



1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951
302 984 6000
www.potteranderson.com

Myron T. Steele
Partner
msteele@potteranderson.com
(302) 984-6030 Direct Phone
(302) 658-1192 Fax

October 10, 2018

BY CM/ECF

Patricia S. Dodszuweit
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: *Jacobs, et al. v. Federal Housing Finance Agency, et al.*,
No. 17-3794

Dear Ms. Dodszuweit:

I write pursuant to Fed. R. App. P. 28(j) in response to Federal Housing Finance Agency's notice of supplemental authority. In *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C. Sept. 28, 2018), the district court erred by holding that Delaware and Virginia law do not apply because, according to the district court, "the GSEs' federal statutory charters specifically grant the GSEs authority to: (1) issue preferred stock 'on such terms and conditions as the board of directors shall prescribe,' ... (2) make dividend payments to GSE stockholders in the manner 'as may be declared by the board of directors.'" *Id.* at 34. Those provisions relate only to terms and conditions for issuing preferred stock (*e.g.*, consideration, conditions precedent, vesting) and declarations of discretionary dividends. They have nothing to do with the rights, powers, and preferences of the preferred stock itself, including mandatory dividends. Even if they did, the district court ignored that, by choosing Delaware and Virginia law, the GSEs' boards *did* prescribe limitations on the rights, powers, and preferences of the stock and the declaration of dividends as imposed by state statutes. Corporate charters, bylaws, and the governing corporate statutes are part of the contract among the corporation and its stockholders, and charter provisions (including certificates of designation) cannot confer rights, powers, or preferences contrary to the governing statute. *See* District

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Court D.I. 69 18-20. The GSEs therefore must “operate with an eye toward both Federal and State law[.]” 67 Fed. Reg. 38367 (June 4, 2002).

The district court further erred by concluding that a lack of case law on this issue is somehow meaningful. *Fairholme* 34-35. There is no directly analogous case because the Net Worth Sweep is an absurdity without precedent. Nevertheless, Appellants cited case law supporting their position. *See* Appellants’ Brief 32. To the extent the Court believes this is an issue of first impression, Appellants respectfully submit it is more appropriately decided by the state courts and invite the Court to certify the question to the Supreme Courts of Delaware and Virginia as Appellants moved in the court below. *See* D.I. 24; Third Circuit L.A.R. 110.1.

Respectfully,

/s/ Myron T. Steele

Myron T. Steele

MTS/

cc: Counsel of Record – by CM/ECF

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