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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAISEY TRUST, by and through its trustee, Eddie Haddad; CAPE JASMINE CT. TRUST, by and through its trustee, Eddie Haddad; and SATICOY BAY LLC, SERIES 10007 LIBERTY VIEW,

Plaintiffs,

vs.

FEDERAL HOUSING FINANCE AGENCY; and SANDRA L. THOMPSON, in her official capacity as Director of the Federal Housing Finance Agency,

Defendants.

Case No.: 2:23-cv-00978-APG-EJY

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Defendants Federal Housing Finance Agency and its Director Sandra L. Thompson (collectively, "FHFA") respectfully oppose Plaintiffs' motion for leave to file a second amended complaint ("Motion"). ECF No. 52.

INTRODUCTION

Plaintiffs' request for leave to amend flies in the face of this Court's order for supplemental briefing on the effect of the U.S. Supreme Court's recent decision in *Consumer Financial Protection Bureau v. Community Financial Services Ass'n*, No. 22-448 ("*CFSA*"), on Plaintiffs' claims. The Court should reject that request and deny Plaintiffs' Motion.

On the day *CFSA* came out, this Court instructed the parties to submit a plan for how this case should proceed in light of the new authority; the Court specifically directed the parties to consider whether *CFSA* "requires amendment of the first amended complaint, withdrawal and refiling of the pending motion to dismiss, *or* some other action." ECF No. 43 at 1 (emphasis added). In response, the parties offered two competing plans: Plaintiffs proposed scrapping the voluminous briefing already completed in this case, moving for leave to amend their already amended complaint, and starting over from scratch, while FHFA proposed submitting supplemental briefs on the pending motion to dismiss the existing first amended complaint in an effort to resolve this action expeditiously on the merits. The Court adopted FHFA's proposal and ordered the parties to submit supplemental briefs.

Plaintiffs, however, were undeterred; they propose to relegate the Court's order—and the opening supplemental briefs both parties filed based upon it—to the dustbin. Despite the Court's rejection of Plaintiffs' proposal to move for leave to amend, which would be their *third* bite at the apple, Plaintiffs now do just that in a transparent attempt at further delay. The Court need not and should not revisit its decision to follow a simple, straightforward path to resolution.

Indeed, the Court already has everything it needs to fully resolve this case on the merits. Plaintiffs' proposed second amended complaint adds no new claims or factual allegations. At most, the proposed amendment tweaks Plaintiffs' underlying *legal* theories. But briefing, not pleading, is the place to assert and refine those theories. And the Court has already given Plaintiffs the chance to do this through supplemental briefing. Plaintiffs nevertheless ask for what can only be described as a do-over—*another* amended complaint followed by *another* motion to dismiss with *still more* largely duplicative briefing, with FHFA and the Court bearing the burden. The Court should not indulge Plaintiffs' request to go back to square one, especially now that *CFSA* demonstrates Plaintiffs' claims fail as a matter of law.

Plaintiffs' Motion also should be denied because amendment is futile. The allegations in the proposed second amended complaint suffer from the same defects as the allegations in the operative first amended complaint. Further, amending the complaint yet again would prejudice FHFA by wasting the significant time and considerable expense incurred to prepare the pending motion-to-

dismiss briefing and by forcing FHFA to move yet again to dismiss this action—which would be the *third* motion to dismiss in this case. And Plaintiffs have every incentive to prolong this litigation. Plaintiffs and other non-party Haddad entities have continued their repeated practice of using this lawsuit as the basis to record improper lis pendens on the eve of foreclosure sales, thereby deterring potential purchasers and depressing sale prices, all to the detriment of FHFA's conservatees Fannie Mae and Freddie Mac. This practice may well be the real reason for requesting yet another amendment, reflecting the most recent form of lawfare by Plaintiffs and other Haddad entities. The Court should put an end to these tactics.

The Federal Rules are designed to promote justice, efficiency, and merit-based decisions. *See* Fed. R. Civ. P. 1. Allowing amendment here accomplishes none of these goals. Prolonging this action so that Plaintiffs can re-formulate the same doomed claims merely forestalls the inevitable and wastes the parties' (and the Court's) time, effort, and resources. The most efficient way to get to a final decision on the merits is for the Court, after considering the supplemental briefing that it ordered, to decide the pending motion to dismiss.

Accordingly, the Court should deny Plaintiffs' Motion.

