

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

PAUL D. WILKERSON, et al.,

Plaintiffs,

And

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
GEORGIAN BANK,

Proposed
Intervenor/Plaintiff,

v.

GORDON R. TEEL, et al.,

Defendants.

CIVIL ACTION FILE NO.

2010-EVD-10567

MOTION TO INTERVENE

COMES NOW, the Federal Deposit Insurance Corporation, as Receiver for Georgian Bank (the "FDIC"), by and through undersigned counsel, and hereby moves this honorable Court, pursuant to O.C.G.A. § 9-11-24(a) and 9-11-24(b), for an order permitting it to intervene in this action as Intervenor/Plaintiff. The grounds for this motion are set forth more fully below. A Notice of Removal to the United States District Court for the Northern District of Georgia accompanies this motion.¹

¹ See *Int. Maintenance Corp. v. Inland Paper Board & Packaging Inc.*, 256 Ga. App. 752, 754, 569 S.E.2d 865 (Ga.App. 2002) ("Case law allows an intervenor to file 'any pleading in the case that original parties could have filed.' *Woodward v. Lawson*, 225 Ga. 261, 262, 167 S.E.2d 660 (1969). Although a brief is not a pleading, the reasoning behind the rule in *Woodward* would seem to allow an intervenor to file whatever briefs, evidence, or *other papers* it chooses.") (emphasis added).

1.

On September 25, 2009, the Georgia Department of Banking and Finance closed Georgian Bank and named the FDIC as receiver. At the time of the closing, Georgian Bank was a wholly-owned subsidiary of Georgian Bancorporation, Inc. (“GBI”) and GBI’s largest asset.

2.

On September 29, 2009, as a result of Georgian Bank’s failure, GBI filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Northern District of Georgia, Case No. 09-85446-mgd (the “Bankruptcy Case”).

3.

On July 22, 2010, Plaintiffs, shareholders in GBI, sued Defendants, former directors of GBI, one of whom was also a director and officer of Georgian Bank, for certain causes of action related to the failure of Georgian Bank that led to GBI’s bankruptcy.

4.

On September 1, 2010, Plaintiffs amended their original complaint to change their original allegations from those of negligent misrepresentation to those of fraudulent misrepresentation (the “Amended Shareholder Complaint”).

5.

In relevant part, O.C.G.A. § 9-11-24(a)(2) states that “anyone *shall* be permitted to intervene in an action... [w]hen the applicant *claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.*” (emphasis added).

6.

To intervene as a matter of right under O.C.G.A. § 9-11-24(a)(2), the FDIC must show that (1) the FDIC has an interest in the property at stake in this action; (2) the FDIC faces potential impairment if this action continues without its involvement, and; (3) the FDIC is inadequately represented by Plaintiffs and Defendants. See *Buckler v. DeKalb County*, 290 Ga.App. 190, 193, 659 S.E.2d 398, 401 (2008) citing *DeKalb County v. Post Properties*, 245 Ga. 214, 219, 263 S.E.2d 905 (1980).

7.

Pursuant to the Financial Institution Reform, Recovery and Enforcement Act of 1989 (“FIRREA”), FDIC succeeds to “all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder...of such institution with respect to the institution and the assets of the institution.” 12 U.S.C. § 1821 (d)(2)(A)(i).

8.

As the successor to “all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder” of Georgian Bank, the FDIC claims a very real interest relating to the property at stake in this action.

9.

The primary “property” at stake in this action is the monetary coverage provided by GBI’s Director & Officer Liability Policy (the “Policy”). The Policy provides limited and finite monies for claims covered by the Policy and may be the only source of recovery against the Defendants in this or any subsequent lawsuit. Consequently, if the Plaintiffs secure any recovery under the Policy there will be an irreversible diminution of monies

available to the remaining shareholders of GBI and to the FDIC in any subsequent lawsuits against the Defendants containing claims covered by the Policy.

10.

