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

DEPARTMENT OF THE TREASURY'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

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INTRODUCTION

Although Plaintiffs-shareholders correctly state the legal standard for leave to amend, they urge its misapplication to the facts here. Under that standard, this Court "may weigh the following factors . . . undue delay or bad faith in filing the motion, repeated failures to cure previously identified deficiencies, futility of the proposed amendment, and lack of notice or undue prejudice to the opposing party." Mem. of L. in Supp. of Pls.' Sec. Mot. for Leave to Amend Compl., ECF No. 107, PageID.2340 (citing *Knight Cap. Partners Corp. v. Henkel AG & Co.*, 930 F.3d 775, 786 (6th Cir. 2019)). Any consideration of those factors requires denial of Plaintiffs' second motion for leave to amend their First Amended Complaint in these remand proceedings on the narrow question of whether the unconstitutional removal restriction on the Director of the Federal Housing Finance Agency (FHFA) "actually affected any actions implementing the third amendment that allegedly harmed shareholders." *Rop v. FHFA*, 50 F.4th 562, 576 (6th Cir. 2022).

ARGUMENT

A. The Undue-Delay Factor Weighs Against Granting Plaintiffs' Second Motion for Leave to Amend.

Plaintiffs have inexplicably delayed these proceedings by initially seeking to expand the remand proceedings when they originally moved to amend their First Amended Complaint in August 2023. *See* Pls' Mot. for Leave to Amend Compl., ECF No. 79, PageID.1870. Although the narrow issue before the Court on remand was clear—whether the unconstitutional removal restriction harmed shareholders in the implementation of the Third Amendment—Plaintiffs sought to amend their First Amended Complaint to add an Appropriations Clause claim. *See id.* Before doing so, Plaintiffs' counsel sought Defendants' position and was advised that such a claim was outside the scope of the Sixth Circuit's mandate and accordingly they would not consent to the amendment. *See* Pls' Sec. Mot. for Leave to Amend Compl. Ex. B, ECF No. 106-2, PageID.2328

("Defendants would consent to amendment of the complaint to reflect the Article II removal restriction claim that is addressed in the 6th Circuit's decision remanding the case, but would not consent to amendment to add an Appropriations Clause claim, which we contend would be both outside the mandate and time-barred."); *see also* Pls' Second Mot. for Leave to Amend Compl. Ex. C, ECF No. 106-3, PageID.2333. Nevertheless, Plaintiffs moved for leave to amend their Complaint beyond the scope of the Sixth Circuit's mandate and that effort was denied by this Court for the reasons Defendants foreshadowed. *See* Op. & Or. Denying Leave to Amend Compl., ECF No. 87, PageID.2019 (denying leave to amend because the "new claim based on a new theory, that the FHFA violates the Appropriations Clause" "exceeds the scope of the mandate").

After the Court's denial of leave in early December 2024, Plaintiffs then waited almost five months to file this second motion for leave to amend. *See* ECF No. 107, PageID.2336. In the intervening period, this Court required Defendants to answer the First Amended Complaint, and Defendants have moved for judgment on the pleadings. *See* FHFA Defs.' Ans. & Affirmative Defenses to Pls.' First Am. Compl. for Decl. & Inj. Relief, ECF No. 92, PageID.2030; Treasury's Ans. to Pls.' First Am. Compl. for Decl. & Inj. Relief, ECF No. 95-1, PageID.2120; FHFA Defs.' Mot. for J. on the Pleadings, ECF No. 99, PageID.2226; Br. of FHFA Defs. in Supp. of Mot. for J. on the Pleadings, ECF No. 100, PageID.2228; Mot. for J. on the Pleadings by the U.S. Dep't of the Treasury, ECF No. 101, PageID.2246; Br. in Supp. of Treasury's Mot. for J. on the Pleadings, ECF No. 102, PageID.2248. Finally, on the eve of the April 2, 2025 Scheduling Conference, Plaintiffs filed the instant motion. *See* Pls.' Sec. Mot for Leave to File Am. Compl., ECF No. 106, PageID.2277. And, as Plaintiffs concede, they are seeking leave to add allegations that they could have added and did seek leave to add in August 2023. *See* ECF No 107, PageID.2342 (explaining that the instant motion seeks to add "amendments to which [Defendants] previously agreed"); *see*

also id. at PageID.2343 (explaining counsel's strategic decision in connection with Plaintiffs' first motion for leave to amend the First Amended Complaint to "focus our arguments here on [the Appropriations Clause] claims" (quoting Mem. of L. in Supp. of Pls.' Mot. for Leave to Amend Compl., ECF No. 80, PageID.1925)). This chronology belies Plaintiffs' suggestion that they have "ensure[d] this case moves as quickly as possible after *Collins* showed what was required to obtain retrospective remedy." ECF No 107, PageID.2342. Accordingly, the undue-delay factor weighs against granting Plaintiffs' second motion for leave to amend their First Amended Complaint.