RELEVANT PROCEDURAL BACKGROUND

As the Court is familiar with the facts surrounding this proceeding, FHFA summarizes only the procedural background relevant to Plaintiffs' Motion.

This case started more than a year ago, when Plaintiff Daisey Trust sued FHFA in June 2023. ECF No. 1. In the original complaint, Plaintiff Daisey Trust asserted that FHFA's self-funding statutory mechanism violates "the Appropriations Clause [and] the Supreme Court's separation-of-powers precedent, including the Nondelegation doctrine." ECF No. 1 at ¶ 56. The original complaint also referenced *CFSA* as a pending Supreme Court case involving "a similar question regarding the constitutionality of another federal agency (the CFPB) that funds itself outside the normal appropriations process." *Id.* at ¶ 1.

FHFA moved to dismiss this action in August 2023. ECF No. 18. After further motions practice, Plaintiffs filed their first amended complaint on November 2, 2023. ECF No. 34. The first amended complaint—which is currently the operative complaint—added two new plaintiffs,

purported to plead a class action, and included demands for money damages. *See generally id.* Yet it asserted the same underlying legal theory as the original complaint—namely, that FHFA's self-funding structure violates the Appropriations Clause, the Nondelegation Doctrine, and separation-of-powers principles. *See id.* at ¶ 2. FHFA moved to dismiss the first amended complaint at the end of last year—on December 18, 2023. ECF No. 36. And that motion was fully briefed six months ago—on February 16, 2024. *See* ECF Nos. 39, 42.

On May 16, 2024, the Supreme Court issued its *CFSA* decision. That same day, this Court ordered "the parties to confer about how the decision impacts this case, and whether it requires amendment of the first amended complaint, withdrawal and refiling of the pending motion to dismiss, or some other action." ECF No. 43. The parties conferred but did not agree on how this case should proceed in light of the new authority.

On June 21, 2024, the parties submitted a joint status report explaining each party's position. *See* ECF No. 45. Plaintiffs articulated their position that an amended complaint was necessary, and FHFA proposed that the case should proceed with limited supplemental briefing. *See id.* On July 8, 2024, the Court adopted FHFA's position and ordered each party to submit a supplemental brief no longer than eight pages limited to the effect of the *CFSA* decision on Plaintiffs' claims by July 31, 2024, with responses no longer than four pages due by August 21, 2024. ECF No. 48.

FHFA submitted its opening supplemental brief on July 31, 2024. ECF No. 51. Plaintiffs did not. Instead, on July 31, 2024, Plaintiffs filed their Motion, asking this Court for leave to file a second amended complaint. ECF No. 52. Plaintiffs attached a copy of the proposed second amended complaint to their Motion, ECF No. 52-1, but did not include a redline reflecting the changes.[1] The next day, on August 1, 2024, Plaintiffs filed their opening supplemental brief on the effect of *CFSA* on Plaintiffs' claims. ECF No. 54.

[1] Plaintiffs previously insisted that this case was somehow limited to foreclosures, and that Plaintiffs were "not trying to burn down the FHFA," but that was never the case. ECF No. 32 at 24. The proposed second amended complaint puts to lie those dubious assertions; Plaintiffs finally acknowledge that they do in fact challenge all of FHFA's "operations," not just those relating to "foreclosure activities." ECF No. 52-1 at ¶ 46.

LEGAL STANDARD

A party is allowed to amend a pleading once as a matter of course. *See* Fed. R. Civ. P. 15(a)(1). After it does so, "a party may amend its pleadings only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). While Rule 15 states that "the court should freely give leave when justice so requires," Fed. R. Civ. P. 15(a)(2), the Ninth Circuit has held that leave to amend "is not to be granted automatically." *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013). For example, the "general rule that parties are allowed to amend their pleadings … does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal." *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (internal quotation omitted).

"Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). A court "need not consider all of these factors in each case." *Cordova Carballo v. Barr*, No. 2:20-cv-02196-APG-BNW, 2021 WL 3009100 (D. Nev. July 15, 2021), *report and recommendation adopted sub nom. Sandor Anival Cordova Carballo v. Barr*, 2021 WL 4047450 (D. Nev. Sept. 3, 2021). Indeed, futility "alone can justify the denial of a motion for leave to amend." *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2003).

