IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY FALONEY, **JAMES M. WHITT AND ANITRA WHITT**, on behalf of themselves and all others similarly situated, Plaintiffs v. **WACHOVIA BANK, N.A.** Defendant	CIVIL ACTION No. 07-1455
CATHERINE D. HARRISON, by and through her sister and attorney in fact, **JOANNE WELLER,** on behalf of herself and all others similarly situated, Plaintiff v. **WACHOVIA BANK, N.A**. Defendant	CIVIL ACTION No. 08-755

PLAINTIFFS' MOTION FOR FINAL CLASS CERTIFICATION
AND FOR FINAL APPROVAL OF THE PROPOSED SETTLEMENT

Plaintiffs, by their counsel Langer, Grogan & Diver, P.C., move the Court for entry of an order substantially in the form attached hereto, certifying the settlement class and approving the class settlement in this matter, and in support hereof aver:

1. Plaintiffs and defendant Wachovia Bank, N.A. have entered into a settlement agreement in these two actions, on behalf of the Class described in the

settlement agreement. This Court granted preliminary certification of the class and preliminary approval of the settlement on October 24, 2008.

2. The Class is defined in the settlement agreement as:

> All individual as to whom RCCs[1] on their bank accounts were deposited by the Payment Processors[2] into one or more accounts in any of the Payment Processors' or Telemarketers' names at defendant Wachovia and finally charged to individuals' bank accounts and which was not returned in full by the drawee bank, between June 1, 2003, and the date of this Agreement.

3. The class contains approximately 800,000 members and is sufficiently numerous that joinder of all members would be impracticable.

4. There are issues of fact and law common to the class, including: (1) the use of the phones in interstate commerce to fraudulently obtain account information from Class members; (2) the transmission of account information by phone or wire; (3) the preparation of demand drafts using the information by the payment processors; (4) the transmission of proceeds from the demand drafts to the telemarketers; (5) the participation of the payment processors in the operation of the telemarketers; (6) whether the payment processors participated in the RICO enterprise; (7) whether the telemarketers and the payment processors engaged in mail and wire fraud; (8) whether the telemarketers and payment processors dealt in unauthorized access devices; (9) whether the activities of the telemarketers and the payment processors constituted a pattern of racketeering activity; and (10) whether Wachovia conspired with the telemarketers and payment processors.

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[1] RCCs are defined in the agreement as a "remotely created draft" or "demand draft". Settlement Agreement ¶ 8.

[2] Working from the class definitions in both the *Faloney* and *Harrison* cases, the agreement defines Payment Processors as "PPC. Netchex, YMA and Guardian". Settlement Agreement ¶ 6.

5. The claims of the named plaintiffs are typical of those of the Class. The claims of the named plaintiffs and those of the Class are fundamentally the same: each had his or her account debited through accounts maintained at Wachovia by payment processors who were acting on behalf of telemarketers whom plaintiffs alleged fraudulently obtained their bank account information. Any minor variations in the underlying telemarketing schemes do not alter the similarly fraudulent nature of their schemes or the common banking modus used to raid the accounts of the named plaintiffs and the Class members.

6. Plaintiffs adequately represent the Class. In appointing their counsel as Interim Class Counsel in the *Harrison* case, the Court described counsel as "highly skilled". Class counsel, the firm of Langer, Grogan & Diver, P.C., has a wealth of experience in the successful pursuit and resolution of class litigation. Courts have remarked on the skill and dedication of the firm's attorneys. *See In re Linerboard Antitrust Litigation*, MDL 1261, 2004 WL 1221350, *6 (E.D. Pa. 2000) ("The highly skilled class counsel [Howard Langer] provided excellent representation for named plaintiffs and absent class members."); *In re Domestic Air Transport Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991) (commenting on the skill of co-lead counsel including Judah Labovitz). Irv Ackelsberg is a nationally recognized consumer rights litigator and the winner of the Vern Countryman Award by the National Consumer Law Center in 2005 and the Andrew Hamilton Award by the Philadelphia Bar Association in 2001. Both John Grogan and Ned Diver were awarded the Equal Justice Award from Community Legal Services. The conduct of this litigation and the result achieved – 100% reimbursement of Class members' damages net of counsel fees – also amply demonstrate the adequacy of legal representation. The class plaintiffs are also adequate representatives. They have no

conflicts with the members of the Class. Plaintiffs in the *Faloney* case also produced their personal records and appeared in Philadelphia for their depositions. The guardian of Ms. Harrison also produced papers and records.

