

**IN THE STATE OF MISSOURI
JACKSON COUNTY SIXTEENTH CIRCUIT COURT
AT INDEPENDENCE**

SAMUEL K. LIPARI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 0916-CV38273
)	Division 14
CHAPEL RIDGE MULTIFAMILY LLC, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFF’S SUGGESTION
IN OPPOSITION TO WELLS FARGO & COMPANY’S
MOTION FOR ORDER TO IDENTIFY PARTY AND QUASH SERVICE**

COMES NOW Plaintiff Samuel K. Lipari appearing *pro se* and makes the following suggestion in opposition to the defendant WELLS FARGO & COMPANY’s Motion For Order To Identify Party And Quash Service. The plaintiff respectfully requests the court deny the Motion For Order To Identify Party And Quash Service as frivolous.

INTRODUCTION

The court should deny the Motion for Order because 1) WELLS FARGO & COMPANY is the real party in interest responsible in entirety for any liability and judgment against the RICO co-conspirators which includes WELLS FARGO & COMPANY’s wholly owned subsidiary WACHOVIA DEALER SERVICES whether WELLS FARGO & COMPANY is a party to this action or not; 2) if WELLS FARGO COMPANY is not ruled to be in interlocutory default by this court, the plaintiff will not allow re-issuance of process by the 16th Circuit Court Clerk because WELLS FARGO & COMPANY is not a necessary party at law to this action; 3) under Missouri law, the plaintiff’s charges against WACHOVIA DEALER SERVICES alleging the commission of fraud pierce the corporate veil between WACHOVIA DEALER SERVICES and its parent WELLS FARGO & COMPANY; and finally 4) the plaintiff will not participate in the criminal scheme of the Novation LLC cartel members to remove this action to the court of Hon. Judge Fernando J. Gaitan, Jr. for the purpose of corruptly procuring a dismissal from a judge with a fiduciary interest in St. Luke’s Health System, Inc. as a recent member of its board of directors having an ownership interest in Novation LLC.

I. STATEMENT OF FACTS

1. WELLS FARGO & COMPANY's Motion For Order To Identify Party And Quash Service is a response to the plaintiff's motion for interlocutory default against the WELLS FARGO & COMPANY that does not assert the default is from excusable neglect.

2. WELLS FARGO & COMPANY's motion dated May 17th, 2010 for is untimely

3. On 10-MAR-10 as recorded in this court's 03/25/2010 docket entry, the defendant WELLS FARGO & COMPANY was served process including a copy of the plaintiff's petition for affirmative relief and monetary damages.

4. The merger of Wells Fargo and Wachovia bank charters was completed on March 20, 2010 and this formally dissolved Wachovia as a separate entity. See **exhibit 1** Wells Fargo Wells Fargo Merger Conditional Approval.

II. SUGGESTION IN OPPOSITION

The plaintiff respectfully requests that the defendant WELLS FARGO & COMPANY's motion be dismissed as untimely and frivolous.

1) WELLS FARGO & COMPANY is the real party in interest

WELLS FARGO & COMPANY is the real party in interest responsible in entirety for any liability and judgment against the RICO co-conspirators which includes WELLS FARGO & COMPANY's wholly owned subsidiary WACHOVIA DEALER SERVICES whether WELLS FARGO & COMPANY is a party to this action or not.

Since 1966, OCC has recognized national banks' "incidental" authority under §24 Seventh to do business through operating subsidiaries. See 12 CFR §5.34(e)(1). The Office of the Comptroller of the Currency licenses and oversees national bank operating subsidiaries just as it does national banks. See, e.g., §5.34(e)(3); 12 U. S. C. §24a(g)(3)(A). The United States Supreme Court has treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise). See, e.g., NationsBank, 513 U. S., at 256–251.

In Wachovia, Wells Fargo seal deal, Media General News Service and Wire Reports published: October 11, 2008, Tulane University law professor Elizabeth Nowicki said Wells Fargo will be on the hook

for any damages claims against Wachovia: “When you acquire a corporation in a full-out merger, you acquire both the assets and liabilities unless there’s some agreement to the contrary,” Nowicki said.

The plaintiff will show in discovery procured from WACHOVIA DEALER SERVICES that the agreement by which WELLS FARGO & COMPANY acquired the failed Wachovia Bank NA the parent of WACHOVIA DEALER SERVICES on December 31, 2008 made WELLS FARGO & COMPANY responsible for Wachovia Bank NA’s liabilities including those incurred by Wachovia Bank NA’s subsidiary WACHOVIA DEALER SERVICES.

