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

13 APPLE INC., a California corporation,  
14 Plaintiff,  
15 v.  
16 PSYSTAR CORPORATION,  
17 Defendant.

Case No. CV 08-03251 WHA

**APPLE INC.'S NOTICE OF MOTION  
AND MOTION TO DISMISS  
PSYSTAR'S COUNTERCLAIMS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

18  
19 PSYSTAR CORPORATION,  
20 Counterclaimant,  
21 v.  
22 APPLE INC., a California corporation,  
23 Counterdefendant.

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

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**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on November 6, 2008, at 8:00 a.m., or as soon thereafter as the matter can be heard, in the courtroom of the Honorable William Alsup, located at 450 Golden Gate Avenue, San Francisco, California 94102, plaintiff and counterdefendant, Apple Inc. (“Apple”) will, and hereby does, move for an order dismissing Psystar Corporation’s (“Psystar”) Counterclaims.

Apple seeks an Order dismissing all of Psystar’s Counterclaims with prejudice.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Psystar Corporation is knowingly infringing Apple’s copyrights and trademarks, and inducing others to do the same. Psystar makes and sells personal computers that use, without permission, Apple’s proprietary operating system software. In an obvious attempt to divert attention from its unlawful actions, Psystar asserts deeply flawed antitrust counterclaims designed to have this Court force Apple to license its software to Psystar, a direct competitor. The Court should reject Psystar’s efforts to excuse its copyright infringement, and dismiss these Counterclaims with prejudice.

Ignoring fundamental principles of antitrust law, and the realities of the marketplace, Psystar contends that Apple has unlawfully monopolized an alleged market that consists of only one product, the Macintosh® computer. However, in direct contradiction to Psystar’s claimed Mac®-only market, Psystar admits that “a seemingly infinite list of manufacturers may be found in the computer hardware system marketplace,” including “Dell, Acer, Lenovo, Sony, and Hewlett-Packard to name but a few.” Counterclaims, ¶ 22, lines 13-17. Psystar also admits, in further contradiction to its alleged Mac-only market, that Apple has gone to great lengths in the media to position its Mac as superior to other personal computers against which it directly competes. Counterclaims ¶¶ 31-35.

Psystar’s very business model is premised on the fact that Apple’s computers compete directly with personal computers using different operating systems. In its Counterclaims Psystar admits computers with the Macintosh operating system (“Mac OS”) are one of many types Psystar sells to consumers: “PSYSTAR manufactures and distributes computers *tailored to customer choosing*. As a part of its devotion to *supporting customer choice*, PSYSTAR supports a wide range of operating systems including Microsoft Windows XP and XP-64 bit, Windows Vista and Vista 64-bit, Linux (32 and 64-bit kernels), and the MacOS.” Counterclaims, ¶ 15, lines 8-11 (emphasis added). Since

1 customers are choosing between these computer systems, the systems necessarily compete with one  
2 another. For these reasons and others, Psystar's effort to assert antitrust claims premised on the  
3 existence of a relevant product market restricted solely to Apple's products fails as a matter of law.

4 Moreover, the ultimate goal of Psystar's Counterclaims is an order from this Court compelling  
5 Apple to help competitors, like Psystar, by forcing Apple to license its proprietary software to those  
6 competitors for use on their own computer hardware. Psystar's effort is contrary to law and must be  
7 rejected. Neither the federal nor the state antitrust laws require competitors to stop competing with,  
8 and instead to start helping, each other.

9 **I. STATEMENT OF RELEVANT FACTS**

10 Apple launched its Macintosh computer line in 1984. Both parties agree the Mac is "considered  
11 to be reliable and to enjoy ease-of-use" and that its current operating system, Mac OS X Leopard®,  
12 "has received 'significant acclaim.'" Answer, ¶ 3, lines 23-25; ¶ 6, lines 20-22. Apple is the exclusive  
13 manufacturer of the Mac and its operating system. Counterclaims, ¶ 18, lines 13-16; ¶ 27, lines 18-21.  
14 Apple's licensing agreement with its customers prohibits the use of the Mac operating system on non-  
15 Apple computers. Answer, ¶ 18, lines 3-5; Counterclaims, ¶ 57, lines 9-10.

16 Psystar also "manufactures and distributes computers . . ." Counterclaims, ¶ 15, line 8. Psystar  
17 tailors the hardware and software configurations it sells "to customer choosing." *Id.* Its Open  
18 Computers can be configured to run the Windows® XP operating system, the Windows Vista®  
19 operating system, the Linux operating system or Mac OS®. *Id.*, lines 8-12. Psystar, however, does not  
20 have a license to copy, use or sell Mac OS, and the terms of the Mac OS license agreement prohibit use  
21 of that software on non-Apple hardware. Counterclaims, ¶¶ 57, lines 9-10; ¶ 61, lines 5-18.

22 Notwithstanding the way it runs its own business, Psystar alleges the Mac is so superior to other  
23 personal computers, especially those based upon Microsoft's Windows operating system, that other  
24 PCs are not "and cannot be considered an effective substitute" for the Mac. Counterclaims, ¶ 19, lines  
25 22-26. Psystar asserts that the features and functions of the Mac are so special, and its customers are so  
26 loyal, that there is a legally and economically cognizable relevant product market limited exclusively to  
27 the Macintosh operating system. Counterclaims, ¶¶ 18-20. By definition, Apple is the only participant  
28 in this alleged market.



