IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER ROBERTS, *et al.*, *Plaintiffs,* v. FEDERAL HOUSING FINANCE AGENCY, *et al.*, *Defendants.*	No. 1:16-cv-2107 Honorable Edmond E. Chang

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' JOINT MOTION TO STAY

Plaintiffs Christopher Roberts and Thomas P. Fischer respectfully submit this memorandum in opposition to Defendants' Joint Motion to Stay this proceeding.

INTRODUCTION

Plaintiffs in this case challenge various actions taken by Federal Housing Finance Agency ("FHFA") and the United States Department of the Treasury ("Treasury") (collectively, the "Agencies") in connection with the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies"). One of those actions is the "Net Worth Sweep," which was effected by an "amendment" to the Preferred Stock Purchase Agreements ("PSPAs") Treasury entered into with FHFA, as conservator of the Companies, upon imposition of the conservatorships in September 2008. Before the Net Worth Sweep, Fannie and Freddie were required to pay Treasury a fixed-rate dividend based on the outstanding amount of stock in the Companies held by Treasury (10% if paid in cash, 12% if paid in kind; the amount of stock outstanding equals $1 billion for each company plus amounts they have drawn from a Treasury

funding commitment to maintain positive net worth—approximately $187 billion in total). FHFA and Treasury entered the Net Worth Sweep in August 2012, at a time when the housing market had recovered from the crisis and Fannie and Freddie were entering a period of robust and record-breaking profitability. The Net Worth Sweep fundamentally changed the nature of Treasury's securities, eliminating the fixed-rate dividend and replacing it with a dividend equal to *all* of Fannie's and Freddie's net worth every quarter, minus a small and diminishing capital reserve amount—hence the title "Net Worth Sweep."

The Net Worth Sweep has proven to be tremendously profitable for Treasury—it has netted the agency nearly $130 billion more in dividends than would have been paid under the prior structure, and Fannie and Freddie now have paid Treasury a total of $245 billion in dividends, approximately $58 billion more than they received from Treasury's funding commitment. Yet the Net Worth Sweep remains in place, and the outstanding principal of Treasury's stock remains fixed at $189 billion.

While the Net Worth Sweep has been tremendously profitable for Treasury, it has been devastating for Fannie's and Freddie's other shareholders. Indeed, its purpose and necessary effect was to *eliminate* those shareholders' economic rights entirely. As Treasury itself stated upon the announcement of the Net Worth Sweep, it requires that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers." Press Release, U.S. Dep't of the Treasury, Treasury Dep't Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), https://goo.gl/UMJFyi.

Given the Net Worth Sweep's devastating effect on Fannie's and Freddie's shareholders, a number of those shareholders, including Plaintiffs, have filed actions challenging it. Plaintiffs in this action, and plaintiffs in the actions FHFA has designated as related in its MDL motion

("related actions"), are shareholders of Fannie and/or Freddie. They have instituted suits challenging the Agencies' actions under the Administrative Procedure Act ("APA") and state law. Three of the actions, including this one, involve challenges to the Net Worth Sweep and other agency actions exclusively under the APA.[1] *See Robinson v. FHFA*, No. 7:15-cv-109 (E.D. Ky.); *Saxton v. FHFA*, No. 1:15-cv-47 (N.D. Iowa). A fourth action involves challenges to the Net Worth Sweep under state statutory and common law. *See Jacobs v. FHFA*, No. 1:15-cv-708 (D. Del.).[2]

On September 30, 2014, the U.S. District Court for the District of Columbia dismissed several actions filed by shareholders in that court challenging the Net Worth Sweep. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014). That judgment is now on appeal before the D.C. Circuit. Happy with the result in *Perry Capital*, FHFA has now moved to centralize and transfer the four related actions pending in district courts to the U.S. District Court for the District of Columbia even though no related cases are pending in that district. Its motion is currently pending before the Judicial Panel on Multidistrict Litigation (the "Panel"). Defendants now seek to stay this litigation until that motion is resolved. Defendants' attempt to transfer all cases challenging the Net Worth Sweep—cases that primarily if not exclusively present legal rather than factual issues—to a court that has already ruled in their favor is without merit, and its motion to stay this case in the meantime should be denied. Indeed, this result is required by

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[1] The plaintiffs in *Saxton v. FHFA*, No. 1:15-cv-47 (N.D. Iowa), also brought state-law claims for breach of contract and breach of the implied covenant of good faith and fair dealing, but, as they have indicated in filings with the MDL, they will not be defending those claims in their response to Defendants' motions to dismiss in that case. *See* Response of Pls. in Opp'n to Mot. for Transfer at 6, *In re FHFA, et al., Preferred Stock Purchase Agreement Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. Apr. 6, 2016), ECF No. 19.

