NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT
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 L. RICHEY, RUTH G. SHAW, LANTY L. SMITH, G. KENNEDY THOMPSON, DONA DAVIS YOUNG, WACHOVIA CORPORATION, and WELLS FARGO & COMPANY,

Defendants.

BRIEF OF DEFENDANT WELLS FARGO IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Preliminary Statement

Defendant Wells Fargo & Company ("Wells Fargo") respectfully submits this memorandum in opposition to plaintiff's motion for a preliminary injunction. As shown below, plaintiff has not met his burden to obtain the extraordinary equitable relief he seeks. In particular:

- Plaintiff has not shown a likelihood of success on his claim that Wachovia's board breached its duties by approving the challenged provisions of the merger agreement. The Wells Fargo/Wachovia merger agreement includes unique features that favor Wachovia and its shareholders and distinguish this case from those on which plaintiff relies. Those features undermine plaintiff's argument and demonstrate that Wachovia's board acted consistently with its fiduciary duties.

- Plaintiff provides no support—and none exists—for his assertion that Wachovia and its shareholders would be better off if Wachovia tried to remain independent. Plaintiff alleges, without any evidence, that government funds would be available to keep Wachovia afloat, and denies, despite abundant evidence, that Wachovia was on the brink of failure in late September. In fact, the government has never indicated that it would extend participation in the current emergency assistance programs to Wachovia. One reason all relevant government authorities have concurred in the need to approve the Wells Fargo/Wachovia merger on an emergency basis is that the merger does not require government financial assistance. No support exists for plaintiff's assumption that the government would now change its earlier position and offer government aid to Wachovia.

- Plaintiff has built his case on pure speculation—the speculation that a new bidder will make a higher bid for Wachovia if this Court declares portions of the merger agreement invalid. But very few financial institutions are big enough to even consider an acquisition of Wachovia—and among those few institutions, even fewer, if any, are in good enough financial condition to carry out such an acquisition. Wells Fargo, which is the *only* AAA-rated bank in the United States of America today, is the only bidder for Wachovia. More than a month has elapsed since the announcement of the transaction without any word of a competing offer, other than that of Citigroup, whose bid for part of Wachovia, as plaintiff does not dispute, is inferior. No new third-party bidder exists.

- Plaintiff ignores the potential damage to Wachovia, to customers, to employees, to retirees and to communities if this Court disrupts the Wells Fargo merger. Despite the risk that any injunction would pose to Wachovia's shareholders, plaintiff has given the Court no basis to think that plaintiff could post the enormous bond that the North Carolina Rules of Civil Procedure would require here.

The Relevant Provisions of the Merger Agreement

The plaintiff makes no challenge in his motion to the financial terms of the Wells Fargo/Wachovia merger agreement. In particular, he does not dispute—and cannot dispute—that the merger agreement offers more shareholder value than the Citigroup proposal or FDIC receivership. The merger agreement provides that Wachovia's shareholders will receive 0.1991 shares of Wells Fargo common stock for each of their shares, for a total value that exceeds $11.8 billion. The relevant non-financial terms are as follows:

1. *Wells Fargo's strong commitment to complete the merger at the specified price*. Merger agreements almost always contain "material adverse change" or "material adverse effect" clauses—provisions that allow a buyer to terminate the deal if the seller's business deteriorates. Here, Wells Fargo did not ask for, and did not obtain, such protection beyond the

most basic condition that Wachovia not become bankrupt or have its banks seized, even though Wells Fargo knew that any number of material adverse changes to Wachovia's business and financial prospects were a possibility. Given the unprecedented market disturbances that occurred in September and October of this year, any merger agreement that contained such protection for the buyer would have been unfavorable to Wachovia's shareholders. Also, Wells Fargo's proposal was not subject to any further due diligence.

2. *Absence of any break-up or termination fee*. The Wells Fargo/Wachovia contract does not provide for any break-up or termination fee to be paid by Wachovia in the event that Wachovia's shareholders do not approve the merger. Although public company merger agreements nearly always include such termination fees, Wells Fargo did not require one here.

