

73522-5

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No. 73522-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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MICAH SCHNALL,

Appellant,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, REGIONAL TRUSTEE  
SERVICES, AND JOHN DOEs inclusive 1 through 20,

Respondents.

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BRIEF OF APPELLANT

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Appeal from King County Superior Court  
Consolidated Case No: 11-2-19807-3 SEA  
The Honorable Judge Bowman

Micah Schnall, Pro Se  
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DIVISION ONE  
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## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
A. Assignments of Error.....	2
B. Issues Pertaining to Assignments of Error.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	6
A. Deutsche Bank did not hold the note.....	6
1. Deutsche Bank did not hold the promissory note when it appointed the successor trustee.....	6
2. Deutsche Bank's own testimony establishes that Deutsche Bank was not beneficiary during the trustee's sale.....	10
B. Notice of Default did not satisfy DTA requirements.....	11
1. Notice not transmitted by beneficiary or trustee.....	11
2. Notice failed to identify owner of promissory note .....	12
C. Statutory noncompliance renders trustee's sale invalid.....	13
V. CONCLUSION.....	17
APPENDIX A-1	
APPENDIX A-2	

## TABLE OF AUTHORITIES

### Cases

<u>Albice v. Premier Mtg. Svcs.</u> , 276 P.3d 1277 (2012).....	14, 15, 16
<u>Amresco Independence Funding, Inc. v. SPS Properties, LLC</u> , 129 P.3d 884 (2005)...	14
<u>Bain v. Metropolitan Mortg. Group, Inc.</u> , 285 P. 3d 34 (2012).....	6, 14
<u>Klem v. Washington Mut. Bank</u> , 295 P.3d 1179 (2013).....	11
<u>O'Brien v. Hafer</u> , 93 P.3d 930 (2004).....	12
<u>Rucker v. Novastar Mortgage, Inc.</u> , 311 P.3d 31 (2013).....	14, 15
<u>Schnall v. Deutsche Bank</u> , No. 68516-3.....	4, 5
<u>Schroeder v. Excelsior Management Group</u> , 297 P. 3d 677 (2013).....	14, 15

### Statutes

Former RCW 61.24.010(2) (2010).....	6, 11
Former RCW 61.24.030(8) (2010).....	11
Former RCW 61.24.030(8)(l) (2010).....	13
Washington's Deed of Trust Act, RCW 61.24 et seq (“DTA”).....	passim

### Rules

CR 56(e).....	8, 9
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## I. INTRODUCTION

This was originally a case involving a borrower (Schnall) presenting pre-sale challenge to a non-judicial foreclosure. The case has since evolved into a post-sale challenge as well as a (consolidated) unlawful detainer action.

Deutsche Bank National Trust Company (“Deutsche Bank”) as the trustee for a pool of mortgage loans, was identified as the beneficiary and highest bidder (with a credit bid) at the trustee's sale.

Mortgage Electronic Registration Systems, Inc. (“MERS”) recorded a public assignment of beneficial interest to Deutsche Bank, but has since admitted in discovery that it had no interest to assign. Schnall does not contest the dismissal of MERS.

On cross-motions for summary judgment. Schnall alleged that the trustee's sale occurred in violation of the DTA and was thus invalid. Deutsche Bank sought to dismiss Schnall's claim and gain possession of the property.

The trial court agreed with Deutsche Bank.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

The trial court erred by denying Schnall's motion for summary judgment (CP 397) and granting Deutsche Bank/MERS' motion for summary judgment (CP 390), dismissing of Schnall's complaint for violation of the DTA and granting a writ of restitution in favor of Deutsche Bank.

### B. Issues Pertaining to Assignments of Error

1. Were the DTA requirements for the transmission and form of a Notice of Default satisfied? **NO**. The notice at issue was not transmitted by the beneficiary or trustee as required, nor did it contain all required information.

2. Did Deutsche Bank hold the promissory note throughout the non-judicial foreclosure, as found by the trial court? **NO**. The promissory note was negotiated by endorsement after Deutsche Bank had already appointed the successor trustee, and Deutsche Bank's own testimony establishes that Deutsche Bank did not hold the note on the date of the trustee's sale.

