IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendant.	§ § § § § § § § § §	Civil Action No. 9:97 CV 063 (COBB)

PLAINTIFFS' REPLY TO 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 ("PLAINTIFFS' MOTION FOR JUDICIAL NOTICE")

I. INTRODUCTION

Plaintiffs have requested that the Court take judicial notice of Vinson & Elkins' ("V&E") hourly rates billed in another case litigated in this Court not only because V&E represents Defendant Lufkin Industries, Inc.'s ("Lufkin") in this case, but additionally as evidence demonstrating prevailing market rates of attorneys litigating complex cases in this Court. In moving for judicial notice of these and other undisputed facts, Plaintiffs do not seek to circumvent this Court's earlier order regarding the discoverability of Lufkin's fees and expenses, but rather to meet Plaintiffs' burden of production of evidence regarding prevailing market rates in support of Plaintiffs' pending motion for attorneys' fees. Lufkin opposes Plaintiffs' Motion for Judicial Notice. However, in doing so, Lufkin does *not* dispute the facts Plaintiffs request the Court to judicially notice: that V&E billed certain hourly rates in another case in this Court; that the evidence before the Court in that case included a declaration of the Honorable Robert M. Parker, and the year of admission to the bar of each of the V&E attorneys who billed time in that case. Instead, Lufkin argues that V&E's hourly rates are irrelevant to the Court's determination of the reasonableness of Plaintiffs' counsel's hourly rates. Lufkin, however, misstates the holding in Harkless v. Sweeny Indep. Sch. Dist., 608 F.2d 594 (5th Cir. 1979) and applicable case law regarding the relevance of evidence of prevailing market rates in support of an application for attorneys' fees. As such, Lufkin fails to demonstrate why the Court cannot and should not take judicial notice of the facts proffered by Plaintiffs. Therefore, the Court should grant Plaintiffs' motion.

II. PLAINTIFFS ASK THE COURT TO TAKE JUDICIAL NOTICE OF UNDISPUTED FACTS ON THE RECORD IN IN RE FOOD FAST HOLDINGS, LTD.

As a threshold matter, Plaintiffs do not ask the Court to take judicial notice of the *factual findings* in In Re Food Fast Holdings, but instead of *undisputed facts* that were presented on the record of that case. See Motion for Judicial Notice at 3. While the "reasonableness" of V&E's rates in In Re Food Fast Holdings may be a disputed fact or mixed question of fact and law, Plaintiffs do not argue that this Court should be bound by the determination on this issue in that

case. Therefore, the cases Lufkin cites for the proposition that the Court may not take judicial notice of another court's factual findings are inapposite to the question before the Court.[1]

The specific "facts" on which Plaintiffs seek judicial notice are the hourly rates that V&E charged and the fact that Judge Parker submitted a declaration in In Re Food Fast Holdings, Ltd.[2] These facts are as indisputable as the fact "that March 27, 2005 lands on a Sunday" or "the listing price of a particular stock on the New York Stock Exchange at a particular moment in time."[3] See Lufkin Opposition at 3. These facts are also "capable of accurate and ready determination by resort to [a] source [i.e., the record in In Re Food Fast Holdings, Ltd.] whose accuracy cannot be questioned," see Fed. R. Evid. 201, and the Court should take judicial notice of the facts Plaintiffs proffer.

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[1] The cases cited by Lufkin concern mixed determinations of fact and law or disputed factual conclusions, which stand in marked contrast to the undisputed facts for which Plaintiffs seek judicial notice. See Taylor v. Charter Med. Corp., 162 F.3d 827, 830 (5th Cir. 1998) (affirming district court's refusal to take judicial notice of another court's determination that a hospital was a "state actor," noting that such a determination is a mixed question of fact and law that is beyond the scope of Rule 201); Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998) (trial court erred in taking judicial notice of determination in previous case regarding what constituted standard industry practice); Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1081-83 (7th Cir. 1997) (trial court erred by taking judicial notice of prior factual finding that terms of class action settlement were "fair, reasonable, and adequate."); Holloway v. Lockhart, 813 F.2d 874, 878-79 (8th Cir. 1987) (district court erred by applying a different case's factual finding that the use of tear gas against the inmates was reasonable and necessary); United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) (judicial notice of different case's factual determination that plaintiff refused to work unless he received a salary increase not appropriate when whether plaintiff refused to work had been a disputed issue of fact).

