UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHYLLIS MOLCHATSKY and STEVEN SCHNEIDER, M.D., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	09 CIV 8697 (LTS/AJP)

UNITED STATES OF AMERICA'S
RESPONSE TO PLAINTIFFS' SURREPLY

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INTRODUCTION

Plaintiffs' surreply ignores the crux of the United States' motion and reply: that the applicable statutes and regulations grant the SEC discretion in determining whether and how to investigate and take action against suspected violators of the securities laws, and thus the discretionary function exception bars Plaintiffs' claims, even if the SEC acted negligently. Rather than address this key point, Plaintiffs persist with arguments that have already been rebutted in the United States' reply, and the authorities cited therein, and that have now been soundly rejected, as well, by the opinion in *Dichter-Mad v. United States*.[1]

First, Plaintiffs renew their discovery demand, apparently hoping to find an informal, yet ostensibly mandatory, policy not contained in the pertinent statutes or regulations, and not identified by the Inspector General in his comprehensive 457-page report. But the materials Plaintiffs seek through discovery, assuming they even exist, would not be legally relevant to the discretionary function inquiry. For this reason, the *Dichter-Mad* court denied an identical discovery request, and this Court should reject it here, too.

Second, Plaintiffs argue that the motion to dismiss must be denied because the United States has failed to present "admissible evidence" that SEC staff *actually* considered the policy implications of warning the public about suspected wrongdoers such as Madoff. In *Gaubert*, however, the Supreme Court held that the United States is not required to meet Plaintiffs' suggested standard. Rather, the operative question is hypothetical: Is the challenged discretionary function *susceptible* to policy analysis? Whether government employees *actually* considered competing policies, or whether that could ever be proven, is simply irrelevant.

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[1] — F. Supp. 2d — , No. CV09-9061-SVW, 2010 WL 1632628 (C.D. Cal. Apr. 20, 2010).

Third, Plaintiffs attempt to discredit *Dichter-Mad*, where the plaintiffs presented claims, and supporting arguments, *identical* to those presented here. In *Dichter-Mad*, the court applied established Supreme Court precedent to conclude that the discretionary function exception bars these claims. While it is unsurprising that Plaintiffs attempt to delegitimize the *Dichter-Mad* decision—a sound rejection of their entire case—none of Plaintiffs' criticisms is valid.

Finally, Plaintiffs continue to ignore, just as they did in their first response, precedent supporting the position that even *if* SEC staff violated a mandatory directive, the discretionary function exception would still bar their claims because the Commission retained the ultimate discretion to take action against Madoff or warn his investors, and it is the Commission's failure to act on which Plaintiffs' claims are "based." The *Dichter-Mad* court applied this principle in rejecting the plaintiffs' claims, and Plaintiffs in this case have offered no reason why this principle should not apply here, as well.

I. Discovery would not alter the discretionary function analysis.

Despite their inability to state a claim within the Court's subject-matter jurisdiction, Plaintiffs seek to conduct discovery. Specifically, they hope to find informal, even "unwritten," agency policies not codified in the statutes or regulations that govern the SEC, and not identified by the IG in his comprehensive 457-page report. But it is Plaintiffs' burden to plead non-conclusory facts that plausibly state a claim that would not be barred by the discretionary function exception.[2] Plaintiffs, having failed to satisfy their pleading burden, cannot avoid

[2] *See* Reply Mem. (Doc. 16.) at 3-5; *see also Ashcroft v. Iqbal*, — U.S.—, 129 S. Ct. 1937, 1949-50 (2009).

dismissal by speculating that informal mandatory policies might be unearthed during discovery. In any event, the discovery sought by Plaintiffs is improper as a matter of law, as it could not alter the discretionary function analysis.[3]

For purposes of the discretionary function inquiry, only "established governmental policy" can cabin discretion.[4] In determining whether an agency has established such a policy, "courts customarily defer to the statements of the official policymaker, not others, even though [they] may occupy important agency positions."[5] Informal policies, even if written in purportedly mandatory terms, simply lack the "decretory significance" that is required to bind an agency actor for purposes of the discretionary function exception.[6] This is especially true when the agency has, by regulation, "unambiguously define[d] the nature of the challenged conduct."[7] In such situations, "the discretionary function inquiry is at an end."[8] This is exactly the situation here.

