UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations	**Misc. Action No. 13-mc-1288 (RCL)**
THIS DOCUMENT RELATES TO:	CLASS ACTION
ALL CASES	

MOTION FOR LEAVE TO FILE A SURREPLY TO DEFENDANTS' MOTION TO DISMISS

Class Plaintiffs respectfully move for leave to file a short Surreply responding to a new ripeness argument which depends upon an inaccurate characterization of Plaintiffs' Second Amended Complaint and was raised for the first time in FHFA's Reply brief. *See* Dkt. 77 at 8-10.

"The standard for granting leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Wultz v. Islamic Republic of Iran*, 2010 WL 4135913, at *1 (D.D.C. Oct. 20, 2010) (quotations and citations omitted). "A district court should consider whether the movant's reply in fact raises arguments or issues for the first time, whether the nonmovant's proposed surreply would be helpful to the resolution of the pending motion, and whether the movant would be unduly prejudiced were leave to be granted." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85 (D.D.C. 2014). Where this standard is met, leave to file is "routinely" granted. *Id.*

Class Plaintiffs' proposed Surreply satisfies this standard. As the Court knows, the D.C. Circuit held that Class Plaintiffs' anticipatory repudiation and implied covenant claims were constitutionally and prudentially ripe. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632 (D.C. Cir. 2017). FHFA's opening memorandum ***implicitly*** attacked this holding by asking this Court to find that the doctrine of anticipatory breach does not apply when the plaintiff has fully performed its contractual performance and it is merely the defendant who has failed to perform and who has announced its intention not to perform. *See* Dkt. 66 at 15-16. Class Plaintiffs responded to these points in their Opposition. *See* Dkt. 72 at 13-16.

Now, in its Reply brief, FHFA seeks ***explicitly*** to relitigate the question of ripeness. *See* Dkt. 77 at 10 ("[T]he contract-related claims in the current complaints are not ripe."). FHFA's basis for this new argument – that Plaintiffs' Second Amended Complaint supposedly "omit[s] the allegations that the D.C. Circuit considered indispensable to ripeness" (Dkt. 77 at 9) – does not appear anywhere in FHFA's opening memorandum and is simply incorrect.

Fairness requires that Class Plaintiffs be allowed to respond to this new argument. The proposed Surreply demonstrates that FHFA's new argument is based on a complete mischaracterization of both the D.C. Circuit's decision and Plaintiffs' Claims, and would therefore be "helpful to the resolution of the pending motion." *Doe*, 69 F. Supp. 3d at 85.

For the foregoing reasons, Class Plaintiffs respectfully request that the Court grant leave to file the attached Surreply.

Dated: April 5, 2018

Respectfully submitted,

/s/ Hamish P.M. Hume

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UNITED STATES DISTRICT COURT
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PROPOSED SURREPLY TO DEFENDANTS' MOTION TO DISMISS

The D.C. Circuit held that Class Plaintiffs' anticipatory repudiation and implied covenant claims were constitutionally and prudentially ripe because "The class plaintiffs allege the Third Amendment, by depriving them of their right to share in the Companies' assets when and if they are liquidated, immediately diminished the value of their shares." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632 (D.C. Cir. 2017). FHFA's Motion to Dismiss had implicitly attacked this holding by asking this Court to find that the doctrine of anticipatory breach does not apply when the plaintiff has fully performed its contractual performance and it is merely the defendant who has failed to perform and who has announced its intention not to perform. *See* Dkt. 66 at 15-16.

On Reply, FHFA has abandoned all pretense and has sought to directly relitigate the question of ripeness. FHFA claims that Plaintiffs' Second Amended Complaint (SAC) supposedly "omit[s] the allegations that the D.C. Circuit considered indispensable to ripeness." Dkt. 77 at 9; *see also id.* at 1 (alleging that the "gravaman" of Plaintiffs' breach claims on remand is that they will be harmed "at some indeterminate point in the future that may or may

not ever occur."). FHFA is wrong. Its argument is based on a complete mischaracterization of both the D.C. Circuit's decision and Plaintiffs' Claims.

