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 RESPONSE TO PLAINTIFFS' MOTION REQUESTING THE COURT TO TAKE JUDICIAL NOTICE OF RELEVANT FACTS CONTAINED IN THE RECORD OF ANOTHER CASE BEFORE THIS COURT AND IN THE PUBLIC RECORD ("MOTION FOR JUDICIAL NOTICE")

The Court has already ruled that Lufkin Industries, Inc.'s ("Lufkin") counsel's billing rates in this case are not relevant. *See* Order of February 28, 2005 (granting Lufkin's motion for protection from Plaintiffs' fifth request for production of documents). Nevertheless, Plaintiffs now ask the Court to take judicial notice of Lufkin's counsel's law firm's transactional attorneys' billing rates in an unrelated bankruptcy proceeding in a bankruptcy court. In doing so, Plaintiffs confuse judicial notice and judicial admissions and misapply Federal Rule of Evidence ("FRE") 201(a).

I. As an Initial Matter, Plaintiffs Confuse Judicial Notice and Judicial Admissions.

In support of their claim that the billing rates of Vinson & Elkins ("V&E") transactional attorneys in an unrelated bankruptcy proceeding in a bankruptcy court can be judicially noticed, Plaintiffs state that "[a]s a general rule, the pleading of a party made in another action, as well as pleadings in the same action which have been superseded by amendment, withdrawn or dismissed, are admissible as admissions of the pleading party to the facts alleged therein,

assuming of course the usual tests of relevancy are met," citing *Cont'l Ins. Co. of N.Y. v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971). (Motion at 1-2) (emphasis added). In citing this authority, it is evident that Plaintiffs have confused judicial admissions with judicial notice. Judicial admissions are concerned only with pleadings, which are defined narrowly in the Federal Rules of Civil Procedure as "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contain a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. FED. R. CIV. P. 7(a). To state the obvious, the first through fourth interim applications for fees and expenses submitted in *In Re Food Fast Holdings, Ltd.* are not pleadings and thus, cannot be judicially admitted.

Additionally, Lufkin was not a party to *In Re Food Fast Holdings, Ltd.*, which also precludes its use as a judicial admission. V&E has many clients besides Lufkin. A pleading filed by a different party, even if represented by V&E, cannot be used as judicial admission against Lufkin.

II. Plaintiffs Also Misunderstand the Doctrine of Judicial Notice.

The doctrine of judicial notice is governed by FRE 201. FED. R. EVID. 201 ("Judicial Notice of Adjudicative Facts"). FRE 201(a) states that "this rule governs only judicial notice of adjudicative facts." FED. R. EVID. 201(a) (emphasis added). An adjudicative fact is defined as "a controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties." BLACK'S LAW DICTIONARY, 7th ed. (1999).

"[T]he kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when the sun rises or sets; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matter of political history: for instance, who was president in 1958."

Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997). Judicial notice is reserved for those things that there is no reason why a party should have to tender testimonial or documentary evidence, such as the fact that March 27, 2005 lands on a Sunday, the fact that there was a full moon on a particular night, the time that the sun rose on a particular date in a particular locale, or the listing price of a particular stock on the New York Stock Exchange at a particular moment in time. Exhibits filed in another case showing the billing rates of V&E transactional attorneys in an unrelated bankruptcy matter and the affidavit testimony of a former judge are not the kinds of things that a court would take judicial notice of. Ordinarily, a party seeking to admit such things would have to establish an evidentiary foundation for their admission and demonstrate that those documents are relevant in the present case. Given that an opposing counsel's billing rates in the same case are irrelevant in the Fifth Circuit, *Harkless v. Sweeny Indep. School Dist.*, 608 F.2d 594, 598 (5th Cir. 1979), it is clear that Plaintiffs would be unable to establish that these documents that relate to attorneys' fees in a different case are relevant here.

Moreover, a court cannot take judicial notice of the factual findings of another court. *See Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998); *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082-83 & n. 6 (7th Cir. 1997); *Holloway v. Lockhart*, 813 F.2d 874, 878-79 (8th Cir.1987); *Wyatt v. Terhune*, 315 F.2d 1108, 1114 (9th Cir. 2003); *U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

III. In Any Event, the Billing Rates of V&E Transactional Attorneys in an Unrelated Bankruptcy Proceeding are Irrelevant.

In granting Lufkin's motion for protection from Plaintiffs' attempt to discover Lufkin's counsel's billing rates (among other things), the Court recognized that 1) the Fifth Circuit has determined that a fee opponent's fee records, including billing rates, are irrelevant to the inquiry

into whether a fee request is reasonable, and 2) a fee opponent's attorneys' fees is not one of the twelve *Johnson* factors the Fifth Circuit considers in evaluating the reasonableness of a proposed fee award. *See* Order of February 28, 2005 ("For the reasons set forth in defendant's motion for protection from plaintiffs' fifth request for production of documents, the motion for protection is GRANTED…" (emphasis added)).

Plaintiffs, however, seek to circumvent the Court's Order in their attempt to get the Court to take judicial notice of V&E's transactional lawyers' billing rates in another case. However, if V&E's billing rates in this case are not relevant, the fees of different lawyers from that firm in a different case are even less relevant. In *Ruiz v. Estelle*, 553 F. Supp. 677 (S.D. Tex. 1982), a prison litigation case that Plaintiffs cite, the court noted that "[i]n an action for which no adequate parallel can be found, the best example of a fee paid for similar work is that paid by opposing counsel in the same action" (emphasis added). It also bears noting that *Ruiz* was a case that was "unprecedented in scope and complexity," which justified looking at the billing rates of opposing counsel in that particular case. *Ruiz*, 553 F. Supp. at 584. There is no precedent (including *Ruiz*) that would support Plaintiffs' claim that the billing rates in *In Re Food Fast Holdings, Ltd.* would be relevant to the Plaintiffs' counsel's billing rates in this class action.

In *U.S. Golf Corp. v. Eufaula Bank & Trust Co.*, 639 F.2d 1197 (5th Cir. 1981), also cited by Plaintiffs, the Fifth Circuit did not "affirm[] the relevance of opposing counsel's fees as one factor among several that informed the court's determination of the customary fees of attorneys who work in Eufaula, Alabama," as Plaintiffs claim. (Motion at 6). To the contrary, the court ignored opposing counsel's fees and chose, instead, to rely only on the witness testimony of several other lawyers from Eufaula. *See U.S. Golf*, 639 F.2d at 1200-01, 1207.

In this Circuit, a court must examine "the experience, reputation, *and* ability of the attorneys" and "awards in similar cases in determining the reasonableness of fee applicants' rates." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (two of the twelve *Johnson* factors, emphasis added); *accord Blum*, 465 U.S. at 895 n.11 ("To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence…that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation"). Examining and comparing experience alone, as Plaintiffs wish to do, is not enough nor allowed in this Circuit. Similar cases must be compared. Because of market conditions, and less competition from small boutiques, transactional lawyers in large firms generally bill at substantially higher rates than litigators. This is not surprising, for "[t]he type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively – even within a law firm." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

To attempt to make these comparisons, as Plaintiffs do, violates this Circuit's well-settled law.

CONCLUSION

For all the reasons cited above, Plaintiffs' Motion for Judicial Notice should be denied.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on this 24th day of March, 2005, a copy of the foregoing Defendant Lufkin Industries, Inc.'s Response to Plaintiffs' Motion Requesting the Court to Take Judicial Notice of Relevant Facts Contained in the Record of Another Case Before This Court and in the Public Record ("Motion for Judicial Notice") 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