ORIGINAL

Honorable Judge Mary Walrath
Bankruptcy Court
824 North Market Street 5th Floor
Wilmington , DE 19801

In RE: Washington Mutual Case No. 08-12229 (MFW)

Dear Judge Mary Walrath,

OBJECTION TO PLAN OF REORGANIZATION, REQUEST FOR PROPER ACCOUNTING OF ALL ASSETS, REQUEST FOR RETENTION OF TAX REFUNDS IN WMI ESTATE, REQUEST FOR REMOVAL OF IMPROPER THIRD PARTY RELEASES AND REQUEST FOR MODIFICATION OF PLAN OF REORGANIZATION OR APPOINTMENT OF TRUSTEE

DEAR JUDGE WALRATH:

The Debtor and current mgt of WMI, pending any shareholder meeting which might quickly remove such mgt, has proposed a "Global"(sic) Settlement and plan of reorganization (POR) which are inadequate illegal, improper, unfair and inequitable for the numerous reasons stated below. In summary, there are at least three reasons why these proposals of Debtor WMI as presently structure should not be approved or substantially modified.

SUMMARY

-NO ACCOUNTING OF ASSETS. There is no proper accounting and allocation of all estate assets, exceeding $10 billion, including those included in the Debtors MOR as well as tax refunds exceeding $5 billion, Net Operating Losses (NOLs), legal claims and other valuable estate assets. These may provide unjustified gains for creditors who receive payment under the plan by providing for payment in full on claims as well as valuable future warrants for a reorganized WAMU which will amount to payment in excess of 100% on the dollar for some parties while other estate claimants receive 0-1% under the plan as proposed.

-UNJUSTIFIED DISTRIBUTION OF TAX REFUNDS AND BENEFITS. Despite evidence that tax refund reallocation from the WMI estate is unusual

and improper, the purported Global Settlement gives over $3 billion in tax benefits, refunds, and related financial benefits to JP Morgan and the FDIC.

-IMPROPER AND UNJUSTIFIED RELEASES. The global settlement provides unjustified releases and injunctions from suits for third parties FDIC and JPMC particularly in view of the limits on discharge or release in bankruptcy of third parties and the substantial recoveries in other comparable cases such as Slattery v. FDIC (2007-5063,-5064,-5089, United States Court of Appeal for the Federal Circuit, decided Sep. 29, 2009) and First Bancorp v. FDIC. The assumption that these releases are justified by a value of $4 billion in deposits is being "provided" from these parties is not a reasonable or supportable basis for the releases when in fact, the $4 billion deposit sums "provided" are already due to the estate and the tax refunds are property of the estate which is being improperly and illegally converted by third parties under the plan. As discussed below, litigation may be time consuming and difficult, but as Slattery demonstrates, it may ultimately vindicate claimants, even against government agencies such as the FDIC.

-INADEQUATE FACTUAL EXAMINATION. As discussed further below, the Examiner's report, while lengthy, is shallow in superficial, in part because of the time constraint under which it was performed, and in part because of resistance or inadequate cooperation by some parties, including particularly FDIC which threatened to string out the process of providing information until the time ran out to submit the Examiner's report. Such behavior should not be countenanced or rewarded by providing financial or legal benefits such as the tax refund reallocation or releases described above. As a minimal example, discussed further below, at page 267, the Examiner states, "FDIC produced no documents to Debtors". How, possibly, after charging the estate in excess of $12 million for litigation efforts nominally by both Weil, Gotshal and Quinn Emmanuel, could the Debtor decide that a settlement with FDIC and JPMC was reasonable if no documents from the regulator that urged, spread the news about, and pre-negotiated the seizure of Washington Mutual were produced to WMI during the course of the superficial "litigation" engaged in by Weil (assisted, of course, because of conflicts, by Quinn Emmanuel.) Moreover, the Examiners' report clearly establishes that the events of March to September 2008 have not been fully revealed, much less investigated to death. Not until the Examiner's report did we know that the Chairman of the FDIC, Ms. Sheila Bair, called the chief executive of JP Morgan, Mr. Dimon, on Sep. 16, 2008 before formal bidding for WAMU was opened on Sep. 22. New facts at this date indicate

that a complete, vigorous investigation may yet uncover legally relevant occurrences which may have multi-billion dollar consequences.

-GLOBAL SETTLEMENT NEVER WAS GLOBAL. The whole concept of a "Global Settlement" is a parody of due process, fair hearing and arms length negotiation given that no consideration of active involvement by preferred or equity security holders in discussions or formation of this settlement has been demonstrated. As a minimal example, discussed further below, at page 267, the Examiner states, "FDIC produced no documents to Debtors".

-CONTINGENT REQUEST FOR APPOINTMENT OF TRUSTEE
Because of the size of the assets at issue, involving more than $5, possibly closer to $6 billion of tax refunds, $4 billion of deposits, and possibly in excess of $20 billion in Net Operating Losses (NOLs) thus totaling about $30 billion in potential assets to be given away or improperly allocated by the plan along with improper releases for legal claims which could have a value at a minimum of over $1 billion, I request that the Court consider, as a contingent matter, appointment of a Trustee to preserve and protect all valuable assets for all classes of claimants, if a truly "Global" settlement with inclusion, consideration, and appropriate payment for equity classes of holders of preferred and common Washington Mutual Stock cannot be shown within 60 days of November, 19, 2010. That is, if no settlement including equity is reached by mid January, the Court should appoint a Trustee.

DISCUSSION OF OBJECTIONS

First and foremost, there is no proper accounting of all estate assets, and a determination of the proper allocation of those assets. The MOR submitted by Debtor shows assets of at least $6.854 billion before consideration of tax refunds. While recognizing that the MOR for an entity in bankruptcy may not be precise, the statement of assets coincides with the assertions of Debtor in its Disclosure Statements and POR that many classes of the Unsecured Creditors will be paid in full, ie 100% on the dollar. But the MOR does not reflect, except in footnotes, the existence of $5.5 to $5.8 billion in tax refunds, and the benefits of Net Operating Losses for a reorganized Washington Mutual to be turned over to these same creditors receiving full payment. The lagniappe to the creditors is made and given at

the expense of preferred and common shareholders, despite their claims to $4 billion of deposits held by JPMC and the rights to the almost $5 billion ($4.77 billion already paid) of tax refunds. With the addition of the paid tax refunds, the
Assets shown by the MOR would be:

	(billions)
Assets shown by Sep MOR	$6.854
Tax refunds paid Oct. 7	$4.770
Total assets as of Oct 7	$11.624

