United States District Court
for the Southern District of Florida

Case No: 0:11-cv-62644-RNS

CARLOS ZELAYA, individually,
and GEORGE GLANTZ,
individually and as trustee of the
GEORGE GLANTZ REVOCABLE
TRUST,

Plaintiffs,

v.

United States of America,

Defendant.
___________________________________/

MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, United States of America, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and Rule 7.1(A) of the Local Rules for the United States District Court for the Southern District of Florida, moves to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction.

I. INTRODUCTION

Robert Allen Stanford orchestrated a massive Ponzi scheme to defraud thousands of investors, including Plaintiffs, who filed this Federal Tort Claims Act ("FTCA") suit based on the failure of the Securities & Exchange Commission ("SEC") to bring an end to Stanford's fraudulent operations at an earlier date.

This Court lacks subject-matter jurisdiction because this suit is barred by the discretionary function exception, which precludes claims under the FTCA based on federal

officials' discretionary, policy-based conduct. Federal securities laws give the SEC broad discretion in how to regulate the securities industry. This discretion is subject to important policy considerations, including how to best use limited agency resources to enforce the nation's securities laws and regulate the securities industry.

II. FACTS[1]

Stanford is alleged to have operated "a massive Ponzi scheme, selling fraudulent offshore certificates of deposit ("CDs")." Compl. ¶ 1. The CDs were issued through his Antiguan-based offshore bank, Stanford International Bank Ltd. ("SIBL"). Compl. ¶ 22. As part of this scheme, Stanford created the Stanford Group Company ("SGC"), which formed part of what Plaintiffs refer to as the "Stanford financial network," the "primary function of [which] was to funnel investments into the CDs issued by SIBL." Compl. ¶ 26. SCG was created and "registered with the SEC as a broker/dealer and investment adviser" in 1995. Compl. ¶ 27.

Certain SEC staff members are alleged to have believed that "Stanford's operations were a fraud," but "did nothing to stop Stanford for years." Compl. ¶ 3. According to Plaintiffs, the SEC conducted "several investigations . . . concluding that Stanford was operating a Ponzi scheme[,]" but "took no action to stop the fraud, not even the statutory obligations it was required to take as a result of the findings." Compl. ¶ 28.

In particular, Plaintiffs allege that, in 1997, an "SEC branch chief concluded that the SIBL CDs purported returns were 'absolutely ludicrous'" and that the "SEC Broker-Dealer Examination Group . . . stated its conclusions from the investigation of SGC as . . . 'Possible Ponzi scheme.'" Compl. ¶ 29.

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[1] For purposes of this motion to dismiss only, the United States accepts Plaintiffs' factual allegations as true.

In 1998, after a "limited matter under inquiry ("MUI") investigation by the Enforcement Group," the Assistant District Administrator viewed Stanford's operations as "a Ponzi scheme to start with." Compl. ¶ 31. Also, in 1998, the members of the SEC's Investment Advisor Examination Group investigated SGC, and concluded that "'Stanford was operating some kind of fraud.'" Compl. ¶ 34.

In 2002, members of the Investment Adviser Examination Group again conducted an examination of SGC and had "suspicions [that] the international bank was a Ponzi scheme." Compl. ¶ 37.

In 2004, the "SEC completed its fourth investigation of Stanford . . concluding that the SIBL CDs were securities and 'may in fact be a very large Ponzi scheme.'" Compl. ¶ 40.

However, "[n]o enforcement action to prevent the fraud was taken until 2009." Compl. ¶ 41. Investors lost billions of dollars "[a]s a result of the SEC's failure to take prompt enforcement action[.]" Compl. ¶ 5.

Plaintiffs allege that in failing to take any action until 2009, the SEC "violated at least two nondiscretionary federal statutory obligations[.]" Compl. ¶ 43. First, Plaintiffs allege that the SEC should have notified the Securities Investor Protection Corporation ("SIPC") "upon learning that SGC was in or approaching financial difficulty[.]" Compl. ¶ 43. According to Plaintiffs, the SEC concluded that "the SIBL CDs promoted by SGC were a Ponzi scheme and the funds invested in the scheme were used, in part, to operate SGC." Compl. ¶ 46. Plaintiffs state that "[b]y definition, a Ponzi scheme is insolvent at its inception." Compl. ¶ 47. Thus, Plaintiffs surmise, because "SGC was part of a Ponzi scheme and financed by redeemable investor funds, the SEC had knowledge that SGC was either insolvent or approaching financial difficulty." Compl. ¶ 48.

