No. 92185-7

SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID GUTTORMSEN and TERRY GUTTORMSEN, husband and wife,

Plaintiffs-Appellants

v.

AURORA BANK, FSB; AURORA LOAN SERVICES, LLC; NATIONSTAR MORTGAGE LLC; FEDERAL NATIONAL MORTGAGE ASSOCIATION; QUALITY LOAN SERVICE CORPORATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; DOE DEFENDANTS 1-10,

Defendants-Respondents

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

ANSWER TO APPELLANTS' PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to RAP 13.4(d), Defendants-Respondents Aurora Bank, FSB, Aurora Loan Services, LLC (collectively, Aurora), Nationstar Mortgage LLC (Nationstar), Federal National Mortgage Association (Fannie Mae), and Mortgage Electronic Registration Systems, Inc. (MERS)[1] respectfully submit this answer to Appellants' Petition for Review (PFR) filed by David and Terry Guttormsen (Guttormsens).

For the reasons articulated below, the PFR should be denied.

II. COUNTERSTATEMENT OF THE CASE

A. The Guttormsens Executed a Negotiable Promissory Note Evidencing a $200,000 Loan and Secured It with a Deed of Trust Containing a Power of Sale.

On February 26, 2006, the Guttormsens executed a promissory note (Note) in the face amount of $200,000, which evidenced a loan from AIG Federal Savings Bank (AIG).[2] By signing the Note, the Guttormsens agreed to pay back the loan according to the Note's original terms.[3]

The Guttormsens secured the Note with a Deed of Trust against real property commonly known as 4315 Hoyt Avenue, Everett, WA 98203 (Property).[4] U.S. Recordings, Inc. (USRI) recorded the Deed of Trust on

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[1] Aurora, Nationstar, Fannie Mae, and MERS are sometimes collectively referred to as Respondents.
[2] CP 934; 949; 848-853.
[3] CP 848.
[4] CP 934; 954.

March 23, 2006 under Snohomish County Recording No. 200603230406 (406 Recording).[5] Immediately thereafter, USRI recorded the same Deed of Trust again, under Snohomish County Recording No. 200603230407 (407 Recording).[6] The Deed of Trust discloses that MERS is the beneficiary in a nominee capacity for AIG and its successors and assigns.[7]

By signing the Deed of Trust, the Guttormsens agreed that the trustee and any successor trustee could sell the Property via the nonjudicial foreclosure process if the Guttormsens did not make their loan payments.[8]

The Deed of Trust securing the Note disclosed that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to [the Guttormsens]."[9] The Deed of Trust also disclosed that such sales "might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note . . . and performs other mortgage loan servicing obligations[.]" *Id.*

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[5] CP 954. The Guttormsens misleadingly characterize the two recordings as two separate deeds of trust, which allegedly "double[] the amount of the security" (PFR at 5), but in fact they were merely two recordings of the same instrument.
[6] *Compare* CP 954 *with* CP 971 (evidencing recordation of the deed of trust at 12:40 and 12:41 p.m. respectively on March 23, 2006).
[7] CP 955.
[8] CP 973.
[9] CP 982.

B. Transfers of Note Ownership and Loan Servicing Rights.

On or about April 22, 2006, AIG indorsed the Note to HSBC Mortgage Services, Inc. (HSBC), via an allonge in connection with HSBC's purchase of the loan.[10] HSBC subsequently indorsed the Note in blank via a second allonge.[11]

On or about August 28, 2007, Fannie Mae purchased the loan.[12] At that time, Aurora was servicing the loan. *Id.* Aurora continued to service the loan until on or about July 2, 2012, when Nationstar acquired the right to service the loan for Fannie Mae.[13] From on or about August 28, 2007 to on or about August 19, 2011, the indorsed in blank Note was in the physical possession of Aurora's authorized document custodian.[14] From on or about August 20, 2011 to on or about March 10, 2013, Aurora itself had physical possession of the indorsed in blank Note. *Id.* Nationstar maintained physical possession of the original indorsed in blank Note from on or about March 10, 2013 to on or about January 28, 2014, when Nationstar transmitted the Note to its counsel of record in this matter.[15]

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[10] CP 843; 851.
[11] CP 852.
[12] CP 843.
[13] CP 843.
[14] CP 843-844.
[15] CP 844.

