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.	**AFFIDAVIT OF CARL L. STINE IN SUPPORT OF PLAINTIFF'S MOTION TO SUPPLEMENT AND AMEND THE COMPLAINT**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CARL L. STINE, being duly sworn, deposes and says:

1. I am an attorney, duly admitted to the Bar of the State of New York. I am a partner of the firm Wolf Popper LLP, attorneys for Plaintiff in the above-captioned case, and I make this affidavit in support of Plaintiff's Motion to Supplement and Amend the Complaint.

2. A true and correct copy of Plaintiff's proposed Amended and Supplemental

Complaint for Breach of Fiduciary Duty is annexed hereto as Exhibit A.

CARL L. STINE

Sworn to before me this
11th day of December, 2008

Notary Public

SUSAN A. CALAMIA
NOTARY PUBLIC, State of New York
No. 01CA104727
Qualified in Bronx County
Commission Expires Jan. 26, 2012

Exhibit
A

NORTH CAROLINA
CHARLOTTE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT

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, ROBERT K. STEEL, DONA DAVIS YOUNG, WACHOVIA CORPORATION, and WELLS FARGO & COMPANY,

Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT FOR BREACH OF FIDUCIARY DUTY

(CLASS ACTION)

Plaintiff, Irving Ehrenhaus, alleges the following based upon an investigation of his counsel, which included, among other things, a review of documents publicly filed with the U.S. Securities and Exchange Commission ("SEC"), including the Definitive Proxy Statement relating to the Merger (defined below), which was filed on November 24, 2008; affidavits and exhibits thereto submitted by the parties in this matter; numerous news articles; letters from shareholders and governmental officials; and other publicly available information, except as to allegations specifically pertaining to Plaintiff and his counsel, which are based on personal knowledge.

NATURE OF THE CASE

1. This is a class action on behalf of the public stockholders of Wachovia Corporation ("Wachovia" or the "Company") in connection with a proposed acquisition of Wachovia by Wells Fargo & Company ("Wells Fargo") in breach of Defendants' fiduciary duties (the "Merger"). Plaintiff alleges that he and the other public shareholders of the Company's

common stock are entitled to enjoin the Merger, or alternatively, to recover damages in the event the Merger is consummated. Plaintiff alleges that the Merger provides Wachovia's public shareholders with inadequate consideration and is the product of a severely flawed sales process. Wachovia's Board of Directors (the "Board") has essentially disenfranchised the voters of Wachovia and locked up the vote in favor of the Merger when, in connection with the Merger Agreement, Wachovia and Wells Fargo entered into a "Share Exchange Agreement" under which Wachovia issued Wells Fargo preferred stock that vote as a single class with Wachovia's common stock representing 39.9% of Wachovia's voting power. In combination with the shares of Wachovia common stock that Wells Fargo owns and that Wachovia's directors and officers own, over 42% of the vote has been virtually locked up in favor of the Merger. Moreover, the individual defendants and Wachovia have breached their fiduciary duty of candor in disseminating the Definitive Proxy Statement, mailed to Wachovia's public shareholders, which contains materially misleading information and/or fails to disclose material information needed by Wachovia's public shareholders to make an informed vote on the Merger.

THE PARTIES

2. Plaintiff is, and has been at all relevant times, the owner of over 1,000 shares of Wachovia common stock.

3. 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. Its deposit products include savings, NOW, money market, and interest-bearing checking accounts, as well as non-interest-bearing deposits and other consumer time deposits. The Company's loan portfolio comprises commercial, financial, and agricultural loans; real estate construction loans; lease financing; real estate secured loans; student loans; and installment loans. Wachovia also offers corporate lending and commercial leasing services. In addition, the Company provides investment banking services, such as equities, merger and acquisition

advisory services; provision of interest rate, leveraged finance, high grade, structured, and nondollar products; and investing in private equity securities, mezzanine securities, and funds sponsored by select private equity and venture capital groups. Further, it provides treasury management products and services, as well as international trade services; and engages in domestic and international correspondent banking operations. Additionally, Wachovia offers wealth management services comprising private banking, personal trust, investment advisory services, charitable services, financial planning, and insurance brokerage; and capital management products and services consisting of stocks, bonds, mutual funds, fixed and variable annuities, reinsurance, asset management accounts, and other investment products and services, and asset management services comprising mutual funds, customized advisory services, and defined benefit and defined contribution retirement services.

4. Defendant Wells Fargo, through its subsidiaries, operates as a financial services company in the United States. It operates in three segments: Community Banking, Wholesale Banking, and Wells Fargo Financial. The Community Banking segment offers deposit products, including checking accounts, savings deposits, market rate accounts, retirement accounts, time deposits, and debit cards; and loan products comprising lines of credit, equity lines and loans, equipment and transportation loans, education loans, residential mortgage loans, and credit cards. This segment also provides receivables and inventory financing, equipment leases, real estate financing, small business financing, venture capital financing, cash management, payroll services, retirement plans, health savings accounts, merchant payment processing, and securities brokerage. Its Wholesale Banking segment provides a range of commercial, corporate, and real estate banking products and services, including commercial loans and lines of credit, letters of credit, asset-based lending, equipment leasing, mezzanine financing, high-yield debt, international trade facilities, foreign exchange services, treasury management, investment management, institutional fixed income sales, interest rate, commodity and equity risk management, online products, insurance, investment banking, and mortgage brokerage services.

Its Wells Fargo Financial segment comprises consumer finance operations that make direct consumer and real estate loans to individuals and purchase sales finance contracts from retail merchants; and auto finance operations, which purchase sales finance contracts directly from auto dealers and make loans secured by autos. This segment also provides credit cards and lease, and other commercial financing services. As of December 31, 2007, Wells Fargo operated 5,964 branches and 6,900 ATMs. Wells Fargo was founded in 1852 and is headquartered in San Francisco, California.

