No. _____

In The
Supreme Court of the United States

SEASIDE FARM, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Fourth Circuit affirmed the Rule 12(b)(1) dismissal of this lawsuit brought by Seaside Farms, Inc. ("Seaside") under the Federal Tort Claims Act ("FTCA"). The Fourth Circuit held that the conduct of the Food and Drug Administration ("FDA") in failing to execute its decision in a reasonable manner, if at all, and its failure to follow its own policies, was shielded, as a matter of law, by the discretionary function exception.

In *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991), this Court established a two-part inquiry for determining whether the discretionary function exception to the FTCA shields the Government's conduct from suit. This Court has not substantively revisited the discretionary function exception in the 26 years since *Gaubert*. During this period, substantial conflicts have arisen in the Circuit Courts regarding the discretionary function exception. The Circuit Courts are split on whether *Berkovitz* and *Gaubert* implicitly overturn this Court's holding in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955); whether *Berkovitz* and *Gaubert* require the burden of proof to be placed on a plaintiff to prove the inapplicability of the discretionary function exception; and how *Berkovitz* and *Gaubert* should be applied in determining whether or not there is subject matter jurisdiction.

The questions presented are as follows:

(1) Should this Court resolve the split among the Circuit Courts and reaffirm its holding in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955)?

(2) Should this Court resolve the split among the Circuit Courts and find that the discretionary function exception is an affirmative defense to liability that the Government must prove?

(3) Should this Court resolve the split among the Circuit Courts and confirm that under *Berkovitz* and *Gaubert*, the discretionary function exception does not apply if a federal policy specifically prescribes a course of conduct, or if an agency's conduct in failing to execute its decision does not involve an element of judgment, or, if so, that judgment is not the kind that the discretionary function exception was designed to shield?

PARTIES

The parties to this proceeding are set forth in the caption.

RULE 29.6 STATEMENT

The petitioner is a South Carolina corporation, but does not have a parent corporation or shares held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Seaside Farm, Inc. ("Seaside") respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit dismissing Seaside's lawsuit brought under the Federal Tort Claims Act ("FTCA"). *Seaside Farm, Inc. v. United States*, 842 F.3d 853 (4th Cir. 2016) [App 1a]. The Fourth Circuit held that the Government's negligence was shielded by the Act's discretionary function exception. 28 U.S.C. § 2680(a).

OPINIONS AND JUDGMENTS BELOW

On March 6, 2012, the United States District Court for the District of South Carolina entered an Order granting in part and denying in part the Government's Rule 12(b)(1) Motion to Dismiss [App 31a].

On December 15, 2015, the United States District Court for the District of South Carolina issued a ruling from the bench on the Government's Motion for Summary Judgment (Renewed), which, after argument, it converted to a Rule 12(b)(1) Motion to Dismiss, which it granted [App 21a]. The Judgment was entered on December 16, 2015 [App 19a].

On December 2, 2016, the United States Court of Appeals for the Fourth Circuit issued a published Opinion [App 1a ("Opinion")]. The Judgment was entered December 2, 2016 [App 18a].

On January 31, 2017, the United States Court of Appeals for the Fourth Circuit denied Seaside's Petition for Rehearing *en banc* or Panel Rehearing [App 51a].

JURISDICTION

The Fourth Circuit denied Seaside's Petition for Rehearing *en banc* or Panel Rehearing on January 31, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2680 - Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--(a) Any claim based upon an action 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.

STATEMENT OF THE CASE

Introduction

Seaside is a family farm which grows tomatoes on St. Helena Island in South Carolina [JA1042-1044]. On June 7, 2008 – two days after Seaside began harvesting its tomato crop – the Food and Drug Administration ("FDA") posted a press release on its website ("June 7 Announcement") to inform consumers that its earlier health warning linking tomatoes with Salmonella Saintpaul did not apply to tomatoes grown in South Carolina (and seven other states, including Georgia and North Carolina).

Contrary to the Good Samaritan Rule and its own protocols, FDA failed to inform the media and stakeholders of its decision. Seaside was, therefore, caught up in the nationwide tomato panic, and many of the world's best and safest tomatoes rotted in the field as FDA did nothing to correct this mistake.

Seaside does not challenge FDA's exercise of discretion regarding any decision it made to protect the public health. Seaside challenges FDA's failure to execute its commendable decision to inform the public of the existence of safe tomatoes. Seaside's lawsuit is all about execution, execution, execution.

This Court recently observed that in keeping with the provisions of the FTCA requiring the United States to be held accountable in the same manner and the same extent as a private individual, "this Court has often rejected the Government's calls

to cabin the FTCA on the ground that it waives sovereign immunity – and indeed, the Court did so in the years immediately after the Act's passage, even as it was construing *other* waivers of immunity narrowly." *United States v. Kwai Fun Wong*, ___ U.S. ___, 135 S. Ct. 1625, 1638 (2015) (emphasis in original). This Court cited several cases for this statement, including *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955).

In *Indian Towing*, this Court held that although the coast guard had no obligation to undertake lighthouse service, once it exercised its discretion to do so, it was obligated to exercise due care. In the ensuing sixty-two years, this Court has never repudiated *Indian Towing*. Seaside heavily relied on *Indian Towing* below in support of its argument that having decided to exercise its discretion and inform consumers of safe tomatoes, it had a duty to execute that decision in a reasonable manner.

The Fourth Circuit declined to address *Indian Towing*, presumably because it previously had held that later decisions of this Court "have all but disavowed *Indian Towing* as authority relevant to the discretionary function exception." *Baum v. United States*, 986 F.2d 716, 723 (4th Cir. 1993) (citations omitted).

As discussed below, there is a major split of authority among the Circuit Courts on this precise issue. In fact, only 36 days before the Fourth Circuit decided *Seaside*, the Eleventh Circuit reached an opposite conclusion in *Swafford v. United States*, 839

F.2d 1165 (11th Cir. 2016). Consequently, if Seaside's farm was located 38 miles to the west (in Georgia), it could have litigated the same lawsuit involving the same June 7 Announcement issued by FDA in a jurisdiction that continues to recognize *Indian Towing*.

Additionally, the Fourth Circuit placed the burden of proof on Seaside to prove the inapplicability of the discretionary function exception. As discussed below, there is also a major split of authority among the Circuit Courts on this precise issue.

Seaside also argued that FDA's failure to execute its decision to inform consumers of safe tomatoes violated this Court's holding that the discretionary function exception does not apply "if a federal statute, regulation, **or policy** specifically prescribes a course of action for an employee to follow." *United States v. Gaubert*, 499 U.S. 315, 322 (1991), quoting *Berkovitz v. United States*, 486 U.S. 531 (1988) (emphasis added). The Fourth Circuit held (before merits discovery or a trial) that FDA did not have to consider or to try and comply with its own protocols on how to execute its decision. Opinion at 10 [App 9a] ("[t]he price of circulating internal guidance should not be an exponential increase in exposure to a tort suit"). The Fourth Circuit's holding that there is a distinction between compliance with statutes and regulations, on the one hand, and policies on the other hand, is contrary to *Gaubert* and *Berkovitz* and is apparently at odds with all other Circuit Courts.

The Fourth Circuit also held that any execution over a decision within the Government's discretion is, in effect, automatically protected in its execution. That holding was at odds with all other Circuit Courts.

Finally, the Fourth Circuit did not determine that FDA's failure to communicate its decision to inform consumers of safe tomatoes involved an element of judgment, a necessary finding under *Gaubert*, or that such a failure would have been of the kind that of judgment the discretionary function exception was designed to shield. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

Procedural Background

Seaside filed this lawsuit on May 18, 2011, seeking recovery under the FTCA for damages it sustained as a result of FDA's negligent execution of its June 7 Announcement [JA149]. The Government filed a Rule 12(b)(1) Motion to Dismiss in which it asserted that its conduct was protected by the discretionary function exception. 28 U.S.C. § 2680(a). The district court issued a written order in which it accurately described the Government's defense as follows:

> The FDA maintains that its warnings acknowledged that the source of the contamination might have been limited to a single grower or packer in a single geographic region. The FDA further claims that on June 7, 2008, four days after it had issued its initial warning, it released an updated report

> listing several geographic sources that it had determined were not associated with the salmonella outbreak, and whose tomatoes posed no risk to consumers. This "safe list" allegedly included North and South Carolina as well as six other states and several foreign countries.

[JA177]. Thus, from the outset, the basis of both Seaside's complaint and the Government's defense centered on the June 7 Announcement.

The district court denied the Government's Motion to Dismiss Seaside's negligence cause of action [JA188]. The district court ruled that Seaside could conduct limited jurisdictional discovery based on "two compelling counterarguments" made by Seaside [JA185-186]:

First, the district court discussed this Court's two-pronged analysis in determining whether or not the discretionary function applies [JA184-186]. The district court recognized that under the first prong, "the discretionary function exception does not apply 'if a federal statute, regulation, **or policy** specifically prescribes a course of action for an employee to follow' (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991), quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)) (emphasis added) [JA184]. The district court found that under the second prong, "'assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield'" (citing *Berkovitz* at 536) [JA184-185].

Second, the district court held that "even if § 2680(a) shields the Secretary's discretion to decide whether to make a public announcement or recall a product, the statute does not relieve the government of its responsibility to ensure that the decision is executed in a reasonable manner" (citing, in part, *Indian Towing Co. v. United States*, 350 U.S. 61, 122 (1955) [JA185].

The pleadings were joined when the Government filed its Answer on April 24, 2012 [JA189-195]. The Government asserted that "on June 7, 2008, the FDA focused its consumer warning by excluding the tomatoes from certain states, including South Carolina, which had not been associated with the Salmonella outbreak" [JA190].

Seaside was only allowed to conduct limited jurisdictional discovery in accordance with the district court's ground rules [App 49a]. As specifically authorized by the district court, Seaside sought and the Government produced "FDA's 'written and unwritten protocols' to determine whether there was a course of action that the FDA

was required to follow, or whether the decision was truly discretionary" [JA185, JA251].[1] The Government also produced a Rule 30(b)(6) witness on the issue of execution [JA382].

The Government filed a Motion for Summary Judgment [JA786]. The Government again told the district court that "on June 7, 2008, FDA issued an updated news release" which announced that "tomatoes from specific geographic areas were not associated with the *Salmonella* Saintpaul outbreak and, therefore, did not pose a risk to consumers" [JA790]. The Government again stated that, "The 'safe' or 'exclusion' list included in FDA's announcement" included South Carolina [JA790].

On December 15, 2015, following briefing and oral argument, the district court, *sua sponte*, converted the Motion for Summary Judgment into a Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction [JA1071].[2] The district court

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[1] The Government explained to the district court that the documents it produced "are used as guides by FDA employees in responding to emergency outbreak investigations [JA303]. Later, in claiming that Seaside's discovery went beyond that authorized by the district court, the Government argued that the district court had authorized discovery on the issue of "whether the FDA acted reasonably in communicating this information to the public in accordance with its emergency response guidelines, already produced to Plaintiff" [App 53a-54a].

[2] The parties briefed the Motion for Summary Judgment based on the Rule 56 standard of whether or not there were any genuine issues of fact. The Fourth Circuit did not address Seaside's argument that the district court erred in not permitting it to brief and argue the 12(b)(1), which presents a

orally ruled and dismissed Seaside's lawsuit based upon the discretionary function exception [JA1078]. Despite its earlier written order, the district court did not discuss FDA's execution of its decision, nor did it refer to *Indian Towing*, which Seaside had relied upon in its opposition brief [JA1086, 1098, 1114] and argument [JA1053, 1061-1063].[3]

On appeal, Seaside argued at the outset that the case should be remanded for completion of discovery and briefing and argument on the 12(b)(1) Motion that the Government did not file [Brief of Appellant at 25]. In the alternative, Seaside argued that the case should be remanded for argument on whether or not the Government met its burden of proof on the Motion for Summary Judgment it did file [*Id*. at 33].

