IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. NEW YORK STATE BOARD OF ELECTIONS; PETER KOSINSKI and STANLEY L. ZALEN, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and STATE OF NEW YORK, Defendants.	Case No. 06-CV-0263 (GLS)

MEMORANDUM OF LAW OF PROPOSED AMICI CURIAE CITIZENS UNION OF THE CITY OF NEW YORK AND CITIZENS UNION FOUNDATION OF THE CITY OF NEW YORK

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INTRODUCTION

Proposed a*mici curiae* Citizens Union Foundation of the City of New York ("CUF") and Citizens Union of the City of New York ("CU," and together with CUF, "Citizens Union") respectfully submit this memorandum of law regarding defendants' plan for compliance with the Help America to Vote Act ("HAVA"), filed on April 10, 2006.

IDENTITY AND INTEREST OF THE PROPOSED *AMICI CURIAE*

CUF is a nonprofit research, education, and advocacy organization, founded in 1948 to complement the efforts of its affiliated organization, CU. Historically, both organizations have been instrumental in achieving significant election reforms in New York, with CU's efforts dating back to the late nineteenth century. (Dadey Decl. ¶ 3).[1]

Citizens Union has gone to great lengths to help ensure that New York State complies with HAVA. These efforts include testifying before New York City and New York State legislative bodies and agencies and meeting with officials involved in HAVA compliance. (Dadey Decl. ¶¶ 4-6).

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[1] References to the supporting declaration of Richard D. Dadey, Jr., the executive director of Citizens Union, are abbreviated as "Dadey Decl. ¶ __."

SUMMARY OF ARGUMENT

After years of neglecting their obligations under HAVA, defendants have finally been compelled to reverse course. Unfortunately, in response to this Court's Order to file a plan bringing New York State into compliance with HAVA, defendants have proposed a plan for the 2006 elections so precipitous and poorly conceived that the New York City Board of Elections has warned that to implement the plan on a broad scale threatens "possible widespread voter disenfranchisement" and " the electoral equivalent of a 'trainwreck.'"

The linchpin of Defendants' plan for HAVA compliance in the 2006 elections is to roll out "ballot marking machines" that create marked ballots for disabled voters. But the New York City Board of Elections has conducted a study revealing that: the rollout can be done in New York City this close to the looming September elections only in a very limited way and even then with great difficulty; serious defects appear to exist with those ballot marking machines that have been tested; reliable data do not exist showing where to install the machines to achieve maximum benefit for disabled voters; and the ballot marking machines may be used just this year, resulting in a waste of public funds and resources. Separately, further material defects exist in defendants' plan for HAVA compliance in 2006: the use of ballot marking machines threatens disabled voters' right to a private vote; the plan's precipitous rollout allows insufficient time for poll worker training and public education; and, in its development, the plan does not allow for public hearings or public comment.

Rolling out ballot marking machines in time for the September elections is also a daunting proposition across New York State. As even a cursory review of defendants' recently filed "[s]ummary of county responses 4-20-06" readily confirms, most counties in the State can install ballot marking machines in only a few percent of poll sites by September, forcing disabled voters who would wish to use those machines to travel at times great distances to do so.

Defendants' plan for 2007 — when they are supposed to roll out the crucial HAVA-compliant voting machine systems — is not a plan at all. Rather, defendants' plan consists merely of a list of several broadly described steps that must be taken, none of which have yet been taken.

Citizens Union yields to no one in its desire to have the voters of New York State enjoy the benefits of HAVA. But faced with the plan proposed by defendants, Citizens Union is constrained to recommend that the Court reject defendants' plan and instead order the creation of a carefully thought-out and comprehensive plan for New York State to become HAVA compliant in 2007. Citizens Union also respectfully suggests that the Court consider the appointment of a special master under FED. R. CIV. P. 53 to supervise the creation and implementation of that plan for 2007.

STATEMENT OF FACTS

I. Procedural History

New York State was required to comply with HAVA on or after January 1, 2006.[2] (42 U.S.C. §§ 15481(d), 15483(d)(1)(B), 15541.)

On March 1, 2006, the United States sued New York State, the New York State Board of Elections, and its co-directors, Peter Kosinski and Stanley Zalen, alleging that New York State had failed to comply with key provisions of HAVA. Specifically, the United States alleges that New York State failed to ensure that its voting systems met the standards in Section 301 of HAVA, 42 U.S.C. § 15481, and that New York State failed to create a computerized statewide voter registration database, as required by Section 303 of HAVA, 42 U.S.C. § 15483(a). (*See* Complaint at 5.) New York State is the first state to be sued by the United States under HAVA.

On March 6, 2006, the United States moved for a preliminary injunction that New York State comply with Sections 301 and 303(a) of HAVA and file a plan specifying how the State will comply with HAVA.

