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No. 21-720

In The

Supreme Court of the United States

RODNEY S. RATHEAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition addresses a conflict between Supreme Court precedent and Tenth Circuit jurisdictional decisions in relation to an abuse of process claim against the United States involving the Security and Exchange Commission's alleged violation of its *No Admit No Deny* settlement policy.

The Questions Presented Are:

Does the SEC publishing a defaming whistleblower notice that implies guilt in violation of its own No Admit No Deny policy directive that after settlement allegations remain allegations to which guilt is not credited, constitute abuse of process?

Does the FTCA 28 U.S.C. 2680(a) discretionary function exception bar an abuse of process by defamation-by-implication claim against the United States?

PARTIES TO THE PROCEEDING

Petitioner Rodney S. Ratheal was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondent the United States of America was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

RELATED CASES

Ratheal v. Lindsay S. McCarthy, United States Securities and Exchange Commission, Tom Harvey, and the Salt Lake Tribune, No. 2:17-cv-997DAK, U.S. District Court for the District of Utah, Central. Judgment entered August 29, 2018.

Ratheal v. United States of America, No. 2:19-cv-00969, U.S. District Court for the District of Utah, Central. Judgment entered September 18, 2020.

Ratheal v. United States of America, No. 20-4099, U.S. Court of Appeals for the Tenth Circuit. Judgment entered August 16, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney S. Ratheal, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

Before Scott M. Matheson, Mary Beck Briscoe, and Carolyn Beck McHugh, Circuit Judges (10th Court of Appeals). The Tenth Circuit's Order and Judgment is reproduced at App. 1. The opinions and orders of the District Court for the Central District of Utah are reproduced at App. 17, App. 18, and App. 27.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit, exercising jurisdiction under 28 U.S.C. 1291, entered judgment on August 16, 2021, affirming the September 18, 2020 District Court of Utah, Central, dismissal of case 2:19-cv-00969 under Fed. R. Civ. P. Rule 12(b)(1). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Federal Tort Claims Act 28 U.S.C. 2680(a) (App. 40)

Federal Tort Claims Act 28 U.S.C. 2680(h) (App. 41)

17 Code of Federal Regulations 202.5/e Enforcement, SEC

> (e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitted to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

INTRODUCTION AND STATEMENT OF CASE

This Petition addresses jurisdictional concerns regarding an abuse of process claim against the United States of America in relation to the Security and Exchange Commission's (SEC) alleged violation of its

No Admit No Deny (NAND) settlement policy (17 CFR 202.5/e). The issues presented in this case make evident a contradiction between the application of case law cited by the Tenth Circuit in support of its affirmation of the district court's dismissal of Petitioner Rodney Ratheal's case, and the Supreme Court's interpretation of the appropriate application of the discretionary function exception (DFE) to the Federal Tort Claims Act (FTCA) waiver of sovereign immunity in cases with similar claims.

In 1995, Rodney Ratheal purchased Premco Western, Inc., an oil and gas company, along with its 26,000 acres of federal and state leases in northwestern Arizona and the existing geological data for those acreages. He subsequently pursued investors for Premco as a wildcat operation and set out in pursuit of commercial oil.

In July 2007, following discovery of and verification by the United States Geological Society (USGS) of live oil samples from two prospects, the Dutchman and Fort Pierce, and in conjunction with the U.S. Congress and the Bureau of Land Management (BLM), Ratheal leased some 340,000 acres of state and federal lands for oil exploration.

In August 2011, the Security and Exchange Commission entered a formal order of investigation in the matter of Premco and Ratheal. In its 2012 Complaint, 2:12-cv-01120, the SEC identified the issue underlying the investigation as the alleged fraudulent sale of working interests in two wells, the Dutchman and Fort Pierce, which the SEC alleged to be dry holes. In

December 2012, the SEC secured settlement based on No Admit No Deny policy conditions, including the fundamental condition that after settlement, allegations would remain allegations to which guilt would not be credited and Ratheal could go right on in the oil business. The litigation results and complaint were then published online. Ratheal called the SEC protesting but was told there was nothing he could do about it "now." He took no legal action at that time.

Then the criminal division of the Internal Revenue Service (IRS) conducted its own investigation, including the dry hole and fraudulent sale allegations. The IRS threatened prison time and offered a deal; but instead, Ratheal provided exonerating and indisputable direct evidence, plus testimony by an onsite geologist, that the wells were not dry and that he had not committed fraud. The IRS did not indict on any count.

In April 2017, Ratheal began to pursue restarting in the oil business, found out he had been blacklisted by the BLM, and discovered the SEC had abused process and violated its No Admit No Deny policy agreement with him by posting defaming 2016 online whistleblower notices crediting guilt by implication. The notice listed him under fraud with the 2012 complaint attached as the basis of the rewards, implying the allegations were true, when in fact, there had been no conviction or admission of fraud, and SEC No Admit No Deny policy holds that after litigation, allegations remain allegations to which guilt is not credited. At that point, Ratheal pro se began to seek relief by filing civil case 2:17-cv-00997 in the U.S. District Court of

Utah, Central Division. Upon his motion, that case was dismissed without prejudice for lack of subject matter jurisdiction because he had failed to submit an agency administrative claim and to properly name the United States as defendant.

Ratheal subsequently submitted an administrative claim to the SEC; and on December 6, 2019, filed claims against the United States alleging negligence, misrepresentation, and abuse of process. The USA filed a Motion to Dismiss for lack of subject matter jurisdiction on February 13, 2020; and on June 30, 2020, Ratheal filed a Motion for Summary Judgment but the court stayed briefing pending resolution of the USA's motion to dismiss.

The district court dismissed the case under Fed. R. Civ. P. Rule 12(b)(1) on September 18, 2020, holding that the claims were barred under the discretionary function exception (DFE) to the Federal Tort Claims Act (FTCA) waiver of sovereign immunity. Ratheal filed a Notice of Appeal and on August 16, 2021, exercising jurisdiction under 28 U.S.C. 1291, the Tenth Circuit affirmed the district court's dismissal of his case.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Conflicts with Supreme Court Precedent.

Review is warranted because the Tenth Circuit's decision to affirm the district court's dismissal of this case was an error based on the Circuit's original failure

to see or acknowledge that in his Complaint, Ratheal identified the SEC's No Admit No Deny policy that after litigation, complaint allegations remain allegations to which guilt is not credited by implication or otherwise, as the policy directive adopted by the SEC at the design level that was violated at the implementation level. Based on that fundamental oversight, the Circuit misinterpreted Ratheal's abuse of process claim in relation to FTCA 28 U.S.C. 2680(a) and (h), and misapplied and misinterpreted results of the *Berkowitz/ Gaubert* test for determining applicability of the discretionary function exception.

The Tenth Circuit's decision to affirm dismissal of Ratheal's case conflicts with jurisdictional decisions made by other circuits and with Supreme Court precedent in cases with similar issues, in that those decisions were consistent with the legal theory holding that conduct is not discretionary if a federal policy specifically prescribes a course of action for an employee to follow and that policy or policy directive is violated by impermissible or unlawful conduct. Although the Tenth Circuit cited most of the same theory, it nonetheless misinterpreted facts and misapplied theory and precedent based on its failure to meaningfully factor in the SEC's NAND policy as the indispensable premise of Ratheal's abuse of process claim against the Government. Consequently, the Circuit erroneously affirmed the district court's dismissal of the case, finding that the claims were barred under the discretionary function exception.

This case presents an appropriate context for this Court to correct the jurisdictional errors below, provide clarity, and enforce more uniform application of complicated federal constructs. In addition, these issues and points of law have national significance in that the people have a right to know and the SEC as a federal agency has a duty to accurately inform the public in its publications and to justly enforce SEC policies and procedures. Also, the overall energy-related context of the case is relevant to current U.S. economic and national security concerns.

The Supreme Court should grant writ of certiorari in order to correct the Tenth Circuit's error. At the same time, the Court would make possible the Petitioner's rightful day in court, and prevent the injustice that happened to him from happening to others.

II. The Tenth Circuit Did Not Specifically Address Ratheal's Argument that His Abuse of Process Claim Is Not Subject to Dismissal Under DFE on the Sole Basis of FTCA 28 U.S.C. 2680(h) Coverage.

The FTCA waives sovereign immunity for claims against the United States "for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission

occurred." 28 U.S.C. 1346(b)(1). FTCA 28 U.S.C. 2680 is reproduced at App. 40. Enforcement exceptions applicable in this case are as follows:

(1) Under 2680(a), the U.S. is not liable for: "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."

(2) The first clause of the 2680(h) intentional tort exception provision excludes from FTCA's waiver of sovereign immunity, "Any claim arising out of . . . abuse of process;" but

(3) 2680(h) clause two waives sovereign immunity for abuse of process when it arises from the acts or omissions of any federal law enforcement officers after the date of the enactment of the proviso.

