

Exhibit “D”

1 February 5, 2008 9:00 a.m.

2 P R O C E E D I N G S

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4 THE VIDEOGRAPHER: This is tape number
5 one in the deposition of Jeff Hays in the matter of
6 Apple, Inc. V. Podfitness, Inc. et al. This case is
7 in the United States District Court, Northern District
8 of California, Case Number C 065805 S B A. Today's
9 date is February 5, 2008, and the time is 9:00.

10 This deposition is taking place at
11 Magleby & Greenwood 170 South Main Street Suite 350,
12 Salt Lake City, Utah. And it's being taken on behalf
13 of the plaintiff. The videographer is Colleen Currey
14 appearing on behalf of Sarnoff Court Reporters and
15 legal technologies located in San Francisco,
16 California.

17 Would counsel please identify yourselves
18 and state whom you represent.

19 MR. MICLEAN: David Miclean, I represent
20 Apple. And with me today is Apple counsel Genevieve
21 Burch.

22 MR. MAGLEBY: Jim Magleby and Jason
23 McNeill with Magleby and Greenwood representing
24 Podfitness, we're also representing the deponent Jeff
25 Hays and also with us is Teri Sundh of Podfitness.

1 question. So I had some alternative names and so do

2 you mean as opposed to the other names.

3 Q. No I'm just asking why -- why did you

4 come up with the name Podfitness for the name of your

5 company?

6 A. I thought it was a great name and then I

7 was able to get the web domain which is the biggest

8 constrictor.

9 Q. When did you purchase the web domain for

10 Podfitness?

11 A. Probably either the summer or fall of

12 2004.

13 Q. And by domain people that haven't bought

14 a domain you're talking about www dot Podfitness dot

15 com?

16 A. Correct, the web page.

17 Q. Why did you think it was a great name why

18 did you think Podfitness was a great name?

19 A. Because it was the closest name that I

20 could come up with that would identify what we do.

21 Q. In what way?

22 A. Well, the pod brings up audio pod casting

23 portable audio, this was if you remember this time

24 period when pod casting was in the newspaper or people

25 writing about it all the time it was people identified

1 with that. And fitness was what we do so I alternated
2 between Podfitness or pod work outs. Our early
3 designs were around pod work outs examine we I finally
4 decided on Podfitness (James came back).

5 Q. Is it your testimony here Mr. Hays that
6 when you first came up with the Podfitness name that
7 the pod referred to pod cast?

8 A. I don't think I've given testimony on
9 that yet.

10 Q. Okay. Is it your testimony that a pod
11 and Podfitness when you first came up with the name
12 was referring to pod cast?

13 A. Pod cast was one of the things that pod
14 refers to, yes.

15 Q. Okay. Anything else pod referred to as
16 you were coming up with the name in 2004?

17 A. Pod refers at that time pod already had a
18 lot of meanings.

19 Q. I'm just asking for what you were
20 thinking of when you came up with the name?

21 A. Okay. But what then I was thinking of
22 the word pod. Pod for me had a lot of meanings, it
23 evokes the word was already in the cultural /SAO*EUL
24 gust, it's the pod in pod casting, it means portable
25 on demand, it's a pod as in a small self contained

1 thing connected to a larger thing.

2 Q. Anything else you were thinking about
3 when you came up with the name Podfitness in the
4 summer of 2004?

5 A. Yes and obviously the iPod.

6 Q. Okay. Was the iPod a famous device at
7 that time in the summer of 2004 when you were coming
8 up with the name?

9 MR. MAGLEBY: Objection, calls for a
10 legal conclusion, lacks foundation.

11 THE WITNESS: If you're asking my
12 opinion.

13 Q. BY MR. MICLEAN: Yeah?

14 A. It was in the summer of 2004 it was still
15 at the stage where it was well known amongst
16 technically savvy people but it was not yet
17 mainstream, it was one 10th as famous as it would be
18 12 months later. Like my wife had never -- it was
19 completely foreign concept to her when I first talked
20 to her about it.

21 Q. Okay. So it's your testimony as you sit
22 here today that Podfitness as you came up with that
23 name in the summer of 2004 related to pod casting, the
24 iPod, P O D being what was it on demand?

25 A. Portable.

1 Q. Portable on demand and this notion of pod
2 being a small king connected to a big thing those were
3 all thing you were thinking about in the summer of
4 2004?

