

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE**

ARNETIA JOYCE ROBINSON,

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, and THE
DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 7:15-cv-00109-ART-EBA

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO STAY

Plaintiff's Opposition provides no convincing arguments against Defendants' Joint Motion to Stay. Plaintiff argues primarily that the Court should not stay this case because, she predicts, the Judicial Panel on Multidistrict Litigation (the "Panel" or "JPML") will deny FHFA's motion to transfer this case and others like it for coordinated pre-trial proceedings. In making that argument, Plaintiff touts FHFA's opposition in 2012 to a motion to stay an unrelated case, *Federal National Mortgage Association v. Hamer*, No. 3:12-cv-50230 (N.D. Ill.), pending the Panel's resolution of a motion to transfer that case and quotes liberally from FHFA's submission concerning that case, characterizing FHFA's position on multi-district litigation ("MDL") transfer there as inconsistent with its position as to transfer here. *See* Opp. at 8-9, 12-13.

The Panel, not this Court, is the proper tribunal to assess the parties' arguments about MDL transfer. When the Northern District of Illinois granted a stay in another case covered by FHFA's MDL motion, it rejected the plaintiffs' virtually identical attempt to engage in a full-blown debate over the merits of transfer, explaining that "[t]he MDL Panel is the right forum to consider the Plaintiffs' arguments." Minute Entry, *Roberts v. Fed. Hous. Fin. Agency*, N.D. Ill. No. 1:16-cv-02107 (Apr. 8, 2016). Indeed, just like the plaintiffs in *Roberts*, Plaintiff's brief to this Court largely parrots arguments Plaintiff and her allies offer to the Panel. See, e.g., *Robinson* Resp. to MDL Motion (JPML No. 2713 Dkt. 18). But even if this Court were inclined to assess MDL arguments, Plaintiff's characterization of FHFA's positions as inconsistent is wrong: Plaintiff ignores important differences that made transfer inappropriate in *Hamer* and other transfer-tax cases but appropriate in this one. Plaintiff's other arguments against a stay are likewise unconvincing.

In other cases covered by FHFA's MDL motion, three district courts have already granted stays of four actions pending the Panel's decision, and no court has yet denied a stay. See Minute Entry, *Roberts v. Fed. Hous. Fin. Agency*, N.D. Ill. No. 1:16-cv-02107 (Apr. 8, 2016); Order, *Saxton v. Fed. Housing Fin. Agency*, N.D. Iowa No. 1:15-cv-00047-LRR (April 4, 2016); Order, *Pagliara v. Fed. Nat'l Mortgage Ass'n*, D. Del. No. 1:16-cv-00193-GMS (April 4, 2016); Order, *Jacobs v. Fed. Housing Fin. Agency*, D. Del. No. 1:15-cv-00708-GMS (March 30, 2016). This Court should follow suit and grant Defendants' Joint Motion to Stay this action until 14 days after the Panel's decision.

ARGUMENT

I. The Panel Is Likely to Grant the Motion to Transfer this Case, in Contrast to *Hamer*

Plaintiff devotes much of her opposition to arguments about the merits of the motion to transfer, but "[t]he MDL Panel is the right forum to consider" such arguments, not this Court.

See Minute Entry, *Roberts*. Even if the Court considered these arguments, they would provide no reason to deny the motion to stay. As Defendants explained in their Memorandum of Law in Support of Their Joint Motion to Stay and FHFA explained in its Motion for Transfer, this case and the Related Cases satisfy the criteria for transfer. *See* Mot. to Stay at 6-10; Mot. to Transfer at 6-11. Plaintiff points to FHFA’s opposition in 2012 to the proposed consolidation of numerous cases, including *Hamer*, that raised whether Fannie Mae and Freddie Mac are exempt under federal statutes from payment of state and local real estate transfer taxes (the “Transfer Tax Cases”). *See* Opp. at 8-9, 12-13. These cases are distinguishable for several reasons:

First, there were no serious factual disputes in the Transfer Tax Cases. All parties agreed on what had happened—Fannie Mae and Freddie Mac had not paid transfer taxes that various state and local entities claimed they were required to pay. The cases turned on a straightforward question of federal statutory interpretation. *See In re: Real Estate Transfer Tax Litigation*, MDL No. 2394, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (noting that the cases involved a “fairly straightforward dispute” that raised a “primarily a *legal* question,” with facts that were “largely undisputed” and “neither numerous nor complex.” (emphasis in original)). No matter which way the courts resolved that question, the cases would be essentially over as soon as that question was resolved. In contrast, the parties in this case and the Related Cases have very different interpretations of what the Defendants did and why they did it, and the complaints are laden with factual allegations.¹ Of course, for purposes of the motions to dismiss that Defendants intend to file in this case (absent a stay), Defendants will accept any well-pleaded allegations in the

¹ Plaintiff’s Amended Complaint, for example, is 70 pages and 165 paragraphs long, and the bulk of it is devoted to factual allegations, including many allegations that are based on discovery taking place in the Court of Federal Claims. In contrast, the *Hamer* complaint was 15 pages and 52 paragraphs long, and most of the paragraphs contained statements of law or descriptions of the parties. *See* Compl., *Federal National Mortgage Association v. Hamer*, No. 3:12-cv-50230 (N.D. Ill. June 22, 2012).

Amended Complaint as true. But if the motions are denied, this case—unlike the Transfer Tax Cases—will be far from over, and the factual disputes are likely to become central to the litigation.² Thus, transfer of this case is far more probable (and warranted) than transfer of the Transfer Tax Cases.

