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

DEFENDANT-APPELLANTS JACK K. BEATLEY AND 64 W. NORTHWOOD AVENUE, LLC'S MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION TO DISMISS

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CLERK OF COURT
SUPREME COURT OF OHIO

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 motion to dismiss filed March 3, 2009. 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.

WAMU is now before this Court upon yet another procedural "motion[1]" which is devoid of any substantive merit. In fact the timing of this motion is suspect, having been filed within a few business days of this Court's denial of WAMU's second motion seeking a 180 day stay of this certified conflict case. The impropriety of the motion is perhaps best gleaned from WAMU's infusion of matters which are not pertinent to the motion before this Court, as well as its improper attempt to apply case law which is easily distinguished from the procedural posture of the case *sub judice.*

II. BACKGROUND – A REVIEW OF THE LOWER COURT PROCEEDINGS:

Part II, of WAMU's motion to dismiss is captioned "Factual Background." A review of Part II, demonstrates that WAMU fails to comprehend the lower court history in this case. First, WAMU at pages 2-6 of its motion to dismiss appears confused as to why R.C. 1329.10(B) served as the basis for dismissal in the trial court action, but then later R.C. 1703.29 was invoked in the court of appeals action. At the time the Complaint was filed in July of 2006, the poor operating practices of WAMU, the largest loan servicer in the country, had not yet been exposed.

[1] WAMU's filing although captioned "Motion to Dismiss" appears to be a memorandum, rather than a "motion" coupled with a "memorandum in support."

In fact, Washington Mutual Bank was not a generally recognized name within the State of Ohio. The body of WAMU's Complaint was devoid of any allegation identifying Washington Mutual Bank, as its name appeared solely in the case caption. The note and mortgage attached as exhibits to the Complaint identified the holder/financial institution as Home Savings of America, F.A., and there was no assignment from that entity to WAMU. Given that the body of the Complaint and the note and mortgage at issue made no reference to WAMU, and WAMU was neither registered nor licensed by the Ohio Secretary of State, the Defendants Beatley and 64 W. Northwood Avenue, LLC filed their motion to dismiss the Complaint. [T.d. 60].

At pages 4-5, of the October 4, 2006 trial court decision and entry granting the motion to dismiss, the trial court noted in its decision that WAMU had not responded to the motion to dismiss, and **more than 30 days had elapsed** since the filing of the motion to dismiss. [T.d. 67] By all accounts Washington Mutual Bank appeared to be a fictitious name within the State of Ohio. Therefore, based upon the certificates of no record issued from the Ohio Secretary of State's Office the trial court applied R.C. 1329.10(B) and this Court's prior holding in *Buckeye Foods v. Cuyahoga County Bd. of Revision* (1997), 78 Ohio St.3d 459, 461, and terminated the action. [T.d. 67]. It was from this decision that WAMU commenced its appeal.

Based upon then newly discovered information, that Washington Mutual Bank was an unregistered foreign corporation, both Beatley and 64 W. Northwood Avenue, LLC moved to dismiss WAMU's appeal pursuant to R.C. 1703.29(A) and the prior holding of *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.,* Summit App. No. 23131, 2006-Ohio-5883. [App. Doc. 94]. Attached to the motion to dismiss was the affidavit of from Debora Batta, Director of the Business Services Division of the Office of the Ohio Secretary of State which explained that WAMU was not domestic entity, and it maintained no registration with the Ohio Secretary of

State. The court of appeals issued a journal entry which stated that the motion to dismiss the appeal would be considered when the court addressed the merits of the appeal. [App. Doc. 100], attached hereto as Exhibit 1. No interlocutory order was ever issued denying the motion to dismiss the appeal which was filed September 11, 2007.

In response to the motion to dismiss for lack of capacity to appeal, WAMU argued that it was a federal savings and loan having its charter office situated in Henderson, Nevada, and attached supporting documentation which demonstrated its "foreign" existence. See Exhibits 2 and 3 to App. Doc. 129 (attached hereto as Exhibits 2 & 3). At oral argument before the court of appeals, WAMU's counsel openly admitted that WAMU was not registered with the Ohio Secretary of State. As noted earlier, the absence of registration by WAMU was also duly set forth in the affidavit from Ms. Batta that was attached in support of the motion to dismiss[2] WAMU's appeal. Further, in its original Appellant's Brief tendered to the Tenth District Court of Appeals, WAMU's counsel argued that "as there are no consequences for not filing the notice [with the Ohio Secretary of State], Washington Mutual was not required to file a notice in order to file its complaint." [App. Doc. 56, at p. 10]. In other words, WAMU's position was that it mattered not what Ohio law required, so long as there was no perceived penalty. Therefore, WAMU argued it need not follow Ohio law.

