UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TIMOTHY J. PAGLIARA

Plaintiff,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Defendant.

Civil Action No. 1:16-cv-00337-JCC-JFA

PLAINTIFF'S OPPOSITION TO MOTION TO STAY THE CASE PENDING A DECISION ON TRANSFER TO MDL OR, IN THE ALTERNATIVE, TO SUBSTITUTE THE FEDERAL HOUSING FINANCE AGENCY AS PLAINTIFF

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Plaintiff Timothy J. Pagliara ("Mr. Pagliara" or the "Plaintiff") hereby opposes the Motion to Stay the Case Pending a Decision on Transfer to MDL Proceeding or, in the Alternative, to Substitute the Federal Housing Finance Agency as Plaintiff (the "Motion," ECF No. 10) filed by Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac") and its conservator, the Federal Housing Finance Agency ("FHFA," and with Freddie Mac, the "Movants").

INTRODUCTION

Mr. Pagliara is a stockholder of Freddie Mac, a publicly traded, privately owned corporation that has elected to follow Virginia law in its corporate governance. Mr. Pagliara asserts just one claim, seeking to inspect certain corporate records of Freddie Mac, which is his individual right as a stockholder under the Virginia Stock Corporation Act ("VSCA"). He asked to inspect the records because of the so-called "Net Worth Sweep," under which Freddie Mac delivers every quarter, in perpetuity, its entire positive net worth to the United States Treasury. The VSCA plainly gives him, as an owner of Freddie Mac, the right to inspect its corporate records to investigate potential wrongdoing and to value his stockholdings in light of Freddie Mac's decision to give all of its multi-billion dollar profits to the government and nothing to any of its private stockholders.

Mr. Pagliara's lone claim in this case is narrow and straightforward. Under the VSCA, Mr. Pagliara is entitled to inspect the corporate records of Freddie Mac if he owned stock in Freddie Mac for six months before he made a written inspection demand on Freddie Mac and his inspection demand complied with the requirements contained in the VSCA. These facts are established by the documents attached to his Complaint. Indeed, when FHFA improperly rejected his inspection demand, it did not dispute his stock ownership or that his demand

complied with the requirements of the VSCA. Because FHFA nonetheless rejected his demand, the VSCA gives Mr. Pagliara the individual right to seek an order permitting the requested inspection, and the VSCA provides explicitly that such actions should be decided on an "expedited basis."

Instead of responding to his claim, Freddie Mac and FHFA have sought to delay it indefinitely. The day after Mr. Pagliara filed his Complaint in Fairfax County Circuit Court, FHFA filed a Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings (the "Motion to Transfer") before the Judicial Panel on Multidistrict Litigation ("JPML"), seeking to centralize four other (and very different) cases in a multi-district litigation ("MDL") in the District Court for the District of Columbia. Those other cases have nothing to do with Mr. Pagliara or the narrow issues presented in his suit for inspection of Freddie Mac's corporate records. Nonetheless, after removing Plaintiff's case from the Fairfax Circuit Court to this District, FHFA then noticed it as a related or "tag-along" action to the proposed MDL it seeks to create in its Motion to Transfer. Movants now seek to stay Mr. Pagliara's case in its entirety pending a decision by the JPML on (a) whether to centralize the four other cases in an MDL, and then (b) if an MDL is created, whether this case should be transferred to it. Movants have obtained an extension of time to respond to the Complaint until after this Motion is decided. In an alternative request for relief, which more appropriately belongs in an actual response to the Complaint that Movants have delayed filing, Movants seek to dismiss Mr. Pagliara's case by substituting in FHFA as the plaintiff.

The case should not be stayed pending FHFA's request to the JPML to transfer this case. Among other reasons, the requested stay could last for four months or more, which is longer than this case should take to resolve on the merits. Because it does not appear that FHFA challenges

any of the facts relevant to Mr. Pagliara's claim, there is no need for discovery or any other significant pretrial proceedings, and the case should proceed to decision promptly after Freddie Mac responds to the Complaint. Staying a case for longer than it otherwise takes to resolve is illogical, inefficient, and plainly and unduly prejudices Mr. Pagliara.

Moreover, there is absolutely no prejudice to Movants if the stay is denied. As an initial matter, the motion to transfer has no merit. An essential requirement for transfer of any case by the JPML is "one or more common questions of fact" with other lawsuits being transferred. Movants do not even try to identify any common question of *fact* in this and the other lawsuits, and there is none. The only facts relevant to Mr. Pagliara's claim relate to his stock ownership and his inspection demand to Freddie Mac. Those facts are not relevant to any other case brought by any other stockholder. The only alleged "common issues" that Movants mention in the Motion are *legal* issues. Legal issues, even if common between cases, cannot justify transfer to an MDL. Movants cannot dispute this principle, as they argued it so persuasively before the JPML in another case: "[w]here the actions involve largely undisputed facts and the overriding questions in each action are legal in nature, transfer . . . is not warranted, even if threshold legal issues are 'common' across the cases." Movants also relied on that same argument in opposing a stay pending the same motion to transfer: "[b]ecause the predominant common issue in the . . . cases is purely legal, the cases do not meet the statutory criteria for MDL centralization . . . . As such, the JPML is unlikely to transfer the action, and the most likely result of a stay pending the JPML's decision would be unnecessary and unproductive delay."

Even in the unlikely event that (i) an MDL were created, and (ii) the request to transfer this case to it were granted, denying the stay now would not result in any duplicate proceedings. There is likely to be no discovery in this case, and even if there were, it would be unique to this

case because there is no factual overlap with the other cases FHFA seeks to transfer. Similarly, Freddie Mac will need to respond to Mr. Pagliara's Complaint in either this Court or the transferee court, as no other plaintiff asserts a claim for inspection of the corporate records of Freddie Mac under the VSCA, and transfer would not absolve Freddie Mac from having to respond to Mr. Pagliara's unique and narrow claim. In the absence of any potential duplicative proceedings or any other prejudice to Movants, the requested stay is nothing more than an attempt to delay a ruling in this case, and it should be denied.

Movants' request to substitute FHFA for Mr. Pagliara also should be rejected. Movants argue that FHFA succeeded to "all" of Mr. Pagliara's rights as a stockholder, even the individual statutory inspection rights that he asserts in this lawsuit, when it became conservator of Freddie Mac. But the law is clear that the succession provision on which Movants rely applies only when stockholders assert *derivative* claims, which seek to enforce a right of the corporation itself, and does not apply when stockholders bring *direct* claims to enforce their own individual rights. The law is equally clear that the claim asserted by Mr. Pagliara here is a *direct* claim, brought to enforce an individual right he possesses as a stockholder, and not a *derivative* claim. Movants fail to cite any case applying the succession provision to bar a stockholder's *direct* claim, and there is ample authority to the contrary.

For all of these reasons and those set forth below, the Motion should be denied, and the case should proceed on an "expedited basis" as provided in the VSCA. Indeed, the only basis asserted by FHFA to reject Mr. Pagliara's demand was the succession provision on which it relies in the Motion, which the Court can and should reject now. As such, there is no reason why this case could not be submitted to the Court for final disposition in a matter of weeks.

BACKGROUND

Mr. Pagliara Is a Stockholder of Freddie Mac, a Publicly Traded Corporation Governed by Virginia Law.

Defendant Freddie Mac is a privately owned and publicly traded corporation. (Compl. ¶ 23; Def's Financial Interest Disclosure Statement (Local Rule 7.1), ECF No. 7). Freddie Mac was created by Congress through the Federal Home Loan Mortgage Corporation Act to improve liquidity in the home mortgage market. As there is no federal corporate law, Freddie Mac has elected to "follow the corporate governance practices and procedures of the law of the Commonwealth of Virginia, including without limitation the Virginia Stock Corporation Act as the same may be amended from time to time." (*Id.* ¶¶ 25-28). Mr. Pagliara is a private owner of publicly traded preferred stock in Freddie Mac, and the certificates of designation for Mr. Pagliara's preferred stock, which are contracts between Freddie Mac and Mr. Pagliara, are expressly governed by Virginia law. (*Id.* ¶¶ 29-31).

Under the VSCA, Freddie Mac is governed by a board of directors (the "Board"): "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors." The Board owes fiduciary duties to Freddie Mac, and it must discharge those duties in the best interests of the corporation. *See* Va. Code Ann. § 13.1-690A ("A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.").

FHFA Appointed Itself Conservator in 2008 and Admitted Stockholders Retained Rights.

As a response to the financial crisis in 2008, Congress passed the Housing and Economic Recovery Act ("HERA"), which created FHFA and made it the primary regulator of Freddie Mac. HERA also gave FHFA the ability to appoint itself as either conservator or receiver of

Freddie Mac and certain other regulated entities, *see* 12 U.S.C. § 4617(a), and on September 7, 2008, FHFA appointed itself as conservator of Freddie Mac. (Compl. ¶ 55). HERA provides that, as conservator, FHFA temporarily succeeds to the rights of Freddie Mac and certain rights of its stockholders, board of directors, and managers to act on behalf of the corporation. *See* 12 U.S.C. § 1367(b)(2)(A); *U.S. ex rel Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. Feb. 22, 2016) (slip op.) ("We agree that the FHFA has 'all the rights, titles, powers and privileges of' Fannie Mae and Freddie Mac. However, this places FHFA in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA *their* rights and duties, not the other way around.") (emphasis in original, internal citations omitted). These corporate powers to which FHFA has succeeded are defined and governed by the VSCA. (Compl. ¶¶ 65-67).

Contrary to Movants' position now, when the conservatorship was announced, FHFA and its then-Director, James Lockhart, admitted that FHFA's succession to the rights of Freddie Mac did not include each and every right of its stockholders. Freddie Mac's common and preferred stock continued to trade on the New York Stock Exchange, and FHFA acknowledged that "stockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market." Director Lockhart also assured Congress that Freddie Mac's "shareholders are still in place; both the preferred and common shareholders have an economic interest in the companies . . ." (Compl. ¶ 62).

FHFA's exercise of its finite powers as conservator also is limited by the statutory purpose of conservatorship. At the time it appointed itself as conservator, FHFA acknowledged that "conservatorship is the legal process in which a person or entity is appointed to establish control and oversight of a Company to put it in sound and solvent condition," and Director Lockhart explained that conservatorship was "a statutory process designed to stabilize a troubled

institution with the objective of returning the entities to normal business operations [and that] FHFA will act as the conservator until they are stabilized." (*Id.* ¶ 57). These statements comported with the language of HERA itself, which authorizes FHFA to exercise conservator powers only as "(i) necessary to put the regulated entity in a *sound and solvent condition*, and (ii) appropriate to carry on the business of the regulated entity and *preserve and conserve the assets and property of the regulated entity*." 12 U.S.C. § 4617(b)(2)(D) (emphasis added).

FHFA Displaced the Freddie Mac Board and Executed the Senior Preferred Stock Purchase Agreement with Treasury.

Upon appointing itself conservator of Freddie Mac, FHFA displaced and dismissed Freddie Mac's then-current directors. (Compl. ¶ 65). FHFA then entered into on behalf of Freddie Mac a senior preferred stock purchase agreement (the "PSPA") with the Treasury Department. (*Id.* ¶ 73). Under the PSPA, Treasury received 1,000,000 shares of Freddie Mac's newly created Senior Preferred Stock in exchange for a funding commitment that initially allowed Freddie Mac to draw up to $100 billion from Treasury. (*Id.* ¶ 75). The 1,000,000 shares of Senior Preferred Stock had an initial aggregate liquidation preference equal to $1 billion ($1,000 per share), which would be increased by any additional amounts drawn on Treasury's funding commitment. (*Id.* ¶ 76). In other words, Treasury's liquidation preference on its Senior Preferred Stock increased by one dollar for each dollar Freddie Mac received from Treasury under the funding commitment. (*Id.*) The Senior Preferred Stock initially provided for a cash dividend to Treasury equal to 10% of the outstanding liquidation preference. (*Id.* ¶ 79).

The Senior Preferred Stock Certificate of Designation for Treasury's Senior Preferred Stock, consistent with the VSCA, vested the Board with discretion to declare dividends thereunder: "holders of outstanding shares of Senior Preferred Stock shall be entitled to receive, ratably, *when, as and if declared by the Board of Directors, in its sole discretion,* out of funds

legally available therefor, cumulative cash dividends at the annual rate per share equal to the then-current Dividend Rate on the then-current Liquidation Preference." (*Id.* ¶ 80).

FHFA Reconstituted Freddie Mac's Board and Delegated Authority to that New Board.

On November 24, 2008, having succeeded to the Board's powers and executed the PSPA, FHFA reconstituted Freddie Mac's Board and delegated responsibility to which it had succeeded back to the new Board. (*Id.* ¶¶ 63-66). Because the Board's corporate powers that FHFA succeeded to as conservator are governed by Virginia's corporate law, the powers FHFA delegated back to the new Board likewise are governed by Virginia law. (*See id.* ¶ 67). Under the structure that FHFA established, certain Board actions were subject to FHFA approval, and FHFA could block Freddie Mac from taking some actions approved by the Board if consistent with fiduciary duties FHFA itself owes to Freddie Mac. (*Id.* ¶ 68). But FHFA could not make the Board take or approve any action. (*Id.*).

FHFA and the New Board Agree to a Third Amendment to the PSPA, Giving Away Freddie Mac's Entire Net Worth, Every Quarter, Forever.

On August 17, 2012, just two weeks after Freddie Mac announced positive net income of $3 billion for the second quarter of 2012, Freddie Mac entered into a Third Amendment to the PSPA, which contained the Net Worth Sweep, transforming Freddie Mac's quarterly dividend to Treasury from 10% of the outstanding liquidation preference (annualized) to all of the net worth in Freddie Mac at the end of every quarter, leaving only a small and decreasing capital reserve. (Compl. ¶¶ 92-96). Treasury openly asserted that this agreement would "help expedite the wind down of . . . Freddie Mac" and that Freddie Mac "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in [its] current form." (Compl. ¶ 99). Treasury further admitted that the Net Worth Sweep would "make sure that every dollar of earnings [the] firm generates is used to benefit taxpayers." (*Id.*). The Net Worth Sweep thus

plainly violates both the purposes of conservatorship under HERA and contradicts FHFA's own statements back in 2008 that conservatorship was "a statutory process designed to stabilize a troubled institution with the objective of returning the entit[y] to normal business operations" and "to put it in sound and solvent condition." (Compl. ¶ 57).

The result is the improper and ongoing transfer of tens of billions of dollars from a private corporation to the Treasury. Absent the Net Worth Sweep, even assuming no redemptions of Treasury's Senior Preferred Stock, Freddie Mac would have paid roughly $23 billion in dividends to Treasury from 2013 through the first quarter of 2016. Instead, under the Net Worth Sweep, Freddie Mac has paid more than $74.4 billion in dividends over the same period, without redeeming any of the Senior Preferred Stock. (Compl. ¶ 97). In total, Freddie Mac has paid to Treasury over $98 billion in dividends under the PSPA—$24 billion more than Treasury provided to Freddie Mac under the PSPA—*without* reducing Treasury's $72 billion liquidation preference that has to be redeemed before any distributions can be made to the other stockholders. (Compl. ¶ 15). And there is no end in sight. (*Id.* ¶¶ 14-15). The declaration and payment of the Net Worth Sweep dividends are plainly not actions taken based on any good faith business judgment of the best interest of Freddie Mac and its stockholders. (*Id.* ¶¶ 98-103). 1/

Mr. Pagliara Made a Proper Inspection Demand under the VSCA, and FHFA Rejected It.

Given the ever-growing gulf between Treasury's funding and the dividends paid by Freddie Mac to Treasury, conflicting statements about the conservatorship, and a dearth of public

1/ While FHFA has attempted to defend the Net Worth Sweep as beneficial to Freddie Mac, documents unsealed last week in another case, *Fairholme Funds, Inc. v. United States*, No. 13-cv-00465 (Fed. Cl.), confirm that the Net Worth Sweep is nothing more than what Treasury said it is: a money grab by Treasury in which FHFA and the Board were complicit. *See* The New York Times, *Documents Undercut U.S. Case for Taking Mortgage Giant Fannie Mae's Profits* (April 12, 2016), available at http://www.nytimes.com/2016/04/13/business/fannie-mae-suit-bailout.html?smid=tw-share&_r=0.

information about the Board's involvement in approving Net Worth Sweep dividends to Treasury, on January 19, 2016, Mr. Pagliara served a written demand to inspect certain corporate records of Freddie Mac in accordance with Section 13.1-771 of the VSCA. (Compl. ¶¶ 122-28, Ex. A thereto). 2/ That section gives stockholders like Mr. Pagliara a right to inspect corporate records after making an inspection demand on the corporation. The records Mr. Pagliara asked to inspect relate to, among other things, the involvement of the Board—which is responsible for declaring dividends under the VSCA and Treasury's Senior Preferred Stock Certificate of Designation and owes fiduciary duties to Freddie Mac—in adopting the Third Amendment and declaring Net Worth Sweep dividends every quarter thereunder, as well as accounting records relating to Freddie Mac's financial condition at the time those dividends were declared. (Compl. ¶¶ 123-25, and Ex. A thereto).

In responding to the inspection demand, neither Freddie Mac nor FHFA has disputed that Mr. Pagliara meets all statutory requirements in his inspection demand. Yet FHFA refused the demand on January 28, 2016, arguing that FHFA succeeded under HERA to all of Mr. Pagliara's rights as a stockholder of Freddie Mac, including his individual right to inspect books and records under the VSCA. (Compl. ¶¶ 126-128, and Ex. B thereto).

Mr. Pagliara Filed this Suit to Permit Inspection, and Freddie Mac and FHFA Seek to Delay the Expedited Proceeding.

Mr. Pagliara filed on March 14, 2016 in the Circuit Court for Fairfax County, Virginia, an application under Va. Code Sections 13.1-771 and -773 for an order to permit inspection of

2/ Mr. Pagliara also sent the Board a second letter on January 19, 2016, asking the Board to publicly clarify its role in declaring and paying dividends to Treasury. (Compl. ¶ 119 & Ex. E thereto). The Board never responded to this letter. Instead, FHFA responded and told Mr. Pagliara that the Board owes no duties to anyone other than FHFA. (Compl., Ex. B thereto).

the requested records. Section 13.1-773B provides that "[t]he court shall dispose of an application under this subsection *on an expedited basis*." (emphasis added).

The next day, FHFA filed the Motion to Transfer with the JPML regarding four cases not involving Mr. Pagliara that have been filed by other stockholder plaintiffs against FHFA, Treasury, and Fannie Mae, as well as Freddie Mac, requesting that those cases be centralized in an MDL in the United States District Court for the District of Columbia. Freddie Mac then removed Mr. Pagliara's case to this District on March 25, 2016, and FHFA noticed it as a "tag-along" action to its Motion to Transfer before the JPML.

Movants now seek to stay the case in its entirety pending a decision by the JPML on whether to transfer this case. Movants also make what they call an "alternative" request to substitute FHFA for Mr. Pagliara as Plaintiff in this case on the erroneous basis that FHFA has succeeded to "all" of Mr. Pagliara's rights to his Freddie Mac preferred stock. For the reasons set forth below, neither staying this case nor allowing FHFA to take over Mr. Pagliara's case is warranted, and the Motion should be denied.

ARGUMENT

I. Movants' Request for a Stay Should Be Denied.

"A pending transfer motion before the MDL panel does not deprive the district court in which the action is then pending of jurisdiction over pretrial matters." *Sehler v. Prospect Mortg., LLC*, No. 13-cv-00473, 2013 WL 5184216, at * 2 (E.D. Va. Sept. 16, 2013) (Cacheris, J.). "Nor should the court automatically postpone rulings on pending motions, or generally suspend further proceedings." *Manual for Complex Litig.* § 20.131 (4th ed.). Indeed, the JPML rules themselves state that the "the pendency of a motion . . . pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal court action and does not limit the pretrial jurisdiction of that court." JPML Rule 2.1(d). Rather, it is the party requesting a stay

pending the outcome of a JPML motion that must "justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Fisher v. United States*, No. 3:13-MC-00008, 2013 WL 6074076, at *4 (E.D. Va. Nov. 18, 2013). In evaluating whether a movant has met this burden, courts weigh three factors: (i) the interests of judicial economy; (ii) hardship and equity, if any, to the moving party if the action is not stayed; and (iii) potential prejudice to the non-moving party. *Id.* at *4. Movants here cannot meet their burden, as each of these three factors weighs *against* granting the stay Movants are requesting.

A. A Stay Will Neither Save Judicial Resources Nor Avoid Duplicative Litigation.

The stay that Movants request will neither conserve judicial resources nor avoid any duplicative litigation. This is true for at least three reasons: (i) this case should be decided on the merits before the stay would expire; (ii) a potential transfer to an MDL would be only for pretrial proceedings, of which there should be almost none, and the case would be remanded to this Court for trial in any event; and (iii) there would be no duplicative proceedings in the absence of a stay because Mr. Pagliara's claim is unique from the other actions FHFA seeks to transfer and shares no common factual questions with any of those cases.

1. This Case Should Be Decided on the Merits Before the JPML Rules and, Thus, Before the Requested Stay Would Expire.

This case presents only one narrow claim—a claim for inspection of corporate records—and there appear to be no material facts in dispute. The only factual questions relevant to Mr. Pagliara's claim to inspect corporate records are (i) whether he owned Freddie Mac stock for at least six months immediately preceding his inspection demand, (ii) whether his demand was made in good faith and for a proper purpose, and (iii) whether his demand on Freddie Mac was in the required form. *See* Va. Code § 13.1-771C(1)-(4). These questions are answered by Mr. Pagliara's Complaint and the documents attached thereto. (Compl., Exs. A & B thereto). In

rejecting Mr. Pagliara's demand, FHFA did not dispute that Mr. Pagliara owned Freddie Mac stock and did not raise any objections to the purpose, form, or content of his inspection demand. (Compl., Ex. B thereto).

Because Freddie Mac and FHFA have not disputed these facts, there should be no need for discovery, and the case should proceed to final disposition promptly after Freddie Mac answers the Complaint. Even if Freddie Mac responds on May 12, 2016 with a motion to dismiss, 3/ the briefing would be completed by early June, and the motion could be heard shortly thereafter. After that motion is resolved, no other pretrial proceedings should be necessary, and this case could easily be submitted for final decision on the merits in June or July of this year.

