**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| BUDHA ISMAIL JAM, *et al.*, | ) | |
| *Plaintiffs*, | ) | |
| *v.* | ) | Civil Action No. 1:15-CV-00612-JDB |
| INTERNATIONAL FINANCE CORPORATION, | ) | |
| *Defendant.* | ) | |

**DEFENDANT INTERNATIONAL FINANCE CORPORATION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT UNDER RULES 59(e) AND 15**

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OF COUNSEL:

Jeffrey T. Green (D.C. Bar No. 426747)
Marisa S. West (D.C. Bar No. 1021694)
1501 K Street, N.W.
SIDLEY AUSTIN LLP
Washington, D.C. 20005
(202) 735-8500

Dana Foster (D.C. Bar No. 489007)
Maxwell J. Kalmann (D.C. Bar No. 1033899)
Jordan E. Helton (D.C. Bar No. 1619082)
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600
defoster@whitecase.com

*Counsel for International Finance Corporation*

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## INTRODUCTION

On February 14, 2020, this Court found that it lacks subject-matter jurisdiction over Plaintiffs' suit, granted-in-full IFC's Renewed Motion to Dismiss, and closed the case. Mem. Op., ECF No. 61. It reached the same conclusion in 2016. Mem. Op., ECF No. 31.

Now, after nearly five years and two dismissals, Plaintiffs wish to amend their 81-page Complaint—a complaint that included an entire section on the alleged applicability of the FSIA's commercial-activity exception (Compl. ¶¶ 193-211)—"under Rule 15, or if necessary, under Rules 15 and 59(e), of the Federal Rules of Civil Procedure." Mot. Am. Compl. 1, ECF No. 63 ("Mot."). Plaintiffs have the analysis backward: Rule 59(e) consideration must precede any Rule 15 analysis.

Plaintiffs attempt to go around Rule 59(e) because they cannot meet its high bar for reconsideration. Lacking an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice, Plaintiffs attempt to fill the holes in their Complaint by citing certain record evidence that the Court chose not to reference in its decision. Mot. 8. That is not a proper use of Rule 59(e) or Rule 15. *See Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir. 2010) (rejecting practice of "us[ing] the court as a sounding board to discover holes in their arguments, then 'reopen[ing] the case by amending their complaint to take account of the court's decision'" (quoting *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983) (Breyer, J.)); *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 135-36 (D.D.C. 2013) (rejecting "motion to amend [a] complaint 'to

correct deficiencies identified by the Court'").[1] Because Plaintiffs cannot satisfy Rule 59(e), the Court must deny their motion.

In any event, Plaintiffs' motion also fails under Rule 15 because (1) Plaintiffs have provided no explanation for their extreme delay in seeking an amendment, (2) amendment at this time would prejudice IFC, and (3) Plaintiffs' proposed Amended Complaint offers only superficial changes and does not move the gravamen of their case to the United States.

Finally, Plaintiffs are not entitled to jurisdictional discovery. Plaintiffs have no pending case for which the Court may order discovery. And the Foreign Sovereign Immunities Act bars a court from ordering jurisdictional discovery if the plaintiff has not alleged facts sufficient to fall within an exception.

## PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint on April 23, 2015. Compl., ECF No. 1. On July 1, 2015, IFC moved to dismiss the Complaint on several grounds, including that this Court lacked subject-matter jurisdiction over Plaintiffs' case. Mot. Dismiss, ECF. No. 10. Plaintiffs made *five* tactical decisions over the next four-plus years to forego earlier opportunities to amend their Complaint.

***First***, in July 2015, Plaintiffs chose not to exercise their right to amend under Rule 15(a)(1) of the Federal Rules of Civil Procedure. On July 22, 2015, Plaintiffs represented to this Court that they "intend[ed] to amend their complaint, but their amendments [were] not necessary

[1] Plaintiffs' proposed Amended Complaint incorporates the following documents: ECF Nos. 22-5 (Herz Decl. Exs., filed Sept. 18, 2015); 40-4 (Loan Agreement, originally filed as ECF No. 10-5 on July, 1, 2015); 40-7 (same); 40-8 (same); 40-19 (2013 CAO Audit Report, originally filed as ECF No. 10-18); 40-20 (IFC Response to CAO Audit Report, originally filed as ECF No. 10-19); 40-21 (Statement by Jin-Yong Cai, originally filed as ECF No. 10-20); and 40-23 (January 2015 IFC Response to CAO Monitoring Report, originally filed as ECF No. 10-2).

to respond to the current Motion to Dismiss before the Court." Mot. Extend 2, ECF No. 15. Instead of filing their amended complaint, on the last day they could have amended their Complaint as of right under Rule 15(a)(1)(B), Plaintiffs made the tactical decision to seek an extension to amend as of right "following a denial of the motion to dismiss; a grant of dismissal would, as usual, require leave to amend." *Id*. at 2-3. The Court denied Plaintiffs' motion. Order, ECF No. 19. While the Court did not preclude Plaintiffs from seeking leave to amend their Complaint, it has taken Plaintiffs over four years to do so.