[2] FHFA has filed a notice of related actions with respect to two additional cases that were recently removed to federal court, but those cases do not even challenge the Net Worth Sweep directly; instead, they make demands for inspection of Fannie's and Freddie's books and records under state statutes. *See Pagliara v. Federal Housing Loan Mortg. Corp.*, No. 1:16-cv-337 (E.D. Va.); *Pagliara v. Federal Nat'l Mortg. Ass'n*, No. 1:16-193 (D. Del.).

principles FHFA *itself* emphasized in *opposing* MDL transfer and a stay in a different case that was filed before this Court in 2012. *See* Enterprise Defs.' Opp'n to Genesee Cty. Mot. for Transfer of Actions Pursuant to 28 U.S.C. § 1407, *In re Real Estate Transfer Tax Litig.*, MDL No. 2394 (J.P.M.L. July 23, 2012), ECF No. 18 ("FHFA *Transfer Tax* Opp'n") (attached as Exhibit 1) (opposing MDL transfer); Pls.' Opp'n to Defs.' Mot. to Stay, *Federal Nat'l Mortg. Ass'n v. Hamer*, No. 3:12-cv-50230 (N.D. Ill. July 30, 2012), ECF No. 54 ("FHFA *Hamer* Opp'n") (attached as Exhibit 2) (opposing a stay).

LEGAL STANDARD

It is well settled that the filing of a motion to transfer pursuant to Section 1407 does not automatically trigger a stay of proceedings in the actions covered by the motion. *See* JPML Rule 2.1(d); *see also In re Air Crash Disaster at Paris, France, on Mar. 3, 1974*, 376 F. Supp. 887, 888 (J.P.M.L. 1974). Indeed, "[t]he transferor court should not . . . automatically postpone rulings on pending motions, or generally suspend further proceedings" during the pendency of a motion for transfer. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2015). The "use of stay orders by the district courts" is "usually undesirable." *In re Penn Cent. Secs. Litig.*, 333 F. Supp. 382, 384 n.4 (J.P.M.L. 1971).

Instead, a court must exercise its "inherent discretionary powers" to grant stays only "under exceptional circumstances." *Morgan v. Kobrin Secs., Inc.*, 649 F. Supp. 1023, 1032 (N.D. Ill. 1986) (citing *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)). "When deciding whether to grant a stay, courts balance the competing interests of the parties and the interest of the judicial system," as well as that of the public. *Markel American Ins. Co. v. Dolan*, 787 F. Supp. 2d 776, 779 (N.D. Ill. 2011); *see also Salcedo v. City of Chicago*, 2010 WL 2721864, at *2 (N.D. Ill. July 8, 2010). In doing so in the context of a stay pending a decision on

an MDL motion, courts consider the following factors: "(1) the potential prejudice to the non-moving party; (2) the hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact consolidated." *Brandt v. BP, PLC*, 2010 WL 2802495, at *1 (D.S.C. July 14, 2010); *see also Board of Trs. of Teachers' Ret. Sys. of Ill. v. Worldcom, Inc.*, 244 F. Supp. 2d 900, 902–03 (N.D. Ill. 2002). " '[I]f there is even a fair possibility that the stay . . . will work damage to some one else,' [then] the party seeking the stay 'must make out a clear case of hardship or inequity in being required to go forward.' " *In re Groupon Derivative Litig.*, 882 F. Supp. 2d 1043, 1045 (N.D. Ill. 2012) (first alteration in original) (quoting *Landis*, 299 U.S. at 255 (1936)).

ARGUMENT

A stay would not promote judicial economy because the Panel is likely to deny FHFA's transfer motion, because Plaintiffs' complaint raises unique challenges to Defendants' actions that are not at issue in the other related actions, and because a stay will inhibit the development of the law. It would prejudice Plaintiffs and the public interest by further delaying resolution of their claims. Finally, Defendants have not made the requisite showing of hardship.

