BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

OPPOSITION OF PLAINTIFFS DAVID JACOBS AND GARY HINDES TO FHFA'S MOTION FOR TRANSFER OF ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Plaintiffs David Jacobs and Gary Hindes (the "*Jacobs* Plaintiffs") oppose the Federal Housing Finance Agency's ("FHFA") Motion for Transfer of Actions to the U.S. District Court for the District of Columbia ("D.C. Court") (D.I. 1) ("Motion to Transfer"). The *Jacobs* Plaintiffs oppose transfer because the litigation they have filed in the United States District Court for the District of Delaware[1] presents substantially different issues than the other three cases identified for transfer by FHFA. Indeed, the state law statutory questions that are the central focus of the Delaware Action are unique to that litigation alone, and the facts relating to those questions are not in dispute. As a result, FHFA cannot and does not identify common questions of disputed fact that the Delaware Action shares with the other actions designated in the Motion to Transfer. Thus, transfer to the D.C. Court of the four designated cases will not "promote the just and efficient conduct of [the] actions." FHFA's motion is not an effort to streamline litigation in multiple forums, but rather is a blatant attempt to shop for a forum that has already issued rulings purportedly favorable to FHFA, but where no related case is actually pending. For these reasons, FHFA's Motion to Transfer should be denied.

BACKGROUND

The Delaware Action concerns the 2012 amendments to certain stock purchase agreements and to the constitutive documents of two publicly traded, stockholder-owned corporations— Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac," with Fannie Mae, the "Companies"). Fannie Mae and Freddie Mac are two of the largest privately owned insurance companies in the world. The Companies operate for profit, and their debt and equity securities are privately owned and

[1] *Jacobs, et al. v. Fed. Hous. Fin. Agency et al.*, C.A. No. 15-708-GMS (D. Del.) (the "Delaware Action").

publicly traded. The *Jacobs* Plaintiffs, and plaintiffs in the other actions FHFA has designated as related, are stockholders of Fannie Mae and/or Freddie Mac.

During the financial crisis, at the Department of Treasury's ("Treasury") urging, Congress created FHFA to replace Fannie Mae's and Freddie Mac's prior regulator, and authorized it to appoint itself as conservator of the Companies. In September 2008, FHFA appointed itself as conservator for both Companies. FHFA then caused the Companies to enter into agreements with Treasury ("Preferred Stock Purchase Agreements" or "PSPAs") for Treasury to purchase preferred stock of Fannie Mae and Freddie Mac. These agreements also established a funding commitment pursuant to which FHFA could cause the Companies to draw additional funds from Treasury to maintain a positive net worth. In 2012, at a time when the Companies had started generating the largest profits in their history, FHFA and Treasury amended the terms of the PSPAs so that all of the Companies' quarterly profits, less a small capital reserve that will be fully depleted by 2018, would henceforth be paid to Treasury.

The amendments changed the terms of senior preferred stock of Fannie Mae and Freddie Mac held by Treasury to grant it a right to quarterly, cumulative dividends from Fannie Mae and Freddie Mac equal to the entire net worth of those corporations, on a perpetual basis, for no consideration. The controlling stockholder, the federal government, called these 2012 amendments the "Net Worth Sweep." The Net Worth Sweep generated a massive windfall for Treasury and, by ensuring that no funds would ever again be available to pay dividends on other classes and series of stock of the Companies, extinguished the value of the private stockholders' interests in the Companies.

Stockholders around the country have instituted various actions challenging the Net Worth Sweep. FHFA seeks to consolidate and transfer just four of them: The Delaware Action;

Saxton v. Fed. Hous. Fin. Agency, No. 1:15-cv-00047 (N.D. Iowa) ("*Saxton*"); *Robinson v. Fed. Hous. Fin. Agency*, No. 7:15-cv-00109 (E.D. Ken.) ("*Robinson*"); *Roberts v. Fed. Hous. Fin. Agency*, No. 1:16-cv-02107 (N.D. Ill.) ("*Roberts*") (collectively, "the Four Actions").[2] The Delaware Action challenges the validity and enforceability of the Net Worth Sweep under the corporate laws of Delaware and Virginia, which are the laws Fannie Mae and Freddie Mac, respectively, selected for their internal corporate governance in accordance with their charter legislation. None of the Other Designated Actions includes the Delaware and Virginia statutory claims that are the focus of the Delaware Action. The Delaware action also asserts claims under Delaware and Virginia law for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. Those claims too are not claims that are being pressed in any of the Other Designated Actions.[3] Moreover, the two state law books and records actions that FHFA has noticed as related actions in this MDL (D.I. 9) assert claims that are completely different from those asserted in either the Delaware Action or the Other Designated Actions.[4] While the Books and Records Actions seek inspection of corporate books and records relating to the Net Worth Sweep, among other matters, neither is a plenary action challenging the Net Worth Sweep itself.[5]

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[2] *Saxton*, *Robinson* and *Roberts* are collectively referred to as the "Other Designated Actions."

[3] The complaint in the *Saxton* case in the Northern District of Iowa does include state law claims for breach of contract and breach of the implied covenant, but the *Saxton* plaintiffs have advised the defendants they will not be opposing dismissal of those claims.

[4] D.I. 9-5 at 78 (*Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 1:16-cv-00193 (D. Del.)); D.I. 9-6 at 36 (*Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-00337-JCC-JFA (E.D. Va.)) (together, the "Books and Records Actions").

[5] In Delaware, actions to inspect books and records are treated as summary actions and are typically decided with limited discovery and on an expedited basis. *See* 8 DEL. C. § 220(d); *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 505 (Del. 2005) ("Section 220 is intended to provide to stockholders of Delaware corporations an economical and expeditious mechanism for

All of the Plaintiffs in the Four Actions oppose FHFA's Motion to Transfer.

ARGUMENT

I. Transfer Is Inappropriate Because FHFA Cannot and Does Not Show that the Delaware Action Shares Complex Common Questions of Fact with the Other Designated Actions

The Panel is authorized to transfer only "civil actions involving one or more common questions of fact." 28 U.S.C. §1407(a). "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." Enterprise Defendants' Opposition to Genesee County's Mot. for Transfer of Actions Pursuant to 28 U.S.C. § 1407 in *In re: Real Estate Transfer Tax Litig.*, MDL No. 2394, at 5 (J.P.M.L. July 23, 2012) (hereinafter "FHFA *Real Estate Transfer Tax* Opp.") (D.I. 108).[6] Simply put, where the background facts are not in dispute and any common disputed facts are not identified or complex, a motion to transfer should be denied. *See, e.g.*, *In re: Ocala Funding, LLC, Commercial Litig.*, 867 F. Supp. 2d 1332, 1332 (J.P.M.L. 2012) (shared background facts not sufficient to support transfer where overlapping questions of fact not shown).

