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No. 91283-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ONEWEST BANK FSB,

Petitioner,

v.

MAUREEN M. ERICKSON,

Respondent.

SUPPLEMENTAL BRIEF OF
PETITIONER ONEWEST BANK N.A.

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The Court should reverse the Court of Appeals because it erred by not extending “full faith and credit” to valid Idaho court orders. An Idaho court appointed a conservator for Bill McKee, and the conservator borrowed money to save McKee’s property from a pending foreclosure. Afterward, Maureen Erickson, McKee’s daughter, launched a collateral attack on those orders in Washington. But Erickson “read and approved” the order authorizing the loan, and Erickson still resides at the property the conservator saved from foreclosure.

First, the Court of Appeals should have given full faith and credit to the Idaho court’s orders because the Idaho court had jurisdiction over McKee, and Washington public policy favors enforcement of other states’ conservatorship orders.

Second, even if the Court of Appeals declined to give full faith and credit to the Idaho court’s orders, OneWest’s deed of trust is nevertheless enforceable because the conservator had the authority to encumber McKee’s property. Even if the conservator lacked authority, applicable law protects OneWest.

Third, even if the Court of Appeals properly reversed the Superior Court, it nevertheless should have remanded the case instead of entering summary judgment in favor of Erickson.

I. ASSIGNMENTS OF ERROR

The Court of Appeals erred by reversing the Superior Court and entering summary judgment for Erickson, as follows:

1. The Court of Appeals should have extended full faith and credit to an Idaho court's orders authorizing a conservator to execute a deed of trust for property in Washington, in accordance with the U.S. Constitution and *In re Kowalewski*, 163 Wn.2d 542 (2008).

2. If the Court of Appeals was not required to extend full faith and credit to Idaho court orders, the Court of Appeals nevertheless should have independently concluded that Idaho law authorized the Idaho court to appoint a conservator over a person with property in Washington.

3. The Court of Appeals should not have concluded that a deed of trust for property in Washington was void simply because that deed of trust was signed by a conservator appointed by an Idaho court.

4. The Court of Appeals should not have voided a deed of trust, to the detriment of the beneficiary, when the beneficiary reasonably relied on an Idaho court order authorizing the deed of trust, and that order was signed by the person who would later challenge the deed of trust.

5. If the Court of Appeals was not required to extend full faith and credit to Idaho court orders, the Court of Appeals nevertheless should have given the beneficiary of a deed of trust—which was deemed void

based on arguments substantially raised for the first time by the Court of Appeals—an opportunity to assert equitable defenses, including subrogation and estoppel, on remand to the Superior Court.

II. STATEMENT OF THE CASE

In August 2007, an Idaho court appointed a conservator to manage the assets and affairs of McKee. CP 18-22. McKee was over 90 years old, had recently endured open-heart surgery, was extremely hard of hearing, and occasionally had difficulties with his eyesight. CP 130 ¶ 22. Erickson nevertheless argues he was competent (*id.*), but before the end of his life in early 2011, he suffered years of dementia (CP 158).

The conservatorship estate included property in Spokane, Washington (CP 20), which McKee purchased in 2001 (CP 66 ¶ 2). The property was encumbered by a deed of trust securing McKee's obligation to repay the loan used to purchase the property. CP 125 ¶¶ 7-8.

By late September 2007, the property faced foreclosure because McKee was not making his loan payments. CP 166. To stop the foreclosure and preserve the property, McKee's conservator took out a new loan secured by a new deed of trust on the property. CP 166. Part of the proceeds of the new loan were used to pay off the old loan, thereby saving the property from foreclosure. CP 167. Because the transaction was in the form of a "reverse mortgage," McKee received the benefit of the

full amount of the loan, and was not required to make any payments before he died. CP 33 ¶ 3, 34 ¶ 7.

Erickson actively participated in the Idaho conservatorship proceedings. Erickson “read and approved” the Idaho court order authorizing the conservator to enter into the reverse mortgage after participating in the hearing by telephone. CP 108-110. Although she now claims not to remember signing the order (CP 131:1-3), the order even bears Erickson’s signature (CP 111).