***Second***, in April 2016, Plaintiffs chose not to seek leave to amend their Complaint once this Court granted IFC's motion to dismiss and closed the case.

***Third***, in March 2019, Plaintiffs chose not to seek leave to amend after the Supreme Court remanded the case to this Court for consideration of whether the FSIA's commercial-activity exception applied to Plaintiffs' suit. In fact, the Supreme Court drew attention to the gravamen test from *Nelson* and *Sachs*, observing that "if the 'gravamen of a lawsuit is tortious activity abroad, the suit is not 'based upon' commercial activity within the meaning of the FSIA's commercial activity exception." *Jam v. IFC*, 139 S. Ct. 759, 772 (2019). The Court even noted the United States' "serious doubts" about whether Plaintiffs could satisfy this requirement. *Id*. Nonetheless, Plaintiffs neither moved for leave to amend their Complaint nor advocated for a briefing schedule for any such motion for leave in the parties' joint status report. *See* Joint Status Report 2-3, ECF No. 37.

***Fourth***, in May 2019, once the Court ordered full briefing on IFC's Renewed Motion to Dismiss, Plaintiffs still did not seek an amendment. Minute Order, May 7, 2019.

***Fifth***, in June 2019, after reviewing IFC's Renewed Motion to Dismiss, Plaintiffs chose not to seek leave to amend their Complaint to respond to IFC's arguments regarding the application of the FSIA's commercial-activity exception.

## ARGUMENT

### I. PLAINTIFFS DO NOT IDENTIFY ANY "EXTRAORDINARY CIRCUMSTANCES" UNDER RULE 59(E) TO WARRANT RECONSIDERATION

This Court should deny Plaintiffs' Motion because they have not established any extraordinary circumstances—a change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice—warranting reconsideration of this Court's decision dismissing Plaintiffs' Complaint.

#### A. Now That This Court Has Dismissed Plaintiffs' Action For Lack Of Subject-Matter Jurisdiction, Plaintiffs Must First Establish That This Court Should Reconsider Its Decision Under Rule 59(e) Before Moving For Leave To Amend

Contrary to Plaintiffs' argument, because this Court has dismissed Plaintiffs' Complaint for lack of subject-matter jurisdiction and closed the case, the Court must first determine whether Plaintiffs have met the high burden warranting leave to file an amended pleading after dismissal under Rule 59(e) before considering Rule 15.

"[O]nce a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisfies Rule 59(e)'s more stringent standard' for setting aside that judgment." *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)); *see Mouzon v. Radiancy, Inc.*, 309 F.R.D. 60, 63 (D.D.C. 2015) ("[T]he Court may only consider Plaintiffs' motion for leave to amend the complaint only if it grants Plaintiffs relief pursuant to Rule 59(e)."). Put simply, "[w]hether the plaintiff satisfies the comparatively lenient requirements for filing an amended pleading under Rule 15(a) is therefore

irrelevant to the threshold question [under Rule 59(e)] of whether the motion for leave to file an amended pleading should be considered in the first instance." *Agrocomplect, AD v. Republic of Iraq*, 262 F.R.D. 18, 21 (D.D.C. 2009) (denying motion to amend complaint after dismissal of the complaint for lack of jurisdiction under the FSIA's commercial-activity exception).

Such motions are held to an exacting standard because "[r]econsideration of a final judgment is 'an extraordinary remedy which should be used sparingly.'" *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 76-77 (D.D.C. 2013) (quoting *United States v. Phillip Morris Inc.*, 130 F. Supp. 2d 96, 99 (D.D.C. 2001)). "The strictness with which such motions are viewed is justified by the need to protect both the integrity of the adversarial process in which parties are expected to bring all arguments before the court, and the ability of the parties to rely on the finality of judgments." *Id.* (quoting *CFTC v. McGraw-Hill Cos.*, 403 F. Supp. 2d 34, 36 (D.D.C. 2005)).

"Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving party established extraordinary circumstances." *Odhiambo v. Republic of Kenya*, 947 F. Supp. 2d 30, 34 (D.D.C. 2013) (quoting *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001)). Relief pursuant to Rule 59(e) is tightly circumscribed and "need not be granted unless the district court finds that there is [1] an intervening change of controlling law, [2] the availability of new evidence, or [3] the need to correct a clear error or prevent manifest injustice." *Ciralsky*, 355 F.3d at 671 (quoting *Firestone*, 76 F.3d at 1208). As the moving party, Plaintiffs bear the burden of establishing that one of these "extraordinary circumstances" applies. *Schoenman v. FBI*, 857 F. Supp. 2d 76, 80 (D.D.C. 2012).

