No. 90089-2

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 68531-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON AND KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENTS, LLC and SHELL LA PAZ, LLC; NORTHLAND CAPITAL, LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC; and P.R.E. ACQUISITIONS, LLC,
Petitioners,

v.

U.S. BANK NATIONAL ASSOCIATION,
Respondent,

and

JOSE NINO DE GUZMAN and NDG INVESTMENT GROUP, LLC,
Defendants.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT AND INTRODUCTION

Respondent U.S. Bank National Association ("U.S. Bank") respectfully requests that this Court deny review of the Court of Appeals Division One's decision dated February 18, 2014 ("Opinion" or "Op."), and attached as Appendix A to the Petition for Review ("Petition").

Petitioners have failed to satisfy their heavy burden under RAP 13.4(b) of demonstrating that the Court of Appeals' unanimous Opinion resolving the parties' discovery dispute necessitates extraordinary discretionary review by this Court. The Court of Appeals issued a narrow, well-reasoned decision applying the federal Bank Secrecy Act privilege to the discovery requested in this case. It is in accord with the published authority from other jurisdictions similarly addressing the Bank Secrecy Act privilege and does not conflict with any Washington authority.

The Bank Secrecy Act requires national banks, such as U.S. Bank, to implement policies and procedures for investigating money laundering and other suspicious activity, and for reporting that activity to the federal government via a Suspicious Activity Report ("SAR"). As the Opinion properly recognized, banks are forbidden by the Bank Secrecy Act from producing information that could reveal the existence of a SAR and any corresponding investigations, as doing so could weaken the Bank Secrecy Act's effectiveness. The privilege against disclosure is not, as Petitioners assert, limited exclusively to the final SAR submitted by banks to law enforcement, or documents that explicitly mention a SAR.

Because the Opinion does not conflict with any Washington law or present any other basis for discretionary review, Petitioners attempt to manufacture a conflict between the Opinion and decisions of this Court. Petitioners cite to cases standing for the general proposition that privileges are narrowly construed. Tellingly, Petitioners failed to cite these decisions (which have nothing to do with the Bank Secrecy Act) to the Court of Appeals, belying Petitioners' current assertion that they are controlling, much less in conflict with the Opinion. Moreover, there is simply no conflict. The Court of Appeals recognized the need to narrowly construe privileges and did not issue a broad or sweeping opinion, as Petitioners suggest. Instead, the Opinion is limited to the narrow question before it: whether a national bank's investigatory documents created pursuant to the bank's obligations under the Bank Secrecy Act are privileged from disclosure. The Opinion confirmed that they are, based upon reasoning consistent with federal statutory and case law. There is no Washington law conflict or basis for extraordinary review.

Petitioners have failed to establish that review is required under the rigorous RAP 13.4(b) factors. The Petition should be denied.

II. STATEMENT OF THE CASE & APPELLATE DECISION

A. Background of this Action

In 2008, Petitioners gave $11 million to 25-year old Jose Nino de Guzman to engage in real estate speculation and development in Peru. CP 4-5. Nino de Guzman had years earlier worked as a low-level employee at

U.S. Bank. CP 3. At the time of Petitioners' investments, he was no longer a U.S. Bank employee and they were not U.S. Bank customers. CP 3, 47. As part of their joint venture with Nino de Guzman, Petitioners wired nearly 90% of their funds ($9.8 million) directly from their bank account to accounts in Peru; not one of these accounts had any connection to U.S. Bank. CP 5. Petitioners made these investments with Nino de Guzman seeking eyebrow-raising annual returns of 50% or more. CP 4.

Petitioners allege that Nino de Guzman misled them, did not properly invest their money, and misappropriated funds for his own use or to pay back other investors. CP 6. Unable to fully recover from him, in 2010, Petitioners added U.S. Bank as a defendant in their suit against Nino de Guzman. CP 1-19. Petitioners seek to hold U.S. Bank liable for their own investment decisions and Nino de Guzman's alleged misconduct.

B. Petitioners' Expansive Discovery Demands and U.S. Bank's Motion for Protective Order

Petitioners' theory of the case is that U.S. Bank should be held liable because Nino de Guzman had basic checking accounts at U.S. Bank. CP 6. Although U.S. Bank received virtually no benefit from holding funds in checking accounts and had no incentive to aid Nino de Guzman, Petitioners allege that U.S. Bank knew or should have uncovered that Nino de Guzman was involved in misconduct and should have protected them from it. CP 6-7. This theory fails as a matter of law. *See, e.g., Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 172-74, 127 P.3d

722 (2005) (affirming CR 12(b)(6) dismissal of claims against bank because banks owe non-customers no duty of care and have no duty to prevent losses resulting from the misconduct of a bank customer).

