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 REPLY BRIEF IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUNCTION

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

PRELIMINARY STATEMENT

In seeking to erect a straw man, Defendants' opposing briefs characterize the relief sought by Plaintiff as attempting to block the shareholder meeting and the vote of Wachovia's shareholders. However, Plaintiff is not asking the Court to stop the shareholder meeting or the vote, or even the Merger. To the contrary, the Motion seeks to permit the owners of the Company, Wachovia's shareholders, to decide on approval or disapproval of the Merger in an unfettered and non-coerced vote. While Defendants argue the Wachovia Board acted under extraordinarily adverse circumstances, and that the consequences of not accepting the Merger would have been dire, the issue before the Court is whether the Board violated its fiduciary duty when it agreed to provisions that deprived the Wachovia shareholders of their right to decide by an unfettered vote whether the Merger authorized by the Board is now in their best interests.

Under traditional and well-recognized principles of corporate governance, the shareholders of a corporation have a right equal to that of the Board to decide for themselves whether or not to approve major corporate transactions. Shareholders may conclude that the Merger consideration is grossly inadequate and that Wachovia should risk remaining independent, and remain in play. Whether to take the risks to their equity posed by rejection of the Merger is for the shareholders to decide, not this Court.

Defendants strongly argue that because the voting power of Wells Fargo and the directors is less than a mathematical majority of the outstanding shares, the vote is not "locked-up" and therefore the vote is not "preordained" or "coerced." However, Defendants ignore the terms of

the Share Exchange that allow Wells Fargo to keep its Preferred Shares far beyond the time of a shareholder vote against the Merger, a provision that makes it impossible for any other bid to arise, thereby intimidating Wachovia's public shareholders to accept the paltry "bird-in-the-hand" consideration offered in the Merger.[1] When combined with the unduly restrictive "fiduciary out" provision, the coercive effect on the shareholder vote is clear. Further, it appears that the Share Exchange itself was subject to the North Carolina statutory requirement of Wachovia shareholder approval which was not obtained, thereby rendering the Share Exchange invalid. Specifically, the Share Exchange is invalid under N.C.G.S. §§ 55-11-02 and 55-11-03, which require that a corporation acquiring all of a class of shares of another corporation obtain approval of the shareholders of the corporation whose shares are being acquired.[2]

STATEMENT OF ADDITIONAL FACTS

The following additional facts are relevant to the issues.

On September 30, one day after Wachovia's announcement of its agreement with Citigroup and two days before the 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. According to a Jones Day "Commentary," the effect of the IRS ruling on Wells Fargo was as

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[1]Under the Merger exchange ratio, the market value of the Wells Fargo common shares being received by Wachovia shareholders is now only $4.33 per share, far below the $7 value when the Merger was entered into on October 3. There is no "collar" or protection to the Wachovia shareholders in the Merger for the material adverse decline in Wells Fargo's stock price that has occurred.

[2]As discussed infra, the North Carolina statute was referenced in a case cited by Defendant in its opposing brief. While the moving brief did not discuss the applicability of the statute, Plaintiff believes it can be considered by the Court since the case relied on by Defendants referenced it and the Court can always take judicial notice of such statute. See Hinkle v. Hartsell, 131 N.C. App. 833, 836 (N.C. App. 1998).

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>

Green Reply Affidavit ("Green Aff."), Ex. A, at 2 (emphasis added); <u>see also</u> <u>id.</u>, Exs. B, C. Thus, because of this IRS ruling, the approximately $25 billion tax savings to Wells Fargo resulting from the Merger will more than pay for the entire transaction.

On October 3, prior to the vote of the U.S. House of Representatives on the revised bailout bill, Wachovia and Wells Fargo entered into the Merger Agreement. Simultaneous with the entry of that agreement, the parties, as discussed in Plaintiff's Opening Brief, 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 approximately $34,500 worth of Wells Fargo common stock. 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 for <u>at least 18 months</u>, a date which extends the life of the shares far beyond the time of a shareholder vote. At that time, Wachovia's Board has the right to redeem the Preferred Shares for a total of $10,000. (Green Aff. Ex. D, at § 6.) The Share Exchange was never submitted for approval by Wachovia's shareholders.