### B. Plaintiffs Have Not Identified Any New Evidence Warranting Reconsideration[2]

Plaintiffs do not—and cannot—identify the availability of newly discovered evidence warranting the reconsideration of this Court's dismissal. Instead, Plaintiffs argue that "[m]any of the facts" they "seek to amend in [sic] were derived from documents which were unavailable to Plaintiffs until after they filed their Complaint, when IFC submitted them." Mot. 8 n.5. As this Court explained in *Odhiambo*, that does not make these alleged facts "new." "[T]he test for Rule 59(e) is not whether the evidence was available before the filing of plaintiff's amended complaint but whether it was available 'prior to the entry of judgment.'" *Odhiambo*, 947 F. Supp. 2d at 36 (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008)).

The only document that Plaintiffs identify as previously "unavailable," the Loan Agreement, was submitted with IFC's original motion to dismiss. Mot. 8 n.5. Indeed, Plaintiffs recognize that "[t]he Loan Agreement, and other documents supporting Plaintiffs' new allegations, were also in the record before the Court" prior to its decision. Mot. 2. Although Plaintiffs' proposed new allegations attempt to make more use of these documents than they chose to do in their opposition to IFC's Renewed Motion to Dismiss, that also does not make the evidence "new." If anything, the evidence is "immaterial" because Plaintiffs simply seek to "corroborate" their own failed arguments from their opposition. *Agrocomplect*, 262 F.R.D. at 22 (concluding that plaintiff failed to offer "new evidence" because corroborating facts in new affidavits supporting a proposed second amended complaint "were available to the plaintiff when it filed its original and amended complaints").

[2] Plaintiffs do not argue that there has been an intervening change in controlling law.

This Court's decision in *City of Dover v. United States Environmental Protection Agency*, 40 F. Supp. 3d 1 (D.D.C. 2013), does not help Plaintiffs. Mot. 8. There, the Court allowed a plaintiff to add a *legal theory*—an APA claim that the Court suggested the plaintiff might have been able to plead with the facts *already alleged* in its complaint. *City of Dover*, 40 F. Supp. 3d at 6-7. The Court rejected the plaintiff's Rule 59(e)/15 motion insofar as it sought to amend allegations relevant to claims the Court had already dismissed. *Id*. at 7. Because Plaintiffs do not offer a new legal theory, only allegations based on the existing record, the same result is appropriate here.

### C. Plaintiffs Do Not—And Cannot—Establish Any Clear Error In This Court's February 14, 2020 Decision

Plaintiffs' criticism that this Court failed to consider certain record evidence does not satisfy the clear-error standard for reconsideration. Under Rule 59(e), the term "clear error" excludes "mere disagreement" with the Court's judgment; rather, "a final judgment must be 'dead wrong' to constitute clear error." *Mohammadi*, 947 F. Supp. 2d at 78 (internal alterations omitted) (quoting *Lardner v. FBI*, 875 F. Supp. 2d 49, 53 (D.D.C. 2012)); *see also id*. ("To be clearly erroneous, a decision must strike a court as more than just maybe or probably wrong; it must . . . strike the court as wrong with the force of a five-week-old, unrefrigerated dead fish." (internal alterations omitted) (quoting *Parts & Elec. Motors v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Plaintiffs argue that the Court's dismissal contained two errors: one legal and one "factual."

***First***, Plaintiffs argue that *if* the Court dismissed their Complaint with prejudice then this "would have been error. . . ." Mot. 1. This argument is a red herring. Plaintiffs must still satisfy the Rule 59(e) standard for amending a judgment even if this Court's FSIA ruling did not specify

whether its dismissal was with prejudice. *See Mouzon*, 309 F.R.D. at 63; *Odhiambo*, 947 F. Supp. 2d at 34; *Mohammadi*, 947 F. Supp. 2d at 77.

***Second***, Plaintiffs argue that Rule 59(e) "allow[s] this Court to reconsider a decision premised on factual error," but they identify no factual error in the Court's decision. Mot. 7. Instead, Plaintiffs request reconsideration because they "did not previously call the Court's attention" to "facts in the record"—now converted into proposed Amended Complaint allegations—that they argue support application of the commercial-activity exception. Mot. 15-16 (citing Herz Decl. & Exs., Sept. 19, 2015, ECF No. 22-5 and Sturtevant Decl. & Exs., June 19, 2019, ECF Nos. 40-4, 40-16, 40-19, 40-20, 40-21, 40-23, *incorporated in* AC ¶¶ 197-269 & nn. 4-59). But reconsideration is improper when its sole purpose is to "relitigate old matters" and "raise arguments or present evidence that could have been raised prior to the entry of judgment." *Mohammadi*, 947 F. Supp. 2d at 77 (citation omitted).

