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

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

Case No. C 06-5805 SBA (JCS)

**APPLE COMPUTER, INC.'S NOTICE OF
 MOTION AND MOTION TO COMPEL
 THE DEPOSITIONS OF JEFF HAYS AND
 TERI SUNDH**

Date: December 7, 2007
 Time: 9:30 a.m.
 Courtroom: A, 15th Floor
 Judge: Honorable Joseph C. Spero

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 22 TO DEFENDANT PODFITNESS, INC. ("PODFITNESS") AND ITS ATTORNEYS OF
 23 RECORD:

24 NOTICE IS HEREBY GIVEN that on December 7, 2007, at 9:30 a.m., before the
 25 Honorable Joseph C. Spero, Plaintiff Apple Computer, Inc. ("Apple") will move this Court for an
 26 order granting its Motion to Compel the Depositions of Jeff Hays and Teri Sundh. Based on
 27 Podfitness' total refusal to communicate with Apple regarding the scheduling of these
 28 depositions, Apple has determined that attempting yet another meet and confer to discuss this

1 matter and filing a subsequent joint letter would be absolutely futile. The motion will be based
2 upon this Notice of Motion and Motion, the Declaration of David J. Miclean, the pleadings and
3 documents on file in this case and on any evidence as may be presented at the hearing on this
4 motion.

5 **I. ARGUMENT**

6 Podfitness has made every effort in the past several months to ignore the discovery
7 process and to avoid actively participating in this litigation. Through motions to stay and total
8 unresponsiveness, Podfitness has thus far managed to prolong its wrongful activities and avoid
9 the depositions of two of its key employees, CEO Teri Sundh, and founder and President Jeff
10 Hays which have been sought by Apple for over 3 months. Podfitness may not refuse indefinitely
11 to comply with the discovery process simply because it no longer wishes to have anything to do
12 with this case. Podfitness is a defendant in this litigation due to its egregious infringement of
13 Apple's famous iPod mark, which it continues to infringe. Having exhausted all non-legal means
14 of trying to schedule the depositions of Mr. Hays and Ms. Sundh, Apple is now forced to
15 respectfully request the Court to grant its motion to compel these depositions.

16 Apple first approached Podfitness *over three months ago*, in early July 2007, with a
17 request to schedule and take the depositions of Teri Sundh and Jeff Hays. Podfitness failed to
18 respond each and every time to Apple's numerous attempts to meet and confer regarding
19 mutually convenient dates to schedule the depositions. [Miclean Decl. ¶ 2.] On July 27, 2007,
20 Apple formally noticed the depositions of Teri Sundh and Jeff Hays for the dates of September 5-
21 6, 2007. [Miclean Decl. ¶ 2.]

22 On August 22, 2007, Podfitness' outside counsel emailed Apple's outside counsel, stating
23 that they were "still working on coordinating dates for the depositions of Teri Sundh and Jeff
24 Hays that you have noticed for September 5th and 6th," but provided no alternative dates and did
25 not comply with the deposition notice. [Miclean Decl. ¶ 3.] Having received no further
26 communication from Podfitness regarding this matter for approximately two weeks, Apple
27 followed up on September 5, 2007 with another email requesting proposed dates for the
28 depositions. [Miclean Decl. ¶ 3.] Podfitness' outside counsel merely responded with a promise

1 to be in touch with Podfitness that week to finalize deposition dates. [Miclean Decl. ¶ 3.]

2 Podfitness counsel did not follow up with deposition dates as they promised they would.

3 Podfitness counsel thereafter ceased all communications with counsel for Apple. Nearly a
4 month later, on October 2, 2007, the parties conversed regarding Podfitness' motion to stay
5 proceedings and the deposition dates, which had still not been finalized, even though the dates for
6 which they were noticed had passed. [Miclean Decl. ¶ 4.] Subsequently, Apple indicated its
7 willingness to stipulate to a 30-day stay of the case so long as Podfitness agreed to set firm
8 deposition dates for Ms. Sundh and Mr. Hays in mid-November. [Miclean Decl. ¶ 4.] Again,
9 Podfitness fell silent, forcing Apple to file an opposition to Podfitness' motion to stay. [Miclean
10 Decl. ¶ 4.]

11 As shown by the timeline above, Podfitness has time and time again refused or utterly
12 ignored even the most reasonable requests to set the depositions. In the over three months since
13 Apple attempted to meet and confer on scheduling the depositions of Hays and Sundh and issued
14 the deposition notices, Podfitness has responded only that the dates are not acceptable, has
15 ignored repeated requests to propose alternate dates, and has attempted to stay the case in an
16 effort to postpone scheduling the depositions for another thirty days. [Miclean Decl. ¶ 2.] Based
17 on this pattern of behavior, Apple believes that attempting to schedule yet another meet and
18 confer to discuss this matter would be absolutely futile. [Miclean Decl. ¶ 2.]

19 In order for the Court to decide this case on the merits as promptly as possible and to
20 preserve the trial date and case management schedule, it is essential that discovery continue
21 without further delay. [Miclean Decl. ¶ 5.] As part of such discovery, the timely depositions of
22 Mr. Hays and Ms. Sundh are important to Apple's case. As established by Podfitness' written
23 discovery, Mr. Hays and Ms. Sundh were involved in virtually every aspect of the company's
24 promotional activities. [Miclean Decl. ¶ 6.] Accordingly, these two individuals are likely to
25 possess significant knowledge regarding Podfitness' decision to adopt its trade name, trademark
26 and domain name, and are likely to have participated substantially in the company's marketing
27 decisions which sought to take advantage of Apple's goodwill in the iPod brand.

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1 This is not the first time Podfitness has attempted to wrongfully delay the litigation of this
2 case while it continues its infringing and diluting conduct, and it undoubtedly will not be the last,
3 unless the Court intervenes. [Miclean Decl. ¶ 7.] Podfitness initially attempted to obtain an
4 elongated case management and trial schedule—Apple initially requested a trial date in June 2008
5 (which the court granted), while Podfitness proposed a trial date in November of 2008. *Id.*
6 Podfitness also has filed two motions to stay the litigation, the first of which was rejected by this
7 Court on May 10, 2007, and the second of which is currently pending. *Id.* Additionally, on
8 September 26, 2007, Podfitness’ in-house counsel Steve Hutchinson filed an improper declaration
9 purporting to support a motion to stay the case. *Id.*

10 **II. CONCLUSION**

11 Podfitness’ blatant attempts to avoid participating in the discovery process are
12 unacceptable, and a waste of valuable judicial time and resources. Podfitness should not be
13 permitted to try to further delay discovery and resolution of this matter. For all of the above
14 reasons, Apple respectfully requests that its Motion to Compel the Depositions of Jeff Hays and
15 Teri Sundh be granted.

16
17 Dated: October 30, 2007

FISH & RICHARDSON P.C.

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19 By: /s/ David J. Miclean
20 David J. Miclean

21 Attorneys for Plaintiff
22 APPLE INC.

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