UNITED STATES DISTRICT COURT
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
IN RE FANNIE MAE/FREDDIE MAC SENIOR PREFERRED STOCK PURCHASE AGREEMENT CLASS ACTION LITIGATIONS ______________________________ This document relates to: ALL CASES	Case No. 1:13-mc-1288-RCL

JOINT SUBMISSION CONCERNING JURY INSTRUCTIONS

In accordance with directions from the Court, the Parties have met and conferred extensively over the proposed jury instructions and verdict forms and have been able to agree on many instructions. They have been unable to agree, however, on certain instructions and on the verdict form.[1] The instructions on which the Parties have agreed are attached as Exhibit 1. Plaintiffs' proposed instructions to which Defendants object are attached as Exhibit 2; Defendants' proposed instructions to which Plaintiffs object are attached as Exhibit 3, and the Parties' competing proposed verdict forms are attached as Exhibits 4 and 5.

[1] The parties may be able to reach agreement on the verdict form based on the evidence and arguments at trial.

Dated: October 14, 2022

Respectfully submitted,

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EXHIBIT 1

INSTRUCTION NO. 1
Introduction and Voir Dire[1]

Good morning, ladies and gentlemen, and welcome. I am Judge Lamberth. You have been called to this courtroom for possible selection as jurors in a civil case.

Would you all please stand so that the courtroom clerk can swear you in, and then we will begin the jury selection process.

The purpose of jury selection is to pick a jury whose members will be fair and impartial, who will keep an open mind, and who will decide the case on the facts and the law. From the people here in the courtroom, we are going to pick twelve jurors. I expect this process to take about ___ hours.

You all should now have an index card and a pen or pencil. Please look at your juror badge and write down the last three digits from your badge in the upper right-hand corner of your index card. I am now going to ask you a series of questions. They are all yes or no questions. There is no right or wrong answer to any of these questions. You must answer the questions candidly consistent with your promise to tell the truth. If your answer is yes, please write the number of the question on your index card. If your answer is no, do not write the number. You do not have to explain your yes or no answer in writing.

After I have asked the questions, I will ask each of you one by one to come to the bench. I will take your index card and you may be asked follow-up questions.

Because the answers to some questions may be personal, I will turn on a device when you come up to the bench that makes a noise that prevents people in the courtroom from hearing what is said at the bench.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[1] Standardized Civil Jury Instructions for the District of Columbia § 1.01.

INSTRUCTION NO. 2
Preliminary Instruction[2]

Before we begin the trial, I want to briefly describe how this trial will work and some important legal rules. I will give more detailed instructions at the end of the trial after you have heard all the evidence and before you start your deliberations.

Your responsibility as jurors is to determine the facts in the case and to apply those facts consistent with the legal principles that I will explain to you. You—and only you—are the judges of the facts. You alone determine the weight of the evidence, including the believability of each witness.

My responsibility is to conduct this trial in a fair and efficient manner. It is your sworn duty as jurors to accept and apply the law as I explain it to you. You should not take anything I do or say as any indication of my opinion about how you should decide the facts or what your verdicts should be.

To help you remember, you can take notes for your personal use. Your notes are only an aid to your memory, and they are not evidence. Those jurors who do not take notes should rely on their own memory of the evidence.

Whether you take notes or not is entirely up to you. Some people find that taking notes helps them remember testimony and evidence; others find it distracts them from listening to and watching the witnesses. You should make your own choice because each of us knows best how we take in and remember information.

In case you want to take notes, we have provided a notebook and pen for each of you. Please take any notes in this notebook. If you take notes, you can take your notebook back with you into the jury room at the end of the trial to review while you deliberate. In breaks and overnight during the trial, please leave your notebooks on your chair. We will keep them safe and secure.

At the end of the trial, after you deliver your verdict, your notebooks will be collected, and the pages with notes will be torn out and destroyed. No one will ever look at any notes you have taken, so you may feel free to write whatever you wish.

You must pay careful attention to the testimony of all of the witnesses because you may not have any transcripts or summaries of the testimony available to you during your deliberations. You will have to rely on your memory and your notes if you choose to take any.

I will now explain some legal terminology, including the burden of proof.

The Plaintiffs are the persons who started the lawsuit, and the Defendants are the persons the Plaintiffs have sued.

[2] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 1.02.

The Plaintiffs must prove that the factual basis of their claims is more likely true than not true. This burden of proof is sometimes called "the preponderance of the evidence" standard.

Although there are multiple Plaintiffs and Defendants, you must consider the evidence concerning each Plaintiff and each Defendant separately.

The lawyers may object from time to time to questions, exhibits, and statements. You must not hold such objections against the lawyer who makes them or the party the lawyer represents. A lawyer has a responsibility to object to evidence or argument he or she considers inappropriate.

If I overrule an objection to a question, it means only that the law permits the witness to answer the question. It is still up to you to decide how much weight, if any, the answer is entitled to.

If I sustain an objection, you should not hold it against the lawyer who asked the question. It means only that the law does not permit the witness to answer the question. You should ignore the question and you must not guess what the answer to the question would have been. If a question is asked and answered, and I then rule that the answer should be stricken, you may not consider either the question or the answer in your deliberations.

Sometimes a lawyer's question suggests the existence of a fact, but the lawyer's question alone is not evidence. It is the witness's testimony that is evidence.

As I mentioned, you must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent investigation or research about this case. For example, you cannot use the Internet to research the facts or the law or the people involved in the case. Research includes something even as simple or seemingly as harmless as getting a definition of a legal term over the Internet or from a dictionary.

I want to explain why you should not conduct your own investigation or research. All parties have a right to have the case decided only on evidence and legal rules that they know about and to which they have a chance to respond. Relying on information you get outside this courtroom would be unfair because the parties would not have a chance to refute, correct, or explain it. Unfortunately, information that we get over the Internet or from other sources may be incomplete or misleading or just plain wrong. It is up to you to decide whether to credit any evidence presented in court, and only the evidence presented in court may be considered. If evidence or legal information has not been presented in court, you cannot rely on it.

You are not permitted to discuss this case with anyone until you begin your deliberations after I give you final instructions. This means that, until the case is submitted to you, you may not talk about it with family members, friends, or even your fellow jurors. You should not communicate about the case by any means—in person, over the phone, or using the Internet, including emailing, texting, blogging, or using social media such as Facebook or Twitter. The only communication you should have is with the jury as a whole once your deliberations begin. This is because we want you to keep an open mind and not make any decisions until you've heard all the evidence and talked with your fellow jurors as a group.

When we take our first recess or when you leave the courthouse at the end of the day, you can call home or work and tell them you have been selected for a jury and how long it will last. They will undoubtedly ask what kind of case you're sitting on. You may tell them it is a civil case, but nothing else.

When the case is over, you may discuss any part of it with anyone, if you wish to do so.

As part of the prohibition against communicating with others, you may not speak with the parties, their lawyers, or the witnesses. And please do not be offended if a lawyer or party does not respond if you say hello if you happen to see them during the trial. They are under instructions not to communicate with you in any way under any circumstances.

It is unlikely, but if someone tries to talk to you about the case, you should refuse to do so and immediately let me know by writing a note and giving it to the clerk. Do not tell the other jurors; just let me know, and I'll bring you in to discuss it outside the hearing of the other jurors.

Similarly, if during the trial you unexpectedly realize that you know anyone involved in the case or something about the facts, you should raise your hand immediately and ask to speak with me.