Also, on October 3, Wells Fargo issued a presentation as part of a common stock offering that explained why the Merger was a "superior deal" for <u>Wells Fargo's</u> shareholders. The

presentation (Green Aff. Ex. E), explains that the Merger will give Wells Fargo "unparalleled market position," with the "largest, most extensive banking store network across the U.S.," id. at 6, and will give Wells Fargo the "leading market share from coast to coast." Id. at 7.

On November 18, Wachovia and Wells Fargo issued an amended SEC Form S-4 (the "Amended Preliminary Proxy") that, among other things, disclosed for the first time that 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]

[3]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. Wachovia's math on page 18 of its brief is incorrect since it does not count either common shares owned by Wells Fargo or the directors' shares committed to vote in favor of the Merger.

ARGUMENT

I. PLAINTIFF DEMONSTRATES A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Defendants' Argument That The Business Judgment Rule Prohibits Court Review of the Propriety of Board Action Affecting the Shareholders' Voting Rights Is Without Merit

In First Union Corp. v. Suntrust Banks, Inc., 2001 NCBC 9A (N.C. Super. 2001), the Court determined the standards for reviewing deal protection measures in a stock-for-stock merger, such as here.[4] Contrary to Defendants' assertions that a simple application of the Business Judgment rule "protects the actions of the Wachovia Board" (Wells Fargo's Opposition Brief ("WF Opp.") at 5), the First Union Court found that such application is not sufficient:

> 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. Here, the Court has found that the Wachovia Board acted in good faith, on an informed basis and in the best interests of the corporation in entering into the merger agreement with the non-termination clause included. The directors had good advisors and they properly relied upon them. If the business judgment rule were the sole determinant or review process, the non-termination clause would not be subject to further review. With the review process adopted by the Court, the non-termination clause gets reviewed for the specific reason that good public policy requires – directors must fulfill their fundamental statutory obligations and shareholders should have an uncoerced vote.

Id. ¶ 152 (Emphasis added).[5]

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[4]Defendant Wachovia agrees that the First Union case "provides the framework for analysis of this case." (Wachovia Opp. at 12.)

[5]The First Union case adopted a review process which allows review of any infringement on the shareholders' co-equal voting rights to approve mergers upon clear and convincing evidence of such infringement. 2001 NCBC 9A, at ¶ 75.

The importance of shareholders' co-equal right to vote was emphasized by V.C. Strine in Chesapeake Corp. v. Shore as follows: " Our law should also hesitate to ascribe rube-like qualities to stockholders. *If stockholders are presumed competent to buy stock in the first place, why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?*" 771 A.2d 293, 328 (Del. Ch. 2000) (emphasis in original). Here, Plaintiff asks simply that Wachovia's shareholders, as owners of the company, be allowed to make the decision as to whether or not the Merger is in their best interests.

B. The Share Exchange Is Coercive of the Shareholder Vote

Defendants argue that the Share Exchange does not prevent other bids from coming forward. (See WF Opp. at 11; Wachovia Opp. at 9.) However, Defendants ignore the fact that the Share Exchange remains in effect for a minimum of eighteen months after any vote against the Merger. Thus, if the Merger is voted down (as unlikely as that is) and another bidder came forward, even one with a substantially higher bid, Wells Fargo would be able to vote more than 40% of Wachovia's votes against this new transaction.[6] Moreover, as Defendants point out (see Wachovia Opp. at 18), under North Carolina law, shares which do not vote count as votes against any merger. Thus, any non-voted shares would be added to Wells Fargo's votes against

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[6]Because Wells Fargo's Preferred Shares have only voting power and no equity value, there is no incentive for Wells Fargo to vote for another offer, even if it is significantly superior to the Wells Fargo deal. Moreover, because of the lack of an equity interest, Wells Fargo would suffer no consequences if it used its Preferred Shares to vote in a new slate of directors and otherwise punish the company's shareholders if they vote against the Merger by, for example, refusing to continue financing Wachovia, or taking actions to drive down the Company's stock price, allowing a second bid to acquire the Company at even lower consideration than it is currently offering.