1 Next Psystar claims there is a second market for computer hardware alone (without an  
2 operating system) that could run Mac OS, which Psystar calls the “Mac OS Capable Computer  
3 Hardware Systems” market. Counterclaims, ¶¶ 21-26. Psystar alleges the only companies in this  
4 purported market are Apple and Psystar, although Psystar claims other companies would enter this  
5 “market” if Apple were forced to allow them to install Apple’s Mac OS on their computers.  
6 Counterclaims, ¶¶ 24, 26. Finally, within this alleged market of two, Psystar asserts there is a sub-  
7 market consisting of the computers Apple sells - its Mac line of computers - called the “Apple-Labeled  
8 Computer Hardware Systems submarket” - in which Apple is the only participant. Counterclaims, ¶ 27,  
9 lines 16-23.

10 While Apple agrees its Macintosh computers are superior to other personal computers, that does  
11 not mean they face no competition. Indeed, Psystar repeatedly contradicts its own market definitions  
12 with allegations throughout its Counterclaims showing active competition between Apple and other PC  
13 manufacturers. Consequently, Psystar’s allegations fail to allege a viable claim that Apple has  
14 restrained trade in any commercially real market.

## 15 **II. THE LEGAL STANDARD FOR A MOTION TO DISMISS**

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the “legal sufficiency”  
17 of the claims alleged in the complaint. *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp.  
18 2d 1011, 1018 (N.D. Cal. 2007). To survive a motion to dismiss under Federal Rule of Civil Procedure  
19 12(b)(6), Psystar must plead facts that, if true, render its antitrust allegations not just possible, but  
20 **plausible**. *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929  
21 (2007); *In re Graphics Processing Units, supra*, 527 F. Supp. 2d at 1023-4. While claims challenged  
22 by a motion to dismiss need not have detailed factual allegations, “a plaintiff’s obligation to provide the  
23 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic  
24 recitation of the elements of a cause of action will not do.” *See Twombly*, 127 S.Ct. at 1955, 1974.  
25 Inconsistent allegations regarding material facts should not be considered as true. *Chongris v. Board of*  
26 *Appeals of Town of Andover*, 811 F.2d 36, 37 (1st Cir. 1987) (citing *Snowden v. Hughes*, 321 U.S. 1,  
27 10 (1944)); *Berry v. Coleman*, 172 Fed.Appx. 929, 932, 2006 WL 759087, 2 (11th Cir. 2006)  
28 (“conclusory allegations [that] contradict the other facts alleged in the complaint” need not be taken as

1 true). Moreover, “conclusory allegations of law and unwarranted inferences are insufficient to defeat a  
2 motion to dismiss for failure to state a claim. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140  
3 (9th Cir.1996) (citations omitted).” *In re Graphics Processing Units, supra*, 527 F. Supp. 2d at 1018.

4 When evaluating the sufficiency of a complaint, courts may consider all materials properly  
5 submitted as part of the complaint or counterclaim, such as exhibits. *See Hal Roach Studios, Inc. v.*  
6 *Richard Feiner and Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990). Courts “are not required to accept as  
7 true conclusory allegations which are contradicted by documents referred to in the complaint.”  
8 *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295 (9th Cir. 1998). In addition, courts may take judicial  
9 notice of “matters of public record,” *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th  
10 Cir.1986), and need not accept as true allegations that contradict matters properly subject to judicial  
11 notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

12 **III. ALL OF PSYSTAR’S COUNTERCLAIMS SHOULD BE DISMISSED WITH**  
13 **PREJUDICE**

14 Psystar’s Counterclaims all are based on the facially implausible premise that there is a separate  
15 relevant product market for the Mac operating system and that there is no competition in that market.  
16 The Counterclaims also presuppose, contrary to the law, that Apple is required to help its competitors  
17 compete against it. The allegations in Psystar’s Counterclaims, and the documents it incorporates by  
18 reference in those claims,<sup>1</sup> establish that Psystar has not pled, and cannot plead, any viable antitrust or  
19 unfair competition claims. Consequently, all of its Counterclaims should be dismissed with prejudice.

20 **A. All of Psystar’s Counterclaims Require The Definition Of Legally Plausible**  
21 **Relevant Markets**

22 For each of its antitrust claims Psystar must plead, and ultimately prove, one or more  
23 economically meaningful relevant product markets. To state a viable tying claim in violation of

24 \_\_\_\_\_  
25 <sup>1</sup> If a document is incorporated by reference in a complaint, but is not physically attached, the entire  
26 document may be considered if it is central to the claim and no party questions its authenticity. *See*  
27 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). As the Ninth Circuit Court of Appeals stated in *In*  
28 *re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999), a district court may  
“consider documents ‘whose contents are alleged in a complaint and whose authenticity no party  
questions, but which are not physically attached to the [plaintiff’s] pleading,’ ” quoting *Branch v.*  
*Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