3. Does statutory noncompliance render the trustee's sale of Schnall's property invalid? **YES**. A forced sale, absent either court order or strict adherence to statute, is unlawful and invalid.

### **III. STATEMENT OF THE CASE**

On October 31, 2006. Schnall took out a loan for the purchase of his home in Redmond, Washington (“the Property”), signing a promissory note and a deed of trust. The promissory note was payable to Quicken Loans, Inc., in the amount of \$460,000, with a five year fixed interest rate of 7.65% and a monthly “interest only” payment amount of \$2922.92. CP 454. The Deed of Trust identified MERS as the beneficiary. CP 435.

Quicken Loans transferred Schnall's loan to IndyMac Bank, FSB (“IndyMac Bank”) on January 2, 2007. CP 35 (Notice of Assignment, Sale, or Transfer of Servicing Rights).

Schnall continued to make payments to IndyMac Bank, and to IndyMac Bank's successor in interest, OneWest Bank, FSB (“OneWest Bank”) until August, 2009, and thereafter attempted to obtain modification of his loan. Schnall made three payments of \$1559.80 under a trial modification plan. CP 36-38 (Trial Period Plan).

Regional Trustee Services Corp. (“RTS”) sent a Notice of Default to Schnall on August 24, 2010. CP 242 at ¶18.

Schnall filed a complaint with the King County Superior Court on June 3, 2011, alleging, inter alia, that the Notice of Default violated the DTA and that it was unclear who was the beneficiary or note holder. CP 1 (Complaint).

Schnall's entire complaint was dismissed without prejudice on December 20, 2011, and Schnall appealed to this Court. Schnall v. Deutsche Bank, No. 68516-3.

On August 10, 2011, OneWest Bank (through its division IndyMac Mortgage Services) notified Schnall that the interest rate on his loan had reduced from 7.625% to 2.75%, with the monthly payment reducing from the original amount of \$2922.92 (interest-only+escrow) to a new payment amount of \$1616.66 (principal+interest+escrow). CP 39 (notice describing interest rate and payment change).

A trustee's sale of the Property was held by RTS on December 2, 2011, with Deutsche Bank as the highest bidder with a credit bid of \$492,185.63. CP 243 at ¶22, CP 320-322 (Trustee's Deed).

Deutsche Bank filed an unlawful detainer action against Schnall (since consolidated with this case) which was subsequently stayed by

Judge Erlick conditional upon monthly deposits being made to the court registry by Schnall in the amount of \$1616.66 Appendix A-1.

On discretionary review, this Court reversed the dismissal of Schnall's claim for violation of the DTA and affirmed the dismissal of Schnall's other claims. Schnall v. Deutsche Bank, No. 68516-3. .

Schnall filed a motion for summary judgment on April 23, 2015. CP 120. Deutsche Bank/MERS filed their own motion for summary judgment on April 24, 2015. CP 144. Judge Bowman subsequently denied Schnall's motion and granted Deutsche Bank/MERS' motion. CP 390, CP 397. On June 1, 2015, Schnall filed a notice of appeal. CP 389.

On June 17, 2015, Judge Bowman vacated the order granting a writ of restitution in favor of Deutsche Bank, allowing Schnall to retain possession of the Property while continuing to make monthly deposits to the court registry under similar terms as those previously set by Judge Erlick. Appendix A-2.

As of the date of this Brief, Schnall is still in possession of the Property.

#### IV. ARGUMENT

##### **A. Deutsche Bank did not hold the note.**

A successor lender bears the burden of establishing its status as beneficiary. “If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its “interests” would not accomplish this.” Bain v. Metropolitan Mortg. Group, Inc., 285 P. 3d 34, 48 (2012).

Here, the trial court found that Deutsche Bank “had possession of the Note throughout the non-judicial foreclosure of the Property.” CP 394 at ¶1.

