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STATE OF WASHINGTON
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No. 95654-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHELLE MERCERI, Petitioner,

v.

DEUTSCHE BANK AG a/k/a DEUTSCHE BANK doing business in the United States as DEUTSCHE BANK USA, and as DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, Respondent

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REPLY TO ANSWER TO PETITION FOR REVIEW TO THE SUPREME COURT

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I. Introduction

Deutsche Bank raises new issues in its answer to the petition for review ("Answer") and fails to adequately address the grounds for granting review. RAP 13.4(e); RAP 10.3(a)(5); RAP 10.3(b). Deutsche Bank's Response is rife with misstatements of facts and law. Petitioner respectfully submits this Reply pursuant to RAP 13.4 (d).

II. Identity of Petitioner

The Petitioner is Michelle Merceri ("Ms. Merceri"), who obtained a partial summary judgment ruling that Deutsche Bank was time-barred from pursuing foreclosure, as a matter of law.

III. Additional Issues Presented for Review under RAP 13.4.

A. Deutsche Bank Successfully Obtained Interlocutory Review Claiming That the Issues Presented a Case of First Impression. Is Deutsche Bank Now Estopped from Claiming the Petition for Review Is Frivolous?

B. Deutsche Bank presents Division One's April 16, 2018 *Erickson v. America's Wholesale Lender* opinion, tolling the six-year statute of limitations for the entirety of nonjudicial foreclosure attempts. Is tolling for nonjudicial foreclosure proceedings, which was briefed by Ms. Merceri and Deutsche Bank but not addressed by Division One, an additional ground for review under RAP 13.7 (b), RAP 13.4(b)(1) and RAP 13.4(b)(3)?

C. Deutsche Bank Now Seeks Attorneys' Fees on Review. Under RAP 13.4(b)(1), Should Review be Granted on This Issue Because Interlocutory Attorneys' Fees conflict with Supreme Court precedent in *Wachovia SBA Lending, Inc. v. Kraft*?

IV. Argument Why Review Should be Granted

A. Deutsche Bank Successfully Obtained Interlocutory Review on the Basis That the Issues Presented a Case of First Impression. Deutsche Bank Should Now Be Estopped from Reversing Its Position Claiming the Petition for Review Is Frivolous.

Deutsche Bank claims there is no authority provided for the Separation of Powers constitutional argument and claims Ms. Merceri has waived these issues by not raising them earlier. Deutsche Bank is wrong. Ms. Merceri urged the proper statutory interpretation of the interplay between RCW 4.16.170, RCW 4.16.230, 11 U.S.C. § 108(c), and 11 U.S.C. § 362 throughout the case. CP 348-350; Resp. Br. at 9, 18-20, 22, 33. This includes the inclusion of 11 U.S.C. § 362(d)(2) in the analysis of § 362. CP 349. The interplay of the state statutes and the bankruptcy statutes (i.e. statutory interpretation) was the basis of the trial court's certified question:

> Even though 11 U.S.C. 108 does not, itself, toll a state statute of limitations, is RCW 4.16.230 a state statute incorporated into section 108(c)(1) to toll the statute of limitations during a bankruptcy stay? Cf. *Hazel v. Van Beek*, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998).

CP 732. It was the basis of the commissioner's grant of discretionary review on this issue. COA Dkt. 10/26/2018 at 5:

> The issue certified by the trial court presents an interplay between Washington's tolling statute, RCW 4.16.230, and federal bankruptcy law that provides for an automatic stay and a limited tolling, 11 U.S.C. §§ 108(c), 362.

Division One failed to properly analyze the interplay of these statutes.

Deutsche Bank failed to properly address this interplay in its Answer.

By claiming there is no support for a constitutional component of review, Deutsche Bank overlooks Ms. Merceri's citations in her petition for review to the Washington and United States Constitutions, her citations to RAP 13.4 (b)(3), and her citations to *Inland Empire Dry Wall Supply Co. v. Western Surety Co*., 189 Wn.2d 840, 408 P.3d 691 (2018), which requires courts to respect the separation of powers and to apply the plain language of the entirety of these statutes. *See also Hazel v. Van Beek*, 135 Wn.2d 45, 954 P.2d 1301 (1998) (thorough analysis of the interplay of state statute and the federal bankruptcy statutes.); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011) (internal citations omitted.):

> A court's "refusal to give effect to the words the legislature has written … necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature. This raises separation of powers concerns."