Perhaps more importantly, the Policy is a “wasting” policy under which legal costs and expenses also diminish the monetary limits on coverage. In fact, on September 3, 2010, the Court in the Bankruptcy Case entered an order approving funding under the Policy coverage for defense of this action. (The Order is attached as Exhibit A). Again, pursuant to the Policy, every dollar spent on defense funding in this action means an irreversible diminution of monies available to the remaining shareholders of GBI and the FDIC. Indeed, this order allows the Policy to be reduced regardless of the outcome of this litigation. Therefore, the FDIC has an interest in the property at stake in this action.

11.

Pursuant to FIRREA, the FDIC retains all rights of Georgian Bank, the wholly-owned subsidiary of GBI, and, likewise, retains all shareholder derivative claims of the Bank. *Lubin v. Skow*, 2010 WL 2354141, *2 (11th Cir. Jun. 14, 2010); see also *In re Se. Banking Corp.*, 827 F.Supp 742, 745 (S.D. Fla. 1993). “As the receiver, the FDIC possesses all the rights of the Bank's shareholders including the rights to sue directors and officers.” *FDIC v. American Cas. Co.*, 998 F.2d 404, 409 (7th Cir.1993). For present purposes, those rights include the FDIC’s right to file its own subsequent lawsuit against the Defendants.

12.

Consequently, the interest of the FDIC is of such a direct and immediate character that its ability to recover in a subsequent lawsuit will be affected by any judgment in this action or protracted litigation; therefore, the FDIC has the interest to intervene as of right.

See *Rossville Federal Savings & Loan Assoc. v. Chase Manhattan Bank, et al.*, 223 Ga. 188, 189, 154 S.E.2d 243, 245 (1967).

13.

Without intervention in this action, the FDIC would be impaired in its ability to bring any such subsequent litigation against the Defendants pursuant to its authorities and powers under FIRREA. Specifically, there is the very real possibility of the application of res judicata to any subsequent litigation involving the Defendants. Additionally, any diminution of monies available under the Policy would fundamentally alter the FDIC's evaluation of its right to pursue the Defendants in that subsequent litigation. At the least, the FDIC has the right to intervene to oversee this action in order to protect both the interests of every other shareholder of GBI and the interests of the general public for whose protection FIRREA was enacted. Otherwise, the FDIC's powers and authority pursuant to FIRREA would be significantly impaired.

14.

Neither the Plaintiffs' claims nor the Defendants' defenses will adequately represent or protect the rights or interests of the FDIC or the remaining shareholders of GBI. Indeed, the FDIC's interest, and mandate, under FIRREA can only be adequately protected by the FDIC's intervention in this action.

15.

The FDIC's interests are not aligned with the Defendants because the FDIC retains the right to bring an action against them at some point in the future. Specifically, the Defendants are part of an ongoing FDIC investigation related to the failure of Georgian Bank. The Defendants are well aware that they could be the targets of a lawsuit by the

FDIC once that investigation is completed. Clearly, the Defendants could not adequately represent the FDIC in this action.

16.

Similarly, the FDIC's interests are not aligned with the Plaintiffs because the Plaintiffs seek relief from the same limited sources of recovery – either under the Policy or the Defendants' own personal assets – to which the FDIC may be entitled. To the extent that the Plaintiffs and the FDIC are battling over the same limited sources of recovery, Plaintiffs cannot adequately represent the FDIC in this action.

17.

The FDIC has clearly shown that it has an interest in this action; that it faces potential impairment if this action continues without its involvement, and; that it is inadequately represented by both Plaintiffs and Defendants. See *Buckler v. DeKalb County*, 290 Ga.App. 190, 193, 659 S.E.2d 398, 401 (2008) citing *DeKalb County v. Post Properties*, 245 Ga. 214, 219, 263 S.E.2d 905 (1980).

18.

