

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

THOMAS SAXTON, IDA SAXTON,  
BRADLEY PAYNTER,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE  
AGENCY, in its capacity as Conservator of  
the Federal National Mortgage Association  
and the Federal Home Loan Mortgage  
Corporation, MELVIN L. WATT, in his  
official capacity as Director of the Federal  
Housing Finance Agency, and THE  
DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:15-cv-00047

**DEFENDANTS' MOTION TO STAY SUBMISSION OF PROPOSED SCHEDULING  
ORDER REGARDING FILING OF ADMINISTRATIVE RECORD**

The Federal Housing Finance Agency (“FHFA”), Melvin L. Watt, and the United States Department of the Treasury (“Treasury,” and collectively, “Defendants”) hereby move to stay the requirement of Local Rule 16(i) to submit “a proposed scheduling order setting forth deadlines for the filing of the administrative record . . . .”<sup>1</sup> As explained in the accompanying Brief, the Court should defer consideration of whether and when an administrative record should be filed until it has ruled on Defendants’ forthcoming motions to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted.

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<sup>1</sup> Defendants concur with Plaintiffs’ request to stay the filing of any proposed scheduling order and discovery plan that might be required by Local Rule 16(a).

DATE: August 26, 2015

/s/ Matthew C. McDermott

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Respectfully submitted,

/s/ Howard N. Cayne

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Defendants.

Civil Action No. 1:15-cv-00047

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STAY SUBMISSION OF  
PROPOSED SCHEDULING ORDER REGARDING FILING OF  
ADMINISTRATIVE RECORD**

The Federal Housing Finance Agency (“FHFA”), Melvin L. Watt, and the United States Department of the Treasury (“Treasury,” and collectively, “Defendants”) submit this brief in support of their motion to stay the requirement of Local Rule 16(i) to submit a proposed scheduling order setting forth deadlines for the filing of the administrative record.<sup>1</sup> Defendants respectfully request that the Court defer consideration of whether and when an administrative record should be produced until it has ruled on Defendants’ motions to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted.

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<sup>1</sup> Defendants concur with Plaintiffs’ request to stay the filing of any proposed scheduling order and discovery plan that might be required by Local Rule 16(a).

## BACKGROUND

Plaintiffs' Complaint is among the latest in a series of shareholder challenges to an amendment (known as the Third Amendment) to the Preferred Stock Purchase Agreements between FHFA, acting as Conservator for Fannie Mae and Freddie Mac, and Treasury. Two federal district courts—in the District of Columbia and the Southern District of Iowa—already have dismissed eleven nearly identical lawsuits asserting various claims regarding the Third Amendment, including the same claims asserted here based on the Administrative Procedure Act (“APA”) and alleged breaches of contract and the implied covenant of good faith and fair dealing. On September 30, 2014, Judge Lamberth granted the defendants' motions to dismiss all claims in the actions in the District Court for the District of Columbia and denied the plaintiffs' cross-motions for summary judgment based on the threshold jurisdictional grounds stated in the motions to dismiss. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014). On February 3, 2015, Judge Pratt of the U.S. District Court for the Southern District of Iowa dismissed another shareholder complaint challenging the Third Amendment, holding that the claims were barred by issue preclusion in light of the *Perry Capital* decision. *See Cont'l W. Ins. Co. v. FHFA*, No. 4:14-cv-00042, --- F. Supp. 3d ----, 2015 WL 428342 (S.D. Iowa Feb. 3, 2015).<sup>2</sup> In the alternative, Judge Pratt concluded that the claims should be dismissed for the same reasons as set forth in the *Perry Capital* decision. *See Cont'l W. Ins. Co. v. FHFA*, No. 4:14-cv-00042, --- F. Supp. 3d ----, 2015 WL 428342, at \*10 n.6 (S.D. Iowa Feb. 3, 2015).

