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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

J.T. COLBY & COMPANY, INC. d/b/a BRICK  
TOWER PRESS, J. BOYLSTON & COMPANY,  
PUBLISHERS LLC and IPICTUREBOOKS LLC,

Plaintiffs,

- against -

APPLE INC.,

Defendant.

Case No. 11-CIV-4060 (DLC)

ECF Case

**REDACTED**

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION  
TO EXCLUDE ANY TESTIMONY, ARGUMENT OR EVIDENCE  
REGARDING THE EXPERT REPORT AND OPINIONS OF MIKE SHATZKIN**

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Defendant Apple Inc. (“Apple”) respectfully submits this memorandum of law in support of its motion to exclude all testimony, argument or evidence relating to the opinions and report of Mike Shatzkin, which may be offered by Plaintiffs J.T. Colby & Co., Inc. d/b/a Brick Tower Press, J. Boylston & Co., Publishers LLC, and ipicturebooks LLC (collectively, “Plaintiffs”).

### **PRELIMINARY STATEMENT**

The testimony, report and opinions of Plaintiffs’ expert Mike Shatzkin should be excluded because they wholly lack any factual basis and fail to bear on any probative issue in this case.

Apple’s marketing expert, Dr. Gregory Carpenter, the James Farley/Booz Allen Hamilton Professor of Marketing Strategy and Director of the Center for Market Leadership at the Kellogg School of Management at Northwestern University, submitted a 43-page, comprehensive marketing analysis, supported by 78 exhibits, in which he investigated the nature and extent of the limited sales, advertising, marketing and promotional expenditures and activities, internet presence, signage, and trade directory presence for the “ibooks” imprint. Dr. Carpenter analyzed two time periods: 1999 to 2006, when the alleged mark was owned by its founder, Byron Preiss, and 2007 to the present, when Plaintiffs owned the business after acquiring the “ibooks” assets from Mr. Preiss’s bankrupt company, Ibooks, Inc. Based on that analysis, Dr. Carpenter concluded, from a marketing perspective, that Plaintiffs’ “ibooks” imprint is not recognized as a brand by consumers.<sup>1</sup>

In response, Plaintiffs submitted the nine-page rebuttal report of Mr. Shatzkin, supported by four blog posts written by Mr. Shatzkin, in which he purports to “evaluate the relevance” of

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<sup>1</sup> In their Amended and Supplemental Complaint, Plaintiffs also allege to own rights in the purported mark “ipicturebooks.” (Am. Compl. ¶ 1.) Because Mr. Shatzkin did not even attempt to rebut Dr. Carpenter’s opinion that “ipicturebooks” is not recognized by consumers (*see, e.g.*, Shatzkin Dep., 72:22-73:4), that alleged mark is not addressed here.

Dr. Carpenter’s opinions “for the publishing world.” (Declaration of Claudia Ray in Support of Motion to Exclude Any Testimony, Argument or Evidence Regarding the Expert Report and Opinions of Mike Shatzkin, submitted contemporaneously herewith (“Ray Dec.”), Ex. 1 (the “Shatzkin Report” or the “Report”), 1.) As Mr. Shatzkin repeatedly testified and as his Report makes clear, the sole factual basis for Mr. Shatzkin’s opinions is a single spreadsheet that he believes reflects sales by Ibooks, Inc. during an unspecified time in the early to mid-2000s. (Shatzkin Rep., 2; Ray Dec., Ex. 2 (“Shatzkin Dep.”), 71:9-18.) The sales reflected in that spreadsheet are drastically different from other sales figures produced by Plaintiffs—to the tune of \$17 million. But Mr. Shatzkin never reviewed those other sales figures. In any case, all of the sales data that Plaintiffs produced for the period from 1999 to 2006 are inadmissible because, among other things, Plaintiffs have no personal knowledge of sales from that period and cannot corroborate the sales data. Thus, the sales data upon which Mr. Shatzkin relied are so unreliable that it was unreasonable for him to use them to form his opinions. *See* Fed. R. Evid. 703.

To make matters worse, other than reviewing a single inadmissible spreadsheet, Mr. Shatzkin did nothing to investigate consumer awareness of the alleged “ibooks” mark, despite the voluminous discovery materials that were available (and upon which Dr. Carpenter relied). As Mr. Shatzkin admits, in formulating his opinions, he failed to review any documents produced in discovery relating to Plaintiffs’ advertising, marketing and promotional activities; failed to run any Google or other internet searches; and in fact failed to undertake any independent investigations or *conduct any research at all*. (Shatzkin Dep., 72:4-75:1; 162:19-23; 174:12-176:23.) Tellingly, nowhere in his Report does Mr. Shatzkin take issue with the detailed marketing analysis and facts presented by Dr. Carpenter regarding the *de minimus* sales,

lack of advertising, marketing and promotional activities, and absence of any internet presence related to the “ibooks” imprint.

