Exhibit B

BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re:	)	
	)	MDL No. ____
Third Amendment Litigation	)	

MEMORANDUM OF LAW IN SUPPORT OF FEDERAL HOUSING FINANCE AGENCY'S MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

The Federal Housing Finance Agency ("FHFA" or the "Conservator"), as Conservator of Fannie Mae and Freddie Mac (the "Enterprises"), respectfully requests that the Judicial Panel on Multidistrict Litigation (the "Panel") transfer four Enterprise-shareholder actions pending in four district courts (the "Related Cases") to the U.S. District Court for the District of Columbia for coordinated pretrial proceedings. Each case—and more that FHFA expects may soon be filed—involves plaintiffs with the *same* interests asserting the *same* claims arising out of the *same* transaction against the *same* defendants.

As with eleven other actions filed in the District of Columbia and the Southern District of Iowa, which have already been dismissed on motions by FHFA and the U.S. Department of the Treasury ("Treasury"), the cases proposed for transfer concern the Conservator's agreement to amend the Preferred Stock Purchase Agreements ("PSPAs") by which Treasury committed hundreds of billions of dollars to support the Enterprises' solvency. Plaintiffs allege that in agreeing to provide Treasury a variable dividend measured by the Enterprises' quarterly earnings, the Conservator and Treasury acted illegally. The claims and relief sought in each of the four Related Cases are substantially similar; indeed, the Complaints are virtually identical. As a practical matter, plaintiffs are relitigating the same legal issues over and over in hopes of

finding a court that will rule in their favor. Transfer would benefit the parties, the courts, and the efficient administration of justice.

BACKGROUND

A. FHFA, Fannie Mae, Freddie Mac, and the Conservatorships

Congress chartered Fannie Mae and Freddie Mac to establish secondary market facilities for residential mortgages, provide stability in the secondary market for residential mortgages, and promote access to mortgage credit. 12 U.S.C. § 1716 (Fannie Mae); *id.* § 1451 note (Freddie Mac). In July 2008, Congress passed the Housing Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified as 12 U.S.C. § 4511 *et seq.*), and created FHFA as the sole regulator for Fannie Mae and Freddie Mac.

The Enterprises suffered massive losses and were at grave risk of insolvency as a result of the collapse of the housing market in 2008. On September 6, 2008, FHFA's Director appointed FHFA as the Enterprises' Conservator, "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). Upon appointment, the Conservator "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises]." *Id.* § 4617(b)(2)(A). Congress vested the Conservator with broad powers to "operate" the Enterprises, "carry on the business" of the Enterprises, enter into contracts on behalf of the Enterprises, "transfer or sell any [Enterprise] asset . . . without any approval," take actions to put the Enterprises in a "sound and solvent condition," and "preserve and conserve" their assets. *Id.* § 4617(b)(2).

Pursuant to those powers, and on behalf of the Enterprises, the Conservator entered into the PSPAs with Treasury pursuant to which, after subsequent amendments, Treasury committed to infuse nearly half a trillion dollars into the Enterprises when and as necessary to eliminate any net worth deficit. In exchange for that ongoing commitment, the PSPAs granted Treasury a

package of rights, including, *inter alia*, (i) an annual dividend equal to 10% of the amount of each Enterprise's respective draws from the commitment, and (ii) a periodic commitment fee ("PCF") intended to fully compensate the taxpayers for Treasury's commitment of ongoing support.

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs (the "Third Amendment"), replacing the fixed 10% dividend with a variable rate dividend equal to the Enterprises' quarterly earnings, if any, and suspending the PCF while the variable dividend was in effect. To date, Treasury has made 24 infusions into the Enterprises totaling more than $187 billion. *See* FHFA, *Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities Data as of November 6, 2015*, at 2 (2015), http://goo.gl/D54JHs. Today, $258 billion of the Treasury commitment remains available to support the Enterprises and ensure they continue to fulfill their important statutory missions.

