

1 TOWNSEND AND TOWNSEND AND CREW LLP
 JAMES G. GILLILAND, JR. (State Bar No. 107988)
 2 MEHRNAZ BOROUMAND SMITH (State Bar No. 197271)
 MEGAN M. CHUNG (State Bar No. 232044)
 3 J. JEB B. OBLAK (State Bar No. 241384)
 Two Embarcadero Center Eighth Floor
 4 San Francisco, CA 94111
 Telephone: (415) 576-0200
 5 Facsimile: (415) 576-0300
 Email: jggilliland@townsend.com
 6 Email: mboroumand@townsend.com
 Email: mmchung@townsend.com
 7 Email: jboblak@townsend.com

8 O'MELVENY & MYERS LLP
 GEORGE RILEY (State Bar No. 118304)
 9 Two Embarcadero Center, 28th Floor
 San Francisco, CA 94111
 10 Telephone: (415) 984-8700
 Facsimile: (415) 984-8701
 11 Email: griley@omm.com

12 Attorneys for Plaintiff and Counterdefendant
 APPLE INC.

13
 14 UNITED STATES DISTRICT COURT
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17
 18 APPLE INC.,

19 Plaintiff,

20 v.

21 PSYSTAR CORPORATION, a Florida
 corporation,

22 Defendant.

23
 24 AND RELATED COUNTERCLAIMS.

Case No. 08-3251 WHA

**DECLARATION OF MEHRNAZ
 BOROUMAND SMITH IN OPPOSITION
 TO PSYSTAR'S MOTION FOR
 SUMMARY JUDGMENT**

Hearing Date: November 12, 2009
 Hearing Time: 2:00 p.m.
 Courtroom: 9
 Judge: Hon. William Alsup
 Trial Date: January 11, 2010

1 I, Mehrnaz Boroumand Smith, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am admitted
3 to practice before this Court. I am a partner in the law firm of Townsend and Townsend and Crew
4 LLP, and am one of the attorneys representing Plaintiff and Counterdefendant Apple Inc. (“Apple”)
5 in the above-captioned matter. I make this declaration on individual knowledge, and if called as a
6 witness, I can and will competently testify with respect to the matters stated herein.

7 2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts from the
8 deposition of Roberto Pedraza taken on April 24, 2009.

9 3. Attached hereto as Exhibit 2 is a true and correct copy of the portions of the August
10 24, 2009 Expert Report of John P.J. Kelly, Ph.D., that Psystar referenced in its Motion for Summary
11 Judgment.

12 4. Attached hereto as Exhibit 3 are true and correct copies of representative website
13 pages from www.psystar.com produced by Apple with Bates Numbers APP_PSY0015565-566
14 (captured on Nov. 07, 2008), APP_PSY0020987 (captured on Dec. 1, 2008) and
15 APP_PSY0046305-306 (captured on May 28, 2009). Psystar uses Apple’s word and design marks,
16 including but not limited to MAC, MAC OS, LEOPARD, Apple Logo, Mac Logo and the Leopard
17 Trade Dress on these web pages. The web pages show that Psystar’s use of Apple’s trademarks and
18 trade dress is not limited merely to description of the Mac OS X upgrade disc. None of these web
19 pages show Psystar’s purported slogan of “It’s not a Mac — it’s for everyone.” Psystar never
20 produced any website pages with that slogan during discovery. (*See infra* ¶ 7.)

21 5. Attached hereto as Exhibit 4 are true and correct copies of representative Psystar
22 advertisements produced by Psystar on August 14, 2009, in its native format in a file entitled
23 “ads.zip”.

24 6. Attached hereto as Exhibit 5 is a true and correct copy of Psystar’s image ad
25 displayed on an OS News blog site that was marked as Plaintiff’s deposition exhibit 233.

26 7. Attached hereto as Exhibit 6 are true and correct copies of representative website
27 pages from www.psystar.com produced by Psystar with Bates Numbers PS036081-84 and
28 PS036085-89. These web pages show that Psystar used Apple’s MAC, MAC OS, LEOPARD,

1 SUPERDRIVE and Apple Logo trademarks numerous times in the description of its computer
2 products. None of these web pages state Psystar's purported slogan of "It's not a Mac — it's for
3 everyone." Apple propounded discovery seeking all documents, including Psystar's web pages,
4 where Psystar used Apple's trademarks and all of Psystar's marketing, advertising and promotional
5 materials relating to Psystar computers running Mac OS X. In response to these requests, Psystar
6 never produced any web site pages or advertising that contained the "It's not a Mac" slogan.

7 8. Attached hereto as Exhibit 7 is a true and correct copy of a summary of Psystar's
8 advertisements through Google Adwords entitled "adwords_report_all" in the native Excel format
9 which Psystar produced on August 13, 2009. This file shows more than 4,500 different ads.
10 Column H indicates whether the ad was a text ad or an image ad. If the ad is a text ad, Columns C-
11 F show the text used in the advertisement. Column K provides the URL address for the webpage on
12 Psystar's website that was the destination after a customer clicks on Psystar's ad.

13 9. A review of the text ads shows that more than 75% of the text ads include an Apple
14 trademark or trade name, such as APPLE, MAC, MAC OS, LEOPARD or OS X or some
15 combination thereof. One of the text ads showed the URL address of www.Psystar.com/OpenMac.
16 For that ad alone, Google recorded 3,856,503 impressions, *i.e.*, the number of times that text ad was
17 displayed to search users.

