

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

J.T. COLBY & COMPANY, INC. d/b/a/)
BRICKTOWER PRESS, J. BOYLSTON &)
COMPANY, PUBLISHERS LLC and) Case No. 11 Civ. 4060 (DLC)
IPICTUREBOOKS LLC,)
)
Plaintiffs,)
)
-against-)
)
APPLE INC.,)
)
Defendant.)

**MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT APPLE INC.'S MOTION TO EXCLUDE
ANY TESTIMONY, ARGUMENT OR EVIDENCE REGARDING THE
EXPERT REPORTS AND OPINIONS OF SUSAN SCHWARTZ MCDONALD**

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Plaintiffs J.T. Colby & Company, Inc. d/b/a Brick Tower Press, J. Boylston & Company, Publishers LLC, and iPicturebooks LLC (collectively “Plaintiffs”) submit this brief in opposition to Defendant Apple Inc.’s (“Apple”) Motion To Exclude Any Testimony, Argument Or Evidence Regarding The Expert Reports And Opinions Of Susan Schwartz McDonald (“Motion” or “Def. Mem.”).

PRELIMINARY STATEMENT

The survey Dr. McDonald conducted in this matter (the “McDonald Survey”)¹ is a valid assessment of the likely-confusing effect of Apple’s iBooks product for digital-book-reading on Plaintiffs’ IBOOKS imprint mark for print and digital books. Her survey is properly tailored to this case—it does not replicate the exact methodologies sometimes used in other trademark cases because Plaintiffs’ IBOOKS mark is used differently than trademarks on other consumption products. As Plaintiff’s lifelong publishing-industry executives have testified,² the manner in which purchasers consume books and recognize publishing imprints is not like the way they immediately apprehend the brand name on a tube of toothpaste. Books are not simply

¹ Dr. McDonald designed and conducted two surveys in this case: (1) an initial study and (2) a sur-rebuttal and supplemental study responding to Defendant’s rebuttal expert Dr. Stephen Nowlis’ unfounded criticism that “iBooks” was actually Defendant’s mark (because Plaintiffs have used the “ibooks” presentation of their mark for longer than “iBooks”), so the use of the “iBooks” presentation in her initial study skewed the results. When Dr. McDonald designed her initial study, she was unaware that two presentations of the imprint name existed. Deposition of Susan Schwartz McDonald, December 12, 2012 (“McDonald Tr.”) (Declaration of Claudia T. Bogdanos (“Bogdanos Decl.”), Ex. A) 314:22-315:16. Under Rule 26 of the Federal Rules of Civil Procedure, experts should supplement their reports with facts subsequently made known to them. Where, as here, supplementation is justified, there is no prejudice to the opposing party, and the supplemental disclosure occurs prior to the pre-trial disclosure deadline (even if after the expert-report deadline), the supplementation is permitted. *See* Fed. R. Civ. P. 26(e)(2); *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, 769 F. Supp. 2d 269, 277-79 (S.D.N.Y. 2011); *Capitol Justice LLC v. Wachovia Bank, N.A.*, 706 F. Supp. 2d 34, 39-40 (D.D.C. 2009). Dr. McDonald’s supplemental study was necessary under Rule 26(e)(2) in light of her new understanding that Plaintiffs’ mark is presented in two ways. She limited her supplementation to correcting for her new knowledge—the second study was identical to the first apart from changing the word “iBooks” to “ibooks.” Both studies are referred to herein collectively as the “McDonald Survey,” the “survey,” or the “study,” except where her initial and second studies are separately so specified. Her reports are referenced herein, respectively, as “McDonald Rep.” and “McDonald Supplemental Report” or “McDonald Supp. Rep.”

² These witnesses are the only ones in the case with specific and extensive knowledge of the book industry.

purchased, used up, and discarded; books are experienced. That experience may span years, and it is from this ongoing exposure that interest in a book's publication source (as opposed to its topic or author) often develops. Mindful of the varied interactions between consumers and books, the McDonald Survey was designed to, and did, measure likely confusion across the range of book experiences.³

Defendant has attacked this reasoned survey with a laundry list of “stock” survey objections, inapplicable to the facts of this case. These trite criticisms are particularly ill-suited to a study designed to measure confusion surrounding Plaintiffs’ imprint, which appears in varying ways and which Plaintiffs, as the senior users, are free to continue to vary. As Dr. McDonald explained: “[T]here are different ways that information can appear in books.... *[M]y representation [is not] going to fit a specific scenario. What is does is simply try to establish whether a consumer who becomes aware of something called iBooks on the information page of a book believes that Apple is the source.*” McDonald Tr. 144:22-145:6 (emphasis added). By leaning so heavily on “standard” methodologies, Defendant loses sight of the experimental nature of surveys and the role that expert witnesses properly play in providing additional information for the trier of fact.

Defendant cannot show that its displeasure with the McDonald Survey is “anything more than reasonable disagreements among experts.” *In re Vitamin C Antitrust Litig.*, 2012 WL 6675117, at *5-6 (E.D.N.Y. Dec. 21, 2012). Simply deviating from old ways is not *per se* erroneous, and “[t]his is not a case in which an expert is unable to articulate a rationale for [her] methodology; nor is it a case where the proffered rationale is patently flawed or unreasonable.” *Id.* at *8. It is for the jury to evaluate the meaning and weight of this relevant study, aided by the

³ Dr. McDonald thus reasonably and “deliberately chose to deviate from standard, ... commonly accepted methodology *specifically because* [she] felt it would not do justice to the problem.” *Id.* 122:5-9 (emphasis added).

cogent explanations of Dr. McDonald—an eminently qualified expert whose credentials Apple has not challenged and who devoted serious and professional consideration to the design of her study.⁴ The Court should deny Defendant’s Motion outright; as an alternative, Plaintiffs request an oral hearing so that Dr. McDonald may articulate fully the rationale for her studied and deliberate choices.

ARGUMENT

Expert testimony is admissible where it “will help the trier of fact to understand evidence or to determine a fact in issue,” Fed. R. Evid. 702, and a trial judge should exclude expert testimony only “if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory so as to suggest bad faith.” *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 213-14 (2d Cir. 2009). Even where a court finds methodological flaws in expert survey evidence, the survey should not be excluded unless it has absolutely “no value in assisting the fact-finder.” *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 2006 WL 2128785, at *8-9 (S.D.N.Y. July 28, 2006). Instead, alleged flaws in methodology can be adequately explored through cross-examination, *see In re Vitamin C*, 2012 WL 6675117, at *5-6, and thus go to the weight, not the admissibility of the survey, *see, e.g., Coach, Inc. v. We Care Trading Co., Inc.*, 2001 WL 812126, at *6 (S.D.N.Y. July 18, 2001) (methodological errors “go[] to the weight of the evidence”), *aff’d in relevant part*, 67 F. App’x 626 (2d Cir. 2002).

I. DR. MCDONALD’S CONCEPTUAL STIMULUS WAS PROPER

There is no one right way to craft a survey, and all surveys, including those offered by Defendant, are approximations of reality.⁵ Survey respondents are not actually engaged in the

⁴ See McDonald Tr. 153:7-12.

⁵ McDonald Tr. 60:20-61:2 (Lanham Act research “experimental almost always by its nature”), 104:4-13, 104:21-105:13, 106:5-21, 118:3-17, 139:14-18, 169:22-170:12, 200:3-7; *see* Deposition of Stephen M. Nowlis, December
(footnote continued)

activities into which research studies strive to place them; there is no single representation of *any* stimulus or stimulus encounter that precisely captures the marketplace.⁶ See *Gucci Am. Inc. v. Guess? Inc.*, 831 F. Supp. 2d 723, 738 (S.D.N.Y. 2011). Instead, surveys strive to recreate the relevant mindset for respondents, dependent on the facts and circumstances of each case—"[t]he suit needs to be tailored to fit the research problem." McDonald Tr. 115:20-24; see *Schieffelin & Co. v. Jack Co. of Boca, Inc.*, 850 F. Supp. 232, 245 (S.D.N.Y. 1994) (stating that a proper survey is "directed to the relevant issues") (citation omitted). *All* surveys are thus conceptual; *none* should be boilerplate.⁷

A. Dr. McDonald's Stimulus Included an Appropriate Degree of Contextual Information

Contrary to Defendant's arguments, conceptual does not mean noncontextual. In the McDonald Survey, appropriate context *was* provided by the study's main question, which asked respondents to envision a digital or electronic book's copyright page that contains information "such as the date of publication, the publisher, the Library of Congress number, etc." McDonald Rep. at 11 (Bogdanos Decl., Ex. C). The question's conceptualism reflects both the marketplace, where Plaintiffs' mark varies in presentation in terms of logo, surrounding information, and the imprint name itself, and the fact that as senior user, Plaintiffs are free, within certain parameters, to present their mark in whatever form they choose.⁸ The selected stimulus "speaks to the kind

14, 2012 ("Nowlis Tr") (Bogdanos Decl., Ex. B) 93:5-9, 309:18-310:2 (acceding to description of his survey as an experiment), 144:13-24, 145:6-7.