ARGUMENT

I. No Amendment Is Necessary to Decide this Case

A. The Court Already Decided How this Case Should Proceed

The Court should deny Plaintiffs' Motion, as further amendment is not necessary. This Court's order following the parties' June 21, 2024 joint status report acknowledges as much. ECF No. 48. The joint status report sets forth the parties' differing views on whether amendment is needed. ECF No. 45. Plaintiffs argued that "an amendment to the pleadings is necessary to remove the resolved issues and develop more fully the spending cap infirmities in the FHFA's structure." *Id.* at 2. Plaintiffs further argued that it would "be too procedurally convoluted for this Court and any reviewing court to shoehorn additional analysis into the current pending motions." *Id.*

FHFA proposed an alternative route. FHFA argued that "[n]o amendment is needed" because "Plaintiffs' operative amended complaint already alleges that FHFA's statutory funding mechanism violates the Appropriations Clause." *Id.* at 3. FHFA pointed out that "Plaintiffs' own submissions to the Court confirm that the Amended Complaint *already* incorporates the 'cap' theory." *Id.* As a result, FHFA argued that the Court can rule "on the legal insufficiency of Plaintiffs' claim without the need to start all over again, for the second time, with a new complaint." *Id.* To allow both parties to address the *CFSA* decision, FHFA proposed that the Court order limited supplemental briefing.

The Court agreed with FHFA. Instead of endorsing Plaintiffs' plan to amend the complaint, the Court implemented FHFA's proposal by ordering the parties to submit supplemental briefing addressing the impact of *CFSA* on Plaintiffs' claims. *See* ECF No. 48.

Plaintiffs' Motion hardly acknowledges the Court's order. Indeed, the Motion merely states that "[t]he Court did not comment on—or preclude—Plaintiffs' ability to move to amend." Mot. at 4. That statement might be technically correct, but it ignores the context in which the Court issued its order: After being presented with two competing proposals for how the case should proceed—one of which involved Plaintiffs amending their complaint—the Court decided to go the alternative route. Plaintiffs' suggestion that the supplemental briefing order did not represent the Court's preference to proceed without further amendment is disingenuous and merits scrutiny by the Court. Plaintiffs' paltering should not be allowed.

Further, Plaintiffs' proposal that amendment proceed in parallel with the supplemental briefing blatantly ignores issues of efficiency and mootness. For instance, the Court-ordered supplemental briefing will be redundant if Plaintiffs file their proposed second amended complaint that requires yet another motion to dismiss. The same legal arguments the parties make in the supplemental briefs will certainly re-appear in a third round of motion-to-dismiss briefing. And if the Court were to issue a ruling on the basis of the already-submitted briefing—including the pending motion-to-dismiss and supplemental briefs—that ruling would be mooted by Plaintiffs' filing of a redundant second amended complaint.

Plaintiffs claim that moving forward without a second amended complaint would be "too

procedurally convoluted for this Court," ECF No. 45 at 2, and that "amendment [would] create the cleanest record possible for the important constitutional issues at stake," Mot. at 2. But Plaintiffs offer no explanation for how proceeding to judgment after limited supplemental briefing muddies the record. It does not. If anything, it is Plaintiffs' request for leave to amend *after* the Court already ordered supplemental briefing that convolutes the procedure and muddies the record. Plaintiffs have only themselves to blame for any resulting procedural complications from their failure to heed the Court's order.

At bottom, Plaintiffs' request for leave to file a second amended complaint is at odds with the Court's order for supplemental briefing. Plaintiffs' Motion offers no explanation for how the Court-ordered supplemental briefing is insufficient to present Plaintiffs' arguments. That is because, as discussed below, there is no such explanation. Accordingly, the Court should deny the Motion and stick with the course of action set forth in its previous order.

B. The Court Has Everything It Needs to Fully Resolve Plaintiffs' Claims

Even if the Court had not already decided on a course of action, leave to amend would still be improper because the proposed second amended complaint does not add any new claims or factual allegations. Moreover, the operative first amended complaint and the proposed second amended complaint set forth the same basic theory: that FHFA's funding provision—12 U.S.C. § 4516—is unconstitutional. Further amendment to elaborate on that same theory is neither necessary nor proper.

