IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Mary E. Glover, individually and on behalf of other similarly situated former and current homeowners in Pennsylvania,	)	
Plaintiffs,	)	**No. #2:08-cv-00990-RCM**
vs.	)	
Washington Mutual Bank, F.A., **Washington Mutual Home Mortgage**, **Mark J. Udren, Udren Law Offices, P.C.**, and **Wells Fargo Home Mortgage**,	)	
Defendants	)	

BRIEF IN OPPOSITION TO FDIC'S REQUEST FOR A SECOND STAY

INTRODUCTION

The Federal Deposit Insurance Corporation ("FDIC"), in its capacity as receiver for Washington Mutual Bank ("WaMu"), has filed a second request to stay this action. FDIC's first request was for a mandatory 90-day stay. Its second request is for a discretionary 180-day stay, stemming from the alleged need for Ms. Glover to undergo FDIC's administrative claims process.[1]

FDIC's request for a stay is fatally flawed. First, FDIC has no basis for an additional 180-day stay, because Ms. Glover has no obligation to undergo FDIC's claims process. FDIC failed to satisfy the mandatory notice prerequisite set forth in 12 U.S.C. § 1821(d)(3)(C) and therefore lacks authority

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[1] FDIC does not accept "class" proof of claim forms; therefore, all class members who have received proper notice from FDIC are allegedly required to file their own claims.

to determine Ms. Glover's claims. Moreover, the claims process is open-ended and inadequate. FDIC has attempted to use its own "policy" to bypass FIRREA's time constraints on the claims process.[2] Under FDIC's alleged policy, it can place a litigant in its claims process at any time, even years after becoming receiver, as long as it provides the litigant at least 90 days "to submit a claim in the administrative claims process." FDIC Mem. at 8. This alleged policy contravenes *Coit Independence Joint Venture v. Federal Savings & Loan Ins. Corp.* ("*Coit*"), 489 U.S. 561, 586 (1989), in which the Supreme Court held that an administrative claims process with no time limit on the receiver's claims review was inadequate and did not need to be exhausted.

Second, FDIC's interpretation of FIRREA is flawed, because FIRREA neither compels nor authorizes the 270-day stay that FDIC seeks here. *See Marc Development, Inc. v. Federal Deposit Ins.*, 771 F. Supp. 1163, 1167 (D. Utah 1991).

Third, the stay would halt Ms. Glover's proceedings against all five defendants for nearly three-quarters of a year, when FDIC's receivership of WaMu has no impact on Ms. Glover's claims against Defendants Wells Fargo Home Mortgage ("Wells Fargo") and debt collectors Mark J. Udren and Udren Law Offices (collectively, "Udren"). FDIC has no standing to request a stay on behalf of Wells Fargo and Udren and has offered no legal justification for this prejudicial delay of Ms. Glover's claims against them.

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[2] "FIRREA" references the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

ARGUMENT

FDIC was appointed as WaMu's receiver on September 25, 2008.[3] One month later, on October 23, 2008, it moved to substitute itself as the Defendant in this action, in lieu of WaMu. It simultaneously moved to stay the action for 90 days. This Honorable Court granted FDIC's request and stayed this action through January 22, 2009.

FDIC's 90-day stay request was improper. FIRREA, 12 U.S.C. § 1821(d)(12) authorized FDIC to stay this action <u>only</u> until December 24, 2008, the 90th day of its receivership. As the Third Circuit held in *Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 71 (3rd Cir. 1991), since FDIC was appointed receiver 30 days before it sought a stay, it was entitled to only a 60-day stay:

> Under our interpretation of section 1821(d)(12), therefore, RTC [the receiver] is entitled to a 90 day stay if it seeks the stay immediately after its appointment as receiver. If RTC lingers and fails to request a stay for 30 days after its appointment, its stay remains mandatory but will only last the remaining 60 days of the 90-day period following appointment. Where, as here, more than 90 days have passed since RTC's appointment, it is not entitled to a stay under section 1821(d)(12).