One reason for demanding a proper statement of assets is the fact that the underlying Purchase and Assumption agreement (P&A) by which JP Morgan took whatever it took from FDIC referred to a Section 3.1 which was supposed to include a statement of assets, but was never included in the P&A, possibly because of the hasty development of these documents. Notably, lately there has been much concern in the financial community about the existence of many foreclosures on homeowners by banks which were accomplished by robo-signing or inadequate executive review of the underlying documentation. The WMI receivership sale by FDIC to JPMC is exactly analogous to these undocumented foreclosures, ie a sale or purported transfer is made by papers which, however, do not provide precise or adequate details of the basis for the transfer. In this case, FDIC and JPMC are the parties who negotiated (according to the Examiner) the details of the P&A agreement and yet left out, intentionally or by mistake, the statement of assets transferred in missing Section 3.1 The failure and ambiguity created by this massive flaw in the WMI transfer should be resolved, as is conventional in the law, against the parties who drafted and negotiated the document. They should not be allowed to benefit by drawing some inference that because of the lack of a clear statement of assets transferred.

In the matter of the tax refunds now amounting to $4.77 billion in hand, and possibly as much as $5.8 billion due to the WMI estate, the Examiner's report is instructive. As noted by the FDIC's Mr. Wigand, "Tax refunds are not usally passed to acquiring bans." P. 289. Footnote 1170 states "In fact, the WMB sale is the first time it has ever occurred." P. 289. In that same footnote, it is noted that "The FDIC's handbook states that this type of asset is "never" transferred. FDIC, Resolutions Handbook, 19 (2003) p. 289.

When the Examiner asked Wigand how potential bidders would know that tax refunds were assets included in the sale, Wigand replied that a tax refund

of $1.5 or $1.6 billion was already present on the books of WMB. P. 289. At the time, WMI's SEC filings reflect $670 million of accrued tax receivables as of March 31, 2008. P. 138, Attachment B-2.
However, deferred tax assets were not to pass to the acquiring bank under the P&A agreement. P. 290. The acquiring bank gets what the entity is owed at the time of its failure, but future tax benefits, such as a net operating loss (NOL) do not pass. P. 290. A different understanding is expressed in the Examiner's report by Mr. Peyster, according to the Examiner. After an Oct. 7, 2008 (post P&A agreement) telephone conference between Mr. Lopata of JPMorgan's tax dept. and Mr. Peyster, attorney for FDIC, an email the next day by Mr. Peyster "stated that all assets of WMB 'whether or not on the books' were transferred to JPMC. Pp. 304-305. This remarkable statement controverts another FDIC witnesses view of proper procedures, as well as the FDIC's resolution handbook cited above. Given the substantial controversy about these assets, Mr. Peyster should have been the subject of an intensive interview-he was not because FDIC refused. However, advice given to a third party about the terms of a negotiated sale agreement does not seem to fall within any attorney client privilege and should not have been withheld from examination.

Moreover, the Examiner's report notes that in the pre-P&A agreement process, Q&A's posted by FDIC in connection with the bidding process, Question 10 asked about whether any deferred tax assets would pass to an acquirer, and the FDIC answer stated, " If there is a deferred tax asset at the thrift level, it relates to the entity itself and can not pass in a purchase and assumption transaction to the acquirer." P. 295, FN 1208. Thus, all the pre-agreement discussions indicate that any deferred tax assets, contrary to Mr. Peyster's post agreement attempted donations by email to JP Morgan, could not pass to an acquiring bank.

I also find it improper and unauthorized that the payments of the $4.77 billion tax refund have been made into a segregated escrow controlled by JPMC, FDIC and the Debtor. There is no reasons for these assets, under the control of the Bankruptcy Court, to be under any degree of control of JPMC and FDIC, rather than the Debtor under the supervision of this Court, or if subject to multi-party control, should not also be subject to the Committee of Unsecured Credtors or the Equity Committee or the U.S. Trustee as well.

The alleged disclosure statement for the reasons stated above does not contain sufficient information under Secton 1125 of the Bankruptcy Code to

determine the amount of assets that may be available or the proceeds available to each class and the degree to which each class of claimants on the bankruptcy estate may be paid in full, or overpaid or impaired. The Debtor, JPMC and FDIC clearly do not want to have a balance sheet but the requirements of the Bankrupty Code clearly supercede the desires of these parties.

Mere statements of opinion or belief, without accompanying factual support, are inadequate to support a disclosure statement. See In re Beltrami Enters., 191 B.R. 303, 304 (Bankr. M.D. Pa. 1995) (conclusory allegations or opinions without supporting facts are generally not acceptable); Ferretti, 128 B.R. at 21 (statement that projection of restaurant's income and expenses was virtually impossible to provide, but debtor believed plan to be feasible based on experience, was inadequate); In re Egan, 33 B.R. 672 (Bankr. N.D. Ill. 1983) (debtor's disclosure statement failed to provide adequate information where rehabilitation plan was founded solely upon bare assertions of opinion without supporting facts); In re East Redley Corp., 16 B.R. 429 (Bankr. E.D. Pa. 1982) (where value of assets is significant to plan, conclusory opinion of value is insufficient).

THE THIRD PARTY RELEASES – ON BALANCE, UNJUSTIFIED

The courts have differing opinions about the merits of third party releases contained within any plan for a bankrupt estate. Some accept that Section 524 of the Bankruptcy Code limits such third party releases, while others find it within the power of the court to provide such releases, if necessary to the plan and in part because the third parties provide substantial consideration to the estate for such releases.

On balance, the facts and the circumstances of this case, considering all of these factors, do not support the releases, particularly of the scope and magnitude proposed, and in the form which seeks to cram down releases even on parties who object to giving such releases of seek to opt out of the injunction against such claims.

Among the factors which have been considered are:

1. Identity of interest between the debtor and the third party
2. Third-party contributes substantial assets to the reorganization
3. Injunction is essential to the reorganization

4. Impacted classes vote overwhelmingly to accept the plan
5. Mechanism in plan to pay all, or substantially all, of the classes affected by the injunction
6. Opportunity for claimants who choose not to settle to recover in full
7. Specific factual findings to support bankruptcy court's conclusions

In this case, factor number 2, the contribution by a third party to the estate or reorganization, does not support the third party releases. There is a pending motion for summary judgement on behalf of the Estate seeking the Court to determine that $4 billion in deposits are the property of the estate. The Examiners report states,

"The Examiner concludes that the Debtors have made a substantial showing that they are entitled to the $4 billion deposit." P. 5, Attachment B-1.

