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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants,

No. CV-16-01065-PHX-DLR

PLAINTIFFS' RESPONSE TO DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTION IN LIMINE ON PLAINTIFFS' SPOLIATION OF ELECTRONIC EVIDENCE

To be certain, after the 2016 election, the Arizona Democratic Party ("ADP") closed the e-mail accounts of ADP's Get-Out-the-Vote ("GOTV") Director, as well as four of ADP's voter protection deputies.[1] [Defendants' and Intervenor-Defendants' Motion in *Limine* on Plaintiffs' Spoliation of Electronic Evidence ("Doc. 352") at 2] As the Plaintiffs affirmatively disclosed to Defendants, these accounts were closed by ADP officials as part of routine close-out operations for the 2016 campaign and during a time of organizational transition at ADP.

Closing these five e-mail accounts was a mistake. But it was nothing more. Defendants point to no evidence, and none exists, that the ADP or any of its staff members deleted these e-mail accounts to intentionally deprive Defendants of their contents' use in this litigation. And this makes sense. ADP had *no* strategic reason for deleting these e-mail accounts, particularly given that they, at most, contained evidence that existed elsewhere and that was likely of marginal relevance to this case.

Nonetheless, Defendants now seek the "extreme sanction" of the imposition of three far-reaching adverse inferences against the ADP. *Moore v. Gilead Scis., Inc.*, No. C 07-03850 SI, 2012 WL 669531, at *5 (N.D. Cal. Feb. 29, 2012). Defendants, however, have not shown, as they must, that this mistake warrants the relief they seek.[2] *See Alvarez v. King Cty.*, No. C16-0721RAJ, 2017 WL 3189025, at *4 (W.D. Wash. July 27, 2017) ("The party requesting sanctions for spoliation has the burden of proof on such a claim."); *see also OmniGen Research v. Yongqiang Wang*, No. 6:16-CV-00268-MC, 2017 WL 2260071, at *3 (D. Or. May 23, 2017) (noting that proof in spoliation motions must be, at a minimum, demonstrated by a preponderance of the evidence).

[1] During the same time period, ADP also closed other e-mail accounts that had been, but were no longer, in use, and would never have been examined as part of this case. [*See* Plaintiffs' Responses and Objections to State Defendants' First Request for Production, Mar. 17, 2017, ("Ex. A") at 2]

[2] Despite having the burden of proof, Defendants have never requested an evidentiary hearing on this issue. Plaintiffs respectfully request that, if the Court is inclined to grant any sanction for the deletion of these accounts, Plaintiffs be permitted to present evidence at a hearing to show, among other things, that ADP did not close any accounts with the intent to deprive Defendants of the information's use in this case.

ARGUMENT

I. RULE 37 GOVERNS.

Whether any sanction is appropriate in this case must be judged according to Federal Rule of Civil Procedure 37(e) and not, as Defendants argue (at 5), imposed as an exercise of this Court's inherent authority. The Ninth Circuit has made clear that "[w]hen there is . . . conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than [its] inherent power." *Ringgold-Lockhard v. Cnty. of Los Angeles*, 761 F.3d 1057, 1065 (9th Cir. 2014).

As amended in 2015, Rule 37(e) expressly provides this Court with a means to address any spoliation of electronically stored information ("ESI"), including e-mails. *See CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016) ("The emails are plainly 'electronically stored information.'"). Specifically, the rule "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures." Advisory Committee Notes to 2015 Amendment to Rule 37(e). That Rule 37—and not this Court's inherent authority—provides the framework for this Court's analysis is confirmed by the advisory committee note to Rule 37(e), which expressly provides that the rule "*forecloses reliance on inherent authority* or state law to determine when certain measures should be used" to remedy ESI spoliation, including deletion of e-mails.[3] *Id.* (emphasis added).

