

Pages 1 - 20

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

APPLE, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 08-3251 WHA
)	
PSYSTAR CORPORATION,)	
)	San Francisco, California
Defendant.)	Thursday
)	September 24, 2009
)	8:00 a.m.

TRANSCRIPT OF PROCEEDINGS**APPEARANCES:**

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Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR*Official Reporter - US District Court**Computerized Transcription By Eclipse*

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P R O C E E D I N G S

1
2 **SEPTEMBER 24, 2009**

9:11 a.m.

3
4 **THE COURT:** All right. Let's hear the other case.

5 **THE CLERK:** Civil 08-3251, Apple versus Psystar.

6 Counsel, can you please state your appearances for
7 the record?

8 **MR. GILLILAND:** Good morning, your Honor. Jim
9 Gilliland Mehrnaz Boroumand Smith from Townsend, Townsend and
10 Crew for plaintiff Apple.

11 **MR. CAMARA:** Good morning, your Honor. Kiwi Camara
12 and Kent Radford from Camara and Sibley for Psystar
13 Corporation.

14 **THE COURT:** Mr. Gilliland, this is your motion.
15 Please, go head.

16 **MR. GILLILAND:** Thank you, your Honor.

17 This is Apple's motion to reopen discovery for a
18 short time for a limited purpose and to dismiss or stay the
19 parallel lawsuit that's been filed in Florida by Psystar
20 against Apple.

21 As the Court knows from our status conference on
22 September 4th, this issue has arisen because after the close
23 of discovery in the --

24 **THE COURT:** Well, wait a minute. Be fair. You
25 stonewalled the entire time on this Snow Leopard. They asked

1 you for the evidence, you refused to give it to them. You
2 ruled it out of the case.

3 Then after discovery closed, you chose -- not them,
4 you chose -- to release Snow Leopard. Then they sued.

5 So you make it sound like something happened after
6 the close of discovery and it's all their fault. It's your
7 fault. You could have kept that in the case and did not.
8 That's your big problem.

9 Now, I'm being honest with you. I know the record
10 in this case. You have -- you, and that other case we had
11 here, you have taken it upon yourself to decide when you are
12 going to give the other side discovery.

13 You didn't want to give them lost profit
14 information. We had to litigate that like crazy. Finally,
15 it took me hours to get through it. I got through it. You
16 won that one. Though if it turns out it's relevant in some
17 way, the jury is going to be told that it's adverse to you
18 because you stonewalled on that.

19 Now you have stonewalled on Snow Leopard.
20 Throughout. They wanted the information. You said no. You
21 ruled it out of the case.

22 Now you want to bring it back into the case because
23 they used it against to bring that lawsuit in Florida.

24 I don't see much equity on your side. That's what
25 I'm feeling right now. I want to give you a fair chance to

1 talk me out of it.

2 **MR. GILLILAND:** Thank you, your Honor. I
3 appreciate that.

4 I would ask the Court when you have a moment to
5 take a look at the declaration of Mehrnaz Boroumand Smith and
6 the attachments to it, specifically Exhibits 6, 7, 8, 9, 10
7 and 11.

8 **THE COURT:** Just a moment. Whose deposition?

9 **MR. GILLILAND:** Mehrnaz Boroumand Smith. It was
10 submitted in support of Apple's motion.

11 **THE COURT:** I have so many papers here. I'm going
12 to hand it down to you. Motions to strike. I've got motions
13 to dismiss. I have so many pieces of paper here. You find
14 it for me in all this material.

15 You lawyers need to learn that you have got to
16 present short, simple, sweet things for the poor judge.
17 Otherwise, how am I supposed to keep all of this straight?

18 (Brief pause.)

19 **THE COURT:** I read their document request and they
20 asked you for this stuff. I don't see how you can get out of
21 the fact that they asked you for it and you -- and you said
22 no.

23 Are you denying that? Are you denying it,
24 Mr. Gilliland? Please answer my question.

25 **MR. GILLILAND:** I will.

1 Your Honor, the original document requests defined
2 the term "Mac OS" and we objected to it as overbroad because
3 it included, as so defined, everything that went back to the
4 beginning of the Mac --

5 **THE COURT:** They asked for Snow Leopard several
6 times. And I read the deposition, the Q & A where they said,
7 "You are asking for Snow Leopard. That's not out yet. We
8 are not giving you that."

