

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

UMG RECORDINGS, INC., et al.	§	
	§	
Plaintiffs,	§	
	§	Civil Action No.
v.	§	4-06CV-860-Y
	§	
BRENTON JAMES GREUBEL, ADAM GREUBEL, NICHOLAS GREUBEL, and E.G., A Minor	§	
	§	JUDGE MEANS
	§	
Defendants.	§	

**DEFENDANT E.G.’s REPLY MEMORANDUM IN SUPPORT OF
MOTION TO APPOINT GUARDIAN *AD LITEM***

NOW COMES Defendant E.G. (“E.G.”), by her attorneys, and respectfully submits this Reply Memorandum in Support of her Motion to Appoint Guardian *Ad Litem* (“Motion”), and states as follows:

Introduction

In their Response to Defendant E.G.’s Motion, the Plaintiffs misrepresent the conduct of Defendants in this proceeding; fail to understand the interplay between ethics, conflicts and the need for a Guardian Ad Litem (and the need to file a motion moving for same); mischaracterize defense counsel’s decision not to file appearances naming the identities of Doe defendants; misrepresent the colloquy between counsel in relation to this motion; and, misstate the need to discussion costs at this juncture. Each of these items can be addressed briefly and succinctly.

Issues Relating to Decorum by Defendants and their Counsel

Initially, Counsel for Defendant E.G. object to Plaintiffs’ characterization of the

“Defendant’s previous actions in this matter” as being “part of an effort to further prolong this proceeding and heap on unnecessary costs.” Pls.’ Resp. Def.’s Mot. Appoint Guardian Ad Litem (“Pls.’ Resp.”), p. 1. To the extent Plaintiffs refer to Defendant E.G., apart from a waiver of service of summons, she has not filed any document with this Court prior to this motion. To the extent the Plaintiffs refer to the Defendants collectively, the Plaintiffs unjustly characterize the Defendants’ conduct. Because the Plaintiffs have a tendency to exaggerate or, in this case, manifest entirely false allegations in an effort to disparage the Defendants in the eyes of the Court, this particular manifestation must be explicitly refuted.

Defendants and their counsel have acted in good faith throughout this litigation. To date, the Defendants have filed very few documents with the Court. Initially, defense counsel filed appearances on behalf of anonymous Doe defendants 1-4 seeking to oppose the Plaintiffs’ motion for expedited discovery. (Docs. ## 9 and 10). Without allowing the Doe Defendants to file a response, this Court granted Defendants’ motion for expedited discovery. Order March 15, 2007 (Doc. #13). Although counsel for Defendants disagreed with the Court’s Order and despite the fact that this Court appeared to have overlooked well-settled precedent throughout the United States allowing anonymous defendants to defend themselves anonymously (at least as to initial issues of expedited discovery) without disclosing their identity (which would eliminate the protection of anonymity), *see infra*, the Defendants refrained from pressing the issues related to expedited discovery further, refrained from filing motions to quash, and consented to have their depositions taken for the limited purpose identified in the Court’s Order of March 15, 2007. Although the deposition of Defendant E.G. has not been taken, the Plaintiffs chose not to take her deposition. All other depositions subject to the Court’s Order of March 15, 2007 have been completed. Additionally, with respect to these depositions, the Defendants responded to many

questions outside the scope of the Court's Order of March 15, 2007 and made no objections to the unnecessary length of the depositions.

With respect to the disclosure of non-party David Greubel's hard drive (also provided for in the Court's Order of March 15, 2007), counsel negotiated with Plaintiffs in good faith and reached an agreed upon protective order governing the discovery of the hard drive. (Doc. #18). After Plaintiffs amended the Complaint to name four defendants, these Defendants agreed through counsel to waive service of process rather than require the Plaintiffs to incur the time and expense of having Plaintiffs serve them. Additionally, except for Defendant E.G., all named defendants have filed Answers to the Plaintiffs' amended complaint rather than file a motion to dismiss or similar motion.

