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, 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 I. RICHEY, RUTH G. SHAW, LANTY L. SMITH, DONA DAVIS YOUNG, WACHOVIA CORPORATION, and WELLS FARGO & COMPANY,

Defendants.

ORDER

Before the Court is Plaintiff's Motion (the "Motion") for final certification of the class, final approval of the class action settlement (the "Proposed Settlement"), entry of a final judgment, and approval of Plaintiff's fee application (the "Fee Award") in the above-captioned case. For the reasons set forth below, the Court **GRANTS** the Motion, except that it shall approve a Fee Award in the amount of $932,621.98. The Court shall also enter a separate Final Judgment.

I.

THE DISPUTE

{1} On 14 October 2008, Plaintiff filed a purported class action Complaint on behalf of himself and all other public shareholders of Wachovia Corporation ("Wachovia").[1]

{2} The Complaint alleged that Wachovia and its Board of Directors (the "Board") breached their fiduciary duties toward Wachovia's public shareholders in connection with a proposed $15.1 billion acquisition (the "Merger") by Defendant Wells Fargo & Company ("Wells Fargo"). (Compl. ¶¶ 26–51.)

{3} Specifically, Plaintiff alleged in his Complaint that (a) a share exchange agreement providing Wells Fargo with 39.9% of the vote on the Merger was an invalid disenfranchisement of the Wachovia shareholders; (b) a separate provision of the Merger (the "Tail Provision") was coercive with respect to the shareholder vote because it improperly impeded the Board from soliciting other bidders for at least 18 months after a shareholder vote rejecting the Merger; (c) the Merger offered an insufficient premium; and (d) the "fiduciary out" clause negotiated by the parties was insufficient because the Board was required to submit the Merger to a vote in the event of a superior proposal, rather than withdraw entirely from the Merger.

{4} Plaintiff's Complaint sought preliminary and permanent injunctive relief or, in the alternative, rescission of the Merger, if consummated, and money damages. (Compl. Prayer for Relief ¶¶ 2–5.)

{5} On the same day that he filed his Complaint, Plaintiff also filed a Motion for Preliminary Injunction (the "Preliminary Injunction Motion") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure.

[1] The term "public shareholders" refers to those Wachovia shareholders unaffiliated with Wells Fargo & Company, the Board, or Wachovia's management.

{6} On 5 December 2008, after briefing and a 24 November 2008 hearing, the Court entered an Order and Opinion granting in part and denying in part the Preliminary Injunction Motion (the "Preliminary Injunction Order").

{7} In the Preliminary Injunction Order, the Court granted injunctive relief only as to the Tail Provision. (Prelim. Inj. Order ¶ 166.)

{8} On 11 December 2008, Plaintiff moved to amend and supplement his Complaint to allege that Wachovia's proxy statement contained material false and misleading statements and omitted material information related to the Merger. (Pl.'s Brief Supp. Mot. Am. Compl. at 3; Pl.'s Mem. Supp. Mot. Final Cert. at 8–9.)

{9} On 23 December 2008, the Merger was approved by 76% of the votes entitled to be cast of Wachovia's outstanding common and preferred stock. (Pl.'s Mem. Supp. Mot. Final Cert. at 10.)

{10} The Merger was consummated on 31 December 2008. (Pl.'s Mem. Supp. Mot. Final Cert. at 10.)

II.

THE PROPOSED SETTLEMENT

{11} On 22 December 2008, the Court entered a consent Order staying the case except for proceedings related to a tentative settlement of the case.

{12} Pursuant to an Order entered 31 December 2008, Plaintiff undertook discovery to assure himself that the settlement terms represented a fair and reasonable resolution of the case.

{13} To that end, Plaintiff's counsel reviewed nearly 10,000 pages of documents and deposed senior Wachovia and Wells Fargo executives, as well as representatives of the investment advisors involved in the Merger.

{14} Following the completion of this discovery, the parties executed a Stipulation and Agreement of Compromise, Settlement and Release on 15 April 2009, and Plaintiff filed a Motion for preliminary approval of the Proposed Settlement.

{15} Pursuant to the Proposed Settlement, Wachovia and Wells Fargo agreed not to appeal the portion of the Preliminary Injunction Order enjoining enforcement of the Tail Provision. (Stipulation at 6.)

{16} Prior to the 23 December 2008 vote of Wachovia shareholders on the Merger, Defendants also made additional disclosures (the "Additional Disclosures"), in the form of a Form 8-K filed with the Securities and Exchange Commission, a press release, and web site postings. (Stipulation at 4, 6–7.)

