

3. Under Illinois law, canned software is considered to be tangible personal property no matter how it is transmitted or transferred: via card, disc, tape, electronic means, or other media. As such, “the sale at retail, or transfer, of canned software intended for general or repeated use is taxable.” *See* Ill. Admin. Code title 86, § 130.1935(a).

4. However, under Ill. Admin. Code title 86, § 130.1935(a) (1), a license of software is ***not*** a taxable retail sale if:

- A) it is evidenced by a written agreement signed by the licensor and the customer;
- B) it restricts the customer's duplication and use of the software;
- C) it prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) the licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) the customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Id.

5. Here, notwithstanding the fact that Plaintiff and the Class Members licensed canned Filemaker software from Claris, and notwithstanding that those licenses met each of the five above requirements for exemption from taxation, Claris charged these licensees sales tax in violation of Illinois law, incorrectly categorizing each license as a taxable event. When Plaintiff informed Claris that Illinois law prohibits charging sales tax on the license of canned software under these

circumstances, Claris denied that the conduct was illegal and, on information and belief, continues to illegally charge these sales taxes to its licensees.

6. It is believed and therefore averred that Claris has charged, and continues to charge, customers Illinois sales tax in violation of Illinois Tax Regulations.

7. The amount of Illinois sales tax Claris has overcharged customers is not known at this time. However, it is expected that discovery will show that the overcharges will exceed several million dollars, at a minimum, given the volume of Claris's sales.

8. Plaintiff herein seeks judgment requiring Claris to inform all Class Members of the illegal sales tax on their purchases and to make appropriate restitution to Plaintiff and the Class. Plaintiff also seeks to have Claris enjoined from illegally overcharging customers for Illinois sales tax in the future.

PARTIES

9. Plaintiff Florodora, Inc., a women's fashion and shoe boutique, is an Illinois corporation located in Chicago, IL. It is owned, operated and managed by its President, Michael Blossom.

10. Defendant, Claris, is a corporation organized and existing under the laws of the State of Delaware, and headquartered at 5201 Patrick Henry Drive, Santa Clara, CA 95054.

JURISDICTION AND VENUE

11. This Court has original jurisdiction over all causes of action asserted herein under the Class Action Fairness Act, 28 U.S.C. §1332(d)(2), because the matter in controversy exceeds the sum or value of \$5,000,000 exclusive of interest and costs and more than two-thirds of the Class resides in states other than the states in which Defendant is a citizen and in which this case is filed, and therefore any exemptions to jurisdiction under 28 U.S.C. §1332(d) do not apply.

12. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because: Plaintiff resides in and suffered injury as a result of Defendant's acts in this district, many of the acts and transactions giving rise to this action occurred in this district, Defendant conducts substantial business in this district, Defendant has intentionally availed itself of the laws and markets of this district, and Defendant is subject to personal jurisdiction in this district.

SUBSTANTIVE ALLEGATIONS

13. Claris, a wholly-owned subsidiary of Apple, Inc., promotes, sells, markets, and licenses various software programs, including Filemaker and Filemaker Pro.

14. FileMaker Pro is a cross-platform database application program that allows users to organize data into screens, layouts or forms and manage contacts and projects. Initially, FileMaker Pro was designed to work with Apple computers, but it later became available on the Windows platform, the web and iOS devices.

15. An important aspect of FileMaker Pro is that users do not need advanced programming skills to use it. It consists of more than 30 integrated starter solutions, which help lay users handle important tasks, including:

Creating a Custom Database: FileMaker Pro can be used to create customizable databases to suit the users' unique requirements.

Producing Reports: The program offers step-by-step reporting tools that can be used to handle and automate user tasks, such as generating and emailing reports in PDF or Excel.

Publishing Data on the Web: FileMaker helps users publish their databases on the Web with a few clicks. Users can also create surveys, customer feedback forms, registration sites, and more.

Sharing the Data: FileMaker Pro enables the users to securely share the data with both Mac and Windows users. They can share the databases to a network with other users.

16. In short, Filemaker and Filemaker Pro are designed to assist individuals and small businesses with managing and organizing their day-to-day operations.

17. These programs can be purchased or licensed in “canned” format, which is a standard, mass-produced version of the software where each customer receives an identical product.

18. Plaintiff and the Class Members licensed canned software from Claris.

I. The Imposition of Illinois Sales Tax for Canned Software

19. Under Ill. Admin. Code title 86, § 130.1935(a), “[t]he *sale* at retail, or *transfer*, of canned software intended for general or repeated use is taxable, including the transfer by a retailer of software which is subject to manufacturer licenses restricting the use or reproduction of the software” (emphases added).

