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14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 SAN FRANCISCO DIVISION

17  
 18 TASH HEPTING, GREGORY HICKS,  
 CAROLYN JEWEL and ERIK KNUTZEN  
 19 on Behalf of Themselves and All Others  
 Similarly Situated,

20 Plaintiffs,

21 vs.

22 AT&T CORP., AT&T INC. and DOES 1-20,  
 23 inclusive,

24 Defendants.

No. C-06-0672-VRW

**DEFENDANTS' RESPONSE TO  
 PLAINTIFFS' CASE  
 MANAGEMENT STATEMENT  
 [DKT. 109]**

**[Fed R. Civ. P. 26(f); Dkts. 7, 78]**

Courtroom: 6, 17th Floor  
 Judge: Hon. Vaughn R. Walker  
 Hearing: May 17, 2006  
 Time: 10:00 a.m.

1 **I. INTRODUCTION.**

2 In their zeal to push this case prematurely into discovery, plaintiffs take the position  
3 that the Court's April 26, 2006 Order (Dkt. 78, the "April 26 Order") set a Case Management  
4 Conference for May 17, 2006. In keeping with this position, plaintiffs filed a Case  
5 Management Statement on May 4, 2006 (Dkt. 109, plaintiffs' "CMS"). Defendants did not  
6 likewise file a Case Management Statement because defendants—as explained to plaintiffs'  
7 counsel on April 25—do not understand the May 17, 2006 hearing to include a Case  
8 Management Conference. Defendants' understanding is based both on the April 26 Order and  
9 on the Court's standing order filed February 13 (Dkt. 7-2).

10 Nowhere in the April 26 Order does the Court state that the May 17 hearing will be a  
11 Case Management Conference. Instead, the Order vacates the Case Management Conference  
12 set for May 16 and states that—in addition to addressing plaintiffs' motion to unseal various  
13 pleadings relating to defendants' confidential documents and defendants' motion to compel  
14 return of the confidential documents—"[a]t the May 17 hearing, the parties may address case  
15 management and scheduling issues regarding other motions in this case." Dkt. 78, at 2:6-8.  
16 The Order did *not* describe the May 17 hearing as a Case Management Conference.

17 Defendants' reading of the April 26 Order is consistent with the Court's standing  
18 orders, which provide that, "where a party files a motion to dismiss pursuant to FRCP 12, the  
19 court will vacate the date of the Case Management Conference and will re-set it after ruling on  
20 the motion to dismiss." February 13, 2006 Order Setting Case Management Conference  
21 (Dkt. 7-2, "February 13 Order") at 2:1-2. Defendants have filed two motions to dismiss. The  
22 government has said it will file (on May 12) its own motion to dismiss the entire action based  
23 on the military and state secrets privilege. Therefore, postponing the Case Management  
24 Conference is the only course of action consistent with the standing orders. It also is the only  
25 logical way to proceed given the nature and status of the case.

26 Pursuant to the Court's normal procedure—and in light of particular concerns present  
27 in this case—the Case Management Conference, and any associated deadlines and obligations,  
28 should be set after the Court rules on the motions to dismiss.

1 **II. ARGUMENT.**

2 **A. The May 17 hearing should not be a Case Management Conference.**

3 Defendants' view is that the matters in Rule 26(f) of the Federal Rules of Civil  
4 Procedure should not be addressed until after the motions to dismiss—in particular, the  
5 government's motion to dismiss on state secrets grounds—are decided. Defendants explained  
6 why discovery on plaintiffs' preliminary injunction motion should not proceed now in their  
7 administrative motion to set hearing dates for the motions to dismiss. *See, e.g.*, Dkt. 107, at  
8 1:18-20 ("The Court cannot decide whether to allow discovery until it decides whether the  
9 state-secrets privilege should bar discovery or end the case."); *id.* at 2:17-25 (citing cases).  
10 The same is true for initial disclosures and the other matters addressed in Rule 26(f).

11 Discovery cannot proceed until the parties have the conference required by Rule 26(f).  
12 Fed. R. Civ. P. 26(d) ("a party may not seek discovery from any source before the parties have  
13 conferred as required by Rule 26(f)"). The Rule 26(f) conference is to happen at least 21 days  
14 before the Case Management Conference. Fed. R. Civ. P. 26(f). Thus, plaintiffs cannot  
15 initiate discovery until a Case Management Conference is set and the parties have the Rule  
16 26(f) conference 21 days in advance of it.

17 The plain language of the Court's orders does not support plaintiffs' position that the  
18 May 17 hearing is also a Case Management Conference. The initial Clerk's Notice setting the  
19 Case Management Conference read:

20 **YOU ARE NOTIFIED THAT a Case Management Conference**  
21 **has been scheduled for Tuesday, May 16, 2006 9:00 a.m. before**  
22 **the Honorable Vaughn R Walker. Counsel are directed to file a**  
**Joint Case Management Statement one week prior to the**  
**conference.**

23 Dkt. 7-1. In the April 26 Order, the Court "vacate[d] the initial case management conference  
24 currently set for May 16, 2006." Dkt. 78, at 2:8-9. The April 26 Order does not state that the  
25 May 17 hearing is to be a Case Management Conference or contain any language similar to  
26 that in the initial Clerk's Notice.