The proposed second amended complaint does not alter the claims at issue in this case. Plaintiffs suggest that the proposed second amended complaint "adds allegations about broader separation of powers principles." Mot at 2. Plaintiffs are wrong. The proposed second amended complaint alleges the same three constitutional violations as the operative first amended complaint:

Operative First Amended Complaint	**Proposed Second Amended Complaint**
FHFA's funding mechanism "violate[s] the Appropriations Clause, the Separation of Powers, and/or the Nondelegation Doctrine." ECF No. 34 at ¶ 83.	FHFA's funding mechanism constitutes a "violation of the Appropriations Clause, Nondelegation Doctrine, and separation of powers principles." ECF No. 52-1 at ¶ 20

Thus, the proposed second amended complaint does not allege any new constitutional violations; it merely offers slightly different legal arguments to support the same alleged violations.

A complaint need not articulate the plaintiff's precise legal theory. *See, e.g.*, *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014); *see also Robertson v. Allied Sols., LLC*, 902 F.3d 690, 695 (7th Cir. 2018) ("Complaints need not delineate every detail of the plaintiff's legal theory."). Indeed, the Federal Rules state that a complaint need only contain "a short and plain statement of the claim showing that the pleader it entitled to relief." Fed. R. Civ. P. 8(a)(2). Under this pleading standard, it is perfectly appropriate for the parties to develop their legal theories in briefing. Thus, Plaintiffs' request to amend the complaint "to develop more fully the spending cap infirmities in the FHFA's structure" is unnecessary. ECF No. 45 at 3.

In addition, the proposed second amended complaint elaborates on legal theories, not new factual allegations. As the redline attached to this Opposition reveals, *see* **Ex. A**, the substantive additions in the proposed second amended complaint consist almost exclusively of *legal* arguments in support of Plaintiffs' same underlying allegations regarding FHFA's constitutionality. Indeed, a substantial portion of these additions are simply quotes from the *CFSA* decision. For example, the proposed second amended complaint's additions include:

- "The [*CFSA*] majority recognized that 'there may be other constitutional checks on Congress' authority to create and fund an administrative agency' aside from the Appropriations Clause," ECF No. 52-1 at ¶ 3 (citing *CFSA*, 601 U.S. at 441);
- "An 'appropriation' within the meaning of the Appropriations Clause is a law authorizing an expenditure of a certain amount from a specified source of public money for designated purposes," *id.* at ¶ 28 (citing *CFSA*, 601 U.S. at 425-26);
- "'[T]he Appropriations Clause requires [no] more than a law that authorizes the disbursement of specified funds for identified purposes,'" *id.* at ¶ 29 (citing *CFSA*, 601 U.S. at 438);
- "The appropriation 'need[s] to designate particular revenues for identified purposes' either by 'requir[ing] expenditure of a particular amount' or 'allow[ing] the recipient of the appropriated money to spend up to a cap,' *id.* (citing *CFSA*, 601 U.S. at 431);
- "[A] law allowing an agency to draw funds that its director deems 'reasonably necessary to carry out the agency's responsibilities' will satisfy the Appropriations Clause if Congress has imposed a statutory cap on funding and spending to constrain the director's 'reasonableness' determination," *id.* at ¶ 30 (citing *CFSA*, 601 U.S. at 435-36);

- "The appropriation 'need[s] to designate particular revenues for identified purposes' either by 'requir[ing] expenditure of a particular amount' or 'allow[ing] the recipient of the appropriated money to spend up to a cap,'" *id.* at ¶ 83 (citing *CFSA*, 601 U.S. at 431-32).

These additions are legal arguments that can be—and have been—elaborated on in subsequent briefing. They do not need to be included in the complaint.[2]

Moreover, the impetus behind the purported need for the proposed second amended complaint is a legal theory that is *already addressed in the operative first amended complaint*. According to Plaintiffs, the main change following *CFSA* is that Plaintiffs are moving from the theory that FHFA's funding violates the Appropriations Clause because it does not come from periodic disbursements from Congress to the theory that the funding violates the Appropriations Clause because it is uncapped. *See* ECF No. 45 at 2. But as Plaintiffs themselves acknowledge, the operative first amended complaint already incorporates Plaintiffs' "cap" theory. Indeed, Plaintiffs' Motion itself disclaims: "To be sure, the First Amended Complaint contains some allegations about the FHFA's lack of a budgetary cap." Mot. at 2. And Plaintiffs made the same representation to the Court when presenting its proposal to amend: "To be sure, Plaintiffs' First Amended Complaint and the pending motion practice reference the lack of a similar cap as one reason for unconstitutionality." ECF No. 45 at 3. Thus, by Plaintiffs' own admission, they seek leave to re-formulate a theory they have already asserted.[3]

