IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Phillip Baca, *et al.*, *Plaintiffs-Appellants*, v. Richard J. Berry, in his official capacity as Mayor of Albuquerque, *Defendant-Appellee.*	No. 14-2174(L) & 14-2181

APPELLANTS' MOTION FOR AN ORDER TO REVISE CASE CAPTION AND LODGE APPELLANTS' BRIEF

Appellants respectfully move the Court, pursuant to Federal Rule of Appellate Procedure 27 and Tenth Circuit Local Rule 27.3, for an order to revise the case caption to identify Luis Roberto Vera, Jr., Phillip G. Sapien, and Antonio Maestas as Appellants in this case and to lodge Appellants' Brief (attached as Exhibit A) on their behalf. For the foregoing reasons, Appellants' Motion should be granted.[1]

This case is a cross-appeal involving the district court's imposition of sanctions pursuant to 28 U.S.C. § 1927 against Plaintiffs' counsel. The Notice of Appeal listed two orders from which Appellants were appealing: the May 28, 2014

[1] Counsel for Mr. Vera, Mr. Sapien, and Mr. Maestas have conferred with counsel for Defendant-Appellee, and counsel for Defendant-Appellee have not yet determined whether they oppose the motion.

order of the district court awarding costs to Defendant and the August 29, 2014 order imposing sanctions against Plaintiffs' counsel.[2]

Although the Notice of Appeal lists only the Plaintiffs as the Appellants, the real Appellants of interest are their attorneys from the case below, Luis Roberto Vera, Jr., Phillip G. Sapien, and Antonio Maestas. The August 29, 2014 order, which is encompassed in the Notice of Appeal, imposes sanctions solely against the attorneys. This Court has held that under these circumstances, where the real appellant of interest is the sanctioned attorney and not the plaintiff, the Court has jurisdiction over the appeal of the sanctions by the attorneys, despite the failure to name plaintiffs' attorneys in the Notice of Appeal. *See Laurino v. Tate*, 2210 F.3d 1213, 1218 (10th Cir. 2000) ("The notice of appeal here specifically purports to appeal, among other things, from an order entered on May 18, 1999, that *only* concerns the sanctions entered against Mr. McDowell.") (emphasis in original); *see also* Fed. R. App. P. 3(c)(4) ("An appeal must not be dismissed for informality of form or the title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice."). This case is on all fours with *Laurino.*

Appellants have attached as Exhibit A to this Motion the opening brief of Appellants in this case, and respectfully request the Court enter an order revising

[2] Plaintiffs no longer seek to pursue the appeal of the award of costs embodied in the May 28, 2014 order of the district court.

the caption to list Luis Roberto Vera, Jr., Phillip G. Sapien, and Antonio Maestas as Appellants, and lodge Appellants' opening brief on the docket, dated December 8, 2014.[3]

CONCLUSION

For the foregoing reasons, Appellants' Motion should be granted and the Court should enter an order revising the case caption and lodging Appellants' opening brief.

Dated: December 8, 2014

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[3] The Court's CM/ECF system will not permit the brief to be filed on behalf of Mr. Vera, Mr. Sapien, and Mr. Maestas at this time because they are currently listed as "non-parties" on the Court's docket, therefore it is filed as an Exhibit to this Motion.

ECF CERTIFICATION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies:

1. All required privacy redactions have been made;

2. Hard copies of the foregoing motion required to be submitted to the Clerk's office are exact copies of the motion as filed via ECF; and

3. The motion filed via ECF was scanned for viruses using Malwarebytes Anti-Malware and is free of viruses.

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CERTIFICATE OF SERVICE

I, Joshua J. Bone, hereby certify that on December 8, 2014, I filed a true, correct, and complete copy of the foregoing with the Court and served it on the following people via the Court's ECF System:

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v.

RICHARD J. BERRY,

in his official capacity as Mayor of Albuquerque,

Defendant-Appellee.

On Appeal From The United States District Court
For The District of New Mexico
Honorable William P. Johnson, No. CV 13-76 WJ/WPL

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF RELATED CASES vi

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 15

ARGUMENT 18

I. Standard of Review 18

II. Plaintiffs' Attorneys Cannot be Sanctioned for "Multiplying" Proceedings They Attempted to End with Voluntary Dismissal 19

A. The District Court, Not Plaintiffs' Attorneys, Multiplied the Proceedings by Erring as a Matter of Law in Staying the Case 20

B. Sanctions Are Inappropriate Because Plaintiffs' Counsel Reasonably Relied Upon the District Court's Conclusion that They Had a Viable Reason to Seek Dismissal Without Prejudice. 24

C. The District Court Erred in Rejecting Plaintiffs' Attorneys' Offer to Proceed with Only the State Claim in State Court. 26

D. The Record Does Not Support the District Court's Sanctions Order. 29

III. Plaintiffs' Attorneys Cannot Be Sanctioned for Failing to Abandon Their Clients' Lawsuit Immediately Upon Receipt of the City's Expert Report, Written by the Same Person Who Drew the Challenged Map. 31

A. An Opponent's Expert Report Does Not Trigger an Obligation to Abandon a Case Under Threat of Sanction. 32

B. The City's Expert Report Contains Errors of Law that Preclude it from Demonstrating Plaintiffs' Claims were Meritless. 36

1. Mr. Sanderoff and the District Court Incorrectly Assert that Plaintiffs' Section 2 Claim is Foreclosed Because Their Expert Jointly Considered the Second and Third *Gingles* Prongs. 37

2. Mr. Sanderoff's Report Does Not Conclusively Establish that Plaintiffs' One-Person, One-Vote Claim is Without Merit. 40

3. The Presence of Majority-Minority Districts Does Not Render Plaintiffs' Claims Meritless. 42

IV. The District Court Legally Erred in Applying a Subjective Standard to Plaintiffs' Attorneys' Conduct 43

V. The District Court Abused its Discretion by Failing to Conduct an Individualized Analysis. 45

CONCLUSION 48

STATEMENT REGARDING ORAL ARGUMENT 50

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 51

ECF CERTIFICATION 52

CERTIFICATE OF SERVICE 53

TABLE OF AUTHORITIES

CASES

AeroTech, Inc. v. Estes, 110 F.3d 1523 (10th Cir. 1997) 18, 19, 45

Aldasoro v. Kennerson, 922 F. Supp. 339 (S.D. Cal. 1995)...................................39

Bixler v. Foster, 403 F. App'x 325 (10th Cir. 2010) 30, 32

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 18, 19, 35, 44, 45

Browning v. Kramer, 931 F.2d 340 (5th Cir. 1991) 25

Clark v. Tansy, 13 F.3d 1407 (10th Cir. 1993)...21

Conroy v. Vilsack, 707 F.3d 1163 (10th Cir. 2013)..33

Davis v. USX Corp., 819 F.2d 1270 (4th Cir. 1987)..22, 28

DMA International, Inc. v. Qwest Communications International, Inc., 585 F.3d 1341 (10th Cir. 2009) 32

Ford Audio Video Systems, Inc. v. AMX Corp., Inc., 161 F.3d 17, 1998 WL 658386 (10th Cir. 1998) (unpublished table decision)................................. 35-36

Galva Union Elevator Co. v. Chicago & North Western Transportation Co., 498 F. Supp. 26 (N.D. Iowa 1980) 28

Grider v. Keystone Health Plan Central, Inc., 580 F.3d 119 (3d Cir. 2009)..........46

Growe v. Emerson, 507 U.S. 25 (1993)...28

Hamilton v. Boise Cascade Express, 519 F.3d 1197 (10th Cir. 2008)....................18

Jacobsen v. Deseret Book Co., 287 F.3d 936 (10th Cir. 2002) 34

Johnson v. Pharmacia & Upjohn Co., 192 F.R.D. 226 (W.D. Mich. 1999)...........28

Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952)...................................34

Lang v. Manufacturers & Traders Trust Co., 274 F.R.D. 175 (D. Md. 2011)........28

Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004)..11, 40, 41, 42

Laurino v. Tate, 220 F.3d 1213 (10th Cir. 2000) 1

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006)............37

Medtronics Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH, 603 F.3d 943 (Fed. Cir. 2010)...24, 25

Miera v. Dairyland Insurance Co., 143 F.3d 1337 (10th Cir. 1998) 30, 44

Miller v. Pfizer, Inc., 356 F.3d 1326 (10th Cir. 2004)...35

Milligan v. Archuleta, 659 F.3d 1294 (10th Cir. 2011)....................................36, 40

Myers v. Hertz Penske Truck Leasing, Inc., 572 F. Supp. 500 (N.D. Ga. 1983) 28

O'Reilly v. R.W. Harmon & Sons, Inc., 124 F.R.D. 639 (W.D. Mo. 1989) 28

Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997).......................................21, 23

Parker v. CitiMortgage, Inc., 499 F. App'x 803 (10th Cir. 2012) 30

Peterson v. BMI Refractories, 124 F.3d 1386 (11th Cir. 1997) 20, 32

Proctor & Gamble Co. v. Amway Corp., 280 F.3d 519 (5th Cir. 2002) 41

Rodriguez v. Scotts Landscaping, 181 P.3d 718 (N.M. Ct. App. 2008)..................27

