STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No.: 08 CVS 22632

IRVING EHRENHAUS, On Behalf Of Himself And All Others Similarly Situated,

Plaintiff,

v.

JOHN D. BAKER, II, PETER C. BROWNING, JOHN T. CASTEEN, III, JERRY GITT, WILLIAM H. GOODWIN, JR., MARYELLEN C. HERRINGER, ROBERT A. INGRAM, DONALD M. JAMES, MACKEY J. MCDONALD, JOSEPH NEUBAUER, TIMOTHY D. PROCTOR, ERNEST S. RADY, VAN L. RICHEY, RUTH G. SHAW, LANTY L. SMITH, G. KENNEDY THOMPSON, DONA DAVIS YOUNG, WACHOVIA CORPORATION, and WELLS FARGO & COMPANY,

Defendants.

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

A. The Parties 2

B. Events Leading to the Discussions With Citigroup and Wells Fargo 3

C. The Citigroup Transaction 6

D. The Wells Fargo Transaction 8

E. The Terms of the Merger Agreement 10

F. The Court's Expedited Discovery Order and Opinion 14

ARGUMENT 14

I. THE STANDARDS FOR A PRELIMINARY INJUNCTION 14

II. PLAINTIFF DEMONSTRATES A LIKELIHOOD OF SUCCESS ON THE MERITS 15

A. The Standards for Reviewing the Board's Actions Regarding the Merger 15

B. The Share Exchange Is Coercive 18

C. The Ineffective Fiduciary Out Provision Prevents the Directors from Complying With Their Continuing Fiduciary Duties 20

D. The Board Was Not "Attentive" and Did not Negotiate the Deal Protection Devices "Carefully" 21

III. PLAINTIFF AND THE CLASS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION 23

IV. THE BALANCE OF HARDSHIPS FAVORS AN INJUNCTION 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Blasius Indus., Inc. v. Atlas Corp.,
564 A.2d 651 (Del. 1988) 23

Cede & Co. v. Technicolor,
634 A.2d 345 (Del. 1993) 17

First Union Corp. v. Suntrust Banks, Inc.,
2001 NCBC 9A (N.C. Super. 2001) . . . . *passim*

In re Gaylord Container Corp. Shareholder Litig.,
753 A.2d 462 (Del. Ch. 2000) 18

Hubbard v. Hollywood Park Realty Enterprises, Inc.,
1991 Del. Ch. LEXIS 9 (Del. Ch. Jan. 14, 1991) 23

In re IXC Commc'ns. Shareholders Litig.,
1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27, 1999) 18

Omnicare, Inc. v. NCS Healthcare, Inc.,
818 A.2d 914 (Del. 2003) 15, 16, 20, 21

Paramount Commc'ns, Inc. v. QVC Network Inc.,
637 A.2d 34 (Del. 1993) 20

Quickturn Design Sys. v. Shapiro,
721 A.2d 1281 (Del. 1998) 30

Ryan v. Lyondell Chem. Co.,
2008 Del. Ch. LEXIS 105 (Del. Ch. July 29, 2008) 19, 21, 22

Wade S. Dunbar Ins. Agency, Inc. v. Barber,
147 N.C. App. 463 (N.C. App. 2001) 14

Williams v. Geier,
671 A.2d 1368 (Del. 1996) 19

Plaintiff respectfully submits this brief in support of his motion for a preliminary injunction (the "Motion").

PRELIMINARY STATEMENT

On October 2, 2008, over the span of a few short hours, without any meaningful negotiations and with the knowledge that a revised federal bailout plan that could relieve the economic pressure facing Wachovia Corporation ("Wachovia") was to be voted on by the U.S. House of Representatives the very next day, the board of directors of Wachovia (the "Board") signed off on a Merger Agreement with Wells Fargo (the "Merger"). The Merger Agreement provided for inadequate consideration to Wachovia's public shareholders and contained coercive defensive provisions that substantially deprived Wachovia's directors and its public shareholders of the ability to determine the appropriateness and fairness of the transaction after the bailout. In entering into a Merger Agreement that prevented an unfettered shareholder vote and prevented the Board from withdrawing from the Merger under any circumstances, the Board breached its fiduciary duties to Wachovia's public shareholders.

The exchange ratio that the Board agreed to valued each Wachovia share at $7.00, despite the fact that the shares had traded significantly higher less than one week earlier, before the announcement of Wachovia's deal with Citigroup decimated Wachovia's share price. Among the most egregious of the defensive measures that Wachovia's Board agreed to was a provision (the "Share Exchange") that handed to Wells Fargo almost 40% of Wachovia's voting rights whether the Merger was ultimately approved or not. Members of Wachovia's management and the Board – some of whom are entitled to excessive golden parachute payments upon consummation of the Merger – hold an additional 2.48% of Wachovia's voting rights, which virtually assures that, with Wells Fargo's votes, the Merger will be approved. Because Wachovia's public shareholders understand that this now is essentially a "done deal" in that the vote is nearly sewn up and that no better third-party offer can arise due to the Share Exchange alone and/or in combination with the restrictive fiduciary out provision (described below), the Share Exchange is coercive and should be invalidated.

The Board also breached its fiduciary duties by agreeing to an improper "fiduciary out" clause in the Merger Agreement. Under the terms of this provision, the Board cannot, under any circumstances, cause Wachovia to back out of the Merger. The only remedy for materially changed circumstances (as has occurred here) is for the Board to withdraw its recommendation of the deal, a meaningless action in view of the Share Exchange. Thus, the Board has tied its hands and violated its continuing responsibility to exercise its fiduciary duties. Under the Court's decision in First Union Corp. v. Suntrust Banks, Inc., 2001 NCBC 9A (N.C. Super. 2001), these onerous provisions are clearly unlawful and should be invalidated.

