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 CLARK
LUFKIN INDUSTRIES,	§ §	
Defendant.	§	

DEFENDANT LUFKIN INDUSTRIES, INC.'S REPLY TO PLAINTIFFS RESPONSE IN OPPOSITION TO DEFENDANT'S SECOND MOTION TO QUASH DEPOSITION AND FOR PROTECTION FROM UNNECESSARY DISCOVERY

The relevant market for determining the prevailing hourly rate is the community in which the district court sits. *Tollet v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002), *cert. denied*, 537 U.S. 883 (2002); *Ross v. Lamm*, 713, F.2d 546, 555 (10th Cir. 1983) (absent unusual circumstances "the fee rates of the local areas should be applied even when the lawyer seeking fees are from another area"). Plaintiffs respond that Defendant's counsel -- who are not from the Eastern District -- should be required to produce their billing information because "comparative information" for this type of litigation in this District is "scare or non-existent." Plaintiffs disregard their lead counsel's experience as a well-known civil rights lawyer who has practiced in this Eastern District, including Lufkin and Beaumont, for many years. More importantly, Plaintiffs ignore that Mr. Garrigan alone represented Plaintiffs in obtaining class certification, defending that certification on appeal, and has been lead counsel in this litigation from its inception. As is apparent from the Court's class certification order, during the time Plaintiffs were represented only by Mr. Garrigan, Plaintiffs went a long way toward convincing the Court that they were victims of unlawful discrimination.[1] Well before the Demchak law firm joined the fray, the major battle had been won. Even at trial, Mr. Garrigan continued to serve as lead counsel, examining 11 out of 22 witnesses who testified.

Plaintiffs note that some courts have relied on out-of-district rates when the litigants were unable to find qualified local counsel. *Mathur v. Bd. Of Trustees of S. Ill. Univ.*, 317 F.3d 738, 743-44) (7th Cir. 2003). In *Mathur*, however, the Plaintiff was unable for find anyone to represent him in the jurisdiction where the case was tried. 317 F.3d at 744. The court found that it was "reasonable for Mathur to search for an attorney in Chicago after he exhausted his options in southern Illinois." *Id.* Plaintiffs also cite *Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany & Albany County Board of Elections*, 522 F.3d 182, 191-92 (2d. Cir. 2008), where the court of appeals held that a district court *may* compensate out-of-town counsel at their higher rate *in certain situations*. Nevertheless the *Arbor Hill* court held that district court did not abuse its discretion by using the lower in-district rate for out-of-town counsel because of the presumption that a paying client would not want to pay more than the local rate. 522 F.3d at 191. The court noted that "we believe that a reasonable paying resident of Albany would have made a greater effort to retain an attorney practicing in [the area], than did the plaintiffs. The rates charged by attorneys in the Southern District of New York would simply have been too high for a thrifty, hypothetical client." *Id*. In both *Mathur* and *Arbor Hill*, the courts recognized the general rule that the local rates should apply.

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[1] For example, this Court found –

"[a] broad array of Lufkin employment practices rest on the subjective decision making processes," Mem. Op. at 4;
"an exception for skilled applicants all but obliterates the seniority rule," *Id.* at 6;
"This channeling process is not guided by any objective standards." *Id.*;
"the pervasive subjective decision-making process interacts with other facially neutral employment conditions to the disadvantage of African-Americans," *Id.* at 7; and
"the discriminatory effects of the constellation of suspect employment practices used by Lufkin Industries cannot be isolated individually." *Id.* at 9.

If the Eastern District of Texas lacked lawyers with Mr. Garrigan's law firm's expertise – not to mention a number of other highly qualified civil rights lawyers – Plaintiffs' arguments to explore the rates of similar *Plaintiffs'* counsel in other jurisdictions might have merit. But, as noted at the beginning of this motion, Mr. Garrigan not only obtained certification for the class without the assistance of the Demchak law firm, but remained the lead lawyer through the time of trial. There is no reason why Mr. Garrigan's actual billing rate should not be used as a benchmark in this case. Nor is there any reason why Lufkin's Houston-based defense counsels' rates would be relevant to establishing a benchmark for plaintiffs in this case.

Nor is Mr. Garrigan the only experienced employment lawyer in the Eastern District of Texas, whose billing rates can be appropriately used as a benchmark in this case. In its response to Plaintiffs' Petition for Fees, Lufkin provided Judge Cobb with affidavit evidence from experienced employment lawyers in Beaumont and Lufkin. Lufkin also provided Judge Cobb with a thorough analysis of Plaintiffs hours as to why much of Plaintiffs work was duplicative or excessive. Unfortunately, Judge Cobb did not cite any of this evidence or analysis in his Opinion and simply stated in conclusory fashion that Ms. Demchak's hours "were excessive and not necessary." There is nothing in the Fifth Circuit's decision that suggests that it disagreed with Judge Cobb's fee award other than the fact that Judge Cobb failed to "explain with a reasonable degree of specificity the findings and reasons upon which the award was based."

Plaintiffs offer no authority that Defendant's counsel's *hourly records* would be relevant to Plaintiffs' petition. While a few cases have held that an opposing counsel's *hourly rates* are relevant for establishing the appropriate market rate for the community, as Lufkin noted in its original Motion, in each of those cases the hourly rate was relevant because the [opposing] counsel in those cases practiced in the same jurisdiction where the case was tried. *See, e.g., U.S.*

Golf Corp. v. Eufala Bank & Trust Co., 639 F.2d 1197, 1203 (5th Cir. 1981) (relevant to consider opposing party's hourly rates because they practiced the same kind of law in Eufala, Alabama).

Judge Cobb was correct when he ruled that Defendant's counsel's fees were not relevant and that Order should not be disturbed. Lufkin was represented by Houston-based attorneys who have never practiced on the plaintiffs' side of the employment bar. There billing rates and records are not relevant. Moreover, Plaintiffs should continue to abide by this Court's Order that no additional discovery be conducted so that Parties can concentrate on the other tasks that the Court has assigned them. For these reasons, Lufkin moves the Court to quash Plaintiffs' deposition and enter an Order reaffirming its original Order that Plaintiffs are to cease engaging in discovery at this time.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that on this 5th day January 2009, a copy of the foregoing Defendant Lufkin Industries, Inc.'s Reply to Plaintiffs' Response to Defendant's Motion to Quash Deposition and for Protection from Unnecessary Discovery 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