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14 ATTORNEYS FOR DEFENDANT
15 PODFITNESS, INC.

16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 OAKLAND DIVISION
20

21 APPLE, INC.,

22 Plaintiff,

23 v.

24 PODFITNESS, INC., and DOES 1-100,
25 Inclusive

26 Defendants.
27
28

Case No. 4:06-cv-05805 SBA

**STATEMENT OF NON-OPPOSITION
TO MOTION TO COMPEL THE
DEPOSITIONS OF JEFF HAYS AND
TERI SUNDH**

1 Pending before the Court is a motion filed by Plaintiff Apple Computer, Inc. (hereinafter,
2 “Apple”) to compel the depositions of two employees of Defendant Podfitness, Inc. (hereinafter,
3 “Podfitness”). This motion was filed after Defendant’s previous outside-counsel moved to
4 withdraw from the case, after Defendant’s in-house counsel had notified Apple of his termination
5 of employment with Defendant,¹ and only *one day*² before the Court entered orders permitting
6 such withdrawal, precluding further filings, and staying the proceedings for thirty (30) days to
7 allow Podfitness to engage substitute counsel.

8 As soon as it was retained by Podfitness as a substitute counsel, Magleby & Greenwood,
9 P.C. began discussing the scheduling of the requested deposition dates with opposing counsel.
10 While Podfitness is hopeful that the outcome of this discussion will moot the motion to compel,
11 Podfitness nonetheless hereby files its statement of non-opposition to Plaintiff’s motion to
12 compel.

13 The genesis of the motion to compel can be traced to certain procedural challenges in this
14 case filed originally against Podfitness on September 21, 2006. After Podfitness answered the
15 complaint on November 13, 2006, the Court entered a Case Management Scheduling Order on
16 January 25, 2007. Under the original Protective Order, in-house counsel for Podfitness was not
17 allowed access to documents designated “CONFIDENTIAL” or “ATTORNEYS’ EYES
18 ONLY.” A Stipulated Addendum was entered by the Court on April 16, 2007 whereby Plaintiff
19 agreed not to serve any third party-discovery to Podfitness’s business associates without first
20 seeking the same documents from Podfitness.³

21
22 ¹ Apple’s opposition to Podfitness’s motion to stay the case pending substitution of counsel was
23 based in large part on the presumption that Podfitness’s in-house counsel, Steve Hutchinson,
24 was sufficient to carry on the representation. After receiving notice of Mr. Hutchinson no longer
being employed by the Defendant, Apple filed its motion at issue here.

25 ² The Order permitting withdrawal as counsel and staying this action issued October 31, 2007.
26 The day prior, October 30, 2007, Apple filed its motion to compel.

27 ³ This addendum was the result of Apple’s interference with certain important Podfitness
28 business relationships, which were lost as a result of, among other things, Apple’s service of
subpoenas without giving notice to Podfitness in contravention of Fed. R. Civ. P. 45.

1 In a sense, this case has only just passed the pleading stage. Specifically, by stipulation
2 between the parties, on August 1, 2007, Plaintiff filed an amended complaint adding causes of
3 action for cybersquatting in violation of federal law and for breach of contract. Such
4 amendments were based in part on a purported licensing agreement relating to Apple's iTunes,
5 and diversion of internet traffic, theories wholly distinguishable from its then-existing causes of
6 action. Podfitness answered the amended complaint on August 31, 2007, and counterclaimed on
7 the basis of tortious intentional and negligent interference with contractual relations, tortious
8 negligent interference with prospective economic advantage, and unlawful, unfair, and deceptive
9 practices in violation of the California Business and Professions Code. Subsequent to the
10 amendments, neither Apple nor Podfitness is believed to have yet propounded discovery on the
11 subject matter raised by said amendments.