The Examiner notes that the Court has reserved a ruling on summary judgement. However, that face, and even the face of "possible lengthy litigation" p. 5 does not justify adding in the value of the deposits in order to justify improper releases, when there is another path to obtain the deposits without providing improper third party releases.
Given this, it is not clear that any value should be ascribed, justifying releases, to the provision of the deposits to the estate. If there are clear legal grounds for recovery of the $4 bilion by the WMI estate without providing releases, then the releases cannot be justified by those deposits as consideration.

The other factors for consideration, such as the essential nature of the injunction, also fail. If the WMI estate has $4 billion in deposits, $4.77 to $5.8 billion in tax refunds, and multi-billion dollar operating losses, a plan of reorganization utilizing those financial assets and attributes is clearly feasible without the releases to third parties, and may in fact be hindered by the releases, which could provide additional financial benefits to WMI or a reorganized WAMU. Nor is there a plan to pay all or substantially all of the classes affected by the injunction. In particular preferred and equity interests would under the purported GS and POR 6 receive little or nothing.

Given the lack of consideration, the potential for a plan of reorganization utilizing existing or legally cognizable financial assets, and the lack of benefits for all claimants affected by the proposed releases or injunction, the injunction and releases of Section 1.43 and other related sections of the POR

or Global settlement should be, at a minimum, stricken from any approved plan, or removed, subject to a truly Global Settlement including equity interests. If not fully stricken, then the releases should be modified to not apply to any interest in WMI which does not receive substantial, ie, at least 25%, payment as part of the POE,

EXAMINERS REPORT DOES NOT SUPPORT POR OR GS

In the words of Louis D. Brandeis, a judge rarely performs his functions adequately unless the case before him is adequately presented. In this case, not only has it not been adequately presented, it has been presented in misleading terms.

The Examiner begins his discussion of his attempt to discover the underlying facts which determine the legal consequences or remedies by noting that, "some of his requests for information from FDIC were met with aggressive assertions by FDIC that it was immune from significant discovery." P. 266. The Examiner reviewed documents OTS (Office of Thrift Supervision) produced to the Debtors. P. 267. "FDIC had not produced documents to the Debtors" P. 267. Thus, in the first instance, Debtors had not obtained any documentary information from one of the major parties included in the Global Settlement or to whom they proposed to provide releases. This in itself raises serious questions of the adequacy of the basis for the settlement and releases.

The Examiner noted that obtaining information from FDIC was "slow and difficult" P. 268. The extent and nature of FDIC's non-cooperation is fully described, and its motivation laid out in the following excerpt:

"In that an subsequent meetings, the FDIC made clear that attempts to compel discovery would be met with certain obstacles including time-consuming, multi-step regulatory procedures, which could effectively delay any discovery beyond the time limits of the Examination." P. 268.

In other words, the FDIC was willing to delay and impede any fully investigation of its actions, to the extent of running out the clock on the Examiner, if its own limits on disclosure were not agree to. Even when FDIC agreed to produce documents, as it did on Aug 18, 2008, P. 269, it delayed production for almost a month, to September 15, produced irrelevant information on Sep. 21, and finally produced documents on

October 12 and Oct. 21, the latter just 9 days before the Examiner's report was due. As the Examiner noted, even this extended and delayed FDIC production was "incomplete in that they did not include documents the Examiner had obtained from other sources." P. 269.

In terms of personal, percipient witnesses, the FDIC was also of limited help. While OTS "was very cooperative" P. 269, the Examiner requested interviews of five FDIC employees, but was allowed by FDIC to speak to only two, Messrs. Wigand and Spoth P. 270. These witnesses "lacked personal knowledge regarding whether certain meetings or calls with potential WMB suitors, including JPMC, took place." P. 270. FDIC refused to allow the Examiner's requests to interview Chairman Sheila Bair, David Gearin, and Richard Peyster. P. 270. (Peyster was an FDIC attorney who participated in the drafting and "negotiation" of the P&A agreement in connection with, among other things, tax benefits and had conversations with Ben Lopata of JPMC tax department P. 297) After these interviews were denied, the Examiner sent a list of written questions, to which FDIC responded on October 20, 2010 (again, about 10 days before the Examiner's report was due) "but the letter was not fully responsive to all the questions posed." As noted further, "The two witnesses from the FDIC interviewed by the Examiner had no knowledge about the timing of the negotiations of the P&A Agreement or when the final draft was uploaded." P. 297, FN 1222.

The Examiner encapsulated the entire process of review of the FDIC's actions by stating"

"In sum, the FDIC has refused to make fully transparent some of its dealings with JPMC and others." P. 270.

As to JPMorgan, the difficulties and omissions with regard to the review of JP Morgan's behavior and legal liability are too many to list, but I will provide a few. Neither Mr. Cavangh or Mr. Scharf remember the contents of a meeting with Sheila Bair on Sep. 9. P. 205, FN 713, Attachment C-1, P. 221, FN 805, Attachment C-2. Finally, the Examiner reports that JP Morgan reported an extraordinary gain in connection with the WAMU acquisition, of $1.9 Billion. This was comprised of a reported $11.9 billion fair value, minus the $1.88 billion purchase price and $8.1 billion of non-current, non-financial assets not held for sale, such as equipment and premises. P. 228, Attachment D-1. But the equipment and structures were precisely why JPMC had pursued WAMU – because it lacked a banking infrastructure on

the West Coast. So the premises and equipment were real value that JPMC sought to cloak and avoid recognizing. Had it not subtracted the real property and equipment, the reported extraordinary gain would have been

Report gain 1.9 billion
Eq. and structures 8.1 billion

Total gain $10 billion.

It is difficult now to hear reports of JPMC seeking additional funds from FDIC, partially to justify their settlement, tax benefits, and releases sought in this case when in fact JP Morgan has indicated to the financial community that it may structure share repurchases to increase shareholder value. See,
JP Morgan May Turn to Buyback Before Dividend
John Melloy, Executive Producer, Fast Money 15 Nov. 2010

"...the firm may declare a buyback instead to send a message about how cheap its shares are, according to an analyst fresh off a meeting with CEO James Dimon." (Attachment D-3 and D-4) .