1 Section 1 of the Sherman Act, as Psystar attempts in its first Counterclaim, requires that Psystar plead  
2 and prove Apple has power in the relevant market for the tying product, which it claims is “the Mac OS  
3 market.” *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 13-14, 104 S.Ct. 1551, 1558-59  
4 (1984); *Ill. Tool Works v. Independent Ink, Inc.*, 547 U.S. 28, 36, 126 S.Ct. 1281, 1287 (2006).  
5 Likewise, to state a valid claim under Section 2 of the Sherman Act, as attempted in Psystar’s second  
6 Counterclaim, Psystar must demonstrate that Apple has monopoly power in a relevant product market  
7 (again, the alleged Mac OS market). *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct.  
8 1698, 1703-1704 (1966); *Spectrum Sports v. McQuillan*, 506 U.S. 447, 455, 115 S.Ct. 884, 890 (1993);  
9 *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432-33 (9th Cir. 1995). Psystar’s exclusive  
10 dealing claims under Section 3 of the Clayton Act require proof that a substantial portion of the  
11 claimed relevant market – usually greater than 50% – was foreclosed. *Jefferson Parish*, 466 U.S. at 45-  
12 6; *Insignia Sys., Inc. v. News Corp., Ltd.*, 2005 U.S. Dist. LEXIS 42851 (D. Minn. Aug. 25, 2005)  
13 (exclusive dealing claim dismissed for failure to allege percentage of foreclosure in properly defined  
14 relevant market). Here, Psystar alleges that Apple “has substantially lessened competition in the Mac  
15 OS Capable Computer Hardware Systems marketplace to the point of near elimination.”  
16 Counterclaims, ¶ 109, lines 12-13.

17 As shown below, Psystar’s single-brand relevant market definitions are irremediably flawed.  
18 Psystar’s own allegations establish that there is no such relevant market as the “Mac OS market.”  
19 Those allegations also show there is no such thing as a Mac OS Capable Computer Systems market.  
20 Consequently, there is no basis for Psystar to claim Apple has market power in any market. As a  
21 result, all of Psystar’s claims collapse, since “failure to identify a[n economically-meaningful] relevant  
22 [product] market is a proper ground for dismissing a Sherman Act claim.” *Tanaka v. Univ. of S. Cal.*,  
23 252 F. 3d 1059, 1063 (9th Cir. 2001) (affirming dismissal where plaintiff sought to restrict the relevant  
24 market to UCLA soccer). Absent some suggestion that Apple exercised substantial market power in a  
25 relevant product market, Psystar’s antitrust claims should be dismissed with prejudice and not be  
26 permitted to continue into their “inevitably costly and protracted discovery phase.” *Asahi Glass Co. v.*  
27 *Pentech Pharmaceuticals, Inc.*, 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by  
28 designation). *See also, Twombly, supra*, 127 S.Ct. at 1967 (“It is no answer to say that a claim just shy

1 of plausible . . . can, if groundless, be weeded out in the discovery process . . .”); *Spahr v. Leegin*  
2 *Creative Leather Products, Inc.*, 2008 WL 3914461 (E.D. Tenn., Aug. 20, 2008) at pg. 8 (“[F]urther  
3 factual inquiry through discovery will add nothing to the question before the Court. It is patently  
4 obvious from the face of the complaint that the plaintiff’s definition of the relevant product market is  
5 deficient and cannot be cured.”)

6 **B. Psystar’s Alleged Single-Product Relevant Markets Are Neither Legally Nor**  
7 **Factually Plausible**

8 **1. Courts Repeatedly Reject Single Brand Markets**

9 Psystar’s effort to define a single-brand relevant market contravenes well-known principles of  
10 antitrust law. Relevant markets generally cannot be limited to a single manufacturer’s products. “As  
11 the Supreme Court recognized in the *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 76  
12 S.Ct. 994 (1956), the ‘power that, let us say, automobile or soft-drink manufacturers have over their  
13 trademarked products is not the power that makes an illegal monopoly. Illegal power must be  
14 appraised in terms of the competitive market for the product.’” 1 ABA Section of Antitrust Law,  
15 *Antitrust Law Developments*, 588-89 (6th ed. 2007). Reasonably interchangeable products that serve  
16 the same use are in the same market. *United States v. E.I. DuPont DeNemours Co.*, at 404, 76 S.Ct.  
17 1012. The outer boundaries of a market “are determined by the reasonable interchangeability of use or  
18 the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe Co. v.*  
19 *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524 (1962). “Most courts correctly define the  
20 presumptive market to include similar products, even though they can be differentiated by brand or  
21 features.” Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles*  
22 *and Their Application*, ¶563d.

23 Courts consistently have rejected the exact same effort to define a single-brand product market  
24 as Psystar attempts here. *See, e.g., Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d  
25 1376, 1378 (9th Cir. 1981) (rejecting market definition limited to Fiat cars based on “unsubstantiated  
26 belief that for a sizeable number of customers only a Fiat will do”); *Lucent Technologies, Inc. v.*  
27 *Gateway, Inc.*, 2007 WL 2900484, 16 (S.D. Cal. 2007) (rejecting relevant market of “MPEG-2  
28

1 compliant computers” where MPEG-2 was patented, yet “interchangeab[le] with other technologies in  
2 the market”). For example, in *Lambtek Yogurt Machines v. Dreyer’s Grand Ice Cream, Inc.*, 1997 –  
3 2 Trade Cases (CCH) ¶ 71, 891 (N.D. Cal. 1997), plaintiff’s antitrust claim was dismissed because it  
4 alleged a single-brand market of “equipment capable of dispensing *Dreyer’s* frozen yogurt.” *Id.* at pg.  
5 80, 296:

6 “Defendants are incapable of monopolizing the market for its own brand  
7 of product. A manufacturer has a natural monopoly in the sale and  
8 distribution of its own products. [Citations omitted] Such natural  
9 monopolies do not contravene antitrust laws.”

