

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

Plaintiff,

v.

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

Defendants.

**PLAINTIFF'S OPENING BRIEF IN SUPPORT OF
AMENDED MOTION FOR EXPEDITED DISCOVERY AND
SCHEDULING HEARING ON MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff submits this brief in support of his motion for entry of the accompanying Order directing expedited discovery in the above action and scheduling a hearing on their application for a preliminary injunction.

FACTUAL BACKGROUND

Plaintiff is a shareholder of Wachovia Corporation ("Wachovia" or the "Company") and has been a shareholder of Wachovia since prior to the conduct complained of in the complaint.

Plaintiff commenced this action on October 8, 2008.

Plaintiff brings his action as a class action on behalf of himself and all other public shareholders of Wachovia in connection with an unlawful scheme and plan to enable Wells Fargo & Company (“Wells Fargo”) to acquire Wachovia for inadequate consideration and in breach of the individual defendants’ fiduciary duties. Specifically, on October 3, 2008, Wachovia announced that Wachovia’s Board of Directors (the “Board”) had approved a definitive agreement (the “Merger Agreement”) to be acquired by Wells Fargo, in a merger (the “Merger”) for approximately \$15.1 billion in equity value, under the terms of which Wachovia’s public stockholders will receive 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock that they own, valued at approximately \$7 per share of Wachovia common stock. Pursuant to the Merger, it is expected that Wachovia’s current senior managers will be offered the opportunity to continue as part of the surviving corporation’s leadership following its close and, at the same time, will benefit from lucrative “golden parachutes.”

This Merger is planned by Defendants to close by the end of this year, according to the Presentation concerning the Merger filed as an exhibit to the Company’s Form 8-K filed with the U.S. Securities and Exchange Commission (the “SEC”) on October 3, 2008, announcing the Merger and also according to the representations made by Defendants’ attorneys to Plaintiff’s attorneys. Thus, Plaintiff only has, at most, a mere two months to complete discovery and depositions, to fully brief a motion to enjoin the shareholder vote, and for the Court to hold a hearing on the issue and render its decision. Should the vote take place and the Merger consummated, unwinding it would be impracticable, if not impossible, and the Company’s

shareholders would have suffered permanent and irreparable harm by, inter alia, losing their ability to cast a free, non-coerced vote, because the Company has already handed over 39.9% of the vote to Wells Fargo by issuing to it a special class of preferred shares (with only voting rights) for no additional consideration beyond the terms of the Merger (the “Share Exchange”).

Defendants John D. Baker, II, Peter C. Browning, John T. Casteen, III, Jerry Gitt, William H. Goodwin, Jr., Maryellen C. Herringer, Robert A. Ingram, Donald M. James, Mackey J. McDonald, Joseph Neubauer, Timothy D. Proctor, Ernest S. Rady, Van L. Richey, Ruth G. Shaw, Lanty L. Smith, and Dona Davis Young (collectively the “Individual Defendants”), as officers and/or directors of the Company, owe fiduciary duties of good faith, loyalty, fair dealing, due care, and candor to Plaintiff and the other public stockholders of the Company (except the Defendants herein and any person, firm, trust, corporation, or other entity related to, or affiliated with, any of the Defendants) and their successors in interest, who are or will be threatened with injury arising from Defendants’ actions as more fully described herein (the “Class”).¹

Plaintiff contends, among other things, that Wells Fargo is attempting to acquire Wachovia for inadequate consideration, achieved through an unfair process.

On September 15, 2008, Wachovia’s President and CEO, Bob Steel, gave an interview on Jim Cramer’s “Mad Money,” during which he publicly represented that, despite its recent problems stemming from the mortgage market melt-down, Wachovia had a promising future as a stand-alone company. In that interview, Mr. Steel explained that Wachovia would not

¹Since filing this action, counsel for Plaintiff has been inundated with phone calls and emails from Wachovia shareholders all over the Country who, without exception, support the goals of this action.

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

Further, as reported in BusinessWeek on October 6, 2008, in an article entitled *Wachovia: A Split May Boost the Banking Industry* concerning the Merger and a lawsuit filed by Citigroup, Inc., which had entered into an agreement to acquire major assets of Wachovia prior to the announcement of the Merger, against Wachovia, “Wachovia CEO Robert Steel has argued to Wall Street [that] only one-quarter of the bank’s loan portfolio consists of the troubled mortgages made in its Golden West subsidiary. Excluding those mortgages – admittedly, no small feat – and a smaller portfolio of troubled construction loans, the majority of Wachovia’s portfolio consists of old-fashioned consumer loans to customers with whom the bank has generally had a long relationship.”

Despite these positive indications for the Company, Wachovia’s Board negotiated a Merger Agreement with, among other things, an inadequate “fiduciary out” clause, a draconian and unlawful Share Exchange, and at an inadequate exchange ratio for Wachovia shareholders,

all at the same time assuring that Wachovia's senior executives would receive lucrative "golden parachutes," whether or not they continued to work for Wells Fargo.

