IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al*.,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al*.,	*	
Defendants.	*	

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NON-PARTY STATE OFFICIALS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS

It is unclear against whom the plaintiffs seek sanctions through this motion: the defendant State Board of Elections officials or the individual non-party "state officials" whom the plaintiffs seek to depose about their legislative activities. It is also unclear why the plaintiffs did not move to compel the information they purport to be seeking about document preservation from the defendants or non-party subpoena targets earlier in the discovery period, waiting instead to seek a spoliation sanction aimed at depriving the non-party subpoena targets of their individual legislative privilege. It is further unclear why the plaintiffs, who waited over five years to bring the claims for which they have sought discovery, believe their claims were reasonably foreseeable by any of the state actors they accuse of spoliation, much less the state officials they appear to seek to sanction through this motion. What is clear, however, is that having sat on their claims concerning legislative motive and intent for over five years, the plaintiffs have no one but themselves to blame for any lapse in document preservation that may have occurred. This Court

should reject the plaintiffs' efforts to punish non-party state officials for not anticipating these claims and deny the plaintiffs' motion with prejudice.[1]

BACKGROUND

The Plaintiffs' Delay in Bringing Their Lawsuit and Current Claims

The definition of spoliation exposes the fatal flaw in the plaintiffs' motion. Spoliation refers to the destruction or failure to preserve evidence for use "in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). For well over a year after the Supreme Court affirmed the three-judge court's ruling in *Fletcher v. Lamone* in July of 2012, there was no pending litigation concerning Maryland's congressional redistricting process, and the plaintiffs have offered no justification for why their litigation would have been reasonably foreseeable at any time during that over 15-month gap in litigation.

Moreover, when the plaintiffs finally brought their challenge to the congressional redistricting plan, over two years after it was enacted, they did not challenge the legislative motive and intent of anyone who developed or voted for the plan. Rather, they challenged only the physical composition of the congressional districts and expressly disclaimed that their claims or the standard they proposed relied on legislative motive or intent. *See* Compl. (ECF No. 1) ¶ 2; Am. Compl. (ECF No. 11) ¶ 2. The plaintiffs did not bring the claims for which they now seek discovery and spoliation sanctions until March 3, 2016, when they

[1] The defendants State Board of Elections officials are filing a response in opposition to the motion, simultaneous to the filing of the non-parties' opposition, and that response is incorporated by reference herein.

substantially amended their pleadings to focus on allegations that Maryland lawmakers retaliated against Republican voters in the former sixth congressional district by diluting their votes such that they were unable to continue to elect a Republican to represent them in Congress. *See* Sec. Am. Compl. (ECF No. 44) ¶¶ 7-7.c. Indeed, the plaintiffs' claims changed so substantially that two of the original plaintiffs have since been dismissed from the lawsuit for lack of standing. ECF No. 105.

The plaintiffs gloss over the 15-month gap in litigation that existed before they brought even their initial, now abandoned, claims, arguing that unrelated litigation that had nothing to do with the congressional redistricting process kept intact a widespread duty to preserve every document and email relating to redistricting. The plaintiffs also do not explain how the claims they are now pursuing, which bear no resemblance to the initial pleadings, and were not brought until nearly five years after the plan was enacted, were reasonably foreseeable before they were alleged in March, 2016. For the reasons discussed below, the plaintiffs should not now be heard to complain that state actors and entities did not preserve every document and email relating to redistricting, no matter how immaterial to the plaintiffs' claims, throughout this entire time period.

In any event, the plaintiffs simply ignore that multiple state actors, including those with custody of the documents relevant to the plaintiffs' claims, preserved thousands of pages of documents for more than five years after the events at issue despite long periods where no claims were pending or anticipated. As discussed at length in the non-parties' motion seeking review of the three-judge court regarding their ability to assert legislative privilege in this case, the plaintiffs have been afforded access to numerous documents that

comprise the "facts or information available to lawmakers at the time of their decision" concerning 2011 congressional redistricting. *Comm. for a Fair and Balanced Map v. Illinois State Bd. of Elecs.*, No. 11 C. 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011); *see also Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015) (permitting discovery of "documents or communications reflecting strictly factual information" including all "materials and information available to lawmakers at the time a decision was made" (citing *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *9)). Given this "considerable information at [the plaintiffs'] fingertips," *Comm. for a Fair and Balanced Map*, 2011 WL 4837508, at *8, the plaintiffs have not set forth any rationale for why the sanction they seek – to invade legislative privilege of non-party state officials – is warranted here.

