STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C0-01-160

Susan M. Zachman, et al., individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

and

Patricia Cotlow, et al., individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs-Intervenors,

and

Jesse Ventura,

Plaintiff-Intervenor,

and

Roger D. Moe, et al.,

Plaintiffs-Intervenors,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota, and Doug Gruber, individually and on behalf of all Minnesota county chief election officers,

Defendants.

MEMORANDUM OF SECRETARY OF STATE MARY KIFFMEYER IN RESPONSE TO MOTIONS FOR TAXATION OF COSTS AND AWARD OF ATTORNEYS' FEES

INTRODUCTION

Each of the four Plaintiffs or Plaintiffs-Intervenors in this matter, the Zachman Plaintiffs, the Cotlow Plaintiffs-Intervenors ("Cotlow Plaintiffs"), Governor Ventura, and the Moe Plaintiffs-Intervenors ("Moe Plaintiffs"), brings a motion for an award of attorneys' fees and

taxation of costs and disbursements against Defendants. Defendant Kiffmeyer ("the State") submits this response to these motions.[1]

The State does not contest the fact that the Plaintiffs and Plaintiffs-Intervenors are "prevailing parties" within the meaning of 42 U.S.C. § 1988 in that a portion of each party's proposed plans was incorporated in the plans adopted by the Court. However, the amounts requested by the parties should be reduced to reflect the fact that none of the parties was 100% successful in achieving their goals. Indeed, they were essentially litigating against each other.

FACTS

A. THE REDISTRICTING PLANS.

On December 11, 2001 the Court issued an Order establishing redistricting criteria. On December 28, 2001, the Plaintiffs and Plaintiffs-Intervenors presented their proposed legislative and congressional redistricting plans. The State remained neutral concerning the merits of the redistricting plans, neither submitting its own plans nor commenting upon the merits of the other parties' plans. On March 19, 2002, the Court issued its legislative and congressional redistricting orders. The Court did not adopt in total the legislative or congressional plan submitted by any of the four parties, but devised its own plans.

B. FEE APPLICATIONS.

1. Zachman Plaintiffs.

The Zachman Plaintiffs have presented a claim for attorneys' fees in the amount of $110,220, plus costs in the amount of $4,010.43, for a total of $114,230.43. They are claiming fees only for the hours of attorneys working for the firm of Trimble & Associates, primarily attorneys Tony Trimble and Matthew Haapoja, and not for work performed by Attorney Tim

[1] The State does not object to the requests for taxation of costs and disbursements, nor to the amounts requested by the parties.

Kelly or his law firm of Kelly & Berens. Mr. Kelly's affidavit lists the hours claimed by the other attorneys, which total 551.1 hours.

The Zachman Plaintiffs contend that they are prevailing parties because this Court adopted their proposal for a "low deviation" in population in the plans, because the congressional plan adopted five urban-suburban districts and three rural districts,[2] because the legislative plan did not give preferential treatment to any incumbents, and because the Court rejected positions urged by certain other parties that the Zachman Plaintiffs opposed, such as the Governor's criteria of political party competitiveness. and the Moe Plaintiffs' suggestion of exceptions to the point contiguity requirement. Zachman Memorandum of Law at 4-5.

2. Moe Plaintiffs-Intervenors.

The Moe Plaintiffs seek attorneys' fees in the amount of $132,636.25, and costs and disbursements in the amount of $8,416.70, for a total of $141,052.95. The Moe Plaintiffs are requesting reimbursement for work totaling 437 hours.

The Moe Plaintiffs claim they are prevailing parties because they were successful in arguing that preservation of political subdivisions should be elevated as a criterion above preservation of other communities of interest, that Minneapolis and St. Paul, and northwestern and northeastern Minnesota should remain in separate congressional districts, and that the Red Lake Band and White Earth Reservations should be together in the same senate district. Moe Memorandum at 4-5.

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[2] The Court interpreted the Zachman plan as being a 4/4 plan, not a 5/3 plan, and thus rejected it. *See* Final Order Adopting Congressional Plan at 5.

3. Governor Ventura.

Governor Ventura is seeking reimbursement for $51,057.75 in attorneys' fees and $4,362.50 in costs and disbursements, for a total of $55,420.25. The total number of hours claimed is 204.75.

