

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES :

LAZARO J. LOPEZ, ESQUIRE
on behalf of the Debtor

BERGER SINGERMAN, by
PAUL S. SINGERMAN, ESQUIRE
on behalf of Apple, Inc.

OFFICE OF THE UNITED STATES TRUSTEE, by
STEVEN SCHNEIDERMAN, ESQUIRE
Attorney/Advisor
on behalf of the United States Trustee

- - - - -

1 THE COURT: Let's get appearances in
2 Psystar, is that how you pronounce it?

3 MR. LOPEZ: Psystar.

4 THE COURT: Psystar. Okay.

5 MR. LOPEZ: Good morning, your Honor.
6 Lazaro Lopez on behalf of Psystar, the debtor.

7 MR. SCHNEIDERMAN: Steven Schneiderman
8 for the U.S. Trustee.

9 MR. SINGERMAN: Good morning, your
10 Honor. I'm Paul Singerman from Berger Singerman
11 and we are counsel to Apple, Inc.

12 MR. LOPEZ: Your Honor, first I want to
13 announce that on the issue of notice, Friday when
14 I learned of the hearing today, I tried to get
15 service on all the -- you know, all the creditors
16 that I had and I was not able to get service on
17 the bank where the debtors have their account and
18 where -- at least one of the motions is to
19 continue to use that bank, and one of the
20 creditors I was not able to get the notice
21 through.

22 I tried to notice all the creditors.
23 When I did the ones I -- everybody I tried to
24 notice by fax. The ones that I was not able to
25 do, too, was because the fax would not go

1 through. I just wanted to let -- make the Court
2 know that and plus I was just talking to Mr. --

3 MR. SINGERMAN: Singerman.

4 MR. LOPEZ: -- Singerman and he
5 informed me that Apple is a creditor of the
6 debtor, which I was not aware of. It seems like
7 I am missing a lot of the information from what I
8 gather from the trustee's office -- I mean, the
9 trustee's representative and Mr. Silverman. I'm
10 sorry --

11 THE COURT: Singerman.

12 MR. LOPEZ: -- Singerman.

13 THE COURT: What generated the filing?

14 MR. LOPEZ: What I understood was that
15 the company was -- well, is heavily indebted to a
16 law firm in California that is representing them
17 in a case over there against Apple and they were
18 not able to pay their bills, so they needed to
19 reorganize and get a scheduled payment to their
20 attorneys and, you know, some other creditors
21 that are involved. That's the reason that -- my
22 understanding to file.

23 I asked my client to be here this
24 morning and he hasn't shown up, or at least a
25 representative of the company.

1 THE COURT: Why is it necessary to
2 assume on the first day the card holder
3 agreements, assuming they're executory contracts?
4 Wouldn't they just be continued to be performed
5 pending assumption or rejection?

6 MR. LOPEZ: I just wanted to make sure
7 that there would be no issue as far as -- because
8 the bulk of the money that comes into the
9 company, since this is a company that does all
10 the business through the internet or the majority
11 of the business through the internet.

12 Also, you know, probably 90, 95 percent
13 of the money that comes into the company comes in
14 through the credit card -- credit card handling
15 companies. Basically, there's two, Heartland and
16 Google, and we wanted to make sure that those
17 companies, because of the pending Chapter 11,
18 would not stop sending the money, so that's why
19 we're seeking the order to make sure that that
20 continues to flow smoothly without any problems.

21 THE COURT: Is there some portion of
22 the credit card agreements which would require
23 the debtor to pay any prepetition debt to keep
24 these things going?

25 MR. LOPEZ: No, but there is -- there

1 is an agreement to -- like if there's any charge
2 backs or whatever, you know, then in this case
3 Psystar would have to reimburse them back, so
4 they would become a creditor at that point.

5 If there's any problem with the credit
6 card where it does not honor and money has been
7 turned over, they would have to give it back to
8 them.

