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 Counterclaim Plaintiff Podfitness, Inc.

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION
 14

15 APPLE COMPUTER, INC.,
 16
 Plaintiff,
 17
 v.
 18
 19 PODFITNESS, INC., and DOES 1-100,
 Inclusive,
 20
 Defendants.
 21

Case No. C 06-05805 SBA
**DECLARATION OF JEFF HAYS IN
 SUPPORT OF DEFENDANT'S
 MOTION FOR PARTIAL SUMMARY
 JUDGMENT**

Hon. Sandra Brown Armstrong

22 PODFITNESS, INC.,
 23
 Counterclaim Plaintiff,
 24
 v.
 25
 26 APPLE COMPUTER, INC.,
 27
 Counterclaim Defendants.
 28

1 I, Jeff Hays, hereby declare:

2 1. I am the President of Defendant and Counterclaim Plaintiff Podfitness, Inc.
3 (“Podfitness”). I have personal knowledge of the facts set forth herein and, if called as a witness,
4 would testify competently thereto.

5 2. I selected the name Podfitness partly in response to the increasing popularity of
6 the term “podcast” or “podcasting, but also because it was one of the names for which a domain
7 name was available to purchase. At the time, because of the media and other discussion about
8 the popularity of podcasts, the word “pod” had a number of meanings, including primarily
9 reference to the generic category of MP3 players, the “pod” in “podcast,” “portable on demand,”
10 a small thing connected to a larger thing, and the iPod product.

11 3. “Podcast” was named the “word of the year” at the end of 2005 by the New
12 Oxford American Dictionary. [See Oxford University Press webpage, attached as Exhibit “A”].
13 The word “podcast” is a generic term meaning a digital recording made available on the Internet
14 for downloading to a personal audio player or computer.

15 4. Podfitness chose its name to associate downloadable Internet media with fitness
16 and exercise. In other words, Podfitness sells fitness podcasts, except that unlike traditional
17 podcasts, the Podfitness product is a customized podcast, created by the consumer (as discussed
18 in more detail below).

19 5. Podfitness registered to do business in the State of Utah on or about April 18,
20 2005. To the best of my knowledge, it was not until months later, in about June 2005, that Apple
21 made podcasts available from its iTunes website.

22 6. Use by Podfitness of the “PODFITNESS” mark is done in a consistent manner,
23 using a consistent color scheme.

24 7. Examples of the Podfitness logo directly from Podfitness electronic files,
25 reflecting how the Podfitness name is used on Podfitness website and marketing materials,
26 follows:

27
28

1 Podfitness.com™

2
3
4 or



10 8. Podfitness sells a customized podcast, a custom audio workout based upon the
11 customer's personal fitness profile, needs and desires. The downloadable audio workouts
12 combine the customer's own digital music library (whether on Microsoft's Zune player, an iPod,
13 or other MP3 music player) with a set of fitness instructions from a trainer selected by the
14 customer for playback on the subscriber's portable media player.

15 9. Podfitness does not make or sell portable media players; nor does it plan to enter
16 the portable media player market in the future.

17 10. Based on their individual fitness profiles, selected goals, trainer, and equipment,
18 customers get a unique, customized workout plan. Once the workout is individually built, then
19 Podfitness combines music tracks from the users' Zune or iTunes library with each training
20 session.

21 11. Even though a user will use Zune or iTunes to manage the music used with their
22 customized workout, a user does not need a Zune or an iPod, because the Zune and iTunes music
23 managers work on all MP3 music players. In fact, an iPod user could use Zune to manage their
24 music library, and a Zune user could use iTunes to manage their music library.

25 12. A description of Podfitness business, its marketing to internet users, and other
26 information about the company and its product are reflected in the current Podfitness website, at
27
28

1 www.podfitness.com. A true and correct copy of the Podfitness website is attached as Exhibit
2 “B.” These pages reflect the use of the Podfitness name and color scheme set forth above.

3 13. Podfitness has also built or is building strategic partnerships with technology,
4 fitness, and media companies like Microsoft, Fitness Magazine, Polar USA, Cooper Aerobics
5 Center, and Lady Foot Locker. Podfitness has been featured on the Tyra Banks show, CNN
6 Headline News, E! News Live, and in the pages of Shape, Life & Style Weekly, Consumer
7 Digest, Wall Street Journal, LA Times, New York Times, Washington Post, and Better Homes
8 and Gardens. Self magazine gave Podfitness the highest rating of its training “gadgets” review,
9 an “A.” rating.

10 14. Podfitness has gathered an incredible group of nationally-known trainers and
11 fitness/workout experts, including “America's Trainer” Kathy Smith, supermodel trainer David
12 Kirsch, Mr. Olympia Jay Cutler, and running legend Jeff Galloway. Others include Yumi Lee
13 (trained Brad Pitt), Mark Blanchard (Yoga instructor to Jennifer Lopez), Jeanette Jenkins (trainer
14 for Queen Latifa), Bas Rutten (undefeated UFC heavyweight champion), Jimmy Pena (Fitness
15 Director, Muscle & Fitness Magazine), Gunther Schlierkamp (former Mr. Universe), and Nancy
16 Kennedy (trained Julia Roberts and Kevin Costner). [See Podfitness website, Meet the Trainers,
17 Ex. B].

18 15. Although Podfitness obviously targets persons who use MP3 players (including
19 iPods and Microsoft’s Zune players), the primary target audience is necessarily those persons
20 interested in fitness and workout programs, i.e., physical exercise. In fact, if a person is not
21 interested in a fitness or workout program, they will have no reason to buy the Podfitness
22 product, no matter how many MP3 players they own, or whether they own an iPod, a Zune, or
23 some other brand of MP3 player.

