UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

WAZEE STREET OPPORTUNITIES FUND IV, LP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 2:18-cv-03478-NIQA

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2024, upon consideration of Plaintiff Wazee Street Opportunities Fund IV LP's Motion for Leave to Amend Complaint, the brief in support thereof, and the responses thereto, it is hereby ORDERED that the Motion is DENIED. IT IS FURTHER ORDERED that the Parties shall submit supplemental briefs addressing the effect of the Supreme Court's decision in *Collins v. Yellen*, 594 U.S. 220 (2021), as well as other new authority since the time regular briefing closed, on the Parties' pending dispositive motions. The briefs shall not exceed 20 pages each and must be submitted within the 30 days of this Order.

SO ORDERED.

BY THE COURT:

_____
The Hon. Nitza I. Quiñones Alejandro

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EASTERN DISTRICT OF PENNSYLVANIA

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FHFA DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

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INTRODUCTION

Defendants Federal Housing Finance Agency and its Director, Sandra L. Thompson, in her official capacity as Director of FHFA, respectfully submit this response in opposition to Plaintiff's Motion for Leave to Amend Complaint (ECF No. 58). The Court should deny leave because the proposed amendments are futile, unduly delayed, and would prejudice Defendants.

The operative complaint in this case was filed six years ago, and each of the parties have filed dispositive motions concerning the allegations and claims in that complaint. The proposed amended complaint seeks to short-circuit those pending dispositive motions, bringing what is essentially a whole new lawsuit to assert different legal theories and factual allegations than the operative complaint.

The operative complaint principally alleges that a 2012 transaction between FHFA, as Conservator for Fannie Mae and Freddie Mac (the "Enterprises"), and the Treasury Department—known as the "Third Amendment"—is void because FHFA's enabling statute unconstitutionally limited the President's power to remove FHFA's Director. The proposed amended complaint would abandon that theory and replace it with two audacious new claims. First, the proposed new complaint seeks an injunction plainly barred by FHFA's enabling statute, compelling Defendants to implement an agenda benefiting Enterprise shareholders that Plaintiffs allege the prior Trump Administration wished to pursue in early 2017 but could not because of the unconstitutional removal restriction. Second, the proposed new complaint asserts that the Third Amendment executed back in 2012 is void, not because of the unconstitutional removal restriction but because the statute providing for FHFA's funding allegedly violates the U.S. Constitution's Appropriations Clause.

Both new claims are meritless. Two district courts and two courts of appeals have already rejected the claim for an injunction compelling implementation of the same alleged 2017 Trump

Administration policies Plaintiffs ask the Court to compel in this case. *Bhatti v. FHFA*, 97 F.4th 556 (8th Cir. 2024), *aff'g* 646 F. Supp. 3d 1003 (D. Minn. 2022); *Collins v. Dep't of the Treasury*, 83 F.4th 970 (5th Cir. 2023), *aff'g* 642 F. Supp. 3d 577 (S.D. Tex. 2022). As for the Appropriations Clause claim, the U.S. Supreme Court recently rejected a similar claim challenging another agency's funding mechanism. *See CFPB v. CFSA*, 601 U.S. 416 (2024). The end result is no different here.

Plaintiff's new claims also are far too late to qualify for amendment. Plaintiff—who only recently was contemplating voluntary dismissal before newly substituted counsel filed this Motion—has provided no valid justification for its three-year delay in litigating this suit. In the Third Circuit, undue delay alone is a sufficient basis for denying leave to amend.

Defendants also would be prejudiced in multiple ways by amendment. There are already three fully-briefed dispositive motions by both sides pending as to the claims in the current operative complaint; those motions would be mooted by the proposed amendments, wasting the time and effort that went into them and unnecessarily delaying this case. This case also must be viewed against the broader backdrop of a decade-long pattern of serial Third Amendment litigation by Plaintiff, Plaintiff's new counsel, and other Enterprise shareholders, including a failed parallel case by Plaintiff itself in another court. Allowing Plaintiff to refashion this case as a vehicle to relitigate infirm theories would impede finality and further tax the resources of the parties and the Court. The new claims are also time-barred because they do not relate back to the original complaint.

Rather than allow the proposed amendment, the FHFA Defendants respectfully request that the Court set a schedule for limited supplemental briefing on the parties' currently pending dispositive motions so that the parties can address how the Supreme Court's decision in *Collins v.*

Yellen, 594 U.S. 220 (2021), as well as other new authority since the time regular briefing closed, bears on the issues raised in those motions. FHFA Defendants respectfully suggest that the Court order the parties to file supplemental briefs of not more than 20 pages each within 30 days of the Court's order. The Court may then proceed to rule on the parties' pending dispositive motions.