10 *Id.* See, *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996)  
11 (rejecting market power in a “firm’s own products” where it “sells in vigorous competition”); *A. I. Root*  
12 *Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675-6 (6th Cir. 1986) (company’s unique operating  
13 system software and hardware is not a relevant market; rather the relevant market is all “small business  
14 computers,” which admittedly included IBM, NCR and Seiko); *In re Wang Laboratories, Inc.*, 1996  
15 WL 87050 (D. Mass. 1996) (single manufacturer’s computer not the relevant market). As the Tenth  
16 Circuit Court of Appeals said in *Green Country Food Market, Inc. v. Bottling Group, LLC*, 371 F.3d  
17 1275, 1282 (10th Cir. 2004), “Even where brand loyalty is intense, courts reject the argument that a  
18 single branded product constitutes a relevant market.” *Accord, Hack v. President and Fellows of Yale*  
19 *College*, 237 F.3d 81, 86-87 (2d Cir. 2000) (affirming district court’s grant of defendant’s motion to  
20 dismiss because the “Yale education” market is not a “plausible” relevant market). Confronted with  
21 implausible singe-brand product market claims, trial courts have not hesitated to dismiss them.  
22 *Lambtek Yogurt, supra*; *Little Caesar Enterprises, Inc. v. Smith*, 34 F.Supp.2d 459, 477 n.30 (E.D.  
23 Mich. 1998) (“[C]ourts [are] reluctant to find market power in single brand products, no matter how  
24 coveted or unique, if other brands of the product might, at a certain price level, be selected as  
25 substitutes for the preferred brand.”); *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F.Supp. 674, 679 (S.D.  
26 N.Y. 1987) (market for Rolex watches is not even a “plausible product market” and the court “does  
27 not need protracted discovery to state with confidence that Rolex watches are reasonably  
28 interchangeable with other high quality timepieces”); *Disenos Artisticos E Industriales, S.A. v. Work*,

1 no basis for employing a single-product market definition.”)

2 Most recently, in *Spahr, supra*, the court rejected almost identical allegations as those made  
 3 here. Plaintiff claimed that Leegin’s brand of women’s accessories, called the “Brighton” brand, was a  
 4 separate market because the products are unique, they are marketed as “one of a kind,” customers  
 5 would not consider other accessories as “suitable substitutes,” and there was an “inelasticity of  
 6 demand” for these products. 2008 WL 3914461, at pp. 3, 8. Applying the Supreme Court’s decision in  
 7 *Twombly*, the District Court dismissed the complaint without leave to amend because its definition of  
 8 the relevant market was implausible “from the face of the complaint....” *Id.*, at 8.

9 “If the plaintiffs were correct... a whole host of products which enjoy brand  
 10 loyalty, such as Pepsi, Coca-Cola, Rolex watches, fast foods, Chevrolet, Ford, Chrysler,  
 11 Volkswagen and Dodge automobiles, office supplies, ice cream, and the like would all  
 become relevant markets for antitrust purposes. Plaintiffs ignore, however, volumes of  
 case law which reject such a conclusion.”

12 *Id.*, at 9. (footnotes citing cases omitted). Noting that “[c]ourts have consistently refused to consider  
 13 one brand to be a relevant market of its own when the brand competes with other potential substitutes  
 14 [citations omitted],” the court dismissed plaintiff’s claims without leave to amend. This Court should  
 15 do the same.

## 16 2. The Allegations Contained In Psystar’s Counterclaims Disprove Its 17 Contentions About Single Brand Markets

18 Despite the plethora of legal authority which makes clear that an antitrust plaintiff cannot  
 19 legitimately plead a single brand market, Psystar has still attempted to do so. Yet with this attempt,  
 20 Psystar has asserted allegations that disprove its own contentions regarding the existence of an alleged  
 21 Mac OS market. All of Psystar’s claims rely on the unsupported premise that Mac OS is a unique  
 22 product<sup>2</sup> that has no competition whatsoever. Psystar grounds all of its Counterclaims on the  
 23 allegation that “the Mac OS market is distinct and unique as compared to other operating systems **in**  
 24

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25 <sup>2</sup> Psystar asserts that an operating system, without a computer, is a separate product. This assertion  
 26 also is wrong. *Digital Equipment Corp. v. Uniq Digital Technologies*, 73 F.3d 756, 761 (7th Cir. 1996)  
 27 (selling operating system software together with a computer is not a tie since “[a]n operating system is  
 28 essential to make a bunch of silicon chips a ‘computer.’ No OS, no computation. ... Every  
 manufacturer in the business includes an operating system with the physical parts that make up a  
 computer.”). However, for the purposes of this motion Apple is not addressing this additional flaw in  
 Psystar’s Counterclaims.

