

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

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v.

LINDA H. LAMONE, *et al.*,

Defendants.

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Case No. 13-cv-3233

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**MOTION FOR PROTECTIVE ORDER AND TO QUASH
NON-PARTY DEPOSITION SUBPOENA SERVED ON
FORMER GOVERNOR MARTIN O’MALLEY AND FOR STAY**

Former Governor Martin O’Malley, through counsel, moves for a protective order and to quash the non-party deposition subpoena served on him by the Plaintiffs, and further seeks a stay of compliance with the subpoena pending review by the three-judge Court of other non-parties’ assertions of legislative privilege against compelled testimony in this case. In support of this motion, Governor O’Malley states the following:

(1) On February 8, 2017, the Plaintiffs served former Governor O’Malley with a subpoena to testify at deposition in this matter on March 3, 2017. Ex. 1, subpoena.

(2) On February 9, 2017, the three-judge Court granted a motion filed by other non-parties, including former members of the Governor’s Redistricting Advisory Committee (“GRAC”), seeking review by the three-judge Court of the orders of a single judge compelling their testimony at depositions in this matter and denying their motions for protective order on grounds of legislative privilege. ECF No. 140. The three-judge Court

also granted the non-parties' motion for a stay of the single judge's orders pending review by the three-judge Court.

(3) Governor O'Malley moves to quash the deposition subpoena served on him based on the same legislative privilege grounds advanced by the former GRAC members, in that his legislative testimonial privilege protects him from being compelled to testify in this matter about his legislative activity in preparing and proposing legislation concerning Maryland's 2011 congressional redistricting or related communications with his aides. Governor O'Malley incorporates by reference the memorandum accompanying the non-parties' Motion for Review by Three-Judge Court and for Stay (ECF No. 139-1).

(4) To the extent the three-judge Court determines that the legislative privilege against compelled testimony yields in this case, Governor O'Malley moves, in the alternative, for a protective order on executive privilege grounds, to protect Governor O'Malley from being compelled to testify about any predecisional deliberations on policy matters ancillary to the legislative activity of preparing or proposing congressional redistricting legislation. *See Jones v. Murphy*, 256 F.R.D. 510, 515-16 (D. Md. 2008) (explaining that the executive privilege "exists to protect the governmental decision-making process" and "protects from disclosure advice, opinions and recommendations that are part of the decision-making process; the goal is 'to prevent injury to the quality of agency decisions'" (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975))), *aff'd*, No. CIV. CCB-05-1287, 2009 WL 604937 (D. Md. Feb. 23, 2009).

(5) Because the three-judge Court may not complete its review by March 3, Governor O'Malley further seeks a stay of any compliance with the deposition subpoena served on

him pending resolution of the other non-parties' motion for review by the three-judge Court.

A proposed order is attached.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

Dated: February 14, 2017

 /s/ Jennifer L. Katz
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