3. *Issuance of the Preferred Shares.* The merger agreement was conditioned on Wells Fargo receiving, without shareholder approval, Wachovia preferred shares carrying with them 39.9% of the voting power of the company (the "Preferred Shares"). The Preferred Shares provided the market with a heightened degree of assurance that the merger would take place, thereby mitigating the instability and uncertainty faced by Wachovia. Because of this heightened assurance, Wells Fargo was also in a position to immediately provide substantial liquidity support to Wachovia at a time when credit markets were basically nonfunctional. From Wells Fargo's point of view, the share issuance provided assurance that because the markets would have confidence that the merger with Wells Fargo was real, Wachovia's value would not massively deteriorate because of a lack of confidence in the institution in the time period between the signing of the merger agreement and the potential closing. Since Wells Fargo and Wachovia knew that there would be a period of two to three months, or potentially longer, between signing and closing, and since the turmoil in the banking system showed signs that it

was likely to continue (as it in fact has continued), the Preferred Shares were integral to the deal and beneficial to both parties.

Argument

A preliminary injunction is "an extraordinary measure." *Ridge Cmty. Investors, Inc.* v. *Berry,* 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977); *see also VisionAIR, Inc.* v. *James*, 167 N.C. App. 504, 508, 606 S.E.2d 359 (2004). To obtain a preliminary injunction against a merger, a plaintiff must demonstrate: (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. *Marcoux* v. *Prim*, 2004 NCBC 5, ¶ 62 (N.C. Super. Ct. Apr. 16, 2004). The Court must also consider whether plaintiff can post the injunction bond required by N.C. R. Civ. P. 65(c). Plaintiff cannot meet any of these requirements.

I. PLAINTIFF HAS FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

Because an injunction of a transaction where there are no competing bidders "risks significant injury to shareholders," this Court has required shareholders seeking to block a transaction under such circumstances to make "a particularly strong showing on the merits." *Marcoux*, 2004 NCBC 5, ¶ 64 (citing Delaware case law); *see also Wayne County Employees' Ret. Sys.* v. *Corti*, 954 A.2d 319, 331 & n.32 (Del. Ch. 2008) ("Given the lack of an alternative bidder and the decidedly unstable market, however, I would hesitate to enjoin the vote for anything other than a particularly strong showing."); *In re Pennaco Energy, Inc.*, 787 A.2d 691, 704 (Del. Ch. 2001) ("[T]his Court is cautious about using [a preliminary injunction] where it might endanger or delay stockholders' receipt of a control premium in a situation where no competing bid has emerged.”). Here, plaintiff fails to make *any* showing of a likelihood of success on the merits, let alone a strong showing.

A. The merger agreement is entitled to the protection of the North Carolina business judgment rule.

Plaintiff is not likely to succeed on the merits because the business judgment rule protects the actions of the Wachovia board. As this Court explained in its November 3 opinion, the business judgment rule

> operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business judgment.

Nov. 3 Op. ¶ 41 (quoting *Hammonds* v. *Lumbee River Elec. Mbrshp. Corp.,* 178 N.C. App. 1, 20-21, 631 S.E.2d 1, 13 (2006)); *see also* ROBINSON ON NORTH CAROLINA CORPORATION LAW § 14.06 (7th ed.). There is no heightened standard of judicial review here, as the legislature has expressly rejected the standards imposed by Delaware courts for sales of companies under that state’s *Revlon* doctrine. *See First Union Corp.* v. *SunTrust Banks, Inc.*, 2001 NCBC 9 ¶ 69 (N.C. Super. Ct. Aug. 10, 2001).

Here, plaintiff has not made any allegations that rebut the initial presumption that Wachovia’s board of directors acted with due care and in good faith. His claim that the board’s actions were affected by management’s compensation arrangements is without merit: Wachovia’s board consists overwhelmingly of *independent* directors (sixteen outside directors and only a single inside director) who had no interest in those arrangements, and whose interests thus did not conflict in any way with those of Wachovia’s public shareholders. *Cf. First Union*

v. *SunTrust*, 2001 NCBC at 9 ¶¶ 91, 133 (noting at time that Wachovia's board consisted of two inside and thirteen outside directors; taking note of credentials of independent directors). (Plaintiff's allegations about the compensation arrangements are factually inaccurate in any event, since Mr. Steele will not derive personal economic benefit from the so-called "golden parachutes" plaintiff refers to.) In addition, the independent Wachovia board did not simply approve the Wells Fargo deal in a few hours without any background; to the contrary, its decision was the product of numerous board meetings since September 16, board meetings in which many alternatives were discussed at length with the benefit of Wachovia's legal and investment advisors.

