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**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**

**MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION TO  
EXCLUDE ANY TESTIMONY, ARGUMENT OR EVIDENCE REGARDING  
THE EXPERT REPORT AND OPINIONS OF SUSAN SCHWARTZ McDONALD**

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## PRELIMINARY STATEMENT

Plaintiffs' Opposition Brief<sup>1</sup> offers little more than the say-so of their own expert, Dr. Susan McDonald, in a circular effort to validate the methodology for her likelihood of reverse confusion survey and belated sur-rebuttal survey. This falls well short of establishing those surveys are reliable and relevant. Moreover, the sur-rebuttal survey, which Plaintiffs call a "supplemental" report, is untimely and improper.

Plaintiffs attempt to justify Dr. McDonald's imaginary stimulus by arguing that (1) it contained contextual information, and (2) books are so different from anything else that standard survey methodology cannot possibly assess confusion in this marketplace, which they self-servingly characterize as "atypical." (Opp., 8.) But it is fundamental that a proper survey must replicate marketplace conditions, regardless of the product. Dr. McDonald made no effort to do so, showing respondents *nothing* concrete—no advertisements, products, websites from which the products could be purchased—and, thus, did not measure "confusion across the range of book experiences." (Opp., 2.) The surveys suffer from additional flaws as well, including (1) failure to use a proper control; (2) failure to ask a relevant question; (3) failure to use a proper universe; (4) deviations from proper survey procedure, such as failing to validate the survey and to exclude atypical respondents; and (5) overall bias, speculation and conjecture.

Dr. McDonald's surveys are quintessential junk science. Plaintiffs cite no cases approving Dr. McDonald's methodology, and Apple is aware of none.

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<sup>1</sup> As used herein, "Opp." or "Opposition Brief" refers to the Memorandum of Law in Opposition to the motion to exclude Dr. McDonald, dated Jan. 25, 2013. "MTE" refers to the Memorandum of Law in Support of the motion to exclude Dr. McDonald, dated Dec. 21, 2013. "Mazzello 2/5 Dec." refers to the Declaration of Mary Mazzello in Support of Defendant's Reply to Plaintiffs' Opposition to the motion to exclude Dr. McDonald, dated Feb. 5, 2013. "Mazzello 12/21 Dec." refers to the Declaration of Mary Mazzello in Support of Defendant's motion to exclude Dr. McDonald, dated Dec. 21, 2012. "Bogdanos Dec." refers to the Declaration of Claudia T. Bogdanos in support of the Opposition Brief, dated Jan. 25, 2012. "Colby Dec." refers to the Declaration of John T. Colby in support of the Opposition Brief, dated Jan. 25, 2012. "McDonald Rep." and "Nowlis Rep." refer to the Expert Reports of Susan Schwartz McDonald, dated Sept. 17, 2012, and Stephen M. Nowlis, dated Oct. 26, 2012, respectively, and attached as Exhibits 9 and 11 to the Mazzello 12/21 Dec. Other capitalized terms are used as defined in the MTE.

## ARGUMENT

### **I. DR. MCDONALD'S IMAGINARY STIMULUS WAS IMPROPER.**

Plaintiffs claim Dr. McDonald's imaginary stimulus was proper because it contains an "appropriate degree" of contextual information given that their imprint and their books' internal pages are displayed inconsistently, and that books differ so much from other "consumption products" that the standard survey methodology applied to goods as varied as lamps, magazines, and t-shirts does not apply to them. (*See Opp.*, 1, 4.) Both arguments are unavailing.

