SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN RE BEAR STEARNS LITIGATION	Index No. 600780/08 The Hon. Herman Cahn

AMICUS CURIAE BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.[1] Among other things, SIFMA files amicus briefs in cases with broad implications for financial markets. See, e.g., Kay v. Abrams, Index No. 100235/07 (Sup. Ct. N.Y. Co. filed Jan. 17, 2007) (Lehner, J.); Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007).

PRELIMINARY STATEMENT

Plaintiffs seek to enjoin JP Morgan Chase & Co ("JPMorgan") from voting 95 million newly-issued shares of common stock of The Bear Stearns Companies Inc. ("Bear Stearns") that JPMorgan recently acquired as part of a merger agreement, pursuant to which JPMorgan has agreed, in a stock-for-stock merger, to acquire all of the common stock of Bear Stearns for $10 per share. Although plaintiffs seek purportedly narrow relief in the form of an injunction preventing JPMorgan from voting its shares, an injunction is clearly designed to threaten the

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[1] Among SIFMA's 650 members are Bear Stearns & Co. Inc, JPMorgan Asset Management, and JPMorgan Securities Inc. On various occasions, SIFMA's counsel for this brief, Willkie Farr & Gallagher LLP, has served as counsel for Bear Stearns, JPMorgan, and affiliated persons and entities, but represents only SIFMA in this action.

merger of these two companies. This amicus curiae brief is submitted for the limited purpose of explaining why an injunction is not in the public interest.

Bear Stearns and JPMorgan, working together with the Federal Reserve, the SEC and the US Treasury Department, have entered into an agreement that saved the country's fifth largest investment bank from filing a bankruptcy petition. In doing so, this coalition of public and private actors also preserved a delicate stability existing within the tightly interconnected financial markets which, if unhinged, could have severely damaged both the financial sector and the broader national economy.

If Bear Stearns had gone into bankruptcy, the consequences would have been dire. Initially, in addition to causing numerous layoffs, a bankruptcy would likely have resulted in a "fire sale" of Bear Stearns's assets -- a process which could have saturated the market with, and further reduced the value of, asset-backed and mortgage-backed securities. Moreover, counterparties to Bear Stearns in derivative trading markets could have suffered substantial losses by the bank's default, and the holdings of Bear Stearns's clients in its clearing and prime brokerage services would have been indefinitely inaccessible as Bear Stearns worked its way through complex and protracted bankruptcy proceedings. As a result, in the short term, investor pessimism would likely have led to a reduction in value, and further liquidation, of similarly-situated assets.

At the same time, other investment banks, especially those holding collateral such as asset-backed and mortgage-backed securities, could have suffered additional write downs as the value of their portfolios plummeted. As a result, some of these banks also could have suffered extreme liquidity problems. Finally, in the longer term, a failure of Bear Stearns (and the consequential impact on the market for asset-backed securities and mortgage-backed securities) would likely have caused credit markets to shrink even further, thus thwarting economic growth and placing further downward pressure on prices in the housing market. The fallout from this chain reaction could have permeated into all economic sectors and industries.

These dangers have not entirely passed. The issuance of an injunction preventing the voting of JPMorgan's 95 million newly-issued shares will likely renew the uncertainty about whether the Bear Stearns - JPMorgan merger will close. That could give new life to liquidity concerns about Bear Stearns, and undo the extraordinary steps that have been taken to save Bear Stearns from bankruptcy.

Because of the costly implications and systemic risk posed by a Bear Stearns bankruptcy, SIFMA submits this amicus curiae brief in support of defendants' position that an injunction would harm the public interest.[2]

ARGUMENT

I. NEW YORK COURTS WILL CONSIDER PUBLIC INTERESTS IN EXERCISING THEIR DISCRETION WHETHER TO GRANT AN INJUNCTION.

The standard for granting an injunction in New York is well-settled, and difficult to satisfy. An injunction can be granted only when each of three prerequisites are met: (i) there exists a likelihood of success on the merits; (ii) irreparable injury will be incurred in the absence of an injunction; and (iii) a balancing of the equities favors granting an injunction. Nobu Next Door, L.L.C. v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 833 N.E.2d 191, 800 N.Y.S.2d 48 (2005). The burden of proving these requirements is on the party seeking the injunction, here the

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[2] In this brief, SIFMA does not take a position on any other portion of the preliminary injunction standard under New York law.

plaintiffs. Wall St. Garage Parking Corp. v. New York Stock Exch., 10 A.D.3d 223, 226, 781 N.Y.S.2d 324, 326 (1st Dep't 2004).

