

Dale M. Cendali
Claudia Ray
Bonnie L. Jarrett
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022

Perry J. Viscounty
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025

Jennifer L. Barry
LATHAM & WATKINS LLP
600 West Broadway, Suite 1800
San Diego, CA 92101-3375

Attorneys for Defendant
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 REPLY BRIEF IN SUPPORT OF MOTION TO EXCLUDE ANY
TESTIMONY, ARGUMENT OR EVIDENCE REGARDING
THE EXPERT REPORT AND OPINIONS OF MIKE SHATZKIN**

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 by Plaintiffs and Apple in discovery in connection with this matter.

I. THE TIME PERIOD COVERED BY THE SHATZKIN SPREADSHEET.

3. I attended the deposition of Mike Shatzkin on December 4, 2012, and have reviewed the transcript of that deposition. True and correct copies of excerpts from the transcript of the December 4, 2012 Deposition of Mike Shatzkin are attached hereto behind the tab “Shatzkin Dep.”

4. Mr. Shatzkin repeatedly testified that he understood that the spreadsheet upon which he relied in connection with his expert report (the “Shatzkin Spreadsheet”) showed sales of “ibooks” books from approximately 2000 to 2004. (*See* Shatzkin Dep., at 71:9-18; 141:7-16; 151:21-154:3; 159:25-160:4; 165:11-14; *see also* Expert Report of Mike Shatzkin, dated Oct. 26, 2012, excerpts from which are attached hereto as Exhibit 1 (the “Shatzkin Report”), at 8.)

5. Plaintiffs’ counsel never asked Mr. Shatzkin about his understanding of the Shatzkin Spreadsheet or sought to correct that understanding in any way during his deposition, including during their own questioning of him.

6. Mr. Shatzkin did not correct this understanding when he reviewed and signed his deposition transcript. *See* Jurat and Errata Sheet, dated Dec. 17, 2012, attached hereto as Exhibit

2.

II. CALCULATION OF NET REVENUES REFLECTED IN THE SHATZKIN SPREADSHEET.

7. The Shatzkin Spreadsheet is an Excel spreadsheet that Plaintiffs produced in its native electronic form. A DVD containing the Shatzkin Spreadsheet is attached as Exhibit 26 to my December 21, 2012, declaration.

8. The Shatzkin Spreadsheet contains 70 columns, labeled A through BR, and 4,237 rows of data. The Shatzkin Spreadsheet appears to contain information about not only the “ibooks” imprint, but also several other imprints owned by Plaintiffs, including Brick Tower Press, Milk and Cookies Press, and Byron Preiss Visual Publications.

9. The Shatzkin Spreadsheet also includes, in a separate tab, a list of “BISAC codes,” which apparently correspond to different book genres. Based on my review of the BISAC codes, the codes FIC028000, FIC028010, FIC028020, FIC028030, and FIC028040 apparently are used for science fiction books. The BISAC codes are included in the 70-column portion of the Shatzkin Spreadsheet under the heading “Department.”

10. The Shatzkin Spreadsheet is undated, and does not appear to include information about when the purported sales occurred. The columns in the spreadsheet are not clearly labeled, but instead include column headings such as “TTD#Out” and “TTD\$Out.” The Shatzkin Spreadsheet does not appear to include columns for net sales (in units or dollars), nor does it include grand totals for any of the columns of information set forth therein.

11. In Paragraph 49 of my December 21, 2012 declaration, I stated that the Shatzkin Spreadsheet reflects net revenues of [REDACTED]. Plaintiffs have asserted that Apple has “provide[d] absolutely no explanation for how it arrived at its net sales calculation for the Shatzkin Spreadsheet,” and that they “are therefore at a complete loss as to where this number comes from, other than Apple’s counsel’s *ipse dixit*.” (Memorandum of Law in Opposition to

Defendant's Motion for Summary Judgment to Exclude Any Testimony, Argument or Evidence Regarding the Expert Report and Opinions of Mike Shatzkin, dated Jan. 25, 2013, at 10.)