B. The Related Cases

Enterprise shareholders have now filed 15 nearly identical complaints challenging the Third Amendment in the U.S. District Courts for the District of Columbia, the Southern District of Iowa, the Northern District of Iowa, the District of Delaware, the Northern District of Illinois, and the Eastern District of Kentucky.[1] Ten of those actions were decided in *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), and are currently on appeal to the U.S. Court of

[1] Two actions filed by Enterprise shareholders against the Enterprises' auditors are currently pending in Florida state court. *Master Sgt. Edwards v. Deloitte & Touche, LLP*, No. 2016-004986-CA-01 (Fla. Cir. Ct. Feb. 29, 2016); *Master Sgt. Edwards v. PricewaterhouseCoopers, LLP*, No. 2016-005875-CA-01 (Fla. Cir. Ct. Mar. 9, 2016). The Conservator is monitoring both cases, which raise many of the same questions of fact and law regarding the conservatorships as the 15 cases filed in U.S. district courts.

Appeals for the District of Columbia Circuit.[2] An eleventh action brought by another shareholder was dismissed on issue preclusion grounds in an opinion that was not appealed.[3]

The four currently pending Related Cases are:

- *Saxton v. FHFA*, No. 1:15-cv-00047, was filed on May 28, 2015 in the U.S. District Court for the Northern District of Iowa and is pending before Chief Judge Linda R. Reade. The *Saxton* plaintiffs filed an Amended Complaint under seal on February 9, 2016. (Docket Sheet attached hereto; Amended Complaint filed under seal.)

- *Jacobs v. FHFA*, No. 1:15-cv-00708, was filed on August 17, 2015 in the U.S. District Court for the District of Delaware and is pending before Judge Gregory M. Sleet. (Docket Sheet and Complaint attached hereto.)

- *Robinson v. FHFA*, No. 7:15-cv-00109, was filed on October 23, 2015 in the U.S. District Court for the Eastern District of Kentucky and is pending before Judge Amul R. Thapar. The *Robinson* plaintiff filed an Amended Complaint under seal on December 29, 2015. (Docket Sheet attached hereto; Amended Complaint filed under seal.)

- *Roberts v. FHFA*, No. 1:16-CV-02107, was filed on February 10, 2016 in the U.S. District Court for the Northern District of Illinois and is pending before Judge Edmond E. Chang. (Docket Sheet and Complaint attached hereto.)

The eleven earlier-filed actions and the four Related Cases all assert materially identical claims against FHFA and Treasury that arise out of the same conduct: the Conservator's and

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[2] Those cases are: *Perry Capital LLC*, 70 F. Supp. 3d 208 (filed July 7, 2013 in D.C.); *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-01053 (filed July 10, 2013 in D.C.); *Arrowood Indemnity Co. v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-01439 (filed September 20, 2013 in D.C.); *Liao v. Lew*, No. 13-cv-01094 (filed July 16, 2013 in D.C.); *Cacciapelle v. Fed. Nat'l Mortg. Ass'n*, No.13-cv-01149 (filed July 29, 2013 in D.C.); *Am.-European Ins. Co. v. Fed. Nat'l Mortg. Ass'n*, No.13-cv-01169 (filed July 30, 2013 in D.C.); *Cane v. FHFA*, No. 13-cv-01184 (filed August 1, 2013 in D.C.); *Dennis v. United States*, No. 13-cv-01208 (filed August 5, 2013 in D.C.); *Marneu Holdings, Co. v. FHFA*, No. 13-cv-01421 (filed September 18, 2013 in D.C.); *Borodkin v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-01443 (filed September 20, 2013 in D.C.). On November 18, 2013, the *Liao*, *Cacciapelle*, *Am.-European Ins. Co.*, *Cane*, *Dennis*, *Marneu Holdings*, and *Borodkin* actions were consolidated as *In re Senior Preferred Stock Purchase*, No. 13-mc-1288, in the District of Columbia.

[3] *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015) (filed February 5, 2014).

Treasury's August 17, 2012 entry into the Third Amendment. The four Related Cases together assert 21 materially identical or substantially similar causes of action. Three of the four Related Cases bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, alleging that FHFA exceeded its statutory authority as the Enterprises' Conservator, Treasury exceeded its temporary authority to purchase Enterprise securities, and Treasury's actions were arbitrary and capricious. *See Saxton* Am. Compl. ¶¶ 134-62 (Counts I, II & II); *Robinson* Am. Compl. ¶¶ 136-64 (Counts I, II & III); *Roberts* Compl. ¶¶ 125-57 (Counts I, II & III). Indeed, plaintiffs not only bring identical claims, but use materially identical language when asserting them. *Compare Saxton* Am. Compl. ¶¶ 136-39, 143 *with Robinson* Am. Compl. ¶¶ 138-41, 143 *and Roberts* Compl. ¶¶ 127-30, 136. *Saxton* and *Jacobs* rely on the same factual allegations regarding the Third Amendment to bring substantially similar state law claims for breach of contract and breach of the implied duty of good faith and fair dealing, and likewise use largely similar language when stating their claims for relief. *Saxton* Am. Compl. ¶¶ 163-81 (Counts IV & V); *Jacobs* Compl. ¶¶ 107-52 (Counts III, IV, V & IV).

