

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FAIRHOLME FUNDS, INC., *et al.*,

Plaintiffs,

v.

FEDERAL HOUSING FINANCE AGENCY, *et al.*,

Defendants.

Civil No. 13-1053 (RCL)

ARROWOOD INDEMNITY COMPANY,
et al.,

Plaintiffs,

v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION, *et al.*,

Defendants.

Civil No. 13-1439 (RCL)

In re Fannie Mae/Freddie Mac Senior Preferred
Stock Purchase Agreement Class Action Litigations

Miscellaneous No. 13-1288 (RCL)

This document relates to:
ALL CASES

CLASS ACTION

**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL
RECONSIDERATION OF DENIAL OF
MOTION TO DISMISS IMPLIED COVENANT CLAIMS**

Plaintiffs' opposition to Defendants' motion for reconsideration confirms that the implied-covenant counts actually pleaded by Plaintiffs are, in substance, claims for anticipatory repudiation. Accordingly, because Plaintiffs do not dispute that Delaware and Virginia law

preclude anticipatory repudiation suits relating to unilateral contracts, Plaintiffs' implied-covenant claims should be dismissed.

Plaintiffs concede that “a breach of implied covenant claim is a ‘form of breach of contract claim’” and that they “plead their implied covenant claim as a breach-of-contract claim.” Opp. 12, 13 n.6. Plaintiffs also do not dispute that (a) implied-covenant claims *can* sound in anticipatory repudiation; (b) whether a claim is expressly labeled as “anticipatory repudiation” is not controlling; and (c) the Delaware and Virginia common-law bars on anticipatory repudiation suits for unilateral contracts apply equally to express-contract claims and their implied-covenant counterparts. Plaintiffs likewise make no distinction between their implied-covenant claims as they relate to dividends and as they relate to liquidation preferences, or attempt to retract their argument to the D.C. Circuit that “the Third Amendment constitutes an anticipatory repudiation of the contractual provisions governing *both* dividends and liquidation distributions.” D.C. Cir. Reply at 13 (emphasis added).

Plaintiffs' only substantive argument in opposition to Defendants' motion is to insist that the particular implied-covenant claims they bring here, whether relating to dividends or liquidation preferences, are not really claims for anticipatory repudiation of those rights. However, Plaintiffs' own analytical framework shows the opposite.

1. Plaintiffs' analysis begins with an articulation of the distinction between an anticipatory breach claim, on the one hand, and “a standard breach of contract claim” permitted regardless of the unilateral nature of the contract, on the other. Opp. 10-11. We agree with that articulation. Far from supporting Plaintiffs, however, it actually shows why their implied-covenant claims assert anticipatory breaches.

Plaintiffs admit that a “standard breach of contract claim” occurs when, for example, “a party fail[s] to deliver goods by a set time or fail[s] to render services as required by the contract.” Opp. 11. In contrast, an anticipatory repudiation claim arises when a party “either promises to breach the contract *or engages in ‘a voluntary affirmative act which renders the obligor unable . . . to perform.’*” *Id.* (quoting *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632 (D.C. Cir. 2017)) (emphasis added). Under the doctrine of anticipatory repudiation, “the law treat[s] . . . the act rendering performance impossible as a breach itself.” *Perry Capital*, 864 F.3d at 632-33 (internal quotation marks and brackets omitted); *see* Opp. 11.

Despite accurately stating those legal propositions, the rest of Plaintiffs’ opposition brief inexplicably argues that they have the *opposite* implications when applied to this case. For example, Plaintiffs argue that their theory that the Third Amendment “extinguish[ed] the possibility of dividends” somehow connotes “past breach, not anticipatory breach.” Opp. 9. But according to Plaintiffs’ own description of the law, the D.C. Circuit’s decision in *Perry Capital*, and this Court’s September 28 opinion, an act that extinguishes the possibility of future performance and receipt of contractual benefits is a quintessential example of an anticipatory repudiation. Opp. 11; *Perry Capital*, 864 F.3d at 632; *id.* at 633 n.26 (equating anticipatory repudiation with “rendering performance impossible”); Mem. Op. at 13 (observing that a claim that defendants “effectively repudiated their contractual obligations . . . by rendering performance impossible” typically “amounts to a claim for anticipatory breach”).

Likewise, Plaintiffs repeatedly insist that under their theory, the Third Amendment itself was the breach. Opp. 1, 7, 9, 10, 12. But that label does not indicate that Plaintiffs’ implied-covenant counts are anything other than anticipatory breach claims, because as Plaintiffs (once again) admit, it is customary in anticipatory breach cases to refer to the repudiation as a breach.

Opp. 11. “[T]he law treat[s] . . . the act rendering performance impossible as a breach itself.” *Perry Capital*, 864 F.3d at 632-33; *accord Glenn v. Fay*, 281 F. Supp. 3d 130, 139 (D.D.C. 2017) (repudiation is “treat[ed] . . . as a present breach of the contract”).¹

Thus, Plaintiffs’ own arguments underscore that their claims, in substance, seek to recover for a past act that allegedly extinguished the possibility of receiving future dividends and liquidation preferences. This is consistent with how Plaintiffs plead the implied-covenant claims in their complaints. Class Plaintiffs allege that they possess express contractual rights consisting of “dividends ‘if declared by the Board of Directors, in its sole discretion’” and “contractually-specified liquidation preferences,” and that the Third Amendment “deprive[s] Plaintiffs . . . of the fruits of their bargain” by eliminating “any possibility of receiving dividends or a liquidation preference.” Class SAC ¶¶ 148, 150, 155, 157, 162, 164.² The Fairholme and Arrowood Plaintiffs similarly allege that the Third Amendment “prevent[s] [them] from receiving the fruits of the bargain,” which they too identify as “a contractually specified, non-cumulative dividend from the Companies” and “a contractually specified liquidation preference.” Fairholme FAC ¶¶ 146, 147; Arrowood FAC ¶¶ 140, 141. In other words, the Third Amendment “*repudiates* . . . the scope, purpose, and terms of the contracts governing the relationships between Fannie and Freddie and their preferred shareholders” and providing for those future potential benefits. Fairholme FAC ¶ 131; Arrowood FAC ¶ 145 (emphasis added).

¹ For the same reason, Plaintiffs are wrong to suggest (Opp. 9-10) that this Court’s use of the past tense when discussing the alleged breach of the implied covenant in its September 28, 2018 Opinion is inconsistent with construing the implied-covenant counts as anticipatory repudiation in substance.

² This reply uses the same abbreviations for Plaintiffs’ amended pleadings as are used in Defendants’ motion and in the Court’s September 28, 2018 Opinion.