5. Defendant John D. Baker, II is, and at all relevant times has been, a Director of the Company.

6. Defendant Peter C. Browning is, and at all relevant times has been, a Director of the Company.

7. Defendant John T. Casteen, III is, and at all relevant times has been, a Director of the Company.

8. Defendant Jerry Gitt is, and at all relevant times has been, a Director of the Company.

9. Defendant William H. Goodwin, Jr. is, and at all relevant times has been, a Director of the Company.

10. Defendant Maryellen C. Herringer is, and at all relevant times has been, a Director of the Company.

11. Defendant Robert A. Ingram is, and at all relevant times has been, a Director of the Company.

12. Defendant Donald M. James is, and at all relevant times has been, a Director of the Company.

13. Defendant Mackey J. Mcdonald is, and at all relevant times has been, a Director of the Company.

14. Defendant Joseph Neubauer is, and at all relevant times has been, a Director of the

Company.

15. Defendant Timothy D. Proctor is, and at all relevant times has been, a Director of the Company.

16. Defendant Ernest S. Rady is, and at all relevant times has been, a Director of the Company. He was also previously Chairman of Dealer Finance business and California banking business of the Company, from March 2006 to March 2007.

17. Defendant Van L. Richey is, and at all relevant times has been, a Director of the Company.

18. Defendant Ruth G. Shaw is, and at all relevant times has been, a Director of the Company.

19. Defendant Lanty L. Smith is, and at all relevant times has been, Chairman of the Board of the Company.

20. Defendant Robert K. Steel is, and at all relevant times has been, a Director, President, and Chief Executive Officer of the Company.

21. Defendant Dona Davis Young is, and at all relevant times has been, a Director of the Company.

22. The Defendants described in paragraphs 5-21 are collectively referred to herein as the "Individual Defendants."

23. The Individual Defendants, as officers and/or directors, have stood in a fiduciary position relative to the Company's public shareholders and owed the public shareholders of the Company the highest duties of good faith, fair dealing, due care, loyalty, and full and candid disclosure.

CLASS ACTION ALLEGATIONS

24. Plaintiff brings this action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, on behalf of himself and: (i) as to Counts I, III, and IV, all other common shareholders of the Company and their successors in interest, who are or will be threatened with

injury arising from Defendants' actions as more fully described herein (the "Class"); and (ii) as to Counts II and IV, all other common shareholders of the Company on the record date for voting on the Merger (the "Proxy Class"; together, with the "Class," the "Classes"). Excluded from the Class and the Proxy Class are the Defendants herein, members of their immediate families, and any subsidiary, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants.

25. This action is properly maintainable as a class action for the following reasons:

(a) the Classes are so numerous that joinder of all members is impracticable. While the exact number of members of these classes is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, as of October 6, 2008, there were 2.41 billion shares of Wachovia common stock outstanding. The holders of these shares are believed to be geographically dispersed throughout the United States. The Company's common stock is listed and actively traded on the New York Stock Exchange under the ticker symbol "WB";

(b) there are questions of law and fact which are common to members of the Classes and which predominate over any questions affecting only individual members. The common questions include, inter alia, the following:

(i) whether any of the Individual Defendants, as directors and/or officers of the Company and/or as significant shareholders of the Company, have breached their fiduciary duties owed to Plaintiff and the other members of the Classes, including their duties of loyalty, due care, and candor;

(ii) whether the Proxy Statement (defined below) is legally deficient in that it contains material false and misleading statements and omits material information; and

(iii) whether Plaintiff and the other members of the Classes would be irreparably damaged were Defendants not enjoined from the conduct described herein;

(c) the claims of Plaintiff are typical of the claims of the other members of the Class, and Plaintiff has no interests that are adverse or antagonistic to the interests of the Classes;

(d) Plaintiff is committed to prosecuting this action and has retained counsel competent and experienced in litigation of this nature. Plaintiff is an adequate representative of the Classes and will fairly and adequately protect the interests of the Classes;

(e) the prosecution of separate actions by individual members of the Classes would create the risk of inconsistent or varying adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and

(f) Defendants have acted, or refused to act, on grounds generally applicable to, and causing injury to, the Classes and, therefore, preliminary and final injunctive relief on behalf of the Classes as a whole is appropriate.

SUBSTANTIVE ALLEGATIONS

A. Background of the Merger

26. 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, Defendant Robert K. 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 had a promising future as a stand-alone company.

27. 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."

28. On September 15, Wachovia's stock closed at a trading price of $10.22 per share.

29. According to the Definitive Proxy Statement that was filed with the SEC concerning the Merger on November 24, 2008 (the "Proxy Statement"), 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.[1]

30. The next day, September 17, Wachovia and an unnamed "potential combination partner" initiated merger discussions, entered into confidentiality agreements, and began conducting due diligence.

31. On September 18, Wachovia entered into discussions with a second unnamed "global financial institution" with the goal of that institution buying 20%-40% of Wachovia's equity.

32. Also during that week, Wachovia received a number of calls from various senior executives at Citigroup Inc. ("Citigroup") concerning a possible transaction.

33. On September 19, the basic terms of a bailout bill in Congress were announced. 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.

34. 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."

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[1] Unless otherwise specified, all facts regarding the background of the Merger are taken from the narrative created by Defendants in the Proxy Statement.

35. Later in that same day, negotiations with the two unnamed financial institutions had ended, although the Proxy Statement does not disclose the reasons why these negotiations ceased.

36. 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.

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

38. 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.

39. On that same day, Wachovia's shares closed at $13.70 per share, down only 10 cents per share from the previous day's close.

40. Immediately after Washington Mutual failed, according to an article published by Bloomberg on September 29, 2008, titled *Citigroup Rescues Wachovia's Bank Unit as Stock Spirals Down*, Steel sent a memo to Wachovia employees "affirming that the company was sound and more diversified than Washington Mutual."