This controverts the assertions made by JPM as reported by the Examiner that: "Although JPMC reported increased net income in the immediate aftermath of the purchase, it maintains that its earnings per share have been diluted because additional shares were issued to raise capital needed to support its purchase of WMB." P. 228-229, Attachment D-1, D-2

As to the Examiner's analysis of the legal claims and risks and timing of any potential recovery, I have only two responses:

First, as demonstrated by Slattery v. United States, (See Attachment A-US Ct. of Appeals for the Federal Circuit, decided Sep. 29, 2009, Appeal from the United States Court of Federal Claims in Case No. 93-CV-280, Senior Judge Loren A. Smith) the wheels of justice may grind slowly, but they may result eventually in substantial recovery. "The United States Court of Federal Claims held that the United States, acting through the Federal Deposit Insurance Corporation ("FDIC") breached a contract...and is liable in damages....we affirm the award of lost value damages of $276 million..We reverse the dismissal of the Intervenors claims on jurisdictional grounds and remand for consideration of any remaining aspects of the final disposition of this sixteen-year proceeding."

Second, if there is a path to a plan of reorganization which does not require improvident and unjustified third party releases, which there clearly is, given the substantial assets available to the WMI estate through effective and timely legal process and decision on ownership of the $4 billion deposits through summary judgement and $5+ billion of tax refunds through rejection of the reallocation to JPMC or FDIC, then the releases are not essential to reorganization and should not be given.

Given all of the deficiencies in the Examiner's report, not necessarily his or his firms fault, but the result of delay, non-cooperation and non-responsiveness by some of the key parties seeking to benefit from the GS, the Examiner's report and its gaping vacuums of information about FDIC, JPMC and WMI assets and transfer intent cannot be deemed to support the GS, its releases, or the WMI POR.

CONCLUSION AND RECOMMENDATIONS.

We suggest a limited period as described below, for the interested parties, including the Equity Committee, to be consulted, and if no agreed resolution of these issues is reached, for the Court to then rule.

We (or our Independent Retirement Accounts) own or have owned WMI Stock in the following amounts:: In excess of 40,000 shares-some may be voting classes.

Courts have denied approval of a disclosure statement where the allegations contained in the statement were "unsupported by factual information so that voting parties were unable to independently evaluate the merits of the plan." In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 980 (Bankr. N. D. NY 1988). Congress intended the disclosure statement to be the primary source of information that will allow creditors and shareholders to make informed decisions regarding the proposed plan. In re Scioto, supra., citing In re Egan, 33 B.R. 672, 675 (Bankr. N.D. Ill 1983).When a party objects to a disclosure statement, there are usually one of two outcomes: a consensual resolution is reached by the debtor and objecting party; or the Court decides the matter.

We believe that the best course for the court at this point is to:

1. Require submission of a full balance sheet and statement of Assets for WMI, as of now, and as of the time of seizure and sale. Require statements by FDIC and JP Morgan of their understanding of the assets or amounts transferred, pursuant to missing Sec. 3.1 of the P&A agreement, and whether the P&A agreement has been finally executed and closed, or if not when such final closure will occur.
2. To indicate an intention to rule on pending motions for determination, by summary judgement, that WAMU has a right to the $4 billion of deposits improperly transferred to JP Morgan and to direct consideration of tax benefits as additional assets of the bankrupt estate And to take control of any tax refund amounts within the direct supervision of the Bankruptcy Court, if no agreed POR can be developed within 60 days after Nov. 19. 2010.
3. Direct Debtor, other parties to the GS, and creditors, to consult with all parties, including the Equity Committee, for a period of 60 days, and attempt to determine a plan of reorganization and disclosure statement which will provide adequate information, represent the interests of all classes of parties in the bankrupt estate, and submit a report by January 31, 2011, as to whether an agreed POR has been arrived at, or if not appoint a Trustee to manage and preserve all estate assets, including, without limitation, cash, claims on deposits, tax refunds or claims on tax refunds or other tax benefits, and legal claims against any and all third parties.

For these purposes, we accept the representation of equity and preferred shareholder interests by the Susman law firm on behalf of the Equity Committee in any such sixty day discussion and settlement period. Setting such a time limit for further development of an 1125 adequate disclosure and fully Global plan of reorganization will serve the interests of justice as well as efficiency. The delay and cost will not be unlimited, but the benefits of broader consultation, fuller disclosure, and compliance with federal law regarding tax benefits will be obtained.

Respectfully submitted, November 18, 2010

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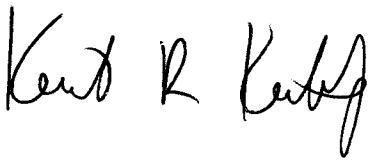

Certification of Service - By Overnight delivery on Nov. 18, 210 To:

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Honorable Judge Mary Walrath
Bankruptcy Court
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Wilmington , DE 19801

Certification of Service by overnight mail to the above parties and the Court

Kermit R Kubitz 11-18-10

Kermit R. Kubitz Nov. 18, 2010

ATTACHMENT A

United States Court of Appeals for the Federal Circuit

2007-5063, -5064,-5089

FRANK P. SLATTERY, JR., (on behalf of himself and on behalf of all other similarly situated shareholders of Meritor Savings Bank),

Plaintiff-Cross Appellant,

and

STEVEN ROTH,
and INTERSTATE PROPERTIES,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

Thomas M. Buchanan, Winston & Strawn, LLP, of Washington, DC, argued for plaintiff-cross appellant Frank P. Slattery, Jr., (on behalf of themselves and on behalf of all other similarly situated shareholders of Meritor Savings Bank). With him on the brief were Peter Kryn Dykema, and Eric W. Bloom.

Bradley P. Smith, Sullivan & Cromwell LLP, of New York, New York, argued for plaintiffs-cross appellants Steven Roth, and Interstate Properties. With him on the brief were Richard J. Urowsky and Jennifer L. Murray.

Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief was Michael W. Hertz, Deputy Assistant Attorney General, Kenneth M. Dintzer, Assistant Director, F. Jefferson Hughes and William G. Kanellis, Trial Attorneys.

Dorothy Ashley Doherty, Federal Deposit Insurance Corporation, of Washington, DC, for amicus curiae Federal Deposit Insurance Corporation.

Appealed from: United States Court of Federal Claims

Senior Judge Loren A. Smith.

United States Court of Appeals for the Federal Circuit

2007-5063, -5064, -5089

FRANK P. SLATTERY, JR., (on behalf of himself and on behalf of all other similarly situated shareholders of Meritor Savings Bank),

Plaintiff-Cross Appellant,

and

STEVEN ROTH,
and INTERSTATE PROPERTIES,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in Case No. 93-CV-280, Senior Judge Loren A. Smith.

