UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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

DEFENDANT DEPARTMENT OF THE TREASURY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

INTRODUCTION

Twelve years ago, following the government's financial rescue of Fannie Mae and Freddie Mac, the Department of the Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA")—acting as conservator for those institutions—entered into a contract amendment referred to as the "Third Amendment." Six years ago, Plaintiff Wazee Street Opportunities Fund filed this lawsuit,[1] the overwhelming focus of which was the legality of the adoption of the Third Amendment. Plaintiff argued that the adoption of the Third Amendment was unconstitutional under Article II and the Appointments Clause, and presented nondelegation and separation of powers concerns. Compl., ECF No. 1. This case was then stayed pending the Supreme Court's consideration of *Collins v. Yellen*, 594 U.S. 220 (2021). Order, ECF No. 43. Although *Collins* was decided more than three years ago, Plaintiff took no action to prosecute this case until now. Represented by new counsel, Plaintiff seeks to assert new claims that these same counsel have brought unsuccessfully on behalf of similar plaintiffs in multiple other districts. Specifically, Plaintiff moves to assert removal restriction causation claims and Appropriations Clause claims.

Although leave to amend is generally liberally granted, the Court should deny Plaintiff's motion because it is untimely, prejudicial, and futile. *First*, Plaintiff's proposed amendment comes far too late in this litigation. Plaintiff's delay alone is sufficient grounds to deny amendment. *Second*, Plaintiff's proposed claims are time-barred and thus amendment is futile. The relevant statute of limitations has passed, and Plaintiff's new allegations do not relate back to the original complaint because they constitute meaningfully different facts and legal theories from what was originally pleaded. And *third*, amendment is also futile because Plaintiff's new claims fail on the merits. The core of these claims has been rejected by multiple courts. The Court should rule similarly here by denying Plaintiff's motion.

BACKGROUND

Plaintiff originally filed this lawsuit in August 2018 as a putative class action on behalf of

[1] Plaintiff originally filed with two other plaintiffs who have recently voluntarily dismissed their claims. ECF No. 53.

shareholders of Fannie Mae and Freddie Mac common stock. Compl. ¶ 1, ECF No. 1. Plaintiff, under various theories, sought to "vacate the third amendment." *Id.* ¶¶ 86, 92, 98, 104, 110. Plaintiff now abandons those theories, including its class claims, in favor of new claims that fall into two groups: removal restriction causation claims and Appropriations Clause claims. *See* Proposed Am. Compl. ¶¶ 96–157, ECF No. 58-1. Counts 1, 3, 5, and 6 of Plaintiff's proposed amended complaint allege constitutional and APA claims based on a removal restriction causation theory, and Counts 2 and 4 allege constitutional and APA claims based on the Appropriations Clause. *Id.* The full procedural history is further set forth in the Opposition to Plaintiff's Motion for Leave to Amend Complaint filed by the FHFA Defendants, ECF No. 61, which Treasury adopts and incorporates by reference.

ARGUMENT

I. PLAINTIFF'S AMENDMENTS ARE UNTIMELY AND PREJUDICIAL.

Plaintiff's delay in prosecuting this case should be dispositive. Three years without taking any action at all amounts to an inexcusable, undue delay, and the Court should not allow it.[2] Leave to amend may be denied when "(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 other party." *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Courts in this district have found undue delay and/or prejudice where the proposed amendments assert new claims, where new discovery would be necessary, and where the motion for leave to amend was filed months after the factual basis of the amendment was discovered by the moving party." *Lafate v. Vanguard Grp., Inc.*, No. CIV.A. 13-5555, 2014 WL 5314832, at *2 (E.D. Pa. Oct. 16, 2014) (Quiñones Alejandro, J.) (collecting cases). Plaintiff must

[2] Plaintiff argues, halfheartedly in a footnote, that the Court's scheduling orders already granted leave to amend. Mem. Supp. Pl.'s Mot. Leave Am. Compl. 1 n. 1, ECF No. 58-2 ("Mot."). Those orders, however, simply gave effect to the extensions negotiated by the parties. *See* Joint Status Report 1, ECF No. 46 ("[T]he parties jointly propose that Plaintiffs shall 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." (emphasis added)). Given Plaintiff's lengthy delay, leave to amend is required by Fed. R. Civ. P. 15(a).

offer a "colorable excuse" for its delay. *Arthur v. Maersk, Inc.*, 434 F.3d 196, 205 n. 11 (3d Cir. 2006).