In contrast, the requested stay is likely to last through the end of July, if not longer. FHFA has noticed this case as a "tag-along" action to its Motion to Transfer. FHFA's Motion to Transfer will not be heard until the next hearing before the JPML, which is scheduled for May 26, 2016. And even if the JPML were to create the MDL that FHFA is requesting shortly after the May 26, 2016 hearing, a final decision on transfer of this particular tagged case would require further proceedings, which would likely extend until after a further hearing of the JPML, scheduled for July 28, 2016. *See* JPML Rules § 7.1(b)-(c), (f). Thus, the stay Movants request would last at least four months, and easily could last longer. In considering a similar request in *Sehler v. Prospect Mortgage, LLC*, this Court found a similar period of delay to be significant. *Sehler*, 2013 WL 5184216, at *3 ("The delay anticipated here is four to six months. This is a significant period of delay . . . .") (internal citations omitted).

3/ On April 5, 2016, Judge Anderson granted Freddie Mac's Motion for Extension of Time to Respond to Complaint, requiring Freddie Mac to respond to the Complaint within seven days of the Court's ruling on this Motion. (ECF Nos. 13, 19).

Because discovery should not be necessary in this case, there is no reason this case could not be presented to the Court for final decision in the next four months. Staying the case for longer than it would take to resolve it is illogical and inefficient and does not conserve judicial resources. *See Sehler*, 2013 WL 5184216, at *3 ("This action could be resolved in this Court before the JPML rules on the transfer motion."). Here, as in *Sehler*, this case can and should be promptly resolved in this Court rather than stayed.

2. Any Transfer to an MDL Would Be Only for Pre-Trial Proceedings, and this Court Will Hear the Merits of Plaintiff's Claim in Any Event.

The JPML has the power to transfer cases only for pretrial proceedings. Eventually, each case must be remanded back to the original court for trial. *See* 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.").

Movants are asking that this case be stayed for four months so that the JPML can decide whether pretrial proceedings should be transferred to another forum. But in the absence of a stay, the minimal pretrial proceedings in this case should be completed in this forum in less than four months. Granting Movants' request to stay this case would simply stall the minimal pretrial proceedings here so there would be something to transfer to an MDL in the unlikely event the JPML were to decide to do so. Then, after those minimal pretrial proceedings in another forum, the case would be remanded back to this Court for trial. Such procedural machinations do not further judicial economy or the ends of swift justice for which this court is well known. *Sehler*, 2013 WL 5184216, at *3 ("This action could be resolved in this Court before the JPML rules on the transfer motion. Moreover, even were the JPML to grant consolidation, it would only be for

purposes of coordinating discovery; the parties would still eventually be required to litigate the merits of their claim in this Court.").

3. This Case Has No Common Questions of Fact with Any Other Action Subject to FHFA's Motion to Transfer, and Thus, There Will Be No Duplicative Proceedings.

Nor would there be any duplication of proceedings if the stay is denied because Mr. Pagliara's claim for inspection of Freddie Mac records is not asserted by any other plaintiff in the actions FHFA seeks to transfer. One essential element for transfer of any case to an MDL is the existence of "one or more common questions of fact" with the other cases in the MDL. *See* 28 U.S.C. § 1407(a). This is because, as Freddie Mac and FHFA argued persuasively in opposing creation of another MDL just a few years ago, "the [JPML]'s central focus under the plain language of Section 1407 is to streamline proceedings where multiple cases address common *factual questions*, not common *legal* issues." Enterprise Def's Opp'n to Genesee County's Mot. for Transfer 9, *In re: Real Estate Transfer Tax Litig.*, MDL No. 2394 (July 23, 2012) (emphasis in original), Ex. 1 hereto (the "FHFA *Transfer Tax* Opp'n").

Mr. Pagliara's case has no common factual questions with any other case subject to FHFA's pending requests for transfer. The only factual questions relevant to Mr. Pagliara's claim for inspection of corporate records relate to his ownership of Freddie Mac stock and his inspection demand on Freddie Mac. No case involving any other stockholders will need to resolve any question regarding Mr. Pagliara's stock ownership or his demand on Freddie Mac. 4/

4/ Contrary to FHFA's assertion, (Mot. 6-7), there are not even common factual questions between this case and Mr. Pagliara's lawsuit against Federal National Mortgage Association ("Fannie Mae") in Delaware. That case involves Mr. Pagliara's ownership of stock in Fannie Mae—a different publicly traded company—and his separate inspection demand to Fannie Mae under the applicable Delaware corporate law, as well as the separate responses he received from FHFA and Fannie Mae to that demand. None of those issues is relevant here.

Movants fail to identify a single factual question in common between this and any other lawsuit. (*See* Mot. 6-7). There is no common discovery that needs to be coordinated, and no common witnesses that need to be deposed. Instead, the only "common issues" mentioned relate to the effect HERA has on claims of stockholders of Freddie Mac and Fannie Mae. (*Id.*). This is merely a legal question, which is not sufficient to justify transfer to an MDL. FHFA cannot dispute this principle, having relied on it in opposing transfer of other cases: the JPML's "function is not to prevent district or circuit court splits on legal issues or to orchestrate the absolute consistency of such rulings across the United States," (FHFA *Transfer Tax* Opp'n 9), and "[t]he presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer. Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate." (*Id.* 5 (quoting *Multidistrict Litig. Manual* § 5:4)).

Thus, the only commonality Movants identify does not support a request for an MDL. *See In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378, 1378 (J.P.M.L. 2009) ("Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization."); *In re: Teamster Car Hauler Products Liab. Litig.*, 856 F. Supp. 2d 1343 (J.P.M.L. 2012) ("Section 1407 does not, as a general rule, empower the Panel to transfer cases involving only common legal issues."). As the JPML does not consider common legal issues in deciding motions to transfer, the existence of such common issues provides no basis to stay the case while the JPML considers FHFA's motion to transfer. *Cf Bertram v. Fed. Express Corp.*, No. 05-00028, 2006 WL 3388473, at *2 (W.D. Ky. Nov. 20, 2006) (denying motion to stay pending JPML motion because there was "little overlap of the relevant issues" between plaintiff's case and those in the MDL proceedings and, thus, "the risk

of unnecessary duplication [was] minimal at best"). Indeed, Movants themselves argued this in opposing a similar stay: "[g]iven that the threshold, and potentially dispositive issue presented in this case . . . is purely legal, a stay pending the JPML's ruling is unlikely to further the interests of justice or judicial economy because the JPML is unlikely to grant the motion for MDL centralization." Pl's Opp'n to Def's Mot. to Stay 7, *Fed. Nat'l Mortg. Assoc'n et al. v. Hamer et al.*, Ex. 2 hereto) ("FHFA *Hamer* Opp'n").

B. Denying the Stay Will Result in No Hardship to Movants.

Movants claim that denying the stay will create a "risk" of duplicative litigation and "possibility" of inconsistent results on preliminary motions. As an initial matter, the JPML does not consider the potential for inconsistent legal rulings in deciding motions to transfer, and it is not a basis to stay the case pending a JPML decision. *In re: Medi-Cal*, 652 F. Supp. 2d at 1378; *In re CleanNet Franchise Agreement Contract Litig.*, 38 F. Supp. 3d 1382, 1383 (J.P.M.L. 2014) ("CleanNet's primary motivation . . . is to obtain a uniform determination . . . of the arbitration provisions in the various franchise agreements. Seeking a uniform *legal* determination, though, generally is not a sufficient basis for centralization.") (emphasis in original). As FHFA itself has argued: "concerns about uniformity of the law are not sufficient to justify centralization. That is the province of the Supreme Court, which often permits legal issues to 'percolate' throughout the circuits before resolving conflicting rulings." (FHFA *Transfer Tax Opp'n* 9 (citing *In re Medi–Cal*, 652 F. Supp. 2d 1378)).

Indeed, Movants' MDL strategy, combined with its request to stay this case and the other cases that it seeks to centralize, is not an attempt to avoid duplicative discovery on common questions of fact, but rather an attempt to funnel cases presenting similar legal issues into a court that has already ruled for Movants (in a decision that is currently on appeal before the D.C. Circuit). In Freddie Mac's and FHFA's own words: "It is not appropriate to use the MDL

mechanism as a *de facto* means of determining the merits of [multiple] cases by transferring them to one judge who has already decided the threshold substantive issue in an as-yet-untested, opinion that would effectively become the law of the land immediately upon transfer." (FHFA *Transfer Tax* Opp'n 10). The rejection of this procedural gambit is hardly cognizable prejudice to Movants.

Underlying Movants' theories of prejudice from denial of the requested stay is an assumption that the case will be transferred to the MDL. But if FHFA's motion to transfer this case is denied, Movants certainly will suffer no prejudice if the case moves forward while that motion is pending. (*See* FHFA *Hamer* Opp'n 5 ("[T]he JPML is unlikely to transfer this action, and the most likely result of a stay pending the JPML's decision would be unnecessary and unproductive delay.")). As in *Sehler*, the JPML here has not even heard FHFA's motion to create an MDL, much less issued a conditional transfer order relating to this case. *See Sehler*, 2013 WL 5184216, at *4 ("[I]n many of the cases cited by Defendant the action had already been conditionally transferred to the MDL. Here, by contrast, there has been no conditional transfer of the case. Indeed, the JPML has not even heard Defendant's argument regarding transfer nor consolidated any of the cases in this matter.") (internal citations omitted); *Fisher*, 2013 WL 6074076, at *5 (denying stay: "Further, there is no indication that the JPML has even heard Petitioner's argument regarding transfer or consolidated any cases in this matter."); *In re Pradaxa Prod. Liab. Actions*, Nos. 12-cv-00610, et al., 2012 WL 2357425, at *2 (S.D. Ill. June 20, 2012) ("At this point there is no assurance that the JPML will consolidate all of the relevant cases before a single judge. Further, [movant's] contention that the JPML might issue a decision on the MDL Motion in late June or early July is mere speculation and does not warrant a stay."). Given the absence of common factual questions and a lack of significant pretrial proceedings,

this case should not be, and is unlikely to be, transferred to an MDL. 5/ As such, there is no prejudice to Movants if the case moves forward here and now.

Moreover, even assuming for purposes of argument that this case were later transferred to an MDL, there would be no prejudice to Movants if this case moves forward now while the Motion to Transfer is pending. Freddie Mac will have to respond to Mr. Pagliara's Complaint somewhere, either here or in a transferee court. Because no other case asserts a claim to inspect Freddie Mac's corporate records under Virginia law, there is no danger that requiring Freddie Mac to file its motion to dismiss here would result in duplicative litigation. Similarly, because there do not appear to be any factual issues in dispute, there should be no discovery and certainly no duplicative discovery. Movants are not concerned with duplicative proceedings over common questions of fact because there are none; they simply want to avoid a swift ruling in this case. Movants removed the case to this court, and having to defend the case here is not a "hardship."

C. A Stay Will Impose Unwarranted Delay on Plaintiff.

Under the Virginia Code, Mr. Pagliara is entitled to have his claim resolved on an "expedited basis." Va. Code Ann. § 13.1-773B. This case should be submitted for final decision by June or July, and Movants seek a stay at least through the end of July. As this Court held in *Sehler*, staying a case for longer than it would take to litigate creates "a significant likelihood of prejudice" for the plaintiff. *Sehler*, 2013 WL 5184216, at *4 ("[T]he Court finds that Plaintiffs face a significant likelihood of prejudice by a stay in this matter. . . . Again, the case could be

5/ Mr. Pagliara has explained in greater detail the reasons why this case (and his Delaware complaint seeking to inspect records of Fannie Mae) should not be transferred in the opposition he filed in the JPML proceeding, a copy of which is attached hereto as Exhibit 3. Moreover, it is unlikely that an MDL will be created at all, even as to the other cases FHFA seeks to have centralized in its Motion to Transfer. Those cases appear to share few, if any, common questions of fact; the common issues, if any, are primarily legal; and three of the four cases primarily involve claims under the Administrative Procedures Act, which are presumptively unsuitable for centralization in an MDL.

fully litigated in this Court before the JPML issues a decision on transfer.") (internal citations omitted). Movants removed this case to this court, and now seek to stop an otherwise "expedited" proceeding in its tracks. Delay may suit Movants' purposes, but it does not comport with this District's "firm belief that justice delayed is justice denied." *Aventis Pharm. Deutschland GMBH v. Lupin Ltd.*, 403 F. Supp. 2d 484, 491 (E.D.Va. 2005).

D. The Cases Cited by Movants Are Distinguishable and Do Not Support Granting A Stay.

Movants cite in the Motion several cases granting motions to stay, but each case is easily distinguished. In *Hawley v. Johnson & Johnson*, the non-moving party *consented* to the stay. *Hawley v. Johnson & Johnson*, No. 3:11-cv-00195-HEH, 2011 WL 7946243, at *1 (E.D. Va. Apr. 29, 2011). In *Paul v. Aviva Life & Annuity Co.*, unlike here, the "stay would likely be brief" because the motion to transfer was fully briefed before the JMPL, and the court anticipated that the JPML would "render its decision in relatively short order." *Paul v. Aviva Life & Annuity Co.*, No. 09-1038, 2009 WL 2244766, at *1 (N.D. Ill. July 27, 2009). In *Commonwealth v. Countrywide Sec. Corp.*, the MDL had *already* been created, and the court expressly relied on the existence of the MDL to grant a stay "while awaiting a JPML decision about the inclusion of a pending case into an [already-created] MDL." *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, No. 3:14-cv-00706, 2015 WL 222312, at *4 (E.D. Va. Jan. 14, 2015). The stay also was narrowly crafted to last 45 days. Here, an MDL has not yet been created, and a stay is likely to last at least four months, longer than it takes to resolve this case.

For these reasons, Plaintiff respectfully requests that the Court deny Movants' request to stay the case pending a decision from the JPML on FHFA's request to transfer this case.

II. HERA Does Not Give FHFA the Right to Take Mr. Pagliara's Direct Claim, and the Motion to Substitute Should Be Denied.

As "alternative" relief, Movants seek an order substituting FHFA for Mr. Pagliara as Plaintiff in this case. That requested relief also should be denied. Movants first ask this Court do something that *no other court* has ever done: to interpret HERA's succession provision as transferring title over a direct stockholder claim from the stockholder to a government agency. Their unprecedented request misconstrues the relevant statutory text and ignores an ever-growing list of courts that have limited succession provisions to derivative claims only.

Movants next argue that HERA's anti-injunction provision bars this suit. As an initial matter, that is a motion-to-dismiss argument, and it has no bearing on whether FHFA is entitled to substitute for Mr. Pagliara. Movants themselves have emphasized that this Motion is not a motion to dismiss. (*See* Resp. in Supp. Mot. for Extension n.3, ECF No. 18). But in any event, the argument is meritless. The resolution of this suit will not restrain FHFA from exercising its statutory authority to make business decisions for Freddie Mac, which is all that HERA's anti-injunction provision prohibits.

A. HERA's Succession Provision Does Not Strip Stockholders of Direct Claims to Enforce Their Individual Rights.

The federal courts have established a clear rule in applying HERA's succession provision and comparable provisions in other statutes. As conservator, a government agency like FHFA succeeds to *derivative* claims that stockholders might otherwise assert on behalf of the corporation. But FHFA does not take ownership of an individual stockholder's stock, (*see* Compl. ¶ 62), and it does not succeed to *direct* claims that stockholders might bring on their own behalf to enforce their individual rights as stockholders. The inspection claim Mr. Pagliara asserts here is a hornbook example of a direct claim, which HERA gives FHFA no right to commandeer.

1. HERA Transfers Derivative Claims Only.

HERA provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). When quoting this language in the Motion, Movants often omit a critical portion of the statutory language—"with respect to the regulated entity and the assets of the regulated entity"—and misleadingly cites a variety of cases for the proposition that they bar all suits brought by Freddie Mac stockholders. The cases say no such thing; rather, they say precisely the opposite.

For the last two decades, courts have been asked to interpret what FHFA calls a "materially-identical" succession provision in the Financial Institutes Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). (Mot. 9). 6/ Those courts have established a uniform rule: FIRREA's succession provision bars stockholders from bringing derivative claims, but not direct claims. *See, e.g.*, *Barnes v. Harris*, 783 F.3d 1185, 1193 (10th Cir. 2015); *Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014); *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 778-79 (4th Cir. 2012); *Pareto v. FDIC*, 139 F.3d 696, 699-700 (9th Cir. 1998); *Lubin v. Skow*, 382 F. App'x 866, 870 (11th Cir. 2010). As the Seventh Circuit observed in *Levin* two years ago, "[n]o federal court has read the statute" to bar direct stockholder claims. 763 F.3d at 672. That remains true today.

Courts have imported this well-established construction of FIRREA's succession provision to HERA's "materially-identical" provision. Another court in this district, for example,

6/ *See* 12 U.S.C. § 1821(d)(2)(A)(i) (FDIC "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution").

explained that it had been "persuaded by" FIRREA decisions in holding that "HERA bars derivative suits by shareholders of the affected companies." *In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009), *aff'd sub nom, La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011). Several other courts have come to the same conclusion. *See, e.g., Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2001) (explaining that HERA "plainly transfers shareholders' ability to bring derivative suits"); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 232 (D.D.C. 2014) (concluding that "HERA's plain language bars shareholder derivative suits"); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) (granting motion for substitution in a derivative "action on Freddie Mac's behalf"). In short, every decision that Movants cite either affirmatively endorses the distinction between derivative and direct claims or adheres to the longstanding rule. Not a single court has allowed a conservator to usurp, under either HERA or FIRREA, a stockholder's direct claims. Without forthrightly addressing the state of the law, Movants ask this Court to become the first.

This Court should refuse to do so. Under Section 4617(b), FHFA does not succeed to all possible rights or legal claims that a stockholder may have; FHFA succeeds only to those stockholder claims "with respect to the regulated entity and the assets of the entity." That qualification limits the transfer of claims to those claims "that investors (but for [the succession provision]) would pursue derivatively on behalf of" Freddie Mac. *Levin*, 763 F.3d at 672. As conservator, FHFA acquires the power to operate the corporation, and it gains the power to bring claims on the corporation's behalf, including those claims of the corporation that might otherwise be asserted derivatively by stockholders. But HERA does not provide that FHFA somehow also gains ownership of Mr. Pagliara's stock or his individual rights as a stockholder.

FHFA admitted as much shortly after it became conservator: "stockholders will continue to retain all rights in the stock's financial worth" and "both the preferred and common shareholders have an economic interest in the companies." (Compl. ¶ 62). Simply put, the agency is the conservator *of Freddie Mac*, not the conservator *of Mr. Pagliara*. Mr. Pagliara still owns his stock, and FHFA cannot prevent Mr. Pagliara from suing to protect his individual rights as a stockholder any more than it could prevent him from selling his stock (or make him sell it).

Freddie Mac and FHFA nevertheless contend that the canon against superfluity requires a contrary reading. (*See* Mot. 13). They argue that HERA's succession provision would be meaningless if limited to derivative actions because derivative actions already belong to the corporation and thus to FHFA as conservator. (*See id.*) While the premise is true, the conclusion does not follow. A stockholder derivative action always belongs to the corporation, and yet stockholders ordinarily (absent a succession provision) have a right and ability to bring derivative actions. Thus, contrary to FHFA's position, HERA's succession provision is necessary to effect the transfer of stockholder derivative claims—and the language "with respect to the regulated entity and the assets of the regulated entity" limits that transfer to stockholder derivative claims. Indeed, if there is any superfluity, it comes from *Movants'* reading of the statute, which gives no meaning to the qualification "with respect to the regulated entity and the assets of the regulated entity." *See Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (canon against superfluity cannot be used to support alternative interpretation that also would create superfluity).

Finally, to the extent there is any ambiguity in the meaning of the phrase "with respect to the regulated entity and the assets of the entity," the canon of constitutional avoidance dictates that direct claims be excluded from the provision. A direct claim is, by its nature, Mr. Pagliara's

individual property. *See* Va. Code § 13.1-771 (affording inspection rights to individual stockholders); *see also, e.g.*, *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (concluding that "a legal cause of action is property within the meaning of the Fifth Amendment"). If HERA were construed to strip Mr. Pagliara of his property and transfer that property to a government agency without just compensation, the statute might violate the Takings Clause of the Fifth and Fourteenth Amendments. *See Levin*, 763 F.3d at 672 (noting that the exclusion of direct claims in the succession provision "avoids the need to tackle that [Takings-Clause] question"). The canon of constitutional avoidance thus forecloses Movants' constitutionally dubious construction. Even if Movants' interpretation of HERA were plausible, when faced with competing "plausible interpretations" of HERA, this Court must presume "that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

2. Mr. Pagliara's Claim for Inspection of Books and Records Is a Direct Claim.

Because HERA provides that FHFA succeeds only to derivative claims, the sole remaining question is whether Mr. Pagliara's claim for inspection of corporate records is derivative or direct. That question is an easy one in Virginia: an inspection claim under Section 13.1-773 is a prototypical direct stockholder claim. *See* Allen C. Goolsby & Steven M. Haas, *Goolsby & Haas on Virginia Corporations* § 8.1 ("[A]n action . . . demanding the right to inspect books and records, is an individual action."); American Law Institute, *Principles of Corp. Governance: Analysis and Recommendations* § 7.01 (1994) (listing actions "to inspect corporate books and records" among the actions that courts have "properly considered" direct).

The derivative-versus-direct analysis is straightforward. "A derivative action is an equitable proceeding in which a shareholder asserts, on behalf of the corporation, a claim that

belongs to the corporation rather than the shareholder." *Simmons v. Miller*, 544 S.E.2d 666, 674 (Va. 2001). A direct action, by contrast, is a proceeding in which the stockholder seeks to redress an injury he has sustained, or to enforce a right he possesses, in his individual capacity. *Cf. id.*; *see also Remora Invs. LLC v. Orr*, 673 S.E.2d 845, 847-48 (Va. 2009). Under Section 13.1-771 of the VSCA, the right to inspect a corporation's books and records is a right that each stockholder possesses in an individual capacity. As the Virginia Supreme Court has explained, the statute allows a stockholder to request inspection so long as the "request is made in good faith and for the purpose of protecting *his rights* as an owner of stock." *Retail Prop. Inv'rs, Inc. v. Skeens*, 471 S.E.2d 181, 183 (Va. 1996) (emphasis added). Because inspection is ultimately *Mr. Pagliara's* right as a stockholder and not *Freddie Mac's* right as a corporation (why would it ever need a right to demand inspection of its own records?), the Complaint here asserts a direct claim.

