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Counterclaim Defendant  
APPLE INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
(OAKLAND DIVISION)

APPLE INC.,  
  
Plaintiff,  
  
v.  
  
PODFITNESS, INC., and DOES 1-100,  
inclusive,  
  
Defendants.

Case No. C 06-5805 SBA  
  
**APPLE INC.'S OPPOSITION TO  
DEFENDANT'S MOTION FOR  
ADMINISTRATIVE RELIEF  
EXTENDING PRETRIAL DEADLINES**  
  
Honorable Sandra B. Armstrong

PODFITNESS, INC.,  
  
Counterclaim Plaintiff  
  
v.  
  
APPLE INC.,  
  
Counterclaim Defendant

1 Pursuant to Local Rule 7-11, Plaintiff and Counterclaim Defendant Apple Inc. (“Apple”)  
2 hereby submits its Opposition to Defendant’s Motion for Administrative Relief Extending Pretrial  
3 Deadlines. Podfitness, Inc.’s (“Podfitness” or “Defendant”) failure to conduct adequate discovery  
4 does not merit an extension of pretrial deadlines in this already prolonged litigation.  
5 Furthermore, Podfitness’ refusal to comply with Apple’s longstanding deposition notices should  
6 not be rewarded by granting it further time beyond the discovery cut-off to conduct its own  
7 depositions. Granting Podfitness’ Motion would simply allow Podfitness to further delay a  
8 decision on the merits of this case, and to continue its infringing behavior for an additional period  
9 of time. For these reasons, Apple opposes Podfitness’ motion to extend the trial dates set by this  
10 Court.

11 **I. ARGUMENT**

12 This is not the first time Podfitness has attempted to wrongfully delay the litigation of this  
13 case while it continues its infringing and diluting conduct. [Miclean Decl. ¶ 2.] Apple initially  
14 requested a trial date in June 2008 (which the court granted), while Podfitness proposed a trial  
15 date in November of 2008. Since the trial date was set, Podfitness filed two separate motions to  
16 stay the litigation, the former of which was rejected by this Court on May 10, 2007. [Miclean  
17 Decl. ¶ 2.] Additionally, on September 26, 2007, Podfitness’ then-in-house attorney Steve  
18 Hutchinson filed a declaration purporting to support a motion to stay the case. [Miclean Decl. ¶  
19 3.] This stand-alone declaration represented an invalid attempt to request a stay from the Court  
20 under Local Rules 7-1 and 7-2 (requiring a party seeking to stay a case to file a notice of the  
21 motion, set a date and time of hearing, and submit a memorandum of points and authorities). *Id.*

22 This present eleventh-hour effort to lengthen the trial schedule in this case is especially  
23 egregious in view of Podfitness’ actions over the past five months. In July 2007, Podfitness  
24 ceased all discovery and essentially shut down all substantive communications with Apple for a  
25 period of *five months*. During this time, Podfitness had more than ample opportunity to notice  
26 and conduct multiple depositions and to serve additional written discovery. In its Motion,  
27 Podfitness rationalizes its inaction by stating that additional issues have been raised by Apple’s  
28 First Amended Complaint and Podfitness’ Answer and Counterclaim. [Motion, p.1:28-p.2:1-6.]

1 Yet Apple filed its First Amended Complaint over *four months ago*, on August 1, 2007, and  
2 Podfitness filed its Answer and Counterclaim on August 31, 2007. Podfitness further argues  
3 that it did not receive the bulk of Apple’s document production until July 2007. [Motion, p.3:28-  
4 p.4-1.] Again, this was over five months ago. Why did Podfitness choose to ignore all discovery  
5 issues during the interim time period, and wait until immediately prior to the discovery cut-off to  
6 seek an extension? Podfitness is simply seeking a bail-out from the Court for its negligent  
7 defense of this case, and the Court should not reward such procrastination.