Plaintiff cannot and does not seriously argue that its three-year delay is excusable. Instead, Plaintiff mischaracterizes the length of the delay and alternatively contends its delay is irrelevant. Plaintiff erroneously contends the delay was only nine months for the removal restriction causation claims and two months for the Appropriations Clause claims. Mot. 3. This case was stayed "pending ***the Supreme Court's*** disposition of the *Collins* matter"—June 23, 2021. Order, ECF No. 43 (emphasis added). Nothing in the order required Plaintiff to wait until, as Plaintiff asserts, the follow-on proceedings by the lower courts concluded. *See* Mot. 3. Likewise, nothing required Plaintiff to wait until the Supreme Court's decision in *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 441 (2024) ("*CFSA*"), to bring its Appropriations Clause claims, and Plaintiff proffers nothing to suggest that decision is the relevant trigger. *See* Mot. 4–5. Indeed, these same counsel, in a different Third Amendment case, moved to amend to bring substantially similar Appropriations Clause claims against these same Defendants in August 2023—nine months before the *CFSA* decision was released. *See* Mem. Supp. Pls.' Mot. Leave Am. Compl., *Rop v. FHFA*, No. 1:17-cv-00497 (W.D. Mich. Aug. 11, 2023), ECF No. 80. And the alleged facts underlying Plaintiff's proposed Appropriations Clause claims have been known for much longer: FHFA's funding structure was set by the Housing and Economic Recovery Act of 2008 ("HERA"). *See* Proposed Am. Compl. ¶¶ 7, 18, ECF No. 58-1.

Although unnecessary to prevail against Plaintiff's motion, Defendants moreover have been prejudiced by Plaintiff's extraordinary delay. *See Est. of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010) (concluding that "***[i]rrespective of whether Appellees would have suffered prejudice*** from Oliva's late assertion of a First Amendment claim, Oliva's delay in seeking leave to amend was undue").[3]

To date, the parties have fully briefed three dispositive motions. *See* ECF Nos. 15, 16, 19.

[3] That also accords with a plain reading of the Third Circuit's test, which uses "or" to separate the individually sufficient bases for denying leave to amend. *See Arnold*, 232 F.3d at 373.

Granting amendment now would waste the time and effort that went into preparing that extensive briefing. *See Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 655 (3d Cir. 1998). Further, Defendants have an interest in finality—bringing to conclusion this years-long litigation—that would be frustrated by amendment. *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 630 (3d Cir. 2013) ("[T]he District Court correctly determined that the City would be prejudiced because the proposed amendment would bring a new theory into the case several years after the beginning of the litigation."). Accordingly, the Court should deny Plaintiff's motion on this procedural ground.

II. PLAINTIFF'S AMENDMENTS ARE FUTILE.

A. Plaintiff's new claims are barred by the statute of limitations.

Because Plaintiff's new claims otherwise would be time-barred if filed for the first time now,[4] to survive, the new allegations must "relate back" to the original complaint. As relevant here, an amendment relates back to the original pleading when "the amendment asserts a claim or defense that 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). The Third Circuit, in *Glover v. FDIC*, 698 F.3d 139, 146 (3d Cir. 2012), explained that "where the original pleading does not give a defendant 'fair notice of what the plaintiff's [amended] claim is and the grounds upon which it rests,' the purpose of the statute of limitations has not been satisfied and it is 'not an original pleading that [can] be rehabilitated by invoking Rule 15(c).'" *Id.* (quoting *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149 (1984)). Rule 15(c)(1)(B) "entails a search for a common core of operative facts in the two pleadings." *Id.* (quotation omitted). "[O]nly where the opposing party is given 'fair notice of the general fact situation and the legal theory upon which the amending

[4] Claims against agencies of the United States must be "filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Such a claim accrues "when the plaintiff is injured by final agency action." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2448 (2024). Plaintiff's Appropriations Clause claims accrued when the Third Amendment was adopted on August 17, 2012, Proposed Am. Compl. ¶ 35, ECF No. 58-1, or at latest when Plaintiff purchased shares of Fannie Mae stock in December 2016, *id.* ¶ 6. Plaintiff's removal restriction causation claims accrued when President Trump took office (and could not immediately remove the FHFA Director) in January 2017. In any case, the six-year period has now passed.

party proceeds' will relation back be allowed." *Id.* By contrast, "amendments 'that significantly alter the nature of a proceeding by injecting new and unanticipated claims are treated far more cautiously.'" *Id.* "Put another way," the relevant question is "whether the *original* complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *Id.* (emphasis in original) (quoting *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008)).

