

**BEFORE THE UNITED STATES  
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

IN RE: FEDERAL HOUSING FINANCE  
AGENCY, *ET AL.*, PREFERRED STOCK  
PURCHASE AGREEMENTS THIRD  
AMENDMENT LITIGATION

MDL Docket No. 2713

**FEDERAL HOUSING FINANCE AGENCY'S  
SUPPLEMENTAL INFORMATION CONCERNING THE  
RESPONSE OF INTERESTED PARTY TIMOTHY J. PAGLIARA**

Interested Party Timothy J. Pagliara, has argued in his Response to FHFA's Motion to Transfer that no MDL should be created, but if one is, the two cases he has filed should be excluded from it. His arguments lack merit. For the reasons stated in FHFA's Memorandum in Support of its Motion to Transfer, transfer here is appropriate, and Mr. Pagliara's actions—which expressly allege wrongdoing in connection with the Third Amendment and on that basis demand access to Fannie Mae's and Freddie Mac's corporate books and records—meet all the requirements for inclusion in that MDL.

Mr. Pagliara has an economic interest in *Perry Capital* and the Related Cases,<sup>1</sup> and he freely acknowledges that he is attempting to use his collateral books-and-records actions as discovery vehicles to acquire additional evidentiary materials that he—and other plaintiffs—

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<sup>1</sup> The four Related Cases, identified in FHFA's Initial Motion to Transfer (ECF No. 1-1, at 4), are *Saxton v. FHFA*, No. 1:15-cv-0047 (N.D. Iowa); *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del.); *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky.); and *Roberts v. FHFA*, No. 1:16-cv-02107 (N.D. Ill.). In addition to Mr. Pagliara's books-and-records cases, FHFA also noticed for transfer two related actions (the "Auditor Cases") pending in the U.S. District Court for the Southern District of Florida: *Edwards v. Deloitte & Touche LLP*, No. 1:16-cv-21221 (S.D. Fla.) and *Edwards v. PricewaterhouseCoopers, LLP*, No. 1:16-cv-21224 (S.D. Fla.). See Not. of Related Actions (Apr. 7, 2016) (ECF No. 22), see also FHFA Br. at 3 n.1, 6 n.4. The district courts have stayed all eight actions pending the Panel's decision on FHFA's motion to transfer.

intend to use in prosecuting their pending and yet-to-be filed legal challenges to the Third Amendment. The Panel has held that collateral actions, like Mr. Pagliara's books-and-records actions, seeking evidence to support claims at issue in a proposed or already-established MDL proceeding are properly subject to transfer and coordination under Section 1407. As in those earlier Panel decisions, consolidating Mr. Pagliara's two books-and-records actions with the proposed MDL proceeding will conserve judicial resources and ensure consistent rulings on the myriad factual questions and legal issues presented by the already pending and yet-to-be filed Third Amendment litigations. Accordingly, this Court should include Mr. Pagliara's books-and-records actions in the proposed MDL proceeding.

**A. The Purpose of Mr. Pagliara's Complaints Are to Gather Documents in Support of a Challenge to the Third Amendment**

Mr. Pagliara is intimately familiar with, and has an economic interest in, the Related Cases and *Perry Capital LLC v. Lew*. He is the founder of Investors Unite, an association of Fannie Mae and Freddie Mac shareholders that is actively involved in the Related Cases. For example, Investors Unite has submitted multiple amicus briefs to the D.C. Circuit in the pending *Perry Capital* appeal.<sup>2</sup> See No. 14-5243 (D.C. Cir.) (Doc. Nos. 1561142 & 1610084) (amicus briefs filed July 6, 2015 and April 22, 2016).

The U.S. District Court for the District of Columbia dismissed the *Perry Capital* complaint and refused to authorize plaintiffs' attempts to obtain discovery in that case.<sup>3</sup>

Undeterred, Mr. Pagliara now seeks to bifurcate his challenge to the Third Amendment into two

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<sup>2</sup> Investors Unite's website states that "Our Mission" is "to educate and mobilize in an effort to regain our investments in the GSEs that are currently being illegally confiscated by the Federal Treasury." See Investors Unite, <http://investorsunite.org/> ("Our Mission" at the bottom of the page).

<sup>3</sup> *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 240 (D.D.C. 2014); see also Order, *Perry Capital LLC*, No. 13-1288 (RCL) (Sept. 30, 2014) (ECF No. 53) (denying, *inter alia*, motions for supplementation of the administrative record and limited discovery).

phases: (1) the instant books-and-records phase through which he is attempting to conduct full-blown discovery without first confronting and surviving the same jurisdictional defenses pending in the Related Cases and that have already defeated the *Perry Capital* and *Continental Western* plaintiffs,<sup>4</sup> and (2) a claim-prosecution phase in which he would use the discovery he hopes to obtain in the books-and-records cases to prosecute his substantive claims on the merits.