[3] Without a doubt "[f]ederal courts possess certain inherent power, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quotation marks omitted). Accordingly a "court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to the task." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Indeed, the cases cited by Defendants (at 5 n.2) confirm that, in the context of the failure to preserve ESI, a court's reliance on inherent authority is only appropriate, if at all, where Rule 37(e) does not apply. *See, e.g.*, *Ronnie Van Zant, Inc. v. Pyle*, No. 17 CIV. 3360 (RWS), 2017 WL 3721777, at *8 n.16 (S.D.N.Y. Aug. 28, 2017) ("As Rule 37(e) does apply here, however, there is no need to rely on [inherent] powers."); *Hsueh v. N.Y. State Dep't of Fin. Servs.*, No. 15 CIV. 3401 (PAC), 2017 WL 1194706, at *4 (S.D.N.Y. Mar. 31, 2017) ("Because Rule 37(e) does not apply, the Court may rely on its inherent power to control litigation in imposing spoliation sanctions"); *CAT3*, 164 F. Supp. 3d at 497 ("If, notwithstanding this reasoning, Rule 37(e) were construed not to apply to the facts here, I could nevertheless exercise inherent authority to remedy spoliation . . . ."); *see also* Hon. James C. Francis & Eric P. Mandel,

II. NO SANCTIONS ARE WARRANTED UNDER RULE 37(E).

When Rule 37(e)'s requirements are properly applied, it is clear that the closure of these five e-mail accounts at issue warrants neither the adverse inferences sought by Defendants, nor any other measure. Tellingly, Defendants make no attempt to outline Rule 37(e)'s requirements in their brief to this Court.

A. Rule 37's Preliminary Requirements Have Not Been Satisfied.

Under Rule 37(e), a court may apply sanctions *only* if ESI "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Thus, for sanctions to be authorized under Rule 37(e), (1) the information must be ESI; (2) there must be anticipated or actual litigation; (3) due to that litigation, the information "should have been preserved"; (4) the information has been "lost"; (5) the "party failed to take reasonable steps to preserve it"; and (6) the information "cannot be restored or replaced through additional discovery." *See Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, No. 1:15-CV-04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017). In this case, the facts meet the first three requirements but not the last three. As a result, "sanctions cannot be imposed under Rule 37(e)." *Id.*

First, ADP took reasonable steps to preserve the closed e-mail accounts. Rule 37(e)

Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction, 17 Sedona Conf. J. 613, 652 (2016) ("And, as long as inherent authority is used only to fill the interstices in [Rule 37(e)], Federal courts avoid the difficult separation-of-powers issues that arise when judges assert inherent power where Congress has directly addressed an issue through the rulemaking process.").

Even if the exercise of inherent authority were appropriate, sanctions would not be warranted here. As discussed below, the closing of the accounts was a mistake and Defendants have not shown, or even attempted to show, to which claims or defenses the information contained in the accounts was relevant. *See Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) (laying out factors for imposition of sanctions under the court's inherent authority). Regardless, courts cannot exercise their inherent authority to impose an adverse inference, where, as here, the deletion at issue was conducted without any intent to deprive the opposing party of evidence. *Limits on Limiting Inherent Authority:* Francis, *supra*, at 660.

"recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." Advisory Committee Notes to 2015 Amendment to Rule 37. Here, ADP circulated a litigation hold to its senior staff on April, 28, 2016, shortly after this litigation was filed. Unfortunately, however, the individual who directed the closing of the accounts during the close out of the 2016 campaign believes he was unaware of the litigation hold. [Plaintiffs' Responses and Objections to Intervenors' Requests for Production, Mar. 13, 2017 ("Ex. B") at 3] So, while the ADP's steps to preserve documents were not perfect, they were reasonable, particularly given the hectic nature of, and high degree of turnover during, the period immediately following a presidential general election.