The law enforcement proviso has been acknowledged by the Supreme Court. *Millbrook v. United States*, 133, 1443 (S. Ct. 2013).

In his appeal, Ratheal argued his abuse of process claim is not subject to dismissal under the discretionary function exception because the claim is expressly permitted by the plain language and clear purpose of the statutory language of the proviso to 2680(h), in that "sovereign immunity does not bar a claim that falls within the proviso to sub-section (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244,

1257 (11th Cir. 2009). In this regard, the courts below did not directly address conflicting circuit decisions between the position that "If a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event" (*Id.*), versus the view that intentional tort claims under 2680(h) must also clear the discretionary function hurdle under 2680(a). *Medina v. U.S.*, F.3d 220, 224-26, 259 (4th Cir. 2001).

Rather, the district court first concluded that all three of Ratheal's claims (negligence, misrepresentation and abuse of process) fall under the SEC's discretion to investigate in that whistleblower postings are intended "to incentivize the public to come forward and help aid" in investigations, and that posting them "should be considered a part of the investigation process" (App. 7). Based on that conclusion, the district court applied the *Berkovitz/Gaubert* two prong test for determining applicability of the discretionary function exception to the SEC's discretion to investigate. Concluding that both prongs were met in that the SEC conduct was discretionary and a permissible exercise of policy judgment, the court dismissed Ratheal's case under Fed. R. Civ. P. Rule 12(b)(1) for lack of subject matter jurisdiction, holding it was barred under the discretionary function exception to the FTCA's waiver of sovereign immunity; and hence, did not escape dismissal by claiming 2680(h) coverage. The Tenth Circuit affirmed, but again without addressing Ratheal-cited case law to the contrary.

III. The Tenth Circuit Failed to Specifically Address Opposing Ratheal-Cited Case Law Regarding the Application of the Discretionary Function Exception and the *Berkovitz/Gaubert* Test.

Ratheal also cited circuit case law (e.g., *Reynolds v. USA*, 7th Cir. 2008) that supported his additional argument that even if under 2680(h) his abuse of process claim were sufficiently separable from the SEC's discretion to investigate to be itself actionable, but also had to clear the discretionary function hurdle under 2680(a), the claim nevertheless did not fall under the DFE because it (a) constituted the kind of wrongful conduct that is meant to corrupt the fairness of a legal process; (b) was not permissible; and (c) was unlawful in the state where the conduct occurred.

Under 1346(b)(1), FTCA liability is determined consistent with the law where the alleged tort happened. *Franklin v. United States*, 992 F.2d 1492 (10th Cir. 1993); and the FTCA "serves to convey jurisdiction when the alleged breach of duty is tortious under state law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law." *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001). In Ratheal's case, the alleged abuse of process consisted of the SEC crediting guilt and posting defaming whistleblower notices (defamation by implication). Under Utah law, the state relevant here, abuse of process is illegal (Utah Criminal Code Title 76(2); 76-601).

Legality of Conduct, Other Supporting Authority. The synopsis of citations, quotations, and arguments in this section that documents circuit opinion that the government "should not be able to break the law . . . and then evade liability based upon the argument that it was just exercising its discretion when it did so," is drawn from *D.J.C.V., Minor Child, and G.C. v. U.S.A.*, D-36-3, 26 (2020).

"[T]he Courts of Appeals, including the Second Circuit, are in agreement that governmental conduct cannot be discretionary if it violates a legal mandate." *Id.* at 21; *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2nd Cir. 1975); *United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 120, 487 U.S. 1235 (3rd Cir. 1988).

In *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) it was found that "actions that are "unauthorized" because they violate the constitution or a statute do not fall within the discretionary function exception"; *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001): (federal officials do not possess discretion to violate . . . federal statutes)." *Id.* at 22.

The Ninth Circuit held that "in general, governmental conduct cannot be discretionary if it violates a legal mandate." *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000). Also, the Government does not have discretion to violate regulations or policies that "define the extent of its official powers." *Red Lake Band*

of Chippewa Indians v. United States, 800 F.2d 1187, 1198 (D.C. Cir. 1986). *Id.* at 22, 23.

Further, because tort theory "at its most basic, utilizes a reasonable person standard in order to determine liability" and "an action cannot, under the law of torts, be reasonable if it would violate the law . . . the FTCA cannot and should not be interpreted to bar recovery of those victimized by tortious conduct that violates the law." *Id.* at 20.

Policy Mandate, Permissive Conduct. Case law also provides precedent for the view that " . . . jurisdiction over an FTCA claim is not triggered by every allegation of unlawful . . . conduct, but only by a showing that the government official's discretion was cabined by a specific, clearly established directive, accompanied by plausible assertions that the specific directive was violated." *Campos v. U.S.*, 15 (5th Cir. 2018).

If in determining whether the discretionary function exception applies to a claim, the first *Berkovitz/ Gaubert prong* results show there is discretion, the issue becomes not whether the employee had a choice, but "whether the employee's acts involve permissible exercises of policy judgment." *Berkovitz v. United States*, 486, 537 (S. Ct. 1988). The FTCA protects the government from suits based on the performance of discretionary functions by its employees, but, a federal statutory or regulatory mandate " . . . can eliminate an official's discretion when it is sufficiently specific/or when an authoritative construction with sufficient

specificity was clearly established before the officer acted." (*Id. White v. Pauly*, 137, 548, 552 (S. Ct. 2017).

The action must be of the kind meant to be protected and the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment. "When the Government has acted contrary to mandate or directive, imposing liability does not require a court to second-guess legislative and administrative decisions grounded in social, economic or political policy." *Berkovitz*, 486, 539, 108, 1960 (S. Ct. 1988). Violating or disregarding a mandated policy directive is not a protected discretionary function.

"When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." *Berkovitz* at 1963. For example, in *Faber v. United States*, 56 F.3d 1122-26 (9th Cir. 1995) it was determined that " . . . because the challenged conduct of the Forest Service was in direct contravention of a specifically prescribed federal policy, the discretionary function exception" did not apply.

The Supreme Court has explained that there's no discretion to exercise, and conduct is not discretionary "if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Shivers v. U.S.*, 12 (2021); *United States v. Gaubert*, 499 U.S. at 322, 111, at 1273 (S. Ct. 1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108, 1954, 1958-59 (S. Ct. 1988); because in those circumstances,

"the employee has no rightful option but to adhere to the directive." *Id.*

"Only when a federal employee acts contrary to a specific prescription in federal law—be it a statute, regulation, or policy—does the discretionary function exception not apply. (*Id.* at 322, 111 S. Ct. at 1273). The Supreme Court has repeatedly said that the discretionary function exception applies unless a source of federal law specifically prescribes a course of conduct. (quoting *Berkovitz* at 1958-59)."

Where there is a specific policy or mandate, there is no discretion but to follow it. In the present case, a specific, well known policy was identified—the SEC's No Admit/No Deny litigation policy with its underlying principle and intrinsic directive, that because in such settlements there is no conviction or admission of complaint allegations, after litigation the allegations remain allegations and guilt is not credited by the agency, the court or any other entity. Because here there was a specific policy directive, the SEC employees had no choice but to act in ways consistent with it, but did not; and the DFE does not protect the government from liability when its employees act in violation of a statute or policy that specifically directs them to act otherwise.

Because at the time the whistleblower notice was posted there was a well-established policy (17 CFR 202.5/e) that was well known by the SEC employees in advance of the challenged conduct, and had become a mandated directive by the agreed upon 2012

settlement conditions concerning the manner in which complaint allegations and the issue of guilt were to be addressed, the agency employees did not have discretion to violate the bedrock of NAND policy by publishing whistleblower notices in a way that implied indictment, conviction, or admission, thereby falsely implying Ratheal had been found guilty of fraud. In 2012, Ratheal agreed to the settlement based on that underlying policy condition which was made clear by the phrase "neither admits nor denies" on the SEC settlement document itself.

The online whistleblower posting violated policy mandated directive; abused legal process; damaged Ratheal, personally, financially and professionally making it virtually impossible to restart in the oil business; and also damaged Premco investors who lost the potential benefit of prior investments in an oil project with immense prospects and potentially vital national economic and security implications. Ratheal had planned to return and complete the projects.

In spite of the wealth of circuit case law and Supreme Court precedent establishing that the DFE does not apply when a claim charges an agency with failing to act legally and in accord with a specifically prescribed federal policy or mandate, in this case, the Tenth Circuit misapplied the DFE directly in opposition to precedent. Even if the abuse of process by defamation claim is considered to be first housed under the SEC's discretion to investigate as the Tenth Circuit argued, the SEC conduct still does not fall within discretionary function exception protection because the

act that abused process was an unlawful violation of a policy mandated directive, and therefore impermissible and not the kind of conduct meant to be protected. By the same token, considering Ratheal's claim under *Berkovitz/Gaubert* as covered by 2680(h) and separate from the SEC discretion to investigate, but under the burden to clear the discretionary function hurdle under 2680(a), the DFE does not apply because there was a mandated policy the government employees had no choice but to follow, but did not; and in Utah, abuse of process by defamation-by-implication is unlawful.