41. 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." Proxy Statement p. 31.

42. On that date, Wachovia's shares closed at $10.00 per share.

43. Over the weekend of September 27-28, Wachovia continued parallel discussions with both Citigroup and Wells Fargo and on September 28, Wachovia's counsel transmitted a draft of a merger agreement to counsel for Wells Fargo.

44. 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.

45. Also on September 28, "[FDIC] Chairman Bair confirmed [to the Company] 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." Proxy Statement, p. 31.

46. 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." Id., p. 32.

47. 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 Proxy Statement, "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." Id., p. 33. Wachovia executed the agreement.

48. 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).

49. Also under the terms of this agreement, according to the Affidavit of Robert K. Steel ¶¶ 8-11, filed in this action as Exhibit 1 to the Merritt Affidavit, which was filed by Defendants in opposition to Plaintiff's motion to expedite proceedings (the "Steel Aff."), "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."

50. After the agreement with Citigroup was announced, U.S. Treasury Secretary Henry Paulson issued a press release, on September 29, 2008, 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.

51. On that same day, Steel agreed, telling Bloomberg, on September 29, 2008, in the article referenced above, titled *Citigroup Rescues Wachovia's Bank Unit as Stock Spirals Down*, that Citigroup was "a strong partner to preserve the stability and quality of our [Wachovia's] banking franchise."

52. 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.

53. 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.

54. 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.

55. 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 Proxy Statement does not describe any attempt by Wachovia's General Counsel, or anyone else on the Company's behalf, to negotiate any terms of such a merger agreement with Wells Fargo.

56. 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, which lasted at most a few hours, 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." Id. ¶ 19.

57. 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.

58. Thus, while there is no basis stated for this statement in either the Steel Affidavit or the Proxy Statement, even under this limitation, Defendants do not explain why the Board decided to act before the House voted on the bailout bill, which was scheduled to take place that day (indeed, less than 11 hours after the Board meeting concluded).

59. After the Merger with Wells Fargo was jointly announced at 7:00 a.m. on October 3, the FDIC, according to an article published by CNNMoney.com on October 3, 2008, titled *Wells, Citi Square Off in Wachovia Bid*, publicly reiterated its support for a Wachovia/Citigroup deal. 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," as among Wachovia, Citigroup, and Wells Fargo.

60. Shortly after noon that same day, the House passed the revised bailout bill.

61. Wachovia's stock closed at $6.21 per share that day, reflecting the now-public, agreed-upon transaction with Wells Fargo, then valued at $7.00 per share. Since that day, Wachovia's stock price has never traded over the originally announced $7.00 per share deal value.

B. The Merger And Share Exchange Agreement

62. On October 3, 2008, Wachovia announced that it had entered into a definitive agreement (the "Merger Agreement") to be acquired by Wells Fargo, in a Merger for approximately $15.1 billion in equity value as of that date, under the terms of which 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.

63. Wells Fargo's CEO, John Stumpf, in the Company's press release regarding the Merger issued on October 3, 2008, stated that Wells Fargo would endeavor to retain Wachovia's management and employees: "We know this has been a time of great uncertainty for Wachovia team members and many of its customers as their company has gone through a very painful and challenging time of unprecedented change in our industry. We want to assure them we'll do everything we can to make the integration of our operations as smooth as possible. An important measure of success for this integration will be our ability to retain as many of the talented Wachovia team members as possible so they can continue to provide outstanding service and financial advice to their customers and continue their careers with Wells Fargo."

64. Simultaneous with the entry of the Merger Agreement, Wachovia and Wells Fargo entered into the Share Exchange Agreement, pursuant to which Wachovia gave Wells Fargo 10 shares of Series M, Class A Preferred Stock (all of the shares of that series) with 39.9% of the voting rights of Wachovia in exchange for 1,000 Wells Fargo common shares, then worth approximately $34,500. According to the Proxy Statement, "The affirmative vote of the holders of a majority of the votes entitled to be cast on the plan of merger consisting of all outstanding shares of Wachovia common stock and the Series M Preferred Stock, voting together as a single class, is necessary to approve the plan of merger contained in the merger agreement."

65. The Articles of Amendment related to the Preferred Stock issued to Wells Fargo provide that the shares of Preferred Stock remain outstanding in the event that the Merger is not consummated and cannot be redeemed for <u>at least 18 months</u>, a date which extends the life of the

shares far beyond the time of a shareholder vote on the Merger (hereinafter, the "Tail Provision"). At that time, Wachovia's Board has the right to redeem the Preferred Shares for a total of $10,000. The Share Exchange was never submitted for approval by Wachovia's shareholders.

66. The Share Exchange was an integral part of the Merger plan although it was not made part of the Merger Agreement itself. By separating these two material interrelated parts of the transaction into two documents, Defendants were attempting to circumvent the application of North Carolina General Statutes §§ 55-11-02 and 55-11-03, which require a vote of a company's public shareholders approving share exchanges, such as the one entered into between Wachovia and Wells Fargo.

67. Defendants state that the Share Exchange was done in connection with the Merger to "afford assurance to the markets, regulators, depositors and counter-parties that the Wells merger was certain to happen." (Wachovia Brief in Opposition to Preliminary Injunction Motion, at p. 2.) Wells Fargo also admits that the purpose of the Share Exchange was to provide "reasonable assurance from Wachovia that the transaction would close." (Wells Fargo Brief in Opposition to Preliminary Injunction Motion, at 10.)

