UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP, *et al.*, Plaintiffs,	)	
	)	No. 1:17-cv-497
-v-	)	
	)	Honorable Paul L. Maloney
FEDERAL HOUSING FINANCE AUTHORITY, *et al.*, Defendants.	)	

OPINION AND ORDER DENYING MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiffs filed a motion seeking leave to amend the complaint to add a new cause of action, a claim that the financing for the Federal Housing Finance Authority violates the Appropriations Clause of the federal constitution (ECF No. 79). Defendants oppose the motion. The Court concludes that the request exceeds the limited scope of Sixth Circuit's remand order and will deny Plaintiffs' motion.

I.

This Court previously described the genesis of this lawsuit (ECF No. 66), as has the Sixth Circuit Court of Appeals, *Rop v. Federal Housing Finance Authority*, 50 F.4th 562, 564-68 (6th Cir. 2022). In short, Plaintiffs own shares of the Federal National Mortgage Association (Fannie Mae) and of the Federal Home Loan Mortgage Corporation (Freddie Mac). By the mid-2000s, the mortgage portfolios for the two entities exceeded $5 trillion dollars and accounted for approximately one-half of the mortgage market in the United States. *Rop*, 50 F.4th at 565. In 2008, our economy entered into a recession in large part

due to a decline in the housing market. Fearful that Fannie Mae and Freddie Mac could default, Congress passed the Housing and Economic Recovery Act (HERA or Recovery Act), which established the Federal Housing Finance Authority (FHFA). The Recovery Act granted FHFA broad authority over Fannie Mae and Freddie Mac. FHFA promptly placed the two entities into conservatorship and negotiated a stock purchase agreement with the Department of Treasury in exchange for substantial funding to avoid the entities going into default. The lawsuit arises from the third amendment to the agreement.

The operative pleading in this lawsuit is Plaintiffs' first amended complaint (ECF No. 17). In September 2020, this Court granted two motions to dismiss and entered judgment (ECF Nos. 66, 67 and 68). In the earlier opinion, the Court summarized the pleading as follows:

> Plaintiffs assert five claims against Defendants. In Count I of the amended complaint, Plaintiffs contend that the FHFA's structure—an independent agency headed by a single director removable only for cause—violates the President's authority in the Vesting Clause of Article II of the Constitution because it limits the President's ability to control the FHFA through the removal of its director.
>
> In Count II, Plaintiffs contend that the structure of the FHFA described in Count I violates the Constitution's separation of powers when combined with other aspects of HERA, including the following: an alleged lack of "meaningful direction or supervision from Congress" over the FHFA; the FHFA's self-funding and exemption from the Congressional appropriations process; and statutory prohibitions on judicial review of the FHFA's actions. (Am. Compl. ¶¶ 148-49.)
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> Count III asserts that the Third Amendment is invalid because the FHFA's acting Director at the time, Edward DeMarco, was not appointed to, or serving in, his position in a constitutionally acceptable manner.
>
> Count IV contends that the Third Amendment is invalid because the FHFA approved it while exercising legislative power impermissibly delegated to it by Congress.

> Count V claims that, to the extent the FHFA acted as a nongovernmental entity when approving the Third Amendment, it exercised legislative power impermissibly delegated to a private entity.

(ECF No. 66 PageID.1765-66).

The Court dismissed all five claims. For Count I and II, the Court concluded that the inability to remove the director likely violated the President's constitutional authority (ECF No. 66 PageID.1806). The Court, nevertheless, found no separation-of-powers violation because the individual who approved the Third Amendment was not subject to the removal restriction (*id.* PageID.1798-99). The Court reasoned that the Third Amendment, "and not any actions taken by FHFA before that time, is the basis for Plaintiffs' complaint and is the source of Plaintiffs' alleged injury" (*id.* PageID.1805). In addition, the Court found that Plaintiffs' argument that "other features of FHFA's independence—including its source of funding, ... —render the FHFA's structure unconstitutional under Article II," failed to state a claim (*id.* PageID.1806). As a result, "to the extent there is a constitutional defect in the structure of the FHFA and the tenure protection for its Director, Plaintiffs cannot show a causal connection between that defect and their injuries. Accordingly, Counts I and II of the amended complaint fail to state a claim" (*id.* PageID.1807).