Second, no sanctions are warranted because the information contained in the five closed e-mail accounts was "restored or replaced" through additional discovery. Fed. R. Civ. P. 37(e). "Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere . . . ." Advisory Committee Notes to 2015 Amendment to Rule 37(e). Thus, relief is "not . . . available under the amended rule where, for example, e[-]mails are lost when one custodian deletes them from his mailbox but remain available in the records of another custodian." *CAT3*, 164 F. Supp. 3d at 497. Furthermore, courts have suggested that information is sufficiently "restored and replaced" even where "the entirety" of the information is not recovered, but "the content of much of th[e] ESI has been preserved through the preservation and production of other emails." *Snider*, 2017 WL 2973464, at *6.

In this case, most, if not all, of the e-mails from the five closed accounts would have been produced through the records of another custodian. Specifically, the four volunteer voter protection deputies' e-mail accounts were created less than a month before the 2016 general election, and those deputies worked primarily at the direction of and in coordination with Spencer Scharff, ADP's Voter Protection Director. [Ex. A at 3] Plaintiffs have produced responsive, non-privileged documents from Mr. Scharff's ADP e-mail account, and Mr. Scharff believes that, until a week before the election, he would

have been included on all or most of the deputies' communications. [*Id.*] Further, in the week before the election, the deputies' practice was to copy Mr. Scharff on all important e-mails, which he believes would have included any e-mails relating to out-of-precinct provisional voting or ballot collection.[4] [*Id.*]

With respect to the fifth account, the GOTV director worked for ADP from August 2016 to November 2016. [*Id.*] Decisions on issues pertinent to this case would have been group decisions, and the GOTV director believes that one or more individuals whose e-mail accounts have been searched (*e.g.*, Mr. Scharff) would have been included on e-mails relating to such decisions. [*Id.*]

That most of the information contained within the five e-mail accounts was in other e-mail accounts that were searched is supported by the result of Plaintiffs' attempt to recover the documents from the five accounts. Although a limited number of documents were recovered, the documents that were found, except for one document, were either duplicates of documents or different versions of the same documents already produced. At bottom, the records at issue have been "restored and replaced," and sanctions should not be imposed. *See Snider*, 2017 WL 2973464, at *4.

Third, and finally, because the majority of the relevant documents contained in these five e-mail accounts would have been produced through other parties, this information was not "lost." *See Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *5 (S.D. Fla. Mar. 22, 2016) ("In the instant case, it appears that the great majority of Defendant's text messages were provided to Plaintiff by another party. Accordingly, the great majority of Defendant's text messages were not 'lost', and sanctions under Rule 37(e) are simply not available . . . .").

[4] Defendants claim Mr. Scharff testified during his deposition that "he may have no longer been copied on 'important' emails from his voter protection deputies." [352 at 9] That is inaccurate. Mr. Scharff said his understanding was that his deputies were copying him on all "important" e-mails, but it was his deputies' discretion as to when an e-mail was important enough to copy Mr. Scharff. [Scharff Dep., Ex. C at 115:19-116:18]

B. Defendants' Requested Adverse Inferences are Not Authorized under Rule 37(e).

1. No Adverse Inferences Are Appropriate.

Assuming *arguendo* that the facts of this case met the preliminary requirements for the imposition of sanctions under Rule 37(e), an adverse inference still would not be appropriate. Under Rule 37(e), a court may "presume that the lost information was unfavorable to the party" "*only* upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e) (emphasis added); *see also* Advisory Committee Notes to 2015 Amendment to Rule 37(e) (same).[5]

Neither in their Motion, nor at any time since Plaintiffs affirmatively disclosed this issue to Defendants, have Defendants pointed to *any* evidence that ADP intended to deprive Defendants of the information contained in the five deleted e-mail accounts for its use in this litigation.[6] Defendants have thus failed to carry their burden of proving that the ADP acted with the requisite intent to warrant the imposition of an adverse inference.[7]

In fact, there is no such evidence. All evidence indicates that the deletion of these e-mails was a mistake. For instance, the ADP generally, and Mr. Williams specifically, closed other non-relevant, inactive e-mail accounts at the same time he closed the five accounts at issue in an effort to wind down ADP's activities after the 2016 election. [Ex. A at 2] These five accounts were not singled out for closure. Additionally, had ADP intended to deprive the Defendants of information, deleting the accounts of four volunteer

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[5] This requirement is consistent with the common law rationale for adverse inferences, which "were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise a reasonable inference that the evidence was unfavorable to the party responsible for the loss or destruction of the evidence." Advisory Committee Notes to 2015 Amendment to Rule 37(e).

