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- 2. Pursuant to Local Rules 7-1 and 7-2 of this Court, if a party seeks certain relief or Court action such as a stay of the case, it must follow the procedures set forth therein, including filing a notice of the motion, setting a date and time of hearing, and submitting a memorandum of points and authorities in support of the motion. Apple opposes Podfitness' counsel Steve Hutchinson's attempt to stay this case via the declaration he filed on September 26, 2007 in connection with the motion to withdraw filed by the Workman Nydegger law firm.
- 3. Mr. Hutchinson has been actively involved with this case since its inception. Mr. Hutchinson actively participated in early settlement negotiations immediately after the complaint was filed on September 21, 2006, he attended and actively participated in the court-ordered mediation on April 18, 2007, and he has regularly communicated directly with Apple's outside counsel regarding this case throughout the litigation. Mr. Hutchinson has long served as the primary contact point and negotiator for Defendant with respect to settlement discussions between the parties.
- 4. After Defendant's outside counsel failed to return multiple messages attempting to meet and confer regarding scheduling the depositions of Defendant's employees, on July 27, 2007 Apple noticed the depositions of Defendant's CEO, Teri Sundh, and its President, Jeff Hays. The depositions were noticed for the dates of September 5-6, 2007. In the approximately two months since Apple issued the notices, Defendant has stated only that the dates are not acceptable, has ignored repeated requests to propose alternate dates, and is now attempting to stay the case in an effort to postpone the depositions for another thirty days. On August 22, 2007 Defendant's outside counsel emailed my firm, stating that they were "still working on coordinating dates for the depositions of Teri Sundh and Jeff Hays that you have noticed for September 5th and 6th." We followed up on September 5, 2007 with another email requesting proposed dates for the depositions. Defendant's outside counsel responded on that day with a promise to be in touch with Podfitness that week to get deposition dates. Since that time, Podfitness' attorneys have has failed to contact us with any proposed dates for the depositions of

Teri Sundh and Jeff Hays which Apple has been trying to schedule for almost three months. Although Apple is willing to participate, and has participated, in settlement discussions with Podfitness, discovery must continue in order that the case management calendar and trial date are preserved. Podfitness already received an elongated case management and trial schedule—Apple initially proposed a trial date in June 2008, while Podfitness requested, and the court ordered, a trial date in November of 2008—and should not be permitted to further delay discovery and resolution of this matter.

- 5. A stay is also unlikely to result in Podfitness being able to retain new outside lawyers. On August 2, 2007, I received an unsolicited telephone call from one of Defendant's creditors, who informed me that Podfitness has failed to pay its employees and creditors for several months. It is presumed that Defendant's failure to pay its legal fees is the primary reason that Defendant's counsel of record in this action now seeks to withdraw, making it unlikely that Mr. Hutchinson will be finding new counsel to represent Podfitness in the next 30 days. Mr. Hutchinson will most likely be required to take over the defense of the action, which he has been involved with from the beginning.
- 6. Further, Mr. Hutchinson personally initiated the latest round of settlement negotiations by contacting our firm on July 3, 2007, and has been the only Podfitness lawyer involved in those discussions over the last almost three months. Our firm has had practically no substantive communications with the Workman Nydegger firm for almost two months.
- 7. The Declaration and request for stay of Mr. Hutchinson, who is the VP of legal affairs for Podfitness, represents merely the latest in a series of attempts by Defendant to delay resolution of this litigation while it continues its infringing and diluting conduct. Defendant also filed a previous motion to stay the litigation, which was rejected by this Court on May 10, 2007.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 27th day of September, 2007, at Redwood City, California.