IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, *et al.,*	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 9:97-CV-063
LUFKIN INDUSTRIES,	§	
Defendant.	§	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR APPOINTMENT OF A SPECIAL MASTER AND COURT-APPOINTED EXPERT WITNESS

Notwithstanding this Court's repeated denial of Plaintiffs' Motion to Bifurcate, Plaintiffs now move essentially to reopen the trial record including the taking of evidence for the determination of specific injunctive relief. Plaintiffs' request for the appointment of a Special Master and a Rule 706 expert to "develop[], examin[e], and implement[] policies, practices and procedures for the initial assignment, training and promotion of employees" impermissibly invades the district court's province, indeed obligation, to hear the evidence and to make findings on the central issues of liability and relief. Any evidence concerning the entry of an injunction should have been presented at trial. Plaintiffs should not be allowed to re-litigate their claims and submit additional evidence after the trial has concluded. Finally, Plaintiffs' motion should be denied as unnecessary or, alternatively, premature, in the absence of any evidence that Lufkin needs assistance or has failed to comply with any mandatory injunction entered by the district court. Simply put, the appointment of a special master or a Rule 706 expert to take evidence, determine substantive issues, and recommend specific injunctive relief, as opposed to compliance, is not authorized under the rules of procedure and evidence and is not warranted

upon an examination of the actual facts. As more fully stated below, Lufkin opposes Plaintiffs Motion for Appointment of a Special Master and Court-Appointed Expert Witness.

BACKGROUND

Following the trial of this case, the Court entered a mandatory injunction and, in it, indicated that it might appoint a "monitor" to "oversee Lufkin's compliance efforts and ensure the smooth implementation of the listed requirements." (Docket No. 461, pp. 37-38). To date, Lufkin has taken a number of steps to comply with the Court's injunction and to ensure the smooth implementation of the specific elements of injunctive relief identified by the Court. These steps include the following:

(i) Retaining an expert to provide diversity training to Lufkin management and advise Lufkin on its personnel policies and procedures consistent with the Court's injunction.

(ii) Instructing the TWC that it should refer applicants for entry level positions and that its procedures should ensure that referrals can come only from a requisition for a single position.

(iii) Requesting and attending a bargaining session with the unions to consider specific revisions to Lufkin's promotion processes.

Notably, Plaintiffs' motion does not complain about Lufkin's efforts to comply with the Court's injunction, nor does it seek the appointment of a special master to monitor Lufkin's continued compliance, as the Court originally opined. Rather, Plaintiffs' motion requests the Court to appoint a special master and a Rule 706 expert to draft and/or refine the injunction already entered by the Court.

ARGUMENT AND AUTHORITIES

A. The Standard for Appointing a Post-Trial Special Master

Rule 53 authorizes the appointment of a post-trial master to handle matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge. FED. R. CIV. P. 53(a)(1)(C). A special master, however, does not displace the court and should

not be appointed to determine substantial issues of liability and relief. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 356 (1957); *see also Sierra Club v. Clifford*, 257 F.3d 444, 447 (5th Cir. 2001) (reference to special master to make recommendation on summary judgment motion relating to liability and remedy issues was abuse of discretion); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 691 (1st Cir. 1992) (referral of fundamental issues of liability to special master was impermissible: "Determining bottom line legal questions is the responsibility of the court itself."); *United States v. Microsoft Corp.*, 147 F.3d 935, 953-54 (D.C. Cir. 1998) (reference of issues related to interpretation of consent decree to special master impermissible, in absence of exceptional circumstances, even if district court reserved power to review master's findings *de novo*).