[6] Defendants argue that "[t]he remedy of an adverse inference sanction is particularly warranted, as Plaintiffs' intentional acts deprived both the Defendants and the Court of the opportunity to review the information during this litigation." [352 at 1 (citing Fed. R. Civ. P. 37(e)(2)(B) and noting that "upon finding that the party acted with 'intent to deprive' court may presume 'that the lost information was unfavorable to the party'")]. This misreads Rule 37(e)(2)(B). Intentional *acts* do not trigger the imposition of adverse inferences, but rather acts done with the intent "*to deprive* another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2)(A)-(B) (emphasis added).

[7] Because Defendants seek to show that the ADP had bad intentions, this showing should be made by "clear and convincing evidence." *CAT3*, 164 F. Supp. 3d at 499.

voter protection deputies and one coordinated campaign GOTV director was an incredibly ineffective way to do so. In marked contrast to ARP's initial production of seven documents in this case, ADP has produced over a thousand documents.

At bottom, the facts here do not permit a sanction under Rule 37(e)(2). *See, e.g.*, *Snider*, 2017 WL 2973464, at *8 (holding that when e-mails were deleted pursuant to a company policy, there was "no evidence" that the emails were destroyed with an intent to deprive the other party of ESI); *Virtual Studios, Inc. v. Stanton Carpet Corp.*, No. 4:15-CV-0070-HLM, 2016 WL 5339601, at *11 (N.D. Ga. June 23, 2016) (noting that while the spoliating party "could have taken greater care to preserve the information at issue, and its IT practices appear to leave much to be desired[,]" at most the evidence indicated that it was negligent or careless, which was insufficient to permit a sanction under subsection (e)(2)). Accordingly, the adverse inferences that Defendants request (at 10) should not be imposed.

2. Even if an Adverse Inference Were Appropriate, Defendants' Requested Inferences are Too Broad.

Defendants' requested adverse inferences also should not be imposed because they are impermissibly broad. [8] As relevant here, where the requisite intent is found, Rule 37(e) authorizes a court to "presume that the lost information is unfavorable to the party" or "instruct the jury that it may or must presume the information was unfavorable to the party." But "[b]efore an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 76 (S.D.N.Y. 1991); *Anderson v. Prod. Mgmt. Corp.*, No. CIV.A.98-2234, 2000 WL 492095, at *5 (E.D. La. Apr. 25, 2000) (same).

[8] Furthermore, given the marginal relevance of the information contained in these e-mail accounts, even if Defendants had carried their burden of showing the requisite intent, an adverse inference would not be warranted. Severe measures, such as adverse inferences "should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." Advisory Committee Notes to 2015 Amendment to Rule 37(e).

Defendants' proposed inferences bear *no* relationship to the information possibly contained in the five deleted e-mail accounts. First, Defendants request an "adverse inference" that "the emails' contents would have supported [a] finding[]" that "Plaintiffs have failed to meet their burdens to prove a discriminatory effect and a severe burden from the challenged election law and procedure." [Doc. 352-2] But these five e-mail accounts, four of which were created less than a month before the 2016 general election, did not and would not have contained *any evidence* that Plaintiffs failed to meet critical evidentiary burdens in this case. Moreover, the e-mails from these selected accounts would not necessarily contain the best evidence of burden on voters.

