

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

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THOMAS SAXTON, IDA SAXTON,  
BRADLEY PAYNTER,

Plaintiffs,

vs.

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.

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Civil Action No. 1:15-cv-00047

**PLAINTIFFS' RESPONSE TO FHFA'S NOTICE  
OF NEW AUTHORITY OF AUGUST 30, 2016**

FHFA characterizes a recent decision of the District Court for the Eastern District of Virginia as “holding[ ] that . . . HERA bars shareholder claims during Conservatorship.” Notice by FHFA of New Authority in Support of Motion to Dismiss at 2 (Aug. 30, 2016), Doc. 89. But in fact the decision says that the issue in that case—whether HERA permits shareholders to inspect the Companies’ books and records during conservatorship—presents “a completely different question” from whether shareholders retain the right to sue for direct injuries inflicted by FHFA. *Pagliara v. Federal Home Loan Mortg. Corp.*, slip op. at 19, No. 16-337 (E.D. Va. Aug. 23, 2016) (“Op.”). Because Plaintiffs do not seek to inspect the Companies’ books and records, elect the Companies’ directors, compel the Companies to hold annual meetings, or exercise any other corporate governance right, the decision in *Pagliara* is inapposite. *See id.* at 19–20. As the *Pagliara* court took care to emphasize in rejecting the plaintiff’s constitutional

avoidance argument, even if HERA deprives shareholders of their right to inspect the Companies' books and records, this "does not affect" their "right to bring a direct lawsuit"—a cognizable property interest. *Id.* at 24 n.16.

Far from endorsing FHFA's position that Plaintiffs' injuries may only be redressed if FHFA *sues itself*, *Pagliara* accepted the many judicial opinions that hold that during conservatorship shareholders retain the right "to bring a lawsuit to remedy [their] own direct injuries." *Id.* at 19. That is because the only shareholder rights that HERA transfers to FHFA as conservator are those "with respect to the regulated entity and the assets of the regulated entity," 12 U.S.C. § 4617(b)(2)(A)(i), and "standing to bring a lawsuit to remedy a personal injury is not easily categorized as a right with respect to the corporation," *Op.* 19; *see* Plaintiffs' Response to Defendants' Motions to Dismiss at 63–67 (June 30, 2016), Doc. 86 ("MTD Response").

While *Pagliara* erred in rejecting a conflict-of-interest exception for *derivative* claims during conservatorship, *Op.* 29 n.20, *see* MTD Response at 75–79, Plaintiffs' claims are direct as a matter of both federal and state law, *id.* at 67–75.

*Pagliara's* suggestion that during conservatorship HERA suspends many of the usual corporate governance mechanisms shareholders possess for ensuring management's loyalty and care underscores why FHFA must be required to scrupulously comply with its statutory duties. HERA presumes that the conservator will seek in good faith to preserve and conserve the Companies' assets with a view to returning them to soundness and solvency. Where, as here, the conservator willfully and openly abandons that statutory mission, injunctive relief is appropriate.

Dated: August 31, 2016

Respectfully submitted,

/s/ Alexander M. Johnson

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ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of August 2016, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Alexander M. Johnson  
Alexander M. Johnson