

EXHIBIT 7

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



EXHIBIT 8

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

Start Print

PSYSTAR Corporation

MMW-530058: Content Pages

26 Sep 2008 02:05 PM

Joel Davidson Hello, Greg.

(Staff) The following links are the URLs to the content pages we have created. If you would like to change any of the pages just shoot us an e-mail reply, we'll be in the office tomorrow as well so we can definitely take care of that.

http://www.psystar.com/thinking_about_buying_a_used_apple.html
http://www.psystar.com/buying_a_used_apple_computer.html
http://www.psystar.com/why_buy_a_used_apple_computer.html
http://www.psystar.com/looking_into_a_used_apple_computer.html
http://www.psystar.com/replacing_your_apple_computer.html
http://www.psystar.com/looking_to_replace_your_apple.html
http://www.psystar.com/replacing_your_mac_mini.html
http://www.psystar.com/get_rid_of_your_ppc_mac.html
http://www.psystar.com/replacing_your_ppc_mac.html
http://www.psystar.com/check_out_the_mac_os.html
http://www.psystar.com/looking_to_get_an_apple_computer.html

Posted on: 26 Sep 2008 02:05 PM

Greg Marsden Thanks, I'll take a look through these. One thing I did notice is that in IE on a pc your phone# is out of place on all the pages, see below:
(User)

thanks, Greg.

Posted on: 26 Sep 2008 02:14 PM

Greg Marsden Hi Joel,

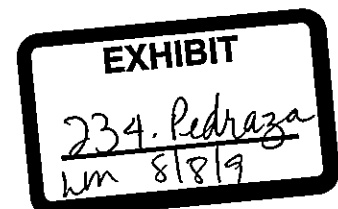
(User) Aside from the phone # being out of place in IE issue I mentioned earlier today I also noticed the buy now buttons all go to the open pro page even when the page is talking about the regular open computer like http://www.psystar.com/check_out_the_mac_os.html which would probably scare off some people looking for the cheaper version. Can you go through those pages and make sure it links to the right product. Also, I think in general the pages are on the right track though some of them are very brief and basically just the comparison. It might be a good idea to add testimonials from buyers or quotes from favorable reviews or some other additional content to these pages to help make them more impactful and meaty. I don't think it would be a good idea to start running traffic at these just yet until at least the buy links are fixed. Can that be fixed by Monday? Also I wanted to check on how your tracking works and if I need to add anything to the URLs below for tracking purposes? Do you also have Google conversion tracking already installed for your shopping cart?

Thanks, Greg.

Posted on: 26 Sep 2008 05:01 PM

Greg Marsden Hi Joel,

(User) Aside from the phone # being out of place in IE issue I mentioned earlier today I also noticed the buy now buttons all go to the open pro page even when the page is talking about the regular open computer like



PS009087

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http://www.psystar.com/check_out_the_mac_os.html which would probably scare off some people looking for the cheaper version. Can you go through those pages and make sure it links to the right product. Also, I think in general the pages are on the right track though some of them are very brief and basically just the comparison. It might be a good idea to add testimonials from buyers or quotes from favorable reviews or some other additional content to these pages to help make them more impactful and meaty. I don't think it would be a good idea to start running traffic at these just yet until at least the buy links are fixed. Can that be fixed by Monday? Also I wanted to check on how your tracking works and if I need to add anything to the URLs below for tracking purposes? Do you also have Google conversion tracking already installed for your shopping cart?

Thanks, Greg.

Posted on: 26 Sep 2008 05:01 PM

Rudy Pedraza Greg,

(Staff)

The google conversion code has been installed. Regarding the landing page corrections, those will be done by tomorrow. I will have one of the web guys go through them and add some links/testimonials as we spoke about earlier as well. I'd still like to get these into a working state and start throwing some traffic on them sometime this weekend. That way we can be sure things are working by the time Monday comes around.

Best,
-- Rudy

Posted on: 26 Sep 2008 05:22 PM

Rudy Greg,

Pedraza

(User)

The google conversion code has been installed. Regarding the landing page corrections, those will be done by tomorrow. I will have one of the web guys go through them and add some links/testimonials as we spoke about earlier as well. I'd still like to get these into a working state and start throwing some traffic on them sometime this weekend. That way we can be sure things are working by the time Monday comes around.

Best,
-- Rudy

Ticket History

=====

Joel Davidson (Staff) Posted On: 26 Sep 2008 02:05 PM

=====

Hello, Greg.

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http://www.psystar.com/buying_a_used_apple_computer.html
http://www.psystar.com/why_buy_a_used_apple_computer.html
http://www.psystar.com/looking_into_a_used_apple_computer.html
http://www.psystar.com/replacing_your_apple_computer.html
http://www.psystar.com/looking_to_replace_your_apple.html
http://www.psystar.com/replacing_your_mac_mini.html
http://www.psystar.com/get_rid_of_your_ppc_mac.html
http://www.psystar.com/replacing_your_ppc_mac.html
http://www.psystar.com/check_out_the_mac_os.html
http://www.psystar.com/looking_to_get_an_apple_computer.html

Greg Marsden (Client) Posted On: 26 Sep 2008 02:14 PM

=====

Thanks, I'll take a look through these. One thing I did notice is that in IE on a pc your phone# is out of place on all the pages, see below:

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thanks, Greg.

image001.png (88.48 KB)

Greg Marsden (Client) Posted On: 26 Sep 2008 05:01 PM

=====

Hi Joel,

Aside from the phone # being out of place in IE issue I mentioned earlier today I also noticed the buy now buttons all go to the open pro page even when the page is talking about the regular open computer like http://www.psystar.com/check_out_the_mac_os.html which would probably scare off some people looking for the cheaper version. Can you go through those pages and make sure it links to the right product. Also, I think in general the pages are on the right track though some of them are very brief and basically just the comparison. It might be a good idea to add testimonials from buyers or quotes from favorable reviews or some other additional content to these pages to help make them more impactful and meaty. I don't think it would be a good idea to start running traffic at these just yet until at least the buy links are fixed. Can that be fixed by Monday? Also I wanted to check on how your tracking works and if I need to add anything to the URLs below for tracking purposes? Do you also have Google conversion tracking already installed for your shopping cart?

Thanks, Greg.

