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

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

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO MOTION TO DISMISS**

Plaintiffs join in full the omnibus opposition to the motion to dismiss submitted on behalf of the *Fairholme*, *Cacciapalle*, *Arrowood*, *Rafter*, *Fisher*, and *Reid* plaintiffs. That opposition addresses Plaintiffs' taking, illegal exaction, and fiduciary duty claims. The omnibus brief does not address Plaintiffs' implied-in-fact contract claims. For purposes of those claims, Plaintiffs incorporate by reference and adopt the arguments in the opposition to the motion to dismiss filed by the *Owl Creek*, *Appaloosa*, *Akanthos*, *CSS*, and *Mason Capital* plaintiffs. Plaintiffs' complaint contains allegations similar to the complaints in those cases, *see* Fairholme Compl. ¶¶ 64–67, 258–87, and Defendant's motion to dismiss Plaintiffs' implied-in-fact contract claims should be dismissed for the same reasons.

In ruling on the motion to dismiss, the Court is obliged to accept Plaintiffs' allegations as true, and the facts in the Complaint deserve special emphasis because Defendant has consistently attempted to portray itself as a white knight that came to the rescue of Fannie and Freddie in their hour of need. Nothing could be further from the truth. These institutions have been healthy and cashflow positive at all relevant times. The Companies were well-positioned to weather the decline in home prices and financial turmoil of 2007 and 2008, and during that period they "continued to generate enough cash to easily pay their debts and retained billions of dollars of capital that could be used to cover any future losses." Fairholme Compl. ¶ 44. "Neither Company was in danger of insolvency in 2008," yet they were forced into conservatorship anyway. *Id.* ¶¶ 45–46. Furthermore, the healthy cash flow generated by mortgages issued in 2009 and thereafter was known to the Companies and the Government long before the Net Worth Sweep, and that cash flow left no room for doubt about whether the Companies would be profitable in the years ahead. *Id.* ¶¶ 94–95. That is why Fannie's Treasurer could say with confidence in the summer of 2012 that the "next 8 years" would be "the golden years of GSE earnings." *Id.* ¶ 103. These facts were self-evident to anyone who studied the cash being generated by the Companies' investments long before the Net Worth Sweep was announced in August 2012.

Date: November 2, 2018

Respectfully submitted,

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