UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Civil Action No: 1:16-cv-21221-Scola/Otazo-Reyes

MASTER SGT. ANTHONY R. EDWARDS,
USAF, RETIRED, *et al.*
Plaintiffs,
v.
DELOITTE & TOUCHE LLP,
Defendant.

DEFENDANT'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO REMAND

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INTRODUCTION

Plaintiffs' Complaint belongs in federal court because it turns on the propriety of actions taken by two federal agencies, pursuant to broad statutory powers granted them by the U.S. Congress, to rescue the Federal National Mortgage Association ("Fannie Mae")—a federally-chartered government sponsored enterprise ("GSE")—at a time of national crisis. The United States Department of Treasury ("US Treasury") and the Federal Housing and Finance Agency ("FHFA"), acting under the express powers granted to them by Congress in the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289 ("HERA"), placed Fannie Mae into conservatorship, infused it with $100 billion in taxpayer funds, and have left it in conservatorship subject to federal oversight—all as a central feature of the federal government's response to the most significant economic downturn since the Great Depression. Plaintiffs cannot attack the bona fides of the federal government's actions in this historic crisis (and Deloitte's alleged assistance in these allegedly improper actions), and then argue that these issues are not sufficiently substantial to merit federal jurisdiction. Nor can they credibly argue, in light of HERA and the allegations in their own Complaint, that these issues are not central to their case.

Plaintiffs acknowledge, as they must, that federal "arising under" jurisdiction exists when any state law claim contains an embedded federal issue that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Motion to Remand ("Mot.") at 4 (quoting *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013)). Plaintiffs make passing—and meritless—arguments about whether the federal issues ubiquitous throughout their Complaint are actually disputed or can be resolved without triggering federalism concerns, but the crux of their challenge to removal is that the Complaint does not necessarily raise a substantial federal issue. Mot. at 6-17 [D.E. 23]. This argument is just plain wrong—and it is not a close call. The Complaint necessarily raises multiple substantial federal issues, any one of which is essential to resolving their claims and more than sufficient to support federal jurisdiction.

First, Plaintiffs cannot even begin to address the most fundamental question in any lawsuit—namely, whether they have standing to raise the claims they have asserted—without raising a substantial federal question: whether Congress transferred through HERA's succession provision the very rights they purport to vindicate. *See* Section I *infra*. As if that were not enough, Plaintiffs' three separate claims for aiding and abetting alleged breaches of fiduciary

duty by the US Treasury, FHFA, and Fannie Mae's directors and officers all turn on threshold issues of federal law regarding the duties, if any, owed by those entities to Fannie Mae in conservatorship. *See* Section II *infra*. Finally, the essential causation element for each of Plaintiffs' claims, as framed by their own Complaint, turns on two purely legal and substantial federal issues: whether HERA requires FHFA to terminate its conservatorship of Fannie Mae if Fannie Mae becomes financially stable, and whether federal auditing standards required Deloitte to take actions that would have allowed Fannie Mae to exit the conservatorship. *See* Section III *infra*. Any one of these numerous, controlling, and substantial federal issues sustains removal.

Where, as here, a state law claim raises a substantial federal issue, "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Nowhere is that clearer than this case, which implicates HERA's fundamental meaning and has broad consequences for the exercise of congressional power in addressing a financial crisis of historic proportion. Removal is appropriate, and remand should be denied.[1]

FACTUAL BACKGROUND

A. Fannie Mae And The Housing And Economic Recovery Act Of 2008

This case arises out of actions taken by the US Treasury and FHFA, pursuant to HERA, to rescue Fannie Mae during the historic 2008 near-collapse of the U.S. economy. *See* Complaint ("Compl.") [D.E. 1-1]. Congress enacted HERA on July 30, 2008 in response to massive declines in the U.S. housing market and a rapidly deteriorating U.S. economy. *Id.* ¶ 20. In HERA, Congress established FHFA as an independent federal agency to supervise and regulate federally chartered Fannie Mae (and other GSEs). *See* 12 U.S.C. § 4511; Compl. ¶ 20. HERA granted FHFA's Director the authority to appoint the agency as conservator for Fannie

[1] Reinforcing that this Action is focused less on the conduct of the auditors than on the alleged federal scheme that the audits purportedly advanced, many of the same plaintiffs and same counsel filed a nearly identical action against PricewaterhouseCoopers LLP, the independent auditor for the other GSE in federal conservatorship, Federal Home Loan Mortgage Corporation ("Freddie Mac") based on nearly identical allegations. *See Edwards v. PricewaterhouseCoopers, LLP*, 1:16-cv-21224 (S.D. Fla.). That action too was removed to federal court, and is pending before Judge Moreno.

Mae, 12 U.S.C. § 4617(a), and authorized the US Treasury to purchase "any obligations and other securities issued by" Fannie Mae, 12 U.S.C. § 1719(g)(1)(A); Compl. ¶ 20.

B. FHFA Is Appointed As Conservator Of Fannie Mae

On September 6, 2008, pursuant to HERA, FHFA was appointed as Fannie Mae's conservator. Upon appointment, HERA authorized that FHFA "immediately succeed" to "all rights, titles, powers, and privileges of [Fannie Mae], and of any stockholder, officer, or director of [Fannie Mae] with respect to [Fannie Mae] and the assets of [Fannie Mae]." 12 U.S.C. § 4617(b)(2)(A)(i). As numerous courts have recognized, in HERA Congress vested FHFA with "extremely broad" authority. *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 16-337, 2016 WL 4441978, at *5, *8 (E.D. Va. Aug. 23, 2016) (HERA reflects "Congress's intent to transfer as much power as possible to the FHFA when acting as [Fannie Mae's] conservator"); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014) (discussing the "extraordinary breadth of HERA's statutory grant to FHFA"), *appeal pending*, No. 14-5243 (D.C. Cir.).

As conservator, FHFA has the power to "operate [Fannie Mae] with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of [Fannie Mae]." 12 U.S.C. § 4617(b)(2)(B). Moreover, Congress moved purposefully and aggressively to protect FHFA's extraordinary authority by limiting the power of the judiciary with language in HERA providing that "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as conservator of Fannie Mae. *Id.* § 4617(f).

Pursuant to its statutory powers under HERA as conservator of Fannie Mae, FHFA entered into a Senior Preferred Stock Purchase Agreement ("PSPA") with the US Treasury in September 2008. Compl. ¶ 22. Under the PSPA, which was amended over time, the US Treasury committed an initial $100 billion in taxpayer funding to support Fannie Mae. *Id.* ¶¶ 22, 26. In exchange, the US Treasury received senior preferred stock and certain contractual rights, including the right to receive quarterly dividends from Fannie Mae. *Id.* In 2012, the US Treasury and FHFA agreed to an amendment to the PSPA (the "Third Amendment"), which required Fannie Mae to pay the US Treasury a quarterly dividend equal to the amount of its net worth each quarter, less a capital buffer that declines over time until it is eliminated in 2018 (the so-called "Net Worth Sweep"). *Id.* ¶ 31.

C. HERA Gives Rise To Extensive Federal Litigation

HERA—and the FHFA conservatorships that it authorized and governs—has taken on

immense national importance and generated extensive litigation across the country, all of it in the federal courts. Shareholders of Fannie Mae and Freddie Mac have filed a class action and more than a dozen non-class actions against the US Treasury, FHFA, Fannie Mae, and Freddie Mac, alleging that the PSPA and the Third Amendment caused harm to their shares.[2] Many of those actions remain pending in federal courts throughout the country, while others have been dismissed on the pleadings, *e.g.*, *Perry Capital*, 70 F. Supp. 3d 208; *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015); *Pagliara*, 2016 WL 4441978; *Robinson v. FHFA*, No. 15-109, 2016 WL 4726555 (E.D. Ky. Sept. 9, 2016). To Deloitte's knowledge, no such actions are in any state court.

D. Plaintiffs' Action Against Deloitte

Notwithstanding the broad powers Congress expressly granted the FHFA as Fannie Mae's conservator, Plaintiffs[3] allege that the federal government's conduct relating to the conservatorship was improper, that the federal actions could not have taken place absent Deloitte's assistance, and that the value of Plaintiffs' Fannie Mae stock was harmed as a result. *See* Compl. In particular, Plaintiffs allege that the Net Worth Sweep was an unfair transaction that shifted value from the holders of Fannie Mae stock to the US Treasury, *id.* ¶¶ 31-32, 40, and that the US Treasury, FHFA, and Fannie Mae's directors and officers breached fiduciary duties to Fannie Mae and its stockholders by engaging in this transaction. *Id.* ¶¶ 31-43.

Plaintiffs claim that Deloitte, Fannie Mae's independent auditor, took actions to assist the US Treasury, FHFA and Fannie Mae's directors and officers in their alleged breaches of fiduciary duty. In particular, Plaintiffs allege that Deloitte failed to comply with federal auditing standards (promulgated by the Public Company Accounting Oversight Board ("PCAOB")), in Deloitte's audits of Fannie Mae's 2008-2013 annual financial statements, and, as a result,

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[2] *See, e.g.*, *Pagliara v. FNMA*, No. 16-193 (D. Del.); *Roberts v. FHFA*, No. 16-2107 (N.D. Ill.); *Saxton v. FHFA*, No. 15-047 (N.D. Iowa); *Jacobs v. FHFA*, No. 15-708 (D. Del.); *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C.); *Arrowood Indem. Co. v. FNMA*, No. 13-01439 (D.D.C.); *Liao v. Lew*, No. 13-1094 (D.D.C.); *Cacciapelle v. FNMA*, No. 13-01149 (D.D.C.); *Am. European Ins. Co. v. FNMA*, No. 13-01169 (D.D.C.); *Cane v. FHFA*, No. 13-01184 (D.D.C.); *Dennis v. U.S.*, No. 13-01208 (D.D.C.); *Marneu Holdings, Co. v. FHFA*, No. 13-01421 (D.D.C.); *Borodkin v. FNMA*, No. 13-01443 (D.D.C.).

[3] Plaintiffs are an amalgam of 39 individuals and entities from seven different states: Tennessee (19), Florida (11), California (3), Maine (2), New York (2), Missouri (1), and North Carolina (1).

allegedly issued materially false audit opinions on those financial statements. *See, e.g.*, Compl. ¶¶ 47-49, 65-66, 97-98. Plaintiffs assert causes of action against Deloitte for aiding and abetting breaches of fiduciary duty and for negligent misrepresentation (Restatement (2d) of Torts § 552), and they aver that but for Deloitte's actions, FHFA would have been required by law to terminate Fannie Mae's conservatorship, restoring lost value to Plaintiffs' Fannie Mae stock. Compl. ¶ 98; *see also id.* ¶ 95. Plaintiffs seek to recover from Deloitte alleged losses totaling "hundreds of millions of dollars." *Id.* ¶¶ 9-10.

On April 6, 2016, Deloitte removed the Action to this Court on the basis of federal question jurisdiction, *see* D.E. 1, which Plaintiffs now challenge. Plaintiffs also challenge FHFA's fully-submitted motion to substitute as plaintiff in this Action, *see* FHFA's Renewed Mot. to Substitute [D.E. 15], based on the clear language in HERA granting FHFA "all rights, titles, powers, and privileges" of Fannie Mae and its stockholders. 12 U.S.C. § 4617(b)(2)(A)(i).

LEGAL STANDARD

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. As the Supreme Court has "recognized for nearly 100 years," certain state law claims implicating "significant federal issues" arise under federal law and thus form the basis for removal to federal court. *Grable*, 545 U.S. at 312. This doctrine of "arising under" jurisdiction "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Id.* A state law claim arises under federal law and thus warrants removal if the claim involves a federal issue that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 133 S. Ct. at 1065.

ARGUMENT

Plaintiffs do not seriously contest that the numerous federal issues presented on the face of their complaint are "actually disputed" by the parties and "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *See generally* Mot.; *Gunn*, 133 S. Ct. at 1064-65. Accordingly, the central question before the Court is whether Plaintiffs' Complaint necessarily raises a substantial federal issue. *Grable*, 545 U.S. at 314. A federal issue is necessarily raised if it must be adjudicated for the plaintiff to prevail on a claim asserted in the complaint. *Id.* The parties agree that the substantiality inquiry looks "to the

importance of the issue to the federal system as a whole." Mot. at 6 (citing *Gunn*, 133 S. Ct. at 1066); *see also Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (holding in a suit between private parties that the federal issue—whether the government's issuance of bonds was proper—was one of general importance to the government and thus "sufficient" to support arising under jurisdiction). As discussed below, the Complaint necessarily raises numerous substantial federal issues, any one of which alone is sufficient to confer federal jurisdiction. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-66 (1997).

I. PLAINTIFFS' CLAIMS RAISE THE FOUNDATIONAL THRESHOLD ISSUE OF WHETHER PLAINTIFFS ARE THE PROPER PARTIES IN INTEREST, WHICH TURNS ON SUBSTANTIAL QUESTIONS OF FEDERAL LAW

Plaintiffs' claims necessarily raise the substantial federal issue of whether, in the wake of HERA, these shareholder plaintiffs—rather than FHFA, as Fannie Mae's conservator—have the power to bring these claims at all. D.E. 1 at ¶ 12. Simply put, this fundamental issue, which turns on the interpretation of HERA, a federal law passed by the U.S. Congress during a period of national crisis, must be resolved before Plaintiffs can continue to prosecute their claim. Indeed, the scope of HERA's succession clause—and its implication for jurisdiction over suits brought by Fannie Mae and Freddie Mac shareholders—is a critical threshold question in a parade of federal cases challenging the Third Amendment and the Net Worth Sweep. *See supra* note 2. As Plaintiffs' motion itself demonstrates, the scope of HERA's succession clause is a threshold issue that is actually disputed and turns on substantial questions of federal law.

A. Plaintiffs' Rights Under HERA Are Not An "Anticipated Defense," But A Threshold Federal Issue That Is Ripe For Disposition

In their motion to remand, Plaintiffs make three arguments on this issue. First, they claim that the succession provision under HERA is "a defense" that may be invoked "at some point in this litigation." Mot. at 14. This argument fundamentally misconstrues the nature of the HERA succession provision. HERA is not merely a defense to Plaintiffs' claims; rather, through the succession provision, it presents a threshold federal issue of jurisdiction and standing, without which there is no knowing whether Plaintiffs have the power to bring these claims at all.

