STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 08-CVS-22632

IRVING EHRENHAUS, On Behalf of Himself and All Others Similarly Situated

Plaintiff,

v.

JOHN D. BAKER, II, et al.,

Defendants

BRIEF OF DEFENDANT WACHOVIA CORPORATION AND OF INDIVIDUAL DEFENDANTS OPPOSING PRELMINARY INJUNCTION

The directors of Wachovia Corporation (the individual defendants in this action, herein the "directors") had and have a duty to act in good faith and with due care and loyalty under G.S. § 55-8-30. A director must discharge these duties "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances." *Id.* Plaintiff contends that the directors breached these duties on October 3, 2008 by approving the merger agreement between Wachovia and Wells Fargo & Company, and seeks injunctive relief. Plaintiff is not entitled to an injunction because he has no likelihood of success on the merits. Under the circumstances facing the Wachovia directors when they approved the Wells Fargo merger, they fulfilled their statutory duties and are entitled to the full deference accorded by the business judgment rule. Moreover, injunctive relief would provide no benefit to plaintiff or other shareholders because no option superior to a merger with Wells Fargo is available to Wachovia. Plaintiff's notion that government funding might allow Wachovia to stay independent is pure speculation and has no factual basis.

In the three-week period prior to October 3, Wachovia experienced an acute liquidity crisis that, as prior briefs have explained, placed Wachovia on the brink of receivership. Lehman Brothers and Washington Mutual failed, and their stockholders received nothing. Without the Wells merger, Wachovia either had to pursue a sale of assets to Citigroup that would have left the remaining company on the verge of insolvency, or go into FDIC receivership and suffer a complete and certain loss of its shareholders' equity. During that period, financial market participants, depositors, and other counterparties had begun refusing to deal with Wachovia. In order to survive, Wachovia needed to afford assurance to the markets, regulators, depositors, and counterparties that the Wells merger was certain to happen, so Wachovia negotiated a merger agreement that afforded Wells no right to terminate based on material adverse changes and that paved a smooth road to consummation of the merger. The current value of the merger to Wachovia's shareholders exceeds $11.8 billion. Wells Fargo's offer was conditioned upon the provisions of the merger agreement to which plaintiff objects – 39.9% of the vote on the merger (negotiated down from over 50% by Wachovia), and a mandatory shareholder vote. These provisions were part and parcel of an overall agreement intended to secure Wachovia's future and deliver value to Wachovia shareholders.

The merger agreement had the desired effect of providing assurance to third parties that allowed Wachovia to obtain access to capital and recover stability. As this Court is aware from prior filings, banking regulators approved the merger almost immediately, expediting their normal review procedures. No other suitor for Wachovia has emerged or is realistically imaginable – and if a superior alternative were to materialize, the new suitor would have access to the courts. A preliminary injunction is not proper, necessary, or appropriate here.

I. FACTS

While Wachovia's officers and directors had been carefully monitoring the troubled financial markets for months, and considering strategic alternatives, rapidly unfolding external events occurred in mid-September 2008 that quickly accelerated the challenges facing Wachovia. On September 15, Lehman Brothers announced that it was making a bankruptcy filing, and Bank of America announced that it was acquiring Merrill Lynch. On September 16, the U.S. government announced that it would provide substantial assistance to AIG in exchange for a 79.9% equity interest and a right to veto all dividends. Young Aff., ¶ 3.[1]

The Wachovia board met at 6:00 p.m. on Tuesday, September 16 and considered the following options: (i) dispose of assets previously considered to be core; (ii) raise primary equity; (iii) combination of (i) and (ii); (iv) attract a strategic investor; (v) combine with another company; and (vi) exclusively pursue a strategy announced in July for preserving and protecting capital and liquidity by continuing to reduce risks and expenses and consider possible disposition of non-core assets. Recognizing that option (vi) was not viable, the board directed management to explore aggressively the other five options. Young Aff., ¶ 4. Management kept the board well and promptly informed of the events, efforts and developments that occurred both before and after September 16, and obtained guidance and direction from the board as appropriate on a timely basis. The board had nine formal meetings from Thursday, September 18 through

[1] Certain facts set forth herein are derived from two sections of the Preliminary S-4 (the "S-4") that Wachovia filed with the Securities and Exchange Commission on October 31, 2008: Background of the Merger (pp. 37-44) and Wachovia's Reasons for the Merger and Recommendation of the Wachovia Board (pp. 44-46). In her Affidavit filed herewith, Wachovia director Dona Davis Young confirms that these sections of the preliminary S-4 accurately summarize the information that was provided to the board of directors with respect to the matters at issue in this lawsuit. For facts outside the S-4, the source of the facts is noted in the text.

