STATE OF NORTH CAROLINA | **IN THE GENERAL COURT OF JUSTICE**
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG | **Civil Action 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.

PLAINTIFFS' BRIEF OPPOSING DISSOLUTION OF PRELIMINARY INJUNCTION AND OPPOSING STAY

I. INTRODUCTION

For this Court to modify or set aside the Preliminary Injunction, the defendants must "make a clear showing of changed conditions" subsequent to its entry. *McGuinn v. City of High Point*, 219 N.C. 56, 62, 13 S.E.2d 48, 52 (1941). The defendants cannot make new legal arguments, or ask that the Court reconsider arguments previously made, but must demonstrate that a modification of the Injunction is necessary because of "new facts which bear upon the propriety' of the previous order." *First Financial Ins. Co. v. Commercial Coverage, Inc.,* 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972)). In their brief, the defendants identify no new factual developments – other than their violation of the Preliminary Injunction – that Judge Ervin did not specifically contemplate in the text of the Preliminary Injunction order. In fact, all of the defendants' arguments concerning allegedly changed factual circumstances are materially identical to arguments they made unsuccessfully at various hearings last Spring. Moreover, as

the Injunction states explicitly, it was entered primarily to ensure that any attempt by the Fund Defendants to re-assign tort claims against the Wachovia plaintiffs to third parties would not effectively prevent Wachovia from asserting champerty and related claims in this Court. Preliminary Injunction, Findings of Fact ¶ 17. Defendants do not even attempt to argue that the Injunction no longer serves any purpose in this respect.

There is also no reasonable basis for staying this case. While the defendants' brief contains numerous analytical errors, which will be addressed below, their argument for a stay fails primarily because it rests on the false assumption all of the disputes between the parties here can be and will be adjudicated in New York. This is not correct. The defendants' argument ignores their violation of the Preliminary Injunction, pursuant to which this Court assumed control over this matter. Moreover, even absent the Preliminary Injunction, the defendants' assumption would be wrong because Wachovia Bank is a plaintiff here, but is not even a party in New York, and none of the various champerty, indemnity, declaratory and unfair trade claims of either of the Wachovia plaintiffs will be adjudicated in New York because none of those claims are compulsory counterclaims there. *See* Fed. R. Civ. P. 13 ("But the pleader need not state the [counter]claim if . . . at the time the action was commenced the claim was the subject of another pending action."). Moreover, it is far from clear that the New York action will go forward at all. Under these circumstances, staying this action would serve no beneficial purpose – but would indefinitely delay the Wachovia plaintiffs' ability to obtain a resolution of the claims asserted here.

II. THE PRELIMINARY INJUNCTION

As the cases cited in the introductory section above indicate, and as defendants concede in their brief, to prevail on their first motion they must "make a clear showing of changed

conditions meriting" modification of the Preliminary Injunction. Def. Br. at 10, citing *McGuinn v. City of High Point*, 219 N.C. 56, 62, 13 S.E.2d 48, 52 (1941). Defendants chose not to appeal the Preliminary Injunction. In reversing a trial court's decision to modify a prior decree, the *McGuinn* Court made it clear that a motion to modify or dissolve an injunction is not a substitute for an appeal, stating that "matters determined on the original hearing" may not "summarily be relitigated." *Id.; see also State v. Duvall*, 304 N.C. 557, 561-63, 284 S.E.2d 495, 498-99 (1981) (requiring new and different facts which, in substance, were not before the first judge originally ruling on the motion). As the *McGuinn* Court went on to explain:

> "[T]he defendants are in these subsequent proceedings concluded by the original decree as to all matters urged as a defense [previously] as well as any defense which might have been presented to defeat the plaintiff's demand for a permanent injunction . . . . Our present consideration of the case is limited to an inquiry as to whether, because of subsequent changes in the situation of the parties, and of facts since arising creating different conditions, the defendant ought in equity be relieved from [the] decree."
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> The original decision is res judicata on the record as it then stood. The question now is whether, on account of later changes, the movants are entitled to relief from the injunction previously granted. We are not at liberty to reverse the former decision, even if regarded as erroneous, which it is not. . . . Our present concern is limited to defendants' request for a revocation of the decree on a showing of changed circumstances.

McGuinn, 219 N.C. at 62-64; 13 S.E.2d. at 52-53 (*quoting Lowe v. Prospect Hill Cemetary Ass'n*, 75 Neb. 85, 106 N.W. 429 (1905)). While *McGuinn* addressed modification of a permanent injunction, governing North Carolina case law confirms that its standards apply with equal force to a preliminary decree, as defendants implicitly acknowledge by citing *McGuinn* in the text of their brief. *See First Financial. Ins. Co., supra*, *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 219-20, 444 S.E.2d 455, 461-62 (1994).

