IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	No. 13-465 C
	)	(Chief Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO
PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

The United States respectfully submits this response to the Notice of Supplemental Authority (Notice, ECF No. 439) filed by plaintiffs, Fairholme Funds, Inc., *et al.*, on September 9, 2019, which cited the Fifth Circuit's *en banc* decision in *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 6, 2019) (en banc).[1] In the Notice, plaintiffs assert that *Collins* "bears on the matters in this Court in several respects." Notice at 1. Specifically, plaintiffs state that *Collins* supports their positions (1) that the Federal Housing Finance Agency (FHFA) acted as a governmental actor in executing the Third Amendment; (2) that the succession provision in the Housing and Economic Recovery Act (HERA) does not bar judicial review of their alleged takings and/or illegal exaction claims; and (3) that plaintiffs' factual allegations in this case suffice to state a claim that FHFA exceeded its statutory authority in adopting the net worth sweep. *Id.* at 1-2. As an initial matter, on October 25, 2019, the Government filed a petition seeking further review of *Collins* in the Supreme Court. The plaintiffs in *Collins*, who are represented by the same counsel as counsel for plaintiffs, Fairholme Funds, Inc., *et al.* in this

[1] The *Rafter*, *Fisher*, and *Reid* plaintiffs filed similar notices of supplemental authority attaching the *Collins* decision. *See Rafter v. United States*, No. 14-740C, ECF No. 49 (Sept. 10, 2019) (Rafter Notice); *Fisher v. United States*, No. 13-608, ECF No. 54 (Sept. 20, 2019) (Fisher Notice); *Reid v. United States*, No. 14-152, ECF No. 40 (Sept. 20, 2019) (Reid Notice).

case, have already filed their own petition for certiorari seeking review of the constitutional ruling and related remedy issues in *Collins*. *See Collins v. Mnuchin*, No. 19-422 (U.S. S. Ct.; filed Sept. 25, 2019). In any event, the *Collins* rulings highlighted by plaintiffs in the Notice do not defeat the arguments presented in our motion to dismiss.

First, contrary to the Fifth Circuit in *Collins*, every other circuit to consider the issue of whether FHFA, acting as conservator, is a governmental actor, has held that it is not. *See* Def. Reply In Support Of Its Omnibus Mot. To Dismiss at 5-8, ECF No. 434 (Reply) (citing cases); *see generally Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017) (when acting as conservator, FHFA "shed its government character and . . . became a private party").

Second, the *Collins* court's holding that the district court plaintiffs were pursuing direct (and not derivative) claims does not bolster plaintiffs' arguments in this Court because the *Collins* court considered whether the plaintiffs' claims were direct in terms of their Article III standing to: (1) bring a cause of action under the Administrative Procedure Act; or (2) challenge a Government action that allegedly violates the separation-of-powers doctrine. *Collins*, slip op. at 22-25, 45-46. The *Collins* court did not consider the question presented here—whether plaintiffs' shareholder claims for damages are derivative or direct under the framework set forth in *Starr Int'l Co. v. United States*, 856 F.3d 953, 958-60 (Fed. Cir. 2017). Indeed, several plaintiffs in this Court concede that their damages claims are derivative, *not* direct, under that framework. *See* Reply 23-25; *see also* Fisher Notice at 2. And, although the *Collins* court observed that constitutional, separation-of-powers claims have been "litigated by individuals," *Collins*, slip op. at 45, whether the plaintiff is an individual or an entity is irrelevant to whether a shareholder's claim for damages is direct or derivative. In any event, briefing on the separation-

of-powers issue has been deferred until our omnibus motion to dismiss is resolved. Therefore, plaintiffs' argument on that point is premature.

Finally, contrary to plaintiffs' suggestion, Notice at 2, the *Collins* court did *not hold* that FHFA was not statutorily authorized to execute the Third Amendment. Instead, *Collins* held that the allegations in the complaint in that case were sufficient for an *ultra vires* claim to survive a motion to dismiss. *Collins*, slip op. at 37-39. Consequently, the scope of FHFA's authority remains an open question subject to further proceedings. Further, as the Fifth Circuit acknowledged, *id*. at 41, every other circuit has ruled that further proceedings were not required based on their uniform holding that, in executing the Third Amendment, FHFA acted within its statutory authority as conservator. *See* Reply 80-81. The reasoning of the other circuits is sound and persuasive, and, unlike the reasoning in *Collins*, consistent with HERA's plain language. For instance, as the Sixth Circuit explained:

> [E]xecution of the Third Amendment . . . falls squarely within [FHFA's] statutory conservator authority to operate the Companies, carry on business, transfer or sell all assets, and to do so in the 'best interests' of the Companies or itself. HERA's language -- that FHFA may take action that it determines is in the 'best interests of the Companies or FHFA, 12 U.S.C. Section 1821(d)(2)(J)(ii) -- is significantly different from the comparable language used in FIRREA.

Robinson v. FHFA, 876 F.3d 220, 231 (6th Cir. 2017).

Importantly, the *ultra vires* claim pursued in *Collins* fundamentally conflicts with plaintiffs' claim for money damages in this Court. The *Collins* court remanded the issue of whether FHFA exceeded its statutory authority. But, unauthorized Government action may not form the basis of a Fifth Amendment taking. *See* Reply 52-53. Even if plaintiffs could prove that FHFA as conservator violated HERA or the non-delegation doctrine—and they cannot—such a holding would be fatal to plaintiffs' takings claims. And, because neither HERA nor the

non-delegation doctrine is a money-mandating statute that resulted in a direct or "in effect" exaction of plaintiffs' money, plaintiffs' illegal exaction claims would also necessarily fail. *See* Reply 76-83. Thus, to the extent that plaintiffs prove that the Third Amendment was *ultra vires*, plaintiffs' sole remedy would be declaratory or injunctive relief, as plaintiffs seek in *Collins*—not money damages in this Court. *See Collins*, slip op. at 14.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

s/Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
Director

OF COUNSEL:

ELIZABETH M. HOSFORD
FRANKLIN E. WHITE, JR.
Assistant Directors

ERIC E. LAUFGRABEN
Senior Trial Counsel

MARIANA T. ACEVEDO
RETA E. BEZAK
Trial Attorneys

s/Kenneth M. Dintzer
KENNETH M. DINTZER
Deputy Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-0385
Facsimile: (202) 307-0973
Email: Kenneth.Dintzer@usdoj.gov

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Attorneys for Defendant