

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Dallas Division**

**M3Girl Designs, LLC
Plaintiff,**

vs.

**Blue Brownies, LLC
Charlotte Liles,
Krista Dudte, and
Robert Dudte
Defendants.**

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CIVIL ACTION NO. 3-09cv2390-F

**PLAINTIFF’S DAUBERT MOTION TO EXCLUDE PROPOSED
FEBRUARY 28, 2012 COPYRIGHT EXPERT TESTIMONY OF
MR. TED LEE**

Comes Now Plaintiff M3 Girl Designs to file a *Daubert* Motion to Exclude the February 28, 2012 Copyright Expert Testimony of Mr. Ted Lee as follows.

I. INTRODUCTION

On February 28, 2012, Mr. Ted Lee, through counsel for Defendants, served an Expert Witness Report, which addresses only the copyright claims that were withdrawn from this case by the Plaintiff more than one year ago. *See Exhibit 1.* Mr. Lee’s proposed testimony in this report does not address any relevant jury issue in the present case. Because Mr. Lee’s February 28, 2012 opinions are not relevant to any jury question, his opinions expressed in that report should be excluded from the jury trial.

II. ARGUMENT

Federal Rules of Evidence 702 and 703, as interpreted in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), govern the admissibility of testimony of expert witnesses. Before allowing expert testimony to be heard, a district court must be assured that the proffered witness is qualified to testify by virtue of his or her "knowledge, skill, experience, training or education." *See id.* The party seeking to rely on expert testimony bears the burden of establishing, by a preponderance of the evidence, that all requirements have been met. *Daubert*, 509 U.S. at 593, n.10; *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); *Kumho*, 526 U.S. at 147.

In evaluating the admissibility of expert testimony, the key factors are reliability and relevance. *Daubert*, 509 U.S. at 589 (under Rule 702, expert testimony must be "not only relevant, but reliable"). The overarching goal of *Daubert's* gatekeeping requirement, however, is to ensure the reliability and relevancy of expert testimony and to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho*, 526 U.S. at 152.

A. Mr. Lee's February 28, 2012 Opinions are Irrelevant

In the Lee February 28, 2012 Report, Mr. Lee provides his opinion on whether the copyright claims initially brought, but later withdrawn, by the Plaintiff

were viable claims when initially pled. Mr. Lee's report and opinion have been rebutted by the Plaintiff's intellectual property counsel, Mr. Steven Ross.

The most troubling issue about Mr. Lee's opinions are that the Defendants intend to present these opinions to the jury, even though the costs and "costs as fees" issue is not a jury question – it is an issue within the Court's domain exclusively. The Court may consider, during its determination of costs and fees under §505 of the Copyright Act what kind of weight to place on the opinions from Mr. Lee and/or Mr. Ross, but the February 28, 2012 Report and Opinion regarding copyright issues is simply not relevant to any pending jury issue in the present case – e.g. the Plaintiff's trade dress claims, infringement, or any other state law claim being asserted by the Plaintiff.

The only relevance Mr. Lee's opinions may have to this case (not the jury trial) is the Court's determination about whether the Defendants' claim for attorney fees under Count II of its Counterclaim – a claim under 17 U.S.C. §505 – should be granted. Under 17 U.S.C. §505, "the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

The Court's determination of "prevailing party," "costs," and "costs as fees" under this statutory provision directly addresses the Defendants' Count II Counterclaim. This cost and fees issue will be addressed and determined by the Court, not the jury. Because Mr. Lee's February 28, 2012 opinions regarding the

Plaintiff's copyright claims are irrelevant to any pending jury issue, such testimony should be excluded from the trial.

III. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that the Plaintiff's Motion to Exclude the February 28, 2012 Expert Opinions of Mr. Ted Lee should be granted.

Respectfully submitted,

Date: May 15, 2012

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on Defendants' counsel by Electronic Mail (ECF-Pacer) this day May 15, 2012.

/s/ D. Scott Hemingway