In his public statements, Mr. Pagliara has described these actions as part of his effort to “pursue all avenues to demonstrate that the Net Worth Sweep violates both federal law and . . . state law.” See Press Release, Investors Unite, Tim Pagliara Files Suit to Inspect Fannie Mae and Freddie Mac Corporate Records (Mar. 14, 2016) (reprinted on PR Newswire), *available at* <http://goo.gl/dy18Nx>.<sup>5</sup> There is little doubt that other plaintiffs pursuing Third Amendment cases, including plaintiffs in the Related Cases, will attempt to use information gained from this proceeding in other cases.<sup>6</sup>

Indeed, Mr. Pagliara’s complaints make clear that his purpose in bringing these books-and-records actions is to open another front in the ongoing litigation to vacate and set aside the Third Amendment. In seeking to show that his inspection demands serve a “proper purpose,” Mr. Pagliara includes no fewer than 25 pages in his Virginia Complaint and 31 pages in his

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<sup>4</sup> *Cont’l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 & n.6 (S.D. Iowa 2015).

<sup>5</sup> That this is well known to be Mr. Pagliara’s litigation strategy is evidenced by other Fannie Mae and Freddie Mac shareholders monitoring the Third Amendment litigations, one of whom has described Mr. Pagliara’s suit as follows: “Tim Pagliara . . . who is also involved in FHFA/Treasury litigation will be able to match what is uncovered in this [books-and-records] litigation to what has been disclosed in the other [Third Amendment] litigation and find the omissions (and we KNOW there will be some). That will give plaintiffs in those [Third Amendment] cases amo [*sic*] in front of a judge for more disclosure there (probably the reason for the expedited hearing request [in the Delaware books-and-records action]).” Todd Sullivan, *GSE Reform: Tim Pagliara Files Suit in Delaware*, ValueWalk (Mar. 14, 2016), *available at* <http://goo.gl/pmPL1D>.

<sup>6</sup> Plaintiffs in the Related Cases have sought and received access to discovery in *Fairholme Funds, Inc. v. United States*, a takings case pending in the U.S. Court of Federal Claims. No. 1:13-cv-00465 (C.F.C., filed June 9, 2013).

Delaware Complaint detailing an array of alleged facts that purportedly show that the Third Amendment was unreasonable and unlawful. *See* Va. Compl. ¶¶ 5-17, 43-114; Del. Compl. ¶¶ 5-14, 103-45, 167-203. These allegations largely mirror those in the Related Cases.

Yet in his brief to this Panel, Mr. Pagliara highlights the legal standards that typically apply to shareholder-actions to inspect books and records in a transparent attempt to obscure the plain fact that the ultimate relief sought by Mr. Pagliara is identical to that sought by plaintiffs in the Related Cases: nullification of the Third Amendment. *See* Opp. at 5-9. Mr. Pagliara's recitation of boilerplate legal standards does not change the fact that he makes the same factual allegations as plaintiffs in the Related Cases.<sup>7</sup> *See In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012) (“[T]he presence of different legal theories among the subject actions is not a bar to centralization.”).<sup>8</sup>

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<sup>7</sup> Mr. Pagliara is also wrong in asserting that there are no common factual questions between the Virginia and Delaware actions. *See* Opp. at 8 n.6. Mr. Pagliara seeks to inspect documents from Fannie Mae and Freddie Mac that relate to virtually identical issues. It is inevitable that there will be overlapping factual disputes about the relevance of various categories of documents to the parallel Third Amendment investigations Mr. Pagliara claims to be pursuing. For example, the courts addressing Mr. Pagliara's suits will each have to decide the factual question of whether Mr. Pagliara is entitled to inspect “[a]ll FHFA and/or Treasury directives to the Company,” regardless of whether those directives have *anything* to do with the Third Amendment. *See* Va. Compl., Ex. A at 3; Del. Compl., Ex. at 3 (same) (emphasis added). Should the resolution of that factual question be necessary, it should be left to a transferee court, which could ensure that the scope of Mr. Pagliara's investigations are consistent for each Enterprise. That would also avoid the possibility that the two courts in which Mr. Pagliara is prosecuting these essentially identical actions could reach different conclusions on particular issues.

<sup>8</sup> Mr. Pagliara's books-and-records complaints also present the same threshold legal issues under HERA as the Related Cases.