The applicable standard originates from the black letter North Carolina case law providing that one Superior Court Judge may not overrule another Judge and may not review the

order of another Judge except when there is a substantial change in factual circumstances. As the Supreme Court explained in *State v. Woolridge*:

> The power of one judge of the superior court is equal to and coordinate with that of another*." Michigan Nat'l Bank v. Hanner,* 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Accordingly, it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; ***that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action***. *Calloway v. Ford Motor Co.,* 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). When the above-noted situation arises, the second judge may reconsider the order of the first judge "only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter*." State v. Duvall,* 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981).
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> The reason one superior court judge is prohibited from reconsidering the decision of another has remained consistent for over one-hundred years. When one party "wait[s] for another [j]udge to come around and [takes its] chances with him," and the second judge overrules the first, an " 'unseemly conflict' " is created. *Henry v. Hilliard,* 120 N.C. 479, 487-88, 27 S.E. 130, 132 (1897) *(quoting Roulhac v. Brown,* 87 N.C. 1, 4 (1882)). Given this Court's intolerance for the impropriety referred to as "judge shopping" and its promotion of collegiality between judges of concurrent jurisdiction, this " 'unseemly conflict' ... will not be tolerated." *Id.* at 488, 27 S.E. at 132 (quoting *Roulhac,* 87 N.C. at 4*).*

357 N.C. 544, 549-50, 592 S.E.2d 191, 194 (2003) (emphasis added).[1] This line of cases applies in this Court. *See Ruff v. Parex, Inc*., 1999 NCBC 6, ¶4; *Jacobs v. Physicians Weight Loss Center of America, Inc*., 2003 NCBC 8, ¶ 54, *aff'd*, 173 N.C. App. 663, 620 S.E.2d 232 (2005) (unpublished).

[1] The *Barr-Mullin* decision cited by the defendants in a footnote in their brief is inapposite here. In that case, five days after a preliminary injunction was entered, the defendant moved for reconsideration before the same trial judge who had entered the injunction. There was no issue or question of changed circumstances, and the main issue on appeal was whether the trial judge had erred in entering the preliminary injunction. The Court of Appeals simply commented in passing that, having properly entered the injunction, it was within the Judge's discretion to deny a motion to reconsider it, without addressing or citing the line of cases that control here. *See Barr-Mullin, Inc. v. Browning,* 108 N.C. App. 590, 593-598, 424 S.E.2d 226, 228-231 (1993).

The defendants cannot in any respect sustain their burden of making a "clear showing of changed conditions" because nothing unforeseen has happened since the entry of the Preliminary Injunction warranting modification of the Injunction now. The Ganz affidavit that the defendants submitted to the Court is materially identical to the Ganz affidavit they filed last Spring when opposing the Preliminary Injunction motion. The defendants offer no other evidence to support their motion, but contend that the filing of the New York action amounts to changed circumstances.[2]

This contention dissolves upon examination. To start, in the Injunction, Judge Ervin specifically found that the defendants intended to sue the Wachovia plaintiffs elsewhere if defendants were not enjoined. Findings of Fact, ¶ 13. The Injunction contemplated the possibility that defendants might file claims elsewhere to the extent not prohibited by the Injunction – such as assigned contract claims, which present no champerty issues, or claims against third parties. Conclusions of Law, ¶ 8. The Injunction also recognized that syndicate members which acquired their interests in the Credit Facility directly from Wachovia (commonly referred to as "original holders") could bring claims elsewhere because they had not purchased tort claims through assignments. Conclusions of Law, ¶ 8. Thus, the New York action hardly represents changed circumstances. To the contrary, the Injunction explicitly recognized and took into account the possibility that parties not subject to the Injunction might assert claims in

[2] All of the factual arguments and most of the legal arguments made by defendants have been previously asserted and rejected in this action, as is noted repeatedly below. For example, the defendants relied on the *Daimler Chrysler* decision at the Preliminary Injunction hearing, *see* Transcript of Preliminary Injunction Hearing at 51, line 25; Defendants' Brief Opposing Entry of Preliminary Injunction (filed 3/26/07) at 11. Judge Ervin rejected their argument, but they have cited *Daimler Chrysler* again in footnote 7 of their current brief in a manner that is materially identical to the cite in their March 26th brief.

another forum, as well as the possibility that the defendants might assert claims not subject to the Injunction in another forum.