Greg Marsden (Client) Posted On: 26 Sep 2008 05:01 PM

=====

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Aside from the phone # being out of place in IE issue I mentioned earlier today I also noticed the buy now buttons all go to the open pro page even when the page is talking about the regular open computer like http://www.psystar.com/check_out_the_mac_os.html which would probably scare off some people looking for the cheaper version. Can you go through those pages and make sure it links to the right product. Also, I think in general the pages are on the right track though some of them are very brief and basically just the comparison. It might be a good idea to add testimonials from buyers or quotes from favorable reviews or some other additional content to these pages to help make them more impactful and meaty. I don't think it would be a good idea to start running traffic at these just yet until at least the buy links are fixed. Can that be fixed by Monday? Also I wanted to check on how your tracking works and if I need to add anything to the URLs below for tracking purposes? Do you also have Google conversion tracking already installed for your shopping cart?

Thanks, Greg.

Ticket Details

=====

Ticket ID: MMM-530058

Department: Admin

Priority: Medium

Status: Open

Posted on: 26 Sep 2008 05:22 PM

PS009089

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EXHIBIT 9

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

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leopard on pc

Search

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[Preferences](#)[Web](#) [Show options...](#)Results 1 - 10 of about 12,700,000 for **leopard on pc**. (0.18 seconds)

[Hack Attack : Install Leopard on your PC in 3 easy steps! | dailyApps](#)

I bet this is the easiest way to Install Mac OS X Leopard OSx86 on PC Dual Boot Windows 7, Vista in 9 Easy Steps ...
[dailyapps.net/.../hack-attack-install-leopard-on-your-pc-in-3-easy-steps/](#) - [Cached](#) - [Similar](#)

[Hack Attack : Install Leopard On your PC in Just One Step | dailyApps](#)

Its been nearly two months, since I last wrote my guide to Install Leopard on your PC in just 3 Steps. Well I wanted to write a better ...
[dailyapps.net/.../hack-attack-install-leopard-on-your-pc-in-just-one-step/](#) - [Cached](#) - [Similar](#)

[Install Leopard on your PC in One step! « Graphic Design Blog](#)

Feb 23, 2008 ... index_hero20071016Its been nearly two months, since I last wrote my guide to Install Leopard on your PC in just 3 Steps. ...
[grafikdesign.wordpress.com/.../install-leopard-on-your-pc-in-one-step/](#) - [Cached](#) - [Similar](#)

[Installing Leopard on a PC](#)

You're on your own if you want to run Leopard on a PC, but Apple is more than willing to sell you a Mac with Leopard pre-installed. ...
[www.tuaw.com/2007/10/28/installing-leopard-on-a-pc/](#) - [Cached](#) - [Similar](#)

[Install Mac OSX Leopard to \(almost\) any PC in one step - MAC.BLORGE](#)

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[mac.blorge.com/.../install-mac-osx-leopard-to-almost-any-pc-in-one-step/](#) - [Cached](#) - [Similar](#)

[Install OS X on Your Hackintosh PC, No Hacking Required - Leopard ...](#)

Jan 24, 2008 ... Two months ago I walked through how to build a Hackintosh Mac on the cheap using PC parts. Since that post, the OSx86 scene has changed ...
[lifehacker.com/.../install-os-x-on-your-hackintosh-pc-no-hacking-required](#) - [Similar](#)

[Testing Grounds: Leopard OS X 10.5.6 On Your PC](#)

Apr 2, 2009 ... This post covers how to install Leopard 10.5.6 on your PC using the ... This is a set of guidelines for installing OS X Leopard onto a PC. ...
[tgrounds.blogspot.com/.../leopard-os-x-1056-on-your-pc.html](#) - [Cached](#) - [Similar](#)

[Guide: Snow Leopard on PC 10a432\(GOLD MASTER!!!\) | TeknoJunkie](#)

Aug 13, 2009 ... Hello, as most of you know Snow Leopard is coming out in a month. Its well supported for Macs, but hey why not PC's?
[www.teknojunkie.com/.../guide-snow-leopard-on-pc-10a421a-10a432-coming-soon/](#) - [Cached](#) - [Similar](#)

[5 Things You Should Know About Snow Leopard - PC World](#)

Despite a lack of new end-user features, there's still plenty to like about Apple's next Mac OS version.

Sponsored Links

[Installing OS X On A PC](#)

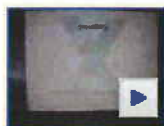
OSX86 Compatible Hardware Platform
Get The Full OS X Experience Now!
[Psystar.com/TheAppleMacAlternative](#)

www.pcworld.com/.../5_things_you_should_know_about_snow_leopard.html -
Cached - Similar

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www.youtube.com



[Install Leopard on Pc Detailed Guide](#)
10 min
www.youtube.com

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[leopard on pc
torrent](#)

[leopard on
vmware](#)

[leopard on pc dual
boot](#)

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sse2 sse3](#)

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leopard on pc

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EXHIBIT 10

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

1 ROBERT J. YORIO (SBN 93178)
yorio@carrferrell.com
2 COLBY B. SPRINGER (SBN 214868)
cspringer@carrferrell.com
3 CHRISTOPHER P. GREWE (SBN 245938)
cgrewe@carrferrell.com
4 CARR & FERRELL *LLP*
2200 Geng Road
5 Palo Alto, California 94303
Telephone: (650) 812-3400
6 Facsimile: (650) 812-3444

7 Attorneys for Defendant/Counterclaimant
PSYSTAR CORPORATION
8

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

12 APPLE INC., a California corporation,

13 Plaintiff,

14 v.

15 PSYSTAR CORPORATION,

16 Defendant.

CASE NO. CV-08-03251-WHA

**PSYSTAR CORPORATION'S
RESPONSES TO APPLE INC.'S THIRD
SET OF REQUESTS FOR ADMISSION
(NOS. 101-161)**

17
18 AND RELATED COUNTERCLAIMS.
19
20

21 PROPOUNDING PARTY: APPLE INC.

22 RESPONDING PARTY: PSYSTAR CORPORATION

23 SET NO: THREE (3)
24

25 TAKE NOTICE THAT Defendant PSYSTAR CORPORATION responds as follows to the
26 third set of requests for admission of Plaintiff APPLE INC. dated December 3, 2008 (the
27 "Requests").
28

REQUEST FOR ADMISSION NO. 141:

Admit that YOU used the term "OpenMac" in YOUR uniform resource locator (URL) address in November 2008.

RESPONSE TO REQUEST NO. 141:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Psystar Corporation further objects on the grounds that this request is vague and ambiguous, *inter alia*, in its use of the term "used" and the phrase "in YOUR uniform resource locator (URL) address." Subject to and without waiving these objections, Psystar Corporation responds as follows: the present request for admission is wholly unintelligible; Psystar Corporation is, therefore, unable to affirm or deny the request.

REQUEST FOR ADMISSION NO. 142:

Admit that YOU have participated in the Google AdWords program.

RESPONSE TO REQUEST NO. 142:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 143:

Admit that YOU have selected the word "Apple" as a keyword in the Google AdWords program.

