

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JT COLBY AND COMPANY, INC., D/B/A
BRICK TOWER PRESS, J. BOYLESTON AND
COMPANY PUBLISHERS, LLC, AND
IPICTUREBOOKS, LLC,

Plaintiffs,

-against-

Index No.
11-CV-4060 (DLC)

APPLE, INC.,

Defendant.

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VIDEOTAPED DEPOSITION OF
SUSAN SCHWARTZ MCDONALD

New York, New York

December 12, 2012, 9:56 a.m.

Reported By:

Nicole Sesta

Ref: 8606

1 S. Schwartz McDonald

2 reviewed the deposition of Dr. Jacoby.

3 Q Okay. Did you review any of
4 plaintiffs' marketing materials?

5 MR. RASKOPF: Objection to
6 the form.

7 A I'm not sure what you mean by
8 "marketing materials." So at the moment, I'm
9 going to have to say no pending some
10 clarification on that.

11 Q Okay. Other than the complaint,
12 did you review any -- in the documents you
13 previously identified, did you review any other
14 documents relating to plaintiffs' business?

15 MR. RASKOPF: Objection to
16 the form.

17 A Not that I'm aware of.

18 Q Do you know how much money
19 plaintiffs have spent on advertising since it
20 acquired the iBooks imprint in 2006?

21 MR. RASKOPF: Objection to
22 the form.

23 A I have no idea.

24 Q Do you know whether it was
25 collectively less than \$50,000 during this

1 S. Schwartz McDonald

2 entire six-year period?

3 MR. RASKOPF: Objection to
4 the form.

5 A One, I would have no way of
6 knowing, and two, I would really have no way of
7 putting whatever number it was in context given
8 the nature of, quote, advertising in the
9 publishing industry and the way that publishers
10 communicate with the trade and with
11 distributors, so...

12 Q But you're not an expert in the
13 publishing industry as we discussed, right?

14 A And that's precisely why I said
15 what I did, because I have no way of putting it
16 in context.

17 Q Fair enough.

18 And do you have any idea what the
19 average annual sales figures have been for
20 plaintiffs for books bearing the iBooks' imprint
21 since 2006?

22 A I don't know, no.

23 Q Do you have an idea as to whether
24 they have ever sold more than \$100,000 worth of
25 books in a year?

1 S. Schwartz McDonald
2 are not questions. And in fact, the question
3 associated with research is, is my hypothesis
4 true or not. So --

5 Q Isn't it true that you wrote that
6 your survey concerns --

7 MR. RASKOPF: I'm sorry.
8 Did you finish your question? The
9 word "so" was out there --

10 THE WITNESS: It was.

11 MR. RASKOPF: And all of a
12 sudden another question.

13 THE WITNESS: It was.

14 A I'm sorry. I think that, at least
15 for the moment, that I had answered the
16 question, but, you know, perhaps we ought to
17 reread the question unless you're satisfied with
18 the answer.

19 Q Isn't it true that you wrote this
20 report championing plaintiffs' cause as if you
21 were a lawyer and did not write your report as a
22 dispassionate survey expert commonly reporting
23 on the results of her work?

24 MR. RASKOPF: Objection to
25 the form of the question.

1 S. Schwartz McDonald

2 A I'd like to parcel out all those
3 assertions in your question.

4 First of all, I think I answered
5 this before, but with all due respect to
6 attorney, I would not have described myself as
7 writing this as if I were an attorney. Nothing
8 I read in any legal cases ever sounds quite like
9 the way I write. And I think what I sounded
10 like and the way I wrote it, at any rate, was in
11 the voice of a marketing consultant and
12 marketing expert who is free and, in fact, who
13 is professionally empowered and required to do
14 her job, generally, to form inferences and
15 interpretations of the world around her. And
16 so, based on that, I entered into this scenario
17 with a hypothesis, which I tested. I believe
18 that my reporting of the data was extremely
19 dispassionate. I think it was extremely neutral
20 in its language. And I think that that may
21 answer all of the elements of your question, but
22 if not, we can return to some of the --

23 Q Didn't you say --

24 A -- the phrases.

25 Q Didn't you say that your survey

1 S. Schwartz McDonald

2 confirmed your opinion?

