

1 PETER D. KEISLER  
 Assistant Attorney General  
 2 SCOTT N. SCHOOLS  
 Interim United States Attorney  
 3 RICHARD LEPLEY  
 Assistant Branch Director  
 4 DANIEL BENSING D.C. Bar No. 334268  
 STEVEN Y. BRESSLER D.C. Bar No. 482492  
 5 KYLE R. FREENY California Bar No. 247857  
 Attorneys  
 6 United States Department of Justice  
 Civil Division, Federal Programs Branch

7 P.O. Box 883  
 8 Washington, D.C. 20044  
 Telephone: (202) 305-0693  
 9 Facsimile: (202) 616-8460  
 Email: Daniel.Bensing@USDOJ.gov

10 Attorneys for Defendants Hon. Gordon Mansfield, the U.S. Department of Veterans Affairs,  
 11 Hon. James P. Terry, Hon. Daniel L. Cooper, Hon. Bradley G. Mayes, Hon. Michael J. Kussman,  
 Ulrike Willimon, the United States of America, Hon. Peter D. Keisler, 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, )	No. C 07-3758-SC
18	Plaintiffs, )	
19	v. )	<b>REPLY MEMORANDUM IN SUPPORT</b>
20	Hon. GORDON H. MANSFIELD, Acting )	<b>OF DEFENDANTS' MOTION FOR</b>
21	Secretary of Veterans Affairs, <i>et al.</i> , )	<b>PROTECTIVE ORDER TO STAY</b>
22	Defendants. )	<b>DISCOVERY</b>
23		Date: December 14, 2007
		Time: 10:00 a.m.
		Courtroom: 1

24 **Introduction**

25 On September 25, 2007 defendants filed a motion to dismiss all claims in this action.  
 26 On October 19, 2007, Plaintiffs propounded outsized discovery including 129 separate requests  
 27 for production of documents and, shortly thereafter, also noticed 47 depositions. Defendants  
 28 advised plaintiffs that they would oppose such overbroad discovery and intended to move for a

1 protective order staying discovery pending a ruling on the motion to dismiss. Plaintiffs have two  
2 responses. First, plaintiffs now complain that defendants were unwilling to engage in 129  
3 separate discussions about why plaintiffs’ many requests would require review of massive  
4 amounts of agency records at a prohibitive cost. Second, plaintiffs ignore the fact that a  
5 dispositive motion not requiring factual development was pending and file even more discovery  
6 – another 62 requests for production making the total 191.

7 In support of the instant motion to stay discovery defendants filed the declaration of Mr.  
8 Thomas Bowman, chief of staff to the Secretary of VA, who described the VA’s effort to quickly  
9 provide the Court with a rough approximation of the cost in time, funds and disrupted programs  
10 VA would incur if it attempted to respond to plaintiffs’ wide-ranging and numerous document  
11 requests. Along with their Opposition, plaintiffs now submit a declaration by Mr. Paul Sullivan,  
12 a former mid-level employee of the VA who is also a an officer with one of the plaintiff  
13 advocacy organizations. As shown below and in supporting rebuttal declarations of Mark  
14 Bologna and Charles DeSanno, plaintiffs’ declarant does not fully understand the design, use, or  
15 interactions between VA data systems, nor the scope of the requests for production of documents  
16 propounded by his own organization.

17 In light of the fact that plaintiffs acknowledge their discovery requests are broad and the  
18 burden on VA would be “significant,” this Court should exercise its discretion to stay discovery  
19 until the motion to dismiss is resolved. If there is any aspect of the case left at that juncture,  
20 plaintiffs should be directed to propound reasonable discovery requests limited to whatever  
21 issues remain.