Monday, September 29 before meeting for a tenth time on October 2 to consider the Wells Fargo proposal. Young Aff., ¶ 5.

During the five-day period between Wednesday, September 17 and Sunday, September 21, Wachovia entered into confidentiality agreements with and conducted due diligence with two potential merger partners. By the evening of September 21, discussions with both potential partners had reached an impasse. One of the potential partners declined to proceed without federal assistance, which the government did not commit to provide. Neither of these parties have returned or made subsequent bids. Young Aff., ¶ 5; S-4 at 38-39.

Wachovia simultaneously attempted to raise capital, sell assets, or obtain a large investment by a strategic investor. Wachovia signed a confidentiality agreement with a potential investor on September 18, but discussions never progressed beyond the exploratory stages. Management engaged in preliminary conversations with other potential private investors during the September 19-21 period in preparation for a possible public offering or private placement during the week of September 22. Young Aff., ¶ 5; S-4 at 39. Wachovia also actively engaged in a process to find purchasers for certain businesses. *Id.*

During the week of September 22, the marketplace continued to deteriorate. On September 23, the breadth of the Federal Reserve's assistance to AIG was announced. Young Aff., ¶ 5; S-4 at 39. On Thursday, September 25, the Office of Thrift Supervision announced the seizure of Washington Mutual Bank and its placement into FDIC receivership. *Id.* Like the Lehman Brothers stockholders, Washington Mutual's stockholders received nothing for their equity. On the evening of Thursday, September 25, the tentative agreement in Congress regarding the federal bailout collapsed in talks at the White House.

These events resulted in significant pressure on Wachovia, as evidenced by the credit default swap market. Credit default swaps reflect the market perception of the underlying credit risk of a company. By September 26, the cost to purchase credit default swap protection on Wachovia had increased to 1500 basis points (15%), up from 106 basis points on January 2, 2008 and from 670 basis points on September 25, 2008. Young Aff., ¶ 5; S-4 at 50. The cost of procuring credit default swap protection on Bear Stearns had not reached 1500 basis points when Bear Stearns' merger with JP Morgan Chase & Co. was announced. *Id.* at 57; *see also id.* at 50 (comparison to other institutions). Employees from Wachovia's Treasury and Balance Sheet Management group informed the board on September 26 that Wachovia's liquidity position (cash available to meet current obligations) had declined alarmingly and that the Lehman bankruptcy, Washington Mutual's failure, and other recent negative events had now made it impossible for Wachovia to access its normal sources of liquidity. Young Aff., ¶ 6.

At the meeting on Friday, September 26, management advised the board that discussions had commenced with Citigroup and Wells Fargo regarding a possible merger. Young Aff., ¶ 5; S-4 at 40. Through the weekend, Wachovia actively explored merger options with both Citigroup and Wells Fargo, including sending top management to New York for due diligence and negotiations. Because of its liquidity position, management believed it likely that Wachovia had to announce a merger transaction by Monday morning, September 29. Young Aff., ¶ 5; S-4 at 40. On Sunday afternoon, September 28, Wells Fargo determined that it could not complete the due diligence it believed necessary and prudent within the compressed timeframe, and informed Wachovia that it would not make a proposal for a transaction without government assistance. Young Aff., ¶ 5; S-4 at 40.

Later that evening, the FDIC contacted Wachovia. Chairman Bair of the FDIC informed Wachovia that the federal government had determined that the Wachovia situation posed systemic risk to the banking system. She indicated that the FDIC intended to exercise its powers under Section 13 of the Federal Deposit Insurance Act to effect an "open bank assisted transaction" with another financial institution, which the FDIC would select through a bidding process to be conducted over the next several hours. Young Aff., ¶ 5; S-4 at 40.[2] A telephonic meeting of the board took place at approximately 9:00 p.m. on September 28. Management advised the board of the current situation and the FDIC's position. Young Aff., ¶ 5; S-4 at 40-41.

At approximately 12:30 a.m. on Monday, September 29, Wachovia submitted its own bid, proposing that it receive FDIC assistance in the form of loss-sharing on a designated loan portfolio, grant the FDIC equity ownership in Wachovia, and raise approximately $10 billion in capital in a public offering. Wachovia urged the FDIC to accept this proposal, and, based on the state of preparation for the capital raising transaction that Wachovia had considered the previous week, indicated that it was prepared to move quickly to implement it. Young Aff., ¶ 5; S-4 at 41.