Moreover, the materials sought in these books-and-records actions will overlap significantly with discovery in the Auditor Cases. Those cases allege, inter alia, that the Enterprises' auditors, Deloitte & Touche and PricewaterhouseCoopers, aided and abetted the Conservator's alleged breach of its purported fiduciary duties. *See* FHFA Not. of Related Actions (ECF No. 22) Exs. 5 & 6 (attaching Auditor Cases complaints). Should the Auditor Cases survive motions to dismiss, discovery is likely to be extensive, and much of it will overlap with the books and records Mr. Pagliara is attempting to access.

**B. Mr. Pagliara's Actions Should Be Included in the Proposed MDL Proceeding Because They Are Collateral to the Other Actions Proposed for Transfer**

Mr. Pagliara argues that his books-and-records actions should not be included in the MDL because they purportedly are limited to the gathering of evidence relating to the Third Amendment in support of his intended substantive challenge to the Third Amendment. *See, e.g.*, Response at 5-10. That position finds no support in the Panel's jurisprudence. To the contrary, the Panel has held that collateral actions *can and should* be transferred where—as here—their purpose concerns gathering facts to support the claims or defenses at issue in the other cases proposed for transfer.

While FHFA is not aware of any instance where the Panel has considered a request to transfer a books-and-records case for inclusion as part of an MDL proceeding, it has considered—and transferred—other collateral evidence-gathering actions related to subpoenas. For example, in *In re: Online DVD Rental Antitrust Litig.*, 744 F. Supp. 2d 1378 (J.P.M.L. 2010), the Panel considered a stand-alone proceeding to quash a subpoena that had been served in connection with an MDL proceeding. As here, the collateral proceeding was initiated for the express purpose of discovering and gaining access to evidentiary materials for use in litigating a substantive issue—the merits of which would not be resolved in the collateral proceeding—in other actions that the Panel had already consolidated. The Panel transferred the collateral discovery proceeding on the ground that the subpoenaed party was “an important third-party with information central to the issues in [the] MDL,” and the discovery sought “involve[d] questions of fact relating to the conspiracy alleged in [the] MDL.” *Id.* at 1378. The same factors warrant the same outcome here: by plaintiff's own admission, his collateral books-and-records proceedings are expressly aimed at obtaining documents for the purpose of litigating a promised-to-be filed substantive challenge to the Third Amendment.

The Panel's unreported decision *In re Fosamax Products Liability Litigation*, MDL No. 1789, stands for the same principle. There, the Panel transferred into an MDL a collateral action brought to quash a subpoena, observing that the subpoena action "involves factual questions common to the actions in [the MDL], and the expertise and familiarity of the transferee judge with the factual and legal issues in the Fosamax litigation favor having him decide the motion to quash." Transfer Order, *In re Fosamax Prods. Liab. Litig.*, MDL No. 1789 (J.P.M.L. June 9, 2009) (attached as Ex. 1). Transfer here is appropriate for the same reason: resolution of Mr. Pagliara's massive books-and-records demands involve questions of fact and law that are common to the Related Cases as well as the Auditor Cases, and will require resolution in connection with discovery demands advanced in those cases.

**C. Consolidating the Books-and-Records Cases with the Related Cases Promotes Judicial Economy**

Mr. Pagliara does not dispute that his complaints present the same dispositive issues as each of Third Amendment cases proposed for transfer: specifically, whether FHFA, in its capacity as Conservator has succeeded to the rights and claims of Fannie Mae and Freddie Mac shareholders while the Enterprises are in conservatorship. Mr. Pagliara purports to assert shareholder-rights to inspect the Enterprises' books and records for the supposedly "proper purpose" of filing another judicial challenge to the same conduct that plaintiffs in the other Third Amendment cases have already challenged. However, HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A), vests "all" shareholder rights in the Conservator for the full duration of the conservatorships. Therefore, neither Mr. Pagliara nor any of the other Third Amendment plaintiffs may assert any rights as shareholders while the Enterprises are in conservatorship. Transfer and consolidation would allow the transferee court to decide this threshold, cross-cutting, and potentially dispositive issue, conserving judicial resources and eliminating the risk

of inconsistent decisions regarding the scope and effect of the Conservator's statutory succession. *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1997) (one purpose of MDL consolidation is to "prevent inconsistent or repetitive pretrial rulings").