8 In addition to Podfitness’ utter failure to conduct its own discovery after the filing of the  
9 First Amended Complaint and Counterclaim, Podfitness has been actively obstructing Apple’s  
10 own attempts to gather information. For a period of *five months*, Podfitness took every  
11 conceivable step to prevent Apple from scheduling the depositions of Teri Sundh and Jeff Hays.  
12 Finally, Apple was forced to file a Motion to Compel the Depositions of Jeff Hays and Teri  
13 Sundh, and the Court granted Apple’s motion on December 10, 2007. [Miclean Decl. ¶ 4.]

14 The timeline leading up to the successful Motion to Compel is indicative of the pattern of  
15 delay and lack of cooperation that Podfitness has exhibited throughout this litigation. First,  
16 Podfitness failed to respond each and every time to Apple’s numerous attempts to meet and  
17 confer regarding mutually convenient dates to schedule the depositions. [Miclean Decl. ¶ 5.] On  
18 July 27, 2007, Apple formally noticed the depositions of Teri Sundh and Jeff Hays for the dates  
19 of September 5-6, 2007. [Miclean Decl. ¶ 5.] On August 22, 2007, Podfitness’ outside counsel  
20 emailed Apple’s outside counsel, stating that they were “still working on coordinating dates for  
21 the depositions of Teri Sundh and Jeff Hays that you have noticed for September 5th and 6th.”  
22 [Miclean Decl. ¶ 6.] Having received no further communication from Podfitness regarding this  
23 matter for approximately two weeks, Apple followed up on September 5, 2007 with another email  
24 requesting proposed dates for the depositions. [Miclean Decl. ¶ 6.] Podfitness’ outside counsel  
25 merely responded with a promise to be in touch with Podfitness that week to finalize deposition  
26 dates. [Miclean Decl. ¶ 6.]

27 Following this exchange, Podfitness’ counsel did not attempt to communicate with Apple  
28 until nearly a month later, on October 2, 2007, when the parties again conversed regarding

1 Podfitness' motion to stay proceedings and the deposition dates. These dates had still not been  
2 finalized, even though the dates for which they were noticed had passed. [Miclean Decl. ¶ 7.]  
3 Subsequently, Apple indicated its willingness to stipulate to a 30-day stay of the case so long as  
4 Podfitness agreed to set firm deposition dates for Ms. Sundh and Mr. Hays in mid-November.  
5 [Miclean Decl. ¶ 7.] Again, Podfitness fell silent. [Miclean Decl. ¶ 7.]

6 Thus, in the approximately four-month period since Apple issued its deposition notices,  
7 Podfitness responded only that the dates were not acceptable, ignored repeated requests to  
8 propose alternate dates, and attempted to stay the case (twice) in an effort to further postpone  
9 scheduling the depositions. [Miclean Decl. ¶ 5.] During this time period, *not once* did Podfitness  
10 discuss the possibility of deposing Apple's employees, though it had considerable opportunity to  
11 do so. [Miclean Decl. ¶ 8.] During this time period, *not once* did Podfitness serve any additional  
12 written discovery. The first time Podfitness even informally indicated that it wished to conduct a  
13 Rule 30(b)(6) deposition was on December 5, 2007. [Miclean Decl. ¶ 8.] The first time  
14 Podfitness mentioned that it wished to extend the discovery period was also on this same date. *Id.*

15 Podfitness provides no explanation for its sudden departure, merely *days* prior to the  
16 discovery cut-off in this case, from its strategy of inaction and delay for the past several months.  
17 What is certain is that after an extended period of uncooperative behavior, Podfitness is now  
18 attempting to sand-bag Apple by abruptly, and without warning, terminating all settlement  
19 discussions and issuing requests for further discovery. Such actions represent last-minute  
20 gamesmanship, pure and simple, and should be discouraged by the Court.

## 21 **II. CONCLUSION**

22 For all of the above reasons, Podfitness' Motion for Administrative Relief Extending  
23 Pretrial Deadlines should be denied.

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Dated: December 13, 2007

FISH & RICHARDSON P.C.

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

Attorneys for Plaintiff  
APPLE INC.

