

UNDER SEAL

No. 10-15113

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PSYSTAR CORPORATION,

Defendant-Appellant,

v.

APPLE INC.,

Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

NOTICE OF FILING UNDER SEAL

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ATTORNEYS FOR APPELLANT PSYSTAR CORPORATION

NOTICE OF FILING UNDER SEAL

Appellant Psystar Corporation hereby gives notice that it is today filing by mail its opening brief and record excerpts under seal. The order from the district court requiring sealing is attached to this notice.

Respectfully submitted,

s\ K.A.D. Camara
K.A.D. CAMARA
KENT RADFORD
MICHAEL LEE WILSON

Camara & Sibley LLP

ATTORNEYS FOR APPELLANT
PSYSTAR CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

APPLE INC., a California corporation,

Plaintiff,

v.

PSYSTAR CORPORATION,
a Florida corporation, and DOES 1-10,
inclusive,

Defendants.

PSYSTAR CORPORATION, a Florida
corporation,

Counterclaimant,

v.

APPLE INC., a California corporation,

Counterdefendant.

Case No. CV 08-03251 WHA

**STIPULATED PROTECTIVE
ORDER AND [PROPOSED] ORDER**

WHEREAS, in the course of discovery, it may be necessary for the parties or third parties to disclose personal, proprietary, or confidential information or trade secrets; and

WHEREAS, the parties do not wish unreasonably to impede or burden the discovery process but also wish to ensure the reasonable protection of such personal, proprietary, or confidential information or trade secrets;

1 IT IS THEREFORE STIPULATED that:

2 1. This protective order (“Protective Order”) shall govern the production and disclosure of
3 personal, proprietary, or confidential information or trade secrets by or on behalf of any party or third
4 party through the discovery and all pretrial processes. This Protective Order is not intended to govern
5 at trial. The parties will cooperate in establishing procedures for trial and any appeal that are
6 acceptable to the Court with respect to the protection of information designated as
7 “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to this
8 Protective Order.

9 2. For purposes of this Protective Order, “Discovery Materials” shall include documents,
10 Software Code (as defined in Section 3, below), things or information produced pursuant to Rules 34
11 and 45 of the Federal Rules of Civil Procedure, responses to requests for admissions and
12 interrogatories, deposition testimony, and all other information that may be disclosed in the course of
13 discovery in this action, as well as compilations or excerpts of such materials. Discovery Materials
14 shall only be used for the prosecution and defense of this action.

15 3. To the extent production of software code becomes necessary to the prosecution or
16 defense of the litigation, “Software Code” means (a) computer instructions and data definitions that
17 are expressed in a form suitable for input to an assembler, compiler, or other translator and which
18 must be processed by an assembler, compiler, or other translator (“Source Code”) or (b) computer
19 instructions and data definitions, which have not been commercially released by Apple or Psystar, that
20 are capable of being executed by a computer without being processed by an assembler, compiler, or
21 other translator (“Executable Code”).

22 4. “Protected Material” means any Discovery Material that is designated as
23 “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as those designations
24 are defined in Sections 6 and 7 below. Protected Materials and all information extracted, excerpted,
25 compiled, or otherwise derived from such materials shall only be used for the purposes of prosecuting
26 or defending this action, including any appeals. Protected Materials shall not be used for any other
27 purpose other than those expressly identified in Section 4.

28 5. This Protective Order shall not abrogate or diminish any privilege or any contractual,

1 statutory, or other legal obligation or right of any party with respect to Discovery Materials.