Second, Defendants request an "adverse inference" that "the emails' contents would have supported [a] finding[]" that as to HB 2023, "Plaintiffs have further proven neither a discriminatory purpose, nor that the statute was enacted with discriminatory intent." [Doc. 352-2] Again, it cannot be, and Defendants have not alleged, that these e-mail accounts have *any* information related to the intent with which HB 2023 was enacted in March 2016, months before *any* of the deleted e-mail accounts were even created. Further, any information about Defendants' intent and conduct, by definition, would not be proven or disproven by Plaintiffs' e-mails. Finally, Defendants request an "adverse inference" that "the emails' contents would have supported [a] finding[]" that "no voter sought the assistance of Plaintiffs in returning an early ballot." [Doc. 352-2] Perhaps these e-mails could have contained no evidence that a voter asked *these five individuals* for assistance in returning an early ballot, but it is highly improbable that they could have contained evidence showing that no one asked *others* at ADP, or with any of the other Plaintiffs in this case, for assistance.

C. No Other Sanctions Are Warranted under Rule 37.

Defendants have not specifically asked for any sanctions other than the previously mentioned adverse inferences. [Doc. 352-2] For this reason alone, the Court should not impose any other type of sanction. Regardless, Rule 37(e) does not authorize any other sanctions here.

Where the preliminary requirements for the imposition of sanctions have been satisfied *and* there was prejudice to the opposing party, a court may, in its discretion, "order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). But, in this case, no such prejudice occurred and, thus, no measures are necessary to cure it. Indeed, apart from vague and sweeping allegations of prejudice (at 1, 9), Defendants point to no *specific* evidence that was allegedly or likely contained in the five deleted e-mail accounts that "would have been helpful in proving [their] claims or defenses." *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924 (JG) (VMS), 2016 WL 792396, at *6 (E.D.N.Y. Feb. 26, 2016).

That some of these accounts would have contained "responsive" documents to the discovery requests is not enough. [Doc. 352 at 8] "Proof of relevance does not necessarily equal proof of prejudice." *Id.* Moreover, in this case, "an abundance of preserved information" is "sufficient to meet the needs of all parties." Advisory Committee Notes to 2015 Amendment to Rule 37(e). Again, Mr. Scharff believes that, until a week before the election, he would have been included on all or most of the deputies' communications. [Ex. A at 3] Further, in the week before the election, the deputies' practice was to copy Mr. Scharff on all important e-mails, which he believes would have included any e-mails relating to out-of-precinct provisional voting or ballot collection. [*Id.*] Additionally, the GOTV director believes that one or more individuals whose e-mail accounts have been searched (*e.g.*, Mr. Scharff) would have been included on his e-mails relating to decisions on issues pertinent to this case. [*Id.*] As a result, Defendants have not suggested or shown, as they must, that any curative measures are necessary. Advisory Committee Notes to 2015 Amendment to Rule 37(e).

CONCLUSION

For the reasons stated above, Defendants' request for sanctions should be denied.

Dated: September 25, 2017

s/ Amanda Callais

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a Notice of Electronic Filing was transmitted to counsel of record.

s/ Amanda Callais

EXHIBIT A

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

PLAINTIFFS' RESPONSES AND OBJECTIONS TO STATE DEFENDANTS' FIRST REQUEST FOR PRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs the Democratic National Committee ("DNC"), the DSCC, and the Arizona Democratic Party ("ADP") (collectively, "Plaintiffs") provide the following written objections and responses to the State Defendants' ("Defendants") Requests for Production served on February 15, 2017.

PRELIMINARY STATEMENT

Discovery is ongoing, and Plaintiffs have not completed their investigations. These objections and responses are based on the information and documents currently available to Plaintiffs, and Plaintiffs reserve the right to alter, supplement, amend, or otherwise modify these objections and responses in light of additional facts revealed through subsequent inquiry.

Plaintiffs also note that a number of responsive documents have already been filed with the Court in this matter, and they are therefore equally available to Defendants and Plaintiffs. Plaintiffs do not intend to produce those documents that have already been served on Defendants.