RESPONSE TO REQUEST NO. 143:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 144:

Admit that YOU have selected the word "Mac" as a keyword in the Google AdWords program.

RESPONSE TO REQUEST NO. 144:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 145:

Admit that YOU have selected the words "Mac Clone" as keywords in the Google AdWords program.

RESPONSE TO REQUEST NO. 145:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 146:

Admit that YOU have selected the word "Leopard" as a keyword in the Google AdWords program.

RESPONSE TO REQUEST NO. 146:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 147:

Admit that YOU have participated in the Google AdSense program.

RESPONSE TO REQUEST NO. 147:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Denied.

REQUEST FOR ADMISSION NO. 148:

Admit that YOU have participated in the Yahoo! Search Marketing program.

RESPONSE TO REQUEST NO. 148:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 149:

Admit that YOU have selected the word "Apple" as a keyword in the Yahoo! Search Marketing program.

RESPONSE TO REQUEST NO. 149:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 150:

Admit that YOU have selected the word "Mac" as a keyword in the Yahoo! Search Marketing program.

RESPONSE TO REQUEST NO. 150:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 151:

Admit that YOU have selected the words "Mac Clone" as keywords in the Yahoo! Search Marketing program.

RESPONSE TO REQUEST NO. 151:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 152:

Admit that YOU have selected the word "Leopard" as a keyword in the Yahoo! Search Marketing program.

RESPONSE TO REQUEST NO. 152:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 156:

Admit that YOU have selected the words "Mac Clone" as keywords in the Microsoft adCenter program.

RESPONSE TO REQUEST NO. 156:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows:

Psystar Corporation has not directly participated in the Microsoft adCenter program; denied.

REQUEST FOR ADMISSION NO. 157:

Admit that YOU have selected the word "Leopard" as a keyword in the Microsoft adCenter program.

RESPONSE TO REQUEST NO. 157:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows:

Psystar Corporation has not directly participated in the Microsoft adCenter program; denied.

REQUEST FOR ADMISSION NO. 158:

Admit that YOU have participated in a pay-per-click internet advertising program other than pay-per-click internet advertising programs offered by Google AdWords, Google AdSense, Yahoo! Search Marketing and Microsoft adCenter.

RESPONSE TO REQUEST NO. 158:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 159:

Admit that no PERSON has developed an operating system on behalf of PSYSTAR.

RESPONSE TO REQUEST NO. 159:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 160:

Admit that PSYSTAR has not developed its own operating system.

RESPONSE TO REQUEST NO. 160:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

REQUEST FOR ADMISSION NO. 161:

Admit that PSYSTAR did not expend resources to develop its own operating system.

RESPONSE TO REQUEST NO. 161:

Psystar Corporation repeats and incorporates by reference its GENERAL OBJECTIONS in full as if set forth herein. Subject to and without waiving these objections, Psystar Corporation responds as follows: Admitted.

Dated: January 16, 2009

CARR & FERRELL LLP

By: 

ROBERT J. YORIO
COLBY B. SPRINGER
CHRISTOPHER P. GREWE

Attorneys for Defendant/Counterclaimant
PSYSTAR CORPORATION

EXHIBIT 11

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

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ---oOo---

**CERTIFIED
TRANSCRIPT**

5
6 APPLE INC., a California corporation,)
7 Plaintiff,)
8 vs.) No. CV 08-03251 WHA
9 PSYSTAR CORPORATION, a Florida)
corporation, and DOES 1-10,)
10 inclusive,)
11 Defendants.)
_____)

12
13 HIGHLY CONFIDENTIAL- ATTORNEYS' EYES ONLY

14
15
16 VIDEOTAPED DEPOSITION OF RODOLFO PEDRAZA
17 WEDNESDAY, AUGUST 26, 2009

18
19
20
21
22
23
24 Pages 1 - 117
25 Pages 29 - 64 HIGHLY CONFIDENTIAL ATTORNEYS' EYES ONLY

CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

1 Q. Did anybody help?

2 A. No.

3 Q. Did you write the OpenHaltRestart kernel
4 extension yourself?

5 A. Yes. 03:15:34PM

6 Q. Did anybody help?

7 A. Well, actually I believe I talked to David
8 about it, but I actually wrote it.

9 Q. When did you write OpenCojones?

10 A. Early 2008. 03:15:49PM

11 Q. "Early" meaning the first half of the year?

12 A. I would say probably in the first quarter.

13 Q. And how long did it take you to write that
14 code?

15 A. I would say -- well, at that time I was 03:16:11PM
16 learning about the Mac OS. If I were to write that
17 extension today, I believe it would be much faster.
18 But back then it took me a few weeks.

19 Q. A few weeks?

20 A. Yeah. I mean, it wasn't something that I 03:16:27PM
21 was devoted to because it wasn't -- I mean, we didn't
22 need it. And, again, I was learning about the
23 Mac OS.

24 MR. GILLILAND: Let me --

25 THE WITNESS: If you are going to change 03:16:56PM

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

1 Q. And the C -- suffix .C, that is the actual
2 -- what did you say, machine code?

3 A. That is the actual C code. So C is for C.

4 Q. The programming language C?

5 A. Yes. 03:46:31PM

6 Q. When did Psystar compile the code that is
7 psybootefi?

8 A. I would say early 2008.

9 Q. Again, the first quarter or the first half
10 of the year? Can you be more particular? 03:47:00PM

11 A. I don't remember.

12 Q. How long did it take to compile psybootefi?

13 A. Well, it was -- it took some time because I
14 was -- I was, I would say, rusty in ANSI C. There
15 are certain very specific nuances with programming in 03:47:25PM
16 ANSI C, the way that pointers work, the way that you
17 have to do things. Because in C++, you know, you
18 have objects and you have different extensions of C
19 that facilitate more of the functional programming,
20 versus in C, you know, you're closer to the hardware. 03:47:50PM
21 So you have to just -- you have to think a little bit
22 differently.

23 Q. So you say it took some time?

24 A. Right.

25 Q. Because you were rusty? 03:48:06PM

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

1 A. Right.

2 Q. How much time?

3 A. A couple months. And I think today it
4 would take me much less time. I mean, I think I am
5 actually so familiar and used to writing C code, 03:48:15PM
6 especially after writing the graphic C code that is
7 used in the dub1 bootloader, which itself was an
8 adventure, so I think today I could do it much
9 faster.

10 Q. So is ANSI, A-N-S-I, C and C the same 03:48:37PM
11 thing?

12 A. Well, it's just that ANSI just has
13 different like -- more specific and strict rules.
14 So, yeah, it's C, but it's more strict, we'll say.
15 But you could call it C for all intents and purposes. 03:48:59PM

16 I think that the reason it's called ANSI C
17 is it is a standard. So even within the C language
18 there's specific, you know, standards.

