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IN THE OFFICE OF THE SECRETARY OF STATE
COMMISSIONER OF SECURITIES
STATE OF GEORGIA

SOS SECURITIES

DEC 16 2013

In the matter of:

Georgia Commerce Bancshares, Inc.
Application for a Fairness Hearing
Pursuant to O.C.G.A. § 10-5-11(9)

Petitioner.

ORDER

DOCKET NUMBER

2013-17

On October 21, 2013, Petitioner Georgia Commerce Bancshares, Inc. (the "Petitioner" or "Buyer") filed an application (the "Application") with the Commissioner of Securities of the State of Georgia (the "Commissioner") for a fairness hearing pursuant to §10-5-11(9) of the Georgia Uniform Securities Act of 2008, O.C.G.A. §10-5-1, *et seq.* (the "Act"). In the Application, Petitioner requested that the Commissioner conduct a hearing to determine the fairness of the terms and conditions of a proposed issuance of securities by Petitioner in connection with a recently announced merger between Petitioner and Georgia Commerce Bank ("GCB"), on the one hand, and Brookhaven Bank ("Brookhaven" or "Seller" and, together with the Petitioner and GCB, the "Parties"), on the other hand. Petitioner sought said hearing so that Petitioner might rely on the exemption from federal securities registration provided for in Section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. §77c(a)(10), as well as the state exemption provided for in §10-5-11(9) of the Act.¹

After appropriate notice to the Parties in accordance with the Commissioner's Rule 590-4-6-.07(1), an evidentiary hearing (the "Hearing") was held by the Commissioner on December 4, 2013 pursuant to §§ 10-5-11(9) and 10-5-71(a)(2) of the Act, Chapter 590-4-6 of the Commissioner's Rules, and the Georgia Administrative Procedure Act, O.C.G.A. §50-13-1, *et seq.*

¹ §10-5-11(9) of the Act contains the same language as Section 202(9) of the Uniform Securities Act of 2002. Official Comment 10 to Section 202 of the Uniform Securities Act of 2002 provides in pertinent part as follows: "Section 202(9) provides a state counterpart to the exemption in Section 3(a)(10) of the Securities Act of 1933."

1 Common Stock will be 518,760 shares. The Merger must be approved by two-thirds of the votes
2 entitled to be cast by holders of Seller Common Stock.

3 7. Petitioner's offer to Brookhaven's shareholders is valued at approximately \$10.00 per
4 common share, representing approximately \$24.0 million in the aggregate for all the issued and
5 outstanding shares of Seller Common Stock.

6 8. At the agreed-upon price of \$10.00 per share of Seller Common Stock and exchange
7 ratio of 0.404 shares of Buyer Common Stock for each share of Seller Common Stock exchanged,
8 the Buyer Common Stock will be issued at a valuation of \$24.75 per share.

9 9. 188 record and beneficial owners of Seller Common Stock, holding in the aggregate
10 approximately 73% of the outstanding Seller Common Stock, are residents of Georgia.

11 10. Petitioner's offer to exchange its securities for the shares of Seller Common Stock was
12 made from Georgia and the sale, issuance, and delivery of the shares of Buyer Common Stock in
13 the Merger will be initiated from Georgia and consummated at a closing to be held in Georgia
14 pursuant to the Merger Agreement.

15 11. Neither the Buyer Common Stock nor the Seller Common Stock is publicly traded.

16 12. In the Application, Petitioner has advised the Commissioner that Petitioner intends to
17 rely on the federal exemption from registration provided for in Section 3(a)(10) of the Securities
18 Act of 1933 if the Commissioner concludes that the terms and conditions of the exchange are fair
19 to the shareholders of Brookhaven, both procedurally and substantively.

20 13. Brookhaven's shareholders are required to approve the Merger under Georgia law, and
21 Brookhaven intends to hold a meeting of its shareholders for that purpose.

22 14. Brookhaven's board of directors has approved the Merger, and will recommend that the
23 Merger and Merger Agreement be approved by Brookhaven's shareholders.

24 15. Brookhaven shareholders who oppose the Merger may exercise appraisal rights
25 pursuant to Georgia law and seek to obtain payment of the fair value of their shares.

26 16. Brookhaven's shareholders will receive proxy materials in connection with the special
meeting of shareholders to be held for considering approval of the Merger. These materials will

1 include: (i) notice of the special meeting of shareholders, including the matters to be decided, and
2 the date, time, and place of the meeting; (ii) a recommendation of the board of directors of
3 Brookhaven that the Shareholders vote "FOR" approval of the Merger and Merger Agreement; (iii)
4 a description of the terms and conditions of the Merger and a copy of the Merger Agreement; (iv) a
5 description and a copy of the fairness opinion issued by Brookhaven's financial advisor with
6 respect to whether, in their opinion, the consideration to be provided to shareholders of
7 Brookhaven is fair from a financial point of view; and (v) a proxy providing the shareholders with
8 the opportunity to vote "FOR" or "AGAINST" approval of the Merger and the Merger Agreement.