2 6. Any party or third party may identify any Discovery Materials that a party or third
3 party deems to be entitled to protection under Rule 26(c) of the Federal Rules of Civil Procedure by
4 designating such Discovery Materials as “CONFIDENTIAL.” Any such designation shall be made in
5 good faith. Discovery Materials so designated shall be marked “CONFIDENTIAL.” If a party or
6 third party produces Discovery Materials that it does not designate as “CONFIDENTIAL” but later
7 wishes to so designate such Discovery Materials, the disclosing party shall be entitled to do so with
8 the caveat that the provisions of this Protective Order applicable to Discovery Materials ultimately
9 designated “CONFIDENTIAL” shall not apply until and unless such designation is made. Unless
10 otherwise ordered by this Court or agreed to in writing by the party producing such information,
11 information designated “CONFIDENTIAL” shall not be revealed except as expressly provided in this
12 Protective Order.

13 7. If any party or third party believes that disclosure of Discovery Materials would affect
14 its competitive position, security interests, intellectual properties, or technological developments in an
15 adverse manner, that party or third party may designate the Discovery Materials as
16 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” The designation of “CONFIDENTIAL –
17 ATTORNEYS’ EYES ONLY” shall be limited to Discovery Materials that the disclosing party in
18 good faith believes contain extremely sensitive confidential information, the disclosure of which
19 would create a substantial risk of serious competitive injury. Any such designation shall be made in
20 good faith. If a party or third party produces Discovery Materials that it does not designate as
21 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” but later wishes to so designate such Discovery
22 Materials, the disclosing party shall be entitled to do so with the caveat that the provisions of this
23 Protective Order applicable to Discovery Materials ultimately designated “CONFIDENTIAL –
24 ATTORNEYS’ EYES ONLY” shall not apply until and unless such designation is made. Unless
25 otherwise ordered by this Court or agreed to in writing by the party producing such information,
26 information designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall not be revealed
27 except as expressly provided in this Protective Order.

28 8. In the event that a party or third party makes documents or things available for

inspection rather than delivering copies of documents or tangible things to another party, no marking need be made in advance of the initial inspection. For purposes of the initial inspection, all Discovery Materials shall be considered as having been marked at least “CONFIDENTIAL” unless otherwise designated by the producing party as being subject to a “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” designation or not subject to any designation otherwise governed by this Protective Order. Deposition transcript pages may be designated “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” within two weeks of receipt of the transcript if not otherwise designated earlier and shall be deemed to have been designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in their entirety until those two weeks have elapsed. Testimony may also be designated on the record of any deposition as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

9. Access to Protected Materials shall be restricted in accordance with the following provisions and paragraphs 10 through 12, below:

(a) Discovery Materials designated “CONFIDENTIAL” may be disclosed to outside attorneys representing the parties in this lawsuit (“Counsel of Record”) and to no more than two (2) full-time employees with settlement authority selected by each party. Any and all further disclosure of “CONFIDENTIAL” Discovery Materials shall be governed by the provisions of subparagraphs (c) - (g) and paragraphs 11 and 12, below.

(b) Discovery Materials designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” may be disclosed only to Counsel of Record. Any and all further disclosure of “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials shall be governed by the provisions of subparagraphs (c) - (g) and paragraphs 11 and 12, below.

(c) No copies, extracts, or summaries of any “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials shall be made except by or on behalf of Counsel of Record. Any such copies, extracts, or summaries shall also be designated and treated as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials and shall not be delivered or exhibited to any persons except as provided by this Protective Order.

(d) Counsel of Record may also allow access to “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials produced by another party to the following:

(1) Court reporters, stenographers, and videographers retained to record testimony taken in this action;

(2) The Court, jury, and Court personnel;

(3) Graphics, translation, design, and/or trial consulting services including mock jurors retained by a party to whom disclosure is reasonably necessary for this litigation, provided that each such person, including their staff, has signed the acknowledgement form annexed hereto as Exhibit A reflecting their agreement to be bound by the terms of this Protective Order, and that a copy of the signed acknowledgement form has been provided to all Counsel of Record at least three (3) business days before the disclosure is made;

(4) Any experts or consultants who are not (i) current directors, officers, or employees of any competitor of the producing party or (ii) experts or consultants for any competitor of the producing party in a matter involving competitive decision making. As used in this Protective Order, “competitive decision making” shall mean any activity, association, or relationship with a competitor that involves providing advice or participating in any decision of the competitor (*e.g.*, pricing, product design, operations etc.).

