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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REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER FROM RULE 30(B)(6) DEPOSITION

In their response in opposition to the Defendants' motion for protective order, the Plaintiffs cite no case requiring that an independent unit of state government be responsible for preparing a Rule 30(b)(6) deponent to testify about the knowledge, processes, steps, consideration or receipt of data or other material, communications, statements, or intent, of (1) individuals who were never employed by or affiliated with the unit of state government, (2) distinct independent units of state government, or (3) a non-governmental organization. Rather, the Plaintiffs rely on inapposite cases involving corporate relationships that differ significantly from the operation of state government set forth in Maryland law. The Plaintiffs also mischaracterize the evidence in this case to greatly overstate the actual Defendants' role in the 2011 redistricting process.

ARGUMENT

INFORMATION ABOUT THE KNOWLEDGE, PROCESSES, STEPS, CONSIDERATION OR RECEIPT OF INFORMATION, COMMUNICATIONS, STATEMENTS, OR INTENT OF UNAFFILIATED INDIVIDUALS AND ENTITIES IS NOT REASONABLY AVAILABLE TO THE DEFENDANTS.

The Plaintiffs rely on two erroneous characterizations of the evidence in this case to support their theory that derives from cases involving corporate 30(b)(6) deponents, not governmental deponents. First, the Plaintiffs maintain that the State Board of Elections has the "'practical ability to obtain materials sought on demand'" from "agencies and officials" included within their definition of Relevant Individuals. ECF 131 at 9 (quoting *Steele Software Sys. Corp. v. Dataquick Info. Sys., Inc.*, 237 F.R.D. 561, 564 (D Md. 2006)). On the contrary, the Defendants do not have the practical ability to obtain materials on *demand* from any of these unaffiliated individuals and entities and, indeed, have been expressly denied access to documents in this case from many of these individuals and entities. The vast majority of the documents produced in this case came from the Department of Planning, and even then access to documents was under the control of counsel to the Department of Planning.

Moreover, merely being able to obtain documents upon *request* from an independent unit of state government, does not equate to *control* over all information within the custody of that entity or its current and former officers and staff. Unlike corporate affiliates, the State Board of Elections and the Department of Planning do not have the same "goals or missions and do not have the ability to share or control the agency's

agenda, documents or personnel." *N.Y. ex rel. Boardman v. Nat'l R.R. Passenger Corp.*, 233 F.R.D. 259, 264 (N.D.N.Y. 2006).

Relying on the lack of control that independent state agencies had over each other, the district court in *Boardman* determined that a government agency could not be compelled to produce the documents of an independent agency under Federal Rule of Civil Procedure 34. Here, the Plaintiffs seek much more than *documents*; they seek all information related to the knowledge, processes, steps, consideration or receipt of data or other material, communications, statements, or intent of numerous unaffiliated individuals and entities. Under the Plaintiffs' broad interpretation of what Rule 30(b)(6) requires, the State Board of Elections would be responsible not just for gathering documents from these unaffiliated individual and entities, but also to demand unfettered access to these unaffiliated individuals and entities, including subjecting them to lengthy and probing interviews. Such an interpretation would be unworkable, and the Plaintiffs have failed to cite any authority to support it. Indeed, even where governmental entities routinely assist each other, which as described below is not even the case here, courts have rejected an interpretation of Rule 30(b)(6) that would make one governmental entity responsible for the knowledge of another entity. *See Covington v. Semones*, No. CIV A 706CV00614, 2007 WL 1052460, at *1–2 (W.D. Va. Apr. 5, 2007) (quashing Rule 30(b)(6) deposition notice seeking to have defendant governmental entity investigate a second governmental entity and provide information where two entities "maintain[ed] a close relationship" but where second entity was not an employee of, subject to, or under the control of the defendant); *see also DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 C 1531, 2011 WL

117048, at *8 (N.D. Ill. Jan. 12, 2011) (concluding Rule 30(b)(6) "does not require one entity which is not under the control of a second entity to inquire into and testify as to the knowledge of the second entity"). Even when entities are affiliated with each other, the duty of a Rule 30(b)(6) designee extends only to those matters in which the deposed entity was involved and has knowledge, and, thus, a "designee need not acquire knowledge from an affiliate on matters in which the deposed [entity] was entirely uninvolved." *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 239 (D. Md. 2010).