As explained below, Plaintiffs, in response to most of the Requests for Production, have produced and will produce responsive, non-privileged documents in their possession, custody, or control that they are able to locate following a reasonable search. Plaintiffs note, however, that although ADP had received a litigation hold in connection with this case, ADP, during the period from November 11, 2016, to December 7, 2016, closed numerous email addresses that had been but no longer were in use. While the vast majority of those accounts were highly unlikely to contain any responsive documents, there are five accounts that likely would have been searched for and would have contained responsive documents: the accounts of four volunteer voter-protection deputies and the account of the GOTV director. The closing of those email accounts resulted in the

deletion of the emails in the accounts, and Plaintiffs have been unable to retrieve those emails.[1]

The email accounts were closed as part of the close-out of operations for the 2016 campaign, and it is Plaintiffs' understanding that the individual who directed the closing of the accounts was unaware of the litigation hold. In addition, the four volunteer voter-protection deputies' email accounts were created less than a month before the 2016 general election—one was created on October 10, two were created on October 20, and one was created on October 21—and those deputies worked primarily at the direction of and in coordination with Spencer Scharff, ADP's Voter Protection Director for the period leading up to the 2016 election. Plaintiffs have produced and will be producing responsive, non-privileged documents from Mr. Scharff's ADP email account, and Mr. Scharff believes that, until a week before the election, he would have been included on all or most of the deputies' communications. Further, in the week before the election, the deputies' practice was to copy Mr. Scharff on all important emails, which he believes would have included any emails relating to out-of-precinct provisional voting or ballot collection. With respect to the account of the GOTV director, Plaintiffs note that he worked for ADP from August 2016 to November 2016. Moreover, decisions on issues pertinent to this case would have been group decisions, and the GOTV director believes that one or more individuals whose email accounts have been searched (e.g., Mr. Scharff) would have been included on emails relating to such decisions.

GENERAL OBJECTIONS

1. Nothing in these objections or responses can be taken as an admission that Plaintiffs agree with Defendants' use or interpretation of terms. These objections and responses are based on Plaintiffs' understanding of each individual request. To the extent

[1] Plaintiffs stated in their Responses and Objections to Intervenors' Requests for Production that an ADP employee closed email accounts on November 30, 2016. Plaintiffs have determined that accounts that had been but no longer were in use were closed on other dates within the above-referenced period as well and that, while one employee directed the closing of the accounts, the accounts were closed out by several different employees.

extent it seeks information that is protected by the attorney-client privilege, the First Amendment privilege, and/or the work-product doctrine, and/or constitutes trial preparation material within the meaning of Rule 26 and/or expert witness information that is not discoverable under Rule 26.

Subject to, expressly reserving, and without waiving these specific objections and Plaintiffs' General Objections above, Plaintiffs will produce any responsive, non-privileged documents in their possession, custody, or control that they are able to locate following a reasonable search.

Dated: March 17, 2017

s/ Joshua L. Kaul

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The undersigned hereby certifies that on March 17, 2017, a true copy of the foregoing document was served via electronic mail to the following:

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**Admitted pro hac vice*

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Arizona Secretary of State's Office, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

PLAINTIFFS' RESPONSES AND OBJECTIONS TO INTERVENORS' REQUESTS FOR PRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs the Democratic National Committee ("DNC"), the DSCC, and the Arizona Democratic Party ("ADP") (collectively, "Plaintiffs") provide the following written objections and responses to Intervenor-Defendants' ("Intervenors") Requests for Production served on February 9, 2017.

PRELIMINARY STATEMENT

Discovery is ongoing, and Plaintiffs have not completed their investigations. These objections and responses are based on the information and documents currently available to Plaintiffs, and Plaintiffs reserve the right to alter, supplement, amend, or otherwise modify these objections and responses in light of additional facts revealed through subsequent inquiry.

Because Requests for Production 1, 2, and 4-10 are the same for each of the Plaintiffs, Plaintiffs are responding and objecting jointly to those requests instead of providing individual responses that would be duplicative of each other. Because Request for Production 3 to ADP is different from Request for Production 3 to the DNC and DSCC, Plaintiffs DNC and DSCC are responding and objecting jointly to their Request for Production 3, while Plaintiff ADP is responding and objecting to its Request for Production 3; both of these responses and objections are included below.

