

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

**IN RE: FEDERAL HOUSING FINANCE
AGENCY, ET AL., PREFERRED STOCK
PURCHASE AGREEMENTS THIRD
AMENDMENT LITIGATION**

MDL Docket No. 2713

**RESPONSE OF DEFENDANTS JACOB LEW AND THE U.S. DEPARTMENT
OF THE TREASURY IN SUPPORT OF THE MOTION FOR TRANSFER OF
ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR
CONSOLIDATED PRETRIAL PROCEEDINGS**

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INTRODUCTION

Defendants, Jacob Lew, in his official capacity as the Secretary of the Treasury, and the U.S. Department of the Treasury (collectively, “Treasury”), respectfully submit this response in support of the motion by the Federal Housing Finance Agency (“FHFA”) for an order transferring four shareholder actions pending in four different districts (the “Related Actions”) to the United States District Court for the District of Columbia for coordinated or consolidated pretrial proceedings.

This litigation consists of four cases pending in four different districts seeking identical injunctive relief, alleging similar claims arising out of the same alleged facts, and all challenging the same conduct: the 2012 Third Amendment to the Preferred Stock Purchase Agreements (the “Third Amendment” and the “PSPAs”) between the Department of the Treasury and the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) (collectively, the “GSEs”).

These four cases follow ten earlier cases filed in the District of Columbia challenging the Third Amendment. Those ten actions were coordinated in a single proceeding, and in September 2014, the court presiding over the coordinated proceeding granted Treasury and FHFA’s motions to dismiss all of the actions. *See Perry Capital, LLC v. Lew, et al.*, 70 F. Supp. 3d 208 (D.D.C. 2014), *appeals docketed*, No. 14-5243 (D.C. Cir. Oct. 8, 2014).¹ The claims in the Related Actions, like the claims in the earlier cases, are brought by shareholders in Fannie Mae and Freddie Mac who allege that the change in terms to Treasury’s investments in the GSEs harmed their stock investments in the GSEs. One of the Related Actions, *Jacobs, et*

¹ In an eleventh lawsuit, filed in the Southern District of Iowa, the Court also granted Treasury and FHFA’s motions to dismiss. *See Cont’l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015). Plaintiff in *Continental Western* did not appeal.

al. v. FHFA, et al., is a putative class action. All of the Related Actions name the Department of the Treasury or its Secretary, Jacob Lew, as a defendant. The claims asserted in the different complaints are either identical or substantially similar. Plaintiffs generally allege that, as a result of the Third Amendment, their stock has lost value and they have suffered economic harm. Plaintiffs have pled a variety of legal theories in support of these claims, including against Treasury for violations of the Administrative Procedure Act (“APA”), and violations of Delaware and Virginia corporate law.

Treasury agrees with FHFA that transfer and consolidation of the four pending cases is appropriate because consolidation will alleviate the inefficiencies posed by litigating substantially similar cases in different jurisdictions. Actions may be transferred to any district for coordinated or consolidated pretrial proceedings where civil actions pending in different districts involve “one or more common questions of fact” and where doing so will serve the “convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a). The Related Actions satisfy these requirements. The pending cases involve common factual allegations, are based on common legal theories and seek substantially similar relief, and the plaintiffs in all of the Related Actions share overlapping interests as shareholders in the GSEs. Moreover, consolidation is appropriate because each of the pending cases is in the early stages of litigation.

This Panel has on many occasions recognized the appropriateness of Multidistrict Litigation (“MDL”) treatment for cases brought by different groups of shareholder plaintiffs. *See, e.g., In re Pfizer Inc. Sec., Derivative & Erisa Litig.*, 374 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005) *In re Unumprovident Corp. Sec., Derivative & ERISA Litig.*, 280 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003) *In re Enron Corp. Sec., Derivative & ERISA Litigation*, 196 F.Supp.2d 1375

(J.P.M.L. 2002). For the reasons set forth below, MDL treatment is also appropriate for the instant cases.

