

# **EXHIBIT A**

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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 (SAN FRANCISCO DIVISION)

SBA  
5805

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

Case No.

**COMPLAINT FOR:**

1. Trademark Infringement in Violation of 15 U.S.C. § 1114(1)
2. Trademark Infringement, Unfair Competition, and False Designation of Origin in Violation of 15 U.S.C. § 1125(a)
3. Trade Dress Infringement in Violation of 15 U.S.C. § 1125(a)
4. Trademark Dilution in Violation of 15 U.S.C. § 1125(c)
5. Trademark Infringement in Violation of Cal. Bus. & Prof. Code § 14335 *et seq.*
6. Trademark Dilution in Violation of Cal. Bus. & Prof. Code § 14330
7. Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*
8. Untrue and Misleading Advertising in Violation of Cal. Bus. & Prof. Code §§ 17500 and 17535

**JURY TRIAL DEMANDED**

1 Plaintiff APPLE COMPUTER, INC. hereby states and alleges as follows:

2 NATURE OF THE ACTION

3 1. This action seeks permanent injunctive relief and damages against Defendant's willful  
4 infringement and dilution of Plaintiff's famous trademark **IPOD**, under the Lanham Trademark  
5 Act of 1946, as amended, Title 15, United States Code, § 1051 et seq. (the "Lanham Act"), and  
6 for infringement, dilution and unfair competition under California Business & Professions Code  
7 §§14330, 14335, 17200, 17500 and 17535.

8 2. APPLE COMPUTER, INC. ("Apple") is a corporation organized under the laws of  
9 Delaware, with a business address at 1 Infinite Loop, Cupertino, California, 95014. Apple is one  
10 of the world's leading computer technology companies and the creator of the enormously  
11 successful portable handheld media player offered and sold under the trademark **IPOD**. Apple's  
12 worldwide annual sales in 2005 were US\$13.9 billion.

13 3. On information and belief, defendant PODFITNESS, INC. ("Defendant") is a  
14 corporation organized under the laws of Nevada, with a business address at 3544 East Danish  
15 Road, Sandy, Utah 84093.

16 4. On information and belief, Defendant is in the business of offering goods and services  
17 that involve the use of Apple's ITUNES proprietary digital media player application to create  
18 customized digital audio files. Such files, which feature music and instructional advice from  
19 professional fitness trainers, are designed to be played on the consumer's portable media player,  
20 particularly the **IPOD** player, to facilitate his or her exercise routine. Defendant promotes its  
21 products and services on the Internet at <http://www.podfitness.com> under the trade name  
22 PODFITNESS.COM and uses the trademark and service mark PODFITNESS, and other similar  
23 POD-formative marks, detailed below, in connection with its goods and services. Defendant's  
24 trade name and marks are highly similar to and confusingly similar to Apple's famous trademarks  
25 as they are used in the marketplace, and Defendant has intentionally sought to imply an  
26 association with Apple in its marketing and advertising. Unless Defendant is enjoined from  
27 continuing to use marks confusingly similar to Apple's famous **IPOD** mark, and any other  
28 confusing signs or indicia, to promote its goods and services, the **IPOD** mark will continue to be

1 infringed and diluted, thereby destroying the distinctive quality that Apple has developed over the  
2 years, to the detriment of Apple and the public.

3 **JURISDICTION AND VENUE**

4 5. This is a civil action arising under the Lanham Act, Title 15, United States Code,  
5 §§1114, 1125(a), (c) and (d) *et seq.* and under the common and statutory laws of California. This  
6 Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), §  
7 1338 (trademark and unfair competition), and § 1367 (supplemental jurisdiction).

8 6. Personal jurisdiction over the defendant is vested and venue is proper pursuant to 28  
9 U.S.C. § 1391 in the United States District Court for the Northern District of California because a  
10 substantial part of the events giving rise to the claims herein occurred in this District, and  
11 Defendant owns and operates an interactive website that displays and promotes the infringing  
12 marks and attempts to establish communication on-line with parties who are interested in  
13 Defendant's goods and services, including parties in this District. On information and belief,  
14 Defendant solicits and has done business using Apple's marks, or marks infringing Apple's marks  
15 in this State with customers located within this State and in this District and thereby purposefully  
16 availed itself of the privilege of doing business in this State and in this District. The claims  
17 alleged herein arise out of or are related to the defendant's forum-related activities and the  
18 exercise of jurisdiction herein is otherwise reasonable. Personal jurisdiction is also proper over  
19 the Defendant in that the intentional and wrongful conduct described herein was directed at this  
20 District and at Apple, whom Defendant knew to be a resident of this District, and who is a resident  
21 of this State, and who suffered damage in this District as a result of Defendant's intentional  
22 conduct.

23 7. Venue is proper in the United States District Court for the Northern District of  
24 California pursuant to 28 U.S.C. §§1391(b) and (c) as the claims arise in this District and  
25 Defendant, a corporation, is subject to personal jurisdiction in this District.

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28

**BACKGROUND**

**Apple's Valuable Trademark Rights**

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3 8. In addition to its position as one of the world's most successful and innovative  
4 computer technology companies, Apple has spearheaded the digital music revolution through its  
5 **IPOD** portable handheld media players and its ITUNES on-line music store.

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

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

19 11. On information and belief, consumers and industry publications have adopted and  
20 have used in the marketplace the term "POD" as slang for the mark **IPOD**, to refer to Apple's  
21 **IPOD** player.

