ORAL ARGUMENT HELD ON APRIL 15, 2016
No. 14-5243 (Consolidated with 14-5254, 14-5260, 14-5262)

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL, LLC, *et al.*,
Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, in his official capacity as the Secretary of the Department of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

RESPONSE OF APPELLEES FEDERAL HOUSING FINANCE AGENCY, MELVIN L. WATT, FANNIE MAE, AND FREDDIE MAC TO PETITIONS FOR PANEL REHEARING

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GLOSSARY

AF Pet.	Arrowood and Fairholme Plaintiffs' Petition for Rehearing
CP Pet.	Class Plaintiffs' Petition for Rehearing
Enterprises	Fannie Mae and Freddie Mac
Fannie Mae	Federal National Mortgage Association
FHFA	Federal Housing Finance Agency
FHFA/Enterprises Appellees	FHFA, Melvin L. Watt, Fannie Mae, and Freddie Mac
Freddie Mac	Federal Home Loan Mortgage Corporation
HERA	Housing and Economic Recovery Act of 2008
JA	Joint Appendix
Op.	*Perry Capital, LLC v. Mnuchin*, No. 14-5243 (D.C. Cir. Feb. 21, 2017) (panel opinion), also available at Class Plaintiffs' Addendum A-001
Purchase Agreements	Preferred Stock Purchase Agreements between FHFA and the Department of Treasury
Third Amendment	Third amendment to the Preferred Stock Purchase Agreements
Treasury	United States Department of the Treasury

INTRODUCTION AND SUMMARY

The Court should deny Class Plaintiffs' petition for panel rehearing because the Court's discussion of the proper framework for analyzing Class Plaintiffs' implied covenant claims on remand is sound and correct. Class Plaintiffs' position that the "reasonable expectations" relevant to a shareholder implied covenant claim are fixed at the historical moment a share of stock was originally issued by the corporation is wrong. Plaintiffs' position cannot be reconciled with the universally accepted principle of corporate law that a purchaser of stock takes its shares subject to the governing law and corporate governance regime then in effect, and as may be amended from time to time in the future, which form an integral part of the broad and flexible contract with the corporation represented by such shares.

When a shareholder purchases stock, whether directly from the issuing corporation or on the secondary market, it enters into a broad, flexible contract with a corporation. That contract consists not only of the terms of the stock certificate in isolation, but also the governing law and organic corporate documents, which often will have been amended—as they were in the case of the Enterprises—following the original issuance of the stock. Moreover, courts have made clear that a secondary market sale of stock effects a novation, not an assignment of a pre-existing contract between the selling shareholder and corporation.

The implied covenant serves a highly circumscribed purpose of filling any interstitial gaps in the parties' contract in order to fulfill what they clearly and reasonably expected to be the terms of their bargain. When considering a shareholder implied covenant claim, it makes little sense to address this inquiry to whether there were interstitial gaps in a *prior* iteration of the contract *previous* shareholders entered into many years, even decades, ago, as Class Plaintiffs posit. Rather, as the Court's opinion properly reflects, the inquiry as to whether the implied covenant is needed to fill any gaps in the contract effected by a stock purchase is properly focused on the time of that purchase, not when the stock was first issued.

To be clear, the FHFA/Enterprises Appellees' position is that Class Plaintiffs' implied covenant claims fail no matter what timeframe is the focus. At no relevant time could purchasers of equity in two government-chartered and pervasively regulated financial institutions have had a reasonable expectation of continued dividends and liquidation preferences following an economic collapse and extraordinary government intervention and capital infusion of the type at issue here. As the district court held in its dismissal of the takings claim, which Class Plaintiffs did not appeal, "[f]or decades" Fannie Mae and Freddie Mac "have been under the watchful eye of regulatory agencies and subject to conservatorship or receivership largely at the government's discretion," making it impossible for

shareholders to have formed any reasonable expectation of compensation following such a government intervention. JA 364; *see* Op. 14-15 n.6. That fact is equally dispositive of any implied covenant claims by shareholders of the Enterprises, no matter when they purchased their shares.

In any event, this Court's delineation of the legal standards applicable to the implied covenant claims is sound and in accord with well-established principles of contract and corporate law, as well as simple logic, and nothing in Class Plaintiffs' petition suggests any reason to revisit it.