the new transaction. Because merger transactions such as here inspire at best a 90% turnout,[7] Wells Fargo's votes (more than 40%), together with the 10% or more non-voted shares ("no" votes under North Carolina law) represent more than 50% of Wachovia's outstanding shares. Thus, for 18 months, no bidder could even hope to obtain a favorable 50% vote no matter how favorable the transaction compared to the present Merger. Thus, the Wachovia shareholders are being asked to vote on the only transaction opportunity they will have for at least 18 months, thereby making it very difficult for them to reject it when weighed against the disadvantages of uncertainty.

In First Union, the Court invalidated a non-termination clause because it would have "extend[ed] the life of the agreement five months beyond a shareholder vote disapproving the merger." 2001 NCBC 9A, at ¶ 155. The Court found that such a provision "is 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." Id. Here, there is no post-Merger transaction that is possible if the shareholders vote it down. As a result, Wachovia's shareholders understand that not only is the Merger essentially a "done deal," but even if it were theoretically possible to vote it down, there cannot be another better deal to take its place for at least eighteen months. As in First Union, the Share Exchange is "an actionably coercive condition impeding the free exercise of the Wachovia shareholder's right to

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[7]In the Wachovia/First Union merger, over 18% of Wachovia's shareholders did not vote. The article reporting these results also indicated that "[m]ost proxy fights have a 15-20 percent non-vote. See Green Affidavit Ex. F; see also Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1382-83 (Del. 1995) (assuming a 90% turnout in a contested election); Robert M. Bass Group, Inc. v. Evans, 552 A.2d 1227, 1244 (Del. Ch. 1988) (crediting testimony that only 80-83% of eligible shares tend to vote in contested matters).

vote on the merger," id., and, therefore, should be invalidated.

C. The IXC Communications Case Is Distinguishable

Defendants rely heavily upon In re IXC Communications Shareholders Litigation, 1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27, 1999), for the proposition that there is no breach of fiduciary duty as long as "Wachovia shareholders other than Wells Fargo control over 50% of the votes of the outstanding shares." (WF Opp. at 8; see also Wachovia Opp. at 18.) IXC is readily distinguishable from the situation presented here. In IXC, a significant, but not majority, institutional shareholder of IXC made a "side deal" with Cincinnati Bell (IXC's merger partner), pursuant to which the shareholder "agreed to support the [stock-for-stock] merger on condition that [the acquirer] purchase one-half of its IXC holdings for $50 per share," in cash.[8] 1999 Del. Ch. LEXIS 210, at *7. The court found that this lock-up arrangement with an independent shareholder did not represent a breach of fiduciary duty by the directors. The court recognized that "[t]he arrangement is arguably a third party transaction between two entities dealing at arms-length, which in and of itself requires no explicit approval by the IXC board." Id., at *26. Here, on the other hand, this is no "third party transaction": Wachovia's Board, not some third party who already owned Wachovia shares, gave (for only $34,500) 39.9% of Wachovia's voting power to Wells Fargo. Furthermore, in IXC, the voting arrangement as to the independent shareholder's shares was limited to the merger transaction, not beyond. Thus, there was no coercive effect on new offers if the merger was disapproved by the shareholders.