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different standard of proof. Although the Government did not argue the point to the district court, the district court was correct that the Fourth Circuit required such a Motion to be filed under Rule 12(b)(1). *Williams v. United States*, 50 F.3d 299, 304 (4th Cir.1995). There is also a split of authority among the Circuit Courts on this point. Compare, *Keller v. United States*, 771 F.3d 1021, 1023 (7th Cir. 2014).

[3] Several weeks earlier, the district court had dismissed a lawsuit filed by another tomato grower arising out of the FDA's decision issue a contamination warning. *Williams Farms Produce Sales, Inc. v. United States*, No. 2-11-cv-1399 (D.S.C. Nov. 19, 2015]. The district court essentially read into the record the same ruling it had read into the record in the *Williams* case. The plaintiff in *Williams*, however, never raised *Indian Towing* or the manner in which FDA executed its decision, most likely because *Williams* primarily involved Florida tomatoes which were not on the safe list. In addition, unlike Seaside, the district court granted *Williams* full merits discovery [JA1046-1052, 1056, 1060, 1064, 1066, 1070].

The Fourth Circuit recognized at the outset of its decision that the media reported FDA's June 7 Announcement "without mentioning that some tomatoes were not implicated." Opinion at 5 [App 4a]. In addition, the Fourth Circuit found that, "FDA officials also stressed the magnitude and national scope of the outbreak but likewise **failed to mention any 'safe' tomatoes**." Opinion at 5 (emphasis added) [App 4a].[4]

Notwithstanding this factual finding going to the heart of Seaside's negligence claim, the Fourth Circuit affirmed the judgment of the district court that the June 7 Announcement "was essential to protect FDA's vital role in safeguarding the public food supply." Opinion at 3 (citations omitted) [App 3a] The Fourth Circuit explained the basis of its decision as follows:

> As the district court rightly noted, decisions regarding contamination warnings are "grounded in the policy of protecting the public from a health risk, **and reducing adverse economic impact**." Discretion is necessary to evaluate available information, assess the sufficiency and reliability of evidence, resolve conflicting data, determine the overall nature of a health threat, and ultimately settle on a course of action. Both the timing and content of a contamination warning reflect this analysis. Acting too soon

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[4] The Court did not note the purpose of the updated June 7 Announcement, nor did the Court note that FDA admitted that it was required to inform retailers of safe tomatoes so that retailers could inform customers of this crucial fact.

> or waiting too late each entail profound potential consequences.

Seaside at 842 F.3d 859 (emphasis added, citations omitted) Opinion at 12 [App. 11a].

Seaside does not, however, challenge FDA's discretion to issue a contamination warning, nor the timing or content of that decision. From the outset, Seaside has focused on FDA's execution of its decision.[5] The Fourth Circuit briefly discussed the issue of execution, but it did not address the particular basis of Seaside's argument. The Fourth Circuit did not explain how requiring the Government to reveal why it did not communicate its decision to inform consumers of safe tomatoes would amount to second guessing of any fundamental policy.

Specifically, the Fourth Circuit did not refer to any of FDA's protocols (briefly discussed below), which set forth how its decisions must be communicated to the media and to stakeholders. Instead, the Fourth Circuit focused on the discretion afforded FDA by its policies in making its decision whether to issue a warning (which Seaside does not challenge here).

The Fourth Circuit then noted in general that "[t]he price of circulating internal guidance should not be an exponential increase in exposure to a tort suit." Opinion at 10 [App 9a]. The Fourth Circuit did not explain how informing consumers of the

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[5] Over the course of the litigation, Seaside also made other arguments which are not pertinent to this Petition.

existence of safe tomatoes (which was the purpose of the June 7 Announcement) in accordance with its own protocols would undermine "FDA's vital role in safeguarding the public food supply" and "protecting the public from serious health risks and minimizing any adverse economic impact on associated industries," Opinion at 3, 6 [App 3a, 6a]. The Fourth Circuit did not explain how the important policy of reducing adverse economic impact could be squared with the major economic damage to Seaside and other growers caused by FDA's failure to execute the June 7 Announcement in compliance with FDA's protocols.

Neither did the Fourth Circuit discuss the Good Samaritan Rule or cite *Indian Towing*, despite Seaside's extensive reliance on that doctrine [Appellant's Brief at 36-40]. Although not raised by the Government, the logical explanation is that two members of the panel previously had joined in an opinion aligning the Fourth Circuit with a minority of Circuit Courts finding that *Indian Towing* is no longer "good law." *Baum v. United States*, 986 F.2d 716, 723 (4th Cir. 1993). This split among the Circuits is discussed below as one basis for granting a writ of certiorari.

Seaside raised all of these points in a Petition for Rehearing and Rehearing En Banc [Doc. 76], which the Fourth Circuit denied without comment on January 31, 2017 [App 5a].

Factual Background

The basic facts are undisputed and uncomplicated. In April 2008, FDA opened an investigation as a result of reported cases of Salmonella Saintpaul in New Mexico and Texas [JA147-148]. The source of the contamination was unknown, but FDA knew that it was "extremely unlikely" that there was more than one geographic source associated with the contamination [JA829].

At some point, FDA suspected raw tomatoes as the cause, but as early as June 1, FDA informed its colleagues in Mexico that, given the dates of onset, "historically the tomatoes eaten in the USA at that time of year come generally (in the western USA) from Mexico and (in the eastern USA) from [southern] Florida" [JA694-696]. Because the harvesting of South Carolina tomatoes would not begin until months after the onset of the problem, FDA knew from the outset that South Carolina tomatoes were not implicated.

On Tuesday, June 3, 2008, FDA posted a press release on its website warning consumers in New Mexico and Texas about a Salmonellosis outbreak, which appeared to be linked to consumption of certain types of tomatoes ("June 3 Warning") [JA147-148]. Because the June 3 Warning was confined to consumers in New Mexico and Texas, the value of Seaside tomatoes may have increased with this announcement [JA1042-1044].

On Saturday night, June 7, 2008 – two days after Seaside began picking its tomato fields [JA1042] – FDA posted the subject Announcement on its website [JA632]. Despite the Government's reliance on this action before the district court as a defense to any perceived challenge to its decision to issue the Announcement, FDA recognized that a consumer is not expected to troll FDA's website for a press release before purchasing produce. FDA protocols required FDA to take a number of specific steps to inform the public of its June 7 Announcement through the media, including requirements for constant follow-up to make sure that its messaging was effective.[6] In addition, FDA's protocols set forth specific directives for FDA to inform "stakeholders" (including retailers and the

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[6] FDA's Center for Food Safety & Applied Nutrition Plan ("CERP") had a specific provision to prevent the media from misconstruing an FDA report. CERP creates a Media Monitor "responsible for monitoring television and other news media and keeping the Situation Room informed of events related to the emergency incident as they are being reported to the public" [JA871]. The Monitor must "[b]rief the Situation Room staff on late-breaking and routine news related to the emergency event" [JA871]. Leaving aside FDA's failure to inform the media of the existence of safe tomatoes, had it followed its own procedures, it could have quickly mitigated the resulting harm before most of Seaside's tomatoes were harvested (Seaside growing season lasted until July 1, 2008) [JA1042].

industry) of the June 7 Announcement.[7] FDA did neither.

As the Fourth Circuit recognized, FDA, directly and through the media, failed to mention any safe tomatoes. As a result, despite the purpose of the June 7 Announcement, the news media reported that all tomatoes were implicated. Seaside representatives immediately viewed newspaper accounts and television reports of contaminated and dangerous tomatoes, including one particular account on a nationwide morning show with a reporter holding a red round tomato just like the ones grown at Seaside Farm stating "don't eat tomatoes." No geographical qualification was given in these initial media reports [JA1042-1044]. FDA was aware of the contemporaneous media coverage reporting that all fresh round tomatoes were dangerous [JA1176-1188], but it did not produce any evidence that it attempted to get the media to clarify these and other inaccurate or incomplete reports as it was supposed to do under its protocols.

The media did not just fail to mention any safe tomatoes, but FDA's own scientists appeared on national shows without mentioning this point which was at the heart of the June 7 Announcement. For example, FDA's representative appeared on the PBS NEWSHOUR segment: "Salmonella Concerns

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[7] For example, CERP provides in Appendix Z that "CFSAN will provide information to industry and other stakeholders through CFSAN's extensive stakeholder blast fax" [JA883, 886]. The record contains no evidence that this was done or that the failure to inform stakeholders of safe tomatoes was the result of a policy decision.

Prompt Widespread Tomato Recalls" [JA1180-1185]. According to PBS, "Concerns over salmonella contamination have led the FDA to issue nationwide health warnings for tomatoes," and that, "Some of the nation's largest restaurant and grocery chains, including McDonald's, Burger King, Wal-Mart, and Ralph's have pulled the affected tomatoes from their shelves and menus" [JA1180-1181]. PBS interviewed two FDA employees, who explained the situation as follows:

> Dr. Andrew Von Eschenbach, Food and Drug Administration Commissioner: Ultimately, what we want to find is, where is the source of the problem and what needs to be done to eliminate the problem?
>
> J.D. Hanson, Center on Food Safety: This could affect the whole country. I mean, we're talking about tomatoes grown by large commercial firms that get shipped everywhere.

[JA1180]. Importantly, neither Dr. Von Eschenbach nor Mr. Hanson pointed out that there were safe tomatoes available.

Although not discussed by the Fourth Circuit, perhaps of equal importance was the failure of the Government to produce any evidence that it ever followed its own policy requiring it to inform retailers – the primary customers of tomato growers – of the existence of safe tomatoes.[8] FDA's

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[8] This omission is particularly enigmatic because on Friday, June 6, after FDA's scientists concluded that Mexico

Rule 30(b)(6) witness testified that it was also the responsibility of retailers to inform consumers [JA565-567]. Yet, major retailers such as Wal-mart and McDonald's pulled all of their tomatoes from the shelves without making any distinction between suspect and safe tomatoes. Moreover, despite the fact that FDA has not issued any recall, there were hundreds of news reports that all tomatoes had been recalled (including, for example, the News Hour report discussed above where FDA's representatives appeared) [JA1180-1185].

No United States produce was ever shown to be contaminated with Salmonella Saintpaul. Shortly after Seaside's harvesting season ended, FDA acknowledged that Mexican peppers were the source of the contamination [JA150].

Seaside suffered $15,036,293.95 in damages that are directly attributable to FDA's failure to

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was the source of contamination [JA681], it circulated a draft document entitled, "Advice for Retailers, Restaurateurs [JA682-686]. Late that evening, however, after being told that the determination that Mexico was the source of the contamination was based on data provided by both industry and states, the associate commissioner for foods immediately told those involved in the Investigation that they should exclude any industry data because that may be considered "biased" [JA690]. When FDA posted the June 7 Announcement the following evening, it did not provide any advice to retailers (as it had drafted to accompany the aborted announcement identifying Mexico as the source).

execute its June 7 Announcement [JA40-144, JA1042-1044].[9]

REASONS FOR GRANTING THE WRIT

The central question in this case has always been whether or not the Government has unbridled discretion to execute its decisions anyway it chooses or not at all. *Indian Towing* teaches that even where the Government has discretion to make a decision, it must execute that decision in a reasonable manner. *Berkovitz* and *Gaubert* hold that the discretionary function exception does not apply if (1) a federal policy specifically prescribes a course of action for an employee to follow; (2) the challenged conduct does not involve an element of judgment; or (3) if the conduct involves an element of judgment, the judgment is not of the kind that the discretionary function exception was designed to shield.