#### **A. Dr. McDonald's Failure To Include Contextual Information Was Improper.**

"[T]he principal question is whether [the surveys] sufficiently simulated the actual marketplace conditions . . . so as to be a reliable indicator of consumer confusion." *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 232 (S.D.N.Y. 2010) ("*THOIP I*"). Plaintiffs claim Dr. McDonald met the requirement to provide contextual information, (*Opp.*, 4), but she admittedly did not include *any* contextual, source-identifying clues, such as the publisher's name, website or address; or the ebooks logo.<sup>2</sup> (*See Mazzello 2/5 Dec.* ¶ 12 ("*McDonald Dep.*"), 193:11-194:11; 175:16-182:11.) She told respondents to *imagine* 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." <sup>3</sup> (*McDonald Rep. App. B*, 4), without providing that information. Merely testing the reaction to a word, devoid of context and source-identifying information that typically appears with the product, is not probative. *See Componentone, L.L.C. v. Componentart, Inc.*, 02: 05CV1122, 2008 WL 4790661, at \*25 (W.D. Pa. Oct. 27, 2008); *Juicy Couture, Inc. v. L'Oreal USA, Inc.*, 04 CIV.7203(DLC), 2006 WL 1012939, at \*25

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<sup>2</sup> Plaintiffs' claim that their light bulb logo is not always seen within their books (*Opp.*, 4 n. 8) contradicts Mr. Colby's 30(b)(6) testimony that the logo appears within all of Plaintiffs' "ebooks" print books and is intended to appear within its e-books. (*See Mazzello 2/5 Dec.* ¶ 13 ("*Colby 30(b)(6) Dep.*") 219:16-20; 221:5-17; 319:19-22.)

<sup>3</sup> Plaintiffs claim Dr. McDonald told respondents to imagine a "copyright page" (*Opp.*, 4, 6), but she did not even do that, instead telling them to imagine an unspecified "particular 'page.'" (*McDonald Rep. App. B*, 4.)

(S.D.N.Y. Apr. 19, 2006); *Pilot Corp. of Am. v. Fisher-Price, Inc.*, 344 F. Supp. 2d 349, 358 (D. Conn. 2004); *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).

Plaintiffs also argue that a single stimulus would have been ineffective because their books contain a variety of information. (Opp., 4-5 & n. 8.) This is nonsense. First, *all* of Plaintiffs' books contain source-identifying information in addition to "ibooks." (Mazzello 2/5 Dec., ¶ 3.) Indeed, Apple is not aware of any book where "ibooks" appears without contextual information. (*Id.*) With rare exceptions, every book that Plaintiffs produced in this case contains at least the following additional information: (1) the publisher's name; (2) its New York location; (3) the publisher's website; and (4) Plaintiffs' "ibooks" logo. (*Id.* ¶ 4-5 & Ex 1.)

Second, Plaintiffs depicted "ibooks" in all lowercase letters until September 2011, when, *after* filing suit, they began depicting it as "iBooks," undoubtedly to more closely match Apple's mark. (*See* Colby Dec. ¶¶ 3-5.) Instead they claim they copied Amazon.com's formulation (*see id.* ¶ 4), but offer no documents showing Amazon unilaterally began referring to the imprint as "iBooks," or regarding their alleged attempt to persuade Amazon not to do so. (*See* Mazzello 2/5 Dec. ¶ 7; Colby Dec. ¶ 4.) It also is absurd to suggest Plaintiffs changed their alleged mark just because Amazon displayed the imprint differently. And if Plaintiffs did change their imprint in September 2011, Mr. Colby was not truthful in his 30(b)(6) deposition on July 18, 2012 when he testified that he "can't think of . . . any other way" in which the imprint was depicted, other than in all lowercase letters. (Colby 30(b)(6) Dep. 319:9-320:5, and Ex. 18 thereto.) In any case, the relevant inquiry is how the mark looked in January 2010 when Apple announced its iBooks app, as subsequent alleged changes are irrelevant to confusion, but may be relevant to Plaintiffs' bad faith. And none of this justifies failing to provide respondents with the information actually seen

in commerce, as even Plaintiffs' expert Dr. Jacoby agreed that "a survey expert should not deprive respondents of contextual clues that might be helpful to them one way or the other in assessing confusion." (Mazzello 2/5 Dec. ¶ 14 ("Jacoby Dep.") 197:25-198:5.)