19 (Exhibit 308 marked for identification;
20 retained by counsel.)

21 BY MR. GILLILAND:

22 Q. Let me ask you to look at Exhibit 308,
23 which has production numbers PS011824 through 832.
24 It has "\I386\LIBSAIO\Fake_EFI.C."

25 Do you see that at the top of the page, 03:49:46PM
42

CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

1 STATE OF CALIFORNIA)
) ss.

2 COUNTY OF SAN FRANCISCO)
3

4 I hereby certify that the witness in the
5 foregoing deposition, RODOLFO PEDRAZA, was by me duly
6 sworn to testify to the truth, the whole truth and
7 nothing but the truth, in the within-entitled cause;
8 that said deposition was taken at the time and place
9 herein named; that the deposition is a true record of
10 the witness's testimony as reported by me, a duly
11 Certified Shorthand Reporter and a disinterested
12 person, and was thereafter transcribed into
13 typewriting by computer.

14 I further certify that I am not interested in
15 the outcome of said action, nor connected with, nor
16 related to, any of the parties in said action, nor to
17 their respective counsel.

18 IN WITNESS WHEREOF, I have hereunto set my hand
19 and affixed my signature this 2nd day of September,
20 2009.

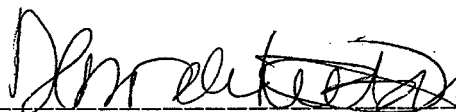
21

22

23

24

25



DEBORAH LEE LUBIN, CSR No. 3234, RPR, CRP

110

EXHIBIT 12

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

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EXHIBIT 13

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

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EXHIBIT 14

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

**AMENDED EXPERT REPORT OF
PROFESSOR CAROL A. SCOTT**

September 16, 2009

I. Qualifications

I am a Professor of Marketing at the Anderson Graduate School of Management at the University of California, Los Angeles ("UCLA"). I hold a Ph.D. in Marketing from Northwestern University, where my minor field of study was Social Psychology. I also received a Master of Science in Management degree from Northwestern University and a Bachelor of Science in Business and History Education degree from the University of Texas at Austin. I have served variously as the Chairman of the Faculty, Associate Dean, and Assistant Dean of the Anderson Graduate School of Management from 1985 through 1994. I am currently the faculty director of the Anderson School Executive Program. Over the past thirty years, I have taught courses on Marketing Strategy and Management, Consumer Behavior, Advertising, Distribution Strategy, and International Marketing to students in undergraduate and graduate education programs at UCLA, Stanford Business School, Harvard Business School, and Ohio State University. I also have published numerous journal articles, research reports, and book chapters on Consumer Behavior, Marketing Research and other marketing topics, a complete list of which is included in my Curriculum Vitae, attached hereto (Exhibit 1). I have served on the editorial boards of the *Journal of Marketing*, *Journal of Marketing Research*, and *Journal of Consumer Research*. I have been a member of the board of directors for Sizzler International and A-Fem Medical Corporation, Inc. and currently am a member of the board of directors of United Online, Inc. and Classmates Media Corp. Over the past 26 years I have served as a consultant and testifying expert for a variety of issues. A list of my recent testimony projects is attached (Exhibit 2).

II. Scope of Opinions

I have been asked by counsel for Apple Inc. (“Apple”) to investigate various issues with respect to the level of recognition by consumers of the Mac OS X Leopard desktop image as well as the likelihood that consumers would be confused by Psystar’s use of the Mac OS X Leopard operating system on its computers and by its offer on its website to sell computers that purport to use the Mac OS X Leopard operating system. Finally, I was asked to address the extent to which Apple’s brand equity and reputation would be harmed by the sale of Psystar computers that are described as running the Mac OS X Leopard operating system.

III. Summary of Opinions

Having reviewed and analyzed the evidence available to me, it is my opinion that:

1. Consumers in the market for a personal computer recognize the Mac OS X Leopard desktop image, and they believe that it is put out by a single source, i.e., it has acquired secondary meaning. Further, a large percentage of consumers who recognize the desktop associate it with the Apple or Mac brands.
2. Despite Psystar’s small changes to the Mac OS X Leopard desktop image and the fact that Psystar does not install the operating system on Apple hardware products, consumers who see Psystar’s version of the Mac OS X Leopard desktop image running on Psystar computers in a post-sale environment also are likely to recognize the desktop image. In my studies, the number of consumers who viewed Psystar’s altered desktop image running on Psystar computers and associated it with a single company was similar to the number of

consumers who viewed the unaltered desktop image and associated it with a single company. In both instances, the most frequently mentioned company was Apple, i.e., consumers are likely to be confused that the operating system running on the Psystar computers is the same as that sold by Apple.

3. Consequently, consumers shopping for computers on the Psystar website are likely to be confused as to the relationship between Apple and Psystar. That is, consumers are likely to believe that Psystar has and is required to obtain permission from Apple to offer Apple's Mac OS X Leopard operating system on its computers. Thus Psystar's use of the Mac OS X Leopard operating system on its website and on its computers is likely to create a false association between Psystar and Apple. Further, consumers who experience problems when using Psystar computers are likely to believe that they are entitled to technical service and support from Apple.
4. Consumers are likely to believe that technical problems they experience with Psystar computers are due, at least in part, to the Mac OS X Leopard operating system. Therefore, Apple's world famous brand, its reputation for quality products, as well as the Apple marks which stand for the Apple and Mac brands (e.g., "Apple", "Mac", and the Apple logo), and which are used by Psystar on its website and computers, all will be tarnished.

IV. Basis of Opinions

My opinions are based on three surveys conducted under my supervision in July and August, 2009, as well as on a review of other documents filed in this case and my

professional expertise in this area.¹ Exhibit 3 lists the materials I obtained from counsel. Detailed support for each of my opinions is given below. In my professional opinion each of the surveys undertaken was done in a proper and unbiased manner consistent with well accepted standards of marketing research and consumer research done in the context of litigation.² These results are valid and reliable. I am continuing my review and analysis, and I may refine or expand my opinions as further information and materials come to my attention. I reserve the right to supplement this report to the extent that additional information becomes available which may affect my opinions.

A. The desktop image of Mac OS X Leopard (hereafter “Mac OS”) is recognized by consumers as having a single source, i.e., it has acquired secondary meaning.