In construing the final requirement, the Court must consider "the enormous public interests involved." In re Liquidation of Midland Ins. Co., No. 41294/86, 2008 WL 151786, at *9 (Sup. Ct. N.Y. Co. Jan. 14, 2008) (citing Seitzman v. Hudson River Assocs., 126 A.D. 2d 211, 214, 513 N.Y.S.2d 148 (1st Dep't 1987)); see also County of Nassau v. Spectator Mgmt. Group, 175 Misc.2d 790, 794, 670 N.Y.S.2d 689, 692 (Sup. Ct. Nassau Co. 1997) (considering the "interests of the general public" in deciding a motion for injunctive relief); United for Peace & Justice v. Bloomberg, 5 Misc.3d 845, 849, 783 N.Y.S.2d 255, 259 (Sup. Ct. N.Y. Co. 2004) (same).

Among the public interests courts will consider in deciding a motion for an injunction are the possible impacts on capital markets. The decision in eSpeed, Inc. v. BrokerTec USA, LLC, No. Civ. A. 03-612-KAJ, 2004 WL 62490 (D. Del. Jan. 14, 2004), is instructive. In eSpeed, plaintiffs commenced an action alleging patent infringement over similar trading platforms offered by defendants. Id. at *1. Both platforms facilitated trading among purchasers and sellers of US Treasury and other securities. Id. In denying a motion for a preliminary injunction, the court examined in detail the public interests involved, and found a "critical public interest in maintaining a fluid, competitive market for trading Treasury securities." Id. at *4. The court also cited approvingly to a government submission concerning the public interests implicated by the case, in which the government argued that "an 'injunction would increase systemic risk to the secondary market for Treasury securities by leaving only one commonly used electronic trading system.'" Id. at *3.

As shown below, the systemic risk to the financial markets posed by a Bear Stearns bankruptcy strongly supports denial of plaintiffs' motion for injunctive relief.

II. PUBLIC INTERESTS STRONGLY SUPPORT A MERGER THAT SAVES THE CAPITAL MARKETS FROM A BEAR STEARNS BANKRUPTCY.

It became clear during the weekend of March 14-15, 2008 that Bear Stearns faced an unavoidable crisis: either find, within a matter of days, a sophisticated acquirer willing and able to take over the liabilities of the firm, or file for bankruptcy the following week. See Turmoil in US Credit Markets: Examining the Recent Actions of Federal Financial Regulators: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 110th Cong. 2 (2008), at 1-2 (statement of Alan Schwartz, President and CEO, Bear Stearns Cos. Inc) ("Schwartz Statement"). See also Id., at. 2 (statement of Robert Steel, Under Secretary for Domestic Finance, U.S. Treasury Department); Id., at. 2 (statement of Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System) ("Bernanke statement"); Id., at 1 (statement of Timothy Geithner, President and CEO, Federal Reserve Bank of New York) ("Geithner Statement"). (Each of the Schwartz, Steel, Bernanke, and Geithner Statements appear in the attached Appendix of Exhibits as A, B, C and D, respectively.)

Because of Bear Stearns's position at the hub of the financial sector, had it been forced into bankruptcy absent the merger with JPMorgan, this event would have caused significant dislocation, disruption and instability in the markets. This outcome posed -- and still poses -- a systemic risk to the US economy.[3] See In re The Bear Stearns Cos. Inc. Shareholder Litig., C.A. No. 3643-VCP, 2008 WL 95992 at *8 (Del. Ch. April 9, 2008) (staying action brought by shareholders in Delaware in favor of the instant action, reasoning that inconsistent rulings

[3] It should be noted that plaintiffs do not even propose an alternative that would prevent a Bear Stearns bankruptcy. This failure also means that plaintiffs have not met their burden to justify an injunction.

"would negatively impact not only the parties involved, but also the U.S. financial markets and the national economy," and also pointing to "the involvement of unusual third party players, including, inter alia, the Federal Reserve Bank and the Department of the Treasury.").

A. A Bear Stearns Bankruptcy Would Have Severely Upset Closely-Linked Segments of The Capital Markets.

The initial effects of Bear Stearns's collapse would have been immediately felt by many parties, such as general market investors, as well as the bank's many clients and counterparties in its clearing, prime brokerage, and derivative trading divisions.

First, in a bankruptcy proceeding, Bear Stearns would have been forced to quickly raise cash to satisfy a growing list of creditors. This would have been accomplished by liquidating substantial portions of the debtor's assets, which, among other investments, includes large holdings in asset-backed and mortgage-backed securities. It was not in the public interest to have a fire sale of these assets, which would have flooded the market with tens of billions of dollars of these securities. This process could have rapidly driven down the price of these securities, which, in turn, could have devalued the portfolios of other major financial institutions that also hold significant positions in such instruments, ultimately leading to write-downs at these firms as well. That, too, could have caused liquidity issues at other financial institutions.