By statute, Congress has defined the SEC's investigations and examinations to be

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[3] *See generally id.* at 28.

[4] *See Irving v. United States*, 162 F.3d 154, 165 (1st Cir. 1998) ("The *Gaubert* Court instructed inferior courts to look to the requirements set forth by 'established governmental policy' in mounting a discretionary function inquiry.") (quoting *Gaubert v. United States*, 499 U.S. 315, 324 (1991)).

[5] *Id.* at 166.

[6] *Id.*; *see also Goetz & Sons W. Meat LLC v. United States*, No. C07-00986MJP, 2008 WL 449654, at *3 (W.D. Wash. Feb. 19, 2008) ("Although Plaintiff contends that further discovery will uncover internal policies governing the protocol for an inspector's actions, internal policies do not have the effect of law and could not transform Plaintiff's claims into claims properly asserting subject matter jurisdiction.") (citation omitted).

[7] *Irving*, 162 F.3d at 165.

[8] *Id.*

discretionary.[9] By regulation, the Commission has done the same.[10] Additionally, the Commission has established a policy that directly undercuts Plaintiffs' failure-to-warn claim: Section 202.5(a) of the Commission's regulations provides that SEC investigations are to be "non-public," "[u]nless otherwise ordered by the Commission."[11] These regulations plainly did not require SEC staff to investigate Madoff in a certain way, or to warn his investors that he may have been violating the securities laws. Most significantly, because these "legislative rules unambiguously define the nature of the challenged conduct" as discretionary, "the discretionary function inquiry is at an end."[12] It does not matter, therefore, whether the SEC's guidance-only Enforcement Manual existed before 2008,[13] or whether there exists some unwritten "policy" with respect to "the method by which [the SEC] assigned personnel," or "the method by which those personnel were supervised."[14] Because "established governmental policy"—in the form of the statutes and regulations that specifically govern the SEC's investigations—gives the SEC discretion, "the discretionary function inquiry is at an end," and discovery is not permitted.

Recognizing this, the *Dichter-Mad* court denied an identical discovery request made by the plaintiffs there. Applying the plausibility standard established by the Supreme Court's

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[9] *See, e.g.*, 15 U.S.C. § 78q(a) & (b)(1); 15 U.S.C. § 78u(a)(1); 15 U.S.C. § 80b-4(a).

[10] *See, e.g.*, 17 C.F.R. § 202.5.

[11] 17 C.F.R. § 202.5(a).

[12] *See Irving*, 162 F.3d at 165.

[13] *See* Pls.' Surreply (Doc. 20) at 6.

[14] *Id.* at 9.

decisions in *Twombly* and *Iqbal*,[15] the court held that the complaint—the same complaint at issue here—"failed to allege sufficient 'facts to raise a reasonable expectation that discovery will reveal evidence' supporting their conclusory assertions."[16] The court therefore found itself "barred from 'unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions.'"[17]

What made the plaintiffs' claims so implausible, the *Dichter-Mad* court held, was the existence of established government policy, in the form of statutes and regulations, that "firmly lodged in the SEC's discretion" "*whether* and *how* to conduct investigations and enforcement actions."[18] The court cited both the Securities and Exchange Act of 1934 and the SEC's "own regulations" to support its conclusion that "the agency retains broad discretion to decide how to conduct its investigations."[19] "In light of this statutory and regulatory language," it observed, "courts have unanimously rejected challenges to the SEC's use of its investigatory powers."[20]

In their surreply, Plaintiffs do not mention these statutes and regulations, but ignoring

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[15] *See Dichter-Mad*, 2010 WL 1632628, at *35-37.

