NO. 91625-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHANIE TASHIRO-TOWNLEY and
SCOTT C. TOWNLEY
Petitioner

vs.

THE BANK OF NEW YORK MELLON, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, FKA Bank of New York; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and OCWEN LOAN SERVICING, LLC
Respondents

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This petition for review arises out of an unlawful detainer action filed by the Bank of New York Mellon f/k/a the Bank of New York, as Trustee for the Certificateholders CWABS Inc. Backed Certificates, Series 2005-10 (the "Trust"). The Trust was the purchaser of the property that is the subject of the action, after purchasing it at a foreclosure sale subsequent to a nonjudicial foreclosure. The Petitioners, Scott Townley and Stephanie Tashiro-Townley ("Townleys" or "Petitioners"), are the grantees of a Deed of Trust securing a note on the Property. The Townleys have never argued that they were appropriately paying on the Note or that the Note is not in default. Instead, they contested the nonjudicial foreclosure by filing suit in Federal District Court, alleging claims for injunctive and declaratory relief, and violations of the Washington Consumer Protection Act ("CPA"). *Tashiro-Townley v. Bank of New York Mellon*, 555 Fed. App'x. 735, 736 (9th Cir. 2014). Those claims were decided in a final order in that Court, *id.*; yet, during the pendency of the Townleys' appeal to the Ninth Circuit, the Townleys asserted the same claims as counterclaims and cross-claims in the unlawful detainer action. The Washington Court of Appeals correctly found that the Townleys' claims were barred by *res judicata*.

This Court's discretionary review is not warranted. The Court of Appeals' unpublished decision is fact-specific, entirely consistent with settled Washington law, and establishes no precedent. The Townleys provide no reasonable argument to support their contention that the issues in this case present a conflict with a decision by the Supreme Court, a conflict with a decision of the Court of Appeals, or qualify as issues of substantial public interest requiring further guidance by this Court. Accordingly, this Court should deny review.

II. ISSUES PRESENTED FOR REVIEW

1. Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP"), Rule 13.4(b), for this Court to accept discretionary review of this matter?

2. Is the Trust entitled to an award of attorney's fees and costs incurred in responding to the Townley's Petition for Review?

III. COUNTER-STATEMENT OF THE CASE

The following outlines the relevant factual and procedural history of this matter:

A. Foreclosure Proceedings Are Commenced and the Townleys Bring Suit in Federal Court

On July 26, 2005, the Townleys executed a promissory note and deed of trust with Countrywide Home Loans, Inc. in the amount of

$297,000 (the "Loan") secured by property located in Maple Valley, WA 98038-5836. ("Property"). Less than four years later, the Townleys stopped making the monthly payments due on the Loan. Consequently, foreclosure proceedings commenced.

In response to foreclosure proceedings, the Townleys filed an affirmative complaint in the Western District of Washington on November 16, 2010 ("Federal Case").[1] The Federal Case was filed against the Trust, Mortgage Electronic Registration Systems, Inc. ("MERS"), Litton Loan Servicing, LP, and Does 1-100. (*Id.*) The Townleys' action challenged the propriety of the foreclosure sale, alleging declaratory and injunctive relief as well as a claim for violations of the Washington CPA. (Supp. Br. Ex. A.) *See also Tashiro-Townley*, 555 Fed. App'x. at 736 (describing suit). However, the Townleys failed to move for a preliminary injunction or otherwise take steps in Court to restrain the sale of the Property. (Supp. Br. Ex. A.) Consequently, the trustee's sale of the Property took place on December 3, 2010 and the Property was sold to the Trust. (CP 1-10.)

After the sale, the Townleys amended their affirmative complaint in the Federal Case twice. (Supp. Br. Ex. A at Doc. 13, 68.) Based upon

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[1] *See Tashiro-Townley v. Bank of New York Mellon as Trustee*, No. 2:10-cv-01720-JCC (W.D. Wash. Compl. Oct. 22, 2010.) A true and correct copy of the Federal Case docket, 2:10-cv-01720-JCC, was attached as Exhibit A to the September 9, 2014 Respondents' Supplemental Brief filed with the Court of Appeals. (Hereinafter, "Supp. Br. Ex. A.")

the motion of the Trust and MERS, the district court dismissed the Townleys' Second Amended Complaint. (Supp. Br. Ex. A, Docs. 86-87.) *See also Tashiro-Townley*, 555 Fed. App'x. at 736 (mentioning district court's resolution.) The district court found that the Townleys' CPA claim failed because the Townleys failed to allege a public interest impact, and that the Townleys' other claims were waived because the Townleys failed to restrain the foreclosure sale before it occurred. *Id.* The Townleys appealed the dismissal to the Ninth Circuit on September 30, 2011. *Id.*