9 THE COURT: I'm always leary just
10 assuming executory contracts before we know where
11 a case is going, but the general law is that
12 pending assumption or rejection the contract
13 parties continue to perform, so that would be --
14 the preferred relief today would just be to
15 reaffirm that principle.

16 The other motion, two motions --

17 MR. LOPEZ: Keep the money.

18 THE COURT: -- one is a motion to honor
19 deposits. If you've got prepetition deposits you
20 want to be able to fill the orders --

21 MR. LOPEZ: Correct.

22 THE COURT: -- and credit the deposits?

23 MR. LOPEZ: Correct, your Honor.

24 THE COURT: And the third one deals
25 with bank accounts and cash management.

1 Well, let me -- I read the motions, let
2 me get comments from Mr. Singerman and
3 Mr. Schneiderman and then we'll come back for you
4 to follow up with your reply.

5 MR. LOPEZ: Sure.

6 MR. SINGERMAN: Thank you, your Honor.

7 Your Honor, as counsel indicated,
8 Apple, Inc. didn't get notice of these hearings.
9 We were told through our co-counsel at a meet and
10 confer in litigation, which I'll describe
11 momentarily, of the debtor's intention to file
12 this case, but learned about the case otherwise
13 informally.

14 In July of 2008, Apple, Inc. filed a
15 lawsuit against the debtor in the Northern
16 District of California, Federal District Court,
17 for copyright infringement, induced copyright
18 infringement, violation of the Digital Millennium
19 Copyright Act, breach of contract, induced breach
20 of contract, trademark infringement, trade dress
21 infringement and unfair competition.

22 The essence of that lawsuit, which has
23 been pending for some time, is subject of a
24 discovery cutoff in June of 2009 and set for
25 trial in November of 2009, is that this debtor is

1 violating rights in respect of the Mac OS10
2 operating system, and other intellectual property
3 of Apple. Essentially, in lay terms, your Honor,
4 that the debtor has found a way to end run the
5 proprietary code in the software, taking the
6 Mac OS10 operating system, putting it on
7 non-Apple branded machines, and selling it
8 without complying with Apple's licensing and
9 other agreements.

10 As I mentioned, that lawsuit is far
11 along and, in fact, recently an order was entered
12 compelling discovery by the debtor and requiring
13 substantial financial discovery from the debtor
14 and a 30(b)(6) deposition of the debtor's
15 representatives in respect of its finances that
16 was set for June 3rd, as well as an explanation
17 by the debtor regarding spoliation of evidence
18 claims, and the District Court ordered the debtor
19 to pay the expenses of Apple if full discovery
20 was not provided in the Court's -- the District
21 Court's recent order.

22 Apple will be, depending on what
23 happens with the case and how long the case
24 lasts, if it does, seeking relief before the
25 Court in respect of stay relief and perhaps other

1 relief.

2 Specifically in respect of the matters
3 set for hearing today, I think we have two main
4 points to make, the first, your Honor, as to the
5 three motions pending, Apple agrees with your
6 Honor's assessment that it would be imprudent to
7 assume an agreement before the Court and the
8 parties have some sense of where the case is
9 going and if the law is what counsel believes it
10 to be, that the non-debtor credit card processor
11 is obligated to comply post-bankruptcy, it would
12 seem assumption is premature.

13 As to the bank accounts and business
14 forms, Apple takes no position, and as to the
15 customer deposits, that's Docket Entry 4, I
16 believe, your Honor, Apple would simply like some
17 disclosure from the debtor regarding the amount
18 of the orders that are subject of these deposits
19 that pertain to Mac OS10 related products.

20 The motion -- and I apologize, your
21 Honor, that's Docket Entry 5, not 4, Docket Entry
22 4 is the credit card motion, refers generally to
23 five to \$10,000 of deposits on hand, but it's not
24 clear what business this debtor does, other than
25 the Apple related business, if any.