##### **1. Deutsche Bank did not hold the promissory note when it appointed the successor trustee.**

“The trustee may resign at its own election or be replaced by the beneficiary.” RCW 61.24.010(2). *Note: References to RCW 61.24 et. al. in this brief are references to former chapter 61.24 RCW (2010).*

On August 18, 2010, MERS assigned its interests in the Deed of Trust and Promissory Note to Deutsche Bank. CP 409-410 (Assignment of Deed of Trust). One day later, on August 19, 2010, Deutsche Bank executed an appointment naming RTS as successor trustee. CP 241 at ¶17,

CP 296-297 (Appointment of Successor Trustee). MERS admitted in discovery that the assignment did not transfer the promissory note. CP 41.

A true and correct copy of the promissory note was provided on July 22, 2011. CP 406 at ¶7, CP 454-458 (Adjustable Rate Note). The signature page contains an endorsement by Quicken Loans, undated, in blank (no payee specified). CP 458. Five days later, counsel for Deutsche Bank/MERS brought the original promissory note into court for the July 27, 2011 preliminary injunction hearing. CP 460 (MacDonald Decl). On the signature page, "IndyMac Bank FSB" was stamped in the payee field of the previously blank endorsement by Quicken Loans, and IndyMac Bank, FSB had in turn made its own endorsement, undated and in blank. CP 473-474 (MacDonald Decl at pp. 15-16). The signature page of the copy of the note later provided by Deutsche Bank in discovery matches the signature page as described at the hearing. CP 42.

IndyMac Bank's endorsement of the blank-endorsed note is incontrovertible evidence that IndyMac Bank held the note at the time it made the endorsement. Since IndyMac Bank's endorsement was not made until after Boyle made his declaration on July 22, 2011, nearly a year after the appointment of the successor trustee, Deutsche Bank could not have been the beneficiary when it made the appointment.

Deutsche Bank attempted to overcome this problem with declarations submitted in support summary judgment. CP 236 (Ortwerth), CP 323 (Campbell), CP 385 (Campbell, supp.).

**a. Inadmissible testimony.**

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e). “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Id.

Both Ortwerth and Campbell declare that their personal knowledge is based on a review of business records. CP 239 at ¶8, CP 387 at ¶4.

**(1) Ortwerth's paragraph 12 is inadmissible.**

Ortwerth declares that Deutsche Bank “has been the owner and holder of the Note at all times through the non-judicial foreclosure of Schnall's property.” CP 240 at ¶12. But, unlike every other statement she makes in her declaration, her statement in paragraph 12 is made with no reference to supporting records.

Since Ortwerth's personal knowledge is based solely on a review of business records, her statement in paragraph 12 is thus inadmissible under CR 56(e).

Further, the statement itself is inadmissible as an overbroad, conclusory statement of ultimate fact.

**(2)** Campbell's entire declaration is inadmissible.

Campbell declared that Deutsche Bank maintained continuous physical possession of the blank-endorsed promissory note from December 7, 2006, until on or about July 25, 2011. CP 387-388 at ¶7, ¶9. But Campbell attached no records to her declaration at all. Since Campbell, like Ortwerth, bases her personal knowledge solely on a review of business records, none of Campbell's testimony is admissible under CR 56(e).

**b.** Ortwerth's paragraph 11 is conclusory and false.

Ortwerth attempted to overcome the problem of the endorsements on the note defeating Deutsche Bank's possession, by declaring that it appears that Quicken Loans endorsed a copy of the note in addition to endorsing the original. CP 240 at ¶11. This (inadmissible) conclusory statement is false.

Reasonable minds could not disagree that, even examining the two different copies provided by Ortwerth herself, the signature, form, and location of the endorsement by Quicken Loans is precisely the same on the copy with a single endorsement (CP 271) and on the copy with both endorsements (CP 249). Quicken Loans only made one endorsement. Ortwerth's statement (or conclusion) is erroneous.

Further, the signature page itself says, "Sign Original Only." It is an unlikely proposition that a sophisticated lending institution such as Quicken Loans would endorse a copy of a \$460,000 instrument, in contravention to the instructions written on the instrument itself, especially considering that it is the instrument that Quicken Loans itself presented to Schnall at the inception of the loan.