B. The Unlawful Detainer Action and the Townleys' Counter and Cross Complaint are Filed During the Pendency of the Ninth Circuit Appeal

In order to obtain possession of the Property it had purchased, the Trust initiated the underlying action for unlawful detainer against the Townleys on February 24, 2012. (CP 1-10.) In response, the Townleys filed "counter and cross complaints," in which they named the Trust as a counter defendant and also named Ocwen Loan Servicing, LLC ("Ocwen"); Goldman Sachs Group, Inc.; MERS; HSBC Mortgage Services, Inc.; and Does 1-20 as "Cross Complained Defendants." ("Counter and Cross Complaint"). (CP 375-394.) In the Counter and Cross Complaint, the Townleys asserted claims for Washington CPA violations, common law fraud, and "mortgage fraud." (*Id.*) The causes of action all related to the underlying mortgage and nonjudicial foreclosure

sale of the property—not to any post sale action. Thus, the subject matter of the Townleys' Counter and Cross Complaint was identical to the subject matter of their affirmative suit in the Federal Case.

On March 7, 2012, the Townleys attempted to change the unlawful detainer proceeding from limited to general jurisdiction. (CP 13-18.) They also filed a Petition for Declaratory Judgment and Injunctive Relief in the Unlawful Detainer action. (CP 612-780.) Respondents opposed. (CP 969-978.) On May 11, 2012, the Court denied the Townleys' Motion to change the proceeding from limited to general jurisdiction. (CP 1060-61.) The Court also denied the Townley's Petition for Declaratory and Injunctive Relief on the grounds that the Superior Court does not have subject matter jurisdiction to decide such a claim within the context of an unlawful detainer action. (CP 1062-63.)

On May 15, 2012, Respondents filed a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) and also asserted in the motion that the Trial Court lacked subject matter jurisdiction to resolve issues outside the scope of the unlawful detainer statute under RCW 59.12. On May 17, 2012, the Court granted Respondents' Motion to Dismiss the Townleys' Counter and Cross Complaint, and a writ of restitution was issued. (CP 1031-15.) The

Townleys filed a Notice of Appeal to the Washington Court of Appeals on August 10, 2012. (CP 1646-53.)

C. The Ninth Circuit Affirms and Vacates in Part the District Court's Judgment

The appeal to the Washington Court of Appeals was stayed pending the outcome of the Ninth Circuit appeal. The Ninth Circuit issued its judgment: the district court was affirmed in part, vacated in part, and remanded for further proceedings. *Tashiro-Townley*, 555 Fed. App'x. at 736. The Ninth Circuit affirmed dismissal of the declaratory and injunctive requests for relief based upon the Townleys' waiver for failing to bring an action to enjoin the sale. *Id.* However, the Ninth Circuit vacated the dismissal of the CPA claim in order to afford the district court an opportunity to reconsider the Townleys' CPA claim in light of the recent decision, *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83 (2012). *Id.* Therefore, the Townleys currently have pending in their Federal Case a CPA claim upon which they requested damages against the Trust and MERS. (*Id.*) That claim has been stayed in the district court pending resolution of the instant appeal. (Supp. Br. Ex. A, Doc. 142.)

D. The Court of Appeals Affirms Dismissal on Res Judicata Grounds

On March 2, 2015, the Washington Court of Appeals affirmed the trial court's dismissal of the Townley's claims in the unlawful detainer

action, finding that the claims were barred by res judicata or otherwise lacked merit. *Bank of New York Mellon v. Tashiro-Townley*, No. 69194-5-I, 2015 WL 890830, at *4 (Wash. App. Div. 1, Mar. 2, 2015.) The Townleys now petition this Court to review the Washington Court of Appeals' decision.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard for Review

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), a petition for review to the Washington Supreme Court is accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Petitioners contend that review is warranted because the appeal raises issues of first impression, due process violations, and deceptive business practices that involve an issue of substantial public interest. As discussed further below, Petitioners are mistaken and review is not warranted under any of the criteria established in RAP 13.4(b).

B. The Court of Appeals' Unpublished Decision Applied Settled Law to Undisputed Facts.

The Washington Court of Appeals' decision in this matter involves straightforward application of settled principles of law to the undisputed facts. It is undisputed that the Townleys brought an affirmative action in the Federal Case to challenge the nonjudicial foreclosure of the Property, and that their subsequent Counter and Cross Complaint also concerned the nonjudicial foreclosure rather than any post-sale conduct. There is ample Washington jurisprudence establishing that "[i]f a matter has been litigated or there has been an opportunity to litigate on the matter in a former action, the party-plaintiff should not be permitted to relitigate that issue." *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1, 3 (1986) (citing cases). Rather, the doctrine of *res judicata* and/or collateral estoppel preclude a subsequent court's review.

