

U.S. Department of Justice

Molchatsky et al v. United States Of America



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United States Attorney
Southern District of New York

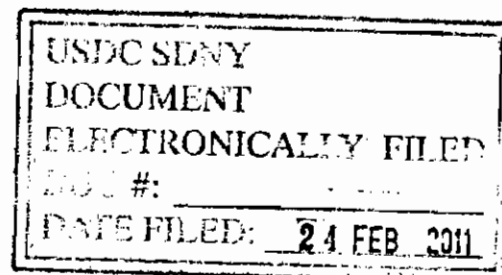
Doc. 44

86 Chambers Street
New York, New York 10007

February 22, 2011

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:

We write respectfully on behalf of the United States (the "Government"), defendant in the above-referenced action, seeking leave of the Court to submit this letter in lieu of a formal opposition to plaintiffs' motion for an order pursuant to Federal Rule of Civil Procedure 16(b), setting a date for a scheduling conference and requiring the parties to confer on a proposed discovery plan. As set forth briefly below, plaintiffs' motion disregards the plain import of the Court's prior orders, which have adjourned the initial pretrial conference in this matter and the concomitant obligation of the parties to prepare a preliminary pre-trial statement pursuant to the Court's Initial Conference Order. In the event that the Court deems that a formal opposition to plaintiff's motion is warranted, the Government respectfully requests that it be afforded until March 15, 2011, to file an opposition brief.

Pursuant to the Court's Initial Conference Order, twenty-one days in advance of the date that the Court has scheduled for an initial pre-trial conference, the parties are required to confer regarding, among other things, a proposed discovery plan, and submit a Preliminary Pre-Trial Statement "which shall constitute the written report required by Fed. R. Civ. P. 26(f)." See October 20, 2009 Initial Conference Order (Docket Entry No. ("Doc.") 3). As the Court is aware, the Government's motion to dismiss plaintiffs' complaint on jurisdictional grounds is now pending before the Court, and, on a number of occasions, in light of the pending motion, the Court has adjourned its initial pretrial conference and its requirement that the parties confer and prepare a Preliminary Pre-Trial Statement. Most recently, on February 2, 2011, at the Government's request and over plaintiffs' objection, the Court adjourned the initial conference to a date ten days after it rules on the Government's motion to dismiss. The Court's February 2, 2011 adjournment is consistent with the adjournments that the Court has granted in eleven other

cases, which the Court has accepted as related to Molchatsky action.¹ In these related actions, the Court has adjourned the initial pretrial conference until a date after the Court decides the Government's motion to dismiss in Molchatsky.

After initially consenting to the adjournment of the initial conference and the Court's requirement that the parties prepare a Preliminary Pre-Trial Statement, see Docs. 9, 19, plaintiffs here first objected to the Government's request for an adjournment by letter to the Court, dated September 20, 2010. As they do in the instant motion, in their September 20, 2010 letter, plaintiffs opposed any further adjournment of the initial conference, arguing that Rule 16(b) requires that an initial conference be scheduled and further arguing that they are entitled to take discovery. See Docket No. 25. As the Government noted in its September 21, 2010 letter to the Court, however, as long as the motion to dismiss is pending, an adjournment is warranted because the parties are not in a position to conduct meaningful discussions concerning the requirements of the Court's Initial Conference Order, and plaintiffs' demand for discovery has already been fully briefed in the context of the jurisdictional motion. See Doc. 26 (citing Doc. 16 at 24-28; Doc. 21 at 2-7). On September 21, 2010, over plaintiffs' objection, the Court granted the Government's request that the initial conference and the requirements associated with preparing the Preliminary Pre-Trial Statement be adjourned. See Doc. 24. Subsequently, on November 29, 2010, and February 2, 2011, the Court granted the Government's request for adjournment over the same objections by plaintiffs. See Docs. 27, 35.

Plaintiffs' instant motion essentially rehashes the arguments they have raised to the Government's past three requests for adjournments -- arguments that the Court has properly rejected in granting the adjournments. To proceed with an initial pretrial conference and require that the parties confer in advance of such a conference regarding a proposed discovery plan is simply not in the interest of judicial economy here. Among other things: (a) the Government's motion to dismiss on jurisdictional grounds based on the discretionary function exception to the Federal Tort Claims Act has been fully submitted to the Court; (b) the plaintiffs' entitlement to discovery to contest the Government's assertion of the discretionary function exception has been fully briefed in the context of the motion to dismiss papers; (c) the scope and nature of discovery, if any, will be guided by the Court's determination of the motion to dismiss; and (d) any discovery in the instant action would have to be coordinated with the discovery in the eleven other actions before the Court, all of which have been adjourned pending the Court's determination of the Government's motion to dismiss in Molchatsky. Under these circumstances, the Court should deny plaintiffs' motion.

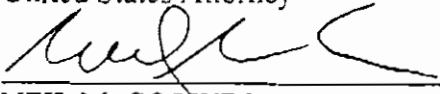
¹ These cases are: Michael and Ruth Slade Foundation v. U.S., 10 Civ. 2483; Goldman v. U.S., 10 Civ. 2484; The Litwin Foundation, Inc. v. U.S., 10 Civ. 7367; Eisenberg v. U.S., 10 Civ. 8348; Goldenberg v. U.S., 10 Civ. 8349; Albert v. U.S., 10 Civ. 8619; Mederrick v. U.S., 10 Civ. 8697; Leif v. U.S., 10 Civ. 8887; Calesa v. U.S., 10 Civ. 8888; Aspen Fine Arts v. U.S., 10 Civ. 9213; and Applestein v. U.S., 11 Civ. 521. Counsel for the Molchatsky plaintiffs also represents the plaintiffs in Slade Foundation, Goldman, and The Litwin Foundation.

We thank the Court for its consideration of this matter and respectfully request that this letter be entered on the docket.

Respectfully,

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