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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

APPLE INC., a California corporation,
 Plaintiff,
 v.
 PSYSTAR CORPORATION,
 Defendant.
 AND RELATED COUNTERCLAIMS.

CASE NO. CV-08-03251-WHA

**PSYSTAR CORPORATION'S
 OPPOSITION TO APPLE
 INC.'S MOTION TO DISMISS
 PSYSTAR CORPORATION'S
 COUNTERCLAIMS**

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

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I. INTRODUCTION

Apple Computer Inc. (“Apple”)’s primary argument in support of its motion to dismiss is that the relevant markets in Pystar’s counterclaims are ‘implausible’ because single-product relevant markets cannot be plead as a matter of law. Apple is simply wrong. The Ninth Circuit Court of Appeals clearly established in *Newcal Industries, Inc. v. Ikon Office Solution* the following legal principle:

“[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue.”

Newcal Industries, Inc. v. Ikon Office Solution,
518 F.3d 1038, 1048 (9th Cir. 2008)

Apple is nothing if tenacious, having previously asserted this very same argument in attempts to dismiss antitrust claims related to Apple’s iPod, iTunes Music Store, and iPhone pending in the Northern District of California. The result should likewise be the same – the motion should be dismissed. The sentiment echoed by Apple in those cases, as it is here, is that the antitrust claimants are trying to “force” and “require Apple to help its competitors compete against it.” This fundamental subversion of the real issues – the adequacy of Psystar’s pleading regarding Apple’s misuse of its Mac OS copyrights and illegal tying of its separately sold OS to its Apple-Labeled Computer Hardware Systems – is ill-founded. Psystar requests that the Court adhere to the precedent of the Ninth Circuit – as did the Court in the aforementioned actions – and deny Apple’s motion to dismiss.

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II. ARGUMENT

A. Apple Misconstrues and Misapplies the Legal Standard for a Motion to Dismiss.

A complaint may be dismissed for failure to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6). A claim may be dismissed as a matter of law for: “(1) lack of a recognizable legal theory or (2) insufficient facts under a cognizable legal theory.” *Robertson v. Dean Witter Reynolds, Co.*, 749 F.2d 530, 534 (9th Cir. 1984). The legal theories at issue are not in question. Apple instead asserts that Psystar’s detailed factual arguments are mere “conclusory allegations” upon which the Court may dismiss Psystar’s counterclaims. Apple is incorrect.

Psystar’s detailed factual arguments go above and beyond what is required under Rule 12(b)(6) of the Federal Rules of Procedure. To survive a Rule 12(b)(6) motion, Psystar “need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by antitrust laws.” *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988); *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004). The Court is required to accept the facts pleaded as true and to construe them in light most favorable to Psystar. *See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Les Shockley Racing, Inc. v. National Hot Rod Ass’n*, 884 F.2d 504, 507 (9th Cir. 1989) (“[non-moving parties] are entitled to have all of their allegations of material fact accepted as true and construed in a favorable light”).

With regard the general rules of pleading, Apple incorrectly applies *Bell Atlantic Corp. v. Twombly* to the allegations in Psystar counterclaims. Unlike the claims in *Twombly*, Psystar’s counterclaims do not simply state “labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (affirming dismissal of Sherman Act § 1 claim of conspiracy in restraint of trade). Psystar’s well-pled complaint sets forth very specific factual allegations. *See* Counterclaim, ¶¶ 17-77). Apple even identifies and points to factual allegations supporting Psystar’s claims in its brief. *See* Apple Brief, 1:16-28 (citing Counterclaim, ¶¶ 15, 22, 31-35), 2:12-21 (citing Counterclaim, ¶¶ 18, 27, 57),

1 2:22-26 (citing Counterclaim, ¶¶ 18,-20) (regarding the absence of effective substitutes for the Mac
2 OS), 8:23-12:26 (citing Counterclaim, ¶¶ 15, 18-19, 21-23, 28, 34-39, 43).

