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PODFITNESS, INC.

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

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

Case No. C 06-5805 SBA

**[PROPOSED] STIPULATED  
PROTECTIVE ORDER**

Hon. Sandra B. Armstrong

23 The discovery procedures in this case may require disclosure of information, either  
24 documentary or testimonial or both, regarded by the producing party as confidential information  
25 incorporating proprietary data, know-how, trade secrets, or other valuable commercial  
26 information. Accordingly, the parties, by and through their respective attorneys, stipulate and  
27 agree to the following terms and conditions of this Stipulated Protective Order (“this Protective  
28 Order”), which shall apply to this civil action:

1           1. For purposes of this Protective Order, "CONFIDENTIAL" information shall mean  
2 all information and material which is produced for or disclosed to a receiving party, and which a  
3 producing party in good faith considers to constitute or to contain proprietary or confidential  
4 material or information which the designating party desires not to be made public, whether  
5 embodied in physical objects, documents, or the factual knowledge of persons, and which has  
6 been so designated in good faith by the producing party in the manner set forth hereafter. The  
7 party or nonparty who produces or discloses its own "CONFIDENTIAL" information is not  
8 precluded by this Protective Order from disclosing or using that "CONFIDENTIAL" information  
9 in any manner as it may deem fit..

10           2. Documents or tangible items, including electronic information, shall be designated  
11 confidential within the meaning of this Protective Order in the following ways:

- 12           (a) In the case of documents and the information contained  
13           therein, by placing on the document the legend  
14           "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."  
15           (b) In the case of interrogatory answers and the information contained  
16           therein, designation shall be made by placing on the caption of such  
17           interrogatory answers containing the confidential information the  
18           legend "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."  
19           (c) In the case of tangible items, designation shall be made by visibly  
20           marking the item "CONFIDENTIAL" or "ATTORNEYS' EYES  
21           ONLY."  
22           (d) In producing original files and records for inspection, no marking  
23           need be made by the producing party in advance of the inspection.  
24           For the purposes of the inspection, all documents produced shall be  
25           considered as marked "ATTORNEYS' EYES ONLY." Thereafter,  
26           upon selection of specified documents for copying by the inspecting  
27           party, and subject to reimbursement of the reasonable cost of  
28           reproduction of such files and records for production to the  
          receiving party, the producing party shall mark as  
          "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" the copies  
          of such documents as may contain confidential information at the  
          time the copies are produced to the inspecting party.

25           3. With respect to all documents, information, or tangible items, produced or  
26 furnished by a party during this litigation, which are designated as "CONFIDENTIAL" or  
27 "ATTORNEYS' EYES ONLY" by the producing party, such information shall be kept  
28 confidential and shall not be given, shown, made available, discussed, or otherwise communicated

1 in any manner (“disclosed”), either directly or indirectly, to any person not authorized to receive  
2 the information under the terms of this Protective Order.

3 4. If, in the course of this proceeding, depositions are conducted that involve  
4 confidential information, counsel for the witness or party producing such information may  
5 identify, on the record, the portion of the deposition which counsel believes may contain  
6 confidential information. If such designation is made, that portion of the deposition will be taken  
7 with no one present except those persons who are authorized to have access to such confidential  
8 information in accordance with this Protective Order, and the court reporter. Subject to the terms  
9 hereof, CONFIDENTIAL or ATTORNEYS’ EYES ONLY information may be disclosed by a  
10 receiving party in a deposition, to the extent that its use is necessary, only at the deposition(s) of:

- 11 (a) the present Directors or Officers of the producing party;
- 12 (b) present employees of the producing party, to the extent such persons  
13 would be entitled to receive such information pursuant to the  
14 producing party’s internal policies respecting confidentiality;
- 15 (c) an author, addressee, or other person indicated as a lawful recipient  
16 of a document containing the information;
- 17 (d) a person clearly identified in prior discovery or by the deponent in  
18 his or her deposition as an author or recipient of the information or  
19 as a person having knowledge concerning the specific confidential  
20 information (without prior disclosure of the specific confidential  
21 information). Prior to any disclosure under this subparagraph (d),  
22 notice must be given to the producing party of the specific  
23 information so that it has a fair opportunity to object to the  
24 disclosure. Notice may be given at the time of the deposition. The  
25 parties agree to cooperate, and, if necessary, to defer any such  
26 disclosure, to allow either party to initiate action, by motion or  
27 otherwise, with the Court. The producing party bears the burden of  
28 establishing confidentiality;
- (e) an independent advisor, consultant or expert otherwise qualified  
under this Stipulated Protective Order to receive such information;  
or
- (f) any person for whom prior authorization is obtained from the  
producing party or the Court.