Rule 53 requires the demonstration of some exceptional condition before a court may appoint a master to make or recommend findings of fact on issues to be decided by the court without a jury. FED. R. CIV. P. 53(a)(1)(B). Rule 53 also contemplates the use of post-trial masters on matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district. Although there is no longer an express requirement of some exceptional condition prior to the appointment of a post-trial master, the Advisory Committee notes reiterate that masters should remain the exception and not the rule. FED. R. CIV. P. ADVISORY COMMITTEE NOTES ¶ 1. This is particularly apt in non-jury cases and of heightened importance where the appointment is opposed by the litigants. *See* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLOM. L. REV. 452, 459 (1958) (concluding that "the utilization of special masters to hear and report on the main issues in litigation under Rule 53 has little support in the non-jury area. With a few minor exceptions, references in non-jury cases run counter to the spirit and purpose of judicial administration in the federal courts."); Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex*

Litigation, 31 WILLIAM MITCHELL L. REV. 1269 (2005) (noting that opposed appointment "will need a rather high exceptional condition to justify the reference").

In *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258-59 (1957), the United States Supreme Court considered the "exceptional condition" requirement and expressly held that a congested docket, the complexity of issues, and the extensive amount of time required for a trial or a proceeding do not, either individually or as a whole, constitute an exceptional condition justifying a Rule 53 reference to a special master in a non-jury antitrust action. The Fifth Circuit applied *La Buy* in *Piper v. Hauck*, 532 F.2d 1016, 1019 (5th Cir. 1976), and held that a crowded docket and the plaintiff's filing of sixteen different lawsuits in the same court did not constitute an exceptional condition under Rule 53.

The *La Buy* decision and its progeny set a high legal threshold for the appointment of a special master. This factor, combined with the more practical observation that the use of masters is expensive and frequently leads to delay, has led courts and commentators alike to conclude that reference to a special master should be reserved only for the "very rare cases." Wright, *et al*, 9A FED. PRAC. & PROC. at § 2601.

1. Plaintiffs' request for a special master to draft an injunction is an impermissible delegation of the court's judicial authority.

In *La Buy*, the Supreme Court held that referral of the "general issue," including the issues of damages, if any, and the question concerning the issuance of an injunction, was an abuse of discretion and "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." 352 U.S. at 256.

Citing *La Buy*, numerous other courts have made similar observations and refused to sanction referrals on central issues of liability and relief. *See* cases cited *supra*; *see also In re Bituminous Coal Operators' Assoc.*, 949 F.2d 1165, 1166 (D.C. Cir. 1991) (holding that blanket

reference of case to special master, over defendant's objection was beyond district court's authority); *New York v. Microsoft Corp.*, 224 F. Supp.2d 76, 179-80 (D.D.C. 2002) (appointment of master to evaluate a third party's complaints under an injunctive decree not warranted where master would have determined rights and obligations of the parties under the final judgment, which was role reserved exclusively for the district court); *United States v. Hooker Chem. & Plastics Corp.*, 123 F.R.D. 62, 63 (W.D.N.Y. 1988) (vacating plan to refer all discovery and case management issues to special master, concluding that plan "present[ed] an unacceptable risk of having significant, potentially dispositive issues taken away from the court").

The Rule 53 referral Plaintiffs propose is no different from the references considered and rejected in the above cases. Specifically, Plaintiffs' motion proposes the appointment of a special master -- not to monitor compliance as the Court originally suggested it might consider -- but to take additional evidence and ultimately to rewrite the injunction that the Court already entered. This is an impermissible use of Rule 53.

It is axiomatic that an injunction does not exist in a vacuum, but must be based on specific liability findings supporting each element of relief. FED. R. CIV. P. 65. If the Court appoints a special master to undertake the task of deciding the question of injunctive relief, the special master will be required at minimum to make findings of fact based on the master's own interpretation of the trial record. Plaintiffs have further proposed that the master be given the authority to hear additional evidence and draft an injunction on the basis of this evidence as well. In either case, the special master will be required not only to make additional liability findings but also to determine whether those findings support the entry of additional specific injunctive relief. This is tantamount to determining the rights and obligations of the parties on a central issue in this case. Because this is an inherently judicial function, it is not subject to referral under Rule 53.

2. Plaintiffs have failed to demonstrate any "exceptional condition."

Plaintiffs do not seek the appointment of a typical post-trial master -- such as a compliance monitor like that referred to in the Court's Memorandum and Opinion. Instead, notwithstanding the fact that they have raised the issue post-trial, Plaintiffs seek the appointment of a master to interpret and compel evidence and to recommend findings of fact on the central issue of injunctive relief. Consequently, Plaintiffs should be required to demonstrate the existence of "some exceptional condition" pursuant to Fed. R. Civ. P. 53(a)(1)(B).