All four Related Cases seek substantially identical declaratory and injunctive relief to void the Third Amendment. The plaintiffs in *Saxton*, *Robinson*, and *Roberts* pray for orders "[d]eclaring that the Net Worth Sweep, and its adoption, are not in accordance with HERA within the meaning of [the APA], and that Treasury acted arbitrarily and capriciously within the meaning of [the APA] by executing the Net Worth Sweep," while the *Jacobs* plaintiffs, who assert state-law claims, pray for an equivalent order "[d]eclaring the Net Worth Sweep is void and unenforceable." *Saxton* Am. Compl. Prayer for Relief (a); *see also Robinson* Am. Compl. Prayer for Relief (a) (same); *Roberts* Compl. Prayer for Relief (a) (same); *Jacobs* Compl. Prayer for Relief (D). Plaintiffs in all four Related Cases also ask for rescission and restitution of the

monies the Enterprises paid to Treasury under the Third Amendment, and three of the four plaintiffs ask the court to enjoin FHFA and Treasury officials from taking any further action under it. *Saxton* Am. Compl. Prayer for Relief (b)-(e); *Jacobs* Compl. Prayer for Relief (C); *Robinson* Am. Compl. Prayer for Relief (b)-(e); *Roberts* Compl. Prayer for Relief (b)-(e).

C. FHFA Anticipates Additional, Materially Identical Actions from Enterprise Shareholders

It is all but certain that the number of pending complaints challenging the Third Amendment will continue to grow. The boards of directors for Fannie Mae and Freddie Mac have received seven demand letters from three Enterprise shareholders presaging litigation. (Attached hereto as exhibits 1 through 7.) Each of these letters asserts that the Enterprises' directors have breached purported duties to the Enterprises and the Enterprises' shareholders by performing under the Third Amendment, and concludes that shareholders are entitled to file suit to seek equitable and legal relief absent action by the boards. Thus, although this motion pertains directly to only the four pending Related Cases, it is likely that there will soon be additional cases that should also be transferred for coordinated or consolidated pretrial proceedings. Indeed, one of the shareholders who sent letters to Fannie Mae and Freddie Mac has now filed suit against Fannie Mae in Delaware Chancery Court and against Freddie Mac in Virginia state court.[4]

ARGUMENT

The Panel may transfer cases for coordinated or consolidated pretrial proceedings if (i) the cases "involv[e] one or more common questions of fact," (ii) transfer would further "the

[4] *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 12105-VCMR (Del. Ch. Mar. 14, 2016); *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. CL 2016-03860 (Va. Cir. Ct. Mar. 14, 2016). The Conservator is monitoring those cases, which raise the same factual and legal issues, and purport to investigate the Third Amendment and the conservatorships.

convenience of parties and witnesses," and (iii) transfer will "promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a). All three criteria are easily satisfied here.

A. The Related Cases Involve Common Questions of Fact

Common questions of fact are presumed "when two or more complaints assert comparable allegations against identical defendants based upon similar transactions and events." *In re Air W., Inc. Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974). Transfer is appropriate where "all actions can be expected to focus on a significant number of common events, defendants, and/or witnesses." *In re Fed. Nat'l Mortg. Ass'n Sec. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005).

Here, the operative factual allegations in each of the Related Cases are materially identical. *See Saxton* Am. Compl. ¶¶ 1, 14-25; *Jacobs* Compl. ¶¶ 1, 15-21; *Robinson* Am. Compl. ¶¶ 1, 14-26; *Roberts* Compl. ¶¶ 1, 15-21. Specifically, plaintiffs allege that FHFA and Treasury agreed to the variable dividend provision of the Third Amendment for supposedly improper purposes. *See Saxton* Am. Compl. ¶¶ 14-25; *Jacobs* Compl. ¶¶ 15-21; *Robinson* Am. Compl. ¶¶ 14-26; *Roberts* Compl. ¶¶ 15-21. FHFA has asserted dispositive jurisdictional defenses and will also contest plaintiffs' allegations should litigation progress, but the allegations nevertheless confirm that the Related Cases share common questions of fact, satisfying Section 1407(a)'s threshold requirement.