{17} The Additional Disclosures provided (a) information about contact between Wachovia and its potential acquirers before and after execution of the Merger; (b) further details of Wachovia's Board meeting on 2 and 3 October 2008, including the basis for the belief of Wachovia's management that the Federal Deposit Insurance Corporation was ready to place Wachovia's banking subsidiaries in receivership absent the signing of a merger agreement on or before 3 October 2008; (c) an explanation of why Wachovia's financial advisors did not perform customary analyses or an independent evaluation or appraisal of Wachovia's or Wells Fargo's assets and liabilities; (d) the basis for the price to earnings multiples used by investment advisor Goldman Sachs in its comparative analysis of Wells Fargo trading multiples; and (e) a list of companies that investment advisor Perella Weinberg reviewed to determine appropriate trading multiple ranges for its analysis. (Notice Pendency Class Action at 8–9.)

{18} Pursuant to the Proposed Settlement, Plaintiff agreed to dismiss the Complaint with prejudice. (Stipulation at 7.)

{19} Wells Fargo agreed to absorb the cost of providing notice to the Class of the Proposed Settlement, and to pay up to $1.975 million in attorney fees to Plaintiff's counsel. (Stipulation at 10, 12.)[2]

{20} Plaintiff agreed that a final approval order would discharge and enjoin all causes of action (the "Released Claims") against Defendants arising from the allegations in Plaintiff's Complaint, including a variety of enumerated claims related to the Merger. (Stipulation at 8–9.)

{21} Under the Proposed Settlement, however, the Released Claims expressly did not include: (a) enforcement of the Proposed Settlement, or (b) "the claims asserted by plaintiffs in the Amended Class Action Complaint for Violations of the Federal Securities Laws, dated December 15, 2008, in *Lipetz v. Wachovia Corp. et al.*, Civil Action No. 08-6171 (RJS) (S.D.N.Y.)." (Stipulation at 9.)

{22} On 24 April 2009, the Court granted preliminary approval of the Proposed Settlement (the "Preliminary Approval Order").

{23} The Preliminary Approval Order conditionally certified the case as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, on behalf of a non-opt-out class consisting of all holders of common stock of Wachovia, including, without limitation, beneficial holders and holders of record, at any time during the period from and including 16 September 2008 through 31 December 2008, the date of consummation of the Merger, including any and all of their respective successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any person or

[2] Plaintiff's counsel undertook the representation in this case on a contingency basis. Nevertheless, in support of the Fee Award, Plaintiff's brief showed that counsel and its staff "have spent approximately 2,333 hours prosecuting the [case], resulting in a lodestar of $1,325,168.50, and have incurred $32,621.98 in expenses on behalf of the Class." (Pl.'s Mem. Supp. Mot. Final Cert. at 31; Waldman Aff. ¶ 36, Exhs. I, J, and L.) Plaintiff's counsel calculated the lodestar based on rates ranging from $750/hr for work completed by partners and $285/hour for work completed by paralegals. (Waldman Aff. Ex. I, L.) Counsel, however, did not submit detailed time records of the work done.

entity acting for or on behalf of, or claiming under, any of them, and each of them, and excluding Defendants, their families, and affiliates (the "Class").

{24} The Preliminary Approval Order also conditionally certified (a) Plaintiff as Class Representative;[3] (b) the law firm of Wolf Popper LLP as Plaintiff's Lead Counsel; and (c) the law firm of Greg Jones & Associates, P.A., as North Carolina Liaison Counsel.

{25} The Preliminary Approval Order required Wells Fargo to mail notice of the Proposed Settlement (the "Notice") to Class members on or before 24 May 2009, "at their last known address appearing in the stock transfer records maintained by or on behalf of Wachovia." (Prelim. Approval Order ¶ 8.)

{26} The Court also directed record owners to forward the Notice to beneficial owners, and directed Wells Fargo to use reasonable efforts to ensure that beneficial owners received Notice. (Prelim. Approval Order ¶ 8.)

{27} Wells Fargo retained Georgeson Inc. ("Georgeson") to distribute the Notice. (Defs.' Mem. Supp. Final Approval at 8.)

{28} Georgeson mailed the Notice to the required recipients on 22 May 2009, as well as to Class members appearing on a list of participants in Wachovia's 401(k) plan. (Vecchio Aff. ¶ 3; Defs.' Mem. Supp. Final Approval at 8–9.)

{29} Georgeson also contacted over 450 banks, brokers, and other intermediaries who might have held shares on behalf of beneficial owners of Wachovia stock. (Vecchio Aff. ¶ 6; Defs.' Mem. Supp. Final Approval at 9.)

