STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANE SPRUCE BLY,	)	
Plaintiffs,	)	NO. D-101-CV-2011-02942
v.	)	CONSOLIDATED WITH: D-101-CV-2011-02944 D-101-CV-2011-02945 D-101-CV-2011-03016 D-101-CV-2011-03099 D-101-CV-2011-03107 D-202-CV-2011-09600 D-506-CV-2011-00913
DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINE, in her official capacity s New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,	)	
Defendants.	)	

LEGISLATIVE DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTIONS FOR APPOINTMENT OF A SPECIAL MASTER

I. INTRODUCTION

The Legislative Defendants oppose the dual Motions for Appointment of a Special Master because there are no "exceptional condition[s] [that] requires" appointment of a special master, Rule 1-053(B), NMRA, and because reference to a special master in this case is likely to cause delay and inefficiency, and increase the costs of this process. Both the Motions from the

Executive Defendants and the James Plaintiffs claim that necessary expedition and concern for costs present the kind of "exceptional conditions" that calls for the appointment of a special master. However, careful and judicious consideration of the matter demonstrates that Movants' justifications are more ephemeral than real. Leaving the original resolution of these matters in the capable hands of this Court, with its considerable authority and experience in managing and expediting litigation will better serve the interests of all concerned, including the compelling public interest.

The Legislative Defendants' objections to the proposals of the Executive Department Defendants and the James Plaintiffs in their parallel Motions are as follows: First, Movants are requesting a complex, three-tiered process which will be less efficient and more costly than the fast-track process established by this Court's scheduling. This is especially true given the demands of Rule 1-053 and due process requirements. *See* Point II, *infra.* Second, both Motions cast unwarranted aspersions on the State's political processes and the ability of this Court to efficiently manage these redistricting cases. *See* Point III, *infra.* Finally both Motions are erroneously premised on the excessive award of attorneys fees in the 2002 redistricting litigation, and a mischaracterization of what occurred in Judge Allen's handling of that previous redistricting effort. *See* Point IV, *infra.*

II. MOVANTS ARE REQUESTING A COMPLEX, THREE-TIERED PROCESS THAT WILL BE LESS EFFICIENT AND MORE COSTLY GIVEN THE DEMANDS OF RULE 1-053 AND DUE PROCESS REQUIREMENTS.

A court's appointment of a special master pursuant to Rule 1-053 NMRA raises separation of powers and due process concerns to the extent such appointment delegates judicial

functions to individuals who are not judges. *See Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992) *and In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1168 (D.C.Cir.1991) (both discussing Article III concerns raised by the use of masters in the federal context); *see also* FPP § 2605, 9C Fed. Prac. & Proc. Civ. § 2605 (3d ed.) ("If there is an overarching principle regarding the utilization of masters in contemporary federal practice it is restraint.") These concerns underlie the provisions of Rule 1-053(B) NMRA, which demand that a reference to a master shall be the exception and not the rule and which provides further that in non-jury actions, except in matters of account and of difficult computation of damages, a matter is to be referred to a master "only upon a showing that some exceptional condition requires it."[1]

Movants claim that reference to a special master is appropriate because it will yield quicker and less costly results. These claims are unavailing. *See* FPP § 2605, 9C Fed. Prac. & Proc. Civ. § 2605 (3d ed.) (noting that reference of a nonjury case often involves expense and delay). First, Your Honor is better suited than most to address complexities which may arise in this suit. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 259, 77 S. Ct. 309, 315 (1957) (stating that complexity of legal and factual issues is "an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc*