There are major splits in the Circuit Courts that undermine all of these decisions concerning the execution of a plan once formulated. Superimposed upon these divisions is a split of authority among the Circuit Courts on who bears the burden of proving the applicability of the discretionary function exception and at what point it is appropriate to decide that issue.

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[9] The Government's position was that the consumer could rely upon the person behind the cash register at a McDonald's to provide advice as to whether the tomatoes on a hamburger were safe [JA565-567].

Absent review by this Court, the Fourth Circuit's decision stands for the proposition that no Court can examine FDA's execution of its decisions, no matter how arbitrary or capricious or worse. The Fourth Circuit did not even require FDA to disclose if it attempted to execute its decision and, if so, how it did so.

A. THERE IS A CONFLICT REGARDING WHETHER *GAUBERT* IMPLICITLY OVERTURNS *INDIAN TOWING*

Notwithstanding that this Court has never suggested that *Indian Towing* has been overturned, there is a conflict among the Circuit Courts as to whether *Gaubert* reaffirms *Indian Towing* or implicitly overrules *Indian Towing*. As shown below, this split is best illustrated by the fact that if Seaside's Farm was located 38 miles to the west (in Georgia), it would have had the benefit of *Indian Towing*, which it was denied because its farm is located in the Fourth Circuit rather than the Eleventh Circuit.

In 1993, the Fourth Circuit held that subsequent decisions of this Court "have all but disavowed *Indian Towing* as authority relevant to the discretionary function exception." *Baum v. United States*, 986 F.2d 716, 723 (4th Cir. 1993), citing *Gaubert* at 499 U.S. 322, and *United States v. Varig Airlines*, 267 U.S. 797, 812 (1984). Two members of the Seaside panel were members of the *Baum* panel.

Twelve years later, the Tenth Circuit ruled that, "the discretionary function exception to the waiver of sovereign immunity implied in the Suits in Admiralty Act insulates the United States from liability in this case." *Harrell v. United States*, 443 F.3d 1231, 1233 (10th Cir. 2006).[10] The Tenth Circuit found that since *Gaubert*, several Circuit Courts, including the Tenth Circuit, had expressly recognized that *Indian Towing* is "simply not persuasive authority in the context of the discretionary function exception." *Id.* at 1237.[11] The Court then concluded that "*Indian Towing* does not preclude application of the discretionary function exception in this case. Thus, because the Coast Guard's decisions regarding the service and maintenance of the buoy involved discretionary judgment and because those decisions are 'susceptible to policy analysis,' the discretionary function exception to the waiver of sovereign immunity under the Suits in Admiralty Act insulates the government from liability." *Id.* at 1238 (citation omitted).

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[10] The opinion was authored by the district court on March 22, 2005, and formally adopted by the Tenth Circuit on April 6, 2006. In between the district court Order and the Court of Appeals decision, this Court decided *United States v. Olson*, 546 U.S. 43 (2005). The Tenth Circuit did not cite *Olson*, which reversed the Ninth Circuit and, in reliance on *Indian Towing*, held in a unanimous opinion that FTCA waives the Government's sovereign immunity only where local law would make a private person liable in tort, not where local law would make a state or municipal entity liable, even where uniquely governmental functions are at issue.

[11] Justice Gorsuch cited *Harrell* as precedent in the Tenth Circuit while a member of that Court. *Sydnes v. United States*, 523 F.3d 1179, 1187, n. 6 (10th Cir. 2008).

In addition to *Baum*, the Tenth Circuit cited prior cases from the Eleventh and First Circuits. *Ochran v. United States*, 117 F.3d 495, 505 (11th Cir.1997); *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 255 (1st Cir. 2003).[12] Subsequently, a 2-1 panel of the Sixth Circuit followed *Harrell* over a vigorous dissent by Senior Judge Gilbert S. Merritt, Jr. *Kohl v. United States*, 699 F.3d 935 (6th Cir. 2012). Thus, as of 2012, five circuits had held that *Indian Towing* did not survive *Gaubert*.

Recently, however, the Eleventh Circuit defected from the *Baum* and *Harrell* decisions and refused to follow its earlier decision in *Ochran* (relied upon by the Tenth Circuit in *Harrell*). *Swafford v. United States*, 839 F.3d 1365 (11th Cir. 2016).[13] *Seaside* and *Swafford* were decided only 36 days apart. Both cases begin with an analysis of the two-prong test set forth by this Court in *Berkovitz* and *Gaubert*. *Swafford* overruled the district court and found that the government was responsible for

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[12] The Tenth Circuit found additional support ("see also") in *Alfrey v. United States*, 276 F.3d 557, 567 (9th Cir. 2002). The Ninth Circuit has never explicitly held that subsequent decisions of this court have raised questions about the viability of *Indian Towing*, and a recent Ninth Circuit dissent by Senior Judge Andrew Kleinfeld relied on *Indian Towing* without any such suggestion. *Chadd v. United States*, 794 F.3d 1104 (9th Cir. 2015).

[13] In the meantime other Circuit Courts have continued to discuss *Indian Towing* without any challenge from the Government that it is no longer good authority. *See, e.g. Hornbeck Offshores Transportation v. United States*, 569 F.3d 506 (D.C. Cir. 2009); *Vuksich v. United States*, 191 F. Appx. 587 (5th Cir. 2008).

injuries sustained by plaintiff when he fell down a set of stairs. The Eleventh Circuit relied on *Gaubert* in holding that:

> Similarly, in *Gaubert*, the Supreme Court clarified that "[t]he United States was held liable [in *Indian Towing*], not because the negligence occurred at the operational level but because making sure the light was operational 'did not involve any permissible exercise of policy judgment.'" *Gaubert*, 499 U.S. at 326, 111 S. Ct. at 1275 (quoting *Berkovitz*, 486 U.S. at 538 n.3, 108 S. Ct. at 1959 n.3.) Indeed, *Gaubert* reiterates that the Government did not seek to claim the benefit of the discretionary-function exception in *Indian Towing*—a decision that in all probability reflects the Government's recognition that negligent maintenance of the lighthouse is not the type of permissible policy decision the exception is designed to protect. *See id.; see also Indian Towing*, 350 U.S. at 64, 76 S. Ct. at 124.

Swafford v. United States, 837 F.2d 1365, 1371 (11th Cir. 2016).

Seaside and *Swafford* perfectly illustrate the necessity for this Court to resolve the split among the Circuit Courts on whether or not *Indian Towing* is still "good law." The Fourth Circuit cited *Gaubert* for the proposition that this Court has "all but disavowed *Indian Towing* as authority relevant to the discretionary function exception." *Baum v. United States*, 986 F.2d 716, 723 (4th Cir. 1993).

The Eleventh Circuit cited *Gaubert* for the proposition that it reaffirms that the Government's failure to exercise its decision in a reasonable manner is not protected by the discretionary function exception.

The reality is that if Seaside's farm was located 38 miles to the west – in Georgia, which is part of the Eleventh Circuit – *Indian Towing* would apply to its lawsuit. The interpretation of a federal statute against the same party involving the actions of the same agency in issuing the same announcement (applicable to South Carolina and Georgia) should not depend upon where the plaintiff lives. This conflict should be resolved.

B. THERE IS A CONFLICT ON WHO HAS THE BURDEN TO PROVE THE APPLICABILITY OF THE DISCRETIONARY FUNCTION EXCEPTION

The Circuit Courts are also split on the question of who has the burden of proving the applicability of the discretionary function exception. *See* 14 Wright & Miller § 3658.1 ["the plaintiff bears the initial burden of alleging subject matter jurisdiction under the FTCA, but generally it is held that the Government bears the burden of proving the applicability of the discretionary function exception, although there is disagreement" (citations omitted)].

In *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 333 n. 2 (3d Cir. 2012), the Third Circuit stated:

> We acknowledge that the Supreme Court's statement in *United States v. Gaubert*, 499 U.S. 315, 324–25, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), that "[f]or 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" creates some uncertainty as to where the Court intended to place the burden.

Id. at 333, n. 2. The Third Circuit then discussed the split among the Circuit Courts on this precise issue and concluded that:

> However, absent an explicit statement from the Supreme Court that the plaintiff bears the ultimate burden, we continue to believe that the burden of proving the applicability of the discretionary function exception is most appropriately placed on the Government. Although the discretionary function exception is jurisdictional on its face, it is analogous to an affirmative defense. Therefore, just as a plaintiff cannot be expected to disprove every affirmative defense that a defendant could potentially raise, so too should a plaintiff not be expected to disprove every exception to the FTCA. Moreover, the Government will generally be in the best position to prove facts relevant to the applicability of the discretionary function exception. Our view is in accord with that of the U.S. Courts of Appeals for the Sixth, Seventh, and Ninth

> Circuits. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952).

Id.

Subsequently, in apparently the most recent Circuit Court decision on this issue, the Seventh Circuit agreed with *Abunabba*. As explained by the Court:

> The discretionary function exception is an affirmative defense to liability under the FTCA that the government must plead and prove. *Parrott v. United States*, 536 F.3d 629, 634–35 (7th Cir. 2008); *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952); *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 333 n. 2 (3d Cir. 2012) (collecting cases from other circuits). To support summary judgment under the exception, **the government must offer evidence that shows beyond reasonable dispute that its conduct was shielded by the exception. The district court, however, placed the burden on Keller to prove that the exception did not apply. This was a legal error that requires reversal unless the error was harmless**.

Keller v. United States, 771 F.3d 1021, 1023 (7th Cir. 2014) (emphasis added).

Neither *Keller* nor *Abunabba* set forth an exhaustive list of the split in the Circuit Courts. For example, neither case refers to the rule in the Fourth Circuit. As the Government argued below, the Fourth Circuit recognizes that the burden of proof is on the Plaintiff to prove jurisdiction. *Hawes v. United States*, 409 F.3d 213, 216 (4th Cir. 2005); *Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005). The Fourth Circuit explained in *Hawes* that:

> As a general matter, "the plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1), because [t]he party who sues the United States bears the burden of pointing to ... an unequivocal waiver of immunity." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (internal citations omitted).

Id. at 216.

In *Welch*, the Fourth Circuit stated:

> [I]t is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

Id. at 650-651.

In this case, the district court ruled that Seaside's Complaint was sufficient to survive a Rule 12(b)(1) Motion. Consequently, the threshold issue

is who has the burden of proving the applicability of the discretionary function exception. Respectfully, Seaside should be permitted to prove that *Keller* represents the correct view.[14]

C. THERE IS A CONFLICT ON THE APPLICATION OF *BERKOVITZ* AND *GAUBERT*

This Court's two-prong test set forth in *Berkovitz* and *Gaubert* presents two distinct questions in this case. There is a split of authority among the Circuit Courts on both of these questions.

1. Was There A Federal Policy That Specifically Prescribed A Course Of Action For FDA To Follow In Issuing Its June 7 Announcement To Inform Consumers That There Were Safe Tomatoes Available?

The short answer to this question is absolutely yes: there were policies on execution and communication of the Announcement set forth in FDA's own protocols. However, the Fourth Circuit created a distinction between a policy set forth in a statute or regulation and a policy set forth in the

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[14] Although it should not be necessary to argue the importance of the burden of proof, in this case the placement of the burden on Seaside was particularly prejudicial because it did not have full discovery and, more importantly, the Government offered no affirmative proof. Whatever evidence is in the record results from limited discovery that Seaside was permitted to take and which the Government produced. There were many unresolved discovery disputes in the district court. [Reply Brief of Appellant at 10-20; App 52a].

agency's own guidelines. The Fourth Circuit explained the basis for this distinction as follows:

> [t]he price of circulating internal guidance should not be an exponential increase in exposure to a tort suit. It is questionable, moreover, whether something as informal as a guidance manual can overcome a statutory consignment of agency discretion.