20. However, under Ill. Admin. Code title 86, § 130.1935(a) (1), when canned software is *licensed*, that license is “**not** a taxable retail sale” if

- A) it is evidenced by a written agreement signed by the licensor and the customer;
- B) it restricts the customer's duplication and use of the software;
- C) it prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) the licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and

- E) the customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Id. (emphasis added). When these conditions are met, no sales tax should be charged.

II. Claris's Annual Volume License Agreement

21. When customers license Filemaker software from Claris, they are required to accede to Claris's Annual Volume License Agreement ("AVLA"). See **Exhibit 1**. The AVLA contains, *inter alia*, the general license terms, termination and warranty information, and restrictions on the use of the software. See *generally id.*

22. Importantly for present purposes, the AVLA contains the following terms:

- "Upon payment of all applicable fees and subject to the terms of this Agreement, Claris grants to Licensee a *non-exclusive, non-transferable* license during the term to install and use the Software as described under the applicable license model in section 1(b)(i) or 1(b)(ii) below" [Ex. 1, § 1(b)];
- "Claris will provide Licensee with a unique License Key, and such License Key must be kept confidential and used solely for the purpose of enabling Licensee to use the Software in accordance with the terms and conditions of this Agreement. Licensee shall be solely responsible for all expenses incurred in the copying and installation of the Software by Licensee." [*id.*];
- "Licensee owns the media on which the Software is recorded, but Licensee acknowledges that Claris and its licensors retain ownership of the Software itself" [§ 1(c)];
- "Licensee acknowledges that the Software contains trade secrets and to protect them, Licensee may not decompile, reverse engineer, disassemble or otherwise reduce the Software to any human perceivable form except as permitted under applicable law. Licensee may not modify, sell, rent, lease, loan, distribute (except as expressly permitted by this License), or create derivative works based upon the Software in whole or in part." [§ 2(a)];
- "LICENSEE MAY NOT TRANSFER OR ASSIGN ANY PORTION OF THIS AGREEMENT TO ANOTHER PARTY WITHOUT CLARIS'S PRIOR WRITTEN CONSENT." [§2(d)];

- “Upon expiry or termination of this Agreement for any reason, all licenses under this Agreement are immediately terminated, and Licensee will cease all use, installation and copying of the Software. Within thirty (30) days following expiry or termination, Licensee must submit the required notice in Claris’s contract system, confirming that Licensee has ceased all use of the Software and confirming that copies of the Software have been deleted or destroyed.” [§ 4(d)].

23. Given these terms in Claris’s AVLA, its licenses of canned Filemaker software do not constitute taxable retail sales. It is therefore believed and averred that Claris has overcharged, and continues to overcharge, customers for Illinois sales tax in violation of Illinois tax laws and regulations.

24. Claris knew, or should have known, that its sales tax assessment practices violated Illinois tax laws, but represented to Plaintiff and the Class Members that they were properly being assessed Illinois sales tax.

25. As a result of Claris’s deceptive business practices, Plaintiff and the Class Members paid Illinois sales taxes they were not legally required to pay.

26. The amount of Illinois sales tax Claris has overcharged customers is not known at this time but will become clear during discovery in this matter.

III. Plaintiff’s Experience

27. Plaintiff entered into a one-year AVLA with Claris for a canned version of its Filemaker Pro software on December 20, 2013. Claris assessed, and Plaintiff paid, a sales tax on that transaction.

28. Plaintiff subsequently renewed its license to use Claris’s canned Filemaker Pro software in 2014 and 2016.

29. Plaintiff again renewed its license to use Claris’s canned Filemaker Pro software on December 23, 2018. Claris assessed a sales tax on that transaction.

30. In March 2019, Plaintiff, through Michael Blossom, contacted Claris, explaining that he believed Florodora's software license was exempt from Illinois sales tax under the terms of the AVLA and applicable governing law.

31. In response, a representative from Claris's finance department informed Mr. Blossom that the sales tax was appropriate and that he would need to pay it to continue to license the software. As a result, Plaintiff ultimately paid a sales tax on the December 2018 transaction in March 2019.

32. Claris's assessment of sales tax on Plaintiff's initial license and subsequent renewals violated Ill. Admin. Code title 86 § 130.1935(a)(1).

33. Claris knew, or should have known, that its sales tax assessment practices violated Illinois tax laws, but represented to Plaintiff that Florodora was correctly being charged sales tax on its software license.