{30} In total, over one million copies of the Notice were distributed to Class members. (Vecchio Aff. ¶ 8; Defs.' Mem. Supp. Final Approval at 10.)

[3] The Class Representative will not be compensated for serving in this role. (Waldman Aff. Ex. G ¶ 3.)

III.

THE OBJECTORS

{31} Fifty-one members of the Class (the "Objectors") have objected to the Proposed Settlement.

{32} At a hearing (the "Settlement Hearing") on 20 August 2009, the parties appeared, and the Court heard from the following Objectors:[4]

a. Orange County Employees' Retirement System ("Orange County");

b. John M. Rivers, Jr., Dorothy W. Harris, Cameron M. Harris, Gary Waller Harris, Patricia Harris Bostwick, Deborah Rice-Marko, John Edward Marko, Jr., The John Edward Marko, Jr. Irrevocable Trust, Evan Rice Marko, The Evan Rice Marko Irrevocable Trust, The Evelyn G. Rice Revocable Trust, The Estate of Evelyn G. Rice, and Ian W. Freeman (collectively, the "Rivers Objectors");

c. John H. Loughridge, Jr. ("Loughridge"), Betty R. Millsaps ("Millsaps"), and Howard R. Hurlocker ("Hurlocker"); and

d. Norwood Robinson.

{33} On 4 September 2009, the Court received an additional objection from Norwood Robinson, Michael L. Robinson, Loughridge, Millsaps, and Hurlocker.

{34} On 30 September 2009, the parties, Orange County, and the Rivers Objectors agreed to a modification of the release contained in the Stipulation (the "Revised Stipulation").

{35} In addition to the two types of claims already excluded from the Released Claims in the Proposed Settlement, the Revised Stipulation also excludes:

> (iii) the claims asserted by plaintiffs in the Consolidated Class Action Complaint filed on September 4, 2009[,] in *In Re Wachovia Preferred*

[4] Prior to the Settlement Hearing, Certain Former Wachovia Shareholders, a group of Objectors comprised of Martha Jean Reynolds, Classie Jo Cooper, Individually, and as Beneficiary to WBNA Custodian Bene Trad IRA, as Trustee of Jerry Allen Cooper Life Insurance, Custodian WBNA SEP IRA, and FMTC Custodian – Roth IRA, Jack Hamilton, Bill Hamilton, Shirley Hamilton, Dan Smalley, Dr. Ellis F. Porch, Jr., Individually, as EFP Properties, a Partnership, and as Trustee, Wynona Porch, Braxton Smith, Ursula Smith, and Dwight Harrigan, withdrew their objections.

> *Securities and Bond/Notes Litigation*, Master File No. 09 Civ 6351 (RJS) (S.D.N.Y.); (iv) claims not arising out of either the Merger or events involving the negotiation of, terms of and disclosures related to the Merger; (v) claims that arise from Wachovia's business or the Defendants'/Released Persons' acts or omissions before or after the Class period; (vi) claims arising from alleged mismanagement, misconduct, misrepresentations, or non-disclosures about Wachovia's business and/or its securities during the Class period unrelated to the Merger; (vii) claims relating to the decline in value of Wachovia's share price before the Class period[;] or (viii) claims relating to the decline in value of Wachovia's share price during the Class period to the extent that such claims either arise from events, acts, or omissions that preceded the Class period or do not arise from the Merger.

(Stipulation Re: Modification at 3; Stipulation Re: Modification Ex. A ¶ 8.)

{36} As a result, Orange County and the Rivers Objectors withdrew their objections.

{37} On 8 October 2009, Norwood Robinson and Loughridge filed an objection to the Revised Stipulation, attaching as an exhibit a complaint they and others filed in Forsyth County on 6 October 2009, asserting claims against Wachovia and the Board related to Wachovia's 2006 acquisition of mortgage lender Golden West Financial Corporation.[5]

IV.

OBJECTIONS TO THE PROPOSED SETTLEMENT

{38} Generally stated, the objections to the Proposed Settlement are as follows:

a. Notice of the Proposed Settlement was insufficient;[6]

b. Venue is improper;

c. Plaintiff is not an appropriate representative of the Class;

d. Plaintiff is compromising the claims without taking substantial discovery;

e. The release in the Revised Stipulation is too broad;

f. The Proposed Settlement confers no benefit on the Class;

[5] On 26 August 2009, Loughridge, Millsaps, and Hurlocker filed a Motion to allow access to the four depositions taken by Plaintiff in this case (the "Motion for Access"), which the Court denied on 8 October 2009.

