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 IPICTUREBOOKS LLC,	)	Case No. 11 Civ. 4060 (DLC)
Plaintiffs,	)	
-against-	)	
APPLE INC.,	)	
Defendant.	)	

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

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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 Report And Opinions Of Mike Shatzkin ("Motion" or "Mot.").

PRELIMINARY STATEMENT

Apple's motion to exclude expert Mike Shatzkin is borne out of a panicked realization that the ***only*** industry-knowledgeable expert in this case supports Plaintiffs, not Apple. Mr. Shatzkin has spent ***half a century*** advising the largest and most successful book publishers. He knows the book-publishing industry inside and out—indeed, Apple does not even try to dispute his credentials.[1] Drawing on his decades of experience, Mr. Shatzkin believes that Plaintiffs' "ibooks" imprint acquired consumer recognition in the science-fiction genre long before Apple launched iBooks, and concludes that Apple has blotted out Plaintiffs' opportunity to develop an even more-recognized, prominent brand.

Particularly striking is the contrast between Mr. Shatzkin and Apple's parallel witness, Mr. Carpenter, who admits he has ***zero*** experience in book publishing[2] and draws his conclusions by applying "truisms" like "advertise your brand" to an industry where such truisms don't apply.

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[1] Nor could it—Mr. Shatzkin has "50 years of participation in the book in the book-publishing industry, the last 40 of them continuously," and has "worked with most of the major players in the industry as an author, agent, packager, or consultant." (Declaration of Claudia T. Bogdanos, dated Jan. 25, 2013 ("Bogdanos Decl."), Ex. A (Expert Report of Mike Shatzkin) ("Shatzkin Rep.") at 2.) For the last 20 years, much of his work has focused on digital change in the book-publishing industry. (Bogdanos Decl., Ex. B (Deposition of Mike Shatzkin, dated Dec. 4, 2012) ("Shatzkin Tr.") at 45:6-47:4.) In Mr. Shatzkin's words, he has "interacted on a professional basis with most of the significant publishers in the English-speaking world." (*Id.* at 47:11-22; *see also, e.g.*, Shatzkin Tr. 91:14-93:2 ("I have been exposed to a lot of dialogue about branding and marketing conversations for many, many, many, many years"); *id.* 193:6-16 (Mr. Shatzkin's opinion that "in publishing … almost no money is spent or has been spent creating consumer awareness in recognition of brands" is based on his "50 years in business"); *id.* 219:23-222:7 (contrasting experience with "people outside the publishing business," explaining that "experts in other fields fail to understand publishing").)

[2] *See* Bogdanos Decl., Ex. C (Deposition of Gregory S. Carpenter, dated Nov. 21, 2012) ("Carpenter Tr.") at 9:8-11, 42:11-17) (Mr. Carpenter has zero experience in book publishing); *id.* 125:13-20 (Mr. Carpenter did not consult with anyone in the book-publishing industry in preparing his reports).

(And if they did, Mr. Carpenter wouldn't know it anyway.) Such ignorance of the book-publishing industry pervades not just the entirety of Apple's expert-witness roster but also Apple's own views about the significance of the facts. In contrast, Mr. Colby, his former distributor Mr. Freese, and Mr. Shatzkin are deeply familiar with book publishing and will testify to the jury about the particularities of the industry. Apple simply has no comparable witnesses.

Desperate to keep Mr. Shatzkin away from the jury, Apple resorts to frivolous positions that simply do not pass the laugh test. ***First***, the data upon which Mr. Shatzkin bases his opinions are reliable and complete: Plaintiffs' records reveal that almost ***2 million*** science-fiction books bearing the ibooks imprint were sold by mid-2006. Based on his decades of experience, Mr. Shatzkin opines that such a level of sales, in a niche characterized by repeat purchases, strongly suggests recognition of the brand among this customer base. None of the critiques leveled by Apple of the data upon which Mr. Shatzkin relies alters that conclusion.

Second, Apple claims that Mr. Shatzkin's testimony does not sufficiently address whether Plaintiffs' use of "ibooks" acquired secondary meaning prior to Apple's infringing use. However, as Mr. Shatzkin explains, the ibooks imprint already acquired recognition among science-fiction readers ***years*** before Apple began its use, satisfying the standard of this Circuit. *PaperCutter, Inc. v. Fay's Drug Co., Inc.*, 900 F.2d 558, 564 (2d Cir. 1990) (plaintiff "must demonstrate that the mark had acquired secondary meaning before its competitor commenced use of the mark").

Even if the Court were to credit Apple's arguments (which it should not), any criticisms go to the weight, not admissibility, of Mr. Shatzkin's testimony, and none provide a basis for excluding his testimony at trial. Given Mr. Shatzkin's qualifications and sound methodology, Apple's challenges (however weak) belong, if anywhere, cross-examination at trial.

RELEVANT FACTS

Because Apple repeatedly misrepresents and mischaracterizes the source of the data for which some of Mr. Shatzkin's opinions are based, Plaintiffs present herein a brief description of the documents referenced (but never described) in Apple's Motion.

On July 16, 2012, Plaintiffs produced to Apple spreadsheets that, *inter alia*, represent and reference Plaintiffs' sales information for books bearing Plaintiffs' ibooks imprint from 1999 through 2012 (the "July Spreadsheet"). (Bogdanos Decl., Ex. D.) The July Spreadsheet reflects Plaintiffs' business records (*i.e.*, invoices) for such sales, gathered from the source data business records. (Declaration of John T. Colby, Jr., dated Jan. 25, 2013 ("Colby Decl."), ¶ 3.) These source data business records were produced to Apple on or about March 23, 2012, and updated source data business records were produced to Apple in July 2012. (*Id.*; Bogdanos Decl., Ex. E.) Thus, ***Apple has all of the source data*** compiled in the July Spreadsheet.

On August 1, 2012, Apple claimed to have difficulty finding certain information on the July Spreadsheet. (Bogdanos Decl., Ex. F.) Plaintiffs responded that these materials were produced in the manner maintained, but would supplement their response. (*Id.* Ex. G.) By e-mail dated August 20, 2012, to assist Apple, Plaintiffs produced spreadsheets (the "August Spreadsheet") that reorganized ***the same information*** in the July Spreadsheet regarding sales of books bearing Plaintiffs' ibooks imprint from 1999 through 2012. (*Id.* Ex. H; Colby Decl. ¶ 4.) In addition, Plaintiffs notified Apple of "two minor errors" in the July Spreadsheet: (1) December 2004 sales of I, Robot Special Sale were inadvertently omitted, and (2) cost of sales had been undercounted in 2005. (*Id.*) The August Spreadsheet corrected these errors. (*Id.*)

On or about October 4, 2012, Plaintiffs provided to Mr. Shatzkin a data file (the "Shatzkin Spreadsheet") containing certain subsets of data derived from ***the same source files*** used to create the August Spreadsheet, with the only addition being the addition of some

"BISAC" codes (which identify the genre) for certain book genres—*e.g.*, science fiction, graphic novels, horror—that Mr. Shatzkin used to form his opinions. (Colby Decl. ¶¶ 5-6; Declaration of Mike Shatzkin, dated Jan. 25, 2013 ("Shatzkin Decl."), ¶¶ 2, 5.) The Shatzkin Spreadsheet also includes the International Standard Book Number ("ISBN"), title, imprint, and net quantity shipped, but does not include ***dollar net sales data***. (Colby Decl. ¶ 5; Shatzkin Decl. ¶ 2.)

