

Exhibit 17

CONFIDENTIAL – ATTORNEYS’ EYES ONLY

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12 Attorneys for Plaintiff
APPLE COMPUTER, INC.

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 (OAKLAND DIVISION)

18 APPLE COMPUTER, INC.,

19 Plaintiff,

20 v.

21 PODFITNESS, INC., and DOES 1-100,
inclusive,

22 Defendants.
23

Case No. C 06-5805 SBA

**PLAINTIFF APPLE’S OBJECTIONS AND
RESPONSES TO DEFENDANT
PODFITNESS’ FIRST SET OF
INTERROGATORIES**

24 Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Apple
25 Computer, Inc. (“Apple” or “Plaintiff”) hereby serves upon Defendant Podfitness, Inc.
26 (“Podfitness” or “Defendant”) the following Objections and Responses to Defendant’s First Set of
27 Interrogatories. These responses are made in accordance with the Federal Rules of Civil
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1 Procedure and are based upon information presently available to Apple. These responses are
2 therefore without prejudice to Apple's right to use or rely upon subsequently discovered
3 information in any future proceedings.

4 Apple expressly reserves the right to later object to the admissibility of any of this information
5 into evidence on any permissible grounds, including grounds not identified below.

6 GENERAL OBJECTIONS

7
8 1. Apple objects to each interrogatory to the extent it seeks information beyond the
9 permissible scope of the Federal Rules of Civil Procedure as being irrelevant to the subject matter
10 of this action and not reasonably calculated to lead to the discovery of admissible evidence.

11 2. Apple objects to each interrogatory to the extent it is vague, ambiguous, indefinite,
12 overly broad, unduly burdensome, oppressive and/or does not reasonably identify the document,
13 information, or thing sought.

14 3. Apple objects to each interrogatory to the extent it would impose an unreasonable
15 burden or expense on Apple to produce such documents, information, or things, if any, or requires
16 the creation of material not currently in existence.

17 4. Apple objects to each interrogatory to the extent it seeks disclosure of documents or
18 information protected by the attorney-client privilege, work product doctrine, and/or any other
19 applicable privilege or immunity. Any production of such information by Apple is inadvertent
20 and is not intended as a waiver of the applicable privilege or immunity as to such information.

21 5. Apple objects to each interrogatory to the extent it seeks disclosure of confidential,
22 proprietary, trade secret, or other competitively sensitive information.

23 6. Apple objects to each interrogatory to the extent it seeks documents or information
24 not in Apple's possession, custody, or control.

25 7. Apple objects to each interrogatory to the extent it seeks information from
26 individuals or entities over which Apple has no control.

27 8. Apple objects to each interrogatory to the extent it is redundant.

1 9. Apple objects to each interrogatory as unduly burdensome to the extent it seeks
2 documents or information subject to a confidentiality agreement with a third party.

3 10. Apple objects to each interrogatory that is vague, indefinite, overly broad, unduly
4 burdensome, and/or oppressive because the burden on Apple to search for, gather, and produce
5 such information or documents, if any, far outweighs the relevancy of such information or the
6 likelihood that such information or documents, if any, will lead to the discovery of admissible
7 evidence.

8 11. Apple objects to each interrogatory that seeks discovery of information or
9 production of documents or things that are in the public domain and therefore of no greater burden
10 for Podfitness to obtain than Apple.

11 12. The foregoing General Objections are applicable to and included in Apple's
12 objections to each and every one of Podfitness' interrogatories, whether or not specifically raised
13 below. The objections set forth below are not a waiver, in whole or in part, of any of the
14 foregoing General Objections.

15 13. The following responses reflect Apple's present knowledge, information, and
16 belief, and as permitted by the Federal Rules of Civil Procedure, may be changed, modified, or
17 supplemented based on discovery or as additional facts and circumstances come to Apple's
18 attention. Apple reserves the right to produce evidence of any subsequently discovered fact, to
19 alter or amend its objections and responses set forth herein, and otherwise to assert factual and
20 legal contentions as additional facts are ascertained, analyses are made, and legal research is
21 completed. Apple objects to each request to the extent that it may be construed as limiting or
22 restricting Apple's right to rely upon any information or document for any purposes whatsoever,
23 including, but not limited to, the use of information or responsive documents as evidence at any
24 subsequent hearing, trial, or other proceeding.

25 14. The following responses are made without waiving or intending to waive any
26 objection on any ground as to relevancy, privilege, or admissibility of any information provided in
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1 response to Podfitness' requests in any subsequent proceeding or at the trial of this or any other
2 action.

3 **DEFINITION**

4 1. The term "non-privileged" means information and documents not protected by
5 either the attorney-client privilege or by attorney work-product immunity.

6 **SPECIFIC RESPONSE TO INTERROGATORIES**

7 **INTERROGATORY NO. 1:**

8 Identify all instance(s) of customer confusion involving the PODFITNESS MARKS and/or
9 any third-party's mark with Apple's IPOD mark, including the identification of any instance of
10 confusion which you allege constitutes actual confusion and all people having knowledge of such
11 instance(s) of confusion including the name, address, and phone number of the customer you
12 allege was confused and the person or persons at Apple most knowledgeable as to each instance.

13 **RESPONSE TO INTERROGATORY NO. 1:**

14 Apple objects to this interrogatory to the extent it seeks discovery of information not in
15 Apple's possession, custody, or control. Apple further objects to this interrogatory to the extent it
16 seeks information from individuals or entities over which Apple has no control. Apple further
17 objects to this interrogatory as overly broad, unduly burdensome, irrelevant to the subject matter
18 of this action, and not reasonably calculated to lead to the discovery of admissible evidence to the
19 extent it seeks discovery of information relating to actual confusion between third parties' marks
20 and Apple's IPOD mark. Apple further objects to this interrogatory to the extent it seeks
21 discovery of information protected by the attorney-client privilege, work product doctrine, and/or
22 any other applicable privilege or immunity. Apple further objects to this interrogatory as
23 premature to the extent that discovery is ongoing in this matter. Apple has received at least one
24 inquiry relating to Apple's association with Defendant. On information and belief, Defendant has
25 received at least one inquiry relating to Defendant's association with Apple. Apple expressly
26 reserves the right to supplement its response to this interrogatory as additional facts are
27 ascertained.

1 **INTERROGATORY NO. 2:**

2 State all facts upon which you rely to support your assertions in your First Cause of
3 Action, ¶¶ 69 - 83, of your Complaint including but not limited to your assertions that Podfitness'
4 "unauthorized" use of the PODFITNESS MARKS is likely to cause confusion, mistake, or
5 deceive consumers or potential consumer wishing to purchase Apple's products and services, and
6 is also likely to confuse consumers as to affiliation between Apple and Podfitness.

7 **RESPONSE TO INTERROGATORY NO. 2:**

8 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
9 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
10 extent it asks numerous questions and seeks discovery of all facts supporting assertions set forth in
11 15 separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
12 premature to the extent that discovery is ongoing in this matter. Subject to these objections and
13 the General Objections, Apple responds as follows:

14 Since its introduction on October 23, 2001, the IPOD player has become an extremely
15 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
16 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
17 tremendous commercial success.

18 Apple has used and is using its IPOD mark in commerce on and in connection with
19 offering and selling its portable handheld media players and associated goods and services
20 continuously since October 2001.

21 On information and belief, the POD mark has been used by consumers and industry
22 publications as a slang term for the IPOD mark and product.

23 Apple owns the following registered IPOD marks in the United States:

- 24 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for "portable and handheld
25 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
26 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
27 audio files on portable and handheld digital electronic devices."

1 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
2 computer hardware.”

3 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
4 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
5 and audio files; computer software for use in organizing, transmitting, manipulating, and
6 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

7 Apple also owns eleven pending applications for POD, IPOD and related marks for a wide
8 variety of goods and services, including printed and electronic materials and publications,
9 educational services, entertainment services, software, accessories for portable handheld digital
10 electronic devices, clothing, retail services, and computerized data storage and retrieval services.

11 Every IPOD player is packaged with Apple’s white earphones, commonly called earbuds.
12 Apple’s distinctive earbuds consist of white circular ear speakers with a gray rim, which are
13 attached to a white cylinder of molded plastic covering the white wire. Apple’s earbuds have been
14 prominently displayed in its advertising for the IPOD player, and, most famously, are featured in
15 Apple’s popular silhouette advertising campaigns. Such earbuds shall be referred to as the
16 “Earbud Trade Dress.”

17 On information and belief, since its introduction in 2001, consumers have used Apple’s
18 IPOD products in connection with their fitness activities. As a result, for several years, Apple has
19 marketed and sold IPOD-compatible protective “sports cases” and arm bands to facilitate the use
20 of the IPOD player while exercising. Apple markets such accessories at The Apple Store (at
21 <http://store.apple.com>) under the slogan, “[k]eep you IPOD secure when you’re on the go. Perfect
22 for riding, running, and working out.”

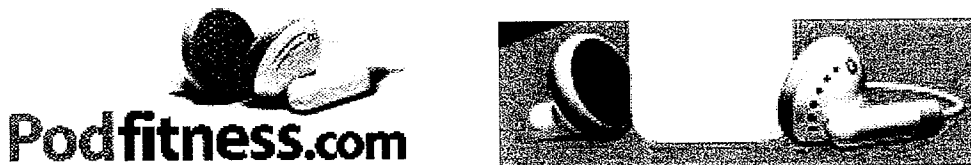
23 In May 2006 Apple announced that it had entered into a collaboration with shoe
24 manufacturer Nike to release a new product, referred to as Nike +IPOD, that would allow a
25 runner’s shoes to communicate with an IPOD player. The Nike + IPOD Sports Kit component of
26 the product is designed to allow an IPOD player to function as a personal trainer or coach, and to
27 help the user achieve individualized fitness goals. The Nike +IPOD product is being promoted by
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1 Apple and Nike in advertisements, some of which feature Apple's Earbud Trade Dress next to a
2 running shoe, and is now available in retail stores and on-line at various websites, including The
3 Apple Store at the URL *http://store.apple.com*.

4 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
5 audio files for handheld media players and related services, which it promotes and provides on the
6 Internet through its website located at *www.podfitness.com*. Consumers pay a monthly
7 subscription fee to download Defendant's digital audio files. Defendant's digital audio files are
8 customized workout programs created by professional fitness trainers in response to a consumer's
9 stated personal exercise objectives. The files are then downloaded to the customer's digital media
10 player to be set to music already on the customer's player. According to the *www.podfitness.com*
11 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
12 application to facilitate the downloading of Defendant's audio workout files.

