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

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

**MOTION FOR AN ORDER OF THE FULL COURT APPROVING OR OTHERWISE DIRECTING COMPLIANCE WITH THE COURT'S JANUARY 31, 2017 AND FEBRUARY 3, 2017 DISCOVERY ORDERS**

Pursuant to Federal Rule of Civil Procedure 7(b), Local Rule 105, and 28 U.S.C. § 2284(b), Plaintiffs respectfully move for an order of the full three-judge Court approving or otherwise directing compliance with the Court's January 31, 2017 and February 3, 2017 discovery orders. In support of this motion, Plaintiffs attach a memorandum of law in support and incorporated exhibits.

Dated: February 8, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of February, 2017, a copy of the foregoing Motion to for Immediate Three-Judge Panel Review and the attached Memorandum of Law were filed and served via the Court's CM/ECF system and separately served via electronic mail upon all counsel of record pursuant to the consent of all parties.

/s/ *Stephen M. Medlock*

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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER OF THE FULL COURT APPROVING OR OTHERWISE DIRECTING COMPLIANCE WITH THE COURT'S JANUARY 31, 2017 AND FEBRUARY 3, 2017 DISCOVERY ORDERS**

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## INTRODUCTION

Judge Bredar, acting on his authority under 28 U.S.C. § 2284(b)(3), entered two orders for the Court on January 31, 2017, and February 3, 2017, correctly rejecting the State's assertion of state legislative privilege in this case and compelling compliance with Plaintiffs' third-party subpoenas. Dkts. 132, 133. The State has refused to comply. It has *continued* to assert third-party legislative privilege in its responses to our discovery requests, *continued* to refuse to produce documents identified in its earlier privilege logs, and *continued* to assert that no state official need yet sit for deposition, all in flat violation of the Court's orders.

The State did not move for an immediate stay of the Court's January 31, 2017, and February 3, 2017 orders, did not request that Judge Bredar make the orders contingent on approval by the full three-judge Court, and did not (despite Plaintiffs' suggestion) ask for initial consideration of its motions by the full Court. Instead, the State has simply declared, unilaterally, that it will not comply with the Court's rulings until the full three-judge panel has exercised its discretion to review them—relief that, one week on, it still has not sought.

Plaintiffs cannot stand idly by while the discovery clock continues to count down. Fact discovery was initially scheduled to close on February 10, but the State's repeated assertion of privilege has necessitated an extension of that deadline. Although the parties have now reached an agreement to extend the discovery schedule by three weeks, to and including March 3, 2017 (*see* Ex. B), even the extended schedule leaves limited time to prepare for and take *seven* depositions, the first of which is scheduled to take place in just nine days, on February 17. And it is no answer to say that Plaintiffs can seek a further extension of the discovery schedule if one later becomes necessary.

As we have explained from the start, time is of the essence in this case. Should Plaintiffs ultimately prevail, final judgment must be entered by early summer, in time for the Governor and General Assembly to negotiate and enact a new map in time for the 2018 primary election cycle. And that is to say nothing of the likelihood that the losing party will appeal to the Supreme Court. The State should not permitted to delay progress in a case of this importance and urgency by simply choosing not to comply with discovery orders duly issued by Judge Bredar.

In our view, the issues presented by the State's assertion of legislative privilege are sufficiently clear that the full Court's review is unnecessary. We therefore request the full Court enter a summary order declining further review of the January 31, 2017, and February 3, 2017 orders and directing immediate compliance. If the Court disagrees and exercises its discretion to review the orders on their merits, we ask that the full Court to summarily approve Judge Bredar's orders for all of the reasons laid out fully in our briefing on the motions. *See* Dkts. 111, 120, 123, 125-1, 125-3, 128, 131.

**BACKGROUND**

Plaintiffs allege that the State of Maryland—through the Governor's Redistricting Advisory Committee (GRAC), the Democrat-controlled General Assembly, and the then-Democrat-controlled governor's office—retaliated against Republicans living in the former Sixth Congressional District by reason of their political associations and voting histories. These state agencies and officials gerrymandered the Sixth District by moving into the district tens of thousands of Democratic voters and out of the district tens of thousands of Republican voters, all with the specific intent and purpose of changing the outcome of all congressional elections in the Sixth District under the 2011 redistricting plan (the Plan).

**1.** In its opinion denying the State's motion to dismiss (Dkt. 88), the Court held that to prove their claims, Plaintiffs must (among other things) "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 v. McManus*, --- F. Supp. 3d ---, 2016 WL 4445320, at *11 (D. Md. 2016).