(i) Such experts and consultants shall not be permitted to provide advice, analysis, or recommendations to a competitor of the producing party on a matter involving competitive decision making while the above-entitled litigation is pending including the completion of all appeals, absent consent of the producing party, and until at least twelve (12) months after the conclusion of this litigation including the completion of all appeals. Consent of the producing party shall not be withheld absent compelling grounds.

(ii) Any such expert or consultant shall first be provided with a copy

1 of this Protective Order and shall execute an undertaking in the form annexed
2 hereto as Exhibit A. Consultants and experts are hereby specifically advised,
3 informed, and otherwise on actual notice that their written work product that
4 contains or discloses the substance of “CONFIDENTIAL” and
5 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials is
6 subject to all the provisions of this Protective Order. Counsel of Record
7 disclosing “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’
8 EYES ONLY” Discovery Materials to consultants shall be responsible for
9 obtaining the executed undertaking in advance of such disclosure and also shall
10 retain the original executed copy of said undertaking;

11 (iii) Before receiving or having access to Discovery Materials
12 designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” such experts
13 or consultants shall execute a Declaration in the form attached as Exhibit B.
14 Counsel of Record disclosing “CONFIDENTIAL – ATTORNEYS’ EYES
15 ONLY” Discovery Materials to experts or consultants shall be responsible for
16 obtaining the executed undertaking, including from the staff of any such expert
17 or consultant, in advance of such disclosure and shall also retain the original
18 executed copy of said undertaking;

19 (iv) At least five (5) business days prior to making such disclosure—
20 and after having secured the undertaking identified in sub-section (iii)—
21 Counsel of Record associated with the expert or consultant shall provide to
22 Counsel of Record for the party whose Protected Materials bearing the
23 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” designation are being
24 disclosed a copy of the executed undertaking as well as the resume of the expert
25 or consultant being granted access to the Protected Materials bearing the
26 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” The purpose of such
27 notice is so that the party whose Protected Materials bearing the
28 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” designation are being

disclosed may lodge any objection to forthcoming disclosure. Should a party lodge such an objection, disclosure of the Protected Materials may not take place until the parties have met, conferred, and otherwise resolved the disclosure either through negotiation or intervention of the Court.

(5) Any current employee or consultant having authored or previously received the designated Protected Material during the course of his or her employment or consultancy subject to disclosure being limited to only the specific document(s) that the person in question authored or received; and

(6) Any other person with the prior written consent of the party whose Protected Material is being disclosed.

(e) During depositions, Counsel of Record may mark any exhibit as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” but no such “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” document, or any portion thereof, shall be attached to any publicly-available deposition or other transcript without the written consent of the party that designated the document as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” Portions of deposition transcripts designated “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall be so marked and “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” portions, including exhibits comprising “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” documents, shall be separately bound under seal from the non-confidential portions of the transcript.

(1) For any “CONFIDENTIAL” Discovery Materials, Counsel of Record may question any witness who is employed by the party who produced or authored the “CONFIDENTIAL” Discovery Materials or that would reasonably have received the “CONFIDENTIAL” Discovery Materials as to the “CONFIDENTIAL” discovery materials.

(2) For any “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials, Counsel of Record may only question a witness who authored or actually

received the “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Material. For any other witness, Counsel of Record must obtain either prior written consent of the party having produced the “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials or consent at the deposition but prior to showing the “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Material to the witness. In the latter instance, consent shall not be unreasonably withheld.

(f) In the event that any party may seek to file with the Court any pleading, motion, or other papers that quote or summarize Protected Materials, or file Protected Materials as exhibits, that party must request to file under seal in accordance with this Court’s Civil Local Rule 79-5 to ensure confidentiality of the Protected Materials. Copies of such documents containing information subject to this Protective Order and that are served on counsel for the parties shall be similarly identified and shall be maintained as “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” as described herein. Nothing in this section shall in any way limit or detract from the requirements relative to Software Code set forth below.