ARGUMENT

Rule 702 of the Federal Rules of Evidence "grants an expert witness testimonial latitude unavailable to other witnesses." *Fed. Housing Fin. Agency v. JPMorgan Chase & Co.*, 2012 WL 6000885, at *6 (S.D.N.Y. Dec. 3., 2012) (Cote, J.); *see also MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 2012 WL 2568972, at *15 (S.D.N.Y. July 3, 2012) ("The Federal Rules of Evidence favor the admissibility of expert testimony and are applied with a 'liberal thrust.'") (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993)). Specifically, trial judges should exclude expert testimony only "if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith." *Fed. Housing Fin. Agency*, 2012 WL 6000885, at *6 (quoting *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 213-14 (2d Cir. 2009)).

Crucially, courts in this Circuit overwhelmingly recognize that attacks on the bases of an expert's conclusions—such as disputes over underlying data or perceived inconsistencies in testimony—are best left to the judgment of the jury, tested through cross-examination and presentation of contrary evidence. *See Olin Corp. v. Certain Underwriters at Lloyd's London*, 468 F.3d 120, 134 (2d Cir. 2006) ("cross-examination and experts … is an appropriate way of attacking weak expert testimony, rather than complete exclusion"); *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 134 (2d Cir. 2006) ("gaps or inconsistencies" in expert testimony "go to the weight of the testimony not to its admissibility"); *In re Vitamin C.*

Antitrust Litig., 2012 WL 6675117, at *5 (E.D.N.Y. Dec. 21, 2012); *Feldman v. Van Gorp*, 2008 WL 5429871, at *2 (S.D.N.Y. Dec. 19, 2008) ("Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional means of attacking shaky but admissible evidence."). The same is true of an expert's use of assumptions. *See MBIA Ins. Corp.*, 2012 WL 2568972, at *16 ("Experts routinely employ assumptions as part of their analysis, and any contentions that the assumptions are unfounded go to the weight of the testimony, not its admissibility."); *Arista Records LLC v. Lime Group LLC*, 2011 WL 1674796, at *13 (S.D.N.Y. May 2, 2011) ("Although some of the assumptions upon which [the expert's] conclusions rest are potentially weak, these weaknesses can be easily exposed through cross-examination, and do not render his testimony inadmissible.").

I. MR. SHATZKIN'S OPINIONS REGARDING RECOGNITION OF THE IBOOKS IMPRINT ARE BASED ON RELIABLE AND PROPER DATA

Apple's first critique of Mr. Shatzkin is that his opinions purportedly are not based on "sufficient facts or data." (Mot. at 7.) Apple is incorrect—each of Mr. Shatzkin's opinions is based on the type of information upon which experts routinely testify, and any challenges that Apple may have to Mr. Shatzkin's conclusions can be brought out via cross-examination at trial.

At the outset, contrary to Apple's misrepresentation, Mr. Shatzkin based his opinions on much more than the Shatzkin Spreadsheet. Specifically, Apple claims that "the sole evidentiary basis for [Mr. Shatzkin's] opinions is 'a spreadsheet that [he] believe[s] was the sales reporting or compilation of the sales reporting by Simon & Schuster for the several-year period that they distributed iBooks.'" (Mot. at 8, quoting Shatzkin Tr. 71:1-15.) Apple neglects to inform the Court that, as Mr. Shatzkin explained, this is the only ***raw data*** Mr. Shatzkin reviewed that reflected ***sales figures***. (Shatzkin Tr. at 71:9-10 ("Q: What sales figures did you look at?").) In addition to the Shatzkin Spreadsheet, in forming the entirety of his opinions, Mr. Shatzkin also

considered: (1) the Complaint, (2) the Answer, (3) examples of print and electronic books, (4) the depositions of Mr. Carpenter, Mr. Colby, and Mr. Freese, (5) Mr. Carpenter's reports and accompanying (many) exhibits; and (6) facts "gathered both anecdotally and systematically through approximately 50 years of participation in the book-publishing industry, the last 40 of them continuously." (Shatzkin Tr. at 11:19-12:22; 141:17-142:9; Shatzkin Rep. at 2.)

In any event, for the reasons discussed below, it was entirely proper for Mr. Shatzkin to have relied on the Shatzkin Spreadsheet (among other information) to conclude that Plaintiffs' sales of almost ***2 million*** science-fiction books sold under the ibooks imprint demonstrates consumer recognition of "ibooks" as a signifier of the brand.[3]

A. Mr. Shatzkin Reasonably Relied On The Sales Data Provided To Him

[3] Apple also suggests that Mr. Shatzkin had some sort of obligation to consider all six non-exclusive factors that courts sometimes consider in determining whether a plaintiff's mark has secondary meaning. (Motion at 7); *see GTFM, Inc. v. Solid Clothing, Inc.*, 215 F. Supp. 2d 273, 294 (S.D.N.Y. 2002) (Cote, J.) (describing the factors as "non-exclusive"). This, of course, is wrong given that Mr. Shatzkin's expertise is not as a lawyer analyzing the elements of secondary meaning, but as one experienced in marketing within the book-publishing world. Mr. Shatzkin's testimony regarding the quantity of science-fiction books sold under the iBooks imprint is relevant to whether Plaintiffs' ibooks imprint had acquired sufficient exposure to have attained consumer recognition prior to Apple's infringing use. Indeed, the Second Circuit has already confirmed, in the context of niche book sales, that secondary meaning can be inferred from sales volume. *See Harlequin Enters. Ltd. v. Gulf & W. Corp.*, 644 F.2d 946, 949 & n.1 (2d Cir. 1981). It is indisputable that evidence of sales is strongly probative of secondary meaning. *See, e.g., Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 393 (2d Cir. 1995) (noting that "[n]o single factor is dispositive," and affirming that plaintiff established secondary meaning in part based on "evidence of … high sales volumes"); *PaperCutter*, 900 F.2d at 564 ("[s]econdary meaning may also be inferred from evidence relating to the nature and extent of the public exposure achieved by the designation, including volume of sales"); *U-Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 172 (S.D.N.Y. 2001) (finding issue of material fact on secondary meaning after considering, *inter alia*, "the sales quantity" of products); *Hi-Tech Pharmacal Co., Inc. v. Hi-Tech Pharms., Inc.*, 2007 WL 1988737, at *10 (E.D.N.Y. July 5, 2007) ("[a] plaintiff may prove secondary meaning through a variety of different types of evidence, including … sales volume"); *Merriam-Webster, Inc. v. Random House, Inc.*, 1991 WL 50951, at *4 (S.D.N.Y. Apr. 4, 1991) (evidence of secondary meaning includes "volume of sales"). Mr. Shatzkin need not list and separately opine on all other factors, such as unsolicited media coverage or third-party attempts to plagiarize the mark—evidence of such activity may be introduced into the record by Plaintiffs through documents and testimony from those with personal knowledge on the subjects.