A federal question is presented where "the vindication of a right under state law necessarily turned on some construction of federal law." *See MSPA Claims 1, LLC v. Allstate Prop. & Cas. Ins. Co.*, No. 16-cv-20443, 2016 U.S. Dist. LEXIS 92958, at *8 (S.D. Fla. June 30, 2016) (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)); *see also*

Iberiabank v. Beneva 41-I, LLC, 701 F.3d 916, 919 n.4 (11th Cir. 2012) (finding federal jurisdiction over a state law contract claim turning on whether FDIC had the power to transfer the sublease at issue). Plaintiffs have themselves argued that FHFA's construction of HERA, if accepted, may eradicate their rights under state law. *See, e.g.*, Opp'n to FHFA Mot. to Substitute at 10 [D.E. 20] (contending that "it would still be improper to interpret HERA's language as transferring *all* shareholder rights, including the ability to bring direct causes of action to protect those rights, to the conservator"); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (A plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the rights or interests of third parties."). Plaintiffs may not now credibly change their tune and deny that their very ability to demonstrate standing to proceed here—which is itself a threshold jurisdictional issue—turns entirely on the Court's construction of federal law. *See, e.g.*, *ACLU of Fla., Inc. v. Dixie Cnty., Fla.*, 690 F.3d 1244, 1247 (11th Cir. 2012) ("Standing is a jurisdictional inquiry[.]"); *AFSCME Council 79 v. Scott*, 278 F.R.D. 664, 668 (S.D. Fla. 2011) ("Standing is an issue which cannot be conceded or waived and must be addressed prior to analyzing the merits of the case.").

Plaintiffs' standing under HERA is not a defense; unlike defenses, it is a threshold issue "necessarily raised by [Plaintiffs'] affirmative claims" which they must satisfy. *See New York v. Shinnecock Indian Nation*, 686 F.3d 133, 140 & n.4 (2d Cir. 2012) (cited in Mot. at 14). It is wishful thinking for Plaintiffs to characterize this issue as one that may be invoked "at some point in this litigation." As Plaintiffs well know (Mot. at 16 n.5), this jurisdictional issue is no hypothetical future hurdle; it has *already* been invoked by the true party-in-interest under HERA—FHFA. *See* FHFA's Renewed Motion to Substitute [D.E. 15]. FHFA has asserted its rights to Plaintiffs' claims and presently seeks to take over this Action in a fully briefed and submitted motion to substitute as plaintiff. *See generally id.* Relying on HERA, FHFA has argued that the shareholder "Plaintiffs lack standing to bring this suit and the Conservator is the only proper plaintiff." *Id.* at 1. As a result, the Court must grapple with Plaintiffs' and FHFA's rights under HERA before reaching the substance of their claims,[4] and Plaintiffs' ability to

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[4] FHFA has filed a brief opposing remand that articulates the bases for hearing the substitution motion prior to or concurrently with the remand motion. *See* FHFA's Opp'n to Remand; *see also, e.g.*, *Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 422, 423 (2007) ("bypassing issues of subject-matter" jurisdiction to "take the less burdensome course" to resolve the case);

establish a *prima facie* case turns entirely on whether, under HERA, shareholders retain any claim at all or whether such claims have been transferred to FHFA.

B. The Scope Of The Application Of HERA Is Actually Disputed

Plaintiffs' second argument, that the extent to which HERA assigns shareholder rights to FHFA as conservator for Fannie Mae is settled law (Mot. at 16), defies reality. Neither this Court nor the Eleventh Circuit or the Supreme Court has ever addressed the scope of HERA's succession provision. Though HERA's plain language makes clear that FHFA has succeeded to "all" shareholder rights, plaintiffs here and around the country continue to dispute the issue. Indeed, having briefed the issue at length for FHFA's motion to substitute (Mot. at 6-10 [D.E. 15]; Opp. at 5-10 [D.E. 20]); Reply at 4-9 [D.E. 34]; Sur-Reply at 1-2 [D.E. 38]). Plaintiffs cannot now seriously contend that the scope of HERA's succession provision is settled—much less settled in their favor.

HERA provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to (i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). The "language means what it plainly says; HERA transferred 'all rights previously held by Freddie Mac's shareholders.'" *Pagliara*, 2016 WL 4441978, at *5; *see also*, *e.g.*, *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (noting that "nothing was missed"); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) ("[U]nder the plain language of HERA, 'all rights, titles, powers, and privileges' of Freddie Mac's shareholders are now vested in the FHFA.").

Plaintiffs dispute that this provision of HERA actually transfers "all rights" to FHFA, as it plainly says, by arguing that the phrase "with respect to the regulated entity and the assets of the regulated entity" means that FHFA succeeded only to the right to bring a derivative lawsuit. Mot. at 15-16. In support, Plaintiffs cite two cases—*Lubin v. Skow*, 382 F. App'x 866 (11th Cir. 2010) (providing dicta regarding a provision in FIRREA), and *FDIC v. Jenkins*, 888 F.2d 1537

In re Facebook, Inc. IPO Deriv. Litig., 797 F.3d 148, 157 (2d Cir. 2015) (resolving shareholder standing before difficult additional subject-matter jurisdiction inquiry as "a proper exercise of judicial power—and good craft"); *Florida Ass'n of Med. Equip. Dealers, Med-Health Care v. Apfel*, 194 F.3d 1227, 1230 (11th Cir. 1999) ("[E]very court has an independent duty to review standing as a basis for jurisdiction at any time, for every case it adjudicates.").

(11th Cir. 1989) (holding without reference to FIRREA)—that do not address HERA's succession clause at all and are otherwise easily distinguished. *See* FHFA Mot. to Substitute Reply at 7-8 [D.E. 34]. Plaintiffs also cite a Seventh Circuit case, in which members of the panel themselves disagreed about the scope of HERA's succession clause. *See Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014) (Easterbrook, J.) (limiting "claims 'with respect to … the assets' of the institution" to claims that investors "would pursue derivatively"); *id.* at 673 (Hamilton, J., concurring) ("[I]f 'rights . . . of any stockholder' was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.").[5] In light of the foregoing, Plaintiffs cannot credibly deny that the scope of HERA's succession provision—and its application to the claims Plaintiff has asserted—is actually disputed by the parties in this case.[6]

C. The Scope Of Plaintiffs' Rights Under HERA Is A Substantial Federal Issue

Not only is the HERA succession issue threshold and disputed; it is also a "substantial" federal issue central to the disposition of a parade of high-profile federal actions by Fannie and Freddie shareholders challenging the Third Amendment. Plaintiffs nonetheless argue that the scope of HERA is not a "substantial federal issue" simply because the MDL Panel declined to consolidate several cases in which this federal issue was raised. Mot. at 17. But the MDL Panel's ruling turned on considerations not presented here. The choice facing the MDL Panel was one of ease of judicial administration—namely whether consolidated proceedings would aid in the expedient administration of justice due to, among other things, the benefits of coordinated discovery. By contrast, the choice here is one of federalism—whether the federal legal issues present in this case are sufficiently substantial to sustain federal jurisdiction—not efficiency.

Indeed, the MDL process highlighted how central this federal legal issue is to the many

[5] Though HERA should be construed in accordance with its plain meaning to authority for bringing direct actions to FHFA as conservator, it is not necessary to resolve that issue to deny remand. It is sufficient that the federal issue here is "actually disputed."

[6] Even if Plaintiffs were to prevail in their argument that their direct claims are preserved for them under HERA, there would remain key federal questions regarding the application of HERA to the claims at bar. Plaintiffs have argued that their claims are both direct and derivative under Delaware law. Opp. to FHFA Mot. to Substitute at 12 [D.E. 20]. Plaintiffs' cases have treated these "dual-natured claim[s]" as derivative in certain respects, including for threshold issues of "claim initiation." *See, e.g.*, *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 132 A.3d 67, 75 (Del. Ch. 2015) (noting that this approach "achieves the important goals of screening out weak claims and providing an efficient and centralized mechanism" for litigation).

Third Amendment cases pending in federal courts.[7] The Fannie Mae shareholders themselves argued that the MDL Panel should deny the motion to transfer because in the various federal actions—which assert different claims against different defendants—the common "questions pertaining to Defendants' liability are primarily legal in nature." Ex. 1, Robinson Opp'n to Motion for Transfer, *In re FHFA et al. PSPA Third Amendment Litigation*, MDL Docket No. 2713, at 5.[8] Whether a Fannie Mae shareholder plaintiff can sue, despite HERA's succession language, to challenge a transaction executed between two federal agencies will implicate numerous cases across many federal districts and is a substantial federal issue.

In short, regardless of how the standing issue is resolved—and the plain language of HERA indicates that it should be resolved against Plaintiffs—this foundational question about whether Plaintiffs can even bring their Complaint at all turns on a contested and substantial issue of federal law, sustains federal subject matter jurisdiction, and counsels against remand.

II. PLAINTIFFS' AIDING AND ABETTING CLAIMS RAISE SUBSTANTIAL FEDERAL ISSUES

Under Supreme Court precedent, Plaintiffs' allegations that Deloitte aided and abetted breaches of fiduciary duty by the US Treasury, FHFA, and Fannie Mae's directors and officers, respectively, comprise three logically distinct sets of claims, and each must be analyzed separately to determine whether federal jurisdiction exists as to any one or more of them. *Christianson v. Colt Indus. Operating Corp.*, 108 S. Ct. 2166, 2174-75 (1988) (finding that single "antitrust count" is in fact two separate claims for purposes of assessing jurisdiction); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005) ("[O]ne 'count' may be understood to encompass more than one 'claim,'" and a "single claim over which federal question jurisdiction exists is sufficient to allow removal"); *see also Gamoran v. Neuberger Berman Mgmt.*, No. 10-6234, 2010 WL 4537056, at *3-5 (S.D.N.Y. Nov. 8, 2010) (disaggregating plaintiff's state law causes of action into multiple claims and exercising "arising under" jurisdiction over state law claims requiring construction of a federal statute).

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[7] There are at least six actions relating to the Third Amendment pending in federal courts, and we are not aware of any in state court. *See supra* note 2. Moreover, at least four actions relating to the Third Amendment have been dismissed from federal courts. *See supra*, at 4.

[8] "Ex. __" herein shall refer to exhibits to the Declaration of Kevin M. McDonough submitted in conjunction with this memorandum.

Christianson provides guidance for rejecting Plaintiffs' transparent efforts to mischaracterize their three separate aiding and abetting claims as a single cause of action. In *Christianson*, the plaintiff asserted an "antitrust count" under the Sherman Act seeking damages, injunctive and equitable relief. 108 S. Ct. at 2172, 2174-75. The Court held that the antitrust count was, in fact, two separate claims requiring the plaintiff to prevail on different factual and legal questions, and that each separate claim was, in turn, based on multiple, alternative theories. *Id.* at 2175-76. The same is true here. Plaintiffs allege that Deloitte aided and abetted breaches of fiduciary duty by three different primary actors (the US Treasury, FHFA, and Fannie Mae's directors and officers). There are distinct legal and factual questions regarding the alleged duty and breach by each primary actor, and the alleged knowledge and substantial assistance by Deloitte. *See, e.g.*, Compl. ¶¶ 113-15 (for each count, providing different allegations for Fannie Mae's directors and officers (¶ 113), FHFA (¶ 114), and the US Treasury (¶ 115)); *Smith v. Copeland*, No. 09-1200, 2010 WL 2104667, at *5-6 (N.D. Ga. May 21, 2010) (analyzing one count of aiding and abetting two different primary actors as two separate claims).[9]

Accordingly, under *Christianson*, Plaintiffs have asserted three logically separate claims against Deloitte for aiding and abetting breaches of fiduciary duty (just as there would be three separate fiduciary duty claims against the primary actors), and federal jurisdiction exists if any one of the three aiding and abetting claims presents a contested and substantial issue of federal law. *See City of Chicago*, 522 U.S. at 164-66. As explained below, all three claims raise substantial issues of federal law and thus each satisfies the test for "arising under" jurisdiction.

A. Plaintiffs' Claim That Deloitte Aided And Abetted The US Treasury's Alleged Breaches Of Fiduciary Duty Necessarily Raises Substantial Federal Issues

Before Deloitte can be liable for aiding and abetting the US Treasury in breaching a fiduciary duty, Plaintiffs must first show that the US Treasury owed a fiduciary duty to Plaintiffs and breached it. That necessarily raises a purely legal, potentially dispositive and thus "substantial" federal issue: whether the US Treasury owes any fiduciary duties at all with respect to a corporation in federal conservatorship (and the shareholders who no longer possess

[9] *See also*, *e.g.*, *Richardson v. Reliance Nat'l Indem. Co.*, No. C 99-2952 CRB, 2000 WL 284211, at *11–12 (N.D. Cal. Mar. 9, 2000) (describing allegations that defendants aided and abetted different primary actors as different claims).

any shareholder rights). That issue cannot be resolved without applying federal law, as Plaintiffs' own Complaint makes clear. *See, e.g.*, Compl. ¶ 38 (alleging that conduct by the US Treasury and FHFA "ran directly contrary to FHFA's purported statutory mission" in 12 U.S.C. § 4617(b)(2)(D)), *id.* ¶ 41; 12 U.S.C. § 1719(g)(1)(A) (authorizing the US Treasury to purchase, with taxpayer funds, "any obligations and other securities issued by" Fannie Mae).

As a federal court dismissing one of the other Third Amendment cases very recently found, there is "no basis for applying" state fiduciary duty law to US Treasury's actions with respect to Fannie Mae in conservatorship because "there is no well established federal precedent applying such duties in this context" and "there is no evidence of Congressional intent to graft state fiduciary duties onto the Treasury's responsibilities under HERA." *Robinson*, 2016 WL 4726555, at *4 n.3 (citing *Hancock v. Train*, 426 U.S. 167, 179 (1976) ("[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation.")). Indeed, Plaintiffs do not cite a single case holding that the US Treasury owes fiduciary duties with respect to a corporation in which it has an interest—whether or not in federal conservatorship—much less that the US Treasury can ever be subject to *state law* fiduciary duties in any context, and we are aware of none.[10]

Further, Plaintiffs' contention that the US Treasury breached a fiduciary duty to Fannie Mae and its shareholders also necessarily raises substantial federal issues. First, the Court must analyze HERA to resolve the Complaint's specific allegation that the Net Worth Sweep violated HERA, Compl. ¶ 38, and if so, whether Deloitte aided the US Treasury in breaching any duties it owed, *see* 12 U.S.C. § 1455(1)(1)(a) (authorizing the US Treasury to make emergency purchases of Fannie Mae securities "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine"). Second, the substantial federal interest in the US Treasury's federal obligation "to act in the public interest as a fiscal agent of the United States" and "take action in 'unusual and exigent circumstances' when its failure to act 'would adversely affect the economy'" is controlling because application of state law would be inconsistent "with adequate protection of the federal interests at stake in stabilizing the national economy." *Starr Int'l Co., Inc. v. Fed. Res. Bank of New York*, 742 F.3d 37, 41-42 (2d Cir.

[10] The only authorities Plaintiffs could muster are a law review article and two dated Delaware Supreme Court cases that have nothing whatsoever to do with federal agencies. Mot. at 12.

2014) (dismissing suit challenging comparable measures taken by the Federal Reserve Bank of New York to rescue AIG from bankruptcy). Accordingly, if the US Treasury's alleged misconduct is governed by any law other than HERA, it must be "federal common law"—not state fiduciary law. *Id.* at 42; *see Robinson*, 2016 WL 4726555, at *4 n.3.