13 On information and belief, Defendant's PODFITNESS service is directly competitive with
14 goods and services offered by Apple under its IPOD mark, including, but not limited to Nike
15 +IPOD and iTunes iMixes.

16 Defendant has also adopted the following logo (on the left) (the "PODFITNESS.COM
17 Logo") for its products and services, which it promotes on its website and which incorporates an
18 image of white and grey earbuds:



24 The Earbud Trade Dress is depicted above on the right.

25 Defendant has also copied and prominently displays Apple's registered IPOD mark
26 throughout its *www.podfitness.com* website and particularly on the homepage, including in the
27 tagline: "Put a Personal Trainer right on your IPOD®," and the bold caption: "Customized IPOD
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1 Workouts” (although Defendant removed both phrases from its home page after communications
2 from Apple). Defendant repeatedly has displayed conspicuous photos of the IPOD product on the
3 site, and has prominently featured images of individuals exercising while wearing Apple’s Earbud
4 Trade Dress. Defendant also uses Apple’s Earbud Trade Dress in its marketing correspondence
5 and other communications. In the “Support” section of the website, Defendant states that “you
6 will need to have [Apple’s] ITUNES 6 installed in order to use the Podfitness software.”

7 On information and belief, Defendant has directly copied images of the IPOD player from
8 Apple’s website at *www.apple.com* to use on its own *www.podfitness.com* website.

9 Defendant has used Apple’s registered IPOD mark in the metatags of each page on its
10 *www.podfitness.com* website, causing Defendant’s website to appear as a “hit” when a query is
11 conducted through a search engine for the following phrases: “IPOD workout music”; “I POD
12 trainer”; “I POD workout”; “I POD workouts”; “IPOD workouts”; “IPOD trainer.”

13 Defendant has also been listed as a sponsored link on the search engine *www.google.com*
14 in connection with the keywords “IPOD Workout” and “IPOD Fitness,” causing a link to the
15 *www.podfitness.com* website to appear prominently in the top banner or right margin of the screen
16 in response to a search query for such terms.

17 Defendant registered and uses the domain names *ipodfitness.com* and *ipodworkouts.com* to
18 automatically re-direct to its homepage at *podfitness.com*.

19 On March 16, 2006, Defendant ran a full-page advertisement in the Wall Street Journal,
20 which stated in large type:

21 Dear Steve Jobs,
22 Thanks for the IPOD®.
23 Best,
24 Jeff Hays

25 P.S. Wait till you hear what we did with it!
26 Call me, 801-990-3238

27 The bottom of the advertisement prominently displayed the white earbuds shown in the
28 PODFITNESS.COM Logo mark along with the tagline “Your Music. Your Workout. Your Way.”
Underneath the logo in smaller print, the advertisement read:

1 "If you're not Steve, and would like to download unlimited, customized training sessions
2 mixed with your music, it's only \$19.95 per month. For you Steve, it's on the house.
3 *www.podfitness.com/steve.*"

4 Also on the PODFITNESS website at *www.podfitness.com/steve*, Defendant posted the
5 following promotional statement:

6 Dear Steve,

7 Thanks for coming to the site.

8 Can I tell you a quick story?

9 Like millions of others, in December of 2004 my 44-year-old wife and I got iPods
10 for Christmas. My 25 year old son was on his 3rd, our teenagers were on their 1st
11 or 2nd. But when my techno-phobic wife got one... well, it was obvious that the
iPod had crossed the chasm. Like the rest of the business world, I couldn't wait to
be involved.

12 So, a month later (January 2005), I filed a couple of patent applications for an idea
13 that I'd been tinkering with for a while. I called it Podfitness. The idea was to
14 create a service that would create customized, downloadable, personalized audio
workouts that could each be mixed with the users' own favorite music. So, off we
went...

15 After we embarked on a yearlong programming journey, as you know, Apple went
16 on to sell 32 million more iPods. (Congratulations, by the way!) This was terrific,
17 but of course "competitors" started appearing. Dang it! None of them were creating
18 anything new, no technology, it was just people taking static workouts and
19 converting them to mp3. We could have done that on our first day, (heck, my 15
year old does it every day, what's the big deal about ripping a CD?) It was pure hell
to sit back and watch people enter the market with... well, nothing. All the while,
we're quietly working away, burning cash, programming, partnering and recording.
And the clock was ticking...

20 Well, it took us over a year and a couple of million dollars, but we did it.

21 It is widely known to the public that Steve Jobs is the CEO of Apple. Neither Steve Jobs,
22 nor Apple, authorized this use of his name in Defendant's advertisements for the PODFITNESS
23 product.

24 Defendant also provides the following explanation for the inspiration behind the creation
25 of PODFITNESS on its *www.podfitness.com* website:

26 **Supernova Marketplace: The Intersection of Music, iPod and Fitness**

27 When Podfitness was founded in January 2005, Apple had sold just over 10 million
28 iPods. Sensing a major shift coming, CEO Jeff Hays gambled that the iPod-led

1 MP3 revolution had the potential not only to change the economics of the music
2 business, but also the fitness industry. This began a multimillion-dollar process of
conceptualizing, building, and refining the idea of Podfitness.

3 Now, in 2006, there have been over 50 million iPods sold, and the "Made for iPod"
4 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.

5 Not coincidentally, at this exact time, Podfitness is at the culmination of 18
6 months' efforts...

7 <https://podfitness.com/web/template/corporate?aff=home>

8 Defendant has also adopted the following arrow logo (on the left is an image from the
9 *podfitness.com* web site) for its products and services (the "Arrow Logo"), which it promotes on
10 its website and which is identical to Apple's shuffle logo, the subject of U.S. Registration No.
11 3,067,950 for "portable and handheld digital electronic devices, and parts therefore sold together
12 as a unit, for recording, organizing, transmitting, manipulating, and reviewing data and audio files;
13 computer software for use in organizing, transmitting, manipulating, and reviewing data and audio
14 files on portable and handheld digital electronic devices" (the "Shuffle Logo").



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21 Apple's Shuffle Logo is depicted on the right.

22 Defendant also uses aspects of Apple's MADE FOR IPOD logo, the subject of U.S.
23 Application Serial No. 78/689,534, to promote and sell its goods and services.

24 Defendant utilizes Apple's proprietary iTunes software in connection with its goods and
25 services without permission from Apple. In order to create its customized audio files, Defendant
26 requires its subscribers to install the iTunes software on his own computer. Defendant then mixes
27 a trainer's voice with music from a subscriber's iTunes media library. The result is an audio
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1 workout that plays the subscriber's music as background music to the trainer's voice instruction.
2 Defendant allows a user to select 1) a particular trainer, 2) a particular exercise, and 3) a particular
3 iTunes playlist (i.e. the subscriber's music). Defendant's application has the capability to cater the
4 trainer's voice to the subscriber (i.e. according to the selected exercise, the user's fitness level
5 controls cadence, number of reps, number of sets, etc.). But on information and belief, Defendant
6 depends on iTunes, via iTunes' Application Programmer Interface, to store, manage, play, and
7 control the audio content. On information and belief, Defendant's services depend on and do not
8 function without Apple's iTunes software.

9 On information and belief, Defendant entered into a collaborative agreement with a
10 television network in connection with the production of an exercise program, pursuant to which
11 Defendant agreed to provide the network with free access to its service, as well as a new IPOD
12 player.

13 On information and belief, Defendant's initial plans for the launch of its service included
14 giveaways for free IPOD players.

15 Apple has not consented to any of Defendant's uses of its iTunes software, its IPOD mark
16 or its product images, nor any mark comprised in whole or part of POD, nor has Apple sponsored,
17 endorsed or approved the goods or services offered and promoted by Defendant. Nor is there any
18 affiliation between Apple and Defendant.

19 The most prominent element of the Podfitness Marks, "POD," comprises the most
20 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
21 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

22 On information and belief, Defendant uses, or intends to use, the Podfitness Marks on
23 goods and services that are identical, or at least highly related, to Apple's IPOD goods and related
24 services.

25 On information and belief, the goods and services offered and/or sold by Defendant under
26 the Podfitness Marks are moving and will continue to move through the same channels of trade,
27 and are being offered and/or sold through the same channels of advertising and to the same
28

1 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
2 mark.

3 On information and belief, Defendant's promotion and sales of its goods and services
4 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

5 Apple expressly reserves the right to supplement its response to this interrogatory as
6 additional facts are ascertained.

7 **INTERROGATORY NO. 3:**

8 State all facts upon which you rely to support your assertions in your Second Cause of
9 Action, ¶¶ 85 - 90, of your Complaint including but not limited to your assertions that Podfitness'
10 use of the PODFITNESS MARKS constitutes a false designation of origin, false or misleading
11 description, and/or false or misleading representation of fact, and that Podfitness' use of the
12 PODFITNESS MARKS is likely to cause confusion, mistake, or deception of others regarding the
13 affiliation, connection, sponsorship, association or approval of Podfitness' goods and services as
14 those of Apple and/or to falsely imply an association with Apple.

15 **RESPONSE TO INTERROGATORY NO. 3:**

16 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
17 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
18 extent it asks numerous questions and seeks discovery of all facts supporting assertions set forth in
19 six separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
20 premature to the extent that discovery is ongoing in this matter. Apple further objects to this
21 interrogatory to the extent it is duplicative of Defendant's Interrogatory No. 2. Subject to these
22 objections and the General Objections, Apple responds as follows:

23 Since its introduction on October 23, 2001, the IPOD player has become an extremely
24 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
25 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
26 tremendous commercial success.

1 Apple has used and is using its IPOD mark in commerce on and in connection with
2 offering and selling its portable handheld media players and associated goods and services
3 continuously since October 2001.

4 On information and belief, the POD mark has been used by consumers and industry
5 publications as a slang term for the IPOD mark and product.

6 Apple owns the following registered IPOD marks in the United States:

7 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for “portable and handheld
8 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
9 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
10 audio files on portable and handheld digital electronic devices.”

11 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
12 computer hardware.”

13 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
14 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
15 and audio files; computer software for use in organizing, transmitting, manipulating, and
16 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

17 Apple also owns eleven pending applications for POD, IPOD and related marks for a wide
18 variety of goods and services, including printed and electronic materials and publications,
19 educational services, entertainment services, software, accessories for portable handheld digital
20 electronic devices, clothing, retail services, and computerized data storage and retrieval services.