As just stated, in violation of their fiduciary duties, the members of the Board agreed to an ineffectual and inadequate "fiduciary out" clause in the Merger Agreement. According to the Merger Agreement, if the Board "determines in good faith that, because of a conflict of interest or other special circumstances . . . it would violate its fiduciary duties under applicable law to continue to recommend the plan of merger . . . then it may submit the plan of merger to its shareholders without recommendation" and "may communicate the basis for its lack of a recommendation." (Merger Agreement Section 6.3.) Thus, the Board has no right to *withdraw* Wachovia from the agreement based upon their fiduciary duties if a superior proposal to acquire or merge with the Company is offered or circumstances change (for example, refinements to the Government's bailout plan) rendering the Merger a less-attractive alternative for Wachovia's public shareholders. Rather, the Board's only remedy is to recommend that shareholders vote against the Merger.

This lack of an effectual fiduciary out clause in the Merger Agreement is especially egregious considering that the Board has impermissibly circumvented the voting process and rendered the vote on the Merger essentially meaningless, thereby coercing Wachovia's shareholders to accept the Merger. The unaffiliated Wachovia shareholders have been effectively disenfranchised, in that over 40% of the vote will almost certainly be cast in favor of the Merger (since Wachovia has issued preferred shares that provide Wells Fargo with control of 39.9% of the vote, combined with the fact that the directors and officers of Wachovia hold 2.48% of the Company's common stock) and there is no protection for those unaffiliated

shareholders, such as a requirement that a majority of the unaffiliated shareholders vote in favor of the Merger. Thus, unless the Court remedies this draconian arrangement, the public shareholders' votes and the Board's recommendation for or against the Merger will be largely irrelevant.

Additionally, by issuing to Wells Fargo preferred shares carrying 39.9% of the Wachovia shareholder vote to Wells Fargo, the Individual Defendants have, for all practical purposes, precluded any competing bid from being offered for the Company without the consent of Wells Fargo, including any possible topping bid by Citigroup. Thus, the odds of any other potential bidder appearing to top Wells Fargo are extremely remote.

Because the Share Exchange would effectively preclude any competing bid for Wachovia, it is unenforceable under Section 126(c) of the recently passed Emergency Economic Stabilization Act of 2008 (the "EESA"), which states:

UNENFORCEABILITY OF CERTAIN AGREEMENTS – No provision contained in any existing or future standstill, confidentiality, or other agreement that, directly or indirectly --

(A) affects, restricts, or limits the ability of any person to offer or acquire,

(B) prohibits any person from offering to acquire or acquiring, or

(C) prohibits any person from using any previously disclosed information in connection with any such offer to acquire or acquisition of,

all or part of any insured depository institution, including any liabilities, assets, or interest therein, in connection with any transaction in which the [FDIC] exercises its authority under section 11 or 13, shall be enforceable against or impose any liability on such person, as such enforcement or liability shall be contrary to public policy.

Thus, just as Wachovia argues in its lawsuit with Citigroup concerning the exclusivity agreement that had been entered into between those two entities,² here, the Share Exchange is unenforceable because it clearly “directly or indirectly . . . affects, restricts, or limits the ability of any person to offer or acquire” Wachovia.

Further, certain of the Individual Defendants and the other executives at the Company have compromised their fiduciary obligations to Wachovia’s public shareholders by their personal motives to secure future employment with Wells Fargo after the Merger and/or to receive golden parachutes and change in control benefits. According to the Merger Agreement, “[Wells Fargo] shall, or shall cause its Subsidiaries to, honor, in accordance with the terms thereof as in effect as of the date hereof or as may be amended or terminated after the date hereof with the prior written consent of Parent, each employment agreement and change in control agreement to which Company or any of its Subsidiaries is a party and the obligations of Company and its Subsidiaries” as of the time the Merger is consummated.

On the other hand, as noted in Citigroup’s complaint filed on October 6, 2008, in New York State Supreme Court objecting to the Merger, under the agreement-in-principle between Wachovia and Citigroup pursuant to which Citigroup would acquire Wachovia’s banking operations for \$2.16 billion in a deal arranged by the Federal Deposit Insurance Corp. (“FDIC”) on Sept. 29, 2008, the golden parachutes of Wachovia’s senior executives would not have been triggered because that deal did not contemplate a change in control of Wachovia, but, instead, a sale of assets of the Company. However, the Merger between Wachovia and Wells Fargo will

²In Wachovia Corp. v. Citigroup, Inc., 08-CV-8503 (S.D.N.Y.), which was filed on October 4, 2008, Wachovia seeks a declaratory judgment that the transaction with Wells Fargo is “valid, proper, and not prohibited by a letter agreement between Wachovia and Citigroup, dated September 29, 2008.

trigger the golden parachutes of Wachovia officers and certain of its directors which “would enable these executives to bestow upon themselves a \$225 million windfall” because it is a change of control transaction.