## 22 ARGUMENT

23 1. A stay of discovery is appropriate pending a ruling on the motion to dismiss. Plaintiffs  
24 fail to refute the well-settled principle that, where no factual issues are presented in a Rule 12  
25 motion, a district court will typically exercise its discretion to stay discovery for a short time to  
26 permit a ruling on a motion to dismiss. See Jarvis v. Regan, 833 F.2d 149, 155 (9<sup>th</sup> Cir. 1987).  
27 This principal is not limited to motions to dismiss on jurisdictional grounds, as plaintiffs suggest,  
28 Opposition at 5, n.2, but extends to motions contending that the complaint is “deficient as a

1 matter of law,” the situation in Jarvis, id. The only Ninth Circuit precedent cited by plaintiffs,  
2 Blankenship v. Hearst Corp., 519 F.2d 418 (9<sup>th</sup> Cir. 1975), Opposition at 3, did not involved a  
3 motion to stay discovery, but rather a motion to block the deposition of a witness on the ground  
4 that his testimony would be unduly repetitive. Id. at 429. The district court decisions plaintiffs  
5 cite merely demonstrate that district courts sometimes exercise their discretion to allow discovery  
6 to proceed in certain situations, such as where the pending motion is to transfer, rather than  
7 dismiss, Kron Med. Corp. v. Groth, 119 F.R.D. 636, (M.D.N.C. 1988), or where the party  
8 seeking the stay “does not argue that responding to this request will present any particular  
9 difficulties,” Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985).

10 The Court does not have to reach a decision on the merits of defendants’ motion to  
11 dismiss in order to recognize that defendants’ motion raises very serious questions about  
12 plaintiffs’ claims, both as to the Court’s jurisdiction as well as the legal sufficiency of plaintiffs’  
13 facial challenge to a decades-old statutory scheme providing an informal claims adjudication  
14 process for awarding veterans’ benefits. In particular, defendants’ motion to dismiss identifies  
15 the extensive line of authority finding that 38 U.S.C. § 511 prohibits district courts from  
16 exercising jurisdiction to entertain challenges to VA decisions affecting the payment of benefits  
17 and the provision of medical care. See Motion to Dismiss at 11, n. 8. In the case most similar to  
18 this action, i.e. a sweeping constitutional challenge to the operation of the VA claims system,  
19 Beamon v. Brown, 125 F.2d 965 (6<sup>th</sup> Cir. 1997), the Court dismissed the action based on section  
20 511.

21 2. Responding to plaintiffs’ discovery requests would require unjustifiable effort and  
22 expense. Defendants’ motion stressed that a stay of discovery is particularly appropriate in this  
23 instance because the burden of responding to plaintiffs’ extraordinarily broad requests for  
24 production of documents would be enormous and would directly and seriously impact the VA’s  
25 ability to carry out its core functions. See Bowman Decl. ¶¶ 12-15. Plaintiffs do not seriously  
26 dispute that the overall burden on defendants will be substantial, as they concede that “discovery  
27 in this case will be significant,” Opp. at 3:14. Indeed, this conclusion is inescapable upon even a  
28 cursory review of plaintiffs’ 129 requests for production of documents (reinforced by a review of

1 plaintiffs' additional requests, numbered 130-191). Because the burden of responding to  
2 plaintiffs' discovery was so great, defendants undertook a preliminary and limited investigation  
3 of the steps that VA would need to take to respond to plaintiffs' document requests, as well as  
4 the approximate cost in staff-hours and funds. The result of those inquiries are summarized in  
5 the Declaration of Thomas Bowman, the Chief of Staff.<sup>1</sup>

6 Plaintiffs have filed a declaration asserting that the document production process would  
7 not be quite as onerous as defendants anticipate. See Declaration of Paul Sullivan. As explained  
8 in the Declarations of VA officials Mark Bologna and Charles DeSanno, Mr. Sullivan does not  
9 fully understand the operation of the VA's data systems and has misstated the scope of plaintiffs'  
10 document requests. For example, Mr. Sullivan assumes that the "large segments" of the VA,  
11 offices such as the National Cemetery Administration, can be excluded from any search, thus  
12 significantly reducing the burden. Sullivan Decl. ¶ 6. However, Mr. DeSanno points out that the  
13 offices that Mr. Sullivan lists account for under one percent of the total number of VA e-mail  
14 boxes. Mr. Bologna explains why Mr. Sullivan is wrong when he suggests that the VA could  
15 respond to Request number 1 through a "simple query" of databases seeking veterans diagnosed  
16 with PTSD, since the request seeks documents on all "pending SCDDC claims based on PTSD  
17 or other mental health disorders," (emphasis added) which would require searches for

