

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXAS DEMOCRATIC PARTY; BOYD §
L. RICHIE, in his capacity as Chairman of §
the Texas Democratic Party; FRANK §
JOSEPH; and BRETT ROSENTHAL, §

Plaintiffs, §

vs. §

Cause No. 3:08-CV-02117-P

DALLAS COUNTY, TEXAS; BRUCE §
SHERBET, in his capacity as Election §
Administrator for Dallas County, Texas, §

Defendants. §

**DEFENDANTS' MOTION TO STRIKE OR, IN THE ALTERNATIVE, OBJECTIONS
TO PLAINTIFFS' RESPONSE TO THE COURT'S ATTORNEYS' FEES ORDER**

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BRUCE SHERBET, IN HIS CAPACITY
AS ELECTION ADMINISTRATOR
FOR DALLAS COUNTY, TEXAS**

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Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas (collectively, “Defendants”) file their Motion To Strike or, in the Alternative, Objections to the Plaintiffs’ Response to the Court’s Attorneys’ Fee Order, as follows:

I. INTRODUCTION

On September 29, 2010, this Court ordered Plaintiffs to file an amended fee petition within twenty (20) days, and instructed Plaintiffs as follows:

(1) Plaintiffs may amend their affidavit(s) and briefing to demonstrate that the copies were necessarily obtained for use in this case; (2) Plaintiffs’ counsel may amend their billing records to include some general description of their research and conferences; (3) Plaintiffs counsel must correct substantive errors, discrepancies, and clerical errors in their billing records; (4) Plaintiffs’ counsel must amend their affidavits and billing records to eliminate charges incurred in prosecuting their Section 2 claim; and (5) Plaintiffs’ counsel must amend their affidavit(s) and billing records to eliminate charges incurred in prosecuting the claims of former Plaintiffs Brett Rosenthal and Frank Joseph.

[doc. 62 at 9]. Because Plaintiffs failed to abide by this Court’s Order, Defendants request that Plaintiffs’ Response to the Court’s Attorney Fee Order (“Plaintiffs’ Response”) [doc. 65] be stricken in its entirety. In the alternative, Defendants request that this Court sustain Defendants’ objections and reduce Plaintiffs’ request for fees and costs as described below.

II. ARGUMENTS AND AUTHORITIES

A. PLAINTIFFS’ RESPONSE SHOULD BE STRICKEN AS UNTIMELY.

Based upon this Court’s Order [doc. 62], it is incontrovertible that Plaintiffs’ amended fee petition was due on October 19, 2010. Plaintiffs untimely filed Plaintiffs’ Response on October 21, 2010. Plaintiffs should have sought leave to untimely file, but no such motion was made. Indeed, Plaintiffs put forth *zero* evidence of good cause for their late filing.

Plaintiffs' disregard of the Court's Order should not be rewarded by consideration of Plaintiffs' Response. This is especially true given that the Court's Order graciously allowed Plaintiffs to correct the many deficiencies of Plaintiffs' original fee request. The Northern District disfavors untimely briefs filed without leave or good cause. *See, e.g., Netknowledge Techs., L.L.C., v. Baron Capital, Inc.*, Civ. A. No. 3:02-CV-2406-M (N.D. Tex. Sept. 8, 2003) Order [doc. 35], attached as Exhibit A ("Because the brief was filed past the due date stated in the Order, the Court strikes it as untimely."); *Affiliated Computer Servs. Derivative Litig.*, Master File No. 3:06-CV-1110-M (N.D. Tex. May 30, 2007) Order [doc. 63], attached as Exhibit B ("Because the Motion was filed past the due date stated in the Order, the Court strikes it as untimely."); *see also Nelson v. City of Watauga, Tex.*, No. Civ. A. 4:03-CV-142-B, 2004 WL 239748, at *1 (N.D. Tex. Jan. 13, 2004) (striking response and exhibits as untimely under Local Rules); *Schwarz v. Potter*, No. Civ. A. 1:04-CV-075-C, 2005 WL 1148734, at *1 (N.D. Tex. May 16, 2005) (refusing to consider an untimely response because plaintiff failed to show good cause or seek an extension). Because Plaintiffs disregarded the filing deadline ordered by the Court without seeking leave or showing good cause, Plaintiffs' Response should be stricken.