There may be reports in the newspaper or on television or in other media concerning this case (or facts relating to this case) during the trial. If there is any such media coverage, you may be tempted to read, listen to, or watch it. You must not do so. That is because you must decide this case solely on the evidence presented in this courtroom. If any publicity about this trial or relating to the issues in this trial inadvertently comes to your attention during trial, do not discuss it with other jurors or anyone else. Just let me or the courtroom clerk know as soon after it happens as you can, and I will then discuss it with you.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

INSTRUCTION NO. 3
Statement of the Case

This is a class action brought by plaintiffs Joseph Cacciapalle, Michelle M. Miller, Timothy J. Cassell, and Barry P. Borodkin on behalf of the common and preferred shareholders of the Federal Home Loan Mortgage Corporation, normally called Freddie Mac, and the common shareholders of the Federal National Mortgage Association, normally called Fannie Mae. I will explain in more detail later what a class action is.

In addition to the class action plaintiffs, the plaintiffs also include several insurance companies, including plaintiff Berkley Insurance Company. When I refer to the "Class Action Plaintiffs," I mean plaintiffs Joseph Cacciapalle, Michelle M. Miller, Timothy J. Cassell, and Barry P. Borodkin, and the Classes of shareholders they represent. When I refer to the "W.R. Berkley Plaintiffs," I mean plaintiff Berkley Insurance Company and the other insurance companies who are plaintiffs in this case. When I refer to the "Plaintiffs," I mean the Class Action Plaintiffs and the W.R. Berkley Plaintiffs together.

The defendants in this case are the Federal Housing Finance Agency, which I will refer to as FHFA, Fannie Mae, and Freddie Mac. Fannie Mae and Freddie Mac are sometimes referred to as government-sponsored enterprises or "GSEs," or sometimes as the "Companies." FHFA is the Conservator of Fannie Mae and Freddie Mac, and is sometimes referred to as the "Conservator." When I refer to the "Defendants," I mean FHFA, Fannie Mae, and Freddie Mac together.

Fannie Mae and Freddie Mac are government-sponsored enterprises created by Congress to promote access to home mortgages by increasing liquidity and stability in the secondary market for home mortgages. While Fannie Mae and Freddie Mac are government-sponsored, they are also publicly traded companies that issued both common and preferred stock over the years. As I explained earlier, Plaintiffs in this case are holders of common and/or junior preferred stock in Fannie Mae and/or Freddie Mac. Shareholders are treated by the law as having contracts with the companies whose stock they hold. A shareholders' contract with the corporation includes not only documents such as the stock certificate, certificate of designations, the corporate charter, and bylaws, but also the corporate law under which the corporation is formed and regulated. For Fannie Mae and Freddie Mac, changes to federal law, that is, those affecting the governance of the GSEs and their relationships with their shareholders, amend or inform the investor contract.

In this case, plaintiffs claim that defendants breached something called the implied covenant of good faith and fair dealing in plaintiffs' shareholder contracts with Fannie Mae and Freddie Mac. Defendants deny Plaintiffs' claim. After the close of evidence, I will instruct you further about the legal standard for proving a breach of the implied covenant. But for now, you should understand that the implied covenant is something that is an unwritten part of every contract, including the shareholder contracts held by the plaintiffs. The question of whether that implied covenant is breached depends on whether defendants took actions that unreasonably or arbitrarily frustrated or interfered with the reasonable contractual expectations of shareholders. I will provide more detailed instructions at the end of the case and before you deliberate.

INSTRUCTION NO. 4
Role of the Court[3]

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room. Likewise, you may not ignore or disregard any portion of these instructions.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be – or ought to be – it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[3] 4-71 Sand, et al., Modern Federal Jury Instructions-Civil, P 71.01 (Matthew Bender).

INSTRUCTION NO. 5
Role of the Jury[4]

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

In determining these issues, no one may invade your province or functions as jurors. In order for you to determine the facts, you must rely upon your own recollection of the evidence. What I may have said – or what I may say in these instructions – about a fact issue is not evidence. Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the Plaintiffs have proven their case.

I also ask you to draw no inference from the fact that upon occasion I may have asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render, or whether any of the witnesses may have been more credible than any other witnesses. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice to any party.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[4] 4-71 Sand, et al., Modern Federal Jury Instructions-Civil, P 71.01 (Matthew Bender).

INSTRUCTION NO. 6
Evidence in the Case[5]

You may consider only the evidence admitted in the case. The evidence consists of the sworn testimony of witnesses, exhibits admitted into evidence, and facts stipulated to by the parties.

Statements and arguments of the lawyers are not evidence. They are intended only to help you to understand the evidence. Similarly, the questions of the lawyers are not evidence.

If anyone describes the evidence you have heard differently from the way you remember it, it is your memory that should control during your deliberations.

You must rely on your own recollection of the testimony and on any notes you may have taken during the trial.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[5] Standardized Civil Jury Instructions for the District of Columbia § 2.02.

INSTRUCTION NO. 7
Direct and Circumstantial Evidence[6]

There are two types of evidence which you may properly use in reaching your verdict.

One type of evidence is direct evidence. Direct evidence is when a witness testifies about something they know by virtue of their own senses—something they have seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

The other type of evidence is circumstantial evidence. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction in the weight to be given to either direct evidence or circumstantial evidence. You are to decide how much weight to give any evidence.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[6] 4-74 Sand, et al., Modern Federal Jury Instructions-Civil, P 74.01 (Matthew Bender).

INSTRUCTION NO. 8
Burden of Proof[7]

The party who makes a claim has the burden of proving it. This burden of proof means that the Plaintiffs must prove every element of their claim by a preponderance of the evidence.

To establish an element by a preponderance of the evidence, the party must show evidence that produces in your mind the belief that the thing in question is more likely true than not true. The party need not prove any element beyond a reasonable doubt, the standard of proof in criminal cases, or to an absolute or mathematical certainty.

If you believe that the evidence is more likely true on an issue the Plaintiffs had to prove, then your finding on that issue must be for the Plaintiffs. If you believe that the evidence is evenly balanced on an issue the Plaintiffs had to prove, then your finding on that issue must be for the Defendants.

In arriving at your verdict, you should consider only the evidence in this case. That said, in determining whether a party has carried its burden of proof, you are permitted to draw, from the facts that you find have been proven, such reasonable conclusions as you feel are justified in the light of your experience and common sense. You should not rely on speculation or guesswork.

You should consider all the evidence bearing on each claim, regardless of who produced it. A party is entitled to benefit from all evidence that favors that party, whether that party or the adversary produced it. You should not give more or less weight to evidence just because it happened to be produced by one side or the other.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[7] Standardized Civil Jury Instructions for the District of Columbia § 2.04.

INSTRUCTION NO. 9
Judicial Notice[8]

Another type of evidence includes facts of which I take judicial notice. I may take judicial notice of public acts, places, facts and events which I regard as matters of common knowledge. When I take judicial notice of a particular fact, you may regard that fact as included in the evidence and proven.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED _______

[8] Standardized Civil Jury Instructions for the District of Columbia § 2.02.

INSTRUCTION NO. 10
Stipulations[9]

A "stipulation" is an agreement. When there is no dispute about certain facts, the parties may agree or "stipulate" to those facts. You must accept a stipulated fact as evidence and treat it as having been proved here in court.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[9] 4-74 Sand, et al., Modern Federal Jury Instructions-Civil, P 74.02 (Matthew Bender).

INSTRUCTION NO. 11
Summaries and Charts Admitted as Evidence[10]

The parties have presented certain exhibits in the form of charts and summaries. I decided to admit certain charts and summaries into evidence in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider those charts and summaries as you would any other evidence.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[10] 4-74 Sand, et al., Modern Federal Jury Instructions-Civil, P 74.06 (Matthew Bender).

INSTRUCTION NO. 12
Summaries and Charts as Demonstrative or Instructional Aids[11]

The lawyers and witnesses have shown to you other charts and summaries that I have not admitted into evidence. Those charts or summaries themselves are not evidence or proof of any facts. If any of those charts or summaries does not correctly reflect facts or figures shown by the evidence in the case, then you should disregard that chart or summary.

In other words, the charts or summaries that were not admitted into evidence are used only as a convenience; you can rely on the chart if you conclude that it correctly summarizes the evidence, but you should disregard any chart or summary that does not state the truth based on the evidence.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[11] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 2.16.