To meet this burden, Plaintiffs served a combination of document and deposition subpoenas on former GRAC chair Jeanne Hitchcock; Maryland Senate President Thomas "Mike" Miller, Jr.; Maryland House Speaker Michael Busch; former GRAC member Richard Stewart; Senator Richard Madaleno, Jr.; Senator C. Anthony Muse; Delegate Kurt Anderson; and former Senator and Democratic candidate for Congress from the Sixth District, Robert Garagiola. We similarly propounded requests for documents, interrogatories, and requests for admissions on the named Defendants, seeking documents and information concerning the drafting of the Plan.

**2.** In response to every last subpoena and discovery request, the Office of the Attorney General filed motions and served objections asserting that current and former state officials are absolutely and categorically immune from having to answer compulsory process in this case pursuant to the state legislative privilege doctrine. *See* Dkts. 111-3 thru 111-21; Dkt. 114; Dkt. 126. At the same time, Plaintiffs filed motions to compel the third parties to produce documents and appear at deposition (Dkt. 111) and to compel the defendants to answer our discovery requests (Dkt. 125). The parties' positions are fully developed in their briefing on the two motions to quash and the two motions to compel, which comprise 1,162 pages of argument and exhibits.

In summary: We argued that state officials cannot duck their federal constitutional obligations by hiding behind claims of state legislative privilege—a creature of federal common law only. That rule, which is affirmed consistently in the case law, has special force in federal lawsuits of broad public importance seeking injunctive relief under the Federal Constitution, in which no state official faces a threat of personal liability. We explained that courts often face claims of state legislative privilege in cases like this one, and relying on a settled balancing test, they virtually always reject them. We explained further that the balancing test applied by other courts in cases like this tips decisively in favor of denial of the privilege. Finally, we demonstrated at length that the State had failed to meet its evidentiary burden to prove the facts necessary to support assertion of the privilege (despite numerous opportunities), and separately that each of the subpoena targets had waived privilege in myriad ways since enactment of the 2011 redistricting plan.

The State disagreed. It took the position that all of the state officials in this case are categorically immune from having to answer compulsory process. In support of that dubious assertion, it cited state-law authorities that have no application to this federal lawsuit; and inapposite federal-law authorities involving assertions of the legislative privilege by state officials defending themselves in private lawsuits seeking awards of damages. Beyond that, the State asserted (puzzlingly) that testimony from individual legislators and the members of the GRAC would be "irrelevant" to our claims because such testimony would provide only "subjective" evidence concerning "subjective" intent, and not objective evidence concerning specific intent. The State never produced an iota of evidence to support the officials' assertion of privilege and generally declined to respond to the arguments and authorities that we cited.

**3.** Acting on his authority under 28 U.S.C. § 2284(b)(3), Judge Bredar rejected the State's arguments, entering an order for the Court denying the motions to quash and granting the first motion to compel. *See* Dkts. 132-133.[1] "After considering all of the parties' arguments," Judge Bredar explained, "the Court concludes the legislative privilege claimed by the Non-Parties must yield to the discovery requests of Plaintiffs." Dkt. 132, at 3. Judge Bredar gave "no weight to the Non-Parties' contention that the Court's earlier opinion purportedly prohibited Plaintiffs from using 'subjective evidence,'" which he described as "a distortion of what the opinion actually said." *Id*. at 4. At bottom, Judge Bredar "[could] not endorse" the State's efforts "to bar essential discovery of evidence that lies at the heart of this case." *Id*. And "[a]lthough the Non-Parties' compliance with the subpoenas served upon them may involve some inconvenience," he concluded, "such inconvenience [is] minor in comparison to the weight of the litigation, which seeks to vindicate fundamental constitutional rights." *Id*. at 7. He accordingly denied both motions to quash and granted the first of Plaintiffs' motion to compel. Plaintiffs' second motion to compel (Dkt. 125) remains pending.

**4.** Notwithstanding the Court's order, both Defendants and the third-party subpoena targets have continued (through common counsel in the OAG) to assert legislative privilege as a basis for refusing to produce documents, answer requests for admissions, and appear at depositions. For example, Defendants have continued to refuse to answer our Requests for Admission 24-25, asserting that they lack sufficient knowledge "in part because of continued assertion of legislative privilege in response to

[1] An order issued with respect to Jeanne Hitchcock, Senator Miller, Speaker Busch, Richard Stewart, and Senator Madaleno on January 31, 2017. Dkt. 132. A second order issued with respect to Senator Muse, Delegate Anderson, and former Senator Garagiola on February 3, 2017. Dkt. 133.