Plaintiffs claim that the lack of contextual information in the stimulus was proper because (1) the surveys were concerned with "post-sale confusion" and (2) such source-identifying information "would not affect Dr. McDonald's measurement of *affiliation* confusion" (Opp., 6), but both arguments are disingenuous. Only after receiving Dr. Nowlis' rebuttal report did they claim Dr. McDonald tested affiliation and post-sale confusion. In fact, Dr. McDonald's first report is titled "A Survey to Measure Potential Source Confusion Associated with iBooks." (McDonald Rep.) Her report repeatedly states she evaluated confusion as to *source*, and *makes no mention* of affiliation or post-sale confusion. (See McDonald Rep., 7; *id.*, at 12; *id.*, at 1.) In any case, even if she had tested post-sale or affiliation confusion, one must replicate marketplace conditions when measuring post-sale or affiliation confusion and Plaintiffs cite no case to the contrary. See *Juicy*, 2006 WL 1012939, at \*25 (post-sale survey flawed where product not shown as in the marketplace).

**B. Books Should Be Treated The Same As All Other Goods.**

Plaintiffs claim the survey methodology rules applicable to all other "consumables" do not apply to books. (Opp., 8-9.) They rely on the opinions of their purported expert Mike Shatzkin and fact witness Richard Freese to support this proposition, but this is merely an *ex post* justification, as Dr. McDonald did not review their testimony or opinions before preparing her report. (See McDonald Rep., 3; McDonald Dep. 42:22-43:2.) Moreover, even had she relied on them, neither offers any factual support for the argument that books are unique.

Besides books, many other product continues to exist after purchase—cars, clothing, accessories, furniture, and other durables do too—and the same survey principles apply to all of



them. *See, e.g., Am. Footwear Corp. v. General Footwear Co. Ltd.*, 609 F.2d 655, 660 (2d Cir. 1979) (footwear); *THOIP v. Walt Disney Co.*, 788 F. Supp. 2d 168, 181 (S.D.N.Y. 2011) (“*THOIP IP*”) (t-shirts); *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 561-62 (S.D.N.Y. 2007) (handbags); *Juicy*, 2006 WL 1012939, at \*25 (lip gloss); *WE Media*, 218 F. Supp. 2d at 474 (cable network); *Inc. Publ’g Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 393-94 (S.D.N.Y. 1985) (magazines) *aff’d sub nom. Inc. Publ’g Corp. v. Manhattan Magazine*, 788 F.2d 3 (2d Cir. 1986). In fact, *Union Carbide Corp. v. Ever-Ready Inc.*, which set the standard for confusion surveys, involved lamps with “Ever-Ready” stamped on them or on labels attached to them—a product which consumers likely would use almost daily post-sale. *See* 531 F.2d 366, 371 (7th Cir. 1976). Plaintiffs’ argument that books are unique is absurd.

## **II. DR. MCDONALD USED AN IMPROPER CONTROL.**

Plaintiffs claim Dr. McDonald’s control “properly weeded out those respondents who named Apple for reasons unrelated to the mark IBOOKS or its Apple-laden ‘i’ element.” (Opp., 12.) They essentially claim to own the letter “i,” and under their theory could use her survey to support a finding of confusion had Apple adopted *any* i-branded name for its product—iNovel, iText, iApplereader—no matter how dissimilar to “ibooks.” But Plaintiffs’ rights, if any, are not so expansive, and Dr. McDonald’s failure properly to control for the impact of the “i” element fatally undermines her surveys. *See 24 Hour Fitness USA, Inc. v. 24/7 Fitness, LLC.*, 447 F. Supp. 2d 266, 280 (S.D.N.Y. 2007) (“Lifetime Fitness” improper control for “24 Hour Fitness” and “24/7 Fitness”); *Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1045-46 (S.D. Ind. 2000) (control website improperly did not include “Simon” where websites both did).

Plaintiffs’ other survey expert, Dr. Jacoby, readily admitted that one needs to use “i” in the control. (Jacoby Dep. 169:11-22; 176:20-24.) Plaintiffs do not deny that he sought to recant this testimony after speaking to Plaintiffs’ counsel during a deposition break. (*See* MTE, 17 nn.

5, 7; Opp., 13 n. 30.) Plaintiffs admit he changed his testimony after “the affording of new information for consideration” from his counsel in the middle of his deposition. (Opp., 13 n. 30.) Such coaching obviously is improper, and Dr. Jacoby’s initial testimony was clearly correct.

