

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JT COLBY AND COMPANY, INC., D/B/A
BRICK TOWER PRESS, J. BOYLESTON AND
COMPANY PUBLISHERS, LLC, AND
IPICTUREBOOKS, LLC,

Plaintiffs,

-against-

Index No.
11-CV-4060 (DLC)

APPLE, INC.,

Defendant.

-----X

VIDEOTAPED DEPOSITION OF
SUSAN SCHWARTZ MCDONALD

New York, New York

December 12, 2012, 9:56 a.m.

Reported By:

Nicole Sesta

Ref: 8606

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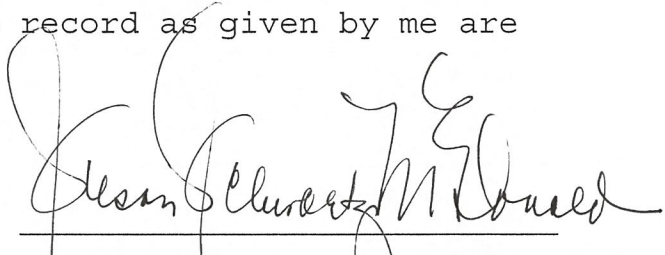
J U R A T

STATE OF NEW YORK)

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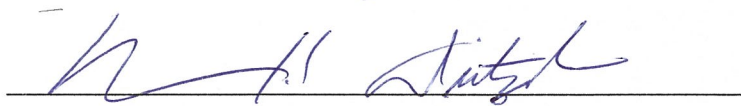
COUNTY OF)

I, SUSAN SCHWARTZ MCDONALD, hereby
certify that I have read the transcript of my
testimony taken under oath in my deposition of
December 12, 2012; that the transcript is a true
and complete record of my testimony, and that
the answers on the record as given by me are
true and correct.

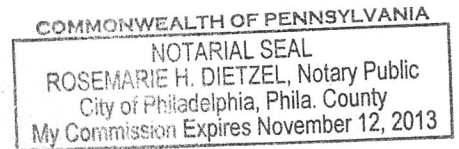


SUSAN SCHWARTZ MCDONALD

Signed and subscribed to before me this
10 day of January, ~~2012~~²⁰¹³



Notary Public, ~~State of New York~~
Com. of PA



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ERRATA SHEET FOR THE TRANSCRIPT OF:
Case Name: JT Colby vs. Apple
Deposition Date: December 12, 2012
Deponent: Susan Schwartz McDonald

CORRECTIONS

<u>PG</u>	<u>LN</u>	<u>NOW READS</u>	<u>SHOULD READ</u>	<u>REASON FOR</u>
60	17	rigors	rigorous	transcription error
78	9	and staple	in the stable	transcription error
88	6	see	cede	transcription error
90	8	looking	look	transcription error
102	25	Latham	Lanham	misspelling
105	6	laboratory understanding	laboratory, understanding	punctuation
105	13	they're	their	transcription error
108	19	precedence	precedents	misspelling
112	5	precedence	precedents	misspelling
119	5	knowledge of forethought	knowledge and forethought	transcription error
119	6	whatever one can argue a	whatever, one can argue,	punctuation/extra word
119	9	understand advisedly here	understand	delete "advisedly here"
120	8	as best you can	"as best you can"	addition of quotation marks
120	12	exceeded	acceded	transcription error
120	15	wants	want	transcription error
128	20	wasn't -- I was in mind	wasn't in mind	extra words
128	21	I	it	transcription error
131	13-14	actually & proffer. If	actually and prefer, if	transcription error
136	20	encountered	encounter	transcription error
137	12	To I believe the encounter, is	I believe the encounter is	extra word/punctuation

27	138	19	Consumers them	Consumers handle them	word missing
28	153	3	I felt	I thought	transcription error
29	<u>PG</u>	<u>LN</u>	<u>NOW READS</u>	<u>SHOULD READ</u>	<u>REASON FOR</u>
30	157	16	queue	hew	transcription error
31	158	11	national	natural	transcription error
32	161	9	that's who is experiential,	that's also experiential,	transcription error
33	161	10	penetration digital books.	penetration of digital books.	missing word
34	161	14	Pugh	Pew	misspelling
35	161	21	Pugh	Pew	misspelling
36	162	6	Pugh	Pew	misspelling
37	162	11	Pugh	Pew	misspelling
38	162	13	Pugh	Pew	misspelling
39	162	18	Pugh	Pew	misspelling
40	166	14	to show what	to show, what	punctuation
41	166	15	to show especially	to show, especially	punctuation
42	170	19	which is	where it's	transcription error
43	170	24	think regardless	think, regardless	punctuation
44	172	20	books contain, some	books contain some,	punctuation
45	187	19	non-specific	specific	extra word
46	198	15	I don't know. I didn't.	No, I didn't.	transcription error
47	198	25	prospective purchaser. In	prospective purchaser in	punctuation
48	199	3	you already have it.	You already have it;	punctuation
49	199	4	Just get another thing and	that's yet another thing.	transcription error
50			we're talking the way	We're talking the way	
51	201	23	that or certain	that for certain	transcription error
52	213	15	taking	sending	transcription error

	<u>PG</u>	<u>LN</u>	<u>NOW READS</u>	<u>SHOULD READ</u>	<u>REASON FOR</u>
53					
54	214	2	double	knowable	transcription error
55	217	2	rationale way correct relative	rational way relative	transcription error/extra word
56	217	20	in attempted	intent to	transcription error
57	218	18	Pugh	Pew	misspelling
58	219	13	several of which	one of which	transcription error
59	220	11	interim	in frequent	transcription error
60	221	16	as well as prints	as well as print	transcription error
61	221	19	imagine that this	imagine, that this	punctuation
62	222	7	Pugh	Pew	misspelling
63	222	10	in the future	if in the future	word missing
64	223	7	Pugh	Pew	misspelling
65	224	2	that's one	that's the only one	words missing
66	228	15	Pugh	Pew	misspelling
67	230	12	is a publisher	is no publisher	transcription error
68	232	3	assemble	dissemble	transcription error
69	232	4	Pugh	Pew	misspelling
70	232	16	disqualified who	disqualified, people who	word missing
71	235	22	wait	weight	misspelling
72	236	24	statistical waiting	statistical weighting	misspelling
73	237	8	I can rate	I can weight	transcription error
74	237	22	Pugh	Pew	misspelling
75	238	12	wait	weight	misspelling
76	238	15	Pugh	Pew	misspelling
77	238	22	roughly equal sales	roughly equal cells	transcription error
78	238	25	wait	weight	misspelling

	<u>PG</u>	<u>LN</u>	<u>NOW READS</u>	<u>SHOULD READ</u>	<u>REASON FOR</u>
79					
80	239	8	Pugh	Pew	misspelling
81	239	9	Pugh	Pew	misspelling
82	239	12	Pugh	Pew	misspelling
83	239	16	Pugh	Pew	misspelling
84	239	18	Pugh	Pew	misspelling
85	239	20	Pugh	Pew	misspelling
86	239	23	statistical waiting	statistical weighting	misspelling
87	240	3	Pugh	Pew	misspelling
88	240	5	Pugh	Pew	misspelling
89	242	5	malls, the reality	malls – the reality	punctuation
90	248	21	have the opportunities	and the opportunities	transcription error
91	254	15	might have	might not have	word missing
92	257	14	control	controlled	transcription error
93	259	17	a control study	a controlled study	transcription error
94	260	8	noble question	knowable question	transcription error
95	264	6	industry is high	industry is hide	transcription error
96	265	21	with queues	with cues	misspelling
97	282	4	in content Apple	in content, Apple	punctuation
98	282	6	can't anybody	can't get anybody	word missing
99	288	5	have it	has it	transcription error
100	288	11	partially	parsing	transcription error
101	315	6	was not capital	was capital	extra word
102	316	16	digital iBook. I'm	digital iBook, I'm	punctuation
103	316	17	sure I did that	sure I did, that	punctuation
104	319	8	It's not unusual	It's unusual	extra word

	<u>PG</u>	<u>LN</u>	<u>NOW READS</u>	<u>SHOULD READ</u>	<u>REASON FOR</u>
105					
106	319	24	surveys in fact required	surveys, in fact, required	punctuation
107	319	25	absolutely foiled for litigation	absolutely fair for litigation	transcription error
108	329	6	I have kudos	I give kudos	transcription error
109	377	Index	Pugh	Pew	misspelling

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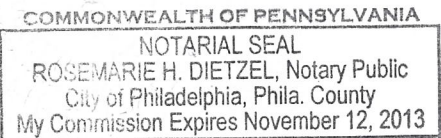
Jan 10 2013
Date

Susan McDonald
Signature

114
115
116

117 Subscribed and sworn to before me
118 this 10 day of January 2013.

119
120 Rosemarie H. Dietzel
121 (NOTARY PUBLIC)



1 S. Schwartz McDonald

2 Q And what was said in that initial
3 conversation?

4 A The case was described. I think
5 some of the general same areas of discussion
6 were recapitulated. There was an opportunity to
7 both refresh and amplify for me the facts that
8 -- what had transpired in this case, the history
9 of Mr. Colby's company. And that really was
10 pretty much it.

11 Q At that time, were you again
12 relying on what counsel told you orally, or were
13 you presented with any additional documents?

14 A I can't recall -- earlier, I
15 think, before meeting with the attorneys from
16 Quinn Emanuel, I did have -- had received a
17 couple of documents from Mr. Morrison and may
18 have skimmed them, didn't necessarily read them
19 with great care at the time because I really
20 didn't have a mission statement for myself.

21 Q Do you recall what documents you
22 were provided?

23 A I think there was -- I'm guessing
24 now because I really just don't have the
25 chronology. I believe that I had some response

1 S. Schwartz McDonald

2 just -- I think we have a semantic issue. Once
3 retained by one party in litigation, therefore,
4 you may be called, depending on what the
5 terminology is, an advocate. However, in this
6 case, I entered into the case in the spirit of
7 intellectual freedom and non-partisanship. I
8 owed nothing to anyone, and I arrived at an
9 inference and a hypothesis that I tested.

10 Q Isn't it true, Dr. McDonald, that
11 you wrote a report in which you strenuously
12 advocated plaintiffs' case as if you were the
13 lawyer representing them?

14 MR. RASKOPF: Note my
15 objection to the form of the
16 question.

17 A Well, I'm flattered, but I would
18 not have described myself as a lawyer advocate
19 in that way. I -- my championship of an
20 intellectual cause here was entirely as a
21 marketing expert who had observed what she, what
22 I believed to be market events and market
23 phenomenon and had derived from that hypotheses
24 about what the likelihood of confusion might be
25 and did a survey that I believe makes a point,

1 S. Schwartz McDonald
2 can be defended intellectually,
3 methodologically. And that probably answers the
4 question or more than.

5 Q Isn't it true that a survey expert
6 should be an objective scientist reporting on
7 the results of her research and not a biased
8 advocate for a particular party's cause?

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

11 A I think I answered it. I'll try
12 to answer it again, if you don't agree.

13 When an expert is called in in a
14 case involving survey research, that expert has
15 the obligation to develop a hypothesis based on
16 the information that's available and to use
17 methodologically rigors and defensible
18 procedures to test that hypothesis to prove or
19 disprove it.

20 Research, as I said at the very
21 outset of this dialogue, is hypothesis driven.
22 That's essentially the requirements of any
23 experimental research, and of course, as you
24 know well, research that is used in Latham Act
25 adjudication is experimental almost always by

1 S. Schwartz McDonald

2 its nature.

3 MS. CENDALI: Move to

4 strike as non-responsive.

5 Can you read my question

6 back?

7 Q Again, can you answer my question?

8 MR. RASKOPF: Excuse me.

9 Read back the question.

10 (Record read.)

11 MR. RASKOPF: Objection to

12 the form of the question.

13 Q Can you answer that question, yes

14 or no?

15 MR. RASKOPF: Objection to

16 the form of the question.

17 A The language is freighted in your

18 question in such a way that a yes or no response

19 won't be meaningful. I think you used the word

20 "advocate" and you used the word "biased." And

21 I was simply trying to make the case, as I did,

22 I think, when I answered your earlier question,

23 that an expert is called in in a case like this

24 is -- in my case especially, because I was

25 called not just as a survey expert, but also as

1 S. Schwartz McDonald
2 a marketing expert. And the mission was to
3 arrive at a hypothesis and to test that
4 hypothesis. I did. I wouldn't describe that as
5 bias, and I wouldn't describe it as advocacy in
6 the sense of partiality or inappropriate
7 hypothesis formation.

8 Q Isn't it true that a hypothesis is
9 a legal question that is tested?

10 A No, actually. That's a
11 misrepresentation.

12 Q Isn't it true that you did not
13 test an hypothesis, you constructed a survey to
14 confirm your -- an opinion that you had
15 previously?

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

18 A I think you have a misconception
19 of what a hypothesis is in the scientific arena
20 and the social scientific as well.

21 A hypothesis is a proposition, and
22 it's not just a question. It can be stated in
23 an affirmative way, X is true, X is not true, I
24 can expect this much difference. There are a
25 number of ways to state a hypothesis, but they

1 S. Schwartz McDonald

2 confirmed your opinion?

3 MR. RASKOPF: Objection to
4 the form.

5 A I would have to see the sentence
6 before I stipulate to that, but I freely concede
7 that the survey confirmed my hypothesis.

8 Q Turn to page 1 of your survey
9 report, Exhibit 1. On the first page of your
10 survey, you wrote, "The survey", in the second
11 paragraph, "The survey confirms my opinion that
12 since early 2010 iBooks has become a strong
13 identifier for Apple," and it continues.

14 Do you see that?

15 A Yes, I do.

16 Q So you constructed a survey that
17 confirmed your prior opinion, isn't that true?

18 MR. RASKOPF: Objection to
19 the form.

20 A Once we are in the context of
21 research, it should be stated as a hypothesis
22 and it was. It was a hypothesis which could
23 have been disproved, it wasn't. I absolutely --
24 and I want to be very clear about this. I was
25 not retained only as a survey expert. I was

1 S. Schwartz McDonald

2 retained as a marketing expert. I was retained
3 as a brand expert, who forms opinions all the
4 time, offers her clients consultation -- and
5 clients of all kinds, I would add, not just
6 pharmaceutical companies, but well-known brands
7 outside that arena -- someone who is retained to
8 offer them opinions and advice. I was retained
9 with that mission in mind, and because I also
10 happen to be a survey expert who does literally
11 hundreds of surveys in the course of a year or
12 two, I was also charged with responsibility for
13 proving or disproving the hypothesis that arose
14 in a research context from my opinions.

15 Q Dr. McDonald, you wrote, "The
16 survey confirms my opinion." Do you see that?

17 A Yes, I do.

18 Q Were you being truthful when you
19 wrote that?

20 A Absolutely.

21 Q And isn't it true that prior to
22 conducting your survey, you had formed an
23 opinion that there was a likelihood of
24 confusion?

25 MR. RASKOPF: Objection.

1 S. Schwartz McDonald

2 Asked and answered.

3 A Again, when I became aware of the
4 issues, knowing the strength of Apple's iBooks'
5 mark, knowing the nature of plaintiffs'
6 products, knowing all the circumstances that
7 have been established and presented in evidence
8 in this case, that I became aware of, I formed
9 the conclusion that there was a likelihood of
10 confusion in this case. I formed that
11 conclusion, that opinion as a marketing
12 consultant. I then put on my researcher hat for
13 purposes of testing it, and I tested a
14 hypothesis. The end of the day, my motivation,
15 my state of mind fundamentally is secondary,
16 tertiary to the methodology that was used and
17 the conclusions that I formed as a result of
18 that methodology.

19 Q Do you believe that a survey
20 expert has the ability to slant results in a
21 particular way by the methodology chosen and
22 questions asked?

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

25 A Yes. I have's seen it done on

1 S. Schwartz McDonald

2 MR. RASKOPF: Objection to
3 the form.

4 A I'm not sure that "critical" is
5 the word I would use. I think it wasn't a moral
6 judgment being cast here, but I think it was a
7 physically active connotation that I wanted to
8 suggest.

9 Q What documents did you rely on to
10 come to your conclusion that Apple commandeered
11 the "I" prefix for its book distribution
12 business?

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

15 A My use of commandeered reflected
16 the information that was provided in the
17 complaint, primarily; although, I would have to
18 say that certainly awareness of Apple's very
19 active attachment of its brands to the "I"
20 prefix is certainly part of the ambient
21 marketing world in which I live and contributed
22 to that thought process.

23 Q Did you accept the allegations in
24 the complaint as true?

25 MR. RASKOPF: Objection to

1 S. Schwartz McDonald
2 Apple marketing. It's difficult to be insulated
3 from that. Apple's marketing is -- it's
4 celebrated, it's iconic actually and much
5 discussed in the industry because of Steve Jobs'
6 propensity -- alleged propensity not to rely on
7 market research himself.

8 Q You don't cite any of these
9 articles or any other information about Apple as
10 documents or things you consulted on and relied
11 on in forming your opinion; isn't that true?

12 MR. RASKOPF: Objection to
13 the form.

14 A Sorry. I tread on your question.
15 I have no way to do that because I'm an active
16 reader. I'm immersed in this. I have to tell
17 you that Apple marketing, Apple as the brand is
18 the amniotic fluid in which we are all bathed.

