

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CHRISTOPHER ROBERTS, and THOMAS)
P. FISCHER,)

Plaintiff,)

v.)

THE FEDERAL HOUSING FINANCE)
AGENCY, in its capacity as Conservator)
of the Federal National Mortgage)
Association and the Federal Home Loan)
Mortgage Corporation, MELVIN L.)
WATT, in his official capacity as Director)
of the Federal Housing Finance Agency,)
JACOB J. LEW, in his official capacity as)
Secretary of the Treasury, and THE)
DEPARTMENT OF THE TREASURY,)

Defendants.)

Civil Action No. 1:16-CV-02107

Honorable Edmond E. Chang

**DEFENDANTS’ MEMORANDUM
OF LAW IN SUPPORT OF THEIR JOINT MOTION TO STAY**

A temporary stay in this case is necessary to promote judicial efficiency and avoid duplicative litigation, and it will impose no prejudice on Plaintiffs. The stay would be of limited duration and for a specific purpose: to permit the Judicial Panel on Multidistrict Litigation (the “Panel”) time to rule on a pending motion to transfer this case and several others—all presenting substantially similar claims and issues, including threshold jurisdictional questions, arising out of common facts—for consolidation and coordination in the District Court for the District of Columbia. *In re Fed. Hous. Fin. Agency, et al., Preferred Stock Purchase Agreements Third*

Amendment Litigation, MDL No. 2713 (Mar. 15, 2016), ECF No. 1.¹ Indeed, two courts have already stayed three actions. The District of Delaware stayed two related actions pending the Panel’s ruling, without briefing, after conducting a teleconference with the parties to discuss the stay. Order, *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del. Mar. 20, 2016), ECF No. 44; Minute Order, *Pagliara v. Fed. Nat’l Mortg. Ass’n*, No. 1:16-cv-00193 (D. Del. Apr. 4, 2016). The Northern District of Iowa likewise granted the Federal Housing Finance Agency’s (“FHFA” or the “Conservator”) and the U.S. Department of the Treasury’s (“Treasury”) joint motion to stay two business days after they filed it and before Plaintiffs filed any opposition thereto. Order, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa Apr. 4, 2016), ECF No. 79.

BACKGROUND

A. The Related Cases

Plaintiffs’ complaint here mimics fourteen other shareholder complaints filed in four different district courts, including those in three cases recently filed in other district courts (the “Related Cases”).² All of the actions are brought by shareholders of the Enterprises to challenge the Third Amendment to the preferred stock purchase agreements (“PSPAs”) governing the terms and conditions for Treasury’s investment of almost \$200 billion in the Enterprises and continuing commitment to invest an additional \$258 billion as necessary to save the Enterprises from mandatory receivership and liquidation. Plaintiffs’ complaint and the Related Cases

¹ Pursuant to the Court’s standing order regarding motions practice, FHFA’s counsel notified Plaintiffs’ counsel of its intent to file this motion, and Plaintiffs’ counsel noted its objection and opposition to it.

² The Related Cases are: *Saxton v. FHFA*, No. 1:15-cv-00047, (N.D. Iowa, filed May 28, 2015); *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del., filed Aug. 17, 2015); and *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky., filed Oct. 23, 2015). FHFA has filed a notice of related actions with the Panel also requesting the transfer of *Pagliara v. Fed. Nat’l Mortg. Ass’n*, No. 1:16-cv-00193 (D. Del. removed Mar. 25, 2016) and *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-00337 (E.D. Va. removed Mar. 25, 2016). *In re Fed. Home Fin. Agency, et al., Preferred Stock Purchase Agreements Third Amendment Litigation*, MDL No. 2713 (Mar. 28, 2016), ECF No. 9.

present identically-situated plaintiffs, bringing substantially similar claims for identical relief, arising out of common factual allegations and raising common legal issues, including threshold jurisdictional issues.

The first ten cases were brought in the U.S. District Court for the District of Columbia.³ Plaintiffs in those actions asserted claims under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, for rescission of the Third Amendment, as well as assorted state law claims for money damages. The District Court for the District of Columbia granted Defendants' motions to dismiss with respect to all ten complaints. *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 246 (D.D.C. 2014). That decision is currently on appeal to the U.S. Court of Appeals for the District of Columbia. Briefing is complete, and oral arguments are scheduled for April 15, 2016.

Soon after the decision in *Perry Capital*, an Enterprise shareholder brought an eleventh action presenting the same claims in the U.S. District Court for the Southern District of Iowa. The court dismissed that case on issue preclusion grounds. *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 (S.D. Iowa 2015). In the alternative, the court noted its agreement with the holding in *Perry Capital* that FHFA's and Treasury's actions "were permissible under the authority granted by HERA." *Id.* at 840 n. 6. Plaintiff did not appeal.