In contrast, Plaintiffs’ implied-covenant claims have nothing in common with a past “fail[ure] to deliver goods by a set time” or failure “to render services as required by the contract”—Plaintiffs’ paradigmatic examples of *non*-anticipatory breach claims. Opp. 11. Here, the analogue to goods delivered or services rendered is dividends and liquidation preferences—the things Plaintiffs’ implied-covenant counts identify as “the fruits of the bargain” of which they anticipate being deprived. Fairholme FAC ¶¶ 146, 147; Arrowood FAC ¶¶ 140, 141; Class SAC ¶¶ 148, 150, 155, 157, 162, 164. And it is undisputed that the “set time” for delivery of those fruits is the indefinite future. No Plaintiff takes the position that it has *already* been denied any dividend or liquidation preference that it would have received but for the Third Amendment. This case is the opposite of a “standard” or “routine” (Opp. 11) past breach claim.

2. Plaintiffs try to avoid the inevitable legal consequences of how they pleaded their implied-covenant counts by positing that “a party breaches the implied covenant the moment that it fails to act in good faith—in other words, the moment it violates the parties’ reasonable expectations.” Opp. 11. According to Plaintiffs, Defendants have an ongoing, nonspecific “implied duty to act in a way that comports with Plaintiffs’ reasonable expectations as holders of preferred stock,” Opp. 12, and not to engage in transactions “in exchange for no meaningful value,” Opp. 10. Contradicting their own complaints, Plaintiffs go so far as to suggest that their alleged expectations regarding dividends and the Enterprises’ determinations about whether to declare dividends are altogether irrelevant to their implied-covenant claims. Opp. at 14-15.

In this regard, Plaintiffs recently disclosed in discovery that they intend to seek, as damages for the alleged breach of the implied covenant, the full purchase price that each and every common and preferred shareholder paid for his or her shares, without regard to the prospect of future dividends or liquidation preferences. *See* Ex. A, at 5-6 (*Fairholme* Plaintiffs’

initial disclosures); Ex. B, at 5-8 (*Arrowood* Plaintiffs’ initial disclosures); Ex. C, at 6-8 (Class Plaintiffs’ initial disclosures). If Plaintiffs were permitted to morph their implied-covenant claims into an unpleaded, sweeping theory that a finding that the Third Amendment was unreasonable would entitle them to an immediate total refund of their share purchase prices, there is little doubt that such astronomical liability would “restrain or affect the exercise of powers or functions of [FHFA] as a conservator,” causing the claims to be barred by 12 U.S.C. § 4617(f). *See Jacobs v. FHFA*, No. 17-3794, 2018 WL 5931515, at *8-9 (3d Cir. Nov. 14, 2018) (holding that “monetary relief” that would “unravel the Third Amendment” or “prevent or at least deter the Agency from implementing it further” is barred by § 4617(f)).³

This Court, however, need not presently reach these issues because Plaintiffs’ newly evolved, vastly expanded conception of their implied-covenant claims is inconsistent both with the governing state law, and with Plaintiffs’ own claims as pleaded in their complaints and understood by the D.C. Circuit when it remanded those claims for this Court to determine in the first instance whether Plaintiffs “stated claims for . . . breach of the implied covenant.” *Perry Capital*, 864 F.3d at 633.

No principle regarding the implied covenant is more ingrained than that it is a “limited and extraordinary” remedy, *Nemec v. Schrader*, 991 A.2d 1120, 1128 (Del. 2010), not a “free-floating duty” to act in accordance with subjective notions of good faith, unmoored from specific contractual obligations, *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

³ The D.C. Circuit’s decision in *Perry Capital* does not suggest otherwise. The Circuit held that Enterprise shareholders’ injunctive and declaratory claims were barred by § 4617(f), and assumed *sub silentio* that the damages claims were not, but did not address whether damages claims that rise to the level of restraining or affecting the exercise of powers or functions of FHFA as Conservator might be barred. As discussed below, the D.C. Circuit could not have understood the implied-covenant claims before it to have the vast, open-ended scope and magnitude of potential damages Plaintiffs now ascribe to them.

The implied covenant is a modest doctrine “by which Delaware law cautiously supplies terms to fill gaps in the express provisions of a specific agreement.” *Dieckman v. Regency GP LP*, 2018 WL 1006558, at *3 (Del. Ch. Feb. 20, 2018) (quoting *Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 182 (Del. Ch. 2014)); see *Gerber v. Enter. Prod. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013) (implied covenant merely fills “residual nooks and crannies” in the written agreement), *overruled on other grounds by Winshall v. Viacom Int’l., Inc.*, 76 A.3d 808 (Del. 2013). The implied covenant is similarly circumscribed in Virginia: it “does not create affirmative obligations, but rather is simply a manifestation of *conditions inherent in expressed promises*.” *Cagle v. CitiMortgage, Inc.*, 2015 WL 2063990, at *8 (E.D. Va. May 1, 2015) (internal quotation marks omitted) (emphasis added).

Indeed, when the D.C. Circuit addressed Plaintiffs’ implied-covenant claims in *Perry Capital*, it understood those claims not as calling for a free-floating reasonableness test, but as closely tied to the express provisions of the shareholder contract that “provide for dividends ‘if declared by the Board of Directors, in its sole discretion.’” 864 F.3d at 631 (quoting stock certificates). The governing principle is that “[w]hen exercising a discretionary right, a party to the contract must exercise its discretion reasonably.” *Id.* (quoting *Gerber*, 67 A.3d at 419) (emphasis added); see also *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, 1993 WL 13029827, at *3 (Va. Cir. Ct. 1993) (“where discretion is lodged in one of two parties to a contract . . . *such discretion* must, of course, be exercised in good faith”) (emphasis added). The D.C. Circuit’s understanding of Plaintiffs’ implied covenant claims as sounding in anticipatory repudiation was essential to its reasoning in remanding those claims. See *Perry Capital*, 864 F.3d at 633 (“Nor do we see any prudential obstacle to adjudicating the class

plaintiffs’ claim that *repudiating* the guarantee of liquidation preferences constitutes a breach of the implied covenant”) (emphasis added).

There is no way to breach an obligation to act reasonably in connection with the performance of a specific discretionary function before the time to perform that function has arrived. Thus, the only way to understand Plaintiffs’ implied-covenant claims consistent with *Perry Capital* and the state-law boundaries of such claims is that the Third Amendment made it impossible for the Enterprises to reasonably exercise discretion in connection with future dividend determinations and liquidation preferences—*i.e.*, anticipatory repudiation. Conversely, the only way for Plaintiffs to avoid that understanding is to decouple their implied-covenant claims from the contractual “fruits” and express contractual provisions on which those claims were predicated: dividends and liquidation preferences that Plaintiffs hoped to receive in the future. But that is a decoupling that neither applicable state law, Plaintiffs’ own pleadings, nor the law-of-the-case will countenance. It is not for nothing that the words “dividends” and “liquidation preferences” appear no fewer than 26 times in Plaintiffs’ collective implied-covenant counts.