21 Every IPOD player is packaged with Apple’s Earbud Trade Dress.

22 On information and belief, since its introduction in 2001, consumers have used Apple’s
23 IPOD products in connection with their fitness activities. As a result, for several years, Apple has
24 marketed and sold IPOD-compatible protective “sports cases” and arm bands to facilitate the use
25 of the IPOD player while exercising. Apple markets such accessories at The Apple Store (at
26 <http://store.apple.com>) under the slogan, “[k]eep you IPOD secure when you’re on the go. Perfect
27 for riding, running, and working out.”

1 In May 2006 Apple announced that it had entered into a collaboration with shoe
2 manufacturer Nike to release a new product, referred to as Nike +IPOD, that would allow a
3 runner's shoes to communicate with an IPOD player. The Nike + IPOD Sports Kit component of
4 the product is designed to allow an IPOD player to function as a personal trainer or coach, and to
5 help the user achieve individualized fitness goals. The Nike +IPOD product is being promoted by
6 Apple and Nike in advertisements, some of which feature Apple's Earbud Trade Dress next to a
7 running shoe, and is now available in retail stores and on-line at various websites, including The
8 Apple Store at the URL *http://store.apple.com*.

9 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
10 audio files for handheld media players and related services, which it promotes and provides on the
11 Internet through its website located at *www.podfitness.com*. Consumers pay a monthly
12 subscription fee to download Defendant's digital audio files. Defendant's digital audio files are
13 customized workout programs created by professional fitness trainers in response to a consumer's
14 stated personal exercise objectives. The files are then downloaded to the customer's digital media
15 player to be set to music already on the customer's player. According to the *www.podfitness.com*
16 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
17 application to facilitate the downloading of Defendant's audio workout files.

18 On information and belief, Defendant's PODFITNESS service is directly competitive with
19 goods and services offered by Apple under its IPOD mark, including, but not limited to Nike
20 +IPOD and iTunes iMixes.

21 Defendant has also adopted the PODFITNESS.COM Logo for its products and services,
22 which it promotes on its website and which incorporates an image of white and grey earbuds.

23 Defendant has also copied and prominently displays Apple's registered IPOD mark
24 throughout its *www.podfitness.com* website and particularly on the homepage, including in the
25 tagline: "Put a Personal Trainer right on your IPOD®," and the bold caption: "Customized IPOD
26 Workouts" (although Defendant removed both phrases from its home page after communications
27 from Apple). Defendant repeatedly has displayed conspicuous photos of the IPOD product on the
28

1 site, and has prominently featured images of individuals exercising while wearing Apple's Earbud
2 Trade Dress. Defendant also uses Apple's Earbud Trade Dress in its marketing correspondence
3 and other communications. In the "Support" section of the website, Defendant states that "you
4 will need to have [Apple's] ITUNES 6 installed in order to use the Podfitness software."

5 On information and belief, Defendant has directly copied images of the IPOD player from
6 Apple's website at *www.apple.com* to use on its own *www.podfitness.com* website.

7 Defendant has used Apple's registered IPOD mark in the metatags of each page on its
8 *www.podfitness.com* website, causing Defendant's website to appear as a "hit" when a query is
9 conducted through a search engine for the following phrases: "IPOD workout music"; "I POD
10 trainer"; "I POD workout"; "I POD workouts"; "IPOD workouts"; "IPOD trainer."

11 Defendant has also been listed as a sponsored link on the search engine *www.google.com*
12 in connection with the keywords "IPOD Workout" and "IPOD Fitness," causing a link to the
13 *www.podfitness.com* website to appear prominently in the top banner or right margin of the screen
14 in response to a search query for such terms.

15 Defendant registered and uses the domain names *ipodfitness.com* and *ipodworkouts.com* to
16 automatically re-direct to its homepage at *podfitness.com*.

17 On March 16, 2006, Defendant ran a full-page advertisement in the Wall Street Journal,
18 which stated in large type:

19 Dear Steve Jobs,
20 Thanks for the IPOD®.
21 Best,
22 Jeff Hays

23 P.S. Wait till you hear what we did with it!
24 Call me, 801-990-3238

25 The bottom of the advertisement prominently displayed the white earbuds shown in the
26 PODFITNESS.COM Logo mark along with the tagline "Your Music. Your Workout. Your Way."
27 Underneath the logo in smaller print, the advertisement read:
28

1 "If you're not Steve, and would like to download unlimited, customized training sessions
2 mixed with your music, it's only \$19.95 per month. For you Steve, it's on the house.
3 www.podfitness.com/steve."

4 Also on the PODFITNESS website at www.podfitness.com/steve, Defendant posted the
5 following promotional statement:

6 Dear Steve,

7 Thanks for coming to the site.

8 Can I tell you a quick story?

9 Like millions of others, in December of 2004 my 44-year-old wife and I got iPods
10 for Christmas. My 25 year old son was on his 3rd, our teenagers were on their 1st
11 or 2nd. But when my techno-phobic wife got one... well, it was obvious that the
iPod had crossed the chasm. Like the rest of the business world, I couldn't wait to
be involved.

12 So, a month later (January 2005), I filed a couple of patent applications for an idea
13 that I'd been tinkering with for a while. I called it Podfitness. The idea was to
14 create a service that would create customized, downloadable, personalized audio
workouts that could each be mixed with the users' own favorite music. So, off we
went...

15 After we embarked on a yearlong programming journey, as you know, Apple went
16 on to sell 32 million more iPods. (Congratulations, by the way!) This was terrific,
17 but of course "competitors" started appearing. Dang it! None of them were creating
18 anything new, no technology, it was just people taking static workouts and
19 converting them to mp3. We could have done that on our first day, (heck, my 15
year old does it every day, what's the big deal about ripping a CD?) It was pure hell
to sit back and watch people enter the market with... well, nothing. All the while,
we're quietly working away, burning cash, programming, partnering and recording.
And the clock was ticking...

20 Well, it took us over a year and a couple of million dollars, but we did it.

21 It is widely known to the public that Steve Jobs is the CEO of Apple. Neither Steve Jobs,
22 nor Apple, authorized this use of his name in Defendant's advertisements for the PODFITNESS
23 product.

24 Defendant also provides the following explanation for the inspiration behind the creation
25 of PODFITNESS on its www.podfitness.com website:

26 **Supernova Marketplace: The Intersection of Music, iPod and Fitness**

27 When Podfitness was founded in January 2005, Apple had sold just over 10 million
28 iPods. Sensing a major shift coming, CEO Jeff Hays gambled that the iPod-led

1 MP3 revolution had the potential not only to change the economics of the music
2 business, but also the fitness industry. This began a multimillion-dollar process of
conceptualizing, building, and refining the idea of Podfitness.

3 Now, in 2006, there have been over 50 million iPods sold, and the "Made for iPod"
4 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.

5 Not coincidentally, at this exact time, Podfitness is at the culmination of 18
6 months' efforts...

7 <https://podfitness.com/web/template/corporate?aff=home>

8 Defendant has also adopted the Arrow Logo, which it promotes on its website and which is
9 identical to Apple's Shuffle Logo.

10 Defendant also uses aspects of Apple's MADE FOR IPOD logo, the subject of U.S.
11 Application Serial No. 78/689,534, to promote and sell its goods and services.

12 Defendant utilizes Apple's proprietary iTunes software in connection with its goods and
13 services without permission from Apple. In order to create its customized audio files, Defendant
14 requires its subscribers to install the iTunes software on his own computer. Defendant then mixes
15 a trainer's voice with music from a subscriber's iTunes media library. The result is an audio
16 workout that plays the subscriber's music as background music to the trainer's voice instruction.
17 Defendant allows a user to select 1) a particular trainer, 2) a particular exercise, and 3) a particular
18 iTunes playlist (i.e. the subscriber's music). Defendant's application has the capability to cater the
19 trainer's voice to the subscriber (i.e. according to the selected exercise, the user's fitness level
20 controls cadence, number of reps, number of sets, etc.). But on information and belief, Defendant
21 depends on iTunes, via iTunes' Application Programmer Interface, to store, manage, play, and
22 control the audio content. On information and belief, Defendant's services depend on and do not
23 function without Apple's iTunes software.

24 On information and belief, Defendant entered into a collaborative agreement with a
25 television network in connection with the production of an exercise program, pursuant to which
26 Defendant agreed to provide the network with free access to its service, as well as a new IPOD
27 player.

28

1 On information and belief, Defendant's initial plans for the launch of its service included
2 giveaways for free IPOD players.

3 Apple has not consented to any of Defendant's uses of its iTunes software, its IPOD mark
4 or its product images, nor any mark comprised in whole or part of POD, nor has Apple sponsored,
5 endorsed or approved the goods or services offered and promoted by Defendant. Nor is there any
6 affiliation between Apple and Defendant.

7 The most prominent element of the Podfitness Marks, "POD," comprises the most
8 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
9 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

10 On information and belief, Defendant uses, or intends to use, the Podfitness Marks on
11 goods and services that are identical, or at least highly related, to Apple's IPOD goods and related
12 services.

13 On information and belief, the goods and services offered and/or sold by Defendant under
14 the Podfitness Marks are moving and will continue to move through the same channels of trade,
15 and are being offered and/or sold through the same channels of advertising and to the same
16 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
17 mark.

18 On information and belief, Defendant's promotion and sales of its goods and services
19 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

20 Apple expressly reserves the right to supplement its response to this interrogatory as
21 additional facts are ascertained.

22 **INTERROGATORY NO. 4:**

23 State all facts upon which you rely to support your assertions in Third Cause of Action, ¶¶
24 92 - 102, of your Complaint including but not limited to your assertions that Apple's Earbuds
25 qualify as trade dress.
26
27
28

1 **RESPONSE TO INTERROGATORY NO. 4:**

2 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
3 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
4 extent it seeks discovery of all facts supporting assertions set forth in 11 separate paragraphs of
5 Apple's Complaint. Apple further objects to this interrogatory as premature to the extent that
6 discovery is ongoing in this matter. Subject to these objections and the General Objections, Apple
7 responds as follows:

8 Every IPOD player is packaged with Apple's stylized and unique white earphones,
9 commonly called earbuds. Apple's distinctive earbuds consist of white circular ear speakers with
10 a gray rim, which are attached to a white cylinder of molded plastic covering the white wire.
11 Apple's earbuds have been prominently displayed in its advertising for the IPOD player, and, most
12 famously, are featured in Apple's popular silhouette advertising campaigns. The public's
13 recognition of the Earbud Trade Dress and association of that trade dress with Apple has been
14 recognized in numerous articles and publications, including but not limited to those articles
15 contained in the following links:

16 http://www.gothamist.com/archives/2005/02/15/have_ipod_will_get_mugged.php ("The
17 South Brooklyn police say that the white earphones are what tip the robbers off, and the police
18 even offered to engrave kids' iPods, cellphones, and other techno-sundries with ID numbers.")