Thus, FDIC has already obtained a longer stay than contemplated by FIRREA

FDIC nevertheless moved for another 180-day stay on January 22, 2009. FDIC contends that this stay is required, because Ms. Glover must complete the administrative claims process to

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[3] Many important events occurred before FDIC's receivership. First, WaMu no longer owned Ms. Glover's mortgage; it had assigned her mortgage to Wells Fargo on December 1, 2006. *See* Cmplt. ¶¶ 35-52. Second, this lawsuit had commenced; it was served on WaMu on June 14, 2008. Third, WaMu had the opportunity to consider Ms. Glover's claims on multiple occasions, including when it filed a notice of removal on July 14, 2008 and when it filed an extensive motion to dismiss on August 18, 2008.

continue litigation. *See* FDIC Mem. at 5 (Jurisdiction is "otherwise provided" by subsection 1821(d) only for those claimants who have completed the administrative claims process.")

FDIC acknowledges, however, that it failed to mail timely notice of the claims process to Ms. Glover. FDIC Mem. at 8. FDIC alleges that its belated notice to Ms. Glover was proper under its own corrective "policy." FDIC Mem. at 8. It further alleges that, despite its belated notice, Ms. Glover must exhaust the claims process to continue litigation. *See, e.g.*, FDIC Mem. at 11.

For the reasons stated below, FDIC's motion to stay this action for an additional 180 days should be denied.

I. SINCE MS. GLOVER HAS NO OBLIGATION TO UNDERGO FDIC'S ADMINISTRATIVE CLAIMS PROCESS, THERE IS NO BASIS FOR FDIC'S STAY REQUEST

Ms. Glover has no obligation to undergo FDIC's administrative claims process. First, FDIC failed to satisfy FIRREA's notice requirements. Second, because FDIC's corrective "policy" imposes no time constraints on its alleged authority to require litigants to undergo the administrative claims process, the administrative remedy is inadequate and need not be exhausted. *Coit,* 489 U.S. 561 ("The lack of a reasonable time limit in the current administrative claims procedure renders it inadequate for several reasons.")

A. Ms. Glover Has No Obligation To Undergo FDIC's Administrative Claims Process, Because FDIC Failed To Satisfy FIRREA's Notice Requirements

FIRREA does not provide FDIC unlimited power to determine claims. FIRREA provides that FDIC "may, as receiver, determine claims <u>in accordance with the requirements of this subsection and regulations prescribed under paragraph (4)</u>." 12 U.S.C. § 1821(d)(3)(A)(emphasis added). The "requirements of this subsection" are notice requirements. FDIC cannot determine a creditor's claim unless it mails timely notice to the creditor:

> (C) Mailing required
> The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books–
>
> (i) at the creditor's last address appearing in such books; or
> (ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

12 U.S.C. § 1821(d)(3)(C).

Thus, if Ms. Glover's name and address appeared on WaMu's "books," FDIC was required to mail notice to her when it published notice in THE SEATTLE TIMES, THE LAS VEGAS REVIEW JOURNAL/ LAS VEGAS SUN NEWSPAPERS, or THE WALL STREET JOURNAL on October 1, 2008. 12 U.S.C. § 1821(d)(3)(C)(i); FDIC Mem. at 7. If Ms. Glover's name and address did not appear on WaMu's books, FDIC was required to mail notice to her within 30 days after discovering her name and address. 12 U.S.C. § 1821(d)(3)(C)(ii).

On October 23, 2008, FDIC sought to substitute itself for WaMu as a Defendant in this action. FDIC cannot reasonably argue that it discovered Ms. Glover's name and address at a later date.[4] FIRREA provided 30 days, until November 22, 2008, in which FDIC could mail the required notice to Ms. Glover. 12 U.S.C. § 1821(d)(3)(C). FDIC did not mail notice to Ms. Glover until

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[4] In reality, FDIC likely discovered Ms. Glover's name and address well before October 23, 2008. Ms. Glover served WaMu on June 14, 2008, and WaMu had vigorously defended itself since that time. It is therefore highly unlikely that Ms. Glover was not listed as a creditor on WaMu's "books."