At best, Plaintiffs suggest, without the benefit of any explanation, that an appointment of a special master is justified because any proceeding to determine additional or specific measures of injunctive relief "may be time-consuming and technical." (Motion, p. 2). This falls far short of the rigorous legal standard warranting a Rule 53 reference and was specifically rejected by the United States Supreme Court in *La Buy*. Further, even post-trial, if this were sufficient to warrant a special master referral, then with the crowded dockets that exist today, practically every Title VII case would be a candidate for referral. This is clearly contrary to the intent of Rule 53.

Plaintiffs' suggestion is likewise factually unsupported. First, to the extent Plaintiffs' hypothecated injunction proceedings "may be" time-consuming and technical, it cannot be gainsaid that the appointment of a special master unfamiliar with the parties or the issues will diminish the complexity of any additional proceedings on the Court's injunction. Indeed, if Plaintiffs' concern is efficiency, it follows that the district court is in the best position to interpret its own findings and dispose of any remaining issues concerning injunctive relief. *See La Buy*, 352 U.S. at 255-56 (concluding that judge's knowledge of case at time of reference, combined with long experience in antitrust field, "points to the conclusion that he could dispose of the litigation with greater dispatch and less effort than anyone else.")

Second, Plaintiffs have offered no evidence that the district court is incapable of resolving any remaining issues in a timely manner. The district court has handled probably hundreds of Title VII cases since taking the bench, presumably without the assistance of a special master. It has also personally supervised the handling of this litigation over the last seven years, from class certification to, what Lufkin believes, is the entry of a mandatory injunction, again, all without the assistance of a special master.

Finally, the issues related to injunctive relief for which Plaintiffs seek the appointment of a special master are relatively straightforward and limited to two discrete employment actions. This is not the type of case for which a special master is typically appointed.[1] In sum, absent proof of an exceptional condition to justify a non-consensual reference in a non-jury trial, or, alternatively, even a compelling need for a post-trial special master, such an appointment is not warranted.

3. Plaintiffs' motion should be denied because the appointment of a special master will occasion further delay.

It is well-settled that any procedural advantage that might be derived from a reference to a master must be considered in light of the expense and delay to which the litigants will be subjected by a reference under Rule 53.[2] Wright, et al., 9A FED. PRAC. & PROC. at § 2603.

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[1] The use of special masters in discrimination and civil rights cases has generally been reserved for those involving major structural injunctions. *Compare Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-97 (3d Cir. 1987) (reference improper, contempt motion was distinguishable from those the "Who's Who" of cases involving supervision of major structural injunction) (distinguishing *Ruiz v.* Estelle, 679 F.2d 1115, 1161-62 (5th Cir. 1982) (appointment of special master appropriate to oversee court order dramatically restructuring Texas prison system); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979) (special master appropriate to supervise reorganization of major health institution); *Gary W. v. State of Louisiana*, 601 F.2d 240 (5th Cir. 1979) (special master appropriate to supervise multi-year implementation of court order affecting care of all mentally retarded children in Louisiana)).

[2] The Seventh Circuit has made the following observation: "Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown. It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably

According to the plan Plaintiffs have proposed to the Court, the special master will have to review all of the evidence and then interpret the district court's findings of facts and conclusions of law to determine if any additional injunctive relief is necessary or supported in the record. Additionally, if the Court adopts Plaintiffs' proposal, the special master may also go outside the four corners of the district court's opinion and compel additional testimony. Not only is this an end-run around the 20-hour time limitation imposed by the Court on the presentation of evidence, but it introduces another lengthy delay in the adjudicative process.[3]

Procedurally, the process is also sweeping and broad. Once the special master's review of the evidence is complete, he or she is to submit a report to the district court. Then, once the district court receives the report, the parties may "state support for, object to, or otherwise comment on the final written recommendations of the Special Master." (Plaintiffs' Proposed Order, p. 2). The district court is then charged with reviewing the recommendations and all of the evidence *de novo* and, if warranted, make additional findings or enter additional relief.

