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

DEFENDANTS' BRIEF OPPOSING MOTION TO EXPEDITE PROCEEDINGS

PRELIMINARY STATEMENT

Plaintiff seeks to interfere with a transaction pronounced by the United States Government as necessary to prevent "*serious adverse effects on economic conditions*" and the "*financial stability*" of the United States. Statement by the Board of Governors of the Federal Reserve (10/21/08 statement following approval of merger on 10/12/08) at 2-3.[1] Nevertheless, Irving Ehrenhaus, who purports to be a shareholder of Wachovia (though he has pleaded no facts concerning the date or amount of his investment) asks this Court to afford this action expedited treatment so he can obtain vague and undefined relief against the merger through entry of a preliminary injunction.

[1] The Affidavit of Mark Merritt, counsel for Wachovia, filed contemporaneously herewith, attaches the publicly available materials supporting the facts set forth in this brief. Except for the Federal Reserve Statement quoted above, which is Merritt Aff. Exh. 7, all of these materials were available to plaintiff's counsel when they filed their Motion to Expedite Proceedings on October 14, 2008.

As the Court is aware, the United States financial system is in crisis. Huge financial institutions such as Merrill Lynch, Bear Stearns, Fannie Mae, Freddie Mac, Washington Mutual, and Lehman Brothers have been either sold on an emergency basis, nationalized, or put into bankruptcy or receivership. The nine largest remaining financial institutions are in the process of receiving capital from the United States Treasury, acting under emergency legislation enacted by Congress less than a month ago.

Wachovia is one of the largest institutions affected by this crisis. With approximately $420 billion in deposits, Wachovia ranks as the third largest depository institution in the United States. It employs 125,000 people, including 20,000 in Charlotte and thousands throughout North Carolina. Through its relations with depositors, creditors, suppliers, financial counterparties and the local communities it serves, Wachovia's viability is a matter of enormous public interest.

On October 3, the board of Wachovia approved the transaction at issue with Wells Fargo in which Wachovia's shareholders will receive approximately $15 billion in Wells Fargo stock. The Wachovia board thereby endorsed a transaction that promised Wachovia's shareholders several times the value of a prior proposed Citigroup transaction. Receivership was the only other option then available to Wachovia. The Wells Fargo/Wachovia merger was approved by the Board of Governors of the Federal Reserve System in record time, acting under statutory emergency powers, because the Federal Reserve considered the successful completion of the transaction to be crucial to the stability of the United States banking system. The merger is expected to close after the Wachovia shareholder vote, which has not yet been scheduled but is expected to occur in December 2008.

Plaintiff Ehrenhaus is, to date, the only shareholder who has sued to stop the Wells Fargo merger. Mr. Ehrenhaus is represented in this action principally by a law firm specializing in corporate class-action litigation. He filed this action only a few days after the merger of Wachovia and Wells Fargo was announced, and his pleadings ignore publicly available facts not subject to reasonable dispute that materially contradict the pleadings he has filed.

Ehrenhaus has provided the Court with no assurance that he could meet the requirement under Rule 65 that plaintiff post a bond sufficient to cover the "costs and damages" if an injunction is determined to have been wrongfully entered. N.C. R. Civ. P. 65(c). Indeed, it is inconceivable that this shareholder could possibly post a bond for the potential costs and damages resulting from obtaining a wrongful injunction against a multi-billion dollar merger that is critical to the stability of the financial system. Just last year Judge Jolly noted that absent the ability to post a substantial bond in a similar proceeding to enjoin a proposed sale, no injunction could issue. *See* Merritt Aff., Exh. 8 at 11-14.

The decision before the Court is whether to grant plaintiff's request for expedited discovery and entertain a preliminary injunction motion prior to the Wachovia shareholders' vote on the merger. The plaintiff's request is addressed to the sound discretion of the Court. Although expedited discovery and preliminary injunction proceedings are certainly not uncommon in corporate merger situations, expedited treatment is not automatically granted. Such treatment is not warranted here because the plaintiff is seeking to prohibit or modify a merger necessary to ensure Wachovia's continued viability – and equally necessary to avoid the damage to customers, depositors, employees, shareholders and the public that would occur if the merger were to be put in doubt, delayed or blocked. Plaintiff's application simply does not

warrant overriding the judgment of the Federal Reserve through entry of an injunction stopping or adversely impacting the prospects for consummation of the merger.