[6] Nine Class members have objected on this ground.

g. Certification of a non-opt out class is inappropriate;

h. Plaintiff's counsel have not made themselves available to discuss the case with members of the Class; and

i. The Fee Award that Wells Fargo proposes to pay to Plaintiff's counsel is excessive.

V.

PRINCIPLES OF LAW

A.

CLASS CERTIFICATION

{39} Rule 23 of the North Carolina Rules of Civil Procedure governs class actions in North Carolina. *See* N.C.R. Civ. P. 23. Specifically, the Court, in its discretion, may certify a class action where these requirements are met:

> (1) the existence of a class, (2) . . . the named representative will fairly and adequately represent the interests of all class members, (3) . . . there is no conflict of interest between the representative and class members, (4) . . . class members outside the jurisdiction will be adequately represented, (5) . . . the named party has a genuine personal interest in the outcome of the litigation, (6) . . . class members are so numerous that it is impractical to bring them all before the court, (7) . . . adequate notice of the class action is given to class members.

Perry v. Union Camp Corp., 100 N.C. App. 168, 170, 394 S.E.2d 681, 682 (1990) (citing *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987)). *See generally English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223 (1979).

{40} A class exists where "the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow*, 319 N.C. at 280, 354 S.E.2d at 464. In other words, a class is "a group of persons whose interests are so closely similar that an adequate representation of the legal

position of one of them will accomplish the same purpose as would be achieved were all of them present and participating in the proceeding." *English*, 41 N.C. App. at 6, 254 S.E.2d at 229.

{41} The manner and form of notice given to class members are within the trial court's discretion, but should be "the best notice practical under the circumstances," and must be given to all members identifiable through reasonable efforts. *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 14, 454 S.E.2d 278, 285 (1995) (citing *Crow*, 319 N.C. at 283–84, 354 S.E.2d at 466).

{42} This Court has in the past certified non-opt-out classes in merger disputes. *See, e.g.*, *In re Quintiles Transnat'l Corp. S'holder Litig.*, No. 02 CVS 5348 (N.C. Super. Ct. Oct. 13, 2003), *available at* http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=2 (search for "Quintiles"; click "02CVS5348" hyperlink; click "Order and Final Judgment" hyperlink for 10/10/2003 filing); *In re Delhaize Am., Inc. S'holders Litig.*, No. 00 CVS 13706 (N.C. Super. Ct. Oct. 29, 2001), *available at* http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=2 (search for "Delhaize"; click "00CVS13706" hyperlink; click "Order and Final Judgment" hyperlink for 10/29/2001 filing) (in final approval of settlement, certifying non-opt-out classes of shareholders where complaints sought primarily to enjoin corporate buyouts alleged to breach fiduciary duties).

{43} These Business Court cases are consistent with the views of courts from other jurisdictions that have certified non-opt-out classes where primarily equitable relief was sought. *See, e.g.*, *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1137 (Del. 2008) (affirming certification of non-opt-out class because allowing opt-out in such a case would "utterly defeat the purpose of the settlement"); *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989) (affirming certification of non-opt-out class, partly because when claims for injunctive relief

predominate, certifying a non-opt-out class is the best way to ensure a *res judicata* effect) (citation omitted).

{44} In the context of federal class actions, opt-out classes may only be certified in actions seeking primarily monetary relief under Rule 23(b)(3). *See* Fed. R. Civ. P. 23(b); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). Where claims for injunctive relief predominate, the federal rules do not provide for opt-out classes. *See* Fed. R. Civ. P. 23(c)(2).

{45} The Court also notes that, unlike Rule 23 of the Federal Rules of Civil Procedure, which requires an opt-out right in certain class actions, Rule 23 of the North Carolina Rules of Civil Procedure includes no such requirement. *Compare* Fed. R. Civ. P. 23 *with* N.C.R. Civ. P. 23.

B.

SETTLEMENT APPROVAL

{46} Settlement has long been favored over litigation, and public policy favors upholding good faith settlements, even without strong regard to the consideration underlying the settlement. *See Hardin v. KCS Int'l, Inc.*, 682 S.E.2d 726, 737–38 (N.C. Ct. App. 2009); *Knight Publ'g Co. v. Chase Manhattan Bank, N.A.*, 131 N.C. App. 257, 262, 506 S.E.2d 728, 731 (1998); *York v. Westall*, 143 N.C. 276, 279, 55 S.E. 724, 725 (1906).

{47} In light of the law and policy favoring settlement, federal courts reviewing a settlement agreement in class action cases conduct first a preliminary approval hearing to determine whether there is probable cause to notify class members of the proposed settlement, then a fairness hearing to determine if the proposed settlement is "fair, reasonable, and adequate." *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827

(E.D.N.C. 1994) (citations omitted).[7] The burden is on the proponents of the settlement to demonstrate that the proposed settlement is fair, reasonable, and adequate. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983).