19 Q Dr. McDonald, did you do any
20 investigation as to Apple's iBooks' business in
21 formulating your expert opinions?

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

24 A I think I've told you I did no
25 independent research. I didn't do any -- even

1 S. Schwartz McDonald
2 web surfing. But Apple, as I told you, is much,
3 much discussed in the marketing world.

4 Q And what did you do other than
5 read the complaint to investigate plaintiffs'
6 business before forming your expert opinions?

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

9 A What I know -- most of what I know
10 about plaintiffs' business, I think, has been
11 articulated in the complaint, at least what is
12 relevant. And I think someone who does what I
13 do for a living has to be credited with the
14 mental agility to interpolate and extrapolate
15 based on that fact pattern, that a company that
16 is in the business of publishing iBooks, a
17 company that has a significant digital library,
18 a company who, in the end, whose survival, like
19 all book publishers, is going to depend upon
20 their presence in the digital space, that they
21 and a mega brand called iBooks from Apple are
22 going to collide in that space.

23 Q What -- did you do any
24 investigation to test whether the allegations in
25 plaintiffs' complaint were actually true?

1 S. Schwartz McDonald

2 have of the publishing industry before we began
3 here. I didn't believe that marketing materials
4 would be copious because of the way in which the
5 brand and brands have traditionally been
6 marketed, which is not to readers and consumers
7 but to the trade, that the strength of titles is
8 the way they're marketed, the strength of
9 authors and staple are the way they're marketed.
10 It's a very different model of brand marketing,
11 and I understand that.

12 Q And did you get that from reading
13 Mr. Shatzkin's expert report?

14 A Actually, I learned some of it
15 from the conversation with Mr. Colby, and I
16 learned some of it by my observations in the
17 publishing industry, which I know to be very
18 different.

19 Q Dr. McDonald, did you or did you
20 not review any of the documents that were
21 produced in discovery in this case in order to
22 assess in forming any of your conclusions with
23 regard to marketing?

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

1 S. Schwartz McDonald

2 whether that, in fact, would occur?

3 A It's not something that's subject
4 to investigation. It's only subject to serious
5 speculation and inference. Again, it's a
6 proposition that one arrives at by assessing the
7 environment, by applying a kind of marketing
8 rule book that allows you to looking at the
9 nature of a brand, the nature of its evolution,
10 its role in the marketplace, and arrive at a
11 conclusion about the meaningfulness and value of
12 its branding rules.

13 Q So you didn't do any investigation
14 to backup your statement that there was a "Near
15 certain prospect that Apple's revenue stream
16 from a substitute brand would suffer by
17 comparison," right?

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

20 A I don't know how one could
21 investigate, to use your word, such a
22 proposition. One can only look at the
23 environmental circumstances and, again, applying
24 the kind of marketing rule book, as I said, that
25 anyone who understands branding would apply,

1 S. Schwartz McDonald
2 it's hard, I think, to gainsay the conclusion
3 that "I" is not a meaningful branding device for
4 Apple.

5 Q Move to strike as nonresponsive.
6 Did you or did you not do any investigation as
7 to whether there was a "Near certain prospect
8 that Apple's revenue stream from a substitute
9 brand would suffer by comparison," yes or no?

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

12 A I'm not sure what you mean by
13 "investigation," and I don't know how an
14 investigation of that would be possible. So the
15 short sound bite answer is, I didn't do an
16 investigation because I don't think it's
17 possible, and I'm not even sure that it's
18 relevant.

19 Q Did you do anything to investigate
20 what brands other than iBooks Apple owns?

21 A Well, as I said, I'm bathed in
22 Apple brands. So when I look at -- when I text
23 as I do often, I see iMessage on my iPhone. I
24 have an iPad. I have -- in addition to an
25 iPhone, I have an iTunes account. And in fact,

1 S. Schwartz McDonald
2 minute. Let her finish her
3 answer, please.

4 Q Are you done?

5 MR. RASKOPF: No. Let her
6 finish her answer, please. You
7 cut her off. Don't ask her if
8 she's done. You cut her off.

9 A I believe that the complaint
10 documents the end as well as Apple's response to
11 the Patent Trademark Office letter. There is
12 ample evidence that Apple cares deeply about
13 "I." It's central to its brand strategy.

14 Q I'm not asking you about whether
15 Apple has other trademarks with an "I." I'm
16 asking you what your basis is for calling "I"
17 Apple an "I" imperialist?

18 MR. RASKOPF: Asked and
19 answered.

20 A I think I did answer them. I told
21 you that it was the importance of "I" to Apple,
22 from a strategic perspective and it's
23 accumulation of "I" marks and its persistence in
24 accumulating those "I" marks even in cases where
25 it put it in litigation with other companies.

1 S. Schwartz McDonald

2 MR. RASKOPF: That's not
3 the end of the sentence, but fine.

4 Q And then it goes on, but I'm
5 focusing on the first phrase of that sentence.
6 What do you mean by "prescriptive methodology"?

7 A I think I referenced it in more
8 detail in the next chapter, which described the
9 methodology, which is a kind of laboratory
10 environment in which people are presented with a
11 more literal stimulus of some kind that aims to
12 create or evoke an environment in which products
13 will be encountered in the marketplace.

14 Q So in this prescriptive
15 methodology, customers are shown a sample of the
16 contested mark as it appears in the marketplace;
17 is that correct?

18 A To the extent possible, with all
19 the qualifications associated with survey
20 research.

21 Q Isn't it true that one of the
22 goals of the survey expert is normally to
23 replicate marketplace conditions to the maximum
24 extent possible?

25 MR. RASKOPF: Objection.

1 S. Schwartz McDonald

2 Asked and answered.

3 You may answer.

4 A I think we attempt in many of the
5 more conventional scenarios to try to create a
6 kind of laboratory understanding that a survey
7 is never a replication of the market. It is
8 always a laboratory. It's always a somewhat
9 stilted representation of the way consumers shop
10 and the way they experience brands. But where
11 it makes any sense at all -- and products are
12 pedestrian and they're marketing or sales
13 environment is pedestrian, we do it.

14 Q And --

15 MR. RASKOPF: Are you
16 finished?

17 A So I was just about to say this
18 was not one of those circumstances, but...

19 Q When you wrote in this sentence
20 that I read, this first part of the sentence
21 read, "That presents to customers a sample of
22 the contested mark as it appears in the
23 marketplace," why does standard survey
24 methodology have people present to customers a
25 sample of the contested mark as it appears in

1 S. Schwartz McDonald

2 the marketplace?

3 MR. RASKOPF: Objection to
4 the form.

5 A Well, as you know, surveys are
6 essentially -- likelihood of confusion surveys
7 are themselves kind of hypothetical construct
8 that aim to provide some kind of statistics
9 around an idea in the marketplace. What would
10 happen to real consumers if going about their
11 business, they were experiencing brands in
12 certain places. So there is, in theory, a value
13 to doing your very best to present those marks,
14 those products in ways that, to the extent that
15 you can, that replicate what happens to
16 consumers, but all of us know -- and this is big
17 footnote -- that what we do in these surveys is
18 not a perfect replication. It's okay in many
19 circumstances. It's sufficient in many
20 circumstances to serve our needs, but it isn't
21 always.

22 Q Isn't it true that surveys have
23 been criticized for failing to replicate
24 marketplace conditions?

25 MR. RASKOPF: Objection to

1 S. Schwartz McDonald

2 There are abundant examples of
3 that. So I'm not insensitive to it, but I am
4 not constrained by it. It wouldn't be unusual
5 even for me to be really very open to an
6 occasion in which I believe that a methodology
7 that's different from what courts have accepted
8 routinely to offer something else if I believe
9 it's going to do a better more valid job of
10 measuring the thing I seek to measure.

11 Q Courts have accepted routinely
12 surveys that use the actual product in issue;
13 isn't that true?

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

16 A Typically, people are able to
17 create those stimuli, and in doing so, feel that
18 they are really doing adequate justice to the
19 circumstances under which actual shopping and
20 decisions take place.

21 Q Can you answer my question,
22 please?

23 MS. CENDALI: Read it back.

24 (Record read.)

25 MR. RASKOPF: No. Asked

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2 prescriptive methodology, that there was a
3 routine approach. That routine approach was one
4 that made sense in many circumstances and that
5 in deviating from it, I was deviating from
6 something that was familiar and routine and that
7 courts have accepted. I'm very clear about that
8 here. So I don't think that I'm embellishing in
9 any way.

10 Q I'm just trying to be clear. You
11 knew that the standard practice was to show
12 consumers an actual product, right? Can you
13 answer that yes or no?

14 MR. RASKOPF: Objection.

15 Asked and answered.

16 A I have said over and over again, I
17 knew that there was a prescriptive methodology.
18 I was familiar with it. I was aware of it. I
19 have been very much a practitioner of that in
20 cases where it made sense. I knew it was
21 standard. But I live in a world in which
22 methodologies are -- they are flexible. They
23 need to be -- the suit needs to be tailored to
24 fit the research problem.

25 Q I'm going to move strike again as

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2 in this environment.

3 Q Let me re-ask the question. Isn't
4 it true that survey researchers typically
5 attempt to replicate marketplace conditions in
6 order to give their surveys more validity?

7 MR. RASKOPF: Objection to
8 the form.

9 A It is commonly agreed that,
10 commonly, not always, it's commonly agreed that
11 wherever possible since you are attempting to
12 develop a measure of likelihood of confusion in
13 the marketplace that you do what you can to
14 create a laboratory in quotes in the survey that
15 will give you insight into what would happen in
16 the marketplace, but we all know that that is
17 not a perfect replication.

18 Q In constructing that laboratory
19 it's common practice to attempt to replicate
20 marketplace conditions as best you can; isn't
21 that true?

22 MR. RASKOPF: Objection to
23 the form. Asked and answered.

24 A We haven't made much progress in
25 answering this question. I think I've answered

1 S. Schwartz McDonald

2 it in so many ways. I certainly was not
3 oblivious to the precedent that went before me.
4 I made the decision to do what I did with
5 knowledge of forethought. I was fully aware of
6 whatever one can argue a methodological
7 deviation I was taking. It was a path that I
8 took advisedly, thoughtfully, and clearly you
9 can understand advisedly here I am sitting here
10 about to defend my choice of methodology to you
11 and ultimately the court. So of course I was
12 prepared for the challenge that would be
13 involved. I did it not fecklessly, not out of
14 ignorance, not out of methodological stupidity.
15 I did it on purpose.

16 Q Objection. Strike as
17 nonresponsive. Can you read the question back
18 again? I'm asking you very simple questions
19 that you're choosing to evade.

20 MR. RASKOPF: I'm striking
21 the characterization there.
22 You're not here to editorialize,
23 Dale. You're here to ask
24 questions. Don't try that one
25 again or we will talk to the

1 S. Schwartz McDonald

2 judge.

3 (Record read.)

4 MR. RASKOPF: Objection to

5 the form. Asked and answered.

6 You may answer.

7 A I think the answer is yes. I'm
8 going to underscore as best you can. If you
9 can't then you have to think in different
10 intellectually nimble ways in order to achieve
11 research validity. So if you think that's
12 unresponsive so be it. I have exceeded as much
13 as I can. I want to be very clear that there
14 are all kinds of limitations around replication
15 of marketplace conditions but I also wants to be
16 clear in my little quote speech to reassure you
17 and the court that I made this decision
18 knowingly, knowledgeably, thoughtfully. To that
19 extent yes. Was I aware I was deviating from
20 commonly accepted practice, it's heralded on the
21 first page of my survey report.

22 Q When you design the survey in this
23 case you were aware that you were deviating with
24 commonly accepted practice, correct?

25 MR. RASKOPF: Objection to

1 S. Schwartz McDonald

2 the form of the question.

3 A I will say yes, only if you allow
4 me to amend your statement or your question as
5 follows. I deliberately chose to deviate from
6 standard, I've forgotten exactly what you said,
7 commonly accepted methodology specifically
8 because I felt it would not do justice to the
9 problem. If you will restate your question that
10 way then I think I can say yes.

11 Q Have you ever criticized another
12 expert for failing to replicate marketplace
13 conditions?

14 MR. RASKOPF: Objection to
15 the form.

16 A I probably have.

17 Q Can you name some of those
18 examples?

19 A No, I actually can't.

20 Q You can't name any examples where
21 if you look at your matters disclosed in your
22 expert report from the past four years --

23 MR. RASKOPF: Do you want
24 her to look at it to refresh her
25 recollection?

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2 A I don't know about the last time
3 you bought a book, but for me it involved
4 handling a bunch of books. It involved walking
5 through a bookstore. They're hard to find but I
6 still frequent them when I can. It involves a
7 particular kind of mission. It involves an
8 attraction between a consumer and a book, not
9 just being handed a book out of context, not
10 necessarily based on interest or anything else
11 here's a book. You can do that with a tube of
12 toothpaste. You can do that with a can of
13 tomato sauce. You can't do that with a book.

14 Q Why not?

15 A Because it doesn't come close to
16 approximating the first interaction that a
17 consumer has, nor does it come close the second,
18 the third, the fourth consumers if we're talking
19 about printed books. Consumers them again and
20 again and again. My MO is after I've read a
21 book to go back to the forward to look at
22 acknowledgements. I mean I don't want to
23 represent my style of reading books as
24 everyone's. It's a point. It's very
25 individual. A person can open a book many

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2 times.

3 The shopping becomes sort of a
4 transition into the reading. Books are
5 experienced. They're not just purchased. It's
6 even more complicated than talking about post
7 sale confusion, which clearly book buying
8 introduces as a very real possibility in a way
9 you never see in toothpaste and shampoo. Once
10 people own those products they very seldom look
11 at the trademark or look at the box again, and
12 in fact as we know they almost never look at
13 them in the way that these trademark surveys
14 require them to look at it. So I have to say my
15 view is that all these Lanham Act surveys are
16 conceptual to one degree or another. They're
17 hypotheticals of construct, the construct that's
18 all they are. In this case because of books,
19 because of the importance of post sale
20 confusion, because when a person picks up a book
21 their first instinct is not to look for the
22 publisher, nothing that happened in Dr. Jay's
23 survey or Dr. Nowlis' survey represents book
24 buying at all.

25 Q What about your survey replicates

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2 at all book buying?

3 A It doesn't. What it does is it
4 replicates an experience. It picks a moment.
5 It picks the moment when a consumer becomes
6 aware that there is something in a book that
7 identifies it, in a digital book in particular,
8 that identifies it as eBooks. It doesn't. I
9 freely concede this. It doesn't tell you how
10 often that occurs and it doesn't tell you the
11 moment it occurs. It could occur in the first
12 opening. It could occur on the second reading.
13 It could occur based on the appreciation of the
14 consumer for the book, and that kind of
15 revisiting as I described, very sincerely as
16 something that happens when you go back.

17 I'm not stipulating as to when in
18 the book experience it occurs, but it is
19 absolutely something that can occur and nothing
20 that happened in the research that your experts
21 did replicates that market condition at all.

22 Q I'm moving to strike as
23 nonresponsive any comments about our experts. I
24 didn't ask you about our experts. I'm asking
25 you, you admit that when someone purchases a

1 S. Schwartz McDonald

2 book in a bookstore they can pick it up and look
3 at it; is that right?

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

6 A They can pick it up and look at it
7 if they're drawn to it in the first place.

8 Q If they decide to buy it
9 presumably they're drawn to it and they've
10 picked it up and looked at it and decided to buy
11 it, is that a fair approximation in your
12 experience in buying books in bookstores?

13 A That's absolutely true, but that's
14 different from being handed a book that no one
15 has any interest in in the first place and
16 treated as a specimen.

17 Q Isn't it true that in what you're
18 suggesting is that the reason you didn't use an
19 actual book in your survey is that you believe
20 that people might look at the book again after
21 they purchase it; is that right?

22 MR. RASKOPF: Objection to
23 the form. You may answer.

24 A There are lots of things that can
25 happen. The first thing that consumers do when

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2 they pick up a book is probably not look at the
3 publisher. They look at the title. They read
4 the book jacket, if they're interested in it.
5 We're talking about print books. We're not
6 talking about digital books. If you pick up a
7 book there's lots of things to look at. You're
8 making a decision as to whether you think you
9 can get through it. I've been known to read the
10 first paragraph. There's lots of things that
11 you're interested in, and I'm not arguing that
12 the first thing you do is check the publisher.
13 I'm not.

14 However, books are not just
15 purchases but experiences. And over the course
16 of a book experience there is ample opportunity
17 to make a decision as to how much information
18 you want about it. You might see it on first
19 opening, you might not.

20 Q Dr. McDonald --

21 MR. RASKOPF: Did you
22 finish? I want to be sure. I was
23 getting the impression you
24 weren't.

25 A The one thing I was going to say

1 S. Schwartz McDonald
2 conversation we've been talking about a printed
3 book and that's because you asked me about a
4 printed book. There are other reasons for
5 thinking about digital books and I've described
6 them in my report and I'll undoubtedly have to
7 describe it again.

8 Q And isn't it true that whether
9 it's a digital book or a printed book when
10 someone purchases it and they choose to look at
11 it again they see that publishing information in
12 the context of other information?