Second, Plaintiffs allege that the SEC "violated its statutory duty to deny SGC's annual registration after concluding that SGC was in violation of federal securities statutes." Compl. ¶ 43; Compl. ¶¶ 55, 56.

III. ARGUMENT

A. The Discretionary Function Exception Test

The United States is immune from liability absent its consent, and the terms of that consent define a court's jurisdiction to entertain a suit against the United States. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). The "'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'" *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). Thus, at the outset of a lawsuit against the United States, the Court must determine whether the United States has waived its immunity. Absent a specific waiver, sovereign immunity bars the suit for lack of subject-matter jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471, 475-76 (1994).

The FTCA, 28 U.S.C. § 1346(b)(1), 28 U.S.C. § 2671-80, is a limited waiver of sovereign immunity. Subject to several exceptions, it authorizes suits against the United States for damages "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. § 2674 ("The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ."). The discretionary function exception is one of the exceptions to the FTCA. It provides that the United States may not be held liable based on "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). "When the discretionary function exception to the FTCA applies, no federal subject matter jurisdiction exists." *U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009).

The Supreme Court has enunciated a two-part test for determining whether the discretionary function exception bars suit against the United States. If both prongs of the discretionary function test are met, the United States is shielded from liability, even if its actions were negligent. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991).[2]

First, courts must determine whether the act "involv[es] an element of judgment or choice." *Gaubert*, 499 U.S. at 322. This inquiry focuses on "whether the controlling statute or regulation mandates that a government agent perform his or her function in a specific manner." *Hughes*, 110 F.3d at 768.[3]

Second, if the conduct does "involv[e] an element of judgment or choice," courts then look at "whether that judgment is of the kind that the discretionary function exception was

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[2] *See also Hughes v. United States*, 110 F.3d 765, 768 n.1 (11th Cir. 1997) ("Our concern under the discretionary function exception is not whether the allegations of negligence are true[.]"); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1540 (10th Cir. 1992) ("Harsh as it may be, whether the Army substantially endangered Plaintiffs' health and welfare is irrelevant to the discretionary function determination. The question is not whether the Army fell short in its efforts to attain the general health and safety goals of CERCLA, but whether the Army's shortcomings involved violations of specific, mandatory directives.").

[3] *See also Autery v. United States*, 992 F.2d 1523, 1529 (11th Cir.1993) (a function involves discretion unless "a federal statute, regulation, or policy specifically prescribes a course of action embodying a fixed or readily ascertainable standard"); *Powers v. United States*, 996 F.2d 1121, 1124-25 (11th Cir. 1993) ("The relevant inquiry is whether the controlling statute or regulation mandates that a government agent perform his or her function in a specific manner."); *Irving v. United States*, 162 F.3d 154, 163 (1st Cir.1998) (looking to whether the regulations "mandate a particular *modus operandi*" or "prescribe any specific regimen").

designed to shield." *Gaubert*, 499 U.S. at 322-23 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)). The discretionary function exception is intended "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id*. at 323 (quoting *Varig Airlines*, 467 U.S. at 814). "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." *Gaubert*, 499 U.S. at 323; *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002) ("If the decision is inherently one allowing discretion, we presume that the act was grounded in policy whenever that discretion is employed.") (citation omitted). "For a complaint to survive a motion to dismiss, it must allege facts which 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." *Monzon v. United States*, 253 F.3d 567, 572 (11th Cir. 2001).

Notably, it is immaterial whether the various policy considerations actually were balanced or considered; the relevant question is whether the conduct is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325 ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.").[4] Accordingly, there is no need for this

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[4] *See also Hughes*, 110 F.3d at 768 (the exception does not require there to have been actual "weighing of policy considerations") (citation omitted); *Mid-South Holding Co., Inc. v. United States*, 225 F.3d 1201,1207 (11th Cir. 2000) (observing that the test is objective, and that discretionary function exception applies so long as it is "conceivabl[e]" that challenged conduct was in furtherance of policy objectives); *Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006) ("Our inquiry does not focus either on the subjective intent of the government agent. . . or on whether the agent actually weighed policy considerations[.]") (citations omitted); *Cochran v.*

(continued...)