BACKGROUND

Plaintiffs Wazee Street Opportunities Fund IV LP, a Colorado-based investment firm that alleges it bought 1,605,000 shares of Fannie Mae common stock in 2016 and 2017, Lisa Brown (a Pennsylvania resident who was the suit's sole connection to this forum), and Douglas Whitley brought this action on August 16, 2018.[1] The complaint challenges the Third Amendment—an August 17, 2012 contract amendment between the Conservator and Treasury that changed how Treasury was compensated for hundreds of billions of dollars of financial support it provided to Fannie Mae and Freddie Mac because of the global financial crisis. Plaintiff alleges five counts: (1) violation of the President's removal authority, (2) separation of powers, (3) Appointments Clause, (4) nondelegation doctrine, and (5) private nondelegation doctrine. ECF No. 1 ¶¶ 78-110. As relief for each count, Plaintiff asks the Court to "vacate the third amendment[.]" *Id.* ¶¶ 86, 92, 98, 104, 110. Plaintiff originally brought this lawsuit as a putative class action on behalf of classes of all holders of Fannie Mae and Freddie Mac common stock.

A. The Broader Saga of Shareholder Litigation Against FHFA

Far from the only case challenging the Third Amendment, this suit is one piece of the tail end of a decade-long multi-jurisdictional litigation campaign by Fannie Mae and Freddie Mac shareholder interests against FHFA and Treasury. A few law firms filed dozens of cases on behalf of different shareholders in courts across the country, asserting a spectrum of claims ranging from

[1] Plaintiffs Brown and Whitley recently dismissed their claims and are no longer in this case.

Administrative Procedure Act to state-law contract claims to Fifth Amendment "takings." *See*, *e.g.*, *Jacobs v. FHFA*, 908 F.3d 884, 890 (3d Cir. 2018) (affirming dismissal of one shareholder challenge and discussing other related cases).[2]

Of relevance here, this particular case is the fourth in a series of copycat cases filed between 2016 and 2018 seeking invalidation of the Third Amendment on account of alleged constitutional issues with FHFA's structure.[3] Those cases have fallen flat. The first case, known as *Collins*, went to the U.S. Supreme Court, which held that a statutory provision restricting the President's ability to remove the Director of FHFA at will was unconstitutional but rejected the main relief the shareholders were seeking, namely invalidation of the Third Amendment. *Collins*, 594 U.S. at 257-60. Although the Supreme Court gave the *Collins* plaintiffs narrow leeway on remand to continue pursuing separate claims that the removal provision might have affected discrete acts *implementing* the Third Amendment,[4] the district court and Fifth Circuit on remand rejected those claims as well, holding that the shareholders were entitled to no further relief. *Collins*, 83 F.4th

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[2] *See also, e.g., Perry Cap. LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017); *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018); *Saxton v. FHFA*, 901 F.3d 954 (8th Cir. 2018); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015).

[3] The first three cases are *Collins v. Lew*, Civ. A. No. 4:16-cv-3113 (S.D. Tex.), *Rop v. FHFA*, Civ. A. No. 17-cv-497 (W.D. Mich.), and *Bhatti v. FHFA*, Case No. 17-CV-2185 (D. Minn.). Plaintiffs in all of these cases were represented by the same shareholder counsel who recently substituted in as Plaintiff's new counsel in this case. Only *Rop* is still pending.

[4] The Supreme Court found the implementation-related arguments "neither logical nor supported by precedent" but concluded that "the possibility" that the unconstitutional removal restriction might have affected Third Amendment implementation "cannot be ruled out." *Collins*, 594 U.S. at 259. Five Justices openly doubted the *Collins* plaintiffs' prospects on remand. *See id.* at 270-71 (Thomas, J., concurring) ("I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy."); *id.* at 282 (Gorsuch, J., concurring in part) (describing remand as "speculative enterprise" expected to "go nowhere"); *id.* at 275-76 (Kagan, J., concurring in part and concurring in the judgment, joined in part by Breyer and Sotomayor, JJ.) ("the lower court proceedings may be brief indeed" because the President's undisputed plenary control over Treasury "seems sufficient to answer the question the Court kicks back").

970, *aff'g* 642 F. Supp. 3d 577. Another district court and the Eighth Circuit also threw out similar post-*Collins* Third Amendment-implementation claims. *Bhatti*, 97 F.4th 556, *aff'g* 646 F. Supp. 3d 1003.[5]

This case is not even *Plaintiff's* only challenge to the Third Amendment. The same month Plaintiff filed this lawsuit, it filed a parallel lawsuit in the U.S. Court of Federal Claims. *See Wazee Street Opportunities Fund IV LP v. United States*, No. 18-1124C (Fed. Cl.). In that case, too, Wazee alleged that "at the time it agreed to the Third Amendment . . . the FHFA was an unconstitutional agency because it was created as a so-called 'independent agency' that was subject to the control of a single Director who could not be removed by the President other than 'for cause.'" Second. Am. Compl., *Wazee*, No. 18-1124C (Fed. Cl.), ECF No. 30 ¶ 15; *see also id.* ¶¶ 117 ("The Third Amendment was unlawful as a matter of constitutional law because it was agreed to by the FHFA, which is an unconstitutional agency."), 162 (alleging "illegal exaction" on the ground that "FHFA acted unlawfully because it is an unconstitutional 'independent' agency").