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

15 A Yes, they do.

16 Q Isn't it true that the conceptual
17 stimulus that you used did not provide consumers
18 with what that other information was?

19 MR. RASKOPF: Objection to
20 the form. You may answer.

21 A That is true and that's because
22 there are different ways that information can
23 appear in books. And as I told you, I was
24 making no representation as to the frequency,
25 nor is my representation going to fit a specific

1 S. Schwartz McDonald

2 scenario. What it does is simply try to
3 establish whether a consumer who becomes aware
4 of something called iBooks on the information
5 page of a book believes that Apple is the
6 source.

7 Q Can you name any circumstance in
8 the real world where the only information
9 provided to the consumer would be simply the
10 name iBooks and not other contextual information
11 on the electronic book that might indicate
12 origin?

13 MR. RASKOPF: Objection to
14 the form.

15 A There is undoubtedly going to be
16 various ways in which a consumer experiences
17 that other information. I have not argued that
18 I have a number or have identified a number that
19 characterizes any single one of them. What I
20 have here is a number which makes vividly clear
21 that for consumers, for roughly half of
22 consumers who are exposed to the conceptual idea
23 of an iBooks source indicator on a book, a
24 digital book, that Apple comes to mind for them
25 as the source that they make that attribution.

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2 Would any given consumer seeing a
3 particular thing at a particular moment have
4 arrived at that particular level of confusion, I
5 can't speak to that. It was an unusual survey
6 and in that sense I think it should be taken as
7 the probably outer bounds of confusion at this
8 point in time. By the way, in the future it
9 might be far worse. But I think it's an outer
10 bounds.

11 Q Is it fair to say that you don't
12 know of any actual circumstance where someone
13 would view one of plaintiff's electronic books
14 where there would not also be information about
15 the name and address of the publisher or the
16 logo of the iBooks company also depicted?

17 MR. RASKOPF: Objection to
18 the form.

19 A I don't have the logo. I don't
20 know about the logo. Undoubtedly there will be
21 information available if not on one page or
22 another. It really depends. My understanding
23 is that a publisher is free to display his or
24 her mark as he chooses. The particular printer
25 which may not necessarily be at issue in digital

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2 books, I don't even know to be honest how
3 digital books always present themselves. If
4 they downloaded a book and it said an ebooks
5 publication on the cover, obviously that's
6 somebody else's source but it was right on the
7 cover. So not John Colby's. I just want to be
8 clear. The point is I think this is an evolving
9 marketplace and I think the way that brand
10 identification will be presented will be varied.

11 Q Do you have any reason to believe
12 that plaintiffs will offer in the future
13 electronic books that just say iBooks and don't
14 give the name of the publisher, the address or
15 logo or any other contextual clues?

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

18 A I really am not privy to anything,
19 any way that they anticipate showing their
20 brand.

21 Q Are you aware today of any of
22 plaintiffs electronic books that simply bear the
23 imprint iBooks alone without other information,
24 such as the name and address of the publisher,
25 the URL or a light bulb logo?

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2 MR. RASKOPF: Objection to
3 the form.

4 A I don't know about the light bulb.
5 I don't know about the other information as
6 well. I mean I'm operating from the following
7 premise that iBooks is John Colby's imprint to
8 do as he pleases with, and that how he shows it
9 and with what other information may vary over
10 time depending upon who in fact is distributing
11 and how it relates to his overall branding
12 strategy.

13 Q So your survey was specifically
14 with regard to electronic books; is that right?

15 A That's right, yes.

16 Q Did you do anything to investigate
17 how plaintiffs use the mark, their claim mark,
18 iBooks on their electronic books?

19 A I downloaded a few myself, yes.

20 Q So you saw that the imprint is not
21 by itself, right?

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

24 A I saw one book and I believe that
25 it has Brick Tower Press and iBooks on it.

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2 the form. You may answer.

3 A My understanding is confusion is
4 confusion. It's pre, post or in sale. I was
5 not aware that one has to specify in a complaint
6 but I'm not a lawyer. So that would be an issue
7 I guess for you to --

8 Q Would you agree that if someone is
9 purchasing an electronic book or a physical book
10 the book remains the same book from the time
11 they purchase it to six years when they look at
12 it again, unless they destroyed it or something?

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

15 A I'm sorry. I'm not sure where
16 you're getting the six years from.

17 Q Isn't it true that when someone
18 purchases a book that contextual information in
19 that book remains unchanged after purchase?

20 MR. RASKOPF: Objection to
21 the form.

22 A The information remains unchanged
23 but the context that the consumer brings, and
24 the book reader, book owner brings is always
25 evolving. I can certainly tell you that I'm

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2 aware usually only post hoc after reading some
3 of the books I have that it's a Signet Classic
4 or it's some other. That's how I've become
5 aware actually that my very favorite little
6 library of Jane Austen books are mostly
7 published under the same imprint.

8 Q Isn't it true that after purchase
9 you would have more time if you wanted to
10 possibly to examine the contextual clues such as
11 the name of the publisher, the URL, the address,
12 whether there was any distinctive logo, you
13 would have had even more time post sale to
14 examine all those contextual clues; isn't that
15 true?

16 A Your question is premised on an
17 assumption that the more time you have to see
18 all the information the more time you have to
19 arrive at a conclusion that would preclude
20 confusion. I disagree with that. I don't think
21 that there is any automatic reason to believe
22 that just because there's a second name on there
23 or there is a company address that iBooks would
24 not, or whoever is the imprint, would not be
25 interpreted as having source signification.

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2 So I think in your head is a
3 conception of how this won't work, which is as
4 soon as somebody sees something else besides
5 iBooks they conclude it couldn't have anything
6 to do with Apple. I have a very different
7 hypothesis. My hypothesis is that iBooks is an
8 enormously powerful mark that carries Apple DNA
9 in it and that it will over time do so more and
10 more, and that despite the fact that there is
11 supplemental information on the page that people
12 may very well conclude that iBooks was -- that
13 Apple is the source. Can I tell you exactly how
14 many on reading one, reading two, exposure
15 seven, year two, no, I can't.

16 Q But you don't have any empirical
17 evidence as to what a consumer thinks when they
18 see the other information on the page about the
19 publisher, the URL, the address, any logo
20 because you didn't provide that information to a
21 consumer, right?

22 MR. RASKOPF: Objection to
23 the form.

24 A That's not the study I did because
25 there are so many different ways and moments of

1 S. Schwartz McDonald

2 experiencing that information that I didn't
3 think it was possible to do justice. I felt
4 long and hard about this, and I went through --
5 as you can imagine, after all I mean however
6 entertaining we may both find this, this is a
7 challenging conversation to have. I'm an
8 intellectually serious woman. I thought very
9 hard about this. In the end I concluded that it
10 did a better job of capturing something really
11 important that "I" is a source signified for
12 Apple.

13 Q Move to strike as nonresponsive.

14 Can you read my question?

15 (Record read.)

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

18 Q Can you answer that question yes
19 or no?

20 A I don't believe it's possible to
21 provide a number that would do justice to that.

22 Q So you don't know if you provided
23 a consumer with the other contextual information
24 such as the logo, the name of the publisher, the
25 URL, the address and the other information that

1 S. Schwartz McDonald

2 A I'm not sure exactly how I've
3 stated it in all these places. I would have to
4 read my report again.

5 Q When you wrote in your report, is
6 it fair to say in the paragraph we're talking
7 about where you say, "I conducted a slightly
8 different type of controlled study, I used a
9 conceptual stimulus designed to take more
10 flexible account of plaintiffs' natural course
11 of brand development had Apple not coopted the
12 mark, that's the only reason that you gave";
13 isn't that true?

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

16 A Well, that is certainly -- that
17 was one of the reasons, and in part it had to do
18 with the fact that in a way that I think speaks
19 to the kind of shape shifting experience for any
20 given consumer is that in fact iBooks mark
21 itself was not one single thing at any given
22 moment in time, and that in the future it is
23 likely to be much more prominently oriented even
24 toward the digital world than it is today.

25 Q My first question is in this

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2 paragraph where you explain why you used a
3 conceptual stimulus, you only mentioned the need
4 to take more flexible account of plaintiffs'
5 natural course of brand development. You didn't
6 talk about this second experiential reason that
7 you're now mentioning; isn't that true?

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

10 A Not specifically in that sentence,
11 no.

12 Q And then when you said that you
13 wanted to take account of plaintiffs' natural
14 course of brand development, what natural course
15 of brand development are you referring to?

16 A The migration increasingly of all
17 publishing and book distribution to the web, I'm
18 sorry, to the digital realm and the fact that if
19 a book publisher is not prepared to be really a
20 significant player in the digital landscape,
21 which notably John Colby has the capacity to do
22 because of his digital rights, that their future
23 is extremely limited.

24 Q So do you believe that a publisher
25 that is not capable of taking advantage of the

1 S. Schwartz McDonald

2 internet is in trouble?

3 A Well, I think a publisher needs to
4 be able to take advantage of a digital world,
5 know that the use or the readership of digital
6 books is growing exponentially.

7 Q What is that based on?

8 A There is data out there in the
9 world. I think that's who is experiential, but
10 there is I think ample data about market
11 penetration digital books.

12 Q What data specifically are you
13 relying on?

14 A There's a study that Pugh did that
15 talks about the fact that roughly one fifth of
16 readers are reading digital books and that the
17 growth is significant there and that digital
18 readers are the most enthusiastic active
19 readers. They're consuming more. They're
20 buying more.

21 Q Did you know about the Pugh study
22 before you read Dr. Jay talking about it in her
23 deposition?

24 A Yes, actually I did.

25 Q Had you read it before you

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2 some insight into something that anyone sitting
3 in this room has to be aware of with the growth
4 of digital readers, which is that digital
5 reading is on the rise. You don't have to read
6 a study to see that.

7 Q When you talk about plaintiffs'
8 natural course of brand development, what
9 information did you have specifically about
10 plaintiffs' course of brand development?

11 A Well, I was aware that John Colby
12 has digital rights, that iBooks has a very
13 significant digital library, and I don't know
14 for sure whether all of their print books also
15 include digital rights but many of them do. And
16 that was something that would afford him an
17 important source of leverage if he meant to take
18 this brand further into the 21st century. It's
19 very hard to imagine a thriving book business
20 other than coffee table books, which may not be
21 so thriving in the future, I don't know, that
22 doesn't have an important digital strategy.

23 Q Did you ever go to any web sites
24 owned by plaintiffs?

25 A Owned by plaintiffs?

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

4 A No.

5 Q Dr. McDonald, I believe you
6 mentioned moments earlier that you thought that
7 in the future plaintiffs would begin to use
8 their imprint eBooks more prominently; is that
9 right?

10 MR. RASKOPF: Objection to
11 the characterization of the
12 witness' prior testimony.

13 A I don't believe I said that.

14 Q Do you have any reason to believe
15 that in the future plaintiffs would use the
16 imprint eBooks more prominently on electronic
17 books than they are currently doing?

18 MR. RASKOPF: Objection.

19 A I don't know. I have no knowledge
20 of that, and I didn't assert that. All I've
21 asserted is the way they use their mark is
22 essentially their business. They're entitled to
23 do various things with it. I don't know what
24 they intend to do with it. I do know if they
25 don't take advantage of the digital world and

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2 their digital rights that they will I think be
3 making a blunder.

4 Q You have no reason to believe that
5 in the future plaintiffs plan on releasing
6 electronic books that do not contain other
7 information about the publisher such as the name
8 of the publisher, or a logo, or an address?

9 MR. RASKOPF: Objection to
10 the form.

11 A I have no information to that
12 effect. I think I only noted that it's
13 plaintiffs' mark and I have no idea what they
14 feel he feels obligated to show what over time
15 makes sense to show especially in a digital
16 publishing environment. All I was saying was I
17 had no reason to believe that the representation
18 of any information page in a book was always a
19 static thing.

20 Q But you had no reason to believe
21 when you conducted your survey that plaintiffs
22 would begin altering the manner that the iBooks
23 imprint is used on its electronic books, right?

24 MR. RASKOPF: Objection to
25 the form.

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2 A I have no way of knowing one way
3 or another. I haven't been retained as a
4 marketing expert to help Mr. Colby market his
5 books.

6 Q Was your survey attempting to --
7 when you asked respondents to envision an
8 electronic book with the imprint iBooks, were
9 you trying to get to depict plaintiffs' imprint
10 as it might appear in the future?

11 MR. RASKOPF: Objection to
12 the form.

13 A No, not necessarily. It was
14 non-specific.

15 Q So were you trying to then have
16 people consider the imprint as they would in the
17 present day circumstances?

18 MR. RASKOPF: Objection to
19 the form.

20 A It didn't preclude the present day
21 circumstance. It didn't require the present day
22 circumstance. It was already apparent that
23 there was a variety of ways in which the logo
24 had been used might appear, and so there
25 wasn't -- sometimes the cover page looked

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2 different. That's just the nature of the beast
3 over time when you have book titles and books
4 that have been published at different times.
5 And so there was no -- I wasn't trying to peg it
6 to a particular moment in time and I wanted to
7 allow it to be expansive and forward looking.

8 Q Wouldn't showing respondents'
9 pages from an actual copy of plaintiffs'
10 electronic books more closely replicate the
11 marketplace then asking him to envision a page?

12 MR. RASKOPF: Objection.

13 Asked and answered.

14 A I don't necessarily think that's
15 true. Had I thought that was true then I might
16 have done it. I think one book, one stimulus,
17 is one stimulus. It is one exposure and so
18 you're essentially limited to whatever it is the
19 respondent sees. You asked me this question
20 before I think in similar terms, and at the time
21 I raised with you the question of showing a
22 digital book, exactly what way and pointing out
23 what. It wasn't clear to me, for example,
24 whether you were envisioning the respondents
25 would be invited to take a look at the iBooks

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2 imprints as opposed to simply reviewing this
3 book without context and then later asked who
4 published it.

5 Q You're aware -- have you ever read
6 the Dooney and Burke case?

7 A No.

8 Q Are you aware of judges that had
9 said it is wrong for a survey researcher to
10 point out aspects of the stimulus and thereby
11 not replicate the actual marketplace reality?

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

14 A There's a complex answer to this.
15 No, I'm not aware one way or another because I
16 don't follow these things. I think the most
17 important thing is whether it's quote right or
18 wrong to point out a particular piece of
19 information or mark in a stimulus really depends
20 on the construct that you have about what it is
21 you're really asking people to do.

22 The very notion of handing someone
23 a package in a mall, asking them to look at, and
24 let's just take toothpaste for example. It
25 doesn't matter to me whether it's a package of

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2 toothpaste or a box of something else, and
3 asking people to look at it as if you were going
4 to purchase it, is itself a construct that from
5 my perspective doesn't resemble what happens in
6 the supermarket in real life. Already you're
7 asking for people to look at things and they're
8 doing it in a way that doesn't reflect their own
9 motivation despite the injunction to treat it as
10 if or look at it as if you're going to shop.

11 That's sort of the fiction that we have in this
12 laboratory environment that we've created.

13 There may be circumstances in which there is
14 such an overwhelming flow of information on a
15 particular relevant issue. Maybe it's the major
16 name, but I can assure you that there are times
17 when I've been involved in deceptive advertising
18 or allegations of deceptive claims on a package
19 which is virtually impossible to ensure that
20 people are going to see it on first blush.

21 If you really want to understand
22 what someone might do or might think if they saw
23 it, you have to point it out. These are not I
24 think regardless of whatever judicial opinions
25 have been offered, they are not things that are

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2 all time, all places, and I think I could make
3 in my own mind a very clear argument for
4 pointing out certain things on label or a
5 specimen.

6 Q But you didn't make that argument
7 in your expert report, did you?

8 MR. RASKOPF: Objection.

9 A I would have made that argument if
10 I had been invited to rebut your experts.

11 Q Turning to page six of your expert
12 report, you have the third paragraph down you
13 talk about as you say plaintiffs' iBooks library
14 of titles, do you see that?

15 A Yes.

16 Q And you say in the second
17 sentence, "The identity of the publisher is
18 typically contained on the title page by
19 convention substantially more information about
20 source, copyright, et cetera that's contained on
21 the back of the title page." Do you see that?

22 A Yes.

23 Q When you wrote substantially more
24 information about source is contained on the
25 back of the title page, what are you referring

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2 Q Fair enough. But the other ones
3 you're familiar with from your Kindle, it's your
4 understanding that they use the light bulb logo,
5 right?

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

8 A Not everywhere. So, for example,
9 it depends on what page you're looking at. On
10 the Dawn of Amber, the iBooks New York it
11 doesn't. That's not the first thing you see.
12 And maybe I missed a page. I'm not sure there
13 is a light bulb on the Dawn of Amber.

14 Q Are you aware of Mr. Colby's
15 deposition testimony where he --

16 A Not at all. I'm sorry to cut you
17 off. I don't know anything about his
18 deposition.

19 Q Is it fair to say that at least
20 based on your own experience in this case with
21 the electronic books that you have looked at
22 they all contain source identifying information
23 other than simply the imprint iBooks?

24 MR. RASKOPF: Objection to
25 the form.

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2 Exhibit 4.