34. As a result of Claris's unlawful assessment of Illinois sales taxes, Plaintiff was forced to remit more taxes to Claris than it was legally required to pay under Illinois law.

CLASS ACTION ALLEGATIONS

35. Plaintiff brings this action on behalf of itself and a class of persons initially defined as follows:

All persons who, within the applicable statutes of limitation:

(1) entered into a written agreement to license canned software from Claris, which agreement:

- (a) restricts the customer's duplication and use of the software;
- (b) prohibits the customer from licensing, sublicensing or transferring the software to a

third party (except to a related party) without the permission and continued control of Claris;

- (c) contains a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep an archival copy; and
- (d) requires the customer to destroy or return all copies of the software to the licensor at the end of the license period; and

(2) were charged Illinois sales tax on that transaction.

Excluded from the Class are Claris; any affiliate, parent, or subsidiary of Claris; any entity in which Claris has a controlling interest; any officer, director, or employee of Claris; any successor or assign of Claris; anyone employed by counsel for Plaintiff in this action; and any Judge to whom this case is assigned, as well as his or her immediate family.

36. Numerosity: The Class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective Class Members through this class action will benefit both the parties and the Court, and will facilitate judicial economy.

37. Typicality: Plaintiff's claims are typical of the claims of the Class Members. The claims of Plaintiff and the Class Members are based on the same legal theories and arise from the same unlawful conduct.

38. Common Questions of Fact and Law: There is a well-defined community of interest and common questions of fact and law affecting Class Members in that they all have licensed software from Claris and were improperly and illegally charged a sales tax, as described above.

39. Adequacy of Representation: Plaintiff is an adequate representative of the Class because its interests do not conflict with the interests of the Class Members. Plaintiff will fairly, adequately, and vigorously represent and protect the interests of the Class Members and has no interests antagonistic to the Class Members. Plaintiff has retained counsel who are competent and experienced in the prosecution of class action litigation, generally, and who possess specific expertise in the context of consumer class litigation in Illinois, specifically.

40. Superiority: The class action is superior to other available means for the fair and efficient adjudication of this dispute. The injury suffered by each Class Member, while meaningful on an individual basis, is not of such magnitude as to make the prosecution of individual actions against Claris economically feasible. Even if Class Members themselves could afford such individualized litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments, as well as increasing the delay and expense to all parties and the court system. The class action provides the benefits of economies of scale, single adjudication, and comprehensive supervision by a single court.

41. Class certification is appropriate because Claris has acted or refused to act on grounds generally applicable to the Class, making appropriate final and injunctive relief with respect to Plaintiff and the Class as a whole.

COUNT I

***Violation of Illinois Consumer Fraud and Deceptive Business Practices Act
(815 ILCS 505/1, et seq.)***

42. Plaintiff incorporates by reference paragraphs 1-41 as though fully set forth herein.

43. Plaintiff brings this action on behalf of itself and the Illinois Class against Defendant.

44. Defendant is a "person" as that term is defined in 815 ILCS 505/1(c).

45. Plaintiff and the Illinois Class are "consumers" as that term is defined in 815 ILCS 505/1(e).

46. The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") prohibits "unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of trade or commerce ... whether any person has in fact been misled, deceived or damaged thereby." 815 ILCS 505/2.

47. In the course of its business, and specifically when it sold canned software exempted from sales tax under Illinois law, Defendant falsely, deceptively, and unfairly represented that the license was a taxable event and charged an improper and illegal sales tax.

48. Defendant engaged in misleading, false, unfair or deceptive acts or practices that violated the Illinois CFA by failing to disclose and actively concealing that these licenses were not subject to sales tax under Illinois law.

49. Defendant intentionally and knowingly misrepresented material facts regarding the tax status of those licenses with intent to mislead Plaintiff and the Class Members.

50. Defendant knew or should have known that its conduct violated the ICFA, as it should have known that the representations it was making, and the sales taxes it was collecting, were *per se* illegal. Defendant owed Plaintiff and the Illinois Class a duty to disclose the illegality of these charges.

51. Defendant's unfair or deceptive acts or practices were likely to and did in fact deceive consumers, including Plaintiff, who unwittingly payed the non-existent sales tax.

52. Plaintiff and the Illinois Class suffered ascertainable loss and actual damages, in

the amount paid in improper Illinois sales tax, as a direct and proximate result of Defendant's misrepresentations and its concealment of and failure to disclose material information.

53. Defendant's violations present a continuing risk to Plaintiff as well as to the general public. Defendant's unlawful acts and practices complained of herein affect the public interest.

