

## **EXHIBIT B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs.

No. 11-cv-4060 (DLC)

APPLE, INC.,

Defendant.

-----X

DEPOSITION OF STEPHEN M. NOWLIS

Friday, December 14, 2012

New York, New York

9:30 a.m.

Reported by:  
Maureen Ratto, RPR, CCR, CLR  
Job No: 27929

STATE OF NEW YORK        )  
                                  ss:  
COUNTY OF NEW YORK     )

I wish to make the following changes, for the following reasons:

<b>PAGE</b>	<b>LINE</b>	
<u>18</u>	<u>3</u>	CHANGE FROM: <u>.01</u> CHANGE TO: <u>0.1</u> REASON: <u>Transcription error.</u>
<u>18</u>	<u>25</u>	CHANGE FROM: <u>don't</u> CHANGE TO: <u>do</u> REASON: <u>Transcription error.</u>
<u>24</u>	<u>6</u>	CHANGE FROM: <u>of if</u> CHANGE TO: <u>of -- if</u> REASON: <u>Transcription error.</u>
<u>61</u>	<u>18</u>	CHANGE FROM: <u>You are correct, you really</u> CHANGE TO: <u>You are correct, I really</u> REASON: <u>Transcription error.</u>
<u>84</u>	<u>19</u>	CHANGE FROM: <u>iBooks*</u> CHANGE TO: <u>ibooks</u> REASON: <u>Transcription error.</u>
<u>84</u>	<u>22</u>	CHANGE FROM: <u>I-picture-books</u> CHANGE TO: <u>ipicturebooks</u> REASON: <u>Transcription error.</u>
<u>85</u>	<u>5</u>	CHANGE FROM: <u>iBooks</u> CHANGE TO: <u>ibooks</u> REASON: <u>Transcription error.</u>
<u>87</u>	<u>10</u>	CHANGE FROM: <u>I-imperialist</u> CHANGE TO: <u>i-imperialist</u>

REASON: Transcription error.

87      11      CHANGE FROM: I

CHANGE TO: i

REASON: Transcription error.

89      6      CHANGE FROM: Deposition

CHANGE TO: Deception

REASON: Transcription error.

90      17      CHANGE FROM: I-Tracking

CHANGE TO: eye-tracking

REASON: Transcription error.

90      20      CHANGE FROM: intention

CHANGE TO: attention

REASON: Transcription error.

91      5      CHANGE FROM: iBooks, Inc.

CHANGE TO: ibooks, inc.

REASON: Transcription error.

91      9      CHANGE FROM: Inc.

CHANGE TO: inc.

REASON: Transcription error.

91      12      CHANGE FROM: iBooks

CHANGE TO: ibooks

REASON: Transcription error.

91      14      CHANGE FROM: iBooks, Inc.

CHANGE TO: ibooks, inc.

REASON: Transcription error.

95      17      CHANGE FROM: Deposition

CHANGE TO: Deception

REASON: Transcription error.

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<u>95</u>	<u>19</u>	CHANGE FROM: <u>Deposition</u> CHANGE TO: <u>Deception</u> REASON: <u>Transcription error.</u>
<u>98</u>	<u>23</u>	CHANGE FROM: <u>peer</u> CHANGE TO: <u>proper</u> REASON: <u>Transcription error.</u>
<u>101</u>	<u>4</u>	CHANGE FROM: <u>I-imperialist</u> CHANGE TO: <u>i-imperialist</u> REASON: <u>Transcription error.</u>
<u>101</u>	<u>6</u>	CHANGE FROM: <u>I</u> CHANGE TO: <u>i</u> REASON: <u>Transcription error.</u>
<u>101</u>	<u>12</u>	CHANGE FROM: <u>I</u> CHANGE TO: <u>i</u> REASON: <u>Transcription error.</u>
<u>101</u>	<u>19</u>	CHANGE FROM: <u>I</u> CHANGE TO: <u>i</u> REASON: <u>Transcription error.</u>
<u>113</u>	<u>16</u>	CHANGE FROM: <u>Page 3</u> CHANGE TO: <u>Page 1</u> REASON: <u>Transcription error.</u>
<u>124</u>	<u>23</u>	CHANGE FROM: <u>away</u> CHANGE TO: <u>a way</u> REASON: <u>Transcription error.</u>
<u>131</u>	<u>21</u>	CHANGE FROM: <u>iBooks</u> CHANGE TO: <u>ibooks</u> REASON: <u>Transcription error.</u>