B. PLAINTIFFS' RESPONSE SHOULD ALSO BE STRICKEN BECAUSE IT FAILS TO ABIDE BY THE SUBSTANCE OF THE COURT'S ORDER.

In addition to being filed out of time, Plaintiffs' Response fails in other respects to comply with the Court's Order. Despite the Court's instruction to remove attorneys' fees relating to non-prevailing claims and plaintiffs—which far outnumbered the single prevailing claim of one plaintiff—Plaintiffs' counsel reduced their original \$109,350.00 fee request by *less than five (5) percent*.¹ In fact, rather than reduce his fees, Mr. Jenkins actually *increased* his

¹ \$109,350.00 is the sum of Plaintiffs' original fee requests, which are contained in Plaintiffs' Motion for Attorneys' Fees [doc. 46] and Reply [doc. 57]. The percentage compares time recorded in Plaintiffs'

original fee request by \$180.00.² Mr. Brazil reduced his original request by a mere 0.3 hours, for a total of \$90.00. Mr. Dunn reduced his fees by only 18.45 hours, for a total of \$5,535.00.

Indeed, Plaintiffs' counsel: (1) failed to make adequate reductions for the unsuccessful section 5 claims of Joseph and Rosenthal (*see* section 1 below); (2) failed to reduce section 2 fees in the manner represented to the Court (*see* section 2); (3) failed to reduce time incurred drafting complaints to account for unsuccessful claims and dismissed plaintiffs (*see* section 3); and (4) failed to reduce any of the time billed for conferences with Joseph and Rosenthal (*see* section 4). Moreover, although this Court provided Plaintiffs' twenty (20) days to amend their fee request to "correct substantive errors, discrepancies, and clerical errors in their billing records," Plaintiffs shirked their obligation and left it to Defendants to "sift through the records to try to find a remaining billing error here or there." [doc. 65 at 4]. Plaintiffs' lax attitude towards the Court's Order makes the continued presence of substantive errors inevitable (*see* section 5),³ and renders the continued presence of vague billing unsurprising (*see* section 6).

In sum, Plaintiffs not only filed an untimely response, but also disregarded the Court's instructions. For this additional reason, the Court should strike Plaintiffs' Response. *See, e.g., Hopkins v. Texas Mast Climbers, L.L.C.*, No. Civ. A. H-04-1884, 2005 WL 3435033, at *1 n.1 (S.D. Tex. Dec. 14, 2005) (disregarding untimely filed brief, which also failed to follow the

original fee requests [docs. 46 & 57], with time recorded for the same time period in Plaintiffs' Response [doc. 65].

² Although Mr. Jenkins reduced his fee request on 02/08/02 by 0.6 hours, Mr. Jenkins increased the billable time in a separate entry, which was listed in the original fee request as 12/18/08 "Conference with co-counsel." (0.3), but appears in the amended fee request as 12/18/10 (a date which has not yet occurred) "Multiple telephone conference with Brown's counsel and clients concerning withdrawing claims related to 2008 elections." (1.5). Accordingly, Mr. Jenkins entered a net *increase* in his billing of 0.6 hours, at \$300 per hour. This net increase is independent of additional fees billed for time expended after Plaintiffs filed their Motion for Attorneys' Fees and Reply.

³ Plaintiffs' counsel's approach is contrary to settled law: the fee applicant bears the burden of proof that its hours were reasonable; the opposing party has no burden to prove unreasonableness. *Leroy v. City of Houston*, 831 F.2d 576, 586 (5th Cir. 1987) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

court's instructions).

1. Fees for Section 5 Claims of Rosenthal and Joseph Were Insufficiently Reduced.

Despite the Court's express instructions to Plaintiffs to "amend their affidavit(s) and billing records to eliminate charges incurred in prosecuting the *claims* of former Plaintiffs Brett Rosenthal and Frank Joseph," [doc. 62 at 9] (emphasis added), Plaintiffs made only *one* reduction for *one* attorney's time for a total reduction of 1.9 hours expended in pursuit of section 5 summary judgment on behalf of Rosenthal and Joseph.⁴ The time billed for Plaintiffs' section 5 claims totals between 58.2 hours (including only time billed exclusively to section 5) and 105.5 hours (including time improperly block-billed, i.e. expended on section 5 as well as other claims or activities). Multiplied by Plaintiffs' attorneys' rate of \$300 per hour, the total amount requested for Plaintiffs' section 5 claims totals between \$17,460 and \$31,650 dollars.⁵ Per the