2) WELLS FARGO COMPANY is not a necessary party at law to this action

There exists no provision of Missouri law that requires a plaintiff to join as defendants in his petition all persons known to plaintiff who are or may be liable to plaintiff for his injuries. If WELLS FARGO & COMPANY is not ruled to be in interlocutory default by this court, the plaintiff will not allow re-issuance of process by the 16th Circuit Court Clerk because WELLS FARGO & COMPANY is not a necessary party at law to this action.

Missouri Supreme Court Rule of Civil Procedure 52.04(a) governs the joinder of persons needed for the just adjudication of a civil action Missouri Rule 52.04(a) states, in pertinent part:

(a) Persons to Be Joined if Feasible. A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest. If the person has not been joined, the court shall order that the person be made a party.

Plaintiff can obtain full relief without WELLS FARGO & COMPANY’s presence, therefore WELLS FARGO & COMPANY is a necessary party under Rule 52.04(a)(1). See *State ex rel. Mayberry v. City of Rolla*, 970 S.W.2d 901, 909 (Mo.App. S.D.1998).

3) WACHOVIA DEALER SERVICES’ fraud pierces the corporate veil

Under Missouri law, the plaintiff’s charges against WACHOVIA DEALER SERVICES alleging the commission of fraud pierce the corporate veil between WACHOVIA DEALER SERVICES and its parent WELLS FARGO & COMPANY.

Ordinarily, Missouri law will protect the separate legal identities of two corporations, even when one corporation owns a part or all of the other. *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 283

(Mo.Ct.App.1986). If one corporation exercises such control over the other that the latter becomes a mere alter ego of the first, however, and if the formal corporate separateness and arrangements between the two corporations are used to achieve fraud, injustice, or an unlawful purpose, a court may ignore the separate formal corporate structures and "pierce the corporate veil" of the controlling corporation. *Id.* at 284.

Missouri courts have established three requirements for piercing the corporate veil. First, the party seeking to prove that two corporations are not separate entities must show control by one corporation over the other. *Id.* (citing *National Bond Finance Co. v. General Motors Corp.*, 238 F.Supp. 248, 255 (W.D.Mo.1964)). "Control" in this context means "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." *Id.* Second, such control must have been used to commit fraud, wrong, a violation of a statutory or other legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights. *Id.* Finally, the control and breach of duty must have proximately caused the injury of which plaintiff complains. *Id.*

The plaintiff's Amended Petition alleges WACHOVIA DEALER SERVICES is wholly owned by its parent WELLS FARGO & COMPANY. The petition alleges the WELLS FARGO & COMPANY committed frauds against the plaintiff through WACHOVIA DEALER SERVICES. And finally, the Amended Petition alleges the breach of duties and frauds by WELLS FARGO & COMPANY through WACHOVIA DEALER SERVICES directly injured the plaintiff.

4) WELLS FARGO & COMPANY seeks the aid of Hon. Judge Fernando J. Gaitan, Jr.

The plaintiff will not participate in the criminal scheme of the Novation LLC cartel members to remove this action to the court of Hon. Judge Fernando J. Gaitan, Jr. for the purpose of corruptly procuring a dismissal from a judge with a fiduciary interest in St. Luke's Health System, Inc. as a recent member of its board of directors having an ownership interest in Novation LLC.

Congress established the "appearance of impartiality" standard "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). The legislative history of § 455(a) is clear:

"This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis

for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case."

H. Rep. No. 93-1453, p. 5 (1974), U.S. Code Cong. & Admin. News 1974, p. 6355. In the words of the Seventh Circuit, "Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done." *Durhan v. Neopolitan*, 875 F.2d 91, 97 (1989).

The facts of Hon. Judge Fernando J. Gaitan, Jr.'s fiduciary interest in St. Luke's Health System, Inc. and its ownership interest in VHA/Novation, alleged by the plaintiff's complaint in the earlier styling of the present matter or controversy which was removed to federal court, to be acting in concert and with the defendants over the sale of the plaintiff's competitor Neoforma to prevent the plaintiff from entering the hospital supply marketplace more than satisfy Section 28 U.S.C. § 455(a), which mandates recusal merely when a Justice's impartiality "might reasonably be questioned." Independently, the plaintiff's ongoing litigation against VHA and Novation LLC also mandates recusal under Section 455(a).

