

1 James M. Wagstaffe (95535)
KERR & WAGSTAFFE LLP
 2 100 Spear Street, Suite 1800
 San Francisco, CA 94105-1528
 3 Telephone: (415) 371-8500
 Fax: (415) 371-0500
 4

5 James E. Magleby (Utah Bar No. 7247, admitted *pro hac vice*)
 Jason A. McNeill (Utah Bar No. 9711, admitted *pro hac vice*)
 6 **MAGLEBY & GREENWOOD, P.C.**
 170 South Main Street, Suite 350
 7 Salt Lake City, Utah 84101-3605
 8 Telephone: (801) 359-9000
 Facsimile: (801) 359-9011
 9

10 Attorneys for Defendant and
 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 PODFITNESS, INC., and DOES 1-100,
 19 Inclusive,

20 Defendants.
 21

22 PODFITNESS, INC.,

23 Counterclaim Plaintiff,

24 v.

25 APPLE COMPUTER, INC.,

26 Counterclaim Defendants.
 27
 28

Case No. C 06-05805 SBA

**DECLARATION OF GREG
 WAYMENT IN SUPPORT OF
 DEFENDANT'S MOTION FOR
 PARTIAL SUMMARY JUDGMENT**

Hon. Sandra Brown Armstrong

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I, Greg Wayment, hereby declare:

1. I am a paralegal with the law firm of Magleby & Greenwood, P.C., attorneys for Defendant Podfitness, Inc. (“Defendant”). I have personal knowledge of the facts set forth herein and, if called as a witness, would testify competently thereto.

2. Attached to this declaration are true and correct copies of printouts of a number of WebPages which I downloaded and saved electronically in .pdf format. Also attached are certain documents which are from the document productions in the custody of Magleby & Greenwood, P.C., and which I understand to be the productions of Apple, Inc. These documents have Control Nos. that begin with APD. Also attached are documents and correspondence from the files of Magleby & Greenwood, P.C.

3. Attached as Exhibit “1” are true and correct excerpts from www.apple.com, which has the Official iPod Store at www.apple.com/store. I captured this attachment from the url <http://store.apple.com/1-800-MY-APPLE/Webobjects/AppleStore>, on February 13, 2008, and the attached accurately reflects what was displayed on my computer screen, although there may be minor differences based upon the conversion of the document from electronic to .pdf format.

4. Attached as Exhibit “2” are true and correct copies of the results of a search through the search engine Google for the term “iPod,” which includes a number of links to the www.apple.com site. I captured this attachment from the url <http://www.google.com/search?hl=en&q=ipod>, on February 4, 2008, and the attached accurately reflects what was displayed on my computer screen, although there may be minor differences based upon the conversion of the document from electronic to .pdf format.

5. Attached as Exhibit “3” are true and correct copies of documents produced by Apple with Control Nos. APD000066 – APD000075 (the “Office Action”).

6. Attached as Exhibit “4” are true and correct copies of documents produced by Apple with Control Nos. APD000045 – APD000062 (the “Response to Office Action”).

7. Attached as Exhibit “5” are true and correct copies of documents produced by Apple with Control Nos. APD000099 – APD000120 (the “December 18, 2002 Facsimile”).

1 8. Attached as Exhibit "6" is a true and correct copy of the Complaint for Trademark
2 Infringement, *et al.*, downloaded from Pacer, in the case of Cisco v. Apple, Case No. C 07-0198.

3 9. Attached as Exhibit "7" is a true and correct copy of a web article dated January
4 10, 2007, from CNET News.com. I captured this attachment from the url [http://www.news.com/](http://www.news.com/2100-1047_3-6149285.html)
5 [2100-1047_3-6149285.html](http://www.news.com/2100-1047_3-6149285.html), on January 25, 2008, and the attached accurately reflects what was
6 displayed on my computer screen, although there may be minor differences based upon the
7 conversion of the document from electronic to .pdf format.