Similarly, Mr. Pagliara's books-and-records cases also will require courts to interpret and apply 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 . . . ." Mr. Pagliara's inspection requests embrace almost the entire universe of communications between FHFA and the Enterprises. *See Va. Compl. Ex. A* at 3 (seeking inspection of all documents that constitute FHFA "directives and/or instructions to [Freddie Mac]"); *Del. Compl. Ex. A* at 3 (similar). Granting that broad relief would allow Mr. Pagliara to engage in a sweeping investigation of the Conservator's management and operation of the Enterprises that would "interfere with and potentially usurp precisely the powers granted to the FHFA by HERA." *See Gail C. Sweeney Estate Marital Trust v. U.S. Treasury*, 68 F. Supp. 3d 116, 126 (D.D.C. 2014). Whether Section 4617(f) deprives the courts of jurisdiction to grant that relief, and FHFA maintains that it does, is a dispositive issue that is also presented in the Related Cases. Again, transferring these cases and allowing the transferee court to decide the Section 4617(f) issue would promote judicial economy and avoid inconsistent jurisdictional rulings. *See In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 824 (J.P.M.L. 1979); *see also In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (noting "real economies in transferring" common jurisdictional issues).

The fact that Delaware and Virginia books-and-records statutes generally provide for expedited proceedings is irrelevant to whether these cases should be included in the proposed MDL. *See Opp.* at 10-13. Any modest delay associated with this transfer motion will not be

material, especially in light of Mr. Pagliara's own delay in bringing his actions; he has waited more than three and-a-half years to file suits seeking to gather documents to aid in a potential future challenge to the Third Amendment, which was executed in August 2012.

Mr. Pagliara's contention that these cases are further developed than the Related Cases is not accurate. *See Opp.* at 12-13. The books-and-records cases, like the Related Cases, will require dispositive motions practice and briefing on the scope of the Conservator's succession and Section 4617(f). Those issues are already fully briefed in some of the Related Cases.

**D. FHFA's Briefing in a Separate Proceeding in 2012 Does Not Counsel Against Transfer of Mr. Pagliara's Complaints to the MDL**

Mr. Pagliara's reliance on FHFA's opposition to an MDL in the unrelated *Transfer Tax* cases (Response at 5, 10) is misplaced because those cases presented an entirely different situation. *First*, the *Transfer Tax* cases involved no disputed facts. All parties agreed on what had happened—Fannie Mae and Freddie Mac had not paid transfer taxes that various state and local entities claimed they were required to pay. Here, by contrast, the parties vigorously dispute what happened and why. As explained herein and in the Motion to Transfer, the cases FHFA now proposes for MDL consolidation present significant factual disputes that will need to be resolved if FHFA does not prevail on threshold legal issues.

*Second*, the danger posed by inconsistent rulings is significantly greater here than in the *Transfer Tax* cases, which involved different taxes imposed by different states and localities. If FHFA and the Enterprises lost a case in one jurisdiction and won in another, both decisions could stand, since the Enterprises could pay one jurisdiction's tax without paying another's. But conflicting Third Amendment decisions cannot be similarly reconciled because each PSPA is a *single* contract that cannot be valid in one jurisdiction but invalid in another. Absent transfer, shareholders will have virtually unlimited opportunities to litigate and re-litigate the same issues



repeatedly, as the Related Cases amply demonstrate. Thus, the risk of inconsistent rulings provides a far more compelling justification for transfer here than it did in the *Transfer Tax* cases.

### CONCLUSION

The creation of the proposed MDL and the inclusion of Mr. Pagliara's actions in the MDL will be just, fair, efficient, and wise.

Dated: May 4, 2016

Respectfully submitted,

/s/ Michael A.F. Johnson

Michael A.F. Johnson (D.C. Bar # 460879)

Howard N. Cayne (D.C. Bar # 331306)

Asim Varma (D.C. Bar # 426364)

David B. Bergman (D.C. Bar # 435392)

ARNOLD & PORTER LLP

601 Massachusetts Ave., NW

Washington, DC 20001

Telephone: (202) 942-5000

Facsimile: (202) 942-5999

Michael.Johnson@aporter.com

Howard.Cayne@aporter.com

Asim.Varma@aporter.com

David.Bergman@aporter.com

*Attorneys for the Federal Housing Finance Agency,*

*Conservator for Freddie Mac and Fannie Mae*

# Exhibit 1

# Exhibit 1

**Jun 09, 2009**

**FILED  
CLERK'S OFFICE**

**UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION**

**IN RE: FOSAMAX PRODUCTS LIABILITY LITIGATION**

In re Fosamax Products Liability Litigation, )  
W.D. Washington, C.A. No. 2:09-10 )

MDL No. 1789

**TRANSFER ORDER**

**Before the entire Panel\***: An individual subpoenaed by the Plaintiffs' Steering Committee in MDL No. 1789 moves pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), asking the Panel to vacate its order conditionally transferring this action to the Southern District of New York for inclusion in MDL No. 1789. The Plaintiffs' Steering Committee in MDL No. 1789 opposes the motion to vacate.