3 A I've seen Brick Tower. I doubt
4 know. I can't tell you whether Brick Tower and
5 Boyleston always appear. I don't know. This is
6 factual information that I'm not really in a
7 position to speak about authoritatively.

8 Q Did you do anything in the course
9 of designing your methodology to see how
10 plaintiff normally depicts its books?

11 MR. RASKOPF: Objection to
12 the form.

13 A I looked at -- I know I saw the
14 Dawn of Amber and probably something else. I
15 might at one time have seen Venus Prime,
16 although I just don't recall because as I said,
17 there was a corruption issue. I don't have --
18 there was no -- let me be clear about this. The
19 whole notion of a study that was non-specific
20 with respect to how information would appear
21 other than iBooks, was something that seemed
22 impossible to me because of the varying ways
23 that these things appear.

24 MR. RASKOPF: Referring to
25 Exhibit 4 again.

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2 that page. I could have said on the spine of
3 the book too. I was referencing a page in which
4 there might be a lot of information and asking
5 them to stipulate that they had seen iBooks on
6 that page.

7 Q But the respondents are not
8 provided with what that actual contextual
9 information would be?

10 A That's correct. That's absolutely
11 correct.

12 Q Turning, if you would turn, to
13 McDonald Exhibit 2, which of the pages on that
14 exhibit would you have wanted the respondents to
15 envision?

16 A I didn't have this in mind. In
17 fact, the multiplicity, the incredibly diverse
18 ways in which information can appear was
19 precisely the problem. So I wasn't asking
20 anyone to imagine Venus Prime. I wasn't asking
21 them to imagine the Dawn of Amber. I was asking
22 them to put in mind a page in the book or a
23 screen, as it happens with digital books, where
24 there is information about the source of the
25 book and to actually place in front of them the

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2 ask to read it back anyway. Let me pause here
3 and let you ask your follow-up question and
4 maybe we can regain it.

5 (Record read.)

6 Q Just to be clear. Prior to your
7 designing your survey methodology how many of
8 plaintiffs' electronic books did you review?

9 A Only a few.

10 Q Fair enough. Did you undertake
11 any effort to survey how plaintiffs' electronic
12 books typically depict information?

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

15 A I don't know. I didn't. And one
16 reason that I didn't was because that is
17 fundamentally something that I think is subject
18 to two sorts of uncertainty. One is that at any
19 given time a representation of the way in which
20 these books can appear may vary, and it varies
21 across books certainly.

22 The other was as I mentioned to
23 you is because I felt that the ability or
24 likelihood of any given prospective reader or
25 prospective purchaser. In a case typically when

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2 it's downloaded, unless you download a sample,
3 which you can do, then you already have it.

4 Just get another thing and we're talking the way
5 in which you experience a digital book for the
6 first time is really very different from the way
7 you experience a print where it's easy to pick
8 it up. It's just very different. These are not
9 static, consistent stimuli, and they're not
10 static consistent uniform reader consumer
11 experiences.

12 Q Do you know how many different
13 electronic book titles plaintiffs published?

14 A I don't know for sure. I think
15 it's in the hundreds, but I'm not sure.

16 Q And you made no effort to look at
17 those to get a feel for what source information
18 is contained in them; is that right?

19 MR. RASKOPF: Objection to
20 the form.

21 A Again, I think what I've said is
22 that I can already see there was variation in
23 the way that books appeared, and that over time
24 there's changes are potentially possible and
25 that again, I mean this is something to tread in

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2 terms of stimulus and your own experts, but
3 fundamentally every experimental design makes
4 assumptions. It has a construct that it begins
5 with, which has to do with this notion of the
6 replication of market experience that you've
7 described.

8 The construct of a one time
9 exposure, that research that your experts have
10 done and forgive me and versus another kind of
11 virtual conceptual exposure that I have
12 described is just a very different way of
13 looking at it. They address and emphasize and
14 forgive different kinds of experience and
15 behaviors.

16 Q Move to strike as nonresponsive.
17 You agree that consumers consider conceptual
18 clues when determining the source of the
19 product; is that right?

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

22 A I think it's always safe to say
23 that contextual clues and contextual experience
24 even outside the product itself of course may be
25 relevant.

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2 Q But you believe source inferences
3 reflect the number of contextual clues
4 integrated by consumers in complex ways, right?

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

7 A I think that's in general a fair
8 statement.

9 Q And you also believe that
10 consumers are able to distinguish between
11 products by applying all information and visual
12 clues available to them, right?

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

15 A I think if I wrote that that I
16 wrote it in a context which was very different
17 from books where we're talking about really much
18 more the source indicia in books is much more
19 complex. While of course that might be a
20 perfectly reasonable thing to be said with no
21 more footnotes to it than that or certain kinds
22 of products, I think that in a sense it's almost
23 the opposite here. I think I wrote it in my
24 report, in a way that I hope is clear, which is
25 that consumers -- it's that paragraph you and I

1 S. Schwartz McDonald

2 were venturing down together. It's this notion
3 that consumers have a lot of information to deal
4 with when they look at a book, and I'm not
5 representing what percentage of consumers would
6 see iBooks, would see iBooks on the second or
7 third exposure.

8 That's a separate issue. I'm
9 happy to talk about it, but the fact is that
10 source information on a book is complex and the
11 paragraph there would imply consumers can do it.
12 Well, maybe, but maybe they don't do it. Maybe
13 they don't do it on day one. Maybe they do it
14 on exposure two and exposure three. I think
15 it's really different. I'm reasonably confident
16 that whenever I wrote that I wrote it about
17 something rather different than a book, wrote it
18 or said it. I'm not sure which.

19 Q You didn't undertake to examine
20 whether consumers would look at an imprint more
21 or less after they purchased the book from at
22 the time they originally purchased the book?

23 (Record read.)

24 MR. RASKOPF: Objection to
25 the form.

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2 there's always available a fresh supply of
3 individuals, who as I mentioned might encounter
4 an invitation for a survey on a social media
5 site or some other web site.

6 Q So there is no one way that people
7 are asked to become members of this panel?

8 A There is no one location.
9 Ultimately my understanding is, and I certainly
10 can't list them all for you, but it's knowable
11 probably. There is a certain number of web
12 locations where individuals who visit those web
13 sites are then intercepted, if you will, by
14 Research Now and given the opportunity to be
15 surveyed so they may qualify for panel
16 membership.

17 Q What are the requirements of panel
18 membership?

19 A I think they are fundamentally
20 that you have an exclusive web address that is
21 yours and yours only. People are validated
22 vis-à-vis their phone number and addresses.
23 They have to provide, I believe there is a
24 certain amount of IP address data collected so
25 that respondents are vetted to ensure that they

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2 are real people and so on.

3 Then the panel is constructed in a
4 way as to make it demographically balanced in
5 the United States. Then there are processes by
6 which the panel is overseen and we call in the
7 industry managed in order to make sure that
8 panel members are not misbehaving. Misbehaving
9 might be that they don't, for example, if they
10 race through surveys or do things that would
11 suggest that they're not being responsible
12 members of the panel community, then Research
13 Now might dis-invite them, that sort of thing.

14 Q Do you know if Research Now
15 employed any of those techniques with regard to
16 the survey you conducted here?

17 A I know that by definition they did
18 because that's how their panel is managed, and
19 there are unique e-mail addresses for every
20 respondent in the panel.

21 Q Well how many households in the
22 United States are members of Research Now?

23 A Several million.

24 Q What is the demographic make up of
25 Research Now members?

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2 A It's a nationally balanced panel.
3 It's one of the best in the industry.

4 MR. RASKOPF: She didn't
5 finish.

6 A I have a lot of conviction in that
7 because of the role I play in the Industry Trade
8 Association and our involvement in overseeing
9 and scrutinizing panel quality.

10 Q How does it confirm age and gender
11 of its members?

12 A Ultimately one can never confirm
13 age of a member. If a person chooses to lie
14 about his or her information. I don't know that
15 there is any independent source of that. That
16 is true of any survey.

17 Q Well, in a mall survey you can
18 check someone's driver's license. You can
19 compare the photo and age to the person standing
20 in front of you. Is there any similar mechanism
21 in an internet survey?

22 A I'm not sure what mechanisms they
23 use to do that. Let me state for the record
24 that roughly 70 percent of research done in the
25 United States now is done on internet panels.

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2 It has become the standard of care in this way.

3 Q What percentage of litigation
4 surveys are done with an internet panel?

5 A Relatively few but increasingly
6 so. In fact, that's almost the entire business
7 left at the mall is litigation because most of
8 the rest of the industry doesn't want to use it.

9 Q Does Research Now make any effort
10 to ensure the individual responding to its
11 e-mail invitations are the same who signed up to
12 be Research Now members?

13 A Every individual in order to be a
14 member of the panel has to have an exclusive
15 e-mail address to which no one has access.
16 There is really no incentive for somebody to
17 sneak into another person's e-mail address if
18 they could, if they could. I don't know how
19 open your e-mail accounts are to other members
20 of your family. Mine is not. If someone could,
21 there would be absolutely no value in doing it
22 because you would not be receiving -- you as the
23 bogus respondent -- would not be receiving any
24 incentive.

25 Q Does Research Now take steps to

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2 ensure that people do not sign up for a service
3 under multiple e-mail addresses?

4 A Yes, they do.

5 Q What?

6 A I don't remember the specifics but
7 I can get them.

8 Q Specifically with regard to the
9 survey you conducted, were invitations sent to
10 members of Research Now inviting them to take
11 the screen survey?

12 A Invitations were sent for 70
13 percent roughly of the sample. Invitations were
14 sent to members of the panel who had already
15 been pre-identified per our specifications as
16 having an ereader or tablet, and who had
17 identified themselves as people who have shopped
18 or purchased books. And then from that sampling
19 frame respondents who came to our web site they
20 were screened per our screening requirements.
21 Roughly 30 percent of the respondents actually
22 came from what they call sort of social media
23 sites, which is people who are intercepted not
24 unlike the respondents would be intercepted in
25 malls.

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2 invitation was there a link in the invitation to
3 National Analysts Worldwide?

4 A Yes.

5 Q That's your company?

6 A That's correct.

7 Q Does National Analysts Worldwide
8 typically host online surveys?

9 A Yes.

10 Q So how many people were sent the
11 invitation?

12 A I believe -- I've forgotten the
13 number. We can't calculate for the social media
14 piece that 30 percent, that's like the mall,
15 it's essentially here is an opportunity to take
16 a survey if you qualify and so we don't have a
17 base for that. My recollection, I believe it
18 was roughly 3,000, I believe, somewhere between
19 3 and 5,000.

20 Q What was the gender make up?

21 A Probably roughly equal, although
22 they may have over sampled or sent more
23 invitations to men because we know that if left
24 to their own devices women are more likely to be
25 respondents than men. That's in every possible

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2 format. It doesn't matter whether you're
3 standing in a mall or you're standing on the
4 internet. That is fundamentally, that is their
5 own calculation as to what they have to do in
6 order to produce a sample that will be roughly
7 balanced.

8 Q How are they distributed
9 geographically?

10 A Nationally.

11 Q Do you know that it was national
12 throughout the country?

13 A National throughout the country.

14 Q Or more in one place?

15 A It was more a national survey than
16 any mall you've ever used.

17 Q What percentage of those who were
18 sent the invitation took the screener?

19 A I think the response rate was 12
20 percent.

21 Q How old were the people who
22 responded to the screen?

23 A The invitations were only sent to
24 people who were 18 to 70.

25 Q What was the gender make up?

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2 A As I told you, I'm not sure
3 whether they sent out slightly more invitations
4 to men than women in order to ensure that we had
5 adequate quotas but our own screening process
6 produced through a balancing algorithm produced
7 quotas that were roughly equally distributed
8 across three age categories between 18 and 70.

9 Q Did you take any steps to ensure
10 that people who had recently taken the survey
11 were not included in your survey?

12 A No, I didn't. I'm unimpressed
13 with the veracity of that. Research Now knows
14 and they take appropriate measures to avoid
15 taking screening invitations to people who have
16 been over sampled. That's one of the things
17 that a very good panel does in terms of panel
18 management. It sets a maximum number of surveys
19 that people can take and they themselves can set
20 a maximum below that. They cannot take more
21 surveys than maximum for the panel.

22 Q Do you know how many surveys the
23 respondents to your survey took in the six
24 months prior to doing your survey?

25 A I don't know the answer to that.

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2 It's probably double. That was not a concern of
3 mine.

4 Q When you did your research did you
5 take any steps to make sure people who were
6 respondents the second time were not respondents
7 as well the first time?

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

10 A Of course.

11 Q How did you do that?

12 A Research Now knows who they sent
13 invitations to and they sent invitations to new
14 individuals.

15 Q Do you have documents reflecting
16 your communications with Research Now on the
17 subject?

18 A I don't have them at hand. I can
19 certainly get Research Now to deliver
20 confirmation of that.

21 Q Did you actually have a
22 communication with Research Now where you told
23 them please make sure you don't have the same
24 respondents in both surveys?

25 A My operations manager did.

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2 Q You know that for a fact?

3 A I do.

4 Q What is the name of that person?

5 A Bob Farley.

6 Q Did you produce your
7 communications with Research Now and information
8 on the sample size, et cetera?

9 A No, it was probably most of it was
10 oral, telephone.

11 Q Were respondents provided any
12 compensation for answering the survey?

13 A The way that Research Now works is
14 that the people, respondents, get a kind of a
15 Research Now cash or points. It's really kind
16 of like a -- it's kind of a point compensation
17 and those points are redeemable for various
18 things. In terms of the equivalent of what they
19 got for this, very similar I'm sure. It's
20 currency value in the real world is probably
21 similar to what the respondents, your experts,
22 conducted in malls.

23 Q So to be included as a respondent
24 in your survey it would have to be people who
25 volunteered to be part of a panel where they

1 S. Schwartz McDonald
2 would be frequently surveyed on various topics?
3 A Not frequently, not frequently.
4 They have to be willing to be surveyed a few
5 times a year, but not frequently. And in fact,
6 Research Now doesn't want them to be surveyed
7 too frequently. That's why they have millions
8 of people in the panel. That's why they also
9 make available a fresh source, if you will, of
10 non-panelists who can be made available for any
11 study. But let me be very clear, survey
12 research by its nature is volunteer. We cannot
13 commandeer, to use a word you and I have
14 discussed before, you cannot commandeer people
15 and compel them to participate in the survey.
16 Even the US Census can't do that.

17 Q Let's talk a little bit about
18 universe. Would you agree that a valid
19 statistically projectable survey requires that
20 researchers correctly define the universe they
21 wish to represent?

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

24 A Researchers need to define
25 universe and they need to define it in a

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2 rationale way correct relative to the population
3 of individuals that you would like to represent.
4 There is no uniform one way. Different studies
5 even for the same company, the same client, will
6 sometimes have slightly different ways of
7 utilizing the definition. Once you commit to a
8 group that you want to represent then you want
9 to utilize criteria that will actually reflect
10 that.

11 Q Am I correct that a proper
12 universe for litigation survey consists of
13 potential purchasers of the product at issue?

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

16 A In general I think that's what we
17 aim for. The best predictor, the very best
18 predictor of future purchase is past purchase.
19 It's actually a better predictor than declared
20 in attempted purchase.

21 Q In your survey you didn't ask if
22 people had purchased an electronic book in the
23 past.

24 A I asked if they downloaded. My
25 interest was -- I was fundamentally interested

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2 in a group of people who are readers of digital
3 books at least as evidenced by their having
4 downloaded a book in the last month and based on
5 that they had to be regular readers. So they
6 had to read books regularly or fairly regularly,
7 which I think distinguishes my sample actually
8 from the samples that you employed, and they had
9 to be individuals who had downloaded at least
10 one book, downloading being really the term of
11 art.

12 I happen to know that the sample I
13 can document purchase behavior as reported by
14 the sample because the screening questions that
15 were used to create the sampling frame that
16 received invitations require that they be
17 shoppers and purchasers of books. You know from
18 the Pugh study people who read digital books
19 tend to buy them.

20 Q Dr. McDonald, you did not ask your
21 respondents if they had purchased digital books
22 in the past, right?

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

25 A I asked if they had downloaded a

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2 book at least one book in the last six months.

3 Q But you didn't ask if they had
4 purchased one, right?

5 A I didn't use the term purchase. I
6 used the term download.

7 Q You didn't ask if they would be
8 interested in purchasing a digital book in the
9 future, correct?

10 MR. RASKOPF: Objection to
11 the form.

12 A I felt no need for several
13 reasons, several of which I've alluded to which
14 is that past behavior is the best predictor of
15 future behavior. I can tell you from a meta
16 analysis that in all the studies that I have
17 ever done in litigation, that there is a perfect
18 match between what people said they have done in
19 the last six months and what they say they
20 intend to do in the next six months with one
21 exception. That was baby formula.

22 Q Isn't it true, Dr. McDonald, in
23 your past studies for litigation you asked
24 respondents about whether they would anticipate
25 purchasing the product in the future?

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2 A Not always because for the reason
3 I told you. What I have found is that simply
4 identifying people who have done something in
5 the past six months or three months, whatever
6 your criteria, is absolutely appropriate to
7 establish that they're in the marketplace. So
8 if I am looking at purchasers of analgesics or
9 shampoo or anything else, anything that's done
10 within a reasonably frequent basis as opposed to
11 something like a car purchase or a very interim
12 purchase, and by the way I don't think I've had
13 those in my litigation history, there is simply
14 no difference.