⁶ McDonald Tr. 104:4-13, 104:21-105:13, 106:5-21, 118:3-17, 120:7-18, 139:14-18, 169:22-170:12, 200:3-7.

⁷ See McDonald Tr. 119:4-15 ("I made the decision to do what I did with knowledge of forethought. I was fully aware of whatever one can argue a methodological deviation I was taking. *It was a path that I took advisedly, thoughtfully.... I did it not fecklessly, not out of ignorance, not out of methodological stupidity. I did it on purpose.*") (emphasis added); 104:4-13 (describing the "prescriptive methodology").

⁸ The light-bulb logo is not always seen in the books, and the imprint name is presented together with varying amounts and pieces of other information; likewise, Plaintiffs' IBOOKS mark appears as both "ibooks" and "iBooks," the latter reflecting some current, and likely future, marketplace usage. See Declaration of John Colby, (footnote continued)

of shape shifting experience for any given consumer [] that in fact [the] iBooks mark itself was not one single thing at any given moment in time, and that in the future it is likely to be much more prominently oriented even toward the digital world than it is today.” McDonald Tr. 159:18-24.⁹ Because she determined that a single physical stimulus would not best yield representative data capable of extrapolation, Dr. McDonald chose a conceptual stimulus that properly accounted for the reverse-confusion reality that the senior user may vary the mark’s presentation.¹⁰

Jr., submitted in support of Plaintiffs’ opposition brief (“Colby Decl.”) ¶¶ 4-9, Exs. A & B. These variations provide “no reason to believe that the representation of any information page in a book was always a static thing.” McDonald Tr. 166:17-19; *see id.* 184:2-13, 187:8-23, 198:10-21, 199:16-24; *see also id.* 146:11-24, 147:21-148:12, 165:20-23, 166:4-19, 167:15-168:7 (stimulus “didn’t preclude the present day circumstance. It didn’t require the present day circumstance.”). “The point is I think this is an evolving marketplace and I think the way that brand identification will be presented will be varied.” McDonald Tr. 147:8-10.

Apple strives to impute bad faith and unclean hands to Plaintiffs for adopting the “iBooks” presentation— with an upper-case “B”—of its imprint name. *See* Colby Decl. ¶ 2. The fact remains, as Apple’s own expert acknowledges, that the “iBooks” presentation is currently in use in today’s marketplace and was so at the time that Dr. McDonald conducted her first survey in this case. Nowlis Tr. 76:2-8, 81:2; McDonald Tr. 316:15-21; Colby Decl. ¶¶ 4-8, Exs. A & B; *see* McDonald Tr. 314:22-315:16 (Dr. McDonald selected “iBooks,” not “ibooks,” unaware that there were two versions of the name). The “iBooks”/“ibooks” distinction is, in any event, absolutely immaterial for consumers, as the *identical* data from both Dr. McDonald’s studies reflect. McDonald Rep. at 15-17 (53% net “Apple” or “iTunes” [or both] mentions); McDonald Supp. Rep. (Bogdanos Decl., Ex. D) at 3-5 (same).

⁹ *See infra* Part IV; McDonald Tr. 75:12-22 (the digital world is where the parties’ brands will “collide”).

¹⁰ Q [by Ms. Cendali]: Wouldn’t showing respondents’ pages from an actual copy of plaintiffs’ electronic books more closely replicate the marketplace than asking him to envision a page?

A: I don’t necessarily think that’s true. Had I thought that was true then I might have done it. ***I think one book, one stimulus, is one stimulus. It is one exposure and so you’re essentially limited to whatever it is the respondent sees.*** You asked me this question before I think in similar terms, and at the time I raised with you the question of showing a digital book, exactly what way and pointing out what. It wasn’t clear to me, for example, whether you were envisioning the respondents would be invited to take a look at the iBooks imprints as opposed to simply reviewing this book without context and then later asked who published it.

McDonald Tr. 168:8-169:4 (emphasis added); *see id.* 169:8-21, (addressing judicial commentary on focusing respondents’ attention on a trademark), 170:13-171:5 (same); *see also* 201:18-19 (“[T]he source indicia in books is much more complex”), 202:3-4 (“consumers have a lot of information to deal with when they look at a book....”); 202:9-15 (“[S]ource information on a book is complex and ... consumers can do it ... maybe, but maybe they don’t do it. Maybe they don’t do it on day one. Maybe they do it on exposure two and exposure three. ***I think it’s really different.***”) (emphasis added).

“[T]he multiplicity, the incredibly diverse ways in which information can appear was precisely the problem.” McDonald Tr. 194:17-19. ***These are not static, consistent stimuli, and they’re not static consistent uniform reader consumer experiences.*** *Id.* 199:8-11 (emphasis added); *see id.* 187:18-23 (“The whole notion of a study that was specific with respect to how information would appear other than iBooks, was something that seemed impossible to me because of the varying ways that these things appear.”).

The cases Defendant cites do not speak to this context—all but one involved forward confusion,¹¹ where the defendant’s activities were frozen in a moment in time. *See* Def. Mem. at 9. Reverse confusion does not justify, much less mandate, such a rigidly encapsulated approach. And Defendant’s cases are inapposite for a host of additional reasons. For example, the surveys in *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218 (S.D.N.Y. 2010) and *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558 (S.D.N.Y. 2007), were doomed by their failure to replicate shopping conditions in cases that centered around only *point-of-sale confusion*, whereas the McDonald Survey was concerned with *post-sale* confusion. Additionally, the *Juicy Couture* and *WE Media* cases involved surveys where respondents were shown a piece of paper bearing only the trademark, utterly devoid of context.¹² The McDonald Survey, in contrast, provided detailed description and context: a digital book’s copyright page bearing “the date of publication, the publisher, the Library of Congress number, etc.” McDonald Rep. at 11. Defendant notably has not cited a single case categorically rejecting a conceptual stimulus that is sufficiently described and contextualized, as was Dr. McDonald’s.¹³

Defendant also tries—and fails—to argue that Dr. McDonald’s use of a conceptual stimulus placed undue emphasis on the IBOOKS mark, claiming that the presence of surrounding information such as a New York address, light-bulb graphic, and/or distinctive font for the IBOOKS mark, necessarily detracts from notions of Apple as the source.¹⁴ Even if this

¹¹ In *Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, 2007 WL 2258688, at *7-12 (S.D.N.Y. Aug. 6, 2007), the reverse-confusion survey was excluded for a host of reasons other than the stimulus.

¹² *Juicy Couture, Inc. v. L’Oreal USA, Inc.*, 2006 WL 1012939 at *25 (S.D.N.Y. Apr. 19, 2006); *WE Media, Inc. v. Gen. Elec. Co.*, 218 F. Supp. 2d 463, 474 (S.D.N.Y. 2002), *aff’d sub nom. WE Media, Inc. v. Cablevision Sys. Corp.*, 94 F. App’x 29 (2d Cir. 2004).

¹³ *Cf. Inc. Publ’g Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 392-93 (S.D.N.Y. 1985), *aff’d sub nom. Inc. Publ’g Corp. v. Manhattan Magazine*, 788 F.2d 3 (2d Cir. 1986) (aural stimulus simply verbalized for respondents over the telephone, with *no description* of the context to be envisioned).