3 **B. Apple’s Motion to Dismiss Based on Psystar’s Single-Product**
4 **Market Definition is Fundamentally Flawed.**

5 **1. Ninth Circuit Law Expressly States that an Antitrust Claimant May**
6 **Restrict the Relevant Market to a Single Brand of the Product at Issue.**

7 In its counterclaim allegations, Psystar identifies two relevant product markets: (1) the Mac
8 OS and (2) Mac OS Capable Computer Hardware Systems. Counterclaim, ¶¶ 17-29. Psystar further
9 specifically identifies Apple-Labeled Computer Hardware Systems as an artificially created and
10 illegally maintained submarket of the Mac OS Capable Computer Hardware Systems market. *Id.* ¶¶
11 27-28. “Apple is the only member and wields monopoly power” in Apple-Labeled Computer
12 Hardware Systems submarket. *Id.* Apple’s motion to dismiss is based on the argument that a
13 single-product market is legally implausible. Apple is simply incorrect.

14 The Ninth Circuit Court of Appeals established in the most plain, unambiguous, and
15 straightforward terms that “the law permits an antitrust claimant to restrict the relevant market to a
16 single brand of the product at issue.” *Newcal Industries, Inc. v. Ikon Office Solution*, 518 F.3d 1038,
17 1048 (9th Cir. 2008); *see also Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th
18 Cir. 1984) (affirming the district courts analysis of a “‘single product’ claim”).

19 In *Newcal*, the Ninth Circuit criticized the district court’s 12(b)(6) dismissal of an antitrust
20 claimant’s claims for exclusive dealing, tying, restraint of trade, and attempted monopolization
21 when all of the movant’s arguments hinged on **factual** deficiencies rather than **legal** deficiencies.
22 *See Newcal Industries*, 518 F.3d at 1051-52. Such is the case here as Apple does not contend that
23 Psystar’s counterclaims lack recognizable legal theories or insufficient facts under those theories.
24 *See Robertson*, 749 F.2d at 534 (dismissing a claim is only proper for: “(1) lack of a recognizable
25 legal theory or (2) insufficient facts under a cognizable legal theory”).

26 Apple simply – and incorrectly – concludes that Psystar’s factual allegations are wrong. *See*
27 Apple Brief, 8:18-12:26. Apple’s conclusions do not support Apple’s motion to dismiss. Apple’s
28

1 arguments do nothing but reinforce the existence of factual disagreement regarding the relevant
2 markets, which necessitates the denial of Apple’s motion to dismiss. *See infra* Section III(B)(3).

3
4 ***a. Denial of Apple’s motion to dismiss on the legal principle that
single-product markets are permitted under Ninth Circuit law
should come as no surprise to Apple.***

5
6 United States District Court Judge Ware recently applied the single-product market
7 principle in his denial of Apple’s motion to dismiss the antitrust claims in the putative class action
8 involving Apple’s iPhone. Judge Ware stated that: “there can be a legally cognizable aftermarket
9 in a single brand’s products, even if that market is created by a contractual relationship.” *In re*
10 *Apple & AT&TM Antitrust Litigation*, No. 144 Civ. 07-05152, slip op. at 13:1-2, 14:10-12 (9th Cir.
11 October 1, 2008) (Order Granting in Part and Denying in Part Apple’s Motion to Dismiss).¹

12 Judge Ware reached a similar decision three years earlier when he denied Apple’s motion to
13 dismiss antitrust claims in a class action involving Apple’s iPod and iTunes Music Store. In that
14 action, Judge Ware stated that: [a]lthough the alleged relevant markets are narrowly defined by
15 Plaintiff, this Court accepts these allegations as true for the purpose of this motion. . . . [A]s plead,
16 Plaintiff alleges all of the elements of a tying claim to survive a motion to dismiss under Rule
17 12(b)(6).” *Slattery v. Apple Computer, Inc.*, 2005 WL 2204981 at *4 (9th Cir. 2005) (Order
18 Granting in Part and Denying in Part Apple’s Motion to Dismiss).²

19
20 ***b. Psystar’s pleading of single-product markets is sufficient
not only as a matter of law but also as a matter of fact.***

21
22 Notwithstanding (1) that “[t]he definition of the relevant market is a question of fact for the
23 jury” (*see infra* Section II(B)(3)) and (2) that a single-product market is sufficient as a matter of
24 law, Psystar’s definition of the Mac OS as a relevant market is factually plausible. Apple

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1 Order attached as Exhibit “A” to Declaration of Christopher Grewe in support of Opposition to
27 Motion to Dismiss (“Grewe Decl.”).

28 2 Order attached as Exhibit “B” to Declaration of Christopher Grewe in support of Opposition to
Motion to Dismiss (“Grewe Decl.”).