[1] Movants underplay separation of powers and due process concerns by suggesting that the Court will have authority to review every decision by the master *de novo*. [Governor Martinez's Motion, p. 10] ("Clearly the Court would make the ultimate decisions regarding the adoption of all the redistricting plans and will not be bound in any way by any of the findings of the special master.") However, this is not the case under New Mexico's rule. *See* Rule 1-053(E)(2) NMRA (requiring the trial court to accept the master's findings of fact unless clearly erroneous). A restrictive policy with respect to the appointment of masters is necessary because reference of a nonjury case involves the danger that as a practical matter the master, not the court, will decide the case. *See* FPP § 2605, 9C Fed. Prac. & Proc. Civ. § 2605 (3d ed.)

basis and ordinarily not experienced in judicial work.") Moreover, what Movants ultimately contemplate is a three-tiered system as follows: 1) a process of selecting a special master and articulating the scope of his or her duties, followed by; 2) an evidentiary hearing process before the special master over plans and recommendations of the parties which would include the submission of expert reports, proposed plans and other evidence, followed by; 3) a further evidentiary hearing process before the court in reviewing the findings and conclusions of the special master. (Governor Martinez's Motion at 9-10; James Plaintiff's Motion at 4-5.)

Under this regime, the appointment of a special master creates additional stages in the process at which litigious disputes will necessarily arise. There will necessarily be disputes over the selection of the special master. The parties will be sensitive to protecting their procedural rights in defining the nature and scope of the judicial instructions to the special master. Also, issues often arise concerning the conduct of the special master that parties are likely to challenge, requiring further proceedings before the district court, even before the special master finishes his or her work. Finally, there are likely to be significant disputes about what, if any, findings by the master should be adopted. Courts have made clear that while the factual findings of a special master can only be overturned if "clearly erroneous," that standard requires a substantial evidence review by the district court. *See Lopez v. Singh,* 53 N.M. 245, 247, 205 P.2d 492, 493 (1949). And, of course, a special master's conclusions of law carry no weight with the district court, requiring full *de novo* review of those questions. *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 18, 122 N.M. 103, 920 P.2d 1057. Finally, our law and due process considerations require that all counsel be given sufficient time to submit to the trial court their

own proposed findings and conclusions. *See Barelas Community Ditch Corp. v. City of Albuquerque,* 63 N.M. 25, 312 P.2d 549 (1957).

Both Movants urge what may turn out to be conflicting and perhaps mutually inconsistent objectives. On the one hand they envision a process that would give independent authority to the Special Master to act hastily to adopt his or her own plan and then limit the parties to focus their support or opposition on only that plan. Applying that approach would short circuit the steps required under Rule 1-053 to assure full *judicial* consideration and decision-making. Movants give lip service to the need for full judicial participation. However, a proper application of Rule 1-053 NMRA would require duplicative litigation before the special master and the Court that can only enhance rather than diminish inefficiency and costs.

The current efforts to adopt a redistricting plan in Nevada are illustrative for purposes of showing the additional delay, inefficiency and increased costs which can result by virtue of reference to a special master or masters. There, three special masters have been appointed to draw redistricting maps where the governor vetoed plans passed by the legislature (*Miller v. First Judicial District Court of Nevada* Petition for Writ of Mandamus attached as Exhibit A.)

Suit was filed on February 24, 2011. On July 12, 2011 the district court indicated an intention to appoint special masters and directed the parties to provide suggestions for 1) people to appoint as masters, 2) a list of legal issues for the Court to decide, and 3) recommended directives for the masters to use in the redistricting process. The court entered an order and an amended order appointing special masters on August 3 and August 4. The Court also ordered that the parties provide briefing on legal issues which would be decided prior to referral to the

special master with time thereafter for the filing of responses and replies. The Court heard arguments on the legal issues on September 21, 2011, and on the same day, referred the matter to the special masters. The referral led to the filing of petitions with the Nevada Supreme Court in which petitioners argued that the district court judge had failed to decide important legal issues before the referral. Petitioners argued, among other things, that this failure would result in significant delays as, without the proper legal guidance the first time around, the masters would be required to draw new maps. The Supreme Court ruled that the process should continue as scheduled, but held that the legal questions raised by the parties should be considered by the district court simultaneously. On October 14, 2011, the special masters issued their report more than three months after the district court judge in that case indicated an intent to appoint masters. Upon belief, the reports of the special masters have not yet been ruled upon by the district court.