In addition, Mr. Shatzkin extensively critiqued Mr. Carpenter's erroneous conclusions relating to secondary meaning. (Shatzkin Rep. 6-8.) Mr. Shatzkin, for example, explained why advertising expenditures (or lack thereof) have no relevance to consumer recognition of book imprints. (*See* Shatzkin Rep. at 6 (opining that "[a]dvertising for brand building is virtually non-existent, as is brand-focused marketing"); Shatzkin Tr. at 127:18-25 ("Book publishing companies I would say with 99.9 percent certainty and accuracy do not advertise their brands, period.").) To the extent Apple believes Mr. Shatzkin should have considered additional information, Apple is free to cross-examine Mr. Shatzkin on such topics at trial and ask if such information would change his conclusions.

Apple repeatedly states that the sales data in the Shatzkin Spreadsheet is somehow "unreliable." Apple is factually incorrect, with its "argument" supported by nothing more than conclusory characterizations and attorney *ipse dixit*.

1. The Shatzkin Spreadsheet is complete and reliable for the purposes for which Mr. Shatzkin used it

Mr. Shatzkin's reliance on the Shatzkin Spreadsheet was for a particular purpose: to establish that "approximately 2 million units of iBooks science fiction were sold" prior to Apple's infringing use, lending support for his conclusion that "those people [who bought such books] would know iBooks." (Shatzkin Dep. 152:6-14.) Apple does not dispute that Mr. Shatzkin is qualified to offer such opinions, and Apple provides no explanation for why the Shatzkin Spreadsheet is purportedly so "unreliable" as to render his opinions to be inadmissible "junk science." *Nat'l Envelope Corp. v. Am. Pad & Paper Co. of Del., Inc.*, 2009 WL 5173920, at *7 (S.D.N.Y. Dec. 30, 2009) ("The primary purpose of the *Daubert* inquiry is to bar 'junk science' from entering the courtroom."). Indeed, ***Apple barely even mentions these nearly 2 million unit sales***, let alone challenge them. Mr. Shatzkin's calculations were properly based on the data, his approach utilized reliable methods, and he reliably applied those methods to the facts of the case. This alone is sufficient to deny Apple's Motion.

Apple's attempts to call into question the reliability or completeness of the Shatzkin Spreadsheet is unavailing. It is black letter law that any challenge to data used by an expert goes to the weight, not the admissibility, of his or her testimony. *See, e.g., Aktas v. JMC Dev. Co.*, 2013 WL 55827, at *4 (N.D.N.Y. Jan. 3, 2013) ("Disputes as to the validity of the underlying data or methodology go to the weight of the evidence, and are for the factfinder to resolve at trial."); *Harkabi v. SanDisk Corp.*, 2012 WL 826892, at *5 (S.D.N.Y. Mar. 12, 2012) (same) (citing *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995)); *Aventis Envtl. Science*

USA LP v. Scotts Co., 383 F. Supp. 2d 488, 514 (S.D.N.Y. 2005) ("[d]efendants are free to challenge the basis and source for [expert's] numbers, but a challenge to the facts or data relied upon by [expert] does not go to the admissibility of his testimony, but only to the weight").

Notwithstanding this uniform treatment, Plaintiffs address Apple's quibbles in turn.

First, Apple's argument that Mr. Shatzkin's conclusions are unreliable because the Shatzkin Spreadsheet is "undated," (Mot. at 9), is bizarre. The Shatzkin Spreadsheet is derived from the same source files contained in the August Spreadsheet—*i.e.*, ***Plaintiffs' historical business records***—that were produced to Apple more than six months ago. (Colby Decl. ¶¶ 3-5.) Apple's challenge to the information in the Shatzkin Spreadsheet is nothing more than an unexplained attack on sales data reflected in standard business records.

Further, Mr. Shatzkin testified that the Shatzkin Spreadsheet is a compilation "of the sales reporting by Simon & Schuster for the several-year period during which they distributed iBooks." (Shatzkin Tr. 71:9-15.) Simon & Schuster sales reporting ran through approximately March of 2005.[4] (Colby Decl. ¶ 9.) Apple's only nitpick is that, when asked during his deposition whether he knew what the Simon & Schuster sales reporting period was, Mr. Shatzkin responded: "***Off the top of my head, like around 2000 to 2004, something like that.***" (Shatzkin Tr. 71:16-18.) (emphasis added). When asked the same question later, Mr. Shatzkin explained:

> Q [*by Ms. Ray*]: You testified that your understanding is that the sales data covered the period 2000 to 2004, correct?
>
> A: Approximately.
>
> Q: Approximately. To the best of your knowledge have you reviewed any sales data for any time period after 2004?
>
> A: I can't recall. I seem to know anecdotally that the numbers have not been

[4] As Plaintiffs accurately alleged in their Amended Complaint, books sold under the ibooks imprint were distributed by Simon & Schuster for "most of" the period between 1999 and 2006. Am. Complaint [Doc. 42] ¶ 13.

> nearly—were not nearly as robust after the Simon & Schuster period. Whether I know that by seeing numbers or whether I know that by asking questions and being told that I can't really recall, but I didn't try to analyze it.

(Shatzkin Tr. 159:25-160:14.)[5]

Mr. Shatzkin represented that his core analysis was for the period during which Simon & Schuster reported sales of the ibooks imprint, and that those were approximate. Further, as Mr. Shatzkin has now clarified, the Shatzkin Spreadsheet reflects sales of science-fiction books under the ibooks imprint ***from 1999 through 2012***, with the vast majority of such sales having occurred by 2006. (Shatzkin Decl. ¶¶ 4, 6.) His testimony is therefore entirely consistent with what the data reflect—that almost 2 million science-fiction units under the ibooks imprint were sold ***before*** Apple's infringing use. (*Id.*) That he described the Shatzkin Spreadsheet as reflecting the Simon & Schuster period, because the vast majority of data (and the crux of his analysis) derived from those dates, is perfectly sensible, given that a deposition is not a memory test and given the raw quantity of books sold during that time. Moreover, Apple does not dispute that the vast majority of the nearly 2 million sales tallied by Mr. Shatzkin occurred almost exclusively during the Simon & Schuster period. (*Id.*) If Apple believes the Shatzkin Spreadsheet contains errors that would or should change Mr. Shatzkin's opinions, it may raise them on cross-examination.[6]

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[5] Apple's counsel repeatedly mischaracterized Mr. Shatzkin's testimony as being that the Shatzkin Spreadsheet covered 2000 through 2004. Mr. Shatzkin consistently responded that he was approximating. *See* Shatzkin Tr. 141:7-16 (describing the time period as "approximately" 2000 to 2004); *id.* 152:15-17 ("Q [*by Ms. Ray*]: And that time period was 2000 to 2004, correct? A: Approximately, yes."); *id.* 165:11-14 ("Q [*by Ms. Ray*]: And as you said the spreadsheet you looked at, your understanding was it covered 2000 to 2004, correct? A: Yes, approximately.").