The mere anticipation of this potential causal chain had a significant impact on the financial markets. For example, on March 14th, in response to concerns about the mounting liquidity crisis at Bear Stearns, the trading price of the shares of Wall Street firms dipped and pushed down non-finance stocks at the same time, with the Dow Jones Industrial Average losing 200 points, or 1.5% of its total value. See Gary Shorter, Congressional Research Service, Bear Stearns: Crisis and "Rescue" for a Major Provider of Mortgage-Related Products, at CRS-1 (March 26, 2008) (Appendix Ex. E).

Second, Bear Stearns's holdings are not limited to asset-backed and mortgage-backed securities, but also include positions in many other kinds of investments. For example, Bear Stearns is a major market participant for investments called credit default swaps (CDS). CDS's are contracts between two parties to share the risk of a third party's inability to pay its debt, functioning like an insurance policy against a default in that party's obligations. The value of CDS's for purchasers, however, are only as good as the ability of their sellers to pay under them. A bankruptcy filing could have lead to a "chaotic unwinding" of positions in these contracts, rendering uncertain their value to the many counterparties opposite Bear Stearns in such arrangements. See Bernanke Statement at 2-3 ("Our financial system is extremely complex and interconnected, and Bear Stearns participated extensively in a range of critical markets. The sudden failure of Bear Stearns likely would have led to a chaotic unwinding of positions in those markets that could have severely shaken confidence.") (Appendix Ex. C).

Moreover, the market for these derivative instruments has become so large -- it is presently estimated to be $45 trillion[4] -- that the failure of a financial institution, like Bear Stearns, could trigger a waive of defaults and other consequences throughout the market. This kind of disruption, and the attendant chaos and confusion, to the CDS market represents precisely the kind of "public interest" this Court should consider when balancing the equities in favor of the Bear Stearns - JPMorgan merger.[5]

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[4] See George Soros, False Ideology at the Heart of the Financial Crisis, Financial Times, Apr. 2, 2008 available at http://www.ft.com/cms/s/0/cb619d4a-00c0-11dd-a0c5-000077b07658.html; Janet Morrissey, Credit Default Swaps: The Next Crisis?, Time, Mar. 17, 2008 available at http://www.time.com/time/business/article/0,8599,1723152,00 .html.

[5] See Buttonwood, The Economist, Apr. 26, 2008, at 92 ("The involvement of Bear Stearns in the credit-derivatives market was one reason why there was a public interest in the firm's rescue; a default might have caused chaos as other counterparties struggled to calculate their risk exposure.").

Third, in addition to those markets in which Bear Stearns was itself an investor, the bank also played a central and critical role for other market participants through its securities clearing and prime brokerage services. In the event of bankruptcy, its customers' cash and securities positions would have been frozen and protected from creditors -- but those assets would not be accessible to investors again until after they were transferred to another registered broker-dealer. See generally 11 U.S.C. §§ 741-753 (2008); 17 C.F.R. § 240.15c3-3 ("Customer Protection Rule"). Given the delays and confusion that often accompany bankruptcies, it may have taken a considerable amount of time to obtain such a transfer, during which time individual and even large institutional investors would have been unable to hedge their market exposure. In the case of a central clearinghouse and prime broker like Bear Stearns, this fact alone would cause severe disruption to capital markets. See eSpeed, 2004 WL 62490 at *3 (holding that the market effect of a potential injunction on investors who were not parties to the case but used defendants' software to effectuate trades was a matter of public interest).

B. A Bear Stearns Bankruptcy Could Have Threatened the Liquidity of Other Wall Street Firms.

The ripple effect of Bear Stearns's bankruptcy would not stop with its clients and counterparties, however. Bear Stearns's bankruptcy could also pose serious liquidity issues for other Wall Street financial institutions, regardless of their actual financial health.

At any given time, a bank will only maintain a limited amount of its total asset value in cash. This amount of cash-on-hand is called liquidity. A bank's liquidity is especially important during any market slowdown because, at such times, many investors lose their appetite for risk, and cash-out their investments. Under these circumstances, if financial institutions are suspected of having insufficient liquidity, they may quickly find themselves caught in an accelerating and uncontrollable echo chamber of negative opinion which impacts their ongoing viability as a business.