Neither *Perry Capital* nor *Continental Western* relied on an administrative record when dismissing the APA claims. In *Perry Capital*, Judge Lamberth concluded that the administrative

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<sup>2</sup> The Court held that issue preclusion was an affirmative defense which it could consider because the defense was “apparent on the face of the complaint.” *See Continental Western*, 2015 WL 428342, at \*3 n.2 (quoting *C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 763–64 (8th Cir. 2012)).

record filed by Treasury was “irrelevant” and denied the plaintiffs’ motion to supplement it.<sup>3</sup> 70 F. Supp. 3d at 225-26. In *Continental Western*, Magistrate Judge Walters rejected the plaintiff’s motion to compel production of an administrative record, explaining that the defendants’ motions to dismiss were based on “purely legal arguments” that could be decided without resort to an administrative record. Ruling on Plaintiff’s Motion to Compel Production of the Administrative Record at 6, *Cont’l W. Ins. Co. v. FHFA*, No. 4:14-cv-00042 (S.D. Iowa Aug. 5, 2014) (Dkt. No. 42) (“S.D. Iowa Order”) (attached as Exhibit A).

### ARGUMENT

Local Rule 16(i) provides that in “actions for judicial review based on an administrative record,” the parties must submit a proposed scheduling order setting deadlines for filing the administrative record and briefs. This Court has approved a briefing schedule that requires Defendants to file a motion to dismiss by September 4, 2015. Order, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa July 13, 2015) (Dkt. No. 12). In their motions to dismiss, Defendants intend to argue that the Complaint must be dismissed for lack of subject-matter jurisdiction and failure to state a claim, even if all allegations in the Complaint are assumed to be true. Specifically, Defendants intend to argue *inter alia* that (1) Plaintiffs’ claims are barred by issue preclusion as a result of the *Perry Capital* ruling, (2) Plaintiffs’ claims are barred by 12 U.S.C. § 4617(f), which provides that “no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator,” (3) the Conservator’s succession to “all rights, titles, powers, and privileges of the regulated entity, and of any stockholder . . . of such regulated entity,” 12 U.S.C. § 4617(b)(2)(a)(i), bars the claims that the shareholders are asserting

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<sup>3</sup> FHFA as Conservator did not submit an administrative record in *Perry Capital*, but it did voluntarily submit a compilation of documents reflecting the considerations it took into account in connection with execution of the Third Amendment.

in this action, and (4) Plaintiffs' claims for deprivation of liquidation preference and dividends are not ripe. As Magistrate Judge Walters recognized in *Continental Western*, such a "facial" challenge to the complaint must be decided on the face of the pleadings, without reliance on an administrative record. *See* S.D. Iowa Order at 5-6. Here, as in *Continental Western*, an administrative record will be irrelevant to the Court's determination of whether it has jurisdiction over this case and whether Plaintiffs have stated a claim upon which relief can be granted. Only if the Court concludes that it has subject-matter jurisdiction and that Plaintiffs have stated a claim will this action become an "action[] for judicial review based on an administrative record." Thus, there is no need to decide now whether or when Defendants should produce an administrative record.

In addition, FHFA was not required to—and did not—create or maintain an administrative record relating to the execution of the Third Amendment because FHFA took that action expressly in its capacity as Conservator. The APA, which serves as the basis for any administrative record review, simply does not apply where other "statutes preclude judicial review." 5 U.S.C. § 701(a)(2). Here, as will be explained in the forthcoming motions to dismiss, the Housing and Economic Recovery Act of 2008 ("HERA") is such a statute and precludes judicial review of the Conservator's action. *See* 12 U.S.C. § 4617(f) ("no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver"); *id.* § 4617(b)(2)(A)(i) (the Conservator succeeds to "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder . . . of such regulated entity"). As such, the APA did not require the Conservator to create or maintain an administrative record relating to the execution of the Third Amendment.