Each party shall have until thirty (30) business days after receipt of the deposition  
transcript within which to inform the other parties to the action of the portions of the transcript (by  
specific page and line reference) that are to be designated as CONFIDENTIAL or ATTORNEYS’

1 EYES ONLY. The right to make such designation shall be waived unless made within the thirty  
2 (30) business day period. Prior to such designation, or prior to the expiration of the thirty (30)  
3 business day period, the entire deposition transcript shall be deemed ATTORNEYS' EYES ONLY  
4 information. Transcripts of testimony, or portions thereof, containing confidential information  
5 shall be filed only under seal as described in paragraph 5.

6 If, during the above-described thirty (30) business day designation period, a party wishes  
7 to disclose portions of the deposition transcript to persons not authorized to receive  
8 CONFIDENTIAL or ATTORNEYS' EYES ONLY information, the party shall make a written  
9 request to opposing counsel. The written request shall identify the portions of the deposition  
10 transcript to be disclosed and the person(s) to whom such disclosure is to be made. If no objection  
11 is made within ten (10) business days of the written request, counsel for the requesting party shall  
12 be free to make such disclosure. If objection is made within the ten (10) business days, then no  
13 disclosure shall be made. Any party may bring before the Court the question of whether the  
14 requested disclosure may be made. In the resolution of such matter, the objecting party shall have  
15 the burden of establishing before the Court the reasons for denying the requested disclosure.

16 5. Any document, pleading, or tangible item which contains confidential information  
17 that is to be filed or served in this action, shall be filed or served in accordance with the official  
18 procedures of the Court, or, if no such procedures are provided by the Court, the document,  
19 pleading, or tangible item which contains confidential information shall be filed or served in a  
20 sealed envelope marked "CONFIDENTIAL - NOT TO BE OPENED EXCEPT BY ORDER OF  
21 THE COURT." Subject to applicable local rules, counsel of record for the parties are hereby  
22 authorized to be the persons who may retrieve confidential exhibits and/or other confidential  
23 matters filed with the Court upon termination of this litigation without further order of this Court,  
24 and are persons to whom such confidential exhibits or other confidential matters may be returned  
25 by the Clerk of the Court, if they are not so retrieved. No materials or copies thereof so filed shall  
26 be released except by order of the Court, to counsel of record or as otherwise provided for  
27 hereunder.

28

1           6. Any confidential document, tangible item, or testimonial information produced by  
2 any party which contains information proprietary to the producing party and which is particularly  
3 sensitive competitive information, may be designated in writing as ATTORNEYS' EYES ONLY.  
4 'For purposes of this Protective Order, ATTORNEYS' EYES ONLY information shall mean all  
5 information and material produced for or disclosed to a receiving party, and which a producing  
6 party in good faith considers to constitute or to contain trade secrets, proprietary technology, or  
7 other confidential research, development, design, financial data, business plans, or commercial  
8 information, whether embodied in physical objects, documents, or the factual knowledge of  
9 persons, and which is of a particularly sensitive nature that could cause competitive harm if  
10 disclosed to a receiving party. Other categories of ATTORNEYS' EYES ONLY information may  
11 exist. The parties agree to designate information as CONFIDENTIAL or ATTORNEYS' EYES  
12 ONLY on a good-faith basis and not for purposes of harassing the receiving party or for purposes  
13 of unnecessarily restricting the receiving party's access to information concerning the lawsuit.  
14 The party or nonparty who produces or discloses its own "ATTORNEYS EYES ONLY"  
15 information is not precluded by this Protective Order from disclosing or using that "ATTORNEYS  
16 EYES ONLY" information in any manner as it may deem fit.