[6] For example, due to minor data system errors, entries that do not list a publication date or list a publication date of "0" on the Shatzkin Spreadsheet had publication dates prior to 2006, with the exception of Green Visions (Tr), which has not yet been released. (Colby Decl. ¶ 8.) The publication date for I, ROBOT SPEC SALE, listed as "12/9999" was December 2004 and the remaining entries of "12/9999" occurred in December 1999. (*Id.*) Finally, the five titles with publication dates of 1990 – 1995 were published prior to 2008. (*Id.*; *see also* Shatzkin Decl. ¶ 5.) Thus, the inclusion of these titles in Mr. Shatzkin's calculation was proper—each publication dates preceded Apple's use by several years. In any event, such purported mathematical errors in data go to weight, not admissibility. *See, e.g.*, *U.S. v. Garguilo*, 554 F.2d 59, 64 (2d Cir. 1977); *U.S. v. Romano*, 859 F. Supp. 2d 445, 459-60 (E.D.N.Y. 2012); *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 657 (S.D.N.Y. 2007).

Second, Apple claims that for the years 2000 through 2004, net sales of books bearing the ibooks imprint total $12,949,121.11 on the Shatzkin Spreadsheet, while such net sales total $29,837,487.71 on the August Spreadsheet. Apple, however, provides absolutely no explanation for how it arrived at its net sales calculation for the Shatzkin Spreadsheet of almost $13 million—the Shatzkin Spreadsheet does not list net sales values, Mr. Shatzkin did not opine on net sales values, and Apple never asked Mr. Shatzkin about net sales values during his deposition.[7] Plaintiffs are therefore at a complete loss as to where this number comes from, other than Apple's counsel's *ipse dixit*.[8] In addition, Apple does not direct the Court to any differences between the August Spreadsheet and Shatzkin Spreadsheet in ***quantity*** of unit sales of science-fiction books bearing the ibooks imprint. This is the data most critical to Mr. Shatzkin's testimony, yet Apple makes no argument (and thus concedes) that the calculation of almost 2 million of unit sales of science-fiction books is reasonable. Apple therefore offers no basis at all (let alone a convincing one) for excluding Mr. Shatzkin's testimony on this basis.

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[7] The only citation supporting Apple's $13 million calculation is a citation to ¶ 21 of the Declaration of Claudia Ray ("Ray Decl."). (Mot. at 8.) That paragraph, in turn, relies solely upon ¶¶ 45-46 of the Declaration of Bonnie Jarrett ("Jarrett Decl.") Notwithstanding that ¶¶ 45-46 say nothing about such a calculation (and that Apple likely committed a typographical error, intending to cite ¶ 49), the Jarrett Decl. merely cites to the entirety of the Shatzkin Spreadsheet, providing no clue of where this purported $13 million figure comes from.

As a separate matter, both the Ray Decl. and Jarrett Decl. are facially improper, as they are rife with legal argument and representations that go beyond their personal knowledge. While courts generally permit attorney declarations that do no more than attach evidence, both the Ray Decl. and Jarrett Decl. go much further, making substantive legal arguments and offering purported analysis of evidence. The Court should therefore disregard and strike both the Ray Decl. and Jarrett Decl. to the extent they offer legal arguments, characterizations of facts for which they do not have personal knowledge, or anything other than the mere attaching of evidence. *See Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 71 (E.D.N.Y. 2004) ("[t]he legal arguments set forth in the [attorney] affidavit are improper and have the effect of circumventing the Court's page limits"); *Ugarte v. Johnson*, 40 F. Supp. 2d 178, 179 n.1 (S.D.N.Y. 1999) (legal argument and facts not based on personal knowledge contained in attorney affidavit cannot be considered); *cf. Gesualdi v. Laws Constr. Corp.*, 759 F. Supp. 2d 432, 449 (S.D.N.Y. 2010) (Cote, J.) ("[a]n attorney's affidavit which … does not demonstrate how the attorney has first-hand knowledge is not entitled to any weight and cannot serve as evidence") (quotations omitted).

[8] In any event, "[w]hen facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other." Rule 702, Advisory Committee Notes (2000 Amendments).

Third, Apple criticizes Mr. Shatzkin because he "never even saw the August Spreadsheets" and purportedly ignored evidence relating to the ibooks imprint after the Simon & Schuster period. (Mot. at 8-9.) Apple, however, is wrong. As Mr. Shatzkin has clarified, the Shatzkin Spreadsheet did in fact include sales after the Simon & Schuster period, and all the way through 2012, but because relatively few units were sold after 2006, post-Simon & Schuster sales do not affect his ultimate conclusions. (Shatzkin Decl. ¶¶ 4, 6.) Thus, the Shatzkin Spreadsheet already contained all of the information that Apple asserts he should have considered.

Mr. Shatzkin's opinion that science-fiction readers had become aware of and associated the ibooks mark with Plaintiffs years before Apple began its infringing uses is well-grounded in, *inter alia*, valid sales data derived from Plaintiffs' business records. (*Id.* ¶ 6.) Mr. Shatzkin's analysis of the Shatzkin Spreadsheet—which reflected sales from 1999 through 2012—confirms that almost 2 million ibooks science-fiction titles had been sold ***before*** Apple's infringing use began in 2010.[9] Such sales support secondary meaning in the mark. Indeed, the sole case Apple cites to confirms that such evidence is probative. *PaperCutter*, 900 F.2d at 564 ("owner of a descriptive mark must demonstrate that the mark had acquired secondary meaning ***before*** its competitor commenced use of the mark") (emphasis added) (cited but not quoted at Mot. at 9.).[10] *See also Kensington Publ'g Corp. v. Gutierrez*, 2009 WL 4277080, at *5 (S.D.N.Y. Nov. 10, 2009) (same); *Hi-Tech Pharmacal*, 2007 WL 1988737, at *10 (same). Because Mr. Shatzkin opines that the nearly 2 million unit sales of science-fiction titles under the ibooks imprint ***by 2006*** already established brand recognition among those readers, Mr. Shatzkin's analysis is

[9] When asked why the 2006 bankruptcy filing did not affect his opinions, he explained: "Because it does nothing to reduce the awareness that was built during the period that I examined and looked at. The things that happened, nothing reduces the number of readers of science fiction under the iBooks brand. The subsequent hard times of iBooks did not reduce those numbers. It doesn't affect my opinion." (Shatzkin Tr. 186:22-187:5.)

[10] Further, Apple does not allege that Plaintiffs abandoned its mark.

relevant, reliable, and complete. At a minimum, Mr. Shatzkin's analysis demonstrates that a genuine issue of fact exists as to secondary meaning of the "ibooks" imprint to those readers.

Finally, even if the Court were to credit each of Apple's arguments about the reliability of the Shatzkin Spreadsheet (which it should not), each of these gripes at most goes to the weight of Mr. Shatzkin's testimony, not its admissibility. Apple is free to cross-examine Mr. Shatzkin to try to undercut the methods or data upon which he relied—the preferred path in this Circuit. *See, e.g.*, *Maran Coal Corp. v. Societe Generale De Surveillance S.A.*, 1996 WL 11235, at *2 (S.D.N.Y. Jan. 10, 1996) (Cote, J.) (denying motion to exclude because "[defendant] is, of course, free to cross-examine the plaintiff's expert" about his data or methods).

2. <u>The Shatzkin Spreadsheet is not inadmissible hearsay, but even if it were, it does not affect the admissibility of Mr. Shatzkin's testimony</u>

Apple also charges that Mr. Shatzkin's testimony should be excluded because the Shatzkin Spreadsheet is "inadmissible hearsay." (Mot. at 10.) Apple is egregiously wrong.