9 17. As described in the Application, Petitioner contends that the Merger will benefit the
10 Brookhaven shareholders that elect to receive (or are allocated) Buyer Common Stock in that they
11 will acquire an interest in a larger corporation with greater financial resources and a stronger
12 market position, and that furthermore, to the extent that Brookhaven shareholders elect to receive
13 cash from Petitioner, such cash compensation will provide immediate liquidity.

14 18. As described in the Application, Petitioner and Brookhaven began discussions
15 regarding the Merger in June 2013. The board of directors of Petitioner considered a number of
16 potential transactions, including but not limited to a potential acquisition of Brookhaven. The
17 board of directors of Brookhaven considered the unsolicited indication of interest from Petitioner.

18 19. The board of directors of Petitioner contacted various investment banking firms that
19 regularly render advisory services to community banks in connection with strategic matters. After
20 interviewing multiple candidates, the board of directors of Petitioner engaged Keefe, Bruyette &
21 Woods ("KBW") as its financial advisor.

22 20. The board of directors of Brookhaven considered various investment banking firms that
23 regularly render advisory services to community banks in connection with strategic matters and
24 ultimately engaged Banks Street Partners, LLC ("BSP") to act as its financial advisor in connection
25 with its consideration of the unsolicited indication of interest from Petitioner. In addition to
26 providing advisory services, the board of directors of Brookhaven engaged BSP, through its
wholly-owned subsidiary, BSP Securities, Inc., to provide an opinion as to whether the

1 consideration to be received in the Merger is fair, from a financial point of view, to the holders of
2 Seller Common Stock.

3 21. On October 1, 2013, BSP provided the Brookhaven board of directors with its opinion
4 that the consideration to be received in the Merger is fair, from a financial point of view, to the
5 holders of Seller Common Stock. A copy of the fairness opinion received by the board of directors
6 of Brookhaven from BSP was attached to the Application as Appendix L.

7 22. Subsequent to the filing of the Application, on November 8, 2013, the Commissioner
8 requested additional information from the Parties; specifically, materials supporting the Parties'
9 valuations of Buyer Common Stock and Seller Common Stock, at \$24.75 per share and \$10.00 per
10 share, respectively.

11 23. In response to the Commissioner's November 8, 2013 information request, the
12 Commissioner received backup materials relating to the fairness opinion delivered by BSP to the
13 board of directors of Brookhaven. The Commissioner received no materials relating to KBW's or
14 any third party's assessment of the valuation of either Buyer Common Stock or Seller Common
15 Stock.

16 24. The Commissioner has not performed any independent valuation analyses of either
17 Buyer Common Stock or Seller Common Stock, and accordingly expresses no determination of the
18 value of either Buyer Common Stock or Seller Common Stock.

19 25. The Commissioner has not retained any third party to perform any independent
20 valuation analyses of either Buyer Common Stock or Seller Common Stock.

21 26. On November 14, 2013, pursuant to Rule 590-4-6-.07(1), a Notice of Hearing was
22 issued to the Parties by the Commissioner setting the date of the Hearing to be December 4, 2013.

23 27. Brookhaven subsequently mailed to all Brookhaven shareholders of record, via 1st Class
24 US Mail, properly addressed and accompanied by adequate postage, copies of a Shareholders'
25 Notice of Hearing, signed by Petitioner's CEO Mark W. Tipton on November 15, 2013, advising
26 all such Brookhaven shareholders of the Application and its contents, as well as the date, time,

1 place and subject of the Hearing, further advising such shareholders of their right to appear and be
2 heard at said Hearing.

3 28. The November 15, 2013 Shareholders' Notice of Hearing further informed the
4 Brookhaven shareholders that the Application and supporting documentation annexed thereto was
5 available for inspection at the office of the Commissioner and the principal offices of the Parties.

6 29. The Hearing requested by the Application was held before the Commissioner on
7 December 4, 2013. The Acting Assistant Commissioner of Securities presided.

8 30. At the Hearing, Petitioner presented four witnesses who provided sworn testimony: (i)
9 Mr. Mark W. Tipton, CEO and Chairman of Petitioner; (ii) Mr. R. Lee Burrows, Jr., CEO of BSP;
10 (iii) Mr. Will F. Brackett, Sr. Vice President of BSP; and (iv) Mr. Mark Saunders, Managing
11 Director of BSP.

12 31. At the Hearing, Brookhaven presented one witness who provided sworn testimony, Mr.
13 William L. Kane, CEO of Brookhaven.

14 32. One Brookhaven shareholder, Mr. Heber Padget, also a Brookhaven employee,
15 appeared at the Hearing and spoke in support of the Merger.

16 33. No person present at the Hearing opposed the Merger.

17 II.

18 CONCLUSIONS OF LAW

19 1. The Commissioner has jurisdiction over this matter as administrator of the Act.