17           7. Before disclosure of any information subject to this Protective Order is made to any  
18 employee or officer of the non-producing party, or to any consultant or expert, and their clerical  
19 and support staff, retained by the non-producing party, or to any witness or prospective witness,  
20 counsel for the party disclosing the information shall obtain a signed undertaking, in the form  
21 attached hereto as Appendix A, from each person to whom disclosure is to be made,  
22 acknowledging that any document, information or tangible item that has been designated as  
23 confidential is subject to this Protective Order, that the person has read this Protective Order, that  
24 such person agrees to comply with, and be bound by, this Protective Order, and that such person is  
25 aware that contempt sanctions may be entered for violation of this Protective Order. The  
26 provisions of this paragraph 7 are subject to the provisions of paragraph 8 hereof. In the event of a  
27 conflict between the provisions of this paragraph 7 and the provisions of paragraph 8, the  
28 provisions of paragraph 8 shall govern.

1 Further, the person to whom disclosure is to be made must be given a copy of this  
2 Protective Order, and the provisions of this Protective Order must be explained to the person to  
3 whom disclosure is to be made by an attorney. If the person to whom disclosure is to be made is a  
4 consultant or expert, a copy of the signed undertaking, a curriculum vitae of the proposed expert,  
5 must be served by facsimile on counsel of record for the producing party at least ten (10) business  
6 days before the confidential information is shown to such consultant or expert. If no objection is  
7 made to such person receiving confidential information within such ten (10) business day period,  
8 then confidential information may be disclosed to such person. If the producing party wishes to  
9 object, that party must notify the opposing party in writing within the above stated ten (10)  
10 business day period of the objection, upon which the objecting party shall have ten (10) business  
11 days to move the Court for an order denying disclosure of the confidential information to such  
12 person.

13 If objection is made, then any party may bring before the Court the question of whether the  
14 confidential information may be disclosed to such person. In the resolution of such matter, the  
15 objecting party shall have the burden of establishing before the Court the reasons for denying  
16 disclosure to such person. All signed undertakings shall be maintained through the conclusion of  
17 this action.

18 8. Except as permitted by further order of this Court or by subsequent written  
19 agreement of the producing party, disclosure of ATTORNEYS' EYES ONLY documents or  
20 information, including summaries thereof, shall be limited to:

- 21 (a) outside counsel of record for the parties, including associate  
22 attorneys, and paralegal, secretarial, and clerical personnel assisting  
23 such counsel;
- 24 (b) Judges, Magistrates, law clerks, stenographers, videographers, and  
25 clerical personnel of the Court before which this action is pending;
- 26 (c) consultants or experts, not employees or officers of the parties,  
27 retained by either of the parties to consult or testify in the case  
28 pursuant to paragraph 7 above;
- (d) mock jurors retained by a party in this action, excluding officers,  
directors, or employees of a named party, or owners of more than a  
two-percent interest in a named party, provided, however, that each  
mock juror executes and that counsel for the receiving party shall

1 serve upon opposing counsel an undertaking in the form attached  
2 hereto as Appendix A, pursuant to paragraph 7.

- 3 (e) authors or drafters of the documents or information;
- 4 (f) translators of foreign language documents or foreign language  
5 testimony retained to provide translations of ATTORNEYS' EYES  
6 ONLY or CONFIDENTIAL documents or information; and
- 7 (g) third parties, who are not affiliates of or employed by one of the  
8 parties, but are specifically retained to assist the attorneys of record  
9 or a party in copying or computer coding or imaging of documents.

10 The parties agree that any disclosure under this paragraph shall not be deemed to waive any  
11 attorney-client privilege or work product immunity that may exist.

12 9. Disclosure of information designated as CONFIDENTIAL, including summaries  
13 thereof, shall be limited to (a) the persons and entities identified in paragraph 8; (b) in-house  
14 counsel for the parties; and (c) employees of a party and their support staff who have agreed on  
15 their own behalf and on behalf of their support staff to be bound by the provisions of the  
16 undertaking set forth in the accompanying Appendix A, pursuant to paragraph 7 above. In the  
17 event that an employee identified under the preceding paragraph is no longer employed by a party  
18 to this action or undergoes a change in position within the party by virtue of which that individual  
19 is no longer performing duties in connection with this action, then that individual shall continue to  
20 be bound by this Protective Order.