The 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock, valued at approximately \$7 per share of Wachovia common stock, to be provided to Class members pursuant to the Merger is unfair and inadequate because, among other things:

(a) the \$7 per share valuation of Wachovia common stock actually offers a \$3 per share discount to the Company’s closing price of \$10 per share on September 26, 2008, which was prior to the initial failure in the U.S. House of Representatives on September 29, 2008 of the EESA (more conventionally known as the “Bailout”), as first proposed, that caused a severe and likely exaggerated sector-wide downturn in financial stock trading prices; and

(b) the U.S. Senate and House of Representatives, on the second vote, did pass into law the \$700 billion Bailout on October 3, 2008, under which the federal government will purchase illiquid assets of companies such as Wachovia; thus, the Bailout should make Wachovia much more valuable in that its most poorly performing assets will likely be purchased by the government and its other remaining valuable assets, most notably its \$339 billion in Wachovia deposits and its network of more than 3,300 branches throughout the country, would solidify Wells Fargo (or any other potential acquirer) as being in the top tier of U.S. retail banking. Since that time many comparable U.S. banks have received billions of dollars of infusions of capital from the Bailout.

Plaintiff asserts that by reason of the foregoing, Defendants have violated, and will continue to violate (unless the shareholder vote is enjoined), their fiduciary duties owed to the

public shareholders of Wachovia by acting to put the interests of themselves and Wells Fargo ahead of those of Wachovia's public shareholders, they have acted against the best interests of the Class, and have otherwise failed to take appropriate steps to protect the interests of the Class.

ARGUMENT

Pursuant to North Carolina Rule of Civil Procedure 34(b), the "court may allow a shorter or longer time" to respond to discovery requests. Thus, expediting discovery in appropriate circumstances is expressly contemplated under North Carolina procedure.

Expediting proceedings in cases challenging fast-moving merger transactions are routinely granted where a motion for a preliminary injunction is sought. For example, the courts in the State of Delaware, where more companies are incorporated than any other, expediting proceedings in such cases is commonplace. As the North Carolina Superior Court stated in First Union Corp. v. Suntrust Banks, Inc., 2001 WL 1885686, *9 (N.C. Super. 2001), "North Carolina courts have frequently looked to Delaware for guidance because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court." Thus, due to the absence of reported North Carolina law on the topic at issue, Plaintiff urges the Court to follow Delaware law in this case, pursuant to which, where, as here, Plaintiff has articulated a sufficiently colorable claim and has shown a sufficient possibility of threatened irreparable harm, those courts have recognized the propriety of expedited proceedings. See Marie Raymond Revocable Trust, et al. v. MAT Five LLC, et al., 2008 WL 2673341 (Del. Ch. Jun. 26, 2008); In re SunGard Data Sys., Inc. S'holders Litig., 2005 WL 1653975 (Del. Ch. July 8, 2005); Giammargo v. Snapple Beverage Co., 1994 WL 672698, *2 (Del. Ch. 1994).

In applying these standards, the Delaware Court of Chancery "traditionally has acted

with a certain solicitude for plaintiffs” and “has followed the practice of erring on the side of more [expedited] hearings rather than fewer.” Giammargo, 1994 WL 672698, at *2. As a result, “[a] party’s request to schedule an application for a preliminary injunction, and to expedite the discovery related thereto, is normally routinely granted. Exceptions to that norm are rare.” In re Int’l Jensen, Inc. Shareholders Litig., 1996 WL 422345, at *1 (Del. Ch. 1996). The Delaware Supreme Court has observed that “Delaware courts are always receptive to expediting any type of litigation in the interests of affording justice to the parties.” Box v. Box, Del. Supr., 697 A.2d 395, 399 (1997).

The Share Exchange, which has now been consummated, will abrogate the Company’s public shareholders’ right to make a non-coerced vote on the Merger, by substituting the judgment of the Board and Wells Fargo for that of the public shareholders on the Merger’s desirability unless the Merger or the vote on the Merger, as currently structured, is enjoined. Unless the Court hears Plaintiff’s application on an expedited basis, Wachovia’s stockholders will irreparably and irretrievably lose their opportunity to (1) make a non-coerced decision as to how to vote with respect to the Merger; and/or (2) to receive fair consideration for their Wachovia shares.

According to the Defendants, the Merger is planned to close by the end of 2008. In the absence of prompt injunctive relief from this Court, Wachovia’s public stockholders will suffer immediate, irreparable harm. Thus, Plaintiff must undertake and complete discovery in connection with his application for injunctive relief, and briefing, argument and decision thereon must take place in an extremely short period (less than two months). Accordingly, expedited discovery is essential.

This threat of irreparable harm justifies expedited discovery with a hearing on plaintiff's Motion for a Preliminary Injunction as soon as practicable.

CONCLUSION

Plaintiff respectfully requests that the Court enter the accompanying Order expediting proceedings and scheduling a hearing on plaintiff's Motion for Preliminary Injunction.

Dated: October 23, 2008

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

s/ Carl L. Stine
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