DECIDED: September 29, 2009

Before NEWMAN and GAJARSA, Circuit Judges, and WARD, District Judge.*

Opinion for the court filed by Circuit Judge NEWMAN. Dissenting opinion filed by Circuit Judge GAJARSA.

NEWMAN, Circuit Judge.

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* Honorable T. John Ward, United States District Court for the Eastern District of Texas, sitting by designation.

A-1

The United States Court of Federal Claims held that the United States, acting through the Federal Deposit Insurance Corporation ("FDIC"), breached a contract with the Meritor Savings Bank ("Meritor") and is liable in damages.[1] The government challenges the jurisdiction of the Court of Federal Claims to review contracts with the FDIC, and also appeals the ruling of breach of contract and the award and measure of damages. On cross-appeal the plaintiff shareholders (collectively "Slattery"), pursuing this action derivatively on behalf of Meritor and in the interest of its shareholders, challenge the sufficiency of the damages award. In addition, former shareholders Roth and Interstate Properties (collectively "Roth" or "Intervenors") challenge the dismissal of their claims in intervention. The FDIC filed a brief as amicus curiae, seeking to modify certain aspects of the judgment.

The decision of the Court of Federal Claims as to jurisdiction and liability for breach of contract is affirmed. With respect to damages, we affirm the award of lost value damages of $276 million, reverse the award of $67 million in non-overlapping restitution damages, and by agreement of the parties reverse as cumulative the award of wounded bank damages of $28 million. We affirm the denial of additional damages measured by the FDIC's savings of $696 million due to the merger that was implemented by the breached contract. We reverse the dismissal of the Intervenors' claims on jurisdictional grounds, and remand for consideration of any remaining aspects of the final disposition of this sixteen-year proceeding.

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[1] Slattery v. United States, 53 Fed. Cl. 258 (2002) ("Liability Ruling"); 69 Fed. Cl. 573 (2006) ("Damages Ruling"); 73 Fed. Cl. 527 (2006) ("Dismissal of Intervenors' Complaint"); 98 A.F.T.R.2d 2006-8303 (Ct. Fed. Cl. Dec. 18, 2006) ("Amended Final Order").

ATTACHMENT B

1. Disputed Deposit at FSB

The Settlement Agreement provides that the Debtors will receive what has been referred to as the $4 billion "deposit" that was transferred from WMB to FSB on the eve of bankruptcy. The Examiner concludes that the Debtors have made a substantial showing that they are entitled to the $4 billion deposit. The Court has reserved ruling on a summary judgment motion concerning this deposit. However, even if the Court rules in favor of the Debtors, it will not foreclose possible lengthy litigation to finally and completely resolve the deposit issue. Indeed, despite the Debtors' confidence that ultimately they will prevail in recovering the Disputed Accounts, there still is a maze of legal issues that remain to be litigated that could prevent an expeditious recovery of the Deposit.

2. Tax Refunds

The Settlement Agreement provides the Debtors with approximately $2.196 billion and certain WMB Bondholders with $335 million out of a total of $5.5 billion in tax refunds. The Settlement gives the Estates the benefit of the majority of refunds that were generated as a result of legislation that was enacted after WMI filed for bankruptcy. The Examiner investigated whether the Settlement Agreement is unfair because the entire $5.5 billion refund belongs to WMI, the tax filing entity for all of its subsidiaries and affiliates.

The Examiner concludes that the Debtors likely could claim the entire $5.5 billion in total tax refunds; however, WMB has meritorious claims to all or most of these refunds pursuant to a Tax Sharing Agreement between the entities. Whether the FDIC Receiver or JPMC owns the refunds does not change the fact that WMI ultimately will not be entitled to retain most of the refunds.

Finally, subject to severe post-confirmation utilization restrictions, the Debtors do retain sizeable net operating loss carryforwards that could shelter future profits. It is highly unlikely,

potential losses to the insurance fund. A second FDIC employee confirmed, after the fact, that this position had never been taken before by the FDIC Receiver in a purchase and assumption agreement.[517]

The Examiner also investigated whether, prior to the distribution of the bid package to potential bidders, there were any discussions between JPMC and the FDIC regarding tax issues. As part of this Investigation, the Examiner questioned all witnesses who might have knowledge of pre-bid discussions about whether there were any pre-bid discussions regarding taxes. Except as detailed below, all witnesses stated they had no knowledge of such discussions.

According to Mr. Wigand, on September 22, 2008, FDIC Resolutions held meetings with representatives of at least four different financial institutions regarding a possible transaction in the event that WMB did fail.[518] During their meeting with the FDIC, JPMC representatives asked whether WMB "tax refunds" were included as assets that were being sold in a potential receivership transaction. The FDIC representatives responded that they were.[519] The FDIC has stated that all interested parties knew (or could have known) that a tax refund was available because it was listed on WMB's balance sheet at the time.[520] WMI's SEC filings reflect $670 million of accrued tax receivables on the balance sheet as of March 31, 2008.

In other FDIC purchase and assumption agreements that contain this exclusion of certain claims, the list of excluded assets contains a separate, specific reference to claims arising under an agreement with another person with respect to the filing of tax returns or the payment of

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[517] JPMCD_000001547.00001.

[518] Wigand Interview. As discussed below, by September 21, 2008, all of the parties that had been considering an "open bank" transaction with WMB had indicated to Mr. Spoth at the FDIC that they were no longer interested in pursuing an "open bank" transaction.

[519] During a telephone call, Mr. Lopata, the Director of the Tax Department at JPMC, discussed tax issues with Richard Peyster from the FDIC. Although he is not completely certain, Mr. Lopata believes it is likely that they had their first telephone discussion on September 24, 2008. JPMCD_000004607.00004.

[520] Wigand Interview.

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taxes. Section 3.5(d), which appears in numerous other purchase and assumption agreements, provides that the purchasing bank does not acquire "any claims arising as a result of the Failed Bank having entered into any agreement or otherwise being joined with another person with respect to the filing of tax returns or the payment of taxes."[521] The schedule of excluded assets did not contain the subsection for "tax receivables" that typically appeared as Section 3.5(d). The exclusion of this provision from the WMB P&A Agreement is an indication that the FDIC Receiver did not intend to exclude claims under the Tax Sharing Agreement from the sale.