Five Corners at 311.

Contrary to Deutsche Bank's waiver assertion, Ms. Merceri raised the Constitutional Statutory Interpretation/Separation of Powers/Federal Preemption issues throughout this case. She addressed the interplay of the statutes in her partial summary judgment motion and appellate briefing, and the trial court certified that issue. CP 348-350; Resp. Br. at 9, 18-20, 22, 33. *See Egede-Nissen v. Crystal Mountain, Inc*., 93 Wn.2d 127, 141, 606 P.2d

1214 (1980). (Under RAP 2.5(a)(3), manifest error affecting a constitutional right may be raised at any time; but timeliness is not an issue where the trial court was sufficiently apprised of the issue.)

To induce Division One to accept interlocutory review of the partial summary judgment that Deutsche Bank was time-barred to seek judicial foreclosure, Deutsche Bank argued that this was a case of first impression, that there was no controlling Washington authority, and that the Court of Appeals should look to out-of-state authority. COA Dkt. 08/31/2016 at 11-12. In granting interlocutory review, the commissioner agreed with Deutsche Bank, stating that "[t]he issue certified by the trial court appears to be a one of first impression." COA Dkt. 10/26/2016 at 6.

Now, Deutsche Bank does a 180-degree reversal, claiming for the first time that these *bona fide* issues are suddenly frivolous. Answer at 1-2, 17. Deutsche Bank is estopped to reverse its position on review. *Arkison v. Ethan Allen, Inc*., 160 Wash.2d 535, 538, 160 P.3d 13 (2007) ("Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.")

Statutory analysis is always appropriate to effect the intent of the legislature as a separate branch of government. *See Five Corners*, *infra*. When Division One Division expanded the scope and reach of the state tolling statute, and thereby expanded the six-year statute of limitations to

over eight years, all without conducting the require proper statutory analysis, it abdicated its duty; it needs to be corrected. [1]

Nothing in Deutsche Bank's Answer explains Division One's failure to properly analyze the plain language of §108(c), §362, and RCW 4.16.230. Instead, Deutsche Bank attempts to obfuscate, encouraging this Court to ignore Congress's intent to provide creditor relief in § 362(d)(2).

Section 362(d)(2) allows a creditor to continue its foreclosure by taking the simple procedural step of making a motion to lift the stay and obtain the relief afforded under § 362(d)(2). *See*, e.g. cases cited in the petition for review at 9-12. When properly construed, the bankruptcy stay is not a "statutory prohibition" under the tolling statute.[2]

Obtaining relief from stay under § 362 (d)(2) is like a pedestrian wanting to walk across the street at a controlled intersection. The red "don't walk" sign temporarily deters him from crossing the street. All he has to do is press the button and wait a few moments. When the "don't walk" sign

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[1] In its Answer, Deutsche Bank's fails to cite any analogous Washington case supporting Division One's Opinion and relies on out-of-state authority. The two out-of-state cases Deutsche cited are inapposite. Neither addressed 11 U.S.C. 362(d)(2). *Koyle v. Sand Canyon Corp*., 2016 U.S. Dist. LEXIS 29616 (D. Utah Mar. 8, 2016) was a Chapter 13 reorganization case in which the automatic stay was expressly extended in the Chapter 13 plan. There was no suggestion that the property was underwater. Deutsche Bank's quoted passage in *Pettibone v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991*)* is dicta. *Pettibone* concerned the bankruptcy court's usurpation of the state court's authority. It did not involve the Illinois state tolling statute.

[2] Proper construction uses Supreme Court authority and the plain language of RCW 4.16.230, 11 U.S.C. § 108(c)(1), and 11 U.S.C. § 362. *Inland Empire, supra*.

turns to "walk," the pedestrian can proceed. But if the pedestrian never presses the button, he does not get the "walk" sign. The sign only changes from "don't walk" to "walk" if the pedestrian pushes the button.