19 http://cbs2chicago.com/westsuburbanbureau/local_story_314095644.html ("However,
20 Shannon won't be slipping on those trademark white earphones that come with the popular music
21 player.")

22 <http://technoidentity.blogspot.com/2006/02/notes-for-20060216.html> ("conventional
23 signal: white iPod earbuds... indicating iPod ownership, which indicates association with apple
24 brand, music-loving, iconoclastic.")

25 http://www.macsimumnews.com/index.php/archive/book_review_jai_guru_ipod/ ("Perhaps
26 the most iconic feature of the iPod are the white earbuds. Scholars have studied this subject and
27
28

1 have determined that as far as the street, showing your white earbud's cord is a silent signal to
2 other iPod owners that you 'get it.'")

3 Moreover, on information and belief, prior to launching its services, Defendant recognized
4 that Apple possessed trade dress rights in its earbuds and discussed modifying its
5 PODFITNESS.COM Logo.

6 Apple expressly reserves the right to supplement its response to this interrogatory as
7 additional facts are ascertained.

8 **INTERROGATORY NO. 5:**

9 State all facts upon which you rely to support your assertions in your Fourth Cause of
10 Action, ¶¶ 104 - 108, of your Complaint that Podfitness' use of the PODFITNESS MARKS has
11 diluted Apple's IPOD mark, including but not limited to whether Apple is claiming that the
12 alleged dilution constitutes blurring or tarnishment or both, how Podfitness' use of the
13 PODFITNESS MARKS has caused the dilution of a distinctive quality of the IPOD mark, and
14 how Apple has been harmed by Podfitness' use of the PODFITNESS MARKS.

15 **RESPONSE TO INTERROGATORY NO. 5:**

16 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
17 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
18 extent it asks numerous questions and seeks discovery of *all* facts supporting assertions set forth in
19 five separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
20 premature to the extent that discovery is ongoing in this matter. Subject to these objections and
21 the General Objections, Apple responds as follows:

22 At this time, Apple claims that Defendant's dilution constitutes blurring and tarnishment.

23 Since its introduction on October 23, 2001, the IPOD player has become an extremely
24 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
25 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
26 tremendous commercial success.

1 In the past five years, the IPOD player has truly become a cultural phenomenon. As stated
2 by Andy Serwer in a Fortune magazine article dated June 27, 2005, “[i]t’s hard to recall any
3 branded recreational product that ever carried the cultural oomph that the iPod now has. The
4 Hula-Hoop was a fad....As for the Walkman, the iPod’s mobile-music ancestor, it generated
5 massive sales. But it never impacted behavior or peripheral markets quite the way the iPod has.”
6 As an example of the IPOD player’s reach, starting in the fall of 2004, Duke University initiated a
7 program in which all incoming freshman were provided IPOD players, free of charge, to use as
8 high-tech educational tools to record lectures, capture scientific data and play language-training
9 recordings.

10 Apple has used and is using its IPOD mark in commerce on and in connection with
11 offering and selling its portable handheld media players and associated goods and services
12 continuously since October 2001.

13 On information and belief, the POD mark has been used by consumers and industry
14 publications as a slang term for the IPOD mark and product.

15 Apple owns the following registered IPOD marks in the United States:

16 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for “portable and handheld
17 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
18 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
19 audio files on portable and handheld digital electronic devices.”

20 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
21 computer hardware.”

22 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
23 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
24 and audio files; computer software for use in organizing, transmitting, manipulating, and
25 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

26 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
27 audio files for handheld media players and related services, which it promotes and provides on the
28

1 Internet through its website located at *www.podfitness.com*. Consumers pay a monthly
2 subscription fee to download Defendant's digital audio files. Defendant's digital audio files are
3 customized workout programs created by professional fitness trainers in response to a consumer's
4 stated personal exercise objectives. The files are then downloaded to the customer's digital media
5 player to be set to music already on the customer's player. According to the *www.podfitness.com*
6 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
7 application to facilitate the downloading of Defendant's audio workout files.

8 Apple has not consented to any of Defendant's uses any mark comprised in whole or part
9 of POD, nor has Apple sponsored, endorsed or approved the goods or services offered and
10 promoted by Defendant. Nor is there any affiliation between Apple and Defendant.

11 The most prominent element of the Podfitness Marks, "POD," comprises the most
12 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
13 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

14 On information and belief, the goods and services offered and/or sold by Defendant under
15 the Podfitness Marks are moving and will continue to move through the same channels of trade,
16 and are being offered and/or sold through the same channels of advertising and to the same
17 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
18 mark.

19 On information and belief, Defendant's promotion and sales of its goods and services
20 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

21 Apple expressly reserves the right to supplement its response to this interrogatory as
22 additional facts are ascertained.

23 **INTERROGATORY NO. 6:**

24 State all facts upon which you rely to support your assertions in Fifth Cause of Action, ¶¶
25 110 - 114, of your Complaint including but not limited to your assertions that Podfitness' use of
26 the PODFITNESS MARKS constitutes unfair competition, which is injurious to the public interest
27
28

1 and has damaged Apple, including damage to Apple's market, reputation, and goodwill, and
2 discouraged customers and potential customers from dealing with Apple.

3 **RESPONSE TO INTERROGATORY NO. 6:**

4 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
5 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
6 extent it asks numerous questions and seeks discovery of all facts supporting assertions set forth in
7 five separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
8 premature to the extent that discovery is ongoing in this matter. Apple further objects to this
9 interrogatory to the extent it is duplicative of Defendant's Interrogatory Nos. 2 and 3. Subject to
10 these objections and the General Objections, Apple responds as follows:

11 Since its introduction on October 23, 2001, the IPOD player has become an extremely
12 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
13 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
14 tremendous commercial success.

15 Apple has used and is using its IPOD mark in commerce on and in connection with
16 offering and selling its portable handheld media players and associated goods and services
17 continuously since October 2001.

18 On information and belief, the POD mark has been used by consumers and industry
19 publications as a slang term for the IPOD mark and product.

20 Apple owns the following registered IPOD marks in the United States:

21 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for “portable and handheld
22 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
23 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
24 audio files on portable and handheld digital electronic devices.”

25 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
26 computer hardware.”

1 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
2 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
3 and audio files; computer software for use in organizing, transmitting, manipulating, and
4 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

5 Apple also owns eleven pending applications for POD, IPOD and related marks for a wide
6 variety of goods and services, including printed and electronic materials and publications,
7 educational services, entertainment services, software, accessories for portable handheld digital
8 electronic devices, clothing, retail services, and computerized data storage and retrieval services.

9 Every IPOD player is packaged with Apple’s Earbud Trade Dress.

10 On information and belief, since its introduction in 2001, consumers have used Apple’s
11 IPOD products in connection with their fitness activities. As a result, for several years, Apple has
12 marketed and sold IPOD-compatible protective “sports cases” and arm bands to facilitate the use
13 of the IPOD player while exercising. Apple markets such accessories at The Apple Store (at
14 <http://store.apple.com>) under the slogan, “[k]eep you IPOD secure when you’re on the go. Perfect
15 for riding, running, and working out.”

16 In May 2006 Apple announced that it had entered into a collaboration with shoe
17 manufacturer Nike to release a new product, referred to as Nike +IPOD, that would allow a
18 runner’s shoes to communicate with an IPOD player. The Nike + IPOD Sports Kit component of
19 the product is designed to allow an IPOD player to function as a personal trainer or coach, and to
20 help the user achieve individualized fitness goals. The Nike +IPOD product is being promoted by
21 Apple and Nike in advertisements, some of which feature Apple’s Earbud Trade Dress next to a
22 running shoe, and is now available in retail stores and on-line at various websites, including The
23 Apple Store at the URL <http://store.apple.com>.

24 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
25 audio files for handheld media players and related services, which it promotes and provides on the
26 Internet through its website located at www.podfitness.com. Consumers pay a monthly
27 subscription fee to download Defendant’s digital audio files. Defendant’s digital audio files are
28

1 customized workout programs created by professional fitness trainers in response to a consumer's
2 stated personal exercise objectives. The files are then downloaded to the customer's digital media
3 player to be set to music already on the customer's player. According to the *www.podfitness.com*
4 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
5 application to facilitate the downloading of Defendant's audio workout files.

6 On information and belief, Defendant's PODFITNESS service is directly competitive with
7 goods and services offered by Apple under its IPOD mark, including, but not limited to Nike
8 +IPOD and iTunes iMixes.

9 Defendant has also adopted the PODFITNESS.COM Logo for its products and services,
10 which it promotes on its website and which incorporates an image of white and grey earbuds.

11 Defendant has also copied and prominently displays Apple's registered IPOD mark
12 throughout its *www.podfitness.com* website and particularly on the homepage, including in the
13 tagline: "Put a Personal Trainer right on your IPOD®," and the bold caption: "Customized IPOD
14 Workouts" (although Defendant removed both phrases from its home page after communications
15 from Apple). Defendant repeatedly has displayed conspicuous photos of the IPOD product on the
16 site, and has prominently featured images of individuals exercising while wearing Apple's Earbud
17 Trade Dress. Defendant also uses Apple's Earbud Trade Dress in its marketing correspondence
18 and other communications. In the "Support" section of the website, Defendant states that "you
19 will need to have [Apple's] ITUNES 6 installed in order to use the Podfitness software."

20 On information and belief, Defendant has directly copied images of the IPOD player from
21 Apple's website at *www.apple.com* to use on its own *www.podfitness.com* website.

22 Defendant has used Apple's registered IPOD mark in the metatags of each page on its
23 *www.podfitness.com* website, causing Defendant's website to appear as a "hit" when a query is
24 conducted through a search engine for the following phrases: "IPOD workout music"; "I POD
25 trainer"; "I POD workout"; "I POD workouts"; "IPOD workouts"; "IPOD trainer."

26 Defendant has also been listed as a sponsored link on the search engine *www.google.com*
27 in connection with the keywords "IPOD Workout" and "IPOD Fitness," causing a link to the
28

1 *www.podfitness.com* website to appear prominently in the top banner or right margin of the screen.
2 in response to a search query for such terms.