Here, transfer should be denied because FHFA has made no showing that any common questions of disputed fact exist and it is FHFA's burden on this motion to do so.[7] FHFA's

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the inspection of documents…."). Similarly, in Virginia, books and records actions are treated on an expedited basis. VA. CODE ANN. § 13.1-773B.

[6] In *In re: Real Estate Transfer Tax Litig.*, FHFA opposed centralization of ten actions pending in seven districts. Citations to FHFA *Real Estate Transfer Tax* Opp. refer to FHFA's brief in opposition to centralization. The Panel denied the motion to centralize. Order Denying Transfer, *In re: Real Estate Transfer Tax Litig.*, MDL No. 2394 (J.P.M.L. Sept. 27, 2012) (D.I. 214). The present matter is unrelated to *In re: Real Estate Transfer Tax Litig.*

[7] "[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

analysis of common questions of fact amounts to just one paragraph of its opening brief and casts a broad generalization over the factual allegations of the Four Actions without identifying any disputed facts common to all Four Actions that would support transfer. *See* FHFA's Memorandum of Law (D.I. 1-1) ("Op. Br.") at 7, *see also* Response of Defendants Jacob Lew and the U.S. Department of the Treasury (D.I. 7) ("Treasury Br.") at 3. But common underlying or background facts are not the same as common questions of fact. Without common questions of fact – *i.e.*, disputed or unresolved facts common to all cases – the mere existence of a common factual background is not enough to support transfer and consolidation of this limited number of actions. *In re: Kissi*, 923 F. Supp. 2d 1367, 1369 (J.P.M.L. 2013). Although FHFA asserts that it will "contest plaintiffs' allegations should litigation progress" (Op. Br. at 7), it does not identify any specific factual disputes that it contends will be material to the resolution of the parties' claims and that it intends to contest. At most, FHFA identifies common factual background matters, *e.g.*, the 2012 amendments to the PSPAs, but fails to identify any common questions of disputed fact. *See id.*; Treasury Br. at 3. Indeed, FHFA's brief argues only that similar facts are alleged by each of the plaintiffs in the Four Actions but does not take the necessary step of identifying which, if any, of those facts FHFA contends are in dispute. On that basis alone, FHFA's motion should be denied. FHFA *Real Estate Transfer Tax* Opp. at 7 ("Tellingly, [movant] identifies no common *questions* of fact to be decided in these actions.") (emphasis in original).

In light of the distinct claims brought in the Delaware Action, it is not surprising that FHFA identified no common questions of disputed fact. The Delaware Action is unique on its

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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: Scotch Whiskey*, 299 F. Supp. 543, 544 (J.P.M.L. 1969).

face in that it makes no claims under the Administrative Procedure Act ("APA") as the Other Designated Actions do and, instead, its claims are directed to violations of state law, including the claim that is the central focus of the Delaware Action – the claim that the Net Worth Sweep violates the General Corporation Law of the State of Delaware ("DGCL") with respect to Fannie Mae and the Virginia Stock Corporation Act ("VSCA") with respect to Freddie Mac. None of the Other Designated Actions raises that statutory validity claim or presses the other state law claims asserted in the Delaware Action.

In its Motion, FHFA completely ignores the state law statutory claims that are the main focus of the *Jacobs* Plaintiffs' complaint; the existence of the state law statutory claims is tellingly not even mentioned by FHFA. Delaware Action, D.I. 23. FHFA's argument also ignores that *Jacobs* Plaintiffs have filed an application to certify questions of first impression under Delaware and Virginia state law to the High Courts of Delaware and Virginia, which application awaits decision by the Delaware District Court.[8] *Id*., D.I. 24.

Even if FHFA chooses to raise new arguments in its reply and attempts to identify common questions of fact, FHFA cannot show that any such questions are "sufficiently complex" or necessitate time-consuming discovery justifying transfer. *See In re: Impulse Monitoring, Inc., Humana Intraoperative Monitoring Servs. Claims & Employee Ret. Income Sec. Act (ERISA) Litig.*, 84 F. Supp. 3d 1376, 1377 (J.P.M.L. 2015) (denying transfer where, although the actions unquestionably involved common factual issues, the issues disputed were not sufficiently complex); *In re: Bally Total Fitness Holding Corp. Lifetime Membership*

[8] Judge Sleet stayed the Delaware Action pending this Panel's decision on FHFA's Motion to Transfer. Delaware Action, D.I. 44. As a result of FHFA's attempt to transfer the Four Actions, resolution of the state corporation law questions of first impression are now delayed while the Panel decides this motion despite all briefing being completed and the *Jacobs* Plaintiffs' desire to move forward expeditiously.

Agreement Contract Litig., 883 F. Supp. 2d 1343, 1344 (J.P.M.L. 2012) (denying transfer even where the three actions shared factual issues regarding contracts and breach, citing a lack of complexity of factual issues). As noted, the Delaware Action asserts only state law claims, and focuses on the prima facie invalidity of the Net Worth Sweep as a preferred stock dividend term as a matter of Delaware and Virginia statutory law. In contrast, the factual issues in the Other Designated Actions are directed to disputes over the administrative record. Accordingly, there will be very few, if any, questions of fact in common between the Delaware Action and the Other Designated Actions, and none that may exist will be sufficiently complex to warrant transfer of the Delaware Action.[9]

II. Any Common Questions of Law Do Not Support Transfer

Where "[t]he overriding question in each action is one that is largely legal in nature," the actions are not suitable for transfer and centralization. *In re: Keith Russell Judd Voting Rights Litig.*, 816 F. Supp. 2d 1383 (J.P.M.L. 2011).

As noted, the Delaware Action focuses on the state law invalidity of the Net Worth Sweep and other state law matters, whereas the three Other Designated Actions focus on APA claims and the Books and Records Actions are summary proceedings seeking to inspect corporate books and records. The central legal issues in the various actions, therefore, are not the same. Even to the extent FHFA were to argue that the matters in the various actions involve mixed questions of law and fact, the legal questions predominate. *See In re Oklahoma Ins.*

[9] The principal "common events," FHFA Br. at 7, at the heart of this litigation are matters of public record and the material features of the Third Amendment to the PSPAs, and its 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) ("These factual questions, however, are largely undisputed."); *In re: Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (denying transfer where "the central allegation . . . appears to be undisputed").