Opinion at 10 (citation and internal quotation marks omitted) [App 9a].[15]

The Fourth Circuit strayed from all other Circuit Courts in finding that an agency's policies cannot satisfy the first prong of the *Berkovitz-Gaubert* analysis. It is axiomatic that an agency's policies are reflected in its own protocols. The agency has the discretion to write those policies. It does not have the discretion to ignore those policies.

There is no support in *Gaubert* or *Berkovitz* for the Fourth Circuit's distinction between statutes and regulations on the one hand, and policies on the other hand. Although the discretionary function exception has been rapidly expanding in many of the circuits, such a distinction has not been recognized

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[15] The only citation for this proposition is a decision of the same Panel in *Holbrook v. United States*, 673 F.3d 341 (4th Cir. 2012). If, as suggested, it is a matter of cost, then, respectfully, that is a matter for Congress to address. *See Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). ["Neither should it (the court) as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."]

by other Circuit Courts.[16] No other Circuit Court has found that it is too much to ask an agency to follow its own policies. The Fourth Circuit is apparently the first to state plainly that it will not require an agency to do so.

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[16] The suggestion is at odds with a plethora of decisions from other Circuit Courts which do not recognize any such distinction. *See, e.g. Limone v. United States*, 579 F.3d 79, 100–02 (1st Cir. 2009); *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991); *Brooks v. Bledsoe*, No. 16-2119, 2017 WL 1014383, at *2 (3d Cir. Mar. 15, 2017) (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991) ("a course of action prescribed by a federal statute, regulation, or **policy**"); *Gonzalez v. United States*, 851 F.3d 538, 543–44 (5th Cir. 2017) ("On the contrary, "[t]he 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"); *Gibson v. United States*, 809 F.3d 807, 812–14 (5th Cir. 2016) ("the discretionary function exception does not apply if the challenged actions in fact violated a federal statute, regulation, or **policy**."); *Kohl v. United States*, 699 F.3d 935, 940 (6th Cir. 2012); *Palay v. United States*, 349 F.3d 418, 427–28 (7th Cir. 2003); *Aslakson v. United States*, 790 F.2d 688, 692 (8th Cir. 1986) ("the discretionary function exception does not apply to a claim that government employees failed to comply with regulations or **policies** designed to guide their actions in a particular situation."); *Whisnant v. United States*, 400 F.3d 1177, 1180–81 (9th Cir. 2005); *Sydnes v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008) ("To overcome the discretionary function exception and thus have a chance of establishing a waiver of sovereign immunity, plaintiffs must show that the federal employee's discretion was limited by "a *federal* statute, regulation, or **policy**"); *Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016) (conduct is not discretionary "when a federal statute, regulation, or **policy** specifically prescribes a course of action for an employee to follow") [emphasis added to foregoing quotes].

The Fourth Circuit did go on to state that "after reviewing the FDA guidance manuals, we still find the agency possesses significant discretion." Opinion at 10 [App 9a]. However, the Fourth Circuit did not refer to any of FDA's protocols governing the execution and communication of its decisions (which set forth in step by step detail what action is required). Whether or not FDA had significant discretion with respect to health warnings, the Fourth Circuit cited nothing in FDA's protocols indicating that it had the discretion, much less significant discretion, to completely ignore the protocols for executing or communicating its decision. As argued above, the burden was properly on the Government – which drafted the protocols – to prove this point.

The fact is that there is no dispute or challenge as to what the Government decided should have been executed. The Fourth Circuit acknowledged that it was FDA's decision to tell the world that there were safe tomatoes. However, FDA failed to follow its own policies in the execution of that decision.

2. Did FDA's Conduct In Failing To Execute Its Decision To Inform Consumers Of Safe Tomatoes Involve An Element Of Judgment?

There is a recognized distinction which the Fourth Circuit ignored. As other Circuit Courts have held, the discretionary function exception is intended to protect formulation of a plan, not the execution of a plan. As explained by the Ninth

Circuit, "a dominant theme in our case law is the need to distinguish between design and implementation: we have generally held 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." *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (footnote omitted); *see also Briggs v. Washington Metro. Area Transit Auth.*, 293 F. Supp. 2d 8, 12 (D.D.C. 2003), citing *Rieser v. District of Columbia*, 563 F.2d 462, 475 (D.C. Cir. 1977) ["An action will be considered 'discretionary' only if the prospect of liability for the decisions the officer must make in the course of his performance would unduly inhibit the officer's ability to perform his function"].

The Fourth Circuit held that if discretion exists as to what decision to make, that discretion automatically blankets the execution of any decision, regardless of policy, in the same immunity afforded the discretionary decision. However, *Berkovitz* and *Gaubert* recognize that even if FDA in its discretion formulated a perfect decision (to protect the public health or to inform the public of the existence of safe tomatoes), the statute does not provide the Government immunity for the execution (and communication) of that decision.

Finally, the Fourth Circuit did not determine that FDA's failure to communicate its decision to inform consumers of safe tomatoes involved an element of judgment, much less that such a failure would have been of the kind that of judgment the discretionary function exception was designed to shield. *Berkovitz v. United States*, 486 U.S. 531, 536

(1988). In reality, FDA's failure to execute its decision was not policy driven.

CONCLUSION

Two years ago, this Court, in holding that the time limitations under the FTCA are subject to equitable tolling, emphasized (once again) that "when defining substantive liability for torts, the Act reiterates that the United States is accountable 'in the same manner and to the same extent as a private individual.'" *United States v. Kwai Fun Wong* __ U.S. __, 135 S. Ct. 1625, 1637-1638 (2015). Despite the Government's constant refrain in this and other cases that it should not be held liable because it has sovereign immunity, this Court observed that, unlike other statutes, the "FTCA treats the United States more like a commoner than like the Crown." *Id*. at 135 S. Ct. 1637.

All roads lead to *Gaubert*. The Circuit Courts are split on whether *Gaubert* overrules or reaffirms *Indian Towing*. The Circuit Courts are split on whether *Gaubert* places the burden of proof on the plaintiff or the Government. The Circuit Courts are split on the applicability of *Gaubert's* two-prong test.

It has now been 26 years since *Gaubert* was decided. This case provides the perfect vessel to resolve and clarify these fundamental issues.

Respectfully submitted this 1st day of May, 2017.

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APPENDIX

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[ENTERED DECEMBER 2, 2016]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2562

SEASIDE FARM, INC.,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. C. Weston Houck, Senior District Judge. (9:11-cv-01199-CWH)

Argued: October 26, 2016 Decided: December 2, 2016

Before WILKINSON, NIEMEYER, and SHEDD, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Shedd joined.

ARGUED: Daniel A. Speights, SPEIGHTS & RUNYAN, Hampton, South Carolina, for Appellant. Michael Shih, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** A. G. Solomons, III, SPEIGHTS & RUNYAN, Hampton, South Carolina, for Appellant. William B. Schultz, General Counsel, Daretia M. Hawkins, Senior Attorney, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Washington, D.C.; Elizabeth H. Dickinson, Chief Counsel, Michael Shane, Associate Chief Counsel for Enforcement, UNITED STATES FOOD AND DRUG ADMINISTRATION, Washington, D.C.; Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; William N. Nettles, United States Attorney, Barbara Bowens, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

WILKINSON, Circuit Judge:

This case involves a Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, suit by a tomato farmer against the United States. Seaside Farm, Inc., alleges that the Food and Drug Administration negligently issued a contamination

warning in response to an outbreak of Salmonella Saintpaul that devalued Seaside's crop by $15,036,293.95. The district court held that FDA was exercising a discretionary function in connection with the contamination warning and dismissed the case under 28 U.S.C. § 2680(a). That ruling was essential to protect FDA's vital role in safeguarding the public food supply, and we affirm the judgment.

I.

Salmonella Saintpaul is a rare strain of bacteria that causes moderate-to-severe illness in humans. Symptoms include fever, diarrhea, nausea, and abdominal pain. Salmonella can also enter the bloodstream and cause more serious health complications, including death. FDA consequently considers salmonella a "serious health concern." 74 Fed. Reg. 33,030, 33,031 (July 9, 2009).

A.

On May 22, 2008, the New Mexico Department of Health notified the Centers for Disease Control and Prevention that a number of local residents had been infected with Salmonella Saintpaul. Similar reports soon arrived at CDC from Texas. After interviewing patients, CDC discovered a "strong statistical association" between the infections and eating raw tomatoes. J.A. 713. This observation was supported by a "historical association" between salmonella and tomatoes generally. J.A. 432. CDC subsequently notified FDA that tomatoes were the "leading hypothosis" for the source of the outbreak. J.A. 660.

By June 1, 2008, CDC was investigating 87 incidents of Salmonella Saintpaul across nine states. J.A. 147. FDA, including its various component parts such as the Center for Food Safety and Applied Nutrition, decided to issue an initial contamination warning to consumers in New Mexico and Texas. The contamination warning informed consumers that the outbreak was likely associated with tomatoes, but acknowledged that the exact type and the origin of the contaminated tomatoes was unknown.

By June 6, 2008, reports of Salmonella Saintpaul had risen to 145 incidents and 23 hospitalizations across sixteen states. J.A. 149. CDC notified FDA that the outbreak threatened the entire country.

On June 7, 2008, FDA issued an updated contamination warning titled, "FDA Warns Consumers Nationwide Not to Eat Certain Types of Raw Red Tomatoes." J.A. 149. The contamination warning explained the nature of Salmonella Saintpaul and specified certain types of tomato as the likely vehicles for the bacteria. It also provided a list of countries and seven states, including South Carolina, whose tomatoes remained unassociated with the outbreak. The media, however, reported the contamination warning without mentioning that some tomatoes were not implicated. FDA officials also stressed the magnitude and national scope of the outbreak but likewise failed to mention any "safe" tomatoes.

Over the next month, CDC accumulated enough data to trace Salmonella Saintpaul to jalapeño and serrano peppers imported from Mexico. FDA withdrew the contamination warning as a result and announced that fresh tomatoes were no longer associated with the outbreak. At that point in time, Salmonella Saintpaul was linked to 1,220 infections across forty-two states and the District of Columbia. J.A. 150.

B.

Seaside harvested a crop of tomatoes in South Carolina while the Salmonella Saintpaul contamination warning was in effect. On May 18, 2011, Seaside brought suit against the United States under the FTCA alleging that FDA negligently issued the contamination warning and impaired the value of Seaside's crop by $15,036,293.95. The government claimed that the suit was barred by the FTCA provision protecting the government's exercise of discretionary functions, see 28 U.S.C. § 2680(a), and moved to dismiss the case. The district court denied the motion as premature and ordered limited jurisdictional discovery, giving Seaside the opportunity to establish some nondiscretionary duty that FDA may have breached.

A three-year discovery fight ensued. The parties frequently disagreed over the scope of authorized inquiry, although the government ultimately produced over 12,000 pages of unredacted FDA guidance manuals, internal deliberations, daily situation reports, and confidential emails relevant to the Salmonella Saintpaul outbreak. Seaside also had

the opportunity to take multiple depositions of CDC or FDA employees. Finally, the government provided an additional 13,000 pages of discovery material that was generated in a related case.

