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 Ulrike Willimon, the United States of America, Hon. Michael B. Mukasey, and Hon. William P.
 12 Greene, Jr.

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO

16 VETERANS FOR COMMON SENSE and)
 17 VETERANS UNITED FOR TRUTH,)
 18 Plaintiffs,)
 19 v.)
 20 Hon. JAMES B. PEAKE, Secretary of)
 Veterans Affairs, *et al.*,)
 21 Defendants.)
 22)
 23)

No. C 07-3758-SC

**MEMORANDUM IN SUPPORT OF
 DEFENDANTS' MOTION FOR
 PROTECTIVE ORDER TO STAY
 DISCOVERY FROM THE U.S. COURT
 OF APPEALS FOR VETERANS CLAIMS**

Date: February 29, 2008
 Time: 10:00 a.m.
 Courtroom: 1

24 Pursuant to Federal Rule of Civil Procedure 26(c), defendants move for a protective order
 25 staying discovery from the U.S. Court of Appeals for Veterans Claims (or CAVC) until this
 26 Court can rule on defendants' Motion to Dismiss Claims Against Defendants William P. Greene,
 27 Jr. and Michael B. Mukasey. On January 18, 2008, defendants moved to dismiss all claims
 28 against William P. Greene, Jr., who was sued in his official capacity as Chief Judge of the U.S.

1 Court of Appeals for Veterans Claims, asserting that this Court lacks jurisdiction to entertain
2 those claims. That motion is scheduled for hearing on February 22, 2008.

3 This Court has broad discretion to stay discovery where, as here, a dispositive motion
4 may resolve all claims against a defendant and render discovery unnecessary. A stay of
5 discovery is particularly appropriate here because this Court has not yet determined that it has
6 jurisdiction over Chief Judge Greene or the U.S. Court of Appeals for Veterans Claims. See
7 Order January 10, 2008 Order at 41:16-18 (MTD Order). A brief stay pending the outcome of
8 Chief Judge Greene's motion to dismiss would result in minimal prejudice to plaintiffs, in stark
9 contrast to the irremediable harm that would be caused by discovery into the workings of an
10 Article I court that later proved unnecessary.

11 **BACKGROUND**

12 Plaintiffs, two advocacy organizations, have leveled broad statutory and constitutional
13 challenges to the benefits programs administered by the Department of Veterans Affairs (VA),
14 alleging defects in the manner in which VA provides medical care and disability compensation to
15 veterans with post traumatic stress disorder (PTSD). On September 25, 2007, defendants moved
16 to dismiss all of plaintiffs' claim, arguing among other things that plaintiffs' claims did not fall
17 within the waiver of sovereign immunity provided by the Administrative Procedure Act (APA),
18 that the Court did not have jurisdiction to consider plaintiffs' challenges to benefits-related
19 decisions of the Secretary, and that the benefits adjudication procedures set up by the Veterans
20 Judicial Reform Act (VJRA) conformed to constitutional requirements as a matter of law. On
21 December 14, 2007, the Court heard argument on defendants' Motion to Dismiss Plaintiffs'
22 Complaint and stayed the case – including all discovery – until the Court could rule on the
23 motion to dismiss. See January 14, 2008 Minute Entry.

24 On January 10, 2008, the Court granted in part and denied in part defendants' motion to
25 dismiss and lifted the stay of discovery. The Court declined to reach defendants' argument that it
26 lacked jurisdiction over Chief Judge Greene and the U.S. Court of Appeals for Veterans Claims.
27 See MTD Order at 41:16-18. Instead, the Court invited defendants to file a separate motion
28

1 seeking to dismiss the claims against Chief Judge Greene. Id.

2 On January 18, 2008, defendants filed a separate Motion to Dismiss Claims Against
3 Defendants William P. Greene, Jr. and Michael B. Mukasey, arguing that there was no basis for
4 plaintiffs to proceed against either party. Defendants assert that the only available waiver of
5 sovereign immunity, 5 U.S.C. § 704, does not encompass claims against the U.S. Court of
6 Appeals of Veterans Claims or its officials, because it applies only to agencies, not to courts like
7 the CAVC. In support of their motion, defendants noted that Article I courts, like Article III
8 tribunals, “exercise the judicial power of the United States,” see Freytag v. Comm’r of Internal
9 Revenue, 501 U.S. 868, 889 (1991), and that the U.S. Court of Appeals for Veterans Claims is
10 very similar in function and structure to other courts that have been held exempt from the scope
11 of the APA. Defendants also contended that injunctive relief against Chief Judge Greene and the
12 U.S. Court of Appeals for Veterans Claims is unavailable. Defendants’ motion is scheduled to
13 be argued on February 22, 2008. That same day, the Court is also scheduled to hear argument on
14 plaintiffs’ Motion for Preliminary Injunction, filed in connection with plaintiffs’ challenge to the
15 adequacy of VA medical care – a motion that does not implicate the U.S. Court of Appeals for
16 Veterans Claims.