22 12. The **IPOD** player is comprised of a portable and handheld digital electronic device  
23 and integrated software for recording, organizing, transmitting, manipulating, and reviewing text,  
24 audio and video files. The **IPOD** player is promoted and sold for a variety of uses, including  
25 entertainment, education, and exercise.

26 13. Every **IPOD** player is packaged with Apple's stylized and unique white earphones,  
27 commonly called earbuds. Apple's distinctive earbuds consist of white circular ear speakers with  
28 a gray rim, which are attached to a white cylinder of molded plastic covering the white wire.

1 Apple's earbuds have been prominently displayed in its advertising for the **IPOD** player, and,  
2 most famously, are featured in Apple's popular silhouette advertising campaigns. As a result of  
3 this well-known advertising campaign and the success of the **IPOD** products, the distinctive white  
4 earbuds have become associated with Apple and its **IPOD** players. Such earbuds shall be referred  
5 to hereafter as the "Earbud Trade Dress."

6 14. Since their introduction in October 2001, Apple has continuously and extensively  
7 promoted, offered and sold its **IPOD** players, and related goods and services, in interstate  
8 commerce under the **IPOD** mark. The **IPOD** players are available in retail stores and on-line at  
9 various websites, including The Apple Store at the URL <http://store.apple.com>.

10 15. On October 18, 2001, Apple filed United States Trademark Application Serial No.  
11 78/089,144 for the **IPOD** mark. On May 9, 2006, the United States Patent and Trademark Office  
12 issued Registration No. 3,089,360 to Apple for **IPOD** for "portable and handheld digital electronic  
13 devices for recording, organizing, transmitting, manipulating, and reviewing text, data, and audio  
14 files; computer software for use in organizing, transmitting, manipulating, and reviewing text,  
15 data, and audio files on portable and handheld digital electronic device." A true and correct copy  
16 of the USPTO online record for Registration No. 3,089,360 is attached hereto as Exhibit A.

17 16. On October 18, 2001, Apple filed United States Trademark Application Serial No.  
18 75/982,871 for **IPOD**. On April 27, 2004, the United States Patent and Trademark Office issued  
19 Registration No. 2,835,698 to Apple for **IPOD** for "portable and handheld digital electronic  
20 devices for recording, organizing, transmitting, manipulating, and reviewing audio files; computer  
21 software for use in organizing, transmitting, manipulating, and reviewing audio files on portable  
22 and handheld digital electronic devices." A true and correct copy of the USPTO online record for  
23 Registration No. 3,089,360 is attached hereto as Exhibit B.

24 17. On March 29, 2005, Joseph N. Grasso assigned the entire interest in Registration No.  
25 2,781,793 to Apple for **IPOD** for "public Internet kiosk enclosure containing computer hardware."  
26 A true and correct copy of the USPTO online record for Registration No. 3,089,360 is attached  
27 hereto as Exhibit C.

28 18. On November 23, 2004, Apple filed United States Trademark Application Serial No.

1 78/521,891 for **IPOD** for “printed materials and publications, namely, books, magazines,  
2 newsletters, brochures, booklets, pamphlets, manuals, journals, leaflets, greeting cards, and  
3 catalogues all relating to computer software, computer hardware, consumer electronics, digital  
4 technology, telecommunications, on-line retailing, entertainment, music, movies and video, and  
5 multimedia apparatus and instruments; pens and pencils, clipboards, posters, memo pads,  
6 binders.” This application is based on Application No. 3957768 for **IPOD** in the European Union,  
7 and received a priority filing date of July 28, 2004, under Section 44(d) of the Lanham Act. A true  
8 and correct copy of the USPTO online record for this application is attached hereto as Exhibit D.

9 19. On December 14, 2004, Apple filed United States Trademark Application Serial No.  
10 78/532,252 for **IPOD** for “Educational services in the nature of classes and training services  
11 offered in-person and over computer networks in the fields of K-12 education, university-level  
12 subjects, topics of general interest, and computer hardware and software applications;  
13 entertainment services in the nature of musical, video, audio-video, and textual materials, namely  
14 books, plays, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of  
15 sporting and cultural activities and a wide range of topics of general interest offered in-person and  
16 distributed over computer networks; providing electronic publications for browsing and  
17 downloading over computer networks, namely books, pamphlets, brochures, newsletters, journals,  
18 and magazines, on the subjects of computer hardware and software applications and a wide range  
19 of topics of general interest; editing of audio-tapes; editing of video-tapes; editing of written text;  
20 editing of photographic images; videotape editing; digital imaging services; providing  
21 information, advice and consultation services relating to all the aforesaid.” This application is  
22 based on Application No. 3957768 for **IPOD** in the European Union, and received a priority filing  
23 date of July 28, 2004, under Section 44(d) of the Lanham Act. A true and correct copy of the  
24 USPTO online record for this application is attached hereto as Exhibit E.

25 20. On December 21, 2005, Apple filed United States Trademark Application Serial No.  
26 78/778,627 for **IPOD NANO** for “portable and handheld digital electronic devices for recording,  
27 organizing, transmitting, manipulating, and reviewing text, data, and audio files; computer  
28 software for use in organizing, transmitting, manipulating, and reviewing text, data, and audio

1 files on portable and handheld digital electronic devices.” A true and correct copy of the USPTO  
2 online record for this application is attached hereto as Exhibit F.

3 21. On June 18, 2005, Apple filed United States Trademark Application Serial No.  
4 78/653,661 for **IPOD** for “a full line of electronic and mechanical accessories for portable and  
5 handheld digital electronic devices for recording, organizing, transmitting, manipulating, and  
6 reviewing text, data, audio and video files; electronic docking stations; stands specially designed  
7 for holding portable and handheld digital electronic devices; battery chargers; battery packs;  
8 electrical connectors, wires, cables, and adaptors; wired and wireless remote controls for portable  
9 and handheld digital electronic devices; headphones and earphones; stereo amplifier and speaker  
10 base stations; automobile stereo adapters; audio recorders; radio receivers; radio transmitters;  
11 image scanners; video viewers, namely video monitors for portable and handheld digital electronic  
12 devices; and, electronic memory card readers; a full line of computer software for portable and  
13 handheld digital electronic devices for recording, organizing, transmitting, manipulating, and  
14 reviewing text, data, audio, image, and video files; computer application software for recording  
15 and organizing calendars and schedules, to-do lists, and contact information; computer game  
16 software; and, computer software for clock and alarm clock functionality; carrying cases, sacks,  
17 and bags, all for use with portable and handheld digital electronic devices for recording,  
18 organizing, transmitting, manipulating, and reviewing text, data, audio, image, and video files.” A  
19 true and correct copy of the USPTO online record for this application is attached hereto as Exhibit  
20 G.

21 22. On August 10, 2005, Apple filed United States Trademark Application Serial No.  
22 78/689,534 for **MADE FOR IPOD & Design** for “a full line of electronic and mechanical  
23 accessories for portable and handheld digital electronic devices for recording, organizing,  
24 transmitting, manipulating, and reviewing text, data, audio and video files; electronic docking  
25 stations; stands specially designed for holding portable and handheld digital electronic devices;  
26 battery chargers; battery packs; electrical connectors, wires, cables, and adaptors; wired and  
27 wireless remote controls for portable and handheld digital electronic devices; headphones and  
28 earphones; stereo amplifier and speaker base stations; automobile stereo adapters; audio recorders;



1 radio receivers; radio transmitters; image scanners; video viewers, namely video monitors for  
2 portable and handheld digital electronic devices; and, electronic memory card readers; a full line  
3 of computer software for portable and handheld digital electronic devices for recording,  
4 organizing, transmitting, manipulating, and reviewing text, data, audio, image, and video files;  
5 computer application software for recording and organizing calendars and schedules, to-do lists,  
6 and contact information; computer game software; and, computer software for clock and alarm  
7 clock functionality; carrying cases, sacks, and bags, all for use with portable and handheld digital  
8 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,  
9 audio, image, and video files.” A true and correct copy of the USPTO online record for this  
10 application is attached hereto as Exhibit H.

11 23. On April 11, 2005, Apple filed United States Trademark Application Serial No.  
12 78/606,357 for **IPOD SOCKS** for “Cases and bags specifically adapted for carrying computers  
13 and consumer electronics, namely, portable and handheld digital electronic devices for recording,  
14 organizing, transmitting, manipulating, and reviewing text, data, audio and video files.” This  
15 application is based on Registration No. 4071271 for **IPOD SOCKS** in the European Union, and  
16 received a priority filing date of October 12, 2004, under Section 44(d) of the Lanham Act. A true  
17 and correct copy of the USPTO online record for this application is attached hereto as Exhibit I.

18 24. On March 9, 2006, Apple filed United States Trademark Application Serial No.  
19 78/833,929 for **IPOD HI-FI** for “speakers; sound systems comprising remote controls, amplifiers,  
20 loudspeakers and components thereof; apparatus for reproduction of sound; apparatus for  
21 connecting and charging portable and handheld digital electronic devices for recording,  
22 organizing, transmitting, manipulating, and reviewing audio, video and other digital content; parts  
23 and fittings for all the aforesaid goods.” This application is based on Application No. 300497133  
24 for **IPOD HI-FI** in Hong Kong, and received a priority filing date of September 20, 2005, under  
25 Section 44(d) of the Lanham Act. A true and correct copy of the USPTO online record for this  
26 application is attached hereto as Exhibit J.

27 25. On June 18, 2005, Apple filed United States Trademark Application Serial No.  
28 78/653,667 for **IPOD** for “full line of holders, straps, armbands, and clips for portable and

1 handheld digital electronic devices for recording, organizing, transmitting, manipulating, and  
2 reviewing text, data, audio, image, and video files; lanyards for portable and handheld digital  
3 electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data,  
4 audio, image, and video files.” A true and correct copy of the USPTO online record for this  
5 application is attached hereto as Exhibit K.

6 26. On June 18, 2005, Apple filed United States Trademark Application Serial No.  
7 78/653,669 for **IPOD** for “full line of clothing, footwear, and headwear.” A true and correct copy  
8 of the USPTO online record for this application is attached hereto as Exhibit L.

9 27. On November 23, 2004, Apple filed United States Trademark Application Serial No.  
10 78/521,796 for **IPOD** for “Retail store services and retail store services provided via  
11 communications networks featuring computers, computer software, computer peripherals and  
12 consumer electronics, and pre-recorded music, audio-visual and music-related products; product  
13 demonstrations provided in-store and via communications networks; information and consultation  
14 in connection with all of the foregoing; computerized data storage and retrieval services for digital  
15 music, photographs, and audio-visual and text works; information and consultation in connection  
16 therewith.” This application is based on Application No. 3957768 for IPOD in the European  
17 Union, and received a priority filing date of July 28, 2004, under Section 44(d) of the Lanham Act.  
18 A true and correct copy of the USPTO online record for this application is attached hereto as  
19 Exhibit M.