Holding Co. Act Litig., 464 F. Supp. 961, 964 (J.P.M.L. 1979) ("[W]hile the purportedly common questions listed by movants … as underlying the constitutionality issue may involve some subsidiary factual inquiries, we are convinced that each of these questions is, at best, a mixed question of fact and of law, and that the legal aspects of these questions clearly predominate."); *see also* FHFA *Real Estate Transfer Tax* Opp. 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."). Accordingly, any alleged commonality between the legal issues presented in the Delaware Action, the Other Designated Actions, and the Books and Records Actions does not support transfer.

III. Transfer Would Not Serve the Convenience of the Parties and Witnesses, Nor Would it Promote the Efficient Conduct of the Four Actions

The Panel should deny FHFA's Motion to Transfer because the issues presented in the Delaware Action are so distinct from the claims brought in the Other Designated Actions that consolidation would be neither convenient nor efficient. Rather, the Delaware and Virginia state law claims are more conveniently resolved separately from the APA claims in the Other Designated Actions. Further, any threat of inconsistent rulings does not meet FHFA's burden to show that transfer and consolidation will promote efficiency.[10]

This Panel routinely declines to transfer cases wherein the claims are sufficiently dissimilar such that consolidation would not be efficient. In particular, where most of the

[10] To the extent the oppositions of the Plaintiffs in the Other Designated Actions argue that challenges under the APA are presumptively unsuitable for consolidation because such consolidation would not promote efficiency, the *Jacobs* Plaintiffs incorporate those arguments by reference in support of their argument that the Four Actions are not collectively suitable for consolidation. Indeed, APA cases are typically decided on common legal issues, not questions of fact and are thus not well-positioned for transfer and coordination. *In re: Removal From U.S.*

transfer candidate cases arise under federal law, the Panel has declined to transfer cases that arise predominantly under state law. *See In re: AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 710 F. Supp. 2d 1378, 1380 (J.P.M.L.) (declining to transfer an action situated in the 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); *Cf. In re Uranium Industry Antitrust Litig.*, 466 F. Supp. 958 (J.P.M.L. 1979) (severing antitrust counterclaim from state law claims and transferring only the antitrust counterclaim to the transferee district). On that basis alone, the Delaware Action is distinct and should not be transferred or consolidated with the Other Designated Actions.

Further, in light of the state statutory law issues that are the focus of the Delaware Action, the *Jacobs* Plaintiffs have filed a motion to certify the state law questions of the statutory invalidity of the Net Worth Sweep to the Delaware and Virginia High Courts. Ex. A. That motion is fully briefed and ready to be decided. Resolution of these critical state law issues in the respective high courts of Delaware and Virginia will likely delay proceedings in the Other Designated Actions in the event the Panel grants FHFA's motion. To delay the Other Designated Actions on account of resolving the Delaware Action's state law questions would be inefficient and unfair to those other plaintiffs. 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. *See, e.g.*, *In re: Uber Techs., Inc., Wage & Hour Employment Practices*, No. MDL 2686, 2016 WL 439976,

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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.").

at *2 (J.P.M.L. Feb. 3, 2016); *In re: LVNV Funding, LLC, Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1374, 1375 (J.P.M.L. 2015) (calling procedural disparities "the most significant obstacle to centralization of these actions"); *In re: Cymbalta (Duloxetine) Products Liab. Litig.*, 65 F. Supp. 3d 1393, 1394 (J.P.M.L. 2014). By the same token, delaying resolution of the Delaware Action's threshold state law issues would be unjust to the *Jacobs* Plaintiffs. Thus, this significant procedural difference between the Delaware Action and the Other Designated Actions is sufficient alone to warrant denial of the motion to transfer. Indeed, "'principles of comity' weigh against transfer of any action 'that has an important motion under submission with a court.'" FHFA *Real Estate Transfer Tax* Opp. at 15-16 (quoting *In re L.E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975)).

While FHFA and Treasury identify a number of other purely *legal* issues that may be subject to inconsistent rulings if the Four Actions are not transferred,

> [t]his 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*, not common *legal* issues. As such, concerns about uniformity of the law are not sufficient to justify centralization. That is the province of the Supreme Court, which often permits legal issues to "percolate" throughout the circuits before resolving conflicting rulings.

FHFA *Real Estate Transfer Tax* Opp. at 9 (emphasis in original). Notwithstanding FHFA's argument to the contrary, the Panel does sometimes consider "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.* With FHFA having failed to raise any question of fact that would support centralization, the premise of FHFA's and Treasury's argument in this regard is unfounded.

IV. Informal Coordination Will Be Effective and Sufficient

Where, as here, informal coordination is not only possible but readily achievable, the Panel should deny FHFA's motion to transfer. There are only four cases subject to this Motion to Transfer (six if the Books and Records Actions are considered included), and counsel are few and well-positioned to coordinate the cases informally. *See In re: Global Tel*Link Corporation Inmate Calling Servs. Litig.*, MDL No. 2651, 2015 WL 6080343, at *1 (J.P.M.L. Oct. 13, 2015) (denying certification because there were only two groups of counsel representing plaintiffs, common counsel representing the sole defendant group, a limited number of actions (3), and "voluntary coordination [was] a practicable and preferable alternative to centralization").[11]

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, 1369 (J.P.M.L. 2015) (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)). Consequently, the Panel routinely denies motions to transfer when voluntary coordination and alternative means of avoiding duplicative efforts are available. *See, e.g., In re: Quest Integrity USA*, No. MDL 2671, 2015 WL 8540882, at *1 (J.P.M.L. Dec. 8, 2015); *In re: Uber Techs., Inc.,*

[11] FHFA argues that "it is likely that there will soon be additional cases that should also be transferred for coordinated or consolidated pretrial proceedings." Op. Br. at 6. The speculation of future cases is not sufficient to support transfer. *In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (denying centralization in favor of voluntary coordination, and noting that factual questions were not "sufficiently complex" and "[w]hile proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions.").

Wage & Hour Employment Practices, 2016 WL 439976, at *2; *In re: Trans Union LLC Fair Credit Reporting Act (FCRA) Litig.*, 923 F. Supp. 2d 1374, 1375 (J.P.M.L. 2013) (order denying transfer where informal coordination could be achieved stating that "[n]otices of deposition can be filed in all related actions; the parties can stipulate that any discovery relevant to more than one action can be used in all those actions; or the involved courts may direct the parties to coordinate their pretrial activities").