3 Defendant registered and uses the domain names *ipodfitness.com* and *ipodworkouts.com* to
4 automatically re-direct to its homepage at *podfitness.com*.

5 On March 16, 2006, Defendant ran a full-page advertisement in the Wall Street Journal,
6 which stated in large type:

7 Dear Steve Jobs,
8 Thanks for the IPOD®.
9 Best,
10 Jeff Hays

11 P.S. Wait till you hear what we did with it!
12 Call me, 801-990-3238

13 The bottom of the advertisement prominently displayed the white earbuds shown in the
14 PODFITNESS.COM Logo mark along with the tagline "Your Music. Your Workout. Your Way."
15 Underneath the logo in smaller print, the advertisement read:

16 "If you're not Steve, and would like to download unlimited, customized training sessions
17 mixed with your music, it's only \$19.95 per month. For you Steve, it's on the house.
18 *www.podfitness.com/steve.*"

19 Also on the PODFITNESS website at *www.podfitness.com/steve*, Defendant posted the
20 following promotional statement:

21 Dear Steve,

22 Thanks for coming to the site.

23 Can I tell you a quick story?

24 Like millions of others, in December of 2004 my 44-year-old wife and I got iPods
25 for Christmas. My 25 year old son was on his 3rd, our teenagers were on their 1st
26 or 2nd. But when my techno-phobic wife got one... well, it was obvious that the
27 iPod had crossed the chasm. Like the rest of the business world, I couldn't wait to
28 be involved.

So, a month later (January 2005), I filed a couple of patent applications for an idea
that I'd been tinkering with for a while. I called it Podfitness. The idea was to
create a service that would create customized, downloadable, personalized audio
workouts that could each be mixed with the users' own favorite music. So, off we
went...

1 After we embarked on a yearlong programming journey, as you know, Apple went
2 on to sell 32 million more iPods. (Congratulations, by the way!) This was terrific,
3 but of course "competitors" started appearing. Dang it! None of them were creating
4 anything new, no technology, it was just people taking static workouts and
5 converting them to mp3. We could have done that on our first day, (heck, my 15
6 year old does it every day, what's the big deal about ripping a CD?) It was pure hell
7 to sit back and watch people enter the market with... well, nothing. All the while,
8 we're quietly working away, burning cash, programming, partnering and recording.
9 And the clock was ticking...

10 Well, it took us over a year and a couple of million dollars, but we did it.

11 It is widely known to the public that Steve Jobs is the CEO of Apple. Neither Steve Jobs,
12 nor Apple, authorized this use of his name in Defendant's advertisements for the PODFITNESS
13 product.

14 Defendant also provides the following explanation for the inspiration behind the creation
15 of PODFITNESS on its *www.podfitness.com* website:

16 **Supernova Marketplace: The Intersection of Music, iPod and Fitness**

17 When Podfitness was founded in January 2005, Apple had sold just over 10 million
18 iPods. Sensing a major shift coming, CEO Jeff Hays gambled that the iPod-led
19 MP3 revolution had the potential not only to change the economics of the music
20 business, but also the fitness industry. This began a multimillion-dollar process of
21 conceptualizing, building, and refining the idea of Podfitness.

22 Now, in 2006, there have been over 50 million iPods sold, and the "Made for iPod"
23 market is white-hot. In addition, the number of people focusing on fitness has never
24 been higher: there are 40 million fitness club members in the U.S. alone.

25 Not coincidentally, at this exact time, Podfitness is at the culmination of 18
26 months' efforts...

27 <https://podfitness.com/web/template/corporate?aff=home>

28 Defendant has also adopted the Arrow Logo, which it promotes on its website and which is
identical to Apple's Shuffle Logo.

Defendant also uses aspects of Apple's MADE FOR IPOD logo, the subject of U.S.
Application Serial No. 78/689,534, to promote and sell its goods and services.

Defendant utilizes Apple's proprietary iTunes software in connection with its goods and
services without permission from Apple. In order to create its customized audio files, Defendant
requires its subscribers to install the iTunes software on his own computer. Defendant then mixes

1 a trainer's voice with music from a subscriber's iTunes media library. The result is an audio
2 workout that plays the subscriber's music as background music to the trainer's voice instruction.
3 Defendant allows a user to select 1) a particular trainer, 2) a particular exercise, and 3) a particular
4 iTunes playlist (i.e. the subscriber's music). Defendant's application has the capability to cater the
5 trainer's voice to the subscriber (i.e. according to the selected exercise, the user's fitness level
6 controls cadence, number of reps, number of sets, etc.). But on information and belief, Defendant
7 depends on iTunes, via iTunes' Application Programmer Interface, to store, manage, play, and
8 control the audio content. On information and belief, Defendant's services depend on and do not
9 function without Apple's iTunes software.

10 On information and belief, Defendant entered into a collaborative agreement with a
11 television network in connection with the production of an exercise program, pursuant to which
12 Defendant agreed to provide the network with free access to its service, as well as a new IPOD
13 player.

14 On information and belief, Defendant's initial plans for the launch of its service included
15 giveaways for free IPOD players.

16 Apple has not consented to any of Defendant's uses of its iTunes software, its IPOD mark
17 or its product images, nor any mark comprised in whole or part of POD, nor has Apple sponsored,
18 endorsed or approved the goods or services offered and promoted by Defendant. Nor is there any
19 affiliation between Apple and Defendant.

20 The most prominent element of the Podfitness Marks, "POD," comprises the most
21 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
22 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

23 On information and belief, Defendant uses, or intends to use, the Podfitness Marks on
24 goods and services that are identical, or at least highly related, to Apple's IPOD goods and related
25 services.

26 On information and belief, the goods and services offered and/or sold by Defendant under
27 the Podfitness Marks are moving and will continue to move through the same channels of trade,
28

1 and are being offered and/or sold through the same channels of advertising and to the same
2 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
3 mark.

4 On information and belief, Defendant's promotion and sales of its goods and services
5 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

6 Apple expressly reserves the right to supplement its response to this interrogatory as
7 additional facts are ascertained.

8 **INTERROGATORY NO. 7:**

9 State all facts upon which you rely to support your assertions in your Sixth Cause of
10 Action, ¶¶ 116 - 119 of your Complaint including but not limited to your assertions that
11 Podfitness' use of the PODFITNESS MARKS dilutes the distinctive quality of the IPOD mark.

12 **RESPONSE TO INTERROGATORY NO. 7:**

13 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
14 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
15 extent it asks numerous questions and seeks discovery of all facts supporting assertions set forth in
16 four separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
17 premature to the extent that discovery is ongoing in this matter. Apple further objects to this
18 interrogatory to the extent it is duplicative of Defendant's Interrogatory No. 5. Subject to these
19 objections and the General Objections, Apple responds as follows:

20 Since its introduction on October 23, 2001, the IPOD player has become an extremely
21 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
22 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
23 tremendous commercial success.

24 In the past five years, the IPOD player has truly become a cultural phenomenon. As stated
25 by Andy Serwer in a Fortune magazine article dated June 27, 2005, "[i]t's hard to recall any
26 branded recreational product that ever carried the cultural oomph that the iPod now has. The
27 Hula-Hoop was a fad....As for the Walkman, the iPod's mobile-music ancestor, it generated
28

1 massive sales. But it never impacted behavior or peripheral markets quite the way the iPod has.”
2 As an example of the IPOD player’s reach, starting in the fall of 2004, Duke University initiated a
3 program in which all incoming freshman were provided IPOD players, free of charge, to use as
4 high-tech educational tools to record lectures, capture scientific data and play language-training
5 recordings.

6 Apple has used and is using its IPOD mark in commerce on and in connection with
7 offering and selling its portable handheld media players and associated goods and services
8 continuously since October 2001.

9 On information and belief, the POD mark has been used by consumers and industry
10 publications as a slang term for the IPOD mark and product.

11 Apple owns the following registered IPOD marks in the United States:

12 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for “portable and handheld
13 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
14 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
15 audio files on portable and handheld digital electronic devices.”

16 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
17 computer hardware.”

18 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
19 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
20 and audio files; computer software for use in organizing, transmitting, manipulating, and
21 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

22 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
23 audio files for handheld media players and related services, which it promotes and provides on the
24 Internet through its website located at *www.podfitness.com*. Consumers pay a monthly
25 subscription fee to download Defendant’s digital audio files. Defendant’s digital audio files are
26 customized workout programs created by professional fitness trainers in response to a consumer’s
27 stated personal exercise objectives. The files are then downloaded to the customer’s digital media
28

1 player to be set to music already on the customer's player. According to the *www.podfitness.com*
2 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
3 application to facilitate the downloading of Defendant's audio workout files.

4 Apple has not consented to any of Defendant's uses any mark comprised in whole or part
5 of POD, nor has Apple sponsored, endorsed or approved the goods or services offered and
6 promoted by Defendant. Nor is there any affiliation between Apple and Defendant.

7 The most prominent element of the Podfitness Marks, "POD," comprises the most
8 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
9 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

10 On information and belief, the goods and services offered and/or sold by Defendant under
11 the Podfitness Marks are moving and will continue to move through the same channels of trade,
12 and are being offered and/or sold through the same channels of advertising and to the same
13 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
14 mark.

15 On information and belief, Defendant's promotion and sales of its goods and services
16 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

17 Apple expressly reserves the right to supplement its response to this interrogatory as
18 additional facts are ascertained.

19 **INTERROGATORY NO. 8:**

20 State all facts upon which you rely to support your assertions in your Seventh Cause of
21 Action, ¶¶ 121 - 124, of your Complaint including but not limited to your assertions that
22 Podfitness' business practices are unfair and offend public policy as unlawful, unfair,
23 unscrupulous, and substantially injurious to Apple and consumers.

24 **RESPONSE TO INTERROGATORY NO. 8:**

25 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
26 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
27 extent it asks numerous questions and seeks discovery of all facts supporting assertions set forth in
28

1 four separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
2 premature to the extent that discovery is ongoing in this matter. Subject to these objections and
3 the General Objections, Apple responds as follows:

4 Since its introduction on October 23, 2001, the IPOD player has become an extremely
5 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
6 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
7 tremendous commercial success.

8 Apple has used and is using its IPOD mark in commerce on and in connection with
9 offering and selling its portable handheld media players and associated goods and services
10 continuously since October 2001.

11 On information and belief, the POD mark has been used by consumers and industry
12 publications as a slang term for the IPOD mark and product.