15 Not only that, people at that
16 point in the survey screening process who are
17 willing to hang in there are so eager to tell
18 you that they're going to do whatever it is that
19 they used to do or have done that it's hard
20 really to feel that that response is terribly
21 credible.

22 Q Can you name a litigation study
23 that you did where you did not screen for
24 prospective future purchasers?

25 A I can't name it but I can tell you

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2 that my recent forays I've become less and less
3 interested, so probably whatever the most things
4 I've done most recently. Again, with the
5 exception of one case, for example, baby formula
6 where it's quite possible for someone to pass
7 into the market in the future, that is to say a
8 woman who is nine months pregnant would have
9 qualified for that study and a woman who is in
10 the process of taking her baby off formula might
11 not qualify going forward. This wasn't one of
12 those situations.

13 I feel very confident that the
14 screening criteria we've used produced people
15 who are actually regular readers and users of
16 digital books as well as prints. The data that
17 I have on these people from the prescreening
18 confirms that, and it's really implausible to
19 imagine that this is not a sample of people who
20 are in the business of buying as opposed to
21 simply downloading the books.

22 Q Dr. McDonald, your survey did not
23 include people who read print books only, right?

24 A No, I didn't think they were
25 relevant. By design it excludes people who read

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2 print books only. If you didn't tell us that
3 you have downloaded a digital book in the last
4 six months you didn't qualify. We know that
5 most digital readers also read print and
6 plausibility, experience, empirical experience
7 as well as the Pugh study confirms that if you
8 read digital books you almost certainly
9 sometimes read print books, although who knows
10 in the future that's going to be true.

11 We also know that if you are a
12 print book reader there is absolutely no reason
13 to assume that you're also a digital reader. So
14 one group is nested inside the other. That's
15 why very specifically require people to be
16 digital readers.

17 Q What is your understanding as to
18 how many print readers also read electronic
19 books?

20 A I don't know what percentage of
21 print readers do, pretty significant. I think
22 it's probably close to a fifth of the reading
23 population, if not higher because we know that
24 as yet most people who read digital books also
25 read print. In other words, it's technically a

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2 sort of diagram where you have some people who
3 read print only and you have a lot of people who
4 read both, and then there's probably a pretty
5 small group of people who are foresworn printed
6 books. I don't know if there are many of them.
7 I don't think Pugh thinks there are many of
8 them. It's a very unlikely to be, but I have
9 not -- I have no reason to think I've excluded
10 any of those people.

11 My requirement was simply it
12 should be a reader and that you downloaded a
13 digital book. That I think is a very good
14 approximation of the universe of people that I
15 care to represent in a study which is looking
16 forward toward a time when digital books will be
17 so ubiquitous that it's going to be harder and
18 harder to find the paper.

19 Q So by choosing to have a universe
20 of electronic book readers you did that because
21 you thought in the future the universe would be
22 electronic book readers?

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

25 A No, I think there are several

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2 reasons. I don't think that's one. One is I
3 feel that the world is moving to digital books.
4 So that is the future and people who are already
5 reading digital books have an experience with
6 books that is different from people who read
7 print. That group also is far more aware of
8 iBooks as a brand, as a phenomenon. I don't
9 mean John Colby's iBooks but Apple's iBooks.
10 That's perfectly relevant. There would be no
11 reason to talk to people who really are not yet
12 in the digital world because they're not people
13 who are going to encounter iBooks from Apple.

14 Q So by surveying people who are
15 electronic book readers you thought that those
16 people would be more likely to be familiar with
17 Apple's iBooks app; is that right?

18 MR. RASKOPF: Objection to
19 the form.

20 A More likely to be familiar with
21 digital books all together, including Apple,
22 that they would be people who were more
23 representative of the world as I think any
24 posture has reason to think about his or her
25 customers in the future as being they are in a

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2 of plaintiffs' books were physical books as
3 opposed to electronic books?

4 MR. RASKOPF: Objection.

5 A I may have asked that question. I
6 probably did but I don't remember the answer. I
7 do know there is a pretty extensive, they have
8 the rights to a large number of digital books,
9 rather I should say digital rights to a large
10 number of books. It may even be in the four
11 digits but I don't recall.

12 Q Can you approximate in any way
13 what percentage of plaintiffs' sales are for
14 electronic books?

15 A At this point in time no, I don't
16 know.

17 Q Well, suppose the majority of
18 plaintiffs' sales were for print books. Would
19 you agree that your universe should have
20 included print book readers too?

21 A Well, first of all, I want to
22 disclaim the idea that my universe didn't
23 include print book readers. It most assuredly
24 did. The vast majority of people who read
25 digital books read print as well. So I think

1 S. Schwartz McDonald
2 there can be no question that print readers were
3 included. But that's a separate question from
4 the one that I think is underlying it, which is
5 is there any good reason to focus on digital at
6 all. I think the answer is yes based on what
7 I've already said.

8 Q Well, if someone only read print
9 books they could not qualify for your survey,
10 right?

11 A Well, they could read primarily
12 print books. There is no representation in here
13 about the frequency with which people read
14 digital books. So I think what we can assume
15 that we have by the odds of random sampling
16 within a panel framework is people for whom the
17 percent of their digital reading relative to
18 their print reading is anywhere from one percent
19 to 100 percent. One percent unlikely 100
20 percent we know very unlikely just based on the
21 statistics that I told you.

22 Q To qualify for your survey you had
23 to have read a digital book in the past six
24 months?

25 A You had to have downloaded a

1 S. Schwartz McDonald

2 digital book in the past six months. That's
3 correct.

4 Q If you didn't do that you couldn't
5 qualify, right?

6 A That's correct. But I want to be
7 clear that that doesn't mean that our sample
8 consists of people who are predominantly digital
9 readers. That's probably not a good to use the
10 term digital and reader in this sense. The
11 reality is that many, many people and the more
12 typical person who reads digital books reads
13 plenty of print too.

14 Q What's that based on?

15 A Look at the Pugh study but I have
16 to say in my own empirical experience that every
17 one I know who uses the digital reader also
18 reads print books. It's the nature of the
19 beast. It's consistent with -- I'm a perfect
20 example of the scenario that the occasion based
21 selection of material or medium for reading.
22 That's pretty common.

23 Q Suppose 75 percent of plaintiffs'
24 sales were for print books. In that case do you
25 think it would be important to make sure that

1 S. Schwartz McDonald
2 your survey included people who read print
3 books?

4 MR. RASKOPF: Objection to
5 the form of the question. Asked
6 and answered.

7 A There is no doubt that the sample
8 includes people who read print books. There is
9 just no doubt at all.

10 Q Well, you said you did a marketing
11 analysis as part of your report, right?

12 MR. RASKOPF: Objection to
13 the characterization of the
14 witness' prior testimony. Go
15 ahead.

16 A Yes, I don't know what you mean by
17 marketing analysis. I'm sure that's not what I
18 said.

19 Q You said that in addition to
20 opining on surveys you also opined on I thought
21 marketing; is that right?

22 MR. RASKOPF: Objection to
23 the characterization of the prior
24 testimony. You may answer.

25 A I misunderstood what you meant by

1 S. Schwartz McDonald

2 this. Did I make a marketing assessment, did I
3 have a marketing point of view or perspective,
4 absolutely.

5 Q In the course of that portion of
6 your opinion did you do anything to ascertain
7 what percentage of plaintiffs' books were
8 published digitally versus in print?

9 A As I told you, I think I did know
10 that at one time. I've forgotten it. It really
11 wasn't a rate limiting issue for me because
12 what's very clear is a publisher is not
13 leveraging what in John Colby's case is a rich
14 catalogue of digital rights going forward into
15 the future. He's not going to be in business
16 very long. So that really was based on my own
17 belief that the marketing is migrating
18 increasingly toward digital reading and the fact
19 that I knew that John Colby had a significant
20 catalogue of digital books.

21 Q Can you approximate in any way
22 what the proportion has been of digital versus
23 print books that plaintiffs have sold?

24 A I'm sure you know it. I don't
25 know.

1 S. Schwartz McDonald

2 Q Can you approximate in any way the
3 number of titles plaintiffs have released
4 digitally versus in print?

5 A I don't know the number.

6 Q You can't approximate it either?

7 A It would be fool hearty for me to
8 do that. I would almost certainly be wrong.

9 Q Does a survey have to include all
10 possible consumers of a product?

11 MR. RASKOPF: Objection to
12 the form.

13 A I don't know how to decode that
14 question.

15 Q If you didn't -- never mind. You
16 said regularly in your question, right?

17 A You had to be someone who read on
18 a regular or fairly regular basis.

19 Q How often is regular?

20 A We left it to the definition and
21 totally subjective. The goal simply was to
22 establish whether people -- we wanted people who
23 considered themselves readers. I say I because
24 this is the stipulation I made. I wanted to be
25 sure that we were talking to people who

1 S. Schwartz McDonald

2 considered themselves readers. People can
3 misestimate and assemble about the number of
4 books that we read. In fact, Pugh study I think
5 makes a comment something we all know that
6 people overstate, overestimate the number of
7 times they do anything, especially if it's a
8 virtuous thing.

9 We really don't have any empirical
10 trustworthy evidence of how much any given
11 person reads. I wanted to be sure that we
12 identified people who considered themselves
13 regular readers. By the way, some people, not
14 so many who came to -- actually it's probably
15 one of the more common reasons for being
16 disqualified who weren't actually, they didn't
17 describe themselves that way. So that's if
18 you're a very occasional reader you're less
19 relevant.

20 Q In your view does a survey
21 universe need to survey all constituencies of a
22 product's users?

23 MR. RASKOPF: Objection to
24 the form.

25 A There is no absolute on that. I

1 S. Schwartz McDonald

2 can tell you that for many of our clients we
3 only talk to in certain circumstances heavy
4 users. Other circumstances we talk to people
5 who aren't users of the product at all because
6 there is an expectation of perhaps you can --
7 they may become users. It depends on your
8 marketing problem. It depends upon the
9 intellectual perspective, the construct if you
10 will that you bring to the study. I think
11 that's why I alluded earlier to the fact there
12 is no single right way to talk about a universe
13 for all time and all studies. It always
14 reflects your conception of the problem and your
15 objectives as a survey researcher.

16 What do you want to represent,
17 what are your goals, are you trying to -- I
18 could see Barnes & Noble doing a survey of
19 people who don't yet have Nooks or digital
20 readers. I can see for other purposes them
21 doing a survey of only people who download books
22 five times a week. It depends on what they want
23 to achieve.

24 Q In your surveys eligible
25 respondents were divided into a test group and a

1 S. Schwartz McDonald

2 matter how you do it the numbers came out the
3 same.

4 Q Did you investigate before you did
5 your survey the demographic make up of ebook
6 purchasers?

7 A I think I gave you the answer to
8 that and I explained to you why it was
9 irrelevant.

10 Q Isn't it true that you just
11 assumed the universe was roughly split between
12 men and women?

13 A No, I didn't assume that at all.
14 What I did was do what is very commonplace, by
15 the way, if we're going to adhere to tradition
16 in Lanham Act cases. It's very common to simply
17 create roughly equal group sizes. So that if
18 you're not allowing the happenstance they told
19 you a survey response rate to skew your sample
20 toward women or toward old people or toward
21 young people, whoever happened to respond to
22 surveys in a higher number, but rather create
23 roughly equal numbers which allows you to apply
24 statistical waiting so that you can demonstrate
25 what the market actually behaves like.

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2 So there is no reason to do it.

3 The reason especially without any absolute
4 knowledge of what every one in this room would
5 agree is the demographic representation of the
6 digital reader population, I would simply argue
7 I can rate that data any way I want and I
8 promise you I'm going to get 50 percent
9 confusion, likelihood of confusion, by the
10 metric that I've used.

11 Q Let me just be very simple.
12 Before you did the survey did you look to any
13 data to determine what the gender and age
14 characteristics were of ebook readers?

15 MR. RASKOPF: Asked and
16 answered. You may answer.

17 A I'm try this again. I did not
18 because it was immaterial and in fact, there was
19 no reason to take the risk that whatever data I
20 could find was actually a misrepresentation of
21 the way I had defined my sample. Remember the
22 Pugh study is one study. It has a way of
23 screening respondents. It had definitions.
24 They may not match the definitions of the
25 universe as it seemed relevant to me. So there

1 S. Schwartz McDonald
2 are some markets in which we have very, very
3 good, if you will, epidemiological or incidents
4 data, other markets which we don't. Even in the
5 realm of health care you'll be surprised how
6 difficult it is for us to tell you exactly what
7 percentage of people have a certain disease.

8 So knowing that uncertainty,
9 forgive me for this long preamble, knowing that
10 uncertainty it doesn't make sense to try to do
11 that because you have available the ability to
12 wait. So it's a lovely flexibility and no
13 matter how we do it the results are the same.

14 Q Just to be clear, you were not
15 aware and you have not read the Pugh study at
16 the time you did your survey, right?

17 MR. RASKOPF: Objection to
18 the characterization of the
19 witness' prior testimony.

20 A I absolutely had no interest in
21 doing that. That was not my goal. My goal was
22 to produce roughly equal sales, each of which
23 was large enough that I could look at separately
24 if I needed to, and then have the ability to
25 wait. So if you say Dr. McDonald, I'd like to

1 S. Schwartz McDonald

2 see what the results of your study had been if
3 you had mimicked my estimate of the proportion
4 of women versus men who read digital books I
5 would say okay, fine.

6 Q I'm not talking about screeners.
7 I'm trying to establish factually because you
8 keep mentioning the Pugh study in various
9 answers. You did not have the Pugh study at the
10 time you designed your survey, right?

11 A I'm not speaking to you about the
12 Pugh study. I'm not using it post hoc. I want
13 to be very clear. I'm not defending my decision
14 not to look for secondary data on the gender and
15 age distribution of people who read digital
16 books by saying post hoc am I lucky the Pugh
17 study says X, Y, and Z. I don't know what the
18 Pugh study says. When I read it that was of
19 little interest to me because I can assure you
20 that if anyone, and I'm not sure the Pugh study
21 does it, if anyone can provide me with
22 trustworthy incidents data I can replicate the
23 market by statistical waiting.

24 Q Again, I'm not talking about
25 screeners or any particular aspect of your

1 S. Schwartz McDonald
2 survey right now. I'm trying to establish that
3 you did not read the Pugh study before you
4 finished your survey; isn't that true?

5 A I didn't read the Pugh study
6 before I finished my survey. It didn't guide or
7 inform the decisions that I made, but it
8 certainly sheds light on some of them and I
9 think it obviates some of your questions or
10 criticisms post hoc.

11 Q Dr. McDonald, isn't it true that
12 survey researchers generally ask screening
13 questions to identify eligible consumers?

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

16 A That's what a screening question
17 is.

18 Q And am I correct that routine
19 eligibility screening questions eliminate
20 individuals who work in the industry in
21 question?

22 A Actually, there is some
23 disagreement about that. There are, from my
24 perspective, there is absolutely no reason to
25 worry about the two people who might have been

1 S. Schwartz McDonald
2 in any one of the industries that you're likely
3 to raise here, because I know from the
4 criticisms of my survey a couple of things.
5 One, I think the mission is to represent the
6 universe of people you have defined as relevant
7 to your market.

8 I see absolutely no reason to
9 exclude people who are survey researchers or
10 market researchers, and even if you did you
11 would be excluding one or two so the impact
12 would be material. But that was a deliberate
13 decision. I've been incredibly unimpressed by
14 the intellectual merit of doing that. If you
15 want a representative group of respondents they
16 come in all forms. I'm a consumer too.
17 Increasingly I note when people call me for
18 telephone surveys they're not asking whether you
19 are or any member of your family is a market
20 researcher.

21 Q You said that if you had screened
22 for typical respondents you might only have
23 eliminated one or two. What is your basis for
24 that?

25 A As much as I live in this

1 S. Schwartz McDonald

2 narcissistic world surrounded by researchers,
3 and as much as you think -- well, lawyers
4 actually who knows, but not so much strolling
5 through malls, the reality is market researchers
6 are a tiny proportion of the population. People
7 in book publishing are a tiny proportion of the
8 population. So it's immaterial and I'm not sure
9 anyone can make a case as to why they shouldn't
10 be in a survey like this.

11 Q Did you write a book called the
12 Group Debt Interview?

13 A Yes, I did.

14 Q Isn't it true in that book you
15 stated, "It goes almost without saying that
16 people employed in the industry under study or
17 their close relatives should be excluded from
18 group interviews"?

19 MR. RASKOPF: Objection to

20 the form.

21 A Group interviews, yes.

22 Q Is there any reason to treat
23 people interviewed in group interviews
24 differently than people interviewed for
25 litigation surveys?

1 S. Schwartz McDonald
2 bunch of consumers, I probably wouldn't want an
3 ad copywriter in the room because it wouldn't I
4 think be useful. In the case of a survey like
5 this the opportunity for any kind of market
6 research experience to do mischief like this is
7 inconceivable that it would.

