IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ AND PATRICK HAMACHER,

for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, ET AL.,

Defendants,

and

EBONY PATTERSON, ET AL.,

Intervening Defendants.

Civil Action No. 97-75231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

CLASS ACTION

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO ALLOW LIMITED DISCOVERY RELATED TO FEES AND COSTS

I. THE REQUEST FOR DISCOVERY IS NOT PREMATURE

Defendants begin by renewing their frivolous argument that plaintiffs are not "prevailing parties." They have disparaged as a meaningless "judicial pronouncement" this Court's January 30, 2001, order, and turned a blind eye to the fact that this order granted summary *judgment* and declaratory *relief* against defendants with respect to the admissions systems that were in effect from 1995-1998. Defendants abandoned their appeal from this judgment, so there can be no genuine dispute that plaintiffs have already established liability against defendants. *See Farrar v. Hobby*, 506 U.S. 109, 111 (1992).

Having admitted that they made "substantial" changes to their LSA admissions system because of the Supreme Court's decision in this case, defendants are in no position to argue that the class members in this properly certified class action received no benefit from the judicial outcome. As a result of this Court's judgment and the decision of the Supreme Court, defendants are no longer free to employ the unconstitutional admissions policies that plaintiffs successfully challenged. Among the immediate beneficiaries of these judicial outcomes were thousands of class members represented by plaintiffs who applied for admission after the policies were struck down. This benefit—the legally-enforced right to apply into a lawful admission program—has already been achieved, regardless of whether any class member is also someday awarded compensatory damages for the defendants' past unlawful conduct. The benefits produced by the lawsuit, moreover, have continued to be national in scope as shown by the recent ruling of yet another court striking down a race-based admissions program as unlawful under the principles articulated by the Supreme Court in this case. *See Comfort v. Lynn Sch. Comm.*, ___ F.3d ___, No. 03-2415, 2004 WL 2348505 (1st Cir. Oct. 20, 2004) (attached as Exhibit A to the accompanying affidavit of Kirk O. Kolbo).[1]

[1] Perhaps defendants' truculent refusal to acknowledge that the plaintiffs prevailed in this action explains why defendants persist in their refusal to pay the judgment for costs assessed against them by the Supreme Court in this case in the amount of $14,676.00.

II. PLAINTIFFS' REQUESTS FOR LIMITED DISCOVERY ARE RELEVANT AND DISCOVERABLE.

Plaintiffs' opening brief cited numerous cases in which courts permitted discovery with respect to fees incurred by the opposing parties' counsel. As plaintiffs explained and the cases demonstrate, whether and to what extent discovery is allowed is a matter of discretion with the Court. The practice is commonplace enough, however, to be recognized as such in the *Manual for Complex Litigation*. *See Manual for Complex Litigation, Fourth*, § 14.231 (2004). In contrast, not one of the cases cited by defendants involved a wholesale refusal to allow any discovery or consideration of opposing counsel's fees as part of contested prevailing-party fee litigation. In one of their cited cases, *Johnson v. University College of University of Alabama*, 706 F.2d 1205, 1209 (11th Cir. 1983), the district court "allowed plaintiffs to submit much information concerning defense fees," including information about the "defense counsel's customary fee," which defendants in this case tenaciously refuse to disclose. Some courts have concluded that in the circumstances of the case being litigated, particular arguments about defense counsel's fees did not have merit, but this is hardly support for defendants' stonewalling on the discoverability of any of the requested information with respect to their time and billing information. Thus, in *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053 (2nd Cir. 1989), another of the cases cited by defendants, while the court rejected plaintiff's contention that he was entitled to "fee parity" with defense counsel, it also acknowledged that "[t]here may be instances when district courts will want to consider—among the myriad of other factors—the fees charged by opposing counsel." *Id.* at 1059.