In fact, in opposing the Preliminary Injunction, the defendants made the same argument they now assert – that this action should not go forward because the Wachovia plaintiffs had not sued all the holders of interests in the Credit Facility. *See* Transcript of Preliminary Injunction Hearing at 62-64 & 83 (pages from Transcript attached hereto); Defendants' Memorandum [Opposing] Preliminary Injunction (filed in Federal Court on 3/22/07) at 5 (posted on this Court's website).[3] The provisions of the Preliminary Injunction summarized in the preceding paragraph demonstrate that Judge Ervin took these arguments into account and found them unconvincing. In fact, Judge Ervin specifically commented at the Preliminary Injunction hearing: "Well, the original holders, they can sue them right now, any way they want." Transcript of Preliminary Injunction Hearing at 63, lines 21-22; *see also id.* at 64 (argument of Wachovia counsel as to why original holders irrelevant and not needed as parties). Judge Ervin specifically explained at the hearing that the Injunction "would have to be limited" in various respects. *Id.* at p. 70, lines 9–22. Under *McGuinn* and the other precedent cited and quoted above, defendants should not be permitted to make the same arguments again as a purported basis for modifying the Injunction.

Defendants' argument that the New York action moots Judge Ervin's concern of a "multiplicity of actions" misapprehends the purpose and effect of the Preliminary Injunction – and ignores the manner in which Judge Ervin addressed their prior arguments in entering the Injunction. The Injunction was not designed to ensure that all claims against Wachovia

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[3] Except for the defendants in North Carolina, all of the plaintiffs in the New York action are original holders. Put another way, the only secondary holders that are plaintiffs in New York are the Fund Defendants here. *See* ¶¶ 163 & 170-176 of the New York Complaint, filed in this action by the defendants on September 17th.

concerning Le-Nature's and/or concerning the Credit Facility were filed in one action. Instead, the Injunction affects only a subset of the possible claims, *i.e*., the assigned tort claims against Wachovia purportedly being traded in the secondary market at the time the Injunction was entered. With respect to this small subset of claims, the Preliminary Injunction prevented and prevents the defendants from attempting to trade tort claims against the Wachovia plaintiffs by assignment (or otherwise) unless the assignee agrees to be joined in this action and bound by the Injunction. Thus, the Injunction limits the defendants' ability to buy and sell statutory and common law tort litigation claims against the Wachovia plaintiffs. By asserting this Court's authority and control over the alleged tort claims in which the defendants were trafficking, the Injunction allows the Wachovia plaintiffs to pursue their claims against the Fund Defendants to conclusion in this action. Absent the Injunction, the Fund Defendants could simply assign their claims to other entities – effectively sending Wachovia on a completely futile and endless wild goose chase in search of the correct defendant to sue. *See id.* at pp. 72–75 & pp. 84–86 (where Judge Ervin explains this point and articulates the basic logic underlying the manner in which he chose to structure the Preliminary Injunction). This point is addressed and explained extensively in the contempt brief being filed today, so the Wachovia plaintiffs will not repeat the same arguments in detail here. Plaintiffs ask that the Court refer to the contempt brief for a complete analysis and explanation in this regard.[4]

[4] The defendants' arguments based on *Donovan v. Dallas* are also fully addressed in the contempt brief, and the Wachovia plaintiffs ask that the Court refer to that brief for a full explanation of why *Donovan v. Dallas* in no respect undermines the legal basis for entry of the Preliminary Injunction here. Moreover, even if the general rule in *Donovan* were applicable here, the defendants would be precluded from making arguments based on *Donovan* because they did not raise *Donovan* for consideration when the Preliminary Injunction motion was decided. *See, e.g., McGuinn, supra*; *Woolridge, supra*.

An understanding of the true purpose and effect of the Preliminary Injunction demonstrates one of the most basic, inherent flaws in defendants' argument. There is no change in circumstances here because the New York action simply does not alleviate the threat of multiple lawsuits that prompted Judge Ervin to enter the Preliminary Injunction or eliminate the real possibility that, absent the Injunction, the Wachovia plaintiffs would have to engage in a futile wild goose chase to try and assert their claims before a defendant could make a reassignment to another entity. Without the continued force of the Preliminary Injunction, the defendants would be free to try and sell their claims against Wachovia to entities that could then sue Wachovia in multiple jurisdictions – which would allow the defendants to dismiss the New York action. Thus, the most fundamental purpose of the Injunction is still served by its continued effectiveness, and that purpose would be vitiated were it to be set aside.

Defendants' notion that the New York action affords a basis for setting aside the Preliminary Injunction implicitly assumes that the New York action will move forward. This assumption is also wrong. As is explained in the contempt motion and brief being filed herewith, the defendants violated the Preliminary Injunction when they filed claims against plaintiff WCM in the New York action. Thus, the defendants are essentially arguing to this Court that the Preliminary Injunction should be set aside because their decision to violate it constitutes changed circumstances. The opposite is true, of course. Their violation of the Injunction should result in the defendants being held in contempt and being forced to dismiss WCM from the New York action.