(g) Any pleadings, motion papers or other papers not filed under seal shall have deleted or otherwise redacted therefrom all “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials and all portions of such pleadings or papers that would disclose the substance of “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials, provided, however, that any “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials served upon Counsel of Record need not have said materials deleted or otherwise redacted therefrom.

10. Disclosure and review of Software Code shall be restricted in accordance with the following provisions and paragraphs 11 and 12:

(a) Software Code that is produced by Psystar Corporation, if any, shall be made available for inspection in electronic format at the Palo Alto office of its outside counsel, Carr & Ferrell LLP, or at any other location mutually agreed upon by the parties. Software

Code that is produced by Apple Inc., if any, shall be made available for inspection in electronic format at the San Francisco office of its outside counsel, Townsend and Townsend and Crew LLP, or at any other location mutually agreed upon by the parties. Prior to the first inspection of any requested piece of Software Code, the requesting party shall provide thirty (30) calendar days notice of the Software Code that it wishes to inspect. The requesting party shall provide three (3) business days notice prior to any additional inspections.

(b) A party producing Software Code that is designated “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall be permitted to give written notice to the receiving party that the receiving party must conduct its inspection and review of such Software Code in accordance with any or all of the following provisions:

(i) All Software Code shall be made available by the producing party to the receiving party’s outside counsel and/or experts in a private room, on a secured computer without access of any kind to the Internet or any other computer over a network, as necessary and appropriate to prevent and protect against any unauthorized copying, transmission, removal, or other transfer of any Software Code outside or away from the computer on which the Software Code is provided for inspection (the “Software Code Computer”). The producing party must produce Software Code in the form in which it is kept in the ordinary course of the producing party’s business. In particular, if the producing party has any copy of Software Code in computer-searchable format, the producing party will load such searchable Software Code on the Software Code Computer. In addition, the producing party shall install tools that are sufficient for viewing and searching the Software Code on the platform produced if such tools exist and are presently used in the ordinary course of the producing party’s business. The receiving party’s outside counsel and/or experts may request that additional software tools for viewing and searching Software Code (commercial or proprietary) be installed on the Software Code Computer for the receiving party to perform its review of the Software Code. In such an instance, the receiving party must provide the producing party with the CD or DVD containing such licensed software

1 tool(s) at least five (5) business days in advance of the date upon which the receiving
2 party wishes to have the additional software tools available for use on the Software
3 Code Computer. The receiving party's outside counsel and/or experts may create a
4 back-up copy of the Software Code on the Software Code Computer. The receiving
5 party may use the searching tools to annotate and number the lines of the back-up copy
6 of the Software Code. The back-up copy will remain on the Software Code Computer
7 and shall otherwise be subject to all of the provisions of this Protective Order
8 governing Software Code.

9 (ii) The receiving party's outside counsel and/or experts shall be entitled to
10 take notes relating to the Software Code but may not copy the Software Code into the
11 notes. Any attempt to do so shall constitute a material breach of the Protective Order.
12 No copies of all or any portion of the Software Code may leave the room in which the
13 Software Code is inspected except as otherwise provided herein. Further, no other
14 written or electronic record of the Software Code is permitted except as otherwise
15 provided herein. The producing party shall make available a laser printer with
16 commercially reasonable printing speeds for on-site printing during inspection of the
17 Software Code. The receiving party may print portions of the Software Code only
18 when reasonably necessary to facilitate the receiving party's preparation of the case,
19 including when reasonably necessary to prepare any filing with the Court or to serve
20 any pleadings or other papers on any other party; to prepare internal work product
21 materials; or to prepare other necessary case materials such as testifying expert reports,
22 consulting expert written analyses, and related drafts and correspondences. The
23 receiving party shall print only such portions as are reasonably necessary for the
24 purposes for which any part of the Software Code is printed at the time. The printed
25 pages shall constitute part of the Software Code produced by the producing party in this
26 action. Upon printing any such portions of Software Code, the printed pages shall be
27 collected by the producing party. The producing party shall Bates number and label
28 "CONFIDENTIAL – ATTORNEYS' EYES ONLY" any pages printed by the