ARGUMENT

A. Transfer is appropriate because the related actions involve common questions of fact

The Panel has recognized that transfer and consolidation is appropriate for cases focused on the same events pending in different districts. *See In re Park W. Galleries, Inc., Litig.*, 887 F. Supp. 2d 1385 (J.P.M.L. 2012); *In re Mush Cay Litig.*, 330 F. Supp. 2d 1364, 1365 (J.P.M.L. 2004) (ordering consolidation of two cases which “arise from the same underlying commercial transaction”); *In re Pittsburgh & L. E. R. Co. Sec. & Antitrust Litig.*, 374 F. Supp. 1404, 1405 (J.P.M.L. 1974) (ordering consolidation because “[t]he complaints in these actions raise common questions of fact encompassing the same transactions”). The same considerations apply here. All of the Related Actions involve the same transaction: the Third Amendment to the PSPAs between Treasury and FHFA as the conservator of the GSEs. *See Jacobs Compl.* ¶¶ 1, 15-21; *Roberts Compl.* ¶¶ 1, 15-21; *Saxton Am. Compl.* ¶¶ 1, 14-25; *Robinson Am. Compl.* ¶¶ 1, 14-26. And each of the four complaints raises identical allegations concerning the Third Amendment. *See Jacobs Compl.* ¶¶ 15-21; *Roberts Compl.* ¶¶ 15-21; *Saxton Am. Compl.* ¶¶ 14-25; *Robinson Am. Compl.* ¶¶ 14-26. Thus, the Related Actions share “common questions of fact” as required under 28 U.S.C. § 1407.

B. Transfer serves the convenience of the parties and witnesses and ensures the just and efficient conduct of the actions

Transfer and consolidation will also serve the convenience of the parties and witnesses and will conserve judicial resources. All of the Related Actions involve the same essential factual allegations concerning the Third Amendment. Defendants have filed, or intend to file, motions seeking dismissal under Rule 12 in each of the Related Actions. Absent

consolidation, each case requires duplicative adjudication, through motions practice, of the same threshold defenses. Transfer and consolidation would serve the convenience of the parties and courts by allowing for the litigation of one motion instead of four, thereby conserving judicial resources and preventing conflicting rulings.

Plaintiffs in the Related Actions have pursued similar legal theories against FHFA and Treasury. Three of the four actions assert claims against Treasury under the APA, while one purports to assert claims against Treasury directly under Delaware and Virginia state corporate law.² The actions asserting APA claims nevertheless incorporate elements of state law by alleging that Treasury has violated the state-law-based fiduciary duties that it allegedly owes to the shareholders of the GSEs. *Compare Jacobs* Compl. ¶¶ 153-90 (alleging a breach of fiduciary duty directly under state corporate law) *with Roberts* Compl. ¶¶ 153-56 (alleging a breach of fiduciary duty as part of an APA claim); *Robinson* Am. Compl. ¶¶ 161-63 (same); *Saxton* Am. Compl. ¶¶ 159-161 (same). Plaintiffs in the Related Actions all seek injunctive relief in the form of rescission of the Third Amendment, as well as similar remedies of damages, other injunctive relief, declaratory relief, and attorney’s fees. *See Jacobs* Compl., Prayer for Relief; *Roberts* Compl., Prayer for Relief; *Robinson* Am. Compl., Prayer for Relief, *Saxton* Am. Compl., Prayer for Relief. Consolidating the Related Actions will thus eliminate the possibility of inconsistent rulings on potentially dispositive legal issues. *See In re:*

² This panel, however, has repeatedly rejected the argument that the presence of different legal theories precludes consolidation. *See In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1372-1373 (J.P.M.L. 2012) (“Where common factual issues exist, however, the presence of different legal theories among the subject actions is not a bar to centralization.”); *In re Aircraft Acci. at Barrow*, 474 F. Supp. 996, 999 (J.P.M.L. 1979) (“The presence of different legal theories in some of the actions with regard to the alleged liability of each defendant does not negate the existence of common questions of fact....”); *In re M3Power Razor Sys. Mktg. & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) (“The presence of differing legal theories is outweighed when the underlying actions, such as the actions here, arise from a common factual core.”).