C. The Guttormsens' Default, and Commencement of Nonjudicial Foreclosure Proceedings.

The Guttormsens failed to make the May 1, 2011 payment required under the Note.[16] On November 30, 2011, a Corporate Assignment of Deed of Trust (CADT) executed by MERS (as nominee) in favor of Aurora was recorded under Snohomish County Recorder's No. 201111300356.[17] This CADT referenced the 407 Recording of the Deed of Trust. *Id.*

On June 13, 2012, Aurora appointed Quality Loan Service Corp. of Washington (Quality) as the successor trustee, referencing the 407 Recording.[18] On July 13, 2012, Quality issued the Guttormsens a Notice of Default which referenced the Deed of Trust, identified Fannie Mae as the "current owner of the Note secured by the Deed of Trust," and identified Aurora as the servicer of the loan.[19]

On October 11, 2012, an Assignment of Deed of Trust (ADT) executed by Aurora (through Nationstar in its capacity as Aurora's attorney in fact) in favor of Nationstar was recorded under Snohomish County Recorder's No. 201210110416.[20] The ADT referenced the 406

[16] CP 844; *see also* CP 1009; 1025.
[17] CP 1003.
[18] CP 1005-1006.
[19] CP 1008-1009.
[20] CP 1020-1022.

Recording of the Deed of Trust. On December 17, 2012, Quality recorded a Notice of Trustee's Sale of the Property.[21]

D. This Lawsuit and Discontinuance of the Trustee's Sale.

On April 18, 2013, the Guttormsens filed this case in Snohomish County Superior Court and obtained an order temporarily restraining the trustee's sale.[22] On April 30, 2013, the Superior Court issued a preliminary injunction enjoining the sale.[23] On July 8, 2013, Quality recorded a Notice of Discontinuance of the Trustee's Sale.[24]

On March 28, 2014, the Superior Court granted Aurora, Nationstar, Fannie Mae, and MERS's motion for summary judgment.[25] On June 4, 2014, the Superior Court denied the Guttormsens' motion for reconsideration of that order.[26]

On September 10, 2014, the Superior Court granted Quality's motion for summary judgment.[27] On September 19, 2014, the Guttormsens appealed.[28]

On August 3, 2015, the Court of Appeals affirmed the trial court in in *Guttormsen v. Aurora Bank*, FSB, No. 72506-8-I, 2015 WL 4611328

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[21] CP 1024.
[22] CP 929-931.
[23] CP 912.
[24] CP 345.
[25] CP 443.
[26] CP 388-389.
[27] CP 14.
[28] CP 2.

(Wash. Ct. App. Aug. 3, 2015) (the Decision). The Guttormsens now petition this Court for review of the Decision.

III. ARGUMENT AGAINST DISCRETIONARY REVIEW

The Guttormsens seek review under RAP 13.4(b)(1) and (4), arguing that the Decision is in conflict with various decisions of the Washington Supreme Court and that the Decision presents issues of substantial public interest that should be determined by the Supreme Court.[29] *See* RAP 13.4(b)(1), (4).[30] The Guttormsens are incorrect.

The Decision properly concluded that Aurora and Nationstar were the holders of the Note at all relevant times and thus the beneficiaries entitled to enforce the Note through the non-judicial foreclosure process, consistent with *Trujillo v. Nw. Trustee Srvs., Inc.*, 181 Wn. App. 484, 493-502, 326 P.3d 768 (2014), *overruled in part on other grounds by Trujillo v. Nw. Trustee Srvs., Inc.*, No. 90509-6 (Aug. 20, 2015) and *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). Therefore, the PFR should be denied.

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[29] PFR at pp. 1-4.

[30] The PFR identifies the reasons why the Guttormsens believe that this Court should review the Decision. Several of these reasons apply only to claims against the trustee, Quality, such as the claim that Quality violated its duty of good faith as deed of trust trustee. Accordingly, Respondents only address the Guttormsens' arguments that apply to them.