December 17, 2008. It therefore failed to satisfy "the requirements of this subsection" and has no authority to determine Ms. Glover's claims.[5]

FDIC does not rely on FIRREA or any regulation to justify its untimely notice. Instead, it points to its own alleged corrective "policy," which it did not produce. The totality of what is known about the alleged policy is that it purportedly exists and authorizes an untimely notice that FIRREA expressly prohibits in 12 U.S.C. § 1821(d)(3)(C). *See* Declaration of David Swiss at ¶ 8 (attached as Exhibit D to the Declaration of Elysa M. Dishman). Because FIRREA requires timely notice as a prerequisite to FDIC's authority to determine claims, FDIC's alleged policy authorizing untimely notice is void.[6]

B. Ms. Glover Has No Obligation To Undergo FDIC's Administrative Claims Process, Because It Does Not Provide An Adequate Administrative Remedy

FDIC's administrative claims procedure is inadequate, because under FDIC's alleged corrective "policy," there are no time constraints on FDIC's authority to place a litigant in the administrative claims process. FDIC could force a litigant into the administrative claims process

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[5] The due process clause of the U.S. Constitution also requires timely individual notice where the person's address is readily available, before their property can be adversely affected. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988). It does not allow the taking of Ms. Glover's property (her claims) without such notice. Moreover, Ms. Glover, a Pennsylvania resident and victim of WaMu's foreclosure proceeding, could not have been placed on notice by information contained in THE SEATTLE TIMES, THE LAS VEGAS REVIEW JOURNAL/ LAS VEGAS SUN NEWSPAPERS, or THE WALL STREET JOURNAL. *Contrast* WaMu Mem. at 7.

[6] In *Yang v. Home Loan Funding, Inc.*, 2009 WL 179689 (E.D.Cal. Jan. 23, 2009), the district court held that the administrative claims process must be finally exhausted before litigation can continue. In that case, however, there was no dispute that FDIC satisfied FIRREA's notice requirements.

years after the inception of its receivership, wielding the administrative claims process as a weapon at the most critical moment of litigation.

FDIC asserts that its corrective policy validates a notice that is untimely under FIRREA's express provisions. 12 U.S.C. § 1821(d)(3)(C)(receiver may only determine the claim of a creditor to whom it mailed a timely notice). In its effort to untangle itself from the constraints of FIRREA's notice requirements, FDIC has created another problem: an administrative procedure with no reasonable time limit is inadequate and need not be exhausted.

In *Coit*, 489 U.S. at 586, the Supreme Court considered whether an administrative claims process with no time limit for the disposition of claims provided an adequate administrative remedy. The Supreme Court agreed that: "[t]hese procedures give FSLIC virtually unlimited discretion to bury large claims like Coit's in the administrative process, and to stay judicial proceedings for an unconscionably long period of time given FSLIC's purportedly limited objectives of centralizing the claims process and deciding whether claims should be paid or not." *Id.* at 586 (quoting Reply Brief for Petitioner at 18).

The Supreme Court concluded that the creditor had no obligation to undergo this claims process, because the "lack of a reasonable time limit ... renders it inadequate for several reasons." *Id.* at 587. The Court found that, absent a reasonable time limit, the administrative claims process became an underhanded weapon FSLIC could use to deny litigants their day in court and coerce them into unfair settlements:

> First, [the lack of a reasonable time limit] allows FSLIC to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs. Second, it may enable FSLIC to coerce claimants to enter into unfair settlements by virtue of the fact that the receiver's assets may be depleted by interim distributions to other claimants

> by the time a claimant finally has access to the courts. These concerns are only exacerbated by the fact that FSLIC itself is often the main creditor against the assets of a failed savings and loan association, and thus may well have an incentive to delay decision on large claims against an insolvent's assets such as the claim filed by Coit.

Id. at 587.