20 28. On July 29, 2004, Apple filed United States Trademark Application Serial No.  
21 78/459,101 for the **POD** mark for “portable and handheld digital electronic devices for recording,  
22 organizing, transmitting, manipulating, and reviewing audio files, and peripherals for use  
23 therewith; computer software for use in organizing, transmitting, manipulating, and reviewing  
24 audio files on portable and handheld digital electronic devices.” This application is based on  
25 Section 44(e) of the Lanham Act, and claims a priority filing date of January 30, 2004 in reliance  
26 on Registration No. 3634623 for **POD** in the European Union. A true and correct copy of the  
27 USPTO online record for this application is attached hereto as Exhibit N.

28 29. Apple has used and is using its **IPOD** mark in commerce on and in connection with

1 offering and selling its portable handheld media players and associated goods and services  
2 continuously since October 2001. On information and belief, the **POD** mark has been used by  
3 consumers and industry publications as a slang term for the **IPOD** mark and product.

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

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

#### 18 The Fame of Apple's Trademarks

19 32. In the almost five years that Apple has been continuously using the **IPOD** mark in  
20 interstate commerce, it has spent hundreds of millions of dollars advertising and promoting its  
21 goods and services under the **IPOD** mark in a variety of media, including but not limited to  
22 television, radio, a wide variety of general circulation and specialized print media, billboards,  
23 trade shows and the Internet. The goods and services offered by Apple under the **IPOD** mark  
24 have been the subject of many thousands of articles in general circulation newspapers and  
25 magazines, as well as radio, television and Internet broadcasts.

26 33. By virtue of the long, continuous and exclusive use by Apple of the **IPOD** mark and  
27 the extensive and costly national and international marketing efforts and repeated association of  
28 Apple's goods and services with the **IPOD** mark, Apple's mark has become famous all over the

1 world. As a result, the consuming public in California and nationwide uses the **IPOD** mark to  
2 identify Apple's goods and services, and associates the mark with Apple exclusively. Because of  
3 the consistent quality of Apple's goods and services marketed under and in association with the  
4 **IPOD** mark, Apple has established considerable good will and reputation with respect to its goods  
5 and services.

6 34. Apple's use of the **IPOD** mark has been exclusive and continuous since long prior to  
7 the date of Defendant's first use of its mark. Furthermore, Apple's **IPOD** mark became famous  
8 long before the date of Defendant's first use of the infringing POD-formative marks referenced  
9 herein. The **IPOD** mark is well known and is an asset of immense value to Apple.

#### 10 Defendant's Wrongful Conduct

11 35. On information and belief, Defendant PodFitness launched its business in March 2006  
12 as a direct result of the popularity of the **IPOD** players. On information and belief, in order to  
13 trade on the good will established by Apple in its **IPOD** mark, Defendant intentionally chose the  
14 trade name PODFITNESS to deceive and mislead consumers into believing that Defendant's  
15 business is somehow affiliated with Apple and Apple's products. Defendant also engaged in a  
16 variety of illegal activities, described below, all for the purpose of creating confusion as to the  
17 source of its goods and services in order to profit from the success of the **IPOD** mark.

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

27 37. Defendant's PODFITNESS product is directly competitive with goods and services  
28 offered by Apple under its **IPOD** mark, including, but not limited to Nike +**IPOD**.

1 38. Defendant has also adopted the following logo (on the left) (herein referred to as the  
2 “PODFITNESS.COM Logo”) for its products and services, which it promotes on its website and  
3 which incorporates an image of white and grey earbuds that are strikingly similar to the Earbud  
4 Trade Dress:



8  
9 The Earbud Trade Dress is depicted above on the right. A captured image of the Defendant’s  
10 website showing use of the PODFITNESS.COM Logo in commerce is attached hereto as Exhibit  
11 O. A printout of Apple’s website showing use of the Earbud Trade Dress in commerce is attached  
12 hereto as Exhibit P.

13 39. Defendant has also copied and prominently displays Apple’s registered **IPOD** mark  
14 throughout its *www.podfitness.com* website and particularly on the homepage, including in the  
15 tagline: “Put a Personal Trainer right on your IPOD®,” and the bold caption: “Customized IPOD  
16 Workouts” (although Defendant recently removed both phrases from its home page after  
17 communications from Apple). Defendant repeatedly displays conspicuous photos of the **IPOD**  
18 product on the site, and prominently features images of individuals exercising while wearing  
19 Apple’s well-known Earbud Trade Dress. (See Exhibit Q for captured images of Defendant’s  
20 website dated July 27, 2006 and September 20, 2006). In the “Support” section of the website,  
21 Defendant states that “you will need to have [Apple’s] ITUNES 6 installed in order to use the  
22 PodFitness software.”

23 40. On information and belief, Defendant has directly copied images of the **IPOD** player  
24 from Apple’s website at *www.apple.com* to use on its own *www.podfitness.com* website, as shown  
25 in the comparison below. A captured image of Apple’s **IPOD** player from Apple’s website is  
26 depicted below to the right. (See Exhibit R for a full printout from Apple’s website showing  
27 images of its **IPOD** players.) The virtually identical image to the left is taken from Defendant’s  
28 website (see Exhibit Q for captured images from Defendant’s website).

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**1 Get Your Workout**  
Every time you log on, the multi-million-dollar *Podfitness Expert System* builds a new custom workout just for you.

**2 Get Moving**  
Take your iPod wherever you work out: to the gym, at home or on the trail.

**3 Listen Up**  
Your trainer coaches your every movement while you enjoy your own music in the background.

**4 Sound off**  
Your post-workout feedback fine-tunes your next experience, making every session even better than the last.

