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 APPLE INC.

9  
 10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION

13 APPLE INC., a California corporation,

14 Plaintiff,

15 v.

16 PSYSTAR CORPORATION,

17 Defendant.

Case No. CV 08-03251 WHA

**APPLE INC.'S REQUEST FOR  
 JUDICIAL NOTICE IN SUPPORT OF  
 APPLE INC.'S MOTION TO DISMISS  
 PSYSTAR'S COUNTERCLAIMS**

Date: November 6, 2008  
 Time: 8:00 a.m.  
 Courtroom: 9, 19th Floor  
 Honorable William Alsup

19 PSYSTAR CORPORATION,

20 Counterclaimant,

21 v.

22 APPLE INC., a California corporation,

23 Counterdefendant.  
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1 Apple Inc. (“Apple”) hereby respectfully requests that pursuant to Rule 201 of the Federal  
2 Rules of Evidence, the Court take judicial notice of the materials set forth below in its determination  
3 of Apple’s Motion to Dismiss Psystar Corporation’s (“Psystar”) Counterclaims:

- 4 1. “Get a Mac campaign” television/video advertisements incorporated by reference and  
5 relied upon in Psystar’s Counterclaims (¶¶ 34-35, 42). A true and correct copy of the  
6 text of the advertisements in the “Get a Mac” television/video campaign is attached  
7 hereto as Exhibit A. Additionally, for reference purposes and convenience of the  
8 Court, a true and correct copy of selected videos of ads from the “Get a Mac”  
9 television/video campaign is attached hereto in CD format as Exhibit B. Exhibit B is  
10 being filed and served manually with the Court because of its format together with a  
11 manual filing notification.
- 12 2. *Press Release: Google, Apple and Symantec’s Customers are the Most Loyal,*  
13 *Satmetrix, July 11, 2006, available at*  
14 [http://www.satmetrix.com/news/pressrelease\\_2006-07-11.htm](http://www.satmetrix.com/news/pressrelease_2006-07-11.htm), incorporated by  
15 reference and relied upon in Psystar’s Counterclaims (¶ 38). A true and correct copy of  
16 this press release is attached hereto as Exhibit C.
- 17 3. John Markoff, *As Apple Gains PC Market Share, Jobs Talks of a Decade of Upgrades,*  
18 *N.Y. TIMES, October 22, 2007, reporting Apple’s domestic market share in the personal*  
19 *computer market was 8.1% in the third quarter of 2007. A true and correct copy of this*  
20 *article is attached hereto as Exhibit D.*
- 21 4. John Markoff, *Apple Riding A 51% Jump In Mac Sales, N.Y. TIMES, April 24, 2008,*  
22 *reporting Apple’s domestic market share in the personal computer market was 6% in*  
23 *the first quarter of 2008. A true and correct copy of this article is attached hereto as*  
24 *Exhibit E.*
- 25 5. Nick Wingfield, *Microsoft Kicks Off Seinfeld Campaign, WALL ST. J. / WSJ.COM,*  
26 *September 5, 2008, reporting Apple’s market share in the personal computer market in*  
27 *the second quarter of 2008 was 7.8%. A true and correct copy of this article is attached*  
28 *hereto as Exhibit F.*

1 **I. THE COURT MAY TAKE JUDICIAL NOTICE OF DOCUMENTS INCORPORATED**  
 2 **BY REFERENCE IN THE PLEADING (CATEGORIES 1-2)**

3 Where a document is incorporated by reference in a complaint, but is not physically attached,  
 4 the entire document may be considered by the court if it is central to the claim and no party questions  
 5 its authenticity. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *In re Silicon Graphics Inc.*  
 6 *Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999) (“[the incorporation by reference doctrine]  
 7 permits a district court to consider documents ‘whose contents are alleged in a complaint and whose  
 8 authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading,’”  
 9 quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)); *In re CNET Networks, Inc.*, 483 F.  
 10 Supp. 2d 947, 953-954 (N.D. Cal. 2007) (“documents referenced in [] complaint ... are the proper  
 11 subjects of judicial notice”); *In re Cornerstone Propane Partners, L.P.*, 355 F. Supp. 2d 1069, 1076-  
 12 1077 (N.D. Cal. 2005).

13 Categories 1-2 above seek judicial notice of documents and information referenced in Psystar’s  
 14 counterclaims and are central to the claims asserted by Psystar. True and correct copies of the  
 15 documents and information are attached (or submitted manually in the case of Exhibit B) for the  
 16 Court’s review and judicial notice.

17 **II. THE COURT MAY TAKE JUDICIAL NOTICE OF NEWS ARTICLES REPORTING**  
 18 **FACTS GENERALLY KNOWN (CATEGORIES 3-5)**

19 Courts may take judicial notice of newspaper articles demonstrating that certain facts are  
 20 generally known. *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 291-292 (D.C. Cir. 1991)  
 21 (holding that under Rule 201, facts were generally known as a result of news articles). Moreover,  
 22 because numerous market studies cited in news articles have reported Apple’s general market share  
 23 figures, Apple’s market share in personal computer market is capable of accurate and ready  
 24 determination by resort to sources whose accuracy cannot be reasonably questioned. *See Fed. R.*  
 25 *Evid. 201; Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-459 (9th Cir. 1995) (district court did not  
 26 abuse its discretion by taking judicial notice of facts generally known and reported in newspaper  
 27 articles or “capable of accurate and ready determination by resort to sources whose accuracy cannot  
 28 reasonably be questioned”); *County of Santa Clara v. Astra USA, Inc.*, 2006 WL 1344572, 2 (N.D.

1 Cal. 2006) (finding that “[j]udicial notice of news articles from *The Wall Street Journal* and the  
2 *Associated Press* is proper when the matter of which “notice is taken is ‘capable of accurate and ready  
3 determination by resort to sources whose accuracy cannot reasonably be questioned.’”); *Plevy v.*  
4 *Haggerty*, 38 F. Supp. 2d 816, 820-821 (C.D. Cal. 1998) (taking judicial notice of press releases and  
5 news articles where the contents of the press releases and news articles were “capable of accurate and  
6 ready determination by resort to sources whose accuracy cannot reasonably be questioned”).

7 Categories 3-5 above seek judicial notice of news articles from *The New York Times* and *The*  
8 *Wall Street Journal* generally discussing Apple’s market share in the personal computer market.  
9 Apple’s market share is capable of accurate and ready determination and has been reported in  
10 numerous news articles. True and correct copies of two articles found in *The New York Times* and one  
11 article found in *The Wall Street Journal* are attached for the Court’s review and judicial notice.

12  
13 DATED: September 30, 2008

Respectfully submitted,

14 TOWNSEND AND TOWNSEND AND CREW LLP

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16 By: /s/ James G. Gilliland, Jr.  
17 JAMES G. GILLILAND, JR.  
18 Attorneys for Plaintiff  
APPLE INC.

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