9 **MR. GILLILAND:** So those are the deposition
10 excerpts that I have referred to you in the Boroumand Smith
11 declaration, your Honor.

12 And, yes, we objected on the grounds of relevance,
13 but we did not -- but the witnesses went ahead and answered
14 all the questions. And we objected --

15 **THE COURT:** Not the one I saw.

16 **MR. GILLILAND:** Well, that's why I'm -- there were
17 six witnesses who were asked about Snow Leopard, your Honor,
18 and every single one of them testified in response, answered
19 the questions that were put to them regarding Snow Leopard.
20 And those are the exhibits I just referred your Honor to.

21 **THE COURT:** Let me find what it was that they said
22 that I read earlier and see if I somehow -- all right. Here
23 is one. Let's see. Someone named -- I don't know whose
24 deposition this. I see Boroumand Smith, but that's not the
25 witness.

1 There is an objection:

2 "To the extent this calls for information
3 regarding Snow Leopard, that hasn't been
4 released."

5 **MR. GILLILAND:** Probably, your Honor, you are
6 looking at the deposition of Simon Patience.

7 And, yes, Miss Smith did say that in the
8 deposition. However, Mr. Patience was then -- then went
9 ahead and answered the questions.

10 **THE COURT:** Well, the witness just said Snow
11 Leopard isn't released yet.

12 **MR. GILLILAND:** But then there were further
13 questions, your Honor. They have quoted to you that portion,
14 but not continued.

15 Indeed, if you look at Psystar's opposition brief
16 to our motion, on page eight they testify that Mr. Patience,
17 Simon Patience -- they write:

18 "Simon Patience testified about this at
19 length in his deposition."

20 And by "this" they are talking about how the
21 technological protection measures in Snow Leopard were
22 changed.

23 So they say that he -- Mr. Patience testified about
24 this at length. We did not stop any of the discovery on
25 this.

1 **THE COURT:** Why was the objection made then?

2 **MR. GILLILAND:** Well, that's a different question.
3 I'm sure your Honor might say there is no such thing as a
4 relevance objection in a deposition. But be that as it may,
5 we -- we objected for the record, but then allowed the
6 discovery to proceed.

7 And as you will see in each of the deposition
8 excerpts of all the other witnesses, they all answer
9 questions regarding Snow Leopard.

10 **THE COURT:** So you are telling me there was never a
11 single question that was refused based upon the fact that it
12 hadn't been released yet?

13 **MR. GILLILAND:** That's correct, your Honor.

14 **THE COURT:** All right. Now, Mr. Camara? Let me
15 just get to the bottom of this.

16 **MR. GILLILAND:** That's fine, your Honor, of course.

17 **THE COURT:** All right. You misled me if that's
18 true. Show me a question that was not answered on account of
19 this objection.

20 **MR. CAMARA:** I didn't mean to mislead you, your
21 Honor. What I meant to quote, and I think the brief reflects
22 what I meant, was that they repeatedly objected to Snow
23 Leopard questions on grounds of relevance.

24 **THE COURT:** Where did the witness refuse -- where
25 did they refuse -- first on depositions. Where did they

1 refuse to allow a witness to answer based upon that
2 objection?

3 **MR. CAMARA:** They never instructed a witness not to
4 answer in the depositions.

5 **THE COURT:** So what's the problem then?

6 **MR. CAMARA:** Well, throughout their depositions
7 they maintained that Snow Leopard was not part of this case.
8 We are not contesting that. We don't say that they
9 should have answered Snow Leopard questions. We agree that
10 Snow Leopard was not part of this case. That's why we didn't
11 press them. That's why we didn't move to compel. Instead we
12 took a different option. We sued them over Snow Leopard in a
13 different case.

14 We don't think the objections were improper. We
15 think they were correct.

16 **THE COURT:** Where on documents, where did they
17 refuse to give you documents on account of Snow Leopard not
18 being a product?

19 **MR. CAMARA:** Throughout the written discovery, but
20 if you look in particular at Apple's responses to
21 interrogatory, we asked an interrogatory that referred to a
22 Mac OS -- and this is on pages four and five our response
23 brief. The definition of Mac OS that we used said:

24 "All versions of Mac OS, including
25 without limitation Mac OS X, Mac OS 9 and Mac

1 OS 8."

2 And Snow Leopard is Mac OS 10.6. So that's
3 included in that definition. It's also included within the
4 phrase "all versions."

