

1 David J. Miclean (#115098/miclean@fr.com)  
 FISH & RICHARDSON P.C.  
 2 500 Arguello Street, Suite 500  
 Redwood City, California 94063  
 3 Telephone: (650) 839-5070  
 Facsimile: (650) 839-5071

4 Lisa M. Martens (#195824/martens@fr.com)  
 5 Andrew M. Abrams (#229698/abrams@fr.com)  
 FISH & RICHARDSON P.C.  
 6 12390 El Camino Real  
 San Diego, California 92130  
 7 Telephone: (858) 678-5070  
 Facsimile: (858) 678-5099

8 Attorneys for Plaintiff  
 9 APPLE COMPUTER, INC.

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 (OAKLAND DIVISION)

14 APPLE COMPUTER, INC.,

Case No. C 06-5805 SBA

15 Plaintiff,

16 v.

**DECLARATION OF ANDREW M. ABRAMS  
 IN SUPPORT OF PLAINTIFF APPLE  
 COMPUTER, INC.'S OPPOSITION TO  
 DEFENDANT'S MOTION TO STAY**

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

18 Defendants.

Date: May 8, 2007  
 Time: 1:00 pm  
 Courtroom: 3, 3rd Floor  
 Judge: Hon. Sandra B. Armstrong

21 I, Andrew M. Abrams, declare under penalty of perjury that the following statements are  
 22 true and correct:

23 1. I am an associate of the San Diego office of the law firm Fish & Richardson P.C.,  
 24 counsel for the plaintiff, Apple Computer, Inc. ("Apple").

25 2. Except for those matters set forth on information and belief, I make this declaration  
 26 of my own knowledge and could and would competently testify as to the matters set forth below if  
 27

1 called upon to do so. As for the matters set forth on information and belief, I have been informed  
2 that they are true and, based upon such information, I believe them to be true.

3 3. A true and correct copy of Apple's Complaint is attached hereto as Exhibit A.

4 4. Defendant posted 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 5. Defendant ran the following full-page advertisement in the Wall Street Journal on  
19 March 16, 2006:

20 Dear Steve Jobs,  
21 Thanks for the IPOD@.  
22 Best,  
23 Jeff Hays

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

26 6. True and correct copies of Defendant's "silhouette" advertisements are attached  
27 hereto as Exhibit B.

28 7. On information and belief, Defendant used a digital copy of Apple's Earbud Trade  
Dress and merely removed the "r", and revised the dots to create its corporate logo.

8. Defendant has copied and prominently displayed Apple's registered IPOD mark  
throughout its *www.podfitness.com* website, including in the tagline: "Put a Personal Trainer right

1 on your IPOD®,” and the caption: “Customized IPOD Workouts” (although Defendant removed  
2 both phrases from its home page after Apple filed this lawsuit). Defendant repeatedly has  
3 displayed conspicuous photos of the IPOD product on the site, and has prominently featured  
4 images of individuals exercising while wearing Apple’s Earbud Trade Dress. On information and  
5 belief, Defendant has directly copied images of the IPOD player from Apple’s website at  
6 *www.apple.com* to use on its own *www.podfitness.com* website.

7 9. Defendant has used Apple’s registered IPOD mark in the metatags of each page on  
8 its *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”; and “IPOD trainer.”

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

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

17 12. On information and belief, Defendant has adopted and used in commerce, without  
18 authorization from Apple, certain aspects of Apple’s “SHUFFLE” logo (Registration No.  
19 3,067,950) and MADE FOR IPOD logo (Application Serial No. 78/689,534).

20 13. On information and belief, Defendant’s Podfitness services entirely depend on  
21 Apple’s proprietary ITUNES software to store, manage, play, and control the audio content, and  
22 also to encode the mixed media into MPEG-4 format.

23 14. A true and correct copy of John M. Murphy, “Playing the Numbers: A Quantitative  
24 Look at Section 2(d) Cases Before The Trademark Trial and Appeal Board,” 94 TMR 800 (2004),  
25 is attached hereto as Exhibit C.

26 15. This Court set a jury trial for this matter to begin on June 23, 2008 for an estimated  
27 5 days.

28

1           16.    According to the records available on the website for the United States Patent and  
2 Trademark Office, *www.uspto.gov*, there are currently seventeen pending Trademark Trial and  
3 Appeal Board proceedings involving Apple’s opposition of applications for “POD”-formative  
4 trademarks.

5           I declare under penalty of perjury under the laws of the United States of America that the  
6 foregoing is true and correct. Executed at San Diego, California this 17<sup>th</sup> day of April, 2007.

7  
8   /s/ Andrew M. Abrams  
9   Andrew M. Abrams

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

I am employed in the County of San Diego. My business address is Fish & Richardson P.C., 12390 El Camino Real, San Diego, California 92130. 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 April 17, 2007, I caused a copy of the following document(s):

**DECLARATION OF ANDREW M. ABRAMS IN SUPPORT OF PLAINTIFF APPLE COMPUTER, INC.'S OPPOSITION TO DEFENDANT'S MOTION TO STAY**


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:

Robert E. Aycock	Attorneys For Defendant
Brett I. Johnson	PODFITNESS, INC.
Mark W. Ford	
C.J. Veverka	
Workman Nydegger	
1000 Eagle Gate Tower	
60 East South Utah	
Salt Lake City, UT 84111	
Telephone: (801) 533-9800	
Facsimile: (801) 328-1707	

- MAIL:** Such correspondence was deposited, postage fully paid, with the United States Postal Service on the same day in the ordinary course of business.
- FEDERAL EXPRESS:** Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express.

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 April 17, 2007, at San Diego, California.

  
 \_\_\_\_\_  
 Nicole C. Pino

10727292.doc