1 conclusorily submits to the Court that the Mac OS is a “competitive substitute” for the Windows
 2 OS and Linux and, thus, cannot plausibly be defined as the relevant market. Apple Brief, 8:18-
 3 10:2. Apple’s contention is wrong on its face for at least two reasons.

4 First, the factual allegations in Psystar’s counterclaims, including reference to Apple’s
 5 advertising campaigns, refute Apple’s contention. See Counterclaim, ¶¶ 19-20, 25, 27-28, 30-46,
 6 55-56, 68; see also Exhibit A of Apple’s Request for Judicial Notice. Second, factual findings of
 7 other district courts regarding the Windows OS in comparison other to operating systems refuted
 8 Apple’s unsupported contention.

9 For example, in *U.S. v. Microsoft Corp.*, the United States District Court for the District of
 10 Columbia made the evidentiary finding that the Mac OS, contrary to Apple’s conclusion in support
 11 of its motion, **was not a suitable substitute to the Windows OS**, stating:

12 The Court has already found, based on the evidence in this record, that there
 13 are currently no products – **and that there are not likely to be any in the near**
 14 **future** – that a significant percentage of computer users worldwide could
 15 substitute for Intel-compatible PC operating systems without incurring
 16 substantial costs.

16 *U.S. v. Microsoft Corp.*, 87 F.Supp.2d 30, 36 (D.D.C. 2000), *aff’d in relevant part, U.S. v.*
 17 *Microsoft Corp.*, 253 F.3d 34 (C.A.D.C. 2001) (emphasis added).

18 On appeal, Microsoft challenged this market definition on the specific basis that the Mac
 19 OS should be included therein. The Court of Appeals emphasized the district court’s finding,
 20 stating:

21 The District Court found that consumers **would not switch from Windows to**
 22 **Mac OS in response to a substantial price increase** because of the costs of
 23 acquiring the new hardware needed to run Mac OS (an Apple computer and
 24 peripherals) and compatible software applications, as well as because of the
 25 effort involved in learning the new system and transferring files to its format.
 Findings of Fact ¶ 20.

25 *U.S. v. Microsoft Corp.*, 253 F.3d 34, 52 (C.A.D.C. 2001) (emphasis added). The Court of Appeals
 26 criticized Microsoft’s conclusory argument on appeal stating that “Microsoft neither points to
 27 evidence contradicting the District Court’s findings nor alleges that supporting record evidence is
 28 insufficient.” *Id.* The Court of Appeals affirmed the lower court’s findings and stated “we have no

1 basis for upsetting the court's decision to exclude Mac OS from the relevant market.” *Id.*³ These
 2 findings of fact suggest that Psystar’s allegations regarding the Mac OS as a relevant market are, at
 3 the very least, plausible.

4
 5 **2. Psystar’s Counterclaims Satisfy the Pleading**
 6 **Requirements under Ninth Circuit Law.**

7 As noted in *In re Apple & AT&TM Antitrust Litigation*, the Ninth Circuit considers several
 8 factors when evaluating a claimant’s market allegations in a motion to dismiss under Federal Rule
 9 12(b)(6). *See In re Apple & AT&TM Antitrust Litigation*, slip op. at 12:19-13:2 (citing *Newcal*, 513
 10 F.3d at 1045). First, “the ‘relevant market must be a product market,’ the boundaries of which are
 11 defined by products and producers.” *In re Apple & AT&TM Antitrust Litigation*, slip op. at 12:19-
 12 13:2. Second, “the market encompasses the product at issue, in addition to all reasonably
 13 interchangeable economic substitutes.” *Id.* Third, an antitrust claimant “may allege a submarket,
 14 which must be ‘economically distinct from the general product market.” *Id.* All of these factors
 15 are encompassed in Psystar’ counterclaims.

