BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

RESPONSE OF PLAINTIFF ARNETIA JOYCE ROBINSON IN OPPOSITION TO THE MOTION FOR TRANSFER OF ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Plaintiff Arnetia Joyce Robinson respectfully submits this response in opposition to the Federal Housing Finance Agency's Motion for Transfer (Mar. 15, 2016).

INTRODUCTION

The Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies") are two of the largest privately owned insurance companies in the world. Plaintiff Robinson, and plaintiffs in the actions the Movant has designated as related ("related actions"), are shareholders of Fannie and/or Freddie.

During the financial crisis in 2008, at the urging of the Department of Treasury ("Treasury"), Congress created the Federal Housing Finance Agency ("FHFA"), and authorized it to appoint itself as conservator of the Companies. Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. 110-289, 122 Stat. 2654, codified at 12 U.S.C. § 4617 *et seq.* In September 2008, again at Treasury's insistence, FHFA appointed itself conservator of the Companies. Treasury then exercised its temporary authority under HERA to enter into agreements (the "Preferred Stock Purchase Agreements" or "PSPAs") with FHFA to purchase securities of Fannie and Freddie. Under these agreements, Treasury established a funding commitment from which the Companies could draw to maintain a positive net worth.

In 2012, at a time when the Companies had returned to profitability, FHFA and Treasury (collectively, "Defendants" or "Agencies") changed the terms of the PSPAs so that all of the Companies' existing net worth and future profits (less a small capital reserve that will decrease to zero by 2018), would thereafter be paid to Treasury on a quarterly basis. This "Net Worth Sweep" constituted a de facto nationalization of the Companies and extinguished the private shareholders' economic interest in the Companies. In response, several shareholders instituted

actions challenging the Agencies' actions under the Administrative Procedure Act ("APA") and state law. *See* Appendix A. On September 30, 2014, Judge Royce Lamberth of the U.S. District Court for the District of Columbia dismissed for lack of jurisdiction the consolidated actions arising from the above facts that had been filed in that district. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014). Happy with the result in *Perry Capital*, FHFA now seeks to centralize the related actions in the District of Columbia. The Panel should deny its motion.

SUMMARY OF ARGUMENT

FHFA cannot have forgotten what it so persuasively argued in *In re Real Estate Transfer Tax Litigation*: that transfer is unjust when the transferee court has already ruled on a "purely legal threshold" issue that could "control all cases." Enterprise Defs.' Opp'n to Genesee Cty. Mot. for Transfer of Actions Pursuant to 28 U.S.C. § 1407 at 4, *In re Real Estate Transfer Tax Litig.*, MDL No. 2394 (J.P.M.L. 2012) ("FHFA *Transfer Tax* Opp'n") (attached as Exhibit 1). The Panel should reject what can only be a conscious attempt "to game the system by shunting all similar litigation to the one court where [Defendants] *already* ha[ve] won an outcome in [their] favor on [a] central legal issue common to all other cases." *Id.* (quotation marks omitted).

Transfer is also inappropriate where, as here, "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. FHFA has failed even to make the threshold showing required for centralization under Section 1407 (that the related actions have common *questions* of fact), and all three statutory factors that the Panel is required to consider (convenience of the parties and witnesses, justice, and efficiency) weigh against transfer of the related actions.

ARGUMENT

I. The Panel Should Deny Transfer Under Section 1407.

A. Transfer Would Not Promote the Just Conduct of the Actions.

As explained below, the gains in convenience and efficiency from centralization will be minimal to non-existent. More importantly, however, any gains will be significantly outweighed by the injustice to the parties. FHFA's "proposal to transfer the cases to a court that has already decided [a] threshold legal issue in [its] favor is anything but fair and just; it is an unvarnished attempt to preordain the outcome of the litigation." FHFA *Transfer Tax* Opp'n at 8.