inquiry regarding these matters by Senate President Miller and House of Delegates Speaker Busch." *See* Ex. A at 6. In the parties' February 7, 2017, meet-and-confer concerning Defendants' most recent (post-order) discovery responses, counsel for the State explained further that they also will not produce documents in response to our third-party document subpoenas on the continued basis of legislative privilege. Counsel explained they were continuing to assert legislative privilege and will not yet comply with the Court's discovery orders because they had not yet had an opportunity to seek and obtain a decision concerning their legislative privilege arguments from the full Court. They also informed us that they will not make any further state officials available for deposition before such a ruling.[2]

**REASONS FOR GRANTING THE MOTION**

Section 2284(b), Title 28, provides that, in actions covered by Section 2284(a), "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure" other than orders granting or denying injunctions or entering judgment on the merits. That is just what Judge Bredar did when he denied the State's motions to quash and granted the first of Plaintiffs' motions to compel: He entered valid, standing orders *of the Court*, requiring compliance with our third-party deposition and document subpoenas. As we noted at the outset, the State did not move for a stay of the discovery orders and did not request that Judge Bredar make the orders contingent on approval by the full three-judge court.

The State has instead taken the untenable position that it need not comply with the Court's January 31, 2017, and February 3, 2017 orders until it first seeks and

[2] We deposed former Senator Robert Garagiola on February 3, 2017, after he agreed to waive all claims to legislative privilege.

obtains full-Court review on a schedule of its own choosing. There is nothing in either the text of the statute or common sense to support that position. To be sure, Section 2284(b) provides that "[a]ny action of a single judge *may* be reviewed by the full court at any time before final judgment." 28 U.S.C. § 2284(b)(3) (emphasis added). But that language is merely permissive, not obligatory; it does not entitle the State as of right to further review of any single-judge orders. And the statutory language assuredly does not say that single-judge orders are unenforceable or without effect until the full three-judge court enters a subsequent order on review.

The State's refusal to comply with the Court's discovery orders are, meanwhile, prejudicing Plaintiffs. We served the first of our deposition subpoenas on December 19, 2016, more than seven weeks ago. Yet it was only late yesterday—three days from the original close of discovery—that the State provided us with acceptable dates for these depositions. *See* Ex. C. Meanwhile, although the parties have agreed to a three-week extension of the discovery deadline (Ex. B)[3] to permit Plaintiffs to take the depositions compelled by the January 31, 2017, and February 3, 2017 orders, the clock continues to tick. The first of the depositions (for Senator Muse) is scheduled for February 17, 2017—just nine days from today. Richard Stewart's depositions, meanwhile, is scheduled for February 21. And counsel for Plaintiffs need time to review as-of-yet withheld documents in order to prepare adequately for those depositions.

Against this backdrop, Plaintiffs respectfully request that the full Court enter an expedited order declining review and directing the State to comply with the January 31, 2017, and February 3, 2017 discovery orders or otherwise approving the orders on

[3] With Defendants' consent, Plaintiffs intend to file a joint stipulation to an extension of the discovery deadline by close of business tomorrow. *See* Ex. D.

their merits. Because the issues were already subject to more than 1,100 pages of briefing and exhibits, and because Judge Bredar's careful opinion is consistent with settled law (the State could not cite a single redistricting case in which the legislative privilege was upheld), we do not believe that full-Court review is necessary. If the full Court nevertheless exercises its discretion to review the January 31, 2017, and February 3, 2017 discovery orders, Plaintiffs respectfully refer the Court to their prior briefs (Dkts. 111, 120, 123, 125-1, 125-3, 128, 131), which fully develop their arguments on the matter.

**CONCLUSION**

The full Court should enter an order (1) declining to review, and directing the State to comply with, the Court's January 31, 2017, and February 3, 2017 discovery orders or (2) otherwise approving the orders on their merits.

Dated: February 8, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

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mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
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# EXHIBIT A

**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*. | * | |

* * * * * * * * * * * * * * * * * * * *

**DEFENDANTS' RESPONSES TO PLAINTIFFS'**
**THIRD SET OF REQUESTS FOR ADMISSIONS**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants Linda H. Lamone and David J. McManus, Jr., state as follows for their responses and objections to Plaintiffs' Second Set of Requests for Admissions.