In re Ruben, 825 F.2d 977 (6th Cir. 1987) 25

San Marco v. City of St. Petersburg, 185 F.R.D. 679 (M.D. Fla. 1999).................28

Sanchez v. Colorado, 97 F.3d 1303 (10th Cir. 1996) 38

Steinert v. Winn Group, Inc., 440 F.3d 1214 (10th Cir. 2006)....................20, 21, 30

Thornburgh v. Gingles, 478 U.S. 30 (1986) 12, 36, 37, 43

United States v. Young, 45 F.3d 1405 (10th Cir. 1995)..25

Veliz v. Crown Lift Trucks, 714 F. Supp. 49 (E.D.N.Y. 1989)................................46

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)..37

STATUTES

28 U.S.C. § 1927 .... 10, 18, 20, 31

42 U.S.C. § 1973 43

OTHER AUTHORITIES

Fed. R. Civ. P. 8(a)(2) 41

Fed. R. Civ. P. 26(a)(3)(B) 35

Fed. R. Civ. P. 26(b)(4)(A) 33

Fed. R. Civ. P. 26(e) 35

9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2008) 28

STATEMENT OF RELATED CASES

This case is a cross-appeal, Nos. 14-2174(L) and 14-2181. There are no prior or related appeals.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367. The district court entered an order awarding attorneys' fees as a sanction against Plaintiffs' attorneys pursuant to 28 U.S.C. § 1927 on August 29, 2014.[1] A notice of appeal was timely filed pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) on September 26, 2014. Although the notice of appeal named only the Plaintiffs as Appellants, their attorneys, Luis Roberto Vera, Jr., Phillip Sapien, and Antonio Maestas, against whom sanctions were assessed, appeal the award of sanctions under 28 U.S.C. § 1927, and this Court has jurisdiction over their appeal because the notice of appeal encompassed the August 29, 2014 sanctions order. *See Laurino v. Tate*, 220 F.3d 1213, 1218 (10th Cir. 2000). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err in sanctioning Plaintiffs' attorneys for multiplying the proceedings when Plaintiffs had moved to *dismiss* the proceedings without prejudice and the court, after concluding that the record did not support

[1] The district court also awarded Defendant costs on May 28, 2014. Plaintiffs included this order in their Notice of Appeal, but no longer seek to pursue the appeal of the award of costs.

dismissal with prejudice (as Defendant had urged), stayed the proceedings, at neither party's request, solely in consideration of judicial economy?

2. Did the district court err in concluding that Plaintiffs' attorneys could be sanctioned for failing to dismiss their clients' case the day they received Defendant's expert report, in the absence of an opportunity to analyze the report, rebut the report, or depose the expert, and where errors of law in the report caused the district court to conclude erroneously that Plaintiffs' case was without merit?

3. Did the district court err in applying a subjective, rather than objective, standard in sanctioning Plaintiffs' attorneys for deciding to seek dismissal *without* prejudice after previously concluding, on an objective basis, that the same factual record did not support dismissal *with* prejudice?

4. Did the district court abuse its discretion in failing to conduct an individualized analysis in its sanctions order?

STATEMENT OF THE CASE

Appellants are attorneys representing four Latino voters in Albuquerque who filed a voting rights lawsuit in New Mexico state court on January 17, 2013 challenging the redistricting map adopted by the city of Albuquerque. The suit subsequently was removed to federal court. A-9.[2] This appeal arises from the district court's imposition of sanctions against Plaintiffs' attorneys under 28 U.S.C.

[2] References to Appellants' Appendix are denoted A-__.

§ 1927. The district court concluded that Plaintiffs' attorneys should be sanctioned for not immediately dismissing their clients' case with prejudice upon reading Defendant's expert report, which asserted that the city's redistricting map was lawful. A-407; Add-6.[3]

Plaintiffs sued Richard Berry in his official capacity as mayor of Albuquerque ("the city"), alleging, pursuant to 42 U.S.C. §§ 1983 and 1988, that the 2012 Albuquerque redistricting map violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection Clauses of the United States and New Mexico Constitutions. A-12. Specifically, Plaintiffs alleged that the enacted redistricting map "minimize[d] the opportunities of Latinos to participate in the political process and to elect the representative of their choice," in violation of Section 2 of the Voting Rights Act, and that city council districts "deviate[d] impermissibly from population equality," in violation of the Equal Protection Clauses of the United States and New Mexico Constitutions. A-14. Although Latinos accounted for seventy-five percent of the approximately 100,000 person population growth in the city, A-29, the redistricting map adopted by the city kept the number of Latino-majority districts flat at three of the city's nine city council districts, the same number of Latino-majority district as in the past decade's redistricting, A-436.

[3] References to the Addendum to Appellants' Brief are denoted Add-__.

The city removed the case to federal court on January 24, 2013. A-9. The magistrate judge assigned to the case issued an order setting a discovery closure date of July 22, 2013, and a deadline to file motions to compel discovery by July 29, 2013. A-42. Both Plaintiffs and the city propounded discovery requests, A-3, A-150, and although neither party received responses it viewed as adequate, neither party filed any motions to compel discovery with the district court, A-187. The parties also exchanged expert reports. Plaintiffs submitted the expert reports of Dr. Lonna Atkeson and Mr. George Korbel, which analyzed the city's redistricting map and concluded that Latinos did not possess the same opportunity to elect candidates of their choice as other members of the electorate in Albuquerque. A-123, A-142. The city submitted an expert report from Mr. Brian Sanderoff, who had drawn the city's redistricting map; he argued that the city's map was lawful. A-65.

On March 11, 2013, a major change in Albuquerque election law occurred when voters approved an amendment to the city charter mandating that no candidate could be elected to office without receiving a majority of the vote.[4] A-111. At the time Plaintiffs' complaint was filed, the top vote-getter was elected if she received over forty percent of the vote. A-111. In the 2009 mayoral election,

[4] City offices are officially nonpartisan, A-467; all candidates (regardless of their actual party affiliation) run together in a single election, with a potential subsequent run-off, A-458-59.

for example, the current mayor of Albuquerque—an Anglo Republican—was elected with 43.82 percent of the vote, while two Latino Democrats split the remaining 56 percent. A-111. Under the new law requiring candidates to obtain an outright majority of the vote to win election to city office, the mayor would not have been elected after the first round of voting, but instead would have faced a run-off election against the Latino Democrat with the second-highest vote total. A-111.

After contemplating the effect of this change in law, Plaintiffs reassessed whether they needed to pursue their lawsuit. A-111-13. Prior to the change in law, Plaintiffs believed that Latinos would have multiple preferred candidates splitting the vote in the city council districts. A-111-13. Following the change in law, Plaintiffs believed it may be possible for Latinos to elect their candidate of choice in these districts because run-off elections would become necessary and Latino voters would coalesce behind a single candidate of choice in the run-off election. A-111-13. Thus, Plaintiffs hoped, the charter amendment would reduce the vote dilutive effect of the current map and allow Latinos to elect candidates of choice in a majority of city council districts. Such a result could allow the Latino community to make any further necessary changes to the map through legislation rather than litigation. A-112.

Accordingly, Plaintiffs filed a motion for voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(2) on July 5, 2013. A-46. Plaintiffs explained that they were moving for voluntary dismissal without prejudice because they wanted to gather data from the next election in October 2013 (and possible run-off elections in November 2013) to assess whether the change in law actually addressed their concerns, or whether they would need to refile their claims at a later time. A-112-13.[5]

The city opposed Plaintiffs' motion, filing three separate briefs on the issue. A-49, A-82, A-162. On July 16, 2013, the city filed an opposition to Plaintiffs' motion, requesting that the case be dismissed with prejudice because, in its view, Plaintiffs' lawsuit had been simply a media stunt and Plaintiffs' claims were meritless, as demonstrated by the city's expert report (which it attached as an exhibit to its opposition, A-65). The same day, the city filed a separate motion for dismissal with prejudice, premised on three legal grounds: Rule 41(b) (contending the city would face legal prejudice if its request were not granted), Rule 16(f) (seeking dismissal as a sanction for alleged discovery delays), and Rule 37(d)

[5] Plaintiffs' counsel informed the city's counsel of Plaintiffs' decision to seek voluntary dismissal on July 1, 2013. A-121. Nonetheless, the city's counsel decided to spend time preparing for the deposition of Mr. George Korbel, which had previously been scheduled for July 9, 2013. A-335. On July 8, 2013, Plaintiffs' counsel confirmed that in seeking dismissal they did not intend to incur, or have the city incur, further discovery or deposition expenses and that the scheduled deposition would not occur. A-335-36.

(seeking dismissal as a sanction for alleged delays in discovery and notification regarding deposition cancelations). A-82.

The district court issued an order on September 3, 2013. A-185; Add-19. In it, the court addressed the parties' positions, and considered whether the city would suffer "legal prejudice" if Plaintiffs' motion to dismiss without prejudice were granted. A-187-90; Add-21-24. The court denied the city's request to grant dismissal as a sanction for purported discovery delays and violations, noting that there was "no evidence on the Court docket that [the city] ever sought formal judicial intervention for Plaintiffs' alleged failures to comply with the federal procedural rules." A-187; Add-21. The court also acknowledged and apparently rejected the city's contention that its expert report was the true cause of Plaintiff's dismissal motion. A-188; Add-22.