The Court should likewise deny the Arrowood and Fairholme Plaintiffs' petition for rehearing because it does not satisfy the threshold requirements of Federal Rule of Appellate Procedure 40, which directs that petitions for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." The Arrowood and Fairholme Plaintiffs do not contend that this Court overlooked *any* point of fact or law. Rather, they ask the Court to reconsider its conclusion that these plaintiffs forfeited their common-law damages claims, because the Arrowood and Fairholme Plaintiffs recognize that their decision not to brief or otherwise present argument

on those claims was not "prudent." AF Pet. 1.[1] In these circumstances, there is no basis for rehearing.

STATEMENT

In the cases consolidated on appeal, owners of common and preferred stock in the Enterprises challenged the Third Amendment to preferred stock purchase agreements between the Enterprises and the U.S. Department of the Treasury under a host of legal claims. On February 21, 2017, this Court issued an opinion affirming the dismissal of most of the claims. However, the Court found the district court's grounds for dismissal insufficient as to certain state common-law claims asserted and preserved only by the Class Plaintiffs: breach of the implied covenant of good faith and fair dealing regarding dividend rights, and breach of contract and breach of the implied covenant of good faith and fair dealing regarding liquidation preferences. Op. 66-73.

By way of background, the theory behind these claims is that owners of Fannie Mae and Freddie Mac stock have contractual rights to shareholder dividends and liquidation preferences. *See, e.g.*, JA 248 ("Under both Delaware and Virginia law, preferred stock designations are deemed as amendments to a corporation's charter and are therefore generally reviewed as contractual in

[1] The Arrowood and Fairholme Plaintiffs' petition for rehearing is cited herein as "AF Pet." Class Plaintiffs' petition is cited as "CP Pet."

nature.").[2] Class Plaintiffs maintain that their contracts arising out of share ownership also include an "implied covenant of good faith and fair dealing, requiring [the Enterprises] to deal fairly with Plaintiffs[,] . . . to fulfill [their] obligations to Plaintiffs . . . in good faith, and not to deprive Plaintiffs . . . of the fruits of their bargain." JA 271-274. Class Plaintiffs allege that the Enterprises, acting through FHFA, breached the implied covenant "[b]y entering into the Third Amendment with the purpose of effectively depriving Plaintiffs . . . of any possibility of receiving dividends or a liquidation preference." *Id.*

This Court rejected Class Plaintiffs' breach-of-contract claim as to dividends because the relevant stock certificates "accord the Companies complete discretion to declare or withhold dividends." Op. 65. However, the Court went on to hold that the failure of the breach-of-contract claim was not necessarily fatal to the implied covenant claims because even if a contract confers discretion, it is still possible for a party to violate the implied covenant by exercising that discretion unreasonably. Op. 68 (citing *Gerber v. Enters. Prods. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013)). What is unreasonable depends on "the parties' reasonable

[2] This Court treated Delaware law as applicable to the Class Plaintiffs' common-law claims regarding Fannie Mae and Virginia law as applicable to those regarding Freddie Mac. *See* Op. 58 n.24. For purposes of this response, the FHFA/Enterprises Appellees do the same. Fannie Mae is not, however, a Delaware corporation, nor is it subject to jurisdiction in Delaware.

expectations at the time of contracting." Op. 68 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)). Specifically, the inquiry is "whether it is *clear*" from the parties' express agreement that they "would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Gerber*, 67 A.3d at 418 (emphasis added) (internal quotation marks omitted). The implied covenant is "best understood as a way of implying terms in the agreement," for example "to fill gaps in the contract's provisions." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005), *cited in* Op. 68. As now Delaware Supreme Court Chief Justice Strine emphasized, "Delaware courts apply the implied covenant rarely, and only in narrow circumstances," namely to "implement [a] clear interstitial intent discernable" from the parties' express contract. *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032, 1035 (Del. Ch. 2006).[3]

This Court thus remanded for the district court to evaluate the implied covenant claims "under the correct legal standard, namely, whether the Third Amendment violated the reasonable expectations of the parties at the various times the class plaintiffs purchased their shares." Op. 68. The Court observed that the analysis for those who purchased their shares after the enactment of HERA and

[3] As the Court noted, Virginia law is similar. Op. 68.