Second, the Plaintiffs mischaracterize the Defendants' role in Maryland's 2011 redistricting process as having "worked together closely [with multiple state agencies and officials] to draft, introduce, and enact the Plan." ECF No. 131 at 11. On the contrary, the State Board of Elections had no role in the drafting, introduction, or enactment of the Plan. Rather, the State Board of Elections compiles voter registration data that is available to the public. ECF No. 104 ¶¶ 15, 29; Ex. 1, Lamone Decl. ¶¶ 4-5. The State Board provided this voter registration data to the Department of Planning for use by the GRAC in May, 2011, before the Governor appointed the members of the GRAC in July, 2011. *See* Ex. 2, Second Decl. of Linda H. Lamone ¶ 6 & Attach.; *see also* Press Release, Office of the Governor, *O'Malley Announces Members of The Governor's Redistricting Advisory Committee* (July 4, 2011) *available at* http://www.pgpost.com/1.html (last accessed Feb. 3, 2017). The State Board of Elections had no other role in the process, and was not involved in the actual drafting of the Plan. *See* Ex. 1 ¶ 5; Ex. 2 ¶¶ 6-8.

Further confusing corporate relationships created by corporate entities with statutory and constitutional provisions governing Maryland governmental agencies, the

Plaintiffs accuse the Defendants of hiding "behind governmental walls that exist only on paper . . . ." ECF No. 131 at 12. Again, the Plaintiffs cite only to case law involving corporate relationships and cite no authority for the proposition that the Maryland Code's provisions establishing independent units of state government and the Maryland Constitution's separation of powers provisions are essentially meaningless because the State Board of Elections was able to obtain documents upon request from another state entity. As set forth in the Defendants' opening memorandum, the Defendants are under the control of an independent State Board, and are not "interrelated" with the Department of Planning, which is under the control of the governor, or the Department of Legislative Services, which is under the control of the General Assembly. *See Boardman*, 233 F.R.D. at 268. When state entities or officials are willing to share information with other state entities, for purposes of discovery or otherwise, they remain independent agencies with no responsibility to provide further information or to answer specific requests for information. Under the Plaintiffs' theory, merely acting cooperatively to produce documents in response to discovery requests, would subject state agencies to extensive disclosure obligations, a resulting mandate that would not only "be unduly burdensome and cumbersome but totally untenable and outside the spirit of the Federal Rules" and would lead to "absurd results." *Id.*

Finally, although discussed in the Background section of their opposition, the Plaintiffs point out that the "Defendants did not raise a similar 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."

ECF No. 131 at 4. That case, however, was decided on a stipulated exchange of affidavits and did not involve the sort of extensive formal discovery sought by the Plaintiffs here. *See* Ex. 3, *Fletcher v. Lamone* scheduling order. Moreover, as discussed above, merely requesting supporting documentary evidence from state officials and entities does not demonstrate the sort of control that would be required under Rule 30(b)(6). That the Defendants were able to "gather declarations from senior officials" at three units of state government does not evidence the State Board's control over those officials or the independent unit of state government with which those officials were affiliated. Finally, the Defendants' assertions in the briefing in *Fletcher*, relying on publicly-available *documents*, also does not support the broad definition of control that the Plaintiffs are pressing here.[1]

The Plaintiffs, running up against their 10 deposition limit, are seeking to take the organizational depositions of 4 entities (the Board, the Department of Planning, the Department of Legislative Services, and the Maryland Democratic Party), and the depositions of numerous individuals (including all members of the General Assembly, a