I. A Stay Would Not Promote Judicial Economy but Would Instead Impede It by Delaying Proceedings Unnecessarily.

A stay will not promote judicial economy but will, in fact, impede it for three reasons: First, the Panel is unlikely to grant FHFA's motion, which does not satisfy the statutory criteria for transfer. Second, resolution of the pending or impending dispositive motions in this case will require production of different administrative records than the ones Defendants will produce in the other related actions. Finally, a stay will prevent the natural development of the law.

In weighing these considerations, it is appropriate for the court to consider the merits of FHFA's motion for transfer. *See, e.g., Bertram v. Federal Express Corp.*, 2006 WL 3388473, at

*1 (W.D. Ky. Nov. 20, 2006); *Tench v. Jackson Nat'l Life Ins. Co.*, 1999 WL 1044923, at *1 (N.D. Ill. Nov. 12, 1999). *Cf. Hilton v. Braunskill*, 481 U.S. 770, 778 (1987) (likelihood of success on the merits of an appeal is one factor courts must consider in deciding whether to stay judgment pending appeal). Unless the Panel transfers this case, and unless deferring decisions until after that transfer promotes judicial economy, the requested stay is nothing more than an unnecessary delay.

1. As FHFA has previously argued to this very court, a stay pending resolution of an MDL motion is inappropriate where, as here, "the JPML is unlikely to transfer this action" because "the [related] cases do not meet the statutory criteria for MDL centralization under 28 U.S.C. § 1407(a)." FHFA *Hamer* Opp'n at 5. Section 1407 authorizes transfer only of actions sharing at least one common question of fact, and only when the Panel concludes that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). As FHFA knows, "[t]o 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." FHFA *Transfer Tax* Opp'n at 5. "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." *Id.*

In *Federal National Mortgage Association v. Hamer*, the FHFA, acting as conservator on behalf of the Companies, encountered a stay motion very much like the one it filed here and opposed it for reasons that apply similarly to this case. *Id.* at 6. As in *Hamer*, "the material facts relating to liability are largely undisputed, . . . there is unlikely to be any merits discovery on

liability, and . . . the only substantial issues are legal questions." FHFA *Transfer Tax* Opp'n at 3. Indeed, yesterday, the parties to this case filed a status report in which all agree that there are no relevant factual disputes and that discovery is unnecessary because the case should be resolved on motions to dismiss (Defendants' position) or motions for summary judgment based on the administrative record (Plaintiffs' position). Joint Initial Status Report at 6, ECF No. 28. As in *Hamer*, the mismatch between the related actions and the statutory criteria for centralization, and the fact that the movant seeks transfer to the one district in which it has prevailed on a common threshold legal question, gives rise to an inference that the motion was driven by an improper desire to "preordain the outcome of the litigation" through "brazen" forum shopping. FHFA *Transfer Tax* Opp'n at 1, 8; *see also* FHFA *Hamer* Opp'n at 6. *See In re Louisiana-Pac. Corp. Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig.*, 867 F. Supp. 2d 1346, 1347 (J.P.M.L. 2012) ("These circumstances raise the concern that the request to centralize in E.D. North Carolina, where class certification has been granted, is based on considerations that are not entirely consistent with the purposes of Section 1407.").

For these reasons, FHFA's MDL motion faces a significant uphill battle. The Panel routinely denies "motions to transfer actions that involve common issues of law but not fact." FHFA *Transfer Tax* Opp'n at 5–6 (collecting cases); *see also In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (mem.) ("As reflected by the conflicting summary judgment decisions already issued . . . this is primarily a *legal* question.").[3] Relatedly, it almost never centralizes APA challenges, which generally are resolved on an administrative

[3] Indeed, in the past year, the Panel has denied consolidation in the only two cases in which the central issue was legal in nature. *See In re Clean Water Rule: Definition of "Waters of the United States"*, 2015 WL 6080727, at *1 (J.P.M.L. Oct. 13, 2015); *In re SFPP, LP, R.R. Prop. Rights Litig.*, 121 F. Supp. 3d 1360, 1361 (J.P.M.L. 2015) (mem.).

record with little or no discovery.[4] *See, e.g.*, *In re Removal from U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d at 1350–51 ("These two cases, brought under the Administrative Procedure Act, are unlike many others that the Panel routinely encounters because there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matters."); *In re Clean Water Rule*, 2015 WL 6080727, at *1 (J.P.M.L. Oct. 13, 2015) (same); *In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015) (same). Finally, and most importantly, it has held that improper motives—including forum shopping—weigh against transfer. *See, e.g.*, *In re Brandywine Commc'ns Techs., LLC, Patent Litig.*, 959 F. Supp. 2d 1377, 1379 (J.P.M.L. 2013); *In re Klein*, 923 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013) (mem.); *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010); *In re Concrete Pipe*, 302 F. Supp. 244, 255 (J.P.M.L. 1969) (Weigel, J., concurring).