68. On September 30, one day after Wachovia's announcement of its agreement with Citigroup and two days before the Merger Agreement with Wells Fargo was entered into, the IRS issued a ruling that allows an unlimited tax deduction attributable to an acquired bank's losses. <u>See</u> IRS Notice 2008-83. According to a "Commentary" by the law firm Jones Day, the effect of the IRS ruling on Wells Fargo was as follows:

> Within the first two days after the [IRS] Notice was published, a major bank acquisition was announced as a superior bid to an agreement reached by the target banking organization with another bank holding company on the day before the Notice. The new buyer of the major banking operation publicly estimated that it would write off $74 billion in losses on the target bank's loan portfolios. <u>This suggests a nominal tax savings [based on a corporate statutory rate of 35 percent] of more than $25 billion.</u> (Emphasis added).

69. In its October 3, 2008 common stock offering presentation filed with SEC (the "October 3 Presentation"),[2] Wells Fargo admitted that it would be able to utilize at least $60 billion in Wachovia acquisition losses. IRS Notice 2008-83 enables Wells Fargo to deduct $60 billion of Wachovia's losses against Wells Fargo income any time over the next 20 years, or by applying those losses against Wells Fargo's previous two years' revenue (pursuant to the time limits set forth in Internal Revenue Code § 172(a)), without the limitation that it be prorated over the next 20 years as dictated by Internal Revenue Code § 382(h)). This will result in Wells Fargo realizing a total of more than $20 billion in tax savings from the Merger as soon as it has $60 billion in profits to offset against the $60 billion in credit losses that it will acquire in the Merger, rather than having to prorate these deductions over 20 years. Simply put, in a very short time frame, the tax savings from the losses acquired in the Merger will more than equal the value of the entire transaction.

70. Wells Fargo represented, in its Annual Report for 2007, attached as an exhibit to its Form 10-K filed with the SEC on February 29, 2008, that its "[r]evenue, the sum of net interest income and noninterest income, grew 10.4% to a record $39.4 billion in 2007 from $35.7 billion in 2006." Through the first nine months of 2008, as reported in Wells Fargo's 10-Q for the third quarter of 2008, filed with the SEC on October 30, 2008, Wells Fargo has had revenue of over $32 billion, outpacing the first nine months of 2007 (through which Wells Fargo had $29 billion in revenue) by 10%.

71. Through the first nine months of 2008, Wells Fargo has reported its provision for credit losses as $7 billion out of its net interest income of $18 billion, leaving an additional $11 billion net interest income after provision for credit losses for the first nine months of 2008 alone. The provisions for credit losses in 2007 was $4.9 billion and in 2006 was $2.2 billion. Net interest income in 2007 and 2006 was $21.1 billion and $20.1 billion, leaving $34.1 billion

[2]Wells Fargo's October 3 Presentation was titled, "Wells Fargo + Wachovia, The Premier Coast-to-Coast Financial Services Company, Best in Service, Best in Sales – Unbeatable Combination."

net interest income after provision for credit losses.

72. Thus, for 2006, 2007, and the first nine months of 2008 alone, Wells Fargo reported a total of approximately $45.1 billion remaining net interest income that can be offset by Wachovia losses immediately after consummation of the Merger. According to Wells Fargo's October 3 Presentation, it estimates $60 billion in Wachovia credit losses (out of the total $74 billion estimated acquisition losses). Thus, by immediately offsetting the entire $45.1 billion in remaining net income with these Wachovia losses, Wells Fargo will realize at least $15 billion in tax savings (assuming a 35% tax rate), which more than equals the value of the entire transaction.

73. In the same October 3 Presentation, Wells Fargo explained why the Merger was a "superior deal" for Wells Fargo's shareholders. That presentation, on pp. 6-7, explains that the Merger will give Wells Fargo "unparalleled market position," with the "largest, most extensive banking store network across the U.S.," and will give Wells Fargo the "leading market share from coast to coast."

74. In addition to the 39.9% that Wells Fargo acquired pursuant to the Share Exchange, Wells Fargo previously owned, and continues to own, more than 32.8 million common Wachovia shares, or what was, prior to the Share Exchange, an additional 1.5% of all such shares. In addition to the more than 40% voting power that Wells Fargo now controls, Wachovia's directors (who have already indicated that they intend to vote for the Merger) owned 2.06% of Wachovia's outstanding common shares as of the record date. Therefore, over 42% of the vote in support of the Merger is locked up.[3]

75. Wells Fargo needs only 13.8% of the remaining shares to vote in favor of the Merger for approval. Put another way, 86.2% of the public shareholders would have to vote against the transaction or otherwise not vote for the Merger to be defeated.

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[3]Under Wachovia's 2003 Stock Incentive Plan, "Change of Control," for purposes of triggering, for example, golden parachutes, is defined, in relevant part, as "[t]he acquisition by any individual, entity or group [] of beneficial ownership of 25% or more of . . . (B) the combined voting power of the then-outstanding voting securities of Wachovia entitled to vote generally in the election of directors."

76. In violation of their fiduciary duties, the Board has impermissibly circumvented the voting process and rendered the vote on the Merger essentially redundant, thereby coercing Wachovia's shareholders to accept the Merger. The unaffiliated Wachovia shareholders have been effectively disenfranchised, in that over 42% of the vote will almost certainly go in favor of the Merger and there is no protection for those unaffiliated shareholders, such as a requirement that a majority of the unaffiliated shareholders vote in favor of the Merger. Regardless of the Board's belief that the Merger was the best or only possible transaction for Wachovia's unaffiliated shareholders under the circumstances, it was not permitted to essentially disenfranchise the public shareholders from making their own uncoerced decision whether to accept the Merger.

77. Additionally, by contracting to issue preferred shares carrying 39.9% of the Wachovia shareholder vote to Wells Fargo with the Tail Provision, the Individual Defendants have, for all practical purposes, precluded any competing bid from being accepted by the Company without the consent of Wells Fargo, including any possible topping bid by Citigroup.