³ The cases filed in the District Court for the District of Columbia are: *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (filed July 7, 2013); *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-01053 (filed July 10, 2013); *Arrowood Indemnity Co. v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-01439 (filed September 20, 2013); *Liao v. Lew*, No. 13-cv-01094 (filed July 16, 2013); *Cacciapelle v. Fed. Nat'l Mortg. Ass'n*, No.13-cv-01149 (filed July 29, 2013); *Am.-European Ins. Co. v. Fed. Nat'l Mortg. Ass'n*, No.13-cv-01169 (filed July 30, 2013); *Cane v. FHFA*, No. 13-cv-01184 (filed August 1, 2013); *Dennis v. United States*, No. 13-cv-01208 (filed August 5, 2013); *Marneu Holdings, Co. v. FHFA*, No. 13-cv-01421 (filed September 18, 2013); *Borodkin v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-01443 (filed September 20, 2013). On November 18, 2013, the *Liao*, *Cacciapelle*, *Am.-European Ins. Co.*, *Cane*, *Dennis*, *Marneu Holdings*, and *Borodkin* actions were consolidated as *In re Senior Preferred Stock Purchase*, No.13-mc-1288, in the District Court for the District of Columbia.

This action, along with the three Related Cases, asserts substantially similar claims to those that the courts dismissed in *Perry Capital* and *Continental Western Insurance Co.* All four Related Cases seek substantially identical declaratory and injunctive relief that would vacate the Third Amendment. *Saxton* Am. Compl. Prayer for Relief (a); *Robinson* Am. Compl. Prayer for Relief (a); *Roberts* Compl. Prayer for Relief (a); *Jacobs* Compl. Prayer for Relief (D).

In addition, four other actions raise the same factual and legal issues related to the Third Amendment, shareholder standing, and the conservatorships. *Edwards v. Deloitte & Touche, LLP*, No. 2016-004986-CA-01 (Fla. Cir. Ct. filed Feb. 29, 2016); *Edwards v. PricewaterhouseCoopers, LLP*, No. 2016-005875-CA-01 (Fla. Cir. Ct. filed Mar. 9, 2016); *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 1:16-cv-00193 (D. Del. removed Mar. 25, 2016); and *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-00337 (E.D. Va. removed Mar. 25, 2016).

B. FHFA's Motion to Transfer Pursuant to 28 U.S.C. § 1407

On March 15, 2016, FHFA filed a motion with the Panel to transfer the Related Cases to the U.S. District Court for the District of Columbia for consolidated or coordinated pretrial proceedings. On March 21, 2016, Treasury filed a brief in support of FHFA's motion to transfer. Responses to FHFA's motion to transfer are due April 6, 2016, and FHFA may file a reply by April 13, 2016.

Defendants are moving to stay all of the Related Cases pending a decision by the Panel on FHFA's motion to transfer. The District of Delaware has already entered a stay in the *Jacobs* and *Pagliara* Related Cases after conducting a teleconference with the parties, even though briefing on Defendants' motions to dismiss in *Jacobs* was complete, and *Pagliara* had not formally been assigned to Judge Sleet at the time of the conference. See Order, *Jacobs v. FHFA*, No. 1:15-cv-00798 (D. Del. Mar. 29, 2016) (“[T]his action is stayed until the Panel rules on the

MDL Motion.”); Minute Order, *Pagliariara v. Fed. Nat’l Mortg. Ass’n*, No. 1:16-cv-00193 (D. Del. Apr. 4, 2016) (staying related case). The Northern District of Iowa acted with similar speed, granting FHFA’s and Treasury’s joint motion to stay the *Saxton* case two business days after it was filed and before Plaintiffs filed any opposition to the motion. Order, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa Apr. 4, 2016), ECF No. 79.

ARGUMENT

Defendants respectfully request this Court stay all proceedings in this suit pending the Panel’s decision on whether to transfer this case for coordination or consolidation with other related cases for pretrial proceedings. Granting a stay is well within the Court’s inherent authority and plainly will serve the interests of judicial efficiency. “A court has the inherent discretionary power to control the disposition of cases on its docket,” *Paul v. Aviva Life & Annuity Co.*, No. 2009 WL 2244766, at *1 (N.D. Ill. July 27, 2009), “with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This authority includes the power to stay a case. *Stone v. INS*, 514 U.S. 386, 411 (1995); *Ohio Env’tl Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977). As the Panel has explained, the goal of a multidistrict litigation (“MDL”) proceeding is to “eliminate duplicative discovery, prevent inconsistent or repetitive pretrial rulings . . . and conserve the resources of the parties, their counsel, and the judiciary.” *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1997). To safeguard these benefits of coordinated pretrial proceedings, “[c]ourts frequently grant stays pending a decision by the MDL Panel regarding whether to transfer a

case.” *Dowler v. Medicine Shoppe*, No. 2:07-cv-848, 2007 WL 2907519 (S.D. Ohio Oct. 3, 2007).⁴

When considering a motion to stay pending a decision by the Panel on whether to transfer and consolidate, a district court considers three factors: (1) whether judicial economy favors a stay; (2) whether the moving party would suffer any hardship or inequity if the case is not stayed; and (3) whether a stay would prejudice the non-moving party. *See Bd. of Tr. of Teachers’ Ret. Sys. of State of Ill.*, 244 F. Supp. 2d at 905. Those factors uniformly and strongly favor staying this action pending the Panel’s decision on the motion to transfer.