**PRELIMINARY STATEMENT**

The following responses are based on the Defendants' knowledge, information, and belief, and are complete to the best of their knowledge at this time. The Defendants assume no obligation to supplement or amend voluntarily these responses beyond applicable legal requirements to reflect information, evidence, documents, or things discovered following service of these responses. Furthermore, these responses were prepared based on the Defendants' good faith interpretation and understanding of the Plaintiffs' requests and are subject to correction for inadvertent errors or omissions, if any. These responses are given without prejudice to subsequent revision, amendment, or supplementation based upon any information, evidence, and documentation that hereinafter may be discovered.

The Defendants reserve the right to refer to, or to offer into evidence at the time of trial, any and all facts, evidence, documents, and things developed during the course of discovery and trial preparation, notwithstanding the reference to facts, evidence, documents, and things in these responses.

The Defendants reserve all objections or other questions as to the competency, relevance, materiality, privilege or admissibility of evidence in any subsequent proceeding of their responses and of any information or documents produced in response thereto.

The Defendants state that, except for facts explicitly admitted herein, no admission of any nature whatsoever is to be implied or inferred from their responses. The fact that the Defendants have responded to a request should not be taken as an admission, or a concession of the existence of any fact set forth, inferred or assumed by such request, or that such response constitutes evidence of any fact thus set forth, inferred, or assumed.

The Defendants' decision to respond to any request, notwithstanding the objectionable nature of any of the requests themselves, is not: (a) an acceptance of, or agreement with, any of the characterizations or purported descriptions of the transactions or events contained in the requests; (b) a concession or admission that the material is relevant to this proceeding; (c) a waiver of the General Objections or of the objections asserted in any specific response; (d) an admission that any such information exists; or (e) an agreement that responses for similar information will be treated in a similar manner.

## GENERAL OBJECTIONS

The Defendants' responses are subject to, qualified by, and limited by the following General Objections, which apply to each specific request as if incorporated and set forth in full in each response.

1. The Defendants object to these requests to the extent they seek material that is not relevant to the subject matter involved in this action or is beyond the scope of what is required to be provided by the Federal Rules of Civil Procedure, the local rules of this Court, or the Orders of the Court in this matter.

2. The Defendants object to these requests to the extent that they are overbroad, oppressive, duplicative, or cumulative.

3. The Defendants object to these requests to the extent that they are vague, ambiguous, fail to specify with reasonable particularity the information sought, or otherwise are incomprehensible.

4. The Defendants object to these requests to the extent that they require the Defendants to make legal conclusions, and/or presuppose legal conclusions or assume the truth of matters that are disputed.

5. The Defendants object to these requests to the extent that they seek admissions regarding information not available to the Defendants and/or that calls for information that is not within the Defendants' possession, custody, or control.

6. The Defendants object to these requests to the extent that they seek information that is protected from disclosure pursuant to the attorney-client privilege, the

attorney work product doctrine, executive or legislative privilege, or otherwise is privileged, protected, or exempt from discovery.

7. The Defendants object to plaintiffs' definition of relevant individual because, with the exception of the Defendants and their agents, representatives, and attorneys, it consists solely of individuals who are employees and former employees of other state entities over whom the Defendants have no control. Plaintiffs' definition also includes other government entities over whom the Defendants have no control.

8. In addition to these General Objections, the Defendants also state, where appropriate, other specific objections to individual requests. By setting forth such specific objections, the Defendants neither intend to, nor do, limit or restrict or waive the General Objections, which shall be deemed incorporated in each of the responses to the specific requests that follow, though not specifically referred to or restated therein.

**RESPONSES**

22. The GRAC had the ability in 2011 to draw the lines of Maryland's eight congressional districts in such a way as to ensure that, as a result of any election held under a map adopting such lines, Maryland's delegation to the U.S. House of Representatives would comprise seven Democrats and one Republican.

Response 22. Defendants admit that GRAC had the ability in 2011 to draw the lines of Maryland's eight congressional districts in any number of ways that would have produced a high likelihood that, as a result of any election held under a map adopting such lines, Maryland's delegation to the U.S. House of Representatives would comprise seven

Democrats and one Republican, because in 2011 Democrats, as measured by voter party registration, outnumbered Republicans by more than 2 to 1 statewide. Defendants further admit that GRAC had the ability in 2011 to draw the lines of Maryland's eight congressional districts in a number of ways that would have produced a high likelihood that, as a result of any election held under a map adopting such lines, Maryland's delegation to the U.S. House of Representatives would comprise eight Democrats and no Republicans. Defendants deny that GRAC could, through the line drawing process, ensure any particular electoral outcome in the composition of Maryland's delegation to the U.S. House of Representatives.

23. The GRAC considered a congressional redistricting map that was projected to produce eight majority-Democratic districts.