The only certain results inherent in this procedure are (i) the district court's work load will not be substantially reduced, (ii) the conclusion of this lawsuit in the district court will be delayed for a minimum of 90 days and could extend indefinitely, and (iii) the process will be costly. *Id.* The purpose of Rule 53 is to streamline the judicial process, not delay it. Where, as here, there is no apparent procedural advantage by a reference to a special master or correlative reduction in the Court's workload, but the delay and cost inherent in the appointment is a

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long. Likewise, the increase in cost is heavy. For nearly a century, litigants and members of the bar have been crying against this avoidable burden of costs and this inexcusable delay. Likewise, the litigants prefer, and are entitled to, the decision of the judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge." *Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942).

[3] Defendant Lufkin tailored its trial presentation, to the extent possible, on the time limits established by the Court. To the extent additional evidence is now taken on remedial issues, Lufkin will be prejudiced because it necessarily was foreclosed from using this time as it determined appropriate in its trial presentation.

certainty, a Rule 53 reference is not warranted. *See* Wright, et al., 9A FED. PRAC. & PROC. at § 2603 (citing cases).

4. The appointment of a special master is unnecessary or, alternatively, premature.

The appointment of a Special Master is unnecessary for purposes of crafting an injunction for the fundamental reason that the Court has already entered an injunction. Second, a review of Plaintiffs' motion and proposed order indicates that their primary objective is to create an opportunity to present the district court with specific remedial measures they would like to see Lufkin implement. Plaintiffs have already had three opportunities to do this -- at trial, in their proposed findings of fact and conclusions of law, and in their "meet and confer" report to the Court. The appointment of a special master to repeat the same process is redundant and inherently unfair.

Plaintiffs further fail to explain why, at this juncture, Lufkin requires assistance to interpret or implement the district court's injunction. Indeed, other than to posit -- incorrectly -- that ". . . Lufkin has been disinterested in obtaining objective advice and singularly resistant to seeking or receiving any input inconsistent with its repeated assertion that it has done nothing wrong in any respect," Plaintiffs have offered no proof that the appointment of a special master is necessary in order to comply with the district court's injunction.

Finally, the only purpose for which the district court has stated that it will consider the appointment of a special master is with respect to compliance. If, as Plaintiffs suggest, the Court has not really entered an injunction, the appointment of a special master to oversee compliance is not ripe for review. Alternatively, if, as Lufkin believes, the Court has entered an affirmative injunction, Lufkin has taken substantial steps to implementing the prescribed relief, as it will report to the Court. Lufkin believes that on this record, the appointment of a special master to draft or refine the Court's injunction under the guise that Lufkin will not or cannot comply with

the Court's original order is unsupported by any evidence and, alternatively, the appointment of a special master to monitor compliance is unnecessary and/or premature in the absence of any record of noncompliance.

5. Alternatively, if the Court appoints a special master, it should refer this matter to an available Magistrate Judge.

Reference to an extra-judicial official should only be made if there is no available magistrate judge. *See* FED. R. CIV. P. 53 ADVISORY NOTES ¶ 14. Plaintiffs offer no evidence of the unavailability of a magistrate judge or any explanation why a magistrate judge would not be capable of such an appointment.[4]

B. Rule 706 Expert

Rule 706 gives courts discretion to appoint their own expert witnesses on the general theory that this may be an appropriate check on any weaknesses in the adversary process. *See generally* Charles Alan Wright & Victor James Gold, 29 FED. PRAC. & PROC. EVID. § 6302 (Supp. 2005). The appointment of a Rule 706 expert requires a careful consideration of the facts and circumstances of each case to determine whether court appointment of an expert witness is appropriate and consistent with the purpose of Rule 706. *Id.*