13 Apple owns the following registered IPOD marks in the United States:

- 14 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for “portable and handheld
15 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
16 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
17 audio files on portable and handheld digital electronic devices.”
- 18 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
19 computer hardware.”
- 20 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
21 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
22 and audio files; computer software for use in organizing, transmitting, manipulating, and
23 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

24 Apple also owns eleven pending applications for POD, IPOD and related marks for a wide
25 variety of goods and services, including printed and electronic materials and publications,
26 educational services, entertainment services, software, accessories for portable handheld digital
27 electronic devices, clothing, retail services, and computerized data storage and retrieval services.

28

1 Every IPOD player is packaged with Apple's Earbud Trade Dress.

2 On information and belief, since its introduction in 2001, consumers have used Apple's
3 IPOD products in connection with their fitness activities. As a result, for several years, Apple has
4 marketed and sold IPOD-compatible protective "sports cases" and arm bands to facilitate the use
5 of the IPOD player while exercising. Apple markets such accessories at The Apple Store (at
6 <http://store.apple.com>) under the slogan, "[k]eep you IPOD secure when you're on the go. Perfect
7 for riding, running, and working out."

8 In May 2006 Apple announced that it had entered into a collaboration with shoe
9 manufacturer Nike to release a new product, referred to as Nike +IPOD, that would allow a
10 runner's shoes to communicate with an IPOD player. The Nike + IPOD Sports Kit component of
11 the product is designed to allow an IPOD player to function as a personal trainer or coach, and to
12 help the user achieve individualized fitness goals. The Nike +IPOD product is being promoted by
13 Apple and Nike in advertisements, some of which feature Apple's Earbud Trade Dress next to a
14 running shoe, and is now available in retail stores and on-line at various websites, including The
15 Apple Store at the URL <http://store.apple.com>.

16 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
17 audio files for handheld media players and related services, which it promotes and provides on the
18 Internet through its website located at www.podfitness.com. Consumers pay a monthly
19 subscription fee to download Defendant's digital audio files. Defendant's digital audio files are
20 customized workout programs created by professional fitness trainers in response to a consumer's
21 stated personal exercise objectives. The files are then downloaded to the customer's digital media
22 player to be set to music already on the customer's player. According to the www.podfitness.com
23 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
24 application to facilitate the downloading of Defendant's audio workout files.

25 On information and belief, Defendant's PODFITNESS service is directly competitive with
26 goods and services offered by Apple under its IPOD mark, including, but not limited to Nike
27 +IPOD and iTunes iMixes.

28

1 Defendant has also adopted the PODFITNESS.COM Logo for its products and services,
2 which it promotes on its website and which incorporates an image of white and grey earbuds.

3 Defendant has also copied and prominently displays Apple's registered IPOD mark
4 throughout its *www.podfitness.com* website and particularly on the homepage, including in the
5 tagline: "Put a Personal Trainer right on your IPOD®," and the bold caption: "Customized IPOD
6 Workouts" (although Defendant removed both phrases from its home page after communications
7 from Apple). Defendant repeatedly has displayed conspicuous photos of the IPOD product on the
8 site, and has prominently featured images of individuals exercising while wearing Apple's Earbud
9 Trade Dress. Defendant also uses Apple's Earbud Trade Dress in its marketing correspondence
10 and other communications. In the "Support" section of the website, Defendant states that "you
11 will need to have [Apple's] ITUNES 6 installed in order to use the Podfitness software."

12 On information and belief, Defendant has directly copied images of the IPOD player from
13 Apple's website at *www.apple.com* to use on its own *www.podfitness.com* website.

14 Defendant has used Apple's registered IPOD mark in the metatags of each page on its
15 *www.podfitness.com* website, causing Defendant's website to appear as a "hit" when a query is
16 conducted through a search engine for the following phrases: "IPOD workout music"; "I POD
17 trainer"; "I POD workout"; "I POD workouts"; "IPOD workouts"; "IPOD trainer."

18 Defendant has also been listed as a sponsored link on the search engine *www.google.com*
19 in connection with the keywords "IPOD Workout" and "IPOD Fitness," causing a link to the
20 *www.podfitness.com* website to appear prominently in the top banner or right margin of the screen
21 in response to a search query for such terms.

22 Defendant registered and uses the domain names *ipodfitness.com* and *ipodworkouts.com* to
23 automatically re-direct to its homepage at *podfitness.com*.

24 On March 16, 2006, Defendant ran a full-page advertisement in the Wall Street Journal,
25 which stated in large type:

26 Dear Steve Jobs,
27 Thanks for the IPOD®.
28 Best,
Jeff Hays

1 P.S. Wait till you hear what we did with it!
2 Call me, 801-990-3238

3 The bottom of the advertisement prominently displayed the white earbuds shown in the
4 PODFITNESS.COM Logo mark along with the tagline "Your Music. Your Workout. Your Way."
5 Underneath the logo in smaller print, the advertisement read:

6 "If you're not Steve, and would like to download unlimited, customized training sessions
7 mixed with your music, it's only \$19.95 per month. For you Steve, it's on the house.
8 *www.podfitness.com/steve.*"

9 Also on the PODFITNESS website at *www.podfitness.com/steve*, Defendant posted the
10 following promotional statement:

11 Dear Steve,

12 Thanks for coming to the site.

13 Can I tell you a quick story?

14 Like millions of others, in December of 2004 my 44-year-old wife and I got iPods
15 for Christmas. My 25 year old son was on his 3rd, our teenagers were on their 1st
16 or 2nd. But when my techno-phobic wife got one... well, it was obvious that the
iPod had crossed the chasm. Like the rest of the business world, I couldn't wait to
be involved.

17 So, a month later (January 2005), I filed a couple of patent applications for an idea
18 that I'd been tinkering with for a while. I called it Podfitness. The idea was to
19 create a service that would create customized, downloadable, personalized audio
workouts that could each be mixed with the users' own favorite music. So, off we
went...

20 After we embarked on a yearlong programming journey, as you know, Apple went
21 on to sell 32 million more iPods. (Congratulations, by the way!) This was terrific,
22 but of course "competitors" started appearing. Dang it! None of them were creating
23 anything new, no technology, it was just people taking static workouts and
24 converting them to mp3. We could have done that on our first day, (heck, my 15
year old does it every day, what's the big deal about ripping a CD?) It was pure hell
to sit back and watch people enter the market with... well, nothing. All the while,
we're quietly working away, burning cash, programming, partnering and recording.
And the clock was ticking...

25 Well, it took us over a year and a couple of million dollars, but we did it.

1 It is widely known to the public that Steve Jobs is the CEO of Apple. Neither Steve Jobs,
2 nor Apple, authorized this use of his name in Defendant's advertisements for the PODFITNESS
3 product.

4 Defendant also provides the following explanation for the inspiration behind the creation
5 of PODFITNESS on its *www.podfitness.com* website:

6 **Supernova Marketplace: The Intersection of Music, iPod and Fitness**

7 When Podfitness was founded in January 2005, Apple had sold just over 10 million
8 iPods. Sensing a major shift coming, CEO Jeff Hays gambled that the iPod-led
9 MP3 revolution had the potential not only to change the economics of the music
10 business, but also the fitness industry. This began a multimillion-dollar process of
11 conceptualizing, building, and refining the idea of Podfitness.

12 Now, in 2006, there have been over 50 million iPods sold, and the "Made for iPod"
13 market is white-hot. In addition, the number of people focusing on fitness has never
14 been higher: there are 40 million fitness club members in the U.S. alone.

15 Not coincidentally, at this exact time, Podfitness is at the culmination of 18
16 months' efforts...

17 <https://podfitness.com/web/template/corporate?aff=home>

18 Defendant has also adopted the Arrow Logo, which it promotes on its website and which is
19 identical to Apple's Shuffle Logo.

20 Defendant also uses aspects of Apple's MADE FOR IPOD logo, the subject of U.S.
21 Application Serial No. 78/689,534, to promote and sell its goods and services.

22 Defendant utilizes Apple's proprietary iTunes software in connection with its goods and
23 services without permission from Apple. In order to create its customized audio files, Defendant
24 requires its subscribers to install the iTunes software on his own computer. Defendant then mixes
25 a trainer's voice with music from a subscriber's iTunes media library. The result is an audio
26 workout that plays the subscriber's music as background music to the trainer's voice instruction.
27 Defendant allows a user to select 1) a particular trainer, 2) a particular exercise, and 3) a particular
28 iTunes playlist (i.e. the subscriber's music). Defendant's application has the capability to cater the
trainer's voice to the subscriber (i.e. according to the selected exercise, the user's fitness level
controls cadence, number of reps, number of sets, etc.). But on information and belief, Defendant
depends on iTunes, via iTunes' Application Programmer Interface, to store, manage, play, and

1 control the audio content. On information and belief, Defendant's services depend on and do not
2 function without Apple's iTunes software.

3 On information and belief, Defendant entered into a collaborative agreement with a
4 television network in connection with the production of an exercise program, pursuant to which
5 Defendant agreed to provide the network with free access to its service, as well as a new IPOD
6 player.

7 On information and belief, Defendant's initial plans for the launch of its service included
8 giveaways for free IPOD players.

9 Apple has not consented to any of Defendant's uses of its iTunes software, its IPOD mark
10 or its product images, nor any mark comprised in whole or part of POD, nor has Apple sponsored,
11 endorsed or approved the goods or services offered and promoted by Defendant. Nor is there any
12 affiliation between Apple and Defendant.

13 The most prominent element of the Podfitness Marks, "POD," comprises the most
14 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
15 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

16 On information and belief, Defendant uses, or intends to use, the Podfitness Marks on
17 goods and services that are identical, or at least highly related, to Apple's IPOD goods and related
18 services.

19 On information and belief, the goods and services offered and/or sold by Defendant under
20 the Podfitness Marks are moving and will continue to move through the same channels of trade,
21 and are being offered and/or sold through the same channels of advertising and to the same
22 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
23 mark.

24 On information and belief, Defendant's promotion and sales of its goods and services
25 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

26 Apple expressly reserves the right to supplement its response to this interrogatory as
27 additional facts are ascertained.

28

1 **INTERROGATORY NO. 9:**

2 State all facts upon which you rely to support your assertions in your Eighth Cause of
3 Action, ¶¶ 125 - 128, of your Complaint including but not limited to your assertions that
4 Podfitness' actions have caused, and are likely to continue to cause confusion and mistake, and to
5 deceive as to the affiliation, connection or association of Apple, and as to the origin, sponsorship,
6 or approval of Defendant's goods and services by Apple and/or the origin, sponsorship, or
7 approval of Apple's goods and services by Podfitness.