By this Motion, Plaintiff respectfully requests that the Court: (1) invalidate the Share Exchange; and (2) preliminarily enjoin Defendants from taking any steps toward consummating the Merger until the parties negotiate a proper and effective "fiduciary out" clause.

STATEMENT OF FACTS

A. The Parties

Plaintiff Irving Ehrenhaus is, and at all relevant times has been, the owner of shares of Wachovia common stock.[1] See Affidavit of Carl L. Stine (the "Stine Aff."), submitted herewith,

[1] Defendants' prior assertion to the Court that Plaintiff is the only shareholder that is against the Merger is off-base. Recently, two significant Wachovia shareholders, including a holder of over 35,000 shares and the former President of First Union Bank, a predecessor to

at ¶ 2.

Defendant Wachovia is a North Carolina corporation with its principal executive office located in Charlotte, North Carolina. Wachovia, a financial holding company, provides commercial and retail banking services, and other financial services in the United States and internationally. As of September 30, 2008, Wachovia had approximately 2.16 billion shares of common stock outstanding and entitled to vote.

Defendant Wells Fargo, through its subsidiaries, operates as a financial services company in the United States and is headquartered in San Francisco, California.

Defendants John D. Baker, II, Peter C. Browning, John T. Casteen, III, Jerry Gitt, William H. Goodwin, Jr., Maryellen C. Herringer, Robert A. Ingram, Donald M. James, Mackey J. Mcdonald, Joseph Neubauer, Timothy D. Proctor, Ernest S. Rady, Van L. Richey, Ruth G. Shaw, Lanty L. Smith, Dona Davis Young (together, the "Individual Defendants") are directors of Wachovia.

B. Events Leading to the Discussions With Citigroup and Wells Fargo

On September 15, 2008, the same day that the bankruptcy of Lehman Brothers Holdings and the acquisition of Merrill Lynch were announced, Wachovia's President and CEO, Robert Steel ("Steel"), gave an interview on Jim Cramer's "Mad Money," during which he publicly represented that, despite its recent problems stemming from the mortgage market melt-down,

Wachovia, have written the Court to express their dismay at becoming disenfranchised and to indicate their support for this litigation. Also, unrelated shareholders have set up a website to challenge the Merger and Defendants' usurpation of the shareholders' vote at www.wachoviavoteno.com. Moreover, since the filing of this action, counsel for Plaintiff has been inundated with communications from Wachovia shareholders who overwhelmingly support this lawsuit.

Wachovia had a promising future as a stand-alone company. In that interview, Steel explained that Wachovia would not necessarily be as negatively impacted by underperforming mortgages as other financial institutions because it does not own mortgage-backed securities, rather, "we own whole loans." Thus, according to Steel, "We have time and can work with the individual mortgages. We think that will yield quite attractive returns over time by owning these assets." Steel continued: "We feel we can work through this and that's the strategy." "We have lots of choices" and "we have a lot of very good loans that are doing well." Later in the interview, Steel stated: "Jim, we have a great future as an independent company." In support of these positive statements, Steel ran through a detailed breakdown of Wachovia's loan portfolio and concluded that only "$10 billion out of over $500 billion [Wachovia's total loan portfolio] are the problematic aspect." (See interview video at www.cnbc.com/id/15840232?video=857133038.)

On September 15, Wachovia's stock closed at $10.22 per share. See Stine Aff., Ex. A.

According to the SEC Form S-4 that was filed on October 31, 2008, and which contains Wachovia's and Wells Fargo's join preliminary proxy statement with respect to the Merger (the "Preliminary Proxy"),[2] notwithstanding Steel's interview on "Mad Money" the day before, on September 16, Wachovia's Board met to consider strategic alternatives, including a sale of the Company or other options that would allow Wachovia to remain an independent company. Id. at 38. The next day, September 17, Wachovia and an unnamed "potential combination partner" initiated merger discussions, entered into confidentiality agreements, and began conducting due diligence. Id. On September 18, Wachovia entered into discussions with a second unnamed

[2] The Preliminary Proxy, a copy of which is attached to the Stine Aff. as Exhibit B, states the factual circumstances according to Wachovia and Wells Fargo.

financial institution with the goal of that institution buying 20%-40% of Wachovia's equity. Id. at 39. Also during that week, Wachovia received a number of calls from various senior executives at Citigroup Inc. concerning a possible transaction. Id. at 38.

On September 19, the basic terms of a bailout bill in Congress were announced. Id. at 39. On that news, Wachovia's stock closed at $18.75 per share, up more than $4.00 per share from the previous day's close. See id., Ex. A.

On September 20, government officials encouraged Wachovia to enter merger discussions with a third unnamed financial institution. By the end of the day, this third unnamed financial institution had determined not to proceed because at that time (prior to the passage by Congress of the bailout bill), federal regulators would not agree to provide "a financial backstop." By later in that same day, negotiations with the other two unnamed financial institutions had ended, although the Preliminary Proxy does not disclose the reasons. Id., Ex. B, at 38-39. Thus, within only a few days of the Board's decision to seek strategic alternatives, Wachovia had discussions with four financial institutions, including Citigroup and three unnamed entities.

During the following week, representatives of Wachovia had discussions with representatives of both Citigroup and Wells Fargo (a fifth financial institution) concerning possible transactions. Id. at 39.