Additional features of the related actions weigh against transfer: They are few in number. *See In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d at 1381 (noting that the movant bears a heavier burden when a small number of actions is involved). There are significant procedural disparities between them. *See In re LVNV Funding, LLC, Time-Barred Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1376, 1378

[4] In fact, it is rare that the Panel is even asked to transfer APA cases, despite the fact that agency actions frequently have nationwide effect and are therefore subject to simultaneous challenge in numerous courts throughout the country. In the rare instances in which the Panel has granted motions to transfer challenges to agency action, the cases involved uncommon features that removed them from the norm of APA cases. *See, e.g.*, *In re Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010) (mem.); *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008); *see also In re Dep't of Energy Stripper Well Exemption Litig.*, 472 F. Supp. 1282, 1285–86 (J.P.M.L. 1979) (enumerating material factual questions for which discovery would be required); *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969) (same).

(J.P.M.L. 2015) (mem.) (denying transfer when procedural disparities would produce "the opposite effect than intended by Section 1407"). Dispositive motions are under submission in Kentucky and Delaware. *See In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d at 1381 (declining to transfer when "summary judgment motions are due to be fully briefed within a matter of weeks"). And alternative methods of coordination are available and have already been shown to work. *See In re Kmart Corp. Customer Data Sec. Breach Litig.*, 109 F. Supp. 3d 1368, 1368–69 (J.P.M.L. 2015) (mem.) ("[C]entralization under Section 1407 should be the last solution after considered review of all other options." (quoting *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011))).

The overwhelming weight of authority suggests that FHFA's motion is likely to be denied. "Thus, the most likely result of staying this action pending the Panel's decision would be unnecessary and unproductive delay." FHFA *Hamer* Opp'n at 8.

2. As FHFA also argued in *Hamer*, judicial economy will not be served by staying an action in which distinct issues are presented for the court's consideration. FHFA *Hamer* Opp'n at 9. Staying the action does "not further any interest in judicial economy," when the court is confronted with "*sui generis*" matters that "one court or another will have to decide." *Id.* In particular, there are limited efficiencies to be gained by having a single court resolve pre-trial motions based on distinct administrative records. *See In re Nat. Gas Liquids Regulation Litig.*, 434 F. Supp. 665, 668 (J.P.M.L. 1977) (declining to transfer when "[d]istinct agency records and other documents will . . . be relevant to each of those groups of actions").

Although the related actions all present *legal* jurisdictional questions about whether the Agencies exceeded their statutory authority, the content of those questions differs in this case. Specifically, Plaintiffs allege actions by the Agencies that exceeded their statutory authority in

addition to the Net Worth Sweep:

- FHFA's decision to pay Treasury cash, rather than in-kind, dividends. *See* Compl. ¶¶ 11, 14, 58, 132, ECF No. 1.
- Provisions of the PSPAs granting Treasury substantial control over FHFA's operation of the conservatorships. Compl. ¶¶ 12, 21, 63, 105, 123, 144.
- Treasury's standby commitment to acquire new equity in the Companies despite the expiration of its authority to acquire the Companies' stock. Compl. ¶¶ 19, 22, 52–53, 145.[5]

Thus, in resolving the dispositive motions anticipated in this case, a court will be required to consider administrative records that differ from the administrative records on which a court would base its decision in actions challenging only the Net Worth Sweep. Relatedly, the Agencies will have to produce distinct administrative records and draft distinct dispositive motions. Even if transfer appears likely, therefore, a stay would produce only unnecessary delay.

Of course, the Agencies' position is that they will not even need to produce an administrative record because they think the Court should dismiss the case on the pleadings. While Plaintiffs believe an administrative record will need to be produced after the motion to dismiss is denied, Defendants' position only underscores why transfer is unlikely and a stay inappropriate, for the necessary implication of that position is that the related cases *lack* the disputed issues of fact that are a necessary prerequisite for transfer.