8 **RESPONSE TO INTERROGATORY NO. 9:**

9 Apple objects to this interrogatory as overly broad, unduly burdensome, and designed to
10 circumvent limitations on interrogatories imposed by the Federal Rules of Civil Procedure to the
11 extent it asks numerous questions and seeks discovery of all facts supporting assertions set forth in
12 four separate paragraphs of Apple's Complaint. Apple further objects to this interrogatory as
13 premature to the extent that discovery is ongoing in this matter. Apple further objects to this
14 interrogatory to the extent it is duplicative of Defendant's Interrogatory Nos. 2, 3, 6, and 8.
15 Subject to these objections and the General Objections, Apple responds as follows:

16 Since its introduction on October 23, 2001, the IPOD player has become an extremely
17 popular and widely recognized consumer product, with over 50 million units sold worldwide. The
18 IPOD player has led digital media player sales in the U.S. for the past several years, garnering
19 tremendous commercial success.

20 Apple has used and is using its IPOD mark in commerce on and in connection with
21 offering and selling its portable handheld media players and associated goods and services
22 continuously since October 2001.

23 On information and belief, the POD mark has been used by consumers and industry
24 publications as a slang term for the IPOD mark and product.

25 Apple owns the following registered IPOD marks in the United States:

- 26 • IPOD – Registration Nos. 2,835,698 and 3,089,360 for “portable and handheld
27 digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing
28

1 audio files; computer software for use in organizing, transmitting, manipulating, and reviewing
2 audio files on portable and handheld digital electronic devices.”

3 • IPOD – Registration No. 2781793 for “public Internet kiosk enclosure containing
4 computer hardware.”

5 • IPOD NANO – Registration No. 3192683 for “portable and handheld digital
6 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,
7 and audio files; computer software for use in organizing, transmitting, manipulating, and
8 reviewing text, data, and audio files on portable and handheld digital electronic devices.”

9 Apple also owns eleven pending applications for POD, IPOD and related marks for a wide
10 variety of goods and services, including printed and electronic materials and publications,
11 educational services, entertainment services, software, accessories for portable handheld digital
12 electronic devices, clothing, retail services, and computerized data storage and retrieval services.

13 Every IPOD player is packaged with Apple’s Earbud Trade Dress.

14 On information and belief, since its introduction in 2001, consumers have used Apple’s
15 IPOD products in connection with their fitness activities. As a result, for several years, Apple has
16 marketed and sold IPOD-compatible protective “sports cases” and arm bands to facilitate the use
17 of the IPOD player while exercising. Apple markets such accessories at The Apple Store (at
18 <http://store.apple.com>) under the slogan, “[k]eep you IPOD secure when you’re on the go. Perfect
19 for riding, running, and working out.”

20 In May 2006 Apple announced that it had entered into a collaboration with shoe
21 manufacturer Nike to release a new product, referred to as Nike +IPOD, that would allow a
22 runner’s shoes to communicate with an IPOD player. The Nike + IPOD Sports Kit component of
23 the product is designed to allow an IPOD player to function as a personal trainer or coach, and to
24 help the user achieve individualized fitness goals. The Nike +IPOD product is being promoted by
25 Apple and Nike in advertisements, some of which feature Apple’s Earbud Trade Dress next to a
26 running shoe, and is now available in retail stores and on-line at various websites, including The
27 Apple Store at the URL <http://store.apple.com>.

1 Defendant has adopted and now uses PODFITNESS as a trademark for its downloadable
2 audio files for handheld media players and related services, which it promotes and provides on the
3 Internet through its website located at *www.podfitness.com*. Consumers pay a monthly
4 subscription fee to download Defendant's digital audio files. Defendant's digital audio files are
5 customized workout programs created by professional fitness trainers in response to a consumer's
6 stated personal exercise objectives. The files are then downloaded to the customer's digital media
7 player to be set to music already on the customer's player. According to the *www.podfitness.com*
8 website, Defendant's consumers must use Apple's ITUNES proprietary digital media player
9 application to facilitate the downloading of Defendant's audio workout files.

10 On information and belief, Defendant's PODFITNESS service is directly competitive with
11 goods and services offered by Apple under its IPOD mark, including, but not limited to Nike
12 +IPOD and iTunes iMixes.

13 Defendant has also adopted the PODFITNESS.COM Logo for its products and services,
14 which it promotes on its website and which incorporates an image of white and grey earbuds.

15 Defendant has also copied and prominently displays Apple's registered IPOD mark
16 throughout its *www.podfitness.com* website and particularly on the homepage, including in the
17 tagline: "Put a Personal Trainer right on your IPOD®," and the bold caption: "Customized IPOD
18 Workouts" (although Defendant removed both phrases from its home page after communications
19 from Apple). Defendant repeatedly has displayed conspicuous photos of the IPOD product on the
20 site, and has prominently featured images of individuals exercising while wearing Apple's Earbud
21 Trade Dress. Defendant also uses Apple's Earbud Trade Dress in its marketing correspondence
22 and other communications. In the "Support" section of the website, Defendant states that "you
23 will need to have [Apple's] ITUNES 6 installed in order to use the Podfitness software."

24 On information and belief, Defendant has directly copied images of the IPOD player from
25 Apple's website at *www.apple.com* to use on its own *www.podfitness.com* website.

26 Defendant has used Apple's registered IPOD mark in the metatags of each page on its
27 *www.podfitness.com* website, causing Defendant's website to appear as a "hit" when a query is
28

1 conducted through a search engine for the following phrases: "IPOD workout music"; "I POD
2 trainer"; "I POD workout"; "I POD workouts"; "IPOD workouts"; "IPOD trainer."

3 Defendant has also been listed as a sponsored link on the search engine *www.google.com*
4 in connection with the keywords "IPOD Workout" and "IPOD Fitness," causing a link to the
5 *www.podfitness.com* website to appear prominently in the top banner or right margin of the screen
6 in response to a search query for such terms.

7 Defendant registered and uses the domain names *ipodfitness.com* and *ipodworkouts.com* to
8 automatically re-direct to its homepage at *podfitness.com*.

9 On March 16, 2006, Defendant ran a full-page advertisement in the Wall Street Journal,
10 which stated in large type:

11 Dear Steve Jobs,
12 Thanks for the IPOD®.
13 Best,
14 Jeff Hays

P.S. Wait till you hear what we did with it!
Call me, 801-990-3238

15 The bottom of the advertisement prominently displayed the white earbuds shown in the
16 PODFITNESS.COM Logo mark along with the tagline "Your Music. Your Workout. Your Way."
17 Underneath the logo in smaller print, the advertisement read:

18 "If you're not Steve, and would like to download unlimited, customized training sessions
19 mixed with your music, it's only \$19.95 per month. For you Steve, it's on the house.
20 *www.podfitness.com/steve.*"

21 Also on the PODFITNESS website at *www.podfitness.com/steve*, Defendant posted the
22 following promotional statement:

23 Dear Steve,
24 Thanks for coming to the site.
25 Can I tell you a quick story?

26 Like millions of others, in December of 2004 my 44-year-old wife and I got iPods
27 for Christmas. My 25 year old son was on his 3rd, our teenagers were on their 1st
28 or 2nd. But when my techno-phobic wife got one... well, it was obvious that the

1 iPod had crossed the chasm. Like the rest of the business world, I couldn't wait to
2 be involved.

3 So, a month later (January 2005), I filed a couple of patent applications for an idea
4 that I'd been tinkering with for a while. I called it Podfitness. The idea was to
5 create a service that would create customized, downloadable, personalized audio
6 workouts that could each be mixed with the users' own favorite music. So, off we
7 went...

8 After we embarked on a yearlong programming journey, as you know, Apple went
9 on to sell 32 million more iPods. (Congratulations, by the way!) This was terrific,
10 but of course "competitors" started appearing. Dang it! None of them were creating
11 anything new, no technology, it was just people taking static workouts and
12 converting them to mp3. We could have done that on our first day, (heck, my 15
13 year old does it every day, what's the big deal about ripping a CD?) It was pure hell
14 to sit back and watch people enter the market with... well, nothing. All the while,
15 we're quietly working away, burning cash, programming, partnering and recording.
16 And the clock was ticking...

17 Well, it took us over a year and a couple of million dollars, but we did it.

18 It is widely known to the public that Steve Jobs is the CEO of Apple. Neither Steve Jobs,
19 nor Apple, authorized this use of his name in Defendant's advertisements for the PODFITNESS
20 product.

21 Defendant also provides the following explanation for the inspiration behind the creation
22 of PODFITNESS on its *www.podfitness.com* website:

23 **Supernova Marketplace: The Intersection of Music, iPod and Fitness**

24 When Podfitness was founded in January 2005, Apple had sold just over 10 million
25 iPods. Sensing a major shift coming, CEO Jeff Hays gambled that the iPod-led
26 MP3 revolution had the potential not only to change the economics of the music
27 business, but also the fitness industry. This began a multimillion-dollar process of
28 conceptualizing, building, and refining the idea of Podfitness.

Now, in 2006, there have been over 50 million iPods sold, and the "Made for iPod"
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.

Not coincidentally, at this exact time, Podfitness is at the culmination of 18
months' efforts...

<https://podfitness.com/web/template/corporate?aff=home>

Defendant has also adopted the Arrow Logo, which it promotes on its website and which is
identical to Apple's Shuffle Logo.

1 Defendant also uses aspects of Apple's MADE FOR IPOD logo, the subject of U.S.
2 Application Serial No. 78/689,534, to promote and sell its goods and services.

3 Defendant utilizes Apple's proprietary iTunes software in connection with its goods and
4 services without permission from Apple. In order to create its customized audio files, Defendant
5 requires its subscribers to install the iTunes software on his own computer. Defendant then mixes
6 a trainer's voice with music from a subscriber's iTunes media library. The result is an audio
7 workout that plays the subscriber's music as background music to the trainer's voice instruction.
8 Defendant allows a user to select 1) a particular trainer, 2) a particular exercise, and 3) a particular
9 iTunes playlist (i.e. the subscriber's music). Defendant's application has the capability to cater the
10 trainer's voice to the subscriber (i.e. according to the selected exercise, the user's fitness level
11 controls cadence, number of reps, number of sets, etc.). But on information and belief, Defendant
12 depends on iTunes, via iTunes' Application Programmer Interface, to store, manage, play, and
13 control the audio content. On information and belief, Defendant's services depend on and do not
14 function without Apple's iTunes software.