As explained below, Plaintiffs, in response to most of the Requests for Production, will produce responsive, non-privileged documents in their possession, custody, or control that they are able to locate following a reasonable search. Plaintiffs note, however, that although ADP had received a litigation hold in connection with this case, an ADP employee, on November 30, 2016, closed numerous email addresses that were no longer in use. While the vast majority of those accounts were highly unlikely to contain any responsive documents, four of the closed email accounts were the accounts of volunteer voter-protection deputies and would have contained responsive documents. The closing of those email accounts resulted in the deletion of the emails in the accounts, and Plaintiffs have been unable to retrieve those emails.

The ADP employee who closed these email accounts did so as part of the close-out of operations for the 2016 campaign and believes he was unaware of the litigation hold. In addition, the four volunteer voter-protection deputies' email accounts were created less than a month before the 2016 general election—one was created on October 10, two were created on October 20, and one was created on October 21—and those deputies worked primarily at the direction of and in coordination with Spencer Scharff, ADP's Voter Protection Director for the period leading up to the 2016 election. Plaintiffs will be producing responsive, non-privileged documents from Mr. Scharff's ADP email account, and Mr. Scharff believes that, until a week before the election, he would have been included on all or most of the deputies' communications. Further, in the week before the election, the deputies' practice was to copy Mr. Scharff on all important emails, which he believes would have included any emails relating to out-of-precinct provisional voting or ballot collection.

GENERAL OBJECTIONS

1. Nothing in these objections or responses can be taken as an admission that Plaintiffs agree with Intervenors' use or interpretation of terms. These objections and responses are based on Plaintiffs' understanding of each individual request. To the extent Intervenors assert an interpretation of any request that is inconsistent with Plaintiffs' understanding, Plaintiffs reserve the right to supplement their objections and responses.

2. Plaintiffs object to Intervenors' requests to the extent that they purport to impose obligations greater than those imposed by the applicable Federal Rules of Civil Procedure or the Local Rules of the United States District Court for the District of Arizona.

3. Plaintiffs object to Intervenors' requests to the extent that they purport to require Plaintiffs to search for and produce documents that are not in their possession, custody, or control.

4. Plaintiffs object to the overly broad and unduly burdensome nature of Intervenors' requests to the extent: (1) they seek information or documents obtainable

doctrine, and/or constitutes trial preparation material within the meaning of Rule 26 and/or expert witness information that is not discoverable under Rule 26.

Subject to, expressly reserving, and without waiving these specific objections and Plaintiffs' General Objections above, Plaintiffs will produce any responsive, non-privileged documents in their possession, custody, or control that they are able to locate following a reasonable search.

Dated: March 13, 2017

s/ Joshua L. Kaul

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2017 a true copy of the foregoing document was served via electronic mail on the following:

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EXHIBIT C

PDF TRANSCRIPT COVER PAGE

Deposition of: **Spencer Scharff**

Case: **Arizona Democratic Party, et al. v. Reagan, et al.**

Date: **06/06/2017**

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Court Reporters **Videoconference** **Transcription**

interacted with any voters, so that way they could inform the voters of the necessary instructions as to where to vote come Election Day.

Q. Line 7 near the end states "Plaintiffs will be producing responsive, non-privileged documents from Mr. Scharff's ADP email account, and Mr. Scharff believes that until a week before the election, he would have been included on all or most of the deputies' communications."

Did I read that correctly?

A. You did.

Q. The first half of that sentence, is that your understanding, that responsive non-privileged documents from your ADP e-mail account were produced?

A. That's my understanding, but I didn't participate in the production of documents.

Q. Were you notified that the documents would be produced?

A. Yes.

Q. And the second half of that sentence it states that until a week before the election, you would have been included on all or most of the deputies' communications.

A week before the election when you left the Party?