On March 23, 2006, this Court entered an Order granting the preliminary injunction (the "Order"). This Court found that the New York State Board of Elections "is not yet fully in compliance with [sections] 301 and 303(a) of HAVA." (Order at ¶ 1.) The Order provides that the New York State Board of Elections shall take all necessary steps to comply with Sections 301 and 303(a) of HAVA as soon as practicable, in

[2] New York State received a waiver of compliance with the original statutory deadline of January 1, 2004.

accordance with a remedial plan to be approved by the Court. (*Id.* at ¶ 3.) Finally, the Order provides that the New York State Board of Elections shall file with the Court, on or before April 10, 2006, a comprehensive plan for compliance with these sections of HAVA. (*See id.* at ¶ 4.)

II. New York State's Proposed Plan

Under the Order, on April 10, 2006, the New York State Board of Elections filed a proposed plan for compliance (the "Plan"). The Plan has two parts: (1) a plan for 2006 (the "2006 Plan Component") and (2) a plan for 2007 (the "2007 Plan Component").

A. The 2006 Plan Component

The 2006 Plan Component provides for the procurement and deployment of "ballot marking devices." (*See* Plan at 1.) "Ballot marking devices" are complicated computer-controlled machines that allow a disabled voter to create a marked paper ballot. (Dadey Decl. ¶ 7.) Ballot marking machines do not count ballots. (*Id.*)

On April 20, 2006, defendants filed a "[s]ummary of county responses" that, among other things, sets forth for each county in New York State the number of ballot marking machines that can be installed in time for the September elections and the number of poll sites in that county. By September, most counties will be able to install these machines only in a small percent of poll sites. For example, in several of the State's most populous counties, the machines can be installed in the following percent of poll sites: in Nassau County, 3%; in Suffolk County, 3%; in Westchester County, 3%; in Albany County, 7%; and in Erie County, an "unknown" number of ballot marking machines can be installed by September. In New York City, the figure is 1-2%. (*Id.*)

B. The 2007 Plan Component

The 2007 Plan Component recites that New York State must adopt voting systems standards regulations, after which there will be certification testing, final certification, the awarding of contracts, and final acceptance testing. (*See* Plan at 10-11.)

ARGUMENT

I. Defects in the 2006 Plan Component

A. Ballot Marking Machines Can Only Be Installed in Time for the Election at 20-30 Poll Sites in New York City

The 2006 Plan Component asks for counties to place ballot marking machines in as many polling places as possible in time for training and use in the upcoming primary election on September 12, 2006. (*See* Plan at 1.) The New York State Board of Elections attached an "Interim Voting Machine Milestone Tasks," outlining the tasks in the 2006 Plan Component with completion deadlines. (*See id.* at 13.) Significantly, these tasks include the New York State Board of Elections accepting ballot marking machines on April 11, 2006, testing these machines on May 5, 2006, and conducting pre-election testing of these machines on September 11, 2006. Thus, in a matter of a mere five months, the New York State Board of Elections has to select ballot marking machines, test them, arrange for the counties to purchase them, install them, and appropriately train poll workers and educate voters, all in time for the September election.

The New York City Board of Elections has prepared a "draft plan" (Dadey Decl. Exhibit "A") describing in thoughtful detail the daunting hurdles that New York City faces in rolling out — even in a very limited way — ballot marking machines in

time for the looming September 12 primary election. The views of the New York City Board of Elections are entitled to special weight because New York City is home to approximately 38% of New York State's voters. The New York City Board of Elections concludes (Dadey Decl. Ex. A at 1-2) that it can only install ballot marking machines at 20-30 poll sites in time for the September elections:

> With it now being little more than five months before the September 12, 2006 primary elections, it is impossible for the City Board to conduct a citywide or extensive implementation of any new voting device, including only ballot marking devices accessible to the disabled. Importantly, the City Board has determined that it can only conduct a very limited implementation of ballot-marking devices at approximately 20 to 30 poll sites this close to the 2006 elections.
>
> The City faces unique issues that complicate the process for running elections and introducing new voting devices. These include: the very large number of candidates and races that appear on the City's ballots; the location of the vast majority of poll sites in public facilities that may not have necessary electronic or spatial resources; the need to comply with minority language requirements; the difficulty of retraining more than 30,000 poll workers; and the need to educate more than 4.3 million registered voters on any substantial voting change. In view of these issues, the introduction in a City election of any new voting devices under an incredibly limited timetable raises an extraordinary level of concern that the City Board have total control and flexibility to run an orderly election and protect the franchise. The City Board must not be asked to undertake a plan that will result in the electoral equivalent of a "train wreck."