Ethics Compel Filing a Motion to Appoint a Guardian Ad Litem

The Plaintiffs contend that Defendant E.G. and defense counsel have no basis upon which to file the Motion to Appoint a Guardian *Ad Litem*. The Plaintiffs erroneously contend that a conflict of interest does not exist because "Defendant's father is not a party to this action." Pls.' Opp., p. 1. By making such a statement, the Plaintiffs' counsel demonstrate their limited understanding of ethics and conflicts of interest. Rule 1.7 of the Model Rules of Professional Conduct provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, Model Rules of Professional Conduct. Contrary to what Plaintiffs state, a concurrent conflict of interest does exist where the representation of “one client will be directly adverse to another client.” Id. Thus, if the testimony of one client will be adverse to another client, a concurrent conflict of interest exists. Id. Pursuant to Rule 1.7, the possibility of a conflict does not arise solely when the same counsel represents two clients in the same proceeding. Id. Indeed, Rule 1.7 (a)(2) specifically states that a concurrent conflict of interest exists where the “representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person” Id. Consequently, it matters not that David Greubel is not a defendant in the instant action. Defense counsel represented him in a separate action involving the Plaintiffs; represented him in negotiating the protective order involving his hard drive; and continue to represent him. Thus, Rule 1.7 applies.

The foregoing being said, Rule 1.7 does allow representation involving the existence of concurrent conflicts of interest when certain criteria have been met, including waiver or consent obtained from the affected parties. With respect to Brenton James Greubel, Adam Greubel, and Nicholas Greubel, each of them has consented to being represented by the same defense counsel.

With respect to Defendant E.G., any consent would have to come from a parent or guardian. However, as Defendant E.G. has argued elsewhere, she has a conflict of interest with her father who may be compelled to testify about her conduct. Indeed, as Plaintiffs acknowledge, David Greubel has provided discovery responses in the preceeding action brought by the Plaintiffs against him. Pls.' Opp., p. 6. This very testimony led to the Plaintiffs naming Defendant E.G. in this litigation. Consequently, an adverse interest does exist. As such, Defendant E.G. and defense counsel on her behalf have a sound basis for filing this motion to protect all of their interests. Moreover, the appointment of a Guardian *Ad Litem* would ensure that a party independent of her father and his counsel protects her interests.

Issues Relating to Appearances

The Plaintiffs also complain that defense counsel never identified the "unknown" parties for whom they appeared pursuant to the Court's Order of March 13, 2007. In the Order, the Court questioned the ability of defense counsel to appear on behalf of anonymous (the Court used the term "unknown") defendants. Based on the Court's understanding of the law, it presented defense counsel with two options: identify the anonymous defendants they represented or be subject to having their appearances stricken. Because defense counsel continue to disagree with the proposition that anonymous defendants must be identified by name a priori to having counsel file an appearance and provide representation on their behalf, defense counsel chose the latter option. See generally Best Western Int'l v. Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. July 25, 2006); Best Western Int'l v. Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 77942 (D. Ariz. October 24, 2006); Lassa v. Rongstad, 718 N.W.2d 673, 687 (Wis. 2006); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Sony Music Ent'l v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); Dendrite Int'l, Inc. v. Doe, 342 N.J. Super

134, 775 A.2d 756 (NJ App. 2001); Columbia Insurance Co. v. Scescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999). In doing so, they have not – as the Plaintiffs contend – failed to comply with the Court’s Order. The Court provided an option and defense counsel chose to not identify the anonymous defendants for whom they filed appearances. As to the consequences of this choice, the Court and Clerk have not yet stricken the appearances. However, since then, defense counsel intended to file appearances for the named defendants Brenton James Greubel, Adam Greubel, and Nicholas Greubel. The Plaintiffs correctly state that this had not occurred. Defense counsel have corrected this issue by contemporaneously filing answers on behalf of Brenton James Greubel, Adam Greubel, and Nicholas Greubel. They ask the Court to allow the *pro hac vice* appearance of Charles Lee Mudd, Jr. to be applied to these defendants for purposes of this litigation.

Issues with Respect to Conference of Parties

With respect to the conference between the Parties, the Plaintiffs’ mischaracterize their communications with defense counsel. Specifically, as Mr. Browning points out in his Declaration (attached hereto as Exhibit “A” and incorporated by reference as if set forth fully herein), his telephone conference with Plaintiffs’ counsel Andrew Mohraz and Tim Reynolds began with Plaintiffs’ counsel stating—before any issue was broached about the costs of a guardian *ad litem*—that they were opposed to the very notion of a guardian *ad litem*. A discussion ensued about the reasoning behind Plaintiffs’ opposition, which Mr. Browning dutifully documented in the certificate of conference accompanying Defendant E.G.’s motion. As both the certificate of conference and Mr. Browning’s declaration make clear, Plaintiffs’ counsel did not feel that a conflict of interest existed mandating the appointment of a guardian *ad litem*, nor did they feel that Defendant E.G.’s age warranted the appointment of a guardian *ad*

litem. Only later in the conversation, after unequivocally stating their opposition to a guardian *ad litem* that had nothing to do with costs, did counsel for Plaintiffs' gratuitously and belatedly offer that they might not be opposed to the appointment of a guardian *ad litem* if Defendants' were willing to bear such costs themselves.

