IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR PROTECTIVE ORDER
FROM RULE 30(b)(6) DEPOSITION

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INTRODUCTION

Defendants' motion for a protective order concerning their Rule 30(b)(6) designee is a variation on two familiar themes: first, hide behind misplaced invocations of privilege and an overwrought view of the separateness of state agencies, and, second, ignore all of the arguments Plaintiffs have made in their prior briefs as though they didn't exist. Enough is enough. The Court should reject Defendants' repeated (and repeatedly unpersuasive) efforts to avoid disclosing evidence that the GRAC drew the 2011 redistricting plan with the specific intent to dilute the votes of Republicans in the old Sixth District.

As former Governor O'Malley recently explained in a speech delivered at Boston College School of Law:

> I can speak [about redistricting] with the credibility that comes from experience. As a governor, I held that redistricting pen in my own Democratic hand. I was convinced that we should use our political power to pass a map that was more favorable for the election of Democratic candidates. . . . How can we expect people to vote if their voice has been carved into irrelevance by a political map ahead of time?

Ex. A at 11. Governor O'Malley's attorney general, Douglas Gansler, was even more direct when discussing the State's 2011 Congressional redistricting:

> So many people have a problem with the way in which the state was gerrymandered this last time. For example, in the Sixth District . . . Garrett County, Maryland, a very rural, agrarian part of the state is couple with Potomac, Maryland in Montgomery County, which is perhaps the most wealthy and lest agrarian part of the state. And, yet, they are voting for the same representative in the election between Roscoe Bartlett, a long-time Congressman, and John Delaney, sort of a new-comer on the political scene. . . . So, what happened, . . . the Democrats had the ability . . . to look at the state gerrymandered in such a way to make it 7 [Democratic representatives] to 1 [Republican representative]. . . . They were looking, do they want to make the Eastern Shore, try that again, to make it even more Democratic and make that the seventh Democratic district, or Western Maryland. They chose Western Maryland, and it's actually a 53% Democratic district.

Ex. B at Supp. Interrog. Resp. 7.

Not wanting to answer questions about these and other similar statements that reflect a consistent understanding of the key facts by the key players, Defendants now hide behind the same control-and-privilege arguments that we already debunked in our December 29, 2016 motion to compel. *See* 12/29 Mot. to Compel 11-31 (Dkt. 125-1) ("12/29 Motion"); *see also* Reply ISO 12/29 Mot. 6-9, 11 (Dkt. 125-3) ("12/29 Reply"). As we have shown (with citations to actual *evidence*), Defendants have demonstrable access to relevant information possessed by other state agencies, legislators, and members of the executive branch. Therefore, they are required to prepare a 30(b)(6) witness based on this information. In response, Defendants offer only the protestations of their lawyers in briefs. That is not enough to satisfy the burden they bear to avoid having to participate meaningfully in discovery. Nor may Defendants fall back on the legislative privilege. For all of the reasons that have now been briefed in two motions to compel and three motions to quash, that privilege is simply inapplicable here. The motion for a protective order accordingly should be denied.

BACKGROUND

Plaintiffs served a deposition notice pursuant to Rule 30(b)(6) on Defendants on January 7, 2017. *See* Ex. C. The notice contained 37 topics for examination, covering a range of relevant issues. The topics generally fall into the following four categories: (1) factual issues concerning the planning, drafting, and implementation of the 2011 congressional redistricting plan, including the intent of, information used by, and public statements made by those who drew and ratified the plan (Topics 1-5, 9-13, 16-23); (2) factual bases for Defendants' asserted denials, affirmative defenses, justifications, and discovery responses (Topics 6-8; 14-15, 24-28); (3) factual issues concerning

Defendants' document preservation and collection practices (Topics 29-35); and (4) the authenticity and admissibility of documents produced in this case (Topics 36-37).