Moreover, Plaintiffs' argument is logically incoherent. The Court could not have committed "clear error" in failing to consider record facts that Plaintiffs admit they did not plead or raise before dismissal. *See Ali v. Carnegie Inst. of Wash.*, 309 F.R.D. 77, 83 (D.D.C. 2015) ("[T]he Court's failure to consider evidence not before it [cannot] constitute error.").

**D. Plaintiffs Identify No Manifest Injustice Warranting Reconsideration**

After foregoing five earlier opportunities to amend or seek leave to amend their Complaint, Plaintiffs identify no "manifest injustice" warranting reconsideration.

"Manifest injustice," as the phrase indicates, is also "an exceptionally narrow concept in the context of a Rule 59(e) motion." *Mohammadi*, 947 F. Supp. 2d at 78. It "does not exist where . . . a party could have easily avoided the outcome, but instead elected not to act until after a final order has been entered." *Ciralsky*, 355 F.3d at 655 (citation omitted); *see also*

*Mohammadi*, 947 F. Supp. 2d at 78 ("[A] manifest injustice does not result merely because a harm may go unremedied."). Remarkably, Plaintiffs claim that the Court "overlooked" record facts now alleged in their proposed Amended Complaint because IFC did not "previously argue" the gravamen of this case lies in India. *See* Mot. 7 ("Defendants [sic] *never* put Plaintiffs on notice that they were [sic] challenging the adequacy of Plaintiffs' allegations that the tortious conduct occurred in the United States." (emphasis added)). That is wrong. IFC argued that the commercial-activity exception does not apply to this case. Mem. Supp. Renewed Mot. Dismiss 10-18, ECF No. 40-1 ("Renewed Mot."). The U.S. Supreme Court put Plaintiffs on notice as well. *Jam*, 139 S. Ct. at 772. In their Opposition to IFC's Renewed Motion to Dismiss, Plaintiffs responded with their own tortious-activity/gravamen arguments. As it did in 2015, this Court analyzed these facts and decided they did not support Plaintiffs' arguments. *See* Mem. Op. 4, 9, 16-20, ECF No. 61 (referencing Loan Agreement); *Jam v. IFC*, 172 F. Supp. 3d 104, 106-07 (D.D.C. 2016) (same); *see also* Mem. Op. 3, 22, ECF No. 61 (referencing ECF Nos. 40-19, 40-20, and IFC written responses to CAO reports, i.e., ECF Nos. 40-21 and 40-22); *infra* at II.C.

Plaintiffs had ample notice that the gravamen of their suit would be a material issue. The Supreme Court remanded Plaintiffs' case in February 2019 so this Court could determine whether the commercial-activity exception applied to Plaintiffs' suit, even referencing the gravamen test from *Sachs* and *Nelson* and noting the United States' "serious doubts" about whether Plaintiffs' suit could meet it. Mem. Op. 1, ECF No. 61; *Jam v. IFC*, 139 S. Ct. 759, 772 (2019). Plaintiffs could have moved to amend their Complaint then. Or they could have expressed a need for amendment in the Joint Status Report filed on April 29, 2019. Joint Status Report 2-3, ECF No. 37. Or they could have sought to add these allegations at any point between June 17, 2019 (when IFC filed its Renewed Motion to Dismiss) and February 14, 2020.

But Plaintiffs decided to defend their original allegations as sufficient. Pls.' Opp'n Renewed Mot. Dismiss 18, ECF No. 45 ("Opp'n").

In other words, this is not a case "in which one misstep by counsel may be decisive to the outcome." Mot. 5 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)). The history of this case, instead, shows that "[P]laintiffs could have 'easily avoided [this] outcome' but either failed to 'exercise due diligence,' *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004), or 'elected not to act' until after the entry of judgment, *Ciralsky*, 355 F.3d at 673." *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 18 (D.C. Cir. 2015) (alteration in original omitted). If there is any prejudice to Plaintiffs, "that prejudice was self-inflicted, and the D.C. Circuit has made clear that self-inflicted prejudice does not qualify as manifest injustice." *Mohammadi*, 947 F. Supp. 2d at 81.

