IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP, *et al.*, Plaintiffs, *v.* FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	No. 1:17-cv-00497

BRIEF IN SUPPORT OF TREASURY'S MOTION FOR JUDGMENT ON THE PLEADINGS

(ORAL ARGUMENT REQUESTED)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Almost five years ago, this Court recognized that Plaintiffs-shareholders' attempts to unwind an agreement struck between the Federal Housing Finance Agency (FHFA) and the Department of Treasury (Treasury) to save the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) was headed towards certain failure—as all such attempts had in courts across the county. *Rop v. FHFA*, 485 F. Supp. 3d 900, 910 (W.D. Mich. 2020). And yet, this protracted litigation remains pending before the Court on a narrow issue remanded by the Sixth Circuit, namely, whether "considering *Collins [v. Yellen*, 594 U.S. 2020 (2021),] the unconstitutional removal restriction [on FHFA's Director] inflicted harm on shareholders." *Rop v. FHFA*, 50 F.4th 562, 564 (6th Cir. 2022). Plaintiffs already have moved to amend their Amended Complaint to assert a claim within the scope of that question but failed. *See* ECF No. 87 PageID.2012 (Op. & Order Denying Mot. for Leave to Amend Compl.). Thus, the operative complaint in this case is Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, ECF No. 17, filed before *Collins* was decided. Because that pleading contains no allegations whatsoever that the unconstitutional removal restriction "actually affected any actions implementing the third amendment," *Rop*, 50 4th at 576, Treasury is entitled to judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Moreover, because granting Plaintiffs leave to amend their complaint yet again would be futile, the Court should finally bring an end to this litigation and dismiss Plaintiffs' remaining claim with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

During and after the 2008 Financial Crisis, Treasury committed hundreds of billions of dollars to stabilize the housing market, secure the availability of home financing for American taxpayers, and ensure the solvency of two government-sponsored enterprises, Fannie Mae and

Freddie Mac (collectively, the "GSEs"). Treasury provided this financial assistance through a series of agreements with FHFA, which Congress created in the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-298, 122 Stat. 2654, and empowered to act as conservator of the GSEs. In exchange, Treasury received certain financial interests in the GSEs, including senior preferred shares with a liquidation preference and periodic dividends.

Plaintiffs initiated this case in 2017 seeking to undo one aspect of this arrangement: the August 17, 2012 "Third Amendment" to FHFA's and Treasury's stock purchase agreement. The "operative pleading in this lawsuit" is the First Amended Complaint Plaintiffs filed on July 27, 2017. *See* ECF No. 87 PageID.2012. This Court previously granted Defendants' motions to dismiss that complaint and entered judgment in Defendants' favor. *See id.* at PageID.2012 (citing ECF Nos. 66 (Opinion), 67 (Order) & 68 (Judgement)). Plaintiffs appealed, and while that appeal was pending, the Supreme Court issued its decision in *Collins v. Yellen*, 594 U.S. 220 (2021), a parallel case by GSE shareholders. In *Collins*, the Supreme Court unequivocally rejected those plaintiffs' attempts to vacate the Third Amendment.

The Supreme Court held that FHFA lawfully exercised its statutory conservatorship authority when it agreed to the Third Amendment and that, consequently, the plaintiffs' statutory challenge to the Third Amendment was barred by HERA's "anti-injunction" provision.[1] *Id.* at 237-42. The Supreme Court determined, however, that HERA unlawfully restricted the President's authority to remove FHFA's Senate-confirmed Director. *Id*. at 250-56. Notwithstanding that determination, the Court generally rejected the plaintiffs' remedial arguments. The Court held that the removal restriction had no bearing on FHFA's agreement to

[1] The statute provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f).

the Third Amendment because at the time, FHFA was headed by an *Acting* Director who was removable at will; accordingly, the Court rejected the plaintiffs' request to set aside the Third Amendment. *Id*. at 257. The Court additionally held that, as to later actions by Senate-confirmed FHFA Directors (e.g., former Director Melvin L. Watt), there was "no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Id*. at 257-58. However, because it was theoretically possible that those Directors' actions to "*implement*" the Third Amendment might have harmed shareholders, *id*. at 257, 259-60, the Supreme Court remanded the case for the "lower courts" to determine "in the first instance" whether the shareholders were entitled to any retrospective relief. *Id*. at 260.

Following the Supreme Court's decision in *Collins*, the Sixth Circuit affirmed this Court's dismissal of Plaintiffs' claims except the removal restriction claim. *See Rop v. FHFA*, 50 F.4th 562 (6th Cir. 2022). Although regarding Plaintiffs' task in proving such a claim "no easy feat," the Sixth Circuit concluded that *Collins* required remand to this Court "for further consideration of whether the restriction actually affected any action implementing the third amendment that allegedly harmed shareholders." *Id*. at 576.