Governor Ventura contends that he was a prevailing party because he persuaded the Court not to adopt certain criteria which might have led to protection of more incumbents, the congressional plan has five urban-suburban and three rural districts, and the legislative plan retains various communities of interest in out-state areas. Ventura Memorandum at 4-5.

4. Cotlow Plaintiffs-Intervenors.

The Cotlow Plaintiffs are claiming $139,895 in fees, and $6,150.03 in costs and disbursements, for a total of $146,045.03. They are requesting an upward adjustment of attorney's fees of 10% for lead attorney Alan Weinblatt, which is an additional request of $11,646, for a grand total of $157,691.03. The requested fees correspond to 549.25 hours in attorneys' time, and 322.75 hours in time of law clerks and other non-attorneys. The Cotlow Plaintiffs contend they are prevailing parties and entitled to fees because they were the only parties representing citizens, as opposed to elected officials, because they took a lead role in many aspects of the case, and because the Court's congressional plan bears significant similarity to that proposed by them. Cotlow Memorandum at 7-8.

ARGUMENT

IN LIGHT OF THE UNIQUE NATURE OF REDISTRICTING LITIGATION AND THE FACT THAT NONE OF THE PARTIES WAS TOTALLY SUCCESSFUL, ANY ATTORNEYS' FEE AWARD SHOULD BE REDUCED FROM THE AMOUNTS REQUESTED.

The controlling standard for the appropriate amount of fees to be awarded by the Court is what is reasonable under the circumstances. *See Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 535-36 (Minn. Ct. App. 1993), *rev. denied* (Minn. Jan. 27, 1994) (citing *Hensley v.*

Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983)). The Court has great discretion in determining what is reasonable. *See Johns v. Harborage I, Ltd.,* 585 N.W.2d 853, 863 (Minn. Ct. App. 1998); *Musicland Group,* 508 N.W.2d at 535; *Casey v. City of Cabool, Mo.,* 12 F.3d 799, 804 (8th Cir. 1993).

In *Hastert v. Illinois State Board of Election Commissioners,* 28 F.3d 1430 (7th Cir. 1994), the court discussed the special circumstances that are applicable to a request for attorneys' fees in a redistricting case:

> The State Board of Elections, the nominal defendant, has no interest in the eventual outcome except that there *be* an outcome which it can implement. Yet the State Board may be held liable for fees to the prevailing parties, whose status as such depends upon the *relative* success of their position in relation to the success of the other plaintiffs. These configurations of claim to liability and of success to failure are essentially unique to redistricting cases. In such cases, liability is usually imposed on a neutral (and nominal) defendant, and successful fees claims are awarded to the *relatively* successful plaintiffs. In this case, we are attempting to apply principles developed in a wide range of civil rights cases to the *sui generis* category of redistricting cases. As might be expected, these principles do not provide a close fit to the subject matter.

28 F.3d at 1444 (Emphasis in original). A dissenting judge in *Hastert* would have gone even further and denied attorneys' fees:

> Neither the state of Illinois nor any other governmental body should be responsible for the attorneys' fees of the prevailing parties in litigation involving a truly nominal defendant who played no active role in the proceedings. Attorneys' fees awards are especially uncalled for when the unmeritorious claims are based primarily on the litigants' partisan interests, i.e., drawing the most favorable redistricting boundaries, as opposed to protection of recognized constitutional rights of aggrieved parties.

28 F.3d at 1446 (Coffey, J., dissenting). The State urges the Court to consider the *Hastert* opinions when deciding the attorneys' fees issues in this proceeding. In a typical attorneys' fees situation, the "prevailing party" would be requesting fees from the party or parties who were litigating against the prevailing party. In this case, the four requesting parties were actually litigating against each other, rather than against the State.

Indeed, each of the four requesting parties has made its fee application as if it prevailed in total and should be reimbursed for at least all of the time expended on the case. Because none of the parties prevailed totally, the Court should not award any of the parties the full amount they have requested.

In determining the proper amount of attorneys' fees to award, this Court should employ the two-step analysis set forth in *Hensley v. Eckerhart,* 461 U.S. 424, 433-34, 103 S.Ct. 1933, 1939-40 (1983). First, the Court should determine the " 'lodestar' " figure "by multiplying the 'number of hours reasonably expended on the litigation * * * by a hourly rate.' " *Anderson v. Hunter, Keith, Marshall & Co.,* 417 N.W.2d 619, 628 (Minn.1988) (quoting *Hensley,* 461 U.S. at 433, 103 S.Ct. at 1939) (omission in original). Second, the Court must consider the results obtained in determining whether to adjust the fee upward or downward. *Hensley,* 461 U.S. at 434, 103 S.Ct. at 1940. The degree of a plaintiff's success is the most critical factor in determining the amount of a reasonable attorneys' fees. *Farrar v. Hobby,* 506 U.S. 103, 114, 113 S.Ct. 566, 574 (1992). The number of hours claimed should reflect a reduction for time spent on unsuccessful claims. *See, e.g., Specialized Tours, Inc. v. Hagen,* 392 N.W.2d 520, 541-43 (Minn. 1986) (following lodestar approach set forth in *Hensley*); *DeGidio v. Pung,* 920 F.2d 525, 533 (8th Cir. 1990). Clearly, none of the four parties was totally successful in this case because the Court did not adopt any of the parties' congressional or legislative plans.

In *Dillard v. City of Greensboro,* 213 F.3d 1347, 1356 (11th Cir. 2000), the court sharply reduced the request for attorneys' fees in a redistricting case in part because the relief awarded was "based on the special master's own investigation and work, not the plaintiffs." Each of the Plaintiffs in this case had substantial input into the final congressional and legislative plans. Nevertheless, it is certainly clear that the Court itself did its own analysis and plan development, rather than simply drawing upon one of the four parties' analyses and plans. Furthermore, the

Court drew extensively upon testimony and other evidence produced by non-parties at the public hearings in this matter. *See* Final Order Adopting a Legislative Redistricting Plan at 3, 4, and 5; Final Order Adopting a Congressional Redistricting Plan at 5, 6, 7, and 8.

Neither of the two final plans represents simply a "cut and paste" job of one or more of the parties' plans. Rather, a substantial portion of the ultimate redistricting plans was not the result of the effort of any one group of plaintiffs, or even of the four groups together. Just as each of the parties achieved some successes in this matter, each also presented important arguments which the Court did not adopt. For example, the Court rejected the Zachman Plaintiffs' proposal to combine the cities of Minneapolis and St. Paul into one congressional district. Final Order Adopting Congressional Plan at 6-9. The Court adopted a five-three metropolitan-rural congressional district configuration, as opposed to the four-four configuration proposed by the Moe and Zachman Plaintiffs. *Id.* at 5. The Court rejected Governor Ventura's Canada to Iowa congressional district in favor of a district extending from Wisconsin to South Dakota across the southern part of the state, and otherwise drew congressional districts significantly differently than those proposed by the Governor. *Id.* at 5-6. The Court rejected the Cotlow Plaintiffs' arguments that "compactness" should not be used as a redistricting criterion. Order of December 11, 2001, at 11. Thus, no party can be said to have succeeded in all of its goals in this case.

In addition, no upward adjustment of fees should be awarded. An upward adjustment to the lodestar figure is justified only in "rare" and "exceptional" cases. *See Gates v. Deukmejian*, 987 F.2d 1392, 1402 (9th 1992); *Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992); *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991). In general, the novelty and complexity of the issues involved in the case are reflected in the number of hours expended, and the expertise and skill of the attorney should be reflected in the reasonable hourly rate for that

attorney. *See Blum v. Stenson,* 465 U.S. 886, 899, 104 S.Ct. 1541, 1549 (1984). No justification exists in this case for an upward adjustment of fees.

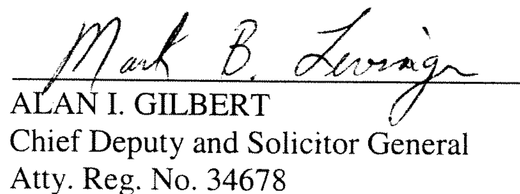
CONCLUSION

The State was a nominal defendant in this matter. The parties were really litigating against each other to obtain the best redistricting plans they could for their clients. None of the parties persuaded the Court to adopt their plans in total. Instead, the Court looked at all of the proposals, took additional evidence from the public, and then drew up its own plans. This Court should exercise its discretion to reduce the attorneys' fees requested by the parties. Any fees awarded to each of the Plaintiffs should only reflect their relative success in this matter.

Dated: September 10, 2002

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota



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