1 Lastly, your Honor, as an overall
2 caveat, without adjudicating any matter before
3 the Court, and certainly not on the record of me
4 telling you what another lawsuit is about in
5 Federal District Court in California, I would
6 only urge the Court to be mindful of the
7 provisions of 28 U.S.C. 959, which obligate a
8 debtor in bankruptcy to comply with applicable
9 non-bankruptcy state law, and I would cite to the
10 Court the case of the JFD Enterprises, Inc. at
11 223 B.R. 610, an opinion of the District of
12 Massachusetts Bankruptcy Court. There the Court
13 said that it's the intent of 959, congressional
14 intent, that 959 apply to federal law, too.

15 And so I go out of my way to point this
16 out because if Apple's allegations are proven,
17 and Apple believes they will handily be proven,
18 most all of the debtor's counterclaims were
19 stricken by prior order of District Court, it
20 would be, I think, unintended and, in fact,
21 inappropriate for the Court to condone
22 post-bankruptcy continued infringement of Apple's
23 intellectual property rights.

24 THE COURT: If that's the case, why
25 haven't you gotten an injunction in District

1 Court stopping them from doing business? It
2 seems that that's essentially what you're asking
3 me to do by implication, is to tell them they
4 can't do what they're accused of doing, but they
5 haven't been enjoined from doing it yet in a year
6 and a half or year in State Court; right?

7 MR. SINGERMAN: Yes, and, Judge, I'm
8 not asking ---

9 THE COURT: I mean, in District Court.

10 MR. SINGERMAN: Yes, sir, in District
11 Court. I'm not asking your Honor to enter any
12 orders. I'm only pointing out that there may be
13 relief that's sought from you that could have an
14 unintended effect of blessing whatever the debtor
15 is doing.

16 There has not been a determination of
17 infringement. Apple believes that it's highly
18 likely there will be and I am exploring and
19 learning, since we were engaged yesterday
20 afternoon, your Honor, about the status in more
21 detail of the California District Court case and
22 issues pertaining to injunctive relief.

23 I don't have an answer for your Honor.

24 THE COURT: As far as you know, there's
25 no injunction in place that would, outside of

1 bankruptcy, stop them from continuing their
2 conduct violative or not --

3 MR. SINGERMAN: That's correct.

4 THE COURT: -- of the law?

5 MR. SINGERMAN: Yes, sir, that's
6 correct, your Honor.

7 THE COURT: All right. So,
8 Mr. Schneiderman, what about the other two
9 motions --

10 MR. SCHNEIDERMAN: Your Honor ---

11 THE COURT: -- or any of them, for that
12 matter?

13 MR. SCHNEIDERMAN: I'd point out, your
14 Honor, that there's no case management summary,
15 which under the local rule was to be filed within
16 three days of the filing of the case, or at least
17 one day before the first day hearings, at the
18 latest three days after the filing of the case.
19 We don't have that.

20 I learned today from counsel that
21 there's no secured creditor. The creditor body,
22 which on Friday there was an amended Schedule F
23 filed, the unsecured creditors are 259,000,
24 120,000 of that is the insider debt, the
25 principal of the corporation, and 88,000 is to

1 the law firm that is, I guess, purportedly
2 representing the debtor in the California
3 litigation, but didn't tell Chapter 11 counsel
4 that Apple was a creditor.

5 So I'm really not sure where this case
6 is going and who's providing counsel with the
7 information, but we don't have compliance with
8 the local rule and I'm not really sure what the
9 intent was to file the case. There's no
10 corporate representative here.

11 THE COURT: Well, it seems pretty
12 clear -- Mr. Lopez said they filed it because
13 they owed their lawyer money, but it seems pretty
14 clear from Mr. Singerman's proffer, assuming he
15 had accurate information, that they filed it to
16 stop the California lawsuit from going forward.

17 MR. SCHNEIDERMAN: Yes, your Honor,
18 which counsel for the debtor didn't know about,
19 other than -- other than he knew that the debtor
20 had a claim against Apple.