It is unclear whether Movants resist this inevitable conclusion. Their Motion does not argue outright that Mr. Pagliara's claim is derivative. It does, however, argue that "the distinction between direct and derivative claims is beside the point in this context." (Mot. 11). That argument appears to contest not whether inspection claims are direct but whether direct claims can be brought at all. In that sense, it merely reiterates the flawed argument that FHFA has succeeded to both derivative and direct claims, and it fails for the reasons explained above. (*See supra* pp. 22-25). To the extent that Movants are also arguing that FHFA has succeeded to the underlying inspection right that Mr. Pagliara seeks to enforce here, rather than his direct claim to enforce that right, the argument also fails. Virginia law affords the *right of inspection* to individual stockholders under Section 13.1-771C, just as it affords the *right to bring suit to demand inspection* to individual stockholders under Section 13.1-773B. *See Cattano v. Bragg*,

727 S.E.2d 625, 631 (Va. 2012) (explaining that "Code § 13.1-773 . . . affords redress for a corporation's failure to permit a shareholder to inspect documents in accordance with Code § 13.1-771"). Simply put, the remedy under Section 13.1-773 is individual, and the corresponding right in Section 13.1-771 also is individual. This reading is confirmed by the meaning of a direct claim: if a claim is direct, by definition, the claim is enforcing an individual right and not a right "with respect to the regulated entity and the assets of the regulated entity." *See Simmons*, 544 S.E.2d at 674; *Remora Invs.*, 673 S.E.2d at 847-48. Thus, FHFA did not succeed to Mr. Pagliara's individual inspection right any more than it succeeded to Mr. Pagliara's right to bring this direct claim to enforce that inspection right.

The Motion makes one last-ditch argument to bring this suit within FHFA's control: Movants assert that the "claims Plaintiff seeks to investigate . . . are themselves derivative" and, apparently, contend that Mr. Pagliara is not entitled to inspect Freddie Mac's corporate records because he could not bring any of the claims being investigated. (Mot. 14 n.7). This argument fails for several reasons. First, investigating claims against the Board is not Mr. Pagliara's only proper purpose for inspection; he also seeks to inspect corporate records to, among other things, value his stock in Freddie Mac. (Compl., Ex. A thereto, at 5). The propriety of this purpose is not affected by the claims Mr. Pagliara is investigating.

Second, even if investigating claims were Mr. Pagliara's only purpose for inspection, Movants cite no authority for the assertion that a court reviewing an inspection claim under Section 13.1-773 must perform a "pass-through" analysis of all potential claims that the investigation might unearth. Instead, the statute simply asks whether a stockholder's demand for inspection "is made in good faith and for a proper purpose." *See* Va. Code § 13.1-771(D)(2). In Virginia, a stockholder pursues a proper purpose so long as his request is designed "to protect his

rights as a shareholder." *Retail Prop.*, 471 S.E.2d at 183; *see also Bank of Giles Cnty. v. Mason*, 98 S.E.2d 905, 908 (Va. 1957) (a proper purpose is "some reasonable purpose germane to his interest as a stockholder"). This suit easily clears that bar. (*See, e.g.*, Compl. ¶¶ 122-123).

Third, many potential claims Mr. Pagliara seeks to investigate are direct, not derivative, and Mr. Pagliara would not be barred from bringing even derivative claims where there is a conflict of interest. Mr. Pagliara seeks to investigate a number of potential direct claims, including claims for breach of contract. (*See generally* Compl. ¶¶ 98-114). Moreover, notwithstanding the HERA succession provision, a stockholder may assert derivative claims if there is evidence that the conservator acted with a manifest conflict of interest. 7/ All of this guesswork, though, further underscores the impropriety of conducting a "pass-through" analysis based on hypothetical claims that Mr. Pagliara might or might not assert in a future lawsuit. FHFA's attempt to bootstrap into this lawsuit possible defenses to potential claims in another, hypothetical lawsuit should fail. Those potential defenses can be raised and addressed on their merits if and when a future suit is brought; they provide no justification for FHFA's request to take over and dismiss Mr. Pagliara's current suit for inspection of corporate records.

B. HERA's Anti-Injunction Provision Does Not Apply.

Movants next argue that permitting the inspection of books and records under Section 13.1-773 would violate HERA's anti-injunction provision, 12 U.S.C. § 4617(f). (*See* Mot. 14-15). They make no attempt whatsoever to explain how this argument supports their request to *substitute* for Mr. Pagliara. Freddie Mac has made clear the Motion is not seeking dismissal. (*See*

7/ Although Movants argue that one district court (in a decision currently under review) has declined to endorse a conflict-of-interest exception to a succession provision, (*see* Mot. 11 n.4), two courts of appeals have done so, *see Delta Savings Bank v. United States*, 265 F.3d 1017, 1021-23 (9th Cir. 2001); *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999); (Compl. ¶ 128).

Resp. in Supp. Mot. for Extension n.3, ECF No. 18). Yet an anti-injunction provision does not demonstrate that there has been a transfer of interest from Mr. Pagliara to FHFA, *see* Fed. R. Civ. P. 25(c). This is merely an (incorrect) argument that Mr. Pagliara's claim is barred and should be dismissed, though Movants purport not to be seeking dismissal in this Motion. For that reason, the Court need not even consider this argument at this time.

Nonetheless, the argument is meritless. HERA's anti-injunction provision states 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). That provision simply provides that when FHFA is acting as conservator, courts cannot tell it how to exercise its business judgment. To illustrate, the Ninth Circuit recently considered a challenge to FHFA's directive that Freddie Mac discontinue purchasing certain assets that FHFA deemed risky. As the court explained, Section 4617(f) barred the suit because the challenged "directive falls within FHFA's conservator powers." *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013); *see also Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012) (FHFA has power to take "protective measures against perceived risks" without judicial intervention). In the analogous FIRREA context, courts have likewise applied the statute's anti-injunction provision to forbid courts from imposing restrictions on the FDIC's ability to dispose of property as it sees fit. *See, e.g., Bank of America Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1244 (11th Cir. 2010) (listing cases).

Mr. Pagliara's inspection claim does not seek to impose any restriction on FHFA's actions or business judgment as conservator. Mr. Pagliara has a right under the VSCA to inspect Freddie Mac's corporate records, and Freddie Mac (and FHFA as conservator) has no discretion in responding to the inspection demand. If Mr. Pagliara and his inspection demand satisfy the statutory requirements, he is entitled to inspect the requested records. *See* Va. Code Ann.

§§ 13.1-771, -773. Enforcement of this individual right in no way limits FHFA's ability to make business decisions on Freddie Mac's behalf, and granting relief here does not "restrain or affect" FHFA's "exercise of powers or functions" as conservator.

Unsurprisingly then, FHFA and Freddie Mac have not identified any case applying Section 4617(f) to bar a direct records inspection suit like the one here. Instead, they cite various decisions that prohibit unauthorized *derivative* suits—again, suits brought on Freddie Mac's behalf. *See Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 125-26 (D.D.C. 2014); *Fed. Home Loan Mortg. Corp.*, 643 F. Supp. 2d at 797; *Sadowsky*, 639 F. Supp. 2d at 350-51; *In re Fed. Nat'l Mortg. Ass'n Secs., Derivative, & ERISA Litig.*, 629 F. Supp. 2d 1, 4 n.4. (D.D.C. 2009). Mr. Pagliara's suit enforces only an individual right and leaves intact FHFA's authority as conservator over Freddie Mac's business operations. HERA's anti-injunction provision, like its succession provision, poses no obstacle to Mr. Pagliara's suit or the relief to which he is entitled.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2016, a true and complete copy of the foregoing was filed via the court's CM/ECF system and notice of electronic filing was sent to the following counsel of record:

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EXHIBIT 1

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: REAL ESTATE TRANSFER TAX LITIGATION	MDL No. 2394

ENTERPRISE DEFENDANTS' OPPOSITION TO GENESEE COUNTY'S MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

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STATUTES

OTHER AUTHORITIES

Defendants the Federal Housing Finance Agency ("FHFA"), the Federal National Mortgage Association ("Fannie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together with Fannie Mae, the "Enterprises") (collectively, the "Enterprise Defendants") hereby oppose Genesee County's Motion for Transfer Pursuant to 28 U.S.C. § 1407 ("Section 1407"). These cases do not meet the standard for centralization under Section 1407, and even the Plaintiffs[1] in these actions are not in agreement that transfer is warranted.[2]

At the heart of this litigation is a single, common, threshold legal question—whether the Enterprise Defendants' express federal statutory exemptions from "all [state and local] taxation" preclude states, counties, and municipalities from taxing the Enterprises when they transfer real estate. No "common questions of fact" are presented on that point, and if the Enterprise Defendants prevail on that core legal issue, *all* factual issues (common or case-specific) will be moot. Even if the Enterprise Defendants do not prevail on that threshold issue, their liability for transfer taxes will depend primarily upon the purely legal issue of whether state and county statutory exemptions apply, while calculation of damages would be a case-specific process individualized by particular taxing authority or state.

Moreover, Genesee's motion amounts to a brazen attempt to forum shop. Genesee asks the Panel to steer all actions to the Eastern District of Michigan. Yet Genesee fails to mention that that court is the only tribunal so far that has decided the threshold liability issue, or that that

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[1] The Enterprise Defendants refer to their adverse parties as "Plaintiffs." In one action (*FHFA, et al. v. Hamer, et al.*, No. 3:12-cv-50230, N.D. Ill., filed June 22, 2012), the procedural roles are reversed—the Enterprise Defendants are seeking a declaratory judgment as plaintiffs. The Enterprise Defendants refer to moving Plaintiff Genesee County, Michigan as "Genesee."

[2] *See* Doc. # 91 at 1 ("Wyoming County opposes the Motion as unnecessary in this case."); *see also In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, MDL 2219, 2011 WL 346946 (J.P.M.L. Feb. 4, 2011) (observing that transfer is "less compelling" where "the defendants and/or some of the plaintiffs oppose centralization").

court granted summary judgment to Genesee, holding (erroneously, in Defendants' view) that the Enterprise Defendants' statutory exemptions from "all [state and local] taxation" do not apply to transfer taxes. Genesee plainly seeks to ensure that the same outcome will follow in all other cases. The Panel ordinarily frowns on such gamesmanship and should reject it here.

Should the Panel nevertheless deem transfer appropriate, the Enterprise Defendants respectfully submit that certain actions should be excluded and the remaining actions transferred to the Eastern District of Virginia, a convenient and efficient forum well suited to handle the issues presented by these cases, in which a transfer tax case is already pending before the Honorable Henry E. Hudson.

THE ENTERPRISES, THE CONSERVATOR, AND THE EXEMPTION STATUTES

Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress to establish secondary market facilities for residential mortgages, to provide stability and liquidity to the secondary market for residential mortgages, and to promote access to mortgage credit throughout the Nation. *See* 12 U.S.C. §§ 1716; 1451 note. FHFA is an independent federal agency, created pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"), Pub L. No. 110-289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4617 *et seq.*, with comprehensive regulatory and oversight authority over the Enterprises and the Federal Home Loan Banks. On September 6, 2008, the Director of FHFA placed the Enterprises into FHFA's conservatorship; FHFA appears in these cases in its capacity as Conservator to the Enterprises.

Each of the three Enterprise Defendants is statutorily exempt from materially "all [state and local] taxation." Fannie Mae's federal charter provides that Fannie Mae, "including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, *shall be exempt from all taxation* now and hereafter imposed by *any State, . . . county, municipality, or*

local taxing authority, except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed." 12 U.S.C. § 1723a(c)(2) (emphasis added). Freddie Mac's federal charter similarly provides that Freddie Mac, "including its franchise, activities, capital, reserves, surplus, and income, *shall be exempt from all taxation* now or hereafter imposed by . . . *any State, county, municipality, or local taxing authority*, except that any real property of [Freddie Mac] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." *Id.* § 1452(e) (emphasis added).[3]

Hence, this litigation turns on a single, threshold legal question—whether Fannie Mae, Freddie Mac, and FHFA are statutorily exempt from paying taxes state and local government plaintiffs would impose upon them for exercising the privilege of transferring real estate.

SUMMARY OF THE ARGUMENT

The Panel should deny transfer under Section 1407.

First, this litigation is not appropriate for centralization because there is no "common question[] of fact," as Section 1407 requires. Rather, the primary common issue in these cases is purely legal. This Panel has often held that where the material facts relating to liability are largely undisputed, where there is unlikely to be any merits discovery on liability, and where the only substantial issues are legal questions, transfer under Section 1407 is not appropriate.

Second, although centralization of *any* set of similar cases could conceivable create some efficiencies, transfer and centralizations here would not promote the just and efficient conduct of these actions, nor would it make them substantially more convenient. Genesee urges the Panel to

[3] HERA confers a substantively identical exemption upon the FHFA Conservator. 12 U.S.C. § 4617(j)(1), (2).

transfer all cases to Judge Victoria Roberts of the Eastern District of Michigan, yet such a transfer would be unjust. Genesee fails to mention that on March 23, 2012, Judge Roberts granted summary judgment to Genesee and another Michigan county,[4] holding (erroneously, in the Enterprise Defendants' view) that the Enterprises' statutory exemptions from "all taxation" do *not* apply to Michigan's real estate transfer taxes, and thereby triggering the current spate of litigation. Hence, although Genesee's motion purports merely to seek transfer to a convenient forum for efficient proceedings, it appears calculated instead to ensure that the single existing ruling on the purely legal threshold liability issue will control all cases. The Panel should not permit Genesee (or any of the other Plaintiffs) to "'game' the system" by shunting all similar litigation to the one court where a Plaintiff *already* has won an outcome in its favor on the central legal issue common to all other cases. *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2241 (2008). Moreover, transfer here would be particularly inappropriate due to significant disparities in procedural posture.

If the Panel is nevertheless inclined to centralize any of the cases, the Panel should withhold cases that are procedural outliers, and transfer the remaining actions to the Eastern District of Virginia, where a Transfer Tax case is already pending before Judge Hudson.

ARGUMENT

I. THE PANEL SHOULD DENY TRANSFER UNDER SECTION 1407

A. The Actions Involve Few, If Any, Common Questions of Fact, Involving Instead Purely Legal Questions as to Liability

These cases are not appropriate for MDL transfer and centralization. To warrant transfer

[4] Genesee County's case, a class action, is proceeding in parallel with a companion individual action brought by Oakland County. *See Genesee Cnty. v. Fannie Mae*, 2:11-cv-14971 (E.D. Mich.); *Oakland Cnty. v. Fannie Mae, et al.*, 2:11-cv-12666 (E.D. Mich.).

under Section 1407(a), the actions must present "one or more common *questions of fact*." 28 U.S.C. § 1407(a) (emphasis added). To satisfy this statutory prerequisite, the party seeking transfer may not simply allege a *common factual background*; it must instead present *outstanding factual questions* that remain unresolved and are subject to further exploration through discovery. The principal common issue in these cases—the application of the federal statutes exempting the Enterprise Defendants from materially "all [state and local] taxation"—is one of law, not fact, making them ill-suited for centralization under Section 1407.

Where the actions involve largely undisputed facts and the overriding questions in each action are legal in nature, transfer under Section 1407 is not warranted, even if the threshold legal issues are "common" across the cases. As explained in the Multidistrict Litigation Manual:

> The common issues of fact must be contested issues. If a party stipulates as to the common issues, then no common issues will exist, and transfer will not be appropriate. The presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer. Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate. In one case, the Panel observed: "Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." ***If the actions present common factual issues that would be disposed of by a single legal issue, the Panel is likely to determine not to order transfers***.

Multidistrict Litig. Manual § 5:4 (2012 ed.) (emphasis added) (quoting *In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378 (J.P.M.L. 2009) (citations omitted)).

Indeed, the Panel has long denied motions to transfer actions that involve common issues of law but not fact. For example, in *In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977), the Panel denied a transfer motion where, as here, the "principal issue" common to all the actions was one of statutory interpretation. In that

case as here, the parties seeking transfer urged that the issue be resolved "by unified proceedings on motions to dismiss in all actions before a single forum." *Id.* The Panel rejected this argument and denied transfer because "these actions raise few if any common questions of fact." *Id.* Instead, the Panel concluded that transfer and centralization were not appropriate because "the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation," and because "[a]ny factual issues are primarily, if not entirely, unique questions pertaining to. . . each [individual] action." *Id.*

The Panel has applied this principle to deny transfer many times, including just last year,[5] and the same principle precludes transfer and centralization here. The facts as to the Enterprise Defendants' liability for transfer tax are largely undisputed, leaving only legal issues to govern

[5] *See, e.g.*, *In re Keith Russell Judd Voting Rights Litig.*, 816 F. Supp. 2d 1383, 1383 (J.P.M.L. 2011) (denying transfer where "[t]he overriding question in each action is one that is largely legal in nature, making these actions unsuitable for centralization"); *In re: Removal from U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L. 2011) (denying transfer where "factual questions . . . are largely undisputed," and observing that "there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matters"); *In re: Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1346-47 (J.P.M.L. 2011) (denying transfer where "common factual issues [were] largely undisputed and primarily common legal questions [were] left to be decided"); *In re Airline "Age of Emp." Employ't Practices Litig.*, 483 F. Supp. 814, 817 (J.P.M.L. 1980) (denying transfer where "common questions, to the extent any exist among these actions, will be mainly legal questions concerning the applicability of" a federal statute); *In re Okla. Ins. Holding Co. Act Litig.*, 464 F. Supp. 961, 965 (J.P.M.L. 1979) (denying transfer where "each of these [purportedly common] questions is, at best, a mixed question of fact and of law, and that the legal aspects of these questions clearly predominate . . . even if those question involve some limited common questions of fact, [they] are an inadequate predicate for coordinated or consolidated pretrial proceedings"); *In re Am. Home Prods. Corp "Released Value" Claims Litig.*, 448 F. Supp. 276, 278 (J.P.M.L. 1978) (denying transfer where "the predominant, and perhaps only, common aspect in these actions is the legal question of what measure of damages is applicable" under the relevant statute); *In re Natural Gas Liquids Regulation Litig.*, 434 F. Supp. 665, 668 (J.P.M.L. 1977) (denying transfer where "these actions raise a common question of law and share few, if any, common questions of fact"); *In re U. S. Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. 1405, 1407 (J.P.M.L. 1976) (denying transfer where "questions of law rather than common questions of fact are significantly preponderant and, hence, Section 1407 treatment would in any event be unwarranted").

the question. Tellingly, Genesee identifies no common *questions* of fact to be decided in these actions. Genesee identifies as "principal facts" the fact that counties are obligated to collect transfer taxes, that the Enterprises claim to be exempt, that the counties dispute that exemption, and that the Enterprises are liable to pay the transfer taxes. Genesee Br. at 4-6. These are nothing more than undisputed background facts that provide "context" for the case—as the plaintiffs in the Florida transfer tax action acknowledge in their response in support (*see Nicolai* Resp. at 2)—or legal conclusions in the guise of facts. The central *fact* alleged in each action, that the Enterprises did not pay all transfer taxes Plaintiffs claim were due when property was transferred (directly or indirectly) to or from an Enterprise, is *undisputed*—in light of their statutory exemption from "all taxation," the Enterprises have not paid all transfer taxes Plaintiffs now claim were owed. The central *issue*—whether the Enterprise Defendants' statutory exemptions protect them from liability for transfer taxes—is a *purely legal* question that can readily and promptly be resolved without the need for any discovery. *See Oakland* ECF No. 63; *Genesee* ECF No. 28.

Accordingly, the threshold, and potentially dispositive, question in all of these cases is not a factual question at all—a reality best illustrated by the *Oakland* case, where the plaintiff filed a motion for summary judgment as to liability *one day* after filing its complaint, and where the Enterprise Defendants later cross-moved for summary judgment, agreeing with the Oakland plaintiff's assessment that no discovery was needed to resolve the question of the Enterprises' liability for Michigan transfer taxes. *See Oakland*, ECF Nos. 5, 40; *see also Genesee*, ECF Nos . 11, 18, 21 (all parties, including the State of Michigan, cross-moved for summary judgment on liability, agreeing that there were no disputed facts and no discovery was needed). Indeed, Genesee has argued to this Panel that "the central issue in all the cases" is "the transfer tax

exemption issue," *i.e.*, the purely legal question of whether the federal statutes that exempt the Enterprises and FHFA from "all taxation" somehow leave them exposed to transfer taxes. Genesee Br. 1 (Doc. #1-1); *see also id*. (characterizing the exemption issue as "critical" to the actions). Only if the court rules against the Enterprise Defendants on that central question would the court need to determine whether the Enterprises would otherwise be liable for such taxes under the relevant states' laws. But these too are legal questions—and ones that are not even common across the several actions because of differences among the relevant states' laws. Indeed, for this very reason the Wyoming County, WV Plaintiffs concede that consolidation is not appropriate here. *See supra* note 2.

B. Transfer Would Not Promote the Just and Efficient Conduct of the Actions, Nor Would it Make the Litigation Substantially More Convenient

Convenience alone cannot justify centralization, and here, any alleged convenience benefits of centralization would be quite limited, as the transfer tax cases are unlikely to involve substantial discovery. But whatever considerations of convenience might suggest, an MDL transfer must also be fair and just to the parties. *See* Heyburn, *A View from the Panel*, 82 Tul. L. Rev. at 2237 ("Every transfer decision has the potential to prejudice a particular party or claim among the many. In difficult cases, the Panel will weigh the likely benefits of centralization against the possibility of such resulting unfairness."). Here, Genesee's proposal to transfer the cases to a court that has already decided the threshold legal issue in their favor is anything but fair and just; it is an unvarnished attempt to preordain the outcome of the litigation.

