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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

PHYLLIS MOLCHATSKY and STEVEN SCHNEIDER, M.D.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

- X

Case No 09 CIV 8697 (LTS/AJP)

MEMORANDUM OF LAW IN SUPPORT OF
<u>PLAINTIFFS' MOTION FOR A RULE 26(f) CONFERENCE</u>

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Plaintiffs Phyllis Molchatsky and Steven Schneider, M.D., respectfully submit this memorandum of law in support of their motion for an order:

(1) directing the attorneys of record for Defendant United States of America to participate in a conference with Plaintiffs as required by Rule 26(f) of the Federal Rules of Civil Procedure;

(2) directing the attorneys of record for Defendant United States of America to confer with Plaintiffs in good faith on a proposed discovery plan, as required by Rule 26(f) of the Federal Rules of Civil Procedure; or, in the alternative;

(3) 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

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

STATEMENT OF FACTS

The facts relevant to this motion are set forth in the accompanying Declaration of Howard Elisofon, dated February 17, 2011 (the "Elisofon Decl."), and the exhibits thereto.

ARGUMENT

I.

THE GOVERNMENT, LIKE ANY LITIGANT, IS OBLIGATED TO COMPLY WITH RULE 26(f)

Rule 26(f) of the Federal Rules of Civil Procedure states the parties "must confer as soon as practicable" concerning discovery matters. This obligation is mandatory and is excused only "when the court orders otherwise." Fed. R. Civ. P. 26(f)(1). The attorneys of record "are jointly responsible for arranging the conference, for attempting in good faith to agree

on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan." Fed. R. Civ. P. 26(f)(2).

There has been no order from this Court excusing the Government from compliance with its obligations under Rule 26(f). See Elisofon Decl. ¶ 7. Nor has there been any order of this Court staying discovery pursuant to Rule 26(c). See id.

In addition to the Government's obligations under Rule 26(f), the Court in this case issued an Initial Conference Order dated October 20, 2009 which, among other things, directed 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)." See Elisofon Decl. at ¶ 4 and Exh. A.

Although the Court has granted the Government's request to postpone the pre-trial conference in this action indefinitely, there has been no order excusing the Government from complying with those paragraphs of the Court's Initial Conference Order which obligate the parties to confer preliminarily and to prepare, execute, and file a Preliminary Pre-Trial Statement. See Elisofon Aff. ¶ 7.

The appropriate remedy in such situation is to "file a petition or motion requesting that the judge (1) hold a scheduling conference, either by telephone or in person; or (2) order all the parties to submit their scheduling order and other management proposals in writing, thus providing opportunity for input by all parties before the court issues its [scheduling] order." 16 Moore's Fed. Practice (3d ed.) at § 16.10[3][a], pg. 16-38 to 16-39; see also Rivera v. Inc. Village of Farmingdale, 2007 WL 3047089 (E.D.N.Y. Oct. 17, 2007) (issuing a scheduling order

in response to plaintiffs' request for "a pre-motion conference regarding their anticipated motion for an order directing the defendants to attend a Rule 26(f) planning conference").

II.

PLAINTIFFS HAVE BEEN PREJUDICED BY THE GOVERNMENT'S FAILURE TO COMPLY WITH RULE 26(f)

The Government's refusal to comply with Rule 26(f) acts as a *de facto* stay of discovery, because "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d)(1).

Plaintiffs have been prejudiced by the Government's failure to comply with Rule 26(f). In addition to the delay in the prosecution of this action, which has been pending for 15 months, each passing day increases the risk that the memories of witness will fade or that documents and other evidence will be inadvertently lost or destroyed.

Plaintiffs have further been denied the opportunity to take discovery of facts which may bear on the Government's pending motion to dismiss the case for lack of subject matter jurisdiction. The Government's motion is premised on 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 jurisdictional 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).

"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]

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. 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.

[1] 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).

III.

DISCOVERY SHOULD NOT BE STAYED

As noted, there has been no order staying discovery in this action. The Government has not requested a stay of discovery and has certainly made no showing that a stay is warranted. To the contrary, the Government's only ground for refusing to comply with Rule 26(f) is the pendency of its motion to dismiss.

It is well established that "discovery 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). 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, 2007 WL 3047089, at *1 ("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 Government has mad no such showing here. The party seeking a stay of discovery bears the burden of showing good cause. Rivera, 2007 WL 3047089 at *1.

IV.

THE COURT SHOULD ISSUE A RULE 16(b) SCHEDULING ORDER

Rule 16(b) of the Federal Rules of Civil Procedure provides that the Court must issue a scheduling order "as soon as practicable," but in any event no later than "the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." Rule 16(b) has not been satisfied in this case.

Rule 16(b) directs the Court to issue a scheduling order "after receiving the parties' report under Rule 26(f)" or "after consulting with the parties' attorneys and any

unrepresented parties at a scheduling conference or by telephone, mail, or other means." Fed. R. Civ. P. 16(b)(1).

Plaintiffs respectfully request that the Court order the Government to participate in a planning conference with Plaintiffs' counsel pursuant to Rule 26(f) or a scheduling conference with the Court pursuant to Rule 16(b)(1). Upon the completion of such conference, Plaintiffs respectfully request that the Court issue a scheduling order pursuant to Rule 16(b). See Rivera, 2007 WL 3047089 (issuing a scheduling order in response to plaintiffs' request for "a pre-motion conference regarding their anticipated motion for an order directing the defendants to attend a Rule 26(f) planning conference"); see also 16 Moore's Fed. Practice (3d ed.) at § 16.10[3][a], pg. 16-38 to 16-39.

CONCLUSION

For the reasons set forth herein and in the accompanying declaration of Howard Elisofon dated February ___, 2011, Plaintiffs respectfully request that the Court enter an order:

(1) directing the attorneys of record for Defendant United States of America to participate in a conference with Plaintiffs as required by Rule 26(f) of the Federal Rules of Civil Procedure;

(2) directing the attorneys of record for Defendant United States of America to confer with Plaintiffs in good faith on a proposed discovery plan, as required by Rule 26(f) of the Federal Rules of Civil Procedure; or, in the alternative;

(3) 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

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

Dated: New York, New York
February 17, 2011

HERRICK, FEINSTEIN LLP

/s/

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