**2. Deutsche Bank's own testimony establishes that Deutsche Bank was not beneficiary during the trustee's sale.**

Campbell, a Vice President for Deutsche Bank (CP 386 at ¶1), testified that the blank-endorsed note was shipped to OneWest Bank on or about July 25, 2011. CP 386-387 at ¶3, ¶5. The note was shipped back to Deutsche Bank on or about December 8, 2011. CP 387 at ¶5.

But the trustee's sale occurred six days prior, on December 2, 2011. CP 243 at ¶22. Thus, OneWest Bank was holder on the date of the sale.

**B. Notice of Default did not satisfy DTA requirements.**

“This court has frequently emphasized that the deed of trust act 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.’” Klem v. Washington Mut. Bank, 295 P.3d 1179 1188 (2013). Strictly interpreting the DTA in favor of the borrower, the statutory requirements for the form and transmission of a notice of default have not been satisfied.

**1. Notice not transmitted by beneficiary or trustee.**

“[W]ritten notice of default shall be transmitted by the beneficiary or trustee to the borrower.” RCW 61.24.030(8).

The Notice of Default at issue was signed by "Regional Trustee Services Corporation, Trustee and/or Agent for the Beneficiary." CP 301. But RTS was not acting as either the trustee or as agent for the beneficiary.

**a. Notice not transmitted by trustee.**

“Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.” RCW 61.24.010(2).

Here, the Notice of Default was transmitted to Schnall on Aug 24, 2010. CP 242 at ¶18. The appointment of RTS as successor trustee was not

recorded until a month later, on Sep 24, 2010. CP 242 at ¶17, CP 296-297 (Appointment of Successor Trustee). RTS had no powers of Trustee when it transmitted the Notice of Default to Schnall.

**b. Notice not transmitted by beneficiary.**

As previously discussed, Deutsche Bank did not yet hold the note. Thus, any agent of Deutsche Bank would not have been acting as agent of the beneficiary.

But even if Deutsche Bank did hold the note, the record does not show that RTS was acting as agent of Deutsche Bank when it transmitted the Notice of Default to Schnall.

The burden of establishing an agency relationship rests upon the party asserting its existence. O'Brien v. Hafer, 93 P.3d 930, 933 (2004).

Here, Deutsche Bank has not established that RTS was acting as its agent when RTS transmitted the Notice of Default. Deutsche Bank appointed RTS as successor trustee on August 19, 2010, five days prior to the transmission of the Notice of Default. The execution of the appointment established the relationship between Deutsche Bank and RTS as one of Beneficiary/Trustee, rather than Principal/Agent.

**2. Notice failed to identify owner of promissory note.**

“In the event the property secured by the deed of trust is residential real property,” the notice of default must contain “the name and address of the owner of any promissory notes or other obligations secured by the deed of trust.” RCW 61.24.030(8)(1).

The Notice of Default at issue states “The beneficial interest under said Deed of Trust and the obligations secured thereby are presently held by or will be assigned to Deutsche Bank.” CP 299. This language fails to meet the requirement.

Nor was this ambiguous language accidental. As previously discussed, Deutsche Bank did not yet hold the promissory note, and the publicly recorded MERS assignment had not yet been made.

**C. Statutory noncompliance renders trustee's sale invalid.**

The trial court declined to invalidate the sale despite statutory noncompliance, relying on a Division Two case from 2005.

The evidence establishes that any defects in the Notice of Default were technical errors which were non-prejudicial. Pursuant to *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn.App 532, 537, 119 P.3d 884 (2005), there is no basis to set aside the non-judicial foreclosure.

CP 395 at ¶3 (Order Granting Mot. for Sum. Judgment).

The Amresco court declined to invalidate a sale despite technical noncompliance, citing previous court cases. “To uphold [the DTA]

objectives, courts have declined to invalidate sales even where trustees have not complied with the statute's technical requirements." Amresco, at 887. But the cases relied on in Amresco have since been superseded by decisions in our Supreme Court.