3. Notwithstanding the distinct challenges brought in this action, FHFA hangs its "judicial economy" hat on common questions of law presented in the related actions. Defs.' Mem. of Law in Supp. of Their Joint Mot. to Stay at 6–8 (Apr. 4, 2016), ECF No. 24 ("Defs.' Mem."). Even if defendants were correct that the analysis of these questions will be identical in the related actions, and even if common *legal* questions were enough to satisfy the statutory

[5] Two days ago, Plaintiffs filed an amended complaint that retains these unique challenges and incorporates discovery information generated in *Fairholme Funds, Inc. v. United States*, No. 1:13-cv-465, in the Court of Federal Claims.

criteria of Section 1407, a stay would not necessarily promote judicial economy. Most cases in which courts emphasize the economies of deferring decisions until after the Panel has ruled on a motion presuppose the existence of common *factual* questions. *See, e.g.*, *Tench*, 1999 WL 1044923, at *2. (That is, after all, what Section 1407 requires). When the common questions are purely legal, however, there is much to be lost by freezing a single decision on a difficult legal question as "the law of the land." FHFA *Transfer Tax* Opp'n at 10; *see also* FHFA *Hamer* Opp'n at 6 (noting that there was "substantial ground for difference of opinion" on the legal issue presented in the transfer actions).

Judicial economy, not to mention even more important principles, is furthered by permitting multiple lower courts to consider difficult legal questions. In *United States v. Mendoza*, for example, the Supreme Court declined to apply the doctrine of nonmutual offensive collateral estoppel against the government for precisely this reason. 464 U.S. 154, 162 (1984). It reasoned that a rule permitting courts to apply the doctrine against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Id.* at 160; *see also id.* at 163 (concluding that this consideration, among others, outweighed the "economy interests underlying a broad application of collateral estoppel"). Especially in the context of agency review, the Supreme Court has recognized that there are significant economies to be gained by permitting percolation. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). The government itself has advanced this argument when it has sought to avoid a previous unfavorable ruling. *See, e.g.*, *National Envt'l Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014) (noting federal agency's argument that "[t]o compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercircuit dialogue

by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency's position" (alteration in original)); *see also* FHFA *Transfer Tax* Opp'n at 9–10. The fact that the government is now in a position where it wishes to cement a prior favorable ruling, rather than avoid a prior unfavorable one, does not alter the principle that it is not always desirable to avoid multiple district court rulings on difficult legal questions. [6]

II. A Stay Would Prejudice Plaintiffs and the Public Interest.

A stay would delay resolution of Plaintiffs' claims that the Agencies deprived Plaintiffs of their rights as shareholders of the Companies. The courts are called on "to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. Plaintiffs ask that the Court balance all three of these factors and ensure that this action is resolved in this just, speedy, and inexpensive manner; the Agencies effectively ask that the Court consider instead only the expense and, then, only the expense to the government. In ruling on a motion to stay, the "Court cannot ignore [a plaintiff's] right to proceed expeditiously with litigation, unless such efforts would be futile," *Wason Ranch Corp. v. Hecla Mining Co.*, 2007 WL 1655362, at *2 (D. Colo. June 6, 2007), particularly where, as here, the delay adds daily to the injury being suffered by Plaintiffs. *See Landis*, 299 U.S. at 255; *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (holding that prayer for injunctive relief against ongoing harm weighed against granting stay). To deny Plaintiffs their right to proceed expeditiously would result in significant prejudice.

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[6] *Board of Trustees of Teachers' Retirement System of Illinois*, is not inconsistent with this principle. Although the court in that case focused on "thorny questions of law" in deciding to stay, 244 F. Supp. 2d at 903, there were already well-developed legal opinions on both sides of the questions it identified. Moreover, the course it took was actually more hospitable to permitting further development of the law in that case: Had it denied the motion to stay and remanded the action to state court, as plaintiffs sought, the removal questions likely would have been shielded from further consideration by federal courts. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .").