WAMU's calculated decision to avoid service of process in Ohio was contrary to the fundamental and constitutional purpose of affording access to the courts and redress to Ohio's residents who may have had claims to assert against WAMU. For over a century the United States Supreme Court has consistently upheld state foreign corporation registration acts. See,

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[2] Contrary to WAMU's argument that the first motion to dismiss filed in the Tenth District Court of Appeals was predicated upon its failure to register as a foreign corporation, that motion to dismiss was based upon WAMU's failure to file an Appellant's Brief within the time proscribed by prior order of the Tenth District Court of Appeals. See, [App. Docs. 42 and 94].

Lafayette Ins. Co. v. French (1855), 59 U.S. 404 (approving of Ohio's foreign corporation registration requirements); *St. Clair v. Cox* (1882), 106 U.S. 350, 1 S.Ct. 354, 27 L.Ed. 222; *Connecticut Mut. Life Ins. Co. v. Spratley* (1899), 172 U.S. 602, 19 S.Ct. 308; and *Mutual Reserve Fund Life Ass'n v. Phelps* (1903), 190 U.S. 147, 23 S.Ct. 707. The holdings of the United Supreme Court treat the right to require registration of foreign corporations at the state level as a lawful and constitutional right of the people. See *State of Washington ex rel. Bond & Goodwin & Tucker v. Superior Court of State of Washington for Spokane County* (1933), 289 U.S. 361, 364, 53 S.Ct. 624, 626. (citing *American Railway Express Co. v. Kentucky* (1927), 273 U.S. 269, 274, 47 S.Ct. 353, 71 L.Ed. 639). Based upon these authorities there can be no doubt that the licensing/registration requirements of R.C. Chapter 1703 serve a fundamental and revered constitutional purpose – to enable the citizens of the State of Ohio to invoke their right of redress through the state courts by way of process to be served upon designated agents of foreign corporations. Absent registration, the state residents and local governments are left without the ability to identify or serve proper agent(s) of the foreign corporation.

III. ARGUMENT:

A. WAMU'S LACK OF A FINAL ORDER ARGUMENT IS DEVOID OF MERIT.

WAMU argues that this Court must dismiss this action because there was no final order/judgment of the court of appeals which would support a certified conflict in this case. In support of its argument, WAMU cites to *Berry v. McCourt* (1963), 119 Ohio App. 288, for the proposition that the denial of a motion to dismiss an appeal is not a final order/judgment upon which certification may be based. However, the *Berry* opinion does not support WAMU's argument now before this Court. The order in *Berry* which was sought to be certified to the Ohio Supreme Court was an interlocutory order issued by the court of appeals, in 1963. It was not

until 1965, that the court of appeals decided the merits of *Berry* and issued a final opinion and judgment. See, *Berry v. McCourt* (1965), 1 Ohio App.2d 172.

WAMU also cites *Schindler v. Standard Oil Co.* (1954), 162 Ohio St. 96, as authority that certification to the Ohio Supreme Court cannot be maintained upon the denial of a motion to dismiss. WAMU's attempted application of *Schindler* is improper since *Schindler* also involved an attempt to certify the appellate record upon an interlocutory order issued by the court of appeals. Since both *Berry* and *Schindler* involve attempts to certify interlocutory orders of the court of appeals they are clearly distinguishable from the final decision and judgment from which the certification in this case arises.

In the case *sub judice*, the court of appeals did not issue an interlocutory order denying the motion to dismiss. Instead the court of appeals combined the consideration of the motion to dismiss with the determination of the merits of the appeal. [App. Doc. 100], attached hereto as Exhibit 1. Thus, when the court of appeals denied the motion to dismiss that determination was included within the merit opinion and final judgment of the court of appeals. [App. Docs. 169 and 170]. The certified conflict before this Court arises from the certification of a conflict involving the final opinion and judgment of the court of appeals. Since this case does not involve the certification of an interlocutory decision or opinion of the court of appeals there is no merit to WAMU's argument that this case should be dismissed for lack of a final order or judgment of the court of appeals.

B. WAMU'S MOTION TO DISMISS DISREGARDS THE DETERMINATION OF THIS COURT, AND THE COURT OF APPEALS FOR THE TENTH DISTRICT THAT A CERTIFIED CONFLICT EXISTS IN THIS CASE.

Within the last part of WAMU's motion to dismiss, WAMU seeks to reargue issues that have been previously decided by this Court and the Court of Appeals for the Tenth District.

WAMU's argument is based upon its apparent confusion of whether the certified issue involves R.C. 1329.10 or R.C. 1703.29. The legal issue which was certified to this Court and accepted by this Court accepted 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?

The briefing of this issue is designed to determine whether or not R.C. 1703.29 operates as a "door-closing" provision to unlicensed foreign corporations who undertake an appeal in Ohio's courts of appeal. R.C. 1703.29 was the basis of the motion to dismiss which was filed and considered by the court of appeals when it rendered its judgment in this case. It is axiomatic that a motion to dismiss an appeal must state the grounds in the motion, and be filed with the court of appeals. The grounds for a motion to dismiss an appeal are not set forth in a motion filed with the trial court.