The Court of Appeals' decision does not warrant review by the Supreme Court because it applied settled law to undisputed facts, and there is no serious legal argument contradicting the *res judicata* effect of the Federal Case. Application of res judicata requires that the prior litigation be identical to the subsequent litigation "in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Schoeman*,

106 Wn.2d at 858, 860. Here, the Court of Appeals correctly found that each necessary element is satisfied.

First, the subject matter of the Federal Case and the Counter and Cross Complaint is identical. The facts all pertain to the Townleys' underlying loan and the non-judicial process and foreclosure thereof. The Counter and Cross Complaint alleges a fraudulent Assignment and Appointment of Successor Trustee Documents used in the foreclosure process, which the Townleys claim were wrongly used to conduct the foreclosure. (CP 375-394, ¶¶ 32-45.) The Federal Case similarly involved a challenge to the nonjudicial foreclosure process. *Tashiro-Townley*, 553 Fed. Appx. at 735.

Second, for the purpose of res judicata, the causes of action in both matters are the same in nature. In order to identify a cause of action, the following criteria should be considered: "(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Rains v. State*, 100 Wn.2d 660, 664 (1983). The Federal Case conclusively determined the same rights the Townleys requested the trial court determine in the unlawful detainer

action. The evidence presented in both matters was nearly identical. Both suits related to the rights afforded the Townleys under the various statutes, including the Deed of Trust Act and the Washington Consumer Protection Act. Moreover, both suits arise out of the same nucleus of actions (i.e., the foreclosure); thus, the causes of action are the same.

With respect to the third and fourth factors, i.e., identity of the parties, the Townley's claims in the federal and state case were asserted against both the Trust and MERS. Additionally, in the Federal Case, the Townleys initially asserted their claims against Litton, the prior servicer; whereas they named the current servicer, Ocwen, in the unlawful detainer action. (*Compare* Supp. Br. Ex. A to CP 375.) For *res judicata* purposes, the parties need not be exactly the same, but only qualitatively the same. *Rains*, 100 Wn.2d at 664 ("'[i]dentity of parties is not a mere matter of form, but of substance....[P]arties nominally different may be, in legal effect, the same.'") Thus, a suit against the prior servicer of the loan was qualitatively against the successor servicer, Ocwen.

Because the Townleys already obtained a final judgment on their claims challenging the propriety of foreclosure in the Federal Case, their state law claims asserting the same challenge and brought during the

pendency of the appeal were barred by *res judicata*.[2] *See Rains*, 100 Wn.2d at 665-66 ("noting party "had an unencumbered, full and fair opportunity to litigate his claim in a neutral forum – federal district court," and consequently could not bring the same claims in state court.)

The Townley's argue that application of *res judicata* was not appropriate because no final judgment was rendered in the Federal Case due to the fact that the district court's decision in that case was reversed in-part. (Petition at 11-12.) The Townleys misunderstand the law. First of all, the Ninth Circuit upheld the district court's dismissal of the Townley's identical claims for injunctive and declaratory relief, and only reversed dismissal of their CPA claim. *Tashiro-Townley*, 555 Fed. App'x. at 736. Moreover, under Washington law, *res judicata* prevents a party

[2] Alternatively, the Townley's counterclaim and cross-complaint were also barred by the doctrine of collateral estoppel. Collateral estoppel applies when each of the four factors are true: (1) an issue decided in the prior adjudication is identical with the issue presented in the current action; (2) there was a final judgment on the merits in the prior adjudication; (3) the party against whom the plea is asserted was a party in the prior action or was in privity with the party in the prior adjudication; and (4) application of the doctrine will not work an injustice on the party against whom the doctrine is to be applied. *Rains*, 100 Wn.2d at 665. Here, the claims and issues presented to both courts are identical, and the Ninth Circuit issued its opinion on said issues. Moreover, the parties, for all intents and purposes, are the same. Last, the Townleys will not face an injustice if their state court claims are barred as they have previously had the opportunity to litigate their claims in the forum of their choice: federal district court. Moreover, their CPA claim remains pending in the Federal Case.

from filing a new action while an appeal on the same action is pending *even if* the appeal is later successful. *See City of Des Moines v. Personal Property Identified as $81,231 in United States Currency*, 87 Wn.App. 689, 702 (1997) (res judicata applies to final judgment even if later reversed), *Lejeune v. Clallam Cy.*, 64 Wn.App. 257, 266 (1992) (same). As explained by one Court:

> "The policy underlying [the rule of *res judicata*] is that a party is entitled to one but not more than one fair hearing. *Lejeune*, 64 Wn.App. at 266. A party who loses at trial may appeal, and if she prevails on appeal the resultant rehearing will have been the first fair hearing. *Id.* While the appeal is pending, however, she is precluded by res judicata from starting a new action at the trial court level in hopes of obtaining a contrary result while the appeal is pending. Similarly, with collateral estoppel, a party is precluded from relitigating issues previously determined while an appeal as to those issues is pending."

