IN THE SUPREME COURT OF OHIO

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	Case No. 2008-1056
Plaintiff-Appellee,	)	
vs.	)	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
JACK K. BEATLEY, *et al.*,	)	Court of Appeals Case No. 06AP-1189
Defendant-Appellant.	)	

PLAINTIFF-APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION TO DISMISS

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I. Introduction

Pursuant to Supreme Court Rule XIV, Section 4(A) and Supreme Court Rule XII(B), the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as Receiver for Washington Mutual Bank, fka Washington Mutual Bank FA, respectfully requests that the Court dismiss the instant appeal. The Tenth District Court of Appeals' decision denying Appellants Jack K. Beatley and 64 W. Northwood, LLC's Motion to Dismiss Appeal was not a final order from which a court of appeals can certify a conflict, and the Ohio Constitution's requirements for certifying a conflict were not satisfied. For these reasons, and for the reasons more fully set forth below, the FDIC respectfully requests that the instant appeal be dismissed.

II. Factual Background

A. Washington Mutual Filed A Complaint In Foreclosure Based Upon Appellants' Failure To Pay.

On July 14, 2006, Washington Mutual Bank fka Washington Mutual Bank, FA ("Washington Mutual") filed a two-count foreclosure Complaint in the Franklin County Court of Common Pleas against Jack K. Beatley, 64 W. Northwood Avenue, LLC (collectively, "Appellants"), John Doe and Don Breckenridge. (Supp. 1.[1]) In its Complaint, Washington Mutual alleged that it was the holder and owner of a promissory note for $187,000 in favor of Washington Mutual's predecessor-in-interest, Home Savings of America, FA. (Supp. 3, 6.)

B. Appellants' Moved To Dismiss The Complaint For Lack Of Standing Based Upon R.C. 1329.10(B).

On September 1, 2006, Appellants filed a Motion to Dismiss the Complaint pursuant to Civ.R. 12(B)(1) and (6). (Supp. 20.) Appellants asserted that Washington Mutual was a fictitious name pursuant to R.C. 1329.01(A)(2) and that under R.C. §1329.10(B), fictitiously

[1] All "Supp. __" references refer to pages in the Supplement of Plaintiff-Appellee, which is being filed contemporaneously with this Motion to Dismiss.

named companies are precluded from "commenc[ing] or maintain[ing] an action in the trade name or fictitious name in any court in this state or on account of any contracts made or transactions had in the trade name or fictitious name until it has first complied with section 1329.01 of the Revised Code ***" (Supp. 22-23, 28-29.) Based upon these statutes, Appellants asserted that, "the law is clear [that] 'Washington Mutual Bank' and/or 'Washington Mutual Bank, FA' . . . lacks standing to commence or maintain an action in this Court." (Supp. 23.) Based upon this lack of standing, Appellants argued, the trial court lacked jurisdiction to hear the matter and should dismiss the Complaint under Civ.R. 12(B)(1). (Supp. 23-24.) Appellants also argued that this same lack of standing and resulting lack of jurisdiction precluded relief and, therefore, justified a finding that Washington Mutual failed to state a cause of action upon which relief could be granted under Civ.R. 12(B)(6). (Supp. 23-24.) Appellants' motion made no mention of or reference to R.C. 1703.29.

C. The Trial Court Granted Appellants' Motion To Dismiss For Lack Of Standing Under R.C. 1329.10(B).

On October 26, 2006, the Franklin County Court of Common Pleas granted Appellees' Motion to Dismiss under Civ.R. 12(B)(1) and (6), and dismissed the matter with prejudice under Civ.R. 41(B)(3) without exception. (Supp. 44, 47-48.) In making its determination, the Court held that it was entitled to rely upon materials outside of the Complaint, without converting the Motion to Dismiss into one for summary judgment, because Appellants were moving to dismiss based upon lack of standing. (Supp. 45-46.) Based upon its review of the materials submitted by Appellants and a reading of R.C. 1329.01(A)(2), the trial court found that "it appears that 'Washington Mutual Bank' and 'Washington Mutual Bank, FA' are fictitious names." (Supp. 47.) The trial court also found that the evidence submitted by Appellants demonstrated that neither entity was a foreign corporation. (Supp. 46.) Based upon R.C. 1329.01, the court held

that "because plaintiff failed to register or report its use of the name 'Washington Mutual Bank" or 'Washington Mutual Bank, FA' with the Ohio Secretary of State, it may not maintain an action in such fictitious name(s)." (Supp. 47.) The trial court did not engage in any analysis of R.C. 1703.29. It did, however, hold that its judgment was a "final appealable order for purposes of App. R. 4" and dismissed all of Washington Mutual's claims with "no exception . . . as permitted by Civ.R. 41(B)(3). (Supp. 48.)