Both courts that have addressed materially-identical APA claims challenging the Third Amendment have held that any FHFA or Treasury administrative records are “irrelevant” to the analysis, because Section 4617(f) bars those claims as a threshold matter. *Perry Capital LLC*, 70 F. Supp. 3d at 225-26; S.D. Iowa Order at 6.<sup>4</sup> Accordingly, there is no need for FHFA or Treasury to produce an administrative record while a motion to dismiss remains unresolved. Plaintiffs’ inclusion of APA claims in their Complaint does not mean that an administrative record is required. APA claims can be dismissed as a matter of law without resort to an administrative record. *See, e.g., American Bankers Ass’n v. Nat’l Credit Union Admin.*, 271 F.3d 262, 266-67 (D.C. Cir. 2001) (holding that the district court was not required to order an agency to produce an administrative record because the APA claims could be resolved “with nothing more than the statute and its legislative history”). Here, Defendants will argue in their motion to dismiss—as they have in the other actions that have been dismissed—that Plaintiffs’ APA claims fail for lack of subject-matter jurisdiction under HERA and otherwise fail to state a claim, even assuming the truth of every fact alleged in the Complaint.

Additionally, setting a schedule for production of administrative records before resolution of the forthcoming motions to dismiss would threaten to derail the briefing schedule for those motions—which was already agreed to by the parties and endorsed by the Court. Production of any administrative records by Defendants will almost certainly trigger motions practice by Plaintiffs seeking supplementation of such records. For example, although the FHFA document compilation and Treasury administrative record in *Perry Capital* have been publicly available for a year and a half, *Perry Capital*, No. 1:13-cv-01025 (D.D.C. Dec. 17, 2013) (Dkt. Nos. 26, 27), Plaintiffs’ counsel still have declined to say whether they intend to challenge their adequacy if

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<sup>4</sup> *Perry Capital* also held that 12 U.S.C. § 4617(b)(2)(A)(i) barred plaintiffs’ derivative claims. Defendants intend to argue that this provision applies in this case as well.

Defendants re-file those records in this case. Instead, Plaintiffs demand the filing of “complete” administrative records, and reserve their rights to seek supplementation if the records are not “complete” in Plaintiffs’ view. *See* Email from Sean P. Moore to Asim Varma and Alex M. Johnson (Aug. 21, 2015) (attached as Exhibit B). But it is wholly unnecessary for the Court to wade into these issues in advance of the motions to dismiss; all disputes as to the adequacy or “complete[ness]” of the records stand to be mooted by the Court’s resolution of the motions to dismiss.

The Southern District of Iowa already rejected a materially identical request in a materially identical case for the court to compel production of FHFA and Treasury administrative records in advance of that court’s resolution of threshold motions to dismiss for lack of subject matter jurisdiction. S.D. Iowa Order at 5-7. There, like here, shareholders asserted APA claims challenging the Third Amendment, and there, like here, the shareholders sought to compel production of an administrative record in advance of the court’s resolution of the motions to dismiss. *Id.* at 2. The court rejected that request. Magistrate Judge Walters held that the FHFA and Treasury motions to dismiss presented facial challenges to the court’s subject matter jurisdiction, and thus were to be resolved on the face of the pleadings, assuming the truth of all allegations in the complaint. The court also recognized that compelling production of administrative records would “portend months of delay in resolving the motions to dismiss to no obvious benefit or purpose,” given “the inevitable disputes about [the record’s] adequacy, requests for additional discovery at which [the plaintiff] hints, and the time required to digest and incorporate the record in what promises to be extensive briefing.” S.D. Iowa Order at 6-7.<sup>5</sup> The

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<sup>5</sup> Notably, the Southern District of Iowa follows the same Local Rule upon which Plaintiffs rely here to justify their request for the production of administrative records. *See* Local Rules of

Footnote continued on next page



same outcome is warranted here. Requiring Defendants to produce administrative records in this case (and addressing the inevitable disputes arising from it) will delay the resolution of Defendants' motion to dismiss "to no obvious benefit or purpose." *Id.* at 7.