Here, there are very few actions and therefore very few counsel, particularly for Defendants. FHFA is represented by the law firm of Arnold & Porter, LLP in each of the Four Actions. Treasury is represented by the Department of Justice in each of the Four Actions. Accordingly, counsel can effectively coordinate these cases and transfer is not necessary. *See In re: Global Tel*Link Corp. Inmate Calling Servs. Litig.*, 2015 WL 6080343, at *1 (few involved counsel weighed in favor of informal coordination); *In re: SFPP, L.P., Railroad Property Rights Litig.*, 121 F. Supp. 3d 1360, 1361 (J.P.M.L. 2015) (same). There is no reason why consolidation will assist Defendants in coordinating discovery in these actions beyond any coordination efforts that could easily be undertaken independently by FHFA's and Treasury's attorneys. *See In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978) (denying transfer while observing that the parties could coordinate discovery and minimize duplication).

Indeed, some informal coordination of discovery has already taken place. Attorneys for Plaintiffs in *Saxton*, *Robinson*, and *Roberts* have all been admitted under the protective order in *Fairholme Funds, Inc. v. United States*, No. 13-456C (Fed. Cl.) (D.I. 265, 279 and 303), to gain access to discovery produced in that case. The undersigned attorneys are in the process of applying to the Court of Federal Claims for the same access. Through admission to that

protective order, Plaintiffs in the Four Actions will have access to the same discovery produced in *Fairholme Funds*. *See In re: Quest Integrity USA*, 2015 WL 8540882, at *1 (denying transfer where counsel had already coordinated discovery and motions for preliminary injunction); *In re: CleanNet Franchise Agreement Contract Litig.*, 38 F. Supp. 3d 1382, 1383 (J.P.M.L. 2014) (denying transfer where counsel agreed to coordinate); *In re Garrison Diversion Unit Litig.*, 458 F. Supp. at 225 (denying transfer where discovery had already transpired in other cases that may have been applicable).

There is no reason to believe such informal coordination cannot continue as these cases move forward. There is also no reason that Plaintiffs' attorneys in the Four Actions cannot coordinate any discovery and discovery schedules across the Four Actions, or that they cannot coordinate with counsel in the Books and Records Actions to the extent there is any overlapping discovery in those proceedings. To the extent Defendants oppose such coordination where Defendants are each represented by the same counsel and Defendants possess the vast majority of discoverable information, that is further evidence that Defendants do not seek transfer for coordination, but rather to have the Four Actions decided by a purportedly favorable court. *See* Section V.A. below.

V. The U.S. District Court for the District of Columbia is Not the Proper Venue

For all of the above reasons, the *Jacobs* Plaintiffs oppose any transfer or consolidation of the Delaware Action, even if the Panel believes that the Other Designated Actions would benefit from transfer. Moreover, FHFA's request to have the Four Actions transferred to the D.C. Court in particular should be denied. First, FHFA's transparent request to transfer the Four Actions to the D.C. Court constitutes blatant forum shopping and would not encourage the just and efficient

resolution of the Four Actions. Second, the factors the Panel usually considers do not support transfer to the D.C. Court.

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

This Court must consider whether "transfer [will] serve any ulterior motive of any party or parties, such as forum shopping." *In re Concrete Pipe*, 302 F. Supp. 244, 256 (J.P.M.L. 1969). There can be no doubt that FHFA's motivation to transfer the Four Actions is to put these unique cases before a judge that FHFA believes will be favorable to its position. As admitted by FHFA, the D.C. Court decided *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014) ("*Perry Capital*"), in favor of FHFA by dismissing those consolidated cases.[12]

FHFA's selection of the D.C. Court for consolidation implicates forum shopping because the D.C. Court dismissed the complaints in *Perry Capital* and the litigation is no longer pending in that Court. In other words, FHFA has moved to consolidate the Four Actions in the D.C. Court, even though none of those Four Actions and no other action relating to the "Net Worth Sweep" is pending there. The previously pending cases have been appealed to the D.C. Circuit, briefing is completed, and the D.C. Circuit will hear oral argument on April 15, 2016. Accordingly, there is no basis for the Four Actions to be transferred to the D.C. Court, where no action is pending.[13]

[12] FHFA and Treasury make much of the fact that eleven related actions were filed in the District of Columbia. Op. Br. at 11; Treasury Br. at 6. The reality is that the eight class action suits were consolidated into a single class action, and the three individual actions were coordinated for consideration with the class action. To date, only one decision has issued. *See Perry Capital LLC*, 70 F. Supp. 3d 208.

[13] To the extent Treasury argues that the appellate court's decision in *Perry Capital* may provide further guidance to the D.C. Court, the District of Delaware can evaluate such guidance to the extent it is relevant. Treasury Br. at 6.

Moreover, as FHFA has argued previously in opposition to a different transfer application, transfer is unjust when the transferee court has already ruled on a "purely legal threshold" issue that "will control all cases." FHFA *Real Estate Transfer Tax* Opp. at 4. 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 [the Defendants] already ha[ve] won an outcome in [their] favor on [a] central legal issue common to all other cases." *Id.* Here, FHFA's true motives are evident because FHFA relied extensively on the D.C. Court's decision in *Perry* in its motion to dismiss the *Jacobs* Plaintiffs' complaint despite the substantial differences between the two actions. Delaware Action, FHFA's Opening Brief in Support of Motion to Dismiss, D.I. 18. That FHFA placed unwavering reliance on the D.C. Court's reasoning and now seeks to transfer the Delaware Action to that Court confirms FHFA's true motives in seeking transfer. Simply put, FHFA's Motion to Transfer is, in effect, asking the Panel to dismiss the Delaware Action and subject the *Jacobs* Plaintiffs to the outcome of an appeal to which they are not even parties. FHFA's gamesmanship should not be allowed and its Motion to Transfer should be denied on the strength of arguments FHFA itself has made previously.[14]

[14] *See also In re: CVS Caremark Corp. Wage and Hour Emp't Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) ("[T]he Panel's primary purpose is not to divine the motives and strategies of the various litigants . . . . Nevertheless, where a Section 1407 motion appears intended to further the interests of particular counsel more than those of the statute, we would certainly find less favor with it."); *In re: Brandywine Commc'ns Techs., LLC, Patent Litig.*, 959 F. Supp. 2d 1377, 1379 (J.P.M.L. 2013) (same); *In re Highway Acc. Near Rockville, Connecticut, on Dec. 30, 1972*, 388 F. Supp. 574, 576 (J.P.M.L. 1975) ("There is an additional and equally compelling reason for denying the requested transfer: . . . it appears that in this particular litigation plaintiff's ulterior motive for seeking transfer amounts to an attempted misuse of the statute."); *In re: Klein*, 923 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013) (denying centralization due to an "improper motive"); *In re Truck Acc. Near Alamagordo, New Mexico, on June 18, 1969*, 387 F. Supp. 732, 734 (J.P.M.L. 1975).