Thus, defendants respectfully request that this Court deny plaintiff's motion to expedite proceedings and refuse to allow plaintiff to interfere with a merger that the Federal Reserve regards as essential to the financial system of the United States.

ADDITIONAL FACTUAL BACKGROUND

Public materials known to plaintiff before he filed his motion for expedited proceedings and for a preliminary injunction discredit the fundamental premise upon which his claims are founded – that better alternatives than a merger with Wells Fargo were and are available to Wachovia.[2] These materials further reinforce the urgent nature of the situation presented to Wachovia and its shareholders.

In an Affidavit publicly filed in this Court and in the Southern District of New York, Robert Steel, CEO of Wachovia, explained succinctly the stark choice facing Wachovia when the board decided to merge with Wells Fargo in the wee hours of Friday, October 3:

> The company's advisors and I told the Board that we believed that unless a definitive merger agreement was signed with either Citigroup or Wells Fargo by the end of the day Friday, October 3, that the FDIC was prepared to place Wachovia's banking subsidiaries into receivership.

Merritt Aff., Exh. 1 at ¶ 19. Early in the evening of October 2, FDIC Chairman, Sheila C. Bair, advised Wachovia that "the Wells Fargo proposal sounded superior to the Citi proposal," and "encouraged [Wachovia] to give serious consideration to that offer." *Id.* ¶ 16. The Wells Fargo

[2] There is no basis for the plaintiff's assumption that emergency government funding would be available to Wachovia. Such funding is subject to the discretion of the Treasury. *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.")

merger proposal was materially superior to the Citigroup proposal. *Id.* ¶ 21. Wachovia's Board approved it:

> After extensive consideration and discussion by the board, the board approved accepting the Wells Fargo proposal subject to the receipt of fairness opinions from Goldman Sachs and Perella Weinberg Partners. Goldman Sachs and Perella Weinberg Partners delivered their fairness opinions orally early in the morning of Friday, October 3.

Id.

On October 3, the market quickly validated the Board's judgment by more than doubling Wachovia's share price from the previous day's close of $3.27 per share to open at $6.94 per share. Merritt Aff., Exh. 3. Shareholders therefore witnessed an increase of over $7 billion in Wachovia's market capitalization resulting from the announcement of the Wells Fargo merger agreement. Not only was Wells Fargo's proposal better for Wachovia shareholders, unlike the Citigroup proposal it did not require government loss-sharing and did not require the break-up of Wachovia's businesses.

Plaintiff's application to this Court is based on the unsubstantiated and illogical notion that Wachovia has alternatives to the Wells Fargo merger and that somehow shareholders are being prevented from taking advantage of these supposedly superior opportunities. This makes no sense. It is now more than a month since Wachovia first announced that it was available for a transaction, and no offers other than those by Citigroup and Wells Fargo have been made. If any capable third party was interested in making such an offer, it could have done so. If any third party does so in the future, the merger agreement between Wells Fargo and Wachovia has a "fiduciary out" that allows the Board to consider another transaction. Merritt Aff., Exh. C to Exh. 1, §§ 6.3 & 6.8. The merger agreement required Wachovia to issue preferred stock to Wells Fargo, which issuance occurred on October 20. Nothing prevented any third party from coming forward before that date, however, and if a third party comes forward, the public shareholders of

Wachovia may still vote to reject the Wells Fargo merger. There is no break-up fee payable by Wachovia if this occurs. Merritt Aff., Exh. C to Exh. 1.

Since October 3, Wells Fargo and Wachovia have received all necessary approvals from federal regulatory authorities.[3] Explaining its reasons for using its emergency powers to approve the merger, the Federal Reserve stated:

> In light of the unusual and exigent circumstances affecting the financial markets, the weakened financial condition of Wachovia, and all other facts and circumstances, the Board determined in its order that emergency conditions existed . . . . The Secretary of the Treasury (in consultation with the President) determined, on the recommendation of the Federal Deposit Insurance Corporation ("FDIC") and the [Federal Reserve] Board . . . that compliance by the FDIC with [certain] provisions of the Federal Deposit Insurance Act ("FDI Act") with respect to Wachovia could likely result in serious adverse effects on economic conditions or financial stability. The proposed acquisition of Wachovia by Wells Fargo as currently structured would avoid those adverse effects without reliance on assistance by the FDIC. The [Federal Reserve] Board provided notice of this proposal to the Office of Comptroller of the Currency ("OCC") and the Office of Thrift Supervision ("OTS") . . . [and] also provided notice of this proposal to the Department of Justice ("DOJ"). Those agencies have indicated that they have no objection to approval of the proposal.