54. As a direct and proximate result of Defendant's violations of the ICFA, Plaintiff and the Illinois Class have suffered injury-in-fact and/or actual damage.

55. Pursuant to 815 I LCS 505/10a(a), Plaintiff and the Illinois Class seek monetary relief against Defendant in the amount of actual damages, as well as punitive damages because Defendant acted with fraud and/or malice and/or was grossly negligent.

56. Plaintiff also seeks an order enjoining Defendant's unfair and/or deceptive acts or practices, punitive damages, and attorneys' fees, and any other just and proper relief available under 815 ILCS § 505/1 *et seq.*

COUNT II

Misappropriation/Conversion

57. Plaintiff incorporates paragraphs 1-41 as if fully set forth herein.

58. At all times relevant herein, Plaintiff and Class Members had a property interest in their money, including monies paid for licenses with Claris.

59. Claris, by its wrongful acts, interfered with Plaintiff's and the Class Members' property interests in their money by forcing Plaintiff and the Class Members to pay an unlawful sale tax which is not permitted by law.

60. Claris had no authority to charge Plaintiff and Class Members sales tax on the licenses of canned software, given the representations in its AVLA.

61. As described above, Claris's collection of sales tax converted the funds rightfully belonging to Plaintiff and the Class Members without their consent.

62. The conversion of this money was illegal, unjustified, outrageous, and intentional, insofar as it is believed and therefore averred that at all times relevant herein Claris has had actual or constructive knowledge that these sales taxes violated Illinois law.

63. Alternatively, if the conversion was not deliberate, it was the result of Claris's recklessness and gross neglect.

64. The conversion of Plaintiff's and Class Members' funds benefitted and continues to benefit Claris, while acting to the severe pecuniary disadvantage of Plaintiff and the Class Members.

65. As a result of the conversion, Plaintiff and the Class Members suffered actual injury and loss in amounts that are capable of identification through Claris's records.

COUNT III
Breach of Constructive Trust

66. Plaintiff incorporates paragraphs 1-41 as if fully set forth herein.

67. Claris received money from Plaintiff and the Class Members to be utilized and applied for a particular purpose: the payment of Illinois sales taxes.

68. The monies paid to Claris by Plaintiff and the Class Members for payment of Illinois sales tax create a constructive trust.

69. Claris served, and continues to serve as the trustee of this constructive trust, and therefore has a duty to ensure that trust funds are paid to the proper payee.

70. Plaintiff and the Class Members are the proper payees of the constructive trust funds representing the amount they were overcharged for Illinois sales taxes, as Plaintiff and the Class Members are owed a refund for the sales tax overcharges.

71. If Claris has retained these sales tax overpayments, it has been unjustly enriched.

72. Alternatively, if Claris has improperly remitted the tax overpayments to a third-party, including the Illinois Department of Revenue, it has breached its duty to Plaintiff and the Class Members as trustee of the constructive trust.

73. As a result of Claris's breach of the constructive trust, Plaintiff and the Class Members suffered actual injury and loss in amounts that are capable of identification through Claris's records.

COUNT IV
Unjust Enrichment

74. Plaintiff incorporates paragraphs 1-41 as if fully set forth herein.

75. As a result of Claris's unlawful and deceptive actions described above, Claris was enriched at the expense of Plaintiff and the Class Members through the payment of sales tax that never should have been charged.

76. Claris received the benefit of the collection of these Illinois sales tax charges without legal justification.

77. Under the circumstances, it would be against equity and good conscience to permit Claris to retain ill-gotten benefits it received from Plaintiff and the Class Members.

78. Thus, it would be unjust and inequitable for Claris to retain the benefit without restitution to Plaintiff and the Class Members for the benefits received as a result of Claris's illegal sales tax assessment practices, as described herein.

PRAYER

WHEREFORE, Plaintiff, on its own behalf and on behalf of the Class, prays for judgment as follows:

- a. An Order certifying the proposed Class, naming Plaintiff as the representative of the Class, and designating counsel for Plaintiff as Class counsel;

- b. An Order enjoining Claris from continuing to engage in unlawful business practices, as alleged herein;
- c. An Order awarding Plaintiff and the Class Members restitution, or other equitable relief as the Court deems just and proper;
- d. An Order awarding Plaintiff and the Class Members payment of costs and reasonable attorneys' fees, including expert witness fees;
- e. An Order awarding Plaintiff and the Class Members pre-judgment and post-judgment interest; and
- f. An Order awarding such other additional or alternative relief as the Court finds just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable as a matter of right.

Dated: August 21, 2019

Respectfully Submitted

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