78. Further, the Merger Agreement contained 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.

79. 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." 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, which has now occurred) rendering the Merger price unfair or inadequate. Such a restrictive fiduciary out provision would require an offer to be submitted to the shareholders regardless of whether a superior offer is received. Because any entity wishing to make a superior offer would not be able to present its proposal to the shareholders for a substantial period of time, this provision will necessarily have a chilling effect on any competing bids. Furthermore, the Merger Agreement contains no "material adverse change" clause to allow Wachovia out of the Merger Agreement if a material adverse change to Wells Fargo's circumstances occurs prior to consummation of the Merger.

80. Coloring the whole truncated process is the fact that three members of the Board will be invited to join the Wells Fargo board after the Merger is consummated and 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. According to p. 8 of the Proxy Statement, "[a]ssuming that the merger is completed on December 31, 2008 and all Wachovia executive officers who have employment agreements experience a qualifying termination of employment immediately thereafter, the 10 executive officers as a group would be entitled to receive an aggregate amount of up to approximately $98.1 million, as severance payments."

81. Further, "[t]he Wachovia stock incentive plans generally provide for the vesting of equity-based awards following a change in control. The merger will constitute such a change in control of Wachovia. Assuming that the merger is completed on December 31, 2008, and a Wells Fargo common stock price of $21.76 (the closing price of Wells Fargo common stock on November 21, 2008), the aggregate cash value of the stock-based awards (which amounts

attribute no value to any unvested Wachovia stock options, since all such stock options have exercise prices greater than the market price based on the November 21, 2008 closing price of Wells Fargo common stock, as adjusted by the exchange ratio) that are held by Wachovia's 11 executive officers and Wachovia's Chairman, Lanty L. Smith, that would vest solely due to the completion of the merger is approximately $2.5 million, as a group." Proxy Statement, p. 8.

82. The independence of the financial advisors retained to evaluate the Merger's fairness to the Company's shareholders is also compromised by the Defendants' causing the compensation of those financial advisors to be heavily dependent on the consummation of the Merger. The difficult financial times for these financial advisory firms only serves to heighten this conflict of interest. Goldman, Sachs & Co. ("Goldman Sachs") was engaged with the proviso that it would receive $20 million of its $25 million fee contingent upon the consummation of the Merger. Perella Weinberg Partners LP ("Perella Weinberg") was given the exact same compensation structure. Thus, both firms have a strong interest in securing shareholder approval of the Merger, without regard to its merits and fairness towards the shareholders of Wachovia.

83. The 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock, valued at the time the Merger Agreement was executed at approximately $7 per share of Wachovia common stock and now, at its closing price of $25.89 on December 2, 2008, at approximately $5.15 per share, to be provided to Wachovia's public shareholders pursuant to the Merger is unfair and inadequate because, among other things:

a. the $5.15 per share valuation of Wachovia common stock actually offers a $4.85 per share <u>discount</u> to the Company's closing price of $10 per share on September 26, 2008, which was prior to the initial failure in the U.S. House of Representatives on September 29, 2008 of the bailout, as first proposed, that caused a severe and likely exaggerated sector-wide downturn in financial stock trading prices;

b. On October 3, Congress passed and the President signed The Emergency Economic Stabilization Act of 2008 (the "EESA"), which authorizes the Department of Treasury to use up to $700 billion to restore liquidity and stability to the U.S. financial system. The Treasury Secretary retains broad discretion under the EESA to determine how and when to use the EESA funds to assist financial institutions, including, the purchase of illiquid assets of companies such as Wachovia or otherwise provide them with cash infusions; thus, the bailout should make Wachovia much more valuable in that its most poorly performing assets may be purchased by the government and its other remaining valuable assets, most notably its $339 billion in Wachovia deposits and its network of more than 3,300 branches throughout the country, would solidify Wells Fargo (or any other potential acquirer) as being in the top tier of U.S. retail banking. Since the passage of the bailout bill on October 3, $160 billion of cash investments has been provided to at least 27 institutions including, for example, $25 billion each to both Citigroup and Wells Fargo. According to a October 27, 2008, MSNBC.com article titled *Banks To Use Bailout for Lending, Acquisitions*, "[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." This trend towards consolidation is confirmed by the fact that Citigroup is still in the market to acquire a bank;

c. Wells Fargo is receiving a tax benefits in acquiring Wachovia, which more than pay for the entire Merger (which only costs Wells Fargo a share issuance, not cash, in the first place); and

d. further, as reported in BusinessWeek on October 6, 2008, in an article entitled *Wachovia: A Split May Boost the Banking Industry* concerning the Merger and Citigroup's TRO, "Wachovia CEO Robert Steel has argued to Wall Street [that] only one-quarter of the bank's loan portfolio consists of the troubled mortgages made in its Golden West subsidiary. Excluding those mortgages—admittedly, no small feat—and a smaller portfolio of troubled construction loans, the majority of Wachovia's portfolio consists of old-fashioned consumer loans to customers with whom the bank has generally had a long relationship."

C. The Proxy Statement

84. On November 24, 2008, the Company filed its definitive Proxy Statement concerning the Merger with the SEC.

85. The Proxy Statement contains the following material misleading statements and omissions:

a. The Proxy Statement fails to disclose that Wells Fargo will receive an immediate tax benefit of at least $15 billion, which more than equals the value of the entire transaction.

b. Although the Proxy Statement, on pp. 33-34, discloses the existence of IRS Notice 2008-83, which sets forth the IRS's change in tax policy, Defendants fail to disclose any general estimate of the possible size of the tax benefit that Wells Fargo will realize in the future, instead simply saying that: "Wachovia's 'net unrealized built-in loss' is not, however, a static number and cannot ultimately be determined until closing. If Notice 2008-83 had not been issued, Wachovia's 'net unrealized built-in losses' would have needed to exceed approximately $21 billion (based on the above estimate of the annual Section 382 limitation) in order for Wells Fargo to lose any tax benefits under Section 382." This is an insufficient and materially misleading disclosure for a number of reasons, including:

(1) Defendants Wachovia and Wells Fargo have estimates of the 'net unrealized built-in loss,' which exceed $21 billion, inasmuch as Wells Fargo has stated in its October 3 Presentation that it has $60 billion in built-in losses that can be immediately offset against Wells Fargo income; and

(2) Defendants imply that there is some possibility that the net unrealized built-in loss will not exceed $21 billion, and therefore Wells Fargo may not receive the tax benefits from the removal of the Section 382 limitations. However, Wachovia has already recognized a $24 billion loss in its 10-Q for the third quarter of 2008 and Wells Fargo has estimated the total acquisition loss at $74 billion ($60 billion of which can be offset as credit losses) in its October 3 Presentation.