Deutsche Bank never pushed the button to proceed with its nonjudicial foreclosure, and Division One never analyzed the plain language of § 362(d)(2)'s "walk" provision. Division One focused only on the temporary "don't walk" provision of § 362(a), inexplicably rewarding Deutsche Bank for passively standing on the sidewalk in bankruptcy court for over two years. Deutsche Bank's choice not to lift the temporary, removable bankruptcy stay to continue its nonjudicial foreclosure proceeding is the reason why Deutsche Bank's foreclosure effort did not succeed. Deutsche Bank has only itself to blame.

Instead of focusing on the availability of the simple § 362(d)(2) procedure to continue its nonjudicial foreclosure remedy, Deutsche Bank cites *Johnston Envtl. Corp. v. Knight* (*In re Goodman*), 991 F.2d 613 (9th Circuit 1993) (creditor who did not seek relief from stay was sanctioned for violation of the automatic stay). *Johnston* does not specifically address the creditor relief in § 362(d)(2). However, the 9th Circuit reminded creditors: "The Knights could have, and should have, pursued the orthodox remedy: relief from the automatic stay." *Id.* at 616. If the creditor pushes the "walk" button (seeks relief from stay), it can proceed with foreclosure with the

bankruptcy court's blessing. *Johnston* does not help Deutsche Bank. And Deutsche Bank fails to explain Division One's failure to apply § 362(d)(2) and to conduct a proper statutory analysis of § 362 as a whole.

Deutsche Bank's suggestion to this Court, that it might have had difficulty proving the property was underwater (had no equity) under § 362(d)(2) misrepresents the bankruptcy facts and law. No one was in a position to oppose Deutsche Bank, if it had brought a § 362(d)(2) motion to lift the stay, rather than idly sitting on its rights.[3] Any suggestion by Deutsche Bank that it could not have met its burden to establish that the property was underwater is disingenuous.[4]

Deutsche Bank acknowledges that the bankruptcy court ordered that Ms. Merceri's home be abandoned to her (Answer at 19, *citing* CP 125) but omits the legal significance of that order. When a bankruptcy court grants an abandonment motion, it has necessarily found that the property was "burdensome to the estate or that it is of inconsequential value and benefit

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[3] Deutsche Bank acknowledged that Ms. Merceri listed the property as underwater, and the bankruptcy trustee conceded that it was underwater. Pet. for Rvw., p. 5, fn. 2; Answer p. 13, citing CP 573-580.

[4] The trustee listed a sale price of $1.56 million. CP 575. Senior creditor BAC Home Loans claimed $3.2 million was owed. CP 576. Considering just the first-priority creditor, the property was underwater by $1.64 million. But the classic test for determining equity under § 362 (d)(2) compares the total liens against the property and the property's current value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir.1984) (citing cases). Total encumbrances were $4.343 million for a property worth $1.56 million. CP 576. The property was not only underwater, *it was underwater by $2.783 million*. Deutsche Bank omits these facts.

to the estate." 11 U.S.C. § 554(b).[5]

The interplay of the state statutes and the bankruptcy statutes (i.e. statutory interpretation) was thoroughly discussed, not "waived," by Ms. Merceri throughout this case. There is no basis to Deutsche Bank's claim of waiver. This interplay was also the basis of the trial court's certified question. And it was the basis for the court commissioner granting discretionary review of the interlocutory, partial summary judgment order.

Deutsche Bank should be estopped from now reversing its position before the Supreme Court. *Arkison v. Ethan Allen*, *supra*. The Statutory Interpretation/Separation of Powers/Preemption issue is not "frivolous," but remains an important ground to accept review under RAP 13.4 (b)(3).

B. In its Answer, Deutsche Bank presents Division One's April 16, 2018 *Erickson v. America's Wholesale Lender* opinion, allowing tolling the six-year statute of limitations for the entirety of nonjudicial foreclosure attempt. Tolling for nonjudicial foreclosure proceedings, which was briefed by Ms. Merceri and Deutsche Bank but not addressed by Division One, is an additional issue for review under RAP 13.7 (b) (Scope of Review), RAP 13.4(b)(1) (Conflict with Supreme Court Authority) and RAP 13.4(b)(3) (Constitutional Issues).

