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 INTERESTED PARTY TIMOTHY J. PAGLIARA IN OPPOSITION TO NOTICE OF RELATED ACTIONS AND MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

C. Barr Flinn
Adam W. Poff
Emily V. Burton
Lakshmi A. Muthu
Benjamin M. Potts
Meryem Y. Dede
YOUNG, CONAWAY, STARGATT, & TAYLOR LLP
Rodney Square
1000 N. King Street
Wilmington, DE 19801-0391
Telephone: (302) 571-6692
Facsimile: (302) 576-3292

N. Thomas Connally
Christopher T. Pickens
HOGAN LOVELLS US LLP
Park Place II, Ninth Floor
7930 Jones Branch Drive
Tel: 703-610-6194
Fax: 703-610-6200
tom.connally@hoganlovells.com
christopher.pickens@hoganlovells.com

Counsel for Interested Party Timothy J. Pagliara

Dated: April 20, 2016

Interested Party Timothy J. Pagliara ("Mr. Pagliara") respectfully submits this response in opposition to the Notice of Related Actions (the "Notice," ECF No. 9) and Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings under 28 U.S.C. § 1407 (the "Motion") filed by the Federal Housing Finance Agency ("FHFA") in this proceeding.

INTRODUCTION

In the Notice, FHFA identified two lawsuits filed by Mr. Pagliara that seek only to inspect certain corporate records of Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"), respectively, 1/ as related or "tag-along" actions to its earlier-filed Motion. The Motion asks the Judicial Panel on Multidistrict Litigation (the "Panel") to create a multidistrict litigation ("MDL") in the United States District Court for the District of Columbia for four other lawsuits filed against FHFA and the United States Department of Treasury (the "Motion Cases"). 2/ For the reasons set forth in the oppositions filed by plaintiffs in the Motion Cases, creation of an MDL is inappropriate here, and Mr. Pagliara joins in those oppositions and incorporates them herein. (ECF Nos. 18-21). But even if the Panel were to create an MDL for the Motion Cases, there are significant differences between Mr. Pagliara's cases and the Motion Cases that make transfer to an MDL inappropriate.

On March 14, 2016, Mr. Pagliara filed a lawsuit in the Delaware Court of Chancery against Fannie Mae (the "Delaware Action") and a second lawsuit in the Circuit Court of Fairfax County, Virginia against Freddie Mac (the "Virginia Action," and together with the Delaware Action, the "Records Actions"). These lawsuits both seek only an order to permit him, as a

---

1/ *Pagliara v. Federal National Mortgage Association*, No 1:16-cv-00193 (D. Del.); *Pagliara v. Federal Home Loan Mortgage Corporation*, No. 1:16-cv-00337 (E.D. Va.).

2/ *Jacobs v. Fed. Housing Fin. Agency*, No. 1:15-cv-00708 (D. Del.); *Roberts v. Fed. Housing Fin. Agency*, No. 1:16-cv-02107 (N.D. Ill.); *Saxton v. Fed. Housing Fin. Agency*, 1:15-cv-00407 (N.D. Iowa); *Robinson v. Fed. Housing Fin. Agency*, No. 7:15-cv-00109 (E.D. Ky.).

stockholder of Fannie Mae and Freddie Mac, to inspect certain corporate records of Fannie Mae and Freddie Mac under Delaware law and Virginia law, respectively.

Unlike the Motion Cases, Mr. Pagliara's Records Actions do not assert claims challenging Fannie Mae's, Freddie Mac's, FHFA's, or Treasury's actions relating to adoption of the Net Worth Sweep in 2012, 3/ and neither FHFA nor Treasury is a party to the Delaware Action or the Virginia Action. Instead, Mr. Pagliara's cases have an entirely different factual predicate: Fannie Mae's and Freddie Mac's rejection in January 2016 of his written requests as a stockholder to inspect corporate records. Fannie Mae has elected to follow Delaware law in its corporate governance, and Freddie Mac has elected to follow Virginia law in its corporate governance. The law of both states gives stockholders a right to inspect the books and records of corporations in which they own stock. On January 19, 2016, Mr. Pagliara served on Fannie Mae a written demand to inspect certain corporate records of Fannie Mae under Section 220 of the Delaware General Corporation Law ("DGCL"). The same day, he served a similar demand on Freddie Mac under Section 13.1-771 of the Virginia Stock Corporation Act (the "VSCA"). On January 27 and 28, 2016, Mr. Pagliara received two letters sent by FHFA on behalf of Fannie Mae and Freddie Mac, improperly rejecting his inspection requests without addressing their merits or disputing that either request complied with the DGCL or VSCA.

FHFA has failed to demonstrate that the requirements for transfer are satisfied as to the Records Actions. First, there are no common questions of fact, disputed or otherwise, between the Records Actions and the Motion Cases. The only facts relevant to Mr. Pagliara's Records

---

3/ The "Net Worth Sweep" was implemented in August 2012 through the Third Amendments to the Senior Preferred Stock Purchase Agreements between Fannie Mae and Treasury and Freddie Mac and Treasury. In the Third Amendments, Fannie Mae and Freddie Mac agreed to pay to Treasury as a dividend, every quarter in perpetuity, all of their positive net worth, leaving only a small and decreasing capital reserve (which will be reduced to zero by 2018). (Del. Compl. ¶ 6, ECF No. 9-5; Va. Compl. ¶ 93, ECF No. 9-6).