[16] *Id.* at *35 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

[17] *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950).

[18] *Id.* at *23; *id.* at *18 (holding that "the SEC retains discretion over *when* and *how* to conduct its investigations"); *id.* at *19 ("[T]he agency retains broad discretion to decide how to conduct its investigations."); *id*. at *28 ("As noted repeatedly in this Order, the SEC retained discretion to make policy-based decisions about the *manner* and *scope* of its investigations."); *id.* at *29 ("SEC staff had broad discretion to determine how to conduct its investigations[.]"); *id.* at *32 ("As has been shown repeatedly throughout this Order, the SEC retained discretion to decide how to conduct its investigations . . . .").

[19] *Id.* at *19.

[20] *Id.* (discussing cases).

them does not diminish their significance. Indeed, as *Dichter-Mad* recognized, the existence of these formally established policies is what distinguishes this case from the one on which Plaintiffs principally rely, *Ignatiev*, assuming that case is still good law.[21]

In *Ignatiev*, the pertinent statute specifically contemplated that the agency's director "may prescribe" additional duties.[22] The *Ignatiev* court therefore concluded that such duties might exist in discoverable materials. Here, in contrast, the governing statutes and regulations contemplate the opposite. Rather than authorize the creation of mandatory rules governing SEC investigations, the formal policies established by Congress and the Commission provide that the SEC should "make such investigations as it deems necessary," and should, "in its discretion . . . investigate any facts, conditions, practices, or matters which it may deem necessary or proper."[23] There is simply no room to conclude, as did the court in *Ignatiev*, that these laws contemplate the informal creation of "mandatory" policies by someone other than Congress or the Commission. (It is thus no surprise that the IG, in his comprehensive 457-page report, did not identify any mandatory policies.[24])

Finally, this Court should not permit Plaintiffs to convert this case from one barred by the discretionary function exception to one grounded in FOIA. This is not a FOIA case. The United States need not litigate here whether the SEC properly rejected "nearly all of [Plaintiffs'] FOIA

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[21] *Id.* at *36 n.23 (questioning whether *Ignatiev* survives the Supreme Court's decisions in *Twombly* and *Iqbal*).

[22] *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (quoting 3 U.S.C. § 202).

[23] 15 U.S.C. § 78u(a)(1); *see also* 17 C.F.R. § 202.5.

[24] *See* Reply Mem. (Doc. 16) at 19-20.

requests," and it need not explain why the SEC's FOIA appeals office allegedly "ignored" Plaintiffs' subsequent appeal.[25] Moreover, the United States did not, as Plaintiffs suggest, rely on the SEC's FOIA response to demonstrate the non-existence of mandatory policies. That point is sufficiently demonstrated, as a matter of law, by the statutes and regulations that govern the SEC, which grant it broad discretion in its investigations. And even if Plaintiffs' potential FOIA case had merit—a question far beyond the borders of the instant complaint—it would have no bearing on whether Plaintiffs are entitled to discovery on a claim that is, as a matter of law, barred by the discretionary function exception, and over which this Court has no jurisdiction.[26] This Court, like the court in *Dichter-Mad*, is therefore "barred from 'unlock[ing] the doors of discovery.'"[27]

II. Proof that the SEC actually considered policy factors is unnecessary because the challenged conduct is "susceptible to policy analysis."

Plaintiffs fault the United States for failing to "provide evidence of . . . the SEC's competing policy considerations in choosing not to warn Plaintiffs about the danger posed by the Madoff scheme."[28] According to Plaintiffs, the United States was required to provide "sworn statements of actual agency policy considerations."[29]

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[25] *See* Pls.' Surreply (Doc. 20) at 7-8.

[26] *See McQueen v. United States*, 179 F.R.D. 522, 530-31 (S.D. Tex. 1998) (recognizing "the Supreme Court's numerous pronouncements that FOIA and discovery . . . serve separate purposes and accordingly operate under different rules").