The scope of these topics was guided by the Court's August 24, 2016 opinion denying the Defendants' Motion to Dismiss and laying out the elements of Plaintiffs' affirmative case. *Shapiro v. McManus*, ---F. Supp. 3d---, 2016 WL 4445320, at *10-11 (D. Md. 2016). To resolve any uncertainty, Plaintiffs identified specific "relevant individuals" that are likely to possess the information sought in the Rule 30(b)(6) notice, based on prior discovery responses from Defendants and publicly available information. Ex. C at 2. These individuals include the members of the GRAC, certain staffers identified by Defendants, and state agencies that worked alongside the State Board of Elections to assist the map drawers. *Id.*

On January 12, 2017, Defendants served their objections, contending that the entire 30(b)(6) notice was improper and should be withdrawn. Ex. D. That same day, Counsel met and conferred regarding the Rule 30(b)(6) notice. Defendants agreed to produce a witness on three topics concerning the factual bases for its affirmative defenses (Topics 26-28) and provisionally agreed to designate a witness to testify on topics concerning the State's document preservation practices (Topics 30-33, 35). Ex. E (1.15.17 Letter from Medlock). Plaintiffs agreed to withdraw two topics concerning the authenticity and foundation of documents produced in this litigation (Topics 36-37) in light of the State's willingness to stipulate to those issues by email. *Id.* On January 16, 2017, Defendants moved for this Protective Order seeking to "significantly limit[] the scope of the Rule 30(b)(6) notice or strik[e] the majority of the topics in their entirety." Mot. 2.

As Defendants' conduct throughout this case and in prior redistricting cases has demonstrated, they can (when they want to) pick up the phone or walk down the hall to obtain relevant documents and information from all corridors of state government. We detailed the basis for this observation in our prior briefing, which we incorporate by reference. *See* 12/29 Mot. 6-11, 31-35; 12/29 Reply 6-10.

Defendants did not raise a similar control objection in *Fletcher v. Lamone*, Case No. 8:11-cv-3220 (D. Md.), a 2011 challenge to the Congressional redistricting that also contained an allegation of unconstitutional partisan gerrymandering. The defendants in *Fletcher* were also Linda Lamone, in her official capacity as State Administrator of Elections, and David McManus's official predecessor, Robert Walker, in his official capacity as Chairman of the State Board of Elections. In that case, the same Defendants—rather than objecting that they did not have and could not obtain the relevant information—put forth detailed, fact-based arguments about the drafting of the 2011 map, the intent of the map drawers, and the effect of the new Congressional map. *See* Ex. F (*Fletcher* MTD); Ex G (*Fletcher* Reply ISO MTD).

In particular, the Defendants in that case stated:

- "The State Plan is the product of the careful consideration of a variety of legitimate districting principles, including ensuring equality of population, maintaining the core of existing districts, protecting communities of interest, respecting existing representational relationships, recognizing growth patterns, and, as plaintiffs claim, partisan considerations." Ex. F at 41.

- The Governor, GRAC, and legislature "all considered and gave effect to a variety of traditional, legitimate redistricting considerations, many of which exist in tension with others." Ex. G at 15. This includes "partisan political considerations." *Id.* at 18.

- "Maryland's registered voters are more than 2 to 1 Democrats over Republicans. GRAC reviewed several partisan maps, including, at one extreme, a map that was projected to produce four Democratic-majority districts and four Republican-majority districts and, at the other extreme, a map that would have

produced eight majority-Democratic districts. Rejecting both extremes, GRAC drew a map that makes five of the eight districts (*i.e.*, Districts 2, 3, 5, 6, and 8) more politically competitive than they were under the prior plan. GRAC members understood that, of the remaining three districts, District 1 was expected to perform as a consistently safe Republican district, while Districts 4 and 7 were expected to remain safely Democratic." Ex. G at 18 (internal footnotes omitted).

- "Plaintiffs do not dispute that the plan was driven, to a large extent, by the desire to make an additional district more politically competitive while protecting the other current incumbents, including one Republican." Ex. F at 42.

In addition, Defendants in *Fletcher* managed to gather declarations from senior officials at the Department of Public Safety and Corrections (DPSC), Department of Planning (DOP), and Department of Legislative Services (DLS) concerning precisely how these state agencies worked together to plan and implement the Congressional redistricting. *See* Ex. F at 21-22.