1 receiving party. The producing party shall then provide one copy set of such pages to
2 the receiving party within five (5) business days. Except as otherwise provided herein,
3 the producing party may not videotape or otherwise monitor review of code by the
4 requesting party.

5 (iii) A list of names of persons who will view the Software Code will be
6 provided to the producing party in conjunction with any written (including email)
7 notice requesting inspection. All persons viewing Software Code shall, each day they
8 view Software Code, (a) each sign a log including the names of persons who enter the
9 locked room to view the Software Code; (b) when each person entered the room; and
10 (c) when each person departed the room. A copy of the log must be available for
11 inspection by the producing party at the producing party's request.

12 (iv) Unless otherwise agreed in advance by the parties in writing, following
13 each day on which inspection is done under this Protective Order, the receiving party's
14 outside counsel and/or experts shall remove all notes, documents, laptops, and all other
15 materials from the room that may contain work product and/or attorney-client
16 privileged information except for the backup copy of the Software Code, which shall
17 remain on the Software Code Computer. The backup copy of the Software Code shall
18 be considered the receiving party's attorney work product. The producing party shall
19 not be responsible for any other items left in the room following each inspection
20 session.

21 (v) Other than as provided in subsections (b)(i) through (b)(iii) above, the
22 receiving party will not copy, remove, or otherwise transfer any Software Code from
23 the Software Code Computer including, without limitation, copying, removing, or
24 transferring the Software Code onto any other computers or peripheral equipment. The
25 receiving party will not transmit any Software Code in any way from the producing
26 party's facilities or the offices of its outside counsel.

27 (vi) The receiving party's Counsel of Record may make no more than ten
28 (10) copies of any portions of the Software Code received from a producing party

1 pursuant to this Paragraph, not including copies attached to Court filings or used at
2 depositions. The receiving party's Counsel of Record shall maintain a log of all paper
3 copies of the Software Code received from a producing party that are delivered by the
4 receiving party to any qualified person under this Protective Order. The log shall
5 include the names of the reviewers and/or recipients of paper copies and locations
6 where the paper copies are stored. A copy of the log must be made available by the
7 receiving party for inspection by the producing party at the producing party's request.

8 (vii) The receiving party's Counsel of Record and any person receiving a copy
9 of any Software Code shall maintain and store any paper copies of the Software Code
10 at their offices in a manner that prevents duplication of or unauthorized access to the
11 Software Code, including, without limitation, storing the Software Code in a locked
12 room or cabinet at all times when it is not in use.

13 (viii) All paper copies of Software Code shall be securely destroyed in a timely
14 manner if they are no longer in use (*e.g.*, at the conclusion of a deposition). Copies of
15 Software Code that are marked as deposition exhibits shall not be provided to the Court
16 Reporter or attached to deposition transcripts; rather, the deposition record will identify
17 the exhibit by its production numbers.

