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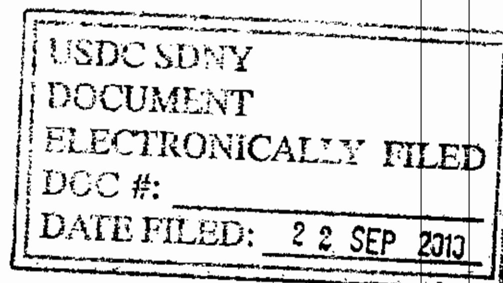
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BY FACSIMILE

Hon. Laura Taylor Swain
United States District Judge
United States Courthouse
500 Pearl Street, Room 755
New York, New York 10007

Re: Molchatsky v. United States, 09 Civ. 8697 (LTS)(AJP)

Dear Judge Swain:

This firm represents Plaintiffs in the above-referenced civil action. We write in response to the Government's letter dated September 17, 2010, which requests a fourth adjournment of the initial pre-trial conference in this case to an indefinite date "at least ten days after the Court has resolved the United States' motion to dismiss this case for lack of subject matter jurisdiction."

Plaintiffs oppose this request. Plaintiffs filed this case on October 14, 2009. Almost a year later, there has been no initial pre-trial conference, no scheduling order, and no discovery has taken place. *See* Fed. R. Civ. P. 16(b) ("The judge must issue the scheduling order as soon as practicable, but in any event, within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared."). The Government now has effectively asked the Court to grant a blanket stay of all discovery pending the resolution of its motion, without making the requisite showing of good cause for a stay required by Rule 26(c).

"[D]iscovery should not be routinely stayed simply on the basis that a motion to dismiss has been filed." *Moran v. Flaherty*, 1992 WL 276913 (S.D.N.Y. Sept. 25, 1992). It is well settled that the filing of a motion to dismiss does not automatically stay discovery. *See Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.*, 206 F.R.D.367, 368 (S.D.N.Y. 2002); *see also Rivera v. Inc. Village of Farmingdale*, 2007 WL 3047089, at *1 (E.D.N.Y. Oct. 17, 2007) ("there is no automatic stay of discovery pending the determination of a motion to dismiss."). A court has discretion to stay discovery under Rule 26(c), but only "for good cause shown." *Spencer Trask*, 206 F.R.D. at 368. The party seeking a stay of discovery -- here, the Government -- bears the burden of showing good cause. *Rivera*, 2007 WL 3047089 at *1.

The Government has made no showing of good cause for a stay of discovery. A stay is particularly unwarranted here, where the Government's motion to dismiss is premised

upon jurisdictional facts that are peculiarly within its knowledge. The Government moves to dismiss this case for lack of subject matter jurisdiction under the discretionary function exception to the Federal Tort Claims Act, on the ground that the SEC's actions (or lack of action) was a matter of discretion that did not violate any internal mandatory policy and was the product of policy considerations. *See* Docket No. 6 at 5, 11. The Government's motion thus raises a factual challenge to the complaint. *See Loughlin v. United States*, 230 F. Supp. 2d 26, 36 (D.D.C. 2002), *aff'd* 393 F.3d 155 (D.C. Cir. 2004). Both Plaintiffs and the Court have been asked simply to accept the Government's representation of the facts at face value, without the benefit of even a scintilla of discovery to test the validity of its assertions.

Plaintiffs have the right to conduct discovery in support of their claims and to determine what policies, practices, and procedures may have been in place at the time of the negligent acts and whether they in fact gave rise to mandatory directives that were not followed. "Without discovery, [plaintiffs] have no way to know what mandatory policies may bind [the SEC]." *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001). Courts have held, in the specific context of a discretionary function defense raised under the FTCA, that "[w]here facts are necessary to establish jurisdiction, plaintiffs must be given 'ample opportunity' to obtain and present evidence before the court may grant a motion to dismiss for lack of subject matter jurisdiction." *Sledge v. United States*, 2010 WL 2745788, at *6 (D.D.C. July 13, 2010).[1]

Plaintiffs have received no such opportunity, notwithstanding the fact that they specifically identified the need for discovery at page 29 of their opposition brief, and cited a number of cases, including *Ignatiev*, where courts have granted plaintiffs the right to conduct discovery relating to agency policies. *See* Docket No. 13 at 29. As Plaintiffs stated in their opposition to the motion, they have reason to believe that the SEC teams assigned to investigate Madoff's activities "did not create reports or consult the SEC's computer system... in violation of internal policies that made such tasks mandatory." *See id.* at 27.

The Government's effort to shield those policies, practices, and procedure from discovery by Plaintiffs is fundamentally unfair. Plaintiffs bear the burden of showing that this Court has subject matter jurisdiction, but have been deprived of the evidence that would enable them to meet their burden. "Since internal guidelines can be an actionable source of a mandatory obligation under the FTCA, an agency cannot shield itself from liability simply by denying the allegations of a complaint." *Sledge*, 238 F.3d at 467. Only discovery can reveal an agency's internal policies, practices, and procedures. *See id.* Indeed, a district court commits reversible error when it simply assumes the truth of a contested jurisdictional fact without allowing discovery. *See id.*; *see also Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40-41 (D.C. Cir. 2000).

[1] Indeed, these cases are no more than a specific application of the general rule applicable to any Rule 12(b)(1) motion "that plaintiffs be given an opportunity to conduct discovery on these jurisdictional facts, at least where the facts, for which discovery is sought, are peculiarly within the knowledge of the opposing party." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004).

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For the foregoing reasons, we respectfully request that the Court deny the Government's request for a further adjournment of the initial pre-trial conference and permit Plaintiffs to proceed with discovery. At a minimum, the Court should grant Plaintiffs leave pursuant to Rule 26(d) to conduct jurisdictional discovery concerning the SEC's internal policies, practices, and procedures. *See, e.g., Sledge*, 238 F.3d at 467.

Respectfully,

Howard R. Elisofon

cc: Neil M. Corwin, Assistant U.S. Attorney