(Ratheal does *not* challenge the legality of SEC regulations or policies, rather, the abuse of process claim challenges the SEC's illegal abuse of its own court validated SEC policy directive. Also, Ratheal does not challenge the SEC's discretion to publish whistleblower notices, just illegal ones.)

IV. The Tenth Circuit's Failure to Factor in the No Admit No Deny Enforcement Policy as the Indispensable Premise of the Abuse of Process Claim Led to Additional Errors.

A. The Circuit Erroneously Stated Whistleblower Postings Publish Violations that Have Been Committed.

The Appeals Court attempted to establish the legality of the posted SEC whistleblower notice by stating that under 15 U.S.C. 78u(a)(1), the SEC has discretion "to publish information concerning any violation the target of the investigation has committed"

(App. 7). However, when considered within the present allegations-remain-allegations No Admit No Deny context, *no such violation* by Ratheal had been established as having been committed, either by conviction or admission.

B. The Circuit Misconstrued the Nature of Ratheal's Abuse of Process Claim in Relation to the Whistleblower Posting.

Neither court below factored in Ratheal's designation of the NAND policy directive and its violation as the true basis of the abuse of process claim. Consequently, beginning with a wrong premise, the district and appeals courts misinterpreted the nature of Ratheal's challenged conduct. In spite of their defense of the whistleblower notice, the courts did allow that the posting was problematic and possibly a violation—defamation, recklessness, or negligence. In addition, the courts implied that Ratheal labeled a defamation claim an abuse of process claim in order to avoid application of the discretionary function exception (App. 12, App. 25), thereby also implying that a defamation violation occurred.

Ratheal did not mislabel his claim. Rather, he claimed that the SEC abused process by defamation-by-implication, an intentional tort that consists of stating a truth that harms another person by implying a falsehood. In Utah, false "means that. . . . a . . . statement must be either directly untrue or that it . . . implies . . . a fact that is untrue" (Model Utah Civil Jury

Instructions, 2nd, Defamation). Defamation and defamation by implication are "more or less different sides of the same coin," and essentially, "it is the *implication* arising from the statement and the *context* in which it was made, not the statement itself that is defamatory." *Faber v. United States*, 56 F3.d 1122 (9th Cir. 1995) (emphasis added).

Although it is true that the 2012 SEC Complaint alleged fraud, linking the complaint and litigation release to the posting notifying the public that whistleblower rewards were available, implied the falsehood that Ratheal was guilty of fraud, a falsehood that destroyed his professional reputation in the oil business, the business to which he dedicated some 25 years of his life. Because the Tenth Circuit did not include the specifics of the NAND policy and settlement factors into its analyses of the case, the connection between the act of posting the defaming notice and the abuse of process claim was also missed and not factored into decision making. Abuse of process as an intentional tort under U.S.C. 2680(h) obviously requires specific conduct that violates legal process, and in this case, that conduct consisted of falsely crediting guilt and posting the whistleblower notice in a manner that violated the agency's duty to act in ways consistent with NAND policy and underlying principle and condition of settlement that guilt is not imputed and allegations remain allegations.

By implying the falsehood that Ratheal was guilty of fraud, the agency abused both the policy and legal process by which settlement had been secured. The

following example illustrates why in Ratheal's Complaint the challenged conduct was accurately labeled abuse of process not defamation.

> If the U.S. Postal Service falsely posted online that a person was guilty of mail fraud when there had been no conviction or admission, that would be defamation, but it would not also be abuse of process as alleged here, because that agency does not, like the SEC, have a *no admit no deny* policy to violate.

The SEC abused process by the illegal act of defamation by implication. By stating that Ratheal cannot label a defamation claim abuse of process, the courts implied that he had so done, thereby inadvertently lending credence to Ratheal's claim that the NAND policy directive had been violated.

C. The Circuit Erroneously Argued Ratheal's Abuse of Process Claim Does Not Meet Utah-Required Elements.

After misconstruing the nature of Ratheal's abuse of process claim as being at best a defamation claim, again because of the failure to factor in the violation of the NAND policy directive, the Tenth Circuit in error argued that Ratheal's claim does not meet Utah requirements for abuse of process. Those elements consist of an ultimate purpose and an act in the use of the process not proper in the regular prosecution of the proceedings. *Hatch v. Davis*, 102 P.3d 774 (Utah 2004); *Crease v. Pleasant Grove City*, 30 Utah 2d 451,

519, 888, 890 (1974); *Kool v. Lee*, 43 Utah 394, 906, 909 (1913).

Abuse of process can involve the entire legal proceeding, and ultimate purpose "required in an abuse of process action can be in the form of coercion to obtain a collateral advantage that is not properly involved in the proceeding . . . [I]t is the use of the process to coerce or extort that is the abuse . . . " *Swicegood v. Lott*, 379 SC. 346, App. (S. Ct. 2008); *Nienstedt v. Wetzel*, 133 Ariz. 348, Ariz. Ct. App. (1982); *Hatch v. Davis*.

During the 2012 NAND settlement process, the SEC gained undue advantage by providing misleading and incomplete information concerning the impact and consequences of signing a NAND agreement, information on which Ratheal relied and by which he was persuaded. He did not have the financial means to fight the government agency in court, and was told that by agreeing to a No Admit No Deny settlement he wouldn't have to admit or deny wrong doing; wouldn't have to pay any money; that the settlement would be the end of the matter and he could go right on in the oil business; and most relevant here, that there would be no conviction so the allegations would remain allegations.

At that time, the SEC had knowledge of or had reason to know that the SEC fraud allegations were groundless based on the indisputable evidence (e.g., the U.S.G.S. report; Schlumberger well completion recommendation letters) provided by Ratheal to the SEC that proved no fraudulent sale of dry holes had

occurred, yet the agency proceeded to seek a NAND settlement. In this specific case, the fact that the SEC had such knowledge "is relevant to prove that the process was used for an ulterior purpose" (*Id., Swicegood v. Lott; Fishman v. Brooks*, 396, Mass 643, 1986) at the enforcement stage as well as at the time the whistleblower notice was posted. Such purpose included a swift settlement consistent with the newly enacted 2012 SEC whistleblower program emphasis, regardless of the truth, the lack of strength of the allegations, or of potential damages to Ratheal. Since 2012, the agency has revised enforcement policy and in order to settle, admissions are now required in more cases. Had that been the case in 2012, Ratheal would not have settled but would have fought the allegations, just as he did those same allegations later with the IRS.

Little did Ratheal know that almost four years after the settlement and in violation of the No Admit No Deny agreement, the SEC fraud allegations would be weaponized against him for the purpose of "justifying" whistleblower rewards. This despite the fact that not only had there been no conviction or admission, but both the SEC and the IRS had overwhelming exonerating evidence in hand that fraud had not occurred.

In its order, the Tenth Circuit stated that one purpose of whistleblower postings is to incentivize the public to come forward and help with investigations. However, in this case if that were true, the SEC gained undue collateral assistance by publishing an illegal and dishonest notice that implied a falsehood.

"Abuse of process applies" when one "uses a legal process . . . *against* another primarily to accomplish a purpose for which it is not designed." *Gilbert v. Ince*, UT 65, 17, 981 P.2d 841 (1999). The No Admit No Deny settlement process was not designed to imply, credit or attribute guilt, but rather, by its literal terminology, to avoid such attribution in the interest of settlement. By later attributing guilt by implication in the whistleblower notice, the SEC violated its settlement agreement with Ratheal concerning how allegations would be addressed in terms of guilt or the lack thereof.

That the whistleblower notice and attachments were presented together in a manner that implied guilt to the extent that professional, reasonable and prudent persons reading the posting would mistakenly assume Ratheal had been found guilty of fraud, is evident in numerous independent online postings that subsequently listed Ratheal under Fraud based on the SEC posting. Listing Ratheal in that manner for the purpose of validating whistleblower awards was a dishonest and unlawful act meant to deceive. Defamation-by-implication (DBI) is an intentional tort not shielded from sovereign immunity by 2680(h) when standing alone as a challenged conduct. However, in this case, the DBI was the act by which the SEC abused process, and abuse of process is listed in the proviso to 2680(h).

The abuse offended justice and violated the meaning, purpose, and weight of evidence that exists in NAND policy in that allegations remain allegations that carry no legal weight for the attribution of guilt as implied truth.

To the detriment of Ratheal and Premco investors, SEC/USA employees, agents and/or officers misused and perverted a regularly issued legal process not justified by the underlying legal action or allowed by NAND policy or procedure. Definitively and operationally, that is abuse of process properly alleged under 28 U.S.C. 2680(h).

D. The Circuit Erroneously Stated Ratheal Did Not Identify a Specific Manner or Procedure Adopted at the Policy Level that Placed His Abuse of Process Claim Facially Outside the Discretionary Function Exception.