Nonetheless, in a fishing expedition to try to support their legally baseless theory, Petitioners served voluminous, wide-sweeping discovery requests seeking all documents relating to any "suspicious activity" monitoring or investigation U.S. Bank may have conducted pursuant to the Bank Secrecy Act concerning the Nino de Guzman checking accounts. CP 57-138. For example, Petitioners demanded that U.S. Bank:

- "describe any efforts made by U.S. Bank to comply with any of its obligations under the Bank Secrecy Act," CP 81-82;
- "detail the internal procedures that the anti-money laundering (AML) and Bank Secrecy Act (BSA) division took in conducting any investigations," CP 127;
- "[p]roduce any and all documents setting forth the policies and procedure of U.S. Bank related to compliance with the Bank Secrecy Act," CP 71; and
- produce all documents "created as a result of any investigation into activities that form the basis of this suit," CP 96.

U.S Bank produced all factual, underlying account and transaction documents relating to the accounts requested by Petitioners, including bank statements, account opening documents, copies of checks, and documentation of wire transfers. Op. at 14. U.S. Bank also produced relevant sections of its operating procedure manuals and employee training materials. Op. at 14. All told, U.S. Bank produced thousands of pages of factual documents relating to the accounts. However, in order to

comply with its obligations under the Bank Secrecy Act, U.S. Bank sought a protective order from Petitioners' improper discovery into Bank Secrecy Act topics (without admitting whether any such documents exist). CP 36-49. Without explanation or oral argument, King County Superior Court Judge Monica Benton denied the motion. CP 346-353. The Court of Appeals granted review. CP 361-62.

C. The Court of Appeals' Thorough, Unanimous Opinion

After extensive briefing and oral argument, the Court of Appeals unanimously concluded that U.S. Bank was entitled to protection from Petitioners' improper discovery seeking material protected by the Bank Secrecy Act. Op. at 15. The Court of Appeals reached its decision based on all of the leading Bank Secrecy Act privilege cases (*Union Bank of Cal. v. Superior Court*, 130 Cal. App. 4th 378 (Cal. App. Ct. 2005); *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004); *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809 (N.D. Ill. 2002)), as well as Office of the Comptroller of the Currency ("OCC") regulatory guidance that, in turn, also specifically relies on these same three cases. Op. 6-14.

In *Union Bank*, the California Court of Appeals held that a bank's internal reports "generated as part of [the bank's] procedure for preparing SAR's and complying with federal reporting requirements" are privileged "because they may reveal the contents of a SAR and disclose whether a SAR has been prepared or filed." 130 Cal. App. 4th at 384, 391; *see* Op. at 10-11, 13 (analyzing *Union Bank*). Likewise, in *Cotton*, the federal

district court held that documents "which were not prepared for the purpose of investigating or drafting a possible SAR" were to be produced, but that investigatory "documents representing drafts of SARS or other work product or privileged communications that relate to the SAR itself . . . are not to be produced." 235 F. Supp. 2d at 815-16; *see* Op. at 7-9, 14 (discussing *Cotton*). Finally, in *Whitney*, another federal court confirmed that the privilege extends to documents indicating "whether a SAR or other report of suspicious transaction to a governmental agency exists; whether such a report is being prepared or has been filed; and the contents of such a report or the information contained therein." 306 F. Supp. 2d at 682; *see* Op. at 9-10, 13 (examining *Whitney*).

The OCC's own published interpretation of the Bank Secrecy Act similarly provides that "SAR confidentiality [applies] not only to a SAR itself, but also in appropriate circumstances to material prepared by the national bank as part of its process to detect and report suspicious activity, regardless of whether a SAR was ultimately filed or not." 75 Fed. Reg. 75576, 75579; *see* Op. at 12 (relying on OCC guidance). In reaching this conclusion, the OCC specifically relies on and incorporates the leading cases of *Union Bank*, Cotton, and *Whitney*, the same three cases relied on by the Court of Appeals here. 75 Fed. Reg. 75576, 75579 n. 22 & 23.