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<u>136</u>	<u>16</u>	CHANGE FROM: <u>iBooks</u> CHANGE TO: <u>ibooks</u> REASON: <u>Transcription error.</u>
<u>136</u>	<u>23</u>	CHANGE FROM: <u>iBooks</u> CHANGE TO: <u>ibooks</u> REASON: <u>Transcription error.</u>
<u>152</u>	<u>5</u>	CHANGE FROM: <u>plaintiffs</u> CHANGE TO: <u>plaintiffs'</u> REASON: <u>Transcription error.</u>
<u>162</u>	<u>23</u>	CHANGE FROM: <u>whose</u> CHANGE TO: <u>who's</u> REASON: <u>Transcription error.</u>
<u>167</u>	<u>2</u>	CHANGE FROM: <u>didn't</u> CHANGE TO: <u>did</u> REASON: <u>Transcription error.</u>
<u>171</u>	<u>7</u>	CHANGE FROM: <u>iBooks</u> CHANGE TO: <u>ibooks</u> REASON: <u>Transcription error.</u>
<u>211</u>	<u>3</u>	CHANGE FROM: <u>two</u> CHANGE TO: <u>to</u> REASON: <u>Transcription error.</u>
<u>215</u>	<u>3</u>	CHANGE FROM: <u>write</u> CHANGE TO: <u>read</u> REASON: <u>Transcription error.</u>
<u>270</u>	<u>9</u>	CHANGE FROM: <u>I</u> CHANGE TO: <u>i</u> REASON: <u>Transcription error.</u>

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<u>272</u>	<u>24</u>	CHANGE FROM: <u>iBooks</u>
		CHANGE TO: <u>ibooks</u>
		REASON: <u>Transcription error.</u>
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<u>273</u>	<u>2</u>	CHANGE FROM: <u>iLit</u>
		CHANGE TO: <u>ilit</u>
		REASON: <u>Transcription error.</u>
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<u>285</u>	<u>19</u>	CHANGE FROM: <u>though</u>
		CHANGE TO: <u>know</u>
		REASON: <u>Transcription error.</u>
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<u>296</u>	<u>14</u>	CHANGE FROM: <u>small</u>
		CHANGE TO: <u>mall</u>
		REASON: <u>Transcription error.</u>

\*Throughout the transcript, when I referred to the name IBOOKS the court reporter transcribed it in the following manner: iBooks. Also, when I referred to ILIT the court reporter transcribed it as "iLit." I corrected the capitalization for these words wherever the court reporter was transcribing a quote from an exhibit in order to match the capitalization used in the original document. Otherwise, for simplicity, I have not changed the capitalization used by the court reporter.

Subscribed and sworn to before me

this 14th day of January, 2013.



Stephen M. Nowlis, Ph. D.

1 NOWLIS

2 buy something I think it says,  
3 "sending," it takes five seconds, and  
4 then it will say "Your sample has now  
5 been received on your Nook. You may  
6 now open it and look at it. I think  
7 they use the word "sending" but I'm not  
8 sure.

9 Q. How would you describe the  
10 business of Apple?

11 MS. CENDALI: Objection.

12 A. I would say Apple is a -- in a  
13 very general sense, a computer company  
14 -- well, a computer company that sells  
15 -- that sell phones, they sell  
16 computers, they sell iPads, so I guess  
17 I would call it a computer company.

18 Q. Do you consider Apple to be a  
19 book publisher?

20 A. No.

21 Q. From the data generated from  
22 your study, is it your opinion that  
23 consumers consider Apple to be a book  
24 publisher?

25 A. No.



1 NOWLIS

2 has nothing to do with selling?

3 A. Well, I mean selling -- again,  
4 the reason why I say "puts out," is  
5 because that was meant to get at the  
6 idea, if people thought that Apple was  
7 the publisher but not -- I didn't ask a  
8 question, for example, about available  
9 because that might have meant something  
10 else to people about whether they were  
11 the distributor or, quote/unquote, the  
12 seller, if you want to use that term.

13 Q. Is "available," then, in your  
14 opinion, a broad word?

15 A. "Available," yes, it's a broad  
16 word that it could encompass lots of  
17 different things beyond source. It  
18 could encompass, for example,  
19 distributor.