At approximately 4:00 a.m. on Monday, September 29, Chairman Bair informed Wachovia of the FDIC's decision not to accept Wachovia's proposal and its further decision that Citigroup would acquire Wachovia's banking subsidiaries. Chairman Bair directed Wachovia to proceed to negotiate terms with Citigroup, with an announcement to occur before the start of business that day. Several hours earlier, Citigroup had delivered what was styled a draft agreement-in-principle to Wachovia, which reflected Citigroup's proposal. Young Aff., ¶ 5; S-4 at 41. Citigroup proposed to acquire only a portion of Wachovia's assets, leaving the Evergreen asset management business and

[2] As the defendants' brief opposing expedition filed on October 28, 2008 explains, Section 13 authorizes the FDIC to effect an open bank assisted transaction only in extraordinarily exigent circumstances. The FDIC had never before invoked its Section 13 authority, and its decision to do so here illustrates the extreme gravity of Wachovia's situation.

Wachovia's retail brokerage operations with Wachovia Corporation. The board met telephonically at 6:30 a.m. on Monday, September 29, and management advised the board of the events that had developed during the night. The board voted in favor of proceeding with Citigroup. Young Aff., ¶ 5; S-4 at 41.

Wachovia negotiated with Citigroup during the week of September 29, but Citigroup's insistence on separating Wachovia's businesses proved problematic. Young Aff., ¶ 5; S-4 at 42.[3] On October 1, Citigroup insisted that the parties be prepared to execute the definitive agreements no later than Friday, October 3. *Id.* As of the evening of October 2, significant substantive areas of disagreement remained, as Citigroup took positions that were inconsistent with the non-binding agreement-in-principle. Young Aff., ¶ 8. Without the certainty of a transaction in hand, Wachovia's liquidity continued to deteriorate. The announcement of the proposed transaction between Wachovia and Citigroup on September 29 had not stemmed the erosion of the financial markets' confidence in Wachovia. Young Aff., ¶ 9.

At approximately 7:15 p.m. on October 2, Chairman Bair advised Wachovia that Wells Fargo would propose a merger transaction that night for the whole company, which would not require government assistance and which would result in Wachovia shareholders receiving the equivalent of $7.00 of Wells Fargo common stock for each share of Wachovia common stock. She encouraged Wachovia to give serious consideration to that offer. Wells Fargo forwarded a signed merger agreement approved by its board shortly after 9:00 p.m. and indicated that its proposal would be disclosed publicly the following morning. The Wachovia board met to consider the Wells proposal at 11:00 p.m. that night. Young Aff., ¶ 7; S-4 at 42-43.

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[3] As the S-4 explains, Citigroup insisted that substantial liabilities be retained by Wachovia Corporation, and as a result Wachovia would at best have been left on the brink of insolvency, with little or no equity value for its shareholders. Young Aff., ¶ 5; S-4 at 43.

Despite diligent, persistent, and continuous efforts after the board meeting on September 16 to raise capital, sell assets, or identify a business combination with another entity, Wachovia had been unable to reach any definitive agreement with a third party that would allow Wachovia to resolve its liquidity issues and avoid FDIC receivership. Wachovia had not been successful in reducing the proposed Citigroup transaction to a definitive and binding agreement. The merger terms proposed by Wells Fargo were far superior to any terms that Citigroup had indicated (or subsequently indicated) it would be willing to accept. In addition, during the October 2-3 board meeting, the board was informed that negotiations with Citigroup had proven to be extremely difficult, with Citigroup insisting on terms that raised significant concerns about whether the surviving Wachovia entity would be solvent and viable, even if a transaction with Citigroup could be finalized. Young Aff., ¶ 8.

The Wells Fargo proposal presented a number of benefits to Wachovia that were far superior to the Citigroup proposal (even assuming it could have been finalized) and to receivership. The merger agreement did not have a "material adverse change" clause and provided Wachovia a clear, unimpeded path to consummation of a merger with Wells Fargo. This was very important because Wachovia was suffering a severe liquidity crisis. The board had been informed that Wachovia's excess liquidity (*i.e.,* cash available to meet current obligations) had declined to alarming levels prior to October 3, 2008, including significant declines during the week of September 28, 2008, even after the proposed Citigroup transaction was announced on the morning of the 29th. Unless the financial markets, customers, and counterparties were confident that the Wells Fargo merger could be and was likely to be consummated, as of the night of October 2-3, it was likely that Wachovia would not be able to fund normal banking activities going forward, and thus would again face the very real prospect of FDIC receivership. Young Aff., ¶ 9.