¹⁴ Defendant’s citation to *Kargo Global* is inapt as the criticism there centered around the oversized appearance of
(footnote continued)

were true (and Defendant has presented no evidence that it is), this additional information would not affect Dr. McDonald’s measurement of *affiliation* confusion—the type of confusion relevant to this case, and the type of confusion that the McDonald Survey measured.¹⁵ The inclusion of specific information would not affect respondents’ understanding of Apple as an affiliated company—one that did not itself publish the book, but was connected to the company that did. It is entirely plausible that readers/consumers would perceive the New York source of the “iBooks”/“ibooks” imprint to be affiliated with Apple as its New York-based publishing or distribution arm. Defendant’s reliance on the testimony of Dr. Jacob Jacoby, Def. Mem. at 9-10, is misplaced: Dr. Jacoby took no opinion on this point, only acknowledging that contextual clues *may or may not* lead readers/consumers away from perceptions of Apple as involved in the book, “*one way or another.*” Deposition of Jacob Jacoby, December 6, 2012 (“Jacoby Tr.”), (Bogdanos Decl., Ex. E), 198:4 (emphasis added). Additionally and significantly, Dr. McDonald did not omit any portion of the mark at issue, unlike the criticized survey in *Vista Food Exch., Inc. v. Vistar Corp.*, 2005 WL 2371958, at *5 (E.D.N.Y. Sept. 27, 2005).

B. The Stimulus Was Properly Tailored to Consumers’ Interaction with Books and Imprints

the mark in the stimulus, which showed it in an unduly prominent manner. By contrast, Dr. McDonald’s question presented the IBOOKS mark to respondents in the same font as the other text in the question; as such, it did not call undue attention to “iBooks”/“ibooks” as a branded entity—akin to her decision to use the term “word,” neutral in connotation, as opposed to “name,” suggestive of branding. Doing as Defendant suggests and presenting “iBooks” or “ibooks” in its usual font, Def. Mem. at 13, would have introduced an element of branding into the question and discouraged respondents from consideration of the IBOOKS mark as simply identifying the electronic-book format. Defendant’s reliance on *Inc. Publ’g.*, 616 F. Supp. 392-93, where the stimulus ignored the prominent and distinctive font and central placement of the mark on a *magazine cover*, is also misplaced, given that the “iBooks”/“ibooks” imprint name *within a book* or at the *very base* of its spine is nowhere near as focal an element. Defendant’s citing *Am. Footwear Corp. v. Gen. Footwear Co.*, 609 F.2d 655, 660 n.4 (2d Cir. 1979), where key information *namely the seller* was omitted, is similarly inapplicable in the more nuanced context of books, as opposed to footwear.

¹⁵ Plaintiffs’ Memorandum Of Law In Support Of Plaintiffs’ Motion To Exclude The Testimony, Including Affidavits, Declarations, And Reports Of (1) Defendant’s Expert Witness E. Deborah Jay And (2) Defendants’ Rebuttal Expert Stephen M. Nowlis (“Pls. Mem. To Exclude Jay/Nowlis”), Parts I.A.2 and I.B, explains why affiliation confusion is integral to this case and details the failure of the studies designed and conducted by Drs. Jay and Nowlis to measure the affiliation confusion prohibited by Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). *Cf.* McDonald Tr. 151:8-153:3.

Defendant blithely maintains that books merit no different treatment than any other consumer product. It is this fundamental misunderstanding of the unique manner by which book imprints are apprehended by, and become known to, consumers that permeates Apple's and its experts' misassumptions throughout this case. "Typically, people are able to create [] stimuli, and in doing so, feel that they are really doing adequate justice to the circumstances under which actual shopping decisions take place." McDonald Tr. 109:16-20. But books are not typical. Plaintiffs' witnesses, with decades of experience specific to the book industry, have shed light on the *atypical* trademark role of a publishing imprint.

It is only after a book has been read and experienced that the reader may be drawn to learn more about the book, and that certain subtleties, such as the imprint, may become relevant enough to command the reader's attention and reflection: "[T]he value of the brand is created over time by the *experiences* readers and consumers have with the published books."¹⁶ An imprint does not meaningfully signal a source—and thus does not have brand significance for consumers—until they have absorbed it through accretion from repeated exposure.¹⁷ See Deposition of Mike Shatzkin, December 4, 2012 ("Shatzkin Tr.") (Bogdanos Decl., Ex. H) 202:15-20 ("[A]ll brands, that is author brands, ... imprint brands, series brands and publishing house brands are the sum total of awareness created by the books sold and read under those brands."), 97:6-12. "Basically what happens is, when [an imprint] brand becomes a trusted brand and you are looking for something else, you know, if you have read books by that publisher, that brand, before, you will look at it and say ... *I know that publisher*, I like their

¹⁶ Expert Report of Mike Shatzkin ("Shatzkin Rep.") (Bogdanos Decl., Ex. F) at 6 (emphasis in original).

¹⁷ See Deposition of Richard Freese, September 25, 2012 ("Freese Tr.") (Bogdanos Decl., Ex. G) 106:21-107:2 ("[I]f you lock up authors and you have the right authors, the authors define the brand and then the brand begins to define the new authors."). Mr. Freese has extensive experience in the independent book imprint distribution business—precisely the business in which Plaintiffs operate. See *generally id.* 9:4-7; 11:19-16:19.

books.” Freese Tr. 105:2-7 (emphasis added) ; *see also id.* 92:5-93:19, 104:6-107:2.

Book shopping is thus not how consumers most often and most meaningfully encounter and process publishers’ imprints.¹⁸ Recognition of an imprint often comes about over time at some point following consumers’ initial purchase of a book under that imprint. Books are in a class of consumables that are fundamentally inexhaustible; they are not used up and discarded like a bottle of shampoo once consumed.¹⁹ Unlike trademarks designed and expected to capture consumers’ attention at the point of purchase, a book imprint is more likely to be noticed once the book *consumer* transitions into the book *reader*.²⁰ Dr. McDonald crafted her study recognizing and accounting for the distinctive reality of book consumption—that “over the course of a book experience there is ample opportunity to make a decision as to how much information you want about it. You might see it on first opening, you might not.” *Id.* 142:15-19. Dr. McDonald’s study “replicates an experience. It picks a moment. It picks the moment when a customer becomes aware that there is something in a book that identifies it, in a digital book in particular, that identifies it as iBooks.” *Id.* 140:3-8. While the actual words on the page may remain constant from the time of purchase to all points subsequent (“[t]he information remains

¹⁸ Dr. McDonald acknowledges the truism that many consumers may not pay attention to the publishing-imprint name when shopping for a book (pre-sale or point-of-sale), and that awareness of the brand arises later, during or after first reading the book. McDonald Tr. 138:1-139:24, 141:25-142:3, 142:10-19, *see also id.* 78:3-11 (expressing her understanding of the “very different model of brand marketing” in the book-publishing industry, which focuses on “the strength of” titles and authors, not on imprint brands.) Apple’s survey experts, by contrast, merely skim the surface of the book-consumption experience, stopping their inquiry at the initial shopping encounter. *See* Pls. Mot. To Exclude Jay/Nowlis, Parts I.A.5 and I.B.

¹⁹ Sections previously read, potentially overlooked, or ignored on first exposure (like a copyright or publisher’s information page) can be revisited *post hoc*, recontextualized by the reading experience. Viewed against consumer durables, books are *sui generis*; their imprint-endowing content is potentially experienced on multiple occasions by a single owner—often after, not before, the book itself has been “consumed” (unlike the branding information on cars or household appliances, which is inevitably absorbed at first glance). *See* McDonald Tr. 139:5-14 (“[B]ook buying introduces [post-sale confusion] as a very real possibility in a way you never see in toothpaste and shampoo. Once people own those products they very seldom look at the trademark or look at the box again ...”), 142:14-15; *see also id.* 105:10-13 (contrasting books with “pedestrian” products and shopping for them), 109:16-20 (books not “typical[]”).

²⁰ “The shopping becomes sort of a transition into the reading.” *Id.* 139:3-5.

unchanged”), “the context that the consumer brings, and the book reader, book owner brings is always evolving.” *Id.* 150:22-25.

In this methodological paradigm, to ask respondent about the term “iBooks”/“ibooks” is not, as Defendant would have it, unduly emphasizing the name, but rather focusing respondents—in a survey environment where they have not actually experienced a book—on the mark at issue to obtain meaningful data. Regardless, at a minimum, Defendant’s critiques go to the survey’s weight, not its admissibility. *See, e.g., Coach, Inc.*, 2001 WL 812126, at *6 (“alleged errors in methodology go[] to the weight of the evidence”); *Cache, Inc. v. M.Z. Berger & Co.*, 2001 WL 38283, at *11 (S.D.N.Y. Jan. 16, 2001) (similar).

