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MEMORANDUM* OPINION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (JUNE 11, 2025)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES CONSOLE; ELIZABETH K. CONSOLE,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 23-3609

D.C. No. 3:23-cv-00652-DMS-JLB

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Submitted June 6, 2025**

Before: SANCHEZ, H.A. THOMAS, and DESAI, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

MEMORANDUM

James and Elizabeth Console appeal the district court's dismissal of their first amended complaint ("FAC") with prejudice for lack of subject matter jurisdiction. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

1. We review a district court's dismissal for lack of subject matter jurisdiction de novo. *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). The Federal Tort Claims Act ("FTCA") provides a limited waiver of the United States' sovereign immunity "for torts committed by federal employees acting within the scope of their employment." *Id.* But if a claim falls within an FTCA exception, then the United States retains immunity, and the district court lacks subject matter jurisdiction to hear the claim. *Id.*

The Consoles' claims are barred under the FTCA's discretionary function and misrepresentation exceptions. *See* 28 U.S.C. § 2680(a), (h). Their claim that the government failed to warn them of the scheme that defrauded them out of their retirement accounts falls within the misrepresentation exception. *See Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003) ("The misrepresentation exception shields government employees from tort liability for failure to communicate information."). And they concede that most of their claims regarding the government's investigation and prosecution of the scheme's perpetrators fall within the discretionary function exception. *See Gonzalez v. United States*, 814 F.3d 1022, 1028 (9th Cir. 2016) (explaining that investigation and prosecution decisions are "generally committed to [the government's] absolute discretion" (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985))).

The Consoles nonetheless contend that the discretionary function exception does not apply to their claim that the government acted negligently by preventing them from participating in the perpetrators' criminal proceedings. They argue that, because they were victims of the fraudulent scheme, victims' rights statutes and the Due Process Clause removed the United States' discretion to exclude them from the proceedings. *See* 18 U.S.C. § 3663A(a)(1) (mandating restitution for victims of certain crimes); *id.* § 3771(a) (prescribing certain rights to crime victims, including the right to be heard at sentencing hearings); *Gonzalez*, 814 F.3d at 1027 (noting that a decision is not discretionary when federal law prescribes a specific course of action).

But the Due Process Clause does not require the government to allow crime victims to participate in criminal proceedings. *Dix v. County of Shasta*, 963 F.2d 1296, 1298–99 (9th Cir. 1992), *abrogated on other grounds by*, *Sandin v. Conner*, 515 U.S. 472 (1995). Regardless, to trigger the rights under the relevant statutes, the Consoles must have been victims of the charged offenses. *See United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 927 n.10 (9th Cir. 2001) (holding that mandatory restitution is limited to "those losses caused by the actual offense of conviction"); 18 U.S.C. § 3771(e)(2)(A) (defining a "crime victim" as a person harmed by the commission of a federal offense). Because the government entered indictments and plea deals with reduced charges, and the Consoles were not victims of the crimes charged, there was no statutory requirement that the United States allow the Consoles' participation in the criminal proceedings. Thus, the United States retained discretion

over the Consoles' participation in the criminal proceedings, and the discretionary function exception applies.[1]

2. "We review for abuse of discretion a district court's dismissal with prejudice and without leave to amend." *Benavidez v. County of San Diego*, 993 F.3d 1134, 1141–42 (9th Cir. 2021). The FAC failed to correct the deficiencies in the original complaint, and the Consoles do not specify how they would correct the deficiencies if granted leave to amend. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041, 1046–47 (9th Cir. 2011). Because dismissal without leave to amend is proper where "amendment would be futile," the district court did not abuse its discretion by dismissing the FAC with prejudice. *Id.* at 1041.

AFFIRMED.

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[1] To the extent that the Consoles assert an independent due process claim, the district court lacked subject matter jurisdiction to hear it. *See Jachetta v. United States*, 653 F.3d 898, 904 (9th Cir. 2011); *Munns v. Kerry*, 782 F.3d 402, 413–14 (9th Cir. 2015).

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (SEPTEMBER 18, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES AND ELIZABETH CONSOLE FAMILY,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Case No.: 23-cv-652-DMS-BLM

Before: Hon. Dana M. SABRAW,
Chief U.S. District Court Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Pending before the Court is Defendant United States of America's ("Defendant") motion to dismiss Plaintiffs James and Elizabeth Console's ("Plaintiffs") Complaint for lack of subject matter jurisdiction and failure to state a claim under Rules 12(b)(1) and (b)(6), respectively, of the Federal Rules of Civil Procedure. (ECF No. 6). Plaintiffs concurrently filed an opposition (ECF No. 10) and a First Amended

Plaintiffs have been unsuccessful in recovering their losses from these individuals and blame the United States in the present litigation for this failure. Plaintiffs allege the United States through various employees wrongfully delayed or declined to bring criminal charges against one or more of the alleged fraudsters, mishandled criminal cases that it did file, and failed to timely warn or share information with Plaintiffs about these fraudsters, thereby causing economic and emotional harm to Plaintiffs.