As the New York City Board of Elections bluntly notes, to attempt any wider deployment of ballot marking machines risks widespread voter disenfranchisement:

> [A]t this very late date before the 2006 elections, the City Board can responsibly conduct only a limited implementation of accessible ballot-marking devices as outlined in this draft plan. A more extensive deployment risks a chaotic implementation of voting devices at the poll sites and possible widespread voter disenfranchisement. *Id. at 9.*

Furthermore, the New York City Board of Elections concludes that even a limited rollout of ballot marking machines imposes very heavy burdens:

> More significantly, even a limited implementation of these ballot-marking devices involves a number of tasks whose scope does not diminish with a decrease in the number of devices purchased. For example, regardless of the number of devices the City Board purchases and implements, it will still need to receive and test the system; integrate the new systems with the existing Board systems, provide compliance with minority language requirements; survey poll sites to determine if they are suitable for the device; develop internal procedures; develop training programs and materials; and educate the public. (*Id. at 5-6.*)

B. The New York City Board of Elections Has Already Found Serious Defects in Two of the Ballot Marking Machines Under Consideration

The New York City Board of Elections has already begun testing two of the ballot marking machines that the New York State Board of Elections is considering. After noting that "both of these devices are relatively new on the market and have very limited track records in elections," (*Id.* at 6), the New York City Board of Elections reports significant concerns with both ballot marking machines. For example, with respect to the "IVS" ballot marking machine, the New York City Board of Elections reported:

> Nevertheless, the City Board has developed initial understandings of the functioning of the system and has significant concerns regarding its usability by members of the disabled community that have limited physical ability (there is no pneumatic interface), the quality of the audio

> interface over the telephone, and its suitability in the vast majority of the poll sites that are in public facilities without telephone access, such as school gymnasiums. (*Id. at 6.*)

C. The New York City Board of Elections Lacks Reliable Data Regarding Where to Best Locate the Ballot Marking Machines

Moreover, the New York City Board of Elections reports that it lacks reliable data showing even where to install the ballot marking machines so as to help the maximum possible number of disabled voters:

> The demographers at the City's Department of City Planning have explained, however, that this census data is not an accurate measure of disabled voters who are registered to vote and able to go to a poll site. . . . The City Board does not have any other data that indicates the number of disabled voters who may appear at a poll site. Accordingly, the City Board will use this census data as a very rough reference point to identify additional poll sites that may have a high concentration of disabled voters, but cannot rely primarily on such data. (*Id. at 8.*)

D. The Ballot Marking Machines May Be Used Only in 2006 and Thus Result in a Waste of Public Funds and Public Resources

The New York City Board of Elections also raises the alarming possibility that these ballot marking machines may be used only this year:

> Indeed, it is possible that any devices bought this year may be used only once because when the State Board finally provides a selection of certified HAVA-compliant voting systems, some of these systems may allow disabled voters to use the same equipment as other voters instead of separate ballot marking devices. (*Id. at 2.*)

There are additional reasons why the ballot marking machines may be used only this year. (Dadey Decl. ¶ 15) The New York City Board of Elections raised the specter that in 2007 the New York State Board of Elections may purchase voting machine systems incorporating ballot marking functions, rendering the ballot marking

machines purchased in 2006 superfluous. In addition, the New York State Board of Elections may also purchase voting machine systems that can link with, but that do not incorporate, ballot marking functions. (*Id.*) But not all voting machine systems can link with all ballot marking functions, and if the New York State Board of Elections ultimately decides to purchase an incompatible voting machine system, the ballot marking machines purchased this year will be useless. (*Id.*)

The potential waste of both public funds and public resources could be dramatic. The current bids submitted from ballot marking machine manufacturers range from $3,600 to $5,410 per machine. (Dadey Decl. ¶ 16) For the IVS vote-by-phone system (*see* page 8, above), there is a minimum of $25,000 per county and an additional $500 per election district. (Dadey Decl. ¶ 16) These prices do not include the cost of supporting software, supporting hardware, maintenance fees, training, and other additional costs of operation. (*Id.*)

Beyond this potential waste of public funds lies the potential waste of public resources, described above, resulting from undertaking this temporary and piecemeal implementation. As the New York City Board of Elections tersely observed, it "will need to divert resources that would otherwise be focused on the full roll-out of the new system next year." (Dadey Ex. A at 2)

E. Further, Material Defects Exist in the 2006 Plan Component

Beyond what the New York City Board of Elections pointed out, further, material defects exist in the 2006 Plan Component. These include:

i. The Use of Ballot Marking Machines Threatens Disabled Voters' Right to a Private Vote