20 Q. What else could it encompass, in  
21 your opinion?

22 A. Like I said, the distributor,  
23 the retailer, that sort of thing, above  
24 and beyond just whether the company had  
25 anything to do with being the source of

1 NOWLIS

2 the item.

3 Q. So what do you mean by "source"  
4 then?

5 A. The questions that I was getting  
6 at about the source, affiliation and  
7 sponsorship were meant to get more at  
8 the publisher of the book.

9 Q. Is publishing encompassed by the  
10 word "available" or "made available"?

11 MS. CENDALI: Objection.

12 A. I don't think in a very precise  
13 way so, no, I don't think so.

14 Q. Is "release" encompassed by  
15 "available," "made available"?

16 MS. CENDALI: Objection.

17 A. I mean, in a very ambiguous  
18 sense.

19 Q. How about "print"?

20 A. Is "made available" the same as  
21 "print"? I do not believe those are  
22 the same thing, no.

23 Q. That wasn't my question. Is  
24 "print" encompassed by "made  
25 available"?

1 NOWLIS

2 Q. Looking through Exhibit 3, do  
3 you see instances in Exhibit 3 where  
4 plaintiffs imprint appears as little I,  
5 big B?

6 A. I do and my understanding is  
7 this was done recently and this is  
8 where I see examples of that.

9 Q. What is the basis for your  
10 understanding that it was done  
11 recently?

12 A. I -- it's just -- that's my  
13 understanding. I believe this is  
14 communications that I had with the  
15 attorneys.

16 Q. Any basis, other than  
17 communications with counsel?

18 A. No. Other than, again, we  
19 talked earlier about Exhibit 2 and  
20 that's something that I produced and we  
21 talked about Exhibit 2 confirms this  
22 point that that Exhibit 2 we only see  
23 small I, large B recently.

24 Q. Can you take a look please at  
25 page -- it's somewhat near the

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NOWLIS

A. Yes. As we talked about this before, my understanding is that was done fairly recently.

MS. BOGDANOS: Can I have this marked as Nowlis Exhibit 2?

And I would like to note for the record that the questions and answers, the testimony concerning this document are confidential and the exhibit itself is confidential. At least the cover page, yes it's -- is confidential, "Restricted Confidential, Subject to the Protective Order."

(Nowlis Exhibit 2, an e-mail from John T Colby, Jr., was received and marked on this date for identification.)

Q. Dr. Nowlis, please read Exhibit 2?

(Whereupon, the Deponent reviews the document.)

A. Okay.

Q. Have you ever seen what has been marked as Exhibit 2 before today?

1 NOWLIS

2 a survey?

3 MS. CENDALI: Objection.

4 A. A way to capture opinion.

5 Q. Is it an experiment?

6 A. It can be.

7 Q. Was yours?

8 A. Yes. I would call -- I would  
9 call it an experiment, yes.

10 Q. And your survey, you've said,  
11 "captured opinions." Is that right?

12 A. Yes. Well, you said -- it's not  
13 my survey, you said, "How would you  
14 describe a survey in general here?"

15 Q. Okay. Right.

16 A. Survey in general, let me come  
17 up with something here. It's a way to  
18 capture people's opinions, sure.

19 Q. Did your survey also capture  
20 people's opinions?

21 A. Yes. I believe it did.

22 Q. You intended for it to?

23 A. Yes.

24 Q. So the data from your survey,  
25 they don't represent facts? Is that

1 NOWLIS

2 hypothesis but maybe you had an axe to  
3 grind and you were trying to find  
4 support for that.

5 You could design a survey  
6 without a hypothesis or you could  
7 design a survey where you don't have a  
8 hypothesis because you don't even know  
9 exactly what you're testing. It's a  
10 very broad based, there is a lot of  
11 ambiguity, so I think a survey can  
12 serve different purposes but one of  
13 those certainly is to test a  
14 hypothesis.

15 Q. Did your survey test a  
16 hypothesis?

17 MS. CENDALI: Objection.

18 A. My survey addressed an issue,  
19 yes, which we could call a  
20 "hypothesis."

21 Q. How did that differ from what  
22 Dr. McDonald did, because she also  
23 tested a hypothesis, did she not?

24 A. My understanding of her  
25 testimony is what she said is she

1 NOWLIS

2 number of things in here and what  
3 exactly you wanted me to focus on. So  
4 I'm focusing on "dramatic rhetoric,"  
5 which I wrote in my report about the  
6 earlier pages, so now I will see --  
7 look at the later pages.