1. The Risk of Inconsistent Rulings on the Central Legal Issue in these Cases Does Not Justify Transfer

Genesee asserts that centralization before the Eastern District of Michigan is warranted to

prevent inconsistent pretrial rulings on dispositive motions. Genesee Br. at 9. Genesee plainly wants that court to be the *only* one to rule on the "central" legal issue presented in each transfer tax case, applying its prior (and in the Enterprise Defendants' view, erroneous) legal conclusion to each of the other pending actions, despite the fact that Defendants already have filed—or expect to file shortly—dispositive motions that present the same legal issue in the other cases.

This Panel's function is not to prevent district or circuit court splits on legal issues or to orchestrate the absolute consistency of such rulings across the United States. As discussed above, this Panel's central focus under the plain language of Section 1407 is to streamline proceedings where multiple cases address common *factual questions*, not common *legal* issues. *See supra* 4-8. As such, concerns about uniformity of the law are not sufficient to justify centralization. That is the province of the Supreme Court, which often permits legal issues to "percolate" throughout the circuits before resolving conflicting rulings.

This Panel's decision in *In re: Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F.Supp.2d 1378 (J.P.M.L. 2009) is instructive. There, the Panel denied transfer of a series of cases that, "by and large, raise[d] strictly legal issues." The Panel observed:

> One of the Panel's prime considerations is often the need to avoid inconsistent rulings on similar issues. Usually, that consideration is bolstered by the concern for duplicative and burdensome discovery leading up to the legal issues. Here, very little discovery appears necessary prior to the joinder of the legal issues. ***Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization***.

Id. at 1378 (emphasis added). The same principle applies here. The Transfer Tax cases, "by and large, raise strictly legal issues," and "very little discovery appears necessary prior to joinder of the legal issues." Accordingly, "the concern for duplicative and burdensome discovery leading up to the legal issues" is wholly absent. Thus, the fact that multiple courts may decide the same

legal issue in different ways is "not sufficient to justify Section 1407 centralization." *Id*.

This principle is particularly apt here, where the very district court that granted summary judgment has certified, pursuant to 28 U.S.C. § 1292(b), that "there is *substantial ground for difference of opinion*" as to the threshold legal question of "whether the federal statutes exempting the Enterprises and the Conservator from 'all [state and local] taxation' . . . apply to transfer taxes" imposed under Michigan law. *Oakland* ECF No. 73 (emphasis added). The *Genesee*/*Oakland* Court's recognition that its decision—the first decision by a federal court on this important issue—should not be the end of the story is underscored by the fact that Michigan's Department of Treasury, among others, had previously declared that "transfers to and from" the Enterprises "are not subject to the real estate transfer tax." Letter (Aug. 12, 2011) (attached as **Exhibit C**) (emphasis added).[6] It is not appropriate to use the MDL mechanism as a *de facto* means of determining the merits of dozens of cases by transferring them to the one judge who has already decided the threshold substantive issue in an as-yet-untested, opinion that would effectively become the law of the land immediately upon transfer.

While it is possible that two courts could come to different *legal* conclusions as to the applicability of the Enterprises' statutory exemptions from "all taxation," the impact of such divergent rulings would not create any *factually* inconsistent obligations on the Enterprises because the transfer taxes are owed on a county-by-county basis. In other words, it is highly unlikely that two or more courts could render the Enterprises simultaneously liable and not liable to the same municipality with respect to the same state transfer tax. To the extent the court in

[6] *See also, e.g.*, D.C. Office of Corp. Counsel, Liability of the Federal National Mortgage Association (FNMA) for Payment of the District of Columbia Real Property Transfer Tax, 6 Op.C.C.D.C. 115, 1981 D.C. AG LEXIS 36 (June 12, 1981).

Hertel I (W.D. Mich.) concludes that the Enterprises are exempt from transfer taxes, that ruling's inconsistency with the earlier rulings in *Genesee/Oakland* (E.D. Mich.) would be resolved by the Sixth Circuit, where the Enterprise Defendants' petition to appeal is pending. Moreover, the Enterprises intend to seek consolidation of the two putative class actions pending in the U.S. District Court for the Southern District of West Virginia (*Goode* and *Hancock County*). Although one of the actions, *Massey* (S.D. Ga.), was filed on behalf of a putative multi-state class (and thereby purports to overlap with some but not all of the other pending actions),[7] the Enterprise Defendants have opposed class certification and moved to strike the class allegations.

2. There Will Be No Merits Discovery on the Threshold and Potentially Dispositive Issue of the Enterprise Defendants' Liability for Transfer Taxes and Damages Discovery Will Be Highly Particularized

MDL transfer is typically appropriate for centralized fact-finding as to *liability*. For example, in *In re Air Crash Disaster at Pago Pago, Am. Samoa, on January 30, 1974*, 394 F. Supp. 799, 800 (J.P.M.L. 1975), a multi-district air disaster litigation, "the common questions of fact pertain[ed] to the issue of liability, whereas the issue of damages is unique with respect to each decedent." Because the parties had "resolved the issue of liability," the Panel denied transfer under Section 1407. *Id.*; *see also In re Klein Med. Malpractice Litig.*, 398 F. Supp. 679, 680 (J.P.M.L. 1975) (denying transfer where "the common factual issues *on the question of liability* in each action are minimal") (emphasis added). Here, as discussed *supra*, there are no material issues of fact on the threshold and potentially dispositive legal issue of the applicability

[7] The putative class in Massey covers 22 states. Seven of the proposed transferor actions are pending in states included in the *Massey* class definition (Florida, Georgia, Kentucky, Minnesota, Virginia, West Virginia), while six actions are pending in states excluded from the *Massey* class (Michigan and Illinois).

of the Enterprise Defendants' exemption from "all [state and local] taxation"—it is undisputed that certain states' laws impose a tax on the transfer of real estate and it is undisputed that real estate is transferred directly and indirectly to and from Fannie Mae and Freddie Mac within the Plaintiff jurisdictions. Therefore, there are no facts to be discovered as to the Enterprise Defendants' potential liability for transfer tax. To the extent damages proceedings may be relevant to this Panel's consideration, as discussed above, *see supra* at 8, damages in these actions are inherently local and thus there are no efficiencies to be gained by transfer for purposes of damages calculations.[8]

3. Purported Concerns About Inconsistent Class-Certification Rulings Are Misplaced

Genesee recognizes that this litigation will likely not involve any discovery before a court rules on the merits of the threshold legal question and does not seriously contend that centralization is needed to make discovery more efficient. Instead, Genesee asserts that MDL transfer is needed to avoid the risk of potentially inconsistent pretrial rulings with respect to class certification. Genesee Br. at 9.

This is a red herring. All but one of the actions that have been filed are actions on behalf of putative statewide classes of county taxing authorities (or on behalf of a single county). To date, the Enterprise Defendants have stipulated to certification of such classes, and they expect to continue to so stipulate in cases involving similar allegations and claims for back taxes or

[8] Efficiencies also can be gained without transfer because many plaintiffs share common counsel and thus can informally coordinate to resolve duplicative discovery. *See In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, MDL 2219, 2011 WL 346946 (J.P.M.L. Feb. 4, 2011) ("[T]he presence of common counsel for moving plaintiffs in actions filed shortly before the motion for centralization . . . also weigh[s] against centralization."). Indeed, plaintiffs in *Massey*, *Butts*, *Small*, and *Vadnais*, share common co-counsel, as do plaintiffs in *Oakland* / *Genesee* and *Hertel I* / *Hertel II*.

declaratory judgments as to liability for transfer taxes, so long as the classes are defined to include the state officials who have the authority to enforce payment of such taxes. Because the Enterprise Defendants expect that there will be no dispute as to the statewide classes, and (with one exception discussed below) no overlap between those classes, there is no potential for inconsistent class certification rulings. Centralization is thus not needed to protect against such a risk. *See, e.g., In re: Gen. Mills, Inc., Yoplus Yogurt Prods. Mktg. & Sales Practices Litig.*, MDL 2169, 2010 WL 2346553 (J.P.M.L. June 8, 2010) (denying MDL transfer where one action was "already certified as a statewide class" and the remaining actions sought "similar putative statewide classes encompassing consumers from different states" because "the certified and putative classes will likely not overlap significantly").

As noted above, *Massey* (S.D. Ga.), is a putative multi-state class action; Fannie Mae has opposed class certification and moved to strike the nationwide class allegations. If the nationwide class is denied (or stricken), those plaintiffs can still seek to certify statewide classes, which defendants would not anticipate disputing (again, so long as the proper state tax authority or official is included as a plaintiff). To the extent there are multiple actions filed within a state, such as in (at present) West Virginia and Georgia, coordination or consolidation of those actions, rather than transfer of all actions, would avoid the risk of inconsistent, single-state class certification rulings.

4. Transfer Would Provide Only Limited Convenience Benefits

Centralization of the actions would provide little incremental convenience because the cases involve no factual disputes on the issue of whether the Enterprise Defendants are liable for transfer taxes—all agree that the Plaintiff states and counties impose a tax on the transfer of real estate, and that real estate is transferred directly and indirectly to and from Fannie Mae and

Freddie Mac within those jurisdictions. Hence, while Section 1407 directs the Panel to consider the convenience of the "witnesses," there will be no witnesses on that issue because there are no material facts in dispute. To the extent damages proceedings would be necessary, centralized discovery proceedings would serve no purpose nor provide any benefit. There will be nothing "common" to discover across these numerous state-wide cases, given the particularities of each state's practice; because damages must be calculated on a jurisdiction-by-jurisdiction basis the discovery needed to measure damages in one jurisdiction would not be of any use to any other jurisdiction. This leaves only motions practice in the various district courts, but with the benefits of electronic filing such activity requires little if any travel or coordination with local counsel. Accordingly, any convenience benefit of centralization would be modest, and could not outweigh the reality that the common disputed questions in these cases are legal. No purported convenience benefit could transform this litigation into one that meets the threshold "common question[] of fact" requirement of Section 1407.

II. ALTERNATIVELY, IF THE PANEL ORDERS TRANSFER, IT SHOULD DENY TRANSFER OF CERTAIN ACTIONS AND ORDER THAT THE REMAINING ACTIONS BE TRANSFERRED TO THE EASTERN DISTRICT OF VIRGINIA

Should the Panel be inclined to order transfer despite the foregoing arguments, the Enterprise Defendants respectfully request that the Panel (a) deny transfer of certain cases that are procedural outliers, and (b) transfer the remaining actions to the Eastern District of Virginia, a convenient and efficient forum in which a transfer tax action is already pending.

A. The Panel Should Not Transfer Actions That Are Procedural Outliers

"Where there is such a significant procedural disparity among the subject actions, the Panel will take a close look at whether movants have met their burden of demonstrating that centralization will still serve the purposes of Section 1407." *In re Louisiana-Pacific Corp.*

Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig., MDL 2366, 2012 WL 2175773 (J.P.M.L. June 11, 2012). Indeed, the Panel has often found that "[t]he presence of procedural disparities among constituent cases is another factor that can weigh against centralization." *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, MDL 2134, 2010 WL 532561 (J.P.M.L. Feb. 12, 2010).[9]

Here, the cases run the gamut from far advanced (in the two cases pending before the Eastern District of Michigan class certification and liability issues have been resolved,[10] and damages proceedings have commenced) to only just commenced (in several actions, the complaint is the only substantive filing to date[11]). And some but not all of the actions would be controlled by the Sixth Circuit decision that would result if that Court grants a pending petition for interlocutory review. While these significant procedural disparities may suggest that centralization of any cases would be inappropriate, these disparities plainly preclude transfer and centralization of the most procedurally advanced cases at this time.

1. The Panel Should Not Transfer Actions in Which a Fully Briefed Dispositive Motion is Pending or Has Been Decided

In this instance, the Panel should not transfer actions where a fully briefed dispositive motion is pending or has been decided. The Panel has consistently recognized that "principles of comity" weigh against transfer of any action "that has an important motion under submission

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9 *See also In re Louisiana-Pacific Corp. Trimboard Siding Mktg, Sales Practices & Prods. Liab. Litig.*, MDL 2366, 2012 WL 2175773 (J.P.M.L. June 11, 2012) (denying transfer and noting that "[t]he efficiencies that could be achieved in the newly filed actions [was] apparent, but we are not convinced, even after oral argument, of how centralization would benefit the significantly more advanced . . . action pending in the proposed transferee district").

10 Only one of the two Eastern District of Michigan actions—*Genesee*—is a class action.

11 *See, e.g.*, *Nicolai* (M.D. Fla); *Hancock Cnty.* (S.D. W.Va.); *Goode* (S.D. W.Va.); *Vadnais* (D. Minn.); *Small* (E.D. Va.); *Butts* (D.S.C.); *Spoonamore* (E.D. Ky.).

with a court." *In re L. E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975).[12] Pragmatic considerations also favor allowing multiple district courts to consider the legal issues underlying liability—the variety of legal and analytical perspectives that multiple district court decision would reflect could benefit the Courts of Appeals in reaching their decisions. *See supra* 9. Accordingly, the Panel should not transfer any action in which a fully briefed dispositive motion is pending or has been decided at the time the Panel makes its decision (such as *Hertel I*, *Hertel II*, *Massey*, *Oakland*, and *Genesee*).[13] The remaining cases, however, are in early stages of litigation—in some, no defendant has even entered an appearance.[14] It makes little sense to combine such procedurally disparate cases into one MDL proceeding. Only those cases at the same stage of litigation—where dispositive motions have not been filed and fully briefed—should be considered for transfer and centralization.

2. The Panel Should Deny Transfer of Actions in the Sixth Circuit, Where a Petition for Interlocutory Review of Judge Roberts' Decisions is Pending

Cases that could be controlled by a pending appeal are also procedurally different from cases that would not be so controlled. Accordingly, if it grants transfer, the Panel should exclude all cases that would be controlled by the Sixth Circuit appeal sought by the Enterprise

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[12] *Accord In re Res. Exploration, Inc., Sec. Litig.*, 483 F. Supp. 817, 822 (J.P.M.L. 1980); *In re Air Crash Disaster at Tenerife, Canary Islands on Mar. 27, 1977*, 435 F. Supp. 927, 928 (J.P.M.L. 1977); *In re Prof'l Hockey Antitrust Litig.*, 352 F. Supp. 1405, 1406 (J.P.M.L. 1973).

[13] *See* **Exhibit A** (identifying three Transfer Tax actions in which a fully briefed dispositive motion is currently pending and the two actions in which such a motion as already been decided). The dispositive motion pending on *Massey* (S.D. Ga.) does not address the statutory exemption issue; that issue will be addressed in future dispositive motions to be filed after class certification issues are settled.

[14] The Defendants intend to move to dismiss many, if not all, of the newly filed actions. To the extent that litigation in those cases is not stayed during the pendency of this motion to consolidate and thus motions to dismiss are fully briefed and heard before this Panel acts, those actions also should not be transferred at this time.

Defendants' pending petition for interlocutory review of Judge Roberts' decisions in *Genesee* and *Oakland*.[15] *See* Multidistrict Litig. Manual § 3:8 (2012) ("The Panel is not allowed to transfer cases . . . that are on appeal."). In *In re: Parallel Networks, LLC, ('111) Patent Litig.*, --- F. Supp. 2d ---, 2012 WL 2175762, at *2 n.4 (J.P.M.L. June 12, 2012), the Panel recently granted transfer under Section 1407, but refused to transfer one case where the district court in that case had already granted summary judgment and that ruling was pending on appeal (as would be the case here if the Sixth Circuit grants interlocutory review).[16] Accordingly, the Panel should not transfer any of the five transfer tax actions, including *Oakland* and *Genesee*, that are pending within the Sixth Circuit (or any other actions that may be filed in that circuit).

B. In the Event the Panel Opts to Centralize Any Remaining Actions, It Should Transfer Them to the Eastern District of Virginia

As noted above, there are a plethora of reasons for the Panel to reject Genesee's request to transfer these cases to Judge Roberts and, indeed, to deny the motion outright. If the Panel is nevertheless inclined to grant transfer, Defendants respectfully request that all transferable actions be centralized in the Eastern District of Virginia, where a transfer tax case is currently pending before the Honorable Henry E. Hudson.[17] In selecting a transferee forum, the Panel has

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[15] *See* **Exhibit B** (identifying five Transfer Tax actions pending in the Sixth Circuit). While the Enterprise Defendants cannot predict with certainty when the Sixth Circuit will act on the pending petition, as to which briefing closed June 8, 2012, they believe it is reasonable to anticipate a decision before the Panel will hear argument on the transfer motion.

[16] *See also In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311, 1314 (J.P.M.L. 1972) (denying transfer of claims where interlocutory appeal was pending at the time transfer was sought); *In re Mid-Air Collision Near Hendersonville, N.C. on July 19, 1967*, 297 F. Supp. 1039, 1040 (J.P.M.L. 1969) (same, observing that "action by the Panel at this time could disrupt the [appellate] review proceeding now in process"); *In re U. S. Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. at 1407 (denying transfer where the outcome of pending appeals "could have a substantial if not dispositive effect on all the actions pending in districts within those circuits").

[17] Enterprise Defendants also respectfully submit that the Alexandria Division of the Eastern District of Virginia would be an appropriate transferee forum; centralization there would entail at

Footnote continued on next page

consistently considered factors such as:

- The proposed district's proximity to common defendants;
- The existence of a transferable action in the proposed district;
- The centrality of the proposed district to all pending actions;
- The proposed district's caseload;
- The substantive experience of the proposed district and transferee judge; and,
- The interests of the federal government.

All factors considered, the Eastern District of Virginia is the most appropriate transferee district.

First and foremost, the Eastern District of Virginia is convenient for the Enterprises, either or both of which are parties to every Transfer Tax case. Freddie Mac's principal place of business is located within that district at McLean, Virginia (in the Alexandria Division); Fannie Mae and FHFA are headquartered just a few miles away in Washington D.C. The Panel has consistently transferred to jurisdictions where common defendants—including the Enterprises—have their principal place of business.[18] That factor is especially strong where—as here—there is no single place where common factual events can be said to have occurred.[19]

The Eastern District of Virginia is also convenient for FHFA, which is located in Washington D.C. Where a federal agency has a substantial interest in the litigation, as FHFA

Footnote continued from previous page
least the same convenience benefits (if not more) as centralization before Judge Hudson, who sits in the Richmond Division.

[18] *See, e.g., In re: Kaplan Higher Educ. Corp. Qui Tam Litig.*, 626 F. Supp. 2d 1323, 1324 (J.P.M.L. 2009) (transferring to district where defendant had one of its headquarters); *In re Fed. Nat'l Mortg. Ass'n Secs. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005) (transferring to the District of Columbia, in part, because "Fannie Mae [the common defendant] is headquartered within the District of Columbia").

[19] *See In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021 (J.P.M.L. 1978) (transferring to jurisdiction where defendant had its principal place of business, though it had no pending cases, because "[n]one of the districts in which actions are pending offers a strong nexus to the common factual questions in this litigation, and little discovery on those issues could be expected to occur in any of them").

does here, the Panel has often selected a transferee court near the agency's headquarters.[20] The district is also convenient for plaintiffs because these actions have been filed across the southeast, up and down the eastern seaboard, and in the midwest. The Eastern District of Virgnia's proximity to four major airports in the Washington, DC/Richmond area make it accessible and convenient for all parties and counsel.[21]

Additionally, the judges of the Eastern District of Virginia have the experience necessary to handle this litigation. For example, Judge Hudson is currently presiding over *Small*, a Transfer Tax action brought on behalf of a putative statewide class of Virginia officials. And the Panel has repeatedly selected the Eastern District of Virginia as a transferee forum.[22]

Finally, the Eastern District of Virginia is known as the "rocket docket" because "civil actions quickly move to trial or are otherwise resolved" by that court. *Pragmatus AV, LLC v.*

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[20] *See, e.g.*, *In re Practice of Naturopathy Litig*., 434 F. Supp. 1240, 1243 (J.P.M.L. 1977) ("Because these 30 actions are pending throughout the entire United States, and because no overall focal point of discovery has emerged, no district stands out as the most appropriate transferee forum. On balance, however, we are persuaded that the District of Maryland is the most preferable. Inasmuch as the federal [agency] defendants are common to all actions in this litigation, several relevant documents and witnesses are located in nearby Washington, D. C. . . . The District of Maryland is the closest district to the District of Columbia wherein an action before us is pending."); *see also In re 1980 Decennial Census Adjustment Litig*., 506 F. Supp. 648, 651 (J.P.M.L. 1981) (similar, selecting District of Maryland); *In re Swine Flu Immunization Prods. Liab. Litig*., 446 F. Supp. 244, 247 (J.P.M.L. 1978) (selecting the District of Columbia, even though no action was pending there, because the department that exercised control over the program at issue was located there).

[21] *See In re Columbia Univ. Patent Litig.*, 313 F. Supp. 2d 1383, 1385 (J.P.M.L. 2004) (noting that "most of the parties in this litigation are in the eastern part of the United States, and thus the Massachusetts district should prove to be convenient for many of the litigants"); *In re Am. Gen. Life & Accident. Ins. Co. Indus. Life Ins. Litig*., 175 F. Supp. 2d 1380, 1381 (J.P.M.L. 2001) ("In selecting the District of South Carolina as transferee district, we observe that the districts with pending actions and the location of the defendant give this litigation a Southern tilt.").

[22] *See, e.g.*, *In re Xyberbaut Corp. Sec. Litig.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005); *In re W. Elec. Co., Inc. Semiconductor Patent Litig*., 415 F. Supp. 378, 379 (J.P.M.L. 1976); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316, 319 (J.P.M.L. 1975) *In re E. Airlines, Inc. Flight Attendant Weight Program Litig*., 391 F. Supp. 763, 765 (J.P.M.L. 1975).

Facebook, Inc., 769 F. Supp. 2d 991, 996 (E.D. Va. 2011). Current statistics demonstrate that, on average, the Eastern District of Virginia disposes of civil cases in only 5.1 months—about 30% faster than the national average.[23] Simply put, if these actions are to be centralized, transfer to the Eastern District of Virginia would promote their just and efficient resolution.[24]

By contrast, transfer to the Eastern District of Michigan would be neither just nor efficient. Judge Roberts has already granted Genesee's motion for summary judgment and the only issues that remain are specific to those actions—namely, a calculation of damages for the relevant Michigan counties and the resolution of recently added claims based on Michigan state law. Accordingly, there would be little to no efficiency gained by transfer to that court. Finally, because the actions pending in the Sixth Circuit should not be included in any centralized proceeding, the Eastern District of Michigan has no interest in overseeing the Transfer Tax cases.