Response 23. Defendants admit that the GRAC was provided with a third-party proposed map that was projected to produce eight majority-Democratic districts, and further admit that the GRAC did not adopt that map.

24. When considering the lines of the Sixth District, the GRAC moved registered Democratic voters into the Sixth District by reason of their party affiliation for partisan purposes.

Response 24. Defendants admit that, when considering the lines of all districts, the GRAC moved population groups in and out of potential districts by Census Block Group, at the smallest unit of consideration. Defendants further admit that the GRAC considered

turnout and party affiliation data at either the Census Block Group or precinct level, as that data was available. Defendants do not have enough knowledge to admit or deny the remainder of this statement. Defendants have made reasonable inquiry of all members of the GRAC and staff members with knowledge of this topic, but were not able to learn more information before responses were due, in part because of continued assertion of legislative privilege in response to inquiry regarding these matters by Senate President Miller and House of Delegates Speaker Busch.

25. When considering the lines of the Sixth District, the GRAC moved registered Republican voters out of the Sixth District by reason of their party affiliation for partisan purposes.

Response 25. Defendants admit that, when considering the lines of all districts, the GRAC moved population groups in and out of potential districts by Census Block Group, at the smallest unit of consideration. Defendants further admit that the GRAC considered turnout and party affiliation data at either the Census Block Group or precinct level, as that data was available. Defendants do not have enough knowledge to admit or deny the remainder of this statement. Defendants have made reasonable inquiry of all members of the GRAC and staff members with knowledge of this topic, but were not able to learn more information before responses were due, in part because of continued assertion of legislative privilege in response to inquiry regarding these matters by Senate President Miller and House of Delegates Speaker Busch.

BRIAN E. FROSH
Attorney General of Maryland

___/s/__Jennifer L. Katz_____
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Dated: February 6, 2017

Attorneys for Defendants

# EXHIBIT B

**Stein, Micah D.**

**From:** Katz, Jennifer [jkatz@oag.state.md.us]
**Sent:** Wednesday, February 08, 2017 3:34 PM
**To:** Medlock, Stephen M.; Rice, Sarah
**Cc:** Kimberly, Michael B.; Hughes, Paul W.; Webb, Brantley; Stein, Micah D.
**Subject:** RE: Benisek v. Lamone, discovery schedule [MB-AME.FID1259210]

Steve,

We have considered your proposal and agree that a 3-week extension of the discovery schedule makes the most sense at this point.

Given our prior correspondence on the issue, is there a reason that you have not complied with the relevant non-parties request to depose President Miller and Speaker Busch in Annapolis and Governor O'Malley in Baltimore?

Finally, with regard to your letter concerning the 30(b)(6) deposition, we believe a meet and confer is necessary. Sarah and I are available Friday morning.

Best,
Jennifer

Jennifer Katz
Assistant Attorney General, Civil Division
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200 Saint Paul Place, 20th Floor
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(410) 576-7005

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**From:** Medlock, Stephen M. [mailto:SMedlock@mayerbrown.com]
**Sent:** Wednesday, February 08, 2017 9:34 AM
**To:** Katz, Jennifer <jkatz@oag.state.md.us>; Rice, Sarah <srice@oag.state.md.us>
**Cc:** Kimberly, Michael B. <MKimberly@mayerbrown.com>; Hughes, Paul W. <PHughes@mayerbrown.com>; Webb, Brantley <BWebb@mayerbrown.com>; Stein, Micah D. <MStein@mayerbrown.com>
**Subject:** RE: Benisek v. Lamone, discovery schedule [MB-AME.FID1259210]

Jennifer and Sarah:

Our counter-proposal is a simple, three-week extension of the discovery deadline. We cannot agree to a piecemeal extension applicable to only certain, cherry-picked aspects of discovery. As we explained during our phone call, your proposal would require Plaintiffs to waive their right (at a minimum) to move to compel should the parties come to an impasse regarding party discovery. This is of particular concern as Defendants have not produced any documents in response to several of our document requests and recently provided a 30(b)(6) witness with multiple pages of what appear to have been coached answers to deposition questions. We are not aware of any case in which the plaintiffs were required, as you propose, to waive their right to file further motions to compel in order to secure an extension of the discovery deadline. We are highly doubtful any such cases exist, particularly where, as here, the need for the extension was a consequence the defendants' conduct.

Although we would prefer not to burden the Court with this dispute, we cannot accept your proposal to extend the discovery deadline on such one-sided terms. You should not be able to pick and choose the consequences of your strategy to slow the discovery process.