In 2022, the Federal Circuit issued a precedential decision in various other Enterprise shareholders' Third Amendment lawsuits, including an illegal exaction claim based on the unconstitutional removal restriction. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022). Applying *Collins*, and consistent with the Fifth Circuit and Eighth Circuit decisions described above, the Federal Circuit held that the unconstitutional removal restriction provided no basis for relief for Enterprise shareholders relating to the Third Amendment. *Id.* at 1304-05. The possibility of harm to shareholders was "extremely limited" and there was always "adequate presidential oversight" over the Third Amendment and related actions by virtue of the President's

[5] In both *Collins* and *Bhatti*, the shareholder plaintiffs could have sought further appellate review of the court of appeals' decisions rejecting their claims (*i.e.*, rehearing *en banc* or a petition for certiorari) but did not do so, and the time for doing so is now expired.

plenary control of Treasury. *Id.* at 1305. After the Supreme Court denied certiorari, the Court of Federal Claims applied the Federal Circuit's *Fairholme* decision to Wazee's case, dismissing the latter with prejudice. *Wazee Street Opportunities Fund IV LP v. United States*, 168 Fed. Cl. 454, 459-60 (2023) ("The illegal exaction claim asserted in this suit is indistinguishable from the illegal exaction claim rejected in *Fairholme*."). Wazee initially appealed, but promptly withdrew its appeal, causing the trial court's final judgment against it to go into effect.

B. Procedural History of This Case: 2018 to June 2024

After this case was filed in 2018, Defendants FHFA and Treasury each moved to dismiss all of the claims in the original complaint. ECF Nos. 15, 16. The parties fully briefed those motions. Meanwhile, Wazee filed a cross-motion for summary judgment on all of the claims in the original complaint. ECF No. 19. The parties' cross-dispositive motions generated hundreds of pages of briefing and exhibits.

In July 2020, FHFA Defendants advised the Court that the Supreme Court had granted certiorari in *Collins*. ECF No. 42. The Court then ordered this case "STAYED pending the Supreme Court's disposition of the *Collins* matter" and placed it in civil suspense. ECF No. 43.

After the Supreme Court issued its disposition of the *Collins* matter about a year later, in June 2021, Plaintiff never sought to revive this case. Unlike *Collins*, Plaintiff here did not challenge discrete post-adoption acts *implementing* the Third Amendment; it simply sought to have the Third Amendment invalidated altogether—the claim the Supreme Court conclusively rejected.

On April 23, 2024, the Court ordered the parties to provide a joint status report by May 10, 2024 in light of the Court's recent removal of all cases from civil suspense. ECF No. 44. The parties requested, and the Court approved, that "[i]n light of the Supreme Court's decision in *Collins*," Plaintiffs have "until June 17, 2024 to decide whether to (a) move to amend their complaint in an effort to allege facts that Plaintiffs contend sustain a claim under the Supreme

Court's *Collins* decision, or (b) voluntarily dismiss their case with prejudice." ECF Nos. 46, 47.

On June 17, 2024, Plaintiff's counsel of six years withdrew, new counsel (the same counsel who represented other shareholders in other copycat constitutional claims) substituted in, ECF No. 48, 49, 50, 51, 54, two of the three original plaintiffs, Lisa Brown and Douglas Whitley, voluntarily dismissed their claims without explanation, ECF No. 53, and Wazee's new counsel sought and received an additional 14 days to move for leave to amend the complaint, ECF Nos. 52, 55.

C. The Instant Motion for Leave and Proposed Amended Complaint

On July 1, 2024, Plaintiff Wazee filed the instant motion for leave to amend. ECF No. 58. Plaintiff's proposed amended complaint is essentially a new, entirely rewritten lawsuit, as is evident from a redline comparing it to the current operative complaint. *See* Katerberg Decl. Ex. A. The proposed amended complaint includes six new counts, while abandoning all five counts in the original complaint. Counts I, III, V, and VI all allege, in sum and substance, that the removal restriction prevented the Trump Administration from carrying out policies to benefit shareholders beginning in 2017, and they seek "an injunction placing plaintiff in the position it would be in" had those alleged policies been consummated. Proposed Am. Compl. ¶¶ 102, 125, 149, 157. Counts II and IV allege that FHFA's statutory funding mechanism violates the Appropriations Clause and that the Third Amendment therefore "must be vacated and set aside." Proposed Am. Compl. ¶¶ 118, 140. Plaintiff no longer seeks to proceed on behalf of any classes, as the class allegations have been dropped from Plaintiff's proposed amended complaint *sub silentio*. While barely reflecting any trace of its current complaint in this case, Plaintiff's proposed amended complaint is a near carbon copy of a complaint Plaintiff's newly substituted counsel are pursuing in the *Rop* case in Michigan on behalf of other shareholders. *See* Katerberg Decl. Ex. B (redline).