5 A. Those are all things that the word pod
6 meant to me in the summer of 2004.

7 Q. Okay. Is it -- was the main thing you
8 were thinking about in Podfitness an iPod?

9 A. No.

10 Q. What was the main thing you were thinking
11 of with the word pod when you were thinking about the
12 name Podfitness?

13 A. Audio MP3, to me the same pod is a
14 generic term that refers to to the entire category in
15 the same way that pod casting is not restricted to
16 iPod and never has been so whatever whatever the birth
17 of that word in the use of of in the the word pod
18 casting were born out of the same soup.

19 Q. Did you ever talk to any attorney about
20 the name Podfitness?

21 A.

22 MR. MAGLEBY: I'm going to object
23 instruct him not to answer.

24 Q. BY MR. MICLEAN: Did you ever seek any
25 legal advice before you came up with the name

1 Q. Previously you testified that you
2 considered the word pod to be generic for a generic
3 term for an entire category I believe you said,
4 something August lung those lines?

5 A. That's correct.

6 Q. What category did you consider pod to be
7 a generic term for?

8 A. Well there's -- in two areas, the one
9 that is most familiar to me is as a device that I own
10 a bunch of called a pod that is for mimicking
11 different types of amplifiers for guitar players. And
12 but what I was talking about as it relates to
13 Podfitness is the category of MP3 players.

14 Q. And you considered it a generic term in
15 the summer of 2004 when you came up with the
16 Podfitness name?

17 A. I do I did.

18 Q. When you said mimicking amplifiers for a
19 guitar there's an am blah fire called a pod that does
20 that?

21 A. Yeah I own a bunch of pods and they're
22 company call line six.

23 Q. Okay do you play guitar?

24 A. I do.

25 Q. When did you first get a pod from line

1 A. So we never implied an association with
2 Apple using anything and our use of the iPod or iPod
3 name was always very clear that we are compatible with
4 so your question starts out we so we never applied any
5 we're not sold on the Apple website the worst thing
6 that could happen for us is for somebody to think we
7 were associated with Apple and then go to iTunes and
8 start looking for us where we're not. So we never
9 implied any association. The white ear buds, again,
10 there are I have Sony white ear buds that I own, I
11 have lots of white ear buds. I don't think Apple owns
12 the color white as it relates to ear buds.

13 Q. Were you using white ear buds on the
14 Podfitness website you or the company using white ear
15 buds if connection with the Podfitness site to make it
16 appear like they were the white ear buds used by Apple
17 until a silhouette ads?

18 A. So will you ask can her to reread that
19 question.

20 Q. Sure.

21 (The record was read as follows: <)

22 A. As I understand the question, no.

23 Q. BY MR. MICLEAN: You knew at the time
24 that white ear buds were used on the Podfitness
25 website that white ear buds were often associated with

1 nor do I care. My audience is MP3 player owners who
2 are in fitness. Our core demographic is the guy is
3 the intersection of music and fitness.

4 Q. Did you sent an email back to Mr. Malone
5 and say no it's MP3 players that are into fitness
6 that's our demographic?

7 A. I don't have any idea.

8 Q. Excuse me?

9 A. I don't have any idea.

10 Q. My original question too was in reading
11 the article now the pod and the pod people headline
12 for the article do you know if that refers to iPod?

13 MR. MAGLEBY: Objection, lacks
14 foundation, calls for speculation.

15 THE WITNESS:

16 Q. BY MR. MICLEAN: Did you read it to mean
17 that?

18 A. So I read and I've answered I read pod as
19 a category of MP3 players.

20 Q. I'm just asking you in this article?

21 A. So the answer is no.

22 Q. Did you ever try to obtain a trademark on
23 pod pocket?

24 A. We filed for a trademark on pod pocket.

25 Q. Did you come up with the idea of the

1 Q. I'm going to show you two exhibits I
2 guess will be ten and 11. Ten will be an email from
3 you dated January 31 06 produced by Podfitness bearing
4 bait labeled P F zero zero zero five one 67 and the
5 other document will be in fax fuse article with the
6 Bates label P T zero zero zero five one eight.
7 (Exhibit 10 and 11 were marked for identification.)

8 Q. BY MR. MICLEAN: First of all I wanted to
9 ask you Mr. Hays, do you know if the email that is in
10 Hays Exhibit 10 from you dated January 31 06 is in
11 reference to the article that is shown as Exhibit Hays
12 11?