(iii) The Understanding of the Parties Regarding the Sale of Tax Attributes

Although there is evidence that the FDIC intended to convey "tax refunds" in the P&A Agreement, there remains a question as to precisely what "tax refunds" the FDIC intended to convey and, in particular, whether the FDIC knowingly conveyed federal income tax refunds based on WMB's 2008 yet-to-be-calculated $32.5 billion NOL (which was generated by the September 25, 2008 Receivership sale itself as opposed to a 2008 operating loss) that was worth at least $1.811 billion (before interest) based on then-existing law, and worth an additional $2.713 billion (before interest) after the enactment of the 2009 Homeownership Act.

In at least two communications with JPMC, both before and after the Receivership sale, representatives of the FDIC stated that "tax refunds" were included in the sale. Mr. Wigand stated that, in the meeting with JPMC representatives on September 22, 2008, the FDIC stated that "tax refunds" were among the assets to be conveyed.[522] On October 8, 2008, approximately two weeks after the Receivership sale, an FDIC official stated in writing that "[a]ll assets

[521] *See, e.g.*, First Integrity Bank P&A Agmt at Section 3.5(d).

[522] Wigand Interview.

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whether or not on the books were transferred. In my view, that clearly includes pending tax refunds, and future refunds based on losses generated up to the date of failure."[523]

The Examiner has identified several possibilities regarding what tax refunds the FDIC conveyed under the P&A Agreement: (1) the FDIC may have knowingly and effectively conveyed all assets, including all current and future tax refund claims; (2) the FDIC may have intended to convey only the tax refunds that had been identified on the books of WMB at the time of the Receivership sale; (3) the FDIC and JPMC may have thought "tax refunds" meant different things and never had a meeting of the minds.

The extent of the FDIC's understanding of WMB's tax attributes at the time of the Receivership sale is unclear. Mr. Wigand stated in his interview that WMB's tax receivables were reflected on the books and records. However at the time of the Receivership sale, the most recent SEC filing reflected a pending tax receivable of approximately $670 million, not the billions of dollars triggered by the Receivership sale. The Examiner has not discovered evidence that the FDIC was aware of the extent of the NOLs. Indeed, the FDIC may not have even had WMI's tax returns at the time of the transaction.[524] An exact calculation of the 2008 NOL carryback refund value attributable to the Receivership sale loss would be virtually impossible without these tax returns.

Mr. Wigand also explained that there are limitations on what assets can be transferred in an FDIC receivership sale. According to Mr. Wigand, tax refunds may be transferred but "deferred tax assets" may not.[525] In an October 8, 2008 email, Richard Peyster, an FDIC

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[523] JPMCD_000001547.00001.

[524] Read Interview. Mr. Read stated that the FDIC requested copies of the tax returns after the sale to JPMC was completed. *Id.*

[525] Previously, Mr. Wigand stated that "tax refunds" were among the assets being sold under the P&A Agreement. It is unclear whether Mr. Wigand considers the phrase "tax refunds" to include NOL carryforwards. Wigand Interview.

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representative, identified another type of "tax refund" in stating that, in his view, "future refunds based on losses generated up to date of failure" were among the tax refunds that the FDIC intended to transfer to JPMC. This email can be read as requiring that the right to the refund existed on the date of seizure, which is before JPMC purchased WMB's assets in the Receivership sale.

There are a number of arguments for the position that the tax refunds were not sold to JPMC. The loss triggered by the Receivership sale of substantially all of the WMB assets pursuant to the P&A Agreement is the loss that resulted in substantially all of the $5.5 billion to $5.8 billion of estimated total Tax Refunds. Therefore, the loss on which the refunds are predicated was triggered by the sale of WMB and did not exist at the time of seizure. A narrow reading of the Peyster email is that refunds generated after the "date of failure" were not conveyed. In addition, a narrow interpretation of "tax refund" would not include inchoate future potential refunds not reflected on the company's books. Finally, the 2009 Homeownership Act, which extended the carryback period, was not enacted until more than a year after the sale.

Any unresolved issues regarding precisely what tax refunds the FDIC Receiver intended to convey to JPMC do not directly benefit the Estates in this case. These issues ultimately relate to whether the FDIC Receiver retained certain assets (which would be available to the Bank Bondholders and others) or conveyed them to JPMC.

b. The Impact of the Tax Sharing Agreement

(i) The Positions of the Parties

The FDIC Receiver and JPMC contend that the Tax Refunds do not constitute WMI property; rather, WMI merely receives tax refunds as agent for the members of the WaMu Group

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ATTACHMENT C

Some of the JPMC witnesses had limited recollections of key events.[713] Even when the Examiner provided documentary evidence of an event, including the witness's calendar entries, these witnesses still could not recall whether certain events occurred.

All third parties also were cooperative with the Examiner's Investigation. With one exception, all parties cooperated in producing relevant documents and witnesses without requiring the Examiner to issue a subpoena.[714]

C. JPMC's Interest in WaMu

1. Background - JPMC Divisions

JPMC is divided into six major business segments: the Investment Bank, Retail Financial Services, Card Services, Commercial Banking, Treasury & Securities Services, and Asset Management. In addition to the six business segments, there is a Corporate/Private Equity segment. WMI and WMB were an acquisition target of the Retail Financial Services Division ("RFS"), which has been headed by Charles Scharf since 2004.[715] As CEO of RFS, Mr. Scharf oversees JPMC's consumer banking functions, including over 5,000 branches, small business and home lending, and auto and education lending.[716] Mr. Scharf reports directly to JPMC's CEO, Mr. Dimon.

RFS used JPMC Investment Bank's Financial Institutions Group ("FIG") to assist with a possible acquisition of WMI or WMB. Tim Main is the Head of FIG for North America.

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[713] For example, Mr. Cavanagh remembered traveling to Washington, D.C. on September 9, 2008, and taking a cab to the FDIC's office for a meeting with Chairman Sheila Bair, but does not recall any details following his arrival at the FDIC's office. Mr. Scharf also did not recall this meeting. Additionally, neither Mr. Cavanagh nor Mr. Scharf recalled meeting with OTS on April 3, 2008. An entry appears in both of their calendars for the same time. Mr. Cavanagh's calendar says, "Conference call with Charlie & OTS." JPMCD_000004589.00001, at JPMCD_000004589.00006; JPMCD_000004852.00001, at JPMCD_000004589.00005.

[714] That exception was TD Bank. TD Bank fully cooperated with the Examiner, but required the issuance of a subpoena before it would produce documents.

[715] Scharf Interview.