McKee died on March 12, 2011, at age 94. CP 158. At his death, the promissory note secured by the deed of trust fell due in full. CP 30-31 at ¶ 7. OneWest, as the holder of the original promissory note, began the foreclosure necessary to satisfy the note. CP 190-235.

Erickson challenged the foreclosure. Erickson complained that the Idaho court could not have acted as it did because she allegedly owned the property (CP 54 at ¶ 6) and because McKee was living with her in Washington (CP 66 ¶ 2). Erickson also alleged that the conservator should not have entered into a reverse mortgage transaction, despite the language in the Idaho court’s order reflecting Erickson’s approval. CP 59-60.

OneWest filed a complaint in Spokane County to foreclose on the property. CP 194-235. After a series of hearings, the Superior Court granted summary judgment in favor of OneWest, authorizing OneWest to

proceed with the foreclosure. CP 188-89. Erickson appealed, and the Court of Appeals reversed the Superior Court's order granting summary judgment and directed the entry of summary judgment for Erickson.

III. ARGUMENT

A. **The Court of Appeals should have given full faith and credit to the Idaho court's orders.**

1. **The Court of Appeals should have honored the Idaho court's orders because those orders did not "adjudicate title to real property."**

The Idaho court did not exceed its jurisdictional reach, and its orders are entitled to full faith and credit by Washington courts. The McKee conservatorship was an *in personam* action. Moreover, the Idaho court's order authorizing the conservator to facilitate a reverse mortgage did not "adjudicate legal title" to the Spokane property. *In re Kowalewski*, 163 Wn.2d 542, 547 (2008).

There is a distinction between an *in rem* action directly affecting or "adjudicat[ing] legal title to real property," and an *in personam* action that indirectly affects real property or "adjudicate[s] personal interests in real property." *Kowalewski*, 163 Wn.2d at 547-48. An *in rem* action must be brought in the state where the property is located, while an *in personam* action may be brought in any court with personal jurisdiction over the parties, even if it involves out-of-state real property. *Id.*; see also *Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wn.2d 519, 525-26 (1968). So

long as a court has personal jurisdiction over the parties, “[t]he power of a court to determine personal interests in real property located outside the state’s territorial jurisdiction has been recognized in this country for nearly 200 years.” *Kowalewski*, 163 Wn.2d at 548.

The Court explained this distinction in *Kowalewski*, holding that a Washington court could determine a Washington couple’s ownership interests in an apartment and farm in Poland as part of dissolution proceedings. *Id.* at 544. “The subject matter of the dissolution action is not an action to settle title to real estate—it is not an *in rem* action over property in Poland. Rather, it is an *in personam* action in which a Washington court has jurisdiction to determine the parties’ relative interests in all property brought to the court’s attention.” *Id.* at 549-50. The Court added: “We have long recognized the distinction between jurisdiction to adjudicate title to land and jurisdiction to settle the parties’ personal interests in real estate.” *Id.* at 548-49. That means courts can “affect legal title indirectly” by, for example, directing a person to “convey or release any interest in the Washington land.” *Id.* at 547, citing *Brown v. Brown*, 46 Wn.2d 370, 372 (1955).

The Court’s analysis in *Kowalewski* is consistent with a century of Washington law. Decades earlier, the Court distinguished between the “naked question of title to land [that] must be brought in the state where

the land is situate,” and transitory, *in personam* actions in which “the court may hear and determine the action even though a question of title to foreign land may be involved, and even though the question of title may constitute the essential point on which the case depends.” *Silver Surprise*, 74 Wn.2d at 526; *see also Donaldson v. Greenwood*, 40 Wn.2d 238, 251 (1952); *Smith v. Fletcher*, 102 Wash. 218, 220 (1918); *Shelton v. Farkas*, 30 Wn. App. 549, 553 n.6 (1981).