17 To date, plaintiffs have served defendants with 191 requests for documents. See First
18 Amended Set of Requests for Production of Documents, Docket Entry 39, Second Set of
19 Requests for Production of Documents, Docket Entry 44 (collectively, Requests for Production).
20 Among these are requests for CAVC docketing and case information, see, e.g., Requests for
21 Production Nos. 14, 127, 188, a request for communications about proposed changes to the
22 CAVC’s attorney practice rules, Request for Production No. 63, and a request for the “working
23 files, including, without limitations, emails of all witnesses” who become the subject of
24 deposition notices in this action. Request for Production No. 126. On November 2, 2007,
25 without consulting with defendants, see Civil Local Rule 30-1, plaintiffs noticed Chief Judge
26 Greene for deposition on March 27 and 28, 2008, and noticed former Chief Judge Frank Q.
27 Nebeker for deposition on January 29, 2008, both to take place in San Francisco.

1 **ARGUMENT**

2 **I. This Court Should Exercise Its Discretion to Stay Discovery Until It Determines**
3 **Whether It Has Jurisdiction Over Chief Judge Greene and the U.S. Court of**
4 **Appeals for Veterans Claims**

5 This Court has wide discretion to control the nature and timing of discovery, and
6 “should not hesitate to exercise appropriate control over the discovery process.” Herbert v.
7 Lando, 441 U.S. 153, 177 (1979). Courts may issue protective orders under Federal Rule of
8 Civil Procedure 26(c) upon a showing of good cause, in order to “protect a party from annoyance,
9 embarrassment, oppression or undue burden or expense, including . . . that the disclosure or
10 discovery not be had.” Fed. R. Civ. P. 26(c). Courts have consistently exercised discretion to
11 stay discovery where it appears that a pending dispositive motion may make the discovery
12 unnecessary. See, e.g., Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987); B.R.S. Land Investors
13 v. United States, 596 F.2d 353, 356 (9th Cir. 1979); Patterson v. United States Postal Serv., 901
14 F.2d 927, 929 (11th Cir. 1990).

15 Where a pending dispositive motion challenges the court’s subject matter jurisdiction, a
16 stay is particularly salutary. See, e.g., Orchid Biosciences, Inc. v. St. Louis Univ., 198 F.R.D.
17 670, 675 (S.D. Cal. 2001). Pending the outcome of a dispositive motion, discovery “is only
18 appropriate where there are factual issues by a motion to dismiss.” See Jarvis, 833 F.2d at 155;
19 see also U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79-80
20 (1988) (“It is a recognized and appropriate procedure for a court to limit discovery proceedings at
21 the outset to a determination of jurisdictional matters.”). Where a motion to dismiss raises only
22 legal questions, as when a defendant challenges the court’s subject matter jurisdiction, discovery
23 should be stayed pending resolution of that motion. See Wahg v. Metris Direct, Inc., 363 F.3d
24 821, 829 (9th Cir. 2003). Defendants’ pending motion to dismiss raises purely legal questions
25 about this Court’s jurisdiction over the U.S. Court of Appeals for Veterans Claims and requires
26 no factual development for its resolution. See Megibow v. Clerk of the United States Tax Court,
27 No. 04-CV- 3321, 2004 U.S. Dist. LEXIS 17698, at *21 (S.D.N.Y. 2004) (whether an Article I
28 tribunal is a court or an agency as defined by the APA “is not a question of fact that must await

1 the receipt of evidence”), aff’d 432 F.3d 387 (2d Cir. 2005).

2 Defendants have raised a substantial legal challenge to this Court’s jurisdiction over the
3 claims against Chief Judge Greene and the U.S. Court of Appeals for Veterans Claims, grounded
4 in the Supreme Court’s conclusion that Article I courts exercise the judicial power of the United
5 States just like this Court, see Freytag, 501 U.S. at 889, and bolstered by the Federal Circuit’s
6 determination that the CAVC is an independent court rather than an executive agency, see Abbs
7 v. Principi, 237 F.3d 1342, 1347-49 (Fed. Cir. 2001). Despite the strength of defendants’
8 motion, this Court need not conclude that it will be successful in order to grant a stay of
9 discovery. A stay of discovery is appropriate whenever a court can conclude that a defendants’
10 motion to dismiss “does not appear to be without some degree of foundation in law and there is a
11 possibility that defendant may prevail.” Ameritel Inns v. Moffat Bros., No. CV 06-359, 2007
12 WL 1792323, at *4 (D. Id. 2007); see also Johnson v. N.Y. Univ. School of Educ., 205 F.R.D.
13 433, 434 (S.D.N.Y. 2002) (stay of discovery appropriate where dispositive motion has
14 “substantial grounds”). Defendants’ motion certainly has a “clear possibility of success.” GTE
15 Wireless, Inc. v. Qualcomm, Inc., 192 F.R.D. 284, 287 (S.D. Cal. 2000). Moreover, the defects
16 in plaintiffs’ claims against the U.S. Court of Appeals for Veterans Claims cannot be cured by
17 amendment of the complaint, as there is simply no waiver of sovereign immunity that would
18 permit plaintiffs to sue Chief Judge Greene in his official capacity as an Article I judge.

