

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

MICHAEL ROP, *et al.*,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE  
AGENCY, *et al.*,

Defendants.

Case No. 1:17-cv-00497

**Oral Argument Requested**

**FHFA DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants Federal Housing Finance Agency and Melvin L. Watt ("FHFA Defendants") submit this notice to inform the Court of two significant recent developments relevant to FHFA Defendants' pending motion to dismiss (ECF No. 24, PageID.383) and Plaintiffs' pending motion for summary judgment (ECF No. 30, PageID.431).

1. Plaintiffs previously filed a Notice of Supplemental Authority regarding a decision by a Fifth Circuit panel, *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018), in a case that raises certain issues in common with this case. *See* ECF No. 47, PageID.1420. FHFA Defendants filed a response. *See* ECF No. 49, PageID.1489. On November 12, 2018, the Fifth Circuit ordered that *Collins* will be reheard *en banc*. *Collins v. Mnuchin*, --- F.3d ----, 2018 WL 5928985 (5th Cir. Nov. 12, 2018). This action has the effect of vacating the panel opinion that was referenced in Plaintiffs' and FHFA Defendants' previous submissions. *See* 5th Cir. R. 41.3 ("the granting of a rehearing *en banc* vacates the panel opinion and judgment of the court").

2. On November 14, 2018, the Third Circuit issued a decision in another shareholder challenge to the Third Amendment. *Jacobs v. FHFA*, No. 17-3794, --- F.3d ----, 2018 WL

5931515 (3d Cir. Nov. 14, 2018) (attached as Exhibit A). Joining many other courts, the Third Circuit held that “the Third Amendment is an exercise of the Agency’s power to take over Fannie and Freddie’s assets and operate their businesses,” which necessarily includes actions to “secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends.” *Id.* at \*4. The court further explained that “[t]he Third Amendment is in essence a renegotiation of an existing lending agreement (albeit with equity rather than debt),” a “traditional power of corporate officers or directors.” *Id.* This holding further supports FHFA Defendants’ arguments that (1) the Third Amendment did not constitute an exercise of sovereign executive power, making vacatur of the Third Amendment particularly inappropriate as a remedy for Plaintiffs’ claims that FHFA is unconstitutionally insulated from presidential control (Counts I and II), and (2) the Third Amendment did not constitute an exercise of the type of legislative or otherwise governmental powers that the nondelegation doctrine addresses (Counts IV and V). *See* Brief of FHFA Defendants in Support of Motion to Dismiss at 10-11, 27-29, ECF No. 25, PageID.403-404, 420-422; Brief of FHFA Defendants in Opposition to Plaintiffs’ Motion for Summary Judgment and in Reply Supporting FHFA Defendants’ Motion to Dismiss at 7-8, 23-25, ECF No. 36, PageID.958-959, 974-976.

Dated: November 21, 2018

Respectfully submitted,

/s/ D. Andrew Portinga  
D. Andrew Portinga (P55804)  
MILLER JOHNSON  
45 Ottawa Avenue SW, Ste. 1100  
Grand Rapids, MI 49503  
Telephone: (616) 831-1700  
portingaa@millerjohnson.com

Howard N. Cayne (D.C. Bar No. 331306)  
Asim Varma (D.C. Bar No. 426364)  
Robert J. Katerberg (D.C. Bar No. 466325)  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Avenue NW  
Washington, D.C. 20001  
Telephone: (202) 942-5000  
Howard.Cayne@arnoldporter.com

*Attorneys for Defendants Federal Housing  
Finance Agency and Director Melvin L. Watt*