Significantly, Mr. Shatzkin never opines that Plaintiffs actually had a brand that was recognized by consumers as of January 2010 when Apple announced the launch of its “iBooks” e-reader software app—which is the central issue here—and by his own admission he has no evidence that such was the case. (Shatzkin Dep., 190:18-191:14; 217:4-20.) Indeed, despite professing to have been involved in the publishing industry for 50 years, Mr. Shatzkin admits that he was only aware of the “ibooks” imprint in the “[l]ate 1990s,” “when it was new.” (*Id.*, 25:21-26:6.) Mr. Shatzkin had no knowledge of the “ibooks” imprint in the ensuing 12 years, and in fact, had never heard of Plaintiffs or their owner, John Colby, prior to this litigation. (*Id.*, 24:23-26:17.) Mr. Shatzkin has never mentioned Mr. Preiss, “ibooks” or Plaintiffs in any of the hundreds of blog posts that he has written about the publishing industry since February 2009. (Shatzkin Dep., 214:15-215:3.) And Mr. Shatzkin admits, consistent with the views of Dr. Carpenter and Dr. Jack Jacoby, another of Plaintiffs’ experts, that publishing brands do not matter to end consumers. (Shatzkin Rep., 1, 3, 4, 6; Shatzkin Dep., 91:7-13.)

As for Mr. Shatzkin’s theory that Plaintiffs might have developed consumer recognition of the “ibooks” imprint as a niche science fiction imprint in the early to mid-2000s, that theory is fatally flawed for several reasons.

First, Mr. Shatzkin wholly ignored the characterization of the “ibooks” imprint by its founder, Mr. Preiss, who described it not as a science fiction imprint but rather as a “general trade imprint.” (Ray Dec., ¶¶ 37-41, Exs. 7-9.) He also ignored Plaintiffs’ own characterization of the “ibooks” imprint. For example, in their Complaint, Plaintiffs repeatedly allege that “ibooks” publishes multiple genres, including history and fiction. (*See* Am. Compl., ¶¶ 15-16;

18.) Indeed, it is notable that nowhere in the Complaint do Plaintiffs allege that the “iBooks” imprint is a niche science fiction imprint. It seems obvious that, faced with Dr. Carpenter’s detailed analysis of the “iBooks” imprint showing that the imprint has never achieved any recognition among consumers, Plaintiffs concocted this argument about a niche science fiction imprint in a desperate attempt to save their claims.

Second, Mr. Shatzkin’s theory also is flawed because it is based on his assistant’s “massag[ing]” of the data in the sales spreadsheet to conclude that (1) [REDACTED] units out of the total of [REDACTED] units sold during whatever period is covered by the spreadsheet were science fiction “iBooks” and (2) during that same period, there were 665 science fiction titles published under the “iBooks” imprint. (Shatzkin Rep., 5; Shatzkin Dep., 147:18-148:6; 168:20-169:2.) Using those figures, Mr. Shatzkin opines that at some time in the early 2000s, “the owners of iBooks would have found themselves with a strong foundation on which to promote iBooks directly to consumers as a science-fiction brand.” (Shatzkin Rep., 8.) But Mr. Shatzkin repeatedly testified that nothing was ever done to build on that supposed “foundation.” (Shatzkin Dep., 190:18-192:4; 223-24.) In any event, Mr. Shatzkin’s calculations are not supported by any admissible evidence and, in any event, they are grossly inflated, as his assistant failed to account for (1) numerous duplicate titles, (2) significant returns by distributors in the mid-2000s of books that failed to sell through to consumers, and (3) Plaintiffs’ destruction of books that their distributor did not “want to sell any more.” (Shatzkin Dep., 156:19-157:21; 161:6-162:2; 180:7-20; *see also* Ray Dec., ¶¶ 27-30.)

Third, even if Plaintiffs or Mr. Preiss had actually sold all of the science fiction books that Mr. Shatzkin claims they did, his theory would still rest on the unproven assertion that some unknown number of consumers each bought two or more “iBooks” science fiction books and



came to recognize “ibooks” as a niche imprint for such books. But as Mr. Shatzkin admits, he has absolutely *no evidence* that this ever actually happened. (Shatzkin Dep., 149:15-22; 152:18-23.)

Finally, Mr. Shatzkin’s opinions about branding also are inadmissible because they are internally inconsistent. In his Report, he argues that “in publishing[,] almost no money is spent—or has been spent—on creating consumer awareness and recognition of brands,” and that the brand-building activities discussed in Dr. Carpenter’s report therefore have no applicability to the publishing industry. (Shatzkin Rep., 6.) Directly contrary to that assertion, Mr. Shatzkin admits that well-known niche brands such as Harlequin (romance novels), and Tor and Baen (science fiction), have engaged in exactly the types of activities discussed by Dr. Carpenter. (*See, e.g.*, Shatzkin Dep., 100:7-103:21; 109:20-110:19; 115:9-121:25.) Further, Mr. Shatzkin admits that Plaintiffs have not engaged in any consumer-directed activities that could have served to build a brand. (*Id.*, 172:17-173:3; *see also id.*, 191:8-192:4; 212:6-19; 224:10-16.) Thus, he actually agrees with Dr. Carpenter on this point.

In sum, Mr. Shatzkin did not base his opinions on sufficient facts, did not use reliable principles and methods to reach his conclusions, and did not address the relevant issue. All of his opinions, as well as any testimony, argument or evidence relating thereto, should thus be excluded. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993).

## **ARGUMENT**

### **I. LEGAL STANDARD.**

Under Federal Rule of Evidence 702, expert testimony is admissible only if “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the

expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid.

702. Expert testimony must also meet the requirements of Federal Rule of Evidence 403, which provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403; *see also Daubert*, 509 U.S. at 589 (holding that to be admissible, expert testimony must be “not only relevant, but reliable”).