### **III. DR. MCDONALD USED AN IMPROPER QUESTION.**

To test confusion, Dr. McDonald asked only a single question:<sup>4</sup> “[W]hat company or companies would you think had made the book available?” (McDonald Rep. App. B, 4.) This question is too broad because *Apple is an appropriate response* for respondents who are *not* confused, as it makes books available through its iBookstore and its iPhone and iPad devices. Plaintiffs do not dispute this. (Opp., 15.) Nor do they dispute that Dr. Jacoby agreed the question was too ambiguous and too broad to measure confusion. (*See* Jacoby Dep. 247:7-248:7.) Instead, they argue this is “irrelevant” because Dr. McDonald used a control. (Opp. at 15.) But that control is too deeply flawed to account for noise from this improper question. *See THOIP II*, 788 F. Supp. 2d at 182-83 (flawed control did not correct for other deficiencies). Plaintiffs also argue that the question somehow is appropriate because Dr. McDonald was measuring sponsorship or affiliation confusion. (Opp., 14-15.) Even if that were true (in fact, Dr. McDonald’s report states that she was testing *source* confusion (*see supra* Section I(A))), it does not change the fact that Apple is a proper response, such that the question measures nothing probative.

### **IV. DR. MCDONALD SURVEYED THE WRONG UNIVERSE.**

Plaintiffs do not dispute that to qualify for Dr. McDonald’s surveys respondents had to have downloaded a digital book in the past (Opp., 16.), thus excluding those who only read print books. They claim this universe surveyed people whose impressions “would be most

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<sup>4</sup> The survey included two follow-up questions: (1) “Did you specify one (or more) companies in the previous question?” and (2) “Please explain in the box below what makes you think that the company or companies you just mention would have been the one(s) to make the book available.” (McDonald Rep. App. B, at 4.)

meaningful” (*id.*), but the potential purchasers of the senior user’s products are the proper universe in which to test reverse confusion. *See Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, 06 CIV 550 JFK, 2007 WL 2258688, at \*3 (S.D.N.Y. Aug. 6, 2007).

*First*, Plaintiffs do not dispute that [REDACTED] of their sales have been for print books. (*See* Mazzello 12/25 Dec. ¶ 8.) They argue that the digital book industry as a whole has grown (*see* Opp., 17), but do not dispute that print books still are the vast majority of their sales. Further, as the PEW study shows, even if e-book readership is growing, over 70% of adults still read print books exclusively.<sup>5</sup> (*See* Bogdanos Dec., Ex. M at 8.) Dr. McDonald excluded all such readers.

*Second*, Plaintiffs claim it was proper to survey *past purchasers* of books because past behavior predicts future behavior. (Opp., 16-17.) But the case law is clear that past purchasing behavior does not necessarily indicate future behavior and, therefore, a universe based on past behavior alone is improper. *See 24 Hour*, 447 F. Supp. 2d at 280; *Paco*, 86 F. Supp. 2d at 322 n. 17; *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 572 (E.D.N.Y. 1999).

*Third*, Plaintiffs offer no evidence that the survey’s panelists, members of the online panel Research Now, “recently bought or shopped for books,” as they claim, and do not specify what “recently” means, or indicate when respondents last updated their Research Now panel-background data, from which data about shopping behavior was allegedly obtained.<sup>6</sup> (Opp, 16.)

## **V. MYRIAD ADDITIONAL FLAWS PERMEATE DR. MCDONALD’S SURVEY**

Numerous other flaws infect Dr. McDonald’s surveys, which cumulatively raise such doubts about the reliability and relevance of the surveys that they must be excluded. *THOIP II*, 788 F. Supp. 2d, at 183-84; *THOIP I*, 690 F. Supp. 2d at 240; *Kargo*, 2007 WL 2258688, at \*12.