First, Apple is simply incorrect that the Shatzkin Spreadsheet is "hearsay." The Shatzkin Spreadsheet is derived from the same source files as the August Spreadsheet—that is, sales data maintained as business records by Plaintiffs. (Colby Decl, ¶¶ 3-5.) These business records have been produced to Apple. (*Id.* ¶ 3; Bogdanos Decl., Ex. E.) And as this Circuit recognizes, when one company acquires another, the business records of the acquired company become the business records of the purchasing company for the purposes of Fed. R. Evid. 803(6). *See, e.g.*, *Matter of Ollag Const. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981) (acquired company's "business records are admissible if witnesses testify that the records are integrated into a company's records and relied upon in its day-to-day operations"); *U.S. v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007) (joining courts that "have found that a record of which a firm takes custody is thereby 'made' by the firm within the meaning of the rule (and thus is admissible [as a

business record] if all the other requirements are satisfied)"). Because Plaintiffs acquired and integrated any predecessors' business records as its own, the underlying sales records—and, by extension, the Shatzkin Spreadsheet reflecting those records—are not inadmissible hearsay.[11]

Second, even if Apple were correct that the Shatzkin Spreadsheet is inadmissible hearsay (which it is not), Rule 703 explicitly permits experts to rely upon hearsay evidence in forming their opinions. *See* Rule 703 ("If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."). As the Second Circuit has explained:

> Experts are generally permitted to rely on otherwise inadmissible evidence in formulating an expert opinion: "expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions." *U.S. v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993).

Howard v. Walker, 406 F.3d 114, 127 (2d Cir. 2005); *see also*, *e.g.*, *MHANY Mgmt. Inc. v. County of Nassau*, 843 F. Supp. 2d 287, 320 (E.D.N.Y. 2012) ("It is beyond dispute that 'an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.'") (quoting *Daubert*, 509 U.S. at 592); *MacQuesten Gen. Contracting, Inc. v. HCE, Inc.*, 2002 WL 31388716, at *2 (S.D.N.Y. Oct. 22, 2002) ("expert analysis is often based on reported information rather than firsthand knowledge, and that is no bar to its admissibility") (citing *U.S. v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001)).[12]

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[11] In addition to its own status as derived from the August Spreadsheet, the Shatzkin Spreadsheet is admissible pursuant to Fed. R. Evid. 1006 as a summary of "voluminous writings … that cannot be conveniently examined in court." Plaintiffs strongly suspect the Court would rather deal with a single spreadsheet summarizing thousands upon thousands of sales invoices rather than forcing Plaintiffs to separately introduce each invoice.

[12] Apple cites one case in support of its hearsay argument. (Mot. at 10 (citing *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558 (S.D.N.Y. 2007)).) But *Malletier* merely repeats the routine proposition that one expert cannot introduce another expert's opinions as his or her own. *Id.* at 666 (excluding testimony where "[one expert] would be relating the out-of-court statements of [another]"). Indeed, the court then states that "[i]t is true that under Rule 703, experts can rely on hearsay in reaching their own opinions." *Id.* Apple makes no claim Mr. Shatzkin's testimony is a backdoor attempt to introduce another expert's opinions—they are, in *Malletier*'s words, his "own opinions."

Apple here makes no assertion that experts in the book-publishing industry, such as Mr. Shatzkin, do not reasonably rely on sales records of clients in determining sales volumes of particular books or genres. To the contrary, such experts regularly rely on sales compilations. (Shatzkin Decl. ¶ 3). Further, Apple asked no questions on this subject to Mr. Shatzkin at his deposition, and thus elicited no contrary testimony. Because Apple does not even argue that experts such as Mr. Shatzkin may not reasonably rely on standard sales summaries in forming opinions, Apple's hearsay arguments fall flat.[13]

Third, even if the Shatzkin Spreadsheet were hearsay (and, again, it is not), such an argument has no bearing on whether the testimony of ***Mr. Shatzkin*** should be excluded. Mr. Shatzkin did not create the Shatzkin Spreadsheet; it was provided to him. (Shatzkin Decl. ¶ 2; Colby Decl. ¶ 5.) Apple has not sought to depose Mr. Colby about the Shatzkin Spreadsheet, or taken any other steps to investigate its *bona fides*—Apple's (incorrect) contentions about the admissibility of the Shatzkin Spreadsheet are pure attorney *ipse dixit*. Apple's attempt to exclude Mr. Shatzkin's testimony on this basis is therefore misplaced and premature.

B. Mr. Shatzkin's Investigation Was Sufficient For The Opinions He Offers

Grasping at straws, Apple separately claims Mr. Shatzkin's opinions are "unreliable because he made no effort to educate himself about the use of the 'ibooks' imprint." (Mot. at 11.) Apple's argument is based on a faulty premise as to the breadth of Mr. Shatzkin's opinions.

Mr. Shatzkin does not purport to opine on, *e.g.*, the number of ibooks imprints ever published or how many copies are sold in brick-and-mortar bookstores versus the internet.[14]

[13] Apple argues that because "the Shatzkin Spreadsheet is inherently unreliable," it is not reasonable to rely on such data. This is a tautology (*i.e.*, because hearsay is unreliable, it is unreasonable to rely on hearsay). This contravenes Rule 703, which explicitly allows experts (such as Mr. Shatzkin) to rely on hearsay in forming opinions.

[14] It is befuddling why Apple believes such inquiries—*e.g.*, the ***current*** number of books sold; the ***current*** owner of the domain name for www.ibooksinc.com; ***present-day*** traffic to Plaintiffs' website; Plaintiffs' ***current*** use of social *(footnote continued)*

Unlike Apple's expert Mr. Carpenter, Mr. Shatzkin does not function as the mouthpiece of legal counsel, supplying unsupported argument instead of fact-based expert opinion. Rather, Mr. Shatzkin provides opinions regarding: (1) branding in the book-publishing industry and its unique components; (2) the effect of the growth of digital and electronic books on the book-publishing industry; (3) the potential of the ibooks brand, based on its significant sales in the niche science-fiction market; and (4) Mr. Carpenter's lack of meaningful knowledge about marketing in the book-publishing industry. (Shatzkin Rep. at 1-2.)

Mr. Shatzkin's testimony on the first and second topics are based on his extensive, 50-year experience in the industry, which will provide invaluable assistance to the factfinder in understanding the nature and repercussions of Apple's unlawful infringement. Mr. Shatzkin's testimony on the fourth topic shares the same bases and likewise will assist the factfinder, explaining why Mr. Carpenter's "Marketing 101" approach to branding of products like coffee and potato chips is entirely inappropriate in the specific context of book publishing.[15] Finally, Mr. Shatzkin's testimony on the third topic—the lost potential of the ibooks brand—is premised on his deep and relevant experience (*i.e.*, knowing exactly what information is most relevant to inform his analysis and his familiarity with patterns of genre readers) and the nearly 2 million books sold in the niche of science-fiction readers. According to Mr. Shatzkin, such a high volume of sales in this specialized market suggests that such readers would recognize the ibooks brand. *See supra* n.3.