Court to inquire into whether the SEC did, as a matter of fact, consider such competing policy factors.

B. The SEC Enjoys Broad Discretion in Regulating the Securities Industry

The challenged conduct here involves matters committed to the SEC's discretion. Although Plaintiffs seem to challenge the SEC's failure to take some sort of enforcement or regulatory action against Stanford at an earlier date, rather than the manner in which the SEC conducted its investigations of Stanford, it nevertheless should be noted that the SEC enjoys complete discretion under the 1934 Securities Exchange Act in deciding whether and how to investigate suspected wrongdoing. The Act specifically provides that "[t]he 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 [the securities laws]." 15 U.S.C. § 78u(a)(1) (emphasis added). The Act further provides that the SEC "is authorized *in its discretion* . . . to investigate any facts, conditions, practices, or matters *which it may deem necessary or proper* to aid in the enforcement of such provisions." 15 U.S.C. § 78u(a)(1) (emphasis added). The SEC's own regulations are similarly discretionary. *See* 17 C.F.R. § 202.5(a) ("The Commission *may*, *in its discretion*, make such formal investigations . . . *as it deems necessary* to determine whether any person has violated, is violating, or is about to violate . . . the federal securities laws.") (emphasis added). Based on these sweeping grants of authority, courts have uniformly dismissed FTCA suits challenging SEC decisions regarding whether and how to investigate

[4](...continued)
United States, 38 F. Supp. 2d 986, 991 (N.D. Fla. 1998) ("[E]ven if there is no evidence that economic, social, or political policy concerns were the basis of the challenged decisions, the discretionary function exception still applies if the decisions are susceptible to that type of policy analysis.").

alleged wrongdoing.[5] Indeed, one district court has held that claims based on the SEC's investigations of Stanford were barred by the discretionary function exception. *See Robert Juan Dartez, LLC v. United States*, No. 3:11-cv-0602N, __ F. Supp. 2d __, 2011 WL 5529841, *4 (N.D. Tex. Nov. 14, 2011) ("Distilled to its essence, Plaintiffs complain that the SEC failed to initiate an investigation of the Stanford Defendants' scheme at the time and in the manner preferred by the Plaintiffs[.]").

The SEC also enjoys discretion in deciding whether and when to use the various enforcement tools at its disposal in order to bring a stop to fraudulent operations. The 1934 Act specifically provides that "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of [the securities laws], it *may in its discretion* bring an action in the proper district court . . . to enjoin such acts or

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[5] *See Bd. of Trade of Chi. v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) (recognizing that "[i]nvestigation" under the Act is "discretionary, not mandatory"); *Sprecher v. Von Stein,* 772 F.2d 16, 18 (2d Cir. 1985) (holding that officials "undertaking an investigation authorized by the federal securities laws" were "performing discretionary functions"); *Sprecher v. Graber*, 716 F.2d 968, 974 (2d Cir. 1983) (recognizing that "SEC investigations" are discretionary under the Act); *Dichter-Mad Family Partners LLP v. United States*, 707 F. Supp. 2d 1016, 1036 (C.D. Cal. 2011) (finding there to be no statutes, regulations, or policies that "require[d] the SEC to conduct its investigations in any particular manner; rather, the agency retains broad discretion to decide how to conduct its investigations."); *Molchatsky v. United States*, 778 F. Supp. 2d 421, 434 (S.D.N.Y. 2011) ("Plaintiffs have not identified any specific, non-discretionary mandate that the SEC conduct investigations under particular circumstances, or that such investigations be conducted in a particular manner."); *Standifer v. SEC*, 542 F. Supp. 2d 1312, 1318 (N.D. Ga. 2008) ("The SEC is granted broad discretion by Congress to investigate possible violations of the securities laws and to determine whether to bring civil or criminal actions to remedy those violations. The FTCA does not apply to Plaintiffs' claims.") (citation omitted); *SEC v. Better Life Club of Am.*, 995 F. Supp. 167, 180 (D.D.C. 1998) ("Investigation . . . under [the Act] is discretionary . . . ."); *Leytman v. NYSE*, No. 95 CV 902, 1995 WL 761843, at *3 (E.D.N.Y. Dec. 6, 1995) ("The decision of whether or not to investigate . . . is left in the discretion of the Commission. Even if the Commission abuses that discretion, the court may not intervene.").