Because the indisputably important questions of whether the US Treasury owed and breached any fiduciary duties to Fannie Mae and its shareholders are issues of federal law, it is clear that a substantial federal issue is necessarily raised. *See Grable*, 545 U.S. at 314-16; *see also D'Alessio v. New York Stock Exch., Inc.*, 258 F.3d 93, 101-02 (2d Cir. 2001) (exercising "arising under" jurisdiction over state law claims requiring construction of federal securities laws and the rules and regulations promulgated thereunder).[11] Hence, "arising under" jurisdiction under *Grable* is satisfied, and remand would be improper.

B. Plaintiffs' Claim That Deloitte Aided And Abetted FHFA's Alleged Breaches Of Fiduciary Duty Necessarily Raises Substantial Federal Issues

Because the claim of aiding and abetting the US Treasury's breach of fiduciary duty indisputably raises substantial federal issues, the Court need not reach whether the claims regarding FHFA's conduct also sustain federal jurisdiction. But they do. FHFA is a federal agency created by HERA, and the allegations that FHFA owed and breached fiduciary duties necessarily raise critical federal issues with broad application in and beyond this action.

First, the threshold question of whether FHFA owes any fiduciary duties to Fannie Mae and its shareholders—an important federal issue being litigated extensively—clearly requires construction of HERA. Indeed, HERA makes clear that FHFA has no fiduciary duties to Fannie Mae or its shareholders. The statute authorizes FHFA to act in its own "best interests" and not Fannie Mae's best interests, *and* it precludes judicial action restraining or affecting FHFA's exercise of its powers as Fannie Mae's conservator. 12 U.S.C. § 4617(b)(2)(J)(ii) (authorizing FHFA to take whatever actions permitted under HERA that FHFA "determines is in the best interests of the regulated entity *or the Agency [FHFA]*") (emphasis added); *id.* at § 4617(f). Second, to the extent FHFA owes any fiduciary duties to Fannie Mae, those duties are

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[11] *See also In re Facebook, Inc.*, 922 F. Supp. 2d 475, 484 (S.D.N.Y. 2013) (holding that "inquiry as to whether NASDAQ's conduct in connection with the Facebook IPO was or was not consistent with the duties imposed upon NASDAQ as a national securities exchange" under federal rules implicates a "significant federal interest").

established by, and can be understood only in the context of, HERA. *See* 12 U.S.C. § 4617(b)(2) (granting FHFA all of the powers of Fannie Mae's directors, officers and shareholders); *id.* (granting FHFA broad powers to "operate" Fannie Mae, "carry on [its] business," enter into contracts on its behalf, and "transfer or sell any . . . asset . . . without any approval").

Accordingly, analysis of HERA is required to evaluate the scope and alleged violation of any duties FHFA owes to Fannie Mae and its shareholders. The Complaint acknowledges as much when it expressly alleges that the Net Worth Sweep violated HERA. Compl. ¶ 38 (quoting 12 U.S.C. § 4617(b)(2)(D) and asserting that "the Net Worth Sweep ran directly contrary to FHFA's purported statutory mission" and was a violation of fiduciary duty); *see also id.* ¶ 41 (alleging that Net Worth Sweep "violated Delaware ***and applicable federal law***") (emphasis added). Contrary to Plaintiffs' argument (Mot. at 10, 12), it defies common sense that HERA would at once empower FHFA act in its own "best interests" and do whatever is necessary to operate, rehabilitate or wind down Fannie—as well as shield FHFA from any judicial action to restrain its exercise of those powers, 12 U.S.C. § 4617(f)—and simultaneously leave FHFA subject to state fiduciary duty laws that may restrict its actions as Fannie Mae's conservator.

Ignoring the import of HERA and the uniquely federal interests it raises, Plaintiffs maintain that FHFA's fiduciary duty as a federally-created conservator of a federal government-sponsored enterprise is a matter of state law. Mot. at 11-13. But "as with Treasury, there is no indication that such [state] fiduciary duties exist" with respect to FHFA as Fannie Mae's conservator. *Robinson*, 2016 WL 4726555, at *6 n.4. Plaintiffs cite *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779 (D.C. Cir. 2008) as contrary authority, but *Pirelli* is a pre-HERA, pre-FHFA conservatorship decision that has no bearing on the source of any fiduciary duties that apply to FHFA acting as Fannie Mae's conservator. Moreover, *Pirelli* stands for the proposition that Fannie Mae's charter confers federal jurisdiction over this case, where Plaintiffs assert claims that belong to FHFA as Fannie Mae's conservator. *See* Section I, *supra*; *Pirelli*, 534 F.3d at 784-85 (construing 12 U.S.C. § 1723a(a)).

Plaintiffs' other authorities likewise fail to support their position. *See, e.g.*, *Atherton v. FDIC*, 117 S. Ct. 666, 674-75 (1997) (applying state law because the statute at issue contained an express savings clause, not present in HERA, that "preserves the applicability of stricter state standards"); *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2053 (1994) (expressly declining to

decide "whether 'federal law governs'").[12] The statutes at issue in *Atherton* or *O'Melveny & Myers* are unlike HERA in that they expressly provided for the application of state law in some circumstances or left gaps to be filled by state law. HERA is different. Congress enacted HERA to stave off a national financial crisis by giving FHFA broad powers to operate Fannie Mae and Freddie Mac in conservatorship, and the statute makes clear that "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as conservator. 12 U.S.C. § 4617(f). HERA's language and purpose are wholly inconsistent with Plaintiffs' effort to apply state law fiduciary standards to FHFA's exercise of the powers Congress gave it. Moreover, to the extent Plaintiffs dispute the meaning of HERA in this regard, that assertion alone raises a substantial federal issue.

C. Plaintiffs' Claim That Deloitte Aided And Abetted Alleged Breaches Of Fiduciary Duty By Fannie Mae's Directors And Officers Necessarily Raises Substantial Federal Issues

As if the federal issues inherent in Plaintiffs' allegations of breaches by the US Treasury and FHFA were not reason enough to deny their remand motion, Plaintiffs' separate claims that Fannie Mae's directors and officers failed to discharge their fiduciary duties also require resolution of substantial federal issues. To start with, a court addressing this claim must first resolve the threshold, purely legal question of whether and to what extent Fannie Mae directors and officers continue to have any fiduciary duties or any capacity to breach such duties while Fannie Mae is in conservatorship pursuant to HERA. If the conservatorship extinguishes such duties, then federal law governs—and invalidates—the claim. If the federal conservatorship does not extinguish the duties, but merely informs their scope, the Court would still need to engage HERA, which established the conservatorship, to decide whether those duties were breached.[13]

[12] Plaintiffs' inapt "common law conservatorship" cases address irrelevant issues involving incompetent persons. Mot. at 10 (citing cases).

[13] Moreover, according to HERA and Plaintiffs' own allegations, the Fannie Mae directors and officers were powerless to stop FHFA and the US Treasury. 12 U.S.C. § 4617(b)(2)(A) (ceding to FHFA "all rights, titles, [and] powers . . . of any . . . officer, or director" with respect to Fannie Mae); Compl. ¶ 36 (alleging Treasury's "de facto control over Fannie Mae"); *id.* ¶¶ 62, 71 (alleging that FHFA "forced" the directors and officers to take allegedly wrongful actions). As a matter of law, any alleged breach of fiduciary duty by Fannie Mae's directors and officers was meaningless, as the directors and officers did not cause, and could not have prevented, FHFA

Fannie Mae's charter and bylaws further reinforce the substantial federal issues animating its directors' and officers' fiduciary duties. Fannie Mae's federal charter permits it to "conduct its business without regard to any qualification or similar statute in any State of the United States." 12 U.S.C. § 1723a(a). Although the bylaws provide for reference to Delaware corporate law, they do so only "to the extent not inconsistent with the Charter Act and other Federal law, rules, and regulations." Ex. 2, Fannie Mae Bylaws §1.05. Thus, a claim that any officer or director violated a state law fiduciary duty to Fannie Mae—or that anyone aided and abetted such a violation—must first be evaluated under federal law.[14] The Court must resort to federal law to understand Fannie Mae's directors' and officers' fiduciary duties, establishing the requisite federal interest to sustain this Court's jurisdiction over Plaintiffs' claim that Deloitte aided and abetted the alleged breaches of fiduciary duty.

III. THE CAUSATION ELEMENT OF PLAINTIFFS' CLAIMS RAISES SUBSTANTIAL FEDERAL ISSUES

In any event, based on Plaintiffs' own allegations, each of their claims—the claims for negligent misrepresentation and the claims for aiding and abetting breaches of fiduciary duty—necessarily raises at least two federal issues in its pleading and proof of causation. Causation is a necessary element to both claims for negligent misrepresentation, *see, e.g.*, Restatement of Torts (Second) § 552 (recognizing "liability for pecuniary loss caused to [plaintiffs] by their justifiable reliance on the information"), and claims for aiding and abetting breach of fiduciary duty, *see id.* § 874 (recognizing "liability to the [plaintiff] for harm resulting from a breach of duty"). In Plaintiffs' Complaint, this essential element turns on the legal questions of whether and when HERA requires FHFA to terminate its conservatorship of Fannie Mae and whether and when federal auditing standards required Deloitte to take actions that would have allowed Fannie Mae

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and the US Treasury from executing the Third Amendment or Plaintiffs from suffering their alleged losses. Plaintiffs' artful pleading of this facially deficient claim should not bear on the Court's assessment of jurisdiction. *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1064 (11th Cir. 2010) (warning against "artful pleading" to "simply make federal jurisdiction disappear").

[14] Plaintiffs' assertion that Delaware law governs this claim, even though Fannie Mae is neither incorporated nor headquartered in Delaware, is not correct because the "source of the duty imposed . . . is found in federal law." *D'Alessio*, 258 F.3d at 101. Cases, like this one, claiming that a "federally regulated financial institution has violated its own rules," are "routinely held to invoke a substantial federal interest." *Capece v. DTC*, No. 05-80498, 2005 WL 4050118, at *8 (S.D. Fla. Oct. 11, 2005) ("[W]hether the entity subject to federal authority is public or private is of no moment so long as the inquiry requires examination of the federal regulatory scheme.").

to end its conservatorship.

A. The Complaint Necessarily Raises A Substantial Federal Issue Regarding Whether And When HERA Requires The Conservatorship To End

The causation element for each of Plaintiffs' claims turns on the allegation that, had Deloitte complied with its duties, FHFA would have terminated its conservatorship of Fannie Mae, thus restoring the full value of Plaintiffs' shares:

> Had Deloitte performed its public duty by either not issuing its false audit opinions for the audit years 2008-2013 or by issuing audit opinions with the disclosures required by the Auditing Standards, *Fannie Mae would have been able to exit the conservatorship* ***as required by law*** *and Plaintiffs would not have suffered their losses*.

Compl. ¶ 98 (emphasis added); *id.* ¶ 95 (same).

1. HERA Must Control The Conservatorship It Created

The only law that could require termination of the conservatorship is HERA, the federal law that created and governs the conservatorship. Plaintiffs themselves allege that the actions preventing Fannie Mae from exiting conservatorship violated HERA's provisions requiring FHFA to "put the regulated entity in a sound and solvent condition," "carry on the business of the regulated entity," and "preserve and conserve the assets and property of the regulated entity." Compl. ¶ 38 (quoting 12 U.S.C. § 4617(b)(2)(D)). Thus, the Court must construe the meaning of those and other provisions in HERA to determine whether Plaintiffs have adequately pled the causation element for their claims. *Id.* ¶¶ 95, 98.

Whether HERA requires the termination of Fannie Mae's conservatorship is a legal issue regarding the meaning of a federal statute, and resolution of that issue therefore "sensibly belongs in a federal court." *Grable*, 545 U.S. at 315; *Moss v. Premiere Credit of N. Am, LLC*, No. 11-123, 2012 WL 1014820, at *3 (S.D. Ga. Mar. 23, 2012) (denying motion to remand because whether defendant violated federal education and debt collection law was "substantial" federal issue); *Davis v. GMAC Mortg., LLC*, No. 11-95, 2012 WL 860389, at *4-7 (M.D. Ga. Mar. 13, 2012) (potentially dispositive issue involving interpretation of a federal regulation was "substantial").

HERA is a landmark federal statute, enacted during a historic collapse of the U.S. economy. The meaning of the statute, and in particular with respect to the termination of the conservatorships it authorized, is a bedrock federal issue of great importance that bears directly on numerous federal lawsuits pending across the country, the future of Fannie Mae and Freddie

Mac, the proper conduct of the independent federal agency (FHFA) acting as conservator, and the power of Congress to define the terms of that conservatorship and regulate the mortgage industry in the United States during a time of economic crisis. Accordingly, the construction of HERA in this context undoubtedly presents a "substantial" federal issue.

2. Plaintiffs' Arguments To The Contrary Are Unavailing

Plaintiffs offer three arguments against "arising under" jurisdiction on the basis of the HERA causation element they themselves pled in their Complaint. Each argument fails.

First, Plaintiffs incorrectly contend that the question of whether and when FHFA is "required by law," Compl. ¶¶ 95, 98, to terminate the conservatorship turns not on HERA but on undefined "common law principles of conservatorship," Mot. at 6. "HERA's grant of authority to the FHFA exceeds the normal bounds of conservatorship" and requires the Court to "look to the statutory text to determine the scope of FHFA's powers and responsibilities," *Robinson*, 2016 WL 4726555, at *6, and Plaintiffs' inapt authorities do not hold otherwise.[15] Accordingly, HERA applies, not a mysterious conservatorship common law, and its meaning presents a substantial federal question. *See id.* ("Plaintiff's voluminous references to general conservatorship duties are inapplicable to FHFA in its role as conservator.").

Next, Plaintiffs attempt to avoid federal jurisdiction by improperly suggesting alternative causation theories that do not appear on the face of their "well-pleaded complaint." *See Ehlen Floor Covering, Inc. v. Lamb*, 660 F.3d 1283, 1287 (11th Cir. 2011) ("Jurisdiction is determined by looking to the face of the plaintiffs' well-pleaded complaint . . . ."). Plaintiffs contend that a theory of reliance is set forth in Paragraphs 108 and 109 of the Complaint, but those paragraphs only allege that Deloitte breached duties to the Plaintiffs. Moreover, reliance is a separate element of Plaintiffs' negligent misrepresentation claims, not an alternative theory of causation.

Third and finally, Plaintiffs also point to Paragraph 97, which asserts that accounting manipulations by Fannie Mae's directors and officers "led directly to the loss of the value of Fannie Mae Stock." Compl. ¶ 97. This is not a separate causation theory but rather an explanation for how FHFA allegedly avoided terminating the conservatorship. According to

[15] *See RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1032-33 (11th Cir. 1995) (making clear that conservator's conduct is governed by the corresponding federal statutory regime); *Del E. Webb McQueen Develop. Corp. v. RTC*, 69 F.3d 355, 357 (9th Cir. 1995) (addressing classification of claims under a regulatory regime governing FSLIC receiverships).