[27] *Dichter-Mad*, 2010 WL 1632628, at *35 (quoting *Iqbal*, 129 S. Ct. at 1950).

[28] Pls.' Surreply (Doc. 20) at 9.

[29] *Id.* at 10.

But this is not what the Supreme Court requires. In *Gaubert*, the Court held that the test's second part focuses not on whether the challenged function was actually the result of policy analysis, but only on whether it is "*susceptible* to policy analysis."[30] This "requirement for a policy nexus is an objective not a subjective one."[31] Whether government employees *actually* considered policy factors is irrelevant to whether the test is satisfied.[32] The Court should therefore reject Plaintiffs' argument that their claims are not barred by the discretionary function exception because the United States failed to prove that the SEC considered policy factors in deciding not to warn Madoff's investors. Instead, as explained in the United States' reply

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[30] *Gaubert*, 499 U.S. at 325 (emphasis added).

[31] *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997); *see also Shansky v. United States*, 164 F.3d 688, 696 (1st Cir. 1999) (recognizing that the *Gaubert* inquiry is "objective"); *Viault v. United States*, 609 F. Supp. 2d 518, 526 (E.D.N.C. 2009) (recognizing that test's second part "is an objective inquiry"); *Rogers v. United States*, 187 F. Supp. 2d 626, 631 n.3 (N.D. Miss. 2001) ("[B]y employing the 'susceptible to policy analysis' language, the two-step inquiry laid out in *Berkovitz* was somewhat expanded by the *Gaubert* Court, and the burden on the government made to be more easily shouldered. . . . Thus, since *Gaubert*, the second prong of the two part inquiry has shifted from a factual inquiry to an hypothetical one."); *Alef v. United States*, 990 F. Supp. 932, 934 (W.D. Mich. 1997) ("The inquiry is an objective one . . . .").

[32] *See Macharia v. United States*, 334 F.3d 61, 67 (D.C. Cir. 2003) (rejecting argument that "Gaubert's second step requires evidence that decision makers actually considered social, economic, or policy considerations"); *Shansky*, 164 F.3d at 692 ("In fine, an inquiring court need not ask whether government actors decided the point explicitly or actually discussed it, for the inquiry hinges instead on whether some plausible policy justification could have undergirded the challenged conduct. The critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis."); *C.R.S. v. United States*, 11 F.3d 791, 798 (8th Cir. 1993) ("Defendant could have considered a wide range of policy factors in making its decision; whether or not it actually did so is immaterial under *Gaubert*."); *Sea-Land Serv., Inc. v. United States*, 919 F.2d 888, 892 (3d Cir. 1990) ("In determining whether the action of the government involves the permissible exercise of policy judgment, we need not examine the record for evidence of a conscious policy decision . . . . The relevant inquiry is whether the . . . matter [is] 'susceptible to policy analysis.'").

memorandum, the decision whether to warn Madoff's investors is susceptible to policy analysis, and is thus protected by the discretionary function exception.[33]

III. *Dichter-Mad* was carefully and correctly decided.

Plaintiffs make several fruitless attempts to discredit the *Dichter-Mad* decision. First, Plaintiffs attempt to delegitimize the decision for reasons having nothing to do with its substance. With disdain, they report that the *Dichter-Mad* plaintiffs include two attorneys who represented themselves as well as the others.[34] They accuse them of "plageriz[ing] Plaintiffs' Complaint in its entirety and fil[ing] it as their own in the Central District of California,"[35] "a district that has no connection to the Madoff scheme other than the residency of the plaintiffs there."[36] They note that the *Dichter-Mad* plaintiffs "erroneously named the SEC as a party defendant."[37] They even fault the court for resolving the case in just under five months ("'rocket docket' treatment," according to Plaintiffs).[38] Finally, Plaintiffs cry "gamesmanship" because the United States' attorneys did not "advise [them] of the existence of the *Dichter-Mad* litigation."[39]

None of this matters. The *Dichter-Mad* plaintiffs were represented by counsel, who

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[33] *See* Reply Mem. (Doc. 16) at 15.