Turning to Plaintiffs' argument, the district court noted that "Plaintiffs' position is that their lawsuit may be premature," A-186; Add-20, and that they "offer[ed] a viable explanation for seeking dismissal without prejudice, claiming that they did not want this lawsuit to interfere with the upcoming city elections and pointing to a change in the law which could render moot the present concerns they have with the current redistricting." A-188; Add-22. After considering the parties' arguments, the district court concluded that "[a]t this point, the record is insufficient to warrant dismissal with prejudice." A-190; Add-24. But rather than

grant Plaintiffs' motion for dismissal *without* prejudice based on that conclusion, the district court *sua sponte* stayed the case, concluding that doing so "prejudices neither [party] and benefits judicial economy." A-190; Add-24.

Because of the district court's action—requested by neither party—the case thus remained alive in federal court. But nothing further happened in the case until a six-minute telephone status conference more than two months later, on November 12, 2013. A-192. The Clerk's minutes of the telephone conference reflect that at 11:35 A.M.,

> Plaintiff advise[d] that the issue also encompassed District 7 race for councilperson, not just mayoral race. [Plaintiff] [s]uggeste[ed] [the] Court continue stay until after that race next Tuesday, when issue may become moot. Plaintiff also advise[d] Court that they are willing to dismiss the federal claims (case had been removed) and proceed only with state law claims in state Court.

A-192. At 11:39 A.M., the city reported its "position [was] that the same issue will be present even after next Tuesday and [the city] believe[d] dismissal with prejudice [was] still appropriate. [The city] [did not] feel that week or two delay will make any difference." *Id.* The Clerk's minutes then note that the "Court will continue the stay in this case, and set a telephonic conference two to three weeks from now, in which time counsel will be able to consult their clients." *Id.* The telephone conference ended at 11:41 A.M. with the note "Court in recess." *Id.*

The next activity in the case was a "Notice of Hearing" docketed by the court on December 11, 2013, setting a telephone status conference for December 17, 2013 at 11:00 A.M. A-4.

That status hearing never happened. Although this is not reflected anywhere on the district court's docket, the district court apparently "vacated this second hearing because, at the time it was scheduled, the Court was in criminal hearings which had required more time than expected." A-195; Add-16.

No further proceedings occurred until the court issued a Memorandum Opinion and Order on January 3, 2014, two-and-a-half weeks after the cancelled status conference, granting the city's motion to dismiss the case with prejudice and denying Plaintiffs' motion to dismiss the case without prejudice. A-193; Add-14. The district court refused the city's request to dismiss the case with prejudice "as a sanction under either Rule 16(f) or 37(d)." A-195; Add-16. But the district court concluded that dismissal with prejudice was nonetheless appropriate because "it is apparent that there is no longer a case to pursue." A-195; Add-16. The district court thus dismissed the case with prejudice, A-197; Add-18, despite the fact that the court four months earlier had concluded that "the record is insufficient to warrant dismissal with prejudice," A-190; Add-24, and despite the lack of any change in the record other than a six minute status conference further staying the case. A-192.

On January 17, 2014, the city moved for attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*[6] and 1988, contending it was a prevailing defendant entitled to fees under the fee-shifting statutes because, in its view, "the suit was frivolous from the outset and any reasonable investigation would have disclosed that." A-203. The city also moved for costs pursuant to Federal Rule of Civil Procedure 54(d). A-202. In addition, the city moved for sanctions against the four Plaintiffs individually, as well as against their attorneys, under Federal Rules of Civil Procedure 16(f) and 37(d), citing alleged discovery delays and violations, A-208, and further moved for sanctions solely against Plaintiffs' attorneys pursuant to 28 U.S.C. § 1927, A-210-11, which authorizes sanctions against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." In total, the city sought over $134,000 in fees. A-369. The vast majority of the fees were incurred by the city in briefing its own motion to dismiss with prejudice and its own motion for fees and sanctions. A-218-40, A-244-66, A-373-80, A-384-91, A-394-95.

On May 12, 2014, the district court conducted a hearing on the city's motion for fees and sanctions. A-419. In support of its arguments that Plaintiffs' lawsuit had been meritless, the city presented testimony from its expert, Mr. Sanderoff. A-424. Mr. Sanderoff testified that, in addition to serving as the city's expert in the

[6] This provision has since been editorially reclassified as 52 U.S.C. § 10310.

litigation, he also had been hired by the city to manage the redistricting process that led to the adoption of the challenged map. A-425. In his view, the adopted map, which he himself had drawn, was lawful and its population deviations had no "evil intent." A-454.

Plaintiffs presented testimony from one of their experts, Mr. Korbel, A-473, who testified that the suit was meritorious for several reasons, including that it involved a meritorious one-person, one-vote claim, citing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004). He testified that the map under-populated Anglo districts that had the slowest rate of growth historically and over-populated Latino districts that had the highest rates of growth, thus ensuring that population deviations would be exacerbated over the life of the map, causing vote dilution. A-476-79. He also clarified that he would have supplemented his expert report upon receiving data the city had previously told him it would provide, but did not provide prior to the dismissal motions. A-520, A-522; *see also* A-39 (Clerk's minutes of initial scheduling conference, reflecting that city offered to assist with providing data).

On August 29, 2014, the district court entered an order granting the city's motion in part and denying it in part. The court denied the city's motion for attorneys fees pursuant to 42 U.S.C. §§ 1973*l* and 1988 and its motion for discovery-related sanctions under Rules 16(f) and 37(d), concluding that sanctions

against the individual plaintiffs were not appropriate and citing the city's concession (and the court's finding) that the lawsuit was not filed in bad faith. A-405; Add-4.[7] Nonetheless, the district court granted the city's motion for sanctions against Plaintiffs' attorneys pursuant to 28 U.S.C. § 1927, concluding that although "Plaintiffs had a good faith basis for filing the complaint," their attorneys "unreasonably continued this matter" after June 25, 2013, the date upon which they were served with the city's expert's report. A-406-07; Add-5-6. "Upon reading that report," the district court concluded, "it would have been clear to a reasonable attorney that this case no longer had merit." A-407; Add-6. The district court noted that it "would have been inclined to grant leniency towards Plaintiffs' counsel if they had simply acquiesced to [the city's] request to dismiss this case with prejudice," but "[t]hey did not, however, and instead continued the charade of proceeding forward with this matter . . . in spite of the fact that Plaintiffs' counsel knew or should have known that this case was over." A-407; Add-6.

The district court concluded that it "was clear from Mr. Sanderoff's report that Plaintiffs could not establish the factors" under *Thornburgh v. Gingles*, 478 U.S. 30 (1986), for Section 2 claims under the Voting Rights Act, and that

[7] In its stay order, the district court rejected the city's contention that the case should be dismissed as a sanction for the same alleged discovery violations, concluding that the city never sought intervention of the court through a motion to compel any discovery, A-187; Add-21, a fact it also found important to Plaintiffs' complaints about the city's failure to produce any discovery, A-411; Add-10, A-573.

although Plaintiffs' expert had raised "additional concerns" that were not "not raised in his initial report," Plaintiffs' explanation—that expert reports are always supplemented—was "not an acceptable response as far as the Court [was] concerned." A-408; Add-7.[8] The district court further stated that "considering that the new plan has three majority Hispanic districts and two majority minority districts, this results in a total of five majority minority districts out of nine districts overall [and that] . . . . Plaintiffs were never able to show how the numbers were anything but what they appeared on their face to be, favorable to minority voters." A-408-09; Add-7-8.

The district court went on to reject Plaintiffs' argument that the case was not meritless because the map violated the one-person, one-vote standard. "First, this issue was only raised when Plaintiffs were facing potential sanctions as an attempt to bolster their case after the fact, as Plaintiffs' expert did not address Lairos [sic] is [sic] in his initial expert report. Thus, the Court finds Plaintiffs attempt to claim a Lairos [sic] violation at this late stage [is] disingenuous."[9] A-409; Add-8. The

[8] At the sanctions hearing, Plaintiffs' counsel (Mr. Vera) explained that Plaintiffs' expert did not respond to Mr. Sanderoff's report because the decision had been made to dismiss the case. A-577. The district court likewise rejected that justification, suggesting that although both sides had sought dismissal, Plaintiffs should have proceeded with a rebuttal report given that the court had not yet *granted* either motion to dismiss. A-577.

[9] The district court made this finding despite the fact that Plaintiffs raised *Larios* much earlier, on July 29, 2013, as a rationale for why the case should be dismissed without prejudice. A-116.

district court further concluded that "there is clearly no Lairos [sic] violation in this instance," A-409; Add-8, because Mr. Sanderoff's report asserted that the population deviation was in response to public comments favoring no districts crossing the Rio Grande River. A-409; Add-8.