In short, Defendants in 2011 were able to obtain sufficient information to make these statements concerning the intent of the Governor, GRAC, and legislature; the map-drawing process; and the electoral impact of the 2011 map. Today, Plaintiffs seek deposition testimony concerning the same information.

ARGUMENT

Federal Civil Rule 30(b)(6) provides that a government agency named as a deponent must "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf," and "[t]he persons designated must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). The designee must testify as to "the knowledge of the [entity], not of the individual deponent[]." *United States v. J.M. Taylor,* 166 F.R.D. 356, 361–62 (M.D.N.C.1996). This creates a "duty" in the entity "to present and prepare a Rule 30(b)(6) designee . . . beyond matters personally known to that designee

or to matters in which that designee was personally involved." *Id*. Therefore, the deponent "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the requesting party] and to prepare those persons in order that they can answer fully, completely, and unevasively, the questions posed . . . as to the relevant subject matters." *Wilson v. Lakner*, 228 F.R.D. 524, 528 (D. Md. 2005) *(*quoting *Mitsui & Co. v. P.R. Water Res. Auth.,* 93 F.R.D. 62, 67 (D.P.R. 1981)). This preparation includes gathering information from "documents, present or past employees, or other sources." *Id*.

The party seeking a protective order under Rule 26(c) bears the burden of production and persuasion (*Caesars*, 237 F.R.D. at 432), and "the standard for issuance of a protective order is high." *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009). "As a general rule, courts will not grant protective orders that prohibit the taking of deposition testimony." *Caesars*, 237 F.R.D. at 432. To overcome the very strong presumption in favor of open testimony, a party must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 102 n.16 (1981) (internal quotation marks omitted). Defendants' burden here cannot be satisfied, in other words, by "'[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning.'" *McDonnell v. Hewitt-Angleberger*, 2012 WL 6088830, at *2 (D. Md. 2012) (quoting *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)). Yet that is all we have. The motion for a protective order accordingly must be denied.

A. Plaintiffs' Rule 30(b)(6) notice is limited and reasonable and does not create an "undue burden" for Defendants

Defendants first argue that Plaintiffs' deposition topics "should be stricken in their entirety" because they are "patently overbroad, unduly burdensome, and

oppressive." Mot. 10. Plaintiffs noticed 37 topics for examination; the parties resolved nine of the topics, leaving 28 outstanding topics for this Motion. Defendants cannot identify a single case where a court has stricken such a limited 30(b)(6) notice in its entirety. The court should decline to do so here.

Recognizing their weakness on this point, Defendants engage in creative math in an attempt to inflate the deposition notice; in their view, the notice actually encompasses "nearly 2,500 separate topics." Mot. 11. But that is only the conservative estimate; in their initial objections to the 30(b)(6) notice, Defendants calculated that the notice in fact contained "8,184 separate topics." Ex D at 4. To reach these absurd numbers, Defendants first unwind the deposition topics into their component parts and then multiply that figure by the total number of individuals from which they may be required to seek information.

No court to our knowledge has ever conducted this kind of artificial multiplication to determine the "true" number of deposition topics at issue; the State certainly cites none. And no surprise why not: The State's approach would render almost any 30(b)(6) deposition notice wildly overbroad. By the its logic, a Rule 30(b)(6) notice issued to Apple (116,000 employees), GE (333,000 employees), or Microsoft (114,000 employees) would entail literally millions of topics.

Defendants' argument boils down to a complaint that they must identify certain individuals with relevant information, collect that information, and then educate their designee. But there is nothing unduly burdensome about that requirement; in fact, it is the bare minimum required to prepare for a Rule 30(b)(6) deposition. A corporate party simply "must make a good faith effort to 'find out the relevant facts—to collect information, review documents, and interview employees with personal knowledge,'"

even when that entails interviewing numerous employees or other witnesses. *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 238 (D. Md. 2010) (quoting *Wilson*, 228 F.R.D. at 528-29). That is all that our 28-topic deposition notice requires. Defendants have given no real reason that they should get a pass.