Contrary to the Tenth Circuit's assertion (App. 14), in his Complaint, Ratheal specifically identified the SEC No Admit No Deny policy settlement condition that allegations remain allegations as (a) the specific manner and course of action agency employees were to follow in addressing guilt issues, and as (b) the prescribed procedure and directive adopted at the policy level that SEC employees violated at the implementation level. By so identifying the specific policy and procedure, Ratheal met his burden to establish subject matter jurisdiction by placing his abuse of process claim facially outside the discretionary function exception. The case should have been reviewed from that perspective and the Tenth Circuit should not have affirmed the district court's dismissal.

Only this Court can definitively determine whether the FTCA 28 U.S.C. 2680(a) discretionary function exception bars an abuse of process by defamation-by-implication claim against the United States when that conduct violates a specific agency policy directive. Only this Court can reverse the faulty dismissal order affirmed by the Tenth Circuit.

CONCLUSION

For the foregoing reasons, and in view of the national significance this case could have, the Supreme Court should grant this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

Respectively submitted,

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November 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODNEY S. RATHEAL, Plaintiff - Appellant, v. UNITED STATES OF AMERICA, Defendant - Appellee.	No. 20-4099 (D.C. No. 2:19-CV-00969-DB) (D. Utah)

ORDER AND JUDGMENT*

(Filed Aug. 16, 2021)

Before **MATHESON**, **BRISCOE**, and **McHUGH**, Circuit Judges.

This appeal stems from a settled civil injunctive action the Securities and Exchange Commission ("SEC") filed against Rodney S. Ratheal and his

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Document Cover Sheet

Ratheal, Rodney S. v. United States

Appendix
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company, Premco Western, Inc. (the "Premco case"), and the SEC's online postings about the settlement. In his lawsuit against the United States, Ratheal asserted claims under the Federal Tort Claims Act ("FTCA") arising from the investigation and postings. The district court held that the claims were barred under the discretionary function exception to the FTCA's waiver of sovereign immunity and dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Ratheal appeals that order.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Following its investigation, the SEC filed the Premco case in December 2012. At about the same time, consistent with its standard practice, the agency published a litigation release on its website, summarizing the allegations in the SEC's complaint and the terms of the settlement. In April 2017, Ratheal discovered "2016 whistleblower postings online" where the SEC listed him as a basis for rewarding whistleblowers who assist in fraud investigations. R. at 7. The posting included a copy of the litigation release and a link to the complaint in the Premco case.

Ratheal filed this suit in 2019, asserting claims for negligence, misrepresentation, and abuse of process

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[1] Ratheal's pro se status entitles him to a liberal reading of his filings. *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003).

based on the SEC investigation and postings.[2] The government moved to dismiss the complaint, arguing that the claims were barred by the discretionary function exception.[3] A magistrate judge issued a report and recommendation concluding that the discretionary function exception barred all of Ratheal's claims, and recommending that the court dismiss the complaint without prejudice for lack of jurisdiction.

Ratheal filed an objection to the report and recommendation. As pertinent here, he argued that the magistrate judge's discretionary-function determination was based on the "false premise that the challenged conduct . . . [was] the SEC's discretion to investigate." R. at 415. He explained that rather than challenging the decision to undertake the investigation, his claims challenged what he characterized as the SEC employees' decisions to (1) "breach their respective duties to properly and fairly implement SEC investigative, settlement, and enforcement processes and procedures," R. at 415; and (2) make postings "falsely implying guilt and fraud not justified by the No Admit No Deny

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[2] This is Ratheal's second lawsuit involving essentially the same claims. He filed the first suit in 2017 against the SEC, an SEC attorney, and two non-governmental defendants. The SEC defendants moved to dismiss on several grounds, including that Ratheal named them, instead of the United States, as defendants. He agreed to dismissal of his claims against the SEC defendants without prejudice so he could file his claims against the United States.

[3] The government also sought dismissal on other grounds, but the district court did not address those issues because it dismissed the complaint on immunity grounds.

settlement," *id.* at 416. He argued that the implementation and posting decisions did not fall within the discretionary function exception. He also argued that his abuse of process claim was not subject to dismissal under the discretionary function exception because 28 U.S.C. § 2680(h)'s law-enforcement exception to the intentional-tort exception to the FTCA's waiver of sovereign immunity applied to that claim.

The district court overruled his objections, adopted the magistrate judge's report and recommendation, and dismissed the complaint without prejudice.

II. DISCUSSION

A. Legal Standards

We review the district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) de novo. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). We also review de novo its determination that the discretionary function exception applies. *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008).

The FTCA waives sovereign immunity for actions against the United States resulting from injuries caused by the negligent acts of its employees while acting in the scope of their employment. 28 U.S.C. § 1346(b)(1). This waiver is limited by a number of statutory exceptions, including the discretionary function exception at issue here. *See id.* § 2680(a). The

discretionary function exception is jurisdictional, and it was Ratheal's burden to establish subject matter jurisdiction. *Garcia*, 533 F.3d at 1175. To avoid dismissal of his claims under the discretionary function exception, he needed to "allege facts that place [his] claim[s] facially outside the exception." *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1130 (10th Cir. 1999).

The discretionary function exception preserves sovereign immunity for claims based on a federal agency's or employee's "exercise or perform[ance] . . . [of] a discretionary function or duty," regardless of whether "the discretion involved be abused." 28 U.S.C. § 2680(a). Whether the exception applies depends on the nature of the agency's conduct as evaluated under the two-part test established in *Berkovitz ex. rel Berkovitz v. United States*, 486 U.S. 531, 536 (1988). When both elements are met, the conduct is protected as a discretionary function and sovereign immunity bars any claim involving that conduct. *Garling v. United States Env't Prot. Agency,* 849 F.3d 1289, 1295 (10th Cir. 2017).

At the first step of the *Berkovitz* test, we consider whether the government function in question was "discretionary," meaning whether it was "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. "Conduct is not discretionary if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because in those circumstances, "the employee has no rightful option but to adhere to the directive." *Garcia*, 533 F.3d at 1175 (internal quotation marks omitted). Where no

"statutes, regulations, or policies prescribing a specific course of action for [agency] employees to follow in investigating potential . . . violations," the first prong of the discretionary function test is satisfied. *Garling*, 849 F.3d at 1296.

If the conduct was discretionary, we move to the second step, where we consider whether the conduct required the "exercise of judgment based on public policy considerations." *Id.* "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *United States v. Gaubert*, 499 U.S. 315, 324 (1991). Thus, to survive a motion to dismiss, the plaintiff must allege facts that "would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Id.* at 324-25. The focus of this inquiry is "on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325; *see also Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004) (explaining that we "need not find that a government employee made a conscious decision regarding policy considerations in order to satisfy the second prong of the *Berkovitz* test").

B. The District Court's Ruling

The district court concluded that all of Ratheal's claims, including the abuse of process claim, which was

based largely on the whistleblower posting, stemmed from the SEC's 2012 investigation and settled civil action. The court explained that because such postings are intended "to incentivize the public to come forward and help aid in SEC investigations," posting them "should be considered a part of the investigation process." R. at 427 n.2. In so concluding, the court rejected Ratheal's argument that the abuse of process claim survived the motion to dismiss because it fell within § 2680(h)'s law enforcement proviso.

The court then applied the *Berkovitz* test and held that both prongs were met. It concluded the first prong was satisfied because Ratheal had "not identified any prescribed duty applicable to investigations . . . [or] supported any of his allegations with any specific statute, regulation, or policy that governs SEC investigation procedures." R. at 427. Accordingly, the court held that the investigation, including the subsequent postings, was "discretionary, meaning it was a matter of judgment or choice." *Id.* (internal quotation marks omitted). Turning to the second prong, the district court observed that under 15 U.S.C. § 78u(a)(1), the SEC has discretion to "make such investigations as it deems necessary" to determine whether the target of the investigation has committed any violations, and "to publish information concerning any such violations" as it "deem[s] necessary or proper to aid in the enforcement of" the laws and regulations it is charged with enforcing. The court held that the SEC employees' investigative and posting decisions under § 78u(a)(1) required "the exercise of judgment based

on considerations of public policy," R. at 427 (internal quotation marks omitted), and were thus covered by the discretionary function exception under *Gaubert*. In so holding, the court rejected Ratheal's argument that the exception did not bar his claims because the challenged conduct occurred at the implementation level, not the design/policy-making level.

C. Analysis

1. The District Court Was not Required to Treat the Motion to Dismiss as a Motion for Summary Judgment

Ratheal first contends the district court erred by not treating the motion to dismiss as a motion for summary judgment. We disagree.