A. What's the question?
Q. Is a week before the election when you left the Party?
A. No.
Q. When did you leave the Party?
A. A few weeks after the election.
Q. So do you have any understanding of why a week before the election you would no longer have been included on all or most of the deputies' communications?
A. You know, it's a short period of time to when I had folks working with me, and essentially there was a lot that needed to take place. And at the outset, I wanted to be included on most e-mail communications in order to ensure they were doing their jobs properly, volunteer gigs properly. But at some point they gained my trust and I began delegating more and more, especially as there's more and more work to do.
And so I continued to be included on a bulk of the work they were doing and e-mail communications, but, you know, there was a lot going on the week before the election.
Q. And so those four -- including those four volunteer voter protection deputies whose e-mail accounts were closed, at that point you may no longer

have been included on all or most of their communications?

A. I don't know how much communications I wasn't included on because, of course, I wasn't included on them.

Q. Did you have specific direction to the voter protection deputies as to which e-mails to include you on?

A. No.

Q. Any specific subjects you notified them you always wanted to be copied on?

A. Yes.

Q. What were those subjects?

A. To the extent that there was ever any information that was voter facing that was disseminated in a public manner, I wanted to just review it to ensure, to the best of my abilities, that it reflected accurate voting information.

Q. Line 10 continues there, "Further in the week before the election the deputies' practice was to copy Mr. Scharff on all important emails, which he believes would have included any emails relating to out-of-precinct professional voting or ballot collection."

Did I read that correctly?

A. You did.
Q. Does that remain your understanding?
A. That seems reasonable, yes.
Q. And when it says the deputies' practice was to copy you on all important e-mails, whose definition of "important" is that?
A. I don't know. Whose is it?
Q. Was it your definition of "important"? Did you tell them: I want to be copied on all important e-mails? Or was it their discretion as to when to copy you?
A. The last week of election, it was largely left to their discretion.
But to be clear, I have a lot of confidence in their discretion. These individuals, they're bright, capable, thoughtful individuals who, honestly, took a lot of time to volunteer. And I remain extremely appreciative of that time they gave.
Q. Do you think that you would have been copied on important e-mails by Tom Reade?
A. I don't know.
Q. Did you ever give any direction to Tom Reade to copy you on important e-mails?
A. I would have asked Tom to include me on any e-mails related to information that was voter facing as

out the rest of it --

MR. BARR: okay.

MS. AGNE: -- at the meet and confer.

THE COURT REPORTER: Do you want this transcribed?

MS. KARLSON: Yes.

THE COURT REPORTER: Do you want a copy?

MS. AGNE: Yes.

MR. BARR: Yes, please.

THE WITNESS: I don't want to waive my right. I want to look at it.

(Concluded at 4:08 p.m.)

_____

SPENCER SCHARFF

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

BE IT KNOWN that the foregoing proceedings were taken before me; that the witness before testifying was duly sworn by me to testify to the whole truth; that the foregoing pages are a full, true and accurate record of the proceedings, all done to the best of my skill and ability; that the proceedings were taken down by me in shorthand and thereafter reduced to print under my direction.

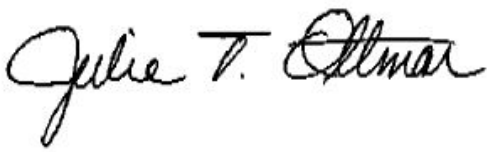
I CERTIFY that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

{X} Review and signature was requested.
{ } Review and signature was waived.
(} Review and signature was not required/requested.

I CERTIFY that I have complied with the ethical obligations set forth in ACJA 7-206(F)(3) and ACJA 7-206 (J)(1)(g)(1) and (2), Dated at Phoenix, Arizona, this 20th day of June, 2017.

MARY DAVIS, RPR - Digital Signature
AZ Certified Court Reporter No. 50271

I CERTIFY that OTTMAR & ASSOCIATES, INC., has Complied with the ethical obligations set forth in ACJA 7-206 (J)(1)(g)(1) through (6).



OTTMAR & ASSOCIATES, INC.
AZ Registered Reporting Firm No. R1008