16 In *In re Apple AT&TM Antitrust Litigation*, the Ninth Circuit found in light of these factors
 17 that the antitrust claimants sufficiently alleged market power and monopolization in the iPhone
 18 voice and data services aftermarket and the iPhone applications aftermarket. Relying on *Newcal*
 19 *Industries* and *Eastman Kodak*, the Ninth Circuit held that the plaintiffs pleading was sufficient
 20 where it “alleged an aftermarket for iPhone voice and data services ‘that would not exist without’
 21 the primary market for iPhones, and is thus ‘wholly derivative from and dependant on the primary
 22 market.’” *See In re Apple & AT&TM Antitrust Litigation*, slip op. at 14:13:-15:26 (citing *Newcal*,
 23 513 F.3d at 1045; *Eastman Kodak Co. v. Image Technical Services, Inc.* 504 U.S. 451 (1992)). The
 24 Ninth Circuit similarly held that the antitrust claimants successfully alleged an iPhone applications
 25

26
 27 ³ Psystar acknowledges that subsequent iterations to the Mac OS have been released since these
 28 findings of fact and affirmation thereof, including the capability of running the Mac OS on Intel
 processors. Such changes, alone, cannot establish that the factual findings of a district court
 after a full bench trial and affirmed on appeal are now completely implausible.

1 aftermarket, stating that “an aftermarket for iPhone applications that ‘would not exist without’ the
2 primary market for iPhones, and is thus ‘wholly derivative from and dependant on the primary
3 market’” was sufficient to state a claim under Section 2 of the Sherman Act. *See In re Apple &*
4 *AT&TM Antitrust Litigation*, slip op. at 16:1-28 (citing *Newcal*, 513 F.3d at 1049).

5 Psystar identifies two relevant product markets: (1) the Mac OS and (2) Mac OS Capable
6 Computer Hardware Systems in its counterclaim allegations. Counterclaim, ¶¶ 17-29. Psystar
7 further specifically identifies Apple-Labeled Computer Hardware Systems as an artificially created
8 and illegally maintained submarket of the Mac OS Capable Computer Hardware Systems market,
9 and of which “Apple is the only member and wields monopoly power.” *Id.* ¶¶ 27-28. Apple
10 illicitly creates and maintains this submarket through its Mac OS End User License Agreement
11 (EULA). *Id.* ¶¶ 27-28. The Apple-Labeled Computer Hardware Systems submarket is one that
12 “would not exist” without the primary market for the Mac OS and is thus “wholly derivative from
13 and dependent” on that market. The present markets are both factually and legally analogous to the
14 markets and submarkets in *In re Apple AT&TM Antitrust Litigation*, wherein the court found the
15 claimants’ antitrust allegations sufficient to overcome Apple’s motion to dismiss.

16 Moreover, the Apple-Labeled Computer Hardware Systems submarket exists as a direct
17 result of Apple’s Mac OS EULA. The Court in *In re Apple & AT&TM Antitrust Litigation*
18 expressly noted that claimants’ antitrust claims were “also adequate to the extent the alleged
19 aftermarket is predicated on an initial contractual relationship between [Apple] and [purchasers of
20 the tying product].” *See In re Apple & AT&TM Antitrust Litigation*, slip op. at 151-6 (citing
21 *Newcal*, 513 F.3d at 1049). The situation in the *In re Apple & AT&TM Antitrust Litigation* is
22 analogous here as the Apple-Labeled Computer Hardware Systems submarket is expressly
23 predicated on contractual relationship (i.e., Apple’s EULA) between Apple and Mac OS purchases.
24 Apple specifically points to Psystar’s counterclaim allegations asserting the same. *See* Apple Brief,
25 2:19-21 (citing Counterclaim, ¶¶ 57, 61). On this additional basis, Psystar’s market allegations are
26 sufficiently plead to deny Apple’s motion to dismiss under the applicable law of the Ninth Circuit.

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1 **3. Apple Overstates the Alleged “Plethora of Legal Authority”**
 2 **in Support of its Motion to Dismiss.**

3 Apple also incorrectly overstates its legal conclusion that the “plethora of legal authority . . .
 4 makes clear that an antitrust plaintiff cannot legitimately plead a single brand market.” Apple Brief,
 5 8:18-19. As noted *supra* in Section II(B)(1), Apple’s conclusion is simply incorrect. Ninth Circuit
 6 law expressly permits an antitrust claimant to restrict the relevant market to a single brand of the
 7 product at issue. *Newcal Industries*, 518 F.3d at 1048.