B. Defendants are obligated to obtain "reasonably available" information from related entities

1. The State next argues that the 30(b)(6) notice is overbroad because it requires Defendants to obtain "knowledge of another entity." Mot. 9 (quoting *DSM Desotech Inc. v. 3D Sys. Corp.*, 2011 WL 117048, at *8 (N.D. Ill. 2011)). That is not the standard.

Rule 30(b)(6) requires an entity to designate and prepare a witness to testify as to "matters known or reasonably available to the organization," based on information "from documents, past employees, or *other sources*." *J.M. Taylor*, 166 F.R.D. at 360-61 (M.D.N.C. 1996) (emphasis added; internal quotation marks omitted). "[C]ourts have rejected an approach which limits the 'reasonably available' requirement to only information possessed by entities over which the corporate deponent has direct legal control." *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, 2013 WL 627149, at *5 (D. Colo. 2013) (citation omitted). Courts construe this duty broadly, generally holding that it is co-extensive with information in a party's "possession, custody, or control" under Rules 33 and 34. *See Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.,* 2002 WL 1835439, at *2 (S.D.N.Y. 2002). Thus, "the 'or reasonably available' language of Rule 30(b)(6) can extend to information held by corporate affiliates." *Sanofi-Aventis v. Sandoz, Inc.,* 272 F.R.D. 391, 394 (D.N.J. 2011) (collecting cases).

"The determination of whether information is known or reasonably available to a corporation requires a fact-specific analysis." *Coryn Grp.,* 265 F.R.D. at 239. In *Coryn Group*, the district court held that a litigant was required to obtain knowledge from its corporate affiliate for a Rule 30(b)(6) deposition where, among other things, the "affiliates operat[ed] as a unit, sharing information amongst themselves." *Id*. Similarly, in *Sanofi-Aventis*, the court concluded that "[d]irect, legal control over the related entity is not required" in order for knowledge from related entities to be reasonably available for a 30(b)(6) deposition. 272 F.R.D. at 395. Rather, information held by an affiliate is "reasonably available" within the meaning of the Rule when (1) the defendant could procure documents from the affiliated entity "as needed" and (2) the related parties "acted together in the transaction at issue." *Id*; *see also Murphy v. Kmart Corp.,* 255 F.R.D. 497, 508-09 (D.S.D. 2009) (holding that a corporation with sufficient access and control was charged with knowledge of its parent and sister corporations for purposes of a representative deposition).

That describes the circumstances here exactly. As we explained in the 12/29 Mot. (at 6-10 & 31-35), Defendants have demonstrated that they have the "practical ability to obtain the materials sought on demand" from these agencies and officials. *Steele Software Sys. Corp. v. Dataquick Info. Sys., Inc.*, 237 F.R.D. 561, 564 (D. Md. 2006) (internal quotation marks omitted).[1]

2. In addition, both factors identified in *Sanofi-Aventis* concerning whether information is "reasonably available" to a litigant are present here:

[1] Defendants' cases on this point are inapposite. None involved the type of coordinated activity between affiliated entities that exists here, nor did the parties demonstrate the actual ability to obtain information from the related entities. *See Covington v. Semones,* 2007 WL 1052460, at *1-2 (W.D. Va. 2007*); State ex rel. Boardman v. Amtrak*, 233 F.R.D. 259, 264 (N.D.N.Y. 2006).

Defendants can obtain documents from other agencies and branches "as needed." Prior to the start of discovery, Defendants procured relevant documents and information "from a number of state agencies and actors," including "the Maryland Department of Planning, the Maryland Department of Legislative Services, individual members of the GRAC, and staffers to the legislator [*sic*] members of the GRAC." Mot. 3. To obtain these documents, the OAG "coordinated through colleagues within the OAG who represent these persons and entities." *Id.* After formal discovery began, Defendants "provided responsive information obtained from non-parties" in response to plaintiffs' Requests for Production. *Id.* at 5. Only after Plaintiffs pointed out that Defendants' maintained control over these sources of information did the well of documents dry up. Ex. H (12.23.16 Letter from OAG) at 5.

Against this backdrop, Defendants bear the burden of establishing that information held by fellow agencies and government entities is not available to them. *See Coryn Grp.*, 265 F.R.D. at 239 ("Where a company fails to provide sufficient evidence why it would not have access to the basic information of its affiliate(s), that information is presumed to be known or reasonably available to the corporation.").

