

IN THE SUPREME COURT OF OHIO

WASHINGTON MUTUAL BANK, FKA  
WASHINGTON MUTUAL BANK, FA,  
n/k/a Federal Deposit Insurance Corporation,  
Plaintiff-Appellee,

v.

JACK K. BEATLEY, *et al.*,  
Defendants-Appellants.

Supreme Court Case No. 2008-1056

On Appeal from the  
Franklin County Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 06AP-1189

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**DEFENDANTS-APPELLANTS JACK K. BEATLEY AND 64 W. NORTHWOOD  
AVENUE, LLC'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFF-APPELLANT (SIC) FEDERAL DEPOSIT INSURANCE CORPORATION'S  
MOTION FOR STAY PENDING THE EXHAUSTION OF MANDATORY  
ADMINISTRATIVE CLAIMS PROCESS**

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KEVIN E. HUMPHREYS\* (0069168)

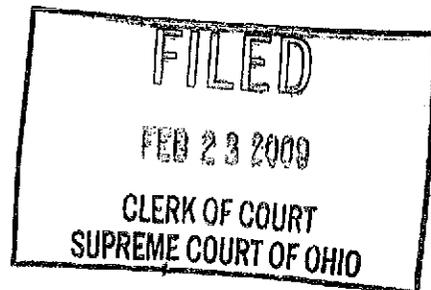
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## **I. INTRODUCTION:**

Appellants Jack K. Beatley and 64 W. Northwood Avenue, LLC, (hereinafter “Beatley”) now tender their memorandum contra to Plaintiff-Appellee Federal Deposit Insurance Corporation’s second motion for stay filed February 12, 2008. This action was previously stayed for 90 days upon Plaintiff-Appellee’s request made pursuant to 12 U.S.C. § 1821(d)(12)(B). Since the Federal Deposit Insurance Corporation asserts that it is the receiver and successor in interest to Washington Mutual Bank in this case, the Plaintiff-Appellee will be referred to as “WAMU” so as to be consistent with Washington Mutual Bank’s generally known trademark.

## **II. ARGUMENT:**

### **A. WAMU’s improper procedural posturing at the appellate level:**

As part of WAMU’s earlier motion for a 90 day stay pursuant to 12 U.S.C. § 1821(d)(12)(B), WAMU made no mention of any desire or intent to subsequently seek an additional 180 day stay pursuant to any other provision of 12 U.S.C. § 1821, *et seq.* Surely, if WAMU desired that this Court grant it a 180 day stay then it should have asked for such stay as part of its initial motion for the 90 day stay that was filed on November 14, 2008.

Unfortunately at this juncture, Beatley is all too familiar with WAMU’s improper procedural machinations which have been interjected throughout the appellate proceedings in this case. Over two years ago, on December 26, 2006, WAMU sought and obtained a stay of briefing and a limited remand from the court of appeals so that WAMU could file a Civ.R. 60(B) motion in the trial court. Notwithstanding the stated time limits within the order of remand, WAMU failed to timely file a Civ.R. 60(B) motion, for which leave had been granted. The appellate proceedings did not resume until after Beatley filed a motion to dismiss the appeal for WAMU’s failure to prosecute. In response to that motion, WAMU filed a Civ.R. 60(B) motion

with the trial court. That motion was summarily denied as having been untimely filed. Thereafter, pursuant to an order of the appellate court, briefing was completed by the parties. Then on October 24, 2007, just 12 days before the scheduled oral argument, WAMU filed a substitution of new counsel and sought and obtained an order from the appellate court allowing it to re-brief the entire case and present new assignments of error. In support of WAMU's motion tendered to the court of appeals, WAMU's present counsel wrote:

**Approximately three weeks ago - after briefing was complete for this appeal - Washington Mutual's in-house litigation department was apprised for the first time regarding the trial court's opinion and this appeal.** In a subsequent review of the case file, Washington Mutual discovered troubling issues with how its counsel handled the case before the trial court. Further, for the reasons explained in more detail in the section below, it was apparent that the briefing before this Court was woefully inadequate, missing pertinent case law, statutory authority, regulatory authority and devoid of sufficient analysis.

*WAMU's Motion to Adjourn Oral Argument and Schedule Additional Briefing*, (App. Rec. 104), at p. 3 (emphasis added). However, contrary to WAMU's representations to the appellate court, before any of the appellate briefing had been undertaken in the court of appeals, WAMU's Assistant General Counsel, Susan Taylor, executed on April 9, 2007, an affidavit in support of WAMU's motion for relief from judgment. Surely, WAMU had knowledge of the trial court's judgment and the procedural posture of the litigation, well before three weeks after the appellate court briefing had been completed. Nonetheless, WAMU tendered a motion to the appellate court based upon false facts and it was allowed to advance additional assignments of error and undertake the filing of a substituted appellant's brief. Now, WAMU, through the same counsel that argued that WAMU had no notice of the trial court judgment, improperly argues to this Court that Beatley must complete an administrative claims process before this Court may proceed with briefing of this certified conflict case.