41. Defendant uses Apple’s registered **IPOD** mark in the metatags of each page on its *www.podfitness.com* website, causing Defendant’s website to appear as a “hit” when a query is conducted through a search engine for the phrase “**IPOD Workout.**”

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

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

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

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

The bottom of the advertisement prominently displayed the white earbuds shown in the **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 A copy of the above-referenced advertisement is attached hereto as Exhibit S.

5 44. It is widely known to the public that Steve Jobs is the CEO of Apple. Neither Steve  
6 Jobs, nor Apple, authorized this use of his name in Defendant’s advertisements for the  
7 PODFITNESS product.

8 45. On information and belief, Defendant used this commercial advertisement for the  
9 purpose of misleading and confusing the public about its association with Apple, and to trade on  
10 the good will, reputation and fame of Apple, its CEO and its **IPOD** player, and its enormous  
11 investment in the **IPOD** mark, and to unjustly enrich itself at the expense of Apple and the public.

12 46. On information and belief, Defendant has entered into an arrangement with the W  
13 Hotels whereby guests at the hotels are offered a free subscription to Defendant’s services. On  
14 information and belief, Defendant has used this commercial opportunity for the purpose of  
15 misleading and confusing the public about its association with Apple.

16 47. On information and belief, Defendant has entered into an arrangement with Marware,  
17 Inc. in which the parties will collaborate to create fitness products and services involving Apple’s  
18 **IPOD** player. In a press release dated September 7, 2006, Jeff Hays, Chief Executive Officer of  
19 PodFitness, is quoted as follows: “Our partnership with Marware brings together the premier iPod  
20 accessory maker and Podfitness, the best way to train with your iPod.” On information and belief,  
21 Defendant has used this commercial opportunity for the purpose of misleading and confusing the  
22 public about its association with Apple.

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

27 49. On November 29, 2005, Defendant filed Application Serial No. 78/762,928 with the  
28 United States Patent and Trademark Office (USPTO) to register the PODFITNESS mark for its



1 products and services in three classes, including the same class of goods for which **IPOD** is  
2 registered, namely:

3 Class 9: Downloadable music, audio programs and audio files; downloadable music  
4 recordings for exercise programs, fitness plans and training systems

5 Class 35: On-line retail store services in the field of music, audio programs and audio files;  
6 on-line retail store services featuring downloadable pre-recorded music; on-line retail store  
7 services in the field of exercise programs, fitness plans and training systems

8 Class 41: Providing an on-line computer database featuring information regarding exercise  
9 programs, fitness plans and training systems; providing an on-line computer database in  
10 the field of music, audio programs and audio files for exercise programs, fitness plans and  
11 training systems; providing digital music from web sites on the Internet; providing digital  
12 music from the Internet

13 (the "PodFitness Goods and Services").

14 50. On December 17, 2005, Defendant filed Application Serial No. 78/775,610 with the  
15 USPTO to register the PODFITNESS.COM Logo mark for the PodFitness Goods and Services.

16 51. On January 9, 2006, Defendant filed Application Serial No. 78/787,637 with the  
17 USPTO to register the PODPOCKET mark for clothing, namely, "blouses; caps; coats; footwear;  
18 gloves; hats; headwear; jackets; jerseys; pants; pullovers; shirts; short-sleeved or long-sleeved t-  
19 shirts; shorts; socks; sweaters; t-shirts; tops; underwear."

20 52. On January 27, 2006, Defendant filed Application Serial No. 78/800,739 with the  
21 USPTO to register the mark PODWORKOUT mark for PodFitness Goods and Services.

22 53. Defendant's marks described in paragraphs 49 and 50 will be referred to herein as the  
23 "Infringing Marks." All of Defendant's above-listed marks in paragraphs 49-52 will be  
24 collectively referred to herein as the "PodFitness Marks."

25 54. Promptly upon learning of Defendant's use of PODFITNESS as a trade name and  
26 trademark, on March 14, 2006, Apple's counsel sent a letter to Jeffrey Hays, Defendant's  
27 president, notifying him that Defendant's use of the PODFITNESS mark and the depiction of  
28 Apple's Earbud Trade Dress as part of the PODFITNESS.COM Logo mark infringed Apple's  
trademark rights and diluted the distinctive quality of Apple's **IPOD** marks. Apple requested that  
Defendant cease its use or intended use of the PodFitness Marks and its plans to launch the  
product, which Defendant's website indicated was scheduled for March 21, 2006. Apple also



1 requested Defendant abandon its pending applications for the PodFitness Marks.

2 55. On March 20, 2006, Apple's counsel called Mr. Hays and put him on notice again of  
3 the unlawfulness of Defendant's actions before it proceeded with its scheduled launch.

4 56. Shortly thereafter, Defendant proceeded to launch its PODFITNESS service despite  
5 notice and knowledge of Apple's concerns.

6 57. Despite repeated efforts, Apple has been unable to obtain Defendant's agreement to  
7 voluntarily cease the infringing and diluting activities, referred to above, and the infringing and  
8 diluting conduct continues today. Defendant's pattern of conduct and its outright refusal to  
9 respect Apple's trademark rights confirms Apple's belief that Defendant deliberately and willfully  
10 selected and is using marks similar to Apple's famous trademarks to mislead and confuse  
11 consumers into believing that Defendant's goods and services are provided, sponsored, or  
12 approved by Apple, and to mislead consumers that Defendant is somehow associated with Apple.  
13 Defendant is improperly trading on Apple's reputation and good will and its enormous investment  
14 in and promotion of the **IPOD** mark, and is diluting the distinctiveness of the **IPOD** mark.