20 2. The Commissioner is authorized to conduct the Hearing pursuant to §§ 10-5-71 and
21 10-5-11(9) of the Act.

22 3. §10-5-11(9) of the Act provides issuers of securities with an exemption from
23 registration of such securities with the Commissioner in connection with a "transaction in a
24 security, whether or not the security or transaction is otherwise exempt, in exchange for one or
25 more bona fide outstanding securities, claims, or property interests, or partly in such exchange and
26 partly for cash, if the terms and conditions of the issuance and exchange or the delivery and

1 exchange and the fairness of the terms and conditions have been approved by the Commissioner
2 after a hearing.”

3 4. Pursuant to Rule 590-4-6-.05(1)(e), a person claiming an exemption, exception,
4 preemption, or exclusion has the burden to prove the applicability of the claim.

5 5. The terms and conditions of the Merger and the Merger Agreement and the issuance
6 and exchange of shares of Buyer Common Stock to the holders of Seller Common Stock as
7 contemplated by the Merger Agreement, are determined to be both procedurally and substantively
8 fair within the purview of the Act to the holders of Seller Common Stock.

9 a. In the course of negotiations, both Petitioner and Brookhaven were represented by
10 counsel experienced in commercial transactions similar to the Merger, and by
11 financial advisors with experience in such transactions. Each of the boards of
12 directors of Petitioner and Brookhaven have approved the terms and conditions of
13 the Merger Agreement and the Merger. The terms and conditions of the Merger
14 Agreement and of the Merger are the result of arms' length negotiations under
15 circumstances in which the board of directors of each party to the Merger
16 Agreement was positioned to act in the best interest of their respective corporation
17 and shareholders.

18 b. Due to the extent of information publicly available regarding Petitioner and GCB,
19 including information filed with the Federal Deposit Insurance Corporation, the
20 Board of Governors of the Federal Reserve System and the Georgia Department of
21 Banking and Finance, and other information which is publicly available and posted
22 on Petitioner's web site, as well as the proxy materials expected to be provided to
23 Brookhaven's shareholders in connection with the special meeting of shareholders
24 to be held for the purpose of considering the Merger, compliance with the
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1 registration requirements of the Act would not provide Brookhaven's security
2 holders, with significant additional information regarding Petitioner.

3 c. The Merger will likely benefit Petitioner in that it is expected to expand Petitioner's
4 footprint in the Atlanta Metropolitan Area through the addition of Brookhaven's
5 branch in Brookhaven and on Johnson Ferry Road in DeKalb County. The Merger
6 will likely benefit the holders of capital stock of Brookhaven that elect to receive (or
7 are allocated) Buyer Common Stock in that they will acquire an interest in a larger
8 corporation with greater financial resources and a stronger market position. The
9 Merger will likely benefit the holders of capital stock of Brookhaven that elect to
10 receive cash from Petitioner as it will provide such holders with immediate
11 liquidity.

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13 d. Brookhaven shareholders who oppose the Merger and perfect their dissenters' rights
14 of appraisal may exercise appraisal rights pursuant to Georgia law and seek to
15 obtain payment of the fair value of their shares.

16 e. All persons to whom Petitioner proposes to issue shares of Buyer Common Stock in
17 consummation of the Merger had the right to appear and be heard at the Hearing.
18 No one was prevented from appearing by action of the Parties or the Commissioner.
19 No person present at the Hearing opposed the Merger.

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21 **III.**

22 **ORDER**

23 On the basis of the Findings of Facts and Conclusions of Law,

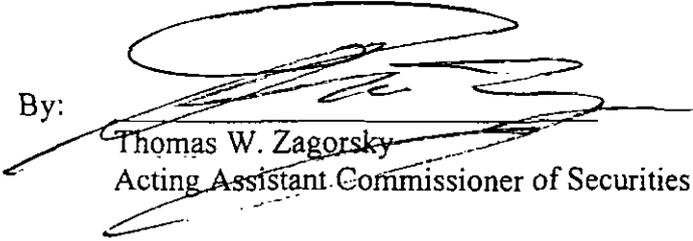
24 IT IS HEREBY ORDERED:

25 1. The terms and conditions of the Merger Agreement providing for the issuance of
26 shares of Buyer Common Stock to the holders of Seller Common Stock substantially upon the terms
described herein and in the Application, are determined to be both procedurally and substantively fair

1 within the purview of the Act to the holders of Seller Common Stock; and the terms and conditions of
2 the Merger Agreement and the procedural and substantive fairness thereof are hereby approved by the
3 Commissioner in accordance with and pursuant to the authority conferred on him by 10-5-11(9) of the
4 Georgia Uniform Securities Act of 2008 and the regulations promulgated thereunder.

5 SO ORDERED this 13th day of December, 2013.

6
7 **BRIAN P. KEMP**
8 **SECRETARY OF STATE**
9 **COMMISSIONER OF SECURITIES**

10 By: 

11 Thomas W. Zagorsky
12 Acting Assistant Commissioner of Securities
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