3. Plaintiffs have no answer to Defendants’ observation (Mot. 11-12) that granting an immediate right to sue under implied covenants associated with unilateral contracts would eviscerate the longstanding prohibition on unilateral-contract anticipatory repudiation suits. Every contract is deemed to include the implied covenant, and virtually any repudiation or rendering impossible of future contractual obligations could be characterized by the disappointed promisee as “unreasonable” or not in “good faith.” Thus, if Plaintiffs were correct, plaintiffs typically would have little difficulty recasting a precluded unilateral-contract anticipatory repudiation suit as an implied-covenant claim.

For example, a lawyer cannot instantly sue his co-counsel for disavowing a promise to share a contingency fee if a judgment is ever collected, but rather must wait to see if the judgment is collected and the promise is actually broken. *Glenn v. Fay*, 281 F. Supp. 3d 130, 138-41 (D.D.C. 2017). But under Plaintiffs’ view of the law, that lawyer could plead that the repudiation was “arbitrary” and thereby seek to recover immediately for breach of the implied covenant. Yet it is well-established that an indemnitee cannot immediately sue an indemnitor who unreasonably advises he does “not intend to perform under [an] indemnity agreement,” but rather must wait until the “sum becomes due” under the agreement. *Parker v. Moitzfield*, 733 F. Supp. 1023, 1025-26 (E.D. Va. 1990). If Plaintiffs were right, the indemnitee could always just bring an implied-covenant claim seeking the same relief—eviscerating the foregoing core contract principle. There is no reason to assume that Delaware and Virginia would allow a gap-filling mechanism designed for application only “rarely,” “cautiously,” and in “narrow circumstances,” *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 252 F. Supp. 3d 537, 548 (E.D. Va. 2017), to upend longstanding common-law limitations on contract remedies in this way.

Plaintiffs do not dispute that *if* their implied-covenant claims are, in substance, claims for anticipatory repudiation tethered to future dividend and liquidation-preference rights, those claims are subject to the same analysis the Court applied to their breach-of-contract claims in its September 28 Opinion. Thus, for the reasons above and in Defendants’ motion, the Court should reconsider its September 28 Opinion to the extent it denied dismissal of Plaintiffs’ implied covenant claims, and should now dismiss those claims and the case with prejudice.⁴

⁴ Plaintiffs complain in a footnote that Defendants first linked this bar to Plaintiffs’ implied-covenant claims in their motion-to-dismiss reply brief. Opp. 8 n.4. However, Plaintiffs “undercut this concern by volunteering a response in the form of a surreply.” *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 36 (D.D.C. 2010).

Dated: November 19, 2018

Respectfully submitted,

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Exhibit A

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

FAIRHOLME FUNDS, INC., et al.,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, et al.,

Defendants.

Case No. 1:13-cv-1053-RCL

PLAINTIFFS' INITIAL DISCLOSURES

Pursuant to Rule 26(a)(1), Plaintiffs make the following initial disclosures.

I. Individuals Likely To Have Discoverable Information that Plaintiffs May Use To Support Their Claims.

A. Defendant Officers and Employees with Discoverable Information.

The following individuals are likely to have information that Plaintiffs may use to show that Defendants acted arbitrarily and unreasonably in imposing the Net Worth Sweep, thereby violating the reasonable expectations of the holders of junior preferred shares in Fannie Mae and Freddie Mac ("the Companies") that Plaintiffs now own. Per the Court's Memorandum Opinion of September 28, 2018, such information is relevant to Plaintiffs' claim that Defendants breached the implied covenant of good faith and fair dealing.

Plaintiffs are currently unaware of these individuals' addresses and telephone numbers, but relevant current or former positions are listed based upon information and belief.

i. FHFA.

- Peter Brereton, Associate Director for Congressional Affairs.
- Jan Brown, Office of the Director.
- Wanda DeLeo, Deputy Director, Division of Examination Programs and Support.
- Ed DeMarco, Acting Director.
- Christopher Dickerson, Office of Systemic Risk and Market Surveillance.
- John Greenlee, Deputy Director, Enterprise Regulation.
- Patrick Lawler, Chief Economist.
- James Lockhart, Director.
- Thomas Jamie Newell, Miscellaneous Administration and Program.

- Nick Satriano, Chief Accountant.
- Scott Smith, Associate Director, Capital Policy.
- Jeffrey Spohn, Deputy Director, Conservatorship Operations.
- Naa Awaa Tagoe, Senior Associate Director.
- Mary Ellen Taylor, Associate Director, Division of Conservatorship; Associate Director for Agency Communication.
- Mario Ugoletti, Special Advisor (also Director, Treasury Office of Financial Institutions).

ii. Fannie Mae.

- David Benson, Executive Vice President, Capital Markets.
- Duane Creel, Examiner-in-Charge (also for Freddie Mac).
- Terry Edwards, Executive Vice President, Credit Portfolio Management.
- Andre Galeano, Associate Director of Credit Risk (also for Freddie Mac).
- Alan Goldblatt, Vice President, Capital Markets Finance.
- Timothy Mayopoulos, President and Chief Executive Officer.
- Susan McFarland, Executive Vice President and Chief Financial Officer.

iii. Freddie Mac.

- Devajyoti Ghose, Senior Vice President, Division of Investment and Capital Markets.
- Edward Golding, Senior Vice President, Division of Models, Mission, and Research.
- Ross Jay Kari, Chief Financial Officer.
- Donald Layton, Chief Executive Officer.
- Paul Mullings, Senior Vice President and Interim Head of Single-Family Business, Operations, and Information Technology.
- Jerry Weiss, Executive Vice President and Chief Administrative Officer.

B. Third Parties with Discoverable Information.

The following individuals are also likely to have information that Plaintiffs may use to show that Defendants acted arbitrarily and unreasonably in conducting the Net Worth Sweep. Plaintiffs again are unaware of these individuals' addresses and telephone numbers, but relevant current or former positions are listed based upon information and belief.

i. Treasury.

- Timothy Bowler, Deputy Assistant, Office of Capital Markets.
- Adam Chepenik, Senior Policy Advisor.
- Jeff Foster, Senior Policy Advisor.
- Timothy Geithner, Treasury Secretary.
- Jeffrey Goldstein, Under Secretary for Domestic Finance.
- Dan Jester, Contractor.
- Taylor Kawan, Acting Director of Accounting.
- Mary Miller, Under Secretary for Domestic Finance.

- Beth Mlynarczyk, Senior Advisor to the Counselor on Housing Finance Policy; Office of Capital Markets.
- Jeremiah Norton, Deputy Assistant Secretary for Financial Institutions.
- Henry Paulson, Secretary.
- Michael Stegman, Counselor to the Secretary for Housing Finance Policy.
- Sam Valverde, Deputy Executive Secretary.

ii. Other Government Officials.