After considering all argument of counsel, we find that this action involves common questions of fact with the actions in this litigation previously transferred to the Southern District of New York, and that transfer of this action to the Southern District of New York for inclusion in MDL No. 1789 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. We further find that transfer of this action is appropriate for reasons that we set out in our original order directing centralization in this docket. In that order, we held that the Southern District of New York was a proper Section 1407 forum for actions involving allegations that ingestion of the prescription drug Fosamax caused adverse effects, in particular, osteonecrosis of the jaw. *See In re Fosamax Products Liability Litigation*, 444 F.Supp.2d 1347 (J.P.M.L. 2006).

This action, arising from a motion to quash a subpoena, stands out from other civil actions for which the Panel usually considers transfer; however, transfer is still appropriate. The deposition at issue in the motion to quash involves factual questions common to the actions in MDL No. 1789, and the expertise and familiarity of the transferee judge with the factual and legal issues in the Fosamax litigation favor having him decide the motion to quash. Accordingly, transfer will promote the just and efficient conduct of this action and the litigation taken as a whole, and thus is consistent with the purposes of Section 1407.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, this action is transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable John

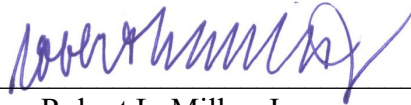
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\* Judges Heyburn, Motz and Hansen took no part in the decision of this matter.

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F. Keenan for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

PANEL ON MULTIDISTRICT LITIGATION



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Robert L. Miller, Jr.  
Acting Chairman

John G. Heyburn II, Chairman\*  
Kathryn H. Vratil  
W. Royal Furgeson, Jr.

J. Frederick Motz\*  
David R. Hansen\*  
Frank C. Damrell, Jr.

**BEFORE THE UNITED STATES  
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

IN RE: FEDERAL HOUSING FINANCE  
AGENCY, *ET AL.*, PREFERRED STOCK  
PURCHASE AGREEMENTS THIRD  
AMENDMENT LITIGATION

MDL Docket No. 2713

**PROOF OF SERVICE**

I hereby certify that on April 14, 2016, I electronically filed the foregoing **FEDERAL HOUSING FINANCE AGENCY'S SUPPLEMENTAL INFORMATION CONCERNING THE RESPONSE OF INTERESTED PARTY TIMOTHY J. PAGLIARA** through this Panel's CM/ECF system. Notice of this filing will be served on all parties of record by operation of the ECF System.

/S/ Douglas M. Humphrey  
Douglas M. Humphrey

Clerk of the Court, District of Delaware  
Wilmington, DE

Clerk of the Court, Northern District of Illinois  
Chicago, IL

Clerk of the Court, Northern District of Iowa  
Cedar Rapids, IA

Clerk of the Court, Eastern District of Kentucky  
Pikeville, KY

Clerk of the Court, Southern District of Florida  
Miami, FL

Clerk of the Court, Eastern District of Virginia  
Alexandria, VA

<b>Jacobs v. Federal National Mortgage Association</b> <b>D. Delaware, No. 1:15-cv-00708</b>	
<p>Myron T. Steele                      Christopher Nicholas Kelly                      Michael A. Pittenger                      Potter Anderson &amp; Corroon, LLP                      Hercules Plaza                      1313 N. Market St., 6th Fl.                      P.O. Box 951                      Wilmington, DE 19899-0951                      (302) 964-6030  <a href="mailto:msteele@potteranderson.com">msteele@potteranderson.com</a>  <a href="mailto:ckelly@potteranderson.com">ckelly@potteranderson.com</a>  <a href="mailto:mpittenger@potteranderson.com">mpittenger@potteranderson.com</a>  <i>Attorneys for Plaintiffs David Jacobs; Gary Hindes</i></p>	<p>Michael Joseph Ciatti                      Graciela Maria Rodriguez                      King &amp; Spalding LLP                      1700 Pennsylvania Ave. NW, Suite 200                      Washington, DC 20006                      (202) 626-5508  <a href="mailto:mciatti@kslaw.com">mciatti@kslaw.com</a>  <a href="mailto:gmrodriguez@kslaw.com">gmrodriguez@kslaw.com</a>  <i>Attorneys for Defendant Federal Home Loan Mortgage Corporation</i></p>
<p>Robert J. Stearn, Jr.                      Robert C. Maddox                      Richards, Layton &amp; Finger, P.A.                      920 North King Street                      Wilmington, DE 19801                      (302) 651-7700  <a href="mailto:stearn@rlf.com">stearn@rlf.com</a>  <a href="mailto:maddox@rlf.com">maddox@rlf.com</a>  <i>Attorneys for Defendants Federal Housing Finance Agency, Federal National Mortgage Association, and Federal Home Loan Mortgage Corporation</i></p>	<p>Paul D. Clement                      D. Zachary Hudson                      Bancroft PLLC                      500 New Jersey Ave. NW, 7th Floor                      Washington, DC 20001                      (202) 640-6528  <a href="mailto:pclement@bancroftpllc.com">pclement@bancroftpllc.com</a>  <a href="mailto:zhudson@bancroftpllc.com">zhudson@bancroftpllc.com</a>  <i>Attorneys for Defendant Federal National Mortgage Association</i></p>
<p>Deepthy Kishore                      Thomas D. Zimpleman                      U.S. Department of Justice                      Civil Division, Federal Programs Branch                      20 Massachusetts Avenue NW                      Washington, DC 20530                      (202) 514-8095  <a href="mailto:deepthy.c.kishore@usdoj.gov">deepthy.c.kishore@usdoj.gov</a>  <a href="mailto:thomas.d.zimpleman@usdoj.gov">thomas.d.zimpleman@usdoj.gov</a>  <i>Attorneys for Defendant U.S. Dept. of the Treasury</i></p>	<p>David Evan Ross                      Ross Aronstam &amp; Moritz LLP                      100 S. West Street, Suite 400                      Wilmington, DE 19801                      (302) 576-1600                      Fax: (302) 576-1100  <a href="mailto:dross@ramllp.com">dross@ramllp.com</a>  <i>Attorneys for Movant Timothy Howard</i></p>
<b>Roberts v. Federal Housing Finance Agency</b> <b>N.D. Illinois, No. 1:16-CV-02107</b>	