Additionally, Plaintiffs will not be prejudiced if Defendants do not file an administrative record at this stage. When deciding the motions to dismiss, Plaintiffs will have the benefit of a favorable standard of review, with the Court assuming the truth of the allegations in Plaintiffs' Complaint. This Court's resolution of the motions to dismiss will determine whether Plaintiffs have adequately alleged that the Conservator acted outside its statutory powers and functions in executing the Third Amendment and thus whether Section 4617(f) bars Plaintiffs' claims. The courts in both *Perry Capital* and *Continental Western* concluded that the Conservator acted within its authority through their resolution of the threshold motions to dismiss, not through any motions for summary judgment. Plaintiffs will not be prejudiced if the Court takes the same approach here. If Plaintiffs' claims survive the motions to dismiss, the Court can then resolve whether and how Defendants should produce any administrative records, and Plaintiffs can seek to file a summary judgment motion at that time. Thus, Plaintiffs cannot claim that resolving the motion to dismiss without an administrative record will cause them any prejudice.

### CONCLUSION

For the reasons above, the Court should stay the requirement that the parties file a proposed order setting forth a schedule for filing the administrative record. The Court should defer consideration of whether and how to set a schedule for the filing of administrative records until the Court has resolved the forthcoming motions to dismiss.

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Footnote continued from previous page  
the United States District Courts for the Northern & Southern Districts of Iowa , Local Rule 16(i).

Dated: August 26, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF IOWA  
 CENTRAL DIVISION

CONTINENTAL WESTERN INSURANCE )	
COMPANY, )	4:14-cv-00042-RP-RAW
)	
Plaintiff, )	
)	
vs. )	RULING ON PLAINTIFF'S
)	MOTION TO COMPEL
THE FEDERAL HOUSING FINANCE )	PRODUCTION OF THE
AGENCY, MELVIN L. WATT, in )	ADMINISTRATIVE RECORD
his official capacity as )	AND FOR SUSPENSION OF
Director of the Federal )	THE BRIEFING SCHEDULE
Housing Finance Agency, and )	AND DISCOVERY-RELATED
THE DEPARTMENT OF THE )	DEADLINES
TREASURY, )	
)	
Defendants. )	

The above resisted motion [31] is before the Court following hearing. Plaintiff Continental Western Insurance Company ("Continental Western") brings this action against The Federal Housing Finance Agency and its Director (collectively "FHFA") and The Department of The Treasury ("Treasury"). Counts I - IV of the Complaint are under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, and challenge the conduct of the agency and department relating to FHFA's conservatorships of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the Companies") under the authority of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. §§ 1455, 1719, 4617. In addition, under the Court's supplemental jurisdiction the Complaint includes a number of common law claims against FHFA for breach of contract, the associated covenant of good faith and fair dealing,

and breach of fiduciary duty (Counts V - VII). Both defendants have filed motions to dismiss for lack of subject matter jurisdiction [23][24]. Fed. R. Civ. P. 12(b)(1). Alternatively defendants urge the Court should transfer this case to the U.S. District Court for the District of Columbia where some ten similar, earlier-filed actions are pending, or stay this case until the resolution of the actions in that court.<sup>1</sup>

By the present motion Continental Western seeks an order compelling production of an administrative record, suspending briefing on the motions to dismiss until the record is produced, and suspending discovery-related deadlines. Defendants do not resist suspending discovery-related deadlines (to include submission of a proposed scheduling order and discovery plan) but do resist the motion to compel and to suspend briefing on their motions to dismiss.

In 2008 Congress enacted HERA in response to the financial crisis at that time which had much to do with the housing market. HERA authorized FHFA to place the Companies into

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<sup>1</sup> As the Court understands it, in one of the District of Columbia cases in which Continental Western's parent is a party (and Continental Western's current counsel are involved), FHFA has filed a motion to dismiss or in the alternative for summary judgment which, according to FHFA, raises many of the same arguments presented by defendants in their motions to dismiss in this Court. The motion is fully briefed. Given the summary judgment context FHFA agreed to provide a compilation of documents in the District of Columbia case, the adequacy of which is disputed and currently the subject of a motion before that court. (Tr. [40] at 10, 18-19, 20).