Defendants cite to no Delaware case since IXC was decided that has taken such an

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[8]It should be noted that unlike here, where Wells Fargo received their Preferred Shares in exchange for only $34,500 worth of stock, the acquirer in IXC paid market price, in cash, for the shares it bought from the third-party shareholder.

extreme stance, let alone one with facts remotely similar to those here.[9] In fact, Delaware courts have since found shareholders with equivalent holdings as Wells Fargo to be controlling shareholders.[10] Thus, for example, in Cysive, Inc. Shareholders Litigation, 836 A.2d 531 (Del. Ch. 2003), the court held that a 40% shareholder of Cysive, Inc. who was attempting to acquire the 60% of shares that he did not already own was a "controlling stockholder" and, therefore, his proposed transaction was "subject to the entire fairness standard under the teaching of *Kahn v. Lynch Communication Systems, Inc.* [638 A.2d 1110 (Del. 1994)]." 836 A.2d at 534. In reaching this conclusion, the court explained its reasoning:

> Candidly, I think it would be naive for me to conclude that Carbonell [the 40% shareholder] does not possess the attributes of control that motivate the *Lynch* doctrine. Although it is true that he does not control a majority of the company's voting power, that was also true of the controlling stockholder in *Lynch* itself, which only controlled 43.3% of the votes . . . . In practical terms, Carbonell holds a large enough block of stock to be the dominant force in any contested Cysive election . . . . Given this voting power, the threat of "inherent coercion" that Carbonell presents to the independent directors and the public stockholders of Cysive cannot be rationally distinguished from that found to exist in *Lynch* or cases of its kind. If Carbonell becomes dissatisfied with the independent directors, his voting power positions him well to elect a new slate more to his liking without having to attract much, if any, support from public stockholders.

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[9]Plaintiff's counsel has been unable to locate one Delaware case that applied IXC to facts remotely similar to this case.

[10]Under Wachovia's 2003 Stock Incentive Plan, the term "Change of Control," for purposes of triggering executives' "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 . . . the combined voting power of the then outstanding voting securities of Wachovia entitled to vote generally in the election of directors." (Green Aff. Ex. G, at B1-B2.) Indeed, it appears that Wachovia management's golden parachutes have been triggered by the Share Exchange even if the Merger does not close.

Id. at 551-52 (footnotes omitted). This same pragmatic approach was also reflected in Chesapeake Corp. v. Shore, 771 A.2d 293 (Del Ch. 2000), where the court invalidated a company by-law sought by management that would have required a 60% super-majority to amend the by-laws. See id. at 297. The court explained:

> At most, the defendants can use [their expert] Cromwell's analysis to demonstrate that it is theoretically possible for Chesapeake, given ideal circumstances, to meet the 60% threshold. But no real-world evidence supports the view that such ideal circumstances have ever come to pass for an insurgent in Chesapeake's position facing the concerted opposition of management holders controlling over 20% of the vote.
>
> Indeed, the defendants' expert Miller was unable to identify, despite his twenty-one years in the business, any situation where an insurgent had been able to obtain a 60% supermajority when opposed by a 20-24% management block . . . .
>
> Therefore, my read of the expert evidence supports the inference that victory is not realistically attainable for Chesapeake in the face of the Supermajority Bylaw.

Id. at 340-41. Moreover, it is settled Delaware law that it is a breach of fiduciary duty "for directors to make use of the issuance of shares to accomplish an improper purpose, such as to enable a particular person or group to maintain or obtain voting control, against the objection of shareholders from whom control is thereby wrested." Condec Corp. v. Lunkenheimer Co., 230 A.2d 769, 775 (Del. Ch. 1967) (citations omitted).

While it is doubtful that even a Delaware court would apply IXC to the facts of this case, such a formula is inappropriate under North Carolina law, and this Court is under no obligation to follow it. Thus, Judge Tennille, in First Union's discussion of the proper standards in North Carolina, emphasized that any review standard to be used could not diverge from "the obligation of the board not to interfere with the shareholder franchise," id. at ¶ 75, or "the stockholder's co-

equal right to approve mergers." Id. Here, by agreeing to the Share Exchange, the Board unquestionably interfered with Wachovia's public shareholders' franchise and such shareholders' "co-equal right" to approve the Merger.[11] Moreover, aside from the Share Exchange's coercive effect causing the disenfranchisement of the public shareholders as to the vote on the Merger, the public shareholders are entirely disenfranchised by not being allowed to vote on the Share Exchange, itself, in violation of N.C.G.S. § 55-11-03. See infra pp. 11-13.