At the October 2-3 meeting, the board was informed that Wachovia had obtained the best available merger terms. In return for the monetary and non-monetary benefits provided to Wachovia and its shareholders by the merger, Wells Fargo had initially proposed a Share Exchange Agreement pursuant to which it would be granted in excess of 50% of the voting power on the merger, but agreed to accept a reduction to 39.9%. The board was informed that these terms were intended by Wells Fargo to provide confirmation to the market that the merger could be closed and thereby prevent further deterioration in Wachovia's financial condition as a result of uncertainty. In return for the voting power granted to Wells Fargo, and the limits on the "fiduciary out provisions," Wachovia was able to obtain approximately $11.8 billion in value and important non-monetary terms that were and are very valuable and attractive to Wachovia and its shareholders (*e.g.*, no material adverse change provision and a structure providing the assurance the merger could close that was necessary to reassure the markets, regulators, customers, and counterparties).[4] The board was aware that the Merger Agreement did not include a break-up fee, a term often included to benefit the acquirer. One or more directors asked if further negotiation with Wells Fargo in an attempt to obtain more favorable terms would be prudent. The board's advisors uniformly advised against such negotiations under the circumstances, particularly in light of the time constraints faced by Wachovia. Young Aff., ¶ 10.

Before approving the merger, the board discussed the urgent need for Wachovia to be able to obtain funding to sustain its operations pending a closing of the merger. The board knew that Wachovia needed to obtain significant immediate funding from Wells Fargo and also needed to

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[4] A material adverse change provision is a clause commonly found in merger agreements that gives the acquiring company the right to walk away from the deal in the event the target company experiences a significant adverse event or a material decline in value in the time period between signing and closing. The absence of such a clause in the Wells Fargo-Wachovia merger agreement was a significant concession by Wells in light of the difficulties that Wachovia faced at that time. *See* Young Aff., ¶ 9.

provide substantial assurance to the financial markets and the Federal Reserve that the merger with Wells Fargo could be closed so that other sources of funding could be accessed as well. Absent such funding, it was extremely unlikely that Wachovia would be able to avoid receivership pending consummation of a merger with Wells Fargo. The company's advisors and Mr. Steel told the board they believed that unless a definitive agreement was signed by the end of the day Friday, October 3, the FDIC was prepared to place Wachovia's banking subsidiaries into receivership. Young Aff., ¶ 11. Receivership would have destroyed the value of Wachovia as a business franchise and completely wiped out its shareholder value.

Wachovia's financial advisors (Goldman Sachs and Perella Weinberg) informed Wachovia that the financial analysis they normally would perform in connection with a merger would not be meaningful for Wachovia because of the extraordinary circumstances faced by Wachovia and its severe liquidity crisis. These advisors indicated that extensive analysis was not required to confirm that the Wells Fargo merger proposal was fair to Wachovia's shareholders. These advisors also informed the board that no third parties were likely to appear and make a proposal superior to the Wells Fargo merger from the perspective of Wachovia and its shareholders. Young Aff., ¶ 13.

Relying on its advisors and informed by its own knowledge of the circumstances, the board approved the Wells Fargo merger. In approving the merger, the board was under significant time constraints imposed by the prospect of receivership; however, the board had thoroughly explored all options available for raising capital or entering into a business combination during the weeks preceding the meeting. Thus, the board was able fully and properly to consider the merger in the limited time available under the circumstances. Young Aff., ¶ 12.

On October 3, upon the announcement of the Wells Fargo merger, Wachovia's stock price jumped to $7.05 from the prior day's close of $3.91, and closed at the end of the day at $6.21.

Merritt Aff., Exh. 3. While the Wells Fargo merger immediately opened access to credit that afforded the liquidity Wachovia urgently required, Young Aff., ¶ 11, Citigroup announced that it would challenge the merger and attempt to force Wachovia to finalize an inferior transaction with it. This announcement caused disruption and damage to Wachovia until October 9, when Citigroup announced that it would discontinue attempts to enjoin the merger. Merritt Aff., Exh. 2 at ¶¶ 10-14.[5]

II. ARGUMENT

In *Marcoux v. Prim*, this Court required a plaintiff seeking to preliminarily enjoin a merger to show (a) a reasonable likelihood of success on the merits; (b) a reasonable threat of irreparable injury if the Court does not issue an injunction; and (c) that the threat of injury from not issuing the injunction outweighs the possible injury from issuing the injunction. 2004 NCBC 5, ¶ 62. As the Court explained, "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