conservatorship and that is what FHFA did in September 2008. FHFA, as conservator, subsequently entered into preferred stock purchase agreements with Treasury under which Treasury committed billions of dollars to the Companies in exchange for senior preferred stock. For reasons the validity of which is in dispute, Treasury and FHFA in 2012 entered into a Third Amendment to the preferred stock agreements which altered the dividend structure to accomplish what Continental Western refers to as a "net worth sweep."<sup>2</sup> The sweep resulted in all of the Companies' future profits going to Treasury, effectively, as Continental Western characterizes it, nationalizing the Companies and resulting in the confiscation of the value of Continental Western's preferred stock. The core of Continental Western's Complaint is that FHFA, at Treasury's prompting, acted in excess of its HERA statutory authority and without legitimate motive when it agreed to the net worth sweep, an action therefore arbitrary and capricious entitling Continental Western to relief under the APA.

In their motions to dismiss defendants argue the Court lacks jurisdiction because HERA prohibits the relief sought in the Complaint. Specifically, 12 U.S.C. § 4617(f) states that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of

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<sup>2</sup> The Complaint states FHFA's then-acting Director used this phrase in describing the Third Amendment. (Complaint [1] ¶ 12).

powers or functions of the Agency as a conservator or a receiver," a provision defendants contend precludes judicial review of FHFA's exercise of its powers as conservator. Defendants further argue that FHFA's succession to the rights and privileges of the Companies and their stockholders as provided in 12 U.S.C. § 4617(b)(2)(A)(i) divests Continental Western of the ability as stockholder to sue for damages directly or derivatively. For this and other reasons defendants argue Continental Western lacks standing.

Continental Western's 56-page Complaint is highly fact specific. The Complaint alleges the net worth sweep was not necessary, other options were available, and the sweep was the product of a Treasury directive aimed simply at giving Treasury all of the Companies' profits. The present motion is prompted by the fact that in their briefs on the motions to dismiss defendants make factual assertions about the necessity and purpose of the net worth sweep inconsistent with the Complaint's allegations on the same subjects. In particular, Continental Western targets statements in defendants' briefs which justify the net worth sweep as necessary to save the Companies from insolvency. (Treasury Motion to Dismiss Brief [24-1] at 9-10; FHFA Motion to Dismiss Brief [23-13] at 9-10). Continental Western argues it needs an administrative record to rebut defendants' assertions about the necessity and purpose of the net worth sweep and to support its contrary factual assertions,

and until then briefing on the motions to dismiss should be suspended. Defendants respond that their motions make only a facial challenge to subject matter jurisdiction and that even accepting all of the many facts stated in the Complaint as true, they are nonetheless entitled to dismissal.

There are two types of challenges to subject matter jurisdiction, a "facial" challenge and a "factual" challenge. See *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). A facial challenge analyzes the face of the Complaint, the jurisdiction-related factual allegations of which are taken as true. *Smith v. Dep't of Agriculture*, 888 F. Supp. 2d 945, 948 (S.D. Iowa 2012)(citing *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005)); *Dolls, Inc. v. City of Coralville, Iowa*, 425 F. Supp. 2d 958, 969 (S.D. Iowa 2006)(also citing *Biscanin*). In a factual challenge the Court may look outside the pleadings to determine its jurisdiction, and the facts of the complaint are not presumed to be true. *Dolls, Inc.*, 425 F. Supp. 2d at 970 (citing *Osborn v. United States*, 918 F.2d 724, 729-30 n.6 (8th Cir. 1990). See 2 *Moore's Federal Practice* § 12.30[4] at 12-46 - 12-47 (3d ed. 2014); 5B Charles Wright and Arthur Miller, *Federal Practice and Procedure: Civil*, § 1350 at 187-98 (3d ed. 2004).