The U.S. District Court for the District of Columbia has already ruled in favor of the Defendants. *See Perry Capital*, 70 F. Supp. 3d 208. It is unfair to the plaintiffs in the six related actions to transfer their cases to a district court that has already rejected the same or similar claims. By asking the Panel to transfer these actions to the District of Columbia, FHFA is, in effect, asking the Panel to dismiss them without argument on the merits, subject to an appeal in which plaintiffs will not even have an opportunity to participate.[1] "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." FHFA *Transfer Tax* Opp'n at 10. A policy of transferring under these circumstances would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160

[1] Because the related actions involve additional factual allegations and claims not raised in the District of Columbia, the district court's decision should not control. By arguing in favor of issue preclusion in its motions to dismiss the related actions, however, the Government has taken the position that the D.C. district court's decision should control. *See, e.g.*, Mem. in Support of Mot. to Dismiss by Defs. FHFA and Watt at 32, *Robinson v. FHFA*, No. 7:15-cv-109 (E.D. Ky. Jan. 11, 2016), ECF No. 23-2.

(1984).

Plaintiff Robinson, of course, respectfully disagrees with the district court's decision in *Perry Capital*, but her fairness considerations are deeper than a desire not to be subject to this unfavorable ruling. Plaintiff Robinson's complaint includes factual allegations based on information that has come to light and events that have occurred since the district court rendered its decision. *See, e.g.*, Amended Compl. ¶¶ 17–23, 57, 59, 81–88, 93–94, 114, 119, 122–123, *Robinson v. FHFA*, No. 7:15-cv-109 (E.D. Ky. Dec. 29, 2015), ECF No. 17 (filed under seal). She is entitled to a full and fair opportunity to present arguments based on those factual allegations before a judge who has not already deemed them to be irrelevant. *See Perry Capital*, 70 F. Supp. 3d at 226 ("[T]he Court need not view the full administrative record to determine whether the Third Amendment, *in practice*, exceeds the bounds of HERA.").

Even if FHFA's only motive was to obtain a uniform legal determination, that would not suffice to support consolidation. *See infra*, at 12. FHFA's real purpose, however, appears to be to "preordain the outcome of the litigation" through "brazen" forum shopping, FHFA *Transfer Tax* Opp'n at 1, 8. The inference of forum shopping is strengthened by FHFA's pirouette on these issues since it took precisely the opposite position in *In re Real Estate Transfer Tax Litigation*, after the first decision on the common question of law came out against it: then, it was in favor of permitting the law to develop in multiple courts. *Id.* at 9. *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."). In that case, FHFA accused the movant of forum shopping. *See* FHFA *Transfer Tax* Opp'n at 1–2, 4, 8. "The panel ordinarily

frowns on such gamesmanship and should reject it here." *Id.* at 2.[2]

B. There Are No Disputed Material Facts, and Accordingly, the Actions Involve Few, If Any, Common Questions of Fact.

Further evidencing FHFA's misuse of the statute is the fact that its motion suffers from the very same flaw it rightly decried in the motion for consolidation in *In re Real Estate Transfer Tax Litigation*: that the related cases lack common questions of fact. The Panel is authorized to transfer only "civil actions involving one or more common questions of fact." 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.*

The Panel routinely denies "motions to transfer actions that involve common issues of law but not fact." *Id.* at 5–6 (collecting cases); *see also In re Oklahoma Ins. Holding Co. Act Litig.*, 464 F. Supp. 961, 965 (J.P.M.L. 1979) (denying transfer where "the legal aspects of [mixed] questions clearly predominate").[3] The same course is proper here, as the questions pertaining to Defendants' liability are primarily legal in nature. This is "a reality best illustrated

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[2] *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 Highway Accident Near Rockville, Conn., on Dec. 30, 1972*, 388 F. Supp. 574, 576 (J.P.M.L. 1975); *In re Concrete Pipe*, 302 F. Supp. 244, 255 (J.P.M.L. 1969) (Weigel, J., concurring).