CONCLUSION

For the foregoing reasons, the Panel should deny Genesee's Motion For Transfer. Alternatively, if the Panel determines that transfer is appropriate, the Enterprise Defendants respectfully request that the Panel stay transfer of the actions identified in Exhibit A and transfer the remaining actions, identified in Exhibit B, to the Eastern District of Virginia.

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[23] *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: Statistics, Fiscal Year 2011, Tbl. C-5, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05Sep11.pdf (last visited July 18, 2012).

[24] Alternatively, if the Panel decides not to select the Eastern District of Virginia, it should transfer the cases to the Hon. William T. Moore in the Southern District of Georgia, who is presiding over *Massey*, the only putative nationwide Transfer Tax class action. Judge Moore was previously selected to preside over an MDL involving mortgage lending practices. *See In re Novastar Home Mortg. Inc. Mortg. Lending Practices Litig.*, 368 F. Supp. 2d 1353, 1354 (J.P.M.L. 2005). He is thus well-positioned to preside over this litigation. *See In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (relying upon judge's "prior, successful experience in the management of Section 1407 litigation").

Dated: July 23, 2012

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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

THE FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"); THE FEDERAL HOME LOAN MORTGAGE CORPORATION ("FREDDIE MAC"); and THE FEDERAL HOUSING FINANCE AGENCY ("FHFA"), in its capacity as an agency of the federal government and in its capacity as Conservator of Fannie Mae and Freddie Mac, Plaintiffs, v. BRIAN HAMER, in his official capacity as Director of the Illinois Department of Revenue; JOHN J. ACARDO, in his official capacity as DeKalb County Clerk and Recorder; KAREN A. STUKEL, in her official capacity as Will County Recorder; NANCY MCPHERSON, in her official capacity as Winnebago County Recorder; DAWN YOUNG, in her official capacity as Whiteside County Recorder; DEBBIE GILLETTE, in her official capacity as Kendall County Recorder; and SANDY WEGMAN, in her official capacity as Kane County Recorder, Defendants.	Civil Action No.: 3:12-cv-50230 Judge Kapala Magistrate Judge Mahoney

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO STAY

Plaintiffs FANNIE MAE, FREDDIE MAC, and FHFA (together, "Plaintiffs") hereby respectfully oppose the motions to stay (or alternatively, for additional time to respond to the Complaint) submitted by Defendants BRIAN HAMER, Director of the Illinois Department of Revenue, JOHN J. ACARDO, DeKalb County Clerk and Recorder, DEBBIE GILLETTE,

Kendall County Recorder, and SANDY WEGMAN, Kane County Recorder.[1] All Defendants seek to stay this action pending a ruling by the U.S. Judicial Panel on Multidistrict Litigation (the "JPML" or the "Panel") on a motion to transfer this case and others to the U.S. District Court for the Eastern District of Michigan. *See* Hamer Mot. Exs. A–B (attaching Genesee County's motions). Defendants Hamer, Gillette, and Wegman alternatively seek a 60-day extension to respond to the Complaint. *See* Hamer Mot. at 1, 3; Gillette Mot. at 2, 5; Wegman Mot. at 3. Plaintiffs have no objection to extending Defendants' response date — and indeed consented to a similar request from the Winnebago County defendants — but Plaintiffs do oppose the request for a stay.

At the heart of this and the other actions subject to the pending MDL motion is a single, common, threshold legal question—whether Plaintiffs' express federal statutory exemptions from "all [state and local] taxation" preclude states, counties, and municipalities from taxing the Enterprises when they transfer real estate. Even if Plaintiffs do not prevail on that threshold issue, their liability for transfer taxes will depend primarily upon the purely legal issue of whether state and county statutory exemptions apply, while calculation of damages would be a case-specific process individualized by particular taxing authority or state. Accordingly, Plaintiffs — and their adverse parties in other transfer tax actions — have opposed the MDL

[1] *See* Def. Brian Hamer's Mot. to Stay, July 17, 2012, ECF No. 26 ("Hamer's Mot."); Def. Debbie Gillette's Mot. to Stay, July 18, 2012, ECF No. 31 ("Gillette's Mot."); Def. Sandy Wegman's Mot. to Stay, July 18, 2012, ECF No. 35 ("Wegman's Mot."); Def. John J. Acardo's Mot. to Stay Proceedings, July 19, 2012, ECF No. 40 ("Acardo's Mot."). Defendant NANCY MCPHERSON, Winnebago County Recorder, filed her Answer, ECF No. 34, on July 18, 2012. Defendants KAREN A. STUKEL, Will County Recorder, and DAWN YOUNG, Whiteside County Recorder, have not filed responsive pleadings or motions.

motion on grounds that there are no common issues of fact presented in the cases, as 28 U.S.C. § 1407(a) requires for MDL centralization.[2]

No stay is warranted here. The pending MDL motion does not affect this Court's jurisdiction to decide the purely legal threshold issue at the heart of this case. The Court has ample discretion to consider and rule on a dispositive motion presenting that issue and should not refrain from doing so — especially in light of Plaintiffs' substantial and well-founded opposition to the MDL motion. *See* Ex. A. Moreover, because several Defendants raise a jurisdictional issue unique to this action, considerations of judicial economy disfavor any stay.

BACKGROUND

Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress to establish secondary market facilities for residential mortgages, to provide stability and liquidity to the secondary market for residential mortgages, and to promote access to mortgage credit throughout the Nation. *See* 12 U.S.C. §§ 1716; 1451 note. FHFA is an independent federal agency, created pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"), Pub L. No. 110-289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4617 *et seq.*, with comprehensive regulatory and oversight authority over the Enterprises and the Federal Home Loan Banks. On September 6, 2008, the Director of FHFA placed the Enterprises into FHFA's

[2] A copy of Plaintiffs' submission to the JPML is attached. *See* Enterprise Defendants' Opp., MDL No. 2394, ECF No. 108 (July 23, 2012) (attached as Ex. A); *see also* Resp. of Wyoming Cnty., W.V., MDL No. 2394, ECF No. 91 at 6 (July 20, 2012) (attached as Ex. B) ("The threshold requirements for transfer and coordination under 28 U.S.C. § 1407 are not satisfied by the Transfer Tax Cases. First, these cases do not present common factual questions."); Resp. of Montgomery Cnty., Ohio, MDL No. 2394, ECF No. 120 (July 27, 2012) (attached as Ex. C) (adopting arguments in Wyoming County brief). Other adverse parties — including Defendant Hamer here — oppose transfer on other grounds. *See* Resp. of Hamer, MDL No. 2394, ECF No. 98 (July 23, 2012); Resp. of Hertel, MDL No. 2394, ECF No. 110 (July 24, 2012).

conservatorship; FHFA appears in these cases in its capacity as Conservator to the Enterprises.

Each of the three Plaintiffs is statutorily exempt from materially "all [state and local] taxation." Fannie Mae's federal charter provides that Fannie Mae, "including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, *shall be exempt from all taxation* now and hereafter imposed by *any State, . . . county, municipality, or local taxing authority*, except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed." 12 U.S.C. § 1723a(c)(2) (emphasis added). Freddie Mac's federal charter similarly provides that Freddie Mac, "including its franchise, activities, capital, reserves, surplus, and income, *shall be exempt from all taxation* now or hereafter imposed by . . . *any State, county, municipality, or local taxing authority*, except that any real property of [Freddie Mac] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." *Id.* § 1452(e) (emphasis added). HERA confers a substantively identical exemption upon the FHFA Conservator. 12 U.S.C. §§ 4617(j)(1), (2).

Plaintiffs' complaint seeks a declaratory judgment that the federal statutes bar Defendants from taxing Plaintiffs for exercising the privilege of transferring real estate. Because that issue is purely legal, Plaintiffs have moved for summary judgment prior to any discovery. Defendants seek to stay these proceedings pending the JPML's decision whether to transfer this and other cases in which the same threshold legal question in presented.

ARGUMENT

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Whether to exercise

this power is at the discretion of the court, and a stay is not automatic, *see id.* at 254–55, even where a motion for MDL transfer is pending before the Panel. *See, e.g.*, *Wells v. Toyota Motor Sales USA, Inc.*, No. 10-cv-0215, 2010 WL 1856012, at *1 (S.D. Ill. May 7, 2010) (denying motion to stay); *Barber v. BP, PLC*, No. 10-0263-WS-B, 2010 WL 2266760, at *1 (S.D. Ala. June 4, 2010) (same). To the contrary, the pendency of a motion to transfer before the Panel does not deprive or limit the "pretrial jurisdiction" of the potential transferor court, and the pretrial proceedings should continue while the motion is pending. J.M.P.L. Rule 2.1(d); *Gen. Elec., Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979). Indeed, the *Manual for Complex Litigation (Fourth)* counsels courts not to "automatically postpone rulings on pending motions or generally suspend further proceedings" simply because a motion for MDL centralization has been filed. *Id.* § 20.131 at 220. Accordingly, courts routinely deny stay requests based on a pending MDL motion. *See*, *e.g.*, *In re Pradaxa Prod. Liab. Actions*, No. 3:12–cv–00610–DRH–SCW, 2012 WL 2357425, at *2 (S.D. Ill. June 20, 2012) (denying motion to stay and citing *Manual for Complex Litigation (Fourth)* § 20.131); *Sullivan v. Cottrell*, No. 11CV1076S, 2012 WL 694825, at *5 (W.D.N.Y. Feb. 29, 2012) (same).

The *Manual*'s admonition that courts ought not "automatically postpone rulings on pending motions or generally suspend further proceedings" based on the pendency of an MDL motion is particularly sound in this instance. Because the predominant common issue in the transfer tax cases is purely legal, the cases do not meet the statutory criteria for MDL centralization under 28 U.S.C. § 1407(a). As such, the JPML is unlikely to transfer this action, and the most likely result of stay pending the JPML's decision would be unnecessary and unproductive delay. Moreover, because Defendants have raised a jurisdictional challenge (based on the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341) that is unique to this case, transferring the

action would not further the interests of judicial economy, but would instead only shift responsibility for deciding that case-specific issue from one court to another.

I. A STAY WOULD LIKELY CAUSE NEEDLESS DELAY

This litigation turns on a single, threshold legal question—whether Fannie Mae, Freddie Mac, and FHFA are statutorily exempt from liability for taxes Defendants are imposing upon them for exercising the privilege of transferring real estate. That purely legal question requires no factual development or discovery, and Plaintiffs have presented it squarely in their pending Motion for Summary Judgment. The pending MDL motion seeks to have this case—and all others in which the issue is presented—transferred to the one judge who has ruled on the issue, Judge Victoria Roberts of the Eastern District of Michigan. The parties seeking centralization—counties attempting to hold the Enterprises liable for transfer taxes—chose Judge Roberts because she has already ruled that the federal statutory exemptions do not apply to transfer taxes. Plaintiffs respectfully submit that the ruling is legally unsound. Indeed, Judge Roberts has already certified that "there is substantial ground for difference of opinion" as to the threshold legal question of "whether the federal statutes exempting the Enterprises and the Conservator from 'all [state and local] taxation' . . . apply to transfer taxes" imposed under Michigan law, and a fully briefed petition for leave to appeal the order under 28 U.S.C. § 1929(b) is pending in the Sixth Circuit. *See* Am. Order Granting Pls.' Mot. for Summary Judgment, *Oakland*, May 11, 2012, ECF No. 73, at 15-16.[3]

Given that the threshold, and potentially dispositive, issue presented in this case (and all of the transfer tax cases) is purely legal, a stay pending the JPML's ruling is unlikely to further

[3] The petition, which identifies several errors in Judge Roberts' opinion, is attached as Ex. D.

the interests of justice or judicial economy because the JPML is unlikely to grant the motion for MDL centralization. Rather, delay in obtaining rulings on this legal issue simply denies the parties greater clarity on this significant question of law. To warrant transfer under Section 1407(a), the actions must present "one or more common *questions of fact*." 28 U.S.C. § 1407(a) (emphasis added). To satisfy this statutory prerequisite, the party seeking transfer may not simply allege a *common factual background*; it must instead present *outstanding factual questions* that remain unresolved and are subject to further exploration through discovery. The principal common issue in these cases—the application of the federal statutes exempting the Enterprise Defendants from materially "all [state and local] taxation"—is one of law, not fact, making them ill-suited for centralization under Section 1407. As explained in the Multidistrict Litigation Manual:

> The presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer. Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate. In one case, the Panel observed: "Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." ***If the actions present common factual issues that would be disposed of by a single legal issue, the Panel is likely to determine not to order transfers***.

Multidistrict Litig. Manual § 5:4 (2012 ed.) (emphasis added) (quoting *In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378 (J.P.M.L. 2009) (citations omitted)). In fact, counties that have sued Fannie Mae, Freddie Mac, and FHFA in other transfer tax cases also oppose the MDL motion on grounds that "[t]he threshold requirements for transfer and coordination under 28 U.S.C. § 1407 are not satisfied by the Transfer Tax Cases," noting "[f]irst" that "these cases do not present common factual questions." *See* Resp. of Wyoming

Cnty., W.V., Ex. B at 6; *see also* Resp. of Montgomery Cnty., Ex. C. (adopting arguments in Wyoming County brief).

Indeed, the Panel has long denied motions to transfer actions that involve common issues of law but not fact. For example, in *In re Environmental Protection Agency Pesticide Listing Confidentiality Litigation*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977), the Panel denied a transfer motion where, as here, the "principal issue" common to all the actions was one of statutory interpretation. The Panel denied transfer because—as is the case here—"the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation." *Id*. The Panel has applied this principle to deny transfer many times, including several just last year.[4] The same principle applies here. Thus, the most likely result of staying this action pending the Panel's decision would be unnecessary and unproductive delay.

II. JUDICIAL ECONOMY DOES NOT FAVOR A STAY

In addition, the presence of a unique legal issue in this action (one that is not presented in any of the other transfer tax actions) further supports denying Defendants' request for a stay and instead moving forward with this case. Here, Defendants' claim that the TIA deprives the Court of jurisdiction, *see, e.g.*, Hamer Mot., at 3; Gillette Mot., at 5, is an issue unique to this case

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[4] *See, e.g.*, *In re Keith Russell Judd Voting Rights Litig.*, 816 F. Supp. 2d 1383, 1383 (J.P.M.L. 2011) (denying transfer where "[t]he overriding question in each action is one that is largely legal in nature, making these actions unsuitable for centralization"); *In re: Removal from U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L. 2011) (denying transfer where "factual questions . . . are largely undisputed," and observing that "there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matters"); *In re: Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1346-47 (J.P.M.L. 2011) (denying transfer where "common factual issues [were] largely undisputed and primarily common legal questions [were] left to be decided"); *In re Airline "Age of Emp." Employ't Practices Litig.*, 483 F. Supp. 814, 817 (J.P.M.L. 1980) (denying transfer where "common questions, to the extent any exist among these actions, will be mainly legal questions concerning the applicability of" a federal statute).

among the transfer tax cases nationwide, making a stay especially inappropriate here.

When a "jurisdictional issue" is raised in a case proposed for MDL transfer, there is no reason for the Court to stay the action unless the potential transferor court will also have to confront "similar or identical" issues in multiple "cases transferred or likely to be transferred" if the JPML centralizes some or all actions. *See, e.g.*, *Meyers v. Bayers AG*, 143 F. Supp. 2d 1044, 1049 (E.D. Wisc. 2001). But in this instance, this action is the *only affirmative case* that implicates the TIA, and this Court is the *only court* before which that jurisdictional issue is pending. Indeed, based on the presence of that issue, Defendant Hamer *opposes* MDL transfer. *See* Hamer Resp. (MDL No. 2394 Dkt. No. 98). Staying this action pending the JPML's decision therefore would not further any interest in judicial economy, as one court or another will have to decide the *sui generis* TIA issue presented in this, and only this, action. Therefore, the Court should deny Defendants' motions to stay and allow the case to proceed. *See Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998) (discussing a district court's obligation to "assure itself that it possesses jurisdiction over" the action).

Defendant Hamer cites a 2002 decision of this Court (Judge Gottschall) for the proposition that the Court may grant a stay when jurisdictional issues are pending before it. Hamer Mot. at 3 (citing *Bd. of Trs. of the Teachers' Ret. Sys. v. Worldcom, Inc.*, 244 F. Supp. 2d 900, 906 (N.D. Ill. 2002)).[5] That case is plainly inapposite. The Court expressly noted that—unlike here—"the same [jurisdictional] issues ha[d] been raised in [other] cases" proposed for

[5] Defendant Acardo cites *Paul v. Avia Life & Annuity Co.*, 2009 WL 2244766 (N.D. Ill. July 27, 2009) as "instructive as to the propriety of a stay under these circumstances." Acardo Mot., at 2. *Paul* is inapposite because it did not have any unique factual or legal issues that distinguished it from related cases pending transfer or already transferred to the MDL in that matter. *See Paul*, 2009 WL 2244766, at *1 (rejecting an attempt to distinguish the case from others pending before the MDL).

transfer, thus implicating interests in consistency and judicial economy that are absent here. *Worldcom*, 244 F. Supp. 2d at 906.

III. PLAINTIFFS DO NOT OPPOSE EXTENDING DEFENDANTS' RESPONSE TIME

As noted *supra*, Plaintiffs would have agreed as a matter of simple professional courtesy to a request for a reasonable extension of Defendants' time to respond to the Complaint. Indeed, Plaintiffs and the Winnebago County defendants made such an agreement. None of the other defendants asked. Nevertheless, Plaintiffs do not oppose Defendants' motions for an extension of time. *See* Hamer Mot., at 3 (requesting an additional sixty days to respond); Gillette Mot., at 5 (same); Wegman Mot., at 3 (same).

CONCLUSION

For all of the foregoing reasons, a stay is unwarranted and Defendants' motions should be denied. In the absence of a stay, Plaintiffs respectfully request that the parties and the Court determine a reasonable schedule for briefing Plaintiffs' pending motion for summary judgment. Although Plaintiffs consent to extend Defendants' time to respond to the Complaint to and including September 17, 2012, Plaintiffs respectfully submit that briefing on the pending Motion for Summary Judgment need not await such response and should be conducted on a reasonably expeditious schedule.

Dated: July 30, 2012

Respectfully submitted,

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EXHIBIT 3

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: FEDERAL HOUSING FINANCE AGENCY, ET AL., PREFERRED STOCK PURCHASE AGREEMENT THIRD AMENDMENT LITIGATION	MDL Docket No. 2713

RESPONSE OF INTERESTED PARTY TIMOTHY J. PAGLIARA IN OPPOSITION TO NOTICE OF RELATED ACTIONS AND MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

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Dated: April 20, 2016

Interested Party Timothy J. Pagliara ("Mr. Pagliara") respectfully submits this response in opposition to the Notice of Related Actions (the "Notice," ECF No. 9) and Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings under 28 U.S.C. § 1407 (the "Motion") filed by the Federal Housing Finance Agency ("FHFA") in this proceeding.

INTRODUCTION

In the Notice, FHFA identified two lawsuits filed by Mr. Pagliara that seek only to inspect certain corporate records of Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"), respectively, 1/ as related or "tag-along" actions to its earlier-filed Motion. The Motion asks the Judicial Panel on Multidistrict Litigation (the "Panel") to create a multidistrict litigation ("MDL") in the United States District Court for the District of Columbia for four other lawsuits filed against FHFA and the United States Department of Treasury (the "Motion Cases"). 2/ For the reasons set forth in the oppositions filed by plaintiffs in the Motion Cases, creation of an MDL is inappropriate here, and Mr. Pagliara joins in those oppositions and incorporates them herein. (ECF Nos. 18-21). But even if the Panel were to create an MDL for the Motion Cases, there are significant differences between Mr. Pagliara's cases and the Motion Cases that make transfer to an MDL inappropriate.

On March 14, 2016, Mr. Pagliara filed a lawsuit in the Delaware Court of Chancery against Fannie Mae (the "Delaware Action") and a second lawsuit in the Circuit Court of Fairfax County, Virginia against Freddie Mac (the "Virginia Action," and together with the Delaware Action, the "Records Actions"). These lawsuits both seek only an order to permit him, as a

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1/ *Pagliara v. Federal National Mortgage Association*, No 1:16-cv-00193 (D. Del.); *Pagliara v. Federal Home Loan Mortgage Corporation*, No. 1:16-cv-00337 (E.D. Va.).

2/ *Jacobs v. Fed. Housing Fin. Agency*, No. 1:15-cv-00708 (D. Del.); *Roberts v. Fed. Housing Fin. Agency*, No. 1:16-cv-02107 (N.D. Ill.); *Saxton v. Fed. Housing Fin. Agency*, 1:15-cv-00407 (N.D. Iowa); *Robinson v. Fed. Housing Fin. Agency*, No. 7:15-cv-00109 (E.D. Ky.).

stockholder of Fannie Mae and Freddie Mac, to inspect certain corporate records of Fannie Mae and Freddie Mac under Delaware law and Virginia law, respectively.

Unlike the Motion Cases, Mr. Pagliara's Records Actions do not assert claims challenging Fannie Mae's, Freddie Mac's, FHFA's, or Treasury's actions relating to adoption of the Net Worth Sweep in 2012, 3/ and neither FHFA nor Treasury is a party to the Delaware Action or the Virginia Action. Instead, Mr. Pagliara's cases have an entirely different factual predicate: Fannie Mae's and Freddie Mac's rejection in January 2016 of his written requests as a stockholder to inspect corporate records. Fannie Mae has elected to follow Delaware law in its corporate governance, and Freddie Mac has elected to follow Virginia law in its corporate governance. The law of both states gives stockholders a right to inspect the books and records of corporations in which they own stock. On January 19, 2016, Mr. Pagliara served on Fannie Mae a written demand to inspect certain corporate records of Fannie Mae under Section 220 of the Delaware General Corporation Law ("DGCL"). The same day, he served a similar demand on Freddie Mac under Section 13.1-771 of the Virginia Stock Corporation Act (the "VSCA"). On January 27 and 28, 2016, Mr. Pagliara received two letters sent by FHFA on behalf of Fannie Mae and Freddie Mac, improperly rejecting his inspection requests without addressing their merits or disputing that either request complied with the DGCL or VSCA.

