

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**M3 GIRL DESIGNS, LLC**

*Plaintiff,*

**v.**

**BLUE BROWNIES, LLC**

**KRISTA DUDTE, and**

**ROBERT DUDTE**

*Defendants.*

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**CIVIL ACTION NO. 3-09-CV-2390-F**

**ORDER DENYING DEFENDANTS' MOTION FOR ADVERSE EXPERTS'  
DEPOSITION FEES**

BEFORE THE COURT is Defendants' Motion for Adverse Experts' Deposition Fees filed on August 31, 2012 (Doc. No. 277). Plaintiff filed a response on September 14, 2012 (Doc. No. 284). Defendant filed a reply on September 28, 2012 (Doc. No. 292). The Defendants' Motion is **DENIED**.

**I. Factual Background**

M3 Girl Designs ("Plaintiff") is in the business of producing and selling bottle cap jewelry. Krista Dudte, Robert Dudte, and their business Blue Brownies (collectively "Defendants") are also in the business of producing and selling bottle cap jewelry. Plaintiff filed this suit in December 2009, alleging that Defendants had committed copyright infringement, trademark infringement, and unfair competition under Texas law.

On February 28, 2012, Plaintiff provided Defendants with the expert reports of Plaintiff's expert witnesses: Steven Ross, Dr. Morgan Ward, and Dr. Helen Reynolds. In March of 2012, Defendants notified Plaintiff of their intention to take the depositions of Plaintiff's expert witnesses. Plaintiff and Defendant agreed that expert fees associated with depositions would be

paid up front. The parties dispute the nature of the agreement. Defendant claims that it felt compelled to comply with the Plaintiff's demands and did not want to risk detrimental delay by filing a motion with the Court. Plaintiff contends that the parties had a clear understanding that each would bear the fees and costs associated with deposing the other's expert. Now, Defendants seek to recover fees paid to Plaintiff's experts for preparing and participating in depositions because they are unreasonable and manifestly unjust.

## **II. Legal Standard**

"Unless manifest injustice would result, the court must require that the party seeking discovery...pay the expert a reasonable fee for time spent in responding to discovery" Fed. R. Civ. P. 26(b)(4)(E).

## **III. Discussion**

Defendants argue that the Court's discretionary duty to deny costs that are manifestly unjust is unaffected by the parties agreement to pay costs upfront. While the Court agrees with the Defendant, the Court is nevertheless of the opinion that there is no manifest injustice in this case.

Plaintiff presented evidence that the party's agreed to comply with Rule 26(b)(4)(E). Accordingly, the only question is whether the payment of fees by the Defendant in this case constitutes manifest injustice. Defendants make essentially two arguments: 1) the rates and time charged were excessive, and 2) much of the testimony was not presented at Court. The Court finds no manifest injustice here.

The Defendants agreed to pay the expert fees up front for a preset amount of time. The fact that the experts were not deposed for the entire amount of time for which Defendants paid is immaterial. If the terms were not agreeable, or were otherwise manifestly unjust, then

Defendants should have raised this issue with the Court at that time. Because the Defendants did not raise the issue at that time, the Plaintiff had no incentive to specifically document the time and manner in which the expert prepared for the deposition. An obvious benefit of pretrial discovery agreements is to avoid this very motion, and to avoid the expense associated with proving the reasonableness of rates and time spent.

Although the Court agrees that it maintains the discretion to find manifest injustice despite the parties' agreement, the fact that the parties agreed to settle this dispute in a pretrial discovery agreement is strong evidence that none exists. The Court also finds that the exclusion of portions of the expert testimony and the Plaintiff's voluntary withdrawal of one of its experts does not create a manifest injustice. To be clear, the Defendants should have brought this issue to the Court's attention rather than agree to pay for expert fees and seek reimbursement after trial. Because the Defendants have waited until this point, the Court does not fault the Plaintiff's inability to produce detailed records of time spent preparing for depositions.

#### IV. Conclusion

Because it has failed to show the existence of manifest injustice, Defendants' Motion for Adverse Experts' Deposition Fees is **DENIED**.

IT IS SO ORDERED

Signed this 3<sup>rd</sup> day of January, 2012.

  
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Royal Furgeson  
United States Senior District Judge