IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,	§ § § §	
Plaintiffs,	§	CIVIL ACTION NO. 9:97-CV-063
vs.	§ §	JUDGE COBB
LUFKIN INDUSTRIES,	§ §	
Defendant.	§	

DEFENDANT LUFKIN INDUSTRIES, INC.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Title VII authorizes the awarding of only "reasonable" attorneys' (including expert) fees. 42 U.S.C. § 2000e-5(k). "Accordingly, the [fee] opponent is entitled to the information it requires to appraise the reasonableness of the fee requested and in order that it may present any legitimate challenges to the application to the District Court." *Nat'l Assoc. of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1329 (D.C. Cir. 1982). Specifically, information "primarily related to the justification for the claimed billing rate and the nature and extent of the work done by the applicant's counsel on various phases of the case…is essential in the calculation of the fee award and opposing counsel should have access to this information as a matter of right." *Id.* (citing *Wolf v. Frank*, 555 F.2d 1213, 1215 (5th Cir. 1977), among others) (emphasis added). Similarly, with regards to costs and expenses, the Fifth Circuit has explicitly held that cost and expenses "must not be awarded when they are extravagant or unnecessary." *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 553 (5th Cir. 1987) (emphasis added).

Plaintiffs object to 1) Lufkin's request for, as evidence of exercised billing judgment, records of time charged, but unbilled, by Plaintiffs' counsel; 2) Lufkin's request for invoices, bills, and other documentation of expenses incurred; and 3) Lufkin's request for Plaintiffs'

counsel's yearly billing rates over the course of their representation of Plaintiffs (i.e., for 1996-2004; 2005 has been provided) (Defendant's Third Request for Production, Requests Nos. 1-3). *See* Plaintiffs' Responses and Objections at 1-4, a copy of which is attached as Exhibit A. These objections are not proper.

I. Records of Time Charged, but Unbilled, by Plaintiffs' Counsel, as Evidence of Exercised Billing Judgment

Recognizing that they are required to exercise "billing judgment,"[1] Plaintiffs' counsel have submitted declarations stating that they have written off some of their time. (Demchak Decl. at ¶73; Garrigan Decl. at ¶¶20, 23). However, they have refused to offer any proof of what they have actually written off. *Id*. Lufkin and the Court are expected simply to take Plaintiffs' counsel at their word – that they exercised billing judgment. However, in order to truly assess Plaintiffs' counsel's "billing judgment," Lufkin should be allowed to review the time entries that they have written off. In fact, the Fifth Circuit expects parties seeking fees to document hours written off so that their billing judgment can be evaluated, having noted that "[i]deally, billing judgment is reflected in the fee application, showing not only hours claimed, but also hours written off." *Walker*, 99 F.2d at 769-70 (emphasis added).

There is no legitimate reason for resisting this request. If the records existed in the first place, producing them is hardly burdensome. In fact, redacting these entries from the time records would have taken more effort. Moreover, given the relevance of "billing judgment" to a final award of fees, Plaintiffs cannot argue that these records are not relevant. Accordingly, Plaintiffs should be compelled to produce records of time charged, but unbilled, by Plaintiffs' counsel.

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[1] *Walker v. U.S. Dept. of Housing & Urban Dev.*, 99 F.2d 761, 769-70 (5th Cir. 1996) ("Plaintiffs submitting fee requests are required to exercise billing judgment…which refers to the usual practice of law firms in writing off unproductive, excessive, or redundant hours").

II. Invoices, Bills, and Other Documentation of Expenses Incurred

While Lufkin is willing to narrow its request for invoices, bills, and other documentation of expenses to only expenses related to 1) expert fees and 2) all travel, these two categories still amount to nearly $700,000. Yet Plaintiffs are unwilling to provide any invoices related to these two categories. Lufkin and the Court must simply assume that all of the work performed by Plaintiffs' statistical experts was reasonable and justified. Similarly, Lufkin and the Court must assume that Plaintiffs' counsel always used good judgment when traveling, despite the fact that frequently, multiple counsel traveled to the same event with airplane tickets costing between $1000 and $2000 each. There is no legitimate justification for withholding this information if Plaintiffs seek reimbursement of such expenses. Thus, Lufkin should have access to this information as a matter of right.