II. BECAUSE “I” IS LADEN WITH TRADEMARK SIGNIFICANCE, EBOOKS PROPERLY CONTROLS FOR NON-TRADEMARK-RELATED NOISE

Dr. McDonald’s eBooks/ebooks control does just what a research control is designed to do: account for responses that do not speak to the issue being tested—here, to filter out “reasons *unrelated* to similarities between the marks at issue,” Def. Mem. at 16 (emphasis added). Apple’s position—that a lower case “i,” preceding a noun in the context of digital books, is “unrelated” to whether consumers would confuse Plaintiffs’ “ibooks”/“iBooks” imprint with Apple’s brands—is untenable and disingenuous. Defendant cannot deny that the market is filled with its own “i”-products and that they form the relevant backdrop for this case. Defendant has identified, described, and vigorously defended Apple’s “i” family of marks, explaining that they have meaning in the context of one another:

IBOOKS is a member of Apple’s family of famous marks that begin with the prefix “i” ... Apple now holds *more than 100* active federal applications and registrations of marks that begin with the prefix “i.” ... The remarkable success of [the IBOOK, IPOD, ITUNES, ITUNES STORE, IPHONE, and IPAD products and service] have all been particularly influential *in cementing the public perception that the ‘i’-prefix brand is synonymous with Apple.* The remarkable success of each of these products, and *the fact that Apple’s IBOOKS software operates in the same Apple product environment as these devices guarantee that*

Apple's IBOOKS is immediately perceived as part of the same family of marks.

Response to Office Action, USPTO Serial No. 85008412 (filed Oct. 9, 2012) (“Oct. 9 OAR”) (Bogdanos Decl., Ex. I), at 2 (emphasis added) (naming IMAC, IBOOK, IMOVIE, IPOD, ITUNES, IDVD, ICAL, IPHOTO, ILIFE, ISIGHT, ICHAT, ITUNES STORE, IPHONE, IPAD, and ICLOUD among Apple’s family members). Defendant’s own expert Dr. Nowlis has also admitted that consumers’ association with an “i” mark is context-driven. *See* Nowlis Tr. 270:14-24, 272:4-17. Any confusion here is predicated on this context,²¹ emanating from a lower-case “i” followed by a noun resonant of an Apple or Apple-related product or service. *See* Oct. 9 OAR, at 2.

The “i” prefix signifies Apple to many consumers and transforms the suffix “books” into something presumed to have Apple provenance (even where the suffix is not tech-related, as with “iTunes”). Dr. McDonald’s choice of control and coding decisions accordingly reflect the fact that “i” confusion is relevant confusion in this case.²² It was the “i,” not the generic “books” element, that needed to be controlled for and removed from the control stimulus;²³ “i” is the

²¹ Defendant tries to argue that its context-driven “i” branding is not relevant to the issue of reverse confusion: “Plaintiffs should not be able to hijack Apple’s permissible use of “i,” and essentially use Apple’s *unrelated* fame to make its case.” Def. Mem. at 22 (emphasis added). But Apple’s fame is *not* unrelated to Plaintiffs’ “iBooks”/“ibooks” books, given the obvious and natural connection between books and book-reading software. The relationship is particularly close in the digital space, where Plaintiffs’ and Defendant’s worlds intersect. Seemingly wishing to have its cake and eat it too—to enjoy the legal and marketplace benefits of its family of marks yet relinquish responsibility for this family when convenient (under the strained rubric of “unrelated[ness]”)—Defendant points, through its expert, to a few third-party uses of “i” marks as evidence that “i” is not always for Apple. Yet the real issue is what consumers perceive. Given how systematic and persistent Defendant has been in its use of “i,” *see* Oct. 9 OAR; Response to Office Action, USPTO Serial No. 85008412 (filed Dec. 29, 2012) (Bogdanos Decl., Ex. J), it is reasonable—even likely—that consumers would in fact assume iGoogle, iRobot, and iPlayer to be part of Apple’s family, due to the presence of the lead “i” before nouns that suggest Apple-like products. McDonald Tr. 298:9-18.

²² *See* McDonald Tr. 288:22-289:13 (citing Apple’s “prefix meaning rule” of the “i” together with “information based objects” as a “very powerful branding device”); 297:13-14 (“[i]’ plus a particular kind of word.”); 298:15-18.

²³ Controlling for the word “books” in a confusion study about IBOOKS would be like controlling for the *shape or color* (rather than the contents) of a pill in a scientific experiment designed to test the *effect* of a drug.

active brand ingredient.²⁴ Dr. McDonald’s brand-neutral eBooks/ebooks control properly weeded out those respondents who named Apple for reasons unrelated to the mark IBOOKS or its Apple-laden “i” element—true noise.²⁵ See, e.g., Shari Seidman Diamond, *Control Foundations: Rationales and Approaches*, in *Trademark and Deceptive Advertising Surveys* 207 (Diamond & Swann, eds. 2012) (referencing respondents’ tendency to name the “product leader”). Removing the “i” from the control properly filtered out those respondents who named Apple for reasons unrelated to the mark at issue (IBOOKS) or any brand-laden element of that mark (“i”)—such as Apple’s general renown in the technology field. Dr. McDonald’s control thus did precisely what a good control (a “placebo”) is designed to do.²⁶ Likewise, consistent with the significance of “i” as an Apple-brand signifier (in the context of, *inter alia*, technology, downloadable music, and digital books), the coding of responses in Dr. McDonald’s Survey properly included “Apple” answers that articulated an “i” rationale, because that is precisely the basis on which confusion is likely to occur.²⁷

²⁴ See McDonald Tr. 287:2-3 (“***I*** is the carrier of Apple brand DNA.”) (emphasis added); see also *id.* 70:17-22, 90:22-91:4, 99:11-13, 99:20-25, 286:22-287:7, 287:23-288:11, 328:2-12. To leave the “i” in the control “would not be parsing out noise at all.” *Id.* 288:11. Defendant’s expert Dr. Jay herself used XBOOKS as one of the two controls in her study, muting Defendant’s insistence that only “i” controls were proper filters.

²⁵ See McDonald Tr. 284:20-24 (Noise is answers that “name something simply because it’s popular or it comes to mind for reasons that are categorical as opposed to embodied in the stimulus.”); 284:15-24, 289:14-290:4, 291:3-19.

²⁶ See McDonald Tr. 290:4. Curiously, Defendant’s rebuttal expert criticizes Dr. McDonald for her non-“i” control, yet demonstrates his own unfamiliarity with the role of a control in consumer surveys. For Dr. Nowlis, an “Apple” answer due wholly to a conception that anything technology-related must be Apple, regardless of trademark reasons, is “perfectly okay.” Nowlis Tr. 279:4-5; see *id.* 278:18-279:9. Dr. Nowlis’s conception of the proper filtering to be accomplished by a control thus actually runs counter to industry-established constructs regarding the purpose of a control in trademark-litigation and cannot be used as a benchmark for, and certainly not a valid critique of, what Dr. McDonald should have done in her survey.

²⁷ On the other hand, it cannot be assumed that simply because a respondent did not verbalize Apple’s iBooks product in his or her answer that the iBooks and/or iBookstore names were not in the respondent’s mind. McDonald Tr. 294:8-19, 296:23-297:22. Responses to the “Please explain” question (Q2) were not exhaustive, see Jerre B. Swann, *Likelihood of Confusion*, in *Trademark & Deceptive Advertising Surveys* 57 n.29 (Diamond & Swann, eds. 2012), and, particularly in view of the strength of the “i” identifier, respondents may well have left their answers at the “i” alone: “The emerging [“i”] rule is so powerful in the minds of consumers that these results may understate the degree to which actual iBooks awareness played a role in their source attributions.” McDonald Supp. Rep. at 6. “[T]hey redound to the rule which they have learned and they proudly declare.” McDonald Tr. 297:20-22. See (footnote continued)

Defendant attempts to pit Plaintiffs' expert Dr. Jacob Jacoby against Dr. McDonald on the issue of a proper control, even though Dr. Jacoby was never asked to design a survey in this matter;²⁸ he thus was never tasked with selecting a control and consequently did not give the choice of control the thought that would usually go into the selection process.²⁹ When presented with information concerning consumers' possible interpretations of the "iBooks"/"ibooks" name (as signifying the internet or electronic books generally),³⁰ and when considering the context-laden significance and history of the "i" prefix,³¹ Dr. Jacoby reconsidered his prior testimony about eBooks/ebooks and the presence of an "i" prefix in the control. With the benefit of further thought, he testified as follows:

Q [by Ms. Cendali]: But isn't it true that if consumers thought of Apple because when it saw the—the imprint iBooks because of Apple's prior use of iBook or because Apple had a family of marks with "i" something else, those would be not probative of the—whether the marking issue has led to confusion?