Because the proposed second amended complaint contains no new factual allegations, the Court has everything it needs to resolve this case. A court need not grant leave to amend if the case can be resolved by the operative pleadings. Indeed, this Court denied a Rule 15 motion for leave to amend under analogous circumstances. In *Stiegler v. Neven*, a habeas petitioner sought to amend his petition to "supplement" his allegations of ineffective assistance of counsel. *See* No. 2:14-cv-01274-APG-CWH, 2017 WL 5339898, at *4 (D. Nev. Nov. 13, 2017). This Court found that because "these claims are already in the petition, no amendment is necessary or proper as to these

[2] Indeed, Plaintiffs' opening supplemental brief includes *every single one* of the quotes provided in the bullet list above. *Compare* ECF No. 52-1 at ¶¶ 3, 28, 29, 29, 30, 83 *with* ECF No. 54 at 7, 1, 6, 5, 6, 5.

[3] In any event, the lack of a statutory cap has no bearing on FHFA's constitutionality. *See infra* Section II.

grounds." *Id.* The same is true here—Plaintiffs' main allegations in the proposed second amended complaint are already asserted in the operative pleading. As a result, amendment is neither necessary nor proper.

Similarly, courts should not grant leave to amend when the proposed amendment is repetitive. The Ninth Circuit has held that a court is "well within its discretion to deny leave to amend" when the pleadings are "highly repetitious." *Cafasso, U.S ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011); *see also Loos v. Immersion Corp.*, 762 F.3d 880, 890-91 (9th Cir. 2014) (upholding district court's refusal to grant leave to amend because the plaintiff's proposed amended complaint "essentially re-pled the same facts and legal theories" as the original); *Martinez v. IRS*, 2015 WL 1221351, at *4 (D. Nev. Mar. 17, 2015) (denying the plaintiff leave to file a second and third amended complaint because "at their core are the same unsupported allegations and legal theories that fill her original complaint").

Here, allowing Plaintiffs to amend yet again simply to restate the same theories that are in the operative first amended complaint would be repetitive. Tellingly, Plaintiffs' Motion did not include a redline showing the changes between the operative first amended complaint and proposed second amended complaint. FHFA is providing such a redline with this filing and encourages the Court to review it. *See* Ex. A. Even a cursory review will reveal that most of the alleged "modifications"—in addition to the quotes from *CFSA* identified above—are non-substantive edits, changing labels and characterizations, reordering of sentences, and wordsmithing. Taken as a whole, the proposed second amended complaint is repetitive of the operative first amended complaint.

As noted above, the Federal Rules are designed to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Allowing Plaintiffs to amend again, when all dispositive issues are fully briefed, runs contrary to that objective. Hence, the Court should deny leave to amend and expeditiously resolve this case on the merits.

II. Amendment Would Be Futile

The Court should deny Plaintiffs' Motion for another reason: The proposed amendment is futile. "A district court acts within its discretion to deny leave to amend when amendment would

be futile." *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000). As discussed in FHFA's motion-to-dismiss and supplemental briefing, Plaintiffs' claims regarding FHFA's constitutionality—both in the operative first amended complaint and in the proposed second amended complaint—are destined to fail. Thus, allowing Plaintiffs to amend the complaint yet again to reformulate their flawed theories would be an "exercise in futility." *Novak*, 795 F.3d at 1020. In particular, Plaintiffs' proposed Appropriations Clause, Nondelegation Doctrine, separation-of-powers, and *Bivens* claims—none of which present anything new—all fail as a matter of law.

Given that Plaintiffs do not change their factual allegations or the substance of their claims, FHFA's arguments in the existing motion-to-dismiss and supplemental briefing show that the claims in the proposed second amended complaint would fail. FHFA does not repeat or expand on all those arguments here, instead presenting only a simple summary, and Plaintiffs should not be permitted to use their reply as a vehicle to supplement the arguments they asserted in their supplemental brief. Instead, the Court should deny Plaintiffs' Motion, consider the pending motion-to-dismiss and supplemental briefing, and issue a ruling on the merits.

A. Plaintiffs' Appropriations Clause Claim Fails as a Matter of Law

Plaintiffs' Appropriations Clause claim, as articulated in the proposed second amended complaint, fails as a matter of law. As discussed above, *see supra* Section I.B, Plaintiffs claim that "the proposed Second Amended Complaint reorientates the litigation's focus to the lack of funding caps and Congress' missing involvement in setting the assessments from the regulated entities." Mot. at 7. But for the reasons explained in FHFA's supplemental brief, *see* ECF No. 51 at 4-8, this argument provides no lifeline.