Actions relate to his stock ownership in Fannie Mae and Freddie Mac and his inspection demands to Fannie Mae and Freddie Mac. By their very nature, these facts do not have any relevance to claims by any other stockholder. Moreover, in responding to Mr. Pagliara's inspection demands, Fannie Mae, Freddie Mac, and FHFA did not dispute any of these facts, and the only common issues FHFA identifies in its Notice are legal issues, which are insufficient to justify transfer.

Second, transfer would not promote the efficient or just resolution of the Records Actions. Under Delaware law, the Delaware Action is a "summary proceeding" and should "be promptly tried"; Delaware courts seek to resolve books and records actions within 45 to 60 days of filing. Similarly, the Virginia Action is, by statute, to be resolved "on an expedited basis." There ordinarily are very minimal pretrial proceedings in books and records actions, and that is particularly true here, where there appear to be no facts in dispute. Without substantial pretrial proceedings, there is no benefit to transferring the Records Actions for coordinated or consolidated pretrial proceedings. Nor is there any risk of duplicative proceedings that can be minimized by transfer. None of the Motion Cases includes a books-and-records claim, much less one brought under Delaware or Virginia law. Thus, Fannie Mae and Freddie Mac will need to respond to each of those claims only once, whether the Records Actions are transferred or not. There also is likely to be no discovery in the Records Actions, and even if there were, it would be unique to the Records Actions because there is no factual overlap with the Motions Cases (or even much factual overlap between the Delaware Action and the Virginia Action). While there is no benefit to transfer, there is a substantial likelihood that centralizing the Records Actions with the Motion Cases will significantly delay the Records Actions, which could otherwise be resolved in a matter of weeks.

Third, there will be no benefit or convenience to the parties or witnesses by transferring either of the Records Actions. Books and records actions consistently involve few, if any, witnesses because they are summary/expedited proceedings, and the close proximity of both the District of Delaware and the Eastern District of Virginia to the District of Columbia precludes any argument that travel between them would impose an undue burden. Indeed, in a case before the Panel just a few years ago, FHFA argued that the Eastern District of Virginia was convenient for not only itself, but also Fannie Mae and Freddie Mac.

For these reasons, the requirements for transfer have not been satisfied, and FHFA's request to transfer the Delaware Action and Virginia Action should be denied.

ARGUMENT

Mr. Pagliara's cases may not be transferred under Section 1407 for consolidated or coordinated pretrial proceedings with the Motion Cases unless (i) there exists one or more common questions of fact between his cases and the Motion Cases; (ii) centralization will serve the convenience of the parties and witnesses; and (iii) centralization will promote the just and efficient conduct of the litigation. *See* 28 U.S.C. § 1407; *see also Multidistrict Litig. Man.* § 8:1 ("The legal standards for transfer of tag-along actions are the same as those applying to initial transfer."). In addition, the Panel has "often stated that centralization under Section 1407 'should be the last solution after considered review of all other options.'" *In re Gerber Probiotic Prods. Mktg.*, 899 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012). Indeed, Section 1407's legislative history provides that "[i]t is expected that . . . transfer [under Section 1407] is to be ordered *only where significant economy and efficiency in judicial administration may be obtained.*" *See* H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 1898, 1900 (emphasis added). Moreover, "[i]n moving to transfer a 'tag-along' action, the moving party has

the burden of 'demonstrating that transfer will further the purposes' of Section 1407." *In re Tobacco/Governmental Health Care Costs Litig.*, 76 F. Supp. 2d 5, 7-8 (D.D.C. 1999) (citation omitted).

FHFA has not and cannot meet this burden. As explained below, the Delaware Action and Virginia Action share no common questions of fact with the Motion Cases, and their transfer would not promote just or efficient conduct of the Actions or the convenience of the parties or witnesses. The Panel should accordingly deny FHFA's request to transfer these Actions.

I. There are No Common Questions of Fact Between the Delaware or Virginia Actions and the Motion Cases.

The Panel is authorized to transfer only "civil actions involving one or more common questions of fact." *See* 28 U.S.C. §1407(a). As FHFA itself has argued persuasively in opposing transfer in another case, 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." Enter. Defendants' Opp. to Genesee Cty.'s Motion for Transfer, *In re: Real Estate Transfer Tax Litig.*, MDL No. 2394, at 5 (J.P.M.L. 2012), Ex. 1 hereto ("FHFA *Transfer Tax* Opp'n.").

Yet in its Notice, FHFA identifies no common questions of fact between the Delaware Action or Virginia Action and the Motion Cases. Rather, FHFA states only that the "purpose of [Mr. Pagliara's] requests is to attack the Third Amendment" and, thus, "his complaints arise out of and relate to the exact same facts as those in the [Motion] Cases." (Notice 2). As an initial matter, the purpose of Mr. Pagliara's lawsuits is not to "attack" the Net Worth Sweep, but to, among other things, investigate the role Fannie Mae's and Freddie Mac's boards of directors (the

"Boards") played in adopting the Net Worth Sweep and approving dividends thereunder, 4/ as well as, in the Delaware Action, to investigate the Fannie Mae Board's approval of its significant investment in a project called the "common securitization platform" (or "CSP"), which will not benefit Fannie Mae in any way. (Del. Compl., Ex. A thereto, at 4-5, ECF No. 9-5; Va. Compl., Ex. A thereto, at 4-5, ECF No. 9-6). Whether Mr. Pagliara succeeds on his claims to inspect books and records turns not on the propriety of the Net Worth Sweep, or even the Board's involvement in the Net Worth Sweep, but whether his inspection requests complied with the requirements of Delaware and Virginia law.