A: Which then leads me to think that an "i" something might not be an appropriate control. We were talking before about using "i", ilit or whatever, "i", full word, as a control. Perhaps under those circumstances, you would need to use something like a generic "ebook" or something else as a control, because the "i" by itself would be sufficient to elicit an Apple response among

McDonald Tr. 269:21-24 ("providing the rule"), 270:6-8 ("The point is that somebody is ... using that rule to generate an inference.") Likewise, respondents could have been more prone to recite the older, more established trademarks in Apple's "i" family, such as iPhone, iPad, iTunes, than the younger iBooks/iBookstore siblings, even if aware of all. See McDonald Supp. Rep. at 6; McDonald Tr. 311:5-7, 325:9-19, 326:11-15. Defendant's expert Dr. Nowlis erroneously recalculated the data from the McDonald Survey, Def. Mem. at 22; but see McDonald Tr. 311:2-10, but it is not for the Court to wade through competing data permutations and number crunching, at summary judgment or indeed ever in this matter. That is the province of the jury as trier of fact.

²⁸ Jacoby Tr. 25:7.

²⁹ Jacoby Tr. 389:16-22-390:2, 391:19-21.

³⁰ What Defendant characterizes as maleficent "intervention of counsel," Def. Mem. at 17 n.5, is more properly the affording of new information for consideration. Jacoby Tr. 389:11-15 ("provid[ing] ... information for [] consideration that [] might not have previously thought of"); see *id.* 389:3-10, 398:24-399:13, 105:22-25.

³¹ Like other experts on both sides of this case (see *supra*), Dr. Jacoby believes context drives the source /source-affiliation association between an "i"-formative mark and Apple. Jacoby Tr. 390:23-25 (when asked at deposition about a putative "i" control: "It's not in the context of hardware. It has nothing to do with the Internet."); *id.* 391:14-15 ("because of the distance. It's not in the same category of goods."); see *id.* 390:13-22, 391:10-13.

controls.³²

Jacoby Tr. 265:14-266:6; *see also id.* 391:22-392:18.³³

In any event, even if this Court finds that Dr. McDonald could have used a control that was “better” or “stronger,” that “does not mean that the survey does not provide relevant information.” *Gucci Am.*, 831 F. Supp. 2d at 740. Thus, even if Defendant’s arguments were fully credited, any alleged defects in Dr. McDonald’s control bear on the weight to be accorded her survey, not its admissibility. *Id.*; *Shell Trademark Mgmt. B.V. v. Warren Unilube, Inc.*, 765 F. Supp. 2d 884, 894 (S.D. Tex. 2011).

III. THE “MADE AVAILABLE” LANGUAGE IS CONTEXTUALLY APPROPRIATE AND IS NOT OVERBROAD

Dr. McDonald properly phrased the main question in her study to capture *all* the various forms of confusion potentially at play.³⁴ A book is neither “manufactured” nor “put out” by its publishing source;³⁵ it is “*published*.” Surveys should not always use the same language; rather, a survey question should include “a verb that’s appropriate for the industry.” McDonald Tr. 274:7-8, 276:10-19 (stating that researchers have an obligation to craft questions that “fit the topic”); *see THOIP*, 690 F. Supp. 2d at 232-33, 241 n. 165 (consumer survey design should be tailored to the facts of the case). Survey language should adapt to fit the question at issue in a particular case. Here, because both sides and their experts concur that Apple is not a book publisher, nor perceived as one by consumers,³⁶ the relevant issue here is *not* confusion as to

³² “[eBooks is] in some ways analogous to what Ms. Jay did with her X control, using some other letter. But, again, I’d want to think that one through.” Jacoby Tr. 392:12-15; *see id.* 392:15-18 (not criticizing Dr. Jay’s choice of XBOOKS as a control).

³³ Neither during nor subsequent to Dr. Jacoby’s deposition did Defendant move to strike this testimony.

³⁴ *See* 15 U.S.C. § 1125(a).

³⁵ The words “put out” in trademark surveys are not inviolate—they are not “the ultimate in clarity for all times and places. *There’s nothing magic or anointed about that terminology.*” McDonald Tr. 274:3-7 (emphasis added).

³⁶ *See* Nowlis Tr. 45:18-25; Deposition of E. Deborah Jay, November 30, 2012 (Bogdanos Decl., Ex. K), 30:25-
(footnote continued)

source. But to ask survey respondents about “putting out” or even “publishing,” as Defendant argues Dr. McDonald should have, goes only to perceptions of the book’s source. Dr. McDonald chose the words “made available” to encompass the type of confusion at play: confusion as to affiliation and sponsorship.³⁷

Defendant also attacks this question for being “overbroad,” because respondents might interpret the question as asking about the book’s distributor or retailer, and may even answer “Apple,” thinking that the book could be purchased at the iBookstore.³⁸ This criticism is irrelevant when applied to a *controlled* study such as Dr. McDonald’s—any responses to the “made available” question that were non-trademark-related were filtered out by Dr. McDonald’s control. Because it is devoid of trademark significance, the eBooks/ebooks control served to eliminate “plausible alternative explanations,” Def. Mem at 16, *including* respondents who referenced Apple as a retailer of books in its iBookstore. Dr. McDonald’s control thus moots Defendant’s concerns about the supposed overbreadth of her questions.

IV. DR. MCDONALD’S UNIVERSE WAS PROPER AND WELL-SUITED TO THE FACTS OF THIS CASE

“[T]here is no single right way to talk about a universe for all time and all studies.”

McDonald Tr. 233:11-13. Dr. McDonald’s survey universe—which consisted of book-reading

31:8; McDonald Tr. 281:17-20; Jacoby Tr. 263:2-14; Expert Report of Gregory S. Carpenter, Sept. 17, 2012 (Bogdanos Decl., Ex. L), ¶ 115.

³⁷ See 15 U.S.C. § 1125(a); McDonald Tr. 279:13-19 (“I wanted to use a verb that I thought did full justice to the various ways that consumers could interpret the role of ... the source, whether they thought it was Apple. All the ways in which they could think Apple might have a hand in it”), 280:2-281:2. Defendant’s expert Dr. Nowlis concurs that the term “make available” is broad and reaches beyond source. Nowlis Tr. 49:15-19, 49:22-50:2.

³⁸ The “made available” language arguably reaches broadly, at its outskirts, in much the same way as could the generally accepted terminology “puts out.” See, e.g., 6 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* (“McCarthy”) § 32:174 (4th ed. 2012); Swann, *Likelihood of Confusion*, *supra*, at 56. Both formulations potentially suggest retailers, not manufacturers—in that it is the retailers that physically place products out on store shelves for sale. Whether because these interpretations are considered to fall only at the outer edges of most responses or because controlled studies account for this noise, such questions have generally been deemed probative for addressing the manufacturer-source issue. See *id.*

individuals who had downloaded an electronic book in the last six months—aptly targeted people whose impressions of the IBOOKS mark would be the most meaningful. As discussed above, books’ identifying information are experienced differently than brands on other products. It is not through *shopping* that consumers process publishing imprints, but through *reading*; accordingly, Dr. McDonald sought book readers for participation in her study.³⁹

In selecting her universe, Dr. McDonald did not include just any book readers—she honed in on *active* readers who had downloaded a digital book in the past six-month period.⁴⁰ The respondents in the McDonald Survey were also book *purchasers*: at least 70% could be documented in panel-background data as having recently bought or shopped for books,⁴¹ and the remaining 30% were more likely than not, based on national survey data of e-readership, to have purchased their most recent book.⁴² Dr. McDonald’s respondents thus qualify as potential book

³⁹ McDonald Tr. 218:5-8, 231:15-232:19. In a classic case of pot and kettle, Defendant criticizes Dr. McDonald for permitting respondents’ subjective self-identification as regular readers, *see* Def. Mem. at 19 n.9, when Defendant’s own experts did not even bother to ascertain whether their survey respondents read *at all*. Moreover, consumer self-identification and self-assessment are ultimately at the root of any market definition. There is no universally agreed-upon, objective definition of what it means to read books regularly, but if a respondent *believes* himself or herself to be reading with some degree of regularity, that person is a potential book consumer and would be a marketing target.