There can be no doubt that Apple is one of the world’s most famous brands. Numerous third party brand rankings consistently include Apple in their lists of top global brands. For example, Millward Brown’s “Brandz” list of top 100 global brands released in April, 2009, ranks Apple as number six in the world with a brand value of just over \$63 billion.³ Similarly, the well-known brand consulting firm, Interbrand, in its top global brand rankings for 2008, listed Apple as number 24 in the world with a brand value of almost \$14 billion.⁴ Indeed, all major brand rankings include Apple among the most famous and valuable.⁵

¹ As suggested by some sources in the field of litigation research, I observed three focus groups and several one-on-one personal interviews of consumers in the market for personal computers that were conducted by a member of my staff to assist me in preparing survey questions in clear and easily understandable language (See Diamond, Shari Seidman, “Reference Guide on Survey Research,” in Reference Manual on Scientific Evidence, 2nd. Ed. (Federal Judicial Center, 2000), pgs. 229-276). The purpose of this pretesting was to ensure that questions would be understood as I intended them, and I have relied on them to help design the surveys that were used and discussed in this report.

² *ibid.*

³ See www.millwardbrown.com/sites/Optimor

⁴ See www.interbrand.com

⁵ See affidavit of Thomas R. La Perle, “Use of the Apple and Apple Logo Trademarks and Variants,” August 12, 2009, for a more inclusive list.

These high brand rankings have not been achieved through happenstance, but rather through substantial and consistent brand building activities. Chief among these activities, of course, is a well-resourced and impeccably executed integrated marketing communications program that includes media advertising, outdoor billboards, sponsorships and events, and a substantial web presence among other elements. I understand that in 2008 alone, Apple spent almost \$500 million dollars on advertising, and has spent almost \$4 billion dollars on advertising in 1994 through 2008.⁶ Advertising alone, however, cannot create a strong valuable brand. Rather, strong brands that stand for excellence are built through consistently outstanding product quality, product design, and brand consistent distribution and pricing strategies.⁷ Indeed, Apple is often used in university classrooms, including mine, as a classic, textbook example of how to use each element of the marketing mix, i.e., product, promotion, distribution, and pricing, to create a strong brand that resonates with its customers.

Along with the overall Apple corporate brand, Apple has also built and promoted several product and product family brands that have achieved fame in their own right. Chief among these, perhaps, is the Macintosh, or Mac family of computers and operating systems which was first introduced during the 1984 Superbowl with the iconic and now legendary “1984” advertisement. I understand that the Mac family of products has been promoted consistently alongside the Apple corporate brand since that time, and that it has contributed, and continues to contribute, a large portion of Apple’s revenues and profits.⁸

⁶ Ibid., p. 40.

⁷ See for example, Aaker, David A., Building Strong Brands, New York: The Free Press, 1996 Chapter 2 for an example of a successful, integrated brand building program for Saturn when that automobile was first introduced.

⁸ See Affidavit of Thomas R. La Perle, “Use of the Apple and apple Logo Trademarks and Variants,” dated August 12, 2009, and Affidavit of John Donald, “Use of the Mac Trademarks and Variants,” dated August 12, 2009.

Both the Apple corporate brand and the Mac product brand use a number of well-known logos or trademarks and other trade dress elements to denote their identity.⁹

In July and August, 2009, I conducted a nationwide survey of 297 U. S. individuals in the market for a personal computer to determine the degree to which the standard Mac OS X Leopard desktop image which includes various Apple and Mac marks and other elements of trade dress has acquired secondary meaning, i.e., that the design or product is recognized in the market by a significant number of consumers as identifying a single source, regardless of whether consumers know who or what that source is.¹⁰ Specifically, my study was designed to test whether consumers believe the Mac OS X Leopard desktop image is associated with a single company. I further investigated the degree to which consumers identify the single company source as Apple or Macintosh and the degree to which elements of the desktop image are used as source identifiers. In-person interviews were conducted in ten locations across the United States: New York, Atlanta, Tampa, Akron, Dallas, Chicago, Seattle, San Diego, Denver, and San Jose. Participants were recruited in shopping malls, and interviews were conducted in private offices off of the mall floor. No Apple stores were located in these malls, which are listed in Exhibit 4. Between 30 and 35 interviews were conducted at each location.

All participants were screened either to have personally purchased a computer within the past twelve months (54%) or to have personally started shopping and doing the research to purchase a computer in the next twelve months (46%). In addition, respondents were asked a series of other qualifying questions to ensure that study respondents:

⁹ Ibid.

¹⁰ See Ninth Circuit Manual of model jury instructions civil (Trademark) 15.10(Aug. 2009 ed.)

- Were at least 18 years of age;
- Had no one in their household who worked for an advertising agency, a public relations firm or a marketing research company;
- Had no one in their household who worked for a company that manufactures, distributes or sells computers;
- Had no one in their household who worked for a store in the mall;
- Had not heard about the topic or subject of any interviews being conducted in the mall; and
- Had not participated in a market research study, other than a political poll, in the last 6 months.

Quotas for age and gender were established to create a sample similar to personal computer purchasers.¹¹ The demographic breakdown of participants is shown in Exhibit 5. A copy of the recruitment screening questionnaire is shown in Exhibit 6.

In accordance with generally accepted procedures designed to reduce any potential bias, the survey was conducted on a double-blind basis, i.e., procedures were followed to ensure that neither the interviewers nor the interviewees knew the purpose or sponsor of the survey or knew that the survey was in any way connected to litigation. Interviews were 5 to 10 minutes in length. I developed the questionnaire and interview methodology, and a member of my staff trained, instructed and supervised all of the interviewers.

To reduce any tendency toward guessing, general instructions asked respondents to tell the interviewer if they did not know or were not sure of an answer to any question. Survey participants were then asked to look at large color photographs of computer screens from the three operating systems that Psystar sells: Linux/Ubuntu, Mac OS X Leopard, and Windows. No monitors were visible in these photographs to prevent any

¹¹ Apple: Grow Mac Study: APP_PSY0056267

identification being based upon the name of the hardware manufacturer. The name of the hard drive icon on the Mac OS photograph was changed from the standard "Macintosh HD" to "Hard Drive" so as not to provide respondents with the brand name of the operating system. The photographs of the two other operating systems were included in the study to disguise the true object of the study (i.e., respondents would not know that we were most interested in their beliefs about the Mac OS photograph). In addition, the photograph of the Windows operating system was used to provide a benchmark of results for perhaps the most widely used and most well-known personal computer operating system. The photograph of the Linux/Ubuntu operating system functioned as a type of control group to help rule out the hypothesis that respondents would identify any non-Windows operating system as an Apple or Mac product.

Copies of the photographs used in this study are shown in Exhibit 7. Pictures were presented individually to the participants and the order was rotated across the three operating systems. The participant was told to take as long as she/he wanted to look at each photograph.

