UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-281C (Chief Judge Sweeney)
APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-370C (Chief Judge Sweeney)
AKANTHOS OPPORTUNITY MASTER FUND, L.P., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-369C (Chief Judge Sweeney)
CSS, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-371C (Chief Judge Sweeney)

MASON CAPITAL L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-529C (Chief Judge Sweeney)

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs attach the Fifth Circuit's *en banc* decision in *Collins v. Mnuchin*, No. 17-20364 (Sept. 6, 2019). It confirms points Plaintiffs made in their Opposition based on the *Collins* panel opinion and Judge Willett's panel dissent, as well as other points in Plaintiffs' Opposition, bearing on jurisdiction, standing, and the merits of Plaintiffs' claims for taking or, in the alternative, illegal exaction. In particular:

- The Sweep Amendment was "created between the FHFA and Treasury," and the President, through Treasury, "had plenary authority to stop" it. *Collins* 58; Opp.I.A&C (suits are against U.S.).
- Based on authority from the "materially identical" FIRREA, "a conservator has power to steward the bank's assets, not to make every conceivable use of them" (*Collins* 16, 34)—indicating any circumstance whereby FHFA might shed its character as the U.S. would not extend beyond what a private conservator could do. Opp.I.B.2 (suits are against U.S.).
- "FHFA is a federal agency, empowered by a federal statute, enriching the federal government" by the Sweep Amendment, an action "similar to retaining the liquidation surplus in *Slattery*." *Collins* 50–51; Opp.I.B.3 (suits are against U.S.).

- The Sweep Amendment directly injured shareholders other than Treasury: Pumping profits to Treasury while excluding all other shareholders is "an injury in fact." *Collins* 44. The Sweep Amendment "transferr[ed] Fannie and Freddie's future value to a single shareholder, Treasury," yet "a common-law conservator may not give the ward's assets to a single shareholder." *Collins* 4 & 40; Opp.III.A (standing, because claims are direct).
- Under background principles and understandings, informed by FIRREA and common law and confirmed by FHFA's own words, shareholders had a property interest that continued under a HERA conservatorship, and the Sweep Amendment took it, "in perpetuity": "[I]nvestors and the market reasonably expect a conservator to 'operate, rehabilitate, reorganize, and restore'" the institution, "not summarily take its property." *Collins* 39–40; *see id.* at 24–25, 35–37, 42; Opp.IV.A (property interest continues under conservatorship, and taking is properly alleged under any analysis).
- The character of the Sweep Amendment was governmental self-dealing, as it transfers the Companies' "net worth indefinitely, well after Treasury has been repaid." *Collins* 39; *see id.* 51 ("FHFA is . . . enriching the federal government."); Opp.IV.A.4 (taking under *Penn Central* factors, among other grounds).
- The Sweep Amendment "exceeded FHFA's statutory powers." *Collins* 3, 46–53; Opp.IV.B.1 (if not authorized, Sweep Amendment is *ultra vires*).

Respectfully submitted:
September 18, 2019

By: *Lawrence D. Rosenberg*

Lawrence D. Rosenberg
Counsel of Record

Of Counsel
Bruce S. Bennett
Sidney P. Levinson
C. Kevin Marshall
Michael C. Schneidereit
Alexandria M. Ordway
Chané Buck

JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Tel.: (202) 879-3939
Fax: (202) 626-1700
ldrosenberg@jonesday.com

Counsel for Plaintiffs