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 PLAINTIFFS THOMAS SAXTON, ET AL., IN OPPOSITION TO THE MOTION FOR TRANSFER OF ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Plaintiffs Thomas Saxton, Ida Saxton, and Bradley Paynter respectfully submit this response in opposition to the Federal Housing Finance Agency's Motion for Transfer (Mar. 15, 2016).

INTRODUCTION

Like the plaintiffs in the actions the Federal Housing Finance Agency (FHFA) has designated as related ("related actions"), Plaintiffs challenge actions by the FHFA and the Department of Treasury ("Treasury") (collectively, the "Agencies") that eliminated their rights as shareholders of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies"). Specifically, Plaintiffs challenge the Agencies' amendment to the Companies' Preferred Stock Purchase Agreements ("PSPAs"), which allowed Treasury to take all of the Companies' quarterly profits, less a small and decreasing capital reserve. The adoption of this "Net Worth Sweep" extinguished Plaintiffs' economic interest in the Companies.

FHFA now moves to transfer several actions instituted as a result of the Net Worth Sweep to the U.S. District Court for the District of Columbia—a district in which no related action is currently pending, but one in which the court has already ruled favorably for the Agencies on a threshold legal issue. The Panel should reject this attempt to preordain the outcomes of the related actions.

ARGUMENT

For the reasons given in Plaintiff Robinson's response in opposition to FHFA's motion, which Plaintiffs join and adopt herein, FHFA has failed to carry its burden to show that the statutory objectives set forth in 28 U.S.C. § 1407 would be furthered by consolidation. The Panel should therefore deny the motion.

1. Transfer of the action pending in the Northern District of Iowa is especially improper

because it has been pending for nearly a year and involves factual allegations that were not at issue in the District of Columbia actions that have since been dismissed by the district court. *See* First Amended Compl. ¶¶ 40–41, 48, 60–66, 70–75, 79–121, 132–33, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa Feb. 9, 2016), ECF No. 61 (filed under seal). Like Plaintiff Robinson, Plaintiffs are entitled to a full and fair opportunity to present arguments based on those factual allegations before a judge that has not already deemed them to be irrelevant. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("[T]he Court need not view the full administrative record to determine whether the Third Amendment, *in practice*, exceeds the bounds of HERA.").

2. If the Panel grants the motion to transfer, Plaintiffs agree with Plaintiff Robinson that centralization in the U.S. District Court for the Eastern District of Kentucky is strongly preferable to centralization in either the U.S. District Court for the District of Columbia or the U.S. District Court for the District of Delaware.

In addition to being the more just choice, the Eastern District of Kentucky will be more efficient. FHFA and Treasury make much of the fact that ten related actions were filed in the District of Columbia. FHFA Br. at 11; Treas. Br. at 6.[1] The reality is that the seven class action suits were consolidated into a single class action, and the three individual actions were consolidated for consideration with the class action. To date, only one decision has issued. *See Perry Capital*, 70 F. Supp. 3d 208. That one decision dismissed all ten actions, so there are currently *zero* related cases pending in that district. By contrast, there is a related action pending in the Eastern District of Kentucky, and it is the farthest advanced of the six related actions. Moreover, whereas Judge Lamberth has not seen any activity in the cases that were pending on

[1] Citations to the responses filed in MDL No. 2713 are as follows: "FHFA Br." refers to FHFA's Mem. of Law in Supp. of Mot. for Transfer (Mar. 15, 2016), ECF No. 1-1; "Treas. Br." refers to Treasury's Resp. in Supp. of the Mot. for Transfer (Mar. 21, 2016), ECF No. 8.

his docket for over a year and a half, Judge Thapar is currently considering fully briefed motions to dismiss, and there is every reason to believe that he will be prompt in disposing of them. It would be a more efficient use of judicial resources to take advantage of Judge Thapar's current familiarity with the underlying events, which have developed with the passage of time and the revelation of new information, than to ask Judge Lamberth to become reacquainted with litigation on which he ruled over a year-and-a-half ago. *See In re Falstaff Brewing Corp. Antitrust Litig.*, 434 F. Supp. 1225, 1231 (J.P.M.L. 1977) ("[T]he civil action docket in the Eastern District of Missouri is more current . . . and therefore the . . . district. . . is in a better position to process the pretrial proceedings . . . toward their most expeditious termination.").