15 58. Apple, the famous **IPOD** mark, and the business of Apple are known to Defendant  
16 and were known to Defendant at the time it adopted the PodFitness Marks and began offering its  
17 goods and services under the Infringing Marks.

18 59. Defendant's first commercial use of the Infringing Marks for its goods and services  
19 occurred much later than Apple's first use of the **IPOD** mark for its goods and services, and well  
20 after Apple's **IPOD** mark had become famous.

21 60. Defendant's trademark applications for the PodFitness Marks were all filed  
22 subsequent to the application date for Apple's **IPOD** registrations and **POD** application.

23 61. On information and belief, Defendant adopted the "POD" portion of its mark to make  
24 a direct reference to Apple's **IPOD** product, with full knowledge that POD is used as a slang term  
25 for **IPOD**.

26 62. The PodFitness Marks are identical or very similar to Apple's marks, the most  
27 prominent element of the PodFitness Marks, "POD," comprising the most prominent element of  
28 Apple's **IPOD** mark. In addition, the dominant element of the PodFitness Marks, "POD," is

1 identical to the “POD” slang term used to refer to the IPOD products.

2 63. Defendant uses, or intends to use, the PodFitness Marks on goods and services that are  
3 identical, or at least highly related, to Apple’s **IPOD** goods and related services.

4 64. Defendant’s promotion and sales of its goods and services under the Infringing Marks  
5 are directed to consumers of Apple’s **IPOD** products and are conducted through the same channels  
6 of trade as are used by Apple to promote and sell its **IPOD** goods and related services.

7 65. Defendant’s use of the Infringing Marks and Defendant’s actions described herein are  
8 likely to cause confusion, deception and/or mistake in the marketplace, the relevant industry, and  
9 all channels of trade for Apple’s **IPOD** goods and related services.

10 66. Defendant’s use of the Infringing Marks and Defendant’s actions described herein  
11 cause dilution of the famous **IPOD** mark.

12 67. Defendant’s use of the Infringing Marks and its actions described herein have been,  
13 and continue to be, deliberate, willful, and with disregard to the rights of Apple.

14 68. Defendant’s continuing conduct constitutes an ongoing threat to Apple and the public.  
15 Apple has sustained and will continue to sustain irreparable injury as a result of Defendant’s  
16 conduct, which injury is not compensable by the award of monetary damages. Unless Defendant  
17 is restrained and enjoined from engaging in its infringing and diluting conduct, Apple will  
18 continue to suffer irreparable injury.

19 **FIRST CAUSE OF ACTION**  
20 **(Trademark Infringement – 15 U.S.C. § 1114(1))**

21 69. Apple incorporates herein by reference each and every allegation in the preceding  
22 paragraphs.

23 70. Prior to Defendant’s adoption of the PodFitness Marks and use of the Infringing  
24 Marks, Defendant either had actual notice and knowledge, or constructive notice (pursuant to 15  
25 U.S.C. § 1072), of Apple’s ownership and registrations of the **IPOD** mark.

26 71. On information and belief, Defendant was aware of Apple’s business and its **IPOD**  
27 mark and registrations prior to Defendant’s adoption of the PodFitness Marks and use of the  
28 Infringing Marks in connection with its business.

1           72. On information and belief, Defendant deliberately and willfully used and is using the  
2 Infringing Marks in an attempt to trade on the enormous goodwill, reputation and selling power  
3 established by Apple under the **IPOD** mark, and to create a false impression of association with  
4 Apple.

5           73. On information and belief, Defendant has used the Infringing Marks as trademarks in  
6 interstate commerce, including in this judicial district.

7           74. On information and belief, the goods and services offered and/or sold by Defendant  
8 under the Infringing Marks are moving and will continue to move through the same channels of  
9 trade, and are being offered and/or sold through the same channels of advertising and to the same  
10 consumer groups, as the goods and services that are offered and sold by Apple under the **IPOD**  
11 mark.

12           75. Apple has not consented to Defendant's use of the Infringing Marks.

13           76. Defendant's unauthorized use of term "POD" as a key component of its Infringing  
14 Marks falsely indicates to consumers that Defendant's goods and/or services are in some manner  
15 connected with, sponsored by, affiliated with, or related to Apple, and/or the products and services  
16 of Apple.

17           77. Defendant's unauthorized use of the Infringing Marks is also likely to cause  
18 consumers to be confused as to the source, nature and quality of the goods and/or services that  
19 Defendant is selling in connection with the Infringing Marks.

20           78. Defendant's unauthorized use of the Infringing Marks, as set forth herein, facilitates  
21 the acceptance of Defendant's goods and/or services throughout the marketplace, not based on the  
22 quality of the goods and services provided by Defendant, but on the association that the public is  
23 likely to make with Apple and the reputation and goodwill associated with Apple's goods and  
24 services.

25           79. Defendant's unauthorized use of the Infringing Marks deprives Apple of the ability to  
26 control the quality of the goods and services marketed under the **IPOD** mark, and instead, places  
27 Apple's valuable reputation and goodwill into the hands of Defendant, over whom Apple has no  
28 control.



1 suffered and will continue to suffer irreparable injury to its business reputation and goodwill for  
2 which no adequate remedy exists at law, and has lost sales and profits in an amount not yet fully  
3 ascertained.