### E. Plaintiffs' Arguments That They Need Not Satisfy Rule 59(e) Are Without Merit

Plaintiffs argue that they can bypass Rule 59(e) as long as this Court dismissed their Complaint *without* prejudice. Mot. 1, 6. Plaintiffs are incorrect; Rule 59(e) "is applicable in cases, like this one, where claims had been dismissed without prejudice," including for lack of jurisdiction under the FSIA's commercial-activity exception. *Mouzon*, 309 F.R.D. at 63; *see Odhiambo*, 947 F. Supp. 2d at 34 (denying motion for reconsideration/amendment under Rules 59(e) and 15 after dismissing case under the FSIA because the gravamen of the plaintiff's claim was in Kenya), *aff'd* 764 F.3d 31 (D.C. Cir. 2014); *see also Mohammadi*, 947 F. Supp. 2d at 77 (same, after dismissal for failure to satisfy the FSIA's "terrorism exception"), *aff'd* 782 F.3d 9 (D.C. Cir. 2015). And Plaintiffs' appeal to the judicial preference for adjudicating cases on their merits also fails. Mot. 1. That preference does not apply to dismissals for jurisdictional defects, which are not "based on a procedural or formal defect." *Odhiambo*, 947 F. Supp. 2d at 40.

Seeking safer ground, Plaintiffs attempt to fit their post-dismissal motion under Rule 54(b)'s liberal standard for revising *interlocutory* orders. Mot. 6. They argue that this Court's dismissal order "may not even be a final judgment" because it did not specify if dismissal was with prejudice and the "Court dismissed the *complaint*, not the action." Mot. 6, 7 n.4 (emphasis in original) (citing *Ciralsky*, 355 F.3d at 666). Regardless, dismissals for lack of subject-matter jurisdiction (under the FSIA or IOIA) are final judgments even if they only dismiss the "complaint" without prejudice. *See Attias v. CareFirst, Inc.*, 865 F.3d 620, 624 (D.C. Cir. 2017) ("[A] dismissal for lack of subject-matter jurisdiction is, in effect, a dismissal of the *action*, and therefore final, even if . . . it is styled as a dismissal of the complaint." (emphasis in original) (clarifying *Ciralsky*, 355 F.3d at 666)); *Odhiambo*, 947 F. Supp. 2d at 40 (noting that plaintiff must satisfy the Rule 59(e) standard after FSIA dismissal that did not specify prejudice).[3]

Here, the Court's dismissal order was final under Rule 54(b) because it dismissed all claims against the only defendant (IFC) for lack of subject-matter jurisdiction. Thus, Plaintiffs' authorities concerning revisions to interlocutory orders under Rule 54(b) are inapposite. *See* Mot. 6-7 (citing *Cobell v. Jewell*, 802 F.3d 12, 25-26 (D.C. Cir. 2015) (discussing the "as justice requires" standard for amending a non-final order under Rule 54(b)); *Breen v. Chao*, 304 F. Supp. 3d 9, 21 (D.D.C. 2018) (same); *Ali*, 309 F.R.D. at 83 (same); *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (same)).

Rule 59(e) sets the threshold requirements for Plaintiffs' motion. Because Plaintiffs cannot satisfy Rule 59(e), the Court must deny their motion to amend as moot. *See Mohammadi*,

[3] As here, the dismissal order in *Odhiambo* did not specify whether it disposed of the case with or without prejudice. *See* Order, *Odhiambo*, No. 12-cv-441 (D.D.C. Mar. 13, 2013), ECF No. 20 ("[I]t is hereby ORDERED that defendants' motion to dismiss . . . is GRANTED . . . .").

947 F. Supp. 2d at 78 ("If a motion to amend a complaint is not filed until after a final judgment, that motion becomes moot if the court denies the accompanying Rule 59(e) motion.").

## II. PLAINTIFFS' UNDULY DELAYED AND FUTILE POST-DISMISSAL MOTION TO AMEND FAILS UNDER RULE 15(a)(2)

Like in *Odhiambo*, this Court "cannot permit" Plaintiffs to amend their Complaint because they have failed to meet "'Rule 59(e)'s more stringent standard' for setting aside [the] judgment," and it must deny Plaintiffs' Rule 15 motion "on that basis alone." 947 F. Supp. 2d at 40 (quoting *Ciralsky*, 355 F.3d at 673). Even if this Court finds that reconsideration under Rule 59(e) is warranted, Plaintiffs cannot satisfy Rule 15. Plaintiffs' explanations about why they waited to seek amendment until after this Court dismissed their action and closed the case for the second time for lack of subject-matter jurisdiction are unpersuasive. And their new allegations do not—and cannot—move the gravamen of their claims to the United States, rendering the motion to amend futile.

### A. Post-Dismissal Rule 15(a)(2) Motions Are Heavily Scrutinized

When evaluating a Rule 15(a)(2) motion, the Court must consider whether there is "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Odhiambo*, 947 F. Supp. 2d at 40 (citing *Atchinson v. District of Columbia*, 73 F.3d 418, 425 (D.C. Cir. 1996)). Courts apply these factors more strictly in the post-judgment posture. "[W]hile Rule 15 plainly embodies a liberal amendment policy" prior to dismissal of the complaint, "in the post-judgment context, [the court] must also take into consideration the competing interest of protecting the 'finality of judgments and the expeditious termination of litigation.'" *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) (quoting *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir.

