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

TEXAS DEMOCRATIC PARTY; et al.	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Cause No. 08-CV-02117-P
	§	
DALLAS COUNTY, TEXAS; et al.,	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT AND PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, Plaintiffs, TEXAS DEMOCRATIC PARTY, BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party, FRANK JOSEPH, and BRETT ROSENTHAL (hereinafter collectively referred to as "Plaintiffs") and files this their Response to Defendants' Motion for Reconsideration and Brief in Support and Plaintiffs' Motion for Expedited Consideration, and would respectfully show the Court as follows:

I.

STANDARD OF REVIEW

1. On January 13, 2010, Defendant filed its Motion for Reconsideration and Brief in Support. Defendants do not cite the authority for their Motion and merely summarily state that it is "pursuant to the Federal Rules of Civil Procedure," without

specifying the rule. *See* Doc. #50 @ p. 1. However, in setting forth the appropriate standard for a Motion for Reconsideration, Defendants cite the Court to *Fisherman's Harvest, Inc. v. Post, Buckley, Schuh & Jernigan, Inc., et al.*, No. G-05-0151, 2008 WL 4277001, at *2 (S.D. Tex. Sept.10, 2008). *Fisherman's Harvest*, is a case based upon a Rule 59(e) motion. Such a motion is called, "Motion to Alter or Amend Judgment." *See* Fed. R. Civ. Pro. 59(e). A Rule 59(e) motion must be filed within 10 days of the entry of judgment. *See id*. The Court's judgment was entered December 17, 2009. *See* Doc. #45 and Doc. #50 @ p.1.[1] Accordingly, Defendants' Motion for Reconsideration is time barred.

2. Moreover, the relief sought by Defendants' Motion for Reconsideration (i.e. reopening of this case) is not proper under a Motion to Alter or Amend a Judgment pursuant to Rule 59(e). Given that *Fisherman's Harvest* is the only authority cited as the basis for the Motion, the Court and Plaintiffs have no choice but to accept that basis. However, should the Court construe the Motion as a request for relief under another Rule, it is also time barred.

[1] Apparently there is no dispute the December 17, 2009 order was final. It resolves all claims and describes the relief granted. Moreover, the Defendants have treated the December 17, 2009 order as final. Defendants did not object to the finality of the December 17, 2009 order when they objected to Plaintiffs' Bill of Costs. See Doc. #49. Had Defendants believed the December 17, 2009 order was anything other than a final order, Defendants best objection to Plaintiffs' Bill of Costs would have been that it was premature. No such objection was made. Furthermore, Defendants' Motion for Reconsideration cites as its only authority for the form of the Motion the *Fisherman's Harvest* case which only deals with a motion under Rule 59(e), and, as stated above, such a motion concerns only "altering or amending" the judgment. *See id*. Where a District Court order fully adjudicates the issues in the case and the parties treat such order as final, the order is considered a final judgment. *See Long v. County of L.A.*, 442 F.3d 1178, 1184 n.3 (9th Cir. 2006) ("a mechanical application of [FRCP] 58 is not required when the parties and the judge all have indicated that they treat a District Court entry as a final, separate judgment.")

3. Defendants' Motion is really a motion for new trial. Defendants seek to reopen both the evidence and legal arguments in this case in order to avoid judgment. Such a request is in line with a Rule 59(a) motion. However, a 59(a) motion must also be filed within 10 days of the judgment. Therefore any such motion under that Rule would also be time barred. *See* Fed. R. Civ. Proc. Rule 59(b). The only other motion Defendants could have filed would be a Motion for Relief from the Judgment or Order pursuant to Fed. R. Civ. Proc. 60. However, this motion is reserved to "correct a clerical mistake or a mistake arising from oversight or omission." *Id*. In other words, the motion is not appropriate to rescind an order because a party disagrees with the relief it grants. Rather, Rule 60 is to correct clerical errors.

4. Accordingly, under all scenarios, Defendants' Motion for Reconsideration is time barred.

II.

DISCRIMINATION

5. Defendants incorrectly argue to the Court that in order for Plaintiffs to prevail on its § 5 claim, the Plaintiffs must show "a potential for discrimination." The only authority Defendants cite for such an opinion is the case of *Presley v. Etowah County Comm'n*, 502 U.S. 491, 513 n.4 (1992). If there is a burden to show a "potential" for discrimination it is minimal as this Court correctly noted in its Order citing *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985).

6. However, the Fifth Circuit has more recently ruled "thus, even a three-judge court cannot assess the discriminatory impact of the challenged method; that determination is reserved for the United States Attorney General or the District Court for the District of Columbia." *See LULAC v. State of Texas, et al.*, 218 Fed. Appx. 261 (5th Cir. 2009) (unpublished opinion) citing *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (on a complaint alleging failure to pre-clear election changes under § 5 th[e] [three-judge district] court lacks authority to consider the discriminatory purpose or nature of the changes). Therefore, the most recent authority by the Fifth Circuit and the United States Supreme Court holds that no evidence of discrimination is necessary. *See also Perkins v. Matthews*, 400 U.S. 379, 385 (1971) ("what is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General — the determination whether a covered change does or does not have the purpose or affect 'of denying or abridging the right to vote on account of race or color'"). *See also City of Lockhart v. United States*, 460 U.S. 125, 129, n.3 (1983) (finding the three-judge district court may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate).