INSTRUCTION NO. 13
Depositions as Evidence[12]

A deposition is the testimony of a person taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers. During the trial, you heard deposition testimony that was read from the deposition transcript or presented by videotape. You should give deposition testimony the same fair and impartial consideration you give any other testimony. You should not give more weight or less weight to deposition testimony just because the witness did not testify in court.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[12] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 2.13.

INSTRUCTION NO. 14
Interrogatories[13]

You have heard and seen evidence in this case that is in the form of interrogatories.

Interrogatories are written questions posed by one side that call for written answers under oath from the other side. Both the questions and answers are made prior to trial after the case has begun in what is called pretrial discovery, and each side is entitled to seek such discovery from the other.

You may consider a party's answers to interrogatories as evidence against a party who made the answer, just as you would any other evidence that has been admitted in this case.

In this regard, you are not required to consider a party's answers to interrogatories as true, nor are you required to give them more weight than any other evidence. It is up to you to determine what weight, if any, should be given to the interrogatory answers that have been admitted as evidence.

One cautionary word on this subject: while you may consider the interrogatory answers as evidence against the party who gave the answers, you may not consider the answers against any other party, nor may you consider the answers as evidence against the party who posed the interrogatory questions. You may only consider the interrogatory answer as evidence against the party who gave the answer.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[13] 4-74 Sand, et al., Modern Federal Jury Instructions-Civil, P 74.07 (Matthew Bender).

INSTRUCTION NO. 15
Conduct of Counsel[14]

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. If I sustained an objection to a question or a document, then you should ignore that question or document. If I overruled an objection to a question or a document, you should treat the witness's answer or the document as evidence like any other.

Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. The purpose of such conferences is not to keep important information from you. They are necessary for me to fulfill my responsibility to ensure that evidence was presented to you properly under the law.

You should not show any prejudice against an attorney or his or her client because the attorney objected to the admissibility of evidence or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not, unless expressly stated by me, indicate any opinion as to the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[14] 4-71 Sand, et al., Modern Federal Jury Instructions-Civil, P 71.01 (Matthew Bender).

INSTRUCTION NO. 16
Evidence Admitted for a Limited Purpose[15]

Some evidence was admitted for a limited purpose only. This evidence may be considered only for the limited purpose of [describe purpose] and for no other purpose.[16]

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED _______

[15] Standardized Civil Jury Instructions for the District of Columbia § 2.08.
[16] The parties will submit a revised/completed instruction at the close of the evidence to identify the limited purpose(s) for which evidence was admitted.

INSTRUCTION NO. 17
Witness Credibility[17]

In deciding what the facts are, you must weigh the testimony of all the witnesses who have appeared before you. You are the sole judges of the credibility of the witnesses. In other words, you alone determine whether to believe any witness and to what extent any witness should be believed. Judging a witness's credibility means evaluating whether the witness has testified truthfully and also whether the witness accurately observed, recalled, and described the matters about which the witness testified.

You may consider anything that in your judgment affects the credibility of any witness. For example, you may consider the witness's demeanor, capacity to observe and recollect facts, and any other facts and circumstances bearing on credibility. You may consider whether the witness has any motive for not telling the truth, any interest in the outcome of this case, or any friendship or animosity toward other persons involved in this case. In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection which the witness may have toward one of the parties. You may consider the plausibility or implausibility of the testimony of a witness. You may also consider whether the witness's testimony has been contradicted or supported by other evidence.

You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

Ultimately, you should give the testimony of each witness as much weight as in your judgment it is fairly entitled to receive.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[17] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 2.10.

INSTRUCTION NO. 18
Impeachment by Prior Inconsistent Statements[18]

You have heard evidence that a witness previously made statements and that these statements may be inconsistent with the witness' testimony here at trial. It is for you to decide whether any of these prior statements was made and, if one or more was made, whether it is inconsistent with the witness' testimony during this trial. If you find that any prior statement is inconsistent with the witness' testimony here in court, you may consider this inconsistency in judging the credibility of the witness.

In one respect, the law treats prior statements that are inconsistent with court testimony differently depending on whether or not the prior statement was made under oath. If the prior inconsistent statement was made under oath, you may consider the statement as evidence that what the witness originally said was true. If the prior inconsistent statement was not under oath, you may not consider it as evidence that what the witness said in the earlier unsworn statement was true. Whether or not the prior inconsistent statement was under oath, you may consider the inconsistency in judging the witness' credibility.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[18] Standardized Civil Jury Instructions for the District of Columbia § 2.14.

INSTRUCTION NO. 19
Adopting Prior Inconsistent Statements[19]

If a witness testifies that a prior inconsistent statement is the truth, then you may consider the prior statement both to evaluate the witness's credibility and as evidence of the truth of any fact contained in that statement.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[19] Standardized Civil Jury Instructions for the District of Columbia § 2.15.

INSTRUCTION NO. 20
Number of Witnesses and Exhibits[20]

The relative weight of the evidence on a particular issue is not determined by the number of witnesses testifying for either side or the number of exhibits on either side—it depends on the quality, and not the quantity, of the evidence. Presenting a greater number of witnesses or exhibits does not necessarily prove a point. Indeed, the testimony of a single witness, which you believe to be the truth, is enough to prove any fact.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[20] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 2.11.

INSTRUCTION NO. 21
Expert Witnesses – Generally[21]

In this case, you heard opinion testimony from [insert the name of experts who testified], who have been identified by the parties as expert witnesses, on various economic issues. The law allows opinion testimony on such matters if the witness possesses sufficient knowledge, experience, training, or education.

You are not bound to accept these witnesses' opinions. If you find that any opinions are not based on sufficient knowledge, experience, training, or education, or that the reasons supporting the opinion are not sound, or that the opinion is outweighed by other evidence, you may completely or partially disregard the opinion.

Opinion testimony should be judged just as any other evidence. You should consider opinion evidence with all the other evidence in the case and give it as much weight as you think it fairly deserves.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[21] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 2.12.

INSTRUCTION NO. 22
Expert Witnesses – Conflicting Testimony[22]

You have heard conflicting testimony from expert witnesses in this case. The way you resolve the conflict between these witnesses is the same way that you decide other fact questions and the same way you decide whether to believe ordinary witnesses. In addition, because they gave their opinions, you should consider the soundness of each opinion, the reasons for the opinion, and the witness's motive, if any, for testifying.

You may give the testimony of each of these witnesses such weight, if any, that you think it deserves in the light of all the evidence. You should not permit a witness's opinion testimony to be a substitute for your own reason, judgment, and common sense.

You may reject the testimony of any opinion witness in whole or in part, if you conclude the reasons given in support of an opinion are unsound or, if you, for other reasons, do not believe the witness. The determination of the facts in this case rests solely with you.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[22] Adapted from 4-76 Sand, et al., Modern Federal Jury Instructions-Civil, P 76.01 (Matthew Bender).

INSTRUCTION NO. 23
Instructions To Be Considered as a Whole[23]

Before I excuse you to deliberate, I want to discuss a few final matters with you. During your deliberations, you must consider the instructions as a whole. All of the instructions are important. You must not ignore or treat any single instruction or part of an instruction differently than the other instructions.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[23] Standardized Civil Jury Instructions for the District of Columbia § 3.01.

INSTRUCTION NO. 24
Selection of Foreperson[24]

When you return to the jury room, you should first select a foreperson to preside over your deliberations and to be your spokesperson here in court. Consider selecting a foreperson who will encourage civility and mutual respect, who will invite each juror to speak up regarding his or her views about the evidence, and who will promote full and fair consideration of the evidence.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[24] Standardized Civil Jury Instructions for the District of Columbia § 3.02.