12 On September 19, 2007, Podfitness's then outside-counsel Workman Nydegger and
13 Collette Erickson Farmer & O'Neill moved to withdraw from the case and received the Court's
14 approval for such withdrawal on November 1, 2007. In finding good cause for allowing
15 withdrawal of counsel, the Court stated that "Podfitness has sufficient time to either engage
16 substitute counsel or proceed through representation of its in-house counsel, Steven Hutchinson."
17 On the same day, the Court entered an order staying the proceedings for thirty (30) days pending
18 engagement of substitute counsel. However, at the time the Court entered the order permitting
19 withdrawal of counsel, Podfitness's in-house counsel, Mr. Hutchinson was no longer employed
20 by Podfitness. Plaintiff filed the current Motion to Compel the Depositions of Jeff Hays and
21 Terry Sundh on October 30, 2007, after both in-house and outside-counsel had left Podfitness.

22 A hearing on the motion to compel is currently set for December 7, 2005. On or about
23 November 30, 2007, Podfitness retained the law firm of Magleby & Greenwood, P.C., which
24 began the search for local counsel. On December 6, 2007, Kerr & Wagstaffe LLP was retained
25 as substitute local counsel of record. On November 30, 2007, upon being retained, Magleby &
26 Greenwood, P.C. contacted Plaintiff's counsel to discuss the scheduling of deposition dates for
27 Jeff Hays and Teri Sundh. Defendant is hopeful that the parties will be able to agree on
28 deposition and other discovery dates that allow for discovery to be conducted in a meaningful

1 way, providing an opportunity for Defendant's new counsel to familiarize itself with the complex
2 facts and issues in this case.

3 Based on the foregoing, while Podfitness believes that the current motion to compel is
4 likely to be rendered moot, it respectfully files its statement of nonopposition to Plaintiff's
5 motion. Specifically, Podfitness does not object to Jeff Hays or Teri Sundh appearing for
6 deposition, but does have requests and concerns relating to the timing of such depositions, and
7 submits that to the extent depositions of Podfitness are to be scheduled for dates certain,
8 reciprocal depositions of Apple are appropriate and necessary. Podfitness has offered to give
9 firm deposition dates for these deponents to Apple. At the same time, Podfitness's counsel has
10 indicated a preference to extend discovery to conduct these depositions in an orderly fashion,
11 including because new counsel has not had access to any of the 150,000 + documents produced
12 in this case, many of which are believed to be "confidential" documents under the existing
13 confidentiality order, and because this matter (including discovery altogether) has just come off a
14 30 day stay period. Podfitness has indicated that if there is no agreement to an extension of fact
15 discovery, and Podfitness is forced by this Court to produce its witnesses prior to the existing
16 fact discovery cutoff, then Podfitness will likewise request a Rule 30(b)(6) deposition of Apple.⁴
17 Again, however, Podfitness hopes to avoid the necessity of such an abbreviated schedule.
18 Copies of the communications between counsel for Podfitness and Apple are attached as Exhibit
19 "A."

20 DATED: December 6, 2007

KERR & WAGSTAFFE LLP

21
22 By



23 JAMES M. WAGSTAFFE
24 Attorneys for Defendant
25 Podfitness, Inc.

26 ⁴ Podfitness, of course, contends that such a result would be wholly unfair and result in severe
27 prejudice to Defendant, especially given, among other things, the procedural history of this case,
28 the parties' recent amendments expanding the scope of litigation, and the 30 day stay period
triggered during the existing discovery period. This issue is the subject of Defendant's Motion
to Extend the Scheduling Order to be filed if a resolution with Apple is not achieved.

EXHIBIT A

James Magleby

From: James Magleby
Sent: Wednesday, December 05, 2007 3:54 PM
To: Lisa Martens; 'magleby@mgpclaw.com'; James M. (Jim) Wagstaffe (wagstaffe@kerrwagstaffe.com); 'mcneill@mgpclaw.com'
Subject: RE: Apple v. Podfitness

Lisa:

This is a follow up to our telephone conversation earlier today. As a housekeeping matter, we have retained local counsel, Jim Wagstaffe of Kerr & Wagstaffe in San Francisco, and we hope to be filing our pro hac vice papers today.