(3) While it may not "ultimately" be possible to determine the entire net unrealized built-in loss until after consummation of the Merger, the general magnitude of the loss is known. Thus, even if Defendants do not know what the *full* loss will be, they should disclose the loss of which they are aware and what the tax benefit of that known loss would be in light of IRS Notice 2008-83.

c. The Proxy Statement fails to disclose whether, and if not, why, any of the unnamed potential strategic partners therein referred to were not contacted after it became clear that (a) Wachovia would seek to merge with the highest bidder; (b) the federal government would provide assistance, if necessary, for a business combination with Wachovia; (c) the $700 billion bailout bill passed Congress; and (d) the IRS changed the tax regulations on September 30 to make an acquisition of Wachovia more attractive to potential suitors.

d. Other than describing a possible alternative transaction that was proposed by Wells Fargo, the Proxy Statement does not disclose if there were other bidders pursuant to the FDIC's auction process, begun on September 28 (as described in the Proxy Statement, at pp. 31-32) and, if so, what terms those other bidders were proposing.

e. The Proxy Statement does not disclose the basis that "Management [had for] inform[ing] the board that it believed that, unless an agreement was signed by the end of the day on October 3, the FDIC was prepared to place Wachovia's banking subsidiaries in receivership over the coming weekend." Proxy Statement, p. 35.

f. The Proxy Statement does not disclose why the Board decided to act on the Wells Fargo Merger proposal before the House voted on the bailout bill, which was scheduled to take place later that same day.

g. On page 30 of the Proxy Statement, Wachovia states that it intensified its efforts in pursuing the strategic option of raising capital by selling a 20-40% equity stake to a strategic investor in light of the announcement of the Emergency Economic Stabilization Proposal. However, Defendants do not disclose whether, during the weekend of Sept. 20- 21, a Board meeting was held in light of the proposed economic stabilization package; whether Defendants considered the possibility (at the time) of borrowing money (secured by Wachovia's loan portfolio) from the federal government or State of North Carolina considered as a further strategic option and whether such a possibility existed; and/or whether there was any analysis done by Wachovia or an advisor to determine if borrowing from the federal government was a possible strategic option.

h. On page 40 of the Proxy Statement, in the opinion of Goldman Sachs, Wachovia's financial advisor, it is stated that "Goldman Sachs did not receive from Wells Fargo forecasts of its future financial performance.... With the consent of Wachovia's board of directors, (i) Goldman Sachs' diligence of Wells Fargo was limited to publicly available information, including publicly available estimates of certain research analysts..." Defendants fail to disclose which analysts' estimates were used by Goldman Sachs and, specifically, what the metrics of the estimates were; and/or whether an average was taken of the estimates from the analysts.

i. Further, there is no discussion in the Proxy Statement as to the extent to which Wachovia took measures to value the subject assets on its balance sheet. Both Goldman Sachs and Perella Weinberg state that while they rendered no opinion on the underlying assets of Wachovia, there is no disclosure of whether any analysis of the underlying assets was performed and details or a summary of any such analysis.

j. On page 42 of the Proxy Statement, Defendants state that "...financial analyses that Goldman Sachs customarily would have prepared in connection with a fairness opinion were not meaningful..." However, the "customary" analyses not utilized are not identified and the reasons for not performing such customary analyses are omitted.

k. On page 43 of the Proxy Statement, Defendants, in discussing Goldman Sachs' trading multiple analysis, state that Goldman Sachs uses estimated earnings and book value as metrics for this analysis. However, there is no disclosure as to whether any other metrics such as revenue were taken into account. If so, Defendants fail to disclose the results thereof.

l. On page 43 of the Proxy Statement, Defendants, in discussing Goldman Sachs' trading multiple analysis, state that Goldman uses estimated earnings for 2008, 2009, and 2010. Defendants fail to disclose where these estimates came from, whether these are Company estimates or Goldman Sachs' or other analysts' estimates, whether these estimates are from one analyst or multiple analysts; and, if they are from multiple analysts, whether Goldman Sachs used average or median estimates.

m. On page 46 of the Proxy Statement, the section concerning the opinion of Perella Weinberg states that "Perella Weinberg did not receive from Wells Fargo forecasts of its future financial performance… With the consent of Wachovia's board of directors, (i) Perella Weinberg's diligence of Wells Fargo was limited to publicly available information, including publicly available estimates of certain research analysts..." However, it does not disclose which analysts' estimates were used by Perella Weinberg and specifically what the metrics were that were considered by these estimates. Also, Defendants do not disclose whether an average was taken of the estimates from the analysts.

n. On page 46 of the Proxy Statement, the section concerning the opinion of Perella Weinberg states that "…Perella Weinberg did not perform certain analyses that Perella Weinberg customarily would have … such analyses were not meaningful…" However, there is no disclosure concerning what these "customary analyses" were that were not performed or the reasons why such customary analyses were not meaningul.

o. On page 49 of the Proxy Statement, in the section concerning the opinion of Perella Weinberg, it is disclosed that "Perella calculated pro forma tangible book value of Wachovia, based on…, and estimates provided by management regarding mark-to-market or fair value adjustments… that would likely be made to Wachovia's loan portfolios…" However, Defendants do not disclose what was estimated or what was the level of estimation.