City of Des Moines, 87 Wn.App. at 702-03. Here, the Townleys filed claims concerning their wrongful foreclosure allegations against MERS, the Trust, and Ocwen while an appeal on dismissal of identical claims was pending in the Ninth Circuit. This was not permitted under principles of *res judicata*, and affirming the trial court's dismissal of the claims was therefore appropriate on this ground. Moreover, the dismissal of the Townley's claims for declaratory and injunctive relief in the Federal Case remains final, while only the CPA claim was reversed. Under *Lejeune*, the proper remedy for the Townleys is to proceed with their originally-filed

CPA claim through a rehearing before the federal court. But the Townleys are not entitled to file the claim anew in a new state court proceeding. 64 Wn.App at 266. *See also Spokane County v. Miotke*, 158 Wn.App 62, 68 (2010) ("Notably, the res judicata doctrine is designed to discourage piecemeal litigation.")

C. The Petition Does Not Identify any Conflict Between the Court of Appeals Decision and Any Supreme Court or Other Court of Appeals Decision

This Court will accept a petition for review if the decision of the Court of Appeals is in conflict with a decision of this Court or a decision of any other Washington Court of Appeals. RAP 13.4(b)(1-2). Respondents, however, fail to even suggest that there is a conflict. It is clear there is none. This Court has already noted that Washington jurisprudence on *res judicata* is "well-established." *In re Coday*, 156 Wn.2d 485, 504 (2006).

The Townleys contend that this Court should grant review of the Court of Appeals' decision because the appeal concerns issues of first impression. This is not a basis of review provided in RAP 13.4 or recognized by the Washington Supreme Court. *See In re Coats*, 173 Wn.2d 123, 132-33 (2011) (noting "petitioner must persuade us that either the decision below conflicts with a decision of this court or another division of the Court of Appeals; that it presents a significant question of

constitutional interest; or that it presents an issue of substantial public interest that should be decided by this court.") (citing RAP 13.4(b)). Moreover, there are no issues of first impression regarding *res judicata* before the Court.

D. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by this Court.

The Townleys' final contention is that their lawsuit involves an issue of substantial public interest. This Court will accept a petition for review if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). A substantial public interest exists, for example, where the Court of Appeals' holding below will affect numerous other individuals. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577 (2005) (noting case before it "presents a prime example of an issue of substantial public interest" because "Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue.")

Here, there is no substantial public interest apparent in the Townleys' request that this Court revisit an unpublished opinion applying settled law on *res judicata*. The Court of Appeals' opinion will not affect other litigants as the opinion cannot be cited for precedent and, in any

event, the opinion would only be relevant to litigants who have filed duplicitous actions, and ample binding authority on *res judicata* already exists.

The Townleys argue that the public interest is implicated because the trial court ignored evidence of violations of the Washington Deed Trust Act "worked on the Townleys and the public at large." (Petition at 1, 10). However, this Court's review of the Court of Appeals' application of *res judicata* would likely never reach that issue. Moreover, although the Townleys assert a litany of conduct they claim was unfair to them, they fail to point the Court to anything in the record establishing a harm to the public by the alleged acts.

For example, in their Counter and Cross Claims, the Townleys alleged that documents created during the nonjudicial foreclosure of the Property – specifically, an Assignment of Deed of Trust and Appointment of Successor Trustee – were fraudulent business records. (CP 375-394, ¶ 32.) The Townleys fail to identify how the documents were fraudulent in their Complaint, let alone identify a public interest. (*Id.*) They submitted a purported expert declaration from Lynn E. Szymoniak, which criticized the documents on the grounds that they were each signed by individuals who hold many different corporate officer titles (CP 612-780, Szymoniak Dec. at ¶¶ 8-14), but the Declaration does not conclude or provide grounds

suggesting that the documents were actually fraudulent. (*Id.*) Moreover, the Szymoniak Declaration provides no evidence that any of the parties involved in this case routinely utilized or caused harm through fraudulent documents as might warrant a basis to claim the public interest was implicated. Instead, the Declaration ultimately concludes (at best) that the deed of trust securing the Loan may not have been assigned to the securitized trust before the closing date of the trust (*Id.* at ¶ 19), a matter that Petitioners have no standing to challenge.[3]