D. Washington Mutual's Appeal.

On November 24, 2006, Washington Mutual filed its notice of appeal. On appeal, Washington Mutual argued that the trial court findings were based upon a faulty decision making process. Specifically, Appellees pointed out that the Court erred in considering materials outside the record and that it was improper to dismiss an action for lack of jurisdiction with prejudice. (Supp. 268-271.) Appellees also argued that the trial court did not engage in any analysis of R.C. 1703.01, et seq. and that Washington Mutual was a foreign corporation that was not subject to the requirements contained therein. (Supp. 168-170.) Appellees further argued that Ohio's license and registration laws that were relied upon by the trial court were pre-empted by the federal laws and regulations applicable to federal savings associations. (Supp. 275-288.)

1. Appellants Moved to Dismiss the Appeal Based on an Alleged Violation of R.C. 1703.29(A).

In their response, Appellants argued for the first time that Washington Mutual was not licensed under R.C. Chapter 1703 and, therefore, lacked the capacity to appeal. (Supp. 209-210.) Appellants subsequently filed a Motion to Dismiss the appeal in which they expanded upon this new argument. (Supp. 240.) In support of their argument, Appellants did not rely upon any finding by the trial court. Instead, Appellants sought a ruling from the Appellate Court that Washington Mutual could not maintain an appeal based upon an affidavit from the Director of

the Business Services Division of the Ohio Secretary of State's Office, Debora Batta (the "Batta Affidavit"). (Supp. 250.)

The Batta Affidavit, dated May 11, 2007, indicated that Washington Mutual, Inc. had informed the Ohio Secretary of State that it does business under the name Washington Mutual Bank as a tradename/trademark. (Supp. 250, ¶3.)[2] The Affidavit went on to state, however, that the name Washington Mutual Bank had not been registered by Washington Mutual, Inc. and that, in fact, the names "Washington Mutual Bank" and "Washington Mutual Bank, FA" had been reserved by Luxor Enterprises, Ltd. (Supp. 250, ¶¶ 6-7.)

The Batta Affidavit was originally submitted to the Court of Appeals as an exhibit to a brief filed by Appellants in support of their first motion to dismiss the appeal, which was also denied. (Supp. 187, 195-196.) Appellants used the Batta Affidavit to respond to an affidavit filed by Washington Mutual in which counsel for Washington Mutual detailed her discovery that on September 1, 2006, Luxor Enterprises, Inc. filed name reservations for Washington Mutual Bank and Washington Mutual Bank, FA. (Supp. 147.) Counsel for Washington Mutual went on to detail her discovery that counsel for Luxor Enterprises, Inc. was also counsel for Appellants. (Supp. 147-148, ¶¶ 3-5.) The Batta Affidavit attempted to explain that there was nothing improper about Appellants' counsel blocking Washington Mutual from addressing the concerns raised by Appellants. (Supp. 195-196.)

On April 8, 2008, the Tenth Appellate District overturned the dismissal based upon error in the trial court's decision making process. (Supp. 314.) Specifically, the Court of Appeals determined that Appellants' argument that Washington Mutual lacked standing did not equate to

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[2] This Notice to the Ohio Secretary of State is presumably the basis for Appellants' change in argument from lack of registration of a fictitious name to lack of registration of a foreign corporation.

the Court lacking jurisdiction and that, as a result, the trial court was not permitted to look beyond the pleadings without converting Appellants' motion into one for summary judgment. (Supp. 318-320.) The court of appeals found "no support for the proposition that the trial court lacked subject matter jurisdiction over this foreclosure action." (Supp. 219.) As a result, the court of appeals reversed the trial court's dismissal and remanded the case for further proceedings consistent with the law and its opinion. (Supp. 321.) Appellants did not appeal grounds for the Tenth District's reversal. The court of appeals simultaneously denied Appellants' motion to dismiss the appeal. (Supp. 316-317, 322.)

Following the Tenth District's decision, Appellants moved to certify a conflict to the Ohio Supreme Court. Specifically, Appellants argued that the court of appeals' denial of their motion to dismiss the appeal conflicted with the Court's holding in *Quality International Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006 – Ohio – 5883. (Supp. 323.) On May 20, 2008, over Appellee's objection (Supp. 328), the Court of Appeals granted Appellants' Motion to Certify. (Supp. 337.) On August 6, 2008, this Court determined that a conflict exists between the Tenth District Court of Appeals' decision in the instant case and the Ninth District Court of Appeals decision in *Quality International.* As demonstrated below, however, the Tenth District's decision denying Appellants' Motion to Dismiss was not a final order and there was not an actual conflict between the Tenth District's decision in the instant case and the Ninth District's decision in *Quality International.*

III. Law and Argument

This Court should dismiss the instant appeal because certification of a conflict was improper. Supreme Court Rule of Practice XII(B) provides:

> When the Supreme Court finds a conflict pursuant to S.Ct.Prac.R. IV, it may later find that there is no conflict or that the same

> question has been raised and passed upon a prior appeal. Accordingly, the Supreme Court may *sua sponte* dismiss the case as having been improvidently certified, or summarily reverse or affirm on the basis of precedent.

