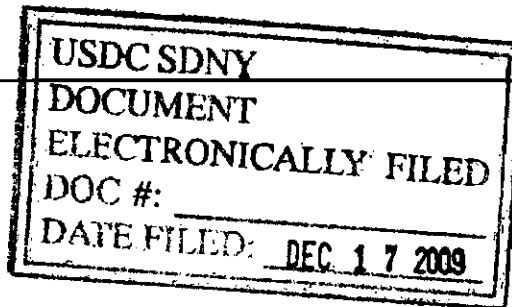


U.S. Department of Justice



United States Attorney
Southern District of New York

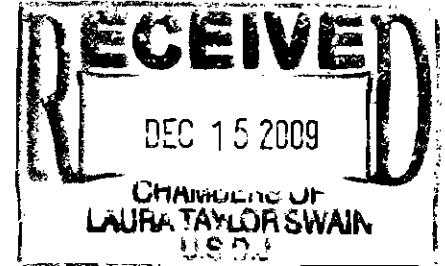


36 Chambers Street
New York, New York 10007

December 15, 2009

BY HAND

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)

MEMO ENDORSED

Dear Judge Swain:

We represent defendant the United States of America (the "Government") in the above-referenced action. On December 14, 2009, the Government filed a motion to dismiss this action for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). With the consent of plaintiffs' counsel, we write to request that the Court adjourn the initial pre-trial conference presently scheduled in this matter for January 22, 2010, and the requirement set forth in the Court's October 20, 2009 Initial Conference Order that the parties confer and present a preliminary pre-trial statement, pending the Court's resolution of the Government's motion to dismiss. We also write to propose, on behalf of all parties, a briefing schedule with regard to the Government's motion.

In its motion, the Government contends that the conduct alleged in the complaint falls within the discretionary function exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act. See 28 U.S.C. § 2680(a) ("The provisions of this chapter and section 1346(b) of this title shall not apply to— (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."). Because Congress has not waived sovereign immunity for claims of the type alleged in the complaint, the Court lacks jurisdiction to entertain plaintiffs' claims. See, e.g., Fazi v. United States, 935 F.2d 535, 537 (2d Cir. 1991).

In light of the Government's motion to dismiss the complaint on jurisdictional grounds, we respectfully request that the Court adjourn the initial pre-trial conference and the corresponding pre-trial statement requirement. Because "sovereign immunity encompasses a right not to be sued," In re World Trade Center Disaster Site Litig., 521 F.3d 169, 191 (2d Cir. 2008), the Government submits that its jurisdictional motion should be resolved before the

parties engage in the discussions required by the Court's October 20, 2009 Initial Conference Order. Plaintiffs' counsel consents to the Government's request to adjourn the initial pre-trial conference and preliminary pre-trial statement requirement.


In addition, the parties request that the Court endorse the following schedule for briefing of the Government's motion to dismiss: plaintiffs' brief will be due on February 12, 2010, and the Government's reply will be due on March 5, 2010.

We thank the Court for its consideration of these requests.

Respectfully,

PREET BHARARA
United States Attorney

By:


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By Electronic Mail

*The conference is adjourned to
June 25, 2010, at 10:00 AM.*

SO ORDERED.

NEW YORK, NY

Dec 16, 2009


J. AURA TAYLOR SWAIN
UNITED STATES DISTRICT JUDGE