18 (ix) Except as provided in this sub-paragraph, absent express written
19 permission from the producing party, the receiving party may not create electronic
20 images, or any other images, or make electronic copies, of the Software Code from any
21 paper copy of Software Code for use in any manner (including by way of example
22 only, the receiving party may not scan the Software Code to a PDF or photograph the
23 code). Images or copies of Software Code shall not be included in correspondence
24 between the parties (references to production numbers shall be used instead), and shall
25 be omitted from pleadings and other papers whenever possible. If a party reasonably
26 believes that it needs to submit a portion of Software Code as part of a filing with the
27 Court, the Software Code shall be filed under seal pursuant to the Civil Local Rule 79-
28 5 of the Northern District of California. In no case, however, may a Party submit more

Software Code as part of a filing with the Court than is necessary to argue the precise point that the Software Code supports, and any Software Code that is included on the pages submitted but which is not required to argue the precise point that the Software Code supports shall be redacted. The Court filing or other materials containing any portion of Software Code (paper or electronic) shall at all times be limited solely to individuals who are expressly authorized to view Software Code under the provisions of this Order. The receiving party shall maintain a log of all such electronic copies of any portion of Software Code in its possession or in the possession of its retained consultants, including the names of the reviewers and/or recipients of any such electronic copies, and the locations where the electronic copies are stored. A copy of the log must be made available for inspection by the producing party at the producing party's request. Additionally, any such electronic copies must be labeled "CONFIDENTIAL – ATTORNEYS' EYES ONLY" as provided for in this Protective Order.

11. Should Counsel of Record for any party wish to disclose any "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" Discovery Materials produced by another party to a person not authorized by this Protective Order to review such Protected Materials, said counsel shall first provide counsel for the producing party with a short statement of the reason for the proposed disclosure and the name, address, and business or professional affiliation and title (e.g., officer, director, etc.) of such person, by written notice, delivered by hand, e-mail or by fax, at least ten (10) business days prior to the proposed disclosure. If counsel for the producing party objects to the disclosure within said ten-day period, then the party requesting consent shall not proceed with the proposed disclosures, the parties shall engage in good faith efforts to resolve the matter informally and, if those efforts should fail, the party requesting consent may file with this Court an application or motion seeking authorization to make the proposed disclosure pursuant to paragraph 12 below.

12. If any dispute arises concerning whether information designated as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" should in fact be considered Protected Material with that specific designation for purposes of this Protective Order, then

the parties shall try first to resolve such dispute in good faith on an informal basis. If the dispute cannot be so resolved, the party who has objected to the designation of the information as “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall give written notice that such informal attempts have failed. After the party's receipt of such notice, the objecting party may file a motion asking the Court to resolve the issue. On such motion, the party asserting confidentiality shall have the burden of proving that the “CONFIDENTIAL”, “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information: (a) constitutes a trade secret or other confidential research, development, or commercial information within the meaning of Rule 26(c)(7) of the Federal Rules of Civil Procedure or (b) is otherwise entitled to protection under Rule 26(c) of the Federal Rules of Civil Procedure. Prior to the determination of such motion, the disputed information shall be treated by the parties at the level designated by the producing party. If such motion is granted and five business days have passed after entry of an order granting the motion, then the party may proceed with the proposed disclosure.

13. The disclosure of any Protected Materials pursuant to the terms of this Protective Order is not intended to be and shall not be construed as a waiver of any right or a relinquishment of any confidentiality claim as to said Discovery Materials or as a waiver of any claim that the information disclosed is a trade secret or is proprietary.

14. Upon final resolution of this litigation, including any appellate proceedings or expiration of the time allowed therefore:

(a) Unless otherwise agreed, counsel for each party shall return all Discovery Materials marked “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” received hereunder, including all copies thereof, to counsel for the party or third party that produced said materials. Counsel for each party shall also destroy all extracts or summaries of “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Discovery Materials or documents containing such material. Certification of such destruction, under penalty of perjury, is to be made in writing to counsel for the party who produced such “CONFIDENTIAL” and “CONFIDENTIAL – ATTORNEYS’ EYES ONLY”; and

(b) The Clerk of the Court shall maintain under seal any documents that have been

1 sealed by the Court subject to Civil Local Rule 79-5(f) and any further order of the Court.

2 15. Nothing contained in this Protective Order shall preclude any party or third party from
3 seeking or obtaining, upon an appropriate showing, additional protection with respect to any
4 documents, information, or other Discovery Materials or trade secrets. Nothing contained herein
5 relieves any party of its obligation to respond to discovery.