7. Thus the overwhelming weight of authority holds that a § 5 plaintiff is not required to show any evidence of discrimination.

8. Nevertheless, Plaintiffs have showed ample evidence of discrimination to support their § 5 claim. Plaintiffs attach to their Motion for Summary Judgment the

recent ballot images printed during the manual recount for a state representative race in Dallas County between Linda Harper-Brown and Bob Romano. *See* Plaintiffs' Notice of Manual Filing [Doc. #29]. Plaintiffs claimed in their summary judgment, a fact not contested by Defendants with any evidence, that these ballot images prove a higher incident of de-selected candidates in minority communities. As one of many examples, attached hereto as Exhibit "A" is a table analyzing these ballot images in the race for President of the United States. The dark line in the middle of the table divides those precincts with the top half of the page including precincts with the highest percentage of population of African Americans and Hispanics. The bottom half of the table includes those precincts with the lowest 50% of African American and Hispanic population. The final precinct, 4651, did not have population data available so was excluded from the calculations. Twenty-eight ballots recorded a straight Democratic vote but recorded no vote for President of the United States. Two of these unrecorded votes were in a precinct for which we do not have population data. Of the remaining 26, 17 of the ballots were in the counties in the top half of African American and Hispanic population. Thus, on a 2:1 margin, the precincts in Linda Harper-Brown's state representative district with the highest minority population were recording blank ballots for President over the Caucasian precincts.

9. The ballot images, part of the summary judgment record, can be analyzed numerous other ways including data from other races and the results are conclusive in so far as ballots with a straight ticket choice that include no selection recorded in a particular

race occurs significantly more often among the African American and Hispanic populations.

10. Defendants are asking this Court to perform the duties of the Department of Justice and determine the issue of discrimination. Whether this Court or the Department of Justice makes that analysis, Plaintiffs are prepared with volumes of data supporting both the potential for discrimination and actual discrimination by the challenged voting procedures.

III.

RULE 56(f)

11. Next, Defendants complain the Court should have granted its Rule 56(f) Motion for Additional Time to Respond to the Motion for Summary Judgment. Though Defendants cite a number of cases in general litigation where district courts have found additional time necessary for a party to respond to summary judgment, Defendants have cited no such authority to the Court in election litigation or litigation under § 5. At the present time, there is little more than 10 months before the next General Election where straight-party voting will occur. More than in other cases, Defendants, under Rule 56(f), carry a heavy burden to show why additional delay is necessary.

12. Defendants have failed to meet their burden under Rule 56(f) and it was proper for the Court to implicitly deny the Motion by granting the Motion for Summary Judgment. First, the affidavit attached to the Rule 56(f) Motion (Doc. #35-2) merely states general topic areas for which Defendants wish to seek discovery. Defendants do

not prove how this additional discovery would to create a fact issue or dispute Defendant Sherbet's hearing testimony. Defendant Sherbet testified under oath in testimony presented in the summary judgment record that (1) both of the changes alleged by Plaintiffs are changes in election practice procedures; and (2) neither of these changes were described in the pre-clearance documents submitted to the Department of Justice. Thus, Defendants could obtain no evidence to overcome their own party's admissions.

13. Next, Defendants seem to ignore that they are the Election Administrators for Dallas County. As such, they have in their possession all of the data, evidence, information relevant to the adjudication of this claim. Defendants fail to explain to the Court how they were unable to obtain affidavits from witnesses who had evidence raising a fact issue in this case. In so far as Defendants required evidence from the Texas Secretary of State, the Defendants ignore that the Secretary of State filed a brief in this case. The Defendants have failed to meet their burden to show what evidence required of the Secretary of State was not forthcoming. There is no evidence Defendants ever sought from the Secretary of State, affidavits on material facts. Furthermore, there is no evidence the Secretary of State holds any evidence that would create a fact issue. The Secretary of State filed its brief and submitted whatever arguments it believed were relevant to the adjudication of this matter.

14. Defendants have failed to name any witnesses from which it would seek discovery and from whom they could not have obtained an affidavit timely. Defendants complain that they were not permitted to issue discovery to Plaintiffs. However,

Plaintiffs have no role in the Defendants' pre-clearance of election processes. The only evidence Plaintiffs have concerning the Defendants behavior are (a) also in the possession of the Defendants, and (b) have been provided to the Court in this proceeding.

15. Under the terms of Defendants own Motion, Defendant must produce "new evidence not previously available." *See* Doc. #50 @ p. 2. Now, almost 10 months after the Rule 56(f) Motion has been filed, Defendants are unable to produce affidavits, or other specific evidence, that would raise a fact issue in this case. Moreover, Defendants are unable to specify an individual or a body of evidence they have, for over a year, been unable to obtain since this case has been pending.

IV.