FHFA's appointment as Conservator should include, for example, the statutory provision authorizing FHFA to act in the best interests of the Enterprises or the Agency, the provisions of the preferred stock purchase agreements with Treasury, and pertinent statements by FHFA. Op. 69.

Class Plaintiffs now contend in their petition for rehearing that this Court was wrong to focus the inquiry on the various times they purchased their shares because, in their view, the "relevant expectations" for their implied covenant claims should be those of "the shareholders who purchased preferred or common shares in the Enterprises *when those shares were issued*, not the subsequent expectations of shareholders who purchased shares in the secondary market." CP Pet. 2.

In a separate petition, the Arrowood and Fairholme Plaintiffs seek rehearing of the Court's ruling that they "did not preserve their appeal against the dismissal of [their common-law] claims." Op. 41. By Order of April 18, 2017, this Court invited the FHFA/Enterprises Appellees to respond to each of the petitions for rehearing to the extent they had an interest in the issues presented.

ARGUMENT

I. THE COURT SHOULD DENY CLASS PLAINTIFFS' PETITION FOR REHEARING ON THE IMPLIED COVENANT CLAIMS

Class Plaintiffs argue that implied covenant claims deriving from stock ownership depend on the "reasonable expectations" of the corporation and the very first shareholder who ever owned the stock, rendering any intervening developments irrelevant. That is wrong. The contractual relationship between a corporation and shareholder is neither static, nor limited to the four corners of the stock certificate. Amendments to the contractual relationship often occur after the stock is issued by the company—through revisions to the corporate charter, bylaws, and relevant statutes enacted by the chartering sovereign.

Consistent with this evolving relationship, a shareholder purchasing stock enters into a new contract with the corporation, consisting of the then-current corporate governance instruments and background law, at the time of purchase. Indeed, courts have specifically described a sale of stock on the secondary market as effecting a novation, rather than an assignment of pre-existing contractual rights as presupposed by Class Plaintiffs. Because of the dynamic nature of the contract between the Enterprises and the shareholders, the contracting parties' reasonable expectations with respect to their contract cannot be fixed at the historical date of issuance of the stock.

A. A Purchaser of Stock Enters Into a Broad, Flexible Contract with the Corporation, and the Initial Time of Contracting Is the Time of Purchase

"[W]hen an individual purchases a share of stock in a Virginia corporation, she, in effect, enters into a contract with the corporation." *Middleburg Training Ctr., Inc. v. Firestone*, 477 F. Supp. 2d 719, 725 (E.D. Va. 2007). Likewise "when [investors] purchase stock in a Delaware corporation," they enter into a "binding broader contract among the directors, officers, and stockholders" that "is, by design, flexible and subject to change." *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (Strine, J.).

That "binding broader contract" includes not just the stock certificate itself, but also the corporate charter, bylaws, and *governing law* under which the corporation is formed and regulated. *See Boilermakers*, 73 A.3d at 940; *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1050 & n.11 (Del. Ch. 2015) (organic documents and governing law "together constitute" the contract between corporation and shareholder); *Middleburg Training Ctr.*, 477 F. Supp. 2d at 725 ("[A] shareholder's contract rights and obligations *vis a vis* the corporation in which they own stock are found not only in the corporation's articles of incorporation, its corporate charter, or other documents, but also in the general corporation laws of the state of incorporation; these, too, are part of the contractual relationship between a corporation and its shareholders."); *Ericksen v. Winnebago*

Indus., Inc., 342 F. Supp. 1190, 1193 (D. Minn. 1972) (holding that "the relationship between a corporation and its shareholders is contractual" and "the provisions of the contract are to be found in the articles, by-laws or on the [stock] certificates themselves").