Here, as in *Coit*, the administrative claims process is rendered inadequate by the lack of a reasonable time limit. FIRREA uses strict notice requirements to place reasonable time limits on FDIC's authority to disrupt litigation by requiring litigants to undergo an administrative claims process. Section 1821(d)(3)(C) establishes that, if a creditor is listed on the books, FDIC must provide notice by mail to the creditor "at the time of" the publication of the notice, which occurred here on October 1, 2008. 12 U.S.C. § 1821(d)(3)(C)(i); FDIC Mem. at 7. If the creditor is not listed on the books, FDIC has 30 days after discovery of the creditor's name and address to provide the creditor notice by mail. 12 U.S.C. § 1821(d)(3)(C)(ii). FDIC may determine claims only "in accordance with" these requirements. 12 U.S.C. § 1821(d)(3)(A).

FDIC acknowledges that it did not satisfy FIRREA's notice requirements, stating that "[i]n some cases, individuals shown as creditors on [WaMu's] books may not have been mailed notice of the claims process until after November 30, 2008." FDIC Mem. at 8. According to FIRREA, 12 U.S.C. § 1821(d)(3)(A)&(C), FDIC has no authority to determine these claims.

FDIC maintains that its own "policy" trumps FIRREA's express language and allows it to determine claims even though it did not satisfy § 1821(d)(3)(C)'s notice requirements. In its attempt – however ineffectual – to shake off FDIC's notice requirements, FDIC has created the same problem present in *Coit*. FDIC acknowledges no time limit on its ability to pull a litigant into the administrative claims process and obtain a six-month stay. FDIC apparently could require a litigant to exhaust administrative remedies years after the inception of its receivership and years into litigation.

As in *Coit*, when FIRREA's reasonable time constraints are removed, the administrative claims process becomes a litigation weapon that FDIC can use improperly to decelerate the creditor at a crucial moment and undermine the creditor's right to its day in court. FDIC can pull the creditor into the claims process when, for example, it seeks to avoid or delay discovery. Also as in *Coit*, without FIRREA's reasonable time constraints, FDIC's claims process provides FDIC ammunition to force creditors into unfair settlements and stack the determination of claims to minimize distributions of the insolvent's assets.[7] For these reasons, FDIC's administrative claims process is inadequate and need not be exhausted by Ms. Glover.

III. FIRREA DOES NOT AUTHORIZE A 180-DAY STAY OF PRE-RECEIVERSHIP LITIGATION DURING THE ADMINISTRATIVE CLAIMS PROCESS

FIRREA's only mandatory stay provision is found in 12 U.S.C. § 1821(d)(12), which authorizes the receiver to request a stay of pending litigation for the first 90 days of receivership:

> **(A) In general**
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> After the appointment of a ... receiver for an insured depository institution, the ...receiver may request a stay for a period not to exceed-
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> * * *
>
> (ii) 90 days, in the case of any receiver, in any judicial action or proceeding to which such institution is or becomes a party.
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> **(B) Grant of stay by all courts required**

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[7] Even if FDIC accepts Ms. Glover's claims, it almost certainly will not award her the total economic recovery she seeks, because the assets of the failed institution will be insufficient to pay all creditors in full. Therefore, this putative class action will continue on the claims against WaMu.

> Upon receipt of a request by any ...receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding.

Section 1821(d)(12) authorizes a stay of pending litigation for the first 90 days of receivership. *Praxis*, 947 F.2d at 71. As explained above, FDIC improperly sought to stay the action for roughly the first 120 days of its receivership. *See supra* p.3.

Some courts have held that 12 U.S.C. § 1821(d)(5)(A)(i), which requires the receiver to process claims within 180 days, gives FDIC grounds for an additional 180-day stay. Section 1821(d)(5)(A)(i) states:

> Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

The Third Circuit has elected not to express a position as to whether a 180-day stay may be implied from this provision. *See Praxis*, 947 F.2d at 64 n.14 ("We express no position on whether the 180-day administrative stay of pending proceedings is a proper inference of from the statute, especially where the statutory provisions are in tension).