8 Moreover, the cases cited by Apple do not support Apple’s motion to dismiss. In fact, the
 9 majority of the cases cited by Apple in support of its single-product argument were not even
 10 decided at the Rule 12(b)(6) pleadings stage on a motion to dismiss. These cases reinforce the point
 11 that market definitions require a factual determination that cannot properly be made on a motion to
 12 dismiss:⁴

- 13 • *Little Caesars Enterprises, Inc. v. Smith*, 34 F.Supp.2d 459 (E.D. Mich. 1998), a
 14 district court case from **outside this jurisdiction**, cited in Apple’s Brief at 7:21-24,
 15 was decided on **summary judgment only after a very fact specific analysis** of the
 16 relevant facts from discovery and testimony from economic experts was completed.
Id. at 490-513.
- 17 • *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986), a circuit
 18 court decision from **outside this jurisdiction**, cited in Apple’s Brief at 7:10-13, had
 19 been decided on **summary judgment only after discovery** relating to the market
 20 definition, including depositions, had been taken.⁵
- 21 • *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir.
 22 1986), a circuit court decision from **outside this jurisdiction**, cited in Apple’s Brief
 23 at 7:9-10, had been decided on **summary judgment after analysis of the facts and**
 24 **consideration of expert opinion** regarding the relevant market.⁶

25 ⁴ A detailed discussion regarding the factual determination of market definitions after the
 26 pleading stage is provided *infra* in Section II(B)(3).

27 ⁵ See *A.I. Root Co. v. Computer Dynamics, Inc.*, 615 F.Supp. 727, 1985-2 Trade Cases P 66,674
 28 (N.D. Ohio May 31, 1985) (NO. C84-1348) (district court’s summary judgment ruling).

⁶ See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 1993 WL 338985, 1993-2
 Trade Cases P 70,378 (N.D. Ill. Sep 01, 1993) (NO. 88 C 0644) (district court’s summary
 judgment ruling).

- 1 • *In re Wang Laboratories, Inc.*, 1996 WL 87050 (D. Mass. 1996), a district court
2 case from **outside this jurisdiction**,, cited in Apple’s Brief at 7:13-14, related to a
3 district court’s decision regarding its factual findings on the relevant market
4 definition *after full trial on the merits*.
- 5 • *Disenos Artisticos E Industriales, S.A. v. Work*, 714 F.Supp. 46 (E.D.N.Y. 1989), a
6 district court case from **outside this jurisdiction**, cited in Apple’s Brief at 7:27-8:1,
7 was decided on **summary judgment after a review of the evidentiary record**.
- 8 • *Lucent Technologies, Inc. v. Gateway, Inc.*, 2007 WL 2900484 (S.D. Cal. 2007), a
9 district court case from **outside this jurisdiction**, cited in Apple’s Brief at 6:26-7:2,
10 was decided on **summary judgment after a review of the evidentiary record**.
- 11 • *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir.
12 1981), cited in Apple’s Brief at 6:24-26, had been decided on **summary judgment**
13 *after a review of the evidentiary record*.
- 14 • *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962), cited in Apple’s Brief at 6:17-19, had
15 been decided *after a full trial on the merits*.
- 16 • *Green Country Foods Market, Inc. v. Bottling Group, LLC*, 371 F.3d 1275 (10th Cir.
17 2004), cited in Apple’s Brief at 7:14-17, had been decided at **summary judgment**
18 *only after it had found a lack of evidence* to establish the market definition at issue.
19 *See id.* at 1284-85.

20 That none of these cases was decided at the pleadings stage is not surprising given that
21 plaintiff’s definition of the relevant market is a post-pleadings factual determination. *Forsyth*, 114
22 F.3d at 1475.

23 **4. Defining the Relevant Market for Antitrust Claims** 24 **is an Issue of Fact for the Jury.**

25 Apple’s motion to dismiss should be further denied because “[t]he definition of the relevant
26 market is a question of fact for the jury.” *Theme Promotions, Inc. v. News America Marketing FSI*,
27 539 F.3d 1046, 1053 (9th Cir. 2008) (citing *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir.
28 1997)). Defining the relevant market is a question of fact for the jury, in part, because
“[d]etermining the relevant market can involve a complicated economic analysis, including
concepts like cross-elasticity of demand, and ‘small but signatory nontransitory increase in price’

1 ('SSNIP') analysis." *Id.* (citing *United States v. Oracle Corp.*, 331 F.Supp. 2d 1098 (N.D. Cal
2 2004) (Walker, C.J.)).

