UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Dallas Division

M3Girl Designs, LLC	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. 3-09cv2390-F**
	§	
Blue Brownies, LLC	§	
Charlotte Liles,	§	
Krista Dudte, and	§	
Robert Dudte	§	
Defendants.	§	

PLAINTIFF'S DAUBERT MOTION TO EXCLUDE PROPOSED EXPERT TESTIMONY OF MS. SHERRI HAAB

Comes Now Plaintiff M3 Girl Designs to file a *Daubert* Motion to Exclude the Expert Testimony of Ms. Sherri Haab as follows.

I. INTRODUCTION

On March 30, 2012, Ms. Sherri Haab, through counsel for Defendants, served an Expert Witness Report along with Exhibits A and B (resume and materials considered). Relevant portions of this Report with Exhibits A and B are attached hereto as Exhibit 1.

Among her proposed "expert" opinions are the following: (1) an economics and marketing opinion on the "market definition" and "product classification" for the Plaintiff's jewelry, (2) a legal opinion on the alleged functionality of the Plaintiff's trade dress and other legal trade dress opinions, (3) an opinions on the "originality" of the internal artwork located inside the Plaintiff's bottlecap jewelry, and (4) testimony regarding her past, personal experiences with writing a book about bottlecaps and her personal experiences with making bottlecap artistic works.

As shown below, the present *Daubert* Motion to Exclude should be granted because: (1) Ms. Haab does not have any economics or marketing expertise to support expert testimony on the

"product definition" or "market classification," (2) she does not appear to have reviewed any materials that would support such an economics or marketing expert opinion, (3) she fails to apply the proper legal standards for providing expert testimony on the legal trade dress issues, such as "functionality" or other legal trade dress issues, (4) she has not reviewed and shows no knowledge of the relevant law regarding "functionality" or other trade dress issues, (5) her opinions regarding the "originality" of the Plaintiff's artwork found inside its bottlecap jewelry are not relevant to any pending jury issue, and (6) her remaining proposed testimony is not "expert" testimony at all – it is actually layperson testimony addressing her own personal experiences in authoring a book that mentions the use of bottlecaps, which is factual in nature.

II. FACTUAL BACKGROUND

Ms. Sherri Haab has an educational background "based in art," she studied illustration at Brigham Young University, and she studied "privately at numerous conferences and art workshops" during her early art career. *Exhibit 1, Haab Report, p. 1.* She purports to be an author of numerous books, including "The Incredible Clay Book," "The Art of Metal Clay," "Metal Clay and Mixed Media Jewelry," "The Art of Resin Jewelry," and "Beaded Macrame Jewelry." *Id. at p. 2.*

She has taught jewelry making at bead shows and art workshops, including jewelry making workshops "internationally." Ms. Haab lectures at "art retreats" about her artistic knowledge. *Id.* She currently manufactures and distributes "a craft product that transfers images onto metal" with her husband, an electrical engineer. *Id. at p. 3.* Her resume is attached to her report at Exhibit A and the list of materials reviewed in identified in Exhibit B. *Exhibit 1, Report with attached Exhibit A and B.*

III. 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 district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999). The issue is whether a particular expert has "sufficient specialized knowledge to assist the jurors [or trier of fact] in deciding the particular issues . . . ." *Kumho*, 526 U.S. at 156 (internal quotation omitted).

A. Ms. Haab's Proposed Expert Testimony

Ms. Haab anticipates providing specialized expert opinions as follows: (1) an economics and marketing opinion on the "market definition" and "product classification" for the Plaintiff's

jewelry (p. 7-9), (2) a legal opinion on trade dress issues, such as alleged functionality of the Plaintiff's trade dress (p. 17-29), (3) an expert opinion on the originality of the Plaintiff's internal artwork designs (p. 33-35), and (4) personal past experience testimony regarding her authorship of a book and her knowledge about different methods of making the bottlecap jewelry (p. 4-6, 10-12).