8 Q But we don't know whether the
9 people you surveyed were members of the
10 publishing industry or had any specific
11 knowledge, right?

12 A Well, we don't know whether there
13 are one or two people who are in the publishing
14 industry. But with respect to the possible
15 impact of that, I can't see how it would redound
16 to anything but your benefit as a partisan for
17 Apple if there were people who were
18 knowledgeable in this survey because they would
19 be unlikely to perhaps say anything.

20 Q Well, your survey didn't screen
21 out people that were working in marketing or
22 advertising either, right?

23 A No, it didn't.

24 Q Isn't it true that in all
25 confusion surveys you've done for litigation

1 S. Schwartz McDonald

2 you've excluded people employed in the industry
3 in your study?

4 A No, I haven't. In cases where I
5 have it's clearly always been at the insistence
6 of my clients. Because for the reasons that you
7 and I have talked about at various times during
8 the day, there is a tendency for people in this
9 business, experts who are hired, the attorneys
10 who hire them to be very attentive to what has
11 been done before. It's actually I think an
12 industry that is or a practice, I guess industry
13 is not the right term, relatively inflexible
14 while the rest of market research evolved in
15 various ways there isn't very much that changes
16 in litigation research I suspect because people
17 are so mindful of precedent and no one wants to
18 take risks.

19 Q You, yourself, have screened out
20 people who are part of the industry being
21 quizzed in the past, right?

22 A Not always and typically neither,
23 and I have made the comment to attorneys I have
24 seen no value. By the way, in claims validation
25 I have had, which work I have done as well, I

1 S. Schwartz McDonald
2 have clients who say absolutely do not screen
3 out anybody because it's the universe that we
4 want to represent is broad and researchers are
5 people too. So I think this is a matter of
6 taste. It is absolutely not a matter of
7 methodological obligation.

8 Q Are you aware of judges
9 criticizing surveys for failing to screen out
10 people with specialized knowledge?

11 A It depends what you mean by
12 specialized knowledge. Specialized knowledge,
13 should you have been in the survey, no, I hope
14 you weren't. That's specialized knowledge. Is
15 a market researcher is someone who works in the
16 industry, who is doing data processing, who is
17 simply involved in what is ordinary marketing or
18 market research, would that be a person with
19 special knowledge, no.

20 Q Do you know whether I was one of
21 your respondents?

22 A I think I can find out.

23 Q Did you screen for people who
24 work, who are lawyers?

25 A No, lawyers --

1 S. Schwartz McDonald

2 Q Did you screen --

3 MR. RASKOPF: She wasn't
4 finished with her answer. You
5 said no, lawyers and then you were
6 cut off.

7 A Why would I do that? I live in
8 Philadelphia where every other person is a
9 lawyer. I think it would be inappropriate to
10 screen out lawyers. It would be desirable
11 perhaps to ensure that no lawyers from this case
12 are present. I have no way to do that that
13 isn't awkward and revealing of the outcome or
14 the agenda for the study. All things considered
15 you take risks. If by chance you happen to be
16 in the study, and I don't know what genre it
17 would have been, I can live with that because
18 statistics blur out this kind of stuff.

19 Q Are you done?

20 A I'm going to stop here.

21 Q Can you name me any study that you
22 have done where you say you did not study for
23 atypical respondents?

24 A I'm sure I could find one. I'm
25 sure I could find one. By the way, the

1 S. Schwartz McDonald

2 definition of atypical respondents varies from
3 study to study as well.

4 Q Would you agree that it's common
5 in the litigation survey to exclude respondents
6 who participated in the survey in the past three
7 months?

8 A I promised you I would make an
9 audible response. My audible response here is a
10 description of a raised eyebrow. One of the
11 things that no one in the industry trusts is
12 people's representation of whether they have
13 been parties to a survey last week, last month,
14 last year. It is absolutely the least reliable
15 data. One thing that you can do with a web
16 panel survey, which you can't do with a mall
17 survey, is actually confirm it. Although
18 research now cannot represent what people have
19 done in other panels, certainly we can begin to
20 talk about what those panel members have done,
21 have the opportunities they have to participate
22 in surveys, and what they've actually
23 participated in. I think this is one of those
24 sources of general amusement in the industry
25 where it's the most pro forma thing that people

1 S. Schwartz McDonald

2 do and it's useless. It's utterly useless.

3 Q Did you do anything to screen your
4 respondents to exclude people who participated
5 in a prior survey in the past three to six
6 months?

7 MR. RASKOPF: Asked and
8 answered.

9 A I answered no because I think it's
10 the silliest thing to do. And by the way, there
11 is no reason why someone shouldn't participate
12 in more than one survey in three to six months.
13 But I, as opposed to your experts, can actually
14 make some headway toward proving whether they
15 participated in Research Now surveys or not. I
16 would add no one really knows what is the right
17 amount of surveys and why wouldn't I want a
18 person to participate in the survey. Just
19 because somebody participated in a survey for JD
20 Powers on their recent Acura purchase, why
21 wouldn't they be eligible for a study that you
22 did or that I did.

23 Q Would you agree that professional
24 respondents can bias a survey?

25 MR. RASKOPF: Objection to

1 S. Schwartz McDonald

2 the form.

3 A I don't think bias is the right
4 word. Professional respondents can potentially
5 shape the outcome of certain kinds of surveys.
6 I don't think that the kinds of surveys that
7 we're talking about here lend themselves to that
8 sort of quote bias. There are lots of different
9 kinds of surveys and lots of different affects
10 that the industry has looked at of so-called
11 professional respondents, whether, for example,
12 they are high raters. There may be some
13 evidence of their use of rating scales. But
14 again, the definition of a so-called
15 professional respondent is yet ill-defined. So
16 in this case could a person who had taken a
17 survey twice last month or four times last
18 month, could that have bias the outcome here I
19 don't see how, on what basis.

20 Q Well, you had a panel of people
21 who chose to be part of Research Now where they
22 get rewards for the more surveys they take;
23 isn't that true?

24 A As I mentioned Research Now
25 doesn't allow them to take more than a certain

1 S. Schwartz McDonald
2 number of surveys over the course of a year. So
3 I would not describe members of a panel, which
4 by the way, the vast, vast majority of research
5 that's done in the United States now is based on
6 work from people who have been impaneled in some
7 way or are now part of a social community.

8 Q In your rebuttal reports that
9 you've submitted in the litigation have you
10 criticized another survey expert for failing to
11 exclude people who work in the industry being
12 tested?

13 A I don't recall. I don't recall.

14 Q You might have though, right?

15 A I might have. If I did I'm sure
16 it was something that I trivialized as a comment
17 because unless really there was a very
18 exceptional circumstance. I think I am very
19 clear in my expert reports about how I
20 prioritize my criticisms, and I really feel very
21 comfortable in standing on that record that the
22 kind of thing that you are enumerating here,
23 which I feel very comfortable defending, is at
24 its very best, and I don't think best is really
25 the fair way to talk about it, is so petty and

1 S. Schwartz McDonald
2 so trivial that it doesn't even take one little
3 morsel out of the credibility of the study.
4 It's truly trivial, contextual, and these are
5 very small fish to fry but I'm feel comfortable
6 about the decisions I've made.

7 Q Have you ever criticized a survey
8 researcher's work for having a report that has
9 so many flaws both big and little that the
10 collective aggregate of those flaws is worse
11 than the some of its parts?

12 MR. RASKOPF: I object to
13 the form of the question.

14 A You do. I don't. But if you have
15 something like that you'd like to show me and I
16 can then explain whatever I meant in that
17 context I'm happy to do it.

18 Q There will come a time. Is it
19 fair to say that Apple is famous as a smartphone
20 maker?

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

23 A Apple is a very well-known
24 smartphone maker, has a very significant market
25 share.

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2 Q Is it fair to say that the iPhone
3 is a popular product?

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

6 A There are several in this room.
7 Yes, of course it's a popular product.

8 Q Is it fair to say that the iPhone
9 is seen as revolutionizing the smartphone
10 industry?

11 MR. RASKOPF: Objection to
12 the form.

13 A That sounds like you're quoting
14 someone. I don't know who that would be.

15 Q Would you agree with it?

16 MR. RASKOPF: Objection to
17 the form.

18 A Is or was?

19 Q Do you agree that the iPhone has
20 revolutionized the smartphone industry?

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

23 A You switched tenses. I don't know
24 whether it is still relevant because Apple is
25 facing some stiff competition in the smartphone

1 S. Schwartz McDonald
2 industry, as you know. I think Apple has
3 absolutely introduced some major advances.
4 That's why I have one.

5 Q Would you agree that a confusion
6 survey is flawed if consumers give a response
7 for reasons other than the trademark at issue?

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

10 A That certainly is something you
11 want to avoid in your research assignment.

12 Q Have you ever heard of the term
13 priming in survey research?

14 A Yes.

15 Q How would you define priming?

16 A Priming is creating some kind of
17 an either literal or subliminal stimulus that
18 might encourage people to provide an answer they
19 wouldn't otherwise have provided or might have
20 otherwise provided.

21 Q What's wrong with that?

22 A If in fact what you've done is
23 prime people and you didn't intend to, and by
24 the way there are legitimate reasons to prime
25 people in certain circumstances, if you didn't

1 S. Schwartz McDonald

2 intend to do it then you can distort the
3 responses.

4 Q Let's go to screening question
5 five of your survey. In screening question five
6 you ask respondents which of the following have
7 you done in the past six months. They're asked
8 order a soft cover paperback book via the
9 internet for delivery by mail, ordered a
10 hardcover book via the internet for delivery by
11 mail and the last one is downloaded a digital
12 book to a reading device of any kind including a
13 smartphone. Did you write that?

14 A Yes.

15 Q Would you agree that upon hearing
16 the word smartphone respondents were more likely
17 to think of Apple?

18 MR. RASKOPF: Objection to
19 the form.

20 A No. You know, this is another one
21 of those raised eyebrows. It's hard to make
22 this criticism with a straight face I think in
23 number one a controlled study and two, a study
24 in which the screening question is then
25 separated by a matter of a minute from their

1 S. Schwartz McDonald

2 experience in the survey. That's what a control
3 study is for.

4 Q You said downloaded a digital book
5 to a reading device of any kind. That's the
6 first part of that question, right?

7 A Yes.

8 Q And a reading device of any kind,
9 that would include a smartphone or a Kindle or
10 any possible device, right?

11 A It would not have occurred to me
12 to include a smartphone if I used only reading
13 device. That was included in here specifically
14 to ensure that people did not restrict their
15 response to a Kindle or Nook or tablet because
16 there is a surprising, I have to say, amount of
17 book reading that's done on phones. I know
18 people who do it. I'm quite amazed that they
19 are now not blind but people do it. That's why.

20 Q You said a reading device of any
21 kind. Any kind, that would include smartphones
22 and tablets; isn't that true?

23 A Not to me it wouldn't. A reading
24 device to me is still a term that I would expect
25 to reference or bring to mind a Nook or Kindle.

1 S. Schwartz McDonald

2 That's a reading device. A phone is a phone. I
3 think of my phone as a phone. It happens to do
4 other things. Apple, of course your client, has
5 been quite extraordinary in redefining what a
6 phone does. But it's still my phone. If you
7 were asking me about my reading devices I
8 wouldn't think to reference my iPhone as
9 readily. So this was meant to be inclusive.
10 That's the reason. There was no intent to
11 prime.

12 However, just to follow on that
13 train of thought, this is precisely what a
14 control study is for. So whatever happens in
15 one arm if truly this were the impetus to
16 reference to speak to Apple, it would happen on
17 the other arm. What's more, just while I'm on a
18 roll, Apple owns a lot of "I's" but it doesn't
19 own the word smartphone, not until such time
20 they call it an "I" smartphone. There are a lot
21 of other smartphones and in my family they
22 abound. So the notion that somehow the world
23 smartphone cannot be used without people hearing
24 Apple, wow, there are confusion cases abounding
25 out there that we have yet to talk about.

1 S. Schwartz McDonald

2 Q Dr. McDonald, right after you said
3 downloaded a digital book to a reading device of
4 any kind including a smartphone, would you agree
5 that a smartphone would include a reading device
6 of any kind?

7 MR. RASKOPF: Objection.

8 Asked and answered.

9 A To you perhaps but not necessarily
10 to every one else. When you say reading device
11 to me, as a matter of fact I'm interestingly --
12 there are some people for whom a tablet is a
13 reading device and other people for whom it's
14 primarily an e-mail and a computer device. So
15 the notion of whether it's a reading device or
16 not, absolutely not only was this an innocent
17 decision but it was a diligent decision. It was
18 meant to ensure that people who had downloaded a
19 book to their phone thought that I was talking
20 about their phone as well.

21 Q And immediately after you asked
22 the question this screener you asked question 1A
23 of the main survey where you ask respondents to
24 envision a particular page of a book, right?

25 A Yes.

1 S. Schwartz McDonald

2 Q How much time is there between
3 when you ask screener five and ask question 1A?

4 A Well, it probably is between the
5 quotas and algorithm it might have been 15
6 seconds and then they have to read the question.
7 And by the way, half of these people were
8 randomized to a control in which there was very
9 little reference to Apple and half were
10 randomized to the test arm. The notion though
11 that somehow the words one cannot say smartphone
12 without bringing to mind for large proportions
13 of people Apple automatically, if you think
14 about the implications of that my goodness no
15 wonder this case is where it is. It's
16 preposterous. I'm sorry. It's preposterous.
17 Again, this is what a control study is for.

18 Q Dr. McDonald, I'm not going to get
19 into what is preposterous or not. Let's just
20 continue asking questions. Did you do anything
21 to control for respondents taking your survey on
22 a smartphone or on an iPad?

23 MR. RASKOPF: Objection to
24 the editorial and objection to the
25 form.

1 S. Schwartz McDonald

2 A No, depends on what you're after.

3 Q Isn't it true that guessing can
4 skew data?

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

7 A It depends on what you want to
8 learn in your survey. Actually, I have a very
9 strong difference of opinion about injunctions
10 not to guess. Because the people who know the
11 answer to this question don't belong in the
12 survey. Those are precisely the people you
13 would have me screen out. Those are the people
14 who are knowledgeable, who have special
15 knowledge, and in this case know that iBooks,
16 John Colby's companies, has nothing to do with
17 Apple iBooks. But every one else is guessing.

18 Q Isn't it true that you believe
19 guessing is generally considered undesirable in
20 surveys since it may not necessarily produce a
21 random response distribution depending upon the
22 topic or population and there is thus some risk
23 that guessing may skew the data?

24 MR. RASKOPF: Objection to
25 the form.

1 S. Schwartz McDonald

2 A If you're going to quote me then
3 you have to show me the context so that I can
4 tell you what I meant and why, because I've had
5 this conversation in court and I've had this
6 conversation with attorneys as in this case. I
7 believe that when you're asking about trademark
8 questions, about source, that it is all about
9 guessing. I think that's actually a fatuous
10 instruction because if anyone knows the answer
11 they don't belong in the survey. What you're
12 really asking and you don't want to exclude
13 people who have arrived at a conclusion, have
14 formed an inference based on what they imagine,
15 based on similarity, based on whatever, visual,
16 auditory, you don't want to exclude those people
17 just because they're not sure. I think the
18 answer -- and that's what a control study does.
19 Controls take care of -- guessing is a problem
20 if there is no control. If there is no control
21 I absolutely agree that there is a risk but for
22 other reasons as well.

23 Q Isn't it true that the standard
24 practice in litigation surveys is to instruct
25 respondents not to guess?

1 S. Schwartz McDonald

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

4 A I've seen it many times and I
5 actively disagree with it. I think it is a
6 mistake and the industry interestingly is high
7 bound in so many ways. What does it mean, talk
8 about fatuous, what does it mean for a
9 respondent. Shall I continue? I know you're
10 distracted.

11 Q I'm listening to you.

12 A I want to make sure --

13 MR. RASKOPF: Do you want
14 us to wait, Dale, until you're
15 finished there?

16 MS. CENDALI: No, she's
17 welcome to continue. I was
18 looking at the next document and I
19 don't want to interrupt you in
20 mid-speech.

21 A Thank you. I feel so passionate
22 about this actually that I feel, I crave your
23 undivided attention.

24 MR. RASKOPF: Sorry for
25 laughing.

1 S. Schwartz McDonald

2 A At the end of the day anyone who
3 knows the answer doesn't belong in the survey.
4 The only people who belong in the survey are
5 consumers who don't know for sure. That's what
6 we're doing. We're measuring likelihood of
7 confusion. The notion that somehow we exclude
8 people from guessing, and at the same time
9 another common code in Lanham Act surveys is
10 please don't guess versus but there is no right
11 or wrong answer. What does that mean. There is
12 no right or wrong answer to me sends an absolute
13 opposing contrary message to this beleaguered
14 respondent who has just been shown something,
15 told that they should provide their opinion.
16 They're not supposed to know it and if they were
17 specially knowledgeable people we wouldn't want
18 them to survey anyway, the purpose of these
19 surveys is to find out what people who don't
20 know are likely to do and think and surmise.
21 Surmise when confronted with queues of various
22 kinds in an environment in which they don't know
23 the answer.