D. The Share Exchange Is Invalid Under N.C.G.S. §§ 55-11-02 and 55-11-03

Defendants cite to Winters v. First Union Corp., 2001 NCBC 08 (N.C. Super. 2001) (see WF Opp., at 7), for the proposition that the Defendants' actions in agreeing to, and adopting, the Share Exchange are entitled to the deference of the business judgment rule. However, Winters supports Plaintiff's Motion, not Defendants' opposition. While the Winters Court explained that under North Carolina law, "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors," id. ¶ 15, the Court also recognized that "[t]he North Carolina statutes also provide that the board submit plans of merger or share exchange to the shareholders for vote." Id., citing N.C.G.S. § 55-11-03.

N.C.G.S. § 55-11-03, which the Winters Court cited, requires that "after adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange,

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[11]Defendants deny that the vote on the Merger is a "done deal," but throughout their briefs, they take a contrary view by pointing to the need for "assurance" the merger would take place. WF Opp. at 3; see also Wachovia Opp. at 9 ("providing the assurance the merger could close").

shall submit the plan of merger (except as provided in subsection (g)) or share exchange for approval by its shareholders." (Emphasis added.) A "share exchange" is defined in N.C.G.S § 55-11-02 as occurring where a "[a] corporation … acquire[s] all of the outstanding shares of one or more classes or series of another corporation...." The Official Comment to N.C.G.S. § 55-11-03 states: "In the case of a share exchange . . . the transaction must always be approved by the shareholders of the corporation whose shares are being acquired." (See Green Aff. Ex. H; emphasis added.) Subsection (g) of N.C.G.S. § 55-11-03 sets out four requirements that must each be met for an exception to the requirement of shareholder approval of a plan of merger.[12] One of those requirements is that "[t]he number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger."

Here, the Share Exchange violates N.C.G.S. § 55-11-03's requirement that a share exchange transaction be submitted to a vote of Wachovia's shareholders. Under the Share Exchange, Wells Fargo obtained all of the entire Series M of Wachovia's Class A Preferred Stock, a single class (see Green Aff. Ex. D, at § 2), thereby making it subject to § 55-11-02. The Share Exchange was not submitted for approval by Wachovia's shareholders. Thus, under

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[12]Unlike the exception to the New York Stock Exchange Rules that allows an audit committee of a board of directors to circumvent the NYSE's voting requirement under certain exigent circumstances, N.C.G.S. § 55-11-03 has no such exception.

N.C.G.S. § 55-11-03, the Share Exchange clearly violates North Carolina statutory law and should be invalidated.[13]

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

The restrictive fiduciary out provision, when it is combined with the Share Exchange, prevents Wachovia's directors from complying with their continuing fiduciary duties.[14] Thus, while technically the Board could withdraw its recommendation if it received a superior offer, as discussed above, no such superior offer is possible given the fact that the Share Exchange cannot be redeemed until at least eighteen months after the Merger is voted. Even without regard to the Preferred Shares, the inability of the directors to withdraw from the Merger in the event of a superior offer makes the fiduciary out provision unduly restrictive as discussed in Plaintiff's Opening Brief at 20-21.

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[13]Further, the North Carolina Court of Appeals has made clear that failure to conform to the statutes governing shareholder votes "constitutes a breach of a director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority." Loy v. Lorm Corp., 52 N.C. App. 428, 435 (N.C. App. 1981); see also Clark v. B.H. Holland Co., 852 F. Supp. 1268, 1275 (E.D.N.C. 1994) ("the North Carolina General Statutes…require a shareholder vote before consummating a fundamental change in a corporation… [citing to N.C.G.S. § 55-11-03] Under North Carolina law, failure to comply with the statutory procedures required for a corporate merger 'constitutes a breach of a director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority.'"), citing to Loy, 52 N.C. App. at 435.