8 10. Attached as Exhibit "8" is a true and correct copy of results of searching for the
9 word "pod" in the Trademark Electronic Search System ("TESS") on the United States Patent
10 and Trademark Office website, reflecting that 1,233 records were found. I captured this
11 attachment from the url [http://tess2.uspto.gov/bin/showfield?=-toc&state=gjh6rp.1.1&p_search](http://tess2.uspto.gov/bin/showfield?=-toc&state=gjh6rp.1.1&p_search=-searchss&p_L=50)
12 [=-searchss&p_L=50](http://tess2.uspto.gov/bin/showfield?=-toc&state=gjh6rp.1.1&p_search=-searchss&p_L=50), on February 9, 2008, and the attached accurately reflects what was
13 displayed on my computer screen, although there may be minor differences based upon the
14 conversion of the document from electronic to .pdf format.

15 11. Attached as Exhibit "9" is a true and correct copy of the first few pages of the
16 results of a Google search for the word "pod," which reflects 410,000,000 results. I captured this
17 attachment from the url <http://www.google.com/search?hl=en&safe=off&q=pod&btnG=Search>,
18 on December 14, 2007, and the attached accurately reflects what was displayed on my computer
19 screen, although there may be minor differences based upon the conversion of the document
20 from electronic to .pdf format.

21 12. Attached as Exhibit "10" is a true and correct copy of the page for the site
22 "[mp3.com](http://www.mp3.com)," which was found by clicking on a link from the "pod" search on Google in Ex. 9. I
23 captured this attachment from the url <http://www.mp3.com/artist/pod/summary/>, on February 21,
24 2008, and the attached accurately reflects what was displayed on my computer screen, although
25 there may be minor differences based upon the conversion of the document from electronic to
26 .pdf format.

27 13. Attached as Exhibit "11" are true and correct copies of the first few pages of the
28 results of a Google search for the word "podcast," which reports 109,000,000 "hits" for the term.

1 I captured this attachment from the url <http://www.google.com/search?hl=en&q=podcast&aq=f>,
2 on February 13, 2008, and the attached accurately reflects what was displayed on my computer
3 screen, although there may be minor differences based upon the conversion of the document
4 from electronic to .pdf format.

5 14. Attached as Exhibit "12" is a true and correct copy of the site
6 <http://www.engadget.com/2006/09/24/with-pod-on-lockdown-apple-goes-after-podcast/>,
7 which reports that "Apple's lawyers have scared the pants off of small entrepreneurs selling
8 products like the Profit Pod and TightPod – items having nothing to do with audio portable in
9 any way mind you –it seems that the next targets are companies that have the audacity to use the
10 word 'podcast' in their names." I captured this site on February 12, 2008, and the attached
11 accurately reflects what was displayed on my computer screen, although there may be minor
12 differences based upon the conversion of the document from electronic to .pdf format.

13 15. Attached as Exhibit "13" are true and correct copies of pages from various
14 websites offering "i" products, including the following: the site iLounge (offering "All things
15 iPod, iPhone, iTunes and beyond"), I captured this attachment from the url
16 <http://www.ilounge.com>, on February 4, 2008, and the attached accurately reflects what was
17 displayed on my computer screen, although there may be minor differences based upon the
18 conversion of the document from electronic to .pdf format.; iThings and [ithings.co.uk](http://www.ithings.co.uk), I
19 captured this attachment from the url <http://www.ithings.co.uk>, on February 13, 2008, and the
20 attached accurately reflects what was displayed on my computer screen, although there may be
21 minor differences based upon the conversion of the document from electronic to .pdf format.;
22 iTrainer and [itrainer.com](http://www.itrainer.com) (identified as "The Personal Trainer on your iPod – Get Fit and Lose
23 Weight – MP3 Fitness Programs"), I captured this attachment from the url [http://www.itrainer](http://www.itrainer.com/au/public/index.aspx)
24 [.com/au/public/index.aspx](http://www.itrainer.com/au/public/index.aspx), on February 13, 2008, and the attached accurately reflects what was
25 displayed on my computer screen, although there may be minor differences based upon the
26 conversion of the document from electronic to .pdf format; iTrain and [itrain.com](http://www.itrain.com) (offering
27 "iTread," iCycle," "iClimb," iRow," iStrength," and numerous other "i" formative programs), . I
28 captured this attachment from the url <http://www.itrain.com/index1.php>, on February 13, 2008,