⁴ This reduction was made from Chad Dunn's time for 02/08/09. All other reductions made for Joseph and Rosenthal were made in entries concerning Plaintiffs' response to Defendants' motion to dismiss. See entries dated 01/21/09, 02/05/09, 02/06/09, 02/07/09, and 02/08/09. Plaintiffs' attorneys sought section 5 summary judgment on behalf of Joseph and Rosenthal. [doc. 27]. The section 5 claims of Joseph and Rosenthal were not dismissed by the Court until April 17, 2009, [doc. 42], long after the parties had fully briefed the Motion for Summary Judgment on Section 5 Claims and related Motion for Permanent Injunction and Motion To Stay.

⁵ A time entry accompanied by an asterisk indicates that the entry was block billed, e.g. time expended on section 5 is billed together with time expended on another claim or activity.

Unreduced section 5 entries for Chad Dunn: 11/26/08 "Review VRA submission." (5.2*); 11/29/08 "Conference with co-counsel regarding effect on minority [sic] voters and timing of federal lawsuit. Review Department of Justice's website for records of pre-clearance submission from Texas concerning voting technology." (4.5); 11/30/08 "Continue review of DOJ's website for applicable section 5 submissions." (5.9*); 12/01/08 "Continue research on voting machine effects on minority voters." (7.1*); 12/04/08 "Multiple conferences with recount observers concerning prevalence of uncounted votes and incidence in minority precincts." (4.8*); 12/12/08 "Review final printouts from recent recount and do preliminary calculations of minority impact." (6.1); 12/16/08 "Research VRA." (2.1*); 12/18/08 "Prepare Motion to Appoint three judge panel. Conference with opposing counsel concerning their position on same." (0.9); 12/18/08 "Multiple conference calls with co-counsel and client concerning draft of amended complaint and request for three-judge court. Prepare Motion to Appoint Panel." (3.8*); 01/05/09 "Research Section 5 Claims regarding standing." (1.2); 01/07/09 "Receipt and review of court order regarding panel." (0.2); 02/03/09 "Research Motion for Summary Judgment and the Voting Rights Act." (4.8); 02/06/09 "Draft and edit motion and order to exceed page limits." (0.4); 02/06/09 "Receipt and

Court's Order, these hours and amounts should have been reduced to account for the failure of Rosenthal and Joseph's section 5 claims.⁶ Because Plaintiffs should not be allowed to benefit from their imprecise block-billing practices,⁷ Defendants urge the Court to reduce Plaintiffs' section 5 fees inclusive of block-billed amounts by half, for a total reduction of \$15,825.

review of Dallas County's response to motion for summary judgment. Conference with co-counsel concerning same." (2.2); 02/09/09 "Prepare Motion for Summary Judgment. Prepare proposed orders. Review local court rules. Conference with opposing counsel on page limits. Edit and file numerous pleadings." (10.8*); 02/10/09 "Copy disc containing ballot images. Review copies for completeness. Conference with Court staff concerning proper filing and delivery method. Overnight mail electronic evidence to court." (1.5); 03/02/09 Receipt and review of Motion to Stay and Dallas County's response to Motion for Permanent Injunction. Research authorities cited therein. Conference with co-counsel and clients concerning same." (6.5); 03/19/09 "Continue editing reply on summary judgment. Legal research on laches and standing." (2.2); 03/20/09 "Edit and file reply." (1.7); 03/23/09 "Draft, edit and file response to Motion to Stay." (6.2); 04/07/09 "Receipt and review of County's reply on Motion to stay." (1.2).

Unreduced section 5 entries for K. Scott Brazil: 11/30/08 "Pull authorities on section 5 litigation in the Northern District of Texas." (1.5*); 01/07/09 "Receipt and review of panel order." (0.1); 02/06/09 "Review and edit response motion to dismiss and motion for summary judgment." (3.5*); 02/09/09 "Review and edit final draft of response to motion to dismiss and motion for summary judgment." (1.8*); 03/19/10 "Edit draft of reply on summary judgment." (0.8); 04/07/09 "Receipt and review of County's reply on motion to stay." (0.2).