Under Delaware law, a books and records action is a summary proceeding in the Court of Chancery by which a stockholder who has demonstrated a purpose reasonably related to his or her interest as such may gain speedy access to the corporate books and records. *See, e.g.*, *Schnell v. Chris-Craft Indus., Inc.*, 283 A.2d 852, 854 (Del. Ch. 1971); 8 *Del. C.* § 220. To prevail in the Delaware Action, Mr. Pagliara must prove only that (i) he was a stockholder of Fannie Mae at the time of his demand, (ii) his inspection demand complied with the statute's requirements as to the form and manner of making demand; and (iii) his requested inspection is for a proper purpose. *See* 8 *Del. C.* § 220(c). None of these elements raises any factual questions relevant in any way to any of the Motion Cases. Mr. Pagliara's stock ownership in Fannie Mae and the form of his demand to Fannie Mae are issues individual to him and not relevant to any claim by any other stockholder. The court's inquiry into whether Mr. Pagliara has a proper purpose under Delaware law also is not relevant to any of the Motion Cases. When, as here, one of a

4/ Under both Delaware and Virginia law, the Boards are responsible for approving dividends paid by Fannie Mae and Freddie Mac. *See* 8 *Del. C.* § 170; Va. Code Ann. § 13.1-653A. The Certificates of Designation for Treasury's Senior Preferred Stock in Fannie Mae and Freddie Mac also limit Treasury's right to dividends to only "*when, as and if declared by the Board of Directors*, in its sole discretion, out of funds legally available therefor." Senior Preferred Stock Certificate of Designation § 2(a) (emphasis added).

stockholder's purposes for an inspection is to investigate potential wrongdoing at the company, the court need find only a credible basis to infer that possible misconduct occurred. *See Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 & n.19 (Del. Ch. 2007). While a plaintiff must establish a credible basis from which a court may infer possible wrongdoing, "*actual wrongdoing itself need not be proved in a Section 220 proceeding . . . .*" *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997) (emphasis added). Delaware courts have clarified that the "credible basis" standard sets the "lowest possible burden of proof" in a books and records proceeding. *In re Lululemon Athletica Inc. 220 Litig.*, No. 9039-VCP, 2015 WL 1957196, at *11 (Del. Ch. Apr. 30, 2015) (citation omitted).

The facts relevant to the Virginia Action are similar. The only factual questions in Mr. Pagliara's books-and-records claim under the VSCA are whether (i) he owned Freddie Mac stock for at least six months immediately preceding his demand; (ii) his demand was made in good faith and for a proper purpose; and (iii) his demand on Freddie Mac was in the required form. *See* Va. Code Section 13.1-771C(1)-(4), -773B. Unlike in Delaware, however, Virginia courts have not required that a stockholder demonstrate a "credible basis" to infer wrongdoing to establish an investigation as a proper purpose for an inspection demand.

Thus, unlike the Motion Cases, whether misconduct actually occurred is not a factual question to be decided in the Delaware Action or Virginia Action. Three of the four Motion Cases bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, alleging that FHFA exceeded its statutory authority as Fannie Mae's and Freddie Mac's conservator, that Treasury exceeded its temporary authority to purchase Fannie Mae and Freddie Mac securities under the Housing and Economic Recovery Act ("HERA"), and that Treasury's actions were arbitrary and capricious. Two of the four Motion Cases also bring claims against

FHFA for breach of contract and breach of the implied duty of good faith and fair dealing. To prevail on these claims, unlike the Records Actions, the plaintiffs will need to demonstrate that the alleged wrongdoing actually occurred. 5/ Moreover, unlike the Records Actions, none of the Motion Cases focus on the conduct of the Fannie Mae and Freddie Mac Boards, as opposed to FHFA or Treasury, and none investigate the CSP, so the improper conduct to be analyzed would be different in any event. 6/ In the absence of any common factual questions, FHFA's request to transfer must be denied. 28 U.S.C. § 1407.

Moreover, the factual questions relevant to the Records Actions have not been disputed by FHFA, making them insufficient to support transfer. In rejecting Mr. Pagliara's inspection demands, FHFA did not dispute that Mr. Pagliara owned Fannie Mae and Freddie Mac stock, that he had a proper purpose, or that his demands complied with the form or content requirements under Delaware and Virginia law. (Del. Compl., Ex. B thereto, ECF No. 9-5; Va. Compl., Ex. B thereto, ECF No. 9-6). When common facts are largely undisputed, the Panel has

---

5/ This does not mean that the four Motion Cases share common questions of fact with each other. To the contrary, FHFA did not even try to identify any common issues of fact between those cases in the Motion. In its reply, FHFA asserts that "common questions of fact are presumed" because the Motions Cases have similar claims and seek similar relief; however, the case FHFA cites for that proposition is more than 40 years old and has never been cited by the Panel in any other opinion. (Reply 2-3). Nor would such a presumption seem to be appropriate for the Motion Cases. In the APA cases, "[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." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (quotation marks omitted). In the *Jacobs* case, plaintiffs bring claims under state statutory and common law that are unique to that case. *See In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (declining to transfer actions involving distinct causes of action when different legal standards make different facts relevant).

6/ There are not even common factual questions between the Delaware Action and the Virginia Action; the Delaware Action relates to Mr. Pagliara's stock ownership in Fannie Mae and the propriety of his demand on Fannie Mae under Delaware law, while the Virginia Action relates to his stock ownership in Freddie Mac, a separate company, and the propriety of a separate inspection demand made to Freddie Mac under Virginia law.

denied centralization because the potential efficiencies to be gained through coordinating overlapping discovery and motions practice are diminished. *See In re Real Estate Transfer Tax Litig.,* 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (denying centralization where there were "insufficient potential efficiencies to be obtained" in part because the "factual questions presented in [the] actions [were] largely undisputed"); *see also In re Skinnygirl Margarita*, 829 F. Supp. 2d at 1381 (denying centralization where the common, "central" factual allegation was "undisputed"); *Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d 1345, 1346-47 (J.P.M.L. 2011) (denying centralization where the "common factual issues" were "largely undisputed").