For instance, in the present case, if Bear Stearns were to fail, rumors about the liquidity of other firms would undoubtedly spread. Rating agencies, investors and other market participants would become concerned about the liquidity of other financial firms, particularly those with balance sheets arguably resembling Bear Stearns. If a financial institution's liquidity becomes suspect, other investment banks may stop accepting trades involving the bank as a counterparty. Likewise, hedge funds may stop placing trades through the bank, afraid of having more securities stuck in bankruptcy, and instead may begin withdrawing cash from their accounts. Finally, money market funds may begin selling their holdings of short-term bank debt.[6] These actions would quickly create a self-fulfilling prophecy: clients and counterparties, fearful of having their assets in a bank with insufficient liquidity, would take incremental actions to protect their investments that, in the aggregate, strip the bank of cash and produce the liquidity crisis originally feared.

The collapse of one bank would increase the likelihood that other financial institutions in similar situations could face liquidity problems. As the head of the Federal Reserve Bank of New York stated in his testimony to Congress earlier this month: "A failure by Bear to meet its obligations would have cast a cloud of doubt on the financial positions of other institutions whose business models bore some superficial similarity to Bear's, without due regard for the fundamental soundness of those firms." Geithner Statement at 10 (Appendix Ex. D) (omitting

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[6] All three of these processes contributed significantly to Bear Stearns's liquidity crisis during the week of March 10, 2008. See Schwartz Statement at 1 and Geithner Statement at 9 (Appendix Exs. A and D).

attachments). For this reason, too, a failure of Bear Stearns would be contrary to public interest and thus militates against the grant of injunctive relief.

C. The Damage Emanating from A Bear Stearns Bankruptcy Could Not Have Been Contained to the Financial Sector.

The waive of potential defaults following the failure of a firm so critically interconnected with the rest of the financial sector would ultimately have an impact on the broader economy as well. This would occur, in large part, through the tightening of credit markets. The following are only a few ways that the unavailability of credit can adversely impact the economy:

- Individual homeowners, or prospective homeowners, would be unable to gain financing for home purchases, decreasing the number of buyers and further depressing the real estate market.

- Companies would be unable to access capital to expand or invest in their business, slowing economic growth and job creation.[7]

- Public municipalities would have difficulty selling their debt, or have to pay higher interest rates on their debt, meaning they could not fund projects like new hospitals, roads and schools.

A restriction in credit availability would prompt a deterioration in the economic outlook that, in turn, would spur additional tightening in credit conditions -- a pattern called an adverse feedback loop. See Minutes of the Federal Open Market Committee, Board of Governors of the Federal Reserve System, at 5 (March 18, 2008) available at http://www.federalreserve.gov/monetarypolicy/files/fomcminutes20080318.pdf.

Because of these possible outcomes, in recent congressional testimony, federal regulators and policymakers expressed substantial concerns that a Bear Stearns bankruptcy would have

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[7] See Steel Statement at 1 ("When our markets work, people throughout our economy benefit -- Americans seeking to buy a car or buy a home, families borrowing to pay for college, innovators borrowing on the strength of a good idea for a new product or technology, and businesses financing investments that create new jobs. And when our financial system is under stress, all Americans bear the consequences.") (Appendix Ex. B).

severe consequences for the financial system and the economy.[8] Members of the Senate had similar views. For example, Christopher Dodd, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs, stated, "The alternative [to the instant merger] -- and I don't think this hyperbole -- could have been devastating, both at home and around the world."[9]

Indeed, the very decision of these government and regulatory officials to involve themselves in the Bear Stearns situation is evidence of the strong "public interest" in avoiding its bankruptcy, and the systemic risk it poses. See Chatham Towers, Inc. v. Bloomberg, 6 Misc.3d 814, 826-27, 793 N.Y.S.2d 670, 680-81 (Sup. Ct. N.Y. Co. 2004) (denying a motion for a preliminary injunction where the moving party challenged a "'government action taken in the public interest pursuant to a statutory or regulatory scheme,'" and holding that "[c]ertainly the NYPD has not frivolously made the decision [challenged by the plaintiffs]. Accordingly, . . . [this court] will not at this juncture assume to have a better grasp of security matters and current security needs for this area than the NYPD.") (quoting No Spray Coalition, Inc v. City of New York, 252 F.3d 148, 149 (2d Cir. 2001)).