24 Q Are you aware of the single
25 judicial opinion that has adopted your review

1 S. Schwartz McDonald
2 that there is no need to instruct respondents
3 not to guess?

4 MR. RASKOPF: Objection to
5 the characterization of the
6 witness' prior testimony.

7 A I will tell you this, no survey of
8 mine has ever been excluded and I don't do it.

9 Q In light of the speech you just
10 gave why did you say in your survey "if you
11 think you would have no idea please feel free to
12 say so" in light of your comments about that you
13 feel no reason to instruct people not to guess,
14 why did you include the instruction to your
15 respondents "if you think you would have no idea
16 please feel free to say so"?

17 MR. RASKOPF: Note my
18 objection to the characterization
19 of the witness' prior testimony.
20 Note my objection to the form of
21 the question. You may answer.

22 A Another small speech. If you
23 believe that those are equivalent then this
24 entire conversation is moot. If you believe
25 that I have essentially achieved the same goal

1 S. Schwartz McDonald

2 that one achieves by the injunction not to guess
3 by telling people if they don't have any idea
4 they should feel free to say so, then probably
5 we're done with the conversation of guessing.

6 If you don't, then I am happy to follow along
7 with that refinement because I think it is sheer
8 I'm going to describe it as courtesy. You're
9 asking people to answer a question which they
10 can't know the answer to. They can't unless you
11 are part of John Colby's retinue of employees
12 and colleagues, people sitting in this room,
13 people at Apple, people at Quinn Emanuel, you
14 don't know for sure. You don't know. So that's
15 what this is all about. It's the average
16 consumer who is uninformed and doesn't know.

17 If though some people will look at
18 the stimulus and say you know what, I think that
19 could be true or this is what I imagine. That's
20 all. We're not requiring that they sign a
21 pledge of conviction and certitude. That would
22 be silly. We don't want to discourage people
23 who aren't sure if they think something is true.
24 That would be artificially repressing responses
25 and I've seen jurists take exception to those

1 S. Schwartz McDonald

2 kinds of things, and people can argue about full
3 filters and what they do and how much they
4 repress response. However, I believe if
5 somebody really doesn't have an answer, doesn't
6 feel inclined to offer, they should be reassured
7 that that's okay and they don't need to be
8 pressed to make something up if they don't have
9 any conviction about it.

10 Q Let's look at Exhibit D to your
11 first report, which is on page 17, respondent
12 100001749. Do you see that?

13 A I'm sorry?

14 Q 100001749 on page 17. This
15 respondent said in response to your question 1A,
16 "I would guess Apple since they have iPhones,
17 iPods, iPads, right?" You agree this person was
18 guessing, right?

19 MR. RASKOPF: Objection to

20 the form.

21 A I think almost every one --
22 perhaps you and I should agree on what the
23 meaning of a guess is. You either know
24 something or you're guessing. A guessing stance
25 to me, an educated hunch, a surmise, a maybe,

1 S. Schwartz McDonald

2 but that's precisely the point. Of course most
3 of these people are using the "I" which is the
4 indicia of Apple to generate a conclusion about
5 this. And the fact that somebody says I would
6 guess, do we think that this person was really
7 guessing harder than somebody who said Apple. I
8 don't think so. I would not take that as a sign
9 that this person lacks special conviction and
10 the other people who didn't say yes --

11 Q This person said that they are
12 guessing. I would guess. Did you assume that
13 they were lying or did you assume that they were
14 telling the truth when they said I would guess
15 Apple?

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

18 A When people say I would guess it's
19 often in speech. It's often a hedge against the
20 possibility that they may be wrong. So is it
21 some wild guess that has no basis, no. As a
22 matter of fact the person is anticipating the
23 follow-up question, the probe why do you say
24 that, and providing the rule. They can't know.
25 If they say Apple they're wrong. So how is it

1 S. Schwartz McDonald
2 possible for guessing not to be part. Every
3 response that carries Apple in it here is a
4 person who is wrong in terms of what confusion
5 would imply, if it's John Colby's book, if it's
6 an Apple reader they're not. The point is that
7 somebody is taking, they're using that rule to
8 generate an inference.

9 Q Your survey tells us nothing about
10 what the reaction would be to one of plaintiffs'
11 books because you didn't show them one of
12 plaintiffs' books, right?

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

15 A I didn't show a book. I'm only
16 making a case that no one could know the answer
17 to this, and what we are asking is what their
18 interpretation would be.

19 Q You counted this person as
20 confused, correct?

21 A I counted this person as confused.

22 Q Let's look on page 19, for
23 example, respondent 100003147. This respondent
24 says --

25 A I'm sorry?

1 S. Schwartz McDonald
2 the Apple prefix as a rule for drawing an
3 inference about using Apple as a source, your
4 argument is that despite the presence of
5 guessing even with that use of the rule somehow
6 qualifies that response in a different way, I
7 would disagree.

8 Q You counted this person as
9 confused, correct?

10 A I did indeed.

11 Q You purposely did not instruct
12 respondents not to guess when you designed your
13 survey; isn't that true?

14 MR. RASKOPF: Objection to
15 the mischaracterization of the
16 witness' prior testimony.

17 A I didn't make a unique decision
18 here. I don't do that. That is not my MO in
19 any of the surveys that I do, and it's because
20 I, notwithstanding whatever jurists may say, I
21 believe and I have testified to that effect I
22 believe that that is not an appropriate
23 injunction. When you're putting people in a
24 position where they can't know the truth of the
25 matter, let's take a traditional survey of the

1 S. Schwartz McDonald
2 sort whether it's, I don't care whether it's an
3 Eveready model or it's something else, the
4 reason there is a survey is because what you're
5 trying to do is measure confusion.

6 If people give a confused answer
7 they can't possibly know it. They don't know
8 it. The only people qualified to be in the
9 survey are people that are going to have to
10 guess. They're going to have to draw
11 inferences. I couldn't disagree more strongly.
12 Perhaps when I retire I will write an article to
13 that effect and maybe I'll have a persuasive
14 impact on some of the jurists and the community.

15 Q Do you agree for a survey to be
16 trusted and relied upon the survey questions
17 must be relevant, clear, and unbiased?

18 A Sounds like something I've said.

19 Q Do you also agree that if the
20 survey uses language that's poorly defined the
21 results can be unreliable?

22 A In theory that's right.

23 Q Isn't it true that in your
24 standard likelihood of confusion survey
25 respondents are asked who makes or puts out the

1 S. Schwartz McDonald

2 product?

3 A I've used and seen different
4 language but I would not regard that language as
5 the ultimate in clarity for all times and
6 places. There's nothing magic or anointed about
7 that terminology. You have to pick a verb
8 that's appropriate for the industry.

9 Q Do you agree that in the vast
10 proportion of likelihood of confusion surveys
11 that you've seen done for litigation respondents
12 are asked who makes or puts out this product?

13 A Perhaps shame on them. It may or
14 may not be appropriate. This is one case in
15 which it wasn't. Every survey researcher, every
16 survey architect reserves the right and should.
17 Every expert you hire should reserve the right
18 to make a decision based on the product, the
19 marketplace, whatever the circumstances that
20 should guide selection of the relevant verb.

21 Q Can you answer my question? Isn't
22 it true that the standard Eveready question asks
23 who makes or puts out the product in question?

24 MR. RASKOPF: Objection to
25 the editorial. Objection to the

1 S. Schwartz McDonald

2 world of clients, attorneys, who undoubtedly
3 take McCarthy and all other sources like that in
4 consideration when discussing with me what's
5 appropriate methodology. I don't want to
6 suggest that I have been so much the maverick
7 that my questions are unrecognizable to anyone.
8 That quite clearly can't be the case because my
9 surveys have been accepted in court.

10 I absolutely reserve the rights as
11 a survey researcher and methodologist to craft
12 the language of a survey to the category and the
13 circumstance. That's the obligation and that
14 flows very much from the question you posed
15 earlier don't I agree that the question should
16 be clear. The answer is yes, I think they
17 should be clear. I think they should fit the
18 topic. I think they should be crafted
19 appropriately.

20 Q Dr. McDonald, this will be shown
21 to the judge at different points in time. I'm
22 going to ask you to try to answer my questions
23 and avoid going on and on with speeches. You're
24 welcome to do that if your counsel wants to
25 redirect you. This is my chance to get answers

1 S. Schwartz McDonald

2 A That is correct.

3 MR. RASKOPF: No objection
4 to the question.

5 A That's correct. I didn't.

6 Q Isn't it true that instead you
7 asked respondents what company or companies
8 would you think had made the book available,
9 right?

10 A That's correct.

11 Q What did you intend the word
12 available to refer to?

13 A I wanted to use a verb that I
14 thought did full justice to the various ways
15 that consumers could interpret the role of
16 whoever they thought was the source, whether
17 they thought it was Apple. All the ways in
18 which they could think that Apple might have a
19 hand in it, whether they thought Apple was a
20 content originator, whether they thought that
21 Apple was the distributor, whether they thought
22 that Apple was the digital transmission tool, it
23 didn't matter.

24 The question really before
25 respondents was essentially when you see iBooks

1 S. Schwartz McDonald

2 on this information page what does it suggest to
3 you about the source. That was it. And making
4 the book available was I think an appropriately
5 encompassing phrase to accommodate all of the
6 action verbs that are involved in getting a book
7 to a consumer and the wrong verb there, and
8 forgive me if you think this is a speech, I'm
9 trying to be very responsive to your question.
10 I don't think I'm going off in irrelevant segue
11 ways. The wrong verb is precisely the kind of
12 error that produces invalid data.

13 Q Available in this context could
14 mean the company from whom you could purchase
15 the book, right?

16 A Could be anybody. It didn't
17 matter.

18 Q So available doesn't have to mean
19 the publisher, right?

20 A It doesn't matter. The issue for
21 me is when you see iBooks do you believe that
22 Apple had something to do with the source,
23 whether it was the direct source or it was
24 affiliated with the source it had a hand in it.
25 Is Apple in the room and is Apple in the room as

1 S. Schwartz McDonald

2 a source.

3 Q Would you agree that the company
4 that makes a book available is not necessarily
5 the same as the company that prints the book?

6 A It isn't necessarily the same as
7 the company that prints the book. It isn't
8 necessarily the same as the company that
9 conceives of the book, edits the book. That's
10 the nature of books. They are different. It's
11 almost reminiscent of movies in which you have
12 multiple producers, multiple sources and you see
13 this cascade of production hands.

14 Q Is it fair to say that Apple is
15 generally known for making content available on
16 the internet?

17 A I think Apple is not thought of as
18 a publisher. That's precisely the problem.
19 Apple is not at this point in time thought of as
20 a publisher. It is thought of as a distribution
21 vehicle for books.

22 Q So you'd agree that Apple is
23 thought of as a distribution vehicle for things
24 like books and CDs, movies, and films?

25 MR. RASKOPF: Objection to

1 S. Schwartz McDonald

2 testing the impact of a trademark element to
3 provide a basis for partialling out potential
4 artifacts associated with guessing and other
5 noise?

6 MR. RASKOPF: Objection to
7 the form.

8 A Yes. I assume you're quoting me.
9 I feel comfortable that I can agree with myself.

10 MS. CENDALI: Can we
11 stipulate that everyone in this
12 room can agree with themselves.

13 A You'd be surprised. Not every one
14 agrees with themselves all the time.

15 Q What do you mean by noise?

16 A Well, noise can take various
17 forms. It can be acquiescence in a case where
18 there was stimulus presented. It can take the
19 form of guesses that are not specifically driven
20 by, after our discussion of guesses, it's the
21 propensity to name something simply because it's
22 popular or it comes to mind for reasons that are
23 categorical as opposed to embodied in the
24 stimulus.

25 Q Is it fair to say that a control

1 S. Schwartz McDonald

2 rights in the word book alone, right?

3 A Yes.

4 Q Do you understand plaintiffs'
5 claim to be the combination of "I" plus books?

6 A It is the combination of "I" plus
7 books, yes.

8 Q And is it your understanding that
9 plaintiffs are not taking issue with Apple's
10 other marks that use an "I" such as iPad,
11 iPhone, and iTunes, et cetera, correct?

12 A Yes, correct.

13 Q And as you stated in your report
14 do you agree that the "I" prefix is a singular
15 and important source indicator for Apple?

16 A Yes.

17 Q A proper control then should
18 account for the possibility that consumers might
19 associate any "I" formative mark with Apple,
20 right?

21 MR. RASKOPF: Objection to
22 the form.

23 A This is case in which the "I" is
24 precisely the issue. No one is arguing that the
25 word book is something that people will

1 S. Schwartz McDonald

2 associate with Apple. It's iBook. "I" is the
3 carrier of Apple brand DNA. It's got to be the
4 thing that's controlled for.

5 Q So you need to control for the use
6 of the "I"; is that right?

7 A Yes.

8 Q Now you selected the control
9 ebooks here, correct?

10 A Yes.

11 Q And ebooks is the generic term for
12 electronic books, right?

13 A I think so.

14 Q Did you personally select this
15 control?

16 A Yes, I did.

17 Q How did you go about selecting the
18 control?

19 A It seemed easy actually. This is
20 one of those occasions, sometimes controls
21 require some ingenuity. This one presented
22 itself to me very, very easily. It does tend to
23 get used generically, that it partialled out
24 exactly what needed to be partialled out, which
25 is not the word books but the "I". That's the

1 S. Schwartz McDonald

2 active ingredient in this trademark case is the
3 "I". Yes, it's true it's "I" adjacent to books,
4 no question about it, but it's the "I". The I
5 have it, so to speak. That's got to be
6 controlled for. Otherwise, all the Apple noise
7 associated with the rules that you've seen
8 respondents articulate about their Apple logic,
9 their Apple brand logic, would be left
10 potentially in the control and, therefore, you
11 would not be partially out noise at all.

12 Q So you don't think Apple has done
13 anything wrong in naming this series of products
14 iPad and iTunes and iMac and the like, right?

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

17 A I'm flattered to be asked that.
18 But I have no basis for saying that. I don't
19 know who else is out there with any kind of
20 cause of action against Apple for anything else.
21 It's all about iBooks.

22 Q So is it fair to say that you
23 think that when consumers see "I" in front of
24 another word they think of Apple?

25 MR. RASKOPF: Objection to

1 S. Schwartz McDonald

2 the form.

3 A I don't know any word. I wouldn't
4 argue that consumers would think that any single
5 word preceded by a lower case "I" would signal
6 Apple to people, but certainly lots of objects,
7 especially information based objects, were
8 concepts, yes. Clearly my study I think has
9 proved that conclusively you need look no
10 further than the study to see that consumers
11 have learned the Apple prefix meaning rule,
12 which is a very powerful branding device I
13 think.

14 Q Do you generally use generic terms
15 for your controls?

16 MR. RASKOPF: Objection to
17 the form.

18 A It doesn't -- there is no way to
19 generalize that way. I've used all kinds of
20 different controls and the notion of generic in
21 some cases I'm trying to recall something that
22 was a personal product, a hygiene product, and
23 what we may have done. I can't recall. But
24 generic, no, because sometimes there is no
25 generic products. So the issue isn't whether a

1 S. Schwartz McDonald

2 control should be generic. Here it's relevant
3 because a generic carries as little noise as
4 possible. It's a true quote placebo, meaning
5 that if anyone had said Apple in response to
6 ebooks we would all agree that they were saying
7 just because we know that Apple makes digital
8 books or they associate something about
9 electronic or the internet, and so Apple came to
10 mind. That's true noise. That's what a control
11 meant to partial out.

12 Q Isn't it true that a control is
13 typically designed to appear as another brand or
14 mark as opposed to a generic term?

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

17 A There is no rule about that.
18 There is a great deal of ingenuity in craft and
19 specificity that's involved in picking a good
20 control. As you know I'm sure through your
21 career some brand scenarios really lend
22 themselves very nicely to a control, others
23 don't. This one lent itself very nicely. I
24 don't know if there's anything in there. It
25 really varies. There's no rule of art that I'm

1 S. Schwartz McDonald

2 aware of.

3 Q Would you agree that an ideal
4 control should be something that's relatively
5 unfamiliar to the respondents with few specific
6 prior associations?

7 A It depends on the circumstance.
8 Few specific brand associations certainly. I
9 mean what you're trying to do is create
10 something that's essentially devoid of brand
11 associations as possible so that you can
12 actually siphon out whatever Apple-ness is
13 coming out just because. That's the nature of
14 the true placebo. There's no active ingredient
15 in it and that's a requirement but it's
16 structurally, morphologically similar enough in
17 this case books, so that you can say well you
18 know we're evoking this idea. We've taken out
19 what I've described as the active ingredient.

20 Q Now did you code the verbatim
21 responses?

22 A No, I just reviewed them. I had
23 two members of my staff do it.

24 Q Did you develop a coding system?

25 A Yes. Well, yes, in conjunction

1 S. Schwartz McDonald
2 clarify for me. I recall what you said but I'm
3 not sure I understand what you mean.

4 Q Well, if people said Apple for
5 some reason other than the mark at issue, the
6 protective aspect of the mark at issue, should
7 that person have been counted as confused?