- Jim Parrott, Senior Advisor, National Economic Council.
- Ben Bernanke, Chair of the Federal Reserve.
- Gene Sperling, Director, National Economic Council.

iii. Grant Thornton.

- Anne Eberhardt, Forensics and Investigation Practice.
- Lee Errickson, Executive Director.
- E. Bradley Wilson, Managing Partner of Audit, Global Public Sector.

iv. PwC.

- Michael English, Partner.
- Ben Evans, Senior Manager.
- Bill Lewis, Partner.
- John Oliver, Partner.
- Diana Stoltzfus, Partner.
- Ryan Trzasko, Senior Manager.

v. Deloitte.

- Jeff Swarmstedt, Lead Client Service Partner.
- Adam VanFossen, Audit Senior Manager.
- Troy Vollertsen, Partner.

vi. FHLBanks.

- James Griffin, Jr., Senior Director, Office of Finance.

C. Plaintiffs' Officers with Discoverable Information.

The following individuals are likely to have information that Plaintiffs may use to show the number of each series of junior preferred shares in the Companies that Plaintiffs own, which is relevant to Plaintiffs' damages computations.

i. Fairholme Plaintiffs.

- Wayne Kellner, President and Chief Financial Officer, Fairholme Capital Management, LLC
 - Office address: 2601 NE 2nd Ave., Miami, FL 33137
 - Telephone: (305) 434-7713

ii. Berkley Plaintiffs.

- Ed Linekin, Senior Vice President for Investments, W. R. Berkley Corporation
 - Office address: 475 Steamboat Rd., Greenwich, CT 06830
 - Office telephone: (203) 629-3000

II. Documents, Electronically Stored Information, and Tangible Things In Plaintiffs' Custody that Plaintiffs May Use To Support Their Claims.

A. Liability.

Pursuant to Rule 26(a)(1)(A)(ii), Plaintiffs herein describe the category and location of the documents and other information showing that Defendants acted arbitrarily and unreasonably in conducting the Net Worth Sweep, thereby violating the reasonable expectations of the holders of the junior preferred shares that Plaintiffs now own. This evidence includes:

- Materials produced by the United States and third parties in *Fairholme Funds, Inc. v. United States*, Case No. 1:13-cv-00465-MMS (Fed. Cl.).
- Certain of the Defendants' own public statements and other publicly available information, which have been described or provided over the course of this litigation. *See, e.g.*, Joint Appendix at 77, 78, 83, 85, 125, 2428, 2438, 4026, *Perry Capital LLC v. Mnuchin*, Case No. 14-5243 (Feb. 16, 2016); *see generally* Amended Complaint, Doc. 67-1; Response to Mtn. to Dismiss, Doc. 76.
- The provisions of the stock certificates for each series of junior preferred shares that Plaintiffs own, which are in Defendants' possession. *See, e.g.*, Ex. C. to Defs'. Mtn. to Dismiss (Jan. 10, 2018) (Fannie preferred); Ex. D. to Defs'. Mtn. to Dismiss (Jan. 10, 2018) (Freddie preferred). Provisions of each series are also described in the offering documents for those series, compiled at Fannie Mae's Stock Information webpage¹ and Freddie Mac's Preferred Stock webpage.²

¹ <http://www.fanniemae.com/portal/about-fm/investor-relations/stock-information.html>.

² <http://www.freddiemac.com/investors/preferred-stock.html>.

Plaintiffs reserve the right to use any information already shared between the parties or referred to in filings in this or in the Court of Federal Claims litigation to prove all elements of their claim.

B. Damages.

The documents relevant to Plaintiffs' damages computations are described in Part III and produced as noted therein.

III. Computation of Each Category of Damages that Plaintiffs Claim.

Plaintiffs are entitled to recover the highest of either restitution, expectancy damages, or reliance damages for Defendants' breach of the implied covenant of good faith and fair dealing. *See* RESTATEMENT (SECOND) CONTRACTS § 378. The following computations of each category are preliminary. Plaintiffs' final computations will presumptively rely upon expert reports and testimony, which Plaintiffs will disclose pursuant to Rule 26(a)(2) and any scheduling order entered in this case.

A. Restitution.

Plaintiffs are entitled to restitution equal to the prices originally paid for any series of junior preferred shares that Plaintiffs own in the Companies, plus prejudgment interest including interest running from the time of the last dividend received. This amount might be reduced by any dividends on those shares that the Companies paid, but Plaintiffs do not concede that it would be.

The original share prices are provided in the offering documents for each series of share. Although these documents are already in Defendants' possession,³ Plaintiffs can provide copies if necessary.

The dividends paid on the shares owned by Plaintiffs can be calculated by using the Companies' annual 10-K statements and quarterly 10-Q statements and records reflecting Plaintiffs' holdings. In particular, the 10-K statements can be used to determine how the total preferred dividends were allocated among the various series of stock. By comparing the total number of shares of a particular series outstanding to the total number held by Plaintiffs, one can calculate the proportion of the dividends that are attributable to Plaintiffs' shares.

Records reflecting Plaintiffs' holdings are provided in Exhibits A and B. Although the Companies' annual and quarterly statements are in the Defendants' possession, Exhibit C shows

³ The offering documents for the Companies' preferred shares are compiled as referenced above in footnotes 1 and 2.

the locations of those statements that Plaintiffs have so far found to be publicly available.⁴ Again, these computations are preliminary, and Plaintiffs may rely on expert assistance to reach final damages amounts.

The prejudgment interest rate is set by state law. *See* 6 Del. Code § 2301(a) (interest rate under Delaware law, which Fannie Mae bylaws designate as controlling); Va. Code § 6.2-302 (interest rate under Virginia law, which Freddie Mac bylaws designate as controlling).

B. Expectancy Damages.

Plaintiffs are entitled to expectancy damages equal to the value that holders of Plaintiffs' junior preferred shares would have enjoyed from those shares—including the current value of the shares and their liquidation preferences, and the value of dividend payments on those shares—absent the Net Worth Sweep, plus prejudgment interest including interest running from the time of the last dividend received.

Information potentially relevant to this computation includes the financial status and capital structure of the Companies absent the Net Worth Sweep, as well as the amount (if any) of the quarterly periodic commitment fee that Treasury would have collected from the Companies. Plaintiffs intend to rely on an expert witness to calculate expectancy damages based on all relevant information, and thus are not yet able to offer an exact computation. But Plaintiffs note that a Freddie document shows that the periodic commitment fee would have been at most a small fraction of the outstanding amount of Treasury's funding commitment to the Companies. Defendants also have possession of this document, since they produced it in discovery in the Court of Federal Claims,⁵ but Plaintiffs again can provide a copy if necessary.