In Rucker v. Novastar Mortgage, Inc., 311 P.3d 31 (2013), this Court followed our Supreme Court's recent rulings in Albice v. Premier Mortgage Services of Washington, Inc., 276 P.3d 1277 (2012), and Schroeder v. Excelsior Management Group, 297 P. 3d 677 (2013), in determining that statutory noncompliance renders a trustee's sale invalid:

Applying these principles, our Supreme Court has explained that "only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Bain*, 175 Wash.2d at 89, 285 P.3d 34. "[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale." *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716 (2013). Such actions by the improperly appointed trustee, we have explained, constitute "material violations of the DTA." *Walker*.

This, of course, is precisely the defect in the foreclosure proceedings that Rucker and April assert occurred in this case. At the time that NovaStar appointed QLS as successor trustee, it did not hold the promissory note.

Rucker, at 37

Similarly, in *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wash.2d 560, 276 P.3d 1277 (2012),

the trustee had continued the trustee's sale for 161 days, thus exceeding the 120-day maximum set forth by RCW 61.24.040(6). The court explained that the trustee's failure to act within the allotted time violated the statute, thus divesting the trustee of statutory authority. *Albice*, 174 Wash.2d at 568, 276 P.3d 1277. Without such authority, the court explained, "any action taken is invalid." *Albice*, 174 Wash.2d at 568, 276 P.3d 1277. Accordingly, the court remanded to the trial court to "enter an order declaring the sale invalid." *Albice*, 174 Wash.2d at 575, 276 P.3d 1277.

Here, Rucker and April contend not only that QLS exceeded its statutory authority, but that QLS was never a proper trustee at all. If the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority. As in *Schroeder* and *Albice*, in such circumstances, vacation of the sale is a proper remedy.

Rucker, at 39

Deutsche Bank has failed to establish that it owned the loan when it appointed the successor trustee, and has admitted that it did not hold the note on the date of the sale. And the trial court did not dispute that the Notice of Default had defects.

Further, Deutsche Bank made no attempt to correct the known mistakes. The Albice court opined that noncompliance could be corrected prior to the sale:

As we have already mentioned and held, under this statute, strict compliance is required. *Udall*, 159 Wash.2d at 915-16, 154 P.3d 882. Therefore, strictly applying the statute as required, we agree with the Court of Appeals and hold that

under RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory notices, to conduct a sale after 120 days from the original sale date, and such a sale is invalid.

Albice, at 1282 (emphasis added)

Here, no attempt was made to correct errors or reissue notices.

Schnall's Complaint, and the subsequent litigation, gave Deutsche Bank notice of the errors in the nonjudicial foreclosure proceedings, months before the trustee's sale was held. Whether or not Deutsche Bank agreed that the errors alleged by Schnall would be fatal to a trustee's sale, it would have cost nearly nothing to simply issue new documents and thus foreclose Schnall's claim. Nothing would have prevented Deutsche Bank from making and recording a new appointment of successor trustee. Nothing would have prevented Deutsche Bank from issuing a new notice of default which clearly identified the present owner of the note. Instead, Deutsche Bank chose to let errors stand.

The sale is invalid.

## V. CONCLUSION

The order granting Deutsche Bank/MERS' motion for summary judgment must be reversed. The dismissal of MERS should be affirmed. The order denying Schnall's motion for summary judgment must be reversed. The trustee's sale must be declared invalid. All monies deposited by Schnall into the court registry in this (consolidated) case must be ordered returned to Schnall forthwith.

Respectfully submitted this 12<sup>th</sup> day of November, 2015.

A handwritten signature in black ink, appearing to read 'Micah Schnall', with a stylized flourish at the end.

Micah Schnall

Appellant, Pro Se.

COURT OF APPEALS  
STATE OF WASHINGTON

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## **APPENDIX A-1**

**FILED**  
KING COUNTY, WASHINGTON

OCT 26 2012

SUPERIOR COURT CLERK  
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DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEUTSCHE BANK NATIONAL TRUST  
COMPANY, AS TRUSTEE  
Plaintiff/Petitioner,

vs.

MICHA SETHNALL, et al  
Defendant/Respondent.

