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 9 Attorneys for Plaintiff  
 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.

Case No. C 06-5805 SBA

**DECLARATION OF DAVID J. MICLEAN  
 IN SUPPORT OF 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

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 23 I, David J. Miclean, declare as follows:

24 1. I am a principal of Fish & Richardson P.C., counsel of record in this action for  
 25 Apple Inc. ("Apple"). I am a member of the Bar of the State of California and am admitted to

1 this Court. I have personal knowledge of the matters stated in this declaration and would testify  
2 truthfully to them if called upon to do so.

3 2. Podfitness' counsel, Steve Hutchinson, has been actively involved with this case  
4 since its inception. Mr. Hutchinson actively participated in early settlement negotiations  
5 immediately after the complaint was filed on September 21, 2006, he attended and actively  
6 participated in the court-ordered mediation on April 18, 2007, and he has regularly  
7 communicated directly with Apple's outside counsel regarding this case throughout the  
8 litigation. Mr. Hutchinson has long served as the primary contact point and negotiator for  
9 Defendant with respect to settlement discussions between the parties.

10 3. After Defendant's outside counsel failed to return multiple messages attempting  
11 to meet and confer regarding scheduling the depositions of Defendant's employees, on July 27,  
12 2007 Apple noticed the depositions of Defendant's CEO, Teri Sundh, and its President, Jeff  
13 Hays. The depositions were noticed for the dates of September 5-6, 2007. In the more than two  
14 months since Apple issued the notices, Defendant has stated only that the dates are not  
15 acceptable, has ignored repeated requests to propose alternate dates, and is now attempting to  
16 stay the case in an effort to postpone the depositions for another thirty days. On August 22, 2007  
17 Defendant's outside counsel emailed my firm, stating that they were "still working on  
18 coordinating dates for the depositions of Teri Sundh and Jeff Hays that you have noticed for  
19 September 5th and 6th." We followed up on September 5, 2007 with another email requesting  
20 proposed dates for the depositions. Defendant's outside counsel responded on that day with a  
21 promise to be in touch with Podfitness that week to get deposition dates. Since that time,  
22 Podfitness' attorneys have failed to contact us with any proposed dates for the depositions of  
23 Teri Sundh and Jeff Hays which Apple has been trying to schedule for over three months.

24 4. On October 2, 2007, we discussed with Mr. Hutchinson this motion to stay  
25 proceedings and the deposition dates, which had still not been finalized, even though the dates  
26 for which they were noticed had passed. On October 3, 2007, we sent an email to Mr.

1 Hutchinson, recapping the October 2, 2007 conversation. In the email, we stated our  
2 willingness to stipulate to a 30-day stay of the case so long as Podfitness agreed to set firm  
3 deposition dates for Ms. Sundh and Mr. Hays in mid-November. Then, on October 4, 2007, Mr.  
4 Hutchinson replied to this email, stating that Podfitness would evaluate the offer and get back to  
5 us with its answer shortly. Having received no further answer from Podfitness regarding our  
6 proposal, we were forced to file this opposition to Podfitness' motion to stay.

7 5. Although Apple is willing to participate, and has participated, in settlement  
8 discussions with Podfitness, discovery must continue in order that the case management calendar  
9 and trial date are preserved. Podfitness already attempted to obtain an elongated case  
10 management and trial schedule—Apple initially requested a trial date in June 2008 (which the  
11 court granted), while Podfitness proposed a trial date in November of 2008—and should not be  
12 permitted to try to further delay discovery and resolution of this matter.

13 6. Podfitness' outside counsel, Workman Nydegger, filed a motion to withdraw as  
14 counsel on September 18, 2007.

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

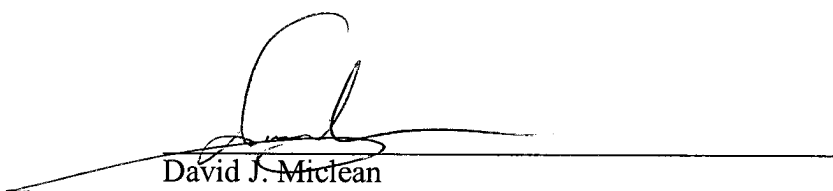
23 8. Further, Mr. Hutchinson personally initiated the latest round of settlement  
24 negotiations by contacting our firm on July 3, 2007, and has been the only Podfitness lawyer  
25 involved in those discussions over the last almost three months. Our firm has had practically no  
26 substantive communications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

1           9.       The Declaration and request for stay of Mr. Hutchinson, who is the VP of  
2 legal affairs for Podfitness, represents merely the latest in a series of attempts by  
3 Defendant to delay resolution of this litigation while it continues its infringing and  
4 diluting conduct. Defendant also filed a previous motion to stay the litigation, which was  
5 rejected by this Court on May 10, 2007.

6           10.       Pursuant to Local Rules 7-1 and 7-2 of this Court, if a party seeks certain  
7 relief or Court action such as a stay of the case, it must follow the procedures set forth  
8 therein, including filing a notice of the motion, setting a date and time of hearing, and  
9 submitting a memorandum of points and authorities in support of the motion. Mr.  
10 Hutchinson's attempt to stay this case via the declaration he filed on September 26, 2007  
11 in connection with the motion to withdraw filed by the Workman Nydegger law firm did  
12 not comply with the Local Rules. Mr. Hutchinson did not correctly file this motion until  
13 October 1, 2007.

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

16           Executed this 15th day of October, 2007, at Redwood City, California.

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David J. Miclean

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