Merritt Aff., Exh. 7 at 2-3. The Federal Reserve refused to hold any public hearing on the application, concluding that "expeditious approval of the proposal was warranted in light of the weakened condition of Wachovia and the turmoil in the financial markets. The record indicates that Wells Fargo has the financial and managerial resources to serve as a source of strength to Wachovia and its subsidiary depository institutions." *Id.*

Plaintiff's application also rests on the unsubstantiated theory that Wachovia's prospects somehow changed for the better when Congress enacted the Emergency Economic Stabilization Act of 2008 ("EESA") on October 4. Compl. at ¶ 36. Government agencies involved in

[3] The Federal Reserve promptly overruled objections to the merger filed by various parties in a statement entered on October 12th. *See* Merritt Aff., Exh. 7.

approving the merger on an expedited basis did not share plaintiff's view that the enactment of EESA removed or even ameliorated the "exigent circumstances" and "emergency conditions" relating to Wachovia that were the basis for the Federal Reserve's Order, which was entered after enactment of EESA.[4]

The merger may close as soon as Wachovia shareholder approval is obtained. A draft preliminary proxy statement is expected to be filed with the Securities and Exchange Commission this week or early next week. While no date for a shareholder meeting has been set, it is expected that such a meeting will be held sometime in December to permit the merger to close before year-end.[5]

The period between now and the shareholder meeting is critical. The same factors that on October 12 led the Federal Reserve, with the endorsement of the Treasury Department and the President of the United States, to waive statutory requirements under their emergency powers – including "the unusual and exigent circumstances affecting the financial markets" – still exist. The financial markets remain in turmoil and consummation of the Wachovia/Wells Fargo merger remains critical to the health of the United States banking system.

THIS COURT SHOULD DENY EXPEDITION

Plaintiffs are not entitled to expedited proceedings. On the contrary, expedited proceedings are exceptional, and the Court should exercise its sound discretion in deciding whether to allow such proceedings. On this motion, the Court should exercise its discretion to deny plaintiff's motion – this is a unique case in which the grant of expedition threatens real

[4] The Federal Reserve, the OCC, the OTS, the Treasury (in consultation with the President) and the Department of Justice (Antitrust Division) have all endorsed the Wells Fargo/Wachovia merger.

harm not only to defendants but also to the Wachovia shareholders plaintiff claims to represent. Plaintiff's bare-bones pleadings do not remotely make out a sufficiently persuasive case on the merits to support expedition. Most importantly, expedited proceedings are not justified because plaintiff cannot possibly show that he can meet the equitable prerequisites required for issuance of a preliminary injunction that would override the public interest articulated in the Federal Reserve decision approving the merger.

A. Plaintiff has misstated the legal standard that guides this Court's decision on the motion to expedite.

Plaintiff's motion is based on the proposition that courts in North Carolina and Delaware routinely grant motions to expedite in merger cases where a plaintiff raises a claim of breach of fiduciary duty. Pls. Opening Br. at 9-10. A review of the case law reveals that plaintiff is incorrect. Plaintiff must make a substantial showing before the burdens of expedited proceedings should be placed on the parties and the Court.

North Carolina courts look to federal cases in interpreting similar procedural rules. *See Parsons v. Jefferson Pilot Corp.*, 333 N.C. 420, 426 S.E.2d 685 (1993). Under federal law, expedited proceedings are only appropriate in "an exceptional case" where there is "some compelling urgency." *See, e.g., Gibson v. Bagas Rest. Inc.*, 87 F.R.D. 60, 62 (W.D. Mo. 1980); *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982); *Crown Crafts, Inc.* v. *Aldrich*, 148 F.R.D. 151, 152 (E.D.N.C. 1993), *quoting Notaro*, 95 F.R.D. at 405 (denying a motion for expedition because the plaintiff failed to demonstrate that the injury "result[ing] [from failure to expedite] looms greater than the injury that the defendant will suffer if the expedited relief is granted");

(footnote continued)

[5] Under SEC rules, once a definitive proxy statement is mailed to shareholders, there is a minimum solicitation period of 20 business days prior to any meeting.

see also Dimension Data North America, Inc. v. Netstar-1, Inc., 226 F.R.D. 528 (E.D.N.C. 2005) (denying expedited discovery under a totality of the circumstances standard).