24 16. Podfitness makes clear that its product works with an iPod or other MP3 player,
25 including the competing Microsoft ZUNE player, and Podfitness is obviously not selling actual
26 iPods (or any other MP3 player). Podfitness explains its business as follows:

27 **Supernova Marketplace: The Intersection of MP3 and Fitness**

28 When Podfitness was founded in January 2005, Apple had sold just over 10 million iPods

1 in the nascent MP3 marketplace. Sensing a major shift coming, President and Founder
2 Jeff Hays gambled that the iPod-led MP3 revolution had the potential not only to change
3 the economics of the music business, but also the fitness industry. This began a
multimillion-dollar process of conceptualizing, building, and refining the idea of
Podfitness.

4 Now, in 2007, there have been over 100 million iPods sold, and the MP3 accessory
5 market is white-hot. In addition, the number of people focusing on fitness has never been
higher: there are 40 million fitness club members in the U.S. alone.

6 Not coincidentally, at this exact time, Podfitness is at the culmination of 2 years' efforts:
7 The company built the world's largest audio exercise library, partnered with the most
formidable team of celebrity trainers ever assembled, created an "expert system" that
8 applies a trainer's style to each workout, and built a mixer to pull it all together with music.
Podfitness has 10 patents pending, with more underway.

9 Podfitness delivers a workout that is customized, varied, and professionally designed,
10 then a custom-built mixer adds music, like a soundtrack for the background of each
workout. There's nothing like it anywhere.

11 17. Podfitness' business is conducted primarily through the Internet, and that is the
12 *only* source of the downloadable, customized podcasts created and bought by the consumers. In
13 other words, if the consumer cannot understand and use the internet to access and customize a
14 Podfitness workout, the customer cannot use the Podfitness product. The Podfitness website
15 makes limited references to the iPod product as necessary to inform the consumer, but these are
16 not confusing. [See Ex. B].

17 18. It is obviously necessary that Podfitness tell consumers about the compatibility of
18 the Podfitness product, and to allow a user to choose the iPod, Zune, or other MP3 player, and
19 such references are limited to this purpose, they are not designed to confuse consumers into
20 thinking that Podfitness is affiliated or sponsored by Apple or iPod. In fact, it would make no
21 business sense for Podfitness to limit its market to only iPod users because, even though iPod
22 users are the majority of the MP3 users, there is an ever-growing number of consumers who are
23 *not* using the iPod.

24 19. For example, in the Frequently Asked Questions ("FAQ") section of the site, there
25 are a few very clear and plain references to the iPod product, like the following:

26 **What do I need to run Podfitness?**

27 All you need is a PC (Windows 2000, XP, or Vista) or Mac (Mac OS 10.4 or greater)
28 running iTunes™ or Zune software, an iPod, Zune, or portable MP3 player, and a
broadband internet connection.

1
2 20. For example, under the “Getting Started” heading on the Podfitness site, a user is
3 told the following:

4 **I own an iPod, how do I get started?**

5 Click here for a Getting Started tutorial on setting up Podfitness for the first time.

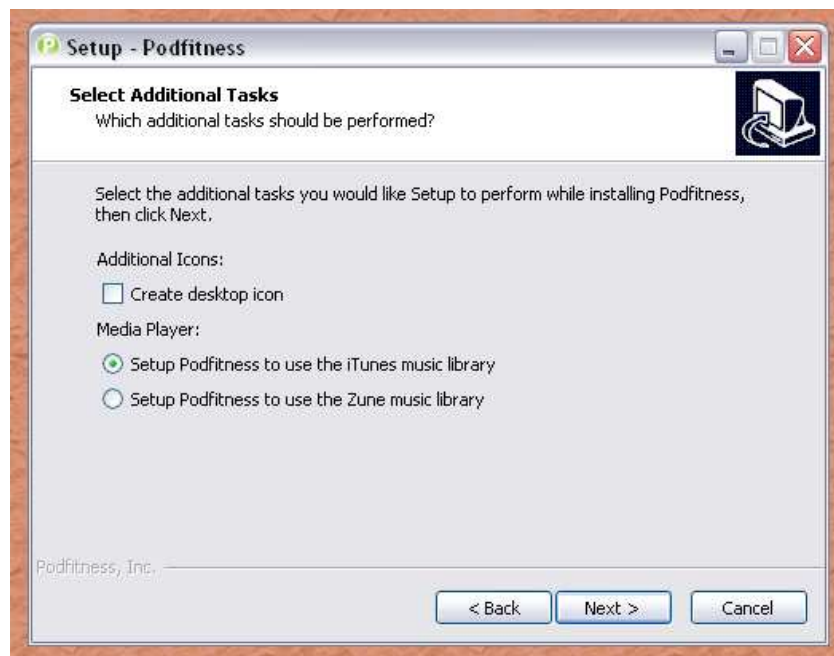
6 **I own a Zune, how do I get started?**

7 Click here for a Getting Started tutorial on setting up Podfitness for the first time.

8 **I don’t use an iPod or a Zune, is there anything I should know?**

9 Yes! If you use an MP3 player that is not an iPod or Zune, you will still need to have
10 iTunes or Zune software installed to mix and download workouts.

11 21. There can be no confusion because the user of the Podfitness product must not
12 only be sophisticated enough to understand and interact with the relatively time-consuming and
13 complicated webpages, but as a *necessary* step a user *must* choose between using a Microsoft
14 ZUNE format, an IPOD format, or some other MP3 format:



25 22. Podfitness’ subscription service is currently \$59.95 per quarter, or about \$240.00 /
26 year.