While Apple may not agree with Mr. Shatzkin, that does not render his thoughtful

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media; and ***present-day*** internet searches for the frequency of the word "ibooks"—to be relevant to whether the ibooks imprint had acquired secondary meaning ***years before*** Apple began its infringing use in 2010.

[15] It is not disputed that Mr. Shatzkin reviewed Mr. Carpenter's reports and accompanying exhibits, constituting hundreds of pages of documents. (Shatzkin Tr. 141:17-142:9.)

conclusions to be "speculative," "conjecture," or "guesses"—his conclusions are based on both his inspection of data and his years of experience (which is exactly what is expected of an expert). Mr. Shatzkin undertook an appropriate investigation of prior use of the ibooks designation that was relevant to his opinions on the specific subjects for which he will offer testimony. Apple offers no explanation for why he would need to engage in extraneous and superfluous research that has no bearing on his opinions.

Further, Apple does not even contend that Mr. Shatzkin's opinions would be any different had he undertaken such investigation. Apple is free to cross-examine Mr. Shatzkin at trial as to whether evidence regarding any additional information (such as current traffic to Plaintiffs' website) would change his conclusions.

II. MR. SHATZKIN PROPERLY EXPLAINED WHY THE QUANTITY OF SALES OF SCIENCE-FICTION BOOKS UNDER THE IBOOKS IMPRINT SUGGESTS RECOGNITION OF THE MARK BY CONSUMERS

Apple also claims that Mr. Shatzkin purportedly did not address the "central question" of whether the ibooks imprint "acquired secondary meaning before Apple adopted the IBOOKS mark in January 2010." (Mot. at 13.) Apple's argument, however, is premised on nothing more than intentional misreadings of Mr. Shatzkin's report and deposition testimony.

First, the Shatzkin Spreadsheet covers the time period from 1999 through 2012. (Shatzkin Decl. ¶ 4.) Further, the vast majority of sales of science-fiction books under the ibooks imprint—nearly 2 million—were sold before Apple's use began. (*Id.* ¶ 6.)

Second, in his report, Mr. Shatzkin states that the nearly 2 million units of science-fiction books sold under the ibooks imprint signals core consumer recognition in that genre:

> [ibook's] specialization in a genre that is characterized by customers who make many repeat purchases in the genre suggests the potential for a core audience that would recognize it as a publishing specialist. It is thus reasonable to surmise that were there no distractions suggesting that the iBooks brand meant something else (namely, Apple and/or Apple's iBooks/iBookstore), it is likely that the publishers

> of iBooks would have had the opportunity ***to build on that awareness to create a powerful niche brand*** in the digital space.

(Shatzkin Rep. at 5 (emphasis added).) As Mr. Shatzkin explains, the quantity of sales in this specialization, characterized by repeat customers, suggests to him that this audience would recognize the ibooks imprint. Not only is this "relevant," but it is a central component of determining whether a mark has achieved secondary meaning. *See supra* n.3 (citing cases supporting that quantity of sales volume is relevant to gauging secondary meaning).

Apple ignores this opinion, and instead focuses on a portion of Mr. Shatzkin's deposition testimony ***from which Apple has selectively omitted a key part of his answer***. (Mot. at 13.) First, Apple fails to direct the Court to its lead-in question:

> Q [*by Ms. Ray*]: You talked earlier about niche imprints. Is it fair to say that iBooks, that the iBooks imprint to the extent it has a brand is a niche imprint?
>
> MR. RASKOPF: Objection to the form of the question.
>
> A: I would say it is fair to say that iBooks ***has the foundation to capitalize on brand equity*** within the science fiction fantasy niche. ***When you cross the line of having something that qualifies as a niche imprint or a strong brand is a separate question, but since my premise is that publishing brands are built on the knowledge of consumers who have purchased and read something that gives the brand identity, I think that iBooks did enough to qualify on that basis*** and if the right strategies were employed they would have -- employed and able to use the brand -- they would have a real opportunity to turn that into something that would be a long way from being Harlequin, but would be on its way to being something like Harlequin or Baen or Tor or Orbit.

(Shatzkin Tr. 222:8-223:6 (emphases added).) Thus, Mr. Shatzkin opined that the ibooks imprint had "the foundation to capitalize on brand equity" and "did enough" ***to have brand identity*** among its consumers. Mr. Shatzkin specifically stated that it was a ***"separate question***" as to when a brand "cross[es] the line" into becoming a "strong brand" such as Baen or Tor (two leading science-fiction imprints). While Mr. Shatzkin is not a lawyer and did not use the term

"secondary meaning," his testimony fully demonstrates that, in his opinion, the ibooks imprint had established a sufficient "foundation"[16] (*i.e.*, recognition) among "consumers who have purchased and read" ibooks imprints to "qualify" as having a recognizable "brand identity."

Failing even to mention Mr. Shatzkin's above testimony, Apple instead directs the Court to the next question, ***but omits a key part of Mr. Shatzkin's answer***. Below is the entirety of the relevant testimony, with the portion omitted by Apple underlined:

> Q [*by Ms. Ray*]: You talked about crossing the line to having a brand. Is it your opinion that iBooks at any point crossed that line?
>
> MR. RASKOPF: Objection to the form.
>
> A: You're asking me to generate a characterization. I'm just simply not comfortable saying when the lines got drawn. ***I go back to what I said***, which is that they have a foundation of knowledgeable people in what strikes me as sufficient number to make a real play for a science fiction brand. It's not a dozen people. It's probably thousands and it may be tens of thousands of people who consumed enough books so if -- remember if it was 50,000 people, we're living in a country of 300 million people. So whether it be 50,000 of them and you and I may never meet one with those odds, but if we could meet those 50,000 people and say, do you know iBooks they'd say I read an Arthur Clarke book, and then I read something by someone I didn't know because these people who read 5, 10, 20, 40 science fiction books a year, as I said earlier, are not reading them from 500 publishers. They're coming from a dozen publishers. ***They would remember iBooks.***
>
> Q [*by Ms. Ray*]: Is it your opinion that iBooks has made a play to capitalize on those people who have bought books in the past?
>
> MR. RASKOPF: Objection to the form of the question.
>
> A: I have not seen the evidence of it.

(Shatzkin Tr. 223:7-224:16.) As the complete deposition testimony demonstrates, based on Ms. Ray's (incorrect) characterization of Mr. Shatzkin's answer, the "line crossing" to which Mr. Shatzkin is referring to is the "separate question" of when a brand has become a "strong brand"

[16] Mr. Shatzkin's belief as to what Plaintiffs could do to ***maximize*** their branding potential and launch from their "foundation" to become a hit imprint akin to Harlequin is not germane to the issues for which he provides opinion.

on par with the success stories of niche publishing such as Harlequin, Baen and Tor. Further, in the omitted section of Mr. Shatzkin's answer, he elaborates that, among consumers of science-fiction books under the ibooks imprint, "***[t]hey would remember iBooks***." (*Id.*)

Mr. Shatzkin's testimony is corroborated by other portions of his deposition, where he opined that "iBooks was recognized as a legitimate science fiction publisher by a substantial number of science fiction book consumers, and that that created a foundation on [*sic*] which can be built upon." (Shatzkin Tr. 191:10-14.) As his testimony reflects, Mr. Shatzkin addressed the "central question" of secondary meaning: whether readers of science-fiction books under the ibooks imprint would recognize the brand prior to Apple's unlawful infringement.