---

18  
19 <sup>1</sup>Plaintiffs do not fully comprehend defendants' concerns about protecting the privacy  
20 interests of veterans in the context of producing medical records and similar sensitive documents  
21 in discovery. Defendants agree with plaintiffs that such sensitive medical files should only be  
22 produced subject to a protective order that protects the confidentiality of this information to the  
23 greatest extent practicable. Defendants proposed such an order several months ago, but plaintiffs  
24 demanded additional terms and the parties have not reached agreement. Inevitably, however,  
25 many veterans will fear that, despite the parties' best efforts in crafting and following such a  
26 protective order, their confidential information might be disclosed improperly. Moreover, even if  
27 all the restrictions in a protective order are followed, veterans may not want their personal  
28 medical information shared with the plaintiff organizations or other persons involved in this  
litigation. The VA's concern is that any disclosure, even subject to a strong protective order  
might "undermine the Vet Center program's hard won trust with the combat veteran population  
and could cause serious barriers to care for new veterans needing readjustment counseling."  
Bowman Decl. ¶ 9 (emphasis added). This loss of trust will occur as soon as sensitive  
documents are produced (even if subject to a protective order) regardless of whether the case  
goes forward.

1 information responsive to 152  
2 additional diagnostic codes for “other mental disorders.” Bologna Decl. ¶ 11. Additionally,  
3 VA’s database will not include all information related to a veteran’s diagnosis, requiring a search  
4 of paper files. *Id.* ¶ 9.

5 Ultimately, the Court does not have to resolve the dispute about the precise steps that  
6 would be necessary to respond to plaintiffs’ document requests and the cost in time and funds to  
7 the VA. The Bowman Declaration was presented to demonstrate why plaintiffs’ document  
8 production requests will entail a significant burden on defendants, a point which is evident from  
9 the face of the requests themselves and which plaintiffs have now conceded.<sup>2</sup>

10 3. Defendants satisfied their obligation to confer with plaintiffs on the motion.  
11 Plaintiffs’ entire discussion of the Rule 26 compliance issue is an unfortunate diversion.  
12 Plaintiffs have not, and cannot, suggest that they have incurred even the slightest prejudice from  
13 the scope of the parties’ discussion before the motion for protective order was filed. For that  
14 reason alone the court should dismiss these complaints.

15 In any event, plaintiffs also concede that defendants’ counsel did meet and confer with  
16 plaintiffs’ counsel on the central question of whether there should be any discovery at all before a  
17 ruling on the motion to dismiss. Ms. Moser states in her declaration that during more than one  
18 conversation during the week of November 5, 2007, government counsel “mentioned that the  
19 government proposed a motion to stay discovery pending the Court’s ruling on the motion to  
20 dismiss,” Moser Declaration, ¶ 2, and she admits that she informed government counsel that  
21 plaintiffs would oppose the motion, *id.* In addition, drafts of the Joint Initial Case Management  
22 Statement exchanged between the parties specifically stated that defendants would file a motion  
23 for a protective order. These communications were documented in the record in the  
24 government’s Motion for Protective Order which contained a footnote confirming that the parties  
25 had conferred on the question of whether to stay discovery and that the plaintiffs opposed the  
26

---

27 <sup>2</sup>Defendants will address plaintiffs evidentiary and other objections to the Bowman  
28 Declaration in their response to plaintiffs’ Motion to Strike the Bowman Declaration.



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

P.O. Box 883  
Washington, D.C. 20044  
(202) 305-0693 (telephone)

Counsel for Defendants