The FDIC also has the right to intervene in this action pursuant to FIRREA because the Amended Shareholder Complaint is, in substance, a derivative claim aimed at a former director of Georgian Bank. Under FIRREA, FDIC succeeds to “all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder...of such institution with respect to the institution and the assets of the institution” including the right to bring derivative actions against former officers and directors of the Bank. See 12 U.S.C. § 1821 (d)(2)(A)(i).

19.

Notwithstanding the Amended Shareholder Complaint's allegations that Plaintiffs' claims are direct and not derivative, "[i]t is the nature of wrong alleged and not the pleader's designation or stated intention that controls the court's decision." *Phoenix Airline Servs. Inc. v. Metro Airlines, Inc.*, 397 S.E.2d 699, 701 (Ga. 1990); see also *Gaudet v. United States*, 517 F.2d 1034, 1035 (5th Cir. 1975)("It is the substance of the claim and not the language used in stating it which controls").

20.

Whether a claim is direct or derivative is based on state law. Moreover, the question of whether a claim is derivative or direct is a legal determination not controlled by conclusory assertions in a complaint. *Lubin v. Skow*, 2009 WL 4641761 *5 (N.D. Ga. Nov. 30, 2009) (Story, J.), *affirmed*, *Lubin*, 2010 WL 2354141 at *3 (citing *Phoenix Airline Servs., Inc. v. Metro Airlines, Inc.*, 397 S.E.2d 699, 701, for the position that "[i]t is the nature of the wrong alleged and not the pleader's designation or stated intention that controls the court's decision). In Georgia "a shareholder must be injured in a way which is different from the other shareholders or independently of the corporation to have standing to assert a direct action." *Grace Bros., Ltd. v. Farley Indus., Inc.*, 264 Ga. 817, 819, 450 S.E.2d 814, 816 (1994). As a result, in order to bring a direct action against former directors of Georgian Bank, the Plaintiffs must have alleged some special injury *not* suffered by other shareholders and *not* derived from an injury to the Bank. See *Totilo v. Herbert*, Case No. 1:08-CV-1033 (N.D. Ga. May 20, 2008).

21.

Despite the Amended Shareholder Complaint's allegations of "individualized damages" based on fraud "directed to each Plaintiff," *Complaint*, ¶ 1, Plaintiff's proof merely consists of letters from GBI addressed to the entire universe of GBI shareholders as evidenced by the salutation "Dear Shareholder." *Complaint*, Exhibits B, C, D, E and F. The Amended Shareholder Complaint alleges no injury unique or special to the Plaintiffs; therefore, it is a derivative claim and can only be brought by the FDIC.

22.

At its core, the Amended Shareholder Complaint alleges economic loss as a result of corporate mismanagement. See *Complaint*, ¶ 52. Any harm to GBI stock is directly attributable to the alleged mismanagement of Georgian Bank. That harm to GBI stock is inseparable from the harm to Georgian Bank. See *Lubin v. Skow*, 2010 WL 2354141, *4 (11th Cir. June 14, 2010).

23.

More importantly, the allegations in the Amended Shareholder Complaint focus entirely on misconduct by Defendants in their management of Georgian Bank. With respect to one Defendant, the alleged misconduct occurred almost entirely while he acted in his capacity as an officer of Georgian Bank. The resulting *injury was to Georgian Bank* which, in turn, led to the devaluation of GBI's shares. "Where a shareholder alleges devaluation of shares due to corporate mismanagement, that shareholder lacks standing to sue the corporate officers directly." *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. Unit B Apr. 1981).

24.

All the harm alleged in the Amended Shareholder Complaint flows from Defendants' mismanagement of Georgian Bank. If the value of a shareholder's investment is reduced by corporate mismanagement, that recovery belongs to the corporation. See *Greenwood v. Greenblatt*, 161 S.E. 135, 138 (Ga. 1931). The Amended Shareholder Complaint is tellingly silent to any conduct by the Defendants separate and apart from their actions with respect to Georgian Bank.

25.