⁴⁰ *See* McDonald Tr. 217:21-218:5, 218:20-219:6, 223:11-18.

⁴¹ The seventy percent (70%) draws from the fielding company Research Now’s internet panel and had pre-identified themselves as book buyers. McDonald Tr. 218:12-17. Contrary to Defendant’s suggestions of impropriety as regards the Research Now panel and/or Dr. McDonald’s willingness to report or share Research Now’s respondent data, Def. Mem. at 19 n.10, at no point in Dr. McDonald’s deposition did Defendant’s counsel call for, or even request, this information. It is not Dr. McDonald’s customary practice to report panel specifics, and when asked about this data at her deposition, she at several points offered to make it available. McDonald Tr. 208:25-209:7, 214:15-20, 232:2-8. As the silent deposition-record reflects, Defendant’s counsel chose not to take Dr. McDonald up on her offer.

⁴² Data from a well-regarded report and the most comprehensive study to date of Americans’ book-reading and book-purchasing habits demonstrate that the majority of those who read e-books prefer to purchase, rather than borrow, them. *See* Lee Rainie et al., *The Rise of E-Reading* (Pew Research Ctr. 2012) (“Pew Study” or “Pew”) (Bogdanos Decl., Ex. M) at 6, 10, 45-47, 60; *see id.* at 48, 61; *see also* McDonald Tr. 218:17-19 (“You know from the Pew study people who read digital books tend to buy them.”). Dr. McDonald did not rely on the Pew Study; the fact that its findings independently align with her assumptions only lends further weight to the logic that guided her survey design. McDonald Tr. 239:6-240:10 (“I’m not using it post hoc. I want to be very clear. I’m not defending my decision[s] ... by saying post hoc am I lucky the Pew study says X, Y, and Z.... It didn’t guide or inform the decisions that I made, but it certainly shed light on some of them and I think it obviates some of [Defendant’s] questions or criticisms post hoc.”).

purchasers,⁴³ given that for frequently purchased items, such as books, past behavior is the best indicator of future behavior.⁴⁴ *See 24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC*, 447 F. Supp. 2d 266, 282 (S.D.N.Y. 2006) (noting that, for some products, “past users are good proxies for future users’....”). In view of this, Defendant’s argument that the McDonald Survey’s universe was not properly limited to potential purchasers is “extraordinarily myopic.” 6 McCarthy § 32:161; *see also Shell Trademark Mgmt.*, 765 F. Supp. 2d at 893 n.6 (finding similar argument “unconvinc[ing]”).

Further, Defendant’s criticism that the McDonald Survey improperly focused on digital-book-reading and did not include people who read *only* print books rings hollow in view of the rapid and ever-accelerating rate at which digital-book consumption continues to grow.⁴⁵ Leslie Kaufman, “Barnes & Noble Faces Steep Challenge as Holiday Nook Sales Decline,” *N.Y. Times*, Jan. 3, 2012, *available at* <http://mediadecoder.blogs.nytimes.com/2013/01/03/barnes-noble-reports-tepid-holiday-sales/> (Bogdanos Decl., Ex. N) (reporting a 13% increase in sales of digital content in the 2012 holiday sales period); Pew Study at 4-5, 13, 23; Shatzkin Report at 1, 3 (discussing the “inexorabl[e]” growth of e-books), 4, 5 (“fast-paced book evolution”); Shatzkin Tr. 46:9-20 (“transition ... to everything being read on screens, just about”), 147:6 (“the digital revolution”); *see id.* 61:10-25 (“digital change”). In this reverse confusion case, the relevant universe is prospective customers of Plaintiffs’ mark. *See Citizens Banking Corp. v. Citizens*

⁴³ Dr. Nowlis’s reticence about assuming that Dr. McDonald’s respondents had probably purchased books stands in vivid and ironic contrast to his insistence that he usually goes by what’s probable. Nowlis Tr. 214:15-16 (“I try to live in the world of [the] probable.”).

⁴⁴ *See* Lutz Sommer, *The Theory of Planned Behavior and the Impact of Past Behavior*, 10 Int’l Bus. & Econ. Res. J. 91 (Jan. 2011) (citing studies providing evidence “that past behavior often predicts future behavior directly”); McDonald Tr. 217:17-20 (“It’s actually a better predictor than declared intent to purchase.”), 219:14-21 (“I can tell you from a meta analysis that in all the studies that I have ever done in litigation, that there is a perfect match between what people said they have done in the last six months and what they say they intend to do in the next six months with one exception. That was baby formula.”), 220:2-14.

⁴⁵ *See* McDonald Tr. 75:18-20, 160:12-23, 160:24-161, 163:2-22, 223:13-18, 224:2-3, 230:12-20.

First Bancorp, Inc., 2007 WL 4239237, at *5 (E.D. Mich. Dec. 3, 2007); *see Universal City Studios, Inc. v. Nintendo Co. Ltd.*, 746 F.2d 112, 118 (2d Cir. 1984) (“To be probative and meaningful ... surveys ... must rely upon responses by potential consumers of the products in question.”) (internal quotation marks and citation omitted). And Plaintiffs’ prospective customers are increasingly readers of digital books: as e-book readership has “surge[d]” since 2010, “changing the way many people discover and read books,” Pew Study at 13, 23, Plaintiffs have introduced new e-book titles and reformatted print titles for digital reading, Colby Decl. ¶ 9; *see also* Deposition of John T. Colby, Jr., July 18, 2012 (Bogdanos Decl., Ex. O), 194:10-23.

Accordingly, Dr. McDonald’s universe of e-book reading individuals represented a large and ever-growing segment of Plaintiffs’ prospective customers. Indeed, the use of an e-book reading universe was more than just appropriate—it was the best possible universe for assessing the confusion likely to arise in this case. Survey respondents must “adequately represent the opinions which are *relevant to the litigation.*” *Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1333-34 (D. Kan. 2005) (citation omitted) (emphasis added). Because Plaintiffs publish both digital and print books and Defendant’s product is a digital-book reader software with readable e-books, the real-world marketplace intersection of their products—and therefore the consumers most relevant for measuring confusion—is people who read digital books. These people are “much more likely to be more tech-savvy in general” and “a technologically connected group.” Pew Study at 53. If this truism means that respondents in the survey universe were more attuned to Apple’s iBooks product, *see* Def. Mem. at 20,⁴⁶ so be it. “That’s perfectly relevant. There would be no reason to talk to people who really are not yet in the digital world because they’re not people who are going to encounter

⁴⁶ *See also* McDonald Tr. 224:7-8 (“That group also is far more aware of iBooks as a brand, as a phenomenon.”).

iBooks from Apple.” McDonald Tr. 224:10-13.

Regardless, as shown in the Pew Study, *eight-eight percent (88%)* of people who read electronic books also read print books;⁴⁷ thus, print readers/consumers are represented as well in the McDonald Survey.⁴⁸ In that sense, Dr. McDonald has covered the growing segment of dual readers—a group whose trajectory outs them on a path to dominate the landscape—whereas Defendant’s experts cannot be said to have given fair voice to digital readers. In any event, Defendant’s criticisms as to the breadth of the McDonald Survey’s universe affect the weight the study should be accorded, not its admissibility. *See* 6 McCarthy § 32:162; *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 124 (4th Cir. 2011) (scope of universe bears on weight, not admissibility); *On Site Energy Co. v. MTU Onsite Energy Corp.*, 2012 WL 2952424, at *3 (E.D.N.Y. July 19, 2012) (same); *THOIP*, 690 F. Supp. 2d at 241-42 (same).

V. NEITHER DR. MCDONALD NOR HER SURVEY IS BIASED

Defendant’s accusations that Dr. McDonald demonstrated bias for having done as seasoned scientists do and initially formed a considered hypothesis are baseless.⁴⁹ Retained as

⁴⁷ Pew Study at 3, 39; *see* McDonald Tr. 222:4-10 (“We know that most digital readers also read print and plausibility, experience, empirical experience as well as the Pew study confirms that if you read digital books you almost certainly sometimes read print books, although who knows if in the future that’s going to be true.”), 226:24-227:3, 228:6-22.

⁴⁸ *See* McDonald Tr. 226:21-24 (“I want to disclaim the idea that my universe didn’t include print book readers. It most assuredly did.”); *id.* 229:7-9 (“There is no doubt that the sample includes people who read print books. There is just no doubt at all.”). As she explained at deposition:

I feel very confident that the screening criteria we’ve used produced people who are actually regular readers and users of digital books as well as print. *The data that I have on these people from the prescreening confirms* that, and it’s really implausible to imagine that this is not a sample of people who are in the business of buying as opposed to simply downloading the books.

