UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY KLAYMAN, *et al.*,

Plaintiffs,

v.

BARACK OBAMA, President of the United States, *et al.*,

Defendants.

Civil Action No. 13-cv-00851 (RJL)

THE GOVERNMENT DEFENDANTS' OPPOSITION TO PLAINTIFFS' AMENDED MOTION TO COMPEL DEFENDANTS' COMPLIANCE WITH FRCP 26

The Government Defendants[1] oppose Plaintiffs' amended motion to compel (ECF No. 104) them to attend a Rule 26(f) discovery conference and to serve their initial disclosures because the governing Case Management Order (CMO) makes clear that it is not yet time to consult on discovery issues or to make initial disclosures; nor, given the procedural posture of this and related cases, would it be prudent or efficient to do so at this time.

A Rule 26(f) discovery conference is premature and therefore not required at this time. Pursuant to Federal Rule of Civil Procedure 26(f)(1) and Local Civil Rule 16.3(a) of this Court, counsel must confer within 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) unless "the court orders otherwise." Fed. R. Civ. P. 26(f)(1). Here, the Court has issued a separate order that provides otherwise. Specifically, on June 12, 2013, the Court entered a CMO which ordered that the parties shall confer pursuant to Rule 26(f) "within

[1] The "Government Defendants" are Barack Obama, President of the United States, Eric Holder, Attorney General of the United States, General Keith B. Alexander, Director of the National Security Agency (NSA), insofar as they are sued in their official capacities, together with defendants NSA and the United States Department of Justice.

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30 days of *all* defendants answering the complaint or filing other motions under Rule 12(b) of the Federal Rules of Civil Procedure." CMO at 2 (ECF No. 6) (emphasis added) (Exh. A). Insofar as they are sued in their individual capacities, President Obama, Attorney General Holder, NSA Director Alexander, and Judge Vinson ("individual federal defendants"), have not been properly served and so have neither answered nor filed a Rule 12(b) motion so as to trigger the timing of the Rule 26(f) conference. *See* Memorandum of Individual Federal Defendants in Opposition to Plaintiffs' "Motion for Entry of Default" (ECF No. 88). Accordingly, Plaintiffs' motion to compel such a conference is improper. *See, e.g.*, *Panowicz v. Hancock*, 2013 WL 5442959, at *2 (D. Md. Sept. 27, 2013) ("Because a Rule 26(f) conference is not required, Plaintiff's motion to compel such [a] conference will be denied.").

Relatedly, Plaintiffs cannot seek to compel the Government Defendants to make their initial disclosures because those disclosures are also not yet due. Under Rule 26 of the Federal Rules of Civil Procedure, the time for making such disclosures is "at or within 14 days after the parties' Rule 26(f) conference." Fed. R. Civ. P. 26(a)(1)(C). Given that a Rule 26(f) conference has not yet occurred, and that it is still premature to hold one, it follows that it is not yet time to make initial disclosures.[2]

[2] Plaintiffs have moved to compel the Government Defendants to attend a Rule 26(f) discovery conference and to make their initial disclosures only in *Klayman v. Obama*, no. 13-cv-0851 (*Klayman I*). The same analysis, however, applies in *Klayman v. Obama*, no. 13-cv-0881 (*Klayman II*) and *Klayman v. Obama*, civ. no. 14-cv-00092 (*Klayman III*) because this Court has entered the same CMO in both of these related cases. *Klayman II* (ECF No. 4); *Klayman III* (ECF No. 7). In *Klayman II*, Plaintiffs not have properly served the individual federal defendants and so they have neither answered nor responded with a Rule 12(b) motion, making a discovery conference (and initial disclosures) premature under the CMO. In *Klayman III* Defendants are not—contrary to Plaintiffs' representations to the Court—"intentionally engaging in more delay and obstructionist tactics" by failing to "return receipts" "for over one month." Mot. to Compel at 2 n.1. After diligent efforts, counsel for the Government Defendants have found no evidence that service was effected on the Government Defendants in any manner

Even if it were time under the governing CMO to hold a Rule 26(f) conference or to make initial disclosures, good cause would exist to stay any discovery obligations in light of the procedural posture of this case. After the Court granted two of the Plaintiffs a preliminary injunction on their claim that the NSA's bulk telephony metadata program violates their Fourth Amendment rights, *see* Memorandum Opinion (ECF No. 48) and Order (ECF No. 49),[3] the Government Defendants appealed that order to the Court of Appeals for the District of Columbia Circuit, *see* Notice of Appeal (ECF No. 64).[4] Discovery should be deferred until the Court of Appeals determines, *inter alia*, whether this Court has subject matter jurisdiction to hear the case (that is, whether Plaintiffs have standing) and whether, in light of the Supreme Court's decision in *Smith v. Maryland*, 442 U.S. 735 (1979), Plaintiffs have a likelihood of success on their Fourth Amendment claim (and otherwise met the requirements for issuance of a preliminary injunction).