13 A. So I don't know that but it would
14 certainly make sense I would be surprised if that was
15 not true.

16 Q. Do you recall seeing this article that's
17 in Exhibit 11 back in 2006 or sometime there after?

18 A. Very vaguely.

19 Q. Okay. I mean do you recall this being
20 brought to your you a then shun, this fashion fuse
21 article?

22 A. Very vaguely.

23 Q. Okay. Do you remember seeing somewhere
24 that it says I'm referring now to the 5th paragraph of
25 the fashion fuse article says building on the ever

1 booming iPod craze Apple is offering a fresh fitness
2 twist with iPod fitness open paren www dot Podfitness
3 dot com the gadget literally puts a video work out in
4 your palm. They're not officially released until
5 February, the street buzz is already red hot for this
6 visual exercise guide, do you see that?

7 A. I do.

8 Q. Do you remember having some discussion
9 with anybody at Podfitness about this article?

10 A. Having any discussion with anybody at
11 Podfitness.

12 Q. Yes or Power Music?

13 A. Yeah, I had my response here is I was I
14 thought it was fairly stupid, you know, we haven't at
15 this point we haven't released a product yet and
16 somebody's writing about something that they know
17 nothing about we haven't released a product they think
18 it's video and versus for us they think it's Apple.

19 Q. So is this where you wrote to Mr. Richard
20 Petty at Power Music on January 31 06 hey they think
21 it came from Apple, oh well no such thing as bad
22 press?

23 A. Yeah, so oh well thing no such thing as
24 bad press at least there's a mention but it was a
25 pretty crummy the worst thing we can do have somebody

1 think that they can get this at Apple and we're not at

2 Apple.

3 Q. So were you activity trying to dissociate

4 Podfitness from Apple?

5 A. We wanted people to know that we were

6 compatible with but we certainly our biggest problem

7 and maybe still our biggest business problem is if you

8 do specifically own an iPod and you're interested in

9 fitness the the first place that you would think to

10 download fitness content for your iPod is iTunes and

11 if people go there to look for us they'll find

12 competitors like fit pod or Podfitness in Brazil, and

13 not find us. And so weep want to be very clear we

14 were, you know, the best service, compatible with the

15 iPod but we actively didn't want someone to think that

16 we were Apple or sponsored by Apple.

17 Q. Let me show you what I'll mark next in

18 order collection of documents which I'll make a Hays

19 Exhibit 12.

20 (Exhibit 12 was marked for identification.)

21 Q. BY MR. MICLEAN: Could you just take a

22 look through these pages and see if these are

23 exemplars of actual pages that appeared on the

24 Podfitness website?

25 A. Yes.

1 this particular exhibit reflects something that's been
2 for lack of a better word work in progress?

3 A. Correct.

4 MR. MICLEAN: Objection leading.

5 Q. Do you know one way or another will not
6 this exact document Exhibit 9 was ever displayed to
7 the public?

8 A. I would doubt it but no I don't know I
9 don't know where it would be displayed to the public.

10 Q. Okay. Let's go to Exhibit 7. When you
11 approved the advertise many that are reflected in
12 Exhibit 7 did you intend for people to think that
13 these advertisements were promoting an Apple or iTunes
14 product?

15 Q. Objection leading?

16 A. Absolutely not.

17 Q. Would it have done you any good if people
18 believed it was promoting an iTunes product?

19 MR. MICLEAN: Objection leading.

20 THE WITNESS: It would a detriment.

21 Q. How come?

22 A. Because we're not for sale on iTunes
23 we're or on the Apple website.

24 Q. Let's go to Exhibit 6. With regard to
25 Exhibit 6 am I correct that the second page of Exhibit

1 6 is the inside of this holiday card?

2 A. That's correct.

3 Q. Ask so anybody who opened it up would
4 have seen the Power Music and the Podfitness logos?

5 MR. MICLEAN: Objection calls for
6 speculation, lacks foundation.

7 THE WITNESS: I would think that anybody
8 who opened it up would see what was on the inside.

9 Q. All right. Doesn't say the word iPod
10 anywhere in there does it?

11 A. No.

12 Q. And am I also correct that this this was
13 not distributed as an advertisement for example in any
14 publications?

15 MR. MICLEAN: Objection leading.

16 THE WITNESS: That's correct, it was not.

17 Q. Anybody ever call you that or respond to
18 this Christmas card by saying hey I think you're
19 affiliated with Apple?

20 MR. MICLEAN: Objection leading.

21 THE WITNESS: No.

22 Q. If somebody had received this card and
23 thought you were affiliated with Apple and gone to
24 iTunes would that have been good for you?

25 MR. MICLEAN: Objection lacks foundation

1 calls for speculation, leading.