On Thursday, September 25, the FDIC seized Washington Mutual, and the bailout bill, which had passed in the Senate, failed to pass in the House. While Steel states in his affidavit[3]

[3] The Steel Affidavit was included as Exhibit 1 to the Merritt Affidavit, which was filed by Defendants in opposition to Plaintiff's motion to expedite proceedings.

that "these two events resulted in significant downward financial pressure in the market on the price of Wachovia stock" (Steel Aff., Ex. 3), on that day, Wachovia's shares closed at $13.70 per share, down only 10 cents per share from the previous day's close. Stine Aff., Ex.A. Also, right after Washington Mutual failed, Steel sent a memo to Wachovia employees "affirming that the company was sound and more diversified than Washington Mutual." Stine Aff., Ex. C.

The Preliminary Proxy states that on Friday, September 26, "Management informed the board of directors that if a combination with another partner could not be arranged by Monday, September 29, the FDIC would place Wachovia's bank subsidiaries in receivership." Stine Aff., Ex. B, at 40. On that date, Wachovia's shares closed at $10.00 per share. Id., Ex. A.

C. The Citigroup Transaction

Over the weekend of September 27-28, Wachovia continued parallel discussions with both Citigroup and Wells Fargo. "On September 28, Wachovia's counsel transmitted a draft of a merger agreement to counsel for Wells Fargo." Stine Aff., Ex. B, at 40. Later that day, Wells Fargo told Wachovia that it was not prepared to make an offer for Wachovia under the compressed timetable that Wachovia believed was necessary. Id. Still later:

> [FDIC] Chairman Bair confirmed that, in the FDIC's view, the Wachovia situation posed systemic risk to the banking system and for the first time indicated that the FDIC intended to take unprecedented action by exercising its powers under Section 13 of the Federal Deposit Insurance Act to effect an "open bank assisted transaction" with another financial institution, which would be selected by the FDIC through a bidding process to be conducted over the next several hours.

Id.

At approximately 4:00 a.m. on Monday, September 29, Chairman Bair informed Wachovia "that the FDIC had determined that Citigroup would acquire Wachovia's banking subsidiaries, that Wachovia should proceed to negotiate terms with Citigroup, . . . and that there would be an announcement before the start of business that day." Stine Aff., Ex. B, at 41. Other than describing a possible alternative transaction that was proposed by Wells Fargo, the Preliminary Proxy does not disclose if there were other bidders pursuant to the FDIC's process and, if so, what terms those other bidders were proposing.

Later that day, Citigroup provided Wachovia with the execution copy of a non-binding agreement-in-principle and also sent Wachovia a letter agreement containing certain exclusivity covenants. According to the Preliminary Proxy, "In addition to the agreement-in-principle, Citigroup instructed Wachovia to sign the letter agreement shortly after receiving it, rejecting Wachovia's few suggested changes, including a suggestion that there be a provision requiring both parties to negotiate in good faith." Stine Aff., Ex. B, at 42. Wachovia executed the agreement. Under the terms of the agreement-in-principle, Citigroup would have acquired Wachovia's banking operations for $2.16 billion, providing shareholders with approximately $1 per share in value (Wachovia would have remained a public company and its shares would also have remained outstanding). Also under the terms of this agreement, "the FDIC committed to use taxpayer money to limit Citigroup's losses on a $312 billion loan portfolio to $42 billion if the transaction was consummated and the FDIC was to receive $12 billion of preferred stock in Citigroup." (Steel Aff. ¶¶ 8-11 (emphasis added); Merritt Aff., Ex. 2 ¶¶ 4-5.)

After the agreement with Citigroup was announced, U.S. Treasury Secretary Henry Paulson issued a press release stating:

> I commend the action taken by Chairman Bair and the FDIC today to facilitate the sale of Wachovia Bank to Citigroup in an orderly fashion to mitigate potential market disruptions. I agree with the FDIC and the Federal Reserve that a failure of Wachovia would

> have posed a systemic risk. As a result of this transaction, all Wachovia depositors will be protected and Wachovia's senior and subordinated debt will be assumed by Citigroup.

See Stine Aff., Ex. D. On that same day, Steel agreed, calling Citigroup "a strong partner to preserve the stability and quality of our [Wachovia's] banking franchise." Id., Ex. C, at 2. On that day, in reaction to the announcement of the Citigroup deal, Wachovia's stock was decimated, closing at $1.84 per share, down from the close of $10.00 per share on Friday, the previous trading day. See Stine Aff., Ex. A.

According to the Preliminary Proxy (p. 42), on Wednesday, October 1, Citigroup "insisted that the parties be prepared to execute the definitive agreements no later than Friday, October 3." However, Steel, in his affidavit, contradicts the Preliminary Proxy by stating: "Wachovia was under tremendous pressure from Citi and the regulators to conclude a transaction with Citigroup with definitive agreements by the following Monday, October 6, 2008." Steel Aff. ¶ 15 (emphasis added). Also on October 1, the Senate passed a revised bailout bill after the close of the markets, sending it to the House. According to numerous news reports, the bill, which had been "revised to lure more Republican support," would be taken up by the House in two days, i.e., Friday, October 3. Stine Aff. Ex., E; see also id. Exs., F and G.