The Plaintiffs' Misrepresentations

The plaintiffs make several demonstrably false accusations that require a response. First, although the plaintiffs acknowledge that the Office of the Attorney General issued a broad preservation notice after the first case challenging congressional redistricting was filed, the plaintiffs contend that because the notice was not sent until October 31, 2011, "the State did *absolutely nothing* to preserve relevant documents or emails despite its admittedly anticipating litigation" prior to that date. Pls. Mem. (ECF No. 153-1) at 8 (emphasis added). The plaintiffs thus ignore completely the efforts of various state actors and entities to preserve documents, including emails, created prior to October 31, 2011 that have been produced to them for use in this litigation.

The Department of Planning served as the clearinghouse for many of the redistricting-related materials that were created and preserved during this time period. These documents, which have been produced to the plaintiffs, include the May 2011 Green Book; briefing books created for use by the GRAC members; third-party plans submitted to the GRAC; transcripts of GRAC hearings held throughout this time period and submissions of written testimony to the GRAC; and public comments submitted to the GRAC online and through email between October 4 and October 11, 2011, after the plan was made public. *See* ECF No. 104 ¶¶ 17, 22-24, 26. Documents from the Department of Legislative Services and former employees were also preserved and produced to plaintiffs through responses to a Maryland Public Information Act request and document subpoena, including data provided to the GRAC and emails related to redistricting. Ex. 1 (response letters to plaintiffs' MPIA request and document subpoena). And the State Board of Elections preserved the emails, and attendant data, of the only employee who had any role in the provision of elections data during redistricting. Ex. 2 (Lamone Decl.) ¶¶ 5-8.

Further, the legislator-members of the GRAC, against whom the plaintiffs seek sanctions, preserved documents from this time period. Senate President Miller's office preserved the contents of the laptop containing the redistricting software Maptitude that was used by the GRAC throughout this time period, which includes versions of draft maps created or considered by the GRAC and the data files that compose those maps. Both President Miller and Speaker Busch also have produced or described on their respective privilege logs other documents and emails related to redistricting that were preserved by their offices during this time period. Ex. 3 (privilege logs).

Second, the plaintiffs misstate that various state actors and entities did not receive the preservation notice. They allege that the Office of the Attorney General failed to send the preservation notice to former Governor Martin O'Malley, despite that the preservation notice was sent to then-Governor O'Malley's senior counsel and his senior legislative aide, Joseph Bryce. Ex. 4 (Nov. 1, 2011 email to J. Bryce). Mr. Bryce was involved in the redistricting process on behalf of former Governor O'Malley, and he preserved emails from the relevant time period, many of which have been produced to the plaintiffs. Although the plaintiffs complain that former Governor O'Malley did not produce any documents or emails in response to the subpoena served on him, he is a private citizen, and had gifted his papers to the State Archives upon his departure from office. The plaintiffs rely only on their own surmise that his administration did nothing to preserve documents during this time, and have declined to request inspection of those papers at State Archives, although they have been informed they have as much right as defendant State Elections officials to do so.[2]

The plaintiffs also allege that the Office of the Attorney General failed to send the preservation notice to one of President Miller's aides who worked on redistricting, Yaakov "Jake" Weissmann, what the plaintiffs term a "particularly troubling" omission, Pls. Mem. (ECF No. 153-1) at 10. But Mr. Weissmann did receive the litigation hold email, also on October 31, 2011, and that email was preserved by Mr. Weissmann and was produced to

[2] In other words, the plaintiffs need not have awaited this Court's February 13, 2017 order compelling production of these documents to access them. Having chosen not to incur the burden of searching the documents themselves, plaintiffs cannot draw any conclusion about the state of preservation of materials that may have been gifted to Archives.

the plaintiffs on February 9, 2017. Ex. 5 (email from K. Rowe disclosing Oct. 31, 2011 email to Y. Weissmann).

Similarly, the Plaintiffs contend that the October 31, 2011 preservation notice was not sent to "any official or employee at the State Board of Elections," Pls. Mem. (ECF No. 153-1) at 9, but omit that the notice was sent to counsel to the State Board of Elections, Assistant Attorney General Jeff Darsie, who was responsible for assuring the directive was followed, Pls. Ex. EE (ECF No. 153-33) at 24-25. As defendant Linda H. Lamone has explained, the State Board of Elections had no role in developing the 2011 congressional redistricting plan. Rather, only one employee had any role in redistricting at all and that was responding to a request from the Department of Planning to provide elections data in May, 2011. *See* Ex. 2 (Lamone Decl.) ¶¶ 5-8. That employee's emails and the data files attached to those emails have been preserved by the State Board of Elections and produced to the plaintiffs. *See* Ex. 10 (email from J. Katz). Although the plaintiffs complain that these emails were retained along with *all* of the former employee's emails for a purpose other than redistricting litigation, that is not evidence that the emails related to redistricting would otherwise have been spoliated. Moreover, spoliation involves the destruction of documents, not preservation for one purpose over another.

