IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOUISE RAFTER, *et al.*,	)	
	)	
Plaintiffs,	)	No. 14-740 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. 49) filed by plaintiffs, Louise Rafter, *et al.*, on September 10, 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 before 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; and (2) that plaintiffs' factual allegations that FHFA exceeded its statutory authority in adopting the net worth sweep, or that FHFA's authority is "so boundless as to violate the non-delegation doctrine," suffice to state derivative illegal exaction and reformation claims (counts III-IV). *Id.* at 2. As an initial matter, on October 25, 2019, the

[1] The *Fairholme*, *Fisher*, and *Reid* plaintiffs filed similar notices of supplemental authority attaching the *Collins* decision. *See Fairholme Funds, Inc. v. United States*, No. 13-465C, ECF No. 439 (Sept. 9, 2019) (Fairholme 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).

Government filed a petition seeking further review of *Collins* in the Supreme Court.[2] 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 has held that, when FHFA is acting as conservator, it is not a governmental actor. *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, contrary to plaintiffs' suggestion, Notice at 2, the *Collins* court held only 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.

[2] The plaintiffs in *Collins*, who are represented by the same counsel as counsel for plaintiffs in *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.), have already filed their own petition for a writ of 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).

> § 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) (emphasis in original).

Importantly, the *ultra vires* claim pursued in *Collins* fundamentally conflicts with plaintiffs' claim for money damages in this Court. Because neither HERA nor the non-delegation doctrine is a money-mandating statute, plaintiffs' derivative illegal exaction claim (count III) 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 the *Collins* plaintiffs seek—not money damages in this Court. *See Collins*, slip op. at 14.

Finally, contrary to plaintiffs' suggestion, the Fifth Circuit's rulings about the *Collins* plaintiffs' *direct* claims in that case lend no support to plaintiffs' *derivative* illegal exaction or reformation claims here. Indeed, the *Collins* court agreed in principle with the Seventh Circuit and D.C. Circuit that FHFA succeeded to shareholder derivative claims under HERA's succession clause. *See Collins*, slip op. at 22 n.89 (citing *Roberts v. FHFA*, 889 F.3d 397, 408 (7th Cir. 2018); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 624 (D.C. Cir. 2017)). Based on that reasoning, plaintiffs have no standing to bring either of these derivative claims in the first instance.

Respectfully submitted,

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November 4, 2019

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