The D.C. Circuit's ripeness holding did not rely on a single "indispensable" factual allegation, but rather relied on Plaintiffs' allegations and arguments "throughout this litigation" that (a) Plaintiffs' contractual rights had value before the Third Amendment, (b) the Third Amendment destroyed that value, and (c) Plaintiffs suffered damages as a result. 864 F.3d at 632, 633 n.26. In a footnote, the D.C. Circuit quoted, as ***examples***, numerous statements articulating these points from <u>*various*</u> filings by the Class Plaintiffs in the trial and appellate courts:

> Although the class plaintiffs do not describe the Third Amendment as "an anticipatory repudiation" until their reply brief, Class Pls. Reply Br. at 13, they have emphasized throughout this litigation that it "nullified—and thereby breached—the contractual rights to a liquidation distribution" by rendering performance impossible. Class Pls. Br. at 40-41; *see also, e.g.*, [First Amended Complaint (FAC), Dkt. 4] ¶ 22 (alleging the Third Amendment "effectively eliminated the property and contractual rights of Plaintiffs and the Classes to receive their liquidation preference upon the dissolution, liquidation or winding up of Fannie Mae and Freddie Mac"); Class Pls. Opp'n to Mot. to Dismiss at 37 ("[T]he Third Amendment has made it impossible for [the Companies] ever to have ... assets available for distribution to stockholders other than Treasury" and thereby "eliminated Plaintiffs' present ... liquidation rights in breach of the Certificates" (internal quotation marks omitted)). The class plaintiffs allege they "paid valuable consideration in exchange for these contractual rights," which rights "had substantial market value ... that [was] swiftly dissipated in the wake of the Third Amendment," [FAC, Dkt. 4] ¶ 23, causing the class plaintiffs to "suffer[ ] damages," *e.g.*, [FAC, Dkt. 4] ¶ 144.

Id. at 633 n.26.

The SAC continues to make all these arguments. It continues to allege that Plaintiffs' contract rights had value before the Third Amendment, and that the Third Amendment destroyed that value. *E.g.*, Dkt. 71 at ¶ 14 ("the Third Amendment completely eviscerated and destroyed the economic rights held by private shareholders."); *id.* at ¶ 57 (alleging that, prior to the Third

Amendment, "the holders of the Preferred Stock and Common Stock had a reason to believe and expect that the economic value of their shares, and the rights they had as stockholders, would likely be increasing, and would not be eliminated."); *id.* at ¶ 59 ("The Third Amendment . . . eliminated the contractual rights of the Preferred Stock and Common Stock holders, and expropriated for the Government the economic value of these privately-held securities."); *id.* at ¶ 60 ("The Third Amendment . . . destroys tens of billions of dollars of value in the Companies' Preferred Stock and Common Stock."); *id.* at ¶ 92 ("The Third Amendment . . . expropriates the value of their shares and transfers that value to the Treasury, the Companies' controlling stockholder."); *id.* at ¶ 93 ("The Third Amendment . . . was specifically intended to ensure that stockholders (other than Treasury) could never again recover any value from their investments."). The SAC also alleges that Plaintiffs ***have already been*** injured as a result of the Third Amendment. *Id.* at ¶ 14 (alleging that stockholders "***have been*** severely damaged" by the Third Amendment) (emphasis added); *id.* at ¶ 98-101 (defining the classes as shareholders "who ***were*** damaged" by the Third Amendment) (emphasis); ¶¶ 130, 137, 144 (alleging that Plaintiffs "***suffered*** damages" as a result of FHFA's anticipatory repudiation) (emphasis added); ¶¶ 151, 158, 165 (alleging that Plaintiffs "***suffered*** damages" as a result of FHFA's breach of the implied covenant of good faith and fair dealing) (emphasis added).