<p>Christian D. Ambler                  Stone &amp; Johnson, Chartered                  111 West Washington St., #1800                  Chicago, IL 60602                  (312) 332-5656  <a href="mailto:cambler@stonejohnsonlaw.com">cambler@stonejohnsonlaw.com</a>  <i>Attorneys for Plaintiffs Christopher Roberts;                  Thomas P. Fischer</i></p>	<p>AUSA - Chicago                  United States Attorney's Office                  219 South Dearborn Street                  Chicago, IL 60604  <a href="mailto:USAILN.ECFAUSA@usdoj.gov">USAILN.ECFAUSA@usdoj.gov</a>  <i>Attorneys for U.S. Department of the Treasury;                  Jacob J. Lew</i></p>
<p>Kristen E. Hudson                  Chuhak &amp; Tecson, P.C.                  30 South Wacker Drive                  Suite 2600                  Chicago, IL 60606                  (312) 855-4315  <a href="mailto:khudson@chuhak.com">khudson@chuhak.com</a>  <i>Attorney for Defendant Federal Housing                  Finance Agency</i></p>	
<p><b><i>Saxton v. Federal Housing Finance Agency</i></b>  <b>N.D. Iowa, No. 1:15-cv-00047</b></p>	
<p>Alexander Michael Johnson                  Sean Patrick Moore                  Brown, Winick, Graves, Gross, Baskerville                  and Schoenebaum                  666 Grand Avenue, Suite 2000                  Des Moines, IA 50309-2510                  (515) 242-2400                  Fax: (515) 283-0231  <a href="mailto:ajohnson@brownwinick.com">ajohnson@brownwinick.com</a>  <a href="mailto:moore@brownwinick.com">moore@brownwinick.com</a>  <i>Attorneys for Plaintiffs Thomas Saxton; Ida                  Saxton; Bradley Paynter</i></p>	<p>Matthew C. McDermott                  Stephen H. Locher                  Belin McCormick, P.C.                  666 Walnut Street, Suite 2000                  Des Moines, IA 50309-3989                  (515) 283-4643                  Fax: (515) 558-0643  <a href="mailto:mmcdermott@belinmccormick.com">mmcdermott@belinmccormick.com</a>  <a href="mailto:shlocher@belinmccormick.com">shlocher@belinmccormick.com</a>  <i>Attorneys for Federal Housing Finance                  Agency; Melvin L. Watt</i></p>