[14]In fact, last month Wachovia made substantially the same point on pages 9-17 of its Reply Memorandum in further support of its TRO and preliminary injunction in Wachovia Corp.v. Citigroup Inc., 08 CV 8503 (LAK) (S.D.N.Y.). Excerpts from that reply memorandum are attached to the Green Affidavit as Exhibit I.

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

Defendants go to great length to explain the number of meetings the Board had during the two-week time period prior to the announcement of the Merger (see, e.g., Wachovia Opp. at 13 ("Wachovia's board met ten times before it met and approved the Wells Fargo merger during the night of October 2-3.") However, Defendants gloss over the fact that the Board considered the deal with Wells Fargo in only one meeting over the span of a couple of hours. Defendants contend that during that one meeting, the Board was informed that the Share Exchange had been negotiated down from more than 50% to 39.9%. (Wachovia Opp. at 2, 9.) However, there is no evidence that any such negotiation occurred, and it is clear that the Board did not negotiate any terms of the agreement whatsoever. In fact, the Preliminary Proxy is silent as to any such negotiations and both the Steel Affidavit and the Preliminary Proxy disclose that the agreement that Wachovia received on October 2 was, at the insistence of Wachovia's General Counsel, already executed by Wells Fargo.

Moreover, based on the factual description in the Preliminary Proxy and in the Young Affidavit, there is no evidence that at that Board meeting, there was any discussion by the Board of any of the following:

-- that because of newly promulgated tax regulations, Wells Fargo stood to benefit more than $25 billion by entering into the deal (enough to more than cover the transaction's entire cost);

-- that because of the inadequate "fiduciary out" clause, the Board had no means to terminate the Merger if changed circumstances so warranted;

-- that, if the Merger were not approved by Wachovia's shareholders, the Share Exchange could not be redeemed for at least eighteen months;

-- that because of the Share Exchange and the ineffective "fiduciary out" clause, a third-party bidder was precluded from coming forward;

-- that the bailout plan had already passed the Senate and was expected to pass the House within hours of the Board meeting; whether the bailout could be available to Wachovia; and whether to wait to make a final determination as to the Merger Agreement until after the bailout plan was passed;[15] and

-- whether to go to the FDIC and ask for more time to negotiate better terms since the Board had only just received the Merger Agreement and in light of the newly possible substantial tax benefits to Wells Fargo.

While the Board was certainly aware of the possibility of receivership, it clearly was not well informed concerning the terms of the Merger Agreement, including the draconian deal-protection devices that they may have unwittingly agreed to.[16]

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[15]In fact, the Preliminary Proxy discloses that the Board specifically instructed both of its financial advisors not to consider or evaluate the Bailout and any potential effect on Wachovia. (See Green Aff. Ex. J, at 41, 47.) Moreover, the financial advisors concede that they did not use normal valuation methodologies. (Id., at 38-50.)

[16]Defendants argue that invalidating the Share Exchange would constitute mandatory relief and, therefore, "cannot be awarded" by the Court. (WF Opp. at 18.) Defendants ignore, however, that in First Union, the Court granted similar mandatory relief, i.e., invalidating the non-termination clause, in the context of, among other things, a motion for a preliminary injunction. See 2001 NCBC 9A, at ¶ 1. In any event, if the Court agrees that the deal protection devices are coercive and/or impair the Board's ability to fulfill its statutory duties if the Merger does not pass, on the record, it can grant final injunctive relief.

II. ABSENT AN INJUNCTION, PLAINTIFF AND THE CLASS WILL BE IRREPARABLY HARMED, AND THE BALANCE OF HARDSHIPS FAVORS AN INJUNCTION

In arguing that the balance of hardships tips against Plaintiff, Defendants contend that Plaintiff is asking the Court to indulge in his speculation that Wachovia will be better off without the present Merger and might receive a better offer. Defendants have grossly distorted Plaintiff's argument.

Plaintiff does not ask the Court to find that this Merger will cause harm to Wachovia and its shareholders because he believes there may be a better deal available or that remaining independent is preferable. Nor does Plaintiff dismiss the possibility that the failure to approve the Merger exposes Wachovia to risks of failure if another bidder or the Treasury does not come to its aid. Plaintiff is not omniscient and neither are Defendants or the Court.