FHFA has failed to demonstrate that the requirements for transfer are satisfied as to the Records Actions. First, there are no common questions of fact, disputed or otherwise, between the Records Actions and the Motion Cases. The only facts relevant to Mr. Pagliara's Records

3/ The "Net Worth Sweep" was implemented in August 2012 through the Third Amendments to the Senior Preferred Stock Purchase Agreements between Fannie Mae and Treasury and Freddie Mac and Treasury. In the Third Amendments, Fannie Mae and Freddie Mac agreed to pay to Treasury as a dividend, every quarter in perpetuity, all of their positive net worth, leaving only a small and decreasing capital reserve (which will be reduced to zero by 2018). (Del. Compl. ¶ 6, ECF No. 9-5; Va. Compl. ¶ 93, ECF No. 9-6).

Actions relate to his stock ownership in Fannie Mae and Freddie Mac and his inspection demands to Fannie Mae and Freddie Mac. By their very nature, these facts do not have any relevance to claims by any other stockholder. Moreover, in responding to Mr. Pagliara's inspection demands, Fannie Mae, Freddie Mac, and FHFA did not dispute any of these facts, and the only common issues FHFA identifies in its Notice are legal issues, which are insufficient to justify transfer.

Second, transfer would not promote the efficient or just resolution of the Records Actions. Under Delaware law, the Delaware Action is a "summary proceeding" and should "be promptly tried"; Delaware courts seek to resolve books and records actions within 45 to 60 days of filing. Similarly, the Virginia Action is, by statute, to be resolved "on an expedited basis." There ordinarily are very minimal pretrial proceedings in books and records actions, and that is particularly true here, where there appear to be no facts in dispute. Without substantial pretrial proceedings, there is no benefit to transferring the Records Actions for coordinated or consolidated pretrial proceedings. Nor is there any risk of duplicative proceedings that can be minimized by transfer. None of the Motion Cases includes a books-and-records claim, much less one brought under Delaware or Virginia law. Thus, Fannie Mae and Freddie Mac will need to respond to each of those claims only once, whether the Records Actions are transferred or not. There also is likely to be no discovery in the Records Actions, and even if there were, it would be unique to the Records Actions because there is no factual overlap with the Motions Cases (or even much factual overlap between the Delaware Action and the Virginia Action). While there is no benefit to transfer, there is a substantial likelihood that centralizing the Records Actions with the Motion Cases will significantly delay the Records Actions, which could otherwise be resolved in a matter of weeks.

Third, there will be no benefit or convenience to the parties or witnesses by transferring either of the Records Actions. Books and records actions consistently involve few, if any, witnesses because they are summary/expedited proceedings, and the close proximity of both the District of Delaware and the Eastern District of Virginia to the District of Columbia precludes any argument that travel between them would impose an undue burden. Indeed, in a case before the Panel just a few years ago, FHFA argued that the Eastern District of Virginia was convenient for not only itself, but also Fannie Mae and Freddie Mac.

For these reasons, the requirements for transfer have not been satisfied, and FHFA's request to transfer the Delaware Action and Virginia Action should be denied.

ARGUMENT

Mr. Pagliara's cases may not be transferred under Section 1407 for consolidated or coordinated pretrial proceedings with the Motion Cases unless (i) there exists one or more common questions of fact between his cases and the Motion Cases; (ii) centralization will serve the convenience of the parties and witnesses; and (iii) centralization will promote the just and efficient conduct of the litigation. *See* 28 U.S.C. § 1407; *see also Multidistrict Litig. Man.* § 8:1 ("The legal standards for transfer of tag-along actions are the same as those applying to initial transfer."). In addition, the Panel has "often stated that centralization under Section 1407 'should be the last solution after considered review of all other options.'" *In re Gerber Probiotic Prods. Mktg.*, 899 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012). Indeed, Section 1407's legislative history provides that "[i]t is expected that . . . transfer [under Section 1407] is to be ordered *only where significant economy and efficiency in judicial administration may be obtained.*" *See* H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 1898, 1900 (emphasis added). Moreover, "[i]n moving to transfer a 'tag-along' action, the moving party has

the burden of 'demonstrating that transfer will further the purposes' of Section 1407." *In re Tobacco/Governmental Health Care Costs Litig.*, 76 F. Supp. 2d 5, 7-8 (D.D.C. 1999) (citation omitted).

FHFA has not and cannot meet this burden. As explained below, the Delaware Action and Virginia Action share no common questions of fact with the Motion Cases, and their transfer would not promote just or efficient conduct of the Actions or the convenience of the parties or witnesses. The Panel should accordingly deny FHFA's request to transfer these Actions.

I. There are No Common Questions of Fact Between the Delaware or Virginia Actions and the Motion Cases.

The Panel is authorized to transfer only "civil actions involving one or more common questions of fact." *See* 28 U.S.C. §1407(a). As FHFA itself has argued persuasively in opposing transfer in another case, the party seeking transfer "may not simply allege a *common factual background*; it must instead present *outstanding factual questions* that remain unresolved and are subject to further exploration through discovery." Enter. Defendants' Opp. to Genesee Cty.'s Motion for Transfer, *In re: Real Estate Transfer Tax Litig.*, MDL No. 2394, at 5 (J.P.M.L. 2012), Ex. 1 hereto ("FHFA *Transfer Tax* Opp'n.").

Yet in its Notice, FHFA identifies no common questions of fact between the Delaware Action or Virginia Action and the Motion Cases. Rather, FHFA states only that the "purpose of [Mr. Pagliara's] requests is to attack the Third Amendment" and, thus, "his complaints arise out of and relate to the exact same facts as those in the [Motion] Cases." (Notice 2). As an initial matter, the purpose of Mr. Pagliara's lawsuits is not to "attack" the Net Worth Sweep, but to, among other things, investigate the role Fannie Mae's and Freddie Mac's boards of directors (the

"Boards") played in adopting the Net Worth Sweep and approving dividends thereunder, 4/ as well as, in the Delaware Action, to investigate the Fannie Mae Board's approval of its significant investment in a project called the "common securitization platform" (or "CSP"), which will not benefit Fannie Mae in any way. (Del. Compl., Ex. A thereto, at 4-5, ECF No. 9-5; Va. Compl., Ex. A thereto, at 4-5, ECF No. 9-6). Whether Mr. Pagliara succeeds on his claims to inspect books and records turns not on the propriety of the Net Worth Sweep, or even the Board's involvement in the Net Worth Sweep, but whether his inspection requests complied with the requirements of Delaware and Virginia law.

Under Delaware law, a books and records action is a summary proceeding in the Court of Chancery by which a stockholder who has demonstrated a purpose reasonably related to his or her interest as such may gain speedy access to the corporate books and records. *See, e.g.*, *Schnell v. Chris-Craft Indus., Inc.*, 283 A.2d 852, 854 (Del. Ch. 1971); 8 *Del. C.* § 220. To prevail in the Delaware Action, Mr. Pagliara must prove only that (i) he was a stockholder of Fannie Mae at the time of his demand, (ii) his inspection demand complied with the statute's requirements as to the form and manner of making demand; and (iii) his requested inspection is for a proper purpose. *See* 8 *Del. C.* § 220(c). None of these elements raises any factual questions relevant in any way to any of the Motion Cases. Mr. Pagliara's stock ownership in Fannie Mae and the form of his demand to Fannie Mae are issues individual to him and not relevant to any claim by any other stockholder. The court's inquiry into whether Mr. Pagliara has a proper purpose under Delaware law also is not relevant to any of the Motion Cases. When, as here, one of a

4/ Under both Delaware and Virginia law, the Boards are responsible for approving dividends paid by Fannie Mae and Freddie Mac. *See* 8 *Del. C.* § 170; Va. Code Ann. § 13.1-653A. The Certificates of Designation for Treasury's Senior Preferred Stock in Fannie Mae and Freddie Mac also limit Treasury's right to dividends to only "*when, as and if declared by the Board of Directors*, in its sole discretion, out of funds legally available therefor." Senior Preferred Stock Certificate of Designation § 2(a) (emphasis added).

stockholder's purposes for an inspection is to investigate potential wrongdoing at the company, the court need find only a credible basis to infer that possible misconduct occurred. *See Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 & n.19 (Del. Ch. 2007). While a plaintiff must establish a credible basis from which a court may infer possible wrongdoing, "*actual wrongdoing itself need not be proved in a Section 220 proceeding . . . .*" *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997) (emphasis added). Delaware courts have clarified that the "credible basis" standard sets the "lowest possible burden of proof" in a books and records proceeding. *In re Lululemon Athletica Inc. 220 Litig.*, No. 9039-VCP, 2015 WL 1957196, at *11 (Del. Ch. Apr. 30, 2015) (citation omitted).

The facts relevant to the Virginia Action are similar. The only factual questions in Mr. Pagliara's books-and-records claim under the VSCA are whether (i) he owned Freddie Mac stock for at least six months immediately preceding his demand; (ii) his demand was made in good faith and for a proper purpose; and (iii) his demand on Freddie Mac was in the required form. *See* Va. Code Section 13.1-771C(1)-(4), -773B. Unlike in Delaware, however, Virginia courts have not required that a stockholder demonstrate a "credible basis" to infer wrongdoing to establish an investigation as a proper purpose for an inspection demand.

Thus, unlike the Motion Cases, whether misconduct actually occurred is not a factual question to be decided in the Delaware Action or Virginia Action. Three of the four Motion Cases bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, alleging that FHFA exceeded its statutory authority as Fannie Mae's and Freddie Mac's conservator, that Treasury exceeded its temporary authority to purchase Fannie Mae and Freddie Mac securities under the Housing and Economic Recovery Act ("HERA"), and that Treasury's actions were arbitrary and capricious. Two of the four Motion Cases also bring claims against

FHFA for breach of contract and breach of the implied duty of good faith and fair dealing. To prevail on these claims, unlike the Records Actions, the plaintiffs will need to demonstrate that the alleged wrongdoing actually occurred. 5/ Moreover, unlike the Records Actions, none of the Motion Cases focus on the conduct of the Fannie Mae and Freddie Mac Boards, as opposed to FHFA or Treasury, and none investigate the CSP, so the improper conduct to be analyzed would be different in any event. 6/ In the absence of any common factual questions, FHFA's request to transfer must be denied. 28 U.S.C. § 1407.

Moreover, the factual questions relevant to the Records Actions have not been disputed by FHFA, making them insufficient to support transfer. In rejecting Mr. Pagliara's inspection demands, FHFA did not dispute that Mr. Pagliara owned Fannie Mae and Freddie Mac stock, that he had a proper purpose, or that his demands complied with the form or content requirements under Delaware and Virginia law. (Del. Compl., Ex. B thereto, ECF No. 9-5; Va. Compl., Ex. B thereto, ECF No. 9-6). When common facts are largely undisputed, the Panel has

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5/ This does not mean that the four Motion Cases share common questions of fact with each other. To the contrary, FHFA did not even try to identify any common issues of fact between those cases in the Motion. In its reply, FHFA asserts that "common questions of fact are presumed" because the Motions Cases have similar claims and seek similar relief; however, the case FHFA cites for that proposition is more than 40 years old and has never been cited by the Panel in any other opinion. (Reply 2-3). Nor would such a presumption seem to be appropriate for the Motion Cases. In the APA cases, "[t]he entire case on review is a question of law, and the complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (quotation marks omitted). In the *Jacobs* case, plaintiffs bring claims under state statutory and common law that are unique to that case. *See In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (declining to transfer actions involving distinct causes of action when different legal standards make different facts relevant).

6/ There are not even common factual questions between the Delaware Action and the Virginia Action; the Delaware Action relates to Mr. Pagliara's stock ownership in Fannie Mae and the propriety of his demand on Fannie Mae under Delaware law, while the Virginia Action relates to his stock ownership in Freddie Mac, a separate company, and the propriety of a separate inspection demand made to Freddie Mac under Virginia law.

denied centralization because the potential efficiencies to be gained through coordinating overlapping discovery and motions practice are diminished. *See In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (denying centralization where there were "insufficient potential efficiencies to be obtained" in part because the "factual questions presented in [the] actions [were] largely undisputed"); *see also In re Skinnygirl Margarita*, 829 F. Supp. 2d at 1381 (denying centralization where the common, "central" factual allegation was "undisputed"); *Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1346-47 (J.P.M.L. 2011) (denying centralization where the "common factual issues" were "largely undisputed").

Rather than identify the required common, and disputed, factual issues, FHFA's Notice identifies only legal questions: whether Mr. Pagliara and the other stockholder plaintiffs have standing in light of HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), and whether HERA's anti-injunction provision divests courts of jurisdiction over stockholders' claims, 12 U.S.C. § 4617(f). (Notice 2-3). 7/ But even if these disparate cases present some similar legal issues because of defenses FHFA has raised to each of them, that is not a basis to transfer any of them under Section 1407. *See Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378, 1378 (J.P.M.L. 2009) ("Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization."); *see also In re CleanNet Franchise Agreement Contract Litig.*, 38 F. Supp. 3d 1382, 1383 (J.P.M.L. 2014) ("CleanNet's primary motivation for centralization of these actions is to obtain a uniform determination of the applicability of the arbitration provisions in the various franchise agreements. Seeking a uniform legal determination . . . generally is not a sufficient basis for

7/ Similarly, in its Reply, FHFA notes only that Mr. Pagliara's cases "raise common legal questions" with the Motion Cases. (Reply n.1, ECF No. 23).

centralization."). 8/ FHFA cannot deny that legal questions are insufficient to justify transfer, as it advocated that exact same principle before the Panel just a few years ago: the JPML's "function is not to prevent district or circuit court splits on legal issues or to orchestrate the absolute consistency of such rulings across the United States," (FHFA *Transfer Tax* Opp'n 9), and "[t]he presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer. Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate." (*Id.* 5 (quoting *Multidistrict Litig. Manual* § 5:4)). 9/

Because there are no common factual questions, much less common disputed factual questions, between the Record Actions and the Motion Cases (or even between the Delaware Action and the Virginia Action), FHFA's request to transfer Mr. Pagliara's cases must be denied.

II. Centralization of Mr. Pagliara's Records Actions Will Not Promote the Just and Efficient Conduct of the Delaware or Virginia Action.

There will be no efficiency gained by transferring the Delaware Action or Virginia Action; to the contrary, significant delay and inefficiency will be created by transfer of the Records Actions. Books and records actions under Delaware law are, by statutory mandate,

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8/ *See also In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (denying transfer where "the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation"); *In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d at 1351 (denying centralization where the actions shared "an overarching legal question" regarding Fannie Mae's, Freddie Mac's, and FHFA's liability for transfer taxes, and "the factual questions presented in these actions [were] largely undisputed"); *Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d at 1346-47 (denying centralization where "primarily common legal questions [were] left to be decided" and the common factual issues were "largely undisputed").

9/ *See also id.* 9 ("[T]his Panel's central focus under the plain language of Section 1407 is to streamline proceedings where multiple cases address common factual questions, not common legal issues. As such, concerns about uniformity of the law are not sufficient to justify centralization. That is the province of the Supreme Court, which often permits legal issues to 'percolate' throughout the circuits before resolving conflicting rulings.") (citing *In re: Medi-Cal*, 652 F.Supp.2d at 1378)).

"summary proceedings" that "are to be promptly tried." *La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co.*, No. 5682-VCL, 2011 WL 773316, at *3 (Del. Ch. Mar. 4, 2011). The entire point of the books and records action is to create an expedited procedure for the limited purpose of acquiring information. *See U.S. Die Casting & Dev. v. Sec. First Corp.*, No. 14019, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995) (explaining that Section 220 proceedings are "narrow in purpose and scope" and that the "accelerated scheduling of cases under it emphasizes prompt processing and disposition"). For that reason, there is usually little—if any—formal discovery in a books and records action. *See id.* 10/

As a result, books and records claims in Delaware often are resolved within 45 to 60 days of their filing. *See Sullivan v. Elcom Int'l, Inc.*, No. 10474-CB, 2015 WL 881074, at p. 4 (Del. Ch. Jan. 15, 2015) (TRANSCRIPT) ("Generally speaking . . . we handle 220 cases on a summary basis. We do aim to have trials of those kind of cases within 60 days."); *Lavi v. Wideawake Deathrow Entm't, LLC*, No. 5779-VCS, 2011 WL 284986, at *1 (Del. Ch. Jan. 18, 2011) ("Under our law, books and records actions are summary proceedings. What that means is that they are to be promptly tried. . . . [T]he case can be tried within two months of filing."). There is no reason to think the Delaware Action would take any longer than 45-60 days to resolve if it remained in Delaware. 11/

10/ The Delaware Court of Chancery also has cautioned against engaging in pretrial practices that would hinder the summary nature of a Section 220 books and records action. *La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co.*, 2011 WL 773316, at *1 (Del. Ch. Mar. 4, 2011) ("Books and records actions are summary proceedings that are to be promptly tried. The summary nature of the proceeding dictate[s] against allowing preliminary motions addressed to the pleadings to be presented and decided . . . . Such a practice would tend to promote delay, thereby undercutting the statutory mandate and policy that the proceeding be summary in character.") (internal quotation marks and citations omitted).

11/ It is likely that the Delaware Action will be remanded back to the Delaware Court of Chancery. Fannie Mae removed the Delaware Action to the District of Delaware alleging only federal-question jurisdiction as its basis for removal. (Del. Notice of Removal ¶ 7, ECF No. 9-2).

Similarly, the VSCA directs the court to resolve an application to inspect corporate records "on an expedited basis." *See* Va. Code Ann. § 13.1-773B. FHFA has not disputed any of the facts relevant to Mr. Pagliara's claim under the VSCA; thus, the Virginia Action should be resolved in just two or three months if it remains in the Eastern District of Virginia.

Because they should be resolved summarily and expeditiously, the Delaware Action and Virginia Action are significantly more advanced than the Motion Cases. Absent transfer, they would be fully resolved on the merits in their current forums, most likely before even preliminary procedural issues could be addressed by a transferee court. Centralizing the Records Actions with the less-advanced Motion Cases would do nothing but delay them. 12/ The Panel has refused to transfer and consolidate cases where, as here, "the main effect of centralization would not be to enhance convenience and efficiency, but to delay the progress of [the] actions." *In re Signal Int'l LLC Human Trafficking Litig.*, 38 F. Supp. 3d 1390, 1391 (J.P.M.L. 2014); *see*

As explained above, the elements of Mr. Pagliara's claim in the Delaware Action turn only on state law, namely the requirements under Section 220 of the DGCL. (*See* pp. 6-7 above). Federal questions arise in the Delaware Action, if at all, only because of defenses FHFA apparently intends to assert, which is not sufficient to establish federal-question jurisdiction. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986) ("[T]he question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' A defense that raises a federal question is inadequate to confer federal jurisdiction.") (citations omitted). The Delaware Action has been stayed pending the Panel's ruling on FHFA's request to transfer the case. After the JPML's ruling, Mr. Pagliara plans to move for remand promptly. Once remanded, the Delaware Action should be resolved within 45-60 days. And after remand to state court, the Delaware Action could not be part of an MDL even if transferred to one in the first instance.

12/ As of June 2015, the median time between filing and disposition of a civil case in the United States District Court for the District of Columbia was 8.2 months, and the median time between filing and trial was 45.1 months. *Federal Court Mgmt. Statistics, June 2015*, United States Courts (June 30, 2015), http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2015. This stands in stark contrast to the 45-60 days needed to resolve the Delaware Action and the 2-3 months needed to resolve the Virginia Action. Indeed, the same data shows that the median time from filing to disposition in the Eastern District of Virginia is just 5.3 months, and that is not limited to cases that should be "expedited" by statute. (*Id.*).

also In re: Brandywine Commc'ns Techs., LLC, Patent Litig., 959 F. Supp. 2d 1377, 1378 (J.P.M.L. 2013) (denying centralization where the "actions [were] being litigated in a manner that [was] likely to lead to their resolution . . . within a relatively short period of time."); *In re Move Artwork Copyright Litig.*, 473 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007) (denying transfer where centralization would "delay the progress" of an action progressing toward resolution); *In re DietGoal Innovations, LLC ('561) Patent Litig.*, 999 F. Supp. 2d 1380 (J.P.M.L. Feb. 19, 2014) (denying centralization where it would delay the progress of significantly advanced actions); c*f. In re Signal Int'l LLC Human Trafficking Litig.*, 38 F. Supp. 3d 1390, 1391 (J.P.M.L. 2014) (indicating that centralization should be avoided where its "main effect . . . would not be to enhance convenience and efficiency, but to delay the progress of these actions, which are swiftly moving towards trial").

Furthermore, given the summary and expedited nature of the Delaware Action and Virginia Action, transfer of these Records Actions would be exceedingly inefficient. There should be few or no pretrial procedures and, therefore, no benefit to centralizing the Records Actions for these minimal pretrial proceedings. The Panel has refused to transfer and consolidate cases where, as here, there are few pretrial proceedings remaining. *See In re Women's Clothing Antitrust Litig.*, 455 F. Supp. 1388, 1390, 1391 (J.P.M.L. 1978) (denying transfer even where cases involved "significant common questions of fact" and where "the presence of these issues commends Section 1407 transfer" because "on balance we are persuaded that this factor is outweighed by the advanced stage of pretrial proceedings in these actions."); *In re Telecomm. Providers' Fiber Optic Cable Installation Litig.*, 199 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002) ("Movants have failed to persuade us that any common questions of fact as opposed to questions of law are sufficiently complex, unresolved and/or numerous to justify Section 1407 transfer . . .

many of the actions are procedurally so far advanced that discovery is completed or nearly completed . . .").