[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.).

by the" litigation in the District of Columbia, where the defendants now urging centralization moved to dismiss the complaints, and the plaintiffs moved for summary judgment on their APA claims, implicitly "agreeing with the [Defendants'] assessment that no discovery was needed to resolve the question of [the Defendants'] liability . . . ." FHFA *Transfer Tax* Opp'n at 7. *See Perry Capital*, 70 F. Supp. 3d at 219 (describing procedural posture)[4]; *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."). In Illinois, too, both plaintiffs and Defendants have taken the position that discovery is unnecessary because the case should be resolved on motions to dismiss or cross-motions for summary judgment. Joint Initial Status Report at 6, *Roberts v. FHFA*, No. 1:16-cv-2107 (N.D. Ill. Apr. 6, 2016), ECF No. 28. "Tellingly, [Defendants] identif[y] no common *questions* of fact to be decided in these actions," FHFA *Transfer Tax* Opp'n at 7. *See* FHFA Br. at 7; Treas. Br. at 3.[5] At most, Defendants identify common factual allegations. *See* FHFA Br. at 7; *see also* Treas. Br. at 3. Although it asserts that it will "contest plaintiffs' allegations should litigation progress," FHFA Br. at 7, FHFA does not identify the specific factual disputes that will be material to the resolution of legal issues in each of the suits. And Treasury has altogether denied the existence of questions of fact in the appeal from the litigation in the District of Columbia. Br. for the Treasury Dep't at 56, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. Dec. 21,

[4] Plaintiffs in the District of Columbia sought discovery on the scope of the administrative record, but not on the merits of their APA claims. *See* Pls.' Mot. for Suppl. of the Admin. Record, *Fairholme v. FHFA*, No. 1:13-cv-1053 (D.D.C. Feb. 12, 2014), ECF No. 31. And even such limited discovery is unlikely in these proceedings now that discovery has already taken place in a related case in the Court of Federal Claims in which compensation for taking of property is sought.

[5] Citations to the responses filed in MDL No. 2713 are as follows: "FHFA Br." refers to FHFA's Mem. of Law in Supp. of FHFA's Mot. to Transfer (Mar. 15, 2016), Doc. 1-2; "Treas. Br." refers to Resp. of Defs. Jacob Lew & U.S. Dep't of Treasury in Supp. of the Mot. for Transfer (Mar. 21, 2016), Doc. 8.

2015) (hereinafter "Treas. App. Br.") ("In an APA case, '[t]he entire case on review is a question of law, and the complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action.' " (alteration in original) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009))).

The principal "common events," FHFA Br. at 7, at the heart of this litigation are matters of public record. The material features of the PSPAs and their amendments, as well as their consequences for Fannie and Freddie and their shareholders, are undisputed. *See 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 undisputed); *In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (same). Whatever factual disputes there are about the Defendants' *motive* for negotiating the Third Amendment will be resolved on the administrative record, as Treasury itself has argued. *See* Treas. App. Br. at 56. Lacking common questions of fact, or at least common questions that demand discovery, these actions do not qualify for transfer under Section 1407.

C. Transfer Would Not Promote the Convenience of the Parties and Witnesses or the Efficient Conduct of the Actions.

Even if the Panel were to identify common questions of fact necessary to satisfy the statutory baseline, the limited nature of the factual dispute makes the related actions poor candidates for transfer under Section 1407. "[I]n order to justify transfer under Section 1407 when only a minimal number of actions is involved, the movant is under a heavy burden to show that those common questions of fact are sufficiently complex and that the accompanying discovery will be so time-consuming as to further the purposes of Section 1407." *In re Garrison Diversion Unit Litig.*, 458 F. Supp. 223, 225 (J.P.M.L. 1978); *see also In re Kissi*, 923 F. Supp. 2d 1367, 1369 (J.P.M.L. 2013). FHFA, which again only alludes to factual disputes without

identifying them, does not come close to satisfying the first part of that burden, namely to show that common questions of fact are "sufficiently complex" to "further the purposes of Section 1407." Neither can it meet the second part—that is, showing that "the accompanying discovery will be so time-consuming as to further the purposes of Section 1407"—because parties do not even anticipate discovery. Completely disregarding its burden, FHFA instead seeks transfer based on a consideration that the Panel has held time and again to be inadequate to justify consolidation. In doing so, FHFA also disregards the considerations that weigh against transfer.

Aware that the Panel disfavors transfer when only a small number of actions are involved, *see, e.g.*, *In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015), FHFA has sought to centralize two distinct types of litigation arising from the Third Amendment to the PSPAs: APA litigation and state law litigation. *See* Appendix A. Plaintiff will begin with the category into which her suit falls: the APA cases.