Plaintiffs' own allegations, if the conservatorship had been terminated, they would have no losses, *id.* ¶ 98; their ability to prove causation therefore necessarily turns on a showing that FHFA would have been required to terminate the conservatorship, absent Deloitte's alleged violation of its duties, *id.*[16]

B. The Causation Element Of Plaintiffs' Claims Necessarily Raises Separate Substantial Federal Issues Regarding Federal Auditing Standards

Plaintiffs' allegations attempting to support the causation element of their claims also necessarily require the construction and application of auditing standards promulgated by the PCAOB, which indisputably are federal standards (the "Auditing Standards," per the Complaint). Plaintiffs expressly allege that "had Deloitte complied with the Auditing Standards by either requiring restatement or withdrawing its prior audit opinions, Fannie Mae would have been able to exit the conservatorship and Plaintiffs would not have suffered their losses." Compl. ¶¶ 95, 98. Whether PCAOB auditing standards required Deloitte to take any actions that could have resulted in Fannie Mae's exit from a federal conservatorship introduces a legal question turning on "just what PCAOB standards require, which is a question of federal law." *See In re Lehman Bros. Sec. and ERISA Litig.*, No. 09-md-2017, 2012 WL 983561, at *5 (S.D.N.Y. Mar. 22, 2012); *accord Navistar Int'l Corp. v. Deloitte & Touche LLP*, 837 F. Supp. 2d 926, 930 (N.D. Ill. 2011) ("[T]he PCAOB effectively federalized GAAS" auditing standards.).

Plaintiffs cite cases in which courts have concluded that alleged violations of PCAOB auditing standards—while presenting federal questions—did not necessarily require resolution of a substantial federal issue. But the allegations in those cases were fundamentally different than Plaintiffs' allegations. For instance, none of those cases incorporated PCAOB standards into an essential causation element of the claims at issue, and in fact, causation was not even an element

[16] Plaintiffs' well-pleaded complaint argument is unavailing, Mot. at 6, principally because the Complaint itself makes construction of HERA essential to their claims, *e.g.*, Compl. ¶¶ 95, 98. Plaintiffs' strategic articulation of their allegation—that absent Deloitte's alleged conduct, exit of the conservatorship would have been "required by law," rather than "required by HERA"—is not sufficient to defeat federal jurisdiction. Indeed, the canon of construction implicated by Plaintiffs' approach is not the "well-pleaded complaint," but the "artful pleading" doctrine. *See Christianson*, 108 S. Ct. at 2174 n.3 ("[M]erely because a claim makes no reference to federal patent law does not necessarily mean the claim does not 'arise under' patent law."); *Ayres v. GMC*, 234 F.3d 514, 518 n.7 (11th Cir. 2000) ("Removal will be held proper when the plaintiff has concealed a legitimate ground of removal by . . . inadvertence, or artful pleading . . . .").

of the Martin Act claims asserted in the *Lehman* case. 2012 WL 983561, at *5; *Navistar*, 837 F. Supp. 2d at 930. Further, the complaints in *Lehman* and *Navistar* presented alternative theories that did not turn on violations of PCAOB standards. *Lehman*, 2012 WL 983561, at *5-6; *Navistar*, 837 F. Supp. 2d at 931.[17] Plaintiffs have alleged no such alternative theories. Compl. ¶¶ 95, 97-98. Lastly, none of Plaintiffs' cases involves a uniquely federal dispute, as here where Deloitte's duties under PCAOB standards are inextricably intertwined with allegations that two federal agencies acting pursuant to broad federal statutory powers conspired to extract value from a federally-chartered entity to prolong a congressionally authorized conservatorship.[18]

Finally, contrary to Plaintiffs' assertion, there is no risk of disrupting the federal-state balance here. Federal courts routinely adjudicate cases requiring construction or application of federal auditing standards, including claims brought under state law. *See, e.g.*, *Meridian Horizon Fund, LP v. Tremont Holdings, Inc.*, 747 F. Supp. 2d 406 (S.D.N.Y. 2010). Exercising jurisdiction in the uniquely federal context in which this case arises—and where the federal auditing standards are central to Plaintiffs' proof of causation—poses no risk of opening the door to federal jurisdiction over typical state law claims asserting violations of federal auditing standards.

CONCLUSION

Plaintiffs' Complaint arises under federal law, because Plaintiffs' claims necessarily raise multiple substantial questions of federal law, including key questions regarding the propriety of the federal government's response to a historic financial crisis. There is an obvious, compelling and important federal interest in adjudicating these issues in federal court.

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[17] *See also Batchelor v. Deloitte & Touche, LLP*, No. 08-22686, 2009 WL 1255449 (S.D. Fla. Apr. 27, 2009) (finding that, unlike here, the complaint asserted violations of state law auditing standards); *Ekas v. Burris*, No. 07-061156, 2007 WL 4055630 (S.D. Fla. Nov. 14, 2007) (involving no claims whatsoever against auditors, much less claims that auditors violated federal auditing standards).

[18] Plaintiffs' reliance on *Merrell Dow*, Mot. at 7, is misplaced because the existence of a federal cause of action is not the test for "arising under" jurisdiction. *Grable*, 545 U.S. at 317 ("*Merrell Dow* cannot be read whole as overturning decades of precedent . . . and converting a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one."). To the extent private rights of action are relevant, Congress *has* created private rights of action for violations of PCAOB standards and conferred *exclusive* federal jurisdiction over such actions. 15 U.S.C. § 7202(b) (violations of PCAOB standards treated "for all purposes" as a violation of the Exchange Act, which creates exclusive federal jurisdiction).

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2), based on the import of the motions and the complexity of the issues presented, Deloitte respectfully requests a hearing on Plaintiffs' Motion to Remand and FHFA's related Renewed Motion to Substitute as Plaintiff. Deloitte estimates that such a hearing will require one hour of the Court's time.

Dated: Miami, Florida
September 14, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case Action No. 1:16-cv-21221-(Scola) (Otazo-Reyes)

MASTER SGT. ANTHONY R.
EDWARDS, USAF, RETIRED *et al.*

Plaintiff,

v.

DELOITTE & TOUCHE LLP,

Defendant,

DECLARATION OF KEVIN M. MCDONOUGH IN SUPPORT OF DEFENDANT DELOITTE & TOUCHE LLP'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

I, Kevin M. McDonough, am a Partner of the law firm of Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834. I am admitted to the Bars of the State of New Jersey and New York. I am submitting this declaration in support of Defendant Deloitte & Touche LLP's Response in Opposition to Plaintiffs' Motion to Remand.

1. Attached as Exhibit 1 is a true and correct copy of the Response of Plaintiff Arnetia Joyce Robinson in Opposition to the Motion for Transfer of Actions to the U.S. District Court for the District of Columbia, *In re FHFA et al. PSPA Third Amendment Litigation*, MDL Docket No. 2713 (April 6, 2016).

2. Attached as Exhibit 2 is a true and correct copy of the Fannie Mae Bylaws, available at http://www.fanniemae.com/resources/file/aboutus/pdf/ bylaws.pdf (last visited Sept. 14, 2016).

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

Executed on the 14th day of September 2016.

Respectfully submitted,

Kevin M. McDonough

**BEFORE THE UNITED STATES JUDICIAL
PANEL ON MULTIDISTRICT LITIGATION**

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

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

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

INTRODUCTION

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

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

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

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

SUMMARY OF ARGUMENT

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

Transfer is also inappropriate where, as here, "the material facts relating to liability are largely undisputed, . . . there is unlikely to be any merits discovery on liability, and . . . the only substantial issues are legal questions." FHFA *Transfer Tax* Opp'n at 3. FHFA has failed even to make the threshold showing required for centralization under Section 1407 (that the related actions have common *questions* of fact), and all three statutory factors that the Panel is required to consider (convenience of the parties and witnesses, justice, and efficiency) weigh against transfer of the related actions.

ARGUMENT

I. The Panel Should Deny Transfer Under Section 1407.

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

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

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

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

(1984).

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

Even if FHFA's only motive was to obtain a uniform legal determination, that would not suffice to support consolidation. *See infra*, at 12. FHFA's real purpose, however, appears to be to "preordain the outcome of the litigation" through "brazen" forum shopping, FHFA *Transfer Tax* Opp'n at 1, 8. The inference of forum shopping is strengthened by FHFA's pirouette on these issues since it took precisely the opposite position in *In re Real Estate Transfer Tax Litigation*, after the first decision on the common question of law came out against it: then, it was in favor of permitting the law to develop in multiple courts. *Id.* at 9. *See In re Louisiana-Pac. Corp. Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig.*, 867 F. Supp. 2d 1346, 1347 (J.P.M.L. 2012) ("These circumstances raise the concern that the request to centralize in E.D. North Carolina, where class certification has been granted, is based on considerations that are not entirely consistent with the purposes of Section 1407."). In that case, FHFA accused the movant of forum shopping. *See* FHFA *Transfer Tax* Opp'n at 1–2, 4, 8. "The panel ordinarily

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

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

Further evidencing FHFA's misuse of the statute is the fact that its motion suffers from the very same flaw it rightly decried in the motion for consolidation in *In re Real Estate Transfer Tax Litigation*: that the related cases lack common questions of fact. The Panel is authorized to transfer only "civil actions involving one or more common questions of fact." 28 U.S.C. § 1407(a). As FHFA knows, "[t]o satisfy this statutory prerequisite, the party seeking transfer may not simply allege *a common factual background*; it must instead present *outstanding factual questions* that remain unresolved and are subject to further exploration through discovery." FHFA *Transfer Tax* Opp'n at 5. "Where the actions involve largely undisputed facts and the overriding questions in each action are legal in nature, transfer under Section 1407 is not warranted, even if the threshold legal issues are 'common' across the cases." *Id.*

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

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[2] *See, e.g.*, *In re Brandywine Commc'ns Techs., LLC, Patent Litig.*, 959 F. Supp. 2d 1377, 1379 (J.P.M.L. 2013); *In re Klein*, 923 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013) (mem.); *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010); *In re Highway Accident Near Rockville, Conn., on Dec. 30, 1972*, 388 F. Supp. 574, 576 (J.P.M.L. 1975); *In re Concrete Pipe*, 302 F. Supp. 244, 255 (J.P.M.L. 1969) (Weigel, J., concurring).

[3] Indeed, in the past year, the Panel has denied consolidation in the only two cases in which the central issue was legal in nature. *See In re Clean Water Rule: Definition of "Waters of the United States"*, 2015 WL 6080727, at *1 (J.P.M.L. Oct. 13, 2015); *In re SFPP, LP, R.R. Prop. Rights Litig.*, 121 F. Supp. 3d 1360, 1361 (J.P.M.L. 2015) (mem.).

by the" litigation in the District of Columbia, where the defendants now urging centralization moved to dismiss the complaints, and the plaintiffs moved for summary judgment on their APA claims, implicitly "agreeing with the [Defendants'] assessment that no discovery was needed to resolve the question of [the Defendants'] liability . . . ." FHFA *Transfer Tax* Opp'n at 7. *See Perry Capital*, 70 F. Supp. 3d at 219 (describing procedural posture)[4]; *see also In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (mem.) ("As reflected by the conflicting summary judgment decisions already issued . . . this is primarily a *legal* question."). In Illinois, too, both plaintiffs and Defendants have taken the position that discovery is unnecessary because the case should be resolved on motions to dismiss or cross-motions for summary judgment. Joint Initial Status Report at 6, *Roberts v. FHFA*, No. 1:16-cv-2107 (N.D. Ill. Apr. 6, 2016), ECF No. 28. "Tellingly, [Defendants] identif[y] no common *questions* of fact to be decided in these actions," FHFA *Transfer Tax* Opp'n at 7. *See* FHFA Br. at 7; Treas. Br. at 3.[5] At most, Defendants identify common factual allegations. *See* FHFA Br. at 7; *see also* Treas. Br. at 3. Although it asserts that it will "contest plaintiffs' allegations should litigation progress," FHFA Br. at 7, FHFA does not identify the specific factual disputes that will be material to the resolution of legal issues in each of the suits. And Treasury has altogether denied the existence of questions of fact in the appeal from the litigation in the District of Columbia. Br. for the Treasury Dep't at 56, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. Dec. 21,

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

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

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

The principal "common events," FHFA Br. at 7, at the heart of this litigation are matters of public record. The material features of the PSPAs and their amendments, as well as their consequences for Fannie and Freddie and their shareholders, are undisputed. *See In re Removal from U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L. 2011) (denying transfer where factual questions are undisputed); *In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (same). Whatever factual disputes there are about the Defendants' *motive* for negotiating the Third Amendment will be resolved on the administrative record, as Treasury itself has argued. *See* Treas. App. Br. at 56. Lacking common questions of fact, or at least common questions that demand discovery, these actions do not qualify for transfer under Section 1407.

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

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

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

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

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

[6] In fact, it is rare that the Panel is even asked to transfer APA cases, despite the fact that agency actions frequently have nationwide effect and are therefore subject to simultaneous challenge in numerous courts throughout the country. To the contrary, the government often prefers to see such challenges litigated circuit-by-circuit. *See, e.g.*, *National Envt'l Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014) (noting federal agency's argument that "[t]o compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercircuit dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency's position" (alteration in original)). In the rare instances in which the Panel has granted motions to transfer challenges to agency action, the cases involved uncommon features that removed them from the norm of APA cases. In the most recent motion, for example, the challenges presented complex questions of fact, and the parties anticipated discovery beyond the administrative record. *See* Federal Defs.' Mot. to Transfer Actions at 12–13, *In re Endangered Species Act Section 4 Deadline Litig.*, MDL No. 2165 (J.P.M.L. Apr. 2, 2010), ECF No. 1; WildEarth Guardians' Resp. to Mot. to Transfer at 17, *In re Endangered Species Act Section 4 Deadline Litig.*, MDL No. 2165 (J.P.M.L. Apr. 23, 2010), ECF No. 9. In granting the motion to transfer, the Panel remarked on how "unusual" it was. *In re Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010) (mem.); *see also In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008) (noting that the group of cases was

dominated by questions of law rather than fact, and any factual disputes are resolved on an administrative record, without the aid of discovery. *In re Removal from U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d at 1350–51 ("These two cases, brought under the Administrative Procedure Act, are unlike many others that the Panel routinely encounters because there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matters."); *In re Clean Water Rule*, 2015 WL 6080727, at *1 (same); *In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d at 1381 (same). Moreover, if the Panel were to begin centralizing challenges to agency action, it would prejudice the maturation of the law "through full consideration by the courts of appeals" that the Supreme Court has held to be especially valuable in the context of agency review. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977).

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

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atypical of MDLs); *In re Dep't of Energy Stripper Well Exemption Litig.*, 472 F. Supp. 1282, 1285–86 (J.P.M.L. 1979) (enumerating material factual questions for which discovery would be required); *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969) (same).

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

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

Sales Practice Litig., 829 F. Supp. 2d at 1381. Both considerations are present here. The *Jacobs* action in Delaware involves claims that arise from state statutory and common law. The principal claims in that litigation assert that the Net Worth Sweep is an invalid term for preferred stock under Delaware and Virginia statutory law and, therefore, that it is void and unenforceable. These claims are entirely unique to the *Jacobs* litigation. The *Jacobs* case also includes common-law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. The two state actions that have been removed to federal court do not even challenge the Net Worth Sweep directly; instead, they make demands for inspection of Fannie's and Freddie's books and records under state statutes.[7] Because resolving motions to dismiss these claims or motions for summary judgment on these claims would require the court to apply different legal standards, there is little efficiency to be gained by consolidating them for pre-trial proceedings.