21 THE COURT: They are a Miami based
22 company?

23 MR. LOPEZ: They are a Miami based
24 company. Their office -- the business is in the
25 Doral area.

1 THE COURT: Do they have a lot of hard
2 assets or they just kind of buy the parts and put
3 it together when they get orders?

4 MR. LOPEZ: Mostly, yes. Mostly, you
5 know, they order merchandise, their orders come
6 in, they order the parts from the suppliers, put
7 the computers together. There are some parts on
8 hand, but from my understanding, it's not like a
9 huge, super large inventory.

10 THE COURT: Okay. But you do have some
11 orders that you're ready to fill provided you can
12 honor the deposits?

13 MR. LOPEZ: From what I've been told,
14 yes.

15 MR. SCHNEIDERMAN: We don't know the
16 bank account, we don't know the amount in the
17 bank account. We don't know -- your Honor, my
18 suspicion would be that one of the reasons for
19 the motion to honor the deposits are because the
20 deposits have been utilized, and if the deposits
21 had to be refunded, because we don't have the
22 case management summary, there is the possibility
23 that there's no available funds to refund. We
24 don't have any of the financial information
25 necessary here.

1 Of the three motions pending today, one
2 I agree with your Honor, is premature to rule on
3 that today because we don't know what
4 administrative obligation that would be causing
5 the debtor to incur.

6 The second motion, which is the deposit
7 motion, your Honor -- and all three of these
8 motions, your Honor, by the way, in Paragraph 6,
9 all, and I'm not a computer person, your Honor, I
10 don't pretend to be, I don't know much about the
11 intellectual property litigation, but all three
12 of these motions detail the exact thing that
13 Mr. Singerman was just describing as the subject
14 of the complaint, as to how they operate -- how
15 they use this operating system for the Mac OS and
16 basically allow computers which aren't Apple to
17 run this. But I'm not a computer person, so I'm
18 not -- I don't know if that's appropriate or not.

19 The customer deposit, your Honor,
20 issue, obviously if they're going to proceed with
21 manufacturing, the deposit should be honored.

22 The third motion, which is the business
23 forms and records, your Honor, I object. They're
24 basically saying they want to -- they want to use
25 their check stock, deposits, but what they don't

1 say is that they want to be relieved from opening
2 a debtor-in-possession operating -- bank account
3 and an end run around that is what they're trying
4 to do.

5 Clearly, your Honor, they need to
6 comply with the U.S. Trustee Guidelines. They
7 need to open up a debtor-in-possession bank
8 account. They should not be authorized to
9 continue to use the check stock that they have
10 and the deposit slips.

11 If they want to use their order forms
12 and stationery, your Honor, there's fine, but the
13 financial matters, I would object to and the
14 motion for that relief should be denied.

15 I would also point out, your Honor, on
16 Friday there was an amended Schedule F filed
17 listing the creditors in the case. The original
18 petition did not have addresses, I think, for
19 several of these. So I would ask counsel if he
20 filed the requisite Local Form 4, I believe,
21 amending the creditor matrix and sending out
22 notice of commencement of the case to these
23 additional parties, unless the clerk of the Court
24 had not sent out the notice commencement of the
25 case yet?

1 MR. LOPEZ: Your Honor, in light of,
2 you know, what I've learned here today from the
3 two gentlemen, I think at this point it would
4 be -- it would be, you know, good to go ahead and
5 continue this and not proceed with these motions
6 until I get all the information and I contact --
7 I file it with the Court or I -- and I contact
8 the trustee's office and counsel for Apple and
9 find out exactly what's going on with the Apple
10 litigation in order to either add them on as a
11 creditor, if that's what they are and, you know,
12 just to -- not to prejudice anybody involved.