Protegrity Corp. & Protegrity USA, Inc., Patent Litig., 84 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015) (ordering transfer of cases because, *inter alia*, “centralization will eliminate the potential for inconsistent rulings on several pending motions to dismiss”); *In re: Nat’l Football League Players’ Concussion Injury Litig.*, 842 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012) (ordering consolidation where pendency of “similar motions to dismiss or sever would invite the risk of inconsistent rulings”).

And in the event that the cases proceed beyond dispositive motions, any review of the Third Amendment is likely to focus on the same core set of documents. Although review of the APA claims is limited to the administrative record, 5 U.S.C. § 706, there is a substantial possibility that plaintiffs will challenge Treasury’s administrative record and seek extra-record discovery. This panel has favored transfer and consolidation in previous cases to prevent inconsistent rulings on the designation of an administrative record. *See In re: Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) (ordering consolidation to “eliminate duplicative discovery and prevent inconsistent pretrial rulings, particularly those with respect to the identification of the underlying administrative record”).

Finally, transfer and consolidation are appropriate because the Related Actions are in early stages of litigation. The first Complaint (*Saxton*) was filed in the District Court for the Northern District of Iowa on May 28, 2015, the second (*Jacobs*) was filed in the District of Delaware on August 17, 2015, the third (*Robinson*) was filed in the Eastern District of Kentucky on October 26, 2015, and the fourth (*Roberts*) was filed in the Northern District of Illinois on February 10, 2016. Dispositive motions have been filed in *Jacobs* and *Robinson*, although neither court has ruled on the motions, and defendants have moved to dismiss the

amended complaint in *Saxton*, although briefing on that motion is not complete. Defendants have not answered or filed a dispositive motion in *Roberts*. Nor has an administrative record been produced in any case. As a result, no party has expended significant resources litigating in any jurisdiction, and no prejudice or inconvenience will result from transfer and consolidation at this time.

C. Transfer to the District Court for the District of Columbia is appropriate

Finally, transfer to the District Court for the District of Columbia, as suggested by FHFA in their motion, is appropriate. Defendants in all Related Actions – including Fannie Mae and Freddie Mac, nominal defendants in these suits brought by their shareholders – are headquartered in the Washington, D.C. metropolitan area. The District Court was also the venue for ten previous coordinated actions, which were dismissed in *Perry Capital*. See 70 F. Supp. 3d 208 (D.D.C. 2014). The appellate court’s decision on the appeal in *Perry Capital* is also likely to provide further guidance on the appropriate resolution of the threshold legal issues in the Related Actions. Finally, according to the Panel’s most recent listing of pending multi-district litigations,³ only eight MDL actions are currently pending in the District Court for the District of Columbia. See, e.g., *In re Lending Tree*, 581 F. Supp. 2d at 1368 (considering a transferee district’s capacity to handle the docket in ordering transfer).

CONCLUSION

For the foregoing reasons, Treasury agrees with FHFA that the Related Actions should be transferred for consolidated or coordinated pretrial proceedings, and agrees that the United States District Court for the District of Columbia is an appropriate venue for transfer.

³ http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_District-February-16-2016.pdf

Dated: March 21, 2016

Respectfully submitted,

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**BEFORE THE UNITED STATES JUDICIAL PANEL
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**IN RE FEDERAL HOUSING FINANCE
AGENCY, ET AL. , PREFERRED
STOCK PURCHASE AGREEMENTS
THIRD AMENDMENT LITIGATION**

MDL No. 2713

CERTIFICATE OF SERVICE

On March 21, 2016, I electronically filed a RESPONSE OF DEFENDANTS JACOB LEW AND THE U.S. DEPARTMENT OF THE TREASURY IN SUPPORT OF THE MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS through the panel's CM/ECF system. Notice of this filing will be served on all parties of record by operation of the ECF system.

Dated: March 21, 2016

Respectfully submitted,

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