[2] Plaintiffs also request that the Court take judicial notice of information provided on the Texas State Bar Association's website showing the year of admission to the bar of the V&E attorneys who billed time in In Re Food Fast Holdings. Lufkin does not contest that this is the type of generally known information not subject to reasonable dispute or that the Court may judicially notice these facts.

[3] Lufkin resorts to Black's Law Dictionary's definition of "adjudicative fact." However, the Advisory Committee Notes to Federal Rule of Evidence 201(a) state that "[a]djudicative facts are simply the facts of the particular case." Clearly, that V&E billed certain hourly rates and Judge Parker submitted a declaration in In Re Food Fast Holdings, Ltd. are facts of that particular case that may be judicially noticed pursuant to Rule 201.

III. HARKLESS V. SWEENY INDEP. SCHOOL DIST. DOES *NOT* HOLD THAT OPPOSING COUNSEL'S RATES ARE IRRELEVANT.

Contrary to Lufkin's assertion, the Fifth Circuit in Harkless v. Sweeny Indep. School Dist., did *not* hold that an opposing counsel's *billing rates* are irrelevant. See Lufkin Opposition at 3. In fact, Harkless says nothing at all about an opposing counsel's billing rates. Instead, the issue in Harkless was whether plaintiffs' counsel's time was reasonable where plaintiffs' counsel did not maintain contemporaneous time records and claimed more hours than opposing counsel billed in the case. On appeal, the Fifth Circuit found that the district court had correctly concluded that plaintiffs' counsel had spent their time efficiently and the fact that defense counsel spent less time on the case than plaintiffs' counsel was irrelevant "so long as all compensated work [of plaintiffs' counsel] was necessary and performed in an expeditious manner." Harkless, 608 F.2d at 598. Thus, it is *not* the law in this Circuit, as Lufkin claims, that Lufkin's counsel's billing rates are irrelevant in determining the reasonableness of Plaintiffs' counsel's rates.[4] See also cases cited at Plaintiffs' Motion for Judicial Notice at 2.[5]

Whether a court should consider an opponent's attorneys' fees "depends, in part, on the objections raised by the opponent to the fee petition going to the reasonableness of the fee petition." Coalition to Save Our Children v. State Bd. of Educ., 143 F.R.D. 61, 64 (D. Del., 1992). In this case, Lufkin has indicated its intent to challenge Plaintiffs' counsel's billing rates. Plaintiffs, therefore, are entitled to provide evidence of Lufkin's counsel's billing rates to rebut Lufkin's objection. At the very least, the Court should reserve ruling on Plaintiffs' Motion for

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[4] The Eleventh Circuit subsequently concluded that "While the concerns noted earlier [in Harkless] regarding the relevancy of evidence of the other sides' hours and fees are still prevalent, the trial judge may consider them as going to the weight of the evidence rather than its discoverability and admissibility." Henson v. Columbus Bank & Trust Co., 770 F.2d 1566, 1575 (11th Cir. 1985). The Eleventh Circuit was, at the time of its decision in Henson, acutely aware of the Fifth Circuit's reasoning in Harkless, since it was in 1980, shortly after the Harkless decision, that the Fifth Circuit split into Fifth and Eleventh Circuits.

[5] While Lufkin is correct that the court in U.S. Golf Corp. v. Eufaula Bank & Trust Co., 639 F.2d 1197 (5th Cir. 1981), relied on the testimony of several other lawyers in Eufala, rather than opposing counsel's rates, Lufkin ignores that Plaintiffs seek to introduce V&E's hourly rates billed in In Re Food Fast Holdings, Ltd. not solely because V&E represents Lufkin in this case, but additionally as evidence of hourly rates charged by attorneys of comparable experience who handle complex cases in this Court.