And Washington law is consistent with federal precedent. The U.S. Supreme Court recognized the “well defined” exception to the general rule that courts in one state lack jurisdiction over property in another. *Fall v. Eastin*, 215 U.S. 1, 8 (1909). “A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever it may do through the party, it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to affect it with liens or burdens.” *Id.*

Neither the McKee conservatorship, nor the Idaho court’s order directing the conservator to facilitate the reverse mortgage, was an *in rem* act directly affecting or “adjudicating legal title to real property” that must be brought in the state where the property is located. Conservatorship proceedings, even when real property interests are at issue, are

fundamentally *in personam* actions. See *McCormick v. Blaine*, 178 N.E. 195, 200-01 (Ill. 1931). Conservatorship and guardianship proceedings often concern more than real property interests: “Today, guardians are called upon to manage wards’ property interests, but also to make vital decisions regarding medical care and end-of-life preferences.” *In re Lamb*, 173 Wn.2d 173, 185 (2011).

None of the Idaho court’s orders affected title to Washington property. The Idaho court’s order directing the conservator to facilitate the reverse mortgage did not transfer title to property, or even authorize the transfer of title. Although the conservator signed a deed of trust for the property, the deed of trust did not convey title. See *First Fed. Sav. & Loan Ass’n v. City of W. Richland*, 39 Wn. App. 401, 406 (1985). The appointment order also did not “adjudicate legal title” or “settle title” to the property. See *Kowalewski*, 163 Wn.2d at 547, 549. The appointment of a conservator “is not a transfer or alienation” of a protected person’s property. See Idaho Code § 15-5-420(b).

The Court of Appeals did not cite *Kowalewski* or distinguish between *in rem* and *in personam* actions. Instead, the Court of Appeals cited several cases involving different facts. Each involved a direct conveyance or adjudication of title to out-of-state real property. See *Green v. Wilson*, 592 S.E.2d 579, 581-82 (N.C. Ct. App. 2004) (court lacks *in rem*

jurisdiction for out-of-state quiet title action); *Sparkman & McLean Income Fund v. Wald*, 10 Wn. App. 765, 772 (1974) (court cannot “directly affect” title to out-of-state property by extinguishing out-of-state mortgages on that property); *Smith v. McKelvey*, 162 N.E. 722, 723 (Ohio Ct. App. 1928) (court lacks jurisdiction to order deed conveying out-of-state real property interest); *Richardson v. Allen*, 185 S.W. 252, 253 (Mo. Ct. App. 1916) (court order to sell out-of-state land is “clearly void”).

The Court of Appeals also relied on *Brown* and *Fall* without noting that those cases themselves acknowledge the distinction between *in rem* and *in personam* actions. In *Brown*, this Court concluded it owed no deference to a California court’s deed of an interest in a Spokane property. *Brown*, 46 Wn.2d at 371, 373. But as this Court explained later, *Brown* did not affect the rule that a court may “affect legal title indirectly” by, for example, “exercis[ing] its coercive powers to accomplish indirectly what it could not do directly.” *Kowalewski*, 163 Wn.2d at 547 (discussing *Brown*). Similarly, *Fall* acknowledged that courts may “indirectly act upon real estate in another state,” 215 U.S. at 8, because “[i]n such case, the decree is not of itself legal title, nor does it transfer the legal title,” *id.* at 11.

2. The Court of Appeals should have honored the Idaho court's orders because public policy favors the uniform enforcement of conservatorship decrees.

Washington public policy favors the mutual recognition of guardianship and conservatorship orders between states. By engineering a jurisdictional dispute over McKee's conservatorship, Erickson created exactly the situation that the Washington legislature sought to avoid when it voted unanimously to enact the Uniform Adult Guardianship and Protected Proceedings Jurisdiction Act (UAGPPJA), RCW 11.90.

Although enacted after the conservatorship at issue here, UAGPPJA is instructive because its provisions embody the modern conception of guardianship endorsed by Washington, Idaho, and most other states. *Legislative Fact Sheet—Adult Guardianship and Protective Proceedings Jurisdiction Act*, Unif. Law Comm'n, www.uniformlaws.org (last visited Jun. 10, 2015). Even before UAGPPJA, the Washington legislature contemplated that guardianship property could be transferred out-of-state when "it would be in the best interests of the incapacitated person." RCW 11.92.170. The UAGPPJA continues that tradition of comity between Washington courts and other jurisdictions.