A. A Stay Will Promote Judicial Economy and Avoid Duplicative Litigation

It is “often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL panel because the judicial resources are conserved.” *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997). Indeed, “stays are frequently granted to avoid duplicative efforts and preserve judicial resources” pending a decision by the Panel on a motion to transfer. *See Tench v. Jackson Nat’l Life Ins. Co.*, No. 99 C 5182, 1999 WL 1044923, at *1 (N.D. Ill. Nov. 12, 1999).

There is no doubt that judicial economy will be served by staying this action. Plaintiffs’ factual allegations, legal theories, and claims for relief are materially identical to those asserted in the Related Cases; all four cases challenge the Third Amendment and argue that FHFA and Treasury exceeded their statutory powers and acted with improper motive. “The very purpose of

⁴ *See, e.g., Bd. of Tr. of Teachers’ Ret. Sys. of State of Ill. v. Worldcom, Inc.*, 244 F.Supp.2d 900, 905 (N.D. Ill. 2002) (granting stay pending decision on MDL consolidation); *Benge v Eli Lilly & Co.*, 553 F. Supp. 2d 1049, 1050 (N.D. Ind. 2008); *see also Munchel v. Wyeth LLC*, No. 12-906-LPS, 2012 WL 4050072, at *2 (D. Del. Sept. 1, 2012) (staying newly removed suit pending decision on MDL consolidation); *Ohio v. U.S. Env. Prot. Agency*, No. 2:15-cv-2467, 2016 WL 525480, at *2 (S.D. Ohio Feb. 8, 2016) (granting stay pending Panel’s decision on motion to transfer); *Bearup v. Pfizer, Inc.*, Case No. 15cv13995, 2015 WL 9266908 (E.D. Mich. Dec. 16, 2015) (same).

multidistrict litigation is to coordinate the pretrial management of actions sharing common facts,” *Azar v. Merck & Co.*, No. 3:06-cv-0579 AS, 2006 WL 3086943, at *1 (N.D. Ind. Oct. 27, 2006), and the Court need not expend resources to familiarize itself “with the intricacies of a case that may be coordinated or consoli[dated] for pretrial purposes in another court.” *See Paul*, 2009 WL 2244766, at *1. A stay would ensure that the court does not expend “judicial resources by addressing various pre-trial motions that could have been resolved in the transferee court.” *See id.*

Staying these actions also mitigates the risk of duplicative litigation on jurisdictional questions that turn on the interpretation of a comprehensive federal statutory scheme concerning the nation’s secondary market in residential mortgages. Absent a stay, each Defendant anticipates that it will move under Fed. R. Civ. P. 12(b)(1) to dismiss this action, arguing, *inter alia*, that (i) the Court has no jurisdiction over the complaint because (i) 12 U.S.C. § 4617(f)—wherein Congress mandated that “no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver”—bars the relief Plaintiffs seek here, and (ii) the Conservator’s succession to “all rights, titles, powers, and privileges” of all Enterprise shareholders precludes Plaintiffs’ claims, *see* 12 U.S.C. § 4617(b)(2)(A)(i). While Defendants’ motions will raise straightforward statutory interpretation issues, plaintiffs in the cases challenging the Third Amendment have raised a myriad of convoluted and implausible arguments. The courts in the Related Cases would have to rule on the exact same issues to resolve materially identical motions that have either already been filed or will be filed if those actions are not stayed.

Where multiple courts face the same jurisdictional issues, and a motion to transfer is before the Panel, the “best course” is to stay the action and, if transfer is granted, allow the

transferee court to “resolve the jurisdictional question[s].” *See Johnson v. AMR Corp.*, Nos. 95 C 7659 to 95 C 7664, 1996 WL 164415, at *3 (N.D. Ill. Apr. 3, 1996). For instance, in *Board of Trustees of the Teacher’s Retirement System*, whether the case was properly removed to federal court turned on three “thorny questions of law” related to the U.S. Bankruptcy Code and U.S. securities laws.⁵ Because the court could not decide whether it had jurisdiction without “untangling at least one of the three legal snarls,” the court concluded that a stay was proper. *Bd. of Trustees of the Teachers’ Retirement Sys. of Ill.*, 244 F. Supp. 2d at 903. Noting that actions pending in two other U.S. district courts presented the same legal issues and would potentially be transferred to the same MDL proceeding, the court concluded that judicial economy weighed in favor of a stay: “[h]aving one court rather than three decide complex jurisdictional issues obviously saves judicial resources.” *Id.* at 905.