In *CFSA*, the Supreme Court declared a two-part test for evaluating Appropriations Clause challenges: "[A]ppropriations need only [1] identify a *source* of public funds and [2] authorize the expenditure of those funds for designated *purposes*." *CFSA*, 601 U.S. at 426 (emphasis added). The Supreme Court articulates this source-and-purpose test no fewer than *six times* in its decision. *See id.* at 424, 426, 427, 438, 439, 441. Plaintiffs' proposed second amended complaint is premised on a non-existent third requirement for Appropriations Clause challenges: a statutory fixed-dollar

cap. But *CFSA* makes clear that "*only*" a source and purpose are required. *Id.* at 426 (emphasis added). Thus, Plaintiffs' proposed amendment is futile.[4]

B. Plaintiffs' Nondelegation Doctrine Claim Fails as a Matter of Law

CFSA also fails to support Plaintiffs' already-doomed Nondelegation Doctrine claim. As discussed in FHFA's motion-to-dismiss briefing, *see* ECF No. 36 at 21-22; ECF No. 42 at 25-26, the Supreme Court has "over and over upheld even very broad delegations." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.). Indeed, "[o]nly twice in this country's history (and that in a single year) [has the Supreme Court] found a delegation excessive." *Id.*

These same arguments—based on longstanding and overwhelming Supreme Court precedent—apply with equal force to the Nondelegation Doctrine claim as asserted in the proposed second amended complaint. As an initial matter, Plaintiffs claim that the proposed second amended complaint "modifies [Plaintiffs'] Nondelegation Doctrine" claim based on *CFSA*'s holding. Mot. at 7. But as the redline comparing the operative and proposed complaints reveals, this "modification" is not to the claim itself—it is to the argument supporting it. *See* Ex. A at 19-21. Thus, Plaintiffs' proposed second amended complaint asserts the same type of claim—i.e., an alleged violation of the Nondelegation Doctrine—for which the Supreme Court has only ever found a violation twice, both in 1935. *See CFPB v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 184 n.1 (2d Cir. 2023). The Court should decline Plaintiffs' renewed invitation to break from nearly a century of precedent.

Nothing in *CFSA* salvages Plaintiffs' Nondelegation Doctrine claim. Plaintiffs' Motion recites the majority's statement "that there may be other constitutional checks on Congress' authority to create and fund an administrative agency." Mot. at 5 (quoting *CFSA*, 601 U.S. at 441). No one disputes that premise. Rather, the parties dispute whether one of those checks—namely, the Nondelegation Doctrine—has been violated here. The *CFSA* majority's acknowledgement that other constitutional checks such as the Nondelegation Doctrine constrain Congress' authority to fund an agency in no way changes the analysis for Nondelegation Doctrine challenges. Instead, the

[4] FHFA's opening supplemental brief addresses in detail the reasons Plaintiffs' attempt to engraft a third requirement onto the *CFSA* two-part source-and-purpose test fails. *See* ECF No. 51 at 4-8. Rather than repeat those arguments here, FHFA incorporates them by reference.

same "intelligible principle" test applies. And as discussed in FHFA's motion-to-dismiss briefing, FHFA's funding structure satisfies the "intelligible principle" test. *See* ECF No. 36 at 21-22; ECF No. 42 at 25-26.[5]

Because Plaintiffs' proposed second amended complaint is at odds with the same overwhelming and longstanding precedent identified in FHFA's motion-to-dismiss briefing, allowing amendment would be futile.

C. Plaintiffs' Separation-of-Powers Claim Fails as a Matter of Law

Plaintiffs also imply that *CFSA*'s acknowledgment of broad separation-of-powers principles somehow bolsters Plaintiffs' own claim that FHFA's funding structure violates the separation of powers. Indeed, Plaintiffs claim that the proposed second amended complaint now "includes [*CFSA*'s] acknowledgment of a broader separation of powers claim layered on the Appropriations Clause." Mot. at 7 (citing ECF No. 52-1 at ¶¶ 1-3). But Plaintiffs' mere addition of quotes from *CFSA* that acknowledge the existence of separation of powers principles, *see* ECF No. 52-1 at ¶ 3, in no way alters Plaintiffs' underlying claim. Nor does it make Plaintiffs' claims any more likely to succeed.