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[5] Citigroup's suit seeking $80 billion in damages remains pending in the U.S. District Court for the Southern District of New York. Wachovia and the directors are defending the suit, in part, on the basis that EESA § 126(c) invalidates any provision in its exclusivity agreement with Citigroup that would otherwise have prevented Wachovia from accepting the Wells Fargo proposal and that Citigroup cannot enforce any provision that would have required the Wachovia directors to violate their fiduciary obligations. *See First Union v. SunTrust* ¶¶ 156 & 160; Restatement (Second) of Contracts § 193 (agreement requiring fiduciary to breach his duty is unenforceable). These issues are briefed and awaiting decision by Judge Kaplan of the Southern District.

Plaintiff's latest filing has placed no reliance on his earlier argument that EESA § 126(c) bars the Share Exchange. *See* Pls. Br. at 20 n.11. Section 126(c) does not apply here for many reasons, including because plaintiff has identified no agreement "in connection with" a transaction in which the FDIC allegedly is exercising its authority under § 11 or § 13 of the Federal Deposit Insurance Act (rather than for the reason suggested by the Court in footnote 7 of its November 3, 2008, Order & Opinion regarding plaintiff's request for expedited discovery). In light of the Southern District action (which directly calls upon the federal court to construe EESA), and in light of plaintiff's cursory treatment of this point in their motion papers, the Wachovia defendants respectfully submit that the Court need not address the federal issues surrounding Section 126 in order to resolve the pending application.

injunction in such circumstances risks significant injury to shareholders." *Id.* ¶ 64; *see also First Union Corporation v. SunTrust Banks, Inc.*, 2001 NCBC 09, ¶ 70 (explaining that the harm to the shareholders must be weighed against the benefits before any injunctive relief is awarded). North Carolina precedent outside the merger context is in accord. *See Harris v. Pinewood Development Corp.*, 176 N.C. App. 704, 706, 627 S.E.2d 639, 641 (2006). Plaintiff has not made the necessary showing, and injunctive relief should be denied.

A. Plaintiff cannot show likely success on the merits.

This Court's opinion in *First Union v. SunTrust, supra,* provides the framework for analysis of this case. As the Court explained, "[i]n reviewing deal protection measures in a stock-for-stock merger subject to shareholder approval, the court will first review the transaction, including the adoption of deal protection measures, to determine if the directors have complied with their statutory duty of care under N.C.G.S. § 55-8-30." *First Union v. SunTrust*, ¶ 70. Section 55-8-30 provides that:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.

N.C.G.S. § 55-8-30(a). In discharging these duties, directors are entitled to rely upon reports and information from officers, employees, counsel, accountants, and financial experts. N.C.G.S. § 55-8-30(b).

1. *Plaintiff cannot overcome the presumption of the business judgment rule.*

As this Court recognized in its Order & Opinion entered on 3 November 2008, to prevail on a breach of fiduciary duty claim, "Plaintiff must overcome the deference accorded Defendants' actions by North Carolina's business judgment rule." Order at 9. This rule creates an initial presumption that the directors acted with due care, in good faith, and with the honest belief that their action was in the best interest of the corporation. *Id.* Absent a rebuttal of the initial presumption, the business judgment rule creates a powerful substantive presumption that a decision by a loyal and informed board will not be overturned unless it cannot be attributed to any rational business purpose. *Id.* Thus, the rule protects corporate directors from being second-guessed by a court when they exercise reasonable care and business judgment. *Id.*

The plaintiff has submitted no evidence to overcome the evidentiary presumption under the business judgment rule that, when approving the Wells Fargo merger, the directors acted with due care and in good faith in the honest belief that their action was in the best interests of Wachovia. In fact, plaintiff does not even mount a serious attack on the board's due care or good faith. As was true in *First Union v. SunTrust*, the overwhelming majority of Wachovia's board consists of outside directors (16 of 17) with not even any arguable personal interest or bias of any type. *See First Union v. SunTrust*, ¶ 132 (noting that 13 of 15 directors were outsiders, which weighed heavily in favor of deference to the board's decisions). After the failure of Lehman Brothers and the subsequent cascade of unexpected events that resulted in an immediate and severe liquidity crisis at Wachovia, Wachovia's board met ten times before it met and approved the Wells Fargo merger during the night of October 2-3. The board was fully informed as to the critical situation in which Wachovia found itself.