Courts serve as the “gatekeepers” of expert evidence. *See Lippe v. Bairnco Corp.*, 288 B.R. 678, 685 (S.D.N.Y. 2003) (excluding unreliable expert testimony). Because expert testimony has the potential to be particularly misleading, courts must exercise greater control over experts than over lay witnesses. *See Daubert*, 509 U.S. at 595. Stricter scrutiny is also warranted where, as here, a jury trial rather than a bench trial is contemplated. *See Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, No. 06 Civ. 550 (JFK), 2007 WL 2258688, \*6 (S.D.N.Y. Aug. 6, 2007). As discussed below, Mr. Shatzkin’s opinions are based on nothing more than his say-so, as his only factual basis is unreliable and unfounded. Furthermore, Mr. Shatzkin fails to address the operative issue. Therefore, Mr. Shatzkin’s opinions and testimony should be excluded because they are wholly unreliable and prejudicial, will confuse the issues and will mislead the jury.

## **II. MR. SHATZKIN’S OPINIONS REGARDING RECOGNITION OF THE “IBOOKS” IMPRINT ARE NOT BASED ON SUFFICIENT FACTS OR DATA AND AMOUNT TO NOTHING MORE THAN CONCLUSORY SPECULATION AND HIS SELF-SERVING OPINION.**

Plaintiffs have offered Mr. Shatzkin as an expert on branding in the publishing industry to rebut the opinion of Dr. Carpenter that neither Plaintiffs nor their predecessor ever developed a recognizable brand in the “ibooks” imprint. (Shatzkin Rep., 1.) If Plaintiffs do not own a

protectable mark in “ibooks,” they cannot sustain their claim that Apple’s use of its iBooks mark is likely to cause reverse confusion with Plaintiffs’ alleged “ibooks” mark. *See PaperCutter, Inc. v. Fay’s Drug Co.*, 900 F.2d 558, 564 (2d Cir. 1990) (holding that to be protectable, plaintiff’s descriptive mark must have acquired secondary meaning before the defendant adopted its mark); *see also Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1040 (2d Cir. 1992); *First Nat’l Bank of Omaha, Inc. v. Mastercard Int’l Inc.*, 03 CIV. 707 (DLC), 2004 WL 1575396, \*7 (S.D.N.Y. July 15, 2004). Proof that a mark is protectable because it has acquired secondary meaning “entails vigorous evidentiary requirements,” and the burden of proof lies with Plaintiffs. *See Bristol-Myers Squibb*, 973 F.2d at 1041. There simply was nothing vigorous about Mr. Shatzkin’s analysis here, however.

**A. Mr. Shatzkin’s Opinions Are Not Based On Sufficient Facts or Data.**

Rule 702 requires that expert testimony be “based on sufficient facts or data.” Fed. R. Evid. 702(b). Here, the facts and data that Mr. Shatzkin should have relied upon are those factors courts consider in determining whether there is secondary meaning, *i.e.*, (1) consumer surveys; (2) “sales success;” (3) advertising expenditures; (4) unsolicited media coverage; (5) third party attempts to plagiarize the mark; and (6) the length and exclusivity of the use. *See Sports Traveler, Inc. v. Advance Magazine Publishers, Inc.*, 25 F. Supp. 2d 154, 164 (S.D.N.Y. 1998). Mr. Shatzkin ignored nearly all of those factors, however, instead relying solely on a single inadmissible spreadsheet that he believes shows sales from some time in the early to mid-2000s. (Shatzkin Rep., 2; Shatzkin Dep., 71:9-21.) Because Mr. Shatzkin did not even conduct “a cursory review of the underlying record in this action,” his testimony is unreliable, and his Report and opinions should be excluded. *See Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at \*8 (Aug. 5, 2010) (excluding expert testimony where purported expert reviewed only two of more than 200 documents produced by the defendant, but

no other documents that “would have provided critical context”); *see also* Fed. R. 702(b); Fed. R. Evid. 703.

**1. Mr. Shatzkin Unreasonably Relied On Sales Data From An Unknown Time Period.**

First, Mr. Shatzkin admits that the sole evidentiary basis for his opinions is “a spreadsheet that [he] believe[s] was the sales reporting or compilation of the sales reporting by Simon & Schuster for the several-year period that they distributed iBooks” (the “Shatzkin Spreadsheet”). (Shatzkin Dep., 71:9-15.) The Shatzkin Spreadsheet is inherently unreliable, however, and thus it was not reasonable for Mr. Shatzkin to rely on it. *See* Fed. R. Evid. 703.

**a. The Sales Data On Which Mr. Shatzkin Relied Are Incomplete And Unreliable.**

Mr. Shatzkin’s testimony and opinions are unreliable because his analysis did not include all of the sales spreadsheets that Plaintiffs produced. He believes the Shatzkin Spreadsheet, which was produced by Plaintiffs in this litigation, covers sales of “ibooks” books from “around 2000 to 2004.” (Shatzkin Dep., 71:9-18.) Plaintiffs also produced another spreadsheet in August 2012 (the “August Spreadsheet”), however, that purports to show sales of “ibooks” books from 1999 through April 2012. (Ray Dec., ¶ 11; Ex. 5.) Notably, the Shatzkin Spreadsheet purports to show net sales of “ibooks” books of [REDACTED] that, according to Mr. Shatzkin, occurred from approximately 2000 to 2004. (*See* Ray Dec., ¶ 21.) By contrast, the August Spreadsheets purport to show net sales of “ibooks” of [REDACTED] for 2000 to 2004. (Ray Dec., ¶ 22.) The nearly [REDACTED] difference in 10-year-old sales data shows that Plaintiffs’ sales data are not reliable.