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<sup>5</sup> Plaintiffs claim that an e-book reading universe “was the best possible universe for assessing the confusion likely to arise in this case [because] the real-world marketplace intersection of [Plaintiffs’ and Apple’s products] is people who read digital books.” (Opp., 18.) In fact, using a universe where confusion is likely to arise is improper. *See Paco Sport, Ltd. v. Paco Rabanne Parfums*, 86 F. Supp. 2d 305, 322 n. 17 (S.D.N.Y. 2000), *aff’d* 234 F.3d 1262 (2d Cir. 2000). Moreover, Plaintiffs offer no evidence that confusion would be different in the digital space.

<sup>6</sup> Plaintiffs refused to produce information about Research Now and its panelists. (*See* Mazzello 2/5 Dec., Exs. 2-3.)

*First*, Plaintiffs admit Dr. McDonald did not validate her survey but assert, based solely on her testimony, that validation is unnecessary in the internet context. (Opp., 22.) This is wrong.<sup>7</sup> See Bruce Isaacson, Jonathan D. Hibbard, & Scott D. Swain, 26 NO. 3 Intell. Prop. L. Newsl. 1, 13 (ABA Spring, 2008) (“The need for validation still exists in an online context”).

*Second*, Plaintiffs admit Dr. McDonald did not exclude professional survey takers, marketing professionals, or those with book industry experience. (Opp., 22-23.) Such respondents should be excluded from a survey (*see* William G. Barber, *The Universe, in Trademark and Deceptive Advertising Surveys* 27, 49 (Shari Seidman Diamond & Jerre B. Swann eds. 2012)), and Plaintiffs cite no authority to the contrary. Indeed, even Dr. Jacoby agreed that such respondents should be excluded. (*See* Jacoby Dep. 152:2-11; 321:9-324:15.)

*Third*, Plaintiffs admit Dr. McDonald did not instruct respondents not to guess. (Opp., 23.) Guessing is improper—surveys measure what consumers believe to be true, not what they guess is accurate. *See Malletier*, 525 F. Supp. 2d at 568-69; *Cumberland*, 32 F. Supp. 2d at 572. Moreover, contrary to Plaintiffs’ assertions, Dr. McDonald’s faulty control cannot counteract this error. *See THOIP II*, 788 F. Supp. 2d at 182-83.

*Fourth*, although Plaintiffs claim the gratuitous reference to smartphones in the screener questions was included only to “obtain a complete sample of respondents within the universe parameters,” this rings false, as no other reading devices were mentioned. (*See* Opp., 24-25; McDonald Rep. App. B.) Nor can Plaintiffs rely on their deeply flawed control to neutralize the priming effect of that reference. *See THOIP II*, 788 F. Supp. 2d at 182-83.

*Fifth*, Plaintiffs do not deny Dr. McDonald’s survey samples did not reflect e-book

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<sup>7</sup> Indeed, Research Now itself uses various measures to validate surveys conducted through its website. (*See* Bogdanos Dec. Ex. P, ¶ 24). Most of those were not applied to Dr. McDonald’s surveys because Research Now only provided the panelists; it did not administer the survey. (*See* McDonald Rep., at 10; *see also* Bogdanos Dec., Ex. P, ¶ 24.) The survey was administered on the National Analysts Worldwide website (*see* McDonald Rep., at 10), and Plaintiffs have offered no information regarding what validation procedures were taken there, if any.

purchaser demographics, instead arguing her surveys could be applied to any demographic. (Opp., 25.) But the sampling frame must reflect the demographics of the entire universe *before* the survey is administered, not after, when one could pick and chose which responses to include in the data subset that accurately reflects the universe’s demographics. *See* Barber, at 48.

**VI. DR. MCDONALD’S SURVEY WAS BIASED, HER CONCLUSIONS WERE SPECULATIVE, AND HER MARKETING OPINIONS WERE UNSUPPORTED.**

Plaintiffs do not dispute Dr. McDonald formed an “ingoing proposition” or “preliminary evaluation” regarding the likelihood of confusion *before* developing her survey. (Opp., 20-21.) Instead, they argue, with no case law or academic support, that this was acceptable because she was hired as a marketing *and* a market-research expert. (*See id.* at 20) But that cannot excuse her failure to conduct an objective survey. *See Malletier*, 525 F. Supp. 2d at 569-70; 603 (excluding non-objective survey). Even Plaintiffs admit that “[h]ad Dr. McDonald’s role been purely to field and report survey data, a *pre hoc* inference may have had no place . . . .” (Opp., 20.) There is no reason not to apply this rule just because Dr. McDonald is wearing two hats.