Moreover, the Wachovia directors were entitled under North Carolina law to rely upon information and advice provided to them by legal counsel or investment advisors, so long as the directors reasonably believed the matter to be within the advisor's expert or professional competence. N.C.G.S. § 55-8-30(b). The "board's reliance upon an investment banker (whose independence and qualifications are not challenged in the complaint) is another factor weighing against the plaintiff['s] ability to state an actionable claim that the defendant directors breached their fiduciary duties by failing to secure the highest value reasonably attainable." *McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 505 n.55 (Del. Ch. 2000). Here, the board was fully advised by two independent financial advisors and two legal advisors.

Wachovia's board of directors worked diligently to respond to fast-moving events at Wachovia and in the markets as a whole, quite literally seeking to salvage Wachovia's equity value and protect the economic interests of the Wachovia shareholders as much as possible under the circumstances. *See* Young Aff., Exh. A at 37-44.[1] As the Delaware Court of Chancery has recognized, there is "no single blueprint" that a board must follow to fulfill its fiduciary duty of care during the sale of a company. *Golden Cycle, LLC* v. *Allan*, No. Civ. A. 16301, 1998 WL 892631, at *13 (Del. Ch. Dec. 10, 1998) (quoting *Barkan* v. *Amsted Indus.*, 567 A.2d 1279, 1286 (Del. 1989)). Indeed, courts have been acutely sensitive to the fact that, in the absence of special circumstances, the business strategy adopted by a board in selling a company must be presumed valid. *See McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000).

In short, plaintiff has failed to make the clear showing that the directors acted without an informational basis or in bad faith that is required to rebut the protection of the business judgment rule:

> 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."

Winters v. *First Union Corp.*, 2001 NCBC 8, ¶ 17 (N.C. Super. Ct. July 12, 2001).[2] Absent this clear showing, "a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business judgment." Nov. 3 Op. ¶ 41.

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[1] The exhibits cited in this brief are those attached to the Affidavit of Mark Merritt, submitted to this Court on October 28, 2008, and to the Affidavit of Dona Davis Young, submitted with the Brief of Defendant Wachovia Corporation and Individual Defendants Opposing Preliminary Injunction.

[2] Plaintiff erroneously describes the standard by which this Court reviews deal protection measures, suggesting that directors' behavior is subject to enhanced scrutiny before the business judgment rule is applied. *See* Pl's. Mem. 16 n.8. In fact, plaintiff bears the initial burden to show that a breach of duty occurred. If, as here, no such breach is proven, plaintiff must

B. The parties' agreement to issue the Preferred Shares to Wells Fargo is not a violation of fiduciary duty.

Plaintiff's challenge to the Preferred Shares is meritless because Wachovia shareholders other than Wells Fargo control over 50% of the votes of the outstanding shares. They retain the power to reject the merger. The Delaware Court of Chancery has rejected assertions similar to those made by plaintiff here. Squarely on point is *In re IXC Communications Shareholders Litigation*, No. C.A. 17324, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999), in which then-Vice Chancellor Myron Steele, now the Chief Justice of Delaware, refused to enjoin a transaction in which 40% of the voting shares were subject to a voting agreement, stating:

> Here, an admittedly independent majority of IXC's shareholders (owning nearly 60% of all IXC shares) may still freely vote for or against the merger, based on their own perceived best interests, and ultimately defeat the merger, if they desire. The defendants have not, in fact, "locked up" an absolute majority of the votes required for the merger through the GEPT deal. Plaintiffs themselves, notwithstanding vigorous argument questioning the fairness of the GEPT deal, tacitly admit that the vote-buying agreement does not make the outcome of the vote a foregone conclusion. They can only say that the GEPT deal "*almost* completely lock[s] up the vote-thus giving shareholders *scant* power to defeat the Merger. . ." (emphasis added). "*Almost* locked up" does not mean "locked up," and "*scant* power" may mean less power, but it decidedly does not mean "no power."
>
> The fact that a *numerical majority* of IXC shareholders are still in a position independently to void the allegedly onerous effect of this vote-buying transaction by voting against the merger leads me to conclude that this agreement does not, in fact, have the purpose or effect of disenfranchising this remaining majority of shareholders.