Specifically, Plaintiffs allege that Mr. Cooper was their financial advisor at Total Wealth Management ("TWM") beginning in 2011. Plaintiffs allege that Cooper and his co-conspirators targeted seniors and used their scheme to defraud victims out of their IRAs and other retirement accounts. Plaintiffs further allege that Cooper was involved in a federal criminal case in Philadelphia in 2010, where he "had been bringing investor money" to co-conspirator Stinson, who is "a felon and securities fraud recidivist." (FAC at 3–4.) Plaintiffs allege Stinson was tried and sentenced in that case to 33 years as a recidivist offender, and

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(E.D. Pa. 2011) (lawsuit against Mr. Cooper and others to secure receivership property for the benefit of investors from the companies involved in the alleged Ponzi scheme); *United States v. Anthony Hartman*, No. 2:19-cr-347 (D.S.C. 2019) (federal criminal case charging Mr. Hartman with fraud); *United States v. James Bramlette*, No. 2:19-cr-347 (D.S.C. 2019) (federal criminal case charging Mr. Bramlette with fraud); *United States v. Terrence Goggin*, No. 4:18-cr-415 (N.D. Cal. 2018) (federal criminal case charging Mr. Goggin with fraud); *SEC v. Total Wealth Mgmt., Inc., et al.*, No. 15-cv-226 (S.D. Cal. 2015) (SEC lawsuit against Total Wealth Management "TWM" and Jacob Cooper for fraud); *Seaman v. Private Placement Capital Notes II, LLC*, No. 16-cv-578 (S.D. Cal. 2016) (lawsuit for fraud and breach of contract).

that all of this happened shortly before Plaintiffs moved their IRA accounts over to Cooper in 2011. (*Id.* at 4.) Plaintiffs fault the government for allowing Cooper to continue "operating a Ponzi-type scheme" when they knew he was complicit with Stinson, which "left [Plaintiffs] vulnerable to his fraudulent conduct" in 2011 and thereafter. (*Id.* at 5.) Plaintiffs further fault federal prosecutors for not bringing criminal charges against Cooper, particularly since the SEC had filed a civil lawsuit and "shut down" Cooper and TWM in 2015. (*Id.*) Finally, Plaintiffs attribute the same kind of wrongdoing to the government with respect to Hartman, who allegedly defrauded investors out of $34 million dollars and "who was also allowed by . . . Government employees to continue his scheme to defraud until April 9th, 2019," when he was finally indicted some "4 years after his crimes against [Plaintiffs] were discovered." (*Id.* at 6.) Plaintiffs allege federal prosecutors excluded them from the criminal investigations and cases, and ultimately allowed Hartman to plead to a reduced charge and enter Pretrial Diversion—a program for which Plaintiffs argue Hartman was "not eligible." (*Id.* at 7.)

Plaintiffs describe several instances of communication between themselves, the SEC, various individuals within United States Attorneys' Offices ("USAO") in California and South Carolina, the Department of Justice ("DOJ"), and the Federal Bureau of Investigation ("FBI"). In an attempt to gather more information, Plaintiffs filed Freedom of Information Act ("FOIA") requests, which were allegedly denied. Plaintiffs also filed an administrative complaint with DOJ outlining the same grievances, and a separate admin-

istrative complaint with the FBI Sorrento Valley field office detailing concerns about possible government corruption. After receiving no response from the government, Plaintiffs filed this suit.

II. Legal Standard

A federal court is a court of limited jurisdiction and possesses "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 535, 541 (1986). Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). When ruling on such a motion, a court may consider extrinsic evidence beyond the face of the complaint. *Wolfe v. Stankman*, 392 F.3d 358, 362 (9th Cir. 2004). A challenge for lack of subject matter jurisdiction "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). A federal court must dismiss an action if it "determines at any time that it lacks subject-matter jurisdiction." Fed. R. Civ. P. 12(h)(3).