A. The Decision Does Not Conflict With Any Prior Decisions of this Court.

Because Fannie Mae purchased the Guttormsens' loan, but the loan was serviced by an authorized loan servicer (Aurora), the Guttormsens advanced the familiar argument that a foreclosing beneficiary must both own and hold the note. *See Guttormsen* 2015 WL 4611328 at *1. The Court of Appeals correctly rejected this argument, holding that loan servicers Aurora and Nationstar were beneficiaries of the Deed of Trust because they held the Guttormsens' Note at all relevant times. The Guttormsens now seek review simply because they disagree with this result, not because the Decision is in actual conflict with any decision of this Court. PFR at 7-10.

Here, review under RAP 13.4(b)(1) is not warranted because the Decision is consistent with the prior decisions of this Court, not in conflict with them.

1. Under Washington Law, the Noteholder is the Beneficiary.

Deeds of trust and foreclosures thereof, such as are at issue here, are governed by RCW 61.24 *et seq.*, the Washington Deed of Trust Act (DTA). Since 1998, the DTA has defined a "beneficiary" of a deed of trust as "the **holder** of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the

same as security for a different obligation." *Bain*, 175 Wn.2d at 98-99, (citing RCW 61.24.005(2)) (emphasis added).

The Washington U.C.C. defines the "holder" of a negotiable instrument in relevant part as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(21)(A); *Bain*, 175 Wn.2d at 104. A negotiable instrument is payable to bearer if, as is the case here, the Note is last indorsed in blank. *See* RCW 62.A.3-205(b).

In *Trujillo*, the Court of Appeals confirmed that holder status, not note ownership, determines beneficiary status. 181 Wn. App. at 493-502. Accordingly, the Court of Appeals rejected claims similar to the Guttormsens' claims, which were also based on a lack of loan ownership. This Court partially reversed the *Trujillo* decision, but on other grounds. This Court reversed because it found that the trustee could not rely on ambiguous language in the operative beneficiary declaration that the beneficiary was the "actual holder of the promissory note . . . *or* has requisite authority under RCW 62A.3-301 to enforce[.]" *Trujillo v. Nw. Trustee Srvs., Inc.*, No. 90509-6, *1 (Wash. Aug. 20, 2015) (emphasis

added). Notably, the beneficiary declaration here is not ambiguous – it clearly states that Aurora is the "actual holder of the Promissory Note[.]"[31]

With respect to the owner/holder issue raised by the Guttormsens and analyzed by the Court of Appeals' opinion in *Trujillo*, this Court stated that:

> Wells Fargo would constitute a "**holder**," and **therefore a valid beneficiary under the DTA**, if it actually held the note when it made the declaration at issue.

Id. at n.4 (emphasis added). In that case, record evidence reflected that Wells Fargo was the loan servicer and Fannie Mae was the owner of the loan. Thus, the Court of Appeals decision is in accord with Supreme Court precedent.

2. The Court of Appeals Properly Found that Nationstar's Agency Status was Irrelevant Under Washington Law.

The Guttormsens argue that the Court of Appeals impermissibly relied on the testimony of a Nationstar representative to establish an agency relationship with Fannie Mae.[32] However, as correctly held by the Court of Appeals and argued above, the role of and authority given by the loan owner Fannie Mae is simply not relevant. Because Aurora and Nationstar could enforce the note and deed of trust as noteholders, the inquiry ends there.

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[31] CP 343.
[32] PFR at 13-14.

Thus, the PFR should be rejected because the issue of whether Nationstar and Aurora proved agency status is irrelevant.

3. The Court of Appeals' Ruling on the Trial Court's Admission of Nationstar's Business Records Was Based on Well-Found Washington Law.

The Guttormsens attempt to undermine Nationstar's testimony regarding noteholder status by claiming that Nationstar's declaration is not admissible as a business record.[33] The Court of Appeals correctly rejected this argument and upheld the trial court's admission of Nationstar's testimony.

Computerized business records are admissible under the same standards as a non-computerized business records. *State v. Ben-Neth*, 34 Wn. App. 600, 604-605, 663 P.2d 156 (1983) (upholding the admission of a bank's computerized records under the business record exception).[34] No aspect of the Decision's well-reasoned approach to the admission of business records meets the criteria for review by this Court.[35]

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[33] PFR at 10-13.

[34] *See also U.S. v. Casey*, 45 M.J. 623, 626 (U.S. Navy-Marine Corps Ct. of Crim. App. 1996) (computer-generated records can be entered into evidence as an exception to the general rule against hearsay if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness); *D & H Auto Parts, Inc. v. Ford Marketing Corp.*, 57 F.R.D. 548, 551 (1973) ("The fact that computers were used in compiling the data for these reports does not impair their admissibility as business records.").

[35] *See* PFR at pp. 10-13.

The Guttormsens rely on various cases from the 1960s and 1970s, hoping to show that the Decision conflicts with Supreme Court precedent. However, these cases actually support Nationstar's position because they affirmed the admission of computerized business records. For example, in *Kane*, the Court of Appeals upheld the admission of computerized business records without testimony concerning the reliability of the computer equipment. *State v. Kane*, 23 Wn. App. 107, 111, 594 P.2d 1357, 1360 (1979).

In *Smith*, this Court upheld the admission of summaries of computerized records, holding "[f]urthermore, summaries of books and records which are themselves admissible as business records are likewise admissible when the original documents are so numerous or the information contained in them is so intricate, as in a misappropriation charge, that it would be impractical to have the jury examine the originals and extrapolate the relevant information." *State v. Smith*, 16 Wn. App. 425, 432-33, 558 P.2d 265, 271 (1976).

Furthermore, the Decision is in accord with the recent and factually analogous decision in *Discover Bank v. Bridges*, 154 Wn. App. 722, 226 P.3d 191 (2010), which the Court of Appeals relied upon in this case. *See Guttormsen,* 2015 WL 4611328 at *4. The Decision's decision to admit routine business records does not conflict with any Supreme

Court or Court of Appeals holding and also does not satisfy any other RAP 13.4(b) factor. Accordingly, the PFR should be denied.

B. <u>This Court's Decision in the Pending *Brown v. Dep't of Commerce* Case Will Address Any Issues of Potential Public Important Implicated in this Case</u>.

Finally, the Guttormsens argue that review is warranted under RAP 13.4(b)(4) because there is substantial public interest in the issues presented by the Decision.[36]

Since issuing its decision in *Bain*, the Supreme Court has decided numerous cases involving DTA issues. *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Mgmt. Grp.*, LLC, 177 Wn.2d 94, 297 P.3d 677 (2013); *Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014); *Lyons v. U.S. Bank Nat. Ass'n,* 181 Wn.2d 775, 336 P.3d 1142 (2014); *Trujillo v. Nw. Tr. Servs.*, Inc., No. 90509-6, 2015 WL 4943982 (Wn. Aug. 20, 2015).

Further, this Court will issue an opinion in *Brown v. Wash. State Dept. of Commerce*, Case No. 90652-1, in the coming months. In what Respondents understand to be a reference to the forthcoming *Brown* decision, , this Court stated the following in its *Trujillo* opinion:

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[36] *See* PFR at 18.

> [W]e do not address whether RCW 61.24.030(7)(a) allows a trustee to rely on an unambiguous declaration stating that the beneficiary is the actual holder of the note, even though the owner is a different party. That issue is raised in a pending case, and we express no opinion on it here.

Trujillo, 2015 WL 4943982, at *8, n. 8. In other words, this Court has clearly indicated that it will weigh in on the an owner/holder" issue in *Brown* that is the same or similar to the issue that the Guttormsens ask this Court to review. Thus, there is no need to grant review of the Decision.

IV. CONCLUSION

For the foregoing reasons, the Guttormsens' Petition for Review should be denied.

RESPECTFULLY SUBMITTED September 30, 2015.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 9th day of September, 2015, I caused a true and correct copy of Response Brief of Defendants/Respondents Aurora Bank, FSB, Aurora Loan Services, LLC, Nationstar Mortgage LLC, Federal National Mortgage Association, Mortgage Electronic Registration Systems, Inc. to be served on the following via messenger and email as indicated below:

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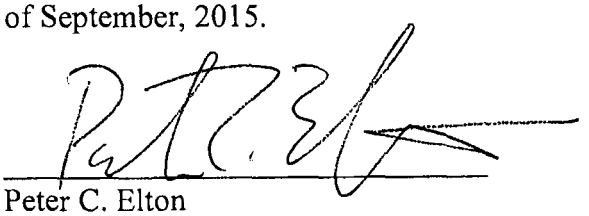

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