In addition to the delays created by virtue of reference to special masters in the litigation in Nevada, the appointment of special masters has also led to disputes about whether and how much the masters should be paid. (*See* http://npri.org/publications/taxpayers-on-the-hook-for-courtordered-redistricting-masters-pay.) The appointment of a special master in this case as proposed by Movants will likely lead to similar controversy as the appointment of a special master who is an academic, demographer, or retired judge, or who needs to hire assistants (James Plaintiffs' Motion, p. 3) is likely to be quite costly. There is no good reason to incur these additional delays and expense in this case.

Furthermore, cases upon which Movants rely to show that the appointment of a special master is necessary to timely address redistricting needs all appear to involve appointments by

sitting judges, presumably with full dockets.[2] In this case, the New Mexico Supreme Court has specifically chosen Your Honor, in part, because Your Honor is not a sitting judge. The Supreme Court expressed its confidence in that Order that Your Honor's appointment would be in the best interest of judicial economy and expeditious disposition. Furthermore, this Court has already set forth a reasonable scheduling order which fairly balances the need to resolve this litigation quickly with the needs of the parties to conduct appropriate discovery and present plans which they feel best serve the interests of the state and its citizens. That scheduling order will allow the Court to be fully informed before rendering judgment, and will assure final, reasoned resolution in sufficient time for the political operatives and potential candidates to conduct and participate in an orderly electoral process.

Finally, with respect to the legislative efforts concerning congressional redistricting, there is not much difference between the maps presented by the leaders of both parties, which may allow the Court to be respectful of the political efforts of both parties in trying but failing to come to resolution. Similarly, the legislative efforts of the political parties to resolve redistricting of the State Senate were not that far apart, and this Court can be sensitive to those efforts in resolving that matter. Furthermore, the articulation of the principles this Court must

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[2] *United States v. Berks County*, 250 F. Supp. 2d 525 (E.D. Pa. 2003), cited to by the James Plaintiffs, was not a case in which the court was required to draw redistricting plans but involved a complaint by the federal government seeking declaratory and injunctive relief against various county entities and officials requiring the county to provide bilingual poll workers and voter materials and assistance at the next scheduled election which was to be sixty days from the court's order. *Id.* at 541-42. The court, with the consent of all counsel, stated it would appoint a special master to work with the parties to determine the sort of relief that would be necessary and appropriate given the short time the court had in which to act. *Id.* at 542.

necessarily adopt in proceeding may lead parties to coalesce around a limited number of existing plans for the Court to consider.

Thus, there is no need for a special master in this case, and the appointment of such a figure will not further the goals of expedition and lower cost, but will instead only complicate and undermine those goals.

III. MOVANTS' PROPOSALS CAST UNWARRANTED ASPERSIONS ON THE STATE'S POLITICAL PROCESS AND THE ABILITY OF THIS COURT TO EFFICIENTLY MANAGE THESE REDISTRICTING CASES.

Movants denegrate the political process from which they come and the special sensitive role of the state court in the districting process. Movants ignore the important recognition of most redistricting courts—from the U.S. Supreme Court on down that redistricting requires essentially political judgments. *See Gaffney v. Cummings,* 412 U.S. 735, 753 (1973) ("[P]olitical considerations are inseparable from districting" because "[t]he reality is that districting inevitably has and is intended to have substantial political consequences, . . . [and that a] "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results . . . ."); *Getty v. Carroll County Bd. of Elections*, 399 Md. 710, 734, 926 A.2d 216, 231 (2007). Judge Allen gave respect to the earlier enactments of the legislature in rejecting plans "that divide portions of the City of Albuquerque into all three congressional districts," (*Jepsen* Congressional Findings 24 & 25), and adopted a plan that was more consistent with "the last, clear expression of state policy on the issue. . . ." (*Jepsen* Congressional Finding 34). Applying similar principles with respect to his State House of Representatives ruling, this Court found it appropriate to give "thoughtful consideration [to plans] developed through a

process which reflects the will of the people, expressed through their elected representatives." (*Jepsen* House Finding 40)[3] As proposed by Movants, the Special Master process would ignore this judicial mandate.