8. All of the requirements of Fed. R. Civ. P. 23(a) are satisfied.

9. Common questions of law and fact predominate. Many of those questions are identified in paragraph 4 above. During class briefing, Wachovia challenged predominance by arguing that each Class member had to separately prove reliance with respect to the predicate RICO offenses of mail and wire fraud.[3] Wachovia's argument with respect to mail and wire fraud was undercut by the Supreme Court's June 2008 decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008), in which the Court held that reliance in not an element of the RICO predicate acts of mail and wire fraud in a civil damage action. Further, plaintiffs adduced evidence that the telemarketing schemes at issue here employed a common modus of deceit. Moreover plaintiffs' also relied on the access device statute as a separate predicate offense which does require a showing of reliance.

10. A class action is the superior method for resolving the claims of the Class. No other Class member has instituted litigation against defendant Wachovia. The size of individual claims – usually only in the hundreds of dollars – militates against separate actions, and the structure of the settlement – including the direct mailing of checks without a claim form – militates against any rational reason for pursuing an individual claim. As a result of the settlement, there will be no trial and therefore any issues of manageability posited by Wachovia in its earlier opposition to class certification are no longer present. Moreover, in their expert affidavits from the Chair of the Marketing

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[3] Wachovia has since withdrawn that objection and joins in this motion for class certification.

Department of the Wharton School at the University of Pennsylvania and a veteran telemarketing fraud investigator, plaintiffs were able to rebut the arguments advanced by Wachovia with respect to manageability.

11. The requirements of Fed. R. Civ. P. 23(b)(3) are satisfied and certification of the settlement class is appropriate and proper.

12. The proposed settlement is fair, reasonable and adequate. A copy of the full agreement is attached as Exhibit A to Plaintiffs' Memorandum of Law in support of this motion.

13. The settlement is entitled to a presumption of fairness because: (1) the negotiations were conducted at arm's length;[4] (2) there was substantial discovery, including review of records and documents from the PPC litigation and cases brought by the FTC against the telemarketers, review of hundreds of thousands of pages of documents produced by Wachovia and third parties and the taking of ten depositions; (3) as described earlier in this motion, class counsel are experienced in this type of litigation.[5]

14. The settlement also satisfies the factors in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

(a) This case was complex, expensive and would have required lengthy litigation. Plaintiffs would have been required to establish all of the elements of RICO, including that a national bank of the reputation of Wachovia conspired to violate RICO. To do so, plaintiffs had already retained ten experts, including four experts on

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[4] The negotiations are described in detail in plaintiffs' Memorandum of Law in support of this motion.

[5] An additional indicium of the fairness of the settlement is a small percentage of objections by Class members. The deadline for such objections will not end until January 12, 2009.

banking and payment systems. Plaintiffs would also have been required to prove that Class members' injuries were caused by the predicate RICO offenses. The time to bring the case to trial was also a considerable concern because many of the Class members are elderly.

(b) The time for Class members to opt out or object has not yet expired, and therefore the reaction of the Class to the settlement cannot be definitively determined. Plaintiffs' will further advise the Court as to the factor when that period has expired on January 12, 2009.

(c) Document discovery was substantially completed by the time of settlement. Plaintiffs also had complete access to documents and depositions from the PPC case and two of the cases brought by the FTC against telemarketers. The motion for class certification was fully briefed and awaiting decision. Plaintiffs had retained ten experts and had taken ten depositions. At the time of settlement, the United States had already shut down PPC, and District Courts in California and Florida were addressing the fraudulent conduct of the two largest telemarketing operations. As of the date of settlement, the OCC had also determined that Wachovia's "handling of the account activities of the payment processors and direct telemarketers was [sic] part of a pattern of misconduct that resulted in financial gain to the Bank in the form of income ..., and a pattern or practice of disregard of the interests of consumers involved in the transactions with the payment processors and direct telemarketers.