Id. at *8-9 (last emphasis added).

(footnote continued)
demonstrate, by clear and convincing evidence, that the deal protection measures are coercive or prevent directors from performing their statutory duties. *See First Union* v. *SunTrust*, 2001 NCBC 9, ¶ 70. Again, North Carolina law does not impose any enhanced scrutiny, such as that imposed by Delaware's *Revlon* doctrine, on the board's decision to approve a merger agreement. *Id*. ¶ 69.

Both this Court in its opinion in *First Union* and plaintiff in his opening brief cited *In re IXC* as persuasive authority for the question, "Will the vote 'be a valid and independent exercise of the shareholders' franchise, without any specific preordained result which precludes them from rationally determining the fate of the proposed merger?'" *First Union* v. *SunTrust*, 2001 NCBC 9 ¶ 81; Pl's. Mem. 18. So long as an independent majority of Wachovia's shareholders are in a position to vote freely for or against the merger, *IXC* answers this question in the affirmative, as this Court should here. And in their independent exercise of their franchise, Wachovia's shareholders remain free to consider every one of plaintiff's attacks on the merger—because his complaint and its allegations have been fully disclosed to the shareholders.[3] As the Delaware Chancery Court has explained, "[a]bsent convincing evidence that the board skewed the process in order to prevent a shareholder from voting knowledgeably and intelligently on the merger agreement, no court should apply an artificial barrier to market consideration of that business judgment." *In re IXC Commc'ns, Inc.*, 1999 WL 1009174, at *7; *see also id.* at *10 ("The directors, having put the issue and all relevant information before the shareholders for their approval, can hardly be said to have 'disenfranchised' those very same shareholders.").

Moreover, the issuance of the Preferred Shares to Wells Fargo on October 20 is not the one-sided giveaway that plaintiff portrays it to be. The Preferred Shares should be seen in their true light as part and parcel of an overall, bargained-for set of mutual considerations embodied in the merger agreement. What Wachovia got, in part, in exchange for its agreement to issue the

[3] Thus, the proxy materials disclose the voting power held by Wells Fargo (Young Aff., Exh. A at 3, 10, 11); the fact that Wachovia officers and directors held additional voting power (*id.* at 33); the fact that Wachovia has agreed to put the transaction to a shareholder vote, even without a board recommendation (*id.* at 75); compensation arrangements of Wachovia's CEO and other directors and officers (*id.* at 59-61); and the fact that some Wachovia directors may continue on as Wells Fargo directors (*id.* at 61).

Preferred Shares was Wells Fargo's binding commitment to purchase Wachovia without the usual material adverse change clause.[4] In other words, Wells Fargo agreed to bind itself to purchase Wachovia without retaining any right to withdraw from the contract prior to closing even if Wachovia's value or business materially declined. Foregoing a material adverse change clause benefited Wachovia's shareholders because including such a clause would in effect have given Wells Fargo an option, rather than an obligation, to buy Wachovia. Under such a scenario, the market would have placed little or no confidence in the likelihood of the transaction closing, and Wachovia's business would have continued to spiral downward. In this mixture of bargains and benefits, the issuance of the Preferred Shares operated to induce Wells Fargo to agree to buy Wachovia at a fixed exchange ratio and without the option to exit the deal normally afforded by a typical material adverse change clause.

The announcement of a signed definitive merger agreement with Wells Fargo restored market confidence in Wachovia. *See* Merritt Aff., Exh. 1 at ¶ 23. In light of Wachovia's rapidly deteriorating situation, no prudent acquirer would have agreed to sign a binding, definitive merger agreement without some reasonable assurance from Wachovia that the transaction would close, which in turn would permit the acquirer to commit its own financial resources to preserve the value of Wachovia in the interim. Wells Fargo has made such a commitment and its willingness to do so has helped stabilize Wachovia since the signing and announcement of the merger agreement. This is especially true in a transaction of this size and scope that would take at least two months, in the midst of a market of nearly unprecedented daily uncertainty and volatility, for any merger partner to complete.

4 The only contingency relating to the financial health of Wachovia under which Wells Fargo is not obligated to consummate the merger is if Wachovia or one of its significant subsidiaries goes into bankruptcy or receivership. *See* Merritt Aff., Exh. C to Exh. 1, § 3.8.