<p>Deepthy Kishore          Thomas D. Zimpleman          U.S. Department of Justice          Civil Division, Federal Programs Branch          20 Massachusetts Ave. NW          Washington, DC 20530          (202) 514-8095  <a href="mailto:deepthy.c.kishore@usdoj.gov">deepthy.c.kishore@usdoj.gov</a>  <a href="mailto:thomas.d.zimpleman@usdoj.gov">thomas.d.zimpleman@usdoj.gov</a>  <i>Attorneys for Defendant U.S. Dept. of the Treasury</i></p>	<p>Kendra Lou Mills Arnold          Matthew G. Whitaker          Whitaker, Hagenow &amp; Gustoff LLP          400 East Court Avenue, Suite 346          Des Moines, IA 50309          (515) 868-0215          Fax: (515) 864-0963  <a href="mailto:karnold@whgllp.com">karnold@whgllp.com</a>  <a href="mailto:mwhitaker@whgllp.com">mwhitaker@whgllp.com</a></p> <p>Matt M. Dummermuth          Whitaker, Hagenow &amp; Gustoff          305 - 2nd Avenue, SE, Suite 202          Cedar Rapids, IA 52401          (319) 849-8390          Fax: (515) 864-0963  <a href="mailto:mdummermuth@whgllp.com">mdummermuth@whgllp.com</a>  <i>Attorneys for Amicus Fairholme Funds, Inc.</i></p>
<p>Charles Justin Cooper          Brian Wesley Barnes          David Henry Thompson          Peter Andrew Patterson          Cooper &amp; Kirk, PLLC          1523 New Hampshire Ave. NW          Washington, DC 20036          (202) 220-9600          Fax: (202) 220-9601  <a href="mailto:ccooper@cooperkirk.com">ccooper@cooperkirk.com</a>  <a href="mailto:bbarnes@cooperkirk.com">bbarnes@cooperkirk.com</a>  <a href="mailto:dthompson@cooperkirk.com">dthompson@cooperkirk.com</a>  <a href="mailto:ppatterson@cooperkirk.com">ppatterson@cooperkirk.com</a>  <i>Attorneys for Amicus Fairholme Funds, Inc.</i></p>	<p>Ryan Gene Koopmans          Ryan Wade Leemkuil          Nyemaster, Goode, West, Hansell &amp; O'Brien          700 Walnut Street, Suite 1600          Des Moines, IA 50309          (515) 283-3173          Fax: (515) 283-3108  <a href="mailto:rkoopmans@nyemaster.com">rkoopmans@nyemaster.com</a>  <a href="mailto:rleemkuil@nyemaster.com">rleemkuil@nyemaster.com</a></p> <p>Michael H. Krimminger          Cleary Gottlieb Steen &amp; Hamilton, LLP          2000 Pennsylvania Avenue, NW          Washington, DC 20006          (202) 974-1720          Fax: (202) 974-1999  <a href="mailto:mkrimminger@cgsh.com">mkrimminger@cgsh.com</a>  <i>Attorneys for Amicus Investors Unite</i></p>
<p><b><i>Robinson v. Federal Housing Finance Agency</i></b>  <b>E.D. Kentucky, No. 7:15-cv-00109</b></p>	



<p>Robert B. Craig  Taft Stettinius &amp; Hollister LLP  1717 Dixie Highway  Suite 910  Covington, KY 41011-4704  (859) 547-4300  Fax: (513) 381-6613  <a href="mailto:craig@taftlaw.com">craig@taftlaw.com</a>  <i>Attorneys for Plaintiff Arnetia Joyce Robinson</i></p>	<p>T. Scott White  Morgan &amp; Pottinger, P.S.C  133 W. Short Street  Lexington, KY 40507-1395  (859) 226-5288  Fax: (859) 255-2038  <a href="mailto:tsw@morganandpottinger.com">tsw@morganandpottinger.com</a>  <i>Attorneys for Federal Housing Finance Agency; Melvin L. Watt</i></p>
<p>Deepthy Kishore  Thomas D. Zimpleman  U.S. Department of Justice  Civil Division, Federal Programs Branch  20 Massachusetts Avenue NW  Washington, DC 20530  (202) 514-8095  <a href="mailto:deepthy.c.kishore@usdoj.gov">deepthy.c.kishore@usdoj.gov</a>  <a href="mailto:thomas.d.zimpleman@usdoj.gov">thomas.d.zimpleman@usdoj.gov</a>  <i>Attorneys for Defendant U.S. Dept. of the Treasury</i></p>	
<p><b><i>Pagliari v. Federal Home Loan Mortgage Corporation</i></b>  <b>E.D. Virginia, No. 1:16-cv-00337</b></p>	
<p>Nathaniel Thomas Connally, III  Hogan Lovells US LLP  Park Place II  7930 Jones Branch Dr., 9th Floor  McLean, VA 22102-3302  (703) 610-6100  Fax: 703-610-6200  <a href="mailto:tom.connally@hoganlovells.com">tom.connally@hoganlovells.com</a>  <i>Attorneys for Plaintiff Timothy J. Pagliara</i></p>	<p>Taylor Thomas Lankford  King &amp; Spalding  1700 Pennsylvania Ave. NW, Suite 200  Washington, DC 20006-4706  (202) 626-5514  Fax: 202-626-3737  <a href="mailto:tlankford@kslaw.com">tlankford@kslaw.com</a>  <i>Attorneys for Federal Home Loan Mortgage Corporation</i></p>
<p><b><i>Pagliari v. Federal National Mortgage Association</i></b>  <b>D. Delaware, No. 1:16-cv-00193</b></p>	