To meet this burden, Defendants offer only a declaration from Linda Lamone, to the effect that "neither [she] nor any other staff or member of the State Board of Elections has any ability to obtain information" from anyone outside of the Board of Elections. Mot. Ex. 9 at 3. But the declaration fails to explain how Defendants have already managed to obtain much of the same information we requested from numerous agencies and entities outside of the Board of Elections. For example, Defendants produced—unsolicited by Plaintiffs—thousands of pages of self-serving documents detailing the GRAC's efforts to solicit public input on the redistricting process,

including transcripts from public hearings and comments submitted online. *See* ECF No. 104. The Defendants have repeatedly demonstrated the ability to procure documents and information from throughout the state government "as needed."

State agencies and branches "acted together" to draw and implement the 2011 congressional map. While Defendants maintain that the Board of Elections played "no role in the 2011 redistricting process," (Mot. 11) publicly available documents tell a different story.

Multiple state agencies and officials—including Defendants, DLS, DOP, members of the GRAC, the governor's office, and members of the General Assembly worked together closely to draft, introduce, and enact the Plan. The Executive Director of DLS oversaw the redistricting process. DLS, *Organizational Structure*, perma.cc/E3RN-WNRL (describing the duties of the Director of DLS, including that he or she "is responsible for oversight of legislative and congressional redistricting"). DOP, the designated state agency coordinator for the Census Redistricting Data Program, provided the GRAC with census data and maintained records of alternative plans submitted by third parties. ECF No. 104 at 4-5; *see also* DOP, *Redistricting*, perma.cc/793Q-ACJE. The GRAC, in turn, relied for its work on staffers from the governor's office, DLS, and the General Assembly. *See* Interrog Resp. 1. For their parts, Defendants provided the GRAC with voter and voting data, including address-level voter registration by party affiliation. ECF No. 104 at 6. The GRAC and DOP together solicited and accepted public comment. *Id.* at 5. Finally, members of the GRAC presented the proposed map to the House and Senate Democratic Caucuses. *Id.* at 7. Taken together, the Defendants, fellow state agencies, and other government entities identified in our 30(b)(6) notice "operat[ed] as a unit, sharing information amongst

themselves" and "acted together" to create and implement the 2011 map. *Coryn Grp.*, 265 F.R.D. at 239; *Sanofi-Aventis,* 272 F.R.D. at 395

Defendants attempt to hide behind a web of state laws and regulations that purport to show that the Board of Elections is not under "common control" of other government entities. Motion 12. But Rule 30(b)(6) looks to the party's practical ability to obtain information, not formalistic differences between entities. *See Int'l Bhd. of Teamsters,* 2013 WL 627149, at *9 ("Any attempt to hide behind the organizational niceties to avoid providing such information is impermissible."). Defendants cannot seek refuge behind governmental walls that exist only on paper when it has shown a real-world ability to access the information. *See S.C. Johnson & Son, Inc. v. Dial Corp.*, 2008 WL 4223659, at *1 (N.D. Ill. 2008) (requiring 30(b)(6) designee to obtain information from a subsidiary with "eight degrees of ownership separation" between it and the parent).

Defendants' contrary position would gut Rule 30(b)(6)'s purpose, which is "to 'curb the bandying' of organizations where a series of organizational employees are 'deposed in turn but each disclaims knowledge of facts that are clearly known to the person in the organization and thereby to it.'" *Wilson*, 228 F.R.D. at 528 (quoting Fed. R. Civ. P. 30(b)(6) advisory committee notes). Because the redistricting involved a coordinated effort, this Rule 30(b)(6) deposition may be the only way to pin down Defendants on several crucial issues in this case.

C. State legislative privilege cannot be asserted in an absolute or blanket fashion in cases like this one

Defendants have continuously attempted to rely on improper, blanket assertions of legislative privilege as a means of keeping secrets, forcing us to explain over and over again that the privilege is not applicable in cases such as this in which state

legislators are alleged to have violated federal law. The party arguing in opposition to a 30(b)(6) deposition must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Bernard,* 452 U.S. at 102 n.16 (internal quotation marks omitted). In addition, the burden falls on the party asserting legislative privilege to explain why it should apply. *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011).