To resolve this dispute, we propose the following: All remaining deadlines in the parties' Scheduling Order will be extended by three weeks, to and including March 3, 2017. This position is simple, fair, and consistent with routine practice. We propose three weeks for two reasons: first, it is a compromise between our initial offer of two weeks and your counter-offer of four weeks, and second, it covers each of the proposed deposition dates that you have offered for the remaining deponents. Our proposal extends all discovery rights on even-handed terms for both Parties and allows the parties to complete all of the noticed depositions in a timely manner. If you do not agree to these common sense terms, we will raise this issue with the Court in a separate statement in the joint status report; we are confident that the Court will agree with our approach.

Please let us know by close of business today whether you agree to our proposal.

In addition, we agree to depose the following individuals on these dates:

2/17/17: Senator Muse, beginning at 9am
2/21/17: Richard Stewart, beginning at 9am
2/24/17: Speaker Busch, beginning at 10am
2/27/17: Delegate Anderson, beginning at 8am
2/28/17: Jeanne Hitchcock, beginning at 4pm
3/2/17: 30(b)(6) designee, beginning at 9am
3/3/17: Governor O'Malley, beginning at 9am
3/3/17: President Miller, beginning at 1pm

You'll note that we are proposing that the deposition of Martin O'Malley occur on March 3rd. We have conflicts that prevent us from deposing Governor O'Malley on the dates you provided (including the deposition of Speaker Busch). Please let us know if that date and time works for you.

Your email does not mention the location of these depositions. Therefore, we assume that there is no objection to holding these depositions at the Washington, D.C. offices of Mayer Brown. Please let us know if you have any objections to this location. We will send amended deposition subpoenas to you via email shortly.

Regards,

Steve

**Stephen M. Medlock**

**Mayer Brown LLP**
1999 K Street NW | Washington, DC 20006
T: (202) 263-3221 | F: (202) 263-5221
smedlock@mayerbrown.com

**From:** Katz, Jennifer [mailto:jkatz@oag.state.md.us]
**Sent:** Tuesday, February 07, 2017 5:24 PM
**To:** Medlock, Stephen M.; Kimberly, Michael B.; Hughes, Paul W.; Webb, Brantley; Stein, Micah D.
**Cc:** Rice, Sarah
**Subject:** Benisek v. Lamone, discovery schedule

Counsel,

As we discussed on the phone today, on behalf of the non-party GRAC members and other legislators, the AG's Office will be filing a request for review by the 3-judge court, to be filed by the end of this week. In addition, in order to preserve Governor O'Malley's right to assert his legislative privilege, the AG's Office will be filing a short motion on his behalf, incorporating by reference arguments made on behalf of the GRAC members.

We understand your concerns about extending the discovery schedule and are sympathetic to them. We also agreed to your request for a compressed discovery schedule and do not see the need for a full extension of the discovery period. We hope to be able to reach a resolution and propose the following terms. We are available tomorrow to discuss.

We agree that if the pending motion to compel is resolved in your favor, including the issue of control, the Defendants will supplement all discovery responses for which the objection was made to the extent necessary to comply with the order, and reserve the right to ask for appropriate time to do so.

We agree to seek to extend the discovery period solely with respect to the non-party documents and depositions contemplated in Judge Bredar's order compelling compliance, and any motions practice required to resolve issues that arise with respect to those documents and depositions.

We agree to extend expert discovery for however long you deem necessary.

We do not agree to extend fact discovery for purposes of serving any new discovery requests or the issuance of new subpoenas.

We do not agree to extend the discovery period to allow for the filing of motions to compel raising issues related to the Defendants' discovery responses not already raised in your initial motion to compel, or any other matter you raise with us before February 10.

Below are dates supplied to us by non-parties on which they are available for deposition.

<u>Senator Muse</u>
Feb. 17
Feb. 24

<u>Delegate Anderson</u>
Feb. 13
Feb. 20
Feb. 27.
The earlier, the better for him – he can start as early as 8 a.m.

<u>House Speaker Busch</u>
Feb. 24, beginning at 10am

<u>Senate President Miller</u>

March 3, 1-6 p.m.

