

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

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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.
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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
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