INSTRUCTION NO. 25
Unanimity and Duty to Deliberate[25]

The verdict must represent the considered judgment of each juror. In order to return a verdict, your verdict must be unanimous—that is, each juror must agree to the verdict.

Each of you has a duty to consult with other jurors in an attempt to reach a unanimous verdict. You should seriously consider the views of your fellow jurors, just as you expect them seriously to consider your views, and you should not hesitate to change an opinion if you are convinced by other jurors. However, you must decide the case for yourself, and you should not surrender your honest beliefs about the effect or weight of evidence merely to return a verdict or solely because of other jurors' opinions.

Remember that you are not advocates but neutral judges of the facts. You will make an important contribution to the cause of justice if you arrive at a just verdict in this case. Therefore, during your deliberations, your purpose should not be to support your own opinion but to determine the facts.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[25] Standardized Civil Jury Instructions for the District of Columbia § 3.03.

INSTRUCTION NO. 26
Communications Between Court and Jury[26]

If it becomes necessary during your deliberations to communicate with me, you may send a note, signed by your foreperson or by one or more members of the jury. If you have a note, the foreperson should knock on the courtroom door, and the clerk will get the note and give it to me. If you are divided on any matter, you should not reveal in any note or otherwise how the jury is divided. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[26] Standardized Civil Jury Instructions for the District of Columbia § 3.05.

INSTRUCTION NO. 27
Right to See Exhibits and Hear Testimony; Communications with Court[27]

You are about to go into the jury room and begin your deliberations. If during those deliberations you want to see any of the exhibits, you may request that they be brought into the jury room. If you want any of the testimony read back to you, may also request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of the testimony.

Your requests for exhibits or testimony – in fact any communication with the court – should be made to me in writing, signed by your foreperson, and given to one of the marshals. In any event, do not tell me or anyone else how the jury stands on any issue while deliberations are ongoing.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[27] Adapted from 4-78 Sand, et al., Modern Federal Jury Instructions-Civil, P 78.01 (Matthew Bender).

INSTRUCTION NO. 28
Delivering the Verdict[28]

When you have reached your verdict, the foreperson should fill out and sign the verdict form, which will be in the front of the binder with the instructions. Send me a note—signed by the foreperson—telling me you have reached your verdict. Do not tell me in the note what your verdict is. I will then call you into the courtroom and ask the foreperson for the verdict form and for your verdict.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[28] Standardized Civil Jury Instructions for the District of Columbia § 3.07.

INSTRUCTION NO. 29
Verdict With Regard to W.R. Berkley Plaintiffs

A verdict for or against the Class Action Plaintiffs will also be a verdict for or against the W.R. Berkley Plaintiffs.

If you award damages to the Class Action Plaintiffs, the amount of damages awarded to the W.R. Berkley Plaintiffs will be determined automatically based on their holdings of Fannie Mae preferred shares, Freddie Mac preferred shares, and Freddie Mac common shares as a percentage of the number of shares in each Class.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRHOLME FUNDS, INC., *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil No. 13-1053 (RCL)
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations ____________________ This document relates to: ALL CASES	Miscellaneous No. 13-1288 (RCL)

PLAINTIFFS' PROPOSED JURY INSTRUCTIONS

INSTRUCTION NO. 30[1]
Class Action – Defined[2]

A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have the same legal claims. In a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. In this case, the Court has ruled that the claims of class representatives Joseph Cacciapalle, Michelle M. Miller, Timothy J. Cassell and Barry P. Borodkin are typical of the claims of class members and that these class representatives will adequately represent the class they represent. Accordingly, based on the Court's ruling, these class representatives are permitted to try this case on behalf of the classes.

In this case, the classes consist of the following:

All current holders of junior preferred stock in Fannie Mae (the "Fannie Preferred Class");

All current holders of junior preferred stock in Freddie Mac (the "Freddie Preferred Class"); and

All current holders of common stock in Freddie Mac (the "Freddie Common Class").

There is no class consisting of holders of Fannie Mae common stock.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

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[1] Plaintiffs propose that the Court read this instruction as part of both its preliminary and final instructions.

[2] Adapted from Judicial Council of California Civil Jury Instructions No. 115 (2022 edition).

INSTRUCTION NO. 31
Implied Covenant of Good Faith and Fair Dealing[3]

In all contracts, each party to the contract has an obligation to comply with the implied covenant of good faith and fair dealing.

A party to a contract violates the implied covenant of good faith and fair dealing if it acts arbitrarily or unreasonably, thereby frustrating the parties' original expectations at the time of contracting. Where a contract confers discretion on one of the parties to the contract, the other party has a reasonable expectation that the party with discretion will not exercise that discretion arbitrarily or unreasonably in a way that deprives the other party of the benefits of the bargain.

In this case, while the shareholder contracts allowed Defendants to exercise discretion as it relates to the payment of dividends to the Plaintiffs (*i.e.*, the private shareholders of Fannie Mae and Freddie Mac), Defendants' exercise of that discretion violated the implied covenant if it

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[3] *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, Memorandum Opinion on Motions in Limine (October 13, 2022) (ECF No. 221), at 5 ("whether defendants acted arbitrarily or unreasonably and thereby breached the implied covenant is determined in reference to plaintiffs' reasonable expectations" and "plaintiffs could logically argue that shareholders would have reasonably expected at the time of contracting that FHFA as conservator would act in good faith on whatever information it had at the time of the alleged breach"); *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, 2022 WL 4745970, at *4 (D.D.C. Oct. 3, 2022) ("Under Delaware and Virginia law, which govern the claims of the Fannie Mae and Freddie Mac shareholders, respectively, an implied covenant of good faith and fair dealing attaches to every contract"); *id.* ("A breach of the implied covenant occurs where one party 'act[s] arbitrarily or unreasonably,'" which is to say that it "violate[s] the reasonable expectations of the parties" at the time of contracting"); *id.* at 5 ("A party to a contract violates the implied covenant of good faith and fair dealing if it "act[s] arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.'"); *id.* at *6 ("HERA only authorizes the discretion through which FHFA agreed to the Third Amendment, rather than the Third Amendment itself…); *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, 2018 WL 4680197, at *7 (D.D.C. Sept. 28, 2018) (describing standard under Delaware and Virginia law); *id.* at *10 ("[A]s noted by the D.C. Circuit, "[a] party to a contract providing for such discretion violates the implied covenant if it 'act[s] arbitrarily or unreasonably.'"…So while Plaintiffs could reasonably expect the GSEs to exercise discretion as it relates to dividends, they could not expect the GSEs to extinguish the possibility of dividends arbitrarily or unreasonably"); *Baldwin v. New Wood Resources, LLC*, -- A.3d --, 2022 WL 3364169, at *14 (Del. Aug. 16, 2022) ("When a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith."); *Gerber v. Ent. Pords. Holdings, LLC*, 67 A.3d 400, 419-20, 422, 425 (Del. 2013) (describing standard), *overruled on other grounds by Winshall v. Viacom Int'l, Inc*., 76 A.3d 808 (Del. 2013); *Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1206-07 (Del. 1993) (holding that the discretionary authority afforded to the general partner in a contract required the general partner to exercise its discretion reasonably and that "[r]easonableness is a question of fact to be determined by the finder of fact"); *Amirsaleh v. Bd. of Trade of N.Y.C.*, Inc., 2008 WL 4182998, at *1 (Del. Ch. Sept. 11, 2008) ("The implied covenant is particularly important in contracts that endow one party with discretion in performance; i.e., in contracts that defer a decision at the time of contracting and empower one party to make that decision later. Simply put, the implied covenant requires that the "discretion-exercising party" make that decision in good faith."); *Charlotte Broad., LLC v. Davis Broad. of Atlanta, L.L.C.*, 2015 WL 3863245, at *7 (Del. Super. Ct. June 10, 2015) (where a contractual termination permitted either party to terminate the agreement "in its sole discretion," Delaware law required that "Plaintiffs must exercise this discretion in good faith. Clearly if the parties had thought to negotiate for it, the parties would have prohibited terminating the Agreement under the Engineering Clause for pretextual reasons."); *Elenza, Inc. v. Alcon Laboratories Holding Corp*., 2017 WL 8890677 (Del. Super. June 15, 2017) (Jury Instruction).

deprived Plaintiffs of the possibility of such dividends arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the Plaintiffs reasonably expected.