Even if no Preliminary Injunction had been entered, defendants' premise that the New York action presents the sole forum for resolving all of the claims at issue would be fundamentally flawed. As is explained briefly in Section I above, Wachovia Bank is not even a

party to the New York action, and none of the claims here are compulsory counterclaims in that action under Federal Rule of Civil Procedure 13. Therefore, none of the affirmative claims here will ever be resolved in New York. Conversely, because federal racketeering claims can be asserted in this Court, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), the defendants could assert all of their purported racketeering claims in this action, if their claims were viable. Thus, defendants' own repeated attempts to escape from this forum have caused multiple actions to be filed, not any flaw in Judge Ervin's logic or in the structure of the Preliminary Injunction.

Moreover, even if the Injunction had not prohibited the defendants from suing WCM in New York, there is no reason to assume that the New York action will move forward. Motions to dismiss will be filed there, and it may be months before the status of that action becomes clear – in the event that it survives at all.

III. STAY MOTION

Defendants' effort to stay this litigation also rests on the false assumption that all of the disputes between the parties can and will be resolved in the New York action. The defendants' filing of claims against WCM in New York violates the Preliminary Injunction, and the New York action should not go forward against any Wachovia entity for that reason alone. Moreover, the defendants' assumption collapses under scrutiny even if one ignores their violation of the Preliminary Injunction because, as is explained above, none of the Wachovia plaintiffs' claims are compulsory counterclaims in New York, so the notion that the entire dispute between the parties could be litigated there is completely fallacious. The New York action is still at the initial stages and may well be dismissed in any event.

Under these circumstances, delaying this action would serve no purpose. Even if the New York action moves forward, the Wachovia plaintiffs' claims will never be resolved there.

As a result, the defendants' motion does not meet the threshold requirement for entry of a stay under G.S. §1-75.12. A stay is appropriate under G.S. §1-75.12 only when it would "merely postpone[] litigation here pending the resolution of the *same matter* in another sovereign court." *Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 358, 435 S.E.2d 571, 574 (1993) (quoting *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 326, 393 S.E. 2d 118, 121 (1990) (emphasis added)). None of the claims of the Wachovia plaintiffs here will ever be litigated in the New York court, so the "same matter" will never be resolved in New York, and a stay here will simply delay this action indefinitely for no reason.

Even more fundamentally, entry of a stay would be improper here because this Court has already asserted jurisdiction over the tort claims against Wachovia that the defendants have attempted to trade by assignments. Section 1-75.12 was never intended to allow a North Carolina Superior Court to defer to proceedings in another state in such circumstances. *See 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). In *Green*, the Court of Appeals reversed a Superior Court stay order that deferred to an action in Georgia when North Carolina had jurisdiction over the property at issue. It would be anomalous for this Court to have entered a Preliminary Injunction asserting control over the tort claims that the defendants have attempted to trade and then to defer to a New York action the Fund Defendants filed in an effort to avoid the Preliminary Injunction and escape from this Court's jurisdiction. The *Green* decision squarely indicates that it would be improper for a stay to be entered now.

The possibility that the claims against WCM in the New York action will be dismissed also fatally undermines the defendants' position under G.S. §1-75.12. The statute allows a stay of litigation only when the moving party stipulates its consent to a jurisdiction that the Court

finds "to provide a convenient, reasonable and fair place for a trial." If the New York case is dismissed, it cannot serve as a "convenient, reasonable, and fair place for a trial." For this added reason, no stay should issue in this action. *See American Motorists Ins. v. Avnet, Inc.*, 98 N.C. App. 385, 391 S.E.2d 50 (1990) (reversing stay because New York court had dismissed the relevant claims once pending there and noting "North Carolina courts cannot force New York courts to accept the North Carolina claims and [movant] did not consent to some other jurisdiction").

Finally, even if the New York federal court were an available forum for the Wachovia plaintiffs' claims, N.C.G.S. § 1-75.12 instructs that this action may be stayed only if this Court determines "it would work substantial injustice for the action to be tried in a court of this State." Ordinarily, if an action pending in state court presents issues that overlap with those presented in a federal action, both actions proceed, with judgment in the first action to be concluded being afforded such collateral estoppel or res judicata effect as may be appropriate. 17A Moore's Federal Practice §120.20[3] (3d ed. 2007) ("[I]f federal and state courts have concurrent jurisdiction, both courts ordinarily may go forward with their proceedings until one court renders a final judgment.").[5] In determining whether to depart from the ordinary rule, a Court may consider: "(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by the plaintiff, and (10) all other practical considerations." *Lawyers Mut.*

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[5] This quote reflects the general rule but does not contemplate a situation where, as here, this Court has asserted jurisdiction over a res. As is explained above, because this Court has asserted jurisdiction over the claims the defendants have been attempting to trade, this action should take precedence.

Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993). These factors are not a rigid checklist and should be considered qualitatively. *Wachovia Bank, N.A. v. Deutsche Bank Trust Company Americas*, 2006 WL 1591130, 2006 NCBC 8, ¶ 32.

