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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

**DECLARATION OF MARY MAZZELLO IN SUPPORT OF
DEFENDANT’S REPLY TO PLAINTIFFS’ OPPOSITION TO DEFENDANT’S
MOTION TO EXCLUDE THE EXPERT REPORT AND TESTIMONY
OF DR. SUSAN SCHWARTZ MCDONALD**

I, Mary Mazzello, declare as follows:

1. I am an associate at the law firm of Kirkland & Ellis LLP. I am duly licensed in the State of New York. I submit this declaration in support of Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Exclude the Expert Testimony of Dr. Susan Schwartz McDonald.

Source-Identifying Information within Plaintiffs' Books

2. I have reviewed the books produced by Plaintiffs in this case.

3. All of the books Plaintiffs produced in this litigation contain source-identifying information in addition to the word "ibooks." I am not aware of any book published by Plaintiffs in which the word "ibooks" appears alone, without surrounding contextual information.

4. Based on my review, with rare exceptions, every book that Plaintiffs produced contains at least the following information: (1) the publisher's name; (2) the publisher's New York location; (3) the publisher's website; and (4) Plaintiffs' "ibooks" logo.

5. Annexed hereto as Exhibit 1 are true and correct copies of the copyright and title pages of several of Plaintiffs' books.

Plaintiffs' Choice to Begin Displaying their Imprint as "iBooks"

6. Plaintiffs allege that they began depicting their imprint as "iBooks" because Amazon.com began depicting the imprint in this way and Mr. Colby's efforts to get Amazon to depict the mark as "ibooks" failed. (*See* Colby Dec. ¶¶ 4-5.)

7. I have reviewed Plaintiffs' production and I am unaware of any documents they have produced showing that Amazon unilaterally began referring to the imprint as "iBooks." I also am unaware of any documents Plaintiffs have produced regarding their alleged attempt to persuade Amazon not to display the name as "ibooks."

Calculation of the Confusion Rate in the Sur-rebuttal Survey

8. Dr. McDonald stated that in her sur-rebuttal report that 55% of respondents in the test group named Apple or iTunes and no other company while 2% in the control group named Apple or iTunes and no other company. (McDonald Sur-Rebuttal Rep., 3.) Thus, she calculated a confusion rate of 53% ± 6%. (*Id.*)

9. Based on Tables II-3 and II-4 of Dr. McDonald's sur-rebuttal report, only 157 of 294 people in the test group of Dr. McDonald's sur-rebuttal survey named Apple or iTunes and no other company as the source of the product. (McDonald Sur-Rebuttal Rep., 4-5.) Based on my calculation, this is 53.4%, not 55% as Dr. McDonald reported (*Id* at 3.).

10. After subtracting the control rate of confusion from 53.4%, the net confusion rate is 51.4%, or 51% rounding to the nearest whole number, not 53% as Dr. McDonald reported. (*Id.*)

11. The net rate of confusion includes all individuals whom Dr. McDonald counted as confused, including individuals who guessed or named Apple only because of the letter "i."

Deposition Testimony

12. Annexed hereto behind the tab "McDonald Dep." is a true and correct copy of excerpts from the Deposition of Dr. Susan Schwartz McDonald dated December 12, 2012.

13. Annexed hereto behind the tab "Colby 30(b)(6) Dep." is a true and correct copy of excerpts from the 30(b)(6) Deposition of John T. Colby dated July 18, 2012 and Exhibit 18 thereto.

14. Annexed hereto behind the tab "Jacoby Dep." is a true and correct copy of excerpts from the Deposition of Dr. Jacob Jacoby dated December 6, 2012.

15. Annexed hereto behind the tab "Nowlis Dep." is a true and correct copy of excerpts from the Deposition of Dr. Stephen M. Nowlis dated December 14, 2012.

Documents

16. Annexed hereto as Exhibit 2 is a true and correct copy of the letter from counsel for Apple to counsel for Plaintiffs dated December 18, 2012 and requesting documents related to Research Now and Dr. McDonald's survey.

17. Annexed hereto as Exhibit 3 is a true and correct copy of the letter from counsel for Plaintiffs to counsel for Apple dated December 21, 2012 and responding to Apple's December 18, 2012 letter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of February 2013 in New York, NY.

A handwritten signature in cursive script, appearing to read "Mary Mazzello", written over a horizontal line.

Mary Mazzello