1 **the marketplace**<sup>3</sup> including but not limited to the Windows operating system from Microsoft  
 2 Corporation.” Counterclaims, ¶ 19, lines 22-24 (emphasis added). Without any factual support -- i.e.,  
 3 “on information and belief” -- Psystar asserts “the Windows operating system is not and cannot be  
 4 considered an effective substitute for Mac OS; the same holds true for any other operating system.”  
 5 *Id.*, lines 25-26; ¶ 45, lines 26-28. However, this unsupported assertion is directly contradicted  
 6 elsewhere in the Counterclaims where Psystar admits that it offers the Windows and Linux operating  
 7 systems as substitutes for the Mac OS on Psystar’s own computer hardware. Counterclaim ¶ 15. It is  
 8 simply not plausible that Psystar would offer Windows and Linux as alternative choices to the Mac OS  
 9 on its own computers if they were not competitive substitutes for one another. Indeed, the allegations  
 10 in Psystar’s Counterclaims, along with the documents Psystar references, demonstrate that its artificial,  
 11 hyper-narrow, market definitions must fail and its Counterclaims must fail along with them.

12 Psystar alleges that Apple has been so successful in advertising its products that loyal customers  
 13 would never consider switching to another brand. Counterclaims, ¶¶ 30-35.<sup>4</sup> Psystar also conclusorily  
 14 asserts that a small but significant change in the price of Apple’s computers would not cause  
 15 consumers to buy computers from another manufacturer. *Id.*, ¶¶ 36-38. According to Psystar, studies  
 16 have shown that Apple is “known for its ‘market performance and brand leadership’... ‘far outranks **its**  
 17 **closest competitor**’... [and] is ‘well known for its passionate and dedicated customer base.’”  
 18 Counterclaims, ¶ 38, lines 10-12 (emphasis added). *See also, id.*, ¶ 39.<sup>5</sup> Yet, this allegation again is  
 19

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20 <sup>3</sup> Even when trying to allege a single-brand market Psystar stumbles, acknowledging in this allegation  
 21 the existence of the actual “marketplace,” which is the market for personal computers with installed  
 22 operating systems. In that market Apple has less than an 8% share, while computers running operating  
 23 systems from Microsoft have a market share of almost 90%. *See, New York Times*, “Apple Riding A  
 24 51% Jump In Mac Sales,” April 24, 2008, pp. C1, C8 (Apple Req. for Judicial Notice, Ex. E)  
 25 (“International Data Corporation’s survey this month showed Apple with a 6 percent share of the  
 26 American market in the first quarter...”); *New York Times*, “As Apple Gains PC Share, Jobs Talks of a  
 27 Decade of Upgrades,” October 22, 2007, pp. C1, C8 (Apple Req. for Judicial Notice, Ex. D) (“Last  
 28 week, the research firm Gartner said PC shipments in the United States grew only 4.7 percent in the  
 third quarter . . . . Gartner forecast that Apple [would achieve] . . . an 8.1 percent share of the domestic  
 market.”)

<sup>4</sup> Examples of the complete text of the advertisements cited by Psystar are submitted as Exhibit A of  
 Apple’s Request for Judicial Notice, and a CD with sample videos of these ads is attached as Exhibit B.

<sup>5</sup> The press release about these third-party studies, quoted by Psystar, is attached as Exhibit C to  
 Apple’s Request for Judicial Notice.

1 one of many in which Psystar admits that Apple has competitors, thereby contradicting its market  
2 definitions. *See also*, Counterclaims ¶¶ 15, 22-23, 36-37.

3 Psystar’s allegations about the competition that is actually occurring contradict its artificial  
4 single-brand market definitions. For example, Psystar’s allegations about Apple’s extensive  
5 advertising campaign comparing the features of Mac computers to computers running the Windows  
6 operating system affirmatively prove that Apple is in direct head-to-head competition with the likes of  
7 Dell, Hewlett-Packard, Sony, and others. For example, the “*Get a Mac*” advertising campaign relied  
8 upon by Psystar (Counterclaims, ¶¶ 34-35) specifically compares the features and functions of a Mac  
9 with a competing PC running the Windows operating system (*See*, Apple’s Request for Judicial Notice,  
10 Exs. A and B.)

11 Among other things, the ads cited by Psystar:

- 12 • Reference a *Wall Street Journal* review that the Mac is “the finest  
13 desktop PC on the market, at any price . . .”;
- 14 • Show that Macs and PCs sold by other companies can work  
15 together on a computer network;
- 16 • Note that both computers run the application program, Microsoft  
17 Office;
- 18 • Acknowledge that both can be used for videoconferencing;
- 19 • Quote a review from *PC World* magazine that “the fastest  
20 Windows Vista notebook we tested this year is a Mac”;
- 21 • Assert that former purchasers of PCs from other companies are  
22 switching to the Mac and can transfer files from competing  
23 computers to a Mac easily; and
- 24 • Reference another review from the *Wall Street Journal* that Mac  
25 OS X “Leopard is better and faster than Vista.”

23 Request for Judicial Notice, Ex. A, pp. 1-3, 5, 22, 32, 47, and 56. Yes, as alleged by Psystar, some  
24 purchasers have concluded Apple’s Mac is better than Windows-based PCs (Counterclaims, ¶ 35).