Similarly, while the Housing and Economic Recovery Act ("HERA") authorized the FHFA to act in the best interests of the GSEs, the FHFA, or the public, the FHFA's exercise of that statutory authority violated the implied covenant of good faith and fair dealing if it arbitrarily or unreasonably deprived Plaintiffs of the possibility of receiving future dividends, thereby frustrating the fruits of the bargain that the Plaintiffs reasonably expected.

Thus, to establish a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs must prove by a preponderance of the evidence that Defendants arbitrarily or unreasonably deprived Plaintiffs of the possibility of receiving dividends in the future. In determining whether Defendants acted arbitrarily or unreasonably, you should consider all information available to Defendants when they agreed to the Net Worth Sweep.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

INSTRUCTION NO. 32
Arbitrary or Unreasonable Conduct[4]

As I instructed you previously, the implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable actions that have the effect of preventing the other party to the contract from receiving the benefits of the agreement.

Arbitrary actions or decisions are those taken or made without appropriate consideration of or regard for the existing facts and circumstances, or that are not supported by fair, solid, and substantial cause in light of all the facts and circumstances.

Unreasonable actions or decisions are those that are not guided by reason, that are beyond what can be expected or beyond the limits of acceptability or fairness, or that are lacking justification in fact or circumstance.

An action or decision is arbitrary or unreasonable if it is made or taken for the wrong or unsound reasons taking into account all the facts and circumstances. Failure to consider significant alternatives to the course ultimately chosen is evidence you may consider in deciding whether the decision was arbitrary or unreasonable.

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[4] *Arbitrary,* Black's Law Dictionary (11th ed. 2019); *Unreasonable,* Black's Law Dictionary (11th ed. 2019); *Neal v. Puckett,* 286 F. 3d 230, 248 (5th Cir. 2002) (Jolly, J. concurring); *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 111 (D.D.C. 2020) ("An agency's failure to 'consider significant alternatives to the course [it] ultimately cho[se],' is a telltale sign that its decision-making process cannot 'be regarded as rational.'"); *Allied Local and Regional Mfrs. Caucus v. U.S. E.P.A.*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses."); *Allen v. Hawley*, 74 Fed. Appx. 457, 461 (6th Cir. 2003) (quoting definitions of "unreasonable" in Black's Law Dictionary, Webster's Third New International Dictionary of the English Language Unabridged, and Oxford English Dictionary Online); *Walls v. Petrohawk Properties, LP*, 812 F.3d 621, 626 (8th Cir. 2015) (affirming district court's conclusion that landlord had unreasonably withheld consent to lease assignment by not giving "fair, solid and substantial cause or reason" for not consenting); *Jarzynka v. St. Thomas Univ. School of Law*, 2005 WL8154066, at *7 (S.D. Fla. 2005) (a decision is arbitrary "if it is 'founded on prejudice or preference rather than on reason or fact.") (quoting Black's Law Dictionary (7th ed. 1999)); *McCawley v. Universidad Carlos Albizu, Inc.*, 461 F. Supp. 2d 1251, 1258 (S.D. Fla. 2006) (arbitrary actions are those not founded on reason and fact); *Long v. State Farm Ins.* 2014 WL 11531890, at *2 (S.D. Ohio Nov. 20, 2014) ("'The term "arbitrary" means without fair, solid, and substantial cause and without reason given; without any reasonable cause; ... fixed or done capriciously or at pleasure; without adequate deter mining [sic] principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic.'"); *Leggett of Virginia, Inc. v. Crown American Corp.*, 1995 WL 17221216, at *2 (W.D. Va March 8, 1995) ("a decision is arbitrary when it is made without a fair, solid, and substantial cause or reason."); *Cerjanec v. FCA US, LLC*, 2018 WL 3729063, at *4 (E.D. Mich. Aug. 6, 2018) (adopting Black's Law Dictionary's definition of "arbitrary" as "'not supported by fair, solid, and substantial cause, and without reason given.'"); *Bergerson v. Salem-Keizer School Dist.*, 144 P.3d 918, 921 (Ore. Sup. Ct. 2006) (defining "unreasonable" to mean "lacking justification in fact or circumstance"); *Watson v. County of Yavapai,* 240 F. Supp. 3d 996, 1000 (D. Ariz. 2017) ("'Unreasonable' means 'not guided by reason; irrational or capricious.'") (*quoting* Black's Law Dictionary 692 (8th ed. 1999))*; Doe v. Dordt Univ.*, 2022 WL 2833987, at *29 (N.D. Iowa July 22, 2022); Merriam-Webster Online, https://www.merriam-webster.com/dictionary/unreasonable; Find Law Legal Dictionary, https://dictionary.findlaw.com/definition/unreasonable.html; *Dunlap v. State Farm Fire and Cas. Co*., 878 A.2d 434, 442, 446 (Del. 2005); *Restatement (Second) of Contracts* § 205, cmt. d; *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010).

In deciding whether Defendants' agreement to the Net Worth Sweep arbitrarily or unreasonably deprived Plaintiffs' of the benefits of their shareholder agreements with the GSEs, you should consider what if any need there was for the Net Worth Sweep at the time Defendants agreed to it, taking into account all the facts and circumstances at the time, the process that FHFA followed and the care it did or did not take in deciding to enter into the Net Worth Sweep, and whether or not the Net Worth Sweep was consistent with the publicly stated goals of the conservatorship made in September 2008.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

INSTRUCTION NO. 33
Agency – Defined[5]

The FHFA is a federal government agency that also acts as conservator for Fannie Mae and Freddie Mac. When FHFA acts as conservator for Fannie Mae and Freddie Mac, it steps into the shoes of the GSEs. Because the FHFA's adoption of the Net Worth Sweep was taken on behalf of the GSEs as conservator, FHFA's conduct in entering into the Net Worth Sweep is deemed to be the conduct of the GSEs.

Thus, if you find that FHFA's entering into the Net Worth Sweep on behalf of Fannie Mae breached the implied covenant of good faith and fair dealing, then FHFA and Fannie Mae are both liable for that breach. Similarly, if you find that FHFA's entering into the Net Worth Sweep on behalf of Freddie Mac breached the implied covenant of good faith and fair dealing, then FHFA and Freddie Mac are both liable for that breach.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

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[5] *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, 2018 WL 4680197, at *12; *Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017); *Collins v. Mnuchin,* No. 17-20364, 2018 WL 3430826, at *8 (5th Cir. 2018); *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 631 (D.C. Cir. 2017).

INSTRUCTION NO. 34
Damages for Breach of the Implied Covenant[6]

A party that is harmed by a breach of the implied covenant of good faith and fair dealing is entitled to damages in an amount calculated to compensate it for the harm caused by the breach. Thus, if you find that Defendants breached the implied covenant, then Plaintiffs are entitled to recover damages equal to the loss in the value of their shares that they prove was reasonably caused by the Net Worth Sweep.

If you find that Plaintiffs are entitled to a verdict in accordance with these instructions, but do not find that they have sustained actual damages, then you may return a verdict for them in some nominal sum. Nominal damages are not given as an equivalent for the wrong but rather merely in recognition of a technical injury and by way of declaring the rights of the party.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[6] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 11.31; *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, 2022 WL 4745970, at *11.