[716] *Id.*

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and that "it is important [for JPMC] to have an open dialogue with [Santander], as Santander would not pursue any of these opportunities if [JPMC] were to do the same."[804]

5. September 2008

On September 9, 2008, several high-ranking officials of JPMC, including Messrs. Dimon, Scharf, and Cavanagh, went to Washington, D.C. to meet with bank regulators and other government officials to discuss the financial crisis. The JPMC witnesses could not recall specifically whether WMI was discussed at these meetings. Neither Mr. Scharf nor Mr. Cavanagh had any recollection of meeting with Sheila Bair, Chairman of the FDIC, or what might have been discussed.[805]

a. September 15 - 21, 2008

By mid-September 2008, Goldman Sachs had notified JPMC that WMI was interested in a sale.[806] The WMI data room was reopened and JPMC reassembled the Project West Team to determine what due diligence was needed in order to assess a possible WMI acquisition.[807] The Project West Team was composed largely of the same individuals that were involved in the March 2008 process.[808] An updated due diligence list was circulated internally on September 16,

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[804] JPM_EX00004075. Issues related to this meeting are discussed in detail in the Antitrust Section of this Report.

[805] Cavanagh Interview; Scharf Interview. Mr. Cavanagh's calendar lists a meeting with Chairman Bair and Mr. Scharf at the FDIC in Washington, D.C. on September 9, 2008. Mr. Cavanagh recalled that in early September, the JPMC Operating Committee went to Washington, D.C. to meet with all of the regulators. Cavanagh Interview. He recalled only being in a cab and going to the FDIC's building that day, but had no recollection of who was at the meeting or if Mr. Scharf attended. This meeting is not listed on Mr. Scharf's calendar, and Mr. Scharf had no specific recollection of it. Scharf Interview.

[806] Dimon Interview.

[807] Cooney Interview. At some point, WMI cut off JPMC's access to the data room in an effort to "smoke them out" and gauge whether JPMC was truly interested in a transaction. Interview of Alan Fishman, September 1, 2010 ("Fishman Interview"). *See* JPM_EX00013119 (September 22, 2008 email from Brian Bessey to Charles Scharf stating that the access to the data room was "down"). Mr. Cooney emailed James Wigand to report that WMI had denied JPMC access to information. JPM_EX00000077. Mr. Fishman recalled a phone call with Mr. Scharf where they smoothed things over and access was restored. He did not recall that the FDIC intervened. Fishman Interview. Mr. Scharf could not recall how the issue was resolved. Scharf Interview.

[808] JPM_EX00031572.

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2008.[809] JPMC subsequently updated WMI models it had created and revised financial projections to reflect changes in credit performance and economic outlook.

Around September 16, Chairman Bair contacted Mr. Dimon by telephone to discuss the possibility of JPMC buying WMB out of receivership without government assistance. Mr. Dimon responded that JPMC might be willing to do such a transaction.[810]

In the same time frame, Chris Spoth, the FDIC Senior Deputy Director of Supervisory Examinations, reached out to JPMC (and other suitors that WMI had identified to the FDIC) to ascertain whether they were interested in acquiring WMI on an open bank or private sale basis.[811] On that call, the FDIC indicated that it wanted a solution by Friday, September 26 and that it preferred an open bank solution.[812] JPMC responded that it would analyze an open bank solution, but did not expect that such a transaction would work for JPMC.[813] JPMC also indicated it would not participate in the auction process that WMI's investment bankers were running.[814] JPMC still had interest in a potential private transaction, but was not interested in an auction; rather, JPMC would consider only a negotiated transaction.[815]

On Friday, September 19, 2008, the JPMC Board of Directors met to review transaction scenarios whereby JPMC would acquire some or all of WMI or WMB.[816] Two possible transaction structures were reviewed: buying WMI in a private transaction, and buying WMB or

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[809] JPM_EX00000271; JPM_EX00000272.

[810] Dimon Interview. Mr. Dimon could not recall the specific date of the conversation, but phone records reflect that he had a telephone conference with Chairwoman Bair on September 16, 2008. JPMCD_000004856.00015.

[811] Spoth Interview.

[812] JPMCD_000003491.00001, at JPMCD_000003491.00002.

[813] Scharf Interview.

[814] *Id.*

[815] *Id.* JPMC responded in this manner because it did not want the FDIC to believe that JPMC was going to solve all of the regulators' problems concerning WMB. Mr. Dimon expressed to the Examiner his impression that "Sheila Bair wanted JPMC to fix her problem." Dimon Interview.

[816] JPMCD_000003490.00001.

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ATTACHMENT D

(vi) JPMC Post-Acquisition Accounting

In 2009, JPMC reported a $1.9 billion extraordinary gain[854] from the acquisition of WMB.[855] This gain was based on JPMC's reported $11.9 billion fair value of WMB, less, pursuant to accounting rules, the $1.88 billion dollar purchase price and about $8.1 billion of non-current, non-financial assets not held for sale, such as equipment and premises. [856]

JPMC witnesses explained that although JPMC used the $11.9 billion fair value estimation for accounting purposes, the true value of WMB's assets, if liquidated in the market, was far less.[857] JPMC witnesses strongly disputed reports that JPMC stands to gain a huge windfall as borrowers repay loans that JPMC marked down.[858] JPMC stated that losses thus far have been greater than expected and that JPMC has raised additional capital to support those losses.[859] Although JPMC reported increased net income in the immediate aftermath of the purchase, it maintains that its earnings per share have been diluted because additional shares

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[854] An "extraordinary gain" refers to a non-recurring source of income. Extraordinary gains are reported on quarterly and annual reports separately from recurring sources of income and loss.

[855] JPMC 2008 Annual Report, p. 135, *available at* http://files.shareholder.com/downloads/ONE/1049003663x0x283416/66cc70ba-5410-43c4-b20b-181974bc6be6/2008_AR_Complete_AR.pdf.

[856] The acquisition was accounted for as a purchase business combination in accordance with Statement of Financial Accounting Standards ("SFAS") 141, issued by the Financial Accounting Standards Board ("FASB"). SFAS 141 requires the assets (including identifiable intangible assets) and liabilities (including executory contracts and other commitments) of an acquired business as of the effective date of the acquisition to be recorded at their respective fair values and consolidated with those of JPMC. In its 2008 Annual Report, JPMC reported $11.9 billion as the fair value of the net assets of WMB's banking operations. This amount exceeded the $1.88 billion purchase price, resulting in approximately $10 billion of negative goodwill (the difference between the allocated fair value of assets and liabilities and the purchase price paid by the acquirer). In accordance with SFAS 141, non-current, non-financial assets not held-for-sale, such as premises and equipment and other intangibles, were written down against the negative goodwill. The negative goodwill that remained after writing down transaction-related core deposit intangibles of approximately $4.9 billion and premises and equipment of approximately $3.2 billion was recognized as an extraordinary gain of $1.9 billion. JPMC 2008 Annual Report. The similarity between the amount of extraordinary gain and the purchase price is coincidental.