There is a movement by creditors like Deutsche Bank to defeat the

[5] Any invitation by Deutsche Bank to speculate that "good cause" existed for the bankruptcy court to continue the automatic stay should be disregarded. This Court cannot find facts or decide phantom relief from stay motions that were never before the bankruptcy court. *See*, e.g., *Minehart v. Morning Star Boys Ranch, Inc*., 156 Wn.App. 457, 462, 232 P.3d 591 (2010) (An appellate court does not find its own facts because it is incapable of assessing the impact of the evidence on the whole case.)

quiet title provision of RCW 7.28.300, which allows debtors to remove outlawed deeds of trust. Op. Br. at 35-44. Creditors argue that they should not be subject to strict applications of a six-year statute of limitations to bring a judicial action on a defaulted deed of trust, but instead argue for tolling for incomplete nonjudicial foreclosure proceedings, which should be added together to provide months or years of additional protection from a statute of limitations RCW 4.16.040 defense beyond the six years the legislature deemed appropriate; Deutsche Bank sought *840 days* of tolling for its nonjudicial foreclosure proceedings. Op. Br. at 35-44.

In the last 4 months, without the required statutory analysis and without thoughtful discussion of the issue, Division One has accepted the creditors' position with a conclusory statement:

> Service of the written notice of default tolls the statute of limitations until 120 days after the date scheduled for nonjudicial foreclosure of the deed of trust. *Bingham v. Lechner*, 111 Wn.App. 118, 127-31, 45 P.3d 562 (2002); see RCW 61.24.040(6) (permitting trustee to continue the trustee's sale for periods not exceeding 120 days).

Heintz v. U.S. Bank, No. 76297-4-I, slip op. at 5-6 (Div. 1, Jan. 16, 2018) (unpublished, *review denied* on other grounds May 1, 2018, No. 95484-4);[6]

[6] *Bingham v. Lechne*r, upon which Division One relied in *Heintz* and *Erickson*, did not address any legal basis for a nonjudicial foreclosure tolling the statute of limitations. In *Bingham*, the parties agreed that tolling applied, so "the question presented is for how long the statute was tolled." *Id.* at 127. The appellate court did not reach the tolling issue, because it found that no amount of applicable tolling resurrected the creditor's cause of action. "Demopolis's attempt to foreclose in August 1999 was too late. The court did not

> We have held that the statutory limitation period applicable to enforcing payment of a loan is tolled during the duration of a foreclosure proceeding up to 120 days after the original sale date. *Bingham v. Lechner*, 111 Wn.App. 118, 129-31, 45 P.3d 562 (2002); *accord Albice v. Premier Mortg. Servs. of Wash., Inc*., 157 Wn.App. 912, 927-28, 239 P.3d 1148 (2010)). The statutory limitation period is tolled for 120 days after the original sale date even when the trustee does not exercise his ability to continue the sale. *Bingham*, 111 Wn.App. at 131 (trustee's "failure to [continue the sale] restarted the statute of limitations either on ... the date scheduled for the foreclosure or 120 days thereafter.")

Erickson v. America's Wholesale Lender, No. 77742-4-I, 2018 Wn.App. LEXIS 811, at *10 (Div. 1 Apr. 16, 2018) (unpublished).

The nonjudicial foreclosure statutory scheme (RCW 61.24) provides no tolling for either the duration of a nonjudicial foreclosure proceeding or for the 120-day continuation period, whether or not the creditor avails itself of a continuation. Rather than seeking legislative amendments to provide tolling, creditors are pushing our courts to expand the statutory scope, reach, and duration of the statute of limitations, a distinctly legislative prerogative. *See Five Corners*, *supra*. Creditors are pushing our courts to not apply the quiet title remedy provided to homeowners under RCW 7.28.300, even after they have waited more than six years to foreclose, are time-barred as a matter of law, and are holding an outlawed deed of trust. It was the

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err by permanently restraining the nonjudicial foreclosure." *Id.* at 131. This Court denied review. 149 Wn.2d 1018, 72 P.3d 761 (2003).

legislature's purpose to improve the marketability of real property by removing these outlawed deeds of trust. RCW 7.28.300. *See* App. 10.

Division One's undisciplined acquiescence to these creditors' pleas is contrary to the plain language of RCW 4.16.040, RCW 4.16.230, RCW 4.16.170, RCW 7.28.300, CR 2, and CR 3, which permit tolling *only for a judicial "action"* "commenced" by filing a complaint or serving a summons, followed within 90 days by a subsequent filing or service.