III. Discussion

Claims brought against the United States sounding in tort are governed by the Federal Torts Claim Act ("FTCA"). *See* 28 U.S.C. § 2680. The United States must consent to being sued through waiver of its immunity. *McGuire v. United States*, 550 F.3d 903, 910 (9th Cir. 2008) (stating "the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to

be sued.") In the subject litigation, Plaintiffs' principal claim is for negligence under the FTCA. (*See, e.g.*, FAC at 11 ("The plaintiffs[] believe that the FTCA . . . is an appropriate remedy for the injuries sustained by the negligent actions of [Defendant's] employees.")) Defendant contends waiver of sovereign immunity under the FTCA is limited and subject to several exceptions, "including the discretionary function and misrepresentation exceptions, which apply here." (Def. Mot. at 4, ECF No. 6.) The Court agrees.

A. Discretionary Function Exception

It is well-settled that the United States may not be sued 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." 28 U.S.C. § 2680(a). This exception applies to all government employees, including prosecutors in criminal cases. *See Gray v. Bell,* 712 F.2d 490, 513 (1983) (stating "prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception."). In addition, prosecutorial negligence in handling criminal cases, as Plaintiffs allege, is "irrelevant to the discretionary function inquiry." *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989). Instead, there is a two-step inquiry to determine whether the discretionary function exception applies. *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000).

First, "the court must determine whether the challenged conduct involves an element of judgment or choice" by the defendant. *Id.* at 1001 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Second, if the "conduct involves some element of choice, the court must determine whether the conduct implements social, economic or political policy considerations." *Nurse*, 226 F.3d at 1001. "If the challenged action satisfies both of these two prongs, that action is immune from suit—and federal courts lack subject matter jurisdiction—even if the court thinks the government abused its discretion or made the wrong choice." *Green v. United States*, 630 F.3d 1245, 1249–50 (9th Cir. 2011). The "government bears the ultimate burden of establishing that the exception applies." *Id.* at 1248–49.

At step one the court must determine whether the challenged conduct involves an element of judgment or choice. *Nurse*, 226 F.3d at 1001 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). "This inquiry looks at the 'nature of the conduct, rather than the status of the actor' and the discretionary element is not met where 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Esquivel v. United States*, 21 F.4th 565, 573 (9th Cir. 2021) (quoting *Berkovitz*, 486 U.S. at 536). If a statute or policy requires certain action, the inquiry ends. *Id.*

The challenged conduct here is the USAO (District of South Carolina) excluding Plaintiffs as victims in Mr. Hartman's criminal case by indicting him on reduced charges, offering Mr. Hartman pretrial diversion, and subsequently dismissing his case; the USAO (Southern District of California) not being

transparent about federal investigations, including investigations into Mr. Cooper and electing not to charge him; and the USAO (Northern District of California) offering Mr. Goggin a plea deal, which resulted in Plaintiffs not being victims of the charged offense and unable to testify regarding restitution.

Plaintiffs argue the Crime Victims' Rights Act ("CVRA"), Victims' Rights and Restitution Act ("VRRA"), and Principles of Federal Prosecution provide "obligations under state laws and federal mandates" that require certain action by government actors, and thus, the discretionary element of step one is not met. (Pls. Oppo. at 5, ECF No. 10.) Initially, Plaintiffs argue the various decisions, or lack thereof, by government employees run afoul of the Principles of Federal Prosecution published by DOJ in its Justice Manual 9-27.000 (2018). Plaintiffs contend government actors and entities did not follow these Principles. However, the Principles of Federal Prosecution state they "are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States." *Id.* § 9-27.150. Moreover, the Principles state they are "intended solely for the *guidance* of attorneys for the government." *Id.* § 9-27.150 (emphasis added). As such, the Principles of Federal Prosecution do not prescribe a course of action that removes discretion from prosecutors in handling criminal cases.

Plaintiffs also attempt to use the CVRA and VRRA to rebut the government's argument that the discretionary function exception applies. The CVRA provides rights to crime victims in federal proceedings. *See* 18 U.S.C. § 3771(a). It requires government employees "engaged in the detection, investigation, and pros-

ecution of crime" to "make their best efforts" to see that crime victims are afforded the rights set forth in § 3771(a). *Id.* § 3771(c)(1). It further provides the procedure in which a victim may be heard and pursue recourse. *See id.* § 3771(d). However, the CVRA states it does not "imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages[,]" *id.* § 3771(d)(6), and that it shall not "be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* Similarly, the VRRA "does not create a cause of action or defense in favor of any person arising out of the failure of a responsible person to provide information." 34 U.S.C. § 20141(d). Thus, the CVRA and VVRA do not restrict prosecutorial discretion and do not create any specific duty or obligation to victims for the breach of which the United States could be held liable. Because the challenged conduct here involves matters of prosecutorial discretion and judgment, and not conduct prescribed by policy or statute, step one is met.[4]

