

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5273

September Term, 2018

1:17-cv-02335-APM

Filed On: May 16, 2019

Robert Allen Stanford, On behalf of himself
and the Stanford Estate,

Appellant

v.

Jay Clayton, U.S. Securities and Exchange
Commission,

Appellee

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BEFORE: Tatel, Millett, and Pillard, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, the motion to appoint counsel, the motion to expedite, and the "Request for Leave to Present Defendant with an Offer to Compromise and Settle Pending Tort Litigation," it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED AND ADJUDGED that the district court's order filed July 5, 2018, be affirmed. The district court properly dismissed the case for lack of subject matter jurisdiction, because appellant's claims are barred by sovereign immunity. In initiating an investigation of and enforcement action against appellant, the U.S. Securities and Exchange Commission performed a discretionary function under 28 U.S.C. § 2680(a). See *Loumiet v. United States*, 828 F.3d 935, 941-42 (D.C. Cir. 2016); cf. *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 760-61 (D.C. Cir. 2001). Although "the discretionary-function exception does not categorically bar [Federal Tort Claims Act] claims where the challenged exercise of discretion allegedly exceeds the government's constitutional authority to act," Loumiet, 828 F.3d at 939,

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appellant did not allege Fourth and Fifth Amendment violations in his complaint or in any other filing before the district court, and “[i]t is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal,” Keepseagle v. Perdue, 856 F.3d 1039, 1053 (D.C. Cir. 2017). Because 28 U.S.C. § 2680(a) bars appellant’s claims, the court need not consider whether suit would otherwise be allowed under the intentional-tort exception found in 28 U.S.C. § 2680(h). See Gray v. Bell, 712 F.2d 490, 507-08 (D.C. Cir. 1983) (declining to address plaintiff’s arguments under § 2680(h) in light of the application of § 2680(a)). Furthermore, appellant did not raise arguments as to that exception before the district court, see Keepseagle, 856 F.3d at 1053, and his arguments on appeal are not sufficiently developed for the court’s consideration, see N.Y. Rehab. Care Mgmt., LLC v. NLRB, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (“It is not enough to merely mention a possible argument in the most skeletal way, leaving the court to do counsel’s work.”). It is

FURTHER ORDERED that the motion to expedite be dismissed as moot. It is

FURTHER ORDERED that the “Request for Leave to Present Defendant with an Offer to Compromise and Settle Pending Tort Litigation” be dismissed as moot, as appellant need not seek leave of court to present a settlement offer.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT ALLEN STANFORD,

Plaintiff,

v.

JAY CLAYTON,

Defendant.

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Case No. 1:17-cv-02335 (APM)
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ORDER

Plaintiff Robert A. Stanford brings this action under the Federal Tort Claims Act (“FTCA”), alleging that the U.S. Securities and Exchange Commission (“SEC”) wrongfully brought a civil enforcement action against him and his companies. *See* Notice of Claim, ECF No. 1 [hereinafter Pl.’s Notice]. Plaintiff does not identify the actual causes of action he advances, but the allegations sound in claims of malicious prosecution and abuse of process. *See generally id.* Defendant Jay Clayton, Chairman of the SEC, moves to dismiss Plaintiff’s complaint.¹ *See* Def.’s Mot. to Dismiss, ECF No. 6 [hereinafter Def.’s Mot.]. Having given full consideration to the parties’ briefing, the court grants Defendant’s Motion.

The court lacks subject matter jurisdiction over Plaintiff’s action because the FTCA’s discretionary-function exception shields the United States from liability premised on the SEC’s investigation of, and decision to bring a civil enforcement action against, Plaintiff and his companies. *See* 28 U.S.C. § 2680(a); *Loumiet v. United States*, 828 F.3d 935, 942 (D.C. Cir. 2016)

¹ Although claims under FTCA must be brought against the United States, and not individual officials, *see* 28 U.S.C. § 2679(a), because Plaintiff is proceeding pro se the court treats his action as if properly brought against the United States.