Contrary to plaintiff's contentions, moreover, the Preferred Share exchange is neither coercive nor preclusive. A "coercive" measure is one that causes shareholders to vote for or against a proposal for reasons "other than the merits" of the transaction. *First Union* v. *SunTrust*, 2001 NCBC 9 ¶ 84 (quoting *Williams* v. *Geier*, 671 A.2d 1368, 1382-83 (Del. 1996)). And where, as here, a plaintiff has failed to demonstrate that directors breached their duty of due care, the plaintiff bears the burden of demonstrating by clear and convincing evidence that a deal is coercive. *Id.* ¶ 142. Plaintiff cannot meet this burden. Any Wachovia shareholder may vote for or against the merger, without fear of coercion or retribution from Wells Fargo—all Wachovia shareholders receive the same consideration for their shares in the completed merger, regardless of their vote. *Cf. Lacos Land Co.* v. *Arden Group, Inc.*, 517 A.2d 271, 276 (Del. Ch. 1986) (finding coercion when a company's principal shareholder and CEO threatened to block transactions in the best interest of the company unless certain proposed amendments were approved).

In any event, plaintiff's argument that the Share Exchange might prevent other bids from coming forward is not only speculative, but also logically and legally incorrect. A competing bidder could announce an offer today, and if that offer were truly superior and had credibility in the marketplace, it would expect the Wachovia board to withdraw its recommendation from the Wells Fargo merger. Such a bidder would also expect that shareholders other than Wells Fargo would vote against the Wells Fargo merger. Wachovia's shareholders retain the ability to reject the Wells Fargo merger in favor of another transaction (although there is none), or in favor of attempting to continue business as an independent entity (although there is no reason to believe this is feasible). Any potential competing bidder would know that. There is no reason to believe that the Share Exchange has deterred or will deter other bidders.

Nothing in the cases cited by plaintiff is to the contrary. Every one of them involved measures that *absolutely* prevented an alternative transaction. In *First Union*, the Court invalidated a non-termination provision not because it required directors to submit a matter to a shareholder vote, but because the provision extended five months *after* any such vote, and would have absolutely prevented shareholders, or directors later elected through a potential proxy contest, from considering other offers. *First Union* v. *SunTrust*, 2001 NCBC 9 ¶ 155-56. Similarly, in *Quickturn Design Systems., Inc.* v. *Shapiro*, 721 A.2d 1281, 1292 (Del. 1998), the Delaware Supreme Court upheld the Court of Chancery's decision to invalidate a "delayed redemption" poison pill that forbade directors from redeeming the pill for six months after election, effectively foreclosing any transaction. And in *Omnicare, Inc.* v. *NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003), the court invalidated a set of deal protection measures that "*completely* protected its transaction" and amounted to an "absolute defense" of the merger because more than 50% of the vote was locked up. Nothing in any of these decisions casts doubt upon a provision that, as here, simply requires directors to submit the merger to a fully informed, non-predetermined shareholder vote.[5]

C. The scope of the fiduciary out provision is consistent with the board's fiduciary duties.

Plaintiff attacks the "fiduciary out" in the merger agreement as being "ineffectual" because it "only" allows Wachovia's board, if it no longer deems the Wells Fargo transaction to

[5] Plaintiffs also suggest that the Preferred Shares remain in place indefinitely. This is not correct. The certificate of designation for the Preferred Shares limits the time the that the shares remain outstanding in the event the Wells merger is not consummated, and gives Wachovia certain redemption rights exercisable at the option of Wachovia's board; the timing of Wachovia's right to exercise its redemption rights is affected by certain events and circumstances as set forth in the certificate. Any claims conceivably arising out of these provisions are unripe at this time.

be in the best interests of shareholders, to make "a 'non-recommendation'" of the deal, and nonetheless requires a vote to be held. Pl's. Mem. 21. But plaintiff does not explain how such a provision violates any duty or is invalid. The fiduciary out in the merger is not absolute and permits the Wachovia board to exercise its duties, including by withdrawing its recommendation of the Wells Fargo merger and fully and publicly explaining its rationale as a response to a third-party offer. It allows Wachovia's board to consider alternative superior proposals and to withdraw its approval from the merger prior to the shareholder vote, which would have the practical effect of advising shareholders to vote down the merger. *See* Merritt Aff., Exh. C to Exh. 1, § 6.3. There is widespread acceptance today—as reflected in the current version of the Model Business Corporation Act—that "directors can agree to submit a matter to the shareholders for approval even if they later determine that they no longer recommend it." Model Business Corp. Act § 8.26 off. cmt., 63 BUS. LAW. 511, 512 (Feb. 2008);[6] *cf.* 8 DEL. CODE ANN. § 146 (explicitly permitting such agreements by statute in Delaware).

The reasonableness of a binding agreement to submit the merger for shareholder approval is even more apparent here, where the agreement would not require Wachovia to pay a "break up" fee in the event the board withdrew its recommendation and the shareholders voted against the merger, even if Wachovia subsequently entered into a competing transaction. *See, e.g., In re Pennaco Energy, Inc.*, 787 A.2d 691, 702-03 (Del. Ch. 2001); *McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 505-506 (Del. Ch. 2000); *see* 2-35 DAVID DREXLER et al., DELAWARE CORPORATION LAW AND PRACTICE § 35.04[3] (2007). Here, no such fee was provided for. As a

6 Section 8.26 was adopted in June 2008. S*ee* ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendment to Section 6.24, Adoption of Section 8.26 ("Force the Vote") and Related Amendments to Chapters 9, 10, 11, 12, and 14*, 63 BUS. LAW 1275 (August 2008).

result, there is no penalty deterring Wachovia's directors from candidly responding, as their fiduciary duties may require, to a third-party proposal.

II. PLAINTIFF CANNOT DEMONSTRATE IRREPARABLE HARM OR THAT THE BALANCE OF HARDSHIPS FAVORS AN INJUNCTION.

To obtain a preliminary injunction, a plaintiff must conclusively show irreparable injury. *Marcoux*, 2004 NCBC 5 ¶ 64. A plaintiff may not conclusorily allege it; rather, he must set out with particularity "facts supporting such statements so the court can decide for itself if irreparable injury may occur." *Town of Knightdale* v. *Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (N.C. Ct. App. 1989) (quoting *United Tel. Co. of the Carolinas, Inc.* v. *Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (N.C. 1975)). Such an injury must be not only irreparable, but also substantial. *Id.*

Plaintiff must also "show that the threat of injury from not issuing the injunction outweighs the possible injury from issuing the injunction." *Marcoux*, 2004 NCBC 5, ¶ 62; *see also First Union* v. *SunTrust*, 2001 NCBC 9 ¶ 70; *Kaplan* v. *Prolife Action League*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993) ("In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.").

A. Wachovia shareholders, not plaintiff, face irreparable harm if an injunction is granted.

At bottom, the harm plaintiff alleges is that he *might* be denied the opportunity to obtain a higher offer for his shares. No such offer has surfaced since Wachovia's merger with Wells Fargo was announced. As a result, plaintiff's allegations of irreparable harm present nothing but unproven speculation—not the substantial proof of actual, imminent harm required to obtain an injunction. Indeed, as this Court has observed, the fact that there is no alternative offer demonstrates that the only irreparable harm threatened here would come from the *issuance* of an injunction, not the *denial* of one: "[T]he absence of another bidder increases the prospect for irreparable injury [to shareholders] from the Court *enjoining* the merger." *Marcoux*, 2004 NCBC 5, ¶ 107 (emphasis added); *see also In re Checkfree S'holders Litig.*, No. 3193-CC, 2007 WL 3262188, at *4 (Del. Ch. Nov. 1, 2007) (requiring an "especially strong showing" to enjoin premium transaction in absence of a competing bid); *Kohls* v. *Duthie*, 765 A.2d 1274, 1289 (Del. Ch. 2000) (Courts are "understandably cautious when the issuance of an injunction would deprive shareholders of the benefits of a merger without offering them . . . any alternative." (quotation omitted)).

Plaintiff's speculative theory of harm is built upon an unstated assumption—one that is contradicted by the record of thirty years of case law authority in merger cases. Plaintiff is asking the Court to assume that the absence of any higher bid can be attributed to the "deal protections" in the Wachovia/Wells Fargo merger agreement. But case after case demonstrates that would-be higher bidders—if they are bona fide and have credibility with the marketplace—come forward and publicly announce their interest in making a bid, irrespective of such deal protection devices as may be embedded in a signed merger agreement. This is, of course, precisely what happened in this Court in *First Union* v. *SunTrust*, and in the courts of Delaware in such landmark decisions as *Time/Warner*, *QVC/Viacom* and *Omnicare*. *See First Union* v. *SunTrust*, 2001 NCBC 9; *Omnicare, Inc.* v. *NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003); *Paramount Commc'ns Inc.* v. *QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *Paramount Commc'ns Inc.* v. *Time Inc.*, 571 A.2d 1140 (Del. 1989).

Plaintiff's other theory of harm is that Wachovia might be better off staying independent. This theory, however, is premised upon speculation: plaintiff supposes that, with federal aid, Wachovia could flourish as an independent bank. But there is no likelihood that any such aid would be given, and no evidence to support plaintiff's supposition otherwise. The Treasury has unreviewable discretion in these matters, along with the Federal Reserve and the FDIC. The Federal Reserve has already concluded that, "In light of the unusual and exigent circumstances affecting the financial markets, the weakened financial condition of Wachovia, and all other facts and circumstances, . . . emergency conditions existed that justified expeditious action on this proposal." *See* Merritt Aff., Exh. 7 at 2. The Federal Reserve's statement on these points was issued *after* the enactment of the Emergency Economic Stabilization Act, and it was concurred in by all relevant agencies of the federal government that could conceivably extend aid; there is absolutely no suggestion in that statement that, because of the enactment of EESA, the Wells Fargo/Wachovia merger was deemed any less necessary or urgent.

Wachovia shareholders currently retain the opportunity to vote to exchange their shares for those of a strong, well-capitalized entity, in a transaction that will prevent a possible FDIC receivership. If plaintiff succeeds in obtaining an injunction, this opportunity may be lost. The merger agreement permits either party to terminate the merger in the event that an injunction prevents the merger from closing. *See* Merritt Aff., Exh. C to Exh. 1, § 7.1(d). Moreover, under some circumstances, should an injunction prohibit Wells Fargo from voting the shares acquired in the Share Exchange, Wells Fargo has the unilateral right to terminate the merger. *Id.* § 8.1(f).

B. The balance of the hardships favors allowing a shareholder vote.

Not only does plaintiff fail to demonstrate irreparable harm if an injunction is denied, but he also fails to demonstrate that the balance of hardships favors an injunction. The plaintiff owns 0.00005% of the common stock of Wachovia (1,080 shares out of 2.16 billion outstanding). As noted above, this lone shareholder asks this Court to indulge his speculation that Wachovia could flourish as an independent bank. That is not just speculation, it is a gamble that Mr. Ehrenhaus offers the Court—an all-in, bet-the-farm wager, at that. For it is possible that Wachovia would wind up in receivership—with all of Wachovia's shareholders, not just plaintiff, losing all their money. That is exactly what happened to Washington Mutual. Depositors were protected; shareholders received nothing. *See, e.g.*, Robin Sidel, David Enrich & Dan Fitzpatrick, *WaMu is Seized, Sold Off to J.P. Morgan, In Largest Bank Failure in U.S. Banking History*, WALL ST. J., Sept. 26, 2008, *available at* http://online.wsj.com/article/SB122238415586576687.html. Indeed, as of the market close on Friday, November 14, Washington Mutual shares were worth less than six cents apiece. Such a specter of loss, by itself, tips the balance of hardships heavily against an injunction.

Beyond this, an injunction in this action poses a grave threat of injury to Wachovia's other shareholders, who hold the remaining 2.16 billion shares. Also at risk are Wachovia's customers, employees, retirees and the communities served by Wachovia. Wachovia employs approximately 120,000 people, and over 20,000 people in Charlotte alone. The merger with Wells Fargo will preserve far more jobs than a federal receivership and wind-down of Wachovia, which could leave thousands more employees jobless and present a significant possibility of lasting harm to the financial markets. And an injunction would deprive Wells Fargo and its shareholders of an important strategic transaction for which it bargained and committed extensive resources.

Finally, there is the importance of the Wells Fargo/Wachovia merger to the banking system as a whole—as demonstrated by the emergency actions undertaken by the Federal Reserve, the Treasury, the President, the OTS, and the OCC, each of which acted to approve this merger in record time. In balancing the hardships, this Court should not ignore the substantial harms that an injunction would cause not only to Wachovia shareholders, but also to the public.

See Direx Israel, Ltd. v. *Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (public interest is a factor in consideration of a preliminary injunction); *see also Wayne County Employees' Ret. Sys.* v. *Corti*, 954 A.2d 319, 329 (Del. Ch. 2008) (same).

C. The relief plaintiff seeks would constitute a final injunction.

Plaintiff also asks this Court to rescind the share exchange—a bargained-for transaction already consummated—and to "require an effective fiduciary out clause." Pl's. Mem. 24. Ordering rescission of the share exchange or some sort of reformation of the contract would be mandatory relief—and thus effectively final, not preliminary, relief. Such relief cannot be awarded on an interlocutory proceeding. *See Shishko* v. *Whitley*, 64 N.C. App. 668, 671, 308 S.E.2d 448, 450 (N.C. Ct. App. 1983) ("A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case. As such, the court has no authority to issue a permanent injunction in an interlocutory proceeding.").

III. PLAINTIFF CANNOT BE GRANTED INJUNCTIVE RELIEF BECAUSE HE CANNOT COMPLY WITH THE BOND REQUIREMENT.

Rule 65(c) of the North Carolina Rules of Civil Procedure provides that no preliminary injunction "shall issue except upon the giving of security by the applicant . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Absent proof of malice or want of probable cause, a wrongfully enjoined party's damages are limited to the amount of the bond. *Indus. Innovators, Inc.* v. *Myrick-White, Inc.*, 99 N.C. App. 42, 49, 392 S.E.2d 425 (1990). In North Carolina, a final adjudication upon the merits favorable to the defendant acts as a determination that the defendant was wrongfully enjoined, and is entitled to recover any resulting damages against the bond. *Id*. For this reason, this Court has taken care to ensure that a shareholder who seeks to enjoin a shareholder vote on a merger is capable of posting an adequate bond. *See* Transcript of Oral Argument at 11-14, *Whitney* v. *Winston*, Index No. 07-CVS-3449 (N.C. Super. Ct. June 19, 2007) (Jolly, J.) ("If I stop this vote; there's going to be a bond. It's that simple.").

Plaintiff, whose total investment in Wachovia as of the close of trading on Friday, November 14 amounted to less than $6,000, 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 over $11.8 billion in consideration payable to Wachovia shareholders. As already explained, an injunction threatens to leave shareholders empty-handed, and Wachovia again adrift, possibly facing the risk of receivership and the total loss of value of its shares. Accordingly, the bond required is well beyond the means of Mr. Ehrenhaus.

Nor can plaintiff avoid the clear requirement of Rule 65(c) by seeking judicial waiver of the bond requirement. The Court of Appeals has made it clear that discretion to waive the security requirement arises in very narrow circumstances:

> The trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant *no material damage*, where there has been *no proof of likelihood of harm*, and where the applicant for equitable relief has *considerable assets* and is able to respond in damages if defendant does suffer damages by reason of a wrongful injunction.

Keith v. *Day*, 60 N.C. App. 559, 562, 299 S.E.2d 296, 298 (1983) (quoting *Fed. Prescription Serv., Inc.* v. *Am. Pharm. Assoc.*, 636 F.2d 755, 759 (D.C. Cir. 1980) (emphasis added, internal citations and alterations omitted)). The state of the financial markets, the circumstances that led to the Wachovia transaction, and the speculative nature of any alternative offer or sufficient federal government support make clear that an injunction could materially damage the defendants and Wachovia's shareholders. Nor can plaintiff show that he possesses assets considerable enough to compensate defendants in damages. Accordingly, N.C. R. Civ. P. 65(c) requires plaintiff to post a bond that would permit recovery against him in the very real likelihood that an injunction would cause this merger to fail and render Wachovia's stock worthless.

Conclusion

Plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted, this 17th day of November, 2008.

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* *To Be Admitted Pro Hac Vice*

RULE 15.8 CERTIFICATE

I hereby certify that Defendant Wells Fargo's **BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**, dated November 17, 2008, complies with B.C.R. 15.8.

/s/ T. Thomas Cottingham, III

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **BRIEF OF DEFENDANT WELLS FARGO IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** was filed electronically with the North Carolina Business Court via the electronic filing system, which will automatically send email notification to the following attorneys of record, this 17th day of November, 2008:

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