On December 15, 2015, the district court dismissed the case for lack of subject matter jurisdiction. The district court reasoned that FDA had broad discretion to warn the public about a contaminated food supply, and that Seaside failed to allege any statute, regulation, or policy that required FDA to proceed in a particular manner. The district court also acknowledged that contamination warnings implicate competing policy considerations of protecting the public from serious health risks and minimizing any adverse economic impact on associated industries. Seaside appeals.

II.

The FTCA provides a limited waiver of sovereign immunity for civil actions against the United States. 28 U.S.C. §§ 1346(b)(1), 2674. This waiver extends to certain claims resulting from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." Id. § 1346(b)(1). The discretionary function exception, however, preserves sovereign immunity and insulates the government from liability for "the exercise or performance [of] 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." Id. § 2680(a). FTCA plaintiffs have the burden of showing that the discretionary function

exception does not foreclose their claim. Welch v. United States, 409 F.3d 646, 651 (4th Cir. 2005); Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995).

The discretionary function exception represents "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984). It was meant to "protect the government from liability that would seriously handicap efficient government operations." Id. at 814 (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)). Congress also wanted 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. Consequently, federal courts lack jurisdiction over claims falling within the discretionary function exception. Holbrook v. United States, 673 F.3d 341, 345 (4th Cir. 2012); Williams, 50 F.3d at 304-05.

III.

Seaside contends the district court improperly concluded that the discretionary function exception barred its claim. Seaside also argues that it did not receive adequate discovery before the case was dismissed, and faults the district court for improperly limiting the scope of inquiry to jurisdictional issues. We shall discuss each contention in turn.

A.

Government conduct is protected by the discretionary function exception if it "involves an element of judgment or choice," and implicates "considerations of public policy." Berkovitz v. United States, 486 U.S. 531, 536-37 (1988); see United States v. Gaubert, 499 U.S. 315, 322-25 (1991); Varig Airlines, 467 U.S. at 813-14; Dalehite v. United States, 346 U.S. 15, 32-36 (1953). We begin by asking whether any "federal statute, regulation, or policy specifically prescribes a course of action." Berkovitz, 486 U.S. at 536. If not, we consider generally "the nature of the actions taken and . . . whether they are susceptible to policy analysis." Gaubert, 499 U.S. at 325. The relevant inquiry is whether the decision "in an objective, or general sense, . . . is one which we would expect inherently to be grounded in considerations of policy." Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993). We do not examine, therefore, "whether policy considerations were actually contemplated in making [the] decision." Smith v. Washington Metro. Area Transit Authority, 290 F.3d 201, 208 (4th Cir. 2002) (emphasis in original). In fact, if a statute or regulation permits discretion, "it must be presumed that [decisions] are grounded in policy when exercising that discretion." Holbrook, 673 F.3d at 345 (quoting Gaubert, 499 U.S. at 324).

The Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., provides that FDA may "cause to be disseminated information regarding food . . . in situations involving, in the opinion of the [Commissioner], imminent danger to

health or gross deception of the consumer." Id. § 375(b) (emphasis added). A notice in the Federal Register emphasizes that "FDA's implicit or explicit authority to disseminate information under [21 U.S.C. § 375(b)] is not accompanied by any procedural requirements." 50 Fed. Reg. 43,060, 43,063 (Oct 23, 1985). The FDCA plainly delegates broad discretion, and we presume FDA is firmly grounded in considerations of public policy when acting pursuant to that discretion.

Seaside argues in response that various FDA guidance manuals eliminate this discretion and prescribe some mandatory course of action. Seaside points to provisions that establish standard operating procedures, contamination warning protocols, "essential steps," and major considerations for emergency response activities.

It would be the rare guidance manual that did not contain some arguably mandatory language. It is our duty, however, to construe the nature of the statutory and regulatory regime as a whole. Indeed, "[t]he price of circulating internal guidance should not be an exponential increase in exposure to a tort suit." Holbrook, 673 F.3d at 347. It is questionable, moreover, whether something as informal as a guidance manual can overcome a statutory consignment of agency discretion. But even if we were to so assume, it would not aid appellant's case. For after reviewing the FDA guidance manuals, we still find the agency possesses significant discretion.

The FDA Emergency Response Plan, for example, begins with a qualification that "the nature

and severity of an emergency . . . will determine . . . the specific actions . . . for each emergency." J.A. 923. It continues to explain that "the exact activities performed . . . will vary by the type and severity of the emergency," J.A. 925, and that any given plan may "require[] significant adjustments during an incident," J.A. 926 (emphasis added). There is even an express disclaimer: "[T]hese identified steps do not comprise the entire scope of the FDA emergency response. Emergencies are unpredictable and dynamic; therefore, the Agency's strategy, while containing core activities, must be unique to each situation."[1] J.A. 925-26. Remaining provisions then speak in broad terms of what FDA "may" or "should" do, subject to the overarching nature of the emergency. See Fortney v. United States, 714 F.Supp. 207, 208 (W.D.Va. 1989) (holding that "should" is indicative of discretion), aff'd, 912 F.2d 722 (4th Cir. 1990). The FDA Emergency Response Plan thus envisions a fluid combination of variable responses and "real-time determination of the necessary course of action." J.A. 926.

The policy considerations inherent in a contamination warning are also evident. The FDCA

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[1] The core activities that comprise the FDA Emergency Response Plan, such as "Performing Initial and On-Going Planning," are all described at a high level of generality. J.A. 926. But a general directive that does not "specifically prescribe[] a course of action" likewise does not operate to restrict the exercise of agency discretion. Berkovitz, 486 U.S. at 536. Furthermore, "[t]he existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." Holbrook, 673 F.3d at 348 (quoting Miller v. United States, 163 F.3d 591, 595 (9th Cir. 1998)).

expressly directs FDA to "protect the public health by ensuring that foods are safe, wholesome, [and] sanitary." 21 U.S.C. § 393(b)(2)(A); see Gaubert, 499 U.S. at 324 ("It will most often be true that the general aims and policies of the controlling statute will be evident from its text."). As the district court rightly noted, decisions regarding contamination warnings are "grounded in the policy of protecting the public from a health risk, and reducing adverse economic impact." J.A. 1077. Discretion is necessary to evaluate available information, assess the sufficiency and reliability of evidence, resolve conflicting data, determine the overall nature of a health threat, and ultimately settle on a course of action. Both the timing and content of a contamination warning reflect this analysis. See Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279 (3d Cir. 1995) (en banc). Acting too soon or waiting too late each entail profound potential consequences.

Seaside insists that there remains a genuine dispute as to whether the government ultimately executed its decision in a reasonable manner. Seaside complains that the contamination warning was overly broad, based on insufficient evidence, and wholly inadequate to notify consumers that South Carolina tomatoes remained safe for consumption. Seaside then emphasizes that no tomato in the United States ever tested positive for Salmonella Saintpaul, and that FDA actually neglected to test sample tomatoes before issuing the contamination warning. Finally, Seaside asserts that, despite considerable evidence linking the outbreak to Mexico when the contamination warning was issued, FDA omitted that information without a defensible

justification. Seaside suggests this decision was made for impermissible "political" reasons beyond the scope of FDA's discretion. Reply Br. of Appellant at 20.

Unfortunately, Seaside misunderstands the nature of the discretionary function inquiry. The decision to issue a contamination warning, especially in the middle of an escalating salmonella outbreak, clearly implicates the policy considerations which FDA was established to weigh. The FDCA even contemplates considerations regarding our commercial relationship with foreign countries. See 21 U.S.C. § 393(b)(3). Seaside fails to identify any mandatory requirements governing FDA's decision, including any directive to test sample tomatoes before issuing the contamination warning. Not only is the FDA Emergency Response Plan phrased in permissive terms, but it envisions "[i]nvestigative, laboratory, and technical/scientific staff" pursuing multiple avenues of obtaining information. J.A. 929. These would encompass, inter alia, such things as gathering field reports from state agencies, healthcare providers, and affected patients, to employing FDA's bank of pre-existing scientific knowledge about the association between certain foods and food-borne illnesses. Whether the agency pursued its investigation, interpreted relevant evidence, or balanced policy considerations in what Seaside believes to be an optimal manner does not affect the discretionary function analysis. Seaside essentially invites us to engage in the very judicial second guessing that the discretionary function exception forbids.

We therefore conclude that the decision to issue a contamination warning "involves an element of judgment or choice," that implicates "considerations of public policy." Berkovitz, 486 U.S. at 536-37. The government rightly observes that contamination warnings -– in both timing and content -- are a prototypical discretionary function.[2]

B.

Seaside next contends it was not allowed sufficient discovery. District courts exercise broad discretion over discovery issues. Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402-03 (4th Cir. 2003). A party is not entitled to discovery that would be futile or otherwise inadequate to establish a sufficient basis for jurisdiction. See Rich v. United States, 811 F.3d 140, 146 (4th Cir. 2015).

The district court was correct to recognize that the discretionary function exception is a jurisdictional threshold that must be considered before moving to the merits of an FTCA claim. Williams, 50 F.3d at 308; Smith, 290 F.3d at 211. The district court was thus well within its discretion to limit discovery to this dispositive issue. Rich, 811 F.3d at 146. Indeed, unlike in Rich, policy would be inevitably implicated in the issuance of the contamination warning and in drafting its contents. See id. at 147. Other circuits considering the

[2] In view of our ruling on the discretionary function exception, we have no need to address the government's contention that the contract rights exception to the FTCA likewise forecloses Seaside's claim. See 28 U.S.C. § 2680(h).

discretionary function exception agree — if they even allow discovery at all. See, e.g., Gonzalez v. United States, 814 F.3d 1022, 1031-32 (9th Cir. 2016) (refusing discovery because available agency guidelines established discretion); Baer v. United States, 722 F.3d 168, 176-77 (3d Cir. 2013) (refusing discovery because available agency guidelines did not foreclose discretion); Davila v. United States, 713 F.3d 248, 263-64 (5th Cir. 2013) (refusing discovery because the plaintiff failed to allege any "well-pleaded facts or evidence to refute the government's assertion . . . that no [nondiscretionary] policy exists"); Ignatiev v. United States, 238 F.3d 464, 467 (D.C. Cir. 2001) (remanding for limited jurisdictional discovery); In re Orthopedic Bone Screw Prod. Liability Litig., 264 F.3d 344, 365 (3d Cir. 2001), as amended (Oct. 10, 2001) (upholding limited jurisdictional discovery).

In any event, Seaside had three years of discovery. The government produced over 25,000 pages of material relevant to FDA practices and the Salmonella Saintpaul outbreak. Seaside also had the opportunity to take multiple depositions of CDC or FDA employees. This was more than adequate to determine whether FDA had some nondiscretionary duty or otherwise exercised discretion that was not susceptible to policy analysis. While Seaside expresses frustration at its inability to obtain additional information relevant to whether the contamination warning was justified, that issue is separate and distinct from the question of jurisdiction and the discretionary function exception.

Relying on Kerns v. United States, 585 F.3d 187 (4th Cir. 2009), Seaside insists that the facts necessary to determine jurisdiction are "inextricably intertwined" with the merits of the case and thus additional discovery was still necessary. See id. at 195. We disagree. Kerns, in fact, acknowledged that the discretionary function exception is a threshold issue that can be "wholly unrelated to the basis for liability under the FTCA." Id. at 196. So it is here. Whether FDA was negligent is an entirely different question from whether FDA was given the discretion to draft and issue a contamination warning, and whether exercising that discretion implicates policy considerations. While we do not suggest the agency's attempt to warn the public of a major unfolding health crisis represented an abuse of the discretion entrusted to it, the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); see Gaubert, 499 U.S. at 322-25; Holbrook, 673 F.3d at 349-50.