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

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

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

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

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

FHFA *Transfer Tax* Opp'n at 9; *see also Mendoza*, 464 U.S. at 160 ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."). "Where the actions involve largely undisputed facts and the overriding questions in each action are legal in nature, transfer under Section 1407 is not warranted, even if the threshold legal issues are 'common' across the cases." *Id.* at 5; *see In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d at 1351.

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

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

It is also true that the Panel has considered the advantage of avoiding "conflicting obligations placed upon the federal defendants," *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008), but that factor—which is present in all cases involving a challenge to administrative action—has not been given significant weight.[8] *See supra* note 6 and accompanying text (discussing the Panel's record on APA challenges). Nor should it be. Before Congress amended the venue statute in 1962 to make it possible for plaintiffs to sue federal agencies under the APA in the judicial district where they reside, suits to enjoin unlawful agency action normally had to be brought in Washington, D.C. *See Stafford v. Briggs*, 444 U.S. 527, 534–35 (1980). A feature of the post-1962 statutory scheme is that, when agencies adopt unlawful policies that affect many people across the country, they are simultaneously subject to suit in many districts. It is understandable that agency lawyers do not appreciate this, but there are other policy considerations that Congress thought more important. *See id.* If the Panel were to transfer every case that threatened a federal defendant with an inconsistent legal ruling, it would effectively thwart the will of Congress. *Cf. Safety Nat'l Cas. Corp. v. United States Dep't of Treasury*, 2007 WL 723 8943, at *4 (S.D. Tex. Aug. 20, 2007) (noting that the government defendants' analogous venue argument "would seem to undercut the . . . rationales behind the enactment and amendment of Section 1391(e)").

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

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

No such special justification exists here. Consolidation will, in fact, be inconvenient and inefficient due to the varying procedural postures of the related cases. The Panel has found that the presence of procedural disparities among the cases weighs heavily against centralization because, far from promoting efficiency, it delays more advanced actions and complicates proceedings.[9] *In re LVNV Funding, LLC, Time-Barred Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1376, 1378 (J.P.M.L. 2015) (mem.) (denying transfer when procedural disparities would produce "the opposite effect than intended by Section 1407"). Indeed, such disparities may constitute "the most significant obstacle to centralization of [otherwise similar] actions," *In re LVNV Funding, LLC, Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1374, 1375 (J.P.M.L. 2015) (mem.). Moreover, " 'principles of comity' weigh against transfer of any action 'that has an important motion under submission with a court.' " FHFA *Transfer Tax* Opp'n at 15–16 (quoting *In re L.E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975)); *see also In re Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d at 1381 (declining to transfer when "summary judgment motions are due to be fully briefed within a matter of weeks"). Even in a case in which the Panel otherwise considered consolidation appropriate, it declined to consolidate during the

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

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

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

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

Breach Litig., 109 F. Supp. 3d 1368, 1368–69 (J.P.M.L. 2015) (mem.) (quoting *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011)). The Panel routinely denies motions to transfer when voluntary coordination and alternative means of avoiding duplicative efforts are available.[10] These cases provide a classic example of an opportunity to use alternative methods of coordination and consolidation, short of the last resort of centralization for MDL treatment: There are few actions—and therefore few counsel—involved in the litigation. The defendants in each of the cases are the same. Counsel have been able to coordinate successfully in the past. For example, counsel have arranged to use materials gathered through discovery in the CFC in several of the related actions. Plaintiffs' counsel have also coordinated their opposition to the present motion.[11]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

April 6, 2016

Respectfully submitted,

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Appendix A

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

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

EXHIBIT 1

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

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

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

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

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

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

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

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

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

THE ENTERPRISES, THE CONSERVATOR, AND THE EXEMPTION STATUTES

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

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

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

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

<u>SUMMARY OF THE ARGUMENT</u>

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

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[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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[8] Efficiencies also can be gained without transfer because many plaintiffs share common counsel and thus can informally coordinate to resolve duplicative discovery. *See In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, MDL 2219, 2011 WL 346946 (J.P.M.L. Feb. 4, 2011) ("[T]he presence of common counsel for moving plaintiffs in actions filed shortly before the motion for centralization . . . also weigh[s] against centralization."). Indeed, plaintiffs in *Massey*, *Butts*, *Small*, and *Vadnais*, share common co-counsel, as do plaintiffs in *Oakland* / *Genesee* and *Hertel I* / *Hertel II*.

declaratory judgments as to liability for transfer taxes, so long as the classes are defined to include the state officials who have the authority to enforce payment of such taxes. Because the Enterprise Defendants expect that there will be no dispute as to the statewide classes, and (with one exception discussed below) no overlap between those classes, there is no potential for inconsistent class certification rulings. Centralization is thus not needed to protect against such a risk. *See, e.g.*, *In re: Gen. Mills, Inc., Yoplus Yogurt Prods. Mktg. & Sales Practices Litig.*, MDL 2169, 2010 WL 2346553 (J.P.M.L. June 8, 2010) (denying MDL transfer where one action was "already certified as a statewide class" and the remaining actions sought "similar putative statewide classes encompassing consumers from different states" because "the certified and putative classes will likely not overlap significantly").

As noted above, *Massey* (S.D. Ga.), is a putative multi-state class action; Fannie Mae has opposed class certification and moved to strike the nationwide class allegations. If the nationwide class is denied (or stricken), those plaintiffs can still seek to certify statewide classes, which defendants would not anticipate disputing (again, so long as the proper state tax authority or official is included as a plaintiff). To the extent there are multiple actions filed within a state, such as in (at present) West Virginia and Georgia, coordination or consolidation of those actions, rather than transfer of all actions, would avoid the risk of inconsistent, single-state class certification rulings.

4. Transfer Would Provide Only Limited Convenience Benefits

Centralization of the actions would provide little incremental convenience because the cases involve no factual disputes on the issue of whether the Enterprise Defendants are liable for transfer taxes—all agree that the Plaintiff states and counties impose a tax on the transfer of real estate, and that real estate is transferred directly and indirectly to and from Fannie Mae and

Freddie Mac within those jurisdictions. Hence, while Section 1407 directs the Panel to consider the convenience of the "witnesses," there will be no witnesses on that issue because there are no material facts in dispute. To the extent damages proceedings would be necessary, centralized discovery proceedings would serve no purpose nor provide any benefit. There will be nothing "common" to discover across these numerous state-wide cases, given the particularities of each state's practice; because damages must be calculated on a jurisdiction-by-jurisdiction basis the discovery needed to measure damages in one jurisdiction would not be of any use to any other jurisdiction. This leaves only motions practice in the various district courts, but with the benefits of electronic filing such activity requires little if any travel or coordination with local counsel. Accordingly, any convenience benefit of centralization would be modest, and could not outweigh the reality that the common disputed questions in these cases are legal. No purported convenience benefit could transform this litigation into one that meets the threshold "common question[] of fact" requirement of Section 1407.

II. ALTERNATIVELY, IF THE PANEL ORDERS TRANSFER, IT SHOULD DENY TRANSFER OF CERTAIN ACTIONS AND ORDER THAT THE REMAINING ACTIONS BE TRANSFERRED TO THE EASTERN DISTRICT OF VIRGINIA

Should the Panel be inclined to order transfer despite the foregoing arguments, the Enterprise Defendants respectfully request that the Panel (a) deny transfer of certain cases that are procedural outliers, and (b) transfer the remaining actions to the Eastern District of Virginia, a convenient and efficient forum in which a transfer tax action is already pending.

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

"Where there is such a significant procedural disparity among the subject actions, the Panel will take a close look at whether movants have met their burden of demonstrating that centralization will still serve the purposes of Section 1407." *In re Louisiana-Pacific Corp.*

Trimboard Siding Mktg., Sales Practices & Prods. Liab. Litig., MDL 2366, 2012 WL 2175773 (J.P.M.L. June 11, 2012). Indeed, the Panel has often found that "[t]he presence of procedural disparities among constituent cases is another factor that can weigh against centralization." *In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig.*, MDL 2134, 2010 WL 532561 (J.P.M.L. Feb. 12, 2010).[9]

Here, the cases run the gamut from far advanced (in the two cases pending before the Eastern District of Michigan class certification and liability issues have been resolved,[10] and damages proceedings have commenced) to only just commenced (in several actions, the complaint is the only substantive filing to date[11]). And some but not all of the actions would be controlled by the Sixth Circuit decision that would result if that Court grants a pending petition for interlocutory review. While these significant procedural disparities may suggest that centralization of any cases would be inappropriate, these disparities plainly preclude transfer and centralization of the most procedurally advanced cases at this time.

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

In this instance, the Panel should not transfer actions where a fully briefed dispositive motion is pending or has been decided. The Panel has consistently recognized that "principles of comity" weigh against transfer of any action "that has an important motion under submission

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[9] *See also In re Louisiana-Pacific Corp. Trimboard Siding Mktg, Sales Practices & Prods. Liab. Litig.*, MDL 2366, 2012 WL 2175773 (J.P.M.L. June 11, 2012) (denying transfer and noting that "[t]he efficiencies that could be achieved in the newly filed actions [was] apparent, but we are not convinced, even after oral argument, of how centralization would benefit the significantly more advanced . . . action pending in the proposed transferee district").

[10] Only one of the two Eastern District of Michigan actions—*Genesee*—is a class action.

[11] *See, e.g.*, *Nicolai* (M.D. Fla); *Hancock Cnty.* (S.D. W.Va.); *Goode* (S.D. W.Va.); *Vadnais* (D. Minn.); *Small* (E.D. Va.); *Butts* (D.S.C.); *Spoonamore* (E.D. Ky.).

with a court." *In re L. E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975).[12] Pragmatic considerations also favor allowing multiple district courts to consider the legal issues underlying liability—the variety of legal and analytical perspectives that multiple district court decision would reflect could benefit the Courts of Appeals in reaching their decisions. *See supra* 9. Accordingly, the Panel should not transfer any action in which a fully briefed dispositive motion is pending or has been decided at the time the Panel makes its decision (such as *Hertel I*, *Hertel II*, *Massey*, *Oakland*, and *Genesee*).[13] The remaining cases, however, are in early stages of litigation—in some, no defendant has even entered an appearance.[14] It makes little sense to combine such procedurally disparate cases into one MDL proceeding. Only those cases at the same stage of litigation—where dispositive motions have not been filed and fully briefed—should be considered for transfer and centralization.

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

Cases that could be controlled by a pending appeal are also procedurally different from cases that would not be so controlled. Accordingly, if it grants transfer, the Panel should exclude all cases that would be controlled by the Sixth Circuit appeal sought by the Enterprise

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[12] *Accord In re Res. Exploration, Inc., Sec. Litig.*, 483 F. Supp. 817, 822 (J.P.M.L. 1980); *In re Air Crash Disaster at Tenerife, Canary Islands on Mar. 27, 1977*, 435 F. Supp. 927, 928 (J.P.M.L. 1977); *In re Prof'l Hockey Antitrust Litig.*, 352 F. Supp. 1405, 1406 (J.P.M.L. 1973).

[13] *See* **Exhibit A** (identifying three Transfer Tax actions in which a fully briefed dispositive motion is currently pending and the two actions in which such a motion as already been decided). The dispositive motion pending on *Massey* (S.D. Ga.) does not address the statutory exemption issue; that issue will be addressed in future dispositive motions to be filed after class certification issues are settled.

[14] The Defendants intend to move to dismiss many, if not all, of the newly filed actions. To the extent that litigation in those cases is not stayed during the pendency of this motion to consolidate and thus motions to dismiss are fully briefed and heard before this Panel acts, those actions also should not be transferred at this time.

Defendants' pending petition for interlocutory review of Judge Roberts' decisions in *Genesee* and *Oakland*.[15] *See* Multidistrict Litig. Manual § 3:8 (2012) ("The Panel is not allowed to transfer cases . . . that are on appeal."). In *In re: Parallel Networks, LLC, ('111) Patent Litig.*, --- F. Supp. 2d ---, 2012 WL 2175762, at *2 n.4 (J.P.M.L. June 12, 2012), the Panel recently granted transfer under Section 1407, but refused to transfer one case where the district court in that case had already granted summary judgment and that ruling was pending on appeal (as would be the case here if the Sixth Circuit grants interlocutory review).[16] Accordingly, the Panel should not transfer any of the five transfer tax actions, including *Oakland* and *Genesee*, that are pending within the Sixth Circuit (or any other actions that may be filed in that circuit).

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

As noted above, there are a plethora of reasons for the Panel to reject Genesee's request to transfer these cases to Judge Roberts and, indeed, to deny the motion outright. If the Panel is nevertheless inclined to grant transfer, Defendants respectfully request that all transferable actions be centralized in the Eastern District of Virginia, where a transfer tax case is currently pending before the Honorable Henry E. Hudson.[17] In selecting a transferee forum, the Panel has

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[15] *See* **Exhibit B** (identifying five Transfer Tax actions pending in the Sixth Circuit). While the Enterprise Defendants cannot predict with certainty when the Sixth Circuit will act on the pending petition, as to which briefing closed June 8, 2012, they believe it is reasonable to anticipate a decision before the Panel will hear argument on the transfer motion.

[16] *See also In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311, 1314 (J.P.M.L. 1972) (denying transfer of claims where interlocutory appeal was pending at the time transfer was sought); *In re Mid-Air Collision Near Hendersonville, N.C. on July 19, 1967*, 297 F. Supp. 1039, 1040 (J.P.M.L. 1969) (same, observing that "action by the Panel at this time could disrupt the [appellate] review proceeding now in process"); *In re U. S. Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. at 1407 (denying transfer where the outcome of pending appeals "could have a substantial if not dispositive effect on all the actions pending in districts within those circuits").

[17] Enterprise Defendants also respectfully submit that the Alexandria Division of the Eastern District of Virginia would be an appropriate transferee forum; centralization there would entail at

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consistently considered factors such as:

- The proposed district's proximity to common defendants;
- The existence of a transferable action in the proposed district;
- The centrality of the proposed district to all pending actions;
- The proposed district's caseload;
- The substantive experience of the proposed district and transferee judge; and,
- The interests of the federal government.

All factors considered, the Eastern District of Virginia is the most appropriate transferee district.

First and foremost, the Eastern District of Virginia is convenient for the Enterprises, either or both of which are parties to every Transfer Tax case. Freddie Mac's principal place of business is located within that district at McLean, Virginia (in the Alexandria Division); Fannie Mae and FHFA are headquartered just a few miles away in Washington D.C. The Panel has consistently transferred to jurisdictions where common defendants—including the Enterprises—have their principal place of business.[18] That factor is especially strong where—as here—there is no single place where common factual events can be said to have occurred.[19]

The Eastern District of Virginia is also convenient for FHFA, which is located in Washington D.C. Where a federal agency has a substantial interest in the litigation, as FHFA

Footnote continued from previous page
least the same convenience benefits (if not more) as centralization before Judge Hudson, who sits in the Richmond Division.