In Count III, Plaintiffs sought to undo the Third Amendment by challenging the tenure of the acting director who approved the amendment. Pointing to the Appointments Clause, Plaintiffs contended that DeMarco approved the Third Amendment during his third year as acting director, which was a longer term that was reasonable under the circumstances. The Court concluded that the claim presented a non-justiciable political question and dismissed Count III (ECF No. 66 PageID.1809-12).

The Court found no merit for the claims in Counts IV and V. The statute creating FHFA did not violate the nondelegation doctrine (ECF No. 66 PageID.1814-16) or the private nondelegation doctrine (*id.* PageID.1816-17).

Plaintiffs filed notice of appeal. While on appeal, the United States Supreme Court issued its opinion in *Collins v. Yellen*, 594 U.S. 220 (2021), a lawsuit brought by other Fannie Mae and Freddie Mac shareholders. In relevant part, the Court held that HERA's "for-cause restriction on the President's removal authority violates the separation of powers." *Id.* at 250. Concerning the remedy, the Court rejected the "shareholders' argument for setting aside the third amendment in its entirety." *Id.* at 257. The Court nevertheless acknowledged the possibility that the unconstitutional restriction on the President's authority inflicted some compensable harm. *Id.* at 259-60. The court remanded the lawsuit so that lower courts could consider and resolve "the possibility that the unconstitutional removal restriction cause any such harm." *Id.* at 260.

Following *Collins*, the Sixth Circuit reversed in part and remanded this lawsuit. *Rop*, 50 F.4th at 564. The circuit court reversed the portion of this Court's order resolving Count III, the Appointment Clause claim. The circuit court disagreed that the claim presented a non-justiciable political question. *Id.* at 569. The court then rejected the merits of the Appointment Clause claim. *Id.* at 569-74. The court next addressed the second issue on appeal, whether the unconstitutional restriction on removing the FHFA director caused the shareholders an injury. The circuit court applied the reasoning in *Collins*, followed the directive in *Collins*, and remanded the lawsuit for this Court "to determine whether the unconstitutional removal restriction inflicted harm on shareholders." *Id.* at 577.

Plaintiffs filed a petition for writ of certiorari, which the Supreme Court denied in June 2023.

II.

In August 2023, Plaintiffs filed this motion for leave to amend the complaint. At this point in the litigation, Plaintiffs' request falls under Rule 15(a)(2) of the Federal Rules of Civil Procedure. Because Defendants oppose the motion, Plaintiffs may amend the complaint for a second time only if the Court grants leave to do so. The decision to grant or to deny leave to amend the complaint falls within this Court's discretion. *Parchman v. SLM Corp.*, 896 F.3d 728, 736 (6th Cir. 2018). Although the rule instructs that leave to amend should be freely given when justice so requires, "the right to amend is not absolute or automatic." *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 551 (6th Cir. 2008).

Defendants argue that the Court should deny the motion because the request exceeds the scope of the remand.

"The basic tenet of the mandate rule is that a district court is bound to the scope of the remand issued by the court of appeals." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999); *see Monroe v. FTS USA, LLC*, 17 F4th 664, 669 (6th Cir. 2021) (citing *Campbell*); *Cont'l Cas. Co. v. Indian Head Indus., Inc.*, 941 F.3d 828, 834 (6th Cir. 2019) (quoting *Campbell*). Circuit courts issue either a general or a limited remand and a rebuttable presumption arises that the court issued a general remand. *United States v. Johnson*, 11 F.4th 529, 531 (6th Cir. 2021); *see Allard Enters., Inc. v. Advanced Programming Res.*, 249 F.3d 564, 570 (6th Cir. 2001) (noting the two possible types of remand).

Following a remand, the district court must first determine the scope of that remand, be it general or limited. *Monroe*, 17 F.4th at 669 (citing *Campbell*, 168 F.3d at 265); *see Allard Enters.*, 249 F.3d at 570 ("it is important to determine whether the remand issued by this court to the district court was of a general or limited nature"). The determination is a question of law. *See United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003). "On a general remand, a district is free to address all matters as long at it remains consistent with the appellate court's opinion." *Monroe*, 17 F.4th at 669. "By contrast, a limited remand 'constrains' the district court's authority to the issue or issues specifically articulated by the appellate court's order." *Id.*

> "To determine whether we issued a limited remand or a general one, we look to any 'limiting language' in the instructions on remand and the broader context of the opinion. Importantly, the court "need not use magic words to limit the scope of its remand, and the limiting language "may be found 'anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language.'"