Even if the FDIC did not have the right to intervene in the action (which it does), O.C.G.A. § 9-11-24(b)(2) states that “[u]pon timely application anyone may be permitted to intervene in an action...[w]hen an applicant's claim or defense and the main action have a question of law or fact in common.”

26.

This Court should apply its discretionary powers pursuant to O.C.G.A. § 9-11-24(b)(2) and permit the FDIC to intervene because the questions of law and fact in this action are material to the FDIC's potential claims against the Defendants.

27.

The Amended Shareholder Complaint is a direct result of the closing of Georgian Bank for which the FDIC was appointed receiver. As such, pursuant to FIRREA, the FDIC succeeds to the interests of Georgian Bank and the shareholders of its holding company, GBI. Every question of law or fact in the Amended Shareholder Complaint impacts the interests and claims of Georgian Bank and the remaining shareholders of its holding company, GBI. Because of the Amended Shareholder Complaint's impact on the interests

and claims of Georgian Bank and GBI's shareholders, the FDIC should additionally be permitted to intervene pursuant to O.C.G.A. § 9-11-24(b)(2).

28.

This motion is timely filed pursuant to O.C.G.A. § 9-11-24.

29.

Neither the Plaintiffs' nor Defendants' rights will be unduly prejudiced by the FDIC's intervention because the pleadings have yet to close and no substantive action has occurred in this action. Furthermore, the FDIC's intervention will not unduly delay this action as the Amended Shareholder Complaint was only filed on September 1, 2010.

30.

The FDIC, in conjunction with this motion, notices the removal of this action to federal court pursuant to the rights and powers accorded it under FIRREA. 12 U.S.C. § 1819(b)(2)(B)(the Notice of Removal is attached as Exhibit B).

WHEREFORE, the Federal Deposit Insurance Corporation, as Receiver for Georgian Bank, prays that it be granted an order permitting its timely intervention in this action.

This 23rd day of September, 2010.

Respectfully submitted,



Tracey Walker
Georgia Bar No. 732752

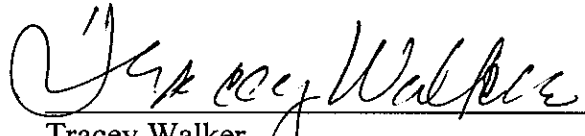
GONZALEZ, SAGGIO & HARLAN, LLP

3353 Peachtree Road, NE
Suite 920 – North Tower
Atlanta, Georgia 30326
(Tel) 404-869-3342
(Fax) 404-842-1722
Tracey_Walker@gshllp.com

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2010, a copy of the foregoing motion was served via regular U.S. mail to Henry A. Turner, TURNER LAW OFFICES, LLC, 403 W. Ponce de Leon Avenue, Suite 207, Decatur, Georgia 30030 and R. Keegan Federal, Jr., FEDERAL & HASSON, LLP, Two Ravinia Drive, Suite 1776, Atlanta, Georgia 30346.

Respectfully submitted,



Tracey Walker
Georgia Bar No. 732752

GONZALEZ, SAGGIO & HARLAN, LLP

3353 Peachtree Road, NE
Suite 920 – North Tower
Atlanta, Georgia 30326
(Tel) 404-869-3342
(Fax) 404-842-1722
Tracey_Walker@gshllp.com

EXHIBIT "A"



IT IS ORDERED as set forth below:

Date: September 03, 2010

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re)	Case No. 09-85446-mgd
)	
GEORGIAN BANCORPORATION, INC.)	Chapter 7
)	
Debtor.)	
)	

ORDER GRANTING STAY RELIEF

Upon the *Unopposed Motion of Former Director and Officer of Georgian Bancorporation, Inc. for Approval of Defense Funding Under Directors and Officers' Insurance Policy or, in the Alternative, for Relief from the Automatic Stay to Allow Defense Funding* (the "Motion") filed by Lynn Darby (the "Movant"), a former director and officer of Georgian Bancorporation, Inc. (the "Debtor"), for an Order; (i) approving the defense funding under that certain Insurance Policy No. 8210-9101 (the "Policy") issued to the Movant and the Debtor and; (ii) granting relief from the automatic stay, to the extent applicable; and finding that notice of the Motion was adequate, and that no

further notice is needed; and finding that good and sufficient cause exists to grant the relief requested; accordingly, it is hereby