In any event, Mr. Shatzkin apparently never even saw the August Spreadsheets, let alone considered them in forming his opinions, even though the critical question is whether the alleged “ibooks” mark was recognized by consumers when Apple adopted its iBooks mark in January

2010. *See PaperCutter*, 900 F.2d at 564. Because Mr. Shatzkin ignored all evidence of activities relates to the “ibooks” imprint that occurred after approximately 2004, at best, his opinions are based on incomplete information. Mr. Shatzkin’s opinions should be excluded for that reason alone. *See Fed. R. Evid. 702* (expert testimony may be excluded where it is not based on sufficient facts or data); *Weiner*, 2010 WL 3119452, \*8 (excluding expert testimony where purported expert conducted only a “ cursory” review of just two documents).

In addition, the Shatzkin Spreadsheet is undated, and Mr. Shatzkin was unable to say whether it identifies when any particular sales occurred, although he believes that it covers “approximately” 2000 to 2004, when Simon & Schuster distributed “ibooks.” (Shatzkin Dep., 159:25-160:4; Ray Dec., ¶ 17.) Mr. Shatzkin’s belief is contradicted by Plaintiffs’ Complaint, which alleges that the period during which Simon & Schuster distributed “ibooks” books was 1999 to 2006. (*See Am. Compl. ¶ 13.*) Moreover, the Shatzkin Spreadsheet includes not only titles published by Ibooks, Inc., but also by Plaintiffs’ other imprints, including Brick Tower Press, which suggests that the spreadsheet covers sales that occurred after Plaintiffs acquired the “ibooks” imprint. (Ray Dec., ¶ 19.) The Shatzkin Spreadsheet also includes many titles that do not have publication dates, as well as five science fiction titles that must have been published after 2006.<sup>2</sup> (Ray Dec., ¶ 33.) Thus, there is no reason to believe that the Shatzkin Spreadsheet covers the time period that Mr. Shatzkin claimed, and there is no way to know what period actually is included. *See Berk v. St. Vincent’s Hosp. & Med. Ctr.*, 380 F. Supp. 2d 334, 352-56 (S.D.N.Y. 2005) (holding that expert testimony was inadmissible on summary judgment where the expert based his opinion in a medical malpractice case on several errors including mistakes regarding symptoms, dates on which the symptoms appeared, and dates on which the plaintiff

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<sup>2</sup> The records for those titles list a publication date that is after 2006 and/or identify John Colby, who was not involved with the “ibooks” imprint until after 2006, as their editor. (Ray Dec., ¶ 19.)

contacted the doctor); *Lippe*, 288 B.R. at 701 (excluding expert testimony regarding business valuation where, among other things, the expert did not “account for major variables” and failed to rely on relevant data that was available to him).

**b. The Spreadsheet Is Inadmissible Hearsay.**

The Shatzkin Spreadsheet also is unreliable and inadmissible. As explained above, Mr. Shatzkin did not know precisely what time period is covered by the Shatzkin Spreadsheet. (Shatzkin Dep., 71:9-15; 159:25-160:4.) There is no witness who can corroborate that spreadsheet, or indeed any of the sales data produced by Plaintiffs for the period prior to 2007 because Plaintiffs do not have personal knowledge of sales during that time, nor do they have any ordinary course of business documents that reflect sales information from that time. (*See Colby 30(b)(6) Dep.*, 134:9-22.) Instead, Plaintiffs’ knowledge is based solely on documents that Plaintiffs acquired in late 2006 when they purchased the assets of Ibooks, Inc. out of bankruptcy. (*See, e.g., Colby 30(b)(6) Dep.*, 133:17-134:8.) Thus, all of the pre-2007 sales data produced by Plaintiffs in this case—including the Shatzkin Spreadsheet—is quintessential hearsay to which the business records exception does not apply because there is no qualified witness who can testify that the Shatzkin Spreadsheet was made in the regular course of business at the time the alleged sales occurred. *See Fed. R. Evid. 803(6); see also Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 666 (S.D.N.Y. 2007) (adopting Special Masters’ recommendation, which noted that “a party cannot call an expert simply as a conduit for introducing hearsay” and excluding expert testimony).

Rule 703 makes clear that an expert witness may only rely on hearsay to support his opinions if it is reasonable to do so. *See Fed. R. Evid. 703* (“If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”). Here, because the Shatzkin Spreadsheet

is inherently unreliable and cannot be corroborated by anyone with personal knowledge, his testimony based on that spreadsheet also is unreliable and should be excluded for that reason as well. *See Malletier*, 525 F. Supp. 2d 558 (excluding testimony of expert who relied on unreliable regression analysis conducted by colleague).