APA actions are presumptively unsuitable for consolidation.[6] These cases are often

[6] 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. To the contrary, the government often prefers to see such challenges litigated circuit-by-circuit. *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)). 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. In the most recent motion, for example, the challenges presented complex questions of fact, and the parties anticipated discovery beyond the administrative record. *See* Federal Defs.' Mot. to Transfer Actions at 12–13, *In re Endangered Species Act Section 4 Deadline Litig.*, MDL No. 2165 (J.P.M.L. Apr. 2, 2010), ECF No. 1; WildEarth Guardians' Resp. to Mot. to Transfer at 17, *In re Endangered Species Act Section 4 Deadline Litig.*, MDL No. 2165 (J.P.M.L. Apr. 23, 2010), ECF No. 9. In granting the motion to transfer, the Panel remarked on how "unusual" it was. *In re Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010) (mem.); *see also In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008) (noting that the group of cases was

dominated by questions of law rather than fact, and any factual disputes are resolved on an administrative record, without the aid of discovery. *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 (same); *In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d at 1381 (same). Moreover, if the Panel were to begin centralizing challenges to agency action, it would prejudice the maturation of the law "through full consideration by the courts of appeals" that the Supreme Court has held to be especially valuable in the context of agency review. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977).

The APA claims at issue here are typical of challenges to agency action: their resolution will turn predominantly on questions of law, will require little to no discovery, and will be resolved on summary judgment. *See* Appendix A. The Agencies seem to ask the Panel to presume that they will produce an inadequate administrative record, giving rise to disputes about the designation of that record. *See, e.g.*, Treas. Br. at 5 (raising a "substantial possibility" of such disputes). To the contrary, the Panel and plaintiffs are entitled to presume that the Agencies will act in good faith, and that the record they produce will be adequate. *See Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 58 (D.D.C. 2003) ("[T]he record is presumed properly designated."); *see also Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (noting that discovery is permitted only "when there has been a strong showing

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atypical of MDLs); *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).

of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review" (quotation marks omitted)). Even if they were correct, however, discovery in APA cases is limited, and would likely be limited here to the proper scope of the administrative record. *See Baptist Memorial Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009). The possibility of discovery is made even more unlikely in this case by the fact that discovery that has already occurred in the Court of Federal Claims ("CFC"), with nine depositions and more than 77,000 documents produced. To the extent that the administrative record needs to be supplemented, it will almost certainly be supplemented from the information generated by this discovery. In fact, the courts and parties in Illinois, Iowa, and Kentucky have already worked out procedures for using the materials obtained in CFC in the related actions, thereby securing any efficiency to be gained by centralization through suitable alternatives. *See In re Cymbalta (Duloxetine) Prods. Liab. Litig.*, 65 F. Supp. 3d 1393, 1393–94 (J.P.M.L. 2014) (finding efficiency gains reduced when common discovery has already occurred).

The second category of cases pending before the Panel involves state law claims. *See* Appendix A. With these actions, too, FHFA fails to identify common questions of fact. Moreover, the *nature* of the questions of law in these actions further counsels against their consolidation with the APA cases. The Panel has declined to centralize actions involving state law claims with actions involving federal law claims. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 710 F. Supp. 2d 1378, 1380 (J.P.M.L. 2010) (declining to transfer an action situated in Southern District of Texas because the plaintiff's claims derived entirely from Texas state law and did not arise under the federal statute at the center of all of the other actions). It has also declined to transfer actions involving distinct causes of action when different legal standards make different facts relevant. *See, e.g., In re Skinnygirl Margarita Beverage Mktg. &*

Sales Practice Litig., 829 F. Supp. 2d at 1381. Both considerations are present here. The *Jacobs* action in Delaware involves claims that arise from state statutory and common law. The principal claims in that litigation assert that the Net Worth Sweep is an invalid term for preferred stock under Delaware and Virginia statutory law and, therefore, that it is void and unenforceable. These claims are entirely unique to the *Jacobs* litigation. The *Jacobs* case also includes common-law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. The two state actions that have been removed to federal court 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.[7] Because resolving motions to dismiss these claims or motions for summary judgment on these claims would require the court to apply different legal standards, there is little efficiency to be gained by consolidating them for pre-trial proceedings.