B. The U.S. District Court for the District of Columbia Will Not Encourage Efficient Resolution

Previous panel decisions have addressed at least the following factors to be considered when deciding a motion to transfer: (1) where the largest number of cases is pending; (2) where discovery has occurred; (3) where cost and inconvenience will be minimized; and (4) the experience, skill, and caseloads of available judges. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004).

According to these factors, the D.C. Court is an improper venue for this putative MDL. The first factor obviously disfavors the D.C. Court because no case is pending there. With regard to the second factor above, the parties have not taken any discovery in any of the Four Actions and, in any event, discovery is not relevant to the principal claims in the Delaware Action, which are based on the prima facie invalidity of the Net Worth Sweep as a matter of Delaware and Virginia Corporate Law.

Importantly, cost and inconvenience will be minimized for the *Jacobs* Plaintiffs to remain in Delaware. Both of the *Jacobs* Plaintiffs are citizens of Delaware. The *Jacobs* Plaintiffs are also represented solely by Delaware attorneys. FHFA's motion to transfer to the D.C. Court, if granted, would significantly increase costs and burden for the *Jacobs* Plaintiffs after they purposefully chose the Delaware court to file their complaint.

Finally, with respect to the case load of available judges, the D.C. Court tends to be very slow in resolving cases. Fifteen percent of civil cases in the D.C. Court have been pending for more than three years which is well over the national average (nine percent).[15] United States

[15] The *Jacobs* Plaintiffs recognize that the District of Delaware also has approximately fifteen percent of its civil cases pending for three years or more. *Id.* Nevertheless, transferring to a district without any benefit in expeditious treatment of the case does not achieve the purpose of Section 1407.

District Courts – National Judicial Caseload Profile, http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3 (last visited March 31, 2016). The D.C. Court's median time to trial (45.1 months) is also well over the national average (26.5). *Id.* The District of Delaware, on the other hand, only takes 34.1 months to reach trial, nearly a year sooner. *Id.* Accordingly, transfer to the D.C. Court will not achieve efficient resolution of the Four Actions.

CONCLUSION

For the above reasons and those set forth in the oppositions filed by the other Plaintiffs, the Panel should deny FHFA's Motion to Transfer. Even if the Panel determines that transfer of the Other Designated Actions would be appropriate, the Delaware Action should not be transferred and consolidated for the above reasons.

Respectfully submitted,

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Dated: April 6, 2016
1220576/42717

Attorneys for Plaintiffs David Jacobs and Gary Hindes

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID JACOBS and GARY HINDES, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, *Plaintiffs*, v. THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and THE UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*, and THE FEDERAL NATIONAL MORTGAGE ASSOCIATION and THE FEDERAL HOME LOAN MORTGAGE CORPORATION, *Nominal Defendants.*	Civil Action No.: 15-708-GMS **CLASS ACTION** **JURY TRIAL DEMANDED**

PLAINTIFFS' APPLICATION FOR CERTIFICATION
TO THE DELAWARE AND VIRGINIA SUPREME COURTS
OF NOVEL AND UNDECIDED ISSUES OF STATE LAW[1]

Plaintiffs David Jacobs and Gary Hindes, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac," and, together with Fannie Mae, the "Companies"), request that this Court certify the following questions of law to the

[1] Proposed Certifications of Questions of Law are submitted herewith.

Delaware and Virginia Supreme Courts in accordance with Del. Supr. Ct. R. 41 and Del. Const. Art. IV, § 11(8), and Va. Supr. Ct. R. 5:40(a) and Va. Const. Art. VI, § 1, respectively:

1. Does Delaware law permit preferred stock of a corporation to have a cumulative dividend right equal to the entire net worth of the corporation, payable quarterly in perpetuity, as provided in Section 2 of Fannie Mae's Amended and Restated Certificate of Designation of Terms of Variable Liquation Preference Senior Preferred Stock, Series 2008-2, dated September 27, 2012 (which is attached hereto as Exhibit A)?

2. Does Virginia law permit preferred stock of a corporation to have a cumulative dividend right equal to the entire net worth of the corporation, payable quarterly in perpetuity, as provided in Section 2 of Freddie Mac's Amended and Restated Certificate of Creation, Designation, Powers, Preferences, Rights, Privileges, Qualifications, Limitations, Restrictions, Terms and Conditions of Variable Liquidation Preference Senior Preferred Stock (Par Value $1.00 Per Share), dated September 27, 2012 (which is attached hereto as Exhibit B)?

Certification of these state law questions of first impression presents the opportunity to potentially resolve this litigation between Plaintiffs and Defendants Federal Housing Finance Agency ("FHFA"), in its capacity as conservator of the Companies, and the United States Department of the Treasury ("Treasury"), as well as decide important matters of Delaware and Virginia policy that broadly impact the corporations organized under the laws of those states. The facts relevant to answering these questions are not capable of dispute.

PRELIMINARY STATEMENT

This case concerns August 2012 amendments to the constitutive documents of two publicly traded, stockholder-owned corporations—Fannie Mae and Freddie Mac—to grant to their controlling stockholder all of their profits forever in return for no consideration. The

controlling stockholder, the federal government, called these 2012 amendments the "Net Worth Sweep." At the time of the Net Worth Sweep, the Companies were profitable, the federal government was acting in a commercial capacity, and it controlled the affairs of the Companies. This action challenges the validity and enforceability of the Net Worth Sweep.

There is no federal corporate law relevant to this case. The applicable federal law incorporates Delaware and Virginia law to govern the constitutive documents and internal affairs of the Fannie Mae and Freddie Mac, respectively. The "Net Worth Sweep" itself re-confirms that Delaware and Virginia law are the applicable federal rules of decision with respect to the preferred stock instruments owned by the government.

Under Delaware and Virginia corporate law, the "Net Worth Sweep" is invalid, void, and unenforceable. The corporate laws of those States do not permit preferred stock to have a dividend right equal to the entire net worth of the corporation, payable quarterly, forever, to the necessary exclusion of any dividends ever being paid on junior stock. Because the Net Worth Sweep purports to do this, it is invalid, void, and unenforceable.

Specifically, Section 151 of the General Corporation Law of the State of Delaware ("DGCL") allows preferred stockholders to receive dividends "***at such rates***, on such conditions and at such times as shall be stated in the certificate of incorporation or in the [board] resolution . . . ." 8 *Del. C.* § 151(c) (emphasis added). Preferred stock dividends must be made "payable ***in preference to, or in . . . relation to***, the dividends payable on any other class or classes or of any other series of stock[.]" *Id.* (emphasis added). Section 151 does not permit a provision requiring that a series of preferred stock receive a quarterly dividend equal to the entire net worth of a corporation to the necessary exclusion (in perpetuity) of any dividends ever being paid on junior stock.