C. Reliance Damages.

Plaintiffs are entitled to reliance damages equal to the costs of preparing to perform and of performing the shareholder's obligations under Plaintiffs' junior preferred shares.

These damages equal the original price of Plaintiffs' shares, plus prejudgment interest including interest running from the time of the last dividend received. This amount might be reduced by any dividends on those shares that the Companies paid, but Plaintiffs do not concede that it would be. The documents relevant to this computation are discussed above in Part III.A. Plaintiffs also intend to rely on expert analysis of the information discussed in Part III.B to show that Defendants cannot meet their burden to prove that Plaintiffs' shares would have lost value absent Defendants' breach of the implied covenant of good faith and fair dealing.

⁴ Specifically, Plaintiffs have located through public channels Fannie Mae's 10-Ks or similar annual reports since 2000, Fannie Mae's 10-Qs since 2003, Freddie Mac's 10-Ks or similar annual reports since 2000, and Freddie Mac's 10-Qs since 2008.

⁵ The de-designated version has Bates number FHFA00102167.

IV. Insurance Agreements.

Plaintiffs are unaware of any insurance policies applicable under Rule 26(a)(1)(A)(iv).

* * *

Plaintiffs reserve the right to supplement this disclosure upon discovery of additional material information.

Date: November 5, 2018

Respectfully submitted,

/s/ Charles J. Cooper

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Fairholme Funds, Inc., et al.

Exhibit B

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

ARROWOOD INDEMNITY COMPANY, *et al.*,

Plaintiffs,

v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION, *et al.*,

Defendants.

Case No. 1:13-cv-1439-RCL

**INITIAL DISCLOSURES OF PLAINTIFFS ARROWOOD INDEMNITY COMPANY,
ARROWOOD SURPLUS LINES INSURANCE COMPANY, AND
FINANCIAL STRUCTURES LIMITED**

Pursuant to Rule 26(a)(1), Plaintiffs Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, and Financial Structures Limited (collectively, “Plaintiffs” or the “Arrowood Plaintiffs”) make the following initial disclosures.

**I. INDIVIDUALS LIKELY TO HAVE DISCOVERABLE INFORMATION
THAT PLAINTIFFS MAY USE TO SUPPORT THEIR CLAIMS**

A. Defendant Officers and Employees with Discoverable Information.

The following individuals are likely to have information that Plaintiffs may use to show that Defendants acted arbitrarily and unreasonably in imposing the Net Worth Sweep, thereby violating the reasonable expectations of the holders of junior preferred shares in Fannie Mae and Freddie Mac (“the Companies”). Per the Court’s Memorandum Opinion of September 28, 2018, such information is relevant to Plaintiffs’ claim that Defendants breached the implied covenant of good faith and fair dealing.

Plaintiffs are currently unaware of these individuals' addresses and telephone numbers, but relevant current or former positions are listed based upon information and belief.

1. FHFA

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- Patrick Lawler, Chief Economist.
- James Lockhart, Director.
- Thomas Jamie Newell, Miscellaneous Administration and Program.
- Nick Satriano, Chief Accountant.
- Jeffrey Spohn, Deputy Director, Conservatorship Operations.
- Naa Awaa Tagoe, Senior Associate Director.
- Mary Ellen Taylor, Associate Director, Division of Conservatorship; Associate Director for Agency Communication.
- Mario Ugoletti, Special Advisor (also Director, Treasury Office of Financial Institutions).

2. Fannie Mae

- David Benson, Executive Vice President, Capital Markets.
- Terry Edwards, Executive Vice President, Credit Portfolio Management.
- Timothy Mayopoulos, President and Chief Executive Officer.
- Susan McFarland, Executive Vice President and Chief Financial Officer.

3. Freddie Mac

- Devajyoti Ghose, Senior Vice President, Division of Investment and Capital Markets.
- Edward Golding, Senior Vice President, Division of Models, Mission, and Research.
- Ross Jay Kari, Chief Financial Officer.
- Donald Layton, Chief Executive Officer.
- Paul Mullings, Senior Vice President and Interim Head of Single-Family Business, Operations, and Information Technology.
- Jerry Weiss, Executive Vice President and Chief Administrative Officer.

B. Third Parties with Discoverable Information.

The following individuals are also likely to have information that Plaintiffs may use to show that Defendants acted arbitrarily and unreasonably in conducting the Net Worth Sweep.

Plaintiffs again are unaware of these individuals' addresses and telephone numbers, but relevant current or former positions are listed based upon information and belief.

1. Treasury

- Timothy Bowler, Deputy Assistant, Office of Capital Markets.
- Jeff Foster, Senior Policy Advisor.
- Timothy Geithner, Treasury Secretary.
- Jeffrey Goldstein, Under Secretary for Domestic Finance.
- Dan Jester, Contractor.
- Mary Miller, Under Secretary for Domestic Finance.
- Beth Mlynarczyk, Senior Advisor to the Counselor on Housing Finance Policy; Office of Capital Markets.
- Jeremiah Norton, Deputy Assistant Secretary for Financial Institutions.
- Henry Paulson, Secretary.
- Michael Stegman, Counselor to the Secretary for Housing Finance Policy.
- Sam Valverde, Deputy Executive Secretary.

2. Other Government Officials.

- Jim Parrott, Senior Advisor, National Economic Council.
- Ben Bernanke, Chair of the Federal Reserve.
- Gene Sperling, Director, National Economic Council.

3. Grant Thornton

- Anne Eberhardt, Forensics and Investigation Practice.

4. PwC

- Michael English, Partner.
- Ben Evans, Senior Manager.
- Bill Lewis, Partner.
- John Oliver, Partner.
- Diana Stoltzfus, Partner.
- Ryan Trzasko, Senior Manager.

5. Deloitte

- Jeff Swarmstedt, Lead Client Service Partner.
- Adam VanFossen, Audit Senior Manager.
- Troy Vollertsen, Partner.

C. Plaintiffs' Officer with Discoverable Information.

The following individual is likely to have information that the Arrowood Plaintiffs may use to show the holdings of Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, and Financial Structures Limited of preferred stock in Fannie Mae and Freddie Mac, and may use to show investment decisions, including decisions to purchase and decisions to sell, with respect to such stock.

- David Shumway, Chief Investment Officer, Arrowpoint Capital Corp. 3600 Arco Corporate Drive, Charlotte, NC 28273; Telephone (704) 522 3491.

II. DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS IN PLAINTIFFS' CUSTODY THAT PLAINTIFFS MAY USE TO SUPPORT THEIR CLAIMS.