B. The Repeated-Failures-to-Cure Factor Weighs Against Granting Plaintiffs' Second Motion for Leave to Amend.

This motion is Plaintiffs' second bite at the apple in an effort to allege a cognizable removal restriction claim in connection with the FHFA Director's implementation of the Third Amendment. Plaintiffs' counsel, moreover, on behalf of similarly situated plaintiff-shareholders have unsuccessfully pled such a claim. *See, e.g., Wazee Street Opportunities Fund IV LP v. FHFA*, Case No. 2:18-cv-03478-NIQA (E.D. Pa.) (denying motion for leave to amend complaint post-*Collins*), attached hereto as Ex. A. These results are not surprising given Plaintiffs' insurmountable task on remand. *See Collins v. Yellen*, 594 U.S. 220, 281 (2021) (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"); *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]"). Accordingly, the repeated-failure-to-cure factor also weighs against granting Plaintiffs' second motion for leave to amend their First Amended Complaint.

C. The Futility Factor Weighs Against Granting Plaintiffs' Second Motion for Leave to Amend.

Leave to amend would be futile. *See* ECF No. 102 at PageID.2261-2262 (discussing futility of amending Plaintiffs' First Amended Complaint). The Fannie Mae and Freddie Mac 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. *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)).

Plaintiffs here intend to rely on a letter that then-Former President Trump drafted after his First Term ended, that was an insufficient predicate for a removal-restriction claim in the Fifth and Eighth Circuits—and should be here too. *See* Pls.' Mot. for Leave to Amend Compl., Ex. A, ECF No. 106-1, PageID.2280 (Proposed Second Amended Complaint). 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 although crediting the letter and the other allegations put forward by similar 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; Ex. A at 11 (adopting the "sound and persuasive" reasoning in *Collins* and *Bhatti* and accordingly ruling that "Plaintiff's argument that the removal restriction caused the harm it alleges is too speculative to survive a motion to dismiss").

Accordingly, the Court should deny Plaintiffs' second motion for leave to amend as futile.

D. The Undue-Prejudice Factor Weighs Against Granting Plaintiffs' Second Motion for Leave to Amend.

The undue-prejudice factor also weighs against granting the requested leave. This litigation has been pending for almost eight years, and Defendants twice have briefed dispositive motions and answered a seventy-four page Amended Complaint that Plaintiffs waited until now to amend with allegations purportedly within the scope of the Sixth Circuit's mandate. Those

allegations moreover are substantively the same as the failed claims of similarly situated plaintiffs. *See id.* Plaintiffs do not even acknowledge, let alone address, these issues in their motion.

Instead, Plaintiffs attach undue significance to Defendants' consent in July 2023 to Plaintiffs' then-proposed amendments to "reflect the Article II removal restriction claim that is addressed in the 6th Circuit's decision remanding the case." ECF No. 106-2, PageID.2328; *see also* ECF No. 106-3, PageID.2333. As already discussed herein, Plaintiffs ignore the events that have transpired since their improper attempt to expand the scope of these remand proceedings, *see* ECF No. 79, PageID.1870: (1) Defendants' filing their Answer to the First Amended Complaint, ECF No. 92, PageID.2030; ECF No. 95-1, PageID.2120; (2) Defendants' filing of Motions for Judgment on the Pleadings, ECF No. 99, PageID.2226; ECF No. 101, PageID.2246, which are pending before the Court and should be resolved before the instant motion; and (3) the failed attempt of similarly situated plaintiff-shareholders to state a cognizable removal restriction claim post-*Collins*, *see Collins*, 83 F.4th at 983; *Bhatti*, 97 F.4th at 561; Ex. A. Plaintiffs already have had an opportunity to state such a claim and made the strategic error of trying to expand this already protracted action. Plaintiffs should bear the consequence of that decision and not be permitted a second bite of the apple. *See Heffernan v. City of Chicago*, 286 F.R.D. 332, 336 (N.D. Ill. 2012) ("To allow the [plaintiffs] to successfully prevail at this point would be to allow them to avoid the consequences of their own strategic decision[s] . . . with the inevitable and obvious consequences to judicial efficiency and to the rule that seeks to prevent sandbagging of the court, and one's opponent by taking a position, and when that doesn't work, simply taking another position.").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' second motion for leave to amend their First Amended Complaint.

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Respectfully submitted,

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