The district court next questioned Plaintiffs' counsels' subjective motivations in litigating the case and found "Plaintiffs' reasons to be disingenuous." A-410; Add-9. The court noted that the timing of the motion to dismiss without prejudice "belies counsel's [sic] insistence that their decision to dismiss the case was not influenced by Mr. Sanderoff's report. Plaintiffs moved for dismissal without prejudice roughly two weeks after Mr. Sanderoff's report was provided to them." *Id.* The court dismissed as "absurd" Plaintiffs' offer to the city to proceed only with the state claim in state court. *Id.* Moreover, the court noted that Plaintiffs had failed to file a motion to compel discovery, which they had stated they needed to complete their expert reports, A-411; Add-10, and concluded that Plaintiffs' contention regarding the discovery was "yet another excuse for Plaintiffs' counsels' clear disregard for the glaringly obvious fact that this case was without merit." *Id.*

Finally, the district court concluded,

> [w]hat the Court is most struck by is that after nearly a year of litigation, discovery, motions practice, Plaintiffs' counsel still does not have a valid explanation for why they continued pursuing this case after the Sanderoff report and the change to the City charter clearly

> demonstrated that minority voters were not being harmed by the new redistricting plan.

A-411-12; Add-10-11.[10] The district court awarded $48,217.95 in fees as a sanction against Plaintiffs' attorneys. A-413; Add-12.

SUMMARY OF ARGUMENT

The district court came to the puzzling conclusion that Plaintiffs' attorneys should be sanctioned for vexatiously multiplying proceedings they only ever sought to have dismissed. Only by relying on blatantly incorrect legal judgments and understandings of the record could the district court reach its conclusion.

First, the district court erred in declining to grant Plaintiffs' motion to dismiss the case without prejudice. Upon initially reviewing the city's three briefs arguing for dismissal *with* prejudice (which included the city's expert report), the district court correctly concluded that dismissal with prejudice was not warranted. From there, however, things went seriously awry. Rather than grant Plaintiffs' motion, the court instead, at no one's request, stayed the case, citing "judicial economy." This was an abuse of discretion under Tenth Circuit precedent, which clearly establishes that a court is to consider only the interests of the parties, and not the court's own time and effort on a case, in deciding a motion to dismiss under Rule 41. Because it was the *court*, and not Plaintiffs' attorneys, that was

[10] The only substantive motion ever filed by Plaintiffs was to dismiss the case, five- and-a-half months after the case was filed, prior to the discovery deadline, and prior to any depositions. A-46.

responsible for the multiplication of the proceedings in this case, the court erred as a matter of law in imposing sanctions.

Moreover, even ignoring the district court's legal errors, the court's sanctions order was an abuse of discretion. Plaintiffs' attorneys filed one substantive motion—seeking dismissal—there was no discovery produced by the parties, no depositions, no summary judgment motions, no trial, *nothing*. There hardly were any proceedings at all. In fact, the bulk of the proceedings in this case have been over the city's motions for sanctions and attorneys' fees. The only court hearing, aside from the initial scheduling conference and the sanctions hearing, was a six minute telephone conference. And that was only necessary because the district court abused its discretion in not dismissing the case when Plaintiffs originally requested it. To sanction Plaintiffs' attorneys given these facts is clearly an abuse of discretion.

Second, the district court erred in concluding that Plaintiffs' attorneys were required, under threat of sanctions, to drop their clients' case the day they were served with the city's expert report. Not only is this a twisted view of the import of an opposing party's expert report—it turns the adversarial system upside down—but the expert report in question was rife with errors of law that make it incapable of supporting the district court's conclusion that the case was meritless.

Third, the district court's sanctions order contains improper (and factually unsupported) subjective speculation about the motivation behind Plaintiffs' attorneys' litigation strategy. This Court has made clear, in an *en banc* decision, that the proper standard for resolving the question of sanctions under § 1927 is an objective one. The district court had previously conducted an objective examination when it decided that dismissal with prejudice was unwarranted, based on the same record the court had before it when it reversed course and imposed sanctions. The court's subsequent subjective musings about whether Plaintiffs' counsel was motivated to seek dismissal out of fear of the city's biased expert report were improper and erroneous as a matter of law.

Fourth, the district court abused its discretion in failing to conduct an individualized analysis of the attorneys against whom it imposed sanctions. Sanctions against Mr. Maestas, who was replaced as local counsel after the case was removed to federal court, and who did not sign the pleadings at issue or receive a mailed service copy of the city's expert report, were inappropriate.

This case falls far wide of the mark of the "extreme" standard this Court has recognized warrant sanctions under § 1927. The district court's conclusion to the contrary is premised on serious legal errors with serious consequences for this and other cases. It must be reversed.

ARGUMENT

I. Standard of Review

The district court's imposition of sanctions under 28 U.S.C. § 1927 is reviewed for abuse of discretion. *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008). "Where the exercise of that discretion depended on the resolution of a purely legal issue, however, [this Court] approach[es] such a question *de novo*." *Id.*

Sanctions under 28 U.S.C. § 1927 may be imposed against "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously." An attorney sanctioned under this provision "may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Id.* This Court has made clear that the statute imposes an "*extreme* standard," *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997) (emphasis added; internal quotation marks omitted), and "a court should make such an award 'only in instances evidencing a serious and standard disregard for the orderly process of justice,'' *id.* (quoting *White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1427 (10th Cir. 1990)). Section 1927 must be "strictly construed" so that it "in no way will dampen the legitimate zeal of an attorney in representing his client." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (*en banc*) (internal quotation marks omitted). The "proper standard" for imposing sanctions

under § 1927 is for the court to determine whether an attorney's conduct, "viewed *objectively*, manifests either intentional or reckless disregard of the attorney's duties to the court." *Id.* (emphasis added).

This case is nowhere near the realm of conduct that satisfies this "extreme" standard of serious "disregard for the orderly process of justice." *AeroTech*, 110 F.3d at 1528 (quotation marks omitted). The district court's conclusion otherwise is premised on a series of legal and factual errors that constitute a clear abuse of discretion, beginning with its order staying the case.

II. Plaintiffs' Attorneys Cannot be Sanctioned for "Multiplying" Proceedings They Attempted to End with Voluntary Dismissal.

The district court abused its discretion in sanctioning Plaintiffs' counsel for "multipl[ying] the proceedings" when the only substantive motion ever filed by Plaintiffs was to *dismiss* the proceedings without prejudice. A-46. After voters amended the city charter in March 2013, Plaintiffs decided to seek dismissal and wait to see how the charter amendment affected the fall elections so as to determine whether this change remedied their concerns or whether they would need to refile their claims. A-46, A-111-13. Although the city filed three separate briefs protesting dismissal *without* prejudice, A-49, A-82, A-162, the district court concluded that the record did not support dismissal *with* prejudice. A-190; Add-24. But rather than grant Plaintiffs' motion, the district court—at no one's behest—kept the suit alive and stayed the proceedings, citing "judicial economy,"

A-190, thus continuing litigation both parties wanted to end. This was an error of law.

A. The District Court, Not Plaintiffs' Attorneys, Multiplied the Proceedings by Erring as a Matter of Law in Staying the Case.

Any "multiplication" of the proceedings did not occur "because of [any] conduct" of Plaintiffs' counsel, 28 U.S.C. § 1927, but rather because of the district court's error, as a matter of law, in staying the proceedings rather than dismissing them without prejudice. "In order for § 1927 to be applicable, there must be a causal connection between the objectionable conduct of counsel and multiplication of the proceedings." *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997). An attorney's conduct must "result[] in proceedings that would not have been conducted otherwise." *Id.* There was no such causal connection here, because it was the decision of the *court*, and not any conduct by Plaintiffs' counsel, that imposed the stay and "result[ed] in proceedings that would not have been conducted otherwise." *Id.*

First, it is an elementary proposition that a motion to dismiss ends proceedings, it does not multiply them. In *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1225 (10th Cir. 2006), the defendant filed a motion to dismiss, which the plaintiff largely contested, but plaintiff acquiesced to the dismissal of its claims under 42 U.S.C. § 1983. The district court later imposed sanctions under § 1927, which this Court mostly upheld. But the Court concluded that the district court

abused its discretion in sanctioning plaintiff's counsel with respect to the § 1983 claim. The Court held that because plaintiff "acquiesced in [defendant's] first and only attempt to dismiss the § 1983 claim," it was an abuse of discretion for the district court to "say that [plaintiff] multiplied the proceedings after pleading this claim in the complaint." *Id.* Here, Plaintiffs did not have to acquiesce to the city's dismissal motion. Rather, it was Plaintiffs who initiated the motion to dismiss, to which the city refused to acquiesce unless it could guarantee being free from future suit. As a common sense textual matter, attorneys cannot be deemed to have vexatiously multiplied proceedings they only sought to end. The district court erred in concluding otherwise.

Second, under this Court's precedent, the district court abused its discretion in not granting Plaintiffs' motion to dismiss without prejudice. "Absent legal prejudice to the defendant, the district court normally should grant . . . a dismissal" sought under Rule 41(a)(2). *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). The district court "must remember that important factors in determining legal prejudice are those involving the parties, *not the court's time or effort* spent on the case." *Id.* (emphasis added). "A court abuses its discretion when denying a motion to dismiss under Rule 41(a)(2) based on its inconvenience." *Id.*; *see also* *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993) ("[T]o the extent the district

court's ruling was founded upon the amount of time the court had spent on the case, the ruling was an abuse of discretion.").