INSTRUCTION NO. 35[7]
Timing of Purchases Is Irrelevant[8]

When shares of stock are sold, the rights to receive dividends, including any claim for breach of those rights, travel with the shares. That means that the current holder of the shares owns the claims for breach of the shareholder agreements, including the implied covenant of good faith and fair dealing, regardless of when the person purchased the shares. In other words, when someone purchased his, her, or its shares is irrelevant. Thus, in reaching your verdict in this case, you may not consider when any of the Plaintiffs or Class Members purchased their shares.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[7] Plaintiffs propose that the Court read this instruction as part of both its preliminary and final instructions.

[8] *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, 2018 WL 4680197, at *8 (D.D.C. Sept. 28, 2018).

INSTRUCTION NO. 36
Consideration of the Evidence: Corporate Party's Agents and Employees[9]

Two of the defendants in this case are corporations. A corporation can act only through individuals as its agents or employees. In general, if any agent or employee of a corporation acts or makes statements while acting within the scope of his or her authority as an agent, or within the scope of his or her duties as an employee, then under the law those acts and statements are of the corporation.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[9] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 4.05.

INSTRUCTION NO. 37
Equality of Litigants[10]

In this case, two of the defendants are government sponsored entities and the other is a government agency. The mere fact that some of the parties are government sponsored entities or a government agency does not mean they are entitled to any greater or lesser consideration by you. All litigants are equal before the law and are entitled to the same fair consideration as you would give any other individual party.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[10] Adapted from 4-76 Sand, et al., Modern Federal Jury Instructions-Civil, P 72.01 (Matthew Bender).

INSTRUCTION NO. 38
Testimony of Government Employees[11]

You have heard the testimony of current and former government employees. The fact that a witness is or was employed as a government employee does not mean that (his)(her) testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness. At the same time, it is quite legitimate for opposing counsel to try to attack the believability of a government employee on the ground that (his)(her) testimony may be colored by a personal or professional interest in the outcome of the case. You must decide, after reviewing all the evidence, whether you believe the testimony of the government employee and how much weight, if any, it deserves.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[11] Adapted from 4-18 Sand, et al., Modern Federal Jury Instructions-Civil, P 76.01 (Matthew Bender) (*citing United States v. Bethancour*t, 65 F.3d 1074, 1080 n.3 (3d Cir. 1995) (approving instruction that “the government witnesses’ testimony was not entitled to any greater consideration because of their federal employment”)).

INSTRUCTION NO. 39
Prejudgment Interest[12]

Under Virginia law, which applies to the claims of the Freddie Mac common and junior preferred shareholders, if you decide to award damages to those Plaintiffs in any amount, you may award prejudgment interest at the rate of 6% per year and fix a date from which interest is to begin. Prejudgment interest is permitted by statute and is designed to compensate the plaintiffs for the loss sustained by not having the value they were entitled to have at the time they were entitled to have it, and the award is considered necessary to place the plaintiffs in the position they would have occupied if the defendants had not breached their contractual obligations.

You are not being asked to determine any award of prejudgment interest for preferred shareholders of Fannie Mae because such interest will be assessed by the Court as a matter of Delaware law on any damages you may award.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED _______

[12] Adapted from *Fort Norfolk Plaza Medical Assoc., LLC et al v. Francis*, 2016 WL 9340591(Va. Cir. Ct.) (Jury Instruction).

INSTRUCTION NO. 40
Burden of Proof – Speculative Damages[13]

Plaintiffs must prove that it is more likely than not that they are entitled to damages. The evidence must establish the amount of Plaintiffs damages with reasonable certainty. Reasonable certainty does not require exact or mathematically precise proof of damages. You may award Plaintiffs only those damages that are based on a just and reasonable estimate based on relevant evidence.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED _______

[13] Adapted from Standardized Civil Jury Instructions for the District of Columbia § 12.03.

EXHIBIT 3

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)
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations ___________________ This document relates to: ALL CASES	Miscellaneous No. 13-1288 (RCL)

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

INSTRUCTION NO. 30
Class Action – Defined[1]

A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have the same legal claims. All of these people together are called a "class." Class Action Plaintiffs Joseph Cacciapalle, Michelle M. Miller, Timothy J. Cassell and Barry P. Borodkin bring this action as the class representatives on behalf of three classes of Fannie Mae and Freddie Mac shareholders. The W.R. Berkley Plaintiffs are not class members but bring the same claim as the Class Action Plaintiffs.

You may assume that the evidence at this trial applies to all class members and all of the W.R. Berkley Plaintiffs unless I tell you otherwise. All members of the class and all of the W.R. Berkley Plaintiffs will be bound by the result of this trial.

In this case, the classes consist of the following:

All current holders of junior preferred stock in Fannie Mae (the "Fannie Preferred Class");

All current holders of junior preferred stock in Freddie Mac (the "Freddie Preferred Class"); and

All current holders of common stock in Freddie Mac (the "Freddie Common Class").

There is no class consisting of holders of Fannie Mae common stock because no one has brought a claim on their behalf.

You will be asked to separately consider the claims of each of the Fannie Preferred Class, the Freddie Preferred Class, the Freddie Common Class.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

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[1] Adapted from Judicial Council of California Civil Jury Instructions No. 115 (2022 edition).

INSTRUCTION NO. 31
Plaintiffs' Shareholder Contracts With Fannie Mae and Freddie Mac

In general, under the law, shareholders, including Plaintiffs, are deemed to have contracts with the companies whose stock they own. Those shareholder contracts differ from other kinds of contracts in several ways.[2]

First, the types of shareholder contracts at issue in this case are not negotiated between the parties in the traditional sense. Rather, by purchasing the company's stock, shareholders agree to the terms of the contracts as those terms exist and as they may change over time.[3] If a person does not want to agree to the terms of the shareholder contract, the person may choose not to purchase the shares in the first place or may sell the shares after purchasing them.

Second, unlike other kinds of contracts, shareholder contracts are not contained in a single document. The terms of a shareholder's contract with a corporation are contained not only in a written stock certificate (also known as a certificate of designation), but also in the corporate charter and bylaws, as well as certain laws affecting the corporation.[4]

Third, the terms of shareholder contracts may change over time without a specific agreement by the parties to those contracts.[5] For instance, if certain official corporate documents such as the company's corporate charter or bylaws change, those changes automatically become part of the shareholder contracts.[6] Similarly, changes to the laws that affect the nature of the corporation, its governance, and its relationship with shareholders also automatically become part of the shareholder contracts.[7] As I explained earlier, in this case, the provisions of the Housing and Economic Recovery Act relating to FHFA's role as Conservator of Fannie Mae and Freddie Mac are part of Plaintiffs' shareholder contracts.[8]

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED _______

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[2] *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. CV 13-1053 (RCL), 2018 WL 4680197, at *8 (D.D.C. Sept. 28, 2018).

[3] *Fairholme Funds*, 2018 WL 4680197, at *9; *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

[4] *Fairholme Funds*, 2018 WL 4680197, at *8.

[5] *Fairholme Funds*, 2018 WL 4680197, at *9; *Boilermakers*, 73 A.3d at 939.

[6] *Fairholme Funds*, 2018 WL 4680197, at *9.

[7] *Fairholme Funds*, 2018 WL 4680197, at *9.

[8] *Fairholme Funds*, 2018 WL 4680197, at *9.

INSTRUCTION NO. 32
Implied Covenant of Good Faith and Fair Dealing

All contracts, including Plaintiffs' shareholder contracts, are deemed to include a term known as the "implied covenant of good faith and fair dealing."[9] In this context, the word "implied" means that this term of the contract is not set out in any written document, but rather is deemed by law to be a term of the contract.[10] The implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct that violates the reasonable expectations of the other party to the contract at the time of contracting.[11]

The implied covenant of good faith and fair dealing does not create duties outside the contracting parties' agreement.[12] Instead, "good faith" simply means that parties must be faithful to the terms of their agreement and its purpose.[13] And "fair dealing" does not require contracting parties to act fairly, but rather to act consistently with the agreement's purpose and terms, even if you think those terms are unfair.[14]

In this case, Plaintiffs allege that FHFA, by entering into the Third Amendment, breached the implied covenant of good faith and fair dealing by eliminating any future possibility of dividends to private shareholders of Fannie Mae and Freddie Mac, thereby causing a decline in the market price of Plaintiffs' shares of the Companies. Defendants deny this claim.