Following that remand, Plaintiffs moved for leave to file a second amended complaint. *See* ECF No. 79 (Pls.' Mot. for Leave to Amend Compl.). Plaintiffs sought to add allegations related to their removal restriction claim as well as entirely new claims "alleging that FHFA's funding structure violates the Constitution's Appropriations Clause." ECF No. 80 PageID.1930 (Mem. of L. in Supp. of Pls.' Mot. for Leave to Amend Compl.). The Court denied Plaintiffs leave to file their second amended complaint, concluding that their "request exceeds the limited scope of [the] Sixth Circuit's remand order." ECF No. 87 PageID.2011. Although aware that "Plaintiffs anticipate[d] filing another motion seeking leave to amend the complaint," this Court ordered

Defendants to answer the amended complaint filed in 2017. ECF No. 90 PageID.2026 (Order). More than a month later, Plaintiffs still have not moved again to amend their Amended Complaint.

LEGAL STANDARD

A Rule 12(c) motion for judgment on the pleadings "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *In re J&M Salupo Dev. Co.*, 388 B.R. 795, 802 (B.A.P. 6th Cir. 2008) (citation omitted). Such a motion "generally follows the same rules as a motion to dismiss the complaint under Rule 12(b)(6)." *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020); *see also* Fed. R. Civ. P. 12(h)(2) (providing that failure to state a claim defense may be raised in a Rule 12(c) motion).

To withstand such a motion, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A claim is facially plausible when it contains sufficient "[f]actual allegations" to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court "need not accept as true legal conclusions or unwarranted factual inferences." *Moderwell v. Cuyahoga County*, 997 F.3d 653, 659 (6th Cir. 2021) (citations omitted). Applying this standard to the pleadings here, the Court should enter judgment in Treasury's favor.

ARGUMENT

I. NONE OF THE ALLEGATIONS IN PLAINTIFFS' FIRST AMENDED COMPLAINT ADDRESSES THE LIMITED QUESTION ON REMAND.

Because Plaintiffs in their motion to amend the First Amended Complaint sought to broaden the scope of this litigation and were denied, they are stuck with a complaint that fails to state a cognizable claim. To say that Plaintiffs' task here "is no easy feat" is an understatement. *Rop*, 50 F.4th at 576; *see also Collins*, 594 U.S. at 281 (Gorsuch, J. concurring in part) (asking "*how* are judges and lawyers supposed to construct the counterfactual history?"); *id.* at 270-71 (Thomas, J. concurring) (doubting seriously "that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution"). To withstand this motion, Plaintiffs' First Amended Complaint must contain factual allegations that the removal restrictions on a Senate-confirmed FHFA Director "actually affected any actions implementing the third amendment" and thereby "harmed shareholders." *Rop*, 50 F.4th at 576; *see also Bhatti v. FHFA*, 97 F.4th 556, 561 (8th Cir. 2024) ("As many circuits have ruled, the harm claimed by the shareholders . . . must be connected in some way, or share some nexus with, the president's inability to remove Watt."); *Collins v. Dep't of the Treasury*, 83 F.4th 970, 982 (5th Cir. 2023) (requiring showing that "'but for the removal restriction, President Trump would have removed [Director Watt] *and* that the [FHFA] would have acted differently as to' the challenged actions" (alterations in original) (citation omitted)); *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022) (determining that "the only possible remedy other than severance of the unconstitutional for-cause discharge provision—which the *Collins* court has already effectuated—would be possible relief for retroactive harm caused by any confirmed Director's actions in not undoing the [third amendment]"). Plaintiffs clearly have not pled such a claim. *See* ECF No. 95-1 PageID.2198-2204, 2219 (Treasury's Ans. to Pls.' First Am. Compl. for Declaratory & Inj.

Relief) ("The Amended Complaint is not within the scope of the Sixth Circuit's limited remand. *See Rop v. FHFA*, 50 F. 4th 562 (6th Cir. 2022).").

A. Plaintiffs' First Amended Complaint Does Not Plead a Connection Between the Removal Restriction and Implementation of the Third Amendment.