21 10. If it becomes necessary for counsel for a party receiving CONFIDENTIAL or  
22 ATTORNEYS' EYES ONLY information to seek the assistance of any other person, other than  
23 those referred to in paragraphs 8 and 9, and to disclose CONFIDENTIAL or ATTORNEYS'  
24 EYES ONLY information to such person in order to properly prepare this litigation for trial, the  
25 following procedures shall be employed:

- 26 (a) Counsel for the receiving party shall notify, in writing, counsel for  
27 the party producing the CONFIDENTIAL or ATTORNEYS'  
28 EYES ONLY information of their desire to disclose such  
CONFIDENTIAL or ATTORNEYS' EYES ONLY information  
and shall identify the person(s) to whom they intend to make  
disclosure;
- (b) If no objection to such disclosure is made by counsel for the  
producing party within ten (10) business days of such notification,

1 counsel for the receiving party shall be free to make such  
2 disclosure to the designated person(s); provided, however, that  
3 counsel for the receiving party shall serve upon opposing counsel,  
4 prior to disclosure, an undertaking in the form attached hereto as  
Appendix A, whereby such person agrees to comply with and be  
bound by this Protective Order.

5 (c) If the producing party objects to such disclosure, no disclosure  
6 shall be made. Any party may bring before the Court the question  
7 of whether the particular CONFIDENTIAL or ATTORNEYS'  
8 EYES ONLY information can be disclosed to the designated  
person(s). In the resolution of such matter, the producing party  
shall have the burden of establishing before the Court the reasons  
for denying disclosure to the designated person(s).

9 11. If, through inadvertence, a producing party provides any information pursuant to  
10 this litigation without marking the information as CONFIDENTIAL or ATTORNEYS' EYES  
11 ONLY information, the producing party may subsequently inform the receiving party of the  
12 CONFIDENTIAL or ATTORNEYS' EYES ONLY nature of the disclosed information, and the  
13 receiving party shall treat the disclosed information as CONFIDENTIAL or ATTORNEYS'  
14 EYES ONLY information upon receipt of written notice from the producing party, to the extent  
15 the receiving party has not already disclosed this information.

16 12. If documents or information that are subject to a claim of privilege or the attorney  
17 work product doctrine are produced or disclosed in this action through inadvertence, mistake or  
18 other error, such documents and information may later be designated "ATTORNEY CLIENT  
19 PRIVILEGED" or "ATTORNEY WORK PRODUCT" if such designation is made promptly upon  
20 discovery by the disclosing / producing party of the mistaken disclosure or production. In the  
21 event such designation is made, no waiver of the privilege or the attorney work product doctrine  
22 shall be deemed to have occurred. Upon such designation, the receiving attorney shall promptly  
23 make best efforts to collect all copies of the documents and information in question and return  
24 such information and documents to the producing party.

25 13. The restrictions set forth in this Order will not apply to information which is known  
26 to the receiving party or the public before the date of its transmission to the receiving party, or  
27 which becomes known to the public after the date of its transmission to the receiving party,  
28 provided that such information does not become publicly known by any act or omission of the

1 receiving party, its employees, or agents which would be in violation of this order. If such public  
2 information is designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY, the receiving  
3 party must inform the producing party of the pertinent circumstances before the restrictions of this  
4 order will be inapplicable.

5 14. No person or party shall directly or indirectly utilize or disclose any  
6 CONFIDENTIAL or ATTORNEYS' EYES ONLY information obtained pursuant to pretrial  
7 discovery in this action, except for the purpose of this action only and in accordance with this and  
8 any further order issued by the Court.

9 15. Acceptance by a party of any information, document, or thing designated as  
10 CONFIDENTIAL or ATTORNEYS' EYES ONLY shall not constitute a concession that the  
11 information, document or thing is confidential. Either party may contest a claim of  
12 confidentiality. If the receiving party disagrees with the designation and marking by any  
13 producing party of any material as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY," then  
14 the parties shall first try to resolve such disputes on an informal basis. If agreement cannot be  
15 reached between counsel, then such dispute may be presented to the Court by either party by  
16 motion or otherwise. In the resolution of such matter, the party asserting confidentiality shall have  
17 the burden of establishing before the Court the confidentiality of the information, document, or  
18 thing.

19 16. This Protective Order shall be without prejudice to the right of any party to oppose  
20 production of any information on grounds other than confidentiality.

21 17. Both parties agree that only final versions of expert studies, opinions and/or  
22 reports, and the data and results thereof, shall be disclosed to the other party pursuant to this  
23 Protective Order. All preliminary drafts of such documents and communications with attorneys  
24 relating to or referring to such documents shall not be discoverable.