Rather than identify the required common, and disputed, factual issues, FHFA's Notice identifies only legal questions: whether Mr. Pagliara and the other stockholder plaintiffs have standing in light of HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), and whether HERA's anti-injunction provision divests courts of jurisdiction over stockholders' claims, 12 U.S.C. § 4617(f). (Notice 2-3). 7/ But even if these disparate cases present some similar legal issues because of defenses FHFA has raised to each of them, that is not a basis to transfer any of them under Section 1407. *See 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."); *see also In re CleanNet Franchise Agreement Contract Litig.*, 38 F. Supp. 3d 1382, 1383 (J.P.M.L. 2014) ("CleanNet's primary motivation for centralization of these actions is to obtain a uniform determination of the applicability of the arbitration provisions in the various franchise agreements. Seeking a uniform legal determination . . . generally is not a sufficient basis for

---

7/ Similarly, in its Reply, FHFA notes only that Mr. Pagliara's cases "raise common legal questions" with the Motion Cases. (Reply n.1, ECF No. 23).

centralization."). 8/ FHFA cannot deny that legal questions are insufficient to justify transfer, as it advocated that exact same principle before the Panel just a few years ago: the JPML'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," (FHFA *Transfer Tax* Opp'n 9), and "[t]he 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." (*Id.* 5 (quoting *Multidistrict Litig. Manual* § 5:4)). 9/

Because there are no common factual questions, much less common disputed factual questions, between the Record Actions and the Motion Cases (or even between the Delaware Action and the Virginia Action), FHFA's request to transfer Mr. Pagliara's cases must be denied.

II. Centralization of Mr. Pagliara's Records Actions Will Not Promote the Just and Efficient Conduct of the Delaware or Virginia Action.

There will be no efficiency gained by transferring the Delaware Action or Virginia Action; to the contrary, significant delay and inefficiency will be created by transfer of the Records Actions. Books and records actions under Delaware law are, by statutory mandate,

---

8/ *See also In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (denying transfer where "the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation"); *In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d at 1351 (denying centralization where the actions shared "an overarching legal question" regarding Fannie Mae's, Freddie Mac's, and FHFA's liability for transfer taxes, and "the factual questions presented in these actions [were] largely undisputed"); *Prop. Assessed Clean Energy (PACE) Programs Litig.*, 764 F. Supp. 2d at 1346-47 (denying centralization where "primarily common legal questions [were] left to be decided" and the common factual issues were "largely undisputed").

9/ *See also id.* 9 ("[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.") (citing *In re: Medi-Cal*, 652 F.Supp.2d at 1378)).

"summary proceedings" that "are to be promptly tried." *La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co.*, No. 5682-VCL, 2011 WL 773316, at *3 (Del. Ch. Mar. 4, 2011). The entire point of the books and records action is to create an expedited procedure for the limited purpose of acquiring information. *See U.S. Die Casting & Dev. v. Sec. First Corp.*, No. 14019, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995) (explaining that Section 220 proceedings are "narrow in purpose and scope" and that the "accelerated scheduling of cases under it emphasizes prompt processing and disposition"). For that reason, there is usually little—if any—formal discovery in a books and records action. *See id.* 10/

As a result, books and records claims in Delaware often are resolved within 45 to 60 days of their filing. *See Sullivan v. Elcom Int'l, Inc.*, No. 10474-CB, 2015 WL 881074, at p. 4 (Del. Ch. Jan. 15, 2015) (TRANSCRIPT) ("Generally speaking . . . we handle 220 cases on a summary basis. We do aim to have trials of those kind of cases within 60 days."); *Lavi v. Wideawake Deathrow Entm't, LLC*, No. 5779-VCS, 2011 WL 284986, at *1 (Del. Ch. Jan. 18, 2011) ("Under our law, books and records actions are summary proceedings. What that means is that they are to be promptly tried. . . . [T]he case can be tried within two months of filing."). There is no reason to think the Delaware Action would take any longer than 45-60 days to resolve if it remained in Delaware. 11/

10/ The Delaware Court of Chancery also has cautioned against engaging in pretrial practices that would hinder the summary nature of a Section 220 books and records action. *La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co.*, 2011 WL 773316, at *1 (Del. Ch. Mar. 4, 2011) ("Books and records actions are summary proceedings that are to be promptly tried. The summary nature of the proceeding dictate[s] against allowing preliminary motions addressed to the pleadings to be presented and decided . . . . Such a practice would tend to promote delay, thereby undercutting the statutory mandate and policy that the proceeding be summary in character.") (internal quotation marks and citations omitted).

11/ It is likely that the Delaware Action will be remanded back to the Delaware Court of Chancery. Fannie Mae removed the Delaware Action to the District of Delaware alleging only federal-question jurisdiction as its basis for removal. (Del. Notice of Removal ¶ 7, ECF No. 9-2).

Similarly, the VSCA directs the court to resolve an application to inspect corporate records "on an expedited basis." *See* Va. Code Ann. § 13.1-773B. FHFA has not disputed any of the facts relevant to Mr. Pagliara's claim under the VSCA; thus, the Virginia Action should be resolved in just two or three months if it remains in the Eastern District of Virginia.