Ms. Haab is not qualified to provide reliable and relevant expert testimony on the first two issues, the third issue is not relevant to any jury issue in this matter, and the only remaining proposed testimony from Ms. Haab is factual in nature, not expert testimony. For those reasons, Ms. Haab's expert testimony should be excluded from the case.[1]

B. Ms. Haab's First Specialized Economics Opinions

Ms. Haab is an artist and author, exclusively, by education, training, experience, and knowledge. She does not possess any economics or marketing degrees, and she lists no economics or marketing course work on her resume to show an adequate foundation for her proposed economics opinions. For example, she did not list any economics or marketing articles, publications, or books in the materials she reviewed in this case.

Ms. Haab is simply not qualified to offer specialized economics or marketing in the present case. The economics analysis in her report demonstrates the significant problems with her offering such testimony. Instead of conducting a market survey or a review of the market classifications for the Plaintiff's products, Ms. Haab indicates that she would "classify" the plaintiff's bottlecap jewelry "as 'bottle cap jewelry' or more specifically, 'bottle cap necklaces' since this is a common idea based on using bottle caps in the design." *Id. at p. 9.* This

[1] If relevant and properly disclosed, Ms. Haab may be allowed to provide factual testimony regarding her authorship or artistic experiences. But, that testimony should not be designated as expert testimony because it does not appear to be expert testimony at all.

classification and market definition is redundant, and it fails to properly consider or relate in any way to the proposed market the plaintiff's jewelry is being sold to – pre-teen or tee-age girls.

Frankly, classifying the Plaintiff's "bottlecap jewelry" as "bottlecap jewelry" is unhelpful to the jury, and it is a conclusion that is arrived at by a person without sufficient economics or marketing background. Moreover, the "product definition" opinion itself is a "red-herring" as it is obviously designed to have a person offer an unsupported opinion regarding whether something is a "common idea" or not. That "common idea" opinion is nothing less than a hidden "genericness" opinion, without it being expressed in those terms. As with her other economics opinions, the "common idea" opinion offered by Ms. Haab is not supported with any factual, economics, or marketing acumen, education, or basis.

Ms. Haab does not have the requisite background, experience or acumen to provide expert opinions on "marketing" and "product" definitions, she does not have any identified economics or marketing expertise to offer expert testimony on "product" and "market" definitions, she did not review any materials that would provide her with a basis for providing such "product" or "market" definition expert testimony, and she does not apply the proper economic benchmarks for determining the appropriate "market" or "product" definition for the Plaintiff's trade dress. For the above reasons, Ms. Haab should not be allowed to testify as an expert witness on economics, marketing or legal issues in this matter.

C. Ms. Haab's Specialized Legal "Trade Dress" Opinions

Ms. Haab is an artist and author, exclusively, by education, training, experience, and knowledge. She does not possess a law degree or any legal training, she lists no legal course work on her resume, and she fails to identify any type of adequate legal support for her proposed legal opinions. For example, she did not list any legal articles, publications, or cases in the materials she reviewed in this case. She fails to identify on her list of materials reviewed any

legal cases or publications on the topic of legal trade dress "functionality" or other trade dress legal issue.

The only pleadings from this case allegedly reviewed by Ms. Haab is the Amended Complaint and Answer. She did not review the most relevant pleadings in this matter, such as this Court's Orders (DE #120, 138 Opinions) denying the Defendants' Motion for Summary Judgment, which directly addressed the trade dress "functionality" issue. These Orders are highly relevant as to how trade dress functionality is determined, how the Court defines the Plaintiff's trade dress, and why the Plaintiff's trade dress is not functional under the proper legal standards. *DE No. 120, p. 3-7; DE No. 133, p. 3-7.*