Moreover, Judge Thapar has a record for disposing of cases, including MDLs, more quickly than Judge Lamberth. Judge Lamberth most recently presided over an MDL that lasted nine years from transfer to termination.[2] *See In re Columbia/HCA Healthcare Corp. Qui Tam Litig. (No. II)*, MDL No. 1307. In the MDL over which Judge Thapar presided, by contrast, the time from transfer to termination was less than a year and a half. *See In re Pilot Flying J Fuel Rebate Contract Litig. (No. II)*, MDL No. 2515. To put these numbers in perspective, the average duration of MDLs before all of the potential transferee judges for the four original related actions identified by FHFA has been just under four years.[3] Judge Lamberth's pace was over double the average; Judge Thapar's was well less than half. The judges' records in MDL

[2] Judge Lamberth presided over one other MDL, in the 1990s. *See In re Fialuridine Prods. Liab. Litig.*, MDL No. 1034. It is unclear whether this MDL terminated on December 21, 1995, as the Panel's docket reflects, or in 2001, as the Panel's Terminated Litigation statistics indicate. *See* U.S. J.P.M.L., MULTIDISTRICT LITIG. TERMINATED THROUGH SEPT. 20, 2015 at 1, *available at* http://goo.gl/GXWb7K. Judge Lamberth also took over an action that was part of an MDL from the Honorable Ricardo M. Urbina when Judge Urbina retired, but the MDL proceeding had already been terminated by that time. *See In re Long-Distance Tele. Serv. Fed. Excise Tax Refund Litig.*, MDL No. 1798.

[3] Statistics based on terminated cases listed at http://goo.gl/WrD5dH. For reasons stated supra, note 2, the *In re Fialuridine Litigation* was omitted.

cases are not an aberration. According to records on PACER, Judge Lamberth's average time for disposing of all civil cases assigned to him between July 1, 2014, and June 30, 2015, that have since been closed was seven and half months. His median time was just over seven months. Among the civil cases assigned to Judge Lamberth during this period that are still pending, the average age is just under fifteen months, and the median age is just over sixteen months. By contrast, Judge Thapar's average time from filing to disposition in civil cases assigned to him during the same time period was only five and half months. His median time was five months. And among the cases assigned to him during this period that are still pending, the average age is just under twelve months, and the median age is ten and a half months.

The docket in the Eastern District of Kentucky is also generally speedier and less burdened. Fifteen percent of civil cases in the District of Columbia have been pending for more than three years—the highest percentage among the potential transferee districts, and well over the national average.[4] Only three percent of civil cases in the Eastern District of Kentucky have been pending for that long. Treasury, in support of transfer to the District of Columbia, points out that there are "only" eight MDLs pending in the District of Columbia. What it does not mention, however, is that there are more MDL actions pending in the District of Columbia than in any other district in which a related case is pending, with the exception of the Northern District of Illinois. The number of MDLs per judgeship in the District of Columbia is the highest. By contrast, only two actions are pending in the Eastern District of Kentucky. And while the eight MDLs in the District of Columbia consist of 169 individual cases, the sole active

[4] U.S. DISTRICT COURTS—COMBINED CIVIL & CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (June 30, 2015), *available at* http://goo.gl/5kjwd9.

MDL in the Eastern District of Kentucky consists of only 11.[5]

3. Finally, Plaintiffs wish to emphasize that consolidation of their suit with the state law actions currently pending in the District of Delaware and the Eastern District of Virginia would be unjust, inefficient, and inconvenient. Plaintiffs have informed the Agencies that they do not intend to defend their state law claims against a motion to dismiss. Even if those claims remained live, however, there would be no efficiency gained by consolidation of Plaintiffs' action with the other state law actions. Whereas Plaintiffs' now-abandoned claims arose under common law, plaintiffs in the *Jacobs* case bring claims arising under Delaware and Virginia statutes, as well as additional common law claims. And whereas Plaintiffs' now-abandoned claims were individual and direct, plaintiffs in the *Jacobs* case are proceeding as putative class representatives and also bring derivative claims. The disparity between Plaintiffs' action and the removed actions in Delaware and Virginia is even more stark: those plaintiffs merely make demands under state statutes to inspect the Companies' books and records. Resolution of those demands turn on questions of fact (if any) and law that bear no relation to the questions of fact and law presented by Plaintiffs' now-abandoned common law claims. Finally, the courts overseeing these three actions will be required to resolve numerous pre-trial procedural motions that have no bearing on Plaintiffs' complaint, with or without the common law claims. Consolidation would prejudice the just and efficient conduct of Plaintiffs' action.

CONCLUSION

Plaintiffs respectfully request that the Panel deny FHFA's motion to transfer.

[5] MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT (Mar. 15, 2016, *available at* http://goo.gl/IgpHMC.

Dated: April 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2016, I electronically filed the foregoing RESPONSE OF PLAINTIFFS THOMAS SAXTON, ET AL., 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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