12. At the time of my December 21, 2012 declaration, and as discussed in greater detail below, it was my understanding that the Shatzkin Spreadsheet covered approximately 2000 to 2004.

13. I determined that the difference between the net revenues reflected in the Shatzkin Spreadsheet and the net revenues set forth in the set of spreadsheets produced by Plaintiffs on August 20, 2012 (the "August Spreadsheets") for the four-year period from 2000 to 2004 is [REDACTED]. A step-by-step explanation of my calculations is set forth below. (A true and correct copy of the one-page worksheet entitled "J. Boylston & Company, Publishers Consolidated Income Statement by Title Imprint" that was included with the electronic version of the August Spreadsheets is attached hereto as Exhibit 3. (The same document was also attached as Exhibit 23 to my December 21, 2012 declaration.)

14. Based on Plaintiffs' statement that the Shatzkin Spreadsheet covers 1999 to early 2012, and not 2000 to 2004, I have now compared the net revenues set forth in the Shatzkin Spreadsheet to the net revenues set forth in the August Spreadsheets, which purports to include sales from 1999 to April 2012.

15. I determined that the difference between the net revenues reflected in the Shatzkin Spreadsheet and the net revenues reflected in the August Spreadsheets is [REDACTED]. A step-by-step explanation of my calculations is set forth below.

A. Calculation of Net Revenues Set Forth in the Shatzkin Spreadsheet

16. In order to determine the net revenues reflected for all "ibooks" books shown on the Shatzkin Spreadsheet, regardless of genre, I first deleted all other imprints (such as Brick Tower Press).

17. Mr. Shatzkin apparently relied on the sales and returns by units in the “TTD#Out” and “Return#In” columns to determine that [REDACTED] units of “ibooks” books in the science fiction genre were sold. (See Shatzkin Report, at 1, 5.) I confirmed this by deleting the information for other imprints and other genres from the Shatzkin Spreadsheet and then calculating the difference between the sum total of the “TTD#Out” column and the sum total of the “Return#In” column, which was [REDACTED] units.

18. I added the amounts shown in the columns “TTD\$Out” and “Return\$In.” I added those columns because the use of the dollar sign in the column headings seemed to indicate that the numbers in those columns reflected sales and returns in dollars that corresponded to the sales and returns in units reflected in the “TTD#Out” and “Return#In” columns. The sum total of the “TTD\$Out” column was [REDACTED] and the sum total of the “Return\$In” column was [REDACTED].

19. When the “Return\$In” figure is deducted from the “TTD\$Out” figure, the net amount is [REDACTED]. That is the amount set forth in Paragraph 49 of my December 21, 2012 declaration as reflecting total net sales of all books on the Shatzkin Spreadsheet.

B. Calculation of Net Revenues Set Forth in the August Spreadsheets for 2000 to 2004

20. At the time I submitted my December 21, 2012 declaration, it was my understanding (based on Mr. Shatzkin’s report and the testimony he gave at his deposition, which I attended), that the Shatzkin Spreadsheet reflected sales of “ibooks” books from approximately 2000 to 2004.

21. The August Spreadsheets contain a row labeled “Gross Sales (iBooks)” and columns labeled “Total 2000,” “Total 2001,” “Total 2002,” “Total 2003,” and “Total 2004,” each of which reflects a dollar figure.

22. In an effort to do an “apples to apples” comparison of the net revenues set forth in the Shatzkin Spreadsheet to those set forth in the August Spreadsheet, I added the dollar figures for the columns labeled “Total 2000,” “Total 2001,” “Total 2002,” “Total 2003,” and “Total 2004” for the row labeled “Gross Sales (iBooks)” on the August Spreadsheets. The sum total of those amounts was [REDACTED], reflecting what appears to be the total net sales for the period 2000-2004 as set forth in the August Spreadsheets. I note that although there is a row labeled “Returns (iBooks) 1999-2004 Unknown” in the August Spreadsheets, for each of the columns for 2000 to 2004, the amount listed is zero.