MOTION FOR EXPEDITED CONSIDERATION

16. Plaintiffs request the Court give expedited consideration to Defendants' Motion to Reconsider. It is evident that Defendants do not intend to comply with the Court's December 17, 2009 Order and Injunction until their Motion is ruled upon. The next General Election is 11 months away. Assuming the Court's Order remains final, Defendants have a choice to submit the challenged election practices for pre-clearance or to request the voting machine manufacturer reprogram the system to operate under the already pre-cleared practice. Assuming the Defendants submit the changes to the Department of Justice, Plaintiffs believe strongly the Department of Justice will deny pre-clearance based upon the data collected. Whether required by the Department of Justice's refusal of pre-clearance or because Dallas County elects to avoid a § 5

submission, reprogramming of the machines, testing, certification by state and federal authorities, and installation will take time. Of course, there also remains the possibility Defendants will appeal this Court's Order.

17. Plaintiffs filed this case a few weeks after the last General Election in the hope a resolution could be had in time for the next General Election. Accordingly, Plaintiffs request the Court give expedited consideration to the Motion to Reconsider, deny the Rule 56(f) Motion for the reasons stated above and also because the General Election is looming and to otherwise deny the Motion to Reconsider or, if Reconsideration is granted, deny Defendants' arguments seeking to overturn this Court's Order and that the Court grant Plaintiffs all other relief to which they may show themselves justly entitled.

Dated this 18th day of January, 2010.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party

By: */s/ Chad W. Dunn*

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2010, 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 the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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/s/ Chad W. Dunn
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SUBDIV	2000 VA WHITE %	2000 VA BLACK %	2000 VA HISP %	Black + Hispanic	Emphasis Ballots*	Total Ballots
4620	31.2	4.5	59.1	63.6	2	1,218
4614	31.4	5.6	56.3	61.9	2	400
4612	37.9	2.3	57.1	59.4	0	784
4646	30.4	8.8	47.4	56.2	0	340
4610	38.4	19.4	33.8	53.2	0	1,597
4631	34	23.7	28.4	52.1	2	2,309
4613	50.1	4.8	41	45.8	0	823
4634	40.9	23.5	22.2	45.7	0	894
4611	52.7	3	41.1	44.1	3	1,160
4625	53.2	4.4	39.5	43.9	2	856
4630	42.5	26.9	16.1	43	0	3,540
4649	55.4	4.9	34.6	39.5	0	77
4622	47.9	19.9	19.2	39.1	3	2,433
4624	56.8	5.1	32.9	38	1	1,362
4609	49.2	22.5	14.8	37.3	1	2,063
4647	47.5	10.6	26.3	36.9	1	177
4618	61	2.8	32.9	35.7	0	351
4623	64.4	7.7	21.2	28.9	1	1,077
4648	73.3	1.3	22.7	24	1	308
4615	73.1	3.2	20.6	23.8	1	379
4627	70.1	7.1	16.6	23.7	0	650
4626	67.3	4.5	18.1	22.6	0	1,105
4621	80	0	20	20	0	8
4643	66.3	10.9	7.9	18.8	2	3,684
4635	50.5	8.9	9	17.9	1	709
4632	68.7	7.8	9.3	17.1	0	877
4640	61.5	7.6	8	15.6	1	2,822
4636	69.9	6.2	9.3	15.5	0	854
4642	69.4	7.8	7.4	15.2	0	3,208
4633	78.2	3.3	11.6	14.9	1	647
4628	68	4	10.5	14.5	0	1,927
4637	63.2	5.6	8.3	13.9	0	975
4644	68.6	6.4	6.6	13	1	1,036
4619	84	1.6	11.4	13	0	614
4651	*NA*	*NA*	*NA*	*NA*	*2*	
Total					28	41,264

	Total Ballots	% of Total Ballots	Emphasis Ballots*	% of Emphasis Ballots
50% of the precincts with the Highest B+H%	20,384	49%	17	65%
50% of the precincts with the Lowest B+H%	20,880	51%	9	35%
Total	41,264	100%	26	100%

*Emphasis Ballots are Ballots where a Dem Straight Tick Vote is cast and no selection is recorded in the Presidential Race

EXHIBIT "A"

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*.	§	

ORDER

BE IT REMEMBERED on this the _____ day of _____, 2010, in the above-numbered and entitled cause, wherein Plaintiffs, TEXAS DEMOCRATIC PARTY and BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party, filed their Response to Defendants' Motion for Reconsideration and Brief in Support and Plaintiff's Motion for Expedited Consideration, and after considering the Motion, pleadings on file, arguments of counsel, and after due consideration, the Count finds that Plaintiffs Motion for Expedited Consideration is hereby GRANTED.

The Court further finds Defendants' Motion for Reconsideration is hereby DENIED. The Court's December 17, 2009 Order is final, it disposes of all parties and all claims and remains the Judgment of this Court.

SIGNED on this the _____ day of _____, 2010.

Edward C. Prado
United States Circuit Judge

Jorge A. Solis
United States District Judge

Reed O'Connor
United States District Judge

APPROVED AND ENTRY REQUESTED:

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party

By: */s/ Chad W. Dunn*

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