Id. 221:13-21 (emphasis added).

⁴⁹ True expertise allows for initial opinions. *Cf.* Nowlis Tr. 115:10, 115:22-116:2, 116:8-15, 116:19-25, 119:19-22, 265:21-25 (Dr. Nowlis was unable at his deposition to opine on even the most basic of issues, apparent to virtually anyone living in the 21st century: the recognizability of the iPhone and iPad brand names and their importance to Apple.) That Defendant’s expert shied away from proffering any independent insight on such a commonly accepted, if not indisputable, concept without resorting to data underscores why Dr. Nowlis has never been sought after as a consultant outside the classroom. *See id.* at 117:11-12.

both a marketing *and* a market-research expert,⁵⁰ Dr. McDonald developed an initial opinion as to putative brand overlap,⁵¹ which she tested through objective research that would prove or disprove her ingoing proposition and that would dictate her ultimate conclusion and thus-substantiated opinion. “I entered into the case in the spirit of intellectual freedom and non-partisanship. I owed nothing to anyone, and I arrived at an inference and a hypothesis that I tested.”⁵² McDonald Tr. 59:6-9.

Had Dr. McDonald’s role been purely to field and report survey data, a *pre hoc* inference may have had no place; her engagement, however, ran deeper than simple data collection and encompassed the broader task of consulting as to marketplace confusion, both at present and going forward. “I was called not just as a survey expert, but also as a marketing expert. And the mission was to arrive at a hypothesis and to test that hypothesis. I did. I wouldn’t describe that as bias, and I wouldn’t describe it as advocacy in the sense of partiality or inappropriate hypothesis formation.” McDonald Tr. 61:24-62:7. Dr. McDonald’s reasoned hypothesis,

⁵⁰ Dr. McDonald testified as follows:

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

McDonald Tr. 66:2-14; *see id.* 61:24-62:7, 65:24-66:2-14.

⁵¹ That Dr. McDonald did not conduct independent research as to Apple’s branding activities and renown, Def. Mem. at 24, is of no consequence given Apple’s brand strength, known to anyone well-versed in the marketing industry, indeed in the world generally. *See* McDonald Tr. 70:18-22 (referencing her general “awareness of Apple’s very active attachment to the ‘I’ prefix [which] is certainly part of the ambient marketing world in which I live . . .”), 74:15-18 (“Apple marketing, Apple as the brand is the amniotic fluid in which we are all bathed.”), 90:22-91:4 (“[I]t’s hard . . . to gainsay the conclusion that ‘I’ is not a meaningful branding device for Apple.”), 99:11-13 (“There is ample evidence that Apple cares deeply about ‘I.’ It’s central to its brand strategy.”), 99:21-25 (similar). What information Dr. McDonald needed about *Plaintiffs’* business was provided through the Complaint or by counsel. McDonald Tr. 26:2-10. And it was Dr. McDonald’s professional experience that informed her hypothesis that Plaintiffs’ and Defendant’s brands “are going to collide in [the digital] space.” McDonald Tr. 75:12-22; *see id.* 330:3-332:9 (emphasizing the “competit[ion] for brand equity and brand identity” and referencing future harm to Plaintiffs as their “brand equity” is increasingly “stymied” by Apple); McDonald Rep. 2-3, App’x A.

⁵² Dr. Nowlis’s survey likewise “addressed” a hypothesis. Nowlis Tr. 97:18-20.

resulting from her initial brands evaluation, does not amount to bias or future speculation,⁵³ as Defendant would degrade it, but considered intuition grounded in decades of marketing and branding experience.⁵⁴ It accords precisely with “the scientific method.” *See, e.g.*, Nicholas Walliman, *Research Methods: The Basics* 34 (2011) (The “combination of experience with deductive and inductive reasoning,” including “[d]eveloping a hypothesis (testable theory) inductively from observations,” “is commonly referred to as scientific method.”).

Indeed, Dr. McDonald’s qualifications and expertise in this regard are unquestionable, and unquestioned by Defendant. Courts have lauded Dr. McDonald for her “impressive credentials and extensive experience.” *See, e.g., Edge Wireless, LLC v. U.S. Cellular Corp.*, 2004 WL 1661992, at *15 (D. Or. July 23, 2004). No court has ever excluded one of Dr. McDonald’s surveys for its design or methodology. Likewise, the study she conducted here to substantiate or dismiss her preliminary evaluation was designed, fielded, and reported wholly objectively. *Cf. Malletier*, 525 F. Supp. 2d at 602-03 (the court inferred non-objectivity from suspect elements of the survey design and incomplete reporting).⁵⁵ Notably, Dr. Nowlis, despite spending a portion of his deposition painstakingly reviewing the sections of Dr. McDonald’s report that concerned her survey and its data, was unable to point to *even one* instance of bias in

⁵³ McDonald Tr. 67:10-18. (“The end of the day, my motivation, my state of mind fundamentally is secondary, tertiary to the methodology that was used and the conclusions that I formed as a result of that methodology.”) Nor did Dr. McDonald improperly opine on Apple’s intentions. *See* Def. Mem. at 6. Dr. McDonald was simply making a (fairly obvious) statement about Apple’s general branding strategy and its intentions in the digital world: “It’s my observation. Consumers make inferences about what brands mean and what they intend. Marketers make more.” McDonald Tr. 329:19-21. Nor do her conclusions rely on this general observation. *Cf. AstraZeneca v. Tap Pharm.*, 444 F. Supp. 2d 278, 293-94 (D. Del. 2006) (Dr. McDonald’s specific factual representations as to opposing party’s intent formed the bulk of her report). Notably, in *AstraZeneca*, the court excluded only Dr. McDonald’s specific statements on intent, *not* her research and related testimony. *Id.*

⁵⁴ McDonald Rep. at 2-3, App. A.

⁵⁵ Unlike in *Malletier* and contrary to Defendant’s unsubstantiated contention that Dr. McDonald’s mindset “infect[ed] her entire survey design,” Def. Mem. at 6, the McDonald Survey demonstrates and reflects scientific objectivity.

Dr. McDonald's presentation of the data from her study. *See* Nowlis Tr. 110:8-16.

VI. APPLE'S OTHER STRAINED CRITIQUES MISS THE MARK

Defendant's other trite criticisms of the McDonald Survey should be rejected. This hodgepodge of nit-picking objections—which, if anything, go to the weight of the McDonald Survey and not its admissibility—are meritless and reveal the extent to which Defendant is scraping the bottom of the barrel as it strains to distance itself from unfavorable data.

First, the argument that Dr. McDonald should have validated participation is irrelevant in the context of an Internet survey. Historically, validation was designed to insure against misconduct, “fraud,” or “slippiness” by the survey-company middleman—to make sure the middleman did not fabricate respondents or answers. Nowlis Tr. 295:2-296:23.⁵⁶ The very nature of an Internet study moots the need for validation, as the direct intermediary has been removed.⁵⁷ And while some may still validate in a nod to ritual, contrary to Defendant's argument, *see* Def. Mem. at 23, it is not a logical concern that an internet respondent would misidentify himself or herself and take the survey under someone else's name and email address, when the true email owner would be the one receiving the survey incentive.⁵⁸ Indeed, Dr. Nowlis himself cannot identify any Internet study that he conducted where the validation results (among those respondents successfully contacted) were less than one hundred percent (100%). *See* Nowlis Tr. 305:18-306:2.

Second, Defendant chastises Dr. McDonald for not screening for atypical respondents

⁵⁶ *See* McDonald Tr. 319:3-320:10, 321:12-14.

⁵⁷ *See* McDonald Tr. 320:17-321:6. The fielding company for an online study is not the type of third party with which validation concerned itself, *cf.* Nowlis Tr. 297:11-18, as the fielding company does not come between the respondent and the questions. Indeed, the fielding company would have *negative* incentive fraudulently to misrepresent that a survey-invitation-e-mail blast had been sent when in fact it had not, because the company then would need to manufacture hundreds of responses itself. The suggestion makes no sense.