Here again, Plaintiffs in their Response have blatantly mischaracterized the statements of defense counsel. Plaintiffs claim that, once the issue of who would bear the costs for a guardian *ad litem* was belatedly raised, defense counsel "refused to provide a direct answer." In fact, as Mr. Browning's declaration points out, he gave a direct answer that accurately states the law: he replied that guardian *ad litem* fees, as a taxable cost of court, would properly be an issue for the Court. The Defendants' motion did not raise the issue of costs, for the same reason that the defense has not moved for the awarding of any other costs that the Defendants may have incurred such as filing fees or costs of depositions---to do so would be wildly premature, and would invade the province of the Court. To suggest that Defendants have somehow waived the issue of costs because it is not discussed in their Motion (but is instead properly left for the Court) is ludicrous. Court costs, which include guardian *ad litem* fees, are assessed against the nonprevailing party. Counsel for Plaintiffs would be best served by remembering that neither side has prevailed yet in this matter; consequently, the issue of assessing costs is not something capable of being addressed, much less waived, at this early juncture in the litigation.

Issues Related to Costs

Finally, the Plaintiffs argue that Defendant E.G. has somehow waived the issue of costs by not raising it in the Motion. This has no basis. Under both the Federal Rules and well-settled Fifth Circuit precedent, as well as under Texas law, the fees for a guardian *ad litem* are regarded as taxable costs of court that the prevailing party may recover. F.R.C.P. 17 (c) grants district

courts the inherent authority to tax guardian *ad litem* fees as costs. The Fifth Circuit has long acknowledged that this power to appoint a guardian *ad litem* pursuant to Rule 17 (c) is important not only to ensure that the minor's rights and interests are fully protected in cases where the minor is otherwise represented and there may be conflicts of interest, but also to ensure that the minor has proper access to the federal judicial system at all. Gaddis v. United States, 381 F.3d 444 (5th Cir. 2004); Dickerson v. United States, 280 F.3d 470 (5th Cir. 2002); Lebron v. United States, 279 F.3d 321 (5th Cir. 2002); Gibbs v. Gibbs, 210 F.3d 491 (5th Cir. 2000). As the Gaddis case and others clearly demonstrate, federal district courts may continue to choose to tax guardian *ad litem* fees as court costs against nonprevailing parties.

Similarly, Texas law has long recognized that guardian *ad litem* fees are taxable court costs. Texas Rules of Civil Procedure 173 provides that guardian *ad litem* fees should be "taxed as part of the costs". A long line of cases recognize not only that guardian *ad litem* fees are a taxable court cost, but one that should be taxed against the unsuccessful party in the suit. See, for example, Cullen Center Bank v. Wonzer, 874 S.W.2d 757 (Tex.App.—Houston [1st Dis.] 1994, no writ); Estate of Caitlin v. G.M. Corporation, 936 S.W.2d 447, 452 (Tex. App.—Houston [14th Dist.] 1996, no writ); Dawson v. Garcia, 666 S.W.2d 254 at 264 (Tex.App.—Dallas 1984, no writ). Consequently, it is premature to engage in a discussion of costs at this point.

CONCLUSION

For the foregoing reasons, Defendant E.G. respectfully moves this Court to grant her Motion to Appoint a Guardian *Ad Litem*.

Dated: Chicago, Illinois

August 29, 2007

Respectfully submitted,

By: s/Charles Lee Mudd Jr.
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CERTIFICATE OF SERVICE

I, Charles Lee Mudd, Jr., do hereby certify that service of this REPLY MEMORANDUM was accomplished pursuant to Electronic Case Filing as to ECF Filing Users and shall be served upon other parties listed below by sending said documents via postage pre-paid U.S. mail on the 29th day of August 2007:

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