[18] *See, e.g.*, *In re: Kaplan Higher Educ. Corp. Qui Tam Litig.*, 626 F. Supp. 2d 1323, 1324 (J.P.M.L. 2009) (transferring to district where defendant had one of its headquarters); *In re Fed. Nat'l Mortg. Ass'n Secs. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005) (transferring to the District of Columbia, in part, because "Fannie Mae [the common defendant] is headquartered within the District of Columbia").

[19] *See In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021 (J.P.M.L. 1978) (transferring to jurisdiction where defendant had its principal place of business, though it had no pending cases, because "[n]one of the districts in which actions are pending offers a strong nexus to the common factual questions in this litigation, and little discovery on those issues could be expected to occur in any of them").

does here, the Panel has often selected a transferee court near the agency's headquarters.[20] The district is also convenient for plaintiffs because these actions have been filed across the southeast, up and down the eastern seaboard, and in the midwest. The Eastern District of Virgnia's proximity to four major airports in the Washington, DC/Richmond area make it accessible and convenient for all parties and counsel.[21]

Additionally, the judges of the Eastern District of Virginia have the experience necessary to handle this litigation. For example, Judge Hudson is currently presiding over *Small*, a Transfer Tax action brought on behalf of a putative statewide class of Virginia officials. And the Panel has repeatedly selected the Eastern District of Virginia as a transferee forum.[22]

Finally, the Eastern District of Virginia is known as the "rocket docket" because "civil actions quickly move to trial or are otherwise resolved" by that court. *Pragmatus AV, LLC v.*

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[20] *See, e.g.*, *In re Practice of Naturopathy Litig.*, 434 F. Supp. 1240, 1243 (J.P.M.L. 1977) ("Because these 30 actions are pending throughout the entire United States, and because no overall focal point of discovery has emerged, no district stands out as the most appropriate transferee forum. On balance, however, we are persuaded that the District of Maryland is the most preferable. Inasmuch as the federal [agency] defendants are common to all actions in this litigation, several relevant documents and witnesses are located in nearby Washington, D. C. . . . The District of Maryland is the closest district to the District of Columbia wherein an action before us is pending."); *see also In re 1980 Decennial Census Adjustment Litig.*, 506 F. Supp. 648, 651 (J.P.M.L. 1981) (similar, selecting District of Maryland); *In re Swine Flu Immunization Prods. Liab. Litig.*, 446 F. Supp. 244, 247 (J.P.M.L. 1978) (selecting the District of Columbia, even though no action was pending there, because the department that exercised control over the program at issue was located there).

[21] *See In re Columbia Univ. Patent Litig.*, 313 F. Supp. 2d 1383, 1385 (J.P.M.L. 2004) (noting that "most of the parties in this litigation are in the eastern part of the United States, and thus the Massachusetts district should prove to be convenient for many of the litigants"); *In re Am. Gen. Life & Accident. Ins. Co. Indus. Life Ins. Litig.*, 175 F. Supp. 2d 1380, 1381 (J.P.M.L. 2001) ("In selecting the District of South Carolina as transferee district, we observe that the districts with pending actions and the location of the defendant give this litigation a Southern tilt.").

[22] *See, e.g.*, *In re Xyberbaut Corp. Sec. Litig.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005); *In re W. Elec. Co., Inc. Semiconductor Patent Litig.*, 415 F. Supp. 378, 379 (J.P.M.L. 1976); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316, 319 (J.P.M.L. 1975) *In re E. Airlines, Inc. Flight Attendant Weight Program Litig.*, 391 F. Supp. 763, 765 (J.P.M.L. 1975).

Facebook, Inc., 769 F. Supp. 2d 991, 996 (E.D. Va. 2011). Current statistics demonstrate that, on average, the Eastern District of Virginia disposes of civil cases in only 5.1 months—about 30% faster than the national average.[23] Simply put, if these actions are to be centralized, transfer to the Eastern District of Virginia would promote their just and efficient resolution.[24]

By contrast, transfer to the Eastern District of Michigan would be neither just nor efficient. Judge Roberts has already granted Genesee's motion for summary judgment and the only issues that remain are specific to those actions—namely, a calculation of damages for the relevant Michigan counties and the resolution of recently added claims based on Michigan state law. Accordingly, there would be little to no efficiency gained by transfer to that court. Finally, because the actions pending in the Sixth Circuit should not be included in any centralized proceeding, the Eastern District of Michigan has no interest in overseeing the Transfer Tax cases.

CONCLUSION

For the foregoing reasons, the Panel should deny Genesee's Motion For Transfer. Alternatively, if the Panel determines that transfer is appropriate, the Enterprise Defendants respectfully request that the Panel stay transfer of the actions identified in Exhibit A and transfer the remaining actions, identified in Exhibit B, to the Eastern District of Virginia.

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

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

Dated: July 23, 2012

Respectfully Submitted,

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**BEFORE THE UNITED STATES JUDICIAL
PANEL ON MULTIDISTRICT LITIGATION**

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

CERTIFICATE OF SERVICE

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

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FANNIE MAE BYLAWS
As amended through July 21, 2016

The Director of the Federal Housing Finance Agency, or FHFA, Fannie Mae's safety, soundness and mission regulator, appointed FHFA as conservator of Fannie Mae on September 6, 2008. As conservator, FHFA succeeded to all rights, titles, powers and privileges of the corporation, and of any stockholder, officer or director of the corporation with respect to the corporation and its assets, and may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of Fannie Mae. On November 24, 2008, FHFA, as conservator, reconstituted the Fannie Mae Board of Directors (Board) and directed the functions and authorities of the Board. The Board serves on behalf of the conservator and shall exercise their authority as directed by the conservator. The Bylaws should be read in conjunction with an understanding of the Company's conservatorship status.

Article 1: General Provisions

Section 1.01. *Name.* The name of the corporation is Federal National Mortgage Association. The corporation may also do business under the name Fannie Mae.

Section 1.02. *Principal Office and Other Offices.* The principal office of the corporation shall be in the District of Columbia. Other offices of the corporation shall be in such places as may be deemed by the Board of Directors or the Chief Executive Officer to be necessary or appropriate.

Section 1.03. *Seal.* The seal of the corporation shall be of such design as shall be approved and adopted from time to time by the Board of Directors, and the seal or a facsimile thereof may be affixed by any person authorized by the Board of Directors or these Bylaws by impression, by printing, by rubber stamp, or otherwise.

Section 1.04. *Fiscal Year.* The fiscal year of the corporation shall end on the 31st day of December of each year.

Section 1.05. *Corporate Governance Practices and Procedures.* Pursuant to Sections 12 C.F.R. 1236 and 1239 of the Federal Housing Finance Agency Regulations (the "FHFA Regulation"), to the extent not inconsistent with the Charter Act and other Federal law, rules, and regulations, the corporation has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law, as the same may be amended from time to time. The inclusion of Sections 1.01, 1.02, 1.05, 2.01, 2.02, 2.03, 2.10, 3.08(b), 3.08(c), 4.01, 4.02, 4.03 and 4.19, Articles 6, 7 and 8, and any new bylaw which may be adopted from time to time and designated as a "Certificate Provision" in accordance with Section 7.01 (collectively, the "Certificate Provisions") in these Bylaws shall constitute inclusion in the corporation's "certificate of incorporation" for all purposes of the Delaware General Corporation Law. The inclusion in these Bylaws of bylaws that are not Certificate Provisions (collectively, the "Bylaw Provisions") shall constitute inclusion in the corporation's "bylaws" for all purposes of the Delaware General Corporation Law.

Article 2: Capital Stock

Section 2.01. *Common Stock.* The common stock, all of which is voting and has no par value, shall have a stated value per share as determined from time to time by the Board of Directors. Shares of the corporation may be acquired and held in the treasury of the corporation, and may be disposed of by the corporation for such consideration and for such purposes as may be determined from time to time by the Board of Directors.

Section 2.02. *Preferred Stock.* The corporation shall have authority to issue up to 700,000,000 shares of preferred stock having no par value. The preferred stock may be issued from time to time in one or more series upon approval by the Board of Directors, or a committee thereof appointed for such purpose, and the Board of Directors or such committee may, by resolution providing for the issuance of such preferred stock, designate with respect to such shares: (a) their voting powers; (b) their rights of redemption; (c) their right to receive dividends (which may be cumulative or non-cumulative) including the dividend rate or rates, conditions to payment, and the relative preferences in relation to the dividends payable on any other class or classes or series of stock; (d) their rights upon the dissolution of, or upon any distribution of the assets of, the corporation; (e) their rights to convert into, or exchange for, shares of any other class or classes of stock of the corporation, including the price or prices or the rate of exchange; and (f) other relative, participating, optional or special rights, qualifications, limitations or restrictions. Notwithstanding Sections 4.12(a)(6) and 4.17 of these Bylaws, the Board of Directors may authorize a committee of the Board to declare dividends on preferred stock.

Section 2.03. *Payment for Shares.* The consideration to be received by the corporation for the issuance of common shares shall be fixed from time to time by the Board of Directors. A subscriber shall be entitled to issuance of shares upon receipt by the corporation of the consideration for which the shares are to be issued. No certificates shall be issued for any share until the share is fully paid, and, when issued, such shares shall be nonassessable.

Section 2.04. *Uncertificated Shares.* Any shares of stock of any class or series of the corporation shall be issued in uncertificated form pursuant to customary arrangements for issuing shares in such form, unless a stock certificate is requested by a stockholder.

Section 2.05. *Certificates Representing Shares.* Each registered holder of the capital stock of the corporation shall be entitled to a certificate or certificates signed by the Chairman of the Board of Directors or the President and by the Secretary or an Assistant Secretary of the corporation, and sealed with the seal of the corporation certifying the number of shares owned by him in the corporation. The certificates shall be in such form as the Board, from time to time, may approve. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue.

Section 2.06. *Transfers of Stock.* Transfers of stock shall be made upon the books of the corporation at the request of either the registered holder of the stock or the attorney, lawfully constituted in writing, of such registered holder and, in the case of a holder with a certificate, on surrender for cancellation of the certificate for such share or, in the case of a holder with an uncertificated share, on presentment of proper evidence of succession, assignation or authority to transfer in accordance with customary procedures for transferring shares in uncertificated form.

Section 2.07. *Registered Holder.* The corporation shall be entitled to treat the registered holder of any share or shares of stock as the holder in fact thereof and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person whether or not it shall have express or other notice thereof, save as expressly provided by the laws of the State of Delaware insofar as they are applicable to the stock of stock corporations organized under the Delaware General Corporation Law.

Section 2.08. *Loss or Destruction of Certificate of Stock.* In case of loss or destruction of any certificate of stock, another may be issued in its place, pursuant to such requirements and procedures as may be established by the Secretary of the corporation with the concurrence of the General Counsel (including, without limitation, requiring provision of a surety bond).

Section 2.09. *Stockholder Records.*

(a) The corporation shall keep at its principal place of business, or at the office of its transfer agent or registrar, a record of its stockholders, giving the names and addresses of all stockholders and the number of shares held by each.

(b) The officer who has charge of the stock ledger of the corporation shall prepare and make, at least 10 days before every meeting of stockholders, a complete list of the stockholders entitled to vote at said meeting, arranged in alphabetical order, showing the address of and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, for a period of at least 10 days prior to the meeting, during ordinary business hours, at the principal place of business of the corporation or as may otherwise be permitted by the Delaware General Corporation Law. The list shall be produced and kept at the time and place of the meeting during the whole time thereof and may be inspected by any stockholder who is present.

Section 2.10. *Registration of common and preferred stock.* The corporation shall register its common and preferred stock with the Securities and Exchange Commission as required pursuant to Sections 12(b) or (g) of the Securities Exchange Act of 1934, as amended, and shall take appropriate steps to maintain such registration. Notwithstanding anything to the contrary contained in Section 7.02 of these Bylaws, this Section 2.10 may be altered, amended, or repealed only by the unanimous vote or consent of all the then incumbent Members of the Board then in office.

Article 3: The Stockholders

Section 3.01. *Place of Meetings.* Meetings of the stockholders of the corporation shall be held at such place or places, within or without the District of Columbia, as shall be determined by the Board of Directors; and the Chairman of the Board (or in his absence another person designated by the Board of Directors) shall preside at all such meetings.

Section 3.02. *Annual Meeting.* The annual meeting of stockholders shall be held on such date and at such time as the Board of Directors may designate.

Section 3.03. *Special Meetings.* Special meetings of the stockholders may be called by the Board of Directors or the Chairman of the Board, or at the request of the holders of not less than one-third of all the shares entitled to vote, to be determined as of the close of the first day of the

month preceding the month in which the request is presented to the Secretary. Business transacted at all special meetings shall be confined to the subjects stated in the notice of special meeting.

Section 3.04. *Notice of Meetings — Waiver and Adjourned Meetings.* Written notice stating the place, date and hour of the meeting, and the purpose or purposes for which the meeting is called, shall be delivered not less than 10, nor more than 60, days before the date of the meeting, by the Secretary of the corporation, to each registered holder entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the registered holder at his address as it appears on the stock transfer books of the corporation, with first class postage prepaid. Waiver by a stockholder in writing of notice of a stockholders' meeting, signed by him either before or after the time of the meeting, shall be equivalent to the giving of such notice. Attendance by a stockholder at a stockholders' meeting, whether in person or by proxy, without objection to the notice or lack thereof, shall constitute a waiver of notice of the meeting. Any meeting of stockholders may be adjourned by the chair of the meeting to reconvene at another time or place. When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than 30 days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

Section 3.05. *Fixing Record Date*

(a) For the purpose of determining stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the Board of Directors may fix a date as the record date. Such date, in any case, shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors and shall be not more than 60 days and not less than 10 days prior to the date of such meeting. If no such record date is fixed, the close of business on the day next preceding the day on which notice is given, or, if notice is waived, the close of business on the day next preceding the date on which the meeting is held shall be the record date for the determination of stockholders entitled to notice of or to vote at a meeting of stockholders. When a determination of stockholders entitled to vote at any meeting of stockholders has been made, as provided in this section, the determination shall apply to any adjournment thereof, provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

(b) For the purpose of determining stockholders entitled to receive payment of any dividend, or in order to make a determination of stockholders for any other purpose (except as provided in Section 3.05(a), the Board of Directors or a duly authorized Committee thereof may fix a date as the record date. Such date, in any case, shall not precede the date upon which the resolution fixing the record date is adopted and shall be not more than 60 days prior to the date on which the particular action is to be taken. If no such record date is fixed, the close of business on the day on which the resolution relating thereto is adopted shall be the record date for the determination of stockholders.