Because the ballots created on the ballot marking machines have a distinctive ballot "face" and distinctive machine markings, election officials will know exactly how a portion of the disabled community voted. (Dadey Decl. ¶ 17) This will effectively deny these voters their right to a private vote. *See* 42 U.S.C.§ 15481(a)(3)(A) (requiring that disabled voters be able to vote as any other voter, e.g., privately).

ii. The 2006 Plan Component Threatens to Disenfranchise Voters

Based on Citizens Union's experience in training poll workers and educating the public about voting issues (Dadey Decl. ¶¶ 2, 4-5), the very limited time between now and the September elections is simply inadequate to allow the necessary training and education. Additionally, changing the voting system now and again in 2007 subjects poll workers and voters to three election systems in three years and poses a significant threat to the proper administration of the election process.

iii. The 2006 Plan Component Is Not Transparent

In drafting its recently adopted regulations on voting system standards, the New York State Board of Elections explicitly allowed for public hearings and public comment periods.[3] Provisions for public hearings and comment periods also run

[3] *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 6209.09 (A) (2006) ("State Board testing and examination shall be performed in an open and public venue."); § 6209.09 (F)(9) (a) ("The purpose of [the Voter Demonstration Test] is to provide, in a simulated election day environment, a public demonstration of the usability and accuracy of such systems or machines."); § 6209.09 (F)(9) (c) ("The State Board shall make available to the public, all non-proprietary documentation submitted by the vendor.").

throughout HAVA.[4] Yet the rushed 2006 Plan Component eliminates public oversight and comment (*See* Plan at 2) and thus collides with the public policy embodied in the voting system regulations and in HAVA and undermines the public's confidence in the voting process.

II. Defects in the 2007 Plan Component

A. The 2007 Plan Component Fails to Supply Crucial Detail

The 2007 Plan Component is aimed at replacing the lever machines currently used in New York elections. But the 2007 Plan Component fails to supply any detail surrounding the testing, selection, certification, or rollout of the crucial HAVA-compliant voting machine systems in 2007. (Dadey Decl. ¶ 18) Indeed, as the Plan reports, the New York State Board of Elections has not even completed the first step in the process, which consists of adopting the necessary amendments to its rules and regulations on voting system standards. (*Id.*) Significantly, all the Plan says is that "it is anticipated" that the New York State Board of Elections will consider relevant amendments at its next meeting. (*Id.*) It is respectfully submitted that a "plan" like this one, which does nothing more than recite that voting systems standards regulations must be adopted, after which there will be certification testing (according to a test plan not yet developed), after which there will be a final certification, after which contracts will be

[4] *See, e.g.*, 42 U.S.C. § 15362 (public comment period and public hearing before the adoption of voluntary voting system guidelines); 42 U.S.C. § 15406 (public inspection and comment on state plans for HAVA compliance); 42 U.S.C. § 15502 (public comment period and public hearing before the election assistance commission adopts voluntary guidance standards for HAVA compliance).

awarded, after which there will be acceptance testing (according to plans and procedures not yet developed) — is not an effective plan for HAVA compliance.

III. The Court Should Appoint a Special Master to Monitor the Plan for HAVA Compliance

Whether or not the Court approves the Plan submitted by defendants — and Citizens Union respectfully urges the Court to reject the Plan for all the reasons discussed above and to adopt a more carefully thought-out and comprehensive plan for 2007 — the Court should, as part of the plan for HAVA compliance that the Court ultimately approves, appoint a special master to oversee and monitor the implementation of that plan under FED. R. CIV. P. 53.

The appointment of a special master would not only avoid the necessity for the parties to continuously report on the status of the plan's implementation, but it would also ensure that the plan is effectively implemented and the Court is otherwise informed of any deficiencies. Rule 53 anticipates cases such as this one, in which special expertise or detailed and lengthy supervision are required. (*See* FED. R. CIV. P. 53 Advisory Committee's Notes on 1983 amendments.)

It is within the district court's discretion to appoint a special master and to decide the extent of the special master's duties. (*See generally* WRIGHT & MILLER: FEDERAL PRAC. & PROC. § 2609, Powers of Masters (1995).) Additionally, "[r]eliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent." (FED. R. CIV. P. 53 Advisory Committee's Notes on 2003 Amendment.)

Indeed, there is precedent in this District for the appointment of a special master in voting rights cases. *See Fund for Accurate and Informed Representation v. Weprin*, Nos. 92-CV-283, 92-CV-720, 92-CV-0593, 1992 U.S. Dist. LEXIS 21617 (N.D.N.Y. Dec. 23, 1992) (copy attached as Exhibit 1) (court found appointment of special master necessary to aid the court in protecting the voting interests of all citizens throughout New York State). In *Fund*, the court appointed a special master to, "prepare a constitutional redistricting plan for New York State that could be implemented in the event that the state did not promulgate such a plan in a timely fashion." (*Id. at* *4.) Additionally, a member of the special master's staff, "provided diligent and insightful help to . . . [the] court throughout the proceedings." (*Id. at* *4.)