Most important, however, is that the pre-trial issues to be confronted in these actions are unique, such that consolidation will likely delay all related actions, rather than hasten their resolution. In the *Jacobs* litigation, there are pending applications to certify questions to the Delaware and Virginia Supreme Courts relating to the validity of the Net Worth Sweep under state statutory law. In the other two, there may be motions to remand to state court. These applications and motions must be resolved before the courts can resolve dispositive motions. Moreover, in contrast to the individual, direct claims in the Kentucky, Iowa, and Illinois actions, the claims in the *Jacobs* litigation are either derivative claims or direct claims raised on behalf of different classes of shareholders. Thus, even if FHFA were correct that the legal theories are

[7] These two cases were not part of FHFA's initial motion to transfer. FHFA subsequently filed a Notice of Related Actions identifying these cases. Thus, they are potential tag-along actions and will be addressed further in an "Interested Party" submission by Mr. Pagliara.

similar, these features raise unique threshold issues—including sovereign immunity, demand futility, and class certification—that must be resolved in pre-trial proceedings. Because each of these issues is unique to the litigation in which it is filed, there is little to no efficiency to be gained by having them resolved by a transferee court, and much efficiency to be lost by delaying the other actions, including Plaintiff's, that do not present such issues.

Understandably, FHFA does not focus on the complex questions of fact or time-consuming discovery this Panel has deemed central to its inquiry under Section 1407, but instead raises the specter of inconsistent legal rulings. *See* FHFA Br. at 8–9; Treas. Br. at 4–5. But as FHFA has elsewhere explained so effectively, this risk does not justify transfer:

> 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 . . . [T]his Panel's central focus under the plain language of Section 1407 is to streamline proceedings where multiple cases address common *factual questions* . . . 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.

FHFA *Transfer Tax* Opp'n at 9; *see also Mendoza*, 464 U.S. at 160 ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."). "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.* at 5; *see In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d at 1351.

True enough, the Panel sometimes considers "the need to avoid inconsistent rulings on similar issues," but that consideration is "[u]sually . . . bolstered by the concern for duplicative and burdensome discovery leading up to the legal issues." *In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp.2d 1378, 1378 (J.P.M.L. 2009). "Merely to avoid two federal

courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." *Id.*; *see also In re CleanNet Franchise Agreement Contract Litig.*, 38 F. Supp. 3d 1382, 1383 (J.P.M.L. 2014).

It is also true that the Panel has considered the advantage of avoiding "conflicting obligations placed upon the federal defendants," *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008), but that factor—which is present in all cases involving a challenge to administrative action—has not been given significant weight.[8] *See supra* note 6 and accompanying text (discussing the Panel's record on APA challenges). Nor should it be. 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 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.* If the Panel were to transfer every case that threatened a federal defendant with an inconsistent legal ruling, it would effectively thwart the will of Congress. *Cf. Safety Nat'l Cas. Corp. v. United States Dep't of Treasury*, 2007 WL 723 8943, at *4 (S.D. Tex. Aug. 20, 2007) (noting that the government defendants' analogous venue argument "would seem to undercut the . . . rationales behind the enactment and amendment of Section 1391(e)").

[8] Any "conflicting obligations" placed on the Defendants as a result of these cases would be unlikely to persist for long, as the Supreme Court likely would grant certiorari to resolve a circuit split on an issue as important as that presented in the related actions. Indeed, it appears that Defendants are attempting to shield the Net Worth Sweep from Supreme Court review by shifting all the cases to a single circuit and thus eliminating the possibility of such a split occurring.

Centralization thus requires a special justification beyond the disadvantages to the agency that the statutory scheme inevitably causes. *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2229 (2008) ("The Panel is mindful that centralization is a limited exception to the generally applied rules of venue and jurisdiction.").

