

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

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 9 Attorneys for Plaintiff  
 APPLE INC.

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

14  
 15 APPLE INC.,  
 16 Plaintiff,  
 17 v.  
 18 PODFITNESS, INC., and DOES 1-100,  
 19 inclusive,  
 20 Defendants.

Case No. C 06-5805 SBA

**COUNTER-DECLARATION OF DAVID J. MICLEAN IN OPPOSITION TO THE DECLARATION OF STEVEN R. HUTCHINSON AND PODFITNESS' REQUEST FOR A TEMPORARY STAY OF THE CASE**

Hon. Sandra B. Armstrong

21  
 22 I, David J. Miclean, declare as follows:

23 1. I am a principal of Fish & Richardson P.C., counsel of record in this action for  
 24 Apple Inc. ("Apple"). I am a member of the Bar of the State of California and am admitted to  
 25 this Court. I have personal knowledge of the matters stated in this declaration and would testify  
 26 truthfully to them if called upon to do so.



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

8 5. A stay is also unlikely to result in Podfitness being able to retain new outside  
9 lawyers. On August 2, 2007, I received an unsolicited telephone call from one of Defendant's  
10 creditors, who informed me that Podfitness has failed to pay its employees and creditors for  
11 several months. It is presumed that Defendant's failure to pay its legal fees is the primary reason  
12 that Defendant's counsel of record in this action now seeks to withdraw, making it unlikely that  
13 Mr. Hutchinson will be finding new counsel to represent Podfitness in the next 30 days. Mr.  
14 Hutchinson will most likely be required to take over the defense of the action, which he has been  
15 involved with from the beginning.

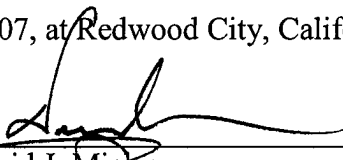
16 6. Further, Mr. Hutchinson personally initiated the latest round of settlement  
17 negotiations by contacting our firm on July 3, 2007, and has been the only Podfitness lawyer  
18 involved in those discussions over the last almost three months. Our firm has had practically no  
19 substantive communications with the Workman Nydegger firm for almost two months.

20 7. The Declaration and request for stay of Mr. Hutchinson, who is the VP of  
21 legal affairs for Podfitness, represents merely the latest in a series of attempts by  
22 Defendant to delay resolution of this litigation while it continues its infringing and  
23 diluting conduct. Defendant also filed a previous motion to stay the litigation, which was  
24 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.



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David J. Miclean

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