5 Apple objected to that definition and refused to
6 answer on the basis of their objection.

7 Apple objected.

8 "Apple objects generally to the
9 definition of Mac OS license agreement
10 because it seeks information regarding all
11 license agreements covering all versions of
12 Apple's operating system that have ever
13 existed, regardless of whether each license
14 agreement as defined is at issue in this
15 action."

16 Then Apple stated how it would construe the
17 request. Apple went on:

18 "Apple will construe each request
19 referring to a Mac OS license agreement as
20 referring to the software license agreement
21 for a Mac OS X Leopard."

22 And, again, we are not saying they did anything
23 wrong. It's okay if the case includes only Leopard. We are
24 simply saying that that's how everyone has conducted the
25 litigation in this case and we agree with it.

1 We think Snow Leopard is not in this case and,
2 therefore, is properly brought in Florida.

3 It's not a motion to compel. It's simply evidence
4 of how the litigation has been understood by the parties
5 throughout fact discovery.

6 **THE COURT:** All right. I misunderstood your point,
7 but I now -- now I get your point.

8 All right. So why isn't is that a correct
9 statement, that even if you allowed the witnesses to answer
10 and you objected on relevance grounds and construed the case
11 to be limited to OS X Leopard, as opposed to Snow Leopard,
12 and now that it's inconvenient to you, you want to go back
13 and change that? Why is it that you are in that situation?

14 **MR. GILLILAND:** Your Honor, thank you for the
15 question.

16 What we are suggesting is not only is this
17 inconvenient to Apple, but it's inconvenient to the Federal
18 Court system and to all the parties.

19 We have a lawsuit here that your Honor has devoted
20 an enormous amount of time to. It involves the question of
21 copyright infringement. It involves the question of a
22 violation of the Digital Millennium Copyright Act.

23 The license at issue is precisely the same, the
24 wording about restricting the use of Apple's software to
25 Apple's computers in this case as it would be in Florida.

1 The question of circumventing the technological
2 protection measure is, as Dr. Kelly's declaration discloses,
3 virtually the same in that case and in this one. We can
4 resolve all of these issues by just another 60 days worth of
5 work here, as opposed to having two separate lawsuits 3,000
6 miles apart.

7 Psystar has argued that it's important to Psystar
8 to find out if its business is lawful, period. We agree. We
9 think it's unlawful. We agree that it's important to resolve
10 that question. It doesn't make sense if we are trying to
11 resolve it to have two different lawsuits, one of which has
12 just started, as opposed to having a trial in this case in
13 March instead of January and doing whatever additional
14 discovery has to occur in the next 30 days.

15 **THE COURT:** But your company knew that they had
16 this other product coming out. They could have said, We will
17 construe this to include Snow Leopard, too, so that we will
18 get it all wrapped up in one lawsuit." And it wasn't until
19 after you got sued in Florida that you said, Oh, wait, maybe
20 that was a mistake. That's what's going on here.

21 **MR. GILLILAND:** Well, your Honor, we believe that
22 the allegations of the complaint are broad enough to include
23 Snow Leopard.

24 **THE COURT:** They were, but you ruled them out in
25 your -- the way you construed your interrogatories.

1 **MS. EDGECOMBE:** Well, with respect to the
2 interrogatory, at the time that it was answered the only
3 license that existed relating to Mac OS X was the Leopard
4 license.

5 Now, as you now see, there was discovery about Snow
6 Leopard. I specifically asked Mr. Pedraza, the CEO of
7 Psystar, about Snow Leopard. This is his testimony. It's
8 Exhibit 14 to the declaration of Miss Boroumand Smith. It
9 was taken on Wednesday, August 26th.

10 I said:

11 **"QUESTION:** Is Psystar attempting to get
12 its computers to work with Snow Leopard?

13 **"ANSWER:** What do you think? I mean,
14 that is a silly question.

15 **"QUESTION:** Why is it silly?

16 **"ANSWER:** I think we would want to
17 support a newer version of the OS.

18 **"QUESTION:** My question was silly
19 because the answer was 'Of course we are?'