After looking at each photograph, survey participants were asked if they recognized what appeared on the pictured screen. Participants who answered positively were asked if they associated the computer screen or any parts of it with one company or with more than one company. Then they were asked to name the company or companies that they had in mind. To determine any substantive basis for these answers, participants were asked to state their reasons for identifying each company mentioned. These last two questions were open-ended, that is, participants were not prompted with responses or given choices, therefore allowing participants the opportunity to say whatever came to mind.

Interviewers recorded all responses verbatim. Participants were then asked to indicate which operating systems were used by computers that they had ever owned and which operating system is used on the computer they currently own. Finally, respondents were asked to grade themselves on a four point scale regarding their proficiency with computers.

All responses were entered online by the interviewers. A copy of the complete questionnaire is provided in Exhibit 8. The Instructions to Interviewers is given in Exhibit 9. After all the interviews were completed, all survey participants were called to validate the survey.¹²

The results of this survey indicate that a large majority of consumers in the market for personal computers recognize the Mac OS X Leopard desktop image. Of the 297 respondents, 233 (78.5%) recognized the image in the photograph of Mac OS X Leopard. This compares to 44.4% who recognized the photograph of Linux/Ubuntu and 93.6% who recognized Windows. The widespread recognition of Mac OS X Leopard – almost 80% of respondents – is quite remarkable given its small market share relative to Windows.¹³

Of the 297 total participants in the study, 166 (55.9%) associated the image with only one company, or a single source. There are persuasive reasons to assess secondary meaning by considering only those consumers who have seen or who recognize the image¹⁴. Obviously, consumers who have not seen the image cannot have any secondary associations with it. The proportion of those people who are familiar with the image and have formed a secondary association is a better measure of the distinctiveness and the

¹² All participants were called to confirm their participation in the survey. Participants who had provided wrong telephone numbers were excluded from the survey. 133 participants were actually contacted, and all confirmed their participation in the survey.

¹³ “HP Takes the Lead in U.S. PC Market as Consumer Shipments Beat Expectations, According to IDC,” *Reuters*, 4/15/09.

¹⁴ “Surveying Secondary Meaning”, Vincent N. Palladino, *The Trademark Reporter*, March 1994-April 1994, 84 TMR 155.

distinctive capabilities of a mark. Under this approach, I calculate that 71.2% of consumers, i.e., 166 of 233 respondents, believe that the image stems from a single source. This result again compares favorably with the 71.3% of respondents who recognized the Windows image and associated it with one company. Thus, I conclude that the desktop image of the Mac OS X Leopard operating system has acquired secondary meaning.

Although not required for a determination of secondary meaning, respondents in my study were further questioned to determine whether they could, in fact, name the company or companies that they had in mind.¹⁵ Of respondents who recognized the Mac OS X Leopard desktop image, 66.1% (154 out of 233) correctly named Apple and/or Macintosh as the single company with which they associate the desktop image. The percentage of all respondents who correctly named Apple or Macintosh as the single company with which they associated the desktop image was also high, i.e., 51.9% (154 of 297). Despite its high market share, for the Windows desktop, approximately 55.2% of respondents (164 of 297) recognized the image and solely associated it with Microsoft or Windows. Only 3% (9 of 297) of respondents who viewed the Ubuntu desktop associated this image with Apple or Macintosh, demonstrating that consumers do not simply assume that any non-Windows operating system is associated with Apple or Macintosh.

To further investigate the substantive basis of respondents' beliefs about the source of the desktop images, respondents were asked what made them think that the photographs were associated with the particular companies they had identified. As shown in Exhibit 10 Table 5, 73.4% (105) mentioned one or more features of the desktop image as reasons for associating the Mac OS X Leopard desktop with Apple or Macintosh. The respondents

¹⁵ This procedure also serves as a check on the robustness of respondents' answers to the question regarding single or multiple company associations.

mentioned the Apple icon, the Finder in the menu bar, the icons along the bottom or the dock, specific program icons, and the aurora borealis background as well as the overall look and feel (e.g., “everything”).

These results provide strong evidence that the Mac OS X Leopard desktop image is widely recognized and is perceived to be provided by a single company. Although association with a single but anonymous source would be sufficient to demonstrate that the image has acquired secondary meaning,¹⁶ these results show that a majority of consumers know the identity of the source, i.e., the Apple or Macintosh brands and base this identity on one or more of the Apple marks or specific features of the image.

B. Consumers who see Psystar’s version of the Mac OS X Leopard desktop image running on Psystar computers in a post-sale environment also are likely to recognize the image and associate it with solely with Apple.

This means they are likely to be confused that the operating system on Psystar’s computers is the same as that sold by Apple. I understand that Psystar has slightly altered the Mac OS X Leopard desktop design and runs a version of Mac OS X Leopard that has been modified to run on Psystar’s computers.¹⁷ Accordingly, I wanted to test whether these changes would affect consumer perceptions of the desktop image or avoid confusion that would otherwise be present if consumers believe that the Mac OS X Leopard on the Psystar computer is the same as the Mac OS X Leopard that is solely associated with Apple.

Once a customer purchases a Psystar computer that runs its version of the Mac OS, that computer and the desktop image may be viewed or used by other consumers in a post-sale environment. For example, someone walking past the desk of a person using a

¹⁶ See Footnote 14

¹⁷ See Report of Dr. John Kelly, Section 5.D.

Psystar computer may see the operating system software as displayed on the monitor. To determine the degree to which consumers would be confused by observations of or experiences with a Psystar computer running its version of Mac OS X, and believe that the operating system is the same as that sold by Apple, I conducted a second study of 283 consumers in ten cities in the United States in July and August, 2009. These cities were: New York, Tampa, Atlanta, Akron, Chicago, Dallas, Denver, Seattle, San Jose and San Diego. The screening criteria for inclusion, and the procedures and survey questions were exactly the same as for the first study. The only difference was that the photographs in this second study were photographs of non-Apple computer monitors running the three operating systems sold by Psystar: Linux, Mac OS X, and Windows. The photograph of the Psystar machine running its version of Mac OS X was almost identical to the photograph of the Mac OS X Leopard screen shown in the first, secondary meaning study. See Exhibit 11. The Psystar version of the Mac OS renames the hard drive the "Open HD" and one or more icons are missing along the bottom portions of the screen in the dock area. Participants were asked to assume that they were walking past someone else's computer, and saw these images on the screen.

All responses were entered online by the interviewers. A copy of the complete questionnaire is provided in Exhibit 12.