D. The Wells Fargo Transaction

As detailed in the Steel Affidavit and the Preliminary Proxy, on October 2, at approximately 7:15 p.m., Steel received a phone call from the FDIC Chairman informing him that Wells Fargo might make a bid for Wachovia. Steel Aff. ¶ 16. In a subsequent call, Wachovia's General Counsel informed the FDIC Chairman that Wachovia could not even consider a Wells Fargo deal because of its agreement with Citigroup unless Wachovia had a signed and board-approved merger agreement from Wells Fargo. Id. The Preliminary Proxy does not describe any attempt by the General Counsel to negotiate any terms. At approximately 9:04 p.m. on that night Wells Fargo emailed to Wachovia such a proposed, signed merger agreement. Id. ¶ 18. Rather than wait to see if the House would pass the bailout bill the next day, by conference call at 11:00 p.m. that night, the Wachovia Board approved accepting the Wells Fargo proposal, without seeking to improve any of its terms, subject to receipt of fairness opinions from its financial advisors, which were subsequently delivered "orally early in the morning of Friday, October 3." Steel Aff. ¶ 19.

In his affidavit, Steel states: "The company's advisors and I told the Board that we believed that unless a definitive merger agreement was signed with either Citigroup or Wells Fargo by the end of the day Friday, October 3 that the FDIC was prepared to place Wachovia's banking subsidiaries into receivership." Id. ¶ 19. Thus, while there is no basis stated for this statement in either the Steel Affidavit or the Preliminary Proxy, or why this date had been moved up from Monday, October 6 (see id. ¶ 15), even under this limitation, Steel does not explain why the Board decided to act before the House voted on the bailout bill, which was scheduled to take place the next day.

After the Merger with Wells Fargo was jointly announced at 7:00 a.m. on October 3, the FDIC publicly reiterated its support for a Wachovia/Citigroup deal. See Stine Aff., Ex. H. Specifically, FDIC Chairman Bair publicly stated that "the FDIC stands behind its previously announced agreement with Citigroup . . . adding that it would pursue a resolution with all three companies." Id. at 2; see also id., Ex. I, at 1 ("statements from the Federal Reserve, Office of the

Comptroller of the Currency, and the Federal Deposit Insurance Corp. appear to favor the Citigroup deal" over a Wells Fargo deal).

Shortly after noon that same day, the House passed the revised bailout bill. Id., Ex. J. Wachovia's stock closed at $6.21 that day (id., Ex. A), reflecting the now-public, agreed-upon transaction with Wells Fargo valued at $7.00 per share.

While the Board of Governors of the Federal Reserve approved the Merger transaction, by statute, it only reviewed whether the Merger would result in too much concentration in the banking markets that Wachovia and Wells Fargo operate in, whether the resulting company would have the resources (managerial, financial, future prospects) to operate going forward, and whether the public benefits to be achieved by the transaction would be greater than adverse effects that the transaction could have (undue concentration of resources, decreased or unfair competitions, conflicts of interests, or unsound banking practices). See Merritt Aff., Ex. 7. The Board of Governors did not pass on the Defendants' fiduciary duties to Wachovia shareholders, which is the relevant inquiry here.

E. The Terms of the Merger Agreement

Under the terms of the Merger Agreement, Wachovia's public stockholders will receive 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock that they own, which, at the time the Merger Agreement was entered into was valued at approximately $15.1 billion, or $7 per common Wachovia share. Based on Wells Fargo's recent trading price, the transaction is now worth a little more than $12 billion, or approximately $5.50 per common Wachovia share.

Aside from the fact that the exchange ratio appears inadequate based upon Wachovia's share price when the initial bailout terms were first announced (Wachovia's per-share closing prices on the five trading days before the Citigroup deal was announced were $14.81, $14.75, $13.80, $13.70, and $10.00, respectively (see Stine Aff., Ex. A)), the Merger Agreement either contained or omitted provisions that had a draconian effect on the Board's ability to comply with its continuing fiduciary duties and on the public shareholders' ability to have a meaningful vote on the Merger. There is no evidence that the Board sought to have these deal protection devices either removed or weakened, either through negotiation with Wells Fargo or by asking the FDIC to intervene on its behalf.

For example, rather than a traditional "fiduciary out" clause that allows a board to withdraw from a transaction in favor of a superior offer or if changed circumstances require withdrawal in keeping with a board's continuing fiduciary duties, the Board here agreed to an ineffectual and inadequate "fiduciary out" clause in the Merger Agreement. According to the Merger Agreement, if the Board "determines in good faith that, because of a conflict of interest or other special circumstances . . . it would violate its fiduciary duties under applicable law to continue to recommend the plan of merger . . . then it may submit the plan of merger to its shareholders without recommendation" and "may communicate the basis for its lack of a recommendation." Steel Aff., Ex. C § 6.3. However, the Board has no right to *withdraw* Wachovia from the Merger Agreement based upon their fiduciary duties if a superior proposal to acquire or merge with the Company is offered or if circumstances change (for example, the Government's bailout plan passes Congress) rendering the Merger price unfair or inadequate.[4]

[4] Similarly, the Merger Agreement contains no "material adverse change" clause.

The parties to the Merger Agreement also made sure that the power of the public shareholders to approve or reject the Merger would be neutralized and there would be virtually no possibility of a superior offer materializing. Thus, in connection with the Merger Agreement, the parties entered into the Share Exchange, pursuant to which, in exchange for the issuance to Wachovia of 1,000 shares of Wells Fargo common stock (then worth approximately $34,500), Wells Fargo agreed to purchase 10 newly issued Series M Preferred shares, "which vote together with Wachovia common stock as a single class and have voting rights equivalent to 39.9% of the total voting power of holders of Wachovia capital stock entitled to vote at the special meeting." Stine Aff., Ex. B at 79. Considering that directors and officers of Wachovia hold 2.48% of the Company's common stock, only 7.63% of the unaffiliated outstanding public shares have to vote for the Merger for it to be approved.