Because they should be resolved summarily and expeditiously, the Delaware Action and Virginia Action are significantly more advanced than the Motion Cases. Absent transfer, they would be fully resolved on the merits in their current forums, most likely before even preliminary procedural issues could be addressed by a transferee court. Centralizing the Records Actions with the less-advanced Motion Cases would do nothing but delay them. 12/ The Panel has refused to transfer and consolidate cases where, as here, "the main effect of centralization would not be to enhance convenience and efficiency, but to delay the progress of [the] actions." *In re Signal Int'l LLC Human Trafficking Litig.*, 38 F. Supp. 3d 1390, 1391 (J.P.M.L. 2014); *see*

As explained above, the elements of Mr. Pagliara's claim in the Delaware Action turn only on state law, namely the requirements under Section 220 of the DGCL. (*See* pp. 6-7 above). Federal questions arise in the Delaware Action, if at all, only because of defenses FHFA apparently intends to assert, which is not sufficient to establish federal-question jurisdiction. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986) ("[T]he question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' A defense that raises a federal question is inadequate to confer federal jurisdiction.") (citations omitted). The Delaware Action has been stayed pending the Panel's ruling on FHFA's request to transfer the case. After the JPML's ruling, Mr. Pagliara plans to move for remand promptly. Once remanded, the Delaware Action should be resolved within 45-60 days. And after remand to state court, the Delaware Action could not be part of an MDL even if transferred to one in the first instance.

12/ As of June 2015, the median time between filing and disposition of a civil case in the United States District Court for the District of Columbia was 8.2 months, and the median time between filing and trial was 45.1 months. *Federal Court Mgmt. Statistics, June 2015*, United States Courts (June 30, 2015), http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2015. This stands in stark contrast to the 45-60 days needed to resolve the Delaware Action and the 2-3 months needed to resolve the Virginia Action. Indeed, the same data shows that the median time from filing to disposition in the Eastern District of Virginia is just 5.3 months, and that is not limited to cases that should be "expedited" by statute. (*Id.*).

also In re: Brandywine Commc'ns Techs., LLC, Patent Litig., 959 F. Supp. 2d 1377, 1378 (J.P.M.L. 2013) (denying centralization where the "actions [were] being litigated in a manner that [was] likely to lead to their resolution . . . within a relatively short period of time."); *In re Move Artwork Copyright Litig.*, 473 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007) (denying transfer where centralization would "delay the progress" of an action progressing toward resolution); *In re DietGoal Innovations, LLC ('561) Patent Litig.*, 999 F. Supp. 2d 1380 (J.P.M.L. Feb. 19, 2014) (denying centralization where it would delay the progress of significantly advanced actions); c*f. In re Signal Int'l LLC Human Trafficking Litig.*, 38 F. Supp. 3d 1390, 1391 (J.P.M.L. 2014) (indicating that centralization should be avoided where its "main effect . . . would not be to enhance convenience and efficiency, but to delay the progress of these actions, which are swiftly moving towards trial").

Furthermore, given the summary and expedited nature of the Delaware Action and Virginia Action, transfer of these Records Actions would be exceedingly inefficient. There should be few or no pretrial procedures and, therefore, no benefit to centralizing the Records Actions for these minimal pretrial proceedings. The Panel has refused to transfer and consolidate cases where, as here, there are few pretrial proceedings remaining. *See In re Women's Clothing Antitrust Litig.*, 455 F. Supp. 1388, 1390, 1391 (J.P.M.L. 1978) (denying transfer even where cases involved "significant common questions of fact" and where "the presence of these issues commends Section 1407 transfer" because "on balance we are persuaded that this factor is outweighed by the advanced stage of pretrial proceedings in these actions."); *In re Telecomm. Providers' Fiber Optic Cable Installation Litig.*, 199 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002) ("Movants have failed to persuade us that any common questions of fact as opposed to questions of law are sufficiently complex, unresolved and/or numerous to justify Section 1407 transfer . . .

many of the actions are procedurally so far advanced that discovery is completed or nearly completed . . .”).

Nor are there any potentially duplicative pretrial proceedings to be avoided by transfer of the Delaware Action or Virginia Action. No other plaintiff in any of the Motion Cases makes any claim for inspection of corporate records, much less makes such a claim under Delaware or Virginia law. Because no other case asserts the same claims, Fannie Mae and Freddie Mac do not have to respond to or defend these claims in any of the Motion Cases. *See In re Skinnygirl Margarita*, 829 F. Supp. 2d at 1381 (denying centralization, noting that “centralization may not prevent either conflicting or multiple rulings, because plaintiffs bring their claims under the laws of different states”). Similarly, because there do not appear to be any factual issues in dispute, there should be little or no discovery in the Records Actions and certainly no discovery that is duplicative of discovery of the Motion Cases. 13/ Even as to legal issues, the courts in Delaware and Virginia are more familiar with the Delaware and Virginia laws that govern the Delaware and Virginia Actions. *See, e.g.*, *Blanco v. Wyeth, Inc.*, No. 07-2877 PAM/JSM, 2010 WL 9487183, at *3 (D. Minn. Jan. 13, 2010) (“Virginia substantive law is likely to apply and Virginia courts are more adept at applying Virginia law.”); *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.,* No. 8126, 1985 WL 21129, at *2 (Del. Ch. Oct. 9, 1985) (“There can be no