The courts reached similar conclusions in *Tench* and *Johnson*, recognizing that the “benefits of transferring” cases presenting materially identical jurisdictional issues “to the MDL—the body established by Congress specifically to ameliorate the duplicative litigation and the valuable waste of judicial resources—are obvious.” *Tench*, 1999 WL 1044923, at *1 (quoting *Johnson*, 1996 WL 164415, at *3). The same circumstance is present here, and concerns for judicial economy and conservation of judicial resources plainly favor a stay. Because the jurisdictional issues in this case and the Related Cases have broad implications beyond each respective case, and the same jurisdictional issues will be before the transferee court in the other similar cases, a single court should decide the motions to dismiss.

⁵ The three questions were: (1) “whether the bankruptcy removal statute, 28 U.S.C. § 1452, requires all defendants to join a notice of removal”; (2) “whether potential indemnity claims are ‘related to’ bankruptcy proceedings” for purposes of 28 U.S.C. § 1334; and (3) whether claims brought under Section 11 of the Securities Act of 1933 can be removed under 28 U.S.C. § 1452. *Bd. of Trustees of Teachers’ Retirement Sys.*, 244 F. Supp. 2d at 903-05. The second question was subject to a circuit split. *See id.* at 903.

B. Denying the Motion to Stay Would Be Harmful and Inequitable to Defendants

Currently, Defendants must defend materially identical actions in four jurisdictions. That number is likely to grow, as additional shareholder actions challenging the Third Amendment are all but inevitable.⁶ Without a stay, Defendants would suffer “considerable hardship and inequity if forced to simultaneously litigate multiple suits in multiple courts,” and it may “potentially suffer conflicting rulings by different judges in these multiple suits.” *See Aikins*, 2000 WL 310391, at *1 (E.D. La. Mar. 24, 2000). Thus, duplicative litigation and risk of inconsistent decisions on those issues prejudice FHFA and weigh in favor of a stay. *See Paul*, 2009 WL 2244766, at *2 (holding the possibility of “conflicting decisions on similar pre-trial issues” weighed in favor of a stay).

C. Staying this Action Does Not Prejudice Plaintiffs

Concerns regarding judicial economy, prejudice to Defendants, and the risk of inconsistent rulings on jurisdictional issues outweigh any possible prejudice to Plaintiffs. *See Smith v. Merck & Co.*, No. 06-cv-0931-DRH, 2006 WL 38422190, at *1 (S.D. Ill. Dec. 29, 2006). Indeed, a stay here, which would be of limited duration, would not prejudice Plaintiffs in any way.

This action is in its earliest stages. The Complaint was filed on February 10, 2016. The Court has not entered a scheduling order, Defendants have not yet filed their responsive pleadings, which will take the form of motions to dismiss, and discovery—if necessary—has not begun. *See Paul*, 2009 WL 2244766, at *1 (finding non-moving party would not be prejudiced by a stay because “case ha[d] only been pending for five months and discovery ha[d]” not

⁶ Indeed, two actions against the Enterprises’ auditors are currently pending in Florida state court, *Master Sgt. Edwards*, No. 2016-004986-CA-01; *Master Sgt. Edwards*, No. 2016-005875-CA-01.

begun); *see also Ever Win Int'l Corp. v. Radioshack Corp.*, 902 F. Supp. 2d 503, 507 (D. Del. 2012) (granting a motion to stay where no scheduling order was in place). The stay in this action will likely be brief: responses to Defendants' motion before the Panel are due April 6, 2016, FHFA may reply by April 13, 2016, and the Panel generally renders its decisions "in relatively short order." *See Paul*, 2009 WL 2244766, at *1. If transfer is granted, Plaintiffs will have a full opportunity to present their arguments to the transferee court. *Munchel*, 2012 WL 4050072, at *5.

In these circumstances, staying this action to allow the Panel to decide the transfer motion would not prejudice Plaintiffs.

CONCLUSION

For the foregoing reasons, the Court should stay this action until 14 days after the Panel rules on the pending motion to transfer.

Dated: April 5, 2016

Respectfully submitted,

/s/ Kristen E. Hudson

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CERTIFICATE OF SERVICE

I, Kristen Hudson, the undersigned attorney, hereby certify that I caused the foregoing Defendants' Memorandum of Law In Support of Their Joint Motion To Stay to be served on parties of record this 5th day of April, 2016 by ECF.

By: s/ Kristen E. Hudson
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