p. On page 49 of the Proxy Statement, the section concerning the opinion of

Perella Weinberg, it is disclosed that "Perella calculated pro forma tangible book value of Wachovia, based on... estimates provided by management..." However, it is not disclosed why management estimates could be used when, on page 46 of the Proxy Statement, it is claimed that Wachovia informed Perella Weinberg that "...currently available forecasts for Wachovia no longer reflected Wachovia's best estimates of its future financial performance."

q. On page 49 of the Proxy Statement, the section concerning the opinion of Perella Weinberg, it is disclosed that Perella Weinberg calculated implied value per share of Wells Fargo using next twelve month EPS, book value per share, and tangible book value per share. However, there is no disclosure as to whether any other metrics such as revenue were taken into account and, if not, the reasons therefor.

r. On page 49 of the Proxy Statement, the section concerning the opinion of Perella Weinberg, in evaluating Wells Fargo common stock and the value implied by the exchange ratio contemplated by the Merger, specifically concerning historical trading multiples, it is disclosed that Perella Weinberg applied a 12.4x EPS multiple, a 2.46x book value multiple, and a 2.69x tangible book value multiple, but it is not disclosed how Perella arrived at these multiples.

s. On page 49 of the Proxy Statement, the section concerning the opinion of Perella Weinberg, Perella Weinberg lists trading multiples for Wells Fargo common stock based on public market comparable companies. However, Perella Weinberg does not disclose which companies are included in the group of comparable companies.

t. On page 50 of the Proxy Statement, the section concerning the opinion of Perella Weinberg, in its Discounted Cash Flow analysis, Perella Weinberg apparently used an equity discount rate range of 10%-13% to value Wells Fargo.

However, there is no disclosure concerning what the rationale was behind this discount rate range. Nor is it disclosed as to whether Perella Weinberg looked at betas of comparable companies or what the implied equity risk premium is that Perella Weinberg is assuming or what the implied risk-free rate is that Perella Weinberg is assuming.

u. The Proxy Statement is materially inaccurate because it fails to disclose the subsequent event of the Court's Preliminary Injunction Order and Opinion, specifically, enjoining the eighteen-month "tail" on redemption of the Class M Preferred Shares that were issued to Wells Fargo pursuant to the Share Exchange Agreement.

86. Therefore, the Proxy Statement is materially false and/or misleading and fails to disclose all material information regarding the Merger.

COUNT I

BREACH OF FIDUCIARY DUTY

(Against All Defendants)

87. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

88. Defendant Wells Fargo is named in this Count because, as a result of the Share Exchange, it is a controlling shareholder of Wachovia and, thus, has direct fiduciary duties to Wachovia's public shareholders. Pursuant to the Share Exchange, which is a defensive measure that was enacted to thwart a modified or renewed Citigroup bid, Wells Fargo owns over 40% of Wachovia's voting rights and it has otherwise exercised its control, for example, by naming the Wachovia senior executives who will continue at the successor to the Company after the consummation of the Merger and providing to Wachovia significant funding since the Merger Agreement was signed.

89. The Merger is both coercive and preclusive. The Merger is not conditioned on a majority of the unaffiliated shares voting in its favor, leaving the Company's shareholders with

no meaningful choice whatsoever in the face of a bloc controlling over 40% of the Company's vote locked up in favor of the Merger. Defendant Wells Fargo and the Individual Defendants, who collectively wield a working control of the Company's stock can also defeat any competing bid and, in fact, have opposed Citigroup's attempts to upset the Merger.

90. Also, under its terms, the Share Exchange remains in effect for a minimum of eighteen months after any vote on the Merger, even if, despite the mathematical improbability, that the Merger is not approved by a majority of those Wachovia securities entitled to vote thereon. As the Court stated in its December 5, 2008 Opinion and Order, this provision "serves no beneficial purpose . . . and, in fact, prevents the Board from fulfilling its fiduciary duties."

91. The unfairness of the terms of the Merger is compounded by the gross disparity between the knowledge and information possessed by the Individual Defendants by virtue of their positions of control of Wachovia and that possessed by the Company's public shareholders.

92. The inherent unfairness in the Merger's consideration is further manifest in the uncertainty and inadequacy of the Merger exchange ratio to Wachovia's public shareholders.

93. The Individual Defendants also breached their fiduciary duties to Plaintiff and the Class by recommending that shareholders vote in favor of the Merger despite the fact that such Individual Defendants were not fully informed concerning the Merger.

94. By reason of the foregoing, the Defendants have breached, and will continue to breach, their fiduciary duties owed to the public shareholders of Wachovia.

95. Plaintiff and the Class will suffer irreparable harm unless Defendants are enjoined from breaching their fiduciary duties as set forth herein.

96. Plaintiff and the Class have been and will be damaged in that they are not and will not receive a fair proportion of the value of Wachovia's assets and business and will be prevented from benefitting from a value-maximizing transaction.

97. Plaintiff and the other Class members are immediately threatened by the acts and transactions complained of herein.

98. Plaintiff lacks an adequate remedy at law.

COUNT II

BREACH OF DUTY OF CANDOR

(Against the Individual Defendants and Wachovia)

99. Plaintiff repeats and realleges paragraphs 1 - 62 and 84 - 86 as if fully set forth herein.

100. The definitive Proxy Statement contains materially misleading statements and omissions. Without material and accurate information, Wachovia's public shareholders cannot make an informed judgment as to whether to vote for or against the Merger.

101. Defendants have breached their duty to fully and faithfully disclose all material information in the Proxy Statement concerning the Merger.

102. Plaintiff and the Proxy Class will suffer irreparable harm unless Defendants are enjoined from breaching their fiduciary duties as set forth herein.