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[4] To the extent Plaintiffs are attempting to use the CVRA and VVRA as independent causes of action, they are barred from doing so. Neither the CVRA nor the VVRA provides a private cause of action. *See* 18 U.S.C. § 3771(d)(6) (stating "[n]othing in this chapter shall be construed to authorize a cause of action for damages . . . "); 34 U.S.C. § 20141(d) (stating "[t]his section does not create a cause of action . . . "). *See also In re Wild*, 994 F.3d 1244, 1256 (11th Cir. 2021) (stating Congress did not through the CVRA "authorize crime victims to file stand-alone civil actions.") The same is true for Plaintiffs' attempted use of California's Marsy's Law, which provides crime victims certain rights. *See* Cal. Const. art. I, § 28(b). Like the CVRA and VVRA, Marsy's Law "does not create any cause of action for compensation or

At step two, the Court must determine whether the conduct at issue implicates social, economic or political policy considerations. *Nurse*, 226 F.3d at 1001. The exception protects government action premised on such considerations. *Esquivel*, 21 F.4th at 574. "Where the government agent is exercising discretion, 'it must be presumed that the agent's acts are grounded in policy when exercising that discretion.'" *Id.* (quoting *Gaubert*, 499 U.S. at 324).

"The investigation and prosecution of crime has long been a core responsibility of the executive branch." *Gonzalez v. United States*, 814 F.3d 1022, 1028 (9th Cir. 2016). "Courts have consistently held that where, as here, a government agent's performance of an obligation requires that agent to make judgment calls, the discretionary function exception applies." *Id.* at 1029. When "harm actually flows from the prosecutor's exercise of discretion, an attempt to recharacterize the action as something else must fail." *Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1286 (9th Cir. 1998).

A prosecutor's investigation, charging decisions, plea bargaining, and evaluation of eligibility for a diversion program are all grounded in policy considerations. So too is the decision-making of the USAO and federal law enforcement agencies concerning when, and to whom, to disclose the existence of an investigation or proceeding. *See Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1051 (C.D. Cal. 2010), *aff'd Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749 (9th Cir. 2013) (dismissing case because discretionary function

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damages against" the government. *Id.* § 28(c)(2).

exception barred investors' claims against SEC for its investigators' failure to discover Ponzi scheme and publicize or prosecute it).

Here, Plaintiffs' claims stem entirely from their dissatisfaction with the manner in which prosecutors exercised discretion. Plaintiffs claim their family was wrongfully excluded as victims in the criminal case against Mr. Hartman based on the types of charges filed, which prejudiced and harmed them. Plaintiffs assert that Mr. Hartman was afforded the opportunity to participate in a diversion program, for which he was not eligible. (*See Hartman*, 19-cr-347, at ECF Nos. 196, 199.)[5] Plaintiffs argue that "[w]ho knew and approved the decision to create a Diversion Program for Mr. Hartman . . . should be made available information." (*Id.* at 15-16.) Plaintiffs further note their discontent with Mr. Hartman's case being dismissed and believe it is "another example of the Government Employees wrongdoing, [and] it has a direct impact on the Plaintiffs' as it will make finding and collecting from the Defendant, Mr. Hartman, highly unlikely." (Pls. Supp. Mem. at 6, ECF No. 19.) However, as discussed, prosecutors have wide discretion in handling cases, including determining the scope of investigation and whether, when, and the types of charges, to file. Prosecutorial discretion is defined as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting,

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[5] On July 12, 2023, the United States moved to dismiss the indictment against Mr. Hartman due to his successful participation in the pretrial diversion program. (*Id.* at ECF No. 234.) The district court granted the motion and dismissed the indictment without prejudice against Mr. Hartman on July 17, 2023. (*Id.* at ECF No. 235.)

plea-bargaining, and recommending a sentence to the court." *Prosecutorial Discretion, Black's Law Dictionary* (10th ed. 2014). "The decision of whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability." *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983). *See also United States v. Nixon*, 418 U.S. 683, 693 (1974) (stating decision whether to prosecute is discretionary and protected). So, too, here.

And the same is true with Mr. Goggin. Plaintiffs allege they were notified by the DOJ Victims Notification System that they were victims of Mr. Goggin. (FAC at 8.) Plaintiffs had discussions with a Victim Witness Specialist in the U.S. Attorney's office regarding the criminal case. (*Id.*) Plaintiff Elizabeth Console alleges she spoke with a Victims' Rights Ombudsman ("VRO") at DOJ. (*Id.* at 9.) Plaintiffs further allege the VRO called the Northern District of California division of the USAO and confirmed that "the charged offense removed our rights as victims." (*Id.*) The VRO allegedly explained to Plaintiffs that she, the VRO, "has no authority to do anything about the decisions that the prosecutor and the court decided." (*Id.*) Because Mr. Goggin accepted a plea deal for money laundering, and Plaintiffs assert they were not victims of his money laundering offense, they had no right to be heard or have restitution ordered. (*Id.* at 9.)