Clearly, nonjudicial foreclosure is not a judicial action. There is no summons or complaint. And since RCW 4.16.230 tolls "commencement of an action" only as defined in RCW 4.16.170, CR 2, and CR 3, it does not provide tolling for a nonjudicial foreclosure proceeding.

Division One's unprincipled tolling expansion conflicts with this Court's analysis in *Hinchman v. Anderson*, 32 Wash. 198, 207, 72 P. 1018 (1903), applying RCW 4.16.230 and our single action statute, concluding that "where a party has a choice of remedies and makes his election, the statute does not cease to run as to other remedies.")[7] In *Hinchman*, the Supreme Court supplied the long-standing common-sense rule that if a creditor *is actually pursuing* one of its remedies, it is not "prohibited" under

[7] *Hinchman* analyzed the verbatim predecessor of RCW 4.16.230, 2 Bal. Code Sec. 4813, and the verbatim predecessor (with updated pronouns) of Washington's single action statute 2 Bal. Code Sec.. 5893, now codified at RCW 61.12.120. *Hinchman* is still good law, having been applied as it relates to the single action statute in *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 367 P.3d 600, 606, 192 Wn.App. 166 (2016).

RCW 4.16.230 from pursuing its remedy, so no tolling is available.

This unprincipled expansion of RCW 4.16.230 conflicts with the analysis in *Winston v. Richard W. Wines, Inc.*, 56 Wn.2d 192, 351 P.2d 929 (1960), where this Court determined that there was no "statutory prohibition," no tolling under RCW 4.16.230 for a nonjudicial remedy. Division One's allowing tolling for the entirety of incomplete nonjudicial foreclosures (plus 120 days) is in direct conflict with this Court's authority in *Hinchman* and *Winston*. Review remains appropriate under RAP 13.4 (b)(1).

Acceptance of review by this Court under RAP 13.7 (b) and (c) will also conserve judicial resources by avoiding piecemeal appeal. *Owens v. Kuro*, 56 Wn.2d 564, 571, 354 P.2d 696, (1960) ("Piecemeal appeal of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.")

The nonjudicial foreclosure tolling issue raised by Deutsche Bank in this interlocutory appeal and by Division One's recent opinions in *Heintz* and *Erickson*, usurping the legislature by granting tolling for the entirety of incomplete nonjudicial foreclosures, is an issue that the Supreme Court can and should consider on review under RAP 13.7 (b) and RAP 13.4(b)(3) (Constitutional Grounds, Separation of Powers).

C. Deutsche Bank's Request for Interlocutory Attorneys' Fees on Review Conflicts with Supreme Court precedent in *Wachovia SBA Lending, Inc. v. Kraft* and Presents an Additional Issue for Review Under RAP 13.4(b)(1).

RCW 4.84.330 defines "prevailing party" as one for whom a final judgment has been entered. It is undisputed in this case that there is no final judgment. Since there is no final judgment, Deutsche Bank is not entitled to attorneys' fees for its interlocutory review. Division One's award of fees (Opinion at 13) is directly contrary to RCW 4.84.330 and *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009) (declining to award fees under RCW 4.84.330 on appeal or at the Supreme Court where no final judgment had been issued.) S*ee also Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885,353 P.2d 950 (1959) ("The prevailing party is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case.") Deutsche Bank's request for interlocutory attorneys' fees conflicts with Supreme Court precedent, presenting an additional issue for review under RAP 13.4 (b)(1).

In addition to raising additional issues for review, Deutsche Bank's Response is rife with misstatements and half-truths, contrary to RAP 10.3(a)(4) (requiring a "fair statement of the facts and procedure relevant to the issues presented for review"), incorporated by reference in RAP 13.4(e). Many of Deutsche Bank's misleading statements and arguments improperly

concern the merits of the petition rather than the grounds for accepting review. RAP 13.4(c)(7). To avoid misunderstanding at this stage, Ms. Merceri briefly addresses the most egregious misstatements:

1. RAP 13(b)(4) – Substantial Public Interest

Deutsche Bank falsely claims that "[h]omeowners' and debtors' rights are not impacted by the Court of Appeals' decision in any respect" and "Merceri has failed to identify any substantial public impact the Court of Appeals' decision could have." Answer at 19, 20.