Third, the plaintiffs cite no evidence for their contention that certain high-ranking former staffers of President Miller, Speaker Busch, or former Governor O'Malley, who produced no documents in response to subpoenas served on them, played "key roles . . . in Maryland's 2011 redistricting process" Pls.' Mem. (ECF No. 153-1) at 2, and thus provide no justification for the imposition of sanctions on non-parties based on these

staffers' document retention practices. None of these staffers have been identified as playing any role in the congressional redistricting process, including Matt Gallagher, Rick Abbruzzese, John Favazza, Kristin Jones, Victoria L. Gruber, and Joy Walker. *See* Ex. 6 (Defs.' Resp. to Interrog. 6). Further, the plaintiffs simply misstate that they received no responsive documents from Ms. Jones, when printed copies of emails sent and received by her were produced to the plaintiffs in response to the subpoena served on Speaker Busch. *See* Ex. 7 (emails produced from the inbox of "Kristin Jones"). Indeed, one such email is attached to the plaintiffs' motion. Pls. Ex. H (ECF No. 153-10) at 8. Similarly, the plaintiffs misstate that Jeremy Baker, chief of staff to Speaker Busch, produced no responsive documents to the subpoena served on him, despite that Mr. Baker's response to the subpoena indicates that responsive documents preserved by him were produced in response to the subpoena served on Speaker Busch's office. Pls. Ex. D (ECF No. 153-6).

Finally, the plaintiffs complain that the preservation notice was not sent to former senator Robert Garagiola, misstating that Mr. Garagiola was a key player in the redistricting process. The plaintiffs present no evidence of this claim, other than their conjecture that he was involved because he was majority leader of the Maryland State Senate at that time and had plans to run for Congress in the sixth congressional district, which many anticipated would encompass portions of western Montgomery County, as it had historically, where former Senator Garagiola's district was located. *See, e.g.*, Ex. 8 (Test. of Steve Shapiro). Mr. Garagiola himself denied under oath that he had any knowledge of what the GRAC considered when developing the 2011 congressional plan and that no GRAC maps were provided to him prior to the Democratic caucus meeting on

October 3, 2011. *See* Pls. Ex. EE (ECF No. 153-18) at 31-32, 93, 95-96; *see also* Pls. Ex. X (ECF No. 153-26) (email from Mr. Garagiola sent on October 4, 2011, the day *after* the Democratic caucus meeting, describing the proposed map).

The Plaintiffs' Reliance on Irrelevant and in Some Cases Non-Existent Emails

On pages 3-4 of the background section of their memorandum, the plaintiffs highlight their concerns about potential spoliation in this case, listing 7 categories of documents that they received or learned about from Maryland's congressional delegation and the deposition of Mr. Garagiola that they contend evidence spoliation of documents "probative of intent." The plaintiffs are mistaken.

First, the plaintiffs cite "emails exchanged between Yaakov 'Jake' Weissmann, Senate Miller's deputy chief of staff, the chiefs of staff for U.S. Representatives Steny Hoyer and John Sarbanes, and NCEC Services, Inc., a Democratic consulting company that was hired by the Democratic National Redistricting Trust to work with Maryland's Democratic members of the U.S. House of Representatives to draft the map that was proposed by the GRAC." ECF No. 153-1 at 3. In the email attached to the motion, however, Mr. Weissmann merely attempts to answer a congressional staffer's question about technical changes made to the plan between the time it was made public by the GRAC and introduced in the legislature, Pls.' Ex. L (ECF No. 153-14), and the plaintiffs fail to set forth any justification for why this email is at all probative of intent. Nor do the plaintiffs explain how this email supports their assertion that Mr. Weissmann was a funnel of information from congressional staffers to Senate President Miller, *see* Pls. Mem. (ECF

No. 153-1) at 10. To the extent the plaintiffs allege the existence of this email evidences the deletion of others, mere speculation about missing emails is not proper grounds for spoliation sanctions. *See Sachs v. Cantwell,* 2012 WL 3822220, *9 (S.D.N.Y. Sept.4, 2012) (denying spoliation motion where plaintiff had not established that the allegedly spoliated evidence had existed); *see also Krause v. Nevada Mut. Ins. Co.*, No. 2:12-CV-00342-JCM, 2014 WL 496936, at *7 (D. Nev. Feb. 6, 2014), *aff'd*, No. 2:12-CV-342 JCM CWH, 2014 WL 3592655 (D. Nev. July 21, 2014) (denying spoliation motion where there was "nothing to suggest that relevant documents . . . were destroyed or otherwise altered").

Second, the plaintiffs cite emails between Patrick Murray, then-chief of staff to President Miller, and congressional staffers purportedly "regarding changes that Congressman Hoyer and Sarbanes were demanding to the draft Congressional Map," but do not attach any such emails. ECF No. 153-1 at 3; *see* Pls.' Ex. M (ECF No. 153-15) (email from congressional staffer providing contact information while attending his sister's wedding). Again, the plaintiffs appear merely to allege that such emails existed and were not properly preserved.