Jeanne Hitchcock
Feb. 22, all day
Any of the following days after 4pm:
Feb. 15
Feb. 21
Feb. 27-Mar. 1

Richard Stewart
Feb. 21
Feb. 16
March 1

Governor O'Malley
Feb. 22
Feb. 24

30(b)(6)
March 2

Best,
Jennifer

Jennifer Katz
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(410) 576-7005

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# EXHIBIT C

**Stein, Micah D.**

**From:** Katz, Jennifer [jkatz@oag.state.md.us]
**Sent:** Tuesday, February 07, 2017 5:24 PM
**To:** Medlock, Stephen M.; Kimberly, Michael B.; Hughes, Paul W.; Webb, Brantley; Stein, Micah D.
**Cc:** Rice, Sarah
**Subject:** Benisek v. Lamone, discovery schedule

Counsel,

As we discussed on the phone today, on behalf of the non-party GRAC members and other legislators, the AG's Office will be filing a request for review by the 3-judge court, to be filed by the end of this week. In addition, in order to preserve Governor O'Malley's right to assert his legislative privilege, the AG's Office will be filing a short motion on his behalf, incorporating by reference arguments made on behalf of the GRAC members.

We understand your concerns about extending the discovery schedule and are sympathetic to them. We also agreed to your request for a compressed discovery schedule and do not see the need for a full extension of the discovery period. We hope to be able to reach a resolution and propose the following terms. We are available tomorrow to discuss.

We agree that if the pending motion to compel is resolved in your favor, including the issue of control, the Defendants will supplement all discovery responses for which the objection was made to the extent necessary to comply with the order, and reserve the right to ask for appropriate time to do so.

We agree to seek to extend the discovery period solely with respect to the non-party documents and depositions contemplated in Judge Bredar's order compelling compliance, and any motions practice required to resolve issues that arise with respect to those documents and depositions.

We agree to extend expert discovery for however long you deem necessary.

We do not agree to extend fact discovery for purposes of serving any new discovery requests or the issuance of new subpoenas.

We do not agree to extend the discovery period to allow for the filing of motions to compel raising issues related to the Defendants' discovery responses not already raised in your initial motion to compel, or any other matter you raise with us before February 10.

Below are dates supplied to us by non-parties on which they are available for deposition.

Senator Muse
Feb. 17
Feb. 24

Delegate Anderson
Feb. 13
Feb. 20
Feb. 27.
The earlier, the better for him – he can start as early as 8 a.m.

House Speaker Busch
Feb. 24, beginning at 10am

Senate President Miller
March 3, 1-6 p.m.

Jeanne Hitchcock
Feb. 22, all day
Any of the following days after 4pm:
Feb. 15
Feb. 21
Feb. 27-Mar. 1

Richard Stewart
Feb. 21
Feb. 16
March 1

Governor O'Malley
Feb. 22
Feb. 24

30(b)(6)
March 2

Best,
Jennifer

Jennifer Katz
Assistant Attorney General, Civil Division
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200 Saint Paul Place, 20th Floor
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# EXHIBIT D

**Stein, Micah D.**

**From:** Medlock, Stephen M.
**Sent:** Wednesday, February 08, 2017 5:27 PM
**To:** Katz, Jennifer; Rice, Sarah
**Cc:** Kimberly, Michael B.; Hughes, Paul W.; Webb, Brantley; Stein, Micah D.
**Subject:** RE: Benisek v. Lamone, discovery schedule [MB-AME.FID1259210]

Jennifer and Sarah:

Thank you for your agreement to the three week extension. We will put together a short joint stipulation that we can file with the court tomorrow. I will send that to you for your approval this evening.

With respect to the location of the remaining depositions, holding seven depositions in Annapolis or Baltimore would be costly and very inconvenient to our team, all of whom live in Virginia or just outside Washington, D.C. What is more, when the roles were reversed, we agreed to make our clients available for deposition at your offices in Baltimore, despite their requests for depositions in locations more convenient to northwest Maryland; as a consequence, each drove between 60 and 90 minutes both ways to attend their depositions, at your insistence.

While we are sympathetic to the witnesses' desire not to have to travel more than a few blocks to their depositions (a courtesy the Plaintiffs would have appreciated when the tables were turned), we are within our rights to require compliance in Bethesda, which is less than an hour by car from both Annapolis and Baltimore. We have already taken Robert Garagiola's deposition there, and all of our deposition notices have consistently identified Bethesda as the location of compliance.

With regard to my correspondence concerning the 30(b)(6) deposition, it is very important that we meet and confer tomorrow. As explained in our letter, we believe that providing a witness with written script to read from at deposition is a serious discovery abuse; multiple courts have imposed sanctions for engaging in similar tactics. We believe this abuse will at minimum necessitate a new deposition on the 30(b)(6) topics already covered, and as we have seen, such coordination takes time. We also need to determine whether we will need seek relief from the Court as soon as possible.