Division One's Opinion "immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Grant County Fire Prat. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004); *citing* RAP 13.4(b)(4). Ms. Merceri cited RAP 13.4(b)(4) and four Washington state statutes demonstrating the legislature's delicate balancing of property rights for both debtors and creditors. Suggesting that Division One's blanket extension of a statute of limitations has no public impact is disingenuous.

2. RAP 13.4(b)(1) – Conflicts with Supreme Court Authority.

a. Ms. Merceri did not ask the Court of Appeals to add a "due diligence" requirement to RCW 4.16.230, as Deutsche Bank claims. Instead, she asked the Court of Appeals to apply this Court's long-standing authority defining "statutory prohibition."

A party is not "prohibited" from seeking its remedy if it has an available remedy. Deutsche Bank disregards Supreme Court authority which holds that "prohibition," not "due diligence" is the issue.

b. Deutsche Bank disregards the holdings of Supreme Court authority, including:

(1) *Spokane County v. Prescott*, 19 Wash. 418, 424-25 (1898) ("when the respondent had the option at any time to obtain leave of court to bring its action, and did not ask for such leave, it cannot enlarge the statute of limitations by its own delinquency);

(2) *Bennett v. Thorne*, 36 Wash. 253, 269 (1904):

> Again, it has been many times held--a**nd this is another important reason why the action should be held to be barred**--that it is not the policy of the law to put it within the power of a party to toll the statute of limitations. And this court has at least twice held that the failure of a party to take the necessary steps to perfect his right of action, although such steps were conditions precedent to the right, would not prolong the statute. *Spokane County v. Prescott*, 19 Wash. 418, 53 P. 661, 67 Am. St. Rep. 733; *Spinning v. Pierce County*, 20 Wash. 126, 54 P. 1006.

(3) *Spinning v. Pierce County*, 20 Wash. 126, 54 P. 1006 (1898) collected cases from around the country applying the rule that where a party controls the act that permits his cause of

action, there is no enlargement of the statute of limitations. *Spinning* at 128 (this rule "well sustained" and "accords with generally accepted ideas of justice.") This Court has recognized the rule laid out in *Spinning* and its progeny in cases analyzing RCW 4.16.230, i.e. that a party is not "prohibited" from seeking its remedy if it has control over an act or procedure. *See*, e.g.:

(4) *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 683, 10 P.3d 371 (2000):

> Because the plaintiff ***lacks control*** over the timing of service once the documents are transmitted to a designated central authority, we hold that the analysis of *Seamans* and the policy underlying RCW 4.16.230 applies to toll the statute of limitations once the necessary documents are sent to the central authority, ***provided they are transmitted within the 90-day period*** of RCW 4.16.170.

(4) *Rivas v. Overlake Hop. Med. Ctr.*, 164 Wn.2d 261 (2008) (declining to adopt a bright-line rule that being a patient in intensive care unit for four days is sufficient in itself to establish tolling under RCW 4.16.190 (disability tolling); remanding to determine if defendant could have assisted with defense). Instead of supporting the argument that Deutsche Bank is entitled to over two years of tolling, when

it never pushed the "walk" button to lift the automatic stay, *Rivas* actually supports the strict application of the statute of limitations and tolling of the statute, as well as a thorough fact-specific analysis, rather than Division One's cursory approval of blanket tolling for the entirety of the bankruptcy stay. Deutsche Bank was obviously under no disability to push the "walk" button to lift the stay during the two years it passively stood on the bankruptcy side of the street, rather than proceeding to continue its nonjudicial foreclosure.