25 And, yes, as Psystar asserts, some Windows-based PCs are less expensive for that reason. *Id.*, ¶¶ 36-  
26 37. **But, that is the very essence of competition involving quality and price!**<sup>6</sup> Phillip E. Areeda &

27 <sup>6</sup> Just this month Microsoft launched a counter advertising campaign “to rejuvenate its Windows brand,  
28 which has been battered in recent years in commercials by rival Apple Inc. . . . The vast majority of

Continued on the next page



1 Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶563d  
 2 (describing cases rejecting relevant market definition that were limited to manufacturer’s differentiated  
 3 brand); see also *In re Wireless Telephone Services Antitrust Litigation*, 385 F. Supp. 2d 403, 419-420  
 4 (S.D.N.Y. 2005) (“the mere existence of a brand and brand identification in the marketplace are not  
 5 synonymous with market power. ... In general, where ‘interbrand competition exists...it provides a  
 6 significant check on the exploitation of interbrand market power because of the ability of consumers to  
 7 substitute a different brand of the same product.”) (citing *Continental T. V., Inc. v. GTE Sylvania Inc.*,  
 8 433 U.S. 36, 52 n.19, 97 S.Ct. 2549, 2558 (1977)); *Wang Laboratories, Inc.*, 1996 WL 87050, supra.  
 9 Indeed, as the Seventh Circuit Court of Appeals recognized in *Digital Equipment Corp. v. Uniq Digital*  
 10 *Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996), “[c]omputer manufacturers are vigorous rivals; prices  
 11 drop daily; this is one of our economy’s most competitive sectors.”

12 Psystar’s conclusory allegations regarding “cross-elasticity and SSNIP” do not rescue its effort  
 13 to allege a single-brand product market. See, Counterclaims, ¶¶ 36, 37, 43. Specifically, Psystar  
 14 asserts, on information and belief, “that a percentage change in price of one product, namely the Mac  
 15 OS, will not result in a change in quantity that consumers will demand of another product as evidenced  
 16 by the price differentiations . . . as otherwise set forth above.” *Id.*, ¶ 43 at lines 11-13. This assertion is  
 17 so vague it is meaningless.<sup>7</sup> Moreover, the “price differentiations” between products that Psystar cites  
 18 do not relate to the price of operating systems. All of the cited advertising, and all of Psystar’s price  
 19 comparisons, refer to complete and functioning computer systems, not to operating systems without  
 20 computers. Consequently, Psystar’s allegations about the cross-elasticity of demand for computer  
 21 systems provide no support whatsoever for its contention that there is a separate product market for one  
 22 brand of operating system software.

23 Equally vague allegations about cross-elasticity of demand were rejected last month in *Spahr v.*

24 \_\_\_\_\_  
 Continued from the previous page

25 PCs continue to run on Windows, though Apple’s Mac business has steadily gained market share,  
 26 rising to 7.8% of new PC shipments in the U.S. . . . according to research firm IDC.” *The Wall Street*  
 27 *Journal*, “Microsoft Kicks Off Seinfeld Campaign,” Sept. 5, 2008, p. 2 (Apple’s Request for Judicial  
 Notice, Ex. F).

28 <sup>7</sup> Psystar also makes reference to the “allegations as made by APPLE in its complaint” but this adds no  
 further specificity to its vague allegations.

1 *Leegin Creative Leather Products*, 2008 WL 3914461 (W.D. Tenn. 2008), where the court granted  
2 defendant’s motion to dismiss:

3 “Plaintiffs do allege . . . that ‘Brighton-brand products are distinct  
4 products characterized by an inelasticity of demand.’ Plaintiffs have not,  
5 however, alleged facts which explain their conclusory allegation. This is  
6 precisely the type of conclusory allegation the Supreme Court cautioned  
7 against in *Twombly*, 127 S.Ct. at 1966.”

8 2008 WL 3914461 at \*9, fn.2 Likewise, Psystar here provides no factual basis for its assertion that the  
9 price of the Mac OS (alone) is not constrained by the price of Windows XP or Windows Vista or Linux  
10 alone. Consequently, its conclusory allegation that there is no cross-elasticity of demand must be  
11 ignored.

12 Finally, Psystar admits that operating system software from competing suppliers all serve the  
13 same purpose:

14 “18.... Operating systems like the Mac OS control and direct the interaction  
15 between software applications such as word processors, Internet browsers, and  
16 applications and the central processing unit of the computer and its various hardware  
17 components.

18 \* \* \*

19 “21.... Operating systems -- like the Mac OS -- manage the interaction between  
20 various prices of hardware such as a monitor or printer. The operating system also  
21 manages various software applications running on a computing device.

22 \* \* \*

23 “28.... Without an operating system, a computer can perform virtually no useful  
24 tasks....”

25 Counterclaims, ¶¶ 18, 21, 28. While the operating system in an Apple computer may perform its  
26 functions in a different (and better) manner than the operating system in other computers, the systems  
27 are economically interchangeable since they serve the exact same purpose. Therefore, they all belong  
28 in the same relevant market.

Psystar has not alleged a plausible relevant product market in which Apple has market power.  
Without such, all its Counterclaims fail.

**C. Apple Is Not Obligated To Help Psystar Compete**

Ultimately, Psystar seeks to force Apple to license its software to competitors, like Psystar, so

1 they can use Mac OS to create Mac “clones.” Psystar undeniably can sell, and is selling, its Open  
2 Computers running Windows or Linux in direct competition with Apple’s Mac. Nevertheless, it also  
3 wants to sell computers running Apple’s Mac OS in direct competition with Apple’s Mac. However,  
4 one of the bedrock principles of antitrust law is that a manufacturer’s unilateral decision concerning  
5 how to distribute its product and with whom it will deal cannot violate the Sherman Act:

6 the [Sherman Act] does not restrict the long recognized right of a trader or  
7 manufacturer engaged in an entirely private business, freely to exercise his  
8 own independent discretion as to parties with whom he will deal. And, of  
course, he may announce in advance the circumstances under which he will  
refuse to sell.