The results of this study clearly indicate that consumers are highly likely to be confused by Psystar's version of the Mac OS X operating system and to identify it as being associated with Apple or Macintosh. Once again, 80.6% (228) of the 283 total respondents recognized the photo. This compares with 92.9% (263) who recognized the photograph of the Windows desktop, and 45.2% (128) who recognized the Linux/Ubuntu

screen. Of the total sample of 283 respondents for this study, 58% (164) associated the Max OS X Leopard image with only one company. This compares favorably to 69.6% (197) of the total sample who associated the Windows desktop with only one company. Finally, the company most frequently mentioned as the one company respondents associated with the image was Apple or Macintosh, mentioned by 150 of the respondents, or 53.0% of the total sample (150 of 283), and 65.8% of those who initially said they recognized it. A comparable analysis for the Windows desktop image showed that 162 respondents associated the image with Microsoft. This represents 57.2% of the total sample (162 of 283) and 61.6% of those who said they recognized the image at all (162 of 263). Very few respondents thought that Apple or Macintosh were associated with the relatively unfamiliar Linux/Ubuntu software, i.e., 8, or 2.8% of the total sample. A further analysis was done to test the hypothesis that more experienced computer users, being more knowledgeable, would be less likely to be confused. This analysis, however, showed that respondents who rated themselves as more knowledgeable about computers were just as likely to be confused as less knowledgeable consumers.

As I did in the secondary meaning survey reported earlier, I also asked respondents why they associated the image with a particular company, e.g., Apple or Mac. In this study, like the secondary meaning one, respondents mentioned various features of the Mac OS X Leopard image. Specifically, 111 respondents, or 79.3%, of those who associated it with Apple or Mac did so because of one or more of these features (see Exhibit 10-6).

In summary, my study shows that consumers, and even fairly sophisticated consumers, are very likely to associate the desktop image shown on Psystar systems with

only one company and to believe that company is Apple or Macintosh. They also are likely, therefore, to be confused in the belief that the Psystar system is the same Mac OS X Leopard operating system that is sold by Apple.

C. Consumers shopping on the Psystar website are likely to be confused as to the relationship between Psystar and Apple.

In July and August 2009, I conducted a nationwide survey of 356 participants to determine consumers' understanding of the relationship between Psystar and Apple. In-person interviews were conducted by experienced interviewers in research facilities in shopping malls in ten cities across the United States in order to reflect the geographic diversity of major markets for personal computers. These ten cities were New York, Atlanta, Tampa, Akron, Dallas, Chicago, Seattle, San Diego, Denver, and San Francisco. No Apple stores were located in any of the malls. Approximately 30 to 35 interviews were conducted at each location. A list of the malls is provided in Exhibit 4.

All survey respondents were screened to ensure that they had, in the past twelve months, personally purchased a computer from a website similar to Psystar's, i.e., where the purchaser configures the computer's specific features such as size of hard drive or type of processor, or that they planned to purchase, in the next 12 months, a computer from the same kind of website. To emphasize a population that likely would be attracted to the Psystar website and to be interested in both parties' products, respondents were screened such that two-thirds of the respondents had purchased or planned to consider purchasing an "Apple", "Macintosh", "Mac", "iMac", "MacMini", or "MacPro". Further, this breakdown of computer ownership or consideration is consistent with the definition of Psystar's target market given by Mr. Rodolfo Pedraza in Exhibit 8 to his

deposition taken on March 19, 2009.¹⁸ Specifically, this documents states that Psystar's target users and markets are (1) Windows based PC users who want to experience Mac Os X without paying the premium for an Apple computer, (2) current Apple users who would like a machine that can be upgraded, and (3) users looking to buy a used Apple computer to save money.

Respondents were asked a series of additional qualifying questions to include in the sample only those who:

- Were at least 18 years of age;
- Had no one in their household who worked for an advertising agency, a public relations firm or a marketing research company;
- Had no one in their household who worked for a company that manufactures distributes, or sells computers.
- Had no one in their household who worked for a store in the mall;
- Had not heard about the topic or subject of any interviews being conducted in the mall, and;
- Had not participated in a marketing research study, other than a political poll, in the last six months.

Age and gender quotas were established so that the sample would be similar to online purchasers of Apple computers. The demographic breakdown of participants is shown in Exhibit 14. A copy of the recruitment screening questionnaire is shown in Exhibit 15.

The survey was conducted on a double-blind basis, meaning that neither the interviewer nor the interviewees knew the purpose or sponsor of the survey or knew that the survey was in any way connected to litigation. Interviews were 6 to 10 minutes in

¹⁸ Deposition of Rodolfo Pedraza, March 19, 2009, Exhibit 8, page 16 titled "Target Users and Markets."

length. I developed the questionnaire and interview methodology, and a member of my staff trained, instructed and supervised all of the interviewers. Approximately 8 to 10 respondents on the first day of interviewing in each location were pre-recruited by telephone to ensure that an adequate number of respondents would be available while a member of my staff was present to train interviewers and observe several interviews for quality control purposes. All other respondents were recruited from the mall floor. The screening questions used to recruit participants was the same whether respondents were pre-recruited via telephone or solicited from the mall floor.

General survey instructions asked respondents to tell the interviewer if they did not know or were unsure of an answer to any question. Respondents were first shown a photograph of Psystar's website home page (See Exhibit 16), and asked if they had ever heard of Psystar. If they had heard of the company, they were asked what they had heard. Next, respondents were asked which company or companies make each of the operating systems listed for sale on the Psystar home page. Respondents were then shown a photograph of the Psystar webpage offering the Open Q computer, which runs Mac OS X Leopard, for sale, and asked if they believed that Psystar needed to get permission from the maker of Mac OS X to offer this system. Respondents were then asked why they gave the answer they did, i.e., either that Psystar needed permission or it did not. Next, respondents were presented with a list of four common computer problems and asked for each one if they thought that the problem would likely be due to (i) the particular hardware sold by Psystar, (ii) the particular operating system running on the computer, i.e., Mac OS X, or (iii) a combination of both the hardware and the operating system. Respondents were asked whether or not they would be eligible for technical support from

the company that makes Mac OS X if they purchased a computer from Psystar and experienced difficulties with it. Finally, respondents were asked to rate themselves on a four-point scale regarding their proficiency with computers. All responses were entered online by the interviewers. A copy of the complete questionnaire is provided in Exhibit 17, and a copy of the Instructions to Interviewers in Exhibit 9.

A total of 22 respondents indicated that they had heard of Psystar prior to the survey and were eliminated from further analysis, leaving a total sample of 320.¹⁹ Complete tabulated results for these respondents is found in Exhibit 10-4. As shown in this exhibit, most consumers are aware of the companies that make the Mac OS X and Windows operating systems. Approximately 71.6% (229) of the respondents correctly named Apple or Mac as the company or companies that make the Mac OS X operating system. This compares with 219 (68.4%) of respondents who said that the Windows operating system is made by Microsoft, a Microsoft named operating system such as Vista, or Windows operating system, and with 46 respondents (14.4%) who said that Linux, Open Source, Red Hat, or Ubuntu make the Linux operating system. Only 23 respondents or 7.2% thought that the relatively unfamiliar Linux operating system is made by Apple or Mac, and only 16 (5.0%) thought that Windows is made by Apple or Mac.