[1] The Plaintiffs quote four assertions made in the Defendants' briefing in *Fletcher*. The first of these assertions cites the Plaintiffs' complaint in *Fletcher* (*see* Pls.' Ex F (ECF No. 131-7) at 41). The second assertion cites to statements of legislators made during floor debates on Senate Bill 1 (*see* Pls.' Ex G (ECF No. 131-8) at 15, 18). The third assertion cites again to these floor statements of legislators, in addition to the Maryland Republican Party's proposed Congressional Plan then available on the Department of Planning website, and to an article in the Baltimore Sun (*see id.*). The fourth assertion does not cite any record evidence and merely states that the plaintiffs in *Fletcher* had not disputed the Defendants' assertions that were derived from the publicly-available sources cited elsewhere in the briefing.

former Governor, former members of the GRAC, among others), through one single deposition notice. They have cited no authority for making the State Board of Elections, an independent unit of state government, responsible for preparing a deponent to testify about how other unaffiliated individuals and state entities engaged in drawing Maryland's congressional redistricting map, a legislative process in which the State Board's role was limited to providing publicly-available data to an independent unit of state government.

Turning to the remaining topics, topic 15 clearly calls for testimony more appropriately discoverable through expert testimony because it seeks information on "[a]ny statistical measure that you contend demonstrates that the boundaries of the Sixth Congressional District were drawn for Constitutionally legitimate reasons" and is not, as the Plaintiffs suggest, limited to "factual information that is relevant to a statistical calculation." With the remaining topics more suited to contention interrogatories, 6, 21, 22, 23, and 25, the Plaintiffs argue that it is "appropriate to ask a state-designated individual to testify on the State's intentions in enacting the Congressional map." The Plaintiffs, thus, overlook that the State Board of Elections had no role in enacting the Congressional map, and, thus, that it would be an "overbroad, inefficient, and unreasonable means of discovering [the Defendants'] factual and legal basis for its claims." *Trustees of Boston Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *4 (D. Mass. Sept. 24, 2014). The State Board should not be "required to have counsel 'marshall all of its factual proof' and prepare a witness to be able to testify on a given defense or [ ]claim." *Id.* (quoting *Indep. Serv. Org. Antitrust Litig.*, 168 F.R.D. at 654); *see also Wilson v. Lakner*, 228 F.R.D. 524, 529 n.8 (D. Md. 2005) ("Whereas the *facts* of a relevant incident

or incidents are proper for 30(b)(6) inquiry, the *contentions*, *i.e.* theories and legal positions, of an organizational party may be more suitably explored by way of interrogatories and the Court may properly order . . . that contentions only be inquired into in this fashion."); *Fidelity Mgmt. & Research Co. v. Actuate Corp.*, 275 F.R.D. 63, 64 (D. Mass. 2011) (explaining that a 30(b)(6) deposition is not the best method for obtaining answers to contention interrogatories, in part, because "drawing the line between questions which seek to elicit facts and questions which will lead to a revelation of work-product matters can be difficult").

The Plaintiffs note that the Defendants objected to certain interrogatories on the basis of legislative privilege that non-parties have asserted, and that based on those assertions, the Defendants do not have access to the information sought by these interrogatories, with the exception of information already made available to the public. Regardless of whether those non-parties are ultimately compelled to testify in this matter, it would be "overbroad, inefficient, and unreasonable" for the State Board of Election's designee to have to testify as to these individuals' intent, and, if those non-parties are ultimately not compelled to testify, the State Board of Elections would have no access to the information. For other contention interrogatories that the Defendants objected to on the grounds that they were premature, the Defendants have provided supplemental answers to these interrogatories.

CONCLUSION

For the reasons set forth above, this Court should grant the Defendants' Motion for Protective Order.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

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___/s/__Jennifer L. Katz_____
JENNIFER L. KATZ (Bar No. 28973)
SARAH W. RICE (Bar No. 29113)
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7005 (tel.); (410) 576-6955 (fax)
jkatz@oag.state.md.us

Attorneys for Defendants

TABLE OF EXHIBITS

Exhibit No. Title

1. Declaration of Linda H. Lamone

2. Second Declaration of Linda H. Lamone

3. Scheduling Order in *Fletcher v. Lamone,* ECF No. 21, Case No 8:11-cv-3220 (D. Md. Dec. 1, 2011)