Similarly, in *Rodriguez v. Pataki*, 207 F. Supp. 2d 123 (S.D.N.Y. 2002), the Court appointed a special master when time was of the essence to prepare a redistricting plan in time for a pending federal election. In *Rodriguez*, the United States challenged redistricting plans enacted by New York State. A three-judge panel found that the action to reapportion the congressional districts required "the delineation of new districts in the shortest time possible, and entail[ed] the inherent complexity and difficulty of dividing the state into districts that will reconcile the demands of applicable law." (*Id.* at 124.) The panel also found that preparing a timely and suitable plan presented an exceptional condition that required the appointment of a special master. *Id. See also Hart v. Community School Board of Brooklyn, New York School District #21*, 383 F.Supp. 699, 758-769 (E.D.N.Y. 1974) ("special master" appointed to arrange remedial plans and to manage the planning efforts of the parties). In a supplemental

opinion addressing the role a special master would play in the desegregation of a school, the court in *Hart* noted:

> The . . . [court appointed expert master] in this case must assist the court by coordinating and evaluating remedial proposals that defendants and others are in the process of preparing pursuant to court order. He must serve an investigatory and consultative function among the parties and advise this court in technical areas so it may approve an effective remedial order. In a sense, he must bridge the gap between the court as impartial arbiter of plans placed before it and advocates protecting their clients' positions that are often narrower than that of society at large.

Hart v. Community School Bd., 383 F.Supp. at 764.

Accordingly, Citizens Union respectfully suggests that the Court appoint a special master to oversee the defendants' compliance with HAVA in 2007.

CONCLUSION

For all the foregoing reasons, Citizens Union respectfully requests that the Court (a) reject the plan for compliance with HAVA, submitted by defendants on April 10, 2006, in favor of a more carefully thought-out and comprehensive plan, to be submitted by defendants, for New York to become HAVA compliant in 2007 and (b) appoint a special master under FED. R. CIV. P. 53 to oversee the implementation of that plan in 2007.

Respectfully submitted,

Dated: April 27, 2006
New York, New York

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EXHIBIT A

LEXSEE 1992 US DIST LEXIS 21617

THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC., JUAN DE SANCTIS, AUGUSTINE C. CHEN, ONEL ALFRARO, MARGARET QUIGLEY, HELEN K. HORN, CALVIN L. WALTON, JUAN L. JIMENEZ, FELIX FIGUEROA, ALFRED HONG, EMORY N. JACKSON and JUAN DE LA CRUZ, BROOKLYN POLITICAL ACTION COMMITTEE, INC., MARTIN CHICON, RONALD TRAVIS, MARTHA HOWLETTE, LOUIS DEGUZMAN, MARION PHILLIPS, BAY RIDGE COMMUNITY COUNCIL, INC., TOWN OF CATSKILL, GREENE COUNTY, BUFFALO COMMON COUNCIL, and GEORGE K. ARTHUR, Plaintiffs, v. SAUL WEPRIN, both Individually and as Speaker of the Assembly of the State of New York, DAVID GANTT, both Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment, DEAN SKELOS, both Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment, MARIO CUOMO, both Individually and as Governor of the State of New York, STANLEY LUNDINE, both Individually and as Lt. Governor of the State of New York and as Presiding Officer and President of the Senate of the State of New York, THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, THE SENATE OF THE STATE OF NEW YORK, THE ASSEMBLY OF THE STATE OF NEW YORK, and THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, Defendants. CLARENCE E. NORMAN, JR., ANGELO DEL TORO, DAVID F. GANTT, THE NEW YORK STATE ASSEMBLY and SAUL WEPRIN, Plaintiffs, v. MARIO M. CUOMO, STAN LUNDINE, THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC., JUAN DE SANCTIS, AUGUSTINE C. CHEN, ONEL AFARI, AURELIA GREENE, and JAMES F. BRENNAN, Defendants. GEORGE P. SCARINGE, Plaintiff, v. RALPH J. MARINO, Majority Leader of the Senate of the State of New York; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; THE SENATE OF THE STATE OF NEW YORK; SAUL WEPRIN, Speaker of the Assembly of the State of New York; DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; THE ASSEMBLY OF THE STATE OF NEW YORK; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; and THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, Defendants. ANTHONY MASIELLO and MANFRED OHRENSTEIN, Intervenor-Defendants.