9 *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468 (1919); *Verizon Communs. v.*  
10 *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408, 124 S.Ct. 872, 879 (2004) (“as a general  
11 matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer  
12 engaged in an entirely private business, freely to exercise his own independent discretion as to parties  
13 with whom he will deal.” (internal quotation marks omitted)); *Schor v. Abbott Labs.*, 457 F.3d 608,  
14 610-11 (7th Cir. 2006) (affirming dismissal of monopolization claim on a motion to dismiss because  
15 “antitrust law does not require monopolists to cooperate with rivals by selling them products that would  
16 help the rivals to compete”).

17 Even if Apple had market power in a true relevant market, the antitrust laws cannot be used to  
18 force Apple to license its Mac OS to a competitor such as Psystar. Forced sharing is an anathema to  
19 the Constitutional and statutory framework for copyrights, which explicitly gives copyright owners the  
20 right to exclude as an incentive to create new works. *See* U.S. Const. Art. I, § 8, cl. 8 (“To promote the  
21 Progress of Science and useful Arts, by securing for limited Time, to Authors and Inventors the  
22 exclusive Right to their respective Writings and Discoveries”); 17 U.S.C. § 106 (2000); *Stewart v.*  
23 *Abend*, 495 U.S. 207, 228-29, 110 S.Ct. 1750, 1764 (1990) (“[N]othing in the copyright statutes would  
24 prevent an author from hoarding all of his works during the term of the copyright.”); *Fox Film Corp. v.*  
25 *Doyal*, 286 U.S. 123, 127, 52 S.Ct. 546, 547 (1932) (“The owner of the copyright, if he pleases, may  
26 refrain from vending or licensing and content himself with simply exercising the right to exclude others  
27 from using his property”). Thus, Apple cannot be compelled to allow Psystar to use the copyrighted  
28 Mac OS in Psystar’s computers.

1 As the United States Supreme Court has emphatically stated, the mere possession of market  
2 power, even monopoly power, “is not only not unlawful; it is an important element of the free-market  
3 system.” *Trinko, supra*, 540 U.S. at 407, 124 S.Ct. 879. It is this opportunity to triumph in the market  
4 that “attracts ‘business acumen’ in the first place . . . [and] induces risk taking that produces innovation  
5 and economic growth.” *Id.* As a result, the Supreme Court confirmed in *Trinko* that except in rare  
6 circumstances clearly not present here even monopolists cannot be compelled to deal with their rivals  
7 or part with the source of their advantage. The Supreme Court emphasized that:

8 Compelling . . . firms to share the source of their advantage is in some tension  
9 with the underlying purpose of antitrust law, since it may lessen the incentive  
10 for the monopolist, the rival, or both to invest in . . . economically beneficial  
11 facilities. Enforced sharing also requires antitrust courts to act as central  
planners, identifying the proper price, quantity, and other terms of dealing -- a  
role for which they are ill suited. Moreover, compelling negotiation between  
competitors may facilitate the supreme evil of antitrust: collusion.

12 *Trinko*, 540 U.S. at 407-08, 124 S.Ct. 879; *see also United States v. Microsoft Corp.*, 147 F.3d 935,  
13 946-48 & n.9, 950-51 (D.C. Cir. 2001) (“[a]ntitrust scholars have long recognized the undesirability of  
14 having courts oversee product design, and any dampening of technological innovation would be at  
15 cross-purposes with antitrust law”).

16 Even in the most extreme case – a complete monopoly protected by patents – the antitrust laws  
17 do not require forced licensing. Thus, in *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir., 1981),  
18 Xerox had the exclusive patent rights to plain paper photocopiers, a product so superior that it  
19 dominated any potential substitute such as coated paper copying or mimeographs. 645 F.2d at 1200.  
20 Nevertheless, the Second Circuit held that the antitrust laws could not be used to force Xerox to license  
21 its intellectual property to a competitor. 645 F.2d at 1209-1210. Likewise, in *Data General Corp. v.*  
22 *Grumman Systems Support Corp.*, 36 F.3d 1147, 1187 (1st Cir. 1994), the First Circuit affirmed the  
23 dismissal of antitrust counterclaims that were premised on Data General’s refusal to license its  
24 copyrighted software to a direct competitor. *See also, In re Independent Service Orgs. Antitrust Litig.*  
25 *CSU, L.L.C.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (following *Data General*).

26 Psystar cannot allege Apple has monopoly power in either a PC operating systems market or a  
27 personal computer market since Microsoft’s Windows has market power in those markets. But even if  
28 Apple had market power, competitors are not required by the antitrust laws to help their rivals. There

1 is no “general principle of antitrust law that a competitor is entitled to the assistance . . . of any firm in  
 2 its market that happens to have monopoly power. A monopolist is not required to subsidize its  
 3 competitors. . . .” *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 802 F.2d 217,  
 4 219 (7<sup>th</sup> Cir. 1986). For all of these reasons Psystar’s antitrust Counterclaims should be dismissed.