Coloring the whole truncated process is the fact that many members of Wachovia's senior management stand to make many millions of dollars in golden parachute payments that will be triggered by the consummation of the Merger. Thus, Steel, who has already announced that he will not remain with the merged company and thus will end up working for Wachovia for less than six months, is slated to receive as much as $21.2 million in severance (which could be increased to $39.2 million under certain circumstances),[5] and other senior executives can receive

[5] All told, Steel's severance payments are limited to 2.99 times the sum of his base salary and his annual cash incentive award. Stine Aff., Ex. K (Offer letter to Robert K. Steel dated July 9, 2008, Annex B, Clause g.) Based on his employment agreement, Steel's salary is $1,100,000 and his target annual bonus is $6,000,000, although it is possible that it could range in value from $0 to $12,000,000. Id. at arrangement 2 and 3. In addition, Steel's target economic value of his annual long-term incentive is $15 million. (Id.) This long-term incentive is a combination of stock options and restricted stock awards, and since it is defined specifically as stock, it appears that the $6 million target annual bonus is cash. Assuming Steel's base salary and annual cash bonus are $7.1 million, that implies his severance could be $21.2 million, although it could

as much as an additional $99.2 million, depending on whether they remain at the post-Merger company or not. Stine Aff., Ex. L, at 55. Unlike the usual golden parachute that compensates an executive when leaving a company, here, even if these Wachovia senior executives retain their jobs, they will be entitled to significant payments totaling many millions of dollars upon consummation of the Merger.[6] Id.

Since the passage of the bailout bill on October 3, $160 billion of cash investments has been provided to at least 27 institutions (id., Ex. M), including, for example, $25 billion each to both Citigroup and Wells Fargo. According to a October, 27 MSNBC.com article titled "Banks to use Bailout for Lending, Acquisitions" (id. Ex. N), "[m]any analysts believe the investments are being doled out to the strongest financial institutions, with the aim of spurring consolidation among banks and protecting the government from having to salvage some of the industry's weakest players." See also "Bank Bailout Money Used to Buy Out 'Ailing' Financial Competitors," Bloomberg, October 25, 2008. Stine Aff. Ex. O. This trend towards consolidation is confirmed by the fact that Citigroup is still in the market to acquire a bank. Id., Ex. P.

be as high as $39.2 million if he were awarded a $12 million cash bonus. Though he has no severance agreement with Wachovia, a change in control is considered a Covered Termination and would entitle him to payments and benefits by Wachovia. Id. at arrangement 8; Annex A ("Certain Defined Terms," #3 "Covered Termination.")

[6] As the Preliminary Proxy and the Steel Affidavit confirm, it was Wachovia's management – the beneficiaries of the golden parachutes if the Wells Fargo, as opposed to the Citigroup, deal was entered into – who controlled the information flow to the Board and pressured the Board to act immediately on October 2.

F. The Court's Expedited Discovery Order and Opinion

On November 3, 2008, the Court issued its Order and Opinion denying Plaintiff's motion for expedited discovery[7] but granting an expedited hearing on this preliminary injunction Motion. In that decision, the Court held, among other things, that Plaintiff had "alleged colorable claims as to his contentions that (1) the Share Exchange transferring a nearly 40% voting bloc to Wells Fargo in advance of a vote on the Merger Agreement is unduly coercive, and (2) the limited 'fiduciary out' clause contained in the Merger Agreement violates the Wachovia board's continuing responsibility to exercise its fiduciary duties." Id. ¶ 44. The Court also held that "Plaintiff also presents a colorable claim as to irreparable harm." Id. ¶ 45.

ARGUMENT

I. THE STANDARDS FOR A PRELIMINARY INJUNCTION

Under North Carolina law, a court will issue a preliminary injunction if: (1) a plaintiff can show a likelihood of success on the merits, and (2) the plaintiff would likely sustain irreparable harm unless the injunction is issued, "or if, in the opinion of the Court, issuance is necessary for the protection of [the plaintiff's] rights during the course of litigation." See Wade S. Dunbar Ins. Agency, Inc. v. Barber, 147 N.C. App. 463, 467 (N.C. App. 2001).

[7] Contrary to the Court's statement that Plaintiff has not served discovery on Defendants (Decision & Order ¶ 47), Plaintiff, in fact, served a document request on Defendants *prior* to the motion for expedited discovery. In keeping with Business Court Rule 18.4, the document request was not filed. For the Court's convenience, a copy of the document request is attached to the Stine Aff. as Exhibit Q. While Plaintiff believes that a preliminary injunction is appropriately issued by the Court upon this record, should the Court believe that additional evidence is necessary for its consideration of the Motion, Plaintiff would renew the request for expedited discovery based on the previously served document request and would request a limited number of depositions. Since the Merger is not slated to close until the end of the year, should the Court wish to defer ruling on the Motion to enable a fuller record, there is still time for expedited discovery.

II. PLAINTIFF DEMONSTRATES A LIKELIHOOD OF SUCCESS ON THE MERITS

Based on the record, Plaintiff submits he is likely to succeed on his claims that the Share Exchange is unduly coercive with respect to the vote of the public shareholders on the Merger and that the "fiduciary out" clause unduly ties the Board's hands and, therefore, violates the Board's continuing fiduciary duties.