⁵⁸ *See* McDonald Tr. 208:9-24, 321:24-323:8.

and baselessly mischaracterizes the Research Now panel as comprising “professional respondents” by “definition.”⁵⁹ Simply by agreeing to be contacted for online surveys does not transform an Internet panelist into a professional respondent. Research Now, which enjoys a top reputation for responsible and reliable Internet data collection,⁶⁰ implements strict safeguards to insure that its panelists do not participate too frequently.⁶¹ Moreover, there is no reason to assume that a “professional respondent’s” survey-taking frequency would translate into bias, or that they would not be randomly distributed across experimental-survey arms.⁶² Likewise, there would be no clear bias if a respondent employed by a book publisher or market researcher were part of the McDonald Survey universe.⁶³ “If you want a representative group of respondents they come in all forms.” McDonald Tr. 241:14-16. If anything, those in the industry would likely know that Apple has not affiliated itself with a publishing entity, so their inclusion would arguably favor Defendant.⁶⁴

Third, Defendant criticizes the McDonald Survey for not including an admonition against guessing, but such an instruction would be irrelevant here; respondents did not have any factual basis for their answers and thus were necessarily responding based on their *perceptions*, not

⁵⁹ Def. Mem. at 20-21.

⁶⁰ See McDonald Tr. 205:17-207:9.

⁶¹ See Research Now, *Panel Quality: Our Values* 7-12, 16, 18, available at www.researchnow.com/en-GB/~media/578E9AB322D5491CA61005CF64005C54.ashx (describing Research Now’s recruitment guidelines, participant identity confirmation procedures, and limitations on over-participation) (Bogdanos Decl., Ex. P); “Research Integrity,” *Research Now*, www.researchnow.com/en-US/Panels/PanelQuality/ResearchIntegrity.aspx (last visited Jan. 25, 2013) (describing Research Now’s participant verification and identification procedures) (Bogdanos Decl., Ex. Q); McDonald Tr. 213:9-21, 214:4-215:3, 215:23-216:16, 250:20-251:7; see also *id.* 248:4-249:2 (asking respondents about recent participation in surveys is unreliable, “one of those sources of general amusement in the industry,” “the most pro forma thing,” and “useless . . . utterly useless”), 249:9-10 (“the silliest thing to do”).

⁶² See McDonald Tr. 250:3-19.

⁶³ See McDonald Tr. 240:18-241:14, 242:6-10, 245:24-246:19, 249:18-22 (“Just because somebody participated in a survey for JD Powers on their recent Acura purchase, why wouldn’t they be eligible for a study [here].”); see *id.* 242:5-8 (describing concerns about atypical respondents as “immaterial”), 247:15-18, 251:25-252:5 (similar).

⁶⁴ See McDonald Tr. 244:15-19.

actual knowledge.⁶⁵ Dr. McDonald never instructs respondents not to guess and has never had a survey excluded on this basis. *Id.* 266:7-8. The McDonald Survey also weeded out true guesses through its control,⁶⁶ and reassured respondents that they were free to answer “I don’t know.”⁶⁷

Fourth, Defendant argues that respondents were “primed” by the words “smart phone” at the end of a screener question: “Which of the following have you done in the past 6 months? ... [The last option being:] Downloaded a digital book to a reading device of any kind, including a smartphone.”⁶⁸ Contrary to Defendant’s implication, Def. Mem. at 18, the “smartphone” wording is *not* just before the main question or the first mention of the IBOOKS mark. It is separated by introductory language setting forth the book scenario in detail.⁶⁹ In any event, the inclusion of the words “smart phone” is neither a “gratuitous reference” nor “just to prime respondents to think of Apple.”⁷⁰ As explicitly reported in the Pew Study, “[e]-reading happens

⁶⁵ See McDonald Tr. 272:23-25 (“[Y]ou’re putting people in a position where they can’t know the truth of the matter ...”); see also *id.* 262:3-17, 263:6-17, 263:23-264:9, 265:2-23, 267:8-268:9, 268:23-270:8, 272:11-273:11.

⁶⁶ See *id.* 263:17-22.

⁶⁷ See McDonald Rep. at 11; McDonald Tr. 266:22-267:5.

⁶⁸ McDonald Rep. at 9 (QS5); see Def. Mem. at 18 n. 8 (objecting as well to alleged priming effect of respondents’ taking the survey on an Apple device). Dr. Nowlis likewise voiced the “smartphone” criticism. Expert Report of Stephen M. Nowlis, Oct. 26, 2012 (Bogdanos Decl., Ex. R), at 19-20. Curiously, Dr. Nowlis has no hesitation opining about the association of the words “smart phone” with Apple and the resulting demand effect, although reluctant on virtually all other topics to volunteer an opinion not substantiated by data. See Nowlis Tr. 115:10, 115:22-116:2, 116:8-15, 116:19-25, 119:19-22

⁶⁹ McDonald Rep. at 11. Specifically (and fifteen seconds notwithstanding, see Def. Mem. at 18, which is but the time between this screener question and the *start* of the main question, McDonald Tr. 259:2-6; the true time measure, which doesn’t suit Defendant as handily, from “smartphone” to “iBooks”/“ibooks” is a minute, *id.* 255:25-256:2), the following **58 words** appear in between “smartphone” and “iBooks”/“ibooks”:

Please envision the following scenario, involving a digital/electronic book. In the scenario we’d like you to envision, you are looking at the particular ‘page’ of a digital/electronic book that contains information about the book—such as the date of publication, the publisher, the Library of Congress number, etc. If, on that page, you see the word

McDonald Rep. at 11. Unlike in *Juicy Couture*, 2006 WL 1012939, at *26, where the suggestive language was central to an introductory question, the McDonald Survey never asked respondents a question focused on smartphones; the reference was a mere clarifying addendum to a question about e-reading.

⁷⁰ Def. Mem. at 18; see McDonald Tr. 253:8-254:4 (Apple is not without strong competition within the smartphone industry), 257:20-25. “Apple owns a lot of ‘I’s’ but it doesn’t own the word smartphone, not until such time they call it an ‘I’ smartphone.” *Id.* 257:18-24.

across an array of devices, including smartphones.”⁷¹ A far cry from some surreptitious black magic of survey design, Dr. McDonald’s inclusion of “smartphone” was a conscientious decision to obtain a complete sample of respondents within the universe parameters.⁷² It was included in an effort to capture the perhaps-curious-yet-real practice of reading books via smart phone.⁷³ Moreover, the existence of the control (once again ignored by Defendant) neutralized the effect of any such possible priming.⁷⁴

Finally, Defendant argues that Dr. McDonald did not match her survey sample to the demographics of e-book purchasers. But this argument ignores the fact that by designating roughly equal quotas for men and women across the age spectrum, Dr. McDonald has accumulated survey data that afford the ability to look at demographic cells separately, as desired.⁷⁵ The underlying data from the McDonald Survey can be diced along various lines, and “the results are *the same*” regardless. McDonald Tr. 238:12-13 (emphasis added).

CONCLUSION

For the aforesaid reasons, the Court should deny Defendant’s Motion and permit the trier of fact to evaluate Dr. McDonald’s relevant and reliable testimony for itself.⁷⁶

⁷¹ Pew Study at 5. Just as the Pew Study recognized the need to clarify that digital-reading devices embrace any technological means on which e-reading is possible and specifically can include a smart phone, *id.*, (which many people may not consider to be an e-reading devices as book-reading was not what the smart phone was designed to accommodate), so Dr. McDonald inserted like clarifying language in her screener questionnaire, *see* McDonald Tr. 256:4-15.

⁷² *See* McDonald Tr. 256:4-15, 258:2-20,16-17 (“[N]ot only was this an innocent decision but it was a diligent decision.”).

⁷³ *See* McDonald Tr. 256:16-19 (“[T]here is a surprising, I have to say, amount of reading that’s done on phones. I know people who do it. I’m quite amazed that they are now not blind but people do it. That’s why.”)

⁷⁴ *See* McDonald Tr. 257:13-14 (“This is precisely what a controlled study is for.”), 255:15-23, 256:2-3, 259:7-17.

⁷⁵ *See* McDonald Tr. 236:10-239:5; *see id.* 211:20-212:7 (“roughly equal gender” composition), 212:8-16 (nationwide study), 213:2-8 (“balancing algorithm produced . . . roughly equal[]” age-distribution quotas).

⁷⁶ In the alternative, if the Court still entertains doubts about Dr. McDonald’s testimony, Plaintiffs request an oral hearing on Defendant’s Motion to afford Dr. McDonald the opportunity fully to articulate the methodological and market-based decisions she made in designing her survey and reaching her ultimate conclusions.

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Respectfully submitted,

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