103. Plaintiff and the Proxy Class have been and will be damaged in that they are not and will not receive full and fair information to allow them to make an informed decision as to whether or not to vote for the Merger and will be required to exchange their Wachovia shares for Wells Fargo shares for inadequate consideration based on the material false and misleading statements and omissions in the Proxy Statement.

104. Plaintiff and the other Proxy Class members are immediately threatened by the acts and transactions complained of herein.

105. Plaintiff lacks an adequate remedy at law.

COUNT III

FOR VIOLATION OF N.C.G.S. §§ 55-11-02 AND 55-11-03

(Against the Individual Defendants and Wachovia)

106. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

107. The Defendants violated North Carolina General Statutes §§ 55-11-02 and

55-11-03 and breached their fiduciary duties to Plaintiff and the other members of the Class by agreeing to and putting into effect the Share Exchange Agreement, without first holding a vote by the public shareholders of the Company on whether to approve the Share Exchange Agreement, as is required by North Carolina State common law and North Carolina General Statutes §§ 55-11-02 and 55-11-03.

108. The Share Exchange Agreement was not a separate voluntary exchange but was an integral part of the involuntary Merger exchange. That the Share Exchange Agreement is an integral piece of the Merger is evidenced by the fact that the Merger Agreement allows Wells Fargo to terminate its obligations if the Share Exchange Agreement is enjoined. See Merger Agreement § 8.1(f). Further support for this fact is found in Wells Fargo's insistence on the Share Exchange Agreement as a key term to agreeing to the Merger. See Proxy Statement, p. 35 ("Wachovia's board was advised that Wells Fargo's proposal stated that its willingness to proceed with the proposed merger agreement was contingent upon it receiving a substantial voting interest via the share exchange agreement that would not be subject to prior shareholder approval..."). Also, the fact that Wells Fargo obtained these shares with the 39.9% aggregate voting rights for nominal value further supports that the Share Exchange was conceived to be an integral part of the Merger.

109. The Share Exchange was not submitted for separate approval by Wachovia's public shareholders other than Wells Fargo.

110. The term "outstanding shares" in § 55-11-02 refers to shares exchanged as part of an involuntary transaction. Since the Share Exchange was and is an integral part of the Merger and all outstanding common and preferred shares of Wachovia will be exchanged or converted involuntarily in the Merger, the statute required a separate vote of the common shareholders on whether or not to approve the Share Exchange and the Merger.

111. By reason of the foregoing, the Share Exchange violates North Carolina General Statutes §§ 55-11-02 and 55-11-03 and should, therefore, be invalidated. Also, Defendants have

breached, and will continue to breach, their fiduciary duties owed to the public shareholders of Wachovia.

112. Plaintiff and the Class have been and will be damaged in that they are being denied a full and fair vote on whether to approve the Merger.

113. Plaintiff and the other Class members are immediately threatened by the acts and transactions complained of herein.

114. Plaintiff lacks an adequate remedy at law.

COUNT IV

AIDING AND ABETTING BREACHES OF FIDUCIARY DUTY

(Against Wells Fargo)

115. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

116. To the extent that the Share Exchange Agreement is invalidated or undone, for any reason, by the Court, or to the extent that Wells Fargo is determined not to be a controlling shareholder despite its over 40% control of the Company's vote, Plaintiff hereby alleges, in the alternative, that Wells Fargo has aided and abetted the breaches of fiduciary duty of the Individual Defendants to Plaintiff and the other members of the Classes.

117. Because they were fiduciaries of the Company, the Individual Defendants owed duties of due care, undivided loyalty, good faith, and truthful disclosure. The Individual Defendants violated and breached these duties.

118. With the knowledge, approval, and participation of each of the Individual Defendants, as alleged herein, defendant Wells Fargo was able to, and in fact did, knowingly render aid and assistance to the Individual Defendants in their breaches of their fiduciary duties. Wells Fargo did so knowingly, or but for its gross negligence would have known, of the Individual Defendants' fiduciary breaches.

119. Wells Fargo also has obtained 39.9% of the Company's voting power, through which it intends to vote in favor the Merger, thereby rendering the vote of the Company's

unaffiliated shareholders largely moot and, by withholding its support, precluding and deterring any potential opposing bid.

120. Wells Fargo has tentatively agreed to certain of Wachovia's senior management's continued employment, or lucrative termination benefits in the alternative, thereby assuring the Board and management's agreement and cooperation in, and to, a transaction which will not maximize value for Wachovia's shareholders. Wells Fargo has so agreed to enable it to acquire Wachovia at the lowest possible price although its dealings with Wachovia's Board and management have necessarily injected personal motives into the negotiations and compromised the undivided loyalty which fiduciaries owe to Wachovia's public shareholders. Wells Fargo provided substantial input and information to the Proxy Statement, as evidenced by the fact that a preliminary form of the Proxy Statement was filed by Wells Fargo as an SEC Form S-4.

121. As a direct and proximate result of the aiding and abetting the Individual Defendants' breaches of their fiduciary duties by Wells Fargo, Plaintiff and the Classes have sustained, and will continue to sustain, substantial harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment, as follows:

(1) declaring this to be a proper class action and certifying Plaintiff as the representative of the Classes and Plaintiff's counsel as counsel for the Classes;

(2) to the extent, if any, that the Merger and Share Exchange Agreement are consummated prior to the entry of this Court's final judgment, rescinding the same or awarding the Class compensatory or rescissory damages;

(3) directing that Defendants pay to Plaintiff and the other members of the Classes all damages caused to them and account for all profits and any special benefits obtained as a result of their wrongful conduct;

(4) directing that Defendants correct all misleading information and provide any material information omitted from the Proxy Statement concerning the Merger;

(5) awarding Plaintiff the costs and disbursements of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and expert(s); and

(6) granting such other further relief as the Court may deem just and proper.

Dated: December 11, 2008

GREG JONES & ASSOCIATES, P.A.

By:______________________________

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