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April 27, 2010

Hon. Laura Taylor Swain
United States Courthouse
500 Pearl Street
New York, NY 10007-1312
Fax: 212-805-0426

MEMO ENDORSED

Re: *Phyllis Molchatsky and Steven Schneider, M.D. v.
United States of America*, 09 Civ 8697

Dear Judge Swain:

We represent Plaintiffs in the above-referenced action. We write to request leave to submit a sur-reply brief of no more than 35 pages in response to the reply papers and supplemental authority that the Government has submitted in further support of its motion to dismiss.

With respect to the Government's reply papers, a sur-reply is warranted by the fact that the Government has submitted new facts that it now claims are decisive in determining this motion. Specifically, the Government, for the first time:

- (1) articulates the SEC's purported policy bases for failing to warn Plaintiffs of the danger posed by the Madoff Ponzi scheme (Reply Br. p. 15);
- (2) identifies the specific sources of the SEC's purported discretion to conduct its investigation in a negligent fashion, including an Enforcement Manual dated and effective as of 2008 (and therefore inapplicable to any of the conduct alleged by Plaintiffs) (Reply Br. pp. 19-25); and
- (3) characterizes and relies on the SEC's purported (though completely nonexistent) production to Plaintiffs of documents responsive to Plaintiff's FOIA requests seeking information relating to the SEC's internal mandatory policies (Reply Br. pp. 25).

The Government also makes arguments relating to the applicable burden of proof and the effect of the 1934 Act. If the Government had wanted to rely on any of this material, it should have been included in its initial briefing. However, now that the Government has made its untimely and improper submission of these new purported facts and arguments, Plaintiffs should be granted leave to submit a sur-reply to address them.

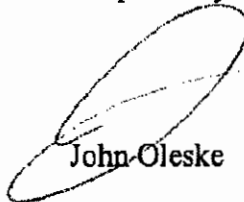
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Moreover, the Government has subsequently submitted a 78-page decision in a case from the Central District of California, *Dichter-Mad Family Partners, LLP, et al. v. United States, et al.*, 09-9061 SVW (FMOx), as supplemental authority. While this decision is not binding authority on this Court, Plaintiffs acknowledge, from their initial review of the decision, that it addresses many of the issues relevant to the Court's consideration of this motion. As such, Plaintiffs submit that it would be appropriate for the Court to grant Plaintiffs the opportunity to more thoroughly review the decision in *Dichter-Mad*, and to then brief the Court with respect to the decision's relevance to the Court's determination of this motion, as part of Plaintiffs' sur-reply.

Thank you for your consideration.

Respectfully submitted,

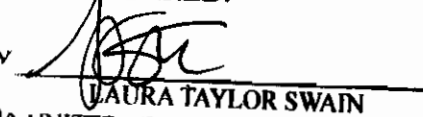


John Oleske

Plaintiffs may file a sur-reply of up to 15 pages; the Government may respond with a sur-sur-reply of up to 15 pages.

SO ORDERED.

NEW YORK, NY



LAURA TAYLOR SWAIN

May 4, 2010 UNITED STATES DISTRICT JUDGE