Because the Net Worth Sweep diverts, in perpetuity, all of the net worth of Fannie Mae to Treasury, it neither is paid at a "rate" nor is it payable "in preference to" or "in relation to" the dividends payable to other classes or series of stock. The Net Worth Sweep is not paid at a "rate" because Treasury's participation in corporate earnings growth is unlimited, absolute, and perpetual. The Net Worth Sweep is not payable "in preference to" or "in relation to" the dividends payable to other classes or series of stock because it is payable to the absolute, permanent exclusion of dividends to other stockholders. Once the Net Worth Sweep is paid each quarter, there necessarily will be no assets remaining in the Company that would ever be available for the payment of dividends on any other classes or series of stock regardless of how valuable the Company may become in the future. Accordingly, the Net Worth Sweep is invalid under Section 151(c) of the DGCL and is void *ab initio* and unenforceable.

Similarly, the Virginia Stock Corporation Act ("VSCA") provides that a corporation may authorize "one or more classes or series of shares that . . . ***have preference over*** any other class or series of shares with respect to distributions [such as dividends]." Va. Code § 13.1-638 (emphasis added). Virginia law does not permit corporations to establish a dividend preference that operates to preclude all other classes of stockholders from the potential to receive dividends in perpetuity. Accordingly, the Net Worth Sweep is invalid under the VSCA and is void *ab initio* and unenforceable.

While Plaintiffs respectfully submit that the invalidity of the Net Worth Sweep under Delaware and Virginia law is clear, this issue has never before been decided by courts of those states. It therefore is a novel issue of Delaware and Virginia law appropriate for certification to those states' highest courts. Furthermore, resolution of this issue is important and urgent, as the issue implicates important matters of Delaware and Virginia policy and will have a broad impact

on the corporations organized under the laws of those states. Were the Net Worth Sweep to be upheld as permissible under Delaware and Virginia law, a very troubling precedent would be set for those states' corporate laws, for stockholders of corporations of those states, and for the mergers and acquisitions community as a whole, because such precedent would appear to extend equally to corporations not under conservatorship and without the federal government as their senior preferred stockholder, and thereby permit the directors of a Delaware or Virginia corporation unilaterally to contract away all of the net worth and profits of the corporation for all time to a single preferred stockholder. Certifying the question now to the Delaware and Virginia Supreme Courts will allow those courts to provide guidance on this important issue of Delaware and Virginia corporate law, which is the central issue in this litigation, and provide needed certainty to corporations and their directors, officers, and stockholders. Additionally, certification of this issue will serve the interests of judicial economy in this case, because the answer could resolve the dispute between Plaintiffs and Defendants at the threshold stage.

UNDISPUTED FACTS RELEVANT TO PROPOSED CERTIFICATION

The facts relevant to answering the questions of law to be certified are not capable of dispute, and are almost entirely based on the Companies' bylaws and the certificates of designation governing Treasury's senior preferred stock in the Companies.

Fannie Mae and Freddie Mac are for-profit, stockholder-owned corporations organized and existing under the Federal National Mortgage Association Charter Act and the Federal Home Loan Mortgage Corporation Act, respectively. Compl. ¶ 30. Federal law authorizes each of the Companies to designate "the law of the jurisdiction in which [its] principal office . . . is located, [or] . . . [the] Delaware General Corporation Law" for purposes of its corporate governance

practices and procedures. 12 C.F.R. § 1710.10.[2] Fannie Mae has elected Delaware law to apply pursuant to Section 1.05 of its bylaws, which provides, in pertinent part, that "the corporation has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law." Compl. ¶ 32. Freddie Mac has elected Virginia law to apply pursuant to Section 11.3 of its bylaws, which provides, in pertinent part, that "the Corporation shall follow the corporate governance practices and procedures of the law of the Commonwealth of Virginia, including without limitation the Virginia Stock Corporation Act as the same may be amended from time to time." *Id.*

On July 30, 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), which created FHFA and empowered it to act as the Companies' regulator and to appoint itself as conservator or receiver of the Companies in certain statutorily specified circumstances. *Id.* ¶ 4. In addition, HERA granted Treasury limited, temporary authority to purchase securities from the Companies. *Id.* ¶ 34. HERA left in place the federal charters of the Companies and did not implicitly or explicitly repeal or modify the provisions of their bylaws, implemented pursuant to federal law, specifying that Delaware and Virginia law govern the Companies' internal affairs. *Id.* ¶ 4.

On September 6, 2008, FHFA placed the Companies under conservatorship and appointed itself as conservator of the Companies. *Id.* The day after the conservatorships were imposed, FHFA, as conservator for the Companies, and Treasury entered into two virtually identical senior preferred stock purchase agreements (the "PSPAs"), pursuant to which each of

[2] On November 19, 2015, FHFA promulgated new regulations applicable to the Companies that concern the state laws that govern their internal affairs. *See* 12 C.F.R. § 1239.3 (effective Dec. 21, 2015). These new regulations do not have retroactive effect, and Defendants do not rely on them in this case. At any rate, they likewise authorize the Companies to select the DGCL or the law of their principal place of business for their corporate governance.

Fannie Mae and Freddie Mac created and issued a new class of stock, the "Senior Preferred Stock." *Id.* ¶ 36. The Senior Preferred Stock was created pursuant to two virtually identical Senior Preferred Stock Certificates of Designation (one each for Fannie Mae and Freddie Mac) (the "Certificates of Designation") that set forth the rights, powers and preferences of the Senior Preferred Stock. *Id.* Treasury purchased 1 million shares of each Company's Senior Preferred Stock in exchange for a funding commitment that allowed each Company to draw up to $100 billion from Treasury (this cap was later increased in size by two subsequent amendments to the PSPAs, first to $200 billion each and then to an amount established by a formula that may be greater (but not less) than $200 billion each, adjusting for the amount of any deficiencies experienced by the Companies in 2010, 2011 and 2012 and any surplus existing as of December 31, 2012). *Id.* The 1 million shares of each Company's Senior Preferred Stock have an aggregate liquidation preference equal to $1 billion ($1,000 per share) plus the sum of all additional amounts drawn by each Company on Treasury's funding commitment. *Id.* ¶ 36. The newly issued Senior Preferred Stock of each of the Companies ranks senior to all other classes and series of stock and initially entitled Treasury to receive a cumulative cash dividend of 10% of the outstanding liquidation preference (12% if the dividend were paid in kind). *Id.* ¶ 8. Absent the express consent of Treasury and FHFA, the Companies generally cannot redeem the Senior Preferred Stock. *Id.* ¶ 36.