It is important to note that the Court does not need to address these factors because, having entered the Preliminary Injunction, it would be improper now, under the *Green* precedent, to defer the matter at issue here to another Court. In addition, as is explained above, the other two threshold requirements for issuance of a stay have not been satisfied – the New York action will not resolve the "same matters" at issue here, nor is New York a "convenient, reasonable and fair place for trial." Nevertheless, analyzing the various factors reveals additional material flaws in the defendants' arguments, the first of which is that their motion is based completely on conclusory assertions. Defendants did not submit any affidavits with new facts in support of their motion to stay. Based on the affidavits and interrogatory responses already of record, it is apparent that the relevant factors identified in *Lawyer's Mutual* weigh heavily against a stay here. The Wachovia plaintiffs will address related factors together below.

A. Choice of Forum by the Plaintiff.

As this Court has aptly explained:

> Courts generally give great deference to a plaintiff's choice of forum, and a defendant must satisfy a heavy burden to alter that choice by transferring or staying the case. The weight accorded to a plaintiff's choice of forum is particularly appropriate where, as in this case, the plaintiff selected its home forum to bring suit. Wachovia is a national banking association, but it maintains its principal place of business in Charlotte, North Carolina. Clearly, North Carolina is Wachovia's home forum.

Wachovia Bank, 2006 NCBC 8, ¶ 51 (citing *Firstar Bank, N.A. v. Interlease, 757 Aircraft Investors, L.L.C.*, 2002 U.S. Dist. LEXIS 20974, *10 (M.D.N.C. Aug. 23, 2002) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be

disturbed."); *Long Haymes Carr, Inc. v. VueCom, Inc.*, 1997 U.S. Dist. LEXIS 21939, *11 (M.D.N.C. Dec. 12, 1997); *Bates v. J.C. Penney Co. Inc.*, 624 F. Supp. 226, 227 (W.D.N.C. 1985) ("Plaintiffs' choice of forum should be given especially strong consideration since the forum they chose is in the district in which they reside.")). To overcome this deference and prevail on the stay motion, a defendant "must show (1) 'more than a bare balance of convenience in [its] favor' and (2) 'that a [stay] does more than merely shift the inconvenience.'" *Id.* at ¶ 53 (quoting *Datasouth Computer Corp. v. Three Dimensional Technologies, Inc.*, 719 F. Supp. 446, 451 (W.D.N.C 1989)). Defendants – who submitted no affidavits to support their motion – have not even attempted to meet this "heavy burden." *See also Keel v. Private Business, Inc.,* 163 N.C. App. 703, 711, 594 S.E.2d 796, 801 (2004) (giving great weight to the "right of the plaintiff to have his dispute determined exclusively by the courts of this state [and to not be forced] to undergo considerable expense and inconvenience responding to proceedings in another state").

The defendants argue that the Wachovia plaintiffs' choice of forum deserves less respect because this is an anticipatory declaratory action. This argument is incorrect because Wachovia primarily seeks affirmative relief, not declaratory relief, and asserts affirmative claims for indemnity, champerty and unfair trade practice violations. The defendants ignore the indemnity and unfair trade practice claims and wrongly assume that champerty is only a defense. The defendants made this same incorrect argument in March when opposing the entry of the Preliminary Injunction. Wachovia responded at that time as follows:

> [D]espite the implicit assumption to the contrary throughout defendants' brief, champerty and unfair trade practice claims are ***claims*** in North Carolina, not defenses. Buying claims through purported assignments, stirring up litigation, and threatening assertion of unassignable claims is champertous and wrongful, and gives rise to affirmative causes of action for relief. *See Oliver v. Bynum*, 163 N.C. App. 166, 592 S.E.2d 707 (2004) (champerty condemns a stranger's officious interference which stirs up "strife and continuing litigation") (citing *Smith v. Hartsell,* 63 S.E. 172, 174 (N.C. 1908); *Wright v. Commercial*

> *Union Ins. Co.*, 305 S.E.2d 190, 192 (N.C. App. 1983) ("The term 'maintenance' has been defined by our courts as 'an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.' 'Champerty' is a form of maintenance whereby a stranger makes a 'bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.'") (quoting *Smith,* 63 S.E. 172, 174). Both *Oliver* and *Wright* recognize champerty as an affirmative cause of action under North Carolina law. Stirring up litigation and trafficking in and wrongful assertion of litigation claims is exactly what the champerty laws are designed to prohibit – and the defendants' brief admits that they have bought interests in the Le-Nature's Credit Facility for the purpose of acquiring such claims. *E.g.,* Def. Br. at 27 & 29 (contending that this suit is diminishing the value of the purportedly purchased tort claims). Thus, this matter is ripe and presents a real and existing controversy. There is no support for the notion that plaintiffs should be forced only to assert their affirmative claims in a defensive posture in a court of the defendants' choosing.