To establish a breach of the implied covenant, each set of Plaintiffs has the burden to prove that FHFA, in its role as the Companies' Conservator, acted arbitrarily or unreasonably by entering into the Third Amendment, thereby violating the reasonable expectations of Fannie Mae and Freddie Mac shareholders at the time of contracting.

Each group of Plaintiffs must prove the alleged breach by a preponderance of the evidence. If you find that any group of Plaintiffs failed to prove the alleged breach by a preponderance of the evidence, then your verdict must be for Defendants as to that set of Plaintiffs.

If you find that any group of Plaintiffs has proved the alleged breach by a preponderance of the evidence, you must then determine whether the breach harmed that group(s) of Plaintiffs

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[9] *Fairholme Funds*, 2018 WL 4680197, at *7.

[10] *Fairholme Funds*, 2018 WL 4680197, at *7; *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).

[11] *Fairholme Funds*, 2018 WL 4680197, at *7; *Gerber v. Enters. Prods. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013).

[12] *Fairholme Funds*, 2018 WL 4680197, at *7; *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005).

[13] *Fairholme Funds*, 2018 WL 4680197, at *7; *Gerber*, 67 A.3d at 419.

[14] *Fairholme Funds*, 2018 WL 4680197, at *7; *Gerber*, 67 A.3d at 419.

financially. If you find that any group of Plaintiffs has proved both a breach and financial harm caused by that breach, then you must determine the amount of damages, if any, incurred by that group of Plaintiffs. Damages means monetary compensation.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

INSTRUCTION NO. 33
Breach of the Implied Covenant of Good Faith and Fair Dealing

As I instructed you previously, the implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct that violates the reasonable expectations of the other party to the contract at the time of contracting.

A decision or action is unreasonable if it is not guided by reason or is irrational.[15]

A decision or action is arbitrary if it is made without consideration of, or regard for, the relevant facts and circumstances.[16]

Therefore, in evaluating whether FHFA's decision to enter into the Third Amendment was arbitrary or unreasonable, you should consider whether FHFA's decision was rational and guided by reason, and whether FHFA considered the relevant facts and circumstances known to FHFA at that time in making its decision.

In addition, in evaluating whether FHFA as Conservator acted arbitrarily or unreasonably, you must accept as true that FHFA acted within the scope of its conservatorship powers under the Recovery Act when it entered into the Third Amendment.[17] The Recovery Act authorizes FHFA to take any action that it determines is in the best interests of the public, even if that action is not in the best interests of Fannie Mae and Freddie Mac or their shareholders.[18] And FHFA could have reasonably determined that the Third Amendment was in the best interests of members of the public who rely on a stable secondary mortgage market.[19] For this reason, FHFA acted within the scope of its conservatorship powers under the Recovery Act when it entered into the Third Amendment.

You must decide whether FHFA as Conservator acted unreasonably or arbitrarily in reference to the parties' reasonable expectations at the time of contracting. A party acts reasonably under a contract if it takes actions that are consistent with the reasonable expectations of the other party. As I instructed you previously, the time of contracting for these purposes is December 24, 2009, the date that the Second Amendment to the PSPAs took effect.

Therefore, you must decide whether it was within the reasonable expectations of shareholders, at the time of the Second Amendment, that FHFA might take some action in the public interest that would result in financial detriment to the private shareholders of Fannie Mae and Freddie Mac.

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[15] Black's Law Dictionary, *Unreasonable* (11th ed. 2019).

[16] Black's Law Dictionary, *Arbitrary* (11th ed. 2019).

[17] *Collins v. Yellen*, 141 S. Ct. 1761, 1777–78 (2021).

[18] *Collins*, 141 S. Ct. at 1776; *Fairholme Funds*, 2018 WL 4680197, at *15.

[19] *Collins*, 141 S. Ct. at 1777.

In determining the reasonable expectations of shareholders, the question is not what any actual shareholder, including any of the Plaintiffs in this case, actually expected.[20] Instead, the question is what an imaginary or "hypothetical" reasonable shareholder expected, based on information known or available to that hypothetical reasonable shareholder.[21]

Here, the expectations of the hypothetical reasonable shareholder would be informed by the terms of the shareholder contract itself as it existed at the time of the Second Amendment, which include:

- The terms of the Fannie and Freddie stock certificates and the offering memoranda or other offering materials;[22]
- The terms of the PSPAs, including the First and Second Amendments;[23]
- The provisions of the Recovery Act;[24] and
- The events surrounding the placement of Fannie and Freddie into conservatorships.[25]

The expectations of the hypothetical reasonable shareholder also would be informed by information available at the time of the Second Amendment, including:

- Fannie's and Freddie's financial statements that were publicly filed with the SEC;[26] and
- Public statements of FHFA, Treasury, and Fannie and Freddie management.[27]

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[20] *In re ICN/Viratek Sec. Litig.*, 1996 WL 34448146, at *3 (S.D.N.Y. July 15, 1996); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 363 (2d Cir. 1973); *United States v. Keyser*, 704 F.3d 631, 642 (9th Cir. 2012).

[21] *United States v. Litvak*, 889 F.3d 56, 68 (2d Cir. 2018); *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 617 (4th Cir. 1999); *In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351, 375 (Del. Ch. 2002).

[22] *Perry II*, 864 F.3d at 631; *Fairholme Funds*, 2018 WL 4680197, at *9–11.

[23] *Fairholme Funds*, 2018 WL 4680197, at *12–14.

[24] *Perry II*, 864 F.3d at 631; *Fairholme Funds*, 2018 WL 4680197, at *12.

[25] *Fairholme Funds*, 2018 WL 4680197, at *10–11.

[26] *California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 2002 WL 33934282, at *24 (D.N.J. June 26, 2002); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001).

[27] *Perry II*, 864 F.3d at 631; *Fairholme Funds*, 2018 WL 4680197, at *9, *14; *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 216 (5th Cir. 2004); *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1199 (2d Cir. 1993).

In determining the expectations of the hypothetical reasonable shareholder here, you also may consider the nature of Fannie Mae and Freddie Mac as highly regulated entities that were created by Congress, which may inform how the hypothetical reasonable shareholder expects these particular companies to behave under the shareholder contracts.[28] You should also keep in mind that the hypothetical reasonable shareholder knows the risks of investing generally.[29]

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

[28] *Fairholme Funds*, 2018 WL 4680197, at *9.

[29] *Greenhouse v. MCG Cap. Corp.*, 392 F.3d 650, 656 (4th Cir. 2004).

INSTRUCTION NO. 34
Harm and Damages

Now I am going to talk to you about issues of harm and damages. If and only if you find that any group of Plaintiffs has satisfied its burden to prove a breach of the implied covenant as described above, then you must decide the question of financial harm as to that group of Plaintiffs. Once again, each group of Plaintiffs has the burden to prove by a preponderance of the evidence that they sustained financial harm caused by the Third Amendment. If you find that any group of Plaintiffs failed to prove that they sustained financial harm caused by the Third Amendment, then your verdict must be for Defendants as to that group of Plaintiffs.

If you find that any group of Plaintiffs has proved financial harm caused by the Third Amendment, then you must determine the amount of damages (monetary compensation) to award, if any, to that group. Each group of Plaintiffs has the burden to prove the amount of their damages with reasonable certainty.[30] Reasonable certainty in this context does not require exact or mathematically precise proof of damages or that future damages are absolutely certain to occur, but it does require a reasonable basis to make such an estimate.[31] But you may not award damages that are speculative, based on guesswork, or dependent upon remote possibilities that are not reasonably certain to occur.[32] You may only award an amount of damages that you find any group of Plaintiffs proved with reasonable certainty.