On August 17, 2012, FHFA entered into a third amendment of each of the Amended and Restated Senior Preferred Stock Purchase Agreements (together, the "Third Amendment") and amended the Certificates of Designation setting forth the terms of the Fannie Mae and Freddie Mac Senior Preferred Stock. *Id.* These amendments changed the preferred dividend on Treasury's Senior Preferred Stock in the Companies from one payable at the previously

established 10% cash (and 12% in-kind) rate to a perpetual quarterly "dividend" equal to the entire positive net worth of each of Fannie Mae and Freddie Mac. *Id.*; *see also id.* ¶¶ 42-43. The Companies and their other stockholders received no consideration in exchange for FHFA's acquiescence to the Net Worth Sweep. *Id.* ¶¶ 15, 42.

Treasury and FHFA have both acknowledged that, under the Net Worth Sweep, ***Treasury will receive—in perpetuity—any and all profits that Fannie Mae and Freddie Mac earn***. *Id.* ¶ 16. Thus, it will be impossible for either Company to ever have a positive net worth, to ever pay a dividend on account of another class or series of stock, or to ever emerge from conservatorship and return to private market control. *Id.*

Specifically, the Third Amendment to the PSPAs and the corresponding Amended and Restated Certificates of Designation provide, in pertinent part, that, as holder of the Senior Preferred Stock, Treasury shall be entitled to receive "cumulative cash dividends in an amount equal to the then-current Dividend Amount." *Id.* ¶ 43.

The "Dividend Amount" is defined as follows:

> For each Dividend Period from January 1, 2013, through and including December 31, 2017, the "Dividend Amount" for a Dividend Period means the amount, if any, by which the Net Worth Amount at the end of the immediately preceding fiscal quarter, less the Applicable Capital Reserve Amount, exceeds zero. ***For each Dividend Period from January 1, 2018, the "Dividend Amount" for a Dividend Period means the amount, if any, by which the Net Worth Amount at the end of the immediately preceding fiscal quarter exceeds zero.*** In each case, "Net Worth Amount" means (i) the total assets of the Company (such assets excluding the Commitment and any unfunded amounts thereof) as reflected on the balance sheet of the Company as of the applicable date set forth in this Certificate, prepared in accordance with GAAP, less (ii) the total liabilities of the Company (such liabilities excluding any obligation in respect of any capital stock of the Company, including this Certificate), as reflected on the balance sheet of the Company as of the applicable date set forth in this Certificate, prepared in accordance with GAAP. "Applicable

> Capital Reserve Amount" means, as of any date of determination, for each Dividend Period from January 1, 2013, through and including December 31, 2013, $3,000,000,000; and for each Dividend Period occurring within each 12-month period thereafter, $3,000,000,000 reduced by an equal amount for each such 12-month period through and including December 31, 2017, so that for each Dividend Period from January 1, 2018, the Applicable Capital Reserve Amount shall be zero. For the avoidance of doubt, if the calculation of the Dividend Amount for a Dividend Period does not exceed zero, then no Dividend Amount shall accrue or be payable for such Dividend Period.

Id. (emphasis added). Thus, pursuant to the Net Worth Sweep, from January 1, 2013 through December 31, 2017, each Company pays to Treasury, in the form of a purported "dividend," that particular Company's "Net Worth Amount" (*i.e.*, total assets less total liabilities) less the "Applicable Capital Reserve Amount" (which starts at $3 billion and decreases to $0 by January 1, 2018). *Id.* ¶ 44. Beginning January 1, 2018 and continuing in perpetuity, the Net Worth Amount will be paid out each quarter to Treasury without any capital reserve whatsoever. *Id.*

The Net Worth Sweep "dividends" are cumulative. *Id.* ¶ 45. If the Net Worth Amount is greater than zero and the board of directors does not declare a "dividend" on the Senior Preferred Stock, then the "dividend" accumulates. Under the Certificates of Designation, no dividends may be paid on any other classes or series of stock of either Company unless and until full cumulative "dividends" (*i.e.*, the full Net Worth Sweep amount) are paid on the Senior Preferred Stock pursuant to the Net Worth Sweep. *Id.* Because the entire net worth of each Company is payable in perpetuity to the Senior Preferred Stock, no dividends can ever be paid on other classes or series of stock. *Id.*

PROCEDURAL HISTORY

On August 17, 2015, Plaintiffs filed a Class Action and Derivative Complaint (the "Complaint") in this Court against FHFA, in its capacity as conservator of the Companies, and

Treasury. On November 13, 2015, FHFA and Treasury moved to dismiss the Complaint and submitted opening briefs in support thereof. Plaintiffs filed their Answering Brief in Opposition to FHFA's and Treasury's motions to dismiss on January 16, 2016.

ARGUMENT

I. Legal Standards For Certification

Delaware. The Delaware Supreme Court will accept certification of a question of Delaware law from a federal district court pursuant to Del. Supr. Ct. Rule 41 and Del. Const. Art IV, § 11(8). Under Rule 41, the district court may, on motion or *sua sponte*, certify to the Delaware Supreme Court for decision a question of law arising in any case before it prior to final judgment if: (1) there is an important and urgent reason for an immediate determination of such question by the Delaware Supreme Court and (2) the certifying court has not decided the issue in the case. Del. Supr. Ct. Rule 41(a)(ii).[3] *See e.g., Waters v. United States*, 787 A.2d 71, 72 (Del. 2001) (deciding question of Delaware law certified by the District Court for the District of Delaware); *United States v. Anderson*, 669 A.2d 73, 74 (Del. 1995) (same); *United States v. Cumberbatch*, 647 A.2d 1098, 1099 (Del. 1994) (same); *Rales v. Blasband*, 634 A.2d 927, 930 (Del. 1993) (same).

Rule 41(b) provides a non-exhaustive list of the types of questions that are appropriate for certification to the Delaware Supreme Court. Specifically, Rule 41(b) provides: "Without

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[3] Rule 41(a)(ii) provides: "The Supreme Court of the United States, a Court of Appeals of the United States, **a United States District Court**, a United States Bankruptcy Court, the United States Securities and Exchange Commission, the Highest Appellate Court of any other State, the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities may, on motion or *sua sponte*, certify to this Court for decision a question or questions of law arising in any matter before it prior to the entry of final judgment or decision if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court or entity has not decided the question or questions in the matter." (bold emphasis added).

limiting the [Delaware Supreme Court's] discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:

(i) *Original question of law*. – The question of law is of first instance in this State;

(ii) *Conflicting decisions.* – The decisions of the trial courts are conflicting upon the question of law;

(iii) *Unsettled question.* – The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court."

Del. Supr. Ct. Rule 41(b) (emphasis in original).