Nor do Plaintiffs dispute that her numerous anti-Apple references, such as accusing Apple of “commandeer[ing]” and “coopt[ing]” the letter ‘i’ (McDonald Rep., 2, 5), indicate anti-Apple bias, stating only that Dr. McDonald’s *pre-formed* opinion on confusion does not indicate bias or speculation (*see* Opp., 19). As Dr. Nowlis explained, the anti-Apple bias infected her surveys and was apparent in every choice she made, from the report’s language to her decision to ignore standard methodology. (*See* Nowlis Rep. ¶¶ 11, 18-23.)

Plaintiffs admit Dr. McDonald did not research Apple’s branding activities or Plaintiffs’ business before developing her “marketing opinion,” relying exclusively on the Complaint and information from counsel. (*See* Opp., 20 n. 51.) Nor do they dispute that although she is not a publishing industry expert, she formed her opinions about the future of publishing based on her

“professional experience.” (*See id.*) Instead, they brush off these flaws as “of no consequence . . .” (*Id.*) But expert testimony should be excluded when, as here, it is purely speculative, conjectural, and based only on a cursory review of the record.<sup>8</sup> *See Weiner v. Snapple Beverage Corp.*, 07 CIV. 8742 DLC, 2010 WL 3119452, at \*7 (S.D.N.Y. Aug. 5, 2010).

## **VII. DR. MCDONALD’S SUR-REBUTTAL WAS NOT A PROPER SUPPLEMENT.**

Plaintiffs claim Dr. McDonald’s untimely sur-rebuttal supplements her initial report, she “was unaware that two presentations of the imprint name existed” when she did her first survey, and the sur-rebuttal was necessitated by supposed “new understanding” of how the mark was depicted.<sup>9</sup> (*See Opp.*, 1 n. 1.) This cannot be true, as the imprint is depicted as “ibooks” in the Complaint and its exhibits, which she admittedly reviewed *before* conducting her first survey. (*See McDonald Dep.* 26:21-27:6.) *See Sandata Technologies, Inc. v. Infocrossing, Inc.*, No. 05 Civ. 09546, 2007 WL 4157163, at \*4-9 (S.D.N.Y. 2007) (precluding allegedly “supplemental” reports which were untimely and responded to criticism by opposing party’s expert).

Clearly, Plaintiffs only offered the sur-rebuttal survey because they realized that the initial survey had surveyed the wrong mark as Plaintiffs admittedly switched to “iBooks” only after Apple commenced use and, thus, their use of that formulation is legally irrelevant to confusion. Plaintiffs’ untimely sur-rebuttal should not be permitted to correct this error.

## **CONCLUSION**

Apple respectfully requests that this Court grant Apple’s motion to exclude Dr. McDonald and deny Plaintiffs’ request for a hearing on this matter.

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<sup>8</sup> Plaintiffs claim Dr. Nowlis could not point to any instances of bias in Dr. McDonald’s presentation of her survey data (*see Opp.*, 21-22), but the testimony shows that he could not point to an instance of “dramatic rhetoric” from pages eight to seventeen of her report (*see Mazzello* 2/5 Dec. ¶ 15 (Nowlis Dep.) 110:8-16). Dr. Nowlis was not asked about pages one through seven, which were replete with anti-Apple assertions. (*See id.* at 106:8-24.)

<sup>9</sup> Plaintiffs claim the difference in capitalization did not matter because both the sur-rebuttal survey and initial survey had confusion rates of 53%. (*See Opp.*, 4-5 n. 8.) The numbers reported in the sur-rebuttal report show its confusion rate was 51% (*see Mazzello* Dec. ¶¶ 8-11), 2 percentage points less than the confusion rate for the initial survey, suggesting the change in the mark’s formulation had an impact, even when shown devoid of context.

Date: February 5, 2013

Respectfully submitted,

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