13/ In FHFA’s Reply, it argues that transfer of the Motion Cases would promote efficiency by preventing duplicative legal rulings on HERA’s succession and anti-injunction provisions. (Reply 5-6, ECF No. 23). FHFA likely would say the same regarding transfer of the Record Actions, and Mr. Pagliara notes that FHFA’s position ignores arguments that both FHFA and the government more broadly have made time and again in other contexts: *i.e.*, having multiple courts weigh in on a single legal question is beneficial. *See* FHFA *Transfer Tax* Opp’n 9; *National Envt’l Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014); *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). Moreover, the succession and anti-injunction provisions raise jurisdictional issues, and FHFA would not be harmed if there are inconsistent rulings on those issues: the only consequence of inconsistent jurisdictional rulings is that it must defend a lawsuit in a court that has concluded it has jurisdiction, while it might escape the burden of simultaneously litigating in a court that has concluded otherwise.

question but that MacAndrews' claims involve novel and substantial issues of Delaware corporate law and that these issues are best resolved in a Delaware court."). 14/

For these reasons, transfer of the Delaware Action and Virginia Action would not promote efficient resolution of either Records Action. Transfer also should be denied because it will not promote the just resolution of the Records Actions. Indeed, it is clear that FHFA is seeking transfer not to avoid duplicative discovery on common questions of fact, but rather to funnel cases presenting apparently similar legal issues into a court that has already ruled in its favor. That is plainly improper. In FHFA's own words: "It is not appropriate to use the MDL mechanism as a *de facto* means of determining the merits of [multiple] cases by transferring them to 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 10). 15/

III. Transfer Will Not Serve the Convenience of Parties or Witnesses.

Transfer and centralization of the Records Actions would not promote the convenience of the Parties and witnesses. First, the convenience of the witnesses will not be significantly implicated, as books and records actions consistently involve few, if any, witnesses. 16/ That is

---

14/ The same also is true of the *Jacobs* lawsuit, which asserts claims under Delaware law.

15/ In its Reply, FHFA tries to distinguish the *In re: Transfer Tax* cases because "the *Transfer Tax* cases did not involve any factual disputes whatsoever." (Reply 9). That is not true, as FHFA admitted in its opposition that there might be factual disputes at the damages phase. (FHFA *Transfer Tax* Opp'n 1). Moreover, for all of the reasons explained above, there are no common factual disputes between the Delaware Action or Virginia Action and the Motions Cases, making these cases like the *Transfer Tax* cases as FHFA has described them. FHFA argues that the risk of conflicting rulings here is greater than in *Transfer Tax*. But where the claimed common issues are legal questions, potentially conflicting *legal* rulings are insufficient to justify transfer—just as FHFA itself argued in its opposition in the *Transfer Tax* cases. (*Id.* 9).

16/ *See generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 8.06[i] (2014) ("[I]t is clear that the court will attempt to strike a balance between the right of the parties to adequately prepare for trial and the

particularly so here, where there do not appear to be any factual disputes, and thus, there does not appear to be much need for discovery at all.

Second, as to the Delaware Action, the transfer sought is only from Wilmington, Delaware to Washington, D.C. To the extent any witness or party representative needs to travel from Washington to Wilmington (which is unlikely), the travel does not impose an undue burden or inconvenience. The distance between those locations is only 110 miles, and to travel between them requires only a two-hour car drive or 90-minute train ride.

Third, as to the Virginia Action, there is absolutely no convenience benefit to parties or witnesses from transferring to the District of the District of Columbia. Freddie Mac, the only defendant in the Virginia Action, has its principal place of business in the Eastern District of Virginia. Moreover, Freddie Mac and FHFA both agreed that the Eastern District of Virginia is convenient for them in a filing with the Panel just a few years ago:

> First and foremost, the Eastern District of Virginia is convenient for the Enterprises [Fannie Mae and Freddie Mac], 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 Eastern District of Virginia is also convenient for FHFA, which is located in Washington D.C.

(FHFA *Transfer Tax* Opp'n 18).

---

statutory mandate to afford summary treatment and relief. It is equally clear that, in most cases, that balance will favor the latter consideration over the former."). Indeed, Section 220 actions in Delaware are often presented to the Court of Chancery on a stipulated paper records. *See, e.g.*, *Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc.*, No. 9587-ML, 2015 WL 1884453, at *1 (Del. Ch. Apr. 24, 2015) (noting that the 220 proceeding "was tried on a paper record"); *Amalgamated Bank v. Yahoo! Inc.*, No. 10774-VCL, 2016 WL 402540, at *1 (Del. Ch. Feb. 2, 2015) (noting that the Section 220 action was held by a "trial on [the] paper record"); *Ind. Elec. Workers Pension Trust Fund IBEW v. Wal-Mart Stores*, Inc., No. 7779-CS, 2013 WL 5636296, at *1 (Del. Ch. Oct. 15, 2013) ("[T]he Parties agreed to conduct [the Section 220] trial on the basis of a paper record.").

For these reasons, transfer of the Delaware Action and Virginia Action would not promote the convenience of the parties or witnesses.

CONCLUSION

For the foregoing reasons, Mr. Pagliara respectfully requests that the Panel deny FHFA's request to coordinate or consolidate the Delaware Action and Virginia Action with MDL No. 2713 and transfer the cases to the United States District Court for the District of Columbia.