As a final matter Apple tries to convince the Court that Mr. Shatzkin's awareness of the ibooks imprint somehow affects the admissibility of his testimony. This is nonsensical. Mr. Shatzkin testified he has been aware of the ibooks and ipicturebooks imprints since the 1990s:

> Q [*by Ms. Ray*]: And in what context did you hear of iPicturebooks?
>
> A: Very aware of it. I'm in the business and I'm aware of what goes on in the business, and I knew Byron Preiss and I knew what Byron Preiss did. ***So I was aware of iBooks and I was aware of iPicturebooks when they were new.***
>
> Q: Do you recall roughly when that was?
>
> A: ***Late 1990s.***

(Shatzkin Tr. 25:20-26:6 (emphases added).) Apple concedes this point. (*See* Mot. at 14.)[17] Mr. Shatzkin's awareness of these imprints ever since "they were new" is strong evidence ***supporting*** secondary meaning in these designations.[18] Thus, there is no basis for Apple's claim that

[17] This negates Apple's citation to *Oxford Indus., Inc. v. JBJ Fabrics, Inc.*, 6 U.S.P.Q.2d 1756, 1760 (S.D.N.Y. 1988), where the expert had never heard of the mark before testifying. Rather, *Oxford* ***supports*** Plaintiffs.

[18] Apple claims it is "telling" that Mr. Shatzkin did not name ibooks when listing some science-fiction imprints. (Mot. at 14-15.) Mr. Shatzkin, however, already said he was aware of ibooks (Shatzkin Tr. 25:22-26:6) and, when asked later to name more, stated: "I don't know them all. I'm not a science fiction reader." (*Id.* at 117:2-4.)

introduction of Mr. Shatzkin's testimony on these issues would be unfairly prejudicial or otherwise confuse the jury under Fed. R. Evid. 403; to the contrary, Mr. Shatzkin's testimony is directly on point and clarifies—rather than confuses—important issues in this case.

III. MR. SHATZKIN'S OPINION THAT IBOOKS ACHIEVED RECOGNITION AMONG SCIENCE-FICTION READERS IS RELEVANT AND SUPPORTED

In a confusing collection of arguments that are difficult to follow (Mot. at 15-20), Apple appears to claim that certain evidence calls into question whether the ibooks imprint achieved recognition among its science-fiction readers. Apple is wrong on both the facts and the law.

First, in gauging whether a mark has acquired secondary meaning, "the analysis focuses not on the general public, but on the ***consumer group relevant to the product or services at issue***." *Rockland Exposition, Inc. v. Alliance of Auto. Serv. Providers of N.J.*, 2012 WL 4049958, at *14 (S.D.N.Y. Sept. 11, 2012) (emphasis added). Science-fiction books are sold to science-fiction readers. (*See* Shatzkin Rep. at 7 (describing how science-fiction readers are a devoted "niche audience")); *cf. Lee Middleton Original Dolls, Inc. v. Seymour Mann, Inc.*, 299 F. Supp. 2d 892, 901 (E.D. Wis. 2004) (plaintiff established secondary meaning in "a special niche in the world of dolls"). While Apple argues that science fiction is not the "first" (but second) genre listed on Plaintiffs' website and that articles from 1999 and 2000 refer to genres other than science fiction (Mot. at 16), Apple ignores that the central inquiry for secondary meaning is whether ***relevant consumers*** associate the mark with the source. Science fiction composes the largest genre of books released under the ibooks imprint—the trademark at issue here. Science-fiction readers thus constitute the relevant unit of analysis for Mr. Shatzkin's opinions.

Second, Apple argues that Mr. Shatzkin's calculations of the number of science-fiction books sold under the ibooks imprint are flawed. (Mot. at 16-19.) The Court need not wade through Apple's nits—even if correct (and they are not), such critiques go to the weight, not

admissibility, of Mr. Shatzkin's testimony. *See Garguilo*, 554 F.2d at 64; *Romano*, 859 F. Supp. 2d at 459-60; *Malletier*, 525 F. Supp. 2d at 657 ("arithmetic can be corrected (unlike the mistake of using an unreliable methodology) and … present questions of weight and not admissibility").

In any event, Mr. Shatzkin's calculations are reliable. For example, Mr. Shatzkin included returns in his calculations, and he explained that the number of books sold to end consumers could be estimated by looking to the difference between gross and net sales. (Shatzkin Tr. at 160:15-161:17.)[19] Thus, his calculation of sales of almost 2 million science fiction books is reasonable and comes nowhere close to the standard of excluding testimony that is "speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith." *Fed. Housing Fin. Agency*, 2012 WL 6000885, at *6.

Apple also claims that Mr. Shatzkin "***significantly*** over-counted the number of individual science fiction titles." (Mot. at 18 (emphasis added).) First, the number of science-fiction titles has no relevance to Mr. Shatzkin's ultimate conclusion that approximately 2 million units of science-fiction books under the ibooks imprint were sold. Second, Apple provides no evidence of ***any*** "over-counting," instead merely directing the Court to the entire Shatzkin Spreadsheet, giving no clue where Apple's summary tally of "449 duplicate science fiction titles" comes from. (*Id.*)[20] In any event, Mr. Shatzkin clarified that while the Shatzkin Spreadsheet lists 665 science-fiction title entries for sales and royalty reporting purposes, it also lists approximately 559 unique

[19] Apple hypothesizes that Mr. Shatzkin did not account for some of the science-fiction books that may have been returned or destroyed after 2004. However, Mr. Shatzkin has clarified that because the Shatzkin Spreadsheet includes the time period up through 2012, his calculations of net sales includes returns for every year. (Shatzkin Decl. ¶¶ 6-7.) Thus, Apple is factually wrong in arguing that Mr. Shatzkin "fail[ed] to account for the massive returns that occurred after approximately 2004. (Mot. at 18.) And in any event, all of Apple's purported "support" that "massive quantities" of books were returned or destroyed dates from ***2010*** and ***2011***, years after Plaintiffs attained secondary meaning in the ibooks imprint. In addition, Apple does not direct the Court to any evidence that any of the nearly 2 million science-fiction books counted by Mr. Shatzkin are among these "returned" or "destroyed" books.

[20] See Mot. at 18 (citing Ray Decl. ¶ 31, which in turn cites to Jarrett Decl., Ex. 26 (the Shatzkin Spreadsheet)); *see also supra* n.7 (describing Apple's pattern of citing to the entire Shatzkin Spreadsheet without any explanation).

ISBNs for science-fiction titles sold under the ibooks imprint (Shatzkin Decl. ¶¶ 8-9; Colby Decl. ¶ 7).[21] Thus, even if the Court were to fully credit Apple's argument, indisputably there are ***hundreds*** of ibooks science-fiction titles illustrating the scope of the ibooks imprint in that genre. (Shatzkin Decl. ¶ 9.)