92-CV-283, 92-CV-720, 92-CV-0593

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

1992 U.S. Dist. LEXIS 21617

December 23, 1992, Decided
December 23, 1992, Filed

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JUDGES: Cardamone, McCurn, Munson

OPINIONBY: PER CURIAM

OPINION: Per Curiam:

MEMORANDUM-DECISION AND ORDER

This three-judge court was convened in April, 1992 pursuant to *28 U.S.C. § 2284* (1988) to adjudicate these three actions involving the reapportionment of New York's legislative districts based upon the 1990 Census. On June 19, 1992, the court appointed a Special Master pursuant to *Fed. R. Civ. P. 53* to assist the court in this involved matter. Since that time, the court has fully adjudicated the merits of these cases and has concluded that the state's reapportionment plan passes constitutional and statutory muster. See *Fund for Accurate and Informed Representation v. Weprin, 796 F. Supp. 662 (N.D.N.Y. 1992)*. During the course of these proceedings, the court issued several decisions setting [*3] forth the procedural history of this case. Rather than repeat that background here, reference is made to those published decisions. See, e.g., id.; *Norman v. Cuomo, 796 F. Supp. 654 (N.D.N.Y. 1992)*.

Presently before the court is an application by the court-appointed Special Master for compensation totaling $112,691.89 for services rendered and costs incurred in connection with this litigation. Some of the parties have registered objections to various aspects of the application. Having reviewed the Special Master's application and the parties' responses, the court concludes that the Special Master is entitled to payment from the State of New York in the amount of $107,754.39.

I. BACKGROUND

By order dated June 19, 1992, the court appointed former United States District Court Judge Frederick B. Lacey pursuant to Rule 53 to serve as Special Master in these proceedings. His appointment was necessary to aid the court in protecting the voting interests of all citizens throughout New York State from the possibilities that the state's 1992 reapportionment plan might be unconstitutional and that the state might not be able to enact a valid apportionment [*4] plan in time for use in the 1992 elections. Mr. Lacey was instructed to prepare a constitutional redistricting plan for New York State that could be implemented in the event that the state did not promulgate such a plan in a timely fashion. In appointing Mr. Lacey, the court remarked that "his recent experience in Congressional redistricting [in New York State] will bring him and an experienced staff to this highly complex task, resulting in a saving of time and money." See Order (6/19/92) at 3 (emphasis added). The court also made the following provision for payment of fees and costs to Mr. Lacey:

> All costs and expenses of the Special Master, including reasonable compensation to the Special Master, himself, shall, after approval by the court, be paid by the State of New York.

Id. at 6.

Mr. Lacey and his staff should be and are commended for the manner in which they met this challenge. They rushed into immediate service, satisfied a rigorous time frame within which to complete this enormous task, and produced a product of superior quality. Mr. Lacey's partner, Molly S. Boast, provided diligent and insightful help to this court throughout the proceedings. Although [*5] there ultimately was no need to implement Mr. Lacey's plan, the timely and capable efforts of his staff resulted in the assurance that the voting rights of all New Yorkers would be secure in the 1992 state elections.

Shortly after completing his work, Mr. Lacey submitted to the court his application for payment. He requests compensation of $37,285.64 for disbursements, which includes payment of $27,350.00 to Professor Theodore Arrington for his extensive participation in drafting a new apportionment plan, and $75,406.25 for services rendered by Mr. Lacey and his staff, for a total of $112,691.89. As discussed more fully below, the main thrust of the objec-

tions to the application concerns Mr. Lacey's request to be compensated at a rate of $450.00 per hour for 10.25 hours of service, and his request for compensation at a rate of $340.00 per hour for the 85 hours Ms. Boast contributed to the redistricting effort. No other request for payment of services exceeds a rate of $300.00 per hour.

II. DISCUSSION

The rates requested on behalf of Mr. Lacey and Ms. Boast represent the main controversy before the court. The parties objecting to the application generally oppose awarding [*6] fees at such high rates for what is essentially public interest work. Significantly, none of the parties suggest that Mr. Lacey's and Ms. Boast's services were not worth the amount requested; in fact, some of the parties have gone out of their way to compliment them for their work. Rather, the parties' main objection focuses on their belief that, regardless of the quality of the work, no Special Master should be awarded fees at such high rates for work undertaken in the public interest. A secondary controversy centers on how (or whether) the payment for the Special Master's services and disbursements should be allocated among the parties.

