

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION

FILED

MAR - 5 2004

LARRY W. PROPES, CLERK  
U. S. DISTRICT COURT

FRANKLIN E. CLARK and  
LATANJALA DENISE MILLER, on behalf  
of themselves and all others similarly situated,  
Plaintiffs,

v.

EQUIFAX INFORMATION SERVICES  
LLC, successor in interest to EQUIFAX  
CREDIT INFORMATION SERVICES, INC.,  
Defendant.

Civil Action No. 8:00-1218-22

FRANKLIN E. CLARK on behalf of himself  
and all others similarly situated,  
Plaintiffs,

v.

TRANS UNION L.L.C.,  
Defendants.

Civil Action No. 8:00-1219-22

**BRIEF OF DEFENDANTS TRANS UNION AND EQUIFAX IN RESPONSE TO  
OBJECTORS' MOTION TO COMPEL ATTORNEY BILLING DATA**

Defendants Equifax Information Services LLC and Trans Union L.L.C. jointly file this brief in response to Coordinated Objectors' motion to compel Equifax and Trans Union and their counsel to produce attorney billing information.<sup>1</sup>

First, there has never been any request for production of any such documents, under Federal Rules of Civil Procedure 34 or otherwise. Indeed, Objector Counsel never even made an informal request for these documents. This, alone, is reason to deny the motion.

Second, the "motion" is inadequate. The heading for Section III of the Reply/Motion asks "Equifax, TransUnion and Their Counsel to Produce Invoices and Documentation of Attorney Billings, Time, Rates, and Expenses." The text requests only that

<sup>1</sup> This was filed as a part of "Coordinated Objectors' Reply to Brief of Defendants Trans Union and Equifax Regarding Attorneys' Fees and Motion to Compel Defendants and Their Counsel to Produce Invoices and Documentation of Attorney Billings, Time, Rates, and Expenses," dated February 27, 2004 (the "Reply/Motion").

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the Court “compel ET to turn over the time records of their attorneys....” (Reply/Brief at 18)  
This is an inadequate specification of the documents requested.<sup>2</sup>

Third, the request for these documents and the motion are untimely. If Objector Counsel needed this information to support their fee petition, they should have sought it before they filed their petition. Objector Counsel wrongly believe that their failure is excusable. They suggest that they were taken by surprise by the concept that the Court would “scrutinize the billing rates and records of objectors and Plaintiffs.”<sup>3</sup> Instead, what is surprising is Objector Counsel’s claim to have expected that the Court would *not* scrutinize their billing rates and records. This is simply not credible. Paragraph 29 of the Stipulations of Settlement expressly provide that the request for fees “will be subject to court approval.” “Properly reducing allowable hours because of overstaffing of attorneys ... falls soundly within the district court’s proper discretion in determining an attorneys fee award.” *Trimper v. City of Norfolk, Virginia*, 58 F.3d 68, 76-77 (4th Cir. 1995). “The district court ... should exclude ... hours that were not ‘reasonably expended.’” *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

Objector Counsel had no right even to consider that the Court would not fulfill its obligations under the law, which the Court would have been compelled to perform even if the Stipulations had purported to abrogate them. Those duties require the Court to scrutinize the billing rates and records of objectors.

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<sup>2</sup> Moreover, given the absence of any request for production and lateness of the motion, the motion naturally violates Federal Rule of Civil Procedure 37(a)(2)(B), which requires that a motion to compel “must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to make the discovery in an effort to secure the information or material without court action.” Local Civil Rule 7.02 contains a similar requirement. Had such a conference occurred before the petition was filed, it might well have been that some compromise could have been reached.

<sup>3</sup> “ET *now* have requested that the Court scrutinize the billing rates and records of objectors and Plaintiffs.” (Reply/Motion at 18, emphasis added) “*If* the Court feels compelled to scrutinize the billing records during its assessment of the total fee award, as *demand*ed by ET, then .....

 (*Id.* at 21, emphasis added)

A clear signal of this Court's commitment to engage in the scrutiny required is the two-phase process adopted by the Court. What did Objector Counsel think Phase One of the fee process was all about? There would have been no need for Phase One, if it were contemplated that defendants would automatically pay \$15,000,000. If the only issue were apportionment among the contestants for the "fund," the Court would have gone straight to Phase Two. Phase One is plainly designed to establish the total amount of fees to be awarded, based on the mandated scrutiny.

Objector Counsel had full and adequate notice that their fee data was going to be scrutinized by the Court in Phase One. If they thought that Trans Union's and Equifax's attorneys fees had any relevance to that scrutiny, they should have sought to develop the information in a timely manner.

Fourth, what Objector Counsel seek is completely irrelevant. As to the work before the mediation, nothing can be learned from comparing the work done in *litigating* the case to the work done by Objector Counsel at the tail end of the settlement.<sup>4</sup> Even as to the settlement itself, no valid comparison can be made between Objector Counsel and the extensive work done by defendants' counsel in negotiating, documenting and implementing the settlement.<sup>5</sup> The few cases cited in the Reply/Motion permitting discovery of a defendants' litigation expenses deal

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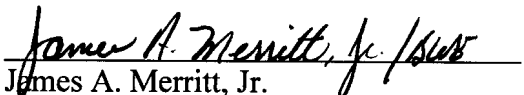

<sup>4</sup> Defendants' *expense* records, for litigation or settlement, are clearly irrelevant and have no relationship to what Objector Counsel's expenses might have appropriately been.

<sup>5</sup> In connection with settlement (not including the litigation the preceded the settlement), all of the following occurred *before* Objector Counsel's first involvement: Mediation; attendance at several hearings; drafting the Stipulations; drafting orders; drafting mailed and published class notices; extensive negotiations among defendants and with class counsel about everything drafted; working with clients first to see what could be done as to the fix, remedy and free credit report and then as to implementing them; working with clients, co-defendants and class counsel to formulate a class notice list methodology and opt-out procedure; working with clients, co-defendants and vendors to create the class notice list and then to disseminate the class notice; legal research regarding notice and the propriety of other aspects of settlement; dealing with questions raised after notice went out. This does not include the extensive work from September 3 to December 5 or the work after December 5, which did involve objectors at all.

with the assessment of a fee application of a *plaintiff* -- a party whose litigation work paralleled that of the defendant -- not an objector for whom neither the work nor the role is comparable. Here, *class counsel*, who did litigate and settle the case, have not asked for defendants' billing records, and defendants have not contested class counsel's billing records.

For the foregoing reasons, objectors' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing was on March 5<sup>th</sup>, 2004 duly served by mail to the following, and that a copy was also sent by overnight express,

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