[34] *See* Pls.' Surreply (Doc. 20) at 10.

[35] *Id.*

[36] *Id.* at 3-4.

[37] *Id.* at 11.

[38] *Id.*

[39] *Id.*

presented the same arguments that Plaintiffs present here—indeed, the *Dichter-Mad* plaintiffs filed, as their surreply, a verbatim photocopy of the opposition memorandum filed by Plaintiffs in this case. That the *Dichter-Mad* plaintiffs copied Plaintiffs' papers only demonstrates why that decision is so pertinent here. That they sued the SEC is irrelevant to the validity of their claims against the United States, which they also named as a defendant. In any event, the opinion in that case spent just three paragraphs dispatching the plaintiffs' SEC-related claims; the rest of the opinion was dedicated to rejecting the exact claims against the United States that Plaintiffs present here. Nor does it matter that the case was decided relatively quickly. The motion to dismiss was fully briefed, and the court held oral argument. As is evident from its lengthy—and thoroughly researched and reasoned—opinion, the court had all that it needed to conclude that the discretionary function exception bars these claims. Plaintiffs' point that the *Dichter-Mad* court sits in Los Angeles, rather than New York, hardly merits a response, except to note that the Supreme Court's decision in *Gaubert*, on which *Dichter-Mad* was based, binds courts equally in both jurisdictions. Finally, Plaintiffs offer no reason why the United States should be expected to inform them of every case from around the country that presents claims similar to theirs, or why its failure to do so could possibly matter. The bottom line is that the *Dichter-Mad* case was carefully and correctly decided, notwithstanding Plaintiffs' misguided attempts to discredit it.

Second, Plaintiffs argue that the *Dichter-Mad* decision should not be followed because it failed to address two of Plaintiffs' arguments: (1) that the SEC had a mandatory duty to warn Madoff's investors and (2) "that some conduct is so inattentive or foolish or self-absorbed that it violates mandatory duties, regardless of whether those duties are reduced to a policy."[40]

[40] *Id.* at 12.

But the United States has previously explained why Plaintiffs' "failure-to-warn" argument is barred by the discretionary function exception,[41] and the *Dichter-Mad* opinion may not be faulted for declining to expressly discuss such a meritless point.[42] The United States has also previously explained why Plaintiffs are wrong that the discretionary function exception can be defeated in the absence of a mandatory policy.[43] Contrary to what Plaintiffs argue, the *Dichter-Mad* court did not commit "reversible error" by limiting "potential government liability to circumstances where there is in place a written, mandatory policy."[44] Rather, that is exactly what the first part of the *Gaubert* test requires to defeat the discretionary function exception.[45]

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[41] *See generally* Reply Mem. (Doc 16) at 11-15.

[42] *See Rita v. United States*, 551 U.S. 338, 356 (2007) ("Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word 'granted,' or 'denied' on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment."); *Potts v. Sec'y of Health & Human Servs.*, No. 92-6267, 1993 WL 303363, at *9 (6th Cir. Aug. 9, 1993) ("Appellants contend lastly that the district court erred because its opinion did not expressly respond to or comment upon every factual and legal argument made by appellants. We do not believe that the district court has an obligation to address explicitly every point raised by the parties.").

[43] *See generally* Reply Mem. (Doc. 16) at 22-24.

[44] Pls.' Surreply (Doc. 20) at 13.

[45] *See Gaubert*, 499 U.S. at 328 ("We first inquire whether the challenged actions were discretionary, *or* whether they were *instead* controlled by mandatory statutes or regulations.") (emphasis added); *see also, e.g.*, *Baum v. United States*, 986 F.2d 716, 720 (4th Cir. 1993) ("The [first] inquiry boils down to whether the government conduct is the subject of any mandatory federal statute, regulation, or policy prescribing a specific course of action. . . . If no such mandatory statute, regulation, or policy applies to remove the challenged conduct from the choice and judgment of the government, then we move to the second tier of the *Berkovitz-Gaubert* analysis."); *Callahan v. United States*, 329 F. Supp. 2d 404, 407 (S.D.N.Y. 2004) ("First, the Court must determine whether the challenged action involves an element of choice or judgment, as opposed to a circumstance in which a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. If no such mandate exists, the action is

Because it properly applied this test, *Dichter-Mad* was correctly decided, and may be relied on by this Court and others.

Finally, the unpublished Fifth Circuit case Plaintiffs cite does not support their argument that they may defeat the discretionary function exception without a violation of a mandatory and specific policy. In *Garza v. United States*, the court first recognized that *Gaubert* requires courts to "determine whether a statute, regulation, or policy mandates a specific course of action."[46] It then found that requirement to be met because the guard's post orders "prescribe[d] a set course of action for the post guard on duty to follow."[47] Indeed, the court found the post orders to be "quite specific, providing an hour-by-hour and, in some cases, minute-by-minute 'to do' list covering the post guard's shift."[48] These "numerous specific and unambiguous directives" caused the court to conclude that *Gaubert*'s requirement was not met.[49] Had the *Dichter-Mad* court been confronted with allegations of such specific, mandatory policies, and had they not been contradicted by federal statutes and regulations that expressly provide discretion, the result there may have been different. But because it was presented with only conclusory allegations about informal policies—the exact allegations in Plaintiffs' Complaint here—the *Dichter-Mad* court correctly held that the discretionary function exception bars the relief sought.

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considered one of choice or judgment and the first step is satisfied.") (citations omitted).

[46] *Garza v. United States*, 161 Fed. App'x 341, 343 (5th Cir. 2005).

[47] *Id.* at 344.

[48] *Id.* at 345

[49] *Id.*

IV. Plaintiffs' claims would be barred even if the SEC violated mandatory policies, as the Commission retained the ultimate discretion to stop Madoff and warn his investors.

Finally, Plaintiffs have again failed to address a fatal flaw in their case identified by the United States in both its motion and reply. That is, even *if* SEC staff violated mandatory policies, the intervening discretionary acts (or omissions) of the Commission require application of the discretionary function exception.[50] This principle also served as a basis for the *Dichter-Mad* decision. There, the court recognized that "an otherwise actionable agency decision is immune from suit if 'a totally separate exercise' of 'independent' and 'broad based discretion' 'intervenes between an alleged government wrongdoer and the harm suffered by a plaintiff.'"[51] The court concluded that any violations of mandatory policies by SEC staff during the Madoff investigations were followed by "intervening exercises of independent and broad-based discretion" by other SEC employees.[52] Because *those* employees independently decided not to prosecute Madoff, the court held that the discretionary function exception applied, notwithstanding any earlier violations of mandatory procedures.[53]

Despite repeated opportunities to do so, Plaintiffs have made no attempt to explain why this principle does not apply equally here to bar their suit. Plaintiffs did not address this argument in their initial response, and they do not address it in their surreply. But, again, this

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[50] *See* Mot. (Doc. 6) at 12-15; Reply Mem. (Doc. 16) at 6-11.

[51] *Dichter-Mad*, 2010 WL 1632628, at *32 (quoting *Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1285 (9th Cir. 1998)).

[52] *Id.* at *34.

[53] *Id.*

flaw in Plaintiffs' suit does not disappear simply because Plaintiffs choose to ignore it. Even *if* SEC staff violated a mandatory directive, other government officials, including the Commission itself, ultimately made their own discretionary decisions not to prosecute Madoff, not to investigate him further, and not to warn his investors. These "intervening discretionary decisions" render Plaintiffs' claims barred by the discretionary function exception, and require dismissal of this lawsuit.

CONCLUSION

The challenged conduct in this case is committed to the SEC's discretion and grounded in policy. The discretionary function exception therefore bars Plaintiffs' suit, and the Court should dismiss it for lack of subject-matter jurisdiction.

Respectfully submitted,

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