\* \* \*

In sum, Mr. Shatzkin failed to consider all of the sales data that Plaintiffs produced and was unsure what time period is covered by the data he did consider. Even under the most generous reading of his opinions, Mr. Shatzkin “proposes to give an expert opinion based on a guess, not facts,” and thus his testimony should be excluded. *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 566 (S.D.N.Y. 2004); *see also* Fed. R. Evid. 702; *Lippe*, 288 B.R. at 689 (excluding testimony that did not “rest[] on a reliable foundation”); *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671, 698 (W.D. Ky. 2010) (in dilution case, noting that “[f]ame in the trademark context must be based upon evidence and case law, not upon the personal opinion of industry commentators”); *Alexander Binzel Corp. v. Nu-Tecsys Corp.*, No. 91 C 2092, 1999 WL 166972, \*8 (N.D. Ill. Marc. 23, 1999) (describing the magistrate judge’s ruling excluding an expert opinion regarding secondary meaning that was “based solely on interaction with customers in an unspecified number of situations” because it lacked foundation).<sup>3</sup>

2. **Mr. Shatzkin Did Not Conduct Any Investigation Regarding Use of the “ibooks” Imprint.**

Second, Mr. Shatzkin’s opinions are also unreliable because he made no effort to educate himself about the use of the “ibooks” imprint by either Plaintiffs or Ibooks, Inc. Specifically,

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<sup>3</sup> Mr. Shatzkin’s opinion that “Apple had created . . . a strong (and overshadowing) alternative identity for the word iBooks” (Shatzkin Rep., 8) should be excluded for the same reasons that his opinions regarding consumer recognition of Plaintiffs’ “ibooks” imprint should be excluded.

Mr. Shatzkin did not review (1) Plaintiffs’ website; (2) any marketing, advertising or publicity materials; (3) any media coverage of “ibooks”; (4) any mentions of “ibooks” on Amazon, Wikipedia or any other website; or (5) any of the documents produced in this case, save for the Shatzkin Spreadsheet. (Shatzkin Dep., 72:4-75:1; 162:19-23; 174:12-176:23; *see also* Shatzkin Rep., 2.) Mr. Shatzkin also did not conduct any internet searches with respect to “ibooks” or “ipicturebooks.” (Shatzkin Dep., 74:18-21.) It is thus not surprising that Mr. Shatzkin did not know:

- How many “ibooks” books are published each year (*see id.*, 141:4-16);
- The current number of “ibooks” books by genre (*see id.*, 144:12-145:5);
- Whether Plaintiffs have ever published any works under the “ibooks” imprint that could not also be obtained from other publishers (*see id.*, 140:22-141:3; 184:8-21);
- How many “ibooks” books have been sold on the internet, how many are sold in hard copy versus electronic form, or how many are sold online versus in bricks-and-mortar stores (*see id.*, 147:7-17; 166:2-9);
- Whether Plaintiffs have an active website (*see id.*, 173:22-174:6);
- Who owns the [www.ibooksinc.com](http://www.ibooksinc.com) domain name (which is owned by Plaintiffs, but was not active until just a few months ago) (*see id.*, 177:9-14);
- The volume of traffic to Plaintiffs’ website (*see id.*, 175); and
- Whether Plaintiffs engage in any marketing or advertising activities—such as using e-mail lists, using Facebook, Twitter or other social media, or hosting in-person events—or otherwise have made any efforts to develop direct contacts with their end consumers (which he views as essential given the publishing industry’s overall shift from a brick-and-mortar bookstore model to an online, digital model) (*see id.*, 171:18-176:23).

Mr. Shatzkin’s failure to consider whether, as a factual matter, Plaintiffs ever use the “ibooks” imprint in any meaningful way only highlights the unreliability of his opinions. *See Weiner*, 2010 WL 3119452, \*9 (excluding expert testimony where expert did not “invest[] sufficient time and effort to develop a reliable methodology to support an expert opinion”);



*Lippe*, 288 B.R. at 689 (excluding testimony that did not “rest[] on a reliable foundation” and was based on “speculative and conjectural conclusions”) (citation omitted).

**III. MR. SHATZKIN FAILED TO ADDRESS THE RELEVANT ISSUE ADDRESSED BY DR. CARPENTER—WHETHER PLAINTIFFS’ ALLEGED MARK EVER ACQUIRED SECONDARY MEANING.**

Even if Mr. Shatzkin’s testimony meets the requirements of Rule 702 (and it does not), his testimony still should be excluded under Rule 403 because it is unfairly prejudicial, confuses the issues, and will mislead the jury. *See* Fed. R. Evid. 403.

As explained above, *supra* at 6-7, Plaintiffs must establish that their alleged “ibooks” mark acquired secondary meaning before Apple adopted the IBOOKS mark in January 2010. *See PaperCutter*, 900 F.2d at 564. Mr. Shatzkin utterly failed to address that central question, however, admitting that he was unable to determine whether any consumers ever recognized the “ibooks” imprint as a brand, and in fact was “not comfortable” answering that question:

Q. You talked about crossing the line to having a brand. Is it your opinion that iBooks at any point crossed that line?

MR. RASKOPF: Objection to the form.

A. You’re asking me to generate a characterization. I’m just simply not comfortable saying when the lines got drawn. I go back to what I said, which is that they have a foundation of knowledgeable people in what strikes me as a sufficient number to make a real play for a science fiction brand. . . .

Q. Is it your opinion that iBooks has made a play to capitalize on those people who have bought books in the past?

MR. RASKOPF: Objection to the form of the question.

A. I have not seen the evidence of it.

(Shatzkin Dep., 223:7-224:16 (emphasis added).)

Mr. Shatzkin testified that he was “very focused” on only the 2000 to 2004 time period (*see* Shatzkin Dep., 217:4-20), and it clearly is Mr. Shatzkin’s opinion that the “ibooks” imprint

has not been recognized since Plaintiffs acquired the business in 2006—and certainly was not recognized in January 2010, when Apple introduced its iBooks software app:

Q. Is it your opinion that iBooks is a business to consumer brand?

MR. RASKOPF: Objection to the form of the question.

