

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

FAIRHOLME FUNDS, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

**NOTICE OF SUPPLEMENTAL AUTHORITY**

In *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 6, 2019) (“Op.”), attached as Ex. A, the en banc Fifth Circuit held that FHFA is unconstitutionally structured and that shareholder plaintiffs stated a claim that FHFA exceeded its statutory authority in adopting the Net Worth Sweep. *Collins* bears on the matters before this Court in several respects.

First, *Collins* held that FHFA exercised government power when it adopted the Net Worth Sweep. Citing *Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009), the Fifth Circuit reasoned that “whether an agency exercises government power as conservator or receiver ‘depends on the context of the claim.’ ” Op.50. And the context indicates that FHFA “adopted the [Net Worth Sweep] with federal governmental power” because that decision involved “a federal agency, empowered by a federal statute, enriching the federal government.” Op.50. The same reasoning demonstrates that the Net Worth Sweep is attributable to the Government here.

Second, *Collins* held that the plaintiffs’ claims that FHFA is unconstitutionally structured and exceeded its statutory authority are direct and therefore not precluded by HERA’s succession provision. Op.23-25, 45-46. Of particular relevance here, the Court held that the succession provision is insufficiently clear to “deny review of constitutional claims,” Op.46, a holding that

demonstrates that the succession provision cannot deny Plaintiffs a forum for their constitutional taking and illegal exaction claims.

Third, *Collins* held that the plaintiffs, based on substantially similar factual allegations as those before this Court, stated a claim that FHFA exceeded its statutory authority in adopting the Net Worth Sweep. The court rejected other courts' "near-limitless view of FHFA's conservator powers," Op.42, in part because departing from "limited powers to 'preserve and conserve' the GSEs' assets and property" would leave FHFA without "any intelligible principle to guide its discretion as conservator," Op.33. *Collins*'s reasoning is compelling, and it supports Plaintiffs' illegal exaction claims whether or not this Court agrees with its ultimate conclusion: the Net Worth Sweep either exceeded FHFA's authority, or FHFA's authority is so boundless as to violate the non-delegation doctrine. *See* Pls.' Resp. to Mot. to Dismiss 61.

Date: September 9, 2019

Respectfully submitted,

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