While the Court is sympathetic to Plaintiffs' frustrations, the conduct of which Plaintiffs complain falls squarely within the prosecutorial discretion afforded to the USAOs. Therefore, all claims derived from the exercise of prosecutorial discretion are barred

under the discretionary function exception and dismissed with prejudice.

B. Misrepresentation by Omission

Defendant asserts that part of Plaintiffs' allegations sound not in negligence, but rather in the tort of misrepresentation by omission for which there is no waiver of immunity. *See* 28 U.S.C. § 2680(h) (stating waiver of sovereign immunity under FTCA does not apply to claims "arising out of . . . misrepresentation"). By extension, the FTCA bars claims for misrepresentation by omission. *See Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003) (affirming dismissal because the "misrepresentation exception shields government employees from tort liability for failure to communicate information, whether negligent or intentional."). To determine if a claim arises out of misrepresentation, it is necessary to look "beyond the labels used to determine whether a proposed claim is barred." *Thomas-Lazear v. United States*, 851 F.2d 1202, 1207 (9th Cir. 1988).

Plaintiffs allege the failure to warn or share information regarding Messrs. Cooper and Stinson, and other alleged co-conspirators, was a proximate cause of Plaintiffs' injury. In part, Plaintiffs' suit is based on the theory that government actors failed to timely advise them of the criminal activities in the underlying fraudulent schemes perpetrated by Cooper, Stinson, and others. At bottom, Plaintiffs contend government employees in the USAOs— and perhaps the SEC and FBI—did not share information with Plaintiffs, either negligently or intentionally, thereby

harming them.[6] Such conduct, however, is immune from suit under the FTCA. *See Lawrence*, 940 F.3d at 958 (affirming dismissal against U.S. Marshals for failure to inform state agency of a felon's full criminal background, which allowed felon access to employment where he sexually assaulted the plaintiff); *Redmond v. United States*, 518 F.2d 811 (7th Cir. 1975) (affirming dismissal based on SEC's failure to disclose a securities dealer's criminal history, resulting in plaintiff being defrauded). Therefore, to the extent Plaintiffs' claim is based on government actors failing to communicate information, the Court lacks jurisdiction under 28 U.S.C. § 2680(h).

C. Futility of Leave to Amend

Courts "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend should "be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." *Intri-Plex Techs. v. Crest Group, Inc.*, 499 F.3d 1048, 1056 (9th

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[6] Plaintiffs named only the United States as a defendant in the present action. It is unclear precisely who Plaintiffs blame for failing to communicate information among the various prosecutors, and SEC and FBI employees. Plaintiffs, for example, allege they "filed a complaint with the FBI, Sorrento Valley department about [their] suspicion of probable public corruption with regards to the handling of Mr. Hartman's case in SC" and "have not had any transparency about that complaint and whether there is an investigation or not." (FAC at 17.) Nevertheless, for the reasons stated, any claim based on this theory of liability against any government employee referenced in the FAC must be dismissed for lack of jurisdiction.

Cir. 2007). However, leave to amend need not be granted where, as here, "the amendment of the complaint . . . constitutes an exercise in futility." *Ascon*, 866 F.2d at 1160. It is clear that Plaintiffs' allegations against Defendant all arise from protected discretionary acts of government employees during the course of the underlying investigations and prosecutions, and their alleged failure to communicate information. The Court therefore declines leave to amend as futile.

IV. Conclusion and Order

For the foregoing reasons, Defendant's motion to dismiss based on lack of subject matter jurisdiction is GRANTED. Plaintiffs' First Amended Complaint is DISMISSED with prejudice.

IT IS SO ORDERED.

/s/ Dana M. Sabraw
Chief U.S. District Court Judge

Dated: September 18, 2023

ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 25, 2025)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES CONSOLE and ELIZABETH K. CONSOLE,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 23-3609

D.C. No. 3:23-cv-00652-DMS-JLB
Southern District of California, San Diego

Before: SANCHEZ, H.A. THOMAS, and DESAI, Circuit Judges.

ORDER

The panel has voted to deny appellants' petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for rehearing and rehearing en banc, Dkt. 16, are DENIED.

Additional material from this filing is available in the Clerk's Office.