A Rule 12(b)(1) challenge to subject matter jurisdiction can be either facial or factual. *See Holt*, 46 F.3d at 1002. A facial attack "questions the sufficiency of the complaint," and when "reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* A factual attack goes beyond allegations in the complaint and challenges the facts on which subject matter jurisdiction depends. *Id.* at 1003. When reviewing a factual attack, a court "may not presume the truthfulness of the complaint's factual allegations," and may consider affidavits and other documents to resolve disputed jurisdictional facts under Rule 12(b)(1) without converting the motion to a summary judgment motion. *Id.*

However, when the question of the applicability of the discretionary function exception is intertwined with the merits of the case, the government's motion to dismiss should be construed as a motion for summary judgment. *Id.* Although we have said that "[t]he jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case," *id.*, we later clarified that "the focus of the inquiry is not merely on whether the merits and the jurisdictional issue are under the same statute," *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002). Instead, whether a motion to dismiss must be converted to a motion for summary judgment depends on whether "resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Id.* (internal quotation marks omitted).

Here, the district court answered the jurisdictional question as a matter of law, without resolving any factual disputes or substantive aspects of Ratheal's claims. Accordingly, it properly applied the Rule 12(b)(1) standard, not the standards applicable to a summary judgment motion. *See Lopez*, 376 F.3d at 1057; *Sizova*, 282 F.3d at 1324.

Moreover, although Ratheal filed a motion for summary judgment after the motion to dismiss was fully briefed, he did not ask the district court—either in that motion or in his objection to the magistrate's report and recommendation—to treat the motion to dismiss as a motion for summary judgment. He thus

waived any challenge to the district court's failure to do so. *See Lopez*, 376 F.3d at 1057. And in any event, he does not explain how applying the summary judgment standard—viewing all well-pled facts in the light most favorable to him and drawing all reasonable inferences in his favor[4]—would have made a difference, given that the court did not resolve any factual disputes.

2. The Abuse of Process Claim Does not Fall under the Law Enforcement Proviso

Ratheal next contends the district court erred by concluding the law enforcement proviso does not apply to his abuse of process claim. We disagree.

The first clause of § 2680(h) excludes certain state law intentional tort claims from the FTCA's waiver of sovereign immunity. *See* 28 U.S.C. § 2680(h). That provision is known as the intentional tort exception. *See Garling*, 849 F.3d at 1295. The second clause of § 2680(h) carves out an exception to the intentional tort exception and waives sovereign immunity for six torts, including abuse of process, when the claim stems from the "acts or omissions" of federal "law enforcement officers." 28 U.S.C. § 2680(h). To determine whether a claim falls within the law enforcement proviso, courts look to the substance of the claim, not how the plaintiff labeled it in the complaint. *Garling*, 849 F.3d at 1298. "[A] plaintiff may not recast a negligence tort as an intentional tort to take advantage of the law

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[4] *See Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1306 (10th Cir. 2017).

enforcement exception to § 2680(h)." *Id.* (internal quotation marks omitted).

Under Utah law, "[t]he misuse of legal process becomes actionable when it is used primarily to accomplish a purpose for which it is not designed." *Hatch v. Davis*, 147 P.3d 383, 389 (Utah 2006) (internal quotation marks omitted).[5] Thus, to constitute an abuse of process, the challenged conduct must be "a perversion of the process to accomplish some improper purpose." *Id.* (internal quotation marks omitted).

Ratheal's abuse of process claim alleged that SEC agents "falsely and wrongly listed and posted online, [his] name under Fraud as the basis for awarding whistleblower funds." R. at 10. In his opposition to the motion to dismiss, he explained that the SEC "abused [the] No Admit No Deny process by implying a 'truth' that was not true by listing [him] under Fraud when there had been no conviction or admission." *Id.* at 166; *see also id.* at 169 (stating that SEC agents abused process by "posting fraudulent online Whistleblower notices and documents falsely listing [him] under fraud").

Based on these allegations, the district court concluded the "complaint attempt[ed] to bring intentional tort claims without alleging intentional tort facts," and

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[5] The issues of subject matter jurisdiction and the meaning of terms used in the FTCA are matters of federal law, but liability issues are determined by state law. *Molzof v. United States*, 502 U.S. 301, 305 (1992); *Franklin v. United States*, 992 F.2d 1492, 1495 (10th Cir. 1993) (explaining that under § 1346(b)(1), "we resolve questions of liability under the FTCA in accordance with the law of the state where the alleged tortious activity took place").

did not allege "facts showing that the SEC had the required ulterior purpose for an abuse of process claim in Utah." R. at 429 (internal quotation marks omitted). We agree. And despite Ratheal's characterization of these allegations as asserting an abuse of process claim, we also agree with the district court's determination that, at best, the alleged facts amount to a defamation claim grounded in negligence, which is not one of the torts listed in the law enforcement proviso. Ratheal cannot avoid application of the discretionary function exception by casting a defamation claim as an abuse of process claim. *See Garling*, 849 F.3d at 1298.

3. The Design/Implementation Distinction is Inapplicable

We also reject Ratheal's contention that the discretionary function exception does not apply to his claims because the challenged conduct—the manner of the investigation and the subsequent postings—involved the SEC's implementation of its investigative policies, not discretionary policy decisions.

His argument is based on *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), in which the Ninth Circuit construed its past precedent as holding that "the *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not." 400 F.3d at 1181. Whisnant was an employee of a government contractor who brought FTCA claims against the United States based on his exposure to

toxic mold at a naval base commissary. At step one of the discretionary function analysis, the court recognized that "[n]o statute, policy, or regulation prescribed the specific manner in which the commissary was to be inspected or a specific course of conduct for addressing mold." *Id.* at 1181. But applying the design/implementation distinction at step two, the court held that Whisnant's claims were not barred because he "alleged negligence in the implementation, rather than the design, of government safety regulations, and the governmental decisions [he] claim[ed] were negligent concerned technical and professional judgments about safety rather than broad questions of social, economic, or political policy." *Id.* at 1185; *see also id.* at 1183 ("Cleaning up mold involves professional and scientific judgment," not a policy decision.).

Relying on this design/implementation distinction, Ratheal maintains that his claims are not barred because they challenge decisions SEC employees made during the implementation stage of the investigation, not policy-based design decisions. But this circuit has not adopted the Ninth Circuit's design/implementation distinction, and we decline to apply it to Ratheal's claims because, even if it is a valid distinction in the right case, it is inapposite here for at least two reasons.

First, *Whisnant* makes clear that the distinction applies to governmental decisions involving safety concerns. As the court explained, "[t]he decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not [because] safety measures, once undertaken,

cannot be shortchanged in the name of policy." *Id.* at 1182 (alteration and internal quotation marks omitted). Ratheal's claims plainly do not involve safety concerns or any other scientific or technical matter to which the design/implementation distinction might apply. And to the extent the distinction applies in other contexts where the government designs procedures its employees implement, Ratheal does not identify investigation procedures the SEC adopted at a policy level that its employees violated at the implementation stage. His unspecific reference to "SEC investigative, settlement, and enforcement processes and procedures," R. at 415, is insufficient to satisfy his burden to "allege facts that place [his] claim[s] facially outside the [discretionary function] exception," *Franklin*, 180 F.3d at 1130.

Moreover, while *Whisnant* drew the distinction between policy design and implementation, it also made clear that the "implementation of a government policy is shielded where the implementation itself implicates policy concerns." 400 F.3d at 1182 n.3 (emphasis omitted). What distinguished the mold situation in *Whisnant* is that there was no legitimate reason for the commissary not to eliminate the toxic mold—there were no policy judgments to be made at the implementation stage. That is not the case here. SEC employees responsible for following the agency's policies have significant discretion to make judgment calls throughout the course of their investigations, including with respect to publishing information concerning violations. *See* 15 U.S.C. § 78u(a)(1). Under *Gaubert*, we presume

that the policy-implementing employees' decisions during the investigation, including their decision to post the litigation release and whistleblower notice, were "grounded in policy," 499 U.S. at 324, and the allegations in Ratheal's complaint provide no basis for concluding otherwise. *See also Dalehite v. United States*, 346 U.S. 15, 36 (1953) ("Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."), *partially overruled on other grounds by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).[6] Accordingly, the design/implementation distinction did not save Ratheal's claims, and the district court properly dismissed them under the discretionary function exception. *See Garling*, 849 F.3d at 1296 (recognizing that when Congress delegates broad authority to an agency to implement and enforce federal laws, the discretionary function exception bars tortious investigation claims where no statutes, regulations, or policies prescribe "a specific course of action

[6] Even the Ninth Circuit does not apply the design/implementation distinction in the context of government investigations like the one at issue here. *See Gonzalez v. United States*, 814 F.3d 1022, 1035 (9th Cir. 2016) (affirming discretionary function dismissal of claims based on decisions made during the course of an FBI investigation and declining to apply design/implementation distinction, explaining that "agents responsible for following the Attorney General's Guidelines are still imbued with an enormous amount of discretion and judgment in the course of their investigations.").

for [agency] employees to follow in investigating potential [] violations").