<p>C. Barr Flinn          Young, Conaway, Stargatt &amp; Taylor LLP          Rodney Square          1000 N. King Street          Wilmington, DE 19801-0391          (302) 571-6600  <a href="mailto:bflinn@ycst.com">bflinn@ycst.com</a>  <i>Attorneys for Plaintiff Timothy J. Pagliara</i></p>	<p>S. Mark Hurd          Zi-Xiang Shen          Morris, Nichols, Arsht &amp; Tunnell LLP          1201 N. Market Street          P.O. Box 1347          Wilmington, DE 19899          (302) 658-9200  <a href="mailto:SHurd@mnat.com">SHurd@mnat.com</a>  <a href="mailto:zshen@mnat.com">zshen@mnat.com</a>  <i>Attorneys for Federal National Mortgage Association</i></p> <p>OF COUNSEL:          Mike Walsh          O'Melveny &amp; Myers LLP          1625 Eye Street, N.W.          Washington, D.C. 20006-4001          (202) 383.5280  <a href="mailto:mwalsh@omm.com">mwalsh@omm.com</a></p>
<p>Robert J. Stearn, Jr. (DE Bar No. 2915)          Robert C. Maddox (DE Bar No. 5356)          Richards, Layton &amp; Finger, P.A.          920 North King Street          Wilmington, DE 19801          (302) 651-7700  <a href="mailto:stearn@rlf.com">stearn@rlf.com</a>  <a href="mailto:maddox@rlf.com">maddox@rlf.com</a>  <i>Attorneys for Federal Housing Finance Agency</i></p>	
<p><b><i>Edwards v. Deloitte &amp; Touche, LLP</i></b>  <b>S.D. Florida, No. 1:16-cv-21221</b></p>	
<p>Hector J. Lombana          Gamba &amp; Lombana          2701 Ponce De Leon Blvd., Mezzanine          Coral Gables, FL 33134          (305) 448-4010  <a href="mailto:hjl@gambalombana.com">hjl@gambalombana.com</a></p> <p>Steven William Thomas          Thomas, Alexander , Forrester LLP          14 27th Avenue          Venice, CA 90291          (310) 961-2536  <a href="mailto:steventhomas@tafattorneys.com">steventhomas@tafattorneys.com</a></p>	<p>Matthew Weinshall          Peter Prieto          Podhurst Orseck          25 West Flagler St., Suite 800          Miami, FL 33130          (305) 358-2800  <a href="mailto:mweinshall@podhurst.com">mweinshall@podhurst.com</a>  <a href="mailto:pprieto@podhurst.com">pprieto@podhurst.com</a>  <i>Attorneys for Defendant Deloitte &amp; Touche LLP</i></p>

<i>Attorneys for Plaintiffs</i>	
<b><i>Edwards v. PricewaterhouseCoopers, LLP</i></b> <b>S.D. Florida, No. 1:16-cv-21224</b>	
<p>Gonzalo Ramon Dorta Dorta Law 334 Minorca Avenue Coral Gables, FL 33134 (305) 441-2299 <a href="mailto:grd@dortalaw.com">grd@dortalaw.com</a></p> <p>Hector J. Lombana Gamba &amp; Lombana 2701 Ponce De Leon Blvd., Mezzanine Coral Gables, FL 33134 (305) 448-4010 <a href="mailto:hjl@gambalombana.com">hjl@gambalombana.com</a></p> <p>Steven William Thomas Thomas, Alexander , Forrester LLP 14 27th Avenue Venice, CA 90291 (310) 961-2536 <a href="mailto:steventhomas@tafattorneys.com">steventhomas@tafattorneys.com</a></p> <p><i>Attorneys for Plaintiffs</i></p>	<p>Valerie Shea Sedgwick LLP 2 South Biscayne Blvd., Suite 1500 Miami, FL 33131 (305) 671-2184 <a href="mailto:Valerie.Shea@sedgwicklaw.com">Valerie.Shea@sedgwicklaw.com</a></p> <p>Ramon A. Abadin Abadin Jaramillo Cook et al 9155 S. Dadeland Blvd., Suite 1208 Miami, FL 33156 (305) 671-2124 <a href="mailto:ramon.abadin@sedgwicklaw.com">ramon.abadin@sedgwicklaw.com</a></p> <p><i>Attorneys for Defendant</i> <i>PricewaterhouseCoopers, LLP</i></p>