20 **"ANSWER:** Well, I mean, I can't really
21 say...and, again, it actually even a little
22 bit frustrates me because I haven't been able
23 to devote time to doing that, but I promise
24 you that I am going to devote my time to do
25 that."

1 My question:

2 "And do you have an estimate as to when
3 the Psystar computers will be compatible with
4 Snow Leopard."

5 Mr. Pedraza:

6 **"ANSWER:** As soon as possible."

7 My question:

8 **"QUESTION:** And what does that mean? Is
9 it a matter of days, weeks, months, years?"

10 Mr. Pedraza's answer:

11 **"ANSWER:** Well, it depends on how
12 inspired I feel. I haven't really looked
13 into it as much as I've wanted to. So once I
14 can, you know, direct my into it, we'll see
15 how long it takes. I will have a better
16 estimate."

17 That was his testimony on Wednesday, August 26.
18 The very next day they filed this lawsuit in Florida, your
19 Honor. And in that lawsuit in Florida they said here are
20 Psystar's computers ready to sell with Snow Leopard and we
21 need declaratory relief that it's lawful.

22 On Wednesday Mr. Pedraza tells me he's still
23 thinking about it. He's still working on it. That's what he
24 said under oath. On Thursday they filed a lawsuit against
25 Apple.

1 **THE COURT:** That sounds fishy, that's true. Why
2 don't you make a motion down there to have the judge transfer
3 the case?

4 **MR. GILLILAND:** I can do that, your Honor, but the
5 issue -- the reason I came to your courtroom first is because
6 of the implication on the trial schedule in January.

7 **THE COURT:** You know, even if we try the case, we
8 still have got to try this part of the case. There are going
9 to be -- you can always have a new product. You can have --
10 by the time we get to that trial, you can have yet another
11 product and say, Oh, let's postpone it again because we want
12 to wrap everything up. There is always going to be a new
13 product in the offing.

14 To my mind the practical thing to do is push
15 forward, try the case. Then you can bring a new case on the
16 next product.

17 But the more products that you lay in front of the
18 jury and in front of the Court, the harder it is to
19 understand them. And to understand -- you know, maybe it
20 will be so complicated I just won't grasp it.

21 And so I think that you are trying to over
22 complicate the case. We have got a good schedule now.

23 **MR. GILLILAND:** We do have a good --

24 **THE COURT:** I don't know what the judge down there
25 ought to do on a motion to transfer. There is a lot of sense

1 in what you say to have one judge do it all on account of the
2 overlap and avoid waste.

3 On the other hand, maybe a fresh look at this
4 probable would -- maybe I have got it wrong. I don't know.
5 Maybe another judge would see it differently and so they -- a
6 second judge might see the problem differently. I don't -- I
7 don't know.

8 **MR. GILLILAND:** Of course, your Honor, if that were
9 to occur, then neither Apple nor Psystar would know whether
10 the Psystar business is lawful. That would be the worst
11 outcome, having a Federal Court in San Francisco say this is
12 lawful and a Federal Court in Florida say it's not lawful.
13 Then neither party would know how to proceed.

14 **THE COURT:** Eventually we would have a conflict in
15 the circuits. It would get somewhere.

16 **MR. GILLILAND:** It's the United States --

17 **THE COURT:** Assuming the circuit courts disagree,
18 but I -- I -- that's a good argument in favor of one judge
19 doing it all.

20 So I see that point, but I -- I don't think -- you
21 know, put yourself in my position. I don't want to tell the
22 judge in Florida how to run his calendar. And I do
23 appreciate the fact that you brought this problem to my
24 attention so that my feelings aren't hurt if you go do that.

25 Honestly, I think the first -- in the first

1 instance this problem should be laid before the judge there
2 and not some judge -- you know, they all think of us as a
3 little loony out here in California. They'll think I'm
4 reaching in all the way from San Francisco to Florida to tell
5 them how to run their docket.

6 No, I think I should let them run their own
7 calendar, just like they would probably let me run my own
8 calendar. And they will -- I trust all the judges to do the
9 right thing on a motion to transfer.