LEGAL STANDARD

Courts deny leave to amend if "(1) the moving party has demonstrated undue delay, bad

faith, or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the non-moving party." *Evans v. City of Philadelphia*, 2018 WL 1525346, at *8 (E.D. Pa. Mar. 28, 2018) (Quiñones Alejandro, J.) (citing *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 116 (3d Cir. 2003)). In applying these standards, courts aim to "secur[e] the just, speedy, and inexpensive determination of every action," with discretion "to prevent the abusive use of amendment to delay or prolong litigation." *Atl. Holdings Ltd. v. Apollo Metals, Ltd.*, 2018 WL 5816906, at *2 (E.D. Pa. Nov. 7, 2018) (quotation marks omitted).[6]

Amendment is futile if "the complaint, as amended, would fail to state a claim upon which relief could be granted." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010). In addition, where, as here, "a party moves to amend the complaint after a motion for summary judgment is filed, courts in this Circuit have imposed stringent standards before granting such motions," namely a requirement that "the proposed amendment has substantial merit." *Evans*, 2018 WL 1525346, at *8. An amendment that "would not be able to overcome the statute of limitations" is futile. *Cowell v. Palmer Twp.*, 263 F.3d 286, 296 (3d Cir. 2001).

"[T]he question of undue delay requires that [the court] focus on the movant's reasons for not amending sooner." *Cureton v. NCAA*, 252 F.3d 267, 273 (3d Cir. 2001). "A motion to amend should be made as soon as the necessity for altering the pleading becomes apparent." *Lafate v. Vanguard Grp., Inc.*, 2014 WL 5314832, at *2 (E.D. Pa. Oct. 16, 2014) (Quiñones Alejandro, J.). Thus, a movant must offer a "cogent reason" for any "delay in seeking the amendment." *CMR*

[6] Plaintiff suggests in a footnote that it was already granted leave to amend and that its current motion is accordingly filed only "in an abundance of caution." Mot. at 1 n.1. Not so. Plaintiff acknowledged in both the May 10, 2024 joint status report (ECF No. 46) and its June 17, 2024 extension motion (ECF No. 52) that if it ended up continuing with this case, it would need to move for leave to amend, and its July 1, 2024 motion is its first and only submission seeking such leave.

D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 629 (3d Cir. 2013). Courts do not permit amendments whose timing was driven by "dilatory and tactical motives" or "strategic decision[s]." *Lafate*, 2014 WL 5314832, at *2. A plaintiff's "misplaced confidence" in an "original [] theory" that did not pan out will not excuse delay. *See Cureton*, 262 F.3d at 274 (finding undue delay where discrimination plaintiffs had made a "tactical decision" to hold back intentional discrimination theory pending outcome of disparate impact theory).

Contrary to Plaintiff's position that delay cannot justify denying leave to amend absent prejudice (Mot. at 2), "*undue* delay," *i.e.*, delay that "places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend," can suffice on its own "[i]rrespective of whether [the nonmoving parties] would have suffered prejudice." *Est. of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010) (denying leave to amend to add First Amendment retaliation claim that "long had been apparent" in seven-year-old case with summary judgment motion pending, without need for showing of prejudice).[7] That is why the Third Circuit frames the standard disjunctively: whether delay is "undue, motivated by bad faith, *or* prejudicial to the opposing party." *Est. of Oliva*, 604 F.3d at 803 (emphasis added; internal quotation marks omitted). In short, regardless of prejudice, "[w]hen a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied." *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006).

While undue delay warrants denying leave to amend even without prejudice, when

[7] *See also USX Corp. v. Barnhart*, 395 F.3d 161, 166 (3d Cir. 2004) (explaining that even "[i]n the absence of substantial or undue prejudice to the nonmoving party," "dilatory motives" or "truly undue or unexplained delay" can still justify denial); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (affirming denial of leave to amend "three years after the action was filed" where "[m]ost of the facts were available" when the action was filed and "probably all of them were available" two years before proposed amendment, even though "the district court did not make any finding of prejudice").

prejudice does exist, it weighs heavily against granting leave to amend. The prejudice inquiry "focus[es] on the hardship to the defendants if the amendment were permitted," including "cost" and "preparation to defend against new facts or new theories." *Cureton*, 252 F.3d at 273; *accord Hesling v. Avon Grove Sch. Dist.*, 428 F. Supp. 2d 262, 278 (E.D. Pa. 2006) ("undue difficulty in [defending] a lawsuit as a result of a change of tactics or theories on the part of the other party"). An archetypal form of prejudice occurs when "the proposed amendment would bring a new theory into the case several years after the beginning of the litigation." *CMR*, 703 F.3d at 630; *accord Atl. Holdings*, 2018 WL 5816906, at *6 (finding prejudice where amendment "would bring this new fraud theory into the case nearly four years after the matter was initially filed").

ARGUMENT

I. The Proposed Amendments Are Futile.

Plaintiff's amended complaint cannot succeed. First, the claims in the proposed amended complaint would be time-barred, which makes them inherently futile. *See Cowell*, 263 F.3d at 296. The relevant statute of limitations is 28 U.S.C. § 2401(a), which bars claims against U.S. agencies that were not "filed within six years after the right of action first accrues." A claim accrues under § 2401 when "the plaintiff is injured by final agency action." *Corner Post, Inc. v. Bd. of Gov. of Fed. Res. Sys.*, 144 S. Ct. 2440, 2460 (2024).