Washington's implementation of UAGPPJA expressly acknowledges that another state may appoint a conservator. The definition for "guardian of the estate" (Washington's version of the conservator) is "a

person appointed by the court to administer the property of an adult, *and includes a conservator appointed by the court in another state.*”

RCW 11.90.020(2) (emphasis added). This definition reinforces Washington’s policy preference for “single jurisdiction” guardianships, and Washington’s commitment to recognizing out-of-state conservators. Subst. House B. Rep. S.H.B. 1261, 61st Leg., Reg. Sess., at 4-5 (Wash. 2009) (“This bill is important in making sure that guardianship orders are recognized and given effect in other states.”).

Under UAGPPJA, a state may have “exclusive and continuing jurisdiction” over a conservatorship even if the protected person does not live in the state or that person’s property is located in another state. *See* UAGPPJA §§ 203, 205. Any state with a “significant connection” may, under appropriate circumstances, exercise exclusive jurisdiction. *Id.* § 201 cmt; *id.* § 203(2). A state may have a significant connection if family members live in the state, if the individual spent time in the state, if the individual has property in the state, or if there are other meaningful ties.

Given Erickson’s speculation that the Idaho court “believed [she] was taking advantage of [McKee],” it is easy to see how the Idaho court could have concluded that it was the appropriate forum to protect McKee, a longtime Idaho resident, and his entire estate. CP 127 ¶ 15. McKee lived in Idaho for 40 years and owned at least two properties in Idaho, in

addition to the Spokane property. CP 142; CP 20 ¶¶ 2-15. By Erickson's own admission, McKee did not reside full-time in Washington until January 2007, only one month before the conservatorship petition was filed in the Idaho court on February 28, 2007. CP 126 ¶ 11; CP 95. Before moving, McKee spent time in Spokane and his home in Idaho. CP 125 ¶ 7.

The Idaho court conducted a three-day trial to decide whether to appoint a conservator, and so was able to make decisions about McKee's welfare based on a fulsome record. The Idaho court apparently addressed and dismissed a challenge to its jurisdiction during the proceeding, and likely considered an affidavit on residency from McKee. *See* CP 97 (motion on June 6); CP 98 (affidavit on June 6); CP 98 (order on June 26). McKee was represented by counsel for almost the entire conservatorship proceeding. *See* CP 96 (notice of appearance on March 6); CP 99 (attorney's closing arguments on July 31). Erickson, an interested party, also participated in the proceeding. CP 127 ¶ 15.

Despite the care taken by the Idaho court, the Washington Court of Appeals effectively reversed the Idaho court after declining to grant full faith and credit to the Idaho court's orders. This is exactly the kind of "jurisdictional dispute" that "the states are struggling with" and that is disfavored by Washington public policy. *See* Subst. House B. Rep. S.H.B. 1261.

As long as due process is preserved—ensuring that the protected individual was represented by counsel and that all interested parties received notice and an opportunity to object, as occurred in the Idaho proceeding—Washington should recognize conservatorships from other states. Even without UAGPPJA’s registration provisions, the full-faith-and-credit clause provides a constitutional basis for this recognition. U.S. Const. art. IV, § 1. Other states have recognized out-of-state guardianships under “principles of comity and the orderly administration of justice.” *In re Jane E.P.*, 700 N.W.2d 863, 865, 876 (Wis. 2005).

Recognizing out-of-state conservatorships eliminates unnecessary duplication for the parties and the courts, saving time and money. Otherwise, the parties would need to relitigate, and the courts need to hear, a full proceeding in every state where the individual had property. Recognition of out-of-state orders also promotes the best interests of the protected individual by reducing cost, conflict, and complexity. Estate planning, resource management, and other decisions are best-accomplished by a single guardian or conservator who can take the individual’s entire situation into account without interference by others, especially in contentious family situations. This can only be effective if the conservator’s authority is recognized across state lines.