Judge Allen was also sensitive that courts in this area should exercise "a limited role" and apply "neutral principles of law." (*Jepsen* Congressional Conclusion No. 11.) Thus, application of neutral principles of law while maintaining respect for the legislative process is what is called for in this case. As suggested by Governor Martinez (Governor Martinez's Motion, p. 9), ten years ago the Court ably applied neutral principles of law in determining which plans to adopt without the aid of a special master. The Court is well-suited to do the same again. Therefore, Movants' Motions should be denied.

IV. BOTH MOTIONS ARE ERRONEOUSLY PREMISED ON THE EXCESSIVE AWARDS OF ATTORNEYS FEES IN THE 2002 REDISTRICTING AND A MISCHARACTERIZATION OF WHAT OCCURRED IN JUDGE ALLEN'S HANDLING OF THAT PREVIOUS REDISTRICTING EFFORT.

With respect to the high attorney's fees that were awarded in the last decennial, Movants are perhaps unaware of the circumstances that resulted in those awards that need not be replicated in the current round. Reasonable fees are mandated for "prevailing parties" in cases such as these under the applicable federal civil rights attorney's fees statute, 42 U.S.C. § 1988.

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[3] Federal courts have similarly found that they are bound to give "thoughtful consideration" to plans passed by the state legislature but vetoed by the governor, as such plans represent the legislature's "proffered current policy." *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) citing to *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 92 S.Ct. 1477, 1484, 32 L.Ed.2d 1 (1972); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982); *see also Terrazas v. Clements,* 537 F. Supp. 514, 528 (N.D. Tex. 1982) (Plans "derived from the plans adopted by the legislature ... are the result of a legislative process which we should recognize as an expression of legitimate legislative activity.")

In the last decennial, defense counsel were in the process of challenging a number of the attorney fee applications as inappropriate and excessive, when the Executive Risk Management Division of the General Services Department, under the Governor's authority in 2002, interceded and agreed to pay all the applications at the levels requested, thus precluding defense attorney challenges that might well have resulted in a judicial determination of much reduced fees. The Legislative defendants trust that no such Executive Department intervention will result this time, given the expression of Executive Department concern over the issue. This Court, of course, will have ample authority to assure that all fee requests are properly scrutinized and limited to those that are appropriate and reasonable.

Finally, according to Movants, the process of litigation carried out before this Court last decennial would result here in a prolix of inefficient, untimely and overly costly proceedings, characterized by the James Movants as "a complex and hotly contested 'beauty contest' in which the Court will be asked to either pick a winner or craft its own plan." (James Plaintiffs' Motion at 2.) Movants mischaracterize the litigation in 2002 by overstating both the tasks to be performed by this Court, and ignoring the ability and experience of this Court to manage the proceedings and constrain costs.

The fact is that the Court managed matters exceedingly well last decennial, allowed the parties sufficient opportunity to prepare and present their views, gave careful consideration to the considerable and useful work of all members of the legislature during the special redistricting session, and completed the task well within the allowable time. There is no reason why such a result cannot be reached in the present case.

V. CONCLUSION

For the foregoing reasons, Legislative Defendants urge this Court to deny the respective Motions to Appoint a Special Master, and proceed under the Court's previously issued Scheduling Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2011, I caused the foregoing pleading to be filed electronically through the Tyler Tech System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing and a true and correct copy of the foregoing pleading was e-mailed and mailed, postage-prepaid, to the following:

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