Second, the danger posed by inconsistent rulings is significantly greater here than in the Transfer Tax Cases. The Transfer Tax Cases involved different taxes imposed by different states and localities. If FHFA and the Enterprises lost a case in one jurisdiction and won in another, both decisions could stand, since the Enterprises could pay one jurisdiction’s tax without paying others. But conflicting Third Amendment decisions cannot co-exist, since each PSPA is a *single* contract that cannot be valid in one jurisdiction but not in another. Absent transfer, shareholders would have virtually unlimited opportunities to relitigate the same issues over and over. Thus, the risk of inconsistent rulings provides a far more compelling justification for transfer here than in the Transfer Tax Cases.

Third, unlike in *Transfer Tax*, policy considerations about forum shopping cut in *favor* of transfer here: Plaintiff and her aligned parties have given every indication of seeking to litigate serially in forums they deem favorable, in hopes of garnering a single victory. For example, when the plaintiff in *Continental Western Insurance Corp.*, No. 4:14-cv-00042 (S.D. Iowa), lost

² Plaintiff argues that this case, as an APA challenge, probably will be “resolved on an administrative record with little or no discovery.” Opp. at 10. But if the conduct of plaintiffs in other Third Amendment cases is any guide, Plaintiff is likely to challenge the adequacy of any administrative records that Defendants provide and to seek additional discovery. *See, e.g., Perry Capital v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014) (noting that the plaintiffs had alleged that Defendants failed to produce a full administrative record); Ruling on Pl.’s Mot. To Compel, *Cont’l W. Ins. Corp.*, No. 4:14-cv-00042 (S.D. Iowa Aug. 5, 2014) (observing that Defendants’ production of an administrative record would prompt “inevitable disputes about its adequacy” and probable “requests for additional discovery”). Indeed, in one of the APA cases that Plaintiff cites as a “rare” example of an APA case that the Panel transferred, the Panel cited disputes over “identification of the underlying administrative record” as a key reason for transfer. *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litigation*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008).

in the Southern District of Iowa on a motion to dismiss, it did not appeal. Instead, shortly thereafter, a new action was brought by another plaintiff in the Northern District of Iowa. Similarly, other plaintiffs have brought actions in forums, such as this Court, where venue is based entirely on the plaintiffs' place of residence and where the forum has little if any connection to the facts of the case. Moreover, Plaintiff is wrong to suggest that transfer would "cement a prior favorable ruling." *See* Opp. at 13. The district court ruling to which Plaintiff refers is the subject of a pending appeal that is yet to be argued, let alone decided. *Perry Capital, LLC v. Lew*, Nos. 14-5243, 14-5454, 14-5260, 14-5262 (D.C. Cir.) (argument scheduled for April 15, 2016).

II. Plaintiff's Other Arguments Are Unpersuasive

Plaintiff provides several other arguments against a motion to stay, but none are persuasive.

Plaintiff contends that "a stay will prevent the natural development of the law." Opp. at 6. But the stay will remain in effect only until the Panel's resolution of the motion to transfer, which will be fully briefed by April 13, 2016. If the motion to transfer is as meritless as Plaintiff claims, then it will be denied and Court will be able to pick up where it left off with this case. Plaintiff's "development of the law" argument appears to be yet another argument against transfer disguised as an argument against a stay, and as such it should be decided by the Panel.

Plaintiff argues that she will be prejudiced by a stay, but she offers nothing to support this assertion except a vague reference to "her right to proceed expeditiously." Opp. at 14. Plaintiff

waited more than *three years* after the Third Amendment went into effect to file this action, so her assertion that she will suffer prejudice from waiting an additional few weeks rings hollow.³

Finally, Plaintiff argues that Defendants will not suffer hardship absent a stay because briefing on the motions to dismiss is complete. Opp. at 15-16. But there are myriad events that could require significant effort on the part of the parties—*e.g.*, the Court could order oral argument, or the parties could find it necessary to brief supplemental issues or discuss new authority. Oddly, Plaintiff bases her argument in part on the fact that Defendants’ requests for stays in four other cases—including another case that has been fully briefed (*Jacobs v. Fed. Housing Fin. Agency*, D. Del. No. 1:15-cv-00708-GMS⁴)—have been granted based on the same arguments that Defendants make here. Opp. at 16 & n.7. In fact, these stays simply underscore the strength of Defendants’ arguments, including their argument that their motion to transfer is likely to succeed, and show that requiring Defendants to proceed with briefing in this case would be a needless burden.

³ Arguing that the public interest weighs against a stay, Plaintiff cites a statement of FHFA Director Melvin L. Watt about the Enterprises’ capital. Opp. at 14-15. Her reliance on Director Watt’s statement to *oppose* the Motion to Stay is bizarre, given that Director Watt is one of the Defendants who *filed* the Motion to Stay.

⁴ Although Plaintiff acknowledges that *Jacobs* has been fully briefed, she suggests that it is somehow different because that case raised exclusively state law claims and the plaintiffs are seeking to certify two of the state law questions to state supreme courts. Opp. at 11. But she does not explain why these differences are relevant.

Dated: April 12, 2016

Respectfully submitted,

/s/ Scott White

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2016, I electronically filed the foregoing through the Court's ECF system, which will send a notice of electronic filing to all parties to this action.

/s/ Howard N. Cayne