Judicial Notice until Lufkin has submitted its opposition to Plaintiffs' fees' motion and formally stated its position on the reasonableness of Plaintiffs' counsel's hourly rates.[6]

IV. LUFKIN MISSTATES THE APPLICABLE LAW ON THE RELEVANCE OF EVIDENCE OF PREVAILING MARKET RATES.

Lufkin's contention that under Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), "examining and comparing" Plaintiffs' counsel's rates to prevailing rates in the community for similar services by lawyers of reasonably comparable skill, experience and reputation is "not enough nor allowed in this Circuit," see Lufkin Opposition at 5, is a clear misstatement of the law. In the Fifth Circuit, a district court, in determining a reasonable attorney's fees, must first "calculate a lodestar fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." Rutherford v. Harris County, Tex., 197 F.3d 173, 192 (5th Cir. 1999).[7] Hourly rates "are to be calculated according to the prevailing market rates in the relevant community." Blum v. Stenson, 465 U.S. 886, 895 (1984); Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 662 (5th Cir. 2002) (same).

Lufkin attempts to argue that the Court's holding in Blum does not mean what it says by relying on a footnote in the decision that addresses the "inherent difficulty" of determining "an appropriate market rate for the services of a lawyer." Blum, 465 U.S. at 896. Lufkin, however, selectively quotes from the decision and fails to note that the Court ultimately concluded that:

> To inform and assist the court in the exercise of its discretion, *the burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the*

[6] While the Court granted Lufkin's Motion for Protection from Plaintiffs' Fifth Request for Production of Documents for "the reasons cited by Lufkin," it did so before Plaintiffs had submitted their opposition to Lufkin's Motion for Protection challenging Lufkin's interpretation of Harkless regarding the relevancy of opposing counsel's fees. Moreover, as discussed above, evidence of prevailing market rates – whether of opposing counsel or other counsel in the relevant market – is relevant and necessary to the Court's determination of a reasonable lodestar.

[7] Lufkin's contention that the Court uses the Johnson factors to *initially* determine the lodestar misreads Johnson's progeny. Subsequent to Johnson, the Fifth Circuit adopted the "lodestar" method of calculating attorney's fees. Graves v. Barnes, 700 F.2d 220, 222 (5th Cir. 1984) (citations omitted). " 'Under this refinement of the Johnson test,' [t]he 'lodestar' is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work. The lodestar is *then* adjusted to reflect other factors such as the contingent nature of suit and the quality of the representation.'" Id. (citations omitted) (emphasis added).

> *community for similar services by lawyers of reasonably comparable skill, experience and reputation.* A rate determined in this way is normally deemed to be reasonable, and is referred to--for convenience--as the prevailing market rate.

Id. at 896 n. 11 (emphasis added).

Blum, as adopted by the Fifth Circuit in Green, clearly contemplates, indeed requires, a district court to consider evidence regarding the billing rates of other comparably experienced attorneys in the relevant market. V&E's rates in other complex cases in this Court are such evidence. Accordingly, the Court should take judicial notice of V&E's rates, not just because V&E represents Lufkin in this case, but also because such evidence is probative of "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum, 465 U.S. at 896.[8] See, e.g., Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1325 (D.C. Cir. 1982) ("Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate.").

V. CONCLUSION

For all of the reasons discussed above and in Plaintiffs' Motion for Judicial Notice, Plaintiffs respectfully request that the Court take judicial notice of the undisputed facts Plaintiffs proffer.

Dated: March 30, 2005

Respectfully submitted,

By: /S/

Teresa Demchak, CA Bar No. 123989
Morris J. Baller, CA Bar No. 048928
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612-3534
(510) 763-9800

Timothy Garrigan, TX Bar No. 07703600
Stuckey, Garrigan & Castetter Law Offices
2803 North Street
Nacogdoches, TX 75963-1902
(936) 560-6020

Attorneys for Plaintiffs

[8] Lufkin's unsupported claim that "[b]ecause of market conditions, and less competition from small boutiques, transactional lawyers in large firms generally bill substantially higher rates than litigators," see Opposition at 5, is pure self-serving speculation. Lufkin will have the opportunity to prove its claim in its opposition to Plaintiffs' motion for fees. However, Lufkin's bald assertion does not make it so, nor defeat Plaintiffs' request that the Court judicially notice V&E's rates in a self-described "complex" case in this Court. At best, Lufkin's contention – if proven – goes to the weight accorded to evidence of V&E's rates, not whether the Court may judicially notice such evidence.

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

Douglas Hamel
Christopher V. Bacon
Vinson & Elkins
2806 First City Tower
1001 Fannin Street
Houston, TX 77002-6760

on this 30th day of March, 2005.

/S/
Teresa Demchak