practices." 15 U.S.C. § 78u(d)(1) (emphasis added).[6] Again, the courts are unanimous in holding that these statutory powers are discretionary. *See Dichter-Mad*, 707 F. Supp. 2d at 1048 ("There are, in short, no mandatory obligations requiring the SEC to conduct its investigations in a particular manner or to bring an enforcement action in particular situations."); *Molchatsky*, 778 F. Supp. 2d at 436-37 ("In light of [the] statutory and regulatory language, the courts have 'unanimously' rejected challenges to the SEC's use of its investigatory or enforcement powers.").[7] As the Northern District of Texas stated in *Dartez*, "[t]he heart of this action, however, consists of an attack on one of the most quintessentially discretionary government functions – an agency's decision to regulate." *Dartez,* 2011 WL 5529841, at *3. The court found that "the decision to investigate and prosecute under the federal securities laws falls squarely within the SEC's discretion." *Id*. (citation omitted).

Aware of this insurmountable case law – especially the recent cases in which challenges to the manner in which the SEC regulated Madoff and Stanford were barred by the discretionary function exception – Plaintiffs attempt to plead around the discretionary function exception by alleging that the SEC failed to comply with its putative statutory duty to notify SIPC that SGC

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[6] *See also* 17 C.F.R. § 202.5(b) ("After investigation or otherwise the Commission *may in its discretion* take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution.") (emphasis added).

[7] *See also Bd. of Trade*, 883 F.2d at 531 (noting that prosecution under the Act is "discretionary, not mandatory"); *id.* at 530 ("Refusal to prosecute is a classic illustration of a decision committed to agency discretion."); *Better Life Club*, 995 F. Supp. at 180 (holding that "prosecution under [the Act] is discretionary"); *Standifer*, 542 F. Supp. 2d at 1318 ("The SEC is granted broad discretion by Congress to investigate possible violations of the securities laws and to determine whether to bring civil or criminal actions to remedy those violations. The FTCA does not apply to Plaintiffs' claims.") (citation omitted); *Le v. SEC*, 542 F. Supp. 2d 1318, 1324 (N.D. Ga. 2008) (same).

was in "financial difficulty," and its putative statutory duty to institute proceedings to suspend or revoke SGC's registration.

Regarding the first putative duty, Plaintiffs cite to 15 U.S.C. § 78eee(a)(1), which provides that "[i]f the Commission . . . is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC[.]" *Id*.

This statutory provision cannot defeat the discretionary function exception, because the determination of whether a broker-dealer is "in or is approaching financial difficulty" is, on its face, an inherently subjective determination that requires the exercise of judgment and discretion.[8] Although Plaintiffs are of the opinion that SGC was in "financial difficulty" because it was funded through what appeared to be a Ponzi scheme, Plaintiffs have pointed to no statute or regulation that defines "financial difficulty," that provides a formula that the SEC must apply when making such a determination, or that requires that such a determination be reached if certain SEC staff believe that a broker-dealer is operating or benefitting from a Ponzi scheme. Thus, such a determination cannot be said to turn on "a fixed or readily ascertainable standard." *Hughes*, 110 F.3d at 768; *see also Powers*, 996 F.2d at 1124 (holding that regulation did not defeat discretionary function exception because it failed to provide a "fixed or readily ascertainable standard," notwithstanding its use of the word "shall").

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[8] *Cf. Hughes*, 110 F.3d at 768 (holding that general safety regulations did not defeat discretionary function standard because there was "ample room for postal employees to exercise judgment and choice" in deciding how to implement regulations); *Zumwalt v. United States*, 928 F.2d 951, 954 (10th Cir. 1991) (because guidelines called for "individual judgment," the "argument that the conduct at issue did not involve an exercise of judgment or choice must fail"); *Alicea Baez v. United States*, 976 F. Supp. 102, 106 (D.P.R. 1997) (decisions resting on "subjective, qualitative evaluations" are considered discretionary).