Here, Plaintiffs argue that topics 1-3, 9-12, 17, and 18 are all shrouded in secrecy by legislative privilege and should therefore be categorically stricken, providing only the explanation that such topics cover "legislative activities related to the 2011 congressional redistricting." Mot. 14. This is not a "particular and specific demonstration of fact," but is simply a broad, conclusory statement, which is insufficient to satisfy the high burden Defendants must meet to receive a protective order. *Bernard*, 452 U.S. at 102 n.16 (internal quotation marks omitted).

As Plaintiffs have previously explained, a "litany of recent federal decisions . . . involving federal constitutional challenges premised on the right to vote" have held "that the [state legislative] privilege [does] not (at least in part) shield state legislators from producing responsive records or testifying at deposition." *See* 12/29 Mot. 17 (quoting *Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015)). Defendants not only fail to provide any degree of particularity as to their claims that legislative privilege applies to certain topics, but they also demonstrate a failure to understand how legislative privilege works at all. For all of the reasons that we have given (multiple times) in prior filings, the Court should reject Defendants' vicarious assertion of legislative privilege. *See* 12/29 Motion 13-28; 1/3 Mot. 10-23; 1/16 Opp to Motion to Quash 3-11 (Dkt. 120).

D. Plaintiff's topics are not better served by a contention interrogatories or expert testimony

Defendants also claim that several of Plaintiff's topics should be eliminated because the information they seek would more be more appropriate for expert testimony and/or contention interrogatories. Specifically, Defendants object to Plaintiffs' topics 6, 15, 21-23, and 25.

First, Defendants do not offer any reason why these topics are better served by expert testimony. Though Topic 15 does mention statistical measures, an expert is not needed to provide this basic, factual information. Courts have found that Rule 30(b)(6) witnesses may provide factual information that is relevant to a statistical calculation, so long as the lay witness is not asked to provide a detailed explanation of the technical processes involved. Thus, while a 30(b)(6) witness cannot be expected to testify on "the actual calculations and methodologies applied by [an] expert," any such witness "would certainly be capable of discussing the relevant underlying facts and surrounding evidence that make up [an expert's] calculations" *See Nippo Corp./Int'l Bridge Corp. v. AMEC Earth & Envtl., Inc.*, 2009 WL 4798150, at *3 (E.D. Pa. 2009). That describes the topics 6, 15, 21-23, and 25.

Nor is information about the Board of Elections' beliefs as to the State's intentions (topic 22) a matter that would require an expert to testify. "[T]he designee must not only testify about facts within the [entity's] knowledge, but also its subjective beliefs and opinions." *J.M. Taylor,* 166 F.R.D. at 361. This means that the designated individual must also speak to the entity's "interpretation of documents and events." *Id.* It is therefore entirely appropriate to ask a state-designated individual to testify on the State's intentions in enacting the Congressional map.

Second, Defendants claim that Topics 21, 23, and 25 are more appropriately addressed by contention interrogatories. But they offer no details to explain why that is so. "I don't want to do it," is not a sufficient response; on the contrary, "the Federal Rules of Civil Procedure do not permit a party served with a Rule 30(b)(6) deposition notice or subpoena request 'to elect to supply the answers in a written response to an interrogatory' in response to a Rule 30(b)(6) deposition notice or subpoena request." *La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 486 (N.D. Cal. 2012) (quoting *Marker v. Union Fid. Life Ins.,* 125 F.R.D. 121, 126 (M.D.N.C.1989)). In addition, it is "not novel" to use a 30(b)(6) deposition "for the purpose of obtaining the factual bases for a defendant's asserted position statements or affirmative defenses." *Caesars*, 237 F.R.D. at 433.