ORDERED, that the Motion is granted and approved; and it is further

ORDERED, that the Insurer is hereby authorized to pay (and to continue to pay), without further Order of this Court, all the defense costs and other covered losses of Insured Persons pursuant to and subject to the terms and conditions of the Policy (i) in or relating to any claims that have been or may be brought against Insured Persons and (ii) incurred in order to seek the relief granted herein, in accordance with the applicable terms of the Policy.

ORDERED, that the 14 day stay imposed under Fed.R.Bankr.P. 4001(a)(3) is waived.

***** END OF ORDER *****

No opposition to entry:

/s/ Eric W. Anderson (by express permission)

Eric W. Anderson (Ga. Bar No.016810)

Attorney for Trustee

Parker Hudson, Rainer & Dobbs LLP

1500 Marquis Two Tower

285 Peachtree Center Avenue, NE

Atlanta, GA 30303

(404) 523-5300

Order prepared and consented to by:

/s/Heather N. Byrd

Heather N. Byrd (Ga. Bar No. 139022)

Attorney for Movants

1201 West Peachtree Street

Atlanta, GA 30309

(404) 881-7000

Distribution List

Heather N. Byrd
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424

Eric W. Anderson
Parker Hudson Rainer & Dobbs LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue, NE
Atlanta, GA 30303

Wendy L. Hagenau
Bryan Cave Powell Goldstein LLP
One Atlantic Center – 14th Floor
1201 West Peachtree Street, NW
Atlanta, GA 30309-3488

EXHIBIT "B"

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

PAUL D. WILKERSON, et al.,

Plaintiffs,

And

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
GEORGIAN BANK,

Proposed
Intervenor/Plaintiff,

v.

GORDON R. TEEL, et al.,

Defendants.

CIVIL ACTION FILE NO.

2010-EVD-10567

NOTICE OF REMOVAL

Now comes the Federal Deposit Insurance Corporation as Receiver for Georgian Bank (“FDIC-R”) and, pursuant to 12 U.S.C. § 1819(b)(2)(B), 28 U.S.C. § 1441 and 28 U.S.C. § 1446, notices the removal of the case styled *Paul D. Wilkerson, et al. v. Gordon R. Teel, et al.*, Case No. 2010-EVD-10567, originally filed in the State Court of Fulton County, Fulton County, Georgia (the “State Court Action”) to the United States District Court for the Northern District of Georgia, Atlanta Division, upon, and contemporaneous to, the entry of the state court’s order granting FDIC-R’s Motion to Intervene.¹

¹ FDIC-R filed a motion to intervene in the State Court Action on September 23, 2010.

BRIEF FACTUAL BACKGROUND

1.

On September 25, 2009, the Georgia Department of Banking and Finance closed Georgian Bank and named the FDIC-R as receiver. At the time of the closing, Georgian Bank was a wholly-owned subsidiary of Georgian Bancorporation, Inc. ("GBI").

2.

As receiver, FDIC-R succeeded to all rights, titles, powers and privileges of Georgian Bank pursuant to 12 U.S.C. § 1821(c)(3)(A).

3.

On July 22, 2010, Plaintiffs, shareholders in GBI, sued Defendants, former directors of GBI, for certain causes of action related to the closing of Georgian Bank. On September 1, 2010, Plaintiffs amended their original complaint to change their original allegations from those of negligent misrepresentation to those of fraudulent misrepresentation.

4.

On September 23, 2010, the FDIC-R, as receiver for Georgian Bank, filed a Motion to Intervene in the State Court Action as of right. A copy of the Motion to Intervene is attached as Exhibit 1. Upon the entry granting the FDIC-R's Motion to Intervene, the FDIC-R will be a party in the State Court Action.