By the time the board met at 11:00 p.m. on October 2, it was abundantly clear that the Wells Fargo proposal presented by far the best option available to Wachovia. Wachovia had explored possible business combinations with third parties, had attempted to raise capital and sell assets, and had made a proposal to the FDIC for government assistance that would have allowed Wachovia to remain independent. Wachovia's nonbinding agreement-in-principle with Citigroup contemplated a transaction likely to leave the corporation near insolvency even if it could be finalized and closed – which was far from certain, given the progress of negotiations.[6] Wachovia, through no fault of the board or management, was caught in a liquidity crisis caused by the events of the prior two weeks (Lehman, AIG, Merrill, WaMu, and the initial failure of the bailout bill to pass the House of Representatives). Not surprisingly, the Wachovia board chose to merge with Wells.

Under these circumstances, no credible argument can be made that the board did not act with due care – or was not fully informed – when it met at 11:00 p.m. on October 2 to consider the Wells proposal. The only alternatives to the merger with Wells Fargo were receivership or a much less attractive transaction (which had yet to be reduced to a final binding agreement) with Citigroup. Wachovia had fully explored all five options identified at the September 16 board

[6] Plaintiff seizes on a purported "contradiction" between the affidavit of Robert Steel in the New York actions and the S-4, arguing that, per Steel's affidavit, Wachovia was being pressured by Citigroup and federal regulators to sign definitive agreements with Citigroup by Monday, October 6, and that therefore Wachovia did not need to accept the Wells Fargo offer on the night of Thursday, October 2. (Pl. Br. at 8-9). In fact, there is no such discrepancy. As noted in the Steel affidavit, he reported to the board on October 2 that he believed unless a definitive merger agreement was signed by the end of the day Friday, October 3, the FDIC was prepared to place Wachovia's banking subsidiaries into receivership. Merritt Aff., Exh. 1 at ¶ 19. Plaintiff's confusion is caused in part by his failure to note that, as set forth clearly in the Carroll Declaration and in the S-4, "on Wednesday, October 1, Citigroup insisted that the parties be prepared to execute the definitive agreements no later than Friday, October 3 in order for Citigroup to commence a $10 billion capital raise that was contemplated in the non-binding agreement-in-principle." Young Aff., ¶ 5; S-4 at 42; Merritt Aff., Exh. 2 at ¶ 6.

meeting and the board was informed of these unsuccessful efforts. No other potential options were on the horizon, or even reasonably within anyone's contemplation. Moreover, the board had to act: delaying a decision exposed Wachovia to the immediate risk of receivership and total loss of shareholder equity. In contrast, Wells offered the Wachovia shareholders an agreement with a value of $7 per share at market close on October 2 (a total current value to the shareholders of approximately $11.8 billion) .

At the October 2-3 meeting, the board asked the proper questions. The board's advisors strongly discouraged any attempt to further negotiate with Wells Fargo, given the precarious position in which Wachovia had found itself. The board recognized that Wachovia needed to provide immediate assurance to the financial markets, depositors, counterparties, and the federal regulators that a merger with Wells Fargo could and would be closed, in order to prevent continuing deterioration in Wachovia's business and financial position. The agreement negotiated with Wells Fargo accomplished this: it had no material adverse change provision allowing Wells Fargo the opportunity to terminate it.[7] Fundamentally, the agreement struck a balance between the interests of Wachovia and Wells Fargo in a way calculated to give more value to shareholders and to improve Wachovia's financial position.

While the agreement afforded Wells Fargo 39.9% of the votes to be cast on the merger with the issuance of preferred shares, Wachovia had negotiated the percentage down from over 50%, thereby affording an opportunity for the Wachovia shareholders to reject Wells Fargo in the event an unexpected, superior alternative were to emerge. Moreover, the votes afforded to Wells Fargo provided benefit to Wachovia. They served the important purpose of providing

[7] The only contingency relating to the financial health of Wachovia under which Wells Fargo is not obligated to consummate the merger is if Wachovia or one of its significant subsidiaries files for bankruptcy or reorganization, becomes insolvent, or becomes subject to conservatorship or receivership. *See* Young Aff., ¶ 5; S-4 at A-10 (§3.8 of merger agreement).

assurance to the capital markets that the merger could be consummated – thereby providing Wachovia the stability necessary to access sources of liquidity in the days following October 3 and averting the entire loss of Wachovia's franchise to receivership.

