EXHIBIT A

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**	**SUR-REPLY OF DEFENDANTS TO NEW ARGUMENTS RAISED BY PLAINTIFF**

Plaintiff's reply brief challenges the issuance of Series M preferred shares to Wells Fargo on a new ground not raised in his opening brief or any prior pleading filed with the Court. Plaintiff now claims that the share exchange transaction was invalid because approval by Wachovia's shareholders was required under N.C.G.S. § 55-11-02 before Wachovia issued Series M preferred shares to Wells Fargo. Section 55-11-02 is inapplicable to Wachovia's issuance of these preferred shares to Wells Fargo. Section 55-11-02 provides a process by which all of the holders of a class of already existing and outstanding shares can be compelled to exchange their shares for shares of another corporation when only the holders of a majority of shares favor the exchange. In other words, the statute provides a mechanism by which a merger can be accomplished without having the target corporation cease to exist. The statute does not apply here because Wachovia issued new preferred shares (in a new series) to Wells Fargo in a voluntary exchange pursuant to which Wells Fargo transferred 1,000 shares of Wells Fargo common stock to Wachovia. Subsection (d) of the statute makes it clear that its provisions have

no applicability here: "This section does not limit the acquisition of all or part of the shares of one or more classes or series of a corporation ***through a voluntary exchange or otherwise.***" N.C.G.S. § 55-11-02(d) (emphasis added).

A. Wachovia's Shareholders Previously Approved Issuance of the Preferred Shares.

Under the Share Exchange Agreement, Wachovia agreed to issue and sell 10 shares of Series M, Class A Preferred Stock (the "Shares") of Wachovia to Wells Fargo – the entire class of Series M shares. Wachovia's shareholders had already authorized the board to issue these Shares. *See* Merritt Aff., Exh. 4 (Amendment to Articles of Incorporation confirming authorization of Shares). In exchange, Wells Fargo agreed to issue 1,000 common shares to Wachovia and to enter into the Merger Agreement. Young Aff. ¶5; S-4 at 79. The Share Exchange Agreement required Wachovia to issue ***new*** Shares. It did not require Wachovia to compel its shareholders to involuntarily exchange already outstanding shares for Wells Fargo stock. (Wachovia issued the Shares to Wells Fargo on October 20, in exchange for the Wells Fargo common stock.)

The issuance of the Shares to Wells Fargo was proper and lawful. When a company's articles of incorporation authorize the issuance of a series of shares, directors need not obtain any further shareholder approval before issuing shares in that series. *See* N.C.G.S. 55-6-03(a) ("A corporation may issue the number of shares of each class or series authorized by the articles of incorporation."); N.C.G.S. 55-6-21(b) ("The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation . . ."). The articles may limit the directors' authority to issue shares in the series. *See* N.C.G.S. 55-6-21(a) ("The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation."). Plaintiff does not, however, claim that the

articles reserve any such power for the Wachovia shareholders to approve the issuance of the Shares, and no such limitation is in the articles. *See* Merritt Aff., Exh. 4. The directors did not issue more shares than authorized or fail to comply with any other condition. Accordingly, the issuance was valid as a matter of North Carolina corporate law.

B. Sections 55-11-02 and 55-11-03 have no applicability here.

Plaintiff relies solely on N.C.G.S. §§ 55-11-02 and 55-11-03 to support his argument. As is explained in the introductory paragraph above, these sections have no applicability to the issuance of the Shares.[1] Section 55-11-02 provides a procedure for a compulsory statutory share exchange that can be used as an alternative to a reverse triangular merger. As the Commentary explains:

> Section 11.02 establishes a procedure by which a direct exchange of shares for cash or other consideration in corporate combinations may be effected under the same safeguards applicable to mergers or other similar transactions. A share exchange under section 11.02 is binding upon all shareholders of the acquired class or series of shares.
>
> It is often desirable to effect a reorganization or combination so that the corporation being acquired does not go out of existence. . . .
>
> Section 11.02(c) [subsection (d) in N.C. Statute] is designed to make it clear that the mandatory exchange provided by section 11.02 does not affect the power of corporations to acquire shares by voluntary exchange or otherwise by agreement with the shareholders.
>
> This section introduces a concept that is new to North Carolina, i.e., a share exchange, which is defined as a transaction by which a corporation becomes the owner of all the outstanding shares of one or more classes of another corporation ***by an exchange that is compulsory on all owners of the acquired shares***.
>
> The same kind of transaction that is accomplished by a share exchange has in the past been accomplished by a "reverse triangular merger," which is the formation of a new subsidiary of the acquiring company, followed by a merger of that

[1] Section 55-11-03(g), cited by plaintiff, does not address a share exchange; it specifies when a surviving corporation's shareholders need not approve a plan of merger. Section 55-11-03(g) has absolutely nothing to do with an issuance of authorized shares.

> subsidiary into the corporation to be acquired in which the securities of the new subsidiary's parent are exchanged for securities of the parent to be acquired.

N.C.G.S. § 55-11-02 (Official MBCA and North Carolina Commentary) (emphasis added). As is apparent from the Commentary, section 55-11-02 in no respect applies to ***voluntary*** transactions such as the exchange of Wachovia preferred shares for Wells Fargo common stock.

In addition, the statute has no applicability to new issuances of shares – it is a mechanism for compelling existing shareholders to surrender their holdings upon the vote of holders of a majority in interest of the same class of shares. Authorized but unissued shares are not "outstanding," *see* N.C.G.S. 55-6-03(a) (defining "outstanding" shares as "[s]hares that are issued"), so the predicate of the statute – "[a] corporation may acquire all of the ***outstanding shares*** of one or more classes or series of another corporation" – confirms its inapplicability to an issuance of new shares. Thus, the statute in no respect limited the Wachovia directors' authority under § 55-6-21 to issue shares authorized by the articles of incorporation, and it had and has no applicability to the issuance of the Wachovia preferred shares to Wells Fargo in exchange for Wells Fargo common shares.[2]

Finally, the interpretation of the statute plaintiff suggests would be completely unworkable. It would have been impossible for a "majority" of the shareholders in the "class or series of shares to be acquired" to approve an issuance of new shares because there were, of course, no Series M preferred shareholders before Wachovia issued the Shares to Wells Fargo. Under the plaintiff's interpretation, newly issued shares could never be exchanged for shares of

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[2] Plaintiff's citation to *Winters v. First Union Corp.*, 2001 NCBC 08 (N.C. Super. 2001), does nothing to bolster his argument. The case simply states that "[t]he North Carolina statutes also provide that the board submit plans of merger or share exchange to the shareholders for vote," ¶ 15 (citing § 55-11-03). As demonstrated herein, § 55-11-03 has no applicability here. The case pending before the Court in *Winters* involved the merger of First Union Corporation and the former Wachovia Corporation.

another corporation even though such an issuance is specifically authorized by N.C.G.S. 55-6-21(b) ("The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation . . .").

The validity of the issuance of the Shares is beyond dispute and required no shareholder approval. Wachovia and the individual defendants respectfully request that the Court disregard Plaintiff's new argument because it is contrary to North Carolina law.

This 23d day of November, 2008.

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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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