BASIS FOR REMOVAL TO FEDERAL COURT

5.

Pursuant to O.C.G.A. § 9-11-24(a), the FDIC-R has the right to intervene in the State Court Action. As a result, upon the FDIC-R's intervention in the State Court Action, the

entire State Court Action must be removed to the United States District Court for the Northern District of Georgia, Atlanta Division.

6.

In part, this Notice of Removal is brought pursuant to 28 U.S.C. § 1441(b) which provides in relevant part:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

7.

Any civil suit in which the FDIC-R, in any capacity, is a party is “deemed to arise under the laws of the United States.” 12 U.S.C. § 1819(b)(2)(A). See *Bullion Services, Inc., v. Valley State Bank*, 50 F.3d 705, 707 (9th Cir. 1995). Likewise, when the FDIC-R is a party, the *entire action* is deemed to arise under the laws of the United States. See *Buchner v. FDIC*, 981 F.2d 816, 819 (5th Cir. 1993)(emphasis added).

8.

The FDIC-R’s right to remove the State Court Action to federal court finds its basis in the Financial Institution Reform, Recovery, and Enforcement Act of 1989. Pub. L. No. 101-73, § 209, 103 Stat. 183 et seq. Specifically, 12 U.S.C. § 1819(b)(2)(B) provides, in relevant part:

Except as provided in subparagraph (D) the Corporation [FDIC-R] may without bond or security, remove any action, suit or proceeding from a state court to the appropriate United States District Court before the end of the 90 day period beginning on the date the action, suit, or proceeding is filed against the Corporation [FDIC-R] or the Corporation [FDIC-R] is substituted as a party.

9.

This Notice of Removal is filed well within the 90 day period from the date the FDIC-R will intervene as a party in the State Court Action.

10.

Furthermore, this Notice of Removal is filed within thirty (30) days of the State Court Action becoming removable by virtue of FDIC-R's Motion to Intervene and within a year of the commencement of the action. Therefore, this Notice of Removal is also timely filed pursuant to 28 U.S.C. § 1446(b).

11.

Venue of this removal action is proper pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1446(a) because this Court is the United States District Court for the District and Division covering Fulton County, Georgia, where the State Court Action was pending.

12.

A copy of all process, pleadings and orders filed in the *Paul D. Wilkerson, et al. v. Gordon R. Teel, et al.*, Case No. 2010-EVD-10567, is attached hereto as required by 28 U.S.C. § 1446(a).

13.

This action is not a non-removable action as described in 28 U.S.C. § 1445.

WHEREFORE, the FDIC-R, as receiver for Georgian Bank, respectfully requests that this Court accept the removal of this action from state court and direct that the State Court of Fulton County, Fulton County, Georgia shall have not further jurisdiction of this matter

This 23rd day of September, 2010.

Respectfully submitted,



Tracey Walker
Georgia Bar No. 732752

GONZALEZ, SAGGIO & HARLAN, LLP

3353 Peachtree Road, NE
Suite 920 – North Tower
Atlanta, Georgia 30326
(Tel) 404-869-3342
(Fax) 404-842-1722
Tracey_Walker@gshllp.com

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2010, a copy of the foregoing motion was served via regular U.S. mail to Henry A. Turner, TURNER LAW OFFICES, LLC, 403 W. Ponce de Leon Avenue, Suite 207, Decatur, Georgia 30030 and R. Keegan Federal, Jr., FEDERAL & HASSON, LLP, Two Ravinia Drive, Suite 1776, Atlanta, Georgia 30346.

Respectfully submitted,



Tracey Walker
Georgia Bar No. 732752

GONZALEZ, SAGGIO & HARLAN, LLP

3353 Peachtree Road, NE

Suite 920 – North Tower

Atlanta, Georgia 30326

(Tel) 404-869-3342

(Fax) 404-842-1722

Tracey_Walker@gshllp.com