4 90. Defendant's conduct complained of herein is malicious, fraudulent, knowing, willful,  
5 and deliberate entitling Apple to an accounting of Defendant's profits, increased damages, and an  
6 award of its attorneys' fees and costs incurred in prosecuting this action under 15 U.S.C. § 1117.

7 **THIRD CAUSE OF ACTION**  
8 **(Trade Dress Infringement - 15 U.S.C. § 1125(a))**

9 91. Apple incorporates herein by reference each and every allegation in the preceding  
10 paragraphs.

11 92. Apple is the owner of common law rights throughout the United States in the Earbud  
12 Trade Dress.

13 93. The Earbud Trade Dress has been prominently displayed in Apple's advertising for  
14 the **IPOD** player, and, most famously, is featured in Apple's popular silhouette advertising  
15 campaigns. As a result of this well-known advertising campaign and the success of the **IPOD**  
16 products, the Earbud Trade Dress has come to be associated exclusively with Apple and its **IPOD**  
17 players. (See Exhibit P).

18 94. The Earbud Trade Dress has become distinctive of Apple's digital music products and  
19 services, and distinguishes Apple's goods and services from those offered by others.

20 95. The Earbud Trade Dress was distinctive long before Defendant began offering its  
21 services on the *podfitness.com* website in connection with the **PODFITNESS.COM** Logo.

22 96. The Earbud Trade Dress is non-functional.

23 97. Defendant's unauthorized use of the **PODFITNESS.COM** Logo, which incorporates  
24 the dominant elements comprising the Earbud Trade Dress, is likely to cause confusion, to cause  
25 mistake, or to deceive as to the source of the goods and services by Defendant, or as to affiliation,  
26 connection, association, sponsorship, or approval of such goods and services.

27 98. Defendant's unauthorized use of the **PODFITNESS.COM** Logo, which incorporates  
28 the dominant elements comprising the Earbud Trade Dress, is likely to cause the public to believe

1 that the goods and services Defendant is offering originate from Apple or are associated with  
2 Apple.

3 99. Defendant's unauthorized use of the PODFITNESS.COM Logo, which incorporates  
4 the dominant elements comprising the Earbud Trade Dress, constitutes a commercial use in  
5 interstate commerce.

6 100. Defendant's unauthorized use of the PODFITNESS.COM Logo, which incorporates  
7 the dominant elements comprising the Earbud Trade Dress, constitutes trade dress infringement in  
8 violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

9 101. As a direct and proximate result of Defendant's infringing conduct, Apple has  
10 suffered and will continue to suffer irreparable injury to its business reputation and goodwill for  
11 which no adequate remedy exists at law, and has lost sales and profits in an amount not yet fully  
12 ascertained.

13 102. Defendant's conduct complained of herein is malicious, fraudulent, knowing, willful,  
14 and deliberate entitling Apple to an accounting of Defendant's profits, increased damages, and an  
15 award of its attorneys' fees and costs incurred in prosecuting this action under 15 U.S.C. § 1117.

16 **FOURTH CAUSE OF ACTION**  
17 **(Trademark Dilution – 15 U.S.C. § 1125(c))**

18 103. Apple incorporates herein by reference each and every allegation in the preceding  
19 paragraphs.

20 104. The **IPOD** mark and product have been and continue to be extensively promoted and  
21 marketed nationwide. As a result, the **IPOD** mark has gained strong national public recognition  
22 and is eligible for protection against dilution as a distinctive and famous mark.

23 105. The **IPOD** mark is well known, is of great value to Apple, is recognized and relied  
24 upon by the trade and the public as identifying Apple as the source of Apple's goods and services,  
25 and serves to distinguish Apple's goods and services from those of others. Apple's use of the  
26 **IPOD** mark has been exclusive and continuous since long prior to the date of Defendant's use of  
27 the Infringing Marks.

28 106. Defendant's use of the Infringing Marks in the advertising and promotion of its

1 goods and/or services dilutes the strength and value of the **IPOD** mark.

2 107. Without injunctive relief, Apple has no means by which to control the continuing  
3 injury to its reputation and goodwill or of the continuing dilution of its trademark. Apple has been  
4 and will continue to suffer irreparable injury for which no adequate remedy exists at law.

5 108. Defendant’s conduct complained of herein is malicious, fraudulent, knowing, willful,  
6 and deliberate entitling Apple to an accounting of Defendant’s profits, increased damages, and an  
7 award of its attorneys’ fees and costs incurred in prosecuting this action under 15 U.S.C. § 1117.

8 **FIFTH CAUSE OF ACTION**  
9 **(Trademark Infringement – Cal. Bus. & Prof. Code §14335 et seq.)**

10 109. Apple incorporates herein by reference each and every allegation in the preceding  
11 paragraphs.

12 110. Defendant engaged in the acts as alleged herein to enhance the commercial value of  
13 its goods or services.

14 111. Defendant’s acts as alleged herein constitute, among other things, unauthorized use  
15 or infringement of Apple’s trademark rights under California Business and Professions Code §§  
16 14335 et seq.

17 112. Unless enjoined, Defendant will continue its infringing conduct.

18 113. As a direct and proximate result of Defendant’s infringing conduct, Apple has  
19 suffered and will continue to suffer irreparable injury to its business reputation and goodwill for  
20 which no adequate remedy exists at law and has lost sales and profits in an amount not yet fully  
21 ascertained.

22 114. Because Defendant’s actions have been committed willfully, maliciously and  
23 intentionally, Apple is entitled to recover Defendant’s profits together with Apple’s damages,  
24 trebled, costs of the action, and reasonable attorneys’ fees pursuant to Cal. Bus & Prof. Code  
25 §§14320, 14330, and 14340.

