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VIA CM/ECF

August 7, 2023
File Number: 038-004

Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

RE: *Kirschner v. JP Morgan Chase Bank, N.A.*, No. 21-2726 (2d Cir.);
Americans for Financial Reform's response to SEC's July 18, 2023 letter

Dear Ms. O'Hagan:

After three extensions and court filings indicating it was giving the matter serious consideration and preparing a brief, the SEC has responded to this Court's invitation to submit an *amicus* brief with a one-page letter. It states that despite "diligent efforts," the SEC's appellate staff is "unfortunately not in a position" to submit any *amicus* brief. In this context, *amicus curiae* Americans for Financial Reform wants to draw the Court's attention to public information and reporting on this turn of events.

There have been press reports that the banks, the banking regulators, and LSTA lobbied aggressively on this issue. See, e.g., Michele Celarier, *Are leveraged loans securities? The answer could upend a trillion dollar market*, Institutional Investor, July 17, 2023 ("LSTA and the banks have had additional meetings with the chairman's office," and "LSTA has met with all of the commissioners more than once"), at <https://tinyurl.com/yc4nnttd> (Ex. A). Such reports have fueled speculation that "[i]t's conceivable that the U.S. Treasury Department may have pushed back against any SEC stance that would have disrupted the [syndicated loan] industry." Alison Frankel, *SEC punts on whether syndicated loans are securities, in closely watched appeal*, Reuters, July 20, 2023, at <https://tinyurl.com/4xndae6m> (Ex. B). Fox Business Network's Charles Gasparino shared reports from SEC sources that "the agency had a brief ready for the second circuit regarding the classification of leveraged loans as securities but pulled it" at the last moment. Charles Gasparino (@CGasparino), The Microblog Formerly Known as Twitter (July 19, 2023, 3:03 p.m.), at <https://tinyurl.com/2t2yx857> (Ex. C). In the Financial Times, Ethan Wu wrote that "one source I spoke with" had "speculated that Gary Gensler, the SEC head, may personally believe that loans are securities, but couldn't muster enough internal support for his view." Ethan Wu, *Are leveraged loans securities?*, Financial Times, July 24, 2023, at <https://tinyurl.com/2cp732yv> (Ex. D). And Liz Hoffman reported that "according to people familiar with the matter," the SEC "backed down last week under quiet pressure from the Federal Reserve and U.S. Treasury" and "shelved a legal brief that would have required bank loans to carry the same kind of disclosures as stocks and bonds." Liz Hoffman, *What's a security? For once, the SEC won't say*, Semafor, July 25, 2023, at <https://tinyurl.com/2p89p9cb> (Ex. E).



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Thirty years ago in *Banco Español*, the SEC and the Solicitor general were clear in their views, and to AFR's knowledge, those views have never been publicly disavowed. See AFR Amicus Br. 26–29 (describing SEC's and SG's contemporaneous criticisms of *Banco Español*); see also SEC Amicus Br., *Banco Español de Credito v. Sec. Pac. Nat'l Bank*, 1992 WL 12667357 (2d Cir. filed Jan. 22, 1992) (Ex. F); SEC Amicus Statement, *Banco Español de Credito v. Sec. Pac. Nat'l Bank*, 1992 WL 12667357 (2d Cir. filed July 16, 1992) (Ex. G); SG Amicus Br., *Banco Español de Credito v. Sec. Pac. Nat'l Bank*, 113 S. Ct. 2992 (1993) (No. 92-913) (filed June 4, 1993) (Ex. H). At minimum, the SEC's letter makes clear how fraught and complex this space is and how it calls out for judicial clarity.

Warm regards,

Thomas A. Burns

Board certified in appellate practice

Cc: All counsel of record (via CM/ECF).

Enclosures: Exhibits A–H.