

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. 08-CV-02117-P

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

Defendants. §

JOINT STATUS REPORT

COME NOW Plaintiffs, TEXAS DEMOCRATIC PARTY and BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party, (collectively “Plaintiffs” or “TDP”) and Defendants, DALLAS COUNTY, TEXAS and BRUCE SHERBERT, in his capacity as Election Administrator for Dallas County, Texas, (collectively “Defendants” or “Dallas County”) and file this their Joint Status Report in response to the Court’s Order, and in support thereof would show the following:

I. Conference Details

On Friday, December 3, 2010, from approximately 1:30 p.m. to 1:45 p.m., lead counsel for Defendants, Leon Carter, conferred with lead counsel for the Plaintiffs, Chad

W. Dunn, by telephone. No matters were resolved by agreement. The specific matter that needs to be heard and determined is whether Plaintiffs' Motion to Compel production of defense counsel's billing records should be granted. The following is a detailed explanation of why an agreement could not be reached as to this matter.

II. Position of Plaintiffs

Over the course of the last several months, Defendants have filed numerous objections to Plaintiffs' attorney billing records. Defendants have nitpicked one charge after another thereby costing the parties and the Dallas County tax payers far in excess of any amounts possibly saved. Defendants' purpose for this exercise has been to attempt to show that Plaintiffs' attorneys fees and costs were not reasonable and necessary. Plaintiffs believe Defendants' charges are vastly in excess of those charged by Plaintiffs' counsel. If so, such evidence is relevant to determine whether the Defendants' objections are well founded.

1. Plaintiffs requested the material in writing on at least two occasions, not including email exchanges on the subject.

On January 25, 2010, counsel for Plaintiffs sent a request to Defense Counsel requesting the billing records. *See* Exhibit "A." Defense counsel responded and refused to produce the records. On February 3, 2010, Plaintiffs' counsel again requested the records by letter and stated: "Since you have refused to inform the Court or produce a copy of your bills, I assume you will be treating my earlier letter as a Request for Production and will respond accordingly." *See* Exhibit "B." No objection was received

by Defense Counsel to this letter, either to the request directly, or to the form of the request. The Defendants did not timely respond nor did they file any objections.

2. *Defendants' objections have been waived for failing to timely respond.*

The only form requirement for a Request for Production is that it be in writing, and this request clearly was. *See* FED. R. CIV. PRO. 34(a). Furthermore, Defense Counsel failed to object timely to the request and therefore all objections are waived. If a responding party does not plan to comply, it must state the objection and include the reasons. *See* FED. R. CIV. PRO. 34(b)(2)(B) and *Gile v. United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996); and *Kansas-Neb. Nat. Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 24 (D. Neb. 1985). Absent a showing of excusable neglect, all objections are waived if not timely submitted. *See General Elec. Co. v. Lehnen*, 974 F.2d 66, 67 (8th Cir. 1992).

3. *The information requested is relevant to determining the objections to Plaintiffs' fee application.*

It has long been the law in the circuits that production of fee records by the party objecting to another's fee award is relevant to determining an objection to a fee award. *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 586 (3rd Cir. 1984) and *Craik v. Minnesota State Univ. Bd.*, 738 F.2d 348, 249 (8th Cir. 1984). As noted in its order, this Court has also so ruled. *See e.g. Migis v. Pearle Vision, Inc.*, 944 F. Supp 508, 514 (Kaplan, J.), *aff'd in part and rev'd in part*, 133 F.3d 1041 (5th Cir. 1998). In fact,

Defendants have found no authority holding the document production requested is not relevant to the issue of the fee award.

III. Position of Defendants

Plaintiffs' Motion should be denied because neither *Migis v. Pearle Vision, Inc.*, 944 F. Supp. 508, 514 (N.D. Tex. 1996), *aff'd in part and rev'd in part*, 135 F.3d 1041 (5th Cir. 1998), nor any authority cited by the TDP, requires a defendant to produce its billing records where (i) no discovery has been allowed in this case, and no formal discovery request was made; or (ii) where the records sought are irrelevant to a plaintiffs' ability to comply with a court order to revise its affidavits and briefing to "correct substantive errors" and "eliminate charges" incurred prosecuting unsuccessful claims.

1. The Motion to Compel is improper because no discovery was allowed in this case, and no formal discovery request was made.