The value of any kind of immunity, applied here as a jurisdictional bar, declines as litigation proceeds. See Mitchell v. Forsyth, 472 U.S. 511, 525-27 (1985) (explaining that qualified immunity in 42 U.S.C. § 1983 litigation "is in part an entitlement not to be forced to litigate the consequences of official conduct" and "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982)). Exposing FDA to extensive rounds of discovery on the merits would undermine the discretionary function exception and introduce the very litigation pressures Congress clearly meant to

avoid. See Wu Tien Li-Shou v. United States, 777 F.3d 175, 186 (4th Cir. 2015); Holbrook, 673 F.3d at 349-50; cf. Harlow, 457 U.S. at 818 ("Until this threshold [42 U.S.C. § 1983] immunity question is resolved, discovery should not be allowed."). The district court was thus well within its discretion to order discovery in the manner that it did.

IV.

We refuse to place FDA between a rock and a hard place. On the one hand, if FDA issued a contamination warning that was even arguably overbroad, premature, or of anything less than perfect accuracy, injured companies would plague the agency with lawsuits. On the other hand, delay in issuing a contamination warning would lead to massive tort liability with respect to consumers who suffer serious or even fatal consequences that a timely warning might have averted. All this would loom if contamination warnings were not protected by the discretionary function exception.

Every public health emergency is different. There is no boilerplate warning that can account for the unknown variables of a pathogenic outbreak. There is little room for leisured hindsight when the decision is one that must be made under the pressure of events and, in many cases, on the basis of imperfect information. After three years of discovery, Seaside failed to identify any mandatory duty that FDA may have breached, or any discretionary decision that was not firmly rooted in the very policy considerations that FDA was intended to exercise. While we acknowledge and

regret any financial loss Seaside may have incurred as a result of the Salmonella Saintpaul contamination warning, allowing Seaside's claim to proceed would allow the law of tort to distort one of the most critical of governmental functions, that of safeguarding the public health and welfare.

The judgment is accordingly affirmed.

AFFIRMED

FILED: December 2, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2562
(9: 11-cv-0 1199-CWH)

SEASIDE FARM, INC.

Plaintiff- Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR. CLERK

[ENTERED DECEMBER 16, 2015]

UNITED STATES DISTRICT COURT
for the
District of South Carolina

Seaside Farm; Inc.	)
Plaintiff	)
v.	) Civil Action No.
United States	) 9:11-cv-1199-CWH
Defendant	)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

□ the plaintiff *(name)* ____ recover from the defendant *(name)* ____ the amount of ____ dollars ($_), which includes prejudgment interest at the rate of _ %, plus postjudgment interest at the rate of __ %, along with costs.

□ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* ____ recover costs from the plaintiff *(name)* ____

■ other: having addressed the United States' Motion for Summary Judgment as a Rule (12)(b)(l) Motion to Dismiss, the Court GRANTS the Motion, thereby dismissing this case. Judgment is entered in favor of The United States against
Seaside Farm, Inc.

This action was *(check one):*

□ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

□ tried by the Honorable _____ residing, without a jury and the above decision was reached.

■ decided by the Honorable C. Weston Houck, United States District Judge.

Date: December 16, 2015 *CLERK OF COURT*

s/ Virginia Druce
Signature of Clerk of Deputy Clerk

[ENTERED DECEMBER 15, 2015]

er THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

SEASIDE FARM, INC.	:	
	:	
vs.	:	
	:	
UNITED STATES OF AMERICA	:	
		9:11 cv 1199

Motion hearing held on Tuesday, December 15th, 2015, commencing at 11:32 a.m., before the Hon. C. Weston Houck, in Courtroom IV, United States Courthouse, 85 Broad Street, Charleston, South Carolina, 29401.

APPEARANCES:

DANIEL A. SPEIGHTS, ESQ. and ALGERNON G. SOLOMONS, III, ESQ., 200 Jackson Aveue East, Hampton, SC, appeared for plaintiff.

BARBARA M. BOWENS, ESQ., 1441 Main Street, Columbia, SC, appeared for defendant.

RECORDED BY JACK BRYAN, ESR
REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
P.O. Box 835
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843/723-2208

* * *
policy consideration. Indian Towing is not.

Now, the other what she's talking about is this two-prong analysis that Berkovitz laid out. We think we get there, but I don't want to waste my time telling you that, if you've already said no, I don't think you get there on that. All right? So Indian Towing doesn't need that. If the only way I could get there is through Berkovitz, which was the only thing advanced by Williams, I have to first show a violation of a policy, and then I have to show the second prong as well. So that is not accurate.

The third thing I wanted to point out is this idea that we challenged their authority under 375 is a farce. It's a straw man. We have never said they don't have the authority to regulate food and produce. And it becomes a circular argument, because I'm not saying that. They keep saying I'm saying that, but I'm not saying that. And so I just want to make clear for the record, we are not challenging their authority under 375 to regulate produce. We know they have it, I never said they didn't. Those are the three things that I felt like I needed -- the recorded needed to be clear on.

THE COURT: Okay.

(Brief interruption in proceedings.)

THE COURT: The facts involved in this case have certainly been stated on numerous occasions, and I see no reason to go into great detail here today in ruling on the defendant's motion to go

into those facts. I think it's sufficient to say that the plaintiff is a tomato grower. And that it claims that certain actions done by the defendant affected the sale of its tomato crop, to the extent that it lost considerable profits. And it sues the Government under the Federal Tort Claims Act for the damages it sustained, allegedly, as a proximate result of the defendant's conduct.

Now, the motion we have before us today is officially titled as one for summary judgment, but I will address the motion under Rule 12(b)(1), because an assertion of governmental immunity is properly addressed under the provisions of 12(b)(1), as opposed to the rules applying to summary judgment. The Government, *in* its motion, claims that it is entitled to a dismissal under Federal Rule 12(b)(1), or judgment as a matter of law, on two bases. First, the plaintiff's negligent cause of action is a claim arising from misrepresentation, deceit, defamation or interference with contractual right, which is barred by 28 U.S.C. Section 2680(h); and second, the Court lacks subject matter jurisdiction, based upon the discretionary function exception to the Federal Tort Claims Act.

In looking at the first ground, which asserts that the plaintiff's cause of action is subject to sovereign immunity because it is a claim for misrepresentation, deceit, defamation or interference with contractual rights, we do not accept the cause of action asserted in the complaint in the manner that the plaintiff presents it to us.

You can't call it one thing and get around the rule, the exception. We must look behind what you call your complaint, your cause of action, and determine whether or not it falls within the exception or not.

The assertion that the claim is based on misrepresentation is not valid. There is no reliance, as counsel points out, and, therefore, it can not be a cause of action for misrepresentation or deceit. It's not a cause of action for defamation. And I think there, the best way to decide that is to look at the damages. The damages here are lost profits, based upon the plaintiff's inability to carry out certain contracts it had made for the sale of its tomatoes, and not based upon any loss of reputation on the part of the plaintiff.

The claim that the bar applies because of interference with contractual rights is a little more troublesome, because of the way the plaintiff alleges its cause of action. It refers to having certain contracts in place, and losing those contracts because of the actions of the defendant. And I quote from the complaint. "In June of 2008, at the precise time when South Carolina tomatoes are corning to market, the FDA announced a national recall of all tomatoes in the U.S. Due to the timing of the announcement, the FDA total recall most affected South Carolina tomato farmers who were poised to have a stellar year due to crop yield and market price. The total recall announcement decimated the market price for fresh tomatoes. Prior to the recall, the plaintiff had arranged for its tomatoes to be purchased at market price, and had purchase

commitments from buyers. After the recall, which occurred just as South Carolina tomatoes were corning to market, the market price immediately fell from the mid twenties per unit to single digits." And the complaint goes on.

And it's the loss of these contractual sales that the plaintiff bases its cause of action on. And so we look at those facts in the light of the Restatement's statement concerning the cause of action for interference with contractual right, which I quote as follows: One who intentionally and improperly interferes with the performance of a contract, paren, except the contract to marry, close paren, between another and a third person, by inducing or otherwise causing a third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Importantly, the Restatement does not require the defendant in such a case to have intended to induce a breach.

So I think the cause of action which I have referred to in quoting from the complaint, clearly falls within the bounds of the Restatement's definition of what constitutes the cause of action for interference with the contractual right.

It seems to me, therefore, that based on that analysis, that the defendant's motion to dismiss should be granted, because sovereign immunity is not waived as to the cause of action for interference with the contractual right.

But let's look at what I think is the more important aspect of the defendant's motion, and that is concerning the discretionary function exception. And that exception is set forth in 28 U.S.C. Section 2680(a), which reads as follows: "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 of performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved the abused."

That section can be divided into two sections. The first clause applies where the Government's acts pursuant to a statute or regulation, and requires for its application that the actor have exercised due care. And second -- the one important here -- which provides a discretionary function exception, excludes claims based on the performance of a discretionary function, and applies regardless of whether the actor exercised due care.

In short, the discretionary function exception protects the Government, even if it acted negligently.

As I pointed out, this case implicates a second clause, because the Government contends that it exercised discretion when warning the public about the possibility of Salmonella contamination in tomatoes.

In order to make out its case, pursuant to the discretionary function exception, courts have applied

a two-pronged analysis. That analysis is set forth in the case of United States against Gaubert, 499 U.S. at page 315. First, the exception covers only acts that are discretionary in nature, meaning that they involve an element of judgment or choice. Accordingly, the discretionary function exception does not apply if the challenged conduct is the subject of any mandatory federal statute, regulation or policy prescribing a specific course of action, because then the Government employee has no rightful option but to adhere to the directive.

Under the second prong of the test, to determine whether the discretionary function exception applies, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield.

The Government relies upon 21 United States Code Section 375(b) to establish that what it did in this case was discretionary. And I quote from that section. "The Secretary may -- and that's DHHS Secretary -- and I repeat – the Secretary may -- and that word "may" is very important -- cause to be disseminated information regarding food, drugs, devices, tobacco products or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer. Nothing in this section shall be construed to prohibit the Secretary from collecting, reporting and illustrating the results of the investigations of the Department."

As the defendant contends, this provision clearly delegates discretion to the Secretary to determine whether to release information to the public, and to make investigations such as the one made in this case.

In opposition to the defendant's position, the plaintiff relies on 45 CFR Section 17. But I think that the defendant correctly argues that that section is inapplicable, because it applies only to statements where a specific person or organization is identified. And at no time did that occur in regard to the plaintiff.

Having concluded that 21 U.S.C. Section 375(b) gives the defendant discretion to act in a manner it acted in this case, we must then look to the second prong of the Gaubert test, which addresses whether the discretionary act is one that the exception was designed to shield. The Government argues that, under Gaubert, there is a strong presumption that the agent's actions are grounded in policy, when exercising the discretion provided under the law.

The Government lists several cases which support its position that the discretionary act involved in this case is one that the exception was designed to shield. Those cases are the Banfi case, and of course the Fisher Brothers case, both of which have been discussed by the parties.

In conclusion, I see nothing in this case that would make the actions of the defendants mandatory. I see no regulation or statute that

requires the Government, in the premises described in this case, to act in a particular way.

Under the section I've cited, 21 375, I think it is, (b), the functions are obviously discretionary. The presumption is that under such circumstances, the second prong of Gaubert is met. And I think the case law that's been cited shows that in this case, the discretionary act is one that the exception was designed to shield.

To repeat myself, I'm convinced by what I've heard today and read, that the FDA had the discretion of when and how to issue the public warnings involved in this case. It did not violate any regulatory or statutory provisions, and its actions were grounded in the policy of protecting the public from a health risk, and reducing adverse economic impact.

Although it's unnecessary under the discretionary function exception, it seems to me also that they exercised due care when making and implementing its policies.

