[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15074

D.C. Docket Nos. 1:16-cv-00294-MW-GRJ

ILLINOIS METROPOLITAN INVESTMENT FUND,
UNIVERSITY OF WISCONSIN CREDIT UNION,
HARVARD SAVINGS BANK,
ENCORE BANK NA,
CITIZENS BANK,
BLACKHAWK BANK,
WATERFRONT SERVICES CO.,

Plaintiffs-Appellants,

PENNANT MANAGEMENT INC,

Consolidated Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Florida

(May 15, 2019)

Before WILLIAM PRYOR and ROSENBAUM, Circuit Judges, and CONWAY,* District Judge.

PER CURIAM:

Seven investors, along with their registered investment advisor, Pennant Management, Inc.,[1] asserted claims arising out of the purchase of ostensible federally-guaranteed portions of loans sold on the secondary market. The loans originated with First Farmers Financial, LLC ("FFF"), who had been approved as a nontraditional lender by the U.S. Department of Agriculture ("USDA") under a loan program designed to increase lending to rural communities; USDA would guarantee up to 80% of such loans. Following the purchase of $179 million in FFF-originated loans, Pennant and the investors subsequently learned the loans were made to fictitious borrowers with forged USDA guarantees as part of a massive Ponzi scheme instigated by FFF's owners, Nikesh Patel and Timothy Fisher.[2]

*Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

[1] Appellants Illinois Metropolitan Investment Fund, University of Wisconsin Credit Union, Harvard Savings Bank, Encore Bank NA, Citizens Bank, Blackhawk Bank and Waterfront Services Company pursue their claims directly, while four additional investment clients assigned their interests to Pennant. The cases were consolidated in the district court, as are the appeals.

[2] Patel, FFF's chief executive officer, pleaded guilty to five counts of wire fraud and was sentenced to 25 years in prison; Fisher, FFF's president and chief operating officer, was sentenced to ten years for money laundering. *See United States v. Patel*, 921 F.3d 663 (7th Cir. 2019) (affirming the sentence for Patel, who was arrested days before sentencing while attempting to board a chartered flight to Ecuador with a plan to abscond with funds newly-stolen during the months he remained on bond awaiting sentencing); *see also In re First Farmers Fin. Litig.*, No. 14-cv-7581, 2017 WL 85442 (N.D. Ill. Jan. 10, 2017) (receivership action).

The investors first sought to recover against FFF, and then sued the United States under the Federal Tort Claims Act ("FTCA").[3] They allege the USDA acted negligently in approving FFF as a nontraditional lender to originate loans which allowed FFF to enter the secondary market for the guaranteed loans and perpetrate the massive fraud. In approving FFF, the investors argue, USDA negligently investigated FFF's statements about its operations, principals, and auditor, which proved to be false.

The federal government moved to dismiss the investors' negligence claims, arguing, among other things, that it was entitled to sovereign immunity. The district court dismissed the investors' negligence claims based on the discretionary function exception to the waiver of sovereign immunity in the FTCA. The investors challenge the district court's dismissal of their negligence claims for lack of subject matter jurisdiction and the limitation of their discovery to jurisdictional issues. We review *de novo* a district court's order dismissing a case for lack of subject matter jurisdiction. *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 843 (11th Cir. 2013).

[3]On November 6, 2018, the Securities and Exchange Commission entered an Order Instituting Administrative and Cease and Desist Proceedings imposing a $400,000 sanction for Pennant's "negligent[] failure to perform adequate due diligence and monitoring of certain investments contrary to representations" to the SEC and investors. *In the Matter of Pennant Management Inc.*, Admin. Proceeding File No. 3-18884, Investment Adviser Act of 1940, Release No. 5061 (Nov. 6, 2018) (available at https://www.sec.gov/litigation/admin/2018/ia-5061.pdf).

"It is well settled that the United States, as a sovereign entity, is immune from suit unless it consents to be sued." *Zelaya v. United States*, 781 F.3d 1315, 1321 (2015). The FTCA waives the sovereign immunity of the United States and grants the federal district courts exclusive jurisdiction over damages claims against the United States arising out of injuries "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); *id.* § 2674; *see also JBP Acquisitions, LP v. United States ex rel. FDIC*, 224 F.3d 1260, 1263 (11th Cir. 2000). Where the FTCA applies, the Government may be liable for certain torts "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

However, the United States may condition this waiver of sovereign immunity "as broadly or narrowly as it wishes, and according to whatever terms it chooses to impose." *Zelaya*, 781 F.3d at 1321-22 (citation omitted). The court "must strictly observe the limitations and conditions upon which the Government consents to be sued and cannot imply exceptions not present within the terms of the waiver." *Id.* at 1322 (quotation omitted). Relevant to the claims in this case, the United States cannot be held liable for harm resulting from its "discretionary function[s]." 28 U.S.C. § 2680(a). This exception preserves sovereign immunity for any claim based on the performance or failure to perform a discretionary

function by a federal employee, even if the Government employee may have abused his discretion. *See* 28 U.S.C. § 2680(a). When the discretionary function exception applies to a claim, the federal court lacks subject-matter jurisdiction over the claim. *See Swafford v. United States*, 839 F.3d 1365, 1369 (11th Cir. 2016). A two-part test determines whether the discretionary function exception applies: whether the conduct that forms the basis of the suit involves an element of judgment or choice by the employee; and "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L.Ed.2d 531 (1988).

The investors in this case allege the USDA was negligent in relying on the documents FFF submitted and failing to investigate and discover that FFF lacked the financial resources to qualify as a nontraditional lender and fabricated the information in the application.[4] In finding the investors' claims barred by the discretionary function exception, the district court noted the "heart" of the investors' allegation is "the USDA was negligent in determining the amount of investigation required before approving a lender" for the loan program, and this "decision of how much investigation to conduct" is precisely the type of

[4]The investors cite 7 C.F.R. § 4279.29(b) which governed approval of nontraditional lenders' applications under the Business & Industry Guaranteed Loan Program for rural communities at the time of FFF's application. 7 C.F.R. § 4279.29(b) (describing requisite lending activity and equity levels) (2016). The district court found, to the extent mandatory language was used in this regulation, such language was directed at the lender and not at the USDA.

governmental decision that the discretionary function exception was designed to protect. *See Zelaya*, 781 F.3d at 1332 (citing cases and applying the discretionary function exception to preclude investors' claims against the Security and Exchange Commission's for failure to investigate and dissolve fraud schemes).

After careful consideration of the parties' briefs, the record, and the law, we find the district court correctly applied the discretionary function exception because the amount and the means of investigation required of the USDA in reviewing nontraditional lender applications was at the discretion of the USDA.[5] The district court correctly found that the discretionary function exception applies and the United States was entitled to sovereign immunity. Accordingly, we affirm the district court's dismissal of the investors' claims against the United States. We also find that the district court's limitation of discovery to jurisdictional issues was not an abuse of discretion.

AFFIRMED.[6]

[5]The Government argued in the alternative that the district court lacked subject matter jurisdiction because there was no state law analogue for the negligent failure to investigate, and because the misrepresentation exception of 28 U.S.C. § 2680(h) applied. The district court did not rely on either of these additional arguments, and we need not address them.

[6]This appeal was originally scheduled for oral argument, but under 11th Circuit Rule 34–3(f) it was removed from the oral argument calendar.