{48} The weight given to each factor in evaluating the fairness, reasonableness, and adequacy of a proposed class action settlement varies depending on the circumstances of a given case. *See Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Generally, a trial court should ensure that the proposed settlement is "not the product of collusion between the parties," and should evaluate its terms relative to the strength of the plaintiff's case. *See Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998) (citations omitted).

{49} In addition to the strength of the plaintiff's case, some factors commonly evaluated include: (a) the defendant's ability to pay;[8] (b) the complexity and cost of further litigation; (c) the amount of opposition to the settlement; (d) class members' reaction to the proposed settlement; (e) counsel's opinion; and (f) the stage of the proceedings and how much discovery has been completed. *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (citations omitted), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

C.

ATTORNEY FEES

{50} In awarding attorney fees in a merger and acquisition class action lawsuit, this Court has considered the following factors: "(1) the results accomplished for the benefit of the shareholders, (2) the time, effort and expense of counsel spent in connection with the case, (3)

[7] Despite differences between Rule 23 of the North Carolina and Federal Rules of Civil Procedure, North Carolina courts "have been attentive to the interpretation of Rule 23 by the federal courts and have been guided by such interpretation when appropriate." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 196, 540 S.E.2d 324, 330 (2000) (citing *Gibbons v. CIT Group/Sales Fin., Inc.*, 101 N.C. App. 502, 506, 400 S.E.2d 104, 106 (1991)).
[8] This factor is not relevant in this case.

the contingent nature of the fee, (4) the difficulty of the litigation, and (5) the standing and ability of counsel involved." *In re Wachovia S'holders Litig.*, 2003 NCBC 10 ¶ 74 (N.C. Super. Ct. Dec. 19, 2004), http://www.ncbusinesscourt.net/opinions/2003%20NCBC%2010.htm.

{51} However, "[i]n cases involving non-monetary benefits and cases where the contributions, causation, or value issues are not clearly determinable, the fee determination moves much closer to a quantum meruit determination." *Id.*

{52} In such a case, the trial court considers "the balance that must be maintained between offering acceptable incentives for shareholders to contest corporate action and the need to maintain the agency costs of such litigation at an acceptable level." *Id.*

VI.

ANALYSIS

{53} The requirements of Rule 23 of the North Carolina Rules of Civil Procedure have been satisfied in this case.

{54} Each member of the Class has an interest in the same issues of law or fact, namely, whether the Board breached its fiduciary duties with respect to the Merger and whether Wachovia's proxy statement was materially false or misleading, which predominate over issues affecting Class members individually. (Pl.'s Mem. Supp. Mot. Final Cert. at 13–14.)

{55} Plaintiff fairly and adequately represents the interests of the Class because Plaintiff is a Class member with the same legal claims as the other Class members, he has a genuine personal interest in the outcome of the litigation, and he has no conflict of interest with other Class members because he will not receive compensation for serving as Class Representative. (Pl.'s Mem. Supp. Mot. Final Cert. at 14; Waldman Aff. Ex. G ¶ 3.)

{56} Moreover, because Notice was mailed to more than 1,000,000 beneficial owners of Wachovia common stock, it is clear that Class members are so numerous that it is impractical to bring them all before the Court. *See Crow*, 319 N.C. at 283, 354 S.E.2d at 466 ("It is not necessary that [Plaintiff] demonstrate the impossibility of joining class members, but [he] must demonstrate substantial difficulty or inconvenience in joining all members of the class.").

{57} The Court received objections to the sufficiency of the notice from nine Class members. Thus, it appears that the manner and form of notice given were the best practical under the circumstances, and that notice was given to all members identifiable through reasonable efforts. *See Schlosser v. Anchor Nat'l Life Ins. Co.*, 1997 U.S. Dist. LEXIS 1699, at *2 (M.D.N.C. 1997) (finding notice by mail and publication in three newspapers sufficient when notice by first class mail usually satisfies requirement that notice be given by most effective means practicable).

{58} The parties also have met their burden of proving that the Proposed Settlement is fair, reasonable, and adequate.

{59} As noted earlier, some factors commonly evaluated in determining the fairness, reasonableness, and adequacy of a proposed class action settlement include: (a) the strength of the plaintiff's case; (b) the defendant's ability to pay; (c) the complexity and cost of further litigation; (d) the amount of opposition to the settlement; (e) class members' reaction to the proposed settlement; (f) counsel's opinion; and (g) the stage of the proceedings and how much discovery has been completed. *Armstrong*, 616 F.2d at 314.