A. Liability

Pursuant to Rule 26(a)(1)(A)(ii), Plaintiffs herein describe the category and location of the documents and other information showing that Defendants acted arbitrarily and unreasonably in imposing the Net Worth Sweep, thereby violating the reasonable expectations of the holders of junior preferred shares. This evidence includes:

- Materials produced by the United States and third parties in *Fairholme Funds, Inc. v. United States*, Case No. 1:13-cv-00465-MMS (Fed. Cl.).
- Certain of the Defendants' own public statements and other publicly available information, which have been described or provided over the course of this litigation. *See, e.g.*, Joint Appendix at 78, 83, 89, 95, 97, 206, 125, 528, 2428, 2438, 4026, *Perry Capital LLC v. Mnuchin*, Case No. 14-5243 (Feb. 16, 2016).
- The provisions of the stock certificates for each series of junior preferred shares that Plaintiffs own or owned as of the date of the Net Worth Sweep, which are in Defendants' possession. *See, e.g.*, Ex. C. to Defs'. Mtn. to Dismiss (Jan. 10, 2018) (Fannie preferred);

Ex. D. to Defs'. Mtn. to Dismiss (Jan. 10, 2018) (Freddie preferred). Provisions of each series are also described in the offering documents for those series, compiled at Fannie Mae's Stock Information webpage¹ and Freddie Mac's Preferred Stock webpage.²

Plaintiffs reserve the right to use any information already shared between the parties or referred to in filings in this or in the Court of Federal Claims litigation to prove all elements of their claim.

B. Damages.

The documents relevant to Plaintiffs' damages computations are described in Part III.

III. COMPUTATION OF EACH CATEGORY OF DAMAGES THAT PLAINTIFFS CLAIM.

Plaintiffs are entitled to recover the highest of either restitution, expectancy damages, or reliance damages for Defendants' breach of the implied covenant of good faith and fair dealing. *See* RESTATEMENT (SECOND) CONTRACTS § 378.

Each measure of damages is based on the number of shares of preferred stock in Fannie Mae and Freddie Mac that each of the Arrowood Plaintiffs held as of the date of the Net Worth Sweep.

As of the date of the Net Worth Sweep, Arrowood Indemnity Company held the following shares of preferred stock in Fannie Mae and Freddie Mac:

¹ <http://www.fanniemae.com/portal/about-fm/investor-relations/stock-information.html>.

² <http://www.freddiemac.com/investors/preferred-stock.html>.

<u>Entity</u>	<u>CUSIP</u>	<u>Coupon Rate</u>	<u>Series</u>	<u>Shares</u>	<u>Par Value Per Share</u>	<u>Aggregate Par Value</u>
Fannie Mae	313586844	5.125%	L	38,800	\$ 50.00	\$ 1,940,000
Fannie Mae	313586877	5.375%	I	78,000	\$ 50.00	\$ 3,900,000
Fannie Mae	313586885	5.81%	H	149,400	\$ 50.00	\$ 7,470,000
Freddie Mac	313400855	5.10%	H	160,000	\$ 50.00	\$ 8,000,000
Freddie Mac	313400731	5.70%	R	100,000	\$ 50.00	\$ 5,000,000
Freddie Mac	313400772	5.81%	O	119,750	\$ 50.00	\$ 5,987,500
Freddie Mac	313400749	6.00%	P	<u>60,000</u>	\$ 50.00	<u>\$ 3,000,000</u>
Total				<u>705,950</u>		<u>\$ 35,297,500</u>

As of the date of the Net Worth Sweep, Arrowood Surplus Lines Insurance Company held the following shares of preferred stock in Fannie Mae and Freddie Mac:

<u>Entity</u>	<u>CUSIP</u>	<u>Coupon Rate</u>	<u>Series</u>	<u>Shares</u>	<u>Par Value Per Share</u>	<u>Aggregate Par Value</u>
Fannie Mae	313586877	5.375%	I	22,000	\$ 50.00	\$ 1,100,000
Freddie Mac	313400772	5.81%	O	40,000	\$ 50.00	\$ 2,000,000
Freddie Mac	313400749	6.00%	P	<u>40,000</u>	\$ 50.00	<u>\$ 2,000,000</u>
Total				<u>102,000</u>		<u>\$ 5,100,000</u>

As of the date of the Net Worth Sweep, Financial Structures Limited held the following shares of preferred stock in Freddie Mac; it did not hold stock in Fannie Mae:

<u>Entity</u>	<u>CUSIP</u>	<u>Coupon Rate</u>	<u>Series</u>	<u>Shares</u>	<u>Par Value Per Share</u>	<u>Aggregate Par Value</u>
Freddie Mac	313400772	5.81%	O	<u>40,000</u>	\$ 50.00	<u>\$ 2,000,000</u>
Total				<u>40,000</u>		<u>\$ 2,000,000</u>

The following computations of each category are preliminary. Plaintiffs' final computations are expected to rely upon expert reports and testimony, which Plaintiffs will disclose pursuant to Rule 26(a)(2) and any scheduling order entered in this case.

A. Restitution.

Plaintiffs are entitled to restitution equal to the prices originally paid by Plaintiffs for the preferred shares that Plaintiffs owned in the Companies as of the date of the Net Worth Sweep, plus prejudgment interest including, at a minimum, interest running from the date of the Net Worth Sweep. With respect to those shares held by Plaintiffs as of the date of the Net Worth Sweep but later sold, the amount actually received by Plaintiffs upon such sale should be deducted from the amount of restitution.

The original share prices are provided in the offering documents for each series of share. Plaintiffs understand that these documents are already in Defendants' possession.³

The prejudgment interest rate is set by state law. *See* 6 Del. Code § 2301(a) (interest rate under Delaware law, which Fannie Mae bylaws designate as controlling); Va. Code § 6.2-302 (interest rate under Virginia law, which Freddie Mac bylaws designate as controlling).

B. Expectancy Damages.

Plaintiffs are entitled to expectancy damages equal to the value that Plaintiffs could reasonably have expected to enjoy from the shares that they held as of the date of the Net Worth Sweep had the Net Worth Sweep not been imposed, plus prejudgment interest including, at a minimum, interest running from the date of the Net Worth Sweep. With respect to those shares held by Plaintiffs as of the date of the Net Worth Sweep but later sold, the amount actually received by Plaintiffs upon such sale should be deducted from the amount of expectancy damages.

³ The offering documents for the Companies' preferred shares are compiled as referenced above in footnotes 1 and 2.

The determination of the value that Plaintiffs could reasonably have expected to enjoy from the shares that they held as of the date of the Net Worth Sweep is based on, among other things, the financial status and capital structure of the Companies as of the date of the Net Worth Sweep, absent the Net Worth Sweep. Plaintiffs believe that such amount is not less than the par value of the share set forth in the tables above.