In fact, *CFSA* undermines Plaintiffs' suggestion that an agency's self-funding mechanism somehow violates the separation of powers. Indeed, *CFSA* explicitly rejects the argument that a self-funding mechanism "provides a blueprint for destroying the separation of powers." *CFSA*, 601 U.S. at 437. Further, the Court extensively describes the longstanding history of agency funding mechanisms, which often allow an agency to raise its own funds. *See id.* at 433-35 (discussing the Customs Service and Post Office); *see also id.* at 444 (Kagan, J., concurring) (discussing the OCC). And as FHFA explained in its motion to dismiss, "[l]ong settled and established practice is a consideration of great weight" when analyzing separation-of-powers claims. ECF No. 36 at 19 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014).

[5] As noted in FHFA's opening supplemental brief, Congress has granted many financial regulatory agencies similar discretion to determine a reasonable amount of funding. *See* ECF No. 51 at 8 (noting the Federal Reserve's "sufficient" standard; the OCC's "necessary or appropriate" standard; the NCUA's "appropriate" standard; and the FDIC's "necessary or appropriate" standard). Thus, not only do Plaintiffs ask the Court to depart from longstanding precedent, they ask the Court to declare a broad swath of financial regulatory agencies as unconstitutional.

Thus, *CFSA* bolsters FHFA's separation-of-powers arguments, not Plaintiffs' separation-of-powers claim. And because Plaintiffs' claim cannot survive these arguments, amendment to assert the claim yet again would be futile.

D. Plaintiffs' *Bivens* Claim Fails as a Matter of Law

Plaintiffs also use the proposed second amended complaint to attempt to correct their inadequately pled *Bivens* claim against FHFA's Director. *See* Mot. at 2. Plaintiffs attribute the need to amend this claim to "FHFA's apparent confusion" about the capacity in which Director Thompson was sued. *Id.* As FHFA explained in its motion to dismiss, "a *Bivens* action can be maintained against a defendant in his or her *individual capacity only*, and not in his or her official capacity." ECF No. 36 at 15 (quoting *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) (emphasis added)). As is obvious from the caption and contents of Plaintiffs' operative first amended complaint, Plaintiffs sued Director Thompson "in her official capacity" only. ECF No. 34 at ¶ 13; *see also id.* at ¶ 94 ("Director Thompson is a federal official for the purposes of *Bivens*."). Thus, Plaintiffs' attempt to pin the shortcomings of their *Bivens* claim on "FHFA's apparent confusion" rings hollow.

In any event, Plaintiffs' proposed second amended complaint cannot save their *Bivens* claim. While it may fix one issue by formally suing Director Thompson in her individual capacity, it fails to correct the much more significant issue: *Plaintiffs allege no individual action on the part of Director Thompson*. As FHFA discussed in its motion to dismiss, a plaintiff asserting a *Bivens* claim "must plead that each Government-official defendant, through the official's own *individual* actions, has violated the Constitution." ECF No. 36 at 24 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (emphasis added)). Thus, to properly state a *Bivens* claim, Plaintiffs must allege that Director Thompson has taken some allegedly unconstitutional action in her individual capacity. She has not, and Plaintiffs fail to make any such allegation.

The proposed second amended complaint does nothing to overcome this fatal flaw in Plaintiffs' *Bivens* theory. Indeed, the proposed second amended complaint adds *zero* allegations about anything Director Thompson herself did or failed to do in her *individual* capacity. *See generally* ECF No. 52-1. This makes sense—Plaintiffs' entire claim is that the FHFA *funding*

statute is unconstitutional, and this claim does not meet the requirements for a *Bivens* action. And because the proposed second amended complaint still fails to identify any individual action on the part of Director Thompson, it fails as a matter of law. Thus, allowing amendment so Plaintiffs can assert this fatally flawed claim would be futile.

III. Amendment Would Prejudice FHFA

The Court should deny Plaintiffs' Motion for yet another reason: Amendment would prejudice FHFA. As an initial matter, amending the complaint would moot FHFA's motion to dismiss, which has been fully briefed and pending for six months. *See, e.g.*, *Johnson v. Cheryl*, 2013 WL 3943606, at *2 (D. Nev. July 29, 2013) ("The amended complaint moots defendants' motion to dismiss."). As another court in this district concluded, "[p]ermitting [the plaintiff] to file a third-amended complaint would also unfairly cause the defendants to incur the expense of litigating a third motion to dismiss … and would be a waste of judicial resources." *Tate v. Univ. Med. Ctr. of S. Nevada*, 2016 WL 2593918, at *5 (D. Nev. May 4, 2016). So too here.

