

1 JEFFREY S. BUCHOLTZ  
 Acting Assistant Attorney General  
 2 JOSEPH P. RUSSONIELLO  
 United States Attorney  
 3 RICHARD LEPLEY  
 Assistant Branch Director  
 4 DANIEL BENSING D.C. Bar No. 334268  
 KYLE R. FREENY California Bar No. 247857  
 5 Attorneys  
 United States Department of Justice  
 6 Civil Division, Federal Programs Branch

7 P.O. Box 883  
 Washington, D.C. 20044  
 8 Telephone: (202) 514-5108  
 Facsimile: (202) 616-8460  
 9 Email: Kyle.Freeny@USDOJ.gov

10 Attorneys for Defendants Hon. James B. Peake, the U.S. Department of Veterans Affairs, Hon.  
 James P. Terry, Hon. Daniel L. Cooper, Hon. Bradley G. Mayes, Hon. Michael J. Kussman,  
 11 Ulrike Willimon, the United States of America, Hon. Michael B. Mukasey, and Hon. William P.  
 Greene, Jr.

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

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

---

No. C 07-3758-SC

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

23  
 24  
 25  
 26  
 27  
 28

1 Plaintiffs fail to address the core issue underlying Defendants' Motion for Protective  
2 Order to Stay Discovery from the U.S. Court of Appeals for Veterans Claims. By opposing the  
3 stay, plaintiffs urge this Court to exercise its jurisdiction and compel fellow federal judges to  
4 disclose the inner workings and communications of their court without first determining whether  
5 the exercise of that jurisdiction is proper. Notably absent from their submission, however, is any  
6 precedent for compelling discovery from a coordinate United States court in this premature  
7 fashion. Plaintiffs' attempts to sidestep the unprecedented nature of their request ring hollow, for  
8 (1) the severe and irreparable harm that the proposed discovery would cause establishes the  
9 requisite good cause for the stay; (2) it is not likely that Chief Judge Greene and the United States  
10 Court of Appeals for Veterans Claims (or "CAVC") would be subject either to this Court's  
11 jurisdiction or to third-party discovery; and (3) the existence of the judicial privilege does not  
12 mitigate the irreparable harm that plaintiffs' discovery would cause. For these reasons, and  
13 because plaintiffs concede that a stay would do them little or no harm, the Court should stay all  
14 discovery against Chief Judge Greene and the CAVC pending a determination on this Court's  
15 jurisdiction.

16 As discussed in defendants' opening memorandum, Mem. Supp'g Defs.' Mot. for  
17 Protective Order to Stay Disc. from the U.S. Court of Apps. For Vets. Claims ("Defs.' Mem.") at  
18 6-7, any discovery from a court's internal deliberations results in "concrete and imminent harm"  
19 to that tribunal that "cannot be remedied after the fact." In re United States, 463 F.3d 1328, 1338  
20 (Fed. Cir. 2006) (discussing discovery from Third Circuit judges). Here, as in In re United  
21 States, plaintiffs seek nothing less than discovery into the decision making process of a  
22 coordinate court. Id. Plaintiffs' requests seek not only court docketing and case information, but  
23 all communications among judges and staff about proposed changes to the CAVC's rules. Pls.'  
24 Reqs. For Prod. Nos. 14, 63, 127, 128. And having already noticed Chief Judge Greene for a  
25 deposition, plaintiffs seek not only the testimony of a sitting federal judge, but also all emails that  
26 he has authored. Pls.' Req. For Prod. 126. The scope of such requests is astonishing and, on its  
27 face, establishes the severe disruption that plaintiffs' requests would impose on the U.S. Court of  
28 Appeals for Veterans Claims. The diversion of court assets to comply with such requests would

1 severely affect court operations. See Orchid Biosciences, Inc. v. Saint Louis Univ., 198 F.R.D.  
2 670, 675 (noting unnecessary loss of time and resources when parties are forced to comply with  
3 discovery subsequently found unnecessary).

4 But even that adverse impact is dwarfed by the chilling effect the potential disclosure of a  
5 chief judge's emails and other documents might have on the workings of a court. See In re  
6 United States, 463 F.3d at 1338 (discovery into internal deliberations of a court causes concrete,  
7 irreparable harm). The inevitable, irreparable harm that would result from such interference led  
8 the Federal Circuit to issue a rarely granted writ of mandamus that dismissed the case underlying  
9 In re United States on jurisdictional grounds, rather than permit that case to proceed through  
10 discovery to trial and then await an appeal to correct any jurisdictional errors. Id. Defendants'  
11 motion merely seeks to apply that lesson here, temporarily staying discovery while a challenge to  
12 the Court's jurisdiction is determined. Without such a stay, the irreparable harm that concerned  
13 the Federal Circuit will occur here as plaintiffs would be permitted to review the CAVC's files  
14 without first having justified such an intrusion.