B. Even if the Court of Appeals decided to review the Idaho court's orders, the Court of Appeals should have affirmed the Superior Court because OneWest's deed of trust is enforceable.

1. The Idaho court had jurisdiction over the parties.

The Idaho court had both the jurisdiction and the authority to appoint a conservator over McKee. The Idaho district court is a court of general jurisdiction, with authority to decide substantially all matters arising in law and equity. Idaho Code § 1-701. That authority extends to persons who have minimum contacts with Idaho, such that the exercise of jurisdiction over those persons does not offend traditional notions of fair play and substantial justice. *Blimka v. My Web Wholesaler, LLC*, 152 P.3d 594, 598-99 (Idaho 2007); *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649-50 (2014); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). Because the Idaho court did not exceed its jurisdictional reach, Washington courts must extend full faith and credit to the Idaho court's orders. U.S. Const. art. IV, § 1; *Brown v. Garrett*, 175 Wn. App. 357, 366 (2013).

The Idaho district court unquestionably had jurisdiction to appoint a conservator over McKee and his assets. When McKee's son commenced the conservatorship action, McKee owned property in Idaho. CP 66 (“[a]t that time, my father was the apparent record owner of real property in Idaho”). McKee appeared through counsel in the Idaho court proceedings. CP 96, 108, 111, 127. Erickson also participated in the proceedings.

CP 108, 127, 130, 133. McKee's ownership of property in Idaho was sufficient to establish minimum contacts with Idaho, allowing the Idaho court to exercise its jurisdiction over him.

Any objections McKee may have had to the Idaho court's jurisdiction were resolved in the Idaho litigation. A party may waive objections to the exercise of personal jurisdiction by appearing in the case and defending it. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982). If McKee had objections to the exercise of the Idaho court's personal jurisdiction over him, his appearance conclusively resolved them. *See* CP 97-98. Even if this Court thinks the Idaho court wrongly decided it had personal jurisdiction, the Idaho court's orders are nevertheless *res judicata*. 456 U.S. at 702-03.

2. The conservator had the authority to encumber property, including property in Washington.

After her appointment, McKee's conservator had the authority to sell or encumber McKee's property without further court approval. The conservator had the power—acting without court authorization or confirmation—to “[c]ollect, hold and retain assets of the estate *including land in another state*,” and “[a]cquire or dispose of an estate asset *including land in another state* for cash or on credit.” Idaho Code § 15-5-424(3)(a) & (g) (emphasis added). And even though the

conservator did not need an order specifically authorizing the reverse mortgage, she obtained one, with Erickson's express approval. CP 110-11.

Nor is there any reasonable dispute that the conservator acted appropriately by incurring that debt. McKee had defaulted on a prior loan, and the Washington property—the very one Erickson was living in—was subject to a pending foreclosure. The reverse mortgage transaction stopped that foreclosure and allowed McKee to live out his life in the same house as his daughter, Erickson. That may be why Erickson, and two lawyers for McKee, approved the reverse mortgage transaction. CP 110-11.

Now disputing the conservator's authority to undertake the transaction that benefitted Erickson and McKee, the Court of Appeals points to Idaho Code § 15-1-301 as circumscribing the conservator's authority (and the Idaho court's jurisdiction) with respect to out-of-state property. But Idaho Code § 15-1-301 expressly says that whatever limits it may impose are subject to exceptions "as otherwise provided in this code." Idaho Code § 15-5-424(3)(a) and (g) can only be read as among those exceptions, insofar as they specifically authorize a conservator to deal with and dispose of estate assets, "including land in another state." Erickson's interpretation would strike those words out of Idaho Code § 15-5-424. *See Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 601 (2012) (courts avoid interpreting statutes in ways that render part superfluous).

3. Even if the conservator lacked authority, applicable law protects OneWest's deed of trust.

Although McKee's conservator unquestionably had the authority to enter into the reverse mortgage transaction, even if she did not, the result would not void OneWest's lien. "A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in section 15-5-408 of this Part, is protected as if the conservator properly exercised the power The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters [of conservatorship]." Idaho Code § 15-5-423.