18 10. A review of the destination URL addresses (see Column K) shows that Psystar
19 created website pages that will deliberately attract people looking for an Apple computer. For
20 example, Psystar created webpage with the following URL addresses:

- 21 o <http://www.psystar.com/shop/openmac.html>
- 22 o http://www.psystar.com/why_buy_a_used_apple_computer.html
- 23 o http://www.psystar.com/looking_to_get_an_apple_computer.html
- 24 o http://www.psystar.com/check_out_the_mac_os.html
- 25 o http://store.psystar.com/ads/installing_mac_on_pc

26 11. Attached hereto as Exhibit 8 is a true and correct copy of a document produced by
27 Psystar that shows the URL addresses for web pages created by Psystar using Apple's trademarks
28 such as APPLE and MAC. It was marked as Plaintiff's deposition exhibit 234.

1 12. Attached hereto as Exhibit 9 is a true and correct copy of a website printout that
2 shows Psystar's text ad appearing after running a search on Google for "leopard on pc." For the
3 Court's convenience, the portion of the document reflecting the search term and Psystar's text ad
4 has been highlighted. The document was produced as APP_PSY0056611-12.

5 13. Attached hereto as Exhibit 10 is a true and correct copy of the relevant portions from
6 Psystar's Responses to Apple's Third Set of Requests for Admissions dated January 16, 2009.

7 14. In discovery, Psystar produced purchase orders to and invoices from vendors
8 showing the number of retail DVDs of Mac OS X acquired by Psystar. Psystar also produced
9 documentation regarding the number of Psystar computers sold preinstalled with Mac OS X.
10 Psystar contends it shipped one retail DVD of Mac OS X with each computer it sold preinstalled
11 with the software. However, based on Psystar's production of the documents described above, the
12 number of retail DVDs of Mac OS X that Psystar acquired from vendors is less than the number of
13 computers Psystar sold with Mac OS X. Psystar has produced documents showing the purchase of
14 approximately 13% fewer retail DVDs than computers it sold preinstalled with Mac OS X.

15 15. Attached hereto as Exhibit 11 is a true and correct copy of excerpts from the 30(b)(6)
16 deposition of Psystar Corporation taken on August 26, 2009. Psystar designated Rodolfo Pedraza
17 for this 30(b)(6) deposition.

18 16. Attached hereto as Exhibit 12 is a true and correct copy of web pages from Dell's
19 website at <http://www.dell.com>. On the home page (www.dell.com), Dell does not show any other
20 company's trademarks, such as Microsoft's. On the webpage specific to its desktops
21 (www.dell.com/home/desktops), Dell does show that it ships computers with Microsoft's operating
22 system. On the left hand side of the page, Dell states under "Operating System" that it distributes
23 Windows 7 Upgrade and Windows Vista. Next to the Windows Logo, Dell also states that it can
24 ship with "Windows XP®." Other than that, that webpage does not show any other trade name or
25 trademark for Microsoft. Dell shows its own product name on its monitors such as "Dell" and
26 "Studio."

27 17. Attached hereto as Exhibit 13 is a true and correct copy of web pages from Toshiba's
28 website at <http://laptops.toshiba.com>. On Toshiba's web pages, Toshiba states that it has a

1 Windows® 7 upgrade option program and has advice regarding Intel®/AMD® processors.
2 However, on these web pages, Toshiba does not show or use another company's trademarks or trade
3 dress next to or on its computers or in the descriptions of its various computers.

4 18. Attached hereto as Exhibit 14 is a true and correct copy of the Professor Carol
5 Scott's September 16, 2009 Amended Expert Report, without the attached exhibits.

6 19. The side panel of a Mac OS X Leopard retail DVD package contains the following
7 language:

8 **Important** Use of this product is
9 subject to acceptance of the software
10 license agreement(s) included in this
11 package. Don't steal software.

12 www.apple.com.

13 A photograph of the side panel is shown below:



14 I declare under penalty of perjury under the laws of the United States of America that the
15 foregoing is true and correct.

16 Executed on October 22, 2009, at San Francisco, California.

17 /s/ Mehrnaz Boroumand Smith
18 Mehrnaz Boroumand Smith

19 62271267 v1

CERTIFICATE OF SERVICE

I, Diane G. Sunnen, declare 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 eighteen and not a party to this action. My business address is Townsend and Townsend and Crew LLP, Two Embarcadero Center, Eighth Floor, San Francisco, California, 94111.

I served the following documents exactly entitled: **DECLARATION OF MEHRNAZ BOROUMAND SMITH IN OPPOSITION TO PSYSTAR'S MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action following the ordinary business practice of Townsend and Townsend and Crew LLP, as follows:

K.A.D. Camara
Kent Radford
Camara & Sibley LLP
2339 University Boulevard
Houston, TX 77005
Tel: 713-893-7973
Fax: 713-583-1131
Email: camara@camarasibley.com

Eugene Action
Attorney at Law
1780 E. Barstow Avenue, #5
Fresno, CA 93710
Email: eugeneaction@hotmail.com

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

[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 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 October 22, 2009, at San Francisco, California.

/s/Diane G. Sunnen
Diane G. Sunnen