FIRREA's proof of claim provision should not be interpreted as an implied stay provision. FDIC was not delegated the power to delay ongoing litigation long after its appointment as receiver. Since FIRREA <u>explicitly</u> provides for one stay, for the first 90 days of receivership, other stays should not be judicially implied. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 100 S.Ct. 1905 (1980)(discussing the interpretive statutory canon *expressio unius est exclusio* that, when a legislative body explicitly enumerates certain things, additional, similar or identical ones should not be implied.); *Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1073 (3rd Cir. 1991);

cf. Marc Development, 771 F. Supp.1163, 1167 ("The implied [180 day] stay proposed by the FDIC is [ ] inconsistent with the stay that is expressly provided in [§ 1821(d)].")

In *Marc Development*, 771 F. Supp. at 1168, the court carefully parsed and rejected the FDIC's 180-day stay request, holding:

> As previously noted, paragraph (d)(5)(F)(ii) preserves the rights of a claimant that filed a lawsuit prior to the appointment of FDIC as receiver. *See* 12 U.S.C. § 1821(d)(5)(F)(ii). Specifically, the paragraph states that the filing of a claim with FDIC does not prejudice the claimant's right to pursue a lawsuit filed prior to the receivership. 12 U.S.C. § 1821(d)(5) (F)(ii). This guarantee of preexisting rights is subject only to a right created for the FDIC to seek a 90 day stay. *Id.* If the court adopted the interpretation of subsection (d) proposed by FDIC, this paragraph would be meaningless. The court reads this guarantee of rights paragraph to contemplate a duality of remedies available to the claimant that has a lawsuit existing when FDIC is appointed as receiver. A claimant with a lawsuit filed prior to the receivership is entitled to pursue that cause in court simultaneously with the administrative claims process. <u>If, as FDIC asserts, the proceedings in the lawsuit must pause during the potentially 330 day long administrative procedures, the Congress would not guarantee rights to pursue a lawsuit on the filing of a claim in the administrative process and provide for a 90 day stay during those administrative procedures</u>.

Id. at 1168.

In addition, the *Marc Development* court also found that considerations of sound public policy counseled against granting FDIC a second stay where, as here, there is ongoing litigation:

> In return for this lengthy delay, the judicial system would receive only an administrative decision from FDIC that does not bind the claimant. In effect, the statute would reach backward to deprive a court of established subject matter jurisdiction to permit the issuance of an advisory opinion by one of the parties. Surely if Congress intended this result, it would have clearly stated so in the statute or the legislative reports. The court is aware of no such expressions.

Marc Development, 771 F. Supp. at 1169.

Ms. Glover agrees with FDIC that the administrative claims process is mandatory if, unlike here, FDIC satisfies FIRREA's notice requirement. It does not follow, however, that FIRREA requires or even authorizes a 180-day stay.

Ms. Glover respectfully submits that although not precedential, the *Marc Development* decision should be given weight here, because its reasoning is compelling.[8] Although some appellate courts outside the Third Circuit have held that a litigant must exhaust the receiver's administrative claims process before continuing litigation (FDIC Mem. at 11), *Marc Development* speaks volumes about why such stays should be denied.

Moreover, FDIC's reasoning is flawed in numerous respects. FDIC cites multiple cases addressing post-receivership litigation for the proposition that exhaustion of the administrative claims process is a prerequisite to subject matter jurisdiction. FDIC Mem. at 10. FDIC failed to note the crucial point that the circuit courts have held virtually universally that subject matter jurisdiction is not affected where, as here, the claims were filed pre-receivership. *See, e.g., Marquis v. FDIC*, 965 F.2d. 1148 (1st Cir. 1992)(holding that FIRREA does not withdraw subject matter jurisdiction from lawsuits pending before the receiver of a failed institution is appointed); *Carney v. RTC*, 19 F.3d 950, 955 (5th Cir. 1994)(same). *See* also *Yang v. Home Loan Funding, Inc.*, 2009 WL 179689 (E.D.Cal. Jan. 23, 2009).