It is beyond contest that Hon. Judge Fernando J. Gaitan, Jr. as a fiduciary through being a Director of St. Luke's Health System, Inc. with an ownership interest in VHA/Novation which the plaintiff is suing in a related action requires Hon. Judge Gaitan's recusal under 28 U.S.C. § 455(b)(4). Yet Hon. Judge Fernando J. Gaitan, Jr. who controls judicial case assignments in the US District Court for the Western District of Missouri has consistently refused to recuse himself from this litigation.

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests the court deny the defendant WELLS FARGO & COMPANY'S Motion For Order To Identify Party And Quash Service which will not result in the plaintiff seeking to cure any misnomer or otherwise cause service of process on WELLS FARGO & COMPANY to be re-issued by the 16th Circuit Court Clerk. WELLS FARGO & COMPANY is present in this case under its alter ego WACHOVIA DEALER SERVICES.

Respectfully submitted,

S/ Samuel K. Lipari

SAMUEL K. LIPARI
PLAINTIFF *PRO SE*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 28th day of May 2010 by hand delivery, by first class mail postage prepaid, or by email to:

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Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

November 24, 2009

**Conditional Approval #941
February 2010**

Mr. James E. Hanson
Vice President
Wells Fargo Bank, National Association
90 South Seventh Street
Minneapolis, MN 55479

Re: Applications to merge Wachovia Bank, National Association, Charlotte, North Carolina and Wachovia Bank of Delaware, National Association, Wilmington, Delaware with and into Wells Fargo Bank, National Association, Sioux Falls, South Dakota.
Application Control Number: 2009-ML-02-0012

Dear Mr. Hanson:

The Office of the Comptroller of the Currency (“OCC”) hereby approves the application to merge Wachovia Bank, National Association, Charlotte, North Carolina (“WBNA”) and Wachovia Bank of Delaware, National Association, Wilmington, Delaware (“WBDNA”) with and into Wells Fargo Bank, National Association, Sioux Falls, South Dakota (“WFBNA”) under the charter of WFBNA and with the title Wells Fargo Bank, National Association, for the reasons and subject to the conditions and requirements set forth herein. This approval is granted after a thorough evaluation of the application, other materials you have supplied, and other information available to the OCC, including representations made in the application and by the applicant’s representatives during the application process.

The Transaction

WFBNA, WBNA and WBDNA are wholly-owned indirect subsidiaries of Wells Fargo & Company (“WFC”). WFBNA has branches in 22 states, WBNA has branches in 18 states and the District of Columbia, and WBDNA has branches only in Delaware. WFBNA will not retain WBNA’s main office in Charlotte, North Carolina as a branch, but will retain the main office of WBDNA in Wilmington, Delaware as a branch of the resulting bank. WFBNA plans to operate the branches of WBNA and WBDNA as branch offices of the resulting bank.

Legal Authority for the Merger

WFBNA has applied to the OCC for approval to acquire by merger WBNA and WBDNA pursuant to 12 U.S.C. §§ 215a-1, 1828(c) and 1831u. The home state of WFBNA is South Dakota and the home states of the target banks are North Carolina and Delaware. Consequently,

in this transaction it is proposed that three affiliated banks with different home states will merge under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal”). The OCC may not approve an interstate merger if the transaction involves a bank whose home state has enacted a law between September 29, 1994, and May 31, 1997, that expressly prohibits all mergers with all out-of-state banks. All three states have laws permitting interstate mergers.

Approval of an interstate merger transaction under 12 U.S.C. § 1831u is also subject to certain requirements and conditions set forth in sections 1831u(a)(5) and 1831u(b). These conditions are: (1) compliance with state-imposed age limits, if any, subject to the Riegle-Neal limits; (2) compliance with filing requirements, including certain state filing requirements permitted by Riegle-Neal; (3) compliance with deposit concentration limits; (4) expanded community reinvestment compliance; and (5) adequacy of capital and management skills. The OCC has determined that the merger satisfies applicable conditions regarding age, filing, and capital and management skills. The requirements relating to deposit concentration limits and expanded community reinvestment analysis are inapplicable to mergers, such as this, between affiliated banks. Pursuant to 12 U.S.C. § 1831u(d)(1), the OCC also has determined that WFBNA may retain its main office as its main office following consummation of the merger, and may retain as branches its own branches, the branches of WBNA, and the main office and branches of WBDNA.