No such special justification exists here. Consolidation will, in fact, be inconvenient and inefficient due to the varying procedural postures of the related cases. The Panel has found that the presence of procedural disparities among the cases weighs heavily against centralization because, far from promoting efficiency, it delays more advanced actions and complicates proceedings.[9] *In re LVNV Funding, LLC, Time-Barred Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1376, 1378 (J.P.M.L. 2015) (mem.) (denying transfer when procedural disparities would produce "the opposite effect than intended by Section 1407"). Indeed, such disparities may constitute "the most significant obstacle to centralization of [otherwise similar] actions," *In re LVNV Funding, LLC, Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1374, 1375 (J.P.M.L. 2015) (mem.). Moreover, " 'principles of comity' weigh against transfer of any action 'that has an important motion under submission with a court.' " FHFA *Transfer Tax* Opp'n at 15–16 (quoting *In re L.E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975)); *see also 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"). Even in a case in which the Panel otherwise considered consolidation appropriate, it declined to consolidate during the

[9] *See, e.g.*, *In re Uber Techs., Inc., Wage & Hour Emp't Practices*, 2016 WL 439976, at *2 (J.P.M.L. Feb. 3, 2016); *In re Cymbalta (Duloxetine) Products Liab. Litig.*, 65 F. Supp. 3d at 1394; *In re Brandywine Commc'ns Techs., LLC, Patent Litig.*, 959 F. Supp. 2d at 1379; *In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d at 1351; *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, 684 F. Supp. 2d at 1379.

pendency of a dispositive motion. *See In re Prof'l Hockey Antitrust Litig.*, 352 F. Supp. 1405, 1407 (J.P.M.L. 1973). *Compare* FHFA Br. at 10 ("Related Cases remain in the early stages of litigation . . . ."), *with In re Droplets, Inc., Patent Litig*, 908 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012) (mem.) (rejecting such a contention when "a potentially case-dispositive motion is pending and has been fully briefed" for two months).

The procedural postures of the related actions vary widely, as shown in Appendix A. The actions in the District of Columbia have been dismissed and are pending on appeal. That appeal has been fully briefed, and oral argument is scheduled for next week. Because FHFA did not move for transfer until many months after Plaintiff Robinson filed her complaint, the motions to dismiss in Plaintiff Robinson's case have been fully briefed and are awaiting disposition in the Eastern District of Kentucky. The motions to dismiss in the District of Delaware are likewise fully briefed, but plaintiffs have filed an application for certification of state law questions to the Supreme Courts of Delaware and Virginia, which is also pending. Briefing on motions to dismiss is underway in the Northern District of Iowa. The complaint in the Northern District of Illinois was just filed in February. The state court actions in Virginia and Delaware were only just removed, and any disputes over the propriety of removal remain to be resolved. Finally, it will be many months, if not years, before motions to dismiss will be ready in any of the hypothetical future actions posited by the government. To consolidate under these conditions would delay the more advanced cases and undermine the "atmosphere of trust, confidence, comity and good will among the district courts and the Panel." *In re Cessna Aircraft Distributorship Antitrust Litig.*, 460 F. Supp. 159, 161–62 (J.P.M.L. 1978).

This Panel has often held that "centralization under Section 1407 should be the last solution after considered review of all other options." *In re Kmart Corp. Customer Data Sec.*

Breach Litig., 109 F. Supp. 3d 1368, 1368–69 (J.P.M.L. 2015) (mem.) (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 Panel routinely denies motions to transfer when voluntary coordination and alternative means of avoiding duplicative efforts are available.[10] These cases provide a classic example of an opportunity to use alternative methods of coordination and consolidation, short of the last resort of centralization for MDL treatment: There are few actions—and therefore few counsel—involved in the litigation. The defendants in each of the cases are the same. Counsel have been able to coordinate successfully in the past. For example, counsel have arranged to use materials gathered through discovery in the CFC in several of the related actions. Plaintiffs' counsel have also coordinated their opposition to the present motion.[11]

Because FHFA has failed to carry its "heavy burden," centralization would actually be inefficient and inconvenient, and because suitable alternatives exist, the Panel should deny FHFA's motion.

II. Even If Transfer Were Appropriate, the Panel Should Transfer to the U.S. District Court for the Eastern District of Kentucky Rather than the U.S. District Court for the District of Columbia.