For corporations chartered pursuant to Delaware's or Virginia's sovereign authority, the respective governing statutes of those states form an integral part of the binding, broader contract between the shareholders and the corporation. *Boilermakers*, 73 A.3d at 940; *accord STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) ("[I]t is a basic concept that the General Corporation Law is a part of the certificate of incorporation of every Delaware company."). Fannie Mae and Freddie Mac do not derive their existence from Delaware or Virginia, but rather are chartered by Congress. Op. 5-6; *see* 12 U.S.C. §§ 1451-1459 (Freddie Mac charter); 12 U.S.C. §§ 1716-1723i (Fannie Mae charter). Applying these same principles, the federal statutory laws governing Fannie Mae and Freddie Mac—including not only their charters but the Federal Housing Enterprises Safety and Soundness Act and HERA—form part of the "flexible contract" to which "stockholders who invest in such corporations assent to be bound . . . when they

buy stock in those corporations." *Boilermakers*, 73 A.3d at 940.[4]

The elements comprising the broad, flexible contract between shareholder and corporation are, by their nature, subject to amendment. The corporation can amend its charter and bylaws, in the case of a state-chartered corporation the state legislature can amend the governing statutes, and in the case of the Enterprises Congress can and did amend both the charters and related statutory provisions, including through HERA. When such amendments occur, whether they operate to expand or to limit shareholder rights vis-à-vis the corporation, the contract between the shareholders and corporation is updated.

For example, when a company issues preferred stock under the Delaware General Corporation Law, "it amends the certificate of incorporation and fundamentally alters the contract between all the parties." *STAAR Surgical*, 588 A.2d at 1136; *see* JA 248 (Class Plaintiffs' complaint acknowledging that "[u]nder both Delaware and Virginia law, preferred stock designations are deemed as amendments to a corporation's charter"). Similarly here, when Congress in HERA

[4] The very stock certificates upon which Class Plaintiffs rely make this clear, providing for example that "[t]his Certificate and the respective rights and obligations of Freddie Mac" and the stockholders "shall be construed in accordance with and governed by the laws of the United States, provided that the law of the Commonwealth of Virginia shall serve as the federal rule of decision in all instances except where such law is inconsistent with Freddie Mac's enabling legislation, its public purposes or any provision of this Certificate." JA 293.

amended both the Federal Housing Enterprises Safety and Soundness Act and each of the Enterprises' statutory charters to provide for, *inter alia*, the issuance of a senior series of preferred stock to Treasury, those provisions became incorporated into the multi-faceted contracts that define the evolving legal relationship between the Enterprises and their other shareholders.

When an investor buys stock in the secondary market, it acquires the contractual rights and obligations as they exist at the time of purchase. If an investor buys stock in 2017 that was issued in 2000 and subject to charter, bylaw, and statutory amendments in the intervening years, the shareholder's contractual rights vis-à-vis the corporation are of course determined not by the 2000 version of the charter, bylaws, and governing law, but by the regime in effect in 2017. That necessarily means the contract into which the shareholder enters with the corporation is formed at the time of purchase by that shareholder.

Accordingly, this Court properly called on the district court to evaluate the "reasonable expectations of the parties at the various times the class plaintiffs purchased their shares" in order to determine whether any such expectations should be used to imply gap-filling terms in the parties' contract. Op. 68. Such "reasonable expectations" may be informed, as the Court recognized, by matters extrinsic to the parties' contract, such as changes in the economic environment or "pertinent statements by the FHFA." Op. 69. But it is all the more clear that the

time of purchase is the right time for measuring reasonable expectations where, as here, the relevant matters include changes in governing law and corporate governance, such as the enactment of HERA and amendment of the Enterprises' charters, that are not merely extrinsic events but form an integral part of the very contract into which shareholders entered.[5]

B. Class Plaintiffs' Assignment Theory is Misplaced

Class Plaintiffs take the contrary position that the formation of the contract between a corporation and shareholder occurs not when the shareholder purchases stock but, rather, "when the shares were first issued to the public" and sold by the corporation to the very first shareholders. CP Pet. 2. According to Class Plaintiffs, when someone else subsequently buys that stock in the secondary market, that purchase merely effects an "assignment" of a pre-existing contractual right, in which the purchaser "'stand[s] in the shoes' of the shareholder from whom they made those purchases, stretching back continuously to the original purchasers of the shares at the time of issuance." *Id.* at 11-12.