3 Apple does not address this issue in its brief. Apple was, however, highly – albeit
4 improperly – critical of Psystar's factual allegations in characterizing them as "so vague [they] are
5 meaningless" and must therefore be "ignored." *See* Apple Brief, 11:16-12:24 (citing a Western
6 District of Tennessee case for this assertion). For example, Apple improperly criticizes Psystar's
7 factual allegation "that a percentage change in price of one product, namely the Mac OS, will not
8 result in a change in quantity that consumers will demand of another product as evidence by the
9 price differentiations . . . as otherwise set forth above." Apple Brief, 11:13-16 (citing Psystar's
10 Counterclaim, ¶ 43).

11 This factual allegation is anything but ambiguous. First, Psystar's factual allegations set
12 forth specific prices, values and products. *See* Counterclaim, ¶¶ 36-37, 44-45. Second, the Ninth
13 Circuit Court of Appeals expressly stated *in almost identical language* that that such a factual
14 allegation is an important fact question to be determined by the jury:

15 "Cross-elasticity of demand measures the percentage change in quantity that
16 consumers will demand of one product in response to a percentage change in
17 the price of another." *Theme Promotions*, 539 F.3d at 1054 (citing *Forsyth*,
114 F.3d at 1483).

18 In short, Psystar has not posited meaningless or vague allegations in its counterclaims.
19 Apple's requests that the Court (1) ignore the federal pleading requirements (*see supra* Section
20 II(A)) (2) determine questions of fact for the jury in a pre-answer motion, and (3) disregard and
21 ignore without reason the very specific factual allegations in Psystar's well-pled complaint are all
22 improper requests.

1 **C. Apple's Incorrectly Asserts that Psystar's Counterclaims**
2 **"Force Apple to Help Its Competitors."**

3 Apple's last gasp argument in support of its motion to dismiss is that Psystar's
4 counterclaims seek to force Apple to share a piece of its Mac OS pie with its competitors. Apple's
5 argument is a fundamental subversion of the true issues relevant to Psystar's counterclaims.
6 Psystar's counterclaims are not premised on "forcing Apple to license its software to competitors."
7 Psystar seeks to prevent Apple from intentionally restraining competition. *See* CAL. BUS. & PROF.
8 CODE § 16700. Apple's contrived attempt to shoehorn this case into the law of *Verizon Communs.*
9 *v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 401-03 (2004), is therefore meritless.

10 The issue in *Trinko* was whether Verizon, a telecommunications carrier subject to regulation
11 by the Telecommunications Act of 1996 (the "Telco Act"), could be held liable for unlawful
12 monopolization if the alleged antitrust violation was for Verizon's failure to adhere to the statutory
13 requirements imposed by Section 251 of the Telco Act. *Verizon Communs. v. Law Offices of Curtis*
14 *V. Trinko, LLP*, 540 U.S. 398, 401-03 (2004). Section 251 of the Telco Act required Verizon to
15 allow competing local exchange carriers to connect to certain components of Verizon's network. *Id.*
16 The antitrust claimants' claims were based on FFC findings that Verizon failed to adhere to the
17 Section 251 requirements, and the claimants asserted that Verizon's failure to meet its obligations
18 under the Telco Act stifled competition and, thus, created antitrust liability. *Id.* at 404. In other
19 words, the alleged antitrust liability was based on Verizon's failure to adhere to Section 251 of the
20 Telco Act. The Supreme Court rejected the claim, noting that while Verizon's action may have
21 been a breach of the Telco Act, it did violate any antitrust law as such laws do not require a firm to
22 assist competitors. *Id.* at 407-10.

23 The issue here is not whether Apple is being forced to help its competitors. Psystar's
24 counterclaims assert, *inter alia*, Apple's misuse of its Mac OS copyrights and illegal tying of its
25 separately sold Mac OS to Apple-Labeled Computer Hardware Systems. Both acts constitute an
26 illegal restraint of trade directly in conflict with the likes of the Cartwright Act. *See* CAL. BUS. &
27 PROF. CODE § 16700.

28 Specifically, Psystar's counterclaims focus, in part, on Apple's illegal tying arrangement

1 consistent with prerequisites of *per se* illegal tying. *See* Counterclaim, ¶¶ 78-92. Those
2 prerequisites are: “(1) separate products, the purchase of one (tying product) being conditioned on
3 the purchases of the other (tied product); (2) sufficient economic power with respect to the tying
4 product to restrain competition in the tied product; and (3) an effect upon a substantial amount of
5 commerce in the tied product.” *Digidyne*, 734 F.2d at 1338 (citing *Fortner Enterprises v. U.S. Steel*
6 *Corp.*, 394 U.S. 495, 499 (1969)). In that regard, Psystar complains of Apple’s illegal tying of its
7 Mac OS to only Apple-Labeled Computer Hardware Systems – not that Apple is refusing to help its
8 competitors.