3 MR. RASKOPF: Objection to
4 the form.

5 A I would have to see the sentence
6 before I stipulate to that, but I freely concede
7 that the survey confirmed my hypothesis.

8 Q Turn to page 1 of your survey
9 report, Exhibit 1. On the first page of your
10 survey, you wrote, "The survey", in the second
11 paragraph, "The survey confirms my opinion that
12 since early 2010 iBooks has become a strong
13 identifier for Apple," and it continues.

14 Do you see that?

15 A Yes, I do.

16 Q So you constructed a survey that
17 confirmed your prior opinion, isn't that true?

18 MR. RASKOPF: Objection to
19 the form.

20 A Once we are in the context of
21 research, it should be stated as a hypothesis
22 and it was. It was a hypothesis which could
23 have been disproved, it wasn't. I absolutely --
24 and I want to be very clear about this. I was
25 not retained only as a survey expert. I was

1 S. Schwartz McDonald

2 retained as a marketing expert. I was retained
3 as a brand expert, who forms opinions all the
4 time, offers her clients consultation -- and
5 clients of all kinds, I would add, not just
6 pharmaceutical companies, but well-known brands
7 outside that arena -- someone who is retained to
8 offer them opinions and advice. I was retained
9 with that mission in mind, and because I also
10 happen to be a survey expert who does literally
11 hundreds of surveys in the course of a year or
12 two, I was also charged with responsibility for
13 proving or disproving the hypothesis that arose
14 in a research context from my opinions.

15 Q Dr. McDonald, you wrote, "The
16 survey confirms my opinion." Do you see that?

17 A Yes, I do.

18 Q Were you being truthful when you
19 wrote that?

20 A Absolutely.

21 Q And isn't it true that prior to
22 conducting your survey, you had formed an
23 opinion that there was a likelihood of
24 confusion?

25 MR. RASKOPF: Objection.

1 S. Schwartz McDonald

2 the form.

3 A I think that it ultimately, the
4 only thing that a witness who was retained by a
5 particular partisan in a case, the only thing
6 that a witness can do really is avail himself or
7 herself of the facts at her disposal. So
8 obviously, I don't know what Apple's defense
9 will be in that regard. I've already told you
10 that I don't know any Apple fact witnesses.
11 Apple has not told me their side of the story.
12 So based on the information available to me,
13 that's the conclusion that I draw.

14 Q So when you say that you were
15 retained as a marketing expert in this case not
16 just as a survey expert in this case, what was
17 the basis of your opinions with regarding the
18 marketing aspects of your opinion?

19 MR. RASKOPF: Objection to
20 the form.

21 A It was several things. One, of
22 course, the cyber, digital environment that
23 envelopes us all is one that I think any
24 sentient consumer is fairly aware of. It's
25 certainly a marketer, probably more keenly so.

1 S. Schwartz McDonald

2 I am a person who consults extensively on brand
3 development, on the health and evolution of
4 brands, a life cycle management of brands, not
5 just in the pharmaceutical industry, but outside
6 it. And although I am absolutely not a
7 publishing expert and I have disclaimed that, I
8 feel qualified to form observations and arrive
9 at opinions about the importance of the "I"
10 prefix to the Apple branding strategy, even
11 though I've never worked with Apple. I'm not in
12 their staple of consultants.

13 Q Okay. When you formed your
14 opinions with regard to what you call the
15 marketing portions of your report, did you rely
16 on any documents that were produced in discovery
17 by either party?

18 MR. RASKOPF: Objection to
19 the form of the question.

20 A Well, I think I mentioned that the
21 complaint was available to me. I believe I
22 mentioned, also, that the trademark office, the
23 Apple answer and the letter from the government
24 trademark office was also available to me, and I
25 believe in that dialogue between them that there