Moreover, when SIPC, which is not a Federal agency,[9] is notified that a broker-dealer is "in or is approaching financial difficulty," it is not necessarily required to take any particular action. Rather, SIPC "*may* . . . file an application for a protective decree with any court of competent jurisdiction[.]" 15 U.S.C. § 78eee(a)(3)(A) (emphasis added). If a protective decree is granted, the court "shall forthwith appoint, as trustee for the liquidation of the business of the debtor and as attorney for the trustee, such persons as SIPC, in its sole discretion, specifies." 15 U.S.C. § 78eee(b)(3). Whether SIPC decides to file such an application depends on, among other things, whether it believes that "the member . . . has failed or is in danger of failing to meet its obligations to customers[.]" 15 U.S.C. § 78eee(a)(3)(A)(**A**).[10] If an application is filed, the SEC may decide what, if any, involvement it will have in the proceedings. *See* 15 U.S.C. § 78eee(c) ("The Commission may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party.").

If, however, SIPC does not file such an application (which, if granted, would lead to liquidation proceedings) the SEC may, in its discretion, choose to do so. The relevant statutory provision provides:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission *may* apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

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[9] *See* 15 U.S.C. § 78ccc(a)(1)(A) (SIPC is "not an agency or establishment of the United States Government.").

[10] SIPC must also find that one of the statutory conditions required for a protective decree exist, as described at 15 U.S.C. § 78eee(b)(1)(A)-(D).

15 U.S.C. § 78ggg (b) (emphasis added).[11]

Thus, the relevant statutory provisions grant the SEC discretion not only in determining whether and when to notify SIPC that a broker-dealer is in "financial difficulty," but also in deciding what, if any, action to take should SIPC decide not to apply for a protective decree upon receiving such notification.

Regarding Plaintiffs' argument that the SEC had a statutory duty to deny SGC's annual registration, Plaintiffs misunderstand the applicable statutory provisions. While the statute requires an investment adviser to register with the SEC in order to "make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser[,]" 15 U.S.C. §80b-3(a), there is no statutory provision requiring that an investment adviser undergo a similar application process to re-register on an annual basis.

In any event, the SEC has the authority to "censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser[.]" 15 U.S.C. §80b-3(e). The SEC may exercise this authority only if it "finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest" *and* that the investment adviser falls into at least one of the categories set forth in 15 U.S.C. §80b-3(e)(1)-(9). *See id.*

Although this statutory provision sets forth the range of regulatory actions the SEC must take *if* it finds, after a hearing, that an investment advisor falls into at least one of the categories set forth in 15 U.S.C. §80b-3(e)(1)-(9) *and* that such action would be in the public interest, the

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[11] *See also SIPC v. Barbour*, 421 U.S. 412, 417-418 (1975).

statute does not dictate any circumstances under which the SEC must institute such a regulatory proceeding in the first place. Thus, the SEC retains discretion as to whether to institute a regulatory proceeding under 15 U.S.C. §80b-3(e). Moreover, even if a regulatory proceeding is instituted under 15 U.S.C. §80b-3(e), the SEC nevertheless retains the discretion to determine whether taking any sort of action against the investment advisor would be "in the public interest," which quite obviously calls for the exercise of judgment and discretion. *See Zumwalt*, 928 F.2d at 956 (determining whether something is in the "'best overall public interest' was infused with such a 'welter of public policy considerations' as to fall within the discretionary function exception") (quoting *Miller v. United States*, 710 F.2d 656, 665 (10th Cir. 1983).[12]

C. How the SEC Regulates the Securities Industry is Susceptible to Policy Analysis

The manner in which the SEC chooses to regulate the securities industry is susceptible to policy analysis. Indeed, as the legislative history demonstrates, Congress was thinking of the SEC's regulatory role in particular when discussing the discretionary function exception. *See* H.R. Rep. No. 79-1287, at 5-6 (1945) (noting that the exception was "designed to preclude application of the [FTCA] to a claim against a regulatory agency, such as . . . the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee."). Congress considered it unwise for the propriety of a discretionary administrative act to "be tested through the medium of a damage suit for tort." *See id.*; *see also* Hearings on

[12] *See also Callas' Estate v. United States*, 682 F.2d 613, 619-20 (7th Cir. 1982) ("The discretionary function exception precludes government liability for policy judgments concerning the public interest.") (citation and internal quotation marks omitted); *Sauders v. South Carolina Public Service Authority*, 856 F. Supp. 1066, 1075 (D.S.C. 1994) ("A determination of the 'public interest' in these situations obviously calls for an exercise of discretion in the manner contemplated by the discretionary function exception to the FTCA.").

