STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION C.A. No. 07 CVS 5097

WACHOVIA BANK, NATIONAL ASSOCIATION and WACHOVIA CAPITAL MARKETS, LLC,

Plaintiffs

v.

HARBINGER CAPITAL PARTNERS MASTER FUND I, LTD. et al.,

Defendants

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR CIVIL CONTEMPT AND FOR ENFORCEMENT OF PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Ever since they filed this preemptive action invoking the ancient doctrine of champerty – concededly based on their fear that they would be sued for their conduct in connection with the Le Nature's bank debt – Plaintiffs have engaged in scorched-earth litigation tactics. Among other things, Plaintiffs sought to disqualify Judge Ervin as a potential Rule 2.1 judge, based on his holdings of *Wachovia* stock, after he adjudicated the preliminary injunction motion; moved to compel a premature answer to the complaint, even before the Court determined its jurisdiction over Defendants; and refused to consent to a 14-day extension to respond to their expansive discovery requests, notwithstanding the holidays in the ten-day period leading up to the original due date. Plaintiffs now seek a ruling that Defendants engaged in civil contempt, purportedly violating this Court's injunction against the assertion of specified state law claims, by filing *federal* claims against Wachovia in *federal* court. In filing their federal court action, Defendants took pains to comply with the injunction, choosing not to assert state law tort claims against Wachovia even though other plaintiffs in the same action asserted those very claims, and even though application of the Preliminary Injunction to prevent the assertion of claims in federal court is prohibited by Supreme Court precedent. Plaintiffs attempt to maneuver their way around both of these issues by raising entirely specious arguments that have no place in a motion seeking the serious sanction of a contempt citation.

First, it is beyond dispute that the Preliminary Injunction – by its very terms – applies only to the assertion of Personal Tort Claims, as defined in the Preliminary Injunction itself. The Preliminary Injunction, in turn, defines Personal Tort Claims as a designated list of claims "arising under the law of North Carolina or of any other state." Plaintiffs' assertion that the Preliminary Injunction bars the assertion of federal claims is wholly at odds with this language. Plaintiffs' suggestion that the Court intended to enjoin the assertion of federal claims, *sub*

silentio, is frankly ridiculous. Because Defendants' assertion of federal claims against Wachovia did *not* violate the Preliminary Injunction, Plaintiffs' contempt motion is baseless.

Second, even if the Preliminary Injunction impacted the assertion of federal claims – which it does not – Plaintiffs' attempt to evade the United States Supreme Court's holding in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), is nothing short of remarkable. *Donovan* clearly holds that a state court cannot enjoin parties from asserting claims in federal court. The *Donovan* principle, rooted in the Constitution's Supremacy Clause, is firmly established and has been cited countless times by courts throughout the country. Recognizing the obvious application of *Donovan*, Plaintiffs now contend, for the first time after more than half a year of litigation, that this is an *in rem* proceeding. They invoke the *in rem* concept *after* months of personal jurisdiction discovery, *after* filing a complaint that identified the long-arm statute as the only basis for jurisdiction, and *after* obtaining equitable relief (the Preliminary Injunction itself) that is plainly an *in personam* remedy. If Plaintiffs were correct that in issuing the Preliminary Injunction, the Court obtained possession over the tort claims and rendered this action an *in rem* proceeding exempt from *Donovan*'s reach, then *Donovan* would never apply in *any* case. *Donovan* specifically addresses cases in which a state court attempts to enjoin – either directly or indirectly – the prosecution of claims in federal court. That is *exactly* this case. *Donovan*, by itself, is dispositive of Plaintiffs' motion.

All told, Plaintiffs have brought an extraordinary motion seeking extreme and improper relief. A litigant should not bring a contempt motion lightly, and such a motion certainly should not be based on a gross distortion of the purportedly violated order and a mischaracterization of the action before the Court. Having engaged in these fundamentally improper tactics, Plaintiffs' motion for civil contempt should be denied.

ARGUMENT

Plaintiffs bear the burden of proof on their civil contempt motion. N.C. Gen. Stat. § 5A-23(a1). Plaintiffs must prove, *inter alia*, that Defendants willfully and without justification failed to comply with the Preliminary Injunction. N.C. Gen. Stat. § 5A-21(a)(2a). As shown herein, Plaintiffs have not met, and cannot possibly meet, this burden.[1]

I. DEFENDANTS HAVE NOT VIOLATED THE PRELIMINARY INJUNCTION

The Preliminary Injunction sets forth, in plain and unambiguous terms, the conduct that it purports to prohibit. Simply put, Defendants are enjoined from asserting Personal Tort Claims in any court, other than as part of this action. "Personal Tort Claims" is a clearly defined term:

> [T]he following statutory or common law causes of action, *whether arising under the law of North Carolina or of any other state* (collectively "Personal Tort Claims"): (a) fraudulent and negligent omissions or misrepresentations, or both, (b) constructive fraud, (c) negligence, (d) breach of fiduciary duty, (e) tortious interference, (f) unfair trade practices, (g) racketeering, (h) conspiracy to commit any of the aforelisted causes of action, (i) aiding or abetting the commission of any of the aforelisted causes of action; and (j) any other causes of action founded in whole or in part upon allegedly tortious conduct.

(Preliminary Injunction, at 10, ¶ 2 (emphasis added).) Claims arising under federal law are not, by definition, Personal Tort Claims. As such, defendants are not enjoined from asserting them. Because, in the New York Action, Defendants asserted only federal claims (arising under the federal RICO statute) against Wachovia, they have not violated the injunction. This, in and of itself, disposes of Plaintiffs' contempt motion.

[1] Furthermore, Plaintiffs must prove that "[t]he purpose of the order may still be served by compliance with the order." N.C. Gen. Stat. § 5A-21(a)(2). As more fully described in Defendants' Motion to Dissolve Preliminary Injunction and Stay Action, and the memorandum in support thereof, the purpose of the Preliminary Injunction can no longer be served, and the Plaintiffs cannot meet their burden.

Unable to avoid the plain and unambiguous language of the Preliminary Injunction, Plaintiffs attempt to re-write the injunction to fit their argument. In the *very first* sentence of their brief, Plaintiffs assert:

> [T]his Court specifically enjoined the Fund Defendants and "all of their officers, agents, servants, employees, and attorneys, and all persons and entities acting in active concert or participation with them" **from filing *any purportedly assigned conspiracy or racketeering claims*** "arising from or relating in any respect to the Le-Nature's Credit Agreement" against either of the Wachovia plaintiffs "in any court other than this Court."

(Pl. Br. at 1) (emphasis added). That is not, however, what the Preliminary Injunction says. To the contrary, it states that the Fund Defendants (and their officers, agents, etc.) are enjoined from filing "**any Personal Tort Claims as defined in paragraph 2 below**" (Preliminary Injunction at 9, ¶ 1), with "Personal Tort Claims" defined as an enumerated list of *state law* claims.

Plaintiffs' omission of "Personal Tort Claims" (through their intentional cropping of quoted material) from their description of the Preliminary Injunction is inexcusable. Plaintiffs are attempting to replace the actual language used by the Court with language more to their liking. The sanction of contempt, however, can be applied only when a party has violated *the Court's order*, which has not happened here. It is well established that whether an act or omission falls within the prohibition of an injunctive order must be determined by the injunction's terms. *See* 42 Am. Jur. 2d *Injunctions* § 316 (2007) (cited by Strong's N.C. Index 4th, *Injunctions* § 52 (2007)). Any ambiguities – none of which even exist here – are construed in favor of the party charged with violating the order. *Id.*; *see also* 43A C.J.S. *Injunctions* § 406 (2007) ("the court may not expand the decree or impose obligations that are not unambiguously

mandated by the decree itself"; "If it is doubtful whether the injunction has been violated the court is not justified in punishing for contempt.").[2]

Unable to find support in the actual language of the injunction, Plaintiffs offer a series of "policy" arguments why the Court must have intended to enjoin the assertion of federal claims, even though it did not actually do so. In addition to being irrelevant, these arguments are simply incorrect.

First, it is plainly incorrect that Judge Ervin intended to include federal claims within the scope of the Preliminary Injunction. North Carolina Rule of Civil Procedure 65 requires that any prohibition be specifically enumerated in the Preliminary Injunction itself. This is not a matter of interpretation. Rule 65(d) provides, in relevant part, that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained . . . ." Moreover, there was never any mention of federal claims at the preliminary injunction hearing.[3] To assume that the Court, *sub silentio*, intended to enjoin the assertion of federal claims is, to be generous, without basis. *See* 42 Am.

[2] On September 18, 2007 – well before this contempt motion was filed – Defendants' counsel submitted a letter to the Court explaining that the filing of the New York Action did not violate the Preliminary Injunction. The letter stated: "While plaintiffs in the New York Action that are not subject to the injunction have asserted state law tort claims against Wachovia, those plaintiffs that are also Defendants here have *not* asserted such claims against Wachovia. All plaintiffs in the New York Action have asserted state law tort claims against parties (such as BDO) that are not affected by the injunction." A copy of the letter is attached as Exhibit A to the Affidavit of James B. Gatehouse, executed on October 22, 2007.

[3] The only mentions of the word "federal" at the hearing were (i) when the parties mentioned that they had filed briefs in federal court (P.I. Tr. at 13:14-23, 35:10-13), (ii) when Judge Ervin defined what would become the term "any court" in the Preliminary Injunction (P.I. Tr. at 84:13-16), (iii) when Plaintiffs' counsel sought to avoid the inclusion of findings and conclusions in the Preliminary Injunction, noting that North Carolina courts, unlike federal courts, are not required to include them (P.I. Tr. at 92:25-93:1), and (iv) when Plaintiffs' counsel argued that a federal statute provides that national banks do not need to post bond prior to final judgment (P.I. Tr. at 95:23-24). Excerpts from the preliminary injunction hearing transcript cited herein are attached as Exhibit D to the Affidavit of James B. Gatehouse (Oct. 22, 2007).

Jur. 2d *Injunctions* § 316 (stating that injunctions are neither wider nor narrower than their terms).

Second, the definition of Personal Tort Claims as certain claims arising under state law clearly does limit the injunction. On the one hand, as Plaintiffs acknowledge, the language makes clear the Court's intention to apply the injunction to all state law claims, not just those arising under North Carolina law. But it makes equally clear that the assertion of federal claims is not enjoined. The definition simply does *not* include federal claims.

Third, Plaintiffs contend that absent applicability to federal claims, the Preliminary Injunction could not have fully prevented the assertion of claims against Plaintiffs in other courts. Given the Court's stated goal of avoiding a multiplicity of actions, Plaintiffs contend, the Court must have intended the injunction to apply to federal claims. Again, if the Court intended the injunction to apply to federal claims, it would have said so in the Preliminary Injunction itself. We should not be left to speculate – as Plaintiffs would have us and the Court do – what was meant by the injunction. Even absent that obvious flaw in Plaintiffs' argument, the assertion that the injunction must enjoin federal claims to avoid what they term a "whack-a-mole" scenario is disingenuous. The injunction does not bar the assertion of certain claims (including contractual claims) by Defendants. The injunction does not bar claims by Initial Lenders (many of which have sued Wachovia in the New York Action). The injunction does not bar claims by the Secondary Lenders that Plaintiffs strategically chose not to sue. Thus, the Preliminary Injunction never could resolve the "whack-a-mole" issue in its entirety, and Plaintiffs never even attempted to obtain an injunction that would do so.

Ironically, what does eliminate the purported "whack-a-mole" scenario is the filing of the New York Action because that action includes claims, both federal and state, by both initial and secondary lenders, in a single court proceeding. Simply put, Defendants voluntarily eliminated

the potential problem that the Court identified in issuing the Preliminary Injunction far more completely than any court order ever could have done.

Finally, Plaintiffs argue that there is "no overriding federal prohibition on assignment," and that state law addresses whether a claim can be assigned. (Pl. Br. at 4.) From this basis, Plaintiffs assert that it would be "anomalous" to preclude the transfer or assertion of state law claims, but not of federal law claims. (*Id.*) That is a red herring. The Preliminary Injunction enjoins the assertion of specified claims regardless of, and without reference to, what law governs the transferability of those claims. And the injunction applies only to state law claims. Federal and state law claims – and the implications of enjoining the assertion of such claims – are different, whether or not they are subject to similar transferability requirements.[4]

* * *

In summary, Defendants did not assert any enjoined Personal Tort Claims against Plaintiffs in the New York Action, even though other plaintiffs in that same action asserted those very claims against Plaintiffs. The record demonstrates that Defendants were careful *not* to even arguably contravene the Preliminary Injunction, notwithstanding the fact – as explained in the next section – that the injunction cannot be enforced to prevent the assertion of claims in federal court. Plaintiffs' attempt to rewrite the order notwithstanding, a party cannot be held in contempt when its actions do not run afoul of the court order at issue. Because that is the case here, the contempt motion should be denied.

[4] Plaintiffs suggest that the Court somehow rejected Defendants' argument with respect to choice of law issues. To the contrary, the Court expressly rejected Plaintiffs' repeated contentions that North Carolina law would necessarily apply to any claims asserted by Defendants. As the Court made clear, it did not reach any decision on what state's law would apply, and it recognized that choice of law issues for tort claims can be complicated. (Tr. at 67:15-23, 85:24-25.)

II. *DONOVAN* APPLIES BECAUSE THIS IS AN *IN PERSONAM* PROCEEDING, NOT AN *IN REM* ACTION

The Supreme Court's decision in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), could hardly be clearer: state courts are not permitted to enjoin the assertion of claims in federal courts. Moreover, if a state court issues an order enjoining a party from asserting claims in federal court (as the Texas court did in *Donovan*), it may not take *any* steps to give effect to such an order, including the imposition of contempt sanctions. In *Donovan*, the specific issue before the Court was the "propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies." *Id.* at 413. In plain terms, the Court stated:

> That right was granted by Congress and cannot be taken away by the State. ***The Texas courts were without power to take away this federal right by contempt proceedings or otherwise.***

Id. at 413-14 (emphasis added); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n.24 (1983) (stating that state court injunction could not prevent party from filing federal lawsuit); *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977) (holding that state court could not enjoin party from filing *in personam* federal lawsuit).

Like the Texas court in *Donovan*, this Court lacks the power to restrain a litigant from asserting claims in federal court, and lacks the power to enforce any such restriction "by contempt proceedings or otherwise." Accordingly, even if Defendants had asserted claims in federal court in violation of the Preliminary Injunction – which, as set forth above, they have not – contempt would not lie.[5]

[5] Plaintiffs also contend that Defendants cannot raise the *Donovan* point now because it was not argued at the time the Preliminary Injunction was issued. That contention is incorrect in any context, including on Defendants' motion to dissolve the injunction. In the context of a contempt motion, however, it is especially baseless. As the Supreme Court made clear in *Donovan*, state courts are without power to issue contempt sanctions to prevent the assertion of claims in federal court. 377 U.S. at 413-14. And, as the North Carolina Supreme Court has made clear, a contempt motion cannot survive if the court that issued the order in question lacked authority to do so. *See In re Smith*, 301 N.C. 621, 633, 272 S.E.2d 834, 842 (1981); *see also Harding v. Harding*, 46 N.C. App. 62, 64, 264 S.E.2d 131, 132 (1980). It is entirely backwards (footnote continued)

It is not surprising that Plaintiffs go to great lengths to avoid *Donovan*. Plaintiffs' never-before-heard assertion that this is an *in rem* proceeding and thus exempt from *Donovan* is a strategic fabrication that lacks any basis in law or fact, and is belied by the history of these proceedings. Plaintiffs' belated attempt to assert *in rem* jurisdiction contradicts both controlling case law and the record of this case.

As an initial matter, were this Court to accept Plaintiffs' new argument, the *Donovan* precedent would be a nullity. In *Donovan*, the state court issued an injunction barring the defendants from pursuing a specific case, asserting defined claims, in federal court. If a state court injunction directed at specific claims amounts to the court's taking "possession" of those claims, and thereby constitutes an exercise of *in rem* jurisdiction – as Plaintiffs now contend – then any state court injunction preventing the assertion of claims in federal court would be exempted from *Donovan*'s holding, **including the injunction at issue in *Donovan* itself**. Clearly, that is not the case. As *Donovan* and an array of cases following *Donovan* have held, a state court cannot enjoin the assertion of claims in federal court, and zealous litigants cannot evade this constitutionally-derived rule by characterizing any such injunction as the result of *in rem* proceedings.[6]

Moreover, Supreme Court precedent makes clear that a state court cannot enjoin a party from asserting *in personam* claims in federal court. *See General Atomic*, 434 U.S. at 12 (holding that, under *Donovan*, "it is not within the power of state courts to bar litigants from filing and

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to suggest that a party cannot argue the court's lack of power to issue the order (under *Donovan*, for example) when such power is a prerequisite to contempt.

[6] In their response to Defendants' motion to dissolve the injunction and stay this action, Plaintiffs cite *Green v. Wilson*, 163 N.C. App. 186, 592 S.E.2d 579, *appeal dismissed*, 359 N.C. 186, 606 S.E.2d 117 (2004), as an example of a case in which the court asserted jurisdiction over the property at issue. *Green* demonstrates what an *in rem* case actually is. In *Green*, the court was adjudicating the disposition of title to real property located within the territorial jurisdiction of North Carolina. In stark contrast, Plaintiffs have not identified a single case in which a state court prohibition on the assertion of *in personam* claims was considered an *in rem* proceeding.

prosecuting *in personam* actions in the federal courts"). If the federal case asserts *in personam* claims, of course, it cannot be rooted in the same "property" purportedly at issue in an *in rem* state court action. In this instance, there can be no question that the New York Action asserts *in personam* claims against Wachovia, BDO Seidman, and the Le Nature's Executives. Any suggestion that the RICO, fraud, and other claims asserted in that case are not *in personam* claims would be frivolous.[7]

Plaintiffs attempt to support their specious characterization of this case as an *in rem* proceeding by contending that "choses of action" and "commercial tort claims" are "property" under North Carolina law. It does not follow, however, that this case is an *in rem* proceeding. The right to assert a claim belongs to the holder of that claim; an action to prevent the holder from asserting such a claim is an *in personam* action directed at the holder itself. Plaintiffs do not contend, for example, that *they* own the claims (as one would in an action to settle title to property). Rather, they are simply attempting to prevent *Defendants* from pursuing these claims. The claims at issue in this case are directed at specific defendants, which is the essence of an *in personam* claim.

Similarly, this case is not, as specified in G.S. § 1-75.8 (the *in rem* jurisdiction statue), an action in which Defendants are asserting a lien or other interest in real or personal property located within the State. Once again, this is not a case to determine who has a greater interest in any property. And, even if one considers Defendants' claims against Wachovia as property – a

[7] In this regard, *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), is plainly distinguishable. In *Princess Lida*, the Court held that a state court *in rem* proceeding, which requires possession of the property at issue, can preclude assertion of claims for the very same property in federal court. The Court explained that "if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other." *Id.* at 466. Here, *neither* this action nor the New York Action is *in rem*, and thus the *Princess Lida* exception to *Donovan* is inapplicable. *See also Al-Abood v. El-Shamari*, 217 F.3d 225, 231 (4th Cir. 2000) (holding that *Princess Lida* doctrine applies only when *both* actions at issue are *in rem* or *quasi in rem*).

substantial departure from any *in rem* case Plaintiffs have identified – there is no basis for concluding that such property would be located in North Carolina. The claims should be "located" – to the extent they are located anywhere – where Defendants that possess them are located. None of the Defendants is located in North Carolina.[8]

Although Plaintiffs cite several cases for the unremarkable proposition that a state court may assert exclusive *in rem* jurisdiction over a *res* where the proceedings directly concern an asset located within the state, they do not identify any cases suggesting that a suit to prevent the assertion of *in personam* claims amounts to an *in rem* action in which those claims are "possessed" by the court. *Hohenberg Bros. Co. v. Anderson Logistics Serv. Corp.*, 6 F. Supp. 2d 1377 (S.D. Ga. 1998), concerned an ownership dispute over cotton bales stored in a warehouse. *Jenkins v. Martin*, 2006 WL 2852300 (7th Cir. Oct. 3, 2006), was a collection action for a $70,000 child support payment kept in an in-state bank account. *Straus v. Straus*, 987 F. Supp. 52 (D. Mass. 1997), asserted jurisdiction over a trust *res* in a dispute for breach of a trustee's fiduciary duty. And *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), concerned ownership of potentially Russian-nationalized assets held in a bank in New York. In each of these cases, if the asset at issue was not controlled by the court, it could have been

[8] As Plaintiffs' complaint fails to allege claims against any specific property, it also necessarily fails to make any assertions that such property is within the territory of the State of North Carolina and that this Court has the power of asserting jurisdiction over such property.

> In rem jurisdiction encompasses any action 'to determine title to or to affect interests in specific property located within territory over which [the] court has jurisdiction[,]…[and also encompasses] [a]ctions in which the court is required to have control of the thing or object and in which an adjudication is made as to the object which binds the whole world and not simply the interests of the parties to the proceeding.'

Cole v. Hughes, 114 N.C. App. 424, 426-27, 442 S.E.2d 86, 88 (1994) (citing *Black's Law Dictionary* 793 (6th ed. 1990)) (brackets in original).

destroyed, lost, or dissipated. In stark contrast, there is no risk that the causes of action against Wachovia will disappear.

Beyond the legal deficiencies of Plaintiffs' argument, the entire record of this case demonstrates that this is an *in personam* action and that Plaintiffs have never contended, or even suggested, otherwise.[9]

First, over more than six months of contentious litigation, Plaintiffs have *never* before stated that this is a dispute over any form of property. For example, in the "Parties and Jurisdiction" section of their Complaint (Compl. at 7-9, ¶¶12-28), Plaintiffs include a long list of their and Defendants' locations, and provide, as the *only* basis of jurisdiction, that "[e]ach of the defendants has engaged in business in North Carolina." (*Id.* at ¶ 28.) This clearly invokes jurisdiction under North Carolina's long-arm statute, G.S. § 1-75.4(1)(d). Plaintiffs did *not* assert jurisdiction under North Carolina's *in rem* jurisdiction statute, G.S. § 1-75.8. At the injunction hearing, Plaintiffs continued to rely on the *in personam* long-arm statute as the sole basis for jurisdiction and engaged in a lengthy (albeit deficient) discussion of the various ways they believed Defendants conducted business in North Carolina. (P.I. Tr. at 24-28.) Plaintiffs even projected a copy of § 1-75.4 on a screen for the Court to review. (*Id.* at 24.) Plaintiffs never mentioned a "*res*" or "*in rem*" and never identified the *in rem* statute as a basis for jurisdiction. Indeed, Plaintiffs' counsel compared this case to an out-of-state car crash – clearly an *in personam* action – during the hearing. (P.I. Tr. at 79:10-23.) It is obvious that Plaintiffs did not view this as an *in rem* action when the Preliminary Injunction issued. Now that it serves their interest do so, however, they have chosen an entirely different tack.

[9] Defendants dispute the existence of *in personam* jurisdiction and have been engaged in extensive personal jurisdiction discovery.

Second, the nature of the remedies sought by Plaintiffs are *in personam*, not *in rem*. Injunctive, declaratory, and monetary relief – the forms of relief sought by Plaintiffs in this action – are all *in personam* remedies. *See Wyandotte Transp. Co. v. U.S.*, 389 U.S. 191, 193 (1967) (identifying claims for injunctive and declaratory relief and damages against shipper as *in personam* rights, in contrast to *in rem* rights against cargo of sunken ship); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999) ("Injunctive relief, by its very nature, can only be granted in an *in personam* action commenced by one party against another in accordance with established process. . . . By contrast, injunctive relief ordered in an *in rem* action would be meaningless because things or property cannot be enjoined to do anything."); *Al-Abood*, 217 F.3d at 232 (noting that action for money damages is not *in rem*); *Lane Trucking Co. v. Haponski*, 260 N.C. 514, 517, 133 S.E.2d 192, 194 (1963) ("Injunction is distinctly an equitable remedy, and the well-established principle underlying equity jurisdiction that it is exercised *in personam*, and not *in rem*, is fully applicable."); *Harrison v. Hanvey*, 265 N.C. 243, 247, 143 S.E.2d 593, 597 (1965) (describing how action for money judgment against defendant was *in personam*, as opposed to either *in rem* or *quasi in rem*); *Worth v. Commissioners of Fayetteville*, 60 N.C. 617, 620 (1864) ("Equity acts *in personam*, and enforces its orders and decrees by process of contempt."); *Rose's Stores, Inc. v. Bradley Lumber Co., Inc.*, 105 N.C. App. 91, 94, 411 S.E.2d 638, 640 (1992) (holding that unfair trade practices claim arising out of lease for real property was *in personam* action that was not required to be venued in the county where the property was located). Having asserted *in personam* claims seeking only *in personam* remedies (Compl. at 28-29, ¶¶ 1-6), Plaintiffs should not now be heard to assert that this is an *in rem* action.[10]

[10] Courts have long considered it a "settled rule that the aims and objects of an action determine its character, and that a proceeding which aims at the person of the defendant and not (footnote continued)

Finally, it should not go unnoticed that the parties have been engaged in extensive personal jurisdiction discovery. In the course of this discovery, Defendants have been compelled to review their records for an array of asserted contacts with the State of North Carolina, including the purchase of wholly unrelated investments and contacts with potential investors located within the State. Never in the course of any of this discovery have Plaintiffs even suggested that jurisdiction over the action is based upon the purported location of Defendants' claims in North Carolina – as would be expected if this were an *in rem* action. Instead, the sole focus has been whether the Court can obtain jurisdiction over Defendants pursuant to North Carolina's *in personam* long-arm statute. Indeed, despite filing two motions to compel and multiple briefs with respect to jurisdictional discovery in this action, Plaintiffs have never invoked or even mentioned the concept of *in rem* jurisdiction. One must assume that Plaintiffs have not forced Defendants to endure months of intensive discovery while misrepresenting and hiding the actual purported basis for the Court's jurisdiction. Whether or not personal jurisdiction is even relevant in an *in rem* proceeding, *cf. R.M.S. Titanic*, 171 F.3d at 957 (noting that "personal jurisdiction need not be exercised in a pure *in rem* proceeding because, in the simplest of terms, a piece of property and not a person serves as the defendant"), it is clear that personal jurisdiction discovery has been pursued to this point on the basis of the State's *in personam* jurisdictional rules.

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at his property or some other thing within the power of jurisdiction of the court is not an action in rem." *National Surety Co. v. Austin Mach. Corp.*, 35 F.2d 842, 843 (6th Cir. 1929).

CONCLUSION

For the reasons set forth above, this Court should deny Wachovia's Motions for Civil Contempt and for Enforcement of Preliminary Injunction.

Respectfully submitted this 22nd day of October, 2007

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RULE 15.8 CERTIFICATION

I certify that this brief complies with BCR 15.8.

This the 22nd day of October, 2007.

/s/ James B. Gatehouse

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Defendants' Brief in Opposition to Plaintiffs' Motions for Civil Contempt and for Enforcement of Preliminary Injunction was served on this day by e-mail and by hand-delivery as follows:

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