All of the claims in Plaintiff's proposed amended complaint accrued prior to July 1, 2018, *i.e.*, more than six years before Plaintiffs moved to amend. Counts I, III, V, and VI allege that "the removal restriction harmed Plaintiff" because in its absence, "President Trump would have fired Director Watt" and "installed his own FHFA director at the start of his presidency." Proposed Am. Compl. ¶¶ 98, 99, 102, 121, 122, 124, 143, 144, 145, 153, 154, 155. President Trump's presidency started January 20, 2017. Plaintiffs therefore could have included these claims in their original complaint filed on August 16, 2018, or by amendment any time up until January 20, 2023.

Likewise, Counts II and IV allege that "the Third Amendment must be vacated and set aside" because "[t]he FHFA adopted the Third Amendment at a time when it lacked constitutionally authorized funding to operate." Proposed Am. Compl. ¶¶ 117, 118, 139, 140. The Third Amendment was adopted on August 17, 2012. *Id.* ¶ 35. Thus, the limitations period for challenges to the Third Amendment expired on August 17, 2018—the day after the original complaint was filed.[8]

Where, as here, claims in a proposed amended complaint would be "barred by the statute of limitations, amendment is only permitted if the proposed amended complaint 'relates back to the date of the original pleading' pursuant to Rule 15(c)." *Anderson v. Bondex Int'l, Inc.*, 552 F. App'x 153, 156 (3d Cir. 2014). New claims relate back if they "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). In other words, proposed amendments relate back only if they "restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct"—but not if they "significantly alter the nature of a proceeding by injecting new and unanticipated claims." *Glover v. FDIC*, 698 F.3d 139, 146 (3d Cir. 2012) (quotation marks omitted). "[F]actual overlap alone is not enough"; rather, the original complaint must have "adequately notified the defendants of the *basis for liability* the plaintiffs would later advance in the amended complaint." *Id.* at 146, 147 (quotation marks omitted; emphasis added).

The proposed new claims here fail that test. They do not simply "restate" or "amplify" the original claims, *id.* at 146, or, in Plaintiff's words, "refine[] its legal theories," Mot. at 12; they

[8] Plaintiff may contend that under *Corner Post* its claims to challenge the Third Amendment did not accrue until it purchased Fannie Mae common stock beginning in December 2016 (*see* Proposed Am. Compl. ¶ 6). FHFA Defendants disagree, but the Court need not resolve that issue because even running the six-year period from December 2016, it expired in December 2022.

completely overhaul the original claims and legal theories. The original claims asserted that the Third Amendment adopted in 2012 was rendered void because of the unconstitutional removal restriction infringing on the President's authority. In contrast, the new claims assert (a) that the Third Amendment was invalid under a distinct constitutional provision, the Appropriations Clause, relating to *Congress*'s authority, and (b) that the Trump Administration was stymied *in 2017* from pursuing an alleged agenda to benefit shareholders like Plaintiff. There is no overlap in the asserted bases for liability. *See Glover*, 698 F.3d at 146-47 (later FDCPA violation by failing to withdraw foreclosure complaint did not relate to earlier "factually and legally distinct" FDCPA violations); *Anderson*, 552 F. App'x at 158 (amendment alleging subsequent phase of asbestos exposure while working in government building did not relate back to original complaint alleging asbestos exposure from father's work clothes during plaintiff's childhood).[9]

Plaintiff protests that Defendants "are not entitled to advance notice of *all legal theories*" Plaintiff may offer. Mot. at 12. But relation-back turns on whether the defendant was "given fair notice of the general fact situation *and the legal theory* upon which the amending party proceeds." *Glover*, 698 F.3d at 146 (emphasis added) (quoting *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 310 (3d Cir. 2004)); *see also Mayle v. Felix*, 545 U.S. 644, 661 (2005) (amendment to habeas petition to add Fifth Amendment self-incrimination legal theory did not relate back to original petition asserting Sixth Amendment confrontation theory, even though both sought vacatur of

[9] Plaintiff's original complaint mentions FHFA's funding mechanism in passing as one factor that supposedly combines with the removal restriction and judicial review limitations to produce a general violation of "the Constitution's structure and separation of powers." ECF No. 1, ¶ 89. It does not, however, mention the Appropriations Clause, much less allege a violation of it. In briefing the dispositive motions, Plaintiff did not assert that the funding mechanism was independently problematic in any way whatsoever. Plaintiff acknowledges that it seeks to change its "legal theories," Mot. at 12, and a fleeting reference to the funding mechanism in the original complaint is insufficient to make the proposed new Appropriations Clause claims relate back.

same trial and conviction); *Anderson*, 552 F. App'x at 157 (confirming *Mayle* is not limited to habeas and applies in normal civil context).[10]