No. 12-2-03428-1 SEA  
ORDER ON CIVIL MOTION

**CLERK'S ACTION REQUIRED**

THIS MATTER having come on duly and regularly before the undersigned Judge of the above-entitled Court upon Defendant's Motion for Revision of Commissioner's order entered on August 15, 2012, granting Plaintiff a writ of Restitution.

and this Court being otherwise fully advised in the premises; NOW, THEREFORE,

IT IS HEREBY ORDERED that Defendant's Motion for Revision is granted and the order issuing writ of Restitution is vacated

IT IS FURTHER ORDERED that this unlawful detainer action is stayed until Defendant's appeal of superior court case

DATED this \_\_\_\_\_ day of \_\_\_\_\_

John P. Erlick, Judge

ORDER

Judge John P. Erlick  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9345

Case Name: DEUTSCHE BANK v. SCHMIDT  
Cause Number: 12-2-03428-1 SEA

Number 11-2-19807-3 SEA (Div 1: 08510-3) is resolved. The stay on the unlawful detainer is conditioned on Defendant making monthly payments by the first of each month, and no later than the fifth of each month, into the King County Clerk Registry. Each monthly payment shall be in the amount of \$1,000.00. The failure of Defendant to make the payment on time will result in a lift of the stay on the unlawful detainer action. Should this stay be lifted, Plaintiff shall be entitled to obtain a writ of restitution, ex parte, upon providing proof to the court that Defendant failed to timely make a monthly payment. Plaintiff shall provide notice to Defendant five days prior to Plaintiff submitting its motion for writ of restitution to the ex parte department. Notice shall include the motion and cover letter indicating the date Plaintiff intends to have the motion presented, and notice shall be by first class mail to the property address as well as by email to micahlegal@gmail.com.

Date: 10/26/12

[Signature]  
Judge

Copy Received  
[Signature]  
Attorney for Plaintiff  
Bar Number: 42968

Copy Received  
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Attorney for Defendant  
Bar Number: pro se

## **APPENDIX A-2**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

MICHAEL SCHINALL,

Plaintiff,

vs.

DEUTSCHE BANK NATIONAL  
TRUST COMPANY, MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, and JOHN DOE's, inclusive  
1 through 20,

Defendants.

Consolidated Case  
No. 011219807-3 SEA, 13-2-03428-1

~~PROPOSED~~ ORDER GRANTING  
STAY OF ENFORCEMENT OF  
JUDGMENT

(Clerk's Action Required)

This matter is before the court upon Michael Schinall's Motion to Stay Enforcement of Judgment. On May 27, 2015, the court entered Summary Judgment which included directions to put Deutsche Bank into possession of property commonly known as 11116 1<sup>st</sup> Place Northeast, Redmond, Washington. On June 1, 2015, Schinall filed a Notice of Appeal, seeking review of the Order of the trial court.

ORDER GRANTING STAY OF ENFORCEMENT OF JUDGMENT

Michael Schinall  
11527 1<sup>st</sup> Avenue P.O. Box  
Redmond, Washington 98076  
509.881.1111

1 it is hereby ORDERED

- 2
- 3 1. The Order granting Writ of Restitution is VACATED, and the Undetained
- 4 Detainer case STAYED, until the Court of Appeals files its Mandate.
- 5
- 6 2. Schnall is to make monthly deposits with the Superior Court Clerk in the
- 7 amount of ~~\$1616.66~~ \$1,616.66 on the fifth of each month, which
- 8 continuing deposits will be considered adequate to secure the costs which
- 9 Deutsche Bank would incur as a result of its inability to enforce the judgment
- 10 during review by the Court of Appeals.
- 11
- 12 3. Should Schnall fail to deposit funds on the above terms, Deutsche Bank
- 13 is entitled to relief from this Stay and assessment.
- 14
- 15 4. A photocopy of this Order may be served on the sheriff in lieu of a certified
- 16 copy.

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Judge Bill Bowman

Presented by

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ORDER GRANTING STAY OF ENFORCEMENT OF  
JUDGMENT

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CERTIFICATE OF SERVICE

On 11/12/15, I served the document(s): BRIEF OF APPELLANT, via email (by agreement) to counsel for Respondents Deutsche Bank and MERS, Sakae S. Sakai, at his address ssakai@houser-law.com.

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

Dated: 11/12/15

  
\_\_\_\_\_  
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