It is, therefore, the conclusion of this Court, and it is so ordered, that the defendant's motion to dismiss the complaint of the plaintiff is granted on the two grounds set forth above; the discretionary function and the exception to sovereign immunity being released under the Federal Tort Claims Act for causes of action that involve interference with contractual rights.

Any questions?

MS. BOWENS: Not from the United States. Thank you, Your Honor.

THE COURT: Thank you very much. We'll be in recess.

(Court adjourned at 12:39 p.m.)

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing *is* a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR

* * *

[ENTERED MARCH 6, 2012]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

SEASIDE FARM, INC.,	)	
	)	Civil Action No.
Plaintiff,	)	9:11-01199-CWH
	)	
vs.	)	**ORDER**
	)	
UNITED STATES	)	
	)	
Defendant.	)	
	)	

This matter is before the Court on the defendant's motion to dismiss, or in the alternative, for summary judgment. For the reasons set forth in this order, the Court grants the defendant's motion to dismiss with regard to counts two, three, and four, and denies the defendant's motion to dismiss with regard to count one.

I. BACKGROUND

A. FACTS

This case arises out of an alleged recall and a series of warnings the FDA issued to the public regarding a potential salmonella outbreak in tomatoes during the summer of 2008. The plaintiff, Seaside Farm. Inc., is a family farming operation located on St. Helena Island in Beaufort County.

Seaside grows tomatoes and distributes them throughout the United States, primarily on the east coast. The plaintiff asserts that it goes to great lengths to ensure that its tomatoes are free from contaminants, including salmonella, and it contends that its tomatoes had passed all inspections in the spring and early summer of 2008. Seaside alleges that in June of 2008, just as its tomato crop was about to hit the market, the FDA announced a national recall of all tomatoes in the United States because of reported incidents of citizens becoming ill because of a particular strain of salmonella that was thought to be transmitted through tomatoes. According to the plaintiff, the FDA advised the public that tomatoes, nationwide, were suspect and should not be consumed. The plaintiff further contends that at the time of the recall, the FDA had not positively identified a single tomato as being contaminated with salmonella or contributing to the outbreak of salmonella, and the FDA ultimately conceded that tomatoes were not the source of the contamination.

The plaintiff claims that at the time of the FDA's announcement, South Carolina tomato fanners were poised to have an excellent year because of their crop yields and the price of tomatoes. However, the recall decimated the price for fresh tomatoes, causing the plaintiff substantial economic harm. The plaintiff alleges that in addition to issuing a warning that ultimately proved to be inaccurate and unnecessary, the FDA failed to carry out the alleged recall in a consistent, reasonable, and fair manner. In particular, the plaintiff claims that the FDA knew that South Carolina tomatoes were

not contaminated. The FDA maintained a specific list of approved tomato providers who admittedly did not have contaminated tomatoes; however, Seaside Farm was not placed on this list, despite the fact that it cooperated with the FDA and paid for two independent audits of its practices prior to the recall.

On July 17, 2008, the FDA announced that it was once again safe for the public to consume raw tomatoes. Seaside filed an administrative claim for its losses. The FDA denied the claim on the grounds that (1) the plaintiff's injuries were not caused by any negligent acts or omissions of the FDA, and (2) the government was entitled to assert sovereign immunity under 28 U.S.C. §§ 2680(a), (h).

The defendant disputes the plaintiffs allegations of fact. It denies that it ever issued a recall on tomatoes in June 2008 and claims that it merely issued a series of consumer warnings. The FDA asserts that between the end of April 2008 and the beginning of June 2008, 57 cases of salmonella poisoning contributed to 17 hospitalizations in New Mexico and Texas. Thirty additional cases of illness were reported in Arizona, Colorado, Idaho, Illinois, Kansas, and Utah. On June 3, 2008, the FDA alerted consumers that the salmonella outbreak appeared to be linked to the consumption of certain raw, red tomatoes. The FDA contends that its warning was limited to consumers in New Mexico and Texas and was restricted to red plum, red Roma, and round red tomatoes. Cherry and grape tomatoes and tomatoes with the vine attached were not discussed in the announcement. The FDA maintains that its warnings acknowledged that the source of the

contamination might have been limited to a single grower or packer in a single geographic region. The FDA further claims that on June 7, 2008, four days after it had issued its initial warning, it released an updated report listing several geographic sources that it had determined were not associated with the salmonella outbreak, and whose tomatoes posed no risk to consumers. This "safe list" allegedly included North and South Carolina as well as six other states and several foreign countries.

B. PROCEDURAL HISTORY

On December 16, 2010, counsel for the plaintiff received a letter from the Department of Health and Human Services denying the plaintiffs administrative tort claim. The letter advised the plaintiff that if it was dissatisfied with the determination, it could ask the agency to reconsider or file suit in the appropriate federal district court within six months of the mailing of the letter. On May 18, 2011, the plaintiff filed its complaint. The plaintiff advances four causes of action: (1) negligence, (2) violation of the Takings Clause, (3) violation of the South Carolina Unfair Trade Practices Act (SCUTPA), and (4) defamation. On August 5, 2011, the defendant filed its motion to dismiss, or in the alternative, for swnmary judgment (ECF No. 5-l).

II. DISCUSSION

A. STANDARD OF REVIEW

The defendant has moved to dismiss the plaintiff's complaint under Rule 12(b)(1) and Rule 12(b)(6), or, in the alternative, for summary judgment under Rule 56. The plaintiff has not had the opportunity to conduct discovery, and the Court declines to consider the defendant's motion for summary judgment at this time. Anderson v. Liberty Lobby, 477 U.S. 242, 250 n.5 (1986) ("[S]ummary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.").

1. Rule 12(b)(1)

A court may dismiss a cause of action for lack of subject matter jurisdiction under Rule 12(b)(l). The Fourth Circuit recently summarized the proper analysis under this provision:

> [W]hen a defendant asserts that the complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6) and assume the truthfulness of the facts alleged. On the other hand, when the defendant challenges the veracity of the facts underpinning subject matter jurisdiction, the trial court may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts. And when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should

> resolve the relevant factual disputes only after appropriate discovery, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.

Kerns v. United States, 585 F.3d 187, 193 (4th Cir. 2009).

2. Rule l2(b)(6)

A plaintiffs complaint should set forth .. a short and plain statement ... showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8" does not require "detailed factual allegations,' but it demands more than an unadorned, the·defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Com. v. Twombly. 550 U.S. 544, 555 (2007)). As the Supreme Court explained in Iqbal. "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 129 S. Ct. at 1950.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" ld. at 1949 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. The facts alleged "must be enough to raise a

right to relief above the speculative level," Twombly, 550 U.S. at 555, and "must produce an inference of liability strong enough to nudge the plaintiff's claims across the line from conceivable to plausible.'" Nemet Chevrolet. Ltd. v. Consumeraffairs.com. Inc., 591 F.3d 250, 256 (4th Cir. 2009) (quoting Iqbal, 129 S. Ct. at 1952). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" Iqbal, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). "This basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court." Twombly, 550 U.S. at 558 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2005)).

In evaluating a motion to dismiss under Rule 12{b)(6), the Court "accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff . . ." Nemet Chevrolet, 591 F.3d at 255. This rule is "inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. Moreover, "elements of a cause of action' · and "bare assertions" do not qualify as well-pled facts, and the Court "need not accept as true unwarranted inferences, unreasonable conclusions or arguments." Nemet Chevrolet, 591 F.3d at 253, 255 (internal quotation marks and citations omitted).

B. ANALYSIS

The defendant has moved to dismiss all four of the plaintiff's causes of action on various grounds. The parties' arguments are analyzed below.

1. Violation of the Takings Clause (Count Two)

The defendant contends that this Court lacks jurisdiction over the plaintiff's Takings Clause claim. The Tucker Act provides that the Court of Federal Claims has jurisdiction:

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C.§ 1491(a)(1). The jurisdiction of the Court of Federal Claims is exclusive with regard to such claims. See E. Enterprises v. Apfel, 524 U.S. 498, 520 (1998) ("[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute:').

The plaintiff's second cause of action is entitled "Violation of the Takings Clause." The claim

specifically alleges that the FDA's actions "constitute a taking of the property rights of Seaside in its 2008 tomato crop" and contends that "Seaside is entitled to full compensation for the property which was taken including interest." Compl. ¶¶ 50-51. The plaintiff argues that jurisdiction is proper in this Court because the Court of Claims lacks jurisdiction over tort claims. Be that as it may, the plaintiffs Takings Clause claim is not a tort claim. Moreover, the plaintiff has not directed this Court to any authority suggesting that the presence of related tort claims in its complaint strips the Court of Federal Claims of its exclusive jurisdiction over the Takings Clause claim. Accordingly, the Court concludes that it lacks jurisdiction over the Takings Clause claim, and the same is hereby dismissed.

2. SCUTPA (Count Three)

The plaintiff's cause of action alleging a violation of SCUTPA is also subject to dismissal. To establish a claim under SCUTPA, "the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3" the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act{s)." Wright v. Craft, 640 S.E. 2d 486,498 (S.C. Ct. App. 2006). SCUTPA defines "trade" and "commerce" as encompassing "'the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and include any trade or commerce directly or indirectly affecting the people of this

State.'" Id. (quoting S.C. Code Ann.§ 39-5-10(b)). The plaintiff has not alleged that the defendant engaged in "trade" or "commerce" as defined by the statute. Thus, the plaintiffs SCUTPA claim fails to state a claim upon which relief can be granted and is accordingly dismissed.

3. Defamation (Count Four)

The FTCA's waiver of sovereign immunity does not apply to "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 . . ." 28 U.S.C. § 2680(h) (emphasis added). Seaside's fourth cause of action is entitled "Defamation", and it alleges that the FDA's admittedly false written and oral statements disparaged and insulted the professional conduct of Seaside and its products. This cause of action is clearly barred by § 2680(h), and is hereby dismissed.

4. Negligence (Count One)

As a threshold matter, the Court questions whether the plaintiff's negligence claim is not, in reality. a claim for defamation or misrepresentation subject to dismissal under§ 2680(h). The plaintiff alleges that the FDA acted negligently and recklessly by:

> failing to verify reports of Salmonella exposure due to consumption of raw tomatoes before announcing the recall; failing to follow federal standards for

> laboratory verification and testing; failing to follow FDA standards with regard to the process of food supervision; in announcing a nationwide tomato recall; in announcing the recall while contemporaneously acknowledging that tomatoes from 41 states were safe; in maintaining on its website an incomplete list of safe tomato sources; in failing to provide a comprehensive list of safe tomato growers; in failing to follow its own "Tomato Safety Initiative"; in failing to adequately explain that tomatoes from South Carolina were always safe, and in making public statements that were patently false.

Compl. ¶44. In short. the plaintiff alleges that it was harmed when the FDA made statements to the public suggesting that it would be dangerous to consume South Carolina tomatoes. and when it subsequently failed to make clear that it was safe to consume South Carolina tomatoes. The alleged negligent actions–failing to verify reports of Salmonella exposure, failing to follow federal standards for laboratory verification and testing, etc.–can only be said to have injured the plaintiff inasmuch as they caused the FDA to publicize inaccurate information.