Similarly, in Delaware, the court exercises its discretion to expedite proceedings only where a plaintiff shows good cause:

> To make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.

In re SunGard Data Systems, Inc. S'holders Litig., C.A. No. 1221-N, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005) (footnotes omitted). "Conclusory allegations that are pleaded without supporting facts cannot be the platform for launching an extensive litigious fishing expedition for facts through discovery in the hopes of finding something to support them." *See Crescent/Mach I Partners, L.P.* v. *Turner*, 846 A.2d 963, 980 (Del. Ch. 2000) (citation omitted).[6]

Indeed, three of the four Delaware cases cited by plaintiff *deny* motions to expedite. *See In re SunGard Data Sys., Inc. S'holders Litig.*, *supra* at *2-3 (denying motion where plaintiffs fail to present colorable issues for litigation); *In re Int'l Jensen, Inc. Shareholders Litig.*, 1996 WL 422345 (Del. Ch. 1996); *Giammargo* v. *Snapple Beverage Co.*, 1994 WL 672698 (Del. Ch. 1994).[7]

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[6] Plaintiff never tried to obtain information to support his complaint through the procedures in N.C.G.S. § 55-16-02. *See In re Quintiles Transnational Corp. S'holders Litig.*, 2003 NCBC 11 at ¶¶ 15-28 (N.C. Super. 2003) (noting that "failure to use inspection of books and records may result in a finding that the suit was not meritorious when filed").

[7] Plaintiff cites only one case in which the Court of Chancery did expedite discovery. *Marie Raymond Revocable Trust* v. *MAT Five LLC*, C.A. No. 3843-VCL, 2008 WL 2673341 (Del. Ch. June 26, 2008). In the context of a tender offer for less than a controlling share of a corporation, the court found irreparable harm in the combination of inadequate disclosures and a requirement that tendering shareholders release all future legal claims against the target and purchaser. *Id.* at *5. As for *Box* v. *Box*, 697 A.2d 395 (Del. 1997), plaintiff's citation references only a Delaware Supreme Court opinion in an appeal *not* involving a motion to expedite.

Moreover, the threshold showing that a plaintiff must make to put the Court and the defendants through the burden of expedited proceedings can only be understood within the context of the ultimate showing plaintiff must make to obtain a preliminary injunction. This Court has 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. *See Marcoux* v. *Prim*, 2004 NCBC 5, ¶ 62. "[I]n 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." *Id.* ¶ 64; *see also First Union Corp. 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). Moreover, in connection with any application for a preliminary injunction, the Court must consider whether plaintiff can post the injunction bond required by N.C. R. Civ. P. 65(c).

B. This action should not be expedited.

Throughout plaintiff's complaint and motion papers runs the theme that intervention by this Court is necessary because Wachovia might be the subject of an improved offer from a third party, now that Congress has enacted emergency legislation to support financial institutions. Compl. ¶¶ 34, 36; Pls. Opening Br. at 5, 8. No factual support exists for these assertions, and no improved offer exists or is realistically forthcoming. But, giving plaintiff the full benefit of the doubt, there is still no need for judicial intervention. Wells Fargo delivered by far the superior proposal (one that did not require government assistance, was much higher per share, and did not require the break up of Wachovia), and Citigroup has not modified its prior proposal. Any bank

large enough to consider acquiring Wachovia knows how to formulate and communicate such an offer. Through the fiduciary out provision in the merger agreement, Wachovia has informed the market that if such a bona fide competing offer is made, it will give due consideration to it. By the time there is a shareholder vote, at least two months will have elapsed during which a competing bidder could come forward.

Further, expedited proceedings could upset the delicate balance in which the financial system finds itself – and jeopardize a merger that the Federal Reserve Board and all other government agencies have endorsed with unprecedented speed because its consummation is essential for the public good. As the Federal Reserve stated, all the responsible federal authorities have agreed that "emergency" and "exigent circumstances" exist supporting prompt consummation of the Wachovia/Wells Fargo merger. It is inconceivable that plaintiff, a single shareholder, will be able to overcome the public interest that weighs heavily against entry of any injunctive relief here.