The claims in the proposed amended complaint are also futile on the merits. As already noted, numerous courts have unanimously rejected Plaintiff's ill-conceived theory that the removal restriction prevented the prior Trump Administration from taking actions that would have benefited Enterprise shareholders at Treasury's expense. *See Bhatti*, 97 F.4th 556, *aff'g* 646 F. Supp. 3d 1003; *Collins*, 83 F.4th 970, *aff'g* 642 F. Supp. 3d 577; *Fairholme Funds*, 26 F.4th at 1304-05. And the Supreme Court's recent decision in *CFSA* seals the Appropriations Clause claims' fate. There, the Court rejected the argument made by Plaintiff here that agencies must be subject to the annual congressional appropriations process, abrogating the 2022 Fifth Circuit opinion featured in the Appropriations Clause counts in the proposed amended complaint. *Compare id.* at 424 (reversing and rejecting analysis in *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 225-32 (5th Cir. 2022) (en banc) (Jones, J., concurring)), *with* Proposed Am. Compl. ¶¶ 106, 108, 129, 131 (citing *All-American Check Cashing*). Contrary to the now-defunct Fifth Circuit approach, agency enabling statutes "need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appointments Clause." *Id.* at 425. Plaintiff's argument that CFPB is "unique" because it has an "inflation-

[10] Plaintiff also contends that its Appropriations Clause claims should be deemed to relate back because Plaintiff supposedly "bases its amendments" on "underlying law" that "has meaningfully changed," referring to *CFSA*. Mot. at 12. This is wrong in every aspect. The Supreme Court's *CFSA*'s decision resoundingly rejected the Appropriations Clause claim and is most unfavorable to Plaintiff. It did not change the law because all prior case law, except for the Fifth Circuit outlier, validated congressionally enacted agency self-funding mechanisms; and Plaintiff did not "base[] its amendments" on *CFSA*—as the Exhibit B redline makes clear, the proposed complaint here is copied verbatim from a pre-*CFSA* 2023 draft complaint and relies on Fifth Circuit case law abrogated by *CFSA*. In any event, purported changes in law play no role in Rule 15(c)'s relation-back test, and changes in law generally cannot revive an already time-barred claim. *See, e.g.*, *Simon Wrecking Co. v. AIU Ins. Co.*, 350 F. Supp. 2d 624, 634 (E.D. Pa. 2004).

adjusted cap," Mot. at 11-12, improperly seeks to add a further requirement to the straightforward test the Supreme Court enunciated in *CFSA*. The futility of Plaintiff's claims is all the more apparent given that, to proceed despite the pendency of summary judgment, Plaintiff must "show that the proposed amendment has substantial merit." *Evans*, 2018 WL 1525346, at *8.

While FHFA Defendants would welcome the opportunity to fully brief the many shortcomings of the proposed amended complaint on a full Rule 12(b)(6) motion if the Court would find it useful, it is respectfully submitted that there is no need to burden yet another court with Plaintiff's meritless theories, especially when those theories are time-barred here. This Court can and should deny Plaintiff's motion on the basis of futility.

II. This Court Should Deny Leave to Amend Because of Plaintiff's Undue Delay.

Plaintiff's delay here is glaring. This case has been pending since 2018 and challenges a transaction that occurred in 2012. Plaintiff represents that "the proposed amendments follow from a binding decision of the Supreme Court of the United States," to wit, *Collins*. Mot. at 2. That decision was in June 2021—over three years ago. *Id.* at 3. At any time thereafter, Plaintiff could have sought to lift the stay and restart this case if it believed any aspect remained viable. Plaintiff did not do so, instead letting the case lie dormant for years. Thus, Plaintiff bears the burden of providing a "cogent reason for the delay in seeking the amendment." *CMR*, 703 F.3d at 629.

Plaintiff fails to offer a cogent reason, mustering only a confused *post hoc* rationalization: that the 2021 *Collins* decision was merely "the *beginning* of the relevant proceedings, not the end" and Plaintiff "reasonably awaited the conclusion of the *Collins* remand proceedings" years later in other courts to "avoid raising duplicative claims in this Court." Mot. at 3, 4. That ignores that this Court stayed this case "pending *the Supreme Court's disposition* of the *Collins* matter," not pending the ultimate termination of the *Collins* case in the lower courts. ECF No. 43 (emphasis added). Up until July 1, 2024, Plaintiff never gave any hint it was intentionally waiting for the

Collins remand proceedings to conclude before restarting this case. Just two months ago, well *after* the *Collins* remand concluded, Plaintiff represented it was considering voluntary dismissal of this action with prejudice in light of the *Collins* Supreme Court decision. ECF No. 46. This is Plaintiff's case. Its failure to diligently pursue it after the Supreme Court ruled in *Collins* cannot be ignored.

Indeed, Plaintiff's professed "desire to avoid raising duplicative claims in this Court" (Mot. at 3) is a hollow charade. Duplicative litigation is the centerpiece of the legal strategy that Plaintiff, its fellow Enterprise shareholder litigants, and their counsel have pursued over the last decade in this and numerous other cases. Plaintiff itself had duplicative parallel cases in this Court and the Court of Federal Claims for years. *See supra* at 5. The shareholder counsel who recently appeared in this case for Plaintiff brought essentially the same lawsuit in two different courts within days in 2017.[11] They prosecuted those duplicative cases aggressively and simultaneously for years, including in the aftermath of the 2021 *Collins* Supreme Court decision, never suggesting that such litigation should wait several more years for the *Collins* remand proceedings to close.