8 (Whereupon, the Deponent reviews  
9 the document.)

10 A. Okay. I would say I don't see  
11 any examples of, quote/unquote,  
12 dramatic rhetoric, from pages 8 to 17.  
13 I see lots of other problems but I  
14 would not phrase those as "dramatic  
15 rhetoric" for these pages,  
16 specifically.

17 Q. Thank you. And taking a look at  
18 paragraph 19, page 7 of your own  
19 report, that paragraph begins with the  
20 words "Dr. McDonald's report." Correct?

21 A. Yes.

22 Q. And indeed, the heading B under  
23 which paragraph 19 falls, begins  
24 "Dr. McDonald's Report"?

25 A. That is correct.

1 NOWLIS

2 Apple consumer, do you consider Apple  
3 to have strong "i-" brands?

4 MS. CENDALI: Objection. Outside  
5 the scope.

6 Q. Let me rephrase it. As a  
7 marketing expert and as an Apple  
8 consumer do you consider the iPhone to  
9 be a strong brand?

10 A. Do I? I really don't know.  
11 What I can tell you as a marketing  
12 expert, I have seen studies that show  
13 that Apple is a strong brand. There  
14 are studies on -- that analyze the  
15 brand equity of different companies and  
16 I believe they say that Coca-Cola is  
17 the strongest brand in the world and  
18 Apple is the second strongest brand in  
19 the world, so I've seen their  
20 methodology, it makes sense to me, and  
21 I believe that.

22 I don't think I've ever seen any  
23 studies on whether iPhone in and of  
24 itself is a strong brand or not, so I  
25 don't know. I'd like to rely on



1 NOWLIS

2 something and not just speculate.

3 Q. Do you -- as a marketing expert,  
4 are you unable, then, to say that the  
5 iPhone is a strong source indicator for  
6 Apple, without having data to rely on?

7 MS. CENDALI: Objection.

8 A. That iPhone is a strong source  
9 indicator for Apple? Again, I couldn't  
10 tell you that without some empirical  
11 information. I don't want to venture  
12 and I don't believe in guessing. I'm a  
13 marketing expert but I try to, as best  
14 I can, have my opinions be based on  
15 something rather than pure speculation.

16 Q. Would your answer be the same if  
17 I asked it about Apple's iPad?

18 MS. CENDALI: Objection.

19 A. Again, I've seen no studies on  
20 this, whether "iPad is a strong source  
21 indicator for Apple," and I'm using  
22 your exact wording here. I've never  
23 seen anything on that, so I honestly  
24 couldn't tell you that without  
25 speculating.

1 NOWLIS

2 Q. Do you provide marketing  
3 consultancy services for anyone or any  
4 company?

5 A. Do I in terms of litigation? Is  
6 that what you mean? I'm a marketing  
7 expert, sitting here today, providing  
8 consulting services in a litigation  
9 matter.

10 Q. In any non-litigation matters?

11 A. I rarely, if ever, in terms of a  
12 paid consultancy. Again, I'm a  
13 professor, I have students, I teach  
14 executives, and many of these people  
15 are working for a business at the time  
16 they take my class. We talk about  
17 marketing issues and I'll give my  
18 opinions about different things they  
19 tell me about and explain what the  
20 situation is, and where they have  
21 information I'll provide my expertise  
22 in that area. I wouldn't call that  
23 consulting, I would call that a  
24 professor.

25 Q. So the information that they

1 NOWLIS

2 informed decision.

3 Q. Have you seen advertisements for  
4 the iPhone?

5 A. I'm sure I have.

6 Q. More than one?

7 A. I can't recall. I'm not going  
8 to guess. I'm not sure.

9 Q. Have you studied anything, in  
10 any literature or business reports,  
11 about Apple's iPhone?

12 A. I probably have seen articles  
13 written on it but nothing comes to mind  
14 right now about it.

15 Q. Are you able to say whether  
16 Apple, itself, considers that the  
17 iPhone is a strong source indicator?

18 MS. CENDALI: Objection.

19 A. I have no idea what Apple would  
20 say, itself. I would say ask Apple  
21 what they think. I'm not going to  
22 guess what they would say.