A. Rate of compensation

The parties opposing the rates charged by the Special Master base their opposition in part upon a statement found in the Eastern District of New York's decision in *Hart v. Community School Bd. of Brooklyn, 383 F. Supp. 699 (E.D.N.Y. 1974),* aff'd, *512 F.2d 37 (2d Cir. 1975).* In Hart, a class action seeking school desegregation, Judge Weinstein ended his lengthy discussion of the merits by suggesting in dicta that the Special Master's fee "would [*7] be based upon about half that obtainable by private attorneys in commercial matters." *383 F. Supp. at 767.* Implicit in that statement was the court's concern that a Special Master not be paid the same amount for working on matters of public concern as he would for working on private, commercial matters. A few courts have followed that rationale in reviewing applications for Special Master fees. Most notably, in *Reed v. Cleveland Ed. of Educ., 607 F.2d 737, 748 (6th Cir. 1979),* the district court appointed a Special Master to assist it in the trying task of crafting and implementing a constitutional desegregation plan. Various parties' challenges to the Special Master's fee application prompted the Sixth Circuit to comment on appeal that "courts must never lose sight of the fact that the fees in a case of this kind are paid from public funds. Every effort should be made to keep these expenses as low as reasonably possible." *Cleveland Ed. of Educ., 607 F.2d at 748;* see also, e.g., *Reed v. Rhodes, 691 F.2d 266, 267 (6th Cir. 1982).*

Certainly one of the court's objectives [*8] in reviewing a fee application should be to set a rate that would allow Special Masters to carry out their professional responsibilities "without either personal profiteering or undue financial sacrifice." Cf. *Wyatt v. Stickney, 344 F. Supp. 387, 410 (M.D. Ala. 1972),* modified in part, *503 F.2d 1305 (5th Cir. 1074)* (representation of indigent clients). The parties opposing the Special Master's application urge this court to rely upon Hart and Cleveland Ed. of Educ. and consider the public nature of the work in determining whether his fee request is reasonable. This court agrees that the public service nature of the Special Master's service should factor into consideration when setting a fee in instances such as the present case. n1

n1 Indeed, the court is aware of the controversy that this application has stirred within the legal community and beyond. See, e.g., Tim O'Brien, Public Service at a Private Price, *132 N.J. L.J. 550 (1992).*

[*9]

The parties' reliance upon Hart and its progeny is somewhat undermined, however, by the unique circumstances extant here. Whereas the court in Hart announced its intent to limit the Special Master's compensation before the Special Master was appointed, this court made no such provision. At least if the issue of Mr. Lacey's rate of compensation had been addressed in June, when he assumed his role as Special Master, then some equitable compromise could have been struck or Mr. Lacey could have declined the appointment. Cf. *United States v. Yonkers Bd. of Educ., 108 F.R.D. 199, 202 (S.D.N.Y. 1985),* on reconsideration, *118 F.R.D. 326 (S.D.N.Y. 1987)* ("Yonkers"); *National Union Fire Ins. Co. v. The Risk Exchange, Inc., No. 86 Civ. 7461, 1990 U.S. Dist. LEXIS 16936* *18 (S.D.N.Y. Dec. 13, 1990) (parties cannot object to court-appointed expert's rates when they agreed to them in advance). Basic notions of fairness militate against negotiating Mr. Lacey's rate ex post facto. See *Yonkers, 108 F.2d at 202.*

The court is cognizant of the fact that these same [*10] parties unsuccessfully challenged Mr. Lacey's application for fees in related litigation in the Eastern District of New York. See Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt, No. CV-92-1521 (E.D.N.Y.) (hereinafter "Gantt"). Simply stated, Gantt was the congressional counterpart to the instant litigation; at issue there was the reapportionment of the state's Congressional districts to be utilized in the 1992 election. The Eastern District appointed Mr. Lacey as Special Master and directed him to prepare a congressional redistricting plan for the state. After completing his work, Mr. Lacey submitted an application for payment using essentially the

same rates requested here. Some of the same parties appearing in this matter opposed his requested rate in Gantt, on the ground that it was excessive given the public service nature of the work.

The Eastern District rejected the opposition to Mr. Lacey's application and granted his request in total. Central to that court's analysis was the high quality of Mr. Lacey's work under difficult circumstances. The court wrote:

> The special master expeditiously organized a staff, solicited public comment, held a hearing [*11] and prepared his Plan and Report for submission to the court [in a timely fashion]. Mr. Lacey performed these tasks in an exemplary manner even though there were extraordinary time constraints in a unique and complex case. . . . .
>
> One of the reasons that the court appointed Mr. Lacey as special master was that few attorneys in the country could match him for ability, experience, energy, and judgment. His work on this case has fully justified our confidence in him. We see no reason to deny him the reasonable compensation requested.

Gantt, No. CV-92-1776 (Order of Nov. 5, 1992).