9 Apple’s contention that such allegations are “implausible” likewise has no merit. The Ninth
10 Circuit has previously held that a computer software and hardware manufacture can be held liable
11 for violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act for *per se* illegal
12 tying of the manufacturer’s OS to the manufacturer’s CPUs of its computer systems. *See Digidyne*,
13 734 F.2d 1336 (reversing district court’s grant of manufacturer’s motion for judgment n.o.v. or for
14 a new trial following a jury verdict of *per se* tying). In *Digidyne*, the “tying product” was the OS
15 and the “tied product” was the CPU of the computer systems. *Id.* Here, the “tying product” is the
16 Mac OS and the “tied product” is Apple-Labeled Computer Hardware Systems. Not only are
17 Psystar’s allegations plausible, they are grounded in factual allegations similar to the factual
18 findings previously held to constitute *per se* illegal tying.

19 Further, Apple’s illegal enforcement of the Mac OS EULA violates Section 2 of the
20 Sherman Act. 15 U.S.C. § 2. Apple’s EULA contractually requires the end user to install, use, and
21 run the Mac OS exclusively on Apple-Labeled Computer Hardware Systems. Counterclaim, ¶ 97.
22 This contractual requirement between Apple and the end user is to the exclusion of all other
23 computer hardware systems manufacturers in the marketplace including Mac OS Capable
24 Computer Hardware System manufacturers. Counterclaim, ¶ 98. Apple’s anticompetitive conduct
25 unlawfully maintains Apple’s market and monopoly power in the artificially created Apple-Labeled
26 Computer Hardware Systems submarket by controlling prices and wholly eliminating competition
27 in the Mac OS Capable Computer Hardware Systems market. *See* 15 U.S.C. § 2; Counterclaim, ¶
28 99. It is this anticompetitive conduct for which Psystar complains – not a plea for Apple to ‘help’

1 its competitors.

2
3 **D. All of Psystar's Counterclaims Are Sufficiently Plead.**

4 **1. Psystar's State and Common Law Counterclaims Are Sufficiently Plead.**

5
6 Because Apple's motion to dismiss Psystar's federal antitrust claims must be denied,
7 Apple's motion to dismiss Psystar's state law claims for Apple's violation of the California
8 Cartwright Act (fourth counterclaim) and Apple's violation of the unfair competition law (fifth and
9 sixth counterclaims) should similarly be denied. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473,
10 1478 (9th Cir. 1986) (noting that if a plaintiff is capable of maintaining a Sherman Act claim, the
11 plaintiff is capable of maintaining a similar Cartwright Act claim); *Cel-Tech Comms., Inc. v. Los*
12 *Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999) (noting
13 that if a plaintiff is capable of maintaining a Sherman Act claim, the plaintiff is capable of
14 maintaining a similar California unfair competition law).

15
16 **2. Assuming *Arguendo* that Apple's Arguments Have Any Merit,
17 Psystar's Fourth, Fifth and Sixth Counterclaims Are Sufficiently
18 Plead Notwithstanding Psystar's Market Definitions.**

19 Assuming *arguendo* that Apple's arguments had any merit, Apple's primary contention
20 (i.e., that the counterclaims are insufficiently plead as a result of the implausibility of a single-
21 product market) does not render Psystar's fourth, fifth and sixth counterclaims for violations of the
22 California Cartwright Act and California unfair competition laws insufficiently plead as a matter of
23 law. Psystar's fourth counterclaim is for Apple's violations of the California Cartwright Act under
24 California Business and Professions Code § 16700 *et seq.* Psystar's fifth counterclaim is for
25 Apple's violations of California unfair competition law under California Business and Professions
26 Code § 17200 *et seq.* Psystar's sixth counterclaim is for Apple's violations of common law unfair
27 competition law. Theses counterclaims do not require the pleading of a market definition and
28 would not fail in the absence of a sufficient market definition.