Neither of Plaintiff's new claims meet this burden. Plaintiff's proposed Appropriations Clause claims fall well short of the *Glover* standard. The crux of Plaintiff's new claim is that FHFA's funding structure is constitutionally flawed because it is "not funded through the ordinary appropriations process." Mot. 10. But in the original complaint there is no mention of the Appropriations Clause, the constitutional provision on which Plaintiff's new claims rely. Compl., ECF No. 1. And the passing reference to FHFA's funding mechanism in the original complaint, *id.* ¶ 89, is unmoored from a claim resembling the Appropriations Clause claims it now seeks to add; it was raised instead as part of a distinct separation of powers claim that focused on alleged insulation of FHFA from "any of the three branches of government," *id.* ¶ 88.[5] Indeed, Plaintiff does not purport to stand on that lone reference. Instead, Plaintiff argues in conclusory fashion that the Appropriations Clause claims "arose out of . . . Defendants' adoption and continued implementation of the Third Amendment." Mot. 10; *see also* Proposed Am. Compl. ¶¶ 117, 139, ECF No. 58-1 (discussing adoption of Third Amendment). But any alleged deficiency in the way FHFA was funded would have arisen under HERA, irrespective of the Third Amendment. *Glover* demands more. Because Plaintiff failed to put Defendants on notice of either the "general fact situation" or the "legal theory upon which the amending party proceeds," *Glover*, 698 F.3d at 146, the amendment does not relate back, and Plaintiff's Appropriations Clause claims are time-barred.

[5] The Supreme Court's recent opinion in *CFSA* recognized that Appropriations Act claims (which Plaintiff now seeks to add) are distinct from other separations of powers claims (which Plaintiff attempted to allege in the original complaint). *See* 601 U.S. at 441 ("Although there may be other constitutional checks on Congress' authority to create and fund an administrative agency, specifying the source and purpose is all the control the Appropriations Clause requires."); *see also id.* at 471 n. 20 (Alito, J., dissenting).

The same holds true for Plaintiff's new removal restriction causation claims. The original complaint was focused on the Third Amendment itself being unlawful, a theory soundly rejected by the Supreme Court in *Collins*. 594 U.S. at 257–58. Any conduct supporting Plaintiff's removal restriction causation claims necessarily had to occur after January 2014 when the Senate confirmed a director. *See Rop v. Fed. Hous. Fin. Agency*, 485 F. Supp. 3d 900, 915 (W.D. Mich. 2020), *rev'd and remanded*, 50 F.4th 562 (6th Cir. 2022). The Supreme Court held that actions taken before January 2014 by the *acting* Director of FHFA were not constitutionally suspect because—unlike a confirmed director—he was removable by the President at will. *Collins*, 594 U.S. at 247. Recognizing that, Plaintiff devotes nearly half of the proposed amended complaint—at least 24 pages—to this post-January 2014 period. *See* ECF 58-1 ¶¶ 44–95. Plaintiff's original complaint in contrast is practically devoid of allegations from that period. *See* ECF No. 1.[6] Accordingly, no "common core of operative facts" shared between the two pleadings, *Glover*, 698 F.3d at 146, supports the removal restriction causation theory. That the *Collins* opinion clarified the law on these removal restriction claims since Plaintiff filed the original complaint is of no moment when determining whether an amendment relates back. *See Simon Wrecking Co. v. AIU Ins. Co.*, 350 F. Supp. 2d 624, 634 (E.D. Pa. 2004) ("In Pennsylvania, intervening changes in law do not revive actions that have already been barred by the running of the statute of limitations.").[7] In other words, Plaintiff may not seek an exception from the normal statute of limitations based on later developments in the law. *See United States v. Sams*, 521 F.2d 421, 429 (3d Cir. 1975).

Plaintiff's motion, for its part, does not apply or address *Glover*. Instead, Plaintiff makes the odd claim that under *Garvin v. City of Philadelphia*, 354 F.3d 215, 220 (3d Cir. 2003), "even entirely new legal claims 'relate back' if they 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]'" Mot. 12. But *Garvin* does not

[6] The only allegations in the original complaint post-dating January 2014 relate to the increased liquidation preference in December 2017, *see* ECF 1 ¶ 50, but there are no allegations explaining how this liquidation preference would have been different but for the removal restriction.

[7] This conclusion can also be gleaned from *Glover* itself, which overwhelmingly focuses on the original pleading, rather than intervening events. *Glover*, 698 F.3d at 146.

say that. *Garvin* addressed an attempt to substitute Doe defendants—not new legal claims. 354 F.3d at 220. And even on that question the Third Circuit determined that the amendment did *not* relate back to the original complaint. *Id.* at 222. Plaintiff is simply wrong that its new claims relate back to the original complaint. *See Glover*, 698 F.3d at 146.