Plaintiffs' First Amended Complaint is devoid of any specific facts regarding the Third Amendment's implementation. Indeed, Former FHFA Director Watt is only referenced a few times in the seventy-seven page First Amended Complaint. *See* ECF No. 17 PageID.238-239 ("Director Watt summed up the situation succinctly when stating that he does not 'lay awake at night worrying about what's fair to the shareholders' but rather focuses on 'what is responsible for the taxpayers.'" (citation omitted)); *id.* at PageID.244 ("Director Watt has described the Companies' instability to build capital reserves under the Net Worth Sweep as a 'serious risk' that erodes investor confidence in the Companies because they have 'no ability to weather quarterly losses.' Defendant Watt [then-]recently reiterated this point . . . ."); *id.* at PageID.245 ("Representatives Stephen Lee Fincher (R-TN) and Mick Mulvaney (R-SC) wrote to Treasury Secretary Jack Lew and Director Watt in February 2016 to express their view that '[i]t is extremely troubling' that Fannie and Freddie 'are being specifically directed to deplete their capital reserves.'"). Instead, the First Amended Complaint is devoted almost entirely to Edward De Marco's tenure as Acting Director of FHFA, who, accordingly to Plaintiffs, was "responsible for an important shift in FHFA's overall approach to operating the [GSEs] as their conservator," which was allegedly "aimed at ultimately winding down the [GSEs] and doing so in a manner that guaranteed their private shareholders would unnecessarily lose all the value of their investments."[2]

[2] Plaintiffs also discuss FHFA's decision to place the GSEs into conservatorship in 2008, but Plaintiffs do not challenge that decision or seek relief against it directly. Nor could they—HERA requires any challenge to that decision to be made within 30 days, 12 U.S.C. § 4617(a)(5), and this lawsuit was not filed until nearly nine years later. Treasury incorporates by reference herein Part II of Defendant FHFA's Motion for Judgment on the Pleadings. *See* ECF No. 100

Id. at PageID.219-220. This purported strategy ultimately culminated in Mr. DeMarco allegedly "imposing the Net Worth Sweep on August 17, 2012," *id*. at PageID.220—the action motivating Plaintiffs' lawsuit and to which Plaintiffs' factual allegations and claim to relief are directed. Such allegations necessarily fail to allege that the "restriction actually affected any actions implementing the third amendment that allegedly harmed shareholders." *Rop*, 50 F.4th at 576.

Plaintiffs' claim on remand otherwise hangs on a few passing allegations that FHFA engaged in "other ongoing conduct," beyond the Third Amendment, that allegedly harmed the GSEs and their shareholders. *See* ECF No. 17 PageID.252 (emphasis omitted). For example, Plaintiffs allege that, "[s]tarting before the Net Worth Sweep and continuing to the present day, FHFA has ordered the [GSEs] to pay quarterly dividends on Treasury's Government Stock in cash, even though those dividends could be paid in kind." *Id*. at PageID.253. But this does not come close to carrying Plaintiffs' causal burden. As the Supreme Court recognized, "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void," *Collins*, 594 U.S. at 257-58, and Plaintiffs include no allegations tying FHFA's practice of paying cash dividends to HERA's removal restriction or a disagreement between the President and a Senate-confirmed FHFA Director.[3] Indeed, Plaintiffs do not even allege that any President ever desired to remove Director Watt from his position or was prevented from doing so by HERA's removal restriction; this alone is fatal to their ability to demonstrate entitlement to relief on remand. *See Collins*, 83 F.4th at 982 (requiring that a party seeking to prove harm from a removal restriction show, among other things, "a substantiated desire by the President to remove the unconstitutionally

PageID.2241-2243 (Def. FHFA's Mot. for J. on the Pleadings Pt. II) ("Section 4617(f) Bars Judicial Action Restraining of Affecting the Powers or Functions of the Conservator").

[3] The only example Plaintiffs cite of this practice allegedly causing them harm is "the first quarter of 2013," ECF No. 17 PageID.254, at which point an acting Director was heading FHFA.

insulated actor" and "a perceived inability to remove the actor due to the infirm provision" (citation omitted)).

The same reasoning also dooms Plaintiffs' vague allegations about FHFA's development of a "Common Securitization Platform" in "recent years," ECF No. 17 PageID.255, an agreement to undated "'credit risk transfer' deals," *id*. at PageID.255, and unspecified "continuing efforts to adopt housing-finance policies that disadvantage the [GSEs] and their shareholders," *id*. at PageID.260. In addition to Plaintiffs' failure to allege that any President desired to remove Director Watt but perceived an inability to do so, they simply include no factual allegations demonstrating "a nexus between the desire to remove" and these FHFA policies. *Collins*, 83 F.4th at 982; *see also Bhatti*, 97 F.4th at 561 (explaining that "the harm claimed by the shareholders . . . must be connected in some way, or share some nexus with, the president's inability to remove Watt").