In transferring cases pursuant to Section 1407, "the Panel . . . consider[s] where the largest number of cases is pending, where discovery has occurred, where cases have progressed

[10] *See, e.g.*, *In re Quest Integrity USA LLC*, 2015 WL 8540882, at *1 (J.P.M.L. Dec. 8, 2015); *In re Glob. Tel*Link Corp. Inmate Calling Servs. Litig.*, 2015 WL 6080343, at *1 (J.P.M.L. Oct. 13 2015); *In re SFPP, LP, R.R. Prop. Rights Litig.*, 121 F. Supp. 3d at 1361; *See In re Cymbalta (Duloxetine) Prods. Liab. Litig.*, 65 F. Supp. 3d at 1394; *In re CleanNet Franchise Agreement Contract Litig.*, 38 F. Supp. 3d at 1383; *In re Louisiana-Pac. Corp. Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig.*, 867 F. Supp. 2d at 1347; *In re Soc'y of Lloyd's Judgment Enf't Litig.*, 321 F. Supp. 2d 1381, 1382 (J.P.M.L. 2004); *In re Garrison Diversion Unit Litig.*, 458 F. Supp. at 225.

[11] The Defendants have also argued in the related actions that the plaintiffs' claims are derivative in nature and are therefore barred by issue preclusion. *See supra* note 1. If the Defendants are successful in these arguments, then that is yet another reason that centralization is unnecessary. *See In re Buffalo Valley Gas Auth. Litig.*, 429 F. Supp. 1029, 1032 (J.P.M.L. 1977).

furthest, the site of the occurrence of the common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges." MANUAL FOR COMPLEX LITIGATION § 20.131 (2015). Due to the low likelihood of discovery and the agreement to share discovery materials from the CFC, the factors pertaining to logistics are less relevant. By contrast, speed of disposition is a critical consideration: while this litigation is pending, FHFA is operating two of the largest financial companies in the world with no capital. Plaintiff Robinson, along with the plaintiffs in the other actions, maintains that this state of affairs is highly prejudicial to Congress's goal of stabilizing the housing and financial markets. If plaintiffs are correct, then prolonging this state of affairs could have dire consequences.

A. The Eastern District of Kentucky Would Provide a More Suitable Transferee Venue Than the District of Columbia.

For reasons already discussed, transfer to the District of Columbia would not promote the just conduct of the actions because that court has already resolved several threshold legal questions in the Defendants' favor. By contrast, Judge Thapar has not yet ruled on the motions to dismiss in the Eastern District of Kentucky.

Transfer to the Eastern District of Kentucky would also be more efficient than transfer to the District of Columbia. As explained at greater length in the Saxton opposition, the Eastern District of Kentucky is preferable because the docket in that district is more current and advanced, because Judge Thapar has a record for resolving civil cases, and MDLs in particular, more quickly than Judge Lamberth, and because the Eastern District of Kentucky has fewer MDLs and is less backlogged than the District of Columbia.

Finally, while factors pertaining to logistics are less relevant because Plaintiff does not anticipate discovery, it should be noted that the District of Columbia is not a preferable forum for all parties and relevant witnesses. The Eastern District of Kentucky represents a midpoint

between the five potential transferee districts and is favored by the most geographically distant plaintiffs in Illinois and Iowa. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (selecting forum that was favored by the most geographically distant party); *In re Air Fare Litig.*, 322 F. Supp. 1013, 1015 (J.P.M.L. 1971) (selecting a district in the middle of the country "when counsel must travel from distant parts of the country"). Moreover, several potential witnesses reside closer to the Eastern District of Kentucky than to Washington.[12] Finally, in cases filed in Pikeville, KY, Judge Thapar has shown a willingness to hold hearings in more accessible locations like Covington and Lexington.[13]

Together, these factors combine to make the Eastern District of Kentucky the preferable transferee district.