B. Transfer for Coordination or Consolidation Will Serve the Convenience of the Parties and Witnesses, and Promote the Efficient Conduct of the Actions

Transfer for coordination or consolidation of the Related Cases will be convenient for the parties and witnesses because it will avoid duplicative pretrial activities. All Related Cases involve identically situated shareholder plaintiffs making the same factual allegations, asserting the same claims, and seeking the same relief. The Related Cases thus give rise to materially

identical, dispositive legal questions, and FHFA and Treasury have filed or intend to file motions to dismiss in each case, arguing, *inter alia*, that (i) 12 U.S.C. § 4617(f) bars jurisdiction,[5] and (ii) the Conservator's succession to "all rights, titles, powers, and privileges" of all Enterprise shareholders precludes plaintiffs' claims, *see* 12 U.S.C. § 4617(b)(2)(A)(i).

Transfer is appropriate where numerous cases share common jurisdictional issues. *See In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (noting "real economies in transferring" for consideration of common jurisdictional issues and holding "MDL Panel has jurisdiction to transfer a case in which a jurisdictional objection is pending"). Here, "[t]ransfer . . . will permit a single judge to consider [defendants' motions to dismiss] and thus will have the salutary effect of promoting judicial economy and avoiding inconsistent adjudications" regarding the courts' jurisdiction and the scope of the Conservator's succession. *In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 824 (J.P.M.L. 1979); *see also In re Cooper Tire & Rubber Co. Tires Prods. Liability Litig.*, No. 1393, 2001 WL 253115, at *1 (J.P.M.L. Feb. 23, 2001) (transferring cases because "[m]otion practice . . . will overlap substantially in each action"). Transfer to consolidate and coordinate overlapping motion practice is particularly important in the circumstances presented here. To resolve the threshold issues in the Related Cases, the courts must construe HERA and the Enterprises' federal statutory charters, which together constitute a complex, comprehensive statutory scheme. *See In re Dep't of Energy Stripper Well Exemption Litig.*, 472 F. Supp. 1282 (J.P.M.L. 1979) (transferring APA cases where "[a]ll actions . . . share[d] questions of fact *and law arising under a complicated series of statutes and regulations*" (emphasis added)).

[5] In that provision, Congress mandated that "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." 12 U.S.C. § 4617(f).

The Related Cases can be resolved on motions to dismiss without discovery; indeed, materially identical actions have been dismissed on legal grounds. *See Perry Capital*, 70 F. Supp. 3d at 246 (granting FHFA's and Treasury's motions to dismiss); *see also Cont'l W. Ins. Co.*, 83 F. Supp. 3d at 840 & n.6 (dismissing on issue preclusion grounds). However, should the Related Cases survive motions to dismiss, additional common questions—including questions concerning the filing, contents, and adequacy of an administrative record—will surely arise.[6] Transfer is warranted here to coordinate the determination of those issues and "avoid potentially conflicting obligations placed upon" the Conservator with respect to the administrative record and any other potential discovery. *See In re: Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) ("[Transfer] will eliminate duplicative discovery and prevent inconsistent pretrial rulings, *particularly those with respect to the identification of the underlying administrative record.*" (emphasis added)).

Absent transfer, different courts could issue conflicting rulings on the same, dispositive legal questions and the administrative record, encouraging forum shopping among future plaintiffs. *See Pan Am. World Airways, Inc. v. C.A.B.*, 517 F.2d 734, 741 (2d Cir. 1975) ("'[F]orum shopping' should be discouraged."). Transfer here "provides the opportunity for the uniformity, consistency, and predictability in litigation that underlies the multidistrict litigation system," allowing FHFA and Treasury to assert the same jurisdictional defenses in the same district court and the same circuit court of appeals, if necessary. *See Scott v. Bayer Corp.*, No. Civ. A. 03-2888, 2004 WL 63978, at *1 (E.D. La. Jan. 12, 2004). With actions already pending in four districts in four different circuits, the circumstances suggest that the various