Unreduced section 5 entries for Clay Jenkins: 11/29/08 "Multiple conferences with co-counsel regarding effect on minority voters and preparation and filing of federal lawsuit." (0.8*); 12/02/08 "Attend recount, supervise recount of servers, obtain evidence supporting discriminatory [sic] of un-precleared election change." (8.5); 12/03/08 "Attend recount, supervise recount of servers, obtain evidence supporting discriminatory [sic] of un-precleared election change." (8.5); 12/12/08 "Coordinate with co-counsel delivery of records for recount." (0.5). Although Mr. Jenkins contends that "Not all days of the recount I attended were billed[,] Mr. Jenkins does not provide records of time written off for other days.

⁶ See *Hopwood v. State of Tex.*, 999 F. Supp. 872, 915-16 (W.D. Tex. 1998), *aff'd in relevant part*, 236 F.3d 256, 277 (5th Cir. 2000) (rejecting fees for time spent in relation to three plaintiffs who withdrew from the lawsuit).

⁷ See, e.g., *Walker v. U.S. Dept. of Hous. & Urban Dev.*, 99 F.3d 761, 773 (5th Cir. 1996) (faulting billing records that "never separate out her day, always lumping all of the day's activities together," calling such timekeeping "woefully inadequate to support any fee application"); *Von Clark v. Butler*, 916 F.2d 255, 259 (5th Cir. 1990) ("When the documentation of hours is inadequate for the court to identify those hours spent on prevailing claims which are separate and distinct from other claims, the district court may reduce the award accordingly.") (citing, *inter alia*, *Leroy*, 831 F.2d at 585-86); *Merced v. City of Eules*, No. 4:06-CV-891-A, 2008 WL 1848451, at *2 (N.D. Tex. April 23, 2008) (denying request for fees because, *inter alia*, "the itemization of services attached to the motion appears to include services rendered in connection with claims outside the scope of § 1988(b), and there is no segregation that would enable the court to exclude the fees related to those services from consideration.").

2. Plaintiffs Failed To Reduce Section 2 Fees in the Manner Represented to the Court.

Although Plaintiffs represented to the Court in their Response that they “reduced the amount of time spent on responding to the Motion to Dismiss by half,” to account for time expended on unsuccessful section 2 claims [doc. 65 at 3], Plaintiffs nonetheless failed to reduce several entries pertaining to Defendants’ motion to dismiss.⁸ These unreduced entries relating to Defendants’ motion to dismiss total between 11.4 and 27.5 hours (due to block billing), amounting to between \$3,420 and \$8,250. These entries should—at a minimum—be reduced by half to match Plaintiffs’ representation to this Court. Because Plaintiffs’ counsel should not be allowed to benefit from their imprecise block-billing practices,⁹ Defendants urge the Court to reduce Plaintiffs’ fees inclusive of block-billed amounts by half, for a total reduction of \$4,125.

3. Plaintiffs Failed To Reduce Any Time Billed for Drafting Complaints To Account for Dismissed Claims and Unsuccessful Plaintiffs.

Plaintiffs openly acknowledge that they did not reduce any of the time they expended drafting their complaint and amended complaint. [doc. 65 at 3]. Yet these complaints included section 2 claims, which were dismissed as to all Plaintiffs, and the section 5 claims of Rosenthal

⁸ Unreduced section 2 entries for Chad Dunn: 01/21/09 “Receipt and review of motion to dismiss.” (0.5); 02/05/09 “Telephone conference with co-counsel regarding Motion to Dismiss response.” (0.2); 02/09/09 “Finalize and file Motion to Dismiss and Response (omitted).” (5.8); 02/09/09 “Continue research, drafting and edits of Response to Motion to Dismiss.” (10.8*); 02/24/09 “Receipt and review of Dallas County’s reply brief on motion to dismiss.” (3.3).

Unreduced section 2 entries for K. Scott Brazil: 02/06/09 “Review and edit response motion [sic] to dismiss and motion for summary judgment.” (3.5*); 02/09/09 “Review and edit final draft of response to motion to dismiss and motion for summary judgment.” (1.8*).

Unreduced section 2 entries for Clay Jenkins: 01/21/09 “Receipt and review of motion to dismiss.” (0.7); 02/05/09 “Telephone conference with co-counsel regarding motion to dismiss responses.” (0.2); 02/24/09 “Receipt and review of Dallas’ reply on motion to dismiss.” (0.7).