25 18. This Protective Order shall not prevent any party from applying to the Court for  
26 relief therefrom, or from applying to the Court for further or additional protective orders, or from  
27 agreeing among themselves to modify or vacate this Protective Order, subject to the approval of  
28 the Court.

1           19. At the conclusion of this action, including any appeals, all CONFIDENTIAL and  
2 ATTORNEYS' EYES ONLY information furnished pursuant to this Protective Order, and all  
3 copies thereof, shall be returned to the producing attorneys of record, or, at the producing party's  
4 option, destroyed by counsel for the receiving party. The provisions of this Protective Order  
5 insofar as they restrict the disclosure, communication of, and use of, confidential and attorneys'  
6 eyes only information produced hereunder shall continue to be binding after the conclusion of this  
7 action. Provided, however, nothing in this Order shall prevent trial counsel from retaining a  
8 complete set of pleadings, depositions, deposition and trial exhibits and work product which  
9 contain confidential information subject to a CONFIDENTIAL and ATTORNEYS' EYES ONLY  
10 designation after final conclusion of this litigation.

11           20. If discovery is sought of a person not a party to this action ("non-party") requiring  
12 disclosure of such non-party's CONFIDENTIAL or ATTORNEYS' EYES ONLY information,  
13 the CONFIDENTIAL or ATTORNEYS' EYES ONLY information disclosed by such non-party  
14 will be accorded the same protection as the parties' CONFIDENTIAL or ATTORNEYS' EYES  
15 ONLY information, and will be subject to the same procedures as those governing disclosure of  
16 the parties' CONFIDENTIAL or ATTORNEYS' EYES ONLY information pursuant to this  
17 Stipulated Protective Order by agreeing in writing to produce documents pursuant to this  
18 Protective Order.

19           21. Nothing in this protective order shall bar or otherwise restrict any attorney herein  
20 from rendering advice to his client with respect to this litigation and in the course thereof, relying  
21 upon the attorney's examination of confidential information; provided, however, that in rendering  
22 such advice and in otherwise communicating with his client, the attorney shall not disclose any  
23 confidential information.

24           22. This Protective Order may be amended by the agreement of counsel for the parties  
25 in the form of a stipulation, subject to order of Court. Any party for good cause may apply to the  
26 Court for a modification of this Protective Order. This Protective Order shall remain in full force  
27 and effect after the termination of this litigation, or until canceled or otherwise modified by the  
28 order of this Court.

1 Dated: February 2, 2007

FISH & RICHARDSON P.C.

2  
3 By: /s/ David J. Miclean

4 David J. Miclean

Lisa M. Martens

5 Attorneys for Plaintiff

6 APPLE COMPUTER, INC.

7  
8 Dated: February 2, 2007

WORKMAN NYDEGGER

9  
10 By: /s/ Robert A. Aycock

11 Charles J. Veverka

Robert A. Aycock

12 Mark W. Ford

13 Attorneys for Defendant

14 PODFITNESS, INC.

15 **DECLARATION OF CONSENT**

16 Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under  
17 penalty of perjury that concurrence in the filing of this document has been obtained from Robert  
18 A. Aycock.

19  
20 Dated: February 2, 2007

FISH & RICHARDSON P.C.

21  
22 By: /s/ David J. Miclean

23 David J. Miclean

Lisa M. Martens

24 Attorneys for Plaintiff

25 APPLE COMPUTER, INC.

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**ORDER**

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Honorable Sandra Brown Armstrong  
Judge Of The United States District Court

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
(OAKLAND) DIVISION

APPLE COMPUTER, INC.,

Plaintiff,

v.

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

Defendants.

Case No. C 06-5805 SBA

**CONFIDENTIALITY UNDERTAKING  
RE: STIPULATED PROTECTIVE  
ORDER**

Hon. Sandra B. Armstrong

I, \_\_\_\_\_ declare that:

My address is \_\_\_\_\_

My present employer is \_\_\_\_\_

I have read and reviewed in its entirety the Stipulated Protective Order (“Protective Order”) entered in the above captioned action. I agree to be bound by and comply with the terms of the Protective Order, and not to disseminate or disclose to any person, entity, party or agency for any reason, except in accordance with the terms of the Protective Order, any information or materials designated “Confidential” or “Attorneys Eyes Only” pursuant to the terms of the Protective Order, regardless of the form in which I obtain access to such information or materials. I further submit myself to the jurisdiction of this Court for purposes of enforcement of the terms of the Protective Order.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name)