10 Now, the immediate problem is not a transfer. It's
11 this discovery problem.

12 **MR. GILLILAND:** Yes, that's right, your Honor. And
13 the -- the reason that we submitted the declaration of
14 Dr. Kelly here is so that the Court can see that the
15 technical issue, which we can't go into in open court, but
16 how Psystar gets around the technological protection measure
17 in Mac OS X, Version 10.6, is not significantly or even
18 materially different. There's a method and you have to use
19 it in order to get Mac OS X to run on your computer. And
20 they have done it four different ways, but each of those ways
21 ends up at the same place, which is how you unencrypt these
22 files. Consequently, the evidence is not actually going to
23 be that much different.

24 **THE COURT:** I can't tell you how the trial is going
25 to come out, all right? But, yes, I can see your argument

1 that there are similarities in the cases and we have to --
2 and maybe that would make some sense, but...

3 All right. Any more?

4 **MR. GILLILAND:** Thank you for your time, your
5 Honor. Of course, you can see the dilemma. If we go to
6 Florida and file a motion and succeed and the case is
7 transferred here, then it probably won't get here in time for
8 a trial in January unless we reopen discovery.

9 **THE COURT:** Then we could have two trials.

10 **MR. GILLILAND:** We could do that.

11 **THE COURT:** It may be too short somewhat smaller
12 trials is better than one gigantic trial.

13 **MR. GILLILAND:** It's -- of course, the decision is
14 in your discretion, your Honor.

15 My suggestion is that it would be more efficient
16 for everyone concerned, most particularly the Courts, to have
17 one trial in March rather than two separate trials.

18 **THE COURT:** Possibly. But what bothers me still is
19 that if you had known this was coming, you should have said
20 to yourself and to your client, We should put this -- make it
21 absolutely clear that Snow Leopard is in the case so we will
22 keep it all in front of that one judge. We'll all go to
23 trial in March.

24 And instead you made a -- because you didn't want
25 them to know. That's probably what it was. Just like you

1 didn't want them to know the profit information and you took
2 it upon yourself to restrict the case de facto to things that
3 had been released. So this is a problem of your own
4 strategic making. That part of it is.

5 Now, this is -- these comments that I'm making here
6 are totally without prejudice to a motion to transfer, and
7 I'm not in any way suggesting it should not be transferred.
8 I see the arguments for a transfer. It's up to the judge
9 there to do what is right in his opinion, so I -- but I --
10 this is not the immediate issue that's before me.

11 The immediate issue before me is whether this --
12 this schedule that we have got in place and with this record
13 in light of the way that discovery unfolded, in order to
14 allow all that to unfold in Florida. So for the time being
15 I'm not so sure that's a good idea.

16 All right. I'm going to take it under submission.
17 I will get an order out soon.

18 **MR. GILLILAND:** Thank you for your time your Honor.

19 **MR. CAMARA:** Thank you, your Honor.

20 **THE COURT:** Yes, sir. What can I do for you?

21 **MR. CAMARA:** We filed a motion with respect to the
22 declaration of Jacques Vidrine. I set it for today thinking
23 it was part of the response. I can reset it later, if the
24 Court prefers.

25 **THE COURT:** What motion?

1 **MR. CAMARA:** We filed a motion to strike the
2 declaration of Jacques Vidrine, which was attached to their
3 motion to enjoin the Florida action.

4 At the last hearing your Honor asked them
5 specifically whether Jacques Vidrine would be involved in the
6 case. Your Honor said they might have leave to amend to add
7 Jacques Vidrine to their initial disclosures if there was
8 some substantial justification because of new evidence.

9 Counsel for Apple paused, conferred with other
10 counsel for Apple and came back and told the Court that
11 Mr. Vidrine was out of their case entirely and then eight
12 days later they filed a motion that relies on the declaration
13 of Jacques Vidrine. So we filed a motion to strike and for
14 sanctions.

15 **THE COURT:** All right. I will consider that on the
16 papers.

17 **MR. CAMARA:** Your Honor, one other calendaring
18 question.

19 Summary judgment briefing is coming up. I was
20 wondering if we might increase the page limits given all the
21 many issues that are in this case?

22 **MR. GILLILAND:** Your Honor, we have no objection to
23 that. It's the Court what has to read them all.

24 **THE COURT:** Page limits are 25 now, right?

25 **MR. CAMARA:** They are, your Honor.

CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 08-3251 WHA, APPLE, INC. vs PSYSTAR CORPORATION were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, October 8, 2009