There has been no discovery in this litigation. No Rule 26(f) conference was held. Rule 26(d)(1) of the Federal Rules of Civil Procedure states "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Before Defendants filed an answer, and while Defendants' Motion to Dismiss was pending, Plaintiffs filed their summary judgment motion. Dallas County's attempt to obtain discovery through its Rule 56(f) Motion [doc. 35] was never ruled on by the Court. Accordingly, Plaintiffs' Motion to compel discovery is not well-taken. *See, e.g., Riley v. Walgreen Co.*, 233 F.R.D. 496,

498 (S.D. Tex. 2005) (“By its express terms, Rule 26(d) bars discovery until after the parties have conferred about a discovery plan as directed by Rule 26(f).”).

Moreover, as this Court has held, a motion to compel should not be granted in the absence of a formal discovery request. *Jaramillo v. City of Dallas*, No. 3-99-CV-0828-D, 2001 WL 1148220, at *2 (N.D. Tex. Sept. 21, 2001) (Kaplan, J.) (quoting an earlier order in the case that, “*Absent a formal written discovery request, the court is without authority to compel production of the documents and information sought by plaintiff.*”); *see also Ledbetter v. United States*, Civ. A. No. 3:96-CV-0678X, 1996 WL 739036, at *1-2 (N.D. Tex. Dec. 18, 1996) (Boyle, J.) (refusing to grant motion to compel in the absence of a formal discovery request, stating, *inter alia*, that Rule 37 “clearly contemplates that the parties have relied on the formal discovery rules”) (citations omitted); *Ghavami v. Alanis*, No. Civ. A. SA-05-CV0700RF, 2006 WL 1821700, at *1 (W.D. Tex. June 29, 2006) (denying motion to compel an informal discovery process). The TDP’s motion is based solely on an informal letter [doc. 57-4] dated January 25, 2010, to which Dallas County responded on February 1, 2010 [doc. 57-5], and the TDP’s letter in response to Dallas County on February 3, 2010. Because Plaintiffs seek discovery that is impermissible under the Federal Rules of Civil Procedure, their motion to compel should be denied.

2. *Dallas County’s billing records are irrelevant to the TDP’s compliance with the Court’s Order.*

On September 29, 2010, the Court ordered the TDP to file an amended fee petition, and instructed the TDP, among other things, to “ (3) . . . correct substantive

errors, discrepancies, and clerical errors in their billing records; (4) . . . amend their affidavit(s) and billing records to eliminate charges incurred in prosecuting their Section 2 claim; and (5) . . . 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]. The TDP filed its amended pleadings and affidavits regarding its fees [doc. 65] on October 21, 2010. Twenty-eight (28) days later, on November 18, 2010, *after* both parties’ briefing of the TDP’s amended fee request was complete, the TDP filed their Motion To Compel Production of Documents from Defendants (“Motion”) [doc. 68], seeking “itemized accounting records reflecting the amount of attorneys’ fees charged to Dallas County for representation in the above-referenced matter.”

Nothing in the Court’s September 29, 2010 Order suggests that Dallas County’s billing records are relevant or necessary to the TDP’s request for fees. On the contrary, the Court’s Order is concerned with the need for the TDP to amend their billing records to provide “some general description of the substance of their research and conferences;” to “correct substantive errors,” and to “eliminate charges” incurred prosecuting their unsuccessful Section 2 claim and the claims of dismissed Plaintiffs Brett Rosenthal and Frank Joseph. [doc. 62 at 9]. Moreover, given that the TDP filed its Response to the Court’s Attorney Fee Order [doc. 65] on October 21, 2010—twenty-eight (28) days before this motion to compel—and given that briefing on the issue is complete, it is

unclear how the TDP could even use these records.¹ For this additional reason, Plaintiffs' Motion should be denied.

3. *Plaintiffs' motion is unsupported by law.*

Although this Court has indicated that it has "previously considered the amount of fees charged by opposing counsel when ruling on an application for attorney's fees," [doc. 70] (citing *Migis v. Pearle Vision, Inc.*, 944 F. Supp. 508, 514 (N.D. Tex. 1996), *aff'd in part and rev'd in part*, 135, F.3d 1041 (5th Cir. 1998)), Dallas County submits that neither *Migis*, nor any authority cited by the TDP, requires a defendant to produce its billing records where (i) no discovery has been taken in the case, and no formal request for production was ever served; or (ii) where the records sought are irrelevant to a litigant's ability to comply with a court order to revise its affidavits and briefing.

