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APPLE INC.

10
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.
21

Case No. C 06-5805 SBA

**APPLE'S OPPOSITION TO
PODFITNESS' MOTION TO STAY
PROCEEDINGS FOR THIRTY DAYS**

Date: November 6, 2007

Time: 1:00 PM

Courtroom: 3, 3rd Floor,
Honorable Sandra B. Armstrong

1 The withdrawal of Podfitness' outside counsel does not merit a stay in this already
2 prolonged litigation. Furthermore, Podfitness' failure to comply with its discovery obligations
3 should not be rewarded by granting it a thirty-day stay of these proceedings. Such a stay would
4 allow Podfitness to further delay, among other things, the scheduling of two essential
5 depositions. For these reasons, Apple opposes Podfitness' motion to stay this case.

6 First, the withdrawal of Podfitness' outside counsel does not require a stay of this case.
7 Podfitness' in-house attorney, Steve Hutchinson, is capable of defending this action, as he has
8 been involved in this case from the beginning. [Miclean Decl. ¶ 2.] Mr. Hutchinson actively
9 participated in early settlement negotiations immediately after the complaint was filed on
10 September 21, 2006. *Id.* Mr. Hutchinson attended and actively participated in the court-ordered
11 mediation on April 18, 2007. He has regularly communicated directly with Apple's outside
12 counsel throughout this litigation, serving as the primary contact point and negotiator for
13 Podfitness with respect to settlement discussions between the parties. *Id.* Further, Mr.
14 Hutchinson personally initiated the latest round of settlement negotiations by contacting Apple's
15 outside counsel on July 3, 2007, and has been the only Podfitness lawyer involved in those
16 discussions over the last almost four months. [Miclean Decl. ¶ 8.] Apple's outside counsel has
17 had practically no substantive communications with the Workman Nydegger firm for almost
18 three months. *Id.* Therefore, the withdrawal of Podfitness' outside counsel should have no
19 appreciable effect on Podfitness' ability to litigate this case, and is not a sufficient reason to stay
20 the case for thirty days.

21 A stay is also unlikely to result in Podfitness being able to retain new outside lawyers in
22 light of the withdrawal of its current outside counsel. On August 2, 2007, Apple's outside
23 counsel received an unsolicited telephone call from one of Podfitness' creditors. [Miclean Decl.
24 ¶ 7.] The creditor stated that Podfitness has failed to pay its employees and creditors for several
25 months. *Id.* Indeed, on September 18, 2007, Podfitness' outside counsel, the Workman
26 Nydegger law firm, filed a motion to withdraw. [Miclean Decl. ¶ 6.] It is presumed that
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Podfitness' failure to pay its legal fees is the primary reason that Podfitness' counsel of record in this action now seeks to withdraw, making it unlikely that Podfitness will even be able to find new counsel in the next thirty days. [Miclean Decl. ¶ 7.]

Second, Apple recently offered to stipulate to a thirty-day stay of proceedings if Podfitness would agree to comply with certain of its own existing responsibilities. [Miclean Decl. ¶ 4.] Specifically, Apple requested that Podfitness finally set firm dates for two depositions necessary to keep the discovery process on track. *Id.* As shown by the timeline below, however, Podfitness continues to refuse or ignore even the most reasonable requests:

- July 2007: Podfitness' outside counsel fails to return multiple messages attempting to meet and confer regarding scheduling the depositions of Podfitness' employees.
[Miclean Decl. ¶ 3.]
- July 27, 2007: Apple notices the depositions of Podfitness' CEO, Teri Sundh, and its President, Jeff Hays. The depositions are noticed for the dates of September 5-6, 2007.
[Miclean Decl. ¶ 3.]
- August 22, 2007: Podfitness' outside counsel emails Apple's outside counsel, stating that they are "still working on coordinating dates for the depositions of Teri Sundh and Jeff Hays that you have noticed for September 5th and 6th." [Miclean Decl. ¶ 3.]
- September 5, 2007: Apple follows up with another email requesting proposed dates for the depositions. [Miclean Decl. ¶ 3.]
- September 5, 2007: Podfitness' outside counsel responds with a promise to be in touch with Podfitness that week to finalize deposition dates. [Miclean Decl. ¶ 3.]
- October 2, 2007: Apple and Podfitness converse regarding the motion to stay proceedings and the deposition dates, which have still not been finalized, even though the dates for which they were noticed have passed. [Miclean Decl. ¶ 4.]
- October 3, 2007: Apple's outside counsel contacts Podfitness' counsel, Steve Hutchinson, recapping the October 2, 2007 conversation. Apple states its willingness to

1 stipulate to a 30-day stay of the case so long as Podfitness agrees to set firm deposition
2 dates for Ms. Sundh and Mr. Hays in mid-November. [Miclean Decl. ¶ 4.]

- 3 ▪ October 4, 2007: Mr. Hutchinson replies, stating that Podfitness will evaluate this offer
4 and get back to Apple with its answer shortly. [Miclean Decl. ¶ 4.]
- 5 ▪ October 12, 2007: Having received no answer from Podfitness regarding Apple's
6 proposal, Apple is forced to file this opposition to Podfitness' motion to stay. [Miclean
7 Decl. ¶ 4.]

8 Thus, in the approximately three months since Apple issued the deposition notices,
9 Podfitness has stated only that the dates are not acceptable, has ignored repeated requests to
10 propose alternate dates, and is now attempting to stay the case in an effort to postpone
11 scheduling the depositions for another thirty days. Although Apple is willing to participate, and
12 has participated, in settlement discussions with Podfitness, discovery must continue so that the
13 case management calendar and trial date are preserved. [Miclean Decl. ¶ 5.] Podfitness already
14 has attempted to obtain an elongated case management and trial schedule—Apple initially
15 requested a trial date in June 2008 (which the court granted), while Podfitness proposed a trial
16 date in November of 2008. *Id.* Podfitness should not be permitted to try to further delay
17 discovery and resolution of this matter. The timely depositions of Mr. Hays and Ms. Sundh are
18 essential to Apple's case, and since these are not even scheduled yet, a thirty-day stay can only
19 delay them further.

20 This is not the first time Podfitness has attempted to wrongfully delay the litigation of
21 this case while it continues its infringing and diluting conduct. [Miclean Decl. ¶ 9.] Podfitness
22 filed a previous motion to stay the litigation, which was rejected by this Court on May 10, 2007.
23 [Miclean Decl. ¶ 9.] Then, on September 26, 2007, Mr. Hutchinson filed a declaration
24 purporting to support a motion to stay the case. [Miclean Decl. ¶ 10.] However, under Local
25 Rules 7-1 and 7-2, a party seeking to stay a case must file a notice of the motion, set a date and
26 time of hearing, and submit a memorandum of points and authorities, none of which were done
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1 by Podfitness until October 1, 2007. *Id.* This stand-alone declaration represents merely the
2 latest in a series of attempts by Podfitness to delay resolution of this litigation.

3 For all of the above reasons, Podfitness' Motion to Stay Proceedings for Thirty Days
4 Pending Engagement of Substitute Counsel should be denied.

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6 Dated: October 15, 2007

FISH & RICHARDSON P.C.

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9 By: 

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