5 **D. Psystar’s Cartwright Act Claims Should Be Dismissed**

6 Psystar's state antitrust claims, pleaded under California's Cartwright Act, Business &  
 7 Professions Code §§ 16700 *et. seq.* suffer from all the same infirmities as its federal claims, and more.  
 8 First, there is no cause of action for unilateral monopolization under the Cartwright Act. *Dimidowich v.*  
 9 *Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986) (“No California statute deals expressly with  
 10 monopolization or attempted monopolization;” “This claim is not cognizable under the Cartwright Act,  
 11 for it fails to allege any combination.”); *Santa Cruz Medical Clinic v. Dominican Santa Cruz Hosp.*,  
 12 1994 WL 619288, 13 (N.D. Cal. 1994) (“Single firm monopolization is not cognizable under the  
 13 Cartwright Act. *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147, 1163  
 14 (1988).”) Second, Cartwright Act tying and exclusive dealing claims have the same requirements as  
 15 the federal Sherman Act which, as shown above, Psystar cannot meet.

16 Psystar's tying claim under California law fails because it has not pled, and cannot plead, a  
 17 legally-cognizable relevant product market in which Apple has market power. *Corwin v. Los Angeles*  
 18 *Newspaper Service Bureau, Inc.*, 4 Cal.3d 842, 856-858 (Cal. 1971) (citing federal tying cases as  
 19 precedent). Likewise, Psystar's exclusive dealing claim fails under California law because its  
 20 allegations demonstrate there cannot be an anticompetitive effect in any economically-plausible,  
 21 legally-cognizable relevant market. *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal.2d  
 22 305, 315 (Cal. 1968) (federal interpretations of section 3 of the Clayton Act control California's  
 23 interpretation of Business & Professions Code §16727); *Morrison v. Viacom, Inc.*, 66 Cal.App.4th  
 24 534, 548 (Cal.App.1.Dist.1998) (“An 'antitrust injury' must be proved; that is, the type of injury the  
 25 antitrust laws were intended to prevent, and which flows from the invidious conduct which renders  
 26 defendants' acts unlawful. [Citations.]” (citing *Kolling v. Dow Jones & Co.*, 137 Cal.App.3d 709, 723  
 27 (1982)). For all the same reasons discussed above, Psystar has not met, and cannot meet, any of these  
 28 pleading requirements, so its state law antitrust claims should be dismissed.

1           **E. Psystar’s California Unfair Competition Law Claims Should Be Dismissed**

2           Psystar’s contention that Apple has engaged in an “unlawful and/or unfair business practice”  
3 (Counterclaims, ¶ 120, lines 7-9) in violation of Business & Professions Code § 17200, is premised  
4 entirely on its contentions that Apple has violated federal and state antitrust laws. Since Psystar’s  
5 antitrust claims are irreparably flawed, its §17200 claim fails as well. *Aguilar v. Atlantic Richfield Co.*,  
6 25 Cal.4th 826, 866 -867 (Cal. 2001) (no §17200 claim where predicate antitrust law claim dismissed);  
7 *RLH Industries, Inc. v. SBC Communications, Inc.*, 133 Cal.App.4th 1277, 1286, 35 Cal.Rptr.3d 469,  
8 475 (Cal.App. 4 Dist. 2005) (“Having properly granted [Defendant] summary judgment on the  
9 Cartwright Act causes of action, the court also properly granted [Defendant] summary judgment on the  
10 unfair competition cause of action”); *Chavez v. Whirlpool Corp.*, 93 Cal.App.4th 363, 375 -376  
11 (Cal.App.2. Dist.2001) (“[C]onduct alleged to be ‘unfair’ because it unreasonably restrains competition  
12 and harms consumers, such as the resale price maintenance agreement alleged here, is not ‘unfair’ if  
13 the conduct is deemed reasonable and condoned under the antitrust laws.”).

14           Apparently misunderstanding California common law, Psystar asserts that Apple has engaged  
15 in an “unlawful and/or unfair business practice within the meaning of the common law of unfair  
16 competition,” (Counterclaims, ¶ 124 at lines 23-25). Common law unfair competition is a trademark  
17 doctrine that refers to the practice of “passing off.” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d  
18 1137, 1153 (9th Cir. 2008); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1147 (9th Cir.  
19 1997) (““The common law tort of unfair competition is generally thought to be synonymous with the  
20 act of ‘passing off’ one’s goods as those of another ... [, or] acts analogous to ‘passing off,’ such as the  
21 sale of confusingly similar products, by which a person exploits a competitor’s reputation in the  
22 market.’ *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1263, 10 Cal.Rptr.2d 538, 544, 833 P.2d  
23 545, 551 (1992). Because Plaintiffs’ allegations do not amount to ‘passing off’ or its equivalent,  
24 Defendants are correct that Plaintiffs’ claim for unfair competition was properly dismissed.”).

25           Since no such allegations are made here, Psystar’s unfair competition claims -- both statutory  
26 and common law -- should be dismissed.

27 ///

28 ///

1 **IV. CONCLUSION**

2 Psystar's attempt to direct attention from its infringing conduct should fail. It cannot plausibly  
3 define a relevant market in which Apple has market power, so Psystar cannot prove any unfair  
4 competition by Apple. Nor can Psystar use the antitrust laws to force Apple to help its direct  
5 competitor. Therefore, Psystar's Counterclaims all should be dismissed with prejudice.

6 DATED: September 30, 2008

Respectfully submitted,

7 TOWNSEND AND TOWNSEND AND CREW LLP

8  
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