(d) Although plaintiffs had amassed substantial evidence of Wachovia's liability, there remained substantial risks in establishing liability. The case involved three layers – the telemarketers, the payment processors and Wachovia – and plaintiffs had to establish the unlawful conduct of each layer of participant. In order to

litigate the case on a class wide basis, plaintiffs also had to show that the telemarketers were systematically fraudulent, and that the unlawfulness of any particular transaction could be established on the basis of class wide evidence. It was also incumbent on plaintiffs to establish that the individual conduct of Wachovia employees amounted to corporate participation in a conspiracy. Issues relating to class certification have already been addressed in this motion.

(e) The only way to establish damages on a class wide basis was by use of data bases either from other litigation or obtained by plaintiffs in discovery. However, Wachovia contended that since some Class members allowed money to taken from their accounts over an extended period of time, and therefore were arguably satisfied customers of the telemarketers, there could be no class wide presumption of damages. In addition, the money was taken not by Wachovia, but by the telemarketers and payment processors, while the fees received by Wachovia - $3.9 million – were a small percentage of the funds taken. There was considerable risk, therefore, that a jury would have been very conservative in awarding damages against Wachovia.

(f) Prior to the *Bridge* decision, *supra*, the reliance issue created a substantial risk with respect to maintaining class action status throughout the litigation.

(g) At the time of settlement there was substantial risk as to Wachovia's ability to withstand a judgment for single damages, let alone treble damages under RICO. While the settlement documents were being drafted, Wachovia was in dire financial straits and was only able to proceed due to the intervention of the Federal Reserve and FDIC.

(h) In view of the attendant risks of litigation the settlement is not only reasonable but is exceptional. Every class member is given the opportunity to recover

100% of his or her damages without any reduction for counsel fees. The bulk of those damages have been distributed in the form of checks mailed to the Class member without need to file a claim form. As to additional bank charges incurred by Class members, they can recover $35 just by certifying that they incurred such charges, or if they claim a greater amount, they can submit their bank records documenting that higher amount. Plaintiffs' counsel and their expert, Stephen A. Saltzburg are unaware of any other case where the class has indisputably received 100% of its damages. The average recovery in class actions is approximately 10% and in the Third Circuit 10.97%. The settlement also provides for prompt payment to a class which includes many elderly people. Without the settlement, under the Consent Agreement in the PPC case, only $6 million dollars would have been available to those Class members whose RCCs were created by PPC. Under the original restitution agreement between the OCC and Wachovia, although full restitution was required, it was to be made pursuant to a claims procedure which likely would have produced only a 10% return rate, with the balance of any restitution funds reverting to Wachovia. The adequacy of the settlement is further demonstrated by the support it has received from the United States Attorney for this District, the OCC and the FTC.

(i) The settlement is fairly allocated. All Class members are receiving 100% of the funds withdrawn from their accounts. Class members who incurred bank charges have two options. They can receive $35 simply by returning a claim form stating that they incurred such charges. Class members who incurred substantial bank charges can submit a claim form for the full amount of those damages by submitting supporting bank records. Therefore, all Class members have the opportunity to collect 100% of the damages they incurred.

15. The named plaintiffs' are entitled to an incentive award of $40,000 for the services they provided to the Class and the efforts they expended in the litigation. All of the named plaintiffs produced their individual records, and the plaintiffs in the Faloney case traveled to Philadelphia for their depositions. The incentive awards sought are modest compared to awards in other cases. Moreover, the awards will not diminish the recovery of the Class since Wachovia has agreed to pay those awards separately.

WHEREFORE, plaintiffs request that the Court enter an order in the form attached hereto, certifying the settlement class as satisfying the requirements of Fed. R. Civ. P. 23(a) and (b)(3), and approving the settlement as fair, reasonable and adequate.

December 18, 2008

LANGER GROGAN & DIVER, PC

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