Plaintiffs' Response To Defendants' Motion To Dissolve TRO (filed 3/23/07) at 4.[6] Neither Judge Conrad nor Judge Ervin were swayed in March by the defendants' argument that this action should be frowned upon as an anticipatory declaratory filing, and the argument has no more validity now in the context of a stay motion.

B. Applicable Law.

The defendants quote remarks of Judge Ervin at the Preliminary Injunction hearing in support of their notion that North Carolina law has no applicability in this action. Judge Ervin's remarks are taken out of context in the defendants' brief, and Judge Ervin took great care to state that he was not making any rulings on applicable law issues when he entered the Preliminary Injunction. When addressing the choice of law argument by the defendants, Judge Ervin specifically stated at the hearing: "***The Court's not sure what the right answer is.***" *See*

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[6] This brief was filed in federal court during the 28 hours that this case was pending there. With Judge Ervin's permission, the Wachovia plaintiffs submitted the federal briefs for his consideration prior to the Preliminary Injunction hearing, rather than recaptioning and refiling the same briefs again. *See* Transcript of Preliminary Injunction Hearing at 8 & 13. The briefs filed in federal court are all now posted on the Business Court website.

Transcript of Preliminary Injunction Hearing at 55, lines 13 & 14 (emphasis added); *see also id*. at p. 60, lines 14–15 ("I'm not sure that you can really determine that at this stage."); *id.* at 86, lines 3–9 (noting that the defendants may want to argue for a change in North Carolina champerty law if they lose arguments about the applicability of North Carolina law). Moreover, the Preliminary Injunction does not render any decision on applicable law.

The defendants' choice of law arguments are also incorrect as a matter of law. A North Carolina court will never apply foreign law if that law offends a fundamental public policy of this State – and application of foreign champerty law in this action would run afoul of this basic principle. More importantly, as is apparent from Judge Ervin's comments at the Preliminary Injunction hearing, the Court has already determined that the defendants' arguments in this regard impose no roadblock to this action proceeding to its merits.

To explain the fallacy in the defendants' choice of law arguments, it is first necessary to review North Carolina champerty law. That law is well established and well developed – and squarely prohibits the buying and selling of tort claims through assignments. As the Court of Appeals has explained:

> It is well settled that claims for unfair and deceptive trade practices under N.C. Gen. Stat. section 75-1.1 are not assignable. *See Investors Title Ins. Co. v. Herzig,* 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992).
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> We hold that [plaintiff's] claims for bad faith refusal to settle, breach of fiduciary duty, and tortious breach of contract are not assignable. An action "arising out of contract" generally can be assigned. *See* N.C. Gen. Stat. § 1-57 (1983). However, assignments of personal tort claims are void as against public policy because they promote champerty. *See Charlotte-Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.,* 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995); *Investors Title Ins. Co.,* 330 N.C. at 688, 413 S.E.2d at 271. Personal tort claims that may not be assigned include claims for defamation, abuse of process, malicious prosecution or conspiracy to injure another's business, unfair and deceptive trade practices and conspiracy to commit fraud. *Investors Title Ins. Co., id.*

Horton v. New South Ins. Co., 122 N.C. App. 265, 269, 468 S.E.2d 856, 858 (1996).

It is black letter law that "where a cause of action is one that is not assignable, its assignment is regarded as champertous." 14 Am. Jur.2d §6. A virtual laundry list of North Carolina cases squarely invalidate such assignments, holding that North Carolina will not tolerate the buying and selling of statutory or common law tort claims. *See Charlotte-Mecklenburg Hosp. Authority v. First of Georgia Ins. Co*., 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995) (An assignment of a tort claim "gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and is void."); *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992) ("The causes of action of conspiracy to commit fraud and unfair practice are also personal in nature. Therefore, the assignment of such claims violates our public policy and will not be enforced."); *Andrews v. Strategic Outsourcing, Inc.* 2006 WL 1967382, *2 (W.D.N.C. 2006) ("purely personal tort claims, such as unfair and deceptive trade practices and breach of fiduciary duty, cannot be assigned because they promote champerty and thus are void against public policy"). As the Supreme Court has explained, if allowed, the assignment of personal tort claims "***would wreak havoc by creating a market for claims of a personal nature***." *Herzig*, 330 N.C. at 689 (emphasis added).

The defendants have raised two different arguments against the application of North Carolina champerty law here. In earlier briefing and arguments, they contended that side agreements they executed with lenders from which they acquired interests in the Credit Facility require application of New York law, even though Wachovia was not a party to those side agreements. *See* Preliminary Injunction Hearing Transcript at pp. 55-57. They also argued earlier, and again in their September 19th brief, that the side agreements are irrelevant and that the applicable champerty law will be determined based on the usual choice of law principles (lex loci, etc.). *Id.* at 57-58. Both arguments are legally incorrect.