A large majority of consumers believed that there must be a relationship between Psystar and Apple. In particular, 76.6% of the respondents stated that they believed that

¹⁹ Consumers who have heard of Psystar may also have heard about this litigation, and thus not be ideal candidates for an unbiased survey. In addition, some of these consumers might have purchased Psystar computers or known people who did which could also affect how they viewed the website after the fact of purchase. In addition some comments about what these consumers had heard about Psystar reflects a potential bias against Psystar. In any event, an analysis of these respondents indicates that none of the conclusions in my report would be changed if their responses were included and the results for them are available in Appendix A.

Psystar needed Apple's permission in order to sell the Mac OS X operating system on its computers. There were many reasons for this belief, but the most frequently offered reasons were that (1) there were issues involving copyrights, patents, or licensing (23.3%) (2) Apple's name is being used and that Apple has the right to control its own name, software or goodwill (20.0%), (3) legal issues would arise if Psystar did not have permission (13.1%); and (4) that Mac OS X does not belong to Psystar (27.8%).

Perhaps because they feel that Apple has given its permission for Psystar to sell the Mac OS X operating system, a large majority of consumers, 229 respondents or 71.6% of the sample, felt that they would be eligible for technical support from the maker of the Mac OS if they experienced any difficulties with it.²⁰

D. To the extent that consumers experience technical problems with a Psystar computer, Apple's reputation will be harmed as consumers are likely to believe that those problems are due, at least in part, to the Mac OS X operating system.

Apple is known for its satisfied and extremely loyal customer base.²¹ The recently reported quarterly American Customer Satisfaction index, for example, once again shows Apple to have the highest level of customer satisfaction of any personal computer manufacturer.²² For the sixth year in a row, Apple has bested second place Dell, and this year's gap between Apple and Dell is the largest differential between a first and second place company in any industry category. Authors of the study note that Apple's high ratings can be traced to the high quality of its products and to the high quality of customer service and support. Similarly, marketing research done by Apple shows that "Is reliable

²⁰ Apple has seen evidence of actual confusion of this type. At least 14 consumers have called or written to Apple to get support with a Psystar computer running OS X Leopard. APP_PSY0050592-607 and APP_PSY0054794-795.

²¹ See for example, "Mac Installed Base Study: United States" a quantitative market research report prepared for Apple, November 2006, by Lieberman Research Worldwide, and the sections on Irreparable Harm in the Expert Report of Matthew R. Lynde, PhD filed in this litigation, dated August 21, 2009.

²² See www.theacsi.org.

and of a high quality” is the most important feature in making the decision to purchase a Macintosh computer.²³

The results of my third consumer study, described above, indicate the harm that problems with Psystar computers will do to Apple’s brand and its excellent reputation. To the extent that consumers experience problems with computers purchased from Psystar, they are likely to blame the maker of the Mac OS X operating system.²⁴ According to Dr. John Kelly, plaintiff’s technical expert, numerous problems with Psystar computers have been encountered, and these are the types of problems that my study shows will be attributed, at least in part, to Apple and Mac OS X Leopard.

Consumers in my third study described above in support of opinion C were asked to imagine that they had purchased a Psystar computer and that they experienced, in turn, each of four different computer problems: (1) some of the software programs designed for Mac OS X won’t work, (2) the computer freezes or crashes often, (3) the computer runs very slowly, and (4) the computer just won’t turn on. Only for this last problem, where the computer simply will not turn on, did the majority of consumers (170 respondents, or 53.1%) blame the Psystar computer. Even so, 28.4% of the respondents (91) thought that both the hardware and the software were likely to be responsible for the problem. For the other three problems, a substantial percentage of respondents blamed the Mac OS X operating system, while another large percentage blamed both the operating system and the Psystar hardware. In the case of software programs designed for Mac OS X not working, 35.3% of respondents blamed the operating system for the problem, while 29.7% blamed

²³ “Mac Installed Base Study: United States”, by Lieberman Research Worldwide, November 2006.

²⁴ According to Dr. John Kelly, Psystar’s installation of its altered version of Mac OS X Leopard on non-Apple hardware is likely to result in many performance problems relative to installations on Apple approved hardware. See Section 5.I.

both the hardware and the software. If the computer freezes or crashes often, 27.5% of respondents would blame the maker of the operating system, and 40.6% would blame both the hardware and the software makers. Finally, if the computer runs very slowly, respondents are fairly evenly split in terms of their assignment of blame: 29.7% (95) would blame the Mac OS X operating system, and 31.3% would blame the Psystar hardware, and 39.1% would blame both the hardware and the software.

As noted above, Apple has worked very hard to provide its customers with a superior user experience, and it is known for its superior performance and outstanding technical support.²⁵ Problems with Psystar computers, which in turn would be associated with the maker of the Mac OS X Leopard operating system, then would strike a serious blow to key differentiating factors for Apple computers. Should consumers encounter technical problems with the Psystar computers, Apple's brand image and the reputation of its products will suffer, and Apple's marks which consumers will have seen as part of the operating system on the Psystar computer and which stand for the brand, will be tarnished.

V. Summary

The results of my three consumers surveys, taken collectively provide strong support for concluding that (1) consumers will recognize the desktop image of the Mac OS X Leopard operating system and associate it solely with Apple and/or Macintosh, (2) this recognition and association is not changed by virtue of any changes to the visible desktop image made by Psystar's version of the Mac OS X when its computers run the Mac OS X Leopard operating system, reflecting confusion that the system as run on Psystar is the same as that sold by Apple, (3) consumers are likely to be confused that

²⁵ See the marketing research report and the American Customer Satisfaction index report.

Psystar has permission from Apple to resell the Mac OS X Leopard operating system along with its computers, and thus they are entitled to service and support from Apple, and (4) the image and reputation of the Apple and Macintosh brands and the marks that stand for them will be tarnished by problems that consumers may experience when using the Psystar computers. The conclusions, which are drawn from my research, are robust across different research sites, age groups and genders, brands of computers purchased or considered, and level of computer expertise.

VI. Compensation

I am being compensated at the rate of \$650 per hour for my work on this matter. The opinions expressed in this report are my own, and my compensation is not dependent upon the substance of these opinions.

A handwritten signature in black ink that reads "Carol A. Scott". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Carol A. Scott
September 16, 2009