

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

LOUISE RAFTER, JOSEPHINE RATTIEN, STEPHEN RATTIEN, PERSHING SQUARE CAPITAL MANAGEMENT, L.P., on behalf of Pershing Square, L.P., Pershing Square II, L.P., Pershing Square Holdings, Ltd., and Pershing Square International, Ltd., PERSHING SQUARE, L.P., PERSHING SQUARE II, L.P., PERSHING SQUARE HOLDINGS, LTD., and PERSHING SQUARE INTERNATIONAL, LTD.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant,

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Nominal Defendant.

Case No. 14-740C

Judge Margaret M. Sweeney

**PLAINTIFFS' 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.<sup>1</sup> Citing *Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009), the Fifth

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<sup>1</sup> Unless otherwise indicated, defined terms have the meaning set forth in the Brief in Opposition to the Defendant’s Omnibus Motion to Dismiss.

Circuit reasoned that “[w]hether an agency exercises government power as conservator or receiver ‘depends on the context of the claim.’” Op. 50. *Collins* found that FHFA “adopted the [Net Worth Sweep] with federal governmental power” because the decision to transfer its “ward’s assets to the government” was made by “a federal agency, empowered by a federal statute, enriching the federal government,” exercising “power that was executive in nature.” Op. 51. The Net Worth Sweep is attributable to the Government here for the same reasons.

Second, *Collins* held that the plaintiffs stated a claim that FHFA exceeded its statutory authority in adopting the Net Worth Sweep based factual allegations substantially identical to those before this Court. The Fifth Circuit 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 because it shows that the Net Worth Sweep either exceeded FHFA’s authority, or FHFA’s authority is so boundless as to violate the non-delegation doctrine. *Collins* therefore supports Plaintiffs’ illegal exaction claim (Claim III) and reformation claim (Claim IV) because it shows that FHFA acted without statutory authority. *See* Plaintiffs’ Omnibus Response to Defendant’s Motion to Dismiss at 59-62 (Nov. 2, 2018), ECF No. 41; Plaintiffs’ Supplemental Brief in Opposition to Defendant’s Amended Motion to Dismiss at 7 (Nov. 2, 2018), ECF No. 42.

Dated: September 10, 2019

Respectfully submitted,

By: /s Gregory P. Joseph

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