

(c) directing the attorneys of record for Defendant United States of America to appear for and attend a scheduling conference with the Court pursuant to Rule 16(b)(1) of the Federal Rules of Civil Procedure; and

(d) for the entry of a scheduling order pursuant to Rule 16(b) of the Federal Rules of Civil Procedure.

3. Plaintiffs commenced this action fifteen months ago, on October 14, 2009.

4. On October 20, 2009, the Court issued an order (the “Initial Conference Order”) directing the parties to: (a) appear before the Court for a pre-trial conference on January 22, 2010; (b) confer preliminary at least 21 days prior to January 22, 2010 to discuss certain matters enumerated in the Order; and (c) prepare, execute, and file a Preliminary Pre-Trial Statement, “which shall constitute the written report required by Fed. R. Civ. P. 26(f).” A true and correct copy of the Court’s Initial Conference Order is annexed hereto as Exhibit A.

5. On December 14, 2009, the Government filed its motion to dismiss the Complaint for lack of subject matter jurisdiction. That motion has been fully briefed and is pending before the Court.

6. The pre-trial conference in this matter, which was originally scheduled for January 22, 2010, has been adjourned a total of six times, notwithstanding the fact that no stay of discovery has been ordered by the Court and the Government has offered no grounds for the issuance of such a stay. On February 3, 2011, the Court granted the Government’s request to postpone the pre-trial conference in this action indefinitely, pending the Court’s determination of the Government’s motion to dismiss. See Dkt. 35.

7. Although the Court has now granted the Government’s request to postpone the pre-trial conference in this action indefinitely, there has been no order staying discovery or

excusing the Government from complying with its obligation to confer with Plaintiffs' counsel pursuant to Rule 26(f) or paragraphs 3 and 4 of the Court's own Initial Conference Order.

8. Although Plaintiffs initially consented to the Government's requests to defer discovery, Plaintiffs are concerned that, with the passage of time, the memories of witnesses may fade or documents may be inadvertently lost or destroyed, which may irreparably harm our clients. Accordingly, since September 2010, Plaintiffs have asked the Government to confer with counsel for Plaintiffs concerning discovery. The Government has refused these requests.

9. Most recently, on Monday, January 31, 2011, I spoke to Neil Corwin, Esq., concerning the Government's most recent request to postpone the pre-trial conference in this action indefinitely, pending the Court's determination of the Government's motion to dismiss. By letter dated February 2, 2011, I advised Mr. Corwin that Plaintiffs would not consent to a further adjournment and requested "that the Government confer with Plaintiffs' counsel regarding the matters set forth in the Court's [Initial Conference] Order dated October 20, 2009, in accordance with said Order and Fed. R. Civ. P. 26(f), as soon as practicable and in all events no later than within the next 30 days, so that the Court may issue a scheduling order as required by Fed. R. Civ. P. 16(b)." A copy of my February 2, 2011 letter to Mr. Corwin is annexed hereto as Exhibit B.

10. Mr. Corwin did not respond to Plaintiffs' request but instead filed a letter with the Court on February 2, 2011 in which the Government requested a further adjournment of the pre-trial conference indefinitely, pending the Court's determination of the Government's motion to dismiss. See Dkt. 35.

11. On February 11, 2011, I had a telephone conversation with Sarah Normand, Esq. concerning Plaintiffs' request that the Government participate in a Rule 26(f) conference. Ms. Normand requested time to consult with her colleagues before responding.

12. On February 14, 2011, Ms. Normand advised me that the Government takes the position that discovery has been stayed in this action pursuant to this Court's prior orders. Accordingly, the Government did not consent to meet with Plaintiffs pursuant to Rule 26(f) or the Initial Conference Order.

13. The Government's refusal to comply with its obligations under Rule 26(f) and paragraphs 3 and 4 of the Initial Conference Order is a *de facto* stay of discovery and effectively precludes Plaintiffs from taking discovery. Pursuant to Rule 26(d) of the Federal Rules of Civil Procedure, Plaintiffs are not permitted to seek discovery from any source "before the parties have conferred as required by Rule 26(f)." (emphasis added).

14. Plaintiffs hereby certify that they have used their best efforts to resolve informally the matters that are raised in their submission. As discussed above, Plaintiffs have conferred with the Government in writing and by telephone concerning Plaintiffs' request for a Rule 26(f) conference, but were unable to reach an informal resolution.

15. Plaintiffs' further certify that they have requested an informal conference with the Court to discuss this motion pursuant to Local Civil Rule 37.2. On February 2, 2011, Plaintiffs filed a letter with the Court in which they expressed their objections to the Government's request for an indefinite postponement of the pretrial conference and the Government's failure to comply with Rule 26(f) and the Court's Initial Conference Order. See Dkt. 36. In that letter, Plaintiffs expressly requested a pre-motion conference with the Court pursuant to Local Rule 37.2. See id.

16. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of February 2011.


Howard Elisofon