**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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

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**DEFENDANTS' RESPONSE IN OPPOSITION**
**TO PLAINTIFFS' MOTION FOR SANCTIONS**

The defendant State Board of Elections officials file this response in opposition to the plaintiffs' motion for sanctions, which seeks to punish non-party "state officials" for the conduct of various state officials, the defendants, and the Office of the Attorney General. For the reasons set forth in the non-party state officials' response in opposition to the plaintiffs' sanctions motion, incorporated by reference herein, the plaintiffs' motion should be denied with prejudice.

The defendants further respond to the plaintiffs' allegations concerning the defendants' conduct. As explained in the non-parties' response in opposition, the defendants' counsel, Assistant Attorney General Jeff Darsie, received a preservation notice issued in response to litigation filed close in time to the passage of Senate Bill 1. Although State Board of Elections officials do not recall being directed to preserve documents at that time, that is likely because the State Board of Elections had "no role" in redistricting. Pls. Ex. EE (ECF No. 153-33) at 24-25. Rather, the State Board merely responded to a request

from the Department of Planning to provide elections data in May, 2011. *See* Ex. 1 (Decl. of Linda H. Lamone) ¶¶ 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. Ex. 2 (email from J. Katz to S. Medlock).

The plaintiffs also appear to fault the defendants for not providing sufficient information in party discovery concerning the document retention practices of non-parties. These complaints are foreclosed by plaintiffs' failure to move to compel the information they sought. In the answers to the plaintiffs' second set of interrogatories, the defendants raised objections, among others, that the plaintiffs sought discovery outside the scope of Rule 26(b)(1) to the extent they sought information about document retention practices during any time period prior to their filing of this lawsuit. The plaintiffs did not file a motion to compel related to this objection (or to this set of interrogatories at all) within thirty days of receipt of the response, as required by L.R. 104.8(a).[1]

[1] The plaintiffs' motion to compel answers to their first set of interrogatories was specific to the issue of control and whether the defendants could assert legislative privilege on behalf of non-parties. Even concerning the control issue, the Court's February 13, 2017 order, ECF No. 143, does not compel the defendants to provide information about non-parties' document retention practices in answers to interrogatories, and the Court's February 14, 2017 order makes clear that the defendants are not responsible for anything other than providing "basic information from nonparties." ECF No. 145. Answers to interrogatories about document retention practices, particularly in the context of a specific case, requires more than "basic information," requiring knowledge about what individuals believed to be relevant and their decisionnaking processes regarding which documents to preserve and whether they reasonably foresaw the filing of litigation. *See Favors v. Cuomo*, No. 11-CV-5632 DLI RR, 2015 WL 7075960, at *15 (E.D.N.Y. Feb. 8, 2015) (explaining that "responses to interrogatories are more akin to testimony than to disclosure of pre-existing documents" in that they "seek after-the-fact accounts of and explanations for" decisionmaking processes).

The plaintiffs also fault the defendants and the Office of the Attorney General for not responding to their informal discovery requests concerning non-parties' document retention practices, despite the absence of any obligation to comply with such requests under the rules or any order of this Court. The correspondence cited by the plaintiffs shows that in the course of the compressed formal discovery period, the plaintiffs' requests had become unduly burdensome given the outstanding formal discovery requests on the same topics. To the extent the plaintiffs were not satisfied with responses to formal discovery, they could have, but did not, seek to compel additional information or challenge the objections made therein.

The plaintiffs further complain that the defendants' Rule 30(b)(6) designee, when testifying only in agreement to produce a witness knowledgeable as to the defendants' document retention practices and policies (*see* ECF No. 118-1 at 2 n.1), did not provide testimony as to non-parties' document preservation practices. Notably, this Court has quashed that deposition notice entirely because the defendants are not required to "immerse themselves into another state agency's records and be able to testify as to that other agency's knowledge," and the Court found it "wholly improper to expect Defendants to learn what other individuals know and require Defendants to testify on their behalf." ECF No. 145 at 3.

Finally, the defendants must respond to the plaintiffs' allegation that the defendants have exhibited a "troubling willingness to offer up expedient (distinct from accurate) answers to our discovery requests concerning document preservation." Pls. Mem. (ECF No. 153-1) at 20. The plaintiffs refer to amended answers to interrogatories, in which the

defendants deleted a prior reference to an oral preservation directive given by counsel to the State Board of Elections in response to this litigation. This amendment arose from a miscommunication between undersigned counsel and long-standing counsel to the State Board of Elections, Mr. Darsie, who is on medical leave due to a serious illness. As soon as the misunderstanding was resolved, the defendants served amended responses within the discovery period and before the defendants' limited Rule 30(b)(6) deposition took place, and explained to the plaintiffs the unfortunate circumstances concerning Mr. Darsie's unavailability. *See* Ex. 3 (email from J. Katz to S. Medlock). Imposing sanctions for such benign conduct, about which the plaintiffs never expressed any concerns to undersigned counsel other than through the filing of this motion, would not "serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)).

For all of these reasons and those set forth in the non-parties' response in opposition, 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. Declaration of Linda H. Lamone
2. Email from Jennifer Katz to Stephen Medlock (Jan. 13, 2017)
3. Email from Jennifer Katz to Stephen Medlock (Feb. 3, 2017)