A. The Standards for Reviewing the Board's Actions Regarding the Merger

In First Union Corp. v. Suntrust Banks, Inc., 2001 NCBC 9A, ¶¶ 72-73 (N.C. Super. 2001), the Court invalidated a "contractual provision in [the] merger agreement that extend[ed] the life of the agreement five months beyond a shareholder vote disapproving the merger." 2001 NCBC 9A, ¶ 155. As recognized by the Court, the level of scrutiny that a court should apply to any given situation depends on the significance of the conduct at issue and the nature of the fiduciary duty at issue. See 2001 NCBC 9A, at ¶¶ 27-31. In the particular case in First Union, the Court's analysis went well beyond a simple application of the business judgment rule. The First Union Court explained: "The existence of the non-termination clause in this case demonstrates why a simple application of the business judgment rule fails to afford protection to shareholders." Id. ¶ 152; see also Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003) ("There are certain circumstances," including the review of deal protection measures, "'which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable . . . before the protections of the business judgment rule may be conferred.'"; citation omitted.)[8]

According to the First Union Court, the contractual provision at issue there, the "non-termination clause," was "an impermissible abrogation of the duties of the Wachovia directors and an actionably coercive condition impeding the free exercise of the Wachovia shareholder's right to vote on the merger." 2001 NCBC 9A, ¶ 155. In reaching this conclusion, the First Union Court explained that deal protection measures are appropriately enjoined if it is demonstrated that the actions or inactions of the directors lead to the conclusion that the board was not "attentive" and did not "negotiate[] the deal protections carefully," or if these devices interfere with shareholders' voting rights. According to the Court, this analysis recognizes "the obligation of the board not to interfere with the shareholder franchise," and "limit[s] the board's ability to intrude on the stockholder's co-equal right to approve mergers."[9] Under this analysis, a court must first "determine whether the directors have complied with their statutory duty of care under N.C.G.S. § 55-8-30." id. ¶ 70, and then determine if "the deal protection provisions [are] actionably coercive, or [if] the deal protection provisions prevent[] the directors from performing their statutory duties." Id.

[8] In its Opinion and Order related to the motion to expedite proceedings, the Court stated that Plaintiff had a high burden imposed by the business judgment rule but did not discuss the high level of scrutiny that should be applied to Defendants' conduct before the business judgment may be conferred, as indicated by the First Union analysis.

[9] "There are inherent conflicts between a board's interest in protecting a merger transaction it has approved, the stockholders' statutory right to make the final decision to either approve or not approve a merger, and the board's continuing responsibility to effectively exercise its fiduciary duties at all times after the merger agreement is executed." Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930 (Del. 2003).

A board's fiduciary duties cannot be relaxed or ignored in times of crisis. It is settled law that "directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders." Cede & Co. v. Technicolor, 634 A.2d 345, 360 (Del. 1993) (emphasis added). Plaintiff has located no precedent that provides some kind of "emergency" exception to this rule. Moreover, creating an "emergency" exception to a board's fiduciary duties would turn corporate governance on its head and would be a "slippery slope" that would inevitably lead to numerous and difficult problems for both boards of directors and courts in trying to determine the scope of such an exception.

In any event, Defendants here overstate the exigencies of the situation. Even assuming that Wachovia faced potential receivership as Defendants claim, Wachovia's announced transaction with Citigroup on September 29 avoided that hypothetical result. While Plaintiff is not advocating the Citigroup deal over the Wells Fargo Merger or vice versa, the point is that either deal would have "saved" the Company from receivership. Moreover, given the FDIC's recent role in providing billions of dollars in bail-out money to numerous banks of equivalent size and stature to Wachovia, it appears clear that the FDIC would not have abandoned Wachovia. Wachovia's public shareholders' right to decide by their vote whether they believe the Merger with Wells Fargo, and the consideration offered by Wells Fargo, is now fair and adequate was arbitrarily eliminated by the Board in agreeing to the Merger.[10]

[10] The current availability of federal monies for troubled banks, such as Wachovia, due to the bailout, is now a critical factor in evaluating the fairness of the Merger consideration offered by Wells Fargo, a factor which Wachovia's public shareholders should be given an unfettered opportunity to decide without the interference of Wells Fargo's 40% vote. See First Union, 2001 NCBC 9A, at ¶ 153.

Additionally, the fact that there is no competing offer to the Merger, at present, is not surprising considering the deal protection devices agreed to by the Board. No other potential bidder has, or will, emerge since Wells Fargo has 39.9% of Wachovia's voting power and will have such voting power in perpetuity, even if the Merger is not consummated. More importantly, no other competitor could appear because the Board is unable to withdraw from the Merger and enter into another transaction due to the lack of an effective fiduciary out. It is illuminating that within only a few days of the Board's decision to seek strategic alternatives, Wachovia had discussions with four financial institutions other than Wells Fargo, including Citigroup. While none of these indications of interest, except for Citigroup, matured into actual competing bids at that time, because of the deal protection devices at issue here, absent the relief sought by the Motion, these potential suitors will not have the opportunity to compete with Wells Fargo.

B. The Share Exchange Is Coercive

The First Union Court explained what constitutes a coercive deal-protection device by cataloging various definitions used in other cases and contexts. See 2001 NCBC 9A, at ¶¶ 78-86. The Court, quoting Delaware Vice Chancellor Strine, noted that "A defensive measure is coercive when it operates to force management's preferred alternative upon the stockholders." Id. ¶ 82 (quoting In re Gaylord Container Corp. Shareholder Litig., 753 A.2d 462, 481 (Del. Ch. 2000)). In this regard, the Court asked: "Will the vote 'be a valid and independent exercise of the shareholders' franchise, without any specific preordained result which precludes them from rationally determining the fate of the proposed merger?'" Id. ¶ 81 (quoting In re IXC Commc'ns. Shareholders Litig., 1999 Del. Ch. LEXIS 210, at *2 (Del. Ch. Oct. 27, 1999)). The Court further described coercion as existing where “the board or some other party takes actions which have the effect of causing the stockholders to vote in favor of the transaction for some reason other than the merits of that transaction.” Id. ¶ 84 (quoting Williams v. Geier, 671 A.2d 1368, 1382-83 (Del. 1996)); accord Ryan v. Lyondell Chem. Co., 2008 Del. Ch. LEXIS 105, at *76 (Del. Ch. July 29, 2008).