1 and the attached accurately reflects what was displayed on my computer screen, although there
2 may be minor differences based upon the conversion of the document from electronic to .pdf
3 format.; iFitnessDirect and [ifitnessdirect.com](http://www.ifitnessdirect.com), iFitness Solutions Club and ifitness.net, I captured
4 this attachment from the url <http://www.ifitnessdirect.com>, on February 13, 2008, and the
5 attached accurately reflects what was displayed on my computer screen, although there may be
6 minor differences based upon the conversion of the document from electronic to .pdf format;
7 iAmplify; iHome (offering an “iH” formative line of products, such as the iHM1B2 “Portable
8 Speaker for iPod Nano” and the iHM3B “Portable Speaker for MP3 Players”), I captured this
9 attachment from the url http://www.ihomeaudio.com/prodShelf.asp?dept_id=1007, on February
10 13, 2008, and the attached accurately reflects what was displayed on my computer screen,
11 although there may be minor differences based upon the conversion of the document from
12 electronic to .pdf format; iSkin and [iskin.com](http://www.iskin.com) (“iskin touch for iPod classic”) . I captured this
13 attachment from the url <http://www.iskin.com/>, on February 13, 2008, and the attached
14 accurately reflects what was displayed on my computer screen, although there may be minor
15 differences based upon the conversion of the document from electronic to .pdf format; iZap
16 (lithium battery line for the iPod) . I captured this attachment from the url [http://www.mobile
17 whack .com/ reviews/izap lithium battery line for the ipod.html](http://www.mobilewhack.com/reviews/izap_lithium_battery_line_for_the_ipod.html), on February 13, 2008, and
18 the attached accurately reflects what was displayed on my computer screen, although there may
19 be minor differences based upon the conversion of the document from electronic to .pdf format;
20 iToner (program to manage iPhone ringtones), I captured this attachment from the url
21 <http://www.ambrosiasa.com/utilities/itoner/>, on February 13, 2008, and the attached accurately
22 reflects what was displayed on my computer screen, although there may be minor differences
23 based upon the conversion of the document from electronic to .pdf format.

24 16. Attached as Exhibit “14” are true and correct copies of pages from various
25 websites offering iPod products or using the “iPod” name, including the following:
26 [ipodcarparts.com](http://www.ipodcarparts.com), I captured this attachment from the url <http://www.ipodcarparts.com>, on
27 February 8, 2008, and the attached accurately reflects what was displayed on my computer
28 screen, although there may be minor differences based upon the conversion of the document