The effort and expense that would be wasted through amendment is readily apparent in this case. Both parties extensively briefed FHFA's motion to dismiss, submitting nearly 100 pages of substantive text in the briefing. *See* ECF Nos. 36, 39, 42. Moreover, in addition to mooting the motion to dismiss, amendment would also moot the parties' recent supplemental briefs. In short, permitting amendment would waste the substantial time, effort, and expense that FHFA and this Court have incurred in litigating this case to date. It would be particularly wasteful here, where amendment is unnecessary and futile. *See supra* Sections I & II.

The prejudice to FHFA that would result from amendment is not limited to the expense of litigating this case. As explained in FHFA's motion to expunge lis pendens and for injunctive relief, *see* ECF No. 44, prolonging this case allows Mr. Haddad and his many entities to continue recording lis pendens based on this action. That, in turn, chills legal foreclosures on properties unrelated to this action. This risk is not hypothetical. As FHFA demonstrated in its briefing, Mr. Haddad's entities have a history of recording lis pendens based on this action on the eve of foreclosure sales. *See* ECF No. 50 at 3. In so doing, the recording party has claimed authority to record the lis pendens because it is a "potential class member" to this action. *Id.* at 3-4, 10. But there is no basis for a

"potential class member" to record a lis pendens. *See* ECF No. 44 at 11-12; ECF No. 50 at 5-7.

Allowing amendment would enable these real-estate investors to continue using this action to manipulate property records and depress sale prices, all while causing additional losses to FHFA's conservatees—the Enterprises. FHFA's motion-to-expunge briefing reveals the playbook: Mr. Haddad's entities wait until a foreclosure sale is imminent and then record a lis pendens, sending a clear message to potential purchasers that there is some defect with the property. *See* ECF No. 50 at 3-4. In addition to chilling the sale price, this tactic is intended to force the Enterprises and their servicers to delay the sale until the lis pendens is expunged. In the meantime, the Haddad entity continues to collect monthly rental income, while losses on the defaulted mortgage loan increase daily. This incentive to prolong this litigation so that real-estate investors can continue reaping financial windfalls is precisely the kind of bad-faith motivation that counsels in favor of denying leave to amend. *See Johnson*, 356 F.3d at 1077 (noting that courts should take into account whether a movant seeks leave to amend in bad faith).[6]

Plaintiffs' attempt to tear this case down and start over would serve neither justice nor judicial economy. It would only delay the inevitable dismissal of Plaintiffs' meritless claims. And if Plaintiffs succeed in dragging this case out, they will continue their strategy of using it as a basis for recording lis pendens on unrelated properties headed for lawful foreclosure. This, in turn, would accomplish Plaintiffs' goal—namely, to frustrate the Enterprises' ability to sell the secured collateral properties at market value—and it would give Mr. Haddad or other opportunistic real-estate investors the unfair ability to acquire these properties at artificially depressed prices. This Court can end these shenanigans by deciding FHFA's pending motion to dismiss as soon as possible (or in the interim, granting FHFA's pending motion to expunge and for injunctive relief, *see* ECF No. 44).

[6] FHFA has recently learned of yet another lis pendens referencing this action that was recorded against a property—but this time, FHFA has no interest in the property. *See* **Ex. B**. Although that lis pendens obviously does not prejudice FHFA, it sheds light on Mr. Haddad's intentions. Specifically, Mr. Haddad—who signed the lis pendens—is willing to go to any lengths to use this lawsuit to hang improper lis pendens against any of his properties facing foreclosure. Mr. Haddad and his entities clearly do not care about FHFA's constitutionality; what matters to them is having a live litigation to use as a lis-pendens-producing tool in their foreclosure-thwarting toolbox.

CONCLUSION

For the foregoing reasons, FHFA respectfully requests that the Court deny Plaintiffs' Motion and proceed to a decision following the close of supplemental briefing.

DATED: August 14, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of August, 2024, I caused the foregoing to be electronically filed using this Court's ECF system, which will then send a notification of such filing by electronic email to counsel of record as follows:

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INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
A	Redlined document
B	Lis Pendens