In determining whether a plaintiffs cause of action is barred under§ 2680(h), courts "must ... look beyond the literal meaning of the language to

ascertain the real cause of complaint." United States v. Neustadt, 366 U.S. 696, 703 (1961) (internal quotation marks and citation omitted). "[T]he argument has been made by plaintiffs, and consistently rejected by the courts ... that the bar of [§] 2680(h) does not apply when the gist of the claim lies in negligence underlying the inaccurate representation, i.e., when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation.'" Id. at 703 (citation omitted). Thus, § 2680(h) bars a plaintiff from recovering from the United States where the harm is caused by false or inaccurate statements even if the government's negligence leads to the false or inaccurate statements. Talbert v. United States, 932 F.2d 1064, 1067 (4th Cir. 1991) (declining to "artificially sever [the plaintiff's] negligent maintenance of records claim from the defamation roots that sustain it"); Mohr v. United States, No. 3:09-1587,2009 WL 5216889, at *2 (O.S.C. Dec. 29, 2009) ("The court agrees with the government that the gravamen of the action is misrepresentation because it involved an alleged failure to exercise due care in communicating information. Because the FTCA does not waive sovereign immunity for misrepresentation and defamation, plaintiff cannot avoid these exceptions to the waiver of sovereign immunity by artful pleading.") (emphasis added).

The defendant did not argue that the negligence claim was actually a claim for defamation. and the plaintiff had no opportunity to respond to this argument. For this reason, the Court declines to dismiss the negligence claim on this ground at this time, but it remains to be determined

whether § 2680(h) bars the plaintifrs claim for negligence in addition to its claim for defamation.[1]

Turning to the arguments the defendant did advance, the defendant argues that the plaintiffs negligence claim must be dismissed because (1) the claim is barred by§ 2680(a), (2) the plaintiff cannot establish proximate causation, and (3) the plaintiff cannot satisfy the private analog requirement.

a) Tile Negligence Claim is Barred by§ 2680(a)

The defendant claims that the plaintiff's claims are barred by § 2680(a), which provides that the FTCA shall not apply to:

> 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 employee of the Government, whether or not the discretion involved be abused.

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[1] The Court cautions the panics that "[o]bjections to subject-matter jurisdiction . . . may be raised at any time." Henderson v. Shinscki, – U.S. - , 131 S.Ct. 1197, 1202 (2011). If the plaintiff's "negligence" claim is really a defamation claim, then this Court lacks subject matter jurisdiction, and the panics would be wise to address the issue sooner rather than later.

Section 2680(a) can be divided into two separate clauses. The first clause applies where the government acts pursuant to a statute or regulation and "requires for its application that the actor have exercised due care." Lively v. United States, 870 F.2d 296, 297 (5th Cir. 1989). The second clause excludes claims based on the performance of a discretionary function and applies "regardless of whether the actor exercised due care." Id. at 297-98. This case implicates the second clause because the government contends that it exercised a discretionary function in warning the public about the possibility of Salmonella contamination in tomatoes.

Courts apply a two-pronged analysis in determining whether the discretionary function exception applies. First, "[t]he exception covers only acts that are discretionary in nature," meaning that they "'involve an element of judgment or choice' . . . ." United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)). Accordingly, the discretionary function exception does not apply "if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" Gaubert, 499 U.S. at 322 (quoting Berkovitz, 486 U.S. at 536)

Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." Berkovitz, 486 U.S. at 536. The Supreme

Court has noted that "the purpose of the [discretionary function] exception is 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 .... '" Gaubert, 499 U.S. at 323 (quoting United States v. Varig Airlines, 467 U.S. 797, 814 (1984)). "[I]f a regulation allows [a government] employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." Gaubert, 499 U.S. at 324.

21 U.S.C. § 375(b) authorizes the Department of Health and Human Services to issue consumer warnings through the FDA. It provides:

> The Secretary may ... cause to be disseminated information regarding food, drugs, devices, tobacco products, or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer. Nothing in this section shall be construed to prohibit the Secretary from collecting, reporting, and illustrating the results of the investigations of the Department.

(Emphasis added). The defendant maintains that this provision delegates discretion to the Secretary to detennine whether to release information to the

public and that the discretionary function exception excludes the plaintiff's negligence claim.

The plaintiff offers two compelling counterarguments. First, the plaintiff contends that dismissal is at the very least premature because it has not had an opportunity to identify the FDA's "written and unwritten protocols" to determine whether there was a course of action that the FDA was required to follow, or whether the decision was truly discretionary. Second, the plaintiff asserts that even if § 2680(a) shields the Secretary's discretion to decide whether to make a public announcement or recall a product, the statute does not relieve the government of its responsibility to ensure that the decision is executed in a reasonable manner. "Once a policy decision has been made negligence in its non-discretionary execution can give rise to FTCA liability without jeopardizing the interests the discretionary function exception is designed to protect." Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279, 288 (3d Cir. 1995) (en banc); see also Indian Towing Co. v. United States, 350 U.S. 61,69 (1955). The Court finds that the plaintiff is entitled to conduct discovery on these issues, and in the absence of such discovery, the defendant's motion is premature.

b) The Plaintiff Cannot Establish Proximate Causation

The defendant argues that the plaintiff has not produced sufficient evidence to establish proximate cause. As noted above, however, a

plaintiff is not required to produce evidence to withstand a motion to dismiss. Under South Carolina law, "proximate cause is ordinarily a question of fact for determination by the jury," and "[o]nly in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Ballou v. Sigma Nu Gen. Fraternity, 352 S.E. 2d 488, 493 (S.C. Ct. App. 1986). The Court declines to dismiss the plaintiffs negligence claim on this ground.

c) Tire Plaintiff Cannot Satisfy the Private Analog Requirement

Finally. the defendant argues that the plaintiff cannot satisfy the FTC A's "private analog requirement." 28 U.S.C. 1346(b)(1) provides:

> [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death 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.

The Supreme Court has held that "the Act requires a court to look to the state-law liability of private entities ... when assessing the Government's liability

under the FTCA 'in the performance of activities which private persons do not perform.'" United States v. Olson, 546 U.S. 43, 46 (2005) (quoting Indian Towing Co., 350 U.S. at 64).[2] "[T]he words 'like circumstances' do not restrict a court's inquiry to the same circumstances, but require it to look further afield." Olson, 546 U.S. at 46 (internal quotation marks and citation omitted). Thus, where a plaintiff alleges an injury arising out of a uniquely governmental activity, a court must consider whether an analogous relationship can exist between private individuals, and if so, apply the pertinent law. See id. at 47.

The defendant reasons that because South Carolina law does not confer on any private person or entity duties comparable to those of the FDA in issuing warnings regarding consumer goods, the plaintiff "cannot establish the existence of any private duty that the FDA owed to it privately." ECF No.5-1 at 8. In response, Seaside argues that "[h]ad a large corporate entity taken the same actions and made the same proclamations in the same manner as [the defendant], Seaside would be suing that entity in the same fashion it now sues [the defendant]." ECF No. 8-1 at 12. Under South Carolina law. Seaside certainly could bring an action against a private entity for the conduct it has alleged against the defendant. The key question, however, is whether as a matter of federal law the plaintiff could bring a claim for negligence as opposed to

[2] In Indian Towing, the Supreme Court rejected the argument that the FTCA "must be read as excluding liability in the performance of activities which private persons do not perform." · 350 U.S. at 64.

defamation, misrepresentation, or one of the other torts excluded by§ 2680(h). See Talbert, 932 F.2d at l 066 (reasoning that "[b]ecause the§ 2680 exceptions define the limits of [the] statutory waiver, they must be construed as a matter of federal, not state, law" and applying the Restatement (Second) of Torts to define defamation) (internal quotation marks and citation omitted). As discussed above. the defendant did not argue that the plaintiffs negligence claim is actually a defamation claim, and the Court will not dismiss the plaintiffs case without first giving the plaintiff the opportunity to address the Court's concerns with regard to§ 2680(h).

III. CONCLUSION

For the reasons set forth above, the Court grants the defendant's motion to dismiss with regard to the plaintiff's claims for violation of the Takings Clause (count two), violation of SCUTPA (count three), and defamation (count four). At this time, the Court cannot dismiss the plaintiff's claim for negligence based on the arguments presented by the defendant. The defendant's motion to dismiss is accordingly denied with regard to count one. The parties have sixty (60) days to conduct discovery relating to the jurisdictional issues discussed in this order. After the parties have completed their jurisdictional discovery, the government may renew its motion for summary judgment, and the Court will revisit the question of subject matter jurisdiction before allowing the plaintiff to conduct full discovery on the merits. At that time, both parties should also be prepared to discuss whether the plaintiff's claim

for negligence is actually a defamation claim barred by § 2680(h).

AND SO IT IS ORDERED.

/s/
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

March 5, 2012
Charleston, South Carolina

FILED: January 31, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2562
(9:11-cv-01199-CWH)

SEASIDE FARM, INC.

Plaintiff- Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Shedd.

For the Court

/s/ Patricia S. Connor. Clerk

[ENTERED AUGUST 20, 2012]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

SEASIDE FARM, INC.,	)
	)
PLAINTIFF,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
DEFENDANT.	)

Civil Action No.: 9:11-1199-CWH

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

COMES NOW THE UNITED STATES OF AMERICA, by and through the United States Attorney for the District of South Carolina and the undersigned Assistant United States Attorney and makes the following Reply to the Plaintiffs Response in Opposition to the Defendant's Motion for a Protective Order. [ECF No. 39] Defendant acknowledges that replies are disfavored in this District, but one is warranted in this instance. [*See* Local Rule 7.07].

Plaintiffs response demonstrates that the plaintiff does not fully appreciate the undue burden its over broad discovery requests have placed on the United States.

Although Plaintiffs response indicates understanding the Court's March 6, 2012, Order limited discovery, the propounded discovery calls into question any such understanding. Plaintiff has made clear that it wants "all" documents and "every piece of paper" relating to the FDA's investigation and action. Plaintiffs requests have become a fishing expedition focusing on merits discovery, which is expressly prohibited by the Court's March 6, 2012, Order. As explained in the motion, Defendant has tried to assist the plaintiff in obtaining relevant discoverable information in as efficient a time frame as possible, by proposing that the document requests be limited to the conclusive scientific (including epidemiologic) data received by the FDA from the CDC and other sources, which the FDA reviewed prior to making any public safety announcements in response to the Salmonella Saintpaul outbreak at issue. Plaintiff, however, has been unwilling to limit its document requests in any way, claiming that it is completing its own investigation of the FDA's investigation. [ECF No. 35, p. 10].

Plaintiff also alleges the Government has not served any response to Plaintiffs Document Requests. [ECF No. 39, p. 2]. The United States has provided the documents that are most relevant and responsive to the limited discovery authorized by the Court. More than 14 documents, including appendices, that are used as guides by FDA

employees in responding to emergency outbreak investigations were not only provided to Plaintiff in unredacted form, but were discussed in detail by Ms. McGarry during her deposition. [ECF 35 p. 3].

The United States has not requested "blanket protection" but has requested the Court to narrow the scope of Plaintiff s discovery, both written and oral, to non-privileged documents relating to the jurisdictional discovery the Court authorized on March 6. Specifically, the government requests that Plaintiffs discovery be limited to the conclusion reached by the CDC as to the source of contamination during the 2008 Salmonella Saintpaul investigation, and whether the FDA acted reasonably in communicating this information to the public in accordance with its emergency response guidelines, already produced to Plaintiff, and it authority to issue warnings under 21 U.S.C. § 375(b). (kb pp. 14-15). The Court limited the scope of discovery, but Plaintiffs refusal to narrow its requests to comply with the Court's Order warrants this Court's intervention.

Plaintiffs discovery requests are overly broad as they seek information beyond the scope of the Court's March 6 order authorizing 'jurisdictional" discovery and seek information that is not critical to the issues at stake. The over broad and unreasonable nature of these requests is placing an undue burden on the agency. Therefore, the United States requests that the Court grant its motion and narrow the discovery requested by Plaintiff.

Respectfully submitted,

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August 20, 2012

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