Bond: Of critical importance here is the fact that plaintiff cannot be in a position to post a bond sufficient to mitigate the serious risks associated with enjoining this merger. This is a transaction involving approximately $15 billion in consideration payable to Wachovia shareholders. N.C. R. Civ. P. 65(c) requires a plaintiff who obtains a preliminary injunction to post an appropriate bond for "costs and damages" if the injunction is determined to have been wrongfully entered. In today's environment, there is no reason to assume that a transaction, once subjected to entry of an injunction, will eventually be completed or that another transaction, equally good or better, will come along. Accordingly, defendants would be entitled to have

plaintiff post a bond in the billions of dollars, which – incontestably – plaintiff cannot do. Expediting proceedings now, when there is no question that plaintiff cannot post the security required to obtain the relief he requests, would serve no purpose.

Success on Merits: In addition, plaintiff's merits allegations are insufficient to support an application for preliminary injunction. The plaintiff has asserted no credible theory or allegation that Wachovia's board breached any fiduciary duty in entering into the Wachovia/Wells Fargo merger agreement or that the shareholder vote will be impermissibly "coerced."

North Carolina law creates a presumption in favor of independent directors who are informed about what they are doing and who act in good faith. *First Union,* ¶ 70. The courts will not second guess directors' decisions absent a clear showing that the directors acted without an informational basis or in bad faith:

> Absent specific allegations of bad faith or inattentiveness, the board's decision is entitled to a presumption of reasonableness and plaintiff must specifically plead facts which would overcome that presumption. At a minimum, "[t]o overcome the presumption of the business judgment rule, the burden is on the plaintiff to show the defendant directors failed to act (1) in good faith, (2) in the honest belief that the action taken was in the best interest of the company, or (3) on an informed basis." If a plaintiff fails to meet the minimum requirements, the board's decision will be upheld "unless it cannot be attributed to any rational business purpose." . . .
>
> To determine the reasonableness of the transaction, a court can simply look at the transaction contemplated and . . . the proxy materials referred to in the complaint, to determine whether or not there is a rational purpose for the board's decision . . . . The wisdom of that decision is not the test.

Winters v. *First Union Corp.*, 2001 NCBC 08, ¶ 17.

The plaintiff makes no allegations to overcome the presumption that the Wachovia board, which is overwhelmingly made up of independent directors, acted with an appropriate base of knowledge. The Wachovia board acted under the circumstances described by the Federal Reserve Board – at a moment when Wachovia's viability was in doubt, in the middle of a

national financial crisis. And the Wachovia board was clearly motivated by the best interests of Wachovia shareholders – it acted to accept an offer which promised several times the amount per share the consideration Citigroup was proposing to pay to Wachovia shareholders (a decision which is, in fact, approved of by plaintiff here).[9]

Further discrediting any argument that a colorable fiduciary breach claim has been asserted here, the merger agreement the Wachovia board approved on October 3 has a fiduciary "out." If any third party offers a higher bid than Wells Fargo, the Wachovia board can withdraw its recommendation and shareholders are free to vote against the Wells Fargo deal. No such offer has been made. If it had been made, the market would know about it.

Plaintiff argues that approval by the Wachovia board of the share exchange consummated on October 20th amounted to a fiduciary breach. But Wachovia's directors are entitled to a presumption that they acted reasonably, which no allegations of the plaintiff have overcome. Wachovia would not have been able to obtain the benefits of the Wells Fargo offer without agreeing to the share exchange. Wells Fargo was not willing to take the risks involved in acquiring Wachovia in the midst of a highly uncertain financial environment without some assurance that the value of Wachovia could be preserved during the two-to-three month period between signing and closing. The share exchange was meant to assure investors, other banks, customers, counterparties and depositors that the Wells Fargo/Wachovia merger was indeed likely to close. Without such assurance, Wells Fargo faced the likelihood that, by the time it

[9] Undisputed, publicly available facts squarely refute the plaintiff's allegations that Wachovia's Board have supported the Wells Fargo merger to protect their employment positions. Only one Wachovia employee, CEO Robert Steel, is a member of the Wachovia Board of Directors. Mr. Steel has already announced that he will not remain with the merged company. *See* Merritt Aff., Exh. 5. There are no credible allegations that any of the other directors stand to benefit personally from the merger.

could close the merger, Wachovia would have suffered further customer defection and value erosion.