Under any of these definitions, the Share Exchange would have a coercive effect on the shareholder vote. Defendants, in fact, all but concede that because of the Share Exchange the shareholder vote will have a “specific preordained result.” See Def. Br. in Opp. to Expedited Discovery at 13 (“The share exchange was meant to assure . . . that the Wells Fargo/Wachovia merger was indeed likely to close”). Because the Share Exchange provides Wells Fargo with control of 39.9% of Wachovia’s voting power and the directors and officers of Wachovia, many of them with potentially lucrative golden parachutes that are triggered by the transaction hold 2.48% of the Company’s common stock, it is clear that the Share Exchange will not allow for the “valid and independent exercise of the shareholders’ franchise.” While Defendants suggest that Wachovia’s shareholders “remain free, if they wish, to reject the Wells Fargo merger and take their chances on another future” (Def. Br. in Opp. to Expedited Discovery at 14), this statement is belied by Defendants’ admission that because of the Share Exchange, the Merger is “likely to close.” Id. at 13.

Equally important, the Share Exchange, combined with the ineffective “fiduciary out” provision, assures that neither Citigroup nor any other potential acquirer will come to Wachovia with a potentially superior offer. No potential bidder would realistically come forward under circumstances where one of its competitors has almost 40% of Wachovia’s voting power and the

Board cannot contractually withdraw from the Wells Fargo Merger. Thus, no one will ever know if there is a better alternative than the Merger unless these defensive mechanisms are invalidated.[11]

C. The Ineffective Fiduciary Out Provision Prevents the Directors from Complying With Their Continuing Fiduciary Duties

In First Union, the Court, in agreeing with the Delaware Supreme Court, stated that "to the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable." 2001 NCBC 9A, at ¶ 89 (quoting Quickturn Design Sys. v. Shapiro, 721 A.2d 1281, 1292 (Del. 1998)); accord Omnicare, 818 A.2d at 936 (quoting Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 51 (Del. 1993)); see also id. at 936 n.74 ("Restatement (Second) of Contracts § 193 explicitly provides that a 'promise by a fiduciary to violate his fiduciary duty *or a promise that tends to induce such a violation is unenforceable on grounds of public policy*.'" (Emphasis in original)).[12]

[11] In its Opinion and Order on expedited proceedings, the Court, at ¶ 23 n.7, notes that under section 126(c) of the Emergency Economic Stabilization Act of 2008 (the "EESA"), restricting agreements are unenforceable only "against an acquirer." However, the restrictive agreement here, the Share Exchange, is specifically set up to preclude any other acquirer from coming forward. Moreover, whether or not this section of the EESA is specifically applicable here, the rationale behind that provision supports the policy argument that the Share Exchange should be invalidated.

[12] According to the Omnicare Court:

> The defensive measures that protected the merger transaction are unenforceable not only because they are preclusive and coercive but, alternatively, they are unenforceable because they are invalid as they operate in this case. Given the specifically enforceable irrevocable voting agreements, the provision in the merger agreement requiring the board to submit the transaction for a stockholder vote and the omission of a fiduciary out clause in the merger agreement

A board has a "continuing responsibility to effectively exercise its fiduciary duties at all times after the merger agreement is executed." Omnicare, 818 A.2d at 930. Here, in violation of their continuing fiduciary duties, the Board, knowing that likely passage of the bailout bill was only hours away, impermissibly tied its hands by entering into an ineffectual "fiduciary out," which does not, in fact, allow for an "out," but only a "non-recommendation." Thus, under the Merger Agreement, regardless of what future events might occur, or have now occurred, the Board cannot, *under any circumstances*, cause Wachovia to withdraw from the Merger.

D. The Board Was Not "Attentive" and Did not Negotiate the Deal Protection Devices "Carefully"

Recently, in Ryan v. Lyondell, a Delaware court was "skeptical of the wisdom of [a] Board's decision to grant considerable deal protections, simply as a matter of course, that limited its ability to discharge proactively its fiduciary obligations after the fact." 2008 Del. Ch. LEXIS 105, at *79 (footnote omitted). The court found that the "Board was largely out of the loop until the very end of the process when it, more or less, ceremonially approved the deal [the target's Chairman] had negotiated." Id. at *70. According to the court, "once it was included in the sale process, there is no significant evidence that the Board negotiated the [proposal] or seriously pushed back against [the acquirers] with respect to the offer price or the deal protections." Id. In this regard, the court stated:

> completely prevented the board from discharging its fiduciary responsibilities to the minority stockholders . . . .

818 A.2d at 936. As in Omnicare, the Court should invalidate the defensive measures here because the Share Exchange and the ineffective fiduciary out clause "prevent the [Wachovia] board from discharging its fiduciary responsibilities." Id.