(holding that “a decision by a [federal agency] to bring an action pursuant to its broad statutory enforcement authority” ordinarily qualifies for the discretionary-function exception); *Sloan v. U.S. Dep’t of Hous. & Urban Dev.*, 236 F.3d 756, 760–61 (D.C. Cir. 2001) (holding that federal agency’s decision to initiate administrative action was subject to discretionary-function exception); *Moore v. Valder*, 65 F.3d 189, 197 (D.C. Cir. 1995) (holding that “[d]eciding whether to prosecute” is “quintessentially discretionary”); *cf. Zelaya v. United States*, 781 F.3d 1315, 1331–32 (11th Cir. 2015) (holding that the discretionary-function exception applies to claims based on the SEC’s failure to discover and take action against Ponzi schemer); *Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 750–51 (9th Cir. 2013) (same); *Baer v. United States*, 722 F.3d 168, 172–73 (3d Cir. 2013) (same). The court notes that Plaintiff has *not* alleged that the SEC exceeded the scope of its constitutional authority in bringing the enforcement action. See Pl.’s Notice at 3 (alleging only that the SEC’s action was “founded and executed on an extra-territorial jurisdiction and statutory authority that never existed”); *Cf. Loumiet*, 828 F.3d at 946; Pl.’s Resp. to United States’ Mot. to Dismiss, ECF No. 8 [hereinafter Pl.’s Opp’n], at 6–7 (alleging only that the SEC’s action “went beyond normal regulatory activity” and was “not grounded in policy”).

Additionally, the court rejects Plaintiff’s request to take jurisdictional discovery to defeat application of the discretionary-function exception. Plaintiff’s demand for discovery is based on no more than “conjecture or speculation,” *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1094 (D.C. Cir. 2008), that he will uncover decision-making that takes the SEC’s enforcement decision outside the discretionary-function exception, *see* Pl.’s Opp’n, at 6–7.

The court also finds that Plaintiff’s action is barred under 28 U.S.C. § 2680(h). That statute exempts the United States from, among other things, suit for “malicious prosecution” and “abuse

of process,” which, as noted, are essentially the torts Plaintiff asserts here. Section 2680(h) does not shield conduct of “investigative or law enforcement officers of the United States Government,” but SEC enforcement officials do not qualify as investigative or law enforcement officers for purposes of the FTCA. *Id.* (defining “investigative or law enforcement officer” to mean “any officer of the United States who is empowered by law to execute searches, to seize evidence, or make arrests for violations of federal law”); *cf. Moore v. United States*, 213 F.3d 705, 710 (D.C. Cir. 2000) (holding that federal prosecutor was “not an investigative or law enforcement officer” for purposes of § 2680(h)); *Loumiet v. United States*, 255 F. Supp. 3d 75, 98 (D.D.C. 2017) (holding that Office of the Comptroller of the Currency officials were not investigative or law enforcement officers within the meaning of § 2680(h) because they could “only enforce witness and document subpoenas by application to a United States District Court”). Plaintiff’s claims for malicious prosecution and abuse of process arising from the acts of SEC officials therefore are barred under the FTCA.²

For the foregoing reasons, Defendant’s Motion to Dismiss, ECF No. 6, is granted. Plaintiff’s Motion for the Appointment of Counsel, ECF No. 2, is therefore denied as moot.

This is a final, appealable order.

Dated: July 5, 2018


Amit P. Mehta
United States District Judge

² In view of the foregoing rulings, the court need not reach Defendant’s statute-of-limitations argument.

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Filed On: June 14, 2019

Robert Allen Stanford, On behalf of himself
and the Stanford Estate,

Appellant

v.

Jay Clayton, U.S. Securities and Exchange
Commission,

Appellee

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith,
Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, the supplement to the
petition for rehearing en banc, and the absence of a request by any member of the
court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk