## SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

CITIGROUP INC.,

Plaintiff.

v.

WACHOVIA CORPORATION, WELLS FARGO & CO., ROBERT K. STEEL, 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, DONA DAVIS YOUNG, JOHN S. CHEN, LLOYD H. DEAN, SUSAN E. ENGEL, ENRIQUE HERNANDEZ, JR., RICHARD M. KOVACEVICH, RICHARD D. MCCORMICK, CYNTHIA H. MILLIGAN, NICHOLAS G. MOORE, PHILIP J. OUIGLEY, DONALD B. RICE, JUDITH M. RUNSTAD, STEPHEN W. SANGER, JOHN G. STUMPF, SUSAN G. SWENSON, MICHAEL W. WRIGHT, and JOHN DOES 1-99

Defendants.

#### VERIFIED COMPLAINT

Index No.

9:21 pm

Plaintiff Citigroup Inc. ("Citigroup"), by its attorneys Gregory P. Joseph Law Offices LLC, Michael S. Helfer and P.J. Mode, Jr., for its Complaint against defendants Wachovia Corporation ("Wachovia"), Wells Fargo & Co. ("Wells Fargo"), John D. Baker, II ("Baker"), Peter C. Browning ("Browning"), John L. Casteen, III ("Casteen"), Jerry Gitt ("Gitt"), William H. Goodwin, Jr. ("Goodwin"), Maryellen C. Herringer ("Herringer"), Robert A. Ingram ("Ingram"), Donald M. James ("James"),

Mackey J. McDonald ("McDonald"), Joseph Neubauer ("Neubauer"), Timothy D. Proctor ("Proctor"), Ernest S. Rady ("Rady"), Van L. Richey ("Richey"), Ruth G. Shaw ("Shaw"), Lanty L. Smith ("Smith"), Dona Davis Young ("Young"), John S. Chen ("Chen"), Lloyd H. Dean ("Dean"), Susan E. Engel ("Engel"), Enrique Hernandez, Jr. ("Hernandez"), Richard M. Kovacevich ("Kovacevich"), Richard D. McCormick ("McCormick"), Cynthia H. Milligan ("Milligan"), Nicholas G. Moore ("Moore"), Philip J. Quigley ("Quigley"), Donald B. Rice ("Rice"), Judith M. Runstad ("Runstad"), Stephen W. Sanger ("Sanger"), John G. Stumpf ("Stumpf"), Susan G. Swenson ("Swenson"), Michael W. Wright ("Wright"), and John Does 1-99 (the "Doe Defendants") alleges on personal knowledge as to the plaintiff's own conduct and on information and belief as to the defendants' conduct, as follows:

### **Nature of the Action**

- 1. This is an action for bad faith breach of contract and tortious interference with contract.
- 2. In late September 2008, Wachovia Corporation ("Wachovia") was on the verge of collapse, burdened by bad loans and caught up in a liquidity crisis that threatened its very survival.
- 3. Well Fargo once had been a potential suitor for Wachovia in connection with a process for the rescue of Wachovia orchestrated by the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve"), and the Federal Reserve Bank of New York ("FRBNY"). By Sunday, September 28, 2008, Wells Fargo had determined not to participate in the process of rescuing Wachovia.

- 4. By approximately 4 a.m. on Monday, September 29, 2008, after intensive negotiations, and in order to avoid the imminent possibility that all of Wachovia's insured depository institution subsidiaries would be closed and put into FDIC receivership, Citigroup and Wachovia reached an agreement-in-principle. Pursuant to that agreement, Citigroup would acquire Wachovia's commercial banking subsidiaries and other businesses for approximately \$2.1 billion plus the assumption of approximately \$54 billion of secured and unsecured Wachovia debt at the holding company level, and the insured and uninsured deposits and other obligations to Wachovia's creditors.
- 5. In order to induce Citigroup and Wachovia to enter into the agreement-in-principle and to avoid the imminent possibility that all of Wachovia's insured depository institution subsidiaries would be closed and put into FDIC receivership, the FDIC agreed to provide open bank assistance to support the transaction, pursuant to Section 13 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1823, after the FDIC, the Federal Reserve and the Secretary of the Treasury, in consultation with the President of the United States, invoked the "systemic risk" provision of the FDIA.
- 6. Had Citigroup not stepped up in this way, Wachovia would have failed the following day and the debt issued by its holding company would have collapsed, with potentially devastating implications for the stability and security of the financial markets.
- 7. At approximately 7:30 a.m., on September 29, 2008, before the parties themselves had issued press releases, the FDIC announced its support for the

transaction and sought to reassure Wachovia customers that their deposits were fully protected.

- 8. On September 29, 2008, Citigroup and Wachovia also entered into a binding agreement (the "Exclusivity Agreement"), pursuant to which Wachovia agreed not to negotiate or enter into any competing acquisition agreement during the exclusivity period, which extended until October 6, 2008. *See* Exhibit A. The Exclusivity Agreement expressly contemplated that Citigroup and Wachovia would negotiate definitive deal documents during this period.
- 9. In particular, pursuant to the Exclusivity Agreement, Wachovia is contractually forbidden, among other things, (i) to "enter into or participate in any discussions or negotiations with, furnish any information relating to Wachovia . . . [or] otherwise cooperate in any way with, or knowingly assist, participate in, facilitate or encourage any effort by, any third party that is seeking to make, or has made, an Acquisition Proposal"; or (ii) to "enter into any agreement in principle, letter of intent, term sheet, merger agreement, acquisition agreement, option agreement or other similar instrument relating to an Acquisition Proposal."
- 10. The Exclusivity Agreement defines "Acquisition Proposal" broadly to include "any acquisition or purchase, direct or indirect" of 15% or more of the consolidated assets or of any class of equity or voting securities of Wachovia; any merger, consolidation, business combination or similar transaction involving Wachovia; or any other transaction "the consummation of which could reasonably be expected to impede, interfere with, prevent or materially delay the [Citigroup/Wachovia] Transaction

or that could reasonably be expected to dilute materially the benefits to Citigroup of the Transaction."

- 11. The Exclusivity Agreement further provides that the parties would be irreparably harmed by any breach of the Exclusivity Agreement, and that each party agrees "that the remedy of specific performance of [the Exclusivity Agreement] is appropriate in any action in court, in addition to any other remedy to which such party may be entitled."
- 12. Early in the morning on Thursday, October 2, 2008, the principals of Citigroup and Wachovia met and reached high-level agreement on all remaining issues. At that meeting, Citigroup and Wachovia further agreed that these points would be quickly documented and that final documents would be executed before the close of business on the following day.
- 13. Following this meeting, teams of lawyers worked through the day and night on Thursday to finalize the definitive deal documents. Their work had nearly been completed by early Friday morning.
- 14. According to press reports, and unknown to Citigroup, at approximately 7:30 p.m. on Thursday, October 2, 2008, unnamed "federal regulators" advised Wachovia to expect an acquisition proposal from Wells Fargo.
- 15. Wachovia did not disclose to Citigroup that it expected to receive a competing offer from Wells Fargo, but instead Wachovia and its lawyers continued to participate in discussions with Citigroup to document their agreement until approximately 2 a.m. on Friday, October 3, 2008.

- 16. At approximately 2:15 a.m. on Friday, October 3, 2008, Wachovia's Chief Executive Officer, Robert Steel, advised Citigroup that Wachovia had entered into an acquisition agreement with Wells Fargo, at which point Wachovia refused to participate in further discussions with Citigroup.
- 17. At approximately 7:15 a.m. on October 3, 2008, Wachovia issued a press release announcing that Wachovia and Wells Fargo had "signed a definitive agreement for the merger of the two companies." This agreement and the negotiations that preceded it flagrantly violate the express language of the Exclusivity Agreement. *See* Exhibit B.
- 18. Among the differences, the illegitimate Wells Fargo deal—unlike the Citigroup agreement to acquire Wachovia's commercial banking subsidiaries and other businesses—triggered the golden parachutes of Wachovia CEO Robert Steel and its other senior executives, which would enable these executives to bestow upon themselves a \$225 million windfall.
- 19. During this period, numerous officers and directors of Wachovia and Wells Fargo, and numerous of their legal and other advisors, known and unknown, acted knowingly and deceptively in furtherance of a plan to violate and interfere with Citigroup's rights under the binding Exclusivity Agreement.

#### The Parties

- 20. Plaintiff Citigroup is a corporation organized under the laws of Delaware with its principal place of business at 399 Park Avenue, New York, New York.
  - 21. On information and belief, Defendant Wachovia is a corporation

organized under the laws of North Carolina with its principal place of business at One Wachovia Center, Charlotte, North Carolina.

- 22. On information and belief, Defendant Wells Fargo is a corporation organized under the laws of Delaware with its principal place of business in at 420 Montgomery Street, San Francisco, California.
- 22A. On information and belief, Defendant Steel is a member of the Board of Directors of Wachovia and resides in Charlotte, North Carolina.
- 23. On information and belief, Defendant Baker is a member of the Board of Directors of Wachovia and resides in Jacksonville, Florida.
- 24. On information and belief, Defendant Browning is a member of the Board of Directors of Wachovia and resides in Charlotte, North Carolina.
- 25. On information and belief, Defendant Casteen is a member of the Board of Directors of Wachovia and resides in Charlottesville, Virginia.
- 26. On information and belief, Defendant Jerry Gitt is a member of the Board of Directors of Wachovia and resides in Palm Desert, California.
- 27. On information and belief, Defendant Goodwin is a member of the Board of Directors of Wachovia and resides in Richmond, Virginia.
- 28. On information and belief, Defendant Herringer is a member of the Board of Directors of Wachovia and resides in Piedmont, California.
- 29. On information and belief, Defendant Ingram is a member of the Board of Directors of Wachovia and resides in Durham, North Carolina.
- 30. On information and belief, Defendant James is a member of the Board of Directors of Wachovia and resides in Birmingham, Alabama.

- 31. On information and belief, Defendant McDonald is a member of the Board of Directors of Wachovia and resides in Greensboro, North Carolina.
- 32. On information and belief, Defendant Neubauer is a member of the Board of Directors of Wachovia and resides in Philadelphia, Pennsylvania.
- 33. On information and belief, Defendant Proctor is a member of the Board of Directors of Wachovia and resides in New York, New York.
- 34. On information and belief, Defendant Rady is a member of the Board of Directors of Wachovia and resides in La Jolla, California.
- 35. On information and belief, Defendant Richey is a member of the Board of Directors of Wachovia and resides in Birmingham, Alabama.
- 36. On information and belief, Defendant Shaw is a member of the Board of Directors of Wachovia and resides in Davidson, North Carolina.
- 37. On information and belief, Defendant Smith is the Chairman of the Board of Directors of Wachovia and resides in Raleigh, North Carolina.
- 38. On information and belief, Defendant Young is a member of the Board of Directors of Wachovia and resides in Hartford, Connecticut.
- 39. Defendants Steel, Baker, Browning, Casteen, Gitt, Goodwin, Herringer, Ingram, James, McDonald, Neubauer, Proctor, Rady, Richey, Shaw, Smith, and Young are collectively referred to as the "Wachovia Director Defendants."
- 40. On information and belief, Defendant Chen is a member of the Board of Directors of Wells Fargo and resides in Danville, California.
- 41. On information and belief, Defendant Dean is a member of the Board of Directors of Wells Fargo and resides in Half Moon Bay, California.

- 42. On information and belief, Defendant Engel is a member of the Board of Directors of Wells Fargo and resides in Minneapolis, Minnesota.
- 43. On information and belief, Defendant Hernandez is a member of the Board of Directors of Wells Fargo and resides in Pasadena, California.
- 44. On information and belief, Defendant Kovacevich is the Chairman of the Board of Directors of Wells Fargo and resides in San Francisco, California.
- 45. On information and belief, Defendant McCormick is a member of the Board of Directors of Wells Fargo and resides in Denver, Colorado.
- 46. On information and belief, Defendant Milligan is a member of the Board of Directors of Wells Fargo and resides in Lincoln, Nebraska.
- 47. On information and belief, Defendant Moore is a member of the Board of Directors of Wells Fargo and resides in Los Altos Hills, California.
- 48. On information and belief, Defendant Quigley is a member of the Board of Directors of Wells Fargo and resides in Burlingame, California.
- 49. On information and belief, Defendant Rice is a member of the Board of Directors of Wells Fargo and resides in Los Angeles, California.
- 50. On information and belief, Defendant Runstad is a member of the Board of Directors of Wells Fargo and resides in Seattle, Washington.
- 51. On information and belief, Defendant Sanger is a member of the Board of Directors of Wells Fargo and resides in Wayzata, Minnesota.
- 52. On information and belief, Defendant Stumpf is President and Chief Executive Officer of Wells Fargo as well as a member of the Board of Directors of Wells Fargo and resides in San Francisco, California.

- 53. On information and belief, Defendant Swenson is a member of the Board of Directors of Wells Fargo and resides in Irvine, California.
- 54. On information and belief, Defendant Wright is a member of the Board of Directors of Wells Fargo and resides in Wayzata, Minnesota.
- 55. Defendants Chen, Dean, Engel, Hernandez, Kovacevich, McCormick, Milligan, Moore, Quigley, Rice, Runstad, Sanger, Stumpf, Swenson, and Wright are collectively referred to as the "Wells Fargo Director Defendants."
- 56. On information and belief, the Doe Defendants are individuals and legal entities that participated in the flagrant violation of the Exclusivity Agreement and committed tortious interference with contract.

#### **Jurisdiction**

- 57. Pursuant to the Exclusivity Agreement, Defendant Wachovia has "irrevocably and unconditionally submit[ted] to the exclusive jurisdiction of any state or federal court sitting in New York City, Borough of Manhattan, over any suit, action or proceeding arising out of or relating to this letter agreement." Moreover, long-arm jurisdiction is appropriate over Defendant Wachovia under § 302 of the New York Civil Practice Law and Rules ("CPLR"), as this entity (i) transacts business in this State, and/or (ii) committed tortious acts within the State, and/or (iii) committed tortious acts outside of this State causing injury to plaintiff in this State, and (a) regularly does or solicits business or derives substantial revenue from services rendered within this State, or (b) expects or should reasonably expect the act to have consequences in the State and derives substantial revenue from interstate or international commerce.
  - 58. Long-arm jurisdiction is appropriate over Defendant Wells Fargo

under § 302 of the CPLR, as this entity (i) transacts business in this State, and/or (ii) committed tortious acts within the State, and/or (iii) committed tortious acts outside of this State causing injury to plaintiff in this State, and (a) regularly does or solicits business or derives substantial revenue from services rendered within this State, or (b) expects or should reasonably expect the act to have consequences in the State and derives substantial revenue from interstate or international commerce.

59. Jurisdiction is appropriate as to each of the individual defendants as they either reside in this State or are subject to long-arm jurisdiction under § 302 of the CPLR.

#### **Venue**

- 60. Pursuant to CPLR § 503(a) and (c), venue is proper in New York County because plaintiff Citigroup's principal office is located in this County.
- 61. In addition, pursuant to the Exclusivity Agreement, Defendant Wachovia "irrevocably and unconditionally waive[d] any objection to the laying of venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum."

# FIRST CAUSE OF ACTION (Against Defendant Wachovia) Breach of Contract

- 62. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 61 above, as if fully set forth here.
- 63. On September 29, 2008, Defendant Wachovia entered into a binding contract with Citigroup, pursuant to which it unconditionally agreed not to

negotiate or enter into any competing acquisition agreement with any other entity during the exclusivity period, which extended until October 6, 2008.

- 64. By negotiating with and entering into an acquisition agreement with Defendant Wells Fargo, Wachovia breached the terms of its Exclusivity Agreement with Citigroup.
- 65. Wachovia's breach of its contractual obligations has caused substantial damages to Citigroup, and threatens to cause enormous additional damages in the future. The amount of such damages shall be determined at trial.
- 66. As Wachovia acknowledged in the Exclusivity Agreement, "in the event of any breach of this letter agreement, the parties would be irreparably harmed and could not be made whole by monetary damages. Each party accordingly agrees (i) not to assert by way of defense or otherwise that a remedy at law would be adequate and (ii) that the remedy of specific performance of this letter agreement is appropriate in any action in court, in addition to any other remedy to which such party may be entitled."
- 67. Citigroup is confident that the few remaining open issues between the parties can be resolved promptly in good faith negotiations and is prepared to go well beyond the halfway mark if necessary to consummate the transaction agreed to by the parties.
- 68. Absent immediate relief by the Court, Citigroup will be deprived of its bargained for opportunity to negotiate pursuant to the Exclusivity Agreement and will be irreparably harmed when deprived of the opportunity to acquire the Wachovia assets as provided for by the Exclusivity Agreement.

69. Citigroup is entitled to (i) specific performance of the terms of the Exclusivity Agreement, including an injunction requiring Wachovia to negotiate with Citigroup in good faith to resolve the few remaining open issues, (ii) an injunction preventing Wachovia from entering into or consummating any acquisition transaction with Wells Fargo, (iii) an injunction preventing Wachovia from further violating its obligations under the Exclusivity Agreement, and (iv) an injunction preventing Wachovia from engaging in further negotiations with Wells Fargo.

#### SECOND CAUSE OF ACTION

(Against Defendant Wells Fargo, the Wachovia Director Defendants, the Wells Fargo Director Defendants, and the John Doe Defendants)

Tortious Interference with Contract

- 70. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 69 above, as if fully set forth here.
- 71. The Exclusivity Agreement is a valid and binding contract between Citigroup and Wachovia.
- Director Defendants, the Wells Fargo Director Defendants and the Doe Defendants were fully aware at all times of the existence and terms of the Exclusivity Agreement, and were further fully aware that the Exclusivity Agreement precluded Wachovia from negotiating or entering into an acquisition agreement with any other party during the exclusivity period, which extends until October 6, 2008. Wells Fargo, the Wachovia Director Defendants, the Wells Fargo Director Defendants and the Doe Defendants were thus aware that the October 3, 2008 agreement, the negotiations that preceded it, and any steps taken to consummate it were violating Wachovia's contractual duties to Citigroup.

- 73. Defendant Wells Fargo, the Wachovia Director Defendants, the Wells Fargo Director Defendants, and the Doe Defendants intentionally and without justification procured Wachovia's breach of the Exclusivity Agreement.
- 74. Wachovia breached the Exclusivity Agreement by, among other things, negotiating and entering into its October 3, 2008 purported agreement with Wells Fargo and taking steps to consummate that agreement.
- 75. Citigroup has been damaged by Wachovia's breach of the Exclusivity Agreement in an amount to be determined at trial, but not less than \$20 billion.
- 76. Accordingly, the participation of Well Fargo, the Wachovia Director Defendants, the Wells Fargo Director Defendants, and the Doe Defendants in the wrongful scheme to violate Citigroup's rights constitutes tortious interference with Citigroup's Exclusivity Agreement with Wachovia.

WHEREFORE, plaintiff Citigroup respectfully requests judgment against the Defendants, as follows:

- (a) Preliminary and permanent injunctive relief enjoining Defendants, their subsidiaries and affiliates, agents, and any other persons working on their behalf or in concert with them, from (i) negotiating, entering into, or consummating any transaction involving any acquisition of or merger with Wachovia; (ii) engaging in any other conduct in furtherance of any such transaction; or (iii) any other conduct prohibited by the Exclusivity Agreement;
- (b) Specific performance of the terms of the Exclusivity Agreement requiring Wachovia to negotiate in good faith with Citigroup as follows: (i) Wachovia and

Citigroup shall reconvene in New York beginning no later than 12 p.m. on Sunday,
October 5, 2008; and (ii) Wachovia and Citigroup shall continue such negotiations until
at least 12 p.m. on Wednesday, October 8, 2008 (unless a definitive and binding
agreement between Citigroup and Wachovia is executed prior to that time);

- (c) A judgment invalidating the proposed agreement between Wells Fargo and Wachovia as contrary to EESA § 126(c);
- (d) Compensatory damages in an amount to be determined at trial, but not less than \$20 billion;

- (e) Punitive damages in an amount not less than \$40 billion;
- (f) The costs of this action, including reasonable attorneys' fees; and
- (g) Any other relief as the Court may consider just.

Dated: New York, New York October 4, 2008

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