As noted, defendants contend that they make only a facial challenge to the Complaint.<sup>3</sup> It is true that in their briefing they describe the net worth sweep in positive terms as a means to save the Companies from the insolvency they were facing under the dividend structure in effect prior to the Third Amendment. It is natural they would explain the sweep from their perspective in view of the allegations in the Complaint about the invalidity of the sweep, but that does not mean defendants make a factual challenge to jurisdiction. At bottom the motions to dismiss do appear to advance purely legal arguments. Defendants having disclaimed a factual challenge, the Court must take Continental Western's factual assertions bearing on its jurisdictional theory -- that the net worth sweep was unnecessary and improperly motivated -- as true. There is no need to adjudicate the truth of the matter in order to determine the motions to dismiss.

The other issues raised by the motions, whether HERA or other standing principles deprive the Court of jurisdiction to consider Continental Western's common law claims, and the alternative request for transfer, clearly present purely legal issues which may be decided without resort to an administrative record.

The Court is also concerned with the practical consequences to the progression of the case if Continental

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<sup>3</sup> See Tr. [40] at 17-18, 33-34.

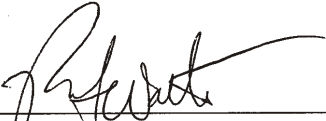


Western's motion is granted. The time necessary to put together an administrative record, the inevitable disputes about its adequacy, requests for additional discovery at which Continental Western hints, and the time required to digest and incorporate the administrative record in what promises to be extensive briefing, all portend months of delay in resolving the motions to dismiss to no obvious benefit or purpose.

Continental Western's motion to compel production of the administrative record and for suspension of briefing schedule and discovery-related deadlines [31] is **granted in part and denied in part**. The motion is granted to the extent that discovery-related deadlines including the deadline under the local rules for submission of a proposed scheduling order and discovery plan are **stayed**. In all other respects the motion is denied. Continental Western may have to and including **August 29, 2014** to submit its response to defendants' motions to dismiss.

IT IS SO ORDERED.

Dated this 5th day of August, 2014.

  
\_\_\_\_\_  
ROSS A. WALTERS  
UNITED STATES MAGISTRATE JUDGE

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**From:** Varma, Asim  
**Sent:** Tuesday, August 25, 2015 11:03 AM  
**To:** 'Moore, Sean P.'; Johnson, Alex M.  
**Cc:** 'Cohen, Bradley (CIV)'; 'McElvain, Joel L (CIV)'  
**Subject:** RE: Saxton v. FHFA and Treasury

Sean,

Thank you for your clarification. We disagree that defendants must file an administrative record in order to provide plaintiffs with the opportunity to move for summary judgment in advance of the court's determination that it has jurisdiction over the matter. In light of our disagreement, we view the requirement to meet and confer for purposes of Local Rule 16(i) satisfied. Defendants will move for relief from the Rule as it is being interpreted by plaintiffs.

Regards,

Asim

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**From:** Moore, Sean P. [mailto:moore@brownwinick.com]  
**Sent:** Friday, August 21, 2015 9:43 AM  
**To:** Varma, Asim; Johnson, Alex M.  
**Cc:** 'Cohen, Bradley (CIV)'; 'McElvain, Joel L (CIV)'  
**Subject:** RE: Saxton v. FHFA and Treasury

Asim,

We are requesting that FHFA and Treasury fulfill their obligation to file complete administrative records. Unless defendants' positions have changed since the filing of the records in the D.D.C., we would anticipate that defendants would file similar records here. Plaintiffs, of course, would reserve the right to challenge the completeness of whatever is produced.

Furthermore, we do not understand the case for bifurcating proceedings addressing defendants' motions to dismiss and plaintiffs' motion for summary judgment, as it appears you are proposing. Many of the issues we expect defendants to raise in a motion to dismiss overlap with issues plaintiffs would raise in a motion for summary judgment. For example, we expect that a central issue in FHFA's motion to dismiss will be whether the agency acted within its statutory authority in adopting the Net Worth Sweep, and that would also be a key issue that plaintiffs would raise in a cross-motion for summary judgment. It would make sense to address these issues once rather than twice. And putting off summary judgment briefing would prejudice plaintiffs by forcing them to engage in repetitive briefing and delaying their ability to obtain a judgment in their favor should the court deny the motions to dismiss.