Wachovia's financial advisors provided opinions that the merger was fair and reasonable, and emphasized that, under the exigent circumstances, normal valuation methodology had no relevance. Although the board had limited time in which to consider the situation, it had met numerous times during the prior two weeks, explored all conceivable options, and was fully knowledgeable about the situation.[8]

2. *Plaintiff cannot show clear and convincing evidence of coercion.*

Given the prudence, diligence, and care with which the board acted – and the board's complete focus at all times on the best interests of Wachovia and its shareholders – plaintiff cannot come close to overcoming the presumption of the business judgment rule and show that a breach of the duties under N.C.G.S. § 55-8-30 has occurred. As *First Union v. SunTrust* explains, "[i]f no breach of duty is proven, the action of the directors is entitled to a strong presumption of reasonableness and validity, including non-coercion, and the court should not intervene *unless the shareholder can rebut that presumption by clear and convincing evidence* that the deal protection provisions were actionably coercive, or that the deal protection provisions prevented the directors from performing their statutory duties." *First Union v.*

[8] Plaintiff argues that Wachovia's officers and sole inside director – Mr. Steel – are personally invested in the merger because of their stock options and golden parachutes. The Young Affidavit completely refutes plaintiff's arguments in this regard. Young Aff., ¶ 14. As the Affidavit of Anthony Augliera explains, Mr. Steel will receive no severance as a result of the merger. *Id.*, ¶ 4. Options previously granted to him are converted to options in Wells Fargo shares and will vest (as they would have had he remained at Wachovia), but they have no value today and their value in the future is extremely speculative because the options vest at exercise prices far higher than the current price of Wells Fargo shares. Plaintiff's calculations of the benefits that Mr. Steel will allegedly receive have no basis in reality. Augliera Aff., ¶¶ 5 - 7.

SunTrust, ¶ 70 (emphasis added). "[T]he court is looking to determine if the deal protection measures impermissibly penalize shareholders for voting against the deal. The courts also look to see what the bidder gave or the shareholders of the acquired company received for the deal protection measure." *Id.* ¶ 86. Moreover, "[r]ather than look at other cases decided on different facts, or other deals under different circumstances, the court [must] look[] at what is actually happening to determine if the shareholder vote will be coerced in any impermissible way." *Id.* ¶ 145; *see also* ¶ 147.

Applying the guidance and framework for decision in *First Union v. SunTrust* demonstrates that plaintiff cannot sustain the high burden of proving actionable coercion by clear and convincing evidence. To start, as this Court recognized in *First Union v. SunTrust*, the challenged provisions must be considered in the context of what Wachovia and its shareholders received in exchange. Here, absent the merger with Wells Fargo, Wachovia would have either faced receivership or a transaction with Citigroup that would have left Wachovia near insolvency, at best. The Wells Fargo merger not only afforded Wachovia the opportunity to survive, but to obtain consideration for its shareholders with a current monetary value of $11.8 billion. Moreover, the very provisions that the plaintiff has attacked provided confidence to the markets, depositors, counterparties, and government officials necessary to Wachovia's survival.

The merger announcement on October 3 allowed Wachovia to obtain urgently needed liquidity essential for Wachovia to stay in business. A few days after the Merger Agreement was executed, Wachovia posted a loss in excess of $20 billion for the third quarter of 2008 – but faced no risk that Wells Fargo would terminate the Merger Agreement because the Agreement contains no material adverse change provision. Wachovia obtained exceptional value in return

for the so-called "deal protection provisions" afforded to Wells Fargo. *See First Union v. SunTrust*, ¶ 86.

In addition, the agreement the board secured from Wells Fargo to reduce the voting percentage from more than 50% to 39.9% provided assurance that, in the unexpected event that a better offer materialized, Wachovia's shareholders would retain the power to vote down the Wells Fargo merger. *See In re IXC Commc'ns S'holders Litig.*, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999) (refusing to enjoin merger with 40% voting rights, reasoning that "an admittedly independent majority of IXC's shareholders (owning nearly 60% of all IXC shares) may still freely vote for or against the merger, based on their own perceived best interests, and ultimately defeat the merger, if they desire"). Under North Carolina law, a majority vote of the shareholders voting at the meeting does not ensure approval of a merger. N.C.G.S. § 55-11-03(e) requires that at least 50% (plus one share) of the shares entitled to vote be voted in favor of the merger. Thus, while Wells Fargo controls 39.9% of the vote, Wells Fargo cannot ensure merger approval without the concurrence of 16.8% of Wachovia's remaining shareholders. Thus, neither the requirement that the merger be put to a vote of the Wachovia shareholders nor the voting power of Wells Fargo predetermines the outcome of the shareholder vote. If a hypothetical suitor proposes a transaction affording Wachovia shareholders materially greater value than the Wells Fargo merger, nothing will prevent Wachovia's remaining shareholders from voting down Wells Fargo.