B. The Panel Should Not Transfer to the U.S. District Court for the District of Delaware.

Of the remaining possible transferee districts, the Panel should not transfer to the District of Delaware, as centralization in that district would significantly delay proceedings in the related cases. That district is even more backlogged than the District of Columbia, with more cases pending per judge and a higher percentage of cases that have been pending for more than three years. Moreover, as explained above, the cases pending in the District of Delaware are completely distinct from the others, minimizing the efficiencies to be gained by centralization in

[12] For example, Egbert L. J. Perry, who is the Chairman of the Board of Fannie Mae, resides in Georgia. Ross J. Kari, former Executive Vice President and Chief Financial Officer of Freddie, resides in Oregon. Susan McFarland, former Chief Financial Officer of Fannie Mae, resides in Texas.

[13] *See, e.g.*, Order, *Johnson Family Props. v. Jewell*, No. 7:14-cv-78 (E.D. Ky. May 16, 2014), ECF No. 6 (scheduling oral argument in Covington, KY); Order, *Johnson Family Props. v. Jewell*, No. 7:14-cv-78 (E.D. Ky. June 6, 2014), ECF No. 27 (scheduling hearing in Lexington, KY).

that district. Whereas Plaintiff Robinson's complaint and the complaints in Iowa and Illinois involve APA claims, the claims in Delaware arise entirely under state law. Finally, that district must resolve pending or impending procedural motions that have no bearing on the related actions in Kentucky, Illinois, and Iowa. Centralizing the cases in that district—indeed, even including the Delaware cases in the centralization order—would not promote efficiency but would instead delay resolution of all unrelated matters in the proceedings.

CONCLUSION

Plaintiff Robinson respectfully requests that the Panel deny FHFA's motion to transfer.

April 6, 2016

Respectfully submitted,

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Appendix A

CASE	POSTURE	CLAIMS	QUESTIONS OF FACT	DISCOVERY
Robinson v. FHFA No. 7:15-cv-109 (E.D. Ky.)	Motions to dismiss have been fully briefed and are pending disposition as of March 14, 2016.	APA	None	None anticipated
Jacobs v. Fannie Mae No. 1:15-cv-708 (D. Del.)	Motions to dismiss and applications for certification of questions of state law to state supreme courts have been fully briefed and are pending disposition as of February 26, 2016. The action has been stayed pending resolution of FHFA's transfer motion.	State law	None	None anticipated
Saxton v. FHFA No. 1:15-cv-47 (N.D. Iowa)	Defendants filed motions to dismiss on March 18, 2016. The action has been stayed pending resolution of FHFA's transfer motion.	APA[14]	None	None anticipated
Roberts v. FHFA No. 1:16-cv-2107 (N.D. Ill.)	Complaint was filed on February 10, 2016, and Amended Complaint was filed on April 5. No answer or motion has yet been filed. Defendants filed a motion to stay proceedings pending resolution of FHFA's transfer motion on April 5, 2016.	APA	None	None anticipated
Pagliara v. Freddie Mac No. 1:16-cv-337 (E.D. Va.)	Case was removed to federal court on March 25, 2016. The action has been stayed pending resolution of FHFA's transfer motion.	State law	Unknown	Unknown
Pagliara v. Fannie Mae No. 1:16-cv-193 (D. Del.)	Case was removed to federal court on March 25, 2016.	State law	Unknown	Unknown

[14] The *Saxton* plaintiffs brought state-law claims for breach of contract and breach of the implied covenant of good faith and fair dealing, but, as they have communicated to counsel for Defendants, they will not be defending those claims in their response to the motions to dismiss.

EXHIBIT 1

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

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

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

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

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

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

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

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

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

THE ENTERPRISES, THE CONSERVATOR, AND THE EXEMPTION STATUTES

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

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

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

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

SUMMARY OF THE ARGUMENT

The Panel should deny transfer under Section 1407.

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

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

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

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

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

ARGUMENT

I. THE PANEL SHOULD DENY TRANSFER UNDER SECTION 1407

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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").

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Respectfully Submitted,

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2016, I electronically filed the foregoing RESPONSE OF PLAINTIFF ARNETIA JOYCE ROBINSON IN OPPOSITION TO THE MOTION FOR TRANSFER OF ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, via the Panel's Electronic Case Filing system. Notice of this filing will be served on all parties of record by operation of the ECF System.

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