{60} In resolving Plaintiff's Preliminary Injunction Motion, the Court has already assessed the claims of the Class and, with one exception, found them wanting. (Prelim. Inj. Order ¶¶ 6–8.)

{61} Nothing in the record submitted since then suggests that the Class's claims are strong enough to justify further litigation. By its very nature, litigation directed at attacking the business judgment of corporate directors in a merger transaction is an uncertain proposition, and the probability of success of the Class in this case is even more tenuous given the extraordinary circumstances facing the Board when it approved the Merger.

{62} The Court is not alone in concluding that the claims being compromised in this case are of minimal value. First, the Merger was approved by 76% of the votes entitled to be cast by holders of Wachovia's outstanding shares of stock, which is strong evidence that the Board exercised sound business judgment in negotiating the Merger. Second, following preliminary approval of the Proposed Settlement, over 1,000,000 Class members received notice of its terms, yet only fifty-one objected. Fourteen Class members have since withdrawn their objections. Thus, the overwhelming majority of the Class has been virtually silent as to the Proposed Settlement.

{63} "It is well settled that 'the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.'" *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (quoting *Sala v. Nat'l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989)). Accordingly, the muted reaction of the Class here supports a finding that the Proposed Settlement is fair and reasonable. *See In re GNC S'holder Litig.*, 668 F. Supp. 450, 451 (W.D. Pa. 1987) (stating that silence of substantial portion of the class as to terms of settlement may be construed as assent); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1381–82 (S.D. Fla. 2007) (low percentage of objections demonstrates reasonableness of a settlement); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D. N.J. 1995) (holding that "substantial silent consent weighs in favor of

certification" and approval of a settlement where approximately 100 of 30,000 class members objected or opted out of the class).

{64} Some of the Objectors contend that Plaintiff and his counsel have not conducted substantial discovery in this case. Plaintiff's counsel, however, reviewed nearly 10,000 pages of documents and took four depositions, all of which was directed at confirming the fairness of the Proposed Settlement. (Stipulation at 4–5.) Plaintiff also retained a financial consultant to provide an opinion concerning deficiencies in the proxy statement.

{65} In any event, "[t]o approve a proposed settlement . . . 'the Court need not find that the parties have engaged in extensive discovery'" so long as the parties have conducted sufficient discovery to be able to fairly consider the merits of the proposed settlement. *Am. Bank Note,* 127 F. Supp. 2d at 425–26 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000)).

{66} After careful review, the Court agrees with Plaintiff and his counsel that they had enough information to consider the merits of the Proposed Settlement and that further discovery would have achieved little.

{67} Some of the Objectors are also unhappy that the Class will not be compensated. From the outset, however, Plaintiff brought this litigation primarily to enjoin the Merger on the terms negotiated by Wells Fargo and Wachovia. As Plaintiff explained in his brief:

> Through the litigation, Plaintiff sought, in substance, to ensure that the public Wachovia shareholders would be able to cast an informed vote, on full and complete information, that the vote would be unencumbered by the issuance of Series M, Class A Preferred Stock to Wells Fargo by Wachovia (the "Preferred Stock") giving Wells Fargo extraordinary voting rights, that competitive offers for Wachovia would not be impeded, and that all shareholders would receive increased consideration for their shares in the Merger.

(Pl.'s Mem. Supp. Mot. Final Cert. at 1.)

{68} While Plaintiff largely failed in that effort, he did succeed in invalidating the Tail Provision, which removed an impediment to the Board's fiduciary duty to seek out other bidders in the event the shareholders rejected the Merger.

{69} The Proposed Settlement also largely remedied the alleged disclosure violations set out in Plaintiff's proposed Amended Complaint by providing the Class with additional information related to the Merger in advance of a shareholder vote, including relevant and material information about Wachovia's communications with potential acquirers, Wachovia's communications with regulatory authorities prior to the Board voting on the Merger, and the limited methodologies utilized by Wachovia's financial advisors in evaluating the Merger.[9]