Following up on our conversation last week, your subsequent e-mail below, and our conversation today, we are prepared to produce Jeff Hays and Terry Sundh for depositions. My preference would be to give you dates certain, sometime after next week, so that we can finalize our appearance, have access to confidential documents under the protective order, and generally have time to integrate into the case. We would like to take, at the least, a Rule 30(b)(6) deposition of Apple, next week if necessary but if we can push out the discovery deadlines then we are content to do so at the convenience of the witness and your office. On these points, in conjunction with this rescheduling, we would like to move the discovery and expert deadlines out for at least 30 days. Finally, I understand that you have to talk with your client before we can discuss these issues further.

I should be here until at least 7:00 p.m. our time, and after that available on my mobile – 801.694.2488. I also usually have access to my e-mail at all times, although it is sometimes hit-or-miss.

Thanks.

- Jim
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Facsimile: 801.359.9011
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From: Lisa Martens [mailto:martens@fr.com]
Sent: Friday, November 30, 2007 5:29 PM
To: James Magleby
Subject: RE: Apple v. Podfitness

Thanks Jim. I just spoke with Apple and they will not be needing any extensions of the TTAB deadlines. We would like to get deposition dates for Hays and Sundh as soon as possible though (if you want to avoid responding to the pending motion to compel).

I look forward to hearing from you.

Lisa M. Martens
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Fish & Richardson P.C.
12390 El Camino Real
San Diego, CA 92130-2081
858-678-4729 (phone)
858-678-5099 (fax)

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Sent: Friday, November 30, 2007 3:53 PM
To: Lisa Martens; magleby@mgpclaw.com; mcneill@mgpclaw.com
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Lisa:

Thanks for talking with me today. As I indicated, we have just been retained by Podfitness to appear in this matter. We are in the process of locating local counsel, having pro hac vice applications filed, etc.

My contact information is below. If you need to reach me over the weekend, my mobile number is 801 694-2488.

- Jim
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James Magleby

From: James Magleby
Sent: Wednesday, December 05, 2007 5:04 PM
To: James Magleby; 'Lisa Martens'; 'magleby@mgpclaw.com'; 'James M. (Jim) Wagstaffe (wagstaffe@kerrwagstaffe.com)'; 'mcneill@mgpclaw.com'
Subject: RE: Apple v. Podfitness
Importance: High

Lisa:

As you know, we are just getting up to speed in this matter. Since you and I talked earlier today, we have reviewed more of the file, and it appears to us that previously issued discovery may not have captured documents and information that relates to the amended complaint and counterclaim. In particular, these amendments took place in August, but the written discovery was served by both sides some months before that date. In addition, it appears that Apple has produced hundreds of thousands of documents, none of which we have been able to review because of timing and the confidentiality order. Our concern is that we will not be adequately representing our client if we do not take the time to investigate these issues, which we have just discovered.

In light of these things, we must reserve the right to seek leave from the Court for more time to conduct fact discovery, at least until such time as we can assess the current state of discovery. I wanted to get this message to you as soon as possible, because I know there are likely some trust issues between Apple and Podfitness and I don't want you to think we were not candid.

I suggest we reach whatever stipulation makes sense to the parties regarding extending discovery to complete at least the depositions of Jeff Hays and Terry Sundh and the Apple 30(b)(6) witness, and both parties reserve all other rights with regard to the schedule. This will protect everyone, but allow discovery to proceed in the meantime. If Apple is not amenable to this proposed, interim solution, I will understand.

So you know, we are preparing a document to file with the Magistrate, indicating that we do not oppose producing Jeff Hays and Terry Sundh, but may have an issue with the timing. Hopefully, we can come to some resolution and not take up the Court's time on Friday with this issue.

Please call me or Jim Wagstaffe or Jason McNeill, if you would like to discuss. Thanks.

- Jim
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