13 I think at this time I would, you know,
14 continue the hearing on these motions.

15 THE COURT: For how long? I mean, the
16 only thing that may be critical is if they have a
17 lot of orders ready to fill, but I ---

18 MR. LOPEZ: I need to find out how many
19 orders they have, yeah. I don't want to
20 represent a number to the Court that I'm not --
21 that I don't know.

22 THE COURT: Hang on one second. I
23 guess I will set it for a week from Thursday --

24 MR. LOPEZ: From this Thursday?

25 THE COURT: -- June 4th. I've got a

1 really busy day, but it may not take that long,
2 so we'll make it 3:30.

3 MR. LOPEZ: If it's okay, you want to
4 move it to the next week?

5 THE COURT: Hold on. Let me check
6 something. The following week I have
7 Chapter 13s, but I guess we can do it June 8th at
8 10:00 in the morning. That's the following
9 Monday, no?

10 MR. LOPEZ: No, that's fine. That's my
11 birthday. That's okay, I work on my birthday, I
12 don't take it off.

13 THE COURT: Okay. I mean, I didn't
14 have a big problem, despite what Mr. Singerman
15 said, with authorizing you to close on orders.

16 MR. SINGERMAN: Your Honor, I just --
17 to be clear, Apple didn't object to that, Apple
18 just asked for some disclosures regarding what
19 orders were in-house and which of them were Apple
20 related products. Apple didn't interpose an
21 objection to that relief.

22 THE COURT: All right. So, yeah, let's
23 push it off to the 8th. We'll just continue
24 without any relief on the business forms, bank
25 accounts, although, talk to Mr. Schneiderman, see

1 what he agrees to.

2 MR. LOPEZ: Okay.

3 THE COURT: Actually, on the executory
4 contract one, I think I won't reset that one,
5 I'll just reserve ruling and reflect in there
6 that the parties continue to perform pending
7 assumption or rejection.

8 Then on customer deposits, I'll grant
9 the motion just with no finding as to whether or
10 not the continuation of the business is or is not
11 in violation of any of Apple's rights or state or
12 federal law, but I'll do the order. But that
13 really leaves us just, at that point, with the
14 business and bank accounts motion that would be
15 on for the 8th, but I imagine some other things
16 may arise before then. Okay.

17 I'll do an order resetting and
18 providing for the relief.

19 MR. LOPEZ: Thank you, your Honor.

20 MR. SINGERMAN: Your Honor, I'm not
21 arguing, I understand the ruling and it's not
22 inconsistent with any relief Apple has sought.

23 Are you entertaining Apple's request
24 that the debtor disclose the number and amount of
25 orders that pertain to its intellectual property

1 in conjunction with the customer deposit motion?

2 THE COURT: No, I'm not going to enter
3 that relief. You can seek discovery. They will
4 have to otherwise account, but at this point I'm
5 keeping the Apple litigation separate.

6 If there was some injunctive relief,
7 then certainly I wouldn't authorize the debtor to
8 do anything that would violate it, but right now
9 if they've been operating without a finding
10 against them in the ordinary course outside of
11 bankruptcy, then I'm going to allow them to
12 continue within the Chapter 11 for the time
13 being.

14 MR. SINGERMAN: Yes, sir.

15 THE COURT: Okay. Then I think we're
16 done.

17 MR. SINGERMAN: Thank you, your Honor.

18 MR. LOPEZ: Thank you, your Honor.

19 (Thereupon, the hearing was concluded.)

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

STATE OF FLORIDA:
COUNTY OF DADE:

I, Margaret Franzen, Shorthand Reporter
and Notary Public in and for the State of Florida
at Large, do hereby certify that the foregoing
proceedings were taken before me at the date and
place as stated in the caption hereto on Page 1;
that the foregoing computer-aided transcription is
a true record of my stenographic notes taken at said
proceedings.

WITNESS my hand this 27th day of
May, 2009.

Margaret Franzen
Court Reporter and Notary Public
in and for the State of Florida at Large
My Commission Expires: April 14, 2010