WFBNA is also authorized to retain each of WBNA’s permissible operating, financial, and statutory subsidiaries and non-controlling investments as established or acquired in accordance with applicable law and OCC regulations.

Bank Merger Act

The OCC reviewed the proposed merger transaction under the criteria of the Bank Merger Act, 12 U.S.C. § 1828(c). Among other matters, we found that the proposed transaction would have no anticompetitive effects. The OCC also considered the financial and managerial resources of the banks, their future prospects, and the convenience and needs of the communities to be served. In addition, the Bank Merger Act requires the OCC to consider “. . . the effectiveness of any insured depository institution involved in the proposed merger transaction in combatting money laundering activities . . .” The OCC considered these factors and found them to be consistent with approval of this application.

Community Reinvestment Act

The OCC also is required to consider the applicants’ records of compliance with the Community Reinvestment Act (“CRA”), 12 C.F.R. § 25.29(a)(3), including the applicant’s record of helping to meet the credit needs of the community, including low- and moderate-income (“LMI”) neighborhoods, when evaluating certain applications, including consolidation and merger transactions that are subject to the Bank Merger Act. The OCC considers the CRA performance evaluation of each institution involved in the transaction. A review of the record of these applicants and other information available to the OCC as a result of its regulatory responsibilities

revealed no evidence that the applicants' record of helping to meet the credit needs of their communities, including LMI neighborhoods, is less than satisfactory.

Section 1818 Condition

This approval is subject to the following conditions:

- Prior to consummation of the merger, as approved, WFBNA shall execute an operating agreement ("Operating Agreement") with the OCC. The Operating Agreement shall provide, among other requirements, that prior to the consummation of the merger, WFBNA shall enter into an agreement, acceptable to the OCC, with WFC pursuant to which WFC shall indemnify WFBNA for losses and related expenditures, as specified, that may be incurred directly or indirectly by WFBNA arising from the acquisition, directly or indirectly, of specified assets or interests in specified assets, or any activity assumed by WFBNA with respect to such assets or interests in such assets.
- The WFBNA Board of Directors shall assure that the Operating Agreement is fully adopted, timely implemented, and adhered to thereafter.

These conditions of approval are conditions "imposed in writing by a Federal Agency in connection with any action on any application, notice or other request" within the meaning of 12 U.S.C. § 1818. As such, the conditions are enforceable under 12 U.S.C. § 1818.

Consummation Requirements

This approval is granted based on our understanding that other applicable regulatory approvals, non-objections or waivers with respect to the proposed transaction will have been received prior to the transaction.¹

With respect to the merger application, please ensure that you have submitted the following prior to your desired consummation date:

- A Secretary's Certificate for each institution, certifying that a majority of the board of directors approved.
- An executed merger agreement and, if appropriate, the Articles of Association for the resulting bank attached.

¹ We note that upon consummation of the merger, WFBNA, as successor to WBNA, and WFC, as the holding company of WFBNA and successor to Wachovia Corporation, as provided for in WBNA's December 2008 Operating Agreement with the OCC, and the December 2008 Indemnification and Repurchase Agreement between WBNA and Wachovia Corporation, hold or continue to hold all rights, duties, responsibilities, and obligations set forth in those agreements.

We also note that while the merger is structured as a merger of WBNA and WBDNA into WFBNA, in accordance with your request, the OCC will renumber WFBNA's charter to take the charter number of WBNA, Charter No. 1.

- A Secretary's Certificate from each institution, certifying that the shareholder approvals have been obtained, if required.

If the merger is not consummated within one year from the approval date, the approval shall automatically terminate, unless the OCC grants an extension of the time period.

This approval and the activities and communications by OCC employees in connection with the filing, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or any officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory and examination authorities under applicable law and regulations. Our decision is based on the bank's representations, submissions, and information available to the OCC as of this date. The OCC may modify, suspend or rescind this decision if a material change in information on which the OCC relied occurs prior to the date of the transaction to which this decision pertains. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

All correspondence regarding this application should reference the application control number. If you have any questions, please contact me at (202) 874-5294 or by email at Stephen.Lybarger@occ.treas.gov .

Sincerely,

Steven A. Lybarger

Stephen A. Lybarger
Large Bank Licensing Expert