Section 3.06. *Quorum.* A majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of stockholders. The stockholders present at a duly organized meeting may continue to do business until adjournment, notwithstanding the withdrawal of the holders of enough shares to leave less than a quorum. If a meeting cannot be

organized because a quorum has not attended, either the chair of the meeting, or those stockholders present, in person or by proxy, by a majority of the votes cast by such stockholders so present, may adjourn the meeting from time to time until a quorum is present when any business may be transacted that may have been transacted at the meeting as originally called.

Section 3.07. *Proxies.* A stockholder may vote either in person or by proxy executed in writing by the stockholder or his duly authorized representative. No proxy shall be valid after 11 months from the date of its execution, unless otherwise expressly provided in the proxy.

Section 3.08. *Voting*

(a) At every meeting of the stockholders, every holder of the common stock shall be entitled to one vote for each share of common stock registered in the name of such holder on the stock transfer books of the corporation at the close of the record date. A proxy purporting to be executed by a corporation shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger. A proxy purporting to be executed by a partnership shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger. Unless a higher percentage of affirmative votes is required by the Charter Act, these Bylaws, applicable stock exchange rules or regulations, or other applicable Federal law, rules, or regulations, the stockholders will have approved any matter if, at a meeting at which a quorum is present, the votes cast by the stockholders present, either in person or by proxy and entitled to vote thereon, in favor of such matter exceed the votes cast by such stockholders against such matter.

(b) Except as provided in Section 308 (b) of the Charter Act, members of the Board of Directors shall be elected by a majority of the votes cast in person or by proxy at any meeting that includes the election of directors at which a quorum is present, provided that if (i) the number of nominees exceeds the number of directors to be elected or (ii) the Secretary of the Corporation received notice that a stockholder nominated a person for election to the Board of Directors in accordance with Section 4.21 of these Bylaws, and that nomination has not been withdrawn by the stockholder on or before the tenth day preceding the date the corporation first mails its meeting notice to stockholders, the directors are to be elected by a plurality of the votes cast in person or by proxy. For purposes of this Section, a majority of the votes cast means that the number of shares voted "for" a director must exceed the number of votes cast "against" that director. For purposes of this Section, if plurality voting is applicable to the election of directors at any meeting, the director nominees who receive the highest number of votes cast "for", without regard to votes cast "against," shall be elected as directors up to the total number of directors to be elected at that meeting. Abstentions and broker non-votes will not count as a vote cast with respect to a director's election.

(c) If an incumbent director fails to receive the required vote for re-election, the Nominating and Corporate Governance Committee will review the director's previously submitted irrevocable resignation (which is contingent upon (i) his or her failure to receive the required vote and (ii) Board acceptance of such resignation), will act on an expedited basis to determine whether to accept such director's resignation, and will submit such recommendation for prompt consideration by the Board. The Board expects the director whose resignation is under consideration to abstain from participating in any decision regarding that resignation. The Nominating and Corporate Governance Committee and the Board may consider any factors they deem relevant in deciding whether to accept a director's resignation. The Board will publicly disclose (in accordance with Section 3.12 of these Bylaws) its decision regarding the tendered resignation and the rationale for the decision within 90 days after the date of certification of the election results. If such incumbent director's resignation is not accepted by

the Board, such director will continue to serve until the next meeting that includes the election of directors and until his or her successor is chosen and qualified, or his or her death, resignation, or retirement or removal in accordance with applicable law or regulation, whichever event shall first occur. If a director's resignation is accepted by the Board, or if a nominee for director is not elected and the nominee is not an incumbent director, then the Board, in its sole discretion, may fill any resulting vacancy pursuant to the provisions of Section 308(b) of the Charter Act.

Section 3.09. *Inspectors of Votes.* The Board of Directors, in advance of any meeting of stockholders, shall appoint one or more Inspectors of Votes to act at the meeting or any adjournment thereof and make a written report thereof. One or more persons may be designated as alternates to replace any Inspector of Votes who fails to act. In case any person so appointed Inspector of Votes or alternate resigns or fails to act, the vacancy shall be filled by appointment made by the chairman of the meeting. The Inspectors of Votes shall (a) ascertain the number of shares outstanding and the voting power of each and determine all questions concerning the qualification of voters; (b) determine the shares represented at the meeting and the validity of proxies and ballots; (c) determine all questions concerning the acceptance or rejection of votes and, with respect to each vote by ballot, shall collect and count all votes and ballots; (d) determine and retain for a reasonable period a record of the disposition of any challenges made to any determination by the Inspectors of Votes; and (e) report in writing to the secretary of the meeting their determination of the number of shares represented at the meeting, and their count of all votes and ballots. The Inspectors of Votes need not be stockholders of the corporation. No person who is an officer or Member of the Board of Directors of the corporation, or who is a candidate for election as a Member of the Board of Directors, shall be eligible to be an Inspector of Votes. Any report or certificate by the Inspectors of Votes shall be prima facie evidence of the facts stated and of the votes as certified by them.

Section 3.10. *Stockholder Notices to the Corporation.* Whenever notice is to be given to the corporation by a stockholder under any provision of law or of these Bylaws, such notice shall be delivered to the Secretary at the principal executive offices of the corporation. If delivered by electronic mail or facsimile, the stockholder's notice shall be directed to the Secretary at the electronic mail address or facsimile number, as the case may be, specified in the corporation's most recent proxy statement.

Section 3.11. *Conduct of Meetings.* The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at such meeting by the person presiding over the meeting. The Board of Directors may adopt by resolution such rules or regulations for the conduct of meetings of stockholders as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board of Directors, the chair of any meeting of stockholders shall have the right and authority to prescribe such rules, regulations and procedures and to do all such acts as, in the judgment of such chair, are appropriate for the proper conduct of the meeting. Such rules, regulations or procedures, whether adopted by the Board of Directors or prescribed by the chair of the meeting, may include, without limitation, the following: (a) the establishment of an agenda or order of business for the meeting; (b) rules and procedures for maintaining order at the meeting and the safety of those present; (c) limitations on attendance at or participation in the meeting to stockholders of record of the corporation, their duly authorized and constituted proxies, or such other persons as the chair shall permit; (d) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (e) limitations on the time allotted to questions or comments by participants. Meetings of stockholders shall not be required to be held in accordance with rules of parliamentary procedure.

Section 3.12. *Notice of Business to be Brought Before an Annual Meeting.* At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (a) specified in the notice of meeting (or any supplement thereto) given by or at the direction of the Board of Directors; (b) otherwise properly brought before the meeting by or at the direction of the Board of Directors; or (c) otherwise properly brought before the meeting by a stockholder. For business to be properly brought before an annual meeting by a stockholder (other than the nomination of a person for election as a director, which is governed by Section 4.21 of these Bylaws), the stockholder must have given timely notice thereof in writing to the Secretary of the corporation. To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the corporation not earlier than the close of business on the 120th day and not later than the close of business on the 60th day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 60th day prior to such annual meeting and the 10th day following the day on which public disclosure of the date of such meeting is first made by the corporation. In no event shall the public disclosure of an adjournment of an annual meeting commence a new time period for the giving of a stockholder's notice as described above. (For purposes of these Bylaws, public disclosure shall be deemed to include a disclosure made in a press release reported by the Dow Jones News Services, Associated Press or a comparable national news service or in a document filed by the corporation with the Securities and Exchange Commission pursuant to Section 13 of the Securities Exchange Act of 1934, as amended.) A stockholder's notice to the Secretary shall set forth as to each matter the stockholder proposes to bring before the annual meeting (A) a brief description of the business desired to be brought before the annual meeting and the reasons for conducting such business at the annual meeting; (B) the name and address, as they appear on the corporation's books, of the stockholder proposing such business; (C) the class and number of shares of the corporation that are beneficially owned by the stockholder; and (D) any material interest of the stockholder in such business. Notwithstanding anything in these Bylaws to the contrary, no business shall be conducted at any annual meeting except in accordance with the procedures set forth in this Section 3.12. The chair of the annual meeting shall, if the facts warrant, determine and declare to the meeting that business was not properly brought before the meeting in accordance with the provisions of this Section 3.12, and if he or she should so determine, he or she shall so declare to the meeting and any such business not properly brought before the meeting shall not be transacted.

Article 4: The Board of Directors

Section 4.01. *General Policies.* General policies governing the operations of the corporation shall be determined by the Board of Directors.

Section 4.02. *Membership.* The Board of Directors shall consist of those Members appointed and elected as provided by law.

Section 4.03. *Term of Members.* Each Member shall hold office for the term for which he is elected or appointed and until his successor is chosen and qualified, or his death, resignation, or retirement or removal in accordance with applicable law or regulation, whichever event shall first occur.

Section 4.04. *Regular Meetings.* The Board of Directors shall meet in regular meetings at such times as shall be determined by the Board from time to time, except as provided in section 4.05 and except when the Chairman of the Board shall notify the Secretary of a different date prior to a scheduled regular meeting. Each regular meeting shall be held at the principal office of the corporation in the District of Columbia, unless special provision is made by the Board, in advance of any such regular meeting, to hold that meeting at another place, either within or without the District of Columbia.

Section 4.05. *Annual Meeting.* Immediately following the annual meeting of the stockholders, the Board of Directors shall meet each year for the purpose of considering any business that may properly be brought before the meeting, and such annual meeting of the Board shall be a regular meeting.

Section 4.06. *Special Meetings.* Other meetings of the Board of Directors may be held upon the call of the Chairman of the Board of Directors, or of a majority of the then incumbent Members of the Board. Each special meeting shall be held at the principal office in the District of Columbia unless the Chairman of the Board prescribes and the notice specifies another place.

Section 4.07. *Notice of Meetings — Waiver.* No notice of any kind to Members of the Board of Directors shall be necessary for any regular meeting that is held on a date determined by the Board, or for the annual meeting. In the case of a regular meeting on a different date, notice shall be given to each Member by the Secretary; in the case of a special meeting, notice shall be given to each Member by the Secretary at the direction of the calling authority. Such notice shall be in writing and sent to the address on file with the Secretary of the corporation not later than during the third day immediately preceding the day for the meeting; or by word of mouth, telephone, facsimile or electronic mail, directed to the telephone number, facsimile number or electronic mail address, as the case may be, on file with the Secretary of the corporation, not later than during the second day immediately preceding the day for the meeting. The attendance of any Member at a meeting shall constitute a waiver of notice by such Member, except where such Member attends for the express purpose of protesting at the beginning of the meeting the lack of notice of the meeting. Neither the business to be transacted at, nor the purpose of, any meeting of the Board of Directors need be specified in the notice of the meeting.

Section 4.08. *The Chairman of the Board of Directors.* The Chairman of the Board of Directors may be chosen by the Board at any meeting of the Board from among the Members, and his tenure shall commence immediately and continue until the next succeeding annual meeting of the Board, or until his successor is chosen, whichever occurs first. The Chairman of the Board (or in his absence another person designated by the Board of Directors) shall preside at all meetings of the Board of Directors and at meetings of stockholders. In addition, the Chairman of the Board shall have such powers and perform such duties as the Board may prescribe. Except as otherwise provided by law, the Charter Act, these Bylaws, or the Board, the Chairman shall have plenary authority to perform all duties as may be assigned to him from time to time by the Board.

Section 4.08a. *The Vice Chairman of the Board of Directors.* The Board of Directors may from time to time elect from among the Members of the Board one or more Vice Chairmen of the Board. Any such Vice Chairman shall have such powers and shall perform such duties as the Board of Directors may prescribe or as the Chairman of the Board shall delegate to him.

Section 4.09. *Quorum.* The presence, in person or otherwise in accordance with section 4.18 hereof, of a majority of the then incumbent Members of the Board of Directors or of a Board Committee, as applicable, at the time of any meeting of the Board or such Committee, shall constitute a quorum for the transaction of business. The act of the majority of such Members present at a meeting at which a quorum is present shall be the act of the Board of Directors unless the act of a greater number is required by these Bylaws. Members may not be represented by proxy at any meeting of the Board of Directors or a Board Committee.

Section 4.10. *Action Without a Meeting.* Any policy or action that may be approved or taken at a meeting of the Board or of any Board Committee may be approved or taken without a meeting if all incumbent Members of the Board or the Committee, as the case may be, consent thereto in writing and the writings are filed with the minutes of the proceedings of the Board or the Committee.

Section 4.11. *Facsimile Signatures.* The Board of Directors, the Chairman of the Board, the Chief Executive Officer or any designee of the Chief Executive Officer may authorize the use of facsimile signatures in lieu of manual signatures.

Section 4.12. *Executive Committee.*

(a) The Executive Committee of the Board shall consist of at least five Members who shall be designated by the Board and serve at the pleasure of the Board. One of the members of the Executive Committee shall be the Chief Executive Officer of the corporation who may also, but is not required to, be chair of the Committee. The designation of such Committee and the delegation thereto of authority shall not alone relieve any director of any duty he owes the corporation. The Executive Committee, during the interim between Board meetings, shall have the authority of the Board, except that it shall not have the authority to take any of the following actions:

1. The submission to stockholders of any action requiring stockholders' authorization.

2. The filling of vacancies on the Board of Directors or on the Executive Committee.

3. The fixing of compensation of the directors for serving on the Board or on the Executive Committee.

4. The appointment or removal of the Chairman of the Board, Chief Executive Officer, President, any Vice Chairman, and any Executive Vice President, except that vacancies in established positions may be filled subject to ratification by the Board of Directors.

5. The amendment or repeal of these Bylaws or the adoption of new bylaws.

6. The declaration of dividends or the authorizing of the issuance of the corporation's stock.

7. The amendment or repeal of any resolution of the Board which by its terms is not so amendable or repealable.

8. The adoption of an agreement of merger or consolidation or the adoption of a certificate of ownership and merger.

9. The recommendation to stockholders of the sale, lease or exchange of all or substantially all of the corporation's property and assets.

10. The recommendation to stockholders of a dissolution of the corporation or a revocation of a dissolution.

(b) The Executive Committee shall meet at the call of its chairman or of a majority of its members, and a majority shall constitute a quorum. The action of the majority of the members of the Committee shall be the action of the Committee.

(c) Unless otherwise expressly provided by resolution of the Board of Directors, members of the Executive Committee shall be compensated and shall be reimbursed for travel and expenses on the same basis and at the same rate as is provided for Members of the Board of Directors for attendance at meetings of the Board.

(d) At the first regular meeting of the Board of Directors following a meeting of the Executive Committee, the Executive Committee shall present to the Board a report and such recommendations as are in its judgment necessary for the proper operation of the corporation.

Section 4.13. *Audit Committee.* The Board of Directors shall have an Audit Committee and, as required by Section 1239.5(b) of the FHFA Regulation, as the same may be amended from time to time, the Audit Committee shall comply with the charter, independence, composition, expertise and other requirements under section 301 of the Sarbanes-Oxley Act of 2002 and under rules issued by the New York Stock Exchange, as the same may be amended from time to time.

Section 4.14. *Compensation Committee.* The Board of Directors shall have a Compensation Committee and, as required by Section 1239.5(b) of the FHFA Regulation, as the same may be amended from time to time, the Compensation Committee shall comply with the charter, independence, composition, expertise, duties, responsibilities, and other requirements set forth under the rules issued by the New York Stock Exchange, as the same may be amended from time to time. The duties of the Compensation Committee shall include overseeing the corporation's compensation policies and plans for executive officers and employees and approving the compensation of principal officers of the corporation.