⁹ *See, e.g., Walker*, 99 F.3d at 773; *Von Clark*, 916 F.2d at 259; *Merced*, 2008 WL 1848451, at *2, described *supra* at note 7.

and Joseph, which were likewise dismissed.¹⁰ Plaintiffs argue that “[t]he amount of additional time required to be spent on the Complaint to add the Section 2 claim paragraph is negligible.” [doc. 65 at 3]. But this contention is belied by Plaintiffs’ acknowledgment that “Plaintiffs’ counsel was required . . . to give specific attention to Section 2 claims while preparing the Original Complaint” *Id.* Moreover, none of Plaintiffs’ section 2 or section 5 claims were removed in Plaintiffs’ First Amended Complaint. [doc. 16]. Plaintiffs’ attorneys have currently billed between 14.1 and 48.3 hours (due to block billing), resulting in fees between \$4,230 and \$14,490, for time expended on Plaintiffs’ complaints. Pursuant to the Courts’ Order, time expended on Plaintiffs’ complaints should have been reduced to account for dismissal of Plaintiffs’ section 2 claims and the section 5 claims of Mr. Joseph and Mr. Rosenthal. [doc. 62 at 9]. Because Plaintiffs should not be allowed to benefit from their imprecise block-billing

¹⁰ Unreduced Complaint and First Amended Complaint entries for Chad Dunn: 11/26/08 “Begin draft of VRA lawsuit.” (5.2*); 11/30/08 “Continue drafting federal lawsuit.” (5.9*); 12/01/08 “Continue drafting and file complaint. Multiple conferences concerning changes made in suit, coordination of records and effective service of Defendants.” (7.1*); 12/03/08 “Conference with court and counsel regarding newly-filed lawsuit. Arrange for service of defendants.” (2.1); 12/04/08 “Telephone conference with opposing counsel regarding newly-filed case.” (4.8*); 12/17/08 “Draft amended complaint.” (2.1); 12/18/08 “Continue drafting amended complaint.” (4.4); 12/18/08 “Continue draft of amended complaint. Correspond with opposing counsel. Multiple conference calls with co-counsel and client concerning draft of amended complaint and request for three-judge court.” (3.8*); 12/19/08 “Edit and finalize amended complaint and joint stipulation. File documents with Court.” (5.1*); 12/23/08 “Receipt and review of court order granting leave to file amended complaint.” (0.1); 05/01/09 “Receipt and review of Dallas County’s answer to amended complaint.” (1.5).

Unreduced Complaint entries for K. Scott Brazil: 11/30/08 “Review and edit draft of federal lawsuit.” (1.5*); 12/18/08 “Edit additional draft of amended complaint.” (0.6) (This time was reduced by 0.2 to eliminate conference time spent by both Brazil and Dunn but entry was not reduced for time spent on the complaint); 05/01/09 “Receipt and review of Dallas County’s amended answer.” (0.3).

Unreduced Complaint entries for Clay Jenkins: 11/29/08 “Multiple conferences with co-counsel regarding effect on minority voters and preparation and filing of federal lawsuit.” (0.8*); 11/30/08 “Review and edit federal complaint.” (1.5); 12/01/08 “Multiple conferences with co-counsel concerning changes made in suit, coordination of records and effecting service of Defendants. Edit additional draft of amended complaint.” (0.8); 12/17/08 “Receipt and review draft of amended complaint. Edit same.” (0.7).

practices,¹¹ Defendants urge the Court to reduce the fees inclusive of block-billed amounts by half, for a total reduction of \$7,245.

4. Plaintiffs Failed To Reduce Any Entries for Conferences with Dismissed Clients.

Plaintiffs' attorneys have as currently billed between 0.5 and 26.3 hours (due to block billing) for time expended on conferences with unspecified "clients" prior to the date upon which Rosenthal and Joseph were dismissed as Plaintiffs. These entries total between \$150 and \$7,890 (due to block billing).¹² Pursuant to the Courts' Order, time expended on client conferences should have been reduced to account for the dismissal of Plaintiffs Rosenthal and Joseph. [doc. 62 at 9]. Because Plaintiffs should not be allowed to benefit from their imprecise block-billing practices,¹³ Defendants urge the Court to reduce the fees inclusive of block-billed amounts by half, for a total reduction of \$3,945.

