

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ADE CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C. A. No. 00-892-### (MPT)
	:	
KLA-TENCOR CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

At Wilmington, this 13th day of **December, 2002**.

This discovery issue relates to ADE's request for certain expenses related to the deposition of Dr. Bokor, KLA's expert. Briefly, Dr. Bokor's deposition was begun on March 13, 2002. Problems arose during his limited deposition which ADE brought to the attention of the court. During a telephonic conference on April 11, 2002 before former Judge McKelvie, the court made the following comments as a result of its review of the deposition transcript and the videotape of Bokor's deposition.¹ During that telephonic conference, Judge McKelvie made the following comments:

1. That ADE should be given another opportunity to depose Dr. Bokor.
2. That ADE should not be charged any hours for the time that it worked on trying to take Dr. Bokor's deposition for the first time and that it should not incur his fee for

¹A prior teleconference occurred on March 28, 2002 during which the Bokor deposition issue were argued in some detail. See *D.I. 358 at 14 through 23*. At that time the court had not reviewed the deposition transcript or the videotape. The April 11 telephonic conference was essentially the court's ruling. Because outside counsel for KLA was not available, the court made comments allowing KLA counsel, should he so request, to have further discussion on the issues involved.

the first deposition.

3. That ADE should not have to pay a fee to depose Dr. Bokor a second time since the first deposition did not “work out well.” In making that comment, the court noted that the problems during the first deposition were not attributable to ADE, but rather, to Dr. Bokor. It further noted that if “he wishes to participate in litigation as an expert witness, he is going to have to be a little more cooperative in the deposition, a little more cooperative in the process. In addition, Judge McKelvie suggested one cure employed is to preclude the witness from testifying at trial.

In reaching his finding, Judge McKelvie observed that Dr. Bokor did not appear to be prepared to appropriately assist as an expert should. The court left open whether additional issues or sanctions would be imposed beyond those commented in the April 11th telephonic conference. Dr. Bokor was subsequently deposed on April 29, 2002. The issue of whether further sanctions than those assessed previously should be imposed has been directed to this court.

This court has reviewed the materials provided to Judge McKelvie, as well as subsequent submissions, including, but not limited to D.I. 294, 358, 423, 426, 429, 598 and 601. As noted by KLA, this particular dispute has not yet been decided “and the Court may begin its review independent of the history that has come to pass on this issue.”

In performing its review, this court agrees with Judge McKelvie’s assessment of Dr. Bokor’s first deposition.² The court has reviewed and considered the arguments made by both sides regarding what transpired during the first deposition, and what occurred

²In fact, Judge McKelvie’s comments were mild and fairly generous regarding Dr. Bokor’s conduct.

thereafter. KLA's no harm-no foul argument that since ADE was able to timely complete Dr. Bokor's deposition really does not address the concerns during his first deposition. The fact that he is not a "professional expert" is irrelevant. It is the responsibility of the party (especially its counsel) proffering the expert to ascertain the expert's preparedness and to educate the expert regarding the deposition process. Further, it appears to this court that Judge McKelvie did not address the other sanctions during the April 11th telephonic conference, in part due to KLA's primary counsel's absence. If this court had been faced with the issue and KLA's counsel was present during the telephonic conference, it would have ordered further sanctions. As a result, this court does not accept KLA's argument that ADE's request for any additional reimbursement is excessive.³

According to Ms. Donovan's letter of April 19, 2002 to Mr. Bohrer (attached as Ex. A to D.I. 426), the expenses requested were those incurred by ADE for the clearly wasted day of the first deposition of Dr. Bokor. They include the court reporter's and videographer's fees (\$784.60 and \$364.75 respectively) incurred for their attendance, 6.75 hours representing actual deposition time for Mr. Pollack, who attempted to take the expert's deposition (his total fees at \$370/hour equals \$2,497.50) and fees of Dr. Bullis, ADE's expert (4 hours @ \$150/hour). This court will accept the representations made by Ms. Donovan, who has been admitted pro hoc and is subject to the professional rules of this court. Moreover, KLA's arguments are not directed to the unreasonableness of these

³The court is similarly unimpressed with KLA's argument that ADE did not complain during the second day of Dr. Bokor's deposition, and find them equally irrelevant. The expenses being sought are for the first deposition day.

expenses; rather, its focus is that no further expense should be sanctioned against it.⁴

This court finds that expenses incurred for the videographer and the court reporter are directly related to the first deposition. Similarly, the time spent by Mr. Pollack is also directly related to that deposition. Since this court has concluded that the initial day of Dr. Bokor's deposition was essentially a wasted day, these expenses should be the responsibility of KLA. Regarding the charge for Dr. Bullis, the court is unclear whether this expense was incurred for his attendance at Dr. Bokor's first deposition or for preparation of this deposition. Therefore, this court will presently reserve determining whether Dr. Bullis fees should be awarded until ADE advises of the basis for this expense. Therefore,

IT IS ORDERED that ADE's motion for additional expenses relating to Dr. Bokor's deposition is GRANTED. Specifically, KLA shall pay to ADE within thirty (30) days \$3,646.46 representing the court reporter's, videographer's and Mr. Pollack's fees. The court presently reserves any decision on the awarding of its expert's (Dr. Bullis) fees for the reasons contained in this Order. Should ADE intend to pursue this expense, it shall provide the information required on or before December 30, 2002.

Mary Pat Thyng
UNITED STATES MAGISTRATE JUDGE

⁴In reality, the only expense KLA incurred was the fee charged by Dr. Bokor to be deposed, an expense it is primarily responsible for an any event, but as recognized by this court, an expense usually paid for by the party taking the deposition. Any additional expenses, such as its own fees for the first and subsequent depositions would have been incurred by it, particularly in light of the understanding that Dr. Bokor was to be available for deposition for two days.