

theory in support of their illegal exaction claims. Specifically, the *Arrowood* plaintiffs now allege that the Department of the Treasury's funding agreements with the Federal Housing Finance Agency (FHFA) as conservator of Fannie Mae and Freddie Mac constituted an illegal exaction because FHFA allegedly "has been operating in violation of constitutional separation of powers principles." Pls. Mot. at 2.

Although the United States does not oppose the *Arrowood* plaintiffs' motion for leave to amend, we raise the following two points in response to the motion. First, we do not intend to address plaintiffs' separation-of-powers argument in our omnibus motion to dismiss, but reserve the right to address that argument in a separate filing, if necessary, after the Court resolves the omnibus dismissal motion.

Second, the United States will need to file an updated motion to dismiss. Because the *Arrowood* plaintiffs filed for leave to amend nearly a month after we filed the omnibus motion, the motion no longer applies to the *Arrowood* plaintiffs' operative complaint. *See Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365 (Fed. Cir. 2000) ("A pleading that has been amended under Rule 15(a) [of the Federal Rules of Civil Procedure] supersedes the pleading it modifies Once an amended pleading is interposed, the original pleading no longer performs any function in the case[.]") (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed. 1990)) (alteration in original); *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (where plaintiff filed amended complaint one hour before district court dismissed original complaint, the dismissal order was non-final because it did not address the operative complaint). Thus, a new motion is necessary for the Court to dismiss the *Arrowood* plaintiffs' complaint.

Finally, simply supplementing the United States' motion to dismiss is not feasible because the *Arrowood* plaintiffs' additional allegations have resulted in inconsistent paragraph numbering between the original and amended complaints. *Compare, e.g., Arrowood* Second Am. Compl. ¶ 166 ("The United States and the Companies, through the acts described above, entered into an implied-in-fact contract"), *with Arrowood* Am. Compl. ¶ 161 (same). Thus, to avoid confusion, the United States needs to re-file its omnibus motion to dismiss to reflect the *Arrowood* plaintiffs' amended-complaint citations.

Accordingly, to conserve Court and party resources, and ensure the efficient resolution of the United States' omnibus motion to dismiss, the Court should adopt the schedule below:

1. The United States will file an updated omnibus motion to dismiss the operative complaints by **October 1, 2018**. The United States' motion to dismiss will be substantively the same as its existing omnibus motion to dismiss, but will reflect the numbering in plaintiffs' operative complaints. Should further briefing be necessary after the Court's resolution of the United States' motion to dismiss, the United States will respond to plaintiffs' newly-pled separation-of-powers theory at that time. Under no circumstances should the United States' decision to defer addressing the separation-of-powers theory until the Court's resolution of the omnibus motion to dismiss be construed as a forfeiture of any argument in favor of that theory's dismissal.
2. Plaintiffs in the Coordinated Actions will file responses to the United States' omnibus motion to dismiss on or before **October 23, 2018**.
3. The United States will file an omnibus reply on or before **January 22, 2019**.

CONCLUSION

For these reasons, the Court should adopt the defendant's proposed briefing schedule and otherwise grant plaintiffs' motion to amend.

Respectfully submitted,

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