The district court's decision to stay the proceedings—thus itself causing them to multiply—was not based on any "legal prejudice" the city would suffer if the suit were dismissed without prejudice. *See Davis v. USX Corp.*, 819 F.2d 1270, 1274 (4th Cir. 1987) ("It is well established that, for purposes of rule 41(a)(2), prejudice to the defendant does not result from the prospect of a second lawsuit."). The court considered and rejected the city's assertions of legal prejudice and determined that Plaintiffs had offered "a viable explanation for seeking dismissal without prejudice." A-188; Add-22. Critically, the district court also concluded that "[a]t this point, the record is insufficient to warrant dismissal with prejudice." A-190; Add-24.[11] Having so concluded, the district court's work should have been done and Plaintiffs' motion should have been granted. There should have been no more proceedings. Instead, at the request of neither party, the court entered a stay, reasoning that doing so "prejudices neither [party] and *benefits judicial economy*." A-190 (emphasis added). Put differently, the district court's sole reason for staying the case rather than granting the motion to dismiss

[11] The record was the same then as it was when the court imposed sanctions. The city's expert report, which the court later determined was the trigger for Plaintiffs' attorneys' vexatious multiplication of the proceedings, was part of the record before the court on the dueling dismissal motions. A-65, A-188; Add-22.

without prejudice was "the court's time or effort spent on the case," an impermissible consideration. *Ohlander*, 114 F.3d at 1537.

This was legal error. And it was this legal error—not any conduct on the part of Plaintiffs' counsel—that was the sole cause of the proceedings "multiplying" in this case, insofar as the proceedings "multiplied" at all. As the district court recognized at the time, "[b]oth [plaintiffs' and the city's] motions raise the *single* question of whether this case should be dismissed with or without prejudice." A-186; Add-20 (emphasis added). Having answered that single question against the city, the court had no discretion to chart its own, new course to prolong its supervisory power over a suit that both parties wanted dismissed.[12] Courts do not have such roving authority to force litigation to proceed when no party wishes it to continue. As such, the court's imposition of sanctions is premised on its own error of law, and not any "vexatious" or "unreasonable" "multiplication" of the proceedings caused by Plaintiffs' attorneys.

[12] The court essentially stated that it was going to force Plaintiffs to remain in the suit long enough to give the court the ability to dismiss the case *with* prejudice, reasoning that if the fall election results convinced Plaintiffs their case was not necessary, "Plaintiff would have no need to continue to prosecute this case, and the case *would* be dismissed *with* prejudice at that time." A-190; Add-24 (emphasis added). It turns Rule 41 on its head to delay dismissal solely to increase the odds that the case can ultimately be dismissed with, rather than without, prejudice. Moreover, the fact that Plaintiffs may later decide to forgo their lawsuit is not a reason to forever preclude them from refiling their suit.

B. Sanctions Are Inappropriate Because Plaintiffs' Counsel Reasonably Relied Upon the District Court's Conclusion that They Had a Viable Reason to Seek Dismissal Without Prejudice.

Sanctions are particularly inappropriate here because Plaintiffs' attorneys reasonably relied upon the district court's statements in its stay order that their rationale for waiting until after the elections to assess their claims was appropriate. The district court invited Plaintiffs to wait until after the fall elections to assess whether they wished to pursue their claims, canceled the status conference in which it was to learn Plaintiffs' ultimate position, dismissed the case with prejudice based upon its own extra-record "ascertain[ing]" of Plaintiffs' purported position regarding their claims, and then imposed sanctions on Plaintiffs' attorneys for following the course of conduct the *court* charted after declining to dismiss the case at Plaintiffs' request. This was an abuse of discretion.

Where a court invites an attorney's actions by statements in its own orders, it may not then sanction the attorneys for following the court-approved path. In *Medtronics Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943 (Fed. Cir. 2010), the court held that § 1927 sanctions for supposedly meritless claims were inappropriate where a party proceeded to trial after the district court had denied the opponent's motion for summary judgment and judgment as a matter of law. The court held that the plaintiff was "entitled to rely on a court's denial of summary judgment and JMOL . . . as an indication that the

party's claims were objectively reasonable and suitable for resolution at trial." *Id.* at 954; s*ee also Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991) ("[O]ne might well wonder how a case could be so frivolous as to warrant sanctions if it has sufficient merit to get to trial." (quotation marks omitted)); *In re Ruben*, 825 F.2d 977, 988 (6th Cir. 1987) (holding that "[t]he denial of the motions for summary judgment precludes a sanction on the ground that the claims against them were *legally* insufficient" and that "[a] sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants").

Here, the district court invited Plaintiffs to wait (with the suit remaining pending) until after the fall elections to decide whether they wished to pursue their claims further, after labeling the changed run-off law a "viable explanation" for Plaintiffs' desire to dismiss the case without prejudice, and after reviewing the city's expert report and concluding dismissal *with* prejudice was inappropriate. A-188; Add-22. The district court thus abused its discretion in sanctioning Plaintiffs' attorneys for following the court's charted path, particularly where the district court's conclusion was built on its extrajudicial "ascertain[ment]" of whether Plaintiffs wished to continue forward with litigation after the District 7 runoff election. *See United States v. Young*, 45 F.3d 1405, 1415 (10th Cir. 1995) ("[W]hile judges naturally form opinions of the parties before them based upon

information properly acquired in the course of judicial proceedings, it may be inappropriate to form dispositions or opinions relying upon knowledge acquired outside of such proceedings.").

Moreover, Plaintiffs' attorneys stand on stronger footing here than the attorneys in the cases cited above, because Plaintiffs' attorneys did not prolong the case through a trial on the merits. Rather, they sought to *dismiss* the case prior to the close of discovery and well before any dispositive motions or trial. Armed with the exact same expert report it later found dispositive of the merit of Plaintiffs' case, the district court told Plaintiffs to continue forward and re-assess their claims later in the fall. Having invited this path of conduct, and having failed even to hold a hearing to find out the ultimate result of Plaintiffs' assessment, the district court abused its discretion in imposing sanctions upon Plaintiffs' attorneys for failing to abandon their claims upon receiving the city's expert report.

C. The District Court Erred in Rejecting Plaintiffs' Attorneys' Offer to Proceed with Only the State Claim in State Court.

The district court also erred as a matter of law in rejecting Plaintiffs' attorneys' offer to proceed with only the state claim in state court. At the November telephone conference—the one that lasted six minutes—Plaintiffs' attorneys' offered to proceed with only their state constitutional claim in state court. A-192. Like the federal constitution, the state constitution contains a one-person, one-vote requirement, and the same one-person, one-vote standards apply

to the state constitutional claim. *See Rodriguez v. Scotts Landscaping*, 181 P.3d 718, 720 (N.M. Ct. App. 2008) ("We have interpreted the Equal Protection Clauses of the United States and New Mexico Constitutions as providing the same protections."). The court chastised Plaintiffs' counsel for its offer. "To suggest that [the city] . . . should agree to dismissal of properly removed federal claims only to have the state claims go back to be litigated in state court is *absurd*."[13] A-410; Add-9 (emphasis added).

But Plaintiffs' counsels' offer to dismiss the federal claims and pursue the state claim in state court was supported by substantial legal authority, and Plaintiffs could have proceeded to raise their valid one-person, one-vote claim in state court. *See infra* Part III.B.2 (addressing district court's error in concluding Plaintiffs' one-person, one-vote claim lacked merit).

It is "well established that, for purposes of Rule 41(a)(2)," the "mere prospect of the transfer of litigation to state court [i]s an insufficient basis for denying the motion for voluntary dismissal. Ordinarily the mere fact that the plaintiff prefers the state courts ought not to prevent his discontinuing his suit; one

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[13] When Plaintiffs' counsel tried to argue at the sanctions hearing that they had wished to return to state court, the district court cut off Plaintiffs' counsel, declaring that the point was irrelevant in light of the city's right to remove the case, and asked counsel "[H]ow much have you litigated in the State of New Mexico?" A-492. The court followed up with an answer that it was "obvious" that Mr. Vera had not "litigated much in this state. So let's stick to what's relevant, all right?" A-493; *see also* A-573 (interrupting Plaintiffs' counsel's closing argument, suggesting Mr. Vera "spend a little more time in New Mexico.").

court is good as another." *Davis*, 819 F.2d at 1274-75 (internal quotation marks omitted; internal citations omitted). Other courts agree. "[T]he overwhelming majority of cases that have considered the issue have held that the fact that a voluntary dismissal will destroy federal jurisdiction is insufficient to constitute prejudice to a defendant." *Johnson v. Pharmacia & Upjohn Co.*, 192 F.R.D. 226, 228 (W.D. Mich. 1999).[14] Moreover, the Supreme Court has held that state courts have primary responsibility for adjudicating redistricting matters. *See Growe v. Emerson*, 507 U.S. 25, 34 (1993).

The district court's rejection of Plaintiffs' attorneys' argument that sanctions were inappropriate because they had offered to proceed on only their state claims in state court was wrong as a matter of law.