Virginia. Similarly, the Virginia Supreme Court will accept certification of a question of Virginia law from a federal district court pursuant to Va. Supr. Ct. R. 5:40(a) and Va. Const. Art. VI, § 1 "if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of [the Virginia Supreme] Court or the Court of Appeals of Virginia." Va. Supr. Ct. R. 5:40(a).

II. The Legal Issue Here Is Appropriate For Certification

The Delaware and Virginia Supreme Courts have not yet decided the key legal issue pending before this Court concerning the validity of a dividend right in the nature of the Net Worth Sweep. Additionally, there is an important and urgent need for this question of state law to be certified to those states' respective Supreme Courts, as the question meets two of the illustrative reasons for certification set forth in Delaware Supreme Court Rule 41, it involves a question of Virginia law that is determinative of this proceeding as required by Virginia Supreme Court Rule 5:40(a), and it is an issue of pressing importance to Delaware and Virginia corporations, as well as their directors, officers, and stockholders.

The question whether the preferred stock of a corporation may be given a cumulative dividend right equal to the entire net worth of the corporation in perpetuity is a question of first

impression in Delaware and Virginia. There is no controlling precedent on point in decisions of any courts of those states. As such, the question can be certified to the Delaware and Virginia Supreme Courts. Del. Supr. Ct. R. 41(b)(i); Va. Supr. Ct. R. 5:40(a); *see also A.W. Fin. Servs., S.A., v. Empire Res., Inc.*, 2009 WL 212412, at *3 (S.D.N.Y. Jan. 29, 2009) (certifying four questions to Delaware Supreme Court and finding that "[e]ach of those questions is an '[o]riginal question of law' pursuant to Del. Supr. Ct. R. 41(b)(i), as this is the 'first instance' that a Delaware court will be addressing any of them"); *Shaw v. Agri-Mark, Inc.,* 50 F.3d 117, 120 (2d Cir. 1995) (certifying questions to Delaware Supreme Court because they were of "first instance in the State of Delaware"); *Lee-Warren v. Sch. Bd. of Cumberland Cty.*, 792 F. Supp. 472, 473 (W.D. Va. 1991) ("Recognizing this as a case of first impression under Virginia law . . . [this] Court . . . certif[ied] to the Supreme Court of Virginia the statutory interpretation issue . . . .").

The legal question at issue also is an unsettled question of law that relates to the "construction or application of a statute of [the State of Delaware] which has not been, but should be, settled by the [Delaware Supreme] Court." *See* Del. Supr. Ct. R. 41(b)(iii). Deciding whether a corporation may grant a dividend right like the Net Worth Sweep will require construction and application of DGCL § 151 (as well as VSCA § 13.1-638). This too makes the question of law appropriate for certification. Del. Supr. Ct. R. 41(b)(iii); *see also Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1151 (Del. 1997) (certified question involved construction and application of Delaware's incontestability statute for health policies); *A.W. Fin. Servs.*, 2009 WL 212412, at *3 (certified questions involved construction and application of Delaware's escheat statute).

Because the question at issue is a legal question of first impression in Delaware and Virginia, and involves the construction and application of Delaware and Virginia statutes, it is

the quintessential example of a question that should be certified to the Delaware and Virginia Supreme Courts.

There also is an important and urgent need for certification of this question because the question raises a threshold dispositive issue in this case and resolution of the question will have a broad impact on state policy.

A determination whether a dividend right like the Net Worth Sweep is valid and enforceable under the corporation laws of Delaware and Virginia should be made at the threshold of the action and is potentially dispositive of this case. If, as Plaintiffs contend, a corporation cannot implement such a dividend right as a matter of Delaware and Virginia corporate law, the parties could avoid protracted litigation and this Court, as well as the Third Circuit, could avoid expending time and resources on this dispute. Therefore, the need for guidance from the Delaware and Virginia Supreme Courts now, on the threshold issue present in this case, is compelling. Seeking guidance from the Delaware and Virginia Supreme Courts at this juncture will serve judicial economy and prevent inefficient use of time and resources by this Court, the parties, and possibly the Third Circuit. Because of the expected efficiencies, district courts often use certification to resolve threshold matters that raise novel issues, such as those present here.

Obtaining answers to novel legal questions that will have a broad impact within the state is a primary purpose of allowing certification to the Delaware and Virginia Supreme Courts. *See, e.g., Rales v. Blasband*, 626 A.2d 1364, 1366 (Del. 1993) ("The question certified is one involving the corporation law of the State of Delaware. The issue presented is apparently one of first impression. Thus, there appear to exist important and urgent reasons for an immediate determination by this Court of the substantive rights implicated by the question certified."); *Bradick v. Grumman Data Sys. Corp.*, 254 Va. 156, 486 S.E.2d 545 (1997) (granting

certification where the issue was a matter of first impression and a decision would have broad ramifications for similarly situated parties). A decision on the open question presented here will not only affect the parties in this case, but will have broad ramifications on Delaware and Virginia corporations, affecting the rights and responsibilities of their directors, officers, and stockholders. Because this case raises important questions of state public policy that affect all relevant constituencies of Delaware and Virginia corporations, the balance weighs heavily in favor of certification. Indeed, the importance of interpreting and applying corporate law statutes and principles has been made clear by the fact that the Delaware and Virginia Supreme Courts previously have accepted certified questions of law regarding those states' corporate laws. *Rales*, 626 A.2d at 1366 (accepting certified question of law regarding a novel demand futility issue because the issue was one of first impression and implicated important matters of Delaware corporation law); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 555 (Del. 2014) (granting certification regarding the validity of fee-shifting bylaw provisions under Delaware corporate law); *C.F. Trust, Inc. v. First Flight L.P.*, 266 Va. 3, 12, 580 S.E.2d 806, 811 (2003) (answering certified question of law asking whether Virginia law would recognize a claim for outsider reverse veil-piercing under the facts of the particular case). In order to provide clarity and certainty to the constituencies of Delaware and Virginia corporations, those states' highest courts should be given the opportunity to address the issue whether their corporate laws permit preferred stock of a corporation to be given a cumulative dividend right equal to the entire net worth of the corporation in perpetuity.

CONCLUSION

For the reasons set forth above, the Court should certify the above-stated questions of law to the Delaware and Virginia Supreme Courts in accordance with Del. Supr. Ct. R. 41 and Del. Const. Art. IV, § 11(8), and Va. Supr. Ct. R. 5:40(a) and Va. Const. Art. VI, § 1, respectively.

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Dated: January 15, 2016
1214048/42717

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2016, I electronically filed the foregoing OPPOSITION OF PLAINTIFFS DAVID JACOBS AND GARY HINDES TO FHFA'S MOTION FOR TRANSFER OF ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA with EXHIBIT A, 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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