Deferring discovery would avoid the potentially unnecessary expenditure of time, effort, and resources required to resolve discovery disputes, avoid litigation over the disclosure of sensitive and classified information about the intelligence sources and methods involved in the telephony metadata program, and would promote judicial efficiency by allowing the parties to know what, if any, claims remain after appeal to which discovery obligations would attach. Indeed, for these and other reasons, the Government Defendants have also moved to stay this

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before Plaintiffs hand-delivered a copy of the *Klayman III* summons and complaint to the U.S. Attorney's Office for the District of Columbia on April 2, 2014, the day after Plaintiffs filed this motion to compel.

[3] The Court did not reach the merits of Plaintiffs' other constitutional claims. *See Klayman v. Obama*, 957 F. Supp. 2d 1, 9 n.7 (D.D.C. 2013).

[4] Plaintiffs cross-appealed the Court's order granting in part their motion for the issuance of a preliminary injunction. *See* Notice of Cross Appeal (ECF No. 67).

case until the Court of Appeals resolves the appeal of this Court's preliminary injunction, *see* Motion for Stay of Proceedings Against the Government Defendants Pending Appeal of Preliminary Injunction at 6-9 (ECF No. 66). Good cause therefore would exist to stay discovery obligations (even if the CMO did not already make clear that a discovery conference is not required at this juncture) based solely on the procedural posture of this case. *See Aygen v. District of Columbia*, 2012 WL 5462994, at *1 (D.D.C. Nov. 8, 2012) (finding that it was "prudent to stay discovery . . . to avoid the unnecessary expenditure of resources"); *Fonville v. District of Columbia*, 766 F. Supp. 2d 171, 174 (D.D.C. 2011) (staying a police officer's due-process challenge to his demotion pending resolution of issue of local law by the D.C. Court of Appeals that would "likely 'narrow the issues in the pending cases and assist in the determination of the questions of law involved'") (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 253 (1936)); *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 65 (D.D.C. 2010) ("A district court has broad discretion to stay a proceeding pending the resolution of proceedings in other courts [that] may affect the scope and necessity for the litigation.").

The procedural posture of two other related cases, *Klayman II* and *Klayman III*, also supports staying discovery obligations here. In *Klayman II* Plaintiffs challenge, in addition to the bulk telephony metadata program, the targeted collection of the content of communications under Section 702 of the Foreign Intelligence Surveillance Act (FISA) and the now-defunct program for the bulk collection of Internet metadata pursuant to the FISA's pen/trap provision, 50 U.S.C. § 1842. *See* Amended Compl. (ECF No. 30). The Government Defendants moved to dismiss Plaintiffs' challenges to these programs and that motion is still pending. *See* Government Defendants' Partial Motion to Dismiss (ECF No. 51); Reply in Support of the Government Defendants' Partial Motion to Dismiss (ECF No. 60). In *Klayman III*, which raises

claims identical to those in *Klayman II*, except that the former purports to be a class action suit,[5] the Government Defendants anticipate filing a dispositive motion responding to the *Klayman III* complaint on or before June 2, 2014, which is 60 days from the date they were served with the summons and complaint. Deferring discovery in *Klayman I* until the parties know which claims, if any, will proceed in any of these three related cases promotes efficiency and reduces the likelihood of duplicative proceedings when many of the same defendants may be subject to the same or similar discovery requests in each of the cases. *See, e.g.*, *Allina Health Servs.*, 756 F. Supp. 2d at 65.

For the reasons set forth above, the Court should deny Plaintiffs' amended motion to compel the Government Defendants' compliance with Rule 26 of the Federal Rules of Civil Procedure.

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[5] In a Praecipe filed on January 15, 2014, Plaintiffs notified the Court that they were withdrawing their class action allegations from *Klayman I* (ECF No. 71) and *Klayman II* (ECF No. 54).

Dated: April 18, 2014

Respectfully submitted,

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