UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED, Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant.	Case No. 1:24-cv-1857-ACR

NOTICE OF ANTICIPATED MOTION AND
THE FDIC'S REQUEST FOR A PRE-MOTION CONFERENCE

Pursuant to paragraph 7(f) of this Court's Standing Order (Dkt. 6), Defendant Federal Deposit Insurance Corporation ("FDIC") respectfully submits this request for a pre-motion conference. The FDIC intends to move to dismiss Count II of HAI's Amended Complaint on 12(b)(1) and 12(b)(6) grounds and is prepared to move for summary judgment on Count I because the FDIC has completed production of the "pause letters." The combined motion would present a fully dispositive motion to the court.

I. Background

On November 8, 2023, History Associates Incorporated ("HAI") filed a Freedom of Information Act ("FOIA") request for the FDIC to produce supervisory letters ("pause letters") that the FDIC sent to certain banks. Dkt. 1, ¶ 38. HAI appealed the FDIC's denial of the FOIA request and, after the appeal was denied, filed suit. On February 12, 2024, HAI filed an Amended Complaint restating Count I and adding a "pattern or practice" claim as Count II. Dkt.

37. The Amended Complaint references and attaches five FOIA requests.[1] FOIA 1 received a categorial denial response, FOIAs 3 and 5 received no record responses, and were not appealed, FOIAs 2 and 4, which resulted in partial releases with redactions based on Exemptions 4, 5, 7 and 8, were appealed and remanded with instructions to consider segregability.

II. Basis of the FDIC's Anticipated Motion to Dismiss Count II

A. Count II Fails to State a Plausible "Pattern or Practice" Claim.

First, HAI has not alleged a "pattern." The recent decision in *CREW v. DOJ*, -- F. Supp.3d --, 2025 WL 879664 (D.D.C. Mar. 21, 2025), which involved separate "pattern or practice" counts against the DOJ and the FBI, illustrates why this case should be dismissed. The DOJ count survived 12(b)(6) dismissal because it alleged six instances of violative conduct that all pertained to a "narrowly defined class of documents," were about the same subject, and received the same response (categorical denials per Exemptions 6 and 7). *Id.* at *8. The claim against the FBI did not survive because it involved three requests that received dissimilar responses. *Id.* at *11 ("DOJ asserts that the responses to CREW's three [FBI] requests were not uniform, thereby dooming Count III …The court agrees."). The same is true here. HAI's primary complaint is that the agency issues categorical denials for Exemption 8. Dkt. 37, ¶ 120. But that is only correct as to FOIA 1. FOIA 2, the other purported example, involved a search, a partial release with Exemption 5- and 8-based redactions, and a remand to reconsider redactions. These two examples are not similar in request or result and, in any event, are numerically

[1] (1) 11.8.23 request seeking "pause letters" sent by the FDIC to banks that is the subject of Count I (Exhs. B, C, H) ("FOIA 1"); (2) 11.8.23 request for meeting minutes of an intra-agency working group and the group charter (Exhs. D-F) ("FOIA 2"); (3) 3.31.23 request for "all" communications between the FDIC and 8 governmental agencies pertaining to a blog post (Exh. G) ("FOIA 3"); (4) 3.31.23 request for "all" communications regarding a joint statement (Exhs. I, J) ("FOIA 4"); and (5) 3.31.23 request for "all" communications regarding a section 9(13) statement issued by the Federal Reserve (Exh. K) ("FOIA 5").

insufficient to constitute a pattern. *CREW*, 2025 WL 879664, at *12; *Khan v. DHS*, No. 22-cv-2480, 2023 WL 6215359, at *7 (D.D.C. Sept. 25, 2023).[2] The same is true for HAI's claim that the FDIC failed to preserve documents. Setting aside that HAI provides no evidence that the FDIC failed to preserve documents responsive to FOIA 1, one example is not a pattern.

Second, a pattern must involve "repeated requests for a narrowly defined class of documents." *CREW*, 2025 WL 879664, at *8 (quoting *Am. Ctr. for L. & Just. v. FBI*, 470 F. Supp. 3d 1, 6 (D.D.C. 2020)). HAI's requests were not repetitive or for a narrowly defined class of documents: FOIA 1 sought correspondence from the FDIC to banks; FOIA 2 sought minutes of intra-agency meetings; FOIA 3 sought "all" inter-agency communications about a blog post; FOIA 4 sought "all" inter-agency communications about a statement on liquidity risks; and FOIA 5 sought "all" inter-agency communications about a Federal Reserve policy statement.

Third, a litigant asserting a "pattern or practice" of categorical denials must demonstrate that, at the time of the FOIA, the categorical denials were contrary to "binding precedent"—*i.e.*, that they were unlawful. *CREW*, 2025 WL 879664, at *10.[3] Unlike with respect to the DOJ-based categorical denials in *CREW*, there is no binding precedent in this circuit disapproving of Exemption 8 categorical denials. On the contrary, the D.C. Circuit repeatedly emphasized the exemption's breadth. *See Gregory v. FDIC*, 631 F.2d 896, 898 (D.C. Cir. 1980); *Consumers Union v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978). District Court authority supports Exemption 8 categorical denials. *Pub. Invs. Arb. Bar Ass'n v. SEC*, 930 F. Supp. 2d 55, 71-72 (D.D.C. 2013) (sustaining Exemption 8 categorical denial "because scope of … request …

[2] No responsive documents were located for FOIAs 3 and 5. FOIA 4 was a partial release with redactions based primarily on Exemption 5 and is on remand.

[3] It should be noted that the FDIC, under new leadership, did not rest on a categorical denial for the pause letters; it produced over 800 pages of information.

renders all potentially responsive materials exempt … under Exemption 8"), *aff'd* 771 F.3d 1 (D.C. Cir. 2014). Similarly, there is no "binding precedent" supporting HAI's assertion that the FDIC was required to search for "all" documents. *See Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) (FOIA does not require a perfect search, only an adequate one).

B. Count II is Moot. Rather than identify a policy or practice, HAI merely points to the FDIC's responses to five dissimilar requests, and asserts without evidence that the responses reflect "fundamental breakdowns in the FDIC's FOIA processes." Dkt. 37, ¶ 92. But a FOIA matter does not survive mootness merely because the plaintiff assumes that errors committed in one case are being repeated across the board. *See*, *e.g.*, *Harvey v. Lynch*, 123 F. Supp. 3d 3, 7-8 (D.D.C. 2015); *J.T. v. District of Columbia*, No. 21-CV-3002, 2023 WL 9215177, at *8 (D.D.C. Jan. 4, 2023).

C. Count II is Not Ripe. The issues presented in Count II are not fit for judicial decision: the FDIC has fully complied with HAI's existing requests, and any continued case or controversy arises from HAI's supposed apprehension that the FDIC maintains policies and practices that will lead to future noncompliance. But a claim premised on future events is unripe for adjudication if it posits "contingent future events that may not occur as anticipated or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted).

III. Basis of the FDIC's Anticipated Motion for Summary Judgment on Count I

On March 14, 2025, the FDIC advised HAI that the agency had completed its search regarding HAI's FOIA requests and produced the responsive records, with redactions pursuant to Exemptions 4, 6, and 8. Dkt. 48, ¶¶ 20-21. The FDIC understands that HAI disputes the adequacy of its search and an unspecified number of redactions. The FDIC appropriately applied exemptions and producing the documents in unredacted form would cause foreseeable harm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2025, I caused a true and correct copy of the foregoing to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

/s/ Lina Soni
Lina Soni