6 16. The Court may modify this Protective Order at any time or consider any dispute which
7 may arise hereunder upon motion of any of the parties.

8 17. This Protective Order shall remain in effect for the duration of the action unless
9 terminated by stipulation or pursuant to Court order. Insofar as they restrict the disclosure, treatment,
10 or use of information subject to this Protective Order, the provisions of this Protective Order shall
11 continue to be binding after the termination of this action, unless the Court orders otherwise.

12 18. In the event that any provision of the Protective Order is found to be in conflict with
13 any other provision of the Protective Order, the more restrictive provision shall govern until the parties
14 otherwise resolve the conflict. Any such resolution shall be reduced to writing and considered an
15 integrated part of this Protective Order, applicable to all future instances involving a similar conflict of
16 governing provisions.

1 DATED: February 25, 2009

Respectfully submitted,

2 TOWNSEND AND TOWNSEND AND CREW LLP

3
4 By: /s/ James G. Gilliland
JAMES G. GILLILAND, JR.

5 Attorneys for Plaintiff and Counterdefendant
6 APPLE INC.

7
8 DATED: February 25, 2009

Respectfully submitted,

9 CARR & FERRELL LLP

10
11 By: /s/ Colby B. Springer
COLBY B. SPRINGER

12 Attorneys for Defendant and Counterclaimant
13 PSYSTAR CORPORATION

14
15 **ORDER**

16 The parties having stipulated to the foregoing and good cause appearing, IT IS SO
17 ORDERED.

18
19 Dated: _____

20 _____
21 Hon. William Alsup
22 United States District Judge

23 61501004 v1
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EXHIBIT A

**AGREEMENT TO BE BOUND BY THE STIPULATION AND PROTECTIVE ORDER
REGARDING CONFIDENTIAL INFORMATION**

I, _____, hereby acknowledge that I have read the Stipulation and Protective Order Regarding Confidential Information entered into on behalf of the parties to *Apple Inc. v. Psystar Corp.*, CV 08-03251 WHA, filed in the United States District Court, Northern District of California. I understand the provisions prohibiting the disclosure of confidential information for any purpose or in any manner not connected with the prosecution or defense of this action and I agree to be bound by all provisions of that stipulation and order.

Date: _____ Signature: _____

Print Full Name and Address: _____

EXHIBIT B

DECLARATION OF UNDERTAKING AND COMPLIANCE

I, _____, declare:

1. My address is _____

2. My present employer is _____

3. My present occupation and job title are _____

4. I have received a copy of the Protective Order Regarding Confidential Information entered into on behalf of the parties to *Apple Inc. v. Psystar Corp.*, CV 08-03251 WHA, filed in the United States District Court, Northern District of California. I have carefully read and understand the provisions of it and agree that I will comply with all provisions of it.

5. I am not involved in “competitive decisionmaking” for any party in the above-entitled action, as that term is defined in the Protective Order. I agree that if I intend at any time to take on responsibility for competitive decisionmaking, I will seek leave of Court to be released from this Protective Order.

6. I submit to the jurisdiction of the United States District Court for the Northern District of California for purposes of enforcement of the Protective Order, and fully understand that violation of the Protective Order is punishable by contempt of Court.

7. I will hold in confidence, and will not disclose to anyone not qualified under the Protective Order, any Discovery Materials disclosed to me that are designated “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or any words, summaries or abstracts thereof.

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

Executed this _____ day of _____, _____ at

_____.

(Print Name)

(Signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPLE INC., a California corporation

No. C 08-03251 WHA

Plaintiff,

v.

PSYSTAR CORPORATION, a Florida
corporation,

**ORDER APPROVING
STIPULATED PROTECTIVE
ORDER SUBJECT TO
STATED CONDITIONS**

Defendant.