Likewise, Apple's claim that "six titles" from among these hundreds were wrongly counted as science-fiction titles justifies Mr. Shatzkin's exclusion (Mot. at 18-19) is frivolous. For example, the book "about Britney Spears" that Apple claims is "clearly … not within the science fiction genre" (Mot. at 19), is titled Britney Spears Is a Three-Headed Alien and is about a UFO abduction of Ms. Spears, who is replaced by an alien. (*See* Ray Decl., Ex. 6 at 8 (describing plot of book).)[22] And in Guns, Drugs & Monsters, the hero is a "monster hunting private eye" who faces a "bloodthirsty vampire." (*Id.*, Ex. 6 at 16.) Notwithstanding Apple's apparent worldview that stories about UFOs, aliens, and monsters are "clearly" not science fiction, Apple's own questionable hand-picked examples demonstrate why such issues are best left for cross-examination at trial.[23]

Third, Apple claims that Mr. Shatzkin's opinions regarding science-fiction readers' purchases of multiple books should be excluded because he has no data that any consumer of an ibooks science-fiction imprint actually bought more than one copy. (Mot. at 20.) What Apple conveniently ignores, however, is Mr. Shatzkin's testimony regarding his experience and

[21] Contrary to Apple's suggestion, Mr. Shatzkin never testified that duplicate ISBNs necessarily identify duplicate "titles." (Shatzkin Tr. 154:18-155:3). Rather, books with the same ISBN may be different (*e.g.*, different editions). The only way to know if books with the same ISBN are "identical" is to examine the books. (Shatzkin Decl. ¶ 8.)

[22] Given that Ms. Ray represents in her declaration that the book's title is "Britney Spears" and is "clearly not within the science fiction genre" (Ray Decl. ¶ 32 & Ex. 6), notwithstanding that ***her own exhibit*** provides the true title and description, at best Ms. Ray failed to review her own declaration, calling its credibility into question.

[23] These were the ***only two*** of the six titles identified by Apple that sold more than zero net units: Britney Spears Is a Three-Headed Alien sold 7,269 units and Guns, Drugs & Monsters sold 1,944 units. None of the other four books identified sold ***any*** net copies and thus were not included in Mr. Shatzkin's calculation. (Shatzkin Decl. ¶ 10.)

understanding of science-fiction readers, based on his 50 years of experience in the industry. In his report, for example, Mr. Shatzkin opines that science fiction is a "specialization … that is characterized by customers who make many repeat purchases in the genre." (Shatzkin Rep. at 5.) And as he explained during his deposition, "I know that science fiction, romance, and other genre readers tend to read many books in the same genre and repeat what they do." (Shatzkin Tr. 150:24-151:3). The jury is perfectly entitled to credit Mr. Shatzkin's real-life field experience.

Further, experts routinely provide testimony regarding trends based on experience rather than data (notwithstanding that the only way to know for an absolute fact the number of science-fiction imprints on a particular reader's shelf would be to break into his or her house). *See, e.g.*, *Figueroa v. Boston Sci. Corp.*, 254 F. Supp. 2d 361, 368 (S.D.N.Y. 2003) (data not required because expert may testify based solely on "extensive experience, education, and knowledge in the … field"); *Lidle ex rel. Lidle v. Cirrus Design Corp.*, 2010 WL 2674584, at *6 (S.D.N.Y. July 6, 2010) ("an expert may base his opinion on experience alone") (citation omitted). To the extent Mr. Shatzkin does not cite data about the buying habits of science-fiction readers of the ibooks imprint—despite that such repeat genre-specific purchase patterns comport with his experience—this critique goes to the weight of his testimony, not its admissibility. *Id.*

IV. MR. SHATZKIN'S OPINIONS ABOUT THE GENERAL ABSENCE OF BRAND-BUILDING AMONG BOOK PUBLISHERS ARE RELEVANT AND SUPPORTED

As Mr. Shatzkin's report makes clear, one of his central tasks was to correct Mr. Carpenter's fundamental misunderstanding of the branding principles in the book-publishing industry. For example, as Mr. Shatzkin explains, in publishing, "almost no money is spent -- or has been spent -- creating consumer awareness and recognition of brands." (Shatzkin Rep. at 6; *see also id.* ("Advertising for brand building is virtually non-existent, as is brand-focused marketing.").) Rather, according to Mr. Shatzkin, "[i]f a reader consumes enough books that

deliver a consistent experience under the heading of an author, imprint, series, or company, that heading becomes a brand with meaning." (*Id.* at 6-7.) Thus, according to Mr. Shatzkin, Mr. Carpenter's report is of no value because it fails to understand how brands are built within the unique industry of book publishing. While Apple may disagree with Mr. Shatzkin, whose opinions are based upon, *inter alia*, 50 years in the book-publishing industry (Shatzkin Tr. 193:6-16), such disagreement goes to the weight, not the admissibility, of his testimony.

Recognizing that Mr. Shatzkin's opinions are properly based on his experience, Apple tries to manufacture a contradiction in his testimony by claiming that he admitted at his deposition that other imprints, such as Harlequin, Tor and Baen supposedly engage in "consumer-directed activities" that constitute brand-building of publishers. (Mot. at 21.) Apple is wrong. In his deposition, Mr. Shatzkin testified that highly successful publishing brands such as Harlequin, Tor and Baen, have marketed ***titles*** or ***series of titles*** directly to consumers. As Mr. Shatzkin explained:

> Q [by Ms. Ray]: Is your testimony that publishers do not spend any money creating consumer awareness?
>
> MR. RASKOPF: Objection to the form of the question.
>
> A: No, it is my contention that publishers spend no money creating consumer awareness of brands. ***Publishers spend money creating consumer awareness of titles they're publishing, of content, not of the names of brands.***
>
> Q: Is it your understanding that publishers do not promote individual imprints or brands?
>
> MR. RASKOPF: Objection to the form of the question. You may answer.
>
> A: Unless the imprint or brand has an audience centric component like Dummies the answer is yes, it is my understanding that they never do.
>
> Q: But there might be some publishers for whom there is an audience centric component, correct?

MR. RASKOPF: Objection to the form.

A: Even -- yes, and even when that is true, such as Harlequin, ***we don't often find Harlequin pushing the name Harlequin. They don't need to do it. They do it by publishing books with Harlequin's name on them.***

(Shatzkin Tr. 193:17-194:23 (emphases added).) Thus, as Mr. Shatzkin consistently explains, publishers do not spend money building their publishing brand; they spend money promoting specific ***titles*** or ***series of titles***. Mr. Shatzkin's testimony that Harlequin, Tor and Baen have strong brand identities does nothing to undercut his testimony—they, like ibooks, have acquired secondary meaning in their genre, built upon the promotion and sales of specific titles, ***not*** the name of the publishing house.[24] For this reason, the lack of such expenditures for Plaintiffs' ibooks imprint is thoroughly unremarkable, while simultaneously showcasing Mr. Carpenter's fundamental lack of understanding of book-publishing branding.

CONCLUSION

For the reasons stated above, the Court should deny Apple's motion to exclude any testimony, argument, or evidence regarding the expert report and opinions of Mike Shatzkin.

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Respectfully submitted,

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[24] Even if Apple were correct and Mr. Shatzkin's testimony was somehow contradictory, "inconsistencies in an expert witness's testimony do not implicate *Daubert*, but rather are properly addressed during cross examination." *In re Fosamax Prods. Liab. Litig.*, 2013 WL 76140, at *14 (S.D.N.Y. Jan. 7, 2013).

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