Plaintiffs are not arguing that they are entitled to be paid the same enormous fees paid to defendants' counsel in this case, or that the requested information about defendants' rates, fees and costs is conclusive of the fee award to which plaintiffs are entitled. Instead, plaintiffs' contention is that certain information about defendants' fees is a relevant consideration for the

specific reasons explained in plaintiffs' opening brief. The ways in which defendants have failed to rebut these justifications for the requested discovery are addressed separately below:

Customary Billing Rates. While defendants have offered no sworn testimony or other admissible evidence to support their challenge to plaintiffs' evidence of the prevailing rate in the relevant market, they did belatedly attach to a sur-reply brief an affidavit containing limited, selective rate information. The rate disclosure is confined to identifying the discounted 2003 rates of two of the attorneys who represented the defendants from the Butzel Long firm. Neither side has argued that the *discounted* hourly rate charged by defense counsel in the case at issue is any evidence of the "prevailing community rate" in the relevant forum—because that undisputedly is not the standard for determining the prevailing rate.[2] Defendants never challenge the proposition that Butzel Long's *normal* hourly rates are at least relevant evidence of the prevailing community rate. The affidavit submitted to identify the discounted rates of Mr. Niehoff and Mr. Kessler in this case sheds no light on what that normal rate, or the prevailing community rate, is. Instead, it opaquely refers to "market factors" and the "significance of the case" as the reasons explaining the discounted rates in this case. *See* Leonard Niehoff Affidavit at ¶ 7. This is exquisitely inscrutable, except perhaps to the extent it means that in exchange for the opportunity to second-chair a very important case, Butzel Long was willing to sharply discount its normal hourly rates. But that answers nothing about the appropriate inquiry—which concerns the prevailing rate in the community for the level of skill and experience required by the case. Just as plaintiffs are not automatically entitled to "fee parity" with defendants, they are not required to accept as the prevailing rate some special lower rated charged by their defeated adversaries. In contrast, while defense counsel's *normal* hourly

[2] Defendants pretend that plaintiffs only sought information about defendants' *normal* hourly rates after learning of Butzel Long's special rates in this case. This is false, as shown by the letter from plaintiffs' counsel to Mr. Niehoff dated September 10, 2004 (attached as Exhibit A to plaintiffs' opening brief), wherein information about "normal" hourly rates was sought before defendants made their late disclosure of specially "discounted" rates.

rates (undiscounted) are not *conclusive* of the determination of prevailing rate, this information is certainly *evidence* of it, and therefore it is appropriate for plaintiffs to obtain discovery of those normal rates where, as here, defendants have challenged the rates for which plaintiffs seek reimbursement.

Defendants' assorted other arguments for refusing to disclose defense counsel's normal hourly rates primarily go only to the weight of the evidence, not discoverability or relevance. Hence, upon disclosing the normal hourly rates of their counsel, defendants are free to argue that they had to look outside the state of Michigan to find superior first-chair lawyers with experience in civil rights law, but so too did plaintiffs find it necessary to hire out-of-state lawyers. The Court can also decide whether "competent" lawyers for plaintiffs could have handled the litigation for a lower rate than the rates customarily charged by defendants' counsel, although defendants have presented no evidence on this point. But none of these or defendants' other arguments justify their stubborn refusal to submit information on their normal rates as part of the inquiry into determining the appropriate "prevailing community rate."

Time and Personnel Devoted to the Case; Billing Records. Defendants have in conclusory fashion put in issue the reasonableness of the number of legal personnel who rendered services in the case on behalf of plaintiffs and the number of hours they devoted to it. As explained in plaintiffs' opening brief, comparisons of these numbers for the two sides is relevant and helpful because the parties litigated the same case, meaning they often devoted services to common tasks, such as preparation for and attendance at the same depositions or court appearances, or research and writing of briefs on the same subject matter and schedule. By challenging the reasonableness of the expenditure of effort by plaintiffs, defendants naturally invite some examination of what level of time and staffing they devoted to the case. Defendants offer no specific rebuttal to any of these considerations, contenting themselves with a cliché

about "apples and oranges" and personal attacks on plaintiffs' lawyers.[3] Defendants make no confession that their defense counsel devoted an unreasonable amount of time and effort to the case, so that a comparison would be meaningless. They also fail to offer explanation or argument why it would have been reasonable for defendants in this case to have devoted substantially more time and personnel to it than plaintiffs, who were seeking to vindicate the important constitutional and civil rights of themselves and thousands of class members. Hence, an examination of defendants' expenditure of time and resources would provide a relevant frame of reference for the Court in considering the reasonableness of plaintiffs' effort, and it would also permit a test of the credibility and genuineness of defendants' charges of excessive or other unreasonable expenditure of effort by plaintiffs.