C. Reliance Damages.

Plaintiffs are entitled to reliance damages equal to the costs of preparing to perform and of performing the shareholder's obligations under Plaintiffs' preferred shares. Such reliance damages are equal to the prices originally paid by Plaintiffs for the preferred shares that Plaintiffs owned in the Companies as of the date of the Net Worth Sweep, plus prejudgment interest including, at a minimum, interest running from the date of the Net Worth Sweep. With respect to those shares held by Plaintiffs as of the date of the Net Worth Sweep but later sold, the amount actually received by Plaintiffs upon such sale should be deducted from the amount of restitution.

IV. INSURANCE AGREEMENTS.

Plaintiffs are unaware of any insurance policies applicable under Rule 26(a)(1)(A)(iv).

* * *

Plaintiffs reserve the right to supplement this disclosure upon discovery of additional material information.

November 5, 2018

Respectfully submitted,

/s/ Drew W. Marrocco

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Attorneys for Plaintiffs

Arrowood Indemnity Co. et al.

Exhibit C

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

In re Fannie Mae/Freddie Mac Senior
Preferred Stock Purchase Agreement Class
Action Litigations

THIS DOCUMENT RELATES TO:

ALL CASES

Misc. Action No. 13-mc-1288 (RCL)

CLASS ACTION

PLAINTIFFS' INITIAL DISCLOSURES

Pursuant to Rule 26(a)(1), Plaintiffs make the following initial disclosures.

I. Individuals Likely To Have Discoverable Information that Plaintiffs May Use To Support Their Claims

A. Defendant Custodians

The following individuals are likely to have information that Plaintiffs may use to show that Defendants acted arbitrarily and unreasonably in imposing the Net Worth Sweep, thereby violating the reasonable expectations of the holders of shares of common stock and junior preferred shares in Fannie Mae and Freddie Mac (“the Companies”) that Plaintiffs now own. Per the Court’s Memorandum Opinion of September 28, 2018, such information is relevant to Plaintiffs’ claim that Defendants breached the implied covenant of good faith and fair dealing.

Plaintiffs are currently unaware of these individuals’ addresses and telephone numbers, but relevant current or former positions are listed based upon information and belief.

i. FHFA Custodians

- Peter Brereton, Associate Director for Congressional Affairs.
- Jan Brown, Office of the Director.
- Wanda DeLeo, Deputy Director, Division of Examination Programs and Support.
- Ed DeMarco, Acting Director.
- Christopher Dickerson, Office of Systemic Risk and Market Surveillance.
- John Greenlee, Deputy Director, Enterprise Regulation.

- Patrick Lawler, Chief Economist.
- James Lockhart, Director.
- Thomas Jamie Newell, Miscellaneous Administration and Program.
- Nick Satriano, Chief Accountant.
- Scott Smith, Associate Director, Capital Policy.
- Jeffrey Spohn, Deputy Director, Conservatorship Operations.
- Naa Awaa Tagoe, Senior Associate Director.
- Mary Ellen Taylor, Associate Director, Division of Conservatorship; Associate Director for Agency Communication.
- Mario Ugoletti, Special Advisor (also Director, Treasury Office of Financial Institutions).

ii. Fannie Mae Custodians

- David Benson, Executive Vice President, Capital Markets.
- Duane Creel, Examiner-in-Charge (also for Freddie Mac).
- Terry Edwards, Executive Vice President, Credit Portfolio Management.
- Andre Galeano, Associate Director of Credit Risk (also for Freddie Mac).
- Alan Goldblatt, Vice President, Capital Markets Finance.
- Timothy Mayopoulos, President and Chief Executive Officer.
- Susan McFarland, Executive Vice President and Chief Financial Officer.

iii. Freddie Mac Custodians

- Devajyoti Ghose, Senior Vice President, Division of Investment and Capital Markets.
- Edward Golding, Senior Vice President, Division of Models, Mission, and Research.
- Ross Jay Kari, Chief Financial Officer.
- Donald Layton, Chief Executive Officer.
- Paul Mullings, Senior Vice President and Interim Head of Single-Family Business, Operations, and Information Technology.
- Jerry Weiss, Executive Vice President and Chief Administrative Officer.

B. Third-Party Custodians

The following individuals are also likely to have information that Plaintiffs may use to show that Defendants acted arbitrarily and unreasonably in conducting the Net Worth Sweep. Plaintiffs again are unaware of these individuals' addresses and telephone numbers, but relevant current or former positions are listed based upon information and belief.

i. Treasury Custodians

- Timothy Bowler, Deputy Assistant, Office of Capital Markets.
- Adam Chepenik, Senior Policy Advisor.
- Jeff Foster, Senior Policy Advisor.
- Timothy Geithner, Treasury Secretary.
- Jeffrey Goldstein, Under Secretary for Domestic Finance.
- Dan Jester, Contractor.
- Taylor Kawan, Acting Director of Accounting.
- Mary Miller, Under Secretary for Domestic Finance.
- Beth Mlynarczyk, Senior Advisor to the Counselor on Housing Finance Policy; Office of Capital Markets.
- Jeremiah Norton, Deputy Assistant Secretary for Financial Institutions.
- Henry Paulson, Secretary.
- Michael Stegman, Counselor to the Secretary for Housing Finance Policy.
- Sam Valverde, Deputy Executive Secretary.

ii. Other Government Officials

- Jim Parrott, Senior Advisor, National Economic Council.
- Ben Bernanke, Chair of the Federal Reserve.
- Gene Sperling, Director, National Economic Council.

iii. Grant Thornton Custodians

- Anne Eberhardt, Forensics and Investigation Practice.
- Lee Errickson, Executive Director.

iv. PwC Custodians

- Michael English, Partner.
- Ben Evans, Senior Manager.
- Bill Lewis, Partner.
- John Oliver, Partner.
- Diana Stoltzfus, Partner.
- Ryan Trzasko, Senior Manager.

v. Deloitte Custodians

- Jeff Swarmstedt, Lead Client Service Partner.
- Adam VanFossen, Audit Senior Manager.
- Troy Vollertsen, Partner.