¹¹ See, e.g., *Walker*, 99 F.3d at 773; *Von Clark*, 916 F.2d at 259; *Merced*, 2008 WL 1848451, at *2, described *supra* at note 7.

¹² Unreduced client conference entries for Chad Dunn: 12/04/08 "Conference with clients updating the case." (4.8*); 12/06/08 "Conference call with clients to update on case activities." (0.3); 12/08/08 "Telephone conference with clients and counsel concerning deadlines." (1.1*); 12/15/08 "Multiple telephone conferences with clients and Brown's counsel concerning withdrawing claims related to 2008 elections." (1.5*); 12/18/08 "Multiple conference calls with co-counsel and client concerning draft of amended complaint and request for three-judge court." (3.8*); 12/19/08 "Conference with clients regarding day's activities." (5.1*); 12/23/08 "Conference with co-counsel and clients regarding court order." (1.5*); 03/02/09 "Conference with co-counsel and clients concerning the same." (6.5*).

Unreduced client conference entries for K. Scott Brazil: 12/06/08 "Conference call with clients to update on case activities." (0.2).

Unreduced client conference entries for Clay Jenkins: 12/18/10 [sic] "Multiple telephone conference with Brown's counsel and clients concerning withdrawing claims related to 2008 elections." (1.5*). Mr. Jenkins *increased* the billable time for this entry, which was listed in the original fee request as 12/18/08 "Conference with co-counsel." (0.3), but which appears in the amended fee request as 12/18/10 (a date which has not yet occurred).

¹³ See, e.g., *Walker*, 99 F.3d at 773; *Von Clark*, 916 F.2d at 259; *Merced*, 2008 WL 1848451, at *2, detailed *supra* at note 7.

5. Plaintiffs' Billing Records Remain Erroneous.

Plaintiffs' billing records still contain entries that cannot be matched with the docket in this case. For example, Mr. Dunn billed 2.2 hours on *February 6, 2009* for "Receipt and review of Dallas County's response to motion for summary judgment. Conference with co-counsel regarding same." *Yet Plaintiffs had not, at that time, even filed their Motion for Summary Judgment*, making review of a response thereto impossible. Indeed, Plaintiffs filed their summary judgment motion on *February 9, 2009*, [doc. 27], and Defendants filed their response on *March 6, 2009* [doc. 38]. Similarly, Mr. Dunn provides no explanation how he could bill 1.8 hours on February 11, 2009, for time described as "[b]egin draft reply to Dallas County's response" when Dallas County had not filed *any* "response" to *any* motion prior to that date.¹⁴

These time entries that cannot be reconciled with the docket are reminiscent of those roundly rejected by the Fifth Circuit. *Leroy*, 831 F.2d at 585-86 (assigning clear error, finding district court abused its discretion in accepting "faulty records," and reversing the district court's acceptance of "reconstructed, after-the-fact summaries"). Accordingly, these entries, numbering 4.0 hours and totaling \$1,200, should be rejected.

6. Plaintiffs' Records Still Contain Non-Specific Billing.

Although the Court directed Plaintiffs' attorneys to "amend their billing records to include some general description of their research and conferences," [doc. 62 at 9], Plaintiffs' amended fee request still contains unspecified billing.¹⁵ These fees, totaling 4 hours for \$1,200, should be denied.¹⁶

¹⁴ See also note 2 *supra*, which details Clay Jenkins's bill for 1.5 hours incurred on a date still months in the future: December 18, 2010.

¹⁵ Chad Dunn: 02/05/2009 "Review of draft brief. Begin editing and additions." (4.0)

¹⁶ See *Hopwood*, 999 F. Supp. at 916 n.93, *aff'd in relevant part*, 236 F.3d at 277 (refusing to assess fees described as "REVIEW AND REVISE BRIEF").