Significantly, the *Migis* decision does not order the defendant to produce its billing records to plaintiffs. The *Migis* order: (1) compared the number of lawyers representing the defendant to those representing plaintiff; and (2) compared the rates charged by plaintiffs' counsel to those charged by defense counsel. Unlike in *Migis*, Dallas County never challenged the number of the TDP's attorneys. *Cf. Migis*, 944 F. Supp. at 514 ("Defendant chides plaintiff for using two lawyers at trial. This attack is disingenuous.

¹ See September 29, 2010 Order [doc. 62] at 9 (providing only that Plaintiffs had twenty (20) days to amend their billing records and affidavits and that Defendants had twenty (20) days from the date the amended fee petition was filed to submit objections). Plaintiffs untimely filed their amended records and briefing [doc. 65] on October 21, 2010, and Defendants filed their Motion to Strike, or in the Alternative, Objections to Plaintiffs' Response to the Court's Attorneys' Fees Order [doc. 66] on November 6, 2010. Plaintiffs filed their Response to Defendants' Motion To Strike and Reply to Defendants' Objections to Plaintiffs' Response to the Courts' Attorneys' Fees Order [doc. 67] on November 18, 2010.

Defendant used as many as four lawyers at different times during the case and was represented by two attorneys at trial.”). Also unlike in *Migis*, Dallas County has never challenged TDP’s counsels’ billing rate. *Cf. id.* at 515 (stating that there was no reason why plaintiffs’ lawyers should not be compensated at the *same rate* paid to the defendant’s lawyers of similar experience). As opposed to the facts in *Migis*, Dallas County’s Motion To Strike, or in the Alternative, Objections to Plaintiffs’ Response to the Court’s Attorneys’ Fees Order [Doc. 66] only seeks to hold the TDP to the Order of the Court, namely to revise its affidavits and briefing to correct substantive errors and eliminate charges incurred in prosecuting their unsuccessful Section 2 claim and charges incurred in prosecuting the claims of dismissed Plaintiffs Brett Rosenthal and Frank Joseph. [doc. 62 at 9].

Plaintiffs’ Motion To Compel is also unsupported by its citations. Nowhere does *Pennsylvania v. Delaware Valley Citizens Council for Clean Air* suggest that opposing counsel’s billing records—with or without a proper discovery request—are relevant to an award of attorneys’ fees. 478 U.S. 546 (1986). The *In re Fine Paper Antitrust Litig.* court concluded that the trial court did *not* abuse its discretion in *denying* a request for *in camera* disclosure of “fees paid by the settling defendants in the underlying litigation, and by the corporate objectors in this and other antitrust litigation.” 751 F.2d 562, 587

(3d Cir. 1984).² The court in *Craik v. Minnesota State Univ. Bd.* likewise did *not* compel production of opposing counsel’s billing records. 738 F.2d 348, 349 (8th Cir. 1984). The *defendants* in *Craik* had argued that plaintiffs’ fees should be reduced because defendants had expended 400 hours less than plaintiffs. *Id.* Although the *Craik* court remarked that “the amount of time spent by defendants is a relevant factor, and in some cases can result, when considered with other circumstances, in a *reduction* of the time for which plaintiffs’ counsel are entitled to be compensated,” the *Craik* court actually *rejected* defendants’ argument that a 400-hour disparity between the billing of the two parties should affect the reasonableness of time expended. *Id.* (emphasis added).

Accordingly, neither this Court’s *Migis* decision nor the authorities cited by the TDP support granting the TDP’s motion to compel. For this additional reason, the Court should deny the TDP’s motion.

IV. Request for Oral Argument

Dallas County respectfully requests oral argument prior to the Court’s ruling on the TDP’s motion to compel.

² Unlike the facts of this case, in *Fine Paper*, the records sought concerned payments made to plaintiffs by “settling defendants in the underlying litigation.” *Id.* Moreover, the “corporate objectors” in *Fine Paper* were *plaintiffs*, *not* defendants. *Id.* at 568.

Dated this 8th day of December, 2010.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
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**COUNSEL FOR DEFENDANTS
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BRUCE SHERBET, IN HIS
CAPACITY AS ELECTION
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the United States District Court, Northern District of Texas, Dallas Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record via the Court's ECF Noticing System on the 8th day of December, 2010.

/s/ Chad W. Dunn
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