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APPLE INC.

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

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

Plaintiffs,

- against -

APPLE INC.,

Defendant.

Case No. 11-CIV-4060 (DLC)

ECF Case

REDACTED

**DECLARATION OF BONNIE L. JARRETT IN SUPPORT OF
DEFENDANT'S SUMMARY JUDGMENT REPLY BRIEF**

I, Bonnie L. Jarrett, declare as follows:

1. I am an associate at the law firm of Kirkland & Ellis LLP, counsel of record for the Defendant Apple Inc. (“Apple”). I am licensed in the State of New York and admitted to practice before this Court. I submit this declaration in support of the Reply Memorandum of Law in Support of Defendant’s Motion for Summary Judgment.

2. I have reviewed the pleadings, correspondence between the parties, written discovery, and documents and books produced by Plaintiffs and Apple in discovery in connection with this matter. I have attended various conferences before the Court in this matter, as well as the depositions of John T. Colby.

I. THE “I” IN IBOOKS DOES NOT REFER TO “IDEA.”

3. Plaintiffs argue that the “i” in “ibooks” could refer to “idea” (Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment, 9), and cite Mr. Colby’s 30(b)(6) testimony about ads in the back of “ibooks” books that allegedly “reference ibooks in connotation with a new idea that’s brand new for 21st century publishing.” (Plaintiffs’ Statement of Controverted Facts in Opposition to Defendant Apple Inc.’s Rule 56.1 Statement of Undisputed Facts in Support of its Motion for Summary Judgment (the “Statement of Controverted Facts”), ¶ 10.)

4. Plaintiffs did not attach to their Statement of Controverted Facts the ads to which Mr. Colby referred.

5. Apple is not aware of any advertisements for the “ibooks” imprint that refer to “idea,” and Plaintiffs have not brought forth evidence of any such advertisements.

6. An ad appears in the back of Arthur C. Clarke’s Venus Prime 4, printed in 2001, and is attached hereto as Exhibit 1. That ad does not use the word “idea,” but does refer to the web:

Please join us in developing the first new publishing imprint of the 21st century.

We're planning terrific offers for ibooks readers... virtual reading groups where you can chat online about ibooks authors... message boards where you can communicate with fellow readers... downloadable free chapters of ibooks for your reading pleasure... free readers services such as a directory of where to find electronic books on the web... special discounts on books and other items of interest to readers...

The evolution of the book is www.ibooksinc.com.

(Ellipses in original.)

II. PURPORTED ADVERTISEMENTS DEPICTING THE “IBOOKS” IMPRINT.

7. Exhibit 21 to the January 25, 2013 declaration of Partha Chattoraj consists of six documents that Plaintiffs assert are advertisements featuring the “ibooks” imprint.

8. Plaintiffs have not provided any information about where or when (if ever) those “advertisements” appeared, or to whom they were distributed.

9. The first ad prominently features Plaintiff J. Boylston & Company, Publishers’ imprint and logo of a horse-drawn carriage, while “ibooks” is buried in other text.

10. The fourth and fifth ads appear to be directed to the trade, and include the 1-800 number for Ibooks, Inc.’s distributor, Simon & Schuster.

11. The third ad appears to be directed to the United Kingdom trade market, announcing that “ibooks” is “growing in the U.K.!”

12. The second and sixth ads are undated and do not include any information about where or when (if ever) the ads appeared, or to whom they were distributed.

III. THE DECLARATION OF JOHN T. COLBY, JR.

13. I have reviewed the Declaration of John T. Colby, Jr., dated January 25, 2013 (the “Declaration” or the “Colby Dec.”). Excerpts from the July 18 and July 20 depositions are attached hereto behind the tab “Colby 30(b)(6) Dep.” and “Mr. Colby Dep.,” respectively.

14. In his Declaration, Mr. Colby states that in its motion for summary judgment, “Apple insinuates that the ibooks catalog . . . was worthless when I purchased the company.” (Colby Dec., ¶ 36.) Mr. Colby states that “This is false,” and that he was “never given the opportunity to explain the reasoning behind the acquisition or to explain the purchase price.” (*Id.*)

15. Mr. Colby goes on to state in the third sentence of Paragraph 43 of his Declaration: “*I believed the company [Ibooks, Inc.] was worth at least \$500,000* just based on the ibooks catalog (based on actual and forecasted sales, existing inventory, and what Rich [Freese] told me about what buyers thought about the list), but I didn’t have enough sales information on the other aspects of the business—the long-term agreements for other rights—to know how much more value there was. I decided to low-ball the bid, knowing what others did not know. We succeeded in purchasing ibooks for far less than what I thought it was worth at that time.” (Emphasis added.)

16. During his July 20, 2012 deposition, Mr. Colby was asked the following questions, and gave the following answers:

Q. How did you set the price of \$125,000 that you bid to purchase the assets of Byron Preiss Visual Publications and ibooks, Inc.?