8 A If a person didn't give a reason
9 here and said I'm not sure, the answer is they
10 might still be counted as confused. It's the
11 obligation and responsibility of the control arm
12 to subtract from that. As you can see there are
13 a handful of people who simply said I know that
14 iBooks is Apple. That's the reason I have
15 guessed or given that answer. But if people
16 overlooked the follow-up reasons I would still
17 count them as confused because there is a
18 control arm and it was a valid control and so
19 that subtraction can take place.

20 Q What type of responses qualified
21 as confusion the way you did your coding?

22 A If someone said Apple or they
23 referred to iTunes or iPad even without Apple,
24 and you can see the table there, you know it
25 well, then they would be considered to be

1 S. Schwartz McDonald

2 Apple and said, "because Apple prefaces
3 everything with an 'I'". Do you see that?

4 A Yes.

5 Q And the next respondent, one many
6 zeroes 45, this person named Apple because, "The
7 "I" in front of the title is their signature."
8 Do you see that?

9 A Yes.

10 Q Do you agree that these three
11 respondents name Apple because of the letter "I"
12 alone?

13 MR. RASKOPF: Objection to
14 the form.

15 A They named it because "I" was
16 critical, yes.

17 Q Based on these responses they were
18 indifferent to the rest of the word, right?

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

21 A You mean that it was books as
22 opposed to some other thing?

23 Q Yes. Nothing in their answer
24 indicated that they were focusing on "I" plus
25 books or books. Their answer just referred to

1 S. Schwartz McDonald

2 the "I" only, right?

3 A But "I" plus books is just a
4 singular event and books is not a word that
5 Apple owns. So the issue is what happens when
6 you put "I" in front of another word. You
7 either know that iBooks is an Apple app, in
8 which case you may feel free to say it, or even
9 if you do know it's an Apple app the point
10 evidently consumers are so versed in what they
11 perceive to be Apple's naming strategy in the
12 syntax of the "I" that they will interpret
13 something as Apple sourced based on "I" plus a
14 particular kind of word.

15 We've agreed, and I told you
16 earlier, that I didn't necessarily think
17 everything with a small "I" in front of it would
18 get the same level of attribution. Even people
19 that have iBooks and iPhones gave this
20 explanation. In other words, they redound to
21 the rule which they have learned and they
22 proudly declare.

23 Q So is it fair to say that you
24 think people would have named Apple even if the
25 prompt had said iNotes or iReading?

1 S. Schwartz McDonald

2 A As far as I know iNotes isn't an
3 Apple application.

4 Q Let's assume it's not.

5 A They might very well have
6 attributed to Apple, but if it isn't an Apple
7 application and it isn't in some legal
8 contention or there isn't a trademark issue
9 around it, then that's fine. Apple may get
10 credit for things that it doesn't actually own
11 under the letter "I". I wouldn't be surprised
12 if some people that iGoogle was an Apple joint
13 venture. That doesn't matter. Apple has iBooks
14 and Mr. Colby has iBooks, and so it's iBooks
15 where rubber meets the road. I fully would
16 expect that it's because it's the "I" attached
17 to books or some information loaded kind of
18 object.

19 Q Well, am I right that you
20 concluded in your first expert report that 83
21 percent of the people who named Apple did so
22 because of the presence of the letter "I"?

23 A It sounds familiar. It certainly
24 was the majority.

25 Q In your second report am I right

1 S. Schwartz McDonald

2 calculate as confused only people who somehow
3 know or said they know that Apple uses iBooks as
4 an app. I think that's totally inappropriate.
5 It's not what about you know. The confusion in
6 the marketplace surely will grow as people come
7 to know iBooks more widely, but even people who
8 don't necessarily know it or know it well, if
9 they understand the Apple naming principal are
10 going to form source attributions around iBooks.

11 Q Isn't it true that in past cases
12 you've argued that you need to distinguish
13 between relevant cases of confusion from
14 irrelevant cases of confusion?

15 A I don't know. I've written a lot
16 of things. Context free I'm not sure I can
17 comment on that. If you show me the report I'll
18 be happy to explain what I said and with any
19 luck I'll agree with myself again.

20 Q Courts have rejected your
21 calculation of survey results in the past,
22 haven't they?

23 MR. RASKOPF: Objection to
24 the form.

25 A Not that I'm aware of.

1 S. Schwartz McDonald

2 Q Did you make a mistake in this
3 report?

4 A I don't know, I really don't.

5 Q Was the second report done under
6 hurried conditions?

7 MR. RASKOPF: Objection to
8 the form.

9 A I don't know what you mean by
10 hurried conditions but for clarity's sake, would
11 you like me to calculate the correct number
12 because whether this is a typo or -- it's
13 probably more likely a typo than it is a
14 miscalculation.

15 Q Why did you do your second report?

16 A I did my second report because I
17 was struck by what I thought was the injustice
18 of the criticism of my first report, and really
19 believed that it didn't matter whether books
20 were capitalized or not, whether the B was
21 capitalized or not.

22 Q Why did you in your first report
23 use the formulation small I capital B?

24 A Because that was what I really had
25 at the top of the box so to speak. That was the

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2 specimens I saw. It was not -- it was a
3 decision that was driven really by that. I
4 probably had a non, if you will, by accident
5 representative set of books and was totally
6 persuaded that it was not capital B. I am for a
7 couple of reasons, which I'm happy to articulate
8 for you if you care, but I felt that that was
9 not material.

10 Q When you looked at the complaint
11 did you notice that plaintiffs throughout the
12 entire complaint referred to their mark as
13 iBooks in all lower case?

14 A I, like the respondents in this
15 survey, didn't notice it. There's nothing more
16 telling than that actually.

17 Q Dr. McDonald, did you do anything
18 at the time that you did your report to
19 ascertain how often plaintiffs used the imprint
20 small I capital B versus all in lower case?

21 MR. RASKOPF: Objection to
22 the form. Asked and answered.

23 A Which report? Would you clarify,
24 do you mean my first report?

25 Q At the time that you did your

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2 first report did you do anything to ascertain
3 how often plaintiffs depicted their imprint with
4 a small I capital B versus all lower case?

5 A No, I didn't.

6 Q Were you aware at the time that
7 you did your first report that plaintiffs
8 depicted their mark at all lower case letters?

9 A You know, I can't really recall.
10 I'm only being partially flip when I say -- a
11 couple of things. First of all, I hadn't read
12 the complaint on the ebook. So the complaint is
13 something I read earlier and I didn't recall
14 that it was lower case B.

15 I had some iBooks on my desk. I
16 may have had at that time a digital iBook. I'm
17 sure I did that had a capital B in it. So I
18 thought capital B was a very legitimate
19 specimen. This was a decision that was really
20 made based on what was present for me in my
21 environment.

22 That's precisely the reason that I
23 was very eager to do a sur-rebuttal survey
24 because I felt the results would be the same
25 because I did not believe that the capital B was

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2 your survey, either one?

3 A Validation as a concept really is
4 geared to the survey world of interviewers who
5 are quite prone to cheat. I am, as luck would
6 have it, I'm unimpressed that you and the
7 service you commissioned encountered no such
8 instances. It's not unusual. So validation as
9 a concept historically in the industry, that
10 very word has grown up in use around interview
11 or misbehavior. The world of self-enumerative
12 surveys via the web introduced new issues but
13 validation in the way we think of it, which is
14 calling respondents to confirm they did a survey
15 or took a survey doesn't make sense in the world
16 of the web. We've talked about other kinds of
17 quality control issues there but for a variety
18 of reasons it's not plausible.

19 Q Isn't it true that it's common
20 practice to validate litigation surveys?

21 MR. RASKOPF: Objection to
22 the form.

23 A It's common practice to validate
24 the issuance of surveys in fact required is
25 absolutely foiled for litigation surveys when

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2 they're conducted in malls using professional
3 interviewers, but not so with web panels because
4 in the emerging world around internet research,
5 which as you know has started very much to
6 penetrate the Lanham Act landscape, we have
7 different kinds of challenges. I have done
8 claims validation work as well in this area and
9 it's just a different issue. No, the answer is
10 I didn't because it really wasn't plausible.

11 Q Just to be clear, you're not aware
12 of any court, are you, that said there is no
13 need to validate litigation surveys that were
14 done on the internet, are you?

15 MR. RASKOPF: Objection to
16 the form.

17 A I would be really curious to hear
18 what procedures anyone, a court or anyone else,
19 would arrive at that would give every one
20 confidence that some kind of validation
21 procedure would really be meaningful,
22 particularly in a very well run panel that has
23 information about the use of the exclusive
24 e-mail addresses and so on. The industry, you
25 probably don't know, but the industry is really

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2 working hard to come to terms with all of the
3 issues around panels. At this point in time
4 there really isn't a standard for validation of
5 this kind because there is no way to accomplish
6 it.

7 Q Move to strike as nonresponsive.
8 To be clear, you did not attempt to validate
9 either of your surveys, right?

10 MR. RASKOPF: Objection.

11 Asked and answered.

12 A It didn't make sense. To do a
13 validation is designed to route out interviewer
14 cheating.

15 Q You're not aware of a judge that
16 as opined that you don't need to do validation
17 in the internet context, correct?

18 MR. RASKOPF: Objection to
19 the form.

20 A I wouldn't be, but I would be
21 surprised if a judge could offer an opinion
22 about how to do it. I think we would all be
23 interested in the industry as to come up with a
24 plausible way of doing it. When you send an
25 e-mail invitation to a respondent, to his or her

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2 inbox, and that person is the individual who is
3 empowered to respond to a survey, it's really
4 difficult to imagine whether that person in any
5 way misbehaved they would acknowledge it. This
6 is a problem. It doesn't make sense really.
7 Only in this kind of context would anybody
8 really be talking about it this way.

9 Q But there is no way in this
10 internet context to see whether you're dealing
11 with a 14 year old who wants a freebie?

12 A But they can't get it. I tried to
13 describe that.

14 Q Or someone who really is the 36
15 year old person who signed up?

16 A I answered this question earlier
17 or at least I anticipated it in my comment when
18 I was trying to describe to you how these panels
19 are run. If a 14 year old breaks into mom or
20 dad's e-mail account. She or he doesn't get a
21 freebie. It doesn't go to her. It comes back
22 in the form of points to mom or dad. So it's
23 not plausible. There is no incentive to do it.
24 That's one of the reasons why there's very
25 little concern about it.

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2 Q Suppose the 14 year old was the
3 person who signed up to begin with and just said
4 they were 36?

5 A The sign up procedure is pretty
6 detailed and careful. I would be happy offline
7 to provide more detailed information from
8 Research Now about how they do that.

9 Q Let's go back to your first
10 report, to page 18, if you don't mind. It's
11 McDonald Exhibit 1. Page 18, paragraph two you
12 stated that, "The study has a foot in the
13 present and a foot in the future insofar as it
14 taps current source attributions in a digital
15 market that will continue to grow." And it
16 continues on from there. When you said it taps
17 current source attributions, you didn't show
18 anyone a current copy of one of plaintiffs'
19 books, right?

20 A Current in the sense that all the
21 attributions are based on people's conceptions
22 today of Apple's "I" branding syntax. So it's
23 very much in the present and we've had lengthy
24 discussions about how it's in the present, but
25 it doesn't speak to a particular stimulus but

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2 A I can't possibly. One thing, you
3 may quarrel with my methodologies in the
4 present, you would certainly quarrel with my
5 argument that I have done survey in 2016.

6 Q Do you generally opine on future
7 confusion in your expert reports?

8 A I can't recall a circumstance.
9 Actually, no, sorry. Without being able to
10 identify the product I'm sure that I have talked
11 about marketplace dynamics that are likely to
12 propel or increase the risk to a brand. I'm
13 quite confident. I just can't identify the
14 product. This is the kind of thing that can
15 easily occur in a market in which there is
16 growth. Whenever a brand is becoming
17 increasingly popular, for example, or a category
18 is becoming increasingly popular, it's just the
19 nature of time. That's why sometimes people
20 seek preliminary injunctions because they're
21 worried about the affect of time.

22 Q There was no preliminary
23 injunction in this case, was there?

24 A Oh, no, and I didn't in any way
25 attempt or mean to suggest. I was only arguing

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2 the time dimension in many markets.

3 Q Isn't it true that time in the
4 future could also have people become more
5 familiar with digital books, more familiar with
6 Apple's iBookstore, more familiar such that they
7 would become even more sophisticated and more
8 aware that there's no confusion between this
9 publishing company and Apple's software?

10 A It's possible. That would be your
11 opinion, probably not mine. That's because the
12 more ubiquitous Apple's mark is the more people
13 who use iBooks, the more likely it is for them
14 to imagine that anything that says iBooks has an
15 Apple connection. That's just for me the logic
16 of it but I fully concede it's my opinion. I'm
17 not representing it as a fact and I can't place
18 a statistic around it.

19 Q Have your reports ever been
20 excluded in any litigation?

21 A Not that I'm aware.

22 Q Have your reports ever been
23 criticized by the court in any litigation?

24 A It's possible. I can't speak to
25 it. In general they've been I think well

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2 A To me Apple has made clear its
3 naming strategy. Every time I look at my
4 iMessage in the text box, I'm reminded that
5 wherever Apple thinks it's suitable to use "I"
6 Apple has used "I". I speak as someone who
7 observes marketing behaviors of many, many
8 companies out there. I'm not in the boudoir of
9 all of them, but if you're a card carrying
10 marketer you can make some inferences. Perhaps
11 I'm wrong but this is my observation. It's my
12 opinion as a person who does this for a living.

13 Q Later in this paragraph you opine
14 that Apple is seeking to dominate virtually
15 every arena and conduit of digital consumption.
16 Do you see that?

17 A Yes.

18 Q What is your basis for that
19 belief?

20 A Well, living and breathing, being
21 a sentient consumer and observer of the
22 landscape, Apple is -- and I say this with all
23 respect, really. I'm sorry I don't have Apple
24 stock or if I did I bought it at a lower price.
25 Apple is an amazing company. They've been

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2 extremely successful through a combination of
3 innovation and very effective marketing and an
4 intuitive appreciation of what consumers can be
5 made to do, even if they don't think they want
6 or need to do it. I have kudos to Apple. If
7 Apple doesn't want to dominate every part of the
8 digital landscape -- and by the way, I include
9 casual articles that I read, business
10 publications, and Forbes and other things,
11 that's all part of the world in which I walk.
12 And so if I have perhaps ascribed more to Apple
13 then they aim to, then it's just a testament of
14 my respect.

15 Q Well, you're opining on Apple's
16 intent, right?

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

19 A It's my observation. Consumers
20 can make inferences about what brands mean and
21 what they intend. Marketers make more.

22 Q Isn't it true in the past courts
23 have criticized you for opining on the opposing
24 party's intent?

25 A I don't recall that happening, but

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2 once again, I'm glad to review any document.

3 Q And in the last sentence on
4 paragraph two on page two, of your report, where
5 you write, "By implication my findings
6 demonstrate convincingly that the confusion
7 already engendered by Apple's use of the iBooks
8 mark precludes plaintiffs from making effective
9 use of their brand in a marketplace whose
10 natural evolution requires them to continue
11 following a digital path." Do you see that?

12 A Yes.

13 Q Have you done anything to look
14 into what has happened, if anything, to
15 plaintiffs' sales since Apple has announced its
16 iBooks mark?

17 MR. RASKOPF: Objection to
18 the form.

19 A At the moment I have no reason to
20 believe that Apple has as yet harmed Mr. Colby,
21 but I'm not a damages expert. I have done
22 nothing to look at his sales data or in any way
23 align them with Apple's launch of iBooks. My
24 comment here speaks to what can't happen in the
25 future for Mr. Colby, if when he says his name

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2 people hear Apple. When you're a brand and you
3 say a name and someone thinks of Apple you're
4 stymied.

5 Q On page four of your report you
6 say, "In this particular circumstance where one
7 of the world's largest brands has squared off
8 against one of its smaller competitors." Do you
9 see that?

10 A Just point me to the right place.

11 Q It's the middle paragraph, the
12 middle of that paragraph.

13 A Yes.

14 Q You refer to plaintiffs and Apple
15 as being competitors, correct?

16 A Well, that's actually a fair -- I
17 think they're competitors for the same brand.
18 Let's put it that way. Not competitors for the
19 same business, but for the same if you will
20 brand equity. Well actually even that's not
21 fair. There is no way that John Colby can
22 aspire to Apple's brand equity but he has equity
23 of his own and he wants to, if he is a good
24 businessman, he wants to maintain it, cultivate
25 it, nourish it, and in this case Apple stymies

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2 that.

3 Q Well, you know that Apple doesn't
4 publish books and plaintiff doesn't sell ebook
5 reading software, right?

6 A Absolutely. That's why I say that
7 competitors here is really more fairly described
8 as competitor for brand equity and brand
9 identity.

10 Q And you have never undertaken --
11 you've never been asked to analyze what brand
12 equity plaintiffs have; is that true?

13 A I have not, no. It has been
14 represented to me that there is equity but I
15 haven't done an independent investigation.

16 Q So that was just an assumption
17 that you've been given effectively?

18 A Well, I have been -- it's been
19 represented to me by the attorneys that retained
20 me and their expert through them.

21 Q Elsewhere in your report you say,
22 "The history of plaintiffs' mark earns it the
23 right to be seen as a brand that could and would
24 have had a robust digital future."

25 A Yes. Could you point -- I