The best evidence of the time and personnel resources devoted to the case by defendants' outside counsel is undoubtedly contained in billing records presumably submitted by defense counsel to defendants, which is why plaintiffs have requested that information. Even without production of the actual records, defendants could be required to identify the number and kind of legal personnel devoting services to the case and the hours they devoted to it. These requests are all clearly contained in the proposed written discovery that plaintiffs attached to their opening brief. Defendants should not be relieved from having to produce this information on the basis of their excuse—a comically ironic one given some of their arguments—that the defense billing records of the *Gratz* and *Grutter* cases are commingled and that some time entries are so poorly

[3] Defendants' unfounded and vicious charge of "padding of attorney" hours by plaintiffs is especially ironic given what limited information is available about defendants' billings in this case. Defendants have acknowledged in response to FOIA requests by the public to having spent over $10 million in outside legal fees and expenses alone as of mid-2003 in the two cases. Assuming that at least $9 million of this was attributable to hourly fees of the two outside firms, and assuming an average billing rate across all years of $212.50 based on the limited 2003 rate information that defendants disclosed, then defendants' two outside law firms devoted over **42,000 hours** to the two cases. This, of course, does not even count time devoted to the case by the multiple lawyers in defendants' in-house general counsel's office. Moreover, to the extent that the rates were lower in the years before 2003, or to the extent that the overall average rate was lower because of the lower rates of associates and paralegals, then the 42,000 hour estimate is actually too *low*. By comparison, plaintiffs are seeking to recover fees based on a grand total of under **5,500** hours devoted to this case by all personnel over seven years.

recorded that it may not be possible to separately identify the work in the two cases. Defendants do not suggest that the billing records contain *no* intelligible information on the extent of the legal resources devoted to the case by them.

Expenses. Given that defendants have challenged the reasonableness of expenses incurred by plaintiffs, and that many of the categories of these expenses will be substantially the same for both sides, the same reasons as discussed above explain why a comparison of expenses by the two sides provides a useful frame of reference for determining reasonableness.

III. DEFENDANTS' PROTESTATIONS OF "PRIVILEGE" AND "BURDEN" ARE NOT JUSTIFIABLE EXCUSES FOR FAILURE TO PRODUCE THE RELEVANT DISCOVERY

Defendants' generalized claims of attorney-client privilege and burden do not justify denying the requested discovery. With respect to privilege, some categories of the requested information do not remotely touch on privilege concerns. These include the normal rates of defendants' counsel; the number and identities of the lawyers and other legal personnel who performed services; and the amount of time they devoted to the case. As to billing entries recording services performed, even defendants acknowledge these records will contain non-privileged matters. *See* Defendants' Br. at p. 7. The privilege, moreover, attaches only to information that by its nature is *confidential*. Defendants offer no explanation for why the amount of time devoted to preparing for or attending a deposition, or producing documents, or answering interrogatories, or researching or writing briefs is entitled to confidentiality protection. Moreover, if it is clear on the face of a time entry that a confidential matter has been recorded, it is just as clear that the simple remedy is redaction of the confidential material.

Finally, defendants' sweeping claim of burden is unsupported by sworn testimony on any point other than the fact of defendants' choice to accept consolidated billing of the *Gratz* and *Grutter* cases by their outside counsel. Defendants are free to withhold information or redact document entries that relate to *Grutter* only or that are legitimately privileged. They have

provided no specific information, however, on why this kind of routine discovery review and production would be excessively burdensome. Every discovery request imposes some burden on the producing party to look for the sought-after information or documents, review it for responsiveness, privilege or other matters, and to produce what is discoverable under the rules. Plaintiffs' limited requests in this case probably implicate at most a couple of thousand pages of documents in defendants' possession that could be reviewed by them in the course of a day or two. Having opened the door to relevant discovery by staking out the positions they have taken in opposing plaintiffs' fee petition, defendants should not be heard to complain when this legitimate discovery is sought from them.

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request the Court to grant their motion for leave to permit limited discovery.

Dated: November 19, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2004, I electronically filed **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO ALLOW LIMITED DISCOVERY RELATED TO FEES AND COSTS AND AFFIDAVIT OF KIRK O. KOLBO** with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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