**B. The stay sought by WAMU applies to actions against WAMU or its receiver, not actions prosecuted by WAMU or its receiver.**

WAMU's current attempt to obtain an additional 180 day stay based upon 12 U.S.C. 1821(d)(5) is analogous to the futile exercise of attempting to insert the proverbial square peg into the round hole. WAMU's premise of the exhaustion of administrative remedies and invocation of the claims review process for Beatley's "claims" has no application to the present procedural posture of this case. The only party which has prosecuted a "claim" in this case is WAMU. That "claim" at issue is a foreclosure claim. WAMU cannot point to any present claims in this case asserted by Beatley against WAMU or the FDIC, as receiver. Pure and simple, this is a foreclosure action which was wrongfully and improperly commenced against Beatley.

It is a matter of common knowledge from the recent failure of WAMU, that it was the largest federal savings and loan in the United States, and represents the largest savings and loan failure in history. The effect of WAMU's inability to manage its banking affairs was manifested in this case, as well as perhaps the thousands of other foreclosure actions commenced and maintained in the courts within the State of Ohio. Rather than credit Beatley's payments to the mortgage at issue in this case, WAMU processed Beatley's payments with reference to a Wells Fargo account and placed them into a "suspense account" for credit to Wells Fargo Bank. Beatley received no relief from loan servicing calls placed to what seemed to be an overseas staffed call center. As a result of WAMU's deficiencies of improper accounting and loan servicing practices, WAMU commenced this foreclosure action against Beatley.

WAMU's argument and case citations demonstrate that the administrative claims process codified at 12 U.S.C. § 1821(d)(3) through (d)(10), and (d)(13) is designed to handle claims which are asserted **against** the financial institution. WAMU cites to several cases at page 6 of its

motion for the position that “Congress created a new claims determination procedure **by which the creditors of a failed institution may be required to first present their claims to the Receiver for administrative consideration** before pursuing a judicial remedy.” See *Melizer v. RTC* (C.A.5, 1992), 952 F.2d 879, 882 (citing 12 U.S.C. § 1821(d)(3)) (emphasis added). WAMU further argues that “Congress barred all courts from hearing **claims against the Receiver, unless and until the claimant completes the administrative claims process.**” See, *WAMU Motion for Stay* filed Feb. 12, 2009, at p. 7 (emphasis added). Thereafter, WAMU argues that compliance with the administrative claims process is a jurisdictional prerequisite to commencement of an action against the receiver in federal district court. However, as the record in this case demonstrates, there is no pending claim against WAMU or the receiver in this case. WAMU has it backwards, as it is WAMU that asserted a claim against Beatley. WAMU’s argument for a stay is frivolous as there is no administrative review process in 12 U.S.C. § 1821 to accommodate a review of WAMU’s foreclosure claim against Beatley. As such, WAMU’s claim in its caption of the “mandatory administrative claims process” is but a sophistry that should not sway this Court.

**C. WAMU’s argument in Part B of its Motion also fails as a matter of law:**

A review of WAMU’s motion demonstrates that there is little substantive difference between Part A and Part B of its argument. WAMU’s argument in both sections effectively requires that a creditor/claimant of a failed institution must proceed through the administrative claims process under 12 U.S.C. § 1821 before it may commence or continue to prosecute its claims against the successor/receiver. However, as illustrated in the preceding section, that statutory framework does **not apply with respect to claims asserted by the failed institution** against a debtor/third-party.

WAMU's citation to *Brady Development Co., Inc. v. Resolution Trust Corp.* (C.A.4, 1994), 14 F.3d 998, 1005, demonstrates that 12 U.S.C. § 1821(d)(6)(A) and (d)(13)(D) only prohibit courts from continuing to exercise jurisdiction over **pending claims against the Receiver** prior to the exhaustion of administrative remedies. See, *WAMU Motion for Stay* filed Feb. 12, 2009, at p. 8. The administrative claim provisions of 12 U.S.C. § 1821(d)(3) through (d)(10), and (d)(13) have no effect upon claims that are asserted by the failed institution, or cases prosecuted by the failed institution or the receiver (which are devoid of claims against the failed institution or the receiver).

