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February 23, 2011

BY FACSIMILE

Hon. Laura Taylor Swain
United States District Court
Southern District of New York
500 Pearl Street, Room 755
New York, New York 10007

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

Dear Judge Swain:

Please allow this letter to serve as Plaintiffs' reply to the letter brief submitted by the Government in opposition to Plaintiffs' motion for an order directing the Government to appear for a Rule 26(f) conference. The Government's letter misstates both the relief sought by Plaintiffs and the prior orders of this Court. In any event, the mere filing of a motion to dismiss does not constitute good cause for a stay of discovery. Because the Government has not shown that there has been a stay of discovery in this action or good cause for the issuance of such a stay, Plaintiffs' motion should be granted.

To be clear, Plaintiffs moved for an order "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" and "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."¹

Contrary to the position asserted by the Government, the Court has not ordered a stay of discovery in this action and has not entered an order excusing the Government from compliance with its obligations pursuant to Fed. R. Civ. P. 26(f). The Government did not move for preliminary relief or a stay of discovery in connection with its pending motion to dismiss. The Government's unilateral refusal to participate in a Rule 26(f) conference has served as a *de facto* stay, however, as it precludes Plaintiffs from obtaining discovery from any source pursuant to Fed. R. Civ. P. 26(d)(1).

¹ In the alternative, Plaintiffs have moved for an order 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," which is the alternative pre-requisite for the issuance of a Scheduling Order pursuant to Rule 16(b)(1).

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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)." The Court has, on six occasions, granted the Government's request to postpone the pre-trial conference.

Contrary to the Government's interpretation of the Court's orders, however, there has been no order excusing compliance with the remainder of the Initial Conference Order or "the requirements associated with preparing the Preliminary Pre-Trial Statement." See Gov't Opp. at 2. The Government has never requested, nor has the Court ordered, any stay of discovery, the Government's obligations to comply with the remainder of the Initial Conference Order, or the Government's obligations as a litigant under Rule 26(f) of the Federal Rules of Civil Procedure.

Rather, on September 17, 2010, the Government moved for "an adjournment of the initial pre-trial conference... until at least ten days after the Court has resolved the United States' motion to dismiss this case." (Dkt. 24) No other relief was requested. The Court granted the Government's motion in part, stating that "[t]he conference is adjourned to December 10, 2010 at 10:00 a.m." Id. No other relief was granted by the Court. See id.

On November 24, 2010, the Government again moved for "adjournments of the initial pre-trial conferences" in this action and in Litwin Foundation, Inc. v. United States, 10 Civ. 7367. (Dkt. 27) No other relief was sought. See id. The Court again granted the Government's motion in part, stating that "[t]he conferences are adjourned to February 17, 2011 at 4:30 p.m." See id. No other relief was granted by the Court. See id.

On February 2, 2011, the Government again moved for "adjournments of the initial pre-trial conferences presently scheduled in these actions for February 17, 2011." (Dkt. 35) No other relief was sought. See id. The Court granted the Government's motion and ordered that "[t]he conferences are adjourned pending resolution of the Molchatsky motion to dismiss and further order of the Court." See id. No further relief was granted by the Court's order. See id.

To the extent that the Court would consider granting the Government an indefinite stay of discovery in this action, Plaintiffs again note that the requisite showing of good cause has not been made. The mere filing of a motion to dismiss does not constitute good cause for a stay of discovery. See Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd., 206 F.R.D.367, 368 (S.D.N.Y. 2002); Rivera v. Inc. Village of Farmingdale, 2007 WL 3047089, at *1 (E.D.N.Y. Oct. 17, 2007). The only other basis for relief advanced by the Government is its unsupported assertion that "as long as the motion to dismiss is pending, the parties are not in a position to conduct meaningful discussions concerning the requirements of the Court's Initial Conference Order." See Gov't Opp. at 2.

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For the foregoing reasons and the reasons set forth in our moving papers, Plaintiffs respectfully request that the Court issue an order directing the attorneys of record for Defendant United States of America to participate in a conference with Plaintiffs and confer with Plaintiffs in good faith on a proposed discovery plan, as required by Rule 26(f) of the Federal Rules of Civil Procedure, together with such further relief as the Court may deem just and proper.

Respectfully,



Howard R. Elisofon

cc: Neil M. Corwin, Esq.
Sarah S. Normand, Esq.
Jeffrey Paul Ehrlich, Esq.