

**IN THE 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

---

**PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE  
OF NEW AUTHORITY OF JANUARY 24, 2017**

The plaintiffs in *Edwards v. Deloitte & Touche, LLP*, No. 16-21221 (S.D. Fla.), did not bring APA claims, and the court in that case had no occasion to decide whether HERA's succession provision permits such claims only if FHFA agrees to sue itself. Because the APA gives a direct claim to anyone who is "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, Plaintiffs' APA claims are direct as a matter of federal law, *see* Plaintiffs' Response to Defendants' Motions to Dismiss at 68–69 (June 30, 2016), Doc. 86 ("MTD Response").

Furthermore, *Edwards* is distinguishable even if the Court ultimately looks to Delaware law to decide whether Plaintiffs may pursue their APA claims. The *Edwards* plaintiffs sought damages from the Companies' auditors, not an injunction against an action by the Companies' management that effectively eliminated private shareholders from the capital structure by

donating their investments to Treasury. With Plaintiffs' entire investment having been expropriated by the federal government and the Companies operating under conservatorship, Delaware law's distinction between direct and derivative claims does not turn on whether the Net Worth Sweep involved "a dilution of voting power." Order Denying Motion to Remand and Granting Motion to Substitute at 10, *Edwards v. Deloitte & Touche, LLP*, No. 16-21221 (Jan. 18, 2017), ECF No. 50.

Finally, the *Edwards* court's analysis adds nothing to the parties' prior briefing on whether HERA's succession provision bars derivative claims when FHFA has a manifest conflict of interest. *See* MTD Response at 75–79. The only two Courts of Appeals to consider this issue have allowed such claims to go forward. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001). And contrary to the *Edwards* court's suggestion, the fact that these rulings concerned FIRREA—and that Congress subsequently reenacted materially identical language in HERA—only further strengthens the conclusion that these appellate decisions are correct.

Dated: January 31, 2017

Respectfully submitted,

/s/ Alexander M. Johnson

Alexander M. Johnson, AT0004024 (*Lead Counsel*)

Sean P. Moore, AT0005499

BROWN, WINICK, GRAVES, GROSS,

BASKERVILLE AND SCHOENEBAUM, P.L.C.

666 Grand Avenue, Suite 2000

Des Moines, IA 50309-2510

Telephone: 515-242-2400

Facsimile: 515-283-0231

E-mail: [ajohnson@brownwinick.com](mailto:ajohnson@brownwinick.com)

[moore@brownwinick.com](mailto:moore@brownwinick.com)

ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January 2017, 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