Third, the plaintiffs cite "emails relating to a September 2011 meeting between former Governor O'Malley, Speaker Busch, Senate President Miller, the chiefs of staff for U.S. Representatives Steny Hoyer and John Sarbanes, and NCEC Services, Inc. concerning the congressional map." ECF No. 153-1 at 3. However, these emails were not exchanged with President Miller, Speaker Busch, former Governor O'Malley, or any of their staff members. *See* Pls.' Ex. N (ECF No. 153-16). Nor have the plaintiffs explained how these emails, discussing parking logistics, are probative of their claims of intent. Again, merely

assuming that other emails pertaining to this meeting existed and were destroyed is not evidence of spoliation. Moreover, the plaintiffs misleadingly omit a piece of that email string indicating that the proposed meeting with Speaker Busch and Senate President Miller may not have taken place. Ex. 9 (email from B. Romick).

Fourth, the plaintiffs cite "emails and documents related to a series of meetings in September 2011 between former Governor O'Malley, Jeanne Hitchcock, Joseph Bryce (Governor O'Malley's chief legislative officer), Dana Thompson (Governor O'Malley's federal relations director), and Samuel Clark (Director of the Office of the Governor)." ECF No. 153-1 at 3. The email itself does not disclose the subject matter or topics of the meeting. Pls.' Ex. O (ECF No. 153-17). As discussed above, the plaintiffs have chosen not to incur the burden of searching former Governor O'Malley's archived documents. Moreover, the plaintiffs merely assume that other emails and documents memorializing these meetings existed.

Fifth, the plaintiffs cite "documents and emails related to former Senate Majority Leader Garagiola's Spring 2011 exchange informing Senate President Miller that he planned to run for Congress in the Sixth Congressional District." As discussed above, the plaintiffs have offered no evidence that former Senator Garagiola played a key role in redistricting. Moreover, the deposition testimony on which the plaintiffs rely indicate that any such meeting would have taken place in person and thus the absence of any documents or emails is not evidence of spoliation. ECF No. 153-1 at 4; *see* Pls.' Ex. P (ECF No. 153-18) at 146:1-153:22.

Sixth, the plaintiffs cite "documents and emails related to an August 2011 meeting between U.S. Representative John Sarbanes and Maryland Senate Majority Leader Robert Garagiola concerning congressional redistricting." ECF No. 153-1 at 4. Again, the plaintiffs have offered no explanation for why there was any duty of the non-party state officials against whom the plaintiffs seek sanctions, the defendants to this action, or their counsel to preserve Mr. Garagiola's documents, given that he had no role in redistricting. Nor do the plaintiffs explain how a lack of documents from an in-person meeting is evidence of spoliation. *See* Pls.' Ex. Q (ECF No. 153-19) (setting up a 10-15 minute, in person meeting).

Seventh, the plaintiffs cite "a November 30, 2011 email chain between Joseph Bryce (Governor O'Malley's chief legislative officer), Brian Romick (Congressman Steny Hoyer's chief o[f] staff), and David Heller (a democratic campaign consultant) referring to an order naming Judge Niemeyer to the three-judge panel in *Fletcher v. Lamone*, 8:11-cv-03220 (D. Md.) as 'a serious problem,' and referencing Judge Niemeyer's supposed 'political leanings.'" The plaintiffs fail to explain how this email chain is at all probative of intent, given that it has nothing to do with the congressional redistricting process or anyone's legislative motive or intent. *See* Pls.' Ex. R (ECF No. 153-20).

ARGUMENT

I. THE PLAINTIFFS' DELAY IN BRINGING THEIR CLAIMS RESULTED IN A SIGNIFICANT GAP DURING WHICH NO DUTY TO PRESERVE DOCUMENTS EXISTED, AND THE PLAINTIFFS SHOULD NOT BE HEARD TO COMPLAIN OF ANY ALLEGED FAILURES OF DOCUMENT RETENTION RELATED TO THEIR LATE-FILED CLAIMS.

This Court should deny the plaintiffs' spoliation motion because the plaintiffs have come forward with no evidence that any relevant document or other tangible object was destroyed during the time that there was any "pending or reasonably foreseeable litigation" concerning Maryland's 2011 congressional redistricting process. *Silvestri*, 271 F.3d at 590. Because the plaintiffs failed to bring their initial claims until nearly two years after the plan was enacted and more than 15 months after other litigation challenging the same plan had been resolved, there was no intervening "duty to preserve" relevant evidence, and, thus, the plaintiffs cannot demonstrate that any of the state actors against whom they seek sanctions "breach[ed]" any duty "through the destruction or alteration of the evidence." *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 269 F.R.D. 497, 521 (D. Md. 2010).