Section 4.15. *Nominating and Corporate Governance Committee.* The Board of Directors shall have a Nominating and Corporate Governance Committee, as required by Section 1239.5(b) of the FHFA Regulation, as the same may be amended from time to time. The Nominating & Corporate Governance Committee shall comply with the charter, independence, composition, expertise and other requirements set forth under the rules issued by the New York Stock Exchange, as the same may be amended from time to time.

Section 4.16. *Risk Committee.* The Board of Directors shall have a Risk Committee, as required by Section 1239.11(b) of the FHFA Regulation, as the same may be amended from time to time. The Risk Committee shall comply with the charter, independence, composition, expertise and other requirements set forth under the rules issued by the New York Stock Exchange, as the same may be amended from time to time.

Section 4.17. *Other Committees.* In addition to the Executive, Audit, Compensation, Nominating and Corporate Governance and Risk committees, the Board of Directors may by resolution designate from among its Members such other committees as it deems appropriate, each of which, to the extent provided by resolution of the Board, may exercise all authority of the Board except those actions outside the authority of the Executive Committee. The designation of any such committee and the delegation thereto of authority shall not alone relieve any director of any duty he owes the corporation.

Section 4.18. *Remote Meetings.* Any meeting of the Board of Directors or any meeting of a Board Committee may be held with the Members of the Board or members of such Committee participating in such meeting by telephone or by any other means of communication by which all such persons participating in the meeting are able to speak to and hear one another.

Section 4.19. *Limitation on Liability.* To the fullest extent permitted by Delaware statutory and decisional law, as amended or interpreted, no director of this corporation shall be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. This Section 4.19 does not affect the availability of equitable remedies for breach of fiduciary duties.

Section 4.20. *Eligibility to Make Nominations.* Nominations of candidates for election as directors at an annual meeting of stockholders called for election of directors may be made (i) by any stockholder entitled to vote at such meeting only in accordance with the procedures established by Section 4.21 of these Bylaws, or (ii) by the Board of Directors or by a duly authorized Committee thereof. In order to be eligible for election as a director, any director nominee must first be nominated in accordance with the provisions of these Bylaws.

Section 4.21. *Procedure for Nominations by Stockholders.* Any stockholder entitled to vote for the election of a director at an annual meeting may nominate one or more persons for such election only if written notice of such stockholder's intent to make such nomination is delivered to or mailed and received by the Secretary of the corporation. Such notice must be received by the Secretary not later than the following dates: with respect to an annual meeting of stockholders, not earlier than the close of business on the 120th day and not later than the close of business on the 60th day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 60th day prior to such annual meeting and the 10th day following the day on which public disclosure of the date of such meeting is first made by the corporation. The written notice shall set forth: (1) the name, age, business address and residence address of each nominee proposed in such notice; (2) the principal occupation or employment of each such nominee; (3) the class of securities and the number of shares of capital stock of the corporation which are beneficially owned by each such nominee; and (4) such other information concerning each such nominee as would be required, under the rules of the Securities and Exchange Commission in a proxy statement soliciting proxies for the election of such nominee as a director. Such notice shall include a signed consent of each such nominee to serve as a director of the corporation, if elected and a statement whether such nominee, if elected, intends to tender, promptly following such nominee's election or re-election, an irrevocable resignation effective upon such nominee's failure to receive the required vote for re-election at the next meeting of stockholders at which such nominee faces re-election and upon acceptance of such resignation by the board of directors. The corporation may also require any proposed nominee to furnish such other

information as may be reasonably required by the corporation to determine whether such proposed nominee is eligible to serve as an independent director of the corporation or that could be material to a reasonable stockholder's understanding of independence, or lack thereof, of such nominee.

Section 4.22. *Compliance with Procedures.* If the chair of the stockholders' annual meeting determines that a nomination of any candidate for election as a director was not made in accordance with the applicable provisions of these Bylaws, such nomination shall be void.

Article 5: The Officers

Section 5.01. *Number.* The principal officers of the corporation shall consist of the Chief Executive Officer, a President, one or more Vice Chairmen of the Board if the Board has elected to fill such position or positions, one or more Executive Vice Presidents and Senior Vice Presidents, a General Counsel, a Controller, a Treasurer, and a Secretary. There shall be such other officers, assistant officers, agents, and employees as may be deemed necessary. Any two or more offices may be held by the same person.

Section 5.02. *General Authority and Duties.* All officers, agents, and employees of the corporation shall have such authority and perform such duties in the management and conduct of the business of the corporation as may be provided for in these Bylaws, as may be established by resolution of the Board of Directors not inconsistent with these Bylaws, as generally pertain to their respective offices, and as may be delegated to them in a manner not inconsistent with these Bylaws.

Section 5.03. *Election, Tenure, and Qualifications.* The principal officers shall be selected by the Board of Directors. Each officer shall hold office until his successor is chosen and qualified, or his death, resignation, retirement, or removal from office, whichever event shall first occur. Selection or appointment without express tenure, of an officer, agent, or employee shall not of itself create contract rights.

Section 5.04. *Removal.* Any officer, agent, or employee may be removed by the Board of Directors. Any removal shall be in accordance with such procedures and safeguards as the corporation may establish and shall be without prejudice to the contract rights, if any, of the person so removed.

Section 5.05. *Vacancies.* Any vacancy in any office shall be filled in the manner prescribed in these Bylaws for selection or appointment to the office.

Section 5.06. *Chief Executive Officer.* The Chief Executive Officer shall have the general powers and duties of supervision, management and direction over the business and policies of the corporation. The Chief Executive Officer shall see that all orders and resolutions of the Board of Directors and any committee thereof are carried into effect, and shall submit reports of the current operations of the corporation to the Board of Directors at regular meetings of the Board of Directors and in annual reports to the stockholders.

Section 5.07. *The President.* The President shall have such powers and perform such duties as the Board of Directors may prescribe, or, if the President is not also the Chief Executive Officer, the Chief Executive Officer may delegate to him.

Section 5.08. *The Vice Presidents.* Each Vice President shall have such powers and perform such duties as the Board of Directors may prescribe or as the Chief Executive Officer may delegate to him.

Section 5.09. *The Treasurer.* The Treasurer shall, in general, perform all the duties ordinarily incident to the office of Treasurer and such other duties as may be assigned to him by the Board of Directors or by the Chief Executive Officer or his designee. The Treasurer shall render to the Board of Directors or the Chief Executive Officer or his designee, whenever the same shall be required, an account of all his transactions as Treasurer. The Treasurer shall, if required to do so by the Board, give the corporation a bond in such amount and with such surety or sureties as may be ordered by the Board for the faithful performance of the duties of his office and for the restoration to the corporation, in case of his death, resignation, retirement, or removal from office, of all books, papers, vouchers, money, and other property of whatever kind in his possession or under his control belonging to the corporation. The premium for any such bond shall be paid by the corporation.

Section 5.10. *The General Counsel.* The General Counsel shall be the principal consulting officer of the corporation in all matters of legal significance or import; shall be responsible for and direct all counsel, attorneys, employees, and agents in the performance of all legal duties and services for and on behalf of the corporation; shall perform such other duties and have such other powers as are ordinarily incident to the office of the General Counsel; and shall perform such other duties as, from time to time, may be assigned to him by the Board of Directors or by the Chief Executive Officer.

Section 5.11. *The Secretary.* The Secretary shall keep or cause to be kept in books provided for the purpose the minutes of the meetings of the Board of Directors and the minutes or transcripts of the meetings of the stockholders; shall see that all notices are duly given as required by law and in accordance with the provisions of these Bylaws; shall be responsible for the custody and maintenance of all related records and the blank stock certificates of the corporation; shall be custodian of the records and of the seal of the corporation; and, in general, shall perform all the duties ordinarily incident to the office of Secretary and such other duties as may be assigned to him by the Board or by the Chief Executive Officer. The Secretary and any Assistant Secretary are expressly empowered to attest signatures of officers of the corporation and to affix the seal of the corporation to documents.

Section 5.12. *The Controller.* The Controller shall keep full and accurate accounts of all assets, liabilities, commitments, receipts, disbursements, and other financial transactions of the corporation; and in general, shall perform all the duties ordinarily incident to the office of Controller and such other duties as may be assigned to him by the Board of Directors or by the Chief Executive Officer or his designee.

Section 5.13. *Assistant Officers.* Each assistant to an officer, including but not limited to any Assistant Vice President, any Assistant Treasurer, any Assistant General Counsel, and any Assistant Secretary, and any other such assistant to any officer, shall perform such duties as are, from time to time, delegated to him by the officer to whom he is an assistant, by the Board of Directors or by the Executive Officer or his designee. At the request of the officer to whom he is an assistant, an assistant officer may temporarily perform the duties of that officer, and when so acting shall have the powers of and be subject to the restrictions imposed upon that officer.

Section 5.14. *Compensation.* Subject to the approval of the Conservator, if so required, the compensation of the principal officers shall be fixed, from time to time, by the Board of Directors.

Article 6: Indemnification

Section 6.01. *General Indemnification.* The Board of Directors may, in such cases or categories of cases as it deems appropriate, indemnify and hold harmless, or make provision for indemnifying and holding harmless, Members of the Board of Directors, officers, employees, and agents of the corporation, and persons who formerly held such positions, and the estates of any of them against any or all claims and liabilities (including reasonable legal fees and other expenses incurred in connection with such claims or liabilities) to which any such person shall have become subject by reason of his having held such a position or having allegedly taken or omitted to take any action in connection with such position.

Section 6.02. *Indemnification of Board Members and Officers.*

(a) To the fullest extent permitted by the Delaware General Corporation Law for a corporation subject to such law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits a Delaware corporation to provide broader indemnification rights than said law permitted such corporation to provide prior to such amendment), the corporation will indemnify and hold harmless each Member of the Board and officer of the corporation or any subsidiary against any and all claims, liabilities, and expenses (including attorneys' fees, judgments, fines, and amounts paid in settlement) actually and reasonably incurred and arising from any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, to which any such person shall have become subject by reason of having held such a position or having allegedly taken or omitted to take any action in connection with any such position. However, the foregoing shall not apply to:

i. any breach of such person's duty of loyalty to the corporation or its stockholders;

ii. any act or omission by such person not in good faith or which involves intentional misconduct or where such person had reasonable cause to believe his conduct was unlawful, or

iii. any transaction from which such person derived any improper personal benefit.

(b) The decision concerning whether a particular indemnitee has satisfied the foregoing shall be made by (i) the Board of Directors by a majority vote of a quorum consisting of Members who are not parties to the action, suit, or proceeding giving rise to the claim for indemnity ("Disinterested Directors"), whether or not such majority constitutes a quorum; (ii) a committee of Disinterested Directors designated by a majority vote of Disinterested Directors, whether or not such majority constitutes a quorum; (iii) if there are no Disinterested Directors, or if the Disinterested Directors so direct, by independent legal counsel in a written opinion; or (iv) a vote of the stockholders.

(c) The Board of Directors may authorize the advancement of expenses to any Member of the Board or officer, subject to a written undertaking to repay such advance if it is later determined that the indemnitee does not satisfy the standard of conduct required for indemnification. The Chairman of the Board is authorized to enter into contracts of indemnification with each Member and officer of the corporation with respect to the

indemnification provided in the Bylaws and to renegotiate such contracts as necessary to reflect changing laws and business circumstances.

Article 7: Amendments

Section 7.01. *Actions by the Board of Directors*. The Board of Directors has the power to alter, amend, or repeal any Certificate Provision or Bylaw Provision of these Bylaws, or to adopt new bylaws, either (i) by the affirmative vote of two-thirds of the then incumbent Members of the Board of Directors, with the exception of Section 2.10, or (ii) in the manner provided in Section 4.10 of these Bylaws. Except by unanimous consent of all the then incumbent Members of the Board, no such action shall be undertaken until at least one week shall have elapsed from either (i) the introduction of the proposal at a meeting of the Board of Directors at which a quorum shall have attended, or (ii) the circulation of such proposed action to all the then incumbent Members of the Board. Any (i) new bylaw adopted by the Board of Directors and (ii) Certificate Provision, as altered or amended by the Board of Directors pursuant to this Section 7.01, shall be designated a "Certificate Provision" for all purposes under these Bylaws unless, by the affirmative vote of two-thirds of the then incumbent Members of the Board of Directors, the Board of Directors shall approve the designation of such bylaw as a "Bylaw Provision" for all purposes under these Bylaws.

Section 7.02. *Actions by the Stockholders*.

(a) Bylaw Provisions. The stockholders have the power to alter, amend, or repeal any Bylaw Provision, or to adopt any new bylaw, the subject matter of which is the subject matter of a Bylaw Provision, by the affirmative vote of a majority of the stock issued and outstanding and entitled to vote at any regular meeting of the stockholders or at any special meeting of the stockholders if notice of such proposed action be contained in the notice of such special meeting; provided, however, that notwithstanding the foregoing, the stockholders shall not have the power to alter, amend or repeal any Bylaw Provision, or adopt any new bylaw, if (i) such Bylaw Provision, as proposed to be altered or amended, or the repeal of such Bylaw Provision, or the new bylaw proposed for adoption, is or would be inconsistent with the Charter Act or other Federal law, rules, and regulations or the safe and sound operations of the corporation, in each case as determined by the applicable regulator, (ii) the subject matter of such Bylaw Provision, as proposed to be altered or amended, or the subject matter of the new bylaw proposed for adoption is the subject matter of any Certificate Provision, or (iii) such Bylaw Provision, as proposed to be altered or amended, or the repeal of such Bylaw Provision, or the new bylaw proposed for adoption is or would be inconsistent with any Certificate Provision. Notwithstanding anything to the contrary herein, any action by the stockholders pursuant to Section 7.02 shall be null and void, without legal effect, if such action shall violate any law, rule or regulation by any government authority applicable to this corporation, including, without limitation, the Charter Act, or any rule, regulation or other requirement of any stock exchange on which the stock of this corporation is then listed. For the avoidance of doubt, any proposed action by the stockholders pursuant to this Section 7.02 will be subject to Article 8 of these Bylaws.

(b) Certificate Provisions. The stockholders may not alter, amend, repeal or adopt any Certificate Provision unless such action is explicitly authorized and referred to the stockholders by the Board of Directors. No such authorization and referral shall be made by the Board of Directors unless such authorization and referral is approved pursuant to the procedures set forth

in Section 7.01. For the avoidance of doubt, this Section 7.02(b) in no way obligates the Board of Directors to seek stockholder approval for any action pursuant to Section 7.01.

Article 8: Regulatory Powers

Nothing in these Bylaws shall be deemed to affect the regulatory or conservatorship powers of the Federal Housing Finance Agency under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Title XIII, P.L. 102-550, as amended by the Federal Housing Finance Regulatory Reform Act of 2008, P.L. 110-289.