Nor are there any potentially duplicative pretrial proceedings to be avoided by transfer of the Delaware Action or Virginia Action. No other plaintiff in any of the Motion Cases makes any claim for inspection of corporate records, much less makes such a claim under Delaware or Virginia law. Because no other case asserts the same claims, Fannie Mae and Freddie Mac do not have to respond to or defend these claims in any of the Motion Cases. *See In re Skinnygirl Margarita*, 829 F. Supp. 2d at 1381 (denying centralization, noting that "centralization may not prevent either conflicting or multiple rulings, because plaintiffs bring their claims under the laws of different states"). Similarly, because there do not appear to be any factual issues in dispute, there should be little or no discovery in the Records Actions and certainly no discovery that is duplicative of discovery of the Motion Cases. 13/ Even as to legal issues, the courts in Delaware and Virginia are more familiar with the Delaware and Virginia laws that govern the Delaware and Virginia Actions. *See, e.g.*, *Blanco v. Wyeth, Inc.*, No. 07-2877 PAM/JSM, 2010 WL 9487183, at *3 (D. Minn. Jan. 13, 2010) ("Virginia substantive law is likely to apply and Virginia courts are more adept at applying Virginia law."); *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, No. 8126, 1985 WL 21129, at *2 (Del. Ch. Oct. 9, 1985) ("There can be no

13/ In FHFA's Reply, it argues that transfer of the Motion Cases would promote efficiency by preventing duplicative legal rulings on HERA's succession and anti-injunction provisions. (Reply 5-6, ECF No. 23). FHFA likely would say the same regarding transfer of the Record Actions, and Mr. Pagliara notes that FHFA's position ignores arguments that both FHFA and the government more broadly have made time and again in other contexts: *i.e.*, having multiple courts weigh in on a single legal question is beneficial. *See* FHFA *Transfer Tax* Opp'n 9; *National Envt'l Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014); *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). Moreover, the succession and anti-injunction provisions raise jurisdictional issues, and FHFA would not be harmed if there are inconsistent rulings on those issues: the only consequence of inconsistent jurisdictional rulings is that it must defend a lawsuit in a court that has concluded it has jurisdiction, while it might escape the burden of simultaneously litigating in a court that has concluded otherwise.

question but that MacAndrews' claims involve novel and substantial issues of Delaware corporate law and that these issues are best resolved in a Delaware court."). 14/

For these reasons, transfer of the Delaware Action and Virginia Action would not promote efficient resolution of either Records Action. Transfer also should be denied because it will not promote the just resolution of the Records Actions. Indeed, it is clear that FHFA is seeking transfer not to avoid duplicative discovery on common questions of fact, but rather to funnel cases presenting apparently similar legal issues into a court that has already ruled in its favor. That is plainly improper. In FHFA's own words: "It is not appropriate to use the MDL mechanism as a *de facto* means of determining the merits of [multiple] cases by transferring them to one judge who has already decided the threshold substantive issue in an as-yet-untested, opinion that would effectively become the law of the land immediately upon transfer." (FHFA *Transfer Tax* Opp'n 10). 15/

III. Transfer Will Not Serve the Convenience of Parties or Witnesses.

Transfer and centralization of the Records Actions would not promote the convenience of the Parties and witnesses. First, the convenience of the witnesses will not be significantly implicated, as books and records actions consistently involve few, if any, witnesses. 16/ That is

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14/ The same also is true of the *Jacobs* lawsuit, which asserts claims under Delaware law.

15/ In its Reply, FHFA tries to distinguish the *In re: Transfer Tax* cases because "the *Transfer Tax* cases did not involve any factual disputes whatsoever." (Reply 9). That is not true, as FHFA admitted in its opposition that there might be factual disputes at the damages phase. (FHFA *Transfer Tax* Opp'n 1). Moreover, for all of the reasons explained above, there are no common factual disputes between the Delaware Action or Virginia Action and the Motions Cases, making these cases like the *Transfer Tax* cases as FHFA has described them. FHFA argues that the risk of conflicting rulings here is greater than in *Transfer Tax*. But where the claimed common issues are legal questions, potentially conflicting *legal* rulings are insufficient to justify transfer—just as FHFA itself argued in its opposition in the *Transfer Tax* cases. (*Id.* 9).

16/ *See generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 8.06[i] (2014) ("[I]t is clear that the court will attempt to strike a balance between the right of the parties to adequately prepare for trial and the

particularly so here, where there do not appear to be any factual disputes, and thus, there does not appear to be much need for discovery at all.

Second, as to the Delaware Action, the transfer sought is only from Wilmington, Delaware to Washington, D.C. To the extent any witness or party representative needs to travel from Washington to Wilmington (which is unlikely), the travel does not impose an undue burden or inconvenience. The distance between those locations is only 110 miles, and to travel between them requires only a two-hour car drive or 90-minute train ride.

Third, as to the Virginia Action, there is absolutely no convenience benefit to parties or witnesses from transferring to the District of the District of Columbia. Freddie Mac, the only defendant in the Virginia Action, has its principal place of business in the Eastern District of Virginia. Moreover, Freddie Mac and FHFA both agreed that the Eastern District of Virginia is convenient for them in a filing with the Panel just a few years ago:

> First and foremost, the Eastern District of Virginia is convenient for the Enterprises [Fannie Mae and Freddie Mac], either or both of which are parties to every Transfer Tax case. Freddie Mac's principal place of business is located within that district at McLean, Virginia (in the Alexandria Division); Fannie Mae and FHFA are headquartered just a few miles away in Washington, D.C. . . . The Eastern District of Virginia is also convenient for FHFA, which is located in Washington D.C.

(FHFA *Transfer Tax* Opp'n 18).

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statutory mandate to afford summary treatment and relief. It is equally clear that, in most cases, that balance will favor the latter consideration over the former."). Indeed, Section 220 actions in Delaware are often presented to the Court of Chancery on a stipulated paper records. *See, e.g.*, *Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc.*, No. 9587-ML, 2015 WL 1884453, at *1 (Del. Ch. Apr. 24, 2015) (noting that the 220 proceeding "was tried on a paper record"); *Amalgamated Bank v. Yahoo! Inc.*, No. 10774-VCL, 2016 WL 402540, at *1 (Del. Ch. Feb. 2, 2015) (noting that the Section 220 action was held by a "trial on [the] paper record"); *Ind. Elec. Workers Pension Trust Fund IBEW v. Wal-Mart Stores*, Inc., No. 7779-CS, 2013 WL 5636296, at *1 (Del. Ch. Oct. 15, 2013) ("[T]he Parties agreed to conduct [the Section 220] trial on the basis of a paper record.").

For these reasons, transfer of the Delaware Action and Virginia Action would not promote the convenience of the parties or witnesses.

CONCLUSION

For the foregoing reasons, Mr. Pagliara respectfully requests that the Panel deny FHFA's request to coordinate or consolidate the Delaware Action and Virginia Action with MDL No. 2713 and transfer the cases to the United States District Court for the District of Columbia.

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April 20, 2016

CERTIFICATE OF SERVICE

I certify that on April 20, 2016, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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EXHIBIT 1

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: REAL ESTATE TRANSFER TAX LITIGATION	MDL No. 2394

ENTERPRISE DEFENDANTS' OPPOSITION TO GENESEE COUNTY'S MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

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Defendants the Federal Housing Finance Agency ("FHFA"), the Federal National Mortgage Association ("Fannie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together with Fannie Mae, the "Enterprises") (collectively, the "Enterprise Defendants") hereby oppose Genesee County's Motion for Transfer Pursuant to 28 U.S.C. § 1407 ("Section 1407"). These cases do not meet the standard for centralization under Section 1407, and even the Plaintiffs[1] in these actions are not in agreement that transfer is warranted.[2]

At the heart of this litigation is a single, common, threshold legal question—whether the Enterprise Defendants' express federal statutory exemptions from "all [state and local] taxation" preclude states, counties, and municipalities from taxing the Enterprises when they transfer real estate. No "common questions of fact" are presented on that point, and if the Enterprise Defendants prevail on that core legal issue, *all* factual issues (common or case-specific) will be moot. Even if the Enterprise Defendants do not prevail on that threshold issue, their liability for transfer taxes will depend primarily upon the purely legal issue of whether state and county statutory exemptions apply, while calculation of damages would be a case-specific process individualized by particular taxing authority or state.

Moreover, Genesee's motion amounts to a brazen attempt to forum shop. Genesee asks the Panel to steer all actions to the Eastern District of Michigan. Yet Genesee fails to mention that that court is the only tribunal so far that has decided the threshold liability issue, or that that

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[1] The Enterprise Defendants refer to their adverse parties as "Plaintiffs." In one action (*FHFA, et al. v. Hamer, et al.*, No. 3:12-cv-50230, N.D. Ill., filed June 22, 2012), the procedural roles are reversed—the Enterprise Defendants are seeking a declaratory judgment as plaintiffs. The Enterprise Defendants refer to moving Plaintiff Genesee County, Michigan as "Genesee."

[2] *See* Doc. # 91 at 1 ("Wyoming County opposes the Motion as unnecessary in this case."); *see also In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, MDL 2219, 2011 WL 346946 (J.P.M.L. Feb. 4, 2011) (observing that transfer is "less compelling" where "the defendants and/or some of the plaintiffs oppose centralization").

court granted summary judgment to Genesee, holding (erroneously, in Defendants' view) that the Enterprise Defendants' statutory exemptions from "all [state and local] taxation" do not apply to transfer taxes. Genesee plainly seeks to ensure that the same outcome will follow in all other cases. The Panel ordinarily frowns on such gamesmanship and should reject it here.

Should the Panel nevertheless deem transfer appropriate, the Enterprise Defendants respectfully submit that certain actions should be excluded and the remaining actions transferred to the Eastern District of Virginia, a convenient and efficient forum well suited to handle the issues presented by these cases, in which a transfer tax case is already pending before the Honorable Henry E. Hudson.

THE ENTERPRISES, THE CONSERVATOR, AND THE EXEMPTION STATUTES

Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress to establish secondary market facilities for residential mortgages, to provide stability and liquidity to the secondary market for residential mortgages, and to promote access to mortgage credit throughout the Nation. *See* 12 U.S.C. §§ 1716; 1451 note. FHFA is an independent federal agency, created pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"), Pub L. No. 110-289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4617 *et seq.*, with comprehensive regulatory and oversight authority over the Enterprises and the Federal Home Loan Banks. On September 6, 2008, the Director of FHFA placed the Enterprises into FHFA's conservatorship; FHFA appears in these cases in its capacity as Conservator to the Enterprises.

Each of the three Enterprise Defendants is statutorily exempt from materially "all [state and local] taxation." Fannie Mae's federal charter provides that Fannie Mae, "including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, *shall be exempt from all taxation* now and hereafter imposed by *any State, . . . county, municipality, or*

local taxing authority, except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed." 12 U.S.C. § 1723a(c)(2) (emphasis added). Freddie Mac's federal charter similarly provides that Freddie Mac, "including its franchise, activities, capital, reserves, surplus, and income, *shall be exempt from all taxation* now or hereafter imposed by . . . *any State, county, municipality, or local taxing authority*, except that any real property of [Freddie Mac] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." *Id.* § 1452(e) (emphasis added).[3]

Hence, this litigation turns on a single, threshold legal question—whether Fannie Mae, Freddie Mac, and FHFA are statutorily exempt from paying taxes state and local government plaintiffs would impose upon them for exercising the privilege of transferring real estate.

SUMMARY OF THE ARGUMENT

The Panel should deny transfer under Section 1407.

First, this litigation is not appropriate for centralization because there is no "common question[] of fact," as Section 1407 requires. Rather, the primary common issue in these cases is purely legal. This Panel has often held that where the material facts relating to liability are largely undisputed, where there is unlikely to be any merits discovery on liability, and where the only substantial issues are legal questions, transfer under Section 1407 is not appropriate.

Second, although centralization of *any* set of similar cases could conceivable create some efficiencies, transfer and centralizations here would not promote the just and efficient conduct of these actions, nor would it make them substantially more convenient. Genesee urges the Panel to

[3] HERA confers a substantively identical exemption upon the FHFA Conservator. 12 U.S.C. § 4617(j)(1), (2).

transfer all cases to Judge Victoria Roberts of the Eastern District of Michigan, yet such a transfer would be unjust. Genesee fails to mention that on March 23, 2012, Judge Roberts granted summary judgment to Genesee and another Michigan county,[4] holding (erroneously, in the Enterprise Defendants' view) that the Enterprises' statutory exemptions from "all taxation" do *not* apply to Michigan's real estate transfer taxes, and thereby triggering the current spate of litigation. Hence, although Genesee's motion purports merely to seek transfer to a convenient forum for efficient proceedings, it appears calculated instead to ensure that the single existing ruling on the purely legal threshold liability issue will control all cases. The Panel should not permit Genesee (or any of the other Plaintiffs) to "'game' the system" by shunting all similar litigation to the one court where a Plaintiff *already* has won an outcome in its favor on the central legal issue common to all other cases. *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2241 (2008). Moreover, transfer here would be particularly inappropriate due to significant disparities in procedural posture.

If the Panel is nevertheless inclined to centralize any of the cases, the Panel should withhold cases that are procedural outliers, and transfer the remaining actions to the Eastern District of Virginia, where a Transfer Tax case is already pending before Judge Hudson.

ARGUMENT

I. THE PANEL SHOULD DENY TRANSFER UNDER SECTION 1407

A. The Actions Involve Few, If Any, Common Questions of Fact, Involving Instead Purely Legal Questions as to Liability

These cases are not appropriate for MDL transfer and centralization. To warrant transfer

[4] Genesee County's case, a class action, is proceeding in parallel with a companion individual action brought by Oakland County. *See Genesee Cnty. v. Fannie Mae*, 2:11-cv-14971 (E.D. Mich.); *Oakland Cnty. v. Fannie Mae, et al.*, 2:11-cv-12666 (E.D. Mich.).

under Section 1407(a), the actions must present "one or more common *questions of fact*." 28 U.S.C. § 1407(a) (emphasis added). To satisfy this statutory prerequisite, the party seeking transfer may not simply allege a *common factual background*; it must instead present *outstanding factual questions* that remain unresolved and are subject to further exploration through discovery. The principal common issue in these cases—the application of the federal statutes exempting the Enterprise Defendants from materially "all [state and local] taxation"—is one of law, not fact, making them ill-suited for centralization under Section 1407.

Where the actions involve largely undisputed facts and the overriding questions in each action are legal in nature, transfer under Section 1407 is not warranted, even if the threshold legal issues are "common" across the cases. As explained in the Multidistrict Litigation Manual:

> The common issues of fact must be contested issues. If a party stipulates as to the common issues, then no common issues will exist, and transfer will not be appropriate. The presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer. Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate. In one case, the Panel observed: "Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." ***If the actions present common factual issues that would be disposed of by a single legal issue, the Panel is likely to determine not to order transfers***.

Multidistrict Litig. Manual § 5:4 (2012 ed.) (emphasis added) (quoting *In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378 (J.P.M.L. 2009) (citations omitted)).

Indeed, the Panel has long denied motions to transfer actions that involve common issues of law but not fact. For example, in *In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977), the Panel denied a transfer motion where, as here, the "principal issue" common to all the actions was one of statutory interpretation. In that

case as here, the parties seeking transfer urged that the issue be resolved "by unified proceedings on motions to dismiss in all actions before a single forum." *Id.* The Panel rejected this argument and denied transfer because "these actions raise few if any common questions of fact." *Id.* Instead, the Panel concluded that transfer and centralization were not appropriate because "the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation," and because "[a]ny factual issues are primarily, if not entirely, unique questions pertaining to. . . each [individual] action." *Id.*

The Panel has applied this principle to deny transfer many times, including just last year,[5] and the same principle precludes transfer and centralization here. The facts as to the Enterprise Defendants' liability for transfer tax are largely undisputed, leaving only legal issues to govern

[5] *See, e.g.*, *In re Keith Russell Judd Voting Rights Litig.*, 816 F. Supp. 2d 1383, 1383 (J.P.M.L. 2011) (denying transfer where "[t]he overriding question in each action is one that is largely legal in nature, making these actions unsuitable for centralization"); *In re: Removal from U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L. 2011) (denying transfer where "factual questions . . . are largely undisputed," and observing that "there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matters"); *In re: Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1346-47 (J.P.M.L. 2011) (denying transfer where "common factual issues [were] largely undisputed and primarily common legal questions [were] left to be decided"); *In re Airline "Age of Emp." Employ't Practices Litig.*, 483 F. Supp. 814, 817 (J.P.M.L. 1980) (denying transfer where "common questions, to the extent any exist among these actions, will be mainly legal questions concerning the applicability of" a federal statute); *In re Okla. Ins. Holding Co. Act Litig.*, 464 F. Supp. 961, 965 (J.P.M.L. 1979) (denying transfer where "each of these [purportedly common] questions is, at best, a mixed question of fact and of law, and that the legal aspects of these questions clearly predominate . . . even if those question involve some limited common questions of fact, [they] are an inadequate predicate for coordinated or consolidated pretrial proceedings"); *In re Am. Home Prods. Corp "Released Value" Claims Litig.*, 448 F. Supp. 276, 278 (J.P.M.L. 1978) (denying transfer where "the predominant, and perhaps only, common aspect in these actions is the legal question of what measure of damages is applicable" under the relevant statute); *In re Natural Gas Liquids Regulation Litig.*, 434 F. Supp. 665, 668 (J.P.M.L. 1977) (denying transfer where "these actions raise a common question of law and share few, if any, common questions of fact"); *In re U. S. Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. 1405, 1407 (J.P.M.L. 1976) (denying transfer where "questions of law rather than common questions of fact are significantly preponderant and, hence, Section 1407 treatment would in any event be unwarranted").

the question. Tellingly, Genesee identifies no common *questions* of fact to be decided in these actions. Genesee identifies as "principal facts" the fact that counties are obligated to collect transfer taxes, that the Enterprises claim to be exempt, that the counties dispute that exemption, and that the Enterprises are liable to pay the transfer taxes. Genesee Br. at 4-6. These are nothing more than undisputed background facts that provide "context" for the case—as the plaintiffs in the Florida transfer tax action acknowledge in their response in support (*see Nicolai* Resp. at 2)—or legal conclusions in the guise of facts. The central *fact* alleged in each action, that the Enterprises did not pay all transfer taxes Plaintiffs claim were due when property was transferred (directly or indirectly) to or from an Enterprise, is *undisputed*—in light of their statutory exemption from "all taxation," the Enterprises have not paid all transfer taxes Plaintiffs now claim were owed. The central *issue*—whether the Enterprise Defendants' statutory exemptions protect them from liability for transfer taxes—is a *purely legal* question that can readily and promptly be resolved without the need for any discovery. *See Oakland* ECF No. 63; *Genesee* ECF No. 28.

Accordingly, the threshold, and potentially dispositive, question in all of these cases is not a factual question at all—a reality best illustrated by the *Oakland* case, where the plaintiff filed a motion for summary judgment as to liability *one day* after filing its complaint, and where the Enterprise Defendants later cross-moved for summary judgment, agreeing with the Oakland plaintiff's assessment that no discovery was needed to resolve the question of the Enterprises' liability for Michigan transfer taxes. *See Oakland*, ECF Nos. 5, 40; *see also Genesee*, ECF Nos . 11, 18, 21 (all parties, including the State of Michigan, cross-moved for summary judgment on liability, agreeing that there were no disputed facts and no discovery was needed). Indeed, Genesee has argued to this Panel that "the central issue in all the cases" is "the transfer tax

exemption issue," *i.e.*, the purely legal question of whether the federal statutes that exempt the Enterprises and FHFA from "all taxation" somehow leave them exposed to transfer taxes. Genesee Br. 1 (Doc. #1-1); *see also id*. (characterizing the exemption issue as "critical" to the actions). Only if the court rules against the Enterprise Defendants on that central question would the court need to determine whether the Enterprises would otherwise be liable for such taxes under the relevant states' laws. But these too are legal questions—and ones that are not even common across the several actions because of differences among the relevant states' laws. Indeed, for this very reason the Wyoming County, WV Plaintiffs concede that consolidation is not appropriate here. *See supra* note 2.

B. Transfer Would Not Promote the Just and Efficient Conduct of the Actions, Nor Would it Make the Litigation Substantially More Convenient

Convenience alone cannot justify centralization, and here, any alleged convenience benefits of centralization would be quite limited, as the transfer tax cases are unlikely to involve substantial discovery. But whatever considerations of convenience might suggest, an MDL transfer must also be fair and just to the parties. *See* Heyburn, *A View from the Panel*, 82 Tul. L. Rev. at 2237 ("Every transfer decision has the potential to prejudice a particular party or claim among the many. In difficult cases, the Panel will weigh the likely benefits of centralization against the possibility of such resulting unfairness."). Here, Genesee's proposal to transfer the cases to a court that has already decided the threshold legal issue in their favor is anything but fair and just; it is an unvarnished attempt to preordain the outcome of the litigation.

1. The Risk of Inconsistent Rulings on the Central Legal Issue in these Cases Does Not Justify Transfer

Genesee asserts that centralization before the Eastern District of Michigan is warranted to

prevent inconsistent pretrial rulings on dispositive motions. Genesee Br. at 9. Genesee plainly wants that court to be the *only* one to rule on the "central" legal issue presented in each transfer tax case, applying its prior (and in the Enterprise Defendants' view, erroneous) legal conclusion to each of the other pending actions, despite the fact that Defendants already have filed—or expect to file shortly—dispositive motions that present the same legal issue in the other cases.

This Panel's function is not to prevent district or circuit court splits on legal issues or to orchestrate the absolute consistency of such rulings across the United States. As discussed above, this Panel's central focus under the plain language of Section 1407 is to streamline proceedings where multiple cases address common *factual questions*, not common *legal* issues. *See supra* 4-8. As such, concerns about uniformity of the law are not sufficient to justify centralization. That is the province of the Supreme Court, which often permits legal issues to "percolate" throughout the circuits before resolving conflicting rulings.

This Panel's decision in *In re: Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F.Supp.2d 1378 (J.P.M.L. 2009) is instructive. There, the Panel denied transfer of a series of cases that, "by and large, raise[d] strictly legal issues." The Panel observed:

> One of the Panel's prime considerations is often the need to avoid inconsistent rulings on similar issues. Usually, that consideration is bolstered by the concern for duplicative and burdensome discovery leading up to the legal issues. Here, very little discovery appears necessary prior to the joinder of the legal issues. ***Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization***.