H.R. 5373 and H.R. 6463 before the H. Comm. on the Judiciary, 77th Cong. 28, 33 (1942) (statement of Asst. Att'y Gen. Francis M. Shea) ("It is neither desirable nor intended that . . . the propriety of a discretionary administrative act[] should be tested through the medium of a damage suit for tort."); *see also Varig Airlines*, 467 U.S. at 810 ("[The discretionary function] exception was added to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action.").

As the Supreme Court has explained

> [W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name.

Varig Airlines, 467 U.S. at 813-14.

Accordingly, courts have routinely held that the manner in which the SEC regulates the securities industry involves classic policy considerations. As the Seventh Circuit has explained:

> Congress gives the SEC a budget, setting a cap on its personnel. With limited numbers of staff-years, the Commission must enforce several complex statutes. To do this intelligently the Commissioners must assign priorities. Prosecuting [one wrongdoer] means less time for something else—investigating claims of fraud in issuing new stock or conducting a takeover contest, resolving disputes under the Investment Company Act, and so on.
>
> Courts cannot intelligently supervise the Commission's allocation of its staff's time, because although judges see clearly the claim the Commission has declined to redress, they do not see at all the tasks the staff may accomplish with the time released. Agencies must compare the value of pursuing one case against the value of pursuing another; declining a particular case hardly means that the SEC's lawyers and economists will go twiddle their thumbs; case-

> versus-case is the daily tradeoff. Judges compare the case at hand against a rule of law or an abstract standard of diligence and do not see the opportunity costs of reallocations within the agency. That fundamental difference in the perspectives of the two bodies is why agencies . . . rather than courts must make the decisions on pursuing or dropping claims. Resource allocation is not a task governed by "law." It is governed by budgets and opportunities.

Bd. of Trade, 883 F.2d at 531.

Recently, in two cases in which investors brought suit under the FTCA for the SEC's failure to stop Madoff's Ponzi scheme, the courts held that the manner in which the SEC regulates the securities industry is a policy-laden function not to be second-guessed by the judiciary. *See Molchatsky*, 778 F. Supp. 2d at 437 ("Courts are ill-suited to oversee the decisions of the SEC precisely because of their inherent policy-oriented nature, often involving considerations of resource allocation and opportunity costs.") (citations omitted); *Dichter-Mad*, 707 F. Supp. 2d at 1039 ("[T]he decisions of whether and how to conduct investigations and enforcement actions are firmly lodged in the SEC's discretion.").

Indeed, in *Dartez*, where investors with Stanford sought damages based on the SEC's failure to bring an earlier end to Stanford's operations, the district court summarized their claim as follows: "Plaintiffs' attribute their damages specifically to SEC inaction where the Plaintiffs' would have preferred otherwise." *Dartez,* 2011 WL 5529841, at *3. In holding that their claim was barred by the discretionary function exception, the court held:

> To find the Exception inapplicable here, moreover, invites the public to use the Act as a means to police government agencies' internal affairs. Congress included the Exception precisely because it "wished to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort" and " 'to protect the Government from liability that would seriously handicap efficient government operations.'" . . . Because

> the "[r]efusal to prosecute is a classic illustration of a decision committed to agency discretion," this action implicates those principles. Accordingly, the Court holds that the FTCA's waiver of sovereign immunity does not extend to the Plaintiffs' claims.

Dartez, 2011 WL 5529841, at *4 (quoting *Varig Airlines*, 467 U.S. at 814); *see also id.* ("[D]ecisions concerning the institution and management of regulatory proceedings fall squarely within the Exception").

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2012, the foregoing Motion to Dismiss and Incorporated Memorandum of Law was served on counsel for all parties via a Notice of Electronic Filing through the CM/ECF system.

/s/ Philip D. MacWilliams
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PHILIP D. MACWILLIAMS