Regards,

Steve

**Stephen M. Medlock**

**Mayer Brown LLP**
1999 K Street NW | Washington, DC 20006
T: (202) 263-3221 | F: (202) 263-5221
smedlock@mayerbrown.com


**From:** Katz, Jennifer [mailto:jkatz@oag.state.md.us]
**Sent:** Wednesday, February 08, 2017 3:34 PM
**To:** Medlock, Stephen M.; Rice, Sarah

**Cc:** Kimberly, Michael B.; Hughes, Paul W.; Webb, Brantley; Stein, Micah D.
**Subject:** RE: Benisek v. Lamone, discovery schedule [MB-AME.FID1259210]

Steve,

We have considered your proposal and agree that a 3-week extension of the discovery schedule makes the most sense at this point.

Given our prior correspondence on the issue, is there a reason that you have not complied with the relevant non-parties request to depose President Miller and Speaker Busch in Annapolis and Governor O'Malley in Baltimore?

Finally, with regard to your letter concerning the 30(b)(6) deposition, we believe a meet and confer is necessary. Sarah and I are available Friday morning.

Best,
Jennifer

Jennifer Katz
Assistant Attorney General, Civil Division
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
jkatz@oag.state.md.us
(410) 576-7005

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**From:** Medlock, Stephen M. [mailto:SMedlock@mayerbrown.com]
**Sent:** Wednesday, February 08, 2017 9:34 AM
**To:** Katz, Jennifer <jkatz@oag.state.md.us>; Rice, Sarah <srice@oag.state.md.us>
**Cc:** Kimberly, Michael B. <MKimberly@mayerbrown.com>; Hughes, Paul W. <PHughes@mayerbrown.com>; Webb, Brantley <BWebb@mayerbrown.com>; Stein, Micah D. <MStein@mayerbrown.com>
**Subject:** RE: Benisek v. Lamone, discovery schedule [MB-AME.FID1259210]

Jennifer and Sarah:

Our counter-proposal is a simple, three-week extension of the discovery deadline. We cannot agree to a piecemeal extension applicable to only certain, cherry-picked aspects of discovery. As we explained during our phone call, your proposal would require Plaintiffs to waive their right (at a minimum) to move to compel should the parties come to an impasse regarding party discovery. This is of particular concern as Defendants have not produced any documents in response to several of our document requests and recently provided a 30(b)(6) witness with multiple pages of what appear to have been coached answers to deposition questions. We are not aware of any case in which the plaintiffs were required, as you propose, to waive their right to file further motions to compel in order to secure an extension of the discovery deadline. We are highly doubtful any such cases exist, particularly where, as here, the need for the extension was a consequence the defendants' conduct.

Although we would prefer not to burden the Court with this dispute, we cannot accept your proposal to extend the discovery deadline on such one-sided terms. You should not be able to pick and choose the consequences of your strategy to slow the discovery process.

To resolve this dispute, we propose the following: All remaining deadlines in the parties' Scheduling Order will be extended by three weeks, to and including March 3, 2017. This position is simple, fair, and consistent with routine practice. We propose three weeks for two reasons: first, it is a compromise between our initial offer of two weeks and

your counter-offer of four weeks, and second, it covers each of the proposed deposition dates that you have offered for the remaining deponents. Our proposal extends all discovery rights on even-handed terms for both Parties and allows the parties to complete all of the noticed depositions in a timely manner. If you do not agree to these common sense terms, we will raise this issue with the Court in a separate statement in the joint status report; we are confident that the Court will agree with our approach.

Please let us know by close of business today whether you agree to our proposal.

In addition, we agree to depose the following individuals on these dates:

2/17/17: Senator Muse, beginning at 9am
2/21/17: Richard Stewart, beginning at 9am
2/24/17: Speaker Busch, beginning at 10am
2/27/17: Delegate Anderson, beginning at 8am
2/28/17: Jeanne Hitchcock, beginning at 4pm
3/2/17: 30(b)(6) designee, beginning at 9am
3/3/17: Governor O'Malley, beginning at 9am
3/3/17: President Miller, beginning at 1pm

You'll note that we are proposing that the deposition of Martin O'Malley occur on March 3rd. We have conflicts that prevent us from deposing Governor O'Malley on the dates you provided (including the deposition of Speaker Busch). Please let us know if that date and time works for you.

Your email does not mention the location of these depositions. Therefore, we assume that there is no objection to holding these depositions at the Washington, D.C. offices of Mayer Brown. Please let us know if you have any objections to this location. We will send amended deposition subpoenas to you via email shortly.

Regards,

Steve

**Stephen M. Medlock**

**Mayer Brown LLP**
1999 K Street NW | Washington, DC 20006
T: (202) 263-3221 | F: (202) 263-5221
smedlock@mayerbrown.com


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