III. CONCLUSION

We affirm the district court's judgment dismissing the complaint under Rule 12(b)(1) for lack of subject matter jurisdiction.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

RODNEY S. RATHEAL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	**JUDGMENT IN A CIVIL CASE** (Filed Sep. 18, 2020) Case No. 2:19-CV-00969 District Judge Dee Benson

It is hereby ORDERED and ADJUDGED that the Report and Recommendation is ADOPTED, and this action is hereby DISMISSED with prejudice.

DATED this 18th day of September, 2020.

BY THE COURT:

/s/ Dee Benson
DEE BENSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

RODNEY S. RATHEAL, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	**MEMORAMDUM DECISION & ORDER OVERRULING OBJECTION AND ADOPTIONG REPORT AND RECOMMENDATION** (Filed Sep. 14, 2020) Case No. 2:19-cv-000969-DB-CMR Judge Dee Benson

Before the court is the Report and Recommendation issued by United States Magistrate Judge Cecilia M. Romero on August 14, 2020, recommending that the court grant Defendant's Motion and dismiss Plaintiff's claims without prejudice. (Dkt. 19.)

The parties were notified of their right to file objections to the Report and Recommendation within 14 days after receiving it. On August 26, 2020, Plaintiff filed his "Objections to Magistrate's Report and Recommendations." (Dkt. 20.) Because Plaintiff has objected, the court reviews the Report and Recommendation de novo. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

> In order to conduct a de novo review a court "should make an independent determination of the issues . . . ; [it] is not to give any special weight to the [prior] determination. . . ." The

> district judge is free to follow [a magistrate judge's recommendation] or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew.

Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967)). Having considered the record in this case, the magistrate judge's Report and Recommendation, and Plaintiff's Objection, the court enters the following Memorandum Decision and Order.

BACKGROUND

For purposes of this Order, the relevant background facts are as follows. On December 10, 2012, following the SEC's investigation of Ratheal and Premco Western, Inc. ("Premco"), the Commission filed a settled civil action against Ratheal and Premco. *See SEC v. Premco Western, Inc., et al.*, No. 2:12-cv-01120 (D. Utah) (*Premco*). On December 11, 2012, in accordance with its standard practice, the Commission published on its website a five-paragraph litigation release. SEC Litig. Release No. 22566 (Dec. 11, 2012).[1] The release summarized allegations in the *SEC v. Premco* complaint, as well as the injunctive relief and damages that were agreed upon. *Id.* In April 2017, Plaintiff

[1] The SEC regularly posts litigation releases on its website, describing, among other things, charges filed and settlements obtained by the Commission. During the month of December 2012, the SEC posted 27 litigation releases, including the release in this case. *See* https://www.sec.gov/litreleases/litrelarchive2012.shtml.

discovered "2016 whistleblower postings online" where the SEC had listed him as a basis for rewarding whistleblowers. (Dkt. 1 at 4.) The posting included a copy of the SEC Litigation Release and a link to the original SEC Complaint against Plaintiff. (Dkt. 1 at 36.)

On September 5, 2017, Plaintiff filed a complaint against the SEC asserting claims under the Federal Tort Claims Act (FTCA) for negligence, misrepresentation, and defamation, arising from the 2012 SEC investigation and subsequent litigation release. *See Ratheal v. McCarthy et al.*, No. 2:17-cv-00997-DAK (D. Utah) (*Ratheal I*). Later, SEC filed a Motion to Dismiss and Judge Kimball granted the motion, dismissing the claims against the SEC without prejudice for lack of subject matter jurisdiction. (*Ratheal I*, Dkt. 54, 61.)

On December 6, 2019, Plaintiff filed a Complaint (Dkt. 1) in the instant action asserting claims against Defendant United States under the FTCA for negligence, misrepresentation, and abuse of process, predominantly arising from the same 2012 SEC investigation and litigation release. *See Ratheal v. USA*, No. 2:19-cv-00969-DB-CMR (D. Utah) (*Ratheal II*). On February 13, 2020, Defendant filed a Motion to Dismiss arguing that Plaintiff's claims were subject to dismissal for lack of subject matter jurisdiction, untimeliness, and issue preclusion. (Dkt. 8.) Plaintiff timely filed a Memorandum in Opposition. (Dkt. 11.) On August 14, 2020, Magistrate Judge Romero issued a Report and Recommendation, recommending that the court grant Defendant's Motion, dismissing Plaintiff's claims without prejudice for lack of subject matter jurisdiction. (Dkt.

19.) On August 26, 2020, Plaintiff filed Objections to Magistrate's Report and Recommendations. (Dkt. 20.)

The court has conducted a thorough review of all relevant materials, including the magistrate judge's Report and Recommendation, Plaintiff's Objection to the Report and Recommendation, as well as the background history and record in this case. Having done so, the court agrees with the analysis and conclusions of the magistrate judge that sovereign immunity bars Plaintiff's claims because all three claims involve investigations which meet the discretionary-function exception. Thus, Plaintiff's claims are dismissed without prejudice for lack of subject matter jurisdiction.

DISCUSSION

Plaintiff makes four objections to the Report and Recommendation. (Dkt. 20.) In his first objection, Plaintiff argues that the magistrate judge was operating under a mistaken assumption that the only challenged conduct in the complaint was the SEC's investigation. (Dkt. 20 at 2.) Plaintiff asserts that he also challenged the SEC's decision "to breach their respective duties to properly and fairly implement investigative, settlement, and enforcement processes and procedures" (Dkt. 20 at 2-3.) and the 2016 SEC "act of posting fraudulent online Whistleblower notices and documents falsely listing the Plaintiff under fraud." (Dkt. 20 at 4.) However, the whistleblower notice in this case refers back to the results of the 2012

investigation.[2] (Dkt. 1 at 25, 36.) At its foundation, Plaintiff's complaint challenges the SEC's investigation and their actions resulting from that investigation. All three claims, including Plaintiff's abuse of process claim, primarily involve actions arising from the SEC's investigation in 2012. (Dkt. 1.)

Plaintiff's second objection challenges the magistrate judge's finding that Plaintiff's claims are barred by the discretionary-function exception. (Dkt. 20 at 3-5.) Specifically, Plaintiff asserts that, because the court mistakenly assumed Plaintiff was only challenging the SEC's investigation, the court overlooked certain non-investigative actions which would have failed to meet the two-part test under the exception. (Dkt. 20 at 3.) However, as stated above, all three of Plaintiff's claims arose from the SEC investigation of Plaintiff. Thus, the applicable test as to all three claims is whether (1) SEC's investigation, including the subsequent whistleblower posting, was discretionary, meaning it was "a matter of judgment or choice for the acting employee," and (2) such conduct required the "exercise of judgment based on considerations of public policy." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

Here, Plaintiff's second objection is unfounded as both prongs of the discretionary-function test have been met. As to the first prong, Plaintiff has not

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[2] Regardless of the fact that the whistleblower notice in this case refers to the 2012 SEC investigation, whistleblower notices like the one here are posted to incentivize the public to come forward and help aid in SEC investigations. Thus, posting these notices should be considered a part of the investigation process.

identified any prescribed duty applicable to investigations, nor has he supported any of his allegations with any specific statute, regulation, or policy that governs SEC investigation procedures. Where no "statutes, regulations, or policies prescribing a specific course of action for [agency] employees to follow in investigating potential . . . violations," the first prong of the discretionary-function test is satisfied. *See Garling v. United States Envtl. Prot. Agency*, 849 F.3d 1289, 1296 (10th Cir. 2017). As to the second prong, 15 U.S.C. § 78u(a)(1) allows the SEC to exercise discretion in making investigations, and "[w]hen established governmental policy, as express or implied by statute . . . allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *United States v. Gaubert*, 499 U.S. 315, 324 (1991). Thus, both prongs of the discretionary-function test are met.

Plaintiff's third objection states that the discretionary-function exception does not bar his claims because the alleged actions occurred at the implementation level, not the design/policymaking level. (Dkt. 20 at 5-7.) Plaintiff relies on a Ninth Circuit case, *Whisnant v. U.S.*, 400 F.3d 1177 (9th Cir. 2005). However, as stated by the magistrate judge, *Whisnant* does not involve a government agency investigation, but rather a breach of a prescribed duty to inspect and maintain safe and healthy premises. *See id.* at 1182-83. As the Ninth Circuit explained, "'[t]he decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions . . . cannot be

shortchanged in the name of policy.'" *Id.* at 1182 (quoting *Bear Medicine v. United States ex rel. Sec'y of the Dep't of the Interior*, 241 F.3d 1208, 1213 (9th Cir. 2001). This case is clearly different from *Whisnant*. Here, the challenged conduct is not safety procedures but investigation procedures. Thus, the design/implementation distinction does not apply.