19 **II. The Balance of Harms Weighs Heavily in Favor of Granting a Stay of Discovery**

20 Unnecessary discovery from the U.S. Court of Appeals for Veterans Claims or from
21 Chief Judge Greene would cause irreparable harm to the CAVC. In contrast, a brief stay of
22 discovery pending a ruling on defendants’ motion to dismiss would cause minimal prejudice to
23 plaintiffs, if any at all. Considered together with the substantial likelihood that defendants will
24 prevail on their motion to dismiss and discovery will be rendered unnecessary, the balance of
25 harms weigh heavily in favor of granting a limited stay in this case.

26 Defendants presently seek a stay of discovery only with respect to Chief Judge Greene
27 and the U.S. Court of Appeals for Veterans Claims, not with respect to VA. Discovery from
28

1 CAVC is unnecessary to develop plaintiffs' Motion for Preliminary Injunction, which relates
2 only to VA's provision of medical care. Moreover, discovery from CAVC would not be expected
3 to play an important role in the development of plaintiffs' larger claims, which focus almost
4 exclusively on VA action or inaction. Of the 278 paragraphs in plaintiffs' complaint, only a
5 handful discuss CAVC actions or procedures, and plaintiffs' prayer for relief makes no mention
6 of CAVC or Chief Judge Greene. Additionally, the bulk of relevant information about the
7 CAVC caseload and case dispositions are publicly available on the court's docket or otherwise
8 on the CAVC's website.¹ Accordingly, a brief stay of discovery relating to plaintiffs' claims
9 against CAVC would not meaningfully prejudice plaintiffs.

10 In contrast, moving forward with discovery before this Court has determined that it has
11 jurisdiction over Chief Judge Greene or the CAVC would substantially and permanently
12 prejudice defendants. Most obviously, "should Defendant[s] prevail on [their] motion to dismiss,
13 any effort expended in responding to merits-related discovery would prove to be a waste of both
14 parties' time and resources." Orchid Biosciences, 198 F.R.D. at 675. Because a ruling on
15 defendants' motion to dismiss will likely obviate the need for discovery in this case, a stay would
16 save the time and resources of the parties as well as the Court. See Scroggins v. Air Cargo, Inc.,
17 534 F.2d 1124, 1133 (5th Cir. 1976). Plaintiffs have themselves complained about the
18 magnitude of CAVC's workload. See Compl. ¶ 16. It would be in no one's interest to divert
19 resources from the adjudication of veterans' appeals and further exacerbate CAVC's workload,
20 in the name of discovery that may ultimately prove unnecessary.

21 Needless discovery poses special concerns in this case, since it potentially involves
22 communications between judges and court staff and other documentation about the inner
23 workings of the U.S. Court of Appeals for Veterans Claims. Discovery into the inner workings
24 of a court "would cause a concrete and imminent harm that cannot be remedied after the fact." In

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26 ¹For example, the court's docket is available on its website in searchable form, as are
27 opinions, the court's procedures, and the court's annual report, which provides aggregate
28 information about case dispositions, attorney representation, and the average duration of an
appeal. See <http://www.vetapp.uscourts.gov>.

1 re United States, 463 F.3d 1328, 1338 (Fed. Cir. 2006); see also Warth v. Department of Justice,
2 595 F.2d 521, 523 (9th Cir. 1979) (recognizing need to avoid “encroach[ing] upon the authority
3 of the courts to control the dissemination of its documents to the public”); McGehee v. CIA, 697
4 F.2d 1095, 1107 (D.C. Cir. 1983) (“special policy considerations militates against a rule
5 compelling disclosure of records originating in” the courts), aff’d in part on reh’g, 711 F.2d 1076
6 (D.C. Cir. 1983). Plaintiffs’ discovery requests in this case purportedly encompass all
7 communications about a given topic, see Requests for Production at 1:23-24, 8:9-10, implicating
8 internal discussions among judges and their staff about the operation of the court. Plaintiffs also
9 seek drafts and working documents of court staff, including those of Chief Judge Greene. See
10 First Requests for Production 2:1, 27:11-14. While defendants may assert judicial privilege as an
11 alternative means to preventing discovery, it may not always be easy to distinguish between
12 protected and non-protected communications. See, e.g., In re Certain Complaints Under
13 Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783
14 F.2d 1488, 1520 n.28 (11th Cir. 1986). This Court should not address the “very delicate matter”
15 of discovery into a coordinate judicial body, see United States v. Frankenthal, 582 F.2d 1102,
16 1107 (7th Cir. 1978), until threshold jurisdictional issues have been resolved.

17 CONCLUSION

18 Accordingly, the Court should grant defendants’ Motion for Protective Order and stay
19 discovery from the U.S. Court of Appeals for Veterans Claims until after a ruling on the CAVC
20 portion of defendants’ Motion to Dismiss Claims Against William P. Greene, Jr. and Michael B.
21 Mukasey. A proposed order is attached.

22
23 Dated: January 25, 2008

24 Respectfully Submitted,

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