Respectfully submitted,

/s/ N. Thomas Connally
N. Thomas Connally
Christopher T. Pickens
HOGAN LOVELLS US LLP
Park Place II, Ninth Floor
7930 Jones Branch Drive
Tel: 703-610-6194
Fax: 703-610-6200
tom.connally@hoganlovells.com
christopher.pickens@hoganlovells.com

C. Barr Flinn
Adam W. Poff
Emily V. Burton
Lakshmi A. Muthu
Benjamin M. Potts
Meryem Y. Dede
YOUNG, CONAWAY, STARGATT,
& TAYLOR LLP
Rodney Square
1000 N. King Street
Wilmington, DE 19801-0391
Telephone: (302) 571-6692
Facsimile: (302) 576-3292

Counsel for Interested Party
Timothy J. Pagliara

April 20, 2016

CERTIFICATE OF SERVICE

I certify that on April 20, 2016, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ N. Thomas Connally_______
N. Thomas Connally
Christopher T. Pickens
HOGAN LOVELLS US LLP
Park Place II, Ninth Floor
7930 Jones Branch Drive
Tel: 703-610-6194
Fax: 703-610-6200
tom.connally@hoganlovells.com
christopher.pickens@hoganlovells.com

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

Jill L. Nicholson
FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313
T: (312) 832-4522
F: (312) 832-4700
jnicholson@foley.com

Attorneys for Defendant Federal National Mortgage Association

Howard Cayne
Asim Varma
Michael Johnson
ARNOLD & PORTER LLP
555 12th Street N.W.
Washington, DC 20004
T: (202) 942-5000
F: (202) 942-5999
Howard.Cayne@aporter.com
Asim.Varma@aporter.com
Michael.Johnson@aporter.com

Michael J. Ciatti
KING & SPALDING LLP
1700 Pennsylvania Avenue NW, Suite 200
Washington, D.C. 20006
T: (202) 661-7828
F: (202) 626-3737
mciatti@kslaw.com

Attorneys for Federal Home Loan Mortgage Corporation

Stephen E. Hart
FEDERAL HOUSING FINANCE AGENCY
Constitution Center
400 Seventh Street, S.W.
Washington, DC 20024
Telephone: (202) 649-3053
Stephen.Hart@fhfa.gov

Attorneys for Defendant Federal Housing Finance Agency

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

THE ENTERPRISES, THE CONSERVATOR, AND THE EXEMPTION STATUTES 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE PANEL SHOULD DENY TRANSFER UNDER SECTION 1407 4

A. The Actions Involve Few, If Any, Common Questions of Fact, Involving Instead Purely Legal Questions as to Liability 4

B. Transfer Would Not Promote the Just and Efficient Conduct of the Actions, Nor Would it Make the Litigation Substantially More Convenient 8

1. The Risk of Inconsistent Rulings on the Central Legal Issue in these Cases Does Not Justify Transfer 8

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 11

3. Purported Concerns About Inconsistent Class-Certification Rulings Are Misplaced 12

4. Transfer Would Provide Only Limited Convenience Benefits 13

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 14

A. The Panel Should Not Transfer Actions That Are Procedural Outliers 14

1. The Panel Should Not Transfer Actions in Which a Fully Briefed Dispositive Motion is Pending or Has Been Decided 15

2. The Panel Should Deny Transfer of Actions in the Sixth Circuit, Where a Petition for Interlocutory Review of Judge Roberts' Decisions is Pending 16

B. In the Event the Panel Opts to Centralize Any Remaining Actions, It Should Transfer Them to the Eastern District of Virginia 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

FHFA, et al. v. Hamer, et al.,
No. 3:12-cv-50230, N.D. Ill., filed June 22, 2012)....1

Genesee Cnty. v. Fannie Mae,
2:11-cv-14971 (E.D. Mich.).... passim

In re 1980 Decennial Census Adjustment Litig.,
506 F. Supp. 648 (J.P.M.L. 1981)....19

In re Air Crash Disaster at Pago Pago, Am. Samoa, on January 30, 1974,
394 F. Supp. 799 (J.P.M.L. 1975)....11, 12

In re Air Crash Disaster at Tenerife, Canary Islands on Mar. 27, 1977,
435 F. Supp. 927 (J.P.M.L. 1977)....16

In re Airline "Age of Emp." Employ't Practices Litig.,
483 F. Supp. 814 (J.P.M.L. 1980)....6

In re Am. Gen. Life & Accident. Ins. Co. Indus. Life Ins. Litig.,
175 F. Supp. 2d 1380 (J.P.M.L. 2001)....19

In re Am. Home Prods. Corp "Released Value" Claims Litig.,
448 F. Supp. 276 (J.P.M.L. 1978)....6

In re Columbia Univ. Patent Litig.,
313 F. Supp. 2d 1383 (J.P.M.L. 2004)....19

In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.,
MDL 2134, 2010 WL 532561 (J.P.M.L. Feb. 12, 2010)....15

In re E. Airlines, Inc. Flight Attendant Weight Program Litig.,
391 F. Supp. 763 (J.P.M.L. 1975)....20

In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig.,
350 F. Supp. 2d 1363 (J.P.M.L. 2004)....20

In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.,
434 F. Supp. 1235 (J.P.M.L. 1977)....6

In re Fed. Nat'l Mortg. Ass'n Secs. Derivative & "ERISA" Litig.,
370 F. Supp. 2d 1359 (J.P.M.L. 2005)....18

In re Keith Russell Judd Voting Rights Litig.,
816 F. Supp. 2d 1383 (J.P.M.L. 2011)....6

In re Klein Med. Malpractice Litig.,
398 F. Supp. 679 (J.P.M.L. 1975)....12

In re L. E. Lay & Co. Antitrust Litig.,
391 F. Supp. 1054 (J.P.M.L. 1975)....16

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)....15

In re Medi-Cal Reimbursement Rate Reduction Litig.,
652 F. Supp. 2d 1378 (J.P.M.L. 2009)....5, 9, 10

In re Mid-Air Collision Near Hendersonville, N.C. on July 19, 1967,
297 F. Supp. 1039 (J.P.M.L. 1969)....17