After the Plan was enacted, three lawsuits were brought challenging the constitutionality of Maryland's congressional redistricting. *Gorrell v. O'Malley*, filed October 27, 2011; *Fletcher v. Lamone*, filed November 10, 2011; and *Olson v. O'Malley*, filed November 22, 2011. The latest court action concerning any of those cases occurred on July 27, 2012, when the Supreme Court affirmed the three-judge court's grant of the defendants' motion for summary judgment in *Fletcher v. Lamone*, 133 S. Ct. 29 (2012). The plaintiffs have provided no justification for why the defendants should have anticipated further litigation surrounding the constitutionality of the plan, other than to

point out that in the 2002 redistricting cycle, a challenge was filed on September 9, 2002, a mere four months after the plan was signed into law on May 6, 2002, *see Kimble v. Willis*, No. AMD 02-2984, 2004 WL 1305328, at *1, *2 (D. Md. June 10, 2004).

Here, in contrast, the plaintiffs waited 24 months after Senate Bill 1 was signed into law to bring their claims, and, by that time, there had been a 15-month gap in any pending litigation challenging Maryland's congressional redistricting plan. Faced with a similar gap in litigation, this court has held that a defendant county had no duty to preserve documents as of the time prior litigation had been resolved, even where the plaintiff had reserved rights to bring future actions against the same defendant. Accordingly, the defendants in that case were under no duty to preserve documents when they deleted files of a former employee only three months after the prior case had ended. *Huggins v. Prince George's County, Md.*, 750 F. Supp. 2d 549, 560 (D. Md. 2010); *see also Gaffield v. Wal-Mart Stores E., LP*, 616 F. Supp. 2d 329, 337–38 (N.D.N.Y. 2009) (no duty to preserve evidence where even though plaintiff had put store on notice that she intended to file suit, she did not pursue the suit for approximately two years).

Moreover, when the plaintiffs filed their initial and first amended complaints in this case, they did not bring any claims challenging or in any way dependent on legislative motive and intent. Rather, the plaintiffs were "challenging the narrow ribbons and orifices used to tie de-facto non-contiguous and demographically inconsistent segments into individual districts – and not the overall partisan make-up of the state's Congressional districts." Compl. (ECF No. 1) ¶ 2; Am. Compl. (ECF No. 11) ¶ 2. The pleadings even highlighted the "critical and significant distinction" of their challenge to the shape of the

districts in that it "d[id] not rely on the reason or intent of the legislature – partisan or otherwise – in its incorporation of these features," and the plaintiffs explained that "this distinction impacts both the standard [plaintiffs] offer for determining the adequacy of representational rights as well as the requested relief to restore such abridged rights." *Id.* The plaintiffs' First Amendment claim also centered on the "structure and composition of the abridged sections" of the 4th, 6th, 7th, and 8th congressional districts, alleging they infringed upon the plaintiffs' First Amendment rights of political association. Am. Compl. (ECF No. 11) ¶ 5.

Notably, the plaintiffs do not complain that they have not been able to obtain documents that would have been relevant to their initial claims in this case, and they have come forward with no evidence that any such documents have been destroyed. Instead, the plaintiffs complain that they should be able to depose legislators and those acting in a legislative capacity about their legislative motive and intent based on their unsupported allegations that documents relevant to their *current* claims were not properly preserved. However, there was no pending litigation challenging the motives or intent of State actors who developed and enacted the plan from July, 2012, when the Supreme Court affirmed *Fletcher*, until March, 2016, when the plaintiffs filed their second amended complaint nearly five years after the enactment of Senate Bill 1. The plaintiffs offer no reasonable justification for why any state actor should have reasonably foreseen the substantial amendments to the pleadings in this case made nearly two-and-a-half years after the initial lawsuit was filed, challenging legislative motive and intent. This is particularly so because Stephen Shapiro, a plaintiff in the case up through his voluntary dismissal in November,

2016 (ECF No. 105), had testified in support of a similar joining of western sections of Montgomery County with Western Maryland in order to create a sixth congressional district that, in Mr. Shapiro's words, "based on history and geography, would be a reasonable situation and one that existed several decades ago." Ex. 8 (Shapiro Test.).

In short, the plaintiffs failed to put the defendants or any other state actor on notice that they were challenging "the reason or intent of the legislature" with regard to the 2011 congressional redistricting plan until March, 2016. Yet, the plaintiffs seek to punish the non-party state officials for allegedly failing to preserve responsive documents for use by the plaintiffs to prove those late-filed claims. The alleged conduct about which the plaintiffs complain is nothing more than a known consequence of their own inaction in bringing their claims.