However, Delaware and Virginia case law alike recognize that a purchaser

[5] This Court's opinion does not foreclose the district court from considering the parties' reasonable expectations at the time of any pertinent amendments in addition to those at the time of purchase. As noted, the parties' expectations at the time of amendments to the shareholders' contracts that occur while they hold their stock are part of the formation of the overall contract.

of stock enters into its own contract with the corporation, rather than simply assuming via assignment a contract into which others entered long ago. *See supra* Sec. I(A). Class Plaintiffs' theory would have the anomalous result of *excluding* any charter, bylaw, or statutory amendments postdating the original issuance of the stock—including amendments that *benefit* shareholders by *expanding* their rights—from the contractual relationship between the corporation and shareholders who purchase on the secondary market. Indeed, Class Plaintiffs alleged in their own complaint that the Third Amendment denied them "the fruits of *their* agreements with Fannie Mae and Freddie Mac," not agreements made by prior shareholders. JA 253 (emphasis added); *see also* JA 271-273 (alleging that Third Amendment deprived "Plaintiffs and [the various classes] of the fruits of *their* bargain" (emphasis added)).

Moreover, courts and leading treatises alike recognize that a sale of stock in the secondary market creates a *new* contract via a novation of the contract between the corporation and shareholder. In *Raybestos-Manhattan v. United States*, the U.S. Supreme Court observed that "[t]ransfer of title to the shares is effected by a form of novation by which the right of the shareholder is surrendered to the corporation in return for its recognition of a new shareholder designated by the transferor and the issue to him of a new certificate of stock." 296 U.S. 60, 62-63

(1935).[6] The authoritative Williston treatise similarly explains: "By the weight of authority, the transfer of the shares in a corporation operates as a novation of the contract of membership." 17 Williston on Contracts § 51:74 (4th ed.) (footnotes omitted); *see also* 30 Williston on Contracts § 76:8 (4th ed.) (contrasting assignment and novation). A novation, by definition, "extinguishes a prior contract and replaces it with a new agreement." *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1186 (Del. Ch. 2009); *accord Honeywell, Inc. v. Elliott*, 189 S.E.2d 331, 334 (Va. 1972).

Here, when investors purchased Enterprise stock on the secondary market, that purchase accordingly effected a novation of the selling shareholder's contract with the corporation and formation of a new contract on the part of the purchaser, further confirming that that the "reasonable expectations" analysis is properly focused on the time of purchase.[7]

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[6] *Accord Witters v. Sowles*, 38 F. 700, 703 (D. Vt. 1889) (explaining that "[a] person can become a shareholder in only one of two ways,—by original subscription for shares, or by a transfer which operates as a novation, and substitutes the transferee in the place of . . . the original subscriber"); *Squire v. Borton & Borton*, 5 N.E.2d 479, 481 (Ohio 1936) ("When a stockholder sells his stock to another and the transfer is entered upon the corporation records, such transfer effects a novation, with the consent of the corporation, substituting the transferee for the transferor, and the transferee succeeds to all the rights, benefits, and liabilities of the transferor as between stockholders.").

[7] Even if a purchase of stock on the secondary market could be deemed to effect an assignment as hypothesized by Class Plaintiffs, it would not follow that the

(footnote continued on next page)

C. Class Plaintiffs' Cases Are Inapposite

Class Plaintiffs spend the bulk of their petition establishing the noncontroversial proposition that "a claim of breach of the implied covenant depends upon the intent that the *original parties* had *at the time of contract formation*." CP Pet. 5 (emphasis in original). For example, they rely heavily on *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, which emphasizes that the "temporal focus" of the implied covenant analysis should be on "the time of contracting," as contrasted with "the time of the wrong." 50 A.3d 434, 440 (Del. Ch. 2012).

But that simply restates what this Court already held. *See* Op. 68 (implied covenant claim should be analyzed based on "the parties' reasonable expectations at the time of contracting" (citation omitted)). It does not address *when* is the "time of contract formation" in the context of the uniquely "flexible contract" to which shareholders "assent" when they buy stock in a corporation. *Boilermakers*, 73 A.3d at 940. *ASB* did not involve a corporation, shareholders, stock, or

(footnote continued from previous page)
relevant "time of contract formation" and focus of the "reasonable expectations" analysis would be the time the shares were originally issued. As discussed above, *see supra* Sec. I(A), when a corporation's organic documents or governing law are amended, the contract that defines the relationship between shareholder and corporation is accordingly updated. To the extent a sale of stock effects an assignment, the contract being assigned would be the corporation-shareholder contract as most recently amended at the time of sale, and the "reasonable expectations" to be evaluated would include those at the time of amendment.

secondary market purchases at all, but rather an implied covenant claim by an original party to an LLC agreement against another original party.