C. Plaintiffs

The following individuals are likely to have information that Plaintiffs may use to show the number of shares of common stock and each series of junior preferred shares in the Companies that Plaintiffs own, which is relevant to Plaintiffs' damages computations:

- i. **Plaintiff John Cane**
33 Bilodeau Parkway
Burlington, VT 05401
802-363-5991
- ii. **Plaintiff Timothy J. Cassell**
2462 Berwick Blvd.
Bexley, OH 43209
614-270-1966
- i. **Plaintiff Joseph Cacciapalle**
100 Glenbrook Road
Freehold Township, NJ 07728
913-888-2755
- Plaintiff Michelle Miller**
4602 Ringer Road
St. Louis, MO 63129
314-894-3947
- ii. **Plaintiff Charles E. Rattley, Jr.**
47 Quartz Way
Savannah, GA 31419
954-336-0992
- iii. **Plaintiff Nicholas Bradford Isbell**
18 McKay Circle
Cabin John, MD 20818
202-357-9370
- iv. **Plaintiff Marneu Holdings, Co.**
Philippe Katz, Esq., General Counsel
160 Broadway, 1st Floor
New York, NY 10011
212-791-5362
- v. **Plaintiff 111 John Realty Corp.**
Philippe Katz, Esq., General Counsel
160 Broadway, 1st Floor
New York, NY 10011
212-791-5362
- vi. **Plaintiff United Equities Commodities, Co.**
Philippe Katz, Esq., General Counsel
160 Broadway, 1st Floor
New York, NY 10011
212-791-5362

II. Documents, Electronically Stored Information, and Tangible Things In Plaintiffs' Custody that Plaintiffs May Use To Support Their Claims

A. Liability

Pursuant to Rule 26(a)(1)(A)(ii), Plaintiffs herein describe the category and location of the documents and other information showing that Defendants acted arbitrarily and unreasonably in conducting the Net Worth Sweep, thereby violating the reasonable expectations of the holders of the shares of common stock and junior preferred shares that Plaintiffs now own. This evidence includes:

- Materials produced by the United States and third parties in *Fairholme Funds, Inc. v. United States*, Case No. 1:13-cv-00465-MMS (Fed. Cl.).
- Certain of the Defendants' own public statements and other publicly available information, which have been described or provided over the course of this litigation. *See, e.g.*, Joint Appendix at 78, 83, 89, 95, 97, 206, 125, 528, 2428, 2438, 4026, *Perry Capital LLC v. Mnuchin*, Case No. 14-5243 (Feb. 16, 2016); *see generally* Amended Complaint, Doc. 67-1; Response to Motion to Dismiss, Doc. 76.
- The provisions of the stock certificates for each series of junior preferred shares that Plaintiffs own, which are in Defendants' possession. *See, e.g.*, Ex. C. to Defs.' Mtn. to Dismiss (Jan. 10, 2018) (Fannie preferred); Ex. D. to Defs.' Mtn. to Dismiss (Jan. 10, 2018) (Freddie preferred). Provisions of each series are also described in the offering documents for those series, compiled at Fannie Mae's Stock Information webpage¹ and Freddie Mac's Preferred Stock webpage.²

Plaintiffs reserve the right to use any information already shared between the parties or referred to in filings in this or in the Court of Federal Claims litigation to prove all elements of their claim.

B. Damages

The documents relevant to Plaintiffs' damages computations are described in Part III and produced as noted therein.

¹ <http://www.fanniemae.com/portal/about-fm/investor-relations/stock-information.html>.

² <http://www.freddiemac.com/investors/preferred-stock.html>.

III. Computation of Each Category of Damages that Plaintiffs Claim

Plaintiffs are entitled to recover the highest of either restitution, expectancy damages, or reliance damages for Defendants' breach of the implied covenant of good faith and fair dealing. *See* RESTATEMENT (SECOND) CONTRACTS § 378. The following computations of each category are preliminary. Plaintiffs' final computations will presumptively rely upon expert reports and testimony, which Plaintiffs will disclose pursuant to Rule 26(a)(2) and any scheduling order entered in this case.

A. Restitution

Plaintiffs are entitled to restitution equal to the prices originally paid for any common stock or series of junior preferred shares that Plaintiffs own in the Companies, plus prejudgment interest including at a minimum interest running from the time of the last dividend received. This amount might be reduced by any dividends on those shares that the Companies paid, but Plaintiffs do not concede that it would be.

The original share prices are provided in the offering documents for each series of share. Although these documents are already in Defendants' possession,³ Plaintiffs can provide copies if necessary.

The dividends paid on the shares owned by Plaintiffs can be calculated by using the Companies' annual 10-K statements and quarterly 10-Q statements and records reflecting Plaintiffs' holdings. In particular, the 10-K statements show the total amount of dividends paid on common stock and preferred shares each year, as well as the dividend rate and the total value of outstanding shares for each series of preferred shares. This information can be used to determine

³ The offering documents for the Companies' preferred shares are compiled as referenced above in footnotes 1 and 2.

how the total common and preferred dividends were allocated among the various series of stock. By comparing the total number of shares of a particular series outstanding to the total number held by Plaintiffs, one can calculate the proportion of the dividends that are attributable to Plaintiffs' shares.

The prejudgment interest rate is set by state law. *See* 6 Del. Code § 2301(a) (interest rate under Delaware law, which Fannie Mae bylaws designate as controlling); Va. Code § 6.2-302 (interest rate under Virginia law, which Freddie Mac bylaws designate as controlling).

B. Expectancy Damages

Plaintiffs are entitled to expectancy damages equal to the value that holders of Plaintiffs' junior preferred shares and common stock would have enjoyed from those shares—including the current value of the shares and their liquidation preferences, and the value of dividend payments on those shares—absent the Defendants' breach of the implied covenant of good faith and fair dealing, plus prejudgment interest including interest running from the time of the last dividend received.

Information potentially relevant to this computation includes the financial status and capital structure of the Companies absent the Net Worth Sweep, as well as the amount (if **any**) of the quarterly periodic commitment fee that Treasury would have collected from the Companies. Plaintiffs intend to rely on an expert witness to calculate expectancy damages based on all relevant information, and thus are not yet able to offer an exact computation. But Plaintiffs note that a Freddie document shows that the periodic commitment fee would have been at most a small fraction of the outstanding amount of Treasury's funding commitment to the Companies.

Defendants also have possession of this document, since they produced it in discovery in the Court of Federal Claims,⁴ but Plaintiffs again can provide a copy if necessary.

C. Reliance Damages

Plaintiffs are entitled to reliance damages equal to the costs of preparing to perform and of performing the shareholder's obligations under Plaintiffs' shares of common stock and junior preferred shares.

These damages equal the original price of Plaintiffs' shares, plus prejudgment interest including at a minimum interest running from the time of the last dividend received. This amount might be reduced by any dividends on those shares that the Companies paid, but Plaintiffs do not concede that it would be. The documents relevant to this computation are discussed above in Part III.A. Plaintiffs also intend to rely on expert analysis of the information discussed in Part III.B to show that Defendants cannot meet their burden to prove that Plaintiffs' shares would have lost value absent Defendants' breach of the implied covenant of good faith and fair dealing.

IV. Insurance Agreements

Plaintiffs are unaware of any insurance policies applicable under Rule 26(a)(1)(A)(iv).

* * *

Plaintiffs reserve the right to supplement this disclosure upon discovery of additional material information.

⁴ The de-designated version has Bates number FHFA00102167.

Dated: November 5, 2018

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