Ms. Haab's legal analysis is unsupported by adequate factual or legal basis. For instance, Ms. Haab proposes to provide an unsupported expert opinion on the alleged functionality of the Plaintiff's alleged trade dress using two different erroneous methods of analysis. First, Ms. Haab initially conducts an improper "piecemeal" analysis of the Plaintiff's trade dress – taking each trade dress element and considering it separately, before concluding that the Plaintiff's trade dress is legally "functional." *Id. at 18-27.* Ms. Haab's "piecemeal" analysis is erroneous because it improperly ignores the Plaintiff's trade dress as a whole or the overall impression of the Plaintiff's trade dress. *Id. at p.18-27.*

After conducting the initial improper analysis, Ms. Haab follows up with a conclusion that the Plaintiff's trade dress is "functional" because it "functions" as an ornamental piece of jewelry. *Id. at p. 27-28.* Ms. Haab's second opinion on "functionality" is entirely circular in reasoning – jewelry cannot be considered "functional" under the applicable trade dress law simply because it functions as an ornamental piece of jewelry. Ms. Haab's functionality determination is not even close to the proper legal standard for determining trade dress functionality.

Both of Ms. Haab's legal opinions on functionality are unsupported by the proper legal analysis, and her opinions are devoid of sufficient legal knowledge, legal basis, or logical rationale. Most importantly, the Haab legal opinions fail to apply this Court's own legal analysis on the "functionality" determination, which is set forth in this Court's Orders denying the summary judgment motions. *See Order, DE No. 133, p. 4 (Inwood functionality test, essential to use or purpose, or if it affects cost or quality and Eppendorf competitive necessity test, put competitors at a non-reputation disadvantage).*

Ms. Haab's wishes to express an opinion that the Plaintiff's trade dress is functional because it functions as ornamental jewelry, but that opinion "sidesteps" the proper legal standards set forth by this Court in its opinions on the matter. Ms. Haab simply does not have the requisite background, experience or acumen to provide expert opinions on legal "trade dress" issues, she does not have any identified legal expertise to offer expert testimony on the legal functionality of the Plaintiff's "trade dress," she did not review the necessary materials that would provide her with a basis for providing such legal "trade dress" expert testimony, and she does not apply the proper legal standards for providing expert testimony on the legal issues of "functionality" or any other legal trade dress issue. For the above reasons, Ms. Haab should not be allowed to testify as an expert witness on economics, marketing or legal issues in this matter.

D. Originality of Internal Designs is Irrelevant to Any Jury Issue In This Matter

On page 33-34 of Ms. Haab's Expert Report, she provides an expert opinion regarding the "originality" of the Plaintiff's internal artwork placed in its bottlecap jewelry designs. This issue is not relevant to the Plaintiff's trade dress or its infringement. In fact, if relevant at all to any issue in this case, the "originality" issue would only be relevant to the dropped copyright infringement allegations and whether the Defendants should be awarded attorney fees as "costs" by the Court under 17 U.S.C. §505. While the Plaintiff opposes such relief, 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."

This issue is the Defendants' Counterclaim II, which is simply not a jury issue. It is the Court's domain to determine the "prevailing party," "costs," and "fees" under the Copyright Act. Costs and "fees as costs" issues are not normally determined by the jury. This is an issue to be addressed and determined by the Court. Because Ms. Haab's opinions regarding the "originality" of the Plaintiff's artwork are irrelevant to any pending jury issue, such testimony should be excluded from the trial.

E. Ms. Haab's Other Testimony Is Layperson, Factual Testimony, Not Expert Testimony

Ms. Haab's only remaining testimony relates to her personal experiences as a book author and artist. *Id. at 4-6, 10-12.* This testimony, however, is layperson, fact testimony -- not expert, testimony. Authorship of books and Ms. Haab's personal experiences are not topics for expert testimony before the jury.

In fact, Ms. Haab's personal experiences and art instruction are irrelevant to the issues in the case at hand. While Ms. Haab may be allowed to testify as a layperson and testify about her personal experiences in writing and authoring her book if that testimony is relevant, admissible, and properly disclosed, she should not be allowed to offer such layperson testimony as an expert in the present case.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that the Plaintiff's Motion to Exclude the Expert Opinions of Ms. Sherri Haab should be granted as set forth above.

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