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1 **B. The Court’s standing orders provide the appropriate procedure and there is no**  
2 **need to alter it so plaintiffs can jump the gun on discovery.**

3 Contrary to plaintiffs’ assertions in their CMS, defendants have not taken the position  
4 that “their decision to file motions to dismiss excuses them from participation in the standard  
5 case management processes.” CMS at 1:5-7. Defendants do not seek anything unusual here.  
6 The Court’s standing orders address situations such as this and support defendants’ position  
7 that the May 17 hearing is not a Case Management Conference. The operation of the Court’s  
8 standing case management order and the April 26 Order vacating the May 16 Conference have  
9 eliminated the need for the Rule 26(f) process at this point in the case, and rightly so.

10 Where a motion to dismiss is filed, the Court’s normal procedure is to “vacate the date  
11 of the Case Management Conference and ... re-set it after ruling on the motion to dismiss.”  
12 Dkt. 7-2, at 2:1-2. Defendants understand the Court to have followed its normal procedure in  
13 this case. There is no reason to deviate from it.

14 Application of the Court’s normal procedure is particularly appropriate here, where the  
15 government contends that the very subject matter of the action is a state secret and thus  
16 requires dismissal of the entire action. Dkt. 82, at 4:11-17 (citing *Kasza v. Browner*, 133 F.3d  
17 1159, 1166 (9th Cir. 1998)). That must be determined at the threshold, lest further  
18 proceedings in the case “forc[e] a disclosure of the very thing the privilege is design to  
19 protect.” *United States v. Reynolds*, 345 U.S. 1, 8 (1953). Defendants, as private parties, can  
20 neither invoke nor waive the state-secrets privilege—only the government can. *See United*  
21 *States v. Reynolds*, 345 U.S. at 7-8; *Kasza*, 133 F.3d at 1165-66. The government “requests  
22 that discovery proceedings be deferred until the government’s submission has been considered  
23 and heard.” Dkt. 82, at 5:12-14. Delaying case management issues and deferring discovery  
24 until after the motions to dismiss are decided is not unusual, contrary to plaintiffs’ contention.  
25 Even if it were unusual, doing so is warranted here.

26 **C. The case should proceed as outlined in defendants’ administrative motion.**

27 By their administrative motion (Dkts. 89-91, 107), defendants asked that the motions to  
28 dismiss (Dkts. 79-81, 82, 86-88) be heard before plaintiffs’ motion for preliminary injunction

1 (Dkts. 16-22, 28-36). Plaintiffs opposed that request. Dkt. 106. Defendants' motions to  
2 dismiss should be heard first for the reasons set forth in the administrative motion and reply,  
3 which defendants will not repeat here. Defendants propose the following schedule:

4 Step 1: Decide the government's and the defendants' motions to dismiss. If they are  
5 granted, the case is over. The Court has already reserved June 21 for this case. Therefore,  
6 defendants suggest June 21 for the hearing on these motions.

7 Step 2: If the motions to dismiss are denied, then decide whether to allow the  
8 discovery plaintiffs want for the preliminary injunction motion. The Court cannot decide  
9 whether to allow discovery until it decides whether the state-secrets privilege should bar  
10 discovery or end the case. If any discovery is allowed, the parties need to complete it before  
11 briefing on the preliminary injunction motion. Briefing the preliminary injunction motion  
12 before understanding what, if any, discovery will be allowed would be a waste of resources  
13 and inevitably invite a second round of briefs post-discovery.

14 Step 3: The preliminary injunction motion should be heard and decided. This too  
15 cannot logically occur before a ruling on the motions to dismiss, including the government's  
16 motion. The motions, if granted, might moot the preliminary injunction motion. And the  
17 motions, even if denied, might result in a ruling limiting the extent to which factual  
18 development and discovery is appropriate or possible in this case.

19 Step 4: Schedule the Case Management Conference to address the matters in  
20 Rule 26(f) and the balance of the case.

### 21 **III. CONCLUSION.**

22 Defendants read the April 26 Order in a manner that is consistent with its plain  
23 language and with the Court's normal procedures, as set forth in the February 13 Order.  
24 Plaintiffs do not. The Court should follow its normal procedures and set the initial Case  
25 Management Conference after the motions to dismiss are addressed. The schedule on the  
26 pending motions should be discussed at the May 17 hearing, as set forth in the April 26 Order.  
27 It would be premature to address other case management issues at this time.

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1 Dated: May 10, 2006.

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