To excuse their own failings, the plaintiffs rely on the pendency of unrelated litigation during the 15-month gap in litigation. The plaintiffs point to state court litigation (1) challenging *legislative* redistricting, *In re 2012 Legislative Redistricting of the State*, 436 Md. 121 (2013); (2) challenging how Senate Bill 1 was petitioned to referendum, *Whitley v. Maryland State Bd. of Elections*, 429 Md. 132 (2012); and (3) challenging the language of the referendum certified to appear on the November, 2012 ballot, *Parrot v. McDonough*, 440 Md. 226 (2014). Notably, none of these lawsuits challenged the process by which Senate Bill 1 was developed or enacted; none challenged the effects of Senate Bill 1; and none challenged or even contained any allegations about the intent or purpose of the GRAC in developing the proposed map, the General Assembly in enacting Senate Bill 1, or the Governor in proposing or signing the legislation. The plaintiffs fail to explain

how the mere existence of these lawsuits, filed close in time to the events forming the basis of those lawsuits' claims, make belated litigation over the intent and effects of the 2011 congressional redistricting plan reasonably foreseeable. Indeed, they contend only that "additional legal challenges were possible." Pls. Mem. (ECF No. 153-1) at 27. But the "logical result of their stance is that a defendant is required to hold all possibly relevant records to all possible litigation if any litigation could possibly occur – an extreme position that extends foreseeability beyond reasonableness." *Huggins*, 750 F. Supp. 2d at 561.

II. THE PLAINTIFFS HAVE PRESENTED NO EVIDENCE THAT ANY OF THE NON-PARTY STATE OFFICIALS AGAINST WHOM THEY SEEK SANCTIONS BREACHED A DUTY TO PRESERVE DOCUMENTS.

The plaintiffs do not name those individuals against whom they seek sanctions, instead seeking an order "compelling all state-official witnesses to testify at deposition without invoking legislative privilege." The plaintiffs do not explain why they believe spoliation sanctions are warranted against non-party state officials and have identified no case in which a court has fashioned such a remedy.[3] *See, e.g.*, *Wandering Dago Inc. v. N.Y. State Office of Gen. Servs.*, No. 1:13-CV-1053 MAD, 2015 WL 3453321, at *7 (N.D.N.Y. May 29, 2015) (rejecting plaintiff's attempt to hold defendants, their counsel,

[3] The only case the plaintiffs cite in support of their novel claim for spoliation sanctions against non-parties had nothing to do with compelling depositions of non-parties or depriving any fact witness of any testimonial privileges; rather, because of the defendants' spoliation of documents in that case, the plaintiffs were permitted to take depositions of fact witnesses prior to resolution of a motion to dismiss where the "plaintiffs would be entitled to take these depositions as part of the regular course of discovery." *Zimmerman v. Poly Prep Country Day Sch.*, No. 09 CV 4586 FB, 2011 WL 1429221, at *32 & n.69 (E.D.N.Y. Apr. 13, 2011). There was no indication that the putative deponents opposed their depositions or had sought to quash deposition subpoenas.

or a non-party responsible for non-party's destruction of emails "because [he] is and has always been nothing more than a nonparty witness to this litigation"). Spoliation is not a substantive claim for relief. *Hodge v. Wal–Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (citation omitted). And although the plaintiffs seek sanctions under this Court's inherent authority to redress conduct that abuses the judicial process, this Court should reject the plaintiffs' attempts to skirt the potential outcome of an outstanding non-party discovery dispute not yet decided by the three-judge Court. To the extent the plaintiffs wish to punish the non-parties for their conduct as it relates to their role as fact-witnesses in this case, the only basis for relief is found in Rule 45(g).

The plaintiffs have served deposition subpoenas on four "state-official witnesses," all of whom are sitting legislators and none of whom has ever been a party to this litigation or any other lawsuit arising from the 2011 redistricting process. Of these four state officials, the plaintiffs' sanction motion is completely silent as to two of them: Senator C. Anthony Muse and Delegate Curt Anderson. With respect to the other two, Senate President Miller and House Speaker Busch, the plaintiffs offer only their own speculation that the legislator-members of the GRAC destroyed or failed to preserve evidence for use in pending or reasonably foreseeable litigation.