23 Q. So when Dr. McDonald testified  
24 that she "Entered into the case in the  
25 spirit of intellectual freedom and

1 NOWLIS

2 selected your stimulus and what you  
3 were trying to achieve in selecting  
4 your stimulus was to replicate  
5 marketplace reality in the kind of  
6 survey laboratory?

7 A. Yes. I mean, that -- that's  
8 exactly why I gave them an actual book  
9 that they would actually see in the  
10 actual marketplace and asked them to  
11 evaluate it. That's exactly why I did  
12 that.

13 Q. Do you agree or disagree with  
14 the following statement, and this is  
15 again as a marketing professional, as a  
16 survey expert: "I think we attempt in  
17 many of the more conventional scenarios  
18 to try to create a kind of laboratory  
19 understanding that a survey is never a  
20 replication of the market. It is always  
21 a laboratory. It's always a somewhat  
22 stilted representation of the way  
23 consumers shop and the way they  
24 experience brands. But where it makes  
25 any sense at all and products are

1 NOWLIS

2 pedestrian and their marketing or sales  
3 environment is pedestrian, we do it."

4 MS. CENDALI: Objection.

5 A. I'm not sure what the word  
6 "pedestrian" means in this case. I was  
7 with you for a while and then we  
8 switched over to pedestrian.

9 Q. Oh, okay.

10 A. Well -- and if you want a  
11 complete answer here and then you  
12 switched over to something else and I'm  
13 not sure how to respond to it.

14 Q. Okay. Let me ask you again,  
15 cutting out that word. "I think we  
16 attempt in many of the more  
17 conventional scenarios to try to create  
18 a kind of laboratory understanding that  
19 a survey is never a replication of the  
20 market. It's always a laboratory.  
21 It's always a somewhat stilted  
22 representation of the way consumers  
23 shop and the way they experience  
24 brands."

25 Do you agree with that

1 NOWLIS

2 A. No. And it also supports my  
3 earlier point that you asked me about  
4 before, about why did I pick a printed  
5 book for my study and this shows 72% of  
6 the adults have read a printed book,  
7 which is by far the most common kind of  
8 book.

9 Q. Is it possible that someone  
10 who's a reader of an e-book might  
11 respond differently to the stimulus in  
12 your study than someone who is a reader  
13 exclusively of printed books?

14 MS. CENDALI: Objection.

15 A. Again, anything is possible. I  
16 try to live in the world of probable  
17 and because in this case there is such  
18 a great overlap amongst the -- both  
19 people, they -- that read both types,  
20 so if somebody is going to read a  
21 printed book, they're also going to  
22 read an electronic book, and I see no  
23 reason why they would respond  
24 differently if they read both kinds of  
25 books.

1 NOWLIS

2 Q. Have you ever discussed this  
3 case with Mr. Kivetz?

4 A. No.

5 Q. Are you friends with Mr. Kivetz?

6 A. I would say we're -- we're  
7 colleagues, we're professional  
8 colleagues, yes.

9 Q. Have you ever worked as an  
10 expert for Apple before?

11 A. No.

12 Q. As a marketing expert are you  
13 able to opine whether Apple has a  
14 strong brand or would you not be able  
15 to do that without data in front of  
16 you?

17 A. I think we talked about this  
18 before and the research that I'm aware  
19 of shows that Apple has a very strong  
20 brand, I believe it was the second  
21 strongest brand. I have not seen any  
22 studies on their individual products,  
23 so I would need some sort of support,  
24 some sort of information, to be able to  
25 give an intelligent answer to that,

1 NOWLIS

2 Q. Sure let's start with that one?

3 A. I don't -- I have no idea what  
4 -- what they would do. I try not to  
5 think -- get in the mind of a company  
6 and see how they would react. I do  
7 know we talked about this, that when --  
8 when people see a word starting with  
9 "I," they tend to speculate and guess  
10 that it has something to do with Apple  
11 in many cases. That's why it's  
12 important to use a control that gets at  
13 that guessing.

14 Q. Okay. With your experience with  
15 brands and marketing and consumer  
16 psychology, do you think consumers  
17 would assume that a frozen pizza  
18 product in the grocery store that was  
19 called "iCheese," would have anything  
20 to do with Apple?