Nor do any of the other cases Class Plaintiffs cite suggest that the time of contract formation between a corporation and shareholder is any time other than the time of stock purchase. Class Plaintiffs advance *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006), as standing for the proposition that "when an implied covenant claim is brought by a party who purchased a *contractual financial instrument* in the secondary market," courts look solely "at the expectations and intent of the original purchaser." CP Pet. 6 (emphases added). Class Plaintiffs' catch-all phrase "contractual financial instrument," however, masks that the financial instrument contract in *Allied* was a discrete promissory note, a much different species of contract than the broad, flexible contract deemed to arise from a purchase of equity in a corporation. *See Boilermakers*, 73 A.3d at 939. Class Plaintiffs also miss the overall point of *Allied*. The court in *Allied* did not use the original noteholder's "expectations and intent" to imply additional terms as Class Plaintiffs seek to do here, but instead held that the successor noteholder was bound by express terms the original noteholder had negotiated. 910 A.2d at 1035 ("Allied cannot use the implied covenant of good faith and fair dealing to avoid the consequences of the plain language of the contract.").

Class Plaintiffs likewise erroneously ascribe to two other Delaware cases a holding that "any aftermarket transactions" are to be disregarded in determining implied covenant duties. CP Pet. 7 (citing *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, No. 10093-VCL, 2015 WL 4975270, at *11 (Del. Ch. Aug. 20, 2015); *Allen v. El Paso Pipeline GP Co., LLC*, No. 7520-VCL 2014 WL 2819005, at *17 (Del. Ch. June 20, 2014)). But those cases involved neither contractual rights arising from ownership of corporate stock, nor the effect of "aftermarket transactions" on such rights. There were no aftermarket transactions at issue: both cases addressed the obligations the original parties to partnership agreements owed to each other. What is more, like *Allied*, these courts *rejected* the plaintiffs' attempt to use the implied covenant to rewrite the parties' express agreements.

Class Plaintiffs also rely on Uniform Commercial Code § 8-302 (as enacted in both Delaware and Virginia), which provides that "a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer." CP Pet. 10-11 n.3. But that statute merely confirms that all rights pass to the purchaser of stock and no residual rights remain with the seller. The decisions Class Plaintiffs cite in the same footnote simply determined, as part of settlement approval, that classes in those cases should be defined to include current shareholders because property rights "travel[] with the shares." *In*

re Activision, 124 A.3d at 1044. None of these authorities supports Plaintiffs' characterization of a sale of stock as an assignment, or is inconsistent with a sale of stock effecting a new contract between the purchasing shareholder and the corporation.

D. Class Plaintiffs' Position Is at Odds with Longstanding Public Policy

While the above considerations provide more than ample basis not to grant rehearing, a further reason not to entertain Class Plaintiffs' novel theories is that it would create a serious tension with the "longstanding Delaware public policy against the 'evil' of purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 (Del. Ch. 2002) (internal quotation marks and citation omitted); *see also Schultz v. Ginsburg*, 965 A.2d 661, 668 (Del. 2009) ("Delaware law recognizes a policy against buying a lawsuit . . . ."). That policy, dating back decades and "vigorously enforced through recent times," applies to derivative and direct claims alike. *Omnicare*, 809 A.2d at 1169.

If adopted, Class Plaintiffs' position necessarily means an investor could purchase Enterprise stock *today*, with full knowledge of HERA, the conservatorships, and indeed the Third Amendment transaction itself, and then attack that transaction based on an artificial construct that disregards all of the developments of the last decade. It strains credulity to imagine that Delaware

would allow an implied covenant cause of action reserved for "rare[]" and "narrow circumstances," *Allied Capital*, 910 A.2d at 1032, to be wielded in a manner so antithetical to its longstanding public policy.

* * *

In sum, because a purchase of stock, whether in an original issuance or on the secondary market, forms a new contract with the corporation rather than assignment of a past contract, the objections advanced in Class Plaintiffs' Petition are without merit and do not warrant rehearing.