1991)) (citing *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000) (holding that a trial court's discretion to allow amendments "narrows considerably after entry of judgment")).

### B. Plaintiffs Offer No Valid Explanation For Their Undue And Prejudicial Delay In Seeking Amendment

Plaintiffs claim that they did not seek to amend the Complaint until now because "IFC did *not* argue that *IFC's* own tortious conduct occurred outside the United States." Mot. 4 (emphasis in original). That is misleading; IFC argued, in part, that Plaintiffs *did not allege* that IFC was involved in the design, construction, and operation of the Plant. *See, e.g.*, Renewed Mot. 5 ("Plaintiffs acknowledge that CGPL designed, constructed, and has operated the plant and its critical functions in India."); *id.* at 31 ("IFC's role was limited to acting as a lender to CGPL.").

Reviewing these arguments, Plaintiffs could have sought leave to amend months ago; instead, Plaintiffs responded with the *exact same arguments* that they are making now. In fact, in their Opposition, Plaintiffs referenced some of the *same documents* they now reference in their proposed Amended Complaint. *Compare* Opp'n 14 ("*IFC's* tortious conduct, in particular its decision to make the loan, occurred in the U.S. . . . ." (emphasis in original) (citing, e.g., ECF Nos. 40-4 & 40-19)), *and id.* at 3, 10-11, 38 (arguing that IFC had a burden to lend prudently and "is liable not just for negligently funding this risky project, but also because it participated in the plant's design and construction, and after retaining responsibility" it failed to address problems identified by the CAO (citing ECF Nos. 40-19, 40-20, 40-21, 40-22, 40-23)), *and id.* at 4, 12, 16 (arguing the Complaint alleged that IFC's decision whether to finance the Project and met the E&S Standards occurred in the United States"), *with* Mot. 8-9 (arguing that IFC's loan was negligent, relying on ECF No. 40-19 (incorporated in AC ¶¶ 216-25)), *and id.* at 10-13 (arguing that IFC "approved" designs and construction plans from the United States by approving funds

after CGPL's E&S review, relying on ECF Nos. 22-5 and 40-4 (incorporated in AC ¶¶ 227-35)), *and id.* at 14-15 (arguing that IFC failed to heed the CAO, relying on ECF Nos. 22-5, 40-4, 40-20, 40-21, 40-23 (incorporated in AC ¶¶ 209, 236, 249-269)). In its Reply, IFC noted that these assertions were "belied by the facts as alleged in the Complaint," which showed that "IFC had no day-to-day management and no input on any business decisions." IFC's Reply Supp. Renewed Mot. Dismiss 20, ECF No. 48.

Plaintiffs thus made the strategic decision to sit on their hands until this Court rejected their arguments, granted IFC's motion, and closed the case. Only then did Plaintiffs seek leave to amend in order to "cure the deficiencies the [Court's] Opinion found in the Complaint." Mot. 1. Courts do not allow such tactics, even under Rule 15's more lenient standard. "Because the plaintiffs could have included these allegations earlier and because they have not justified their delay, they have demonstrated a dilatory motive or bad faith." *Williams v. Savage*, 569 F. Supp. 2d 99, 107-08 (D.D.C. 2008) (citation omitted); *Dierson v. Chi. Car Exch.*, 110 F.3d 481, 489 (7th Cir. 1997) ("[D]elay in presenting a post-judgment amendment when the moving party had an opportunity to present the amendment earlier is a valid reason for a district court not to permit an amendment . . . ." (quoting *Twohy v. First Nat'l. Bank of Chi.*, 758 F.2d 1185, 1196 (7th Cir. 1985))). As this Court has found, a motion to amend to "correct deficiencies identified by the Court" is "not a proper use of Rule 15." *Nat'l Sec. Counselors*, 960 F. Supp. 2d at 135-36; *see also Leisure Caviar*, 616 F.3d at 616 (affirming denial of Rule 59(e) motion when plaintiff used the Court's opinion to discover "holes in their arguments, then 'reopen the case by amending their complaint to take account of the court's decision'" (quoting *Watt*, 716 F.2d at 78)).

In addition, Plaintiffs' motion is prejudicial to IFC, a quasi-sovereign that has endured this litigation for five years despite IFC's immunity from the attendant burdens of litigation. *See*

*Sai v. Transp. Sec. Admin.*, 326 F.R.D. 31, 34 (D.D.C. 2018) (concluding that "granting leave to amend would cause undue delay and unfairly prejudice the defendant" where the case had "been pending for well over four years"); *see also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation.").

### C. Plaintiffs' Motion To Amend Is Futile

This Court should deny Plaintiffs' motion to amend for the additional reason that their proposed amendment is futile.