Further, Class Plaintiffs' Opposition explained that its claims were based on the fact that the Third Amendment "***immediately*** reduced the value of Plaintiffs' stock." Dkt. 72 at 15; *see also id.* at 3 ("[A]s of August 16, 2012, the day before the Net Worth Sweep[,] Private shareholders had legal rights to dividends and liquidation proceeds, and those rights had economic value. Once the Net Worth Sweep was put in place, however, those legal rights were obliterated. Their economic value was therefore also wiped out."). Indeed FHFA has

acknowledged this – its Reply **quotes these exact passages** from Class Plaintiffs' Opposition and uses them as a basis to explain that Class Plaintiffs' claims are based on "the alleged decline in value of their shares." *See* Dkt. 77 at 36 (quoting Dkt. 72 at 3, 15).

The SAC does not rely on the stock price of Plaintiffs' securities because that price reflects the market's expectations regarding this litigation, and thus, is not a reliable metric for accounting for the damages caused to Plaintiffs by the Third Amendment. Because investors evidently believe that this Court will uphold Plaintiffs' contract rights and order FHFA to distribute some funds to stockholders, investors are willing to pay a premium to acquire these shares (and current holders are willing to forego a premium to hold the shares) notwithstanding the Third Amendment's evisceration of those contract rights. Thus, the omission of stock price from the SAC is related to *how* Plaintiffs' damages should properly quantified, not *whether* Plaintiffs have suffered any damages. *See* Dkt. 72 at 3 ("The only value the preferred and common stock has had since the Net Worth Sweep is a value that depends on the litigation challenging the Net Worth Sweep—or seeking to recover the damages caused by the Net Worth Sweep. Again, Defendants do not and cannot dispute this.").

FHFA also badly mischaracterizes the D.C. Circuit's reliance on *State National Bank v. Lew*, 795 F.3d 48 (D.C. Cir. 2015). FHFA says the D.C. Circuit construed that case as somehow *requiring* allegations regarding share price. Dkt. 77 at 9. In fact, the D.C. Circuit quotes *State National Bank* as merely requiring allegations that "current investments are worth less now, or ***have been otherwise adversely affected*** now." 864 F.3d at 632 (quoting *State National Bank*, 795 F.3d at 56) (emphasis added). As demonstrated above, the SAC plainly satisfies this requirement.

Further, FHFA's attempt to relitigate ripeness makes no sense in light of the fact that the D.C. Circuit's ripeness holding hinged on its recognition that "class plaintiffs' claims for breach of contract with respect to liquidation preferences are better understood as claims for anticipatory breach." 864 F.3d at 633. Unlike the FAC, which did not even use the words "anticipatory breach," the SAC expressly states claims for "anticipatory breach." *Compare* Dkt. 71 Counts I – III ("Breach of Contract – Anticipatory Breach), *with* Dkt. 4, Counts I-III ("Breach of Contract"). It cannot be the case that the FAC stated a valid claim for anticipatory breach, but the SAC does not.

The D.C. Circuit's holding that Plaintiffs' claims are constitutionally and prudentially ripe is binding on this Court. Accordingly, the Court must decide Plaintiffs' claims on the merits.

CONCLUSION

For the foregoing reasons, as well as those articulated in Plaintiffs' Opposition (Dkt. 72), the Court should deny FHFA's Motion to Dismiss.

Dated: April 5, 2018

Respectfully submitted,

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[PROPOSED] ORDER GRANTING CLASS PLAINTFFS' MOTION FOR LEAVE TO FILE A SURREPLY TO DEFENDANTS' MOTION TO DISMISS

Upon consideration of Class Plaintiffs' Motion for Leave to file a Surreply to Defendants' Motion to Dismiss, it is hereby

ORDERED that the motion is granted.

SO ORDERED.

Date:_____ _____

Hon. Royce C. Lamberth
U.S. District Judge