II. THE COURT SHOULD DENY THE ARROWOOD AND FAIRHOLME PLAINTIFFS' PETITION FOR REHEARING WITH RESPECT TO THE FORFEITURE OF THEIR COMMON LAW CLAIMS

Federal Rule of Appellate Procedure 40(a)(2) requires that petitions for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." "[A] properly drawn petition for rehearing serves a very limited purpose—to call the panel's attention to particular matters, factual or legal, that it overlooked in its decision or about which it was unquestionably—or almost unquestionably—mistaken." Mayer Brown LLP, *Federal Appellate Practice* 492 (Philip A. Lacovara ed., BNA 2008) (footnote and internal quotation marks omitted). Courts routinely reject petitions for panel rehearing that do not comply with the requirements of Rule 40(a)(2). *See, e.g.*, *Sash v. Zenk*, 439 F.3d 61, 62 (2d Cir. 2006) (Sotomayor, J.) ("Because

[petitioner] has failed to show 'point[s] of law or fact that . . . the court has overlooked or misapprehended,' Fed. R. App. P. 40(a)(2) . . . the petition is denied." (citation omitted)); *Sukhov v.Gonzales*, 403 F.3d 568, 570 (8th Cir. 2005); *cf. Trans Union Corp. v. Federal Trade Comm'n*, 267 F.3d 1138, 1144 (D.C. Cir. 2001) (denying rehearing where petitioner did not identify "arguments claimed to have been overlooked or misunderstood").

Here, the Arrowood and Fairholme Plaintiffs' rehearing petition does not argue the Court's decision was erroneous, or identify "point[s] of law or fact . . . the court has overlooked or misapprehended"—let alone do so "with particularity." Fed. R. App. P. 40(a)(2). Nor could it. The Court's decision did not overlook or misapprehend any point of law or fact. Instead, the Arrowood and Fairholme Plaintiffs effectively seek reconsideration of the Court's decision not to excuse their forfeiture. The essence of their argument is that (1) this case involved two opening briefs instead of one, (2) all plaintiffs were admonished—as is common in appeals involving multiple briefs—to avoid duplication, and (3) the Court had the discretion to excuse the forfeiture.

Plaintiffs offer no reason to assume the Court did not understand these points when it rendered its decision. The Court nevertheless did not excuse Plaintiffs' forfeiture. None of the factors relied upon by Plaintiffs could be said to qualify as a point of law or fact overlooked or misapprehended by the Court, as

required by Rule 40. A petition for rehearing is not a vehicle for overcoming existing deficiencies or rearguing the case.

None of the cases regarding forfeiture that the Arrowood and Fairholme Plaintiffs cite in their petition addresses the issue in the context of a rehearing petition where, as here, the court already has decided that a forfeiture occurred. To grant relief, the Court would have to both (1) overlook Plaintiffs' inability to satisfy the core requirements of Rule 40, and (2) reverse itself with respect to an issue it already decided—a ruling that even the Arrowood and Fairholme Plaintiffs do not contend was legally erroneous. Defendants respectfully submit that neither course of action is appropriate here.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for rehearing.

Dated: June 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify as follows:

1. This response complies with the Court's Order dated April 18, 2017, which permitted the FHFA/Enterprises appellees to file a response to the petitions for panel rehearing not to exceed 5,200 words if produced using a computer or 20 pages if handwritten or typewritten, because this response contains 5,027 words, excluding the parts of the response exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

Dated: June 2, 2017

/s/ Howard N. Cayne
Howard N. Cayne

Counsel for Appellees FHFA and Melvin L. Watt

DISCLOSURE STATEMENT UNDER CIRCUIT RULE 26.1

As an individual and an independent federal agency, Mr. Watt and FHFA are not required to file corporate disclosure statements under Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1.

Fannie Mae is a government-sponsored enterprise chartered by Congress to "establish secondary market facilities for residential mortgages," to "provide stability in the secondary market for residential mortgages," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716(1), (4). Fannie Mae has no parent corporation, and it is a publicly traded company. According to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common stock.

Freddie Mac is a government-sponsored enterprise chartered by Congress "to promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1451 note. Freddie Mac has no parent corporation. It is a publicly traded company and, according to public securities filings, no publicly held corporation owns 10% or more of Freddie Mac's common stock.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Howard N. Cayne
Howard N. Cayne

Counsel for Appellees FHFA and Melvin L. Watt