WAMU argues that Beatley has until April 16, 2009, to file a claim against the receiver for claims Beatley may have against the failed institution or the receiver. Irrespective of WAMU's legal conclusions on that particular point, the case docketed before this Court remains a certified conflict case which is based upon the asserted claims of WAMU, not any asserted claims of Beatley. Thus, even if Beatley were to present claims to the receiver, whether permitted or denied, judicial review of that action would not proceed upon first impression with this Court in this certified conflict appeal.

To buttress its flawed argument, WAMU attaches examples of stay orders as exhibits B, C, and D to its motion for stay filed February 12, 2009. However, those cases are easily distinguished from the case at bar. Each of those cases was filed against the failed institution named therein, and the respective court stayed the plaintiff's claims against the failed institution pending the receiver's determination of the claims against the failed institution. Therefore, WAMU's request for stay which is predicated upon the administrative claim process codified in 12 U.S.C. § 1821(d)(3) through (d)(10), and (d)(13) is devoid of merit, and should be denied.

**D. WAMU should be required to brief this matter as it continues to seek judgments in its other pending foreclosure cases in the courts of the State of Ohio.**

Undoubtedly, WAMU has undertaken its unfounded February 12, 2009, motion for stay so as to delay an opinion of this Court that may adversely affect the many foreclosure cases that WAMU continues to prosecute against homeowners in the State of Ohio. WAMU articulated in its motion, at page 4 under the heading "Factual Status of This Action," that JPMorgan Chase Bank acquired the assets of WAMU, excepting any defensive litigation claims -- which are now held and administered by the FDIC as receiver. Nonetheless, WAMU continues to prosecute numerous foreclosure cases in the State of Ohio through its attorneys well after the September 25, 2008, receivership and asset purchase by JPMorgan Chase Bank.

So as to provide this Court with other facts that demonstrate that WAMU continues to engage in foreclosure activities within Ohio's trial courts, Beatley has attached hereto the affidavit of Mr. Kevin R. Nose, Esq. See, Exhibit 'A.' This affidavit states that Mr. Nose is presently counsel of record defending Mr. Michael S. Wentzel and Ms. Keri L. Wentzel, in a WAMU foreclosure case docketed in the Court of Common Pleas for Franklin County, Ohio. He states that WAMU continues to prosecute the foreclosure case against the Wentzels through filings with the trial court, which have been served as recently as February 12, 2009. WAMU has neither attempted to substitute any subsequent party-plaintiff in its place nor stay the foreclosure case against the Wentzels.

Based upon the recitation of "facts" set forth in its motion for stay, and its motion to substitute the FDIC in this case, WAMU is effectively defunct. WAMU lacks the requisite capacity to continue to prosecute any foreclosure actions in the State of Ohio which are based upon notes and mortgages that were purchased by JPMorgan Chase Bank, and/or under the

control of the substituted party in this case – the FDIC. While poor business and accounting practices of WAMU were likely contributors to the present mortgage foreclosure crisis, its failures should not be permitted to spill over into Ohio’s judicial system. Specifically WAMU should not be permitted to continue to march forward with pleadings and filings seeking foreclosures in Ohio’s trial courts all the while claiming a right of stay or exemption from briefing a foreclosure case which is pending before this Court. Surely, if WAMU has the ability to continue to prosecute its many cases at the trial court level, then it can devote sufficient resources to brief a single case set before The Supreme Court of Ohio.

Alternatively, should this Court find merit to WAMU’s red-herring “stay” argument, then the undersigned submits that it would seem just and equitable that this Court stay each and every WAMU foreclosure case pending in Ohio’s Courts so that all affected Ohio citizens, and not simply Beatley, may have an opportunity to submit administrative claims to the FDIC for consideration through the administrative review process.

### **III. CONCLUSION:**

Since the stay sought by the Plaintiff-Appellee FDIC, as successor to Washington Mutual Bank, is only available as to affirmative claims asserted against the failed institution, the absence of such claims in this case precludes the imposition of a stay. Denial would nonetheless be required since in moving for its first 90 day stay of this matter, the Plaintiff-Appellee failed to include these newly asserted grounds for a stay in that motion which relied upon 12 U.S.C. § 1821(d)(12), a stay provision available to a receiver to exercise in any case in which the failed institution is or becomes a party. Wherefore, the Defendants-Appellants Jack K. Beatley, Esq., and 64 W. Northwood Avenue, LLC, respectfully request that this Court **DENY** the *Plaintiff-*

*Appellant [sic] Federal Deposit Insurance Corporation's Motion for Stay Pending the Exhaustion of Mandatory Administrative Claims Process* filed February 12, 2009.