The stipulated protective order submitted by the parties is hereby **APPROVED**, subject to the following conditions, including adherence to the recently announced strict caution against sealing orders by the Ninth Circuit (as set out below):

1. The parties must make a good-faith determination that any information designated “confidential” truly warrants protection under Rule 26(c) of the Federal Rules of Civil Procedure. Designations of material as “confidential” must be narrowly tailored to include only material for which there is good cause. A pattern of over-designation may lead to an order un-designating all or most materials on a wholesale basis.

2. In order to be treated as confidential, any materials filed with the Court must be lodged with a request for filing under seal in compliance with Civil Local Rule 79-5. Please limit your requests for sealing to only those narrowly tailored portions of materials for which good cause to seal exists. Please include all other portions of your materials in the public file and clearly indicate therein

1 where material has been redacted and sealed. Each filing requires an
2 individualized sealing order; blanket prospective authorizations are no longer
3 allowed by Civil Local Rule 79-5.

4 3. Chambers copies should include all material — both redacted and
5 unredacted — so that chambers staff does not have to reassemble the whole brief
6 or declaration. Although chambers copies should clearly designate which
7 portions are confidential, chambers copies with confidential materials will be
8 handled like all other chambers copies of materials without special restriction, and
9 will typically be recycled, not shredded.

10 4. In *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006),
11 the Ninth Circuit held that *more* than good cause, indeed, “compelling reasons”
12 are required to seal documents used in dispositive motions, just as compelling
13 reasons would be needed to justify a closure of a courtroom during trial.
14 Otherwise, the Ninth Circuit held, public access to the work of the courts will be
15 unduly compromised. Therefore, no request for a sealing order will be allowed
16 on summary judgment motions (or other dispositive motions) unless the movant
17 first shows a “compelling reason,” a substantially higher standard than “good
18 cause.” This will be true regardless of any stipulation by the parties. *Counsel are*
19 *warned that most summary judgment motions and supporting material should be*
20 *completely open to public view.* Only social security numbers, names of
21 juveniles, home addresses and phone numbers, and trade secrets of a compelling
22 nature (like the recipe for Coca Cola, for example) will qualify. If the courtroom
23 would not be closed for the information, nor should any summary judgment
24 proceedings, which are, in effect, a substitute for trial. Motions *in limine* are also
25 part of the trial and must likewise be laid bare absent compelling reasons. Please
26 comply fully. Noncompliant submissions are liable to be stricken in their
27 entirety.
28

1 5. Any confidential materials used openly in court hearings or trial
2 will not be treated in any special manner absent a further order.

3 6. This order does not preclude any party from moving to
4 undesignate information or documents that have been designated as confidential.
5 The party seeking to designate material as confidential has the burden of
6 establishing that the material is entitled to protection.

7 7. The Court will retain jurisdiction over disputes arising from the
8 proposed and stipulated protective order for only **NINETY DAYS** after final
9 termination of the action.

10
11 **IT IS SO ORDERED.**

12
13 Dated: March 2, 2009



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

CAMARA & SIBLEY

Camara & Sibley
2339 University Boulevard
Houston, Texas 77005

April 30, 2010

James G. Gilliland, Jr.
Two Embarcadero Center, Eighth Floor
San Francisco, California 94111
415-576-0200
415-576-0300 (fax)

Dear Mr. Gilliland:

Based on our agreement, I obtained a 14-day extension from the Ninth Circuit in Apple Inc. v. Psystar Corp., No. 10-15113 in the United States Court of Appeals for the Ninth Circuit.

The clerk instructed me to write you a letter stating that the due date for Psystar's opening brief is now May 17, 2010, and the due date for Apple's response brief is now June 16, 2010. As we agreed, we are not opposed to a further 14-day extension of Apple's response deadline, which I understand you can obtain by calling the clerk.

I am also instructed to file a copy of this letter with our opening brief, which I will do. Thanks again for your cooperation.

Yours,



K.A.D. Camara