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[8] A Tenth Circuit panel in *Marc Development* held, "[t]he district court's thorough and well-reasoned opinion fully addresses, disposes of, and rejects the FDIC's assertions that it is entitled to the 180 day stay as a result of FIRREA provisions contained in 12 U.S.C.§ 1821(d) and as a result of the FIRREA's legislative history." *Marc Development, Inc.*, 992 F.2d 1503, 1507 (10th Cir. 1993). The Tenth Circuit accepted the stay issue presented *en banc,* but the FDIC settled and thus avoided a decision on the merits. The *en banc* court then concluded that the Panel decision should be vacated. *Marc Development, Inc.*, 12 F.3d 948 (10th Cir. 1993).

Similarly, FDIC cites *Marquis* as support for the proposition that FIRREA authorizes a stay during the administrative claims process but fails to note that *Marquis* contemplated a far shorter stay than the 270-day stay FDIC requested here. *Marquis*, 965 F.2d at 1155 (contemplating a stay of a maximum stay of 180 days); *Id.* ("[S]tays cannot be cavalierly dispensed; there must be good cause for their issuance; they must insure that competing equities are weighted and balanced").

FDIC attached multiple court orders to its Memorandum and to the Declaration of Elysa Dishman, Esquire, both filed in support of its stay request on January 22, 2009. These court orders merely confirm that courts routinely grant stay requests where the stay is unopposed or the litigation is filed after receivership, neither of which is the case here. Orders granting unopposed motions are not precedential. *Petruska v. Gannon University*, 2008 WL 2789260 (W.D.Pa. Mar. 31, 2008)(quoting *Soyka v. Alldredge*, 481 F.2d 303, 306 (3d. Cir. 1973)("Questions 'neither brought to the attention of the Court nor ruled upon are not to be considered as having been so decided as to constitute precedents."). Other courts have issued opinions denying FDIC's request for a 180 day stay, when it was disputed. *See infra* pp. 10-11 (discussing *Marc Development,* 771 F. Supp. 1163).

The Third Circuit's order granting the unopposed stay request in *Jones v. FDIC*, No. 08-2353 (3rd Cir. Dec. 4, 2008) is typical of the cases FDIC cites. FDIC Mem. Ex A. Moreover, although FDIC's stay request in *Jones* was unopposed, the Third Circuit did not give FDIC carte blanche to delay the litigation for 180 days. FDIC Mem. Ex. A. The Third Circuit required the parties to provide updates on the status of the claims process every 30 days. FDIC Mem. Ex. A. If the claim was not determined within four months, the parties were required to seek an additional stay. FDIC Mem. Ex. A. Thus, even where FDIC's stay request was unopposed, the Third Circuit created procedural protections to avoid delays.

III. FDIC LACKS STANDING TO OBTAIN A STAY OF MS. GLOVER'S CLAIMS AGAINST DEFENDANTS WELLS FARGO AND UDREN

FDIC lacks standing to seek a stay for Defendants Wells Fargo and Udren under the fundamental standing doctrine known as *jus tertii*. With rare exceptions not applicable here, a party "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights and interests of third parties." *Warth v. Silden*, 422 U.S. 490, 499 (1975); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985). FDIC has offered no justification for the prejudicial, 270-day delay of Ms. Glover's litigation against defendants not affected by FDIC's receivership. If and when Ms. Glover's litigation against Wells Fargo and Udren interferes with FDIC's administrative claim process, FDIC may reassert its motion to stay the action based on a proper factual record. At this juncture, FDIC's factually baseless assumption of its *jus tertii* standing is meritless. *See, e.g., Warth, supra* and *Phillips, supra*.

FDIC's motion to stay this action for an additional 180 days is fatally flawed for all of the reasons set forth above.

CONCLUSION

For the reasons stated above, Ms. Glover respectfully requests this Honorable Court to deny the FDIC's second stay request. Ms. Glover also respectfully requests this Honorable Court to deny the FDIC's third party stay request for Defendants Wells Fargo and Udren, because it lacks standing to assert their alleged rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February 2009, a true and correct copy of the foregoing ***Brief in Opposition to FDIC's Request for a Second Stay*** was served electronically as follows:

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