A. . . . It is my opinion that iBooks was recognized as a legitimate science fiction publisher by a substantial number of science fiction book consumers, and that that created a foundation on which can be built upon [sic].

Q. That again is based on the sales numbers [from approximately 2000 to 2004]?

A. Yes.

Q. In paragraph three [of the Shatzkin Report], where you say how the iBooks brand could have capitalized on its legacy, do you see that, to build a valuable consumer franchise? Is it your opinion that it ever did capitalize on that legacy?

MR. RASKOPF: Objection to the form of the question.

A. I'm not aware of any specific steps that were taken to capitalize on that legacy in the manner which say I would have done it.

(Shatzkin Dep., 190:18-192:4 (emphasis added); *see also id.*, 212:17-19 (Mr. Shatzkin has seen “no evidence” that the publishers of “ibooks” ever turned their attention to consumer branding). In short, at no time in his Report or in his deposition did Mr. Shatzkin opine that “ibooks” was a brand that actually was recognized by consumers as of January 2010.

In fact, Mr. Shatzkin testified that he was not aware of Plaintiffs before he was asked to serve as an expert in this case, and was only aware of the “ibooks” and “ipicturebooks” imprints in the late 1990s, “when they were new.” (Shatzkin Dep., 24:23-26:6.) Furthermore, when asked to name the “significant” science fiction imprints that are known to consumers, Mr. Shatzkin made no mention of “ibooks.” (*Id.*, 115:15-117:23.) Given that Mr. Shatzkin claims to have “interacted on a professional basis with most of the significant publishers in the English

speaking world,” the fact that he had not heard of Plaintiffs and does not consider “ibooks” to be worthy of mention among the significant science fiction publishing imprints is telling. (Shatzkin Dep., 47:11-22; *see also id.*, 24:23-26:6.)<sup>4</sup> *See Oxford Indus., Inc. v. JBJ Fabrics, Inc.*, 6 U.S.P.Q.2d 1756, 1760 (S.D.N.Y. 1988) (finding registered mark was “extremely weak” where an expert who had been employed in the relevant field for 40 years was unaware of the mark).

Because Mr. Shatzkin did not address the relevant question—namely, whether the “ibooks” imprint was recognized by consumers before January 2010—his testimony and opinions are unfairly prejudicial and will serve only to confuse and mislead the jury, and thus should be excluded. *See Fed. R. Evid. 403; PaperCutter*, 900 F.2d at 564 (holding that a plaintiff must show its mark had acquired secondary meaning before the defendant adopted its mark).

#### **IV. MR. SHATZKIN’S OPINION THAT “IBOOKS” IS A NICHE PUBLISHER IS BELIED BY THE EVIDENCE, AND IS IRRELEVANT.**

Mr. Shatzkin opines that the “ibooks” imprint “specializ[es] in science-fiction” (Shatzkin Rep., 5), but as discussed below, the evidence shows that the “ibooks” imprint is not, and never has been, a niche science fiction-focused imprint. Because Mr. Shatzkin’s opinion is not supported by the evidence, it should be excluded. *See Fed. R. Evid. 702(b)* (requiring expert testimony be based on “sufficient facts or data”); *see also Fed. R. Evid. 403* (requiring that evidence not confuse the issues or mislead the jury). Furthermore, because books published under the “ibooks” imprint are directed not only to science fiction readers, but to readers across a wide variety of genres, Mr. Shatzkin’s opinions regarding science fiction readers are irrelevant and thus should be excluded for this reason as well. *See Black & Decker Corp. v. Dunsford*, 944

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<sup>4</sup> Mr. Shatzkin has written 300-400 blog posts since February 2008, none of which have mentioned the “ibooks” imprint, Plaintiffs or Preiss. (Shatzkin Dep., 214:12-215:3.)

F. Supp. 220, 226 n.8 (S.D.N.Y. 1996) (explaining that secondary meaning is “determined by assessing the attitude of the consuming public,” and that the consuming public is the market “to which the product is directed”).

**A. Neither Mr. Preiss, Plaintiffs Nor Third Parties Consider “ibooks” To Be A Science Fiction Imprint.**

In asserting that “ibooks” is a niche science fiction imprint, Mr. Shatzkin wholly ignores the fact that “ibooks” has never been promoted as such, but instead has always been described as a general trade publisher. (Ray Dec., ¶¶ 37-41.) For example, a May 24, 1999, *Publishers Weekly* article about the launch of the “ibooks” imprint stated that the “ibooks” imprint “will emphasize titles in science, history, science fiction and mystery.” (Ray Dec., ¶ 38, Ex. 7.) Similarly, a May 17, 2000 memo from Mr. Preiss to investors described “ibooks” as a “general trade imprint” that published media tie-ins, science, history, mystery, science fiction and literary classics. (Ray Dec., ¶39, Ex. 8.)

More recently, Plaintiffs themselves assert in their Amended and Supplemental Complaint that “many of [the books published under the “ibooks” imprint] focus on history;” that the “imprint also features a number of well-known fictional works and annotated versions of classical fictional works. . . ;” and that the ““ibooks’ print books also include numerous graphic novel versions of famous novels....” (Am. Compl., ¶¶ 15-16, 18.) Even at this late date, the “About Us” page on Plaintiffs’ website describes the “ibooks” imprint as being “known for its extensive backlist titles in trade fiction, science fiction, fantasy, graphic novels, history and popular culture”—it does not even list science fiction first. (Ray Dec., ¶41, Ex. 9.)