3. RAP 13.4(b)(2) – Conflict with Court of Appeals Authority

Contrary to Deutsche Bank's claim that *Watson v. Northwest Trustee Services, Inc*., 180 Wn.App. 8, 321 P.3d 262 (Div. 1 2014), *review denied*, 181 Wn.2d 1007 (2014), "is irrelevant to any issue raised in the present case" and that judicial notice is improper,[8] (Answer at 15-16), *Watson* very clearly addresses RCW 61.24.130, which permits a creditor to hold its foreclosure sale 45 days after the bankruptcy automatic stay is lifted. *Watson* at 14-15 (sale held under RCW 61.24.130 after bankruptcy stay was lifted was wrongful where the initial pre-bankruptcy scheduled sale was cancelled.) It was not the bankruptcy stay which prevented the creditor from

[8] Contrary to Deutsche Bank's assertion, nothing precludes a party from citing additional authority to support a claim or issue, up to and including after oral argument. RAP 10.8.

holding the sale 45-days after the stay was lifted on December 4, 2012; it was Deutsche Bank's decision to discontinue the nonjudicial foreclosure and to not timely bring a judicial foreclosure which is the root of its problem.

Deutsche Bank does not deny that it withheld evidence that its own trustee discontinued the 2010 trustee sale in January 2012. This publicly-recorded discontinuance should be considered by this Court so it can fairly review the tolling issues under § 362(d)(2) and RCW 4.16.230.

4. RAP 13.4(b)(3) – Separation of Powers, Preemption

Deutsche Bank mistakenly claims that 11 U.S.C. § 108(c)(1) (the "Suspension Clause") is incorporated into RCW 4.16.230 for tolling for nonjudicial foreclosure. Answer at 18. However, federal courts have held that the plain language of the Suspension Clause -- "commencing" "a civil action" -- does not apply to extend time for *nonjudicial* proceedings. *See* Appendix 6 for § 108. For example, in *Ramming v United States*, 281 F.3d 158, 165 (5th Cir. 2001) (applying 108(c)(1) to an FTCA claim which permitted both a nonjudicial remedy and a judicial remedy), the Fifth Circuit held:

> The resolution of this issue is controlled by this Court's binding precedent set forth in *TLI, Inc. v. United States*, 100 F.3d 424 (5th Cir. 1996). . . . The term "commencement of an action" in § 108(a) applies only to "the bringing of suit in court" and not to administrative

> proceedings that may precede such a suit. *Id.* This Court reasoned that "an action in its usual legal sense means a lawsuit brought in a court; a formal complaint brought within the jurisdiction of a court of law." *Id*. (quoting Black's Law Dictionary 28 (6th ed. 1990)). *See also* Fed. R. Civ. P. 3 (defining "Commencement of Action" as follows: "A civil action is commenced by filing a complaint with the court").

Ramming's plain language analysis is consistent with Washington law, including our CR 3.[9] Construing RCW 4.16.230, this Court has held that a party's pursuit of a *nonjudicial remedy* does not toll the statute of limitations for the *judicial* remedy. *Winston* and *Hinchman* cases, *infra.* What matters is what steps Deutsche Bank failed to take from 2010 to 2016. As a merits brief will show, it was Deutsche Bank's choices, not the automatic stay itself, which ran out the six-year statute of limitations and barred its judicial foreclosure. Deutsche Bank failed to timely file its judicial foreclosure action (June 2016) until long after the six-year statute of limitations had already run in 2014.[10]

The plain language of § 108(c)(1)'s Suspension Clause provides no tolling for Deutsche Bank's nonjudicial foreclosure and further supports

[9] Washington's CR 3 defines "Commencement of an Action" as follows: "a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.

[10] Even if Deutsche Bank's judicial foreclosure counterclaim relates back to Ms. Merceri's filing date of 12/4/2015, the commencement of Deutsche Bank's judicial action was over a year too late; the statute of limitations ran on August 17, 2014.

granting review under RAP 13.4(b)(1) (conflict with Supreme Court precedent) and 13.4(b)(3) (Constitutional issue, federal preemption).

V. Conclusion

Deutsche Bank fails to adequately refute the RAP 13.4(b) bases for accepting review. Instead, Deutsche Bank raises three new issues for review in its Answer, which is replete with serious misstatements and disingenuous arguments. Contrary to Deutsche Bank's unsupported assertion of frivolity and no impact, Division One's tolling decision immediately impacts a significant segment of the population and "has a direct bearing" on commerce, finance, and quieting title to real property in Washington.

Respectfully submitted this May 8, 2018.

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CERTIFICATE OF SERVICE

I certify that on May 8, 2018, a copy of the foregoing Petition for Review was served at the indicated address by:

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