21 MS. CENDALI: Objection.

22 A. If it has nothing to do with the  
23 type of product that they sell, I  
24 really don't know. I'm not sure. I  
25 don't know how the average consumer



1 NOWLIS

2 A. Right. I don't know at this  
3 point.

4 Q. Do you know in a relative  
5 context if a consumer seeing my frozen  
6 pizza, my frozen iCheese pizza and a  
7 consumer seeing, say, something called  
8 an "iPen" that came with a little flash  
9 drive on the top of it, if consumers  
10 would be more likely to think the iPen  
11 had something to do with Apple than  
12 that -- than the iCheese pizza had  
13 something to do with Apple?

14 MS. CENDALI: Objection.

15 A. Possibly because it -- consumers  
16 can -- can see that it has something to  
17 do with their core business.

18 Q. Dr. Nowlis, who selected the  
19 control that was used in your study?

20 A. I did.

21 Q. Can you take a look, please, at  
22 exhibit -- Exhibit 1 in your study, at  
23 page 40, in paragraph 98 you say "In  
24 addition, all references to 'iBooks' on  
25 the title page of the book were

1 NOWLIS

2 around with what they think they're  
3 supposed to say, with what the right  
4 answer is, even though they may --  
5 never would have associated this with  
6 -- with Apple at all, in the first  
7 place, but they are asked this  
8 question, they see an "I" and they say,  
9 "Hmm, I see an 'I' on other things and  
10 I guess I'm supposed to say 'Apple'  
11 here."

12 I tried to point out examples of  
13 this in -- in my report where people  
14 said "I'm assuming," "I'm guessing,"  
15 and that kind of a thing, so you would  
16 want to remove that kind of "noise"  
17 from your survey.

18 Q. In my iPen example, then, is  
19 there another type of noise to be  
20 removed, namely someone who thinks of  
21 Apple simply because the product has  
22 something to do with electronics, with  
23 computers?

24 A. If -- if there's a basis for  
25 that opinion other than "Hmm, I'm just

1 NOWLIS

2 going to take a wild guess, I'm  
3 supposed to answer this," if there's a  
4 real reason for them saying it, then,  
5 that's perfectly okay. But that's  
6 exactly is why the control is there, to  
7 remove the sort of real reasons versus  
8 the guessing and speculation, and it  
9 can come in various forms. You don't  
10 know exactly what the "noise" is going  
11 to be, but a good control can take care  
12 of all of those different kinds of  
13 "noise," so you get a true response.

14 Q. Do you consider -- in your  
15 study, do you consider Xbooks to be a  
16 good control?

17 A. In my -- in the study that I  
18 did?

19 Q. Right. If in that study -- did  
20 you consider using Xbooks as a control?

21 A. I considered it, yes.

22 Q. Why did you not select it?

23 A. I thought that in my particular  
24 study that iLit would be better. I  
25 didn't see a problem with it, I just

1 NOWLIS

2 Q. In general, why are surveys  
3 validated?

4 A. To make sure that people  
5 actually responded to the survey.

6 Q. Is that the only reason?

7 A. You asked me in general. That  
8 was the general reason. Are there  
9 other reasons besides making sure -- I  
10 mean, I'm not -- I think that  
11 encompasses a lot, to make sure that  
12 somebody actually did it.

13 So, therefore, there wasn't some  
14 sort of fraud going on or sloppiness or  
15 other reasons to make sure that the  
16 results were -- are real and not, you  
17 know, the survey company didn't make  
18 things up to make money, for example.  
19 That's the general reason.

20 Q. So if the survey company made  
21 things up, that would really be a  
22 fraudulent action on the part of the  
23 interviewer or supervisor or someone  
24 working for the survey company. Is  
25 that right?

1 NOWLIS

2 A. True. And it -- right. And  
3 another good reason for doing it is to  
4 make sure that the person who said that  
5 they did the survey, actually did the  
6 survey, himself or herself, rather than  
7 having somebody else complete it for  
8 him or her.

9 Q. So in a mall context, then, that  
10 would be akin to a respondent providing  
11 his brother's name instead of his own  
12 name?

13 A. Yeah. That would be very  
14 unlikely in a small setting for  
15 somebody to fill out a survey and then  
16 when they were recontacted, to say,  
17 "No, it wasn't really me, that was my  
18 brother who gave my name." That  
19 wouldn't be very common to happen in a  
20 mall survey, I don't think but, again,  
21 validation, is just to make sure that  
22 the person actually did it. Who knows  
23 why.

24 Q. How does the context of an  
25 internet study affect, if at all, the

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2 need to validate survey research?