The Credit Agreement and the Supplements executed by the defendants both require the application of North Carolina law. See Harkness Aff. (3/14/07) ¶¶13 & 30 & Exhs. A (§9.13) & C (¶3 of Standard Terms and Conditions). If the choice of law issue is viewed as a contractual inquiry, any attempt by the defendants to avoid North Carolina law by a provision in a side agreement (to which no Wachovia entity was a party) will be invalid. *See, e.g., Accrued Financial Services, Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 297-98 (4th Cir. 2002) (refusing to honor an agreement attempting to apply California law to a champertous assignment because such a choice of law provision would be contrary to the champerty law and strong policy of Maryland prohibiting such "lawsuit-mining arrangements"); *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980) (explaining that North Carolina will also reject a contractual attempt to displace North Carolina law in violation of a fundamental policy of the State). These cases reflect black letter conflicts principles under §187 of the Restatement (2d) of Conflicts. *See id.*; *see also Cable Tel Services v. Overland Contracting, Inc.*, 154 N.C. App. 639, 574 S.E.2d 31 (2002) (recognizing that, under §187, North Carolina will not honor a choice of law provision when the law of the chosen state violates a fundamental policy). The champerty cases cited and analyzed in the prior two paragraphs leave no doubt that prohibiting champerty is a fundamental public policy here in this State. *See In re Buildnet, Inc.*, 2004 WL 1534296, *11 (M.D.N.C. Bankr. 2004) ("North Carolina has established valid public policy arguments to restrict assignment of tort claims . . . there is not a competing federal interest that would warrant a different result"). Thus, the side agreements executed by the Fund Defendants with their assignors cannot and do not displace North Carolina law – and under North Carolina law, the purported assignments of tort claims against Wachovia are champertous and unenforceable.

If the inquiry is not viewed as a contractual analysis, but as governed by the usual choice of law rules, the result is the same. No matter what state's tort laws would otherwise govern under lex loci (or any other choice of law system), North Carolina courts will never apply foreign law that would displace the State's fundamental public policy against champerty. *See Boudreau v.Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988) ("foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum"). The choice of law rule is thus identical under either a contractual or noncontractual analysis – North Carolina courts will always apply North Carolina champerty law because to do otherwise would violate a fundamental public policy of North Carolina. *See id.*; *see also Behr, supra; Cable Tel, supra.*

Under both of the possible methods of analyzing the issue, North Carolina law will govern the affirmative claims of the Wachovia plaintiffs for champerty. North Carolina law also governs the Wachovia plaintiffs' unfair trade practices claim, which is asserted under G.S. §75-1.1. The Credit Agreement itself and the Supplements require the application of North Carolina law to the remaining claims of the Wachovia plaintiffs. Therefore, the defendants' arguments concerning applicable law should be rejected.

C. Nature of the Case.

Both Wachovia plaintiffs assert claims for (i) indemnity from the Fund Defendants under the Credit Agreement (which is governed by North Carolina law), (ii) violations of North Carolina's common law prohibition on champerty and maintenance (iii) violations of N.C.G.S. § 75-1, *et seq*. and (iv) related declaratory relief. The plaintiffs maintain their principal places of business in North Carolina and are part of one of this State's largest financial institutions. *Wachovia Bank, N.A. v. Deutsche Bank*, 2006 NCBC 8, ¶ 37. The Fund Defendants each

became parties to the Credit Agreement, which is governed by North Carolina law and has always been administered by Wachovia in Charlotte. Plaintiffs' First Supplemental Responses to Defendants' Personal Jurisdiction Discovery at 9 - 13.[7] Because North Carolina has a strong interest in resolving disputes concerning businesses with a substantial presence in the State – and because North Carolina has a very strong interest in preventing champerty and unfair trade practices as is explained above – this factor weighs heavily against granting a stay. *Wachovia Bank, N.A. v. Deutsche Bank Trust Co.*, 2006 NCBC 8, ¶ 37.

D. Convenience of the Witnesses & Availability of Compulsory Process to Require the Appearance of Witnesses and Production of Documents.

It is unclear (especially absent any cite to an affidavit or other record evidence) why the defendants contend that a New York forum would be more convenient than this forum. The only claims now pending in North Carolina are the Wachovia plaintiffs' affirmative claims for relief, and as is explained above, those claims will never be required to be asserted in New York. All of the Wachovia employees who may be witnesses about these claims are based in North Carolina. *See* Plaintiffs' First Supplemental Responses to Defendants' Personal Jurisdiction Discovery at 9 - 13. The Wachovia employees involved in the Credit Facility were all located in North Carolina, as is Wachovia's documentation concerning the Credit Facility. The Fund Defendants voluntarily became parties to the Credit Agreement, which is governed by North Carolina law. There are far more witnesses and documents in North Carolina that may be of relevance to this lawsuit than in any other State.[8]

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[7] These Responses are already before the Court as Exhibit 3 to the Brief Supporting Plaintiffs' First Motion to Compel (filed 5/16/07).