Respectfully submitted,



Kevin E. Humphreys (0069168)  
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Facsimile: (614) 241-5551  
Counsel for Appellants Jack K. Beatley, Esq. and  
64 W. Northwood Avenue, LLC

**CERTIFICATE OF SERVICE**

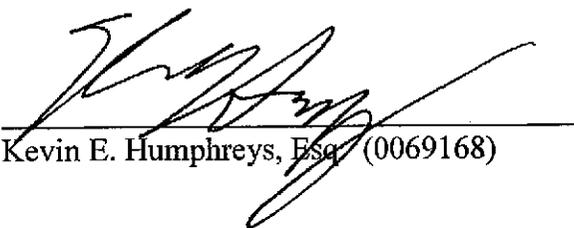
The undersigned hereby certifies that a copy of the foregoing *DEFENDANT-APPELLANTS JACK K. BEATLEY AND 64 W. NORTHWOOD AVENUE, LLC'S MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT (SIC) FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION FOR STAY PENDING THE EXHAUSTION OF MANDATORY ADMINISTRATIVE CLAIMS PROCESS* was deposited with the U.S. Postal Service for delivery via prepaid first class mail upon all parties entitled to service as identified below this 23<sup>rd</sup> day of February, 2009:

Thomas R. Winters – First Assistant Attorney General of Ohio  
Michael Stokes, Esq.  
Kelly Borchers, Esq.  
Assistant Attorneys General  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
Counsel for Amicus Curiae  
Ohio Attorney General

Gregory J. O'Brien, Esq.  
Charles A. Bowers, Esq.  
Taft Stettinius & Hollister LLP  
200 Public Square, Suite 3500  
Cleveland, OH 44114

- and -

John P. Wolfsmith, Esq.  
Matthew R. Devine, Esq.  
Jenner & Block, LLP  
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Chicago, Illinois 60611  
Counsel for Appellee Washington Mutual Bank, fka  
Washington Mutual Bank, FA,  
n/k/a Federal Deposit Insurance Corporation, receiver

  
\_\_\_\_\_  
Kevin E. Humphreys, Esq. (0069168)

**EXHIBIT A**

**FOLLOWS THIS PAGE**

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Defendants-Appellants.



Supreme Court Case No. 2008-1056

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FEBRUARY 23, 2009 – AFFIDAVIT OF KEVIN R. NOSE

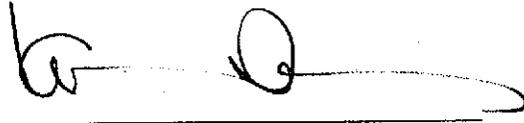
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Now comes Kevin R. Nose, being first duly cautioned and sworn, and hereby states that the following statements are true to the best of his knowledge and belief and that he is competent to testify to the matters set forth herein:

1. I am over the age of eighteen years, am mentally competent, and have personal knowledge of all facts set forth herein.
2. I am Counsel of Record in a foreclosure case which continues to be prosecuted by Washington Mutual Bank, as Plaintiff against the Defendants Mr. Michael S. Wentzel and Ms. Keri L. Wentzel, docketed in the General Division of Franklin County Common Pleas Court, Franklin County, Ohio, having case number 08CVE-06-8609 (hereinafter "WAMU Foreclosure Case").
3. I presently represent Mr. Michael S. Wentzel and Ms. Keri L. Wentzel in the WAMU Foreclosure Case.
4. WAMU continues to prosecute the WAMU Foreclosure Case against the Wentzels through filings with the trial court, which have been served as recently as February 12, 2009.

5. WAMU has neither attempted to substitute in any subsequent party-plaintiff in its place nor stay the proceedings pursuant to 12 U.S.C. § 1821, et seq., in the WAMU Foreclosure Case.

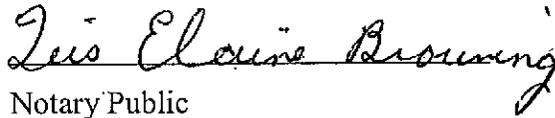
Further Affiant Sayeth Naught:



Kevin R. Nose, Esq.

State of Ohio            )  
                                  )     SS:  
County of Franklin    )

The undersigned, a notary public in and for the State of Ohio, County of Franklin, does hereby attest that Kevin R. Nose, did personally appear before me this 23<sup>rd</sup> day of February, 2009, and he did swear and acknowledge that he executed this affidavit as his voluntary act and deed.

  
Notary Public



IRIS ELAINE BROWNING  
NOTARY PUBLIC, STATE OF OHIO  
COMMISSION EXPIRES 08-15-12