{70} In similar cases, courts have approved class action settlements where a shareholder class received little or no compensation but obtained the benefit of additional disclosures on the cusp of a merger vote. *See, e.g.*, *County of York Employees Ret. Plan v. Merrill Lynch & Co.*, No. CA 4066-VCN (Del. Ch. Aug. 31, 2009); *In re Alltel Corp. S'holder Litig.*, No. 07-6406 (Ark. Cir. Ct. Aug. 28, 2008) (Waldman Aff. Ex. O); *In re Fla. E. Coast Indus., Inc. S'holder Litig.*, No. CA-07-003919 (Fla. Cir. Ct. Jan. 10, 2008) (Waldman Aff. Ex. P); *In re Station Casinos S'holder Litig.*, No. A-532367 (Nev. Dist. Ct. Feb. 13, 2008) (Waldman Aff. Ex. Q); *In re FHS Holdings, Inc. S'holders Litig.*, 1993 Del. Ch. LEXIS 57 (Del. Ch. Apr. 22, 1993); *see also In re Coleman Co. S'holders Litig.*, 750 A.2d 1202, 1208 (Del. Ch. 1999) (approving settlement of class action for breach of fiduciary duties in connection with a merger where the settlement gave plaintiffs "a real benefit" in the form of shares of the new company on terms like those of the majority shareholder); *In re Talley Indus., Inc. S'holders Litig.*, 1998 Del. Ch.

[9] The only remaining disclosure issue, related to the tax benefits Wells Fargo purportedly would receive following the Merger, merits no further litigation. This factual issue would require substantial discovery involving expert witnesses and, in any event, Plaintiff would have difficulty proving that disclosure of this information would have been material to Wachovia shareholders voting on the Merger. (Pl.'s Mem. Supp. Final Cert. at 23.)

LEXIS 53 (Del. Ch. 1998) (in merger context, approving non-opt-out class and settlement where class received increased disclosures).

{71} Furthermore, this Court is persuaded by the judgment of counsel who negotiated the Proposed Settlement. In determining the fairness of a settlement, "the opinion of experienced and informed counsel is entitled to considerable weight" provided counsel has undertaken a "detailed assessment[] of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery." *Am. Bank Note*, 127 F. Supp. 2d at 430.

{72} The experienced lawyers in this case have concluded—and the Court agrees—that the Proposed Settlement offers a reasonable compromise given the uncertain value of the remaining claims and the expense and delay that would result from further litigation.

{73} Several Objectors also contend that the scope of the release is too broad because it forecloses litigation against Wachovia and the Board related to Wachovia's 2006 acquisition of mortgage lender Golden West Financial Corporation, which some Class members contend caused the collapse of Wachovia's share price immediately prior to the Merger.

{74} In fact, however, the Revised Stipulation expressly excludes from the Released Claims all:

> claims asserted by plaintiffs in the Amended Class Action Complaint for Violations of the Federal Securities Laws, dated December 15, 2008, in *Lipetz v. Wachovia Corp. et al.*, Civil Action No. 08-6171 (RJS) (S.D.N.Y.) . . . [,] claims asserted by plaintiffs in the Consolidated Class Action Complaint filed on September 4, 2009[,] in *In Re Wachovia Preferred Securities and Bond/Notes Litigation*, Master File No. 09 Civ 6351 (RJS) (S.D.N.Y.) . . . [,] claims not arising out of . . . the Merger . . . [,] claims that arise from Wachovia's business or the Defendants'/Related Persons' acts or omissions before . . . the Class period . . . [,]claims relating to the decline in value of Wachovia's share price before the Class period . . . [, and] claims relating to the decline in value of Wachovia's share price during the Class period to the extent that such claims either arise from

> events, acts, or omissions that preceded the Class period or do not arise from the Merger.

(Stipulation Re: Modification at 5–6; Stipulation Re: Modification Ex. A ¶ 8.)

{75} As several of the Objectors have concluded, *see* Notice Withdrawal Orange County at 2; Rivers Withdrawal at 2, claims alleging a decrease in Wachovia's share price due to Wachovia's acquisition of Golden West Financial Corporation fall into at least one of the categories the Revised Stipulation expressly excludes from the Released Claims, and thus are not barred by the Proposed Settlement.

{76} After careful consideration, the Court finds that none of the remaining objections warrants rejection of the Proposed Settlement.

{77} The Court also specifically approves a non-opt-out class in this case.

{78} Although the North Carolina Supreme Court has not said so expressly, it has intimated that an opt-out right is not required in every class action. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466 ("[T]he trial court *may* require that potential class members be given an opportunity to request exclusion from the class . . . in a manner similar to the current federal practice.") (emphasis added).

{79} A non-opt-out class is appropriate here because this is not a case where the parties "seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 n.3 (1985). Instead, from the outset, Plaintiff pled and litigated this case as one in which equitable claims predominated.

{80} To the extent that the Class is being required to forego claims for money damages related to the alleged inadequacy of the Merger consideration, the Court concludes, consistent with the evaluation of Plaintiff and his counsel, that such claims would face the substantial

hurdle of overcoming the defense of North Carolina's business judgment rule. (Pl.'s Mem. Supp. Final Cert. at 21.)