Consistent with this uniform authority, the Court of Appeals held that the "privilege is not limited [as Petitioners suggest] to documents that contain an explicit reference to a Suspicious Activity Report." Op. at 12. Rather, the privilege "covers documents related to a bank's internal

inquiry or review of accounts at issue, communications between a bank and law enforcement agencies relating to transactions conducted by the person suspected of criminal activity, and internal forms used in a bank's process for detecting suspicious activity." *Id.* (citations omitted).

In reaching its decision, the Court of Appeals did not ignore the general rule that privileges are to be narrowly construed, as Petitioners assert. On the contrary, the it specifically noted "the general rule that evidentiary privileges should be narrowly construed." Op. at 11 (quotations omitted). While bearing in mind this "general rule," the Court of Appeals correctly concluded that the purpose of the Bank Secrecy Act would be undermined if only final SARs were protected from production but not the precursor investigatory documents. Op. 12-13. In doing so, the Court of Appeals was able to effectuate the public policy purpose of the privilege – that is, to aid law enforcement and conceal from would-be wrongdoers the methods for detecting wrongdoing. At the same time, the Court of Appeals recognized that the underlying transactional documents which may give rise to an investigation must be produced. Op. at 14. After all, as the court noted in *Union Bank*, it is those factual documents that might constitute evidence of misconduct, whereas the "internal reports or investigators of suspicious activity are not 'proof' of the crime." 130 Cal. App. 4th at 393. As noted above, here such underlying responsive documents (account statements, etc.) have already been produced.

III. WHY REVIEW SHOULD NOT BE ACCEPTED

A. The Opinion is Not in Conflict with Any Washington Supreme Court Decision

Petitioners argue that review should be granted because the Opinion conflicts with precedent regarding the general proposition that privileges should be narrowly construed. This argument is unavailing. In their Petition, Petitioners for the first time cite to three Washington Supreme Court decisions purportedly standing for this proposition. *Compare* Petition at 5 (citing *Gendler v. Batiste*, 174 Wn.2d 244, 274 P.3d 346 (2012); *Lowy v. PeaceHealth*, 174 Wn.2d 769, 280 P.3d 1078 (2012); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999)), *with* Respondent's Brief at ii *and* CP 259-273 (Petitioners' Superior Court Brief) (both containing no such citations). These decisions provide no basis for review because (1) they have nothing to do with the Bank Secrecy Act; (2) the Court of Appeals was not made aware of these cases by Petitioners; and (3) in any event, there is no conflict because the Opinion specifically acknowledged the general principle that privileges are to be narrowly construed and did not deviate from it.

First, there is no conflict with any Washington Supreme Court decision because none of the cited cases has anything to do with the Bank Secrecy Act. *Gendler* addressed the release of motor vehicle accident reports generated for purposes other than complying with federal road survey requirements; *Lowy* concerned whether hospitals were required to consult quality assurance records to identify discoverable medical records;

and *C.J.C.* dealt with whether a priest's mental health records could be shielded from discovery if they were not kept confidential. These cases do not bear any resemblance to, much less address, the question before the Court of Appeals regarding the specific Bank Secrecy Act privilege and its unique law enforcement underpinnings. There is no "conflict" between the Opinion and the decisions cited by Petitioners on unrelated topics.

Second, the three cited cases provide no basis for review because Petitioners never cited them to the Court of Appeals or to the Superior Court. This fact powerfully illustrates that the decisions now being cited are not controlling as to, and do not conflict with, the decision of the Court of Appeals (or else Petitioners would and should have brought them to the attention of the Court of Appeals). Indeed, Petitioners have waived their ability to argue that these three decisions control by raising them for the first time in their Petition. *See Peoples Nat'l Bank of Wa. v. Peterson*, 82 Wn.2d 822, 829, 514 P.2d 159 (1973) (new arguments raised for the first time on a petition for review "are not fairly and sufficiently before [the Court] to justify consideration"). This Court's conclusion in *Peoples* that a party cannot raise new arguments and authority in a petition for review was based on the well-recognized principle that any argument not raised in a lower court cannot be raised to a subsequent appellate court. *Id.* Here, because RAP 13.4(b)(1) permits review only where there is a conflict with a Supreme Court decision, Petitioners cannot obtain review by raising the allegedly conflicting authority for the first time to this Court.

Third, to the extent the three newly-cited cases pertain in any way to the Opinion, the decisions are consistent. Petitioners rely on these cases for the general proposition that privileges should be narrowly construed. The Court of Appeals specifically recognized and applied this approach. Op. at 11. The Court of Appeals noted that "[t]he only type of information the bank has refused to produce that the Nortons claim is outside the privilege is information about the bank's internal investigations and monitoring of suspicious activity." Op. at 14. As to this limited class of documents and information, the Court held, consistent with the other reported Bank Secrecy Act privilege decisions, that such material is protected from disclosure in civil discovery. There is nothing about that narrow and discerning decision that is "in conflict" with this Court's generalized guidance about the application of privileges.[1]

Petitioners have failed to demonstrate that the Opinion is in conflict with any decision of this Court. Review should be denied.

B. The Opinion is Consistent with Settled Bank Secrecy Act Jurisprudence and OCC Guidance

Not only is the Court of Appeals' decision consistent with authority of this Court, it is also supported by all three of the leading Bank

[1] Indeed, Petitioners' argument here is equally applicable to *every* decision applying a privilege to limit discovery. The party seeking disclosure can always argue that the court's decision protecting certain material from disclosure conflicts with the general rule to construe privileges narrowly. Such arguments that could be made in every privilege dispute do not support discretionary review under RAP 13.4.

Secrecy Act privilege cases as well as OCC guidance. The Opinion is in accord with the *Union Bank*, *Cotton*, and *Whitney* decisions and the OCC guidance that the Bank Secrecy Act privilege extends not just to SARs themselves but also to other investigatory documents created by banks to comply with the Bank Secrecy Act's requirements.

The overwhelming weight of authority supports the Court of Appeals' decision. Pursuant to the Bank Secrecy Act and implementing regulations, national banks are required to assist the government in monitoring financial crimes. Specifically, banks are required to "develop and provide for the continued administration of a program reasonably designed to assure monitoring compliance." 12 C.F.R. § 21.21(b). When the bank's statutorily-mandated monitoring and investigation regime detects suspicious activity, the bank must file a SAR. In order to encourage banks to cooperate with law enforcement and to shield monitoring techniques from would-be criminals, the Bank Secrecy Act prohibits banks from disclosing SARs and related investigatory documents. The Bank Secrecy Act regulations provide that any bank that is "requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information." 12 C.F.R. § 21.11(k). Interpreting this language, courts and the OCC have made clear that internal investigatory documents created by a bank for the purpose of complying with the Bank Secrecy Act, including documents created to determine whether activity requires a SAR, are likewise prohibited from disclosure.

For example, the plaintiffs in *Union Bank*, like Petitioners here, sought access to the bank's "internal suspicious activity reports." 130 Cal. App. 4th at 384; *see*, *e.g.*, CP 96 (Petitioners' request for all documents "created as a result of any investigation"). The court held that an "internal memorandum prepared as part of a financial institution's process for complying with federal reporting requirements is generated for the specific purpose of fulfilling the institution's reporting obligation." *Id.* at 391. The court reasoned that such "internal reports or memoranda citing suspicious activity . . . may legitimately be part of the process for complying with federal reporting requirements." *Id.* at 392. Accordingly, "[t]hese types of documents fall within the scope of the SAR privilege." *Id.* at 391. Importantly, the *Union Bank* court, like the Court of Appeals here, held that the lynchpin of the inquiry was whether the documents were "prepared as part of a bank's process of investigating and preparing SAR's." *Id.* at 397. If so, the documents are protected. If not, they must be produced. *See* Op. at 12 (agreeing that "the Bank Secrecy Act privilege reaches to material prepared by the national bank as part of its process to detect and report suspicious activity") (quotations omitted).

The decision in *Cotton* also supports the Opinion. The plaintiffs there sought "[a]ll documents relating to any inquiry or investigation or review conducted by" the bank. 235 F. Supp. 2d at 811. Petitioners here sought the same thing. CP 96. The court held that while "factual documents which give rise to suspicious conduct" must be produced, investigatory "documents representing drafts of SARS or other word

product or privileged communications that relate to the SAR itself . . . are not to be produced." *Id.* at 815.

The Opinion is also in accord with the *Whitney* decision. As noted above, there the court held that "any preliminary, prepatory, follow-up or related communications" are privileged, as is the "discussion leading up to or following the preparation or filing of a SAR or other form of report of suspected or possible violations." 306 F. Supp. 2d 678 at 680, 683.

Finally, the OCC's own guidance (which, like the Court of Appeals' Opinion, relies on *Union Bank*, *Cotton*, and *Whitney*) powerfully buttresses the Opinion as well. The OCC has stated: "SAR confidentiality [applies] not only to a SAR itself, but also in appropriate circumstances to material prepared by the national bank as part of its process to detect and report suspicious activity, regardless of whether a SAR was ultimately filed or not." 75 Fed. Reg. 75576, 75579.

The Court of Appeals carefully analyzed this authority and rightly concluded that it supported protecting U.S. Bank's Bank Secrecy Act documents from disclosure, to the extent any such documents exist. Petitioners' attempt to distinguish these cases is unavailing and, in any event, does not provide any basis for review under RAP 13.4.

Petitioners' reliance on the decisions of *In re Whitley*, 2011 WL 62002895 (Bankr. M.D.N.C. Dec. 13, 2011) and *Regions Bank v. Allen*, 33 So.3d 72 (Fla. App. 2010) does nothing to undermine the validity of the Court of Appeals' decision and certainly provides no legal basis for discretionary review under RAP 13.4. In *Whitley*, an unreported

bankruptcy court order, the court protected "any SAR filed by a bank as well as any document that refers to a SAR having been filed or refers to information as being part of a SAR or otherwise reveals the preparation or filing of a SAR." 2011 WL 62002895, at *4. This is consistent with protecting investigatory documents created pursuant to the Bank Secrecy Act and which could lead to the creation of a SAR. In the same vein, in *Regions*, the court reversed a trial court decision ordering a bank to simply redact all references to SARs. 33 So.3d at 73. On appeal, the *Regions* court agreed with authority holding that the Bank Secrecy Act privilege extends to "whether a SAR or other report of suspicious transaction to a governmental agency exist; whether such a report is being prepared or has been filed; and the contents of such a report or the information contained therein." *Id.* at 76. Thus, this authority, too, supports the Opinion.

Put simply, there is no need, justification, or basis under RAP 13.4 for review of the Court of Appeals' well-supported decision.

C. This Correctly Decided Federal-Law Discovery Dispute is Not an Issue of Such Great Public Importance that it Must Be Decided by the Washington Supreme Court

Petitioners also argue generally that review should be granted in this case because financial fraud is bad. Petition at 14. But Petitioners make no particularized showing of why this particular, correctly-decided discovery dispute is of substantial public importance – the standard under RAP 13.4(b)(4). If Petitioners' generalization were sufficient to warrant review, then review would be necessary of every dispute in all fraud cases.

Petitioners assert – with some drama – that the Court of Appeals' decision poses a "near insurmountable barrier to enforcement of securities laws." Op. at 14. This unsupported assertion is hyperbole. The Court of Appeals applied a narrow federal law privilege, in the same manner as the other courts to consider the issue, to preclude discovery into a limited category of material unrelated to the underlying facts of any alleged fraud. Notwithstanding their exaggerated assertions, Petitioners have not been deprived of the opportunity to attempt to prove their (legally and factually baseless) claims. The Bank Secrecy Act privilege does not restrict the production of underlying factual documents that could be used as evidence of fraud, but instead applies to "internal reports or investigations of suspicious activity [which] are not 'proof' of the crime." *Union Bank*, 130 Cal. App. 4th at 393. U.S. Bank has already produced an enormous volume of underlying transaction and account documents, including detailed information about every single transaction in every single account. Nothing in the Court of Appeals' decision impedes parties from legitimately seeking evidence of misconduct.[2]

[2] The notion that this case presents an issue of public importance because it concerns claims against a bank relating to a customer's financial fraud is further undermined by the fact that allegations like those at issue here are regularly found not to state a claim. *See, e.g.*, *Zabka*, 131 Wn. App. at 172-74 (dismissing claims because banks owe non-customers no duty of care and have no duty to prevent losses resulting from customer misconduct); *In re Agape Litig.*, 681 F. Supp. 2d 352, 360 (E.D.N.Y. 2010) (rejecting plaintiffs' claim that bank breached duty of care under Bank Secrecy Act monitoring requirements because there is no such duty or right of action); *Hanninen v. Fedoravitch*, 583 F. Supp. 2d 322, 326 (D. Conn. 2008) (same); *cf.* 31 U.S.C. § 5318(g)(3) (granting banks a safe harbor from litigation arising out of bank's actions in filing SAR).

The correctly-decided Opinion, rightly upholding the narrow application of a federal law privilege in a discovery dispute, does not present such substantial issues of public importance in Washington as to necessitate review. Petitioners' general assertions about the importance of preventing financial fraud are insufficient to satisfy their heavy burden of proving a basis for review under RAP 13.4(b)(4).

D. The Decision Not to Order *In Camera* Review Does Not Conflict with Washington Supreme Court Authority

Finally, Petitioners contend that review should be granted because the Court of Appeals' decision not to require *in camera* review somehow conflicts with this Court's decisions. Again, there is simply no conflict. Importantly, the Court of Appeals did not hold that *in camera* review would never be appropriate. Instead, the Court rightly noted the numerous categories of documents U.S. Bank had produced, and held that Petitioners had failed to establish any "reason to believe that the bank is withholding discoverable documents." Op. at 14. As a result, the Court concluded that Petitioners had "not articulated a basis for requiring *in camera* review" of any documents created by U.S. Bank pursuant to the Bank Secrecy Act and subject to the Bank Secrecy Act privilege. Op. at 15.[3]

[3] The Court of Appeals' decision is consistent with authority from other jurisdictions. *See, e.g., Gregory v. Bank One*, 200 F. Supp. 2d 1000, 1003 (S.D. Ind. 2002) (*in camera* review of documents subject to Bank Secrecy Act is not required).

In an effort to find some purported conflict between the Court of Appeals' decision regarding *in camera* review and the authority of this Court, Petitioners once again cite to several cases they neglected to cite previously. *See* Petition at 16 (citing *Cedell v. Farmers Ins. Co. of Wa.*, 176 Wn.2d 686, 295 P.3d 239 (2013); *Fellows v. Moynihan*, 175 Wn.2d 641, 285 P.3d 864 (2012); *State v. Harris*, 91 Wn.2d 145, 588 P.2d 720 (1978)). In their submissions to the Court of Appeals, Petitioners did not discuss *Fellows* or *Harris* at all, and cited *Cedell* only as to the standard of review (not in support of their arguments regarding *in camera* review). *See* Respondent's Brief at ii, 11, 43-45. As before, Petitioners' failure to cite these decisions to the Court of Appeals demonstrates that the decisions are not controlling of the issue decided by the Court of Appeals, and thus demonstrates that there is no real conflict. Moreover, Petitioners cannot raise via their Petition argument and authority they failed to present to the Court of Appeals. *Peoples Nat'l*, 82 Wn.2d at 829.

Even if Petitioners had properly raised these cases to the Court of Appeals, there is no conflict. In *Cedell*, this Court held that a party was entitled to an *in camera* review of purportedly privileged documents only if the party had made a reasonable showing that an act of *bad faith* had occurred. 176 Wn.2d at 700 (requiring "a showing that a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred"). In other words, courts will generally trust a party's assertion of privilege unless there is reason to believe the assertion is in bad faith. There is nothing like that here. As the Court of Appeals

noted, Petitioners did not set forth any "reason to believe that the bank is withholding discoverable documents," and, therefore, had "not articulated a basis for requiring *in camera* review." Op. at 14-15. This reasoning is completely consistent with *Cedell.*

Similarly, in *Fellows*, this Court remanded for an *in camera* determination of whether a hospital had ignored a trial court order and withheld certain documents that fell outside the scope of the quality improvement privilege. 175 Wn.2d at 657-58. The *in camera* review was appropriate because there were indications the defendant was flouting a court order by asserting an overly aggressive and baseless interpretation of the privilege. The facts here are not remotely similar. Petitioners have never suggested that U.S. Bank has engaged in bad faith, and would have no basis for making any such allegation. Indeed, from the outset, U.S. Bank has been forthcoming about the narrow category of documents it may be withholding, to the extent such documents exist. It also proactively sought a protective order to obtain court guidance and confirmation that any such documents would be subject to the Bank Secrecy Act privilege. The Court of Appeals' decision in this case does not conflict with this Court's jurisprudence about *in camera* review, and Petitioners have not demonstrated any basis for discretionary review.[4]

[4] The final case relied on by Petitioners, *Harris*, has nothing to do with *in camera* review of privileged documents, and instead deals with when an informant's identity should be disclosed to a defendant in a criminal proceeding. 91 Wn.2d at 150.

IV. CONCLUSION

For the reasons set forth herein, U.S. Bank respectfully requests that the Petition be denied. The Court of Appeals' unanimous, well-reasoned, and correctly-decided Opinion does not conflict with any decision of this Court and does not present any issue of great public importance. Petitioners have failed to meet their burden of demonstrating that review is warranted under RAP 13.4.

Respectfully submitted this 18th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

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Dated this 18th day of April, 2014.

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Dear Clerk:

Attached for filing in *Norton, et al. v. U.S. Bank National Association*, No. 90089-2, please find Respondent's Answer to Petition for Review.

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