Plaintiff's reliance on the outcome of the remand proceedings is especially misguided because, if anything, that outcome militates heavily *against* allowing the new claims, which the *Collins* lower courts firmly rejected. *See Collins*, 83 F.4th at 983 (complaint "fail[ed] plausibly to allege" requisite "nexus" between removal restriction and harm to shareholders), 984 (plaintiffs' theory was based on "uncertainty and speculation"), 984-85 ("FHFA's funding structure has nothing to do with the issue for which *Collins* remanded" and "*Collins* in no way changes the law with respect to the Appropriations Clause"); *Collins*, 642 F. Supp. 3d at 584-86 ("contradictory,"

[11] *See Rop v. FHFA*, Civ. A. No. 17-cv-497 (W.D. Mich.) (filed June 1, 2017); *Bhatti v. FHFA*, Case No. 17-CV-2185 (D. Minn.) (filed June 22, 2017).

"largely non-cognizable," and "incongruous"). It makes no sense to read that rejection as a green light to seek to start over in this Court to relitigate what Plaintiff admits are "duplicative claims … seek[ing] the same relief." Mot. at 4.

Even crediting Plaintiff's untenable position that the final termination of *Collins* in the lower courts in October 2023 was the "relevant trigger" from which delay should be measured, Plaintiff's ensuing delay of over eight months would still be excessive and undue.[12] Courts in this Circuit routinely deny leave for even lesser delays. *See, e.g.*, *Special Risk Ins. Servs., Inc. v. GlaxoSmithkline, LLC*, 2021 WL 6075892, at *1 n.1 (E.D. Pa. Mar. 11, 2021) (Quiñones Alejandro, J.) (even crediting plaintiff's explanation, delay of "approximately three months after allegedly discovering the factual basis for the amendment" was excessive and plaintiff "failed to act diligently").[13] While Plaintiff cites *Arthur v. Maersk*, 434 F.3d at 204, for the proposition that "[a] delay of less than one year is almost never a basis for denial of leave to amend," Mot. at 5, the

[12] Plaintiff is wrong to suggest that, as to the proposed new Appropriations Clause claim, "[t]he earliest point in time" Plaintiff could have amended is "even later—in May of 2024," when the Supreme Court decided *CFPB v. CFSA*, 601 U.S. 416. Mot. at 3. All of the facts relevant to the proposed new claim were available as of the filing of the original complaint in 2018, and the *Collins* and *Rop* plaintiffs, through the same shareholder counsel as here, surfaced the Appropriations Clause claim in those cases in June 2022 and August 2023, respectively. ECF No. 80 (June 3, 2022), *Collins v. Lew*, Civ. A. No. 4:16-cv-3113 (S.D. Tex.); ECF No. 79 (Aug. 11, 2023), *Rop v. FHFA*, Civ. A. No. 17-cv-497 (W.D. Mich.). Moreover, the Supreme Court's *CFSA* decision *rejected* the Appropriations Clause theory. *See supra* at 13-14. Not surprisingly, the proposed amended complaint, copied as it was from *Rop*, does not even acknowledge the *CFSA* decision; rather, it cites a May 2022 Fifth Circuit decision that *CFSA* has abrogated. *See* Proposed Am. Compl. ¶¶ 106, 108, 129, 131 (citing *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 225-32 (5th Cir. 2022) (en banc) (Jones, J., concurring)).

[13] *Accord Berger v. Edgewater Steel Co.*, 911 F.2d 911, 924 (3d Cir. 1990) (four-and-a-half months); *Clark v. Township of Falls*, 890 F.2d 611, 624 (3d Cir. 1989) (three months); *Atl. Holdings*, 2018 WL 5816906, at *4 (approximately eight months); *Heraeus Med. GmbH v. Esschem, Inc.*, 321 F.R.D. 215, 217 (E.D. Pa. 2017) (five months); *Duffy v. Charles Schwab & Co.*, 2001 WL 1104689, at *2 (D.N.J. Sept. 4, 2001) (approximately six months); *Furman Lumber, Inc. v. Mountbatten Surety Co.*, 1997 WL 397496, at *4 (E.D. Pa. July 9, 1997) (two months).

relevant discussion in *Arthur* pertained to the amount of time elapsed "*from commencement of an action* to the filing of a motion for leave to amend." *Arthur*, 434 F.3d at 205 (emphasis added). Measured that way, Plaintiff here delayed *for nearly six years*.

Litigation is not a game of sequels, in which the final termination of one case opens the door to recycle the same meritless theories in another court. Duplicative litigation is always inimical to judicial economy, but when it is prosecuted in seriatim fashion as Plaintiff is trying to do here, it also frustrates the parties' and the public's interest in finality.

III. The Belated Proposed Amendments Would Prejudice Defendants.

While Plaintiff's undue delay by itself supports denial under governing Circuit precedent, *see Oliva*, 604 F.3d at 803 (undue delay warrants denying leave "[i]rrespective of . . . prejudice"), FHFA Defendants would be prejudiced in multiple ways if the proposed amended complaint were allowed. Prejudice includes any kind of "hardship" introduced by the new claims, including additional "cost" and "preparation to defend against new facts or new theories." *Cureton*, 252 F.3d at 273. And prejudice is inherent when "the proposed amendment would bring a new theory into the case several years after the beginning of the litigation." *CMR*, 703 F.3d at 630.