{81} Accordingly, the Court agrees with counsel that a non-opt-out class is appropriate in these circumstances. *See Hynson v. Drummond Coal Co.*, 601 A.2d 570, 571–72 (Del. Ch. 1991) (holding that a class action may be certified, without affording opt-out rights, in an action seeking to vindicate rights attaching to corporate stock).

{82} In sum, the Court holds that the Proposed Settlement is fair and reasonable and that the benefits secured by virtue of the Additional Disclosures and the nullification of the Tail Provision, while perhaps not overwhelming, are adequate to support entry of a dismissal with prejudice of all claims asserted in this litigation.

{83} Finally, the Court addresses the Fee Award.

{84} This Court has noted previously that "[w]hen the Court is asked to approve a fee to be paid by the surviving company with no cost to the shareholders it is essentially being asked to insure that the settlement is not collusive between the company and class counsel and that the fee awarded is fair in light of the benefit provided by class counsel." *In re Quintiles Transnat'l Corp. S'holders Litig.*, 2003 NCBC 11 ¶ 5 (N.C. Super. Ct. Dec. 19, 2003), http://www.ncbusinesscourt.net/opinions/2003%20NCBC%2011.htm.

{85} As to this issue, the Court finds:

a. That Plaintiff was largely unsuccessful in obtaining injunctive relief;

b. That Plaintiff did, however, provide some benefit to the Class by securing the Additional Disclosures and nullifying the Tail Provision;

c. That the benefit to the Class in this case is difficult to value;

d. That Plaintiff's counsel undertook the representation in this case on a contingency basis;

e. That Wells Fargo has agreed to pay a Fee Award of up to $1.975 million;

f. That the proposed Fee Award was negotiated in good faith only after the parties agreed in principle to the Proposed Settlement;

g. That any attorney fees awarded in this case will not be paid directly by the Class;[10]

h. That Plaintiff's counsel are highly respected and experienced in shareholder class action litigation;

i. That the contested issues were novel and complex, and Plaintiff's counsel litigated them under significant time constraints;

j. That Plaintiff's counsel (and counsel's staff) spent approximately 2,333 hours prosecuting the litigation;

k. That Plaintiff's counsel did not submit time records detailing the work done on the case;

l. That the lodestar calculation submitted by Plaintiff, based on current billing rates for Plaintiff's counsel and its staff, amounts to $1,325,168.50 in fees and $32,621.98 in expenses.

m. That the billing rates for Plaintiff's New York counsel range from $750/hour for partners involved in the case, to $285/hour for work completed by paralegals;

n. That the time spent by counsel on the case appears to be somewhat excessive, given that litigation on the merits in this case effectively ended at the preliminary injunction stage;

o. That the hourly rates of Plaintiff's New York counsel are far in excess of those normally charged by attorneys in North Carolina, *see* N.C.R. Prof'l Conduct 1.5(a)(3); *In re Stucco Attorney Fee Petitions*, 2000 NCBC 7 ¶ 16 (N.C. Super. Ct. May 17, 2000), http://www.ncbusinesscourt.net/opinions/2000%20NCBC%207.htm (comparing requested fee with average customary fees charged in North Carolina);

p. That no evidence was presented that North Carolina lawyers would have been unwilling or unable to represent Plaintiff or the Class in this litigation; and

[10] Some Objectors complain that, as newly minted Wells Fargo shareholders, they are at least indirectly being forced to shoulder the cost of the Fee Award. These Objectors, however, ignore the presumption that the Wells Fargo board exercised sound business judgment in agreeing to settle this litigation and pay the Fee Award to staunch further defense costs that would also be shouldered (at least indirectly) by the Objectors and all other Wells Fargo shareholders. Moreover, as Plaintiff notes, with over 4.26 billion Wells Fargo shares outstanding, approval of a $1.975 million Fee Award would result "in each shareholder being indirectly 'responsible' for **less than 1/20th of a cent per share.**" (Pl.'s Mem. Supp. Mot. Final Cert. at 29 n. 14.)

q. That on balance, after considering the results achieved, the time expended, the rates charged, the expenses incurred, and the broader policy considerations of offering a sufficient incentive for shareholders to contest corporation action, while capping costs in litigation such as this at a reasonable level, the Court concludes that Plaintiff's counsel is entitled to a Fee Award of $932,621.98.

VII.

CONCLUSION

For the reasons set forth above, the Court **GRANTS** the Motion, except that it shall approve a Fee Award of $932,621.98. The Court shall enter a separate Final Judgment.

SO ORDERED, this the 5th day of February, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge