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 BURNETT H. RADOSH'S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Plaintiffs commenced this case on October 14, 2009. On December 14, 2009, the United States moved to dismiss for lack of subject-matter jurisdiction because Plaintiffs' claims are barred by the discretionary function exception.[1] The parties have exhaustively briefed this issue, together producing more than 120 pages of material. In addition to the United States' motion and supporting memorandum, the parties have filed a response opposing the motion;[2] a reply supporting it;[3] a notice of supplemental authority regarding the dismissal of a nearly-identical case;[4] a surreply;[5] and a response to the surreply.[6] Briefing has been closed since June 11, 2010.

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[1] *See* Doc. 6.

[2] *See* Doc. 13.

[3] *See* Doc. 16.

[4] *See* Doc. 17 (citing *Dichter-Mad Family Partners v. United States*, 707 F. Supp. 2d 1016 (C.D. Cal. 2010)).

[5] *See* Doc. 20.

[6] *See* Doc. 21.

Now, more than a year after the United States filed its motion and more than six months since briefing was completed, Burnett H. Radosh, who, like Plaintiffs, was a Madoff investor, seeks to file an amicus curiae brief opposing the United States' motion. The Court should deny Radosh's request.

"District courts have broad discretion to permit or deny the appearance of amici curiae in a given case."[7] Courts generally deny amici requests where the parties' interests are adequately represented by counsel and additional memoranda of law would not aid the court.[8]

Radosh's amicus request should be denied because his participation in this case would offer nothing new. The statute he cites, like those relied on by Plaintiffs,[9] fails to prescribe a fixed or readily-ascertainable standard,[10] and so cannot defeat the discretionary function exception. The United States has already addressed this point in its reply memorandum,[11] but stands ready to supply additional briefing should the Court deem it necessary.

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[7] *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992).

[8] *Id.*; *see also, e.g., Esther Sadowsky Testamentary Trust Derivatively ex rel. Home Loan Mortgage Corp. v. Syron*, No. 08-CV-5221 (BSJ), 2009 WL 1285982, at *3 (S.D.N.Y. May 6, 2009) ("Here, the parties seeking to intervene offer no new substantive legal arguments or perspectives that appear necessary or useful to the Court. Moreover . . . the Court finds that their motions are neither timely nor necessary to protect the movants' interest. Finally, all parties are adequately represented by counsel. Therefore, the Court DENIES the . . . applications to appear as amici curiae."); *United States v. El-Grabowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994) (Mukasey, J.) (rejecting amici applications because "[n]either of [the] submissions offers any argument or point of view not available from the parties themselves").

[9] *See, e.g.*, Doc. 13 at 26-27.

[10] Radosh's statute, for example, leaves to the SEC to determine whether it has enough facts "to believe" that a regulated entity is "in or is approaching financial difficulty," and it prescribes no standards for determining when that threshold has been met (or "approached").

[11] *See* Doc. 16 at 18.

Because the proposed amicus brief would not aid the Court's determination of the pending motion to dismiss, the Court should deny Radosh's motion to appear as amicus curiae.

Respectfully submitted,

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