Beyond that, Defendants' position presumes that they would provide meaningful responses if topics 21, 23, and 25 were reframed as contention interrogatories. Unfortunately, there is little reason to believe they would. Indeed, we have already moved to compel Defendants to provide answers to their First Set of Interrogatories that account for information within Defendants' control. As with this Rule 30(b)(6) deposition, Defendants failed to provide meaningful answers, instead objecting on nearly every conceivable basis, including prematurity, vagueness, legislative privilege, and relevance. *See* Ex. I at Supp. Resps. 2-4; Ex. J at Resps. 5-7, 9-10. It should go without saying that objection-laden interrogatory answers that do not provide any relevant information would not be an adequate substitute for a deposition even if the law supported Defendants' position.

E. Plaintiffs are not seeking attorney work product

Defendants argue that Topic 24, which seeks "justifications" for the creation of district lines including "respect for communities of interest," should be stricken as "overly broad, inefficient, and unreasonable because it seeks the theories and legal positions of defendants" Mot. 16 (internal quotation marks omitted). Plaintiffs, however, are not asking for "classic work product," or Defendants' "mental impressions, conclusions, opinions, and legal theory," which (we agree) would be inappropriate under the 30(b)(6) process. *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002). The information Plaintiffs seek is not "legal in nature," but rather is "directly geared towards discovering factual evidence or documents." *EEOC v. Freeman*, 288 F.R.D. 92, 102 (D. Md. 2012). Topic 24 asks for factual information that caused the State to alter the Congressional district lines, including information about communities of interest. Answering this question does not require Defendants to reveal protected work product or opine on legal theories. Therefore this request is appropriate for a 30(b)(6) deposition.

F. Plaintiffs' topics concerning intent are sufficiently particularized

Defendants challenge Topics 9 and 13 as unreasonably vague. They assert that Topic 9 fails to state "whose intent or purpose it was to take what action with respect to the Proposed Congressional Plan, Senate Bill 1, and/or the Maryland Redistricting Referendum." Mot. 16-17. This court has clearly stated—and we have re-stated many times in our motions—that we must "produce objective evidence, either direct or circumstantial, that the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated." *Shapiro*, 2016 WL 4445320, at *10-11. Defen-

dants do not argue that statements made by persons with knowledge of the 2011 redistricting process cannot be objective evidence of intent. We thus ask for no more here than what the Court has already stated is necessary to prove our claim—namely, evidence concerning the specific intent of the members of the GRAC and General Assembly. There is nothing vague about that request.

G. Defendants fail to demonstrate that the testimony requested is available elsewhere with less expense, burden, or inconvenience

Finally, Defendants argue that topic 13, covering information about demographic differences between Montgomery County and Western Maryland, is overbroad because the State Board of Elections did not gather this data, such topics are not within the State Board of Election's "expertise," and discovery can be obtained more easily from other sources. This blunderbuss argument is wrong for two reasons.

First, the fact that the Board is not an expert and did not collect the data does not mean that it cannot be covered by a 30(b)(6) topic. In fact, Rule 30 requires a deponent to testify on information "reasonably available to the organization." Fed. R. Civ. Proc. 30(b)(6). As a state agency that has participated in sharing information with other state agencies in the past, this information, even if not directly gathered by the State Board of Elections, can easily be found to prepare a deponent for a 30(b)(6) deposition. Defendants (who bear the burden of proof and persuasion on their motion) have not demonstrated otherwise.

Second, Defendants offer no explanation for their argument that this information could be obtained by us from "some other source that is more convenient, less burdensome, or less expensive" (Mot. 17-18) (internal quotation marks omitted), and they should not be allowed to offer such an explanation for the first time in their reply brief. Again, "[t]he party opposing the discovery sought must support its position with a

'particular and specific demonstration of fact.'" *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D. Conn. 2010) (quoting *Bernard,* 452 U.S. at 102). Defendants offer no facts to support this assertion, which must therefore be rejected.

CONCLUSION

The motion for a protective order should be denied. Defendants should designate an appropriate individual for a 30(b)(6) deposition and make them available to testify regarding all information that is within Defendants' control.

Dated: January 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2017, a copy of the foregoing Opposition to Defendants' Motion For Protective Order From Rule 30(b)(6) Deposition was filed in the United States District Court for the District of Maryland and electronically served upon all counsel of record through the Court's CM/ECF system.

Respectfully submitted,

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