Id. at 1378 (emphasis added). The same principle applies here. The Transfer Tax cases, "by and large, raise strictly legal issues," and "very little discovery appears necessary prior to joinder of the legal issues." Accordingly, "the concern for duplicative and burdensome discovery leading up to the legal issues" is wholly absent. Thus, the fact that multiple courts may decide the same

legal issue in different ways is "not sufficient to justify Section 1407 centralization." *Id.*

This principle is particularly apt here, where the very district court that granted summary judgment has certified, pursuant to 28 U.S.C. § 1292(b), that "there is *substantial ground for difference of opinion*" as to the threshold legal question of "whether the federal statutes exempting the Enterprises and the Conservator from 'all [state and local] taxation' . . . apply to transfer taxes" imposed under Michigan law. *Oakland* ECF No. 73 (emphasis added). The *Genesee*/*Oakland* Court's recognition that its decision—the first decision by a federal court on this important issue—should not be the end of the story is underscored by the fact that Michigan's Department of Treasury, among others, had previously declared that "transfers to and from" the Enterprises "are not subject to the real estate transfer tax." Letter (Aug. 12, 2011) (attached as **Exhibit C**) (emphasis added).[6] It is not appropriate to use the MDL mechanism as a *de facto* means of determining the merits of dozens of cases by transferring them to the one judge who has already decided the threshold substantive issue in an as-yet-untested, opinion that would effectively become the law of the land immediately upon transfer.

While it is possible that two courts could come to different *legal* conclusions as to the applicability of the Enterprises' statutory exemptions from "all taxation," the impact of such divergent rulings would not create any *factually* inconsistent obligations on the Enterprises because the transfer taxes are owed on a county-by-county basis. In other words, it is highly unlikely that two or more courts could render the Enterprises simultaneously liable and not liable to the same municipality with respect to the same state transfer tax. To the extent the court in

[6] *See also, e.g.*, D.C. Office of Corp. Counsel, Liability of the Federal National Mortgage Association (FNMA) for Payment of the District of Columbia Real Property Transfer Tax, 6 Op.C.C.D.C. 115, 1981 D.C. AG LEXIS 36 (June 12, 1981).

Hertel I (W.D. Mich.) concludes that the Enterprises are exempt from transfer taxes, that ruling's inconsistency with the earlier rulings in *Genesee/Oakland* (E.D. Mich.) would be resolved by the Sixth Circuit, where the Enterprise Defendants' petition to appeal is pending. Moreover, the Enterprises intend to seek consolidation of the two putative class actions pending in the U.S. District Court for the Southern District of West Virginia (*Goode* and *Hancock County*). Although one of the actions, *Massey* (S.D. Ga.), was filed on behalf of a putative multi-state class (and thereby purports to overlap with some but not all of the other pending actions),[7] the Enterprise Defendants have opposed class certification and moved to strike the class allegations.

2. There Will Be No Merits Discovery on the Threshold and Potentially Dispositive Issue of the Enterprise Defendants' Liability for Transfer Taxes and Damages Discovery Will Be Highly Particularized

MDL transfer is typically appropriate for centralized fact-finding as to *liability*. For example, in *In re Air Crash Disaster at Pago Pago, Am. Samoa, on January 30, 1974*, 394 F. Supp. 799, 800 (J.P.M.L. 1975), a multi-district air disaster litigation, "the common questions of fact pertain[ed] to the issue of liability, whereas the issue of damages is unique with respect to each decedent." Because the parties had "resolved the issue of liability," the Panel denied transfer under Section 1407. *Id.*; *see also In re Klein Med. Malpractice Litig.*, 398 F. Supp. 679, 680 (J.P.M.L. 1975) (denying transfer where "the common factual issues *on the question of liability* in each action are minimal") (emphasis added). Here, as discussed *supra*, there are no material issues of fact on the threshold and potentially dispositive legal issue of the applicability

[7] The putative class in Massey covers 22 states. Seven of the proposed transferor actions are pending in states included in the *Massey* class definition (Florida, Georgia, Kentucky, Minnesota, Virginia, West Virginia), while six actions are pending in states excluded from the *Massey* class (Michigan and Illinois).

of the Enterprise Defendants' exemption from "all [state and local] taxation"—it is undisputed that certain states' laws impose a tax on the transfer of real estate and it is undisputed that real estate is transferred directly and indirectly to and from Fannie Mae and Freddie Mac within the Plaintiff jurisdictions. Therefore, there are no facts to be discovered as to the Enterprise Defendants' potential liability for transfer tax. To the extent damages proceedings may be relevant to this Panel's consideration, as discussed above, *see supra* at 8, damages in these actions are inherently local and thus there are no efficiencies to be gained by transfer for purposes of damages calculations.[8]

3. Purported Concerns About Inconsistent Class-Certification Rulings Are Misplaced

Genesee recognizes that this litigation will likely not involve any discovery before a court rules on the merits of the threshold legal question and does not seriously contend that centralization is needed to make discovery more efficient. Instead, Genesee asserts that MDL transfer is needed to avoid the risk of potentially inconsistent pretrial rulings with respect to class certification. Genesee Br. at 9.

This is a red herring. All but one of the actions that have been filed are actions on behalf of putative statewide classes of county taxing authorities (or on behalf of a single county). To date, the Enterprise Defendants have stipulated to certification of such classes, and they expect to continue to so stipulate in cases involving similar allegations and claims for back taxes or

[8] Efficiencies also can be gained without transfer because many plaintiffs share common counsel and thus can informally coordinate to resolve duplicative discovery. *See In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, MDL 2219, 2011 WL 346946 (J.P.M.L. Feb. 4, 2011) ("[T]he presence of common counsel for moving plaintiffs in actions filed shortly before the motion for centralization . . . also weigh[s] against centralization."). Indeed, plaintiffs in *Massey*, *Butts*, *Small*, and *Vadnais*, share common co-counsel, as do plaintiffs in *Oakland* / *Genesee* and *Hertel I* / *Hertel II*.

declaratory judgments as to liability for transfer taxes, so long as the classes are defined to include the state officials who have the authority to enforce payment of such taxes. Because the Enterprise Defendants expect that there will be no dispute as to the statewide classes, and (with one exception discussed below) no overlap between those classes, there is no potential for inconsistent class certification rulings. Centralization is thus not needed to protect against such a risk. *See, e.g.*, *In re: Gen. Mills, Inc., Yoplus Yogurt Prods. Mktg. & Sales Practices Litig.*, MDL 2169, 2010 WL 2346553 (J.P.M.L. June 8, 2010) (denying MDL transfer where one action was "already certified as a statewide class" and the remaining actions sought "similar putative statewide classes encompassing consumers from different states" because "the certified and putative classes will likely not overlap significantly").

As noted above, *Massey* (S.D. Ga.), is a putative multi-state class action; Fannie Mae has opposed class certification and moved to strike the nationwide class allegations. If the nationwide class is denied (or stricken), those plaintiffs can still seek to certify statewide classes, which defendants would not anticipate disputing (again, so long as the proper state tax authority or official is included as a plaintiff). To the extent there are multiple actions filed within a state, such as in (at present) West Virginia and Georgia, coordination or consolidation of those actions, rather than transfer of all actions, would avoid the risk of inconsistent, single-state class certification rulings.

4. Transfer Would Provide Only Limited Convenience Benefits

Centralization of the actions would provide little incremental convenience because the cases involve no factual disputes on the issue of whether the Enterprise Defendants are liable for transfer taxes—all agree that the Plaintiff states and counties impose a tax on the transfer of real estate, and that real estate is transferred directly and indirectly to and from Fannie Mae and

Freddie Mac within those jurisdictions. Hence, while Section 1407 directs the Panel to consider the convenience of the "witnesses," there will be no witnesses on that issue because there are no material facts in dispute. To the extent damages proceedings would be necessary, centralized discovery proceedings would serve no purpose nor provide any benefit. There will be nothing "common" to discover across these numerous state-wide cases, given the particularities of each state's practice; because damages must be calculated on a jurisdiction-by-jurisdiction basis the discovery needed to measure damages in one jurisdiction would not be of any use to any other jurisdiction. This leaves only motions practice in the various district courts, but with the benefits of electronic filing such activity requires little if any travel or coordination with local counsel. Accordingly, any convenience benefit of centralization would be modest, and could not outweigh the reality that the common disputed questions in these cases are legal. No purported convenience benefit could transform this litigation into one that meets the threshold "common question[] of fact" requirement of Section 1407.

II. ALTERNATIVELY, IF THE PANEL ORDERS TRANSFER, IT SHOULD DENY TRANSFER OF CERTAIN ACTIONS AND ORDER THAT THE REMAINING ACTIONS BE TRANSFERRED TO THE EASTERN DISTRICT OF VIRGINIA

Should the Panel be inclined to order transfer despite the foregoing arguments, the Enterprise Defendants respectfully request that the Panel (a) deny transfer of certain cases that are procedural outliers, and (b) transfer the remaining actions to the Eastern District of Virginia, a convenient and efficient forum in which a transfer tax action is already pending.

A. The Panel Should Not Transfer Actions That Are Procedural Outliers

"Where there is such a significant procedural disparity among the subject actions, the Panel will take a close look at whether movants have met their burden of demonstrating that centralization will still serve the purposes of Section 1407." *In re Louisiana-Pacific Corp.*

Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig., MDL 2366, 2012 WL 2175773 (J.P.M.L. June 11, 2012). Indeed, the Panel has often found that "[t]he presence of procedural disparities among constituent cases is another factor that can weigh against centralization." *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, MDL 2134, 2010 WL 532561 (J.P.M.L. Feb. 12, 2010).[9]

Here, the cases run the gamut from far advanced (in the two cases pending before the Eastern District of Michigan class certification and liability issues have been resolved,[10] and damages proceedings have commenced) to only just commenced (in several actions, the complaint is the only substantive filing to date[11]). And some but not all of the actions would be controlled by the Sixth Circuit decision that would result if that Court grants a pending petition for interlocutory review. While these significant procedural disparities may suggest that centralization of any cases would be inappropriate, these disparities plainly preclude transfer and centralization of the most procedurally advanced cases at this time.

1. The Panel Should Not Transfer Actions in Which a Fully Briefed Dispositive Motion is Pending or Has Been Decided

In this instance, the Panel should not transfer actions where a fully briefed dispositive motion is pending or has been decided. The Panel has consistently recognized that "principles of comity" weigh against transfer of any action "that has an important motion under submission

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9 *See also In re Louisiana-Pacific Corp. Trimboard Siding Mktg, Sales Practices & Prods. Liab. Litig.*, MDL 2366, 2012 WL 2175773 (J.P.M.L. June 11, 2012) (denying transfer and noting that "[t]he efficiencies that could be achieved in the newly filed actions [was] apparent, but we are not convinced, even after oral argument, of how centralization would benefit the significantly more advanced . . . action pending in the proposed transferee district").

10 Only one of the two Eastern District of Michigan actions—*Genesee*—is a class action.

11 *See, e.g.*, *Nicolai* (M.D. Fla); *Hancock Cnty.* (S.D. W.Va.); *Goode* (S.D. W.Va.); *Vadnais* (D. Minn.); *Small* (E.D. Va.); *Butts* (D.S.C.); *Spoonamore* (E.D. Ky.).

with a court." *In re L. E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975).[12] Pragmatic considerations also favor allowing multiple district courts to consider the legal issues underlying liability—the variety of legal and analytical perspectives that multiple district court decision would reflect could benefit the Courts of Appeals in reaching their decisions. *See supra* 9. Accordingly, the Panel should not transfer any action in which a fully briefed dispositive motion is pending or has been decided at the time the Panel makes its decision (such as *Hertel I*, *Hertel II*, *Massey*, *Oakland*, and *Genesee*).[13] The remaining cases, however, are in early stages of litigation—in some, no defendant has even entered an appearance.[14] It makes little sense to combine such procedurally disparate cases into one MDL proceeding. Only those cases at the same stage of litigation—where dispositive motions have not been filed and fully briefed—should be considered for transfer and centralization.

2. The Panel Should Deny Transfer of Actions in the Sixth Circuit, Where a Petition for Interlocutory Review of Judge Roberts' Decisions is Pending

Cases that could be controlled by a pending appeal are also procedurally different from cases that would not be so controlled. Accordingly, if it grants transfer, the Panel should exclude all cases that would be controlled by the Sixth Circuit appeal sought by the Enterprise

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[12] *Accord In re Res. Exploration, Inc., Sec. Litig.*, 483 F. Supp. 817, 822 (J.P.M.L. 1980); *In re Air Crash Disaster at Tenerife, Canary Islands on Mar. 27, 1977*, 435 F. Supp. 927, 928 (J.P.M.L. 1977); *In re Prof'l Hockey Antitrust Litig.*, 352 F. Supp. 1405, 1406 (J.P.M.L. 1973).

[13] *See* **Exhibit A** (identifying three Transfer Tax actions in which a fully briefed dispositive motion is currently pending and the two actions in which such a motion as already been decided). The dispositive motion pending on *Massey* (S.D. Ga.) does not address the statutory exemption issue; that issue will be addressed in future dispositive motions to be filed after class certification issues are settled.

[14] The Defendants intend to move to dismiss many, if not all, of the newly filed actions. To the extent that litigation in those cases is not stayed during the pendency of this motion to consolidate and thus motions to dismiss are fully briefed and heard before this Panel acts, those actions also should not be transferred at this time.

Defendants' pending petition for interlocutory review of Judge Roberts' decisions in *Genesee* and *Oakland*.[15] *See* Multidistrict Litig. Manual § 3:8 (2012) ("The Panel is not allowed to transfer cases . . . that are on appeal."). In *In re: Parallel Networks, LLC, ('111) Patent Litig.*, --- F. Supp. 2d ---, 2012 WL 2175762, at *2 n.4 (J.P.M.L. June 12, 2012), the Panel recently granted transfer under Section 1407, but refused to transfer one case where the district court in that case had already granted summary judgment and that ruling was pending on appeal (as would be the case here if the Sixth Circuit grants interlocutory review).[16] Accordingly, the Panel should not transfer any of the five transfer tax actions, including *Oakland* and *Genesee*, that are pending within the Sixth Circuit (or any other actions that may be filed in that circuit).

B. In the Event the Panel Opts to Centralize Any Remaining Actions, It Should Transfer Them to the Eastern District of Virginia

As noted above, there are a plethora of reasons for the Panel to reject Genesee's request to transfer these cases to Judge Roberts and, indeed, to deny the motion outright. If the Panel is nevertheless inclined to grant transfer, Defendants respectfully request that all transferable actions be centralized in the Eastern District of Virginia, where a transfer tax case is currently pending before the Honorable Henry E. Hudson.[17] In selecting a transferee forum, the Panel has

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[15] *See* **Exhibit B** (identifying five Transfer Tax actions pending in the Sixth Circuit). While the Enterprise Defendants cannot predict with certainty when the Sixth Circuit will act on the pending petition, as to which briefing closed June 8, 2012, they believe it is reasonable to anticipate a decision before the Panel will hear argument on the transfer motion.

[16] *See also In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311, 1314 (J.P.M.L. 1972) (denying transfer of claims where interlocutory appeal was pending at the time transfer was sought); *In re Mid-Air Collision Near Hendersonville, N.C. on July 19, 1967*, 297 F. Supp. 1039, 1040 (J.P.M.L. 1969) (same, observing that "action by the Panel at this time could disrupt the [appellate] review proceeding now in process"); *In re U. S. Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. at 1407 (denying transfer where the outcome of pending appeals "could have a substantial if not dispositive effect on all the actions pending in districts within those circuits").

[17] Enterprise Defendants also respectfully submit that the Alexandria Division of the Eastern District of Virginia would be an appropriate transferee forum; centralization there would entail at

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consistently considered factors such as:

- The proposed district's proximity to common defendants;
- The existence of a transferable action in the proposed district;
- The centrality of the proposed district to all pending actions;
- The proposed district's caseload;
- The substantive experience of the proposed district and transferee judge; and,
- The interests of the federal government.

All factors considered, the Eastern District of Virginia is the most appropriate transferee district.

First and foremost, the Eastern District of Virginia is convenient for the Enterprises, either or both of which are parties to every Transfer Tax case. Freddie Mac's principal place of business is located within that district at McLean, Virginia (in the Alexandria Division); Fannie Mae and FHFA are headquartered just a few miles away in Washington D.C. The Panel has consistently transferred to jurisdictions where common defendants—including the Enterprises—have their principal place of business.[18] That factor is especially strong where—as here—there is no single place where common factual events can be said to have occurred.[19]

The Eastern District of Virginia is also convenient for FHFA, which is located in Washington D.C. Where a federal agency has a substantial interest in the litigation, as FHFA

Footnote continued from previous page
least the same convenience benefits (if not more) as centralization before Judge Hudson, who sits in the Richmond Division.

[18] *See, e.g., In re: Kaplan Higher Educ. Corp. Qui Tam Litig.*, 626 F. Supp. 2d 1323, 1324 (J.P.M.L. 2009) (transferring to district where defendant had one of its headquarters); *In re Fed. Nat'l Mortg. Ass'n Secs. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005) (transferring to the District of Columbia, in part, because "Fannie Mae [the common defendant] is headquartered within the District of Columbia").

[19] *See In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021 (J.P.M.L. 1978) (transferring to jurisdiction where defendant had its principal place of business, though it had no pending cases, because "[n]one of the districts in which actions are pending offers a strong nexus to the common factual questions in this litigation, and little discovery on those issues could be expected to occur in any of them").

does here, the Panel has often selected a transferee court near the agency's headquarters.[20] The district is also convenient for plaintiffs because these actions have been filed across the southeast, up and down the eastern seaboard, and in the midwest. The Eastern District of Virgnia's proximity to four major airports in the Washington, DC/Richmond area make it accessible and convenient for all parties and counsel.[21]

Additionally, the judges of the Eastern District of Virginia have the experience necessary to handle this litigation. For example, Judge Hudson is currently presiding over *Small*, a Transfer Tax action brought on behalf of a putative statewide class of Virginia officials. And the Panel has repeatedly selected the Eastern District of Virginia as a transferee forum.[22]

Finally, the Eastern District of Virginia is known as the "rocket docket" because "civil actions quickly move to trial or are otherwise resolved" by that court. *Pragmatus AV, LLC v.*

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[20] *See, e.g.*, *In re Practice of Naturopathy Litig*., 434 F. Supp. 1240, 1243 (J.P.M.L. 1977) ("Because these 30 actions are pending throughout the entire United States, and because no overall focal point of discovery has emerged, no district stands out as the most appropriate transferee forum. On balance, however, we are persuaded that the District of Maryland is the most preferable. Inasmuch as the federal [agency] defendants are common to all actions in this litigation, several relevant documents and witnesses are located in nearby Washington, D. C. . . . The District of Maryland is the closest district to the District of Columbia wherein an action before us is pending."); *see also In re 1980 Decennial Census Adjustment Litig*., 506 F. Supp. 648, 651 (J.P.M.L. 1981) (similar, selecting District of Maryland); *In re Swine Flu Immunization Prods. Liab. Litig*., 446 F. Supp. 244, 247 (J.P.M.L. 1978) (selecting the District of Columbia, even though no action was pending there, because the department that exercised control over the program at issue was located there).

[21] *See In re Columbia Univ. Patent Litig.*, 313 F. Supp. 2d 1383, 1385 (J.P.M.L. 2004) (noting that "most of the parties in this litigation are in the eastern part of the United States, and thus the Massachusetts district should prove to be convenient for many of the litigants"); *In re Am. Gen. Life & Accident. Ins. Co. Indus. Life Ins. Litig*., 175 F. Supp. 2d 1380, 1381 (J.P.M.L. 2001) ("In selecting the District of South Carolina as transferee district, we observe that the districts with pending actions and the location of the defendant give this litigation a Southern tilt.").

[22] *See, e.g.*, *In re Xyberbaut Corp. Sec. Litig.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005); *In re W. Elec. Co., Inc. Semiconductor Patent Litig*., 415 F. Supp. 378, 379 (J.P.M.L. 1976); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316, 319 (J.P.M.L. 1975) *In re E. Airlines, Inc. Flight Attendant Weight Program Litig*., 391 F. Supp. 763, 765 (J.P.M.L. 1975).

Facebook, Inc., 769 F. Supp. 2d 991, 996 (E.D. Va. 2011). Current statistics demonstrate that, on average, the Eastern District of Virginia disposes of civil cases in only 5.1 months—about 30% faster than the national average.[23] Simply put, if these actions are to be centralized, transfer to the Eastern District of Virginia would promote their just and efficient resolution.[24]

By contrast, transfer to the Eastern District of Michigan would be neither just nor efficient. Judge Roberts has already granted Genesee's motion for summary judgment and the only issues that remain are specific to those actions—namely, a calculation of damages for the relevant Michigan counties and the resolution of recently added claims based on Michigan state law. Accordingly, there would be little to no efficiency gained by transfer to that court. Finally, because the actions pending in the Sixth Circuit should not be included in any centralized proceeding, the Eastern District of Michigan has no interest in overseeing the Transfer Tax cases.

CONCLUSION

For the foregoing reasons, the Panel should deny Genesee's Motion For Transfer. Alternatively, if the Panel determines that transfer is appropriate, the Enterprise Defendants respectfully request that the Panel stay transfer of the actions identified in Exhibit A and transfer the remaining actions, identified in Exhibit B, to the Eastern District of Virginia.

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23 *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: Statistics, Fiscal Year 2011, Tbl. C-5, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05Sep11.pdf (last visited July 18, 2012).

24 Alternatively, if the Panel decides not to select the Eastern District of Virginia, it should transfer the cases to the Hon. William T. Moore in the Southern District of Georgia, who is presiding over *Massey*, the only putative nationwide Transfer Tax class action. Judge Moore was previously selected to preside over an MDL involving mortgage lending practices. *See In re Novastar Home Mortg. Inc. Mortg. Lending Practices Litig.*, 368 F. Supp. 2d 1353, 1354 (J.P.M.L. 2005). He is thus well-positioned to preside over this litigation. *See In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (relying upon judge's "prior, successful experience in the management of Section 1407 litigation").

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Respectfully Submitted,

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