Johnson, 11 F.4th at 531 (all citations omitted); *see O'Dell*, 320 F.3d at 680 ("The difference between the limited mandates and the general mandates is the presence of limiting language.").

In its October 4, 2022, opinion, the Sixth Circuit issued a limited remand. *See O'Dell*, 320 F.3d at 680-81 (discussing and comparing multiple limited and general remands). At the end of the first section of the opinion where the court describes the factual background, the court briefly summarized the Supreme Court's *Collins* opinion and its remand.

> While this case was held in abeyance for mediation, the Supreme Court decided *Collins*. In *Collins*, the Supreme Court held that the Recovery Act's

> removal restriction violated the separation of powers. 141 S Ct. at 1787. Although the Court held that shareholders were not entitled to vacatur of the third amendment and all actions taken pursuant to it, it did remand for consideration of whether shareholders may be entitled to retrospective relief. *Id.* at 1788-89.

Rop, 50 F.4th at 569. The court applied and followed *Collins*, repeating the same remand instruction in four different places. First, in the introduction, the court stated "[w]e remand to the district court to determine whether, considering *Collins*, the unconstitutional removal restriction inflicted harm on shareholders.." *Id.* at 564. The court addressed the removal restriction in Section V of the opinion. In the first paragraph, the court wrote "[c]onsistent with the Supreme Court's recent decision in *Collins*, we reverse and remand to determine whether the unconstitutional removal restriction inflicted harm on shareholders." *Id.* at 574. The court repeated this instruction in the final paragraph of Section V. "Following *Collins*, and the Fifth and Eighth Circuit's examples, we remand for the district court to determine whether the unconstitutional removal restriction inflicted compensable harm on shareholders entitling them to retrospective relief." *Id.* at 576-77 (citations omitted). The court again repeated this limiting directive in the last sentence of the conclusion. "We remand to the district court to determine whether the unconstitutional removal restriction inflicted harm on shareholders." *Id.* at 577. This directive amounts to a limited remand, rather than a general one, because the Sixth Circuit "sufficiently outlined the procedure the district court is to follow" and "articulated [it] with particularity." *Campbell*, 168 F.3d at 268.

Plaintiffs' arguments against construing the mandate as limited are not persuasive. That Plaintiffs might also obtain retroactive monetary relief under some new theory does not establish that proposed claim falls within the scope of the remand. Plaintiffs' proposed

Appropriations Clause claim concerns congressional authority under Article I. The claim the Court must consider on remand concerns executive power under Article II. The specific directive of the mandate forecloses consideration of any issue other than whether shareholders were injured by the removal restriction. The limitation requires the Court to *only* consider that issue. And, *Collins* does not constitute an intervening change in the law that would permit a district court to find an exception to the mandate rule. The Sixth Circuit issued the limited remand in light of *Collins*, specifically referenced the mandate and remand in that action, and provided this Court with the same specific instruction on remand.

The *Collins* litigation supports this conclusion. Following the remand, the plaintiffs in that case filed an amended complaint that included two new claims under the Appropriations Clause. *Collins v. Lew*, 642 F. Supp. 3d 577, 583 and 586 (S.D. Tx. 2022). The district court found that the mandate rule foreclosed the new Appropriations Clause claims. *Id.* at 587. The district court reasoned that the Supreme Court "resolved the main issues and remanded for further proceedings on a narrow question." *Id.* The Fifth Circuit affirmed this conclusion. *Collins v. Dept. of the Treasury*, 83 F.4th 970, 984 (5th Cir. 2023). The court held that the mandate left "no opening for plaintiffs to bring a challenge under a completely different constitutional theory for the first time on remand." *Id.* The Fifth Circuit rejected the argument that *Collins* constituted an intervening change in the law by a controlling authority. *Id.* at 985. The court reasoned that while the FHFA's structure was an issue, the lawsuit "was not an Appropriations Clause case." *Id.*

III.

This lawsuit remains pending following a remand from the Sixth Circuit. The remand directed this Court to consider a narrow and limited issue: whether the shareholder plaintiffs were injured by the removal restriction. Plaintiffs filed a motion to amend their complaint to add a new claim based on a new theory, that the FHFA violates the Appropriations Clause. The Court must deny the motion because the new claim exceeds the scope of the mandate.

ORDER

For the reasons provided in the accompanying Opinion, the Court **DENIES** Plaintiffs' motion for leave to file an amended complaint (ECF No. 79). **IT IS SO ORDERED.**

Date: December 11, 2024

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge