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

CHRISTOPHER ROBERTS, and
THOMAS P. FISCHER,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, JACOB J. LEW, in his official capacity as Secretary of the Treasury, and THE DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:16-CV-02107

Honorable Edmond E. Chang

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO STAY

Plaintiffs' Opposition provides no convincing arguments against Defendants' Joint Motion to Stay. Plaintiffs argue primarily that the Court should not stay this case because, they predict, the Judicial Panel on Multidistrict Litigation (the "Panel" or "JPML") will deny FHFA's motion to transfer this case and others like it for coordinated pre-trial proceedings. In making that argument, Plaintiffs tout FHFA's opposition in 2012 to a motion to stay an unrelated case, *Federal National Mortgage Association v. Hamer*, No. 3:12-cv-50230 (N.D. Ill.), pending the Panel's resolution of a motion to transfer that case and quote liberally from FHFA's submission concerning that case, characterizing FHFA's position on multi-district litigation ("MDL") transfer there as inconsistent with its position as to transfer here. *See* Opp. at 3-4, 6-7, 9, 11.

The Panel, not this Court, is the proper tribunal to assess the parties' arguments about MDL transfer. Indeed, Plaintiffs' brief to this Court largely parrots arguments Plaintiffs and their allies offer to the Panel. *See*, *e.g.*, *Robinson* Resp. to MDL Motion (JPML No. 2713 Dkt. 18); *Roberts* Resp. to MDL Motion (JPML No. 2713 Dkt. 20) (adopting *Robinson* submission). But even if this Court were inclined to assess MDL arguments, Plaintiffs' characterization of FHFA's positions as inconsistent is wrong: Plaintiffs ignore important differences that made transfer inappropriate in *Hamer* and other transfer-tax cases but appropriate in this one. Plaintiffs' other arguments against a stay are likewise unconvincing.

In other cases covered by FHFA's MDL motion, two district courts have already granted stays of three actions pending the Panel's decision, and no court has yet denied a stay. *See* Order, *Saxton v. Fed. Housing Fin. Agency*, N.D. Iowa No. 1:15-cv-00047-LRR (April 4, 2016); Order, *Pagliara v. Fed. Nat'l Mortgage Ass'n*, D. Del. No. 1:16-cv-00193-GMS (April 4, 2016); Order, *Jacobs v. Fed. Housing Fin. Agency*, D. Del. No. 1:15-cv-00708-GMS (March 30, 2016). This Court should follow suit and grant Defendants' Joint Motion to Stay this action until 14 days after the Panel's decision.

ARGUMENT

I. The Panel Is Likely to Grant the Motion to Transfer this Case, in Contrast to *Hamer*

As Defendants explained in their Motion to Stay and their Motion to Transfer, this case and the Related Cases satisfy the criteria for transfer. *See* Mot. to Stay at 6-8; Mot. to Transfer at 6-11. Plaintiffs point to FHFA's opposition to the proposed consolidation of numerous cases, including *Hamer*, that raised whether Fannie Mae and Freddie Mac are exempt under federal statutes from payment of state and local real estate transfer taxes (the "Transfer Tax Cases"). *See* Opp. at 3-4, 6-7, 9, 11. These cases are distinguishable for several reasons:

First, there were no serious factual disputes in the Transfer Tax Cases. All parties agreed on what had happened—Fannie Mae and Freddie Mac had not paid transfer taxes that various state and local entities claimed they were required to pay. The cases turned on a straightforward question of federal statutory interpretation. *See In re: Real Estate Transfer Tax Litigation*, MDL No. 2394 (J.P.M.L. 2012) (noting that the cases involved a "fairly straightforward dispute" that raised a "primarily a *legal* question," with facts that were "largely undisputed" and "neither numerous nor complex." (emphasis in original)). No matter which way the courts resolved that question, the cases would be essentially over as soon as that question was resolved. In contrast, the parties in this case and the Related Cases have very different interpretations of what the Defendants did and why they did it, and the complaints are laden with factual allegations.[1] Of course, for purposes of the motions to dismiss that Defendants intend to file in this case (absent a stay), Defendants will accept any well-pleaded allegations in the Amended Complaint as true. But if the motions are denied, this case—unlike the Transfer Tax Cases—will be far from over, and the factual disputes are likely to become central to the litigation.[2] Thus, transfer of this case is far more probable (and warranted) than transfer of the Transfer Tax Cases.

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[1] Plaintiffs' Amended Complaint, for example, is 85 pages and 192 paragraphs long, and the bulk of it is devoted to factual allegations, including many allegations that are based on discovery taking place in the Court of Federal Claims. In contrast, the *Hamer* complaint was 15 pages and 52 paragraphs long, and most of the paragraphs contained statements of law or descriptions of the parties. *See* Compl., *Federal National Mortgage Association v. Hamer*, No. 3:12-cv-50230 (N.D. Ill. June 22, 2012).

[2] Plaintiffs argue that their case, as an APA challenge, probably will be "resolved on an administrative record with little or no discovery." Opp. at 7-8. But if the conduct of plaintiffs in other Third Amendment cases is any guide, Plaintiffs are likely to challenge the adequacy of any administrative records that Defendants provide and to seek additional discovery. *See, e.g.*, *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014) (noting that the plaintiffs had alleged that Defendants failed to produce a full administrative record); Ruling on Pl.'s Mot. To Compel, *Cont'l W. Ins. Corp.*, No. 4:14-cv-00042 (S.D. Iowa Aug. 5, 2014) (observing that Defendants' production of an administrative record would prompt "inevitable disputes about its adequacy" and probable "requests for additional discovery"). Indeed, in one of the APA cases that Plaintiffs cite as a "rare" example of an APA case that the Panel transferred, the Panel cited

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Second, the danger posed by inconsistent rulings is significantly greater here than in the Transfer Tax Cases. The Transfer Tax Cases involved different taxes imposed by different states and localities. If FHFA and the Enterprises lost a case in one jurisdiction and won in another, both decisions could stand, since the Enterprises could pay one jurisdiction's tax without paying others. But conflicting Third Amendment decisions cannot co-exist, since each PSPA is a *single* contract that cannot be valid in one jurisdiction but not in another. Absent transfer, shareholders would have virtually unlimited opportunities to relitigate the same issues over and over. Thus, the risk of inconsistent rulings provides a far more compelling justification for transfer here than in the Transfer Tax Cases.

Third, unlike in *Transfer Tax*, policy considerations about forum shopping cut in *favor* of transfer here: Plaintiffs and their aligned parties have given every indication of seeking to litigate serially in forums they deem favorable, in hopes of garnering a single victory. For example, when the plaintiff in *Continental Western Insurance Corp.*, No. 4:14-cv-00042 (S.D. Iowa), lost in the Southern District of Iowa on a motion to dismiss, it did not appeal. Instead, shortly thereafter, a new action was brought by another plaintiff in the Northern District of Iowa. Similarly, other plaintiffs have brought actions in forums with little if any connection to the facts of the case, such as the Pikeville division of the Eastern District of Kentucky. Moreover, Plaintiffs are wrong to suggest that transfer would "cement a prior favorable ruling." *See* Opp. at 11. The district court ruling to which Plaintiffs refer is the subject of a pending appeal that is yet to be argued, let alone decided. *Perry Capital, LLC v. Lew*, Nos. 14-5243, 14-5454, 14-5260, 14-5262 (D.C. Cir.) (argument scheduled for April 15, 2016).

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disputes over "identification of the underlying administrative record" as a key reason for transfer. *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litigation*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008).

II. Plaintiffs' Other Arguments Are Unpersuasive

Plaintiffs provide several other arguments against a motion to stay, but none are persuasive.

Plaintiffs argue that their Amended Complaint raises a handful of "unique" issues that are not raised in other Third Amendment cases, which supposedly will require consideration of "differ[ent]" administrative records. Opp. at 9-10. But the overwhelming focus of Plaintiffs' Amended Complaint is the Third Amendment. The inclusion of a handful of additional allegations is not sufficient to defeat transfer when the core allegations are the same. *See, e.g.*, *In re: BRCA1- and BRCA2-based Hereditary Cancer Test Patent Litig.*, 999 F. Supp. 2d 1377, 1379 (J.P.M.L. 2014) (consolidation is appropriate when "the core factual and legal inquiries in each action will be similar," even when "there is some difference" in the asserted claims). And in any event, the factual allegations Plaintiffs highlight—payment of "cash rather than in-kind dividends," Treasury's purported "control" over the conservatorships, and Treasury's "standby commitment to acquire new equity," Opp. at 10—are in no way unique to this case. Other plaintiffs offer substantially the same *factual* allegations, albeit to support arguably different *legal* theories or claims. *See, e.g.*, Amended Complaint ¶¶ 62, 99, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa) (alleging that FHFA could have paid dividends at a 12% interest rate); *id.* ¶¶ 23, 112, 139, 149, 160 (alleging that Treasury has de facto control over the conservatorships); *id.* ¶¶ 22, 100, 143 (alleging that Treasury's authority to acquire new equity had expired). Accordingly, to whatever extent the cases require any factual development, the underlying facts and circumstances to be examined overlap substantially across cases.

Plaintiffs also contend that "a stay will inhibit the development of the law." Opp. at 5. But the stay will remain in effect only until the motion to transfer is resolved. Even if this case progresses unusually quickly, it is unlikely that any law will be "develop[ed]" before the Panel's

resolution of the motion to transfer, which will be fully briefed by April 13, 2016. It is much more likely that the parties will be required to file unnecessary briefs in this case, only to have the case be transferred.

Plaintiffs argue that they will be prejudiced by a stay, but they offer nothing to support this claim except a vague reference to "their right to proceed expeditiously." Opp. at 12. Moreover, Plaintiffs waited more than *three years* after the Third Amendment went into effect to file this action, so their assertion that they will suffer prejudice from an additional few weeks rings hollow.[3]

Finally, Plaintiffs argue that Defendants have failed to show that they will suffer hardship absent a stay. Opp. at 13-15. Oddly, their argument rests primarily on the fact that Defendants' requests for stays in three other cases have been granted—based on the same arguments that Defendants make here. *Id.* In fact, these stays simply underscore the strength of Defendants' arguments, including their argument that their motion to transfer is likely to succeed, and show that requiring Defendants to proceed with briefing in this case would be a needless burden.

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[3] Arguing that the public interest weighs against a stay, Plaintiffs cite a statement of FHFA Director Melvin L. Watt about the Enterprises' capital. Opp. at 13. Their reliance on Director Watt's statement to *oppose* the Motion to Stay is bizarre, given that Director Watt is one of the Defendants who *filed* the Motion to Stay.

Dated: April 8, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kristen Hudson, the undersigned attorney, hereby certify that I caused Defendants' Reply in Support of Their Joint Motion to Stay to be served on the parties of record this 8th day of April, 2016 by ECF.

By: s/ Kristen E. Hudson
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