In re Nat'l Student Mktg. Litig.,
368 F. Supp. 1311 (J.P.M.L. 1972)....17

In re Natural Gas Liquids Regulation Litig.,
434 F. Supp. 665 (J.P.M.L. 1977)....6

In re Novastar Home Mortg. Inc. Mortg. Lending Practices Litig.,
368 F. Supp. 2d 1353 (J.P.M.L. 2005)....20

In re Okla. Ins. Holding Co. Act Litig.,
464 F. Supp. 961 (J.P.M.L. 1979)....6

In re Practice of Naturopathy Litig.,
434 F. Supp. 1240 (J.P.M.L. 1977)....19

In re Prof'l Hockey Antitrust Litig.,
352 F. Supp. 1405 (J.P.M.L. 1973)....16

In re Res. Exploration, Inc., Sec. Litig.,
483 F. Supp. 817 (J.P.M.L. 1980)....16

In re Sundstrand Data Control, Inc. Patent Litig.,
443 F. Supp. 1019 (J.P.M.L. 1978)....19

In re Swine Flu Immunization Prods. Liab. Litig.,
446 F. Supp. 244 (J.P.M.L. 1978)....19

In re U. S. Navy Variable Reenlistment Bonus Litig.,
407 F. Supp. 1405 (J.P.M.L. 1976)....6, 17

In re W. Elec. Co., Inc. Semiconductor Patent Litig.,
415 F. Supp. 378 (J.P.M.L. 1976) 20

In re Westinghouse Elec. Corp. Uranium Contracts Litig.,
405 F. Supp. 316 (J.P.M.L. 1975) 20

In re Xyberbaut Corp. Sec. Litig.,
403 F. Supp. 2d 1354 (J.P.M.L. 2005) 20

In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.,
MDL 2219, 2011 WL 346946 (J.P.M.L. Feb. 4, 2011) 1, 12

In re: Gen. Mills, Inc., Yoplus Yogurt Prods. Mktg. & Sales Practices Litig.,
MDL 2169, 2010 WL 2346553 (J.P.M.L. June 8, 2010) 13

In re: Kaplan Higher Educ. Corp. Qui Tam Litig.,
626 F. Supp. 2d 1323 (J.P.M.L. 2009) 18

In re: Parallel Networks, LLC ('111) Patent Litig.,
--- F. Supp. 2d ---, 2012 WL 2175762 (J.P.M.L. June 12, 2012) 17

In re: Prop. Assessed Clean Energy (PACE) Programs Litig.,
764 F. Supp. 2d 1345 (J.P.M.L. 2011) 6

In re: Removal from U.S. Marine Corps Reserve Active Status List Litig.,
787 F. Supp. 2d 1350 (J.P.M.L. 2011) 6

Oakland Cnty. v. Fannie Mae, *et al.*,
2:11-cv-12666 (E.D. Mich.) .... passim

Pragmatus AV, LLC v. Facebook, Inc.,
769 F. Supp. 2d 991 (E.D. Va. 2011) 20

STATUTES

12 U.S.C. § 1452(e) 3

12 U.S.C. § 1716 2

12 U.S.C. § 1723a(c)(2) 3

28 U.S.C. § 1292(b) 10

28 U.S.C. § 1407 ("Section 1407") .... passim

28 U.S.C. § 1407(a) 5

Housing and Economic Recovery Act of 2008, Pub L. No. 110-289, 122 Stat. 2654,
codified at 12 U.S.C. § 4617 *et seq.* 2, 3

OTHER AUTHORITIES

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) 20

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) 10

John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2241 (2008) 4, 8

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

---

[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

Case 1:12-cv-70143 Document 2-13 Filed 07/20/12 Page 16 of 28

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

[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

---

[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

[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

---

[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.*

---

[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.

---

[23] *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: Statistics, Fiscal Year 2011, Tbl. C-5, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05Sep11.pdf (last visited July 18, 2012).

[24] Alternatively, if the Panel decides not to select the Eastern District of Virginia, it should transfer the cases to the Hon. William T. Moore in the Southern District of Georgia, who is presiding over *Massey*, the only putative nationwide Transfer Tax class action. Judge Moore was previously selected to preside over an MDL involving mortgage lending practices. *See In re Novastar Home Mortg. Inc. Mortg. Lending Practices Litig*., 368 F. Supp. 2d 1353, 1354 (J.P.M.L. 2005). He is thus well-positioned to preside over this litigation. *See In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (relying upon judge's "prior, successful experience in the management of Section 1407 litigation").

Dated: July 23, 2012

Respectfully Submitted,

__w/permission__
Jill L. Nicholson
FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313
T: (312) 832-4522
F: (312) 832-4700
jnicholson@foley.com

Attorneys for Defendant Federal National Mortgage Association

__w/permission__
Michael Ciatti
KING & SPALDING LLP
1700 Pennsylvania Avenue NW, Suite 200
Washington, D.C. 20006
T: (202) 661-7828
F: (202) 626-3737
mciatti@kslaw.com

Attorneys for Federal Home Loan Mortgage Corporation

/s/ Howard Cayne
Howard Cayne
Asim Varma
Michael Johnson
ARNOLD & PORTER LLP
555 12th Street N.W.
Washington, DC 20004
T: (202) 942-5000
F: (202) 942-5999
Howard.Cayne@aporter.com
Asim.Varma@aporter.com
Michael.Johnson@aporter.com

Stephen E. Hart
FEDERAL HOUSING FINANCE AGENCY
1700 G Street N.W.
Washington, DC 20552
(202) 414-3800
Stephen.Hart@fhfa.gov

Attorneys for Defendant Federal Housing Finance Agency