As explained in part II above, it is undisputed that WAMU was neither a domestic entity in the State of Ohio, nor had it made any filing with the Ohio Secretary of State pursuant to R.C. Chapter 1703. Thus, R.C. 1703.29(A) deprives WAMU, an unlicensed foreign corporation, access to the state courts within Ohio, including the courts of appeal. See, *Quality Internatl. Ents., Inc.*, supra., 2006-Ohio-5883, at ¶¶ 7, 8, 10-12. The certified conflict arose in the case sub judice since the opinion and judgment entry of the Court of Appeals for the Tenth District allowed WAMU access to the appellate court process, even though the Court of Appeals for the Ninth District had rendered a conflicting decision which barred appellate relief to an unlicensed foreign corporation, as a matter of law – citing R.C. 1703.29(A).

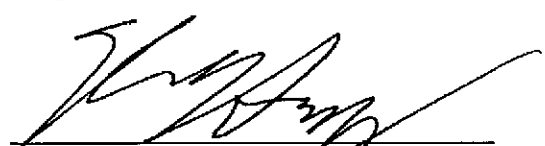
This Court previously considered the analogous "door-closing" provision set forth in R.C. 1329.10(B), which this Court determined deprived such an offending party of an appeal to

the courts of appeals brought in the unregistered fictitious name. See, *Buckeye Foods,* 78 Ohio St.3d at 461. However, this Court has not opined upon the effect of R.C. 1703.29(A), as a "door-closing" provision in the context of an appeal. This certified conflict case allows this Court to fulfill its constitutional mandate to settle the conflict that exists within the conflicting decisions between the Ninth District and Tenth District as to whether 1703.29(A) prohibits an unlicensed foreign corporation from commencing or maintaining an appeal.

IV. CONCLUSION:

Wherefore, the Defendants-Appellants Jack K. Beatley, Esq., and 64 W. Northwood Avenue, LLC, respectfully request that this Court **DENY** the *Plaintiff-Appellee Federal Deposit Insurance Corporation's Motion to Dismiss* filed March 3, 2009.

Respectfully submitted,



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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-APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION TO DISMISS* 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 13th day of March, 2009:

Gregory J. O'Brien, Esq.
Charles A. Bowers, Esq.
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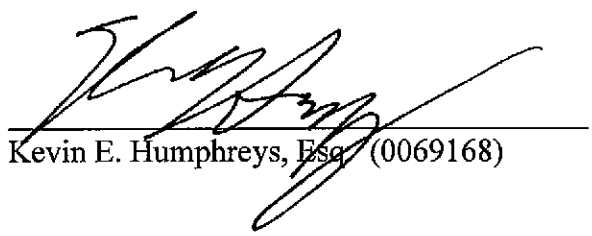

Kevin E. Humphreys, Esq. (0069168)

EXHIBIT 1

FOLLOWS THIS PAGE

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Washington Mutual Bank, f/k/a Washington Mutual Bank, FA,	:	
Plaintiff-Appellant,	:	
v.	:	No. 06AP-1189
Jack K. Beatley et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JOURNAL ENTRY

Appellees' September 11, 2007 motion to dismiss this appeal shall be considered at such time as the court addresses the merits of this appeal.

JUDGE

JUDGE

cc: Deputy Court Administrator

EXHIBIT 2

FOLLOWS THIS PAGE

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Your search retrieved 1 record *(1 page)*.

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Updated: Wednesday, October 24, 2007 at 8:00 AM

Effective March 31, 2006 all savings associations are insured by the Deposit Insurance Fund (DIF). Charter type descriptions reflect the prior insurance fund.

Docket/ Region	Name/Location Telephone	Officer/Title Mailing Address	Charter Type Assets ($000)
1. 08551 West	Washington Mutual Bank 2273 North Green Valley Pkwy, Ste. 14 Henderson, NV 89014-0000 206-461-2000	**Kerry Killinger** *CEO* 1201 Third Ave Seattle, WA 98101-0000	DIF-Ins Fed Stk $ 311,053,133

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EXHIBIT 3

FOLLOWS THIS PAGE

Back to Search Bank Find

Your Bank at a Glance

Washington Mutual Bank (FDIC Cert: 32633)
is a Savings Association and has been FDIC insured since **December 27, 1988.**
It was established on **December 27, 1988.**
Its main office (headquarters) is located at:

Arch Plaza Financial Center
Henderson, Nevada 89014
County of Clark

Washington Mutual Bank's reported (or primary) website. http://www.wamu.com:80/

The primary regulator is Office of Thrift Supervision (OTS).
For **consumer assistance** regarding an issue with this institution, please contact the OTS directly.

Check to locate Branches Offices by state.

Last financial information available about Washington Mutual Bank.
Historical profile of Washington Mutual Bank

For additional information please click on one of the following:

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9. View branch office deposit information - Summary of Deposits
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