26 ///  
27 ///  
28 ///







1 124. Without injunctive relief, Apple has no means by which to control Defendant's  
2 deceptive and confusing use and advertising of its marks. Apple is therefore entitled to injunctive  
3 relief prohibiting Defendant from continuing such acts of unfair competition, and appropriate  
4 restitution remedies, pursuant to California Business and Professions Code § 17203.

5 **EIGHTH CAUSE OF ACTION**  
6 **(Untrue and Misleading Advertising -**  
7 **Cal. Bus. & Prof. Code §§ 17500 and 17535)**

8 125. Apple incorporates herein by reference each and every allegation in the preceding  
9 paragraphs.

10 126. Defendant's use of Apple's **IPOD** mark and other marks confusingly similar to  
11 Apple's **IPOD** mark in advertising constitutes advertising done with the intent to directly or  
12 indirectly induce the public to enter into business transactions with Defendant regarding  
13 Defendant's services.

14 127. Defendant's actions have caused, and are likely to continue to cause confusion and  
15 mistake, and to deceive as to the affiliation, connection or association of Defendant and Apple,  
16 and as to the origin, sponsorship, or approval of Defendant's goods and services by Apple and/or  
17 the origin, sponsorship, or approval of Apple's goods and services by Defendant, to Apple's harm.

18 128. In making and disseminating advertising and promotional materials as alleged  
19 herein, Defendant knew, or by the exercise of reasonable care should have known, that the  
20 statements were untrue and/or misleading and so acted in violation of California Business &  
21 Professions Code § 17500 and/or § 17535. Defendant's unlawful actions have caused, and will  
22 continue to cause, irreparable harm to Apple unless enjoined.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, in consideration of the foregoing, Apple respectfully requests that this  
25 Court enter an Order granting the following relief:

- 26 a) For judgment that the **IPOD** and **POD** marks have been and continue to be infringed by  
27 Defendant;
- 28 b) For judgment that the **IPOD** mark has been and continues to be diluted by Defendant;
- c) Permanently enjoining Defendant and each of its agents, employees, servants, officers,

1 directors, successors in interest, heirs, assigns and all persons, firms or corporations, acting  
2 by or under their authority, in active concert or privity or in participation with it, from  
3 using the **IPOD** and **POD** marks or any confusingly similar marks in any way or using any  
4 word, words, phrases, symbols, logos, or any combination of words or symbol that would  
5 create a likelihood of confusion, mistake, or deception therewith, including, without  
6 limitation, the PodFitness Marks, in connection with or in the marketing, offering, selling,  
7 disposing of, licensing, leasing, transferring, displaying, advertising, reproducing,  
8 developing, or manufacturing of Defendant's business, services, and goods;

- 9 d) Permanently enjoining Defendant to recall from all its offices and all others, whether  
10 persons, firms, or corporations, acting by or under their authority, in active concert or  
11 privity or in participation with it, any material containing the **IPOD** or **POD** mark in any  
12 way and any word, words, phrases, symbols, logos, any combination of words or symbols  
13 that would create a likelihood of confusion, mistake and/or deception therewith, including,  
14 without limitation, the PodFitness Marks, in connection with or in the marketing, offering,  
15 selling, disposing of, licensing, leasing, transferring, displaying, advertising, reproducing,  
16 developing, or manufacturing of Defendant's business, goods and services;
- 17 e) Permanently enjoining Defendant, its officers, agents, employees, and all persons acting in  
18 concert with them, from infringing the **IPOD** and **POD** marks and/or engaging in further  
19 such unlawful acts and from reaping any additional commercial advantage from its  
20 misappropriation of the rights of Apple and all affiliated and related companies of Apple in  
21 the **IPOD** and **POD** marks and the registrations of these marks;
- 22 f) Requiring Defendant to destroy, at its sole and exclusive cost, all materials in its  
23 possession or under its control that contain infringements of the **IPOD** and **POD** marks;
- 24 g) Ordering the Director of the United States Patent and Trademark Office to order that  
25 Defendant is not entitled to any trademark registrations for the PodFitness Marks and any  
26 word, words, phrases, symbols, logos, or any combination of words or symbols that would  
27 create a likelihood of confusion, mistake, and/or deception therewith, including, without  
28 limitation, Defendant's Trademark Application Serial Numbers 78/762,928; 78/775,610;

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- 78/800,739; and 78/787,637;
- h) Ordering that the <www.podfitness.com> domain name be transferred to Apple;
- i) For all actual damages sustained by Apple as the result of Defendant's acts of infringement and/or dilution, together with prejudgment interest, according to proof, pursuant to 15 U.S.C. § 1117;
- j) For an accounting of the profits of Defendant resulting from their acts of infringement and/or dilution pursuant to 15 U.S.C. § 1117;
- k) For enhanced damages pursuant to 15 U.S.C. § 1117;
- l) For an award of attorneys' fees pursuant to 15 U.S.C. § 1117 or as otherwise permitted by law;
- m) For Apple's costs of suit, including its reasonable litigation expenses, pursuant to 15 U.S.C. § 1117; and
- n) Granting Apple such additional, other, or further relief as the Court deems proper and just.

**DEMAND FOR JURY TRIAL**

Plaintiff demands trial by jury on all issues so triable.

DATED: September 21, 2006

Respectfully submitted,  
FISH & RICHARDSON P.C.

By:   
 David J. Miclean  
 Lisa M. Martens

Attorneys for Plaintiff  
APPLE COMPUTER, INC.

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