Finally, even if Plaintiffs had included allegations from the relevant time period or of frustrated presidential desire to remove then-FHFA Director Watt, Plaintiffs' claim still would fail as a matter of law because the President maintained adequate oversight over all events relevant to this lawsuit through his plenary authority over Treasury's financial interest in the GSEs. As Justice Kagan noted in *Collins*, the "Secretary of the Treasury is 'subject to at will removal by the President,'" so there is no need to "'speculate about whether appropriate presidential oversight would have stopped' the FHFA's actions." *Collins*, 594 U.S. at 275 (Kagan, J., concurring in part) (citation omitted); *see also Fairholme Funds*, 26 F.4th at 1304-05 (holding no relief available to GSE shareholder challenging HERA removal restriction because "all the FHFA's policies relating to its actions as conservator of the [GSEs] were 'jointly created by the FHFA and Treasury' and the latter's Secretary was removable at will" (citation omitted)).

B. Plaintiffs' First Amended Complaint Fails to Allege Entitlement to "Retrospective Relief."

Plaintiffs' First Amended Complaint alternatively cannot withstand this motion because the primary relief it seeks is foreclosed by the Supreme Court's decision in *Collins*. As here, the plaintiffs in *Collins* sought "an order setting aside the [third] amendment and requiring the 'return to Fannie and Freddie [of] all dividend payments made pursuant to [it].'" *Collins*, 594 U.S. at 257 (second & third alterations in original) (citation omitted); *see*, ECF No. 17 PageID.271 (Am. Compl., Prayer for Relief paras. a-c). But the Supreme Court declined to do so, expressly rejecting the argument for "setting aside the third amendment in its entirety." *Collins*, 594 U.S. at 257. This Court should do likewise.

Although Plaintiffs alternatively request that the Court consider prior "dividend payments made pursuant to the" Third Amendment as "a pay down of the liquidation preference and a corresponding redemption of Treasury's Government Stock," *Rop*, 50 F.4th at 576 (citation omitted); *see* ECF No. 17 PageID.271 (First Am. Compl., Prayer for Relief para. c), Plaintiffs have not alleged facts justifying such a remedy. Nor have other GSE shareholder plaintiffs in post-*Collins* remand cases successfully done so. *See Collins*, 83 F.4th at 982-84 (rejecting amended complaint that sought "the elimination of the liquidation preferences as a remedy for the harm resulting from" Director Watt's alleged "failure to exit the conservatorships and return the companies to private control"); *Bhatti*, 97 F.4th at 559-62 (rejecting attempt to show harm based on "lost profits due to the Treasury's liquidation preference"). Plaintiffs' bare-bones allegation regarding the liquidation preference does not plausibly allege entitlement to relief under the terms of this remand.

Finally, the requested injunction commandeering President Trump to take actions that he did not take during his first Term contravenes the Separation of Powers Doctrine. *See, e.g.*, *Loving*

v. United States, 517 U.S. 748, 757 (1996) (concluding that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties"); *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019), (finding, out of "respect for the Constitution and our co-equal branches of government," that it would not "make sense" to undo the Third Amendment and "wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency"), *cert. granted by* 141 S. Ct. 193 (2020) (mem.) & 141 S. Ct 193 (2020) (mem.), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, 594 U.S. 220 (2021). Plaintiffs thus have failed to sufficiently plead entitlement to retrospective relief.

II. THE COURT SHOULD NOT ALLOW PLAINTIFFS A SECOND OPPORTUNITY TO AMEND THEIR COMPLAINT TO ALLEGE A REMOVAL RESTRICTION CLAIM.

Having already failed to amend their First Amended Complaint to include a cognizable removal restriction claim and having sat on their rights for over a month after this Court was advised of their intention to move a second time to amend, this Court should deny Plaintiffs a second bite at the apple. *See* ECF No. 90 PageID.2026 (noting that "Plaintiffs have not yet filed any motion for leave to amend"). GSE shareholders before them have not withstood dismissal of their removal restriction claims post-*Collins*. *See Bhatti*, 97 F.4th at 562 ("Bhatti did not plausibly plead that Trump's inability to remove Watt harmed the shareholders."); *Collins*, 83 F.4th at 983 ("[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.") (citation omitted); *Bhatti v. FHFA*, 646 F. Supp. 3d 1003, 1013 (D. Minn. 2022) (noting "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"), *aff'd*, 97 F.4th 556 (8th Cir. 2024); *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."). Thus, leave to amend—again—would be futile and should be denied.[4] *See 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)).

CONCLUSION

For the foregoing reasons, the Court should grant judgment on the pleadings to Treasury and dismiss this action with prejudice.

Dated: March 28, 2025

Respectfully submitted,

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[4] To the extent Plaintiffs intend to rely on a letter that then-Former Present Trump drafted after his first term ended, such reliance would be misplaced. 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 (emphasis added). And even crediting the letter and the other allegations put forward by GSE shareholder 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.