The record is similarly factually deficient with regard to Petitioners' fraud claim premised on the allegation that, at some point in time, MERS records showed a second deed of trust on the Property that did not exist. (CP 375-394 ¶ 53.) There is no argument that any alleged

[3] *See, e.g., In re Davies*, 595 Fed. App'x. 630, 633 (9th Cir. 2014) (recognizing the clear "weight of authority hold[ing] that debtors in the Davies' shoes – who are not parties to the pooling and servicing agreements – cannot challenge them.") (citing authorities); *Ogorsolka v. Residential Credit Solutions, Inc.*, No. 2:14-CV-00078, 2014 WL 2860742, at *3 (W.D. Wash. Jun. 23, 2014) ("Plaintiffs do not allege that they were investors in a trust or a party to any purchase and sale agreement and as third party borrowers, they lack standing to enforce any terms of the [trust documents]."); *Borowski v. BNC Mortgage, Inc.*, No. C12–5867 RJB, 2013 WL 4522253, *5 (W.D.Wash. Aug. 27, 2013), *appeal dismissed* (Oct. 25, 2013), *motion for relief from judgment denied*, No. C12–5867 RJB, 2013 WL 5770378 (W.D.Wash. Oct.24, 2013) ("there is ample authority that borrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands").

issue with MERS' database even harmed the Petitioners, let alone that it is a rampant problem harming anyone and/or impacting the public.

In sum, while the Townleys may have a substantial interest in obtaining damages for possible CPA violations or retaining the ability to live at the Property, they have failed to show any substantial *public* interest in this issue. There is no public interest implicated in the Townleys' request for review of the Court of Appeals application of *res judicata*. And, even in the unlikely event that this Court had occasion to delve into the merits of the Townleys' claim, there has been no adequate showing that those claims involve an issue of substantial public interest justifying discretionary review.

V. ATTORNEY'S FEES AND COSTS

Washington Rules of Appellate Procedure allow an award of fees where supported by law. RAP 18.1(a). Pursuant to RCW 59.18.290(2), an award of attorney's fees is allowed to a landlord who prevails in an unlawful detainer action. Further, the deed of trust executed by the Townleys include a provision awarding attorney's fees, including appellate fees, to a prevailing party. Consequently, if this Court denies the Townley's Petition, Respondents respectfully request that the Court award reasonable attorney's fees and costs pursuant to RAP 18.1(a) for time spent preparing an Answer to the petition. Further, if this Court grants

review of the Townley's petition, Respondents request that the Court also review whether the Washington Court of Appeals appropriately denied fees and costs incurred by the Respondents in connection with responding to the Townley's appeal.

VI. CONCLUSION

For the reasons stated above, Respondents request that this Court to deny the Townley's Petition.

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

HOUSER & ALLISON, APC

/s/ Emilie K. Edling
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Attorneys for Respondents The Bank of New York Mellon, as Trustee for the Certificateholders CWL, Inc. Asset Backed Certificates, Series 2005-10, fka Bank of New York; Mortgage Electronic Registration Systems, Inc.; and Ocwen Loan Servicing, LLC.

CERTIFICATE OF SERVICE
(BY OVERNIGHT MAIL)

In accordance with the laws of the **STATE OF WASHINGTON,** I the undersigned declare as follows: I am a person over the age of eighteen years and not a party to this action. My business address is 9600 SW Oak Street, Suite 570, Portland, OR 97223.

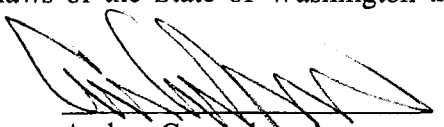
On June 9, 2015, I served true copies of the attached

ANSWER TO PETITION FOR REVIEW

[X] **VIA OVERNIGHT MAIL/COURIER:** By placing a true copy thereof enclosed in a sealed envelope, addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would in the ordinary course of business, be delivered to an authorized courier or delivery authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day for delivery on the following business day.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: June 9, 2015



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Subject: RE: No. 91625-0: Stephanie Tashiro-Townley and Scott C. Townley (Petitioner) v. The Bank of New York Mellon (Respondents)

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Supreme Court Clerk's Office

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Subject: No. 91625-0: Stephanie Tashiro-Townley and Scott C. Townley (Petitioner) v. The Bank of New York Mellon (Respondents)

Dear Supreme Court Clerk:

Attached for filing and entry please find Respondents' Answer to Petition for Review in the below-referenced matter:

NO. 91625-0

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