A. Expert fees

As mentioned above, Title VII authorizes the awarding of only "reasonable" attorneys' (including expert) fees. "Accordingly, [Lufkin] is entitled to the information it requires to appraise the reasonableness of the fee requested and in order that it may present any legitimate challenges to the application to the District Court." *See supra*. Such documentation is especially necessary for Lufkin (and the Court) in this case as Plaintiffs are claiming expert fees of nearly half a million dollars ($497,666.53), (Demchak Decl. Exh. 29 ($465,915.36); Garrigan Decl. Exh. 2 ($31,751.17)), or nearly 60 percent (59.2%) of the total cost and expense request. *Id.*

B. Travel expenses

As noted above, the Fifth Circuit has explicitly held that cost and expenses "must not be awarded when they are extravagant or unnecessary." *Supra*. "Accordingly, [Lufkin] is entitled to the information it requires to appraise the reasonableness of the [cost and expense] requested and in order that it may present any legitimate challenges to the application to the District

Court." *See supra*. In fact, such a production is required by 28 U.S.C. § 1821 for travel costs associated with all witnesses and deponents. *See infra*. Expense reports alone, (Demchak Decl. Exh. 29; Garrigan Decl. Exh. 2), are not sufficient.

For example, § 1821(c)(1) states that a witness or deponent who travels by common carrier "shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished" (emphasis added). Similarly, "[t]oll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt) shall be paid in full to a witness [or deponent] incurring such expenses." 28 U.S.C. § 1821(c)(3) (emphasis added).

Such documentation is especially necessary for Lufkin (and the Court) in this case as Plaintiffs are claiming travel expenses for Goldstein Demchak alone of nearly $175,000 ($174,249.21), (Demchak Decl. Exh. 29), or nearly a quarter (22.1%) of the total cost and expense request for the firm. (*Id.*) Entries also abound of airfares costing between $1,000 to $2000 each (e.g., $1,897 (8/11/2000); $1,499 (10/26/2001); $1,688 (11/18/2001)) with no additional information whatsoever.

Moreover, the request will not be burdensome. As Plaintiffs describe, travel receipts for airfare, hotels, meals, etc. are all already organized and attached to expense reports. *See* Plaintiffs' Responses and Objections at 3. All that is needed is to copy them, some on both sides. (*Id.*)

Plaintiffs should be compelled to produce invoices, bills, and other documentation of expert fees and all travel expenses incurred.

III. Plaintiffs' Counsel's Yearly Billing Rates Over the Course of Their Representation of Plaintiffs

Finally, Plaintiffs refuse to reveal their billing rates for any year other than 2005 and ask the Court to use that billing rate for all years on grounds that "compensation at current relevant market rates is appropriate as a means of compensating for delay in payment." (Plaintiffs Response and Objections at 4, citing *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989)). Plaintiffs tell only half of the story.[2] "In compensating for a delay, the district court may either grant an unenhanced lodestar based on current rates, *see Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987), or calculate the lodestar using the rates applicable when the work was done and grant a delay enhancement, *see Alberti v. Klevenhagen*, 896 F.2d 927, 936 (5th Cir. 1990)." *Walker*, 99 F.2d at 773 (emphasis added).

This decision is for the Court, not Plaintiffs, to make. And for good reason, for if Plaintiffs' counsel's billing rates between 2004 and 2005 increased at a faster rate than in previous years – either because of their perception of market forces or because they anticipated prevailing in a particular case – it would clearly not make sense to use those rates for earlier years. If the current hourly rate is used for all hours, the attorney will most likely be over-compensated. 151 A.L.R. Fed. 77 at §10. Disfavoring Plaintiffs' approach is consistent with subsequent Supreme Court holdings. *See Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (citing *Riverside v. Rivera*, 477 U.S. 561, 580 (1986)) ("prevailing party" attorneys' fee awards under civil rights statutes "were never intended to 'produce windfalls to attorneys'").

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[2] The holding of *Missouri* actually reads, "an appropriate adjustment for delay in payment – whether by the application of current rather than historic hourly rates or otherwise – is within the contemplation of the statute. *Missouri*, 491 U.S. at 284 (emphasis added).

The Court needs these historical rates in order to choose the appropriate approach. Plaintiffs should not be allowed to hide this information and should be compelled to produce their counsel's yearly billing rates over the course of their representation of Plaintiffs.

CONCLUSION

For all the reasons cited above, Defendant's Motion to Compel Production of Documents should be granted.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on this 6th day of April, 2005, a copy of the foregoing Defendant Lufkin Industries, Inc.'s Motion to Compel Production of Documents was filed electronically through the Court's CM/ECF System and was automatically copied to Plaintiffs through the Court's electronic filing system.

_____________/s/________________
Attorney for Defendant

CERTIFICATE OF CONFERENCE

Pursuant to FRCP 26(c) and Local Rule CV-7(h), Lufkin's counsel attempted to confer with Plaintiffs' counsel in a good faith attempt to resolve the matter without court intervention by leaving a voicemail message – after assurances Plaintiffs' counsel would be checking voicemail messages – detailing Lufkin's concerns and proposed compromise. Plaintiffs' counsel has not responded.

_____________/s/________________
Attorney for Defendant