As in *Odhiambo*, Plaintiffs' proposed Amended Complaint does not—and cannot—shift the gravamen of their suit, which would remain in India. *See* 947 F. Supp. 2d at 34, 40 (denying motion to amend after dismissal of complaint under the commercial-activity exception because "the gravamen of his complaint remains the same"). Rather, Plaintiffs' new proposed "allegations" are merely expanded factual arguments from documents already before this Court.

Plaintiffs argue that they "can" offer allegations that (1) IFC's approval of the Loan Agreement "was itself a negligent act"; and (2) "IFC's subsequent failure to prevent and mitigate harms to Plaintiffs occurred here," i.e., in Washington D.C. Mot. 1-2. But Plaintiffs argued both of these points in their Opposition to IFC's Renewed Motion to Dismiss. *See* Opp'n 32 ("IFC was negligent under either D.C. or Indian law. Despite knowing the project posed unreasonable risks to Plaintiffs, IFC took the affirmative act of providing indispensable funding."); *id.* at 19 n.14 ("IFC suggests IFC's supervision occurred in India. But while IFC may have gathered information there, it made its *decisions* in the U.S." (citation omitted) (emphasis in original)). As Plaintiffs acknowledge, they made these arguments with reference to the same documents that they now attempt to incorporate into the proposed Amended Complaint. Mot. 16 (claiming

that the Court overlooked documents and that "[a]ll of this evidence is referenced in footnotes in the amended complaint. *See* AC ¶¶ 197-269 & nn. 4-59"). Plaintiffs failed to satisfy the commercial-activity exception then, and would still fail if allowed to amend their complaint now.

**Plaintiffs' allegation that designating the Project as "Category A" showed IFC was negligent in lending.** Plaintiffs argue that they "can allege that when IFC approved the loan, allowing the project to go forward . . . it also knew that at least some of the harms IFC foresaw could not be completely prevented by subsequent oversight by IFC or mitigation efforts." Mot. 9. Plaintiffs quote AC ¶ 217, identifying "Category A" projects as those presenting risks that "can be only partially addressed through mitigation measures." *Id*. (emphasis omitted). This paragraph quotes from ECF No. 22-5, which Plaintiffs filed in 2015. Herz Decl. 220, ECF No. 22-5. Plaintiffs made an indistinguishable argument in their Opposition to IFC's Renewed Motion to Dismiss. *See* Opp'n 3-4 (arguing that by designating the Plant as a "'category A' project," "IFC recognized from the outset that the Project would substantially harm [Plaintiffs] if sufficient steps were not taken to address critical issues"). This Court concluded that "[t]he negligent conduct at the center of plaintiffs' complaint is not the approval of the loan," but its post-lending "supervision" of the Project. Mem. Op. at 18, ECF No. 61. Even if Plaintiffs' amendment added more support for their negligent-lending claim, that would not alter the Court's conclusion that IFC's loan is not the gravamen of Plaintiffs' suit.

**Plaintiffs' allegation that IFC's "oversight" of the design, construction, and operation of the Plant occurred in the United States.** Plaintiffs claim they "can allege that IFC's supervision and approval of the negligent design and operation of the [P]lant was carried on in the United States." Mot. 10. Plaintiffs reference AC ¶¶ 197-215 and 226-250, which allege that IFC undertook an affirmative obligation to supervise the Plant and to take remedial

action, that IFC overlooked certain risks in deciding to fund the Plant, and that personnel in Washington, D.C. failed to take remedial actions. In AC ¶¶ 231-244, Plaintiffs further allege that IFC's Board of Directors approved the Plant's design when it ratified CGPL's E&S review and decided to lend money for the Plant. These paragraphs, in turn, cite ECF Nos. 22-5, 40-4, and 40-19.

Plaintiffs cited these same exhibits when they made the same argument in their Opposition, i.e., that IFC's E&S review gave it "active[] involve[ment] in Project design and management" and that IFC's Board and personnel in its "D.C. headquarters" approved the Plant's design by deciding to lend money after the E&S review. Opp'n 4, 6-8, 32 (citing ECF No. 40-4 & 40-19); *see also id.* at 38 (claiming that the same documents show IFC "exercises substantial control, including through approval of design and construction, the ability to change CGPL's directors and management, oversight of environmental and social compliance, and its ability to compel corrective action"). The Court provided an example of what sort of alleged involvement *may* be sufficient to shift the gravamen to the United States: "Imagine, for example, if CGPL contracted with IFC to actively monitor and adjust the power plant's cooling levels from a computer system in the United States, but IFC's technicians negligently mis-adjusted the cooling levels, causing a fire at the plant." Mem. Op. 12 n.3., ECF No. 61. Plaintiffs' proposed amended allegations do not, and cannot, detail this level of involvement, or anything close.