**B. Mr. Shatzkin’s Calculations Regarding Science Fiction “ibooks” Are Flawed.**

Mr. Shatzkin ignored the evidence that even Plaintiffs do not consider “ibooks” a niche science fiction imprint, instead basing his conclusions on the single inadmissible spreadsheet

discussed above. Even if the Shatzkin Spreadsheet were accepted at face value, Mr. Shatzkin's analysis of the data set forth in that spreadsheet is so deeply flawed that his opinions should be excluded.

According to Mr. Shatzkin's calculations, [REDACTED] units of science fiction "ibooks" were sold, out of a total of [REDACTED] units sold during whatever period is covered by the Shatzkin Spreadsheet. (Shatzkin Rep., 5.) Thus, even using his numbers, the "ibooks" books sold during that unknown period were not "primarily" science fiction, as Mr. Shatzkin claims in his Report, but rather only 34% science fiction. (Ray Dec., ¶ 36; Shatzkin Dep., 147:24-148:6) Mr. Shatzkin admitted as much, but asserted that it was in fact irrelevant that the majority of "ibooks" books were not science fiction:

What I was looking for was a critical mass of output in any area. So, in other words, whether approximately [REDACTED] science fiction units were sold, whether that was [REDACTED] out of 3 million or 6 million or 10 million is not as important to me as they sold [REDACTED] units.

(Shatzkin Dep., 148:7-149:14.)

Even there, however, his analysis fails, because Mr. Shatzkin also admitted that he has no way of knowing how many of the books actually made their way into the hands of consumers, as opposed to the distributors to whom Ibooks, Inc. sold its books. (Shatzkin Dep., 161:21-162:2.) Mr. Shatzkin admitted that the practice in the publishing industry is to "enable[]" returns, and that it "is not unusual" for a distributor to be able to return books for up to two years. (*Id.*, 180:7-20.) Nevertheless, he asserted, without any basis, that the sales and return activity that occurred after 2004 "did not subtract anything from" the sales that occurred in prior years. (*Id.*, 184:22-185:20.) The facts are directly contrary to his view. Plaintiffs' own documents show that beginning in 2004 the books sold to distributors under the "ibooks" imprint were *returned in massive quantities*. (Ray Dec., ¶¶ 23-26; Colby 30(b)(6) Dep., 162:3-21; 165:11-21; Mr. Colby

Dep., 104:5-10.) Furthermore, since acquiring the “ibooks” business in 2006, Plaintiffs admittedly have destroyed “a lot” of books—including [REDACTED] worth of books in 2010 and 2011—because their “distributor didn’t want to sell them any more.” (Ray Dec., ¶¶ 27-29; Colby 30(b)(6) Dep., 238:4-242:4; Mr. Colby Dep., 33:10-34:13.) Thus, the evidence shows that those returns and destroyed inventory did “subtract” from the sales that Mr. Shatzkin believes occurred in the mid-2000s because those books never made their way into the hands of consumers—a fact Mr. Shatzkin wholly ignored. Mr. Shatzkin’s failure to account for the massive returns that occurred after approximately 2004 further invalidates his conclusions. *See Lippe*, 288 B.R. at 701 (excluding testimony where the expert did not “apply[] reliable principles and methods in a fair and reliable way, and [made] no effort to account for major variables that one would expect to have an impact on [his] conclusions”).

Mr. Shatzkin also significantly over-counted the number of individual science fiction titles published under the “ibooks” imprint. Mr. Shatzkin opined that 665 science fiction titles were published under the “ibooks” imprint (Shatzkin Rep., 5), based on his assistant’s “massag[ing]” of the Shatzkin Spreadsheet. (Shatzkin Dep., 11:19-12:11.) By his own admission, however, Mr. Shatzkin has no idea whether any effort was made to account for the many duplicate title and ISBN number listings<sup>5</sup> in the Shatzkin Spreadsheet. (Shatzkin Dep., 156:19-157:21.) In fact, the Shatzkin Spreadsheet includes 449 duplicate science fiction titles, none of which should have been counted as separate science fiction titles. (Ray Dec., ¶ 31.) This flawed and unreliable methodology further undermines the conclusions in Mr. Shatzkin’s Report.

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<sup>5</sup> As Mr. Shatzkin explained, an ISBN number is a unique identifier for a given book. (Shatzkin Dep., 154:18-23.) Thus, duplicate ISBN numbers on the spreadsheet necessarily identify duplicate titles.

In addition, Mr. Shatzkin’s Report apparently counted as science fiction six titles, including one about Britney Spears, that clearly are not within the science fiction genre. (Ray Dec., ¶ 32.)<sup>6</sup> That Mr. Shatzkin included them highlights the slap-dash nature of his analysis. Mr. Shatzkin also included five titles that were published after 2006, as well as more than 300 titles for which there is no publication date at all. (Ray Dec., ¶ 33.) Thus, it appears that there were at most 205 science fiction titles published under the “ibooks” imprint in the mid-2000s—and likely far less than that, given the lack of information about when the listed titles were published and sold. (Ray Dec., ¶ 34.) This is very far from the 665 science fiction titles that Mr. Shatzkin claims were published under the “ibooks” imprint during the early to mid-2000s.