> The Board argues that [the acquirer] demanded the deal protections as a condition of making the offer, but that argument is unpersuasive. First, there is no evidence that the Board put up much resistance to avoid conceding on all the protections [the acquirer] sought. Second, there is no persuasive evidence in the present record that [the acquirer] was going to walk away from the deal if it did not receive all the protections it demanded. The Court, thus, is not persuaded that a difficult and demanding buyer justifies a board's acquiescing in merger provisions that may undermine (to some extent) the interests of the stockholders under the circumstances – at least, not without adequate evidence that the board really had no choice but to accept the conditions or lose the offer.

Id. at *81 (footnote omitted).

As in Ryan, the Board here was "largely out of the loop" and there is no indication that it negotiated at all, let alone "carefully," with respect to the Share Exchange and fiduciary out aspects of the Merger. Thus, at approximately 9:00 p.m. on October 2, Wachovia first received a final, signed Merger Agreement, which was approved by Wachovia's Board only a few hours later. There is no indication that the Board, which includes three members who will be invited to join the Wells Fargo board and another (Steel) who will receive tens of millions of dollars in golden parachute payments, "pushed back" in any way whatsoever against these devices or even discussed the ramifications of the soon-to-be-passed bailout. Nor is there any indication that the Board sought the intervention on its behalf of the FDIC to try to convince Wells Fargo to forego these drastic measures. Indeed, based on the FDIC's actions, it appears quite possible that the FDIC would have arm-twisted Wells Fargo to relent in order to get a deal done had the Board displayed any concern for its shareholders' rights. Instead, the Board rolled over and accepted all of these provisions "in derogation of their unyielding fiduciary duties." Ryan, at *73.

III. PLAINTIFF AND THE CLASS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

Interference with "shareholders' exercise of their corporate franchise" represents irreparable harm, unless enjoined. Hubbard v. Hollywood Park Realty Enterprises, Inc., 1991 Del. Ch. LEXIS 9, at *17 (Del. Ch. Jan. 14, 1991); see also Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

Here, the deal protection devices at issue blatantly interfere with Wachovia's public shareholders' corporate franchise. If these devices are not invalidated, or enjoined, the Company's public shareholders will lose their right to a non-coerced vote on the Merger and their judgment as to the desirability of the Merger will be improperly substituted with the judgment of the Board and Wells Fargo. Furthermore, once the Merger is consummated, it will be impossible to "unscramble the eggs" should the Court, on a complete record, find for Plaintiff.

IV. THE BALANCE OF HARDSHIPS FAVORS AN INJUNCTION

Where a plaintiff seeks to enjoin deal protection measures, if a court "finds that the deal protection measures are coercive or require directors to breach their statutory duties, the court must then weigh the harm to the shareholders in enjoining either the deal protection measures, the vote on the transaction or the merger, if the transaction is approved, against the harm resulting from not entering injunctive relief." First Union, 2001 NCBC 9A, at ¶ 70.

In First Union, the Court balanced the hardships in that case as follows:

> Finally, the court has considered the balance of hardship in invalidating [the non-termination] provision. There appears to be little, if any, harm done to Wachovia or First Union. This is not a

> provision that affects the value or structure of the transaction upon which will be voted . . . . [B]oth parties knew the non-termination provision was questionable. Wachovia tried to get it removed. The transaction is still pending. The policy concerns are especially significant, and the parties' reliance on the existence of this provision does not merit protection. On the other hand, the shareholders have the benefit of knowing their directors' hands are not tied and that they are in a position to fully perform their statutory duties.

Id. ¶ 163. Here, as in First Union, neither the invalidation of the Share Exchange nor the requirement of an effective fiduciary out clause would cause harm to Wachovia or Wells Fargo. Neither are provisions that "affects the value or structure of the transaction." To the extent Defendants argue either that the parties relied upon these provisions or that Wells Fargo is entitled to withdraw from the Merger if the Share Exchange is enjoined, the policy concerns protecting the shareholders' voting rights clearly outweigh the former. On the other hand, should the Court invalidate the Share Exchange and require an effective fiduciary out clause, the shareholders of Wachovia may still approve the transaction. The Court is not being asked to block consideration of the Merger by the shareholders. Moreover, should Wells Fargo withdraw from the Merger as a result of such injunction (it does not appear it would), there is every indication since the passage of the bailout bill that Wachovia would either be able to remain a viable stand-alone company or would find another entity, such as Citigroup, that would be willing to make an equally beneficial offer or that Wells Fargo would improve the consideration being offered.

If the Merger is as good for Wachovia's shareholders as Defendants have previously suggested to the Court, an unfettered vote by Wachovia's public shareholders should not cause any hardship to Wachovia or Wells Fargo. On the contrary, permitting the disenfranchisement of Wachovia's public shareholders would clearly be inconsistent with North Carolina law.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) invalidate the Share Exchange; and (2) preliminarily enjoin Defendants and their agents or employees from taking any steps towards consummation of the Merger until such time as an effective fiduciary out clause is included in the Merger Agreement.

Dated: November 10, 2008

GREG JONES & ASSOCIATES, P.A.

By: s/ Greg Jones
Greg Jones, Esq.
3015 Market Street
Wilmington NC 28403
(910) 251-2240
(910) 251-1520 fax

Attorneys for Plaintiff

OF COUNSEL:

WOLF POPPER LLP
Robert M. Kornreich, Esq.
Chet Waldman, Esq.
Carl L. Stine, Esq.
Anthony Green, Esq.
845 Third Avenue
New York, New York 10022
(212) 759-4600

I hereby certify that the foregoing brief complies with Rule 15.8 of General Rules of Practice and Procedure for the North Carolina Business Court.

s/ Carl L. Stine
Carl L. Stine