Regards,

Sean

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**From:** Varma, Asim [<mailto:Asim.Varma@APORTER.COM>]  
**Sent:** Wednesday, August 19, 2015 10:13 AM  
**To:** Moore, Sean P.; Johnson, Alex M.  
**Cc:** 'Cohen, Bradley (CIV)'; 'McElvain, Joel L (CIV)'  
**Subject:** RE: Saxton v. FHFA and Treasury

Sean,

We do not fully understand your position and proposal. Are you requesting that FHFA and Treasury merely re-file the Document Compilation and Administrative Records that were filed in the DDC? Or will you be taking the position that FHFA and Treasury file an allegedly more “complete” set of records, as the plaintiffs in Continental Western and Perry Capital requested? Please clarify.

Moreover, although some plaintiffs chose to file a cross-motion for summary judgment in the DDC, the court denied that motion based on threshold legal grounds that were presented in defendants’ motions to dismiss, not in the Document Compilation or Administrative Record. So, we fail to see any “prejudice” from the court first resolving the forthcoming motions to dismiss before determining whether any administrative records should be filed. If I am misunderstanding your position in this regard, please clarify.

Regards,

Asim

---

**From:** Moore, Sean P. [<mailto:moore@brownwinick.com>]  
**Sent:** Monday, August 17, 2015 9:10 AM  
**To:** Varma, Asim; Johnson, Alex M.  
**Cc:** 'Cohen, Bradley (CIV)'; 'McElvain, Joel L (CIV)'  
**Subject:** RE: Saxton v. FHFA and Treasury

Asim,

As you acknowledge, Local Rule 16(i) applies to “actions for judicial review based on an administrative record.” We fail to see how the defendants’ filing of a motion to dismiss changes the nature of the action that we have brought. Furthermore, we are planning to file a cross-motion for summary judgment in response to your motion to dismiss – which is what we understand the plaintiffs in the D.D.C. litigation did, and which is an appropriate way to proceed given the nature of the issues in this case. Thus, we will be prejudiced by defendants’ refusal to produce an administrative record. Furthermore, we do not understand how producing an administrative record will be a burden to the defendants, as presumably defendants will produce here a similar if not identical administrative record and “document compilation” as produced in the D.D.C. action.

Please let us know if the defendants will persist in their refusal to produce an administrative record so that we know whether we will be required to bring this issue to the attention of the court.

Regards,

Sean

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**From:** Varma, Asim [<mailto:Asim.Varma@APORTER.COM>]  
**Sent:** Wednesday, August 12, 2015 5:52 PM  
**To:** Moore, Sean P.; Johnson, Alex M.  
**Cc:** 'Cohen, Bradley (CIV)'; 'McElvain, Joel L (CIV)'  
**Subject:** RE: Saxton v. FHFA and Treasury

Sean --

We believe Local Rule 16(i) does not apply in this case. By its terms, that rule applies only “[i]n actions for judicial review based on an administrative record.” Here, FHFA and Treasury intend to move to dismiss the case under Rule 12(b) based on threshold legal grounds, and that motion will assume the truth of the allegations in the complaint and will not depend upon the contents of any administrative record. Accordingly, there will be no “judicial review based on an administrative record.” The irrelevance of any administrative record is confirmed by the fact that two other courts -- the D.D.C. (in the *Perry Capital* case) and the S.D. Iowa (in the *Continental Western* case) -- have dismissed other complaints challenging the Third Amendment without considering any administrative record.

Accordingly, we believe the parties are not required to file a proposed schedule in connection with Local Rule 16 (i). Should you choose to file something on August 26 regardless, please let us know in advance and we will state our position to the court in the filing.

Regards,

Asim

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**From:** Moore, Sean P. [<mailto:moore@brownwinick.com>]  
**Sent:** Tuesday, August 11, 2015 10:50 AM  
**To:** Varma, Asim; Johnson, Alex M.  
**Cc:** 'Cohen, Bradley (CIV)'; 'McElvain, Joel L (CIV)'  
**Subject:** RE: Saxton v. FHFA and Treasury

Ms. Varma,

Local Rule 16(i) require the parties to submit a proposed scheduling order within 90 days after the filing of the complaint regarding deadlines for filing of the administrative record. We propose your client and Treasury file the record by September 4, the date your motion to dismiss is due. Please advise if that date is acceptable and I will prepare a proposed order for the court.