1 For example, the fourth, fifth and sixth counterclaim allege, in part, that Apple’s general
 2 suppression of competition and the misuse of its intellectual property including its copyrights
 3 expressly forms part of its claims for relief. *See* Counterclaim, ¶¶ 114-126. With regard to
 4 Psystar’s fourth counterclaim (Cartwright claim), it is acknowledged (as noted *supra* Section
 5 II(D)(1)) that if a plaintiff is capable of maintaining a Sherman Act claim, the plaintiff is capable of
 6 maintaining a similar Cartwright Act claim; however, the laws are distinct. *See Dimidowich v. Bell*
 7 *& Howell*, 803 F.2d 1473, 1478 (9th Cir.1986) (“[s]imilar’ does not mean identical. California
 8 courts have never said that federal authority is binding on them . . . to the extent the California
 9 courts’ interpretation of the Cartwright Act is different from federal interpretations of the Sherman
 10 Act, we must respect those differences, and follow the California courts’ interpretation”).

11 A claim for unfair competition under California Business & Professions Code section 17200
 12 is also far broader than a federal antitrust claim and thus Apple’s conduct may constitute a violation
 13 of section 17200 even if not rising for some technical reason to an antitrust violation. *See Cel-Tech*
 14 *Comms., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d
 15 527 (1999). Section 17200 defines “unfair competition” as “any unlawful, unfair or fraudulent
 16 business act or practice.” CAL. BUS. & PROF. CODE § 17200. The California Supreme Court has
 17 consistently recognized the sweeping nature of section 17200, stating: “[w]hen a plaintiff who
 18 claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice invokes section
 19 17200, the word ‘unfair’ in that section means conduct that threatens an incipient violation of an
 20 antitrust law.” *Cel-Tech*, 20 Cal.4th at 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.

21 The same applies for common law unfair competition. Despite Apple’s claim the Psystar
 22 does not understand the law (*see* Apple Brief, 16:14-24 (asserting unfair competition applies only
 23 to trademarks)), common law unfair competition encompasses Psystar’s claims in spite of the
 24 sufficiency, or alleged lack thereof, Psystar’s market definitions. *See e.g., Aydin Corp. v. Loral*
 25 *Corp.*, 981 WL 2178, 1982-1 Trade ¶ 64,685, at 72,687 (N.D.Cal. Oct 08, 1981), *aff’d in relevant*
 26 *part*, 718 F.2d 897, 905 (9th Cir. 1983), 1 (addressing antitrust claims and related common law
 27 unfair competition claims); *Edwards v. Arthur Anderson LLP*, 44 Cal.4th 937, – Cal.Rptr.3d –, –
 28 P.3d – (2008) (addressing contracts that restrict competition). “There is no complete list of the

1 activities which constitute unfair competition.” *Ojala v. Bohlin*, 178 Cal.App.2d 292, 301, 2
 2 Cal.Rptr. 919, 924 (1960). For example, claims of unfair competition can also be based on acts and
 3 practices contravening intellectual rights. *See e.g., Golan v. Pingel Enter., Inc.* 310 F.3d 1360, 1374
 4 (Fed. Cir. 2002) (assertion of rights under unenforceable patent); *Karl Storz Endoscopy-Am., Inc. v.*
 5 *Surgical Techs., Inc.*, 285 F.3d 848, 852-53 (9th Cir. 2002) (consumer confusion based on
 6 company’s preservation of manufacturer’s mark, instead of using mark, on product at issue); *Imax*
 7 *Corp. v. Cinema Tech., Inc.*, 152 F.3d 1161, 1169-1170 (9th Cir. 1998) (misappropriation of trade
 8 secrets).

9 Psystar asserts, in part, factual allegations in its well-pled complaint regarding Apple’s
 10 anticompetitive conduct and copyright misuse. Counterclaim, ¶¶ 46-77. Apple’s overstated
 11 conclusions regarding the inability of Psystar’s counterclaims to survive a motion to dismiss based
 12 entirely on the insufficiency of Psystar’s market definitions is ill-founded. For this reason, Apple’s
 13 motion to dismiss the fourth, fifth and sixth counterclaims must be denied, notwithstanding any
 14 finding as to the sufficiency, or lack thereof, Psystar’s market definitions.

15 III. CONCLUSION

16
 17 For the foregoing reasons, Psystar respectfully requests that the Court deny Apple’s motion
 18 to dismiss in its entirety.

19
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