A. That was my estimate of the fair market value of the sales potential of the existing inventory in the next two years out.

Q. How did you go about figuring that out?

A. I created a spreadsheet by title, may have described this on Wednesday, by opening inventory, purchases, sales, returns, pending inventory, doing that for units and dollars and then once I figure out the return, return curve, I can also figure out the sales curve. These are all basically signed curves, I won’t go into the math, but they’ll go out 60 cycles, which is in my world five years, and I just forecasted it out knowing what the existing inventory, how long the existing inventory was going to last and then would calculate the required purchases to replenish that inventory. When the inventory ran out—I did that by title—and that spreadsheet gave me the total number that, well, it’s a

forecast and *based on that information I thought that 125 was a fair price. Like a net present value situation.*

Q. Did you allocate any portion of the purchase price to the value of the iBooks mark itself?

A. It was important to know that we had the rights in the mark and that bankruptcy trustee represented to me also the right to Byron Preiss Visual Publications the name to that one too, and to Milk & Cookies Press, that was very important to the marks, that have been mentioned earlier. And the bankruptcy trustee represented to me that those are the marks. And so, okay, I built that into the equation. Otherwise, I, it would have been difficult to value it without those marks. I needed all those marks in place.

(Mr. Colby Dep., 301:5-302:25 (emphasis added).)

IV. COMPARISON OF THE AUGUST SPREADSHEETS AND IBOOKS, INC.'S OFFICE ACTION RESPONSE

17. In a Response to Office Action dated September 4, 2002, Ibooks, Inc. stated: “Additionally, applicant’s mark has been in use since 1999 (an Allegation of Use will be filed shortly). Applicant’s sales have been over \$5,154,493 through June 2002. . . . A Declaration in support of this information will be submitted shortly.” A true and correct copy of the Response to Office Action is attached hereto as Exhibit 2.

18. Neither the Allegation of Use nor the Declaration was submitted to the PTO.

19. In his September 17, 2012 expert report, Robert Scherer stated: “Between 1999 when the mark was first used and June, 2002, plaintiff had iBooks sales of more than \$5,000,000. . . .” A true and correct copy of the cover page and page 35 of Mr. Scherer’s report is attached hereto as Exhibit 3.

20. The set of spreadsheets produced by Plaintiffs on August 20, 2012 (the “August Spreadsheets”) purport to show gross sales for the period 1999 to 2001 of [REDACTED] (See Exhibit 4 hereto.) Thus, the Plaintiffs claim to have earned [REDACTED] more in gross sales in a period that is six months shorter than that reflected in the Response to Office Action. This

further highlights the discrepancy between the sales figures, and thus the unreliability of Plaintiffs' sales figures.

21. I note that the August Spreadsheets lists "Returns" for 1999 to 2001 as zero, apparently because actual returns during that period are unknown. The August Spreadsheets, however, appear to have treated the gross sales for 1999 to 2001 as reflecting net sales for that period.

V. DEPOSITION TRANSCRIPT EXCERPTS

22. Attached hereto behind the tab "Borden Dep." are true and correct copies of excerpts from the transcript of the October 2, 2012 Deposition of Hal Borden, Esq.

23. Attached hereto behind the tab "Colby 30(b)(6) Dep." are true and correct copies of excerpts from the transcript of the July 18, 2012 Deposition of John T. Colby, pursuant to Rule 30(b)(6).

24. Attached hereto behind the tab "Mr. Colby Dep." are true and correct copies of excerpts from the July 20, 2012 Deposition of John T. Colby.

25. Attached hereto behind the tab "Freese Dep." are true and correct copies of excerpts from the transcript of the September 25, 2012 Deposition of Richard Freese.

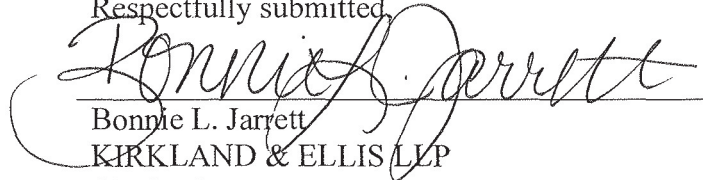
26. Attached hereto behind the tab "Goldhor Dep." are true and correct copies of excerpts from the transcript of the January 31, 2012 Deposition of Richard S. Goldhor, Ph.D.

27. Attached hereto behind the tab "Gundersen Dep." are true and correct copies of excerpts from the transcript of the October 3, 2012 Deposition of Glenn Gundersen, Esq.

28. Attached hereto behind the tab "Kvamme Dep." are true and correct copies of excerpts from the transcript of the September 25, 2012 Deposition of Grace Kvamme.

Date: February 6, 2013

Respectfully submitted,

A handwritten signature in cursive script, reading "Bonnie L. Jarrett", is written over a horizontal line. The signature is fluid and extends slightly above and below the line.

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