While this litigation is pending, FHFA is operating two of the largest financial companies in the world with little to no capital. Ensuring adequate capital levels is a linchpin of modern financial regulation, and FHFA is specifically tasked with ensuring that Fannie and Freddie are adequately capitalized. *See* 12 U.S.C. § 4513(a)(1)(B). Yet, with each quarter that passes, Treasury sweeps into its coffers all of the Companies' net worth, less a small and diminishing capital reserve. This is highly prejudicial to Congress's goal of stabilizing the housing and financial markets. Indeed, FHFA Director Melvin L. Watt, who is a defendant in this action, has himself identified the Companies' "lack of capital" as a "serious risk" with "potential for escalating in the future." Melvin L. Watt, Director, FHFA, Prepared Remarks of Melvin L. Watt Direct of FHFA at the Bipartisan Policy Center (Feb. 18, 2016), http://goo.gl/jwhSpN. Yet the Agencies, and Treasury in particular, apparently are happy to see Fannie and Freddie operate with little to no capital so long as their billions of dollars in profits continue flowing to Treasury. Prolonging this state of affairs is highly prejudicial not only to Plaintiffs' interests as shareholders but also to the public interest.

III. Defendants Have Not Met Their Burden To Clearly Show Hardship and Inequity in Being Required To Go Forward.

Defendants argue that they face hardship because they must "defend materially identical actions in four jurisdictions." Given that the pendency of multiple similar actions against a single set of defendants is a common condition when an MDL motion is filed, and given that stays in transferor courts are nevertheless disfavored, this allegation cannot be enough to meet the Defendants' burden of demonstrating a "clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255.

In any event, the allegation of hardship is simply untrue. Defendants have successfully obtained stays of the actions pending in Delaware and Iowa. Defs.' Mem. at 2.[7] They have obtained a significant extension of time to respond to the complaint in Virginia—in an action that, in any event, bears very little resemblance to the present action. Order, *Pagliara v. Federal Home Loan Mortg. Corp.*, No. 1:16-cv-337 (E.D. Va. Apr. 5, 2016), ECF No. 19. And their motions to dismiss are fully briefed and submitted in Kentucky. Docket Entry, *Robinson v. FHFA*, No. 7:15-cv-109 (E.D. Ky. Mar. 15, 2016). That means that, with the possible exception of briefing on entirely unrelated motions in the Eastern District of Virginia, this district is likely the only one in which Defendants will face the "hardship" of defending against a challenge to their actions during the pendency of the MDL motion. Given their position (however misguided) that this action is "materially identical" to the others, and given that they have filed motions to dismiss in the District of Columbia, the Southern District of Iowa, the Northern District of Iowa, the District of Delaware, and the Eastern District of Kentucky, it is difficult to imagine why they consider having to file one in this district a "hardship" at all.

Even if the Agencies were required to contend with multiple challenges at once, the Court should give that burden very little weight in deciding whether to stay this action. It is well settled that "the Government is not in a position identical to that of a private litigant, both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates." *Mendoza*, 464 U.S. at 159. Before Congress amended the venue statute in 1962 to make it possible for plaintiffs to sue federal agencies under the APA in the judicial district where they reside, suits to enjoin unlawful agency

[7] Defendants' success on these motions should not be taken as evidence of their merit. The stays in Delaware were entered without briefing and after a discussion between the court and the parties about the best way to proceed in those cases. Defs.' Mem. at 2. The stay in Iowa was entered without any response having been filed by the plaintiffs in that action; thus, Defendants' arguments in favor of a stay were untested. *Id.*

action normally had to be brought in Washington, D.C. *See Stafford v. Briggs*, 444 U.S. 527, 534–35 (1980). A feature of the post-1962 statutory scheme is that, when agencies adopt unlawful policies that affect many people across the country, they are simultaneously subject to suit in many districts. It is understandable that agency lawyers do not appreciate this, but there are other policy considerations that Congress thought more important. *See id.* Out of respect for these policy considerations, courts should not resort to the "exceptional" measure of staying actions unless an agency defendant has shown a special hardship beyond the disadvantages to the agency that the statutory scheme inevitably causes. Defendants do not even purport to make such a showing here.

CONCLUSION

For all of the foregoing reasons, the Defendants' Motion to Stay should be denied.

April 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 7th day of April, 2016, via the Court's Electronic Case Filing system.

/s/ Christian D. Ambler
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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

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[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

Respectfully Submitted,

w/permission

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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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* Pro Hac Vice Applications to be filed
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