[8] Several of the most significant issues presented – such as whether champerty law precludes the Fund Defendants from asserting purportedly assigned claims – are issues of law for which no witnesses will be needed in any event.

Moreover, the only location in which a critical mass of nonparty witnesses may be located is the Pittsburgh/Latrobe area, where Le-Nature's maintained its headquarters and where its employees resided. This weighs in favor of neither New York nor North Carolina because the Pittsburgh/Latrobe area is outside the subpoena range of both New York and North Carolina courts.

The defendants argue that the New York Court can issue process this Court cannot, but their argument is incorrect. This Court is quite familiar with and has often implemented the process for issuance of subpoenas through courts in other States under procedures such as those set forth in N.C. R. Civ. P. 28(d). Thus, the availability of process is not a material factor here. *See Reliance Ins. v. Six Star, Inc.,* 155 F. Supp. 2d 49, 58 (S.D.N.Y. 2001) ("[A]vailability of process over third-party witnesses does not compel transfer when the practical alternative of offering videotaped or deposition testimony of a given witness exists"); *Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923, 928 (W.D. Mo. 1985) (availability of compulsory process factor held not to favor transfer because defendant failed to show that use of videotaped deposition would be inadequate). Defendants have wholly failed to demonstrate any considerations relating to the convenience or availability of witnesses that favors of stay of this action.

Similarly, Defendants present the Court a false argument that the location of documents favors granting a stay, purportedly because third-party documents will be difficult to obtain in this action. In fact, these documents will be readily available through the Rule 28(d) process (to the extent they have not already been provided to the defendants through the Le-Nature's bankruptcy proceedings). Wachovia maintains all of its documents related to the claims pending in this litigation either in paper or electronic form in North Carolina, and Wachovia has a huge volume of documents concerning Le-Nature's. *See* Initial Attorneys' Conference Report, §(i)

(filed 6/22/07). At worst, this factor is neutral to the stay motion analysis. *D. P. Riggins & Associates v. American Board Companies*, 796 F. Supp. 205, 212 (W.D.N.C. 1992); *Commercial Equip. Co. v. Barclay Furniture Co.*, 738 F. Supp. 974, 977 (W.D.N.C. 1990) (both concluding factor was neutral because, regardless of forum, one party would be burdened with transporting documents). In any event, in the electronic age, the burden of transporting documents is insignificant.

E. Burden of Litigating Matters Not of Local Concern & Desirability of Litigating Matters of Local Concern in Local Courts:

In asserting that these factors weigh in favor of a stay, the Defendants simply ignore the strong interest of the State of North Carolina in the outcome of this litigation. North Carolina has a long recognized policy against claims trading, the issue at the heart of this litigation. *See Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 689, 413 S.E.2d 268, 271-72 (1992) (if allowed, the assignment of statutory and common law tort claims "would wreak havoc by creating a market for claims of a personal nature"). Moreover, Wachovia is one of the largest employers in Mecklenburg County and the State, and North Carolina has a unique interest in resolving claims directly related to Wachovia, one of its largest corporate citizens. *Wachovia Bank*, 2006 NCBC 8, ¶ 45. This factor weighs heavily against any stay. *Id.*

F. Other Factors.

The defendants attempted to remove this action to federal court last March. Judge Conrad specifically ruled that the federal district courts should abstain from hearing the parties' dispute and, alternatively, that the case should be remanded on equitable grounds. (Judge Conrad's 3/32/07 Order Continuing Temporary Restraining Order and Remanding Action is posted on the Business Court's website.) Judge Conrad's Order authoritatively states that the federal courts have no role in this dispute. Defendants' attempt to obtain a stay here represents

yet another attempt to avoid having this Court resolve disputes that should be decided in a North Carolina state court, as Judge Conrad and Judge Ervin both determined. Defendants' efforts to relitigate issues resolved against them in the Preliminary Injunction and in the Remand Order should not be rewarded by entry of a stay now.

IV. CONCLUSION

For the reasons explained above, the Wachovia plaintiffs request that this Court deny the defendants' motions.

This 10th day of October, 2007.

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RULE 15.8 CERTIFICATION

I certify that this brief complies with BCR 15.8.

This the 10th day of October, 2007.

s/Robert W. Fuller
Robert W. Fuller

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this pleading with the North Carolina Business Court today, provided email notification of the filing today to counsel of record in accordance with the Court's Order of June 11, 2007, and served the following counsel of record by hand delivery or by regular U.S. mail, postage-prepaid (as indicated below) and addressed as follows, all in accordance with the North Carolina Rules of Civil Procedure and the Rules of the North Carolina Business Court:

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