Indeed, despite the lack of any pending litigation or reasonable anticipation of new litigation, the legislator-members of the GRAC's responses to the plaintiffs' subpoenas demonstrate that both Speaker Busch and President Miller preserved documents related to congressional redistricting. As noted above, President Miller's office preserved the contents of the laptop containing the redistricting software Maptitude that was used by the

GRAC as part of the congressional redistricting process. In addition, emails sent from the Speaker's and President's staff concerning redistricting have been produced, indicating they were preserved. Notably, many of these emails were preserved prior to the issuance of the October 31 litigation hold, belying the plaintiffs' suggestion that no state actor took any effort to preserve documents during this time period. The plaintiffs, again based solely on their own surmise, allege that the fact that these documents and emails were *preserved* must demonstrate that other unspecified emails and documents were *destroyed*. This Court should reject such unfounded speculation as grounds for issuance of sanctions. *See Sachs,* 2012 WL 3822220, at *9 (denying spoliation motion where plaintiff had not established that the allegedly spoliated evidence had existed). Moreover, the Supreme Court has noted that states engaged in redistricting need not compile "a comprehensive administrative record." *Bush v. Vera*, 517 U.S. 952, 966 (1996) (quotation omitted).

Sanctioning non-parties who preserved documents relevant to the plaintiffs' claims after any obligation to do so had been relieved would not "serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Silvestri*, 271 F.3d at 590 (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)).

Moreover, the plaintiffs have known for almost two months the scope of documents possessed by President Miller and Speaker Busch, based on their responses to the plaintiffs' document subpoenas. And yet the plaintiffs never sought to compel any discovery into these legislators' document retention practices. Indeed, the plaintiffs did not move to compel the deposition testimony of these legislators based on any alleged failure to preserve documents and did not express any intent to depose these legislators about their

document preservation practices in the motions to compel that they did file. *See* ECF Nos. 111-1, 120, 123. Nor have the Plaintiffs requested that President Miller or Speaker Busch provide written answers to questions about their document retention practices (having posed only one question during the purported meet and confer as to whether these legislators would agree to sit for deposition on these topics during legislative session).[4] Rather, the plaintiffs waited almost two months to indicate that they found President Miller's and Speaker Busch's responses to document subpoenas to be evidence of spoliation, despite having obtained no new evidence that these legislators destroyed any documents or emails *at all*, much less while the plaintiffs' litigation was pending. And they have done so, not through a motion to compel or for additional discovery on document retention, but in an unsupported motion for sanctions seeking only to deprive President Miller and Speaker Busch of their legislative privilege.

[4] In their Rule 104.7 statement, plaintiffs' counsel provides no detail about the purported meet and confer session with undersigned counsel, other than the timing of the call. Notably, the plaintiffs had not asked to meet and confer about the issue of spoliation, but rather brought up the subject at the end of a call scheduled to discuss the plaintiffs' Rule 30(b)(6) deposition notice. At no time did plaintiffs' counsel identify that they sought to meet and confer about spoliation. Rather, at the end of the call, plaintiffs' counsel posed a single question concerning depositions of non-parties, asking whether undersigned counsel would agree to make the non-party subpoena targets available to be deposed on their document retention practices. Having had no opportunity to prepare for a meet-and-confer on this subject and, thus, not having discussed this offer with the subpoena targets, undersigned counsel answered simply in the negative. Although plaintiffs' counsel stated that the plaintiffs may file a spoliation motion, they did not offer or seek any alternative resolution to gather information about the non-parties' document retention policies.

To the extent the plaintiffs seek to sanction President Miller or Speaker Busch for the alleged conduct of their staff members, such a theory is even more lacking in foundation. Plaintiffs have not sought to depose *any* of the staff members identified as having been involved in congressional redistricting. Rather, plaintiffs have, illogically and without evidentiary foundation, sought sanctions against their bosses. Moreover, the plaintiffs have come forward with no evidence that any of these staff members failed to preserve relevant documents during any time that there was a corresponding duty to preserve documents.

The plaintiffs, having not timely sought to compel any of this information directly from President Miller or Speaker Busch or their staffers, assign blame to the defendant State Board of Elections officials for not providing specific enough information about these non-parties' document retention policies in party discovery. These allegations are addressed in the defendants' response in opposition, and are incorporated by reference herein. Moreover, the plaintiffs cite no authority for sanctioning non-parties based on the defendants' conduct in discovery.

Although they seek sanctions only against "state-official witnesses," it is worth noting that the plaintiffs have not alleged that Jeanne Hitchcock, Richard Stewart, or former Governor O'Malley (the three private citizens and former state officials served with deposition subpoenas) have engaged in any wrongdoing. First, Richard Stewart, who was a private citizen when he served on the GRAC, produced emails that he saved in his private email account in response to the document subpoena served on him. Although the plaintiffs allege that Mr. Stewart must have spoliated evidence related to his time on the GRAC, they

have produced no evidence that Mr. Stewart did so, other than Mr. Stewart's inability to locate a few emails produced by others and containing logistical information that is immaterial to the plaintiffs' claims. *See Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (recognizing that litigants are not required to preserve "every shred of paper, every e-mail or electronic document, and every back up tape").