First, the proposed amendments would end-run the parties' pending dispositive motions, wasting the significant effort and resources that went into them. FHFA Defendants and Treasury Defendants each have motions to dismiss pending, and Plaintiff moved for summary judgment on all counts of the current complaint. ECF Nos. 15, 16, 19. The briefing and exhibits on those motions took months to prepare and comprise hundreds of pages. If Plaintiff is permitted to amend, those motions will be mooted, and the time, effort, and costs spent on them will have been for nought. *See Pippett v. Waterford Dev., LLC*, 166 F. Supp. 2d 233, 236 (E.D. Pa. 2001) ("The filing of an amended complaint generally renders a pending motion to dismiss moot."). This effect and the ensuing waste are a classic form of prejudice. *See Rolo v. City Investing Co. Liquidating*

Trust, 155 F.3d 644, 655 (3d Cir. 1998) (denial of leave supported by lengthy "duration of this case" and "effort and expense" involved in motion practice directed toward prior complaint).[14]

Second, the proposed amendments would prolong vexatious litigation. It is well-established in this Circuit that "bring[ing] a new theory into the case several years after the beginning of the litigation" is prejudicial. *CMR*, 703 F.3d at 630 (rejecting property owner's attempt to amend complaint in four-year-old litigation challenging zoning ordinance to add a new theory objecting to the ordinance's width restriction).[15] This prejudice is all the more acute because it arises against a backdrop where all conceivable Enterprise shareholder legal issues relating to the Third Amendment have already been exhaustively litigated, including by Plaintiff Wazee itself, in many other courts over the course of a decade.[16]

Plaintiff asserts that prejudice is lacking because Defendants are not foreclosed from presenting any facts or evidence and the proposed new claims raise "questions of law" unlikely to

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[14] *Accord Hoffmann v. United State*s, 266 F. Supp. 2d 27, 33-34 (D.D.C. 2003) (rejecting proposed amendment that would prejudice defendant and "divert the court's attention" from dispositive motion that was "ripe and currently before th[e] court," when plaintiffs had "all the facts necessary to amend" years earlier), *aff'd*, 96 F. App'x 717 (Fed. Cir. 2004); *Duffy*, 2001 WL 1104689, at *2 (finding that amendment's spawning of additional motion practice when summary judgment was already pending placed an "undue burden on the Court and . . . prejudiced the defendant").

[15] *Accord Cureton*, 252 F.3d at 275 (finding prejudice from late switch from disparate impact to intentional discrimination theory that "fundamentally altered the proceeding and could have been asserted earlier"); *In re Fisker Auto. Holdings, Inc. S'holder Litig.*, 2018 WL 5113964, at *6 (D. Del. Oct. 12, 2018) (denying leave where plaintiffs "waited almost three years" to seek to add new claims "inject[ing] new liability theories and legal issues into the case that would unfairly prejudice Defendants and lead to added litigation that would burden the Court at this late date")

[16] *See Gleason v. Firstrust Bank*, 2021 WL 1853424, at *2 (E.D. Pa. May 10, 2021) (finding that amendment would prejudice defendant who had "already been litigating [a related action] for over two years in California and would be forced to waste additional resources responding to a second case in Pennsylvania" due to plaintiff's "tactical maneuvering"); *Hoffman*, 266 F. Supp. 2d at 33 (finding "clear and significant prejudice" where amendment to lawsuit against backdrop of many years of related litigation in multiple forums would cause "resolution of this already-protracted litigation" to be "significantly delayed").

involve significant discovery. Mot. at 6. However, those are not the only forms of prejudice, and the Third Circuit has stressed that prejudice need not be "discovery-related" to be cognizable. *CMR*, 703 F.3d at 629 (rejecting movant's argument that pledge to "seek no further discovery" obviated prejudice); *accord Fatir v. Dowdy*, 2002 WL 2018824, at *8 (D. Del. Sept. 4, 2002) (discovery "is not the only source of prejudice"). Plaintiff also blames the prejudice on the fact that this case was stayed pending the Supreme Court's *Collins* decision. But that argument ignores that the Supreme Court issued its *Collins* decision in June 2021 and that Plaintiff easily could have sought to lift the stay at any time since then if Plaintiff genuinely believed it had any claim that survived *Collins*.

"If parties were allowed to repeatedly amend their complaints, even after summary judgment motions had been filed, not only the opponent, but the courts, would be prejudiced by the never-ending litigation." *Fatir*, 2002 WL 2018824, at *8. In light of this prejudice, this Court should deny leave to amend.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for leave to amend its complaint, and should instead order supplemental briefing in aid of deciding the parties' cross-dispositive motions directed toward the claims in the current complaint. A proposed order is attached.

Dated: July 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2024, I filed and served via the Court's ECF system a true and correct copy of the foregoing documents.

/s/ Robert J. Katerberg
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