The quality of the Special Master's work in light of the complexity of the task is an important consideration in determining the special master's fee, see, e.g., *American Safety Table Co. v. Schreiber, 415 F.2d 373, 380 (2d Cir. 1969)*, cert. denied, *396 U.S. 1038, 24 L. Ed. 2d 682, 90 S. Ct. 683 (1970)*. The Eastern District's view concerning the quality of Mr. Lacey's work applies with equal force to this case. The Supreme Court discussed the significance of work quality in this context more than seventy years ago, when it instructed that "a higher rate of compensation [*12] is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings." *Newton v. Consolidated Gas Co., 259 U.S. 101, 105, 66 L. Ed. 844, 42 S. Ct. 438 (1922)*; accord *Yonkers, 108 F.R.D. at 202*. As discussed above, this court called upon Mr. Lacey and his staff in large part because of the insight they brought to the project as a result of the invaluable experience they gained through their work in the Eastern District's litigation involving reapportionment of the state's Congressional districts. The task required urgent attention due to the immanency of the election season, and Mr. Lacey and his staff responded to our call immediately. The services rendered by Mr. Lacey and his staff under these trying circumstances were worth the rates charged.

In sum, it is clear that the court faces a number of conflicting interests in determining whether Mr. Lacey's request is excessive. Of course, the foregoing discussion does not present an exhaustive list of the factors which the court must consider in determining whether a Special Master's request for payment is reasonable. [*13] Courts must exercise their discretion in considering numerous other factors, including (but not limited to) the standard rates in the community and the degree of assistance the Special Master contributed to the final product, before setting the reasonable rate of compensation. See 5A James W. Moore, et al., Moore's Federal Practice P 53.04 (2d ed. 1992) (citing cases). In addition to the factors discussed above, the court has reviewed Mr. Lacey's application in its entirety, keeping in mind the broad discretion that district courts have in formulating what constitutes a reasonable and appropriate fee. Cf. *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 885 F.2d 1, 9* (2d Cir.) (district court has discretion to set reasonable Special Master's fee), cert. denied, *494 U.S. 1029, 110 S. Ct. 1477, 108 L. Ed. 2d 614 (1989)*.

Having considered all of the arguments and the applicable case authority, the court concludes that the maximum rate proper for recovery here is $300.00 per hour. This rate strikes a compromise between what some parties implicitly deem to be reasonable for public interest work "in 1992 dollars," see, e.g. Carvin letter to Court [*14] (9/21/92) at 1, while also taking into account that the Special Master's work was worth the amount requested and that he was never given notice that his set rate of compensation might be reduced and an accompanying opportunity to decline the appointment. This rate obviously applies only to the services rendered by Mr. Lacey and Ms. Boast. All other members of Mr. Lacey's staff, having requested compensation below that amount, shall be compensated at the rates set forth in Mr. Lacey's application.

Calculation of the Special Master's fee in accordance with this ruling, i.e. utilizing a rate of $300.00 per hour for Mr. Lacey and Ms. Boast and leaving all other rates intact, results in a fee award of $107,754.39.

B. Allocation

Finally, the court must address the arguments relating to allocation of the burden of paying the Special Master's fee. These arguments can be disposed of in short order because the court already resolved this issue in its order appointing Mr. Lacey. In that order the court directed that "all costs and expenses of the Special Master, including reasonable compensation to the Special Master, himself, shall, after approval by the Court, be paid [*15] by

the State of New York." See Order (6/19/92) at 6 (emphasis added). This direction reflected the court's belief that the burden should be spread among all New Yorkers, instead of concentrated among a few small groups, since this litigation was brought to benefit all New Yorkers. This litigation was brought in good faith and the parties who challenged the reapportionment, while unsuccessful, presented credible arguments. Accordingly, the court reaffirms its previous direction that the Special Master's compensation shall be paid by the State of New York.

III. CONCLUSION

Having reviewed the Special Master's application for payment and the parties' opposition thereto, this court hereby orders that the State of New York shall compensate the Special Master in the amount of $107,754.39 for services rendered and costs incurred in this litigation. Payment is due to the Special Master within sixty days of this order, unless the State and the Special Master mutually agree to an alternative payment schedule.

IT IS SO ORDERED.

DATED: December 23, 1992
Syracuse, New York

Richard J. Cardamone

United States Circuit Court Judge

Neal P. McCurn

Chief United States District Judge

Howard [*16] G. Munson

Senior United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and exact copy of the foregoing Motion of Citizens Union of the City of New York and Citizens Union Foundation of the City of New York for Leave to Appear as *Amici Curiae*, the Proposed Order, the Memorandum of Law, the Declaration of Richard D. Dadey, Jr. to be served upon the following parties by first-class U.S. mail, postage prepaid and by email on this 27th day of April, 2006.

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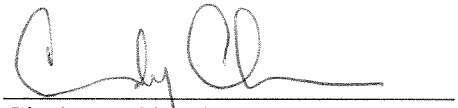

Cindy Y. Chen*

*Motion pending for admission *pro hac vice*.