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[8] See Geithner Statement at 10 ("In short, we judged that a sudden, disorderly failure of Bear would have brought with it unpredictable but severe consequences for the functioning of the broader financial system and broader economy, with lower equity prices, further downward pressure on home values, and less access to credit for companies and households.") (Appendix Ex. D); Bernanke Statement at 3 ("Our financial system is extremely complex and interconnected, and Bear Stearns participated extensively in range of critical markets. The sudden failure of Bear Stearns likely would have led to a chaotic unwinding of positions in those markets and could have severely shaken confidence. The company's failure could also have cast doubt on the financial positions of some of Bear Stearns' thousands of counterparties and perhaps of companies with similar businesses. Given the exceptional pressures on the global economy and financial system, the damage caused by a default by Bear Stearns could have been severe and extremely difficult to contain. Moreover, the adverse impact of a default would not have been confined to the financial system but would have been felt broadly in the real economy through its effects on asset values and credit availability.") (Appendix Ex. C).

[9] Neil Irwin, Senators Back Bear Rescue, But Not Without Questions, The Washington Post, April 4, 2008, at D03.

Due to the potentially far-reaching impact of a Bear Stearns bankruptcy for its customers, counterparties and other financial institutions, as well as the health of the entire national economy, the public interests strongly oppose an injunction in this instance.

III. AN INJUNCTION WOULD CREATE MARKET UNCERTAINTY OVER THE PROPOSED MERGER AND RISKS RENEWED LIQUIDITY PROBLEMS FOR BEAR STEARNS.

The proposed JPMorgan merger, combined with intervention by federal regulators, spared the economy from a Bear Stearns bankruptcy and from "the possibly devastating consequences of a financial meltdown."[10] If this Court grants the preliminary injunctive relief sought, there will again be increased uncertainty over whether this merger will close. That uncertainty risks leading customers and counterparties to fear doing business with Bear Stearns and, once more, raises the danger that the bank will lack the liquidity to meet its business obligations. Such a crisis of confidence jeopardizes pushing Bear Stearns to the brink of bankruptcy again.

Although the proposed Bear Stearns - JPMorgan merger has had a beneficial effect on the credit crisis and markets, those markets are currently in a state of sensitive flux. The beneficial effect is thus easily reversible. The continued presence of the underlying market forces that created the Bear Stearns crisis in the first instance amplify this risk. Among other factors, housing sales remain sluggish, financial firms still hold large portfolios of asset-backed and mortgage-backed securities, credit remains scarce, investors remain wary, and bankruptcies are rising.[11] Moreover, liquidity pressures continue to concern policymakers and banks. Only last

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[10] Alice M. Rivlin, The Fed's Money Well Spent, The New York Times, Apr. 11, 2008, at A23.

[11] See, e.g., Sudeep Reddy, Economy Suffers as Businesses and Consumers Waver, The Wall Street Journal, May 2, 2008, at A4 ("The nation's economy is being battered from all sides, new data show, as labor markets weaken, rising prices exact a heavy toll and anxious consumers slow their spending. The data released [yesterday] pointed to continued contraction in manufacturing and feeble growth in Americans' incomes and spending . . ."); Kelly Evans,

Friday, the Federal Reserve increased the size of its term auction programs and expanded currency swaps with two European central banks in order to counteract "persistent liquidity pressures in some term funding markets."[12]

An injunction threatens to create significant negative repercussions by renewing market uncertainty in the guarantees provided by the proposed merger. That, in turn, risks jumpstarting the same damaging chain reaction the Bear Stearns - JPMorgan merger agreement was designed to avoid in the first place. For these reasons, plaintiffs' purportedly narrow motion for an injunction poses an immediate and broad threat to the financial markets and is not in the public interest.

GDP Expands Slightly, But Gloomy Signs Persist, The Wall Street Journal, May 1, 2008, at A13 ("Those problems -- the housing and credit crisis, and soaring energy and food prices -- are battering consumers, and the toll is evident in the latest GDP figures."); Michael M. Grynbaum, New Home Sales Fall to Low Last Seen in 1990's, The New York Times, April 25, 2008, at C4 ("Even those who wish to buy may be stymied . . . as banks and mortgage lenders tighten their credit standards amid broader troubles in the economy."); Buttonwood, The Economist, Apr. 26, 2008, at 92 (noting "the weakness of the American economy and the scale of the credit crunch"); Michael Barbaro, Retailing Chains Caught in a Wave of Bankruptcies, The New York Times, April 15, 2008, at A01 ("The consumer spending slump and tightening credit markets are unleashing a widening wave of bankruptcies in American retailing, prompting thousands of store closings that are expected to remake suburban malls and downtown shopping districts across the country.").

[12] Press Release, Board of Governors of the Federal Reserve System, Federal Reserve, European Central Bank and Swiss National Bank Announce An Expansion of Liquidity Measures (May 2, 2008) available at http://www.federalreserve.gov/newsevents/press/monetary/20080502a.htm.

CONCLUSION

For the foregoing reasons, the public interests oppose the injunctive relief sought by the plaintiffs.

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