Finally, if another suitor does appear from nowhere, the suitor knows how to find this Court. If there is a real prospect of a better opportunity for Wachovia, the Court can decide then whether to take action. Absent a realistic prospect of a better opportunity for Wachovia and its shareholders, however, for the reasons explained below and implicit in the discussion above,

entry of injunctive relief by this Court would serve no purpose and is likely to cause irreparable harm.

B. Balancing harms and benefits weighs heavily against entry of a preliminary injunction.

Plaintiff rests his argument on the unsupported contention that, should the Wells Fargo merger be rejected, government funding would be available to allow Wachovia to remain independent. He offers no evidence that such support would be forthcoming, however, and such funding is available purely at the discretion of the Treasury Department. *See* http://treasury.gov/press/releases/hp1207.htm ("Treasury will determine eligibility and allocations for interested parties after consultation with the appropriate federal banking agency.") No proposals have been forthcoming that are superior to the Wells Fargo merger. Wachovia's management and directors diligently and exhaustively identified all other possible options during the latter half of September, and Wells Fargo emerged as the only entity willing to acquire Wachovia without substantial government assistance. Plaintiff does not contend that the Citigroup transaction was superior, and Citigroup never showed any willingness to (and never did) make a better or competing proposal. Following this Court's guidance in *Marcoux v. Prim*, plaintiff does not make the showing of irreparable injury necessary for entry of a preliminary injunction.

As the *Marcoux* decision instructs, "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." 2004 NCBC 5, ¶ 64. The injury envisioned by the *Marcoux* decision looms large in this action. The Wachovia shareholders will receive approximately $11.8 billion (based on stock prices current as of the filing of this brief) if they approve the Wells Fargo merger. Entry of an injunction by the Court

would serve no useful purpose, but could cause confusion in the markets and among shareholders and thereby adversely affect prospects for consummation of the merger. Thus, in the absence of any concrete, actual superior alternative, an injunction could cause Wachovia's shareholders to lose $11.8 billion. This injury would be irreparable because, as the Wells Fargo brief explains, the plaintiff cannot post a bond securing any damage suffered by the Wachovia shareholders or the defendant corporations. Plaintiff's inability to post a bond to provide security for these damages – standing alone – bars entry of the injunctive relief that he now seeks. *See* Merritt Aff., Exh. 8 at 11-14 (transcript of argument before Judge Jolly) ("If I stop this vote; there's going to be a bond. It's that simple.").[9]

Moreover, as the brief submitted by the defendants opposing expedition in this action indicated, Wachovia's merger with Wells Fargo is a transaction that the United States Government has explicitly pronounced necessary to prevent "serious adverse affects on economic conditions" and the "financial stability" of the United States. Statement by the Board of Governors of the Federal Reserve, 2-3 (attached to Affidavit of Mark Merritt as Exhibit 7). The importance of the merger to the financial system also weighs heavily against entry of an injunction here.

III. CONCLUSION

Rocked by external market conditions it could not control following the bankruptcy of Lehman Brothers and receivership of Washington Mutual, Wachovia narrowly avoided receivership through the diligent efforts of its management and board of directors. The Wells Fargo merger has provided the stability Wachovia needed to avoid receivership. It currently affords approximately $11.8 billion in value to Wachovia's shareholders. In comparison, the

[9] Wachovia and the directors join in the arguments made in the Wells Fargo brief concerning the requirement that plaintiff post a bond and will not repeat the same arguments here.

stockholders of Lehman Brothers and Washington Mutual received nothing. No better alternative is available to Wachovia, and there certainly is no assurance of government support in the event that Wachovia does not merge with Wells Fargo. Should a better alternative emerge, Wachovia's shareholders remain free to vote down the Wells Fargo merger. Under these circumstances, plaintiff's motion for entry of a preliminary injunction should be denied.

This 17th day of November, 2008.

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RULE 15.8 CERTIFICATION

I certify that this brief complies with BCR 15.8.

This the 17th day of November, 2008.

s/Robert W. Fuller
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the registered agent of the Defendant with a copy of the within and foregoing pleading via electronic service through e-filing in the Business Court and by U.S. First Class Mail delivery in an envelope properly addressed to the following, with adequate postage thereon to ensure proper delivery:

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