B. Plaintiff's new claims fail on the merits for the same reasons they failed in the Fifth and Eighth Circuits.

Plaintiff's new claims fail to state a claim under the Rule 12(b)(6) standard. Amendment is futile when, as here, "the proposed complaint could not 'withstand a renewed motion to dismiss.'" *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp*, 908 F.3d 872, 878 (3d Cir. 2018) (quoting *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988)). Plaintiff's removal restriction causation claims have been rejected in every court that has addressed them post-*Collins*. Plaintiff's counsel has brought these claims in courts around the country, and the Southern District of Texas, District of Minnesota, Fifth Circuit, and Eighth Circuit have all rejected these claims for substantially similar reasons. *See Bhatti v. Fed. Hous. Fin. Agency*, 97 F.4th 556, 562 (8th Cir. 2024) ("Bhatti did not plausibly plead that Trump's inability to remove Watt harmed the shareholders."); *Collins v. Dep't of the Treasury*, 83 F.4th 970, 983 (5th Cir. 2023) ("[T]he complaint fails plausibly to allege 'a nexus between the desire to remove and the' Trump Administration's failure to exit the conservatorships and return the companies to fully private control."); *Bhatti v. Fed. Hous. Fin. Agency*, 646 F. Supp. 3d 1003, 1013 (D. Minn. 2022) ("[T]he Court notes that, even if plaintiffs had stated the type of claim contemplated in *Collins*, the nature of their claim is far too speculative to survive a motion to dismiss."); *Collins v. Lew*, 642 F. Supp. 3d 577, 584 (S.D. Tex. 2022) ("While Plaintiffs' evidence may plausibly suggest that the Trump Administration hoped to end the conservatorship, Plaintiffs do not demonstrate that the Administration had a concrete plan in place, that this plan necessarily involved liquidating Treasury's preferred stock, or that the Administration would have completed these actions within four years.").

Plaintiff argues that it has "direct evidence" of causation, Mot. 8, namely a letter President

Trump wrote after he left office, but that same evidence was before these other courts. The Eighth Circuit held that the Supreme Court's hypothetical guidance on what could prove causation called for "a statement that the president '*would*' remove the director, not a post-hoc statement that he '*would have*' removed the director." *Bhatti*, 97 F.4th at 560. And even crediting the letter and the other allegations put forward by plaintiffs, the Fifth Circuit held that "nothing in the amended complaint show[ed] that the companies would have exited the conservatorships and returned to private control if the Trump Administration had a full four years with its chosen director." *Collins*, 83 F.4th at 983; *see also Bhatti*, 97 F.4th at 561.[8]

Plaintiff's Appropriations Clause claims fail under recent Supreme Court precedent. The bottom-line of *CFSA* is straightforward: the Appropriations Clause requires nothing "more than a law that authorizes the disbursement of specified funds for identified purposes." 601 U.S. at 438; *see also id.* at 441 ("Although there may be other constitutional checks on Congress' authority to create and fund an administrative agency, specifying the source and purpose is all the control the Appropriations Clause requires."). Plaintiff's cherry-picked factual distinction between *CFSA* and this case—the lack of a "cap" as exists for CFPB, *see* Mot. 11—does not bring its theory in line with the decision. Congress plainly passed a law authorizing the funding of FHFA. The FHFA Director is directed to "establish and collect from the regulated entities annual assessments," 12 U.S.C. § 4516(a)—the "source" or "specified funds." And the same section of the Code provides an enumerated list of authorized "reasonable costs (including administrative costs) and expenses of the Agency," *id.*—the "purpose." The funding structure of FHFA is therefore permissible under the Appropriations Clause, and Plaintiff's arguments to the contrary are inconsistent with *CFSA*. Accordingly, the futility of adding both claims is clear.

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[8] Several Justices' concurring opinions in *Collins* cast doubt on the need for remand proceedings. *See* 594 U.S. 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) (criticizing remand and stating that "the Court may calculate that the lower courts on remand in this suit will simply refuse retroactive relief"); *id.* at 275–76 (Kagan, J., concurring in part and concurring in the judgment, joined in part by Breyer and Sotomayor, JJ.) ("[T]he lower court proceedings may be brief indeed . . . the Court of Appeals already considered and decided the issue remanded today.").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for leave to amend.

Dated: July 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2024, a true and correct copy of the foregoing memorandum was filed electronically and is available for viewing and downloading from the Court's CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF system.

Executed on July 29, 2024.

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