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6 For example, while FHFA as Conservator is under no obligation to maintain or produce an administrative record for the innumerable decisions it makes when operating the Enterprises, FHFA anticipates plaintiffs will nevertheless demand that one be produced.

shareholder plaintiffs and their counsel are distributing the litigation in an effort to evade potentially binding precedent that would foreclose their ability to challenge the Third Amendment.[7] The letters received by the boards of directors of Fannie Mae and Freddie Mac, which threaten still more Third Amendment litigation, underscore the risk of further forum shopping and demonstrate that innumerable shareholder complaints could yet be filed in every district court in the nation. *See In re: Polar Bear Endangered Species Act*, 588 F. Supp. 2d at 1377 ("[O]ther related actions are soon likely to increase the complexity of the litigation. Accordingly, there are sufficient dynamics involved here that warrant our concern for overlapping and duplicative activity."). It is of no moment that there are presently only four Related Cases; more are likely to be filed and the Panel has transferred as few as two or three cases. *See, e.g.*, *In re Fresh & Process Potatoes Antitrust Litig.*, 744 F.Supp.2d 1381, 1382 (J.P.M.L. Oct. 13, 2010) (transferring two actions); *In re: BP p.l.c. Secs. Litig.*, 734 F.Supp.2d 1376, 1379 (J.P.M.L. 2010) (three pending actions); *In re Tramadol Hydrochloride Extended-Release Capsule Patent Litig.*, 672 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010) (three pending actions).

The fact that the Related Cases remain in the early stages of litigation further supports transfer and coordination or consolidation pursuant to Section 1407. The first of the Related Cases was filed less than a year ago, *see Saxton* Compl. (filed May 28, 2015), and the latest, *Roberts*, was filed on February 10, 2016. No discovery has been taken in any of the actions, and neither FHFA nor Treasury has produced an administrative record. FHFA has moved, or will

[7] The actions within the Eighth Circuit are illustrative. The plaintiff in the Southern District of Iowa case, *Continental Western Insurance Co.*, 83 F. Supp. 3d 828, did not appeal the February 3, 2015 decision to the Eighth Circuit. On May 28, 2015, a mere three months later, plaintiffs filed *Saxton* in the immediately adjacent Northern District of Iowa.

soon move, to dismiss each of the complaints, but the courts have not yet ruled. Thus, no prejudice or inconvenience will result from transfer at this time.

C. The Panel Should Transfer All Related Cases to the U.S. District Court for the District of Columbia

The Panel should transfer the Related Cases to the U.S. District Court for the District of Columbia. That district was the venue for ten previous cases concerning the validity of the Third Amendment and therefore is familiar with the factual and legal questions in the Related Cases. *See Perry Capital LLC*, 70 F. Supp. 3d 208. *Perry* granted defendants' motions to dismiss; the decision is on appeal in the D.C. Circuit with argument set for April 15, 2016.[8]

Moreover, FHFA, Treasury, and Fannie Mae all have their headquarters in Washington, D.C., and Freddie Mac is headquartered in nearby McLean, Virginia. Thus, the relevant documents and decision-makers are all located in or near the district. *See In re TJX Companies, Inc. Customer Data Sec. Breach Litig.*, 493 F. Supp. 2d 1382, 1383 (J.P.M.L. 2007). Counsel for FHFA and Treasury are also located in Washington, and transfer would eliminate the need to travel to every location where Related Cases are pending or any other locale where shareholders may file additional copycat complaints. Transfer would not inconvenience potential witnesses because they are deposed "in proximity to where they reside," *In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981) (citing Fed. R. Civ. P. 45(d)(2)), and any potential witnesses most likely reside within a 50-mile range of the U.S. District Court for the District of Columbia's subpoena powers. *See* D.D.C. Local R. Civ. P. 30.1.

[8] Although FHFA is confident in the arguments it has presented on appeal, no one can be certain how the D.C. Circuit will rule. Thus, transfer to the District of Columbia would not predetermine the outcome of the cases.

CONCLUSION

For all the foregoing reasons, FHFA respectfully requests that the Panel coordinate or consolidate the Related Cases listed in the accompanying Schedule of Actions and transfer the cases to the U.S. District Court for the District of Columbia.

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Respectfully submitted,

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