Plaintiff's final objection argues that sovereign immunity does not bar his abuse of process claim because the law enforcement proviso under 28 U.S.C. § 2680(h) applies. (Dkt. 20 at 7-9.) Under § 2680(h), the United States waives its sovereign immunity for "acts or omissions" of federal "law enforcement officers" arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process. *Id.* To determine whether a claim of abuse of process falls within the law enforcement proviso, "we look to the substance of their claims and not how they labeled them in their complaint." *Garling*, 849 F.3d at 1298. In addition, courts are generally wary of plaintiffs "recast[ing] a negligence tort as an intentional tort to take advantage of the law enforcement exception to § 2680(h)." *Milligan v. United States*, 670 F.3d 686, 696 (6th Cir. 2012); *see also Lambertson v. United States*, 528 F.2d 441, 443 (2d Cir. 1976); *Johnson v. United States*, 547 F.2d 688, 691-92 (D.C. Cir. 1976).

Here, Plaintiff's claim does not fit into the law enforcement proviso. Instead, Plaintiff's complaint attempts to bring intentional tort claims without alleging intentional tort facts. As to the abuse of process claim, Plaintiff contends that SEC agents "abused

process stating the act of posting fraudulent online Whistleblower notices and documents falsely listing the Plaintiff under fraud." (Dkt. 11 at 6.) However, the complaint never alleges facts showing that the SEC had the required "ulterior purpose" for an abuse of process claim in Utah. *See Hatch v. Davis*, 2004 UT App 378, ¶ 34, 102 P.3d 774, 782, aff'd, 2006 UT 44, ¶ 34, 147 P.3d 383. Instead, Plaintiff's complaint attempts to cast his prior defamation claim made in *Ratheal I* as an abuse of process claim using the same facts involving the 2012 SEC's investigation and subsequent litigation release. If this truly is not a defamation claim, at best, the alleged facts amount to negligence or recklessness, claims which are precluded by the discretionary-function exception.

In conclusion, the court finds that Plaintiff's Objection fails to provide any legitimate basis for challenging the reasoning and recommendation of the magistrate judge. Considering the substance of the allegations, the court agrees with the magistrate judge that the court lacks jurisdiction over Plaintiff's claims.

CONCLUSION

Having reviewed all relevant materials, including Plaintiff's *pro se* objection, the record that was before the magistrate judge, and the reasoning set forth in the magistrate judge's Report and Recommendation, the court agrees with the analysis and conclusion of the magistrate judge.

Accordingly, the court ADOPTS the Report and Recommendation and issues the following Order. Defendant's Motion to Dismiss is GRANTED.

Entered this 14th day of September, 2020.

BY THE COURT

/s/ Dee Benson
Honorable Dee Benson
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

RODNEY S. RATHEAL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	REPORT AND RECOMMENDATION (Filed Aug. 14, 2020) Case No. 2:19-cv-00969-DB-CMR District Judge Dee Benson Magistrate Judge Cecilia M. Romero

This matter is referred to the undersigned in accordance with 42 U.S.C. § 636(b)(1)(B) (ECF 3). Before the court is Defendant United States of America's (Defendant or United States) Motion to Dismiss (ECF 8) (Motion) seeking dismissal of Plaintiff Rodney S. Ratheal's (Plaintiff) Complaint (ECF 1) for lack of subject matter jurisdiction. Having carefully considered the relevant filings, the undersigned RECOMMENDS that the court grant Defendant's Motion (ECF 8) and dismiss Plaintiff's claims without prejudice.

I. BACKGROUND

Plaintiff's claims arise from an investigation of Plaintiff and his company Premco Western, Inc. (Premco) by the Securities and Exchange Commission (SEC), which resulted in the SEC filing a civil action against him and Premco and following a settlement agreement,

publishing a litigation release in December 2012. *See SEC v. Premco Western, Inc., et al.*, No. 2:12-cv-01120 (D. Utah) (*Premco*). On September 5, 2017, Plaintiff filed a complaint against the SEC, SEC attorney Lindsay McCarthy (McCarthy), the Salt Lake Tribune, and reporter Tom Harvey asserting claims under the Federal Tort Claims Act (FTCA) for negligence, misrepresentation, and defamation, arising from this investigation and litigation release. *See Ratheal v. McCarthy et al*, No. 2:17-cv-00997-DAK (D. Utah) (*Ratheal I*) (ECF 39). The SEC filed a motion to dismiss for lack of subject matter jurisdiction, failure to exhaust administrative remedies, and improperly naming the SEC and McCarthy as defendants rather than the United States (*Ratheal I*, ECF 54). In his opposition, Plaintiff agreed to dismissal of his claims against the SEC and McCarthy without prejudice so that he could file his claims against the United States (*Id.*, ECF 55). Judge Kimball thereafter entered an order granting the SEC's motion and dismissing Plaintiff's claims against the SEC and McCarthy without prejudice for lack of subject matter jurisdiction (*Id.*, ECF 61).[1]

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[1] Defendant requests that the court take judicial notice of the proceedings in *Premco* and *Ratheal I*. The court finds that the proceedings in these cases directly relate to the case at hand and therefore grants this unopposed request. *See Garcia-Rodriguez v. Gomm*, 169 F. Supp. 3d 1221, 1227 (D. Utah 2016) ("[A]lthough not obliged to do so, a court in its discretion may take judicial notice of publicly-filed records in [federal] court and certain other courts concerning matters that bear directly upon the disposition

On December 6, 2019, Plaintiff filed a Complaint (ECF 1) in the instant action asserting claims against Defendant United States under the FTCA for negligence, misrepresentation, and abuse of process, again arising from the 2012 SEC investigation and litigation release. *See Ratheal v. USA*, No. 2:19-cv-00969-DB-CMR (D. Utah) (*Ratheal II*). On February 13, 2020, Defendant filed a Motion to Dismiss (ECF 8) arguing that Plaintiff's claims are subject to dismissal for lack of subject matter jurisdiction, untimeliness, and issue preclusion. Plaintiff timely filed a Memorandum in Opposition (ECF 11), and Defendant then filed a Reply Memorandum (ECF 12). Without leave of court and after Defendant had filed a request to submit the Motion to Dismiss for decision (ECF 13), Plaintiff filed a "Response to New Objections" (ECF 14).[2]

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of the case at hand." (citation and internal quotation marks omitted)).

[2] Plaintiff filed his "Response to New Objections" pursuant to Fed. R. Civ. 7 and DUCivR 7-1 (ECF 14 at 1). Although DUCivR 7-1(b)(1)(B) permits the filing of an evidentiary objection within seven days after service of a reply that proffers new evidence, the standard is not met here. Plaintiff repeatedly states that his Response to New Objections was filed in response to "new argument[s]" (ECF 14 at 1-2), and he does not identify any new evidence. In order to respond to new arguments in Defendant's Reply, Plaintiff was required to seek leave of court to file an additional response memorandum. *See* DUCivR 7-1(b)(2)(A) ("No additional memoranda will be considered without leave of court."). In light of Plaintiff's pro se status and the brevity of his Response, the court will nonetheless consider his Response to New Objections despite its procedural deficiencies.

II. LEGAL STANDARDS

Defendant's Motion seeks dismissal of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. A challenge to subject matter jurisdiction may be either facial or factual. *See Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1072 (10th Cir. 2004). Where, as here, the United States makes a facial challenge to subject matter jurisdiction, the court accepts the allegations of the Complaint as true. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *See Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014).

As a sovereign, "[t]he United States and its officers enjoy immunity from suit except in instances where the United States has expressly waived that protection." *Flute v. United States*, 808 F.3d 1234, 1239 (10th Cir. 2015). "Unless the United States waives its sovereign immunity, thereby consenting to be sued, the federal courts lack jurisdiction to hear claims against it." *San Juan Cty., Utah v. United States*, 754 F.3d 787, 792 (10th Cir. 2014). The FTCA waives sovereign immunity for "claims against the United States, for money damages . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1346(b)(1). This waiver is limited by a number of statutory exceptions, including the discretionary-function exception at issue here. *See* 28 U.S.C. § 2680(a). "When an exception applies,

sovereign immunity remains, and federal courts lack jurisdiction." *Garling v. EPA*, 849 F.3d 1289, 1294 (10th Cir. 2017). "Because the discretionary function exception is jurisdictional, the burden is on [the plaintiff] to prove that it does not apply." *Hardscrabble Ranch, LLC v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016). If the plaintiff fails to meet his burden, "[t]he [discretionary function] exception applies even if the governmental employees were negligent." *Aragon v. United States*, 146 F.3d 819, 822 (10th Cir. 1998). The court will address the parties' arguments regarding the applicability of the discretionary-function exception in turn.

III. DISCUSSION

A. Issue preclusion does not bar Plaintiff's claims.

Before turning to the issue of subject matter jurisdiction, the court briefly addresses issue preclusion. Defendant argues that the doctrine of issue preclusion bars Plaintiff's claims in the instant case in light of the court's dismissal of similar claims in *Ratheal I* for lack of subject matter jurisdiction (ECF 8 at 19). Plaintiff responds that the elements of issue preclusion are not met because of differences in the parties, claims, and issues (ECF 11 at 11). Issue preclusion applies when:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against

> whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Park Lake Resources Ltd. Liability v. U.S. Dept. of Agr., 378 F.3d 1132, 1136 (2004) (quoting *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000)). For instance, "dismissals for lack of jurisdiction 'preclude relitigation of the issues determined in ruling on the jurisdiction question." *Id.* (quoting *Matosantos Commercial Corp. v. Applebee's Int'l Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001) (additional citations and quotations omitted)).