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[14] *See also, e.g.*, *Lang v. Mfrs. & Traders Trust Co.*, 274 F.R.D. 175, 181-84 (D. Md. 2011) (granting Rule 41(a)(2) motion despite "unvarnished attempt to have this matter, by any mechanism available, litigated in [Maryland state court]"); *San Marco v. City of St. Petersburg*, 185 F.R.D. 679, 680-81 (M.D. Fla. 1999) (granting dismissal without prejudice eight months after complaint filed, and after summary judgment motion filed, to permit plaintiff to litigate state law claims in state court); *O'Reilly v. R.W. Harmon & Sons, Inc.*, 124 F.R.D. 639, 640 (W.D. Mo. 1989) (granting voluntary dismissal without prejudice to allow plaintiff to add a non-diverse defendant and re-file in state court after case had been removed to federal court); *Galva Union Elevator Co. v. Chicago & N.W. Transp. Co.*, 498 F. Supp. 26, 27 (N.D. Iowa 1980) (granting motion for dismissal without prejudice motivated by desire to defeat removal jurisdiction); *see also* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2364, at 491-93 (3d ed. 2008) ("A dismissal without prejudice has been allowed in a removed action so that the plaintiff might start anew in a state court with a restructured action that might avoid a second removal."). *But see Myers v. Hertz Penske Truck Leasing, Inc.*, 572 F. Supp. 500, 503 (N.D. Ga. 1983) (denying motion to dismiss to protect federal removal jurisdiction).

D. The Record Does Not Support the District Court's Sanctions Order.

Even in the absence of these legal errors, the record in this case manifestly does not support the imposition of sanctions. The only substantive motion Plaintiffs filed was to dismiss the proceedings, a mere five-and-a-half months after filing the complaint. A-46. The parties did not exchange any written discovery other than expert reports. A-187; Add-21. No depositions occurred. A-188; Add-22. And the district court originally *agreed* with Plaintiffs that dismissal with prejudice was inappropriate. A-190; Add-24. The only subsequent court proceeding after that decision by the district court lasted six minutes via telephone. A-192.

The docket sheet is illustrative. Plaintiffs' motion to dismiss was the twenty-third entry. A-3. The district court's judgment of dismissal was the thirty-sixth entry. A-4. The remaining thirty-seven entries—over half of the total for this case—are all a result of the city's fees and sanctions motion. A-4-7. Anyone familiar with the amount of docket activity in federal litigation—particularly redistricting litigation—would be hard pressed to find objective evidence of vexatious or unreasonable "multiplication" of any proceedings here.[15]

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[15] Appellants' Appendix in this Court further illustrates the inappropriateness of sanctions based on this record. The first 48 pages of the Appendix contain everything up through Plaintiffs' motion to dismiss. The remaining 536 pages are attributable to the city's decision to oppose dismissal without prejudice, the court's

This case is miles apart from the circumstances in which this Court has either upheld or imposed sanctions under § 1927. *See, e.g.*, *Parker v. CitiMortgage, Inc.*, 499 F. App'x 803, 806 (10th Cir. 2012) (unpublished) (imposing § 1927 sanctions upon filing of *fifth appeal* "concerning the same issues and based on the same claims for relief [that were previously] . . . squarely rejected" (emphasis added)); *Steinert*, 440 F.3d at 1221 (affirming sanctions order under § 1927 where party's "requested extensions multiplied the proceedings by approximately 495 days" (internal quotation marks omitted)); *Bixler v. Foster*, 403 F. App'x at 327-28 (10th Cir. 2010) (unpublished) (affirming § 1927 sanctions where plaintiffs' attorney alerted that plaintiffs lacked standing and claim was statutorily barred, and where attorney filed 93 page opposition to defendant's motion to dismiss). Moreover, this Court has reversed a district court's imposition of sanctions under § 1927 where the attorney's conduct was less supportable than this case. In *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1342 (10th Cir. 1998), a case removed from state to federal court, plaintiff's attorney neglected to cite a Tenth Circuit case providing the Circuit's interpretation of the relevant New Mexico law. "[T]hough not laudable, plaintiff's counsel's failure to cite *Quinones* is not such objectively unreasonable conduct under the circumstances of this case to warrant the imposition of sanctions." 143 F.3d at 1343; *id.* (referring to

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decision to stay the case both parties sought to dismiss, and the city's decision to seek every possible form of fees and sanctions.

plaintiff's counsel's conduct as "inappropriate and unavailing under Tenth Circuit law," but not deserving of § 1927 sanctions).

This course of proceedings, demonstrated plainly by a glance at the docket sheet, *see* A-1-7, cannot plausibly be characterized as having been "vexatiously" or "unreasonably" "multiplied." The district court's imposition of sanctions should be reversed.

III. Plaintiffs' Attorneys Cannot Be Sanctioned for Failing to Abandon Their Clients' Lawsuit Immediately Upon Receipt of the City's Expert Report, Written by the Same Person Who Drew the Challenged Map.

The district court further abused its discretion in concluding that Plaintiffs' attorneys were required—in order to avoid sanctions—to abandon their clients' lawsuit the day they received the city's expert report, particularly where the city's "expert" was the very same person who had drawn the redistricting map that Plaintiffs' suit was challenging. The district court concluded that Plaintiffs' attorneys "multiplie[d] the proceedings in [this] case unreasonably and vexatiously," 28 U.S.C. § 1927, beginning the day they received the city's expert report, because "[u]pon reading that report, it would have been clear to a reasonable attorney that this case no longer had merit," A-407; Add-6. Apparently, under the district court's view, attorneys are to immediately abandon their client's case upon the mere say-so of an opponent's expert who happens to have a substantial interest in the outcome of the case. "[T]he articulation of that

proposition suffices to refute it." *Peterson*, 124 F.3d at 1397. Moreover, the city's expert report contains conclusory statements and mistakes of law that render the district court's reliance upon it in imposing sanctions an error of law.

For purposes of reviewing the district court's decision to award sanctions, the question is not whether Plaintiffs would ultimately win or lose, but instead whether their claims were "completely frivolous." *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1346 (10th Cir. 2009) (quotation marks omitted). "[A] fee award is [not] appropriate any time a lawyer makes losing arguments. Losing is part of the lawyer's lot, and § 1927 isn't aimed at shifting fees from winner to lawyers who happen to represent the losing side." *Bixler*, 403 F. App'x at 328. Plaintiffs' claims, as a matter of law, were neither frivolous nor obviously losers. The district court's order, premised on its adoption of the city's expert's incorrect view of the merits, is wrong as a matter of law and cannot support the imposition of sanctions.

A. An Opponent's Expert Report Does Not Trigger an Obligation to Abandon a Case Under Threat of Sanction.

An opponent's expert report does not trigger an obligation to abandon a case, lest an attorney be sanctioned. Every day attorneys submit expert reports that, shocking to no one, claim that their side is correct as a matter of fact and law, and that the opponent's claims are without merit as a matter of fact and law. The district court's imposition of sanctions against Plaintiffs' attorneys for failing to

abandon ship immediately upon receipt of the city's expert report seriously upends the normal system of expert discovery and civil procedure, and has grave precedential ramifications for future cases.

Expert testimony is not deemed true by its proponent's mere say-so. Rather, "[t]he proponent of expert testimony bears the burden of showing that the testimony is admissible." *Conroy v. Vilsack*, 707 F.3d 1163, 1168 (10th Cir. 2013). The logical extension of the district court's sanction order here is that, in the court's view, the city met its burden (and conclusively won its case) by merely *serving* its expert report. That is not the law.

To begin, the Federal Rules of Civil Procedure provide that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." Fed. R. Civ. P. 26(b)(4)(A). In this case, the city's expert, Mr. Sanderoff, happens to be the same person whom the city paid to draft the map challenged in this lawsuit, A-425, and undoubtedly has a financial interest in not having his work deemed to have violated civil rights laws and the United States Constitution. Unsurprisingly, Mr. Sanderoff asserted in his expert report that his map did not violate federal or state law, and that its population deviations (which disproportionately affected majority Latino districts, A-477-78), "were not used to advance any inappropriate agenda, such as for partisan, racial or rural/urban gain." A-66. "Interest in an action is evidence of bias which may affect the credibility of

a witness, and is competent on cross-examination for the purpose of showing such bias." *Kanatser v. Chrysler Corp.*, 199 F.2d 610, 617 (10th Cir. 1952). Here, the district court concluded that proceeding to such a cross-examination would come at the price of sanctions.

The right afforded by Rule 26 means little if it comes with that risk. The purpose of expert disclosures and reports under Rule 26 is not to be the final judgment on an opponent's claims, but rather "to allow the opposing party a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir. 2002) (internal quotation marks omitted). At the sanctions hearing, Plaintiffs' counsel explained that, had they not determined to seek dismissal of the case, they would have supplemented their expert reports to respond to Mr. Sanderoff's critiques. A-572. The court rejected this explanation, stating: "When questioned about this, Plaintiffs' counsel replied that experts always have the ability to supplement their reports and that it is not unusual for an expert report to be supplemented a number of times. This is not an acceptable response as far as the Court is concerned." A-408; Add-7.

It is, however, an acceptable response as far as the Supreme Court and Congress are concerned. Under Federal Rule of Civil Procedure 26(e), a party's expert may supplement his report and "[a]ny additions or changes to this

information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." Fed. R. Civ. P. 26(e); *see also Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1332 (10th Cir. 2004) ("Supplemental disclosures are permitted, and indeed may be required."). These disclosures are due by thirty days before trial. *See* Fed. R. Civ. P. 26(a)(3)(B). Plaintiffs' counsel's response was not only "acceptable," it was entirely correct and warranted.

The district court's imposition of sanctions premised upon the mere service of an unfavorable opposing expert report severely undercuts basic provisions of civil litigation. And it comes with a steep price. The court's sanctions order, if allowed to stand, will have the effect of seriously chilling advocacy, particularly in the civil rights context. If attorneys must worry that the receipt of an expert report might trigger a sanctions clock, then this Court's *en banc* holding in *Braley* will have little meaning. Rather than § 1927 being "strictly construed," so that it "in no way will dampen the legitimate zeal of an attorney in representing his client," *Braley*, 832 F.2d at 1512 (quotation marks omitted), § 1927 will instead cause attorneys to worry whether zealously pursuing their client's case might lead to dire monetary and professional ramifications. "Due both to the penal nature of § 1927 and the need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests," *Ford Audio Video Systems, Inc. v. AMX*

Corp., Inc., 161 F.3d 17, 1998 WL 658386, at *3 (10th Cir. 1998) (unpublished table decision), the district court's sanctions order must be reversed.

B. The City's Expert Report Contains Errors of Law that Preclude it from Demonstrating Plaintiffs' Claims were Meritless.

Further undercutting the district court's sanctions order is that the city's expert report, written by the same person the city hired to draw the challenged map, contains conclusory statements and errors of law, and therefore cannot demonstrate Plaintiffs' claims were meritless. To support its newly formed view that Mr. Sanderoff's report "would have made clear to a reasonable attorney that this case no longer had merit," the district court pointed to three assertions in the report: (1) that Plaintiffs' experts had failed to separately establish the third prong of Section 2 claims under *Thornburg v. Gingles*, 478 U.S. 30 (1986), (2) that the map's population deviations were only motivated by a desire to use major roadways as boundaries and to prevent districts from crossing the Rio Grande River, and (3) that the new map added an additional majority-minority district. *See* A-407-10; Add-6-9. As a matter of law, these assertions do not render Plaintiffs' claims meritless. *Cf. Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011) ("[W]here the frivolousness determination turns on an issue of law, we review the determination *de novo*." (quotation marks omitted)); *id.* ("Dismissal for frivolousness is only appropriate for a claim based on an indisputably meritless legal theory." (internal quotation marks omitted)). A proper application of the

relevant law shows that Plaintiffs' claims certainly were not "indisputably meritless."[16]

1. Mr. Sanderoff and the District Court Incorrectly Assert that Plaintiffs' Section 2 Claim is Foreclosed Because Their Expert Jointly Considered the Second and Third *Gingles* Prongs.

Mr. Sanderoff's primary critique of Plaintiffs' claims was that their expert allegedly failed to address the third prong of *Gingles* separately from the second prong.[17] The district court adopted this critique as its basis for finding that Plaintiffs' claims were without merit. *See* A-408; Add-7 ("Neither of Plaintiffs' experts ever purported to, let alone actually established, the Gingles factors in this

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[16] Although the district court's reliance was largely on these three factors, it is noteworthy that Mr. Sanderoff's report is lacking in several other aspects. For example, his criticism of Plaintiffs' expert Dr. Atkeson for relying on partisan elections is belied by the widespread knowledge of city candidates' partisan affiliations. A-67. Mr. Sanderoff does not appear to limit his analysis to citizens, thus potentially artificially inflating the Latino makeup of districts. A-68-73; *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427-28 (2006). And his primary focus on the elections of former Mayor Chavez is an unreliable methodology. A-67. Furthermore, he did not address the question of intentional discrimination under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See* A-481 (Plaintiffs' expert testifying to *Arlington Heights* factors and the city's redistricting map). These and other issues were ripe for rebuttal, had Plaintiffs not decided to seek dismissal without prejudice.

[17] The second and third prongs of *Gingles* are: (2) "the minority group must be able to show that it is politically cohesive" and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, . . . to defeat the minority's preferred candidate." 478 U.S. at 50-51 (internal citation omitted).

case. One of Plaintiffs' experts, Lonna Atkeson, alluded to racially polarized voting, but her report did not contain a full analysis of whether this racially polarized voting was sufficient to meet the third prong of the Gingles test."). This is wrong on the law and wrong on the facts.

Contrary to the district court's views, this Court has explicitly held that the second and third *Gingles* factors can be collapsed into a single analysis. In *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), this Court found no fault in the "conjunctive approach" of examining the second and third *Gingles* prongs together. *See id.* at 1315 (quoting *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (10th Cir. 1988)).

Although this Court finds no fault in a conjunctive approach, the district court, apparently instead relying upon Mr. Sanderoff as arbiter of the law, thought such an approach was so frivolous as to warrant sanctions. Even a quick skim of Dr. Atkeson's report demonstrates she did just what this Court approved in *Sanchez.* She stated that "[r]acially polarized . . . voting is important to examine because two of the three prongs in the *Gingles* test are related to whether whites and some other ethnic or racial group . . . tend to vote as a block and whether different ethnic groups prefer different candidates," A-124, and concluded that "Asians in Albuquerque consistently vote with whites and . . . Native Americans

and Hispanics/Latinos similarly vote for the same candidates." A-125.[18] She then conducted a statistical analysis to determine racial bloc voting in Albuquerque.[19] A-125-28.

This is precisely the same "collapsed" and "intertwined" analysis that this Court held to be appropriate in *Sanchez*. Though the experts disagreed as to whether the *Gingles* test was satisfied, Mr. Sanderoff's legal assertions, adopted carte blanche by the district court, were incorrect and the district court erred as a matter of law in relying upon them to determine the claims were meritless and deserving of sanctions. The district court's misapprehension of the requirements for the *Gingles* analysis underpins its sanctions order, and that error of law requires the sanctions order to be reversed.

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[18] Mr. Sanderoff criticized Dr. Atkeson for combining whites and Asians, contending that *Gingles*'s third prong is limited to whites. A-67-68. Dr. Atkeson's approach, however, is common among redistricting experts. *See Aldasoro v. Kennerson*, 922 F. Supp. 339, 375 (S.D. Cal. 1995) (stating that minority group and whites can only be combined for third prong of *Gingles* test if "they are cohesive, as demonstrated by their voting patterns"). Because Mr. Sanderoff never challenged Dr. Atkeson's determination that whites and Asians vote cohesively, this criticism does not establish that Plaintiffs' claims were without legal merit.

[19] The district court's characterization of Dr. Atkeson's report as merely "allud[ing]" to racially polarized voting blinks at reality. A-408. Her report has three pages of prose explaining her statistical regression analysis of racially polarized voting and eight pages of charts and graphs presenting that statistical analysis. A-124-36.

2. Mr. Sanderoff's Report Does Not Conclusively Establish that Plaintiffs' One-Person, One-Vote Claim is Without Merit.

Mr. Sanderoff's report does not conclusively establish that Plaintiffs' one-person, one-vote claims under the United States and New Mexico constitutions are without merit. Rather, far from being "indisputably meritless," *Milligan*, 659 F.3d at 1296, Plaintiffs' claims had substantial merit under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004). The district court's contrary conclusion was an error of law and alone justifies reversal of its sanctions order.

Before reaching the district court's substantive legal errors regarding *Larios*, it is necessary to first address the district court's finding that Plaintiffs' counsels' invocation of *Larios* "at this late stage [is] disingenuous." A-409; Add-8. This finding is premised on the district court's belief that Plaintiffs' counsel "only raised [*Larios*] when Plaintiffs were facing potential sanctions as an attempt to bolster their case after the fact." *Id*. But Plaintiffs cited *Larios* in July 2013 in opposing the city's effort to obtain dismissal with prejudice, contending that *Larios* supported their one-person, one-vote claims, requiring dismissal without prejudice so the claims could possibly be refiled. A-116.[20]

[20] Furthermore, the complaint alleges a violation of both the federal and state constitution's one-person, one-vote requirement. The fact that Plaintiffs did not reference the case name "*Larios v. Cox*"—a case *applying* the one-person, one-

In *Larios*, the court left open the question of "whether the mere use of a 10% population window renders [a plan] unconstitutional," 300 F. Supp. 2d at 1340 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Roman v. Sincock*, 377 U.S. 695 (1964)). Moreover, the *Larios* court expressed concern that the districts that had the fastest rate of population growth were the ones that had been overpopulated, noting that "if the population trend that has transformed the state over the last several years continues, the vote dilution suffered by individuals living in significantly overpopulated districts is likely to compound over the course of this decade." *Id.* at 1329.

Mr. Sanderoff's expert report is clear that the city followed a policy that deviations of plus or minus five percent were acceptable, A-66, and he reiterated this fact in this sanctions hearing testimony, A-434, A-440-41. Whether that was constitutional or not is precisely the question left open by *Larios*. "A party that predicates its legal claim on . . . [an] unsettled legal theory should not face sanctions under . . . § 1927 . . . ." *Proctor & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 531-32 (5th Cir. 2002). For this reason alone, the district court erred as a matter of law in concluding that Plaintiffs' claims were so meritless as to permit

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vote requirement—in their complaint is not surprising *See* Fed. R. Civ. P. 8(a)(2) (requiring pleading of "a short and plain statement of the claim showing that the pleader is entitled to relief"). In addition to being factually inaccurate, the district court's observation about the citation to *Larios* being "disingenuous" reflects an improper subjective standard—a legal error. *See infra* Part IV.

sanctions. A-413-14; Add-12-13. Furthermore, as in *Larios*, the overpopulated districts here were the same ones that experienced the greatest population growth over the past decade. A-478. "[T]he vote dilution suffered by individuals living in significantly overpopulated districts is likely to compound over the course of this decade." *Larios*, 300 F. Supp. 2d at 1329. As seventy-five percent of Albuquerque's population growth was attributable to Latinos over the last decade, *see* A-29, Plaintiffs' one-person, one-vote claim was plainly not frivolous.[21]

3. The Presence of Majority-Minority Districts Does Not Render Plaintiffs' Claims Meritless.

The district court erred in concluding that Plaintiff's claims were meritless and sanctionable because the challenged map resulted in five of the nine districts being majority-minority. The court stated that "[t]he thrust of the lawsuit was that the new plan disadvantage [sic] minority voters[,] [but] . . . the majority of the city council districts in the plan adopted are majority minority districts. Plaintiffs were

[21] In addition, Mr. Sanderoff is the person responsible for drawing the map that resulted in the challenged population deviations. As discussed above, the notion that Plaintiffs' attorneys should have simply taken him at his word that "[t]he population deviations that exist under this plan were not used to advance any inappropriate agenda, such as for partisan, racial or rural/urban gain," A-66, lest they be sanctioned, strains credulity. And Mr. Sanderoff's statement that the population deviations resulted from the desire to prevent districts from crossing the river is belied by the fact that the public comments supporting that approach were received only *after* the city had already proposed that approach, with the attendant population deviations already in place before anyone suggested it was a bad idea to cross the Rio Grande. A-536-37, A-543-45. Permitting such post-hoc rationalizations would effectively neuter *Larios*.

never able to show how the numbers were anything but what they appeared on their face to be, favorable to minority voters." A-408-09; Add-7-8. This conclusion is entirely unmoored from the legal standard of *Gingles*.

The test of whether a redistricting plan dilutes minority voting strength is not a simple mathematical determination of how many majority-minority districts exist under a challenged plan. Under Section 2 of the Voting Rights Act, the court is to determine whether the statistical evidence (*e.g.*, analysis of election returns) demonstrates that members of a minority group (*e.g.*, Latinos) have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. *See* 42 U.S.C. § 1973; *Gingles*, 478 U.S. at 50-51. By instead concluding there was no problem because several majority-minority districts were present, the district court clearly failed to understand how vote dilution claims under *Gingles* are to be evaluated, and its decision to base its sanctions order on its misunderstanding of *Gingles* is reversible error.

IV. The District Court Legally Erred in Applying a Subjective Standard to Plaintiffs' Attorneys' Conduct.

The district court erred by buttressing its misapprehension of the force of the city's expert report and its legally incorrect conclusion that it was "glaringly obvious . . . that this case lacked merit," A-411; Add-10, with an improper, subjective analysis speculating about the "real" reasons Plaintiffs' attorneys moved

to dismiss without prejudice. That was an error of law. This Court, sitting *en banc*, has held that "the proper standard under . . . § 1927 is that excess costs, expenses, or attorney's fees are imposable against an attorney personally for conduct that, viewed *objectively*, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley*, 832 F.2d at 1512 (emphasis added); *see also Miera*, 143 F.3d at 1342 (explaining that *Braley* "rejected a subjective good faith inquiry").

The district court's marked reversal from its characterization of Plaintiffs' position in its original stay order to its later order imposing sanctions demonstrates this error. In its September 2013 stay order, the district court objectively reviewed the evidence, including the city's expert report and the facts surrounding the change in the city's run-off law, and concluded that dismissal with prejudice was not warranted and that Plaintiffs' reasons for seeking dismissal without prejudice were "viable." A-188; Add-22. In its sanctions order the district court fully reversed itself—on the basis of *no new evidence* regarding Plaintiffs' attorneys' conduct.[22] It did so based on subjective speculation about the reason Plaintiffs had requested dismissal without prejudice. A-410; Add-9.

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[22] It is no response to claim that sanctions were appropriate because Plaintiffs' counsel sought to have the stay continued during the November 2013 six-minute telephone status conference. They had alerted the court in July that they would be seeking to wait until after the results of the potential runoff in District 7 to determine how to proceed. *See* A-112. That runoff was scheduled to take place on

The district court's speculation about the strategy and motivations for Plaintiffs' counsel seeking dismissal without prejudice based on the timing of their motion is an improper consideration in imposing sanctions under § 1927. It is irrelevant whether Plaintiffs' counsel were motivated by fear of Mr. Sanderoff (they were not). The "proper standard" is not to probe the motivations for the dismissal motion based on its timing, but rather to ascertain whether Plaintiffs' attorneys conduct, "viewed objectively," *Braley*, 835 F.2d at 1512, rose to the "extreme" standard for imposing sanctions under § 1927, *AeroTech*, 110 F.3d at 1528. If, as the court concluded in its September 2013 stay order, Mr. Sanderoff's expert report was not so impervious as to warrant dismissal with prejudice, it cannot possibly have been an appropriate catalyst for sanctions in August 2014, a year and a half after Plaintiffs sought to end the case. The only difference between the two orders is the district court's improper speculation. The district court abused its discretion in flipping from an objective standard in its stay order to subjective speculation in its sanctions order.

V. The District Court Abused its Discretion by Failing to Conduct an Individualized Analysis.

Even if this Court were to conclude that sanctions were appropriate in this case (they are not), it nonetheless should find that the district court abused its

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November 19, 2013. A-192. But the court canceled and never rescheduled the subsequent status conference.

discretion by failing to conduct an individualized analysis of the attorneys against whom sanctions were appropriate. Courts have held that such an analysis is required before imposing sanctions. *See Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 144 (3d Cir. 2009) ("[I]t was an abuse of discretion to impose sanctions pursuant to [§ 1927] without undertaking an individualized analysis.").

Here, sanctions were plainly inappropriate against attorney Antonio Maestas, who served as local counsel when the case was originally filed in state court. Although Mr. Maestas did not formally withdraw as counsel, he was effectively replaced as local counsel after the case was removed by the city to federal court. A-25, A-40. This case is thus similar to *Veliz v. Crown Lift Trucks*, 714 F. Supp. 49 (E.D.N.Y. 1989), in which the court refused to impose sanctions against a firm that had filed the case when it was in state court, but had been effectively replaced as counsel when the case was removed to federal court, even though the firm had failed to formally withdraw. *Id.* at 56-57. "Although it is correct that the Horenstein firm never was relieved as counsel, it took no part in the conduct that is the subject of this sanctions motion. . . . [I]n the absence of an indication of active participation [in the sanctionable conduct] it does not seem appropriate to subject [non-offending co-counsel] to sanctions . . . ." *Id.* at 57 (internal quotation marks omitted; first bracket added).

Mr. Maestas did not sign the pleadings on Plaintiffs' motion to dismiss without prejudice or Plaintiffs' opposition to the city's motion to dismiss with prejudice, A-47, A-123. The city's expert report was served by mail only upon Mr. Vera and Mr. Sapien, not on Mr. Maestas. A-44. And the city's motion for sanctions did not specify the individual attorneys against whom it was seeking sanctions. A-210-11. Under the circumstances, it is inappropriate to sanction Mr. Maestas, who was not involved in the conduct that triggered the sanctions.

* * * * *

Section 1927 permits courts to impose sanctions for vexatious and unreasonable conduct that multiplies proceedings, causing excess cost for an opposing party. The district court's imposition of sanctions against Plaintiffs' attorneys in this case departs from a reasonable use of discretion for such a serious and penalizing decision with profound professional consequences for Plaintiffs' attorneys. Only through a series of legal errors could the district court have come to the conclusion that attorneys whose only substantive request was that the case be dismissed had vexatiously multiplied the proceedings.

Civil rights suits are difficult to prosecute. They require individual citizens to step into the role of plaintiffs, exposing themselves and their families to the stress of a federal lawsuit against powerful interests. They also require attorneys—often a combination of national civil rights groups and local counsel—to expend

time and resources litigating a case, usually with substantial risk they will not recuperate their fees and costs. Voting rights cases are all the more difficult, as they involve a complex and changing area of law and require building a substantial and complicated factual record. Plaintiffs' counsel must retain experts to conduct advanced statistical analyses of their own claims and also to rebut the government's analyses. If voting rights attorneys can be sanctioned—starting the day they receive the government's expert report—there will be a serious chilling effect on civil rights suits. The district court's order means that attorneys in voting rights cases cannot even take a day to have their experts review the statistical analyses and claims in the government's expert report. Any one of these considerations should have given the district court pause before imposing sanctions.

Congress struck a delicate balance in entrusting private citizens and their attorneys to enforce this nation's civil rights laws. The district court's sanctions order upends that balance by seriously disincentivizing plaintiffs, local counsel, and national groups from litigating civil rights cases. This Court should reverse the district court's decision.

CONCLUSION

For the foregoing reasons, the district court's order imposing sanctions against Plaintiffs' attorneys should be reversed.

Dated: December 8, 2014

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs' attorneys respectfully request oral argument, given the penalizing effect of the district court's sanctions order and the breadth of the errors of law and fact asserted herein.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as indicated by Microsoft Office Word 2010's word-count function.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

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ECF CERTIFICATION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies:

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, hereby certify that on December 8, 2014, I filed a true, correct, and complete copy of the foregoing Brief of Appellants and Addendum with the Court and served it on the following people via the Court's ECF System:

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