In any case, Mr. Shatzkin’s sole focus is on the period from 2000 to 2004 (Shatzkin Rep., 5; Shatzkin Dep., 217:4-20.), even though the issue is whether the “ibooks” imprint was recognized by consumers in January 2010, when Apple adopted its iBooks mark. *See PaperCutter*, 900 F.2d at 564. He has no data whatsoever about sales of “ibooks” books from 2005 to the present, and thus has no basis to opine about what, if anything, happened with the “ibooks” imprint after the Ibooks, Inc. bankruptcy in 2006. In particular, he cannot say how many science fiction “ibooks” titles were sold after 2006, and what percentage of the overall “ibooks” sales they represent. In fact, he simply cannot say whether the “ibooks” books are currently marketed as a niche science fiction imprint, or whether any consumers currently recognize the “ibooks” imprint as a brand. Thus, Mr. Shatzkin has no basis for offering any opinion as to the imprint’s current status, which is the relevant question.

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<sup>6</sup> Those titles are “1001 Playlists,” “Battle of Yorktown,” “Big Numbers,” “Britney Spears,” “Capital Offense,” and “Guns Drugs & Monsters.” (Ray Dec., ¶ 32.)

**C. Mr. Shatzkin’s Opinion That Consumers Purchased Multiple Science Fiction “ibooks” Books Is A Mere Assumption.**

Finally, Mr. Shatzkin “assume[d] that many thousands, perhaps tens of thousands, of science-fiction readers purchased and read several iBooks titles” (Shatzkin Rep., 8), and claims that if some number of consumers purchased two, three or more such books, they would have become aware of the “ibooks” imprint as a result of seeing it repeatedly on the books they purchased. (Shatzkin Dep., 148:7-149:14.) But as even he admits, there is absolutely no factual basis for any of these assertions, and therefore this opinion should be excluded for this reason as well. (*Id.*, 149:19-22; *see also id.*, 152:18-23.)

At his deposition, Mr. Shatzkin admitted he had no evidence—and there is none—that any consumers ever bought more than one “ibooks” science fiction book. (*Id.*, 149:19-22; 152:18-23.) “By *assuming* the existence of [such purchases, Mr. Shatzkin] was relying not on facts or data but instead was engaging in rank speculation.” *Lippe*, 288 B.R. at 698 (emphasis in original). Indeed, Mr. Shatzkin acknowledged that any books that were sold in the mid-2000s “were sold to an unknown number of people.” (Shatzkin Dep., 151:21-152:14.) In light of this, his opinions should be excluded as the inappropriate musings of an industry observer, and not the rigorous analysis of an expert qualified under the Federal Rules of Evidence. *See In re Rezulin Prods.*, 309 F. Supp. 2d at 540 (excluding expert testimony and noting that a district court is not required to “admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert”); *Lippe*, 288 B.R. at 686 (excluding expert testimony that was speculative, unrealistic, and based solely on the experts’ *ipse dixit*).

**V. MR. SHATZKIN ADMITTED THAT PLAINTIFFS DID NOT ENGAGE IN ANY BRAND-BUILDING ACTIVITIES.**

In his Report, Mr. Shatzkin provides opinions about “the evolution to direct consumer marketing” in the publishing industry, in an effort to show that Dr. Carpenter was mistaken when



he opined that Plaintiffs failed to build a brand because they did not engage in any consumer-directed branding activities. (Shatzkin Rep., 2-5.) For example, Mr. Shatzkin argues, without citing any authority for the proposition, that “in publishing[,] almost no money is spent—or has been spent—on creating consumer awareness and recognition of brands.” (*Id.*, 6.)

At his deposition, however, Mr. Shatzkin contradicted his own report when he admitted that Harlequin—a publisher with a “strong brand identity” (Shatzkin Dep., 123:6-12) that he believes consumers “know” (Shatzkin Rep., 5)—has marketed directly to consumers, including by offering subscriptions and free online content and hosting events for its readers. (Shatzkin Dep., 100:7-103:21; 121:22-25.) Similarly, Mr. Shatzkin admitted that Tor and Baen—two “known” niche science fiction publishers referenced in his Report—“make very active efforts to communicate directly with their audiences.” (*Id.*, 115:15-116:11.) Tor and Baen “solicit people to be in touch with them. They say register on our web site, get our newsletter,” and sell directly to consumers. (*Id.*, 117:24-118:15.)

In contrast to these consumer-directed activities, Mr. Shatzkin repeatedly testified that, as Dr. Carpenter concluded, neither Plaintiffs nor Ibooks, Inc. ever engaged in the kinds of activities that would create consumer awareness, even going so far as to volunteer that Mr. Colby is an antiquated “bookstore guy” who is “behind the curve” when it comes to marketing. (*Id.*, 172:17-173:3; *see also id.*, 191:18-192:14; 212:17-19; 224:10-16.) Indeed, Mr. Colby himself admitted that he is “unsure how to effectively market a web strategy.” (Ray Dec., Ex. 3 (Colby 30(b)(6) Dep., 298:22-25.) Thus, if anything, Mr. Shatzkin’s testimony only serves to confirm Dr. Carpenter’s conclusion that there is no consumer recognition of the “ibooks” imprint.

### **CONCLUSION**

The purpose of Rule 702 and 403 is to exclude testimony that is neither reliable nor helpful and, instead, is likely to mislead the jury. Because Mr. Shatzkin did not conduct any

meaningful research or investigation regarding consumer recognition of the “ibooks” imprint, utterly failed to address the relevant issue, and based his opinions on a flawed analysis of a single unreliable document, his Report and opinions, and testimony, evidence or argument relating thereto, should be excluded.

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Respectfully submitted,

*s/ Dale M. Cendali*

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