Here, the court is not persuaded that the elements of issue preclusion are met. Although the court agrees with Defendant that the first three elements appear to be met as to the issue of subject matter jurisdiction, the court is wary of the fourth element. The procedural history in *Ratheal I* suggests that Plaintiff did not have a full and fair opportunity to litigate the jurisdictional issue. While the SEC presented nearly identical jurisdictional arguments to those presented by the United States here, Plaintiff did not respond to the substance of the arguments in *Ratheal I.* Instead, Plaintiff essentially stipulated to the dismissal of his claims against the SEC and McCarthy without prejudice so that he could refile his lawsuit against the United States (*Ratheal I*, ECF 55). More significantly, Judge Kimball's order of dismissal did not address the merits of the parties' arguments regarding subject

matter jurisdiction or provide a rationale for the decision (*Id.*, ECF 61). It is therefore unclear whether Judge Kimball granted the SEC's motion on the basis of the arguments of the parties or due to Plaintiff's stipulation to dismissal. For these reasons, the court finds that the issue of subject matter jurisdiction was not fully and fairly litigated in *Ratheal I*. Accordingly, the court finds that Plaintiffs claims are not barred by issue preclusion and will proceed to address the parties' arguments regarding subject matter jurisdiction.

B. The court lacks subject matter jurisdiction over Plaintiff's claims.

Defendant argues that the discretionary-function exception to the FTCA bars Plaintiff's claims (ECF 8 at 10). The discretionary-function exception provides that the United States may not be held liable for claims "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." 28 U.S.C. § 2680(a). The applicability of this exception "depends on the nature of the agency's conduct" as evaluated under a two-part test. *Garling*, 489 F.3d at 1295. First, the court will "determine whether the conduct was discretionary—whether it was 'a matter of judgment or choice for the acting employee.'" *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Second, the court will determine whether the challenged conduct "required the 'exercise of judgment based on considerations of public policy.'" *Id.* (quoting

Berkovitz, 486 U.S. at 536). When both parts of the tests are met, "the governmental conduct is protected as a discretionary function, and sovereign immunity bars a claim that involves such conduct." *Id.*

1. The SEC's investigation of Plaintiff was discretionary.

Defendant argues that the first part of the discretionary-function test is satisfied because although Plaintiff's claims focus on the SEC's investigative techniques, the challenged conduct in this case is the SEC's discretionary decision to investigate Plaintiff (ECF 8 at 12). Defendant notes that no statute, regulation, or mandatory directive prescribed the SEC's decision to investigate. Defendant also points to the Securities and Exchange Act (the Exchange Act), which grants the SEC broad discretion to investigate: "The Commission may, *in its discretion*, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, [or] the rules or regulations thereunder." *See* 15 U.S.C. § 78u(a)(1) (emphasis added). This investigational authority also includes broad discretion to publish information: "The Commission is authorized *in its discretion*, to publish information concerning any such violations[.]" *See id.* (emphasis added).

In response, Plaintiff concedes the SEC's discretion to investigate, but argues that "the discretionary function exception does not bar [his] claim[s] in this

case because the alleged acts and omissions occurred at the implementation level, not the design/policy-making level" (ECF 11 at 2). Indeed, Plaintiff's negligence, misrepresentation, and abuse of process claims are based on allegations that employees of the United States "breached their respective duties to properly and fairly implement SEC investigative, settlement, and enforcement processes and procedures . . . " (ECF 1, ¶ 30). Plaintiff further alleges that Defendant's employees breached "the duty to accurately inform the public; protect the U.S. economy, investors and business; and enforce No Admit No Deny policy and Dodd-Frank whistleblower law" (ECF 1 at 7).

To support this theory of liability, Plaintiff relies on a Ninth Circuit case entitled, *Whisnant v. U.S.*, 400 F.3d 1177 (9th Cir. 2005), in which the plaintiff brought an FTCA claim for negligence based on his exposure to toxic mold at a naval-base commissary. In *Whisnant*, the court held that the discretionary-function exception did not apply because the plaintiff "alleged negligence in the implementation, rather than the design, of government safety regulations, and the governmental decisions [the plaintiff] claim[ed] were negligent concerned technical and professional judgments about safety rather than broad questions of social, economic, or political policy." *Id.* at 1185.

The court agrees with Defendant that the *Whisnant case* is inapposite, not only factually, but also, in the nature of the challenged conduct. As Defendant correctly notes, the *Whisnant* case is distinguishable first because it does not involve the SEC or a

government agency investigation, and second because it involves the breach of a prescribed duty to maintain safe and healthy premises not present here. Plaintiff has not identified any such prescribed duty applicable to investigations by the SEC. The various duties referenced by Plaintiff are unsupported by any specific statute, regulation, or policy that explicitly governs the SEC or prescribes its investigations. Plaintiff's vague, conclusory allegations referencing unspecified "duties to fairly and properly implement SEC investigative . . . processes and procedures" (ECF 1, ¶ 30), are also insufficient to meet his burden.

The Tenth Circuit makes clear that where there are no "statutes, regulations, or policies prescribing a specific course of action for [agency] employees to follow in investigating potential . . . violations," the first part of the discretionary-function exception is satisfied. *See Garling*, 849 F.3d at 1296; *see also United States v. Gaubert*, 499 U.S. 315, 322 (1991) ("The requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow[.]" (citation omitted)). Even the Ninth Circuit has acknowledged that "[the] discretionary function protects agency decisions concerning the *scope and manner* in which it conducts an investigation so long as the agency does not violate a mandatory directive." *See Vickers v. United States*, 228 F.3d 944, 951 (9th Cir. 2000) (emphasis added). In light of the broad discretionary authority delegated to the SEC in making investigations and Plaintiff's failure to identify any

specific statute, regulation, policy, duty, or directive prescribing SEC investigations, the court finds that the first part of the discretionary-function test is satisfied.

2. The SEC's investigation was based on public policy considerations.

Defendant argues that the second part of the discretionary-function is also met because of a presumption that the SEC's decision to investigate was grounded in policy (ECF 8 at 13). In response, Plaintiff does not address public policy considerations by the SEC, other than to note that "the legislative intent of [the] FTCA [is] to compensate citizens damaged by wrongful acts of U.S. employees, in relation to the U.S. sovereign immunity discretionary function exception" (ECF 11 at 4-5). However, the legislative intent of the discretionary-function exception was to shield agencies like the SEC from suits based on the exercise of its discretionary authority. *See United States v. Varig Airlines*, 467 U.S. 797, 808 (1984) (noting that the discretionary-function exception was "designed to preclude application of the [FTCA] to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, . . . the Securities and Exchange Commission[.]" (citing H.R. Rep. No. 77-2245, at 10) (1942))).

Consistent with this intent, "[w]hen established governmental policy, as express or implied by statute, regulation, or agency guidelines, allows a Government

agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324; *see also Baer v. United States*, 722 F.3d 168, 175 (3d Cir. 2013) ("[B]ecause SEC regulations afford examiners discretion regarding the timing, manner, and scope of investigations, there is a strong presumption that the SEC's conduct is susceptible to policy analysis."). The court agrees with Defendant that where, as here, there is a statute allowing the SEC to exercise discretion in making investigations, *see* 15 U.S.C. § 78u(a)(1), the court must presume that the SEC's investigation in this case was grounded in policy considerations. The court therefore concludes that the second part of the discretionary-function test is met.

In summary, because both parts of the discretionary-function test are met, the court concludes that sovereign immunity bars Plaintiff's claims. The undersigned therefore RECOMMENDS that Plaintiff's claims be dismissed without prejudice for lack of subject matter jurisdiction.[3]

RECOMMENDATION

In summary, IT IS HEREBY RECOMMENDED that Defendant's Motion to Dismiss (ECF 8) be GRANTED

[3] In light of the recommendation that Plaintiff's claims be dismissed for lack of subject matter jurisdiction on the basis of the discretionary-function exception, the court does not reach Defendant's alternate grounds for dismissal.

and that Plaintiff's claims be dismissed without prejudice.

NOTICE

Copies of the foregoing Report and Recommendation are being sent to all parties who are hereby notified of their right to object. Within **fourteen (14) days** of being served with a copy, any party may serve and file written objections. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Failure to object may constitute a waiver of objections upon subsequent review.

DATED this 14 August 2020.

/s/ Cecilia M. Romero
Magistrate Judge
Cecilia M. Romero
United States Court
for the District of Utah

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..1

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, §13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer"

means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.