Regards,

Sean

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**From:** Moore, Sean P.  
**Sent:** Monday, July 06, 2015 4:11 PM  
**To:** 'Varma, Asim'; Johnson, Alex M.  
**Cc:** Cohen, Bradley (CIV); McElvain, Joel L (CIV)  
**Subject:** RE: Saxton v. FHFA and Treasury

Ms. Varma,

We have no objection to your request provided you would agree to grant us a similar extension of time and total number of pages in response.

Regards,

Sean Moore

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**From:** Varma, Asim [<mailto:Asim.Varma@APORTER.COM>]  
**Sent:** Monday, June 29, 2015 12:26 PM  
**To:** Johnson, Alex M.; Moore, Sean P.  
**Cc:** Cohen, Bradley (CIV); McElvain, Joel L (CIV)  
**Subject:** Saxton v. FHFA and Treasury

Counsel,

I am counsel for the Federal Housing Finance Agency. FHFA and Treasury (who is separately represented by Department of Justice counsel cc'd here) would appreciate the opportunity to discuss with you a briefing schedule for a motion to dismiss the Saxton complaint pending in the Northern District of Iowa. In particular, Defendants request an extension of time to respond to the Saxton complaint pending in the Northern District of Iowa until September 4, 2015. In addition, FHFA and Treasury request a page enlargement for the opening and reply briefs. FHFA requests 45 pages for the opening brief and 25 page for the reply. Treasury requests 35 pages for the opening brief and 25 pages for the reply. We are open to Plaintiffs' request for extensions of time and page enlargement.

Please let us know when you would be available to discuss further.

Asim Varma


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Brown, Winick, Graves, Gross, Baskerville, & Schoenebaum P.L.C.

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

THOMAS SAXTON, IDA SAXTON,  
BRADLEY PAYNTER,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE  
AGENCY, in its capacity as Conservator of  
the Federal National Mortgage Association  
and the Federal Home Loan Mortgage  
Corporation, MELVIN L. WATT, in his  
official capacity as Director of the Federal  
Housing Finance Agency, and THE  
DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:15-cv-00047

**DEFENDANTS' CERTIFICATION PURSUANT TO LOCAL RULE 37 IN SUPPORT OF  
MOTION TO STAY SUBMISSION OF PROPOSED SCHEDULING ORDER  
REGARDING FILING OF ADMINISTRATIVE RECORD**

Pursuant to Local Rule 37, counsel for the Federal Housing Finance Agency ("FHFA"), Melvin L. Watt, and the United States Department of the Treasury ("Treasury," and collectively, "Defendants") hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, in support of their Motion to Stay Submission of Proposed Scheduling Order Regarding Filing of Administrative Record:

1. Counsel for Defendants have conferred personally with counsel for Plaintiffs in an attempt to resolve or narrow by agreement the issues raised by the Motion;
2. Counsel for Defendants and Plaintiffs have been unable to reach an agreement;
3. Counsel for Defendants argues that Defendants' obligation to submit a proposed schedule for the filing of an administrative record should be stayed until the Court

has resolved Defendants' forthcoming motions to dismiss. Counsel for Plaintiffs argues that Defendants should be required to submit a proposed schedule now and to file an administrative record before the resolution of the forthcoming motions to dismiss.

DATE: August 26, 2015

Respectfully submitted,

/s/ Matthew C. McDermott  
Matthew C. McDermott  
Stephen H. Locher  
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DIANE KELLEHER  
Assistant Branch Director

/s/ Bradley H. Cohen (by permission)  
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*Counsel for Defendant U.S. Department of  
the Treasury*

/s/ Howard N. Cayne  
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*Attorneys for Defendants Federal Housing  
Finance Agency and Director Melvin L. Watt*