With regard to Ms. Hitchcock, the plaintiffs finally acknowledge that she is a private citizen without access to State records or her former government email account, a distinction they failed to make in their motion to compel. Instead, to the extent the plaintiffs seek to sanction her, they do so based on the alleged fault of the Office of the Attorney General for not producing these records. Of course, the defendants have produced numerous documents concerning Jeanne Hitchcock's involvement with the GRAC, including her GRAC briefing book and the transcripts of the public hearings Ms. Hitchcock chaired across the state. And through other document requests, the plaintiffs have been provided with emails sent or received by Ms. Hitchcock in relation to her service on the GRAC; notably, none of these emails are material to the plaintiffs' claims. *See* Pls. Ex. K (ECF No. 153-13). Similar to the other GRAC members,[5] the plaintiffs did not seek to compel Ms. Hitchcock's deposition testimony on the basis that they needed to question her

[5] The plaintiffs complain that the fifth GRAC member, James King, also a private citizen at the time he served on the GRAC, did not produce emails on which he was copied that related to his time on the GRAC. The plaintiffs never served Mr. King with a subpoena for documents. Although Mr. King agreed to search his private email account for responsive documents, the plaintiffs offer no explanation for why other GRAC members should be sanctioned for Mr. King's voluntary responses to discovery. Moreover, the emails on which Mr. King was copied either relate to the status of litigation or purely logistical matters involving the GRAC, neither of which is material to the plaintiffs' claims.

about her document retention practices, despite the plaintiffs' complaints about her inability to produce responsive documents in response to the subpoena served on her. *See* ECF No. 111-1 at 9.

With regard to former Governor O'Malley, the plaintiffs also have produced no evidence that he or his staff members failed to preserve documents while this litigation was pending or was reasonably foreseeable. Indeed, as discussed above, former Governor O'Malley's senior legislative aide, Joseph Bryce, preserved numerous emails related to congressional redistricting. Notably, moreover, by the time the plaintiffs brought any claims that were at all relevant to the legislative motive and intent of the GRAC members or former Governor O'Malley, his administration faced term limits; a general election took place; the Maryland executive switched parties; and former Governor O'Malley had gifted his papers to archives.

With regard to all three former state officials, the plaintiffs never moved the Court to order formal discovery into their document preservation relating to this litigation, opting instead to seek sanctions based on unsupported allegations of spoliation. Again, the plaintiffs ignore the over 15-month gap in litigation, and they point to no evidence that any relevant emails were deleted by these former state officials while the plaintiffs' litigation was reasonably foreseeable or pending, much less since the plaintiffs amended their pleadings to include claims implicating legislative motive and intent.

Finally, with regard to all of their allegations of spoliation, it is too late for the plaintiffs to seek additional discovery, having foregone these avenues during the discovery period and having sought no relief from the Court other than their unsupported spoliation

motion. The plaintiffs should not be permitted "to engage in a fishing expedition" into various state actors' document retention practices having not timely sought such discovery. *Ellicott Mach. Corp. Intern. v. Jesco Const. Corp.*, 199 F.Supp.2d 290, 296 (D. Md. 2002) (denying spoliation motion and denying motion for additional discovery to support spoliation argument where party knew about alleged spoliation before the end of the discovery period yet waited until the last day of the discovery period to seek the extension); *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S F, 2011 WL 1549450, at *6–7 (W.D.N.Y. Apr. 21, 2011) (denying request to conduct discovery directed to party's document preservation because "[g]iven the lack of colorable factual basis for Campbell's spoliation motion, such request amounts to one seeking to initiate a 'fishing expedition' based on mere speculation").

CONCLUSION

For the reasons discussed above, this Court should deny the plaintiffs' motion for spoliation sanctions with prejudice.

Respectfully submitted,

Dated: March 2, 2017

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TABLE OF EXHIBITS

Exhibit No. Title

1. Letter and emails from Kathryn Rowe to Michael Kimberly (Nov. 15-16, 2016); letter from Sarah Rice to Stephen Medlock (Feb. 3, 2017)

2. Declaration of Linda H. Lamone

3. Privilege logs for House Speaker Michael E. Busch and Senate President Thomas V. Mike Miller, Jr.

4. Email from Dan Friedman to Joseph Bryce (Nov. 1, 2011)

5. Email from Kathryn Rowe to Stephen Medlock (Feb. 9, 2017), producing email from Dan. Friedman to Yaakov Weissmann (Oct. 31, 2011)

6. Defendants' Supplemental Responses to Plaintiffs' First Set of Interrogatories

7. Email from Kathryn Rowe to Stephen Medlock (Feb. 9, 2017), producing emails from K. Jones

8. Testimony of Steve Shapiro before the Governor's Redistricting Advisory Committee (Aug. 10, 2011)

9. Email from Brian Romick to MG2590@aol.com (Sept. 1, 2011)