C. Calculation of Net Revenues Set Forth in the August Spreadsheets for 1999 to April 2012

23. To determine the net revenues for 1999 to April 2012 reflected in the August Spreadsheets, I added the amounts set forth in the row labeled “Gross Sales (iBooks)” for *all* of the columns in the August Spreadsheets. The sum total of those amounts is [REDACTED].

24. I then added the amounts set forth in the row labeled “Returns (iBooks) 1999-2004 Unknown” for all of the columns in the August Spreadsheets. The sum total of those amounts is [REDACTED].

25. To determine total net revenues for the entire period reflected in the August Spreadsheets, I then deducted the total returns (*i.e.*, [REDACTED]) from the total gross sales (*i.e.*, [REDACTED]) that I had previously calculated. Based on that calculation, the total net revenues for 1999 to April 2012, as shown as on the August Spreadsheets, is [REDACTED].

D. Differences Between the Shatzkin Spreadsheet and the August Spreadsheets.

26. Using the figures described above, if the Shatzkin Spreadsheet covers 2000 to 2004, the difference between the net revenues reflected in the Shatzkin Spreadsheet for that time

period (*i.e.*, [REDACTED]) and those reflected in the August Spreadsheets for the same time period (*i.e.*, [REDACTED]), is [REDACTED].

27. Using the figures described above, if the Shatzkin Spreadsheet covers 1999 to early 2012, the difference between the net revenues reflected in the Shatzkin Spreadsheet for that time period (*i.e.*, [REDACTED]) and those reflected in the August Spreadsheets for the same time period (*i.e.*, [REDACTED]) is [REDACTED].

III. MR. SHATZKIN HAS NOT ACCOUNTED FOR DUPLICATE TITLES.

28. In his declaration, Mr. Shatzkin explains that he included duplicate ISBNs in his original analysis of the Shatzkin Spreadsheet. (*See* Declaration of Mike Shatzkin, dated Jan. 25, 2013, ¶¶ 8-9.) Mr. Shatzkin's does not explain how he determined that "the Shatzkin Spreadsheet lists approximately 559 unique ISBNs." (*See id.*, ¶ 9.)

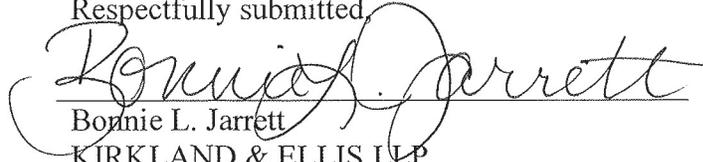
29. Mr. Shatzkin's declaration makes no mention of duplicate *titles*, and it therefore appears that Mr. Shatzkin still includes duplicate titles in his analysis. For example, the Shatzkin Spreadsheet includes at least three listings for "BATTLESTAR GALACTI." Mr. Shatzkin apparently accounts for the fact that one of those listings should not be counted because it has a duplicate ISBN, but fails to account for the fact that the third listing is actually the same title (listed on Amazon as "Resurrection (Battlestar Galactica)"), albeit with a different ISBN, apparently because one version is in hardcover and the other is in paperback. Listings from Amazon.com for "Resurrection (Battlestar Galactica)," with the titles and ISBNs highlighted are attached hereto as Exhibit 4.

IV. DEPOSITION EXCERPTS

30. 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).

Date: February 5, 2013

Respectfully submitted,

A handwritten signature in cursive script that reads "Bonnie L. Jarrett". The signature is written in black ink and is positioned above a horizontal line.

Bonnie L. Jarrett
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: 212-446-4800
Fax: 212-446-4900

ATTORNEY FOR DEFENDANT