15 On information and belief, Defendant entered into a collaborative agreement with a
16 television network in connection with the production of an exercise program, pursuant to which
17 Defendant agreed to provide the network with free access to its service, as well as a new IPOD
18 player.

19 On information and belief, Defendant's initial plans for the launch of its service included
20 giveaways for free IPOD players.

21 Apple has not consented to any of Defendant's uses of its iTunes software, its IPOD mark
22 or its product images, nor any mark comprised in whole or part of POD, nor has Apple sponsored,
23 endorsed or approved the goods or services offered and promoted by Defendant. Nor is there any
24 affiliation between Apple and Defendant.

25 The most prominent element of the Podfitness Marks, "POD," comprises the most
26 prominent element of Apple's IPOD mark. In addition, the dominant element of the Podfitness
27 Marks, "POD," is identical to the "POD" slang term used to refer to the IPOD products.

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1 On information and belief, Defendant uses, or intends to use, the Podfitness Marks on
2 goods and services that are identical, or at least highly related, to Apple's IPOD goods and related
3 services.

4 On information and belief, the goods and services offered and/or sold by Defendant under
5 the Podfitness Marks are moving and will continue to move through the same channels of trade,
6 and are being offered and/or sold through the same channels of advertising and to the same
7 consumer groups, as the goods and services that are offered and sold by Apple under the IPOD
8 mark.

9 On information and belief, Defendant's promotion and sales of its goods and services
10 under the Podfitness Marks are directed to consumers of Apple's IPOD products.

11 Apple expressly reserves the right to supplement its response to this interrogatory as
12 additional facts are ascertained.

13 **INTERROGATORY NO. 10:**

14 For Apple's Federal Trademark causes of action, claims 1 - 4 of its Complaint, identify
15 separately and describe with particularity the factual basis for each measure and amount of all
16 damages Apple claims, including a full and complete computation and description of the
17 method(s) of computation used.

18 **RESPONSE TO INTERROGATORY NO. 10:**

19 Apple objects to this interrogatory as premature. Apple's computation of damages will be
20 the subject of expert testimony. Apple will make expert disclosures at the appropriate times
21 pursuant to Fed. R. Civ. P. 26(a)(2).

22 **INTERROGATORY NO. 11:**

23 For Apple's California Business and Professions Code causes of Action, claims 5 - 8 of its
24 Complaint, identify separately and describe with particularity the factual basis for each measure
25 and amount of all damages Apple claims, including a full and complete computation and
26 description of the method(s) of computation used.

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1 **RESPONSE TO INTERROGATORY NO. 11:**

2 Apple objects to this interrogatory as premature. Apple's computation of damages will be
3 the subject of expert testimony. Apple will make expert disclosures at the appropriate times
4 pursuant to Fed. R. Civ. P. 26(a)(2).

5 **INTERROGATORY NO. 12:**

6 State all facts that form the basis of why Apple and/or its predecessors chose to use the
7 name IPOD.

8 **RESPONSE TO INTERROGATORY NO. 12:**

9 Apple objects to this interrogatory as irrelevant to the subject matter of this action and not
10 reasonably calculated to lead to the discovery of admissible evidence. Apple further objects to this
11 interrogatory to the extent it seeks discovery of confidential, proprietary, trade secret, or other
12 competitively sensitive information. Apple further objects to this interrogatory to the extent it
13 seeks discovery of information protected by the attorney-client privilege, work product doctrine,
14 and/or any other applicable privilege or immunity. Subject to these objections and the General
15 Objections, Apple expressly reserves the right to produce documents from which the answer to
16 this interrogatory may be ascertained pursuant to Fed. R. Civ. P. 33(d).

17 **INTERROGATORY NO. 13:**

18 State all facts upon which you rely to support your assertion that the Apple Earphones are
19 distinctive or have become uniquely associated with Apple.

20 **RESPONSE TO INTERROGATORY NO. 13:**

21 Apple objects to this interrogatory as duplicative of Defendant's Interrogatory No. 4. See
22 Apple's response to Interrogatory No. 4.

23 **INTERROGATORY NO. 14:**

24 State all facts upon which you rely to support your assertion that the term "pod" is slang
25 for the mark IPOD.

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1 **RESPONSE TO INTERROGATORY NO. 14:**

2 Subject to the general objections, Apple responds that it will produce documents from
3 which the answer to this interrogatory may be ascertained pursuant to Fed. R. Civ. P. 33(d).

4 **INTERROGATORY NO. 15:**

5 Specify the amount of money Apple spent on a month-by-month basis to promote, market,
6 and/or advertise the goods and services offered under the IPOD mark during the period Apple
7 alleges trademark infringement.

8 **RESPONSE TO INTERROGATORY NO. 15:**

9 Apple objects to this interrogatory as irrelevant to the subject matter of this action and not
10 reasonably calculated to lead to the discovery of admissible evidence. Apple further objects to this
11 interrogatory to the extent it seeks discovery of confidential, proprietary, trade secret, or other
12 competitively sensitive information. Subject to this objection and the General Objections, Apple
13 responds that after entry of a suitable protective order it will produce documents from which the
14 answer to this interrogatory may be ascertained pursuant to Fed. R. Civ. P. 33(d).

15 **INTERROGATORY NO. 16:**

16 Identify all marketing studies, surveys, opinion polls, business plans, and/or strategic plans
17 relating to IPOD and Plaintiff's Goods and Services and the PODFITNESS MARKS and
18 Defendant's Goods and Services.

19 **RESPONSE TO INTERROGATORY NO. 16:**

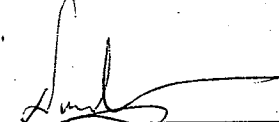
20 Apple objects to this interrogatory as irrelevant to the subject matter of this action and not
21 reasonably calculated to lead to the discovery of admissible evidence. Apple further objects to this
22 interrogatory to the extent it seeks discovery of information protected by the attorney-client
23 privilege, work product doctrine, and/or any other applicable privilege or immunity. Apple further
24 objects to this interrogatory to the extent it seeks discovery of confidential, proprietary, trade
25 secret, or other competitively sensitive information. Subject to these objections and the General
26 Objections, Apple responds that it does not possess any marketing studies, surveys, opinion polls,
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1 business plans, and/or strategic plans relating to both IPOD and Plaintiff's Goods and Services and
2 the PODFITNESS MARKS and Defendant's Goods and Services.

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Dated: February 13, 2007

FISH & RICHARDSON P.C.

By: 

David J. Miclean
Lisa M. Martens
Andrew M. Abrams

Attorneys for Plaintiff
APPLE COMPUTER, INC.

PROOF OF SERVICE

I am employed in the County of San Mateo. My business address is Fish & Richardson P.C., 500 Arguello Street, Suite 500, Redwood City, California 94063. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight service.

On February 13, 2007, I caused a copy of the following document(s):

**PLAINTIFF APPLE'S OBJECTIONS AND RESPONSES TO DEFENDANT
PODFITNESS' FIRST SET OF INTERROGATORIES**

to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

Mark W. Ford
1000 Eagle Gate Tower
60 East South Utah
Salt Lake City, UT 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707
Email: mford@wnlaw.com

Attorneys For Defendant
PODFITNISS, INC.

- | | | |
|-------------------------------------|-------------------------|---|
| <input type="checkbox"/> | MAIL: | Such correspondence was deposited, postage fully paid, with the United States Postal Service on the same day in the ordinary course of business. |
| <input type="checkbox"/> | PERSONAL: | Such envelope was delivered by hand to the offices of the addressee. |
| <input type="checkbox"/> | FACSIMILE: | Such document was faxed to the facsimile transmission machine with the facsimile machine number stated above. Upon completion of the transmission, the transmitting machine issued a transmission report showing the transmission was complete and without error. |
| <input type="checkbox"/> | ELECTRONIC MAIL: | Such document was transmitted by electronic mail to the addressees' email addresses as stated above. |
| <input checked="" type="checkbox"/> | FEDERAL EXPRESS: | Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express. |
| <input type="checkbox"/> | EXPRESS MAIL: | Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by the United States Postal Service. |

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**OVERNIGHT
DELIVERY:**

Such correspondence was given on the same day in the ordinary course of business to an authorized courier or a driver authorized by that courier to receive documents.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the above is true and correct. Executed on February 13, 2007, at Redwood City, California.

Diane M. Arceo-Lowenstein

10696865.2.doc

From: Origin ID: PAOA (650)839-5125
Diane Arceo-Lowenstein
FISH & RICHARDSON P.C
500 ARGUELLO STREET

REDWOOD CITY, CA 94063

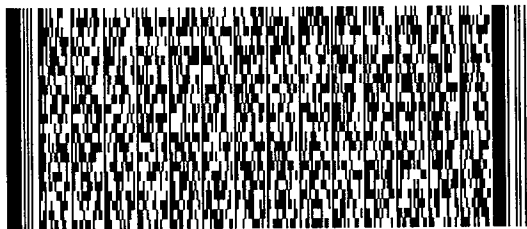


CLS012107/2123

SHIP TO: (801)533-9800

BILL SENDER

Mark W. Ford
Workman Nydegger
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

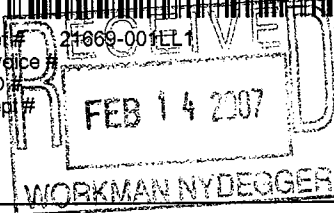


Ship Date: 13FEB07
ActWgt: 5 LB
System#: 3852279/INET2600
Account#: S *****

Delivery Address Bar Code



Ref: 21069-00111
Invoice:
PO:
Dept #



PRIORITY OVERNIGHT

WED

Deliver By:
14FEB07

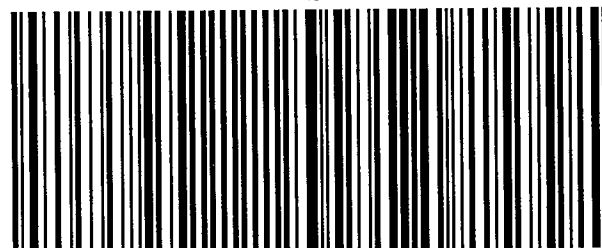
TRK# 7916 3448 5903

FORM
0201

SLC A1

84111 -UT-US

WM NPHA



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2. Fold the printed page along the horizontal line.
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