[857] Cavanagh Interview; Dimon Interview. Mr. Dimon said that many of the assets would not be marketable at all and that he believes the negative goodwill that existed is likely already gone or has fluctuated significantly.

[858] *See* Ari Levy & Elizabeth Hester, *JPMorgan's WaMu Windfall Turns Bad Loans into Income*, Bloomberg, May 26, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYhaiSOq_Tbc.

[859] Scharf Interview.

were issued to raise capital needed to support its purchase of WMB.[860] JPMC witnesses maintained that neither the $1.88 billion purchase price nor the $1.9 billion extraordinary gain reflected the amount of risk capital needed to support WMB's impaired loan portfolio.[861]

D. Analysis of Potential Claims Against JPMC

The Examiner investigated potential business tort and contract claims arising out of allegations that JPMC intentionally injured WMI, resulting in the seizure of WMB and sale to JPMC. Specifically, the Examiner investigated allegations that JPMC:

- breached the terms of its Confidentiality Agreement with WMI by leaking WMI's confidential information to regulators, ratings agencies, and the media;
- breached the terms of the Confidentiality Agreement by purchasing WMB's assets from the FDIC in violation of the "standstill" provision of the agreement;
- placed "moles" at WMI who provided confidential information to JPMC and enabled JPMC to gain an insider position;
- misused WMI's confidential information to drive down the value of WMB, thereby forcing the bank into receivership and enabling JPMC to purchase its assets from the FDIC at a fire-sale price; and
- improperly discouraged or prevented third parties from purchasing WMI or WMB in either a private transaction with WMI or in a sale by the FDIC.

Based on the Examiner's review of discovery materials, the Debtors' substantial work product, briefs filed with the courts, and independent analysis, the Examiner identified potential causes of action that the Debtors might have against JPMC, including breach of contract, tortious interference with a prospective economic advantage, trade libel, business disparagement, violation of state unfair practices and unfair competition laws, conversion, unjust enrichment,

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[860] Cavanagh Interview.

[861] Cavanagh Interview.

JPMorgan May Turn to Buyback Before Dividend

Published: Monday, 15 Nov 2010 | 3:07 PM ET

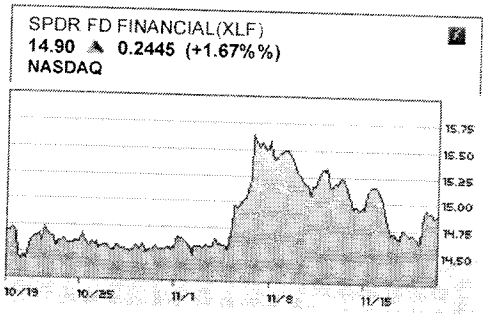
Text Size

By: John Melloy
Executive Producer, Fast Money

BEHIND THE MONEY

JPMorgan Chase is among the first companies mentioned by analysts and investors when discussing which financial firm will be the first to pay a dividend once regulators give the **TARP**-stained sector the OK to deploy capital to shareholders once again. But the firm may declare a buyback instead to send a message about how cheap its shares are, according to an analyst fresh off a meeting with CEO Jamie Dimon.

"Given Jamie's confidence in capital levels and earnings power, we got a strong sense that management and the Board are seriously considering favoring a big buyback over a big dividend," said respected banking analyst Glenn Schorr of Nomura Equity Research, in a note. "Considering our positive near-term capital markets outlook for the company and the fact JPMorgan [JPM 39.75 ▲ 0.57 (+1.45%)] trades at just 0.9x book and 1.4x tangible book, we agree and think a buyback is a better use of capital at this time."



JPMorgan has led the banking sector higher this month, up more than 7 percent, on the hope that a parade of dividend payouts are coming after the Federal Reserve hinted it may ease restrictions instituted against the industry during the credit crisis.

In the past, dividends played a key part in evaluating financial stocks, especially for slower growing supermarket banks, but this time around banking chiefs like Dimon may believe a stronger message could be sent by a monster buyback indicating the shares are being undervalued by the market.

"The stock doesn't trade on a dividend yield, so they won't get much value in the market for that dividend," said Karen Finerman, President of Metropolitan

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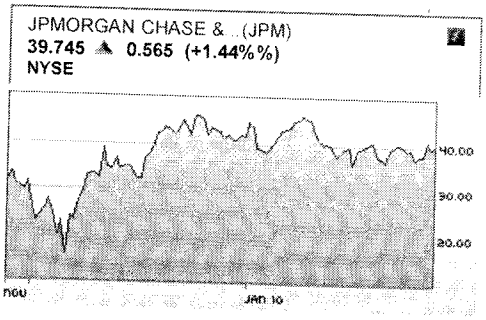
Capital Advisors. "If they buy back stock, that's very accretive mathematically so that's what I'd prefer as a long term shareholder."



JPMorgan cut its quarterly dividend to a nickel from 38 cents back in February 2009. The stock would tumble to its credit crisis bottom a month later.

"From an institutional investor standpoint, I would rather see share repurchase than dividends," said Jon Najarian, co-founder of TradeMonster.com. "The tip-off is that when we see them committing capital to buy shares, they are not just doing it to pump up EPS by retiring shares, but telling me that they think shares are cheap. Putting their money where Jamie's mouth is."

Nomura's Schorr, who said he met with Dimon "recently", said that low rates, weak loan demand and mortgage put-back risk will continue to be negative factors, but improvement in loan losses and international growth will more than make up for it.

Of course, some skeptical investors would say if Dimon was so "confident" in the future of their business, why wouldn't he declare a dividend that the company would have to pay every quarter, rain or shine. A buyback program, after all, is easier to retract. As JPMorgan learned in 2009, investors want dividends forever.

For the best market insight, catch 'Fast Money' each night at 5pm ET, and the 'Halftime Report' each afternoon at 12:30 ET on CNBC.

John Melloy is the Executive Producer of Fast Money. Before joining CNBC, he was an editor for Bloomberg News, overseeing the U.S. Stock Market coverage team.

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