15 This irreparable harm establishes the good cause required for a protective order under  
16 Rule 26(c). Without citation, plaintiffs mistakenly argue that only motions to dismiss entire  
17 complaints satisfy the good cause criteria. Pls.' Opp'n to Defs.' Mot. For Protective Order to  
18 Stay Disc. From the U.S. Court of Appeals for Veterans Claims ("Pls.' Mem.") at 5 (attempting  
19 to distinguish defendants' cited authority). While such motions may indeed be sufficient for a  
20 protective order, the rule does not restrict good cause only to such motions. As plaintiffs' own  
21 cases attest, a stay is appropriate where any "good cause" is shown. See, e.g., Lithgow v.  
22 Christopher M. Edelmann, M.D., P.C., 2007 U.S. Dist. Lexis 94041 at \*3-\*4 (D. Conn. Dec. 7,  
23 2007) (requiring good cause be shown but noting the absence of good cause where, unlike here, a  
24 motion to dismiss had not been filed even though discovery had already commenced); In re  
25 Sulfuric Acid Antitrust Litig., 231 F.R.D. 331, 336 (N.D. Ill. 2005) (cited for the uncontroversial  
26  
27  
28

1 proposition that the mere filing of a motion to dismiss does not *automatically* stay discovery);<sup>1</sup> In  
2 re United Telecomms., Inc. Sec. Litig., 1991 WL 335820 (D. Kan. June 27, 1991) (noting good  
3 cause required for a stay and that court’s predisposition against finding such cause merely from  
4 the filing of a motion to dismiss). Where, as here, incalculable irreparable harm will result from a  
5 plaintiff’s unfettered access to the inner workings of a court, good cause has been established for  
6 a stay of discovery until the jurisdiction over that court has been properly established. In re  
7 United States, 463 F.3d at 1338.

8 Plaintiffs may not evade this good cause by arguing that they would still seek discovery  
9 from Chief Judge Greene and the CAVC as non-parties. The scope of any third-party discovery  
10 against either the judge or his court would undoubtedly be the subject of another motion on  
11 another day. It may safely be presumed that a primary issue would be the continued relevance of  
12 plaintiffs’ requests in light of a finding that this Court lacked jurisdiction over them as parties.  
13 Moreover, to the extent still deemed potentially relevant, any third-party discovery would likely  
14 be severely curtailed or tightly controlled to prevent any unnecessary intrusion into the personal  
15 papers of Chief Judge Greene or the inner workings of his court. And one argument favoring  
16 significant if not total restrictions on such discovery is the public availability of much of the  
17 information that plaintiffs purport to seek.

18 Similarly, the mere existence of the judicial privilege fails to argue against a stay here.  
19 Even in seeking protection under that privilege, Chief Judge Greene and the CAVC will incur  
20 virtually all of the harm that defendants’ stay motion seeks to avoid. First, unless a stay is  
21 granted, CAVC resources will have to be diverted to gather all the potentially responsive  
22 documents. See Orchid Biosciences, 198 F.R.D. at 675. Thus, the ability to assert the privilege  
23 will not lessen the interference plaintiffs’ discovery would have on court operations. Nor will it  
24 quell the chilling effect resulting from the unnecessary threat of compelled disclosure of internal  
25 judicial communications. Consequently, the privilege does little to mitigate the harms that would

---

26  
27 <sup>1</sup> Plaintiffs mistakenly cited Cytosport, Inc. v. Nature’s Best, Inc., 2007 U.S. Dist. Lexis  
28 29039 (E.D. Cal.) for this proposition. Pls.’ Mem. at 4. That case, however, merely quotes In re  
Sulfuric Acid Antitrust Litig., which is the proper citation for the quote used by plaintiffs.

1 flow from the potential disclosure of Chief Judge Greene's or the CAVC's internal documents.  
2 Those harms, rather, flow solely from plaintiffs' moving forward on discovery from the judge or  
3 the court before this Court's jurisdiction over them has even been established.

4 In contrast to the severe, irreparable harm that would result if a stay is not granted,  
5 plaintiffs can point to little harm to themselves from a stay. In their opposition, they concede that  
6 the sought-after information is not relevant to their motion for a preliminary injunction. Pls.'  
7 Mem. at 8-9. Nor did they include any of these requests on their prioritized list of 13 areas for  
8 defendants to first address when responding to plaintiffs now-propounded 207 requests for  
9 production. *Id.* Moreover, a great deal of the information that plaintiffs seek is, as plaintiffs  
10 concede, publically available. *See id.* at 6 n.4.

11 Accordingly, this Court should follow the instruction of the Federal Circuit in In re  
12 United States. There, the irreparable harm that would have been imposed on the Third Circuit by  
13 permitting the underlying case to proceed to discovery militated in favor of the issuance of the  
14 extraordinary writ of mandamus – a measure requiring a much greater showing than the good  
15 cause standard applicable here. The existence of a subsequent appeal to correct the subordinate  
16 court's jurisdictional error was deemed insufficient to correct the intrusion into the inner  
17 workings of a judicial tribunal.

## 18 CONCLUSION

19 Absent an explicit finding that Chief Judge Greene and the CAVC are properly before  
20 this Court, party-discovery against them should not be permitted. Defendants' motion for a stay  
21 of discovery against Chief Judge Greene and the CAVC should be granted.

22  
23 Dated: February 19, 2008

Respectfully Submitted,

24 JEFFREY S. BUCHOLTZ  
Acting Assistant Attorney General

25 JOSEPH P. RUSSONIELLO  
26 United States Attorney

27 RICHARD LEPLEY  
28 Assistant Branch Director

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

/s/ Kyle R. Freeny  
KYLE R. FREENY California Bar #247857  
DANIEL BENSING D.C. Bar # 334268  
U.S. Department of Justice, Civil Division  
P.O. Box 883  
Washington, D.C. 20044  
  
Counsel for Defendants