As set forth below, certification of a conflict was improper because the Tenth District Court of Appeals' decision overruling Appellants' Motion to Dismiss was not a final order and because there is no conflict between the Tenth District's decision in the instant case and the Ninth District's decision in *Quality International*

A. The Tenth District Court of Appeals' Decision Overruling Appellants' Motion to Dismiss Was Not A Final Order.

This Court should dismiss Appellants' appeal because the Tenth District Court of Appeals' decision dismissing Appellants' Motion to Dismiss Washington Mutual's appeal was not a final order. An order overruling a motion to dismiss is not a final order, and "the existence of a final order is a prerequisite to the authority of the Court of Appeals to certify a record in a conflict case." *Berry v. McCourt* (Ohio App. 10th Dist. 1963), 119 Ohio App. 288, 290. Indeed, in *Schindler v. Standard Oil Co.* (1954), 162 Ohio St. 96, 98, this Court explained that an "order of the Court of Appeals overruling the motion to dismiss the appeal did not determine the action and is not a final order or judgment from which an appeal may be taken." It is well established that if there is no final order, there can be "no valid certification of the record by the judges of the Court of Appeals" because "[t]he existence of a final order is a prerequisite to the authority of the Court of Appeals to certify the record in a conflict case." Id.

In this case, the certified question is as follows:

> When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

(See August 8, 2008 Judgment Entry.) Although the question implies otherwise, the trial court in this case never made a determination that Appellees lacked capacity to maintain an action based

upon a failure to "license" a foreign corporation under R.C. 1703.29(A). Instead, Appellants only argued at the trial court level that Washington Mutual failed to "register" a fictitious tradename under R.C. 1329.10(B). The first time Appellants raised the applicability of R.C. 1703.29(A) was on appeal. Thus, it is undisputed that Appellants' motion for certification of a conflict stems entirely from the denial of their motion to dismiss Appellees' appeal rather than the affirmative of any ruling by the trial court. (Supp. 323.) Because the denial of a motion to dismiss is not a final appealable order, and because the existence of a final order is a prerequisite to a court of appeals certifying that a conflict exists, the instant appeal should be dismissed.

B. The Constitutional Requirements Necessary For Certification of A Conflict Were Not Satisfied.

Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, in order to certify a case to this Court for review and final determination, it must first be determined that: (1) the asserted conflict is based upon the same question; and (2) the alleged conflict is on a rule of law, and not facts. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. There must be an actual conflict between appellate districts on a rule of law, and the conflicts must be over questions that are material to both judgments so as to be dispositive of the cases. Id. at paragraph one of the syllabus; *Lyons v. Lyons* (Oct. 4, 1983), Tenth Dist. No. 82AP-949, unreported, 1983 WL 3715, at * 1 (noting that "there must be more than a mere difference in pronouncements in the opinions upon some question presented in the cases"). These requirements were not satisfied in this case, and this Court should dismiss this appeal.

In the instant case, the conflict between the appellate court's ruling and the holding in *Quality International* is based upon a conflict between the facts, not law. In *Quality International*, there was a determination by the trial court that the plaintiff was a foreign corporation that was not licensed under R.C. Chapter 1703 and that, therefore, the plaintiff was

prohibited from maintaining an appeal. 2006-Ohio-5883, at ¶ 8. Here, no determination has ever been made that Appellee was a foreign corporation that was required to be licensed under R.C. Chapter 1703, or that it failed to do so. Instead, the trial court determined only that Washington Mutual lacked standing to bring its claims as an unregistered fictitious entity under R.C. 1329.10 and that Washington Mutual was not a foreign corporation. This factual distinction is crucial because it is only upon a finding that a plaintiff should have obtained a license under R.C. Chapter 1703, and failed to do so, that a plaintiff is precluded from maintaining an action under R.C. 1703.29(A). Thus, while the questions in *Quality International* was whether a plaintiff could appeal after a trial court found that it violated R.C. 1703.29(A), the question here is whether R.C. 1703.29(A) prohibits an appeal of a trial court's finding that a plaintiff failed to meet the requirements of an entirely different statute – namely R.C. 1329.10(B). Because these two questions of law are entirely different, Appellants' appeal should be dismissed.

IV. Conclusion

For these reasons, the FDIC, in its capacity as Receiver for Washington Mutual Bank, fka Washington Mutual Bank FA, respectfully requests that the Court dismiss the instant appeal. The Tenth District Court of Appeals' decision denying Appellants Jack K. Beatley and 64 W. Northwood, LLC's Motion to Dismiss Appeal was not a final order from which a court of appeals can certify a conflict. Furthermore, there is no conflict between the Tenth District Court of Appeals' decision in the instant case and the Ninth District Court of Appeals' decision in *Quality International*. For these reasons, the FDIC respectfully requests that the instant appeal be dismissed.

Respectfully submitted,

G. O'Brien, by B. Parsons, per authority

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Dismiss was served this 3rd day of March, 2009, via regular U.S. Mail, upon:

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