**Plaintiffs' allegation that IFC's negligent responses and failure to mitigate was "based upon" conduct in the United States.** In its February 14, 2020 decision, the Court faulted Plaintiffs for mounting only a "general and ambiguous allegation" that "IFC's responses to allegations of harm" took place in the United States. Mem. Op. 21-22, ECF No. 61

(concluding that this allegation was "insufficient to shift the gravamen of the complaint to the United States"). If those "responses" referred to "IFC's written responses to the CAO's assessment report and audit," the Court concluded, those written responses "are not themselves the gravamen of plaintiffs' complaint—the particular conduct that actually injured plaintiffs." *Id*. at 22. Plaintiffs' proposed Amended Complaint does not resolve any ambiguities. The proposed allegations still reference IFC's "responses to allegations of harm" (AC ¶ 251), but add the unhelpfully vague allegation that these "responses" refer to "IFC's overall response" and "decision to do nothing" (Mot. 14 (emphasis omitted)). This "overall response," it seems, refers to IFC management's receipt of the CAO complaints filed by Plaintiffs and meetings with "civil society organizations." AC ¶¶ 265-68. But the only affirmative "response" by IFC management that Plaintiffs allege in the proposed Amended Complaint remains its written responses to the CAO. Mot. 15 ("IFC's written responses to the CAO reflect the inadequate institutional response to the problems that was the result of decisions and failures to act by IFC management in D.C." (citing AC ¶ 260)). Thus, on this issue as well, amendment would be futile.

* * *

For all of these reasons, this Court should deny Plaintiffs' request to amend their Complaint.

## III. THIS COURT MAY NOT ORDER PRE-LITIGATION JURISDICTIONAL DISCOVERY AGAINST IFC

Finally, this Court should reject Plaintiffs' request for discovery of a defendant against which it has no active claims.

At the end of their motion, Plaintiffs claim that they have a *right* to jurisdictional discovery of IFC even if they cannot allege sufficient facts to establish that this Court enjoys subject-matter jurisdiction over their claims and even though the case is closed. Mot. 16

(asserting that "if Plaintiffs' amended complaint or the facts already in the record are deemed insufficient, or if IFC disputes the allegations, Plaintiffs are *entitled* to limited discovery" (emphasis added)). This argument fails. Plaintiffs are not entitled to discovery because they have no pending case. They offer no example of any case in which a court granted a plaintiff discovery to fish for more allegations to establish subject-matter jurisdiction after dismissal of the complaint. *See* Mot. 17 (citing *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 672-75 (D.C. Cir. 1996) (reversing denial of discovery where plaintiffs requested stay on dismissal until after discovery on personal jurisdiction) and *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 426-27 (D.C. Cir. 1991) (reversing denial of discovery as to certain, but not all, defendants to establish personal jurisdiction)).[4]

As noted in *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000), a party can seek jurisdictional discovery in response to a motion to dismiss that mounts a *factual*-sufficiency challenge to the complaint. IFC made a *legal*-sufficiency challenge to Plaintiffs' jurisdictional allegations. *See* Mot. Strike 2, ECF No. 60.

Moreover, Plaintiffs have the test backwards. "When sovereign immunity is at issue, discovery is warranted 'only to *verify* allegations of specific facts crucial to an immunity determination.'" *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 207 (2d Cir. 2016) (emphasis added) (citation omitted). Because Plaintiffs seek discovery *if* the Court finds that their proposed Amended Complaint is as equally insufficient as their first, by definition, they ask this Court to endorse a "fishing expedition . . . without any non-speculative basis for believing that [discovery] would establish jurisdiction." *Id.* IFC's presumptive immunity under the FSIA

[4] Plaintiffs' arguments regarding IFC's immunity from certain discovery under the IOIA are premature. Mot. 18 n.7. IFC reserves the right to assert any applicable immunities at the appropriate time.

requires this Court to deny Plaintiffs' request. *See Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314-15 (11th Cir. 2009) ("[T]he need to protect appellants' claim to immunity from discovery [under the FSIA] greatly outweighed any competing need for further discovery.").

## CONCLUSION

For these reasons, this Court should deny Plaintiffs' motion for reconsideration or leave to amend, and deny Plaintiffs' alternative request for jurisdictional discovery.

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Respectfully submitted,

/s/ Dana Foster
Dana Foster (D.C. Bar No. 489007)
Maxwell J. Kalmann (D.C. Bar No. 1033899)
Jordan E. Helton (D.C. Bar No. 1619082)
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600

Jeffrey T. Green (D.C. Bar No. 426747)
Marisa S. West (D.C. Bar No. 1021694)
1501 K Street, N.W.
SIDLEY AUSTIN LLP
Washington, D.C. 20005
(202) 735-8500

*Counsel for International Finance Corporation*