

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE**

ARNETIA JOYCE ROBINSON,

Plaintiff,

vs.

THE FEDERAL HOUSING FINANCE
AGENCY, et al.,

Defendants.

Civil Action No. 7:15-cv-109-KKC-EBA

Chief Judge Karen K. Caldwell

**PLAINTIFF’S 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 of New Authority in Support of Motion to Dismiss by FHFA at 1 (Aug. 30, 2016), Doc. 61. 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 Plaintiff does 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 Plaintiff's 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* Plaintiff's Consolidated Response in Opposition to Defendants' Motions to Dismiss at 60–64 (Feb. 12, 2016), Doc. 32 ("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 73–77, Plaintiff's claims are direct as a matter of both federal and state law, *id.* at 64–73.

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.

Respectfully submitted,

s/ Robert B. Craig

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 1st day of September, 2016, via the Court's Electronic Case Filing system.

s/ Robert B. Craig