However, Plaintiff submits that the decision whether to approve the Merger should not be forced on the shareholders who are, under our system of corporate governance, entrusted to make the decision without coercion and who must bear the consequences of their action to approve or disapprove.

Since Plaintiff does not seek to block the Merger, Defendants' arguments about the likelihood of a bad outcome if the Merger is approved should be addressed to the shareholders, not this Court.[17] In seeking to invalidate the Share Exchange, Plaintiff is not affecting the value

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[17]Defendants rely on Marcoux v. Prim, 2004 NCBC 5, ¶ 64 (N.C. Super. Ct. 2004), for the proposition that "in the absence of a competing offer a plaintiff must make a particularly strong showing on the merits to obtain a preliminary injunction because an injunction in such circumstances risks significant injury to shareholders." (Wachovia's Opposition Brief ("Wachovia Br.") at 11-12.) In Marcoux, plaintiff moved for a preliminary injunction "to prevent the shareholders from voting on the Merger." 2004 NCBC 5, at ¶ 1. Here, Plaintiff does not seek to stop the vote or, for that matter, to stop the Merger.

or the structure of the Merger to be voted on. As in First Union, the policy concerns to prevent coercion affecting the vote and to prevent tying the Board hands by a restrictive fiduciary out provision are "especially significant." Therefore, there is irreparable harm which clearly outweighs any possible harm that may occur by granting the Motion.[18]

III. A BOND SHOULD NOT BE REQUIRED IN THIS CASE

Defendants' argument that Plaintiff cannot obtain a preliminary injunction because he cannot afford a multi-billion dollar bond (WF Opp., at 18-20) is a red herring. Plaintiff is not seeking to block the Merger, but is only seeking a full and fair vote for the shareholders. Therefore, any possible damage to Wachovia and/or Wells Fargo due to the possible failure of the transaction would be due to the shareholder vote – not the injunction. Defendants argue that the potential damages are enormous - "$11.8 billion" worth. WF Opp. at 19. However, if, as Defendants argue, the deal is not locked up in favor of Wells Fargo, then any damage to Defendants is purely speculative, since the shareholders could vote down the Merger. The only way Wachovia might potentially be harmed by granting the Motion is if Wells Fargo voluntarily elects to walk away from the Merger. Wells Fargo suggests, but does not represent, that it might withdraw from the Merger if a ruling invalidated its Preferred Shares, or prevented it from voting its shares. This seems remote given the advantageous conditions under which it negotiated the terms of the Merger, the tax advantages, and their views of the benefits. (See supra pp. 2-4.) If

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[18]Wells Fargo also speculates that letting the public shareholders determine their fate without the Wells Fargo 40% block (which they concede almost certainly assures approval of the Merger) will cause harm to the banking system and the public. It seems obvious, however, if Wachovia remains independent and poses such a threat to the banking system, that the governmental bodies entrusted with the job of protecting the banking system, would not fail to recognize such danger and provide federal aid if necessary.

that occurred, any potential damage would be due to Wells Fargo's choice, since the injunction does not affect the Merger or its value to Wells Fargo or require Wells Fargo to withdraw.[19]

CONCLUSION

For the foregoing reasons as well as those in Plaintiff's opening papers, Plaintiff respectfully requests that the Court enter an order: (1) invalidating the Share Exchange; and (2) preliminarily enjoining 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 21, 2008

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[19]It is worth noting that the amount of the injunction bond required in a class action in this Court brought by Wachovia's shareholders, interestingly represented by Wachoiva's counsel here, to enjoin Citigroup from asserting its rights under its alleged exclusivity agreement with Wachovia was only $5,000. See Green Aff., Ex. K.

I hereby certify that the foregoing brief complies with the Court's Order dated November 20, 2008, granting Plaintiff's motion to expand the word limitation to a maximum of 5,625 words, including footnotes.

s/ Carl L. Stine
Carl L. Stine