The circumstances surrounding the share exchange and the Wells Fargo/Wachovia merger agreement are unprecedented. Prior cases where the facts do not involve a bank that was on the edge of failure and an ongoing national financial crisis are simply not relevant. Moreover, this is not a case where a genuine third-party bidder is attempting to make a higher bid and asking the Court to relieve it from some restriction in an existing merger agreement.

Nor is there anything "coercive" about the share exchange or other provisions in the merger agreement. There is no break up fee payable if the merger is voted down. The non-Wells Fargo shareholders of Wachovia remain free, if they wish, to reject the Wells Fargo merger and take their chances on another future. These shareholders are not in the dark about the enactment of EESA – if they believe the passage of that legislation means that Wachovia would be better off going it alone, they can vote against the merger.

Balance of hardships: Plaintiff stands to suffer no harm at all if his motion is denied. There is no opportunity that might be lost if this action is not expedited. No better offer to purchase Wachovia is on the horizon, and no prospect of government assistance exists that might permit Wachovia to remain independent.

In contrast, an injunction against the merger risks grave harm to Wachovia's shareholders, to its ability to do business with other financial institutions, to its employees, to its depositors, and to the financial system.[10] If the markets perceived that Wachovia's business

[10] These considerations show a crucial difference between the current situation and the state of affairs before the Court in *First Union*. In that case, there was no financial crisis, no need for any bank involved to have the support of another financial institution, and no risk of financial

(footnote continued)

might *not* be supported by Wells Fargo going forward, Wachovia would be placed in a state of uncertainty that would threaten the financial interests of the very shareholders that plaintiff purports to represent. FDIC receivership would leave the shareholders with no value whatsoever, making plaintiff's blithe effort to disrupt the Wells Fargo merger self-defeating and non-sensical. Indeed, permitting plaintiff to move forward on an expedited basis is likely to cause great damage to Wachovia and its shareholders that could never be outweighed by any benefit that could come from this lawsuit.

CONCLUSION

Because plaintiff cannot under any reasonably conceivable circumstances obtain the extraordinary relief he seeks, there is no reason to expedite these proceedings. A preliminary injunction cannot enter, no matter what facts plaintiff discovers, because plaintiff has no likelihood of success on the merits and – as demonstrated by the expedited approval of the transaction under emergency powers by the United States government and the lack of any other viable alternative for Wachovia – this transaction is indisputably in the best interests of both Wachovia shareholders and the public at large.

During the ongoing banking crisis, it is important for the market to be confident that Wells Fargo and Wachovia can and will consummate their merger. The Federal Reserve, recognizing the critical importance of providing this assurance, acted to approve the merger in record time. No other shareholder has filed a suit to question it. No other viable alternative to the merger has been identified – any notion that emergency federal assistance is available is pure

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(footnote continued)

harm to any bank by virtue of an injunction. Moreover, in *First Union*, a bona fide, capable third-party bidder had in fact made a bid.

speculation. Allowing this litigation to distract from and perhaps endanger the merger would truly be backwards – any reasonable Wachovia shareholder motivated to obtain the best possible outcome in this extraordinary market can only hope that the merger closes.

It is also important that the full time and attention of Wachovia's key personnel be focused on maintaining Wachovia's financial stability, reinforcing its business, safeguarding its deposit base, and reinforcing the confidence of its customers, depositors and fellow banking institutions. This is also a time in which planning for a successful transition to becoming part of the merged bank will require the undivided attention of senior management.

Each of Wells Fargo and Wachovia is a very large institution with more than 125,000 employees. Together they will have more than $700 billion in deposits. Insuring that customers, depositors and other participants in the banking system are protected as the two banks merge their operations is a hugely important and time-consuming task. During this period, Wachovia's senior executives should not be preoccupied with responding to broad document discovery demands and deposition notices served at the insistence of a single shareholder without any apparent material interest in either Wachovia or obtaining the highest value for his shares.

For all the foregoing reasons, plaintiff's motion for expedited discovery and the setting of a date for a preliminary injunction hearing should be denied.

This 28th day of October, 2008.

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RULE 15.8 CERTIFICATION

I certify that this brief complies with BCR 15.8.

This the 28th day of October, 2009.

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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This 28th day of October, 2008.

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