Rule 706 does not prescribe any standard for when a court should appoint an expert witness. *Id.* A review of the caselaw, however, indicates that the most important factor in favor of appointing an expert is that the case involves a complex or esoteric subject beyond the trier-of-fact's ability to adequately understand without expert assistance. *Id.* For example, there is precedent for appointing experts to deal with scientific or technical issues involving DNA evidence, mental capacity, computers, patents, medicine, and bankruptcy administration. *Id.* (footnotes omitted). *See also Quiet Tech. DC-8, Inc. v. Hurel Dubois UK, Ltd.*, 326 F.3d 1333, 1348 (11th Cir. 2003) (concluding that Rule 706(a) is "especially appropriate where the evidence

[4] The Court previously referred this lawsuit to Magistrate Judge Radford for mediation.

or testimony at issue is scientifically or technically complex"); *Webster v. Sowders*, 846 F.2d 1032, 1038-39 (6th Cir. 1988) (cited by Plaintiffs, appointment of technical expert to determine if defendant was complying with federal regulations regarding asbestos removal approved where alternative was to close down prison facility to protect the safety of inmates).

But even where the case involves complex matters, "the courts usually decline to appoint an expert if they can rely on the parties' experts to educate the trier of fact." Wright, *et al*., 29 FED. PRAC. & PROC. EVID. at § 6304. According to Professors Wright and Gold: "As a consequence, courts are more inclined to exercise their Rule 706 powers where testimony from the parties' experts lack credibility, fail adequately to address the issues, or give conflicting opinions that are irreconcilable. . . . Appointment of a court expert also may be justified where the parties entirely fail to present expert testimony or only some parties present such testimony, thus depriving the trier of fact of a balanced view of the issues." *Id.* (footnotes omitted).

The well-accepted rule is that the decision to appoint an expert under Rule 706 should be made before trial. Where the appointment is not made until trial, the effectiveness and fairness of the subdivision (a) procedures, including the right to depose the expert and to cross-examine the expert, may be serious compromised. Where it is too late effectively and fairly to implement these procedures, the appointment of an expert under Rule 706 may be an abuse of discretion. *Id.* (citing *U.S. v. Weathers*, 618 F.2d 663, 664 n.1 (10th Cir. 1980) (where presentation of evidence was completed and case submitted, court committed error in ordering, sua sponte, further examination and report by independent expert, "[T]here is serious doubt whether the procedure employed by the trial court in seeking additional expert testimony comported with the requirements of Fed. R. Evid. 706, which was designed in part to lessen the risk that the adversary system would be encroached upon by a judge's assumed inquisitorial power.")

1. <u>It would be an abuse of discretion to appoint a post-trial Rule 706 expert.</u>

It would be an abuse of discretion to appoint a Rule 706 expert at this stage of the litigation. Rule 706 experts are essentially testifying experts appointed by the Court. As such, they are subject to the normal rules of discovery and cross-examination at trial. The appointment and use of a Rule 706 expert after a trial has concluded essentially strips Rule 706 of all of its procedural safeguards. Here, among other things, there is no opportunity in Plaintiffs' proposal for Lufkin (i) to depose the expert to discover his or her findings, (ii) to cross-examine the expert on his or her findings, (iii) to present witnesses to rebut the findings of the court-appointed expert, or (iv) to present the findings of any rebuttal expert to the Court. Absent these procedural safeguards, it is an abuse of discretion to appoint a Rule 706 expert. *See Weathers*, 618 F.2d at 664 n.1.

It is also contrary to the policy behind Rule 706. Allowing a witness to testify on a central issue in a case after the evidence has been closed, without the opportunity for discovery or cross-examination by the opposing party and rebuttal evidence ensures a one-sided opinion, perpetuates an image of bias in the expert's opinion, and undermines as opposed to enhances accurate fact-finding. To the extent the district court has the authority to enter additional injunctive relief, it should be made on the record already before the district court, not the post-trial testimony of an undisclosed Rule 706 expert.

2. <u>It would be procedurally improper and inherently unfair to appoint a Rule 706 expert at this stage of the proceedings.</u>

This was not a bifurcated proceeding. Indeed, Plaintiffs' motion to bifurcate was expressly denied by the Court as was their follow-up motion for reconsideration. (Docket Nos. 144, 205, 210, & 225). Plaintiffs were thus on notice early on that it was incumbent upon them to present all of their evidence on both liability and a remedy, including any aspect of injunctive relief, at the trial because there would not be a Stage 2 proceeding. If Plaintiffs

thought a Rule 706 expert was necessary to carry this burden, the proper time to request an appointment was before trial, or, at the latest, during trial.

Equally undisputed, Plaintiffs had the unfettered opportunity to present any evidence they wanted at trial. Although the Court only allowed each side 20 hours for the presentation of its case, Plaintiffs did not object to the time limitation and have never complained that they were prevented from presenting any evidence at trial. To allow Plaintiffs to present additional testimony through a Rule 706 expert after the close of evidence is simply a device to circumvent the 20-hour time limitation and should not be tolerated by the Court.

3. Plaintiffs have not demonstrated the need for a Rule 706 expert sufficient to justify the substantial delay and cost that the appointment will cause.

The power to appoint a Rule 706 expert should be used sparingly and only upon demonstrated need, consistent with the purposes of Rule 706. Plaintiffs have failed to identify a tangible need for a Rule 706 expert, other than to speculate that there may be "complex" issues involved in formulating an injunction. The apparent "complexity" Plaintiffs allude is not of a scientific or technical nature, but essential involves interpreting the testimony and evidence, which is a function solely for the district court. *Compare Webster v. Sowders*, 846 F.2d 1032, 1038-39 (6th Cir. 1998) (cited by Plaintiffs, expert appointed to advise court on compliance with complex environmental laws); *see also Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097 (3d Cir. 1989) (setting aside appointment of special master, concluding that single question of whether exhibition of fountain was in compliance with consent decree, concluding that this was not comparable to cases involving major structural injunctions).

In comparison to those cases where a Rule 706 expert has been appointed, this case is limited to two discrete employment practices, both of which are composed of a series of objective steps and procedures. Courts have been devising Title VII remedies for decades in cases exactly like this without the necessity of a post-trial technical expert. Finally, Plaintiffs

provide no authority for the proposition that Rule 706 authorizes the appointment of an independent expert to advise Lufkin on how to implement the district court's injunction or that "Lufkin will flounder in any attempts to reform its practices." In any event, as discussed above Lufkin has already retained a highly qualified independent expert to provide diversity training and advice regarding its employment practices and policies.

C. <u>If the Court appoints a special master or Rule 706 expert, Lufkin requests the opportunity at that time to comment on the scope of the special master's and/or expert's duties and responsibilities and his or her compensation.</u>

Because Lufkin's comments will depend on the nature of the appointment of a special master or Rule 706 expert, Lufkin requests the opportunity at that time to comment on the scope of their respective duties and responsibilities. For example, if the court appoints a special master to craft an injunction and a Rule 706 expert to advise the special master in this regard, Lufkin's comments will likely be substantially different than its comments regarding the appointment of a compliance monitor. Among other things, if the court appoints a special master to craft an injunction, Lufkin would request that he or she be prohibited from imposing non-contempt sanctions or recommending contempt sanctions, compelling, taking, or recording evidence, requiring the submission of remedial proposals, consulting with any court-appointed technical or other expert, or undertaking any task which involves the consideration of matters outside the trial record. Similarly, if the court appoints a Rule 706 expert, Lufkin requests that the Court provide it with the full panoply of procedural protections set forth in Rule 706 and the opportunity to present rebuttal evidence with respect to such expert. Finally, Lufkin believes that Plaintiffs, as the requesting party, should bear all or a portion of the master's and expert's fees.

CONCLUSION

For all the reasons stated above, Plaintiffs' motion should be denied. If there are additional proceedings to be conducted, they should be conducted by the district court in a timely manner based on the evidence submitted at trial.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on this ___ day of _____ 2005, a copy of the foregoing was filed electronically though the Court's CM/ECF system and was automatically copied to Plaintiffs through the court's electronic filing system.

/s/

Attorney for Defendant