

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

<p>FAIRHOLME FUNDS, INC., et al.,</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> <p>THE FEDERAL HOUSING FINANCE AGENCY, et al.,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>Case No. 1:13-cv-1053-RCL</p>
<p>ARROWOOD INDEMNITY CO., et al.,</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> <p>FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al.,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>Case No. 1:13-cv-1439-RCL</p>

**PLAINTIFFS’ MOTION FOR LEAVE TO FILE SURREPLY
TO FHFA’S MOTION TO DISMISS**

Plaintiffs respectfully move for leave to file a short surreply to FHFA’s motion to dismiss. On March 23, 2018, FHFA filed a reply brief in support of its motion to dismiss in which FHFA argues for the first time that (a) Plaintiffs’ Amended Complaints “omit the allegations that the D.C. Circuit considered indispensable” to its determination that Plaintiffs’ breach of contract claims are ripe, and (b) “[t]he D.C. Circuit did not consider whether Fairholme’s and Arrowood’s contract claims were ripe” FHFA Reply Mem. in Supp. of Mot. to Dismiss Am. Compls., *Fairholme Funds, Inc. v. FHFA*, No. 13-1053, Doc. 78; *Arrowood Indemnity Co. v. FNMA*, No. 13-1439, Doc. 86 at 9 (Mar. 23, 2018).

The Class Plaintiffs have already sought leave to file a surreply responding to the first of these two new arguments. *See* Motion for Leave to File Surreply (Apr. 5, 2018), *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, No. 13-1288, Doc. 78. Without retreading ground covered by the Class Plaintiffs' surreply, Plaintiffs propose to file a brief that joins the Class Plaintiffs' arguments, identifies the relevant paragraphs in Plaintiffs' complaint that rebut FHFA's new argument, and respectfully directs the Court's attention to the holding in the D.C. Circuit's Opinion that Fairholme's and Arrowood's contract claims are ripe.

Plaintiffs consulted counsel for FHFA, and FHFA opposes this motion.

Date: April 13, 2018

Respectfully submitted,

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PLAINTIFFS’ SURREPLY TO FHFA’S MOTION TO DISMISS

Plaintiffs agree with and adopt the arguments advanced in the Class Plaintiffs’ Proposed Surreply.¹ Contrary to arguments FHFA advances for the first time in its reply brief, the Fairholme and Arrowood Plaintiffs’ breach of contract claims are ripe.

The D.C. Circuit held that the contract claims of the Fairholme and Arrowood Plaintiffs are ripe (as are Class Plaintiffs’ claims) under the anticipatory breach doctrine because Plaintiffs alleged that the nullification of their contractual rights “immediately harmed them by

¹ Class Plaintiffs’ Proposed Surreply, *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, No. 13-1288 (Apr. 5, 2018), Doc. 78-1.

diminishing the value of their shares.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 616, 632 (D.C. Cir. 2017).² Like the Class Plaintiffs’ Amended Complaint, the Fairholme and Arrowood Plaintiffs’ Amended Complaints are replete with such allegations. *See, e.g.*,

- “If valid, the Net Worth Sweep expropriates the value of Fairholme’s preferred stock by eliminating any prospect of a return of principal (i.e., the liquidation preference) or any return on its principal (i.e., in the form of dividends).” Am. Compl. for Declaratory & Inj. Relief & Damages ¶ 5 (Feb. 1, 2018), *Fairholme Funds, Inc. v. FHFA*, No. 13-1053, Doc. 75 (“Fairholme Am. Compl.”).
- “Wiping out the Companies’ private shareholders was among the Net Worth Sweep’s contemplated purposes.” Fairholme Am. Compl. ¶ 76; First Am. Compl. for Declaratory & Injunctive Relief & Damages ¶ 71, *Arrowood Indemnity Co. v. FNMA*, No. 13-1439 (Nov. 9, 2017), Doc. 73-1 (“Arrowood Am. Compl.”).
- “[B]ecause of the Net Worth Sweep, the Companies are required to operate at the edge of insolvency, with no prospect of ever generating value for private shareholders” Fairholme Am. Compl. ¶ 107; Arrowood Am. Compl. ¶ 99.

² FHFA acknowledges that the D.C. Circuit held that the Class Plaintiffs’ contract claims were ripe, but incorrectly states that “[t]he D.C. Circuit did not consider whether Fairholme’s and Arrowood’s contract claims were ripe” FHFA Reply Mem. in Supp. of Mot. to Dismiss Am. Compls., *Fairholme Funds, Inc. v. FHFA*, No. 13-1053, Doc. 78; *Arrowood Indemnity Co. v. FNMA*, No. 13-1439, Doc. 86 at 9 (Mar. 23, 2018). When the D.C. Circuit held that the Fairholme and Arrowood Plaintiffs’ contract claims were preserved, the court stated, “subsequent references to the class plaintiffs are also applicable to the Arrowood and Fairholme plaintiffs insofar as they concern claims for breach of contract and breach of the implied covenant of good faith and fair dealing.” *Perry Capital LLC*, 864 F.3d at 617. Thus, the subsequent references in the D.C. Circuit Opinion finding the Class Plaintiffs’ contract claims ripe, *id.* at 632, “are also applicable to the Arrowood and Fairholme plaintiffs.” *Id.* at 617.

- “The dramatically negative impact of the Net Worth Sweep on the Companies’ private shareholders is demonstrated by Fannie’s results in the first quarter of 2013.”
Fairholme Am. Compl. ¶ 108; Arrowood Am. Compl. ¶ 100.
- “FHFA has expropriated the Companies’ entire net worth for the benefit of the federal government, to the detriment of private shareholders such as Plaintiffs.”
Fairholme Am. Compl. ¶ 113.
- “FHFA has seized the Companies’ entire net worth for the benefit of the federal government, to the detriment of private shareholders such as Plaintiffs.” Arrowood Am. Compl. ¶ 105.

Date: April 13, 2018

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**[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE A
SURREPLY TO DEFENDANTS' MOTION TO DISMISS**

Upon consideration of 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