If you find that any group of Plaintiffs proved both a breach of the implied covenant and financial harm from that breach, but that they have failed to prove the amount of damages with reasonable certainty, then you may award a nominal sum of damages to that group of Plaintiffs, such as $1.00. Nominal damages are not given as an equivalent for the wrong but rather merely in recognition of a technical injury and by way of declaring the rights of Plaintiffs.

Any damages award that you make in this case will be the responsibility of Fannie Mae and/or Freddie Mac. Neither FHFA nor the Director of FHFA nor the federal government will be responsible for any damages award in this case.

It is up to you to decide the extent of any damages that have been proved and what the appropriate measure of compensation is for those damages. In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing the amount of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, prejudice, speculation, or guesswork.

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[30] *eCommerce Indus., Inc. v. MWA Intel., Inc.*, 2013 WL 5621678, at *13 (Del. Ch. Sept. 30, 2013); *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006).

[31] *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2014 WL 3974167, at *8 (Del. Ch. Aug. 8, 2014); *Xeras v. Heiss*, No. 1:12-cv-456, ECF No. 223 (D.D.C. Nov. 16, 2018).

[32] *Sunrise Continuing Care, LLC v. Wright*, 671 S.E.2d 132, 135 (Va. 2009); *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *17 (Del. Ch. Dec. 4, 2013); *Xeras v. Heiss*, 1:12-cv-456, ECF No. 223 (D.D.C. Nov. 16, 2018).

A party that is harmed by a breach of the implied covenant of good faith and fair dealing is entitled to damages in an amount calculated to compensate them for the harm caused by the breach. The compensation should place the injured party in the same position they would have been in if the breach had not occurred.

You may not award any punitive damages in this case. This means that you may not base any monetary award on a desire to punish Defendants, to prevent their conduct from being repeated in the future, or to warn others not to engage in such conduct. Any monetary award that you make in this case must be calculated solely to provide fair compensation to Plaintiffs for any actual injuries that you find they sustained, and on no other basis.

The fact that I have instructed you about the proper measure of damages should not be considered as my suggesting which party is entitled to your verdict in this case, or that any of Plaintiffs are entitled to any damages award at all. Instructions about the measure of damages are given for your guidance only if you find that a damages award is in order.

GIVEN ________

REFUSED ________

GIVEN AS MODIFIED ________

EXHIBIT 4

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)
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations ____________________ This document relates to: ALL CASES	Miscellaneous No. 13-1288 (RCL)

DEFENDANTS' PROPOSED VERDICT FORM

You are to follow this Form and use it to report your findings after you have reached a unanimous verdict.

Definitions

The following definitions apply to this verdict form.

- "Fannie Mae" is the Federal National Mortgage Association. Fannie Mae is in Conservatorship. FHFA is the Conservator for Fannie Mae.
- "Freddie Mac" is the Federal Home Loan Mortgage Corporation. Freddie Mac is in Conservatorship. FHFA is the Conservator for Freddie Mac.
- "FHFA" is the Federal Housing Finance Agency, the Conservator of Fannie Mae and Freddie Mac.
- "W.R. Berkley Plaintiffs" are Berkley Insurance Company, Berkley Regional Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Carolina Casualty Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company. The W.R. Berkley Plaintiffs are current holders of junior preferred stock in Fannie Mae and Freddie Mac.
- "Fannie Mae Preferred Class" is all current holders of junior preferred stock in Fannie Mae.
- "Freddie Mac Preferred Class" is all current holders of junior preferred stock in Freddie Mac.
- "Freddie Mac Common Class" is all current holders of common stock in Freddie Mac.
- "Plaintiffs" refers collectively to the W.R. Berkely Plaintiffs, the Fannie Mae Preferred Class, the Freddie Mac Preferred Class, and the Freddie Mac Common Class.
- "Third Amendment" is the Third Amendment to the Senior Preferred Stock Purchase Agreements ("PSPAs") for Fannie Mae and Freddie Mac, entered into by FHFA, as Conservator for Fannie Mae and Freddie Mac, and the United States Department of Treasury on August 17, 2012.

Question No. 1:

Did the Plaintiffs prove by a preponderance of the evidence that FHFA, in its role as the Conservator of Fannie Mae and Freddie Mac, acted arbitrarily or unreasonably in entering into the Third Amendment, thereby violating the reasonable expectations of holders of Fannie Mae junior preferred stock, Freddie Mac junior preferred stock, and/or Freddie Mac common stock?

- Fannie Mae Junior Preferred Stock: Yes ____ No ____
- Freddie Mac Junior Preferred Stock: Yes ____ No ____
- Freddie Mac Common Stock: Yes ____ No ____

If your answer to Question 1 is "Yes" for any group of shareholders, continue to Question 2, but only for the group(s) of Plaintiffs as to whom you answered "Yes". If your answer to Question 1 is "No" for all three groups of shareholders, skip all other questions and sign the verdict form.

Question No. 2:

Did the Plaintiffs prove by a preponderance of the evidence that members of the Fannie Mae Preferred Class, the Freddie Mac Preferred Class, and/or the Freddie Mac Common Class sustained harm as a result of the Third Amendment?

- Fannie Mae Junior Preferred Class: Yes ____ No ____
- Freddie Mac Junior Preferred Class: Yes ____ No ____
- Freddie Mac Common Class: Yes ____ No ____

If your answer to any subpart of Question 2 is "Yes," proceed to Question 4, but only for the group(s) of Plaintiffs as to whom you answered "Yes." If your answer to all of the subparts of Question 2 is "No," skip Question 3 and sign the verdict form.

Question No. 3:

Enter the amount of damages (monetary compensation), if any, that you find each group of Plaintiffs listed below has proven to a reasonable certainty. Please answer in dollars and cents or state "None." (You need not determine a separate amount of damages for the W.R. Berkley Plaintiffs.)

- Fannie Mae Preferred Class: $____________________
- Freddie Mac Preferred Class: $____________________
- Freddie Mac Common Class: $____________________

Your deliberations are now concluded. Sign and date the verdict form and notify the courtroom deputy that you have reached a verdict.

Date: ________________

____
Jury Foreperson

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRHOLME FUNDS, INC., *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil No. 13-1053 (RCL)
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations ____________________ This document relates to: ALL CASES	Miscellaneous No. 13-1288 (RCL)

PLAINTIFFS' PROPOSED VERDICT FORM

1. Do you find by a preponderance of the evidence that Defendants breached the implied covenant of good faith and fair dealing?

Yes _____ No ____

If you answered "YES," go to Question #2. If you answered "No," the foreperson should sign and date the verdict form and contact the Courtroom Deputy.

2. Do you find by a preponderance of the evidence that, as a result of Defendants' breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered damages?

Yes _____ No ____

If you answered "YES," go to Question #3. If you answered "No," the foreperson should sign and date the verdict form and contact the Courtroom Deputy.

3. What is the total amount of damages you award in favor of each of the following?

(You need not determine a separate award for the W.R. Berkley Plaintiffs. As I instructed you, their damages award will be determined automatically based on their holdings of each class of shares.)

Fannie Mae Preferred Shareholders: $______________________________

Freddie Mac Preferred Shareholders: $______________________________

Freddie Mac Common Shareholders: $______________________________

4. Do you award Prejudgment Interest on the amount of damages you awarded Freddie Mac Common and Preferred Shareholders?

Yes _______________

No ________________

If you answered "YES," go to Question #5. If you answered "No," the foreperson should sign and date the verdict form and contact the Courtroom Deputy.

5. On what date do you find that prejudgment interest of 6% per year should begin?

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Once you have ended your deliberations, sign and date the verdict form and contact the Courtroom Deputy.

_________________________________ _____________
FOREPERSON DATE