Supplementing that statutory safe harbor, both Idaho and Washington protect third parties who deal in good faith with trustees, including conservators. A conservator holds property in trust. *See* Idaho Code § 15-5-420(a) & (c). The law broadly protects third parties who deal with trustees, even when trustees exceed their authority. *See* Restatement (Third) of Trusts §108; RCW 11.98.105; Idaho Code § 68-110. "A third party who acquires an interest in trust property through a breach of trust is entitled to retain or enforce the interest to the extent the third party is protected as a bona fide purchaser." Restatement (Third) of Trusts

§ 108(2). A third party is “not required to inquire into the extent of the trustee’s powers or the propriety of their exercise.” RCW 11.98.105(2).

OneWest’s deed of trust remains enforceable, even if the Idaho court acted improperly in appointing a conservator, and even if the conservator acted improperly by entering into a reverse mortgage transaction to save McKee’s property. The lender made a loan of over \$300,000, relying on a court order that specifically authorized the transaction. The order expressly stated that it was read and approved by McKee’s attorneys and by Erickson. CP 110-11.

A search of the Washington land records would also have revealed a recorded copy of the letters of conservatorship, which apparently gave the conservator the authority to deal with the Washington property. *See* CP 17-18; *see also* Idaho Code § 15-5-421. OneWest dealt in good faith with a conservator invested with apparent authority to deal with the property, and under both Washington and Idaho law, OneWest is protected.

C. Alternatively, the Court of Appeals should have remanded the case to allow OneWest to develop its equitable defenses.

Even if the Supreme Court agrees with Erickson’s legal arguments, it should nevertheless reverse that part of the Court of Appeals decision directing the entry of summary judgment for Erickson so that OneWest can assert its equitable defenses.

Erickson is not entitled to a windfall under equitable principles of estoppel, waiver, and laches, because she participated in the conservatorship proceedings, agreed with and benefitted from the reverse mortgage, and continues to retain the benefits to OneWest's detriment. CP 108, 111, 130. The loan saved the property from a pending foreclosure and allowed Erickson to continue living in the property with McKee. Erickson apparently still resides in the property. CP 124, 153. Erickson cannot both attack the validity of the loan transaction and continue accepting the benefits of the loan transaction. *See, e.g., Svatonsky v. Svatonsky*, 63 Wn.2d 902, 904-05 (1964).

OneWest is also entitled to be subrogated to the prior lien—the one that was paid off when the conservator entered into the 2007 loan. “[I]n the context of mortgage refinancing, this court has generally permitted a lender to be subrogated to the position of a priority interest holder simply by paying off that priority interest holder’s loan.” *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 577 (2013). The Court of Appeals issued summary judgment for Erickson without providing OneWest an adequate opportunity to demonstrate its subrogation rights.

OneWest was not given a meaningful chance to develop those equitable issues. There was no reason for OneWest to do so in the Superior Court because OneWest has a recorded deed of trust that was blessed by

an Idaho court order. It would have been strange for OneWest to develop equitable defenses in anticipation of a future decision on grounds never raised by Erickson in the Superior Court—and first substantially raised by the Court of Appeals itself—declaring the Idaho court’s orders ineffective.

* * *

For the foregoing reasons, the Court should (1) reverse the Court of Appeals’ decision dated November 13, 2014, and the subsequent order dated January 8, 2015, denying OneWest’s motion for reconsideration, and (2) affirm the Superior Court’s order dated August 16, 2013, granting summary judgment in favor of OneWest. Alternatively, the Court should reverse those parts of the Court of Appeals’ decisions granting summary judgment for Erickson, and remand the case to allow OneWest to develop its legal and equitable defenses in light of this Court’s guidance.

RESPECTFULLY SUBMITTED this 30th day of July, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2015, I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Attorneys for Appellant
Maureen M. Erickson

Signed in Seattle, Washington, this 30th day of July, 2015.


Elaine Huckabee

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Attached please find Supplemental Brief of Petitioner OneWest Bank, N.A. to be filed in the above matter.

Sent on behalf of:
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