3 A. I don't think it changes  
4 anything. I think it's still needed.

5 Q. Even though there's no middle  
6 person, as it were, such as the mall  
7 interviewer or the supervisor who might  
8 be cheating to get their quotas or --  
9 even without the middle person, your  
10 opinion is that the same issues remain?

11 A. There is a middle person,  
12 though, within a survey. It's the  
13 company that's conducting the survey,  
14 right? So there's a middle person  
15 whose conducting the survey that is  
16 giving you responses. Hypothetically,  
17 they can make up responses to give you,  
18 potentially.

19 But there's also the issue with  
20 an internet survey where now the other  
21 issue becomes much more likely. We're  
22 now somebody who signed up for the  
23 survey who met certain criteria, now he  
24 or her does not fill out the survey,  
25 but has somebody else do the survey for

1 NOWLIS

2 Q. Okay. I didn't mean to leave  
3 that unclear. I'll use your language  
4 then, I apologize.

5 Okay. So the fact that 61% of  
6 your respondents were reached and all  
7 of the 61% verified their participation  
8 in your study. Is that usual, such a  
9 perfect track record?

10 A. That's very common, yes. I -- I  
11 don't know why it wouldn't be.

12 Q. Was that common in the internet  
13 study that you conducted as well?

14 A. I wish I could remember to help  
15 you out here but I honestly don't  
16 recall the percentage of people that  
17 were validated, I wish I could.

18 Q. And I made reference to a single  
19 study and I know you said there may or  
20 may not have been more than that. Do  
21 you, as you sit here today, have any  
22 recollection of an internet study that  
23 you conducted where the validation  
24 results were such -- were -- were lower  
25 than 100%?

1 NOWLIS

2 A. I do not recall that, no.

3 Q. Do you know of any study,  
4 perhaps in your role as a rebuttal  
5 expert, and it doesn't have to be a  
6 study conducted by you, any trademark  
7 study for litigation where the survey  
8 results were thrown out because of  
9 validation problems?

10 A. When you say "thrown out," you  
11 mean they weren't accepted by the judge  
12 because of validation issues? Is that  
13 what you mean?

14 Q. Let's start with that. Sure.  
15 Yes.

16 A. I couldn't -- I couldn't  
17 pinpoint, one way or the other. I  
18 simply don't know.

19 Q. Do you recall any studies that  
20 you have critiqued where the validation  
21 was so low as to be problematic?

22 A. I can vaguely recall possibly --  
23 I'm not going to guess. Honestly, I  
24 don't know. That's my truthful answer.

25 MS. BOGDANOS: Let's take a



1 NOWLIS

2 doesn't mess up the covers. Does that  
3 sound good to you?

4 MS. BOGDANOS: Yes. Why -- why  
5 don't we mark them on the inside of the  
6 hardcover and then we are fine with  
7 counsel taking these back into -- into  
8 custody.

9 MS. CENDALI: Thank you.

10 (Nowlis Exhibit 9, the test cell  
11 for iBooks, was received and marked on  
12 this date for identification.)

13 (Nowlis Exhibit 10, the control  
14 cell for iLit, was received and marked  
15 on this date for identification.)

16 (Whereupon, a discussion is held  
17 off the record.)

18 Q. Dr. Nowlis, a survey like yours  
19 is an experiment designed to examine  
20 what might happen in the real world.  
21 Is that correct?

22 A. It's -- it's -- right. Right.  
23 I refer to it as an experiment, it's an  
24 experiment meant to replicate  
25 marketplace conditions in the real

1 NOWLIS

2 world, yes.

3 Q. And do you, then, attempt to  
4 extrapolate from the data derived from  
5 your survey experiment to predict  
6 actual market conditions?

7 A. Right. They were -- people were  
8 shown actual market conditions and the  
9 responses that they gave would be  
10 representative of the population, a  
11 sample, a smaller group of people than  
12 everybody in the population just like  
13 political polls do, but that -- that is  
14 meant to be representative of everybody  
15 in -- in the universe.

16 Q. And representative of everyone  
17 in the universe's reaction to the  
18 stimulus?

19 A. Yes. Their opinion, based on  
20 the stimulus.

21 Q. No study replicates actual  
22 market conditions. Is that right?

23 MS. CENDALI: Objection.

24 A. Well, I mean, I guess not to  
25 split hairs here, but what actual