1 from electronic to .pdf format; [theipodaccessorystore.com](http://www.theipodaccessorystore.com), I captured this attachment from the
2 url <http://www.theipodaccessorystore.com>, on February 12, 2008, and the attached accurately
3 reflects what was displayed on my computer screen, although there may be minor differences
4 based upon the conversion of the document from electronic to .pdf format; [hipodgear.com](http://www.hipodgear.com), I
5 captured this attachment from the url <http://www.hipodgear.com>, on February 8, 2008, and the
6 attached accurately reflects what was displayed on my computer screen, although there may be
7 minor differences based upon the conversion of the document from electronic to .pdf format;
8 iPodCopy software; iPod Hacks and [ipodhacks.com](http://www.ipodhacks.com), I captured this attachment from the url
9 <http://www.ipodhacks.com>, on February 8, 2008, and the attached accurately reflects what was
10 displayed on my computer screen, although there may be minor differences based upon the
11 conversion of the document from electronic to .pdf format; [iPodFanatic.com](http://www.ipodfanatic.com), I captured this
12 attachment from the url <http://www.ipodfanatic.com>, on February 8, 2008, and the attached
13 accurately reflects what was displayed on my computer screen, although there may be minor
14 differences based upon the conversion of the document from electronic to .pdf format;
15 allthingsiPod and allthingsipod.co.uk; “iFidelity DVD Notebook for iPod,” “iFidelity Clock
16 Radio for iPod” (an “accessory set for iPod”); [iProng.com](http://www.iprong.com) and iProng Magazine (“the
17 publication for iPod and iPhone users”), I captured this attachment from the url
18 <http://www.iprong.com>, on February 9, 2008, and the attached accurately reflects what was
19 displayed on my computer screen, although there may be minor differences based upon the
20 conversion of the document from electronic to .pdf format; [everythingiPod.com](http://www.everythingiPod.com) (“The
21 Superstore for your iPod”), I captured this attachment from the url <http://www.dlo.com/index.tpl>
22 on February 13, 2008, and the attached accurately reflects what was displayed on my computer
23 screen, although there may be minor differences based upon the conversion of the document
24 from electronic to .pdf format; iPodLinux, I captured this attachment from the url
25 http://ipodlinux.org/main_page, on February 13, 2008, and the attached accurately reflects what
26 was displayed on my computer screen, although there may be minor differences based upon the
27 conversion of the document from electronic to .pdf format; iFrogz (iWrapz for iPod and iPhone),
28 I captured this attachment from the url <http://ifrogz.com>, on February 9, 2008, and the attached

1 accurately reflects what was displayed on my computer screen, although there may be minor
2 differences based upon the conversion of the document from electronic to .pdf format;
3 ipodgear.com (iPod stuff n' more), I captured this attachment from the url http://www.
4 ipodgear.com, on February 9, 2008, and the attached accurately reflects what was displayed on
5 my computer screen, although there may be minor differences based upon the conversion of the
6 document from electronic to .pdf format.

7 17. Attached as Exhibit "15" are true and correct copies of pages found at
8 ipodtour.com and ipodtraining.com, I captured this attachment from the url http://www.ipodtour
9 .com, on February 9, 2008, and from the url http://www.ipodtraining.com/ on February 9, 2008,
10 and the attached accurately reflects what was displayed on my computer screen, although there
11 may be minor differences based upon the conversion of the document from electronic to .pdf
12 format.

13 18. Attached as Exhibit "16" are true and correct copies of pages of images of white
14 earbuds that resulted from a search in Google for the terms "earbuds white," and then following
15 the "Product search results for earbuds white" link. Only the first 5 pages from the search are
16 attached. I captured this attachment from the url http://www.google.com/products?hl=en&q=
17 earbuds+white&um=1&ie=UTF-8, on February 9, 2008, and the attached accurately reflects what
18 was displayed on my computer screen, although there may be minor differences based upon the
19 conversion of the document from electronic to .pdf format

20 19. Attached as Exhibit "17" is a true and correct copy of Apple's Objections and
21 Responses to Podfitness' First Set of Interrogatories.

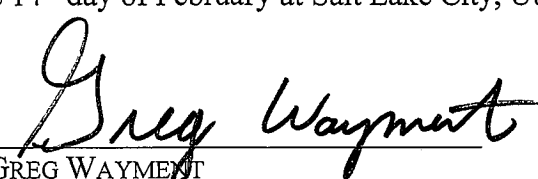
22 20. Attached as Exhibit "18" is a true and correct copy of correspondence from James
23 E. Magleby to counsel for Apple, dated January 17, 2007.

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21. Attached as Exhibit "19" is a true and correct copy of correspondence from Andrew Abrams to James E. Magleby, dated January 30, 2007.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on the 14th day of February at Salt Lake City, Utah.



GREG WAYMENT