2 THE WITNESS: No it wouldn't have.

3 Q. All right. Let's take a look at

4 Exhibit 4. You testified that you had had a few phone

5 calls in response to Exhibit 4, do you recall that?

6 A. Yes.

7 Q. Did any of the people that called you

8 think that this advertise many was somehow placed or

9 sponsored by Apple?

10 A. No.

11 Q. Did you intend when you you placed this

12 ad to confuse anybody into believing that you were

13 sponsored by or endorsed by Apple?

14 MR. MICLEAN: Objection leading, vague.

15 THE WITNESS: No, I my biggest hope for

16 it was that we would hear from Steve jobs.

17 Q. We talked about the earlier versions or

18 at least an earlier version of the Podfitness product

19 was not compatible with Mac?

20 A. That's correct.

21 Q. And what do you mean by that?

22 A. That the it whenever you release software

23 you generally will target the Microsoft market first

24 because they have such a large share of the P C market

25 and then you get to the Mac port of it when you can.

1 Q. So if somebody it's your understanding

2 Mac is an Apple product?

3 A. Yes.

4 Q. So up until the time that the Podfitness

5 product became compatible with the Mac if owner of a

6 pack tried to use your product it wouldn't work?

7 A. That's correct.

8 MR. MAGLEBY: That's all I have.

9 MR. MICLEAN: Did your statement Mr. Hays

10 today that you were never Podfitness was never trying

11 to create an association or a sense of association

12 with Apple.

13 MR. MAGLEBY: Objection, ambiguous.

14 THE WITNESS: We always want people to

15 know that we were compatible with the iPod that we

16 worked on the iPod. We never wanted somebody to think

17 that we were that they could buy us through Apple or

18 that we were Apple.

19 Q. Is it your statement that it would have

20 been a negative thing for Podfitness to have any sense

21 of association with Apple or Apple products?

22 MR. MAGLEBY: Same objections.

23 THE WITNESS: We always wanted people we

24 wanted to be very clear for people to know that we

25 were compatible with the iPod, we didn't want anybody

1 to think that we were Apple or that they could
2 purchase us from Apple. It's the it's the biggest you
3 asked why hadn't we succeeded, what did I think I
4 think the biggest problem that we have as a company is
5 that we're people go to look for content for not only
6 their iPod but for the MP3 player is iTunes. iTunes
7 sells, you know, over a billion songs that's, you
8 know, they've and we're not on it so, no, it's we
9 don't want people to think of us as associated with as
10 you say Apple if by that you mean that that's where
11 they can buy us or that we're Apple or that we're
12 sponsored by Apple. Anything that would lead them
13 away from our side to Apple.

14 Q. Is Exhibit 12 is the first page of that a
15 page of was your home page or do you remember what
16 kind of if that was the home page of Podfitness?

17 A.

18 MR. MAGLEBY: Objection, lacks
19 foundation, call for speculation.

20 THE WITNESS: So Exhibit 12 you're asking
21 me about the first two pages, what part of.

22 Q. No just asking about is Exhibit 12 the
23 first page there, was that the home page of Podfitness
24 at one time?

25 A. So the answer to your question is no.

1 Q. It's not the home page?

2 A. You said is the first page the home page.

3 Q. Right?

4 A. The answer to that question is no.

5 Q. Okay?

6 A. The first page and the second page

7 together look like they are part of the home page.

8 Q. Okay. Was what is on Page 1 on the home

9 page of Podfitness?

10 A. Yes, it's part.

11 Q. Exhibit 12?

12 A. It is a partial section of the home page.

13 Q. Okay. Thank you.

14 MR. MAGLEBY: One more thing. Dave,

15 Mr. Hays identified a bunch of people, names,

16 entities, persons, and we would request if you want to

17 talk to those people start with us rather than hit

18 them with subpoenas, or at least give us, you know,

19 advanced notice. I also think it would make it a lot

20 faster if we can coordinate that. That's my request.

21 MR. MICLEAN: Let me see if I have -- I

22 seem to be missing Exhibit 13.

23 MR. MAGLEBY: 13 to the Marware.

24 MS. BURCH: I gave you back what I looked

25 at.

1 MR. MICLEAN: That was the Marware thing.

2 MR. MAGLEBY: I'm assuming you didn't

3 look at Exhibit 13.

4 MS. BURCH: I looked at the back page of

5 14.

6 MR. MICLEAN: We're off.

7 THE VIDEOGRAPHER: We're off the record

8 the time is six 06.

9 (The deposition was concluded at 6:06 p.m.)

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