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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 JENNIFER L. BARRY IN SUPPORT OF DEFENDANT'S
MOTION TO EXCLUDE ANY TESTIMONY, ARGUMENT OR EVIDENCE
REGARDING THE EXPERT REPORTS AND OPINIONS OF ROBERT T. SCHERER**

I, Jennifer L. Barry, declare as follows:

1. I am a partner at the law firm of Latham & Watkins LLP. I am counsel for Defendant Apple, Inc. (“Apple”) in this action. I am admitted Pro Hac Vice in the Southern District of New York. I submit this declaration in support of Defendant’s Motion to Exclude Any Testimony, Argument or Evidence Regarding the Expert Reports and Opinions of Robert T. Scherer.

2. The facts set forth in this declaration are based on my personal knowledge.

3. Attached hereto as Exhibit 1 is the Expert Report of Robert T. Scherer, dated September 17, 2012 (the “Scherer Report”).

4. Attached hereto as Exhibit 2 is the Expert Rebuttal Report of Robert T. Scherer, dated October 26, 2012 (the “Rebuttal Report”).

5. Attached hereto as Exhibit 3 are excerpts from the transcript of the November 16, 2012 Deposition of Robert Scherer, with the relevant lines bracketed.

6. Attached hereto as Exhibit 4 is an excerpt from the transcript of the November 6, 2012 Deposition of Siegrun Kane, with the relevant lines bracketed.

7. Apple acquired all rights Family Systems had in the IBOOK mark. Family Systems’ IBOOK registration in the European Union had expired before Apple entered into the Assignment Agreement with Family Systems. Attached hereto as Exhibit 5 is a Westlaw record of the Community Trademark Registration No. 001018555 which shows the registration expired.

8. The specimen filed in connection with Apple’s Combined Declaration of Use and Renewal shows that Apple’s IBOOKS software allows a user to create an electronic book that can be read on an Apple device, and that the software also allows a user to modify and interact with the book. Attached hereto as Exhibit 6 is the specimen filed in connection with such submission.

9. Apple’s Senior Product Line Manager, Mr. Steve Gedikian, and in-house counsel, Ms. Lisa Widup, testified that the IBOOKS software allows a user to create, modify and interact with an electronic book. Attached hereto as Exhibit 7 are excerpts from the transcript of the

September 21, 2012 Deposition of Lisa Widup, with the relevant lines bracketed. Attached hereto as Exhibit 8 are excerpts from the transcript of the September 27, 2012 Deposition of Steve Gedikian, with the relevant lines bracketed.

10. During the February 27, 2012 Status Conference for this case, Judge Forrest stated that “the trademark expert . . . wouldn’t be able to go through and do whether or not there has been fraud on the Trademark Office or anything like that.” Attached hereto as Exhibit 9 is an excerpt from the transcript of the February 27, 2012 Status Conference.

11. Plaintiffs previously sought discovery into trademarks unrelated to this case. Attached hereto as Exhibit 10 is the Endorsed Letter including Plaintiffs’ arguments for such discovery, dated August 1, 2012. These arguments were rejected by Judge Batts, Judge Forrest and Judge Cote. Attached hereto as Exhibit 11 is Judge Forrest’s Motion Denial, dated January 9, 2012. In fact, the Court granted the parties’ request to adjourn time for Apple to rebut Plaintiffs’ damages expert opinion because the expert relied on information about Apple’s other trademarks. Attached hereto as Exhibit 12 is the Endorsed Letter, dated October 1, 2012.

I declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct. This declaration was executed on December 21, 2012.



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