C. PLAINTIFFS IMPROPERLY BILLED FOR APPELLATE FEES.

Plaintiffs waited more than ten months after the Court's grant of summary judgment to state that "Plaintiffs reserve the right to seek their attorneys' fees in the likely event Dallas County is unsuccessful on appeal." [doc. 65 at 4]. Plaintiffs' Motion for Attorneys' Fees [doc. 46] did not state that Plaintiffs were seeking appellate fees nor that they would do so in the future. Because Plaintiffs made their request for appellate fees far beyond the fourteen-day deadline provided by Rule 54(d), Plaintiffs' request is untimely and should be denied. *See, e.g., Texas Soil Recycling, Inc. v. Intercargo Ins. Co.*, 73 Fed. Appx. 78, 2003 WL 21756344, at *2 (5th Cir. 2003) (explaining request for appellate fees was untimely because, *inter alia*, "[n]o prospective request for such fees was included in Intercargo's initial fee motions in the district court"); *South Tex. Elec. Coop. v. Dresser-Rand Co.*, No. V-06-28, 2010 WL 1855959, at *2 (S.D. Tex. May 5, 2010) ("[T]he fact that a motion for appellate fees attorneys' fees is not ripe when it must be raised under Rule 54 does not excuse a party from failing to comply with required procedures under the Federal Rules.").¹⁷

Plaintiffs' Response improperly includes appellate fees totaling 4.9 hours amounting to \$1,470.¹⁸ Because Plaintiffs failed to satisfy Rule 54(d) as to their request for appellate attorneys' fees, their appellate fees totaling \$1,470 should be denied.

¹⁷ *But cf. Dippin' Dots v. Mosey*, 602 F. Supp. 2d 777, 782-83 (N.D. Tex. 2009) (Thrash, J.). Although the *Dippin' Dots* court concluded, based on an unreported 6th Circuit case, that Rule 54 does not apply to appeals, the *Dippin' Dots* court failed to consider contrary Fifth Circuit authority, *Texas Soil Recycling, Inc. v. Intercargo Ins. Co.*, which is quoted above. *See South Tex. Elec. Coop.*, 2010 WL 1855959 at *3 (refusing to follow *Dippin' Dots* because, *inter alia*, it cannot be reconciled with Fifth Circuit authority, *Texas Soil Recycling, Inc. v. Intercargo Ins. Co.*).

¹⁸ Appellate fees sought by Chad Dunn: 10/07/10 "Receipt and review of Defendant's [sic] Appeal to Supreme Court. Review Supreme Court Rules as to deadlines for filing jurisdictional statement and response. Review other Section 5 cases on Supreme Court docket." (4.5); 10/08/10 "Telephone conference with client concerning Supreme Court appeal." (0.1).

Appellate fees sought by Clay Jenkins: 10/07/10 "Receipt and review of Interlocutory Appeal to Supreme Court." (0.2); 10/08/10 "Conference call with opposing counsel concerning Supreme Court appeal." (0.1).

D. PLAINTIFFS ADDED A DUPLICATE ENTRY TO THEIR COSTS.

Finally, Plaintiffs' attempt to provide detail as to their costs resulted in a newly-introduced error. A duplicate copying charge of \$196.24, which was not present in Plaintiffs' original bill of costs, should be denied by this Court.¹⁹

III. REQUEST FOR RELIEF

For the foregoing reasons, Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas, respectfully request that this Court strike the Plaintiffs' Response, or in the alternative, reduce the Plaintiffs' fee and cost recovery in accordance with this Court's Order and applicable law by a total of \$35,206.24, as follows:

Section 5 claims of Joseph and Rosenthal	\$15,825
Section 2 claims	\$4,125
Complaints	\$7,245
Conferences with Joseph and Rosenthal	\$3,945
Erroneous entries	\$1,200
Non-specific entries	\$1,200
Appellate fees	\$1,470
Duplicated entry in costs	\$196.24
Total	\$35,206.24

Defendants also request the Court grant Defendants any and all relief to which they may be entitled.

¹⁹ Plaintiffs seek \$196.24 in copying costs on two dates: 11/25/08 and 02/28/09. The charge for 11/25/08 was not included in Plaintiffs' original bill of costs. [docs. 47-2 & 48].

Respectfully submitted,

/s/ E. Leon Carter

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**COUNSEL FOR DEFENDANTS
DALLAS COUNTY, TEXAS AND
BRUCE SHERBET, IN HIS CAPACITY
AS ELECTION ADMINISTRATOR
FOR DALLAS COUNTY, TEXAS**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon counsel of record via the Court's ECF Noticing System on this 6th day of November, 2010.

/s/ E. Leon Carter